18-1591

United States Court of Appeals

for the

Second Circuit

KRISTINE SULLIVAN-MESTECKY, individually and as the beneficiary of the life insurance policy of Kathleen Sullivan, deceased,

Plaintiff-Appellant,

v.

VERIZON COMMUNICATIONS INC. and THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

OPENING BRIEF FOR PLAINTIFF-APPELLANT

Peter K. Stris
John Stokes
STRIS & MAHER LLP
725 S. Figueroa St., Ste. 1830
Los Angeles, CA 90017
(213) 995-6800

Counsel for Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases (cont.) **Page(s) (cont.)**

INTRODUCTION

This is a straightforward case under the Employee Retirement Income Security Act of 1974 (ERISA) that became mired in complexity before the district court. Perhaps in light of this complexity, and despite its thoughtful and thorough efforts in many respects, the district court dismissed Plaintiff Kristine Sullivan-Mestecky's central claim—that she may obtain monetary make-whole relief to remedy a clear breach of the Defendants' ERISA-imposed fiduciary duties—based on a view of the law that has been overruled by the Supreme Court and this Court. This Court should accordingly vacate and remand.

Kristine Sullivan-Mestecky is the daughter and life insurance beneficiary of Kathleen Sullivan. Ms. Sullivan worked for a predecessor company of Defendant Verizon Communications. In 2011, Verizon enrolled Ms. Sullivan in an ERISA-governed life insurance policy in the amount of $679,700. Defendant Prudential Insurance Company is the insurer and claims administrator on the policy.

Over the course of 2011 and 2012, Verizon and Prudential repeatedly confirmed the existence and amount of the policy to Ms. Sullivan. They indeed sent her multiple written confirmations of her enrollment and even provided W-2s reflecting imputed income from the policy. Ms. Sullivan, moreover, called the Verizon Benefits Center on numerous occasions to confirm the policy amount, and was told each time it was correct. And Defendants' internal records show they repeatedly "double check[ed]" that Ms. Sullivan was "truly eligible" for a $679,700 policy and concluded she was. A390

But when Ms. Sullivan died in 2012, Defendants disbursed $11,380 for her funeral, and then sent her daughter a check for what they claimed was the full remaining amount—$20. They told Ms. Sullivan-Mestecky that Verizon had enrolled her mother in the $679,700 policy by mistake, but had now "corrected" the mistake and made the full payout due.

At minimum, these actions violated Defendants' ERISA-imposed fiduciary duty to act prudently and avoid misrepresentations. Defendants indeed admit they made a "substantial error" (A377), but that is an understatement. Every circuit to consider similar facts has easily found a fiduciary breach. And under ERISA, a beneficiary is entitled to seek "appropriate equitable relief" to remedy such a breach. 29 U.S.C. § 1132(a)(3).

Despite Defendants' (essentially admitted) misconduct, the district court dismissed Ms. Sullivan-Mestecky's Section 1132(a)(3) fiduciary breach claim on the ground that she did not seek "appropriate equitable relief." The court reasoned that because Ms. Sullivan-Mestecky sought payment of the remainder of the life insurance policy, she was "'seeking, in essence, to impose personal liability on defendants . . . to pay money [damages]—relief that was not typically available in equity.'" A072 (quoting *Great-West Life & Ann. Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002)) (brackets omitted).

But that is **indisputably wrong** after the Supreme Court's decision in *CIGNA Corp. v. Amara*, 563 U.S. 421, 440-41 (2011), which held that beneficiaries may obtain make-whole monetary relief—i.e., the equivalent of money damages—under Section 1132(a)(3). Since *CIGNA*, every circuit to address this issue, including the Second Circuit, has agreed. *See, e.g.*, *Amara v. CIGNA Corp.*, 775 F.3d 510, 518 (2d Cir. 2014). And the several circuits to confront facts materially identical to this case have *all* held that an ERISA beneficiary under these circumstances is entitled to money damages in the amount of the promised insurance payout. This Court should do the same.

Independent of her Section 1132(a)(3) fiduciary breach claim, Ms. Sullivan-Mestecky *also* sought relief from Defendants' conduct under an ERISA provision that allows beneficiaries to "recover benefits due to [them] under the terms of [their] plan." 29 U.S.C. § 1132(a)(1)(B). The district court erroneously granted Defendants summary judgment on this claim as well.

Section 1132(a)(1)(B) claims turn on the benefits due as a matter of contract law under the plan documents, and plan administrators are typically entitled to deference in interpreting those documents. But that principle is subject to some limitations. Once a beneficiary's benefits vest—as Ms. Sullivan-Mestecky's did here the moment her mother died—those benefits cannot be reduced, even if reduction would have been appropriate prior to vesting. Here, the life insurance policy in effect at the moment Ms. Sullivan died was both valid under the governing documents' terms and reflected the full policy amount that Ms. Sullivan-Mestecky now seeks to recover. Because the full policy amount vested upon Ms. Sullivan's death, the Defendants could no longer amend the policy to "correct" their mistake. The district court's contrary conclusion was error.

JURISDICTIONAL STATEMENT

Because this case arises under ERISA, the district court had subject matter jurisdiction under 28 U.S.C. § 1331. The district court entered final judgment in this matter, disposing of all claims, on May 16, 2018. A156. Ms. Sullivan-Mestecky timely filed a notice of appeal on May 24, 2018. A158. This Court accordingly has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in dismissing Ms. Sullivan-Mestecky's fiduciary breach claim under Section 1132(a)(3).
2. Whether the district court erred in granting Defendants summary judgment on Ms. Sullivan-Mestecky's claim for benefits under Section 1132(a)(1)(B).

STATEMENT OF THE CASE

I. Local Rule 28.1 Statement

This case involves claims for equitable relief and benefits under ERISA, arising out of Defendants' enrollment of Plaintiff Kristine Sullivan-Mestecky's mother in an ERISA-governed life insurance policy. The district court (Judge Feuerstein) granted Defendants' motion to dismiss Ms. Sullivan-Mestecky's claim for equitable relief and then granted Defendants summary judgment (adopting Magistrate Judge Shields's report and recommendation) on Ms. Sullivan-Mestecky's benefit claim. Neither of the decisions under review is reported. But the motion to dismiss decision is available at 2016 WL 3676434 (E.D.N.Y. July 7, 2016), and the summary judgment decision adopting the magistrate's report and recommendation is available at 2018 WL 2229140 (E.D.N.Y. May 5, 2018).

II. Statutory Background

ERISA is a landmark federal statute enacted "to protect . . . the interests of participants in employee benefit plans . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries . . . and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b).

Although ERISA in some respects deserves its reputation as immensely complicated, its core design is straightforward. To safeguard employee benefits, it imposes strict fiduciary duties on those who manage them, to be discharged "solely in the interest of . . . participants and beneficiaries." 29 U.S.C. § 1104. Congress derived these duties from the common law of trusts. *See Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996).

Central among those duties is the duty to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent [person] . . . would use." 29 U.S.C. § 1104. Relatedly, fiduciaries must "disclose material information to beneficiaries . . . [which] encompasses both an obligation not to mislead the participant of an ERISA plan, and also an affirmative obligation to communicate material facts affecting the interests of plan participants." *Kenseth v. Dean Health Plan, Inc.*, 722 F.3d 869, 872 (7th Cir. 2013); *see, e.g.*, *Estate of Becker v. Eastman Kodak Co.*, 120 F.3d 5, 8 (2d Cir. 1997) (fiduciary duties encompass the duty to avoid "affirmative material misrepresentations" and to "provide complete and accurate information in response to beneficiaries' questions about plan terms and/or benefits"); *Eddy v. Colonial Life Ins. Co. of Am.*, 919 F.2d 747, 750 (D.C. Cir. 1990) ("The duty to disclose material information is the core of a fiduciary's responsibility, animating the common law of trusts long before the enactment of ERISA.").

