IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HEIDE K. BARTNETT, Plaintiff, v. ABBOTT LABORATORIES, MARLON SULLIVAN and ALIGHT SOLUTIONS, LLC, Defendants.	)	Case No. 20 CV 2127 Hon. Thomas M. Durkin

ABBOTT DEFENDANTS' MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS AMENDED COMPLAINT

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Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants Abbott Laboratories ("Abbott") and Marlon Sullivan ("Sullivan") (collectively the "Abbott Defendants"), by and through their attorneys, move this Court to dismiss Plaintiff Heide Bartnett's ("Bartnett") claims against them in the Amended Complaint with prejudice.

INTRODUCTION

In its October 2, 2020 Memorandum Order and Opinion (Dkt. 52) (the "Order"), the Court granted Abbott and Sullivan's motion to dismiss Bartnett's breach of fiduciary duty claims against them under Section 502(a)(2) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq*. The Court found that Bartnett failed to state a claim that Abbott was a functional fiduciary under ERISA, or that Sullivan breached any fiduciary duty owed to her. *See* Dkt. 52 at 9-12.

Bartnett has now filed an Amended Complaint attempting to bolster her deficient allegations against Abbott and Sullivan, but review of the new allegations reveals that Bartnett has once again failed to identify any facts that support her claims. Instead, Bartnett includes allegations of what she claims are "prior incidents" of "unauthorized distributions" by Defendant Alight Solutions, LLC ("Alight"). Am. Compl. (Dkt. 54) ¶¶ 50-62. Of course, the mere fact that a company the size of Alight, undertaking hundreds of millions of HR and benefits transactions per year, has experienced isolated prior incidents cannot establish a claim for imprudent hiring—such a rule leaves no contractors left to hire. But even if that were sufficient, Bartnett's new allegations still would not support a claim in this case because (a) most of the alleged "incidents" do not involve unauthorized distributions, and (b) the two that do were publicly disclosed only after Abbott had renewed its contract with Alight, and *after* the theft of Bartnett's funds. As a consequence, these new allegations have little to nothing to do with the current dispute, and are

certainly not sufficient to sustain breach of fiduciary duty claims against Abbott or Sullivan. Bartnett's claims against these Defendants should therefore be dismissed, this time with prejudice.

BACKGROUND

As recounted in the Court's Order, Bartnett is a former Abbott employee who had $245,000 stolen from her account in the Abbott Laboratories Stock Retirement Plan (the "Plan") by an identity thief in January 2019.[1] Dkt. 52 at 2-5. Defendants helped her recover $108,485.02. Am. Compl. ¶¶ 65-66. Bartnett then filed this lawsuit asserting breach of fiduciary duty claims under Section 502(a)(2) of ERISA against Abbott (the Plan sponsor), Sullivan (the named Plan fiduciary), the Plan itself, "Abbott Corporate Benefits," and Alight.[2]

In its Order, the Court found that Bartnett stated plausible claims for relief against Alight, but not against the Abbott Defendants. The Court dismissed Bartnett's claim against Abbott because she offered only a "formulaic recitation" of the language in 29 U.S.C. § 1002(21)(A), and "fail[ed] to allege any fiduciary acts taken by Abbott Labs, no less link them to the alleged theft." Dkt. 52 at 10-11. The Court dismissed Bartnett's claim against Sullivan because she failed to plausibly allege any breach of the duties of loyalty, prudence, or monitoring by him. *Id.* at 11-13.[3]

Bartnett has now filed an Amended Complaint adding new allegations based on online research regarding Alight.[4] In new Paragraphs 51-62, Bartnett identifies what she claims are "prior incidents of unauthorized distributions under Alight's watch": (1) in 2013, a criminal complaint

[1] The Plan is a defined contribution plan regulated by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, established by Abbott for the benefit of its employees.

[2] Bartnett also asserted a claim against Alight under the Illinois Consumer Fraud Act.

[3] The Court dismissed the Plan because it cannot be sued as a fiduciary to recover losses to itself, and Abbott Corporate Benefits because it is an address, not a legal entity. Dkt. 52 at 14.

