CIVIL ACTION NO.: 22-cv-299-TCF

IN THE UNITED STATES COURT OF APPEALS
FOR THE 13th 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

Defendant-Appellee.

On Appeal from the District Court for
The District of Columbia
CIVIL ACTION NO.: 22-cv-299-TCF
Hon. Judge Farnam

BRIEF FOR THE PLAINTIFF-APPELLANT

Team 3

Attorneys for Appellant
Renita Connolly

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JURISDICTIONAL STATEMENT

Plaintiff brought suit under 29 U.S.C. § 1132(a)(2). The district court had exclusive subject-matter jurisdiction pursuant to 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331.

On September 30, 2022, the district court entered a final judgment dismissing Plaintiff's claims with prejudice. Plaintiff filed a timely notice of appeal. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in holding that Plaintiff is barred by the three-year statute of limitations set out by ERISA despite Plaintiff having no actual knowledge of the DRU's actions that violated its fiduciary duty of prudence.

2. Whether the district court erred in holding that under ERISA, DRU is not a fiduciary notwithstanding having discretionary control over the assets of Ms. Connolly's plan and violating its duty of prudence to Ms. Connolly by relying on the determinations of a supercomputer rather than a reasonably prudent expert and by prioritizing cost savings over the interests of the beneficiary.

STATEMENT OF THE CASE

A. Proceedings Below

On April 14, 2022, Renita Connolly ("Ms. Connolly") filed a civil action in the United States District Court for the District of Columbia against the National Laborers Retirement Savings Fund, Board of Trustees of the National Laborers Retirement Savings Fund, Joe Schlitz and Letitia Beck, and DROs-я-Us LLC.[1] This action alleged that each of the Defendants is a fiduciary under ERISA, that the Defendants each had an obligation to prudently administer the Fund, that the Defendants had an obligation to prudently implement and follow the terms of qualified domestic relations orders ("QDROs"), and that each of the Defendants failed in their

[1] R. at 9, p. 43.

duties to prudently administer the Fund and implement the terms of Ms. Connolly's QDRO.[2]

The Defendants each filed motions to dismiss the lawsuit.[3] District Court Judge Thomas C. Farnam granted the Defendants' motions and dismissed Ms. Connolly's suit.[4] Ms. Connolly subsequently appealed the Opinion and Judgment to the United States Court of Appeals for the Thirteenth Circuit. After filing the Notice of Appeal noted above, Ms. Connolly and the Fund Defendants entered into a Partial Global Settlement of the lawsuit which preserves for appeal only the two issues presented above, which are against DRU only.

B. Statement of Facts

Ms. Connolly works as a journeyman electrician in Washington D.C. for R.A. Gray Electric Company.[5] Through her employer, she participates in the National Laborers Retirement Savings Fund ("the Fund"), which provides pension benefits to its 1,321 participants.[6] The Fund contracts with DROs-я-Us LLC ("DRU"), for DRU to provide processing and qualification determination services for domestic relations orders ("DROs") with respect to pension plans.[7]

On February 21, 2017, Ms. Connolly was granted a judgment of absolute divorce from her ex-wife, Mary Obergefell.[8] The judgment also granted Ms. Obergefell a 15% interest in Ms. Connolly's retirement savings.[9] On September 27, 2017, the Superior Court of the District of Columbia entered a DRO laying out the terms under which a Plan Administrator may determine the valuation of Ms. Obergefell's interest in Ms. Connolly's assets with the Fund.[10] The DRO

[2] R. at 9-10, p. 43.
[3] R. at 10, p. 45.
[4] R. at 18.
[5] R. at 2.
[6] *Id*.
[7] *Id*.
[8] R. at 3.
[9] *Id*.
[10] *Id*.

stated that Ms. Connolly's account balance as of the date of the order.[11] The value of Ms. Connolly's account balance as of the date of the order, September 27, 2017, was $330,000.[12]

On October 15, 2017, Ms. Connolly's lawyer, Mr. Hasty, sent a court certified copy of the DRO to the Fund who responded by informing him that DRO submissions must be submitted online to DRU.[13] Therefore, on November 30, 2017, Mr. Hasty submitted the court certified copy of the DRO to DRU, and received an automated response email that thanked him for the submission and encouraged him to reach out with any questions, ensuring a prompt response.[14] The automated email also contained attachments including a 112-page document outlining the Fund's QDRO procedures, a document representing a model QDRO from the fund, and a document of Frequently Asked Questions.[15] This automated message was the only contact Ms. Connolly's lawyer received from the Fund.