When a fiduciary breaches its duties, ERISA (in keeping with its trust law roots) allows participants and beneficiaries to seek "appropriate equitable relief" to remedy that breach. 29 U.S.C. § 1132(a)(3). Although this requirement has engendered serious confusion in some contexts, the Supreme Court has squarely held that ERISA beneficiaries may seek monetary make-whole relief to remedy fiduciary breach—because such relief "closely resembles [the] three . . . traditional equitable remedies" of "surcharge," "reformation," and "estoppel." *CIGNA*, 563 U.S. at 440-42.

Additionally, even when no fiduciary breach has occurred, ERISA permits a "participant or beneficiary . . . to recover benefits due to him under the terms of his plan." 29 U.S.C. § 1132(a)(1)(B). Such claims are commonly referred to as "benefit claims," and they are generally governed by what a beneficiary is entitled to, as a matter of contract law, under the language of the plan. *See generally Conkright v. Frommert*, 559 U.S. 506, 509 (2010).

III. Factual Background

A. Verizon Enrolls Ms. Sullivan In A $679,700 Life Insurance Policy.

In 2011, Verizon enrolled Kathleen Sullivan, a former employee of its predecessor company New York Telephone, in a life insurance policy in the amount of $679,700. A108. Ms. Sullivan had begun working for New York Telephone, along with her husband Joseph, in the early 1970s. A105. But because of a severe automobile accident, she left the company on long-term disability leave in 1978. A105. For many years, she continued to receive benefits under her husband's name as part of Verizon's (and its predecessor companies') employee benefits plan. A105. But after Joseph's death in 2005, Verizon terminated her benefits.

In July 2011, Ms. Sullivan called the Verizon Benefits Center to seek employee benefits based on *her own* years of service with New York Telephone. A108. As a result, Verizon enrolled her in a life insurance policy under the Group Life Insurance Plan for New York and New England Associates (the "GLI Plan") in the amount of $679,700. A108. Prudential "served as the insurer and the claims administrator for the policy." A060 (district court citing Prudential admission). Thus, in addition to Verizon, Prudential was a named fiduciary with respect to Ms. Sullivan's life insurance policy. A054 (district court quoting GLI Plan language saying the "Insurance Company" "appoint[ed] . . . as Administrator[] under the Plan . . . shall be a Named Fiduciary of the Plan"); A057 n.13 (quoting Prudential/Verizon agreement acknowledging that "[Prudential] is the appropriate named fiduciary").

B. Verizon And Prudential Repeatedly Confirm The Policy's Existence And Amount Both In Writing And Orally.

After Verizon enrolled Ms. Sullivan in the policy, Defendants confirmed its details to Ms. Sullivan on numerous occasions.

Written confirmations. As an initial matter, Verizon sent Ms. Sullivan a "Retirement Enrollment Worksheet" and a "Confirmation of Coverage" confirming the existence and amount of her policy. A349, A352-354. And later that year, Prudential sent her a notice that her $679,700 life insurance policy would be reduced by $97,100 in 2012 (based on her age) to $582,600. A350-351. In 2011 and 2012, Verizon also sent Ms. Sullivan W-2s reflecting thousands of dollars of imputed income based on the life insurance policy. A355.[1]

Oral confirmations. Ms. Sullivan did not simply rely on Defendants' written confirmation of her policy, however. Given the idiosyncrasies of her situation—retirement in 1978, followed by six years of long-term disability benefits, and then many more receiving benefits in her husband's name—she certainly thought it was both plausible and reasonable that she would be entitled to a substantial life insurance policy. A361-363. But she also wanted to be completely sure that she had the correct information about her policy. So she *repeatedly* called the Verizon Benefits Center to confirm both its existence and amount.

In one conversation, for example, the Benefits Center told her, "Okay what I'm showing here, your retiree—retiree life is currently 679,700." A363. When Ms. Sullivan moments later asked again "and how much is it for?," the Benefits Center again told her "[r]ight now it's currently at $679,700." A363.

On another occasion, after the policy had been reduced, Ms. Sullivan called about the income tax Verizon had withheld based on imputed income from the

[1] As the Verizon Benefits Center explained to Ms. Sullivan on the phone at the time, Verizon paid the premiums on Ms. Sullivan's policy, and the premium payments made on her behalf constitute taxable income. A369.

policy. The agent remarked, "It's an awful lot of life insurance," to which Ms. Sullivan responded "Yes I know." A368. But the agent nonetheless told her "Well your life insurance again they—you know, they confirmed the value is right now $582,600." A369.

Ms. Sullivan made similar calls on other occasions, and each time the Benefits Center confirmed the amount of the policy to her. *E.g.*, A375.[2]

C. Defendants Repeatedly Flag Ms. Sullivan's Policy Internally As Potentially Too Large, But Then Repeatedly Confirm It Is Correct.

The reason Defendants repeatedly confirmed the existence and amount of the policy is simple: their own internal records show that on numerous occasions during 2011 and 2012, they "double check[ed]" whether Ms. Sullivan "is truly eligible for that amount" of life insurance. A390. And each time, they confirmed that the "[r]etiree life amount is correct." A391. These records are remarkable; Ms. Sullivan-Mestecky invites this Court to review them carefully. A381-392. They show that

[2] During the relevant period, the Benefits Center was run by Aon Hewitt on behalf of the plan's named fiduciaries (i.e., Verizon and Prudential), who expressly told participants to direct benefit questions to the Benefits Center. A292 (defining the Benefits Center as "[t]he information and communication system maintained for the Plan to be used by Covered Persons when enrolling in the Plan"); A059 (district court quoting SPD language saying "for questions about plan benefits, you should contact the Verizon Benefits Center or the claims administrator . . . . The Verizon Benefits Center administers enrollment and handles participant questions, requests and certain benefits claims, but is not the plan administrator. . . . "[M]ost of your day-to-day questions can be answered by . . . a Verizon Benefits Center representative.").

Defendants had every opportunity to identify and correct their purported mistake but repeatedly failed to do so, and as a result continued to mislead Ms. Sullivan.

In July 2011, for example, after Ms. Sullivan called the Benefits Center, an employee noted "[t]he ppt wants to know if she would be entitled to retiree life ins[.] pls advise." A381. A few days later, the Benefits Center flagged her policy as potentially incorrect: "can we please confirm that TBA [i.e., the benefit system] is providing a correct figure? This dollar amount seems high is there a possibility that TBA could be giving a higher figure than what the ppt is eligible for?" A382.

The same concerns were raised again the very next day: "can we please confirm that TBA is providing a correct figure? This ppt was not salaried when active. She was hourly and not part of the SMG population. The dollar amount seems high is there a possibility that TBA could be giving a higher figure than what the ppt is eligible for? Thanks in advance." A383. And again: "pls clarify the employees 1xpay retiree basic life ins is at $679,700, which seems incorrect." A383. And again: "per Team Manager request can we please confirm if ppt is getting correct basic life insurance amount? TBA reflects [$679,700] but the number seems to be incorrect for a North Associate." A384.

