Team 4

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,

Defendant/Appellee.

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

BRIEF FOR APPELLEE

Team 4
Counsel for Defendants/Appellees

January 31, 2023

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JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over these claims, arising under the Employee Retirement Income Security Act of 1974 ("ERISA"), which are "necessarily federal in character" and fall under the scope of 28 U.S.C. § 1331. *See Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 67 (1987). ERISA explicitly grants subject matter jurisdiction under 29 U.S.C. § 1132(e).

This court has appellate jurisdiction. "The courts of appeals . . . shall have jurisdiction 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 of all parties' claims.

QUESTIONS PRESENTED

1. Under applicable ERISA law, does the statute of limitations bar a claim brought more than three years after the plaintiff gained actual knowledge of the claim's existence and when the continuing violation doctrine does not apply?

Suggested Answer: Yes

2. Under applicable ERISA law, does a service provider have a fiduciary relationship with a plan participant when the pension benefit plan contracted with the service provider specifically to qualify domestic relations orders?

Suggested Answer: No

STATEMENT OF THE CASE

This action arises out of Renita Connolly's ("Appellant") participation in the National Laborers Holiday and Vacation Fund (the "Fund"), sponsored by Board of Trustees (the "Board"), and processed by DROs-я-Us LLC ("DRU"), (ECF No. 11). On April 14, 2022, Appellant filed suit in the United States District Court for the District of Columbia (the "Complaint") against the Fund, the Board, Letita Black, Joe Schiltz (collectively the "Fund Defendants"), (ECF No. 12), and DRU. (R. 1–3.)

STATEMENT OF FACTS

DROs-я-Us LLC ("DRU") provides invaluable services to its clients. (SF. 1.)[2] DRU is a turnkey operation that processes and qualifies domestic relations orders in a manner upholding the law. (SF. 1.) DRU's general partner, John Rutledge, practiced employment law for over 40 years, and that experience, combined with DRU's computer operating systems, allows the firm to streamline the process of qualifying domestic relations orders. (SF. 1.)

DRU is employed by the Fund. (R. 2.) The Fund is a pension plan employer and provides its services to over a thousand participants. (R. 2.) DRU provides

[2] Regarding record citations to both the "District Court Opinion" and the "Problem," hereinafter, "R" will represent citations to the District Court Opinion and "SF" will represent citations to the "stipulated facts" in the Problem according to the PDF page numbers.

several services per its agreement with the Fund. (R. 2.) DRU (1) maintains all the records submitted to the Fund regarding any and all domestic relations orders; (2) has an interface for all of the Fund's participants to submit their domestic relations orders and any and all other communications regarding the matter; (3) reviews all domestic relations orders; (4) determines in accordance with the law and Fund policies whether a domestic relations order is qualified; and (5) provides other services related to domestic relations orders. (R. 3.) The Fund's administrative services agreement ("Agreement") with DRU also states that the Fund will pay DRU a one-time flat fee of $500 per each domestic relations order DRU reviews. (R. 3.) This flat fee can be charged against the account of the participant whom the domestic relations order pertains to. (R. 3.) In accordance with the law and the Fund's policies, DRU determines whether a domestic relations order is qualified or not, and the Agreement states that a participant may appeal DRU's determination within forty-five days. (R. 3.) If a participant does decide to appeal within the applicable time frame, the Board of Trustees of the National Laborers Retirement Savings Fund, who is a sponsor and fiduciary to the fund, will review the appeal, not DRU. (R. 3.) The last section of the Agreement states that "DRU *shall not be regarded as a fiduciary* for the purposes of ERISA." (R. 3) (emphasis added).

On February 21, 2017, Renita Connolly ("Appellant") received a judgment of absolute divorce from her now ex-wife, Mary Obergefell. (R. 3.) Under the

terms of the divorce, Mary was to receive a marital interest in Appellant's retirement savings. (R. 3.) That interest was 15% of Appellant's savings. (R. 3.) On September 27, 2017, the Superior Court for the District of Columbia entered a domestic relations order regarding Appellant's retirement fund. (R. 3.) The order requires that if DRU determines that the domestic relations order is qualified, DRU should divide Appellant's account accordingly. (SF. 3.) To divide the account in accordance with the court order, DRU divides the account in two: one for Appellant and one for Appellant's alternate payee. (SF. 3.) This allows the plan administrators to deal with each party separately and split funds accordingly into each account. (SF. 3.) Appellant's account will be split by 15%, not including any loans attached to Appellant's account. (SF. 3.)

On October 15, 2017, Dash Hasty, Appellant's lawyer, sent a court certified copy of the domestic relations order to DRU for the first of four times. (SF. 3.) A month later, the Fund sent a package back to Mr. Hasty informing him that he had to submit the copy online and not through the mail. (SF. 3.) After uploading the domestic relations order, DRU sent an email to Mr. Hasty alerting him that they received the domestic relations order with an attachment to a list of "frequently asked questions." (SF. 4.) Instead of reading the attached form, Mr. Hasty forwarded it to his assistant, Ima, and asked Ima to read the attachment because he was late for court as usual. (SF. 4.) Ima noted that the review process could take up

to eighteen months to complete and that DRU handles all reviews in accordance with U.S. Department of Labor. (SF. 4.) She also noted that someone cannot take out a loan from their account while it is being reviewed. (SF. 4.) Mr. Hasty emailed Appellant regarding Mr. Hasty's fee, and also alerted Appellant to the fact that the process with DRU could take eighteen months. (SF. 4.) Mr. Hasty never heard back from Appellant. (SF. 4.)

On January 1, 2018, *only one month* after sending the first court certified domestic relations order to DRU, Mr. Hasty decided to employ a "tactic" he used several times before, hoping to illicit a quicker response from DRU. (SF. 4.) On January 3, 2018, Mr. Hasty had Ima go back to the Superior Court and get a new court certified copy of the domestic relations order, which had the new date on it instead of the original date form the court. (SF. 5.) On January 4, 2018, Mr. Hasty uploaded the second domestic relations order to DRU and got the same generic email from DRU. (SF. 5.) This response again stated it could take DRU eighteen months to qualify the domestic relations order. (SF. 5.)

On March 1, 2018, Mr. Hasty instructed Ima yet again to go to the Superior Court and get another certified copy of the domestic relations order, again with the new date on the top right corner. (R. 6.) On March 3, 2018, Mr. Hasty submitted the third domestic relations order to DRU for processing. (SF. 5.) DRU again sent a response back to Mr. Hasty; however, again this letter alerted Mr. Hasty to the

fact it could take DRU eighteen months to qualify the domestic relations order. (SF. 4-5.)

On May 2, 2018, for the fourth and final time, Mr. Hasty instructed Ima to go back to the Superior Court and get another certified copy of the domestic relations order, again with the new date on the top corner. (SF. 5.) Mr. Hasty's office did not send the copy to DRU until October 15, 2018, because Mr. Hasty was in trial for several months. (SF. 5.) Once again, DRU emailed Mr. Hasty the same response after his office uploaded the order. (SF. 5.)

On November 1, 2018, DRU notified Appellant, Mr. Hasty, and the alternate payee that the domestic relations order was qualified. (SF. 6.) DRU sent a letter to all three parties containing the following information: (1) DRU qualified the domestic relations order under applicable ERISA law; (2) the alternate payee receives 15% of Appellant's account as of the date of the domestic relations order; (3) a $500 fee is assessed to DRU from Appellant's account; (4) if the QDRO determination was not what the parties intended, they should resubmit for court approval and then submit the amended order to DRU; and (5) any party adversely affected by the determination could appeal it within 45 days. (SF. 6.) The Fund implemented the terms of the QDRO on December 15, 2018. (R. 8.) The Fund issued 15% of Appellant's account to the alternate payee, who received the money in the form of a check. (R. 8.) The next day, Mr. Hasty contacted Appellant, urging

her to take out a load for $50,000 to pay Mr. Hasty for his services. (R. 8.) On December 29, Appellant did just that and wrote Mr. Hasty a check for $50,000 (R. 8.) This was the last time Appellant and her counsel, Mr. Hasty, spoke. (R. 8.)