One month later, having not heard any response from the Fund concerning the DRO submission, Mr. Hasty decided he would resubmit the order.[16] On January 4, 2018, Mr. Hasty uploaded a second court certified copy of the DRO, identical in every way to the first DRO save for the date in the upper right-hand corner, which stated January 3, 2018.[17] Again, Mr. Hasty received the exact same automated response email, and no further correspondence.[18] Mr. Hasty resubmitted a third and fourth copy of the order which were dated March, 2, 2018 and May 2, 2018 respectively.[19] Mr. Hasty received no correspondence from DRU at any point between

[11] R. at 4.
[12] R. at 8.
[13] R. at 4-5.
[14] R. at 5.
[15] *Id.*
[16] R. at 6.
[17] *Id.*
[18] *Id.*
[19] R. at 6–7

November 30, 2017 and November 1, 2018, other than the automated "Thank You" emails.[20]

On November 1, 2018, DRU notified Ms. Connolly, Ms. Obergefell, and Mr. Hasty that "[t]he Fund has completed its review of the court certified domestic relations order . . . [w]e have determined that the Order is a qualified domestic relations order" and that Ms. Obergefell would receive the appropriate benefits.[21] The determination letter also stated that the determination that the Order is qualified could be appealed.[22] "Any party adversely affected by the Fund's determination may appeal it by submitting [a] written request for review within 45 days of the date of the determination."[23] The QDRO determination letter was not appealed.[24] Ms. Connolly received identical correspondence from DRU on January 3, 2019, February 1, 2019, and April 15, 2019.[25]

On September 27, 2018, without notification to Ms. Connolly, the Fund implemented the terms of the QDRO and transferred 15% of Ms. Connolly's account ($49,500) to Ms. Obergefell.[26] For each subsequent determination letter sent by DRU, the Fund transferred another 15% from Ms. Connolly's retirement account to Ms. Obergefell.[27] Between September 27, 2018 and April 1, 2019, DRU had authorized the transfer of a total of $138,700.88 from Ms. Connolly's account.[28]

In April of 2020, Ms. Connolly fell severely ill for a year and a half.[29] As a result, in September of 2021, Ms. Connolly made the decision to retire on March 31, 2022.[30] Upon her

[20] R. at 5-7.
[21] R. at 7
[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] R. at 8-9.
[26] R. at 8.
[27] R. at 8-9.
[28] *Id*.
[29] R. at 9.
[30] *Id*.

retirement, Ms. Connolly received her quarterly account statement from the Fund and discovered that her retirement account was significantly lower than she had expected.[31]

On April 8, 2022, Ms. Connolly contacted the Fund demanding they return the money taken from the second, third, and fourth QDRO's back into her account.[32] The Fund Administrators responded on April 13, 2022, delineating that all actions taken with respect to the QDRO's were legal and that they would not restore her account balance to what it would be if the second, third and fourth DROs had not been qualified.[33] On April 14, 2022, Ms. Connolly brought a civil action against the Fund Defendants and DRU under the legal theory that Defendants had failed in their fiduciary duty under ERISA, and that she was entitled to the award of lost benefits and equitable relief.[34]

SUMMARY OF ARGUMENT

This Court should reverse the district court's dismissal of Ms. Connolly's claims under ERISA because as a Plan fiduciary, DRU violated its duty of prudence to Ms. Connolly and the Plan by negligently qualifying four identical domestic relations orders and authorizing the divestment of $138,700.88 from the plaintiff's retirement account. Ms. Connolly's claims were improperly dismissed by the district court because she lacked actual knowledge of DRU's breach of fiduciary duties prior to April 8, 2022, and thus fell within the six-year statute of limitations set by ERISA. Furthermore, Ms. Connolly is not barred from bringing her claims against DRU because she can avail herself of the continuing violation doctrine.