Nonetheless, on August 1, 2011, the Benefits Center concluded "after clarification—they state [it] is correct. closing w[ork]f[low]." A384.

This process repeated itself in January and April 2012. A386-391. In April, for example, the Benefits Center noted Ms. Sullivan's "ABC [yearly compensation] shows as 970,920.00. Basic Life ins amount shows at 582,600 and it went into effect as of 07/01/2011. Can we please double check that the information is correct and that the ppt is truly eligible for that amount for the life ins policy." A390. A few days later, the Benefits Center again confirmed that the policy was correct: "SECURED – Retiree life amount is correct." A391.

D. After Ms. Sullivan Passes Away, Ms. Sullivan-Mestecky Seeks Payment On The Policy, And Defendants Discover What They Call A "Substantial Error" In Having Enrolled Ms. Sullivan.

Ms. Sullivan named her daughter, Plaintiff Kristine Sullivan-Mestecky, the beneficiary of her life insurance policy. A354. Over the final two years of Ms. Sullivan's life, Ms. Sullivan-Mestecky incurred significant expenses on her mother's behalf based on her expectation of receiving benefits from the policy. Among other things, Ms. Sullivan-Mestecky allowed her mother to live rent-free at her home; she covered her mother's daily living expenses; and she paid her mother's debts. A183-184. To do all of this, moreover, Ms. Sullivan-Mestecky took an extended leave of absence from work. A184.

Ms. Sullivan passed away on November 17, 2012. A184. Two days later, Ms. Sullivan-Mestecky contacted the Benefits Center to arrange the release of funds to cover her mother's funeral expenses. A109. She was told that the death benefit remained $582,600, and she accordingly authorized the release of $11,380 for the funeral. A110.

After the funeral, however, Ms. Sullivan-Mestecky received a check for $20, which purportedly represented the entire remaining amount of the policy. A110. According to Defendants, they had erroneously enrolled Ms. Sullivan in $679,700 of life insurance. They explained that under the terms of the GLI Plan, Ms. Sullivan was not entitled to life insurance benefits *at all*. A116. And even if she were, she would have been entitled only to "one times her annual compensation." Because Ms. Sullivan had retired with a salary of $18,600 in 1978 (a respectable salary at the time), and accounting for appropriate age-related deductions, her policy would have been for $11,400. A109-110. Thus, Defendants told Ms. Sullivan-Mestecky, even though she was actually entitled to *nothing*, they would not seek to recover the $11,400 they had already mistakenly paid out. A116. Defendants themselves noted that "[c]learly" they had made a "substantial error." A377.

IV. Procedural History

After spending more than a year pursuing her claims through Defendants' administrative review process to no avail, Ms. Sullivan-Mestecky filed suit in New York state court. A119. In addition to Verizon and Prudential, Ms. Sullivan-

Mestecky's complaint named Wells Fargo Bank, Xerox, and Aon Hewitt as defendants. A119.

Defendants removed the case to federal court, at which point Ms. Sullivan-Mestecky filed an amended complaint (the operative pleading) alleging ERISA claims for, *inter alia*, (1) equitable make-whole relief based on the fiduciary Defendants' imprudence and misrepresentations (29 U.S.C. § 1132(a)(3)), and (2) benefits under the terms of the plan (29 U.S.C. § 1132(a)(1)(B)). She also alleged contract and misrepresentation claims under New York state law.[3]

Motion to dismiss. The district court granted Defendants' motion to dismiss Ms. Sullivan-Mestecky's Section 1132(a)(3) fiduciary breach claim. The court reasoned that Section 1132(a)(3) permits ERISA beneficiaries to seek only "appropriate equitable relief"; thus, because Ms. Sullivan-Mestecky sought payment of the remainder of the life insurance policy, she was "'seeking, in essence, to impose personal liability on defendants . . . to pay money [damages]—relief that was not typically available in equity.'" A072 (quoting *Great-West*, 534 U.S. at 210) (brackets omitted).

The district court also dismissed Ms. Sullivan-Mestecky's state law claims as preempted by ERISA. A079-080. Finally, the court converted Defendants' motion

[3] The administrative review process continued while Ms. Sullivan's case proceeded in federal court, resulting in a final denial of her claims on June 12, 2015. A330.

to dismiss to a motion for summary judgment with respect to Ms. Sullivan-Mestecky's promissory estoppel claims (under ERISA and state law), and it granted Defendants' motion on the basis that Ms. Sullivan-Mestecky had not reasonably relied on the Defendants' representations and had not demonstrated the required "extraordinary circumstances" to warrant estoppel. A083-094.[4]

Summary judgment. Ms. Sullivan-Mestecky's Section 1132(a)(1)(B) benefits claim survived the motion to dismiss, but the district court subsequently granted Defendants summary judgment on that claim as well, adopting the magistrate judge's Report & Recommendation on this issue in its entirety. The court accepted the Defendants' argument that Verizon enrolled Ms. Sullivan in the $679,700 policy by mistake, and that under the terms of the GLI Plan, (if she was eligible for benefits at all) Ms. Sullivan would have been entitled to life insurance only in the amount of one year's salary. Because Ms. Sullivan had in fact retired with a salary of $18,600 in 1978, the $11,400 that Defendants had paid out was appropriate.

The $679,700 amount, according to Defendants, arose because they mistakenly input Ms. Sullivan's *yearly* salary as a *weekly* salary. The court accepted Defendants' explanation despite expressly noting that their math did not add up: a

[4] The district court dismissed all claims against Wells Fargo, Xerox, and Hewitt, essentially on the ground that they were not proper defendants in the case. The court also directed the clerk to enter partial final judgment as to "Wells Fargo, Xerox and Hewitt . . . pursuant to Rule 54(b)." A095.

weekly salary of $18,600 would mean a *yearly* salary of $967,200; thus the life insurance policy would have been $967,200, not $679,700. A109 nn.2 & 3.

Finally, the court rejected Ms. Sullivan-Mestecky's argument that—even if Verizon enrolled Ms. Sullivan erroneously—Ms. Sullivan-Mestecky's benefits vested at the moment of Ms. Sullivan's death and could not be reduced retroactively, even if they could have been reduced before vesting. A137.

This appeal followed.

STANDARD OF REVIEW

This Court reviews *de novo* both a district court's grant of a motion to dismiss and its grant of summary judgment. *See Kassner v. 2nd Avenue Delicatessen Inc.*, 496 F.3d 229, 237 (2d Cir. 2007); *Gallo v. Prudential Residential Services, Ltd. Parternship*, 22 F.3d 1219, 1224 (2d Cir. 1994).

SUMMARY OF ARGUMENT

Section 1132(a)(3). The district court erroneously dismissed Ms. Sullivan-Mestecky's Section 1132(a)(3) fiduciary breach claim. It believed that because Ms. Sullivan-Mestecky sought payment of the remainder of the life insurance policy, she was in effect seeking money damages—"relief that was not typically available in equity." A072 (quoting *Great-West*, 534 U.S. at 210).

The Supreme Court overruled that view of the law, however, in *CIGNA*, 563 U.S. at 440-41, holding that beneficiaries may obtain make-whole monetary relief—

i.e., the equivalent of money damages—under Section 1132(a)(3). This Court has followed *CIGNA*'s clear rule on numerous occasions in the intervening years, as has every other circuit to address the issue. *See Amara*, 775 F.3d at 518; *N.Y. State Psychiatric Ass'n, Inc. v. UnitedHealth Group*, 798 F.3d 125, 134-35 (2d Cir. 2015) (collecting cases from other circuits).

