Team 1

ORAL ARGUMENT SCHEDULED FOR MARCH 4, 2023

Civil Action No. 22-cv-299-TCF

IN THE

United States Court Of Appeals

For The Thirteenth Circuit

RENITA CONNOLLY,

Plaintiff/Appellant

vs.

DROs-я-Us LLC, *et. al.*,

Defendants/Appellees

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

BRIEF FOR APPELLANT

Team 1

Counsel for Plaintiff/Appellant

January 31, 2023

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JURISDICTIONAL STATEMENT

The district court has subject matter over claims under the Employee Retirement Income Securities Act of 1974 ("ERISA"). A participant may enforce their rights under ERISA through civil actions. 29 U.S.C. § 1132. These civil actions fall within the subject matter jurisdiction of the federal courts. *Id*.

This Court has appellate jurisdiction. "The court of appeals. . . shall have jurisdictions of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. This appeal is from the final judgment of a district court that disposes all of Plaintiff's claims.

ISSUES PRESENTED

1. Under ERISA, did the district court improperly grant a motion to dismiss on Plaintiff's claims when Plaintiff was within the applicable statute of limitations?

Suggested Answer: Yes.

2. Under ERISA, can Defendant be held liable for violating their fiduciary duties to Plaintiff?

Suggested Answer: Yes.

STATEMENT OF THE CASE

This action arises out of Renita Connolly's ("Ms. Connolly" or "Appellant") participation in the National Laborers Retirement Savings Fund (the "Fund"), processed and serviced by Defendant, DROs-я-Us LLC ("DRU" or "Appellee") (R. at 1.) On April 14, 2022, Appellant filed suit in the United States District Court for the District of Columbia against DRU; the Fund; co-administrators of the Fund, Letitia Beck and Joe Schlitz ("Administrators"); and the Board of Trustees of the National Laborers Retirement Savings Fund (the "Board"), seeking complete relief. (R. at 8.)

On May 15, 2022, The DRU moved to dismiss the complaint, followed by The Fund, Board, and Administrators who collectively moved to dismiss on May 16, 2022. (ECF Nos. 11 and 12.) Plaintiff filed separate Responses in Opposition to both Motions to Dismiss on June 14, 2022. (ECF Nos. 13 and 14.) On September 30, 2022, the United States District Court for the District of Columbia granted these motions and dismissed Appellant's complaint with prejudice. *Connolly v. DROs-я-Us LLC,* Civil Action No. 22-cv-299-TCF, at *18 (D.D.C. Sept. 30, 2022). Appellant now appeals to this Court.

STATEMENT OF FACTS

Renita Connolly is a hardworking journeyman electrician in Washington D.C. who worked for R.A. Gray Electric Company prior to her retirement on March 31, 2022. (R. at 1, 8.) She participates in several multilevel employment plans including the National Laborers Retirement Savings Fund (the "Fund). (R. at 1.) The Fund is monitored by DROs-я-Us LLC ("DRU") who provides "turnkey services" to pension plans when processing qualified domestic relations orders ("QDROs") in return for payment. (R. at 1.) The Administrative Services Agreement depicts the relationship between the Fund's Administrators and the DRU. (R. at 2.)

On February 21, 2017, Ms. Connolly was granted a judgment of absolute divorce from her ex-wife, Mary Obergefell. (R. at 2.) Ms. Obergefell was granted a "marital interest in the amount of 15% of Renita Connolly's retirement saving with the National Laborers." (R. at 2.) On September 27, 2017, the Superior Court for the District of Columbia entered a QDRO for Ms. Obergefell's interest in the Fund. (R. at 2.)

On November 30, 2017, Ms. Connolly's domestic relations lawyer, Mr. Hasty, uploaded a court-certified copy of the QDRO to the DRU's website. (R. at 3.) The site sent Mr. Hasty a stock email with attachments providing copies of the

Fund's QDRO procedures, the Fund's Model Qualified Domestic Relations Order, and a document captioned "Frequently Asked Questions." (R. at 3.)

Despite assuring in the "Frequently Asked Questions" section that the DRU would respond to the submitted QDRO within a "reasonable amount of time," two months passed before Mr. Hasty resubmitted the same QDRO on January 3, 2018. (R. at 4-5.) On January 4, 2018, Mr. Hasty received an identical generic email he previously received from the DRU with no further response. (R. at 5.)

Mr. Hasty submitted the QDRO twice more—once on March 3, 2018, and again on October 15, 2018—and he did not receive any correspondence from the DRU regarding the submissions besides the stock form email. (R. at 5.)

In fact, neither Mr. Hasty nor Ms. Connolly received any notification regarding the QDRO until November 1, 2018, when they received a letter stating the submitted order was determined to be a QDRO and that Ms. Obergefell would receive 15% of Ms. Connolly's pension benefit. (R. at 6.) And, on December 15, 2018, the Fund implemented the QDRO and transferred 15%—$49,500—of Ms. Connolly's account balance to Ms. Obergefell. (R. at 6.)

DRU notified the Plaintiff three more times on January 3, 2019, February 1, 2019, and April 15, 2019, that the DRO had been qualified. (R. at 6-7.) Each notification contained the identical stock information and did not contain a balance

statement or any indication that multiple, separate QDROs were being applied. (R. at 6-7.)

In April 2020, Ms. Connolly became extremely ill, but thankfully made a full recovery on September 30, 2021. (R. at 7.) For quality-of-life reasons, Ms. Connolly decided to retire on March 31, 2022. (R. at 8.) Upon retirement, she received her quarterly account statement on March 31, 2022, and to her dismay, she discovered the balance of her Fund account was significantly less expected. (R. at 8.) Upon realizing that multiple QDROs had been applied, Ms. Connolly immediately demanded on April 8, 2022, that the Fund restore her account to the proper balance by applying a retroactive disqualification of the second, third, and fourth QDROs (R. at 8.)

The Board of the Fund declined to retroactively disqualify the second, third, and fourth QDROs and Ms. Connolly brought a civil suit against the Fund and the DRU seeking complete relief. (R. at 8.)

SUMMARY OF THE ARGUMENT

Ms. Connolly timely brought her claims and DRU is liable. Ms. Connolly acted properly when suing DRU for the decrease in her pension account within three years from when she gained actual knowledge of their fiduciary breach. Ms. Connolly became aware of the breach when reviewing her quarterly account disclosure on April 8, 2022 (R. at 8.) Applying the correct time limitation under the Employee Retirement Income Security Act of 1974 (herein "ERISA") would not time-bar her claims until April 8, 2025. Consequently, her action is well-within the required timeframe.

Longer statute of limitations periods fulfill the objectives of ERISA and are beneficial for public policy because they dissuade plan administrators like the DRU from neglecting their fiduciary duties. Because pension recipients lack the necessary expertise to grasp their plans fully, identifying a fiduciary breach from a plan administrator is difficult. Longer periods of time allow fiduciaries to be held accountable when they are neglecting their duties.

Further, the DRU neglected its fiduciary duties continuously, thus triggering the doctrine of continuing violations. By applying multiple QDRO payments to Ms. Connolly's ex-spouse and not properly monitoring Ms. Connolly's account,

the DRU violated its fiduciary duties. The DRU cannot claim that Ms. Connolly's claims are time-barred to evade responsibility for its omission to monitor.