On January 3, 2019, DRU again notified Appellant, Mr. Hasty, and the alternate payee that DRU qualified the second domestic relations order. (R. 8.) The second letter contained the same five points from the first letter DRU sent after qualifying the first domestic relations order. (R. 8.) Appellant contacted Mr. Hasty but never heard back. (R. 8.) The Fund again took 15% out of Appellant's account and gave it to the alternate payee via check. (R. 8.) Appellant failed to take any action other than contacting Mr. Hasty's office. (R. 8.) Appellant did not attempt to appeal against the decision. (R. 8.)

On February 1, 2019, DRU again notified Appellant, Mr. Hasty, and the alternate payee that DRU qualified the third domestic relations order. (R. 8.) Once again, the QDRO letter contained the five points from the first letter and Appellant contacted Mr. Hasty's office but never heard back. (R. 8.) DRU implemented the terms of the QDRO and again, Appellant failed to take any other action or appeal the decision within the given time frame. (R. 8.)

On April 1, 2019, DRU notified Appellant, Mr. Hasty, and the alternate payee for the final time that it qualified the fourth domestic relations order. (R. 8.) Once again, the letter contained the same five paragraphs as the previous three. (R.

9.) The issue of when DRU sent this last letter is uncertain because according to the district court opinion, DRU sent this fourth QDRO letter on April 1, 2019, but according to the Stipulated Facts, this final QDRO letter was sent on April 15, 2019.[3] Regardless of the date, Appellant once again contacted Mr. Hasty and never heard back. (R. 9.) For the fourth and final time, Appellant failed to take any action regarding the letters. (R. 9.)

In April of 2020, Appellant became very sick but eventually made a full recovery in September of 2021. (SF. 7.) Appellant decided to retire after making her recovery and determined the best date for her to retire would be March 31, 2022. (SF. 8.) When Appellant viewed a quarterly report after retiring, Appellant realized that the report showed significantly less money in her account than Appellant thought she had. (SF. 8.) Appellant then contacted the Board regarding the status of her account. (SF. 8.) Appellant requested that the Board retroactively determine that the second, third, and fourth domestic relations order that Mr. Hasty sent DRU are deemed not qualified. (SF. 8.) The Board responded to Appellant by

[3] Appellees acknowledge a discrepancy in the record and the District Court opinion as to the date of the fourth QDRO letter sent to Appellant. Regardless of the date, Appellee's brief has been written according to the District Court Opinion. Because this court will not determine an issue of fact, if this court finds this date discrepancy to be material, a remand may be proper to determine the correct date.

stating that the actions the Fund took were only the ones legally required by the court order Appellant's counsel sent to DRU. (SF. 8.)

SUMMARY OF THE ARGUMENT

The justice system requires that plaintiffs pursue the proper legal recourse against the party or parties who are responsible for the harm caused. Appellant is barred by the ERISA's three-year statute of limitations and DRU is not liable under ERISA because DRU is not a named fiduciary and did not act in a fiduciary capacity. The district court upheld the law and protected DRU who was merely following a court order. This court should affirm the district court on both grounds.

First, the district court properly interpreted ERISA's actual knowledge requirement in the state of limitations to bar Appellant from bringing a claim against DRU. ERISA's statute of limitations requires a plaintiff who has actual knowledge of an alleged breach to bring a claim within three years of finding out about the breach. 29 U.S.C. § 1113(2). Here, Appellant had actual knowledge of the second, third, and fourth QDROs from the letters DRU sent her, combined with Appellant simultaneously receiving quarterly statements. Appellant failed to bring a claim within three years of when she gained actual knowledge, thus the district court correct in barring Appellant's claim. Although there is a factual dispute between when DRU sent Appellant the fourth QDRO, there is enough evidence to prove Appellant had actual knowledge from the second and third QDROs to

uphold the district court opinion. Under the Supreme Court's application of actual knowledge, this court should uphold the district court's decision that Appellant failed to bring her claim within the applicable three-year statute of limitations.

Second, the district court properly held that DRU is not a fiduciary and therefore, DRU is not liable for any loss suffered by Appellant. Under a two-prong balancing test, DRU is *not* a fiduciary because (1) DRU followed its specific contractual term with the Fund and (2) Appellant had multiple opportunities to appeal the decision to the Board of Trustees. Furthermore, ERISA provides that "a person is a fiduciary with respect to a plan to the extent 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." 29 U.S.C. § 1002(21)(A)(i). Under Section 1002(21)(A), DRU is *not* a fiduciary because Appellant cannot succeed on a claim that DRU's omission from investigating into the prior QDROs—rather than an affirmative action—constitutes DRU "exercising discretionary authority." Additionally, Section 8.1 of the Fund's Administrative Services Agreement with DRU explicitly states "DRU *shall not be regarded as a fiduciary* for purposes of ERISA." (R. 3) (emphasis added). DRU cannot be said to have assumed fiduciary duties under Section 1002(21)(A).

Even hypothetically considering DRU as a functional fiduciary, under ERISA Section 1104(a)'s "Prudent Person Standard of Care," DRU is *still not*

liable for any loss suffered by Appellant. Fiduciaries must act with the type of "care, skill, prudence, and diligence under the circumstances" of one experienced and knowledgeable with the matters at hand. 29 U.S.C. § 1104(a)(1)(B). From the 40 years of employee benefit experience DRU's managing general partner has endured, DRU possessed the "experience and knowledge" to properly handle Appellant's domestic relations orders. Regarding DRU's duty of prudence, DRU offered Appellant several actions to take in the four separate QDRO letters DRU sent to Appellant. DRU advised Appellant that if the QDRO determination in each letter was not what Appellant intended, Appellant may need to re-submit a revised domestic relations order—which is precisely what Appellant's attorney did. (SF. 6.) DRU also offered "any adversely affected" party of the QDRO the opportunity to appeal the QDRO within 45 days—which no party did. (SF. 6.) Moreover, ERISA does not require DRU to delve into the underlying merits of the domestic relations orders applied for by Appellant's attorney and processed by the D.C. Superior Court. Thus, it would take this court well beyond established precedent to hold that DRU should have second-guessed the legitimacy of such domestic relations orders when determining if they were qualified. This court should affirm the district court's decision on both issues.

ARGUMENT

I. This court should affirm the district court's decision because (1) Appellant's claim is time-barred by Section 1113 of ERISA and (2) the continuing violation doctrine does not apply to excuse Appellant's delay in filing her complaint.

ERISA's statute of limitations period states that a plaintiff cannot bring an action for any breach of duty or obligation after three years from the *earliest date on which the plaintiff had actual knowledge* of the breach or violation. 29 U.S.C. § 1113(2) (emphasis added). The only time there is an exception to this statute is when the action revolves around fraud or concealment. *Id.* For the purposes of ERISA, "actual knowledge" takes on its plain meaning: existing in fact or reality. *Id.*; *see also Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 U.S. 768, 777 (2020). Furthermore, the "continuing violation" doctrine allows for tolling of a statute of limitations based on continuing unlawful acts. However, in the spirit of ERISA, this doctrine does not apply here because "discrete events that are easily identifiable and separately actionable do not constitute a continuing violation." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). The continuing violation doctrine, therefore, does not excuse Appellant's delay in filing her complaint because each of the QDRO letters sent to Appellant accrued independently through a discrete approval process, and each approval occurred more than three years before the Appellant filed suit on April 14, 2022. (SF. 6–8.) The district court correctly held the continuing violation doctrine would read

ERISA's "actual knowledge" requirement out of the statute. (R. 15.) Appellant's claim is time-barred by Section 1113.

A. Appellant is barred by the applicable three-year statute of limitations because she had actual knowledge of facts constituting the alleged breach.

Appellant is barred by ERISA's three-year statute of limitations because she obtained actual knowledge of her alleged claim when she received the January 3, 2019, letter from DRU informing Appellant of a second QDRO. (SF. 7.)