[4] A redline prepared by Bartnett illustrating the amendments is attached for the convenience of the Court as Exhibit 1.

averred that Alight (formerly known as Aon Hewitt) was "targeted" by a cybercrime ring; (2) in 2015, 2016 and 2019 Alight issued data breach notifications; (3) an October 2019 complaint accused Alight of allowing $99,000 in unauthorized transfers; and (4) the Department of Labor is now investigating Alight. As discussed below, only the latter two involved allegations of unauthorized distributions, and neither was publicly disclosed until months after the theft of Bartnett's funds occurred.

Bartnett also adds a new allegation in Paragraph 68 that after she was told by an Alight representative that she "had received back" all she would get, the Abbott in-house lawyer told Bartnett's counsel to disregard that statement ("the person who provided information has no authority to speak on the ultimate resolution") as the matter now rested with her and Abbott's legal department. After this exchange, the Abbott in-house lawyer did offer for Abbott to make an additional payment to help Bartnett with her loss, but Bartnett rejected that offer and filed this lawsuit instead. Am. Compl. ¶¶ 76-78.

ARGUMENT

I. BARTNETT DOES NOT STATE A SECTION 502(A)(2) CLAIM BASED ON THE HIRING OF ALIGHT OR THE RENEWAL OF ITS CONTRACT.

Bartnett has now recast her theory to claim Abbott should never have hired Alight. She claims that "Abbott breached its fiduciary duties" by "hiring" Alight "despite Alight lacking experience with retirement plans, Alight's inability and failure to provide quality plan administration services, Alight's inadequate policies and practices, recent litigation and/or enforcement actions against Alight, and Alight's poor performance record" and by "renewing its contract with Alight despite information regarding Alight's failures with respect to cybersecurity and data privacy, which Abbott Laboratories knew or should have known of." Am. Compl. ¶¶ 85-86. She claims that "Sullivan breached his fiduciary duties" by "allowing Abbott Laboratories to

hire Alight" and by "allowing Abbott Laboratories to renew its contract with Alight." *Id.* ¶¶ 87-88. These claims are even more glaringly inadequate than before.

A Section 502(a)(2) hiring claim requires facts showing the appointee was hired imprudently. *See Howell v. Motorola, Inc.*, 633 F.3d 552, 573 (7th Cir. 2011) (citing *Leigh v. Engle*, 727 F.2d 113, 135 (7th Cir. 1984) (company must exercise "appropriate prudence and reasonableness")). Bartnett offers no such facts. The only factual allegations relating to her hiring claim are in Paragraphs 51-62 of her Amended Complaint, where Bartnett purports to identify "prior incidents of unauthorized distributions under Alight's watch." Critically, Bartnett overlooks the timing of Alight's hiring, with good reason: the alleged incidents all post-date Abbott's hiring of Alight, and most of them post-date the contract renewal as well.

Abbott hired Alight (formerly Aon Hewitt) on November 25, 2003. *See* Dkt. 27-1 Ex. A at 1 ("Client and Aon Hewitt are parties to that certain Administrative Services Agreement, dated as of November 25, 2003 (as amended, the 'Original Agreement') …").[5] The first "incident" identified by Bartnett occurred in 2013. Am. Compl. ¶ 52. Abbott cannot have breached a fiduciary duty by hiring Aon Hewitt in 2003 based on events a decade later.

Abbott renewed its contract with Aon Hewitt on September 29, 2015. *See* Dkt. 27-1 Ex. A at 1. Bartnett has not identified any "unauthorized distributions" allowed by Alight/Aon Hewitt prior to that date. She points to the criminal complaint filed on June 13, 2013 in *United States v.*

[5] As stated by Alight, this document may be considered on a motion to dismiss because it is referenced in the Amended Complaint and central to Bartnett's claim. *See, e.g.*, Am. Compl. ¶ 5 (describing the "agreement between Alight and Abbott Laboratories"); *Hecker v. Deere & Co.*, 556 F.3d 575, 582–83 (7th Cir. 2009) (plan documents were not matters outside the pleadings because they were central to plaintiff's ERISA claims).

