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

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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INTRODUCTION

Verizon and Prudential's argument on appeal boils down to a few central themes: (1) they did not do anything wrong *themselves*—this is all Hewitt's (or indeed, Ms. Sullivan's) fault; (2) even if they did do something wrong, Ms. Sullivan-Mestecky did not ask the district court for the relief she now asks for on appeal; and (3) even if the law says otherwise, they should win—because how could anybody look at this situation and think Ms. Sullivan was entitled to life insurance. Each of these arguments is wrong. This Court should reject Defendants' attempts to shirk responsibility for their undeniable breach of fiduciary duty.

First, both Verizon and Prudential *themselves* made misrepresentations to Ms. Sullivan. Their contrary characterization of the record is mistaken. And where a fiduciary *itself* misleads a participant, it cannot hide behind the terms of the plan. Nor can it shift responsibility to its agents simply because they made additional misrepresentations that compounded the fiduciary's breach. Under the law of every circuit to address analogous facts, Defendants breached their fiduciary duties.

Second, Defendants' waiver argument is an exercise in cognitive dissonance. While on the one hand arguing that Ms. Sullivan-Mestecky seeks a new remedy on appeal, Defendants on the other hand *admit* that she asked the district court for make-whole monetary compensation to remedy their fiduciary breach under 29 U.S.C. § 1132(a)(3). Indeed, Ms. Sullivan-Mestecky not only made this argument, she cited case law that discusses both *CIGNA v. Amara* and surcharge. Defendants' real argument appears to be that Ms. Sullivan-Mestecky should have cited *better* case law to the district court. But they offer no authority for the proposition that where an argument is otherwise pressed, failing to cite the best cases results in waiver.

And third, the best evidence that Ms. Sullivan reasonably believed she was entitled to this policy is that *so too did the Verizon Benefits Center*, even after repeatedly "double-check[ing]" whether she was "truly eligible for that amount" of life insurance. A390. Defendants' view changed only once it was time to pay out on the policy and Prudential's own financial interests were in play. Once again, the Court should reject Defendants' attempt to ignore inconvenient facts now that they are being called to account for their misconduct.

In short, Ms. Sullivan-Mestecky has alleged a paradigmatic fiduciary breach that can be remedied by make-whole monetary compensation under 29 U.S.C. § 1132(a)(3). The district court erred in concluding otherwise.

Defendants' argument with respect to Ms. Sullivan-Mestecky's benefits claim under Section 1132(a)(1)(B) fares no better. They contend that here, unlike in the cases upon which Ms. Sullivan-Mestecky relied in her opening brief, the *plan itself* was not amended after Ms. Sullivan's death. But it was. Under the terms of the GLI Plan, the underlying policy documents *are part of the plan itself*. Thus, a change to Ms. Sullivan's policy—which surely includes reducing her coverage from $582,600 to $11,400—is also a change to the plan. That could not occur once Ms. Sullivan died and the benefits under her policy vested.

This Court should accordingly vacate and remand.

ARGUMENT

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

Defendants cannot escape the district court's fundamental error in this case: it dismissed Ms. Sullivan-Mestecky's Section 1132(a)(3) claim based on an understanding of the law that the Supreme Court overruled in *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011). Their attempts to avoid this reality are uniformly unavailing.

A. Defendants themselves made misrepresentations to Ms. Sullivan, meaning they cannot be insulated from liability by the plan's terms or their agents' additional misrepresentations.

Verizon and Prudential's central argument on Ms. Sullivan-Mestecky's fiduciary breach claim is that they are shielded from liability under this Court's recent decision in *In re DeRogatis*, 904 F.3d 174 (2018), because *they* never made any misstatements to Ms. Sullivan *themselves*. That is false.[1]

[1] *DeRogatis* was issued approximately two weeks after Ms. Sullivan-Mestecky filed her opening brief.

1. In *DeRogatis*, a beneficiary argued that she had been misled about her benefits by agents of the fiduciaries of two ERISA plans. It was undisputed that the fiduciaries themselves never made any misrepresentations. The question, accordingly, was under what circumstances a fiduciary can be held liable for its agent's misrepresentations.