However, even if the doctrine of continuing violations does not apply, the DRU's lack of action constitutes successive violations. The DRU incorrectly paid Ms. Connolly's ex-spouse on three separate occasions: once on January 3, 2019; once on February 1, 2019; and finally on April 15, 2019. (R. at 7.)[2] With the three-year statute of limitations running from each breach, the last day Ms. Connolly would be able to bring her claims is April 15, 2022. Appellant brought her action on April 14, 2022, which makes her final claim timely. (R. at 8.)

Additionally, because DRU is a fiduciary by traditional statute and functional terms, they owe Ms. Connolly fiduciary duties. Originally, DRU attempted to draft around its fiduciary status in Section 4.1 of the Agreement; however, they may not exonerate themselves of their duties via contract.

[2] It should be noted that there is a discrepancy as to when Ms. Connolly was notified of the final qualification of the fourth QDRO. The record states the final notification occurred on April 15, 2019, while the district court opinion states that the final notification occurred on April 1, 2019. (R. at 8.) *Compare with Connolly v. DROs-я-Us LLC*, Civil Action No. 22-cv-299-TCF, at *14 (D.D.C. Sept. 30, 2022). It is the belief of this brief that the district court made a clerical error when writing the date and accidentally left off a 5. Therefore, this brief assumes that the date of April 15, 2019, is correct.

Moreover, public policy favors holding DRU to all their obligations, including prospective financial gains and risks. (R. at 16.)

Beyond their traditional status of an ERISA Fiduciary, DRU assumed fiduciary duties functionally through its actions as a service provider. DRU acted as a fiduciary when its actions exceeded the express contractual obligations, and it used its power to influence the Fund's stream of earnings. Likewise, although the Fund maintained supervising power over DRUs actions, DRU established their own scope of authority in exclusively determining whom to grant DRO's to, thus impacting and increasing their own capital to the furthest extent. (R. at 3.)

As an established traditional fiduciary or service provider acting as a fiduciary, DRU is liable for its breached duties of loyalty and prudence owed to Ms. Connolly. DRU wrongfully acted in its own self-interest when they accepted the second, third, and fourth DRO and accumulated an extra $500 for each mistaken submission. (R. at. 3.) DRU's failure to elevate Ms. Connolly's interests over their own renders them personally liable for a breach of loyalty.

Moreover, DRU owed and violated its duty of prudence to monitor Ms. Connolly's account under the Prudent Person Standard of Care. If a prudent expert, such as DRU, honored their duty and meticulously reviewed each of the four QDROs, they undoubtably would have ascertained the identical submissions were

submitted by error. (R. at 3.) However, DRU's failure to monitor and recognize the quadrupled QDROs leaves them personally liable for their breach.

ARGUMENT

Ms. Connolly's complaint was improperly dismissed, and so, the decision of the district court must be reversed. First, Ms. Connolly's claims were timely under the applicable ERISA statute of limitations. Second, the DRU's violated its fiduciary duties, so it must be held liable.

Ms. Connolly's claims were timely. A claim is timely if it is brought within "(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or (2) three years after the earliest date on which the Plaintiff had actual knowledge of breach or violation." 29 U.S.C. § 1113. Ms. Connolly only gained actual knowledge of DRU's breach in fiduciary duties when she retired and received her quarterly account statement from the Fund on April 8, 2022.[3] (R. at 8.) However, even if this Court find Ms.

[3] The DRU filed a motion to dismiss which the district court granted and is the basis for this appeal. (R. at 9-11.) Because this appeal is based upon a Federal Rule of Civil Procedure 12(b)(6) motion, the court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *DirecTV v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007); Fed. R. Civ. Pro. 12(b)(6). Therefore, for purposes of this appeal this Court must view all facts in the light most favorable to Plaintiff which includes accepting

Connolly gained actual knowledge of the breach prior to her retirement, DRU's failure to monitor constituted a continuing violation, so the continuing violation doctrine should be applied to all Ms. Conolly's claims making them timely.

In the alternative, if this Court is unconvinced that the continuing violation doctrine should apply, Ms. Connolly must be able to recover on her claim from April 15, 2019, because the three-year statute of limitations had not run out until after she filed suit.

Additionally, DRU is liable under ERISA for all losses suffered by Ms. Connolly. DRU is an established fiduciary through either statute or its fiduciary actions as a service provider. ERISA institutes mandatory fiduciary duties on entities that plan, advise, or manage a retirement plan within some form of their own control. 29 U.S.C. § 1002(21)(A). Failure to comply with duties of loyalty and prudence constitutes a breach, stimulating personal liability on the breaching party. 29 U.S.C. § 1109(a). DRU breached their fiduciary duty of loyalty by putting their interests in gaining capital before Ms. Connolly's interest in having sufficient funds to retire. (R. at. 9.) Furthermore, DRU breached their fiduciary duty of

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that the first time Ms. Connolly saw her pension account balance was after her retirement.

prudence to monitor by failing to identify and dismiss the erroneous quadrupled QDROs before they injured multiple parties. (R. at 9.)

So, the district court's decision must be reversed.

I. THE DISTRICT COURT INCORRECTLY DISMISSED MS. CONNOLLY'S LAWSUIT BECAUSE SHE IS NOT BARRED BY THE APPLICABLE STATUE OF LIMITAIONS FROM RECEIVING THE RELIEF REQUESTED

Ms. Connolly's lawsuit is timely, so the district court's decision should be reversed. ERISA is a federal statue, regulating entities with discretionary authority over investment plans. *See* Employee Retirement Income Security Act of 1974 (ERISA) §§ 2, 3(21)(A), 404(a), 409; 29 U.S.C. §§ 1001, 1002(21)(A), 1104(a), 1109. ERISA imposes fiduciary duties upon entities engaging in the administration of plan assets. *See* ERISA §§ 404(a), 409, 502(a); 29 U.S.C. §§1104(a), 1109, 1132(a); *See also Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). These fiduciary duties create an avenue for participants to commence civil actions if the entity administering their plan breaches their fiduciary duties. *Id*. Civil actions must commence within a certain time to qualify for remedies. *See* ERISA § 413, 29 U.S.C. § 1113. Under section 413 of ERISA, a plaintiff must bring an action within six years of the breach. *Id*. However, an exception exists when a plaintiff has actual knowledge, transforming the six-year period into a three-year limitation. *Id*.

Ms. Connolly did not have actual knowledge of the DRU's fiduciary breach when the breach occurred, so the statute of limitations should commence when Ms. Connolly gained actual knowledge upon receiving her quarterly statement on April

8, 2022. (R. at 8.) Utilizing this time frame, Ms. Connolly's claims are timely. However, even if this court were to decide that Ms. Connolly had actual knowledge of the breach at the time of the breach, the DRU's actions constituted a continuing violation or, at least, successive violations, causing the three-year statute of limitations to begin on the date of the most recent breach on April 15, 2019. (R. at 7.) Since either of these time barring applications make Ms. Connolly's claims viable, this Court must reverse the district court's dismissal.

a. Ms. Connolly Gained Actual Knowledge Of The Breach After Her Retirement So Her Claims Are Not Time Barred

Under ERISA's statute of limitations, Ms. Connolly's claims are not time-barred. In the pivotal Supreme Court case *Intel Corp. Inv. Policy Comm. v. Sulyma*, the Court held that if a plaintiff gains actual knowledge of a breach, they must file suit within three years of gaining that knowledge rather than the six-year period that would otherwise apply. 140 S.Ct. 768 (2020); *See also* § 413(a)(2)(A), 88 Stat. 889, as amended; 29 U.S.C. § 1113.

