Team 5

ORAL ARGUMENT SCHEDULED MARCH 05, 2023
No. 22-cv-299-TCF

IN THE UNITED STATES DISTRICT COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

Renita CONNOLLY,

Plaintiff-Appellant,

---v.---

NATIONAL LABORERS RETIREMENT SAVINGS FUND, BOARD OF TRUSTEES OF THE NATIONAL LABORERS RETIREMENT SAVINGS FUND, Joe SCHLITZ, Letitia BECK, And DROS-Я-US LLC.

Defendants-Appellees.

On Appeal from the

United States District Court for the District of Columbia

The Hon. Thomas C. Farnam, Presiding

BRIEF FOR THE APPELLANT

January 31, 2023

TEAM 5
Counsel for Appellant

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this case pursuant to 28 U.S.C. § 1331. The Court's federal question jurisdiction was based on the alleged violation of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(a)(3). Pursuant to 28 U.S.C. § 1291, this Court has appellate jurisdiction as appealed from the final judgment entered September 30, 2022. The Notice of Appeal was properly filed.

STATEMENT OF THE ISSUES

I. Whether the District Court erred in determining that Plaintiff is barred by the applicable statute of limitations from receiving the relief she has requested.

II. Whether the District Court erred in determining that DRU is not liable under ERISA for any loss suffered by the Plaintiff.

STATEMENT OF THE CASE

This action arises out of Renita Connolly's participation in the National Laborers Retirement Savings Fund (the "Fund"). (R. at 1.) On April 14, 2022, Ms. Connolly brought a civil action in the United States District Court for the District of Columbia against the Trustees of the National Laborers Retirement Savings Fund (the "Board") as Fund sponsors, as well as Letitia Beck and Joe Schlitz ("Administrators") as Fund administrators contracted with DROs-я-Us LLC ("DRU") seeking awarded lost benefits and equitable relief under ERISA Section 502(a)(2). (R. at 8.)

All Defendants moved to dismiss the complaint. (R. at 10.) The motion to dismiss was granted with prejudice by the District Court. (R. at 10.) Plaintiff has appealed to the United States Court of Appeals for the Thirteenth Circuit.

STATEMENT OF THE FACTS

Plaintiff Renita Connolly is a journeyman electrician who works for R.A. Gray Electric Company and participates in several multiemployer plans including the National Laborers Retirement Savings Fund (the "Fund"). (R. at 1.) On February 21, 2017, Ms. Connolly was granted a judgment of absolute divorce("JAD") from her ex-wife who was granted "a marital interest in the amount of 15% of Renita Connolly's retirement savings with the National Laborers." (R. at 2.) On September 27, 2017, the Superior Court for the District of Columbia entered a "Qualified Domestic Relations Order" with respect to Plaintiff's interest in the Fund (the "DRO"). (R. at 2.)

The Fund contracts with DROs-я-Us LLC ("DRU") to process and determine the qualification of domestic relations orders ("QDROs"). (R. at 2.) The Fund has an Administrative Services Agreement (the "Agreement") with DRU which lists its contractual obligations. (R. at 2.) In consideration of the Funds payment of $500 per domestic relations order charged against the Participants account, DRU is required to provide maintenance of all records, an interface that Fund participants shall use, review of all domestic relations orders submitted, and determinations on the qualified status of all domestic relations orders in accordance with law and Fund policies. (R. at 2.) Although the agreement provides the DRU with initial determination of QDRO status, it reserves determinations on appeals for the Board of Trustees. (R. at 2.)

On October 15, 2017, Plaintiff's domestic relations lawyer, Dash Hasty, sent the court-certified copy of the DRO to the Fund's offices in Washington, D.C. (R. at 3.) On November 15, 2017, Mr. Hasty's office received a package from the Fund office returning the DRO submission with a yellow post-it note that provided as follows: "Must be submitted to DROs-R-Us at www.drosrus.com." (R. at 3.) On November 30, 2017, Mr. Hasty's office uploaded the