A plaintiff must file a suit for breach of fiduciary duty under ERISA within six years of the last breach; however, if a plaintiff has "actual knowledge" of the breach, the timeline accelerates, and the plaintiff must bring suit within three years of when the plaintiff gained or should have gained actual knowledge of the breach. *Sulyma*, 140 U.S. at 774. ERISA does not define the phrase "actual knowledge," but its meaning is plain. *Id.* Dictionaries and legal dictionaries confirm that, to have "actual knowledge" of a piece of information, one must in fact be aware of it. *Id.* at 772. Actual knowledge of the breach or violation is triggered by a plaintiff's knowledge of the transaction that constituted the alleged violation, not by the plaintiff's knowledge of the law. *Blanton v. Anzalone*, 760 F.2d 989, 992 (9th Cir. 1985). The law will sometimes attribute knowledge "to a person who fails to learn something that a reasonably diligent person would have learned." *Sulyma*, 140 U.S. at 772. A defendant's burden is to show the plaintiff was actually aware—or had

reason to be aware—of the facts constituting the breach, not only that those facts were available to the plaintiff. *Guenther v. Lockheed Martin Corp.*, 972 F.3d 1043, 1054–55 (9th Cir. 2020).

A defendant can prove a plaintiff had actual knowledge through inference from circumstantial evidence. *Id.* at 1054 (citing *Farmer v. Brennan*, 541 U.S. 825, 842 (1994)); *see also Staples v. United States*, 511 U.S. 600, 615-616 (1994). In *Guenther*, the plaintiff received a letter in November of 2007 alerting him to the fact that his prior pension at his company would become vested immediately, and that he was not entitled to a pension for his current period of service with the company. 972 F.3d at 1049. After receiving the November letter, the plaintiff attempted to contact multiple entities to try and get an explanation for the letter but never got an answer. *Id.* He failed to receive any information about the letter his company sent him, and after reaching out to the entity in charge of pensions, he failed to get a response. *Id.* at 1049–50. The plaintiff brought suit against his company more than three years after receiving the letter. *Id.* at 1050. The court opined that evidence of the plaintiff attempting to get answers from his company and the entity in charge of the pensions qualified as circumstantial evidence to prove the plaintiff had actual knowledge. *Id.* at 1055. The reason plaintiff attempted to get answers for the November letter was because he had actual knowledge. *See id*. at 1055. The court also noted that the plaintiff *received updates*

about his account and that after the November letter, the plaintiff stopped checking his account, showing his acceptance—"actual knowledge"—of the company's new pension plan. *Id.* at 1056.

Actual knowledge does not require someone to know they have a legal claim against another party, but only that they know the relevant facts of the matter. *Wright v. Heyne*, 349 F.3d 321, 328 (6th Cir. 2003). In *Wright* the plaintiff became aware of bad investments made by the defendant more than four years before filing a claim under ERISA. *Id.* at 324. The plaintiff noticed these bad investments after *receiving quarterly reports* from the defendant and talking to his brother about them. *Id.* After failing to file his claim within the three-year statute of limitations, the plaintiff argued that the statute should be tolled until he knew he had a cognizable claim under ERISA from his attorney. *Id.* at 325. The court concluded that someone does not need to know every detail of the transaction or its effect to satisfy actual knowledge. *Id.* at 328; *see also Rush v. Martin Petersen Co.*, 83 F.3d 894, 896 (7th Cir. 1996). The court rejected the plaintiff's argument that to have actual knowledge a person needs to know they have a legal claim. *Wright*, 349 F.3d at 328. The court held that to have actual knowledge, a person must know the relevant facts that constitute the breach, which can include knowledge of a transaction's harmful consequences, but does not have to. *Id.* at 328; *see also Brock v. Nellis*, 809 F.2d 753, 755 (11th Cir. 1987); *Martin v. Consultants &*

Administrators, Inc., 966 F.2d 1078, 1086 (7th Cir. 1992). The court ruled that because the plaintiff had knowledge of the transactions through quarterly reports and the defendant himself, the plaintiff had actual knowledge more than three years from the time he filed a claim. *Wright*, 349 F.3d at 331–32.

If a plaintiff can prove he or she knew no information about an alleged breach or did not see any material that would lead them to think there was a breach, they may not have actual knowledge. *Sulyma*, 140 U.S. at 775. In *Sulyma*, the plaintiff testified that he did not remember viewing the disclosures the company gave him, breaking down the investments of his retirement plan. *Id.* The plaintiff also testified that he was unaware of how the company invested his money and what kind of stocks, bonds, or other investment sources his money was invested in. *Id.* The Court ruled that the plaintiff did not have actual knowledge in part because he did not know enough information to have actual knowledge. *Id.* at 779. The Court noted certain factors that could have led to a finding of actual knowledge: (1) evidence of disclosure; (2) proof plaintiff looked at disclosures; and (3) evidence plaintiff acted in response to the disclosures. *Id.* The defendants failed to properly establish these factors and therefore could not prove the plaintiff had actual knowledge. *Id.*; *But see Ziegler v. Connecticut General Life Ins. Co.*, 916 F.2d 548, 551 (9th Cir. 1990) (holding that plaintiffs had actual knowledge of pension providers termination agreement because of a letter defendant sent to

plaintiff, thus the three-year statute of limitations period should start to run from when the plaintiff received the letter).

Here, circumstantial evidence proves that Appellant had actual knowledge of DRU's alleged breach of fiduciary duty. Appellant never appealed the decision of the first QDRO or contacted Mr. Hasty to find out more information about it after she received it. (SF. 7.) This showed her acceptance of the first QDRO and is similar to the plaintiff in *Guenther* who stopped checking his account—showing his actual knowledge through circumstantial evidence. (SF. 6.) After receiving the letters regarding the second, third, and fourth QDROs' implementation, Appellant reached out to her attorney, Mr. Hasty, each time. (SF. 7.) This shows that although Appellant may not have accepted this action, she had—or should have reasonably had—actual knowledge of what was going on at the time. (SF. 7.) This action showed that Appellant took efforts to find out more information about the three additional QDRO letters. (SF. 7.) The *Guenther* court held that evidence of the plaintiff reaching out multiple times to try and assess what the company's letter meant all went towards a finding of actual knowledge through circumstantial evidence, even though the plaintiff never received a response. *See* 972 F.3d at 1049. Appellant reached out to Mr. Hasty's office immediately after receiving each QDRO letter, showing that Appellant wanted to find out more about DRU's letter just like the plaintiff in *Guenther*. (SF. 7.)

Here, Appellant had actual knowledge because she knew enough relevant facts on the matter to realize she may have a claim against DRU, even without speaking with her attorney on the matter. After the Fund implemented the first QDRO, Appellant did not appeal the decision and paid Mr. Hasty using a loan from her pension plan. (SF. 6.) Mr. Hasty previously told Appellant that she could not pay him until the QDRO went through because participants are not allowed to withdraw any money during the process. (SF. 4.) This establishes that Appellant knew what the QDRO did and that Appellant had a basic understanding of the money in her account. (SF. 4.) Furthermore, similar to the plaintiff in *Wright*, here Appellant received statements of the "account balance" and "all activity in the account" each fiscal quarter. (SF. 8.) Based on the Fund's fiscal year, Appellant *received two quarterly reports* detailing the implementations of each of the four QDROs. (SF. 8.) In *Wright*, the court noted the quarterly statements the plaintiff received were a factor towards a finding of actual knowledge, and the same should hold true here. 349 F.3d at 331. Appellant contacted Mr. Hasty's office to inquire as to the second, third, and fourth QDROs, but as case law lays out across multiple circuits, knowledge of a legal claim is not relevant to whether someone has actual knowledge. (SF. 6-7.) Instead, the fact Appellant reached out shows that she had actual knowledge that something was wrong. The *Wright* court held that a plaintiff does not need to know every detail of a transaction to establish actual knowledge.

349 F.3d at 325. Appellant had actual knowledge of (1) DRU completing its domestic relations order review finding that the Order was a QDRO; (2) how the money in the account would be distributed; and (3) all the details required to file an appeal. (SF. 6.) Thus, Appellant had all the relevant information needed to determine that something was amiss right in front of her and Appellant failed to properly act. (SF. 6.)

Here, Appellant had sufficient knowledge of the facts behind the alleged breach to satisfy actual knowledge. Similar to the *Sulyma* plaintiff, nothing in the record shows that Appellant at any point in time did not know the basic facts behind the alleged breach. Applying the first factor the Court used in *Sulyma*, "evidence of the disclosure," Appellant received not only a separate letter disclosing each of the four QDROs, but also simultaneously received quarterly reports of Appellant's account from the Fund. (SF. 6–8.) Applying the second factor, "proof plaintiff looked at disclosures," according to the record, Appellant received and looked at each letter—alerting her of the four separate QDROs. (SF. 6–8.) Applying the last factor, "evidence the plaintiff took action in response to the disclosures," Appellant contacted her attorney, Mr. Hasty, after Appellant received each QDRO letter. (SF 6–7.) The *Sulyma* Court laid out these factors to give lower courts a basis to establish actual knowledge, and Appellant satisfies each factor. Thus, it is evident that Appellant had actual knowledge.