In the district court's opinion, the court noted there was not enough information to concretely conclude that Ms. Connolly had actual knowledge of the breach at the time of the breach and incorrectly applied the three-year limitation beginning at the time the first breach occurred. Further, ERISA was enacted to

ensure fair and prompt enforcement of rights under employee benefit plans and the application of the longer time period confers a benefit on public good. Therefore, this Court should find that applying the statute of limitations from the time of retirement is not only the correct decision but beneficial to the public application of ERISA law.

i. The district court's opinion admitted there was not enough evidence to conclude Ms. Connolly had actual knowledge at the time of the breach

In their opinion, the district court conceded there was not enough evidence to conclusively decide Ms. Connolly gained actual knowledge at the time of breach, so her claims were improperly dismissed. The district court incorrectly concluded Appellant had *knowledge* of the breach and applied the three-year statute of limitations from the date of the first breach. However, for the court to properly apply the statute of limitations, the standard laid out in *Sulyma* is an "actual knowledge standard." *Id.*

In *Sulyma,* the Court stated that actual knowledge means "knowledge [that is] more than 'potential, possible, virtual, conceivable, theoretical hypothetical, or nominal.'" *Id*. at 777-79 (citing Black's Law Dictionary 53 (4th ed. 1951)). They provided a test for differentiating between actual knowledge and other types

stating, "as presently written, therefore, §1113(2) requires more than evidence of disclosure alone." *Id*. To have actual knowledge, a plaintiff must understand what they are reading and have knowledge of the contents. *See Id.* at 776. In their opinion, the Court rejected the contention that actual knowledge included "constructive knowledge" which is knowledge a plaintiff *should* have received given the surrounding circumstances. *Id*. at 777. In their discussion, they noted that Congress intentionally removed any mention of constructive knowledge from section 413, limiting the broad application of the three-year statute of limitations beginning at the time when the breach occurred. *Id.*; *See also* ERISA § 413; 29 U.S.C. § 1113.

In *Sulyma*, the plaintiff did not have "'actual knowledge' of his plan's investments because he did not read the disclosures that were sent to him." *Id.* at 777-79. Mere disclosure is insufficient for a defendant to prove a plaintiff had actual knowledge of the fiduciary breach. *Id*. Like the plaintiff in *Sulyma*, Ms. Connolly did not have actual knowledge of the DRU's breach at the time of the breach.

While the DRU may argue notifications were sent to Ms. Connolly regarding the applied QDROs to her pension plan, this is insufficient to prove actual knowledge in multiple ways. First, the DRU assumes that the notifications were received and read on the date the notifications were sent, rather than focusing

on when Appellant received them and if she read them fully. Second, the DRU's contentions assume with no factual basis that Ms. Connolly would have understood those disclosures if she was presented with the requisite information to notice the breach.[4] Third, the "actual notice requirement" cannot be fulfilled by the mere identification that something is awry. *See* ERISA §§ 409, 413(2); 29 U.S.C. §§ 1109, 1113(2). Finally, the DRU's disclosure of form letters did not provide specific enough information that Ms. Connolly could have adequately acquired the "actual knowledge" sufficient to trigger the three-year limitation.

To the first point, the notifications are dated on the day they were sent by the DRU, but there is no mention in the record on how these notifications were sent and when they were received. (R. at 1-8.) To say Ms. Connolly gained actual knowledge based on the date the notification was sent, ignores when Ms. Connolly could have reviewed them. For example, if they were sent by mail, it could take days for them to arrive which would be the earliest date Ms. Connolly could have gained actual knowledge—assuming Ms. Connolly read the notifications the day they were received. The DRU attempts to convince this Court that the necessary

[4] If this Court is unconvinced to fully rule that Ms. Connolly's claims were timely, this case should be remanded to the trial court for further investigation on these two series of facts prior to applying the three-year statute of limitations to her claims.

fact is the date the letters were sent when the relevant information was the day Ms. Connolly reviewed and read the notifications.

Many participants do not read plan disclosures because of the volume of documentation provided. Transcript of Oral Argument, *Intel Corp. Inv. Policy Comm. v. Sulyma* (5-6, 16-17) (Justice Roberts stating, "the more and more disclosures that are required, the less and less likely it is that people are going to look at them . . . [petitioner's] argument depends upon the assumption that these are actually going to be read. . . and I just don't think that's an accurate assumption."); *See also Gluck v. Unisys Corp.*, 960 F.2d 1168, 1177 (3d Cir. 1992) (stating "when a transaction does not affect the employees' day-to-day working conditions, it is less likely that employees will immediately become aware of a grievance.")). Further, "many people have little to no investment experience training [and] are not pouring over [dense plan] disclosures." *Id*. at 23. And, when multiple notifications are sent containing disclosure information that a participant may not understand, there is a higher likelihood that participants will feel overwhelmed and thus not read the disclosures. Anne Tucker, *Retirement Revolution: Unmitigated Risk in the Defined Contribution Society*, 51 Hous. L. Rev. 188-89 (Fall 2013).

While the DRU may argue the quarterly disclosures were sent to Ms. Connolly regarding her pension account balance, it is entirely possible Ms.

Connolly did not read the quarterly disclosures based on volume alone. There are also no facts provided that state whether the quarterly disclosures were reviewed and understood prior to when Ms. Connolly reviewed her pension account balance on April 8, 2022. (R. at 8.)

To the second point, if Ms. Connolly did to read the QDRO notifications or the quarterly disclosures but did not understand them, she still would not have actual knowledge of the DRU's fiduciary breach. *Bouvy v. Analog Devices, Inc.*, No. 19-cv-881, 2020 U.S. Dist. LEXIS 110747, at *8-9 (S.D. Cal. June 23, 2020) (holding "evidence of disclosure alone is insufficient to prove 'actual knowledge' because 'a given plaintiff will not necessarily be aware of all facts disclosed to him; even a reasonably diligent plaintiff would not know those facts immediately upon receiving the disclosure'").

During oral argument in *Sulyma*, the Court asked Intel's attorney whether a participant who read a disclosure but did not understand it was enough to create actual knowledge. Transcript of Oral Argument, *Intel Corp. Inv. Policy Comm. v. Sulyma* (27-28). Intel's attorney conceded that a situation where the participant did not understand what they were reading would not constitute actual knowledge. *Id*. Here, the facts are notably silent on whether Appellant received, read, and understood those quarterly disclosures. (R. at 1-8.)

To the third point, courts agree that in the application of the "actual knowledge" standard, more is required than a participant merely noticing something is off. Since *Sulyma*, a circuit split has emerged on how to apply the actual knowledge standard. However, a majority of courts interpret "actual knowledge of a breach or violation" to mean a plaintiff has knowledge of the underlying facts constituting the breach. *See, e.g., Edes v. Verizon Comms. Inc.*, 417 F.3d 133, 141-42 (1st Cir. 2005); *L.I. Head Start Child Dev. Servs. v. Econ. Opportunity Council of Suffolk, Inc.*, 710 F.3d 57, 67 (2d Cir. 2013); *David v. Alphin*, 704 F.3d 327, 339 (4th Cir. 2013); *Wright v. Heyne*, 349 F.3d 321, 330 (6th Cir. 2003); *Martin v. Consultants & Admrs.*, 966 F.2d 1078, 1086 (7th Cir. 1992); *Brock v. Nellis*, 809 F.2d 753, 755 (11th Cir. 1987). Therefore, it is not enough that Ms. Connolly notice something awry, but she must also have specific knowledge of the DRU's breach in fiduciary duties. ERISA §§ 409, 413(2); 29 U.S.C. §§ 1109, 1113(2); *George v. Kraft Foods Global, Inc.*, 674 F. Supp. 2d 1031 (N.D. Ill. 2009). Simply, Ms. Connolly must have known for years that her account balance was consistently decreasing due to the DRU's error in applying multiple QDROs. However, she did not.