Ms. Sullivan-Mestecky, moreover, has pled (and will prove on remand) a paradigmatic fiduciary breach claim warranting monetary make-whole relief under Section 1132(a)(3). As the Seventh Circuit has put it (summarizing the law of every circuit to address this fact pattern): a fiduciary breach occurs where the plan "assur[ed] [beneficiaries] that [they] would be covered by a plan benefit," but then "later determined that the plan participants were not actually entitled to the benefits under the terms of the plan." *Kenseth*, 732 F.3d at 881. In such cases, the beneficiary has "pled a breach of fiduciary duty by the plan administrator in misleading her" and may "be made whole with money damages." *Id*. So too here. This Court should accordingly vacate and remand.

Section 1132(a)(1)(B). Independent of her Section 1132(a)(3) fiduciary breach claim, Ms. Sullivan-Mestecky sought to "recover benefits due to [her] under the terms of [the] plan." 29 U.S.C. § 1132(a)(1)(B). The district court erroneously granted Defendants summary judgment on this claim as well. There is no dispute that Ms. Sullivan was enrolled in a life insurance plan in the amount of $582,600 at the moment of her death. Even if she was enrolled in that policy erroneously in the first instance, its premiums were fully paid, and the coverage was valid under the governing Group Life Insurance Contract between Verizon and Prudential. Accordingly, once Ms. Sullivan died—and the benefits under the policy vested—Defendants could no longer amend the policy to correct Ms. Sullivan's mistaken enrollment. The district court erred in concluding otherwise.

ARGUMENT

I. The District Court Erred In Dismissing Ms. Sullivan-Mestecky's Section 1132(a)(3) Fiduciary Breach Claim.

The district court dismissed Ms. Sullivan-Mestecky's Section 1132(a)(3) claim based on an outdated and overruled understanding of the law. This Court should correct the district court's error and hold—in accord with every circuit to consider similar facts—that Defendants' conduct (if proven on remand) constitutes a paradigmatic fiduciary breach entitling Ms. Sullivan-Mestecky to her requested relief: the full remaining amount of the life insurance policy.

A. The District Court Concluded, Contrary To Settled Supreme Court And Second Circuit Authority, That Beneficiaries Cannot Seek Monetary Make-Whole Relief To Remedy Fiduciary Violations Under ERISA.

The district court's sole basis for dismissing Ms. Sullivan-Mestecky's fiduciary breach claim was its conclusion "that plaintiff is 'seeking, in essence, to impose personal liability on defendants . . . to pay money [damages]—relief that was not typically available in equity.'" A072 (quoting *Great-West*, 534 U.S. at 210) (brackets omitted). But that is indisputably wrong after the Supreme Court's decision in *CIGNA*, 563 U.S. at 440-41.

When a plan fiduciary (such as Verizon and Prudential here) breaches the fiduciary duties ERISA imposes on it, ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), permits beneficiaries to seek "appropriate equitable relief" to remedy that breach. Longstanding Supreme Court precedent holds that this includes only "those categories of relief that . . . were typically available in equity." *CIGNA*, 563 U.S. at 439 (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993)) (internal quotation marks omitted). And for many years, across a wide array of contexts, lower courts have struggled to identify which remedies meet that definition.

But in *CIGNA*, the Supreme Court made that task easy in suits by beneficiaries against plan fiduciaries. The Court held that ERISA beneficiaries may seek monetary make-whole relief to remedy fiduciary breach because such relief "closely resembles [the] three . . . traditional equitable remedies" of "surcharge," "reformation," and "estoppel." *Id.* at 440-42.

In the years since *CIGNA* was decided, every circuit to consider the issue has followed its clear rule—including the Second Circuit. *See, e.g.*, *Amara*, 775 F.3d at 518 (recognizing, on remand from the Supreme Court, that the Court had held beneficiaries may obtain monetary make-whole relief under the rubrics of "reformation, estoppel, and surcharge"); *N.Y. State Psychiatric Ass'n*, 798 F.3d at 134-35 (following *CIGNA*, a plaintiff may pursue "surcharge"—"monetary 'compensation' for a loss resulting from a fiduciary's breach"); *see also, e.g.*, *Osberg v. Foot Locker, Inc.*, 862 F.3d 198, 205, 211-13 (2d Cir. 2017) (same, specifically discussing reformation); *Pearce v. Chrysler Group LLC Pension Plan*, 893 F.3d 339, 346-51 (6th Cir. 2018) (specifically addressing reformation and estoppel); *Silva v. Metropolitan Life Ins. Co.*, 762 F.3d 711, 721-23 (8th Cir. 2014) ("[T]he Supreme Court's decision in *[CIGNA v.] Amara* changed the legal landscape by clearly spelling out the possibility of an equitable remedy under ERISA for breaches of fiduciary obligations by plan administrators," including "surcharge," "reformation," and "estoppel."); *Kenseth*, 722 F.3d at 882-83 (7th Cir. 2013) ("[U]nder *CIGNA*, Kenseth may seek make-whole money damages as an equitable remedy under section 1132(a)(3) if she can in fact demonstrate that Dean breached its fiduciary duty to her and that breach caused her damages."); *Gearlds v. Entergy Services, Inc.*, 709 F.3d 448 (5th Cir. 2013) (money damages available under *CIGNA*); *McCravy v. Metropolitan Life Ins. Co.*, 690 F.3d 176 (4th Cir. 2012) (same); *Skinner v. Northrop Grumman Retirement Plan B*, 673 F.3d 1162, 1166 (9th Cir. 2012) (same).

The district court's contrary conclusion—that make-whole relief equivalent to money damages is unavailable to beneficiaries under Section 1132(a)(3)—rests on pre-*CIGNA* authority that *CIGNA* itself acknowledged and distinguished. *Compare* A072 (relying on *Great-West v. Knudson*), *with CIGNA*, 563 U.S. at 439 (expressly distinguishing "*Great-West* [as] consider[ing] a claim brought by a fiduciary against a tort-award-winning beneficiary," whereas "[t]he case before us concerns a suit by a beneficiary against a plan fiduciary").

In short, there can be absolutely no doubt that the district court erred in dismissing Ms. Sullivan-Mestecky's fiduciary breach claim on the basis that she seeks make-whole relief that is the equivalent of money damages. Such relief is unquestionably authorized here.

B. Ms. Sullivan-Mestecky Has Pled (And Will Prove On Remand) A Paradigmatic Fiduciary Breach Claim.

The district court went no further than concluding Ms. Sullivan-Mestecky did not seek appropriate relief. A076 n.21 ("In light of this determination, it is unnecessary to consider defendants' remaining contentions seeking dismissal of plaintiff's ERISA [fiduciary breach] claims."). This Court could accordingly vacate and remand on that basis alone. *See, e.g.*, *CIGNA*, 563 U.S. at 445; *Kenseth*, 722 F.3d at 892 ("We remand so that the district court may address the question of whether Dean breached its fiduciary duty and whether that breach was the cause of any harm that Kenseth suffered.").