Additionally, this Court should find that DRU is a Plan fiduciary pursuant to ERISA and is therefore liable for losses suffered by Ms. Connolly due to DRU's failure to act prudently in

[31] R. at 9.
[32] *Id.*
[33] *Id.*
[34] *Id.*

the interests of the Plan and its beneficiaries. DRU is a functional fiduciary to the Plan because it had discretionary authority and control over Ms. Connolly's Plan assets. DRU was contracted by the Plan to use its discretion to qualify domestic relations orders and took unilateral action respecting the management and disbursement of Ms. Connolly's assets. Ms. Connolly lacked the opportunity to reject DRU's QDRO determinations, resulting in three erroneous transfers of 15% of her account balance to her ex-wife. Each of these factors taken alone would be enough to establish that DRU was a Plan fiduciary; taken together these facts demonstrate that DRU was undoubtedly a fiduciary to the Plan and Ms. Connolly.

Because DRU is a Plan fiduciary, the trial court erred in holding that it is not liable to Ms. Connolly for its breach of the duty of prudence under ERISA. DRU did not discharge its responsibility with the care, skill, prudence, and diligence that a prudent person acting in a like capacity familiar with such matters would use. Instead, DRU negligently relied on computer automated determinations and prioritized cost savings over the interests of the Plan beneficiaries. DRU acted unreasonably in qualifying four identical DROs and authorizing the withdrawal of $138,700.88 from Ms. Connolly's retirement account. Accordingly, Ms. Connolly's claims were improperly dismissed and DRU should be held liable for its negligence and the losses suffered by the Appellant.

STANDARD OF REVIEW

The district court's grant of a Rule 12(b)(6) motion is reviewed de novo by this court.[35] This court should accept the allegations of the complaint as true and construe all facts and inferences in favor of the plaintiff.[36] The lower court's motion to dismiss should not be affirmed

[35] *Solers, Inc. v. Doe*, 977 A.2d 941, 947 (D.C. 2009).
[36] *Solers*, 977 A.2d at 947 (D.C. 2009) (quoting *In re Estate of Curseen*, 890 A.2d 191,196 (D.C. 2006)).

unless the plaintiff can in no way prove their set of facts supporting her claim for relief.[37]

ARGUMENT

1. MS. CONNOLLY'S CLAIMS WERE IMPROPERLY DISMISSED BY THE DISTRICT COURT BECAUSE THEY FELL WITHIN THE STATUTE OF LIMITATIONS SET BY ERISA AND BECAUSE SHE CAN AVAIL HERSELF OF THE CONTINUING VIOLATION DOCTRINE.

    a. <u>The district court incorrectly applied Supreme Court precedent and erroneously held that Ms. Connolly had actual knowledge of DRU's breach of fiduciary duties prior to April 8, 2022.</u>

Because DRU can only allege facts demonstrating that Ms. Connolly reasonably could have or should have known of DRU's breach of fiduciary duty, the defendant fails to establish any actual knowledge on behalf of Ms. Connolly prior to April 8, 2022. Under § 1113(2) of the ERISA statute, a plaintiff's claims are barred by a three-year statute of limitations when a plaintiff has actual knowledge of the breach or violation of a fiduciary's responsibility, duty, or obligation.[38] If a plaintiff does not have actual knowledge of the alleged fiduciary breaches, § 1113(2) does not apply and the statute of limitations is six years.[39] In a Supreme Court opinion analyzing the actual knowledge requirement of § 1113(2), the court held that the usage of "actual" in the statute means plaintiff's knowledge must be more than "potential, possible, virtual, conceivable, theoretical, hypothetical, or nominal."[40] The test for differentiating actual knowledge from other types of knowledge "requires more than evidence of disclosure alone."[41] While disclosure of information is relevant in judging whether a plaintiff gained knowledge of the information, to satisfy §1113(2)'s "actual knowledge" requirement, the plaintiff must in fact

