IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Appeal No. 13-2233

SALVADOR SILVA,

Plaintiff-Appellant,

v.

METROPOLITAN LIFE INSURANCE COMPANY,

AND

SAVVIS COMMUNICATIONS CORPORATION,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
HONORABLE THOMAS C. MUMMERT

APPELLEES' BRIEF

Ann E. Buckley
Buckley & Buckley, LLC
1139 Olive St., Suite 800
St. Louis, MO 63101
Telephone: (314) 621-3434
Facsimile: (314) 621-3485
ATTORNEYS FOR
APPELLEES

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

In this ERISA-governed action, Plaintiff appeals both the district court's entry of summary judgment on his claim for Plan benefits under ERISA § 502(a)(1)(B) and the denial of leave to amend to add § 502(a)(3) claims for equitable relief against the Plan Administrator. Plaintiff sought $429,000, the amount of the Supplemental Life Insurance benefits he claims are payable following his son's death, as relief on both theories.

Both the Supreme Court and this Court have held that a plaintiff may not pursue a § 502(a)(3) claim when he has available and is pursuing a § 502(a)(1)(B) claim for the same relief. *See Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996); *Conley v. Pitney Bowes*, 176 F. 3d 1044, 1047 (8th Cir. 1999); *Pilger v. Sweeney*, ___ F. 3d ___, 2013 WL 4016523 (8th Cir. Aug. 8, 2013). The decision in *CIGNA Corp. v. Amara*, 131 S.Ct. 1866 (2011) did not alter that holding. The district court correctly denied leave to amend and properly upheld the denial of benefits based on the Decedent's failure to submit evidence of insurability, as required by the Plan. The claim fiduciary's determination was reasonable and was not arbitrary and capricious.

Appellees agree that oral argument is appropriate but suggest that fifteen minutes is sufficient.

Appellate Case: 13-2233 Page: 2 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

DISCLOSURE OF CORPORATE INTERESTS

Pursuant to Rule 26.1(a) of the Federal Rules of Appellate Procedure:

Defendant-Appellee Metropolitan Life Insurance Company states that MetLife, Inc. is the parent corporation of, and wholly owns, Metropolitan Life Insurance Company; and

Defendant-Appellee Savvis Communications Corporation, now known as Savvis, Inc., states that CenturyLink, Inc. is the parent corporation of, and wholly owns, Savvis, Inc., formerly known as Savvis Communications Corporation.

Appellate Case: 13-2233 Page: 3 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

TABLE OF CONTENTS

Appellate Case: 13-2233 Page: 4 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

TABLE OF AUTHORITIES

Cases Page(s)

Appellate Case: 13-2233 Page: 5 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

Appellate Case: 13-2233 Page: 6 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

Statutes

Appellate Case: 13-2233 Page: 7 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

STATEMENT OF THE ISSUES

I. Whether the District Court properly denied Plaintiff leave to amend to assert a claim under ERISA § 502(a)(3)(B), when Plaintiff had available and was asserting a claim for plan benefits under ERISA § 502(a)(1)(B).

Varity Corp. v. Howe, 516 U.S. 489 (1996)

Conley v. Pitney Bowes, 176 F. 3d 1044 (8th Cir. 1999)

Pilger v. Sweeney, ___ F. 3d ___, 2013 WL 4016523 (8th Cir. Aug. 8, 2013)

II. Whether the District Court properly granted summary judgment in favor of Defendants on Plaintiff's claim under ERISA § 502(a)(1)(B) on the grounds that MetLife's determination that the Decedent was not covered for Supplemental Life Insurance, because he had not provided evidence of insurability by completing and returning the Statement of Health which Savvis' online enrollment system prompted him to complete and return, was reasonable and supported by substantial evidence in the administrative record.

Midgett v. Washington Group International Long Term Disability Plan, 561 F. 3d 887 (8th Cir. 2009)

Green v. Union Sec. Ins. Co., 646 F. 3d 1042 (8th Cir. 2011)

O'Connor v. Provident Life and Accident Co., 455 F. Supp. 2d 670 (E.D. Mich. 2006)

Appellate Case: 13-2233 Page: 8 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

STATEMENT OF THE CASE

Initial Pleadings

Plaintiff Salvador Silva initially filed this action in the Circuit Court of St. Louis County, Missouri, seeking a declaration that he was "the one, true, and only beneficiary of all of the life insurance policies that Abel Silva had through his employer Savvis with Metropolitan Life Insurance Company" and requesting that the court declare that MetLife should pay him "the proceeds of the policies at issue." (App., p. 37, ¶¶13-14).[1] Defendants Metropolitan Life Insurance Company ("MetLife") and Savvis Communications Corporation ("Savvis") removed the case to federal court on the grounds that the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§1001, *et seq.* completely preempted Plaintiff's claims and provided his exclusive remedy. (App., pp. 14-17). Defendants answered and MetLife filed a Counterclaim and Cross-claim in interpleader with respect to the Basic Life Insurance benefits, which were the subject of a dispute between Plaintiff and another individual as to who was the proper beneficiary. (App., pp. 39-51, 57-60).

Plaintiff subsequently filed a First Amended Complaint. (App., pp. 61-65). Count I sought a declaration that Plaintiff was entitled to the Basic Life Insurance benefits, while Count II sought payment of Supplemental Life Insurance benefits.

[1] References are to Appellant's Appendix, "App., p. ."

Appellate Case: 13-2233 Page: 9 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

In Count II, Plaintiff alleged that his son, Abel Silva (the "Decedent") had paid premiums for the Supplemental Life Insurance and satisfied all other conditions precedent but that MetLife and the Plan[2] had failed to pay Supplemental Life Insurance benefits. Plaintiff further alleged:

> 21. Defendants Plan, Metropolitan Life and Savvis failed to provide Abel Silva notice of the requirement of Evidence of Insurability, either through actual notice or through the Summary Plan Description, or failed to provide him a copy of the Summary Plan Description.
>
> 22. By continuing to collect premiums for six months through Abel Silva's death without requesting Evidence of Insurability, Defendants waived the Evidence of Insurability requirement.
>
> 23. By allowing six months to pass with no notification to Abel Silva that Evidence of Insurability was required, Defendants Plan and Metropolitan Life accepted the information as to Evidence of Insurability provided by Abel Silva as satisfactory, or alternatively this action acted as a waiver.

(App., pp. 63-64).

Plaintiff and the other individual resolved their differences with respect to the Basic Life Insurance, and the Court disbursed the interpleaded Plan benefits deposited by MetLife. (App., p. 66). On motion by MetLife and Savvis (App., pp. 75-78), the court discharged MetLife, Savvis and the Plan from any and all liability with respect to the Basic Life Insurance benefits. (App., pp. 83-84). In the same

[2] The First Amended Complaint named the Plan as an additional defendant, but the Plan was never served. Because MetLife is the entity responsible for paying any Supplemental Life Insurance benefits, Defendants do not contend that the Plan was a necessary party.

