ORAL ARGUMENT SCHEDULED ON MARCH 4, 2023

No. 22-cv-299-TCF

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRTEENTH CIRCUIT

RENITA CONNOLLY, ET. AL.

Petitioner-Appellant,

v.

DROs-я-Us LLC.

Respondent-Appellee.

On Appeal from the United States District Court

For the District of Columbia

BRIEF FOR RESPONDENT-APPELLEE

Team 2

Counsel for Respondent-Appellee.

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JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction over this case because it is an appeal from the final judgment of the United States District Court for the District of Columbia entered on September 30, 2022. 28 U.S.C. § 1291; Fed. R. App. P.4. Further, the Employee Retirement Income Security Act of 1974 ("ERISA") grants exclusive subject matter jurisdiction over the Appellant's claims. 29 U.S.C. § 1132(e); 28 U.S.C. § 1331.

ISSUES PRESENTED

I. Whether a claimant's petition is barred due to the three-year statute of limitations for "actual knowledge" under ERISA where a third-party service executed a QDRO per repeated, dated requests and disclosed such executions outside the statute of limitations period of 29 U.S.C. § 1113(2)?

II. Was a service provider acting in a fiduciary capacity by determining that the claimant's DRO was a QDRO based on the consideration of discrete, standard factors and implementing the terms of the QDRO, and if so, are they liable for the losses of the claimant that occurred after claimant's lawyer submitted the DRO four times?

STATEMENT OF THE CASE

Appellant-Plaintiff brought suit against the National Laborers Retirement Savings Fund, the Board of Trustees of the National Laborers, the Retirement Savings Fund, Joe Schlitz, Letitia Beck, and DROs-я-Us LLC in the United States District Court for the District of Columbia for lost benefits and equitable relief under ERISA. R. at 8-9. The Defendants filed motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) based on failure to state a claim. The

District Court approved this motion to dismiss. R. at 18. In the District Court's opinion, the court concluded that Plaintiff-Appellant was precluded by the applicable statute of limitations, 29 U. S. C. § 1113(2), from pursuing their claims. R. at 13. The court rejected Plaintiff-Appellant's argument that the "continuing violation" doctrine should extend this statute of limitations. R. at 13. On the issue of DRU's alleged fiduciary status, the District Court held that DRU is not a fiduciary under ERISA with respect to the allegations pleaded by Plaintiff-Appellant. R. at 16. Further accepting the defendant's argument, the Court held that DRU's actions were not actionable under ERISA and that Plaintiff-Appellant's losses may be attributed to Plaintiff-Appellant's domestic relations lawyer, Mr. Hasty. R. at 17-18.

Before Plaintiff-Appellant appealed this case to the U.S. Court of Appeals for the Thirteenth Circuit, Plaintiffs and the Fund Defendants entered into a Partial Global Settlement of the lawsuit. The claims that remain on appeal are the claims related to statute of limitations, "continuing violation" doctrine, DRU's alleged fiduciary status, and DRU's alleged fiduciary breach, against DRU only.

When ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, a pleading is required by Federal Rule of Civil Procedure 8(a)(2) to contain a plausible argument demonstrating that the defendant unlawfully harmed the plaintiff. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In accordance with Federal Rule of Civil Procedure 12(b)(6), a court must accept all factual allegations as true. However, this requirement is inapplicable to legal conclusions as well as to "legal conclusion[s] couched as factual allegations." *Papasan v. Allain,* 478 U.S. 265, 286 (1986). The Court's review of the lower court's decision is a mixed question of law and fact. This court reviews *de novo* the district court's legal conclusions and application of the law to the facts, including its decision to grant

the Motion to Dismiss. *United States v. McGough*, 412 F.3d 1232, 1236 (11th Cir. 2005). The district court's factual findings should be reviewed only for clear error and construed in light most favorable to the prevailing party below, the Defendant. *Id*.

STATEMENT OF THE FACTS

On February 21, 2017, Appellant, Renita Connolly (the "Appellant"), was granted a Judgment of Divorce from her ex-wife. R. at 3. As part of the Judgment of Divorce, on September 27, 2017 the Court granted Appellant's ex-wife 15% of Appellant's retirement savings in the National Labor Retirement Savings Fund (the "Fund") through a Domestic Relations Order (the "DRO"). *Id*. The Fund is a multiemployer pension plan based in Washington, DC sponsored by the Board of Trustees of the National Labor Retirement Savings Fund. R. at 2.

Defendant, DROs-R-Us ("DRU"), is a third-party service providing consultation, administration, and record-keeping services to pension plans such as the Fund. R. at 2. By an Administrative Service Agreement between DRU and the Board (the "Agreement"), DRU agreed to provide determination of Qualified Domestic Relations Orders ("QDROs"), fund maintenance stemming from such orders, and related services. R. at 3. Per Section 8.1 of the Agreement, DRU is not regarded as a fiduciary of the fund for purposes of ERISA. *Id*.

On October 15, 2017, Appellant's attorney, Mr. Dash Hasty ("Hasty") sent a certified copy of the Domestic Relations Order ("DRO") to the Fund's offices in Washington, DC. R. at 4. Pursuant to the Agreement, the Fund directed Hasty to submit the DRO to DRU's online service for qualification and execution. R. at 5. Hasty proceeded to submit three additional successive requests for qualification and execution to DRU's online service. R. at 6-7. With each submission, Hasty received a timestamped form response accompanied by a document that

provided (1) the Fund's QDRO procedures, (2) the Fund's Model Qualified Domestic Relations Order, and (3) a document captioned "Frequently Asked Questions." *Id*. The "Frequently Asked Questions" section informed the submitter, Hasty, that DRU would process the submission "within a reasonable period of time after receiving the order" per Department of Labor standards. *Id*.