[37] *Directv, Inc., v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007).
[38] 29 U.S.C. § 1113(2); *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 776 (2020) ("When Congress passed ERISA, the word 'actual' meant what it means today: 'existing in fact or reality,' as did the word 'knowledge,' which meant and still means 'the fact or condition of being aware of something.' Thus, to have actual knowledge of a piece of information, one must in fact be aware of it.") (internal citations omitted).
[39] 29 U.S.C. § 1113(1).
[40] *Sulyma*, 140 S. Ct. at 776.
[41] *Id*.

have become aware of that information.[42] The Defendant can only establish that the information was disclosed to Ms. Connolly, and not that she had actual knowledge—prior to April 8, 2022—that DRU authorized three erroneous withdrawals from her retirement account. Under the Supreme Court's understanding of the actual knowledge standard of § 1113(2), the three-year statute of limitations for the Appellant's claims only began to run when she became aware, on April 8, 2022, of the three erroneous withdrawals from her bank account authorized by DRU.

The defendant's theory that the plaintiff could reasonably have expected to gain knowledge of the alleged breach is unavailing because Congress explicitly abrogated the constructive knowledge clause in U.S.C. § 1113(2).[43] There are other ERISA limitations provisions where Congress used language that explicitly encompasses both what a plaintiff actually knows and what he reasonably could know.[44] As such, the §1113(2) three-year statute of limitations only begins to run "when a plaintiff actually is aware of the relevant facts, not when he should be. And a given plaintiff will not necessarily be aware of all facts disclosed to him."[45] The constructive knowledge theory imputes knowledge to a person who fails to learn something that a reasonably diligent person would have learned.[46] The defendant's argument that Ms. Connolly should have reasonably known about the withdrawals from her retirement account fits squarely within the constructive knowledge theory, which is impermissible under both the ERISA statute and Supreme Court precedent.[47]

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[42] *Sulyma*, 140 S. Ct. at 776.
[43] *Id*. at 778. An earlier version of the ERISA statute used language barring a plaintiff's claims if they should have known of the breach within three years. *Id*. This language is no longer included in the current version of the statute. *Id*.
[44] Multiple ERISA provisions contain alternate 6-year and 3-year limitations periods, with the 6-year period beginning at "the date on which the cause of action arose" and the 3-year period starting at "the earliest date on which the plaintiff acquired *or should have acquired* actual knowledge of the existence of such cause of action." 29 U.S.C. §§1303(e)(6), (f)(5) (emphasis added); *accord*, §§1370(f)(1)–(2), 1451(f)(1)–(2).
[45] *Sulyma*, 140 S. Ct. at 778.
[46] *Id*. at 772.
[47] *Id*. at 778. *See also Merck & Co. v. Reynolds*, 559 U.S. 633, 646 (2010).

Ms. Connolly would be said to have constructive knowledge of DRU's actions if a court found that she reasonably should have known the status of her account balance because she regularly received quarterly statements. But a court cannot find that she had actual knowledge of DRU's actions because there is no evidence in the record to demonstrate that Ms. Connolly read or reviewed any of the quarterly statements prior to April 2022. Additionally, there is no evidence in the record to support a conclusion that Ms. Connolly was willfully blind or purposefully ignorant to this information.[48] Nor does the record show that Ms. Connolly understood that the QDRO determination letters from DRU led to three additional withdrawals from her retirement account.[49] In fact, the district court stated that it was unsure "whether Plaintiff actually knew that ***multiple*** [QDROs] had been qualified."[50]

Lastly, it is imperative to note that the district court found that Ms. Connolly lacked actual knowledge and incorrectly applied the statute of limitations in this case. In its opinion, the district court concluded that:

> The generic form-letters that the DRU and the Fund issued to Plaintiff are utterly lacking in important details about the DRO that had been qualified. Although we are sure Plaintiff actually knew that ***an order*** had been qualified, we are not sure Plaintiff actually knew that ***multiple orders*** had been qualified.[51]

This reasoning clearly demonstrates the district court's misconception of the actual knowledge requirement under § 1113(2) of ERISA. If the court found that Ms. Connolly did not have actual knowledge of DRU's violations, then the three-year statute of limitations would not begin to run, and Ms. Connolly could bring her claims under the six-year statute of limitations.