Appellate Case: 13-2233 Page: 10 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

order, the court granted Plaintiff leave to file the First Amended Complaint. (App., p. 83).

Plaintiff's Motion for Leave to Amend

After MetLife completed its review of Plaintiff's administrative appeal, Plaintiff sought leave to file a Second Amended Complaint. (App., pp. 85-89). This motion was superseded by Plaintiff's subsequent Motion for Leave to File a Third Amended Complaint. (App., pp. 112-118).

The proposed Third Amended Complaint (App., pp. 119-125) was in four counts. Count I, a claim for Supplemental Life Insurance benefits, was essentially the same as Count II of the First Amended Complaint and sought judgment against all Defendants for $429,000.00, the amount of the Supplemental Life Insurance benefits the Decedent had requested in his online enrollment, as well as interest and costs. Plaintiff, however, added alternative allegations suggesting that the Supplemental Life Insurance benefits might be governed by state law, rather than ERISA. (App., pp. 120-121).

In Count II, Plaintiff alleged that Savvis breached its fiduciary duty, either under ERISA or the common law, in several respects, including failing to monitor the process of providing evidence of insurability and failing to provide any links to obtain evidence of insurability. Plaintiff alleged that, as a direct result of this alleged breach, he did not receive the Supplemental Life Insurance benefits to

Appellate Case: 13-2233 Page: 11 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

which he claimed entitlement and that he was therefore entitled to either restitution or surcharge or damages in the amount of $429,000.00. Plaintiff also asserted an alternative entitlement to certain state law remedies. (App., pp. 122-123). In Count III, Plaintiff alleged that Savvis, the Plan Administrator, had failed to reasonably apprise participants and beneficiaries of their rights and obligations under the plan pursuant to 29 U.S.C. §§1022(a) and 1024(b), that as a result, he did not receive the Supplemental Life Insurance benefits to which he claimed entitlement, and that he was therefore entitled to either restitution or surcharge or damages in the amount of $429,000.00. (App., p. 123). Count IV was an alternative state law claim for negligence against Savvis. (App., p. 124).

MetLife and Savvis opposed the filing of a Third Amended Complaint on the grounds of futility. (App., pp. 126-138). They argued that the state law claims were preempted by ERISA. With respect to the breach of fiduciary duty claims asserted in Counts II and III, Defendants argued both: that a plaintiff who has a claim for benefits under 29 U.S.C. §1132(a)(1)(B) may not seek the same benefits in the form of equitable relief under §1132(a)(3)(B); and that 29 U.S.C. §1132(a)(3) does not allow recovery of individual monetary relief of the type Plaintiff sought in Counts II and III. (App., pp. 134-135).

The district court held that the state law claims were preempted by ERISA. (App., pp. 150-151). Citing *Pichoff v. QHG of Springdale, Inc.*, 556 F. 3d 728 (8th

Appellate Case: 13-2233 Page: 12 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

Cir. 2009), the court held that the relief sought by Plaintiff was not available under 29 U.S.C. §1132(a)(3)(B). The court distinguished *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011), noting that the plaintiffs in *Amara* sought reformation of the terms of the plan and an order requiring CIGNA to do what it had promised (not take from employees under the new plan benefits they had had under the old plan), while no such relief was at issue in this case. (App., pp.154-155). The court concluded that "the Supreme Court's holding in *CIGNA Corp.* does not affect the Eighth Circuit's holding in *Pichoff*, 556 F. 3d at 732, that the relief sought by Plaintiff is unavailable as 'other appropriate equitable relief.'" (App., p. 155).

Summary Judgment

Plaintiff and Defendants then filed cross-motions for summary judgment. (App., pp. 156-160, 186-187). The district court granted Defendants' motion and denied Plaintiff's motion. *Silva v. Metropolitan Life Ins. Co.*, 912 F.Supp.2d 781 (E.D. Mo. 2012) (App., pp. 270-294). Citing the portions of the record in which MetLife confirmed that the MetLife certificate was distributed to Savvis employees (App., pp. 571, 576), the district court held that notice of the evidence of insurability requirement was properly given. (*Silva*, 912 F.Supp.2d at 787; App., pp. 279-280). The court rejected Plaintiff's contention that the absence of a signed receipt and evidence of how distribution was made indicated that the certificate had not been distributed. (*Silva*, 912 F.Supp.2d at 787; App., pp. 279-

Appellate Case: 13-2233 Page: 13 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

280). The court also noted that the enrollment form the Decedent completed online prompted him to complete a statement of health form. (*Silva*, 912 F.Supp.2d at 788; App., p. 280).

Recognizing that MetLife was both the claim fiduciary and the payor under the Plan, the court gave this structural conflict some weight in determining whether there had been an abuse of discretion. (*Silva*, 912 F.Supp.2d at 789; App., p. 282). The court held, however, that MetLife's interpretation of the Plan to require the Decedent to submit evidence of insurability and to provide that his requested coverage would not take effect until MetLife stated so in writing was reasonable. (*Silva*, 912 F.Supp.2d at 790; App., pp. 284-285). The court rejected Plaintiff's waiver argument, holding that while the deduction of premiums for six months for Supplemental Life Insurance coverage for which the Decedent had not been approved was an error, Plaintiff had not established a voluntary and intentional relinquishment of a known right. (*Silva*, 912 F.Supp.2d at 791-792; App., pp. 287-289). The court also held that Plaintiff had not established equitable estoppel (*Silva*, 912 F.Supp.2d at 792-794; App., pp. 289-293).

The court granted Defendants' Motion for Summary Judgment with respect to Plaintiff's claim for Supplemental Life Insurance benefits but held that Plaintiff's claim for the withheld premiums, which MetLife had returned to Savvis, which had deposited them with the court, was undefeated. (*Silva*, 912 F.Supp.2d at

Appellate Case: 13-2233 Page: 14 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

794; App., p. 293).

Plaintiff filed a Motion to Alter or Amend Judgment Pursuant to Rule 59 (App., pp. 300-302). The court denied the motion (App., pp. 321-323), and this appeal followed.

STATEMENT OF FACTS

The administrative record (App. Vol. II) reflects the following facts.