But to ultimately establish her right to relief on remand, Ms. Sullivan-Mestecky will be required to demonstrate (1) that Defendants breached their fiduciary duties, and (2) that this breach warrants her requested relief under one of the rubrics identified by the Supreme Court. On both of these issues, Ms. Sullivan-Mestecky has pled (and with the facts already adduced in discovery will prove) a *textbook* case of fiduciary breach warranting make-whole monetary relief.[5]

1. Defendants made repeated misrepresentations, stopping only once their own financial interests were at stake.

ERISA imposes strict fiduciary duties on those who manage employee benefit plans. 29 U.S.C. § 1104(a). These include the duty to act "with the care, skill,

[5] The district court dismissed Ms. Sullivan-Mestecky's Section 1132(a)(3) claim on the pleadings. *See* A075-076. On remand, however, the district court would of course be entitled to consider the evidence adduced during discovery in evaluating Defendants' fiduciary breaches and Ms. Sullivan-Mestecky's entitlement to relief. *See, e.g.*, Fed. R. Civ. P. 12(d); Fed. R. Civ. P. 56. Indeed that is what the district court did in addressing Ms. Sullivan-Mestecky's promissory estoppel claim below, converting Defendants' motion to dismiss to one for summary judgment. Thus, although this Court could certainly remand based on the pleadings alone, it should also address the relevant record evidence.

prudence, and diligence . . . [of] a prudent [person]," *id.*, and "to disclose material information to beneficiaries of trusts . . . [which] encompasses both an obligation not to mislead the participant of an ERISA plan, and also an affirmative obligation to communicate material facts affecting the interests of plan participants." *Kenseth*, 722 F.3d at 872; *see also, e.g.*, *Estate of Becker*, 120 F.3d at 8; *Eddy*, 919 F.2d at 750.

Here, Defendants fell far short of these standards by repeatedly telling Ms. Sullivan—both orally and in writing—that she was enrolled in and entitled to a life insurance policy in the amount of $679,700 (later reduced to $582,600) when in fact (according to Defendants) she was not. They did so despite (1) Ms. Sullivan's repeated and diligent efforts to verify her policy, and (2) their own repeated identification of Ms. Sullivan's policy as potentially incorrect. They themselves call their error "[c]lear[]" and "substantial." A377.

Notably, Defendants ultimately caught their error (after Ms. Sullivan's death) by precisely the same process that had on several previous occasions led to the policy amount being confirmed. As the district court explained: "On or about December 14, 2012, [after Ms. Sullivan-Mestecky had made her benefit claim,] Prudential internally stated that the claim should not be approved until 'the $970,920 annual earnings is verified.'" A110. This is virtually identical to the April 2012 note that "ABC [i.e., annual earnings] shows as 970,920.00 . . . . Can we please double check that the information is correct and that the ppt is truly eligible." A390. Yet the outcome—now that Ms. Sullivan-Mestecky sought payment on the policy—was different.

The natural inference is that Defendants began taking their fiduciary duties seriously only once their *own* interests were at stake. A Prudential employee himself said as much, noting in an email: "This Basic Retiree claim is based on a salary of $970,920 . . . . Looks like something is wrong. Has this claim been adjudicated yet? Need to know right away as it will have a *significant impact on Group earnings*." D. Ct. Dkt. 132-4 at 143 (emphasis added). That is precisely the opposite of how ERISA's fiduciary duties work. *See* 29 U.S.C. § 1104(a) ("a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries").

2. Every circuit to consider similar facts has found a fiduciary breach warranting monetary make-whole relief.

Unsurprisingly, although the Second Circuit does not yet appear to have addressed this precise factual scenario, other circuits have not hesitated to find a fiduciary breach under materially identical circumstances. *See Kenseth*, 722 F.3d at 872-74 (fiduciary breach where plan told participant procedure was covered by her health plan, but in fact it was not); *Gearlds*, 709 F.3d at 449-50 (fiduciary breach where participant was told orally and in writing he would be entitled to medical benefits, but the plan later determined this was an error); *McCravy*, 690 F.3d at 178-79 (fiduciary breach where plan accepted life insurance premiums from beneficiary, leaving her under the impression her daughter was covered, when in fact the daughter was ineligible); *see also Kenseth*, 722 F.3d at 881-82 (discussing *Gearlds* and *McCravy* at length).

The Seventh Circuit in *Kenseth* described the upshot of each of these cases as follows: a fiduciary breach occurs where the plan "assur[ed] [beneficiaries] that [they] would be covered by a plan benefit," but then "later determined that the plan participants were not actually entitled to the benefits under the terms of the plan." *Id.* at 881 (discussing *Gearlds* and *McCravy*). In such cases, the beneficiary has "pled a breach of fiduciary duty by the plan administrator in misleading her" and may "be made whole with money damages." *Id.*

This case sits squarely on all fours with *Kenseth*, *Gearlds*, and *McCravy*. Defendants' fiduciary breach was indeed paradigmatic under this line of cases. This Court should therefore follow its sister circuits (not to mention a common sense understanding of what it means to act prudently) and conclude that Defendants breached their fiduciary duties—and as a result, Ms. Sullivan-Mestecky is entitled to "be made whole with money damages." *Id.*

C. Defendants' Fiduciary Breaches Entitle Ms. Sullivan-Mestecky To The Monetary Make-Whole Relief She Seeks—Damages In The Full Amount Of The Promised Life Insurance Policy.

Defendants' fiduciary breaches, moreover, entitle Ms. Sullivan-Mestecky to her requested relief under each of the three traditionally equitable rubrics the Supreme Court identified in *CIGNA*—surcharge, reformation, and estoppel.[6]

1. Ms. Sullivan-Mestecky's requested relief is available under the rubric of surcharge.

Ms. Sullivan-Mestecky's entitlement to money damages under a surcharge theory is simple, and has been accepted in each of the materially identical cases of *Kenseth*, *Gearlds*, and *McCravy*. As the Supreme Court explained in *CIGNA*, to obtain surcharge relief, an ERISA beneficiary must show a monetary "loss resulting

---

[6] The district court incorrectly stated that Ms. Sullivan-Mestecky sought only an injunction and constructive trust to remedy Defendants' fiduciary breaches. A071. Ms. Sullivan-Mestecky repeatedly made clear that she *also* seeks damages in the full amount of the life insurance policy. *See* A204; A223 (Wherefore clause seeking "On All Causes of Action, damages"); *see also* Sullivan-Mestecky Opp. to Mot. to Dismiss at 56 (D. Ct. Dkt. 76) ("Because Plaintiff has sufficiently pled claims under ERISA § 502(a)(3), she may recover in equity for her losses."). The district court presumably disregarded this request based on its misconception of the relief available under Section 1132(a)(3). Courts have repeatedly held that this is adequate to obtain monetary make-whole relief under Section 1132(a)(3). *E.g.*, *Kenseth*, 772 F.3d at 881 (agreeing with the Fifth Circuit's reasoning that surcharge relief was available "even though Gearlds had not specifically included surcharge in his prayer for relief. Instead, he had asked to be made whole in the form of compensation for lost benefits.") (citing *Gearlds*, 709 F.3d at 452-53).

from a trustee's breach of duty." *CIGNA*, 563 U.S. at 441. Nothing else (for example, detrimental reliance) is required. *Id.* at 444 ("Nor did equity courts insist upon a showing of detrimental reliance in cases where they ordered 'surcharge.' Rather, they simply ordered a trust or beneficiary made whole following a trustee's breach of trust."); *see also Silva*, 762 F.3d at 722 ("Because Silva pleads facts that, if proven to be true, could show an ERISA violation and resulting harm, and because that breach has a remedy under the equitable theory of surcharge, we reverse.").