Hasty submitted certified copies of the DRO to DRU's website on four separate occasions: November 30, 2017, January 4, 2018, March 3, 2018, and October 15, 2018. *Id*. On each occasion, Hasty presented a new certified copy of the DRO that he received from the Supreme Court. *Id*. As such, each new certified copy displayed a different date (*i.e.* "September 27, 2017," "January 3, 2018," "March 2, 2018," and "May 2, 2018," respectively). *Id*.

In response to each submitted DRO certified copy displaying a different effective date, DRU divided the funds in Appellant's account per the order accordingly. R. at 7-9. First, by letter dated November 1, 2018, DRU notified Appellant, Hasty, and the alternate payee that the DRO had been determined to be a QDRO. R. at 7. The notice stipulated that unless a party appealed the determination within 45 days per ERISA, the QDRO would be implemented. *Id*. The letter contained language regarding the implementation procedure, including, "The Alternate Payee will receive 15% of the Participant's benefit as of the date of the order." *Id*. The terms of the QDRO were later implemented on December 15, 2018. R. at 8.

By letter dated January 3, 2019, DRU notified Appellant, Hasty, and the alternate payee that the DRO had been determined to be a QDRO. *Id*. The notice stipulated that unless a party appealed the determination within 45 days per ERISA, the QDRO would be implemented. *Id*. The letter contained language regarding the implementation procedure, including, "The Alternate Payee will receive 15% of the Participant's benefit as of the date of the order." *Id*. Upon receipt,

Appellant unsuccessfully attempted to contact Hasty. *Id*. The terms of the QDRO were later implemented per the letter. *Id*.

By letter dated February 1, 2019, DRU notified Appellant, Hasty, and the alternate payee that the DRO had been determined to be a QDRO. *Id*. The notice stipulated that unless a party appealed the determination within 45 days per ERISA, the QDRO would be implemented. *Id*. The letter contained language regarding the implementation procedure, including, "The Alternate Payee will receive 15% of the Participant's benefit as of the date of the order." *Id*. Upon receipt, Appellant unsuccessfully attempted to contact Hasty. *Id*. The terms of the QDRO were later implemented per the letter. *Id*.

By letter dated April 1, 2019, DRU notified Appellant, Hasty, and the alternate payee that the DRO had been determined to be a QDRO. *Id*. The notice stipulated that unless a party appealed the determination per ERISA, the QDRO would be implemented. R. at 9. The letter contained language regarding the implementation procedure, including, "The Alternate Payee will receive 15% of the Participant's benefit as of the date of the order." *Id*. Upon receipt, Appellant unsuccessfully attempted to contact Hasty again. *Id*. The terms of the QDRO were later implemented per the letter. *Id*.

After retiring on March 31, 2022, Appellant received her quarterly Fund account statement. *Id*. Appellant filed the present action two weeks later on April 14, 2022. *Id*.

SUMMARY OF THE ARGUMENT

Appellant is barred by the three-year statute of limitations provided in 29 U.S.C. § 1113 from bringing the presented claims. On January 3, 2018, Appellant acquired actual knowledge that her funds were not being distributed as expected due to the multiple DRO submissions made to DRU by her attorney on her behalf. R. at 8. The disclosure letter explained that the DRO was

determined to be a QDRO and that it would be executed per the online request made by Hasty, and it provided an appeals process to be pursued prior to execution in the case of any issues. *Id*. By the disclosure, DRU successfully apprised Appellant of all facts relevant to the transaction, thereby conveying actual knowledge upon Appellant. Upon receipt, Appellant acted affirmatively by attempting to contact her attorney, but took no further action to remedy the alleged violation. R. at 8-9. After receipt of two more unexpected, dated disclosures, Appellant again attempted to contact her attorney but took no further action. *Id*. Over three years after the initial alleged violation (i.e. the implementation of the QDRO after the January 3, 2018 letter), Appellant brought the present suit. R. at 9.

Appellant received detailed disclosures, read the disclosures, acted affirmatively to contact her attorney, and thereafter took no further action, sleeping on her rights. Appellant is barred from alleging a breach of fiduciary duty claim against DRU regarding the alleged violation. There is no known exception to § 1113(2), and the continuing violations doctrine is not applicable because (1) the alleged violation is a repeated, not a continuing violation and (2) ill effects from an alleged violation do not fall under the exception. Appellant gained actual knowledge of the alleged breach on January 3, 2018 and did not attempt to remedy such alleged breach until over three years later, on April 14, 2022.

Next, DRU was liable under ERISA for any losses suffered by the Plaintiff. First, DRU was not acting as a fiduciary when it determined that Appellant's DRO was a QDRO. DRU was not a named fiduciary, and to the contrary, the Agreement that governed the fund specified that DRU should not be regarded as an ERISA fiduciary. R. at 3. DRU was also not a "functional" fiduciary, because DRU when determining that the DRO was a QDRO and then implementing the QDRO, DRU was carrying out the specific terms of the Agreement and the QDRO, which

were based on "arm's length" negotiations. DRU exercised minimal discretion when following the terms of these agreements because the terms laid out specific instructions for DRU, and the plan and plan participants had the opportunity to reject DRU's determination that the DRO was a QDRO. Furthermore, DRU was acting in a solely ministerial capacity. DRU's services consist of tasks that contribute to "processing domestic relations orders," which is ministerial in nature. *R*. at 2. When determining whether Appellant's DROs were QDROs, DRU relied narrowly on the specific factors permitted by § 1056(d)(3)(B)(i) Subparagraph (C), and lacked the discretionary authority to consider anything more than these factors.