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[48] Evidence of "willful blindness" supports a finding of actual knowledge. Cf. *Global-Tech Appliances, Inc. v. SEB S. A.*, 563 U. S. 754, 769 (2011). Ms. Connolly was extremely ill between April 2020 and September 30, 2021. R. at 9, p. 38.
[49] *See generally* Record.
[50] R. at 15, p. 2.d.
[51] R. at 15, p. 2.d.

b. Ms. Connolly is not barred from bringing this claim under the continuing violation doctrine.

The district court incorrectly dismissed the plaintiff's claims under the continuing violation doctrine reasoning that this doctrine has no precedent in the ERISA context when in fact this doctrine has been upheld in the ERISA context by the Supreme Court. The "continuing violation" doctrine is "an exception to the ordinary rule regarding the commencement of a statute of limitations," which "allows for tolling based on continuing unlawful acts."[52] In a unanimous Supreme Court decision, the court vacated and remanded the Ninth Circuit's dismissal in *Tibble v. Edison Int'l,*[53] of a breach of fiduciary duty claim as time-barred under ERISA's fiduciary statute of limitations provision.[54] The Supreme Court in *Tibble* accepted a continuing violation theory of liability, which means that ERISA's statute of limitations will remain open while a fiduciary continues to breach its duties.[55]

The defendant argues that the doctrine essentially reads the "actual knowledge" standard out of § 1113(2). The defendant, and the district court, supported this rationale by citing *Phillips v. Alaska Hotel and Restaurant Employees Pension Fund*, which held that where a plaintiff has actual knowledge of a breach in a series of breaches of the same character, the § 1113(2) limitations period does not begin anew with each related breach.[56] The court in *Phillips* was concerned that the continuing violation doctrine would essentially "read the actual knowledge standard out of § 1113(2)."[57] However, *Phillips* was narrowed by the 9th Circuit in 2016 when the court held that "*Phillips* did not reject a continuing violation theory for the ERISA statute of

[52] *Norman v. Granson*, No. 18-4232, 2020 WL 3240900, at *2 (6th Cir. March 25, 2020); see also *Sharpe v. Cureton*, 319 F.3d 259, 267 (6th Cir. 2003) (explaining that under the continuing violation doctrine, the court can consider as timely all relevant violations "including those that would otherwise be time[-]barred").
[53] 729 F.3d 1110 (9th Cir. 2013), *rev'd*, 575 U.S. 523 (2015).
[54] *See Tibble v. Edison Int'l*, 575 U. S. 523, 530 (2015).
[55] *Id*.
[56] 944 F.2d 509 (9th Cir. 1991).
[57] *Id*. at 520.

limitations generally; it merely held that, for claims subject to § 1113(2), the earliest date of actual knowledge of a breach begins the limitations period, even if the breach continues."[58] The policy behind the statute of limitations is to ensure that a plaintiff does not "sit on her rights" and allow a series of related breaches to continue.[59] When a plaintiff has no actual knowledge of a breach of continuing duty, and § 1113(1) applies, *Phillips*' rationale against the continuing violation claim under § 1113(2) is no longer relevant. As established above, Ms. Connolly had no actual knowledge of DRU's breach of fiduciary duty. As a result, the continuing violation theory may apply, and Ms. Connolly's claims are not barred.