court-certified copy of the DRO to the website and received a generic response which he forwarded to his assistant which read: “Thank you for submitting your domestic relations order to DROs-я-Us. Our goal is to ensure you are 100% satisfied with or services, so please feel free to email us with any questions and we promise to get back to you promptly.” Attached to the email was a 112-page document that provided copies of: (1) the Fund’s QDRO Procedures, (2) the Fund’s Model Qualified Domestic Relations Order, and (3) a document captioned “Frequently Asked Questions. (R. at 3.) On January 1, 2018, Mr. Hasty noted that he had not received any further response from the Fund to the DRO submission. (R. at 5.) To move the case along, Mr. Hasty instructed his assistant to retrieve a new court-certified copy of the DRO and on January 4, 2018, Mr. Hasty’s office uploaded the second court-certified copy of the DRO to the website. (R. at 5.) He again received the same generic response. (R. at 5.)

After receiving no other communication from the Plan or the DRU Mr. Hasty repeated this submission process again on March 3, 2018, and October 15, 2018, receiving the same generic email response each time. (R. at 5.) By letter dated November 1, 2018, DRU notified the Plaintiff, the alternate payee, and Mr. Hasty that the DRO had been determined to be a QDRO, that the Alternate Payee will receive 15% of the Participant’s benefit as of the date of the Order, that a $500 processing fee would be accessed, the process to change or update the Order, and finally a notice of right to appeal, (R. at 6.) The letter enclosed a pamphlet that provided all the details necessary to file an appeal, however, neither party appealed the Fund’s November 1, 2018, determination. (R. at 6.)

Rather than processing Ms. Connolly’s single DRO, the Fund through DRU determined that Ms. Connolly’s DRO was in fact a QDRO and implemented the terms four separate times, on December 15, 2018, December 16, 2018, January 3, 2019, and February 1, 2019, respectively,

transferring 15% of her account balance to her ex-wife on each occasion. (R. at 6-7.) In each instance the DRU notified the Plaintiff, the alternate payee, and Mr. Hasty that the DRO had been determined to be a QDRO. The letter contained the same paragraphs as the November 1, 2018 letter. In addition to the four separate implementations of the QDRO, on December 16, 2018, Plaintiff applied to the Fund for a loan of $50,000 to pay her attorney fees. On December 29, 2018, the Fund transferred $49,500 – the $50,000 loan amount minus the processing of $500 into Plaintiff's checking account. (R. at 7.) Plaintiff then paid the $50,000 outstanding balance from the divorce to Mr. Hasty. (R. at 7.)

After falling extremely ill in April 2020 and making a recovery on September 30 of 2021, Plaintiff decided to retire and had her final day of work on March 31, 2022. (R. at 8.) After receiving her March 31, 2022, account statement on April 8, 2022, Plaintiff was horrified to see that the balance in her Fund account was only $280,000 plus earnings from October 1, 2017, much less than anticipated. (R. at 8.) Following the realization, the Plaintiff sent a letter to the Board demanding that the Fund retroactively determine that the second, third and fourth DROs are not QDROs and restore her account balance to what it would be after such retroactive disqualification. (R. at 8.) On April 13, 2022, the Administrators, on behalf of the Board, replied by letter affirming that the Board had undertaken a thorough review of the facts and had determined that the Fund had taken the legally required actions with respect to all four QDROs. (R. at 8.)

In response to Ms. Connolly's civil action in the United States District Court for the District of Columbia, each Defendant immediately filed motions to dismiss arguing that Plaintiff failed to show that Defendants are fiduciaries under ERISA, and that Plaintiff's lawsuit is barred by the applicable statute of limitations. (R. at 9.) The Fund Defendants argued that any loss

suffered by Plaintiff is the direct result of the actions of DRU and/or Plaintiff's domestic relations lawyer and not by any action or inaction of the Fund Defendants. (R. at 9.) DRU further argued that its role is ministerial and that it performed all duties in accordance with the valid instructions of authorized individuals. (R. at 9.) The District Court agreed with Plaintiff that all Fund Defendants are fiduciaries under ERISA. (R. at 10.) The court also held that any loss suffered by the Plaintiff is the direct result of the actions of DRU and/or Plaintiff's domestic relations lawyer and not by any action or inaction of the Fund Defendants but held that DRU that it is not a fiduciary under ERISA. (R. at 10.) The Court agreed with the Defendants and determined that Plaintiff is barred by the applicable statute of limitations from receiving the relief she has requested. (R. at 10.)