In answering that question, this Court first reaffirmed that it "ha[s] long interpreted ERISA to require that Plan fiduciaries provide 'complete and accurate' information to plan members and beneficiaries about their benefits." *Id.* at 179 (citation omitted). But, the Court held, in cases where the only misrepresentations come from an *agent* of the fiduciary, the fiduciary will be liable only if the plan documents are *also* unclear. "We have in the past permitted plaintiffs to pursue claims for breach of that fiduciary duty that are based on a combination of unclear written plan materials and misrepresentations made by plan agents who were not themselves fiduciaries. That approach governs Emily's claims here." *Id.*

Defendants contend that this case falls under the same paradigm. They argue that they themselves were meticulously accurate in all of their communications with Ms. Sullivan, and the misrepresentations came exclusively from the Verizon Benefits Center (which was run by Hewitt, a third-party administrator). Verizon Br. 41-42; Prudential Br. 20 & n.8. Verizon goes so far as to say that Ms. Sullivan-Mestecky made false statements to the Court in arguing otherwise. Verizon Br. 41-

42. And it says, in no uncertain terms, that "[t]he record is devoid of any support for the conclusion that either Verizon or Prudential . . . made any misstatements to her concerning the amount of coverage under the Plan." Verizon Br. 42. That stark assertion is patently incorrect.

Verizon itself misled Ms. Sullivan about her benefits, in writing, on multiple occasions. First, on June 20, 2011, Verizon sent Ms. Sullivan a "Retirement Enrollment Worksheet"—on Verizon letterhead, no less—that told Ms. Sullivan she was (1) eligible for life insurance (2) with a "Coverage Amount" of "$679,700." A346-349. Then, on December 20, 2011, Verizon sent Ms. Sullivan a "Confirmation of Coverage" statement—again on Verizon letterhead—confirming her "current coverage" of "$679,700." A352.

True enough, the bottom corner of these documents' first page says they were "delivered by Hewitt." A346, 352. But these communications can be attributed to Hewitt no more than a letter stamped "delivered by the U.S. Postal Service" can be attributed to the government of the United States. It is beyond dispute that Verizon itself misled Ms. Sullivan about her benefits.[2]

[2] To the extent Verizon's argument is that Hewitt prepared these communications behind the scenes and then sent them in Verizon's name, that is not the circumstance contemplated by *DeRogatis*. And at minimum, this would be a question of fact unsuitable for resolution at this stage of the litigation.

The same is true of Prudential. On December 1, 2011, "The Prudential Insurance Company of America" sent Ms. Sullivan a letter "in reference to your coverage under the Verizon Communications Inc. Basic and/or Supplemental Life Insurance coverage Program." A350. Prudential told Ms. Sullivan that "[u]nder the provisions of this plan, your life insurance coverage amount will decrease effective January 1, 2012" by "$97,100." A350-351. If Ms. Sullivan should not have been enrolled (or if her coverage should only have been $11,400), her policy could not be reduced by $97,100. Prudential too misled Ms. Sullivan directly about the existence and amount of her policy.

Because both plan fiduciaries *themselves* made false statements to Ms. Sullivan, *DeRogatis*—addressing circumstances where the fiduciary assiduously complied with its duty not to mislead participants, and the only misrepresentations came from third-party agents—is entirely inapplicable to this case. Verizon and Prudential cannot be insulated from their *own* misstatements simply because their agents made *additional* misstatements that compounded the fiduciary breach. That is particularly so where Verizon and Prudential expressly "required" Ms. Sullivan to use the Verizon Benefits Center to enroll in life insurance (A298), and expressly told

Ms. Sullivan that the Verizon Benefits Center could be trusted to answer her questions (A059).[3]

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[3] Even if the *DeRogatis* framework applied here, remand would be necessary. The GLI Plan bears striking similarities to the plan that this Court concluded was sufficiently unclear as to preclude summary judgment in *DeRogatis*. The standard the Court appears to have announced is that the plan materials must be clear enough for a participant to know for certain whether or not she falls within its bounds. *See* 904 F.3d at 197-98 (focusing on the fact that "a member of Local 15 might not realize that this provision applies to him *at all*," where "[w]ith no large-font heading announcing policies of general applicability, a skimming reader might reasonably (but incorrectly) assume that the 'Local 15' section is self-contained"). That standard makes sense—if a plan is sufficiently unclear that a person might need to seek clarification about what it means, then the fiduciary must ensure that the clarification she receives is accurate. *See id.* at 196 (citing the plan's "directive[]," "When in doubt …… ASK!").

