IN THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

Liberte Chen,

Appellant,

v.

New York Mail, New York Mail 401(k) Plan New York Mail 401(k) Plan Administrative Committee, King Westley, Samantha Ortiz, and LaBron Hastings , Andrews Record-Keeping, Inc.,, Andrews Investment Company, and Alina Oxmix Comey

Appellees,

CIVIL ACTION NO.: 20-cv-099-TCF

New York, et al Defendants Support of the District of Columbia District Court's Summary Judgement Holding against Liberte Chen.

Oral Argument scheduled for March 27, 2021

Brief for Appellee

Team 8

Table of Contents

TABLE OF AUTHORITIES[1]

CASES

[1] Authorities upon which Appellee chiefly relies are marked with asterik

STATUTES

OTHER AUTHORITIES

GLOSSARY

AIC - Andrews Investment Company
AOC -Alina Oxmix Comey
ARK - Andrews Record-Keeping, In

Statement of Jurisdiction

This appeal follows from a final decision by the United States District Court for The District of Columbia. The Court of Appeals has jurisdiction "from all final decisions of the district courts of the United States." 28 U.S.C. § 1291.

Issue Presented

1. ERISA § 502(a)(1)(B) gives the parties the freedom to contract statute of limitations to recover plan benefits absent an analogous state provision. Section 12 of the Employee Retirement Plan ("Plan") provides that any suit seeking to challenge the Plan must be brought within six months of the date the Plan issues a final determination on an employee's grievance. Does Section 12 of the Plan's time limitation require the lawsuit to be dismissed as untimely?
2. Under ERISA § 404(c) a fiduciary is either named in a plan or is a party who plays a discretionary role. The Employee Retirement Plan's contract does not name AIC Defendants as fiduciaries. Furthermore, the contract describes the specific job of the aforementioned defendants. Do the actions of AIC and ARK make them fiduciaries under the contract?
3. ERISA § 404(a) outlines the fiduciary responsibilities of the duties of loyalty and prudence; the New York Mail defendants followed these duties. Ms.

Chen failed to plead with sufficient particularity that New York Mail breached their fiduciary duties. Did the District Court erred in finding that the complaint failed to plead with sufficient particularity that the Mail Defendants breached any fiduciary responsibilities under ERISA?

Statement of the Case

On December 15, 2020 Ms. Chen filed a complaint in the District Court for the District of Columbia. *Id.* at 5. The district court granted summary judgment in favor of, the Plan, AIC, ARK, and the Administrative Committee; concluding that Ms. Chen failed to state a claim upon which relief could be granted. *Id.* at 6. The appeal to the United States Court of Appeals for the Thirteenth Circuit was filed on the grounds that Section 12 of the Plan is not enforceable, that Mail Defendants breached fiduciary duties under ERISA § 404(c) and ERISA § 404(a) and that AIC Defendants were fiduciaries. *Id.* at 6.

This Court of Appeals reviews the district court's grant of summary judgment *de novo*, viewing the evidence and drawing all reasonable inferences in the light most favorable to the nonmoving party. *Lafleur v. Louisiana Health Serv. & Indem. Co*., 563 F.3d 148, 153 (5th Cir. 2009). Summary judgment is appropriate if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(a).

Statement of the Facts

New York Mail ("Mail") is a newspaper located in New York City, Washington, D.C., and Los Angeles, California. R. at 1. The Mail provides its employees with a competitive and comprehensive 401(k) Plan (the "Plan"). *Id.* The Mail is the named fiduciary of the Plan and appoints the New York Mail 401(k) Plan Administrative Committee ("Administrative Committee"). *Id.* In order to provide an efficient and quality service to its employees, the Mail hires a third-party company to keep the records. Although the Plan can pay the fees to the third party, the Mail has and continues to pay the fees of the record-keeping company; thus, lowering the Plan's administrative. *Id.*

In 2001, the Mail became concerned of the fees it was paying to its then record-keeper. *Id.* at 2. The Administive Committee asked for bids from other record-keeping companies to provide the same services that the Plan was receiving. *Id.* Andrew Record-Keeping, Inc. ("ARK"), a wholly owned subsidiary of Andrews Investment Company ("AIC"), was among one of the low bidders. *Id.* Alina Oxmix Comey ("AOC") was an executive employee of ARK. *Id.* at 4; (From here on after, AIC, ARK, and AOC will collectively be known as AIC Defendants).

Before hiring ARK, the Administrative Committee hired an independent financial advisor to determine the quality of services that ARK offered. *Id.* at 2.