Sarapka, No. 13-6089 (D.N.J.), but that complaint (attached as Exhibit 2)[6] does not support her allegation. The complaint alleges that Aon Hewitt was "targeted" along with the IRS, the Department of Defense, and "over a dozen" other "banks, retail brokerage firms, financial services companies, accounting firms, and payroll processing firms" by thieves trying to get access to their customer accounts. *See* Ex. 2, ¶ 2k(i)–(xv). According to the complaint, the thieves accomplished fraudulent transfers from the accounts of ADP, Fundtech and Chase Bank customers—*not* from the accounts of Aon Hewitt customers. *See id.* at ¶¶ 3-20. Bartnett does not explain why Aon Hewitt being "targeted"—along with the U.S. government and many large institutions—should have caused Abbott not to renew its contract. Indeed, if simply being targeted by cyber criminals disqualifies a company from being hired under a duty of prudence, it is likely every large corporation and government agency in the country would fail the test.

Likewise, an examination of the "data breaches" identified by Bartnett reveals that none of them involved an "unauthorized distribution." The 2015 breaches are the only ones potentially prior to the September 29, 2015 contract renewal, and both were minor. The first involved a manual mailing error by Aon Hewitt of client information to "an unintended recipient," and the second involved a participant who "inadvertently accessed an embedded bookmark on a file" sent by Aon Hewitt which allowed him to see other participants' social security numbers. *See* Am. Compl. ¶¶ 53-54; *see also* Exhibit 3, 2015 Identity Theft Resource Center Data Breach Report (excerpt) at 22-23, 62.[7] The 2016 and 2019 data breaches post-date the contract renewal altogether.

[6] "Courts may take judicial notice of court filings and other matters of public record when the accuracy of those documents reasonably cannot be questioned." *Parungao v. Cmty. Health Sys., Inc.*, 858 F.3d 452, 457 (7th Cir. 2017).

[7] *See* n. 5.

Bartnett again offers no explanation why these isolated incidents separated by years—including ones that occurred *after* Abbott renewed Alight's contract—matter at all.

These isolated instances are also out of the hundreds of millions of HR and benefits transactions handled by Alight each year. *See, e.g.*, Ex. 4, Alight February 14, 2019 S-1 Registration Statement (excerpt) at 1 (noting that Alight services "nearly 3,000 employers" and processed "more than 340 million benefits and HR transactions" in 2017).[8] Under Bartnett's reasoning, it would be impossible for employers to do business with any benefits companies that have had a data breach, which would drive Alight and most of the rest of the financial industry out of business entirely. The Identity Theft Resource Center Reports cited by Bartnett, for example, show that Schwab Retirement Services, Scottrade/TD Ameritrade and Morgan Stanley all had far more serious data breaches in 2015 than Alight.[9] Bartnett's new hiring claim is entirely unsupported and illogical, and should be dismissed with prejudice.

II. BARTNETT DOES NOT STATE A SECTION 502(A)(2) CLAIM BASED ON MONITORING.

Bartnett continues to allege that Abbott and Sullivan also "fail[ed] to monitor" Alight (Am. Compl. ¶¶ 85, 87), but as the Court previously found, this allegation is wholly conclusory and "amounts to nothing more than speculation." *See* Dkt. 52 at 13 (quoting *Neil v. Zell*, 677 F. Supp.

[8] *See Garden City Emps.' Ret. Sys. v. Anixter Int'l, Inc.*, No. 09-cv-05641, 2011 WL 1303387, at *12 (N.D. Ill. Mar. 31, 2011) ("[J]udicial notice may be taken of the contents of public record disclosure documents filed with the SEC if the facts sought to be noticed are not subject to dispute.").

[9] *See* Ex. 3 at 42 (Schwab Retirement Plan Services inadvertently emailed spreadsheet containing "Social Security number, name, address, date of birth, date of termination (if applicable), employment status, division code, marital status and account balance" for 9,400 individuals to person), 43 (thieves gained access to "Social Security numbers, email addresses and other sensitive data" for 4,600,000 Scottrade customers), 168 (fired Morgan Stanley employee "stole data, including account numbers, for as many as 350,000 wealth-management clients and posted some of the information online").

2d 1010, 1024 (N.D. Ill. 2009) (dismissing failure to monitor claim which was nothing more than a "bare assertion that the defendants breached their duty to monitor)). Bartnett still "does not allege any monitoring process" much less "a defect in that process," even after the Court identified these pleading deficiencies. *Id.; White v. Chevron Corp.*, Case No. 16-cv-0793-PJH, 2016 WL 4502808, at *19 (N.D. Cal. Aug. 29, 2016) (dismissing monitoring claim because "plaintiffs allege no facts showing how the monitoring process was deficient").