Moreover, DRU's actions did not give rise to a fiduciary breach, irrespective of fiduciary status. Appellant did not allege a sufficient "nexus" between the DRU's alleged discretionary action, which was determining that Appellant's DROs were QDROs, and Appellant's losses, which occurred over a month later when DRU implemented the terms of the QDROs. Hasty's choice to submit the DRO three unnecessary times was an intervening factor that broke the chain of causation between DRU's alleged fiduciary action and Appellant's losses.

Appellant failed to demonstrate that DRU performed below the "prudent person" standard for fiduciary breach. DRU sent several letters to Appellant warning her of their plans to implement the QDRO and did not mislead the Appellant. R. at 7-8. Given the information that was available to DRU at the time, DRU's good faith attempt to implement the QDROs as they were written and submitted was sufficient to satisfy the "prudent person" standard.

ARGUMENT

I. Appellant is barred from asserting ERISA-based claims because the statute of limitations on these claims has run per 29 U.S.C. § 1113.

A claimant may bring an ERISA-based action (1) six years after "the date of the last action which constituted a part of the breach or violation, or in the case of 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 the breach or violation; except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation. 29 U.S.C. § 1113. The statute of limitations for ERISA claims begins to run on the earliest date at which the claimant becomes aware of the information constituting the violation. *Martin v. Consultants & Adm'rs*, 966 F.2d 1078, 1086 (7th Cir. 1992). Appellant had actual knowledge of the entirety of facts and transactions that constituted the alleged violation, as evidenced by Defendant's disclosures and Appellant's response to receiving such disclosures.

A. Appellant possessed actual knowledge of the alleged violations, triggering the three-year statute of limitations provided in ERISA.

Actual knowledge is defined under ERISA by its plain meaning. *Intel Corp. Investment Policy Committee v. Sulyma*, 140 S.Ct. 768, 776 (2020). One cannot attribute knowledge of facts to a claimant that did not actually have knowledge of them, and disclosure alone does not constitute actual knowledge. *Id*. at 777. However, circumstantial evidence or evidence of willful blindness can prove actual knowledge. *Id*. at 779. Actual knowledge lies somewhere between "every last detail" and "something was awry," and a court will consider "the complexity of the underlying factual transaction, the complexity of the legal claim, and the egregiousness of the alleged violation." *Martin*, 966 F.2d at 1086.

Evidence of disclosure and the claimant's response to such disclosure is relevant in analyzing actual knowledge. *Compare Wright v. Heyne*, 349 F.3d 321, 331 (6th Cir. 2003) (deciding that claimants gained knowledge of the alleged fiduciary breach after independently consulting with external advisors, and that this actual knowledge was evidenced by the termination of the relationship with their fiduciary after such consultations but before speaking with their attorneys or actually suffering harm); *and Neuma, Inc. v. Wells Fargo & Co.*, 515 F.Supp.2d 825, 852 (N.D. Il. 2006) (deciding that the claimant fulfilled the actual knowledge requirement when having a conversation with a fiduciary that disclosed the facts on which the claimant's action was based, yet did not pursue legal action until over four years later); *with Brock v. Nellis*, 809 F.2d 753, 755 (11th Cir. 1987) (reasoning that there was no direct or circumstantial evidence implying that the claimant had actual knowledge of appellee's decision to purchase property at an inflated sale price).

Here, appellant had knowledge of the alleged violation over three years before pursuing action and yet, like the claimant in *Neuma*, she did nothing. Unlike the claimant in *Sulyma*, Appellant did read the disclosures provided to her by DRU. Here, as in *Wright*, Appellant acquired actual knowledge of the alleged breach through repeated disclosures sent to her by DRU regarding the pension split. Though the information was from the source itself, like in *Neuma*, and not from independent consultations, Appellant did receive the information and acknowledged receipt through the affirmative action of trying to contact her attorney. It is not relevant here, as in *Wright*, that Appellant did not reach her attorney; the affirmative action of attempted consultation alone is circumstantial evidence that her knowledge from the disclosures rose above "something [being] awry." Unlike *Brock*, this affirmative action serves as clear

circumstantial evidence of actual knowledge, and Appellant's failure to bring timely action is more attributable to the willful blindness found in *Neuma*.

Interpreting the meaning of "actual knowledge" for the purposes of 29 U.S.C. § 1113(2) has led to an apparent split among the Circuit courts, and the Thirteenth Circuit has not yet given a post-*Sulyma* decision. The majority of U.S. Circuit Courts define actual knowledge as "knowledge of the facts or transaction that constituted the alleged violation; it is not necessary that the [claimant] also have knowledge that the facts establish a cognizable claim under ERISA." *See Browning v. Tiger's Eye Benefits Consulting*, 313 Fed. Appx. 656, 662 (4th Cir. 2009) (reasoning that once the claimant has knowledge of facts supporting his allegation, he has three years to bring the suit); *Wright*, 349 F.3d at 331 (deciding that claimants gained actual knowledge of all facts relevant to their lawsuit through independent external consultation, evidenced by the termination of their relationship with the fiduciary subsequent to such meetings); *Martin*, 966 F.2d at 1088-89 (holding that because the claim was a breach of the fiduciary's monitoring obligation, the statute of limitations began tolling when the claimant gained knowledge of all monitoring procedures used by the fiduciaries).