2. DRU IS A PLAN FIDUCIARY PURSUANT TO ERISA AND IS THEREFORE LIABLE FOR LOSSES SUFFERED BY MS. CONNOLLY AS A RESULT OF ITS FAILURE TO ACT PRUDENTLY IN THE INTERESTS OF THE PLAN AND ITS BENEFICIARIES.

DRU functioned as a fiduciary to the Plan under ERISA by controlling the disposition of Ms. Connolly's Plan assets and by using its discretion to qualify the four identical DROs. The threshold question in every case charging breach of an ERISA fiduciary duty is whether that person was acting as fiduciary.[60] Congress intended ERISA's definition of "fiduciary" to be broadly construed.[61] The ERISA statute provides that not only those named by a benefit plan are fiduciaries, but also those who

> (i) [e]xercise[] any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . or (iii) [] has any discretionary authority or discretionary responsibility in the administration of such plan…[62]

Additionally, ERISA provides that any provision in an agreement or instrument which purports

[58] *Tibble v. Edison Int'l (Tibble IV)*, 843 F.3d 1187, 1196 (9th Cir. 2016).
[59] *Id.*
[60] *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000).
[61] *John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank*, 510 U.S. 86, 96 (1993) ("Congress commodiously imposed fiduciary standards on persons whose actions affect the amount of benefits retirement plan participants will receive.").
[62] 29 U.S.C. § 1002(21)(A). *See also Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993).

to relieve a fiduciary from responsibility or liability for any obligation or duty is void.[63] DRU is not a fiduciary by name but rather a fiduciary by function because it had discretionary authority and control over the assets of Ms. Connolly's plan.

An entity's status as a fiduciary hinges not on whether it is named as such in a benefit plan, but on whether it "exercises discretionary control over the plan's management, administration, or assets."[64] DRU exercised control over the Plan assets in at least four different respects. First, DRU determined that 15% of Ms. Connolly's account should be paid out to the Alternate Payee on four separate occasions in its November 1, January 3, February 1, and April 1 letters.[65] Second, DRU directed the Fund Administrators to divest Ms. Connolly of 15% of her account.[66] Third, in the event of a determination appeal, DRU directed the Plaintiff to appeal the decision directly with it.[67] Finally, in its communication with the Plaintiff, DRU held itself out to be "The Fund" and that each of its determinations were made on behalf of and under the authority of "The Fund".[68] Because DRU had control over Ms. Connolly's assets in the above defined ways, DRU is a fiduciary to the Plan.

Additionally, the district court incorrectly applied the specific criteria established in *Teets v. Great-West Life & Annuity Ins. Co* when it found that DRU is not a fiduciary.[69] Under *Teets*, "a service-provider acts as a fiduciary: if (1) it "did not merely follow a specific contractual term set in an arm's-length negotiation' and (2) it 'took a unilateral action respecting plan management or assets without the plan or its participants having an opportunity to reject its

[63] 29 U.S.C. § 1110(a).
[64] *Mertens*, 508 U.S. at 252.
[65] R. at 8-9, pp. 33-37.
[66] *Id*.
[67] R. at 7, p. 32.
[68] R. at 7–9, pp. 32–37.
[69] 921 F.3d 1232, 1238 (10th Cir. 2019).

decision.'"[70] DRU satisfies both criteria set out in the two-part test of *Teets* because its "specified contractual term" required DRU to use its discretion in making QDRO determinations and because Ms. Connolly did not have the opportunity to reject DRU's determinations.

a. DRU is a Plan fiduciary because it did not merely follow a specific contractual term set in an arm's-length negotiation.

DRU is necessarily a fiduciary because it did not "merely follow a specified contractual term" under the Plan when it used its discretion to qualify Ms. Connolly's DROs. In a similar case where the 8th Circuit held that a service provider is a fiduciary under ERISA, the court reasoned that a service provider may still qualify as a functional fiduciary even if the discretionary action at issue is authorized under the contract.[71] *Rozo* found that the defendant was a fiduciary because although the contract between the plan and the defendant specified that the provider would set the return rate for the plan, the provider was required to use its discretion to determine that rate.[72] Following the precedent set in *Rozo*, DRU is a fiduciary to the Plan because the actions at issue required DRU to use discretion authority.