Only after the financial advisor conducted an analysis and determined that the quality of services was competent, did the Administrative Committee hire ARK. *Id.* Further, the Administrative Committee closely monitored complaints made against ARK since hiring them and found they were no greater than those made against their previous record-keeper. *Id.*

The contract to retain ARK and AIC as a record-keeper included the following stipulations:

> Section 1 of the Administrative Services Agreement by and between AIC, ARK and the Plan (the "Agreement") provides that in consideration of the Plan's payment of the Per Capita Fee specified in Section 4.3 of the Agreement, ARK will provide, among other things, (i) maintenance of records for the Plan, (ii) an interface that Plan participants can use to designate and change investments vehicles, and (iii) a phone-in service center in which Plan participants can request information concerning account balances and can provide instructions to ARK on designating and changing investment vehicles.
> Section 5 of the Agreement, entitled "Best Execution" provides that "AIC intends to provide best execution reasonably practicable under the circumstances for all Plan investment transactions, including but not limited to transmitting any investment instructions to the appropriate investment manager(s) in a timely manner."
> Section 8 of the Agreement provides that "ARK and AIC are not and shall not be regarded as a fiduciary for purposes of ERISA."
> Section 9 of the Agreement provides that any lawsuit related to the Agreement must be filed in accordance with the provisions of the Plan.
> Section 10 of the Plan provides that "the Administrative Committee that is named by the Employer shall be the Plan Administrator and named fiduciary."
> Section 12 of the Plan, a statute of limitations provision. It provides as follows: "Any lawsuit seeking Plan benefits or challenging the management and administration of the Plan must be filed within six (6) months of the date the Plan issues a final determination regarding

> such claim." The statute of limitations was communicated to Plan participants in a Summary Plan Description that was issued on April 30, 2020. *Id.* at 2–3.

In March of 2020, hourly-paid ARK employees went on strike. *Id.* at 4. While ARK negotiated with the union, they filled the positions with ARK executives and salaried employees; including AOC. *Id.* These employees worked exclusively in the phone center and on the on-line interface servicing clients. *Id.* During this time, an unusually high number of customers called including Ms. Chen. *Id.*

On March 15, Ms. Chen requested to transfer the entirety of her Plan account into a risky investment. *Id.* Ms. Chen did not receive confirmation of the transaction and took no further action to confirm her request. *Id.* On April 10, 2020 Ms. Chen received her March 31, 2020 benefit statement account that did not reflect the changes. *Id.* Additionally, her April 30, 2020, benefit statement, received on May 14, 2020, showed no change in her investment. *Id.*

On May 15, 2020 Ms. Chen sent a letter to the Plan demanding for them to "make this right." *Id.* at 4. On May 31, 2020 the Plan replied and apologized explaining there was nothing they could do because the matter should have been brought to the Administrative Committee. *Id.* at 5. Although Ms. Chen had been mailed a copy of the amended statute of limitations on April 30, 2020, Ms. Chen brought suit after the six-month provision expired (December 15, 2020). *Id.* at 5.

Summary of the Argument

The district court's grant of summary judgement should be affirmed because the contract's statute of limitations bars Ms. Chen's claims, AIC and ARK were not fiduciaries, and the Mail did not breach any fiduciary duties. The district court was correct in granting summary judgement because Ms. Chen's claims were brought after the six-month limitations period and because she did not plead her case with sufficient specificity.

First, the Section 12 amendment outlining the six-month statute of limitation is enforceable and precludes Ms. Chen's claim. The Supreme Court has enforced contractual statute of limitations in ERISA claims. First, the limitation must be of reasonable length. Second, there must be no controlling statute to the contrary of the limitation's provisions. The Plan's statute of limitations meets both factors.

Second, the statute of limitations provision applies even though the cause of action began before it was announced. Both the Supreme Court and Circuit Courts have established precedent upholding such statute of limitations. Section 12 of the Plan is consistent with the previous precedent set.

Third, the AIC Defendants are not fiduciaries under ERISA. Under applicable ERISA statutory provisions and case precedent, a party must either be named in the plan or use discretionary authority in order to be named a fiduciary. AIC Defendants do not meet the functional definition of a fiduciary created by common law or legislative intent, as they only exercised ministerial acts as stipulated in the Plan's contract. Furthermore, expanding the definition of a fiduciary to include AIC would prove detrimental to the purpose of ERISA.

Fourth, the New York Mail did not breach their fiduciary duties because Ms. Chen failed to plead with sufficient particularity an action that constituted a breach. Under ERISA and common law precedent the Mail is held to a duty of loyalty and prudence. Based on the facts, the Mail Defendants met their duties.

In order to uphold the statutory provisions and common law understanding of ERISA, the Circuit Court should uphold the lower court's summary judgement ruling. Summary judgment to dismiss all claims against the New York Mail, ARK, AIC, and AOC should be upheld.

Argument

I. The Statute of Limitations in The Plan is binding and enforceable.

The district court was correct in granting summary judgment for AIC Defendants by holding that the Plan's six-month statute of limitation was neither unreasonably short, nor was there a controlling statute to the contrary.