To the final point, the notifications of the QDRO's sent to Ms. Connolly were form letters and did not indicate that multiple QDROs were being applied—appearing to be repeated letters sent regarding the same transaction. (R. at 6-7.) It

is not uncommon for large companies to send multiple notifications regarding old transactions.

Further, the facts suggest that the DRU was a slow company that was not entirely organized. For example, after Attorney Hastings filed the first DRO with the DRU on November 30, 2017, Ms. Connolly was not notified that the DRO had been qualified by the DRU until November 1, 2018—nearly a year after the first DRO was sent to the DRU to be qualified. (R. at 3, 6.) Because it took nearly a year for the first DRO to be qualified and notification to be sent, it is reasonable to believe that Ms. Connolly could have mistaken the subsequent notifications to be duplicates. This inference is supported by the fact the notifications that Ms. Connolly received were comprised of the same form letter with no extra specific information such as her account balance. (R. at 6-7.)

As stated in the district court's opinion, "[t]he generic form-letters that the DRU and the Fund issued to Plaintiff are utterly lacking in important details about the DRO that had been qualified. Although we are sure Plaintiff actually knew that ***an order*** had been qualified, we are not sure Plaintiff actually knew that ***multiple orders*** had been qualified." *Connolly v. DROs-я-Us LLC,* Civil Action No. 22-cv-299-TCF, at *15 (D.D.C. Sept. 30, 2022). The qualification of the first order was not a breach in the DRU's fiduciary duties, rather the subsequent QDRO payouts were the breaches.

Even following the Court's decision in *Philips v. Alaska Hotel & Restaurant Employees Pension Fund*, where the court found the earliest date on which Appellant became aware of the breach would trigger the three-year limitation period, if Ms. Connolly was unaware of the specifics that multiple orders were qualified, then the three-year limitation period could not start until she gained actual knowledge of the fiduciary breach. 944 F.2d 509, 520 (9th Cir. 1991). So, if the district court was unable to conclude that Ms. Connolly had actual knowledge of the breaches when the DRU violated their fiduciary duties, then the three-year statute of limitations could not be applied from the date of those notifications. If this court finds that Ms. Connolly gained actual knowledge after the disclosure of her pension following her retirement, then the three-year limitation would begin, and Ms. Connolly's claims would not be time-barred.

The DRU may attempt to argue that Ms. Connolly was willfully blind of the multiple orders that were qualified, but this analysis fails. Willful blindness is present when "knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence." *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S., 754, 755 (2011); Gregory M. Gilchrist, *Willful Blindness as Mere Evidence*, 54 LOY. L.A. L. REV. 405, 417 (2021). Most courts have adopted a substantive approach in where willful blindness can be proven if: "(1) the [plaintiff] was aware of a high

probability of a fact in question, (2) the [plaintiff] took deliberate action to avoid learning more about the fact, and (3) the [plaintiff] did not hold an actual belief the fact did not exist." *Id*. at 420. The DRU must show all three of these requirements in order to prove willful blindness which they cannot do. In fact, the second requirement fails because Ms. Connolly took deliberate steps to learn more about the notifications she received. Ms. Connolly called her attorney after receiving each of the notifications, demonstrating deliberate actions to learn more about the notifications. (R. at 6-7.) Therefore, Ms. Connolly cannot be charged with willful blindness, and this Court must conclude that the district court incorrectly applied the three-year statute of limitations from the first breach.

ii. Public policy supports a need for a broader application of a longer statute of limitations period.

The ERISA statute was created as a "'careful balancing' between ensuring fair and prompt enforcement of rights under the plan and encouragement of the creation of [employee benefit plans]." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 215 (2004) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987)). The outcome of an employee's future income rests within retirement plans. In fact, the fiduciary duties of entities administering pension funds hold an important responsibility because the retirement benefits a participant may receive are dependent on the handling and management of the plan assets. *See LaRue v.*

DeWolff, Boberg & Assocs, Inc., 552 U.S. 248, 262 n.1 (2008). And so, protecting retirement plans from employers breaching their fiduciary duties is of the upmost importance.

For a layperson like Ms. Connolly, it is very difficult without financial expertise to recognize when a breach by a fiduciary occurs. Participants of pension plans often lack the expertise required to fully understand their plans and rely on fiduciaries to be their experts. *See Gluck v. Unisys Corp*., 960 F.2d 1168, 1177 (3d Cir. 1992). It is important that employees without the requisite knowledge to fully understand how their plans are being invested or distributed have access to the courts should they find fiduciary breaches. *Id.* at 15-16. If this Court adopts the short time limit for employees to bring cases, many employees will likely forfeit their claims due to inadequacy of time, thus promoting fiduciaries to breach if they know they will not be held accountable for their breaches. On the other hand, plan participants may flood the court system with meritless claims in fear of missing out on their chance to bring their case to court without first exhibiting due diligence by gathering more information to see if their claim is viable. The longer statute of limitations period allows employees time to determine whether a breach exists under ERISA and whether it would be viable in the courts. *See* Transcript of Oral Argument, *Intel Corp. Inv. Policy Comm. v. Sulyma* (42-43).

b. In The Alternative, Even If Ms. Connolly Had Actual Knowledge Of The Violations, the DRU's Failure To Monitor Constituted A Continuing Violation, Or Successive Violations, So The Three-Year Statute Of Limitations Should Commence At The Time Of The Final Violation

If this Court determines that Ms. Connolly had actual knowledge of the breach at the time of the breach, then the DRU's failure to monitor constituted a continuing violation or, at the very least, successive violations, for which Ms. Connolly's claims would survive under the statute of limitations.

i. The DRU violated its duty to monitor so the doctrine of continuing violation should apply, making Ms. Connolly's claim viable

Under the doctrine of continuing violation, Ms. Connolly's claims are not time-barred. The continuing violation doctrine is "an exception to the ordinary rule regarding the commencement of a statute of limitations." *Norman v. Granson*, No. 18-4232, 2020 WL 3240900, at *2 (6th Cir. March 25, 2020); *See also Sharpe v. Cureton*, 319 F.3d 259, 267 (6th Cir. 2003) (explaining that under the continuing violation doctrine, the court can consider as timely all relevant violations "including those that would otherwise be time[-]barred"). Courts have

distinguished utilizing the continuing violations doctrine when the fiduciary acts against when the breach occurs from *omission* that result from the actions of an ERISA fiduciary. *In re Trans-Indus., Inc.*, 538 B.R. 323, 354 (Bankr. E.D. Mich. 2015). The DRU's failure to monitor Ms. Connolly's pension account counts as an omission so the six-year limitation would commence on the latest date when the fiduciary could have cured the breach or violation.[5] 29 U.S.C. § 1113(1)(A) and (B). Because the DRU failed to continuously monitor Ms. Connolly's pension plan and the application of multiple QDROs, the doctrine of continuous violation should apply beginning from the last date the DRU could have cured the breach which would have been the final application of the QDRO on April 15, 2019.