The issues of appeal are: (1) whether the Plaintiff is barred by the applicable statute of limitations from receiving the relief she has requested; and (2) whether DRU is liable under ERISA for any loss suffered by the Plaintiff.

SUMMARY OF THE ARGUMENT

The District Court erred in dismissing Appellant's complaint as time barred. The main purpose of ERISA is to protect the interests of beneficiaries who participate in employee benefit plans. Considering this intent, both the statute and the courts have built-in protections for beneficiaries against improper practices. One such protection is the extension of the statute of limitations when a beneficiary does not have actual knowledge of harm. In this case, Ms. Connolly has clearly exhibited that she did not have actual knowledge that would limit her ability to bring this claim.

The District Court also erred in finding that the DRU was not liable under ERISA for harms suffered by the Appellant. As a complete and direct result of DRUs actions as a fiduciary in this case, Ms. Connolly has lost hard-earned retirement savings that she was wholly entitled to

as a result of DRUs participation in prohibited transactions and breaches of fiduciary duty. Ms. Connolly is seeking relief under ERISA against DRU for these losses.

Ms. Connolly should be permitted to proceed with her claim under the applicable statute of limitations, and DRU should be held liable under ERISA allowing Ms. Connelly relief under the doctrine of equitable estoppel for loss suffered.

ARGUMENT

I. Standard of Review

The district court's grant of Rule 12(b)(6) motions is reviewed *de novo*. *Citizens for Resp. and Ethics in Washington v. U.S. Dept. of J.*, 922 F.3d 480, 486 (D.C. Cir. 2019). In ruling on a motion to dismiss, courts "must accept the well-pleaded facts as true and resolve them in the light most favorable to the plaintiff." *Paradise Divers, Inc. v. Upmal,* 402 F.3d 1087, 1089 (11th Cir. 2005). However, this assumption of truth does not extend to legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To survive a motion to dismiss, a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v Twombly*, 550 U.S. 544, 570 (2007). Determination of a plausible claim is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal,* 556 U.S. at 679.

II. The District Court Erred in Dismissing Appellant's Complaint as Time-Barred

The application of the Supreme Court's interpretation of "actual knowledge" to the facts at issue in this appeal makes it clear that actual knowledge of the breach occurred on April 8, 2022, and not at any date prior. Certainly, actual knowledge did occur as to the implementation of the original plan, but knowledge of the breach did not occur until the later date. As such, this

court should find that the trial court erred in their standard of "actual knowledge" and the case should be remanded accordingly.

Under the ERISA framework, "the victim of an alleged fiduciary breach normally has six years to bring her claim, though this period may be shortened to three years when the victim had actual knowledge of the breach or violation." *Zirnhelt v. Mich. Consol. Gas Co.*, 526 F.3d 282, 288 (6th Cir. 2008) Under the shorter limitations period, a breach- of-fiduciary-duty claim becomes time-barred "three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." 29 U.S.C. § 1113(2)."

A. The Standard of Actual Knowledge

In *Intel Corporation Investment Policy Committee v. Sulyma* 140 S. Ct. 768 (2020), the Supreme Court was tasked with determining what ERISA meant by "actual knowledge" in litigation over the meaning of the term in ERISA § 1113(2), a statute which accelerates the filing deadline for a breach of fiduciary duty claim and begins when the plaintiff gains "actual knowledge" of the breach. *Id.* Under § 1113(2), suit must be filed within three years of "the earliest date on which the plaintiff had actual knowledge of the breach or violation." *Id.* The Court, in examining the legislative history of the statute, as well as previous decisions, found that "to have 'actual knowledge' of a piece of information, one must in fact be aware of it." *Sulyma*, 140 S. Ct. at 777. For, as the Court noted, "if a plaintiff is not aware of a fact, he does not have 'actual knowledge' of that fact however close at hand the fact might be. § 1113(2)." *Id.* at 777. Additionally, "Congress has never added to § 1113(2) the language it has used in other ERISA limitations provisions to encompass both what a plaintiff actually knows and what he reasonably could know." *Id.* The Court in *Sulyma* ultimately held that the phrase "actual knowledge" did in fact, mean "what it says," *Id.* at 776. Thus, in order to have "actual knowledge", the Court found

that "§ 1113(2) requires more than evidence of disclosure alone. That all relevant information was disclosed to the plaintiff is no doubt relevant in judging whether he gained knowledge of that information." *Id.*