Generally, a contractual statute of limitations is permitted "so long as the limitations period is of reasonable length and there is no controlling statute to the contrary." *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 571 U.S. 99, 99 (2013).

The Supreme Court specifically enforces contractual limitations in ERISA claims by stating that, "[t]he principle that contractual limitations provisions should ordinarily be enforced as written is especially appropriate in the context of an ERISA plan." *Id.* at 100. The Court in *Heimeshoff* analyzed two factors, reasonable length and controlling statutes, to determine what a reasonable statute of limitations is. The Court upheld a statute of limitations that gave the employer one year to bring suit after a final administrative decision had been made. *See Id.* ("The Plan's period is not unreasonably short . . . the Plan's administrative review process required more time than usual but still left Heimeshoff with approximately one year to file suit"). Whether a contractual six-month statute of limitations is of reasonable length is a matter of first impression to this court.

The lower court appropriately applied the *Heimseshoff* holding and correctly held that the six-month statute of limitations barred Ms. Chen's claim. First, a six-month statute of limitations is a reasonable period of time. Second, Washington D.C. has no controlling statute to the contrary of the Agreement's provision.

A. A six-month statute of limitation is reasonable

A six-month statute of limitations is a reasonable period of time. Previous circuit courts have held six-month provisions to be reasonable. Washington, D.C. case law does not provide factors to determine what a reasonable length of time is. Because neither this circuit court nor the Supreme Court have ruled on the reasonability of a six-month statute of limitations, this Court should look at other courts that have ruled on the matter.

Previous courts have held that "a period limited to six months is the minimally valid period." *Mardis v. Hewitt*, 2:16-cv-02115 (JLL) (JAD), 2017 WL 1104905, at *11 (D.N.J. Mar. 23, 2017) (citing to *Taylor v. Western & Southern Life Ins. Co.*, 966 F. 2d 1188, 1201 (7th Cir. 1992)); *see e.g., see also Johnson v. Daimler Chrysler Corp.*, 2003 U.S. Dist. Lexis 28026, at *11 (D. Del. Mar. 4, 2003); *Vega v. Fed. Express. Corp.*, 2011 U.S. Dist. Lexis 111531. * at 17 (S.D.N.Y. Sept. 29, 2011). The aforementioned courts decisions hold that a six-month period of time is of reasonable length. Although there have been challenges of what a reasonable statute of limitations is, courts have analyzed what constitutes a reasonable length of time is and have determined a floor of three months. *See The President Polk*, 43 F.2d 695, 698 (2d Cir. 1930). Here, the six-month period added in Section 12 of the Plan falls within the cut off period that the 7th Circuit held was applicable. *See Taylor v. Western & Southern Life Ins. Co.*, 966 F. 2d 1188, 1202 (7th Cir. 1992).

Although circuit courts have not specifically ruled on a six-month statute of limitations in ERISA claims, lower courts have addressed the issue. A Utah district court previously held that a "six-month contractual provision is enforceable for the ERISA claims." *Zisumbo v. Convergys Corp*., 1:14-CV-134, 2019 WL 1170766, at *6 (D. Utah Mar. 13, 2019). Additionally, district courts in New York have also upheld contractual six-month statute of limitations. *Wechsler v. HSBC Bank USA,* N.A., 2016 U.S. Dist. LEXIS 55404, *5 (S.D.N.Y. April 26, 2016); *Vega v. Fed. Express Corp.*, 2011 U.S. Dist. LEXIS 111531, at *9 (S.D.N.Y. 2011).

Other courts have denied upholding statute of limitations provisions longer than six-months, because of existing obstacles. *See Occidental Life Ins. Co. of California v. E.E.O.C.*, 432 U.S. 355 (1977) (where the Supreme Court declined to enforce a 12-month statute of limitations due to a 18 – 24 month backlog). However, the Supreme Court reasoned that in the absence of any evidence of obstacles in "bringing a timely ERISA § 502(a)(1)(B) claim. . . ," a statute of limitations should be upheld. *Heimeshoff*, 571 U.S. at 100. The facts do not point to obstacles hindering Ms. Chen from bringing forth her claim in a timely fashion.