Moreover, the duty to monitor requires appointing fiduciaries to monitor the "performance" of Plan administrators at "*reasonable intervals*." Dkt. 52 at 13 (quoting 29 C.F.R. § 2509.75-8) (emphasis added). It does *not* require a fiduciary to "review all business decisions of Plan administrators," which would "defeat the purpose of having [administrators] appointed to run a benefits plan in the first place." *Howell v. Motorola, Inc.*, 633 F.3d 552, 573 (7th Cir. 2011); *Leigh v. Engle*, 727 F.2d 113, 135 (7th Cir. 1984) (a fiduciary is "not obliged to examine every action taken by [the administrator]"). Bartnett still cannot explain how monitoring would have detected, much less prevented, the unauthorized distributions to her identity thief occurring in a two-week span. *See* Am. Compl. ¶¶ 24, 42.

The only new facts alleged by Bartnett that possibly relate to the duty to monitor are in Paragraphs 56-57 and 59 of her Amended Complaint, where she refers to allegations of unauthorized transfers by Alight in *Berman v. Estee Lauder*, Case No. 4:19-cv-6489 (N.D. Cal.) and by the Department of Labor in an ongoing investigation of Alight. Again, however, Bartnett fails to recognize the timing of these allegations. The complaint in *Berman* was not filed until October 2019. *See* Exhibit 5, *Berman v. Estee Lauder*, Case No. 4:19-cv-6489 (N.D. Cal. Oct. 9, 2019) (Dkt. 1).[10] Bartnett does not allege how Abbott could have known of the complaint's

[10] *See* n. 6.

allegations ten months before it was filed, when Bartnett's funds were stolen in January 2019. The same is true of the Department of Labor investigation, which did not begin until July 2019 (six months after the theft) and was not made public until April 2020. *See* Exhibit 6, *Scalia v. Alight Solutions*, Case No. 20-cv-2138 (N.D. Ill. Apr. 6, 2020) (Dkt. 1).[11]

Like the claim in *Neil*, Bartnett's allegations that Abbott and Sullivan "breached [their] duty to monitor is no more than conceivable," if that, and "fails *Twombly's* plausibility requirement." 677 F. Supp. 2d at 1024. As before, Bartnett fails to allege a breach of the duty to monitor, even after the Court pointed out the defects in her claim. Her claims should be dismissed with prejudice.

III. BARTNETT FAILED TO EXHAUST HER ADMINISTRATIVE REMEDIES.

Bartnett also admits she did not initiate or exhaust her administrative remedies under the Plan. *See* Am. Compl. ¶ 78 (alleging an "administrative appeal" would have been "futile"). The Court did not need to address this argument in dismissing Bartnett's claims against Abbott and Sullivan before (Dkt. 52 at 7 n.1), and does not need to reach it to dismiss those claims again, but it is an independent reason why the claims fail.

The Seventh Circuit has long "interpreted ERISA as requiring exhaustion of administrative remedies as a prerequisite to bringing suit under the statute." *Edwards v. Briggs & Stratton Ret. Plan*, 639 F.3d 355, 360 (7th Cir. 2011); *see also Powell v. AT&T Commc'ns, Inc.*, 938 F.2d 823, 826 (7th Cir. 1991) (applying exhaustion to fiduciary duty claims). The exhaustion requirement encourages "private resolution of ERISA-related disputes," *Powell*, 938 F.2d at 825-26, and was "'intended by Congress . . . to promote the consistent treatment of claims for benefits; to provide a nonadversarial method of claims settlement; and to minimize the cost of claims settlement for

[11] *See* n. 6.

all concerned.'" *Edwards*, 639 F.3d at 360 (quoting *Kross v. W. Elec. Co.*, 701 F.2d 1238, 1244-45 (7th Cir. 1983)).