This interpretation is consistent with the Supreme Court's "plain meaning" determination in *Sulyma*, applying Black's Law Dictionary definition of "more than 'potential, possible, virtual, conceivable, theoretical, hypothetical, or nominal.'" Black's Law Dictionary 53 (4th ed. 1951). *See Sulyma*, 140 S.Ct. at 776-77 (holding that actual knowledge is interpreted according to its plain meaning, and the claimant did not have actual knowledge of disclosed information if he did not recall reading such disclosures); *Brock*, 809 F.2d at 755 (deciding nothing in ERISA's legislative history implies that actual knowledge constitutes anything more than its plain meaning, that being knowledge of all facts relevant to the claim).

Appellant sat on her rights for over three years. Again, here, Appellant both read the disclosures and contacted her attorney to discuss their ramifications. Per the "plain meaning" definition of actual knowledge, as in *Wright*, Appellant had knowledge of the transaction underlying the alleged violation, and acted affirmatively and accordingly in contacting her attorney. More specifically, Appellant alleges breach of fiduciary duty in the repeated splitting of the pension fund per the request of her attorney to DRU: the exact claim to which the disclosures serve as direct evidence of DRU's execution. It follows, therefore, as in *Martin*, that the Appellant had actual knowledge of the facts underlying the alleged violation by DRU. It is not necessary or relevant that she knows of her attorney's involvement. Appellant, like the claimants in *Martin*, gathered actual knowledge of the specific facts relevant to this specific violation from DRU's disclosures.

This analysis encapsulates the "plain meaning" of actual knowledge as provided by the *Sulyma* court: Appellant received the disclosures from DRU, read them, attempted to contact her attorney for assistance, and brought the present claim over three years later. Appellant had actual knowledge of the alleged violation with each successive disclosure, which, though bearing similar language, bore a different effective date. As reasoned in *Brock*, nothing in ERISA's history implies that actual knowledge rises above its plain meaning, and Appellant acquired actual knowledge of the alleged breach first on January 3, 2019 and submitted a claim over three years later on April 14, 2022.

The minority of U.S. Circuit Courts apply a test requiring a claimant to have knowledge of the relevant events constituting a fiduciary breach and also that those events "supported a claim of breach of fiduciary duty or violation under ERISA" to establish actual knowledge. *See Gluck v. Unisys Corp.*, 960 F.2d 1168, 1178-79 (3d Cir. 1992) (finding no actual knowledge of a

violation where participants received literature regarding "a major addition" to the plan described as "improving participants' benefit packages," but not knowing the specifics of the underlying failure to vest); *Maher v. Strachan Shipping Co.*, 68 F.3d 951, 955-56 (5th Cir. 1995) (deciding that financial reports in the financial press did not constitute actual knowledge of a company's actual financial condition, and some members of a class action exhibiting knowledge did not equate to all members sharing collective knowledge).

Application of this narrow test would inhibit the intent of statute of limitations provisions and undermine ERISA's emphasis on disclosure requirements. *See Wright*, 349 F.3d at 330 (quoting *Board of Regents of State of N.Y. v. Tomanio*, 446 U.S. 478, 487 (1980)) (reasoning that actual knowledge must be confined to its plain meaning to be consistent with the purpose of statute of limitations because "there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious.").

Unlike in *Gluck*, where the claimants were not privy to the full extent of the plan amendment and were misled by their fiduciaries, Appellant here knew all relevant facts of the transaction from the DRU disclosures. DRU advised Appellant that they were splitting the fund as requested on the date stipulated, which was the full extent of the execution. Moreover, unlike *Maher*, where the claimants relied on reports from the financial press and were not aware of their fiduciary's actual financial position, here, Appellant learned all relevant facts directly from disclosures from DRU. Appellant received timestamped facts directly from the source regarding the status of her account, and her only response was a feeble attempt to contact her lawyer.

Allowing the present suit would undermine the purpose of the statute of limitations provision, as explained in *Wright*, creating a difficult and inaccurate fact-finding process, limiting the efficiency of the judicial process, and upsetting DRU's substantive expectation of being hailed into court for its disclosed actions requested by Appellant's representative. Appellant sat on her rights for over three years. The U.S. judicial system cannot reward such failure to adjudicate, and allowing the present action sets a dangerous precedent in introducing unnecessary prejudice upon DRU.

B. Appellant cannot find an exception to its ERISA-based claim in the continuing violations doctrine.

To date, the continuing violations theory has not been applied in an ERISA-based action in a U.S. Court of Appeals across the Circuits. In order for the continuing violations doctrine to apply, (1) "the defendant's wrongful conduct must continue after the precipitating event that began the pattern," (2) "injury to the plaintiff must continue to accrue after that event," and (3) "further injury to the plaintiff must have been avoidable if the defendants had at any time ceased their wrongful conduct." *Norman v. Granson*, 2020 WL 3240900, at *2 (March 25, 2020). The continuing violations doctrine applies to a series of events that are not separately actionable and will not be applicable to discrete, identifiable, and separately actionable events. *Id.*

Applying the continuing violations doctrine to ERISA cases would effectively read the "actual knowledge" requirement out of ERISA's statute of limitations. *See Phillips v. Alaska Hotel and Restaurant Employees Pension Fund*, 944 F.2d 509, 520 (9th Cir. 1991) (deciding that the continuing violations doctrine is not applicable to ERISA claims because "once a plaintiff knew of one breach, an awareness of later breaches would impart nothing materially new," especially where all later breaches are essentially of the same, though independent, character of the first).