B. Washington D.C. has no controlling statute to the contrary of the Agreement's provision.

Washington D.C. has no controlling statutes limiting statute of limitations in ERISA claims. The district court was correct in holding that Ms. Chen's claim is most properly regarded as a claim for benefits under ERISA § 502(a)(1)(B). ERISA § 502(a)(1)(B) has no statute of limitations. In the absence of a controlling statute of limitations, this court has previously applied the District of Columbia's three-year statute of limitations because it is "the most closely analogous statute of limitations from the state in which the court sits." *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 341 (D.C. Cir. 1991); D.C. Code § 12-301(7); *see* *also Kifafi v. Hilton Hotels Ret. Plan*, 616 F. Supp. 2d 7, 36 (D.D.C. 2009), *aff'd*, 701 F.3d 718 (D.C. Cir. 2012) ("Because employee benefit plans are contracts, courts in this jurisdiction have borrowed the statute of limitations provision for breach of contract actions in the District of Columbia."). However, the D.C. Circuit has recognized that "in the absence of a controlling statute *to the contrary,* the parties to a … potential lawsuit *may,* by agreement, modify a statutory period of limitation." *Hunter-Boykin v. George Washington Univ.*, 132 F.3d 77, 79 (D.C. Cir. 1998) (emphasis added) (*quoting* C.J.S. *Limitations of Actions* § 25, at 56) *see also Serv. Employees Int'l Union Nat'l Indus. Pension Fund v. Hebrew Homes Health Network, Inc.*, 1:17-CV-01215 (TNM), 2019 WL 4346325, at *9 (D.D.C. Sept. 12, 2019), *appeal dismissed*, 19-7131, 2020 WL 2610920 (D.C. Cir. May 19, 2020) ("D.D.C. 2019 parties' agreement directs that Florida's five-year statute of limitations should be applied to actions like this one seeking to collect delinquent contributions for the benefit of employees").

Properly reading the amendment, the Plan put its employees on notice of the six-month statute of limitations. By continuing to use the Plan and raising no objections, the employees agreed to the amendment.

II. The statute of limitations amendment applies to actions committed before the amendment was publicly announced.

The district court was correct in applying the statute of limitations amendment to Ms. Chen's complaint by holding that the amendment barred the claims. Notice of the amendment was given to the Plan's clients before Ms. Chen brought forth her grievance. Notice was also given eight months before she filed her claim. This court should follow previous Supreme Court standards and Circuit Court precedent to affirm the district court's holding.

First, Supreme Court precedent states that ERISA claims should be construed in light of trust law. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110-11, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989). In trust law, the statute of limitations begins to run after "a clear and continuing repudiation of the right to trust benefits." *Kosty v. Lewis*, 319 F.2d 744, 750 (D.C. Cir. 1963). Here, the statute of limitations began to run after a final determination was given (the final determination being analogous to the repudiation of rights in trust law). Therefore, the date this court should look at in order to determine whether Ms. Chen was given timely notice of the amendment is May 31, 2020, the day the Plan issued its final determination regarding her complaint. The question of whether or not the amendment should apply retroactively is moot because Ms. Chen was given notice of the amendment before a final determination on her claim was issued.

Second, even if a question on retroactively applying the amendment existed, case law would uphold its application. The Third Circuit considered the equitable implications of retroactively applying a statute of limitations. *See Perez v. Dana Corp., Par. Frame Div.*, 718 F.2d 581, 588 (3d Cir. 1983). In *Perez*, the court held that it was not inequitable to retroactively apply a six-month statute of limitations because the plaintiff was aware of the statute before filing his claims. *See Perez v Dana Corp* 718 F. 2d at 588 ("After the *Liotta* decision announced that *Vaca-Hines* claims against Pennsylvania employers were governed by that state's ninety-day statute of limitations for vacation of arbitration awards, Perez [Plaintiff] did not file suit within ninety days; instead he waited over a year to act . . . Where a party gives such indications that he is sleeping on his rights, it is not inequitable to apply the statute of limitations retroactively to bar his claim."). Here, it is not inequitable to apply the six-month statute of limitation because Ms. Chen was well aware that her claim was governed by the six-month provision. She did not file her claim within the six-months but instead waited almost seven months to act, barring her ability for relief.

III. AIC Defendants are not fiduciaries under ERISA

The District Court did not err in finding that the AIC were not fiduciaries under ERISA. In order to become a fiduciary under ERISA the party must either be named under the plan or deemed a functional fiduciary. AIC Defendants were neither named under the plan as fiduciaries nor fiduciaries under a functional definition. Additionally, the law of trusts cannot expand the definition of a fiduciary further, as the Supreme Court has held that ERISA constitutes a comprehensive statutory scheme that preempts the common law of trusts where the two bodies of law conflict. *See Mertens v. Hewitt Associates*, 508 U.S. 248, 262, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993). Although trust law may offer a "starting point" for analysis in some situations, it must give way if it is inconsistent with "the language of the statute, its structure, or its purposes." *See Varity Corp. v. Howe*, 516 U.S. 489, 497, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996); *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447, 119 S. Ct. 755, 142 L. Ed. 2d 881 (1999); *See Hartline v. Sheet Metal Workers' Nat. Pension Fund*, 134 F. Supp. 2d 1 (D.D.C. 2000), *aff'd*, 286 F.3d 598 (D.C. Cir. 2002). Finally, to classify the AIC Defendants as fiduciaries under ERISA law would create implications for future definitions of fiduciaries.