This doctrine has been applied in other contexts such as employment discrimination and antitrust cases. *See Kovacevich v. Kent State Univ.*, 224 F.3d 806, 829 (6th Cir. 2000) (stating in the context of employment discrimination, "when there is an ongoing, continuous series of discriminatory acts, they may be challenged in their entirety as long as one of those discriminatory acts falls within the limitations period"); *Peck v. Gen. Motors Corp.*, 894 F.2d 844, 849 (6th Cir. 1990) (explaining a continuing antitrust violation is one in which the plaintiff's interests are "repeatedly invaded," and "a cause of action accrues each time a

[5] The discussion of how the DRU failed to monitor is discussed further in depth in the second portion of this brief.

plaintiff is injured by an act of the defendants"). Because ERISA's fiduciary duty was "derived from the common law of trusts," where a trustee has a continuing duty to monitor trust investments, the doctrine of continuing violation should be applied in contexts where a fiduciary has repeatedly breached their duties. *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985). Therefore, if a plaintiff claims that a fiduciary breached their duty to properly monitor their investments and accounts than so long as the breach occurred within three years of gaining actual knowledge of the breach, all claims should be timely under the doctrine of continuing violations. *Tibble v. Edison Int'l*, 575 U.S. 523, 530 (2015).

If fiduciaries are not held responsible for their repeated bad conduct, then their duty as a fiduciary would be severely weakened and similar lazy conduct would be encouraged in the future. *Martin v Consultants & Admrs., Inc.*, 966 F.2d 1078, 1086 (7th Cir. 1992). By disallowing the doctrine of continuing violations, fiduciaries would effectively be in a race from when they breached to the end of three years, and so long as they are discovered to be violating but not subject to suit within that time period, they can continue to breach with participant's retirement funds. *Id*.

Because the DRU did not monitor well enough over the course of four months and distributed four QDROs to the same person from the same account,

Ms. Connolly was left to suffer the consequences. The duty to monitor is a continuing duty that was breached on three separate occasions until the very final QDRO notification on April 15, 2019. (R. at 7.) By applying the doctrine of continuing violations, Ms. Connolly would be able to recover on all three breaches because the final breach occurred on April 15, 2019, and she filed her suit on April 14, 2022—within three years of the latest breach. (R. at 7.) Therefore, the DRU's omission to timely and prudently monitor Ms. Connolly's pension plan created a continuing violation and the statute of limitations should begin running at the time that the DRU was last able to cure the breach which was April 15, 2019.

ii. Alternatively, if this Court is not convinced to apply the doctrine of continuing violations than the DRU's breaches in their fiduciary duties are successive violations and Ms. Connolly should be able to recover for the April 15, 2019, breach

If this Court finds Ms. Connolly had actual knowledge of the breaches in the DRU's fiduciary duties, then DRU's breaches were successive violations and the district court's decision must be reversed. ERISA charges fiduciaries the duty to administer pension plans "in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1)(D). To circumvent fiduciaries repeatedly breaking their duties, courts have concluded that multiple breaches constitute successive violations. In

Meager v. Int'l Asso. Of Machinists & Aerospace Worker's Pension Plan, the Ninth Circuit found the repeated use of an improper amendment constituted successive breaches and each breach begins its own statute of limitations because each amendment reduced the amount of benefits to which the plaintiff was entitled. 856 F.2d 1418, 1423 (9th Cir. 1988).

Similarly, Ms. Connolly lost more money each time the QDRO was paid out to her ex-wife. (R. at 6-7.) Each breach dealt with a new set of facts such as the amount of money that was left in Plaintiff's account. *Id*. While it was the same QDRO being applied four times, the 15% that Ms. Connolly's ex-wife received reduced Ms. Connolly's pension each time it was applied. *Id*. Therefore, this Court should find that the breaches were successive violations and, if this Court determines Ms. Connolly had actual knowledge of the breaches, then the Court must begin the three year limitation on April 15, 2019, which would bring Ms. Connolly's claim for the final breach within the statute of limitations.

II. UNDER ERISA, DRU IS AN ESTABLISHED FIDUCIARY AND IS LIABLE FOR THE FINANCIAL LOSSESS SUFFERED BY MS. CONNOLLY

ERISA provides federal statutes that impose fiduciary duties on entities and individuals participating in discretionary authority or control in planning, advising,

or managing an employee retirement plan. 29 U.S.C. § 1002(21)(A). A fiduciary must not breach its duties of loyalty and prudence, for failure of compliance leaves the fiduciary personally liable and may entice civil action from any injured party seeking both compensatory and punitive damages as relief. 29 U.S.C. § 1104; *Sulyma*, 140 S. Ct. at 773; *Mass Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 137 (1985). Therefore, because DRU is a fiduciary and breached its duties of loyalty and prudence, it is personally liable under ERISA for any damages incurred by Ms. Connelly.

a. Under ERISA, DRU Is A Fiduciary And Owes Duties To Ms. Connolly Because It Acted As A Service Provider

Fiduciaries are found in many variances, including, but not limited to, organizations providing services or containing members covered by an employee benefit plan, and "any administrator, officer, trustee, custodian, counsel, or employee of such an employee benefit plan." 29 U.S.C. § 1002 (A)-(D). Specifically, under 29 U.S.C. § 1002(21)(A), "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." *Id*. Likewise, service providers act as fiduciaries when they manage the fiduciary's business actions and funds, thus inheriting the duties burdened by traditional fiduciaries. *Hecker v. Deere & Co.*, 556 F.3d 575, 583 (7th Cir. 2009). Therefore, because DRU can classify as either a traditional fiduciary or a service provider acting as a fiduciary, it owes statutorily mandated duties to Ms. Connolly.

i. DRU improperly attempted to relieve themselves of fiduciary status against statutory restrictions and public policy considerations

Despite the district court finding DRU contracted around being an ERISA fiduciary, their interpretation improperly suggests a contract provision can supersede a statute or public policy.

While contracts are generally free to set their own terms and conditions, it has long been recognized that they are "subject only to statute[s] and considerations of the public interest," and courts may deem violating contracts void. *Martello v. Santana*, 713 F.3d 309, 313 (6th Cir. 2013) (citing *Smith v. The Ferncliff*, 306 U.S. 444, 450 (1939)); *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987). Moreover, parties cannot craft contracts to draft

around specific statutory or regulatory requirements, as "ERISA's statutory scheme 'is built around reliance on the face of written plan documents.'" *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995); *Molton, Allen & Williams, Inc. v. Harris*, 613 F.2d 1176, 1178 (D.C. Cir. 1980). Thus, even when parties have an agreement containing provisions exonerating the company from fiduciary responsibilities, the contract is generally without effect because the disparate terms cannot override the statute. *Id.; IT Corp. v. General Am. Life Ins. Co.*, 107 F.3d 1415, 1418 (9th Cir. 1997). However, violations of ERISA's express fiduciary duty regulations do not render the entire contract void per se. *Kidder, Peabody & Co. v. IAG Int'l Acceptance Group N.V.*, 28 F. Supp. 2d 126, 139 (S.D.N.Y. 1998). Simply, the exact violating provision becomes unenforceable without precluding the lawfulness of the other legitimate provisions in the agreement. *Id.*; *Solis v. Couturier*, 2009 U.S. Dist. LEXIS 63271, *6 (E.D. Cal. 2009).

Determinations of drafting around a statute are matters of interpreting black letter law, but public policies—including voluntary statutory compliance and large companies' ability to withstand financial burdens better than individuals—are also widely considered and accepted "beyond question." *W.R. Grace & Co. v. Local Union 759, Int'l Union of Utd. Rubber*, 461 U.S. 757, 766-70 (1983); *Martello*, 713 F.3d at 313 (explaining "in the absence of legislative guidance, courts may

determine public policy"). Furthermore, 29 U.S.C. §1110(a) states "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy." In *Grace*, the company attempted to enforce an agreement, availing themselves of federal statutory compliance and reallocating the burden of the company's financial liability to individuals. *Id*. However, because the company voluntarily assumed all its other fiduciary obligations by providing their regular services, the court determined public policy would not be violated by committing the company to their obligations and financial risks and barring their attempted sidestep of liability for any financial damages. *Id*.