Ms. Sullivan-Mestecky meets those requirements here. As discussed above, Defendants seriously breached their fiduciary duty to act prudently and to provide accurate information. And those breaches caused Ms. Sullivan-Mestecky straightforward damages in the amount of the life insurance policy that Defendants have refused to pay out. The law is accordingly clear that Ms. Sullivan-Mestecky is entitled to monetary make-whole relief in the full remaining amount of the policy. *See CIGNA*, 563 U.S. at 441; *Kenseth*, 722 F.3d at 882; *Gearlds*, 709 F.3d at 452; *McCravy*, 690 F.3d at 181; *see also N.Y. State Psychiatric Ass'n*, 798 F.3d at 134-35; *Silva*, 762 F.3d at 722.[7]

---

[7] Courts have consistently rejected fiduciaries' attempts to limit a beneficiary's surcharge damages to, for example, "a return of premiums," rather than "the amount of the life insurance proceeds lost." *E.g.*, *Kenseth*, 722 F.3d at 881 (agreeing with *McCravy* that beneficiaries are "not limited to seeking a return of premiums," but rather "as the beneficiary of a trust, [may] rightfully seek to surcharge the trustee insurer in the amount of life insurance proceeds lost"). This Court should accordingly reject any attempt by the Defendants to make such an argument here.

2. Ms. Sullivan-Mestecky's requested relief is available under the rubric of reformation.

Ms. Sullivan-Mestecky is also entitled to make-whole monetary relief under the rubric of reformation. The Second Circuit has firmly held that reformation is available to uphold a beneficiary's mistaken expectation of benefits, where that expectation results either from "mutual mistake" or a fiduciary's "equitable . . . fraud." *Amara*, 775 F.3d at 526. Ms. Sullivan-Mestecky may obtain reformation under either of these theories.

Mutual mistake. Defendants' *own theory of the case* is that the parties believed Ms. Sullivan-Mestecky was entitled to the $679,700 life insurance policy based on a mutual mistake. When that happens, the beneficiary is entitled to reformation in accordance with her expectations. *See Amara*, 775 F.3d at 524-26 (rejecting the argument that "the court should have applied trust law and considered the *settlor's* intent when reforming the plan," and instead reforming the plan to reflect the benefits *participants* expected to receive based on the plan's misleading communications). That is the long and the short of it.

But even if this Court departed from its sister circuits on this issue, Ms. Sullivan-Mestecky has suffered other damages that could be recompensed on a surcharge theory: because she believed she would receive the $582,600 life insurance benefit, she allowed her mother to live rent-free in her house for two years; she forewent work to care for her mother during that time; and she paid her mother's debts.

Equitable fraud. Ms. Sullivan-Mestecky could also obtain reformation under an equitable fraud theory. Courts' use of the word "fraud" in this context can be somewhat confusing, given the typical connotation of intentional or malicious misrepresentations. But this Court, the Supreme Court, other circuits, and leading equity treatises have *all* made clear that "[f]raud has a broader meaning in equity [than at law] and intention to defraud or to misrepresent is not a necessary element." *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 193 (1963) (second alteration in original) (footnote and internal quotation marks omitted); *see Pearce*, 893 F.3d at 347 (holding same in context of ERISA reformation).

"While no 'single statement . . . accurately define[s] the equitable conception of fraud,' it generally consists of 'obtaining an undue advantage by means of some act or omission which is unconscientious or a violation of good faith.'" *Amara*, 775 F.3d at 526 (quoting 3 John N. Pomeroy, *A Treatise on Equity Jurisprudence* § 873 at 420-21 (5th ed. 1941)). Indeed, "[f]raud . . . in the sense of a court of equity properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another." *Capital Gains Research Bureau, Inc.*, 375 U.S. at 194 (footnote and internal quotation marks omitted); *see Pearce*, 893 F.3d at 347 (quoting same in the context of ERISA reformation).

The Sixth Circuit recently—and cogently—expounded upon these "rather nebulous" principles by identifying certain useful "guideposts." *Id.* It did so largely relying on this Court's decision in *Amara* and the Supreme Court's equitable fraud jurisprudence. Those guideposts merit consideration here.

> [W]e highlight some guideposts. **First**, whether a defendant had a "legal or equitable duty, trust, or confidence" is an important factor, although not dispositive. *Capital Gains Research Bureau, Inc.*, 375 U.S. at 194 (internal quotation marks omitted). . . . **Second**, the defendant must have obtained "an undue and unconscientious advantage" or the plaintiff must have suffered an injury or both. [*Id.*] (internal quotation marks omitted). . . .
>
> **Third**, reformation's requirement of fraud or inequitable conduct roughly mirrors the fraud element of equitable estoppel, and therefore fraud in the latter context provides some helpful factors to consider in the former. *Compare Crosby v. Rohm & Haas Co.*, 480 F.3d 423, 431 (6th Cir. 2007) (holding, in an equitable estoppel case, that equitable fraud requires "either intended deception or such gross negligence as to amount to constructive fraud" (internal quotation marks omitted)), *with Capital Gains Research Bureau, Inc.* 375 U.S. at 194 (stating that equitable fraud "includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence," that cause an injury to another or an undue advantage to the wrongdoer), *and Amara V*, 775 F.3d at 526 (holding that equitable fraud arises from an "undue advantage" obtained through an unconscientious or bad faith "act or omission").
>
> We have typically found constructive fraud in the ERISA context when there is: (1) an information asymmetry, such that the defendant is the only one who knows the true facts and the plaintiff cannot ascertain the true facts; (2) the defendant misrepresents the benefits to which the plaintiff is entitled; and (3) the plaintiff investigated her benefits and

> drew a reasonable conclusion about them on the basis of the defendant's misrepresentations, even when the documents the plaintiff relied upon contained a disclaimer that the plan would govern in the event of a conflict. *Deschamps v. Bridgestone Americas, Inc. Salaried Emps. Ret. Plan*, 840 F.3d 267, 274–75 (6th Cir. 2016). Additionally, whether the defendant took actions to mitigate its misrepresentations and correct the plaintiff's misunderstanding is also relevant. Thus when an employer made an "honest mistake" and misinformed a beneficiary of her benefits, but then repeatedly sent correction letters in the ensuing months, the employer is not grossly negligent and therefore has not committed constructive fraud. *Id.*

Pearce, 893 F.3d at 347-49 (emphasis added) (some citations omitted).

Applying these principles here, it is clear that Ms. Sullivan-Mestecky would be entitled to reformation under an equitable fraud theory as well. As discussed above, Defendants seriously breached their duty to act prudently and provide accurate, non-misleading information about Ms. Sullivan's benefits. They abdicated these duties, moreover, up until *their own* financial interests were at stake—when it was time to pay out on the policy—demonstrating serious disregard for Ms. Sullivan (and Ms. Sullivan-Mestecky's) rights, and a precisely backwards understanding of their fiduciary duties.

This conduct unquestionably harmed Ms. Sullivan-Mestecky and was, at best, grossly negligent. *Cf. Doe v. N.Y. City Dep't of Soc. Services*, 649 F.2d 134, 142 (2d Cir. 1981) ("fail[ure] to explain to the jury that repeated acts of negligence could be evidence of [gross negligence]" was error); *Bayerische Landesbank, N.Y. Branch v. Aladdin Capital Management LLC*, 692 F.3d 42, 61-62 (2d Cir. 2012) (explaining that "gross negligence" arises where "the danger [i.e., here, the risk that Ms. Sullivan's policy was incorrect] was . . . known to the defendant," yet the defendant still acts negligently).