The Plan

Savvis made Basic Life Insurance and Supplemental Life Insurance coverage available to eligible employees through the Group Life and Supplemental Life Plan for Employees of Savvis Communications Corporation and Its Affiliates (the "Plan"), a component of the Savvis, Inc. Comprehensive Health and Welfare Benefit Plan. (App., p. 68, ¶ 4; p. 454). While Basic Life Insurance was provided by Savvis at no cost to Plan participants, Plan participants were required to contribute to the cost of any Supplemental Life Insurance coverage they elected. (App., pp. 338, 393, 406, 455). MetLife is the claim fiduciary for the Plan, which is funded by a group policy of life insurance issued to Savvis by MetLife. (App., pp. 367-369, 454-456). The Plan expressly provides:

> In carrying out their respective responsibilities under the Plan, the Plan administrator and other Plan fiduciaries shall have discretionary authority to interpret the terms of the Plan and to determine eligibility for and entitlement to Plan benefits in accordance with the terms of the Plan. Any interpretation or determination made pursuant to such discretionary authority shall be given full force and effect, unless it

Appellate Case: 13-2233 Page: 15 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

can be shown that the interpretation or determination was arbitrary and capricious.

(App., p. 458).

Plaintiff's Initial Declination of Supplemental Life Insurance

The Decedent, the Plaintiff's son, was hired by Savvis in September 2004. (App., p. 329). Plaintiff completed an enrollment form on or about September 20, 2004. (App., pp. 338-339). Although eligible for Supplemental Life Insurance at that time, he specifically declined it, checking a box beside the words: "I elect to decline the Supplemental Life Plan" (App., p. 338). He also signed an Employee Confirmation, stating in part:

> I have been given the opportunity to enroll in SAVVIS Communications Corporation's Group Supplemental Life Insurance plans. I understand that if I decline now, but later decide to enroll, I will be required to provide evidence of good health that is satisfactory to Hartford Life and understand my request for coverage may be denied.[3]

(App., p. 339).

Plan Terms

The Plan describes the enrollment process as follows:

> **ELIGIBILITY PROVISIONS: INSURANCE FOR YOU**
>
> * * * * *

[3] Hartford was the prior insurer and claims administrator for the Plan. MetLife became the insurer and claims administrator for the Plan effective January 1, 2008. (App., p. 367).

Appellate Case: 13-2233 Page: 16 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

ENROLLMENT PROCESS

If You are eligible for insurance, You may enroll for such insurance by completing the required form. In addition, You must give evidence of Your Insurability satisfactory to Us at Your expense if You are required to do so under the section entitled EVIDENCE OF INSURABILITY. If You enroll for Contributory Insurance, You must also give the Policyholder written permission to deduct premiums from Your pay for such insurance. You will be notified by the Policyholder how much You will be required to contribute.

(App., pp. 163-164, 409). The Plan also explains that during any annual enrollment period, "You may enroll for insurance for which You are eligible or choose a different option than the one for which You are currently enrolled." (App., pp. 164, 411). The Plan provides:

DATE YOUR INSURANCE THAT IS PART OF THE FLEXIBLE BENEFITS PLAN TAKES EFFECT

* * * * *

Enrollment During Any Subsequent Annual Enrollment Period

. . . The insurance enrolled for or changes to Your insurance made during an annual enrollment period will take effect as follows:

* * * * *

- for any amount for which You are **required** to give evidence of Your insurability and We determine that You are insurable, such insurance will take effect on the date We state in Writing, if You are Actively at Work on that date.

(App., pp. 164, 411).

Appellate Case: 13-2233 Page: 17 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

The Evidence of Insurability Requirement

Under the terms of the Plan, whether evidence of insurability is required depends upon the amount of insurance elected and whether the election is made when the employee is first eligible to enroll for the insurance or during an annual enrollment period. (App., pp. 427-428). The "Non-Medical Issue Amount" for Supplemental Life Insurance was the lesser of three times Basic Annual Earnings or $400,000. (App., p. 394). If a Savvis employee elected an amount of Supplemental Life Insurance greater than this amount, evidence of insurability was required, regardless of whether the election was made when the employee first enrolled or during an annual enrollment period. (App., p. 427, ¶ 3). In addition, evidence of insurability was required if a Savvis employee requested Supplemental Life Insurance more than 31 days after becoming eligible for it or, during an annual enrollment period, requested an increase in Supplemental Life Insurance by more than one level. (App., p. 427-428). The Plan provides:

> **EVIDENCE OF INSURABILITY**
>
> We require evidence of insurability satisfactory to Us as follows:
>
> * * * * *
>
> 5. if you make a request during an annual enrollment period to increase the amount of Your Supplemental Life Insurance to an option which is more than one level **above** Your current amount of Supplemental Life Insurance.
>
> If You do not give Us evidence of insurability or the evidence

Appellate Case: 13-2233 Page: 18 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

of insurability is not accepted by Us as satisfactory, the amount of Your Supplemental Life Insurance will not be increased.

* * * * *

9. if You make a late request for Supplemental Life Insurance. A late request is one made more than 31 days after You become eligible.

   If You do not give Us evidence of insurability or the evidence of insurability is not accepted by Us as satisfactory, You will not be covered for Supplemental Life Insurance.

(App., pp. 164-165, 427-428).

Having declined Supplemental Life Insurance in 2004, the Decedent, in a subsequent online enrollment, requested Supplemental Life Insurance, effective January 1, 2010, at a coverage level of five times salary, for a total of $429,000. The Decedent designated Plaintiff as the beneficiary of the requested Supplemental Life Insurance. (App., pp. 331-332). Although Savvis' online enrollment process prompts employees to complete a Statement of Health form and submit it to their HR department if the amount of Supplemental Life Insurance elected is greater than three times Basic Annual Earnings, the Decedent did not submit a Statement of Health form. (App., pp. 566, 573-574). The Decedent died on June 27, 2010. (App., p. 355).

Plaintiff's Claim and Appeal

By letter dated November 2, 2010 (App., pp. 342-344), MetLife denied Plaintiff's claim for Supplemental Life Insurance benefits, quoting paragraphs 5

Appellate Case: 13-2233 Page: 19 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

and 9 of the Plan provisions concerning Evidence of Insurability. Noting that the Decedent had declined Supplemental Life Insurance coverage when he was first eligible in September 2004, MetLife stated that his election of Supplemental Life Insurance coverage, in the amount of five times his Basic Annual Earnings, to become effective for the first time on January 10, 2010, was a "late request for Supplemental Life Insurance," for which evidence of insurability was required. Because the Decedent did not submit evidence of insurability, "his request for Supplemental Life Insurance coverage in the amount of 5 times his BAE was never approved." (App., pp. 166, 343).