A. AIC did not exercise discretionary authority in its actions under the Plan

AIC is neither named a fiduciary under the Plan's Contract nor a fiduciary under the functional definition of a fiduciary based on ERISA and common law. Under Section 8 of the Plan's Contract, "ARK and AIC are not and shall not be regarded as a fiduciary for purposes of ERISA." R. at 2. Therefore, the Plan's Contract specifies that AIC should not be deemed a fiduciary. The terms of the contract are clear and specific in order to align with the Plan's intent — limiting AIC from being deemed fiduciaries. Furthermore, the Plan's Contract also specified its intent to not name the AIC as fiduciaries by *leaving* them out of the named fiduciaries. Under Section 10 of the Plan's Contract, "the Administrative

Committee that is named by the Employer shall be the Plan Administrator and named fiduciary." *Id.* at 3. Therefore, the contract defines the fiduciaries of the Plan under ERISA and specifically excludes AIC Defendants from being liable as a fiduciary.

Because AIC Defendants are not named fiduciaries, the court must next apply a functional analysis in determining if a party was acting as a fiduciary. *See Pegram v. Herdrich*, 530 U.S. 211 (2000). Under 29 U.S.C § 1002(21)(A) and ERISA:

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

29 U.S.C. § 1002. Therefore, a fiduciary is anyone who exercises discretion. Discretionary authority and control refer to actual decision-making power, not the influence a professional may have over the decision made by the plan trustees. *Reich v. Lancaster*, 55 F.3d 1034, 1048 (5th Cir. 1995). The Supreme Court and Circuit Courts have interpreted this provision to indicate discretion in plan management and administration as the hallmarks of deciding fiduciary status. *See Varity Corp.*, 516 U.S. at 498; *see Hartline*, 134 F. Supp. at 9–10. Additionally, circuit courts have adopted a 2-prong test to determine functional

fiduciary status. *See Teets v. Great-W. Life & Annuity Ins. Co.*, 921 F.3d 1200 (10th Cir. 2019), *cert. denied*, 140 S. Ct. 554, 205 L. Ed. 2d 357 (2019). In *Teets*, to establish a service provider's fiduciary status, "an ERISA plaintiff must show the service provider (1) did not merely follow a specific contractual term set in an arm's-length negotiation; and (2) took a unilateral action respecting plan management or assets without the plan or its participants having an opportunity to reject its decision." *Id.* at 1212; *See Rozo v. Principal Life Ins. Co.*, 949 F.3d 1071 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 268, 208 L. Ed. 2d 33 (2020).

Under Section 1 of the Plan's Contract, it states that:

> ARK will provide, among other things, (i) maintenance of the records for the Plan, (ii) an interface that Plan participants can use to designate and change investments vehicles, and (iii) a phone-in service center in which Plan participants can request information concerning balances and can provide instructions to ARK on designating and changing investment vehicles.

R. at 2. Section 5 further states that AIC intends to provide best execution in transmitting any investment instructions to the appropriate investment manager(s) in a timely matter. *Id.* In the complaint, the replacement staff, AOC, simply received instructions over the plaintiff's account, repeated them, transcribed them, and did not forward them to AIC. *Id.* ARK and AOC were merely following the specific job outlined in Section 1 of the Contract. Specifically, ARK was providing services under the (iii) requirement of the Section, as the plain language of the section describes, phone in service and the need to provide information regarding balances for ARK to designate and change investment vehicles. Thus, ARK and AOC did not use any discretion in the investments as AIC Defendants did not make any decisions that were outside the specific contractual terms set. Courts have found that to the degree that the plan gives an employee discretion, the employee is not a fiduciary when it makes decisions according to the plan's terms. *Noorily v. Thomas & Betts Corp.*, 188 F.3d 153, 158 (3d Cir. 1999). Thus, AIC Defendants did not satisfy the first prong of the *Teets* 2-prong test to be deemed a fiduciary.

Additionally, AOC simply repeated the instructions back to the plaintiff and thus did not make any unilateral action respecting the plan management without the plan or participants having an opportunity to reject. The plaintiff's investment instructions were never communicated to AIC, thus, there was no opportunity for AIC to act unilaterally or with discretion. Therefore, AIC Defendants do not satisfy the 2nd prong of the *Teets* test. ARK was merely providing ministerial services in accordance with § 404(c) of ERISA. A person or entity who performs only ministerial services or administrative functions within a framework of policies, rules, and procedures established by others is not an ERISA fiduciary. *Kyle Railways, Inc. v. Pac. Admin. Servs., Inc.*, 990 F.2d 513, 516–18 (9th Cir. 1993).