Regardless, if the continuing violations doctrine were to be considered here, Appellant must identify a series of events that are not separately actionable. *Compare Martin*, 966 F.2d at 1088 (holding that a claim brought under ERISA involved a "*repeated*, rather than a *continued* violation" where the alleged violations involved separate contracts to prevent plaintiffs from using the continuing violations doctrine to "[rack] up damages"); *and Eidson v. Tenn. Dep't of Children's Services*, 510 F.3d 631, 635 (6th Cir. 2007) (holding that the continuing violations doctrine is applicable to "continual unlawful acts, not continual ill effects from an original violation" where alleged harmful effects ensued after a child was removed from her parent's custody, and "passive inaction" does not amount to a continuing violation); *with Tibble v. Edison Intern.*, 575 U.S. 523, 529-31 (2015) (deciding that the case was not barred by ERISA's six-year statute of limitations because the fiduciaries had a continuing duty to monitor a 401(k) plan's investments and remove "imprudent trust investments").

Here, Appellant is unable to apply a continuing violations theory. As explained in *Phillips*, the continuing violations doctrine would read the ERISA "actual knowledge" requirement moot, undermining the express conditions and plain meanings of § 1113 that ERISA analyses have hinged upon for decades. Appellant learned no new information with each successive disclosure from DRU except that DRU had split the account on the date provided per Appellant's attorney's request. Moreover, as in *Martin*, the alleged violation was repeated and not continual, with each disclosure representing a discrete and separately-actionable alleged breach.

Furthermore, unlike *Tibble*, DRU had no duty to monitor or any sort of long-term relationship with the Fund. DRU was a third party tasked with approving and implementing QDRO qualification requests; each separate request was treated as a separate contract, much like

those encountered in *Martin*. Lastly, Appellant is attempting to apply the doctrine not to the alleged violations of DRU, but rather the effects of such allegations like the petitioner in *Medical Mutual*; this proposed analysis clearly exceeds the scope of the doctrine in any application. Appellant cannot break precedent here and apply the continuing violations doctrine to discrete, separately actionable, repeated acts that *each fall outside of the statute of limitations period*, with the last alleged violation occurring on April 1, 2019 and the suit commencing on April 14, 2022.

II. DRU is not liable under ERISA for any losses suffered by the Plaintiff.

When reviewing an ERISA claim, the Supreme Court has been reluctant to "infer causes of action under ERISA" because "the statute's carefully crafted and detailed enforcement scheme" demonstrates that Congress did not intend to allow additional remedies. *Mertens v. Hewitt*, 508 U.S. 248, 254 (1993). Accordingly, the Thirteenth Circuit should only rule for the Appellant if her pleading created a sufficient basis to provide relief under the remedies historically recognized under ERISA.

Appellant in the present case failed to sufficiently plead that DRU's actions were unlawful under ERISA and were the direct cause of Appellant's losses. First, DRU did not act as a fiduciary during the period of facts alleged by Plaintiff, and thus DRU does not have a fiduciary duty to Appellant. DRU was not acting as a named or "functional" fiduciary, and was merely acting in a ministerial capacity. Next, regardless of fiduciary status, Appellant did not plead a sufficient "nexus" between DRU's actions and Appellant's losses, and did not demonstrate that DRU performed below a "prudent person" standard, so DRU is not liable for Appellant's losses.

A. DRU was not acting as a fiduciary when they determined that Appellant's DRO was a QDRO and implemented the terms of the QDRO.

For the reasons discussed below, Appellant failed to demonstrate that DRU was acting with fiduciary discretion when DRU decided that Appellant's DRO was a QDRO and implemented the terms of the QDRO.

i. DRU was not a named fiduciary and was not performing a "functional" fiduciary duty by determining and implementing the terms of Appellant's QDRO.

Under ERISA, a person is a fiduciary only if they are named as a fiduciary through the plan's contract or if they perform fiduciary functions. 29 U.S.C.S. § 1102 (a)(2); 29 U.S.C. § 1002(21)(A). A person can only become a "functional" fiduciary "to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A). For a complaint to categorize a service provider's action as a fiduciary function, it must show that the service provider, the *Teets* test requires that "(1) did not merely follow a specific contractual term set in an arm's-length negotiation; and (2) took a unilateral action respecting plan management or assets without the plan or its participants having an opportunity to reject its decision." *Teets v. Great-West Life & Annuity Ins. Co.*, 921 F.3d 1200, 1244 (10th Cir. 2019).*

To clarify element (1) of the *Teets* test, if there is no contract provision controlling an actor's decision, the decision was not based on a contractual term negotiated at "arm's length." *See Rozo v. Principal Life Ins. Co.*, 949 F.3d 1071, 1074 (8th Cir. 2020). An action is more likely

to be based on an "arm's length" contract if the agreement between the service provider and employer grants explicit authority to the service provider to perform that action. *See McCaffree Fin. Corp. v. Principal Life Ins. Co.*, 811 F.3d 998, 1003 (8th Cir. 2016)* (finding that a contract term allowing the service provider to pass operating costs onto participants was negotiated at "arm's length" because the initial contract between the service provider and employer included the authority for the service provider to charge for such costs). A contract provision likely does not meet the "arm's length" standard if it does not establish guidelines governing the action or create accountability to the plan or its participants. *See Teets v. Great-West Life & Annuity Ins. Co.*, 921 F.3d at* 1248 (finding that a Credited Rate set by a service provider was not negotiated at "arm's length" because it allowed the service provider to set any Credited Rate without input from the plan or the plan's participants).