Plaintiff was advised of his right to appeal (App., p. 343). By letter dated December 21, 2010, Plaintiff's attorney gave notice of his intent to appeal, requested a copy of the administrative record and reserved his right to submit supplemental records, reasons and arguments. (App., p. 360). MetLife provided a copy of its file on December 29, 2010 (App. 364), and Plaintiff filed suit on January 24, 2011. (App., p. 18). Through his attorney, Plaintiff subsequently submitted additional documents for MetLife's review. (App., pp. 507-525, 527-530, 536-538, 552-555).

In conducting its review of Plaintiff's claim, MetLife confirmed that no Statement of Health form had been submitted by the Decedent. (App., p. 566). MetLife had contacted Savvis and had been advised that the Decedent's election of

Appellate Case: 13-2233 Page: 20 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

benefits effective January 1, 2010 was an electronic enrollment that was password protected. (App., p. 577). MetLife also confirmed that the MetLife certificate, which includes the Evidence of Insurability provisions, was distributed to Savvis employees. (App., pp. 571, 576).

During the course of its review, MetLife learned that there were around 200 Savvis employees who should have sent in Statement of Health forms "for one reason or another" but for whom no Statement of Health form was submitted to MetLife. (App., 565). Many of these individuals had actually "filled out a SOH but they were never submitted due to a glitch in the employer's enrollment process." (App., p. 566).[4] The Decedent, however, had neither completed nor submitted a Statement of Health form. (App., p. 565).

In addition, MetLife learned that the Decedent, because of the amount of coverage he requested, received a prompt from Savvis' online enrollment process to complete and submit a Statement of Health form. (App., pp. 573-574). Savvis explained that its employees complete their enrollments online and that if they elect more than three times their Basic Annual Earnings, they are prompted to complete a paper Statement of Health form and submit that to their HR department. (App., p. 574). When an employee completes the enrollment online

[4] MetLife and Savvis worked to address this issue. MetLife's Statement of Health Unit agreed to review any forms completed within the last twelve months, although older forms would have to be completed again and resubmitted. (App., p. 565).

Appellate Case: 13-2233 Page: 21 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

and is prompted to complete a Statement of Health form, the employee is directed to contact the Benefits Department which is accessible during all work hours and has the Statement of Health forms available. (App., p. 573). Savvis informed MetLife that the Decedent worked in the same building as the Benefits Department, so he could have walked to the area and requested a form or could have called or e-mailed. (App., p. 573).

With this information, MetLife upheld the denial of Plaintiff's claim by letter dated October 12, 2011. (App., pp. 559-561). MetLife advised that the premium payments that Savvis had deducted from the Decedent's paychecks and remitted to MetLife would be reimbursed. (App., p. 560). The premiums of $128.76 were refunded to Savvis, which deposited them with the court. (App., pp. 232-234, 276).

SUMMARY OF THE ARGUMENT

This Court may affirm the district court's rulings on any basis supported by the record. *See Pullington v. Pfizer, Inc.*, 720 F.3d 739, 747 (8th Cir. 2013) (quoting *Phipps v. FDIC*, 417 F.3d 1006, 1010 (8th Cir. 2005)).

The district court properly denied Plaintiff's motion for leave to file a Third Amended Complaint, adding claims under ERISA § 502(a)(3), 29 U.S.C. §1132(a)(3), because Plaintiff had available and was pursuing claims under § 502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B). As this Court held in *Conley v. Pitney*

Appellate Case: 13-2233 Page: 22 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

Bowes, 176 F. 3d 1044, 1047 (8th Cir. 1999), a claimant who has a right to bring a claim for benefits under 29 U.S.C. §1132(a)(1)(B) "may not seek the same benefits in the form of equitable relief under § 1132(a)(3)(B)." More recently, in *Pilger v. Sweeney*, ___ F. 3d ___ (8th Cir. Aug. 8, 2013), this Court, relying on *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996), reaffirmed this principle.

The Supreme Court did not alter this principle in *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011) but allowed relief under 29 U.S.C. §1132(a)(3) in that case only after concluding that the relief ordered by the district court (reforming the pension plan to provide benefits already earned under the old plan plus what the plaintiffs would earn through CIGNA's deposits under the new plan, rather than simply the greater of those benefits) was not available under 29 U.S.C. §1132(a)(1)(B). *Amara*, 113 S.Ct. 1876-1878. On remand, the district court noted that the concern about whether relief available under ERISA § 502(a)(3) could be provided when the same relief was available under § 502(a)(1)(B) was obviated by the Supreme Court's holding that the relief ordered was not available under §502(a)(1)(B). *Amara v. CIGNA Corp.*, 925 F.Supp.2d 242 at n. 2 (D. Conn. 2012), *appeal pending*. None of the cases relied on by Plaintiff and the Secretary of Labor involve the simultaneous pursuit of relief under §502(a)(1)(B) and § 502(a)(3).

The district court also properly granted summary judgment to Defendants on

Appellate Case: 13-2233 Page: 23 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

the record before it. Contrary to Plaintiff's assertions, he did not demonstrate that the evidence of insurability requirement was "unnoticed." MetLife confirmed that the certificate of insurance, which functions as both the Plan document and the summary plan description, was distributed to Plan participants. (App., pp. 571, 573). There was no contrary evidence. Although Plan participants were not required to sign receipts for the certificates, there is no statutory, regulatory or Plan requirement that receipts be signed.

In addition, as the district court noted, Savvis confirmed that its online enrollment process prompted enrollees who selected an amount of Supplemental Life Insurance coverage in excess of three times Basic Annual Earnings to complete a Statement of Health form. (App., p. 574). The Decedent specifically requested five times his annual earnings. (App., p. 331). In addition, the online enrollment process, although it did not take the enrollee directly to the Statement of Health form, advised the enrollee that a form could be obtained from the Benefits Department. (App., p. 573). Savvis informed MetLife that the Benefits Department was located in the same building where the Decedent worked, so that he could have stopped by to get a form or could have requested it by phone or email. (App., p. 574).

In these circumstances, MetLife's determination that the Decedent was not covered for Supplemental Life Insurance because he had not submitted evidence of

Appellate Case: 13-2233 Page: 24 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

insurability and his request for Supplemental Life Insurance had not been approved by MetLife was reasonable, was supported by substantial evidence, and was not arbitrary and capricious. The summary judgment in favor of Defendants should be affirmed.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED PLAINTIFF LEAVE TO FILE A THIRD AMENDED COMPLAINT ASSERTING CLAIMS UNDER 29 U.S.C. §1132(a)(3), BECAUSE PLAINTIFF HAD AVAILABLE AND WAS PURSUING A CLAIM UNDER 29 U.S.C. §1132(a)(1)(B).