This case is indeed the perfect foil for the circumstance identified by the Sixth Circuit where "an employer made an 'honest mistake' and misinformed a beneficiary of her benefits, but then repeatedly sent correction letters in the ensuing months." Pearce, 893 F.3d at 349. In *that* case, where the employer promptly identified the mistake and took corrective action, the employer was "not grossly negligent." *Id.*

Here, by contrast, even if the Defendants' mistake was initially an "honest" one, rather than promptly and repeatedly sending correction letters, they instead repeatedly *confirmed* their "substantial error" both internally and to Ms. Sullivan—even after internally flagging the risk that her policy was erroneous. It was not until after Ms. Sullivan died and Ms. Sullivan-Mestecky sought payout from the policy that Defendants attempted to "correct" their mistake. That conduct plainly warrants reformation in accordance with Ms. Sullivan and Ms. Sullivan-Mestecky's understanding of what they would receive.

In short, Ms. Sullivan-Mestecky may obtain her requested relief—make-whole damages in the amount of the life insurance policy—under each of the accepted bases for ERISA reformation.[8]

3. Ms. Sullivan-Mestecky's requested relief is available under the rubric of estoppel.

The final rubric under which ERISA beneficiaries may seek make-whole monetary relief is equitable estoppel. The district court in fact addressed and rejected Ms. Sullivan-Mestecky's related promissory estoppel claim (albeit outside the context of its Section 1132(a)(3) analysis). A083-094. This was error. Ms. Sullivan was entitled to rely—and did so to her detriment—on Defendants' repeated written and oral assurances about her life insurance policy, particularly after she affirmatively, diligently, and repeatedly sought confirmation of its existence and amount.

Estoppel is available in cases where a defendant's misrepresentations rose to the level of "gross negligence . . . as to amount to constructive fraud," and the beneficiary relied on those representations to her detriment. *Brant v. Virginia Coal & Iron Co.*, 93 U.S. 326, 335 (1876); *see CIGNA*, 563 U.S. at 443 ("estoppel"

[8] To anticipate an argument that the Second Circuit has squarely rejected: "detrimental reliance need not be shown where, as here, a plaintiff alleging a violation of § [11]04(a) seeks plan reformation under § [113]2(a)(3)." *Osberg*, 862 F.3d at 212.

requires "detrimental reliance, *i.e.*, that the defendant's statement in truth influenced the conduct of the plaintiff, causing prejudice" (brackets and internal quotation marks omitted)). Courts have also required a showing of "extraordinary circumstances"—i.e., to obtain estoppel "there must be some plus factor beyond a simple showing of reliance on a promise, harm, and injustice." *Straus v. Prudential Employee Sav. Plan*, 253 F. Supp. 2d 438, 452 (E.D.N.Y. 2003).

Promise of benefits and gross negligence. There can be little doubt as to the first element—whether the Defendants made a promise of benefits. Their repeated written and oral representations to Ms. Sullivan plainly suffice. And for the reasons discussed above, Defendants' conduct was at minimum grossly negligent.

Reliance. Although the district court framed its analysis in terms of extraordinary circumstances, it also appears to have agreed with Defendants' arguments below and in the administrative process that Ms. Sullivan (and Ms. Sullivan-Mestecky) did not reasonably and detrimentally rely on the benefit promises. A091-092. But that is simply untrue.

Perhaps Ms. Sullivan's reliance would not have been reasonable if Verizon or Prudential had made a single, one-off statement that she had a policy far larger than her previous annual salary. But it is untenable to suggest that it was unreasonable for Ms. Sullivan—after she diligently investigated her entitlement to the benefits—to rely on Defendants' *repeated* assurances that the policy amount was correct. At some point, an employee must be able to rely on what her employer tells her. That line was surely crossed here. *See, e.g.*, *Pearce*, 893 F.3d at 349 (constructive fraud present where, *inter alia*, "plaintiff investigated her benefits and drew a reasonable conclusion about them on the basis of the defendant's misrepresentations").

Both Ms. Sullivan and Ms. Sullivan-Mestecky, moreover, relied on Defendants' representations to their detriment. As the Amended Complaint explains: "Ms. Sullivan advised her daughter . . . that but for obtaining insurance coverage through Verizon she would have obtained at least the same amount of coverage from another insurance source." A183. And based on her belief she would receive life insurance benefits in this amount upon her mother's death, "Plaintiff permitted her mother to reside in her residence rent-free. Further, Plaintiff financially supported her mother and paid her debts until her death [and] . . . [took] an unpaid leave of absence from work" to do so. A183-184. That is more than enough to establish detrimental reliance.

Extraordinary circumstances. The district court also concluded that Ms. Sullivan-Mestecky could not obtain estoppel because she had not demonstrated "extraordinary circumstances." A083-094. The district court, however, took too narrow a view of the circumstances that may qualify as extraordinary.

Although the typical case of "extraordinary circumstances" involves some kind of inducement for the plaintiff to act for the defendant's benefit (for example, by accepting a job), the Second Circuit has never limited the inquiry to those circumstances. *See Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 86 (2d Cir. 2001) ("[W]e need not decide whether extraordinary circumstances other than intentional inducement would suffice.").

Instead, the correct question is simply whether some sort of "plus factor" exists, *see Straus*, 253 F. Supp. 2d at 452, to distinguish cases in which estoppel is appropriate from a mine-run "honest mistake" that in fairness should not be actionable. *See Pearce*, 893 F.3d at 349; *Casagrande v. Siemens AG*, No. 11 Civ. 5442, 2013 WL 2489933, at *4 (S.D.N.Y. June 11, 2013) ("A [mere] mistake in the calculation of benefits [without more] simply does not rise to the level of bad faith or [equitable] fraud, and therefore does not constitute extraordinary circumstances."), *aff'd* 556 F. App'x 54 (2d Cir. 2014), *cert. denied* 135 S. Ct. 405 (2014) (quotations, brackets, and citations omitted).

Here, that plus factor can be found in the remarkable repetition of Defendants' fiduciary breach—even in the face of Ms. Sullivan's diligence and their own repeated identification of her policy as potentially incorrect—up until the moment their own financial interests were implicated. These factors elevate the misconduct in this case beyond the type of mine-run, honest fiduciary mistake that the extraordinary circumstances requirement seeks to insulate. Estoppel is warranted.

* * *

In sum, the district court erred in dismissing Ms. Sullivan-Mestecky's Section 1132(a)(3) fiduciary breach claim. Defendants engaged in paradigmatic breaches of their fiduciary duties of prudence and to avoid misrepresentations. And the law is clear that such conduct entitles Ms. Sullivan-Mestecky to the monetary make-whole relief she seeks in this case: payment of the full remaining amount of the life insurance policy. This Court should accordingly vacate and remand.