While it is true that other provisions of ERISA with a similar tolling period and have a more lenient standard of what basically amounts to constructive knowledge, the Court, citing *Merck & Co. v. Reynolds*, 599 U.S. 633 (2010), noted that "Congress has repeatedly drawn a "linguistic distinction" between what an ERISA plaintiff actually knows and what he should actually know, and then mentioning that when "Congress has included both forms of knowledge in a provision limiting ERISA actions, it has done so explicitly." *Sulyma*, 140 S. Ct. at 777. In terms of reading more into the statute than it should, the Court also noted that "We cannot assume that it meant to do so by implication in § 1113(2). Instead, we 'generally presume that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.'" *Id.*, citing *BFP v. Resolution Trust Corporation*, 511 U.S 531 (1994).

In addition to what the Court held in *Sulyma*, actual knowledge may be proven in "usual ways" during any stage of the litigation, *Farmer v. Brennan*, 511 U.S. 825, 842 (1994). For example, in an instance where someone has recalled reading disclosures will be bound by oath in their subsequent depositions. In addition, actual knowledge can be "inferred from circumstantial evidence." *Staples v. United States*, 511 U.S. 600, 615 n.11 (1994). To find this, evidence of disclosure would be perhaps the most relevant piece of information, however, there would need to be a strong supporting cast of other circumstantial evidence, such as communications being specific as to each individual effect, or additional evidence suggesting that the appellant acted in response to the information contained in letters received.

One way to possibly prove "actual knowledge" is a consideration that evidence of willful blindness, which the Court has suggested "supports a finding of "actual knowledge." *Global-Tech Appliances, Inc. v. SEB S. A.*, 563 U.S. 754, 767 (2011). The Court has found this to be justified on the theory that "defendants who behave in this manner are just as culpable as those who have actual knowledge," and that "persons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts." *Id*. Though primarily utilized in the criminal context, the Court found that many of the same rationales for the establishment of accountability are also found in the civil context and may be applicable when there has been an accusation of wrongdoing in that arena.

To support a finding of "willful blindness," the Court has imposed two requirements: "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." *Id.* "Under this formulation," the Court explained, "a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts." *Id.* However, this is not the equivalent of actual knowledge, all it merely does is function as an avenue of proving that a party acted "knowingly".

B. The Appellant Did Not Have Actual Knowledge as Defined by the Standard Until April 8, 2022

Utilizing this as a framework, it is therefore clear that the appellant in this case did not, in fact, have what would constitute "actual knowledge" of the breach, and therefore, the statute of limitations would not have foreclosed her claim. The only "actual knowledge" that she gained was of the terms relating to the original request for the QDRO and that it had been processed by DRU. As the facts have demonstrated, none of the communications relating to the subsequent letters spelled out anything different. (R. at 7-8.) Each subsequent communication contained

identical and unchanged paragraphs from the initial letter, which suggested to any reasonable onlooker that these communications were nothing more than courtesy notices that simply re-stated the same terms as the original.

Under the Supreme Court's "actual knowledge" standard, the actual knowledge of the breach was when the appellant considered the shattered state of her accounts on April 8, 2022, and not at any time prior. As noted above, actual knowledge under the statute "requires more than evidence of disclosure alone. That all relevant information was disclosed to the plaintiff is no doubt relevant in judging whether he gained knowledge of that information." *Sulyma* at 776. The only relevant information that was disclosed to the appellant and her attorney from DRU was that (1) the QDRO had been received and processed, and (2) a procedural description of how DRU would implement the QDRO. (R. At 6.) There was nothing noting account balances, or any other red flags that would have jumped out to even the most casual observer. To any reasonable individual, each of the subsequent notices looked to be merely carbon copies of the original November 1, 2018, letter, and nothing more. Even when considering the requirements under the Farmer and Staples decisions, there is nothing to suggest that actual knowledge of the breach occurred. After all, while the appellant and her counsel both read the disclosures, there was nothing on them that would indicate a breach; there were no account balances because of each subsequent filing, and thus, there was no actual knowledge of the breach until April 8, 2022.