Standard of Review

A denial of leave to amend on the grounds that amendment would be futile is reviewed *de novo*. *See In re: NVE Corp. Sec. Litig.*, 527 F.3d 749, 751 (8th Cir. 2008). Because a determination that amendment would be futile is essentially a determination that the proposed amended pleading could not withstand a motion to dismiss, the denial of leave, like a dismissal, may be upheld on any basis supported by the record. *See In re 2007 Novastar Financial, Inc., Securities Litigation*, 579 F.3d 878, 884 (8th Cir. 2009) (affirming denial of leave to amend).

In this case, while the district court relied on *Pichoff*, it also reasonably distinguished *Amara* on the grounds that Plaintiff did not seek to reform the terms of the Plan. (App., p. 154). In addition, the denial of leave to amend can and should be upheld on the grounds that a claimant who has and who pursues a cause of action under §502(a)(1)(B) cannot pursue a claim for the same relief under

Appellate Case: 13-2233 Page: 25 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

§502(a)(3). *See Pilger v. Sweeney*, ___ F. 3d ___, 2013 WL 4016523 at *4 (8th Cir. Aug. 8, 2013).

The Decision in *CIGNA Corp. v. Amara* Does Not Allow a Plaintiff Who Has and Who Pursues a Claim Under 29 U.S.C. §1132(a)(1)(B) to Seek the Same Relief Under 29 U.S.C. §1132(a)(3)

The Supreme Court, in *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011), did not abrogate the principle of *Varity Corp. v. Howe*, 516 U.S. 489, 415 (1996), that "where Congress elsewhere provided adequate relief for a beneficiary's injury, there will be no need for further equitable relief, in which case such relief normally would not be 'appropriate.'" In *Varity*, the Supreme Court held that the plaintiffs could not proceed under § 501(a)(1)(B) because they were no longer members of the plan and had no benefits due them under the plan. *Id.* As a result, the court found that the plaintiffs had to rely on § 501(a)(3) or "have no remedy at all." *Id.*

The majority of circuits addressing the issue, including this circuit, have interpreted *Varity* to hold "that a claimant whose injury creates a cause of action under §1132(a)(1)(B) may not proceed with a claim under §1132(a)(3)." *Pilger v. Sweeney*, F.3d , 2013 WL 4016523 at *4 (8th Cir. 2013) (quoting *Korotynska v. Metro. Life Ins. Co.*, 474 F.3d 101, 106 (4th Cir. 2006)).

In the present case, Plaintiff's proposed Third Amended Complaint sought identical relief a judgment of $429,000.00 plus costs, interest and attorney's fees – under Count I, his claim for Plan benefits, which could be brought only under 29

Appellate Case: 13-2233 Page: 26 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

U.S.C. §1132(a)(1)(B), and Counts II and III, the claims for "restitution or surcharge or damages" under 29 U.S.C. §1132(a)(3). (App., pp. 120-123).

This Court has held consistently that a plaintiff's ability to seek relief in a 29 U.S.C. §1132(a)(1)(B) claim forecloses him or her from pursuing the same relief in a 29 U.S.C. §1132(a)(3) claim. *See, e.g., Conley v. Pitney Bowes*, 176 F. 3d 1044, 1047 (8th Cir. 1999). More recently, this Court reiterated this holding in *Pilger v. Sweeney*. The plaintiffs in *Pilger* were retirees who were receiving pension benefits. Due to an error, the defendants, a pension fund and its administrator and trustees, calculated the plaintiffs' pension benefits at a higher rate than that applicable under the formula the defendants had adopted previously. Some of the plaintiffs had retired based on the inflated, inaccurate information they had been given concerning their pension benefits, because of the mistake. Initially, the plaintiffs were paid excess benefits, due to the error. Once the error was discovered, the plaintiffs' benefit payments were reduced and the defendants began recouping the overpayments by withholdings from the plaintiffs' benefit checks.

The plaintiffs brought suit, asserting claims under both 29 U.S.C. §1132(a)(1)(B) and 29 U.S.C. §1132(a)(3)(B). This Court affirmed summary judgment for the defendants on each count. On the §1132(a)(1)(B) claim, the Court held that the defendants were entitled to recoup the overpayments and that the plaintiffs' challenge to the formula, under which the plaintiffs were entitled to a

Appellate Case: 13-2233 Page: 27 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

lower benefit amount than was paid initially, was time-barred. The Court held that the §1132(a)(3) claim failed because it sought payment based on the higher rate and return of the recouped overpayments, the same relief the plaintiffs sought in their §1132(a)(1)(B) claim. *Pilger*, 2013 WL 4016523 at *4. Citing *Varity* and *Conley*, the Court held: "Plaintiffs' ability to seek this relief in their §1132(a)(1)(B) claim forecloses them from also pursuing it in this §1132(a)(3)(B) claim." *Id.*

While this Court, in *Pilger*, did not discuss *Amara*, several district courts have done so and have concluded that *Amara* does not abrogate the principle, stated in *Varity*, that relief under §1132(a)(3) is not available where the plaintiff can seek the same relief under §1132(a)(1)(B). *See Biglands v. Raytheon Employee Savings & Inv. Plan*, 801 F.Supp.2d 781, 786 (N.D. Ind. 2011) (dismissing §1132(a)(3) claim and noting that "as in *Varity* the plaintiffs in *Amara* were allowed to proceed with their claim under §1132(a)(3) because they had no claim for relief under §1132(a)(1)(B)"); *Moyle v. Liberty Mut. Retirement Ben. Plan*, ___ F.Supp.2d ___, 2013 WL 3316898 at *16 (S.D. Cal. July 1, 2013) (holding that the plaintiff, who sought credit under a pension plan for past service, could not seek the same relief by way of reformation or surcharge in an amount equal to the unpaid benefits); *Roque v. Roofers' Unions Welfare Trust Fund*, 2013 WL 2242455 at *7 (N.D. Ill. May 21, 2013) (holding that "*Amara* did not, as Roque contends, alter the rule announced in *Varity*" and dismissing §1132(a)(3)

Appellate Case: 13-2233 Page: 28 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

claims where the plaintiff sought the same relief, reimbursement for a medical procedure, under §1132(a)(1)(B)).

The cases relied on by Plaintiff do not involve situations in which a plaintiff sought the same relief under both §1132(a)(1)(B) and §1132(a)(3). As a result, affirming the district court's judgment in this case will not create a split among the circuits, as the Secretary of Labor suggests. The plaintiff in *McCravy v. Metropolitan Life Ins. Co.*, 690 F.3d 176, 178 (4th Cir. 2012) made no claim under 29 U.S.C § 1132(a)(1)(B) but sought relief only under §§ 1132(a)(2) or (a)(3). Likewise, the plaintiff in *Gearlds v. Entergy Services, Inc.*, 709 F.3d 448, 449-450 (5th Cir. 2013) asserted claims for breach of fiduciary duty and equitable estoppel under § 1132(a)(3) based on the plan administrator's discontinuance of his medical benefits after he allegedly was induced to take early retirement by the plan administrator's representations that he would continue to receive medical benefits.