Next, to satisfy element (2), the complaint must demonstrate that the plan or its participants cannot reject the service provider's decision. *Id*. at 1244. In *Teets*, an employee sued the service provider based on a claim for breach of fiduciary duty. *Id*. at 1237. The Tenth Circuit affirmed the lower court's decision to grant summary judgment to the service provider because they were not acting as a fiduciary when it set the plan's credited rate each quarter. *Id.* at 1249-51. The court reasoned that plan participants could reject the credited rate by leaving the plan. *Id*. Accordingly, the service provider's unexercised ability to impose a 12-month waiting period before withdrawing from the plan did not impede participants from rejecting the rate by leaving the plan. *Id*. at 1249. Likewise, the lack of similar risk level investment options for participants seeking to leave did not impede rejection of the rate. *Id*. at 1250-51. The employee's complaint could not survive summary judgment because the employee did not provide evidence that any circumstances actually prevented plans or participants from rejecting the rate. *Id*.

Here, DRU is not a fiduciary because they are not a named fiduciary and they do not perform fiduciary functions. First, According to the terms of the Fund, the Board is a named fiduciary. "Stipulated Facts And Procedural Background" (hereinafter "Facts"). In addition, complying with Section 10 of the Fund, the Board appointed Letitia Beck and Joe Schlitz as co-administrators as named fiduciaries. No provisions suggest that DRU is a fiduciary. To the contrary, the "Agreement" that governed the fund explicitly stated that DRU should not be regarded as a fiduciary under ERISA. *R*. at 3. Thus, DRU is not a named fiduciary.

Additionally, DRU was not performing a fiduciary function when they implemented the terms of Connolly's QDRO for the same number of iterations that Mr. Hasty submitted. DRU merely performed its obligations under the terms of the Agreement and the QDRO, which left little room for discretion. Applying the *Teets* test, addressing element (1), the Agreement was the result of an "arm's length" negotiation, and DRU followed the specific contractual terms set in the Agreement. The Agreement stipulated that, among other duties, DRU would review "all domestic relations orders submitted" and make "determinations on the qualified status of all domestic relations orders in accordance with law and Fund policies." *R*. 3. Also, Section 7 of the Agreement states that DRU "will issue determinations regarding the qualified status of domestic relations orders in accordance with applicable law and Fund policies which are attached as Exhibit Q to this Agreement." *Id*. In *McCaffree*, the plan's agreement was negotiated at "arm's length" because it gave the service provider authority for the alleged fiduciary action of charging operating costs. Similarly, here, the Agreement was negotiated at arm's length because it authorizes DRU to perform the alleged fiduciary act of making QDRO determinations. Further, the present case can be distinguished from the application of element (1) in *Teets*. The service provider in *Teets* could set any credited rate without accountability to the plan or the plan's

participant, which made the credited rate less tied to an "arm's length" negotiation because the service provider had more discretion. On the other hand, here, the plan participants could appeal the decision, and the appeal would be reviewed by the Board. DRU must also abide closely to federal law and Fund policies, which allow minimal discretion.

Beyond the Agreement, the QDRO itself might be considered to be the result of an "arm's length" negotiation. The terms of the DRO were decided in domestic relations court by Appellant and her ex-wife, and were solidified before DRU even received a copy of the DRO. *See* "Facts". After DRU determined that the DRO was a QDRO, DRU implemented the terms of the QDRO precisely as they were written, with no discretion to revise the instructions of moving 15% from one account to another. *Id*.

Turning to element (2), DRU explicitly gave the plan and its participants an opportunity to reject DRO's determination that all four of Connolly's DROs were QDROs. Accordingly, summary judgment is appropriate because Appellant has not sufficiently alleged that there were circumstances preventing her from rejecting the QDRO determination. On November 1, 2018, DRU notified the Appellant, Obergefell, and Mr. Hasty that the first DRO was determined to be QDRO. R. at 3. This letter explained that parties could appeal the decision for the next 45 days. *Id*. By the time DRU notified the same parties about the determination for the second QDRO, on January 3, the terms of the first QDRO had already been implemented. *Id*. Noticing this inconsistency, the parties had an opportunity to appeal the implementation of the second QDRO. By the implementation of the fourth QDRO, the party had multiple opportunities to appeal the decisions during 45 day windows. If the parties had begun this appeal process, the Board would have had the opportunity to overturn DRU's decision to implement the 2nd, 3rd, and 4th QDROs. Like in *Teets*, where the circumstances did not actually prevent rejection of the rate,

here, the Appellant's did not allege any circumstances that prevented her from rejecting the QDRO decision. Although the Appellant reached out to Mr. Hasty's after receiving the duplicate QDRO determinations, she does not allege that she was unable to appeal the decision. She also did not manifest any objection to the implementation after receiving each letter. Consequently, Appellant's claim should not survive summary judgment on this point.

ii. DRU was merely acting in a ministerial capacity because QDRO determinations are narrow and discrete.