There is also nothing else to suggest that something else points in a more sinister direction. Willful blindness does not apply here. Considering the two elements, there is nothing in the facts that suggests that the appellant knew there was a high probability that a breach existed, and there is also nothing to suggest that the appellant took any part in deliberate actions to avoid learning of that fact. The appellant merely considered the contents of each subsequent

letter, and since the terms in the subsequent letters were identical to the terms of the original April 8, 2022, letter. (R. at 7.) In doing so, she simply did not inquire further, operating on the assumption that nothing had changed regarding her plan. As a result, there is nothing to suggest that willful blindness applies to the appellant's conduct in this case.

C. <u>The Statute of Limitations Did Not Expire</u>

In construing the timeline relating to the statute of limitations, it is clear that "actual knowledge" as required by ERISA § 1113(2) to support the three-year statute of limitations only existed regarding the breach itself was only constituted on April 8, 2022, when the appellant had initial notice that a potential breach may have occurred, and not on any date prior. Certainly, the appellant was provided several notices, but these were immaterial and would look to any reasonable person to be simply carbon copies of the original acceptance of the DRU on November 1, 2018.

The initial acceptance of the QDRO had nothing to suggest that there was any breach that had occurred, nor did any of the subsequent mailings suggest a material change to the terms of the initial November 1 letter, that might indicate a breach. Additionally, there is also nothing to suggest that the appellant willfully blinded herself to the realities of her situation. Thus, the actual knowledge, that is required under ERISA § 1113(2), and defined by the Supreme Court to support a claim for breach, was only obtained on April 8, 2022, the date that the appellant noticed the shortfall that had occurred in her account, and as a result, the statute of limitations did not expire, and the trial court erred in its finding.

III. The District Court Erred in Determining that DRU cannot be held liable under ERISA for any loss suffered by Appellant.

A. <u>DRU is a "Functional Fiduciary"</u>

The District Court erred in dismissing the Complaint against DRU because they were not a named fiduciary. Appellant does dispute that under Section 8.1 of the agreement, DRU is not a named fiduciary. However, the duty prescribed to named fiduciaries under ERISA has also been found to expand to functional fiduciaries. *See Beddall v. State Street Bank & Trust Co*., 137 F.3d 12, 18 (1st Cir. 1998) ("the statute also extends fiduciary liability to functional fiduciaries"); *Olsen v. E.F. Hutton & Co*., 957 F.2d 622, 625 (8th Cir. 1992). A service provider acts as a functional fiduciary: "if (1) it 'did not merely follow a specific contractual term set in an arm's-length negotiation' and (2) it 'took a unilateral action respecting plan management or assets without the plan or its participants having an opportunity to reject its decision.'" *Rozo v. Principal Life Ins. Co*., 949 F. 3d 1071 (8th Cir 2020) (quoting *Teets v. Great-West Life & Annuity Ins. Co.*, 921 F.3d 1200 (10th Cir. 2019)). While ERISA does not define "plan assets" the DOL has stated that they include any amount "that a participant or beneficiary pays to an employer or amounts that a participant has withheld from his wages by an employer, for contribution to the plan as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets." 29 C.F.R. § 2510.3–102 (2000). Other courts have agreed with this definition holding that plan assets "include employee contributions to benefit plans which are withheld from employees' paychecks and for deposit into their benefit plans, even though the contributions have not actually been delivered to the benefit plan." *United States v. Grizzle*, 933 F.2d 943, 946 (11th Cir. 1991), *cert. denied*, 502 U.S. 897, 112 (1991).

As a defined contribution plan, the money in Ms. Connolly's account is clearly established as a plan asset. Regarding the use of these assets. DRU's actions are similar to those described in *Eaves v. Penn,* where the Tenth Circuit held that a service provider breached their duty by "recommending, designing, and implementing" a transaction that was not in the interest of the plan's participants and beneficiaries. *See Eaves*, 587 F.2d 453, 457(10th Cir.1978) (emphasis added). In this case, under Section 4.1 of the agreement, DRU had the authority to manage and disburse these fund assets and was expressly given discretionary authority to make decisions regarding the qualification of QDROs and disbursement of plan assets as dictated by these orders.