Making a decision in the exercise of a ministerial duty does not rise to the level of discretion required to be an ERISA fiduciary. *See Mertens,* 948 F.2d at 610;

Arizona State Carpenters Pension Tr. Fund v. Citibank (Arizona), 125 F.3d 715, 721–22 (9th Cir. 1997); *Pegram*, 530 U.S. at 225–26; *Baxter v. C.A. Muer Corp.,* 941 F.2d 451, 455 (6th Cir.1991) (plan administrator who processed claims in accordance with terms of the plan was not a fiduciary); *Anoka Orthopaedic Assocs., P.A. v. Lechner,* 910 F.2d 514, 517 (8th Cir. 1990) (attorney and accounting firm who performed ministerial tasks that did not entail discretionary authority or responsibility were not fiduciaries); *Reich*, 55 F.3d at 1049–50. AIC and ARK did not perform any actions that fall under either the ERISA definition of a fiduciary or the common law definition.

B. The legislature did not intend to expand the definition of a fiduciary under ERISA

The legislature created ERISA to ensure beneficiaries have safeguards and are treated with the best benefits. Under 29 U.S.C. § 1104 and Title I of ERISA, a beneficiary is also able to exercise control over their own account and no person is liable "for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control." 29 U.S.C. § 1104. Thus, the legislature was careful in its language of the statues to carve out its intent to not make employees liable as fiduciaries when beneficiaries were exercising control over their own account. ARK and AIC were merely the means for which Ms. Chen used to exercise control over her account. ARK simply translated exactly what Ms. Chen wanted over the phone and thus acted as a tool for her to exercise control over her own account. The function of ARK is simply ministerial in this sense and could be compared to the same function that Ms. Chen would use if she had made the same requirements by typing them in a computer website. ARK functioned merely as a computer would in being the messenger of Ms. Chen's wishes. A Department of Labor interpretive bulletin explains that a person without the power to make plan policies or interpretations but who performs purely ministerial functions, such as processing claims, applying plan eligibility rules, communicating with employees, and calculating benefits, is not a fiduciary under ERISA. *Baxter*, 941 F.2d at 455.

C. Expanding the definition of a fiduciary is detrimental to the purpose of ERISA

Naming AIC as fiduciaries under ERISA would expand the definition of a fiduciary beyond that which was intended in the creation of ERISA and would create serious implications for the courts. Expanding the definition further than intended by the legislature would open the floodgates to litigation in an already backed up court system. Additionally, by expanding the definition to include ARK and AIC, it will create difficulties for future employers to ever have employees who are not classified as fiduciaries, even if they are only performing simple ministerial type tasks and are not named as fiduciaries. This creates an extra burden on companies as they are always going to be liable and are less likely to want to engage in the market as record-keepers. Thus, it will create either higher costs for companies to conduct efficient plans or force employers to rely on more costly technology rather than hiring services.

Expanding the definition of a fiduciary beyond what the legislature intended under ERISA creates more difficulties to ensure greater protections for beneficiaries and is counter to the intention of ERISA. While it may be argued that failure to implement Plaintiff's instructions was a unilateral form of action, creating that analysis would create a slippery slope for courts because it would make an oversight a unilateral action. A unilateral action is commonly understood to include both thought and decision. Therefore, creating precedent that includes oversight as a unilateral action requires not only investigation into the mind person's mind, but also creates implications that would constitute all accidents and involuntary actions as a breach of fiduciary duties. This will deter employers from providing comprehensive employee benefit plans out of fear that human error will create a breach in fiduciary duty.

IV. Mail exercised its fiduciary responsibilities in all its actions regarding the Plan

The district court did not err in finding the complaint failed to plead with sufficient particularity that the Mail Defendants breached any fiduciary responsibilities under ERISA. When enacting ERISA, Congress intended to protect participants in employee benefit plans by establishing standard conduct and responsibilities for fiduciaries of the plans. *Johnson v. Couturier,* 572 F.3d 1067, 1082 (9th Cir. 2009). Within the responsibilities of a fiduciary is the duties of loyalty, prudence, to diversify investments, and the duty to act in accordance with the governing plan documents and instruments. 29 U.S.C. § 1104. Under the duty of prudence lies the prudent man standard of care to act in a like capacity as a man in a similar situation would use. Mail Defendants upheld this standard by carefully picking a new record-keeper and continuing to monitor them. R at 1–2. Creating a higher standard of prudence than that specified under ERISA and by the common law would create serious implications on the courts and how future fiduciaries exercise their responsibilities.