Meanwhile, a person is not a fiduciary if they are performing "purely ministerial" duties. Guidance from the Department of Labor states that certain actions are ministerial in nature and thus do not involve the exercise of discretion which creates a "functional" fiduciary duty. 29 C.F.R. 2509.75-8. These actions include, but are not limited to: "Application of rules determining eligibility for participation or benefits;" "Calculation of services and compensation credits for benefits;" "Calculation of benefits; "Collection of contributions and application of contributions as provided in the plan;" and "Processing of claims." *Id. See IT Corp. v. General Am. Life Ins. Co.*, 107 F.3d 1415, 1421-22 (9th Cir. 1997) (contrasting a plan administrator, who might have been a fiduciary because it has control over the plan bank account, from a bank, who is not an ERISA fiduciary because they are not "entitl[ed] to pay anyone but payees and endorsees on checks").

Furthermore, the Supreme Court has recognized that "[a] QDRO enquiry [by a plan administrator] is relatively discrete, given the specific and objective criteria for a domestic relations order that qualifies as a QDRO," with "requirements that amount to a statutory checklist working to spare [an administrator] from litigation-fomenting ambiguities." *Brown v. Continental*, 647 F.3d 221, 224 (5th Cir. 2011)* (quoting *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan,* 555 U.S. 285 (2009). Statutory requirements specify that a QDRO must

include these specific details: "(C)(i) the name and the last known mailing address (if any) of the participant and alternate payee, (ii) the amount/percentage, or manner to determine it, of the benefits that the alternate payee receives, (iii) the number of payments or period of time for payments, (iv) which plan it applies to." § 1056(d)(3)(B)(i) Subparagraph (C). A QDRO cannot (i) require a plan to provide something not available under the plan, (ii) require higher value benefits than the plan offers, or (iii) require payment for benefits already promised to someone else. *Id.* at Subparagraphs (D).

When deciding whether a DRO is a QDRO, an administrator cannot consider any other factors besides those listed in § 1056(d)(3)(B)(i) Subparagraph (C). *See Brown v. Continental*, 647 F.3d at* 224-25. In *Brown v. Continental*, a plan administrator sued employees who filed DROs based on "sham" divorces. *Id*. The Fifth Circuit found that the "sham" divorces could not factor into whether the employees' DROs were QDROs because the administrator was not permitted to consider the intent of beneficiaries. *Id*. If an administrator finds that a DRO satisfies the statutory requirements from § 1056(d)(3)(B)(i) Subparagraph (C), it must determine that the DRO is a QDRO. *Id*.

Here, DRU's decision about whether Connolly's DRO was a QDRO was merely ministerial. The District Court opinion summarizes DRU's services as "consulting, administration, and recordkeeping services to pension plans in processing domestic relations orders." R. at 2. DRU's responsibilities are largely characterized tasks that contribute to "processing domestic relations orders"; this is similar to "processing of claims, " which the Department of Labor states are ministerial in nature. *Id.*; 29 C.F.R. 2509.75-8.

When DRU was deliberating on Appellant's DRO, they narrowly considered the factors permitted by § 1056(d)(3)(B)(i) Subparagraph (C). The first factor was the names and addresses

of the participant and alternate payee, which the DRO stated were Renita Connolly and Mary Obergefell. R. at 4. Second, DRU considered the amount, percentage, or method of determining the amount or percentage given to the alternate payee. The DRO specified that the alternate payee would include a "fixed sum of fifteen (15) percent of such Account Balance," not including outstanding loans. R. at 4. Third, DRU checked for the number of payments or timeframe. The DRO stated that the alternate payee should receive 15% of the value of the plan on the date of the order, with gains or losses incorporated from then until the distribution. *R.* at 4. The last factor was which plan the DRO applied to, and the DRO detailed "National Laborers Retirement Savings Fund and any successor plan or transferee." *Id. IT Corp.* contrasts a bank's ministerial task of implementing a check with a fiduciary's task of managing the activities of money in a bank account. Following this analogy, here, DRU was acting more like a bank by strictly following the objective checklist that is universally relied on for QDRO determinations.

DRU lacked the discretionary authority to consider anything beyond these factors, including the "intent" of Mr. Hasty when he submitted the DRO an extra three times. As in *Brown v. Continental*, where the beneficiaries intent to participate in a "sham" divorce was irrelevant to the QDRO decision, here, DRU could not consider why Mr. Hasty might have submitted the same terms multiple times. Since DRU satisfied the four criteria detailed above, DRU was obligated to implement the terms of the QDRO.

B. Regardless of fiduciary status, DRU's actions did not amount to a fiduciary breach.

For the reasons discussed below, Appellant failed to demonstrate that DRU's alleged fiduciary action of determining the QDRO amounted to a fiduciary breach that caused Appellant's losses.

i. There was no "nexus" between DRU's actions and Appellant's losses.

The Supreme Court has established that functional fiduciary status only applies if the person was serving as a fiduciary while performing the action that created the claim. *See Pegram v. Herdrich*, 530 U.S. 211, 226 (2000). This requirement is derived from the phrase "to the extent" at the start of 29 U.S.C. § 1002(21)(A). *Id*. Circuit courts have interpreted this standard to require a "nexus" between the action giving rise to the claim and the alleged fiduciary breach. *See McCaffree Fin. Corp. v. Principal Life Ins. Co.*, 811 F.3d at* 1002; *Santomenno ex rel. John Hancock Trust v. John Hancock Life Ins. Co. (U.S.A.),* 768 F.3d 284, 297 (3rd Cir. 2014); *Cooper v. Ruane Cunniff & Goldfarb Inc.*, 990 F.3d 173, 182-84 (2nd Cir. 2021).