ERISA's actual knowledge requirement only requires a plaintiff to have knowledge of the relevant facts of the alleged dispute. *Wright*, 349 F.3d at 328. Therefore, the Third Circuit's holding in *Gluck* is not applicable here. Accordingly, the Seventh, Ninth, and Eleventh Circuits decided on a less stringent standard for actual knowledge. *Id.* The *Gluck* court held that a plaintiff must have material knowledge of a breach and the actual harm it has done. *Gluck v. Unisys Corp.*, 950 F.2d 1168, 1177 (3rd Cir. 1992). To the contrary, the *Wright* court opined that if the stringent standard in *Gluck* was the widespread, the policy and purpose behind the statute of limitation would be moot. *Wright*, 349 F.3d at 330. A stringent statute would lead to stale claims in court and unreliable testimony by witnesses and parties because the matter is no longer fresh in the parties' minds. *Id.*; *Johnson v. Railway Exp. Agency, Inc.*, 421 U.S. 454, 463–64 (1975); *see also Board of Regents of University of State of N.Y. v. Tomanio*, 446 U.S. 478, 487–88 (1980) (holding that eventually a case gets to a point where the delay of a plaintiff in asserting a claim is likely to impair the accuracy of the fact-finding process and that a substantive claim will be barred without respect to whether it is meritorious).

Appellant had actual knowledge of the alleged breach because she knew all the relevant facts of the matter, contacted her attorney after receiving each of the

QDRO letters from DRU, and received quarterly reports from the Fund invoicing the changes in Appellant's account.

B. The continuing violations doctrine does not save Appellant's claim from being barred by the applicable statute of limitations.

The statute of limitations under 29 U.S.C. § 1113(2) is not tolled by the doctrine of "continuing violations" and therefore, Appellant's claim is time-barred.

The continuing violations doctrine, an exception to the commencement of a statute of limitations, allows for tolling based on continuing unlawful acts—not an independent theory of liability. *Norman v. Granson*, No. 18-4232, 2020 WL 3240900, at *2 (6th Cir. Mar. 25, 2020); *Tassy v. Buttigieg*, 51 F.4th 521, 530 (2d Cir. 2022). For a continuing violation to exist: (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*, 2020 WL 3240900, at *2 (quoting *Tolbert v. Ohio Dep't of Transp.*, 172 F.3d 934, 940 (6th Cir. 1999)). Two categories of continuing violations exist: (1) "those alleging serial violations" and (2) "those identified with a longstanding and demonstrable policy of discrimination." *Sharpe v. Cureton*, 319 F.3d 259, 266 (6th Cir. 2003). A continuing violation only applies to "several incidents that are not themselves actionable." *Norman*, 2020 WL 3240900, at *2. Conversely, discrete events that

are easily identifiable and separately actionable do not constitute a continuing violation because "each discrete discriminatory act starts a new clock for filing charges alleging that act." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). This doctrine does not apply to discrete acts of discrimination or retaliation that occur outside the statutory time period, even if other related acts of discrimination occurred within the statutory time period. *Patterson v. Cnty. of Oneida*, 375 F.3d 206, 220 (2d Cir. 2004) (quoting *Morgan*, 536 U.S. at 105). Several circuits have consistently rejected the continuing violation doctrine in an ERISA benefit case arising under Section 1113(2) since application of the doctrine would essentially read the "actual knowledge" requirement out of the statute. *Phillips v. Alaska Hotel & Rest. Emps. Pension Fund*, 944 F.2d 509, 520 (9th Cir. 1991); *see also Sharpe*, 319 F.3d at 267.

Discrete acts in the employment world such as termination, failure to promote, denial of transfer, denial or alteration of benefits, and refusal to hire are examples of issues that are easy to identify and thus do not implicate the continuing violation doctrine. In *Morgan*, the Court unanimously rejected the Ninth Circuit's view that a series or pattern of "related discrete acts" could constitute one continuous "unlawful employment practice" for purposes of the statute of limitations. 536 U.S. at 111. The plaintiff in *Morgan* alleged that he faced harassment and harsher discipline than other employees because of his race.

Id. at 105. The *Morgan* Court held that discrete discriminatory acts are not actionable if time-barred, even when they are related to acts alleged in timely filed charges. *Id.* at 113. Each discrete discriminatory act starts a new clock for filing charges alleging that act. *Id.* However, the Court distinguished such discrete acts from an allegedly hostile and racist work environment, which it held could be a continuing violation because its "very nature involves repeated conduct." *Id.* at 115. "Such claims are based on the cumulative effect of individual acts," the Court wrote, noting that "a single act of harassment may not be actionable on its own." *Id.*

Because the continuing violation doctrine has not been accepted by any Court of Appeals in an ERISA benefit case, this court must go outside ERISA to understand the appropriate application of the doctrine in a "insufficient notice" context that Appellant alleges here. In *DeSuze*, tenants did not receive notice of a document containing details about the basis for an increase in the tenants' rent. *See DeSuze v. Ammon*, 990 F.3d 264, 267 (2d Cir. 2021). The tenants claimed they never had an opportunity to challenge or comment on the proposed basis for the rent increase because of the missing details in the document. *Id.* Since the tenants' claims were time-barred, the tenants attempted to use the continuing violation doctrine to toll the statute of limitations, alleging there was a departure from agency regulations and a violation of the APA by approving the building's rent

increase application without notice given to the tenants. *Id.* at 268. In affirming the lower court's denial of the tenants' continuing violation claim, the Second Circuit held the tenants complained of "discrete acts"—separate in time—during the approval process of their rent increase and therefore, "the usual limitations rule applies." *Id.* at 272.

Implementing the continuing violation doctrine in ERISA cases essentially reads the "actual knowledge" standard out of ERISA's statute of limitations. *See* 29 U.S.C. § 1113(2); *Phillips*, 944 F.2d at 520. In *Phillips*, the Ninth Circuit held that ERISA's statute of limitations begins when a plaintiff gains actual knowledge of a breach. *Id.* at 520–21. The Ninth Circuit did not reject the continuing violation doctrine in the ERISA statute of limitations in general, but merely held that, for claims subject to Section 1113(2), the earliest date of which the plaintiff gains actual knowledge of an alleged breach begins the limitations period, even if the breach continues thereafter. The *Phillips* court held that "once a plaintiff is aware of one breach, an awareness of later breaches of the same character would impart nothing materially new." 944 F.2d at 520.

Here, since Appellant had—or reasonably should have had—actual knowledge that each letter from DRU was discrete, what Appellant alleges is *not* one on-going violation, but instead a series of repeated violations. Each gives rise to a new cause of action and thereby begins a new statute of limitations period as

to each particular QDRO letter. Appellant claims the QDRO letters DRU sent her, her former spouse, and Mr. Hasty prevented her from having actual knowledge that the Fund was about to transfer more than the court ordered 15% of her account balance to Appellant's former spouse. (R. 14.) However, as Appellant was receiving these QDRO letters from DRU, she was also simultaneously receiving quarterly statements that provided her "account balance at the end of the quarter and all activity in the account during the quarter." (R. 8.) Unlike in *Morgan* where the Court held a hostile and racist work environment could be considered a continuing violation, here Appellant is attempting to lump together discrete letters from different dates, each of which she separately contacted her attorney about. *See* 536 U.S. at 117; (SF. 7.) Furthermore, the quarterly reports Appellant received with the details of her account balance—combined with several QDRO letters on different dates from DRU—should have made Appellant aware that each QDRO letter constituted a discrete notice of updates to her retirement account. Thus, if Appellant had concerns about the contents of these letters, which seems apparent by Appellant contacting her attorney about them, each discrete letter was actionable on its own and started a new clock for filing a claim.