DRU attempted to evade ERISA's blackletter statutory determination of a fiduciary by merely stating in Section 4.1 of the Agreement "DRU shall not be regarded as a fiduciary for purposes of ERISA." (R. at 16.) However, even though the parties agreed on the terms, DRU's attempt at exoneration by contract is frequently found in law to be fruitless. *IT Corp.*, 107 F.3d at 1418. Furthermore, DRU fits comfortably into the fiduciary definition provided in 29 U.S.C. § 1002(21)(A)(i). Section i details discretion isn't necessary to be a fiduciary in stating, "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…" (emphasis added). Finally, many circuits have noted the phrase distinctively omits the word "discretion" and is separated by the word "or" to note that discretionary control is not required to be a fiduciary. *Leinkuehler v. Am. Utd. Life Ins. Co.*, 713 F.3d 905, 913 (7th Cir. 2013) (citing cases from D.C. circuit and circuits 2, 3, 6, 8, 10, and 11).

Even if DRU is not found to satisfy the statute, they are still fiduciaries in consideration of the public interest including statutory compliance and accepting financial liability for mistakes. Like *Grace*, DRU's Section 4.1 clause attempts to dispose of their fiduciary classification to eliminate DRUs duties to Ms. Connolly and forgo any financial damages that may follow a breach of those duties. 461 U.S. at 766-70. However, DRU uses its discretion to simultaneously accept payments to the Fund while voluntarily assuming all its other obligations and provides: "(i) maintenance of all records related to domestic relations orders submitted for the Fund, (ii) an interface that Fund participants shall use to submit domestic relations orders and related correspondence, (iii) review of all domestic relations orders submitted, (iv) determinations on the qualified status of all domestic relations orders in accordance with law and Fund policies, and (v) all other related services." (R. at 3.) Hence, public policy would not be violated by holding DRU to their obligations, financial gains, and risks. Thus, their attempted contract provision for

absolving their fiduciary status and reallocating their financial liability burden on Ms. Connolly should be barred and struck from the contract.

Therefore, because the district court's interpretation improperly suggests a contract provision can supersede a statute or public policy, the judgment should be reversed.

ii. DRU is a service provider acting as a fiduciary

Even if the court finds DRU is not a fiduciary under ERISA, their actions still subject them to fiduciary duties as a service provider.

Teets provides a two part test explaining, "a service provider acts as a fiduciary: if (1) it 'did not merely follow a specific contractual term set in an arm's-length negotiation' and (2) it 'took a unilateral action respecting plan management or assets without the plan or its participants having an opportunity to reject its decision.'" *Rozo v. Principal Life Ins. Co.*, 949 F.3d 1071, 1073 (8th Cir. 2020) (quoting *Teets v. Great-West Life & Annuity Ins. Co.*, 921 F.3d 1200 (10th Cir. 2019)).

Part one of the *Teets* test considers if the service provider only abides by the requirements specified in the agreement. *Rozo*, 949 F.3d at 1073. When a service provider and plan enter an agreement, the service provider may be granted control over additional factors not listed in the contract impacting its actual amount of

compensation, thereupon granting the status of an ERISA fiduciary. *F.H. Kreaer & Co. v. Nineteen Names Trustees*, 810 F.2d 1250, 1259 (2d Cir. 1987). In *Martin*, a party was hired to supply accounting services, "but they provided…far more than professional accounting services." *Martin v. Feilen*, 965 F.2d 660, 669 (8th Cir. 1992). The accountants used their basic contractual duties granted to them and expanded their role to new heights—including recommending transactions, structuring deals, providing investment advice—thus impacting the flow of compensation to the company and satisfying part one of the test. *Id*. at 670.

Part two of the *Teets* test considers service providers actions and the potential authority governing that provider. *Rozo*, 949 F.3d at 1073. Thus, when a corporation or individual provides services to another body without strict supervision, its primary functions determine its ascension to an ERISA fiduciary classification. *Reich v. Lancaster*, 55 F.3d 1034, 1047 (5th Cir. 1995). In *American*, the defendant was contractually granted authority to permit or challenge incoming fund claims, maintain files, and manage the fund's assets. *American Fed'n of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc.*, 841 F.2d 658, 663 (5th Cir. 1988). The court asserted that even though the defendant was subject to the supervising fund's final approval on all claims and actions, they still possessed unilateral discretionary authority and their fiduciary status was not diminished. *Id*. Similarly, in *Reich*, a consultant was hired "to give

advice and handle all of the fund's health, medical, and life insurance needs." 55 F.3d at 1046. Because the consultant's scope of discretion in managing and administering fund assets and availability was broad, the court declared it rose to the standing of a fiduciary. *Id*. at 1047.

DRU acted as a fiduciary when it did not exclusively follow the specific contractual terms and used its power to impact the flow of compensation to the Fund. Referencing part one of the *Teets* test, when DRU and the plan entered an agreement, DRU was granted control over extra factors not listed in the contract that impacted its actual amount of compensation, thereupon granting the status of an ERISA fiduciary. Like *Martin*, DRU was hired to provide basic consulting, administration, and recordkeeping services, and to make determinations about the qualified status of DRO's. (R. At 2.) However, they surpassed those guidelines, and they expanded their role to new heights, including marketing by providing communication services to customers to increase their satisfaction and expanding the fund's reputation and customer base. (R. at 5.) Because DRU was paid from plan assets—$500 for each new DRO issued (R. at 3.)—and greatly benefited from an ever-expanding customer base, they took it upon themselves to expand their role past the contracted terms, thus impacting the flow of compensation to the fund and satisfying part one of the *Teets* test. DRU acted as a fiduciary when it took

unilateral and discretionary actions respecting plan management or assets without the plan rejecting its decisions.

Referencing part two of the *Teets* test, this Court should look at DRU's actions and if the fund wholly regulated DRU's power. Thus, when DRU provides unsupervised services, its primary functions demonstrate its rise to an ERISA fiduciary classification. Like *American*, DRU was contracted to provide recordkeeping services and was granted the authority to "issue determinations regarding the qualified status of domestic relations orders in accordance with applicable law and fund policies." (R. at 2.) DRU can exercise discretion within the Funds policies, but they cannot make determinations outside of those requirements. *Id*. However, in applying *American's* reasoning, because DRU possesses some discretion, they can still be found to have fiduciary status even though they are subject to higher ultimate approval. Additionally, like *Reich*, DRU was hired to provide consulting, administration, maintenance of all records, and interface to held correspondence, and "all other related services." (R. at 3.) DRU's scope of discretion in how it provides these services—even including those that are not named and fall within the "all other related services" category—is vast and thus gives rise to fiduciary duty.

Even if some courts adopt a narrow interpretation on who is acting as a fiduciary, the concept of a fiduciary should be broadly constructed within ERISA.