Here, that standard is met. Life insurance is available under the GLI Plan to "a *management* employee who retired before July 2, 1985 with a service or *disability* pension." Verizon Br. 44 (citing SA064) (emphasis added). And Ms. Sullivan (1) worked as a "Communications Manager" (Prudential Br. 4 (quoting SA205)), and (2) retired with long-term disability benefits before July 2, 1985 (A105). Under those circumstances, she could certainly have "reasonably (but incorrectly)" believed she was entitled to life insurance benefits. *DeRogatis*, 904 F.3d at 197. In fact, there was extensive litigation below about whether or not Ms. Sullivan qualified as a management employee under the plan's terms. *See, e.g.*, A134-135 (summary judgment order, discussing briefing on this issue).

Even if Ms. Sullivan was wrong about her eligibility, she was at minimum justified in seeking clarification. At that point, the Plan *required* Ms. Sullivan to seek enrollment through the Verizon Benefits Center (A298), and it *expressly told her* that the Verizon Benefits Center could answer questions about her benefits (A059). *Compare with DeRogatis* 904 F.3d at 196 (citing plan provision telling participants, "When in doubt …… ASK!"). Accordingly, even if the *DeRogatis* framework governed here (to be absolutely clear: it does not), remand would be necessary.

2. This case, accordingly, is about fiduciaries themselves misleading a participant. And where fiduciaries themselves mislead a participant, they cannot be saved from liability by the terms of the plan. That is the law of *every other circuit* to confront these facts, and *DeRogatis* does nothing to create a different rule in the Second Circuit. *See, e.g.*, *Kenseth v. Dean Health Plan*, 722 F.3d 869, 881 (7th Cir. 2013) (discussing cases holding that 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 883 (same). For good reason—if the plan's terms could excuse a fiduciary's false statements, there would effectively be no duty to avoid misrepresentations in the first place.

Defendants' contrary argument is untethered to the cases addressing a fiduciary's own misleading statements. Indeed, Defendants address only *one* of the squarely on-point decisions from other circuits upon which Ms. Sullivan-Mestecky relied in her opening brief. And as to the one decision they do address (*Kenseth*), they significantly misstate its holding. Defendants contend that *Kenseth* "allowed plaintiff to pursue 'make-whole' relief against the plan fiduciary as an equitable remedy under Section 502(a)(3) because 'the plan was ambiguous in at least three important respects.'" Prudential Br. 28-29 (quoting *Kenseth*, 722 F.3d at 883); *see* Verizon Br. 50 (plaintiff could obtain relief in *Kenseth* because "the health plan at issue was ambiguous"). That is, they say that plan ambiguity was the deciding factor in the court's holding.

But Defendants neglect to mention that *Kenseth* specifically held relief was available "even if the plan's language *unambiguously* supports the fiduciary's decision to deny coverage." 722 F.3d at 883 (collecting cases). Prudential, at least, cannot possibly have overlooked this critically important aspect of the court's holding. It is the *very next sentence* after the one Prudential selectively quotes. *Compare* Prudential Br. 29-30, *with Kenseth*, 722 F.3d at 883.[4]

Defendants do not address the holdings of the remaining cases involving direct fiduciary misrepresentations. The closest they come is a cursory footnote saying that *McCravy v. Metropolitan Life Insurance Co.*, 690 F.3d 176 (4th Cir. 2012), and *Gearlds v. Entergy Services, Inc.*, 709 F.3d 448 (5th Cir. 2013), are inapposite because the plaintiffs there did not assert claims under both Section 1132(a)(3) and Section 1132(a)(1)(B). Verizon Br. 52 n.7; Prudential Br. 30 n.13. But that argument is an utter non-sequitur. The existence of a benefits claim says nothing about whether the fiduciary breached its duty to avoid misrepresentations.

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[4] It is worth noting in any event that one of the three "important" ambiguities in *Kenseth* was "inviting participants to call customer service with coverage questions but not warning them that they could not rely on any advice they received." 722 F.3d at 883. That is precisely what Verizon and Prudential did here.

What matters is that in *neither* case could the participant argue the plan was ambiguous or misleading, yet in *both* cases the fiduciary could be held liable for its misrepresentations about the participant's coverage. *See McCravy*, 690 F.3d at 178 (the plan covered only "eligible dependent children" "under the age of 24," and the child at issue was 25); *Gearlds*, 709 F.3d at 449, 451 (participant was erroneously enrolled in medical benefits because plan made error in computing service years; under accurate count of service years, participant was not entitled to benefits). So too here.[5]

In short, there is no escaping that every circuit to address facts analogous to this case has found a fiduciary breach. This Court should do the same.