This "nexus" must temporally link a fiduciary action with the alleged breach of fiduciary duty. *See Santomenno ex rel. John Hancock Trust v. John Hancock Life Ins. Co. (U.S.A.),* 768 F.3d at 299-300. (finding that there would be no "nexus" between the fiduciary action of providing investment advice and the alleged breach of charging excessive fees because Hancock was not providing investment advice when the breach occurred). Furthermore, the "nexus" must link the alleged fiduciary breach to specific facts that create the claim under ERISA. *Cooper v. Ruane Cunniff & Goldfarb Inc.*, 990 F.3d 182-84 (noting that more than but-for causation is necessary to create a "nexus" and finding that the plaintiff's claim of fiduciary breach did not "relate to" his employment because the merits of his claim were not specific to his employment, and others who were never employed by the defendant "could have brought identical claims").

In *McCaffree*, McCaffree attempted to plead a connection between a service provider's alleged fiduciary breach of charging unreasonable fees and several fiduciary actions. *See McCaffree Fin. Corp. v. Principal Life Ins. Co.*, 811 F.3d at* 1003-05. These fiduciary actions included reducing the available investment accounts, offering investment advice, and inadequate

disclosure of management fees. *Id*. The Eighth circuit rejected McCaffree's arguments because they failed to plead a causal connection. *Id*. For example, McCaffree did not claim that the service provider used its authority to reduce the available investment accounts so that plan participants would only have access to plans with higher, unreasonable fees. *Id.* at 1003. Instead, the complaint argued that the service provider did not have a legitimate basis for charging high fees in general for the accounts. *Id*. Thus, the complaint did not satisfy the "nexus" requirement because it did not allege that the service provider was specifically engaging in fiduciary actions in a way that caused the allegedly excessive fees. *Id*. at 1003-05.

Here, there is not a sufficient "nexus," between the alleged fiduciary action and the loss that created the claim. The alleged fiduciary action was making determinations that the DROs were QDROs, and the loss was Appellant's reduced pension benefits. Like in *Santomenno*, where there was a temporal separation between the discretionary act and the losses that created the claim, here, the alleged discretionary act of making determinations on the QDROs occurred in each instance well before the QDROs were actually implemented, causing the losses. During this time, Appellant had a 45-day window to reach out and appeal the decision, but Appellant and her lawyer chose not to utilize the opportunity. R. at 16.

Appellant's claim relies on mere but-for causation and does not adequately allege that the losses were specifically and directly caused by DRU's actions. As in *Cooper*, where the alleged fiduciary breach was not specific to the aspect of the claim that gave rise under ERISA, here, DRU's alleged discretionary actions of making determinations on the QDROs are not specific to Appellant's losses, which occurred when the QDROs were implemented. Notably, Hasty's actions were significant intervening factors causing the losses because he submitted the QDRO three unnecessary times. In *McCaffree*, the court found that there was no causal connection

because the service provider was not exercising its discretion in a way that led directly to the losses in the claim. Similarly, here, Hasty's actions disrupt the chain of causation, separating DRU's determination about the QDRO with the losses that Appellant incurred.

ii. Appellant failed to plead facts demonstrating that DRU performed below the "prudent person" standard.

If a service provider is found to be a fiduciary, they must perform their fiduciary duties at a "prudent person" standard that takes the best interests of the beneficiary into account. This requires that fiduciaries perform their duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a). The "prudent person" standard does not require specific outcomes that benefit the plan participants, but rather asks whether the fiduciary's choice was reasonable based on the information they knew at the time. *See Tussey v. ABB, Inc.*, 746 F.3d 327, 338 (8th Cir. 2014) (noting that previous cases have found the "prudent person" standard to focus on the fiduciary's perspective at the time of the decision, and not on the results). Intentional or negligent material misrepresentation violates the "prudent person" standard. *See James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 43, 449 (6th Cir. 2002).

As previously mentioned, determinations as to whether a DRO qualifies as a QDRO are "discrete" "enquir[ies]" that do not allow for the consideration of factors beyond those listed in § 1056(d)(3)(B)(i). *Brown v. Continental*, 647 F.3d at* 224 (quoting *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan,* 555 U.S. 285; § 1056(d)(3)(B)(i).

Here, DRU's choice to approve, and later to implement, the QDROs did not violate the "prudent person" standard. DRU did not intentionally or even negligently misrepresent Appellant about its determinations and plans to implement the QDRO, which *James* found would violate

the "prudent person" standard. To the contrary, DRU sent several letters to Appellant and her lawyer warning them that the QDROs would be implemented if the Appellant took no further action. R. at 7-8.

Following the standard of *Tussey*, where actors must act reasonably based on the information they knew at the time, DRU made a good-faith effort to implement the QDRO in a way that aligns with instructions they were given. QDRO determinations are discrete, and may only consider a narrow set of four factors from 1056(d)(3)(B)(i). With no communication from the Appellant and only the submitted documents to draw on, DRU had no choice but to assume that Hasty meant to submit all four documents. DRU could not have denied the DROs because they contained the necessary information listed in 1056(d)(3)(B)(i). As a result, DRU was obligated to take the QDROs at face value and implement them as written. Appellant has failed to allege any facts suggesting that DRU was aware of Hasty's strategy to submit the same terms four times in effort to expedite the implementation process, or that DRU knew that Hasty did not intend the terms to be implemented four times.

CONCLUSION

For the reasons stated herein, this Court should affirm the judgment of the District Court and dismiss Appellant's petition for failure to state a claim upon which relief can be granted.

Respectfully submitted,

/s/ Team 2

Team 2

DATED: January 31, 2023 Attorneys for Appellee