Here, a continuing violation cannot be established merely because Appellant continues to feel the effects of time-barred acts. *See DeSuze*, 990 F.3d at 272. In *DeSuze*, the Second Circuit rejected tenants' continuing-violation claim that over

several years, the tenants' building failed to give them notice of important financial details regarding proposed rent increases and that this amounted to a consistent insufficient-notice policy by the building. *See* 990 F.3d at 272. Here too, Appellant is attempting to claim the repeatedly issued, separate letters from DRU constituted a continuing violation of insufficient notice. (R. 14.) The *DeSuze* court held each of the tenants' claims "accrued independently through a discrete approval process, and each approval occurred more than three years before the tenants filed suit." 990 F.3d at 272. Likewise, here Appellant's continuing violation claim fails because each QDRO letter DRU sent Appellant was the *independent result* of a *discrete review period* to approve each domestic relations order certified by the D.C. Superior Court. (R. 4.) Thus, as the tenants in *DeSuze*, Appellant cannot lump together the discrete QDRO letters to claim repeated insufficient notice by DRU.

Here, allowing Appellant to pursue a continuing violation theory would improperly supplant the plain language of ERISA Section 1113(2), and would therefore read out the "actual knowledge" requirement in the statute. When Appellant obtained actual knowledge of her alleged breach on January 3, 2019, Section 1113(2) began to operate to keep her from sitting on her rights and allowing the series of related alleged breaches to continue. The district court properly rejected Appellant's continuing violation theory and held that ERISA's three-year statute of limitations based on actual knowledge runs from the earliest

date on which Appellant had actual knowledge of the alleged breach or violation—January 3, 2019. (SF. 7.)

Although Appellant alleges that DRU's approval of QDROs stemmed from their "generic form letter" with "lack of meaningful disclosure," each of the QDRO letters accrued independently through a discrete approval process, and each approval occurred more than three years before the Appellant filed suit on April 14, 2022. Thus, the continuing violations doctrine does not save Appellant's claim from being time-barred by the applicable three-year statute of limitations. Appellant's claim is therefore time-barred by Section 1113(2).

II. This court should affirm the district court's decision because DRU is not a fiduciary and is not liable under ERISA for any loss suffered by Appellant.

An entity is determined to be a fiduciary based on the amount of authority and control it has over the other party. *See* 29 U.S.C. § 1002(21)(A). The Supreme Court has held that when determining whether an entity is a fiduciary, courts must look at the exercise and control they have only with respect to the action at issue. *Leimkuehler v. Am. United Life Ins. Co.*, 713 F.3d 905, 913 (7th Cir. 2013) (citing *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000)). One thing the Court considers is a two-part test to determine whether an unnamed fiduciary could become a "functional" fiduciary based on their conduct. *See Teets v. Great West Life & Annuity Ins. Co.*, 921 F.3d 1200, 1212 (10th Cir. 2019). Both of these factors in the

Teets test lean in favor of DRU and the lack thereof fiduciary responsibilities DRU had in relation to Appellant's claim. Accordingly, under Section 1002(21)(A), DRU is not a fiduciary because Appellant cannot succeed on a claim that DRU's omission from investigating into the prior QDROs constitutes DRU exercising discretionary authority. Even when evaluated under ERISA's "Prudent Person Standard of Care," Appellant does not have a viable cause of action against DRU because ERISA prohibits QDRO administrators from second-guessing the legitimacy of domestic relations orders issued by competent state courts, such as the D.C. Superior Court here.

A. DRU is not a fiduciary because (1) it followed specific contractual terms in an arm's length negotiation and (2) because Appellant had an opportunity to appeal and reject the QDROs but failed to do so.

Courts adopted a two-part test to determine whether a service provider is a fiduciary or not. The first part of the test looks at whether a service provider entered into an arm's length contract with the participant. The second part considers whether the participant has the ability to freely reject the service provider's actions. Here, per DRU's contract with the Fund and participants, DRU only determines whether a domestic relations order is qualified or not after receiving a court order to do so. After this review process and QDRO determination, DRU allows a participant to appeal the determination within forty-

five days. Appellant slept on this right to appeal and reject the alleged additional QDROs.

1. DRU followed specific contractual terms set in an arm's length negotiation to decide whether the domestic relations order was qualified or not.

DRU qualified the domestic relations order per its contractual duty in the Agreement with the Fund and Appellant, and did not take any other activities that would make DRU's conduct fall out of the specific language of its contract.

To bring an ERISA claim against a service provider for a breach of fiduciary duties, a plaintiff must show definitive facts proving a defendant owes said fiduciary duty to its participants. *See McCaffree v. Fin. Corp. v. Principal Life Ins. Co.*, 811 F.3d 998, 1002 (8th Cir. 2016); *see also Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993). Courts apply a two-factor test when determining whether a service provider is a fiduciary. This test considers: (1) whether the service providers did more than follow specific contractual terms set in an arm's length negotiation and (2) whether the service provider took a unilateral action regarding plan management without the principal or participants having a chance to reject the action. *Rozo v. Principal Life Inc. Co.*, 949 F.3d 1071, 1073 (8th Cir. 2020) (citing *Teets* 921 F.3d at 1212). When handling ERISA cases, courts look specifically at whether the defendant owed a duty "when taking the action subject to the complaint." *Pegram*, 520 U.S. at 226.

If a service provider's action conforms to a specific contractual term, it satisfies the first part of the *Teets* test and goes towards a finding of no fiduciary duty. *Rozo*, 949 F.3d at 1074. In *Rozo*, the defendant offered a 401(k) retirement to all employees, in which it guaranteed all participants a rate of return based on the Composite Credit Rate (CCR). *Id.* at 1073. Every six months, the defendant unilaterally calculates the CCR and informs participants of the new rate. *Id.* Plaintiff sued the defendant and his claim rested on whether the defendant was a fiduciary. The plaintiff alleged that since the CCR rate is not specifically defined in the contract, the defendant's determination went beyond the specific scope of the contract. *Id.* The *Rozo* court noted that a service provider is *not* a fiduciary in a situation when that service provider does not have the power to change the terms of the contract at its own discretion. *Id.* at 1074. However, to the contrary, if the contract allows a service provider discretionary change over a contract, it may lead to them being a fiduciary. *Id.* (citing *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 737 (7th Cir. 1986)). The Eighth Circuit in *Rozo* held that even though the contract enabled the defendant to change CCR, that provision gave them discretionary control over the CCR because it constantly changed, and the defendant had control over its implementation. *See Rozo*, 949 F.3d at 1074.

A service provider's discretion must amount to more than execution of an arm's length contract to give rise to fiduciary duties. *McCaffree v. Fin. Corp. v.*

Principal Life Ins. Co., 811 F.3d 998, 1003 (8th Cir. 2016). In *McCaffree*, the defendant offered investment options to any employee participating in the company's retirement plan. *Id.* at 1000. The contract allowed the defendant to choose from a wide variety of stocks to invest in for the plaintiff and charge the plaintiff a management fee and an operating fee based on the stocks in the portfolio. *Id.* at 1001. The plaintiff argued that since the defendant could change the fee based on the investments in each participant's portfolio, the defendant exercised a level of discretion resulting in fiduciary responsibilities. *Id.* at 1003. In affirming the district court's decision, the Eighth Circuit held that contrary to the plaintiff's argument, the management fee and operating cost were actually set out in the original contract with the plan participants. *Id.* Although the operating cost for each participant varied based on what stocks made up the portfolio, the defendant did not exercise discretion over that fee because it was a set amount depending on the stocks in the portfolio. *See id.*; *see also Schulist v. Blue Cross of Iowa*, 717 F.2d 1127, 1132 (7th Cir. 1983) (holding that an insurer could negotiate future compensation without becoming a fiduciary). The *McCaffree* court looked at the fact that both parties agreed to the terms in the contract and that because both parties agreed no fiduciary duty arose. *McCaffree*, 811 F.3d at 1103; *see also Hecker v. Deere & Co.*, 556 F.3d 575, 583 (7th Cir. 2009); *Renfro v. Unisys Corp.*, 671 F.3d 314, 324 (3d Cir. 2011).