Under ERISA § 404(a), plan fiduciaries are held to detailed duties and responsibilities, which include "the proper management, administration and investment of plan assets, the maintenance of proper records, the disclosure of specific information, and the avoidance of conflicts of interest." *Mertens*, 508 U.S. at 251. These duties and responsibilities "draw much of their content from the common law of trusts, the law that governed most benefit plans before ERISA's enactment." *Varity Corp.*, 516 U.S. at 496. Therefore, the common law of trusts will inform, but will not necessarily determine an effort to interpret ERISA's fiduciary duties. *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 417 (4th Cir. 2007). The first is the duty of loyalty stating that "all decisions regarding an ERISA plan 'must be made with an eye single to the interests of the participants and beneficiaries." *Berlin v. Michigan Bell Tele. Co.*, 858 F.2d 1154, 1162 (6th Cir. 1988). The second duty imposed under ERISA is the "prudent man standard of care" obligation, requiring a fiduciary to act "as a prudent person would act in a similar situation." *Id.* Finally, an ERISA fiduciary must "'act for the exclusive purpose'" of providing benefits to plan beneficiaries. 29 U.S.C. § 1104(a)(1); *Chao v. Hall Holding Co.*, 285 F.3d 415, 426 (6th Cir. 2002).

A. Mail Defendants upheld their duties of loyalty and prudence based on the facts

To sufficiently allege that Mail Defendants failed to fulfill their duties as fiduciaries, Ms. Chen must allege at the very least facts that demonstrate the defendants (1) failed to evaluate their appointees performance of have a system for doing so; (2) failed to monitor and a have a prudent process in place for evaluating the Plan's administrative fees and ensuring the fees were competitive; and (3) failed to remove appointees whose performance was inadequate. *See Marshall v. Northrop Grumman Corp.*, No. CV 16-06794-AB (JCx), 2017 WL 2930839 (C.D. Cal. Jan. 30, 2017). Therefore, Ms. Chen must show that the Mail Defendants failed to fulfill their duty of loyalty and prudence, which is not apparent based on the facts.

ERISA requires that a fiduciary shall act "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). Additionally, a fiduciary "shall discharge his duties ... solely in the interest of the participants and beneficiaries." *Id.* at (a)(1). When evaluating these duties, "the court focuses not only on the merits of [a] transaction, but also on the thoroughness of the investigation into the merits of [that] transaction." *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir.1996); *DiFelice*, 497 F.3d at 417–18. The duty of prudence involves a continuing duty to monitor investments and remove imprudent ones under trust law. *See Tibble v. Edison Int'l*, 729 F.3d 1110 (9th Cir. 2013).

Based on the facts, Mail Defendants upheld the standard of prudence. The language of the statue is specific that the fiduciary must exercise care, skill, prudence and diligence of a person in a similar capacity would act in the interest of their beneficiary. 29 U.S.C. § 1104. Instead of retaining a record-keeper they had for fifteen years, the Mail was concerned in the fees it was paying and asked for bids from other record keepers. R. at 1. The Mail was careful in searching for a different record-keeper with better fees for their beneficiaries, instead of taking the easier route of maintaining a record-keeper they had maintained for years. Mail exercised prudence by seeking to remove an imprudent record-keeper, as is required under trust law. In discussing the duty of prudence, the Ninth Circuit stated that "cost-conscious management is fundamental to prudence in the investment function and should be applied not only in making investment but also in monitoring and reviewing investments." *Tibble*, 729 F.3d at 1198. The duty of prudence "focuses on a fiduciary's conduct in arriving at an investment decision, not on its results, and asks whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment." *White v. Chevron Corp.*, No. 16–CV–0793–PJH, 2016 WL 4502808, at *5 (N.D. Cal. Aug. 29, 2016) (citing *Pension Benefit Guar. Corp. ex rel St. Vincent v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705, 716 (2d Cir. 2012)); *Marshall*, No. CV 16-06794-AB (JCx) at *10. Any prudent fiduciary in Mail's position would have continued to look for the best record-keeper if concerned about fees of the previous one.

After soliciting bids, ARK was among the low bidders and the Administrative Committee hired a financial advisor to determine whether ARK provided competent services. R. at 1. Mail did not simply pick the lowest bid. They exercised the care, skill, prudence, and diligence required under the statue by making careful and thoughtful decisions in the bidding process. They examined the financial aspects and were diligent and prudent in making sure to get a financial advisor to ensure ARK was also a competent record-keeper. "A fiduciary has an obligation to use appropriate methods to investigate the merits of removing a plan option and at a minimum to engage in an independent investigation of their options to ensure that they act in the best interests of the plan beneficiaries." *Leigh v. Engle,* 727 F.2d 113, 125–26 (7th Cir.1984); *DiFelice*, 497 F.3d at 420; *Howard*, 100 F.3d at 1488–89. Mail met their duty by seeking out and hiring an independent advisor to review ARK's competence. They went beyond the minimum standard by not only seeking bids but by also evaluating them diligently. They conducted a thorough investigation of options as they further continued to monitor ARK, after hiring them, by maintaining a record of complaints from participants over the years and finding that the complaints were no greater than those from their previous record-keeper. R. at 2. Prudence is defined as "skill and good judgement in the use of resources" and "the ability to govern and discipline oneself by the use of reason." Prudence, Merriam-Webster, (11th ed. 2016). Mail used its judgement as any other fiduciary in its position would and relied on not only numbers, but diligently investigated its options and made the decision to hire ARK based on its overall evaluation. Mail made every effort to ensure that the beneficiaries were not only being served better but also not at a higher risk, putting the interest of the beneficiaries first, as required under their duty of loyalty and prudence under ERISA.