Donovan v. Mercer, 747 F.2d 304, 308 (5th Cir. 1984). Congress stated their emphasis on defining fiduciaries authority in functional terms "expand[ing] the universe of persons subject to fiduciary duties." *Chamber of Commerce of the United States v. United States DOL*, 885 F.3d 360, 377 (5th Cir. 2018) (citing *Mertens v. Hewitt Assocs*., 508 U.S. 248, 262 (1993)). The *Mertens* court used common law to explain, "[p]rofessional service providers such as actuaries become liable for damages when they *cross the line from adviser to fiduciary." Id.* Here, DRU functionally held the highest power in deciding who to process for DRO's. (R. at 3.) In a broadened scope, their actions establish their own realm of authority, and they should be subjected to fiduciary duties. ERISA is understood to apply broadly to anybody exerting some sphere of authority acting as a fiduciary, as their functional terms may hold equal weight to an express fiduciary label. *Id*. at 378.

Therefore, because DRU satisfied both parts of the *Teets* test and is a service provider acting as a fiduciary, they are obligated to serve their fiduciary duties.

b. Under ERISA, DRU Owes Damages To Ms. Connolly For Actions Resulting In Financial Losses

After establishing the party is a lawful or functional fiduciary, breaches of fiduciary duties generate one principal inquiry: "whether that [party] was acting as a fiduciary…when taking the action subject to complaint." *Pegram v. Herdrich*,

530 U.S. 211, 226 (2000). "ERISA demands that fiduciaries act with the type of 'care, skill, prudence, and diligence under the circumstances' not of a lay person, but of one experienced and knowledgeable with these matters." *Tibble*, 729 F.3d at 1133; 29 U.S.C. § 1104(a)(1)(B). Moreover, when a fiduciary breaches their duties, plan participants and their beneficiary are authorized to sue for relief of any losses, which fiduciaries are personally liable for. *Sulyma*, 140 S. Ct. at 773; *Id.* § 1109(a); *Id.* § 1132(a)(2).

i. DRU owed and violated its duty of loyalty to Ms. Connolly

DRU owes damages to Ms. Connolly for breaching its duty of loyalty under § 1104.

The duty of loyalty is derived from statutory and common law, explaining a fiduciary is held to strict morals—"the punctilio of an honor the most sensitive"—and must elevate the interests of their beneficiaries before their own. *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928). § 1104(a)(1) provides "fiduciaries shall discharge their duties with respect to a plan 'solely in the interest of the participants and beneficiaries' that is 'for the exclusive purposes of (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan.'" *Pegram v. Herdrich*, 530 U.S. 211, 223-24 (2000). Likewise, common law describes the duty of loyalty as the most

fundamental to society, and burdens fiduciaries with acting solely in the interests of the beneficiaries while excluding their own selfish interests or interests of third parties. *Id*.; *Central Transport. Inc*., 472 U.S. at 570. Thus, fiduciaries have breached their duty of loyalty when they focus on furthering their own interests over their clients. *Brotherston v. Putnam Invs., LLC*, 907 F.3d 17, 41 (1st Cir. 2018). Lastly, as stated above, the primary question in enforcing a breach of an ERISA duty is if the fiduciary was performing a fiduciary function when assuming the action in the complaint. 29 U.S.C. § 1002 (21)(A).

Fiduciaries must "keep the interests of the beneficiaries foremost in their minds, taking all the steps necessary to prevent conflicting interests from entering into the decision-making process." *Metzler v. Graham*, 112 F.3d 207, 213 (5th Cir. 1997). In *Perez*, the court explained "[t]he duty of loyalty was breached from start to finish" because the fiduciaries were more concerned with making profits and expanding the value of the fund than what "was best for [the beneficiaries]" *Perez v. Bruister*, 823 F.3d 250, 261 (5th Cir. 2016). Moreover, the fiduciaries were not purposely acting disingenuous; however, their actions resulted in mismanagement of funds and left the beneficiaries seeking remedies for the value they had lost. *Id*.

The duty of loyalty holds DRU to strict morals and they must put the interests of Ms. Connolly before their own. Following § 1104(a)(1), DRU is obligated to act with the paramount purpose of providing benefits to Ms. Connolly.

DRU should honor the duty of loyalty as most fundamental to society, and it must subdue its own selfish interests or interests of the Fund in general. Thus, DRU has breached their duty because they focused on furthering their own financial interests over honoring Ms. Connolly's interest in retiring with enough funds. Like *Perez*, DRU's duty of loyalty was breached from start to finish. When DRU accepted the second, third, and fourth DRO from Mr. Hasty, they were more concerned with making profits each time and expanding the value of the Fund than what was best for Ms. Connolly. (R. at. 9.) The quadruple submission was a blatant mistake — easily catchable by DRU—but DRU ignored the repeat order and enjoyed the extra cashflow that followed. Moreover, even if DRU did not purposely act disingenuously and they didn't realize it was the same request four times, they still accepted the payments rendering them overindulged and leaving Ms. Connolly searching for the value she deserves.

Although DRU may assert they put the interests of Ms. Connolly first by initially honoring her requests of the extra QDRO's, they have further failed in their loyalty duty by not attempting to recover Ms. Connolly's damages after they were made aware of the mistaken submissions. *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 105 (2013). If DRU desired to put Ms. Connolly's interests first, they would attempt to repossess an equivalent amount of compensation by exercising a theory of recoupment. *Id*. Furthermore, when plans—are here—are silent to the

allocation of costs for recovery, an "overwhelming majority" of states routinely exercise the equity focused common-fund doctrine that dictates the costs of recovering funds from third-party beneficiaries are allocated between the insurers and beneficiaries. *Id*. at 92, 104. Here, Ms. Obergefell received sizable excess compensation because of DRUs failure to put Ms. Connolly's interests first. (R. At 9). Both DRU and Ms. Connolly should be interested in reclaiming those funds (and may even split the costs in doing so); however, DRU continued their blunder of not protecting Ms. Connolly by not returning her money and surrendering their duty of loyalty while disrespecting her wishes and hopes of retiring with sufficient funds. (R. at. 9.)

Therefore, in putting both their interests and the greater interests of the fund ahead of Ms. Connolly's, DRU breached its duty of loyalty under § 1104.

ii. DRU owed and violated its duty of prudence to monitor to Ms. Connolly

DRU owes damages to Ms. Connolly for breaching its duty of prudence to monitor under the Prudent Person Standard of Care.

Plaintiffs can bring a claim for breach of the duty to monitor when there is an underlying breach—duty of loyalty alleged above—enforced by ERISA. *Rinehart v. Lehman Bros. Holdings Inc.*, 817 F.3d 56, 68 (2d Cir. 2016). Likewise,

ERISA defines fiduciary terms of control and authority over the plan and expands the universe of persons subject to fiduciary duties—and damages—under §409 (a). *Mertens,* 508 U.S. at 248. Moreover, both common law and 29 U.S.C. § 1104(a)—the Prudent Person Standard of Care—set a general scope of fiduciary responsibilities detailing:

> "…a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and— (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan; (B) *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;* (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III." 29 U.S.C. § 1104(a); *Central Transport. Inc*., 472 U.S. at 570.

Thus, when a fiduciary violates ERISA's wishes and is inadequate in providing skillful and diligent service or meeting the retiree's desired outcomes, a breach has occurred, and the fiduciary is liable. *Id*.