The Appellant has also established that DRU acted as a fiduciary, "with regard to the specific transaction about which they complain." *Tiblier v. Dlabal*, 743 F.3d 1004, 1008 (5th Cir. 2014); *see also Pegram v. Herdrich*, 530 U.S. 211, 226 (2000). Ms. Connolly has lost a large portion of her retirement savings due to multiple distributions from her accounts that the DRU incorrectly determined were QDROs. All of these transactions stem from DRUs action as a fiduciary in relation to the QDRO which caused injury to Appellant. This created a nexus between the transaction and the DRU as a functional fiduciary.

B. <u>The Distribution of Assets from the Segregated Account was a Breach of Fiduciary Duty</u>

ERISA § 404(a) prescribes strict rules for which fiduciaries must abide. As related to this case, this includes the duty of loyalty, the duty of prudence and the duty to act in accordance with the governing plan documents and instruments. 29 U.S.C. § 1104(a)(1). The duty of loyalty requires a fiduciary to act "for the exclusive purpose" of providing benefits to the participants. 29 U.S.C. § 1104(a)(1)(A).) Regarding a fiduciary duty to act in accordance with plan documents, "ERISA requires the Plan be administered as written and to do otherwise violates not only the

terms of the Plan but causes the Plan to be in violation of ERISA." *Gagliano v. Reliance Standard Life Ins. Co.*, 547 F.3d 230, 239 (4th Cir. 2008) (citing 29 U.S.C. § 1102(a)(1)); *see also White v. Provident Life & Accident* Ins. Co., 114 F.3d 26, 28 (4th Cir. 1997) ("ERISA demands adherence to the clear language of [an] employee benefit plan") The duty of prudence requires ERISA fiduciaries to discharge 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)(1)(B). In addition, these duties also prohibit a fiduciary from making "material misrepresentations and incomplete, inconsistent or contradictory disclosures" to the plan beneficiaries. *Griggs v. E.I. DuPont de Nemours & Co.*, 237 F.3d 371, 380 (4th Cir. 2001) (quoting *Harte v. Bethlehem Steel Corp*., 214 F.3d 446, 452 (3d Cir. 2000)).

ERISA generally prohibits the assignment or alienation of employee benefits under covered plans. 29 U.S.C. § 1056(d)(1). However, an exception to this rule is made for QDROs. Id. §§ 1056(d)(3)(A). However, a DRO must satisfy certain requirements to be a QDRO. *Boggs v. Boggs*, 520 U.S. 833 (1997). Upon receipt of “any domestic relations order” a plan, administrator must “promptly notify the participant and any other alternate payee of the receipt of such order” and advise them of “the plan's procedures for determining” whether the order is a QDRO. 29 U.S.C. § 1056(d)(3)(G)(i) While the order's status as a QDRO is being determined, the plan administrator is required to “hold and separately account for amounts that would be payable to the alternate payee” when the order is determined to be a QDRO. 29 U.S.C. § 1056(d)(3)(H)(i). The statute also provides an eighteen-month period for determining whether a DRO is a QDRO which begins “with the date on which the first payment would be required to be made under the [DRO”] *Id.* If after the 18 months have elapsed, the DRO's status is still

undecided, the plan must pay the segregated funds to the person who would otherwise have been paid. 29 U.S.C. § 1056(d)(3)(H). These provisions ensure that benefits that may be assignable to someone other than the filing alternate payee are distributed correctly through proper legal means. *See Trustees of Directors Guild of Am.-Producer Pension Benefits Plans v. Tise,* 234 F.3d 415 (9th Cir. 2000) (noting that, "[t]his well-calibrated statutory system not only balances the interests of the plan and the various possible claimants to benefits……but also assures that the ultimate rights of the putative alternate payees are resolved through legal proceedings rather than through manipulation or fortuity.")

In addition to the statutory requirements, through the Funds Question-and-Answer (Q&A) Section provided to the Appellant's attorney through the DRU response email, the Fund provided instruction that they would "ensure that all amounts in the participant's account remain payable to the alternate payee" and, "hold these amounts as "segregated amounts,"" which would not be distributed to the participant or any other person. In the same document, the Q&A reiterated that during the 18-month review period the plan participant could not take out a loan or distribution of any segregated amounts.