The only claims addressed by the court in *Kenseth v. Dean Health Plan, Inc.*, 722 F.3d 869, 872 (7th Cir. 2013) were claims under §1132(a)(3), as the court had previously affirmed summary judgment for defendant on plaintiff's state law and estoppel claims. *See Roque v. Roofers' Unions Welfare Trust Fund*, 2013 WL 2242455 at *8 (noting that "in *Kenseth* the plaintiff did not bring simultaneous claims under § 502(a)(3) and § 502(a)(1)(B)" but "only sought relief under a theory of equitable estoppel and § 502(a)(3)"). In *Skinner v. Northrop Grumman*

Appellate Case: 13-2233 Page: 29 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

Retirement Plan B, 673 F.3d 1162, 1165 (9th Cir. 2012), the plaintiffs focused on their §1132(a)(3) claim because the *Amara* decision foreclosed the relief they had sought under §1132(a)(1)(B).

The Fourth, Fifth, Seventh and Ninth Circuit decisions simply do not hold that a claimant may pursue simultaneous claims for the same relief under both 29 U.S.C. § 1132(a)(1)(B) and § 1132(a)(3).

The Fourth Circuit observed in *Korotynska v. Metro. Life Ins. Co.*, 474 F.3d at 107, that the alleged fiduciary breaches and procedural deficiencies asserted by the plaintiff in her §1132(a)(3) claim could be addressed "in the context of review of actual benefits claims under § 1132(a)(1)(B)." That was certainly true in the present case. Plaintiff's complaints about Savvis' enrollment process and his contention that the Decedent was not given adequate notice of the Evidence of Insurability requirement were considered by the district court in ruling on the parties' motions for summary judgment. (*Silva*, 912 F.Supp.2d at 787-788, 790-792; App., pp. 278-281, 284-290).

Because Plaintiff had available and actually pursued his claim for $429,000 under § 1132(a)(1)(B), the district court properly denied him leave to amend to assert a claim under §1132(a)(3).

Appellate Case: 13-2233 Page: 30 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

II. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS, BECAUSE THE BENEFIT DETERMINATION WAS REASONABLE AND SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS NOT ARBITRARY AND CAPRICIOUS.

Standard of Review

The district court's grant of summary judgment is reviewed *de novo*. *See Darvell v. Life Ins. Co. of North America*, 597 F.3d 929, 934 (8th Cir. 2010). The district court properly applied the abuse of discretion standard in reviewing MetLife's determination that no Supplemental Life Insurance benefits are payable.

The abuse of discretion standard applies where, as here, the Plan gives a claims fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the Plan. (App., p. 458). *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989); *accord, Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 115-116 (2008); *Conkright v. Frommert*, 559 U.S. 506, 513 (2010).

Under the abuse of discretion standard, the court considers whether the claims administrator's decision was reasonable and supported by substantial evidence. *Green v. Union Sec. Ins. Co.*, 646 F.3d 1042, 1050 (8th Cir. 2011). Substantial evidence is "more than a scintilla but less than a preponderance." *Id.* A determination is reasonable "if a reasonable person *could* have reached a similar decision, given the evidence before him, not that a reasonable person *would* have reached that decision." *Midgett v. Washington Group International Long Term*

Appellate Case: 13-2233 Page: 31 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

Disability Plan, 561 F.3d 887, 897 (8th Cir. 2009). Where the administrator offers a reasonable explanation for its decision, the decision should not be disturbed, even though a different reasonable interpretation could have been made. *Id.* at 898. Under the abuse of discretion standard, a court will reverse a claims administrator's determination only if it is arbitrary and capricious. *Jackson v. Prudential Ins. Co.*, 530 F.3d 696, 701 (8th Cir. 2008).

The Administrative Record Showed Adequate Notice of the Evidence of Insurability Requirement

Although Plaintiff and the Secretary of Labor argue that the Decedent was not given adequate notice of the evidence of insurability requirement, MetLife confirmed that the MetLife Certificate of Insurance with ERISA wrapper (App., pp. 367-461), which functions as both the Plan Document and Summary Plan Description, was distributed by Savvis to its employees. (App., pp. 571, 576). Defendants' attorney's letter (App., pp. 520-521), written in response to Plaintiff's counsel's letter, is not to the contrary and does not state that the SPD is available only on the Savvis intranet. Rather, it states both that the SPD was distributed to Plan participants and that it is available on the intranet, the latter being mentioned to explain why Savvis did not have employees sign a document stating that they had received a copy. As the district court noted, no statute or regulation requires a signed receipt. (*Silva*, 912 F.Supp. at 788; App., p. 280).

This is not a situation, like that in *Leyda v. AlliedSignal, Inc.*, 322 F.3d 199

Appellate Case: 13-2233 Page: 32 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

(2d Cir. 2003), where there was specific evidence of a limited distribution of the summary plan description. In the present case, Plaintiff stated that he would present evidence that there was no "actual receipt" of the MetLife certificate, but he did not do so. (App., p. 523).

In addition, even if Plaintiff could show that the Decedent did not receive a copy of the MetLife certificate, Savvis' online enrollment system prompted him to complete and submit a Statement of Health form. (App., pp. 573-574). During its review of Plaintiff's claim, MetLife contacted Savvis concerning its enrollment process. Savvis advised that employees completed their enrollment online and if they elected more than three times their Basic Annual Earnings, they were prompted to complete a paper Statement of Health form and submit that to their HR department. (App., p. 574). On further inquiry to Savvis, MetLife was informed that when an employee completes the enrollment online and is prompted to complete a Statement of Health form, the system tells the employee to contact the Benefits Department.

Savvis informed MetLife that the Benefits Department is accessible during all work hours and has the Statement of Health forms available. Because the Decedent worked in the same building in which the benefits department was located, he could have walked to the area and requested a form, or he could have called or emailed. (App., p. 573). *See Schad v. Stamford Health System, Inc.*, 358

Appellate Case: 13-2233 Page: 33 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

Fed. Appx. 242, 244 (2d Cir. 2009) (unpublished) (affirming judgment for defendant where, even if defendants failed to provide the decedent with an adequate summary plan description, the enrollment form advised her that evidence of insurability was required).