Here, DRU's fee per domestic relations order is a specified amount in its contractual agreement with the Fund and is not a discretionary fee. (SF. 2.) Per the "Agreement" between DRU and the Fund, DRU is permitted to obtain a one-time payment of $500 per domestic relations order it reviews, and that fee is charged against the participant's account. (SF. 2.) Unlike in *Rozo* where the defendant had control of the CCR, here DRU's fee is negotiated into the contract and does not change depending on the participants' account. (SF. 2.) DRU charged its $500 fee each time it reviewed a domestic relations order that was certified by the D.C. Superior Court and sent to DRU for QDRO determination. (SF. 2.) DRU's fee never changed at any point, and DRU merely adhered to its contractual duty in the Agreement with the Fund and its participants.

Here, DRU performed its services in accordance with its specific contractual duty with the Fund. DRU and the Fund contracted to perform specific duties in relation to qualifying a domestic relations order such as: (1) maintaining records related to domestic relations orders; (2) a system for the Fund's participants to submit a domestic relations order; (3) review domestic relations orders; and (4) determine whether a domestic relations order is qualified. (SF. 2.) Similar to *McCaffree*, here Appellant's case rests on whether DRU is a fiduciary. (R. 9.) Accordingly, like the *McCaffree* defendant, DRU does not exercise any discretion beyond the specific functions laid out in the Agreement with the Fund. (SF. 2-3.)

Although DRU decides as to whether a domestic relations order is qualified, that task is specifically laid out in the Agreement. (SF. 2.) The *McCaffree* court held that shifting costs based on investments did not constitute using discretion and the same applies here to DRU's ability to qualify a domestic relations order. *See* 811 F.3d at 1003; (SF. 2.) None of DRU's services utilized by the Fund permit DRU to use its own discretion. (SF. 2.) Maintaining records, providing an interface for participants, and the reviewing of domestic relations orders do not invite DRU to go beyond its specific contractual duties.

DRU did not go beyond following the specific terms of the Agreement with the Fund and therefore cannot be considered a functional fiduciary under the first factor of the *Teets* test.

2. DRU qualifying a domestic relations order is not a unilateral action regarding plan management that Appellant did not have a chance to reject because Appellant had the right to appeal DRU's decision.

Appellant had the ability to appeal DRU's decision to qualify the domestic relations orders—satisfying the second prong of the *Teets* test.

The second prong of the *Teets* test rests on whether the service provider took a unilateral action regarding plan management without the principal or participants having a chance to reject the action. *Teets v. Great West Life & Annuity Ins. Co.*, 921 F.3d 1200, 1212 (10th Cir. 2019). When a plan or the plan's participants

cannot challenge or reject a service without incurring a penalty for trying to reject it, that service provider acts as a fiduciary. *Rozo*, 949 F.3d at 1075.

As long as a service provider's terms or decisions are objectionable without a penalty, they are not held out as a fiduciary. *See id.* In *McCaffree* the plaintiff argued that the defendant took unilateral control over the plan because of their shifting fee. 811 F.3d at 1003. The Eighth Circuit concluded that the participant could reject the investment moves made by the service provider and held that because the service provider could not maintain actual control over the participant or their plan, it was impossible for the service provider to act as a fiduciary. *Id.* The *McCaffree* court reasoned that a participant could negotiate terms before they signed the contract, and the actions the service provider took merely adhered to the contract. *See id. But see Rozo v. Principal Life Inc. Co.*, 949 F.3d 1071, 1073 (8th Cir. 2020) (holding that when a service provider gives a plan participant two options to reject its actions: (1) pay a 5% surrender charge or (2) give notice and wait twelve months, the service provider *is* considered a fiduciary under the *Teets* test because the participant *did not* have the ability to freely leave or reject the plan).

Here, Appellant is freely able to appeal and reject DRU’s determination of domestic relations orders. Section 7 of the Agreement between the Fun and DRU states that after DRU reviews any domestic relations order, the plan participant can

appeal that decision within forty-five days. (R. 3.) Similar to *McCaffree* where the court held the service provider was not a fiduciary, here DRU notified Appellant that after qualifying each domestic relations order, Appellant had the option to appeal. (R. 3.) Appellant not only failed to take advantage of that after the first domestic relations order was qualified, but also each of the following three times. (R. 5–7.) Unlike *Rozo* where the plaintiff incurred a penalty for trying to reject a service provider's actions, here if Appellant decided to appeal DRU's decision, the Board of Trustees would take over and review the decision. (R. 3.) Nothing in DRU's agreement permits DRU to penalize a participant for appealing a decision, and in fact, once a participant appeals a decision, DRU no longer has any control over subsequent results. DRU freely allowed Appellant to appeal DRU's QDRO determination and therefore satisfied the second factor of the *Teets* test.

Per the Agreement between DRU and the Fund, DRU adhered to the specific terms of its contract with the Fund to qualify a domestic relations order in pursuance to a court order. Accordingly, DRU did not take any unilateral actions that Appellant did not have the chance to reject through the appeal process specifically stated in each of DRU's QDRO letters to Appellant.

B. Under Section 1002(21)(A), DRU is not a fiduciary because Appellant cannot succeed on a claim that DRU's omission from investigating into the prior QDROs constitutes DRU exercising discretionary authority.

DRU's absence of an investigation into Appellant's prior QDROs is an omission, rather than an affirmative action that "exercises discretionary authority" over Appellant's benefit plan, and thus does not initiate fiduciary duties.

ERISA provides that "a person is a fiduciary with respect to a plan to the extent 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." 29 U.S.C. § 1002(21)(A)(i) (emphasis added). "In every case charging breach of ERISA fiduciary duty, . . . the threshold question is . . . whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000). Section 1002(21)(A) states that an entity is a fiduciary *only* "to the extent" it exercises its authority or control. *Leimkuehler v. Am. United Life Ins. Co.*, 713 F.3d 905, 913 (7th Cir. 2013) (emphasis added); *see also Chicago Dist. Council of Carpenters Welfare Fund v. Caremark, Inc.*, 474 F.3d 463, 471–72 (7th Cir. 2007) (holding an ERISA plaintiff must show that entity "was acting in its capacity as a fiduciary at the time it took the actions that are the subject of the complaint"). Furthermore, Section 1002(21)(A)'s "reach is limited to circumstances where the individual *actually exercises* some authority." *Trustees of the Graphic Commc'ns Int'l Union Upper Midwest Local 1M Health & Welfare Plan v. Bjorkedal*, 516 F.3d 719, 733 (8th

Cir. 2008) (emphasis added); *see also Leimkuehler*, 713 F.3d at 914; *Teets v. Great-W. Life & Annuity Ins. Co.*, 921 F.3d 1200, 1206–07 (10th Cir. 2019). Circuits have explicitly held "[a]n act of omission fails to satisfy the requirement that the individual exercise discretionary authority over plan assets." *Bjorkedal*, 516 F.3d at 733; *see also Leimkuehler*, 713 F.3d at 914.

Fiduciary status depends not on formal titles, but rather on "functional terms of control and authority over the plan." *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993). It follows that two types of fiduciaries exist under ERISA: "named" fiduciaries and "functional" fiduciaries. *See id.* at 251. Named fiduciaries refers to persons who are "named in the plan instrument, or who, pursuant to a procedure specified in the plan" are given express "authority to control and manage the operation . . . of the plan." 29 U.S.C. § 1102(a)(1)–(2). Functional fiduciaries are not named as fiduciaries in the plan document or contractual agreement but may still be held to a fiduciary standard if it exercises "discretionary control or authority over the plan's management, administration, or assets." *Mertens*, 508 U.S. at 251 (citing § 1002(21)(A)).

A service provider's omission to act fails to satisfy the requirement that an individual must "exercise discretionary authority" over plan assets before the individual can be held liable for breaching a fiduciary duty under ERISA. *See Leimkuehler*, 713 F.3d at 914; *see also* 29 U.S.C. § 1002(21)(A)(i). In

Leimkuehler, a service provider "[kept] track of individual accounts, [took] responsibility for calculating the daily value of assets in the separate account, distribute[d] information to the plan sponsor and participants, and provide[d] a customer-service hotline." *See Leimkuehler*, 713 F.3d at 909. Since the service provider was "not named as a fiduciary to the Leimkuehler Plan" . . . "any fiduciary responsibility that [the service provider] owes to the plan must stem from its status as a 'functional fiduciary.'" *Id.* at 910. The *Leimkuehler* plaintiff alleged that the service provider's omission to exercise its contractual authority satisfied Section 1002(21)(A)'s "exercise discretionary authority" requirement to be held as a functional fiduciary. *See* 713 F.3d at 914. In affirming the district court's rejection of such a claim, the Seventh Circuit concluded the plaintiff's "theory is unworkable" because (1) "it conflicts with a common-sense understanding of the meaning of 'exercise'; (2) is unsupported by precedent; and (3) would expand fiduciary responsibilities under Section 1002(21)(A) to entities that took no action at all with respect to a plan." *Id*. The *Leimkuehler* court held the service provider's "decision not to exercise its contractual right to substitute different (less expensive) funds for the [plaintiff's plan] does not make [the service provider] a fiduciary." *Id*.