In this case, DRU was put on notice when they acknowledge the receipt of the DROs sent to them on November 30, 2017, January 4, 2018, March 3, 2018, and October 15, 2018. As such, they were required to place all funds on hold in segregated accounts until determinations were made regarding *each and all* of these DROs. In following each order, and more specifically the DRO submitted on October 15th, 2018, no funds should have been loaned or distributed from the segregated accounts until final approval of that DRO that was submitted. This final approval and notification did not occur until April 1, 2019. However, on November 1, 2018, the first distribution was made, and on December 16, 2018, Appellant was granted a loan from the

account going against the language of the Fund as well as ERISA. DRU claims they were unaware that the DROs were the same, giving even more reason to hold the funds in order to determine what interest was actually due and to whom under each DRO.

This distribution not only caused an improper distribution of 15% of the Appellants account, but DRU also violated the duty of loyalty by retrieving benefits from the plan prematurely. As an extension of the duty of loyalty, Congress enacted ERISA § 406 which prohibits certain transactions deemed "likely to injure the pension plan," *Commissioner v. Keystone Consol. Industries, Inc.*, 508 U.S. 152, 160, (1993). Section 406(a)(1) provides that a fiduciary may not allow a plan to engage in a transaction the fiduciary knows or should know is "lending of money or other extension of credit between the plan and a party in interest"; or "transfer to, use by or for the benefit of, a party in interest, of any assets of the plan"; 29 U.S.C. § 1106(a)(1)(A)-(E). Section 406(b)(2) provides that a fiduciary with respect to a pan shall not "in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are averse to the interests of the plan or the interests of its participants or beneficiaries." 29 U.S.C. § 1106(b)(2). A "party in interest" includes fiduciaries, employers, service providers, and certain stockholders, as well as employees of the plan. 29 U.S.C. § 1002(14).

Recently, in *Peters v. Aetna,* the court in the Fourth Circuit found that a third-party service provider becomes a party in interest to a transaction when they "provide services to the plan at the time [its administrative] fees were paid[.]" *Peters v. Aetna Inc*., 2 F.4th 199, 239 (4th Cir. 2021) (citing*, Sweda v. Univ. of Pennsylvania,* 923 F.3d 320 (3d Cir. 2019)). In the present case, as a service provider in the DRO transaction, DRU allowed fund assets to be transferred for their benefit. This occurred when they allowed themselves to directly take $500 in fees from the

accounts, in the course of providing a service to the plan, when these funds were in fact restricted assets by law and under the plan terms until the Final DRO was processed on April 01, 2019.

Moreover, Appellant as an *employee* party of interest was granted a loan against the plan in clear violation of the prohibited transaction rule. Although Congress has enacted exemptions for participant loans, under 29 U.S.C. § 1108(b)(1) a plan may only make loans "in accordance with specific provisions regarding such loans set forth in the plan." In this case, the loan made to Ms., Connolly clearly did not follow the procedure set forth in the plan as it was granted at a time when assets were to be held. From the circumstances surrounding these distributions, it is clear that DRU not only failed to follow the fund documents but did not inform the Fund that other DROs were under review. This caused the Fund to engage in prohibited transactions violating the duty of loyalty.

Finally, as a fiduciary acting "with the care, skill, prudence, and diligence under the circumstances," DRU had "a duty to give beneficiaries upon request 'complete and accurate information as to the nature and amount of the trust property. "*Faircloth v. Lundy Packing Co*., 91 F.3d 648, 656 (4th Cir.1996) (quoting Restatement (Second) of Trusts § 173 (1959). While this does not mean that DRU needed to ensure that all terms of the Plan were clear to Ms. Connolly, as the court in *Griggs* noted, "an ERISA fiduciary that knows or should know that a beneficiary labors under a material misunderstanding of plan benefits that will inure to his detriment cannot remain silent—especially when that misunderstanding was fostered by the fiduciary's own material representations or omissions. In other words, a fiduciary is obligated to advise the beneficiary "of circumstances that threaten interests relevant to the [fiduciary] relationship." *Griggs* 237 F.3d 371 at 383. As reasonably prudent provider of these services DRU should have acted with diligence in this circumstance to note that Ms. Connolley had filed

four separate times with the same exact order each time and advised her to approve or deny the duplicate forms.