Plaintiff and the Secretary of Labor are also in error in arguing that the certificate of insurance was inadequate as a summary plan description. The courts have recognized that a single document may function as both the Plan Document and the summary plan description. *See Alday v. Container Corp. of America*, 906 F.2d 660, 662, n. 2 (11th Cir. 1990) (noting that the plan document and summary plan description were identical). In the present case, the certificate, titled "Your Benefit Plan" and bearing the name "Savvis Communications Corporation and its Affiliates" (App., p. 367), was directed to the Plan participants. Its first page states:

> TO OUR EMPLOYEES:
>
> All of us appreciate the protection and security insurance provides.
>
> This certificate describes the benefits that are available to you. We urge you to read it carefully.
>
> Savvis Communications Corporation and its Affiliates

(App., p. 378).

The certificate spelled out in plain language the circumstances that made it necessary for the Decedent to submit evidence of insurability, as well as the

Appellate Case: 13-2233 Page: 34 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

consequences of failing to do so:

> 5. if You make a request during an annual enrollment to increase the amount of Your Supplemental Life Insurance to an option which is more than 1 level **above** Your current amount of Supplemental Life Insurance.
>
> If You do not give Us evidence of insurability or the evidence of insurability is not accepted by Us as satisfactory, the amount of Your Supplemental Life Insurance will not be increased.
>
> * * * * *
>
> 9. if You make a late request for Supplemental Life Insurance. A late request is one made more than 31 days after you become eligible.
>
> If You do not give Us evidence of insurability or the evidence of insurability is not accepted by Us as satisfactory, You will not be covered for Supplemental Life Insurance.

(App., pp. 427-428).

The Decedent elected Supplemental Life Insurance several years after he became eligible to elect it, and he increased his level of supplemental life insurance from none to five times his Basic Annual Earnings. In these circumstances, he was required to submit evidence of insurability, and the enrollment process prompted him to submit that evidence in the form of a statement of health. Because he failed to do so, the Supplemental Life Insurance coverage he requested was never approved and never became effective.

The District Court Properly Held that MetLife's Determination Was Reasonable and Was Supported by Substantial Evidence in the Record

Because review of a claim determination is limited to the administrative

Appellate Case: 13-2233 Page: 35 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

record where the Plan gives the claim fiduciary discretionary authority, the issue on review of a summary judgment or judgment on the administrative record is whether the claim fiduciary's determination was reasonable and supported by substantial evidence in the administrative record. *Green v. Union Sec. Ins. Co.*, 646 F.3d 1042, 1050 (8th Cir. 2011). In the present case, substantial evidence in the administrative record supported MetLife's determination.

The Plan unambiguously required the Decedent to submit evidence of insurability satisfactory to MetLife, and he failed to do so. See *O'Connor v. Provident Life and Acc. Co.*, 455 F.Supp.2d 670, 678, 680 (E.D. Mich. 2006) (holding that there was a reasonable basis for claim administrator's denial of benefits where plan plainly stated that additional insurance was offered only if evidence of insurability was furnished and the decedent never furnished such evidence); *Colardo v. Metropolitan Life Ins. Co.*, 2011 WL 1899253 at *7 (M.D. Fla. March 16, 2011), *adopted*, 2011 WL 1899236 (M.D. Fla. May 19, 2011) (holding that identical plan language "unequivocally requires a participant who makes a late request for Optional Life Insurance to submit evidence of insurability to MetLife").

When he initially declined Supplemental Life Insurance when he became eligible, the Decedent acknowledged that if he elected it in the future, he would be required to provide evidence of good health satisfactory to the insurer. (App., p.

Appellate Case: 13-2233 Page: 36 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

339). Although the Secretary of Labor argues that the district court should not have considered this notification, it was part of the administrative record and went to the issue of the Decedent's recognition that he could be required to provide information concerning the state of his health if he later requested Supplemental Life Insurance. When the Decedent did request Supplemental Life Insurance in the amount of five times his Basic Annual Earnings, to become effective January 1, 2010, Savvis' online enrollment system prompted him to complete and submit a Statement of Health form, but he failed to do so. (App., pp. 573-574).

Although Plaintiff argues that other persons did not submit a Statement of Health form, the only claim at issue in this case is Plaintiff's claim for Supplemental Life insurance benefits by reason of the Decedent's death. The Plan states several different situations in which evidence of insurability is required. (App., pp. 427-428). Savvis' enrollment system prompted completion and submission of a Statement of Health form if the amount of Supplemental Life Insurance requested exceeded three times Basic Annual Earnings. (App., pp. 573-574). Because the Decedent elected Supplemental Life Insurance of five times his Basic Annual Earnings, Savvis' online enrollment process prompted him to complete and return a Statement of Health form and directed him to contact the Benefits Department which had the forms available and was in the same building where the Decedent worked. (App., pp. 573-574). On the record before MetLife –

Appellate Case: 13-2233 Page: 37 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

including the evidence that Savvis' online enrollment system prompted the Decedent to complete and submit a Statement of Health form – MetLife's determination that the Decedent was not covered for Supplemental Life Insurance was reasonable and was supported by substantial evidence.

Plaintiff's suggestion that evidence of insurability was unnecessary because the Decedent was "eligible" for Supplemental Life Insurance (Aplt. Brief, pp. 23-24) misconstrues the Plan. Although all full-time Savvis employees were eligible to enroll for insurance (App., p. 409), late enrollments (more than 31 days after becoming eligible) for Supplemental Life Insurance, enrollments for Supplemental Life Insurance in excess of the lesser of three times Basic Annual Earnings or $400,000, and certain increases in the amount of insurance elected were subject to the additional requirement that the enrollee provide evidence of insurability. (App., pp. 394, 427-428). If evidence of insurability was not provided or was not accepted by MetLife as satisfactory, the enrollee would not be covered for the requested insurance. (App., pp. 427-428).

Plaintiff disputes the statements in the administrative record that MetLife had confirmed that the certificate of insurance was distributed to Savvis employees and learned from Savvis that the enrollment process prompted completion of a Statement of Health form when an employee requested Supplemental Life Insurance in an amount more than three times Basic Annual Earnings.

Appellate Case: 13-2233 Page: 38 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

A claim fiduciary conducting an administrative review of an ERISA-governed claim, however, is not required to insist on the same type of evidence that would be admissible in court. *See Black v. Long Term Disability Ins. Co.*, 582 F.3d 738, 744, n. 4 (7th Cir. 2009) ("The Federal Rules of Evidence, however, do not apply to an ERISA benefits administrator's benefits determination, and we review the entire administrative record, including hearsay evidence relied upon by the administrator."). *See also Coker v. Metropolitan Life Ins. Co.*, 2011 WL 5838218 at * 2 (E.D. Mich. Nov. 18, 2011) (upholding claim administrator's denial of certain optional life insurance benefits for lack of submission of evidence of insurability where it was advised by the plan administrator, during investigation of the claim, that the enrollment was done online and that during the enrollment process a participant was notified if proof of good health was required).