Here, Appellant's claim that DRU is a fiduciary fails because DRU's omission from investigating into Appellant's prior QDRO applications does not satisfy Section 1002(21)(A)'s requirement of "exercising discretionary authority"

to be considered a fiduciary. In *Leimkuehler*, the court rejected a plaintiff's attempt to hold a service provider liable as a fiduciary for the service provider's absence of action. Likewise, here DRU holds almost identical responsibilities as the *Leimkuehler* service provider, and thus Appellant misconstrues DRU's omission as a breach of an assumed fiduciary duty that never existed. (SF. 9.) The *Leimkuehler* service provider was evaluated under the threshold of a "functional fiduciary" since the mutually agreed upon plan did not list the service provider as a named fiduciary. 713 F.3d at 910. Similarly, here Section 8.1 of the "Fund's Administrative Services Agreement with DRU" explicitly states "DRU *shall not be regarded as a fiduciary* for purposes of ERISA." (R. 3) (emphasis added). DRU cannot be said to have assumed fiduciary duties under Section 1002(21)(A).

Appellant's argument—that the language of the Agreement is not always controlling—fails when viewed alongside (1) the demonstrative factor that DRU was not bound by functional fiduciary responsibilities and (2) the persuasive opinion of the district court, holding it "impossible to conclude that DRU agreed to be an ERISA fiduciary" under Section 1002(21)(A). (R. 16.)

Under Section 1002(21)(A), DRU is not a functional fiduciary because Appellant cannot succeed on an allegation that DRU's omission from investigating the prior QDROs constitutes DRU "exercising discretionary authority."

C. When evaluated under ERISA's "Prudent Person Standard of Care," Appellant does not have a viable cause of action against DRU.

Even if DRU was considered a functional fiduciary, under Section 1104(a)'s "Prudent Person Standard of Care," DRU is not liable for any loss suffered by Appellant. ERISA states that fiduciaries must act with the type of "care, skill, prudence, and diligence under the circumstances" of one experienced and knowledgeable with the matters at hand. 29 U.S.C. § 1104(a)(1)(B). DRU's managing general partner, John R. Rutledge, has practiced employee benefits law for over 40 years. DRU possessed the experience and knowledge to properly handle Appellant's domestic relations orders. Regarding DRU's duty of prudence, DRU offered Appellant several actions to take in the four separate QDRO letters DRU sent to Appellant. DRU advised Appellant that if the QDRO determination in each letter was not what the parties intended, they may need to re-submit a revised domestic relations order. (SF. 6.) DRU also offered "any adversely affected" party of the QDRO the opportunity to appeal the QDRO within 45 days. (SF. 6.) Moreover, ERISA does not require, let alone encourage, DRU to delve into the underlying merits of the domestic relations orders applied for by Appellant's attorney and processed by the D.C. Superior Court. Thus, it would take this court well beyond established precedent to hold that DRU should have second-guessed the legitimacy of such domestic relations orders when determining if they were qualified.

1. Even if DRU was a fiduciary, under Section 1104(a)'s "Prudent Person Standard of Care," DRU is not liable for any loss suffered by Appellant.

DRU is not a fiduciary, but even assuming arguendo that DRU should be judged under the "Prudent Person Standard of Care," Appellant still does not have a viable cause of action under ERISA against DRU.

ERISA imposes on plan fiduciaries duties of loyalty and prudence. *Burke v. Boeing Co.*, 42 F.4th 716, 723 (7th Cir. 2022). Plan fiduciaries have a duty to manage plan assets under a "prudent man standard of care." *Chao v. Merino*, 452 F.3d 174, 182 (2d Cir. 2006). The duty of loyalty requires a plan fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1)(B). The duty of prudence requires a plan fiduciary to discharge its 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." *Id.*; *see also Burke*, 42 F.4th at 724. A fiduciary's failure to exercise its discretion—"to balance the relevant factors and make a reasoned decision as to the preferred course of action"—where a prudent fiduciary would have done so, is a breach of the prudent person standard of care. *George v. Kraft Foods Glob., Inc.*, 641 F.3d 786, 796 (7th Cir. 2011). Accordingly, "the ultimate outcome of an investment is not proof of imprudence." *Albert v. Oshkosh Corp.*, 47 F.4th 570, 579 (7th Cir. 2022).

To succeed on claim alleging a breach of the duty of prudence under ERISA, a plaintiff must prove "(1) that the defendant is a plan fiduciary; (2) that the defendant breached its fiduciary duty; and (3) that the breach resulted in harm to the plaintiff." *Albert*, 47 F.4th at 579 (quoting *Allen v. GreatBanc Tr. Co.*, 835 F.3d 670, 678 (7th Cir. 2016)). Because the crux of the duty of prudence "turns on the circumstances prevailing at the time the fiduciary acts, the appropriate inquiry will necessarily be context specific." *Hughes v. Nw. Univ.*, 142 U.S. 737, 742 (2022). As long as the "prudent person" standard is met by a defendant, ERISA does not impose a "duty to take any particular course of action if another approach seems preferable." *Chao*, 452 F.3d at 182.

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 the matters at hand. 29 U.S.C. § 1104(a)(1)(B); *see also Tibble v. Edison Int'l*, 729 F.3d 1110, 1133 (9th Cir. 2013). In *Burke*, the plaintiffs' "imprudence and disloyalty claims . . . revolve[d] around a theory of failure to disclose corrective information." 42 F.4th at 723. In affirming the district court's dismissal of the plaintiffs' claims against all defendants, the Seventh Circuit held "the mere exercise of some authority over . . . employee benefit plans . . . did not mean that [the defendants were] exercising fiduciary authority over the investment choices and holdings of the Boeing Stock Fund." *See id.* at 727. Throughout the

Burke opinion, the court repeatedly focused on *Pegram's* holding that "a person is an ERISA fiduciary *only to the extent* that she acts in such a capacity in relation to the plan." *Pegram*, 530 U.S. at 225–26 (emphasis added). This attention to "the extent" of the *Burke* defendants' actions led the Seventh Circuit to conclude that the "plaintiffs have failed to allege facts indicating that the [defendants] were acting in a fiduciary capacity related to managing the investments and investment options of the Boeing Stock Fund." *Burke*, 42 F.4th at 726. Thus, since none of the defendants were deemed fiduciaries, the plaintiffs otherwise failed to state a claim for breach of the duty of prudence by failing to meet the "*demanding* standard for duty of prudence claims." *Id.* at 723 (emphasis added); *see also Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 419 (2014).

Here, even if DRU had been a fiduciary, DRU would not have breached its duties of prudence and loyalty to Appellant "to the extent" that DRU acted in such a capacity related to the plan. *See Pegram*, 530 U.S. at 225–26. In *Burke*, the plaintiffs failed to state a claim for breach of ERISA's duty of prudence. *See* 42 F.4th at 723. Likewise, here, even if DRU was a fiduciary, Appellant fails to impose liability on DRU because DRU acted with "care, skill, prudence, and diligence under the circumstances" of one experienced and knowledgeable in the field. *See* 29 U.S.C. § 1104(a)(1)(B); *Tibble* 729 F.3d at 1133. DRU's experience and knowledge stem from its managing general partner, John R. Rutledge, who

holds a B.S. in Computer Science and a J.D. (SF. 1.) Mr. Rutledge practiced employee benefits law for over 40 years, and the Fund was one of his clients for over 30 years. (SF. 1.) After retiring as co-counsel to the Fund in 2016, Mr. Rutledge started DRU. (SF. 1.) Mr. Rutledge's 40 years of experience buttresses the "care, skill, prudence, and diligence" of DRU's qualification of all four domestic relations orders Appellant's counsel submitted. *See* 29 U.S.C. § 1104(a)(1)(B). DRU followed the agreed-upon terms of Section 1 of the Agreement with the Fund—specifically, subsections (i) and (iii) which instruct DRU to provide maintenance and review of *all* domestic relations orders submitted. (SF. 2) (emphasis added). Accordingly, DRU offered Appellant several actions to take in the QDRO letters. DRU advised Appellant, the alternate payee, and Mr. Hasty that if the QDRO is not what the parties intended, they may need to re-submit a revised DRO—which is exactly what Appellant's counsel did. (SF. 6.) Furthermore, DRU offered "any adversely affected" party of the QDRO the opportunity to appeal the QDRO within 45 days. (SF. 6.) Sleeping on rights to appeal and instead re-submitting additional domestic relations orders does not shift liability for subsequent results to DRU. Thus, DRU did not breach its duties of prudence and loyalty because DRU acted with "care, skill, prudence, and diligence" when qualifying each domestic relations order Appellant submitted. *See* 29 U.S.C. § 1104(a)(1)(B).