"The content of prudence turns on 'the circumstances…prevailing' at the time of the fiduciary acts [and] the appropriate inquiry will necessarily be context specific." *Hughes v. Northwestern Univ*., 142 S. Ct. 737, 742 (2022) (citing *Fifth Third Bancorp v. Dudenhoeffer,* 573 U.S. 409, 425 (2014)). Additionally, when examining the duty of prudence, a breach is weighed on "whether the fiduciary

took into account all relevant information in performing its duties" and if their duties were performed diligently and continuously with care. *Tibble,* 575 U.S. at 529; *Moitoso v. FMR LLC*, 451 F. Supp. 3d. 189, 204 (D. Mass. 2020). In *Phillips*, alternate payees were overcompensated in their QDRO monthly benefit checks. *Phillips v. Maritime Ass'n – I.L.A. Local Pension Plan*, 194 F. Supp. 2d 549, 553 (E.D. Tex. 2001). Moreover, the fund administrator was contested by the alternative payees when attempting to recover the excess payments by reducing the following monthly payments. *Id*. The court determined the fund administrator made a mistake and violated the prudent person standard because their initial failure to handle the QDRO's with extreme care, precision, and diligence had a significant impact on the parties. *Id*. at 556.

Furthermore, a "fiduciary must exercise his position of trust so as, at the very minimum, not to harm the beneficiary as a result of his failure…" *Wright v. Nimmons*, 641 F. Supp. 1391, 1402 (S.D. Tex. 1986). In *Greenspan*, the service provider was contractually obligated to perform maintenance and review all smoke alarms to ensure they were properly replaced and could protect the customer's home. *Greenspan v. ADT Sec. Servs*., 444 Fed. Appx. 566, 567 (3d Cir. 2011). The court explained the providers contract imposed an obligatory duty to monitor the system and they breached that duty in failing to provide the contracted services and ensuring the smoke alarms were in proper order. *Id*. at 571.

Here, Ms. Connolly can bring a claim for breach of the duty to monitor because the breach of the duty of loyalty is enforced by ERISA. Also, ERISA's broad terms of control and authority over the plan greatly expands the universe of persons subject to fiduciary duties and damages to encompass DRU. Thus, because DRU violated ERISA's purpose by inadequately failing to provide skillful and diligent services in monitoring Ms. Connolly's plan and grossly floundering her desired outcome DRU is liable for the breach.

The fact specific inquiry weighs whether DRU performed its duties diligently and continuously with care. Like *Phillips*, Ms. Obergefell was overcompensated in her QDRO monthly benefit checks, and DRU would be contested by her if they attempted to recover the excess payments by reducing the subsequent monthly payments because of the error. (R. at 8, 9.) Importantly, the issue here is with DRU mishandling the funds, not Ms. Obergefell accepting them, and DRU has violated the prudent person standard in their failure to handle the QDRO's with extreme care, precision, and diligence as to catch the mistake before it had a significant impact on the parties. Prudent experts, such as DRU, should have upheld their duties and carefully inspected each of the four DRO submissions. If DRU spent reasonable time monitoring the submissions, they would have discovered and noted the glaring error. Each submission was signed by the same domestic relations judge, on the same date, and provided the exact same terms—

overtly displaying signs of a mistake. (R. at 18.) However, DRU simply accepted payments without holding up their end of the bargain, violating their duties and leaving them liable for their failures.

Additionally, DRU had the duty to exercise their natural position of trust with Ms. Connolly's funds to not allow their failure to result in any harm to her. Like *Greenspan*, DRU was contractually obligated to perform maintenance on all records related to DROs and review all accounts and orders to ensure they were properly filed, thus protecting Ms. Connolly's retirement fund. (R. at 3.) DRU's contract imposed an obligatory duty to monitor the system and DRU breached that duty when it failed to properly review Ms. Connolly's submissions and preserve her account to ensure her retirement fund and dreams were in proper order.

Even if this circuit maintains duty to monitor claims must be premised on underlying fiduciary duty breaches, Ms. Connolly's claim is premised on DRUs breach of the duty of loyalty and public policy further promotes this claims inclusion. *Albert v. Oshkosh Corp*., 47 F.4th 570, 583 (7th Cir. 2022). The nature of claiming a breach of fiduciary duty to monitor often runs parallel with other claims and further stresses the importance of raising this breach when an individual is injured by a large corporation's short sightedness or lack of care. *Howell* explains, "[t]he duty [to monitor] exists so that a plan administrator or sponsor cannot escape liability by…turning a blind eye." *Howell v. Motorola, Inc.*, 633 F.3d 552, 573 (7th

Cir. 2011). Here, DRU turned a blind eye to the blatant carbon copy refiling of the DRO submissions and they easily could have caught this error if they monitored the work properly. (R. at 18).

Therefore, DRU owes damages to Ms. Connolly for breaching its duty of prudence to monitor under the Prudent Person Standard of Care.

iii. DRU is personally liable damages incurred by Ms. Connolly

DRU's multiple breaches of duty render them personally liable for Ms. Connolly's damages.

ERISA seeks to institute fiduciary duties on individuals who are responsible for the management and safekeeping of retirement plans and ensures beneficiaries will not be destitute when they go to access those funds. *Santomenno v. Transamerica Life Ins. Co*., 883 F.3d 833, 837 (9th Cir. 2018); *Lockheed Corp*, 517 U.S. at 887. ERISA § 1109(a), "liability for breach of fiduciary duty", explains:

> "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate…"

Importantly, the statute details the fiduciary is personally liable to the plan, meaning the flow of financial remedy begins with the fiduciary paying the plan and ends with the plan reimbursing the injured party.

Simply, when a party is injured and is left with insufficient funds "the liability…is against the fiduciary personally, not the plan." *Mass. Mut. Life Ins. Co.,* 473 U.S. at 137. In *Mass Mut.*, a plan beneficiary brought suit after being dissatisfied with her account balance and alleging she was entitled to more money in the plan. *Id*. at 136. The Supreme Court consulted ERISA and legislative history to emphasize the "abundantly clear" standard that § 1109 is particularly focused on providing remedies to protect the entire plan and the interests of the plan participants from any possible misuses of the assets. *Id*. at 143.

Here, ERISA imposes fiduciary duties on DRU because they are responsible for the management and safekeeping of Ms. Connolly's retirement plans and should have ensured she was not left light-handed when she went to access her rightfully earned and protected funds. (R. at 3.) However, DRU breached that duty and ERISA § 1109(a), details DRU is personally liable to the plan, who in turn will reimburse Ms. Connolly and make her whole again. Because Ms. Connolly was injured by DRU's breach and has insufficient funds, the liability is against DRU personally, not the plan. Like *Russell,* Ms. Connolly brings suit after being dissatisfied with her account balance and alleges she is entitled to more money in

the plan. (R. at 9.) Specifically, Ms. Connolly was wronged when DRU classified the second, third, and fourth DROs as QDROS, and she has been shorted hundreds of thousands of dollars—jeopardizing her ability to retire. (R. at 8, 9.) ERISA's precise language and legislative history to detail DRU should pay damages under § 1109 to protect the entire plan and the retirement interests of Ms. Connolly from their miscalculations and misapplications of Ms. Connolly's money.

Therefore, because DRU's breached their duties, they are personally liable under ERISA for Ms. Connolly's damages.

CONCLUSION

Ms. Connolly's civil action is timely because no statute of limitations under ERISA bars it. The DRU fails to provide a basis for any or all of Ms. Connolly's claims to be barred. Furthermore, the breaches in the DRU's fiduciary duty constitute continuing violations for which the statute of limitations should be extended.

Additionally, the DRU has failed to demonstrate that they owe no fiduciary duty to Ms. Connolly, nor do they provide a compelling excuse to evade their responsibilities of loyalty or monitoring to Ms. Connolly's account.

For the foregoing reasons, this Court should reverse the district court's decision to grant the DRU's motion to dismiss and remand this case to the trial court.