MetLife reasonably inquired of Savvis, the Plan Administrator, concerning both the distribution of the certificate of insurance and the online enrollment process. It was informed that the certificate of insurance, which contains the Evidence of Insurability requirements, had been distributed to Savvis employees. (App., pp. 571, 576). Although Plaintiff stated that he would submit evidence that no actual receipt occurred (App., p. 523), he did not do so. Savvis also informed MetLife that its online enrollment process prompts employees who elect more than three times Basic Annual Earnings to complete and submit a paper Statement of

Appellate Case: 13-2233 Page: 39 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

Health form (App., p. 574) and tells them to contact the Benefits Department, which has the forms available. (App., p. 573).

Contrary to Plaintiff's argument, MetLife's interpretation of the Plan's Evidence of Insurability requirement to require a Statement of Health form was reasonable where the enrollment process prompted Plaintiff to complete and submit a Statement of Health form. *See Schad v. Stamford Health System, Inc.*, 358 Fed. Appx. 242, 244 (2d Cir. 2009) (unpublished) (where the decedent received written notice of the Evidence of Insurability requirement when she completed the enrollment forms, any alleged deficiency in summary plan description was harmless).

Plaintiff's argument that MetLife accepted evidence of insurability, which the Decedent did not submit, by receiving premiums which Savvis deducted from the Decedent's paychecks (Aplt. Brief, p. 26), has no support in the record. The "Benefit Elections" record maintained by Savvis (App., pp. 331-332) is simply that, a record of the coverage the Decedent had elected. It in no way suggests that MetLife had approved Supplemental Life Insurance coverage for the Decedent.

There is no evidence that MetLife received any information concerning the Decedent's benefit elections prior to his death. To the contrary, the administrative record reflects that MetLife requested a copy of the enrollment form on September 22, 2010, and on October 15, 2010, Savvis faxed the "Benefits Elections"

Appellate Case: 13-2233 Page: 40 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

information, along with the "Employer's Statement" portion of the claim form, to MetLife. (App., pp. 327-336). Moreover, while Savvis was responsible for providing the Statement of Health forms to its employees, it could not and did not approve coverage. That could be done only by MetLife (referred to in the Plan as "We" or "Us"). (App., pp. 408, 411, 427-428).

Plaintiff failed to show that MetLife accepted premiums, prior to the Decedent's death, with knowledge that the Decedent was required to submit evidence of insurability and had not done so. As in *O'Connor v. Provident Life and Acc. Co.*, 455 F.Supp.2d 670, 680 (E.D. Mich. 2006), the evidence in the administrative record "does not support the notion that the defendant was aware that [the Decedent] had applied for coverage that required proof of insurability and waived that requirement."

The court in *O'Connor* rejected the plaintiff's waiver argument and observed that a "receipt of premiums without explanation from the employer in this case may have appeared to the defendant as part of normal receipts under the terms of the group policy." Citing *O'Connor*, the district court in the present case properly reached the same conclusion that the deduction of premiums for six months did not constitute a waiver. (*Silva*, 912 F.Supp.2d at 791-792; App., p. 287). *See also Colardo v. Metropolitan Life Ins. Co.*, 2011 WL 1899253 at *7-8 (M.D. Fla. March 16, 2011), (noting that insurer and claim administrator was

Appellate Case: 13-2233 Page: 41 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

unaware of both the decedent's election of Optional Life Insurance and that premiums were being deducted based on her election "until it undertook to address the beneficiaries' claim for such benefits upon her death").

Moreover, as MetLife noted in its letter upholding the denial of Plaintiff's claim, MetLife never approved Plaintiff's request for Supplemental Life Insurance coverage. (App., pp. 559-560). *See Knopick v. Metropolitan Life Ins. Co.*, 457 Fed. Appx. 25, 27, 29 (2d Cir. 2012) (unpublished) (reversing summary judgment for the plaintiff and remanding for entry of summary judgment in favor of the defendant because it had not stated, in writing, that coverage was in effect). The Plan provides for written notification that coverage will take effect on a stated date if Evidence of Insurability is accepted. (App., p. 411). No such notification was given, because Evidence of Insurability was neither submitted by the Decedent nor accepted as satisfactory.

CONCLUSION

The district court properly denied Plaintiff's motion for leave to file a Third Amended Complaint, adding claims under ERISA § 502(a)(3) because Plaintiff had available and was pursuing a § 502(a)(1)(B) claim for the same relief. The district court also properly held that MetLife did not abuse its discretion in applying the Evidence of Insurability requirement and determining that no Supplemental Life Insurance benefits were payable. The determination was

Appellate Case: 13-2233 Page: 42 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

reasonable and supported by substantial evidence in the administrative record. The summary judgment in favor of Defendants should be affirmed.

Respectfully submitted,

BUCKLEY & BUCKLEY, L.L.C.

By: /s/ Ann E. Buckley
Ann E. Buckley
1139 Olive Street, Suite 800
St. Louis, MO 63101-1928
Telephone: (314) 621-3434
Facsimile: (314) 621-3485
abuckley@buckleylawllc.com

Attorneys for Appellees

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed.R. App. 32(a)(7)(B) because this brief contains 8,183 words, as counted by the word processing system used in preparing this brief, Microsoft Word 2010, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with Times New Roman font 14.

By: /s/ Ann E. Buckley
Attorneys for Appellees
Dated: September 13, 2013

Appellate Case: 13-2233 Page: 43 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED

CERTIFICATE THAT BRIEF IS VIRUS-FREE

In accordance with Rule 28 A(h)(2) of the Rules of the United States Court of Appeals for the Eighth Circuit, the undersigned hereby certifies that this brief has been scanned for viruses by AVG corporate edition and that it is virus-free.

/s/ Ann E. Buckley

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 13th day of September, 2013, a copy of the above and foregoing Appellees' Brief was filed electronically with the Clerk of the Court, using CM/ECF system, which sent notification of such filing to: David C. Knieriem, 7711 Bonhomme, Suite 850, Clayton, MO 63105, attorneydavek@cs.com; Peter K. Stris, Stris & Maher LLP, 19210 S. Vermont Ave. Building E, Gardena, CA 90248, peter.stris@strismaher.com; and Michael T. George, 2339 Menard, Suite 301, St. Louis, MO 63104, mtglaw1@gmail.com, Attorneys for Appellant; and Evelyn H. Chung, Senior Trial Attorney, U.S. Department of Labor, 200 Constitution Ave. N.W., Room N-4611, Washington D.C. 20210, Attorney for the Acting Secretary of Labor.

/s/ Ann E. Buckley

Appellate Case: 13-2233 Page: 44 Date Filed: 09/13/2013 Entry ID: 4075459 RESTRICTED