The Summary Plan Document likewise states that a participant "may not initiate any lawsuit to recover under the [Plan] until [she has] exhausted the claims and appeals procedures" outlined therein. *See* Dkt. 34-2 at 31; Dkt. 34 at 12 n.8 (courts may consider plan documents on motion to dismiss). Those procedures provide that a participant "may file a claim under the [Plan] within 90 days" after learning of the circumstances giving "rise to the claim," and that if the claim is denied, the participant "may file an appeal with the Plan Administrator . . . in writing . . . within 60 days after [she] receive[s] the written claim denial[.]" *Id.* at 30-31. The Plan Administrator then must provide a "final written decision" that includes the "specific reasons for the decision, with specific reference to the plan provisions on which that decision is based" and includes the "right to file a civil suit under ERISA[.]" *See id.* at 31.

Bartnett admits that she failed to follow this claims and appeals procedure. Am. Compl. ¶¶ 77-78. She and her prior counsel informally negotiated with an Abbott in-house attorney culminating in an offer by Abbott for an additional payment in December 2019, which Bartnett rejected. *Id.* ¶¶ 64, 68-71, 73, 75-76. Those discussions are not a substitute for the formal administrative review process under the Plan. *See Stark v. PPM Am., Inc.*, 354 F.3d 666, 671-72 (7th Cir. 2004) (explaining "if claimants were allowed to skip the administrative procedure" based on unsuccessful negotiations, "it is hard to imagine that these factors would not be present in almost all cases"); *Powell*, 938 F.2d at 827 ("Absent a . . . clear-cut request for administrative review, the denial of [plaintiff's] claim on the grounds of exhaustion was proper."). Because Bartnett did not pursue, much less exhaust, the administrative remedies available under the Plan, her Section 502(a)(2) claims should be dismissed.

Bartnett's failure is not excused by futility or lack of meaningful access. While an " ERISA plaintiff's failure to exhaust administrative remedies may be excused . . . where pursuing internal plan remedies would be futile," *Edwards*, 693 F.3d at 361, the Seventh Circuit applies a high standard to the futility exception, and requires that it must have been "certain" that the plaintiff's claim would have been denied had the plaintiff pursued his administrative remedies. *Lindemann v. Mobil Oil Corp.*, 79 F.3d 647, 650 (7th Cir. 1996) (quoting *Smith v. Blue Cross & Blue Shield United of Wis.*, 959 F.2d 655, 659 (7th Cir. 1992)). Plaintiff makes a conclusory allegation that "any administrative appeal would [have been] futile" (Am. Compl. ¶ 78), but she does not allege with certainty that her appeal would have been denied. She cannot do so, because there was no formal claim denial much less an appeal. *See Robyns v. Reliance Standard Life Ins. Co.*, 130 F.3d 1231, 1237 (7th Cir. 1997). That Bartnett deemed an appeal unlikely to be successful does not make it futile. *See, e.g., Stark*, 354 F.3d at 671-72 (rejecting futility claim based on failed negotiations and defendants' potential opposition to claim); *Robyns*, 130 F.3d at 1238 (employer's alleged predisposition based on pre-litigation communications did not establish futility).

An ERISA plaintiff's failure to exhaust administrative remedies also may be excused where "there is a lack of meaningful access to review procedures," *Edwards*, 639 F.3d at 361, which requires that the claimant must have attempted to initiate the higher level review procedure, but was denied access to that level of review. *Smith v. Blue Cross & Blue Shield United of Wis.*, 959 F.2d 655, 659 (7th Cir. 1992) (citing *Carter v. Signode Indus., Inc.*, 688 F. Supp. 1283, 1287 (N.D. Ill. 1988)). While Bartnett alleges that she was not advised of the appeal process, she never filed a claim in the first place. She was also represented by counsel at the time (Am. Compl. ¶¶ 64, 68-71, 73, 75-76), who should have understood how to proceed with an ERISA claim through the ERISA claim and appeal process. Because Bartnett does not plausibly allege that an exception

to the exhaustion rule is applicable, her failure to exhaust administrative remedies requires dismissal of her claims.

CONCLUSION

For all of the foregoing reasons, Abbott and Sullivan respectfully request that the Court dismiss Plaintiff's claims against them with prejudice.

Dated: November 20, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ronald S. Safer, certify that on November 20, 2020, I served a copy of the foregoing document electronically using the Court's CM/ECF system, which will automatically generate notice of this filing to all Counsel of Record.

/s/ *Ronald S. Safer*