C. DRU May Still Be Held Liable as a Non-Fiduciary

Even if this court determines that DRU is not a functional fiduciary, ERISA plan participants may assert a cause of action against a non-fiduciary "party in interest" to a prohibited transaction. *See Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245–54 (2000). However, "[T]he transferee must be demonstrated to have had actual or constructive knowledge of the circumstances that rendered the transaction unlawful." *Harris Trust.*, 530 U.S. at 251. Even if this court determines that DRU is not a plan fiduciary, as a non-fiduciary party in interest in a prohibited transaction, DRU is subject to liability. *See id*. at 245.

In *Harris Trust,* fiduciaries of a pension trust covered by ERISA brought an action against a service provider who was not a fiduciary of the trust, for causing the trust to enter into a prohibited transaction. 530 U.S. at 240. Although the third party argued that it could not be liable as a service provider, the Supreme Court disagreed and held they a service provider, "party in interest" may be subject to suit under § 1132(a)(3). *Id.* at 254. DRU was bound by the contract to follow the terms of the plan, applicable law, and guidance. As a service provider who claims to have specialization in this area, they should have had knowledge surrounding the laws of DROs as well as the terms of the Plan that made these transactions unlawful. Had it not been for DRU's oversight, and mismanagement of the Plan, it is likely that the Plan would not have engaged in the prohibited transaction, leaving DRU liable even if they are not a fiduciary.

D. Appellant Is Entitled To Equitable Relief

Section 502(a)(1) of ERISA permits a plan participant or beneficiary to bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms

of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). The plan participant or beneficiary may seek an injunction or "other appropriate equitable relief" to redress violations of ERISA or to enforce the terms of the plan. 29 U.S.C. § 1132(a)(3). Both fiduciaries and non-fiduciaries that participate in a fiduciary breach, may be liable for equitable relief, even if not ordinary money damages. *See Mertens v. Hewitt Assocaites*, 508 U.S. 248, 255 (1993) (recognizing that non-fiduciaries may be liable under ERISA § 502(a)(3) for equitable relief such as injunction or restitution); *Herman v. South Carolina National Bank*, 140 F.3d 1413, 1422 (finding that "non-fiduciaries may be ... required under § 502(a)(5) to disgorge ill-gotten plan assets or profits obtained through participation in transactions prohibited by [ERISA] § 406") However, Section 1132(d)(2) provides that "[a]ny money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter." Discussing this provision, the court in *Cyr v. Reliance Standard Life Ins. Co*., held that this clause "necessarily indicates that parties other than plans can be sued for money damages under other provisions of ERISA, such as § 1132(a)(1)(B), as long as that party's individual liability is established." 642 F.3d 1202 (9th Cir. 2011).

Equitable relief, holds the fiduciary "to what it had promised" and "operates to place the person entitled to its benefit in the same position he would have been in had the representations been true." *Cigna Corp. v. Amara,* 563 U.S. 421, 439 (2011) (quoting James W. Eaton, Handbook of Equity Jurisprudence § 62, at 176 (1901)). To obtain relief under § 502(a)(3), "the Appellant must show a breach of duty, harm, and causation." *Id.* In addition: "(1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so

act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury." *Greany v. W. Farm Bureau Life Ins. Co.,* 973 F.2d 812, 821 (9th Cir.1992).

In its role as a functional fiduciary or in the alternative, an interested party, DRU had a duty to avoid causing participation in transactions that violated ERISA. Because the terms of the service agreement state that DRU was to operate under the terms of the Plan and applicable law, it would stand to reason that they were fully aware of the terms of the plan, made interpretations based upon the plan, and should have known the transactions were wrongful. Based on this evidence the court should determine that DRU knowingly aided, abetted, and participated in prohibited transactions, causing injury to the Appellant and allow the Appellant.to recover from her claim for equitable relief.

CONCLUSION

For the foregoing reasons, Appellant. respectfully requests that this Court reverse the decision of the United States District Court for the District of Columbia and remand this matter for further proceedings.

Dated: January 31, 2023
Washington, DC

Respectfully submitted,
/s/ Team 5
Attorneys for Appellant