DRU was contracted to provide "determinations on the qualified status of all domestic relations orders"[73] which required discretionary decision-making to determine the status of all DROs. There were no contract terms between DRU and the Plan that specified how DRU should qualify DROs.[74] Instead, DRU was specifically hired to use its discretion and expertise to determine whether each DRO it received was qualified.[75] The terms of the service agreement only provided broad guidelines as to how DRU should fulfill its duties under the contract.[76] Each

[70] *Rozo v. Principal Life Ins. Co.*, 949 F. 3d 1071, 1073 (8th Cir 2020) (quoting *Teets v. Great-West Life & Annuity Ins. Co.*, 921 F.3d 1200 (10th Cir. 2019)).
[71] *Id*. at 1074.
[72] *Id.*
[73] R. at 3, p. 11.
[74] *Id.*
[75] *Id.*
[76] *Id.*

time that DRU qualified Ms. Connolly's DRO, it was acting within its own discretion and was not merely following a specific contractual term set in an arm's-length contract. Because DRU's actions were discretionary, DRU is a fiduciary to the Plan and is liable for any losses suffered by Ms. Connolly resulting from its determinations.

b. DRU is a Plan fiduciary because it took unilateral action respecting plan management and lacked the opportunity to reject DRU's decision as required by *Teets*.

The second part of the *Teets* test states that a party is a fiduciary if it "took a unilateral action respecting plan management or assets without the plan or its participants having an opportunity to reject its decision."[77] The Defendant argues that because Ms. Connolly had an opportunity to appeal the QDRO determinations it is not a fiduciary under the Plan. However, this Court should be wary of the defendant's sleight of hand in attempting to mask the difference between an opportunity to appeal and an opportunity to reject.

To reject something means to "refuse to take, agree to, accede to, use, believe, etc."[78] A party who rejects a decision chooses to be free from its terms and refuses to be bound by the terms set forth. In contrast, a party who appeals a decision is bound by the outcome of such an appeal regardless of whether the party accepts the terms therein. Ms. Connolly was never in a position to reject the determinations made by DRU but only to appeal them. Because she was bound by the decisions DRU and the Plan's administrators, and would be bound by the results of any appeal, she had no opportunity to reject the decisions of DRU. As such, DRU satisfies the second step in the *Teets* test and is a plan fiduciary.

3. BECAUSE DRU IS A PLAN FIDUCIARY, THE DISTRICT COURT ERRED IN HOLDING THAT DRU IS NOT LIABLE TO MS. CONNOLLY FOR ITS BREACH OF THE DUTY OF PRUDENCE UNDER ERISA.

[77] *Rozo*, 949 F.3d at 1073 (quoting *Teets*, 921 F.3d).
[78] *Reject*, Webster's New World College Dictionary (4th ed. 2008).

The district court incorrectly insisted that DRU was unable to take action because a "QDRO enquiry is relatively discrete, given the specific and objective criteria for a domestic relations order that qualifies as a QDRO."[79] The precedent that the court relies on, *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, fails to distinguish how a plan administrator should enforce a qualified DRO with how a service provider should initially go about qualifying the DRO.[80] Additionally, the facts in *Kennedy* are distinguishable from those in our case. The issue in *Kennedy* was whether a plan administrator should look to documents outside of the DRO to determine whether it should pay benefits to a plan participant's designated beneficiary.[81] The designated beneficiary in *Kennedy* had waived her right to the benefits in a non-QDRO divorce decree that was outside the scope of the QDRO.[82] Compare that to the facts in Ms. Connolly's case, where DRU was provided four identical DROs signed by the same judge, on the same date, and provided the exact same terms.[83] DRU required no external documentation to determine that the four DROs provided by Ms. Connolly's attorney all specified the same terms and were in fact the same order.