Mail evaluated ARK holistically before hiring them, continued to monitor their work, and was quick to remove the previous record-keeper when necessary. Mail exercised its duty of loyalty and prudence diligently up to and through the complaint, as the Administrative Committee meets with ARK each year to review its work. Mail additionally monitored ARK during its strike period and found no reason for concern at any point.

B. Mail adhered to the legislative intent of the prudent man standard of care

The legislature was broad in its definition of the prudent man standard of care and the duties of fiduciaries. Congress expected the courts to interpret the prudent man rule (and the other fiduciary standards) bearing in mind the purpose of employee benefit plans under ERISA. *Varity Corp.*, 516 U.S. at 497. The Supreme Court has found that if a fiduciary using a prudent decision making process “could have” decided the defendant’s investment decision was a prudent one, then the defendant cannot be liable for a breach of the duty of prudence. *See Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 134 S. Ct. 2459, 189 L. Ed. 2d 457 (2014). Ms. Chen, in the Complaint and the brief, has not identified a viable alternative course of conduct that the either Mail or ARK could have done to not only have picked a record-keeper but to also monitor the fiduciaries named. Mail exercised prudence throughout its decision making and monitoring. Any fiduciary in the position of Mail could have made the same decisions for the benefit of the beneficiaries. Thus, to hold Mail liable for breaching a fiduciary duty would go against the legislature’s intention in writing the prudent man standard of care and the function of ERISA.

Courts have assessed a fiduciary's performance by looking at process rather than results, “focusing on a fiduciary's conduct in arriving at [a] ... decision ... and asking whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment.” *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 434 (3d Cir. 1996). A fiduciary's process and decision making must indicate loyalty, skill, and diligence expected of another fiduciary in the same position. *Sweda v. Univ. of Pennsylvania*, 923 F.3d 320, 329 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 2565, 206 L. Ed. 2d 496 (2020); *See* Marshall, No. CV 16-06794-AB (JCx) at *11. Circuit Courts have also found that ERISA fiduciaries “have a duty to seek ... the lowest level of risk and cost for a particular level of expected return--or, inversely, the highest return for a given level of risk and cost.” *Tatum v. RJR Pension Inv. Comm.*, 855 F.3d 553, 566 (4th Cir. 2017). Each of these encompass the legislatures intent for fiduciaries to keep in mind the purpose of ERISA and its beneficiaries in exercising their duties. Examining Mail’s actions leading up to its decision of hiring ARK, as they solicited bids, investigated ARK, monitored ARK, and sought lower costs, they have acted just as the legislature intended a prudent fiduciary to act.

C. A finding that Mail breached their duties of loyalty and prudence will create negative implications on how future fiduciaries conduct themselves

To find Mail breached a duty of prudence will create precedent that soliciting bids, hiring advisors, and monitoring complaints is not enough to be held as prudent under ERISA. This will open the floodgates to litigation because it would alter the definition of prudence in courts and create a need for more time in an already backed up court system. Additionally, this will impose costs on fiduciaries to create even more systems to monitor and hire more advisors as the current process Mail used would not be sufficient. Fiduciaries will be forced to spend more money and time, leading to greater costs and a decrease in efficiency in the long run on the beneficiaries of the plans, counter to the purpose of ERISA.

Furthermore, fiduciaries will be deterred from using advisors and conducting thorough investigations as it will no longer be sufficient. This decision would create a higher standard of prudence that is less attainable and riskier for fiduciaries as they will not know when they have made sufficient efforts to satisfy their duties. In return, this could deter fiduciaries from doing any sort of investigation and decision making at all, as they will still be deemed to have breached their fiduciary duties even after exercising care. This could create fiduciaries who either never make changes in fear that they will not do enough to reach their fiduciary duties or fiduciaries who act purposefully negligent as they believe they will never reach the appropriate standard of prudence. Creating this precedent for the courts will put beneficiaries at higher risk of harm from their fiduciaries and, therefore, would be counter to the purpose of ERISA.

Conclusion

The court should uphold the district court's summary judgment in favor of the New York Mail Defendants and AIC Defendants.