II. The District Court Also Erred In Granting Defendants Summary Judgment On Ms. Sullivan-Mestecky's Claim For Benefits.

The district court independently erred in granting Defendants summary judgment on Ms. Sullivan-Mestecky's claim for benefits. As of the time of her death, Ms. Sullivan was *in fact* enrolled in a valid life insurance policy of $582,600, and the law bars Defendants from reducing that amount once Ms. Sullivan died and the benefits vested—even if the initial enrollment was in error, and a reduction would have been appropriate before vesting. The Court should thus vacate and remand on this claim as well.[9]

[9] Ms. Sullivan-Mestecky's Section 1132(a)(3) and Section 1132(a)(1)(B) claims are independent bases for relief. An ERISA plaintiff will often be unable to recover under both provisions (essentially because if recovery is available under the plan's terms, equitable relief will not *also* be necessary). But as the district court recognized (A071-072), the law in this Circuit is clear that Ms. Sullivan-Mestecky is entitled to pursue both claims to final judgment. *See N.Y. State Psychiatric Ass'n*, 798 F.3d at 134 (holding that plaintiff may pursue claims under both Section

A. Although Plan Administrators Are Entitled To Deference In Their Interpretation Of The Governing Documents, They May Not Retroactively Eliminate Vested Benefits.

Unlike fiduciary breach claims under Section 1132(a)(3), ERISA benefit claims are typically governed entirely by what a beneficiary is entitled to, as a matter of contract law, under the terms of the plan. As Defendants pointed out below, that means that a plan administrator generally may correct a mistake in telling beneficiaries what benefits they are entitled to. If, under the plan's terms, the beneficiary is not actually entitled to those benefits, then a Section 1132(a)(1)(B) benefit claim will fail. (Although, to be clear, the beneficiary may still obtain relief through a Section 1132(a)(3) fiduciary breach claim.) Courts, moreover, generally defer to plan fiduciaries' interpretation of the plan, so long as that interpretation is not arbitrary and capricious. *See generally Conkright*, 559 U.S. at 509 (2010).

But these principles extend only so far. The law is also clear that once benefits have *vested*, they cannot be reduced—even if reduction would have been warranted had the plan administrator's error been discovered before vesting. *See, e.g.*, *Blackshear v. Reliance Standard Life Ins. Co.*, 509 F.3d 634, 640-41 (4th Cir. 2007),

---

1132(a)(3) and Section 1132(a)(1)(B), and that "[i]f, on remand, [plaintiff] prevails on his claims under both [provisions], the District court should then determine whether equitable relief under § [11]32(a)(3) is appropriate" in addition to relief under Section 1132(a)(1)(B)).

abrogated in part on other grounds as recognized by Williams v. Met. Life Ins. Co., 609 F.3d 622, 630 (4th Cir. 2010). In *Blackshear*, an ERISA plan and summary plan description contained a "clerical error" that appeared to entitle an employee named Verdie Blackshear to life insurance benefits. *Id.* Verdie accordingly enrolled in the life insurance plan and named the plaintiff as beneficiary. Although the plan administrator eventually corrected the clerical error (as the terms of the plan allowed it to do), Verdie died before that happened. And when the plaintiff sought payment on the life insurance policy, the plan refused—saying Verdie had been enrolled erroneously based on a clerical error. *See id.* At risk of stating the obvious, the circumstances were very similar to this case.

The Fourth Circuit rejected the plan administrator's benefit denial. The court explained that "[o]nce an employer or plan sponsor grants vested rights under a welfare benefit plan, . . . it may not retroactively amend the plan to deprive a beneficiary of a vested benefit." *Id.* at 640. It did not matter that all the amendment did was fix a clerical error, or that the plan permitted clerical errors to be fixed. *Id.* at 641-42. Nor was the court going out on a limb in stating this rule. "Numerous courts have taken, in a wide array of circumstances, a similarly dim view of any amendment that attempts to retroactively eliminate vested welfare benefit rights." *Id.* at 641 (collecting cases from the Third, Sixth, Seventh, and Tenth Circuits).

In this very case, the plan's governing documents recognize this principle. Verizon's Group Life Insurance Contract with Prudential states that "[t]he Group Contract may be amended, at any time, without the consent of the insured Employees or of anyone else with a beneficial interest in it. . . . But an amendment will not affect a claim incurred before the date of change." A281. The Group Contract (and thus the documents to which this limitation applies) includes the "Insurance Certificate(s)" issued thereunder and "the individual applications . . . of the persons insured." A280.[10]

The Group Contract further provides that, although Verizon may generally correct clerical errors with respect to a given policy, such errors do not *automatically* invalidate an employee's coverage. *See* A280. Thus, even if Ms. Sullivan's life insurance policy was issued in error, it (1) was not *per se* invalid under the plan, and (2) could not be amended with respect to "a claim incurred before the date of change." A281.

The critical question, both under the plan documents and *Blackshear*, is accordingly "whether [the beneficiary's] right to life insurance proceeds vested before [the administrator] issued the amended policy"—i.e., before the administrator

---

[10] The GLI Plan expressly incorporates the "Insurance Contract" into the plan, which it defines as the "group term life . . . insurance contracts (including the applicable certificates of coverage) that provide benefits under the Plan." A291; *see also*, *e.g.*, A299 ("Decreases in coverage shall be administered in accordance with the terms of the applicable Insurance Contract.").

corrected the error that led to improper enrollment. 509 F.3d at 641. The court explained that "[i]n the case of a group life insurance policy, the right to benefits vests—*i.e.*, performance becomes due—at the time of the plan participant's death." *Id.* Thus, the beneficiary's "rights under the plan vested at the moment [the plan participant] died," meaning that the plan administrator could no longer correct the clerical error, because doing so "had the effect of dispossessing [the beneficiary] of rights that were already vested." *Id.*

B. By Amending Ms. Sullivan's Life Insurance Policy After Her Death, Defendants Impermissibly Eliminated Vested Benefits.

This case fits the paradigm set forth in *Blackshear* and recognized by other circuits. It is undisputed that—regardless of whether she *should* have initially been enrolled in the life insurance plan—Ms. Sullivan was *in fact* enrolled in a life insurance policy of $582,600. It is also undisputed that—regardless of whether she was enrolled by mistake—she *remained* enrolled at the time of her death. And it is undisputed that Defendants amended their error only *after* Ms. Sullivan died. Thus, just as in *Blackshear*, the life insurance policy in effect when Ms. Sullivan died unambiguously provided for $582,600 in life insurance. *See id.* at 640.

At that point, correcting the administrative error "had the effect of dispossessing [Ms. Sullivan-Mestecky] of rights that were already vested and was therefore impermissible." *Id.*; *see Filipowicz v. American Stores Ben. Plans*

Committee, 56 F.3d 807, 815 (7th Cir. 1995) (employer could not "retroactively modify a life insurance policy after the insured's death so as to take away the life insurance proceeds due a beneficiary at the date of the insured's death."). The district court erred in concluding otherwise.

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's judgment as to Ms. Sullivan-Mestecky's Section 1132(a)(3) and Section 1132(a)(1)(B) claims and remand for further proceedings.

Dated: August 31, 2018

Respectfully submitted,

/s/ John Stokes
Peter K. Stris
John Stokes

STRIS & MAHER LLP
725 S. Figueroa Street, Suite 1830
Los Angeles, CA 90017
T: (213) 995-6800
F: (213) 261-0299
john.stokes@strismaher.com

Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Local Rule 32.1(a)(4)(A), this brief contains 9,686 words, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), and complies with the format, typeface, and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5)-(6).

Dated: August 31, 2018

/s/ John Stokes
John Stokes

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2018, I electronically filed the above document, along with the Plaintiff-Appellant's Appendix, with the Clerk of the Court of the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 31, 2018

/s/ John Stokes
John Stokes