Because DRU failed to scrutinize the submitted DROs closely enough to see that they were copies of the same order, DRU has breached its duty of care or prudence to the plan. ERISA requires fiduciaries to discharge their duties with "the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like

[79] *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 301–302 (2009). See also, *Brown v. Continental*, 647 F.3d 221 (5th Cir. 2011).
[80] 555 U.S. 285, 301–302 (2009).
[81] *Id.*
[82] *Id*. at 298.
[83] R. at 18, p. 6.b. The four DROs that DRU received from Ms. Connolly's attorney were completely identical except for the dates stamped in the upper right-hand corner noting what day the documents were retrieved from the Superior Court.

aims."[84] Courts have found that ERISA demands fiduciaries act with the "care, skill, prudence, and diligence under the circumstances" not of a lay person, but of one experienced and knowledgeable with a plan, and they must act exclusively in the interest of the beneficiaries.[85] DRU breached its fiduciary duty of prudence by relying on the determinations of a supercomputer, rather than a reasonably prudent expert in the field, and by prioritizing cost savings over the interests of the beneficiary.

Additionally, DRU breached its fiduciary duty of prudence by negligently relying on the determinations of a supercomputer, rather than a reasonably prudent expert in the field. The district court failed to address how DRU's reliance on a supercomputer program built to expedite the QDRO process could constitute a breach in its duty to act. Courts faced with cases where a party relies on information provided by a computer to make determinations have consistently held that a reasonable jury could find this to be negligent and a breach of the duty of care.[86] According to a press release that Mr. Rutledge issued on January 2, 2016, DRU "leverages the power of super computers and law to streamline processing of QDROs and achieve cost savings never before seen."[87] The pattern of automated communications that Ms. Connolly's attorney received, in conjunction with the press release touting the usage of supercomputers to expedite the process of QDRO determinations leads a reasonable person to question whether DRU can meet the prudent man standard acting in a like capacity and familiar with such matters.

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[84] 29 U.S.C. § 1104(a)(1)(B).
[85] *Tibble*, 575 U.S. at 528 (citing 29 U.S.C. § 1104(a)(1)(B), 29 U.S.C. § 1104(a)(1)).
[86] See *Gulf Life Ins. Co. v. Folsom*, 806 F.2d 225, 229-30 (11th Cir. 1986) (holding that a jury issue exists as to whether the plaintiff was negligent and acted without reasonable prudence in relying solely on its computer for information related to the defendant's insurance policy); See also, *Souran v. Travelers Ins. Co.*, 982 F.2d 1497, 1506 (11th Cir. 1993) (holding that a reasonable jury could find that the Defendant's failure to inquire beyond the information provided the computer could constitute negligence); See also, *Lewis v. Allstate Ins. Co.*, No. 3:15-cv-8074-HRH, 2016 U.S. Dist. LEXIS 134810, at *19 (D. Ariz. Sep. 28, 2016) (denying defendant's motion for summary judgment as to plaintiff's negligence claim. Court found under the facts of the case that it may have been negligent for defendant to rely solely on its computer system to determine policy limits).
[87] R. at 2, p. 6.

Lastly, DRU breached its fiduciary duty of loyalty by prioritizing cost savings over the interests of the beneficiary. One of ERISA's primary purposes is to protect the interests of participants and beneficiaries by establishing standards of conduct, responsibility, and obligation for fiduciaries and providing for appropriate remedies and ready access to the Federal courts.[88] To further this aim, ERISA requires fiduciaries to discharge their duties "solely in the interest of the participants and beneficiaries."[89] In its press release, DRU touted that its use of supercomputers to process QDROs would streamline the process and "achieve cost savings never before seen."[90]

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court Order and Judgment in its entirety and find that Ms. Connolly's claims were properly filed within the statute of limitations and that DRU is a fiduciary under ERISA and liable to both the Plan and Ms. Connolly for any losses suffered.

[88] *Varity Corp. v. Howe*, 516 U.S. 489 (1996).
[89] 29 U.S.C. § 1104(a)(1).
[90] R. at 2, p. A.6.