Appellant cannot pursue a failure to monitor claim against DRU. "Appointing fiduciaries" have an ongoing fiduciary duty to monitor the activities delegated to the fiduciary's "appointees." *See Burke*, 42 F.4th at 730 (citing 29 U.S.C. § 1104(a)(1); *see also Howell v. Motorola, Inc.*, 633 F.3d 552, 573 (7th Cir. 2011) ("The duty exists so that a plan administrator or sponsor cannot escape liability by passing the buck to another person and then turning a blind eye"). Here, the "duty to monitor" would be in relation to the Fund (the appointing fiduciary) monitoring DRU (the appointee). The Fund contractually delegated to DRU the task of QDRO determination with specific instructions. (SF. 2.) Thus, any failure to monitor claim Appellant believes she may have would be directed toward the Fund's failure to monitor DRU—rather than DRU's alleged failure to monitor the excessive domestic relations orders Appellant submitted. Said differently, Appellant was required to object to DRU's QDRO determinations to shift the focus to how the Fund was monitoring DRU. (R. 17.) Accordingly, the district court properly held Appellant "may not pursue a failure to monitor theory" because Appellant "did not avail herself of her right to appeal the determinations that DRU issued." (R. 17.)

Even if DRU had fiduciary responsibilities, under Section 1104(a)'s duties of prudence and loyalty, DRU is not liable for any loss suffered by Appellant.

2. ERISA does not require DRU to delve into the underlying merits of domestic relations orders processed by state courts and DRU not should second-guessed the legitimacy of such orders when determining if they are qualified.

No part of ERISA requires DRU to second-guess whether a competent state court's DRO-issuing proceeding is legitimate.

An exception to ERISA's anti-alienation provision allows retirement benefits to be assigned to an "alternate payee," such as an ex-spouse, in accordance with a domestic relations order issued by a court. *Brown v. Cont'l Airlines, Inc.*, 647 F.3d 221, 223 (5th Cir. 2011). The Supreme Court has unanimously held that the specific criteria in Section 1056(d)(3) of ERISA is to be regarded as a "discrete inquiry" and a "statutory checklist" intended to promote "simple administration" and minimize "litigation-fomenting ambiguities." *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 300–01 (2009). The process of determining whether domestic relations orders are qualified is a "straightforward matter that requires the administrator to take domestic relations orders at face value and not to engage in complex determinations of underlying motives or intent" of the court that issued the domestic relations order. *Brown*, 647 F.3d at 227. The reason for this is to relieve the qualification process of domestic relations orders from having to engage in "factually complex and subjective determinations." *Kennedy*, 555 U.S. at 302. ERISA does not grant discretion to "look beneath the

surface" when determining whether a domestic relations order is qualified. *Blue v. UAL Corp.*, 160 F.3d 383, 385 (7th Cir. 1998).

Section 1056(d)(3) of ERISA precludes any inquiries about whether, why, or how many times a participant has divorced. If a domestic relations order is deemed "qualified" as a QDRO, ERISA requires the plan administrator to "mechanically implement" the order without second-guessing whether it is legitimate. *Blue*, 160 F.3d at 386. The United States Department of Labor—the "agency charged with administering" ERISA—has determined that whether a domestic relations order was obtained by fraud or unconventional means goes to the validity of the order under state law, not whether it is "qualified." *See Meredith v. Time Ins. Co.*, 980 F.2d 352, 355 (5th Cir. 1993); *see also* Department of Labor Advisory Opinion 99-13A (Sep. 29, 1999), p. 5. Information indicating that a domestic relations order was obtained in absence of good faith calls into question whether the order was properly issued pursuant to state domestic relations law. *See* DOL Advisory Opinion 99-13A (Sep. 29, 1999), p. 5. Moreover, this opinion letter from the Department prohibits QDRO administrators from (1) independently determining that the domestic relations order is invalid under state law and (2) reviewing the "correctness of a determination by a competent state authority pursuant to state domestic relations law." *Id.* Nothing in this advisory letter suggests that QDRO administrators may, as part of the domestic relations order review process,

independently second-guess state court decisions assigning pension rights to alternate payees. *Id.*

QDRO administrators may not refuse to treat a domestic relations order as a QDRO on the basis that the administrator believes the domestic relations order was not obtained in good faith from the state court that issued it. In *Brown*, QDRO administrators alleged that employees and spouses obtained “sham” divorces, and therefore fraudulent domestic relations orders, for the purpose of obtaining lump sum pension distributions from the employees’ retirement plans. *See* 647 F.3d at 225. In affirming the district court’s dismissal of the administrators’ allegations, the Fifth Circuit held Section 1056(d)(3) “does not authorize a [QDRO] administrator to consider or investigate the subjective intentions or good faith underlying a divorce” or the court-issued domestic relations order regarding said divorce. *Brown*, 647 F.3d at 223; *see also Kennedy*, 555 U.S. at 301 (emphasizing that the strong suits of ERISA’s QDRO inquiry are “simple administration, avoiding double liability, and ensuring that beneficiaries get what's coming quickly, without the folderol essential under less-certain rules”).

Here, nothing in ERISA suggests that DRU—when determining a QDRO—may or should attack a state court's decision to issue a domestic relations order by challenging the D.C. Superior Court’s proceedings as part of an illegitimate “tactic” of Appellant’s counsel. In *Brown*, the Fifth Circuit held Section 1056(d)(3)

"does not authorize a [QDRO] administrator to determine that an otherwise valid domestic relations order [issued by a state court] is not a QDRO because it is based on a sham divorce." *See* 647 F.3d at 228. Likewise, here DRU may not refuse to treat Appellant's multiple domestic relations orders as QDROs on the hypothetical basis that DRU should believe the domestic relations orders were not obtained in good faith from the D.C. Superior Court that issued them. *See id.* at 225.

Appellant's stance seeks to expand DRU's limited role in determining whether duly issued state court domestic relations orders are "qualified" under ERISA. Appellant essentially contends that DRU has a continuing fiduciary duty under ERISA to examine—and re-examine—whether a state court's proceeding was legitimate. (SF. 9.) To the contrary, as the district court concluded, no authority supports a cause of action under ERISA for Appellant "to plead to recoup her losses." (R. 18.) Far from authorizing DRU to consider the subjective intent behind Appellant's divorce situation and the domestic relations orders that followed, Section 1056(d)(3) requires nothing more than a comparison between the text of the domestic relations orders and the agreed-upon text of "the Agreement." The text of the Agreement expressly provides that "DRU *shall not* be regarded as a fiduciary for the purposes of ERISA." (R. 16) (emphasis added). Appellant's contention would allow and encourage DRU personnel to second-guess the domestic relations decisions of state courts nationwide. *See Blue*, 160 F.3d at 386.

Appellant’s rationale would delay and complicate the domestic relations order review process, harming plan participants and wasting plan resources along the way.

Sifting liability to DRU is contrary to ERISA's carefully drawn QDRO review provisions and would require DRU to step beyond its role and second-guess the legality of domestic relations orders issued by competent state courts, such as the D.C. Superior Court.

CONCLUSION

For the reasons stated herein, this court should affirm the district court’s decision to dismiss Appellant’s claims against DRU.

Respectfully submitted,

_____/s/ Team 4______
Team 4
Attorneys for Appellees

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