3. Underlying Defendants' fiduciary breach argument is the suggestion that Defendants should win—regardless of what the law actually says about their fiduciary responsibilities—because nobody could possibly look at the plan here and think that Ms. Sullivan was entitled to life insurance under it. Even if that suggestion were at all relevant to the inquiry, it is belied by the simple fact that *Defendants themselves* concluded Ms. Sullivan was entitled to benefits under the GLI Plan.[6]

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[5] In light of these decisions, Verizon is incorrect to state that "all of the post-*CIGNA* decisions cited in Appellant's Opening Brief involved circumstances in which the plan participants had been furnished incomplete or misleading written materials and plan documents." Verizon Br. 50.

[6] Verizon even attempts to blame *Ms. Sullivan* for not "correct[ing] Hewitt by advising that she did not meet the eligibility requirements under the Plan." Verizon Br. 16. That argument is puzzling. It is *Verizon*, not Ms. Sullivan, who bore a

The best evidence that Ms. Sullivan reasonably believed she was entitled to this policy is that the Verizon Benefits Center—the experts that Verizon and Prudential charged with evaluating participants' eligibility and answering their coverage questions—*repeatedly* reviewed Ms. Sullivan's case and determined that, indeed, she was so entitled. *See* Sullivan-Mestecky Br. 9-12. If Ms. Sullivan "would have been aware of the approximate amount of a Verizon life insurance benefit under the GLI Plan" (Verizon Br. 8), then surely the Verizon Benefits Center would have been as well. Yet it was only once Ms. Sullivan-Mestecky sought payment on the policy (and Prudential's own financial interests were at stake) that Ms. Sullivan's ineligibility apparently became so crystal clear. Defendants cannot brush aside as absurd an apparent misimpression they themselves held for years, even after repeatedly "double check[ing]" that Ms. Sullivan was "truly eligible" for her policy. A390.

In misleading Ms. Sullivan about her life insurance benefits—causing her to forego purchasing other life insurance (A183) and her daughter to incur significant expense in reliance on receiving the policy (A183-184)—Defendants breached their fiduciary duties under ERISA.

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fiduciary duty—the highest known to the law—to take corrective action after making misrepresentations to Ms. Sullivan. And in any event, Ms. Sullivan made repeated attempts to confirm that she was, in fact, entitled to this policy. Verizon does not say at what point she should be permitted to believe what it, Prudential, and the Verizon Benefits Center repeatedly told her.

B. Defendants' paradigmatic fiduciary breach entitles Ms. Sullivan-Mestecky to the exact remedy she sought before the district court: make-whole monetary relief in the full amount of the policy.

The fiduciary breach here is paradigmatic, and that means Ms. Sullivan-Mestecky is entitled to the precise relief she sought before the district court: make-whole monetary compensation under 29 U.S.C. § 1132(a)(3), in the full amount of the policy that Defendants told Ms. Sullivan she had.

1. Defendants' waiver argument fails on its own terms.

Defendants' main argument on this question is that Ms. Sullivan-Mestecky did not request before the district court the relief she argues for on appeal. Verizon Br. 33; Prudential Br. 25. But their interpretation of Ms. Sullivan-Mestecky's complaint and lower court briefing is at war with itself. After first saying Ms. Sullivan-Mestecky's papers below do "not contain even a hint" that she sought monetary make-whole relief under Section 1132(a)(3), Defendants then admit that such relief is *exactly* what Ms. Sullivan-Mestecky sought: "A fair reading of Sullivan-Mestecky's 481-paragraph Amended Complaint, coupled with the brief filed by her in opposition to Defendant's motion to dismiss, clearly demonstrates that she . . . seeks compensatory d amages in the form of the payment of insurance benefits." Verizon Br. 32; *see also id.* at 48-49 (describing the various ways in which

Ms. Sullivan-Mestecky's complaint sought "individual damages based on" the alleged fiduciary breach "under Section 502(a)(3)"); Prudential Br. 25 (similar).

Defendants have it exactly right: Ms. Sullivan-Mestecky seeks monetary make-whole relief under ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), based on Defendants' breach of fiduciary duty. And that is what she told the district court in opposing Defendants' motion to dismiss—"Because plaintiff has sufficiently pled claims under ERISA § 502(a)(3), she may recover in equity for her losses." Sullivan-Mestecky Opp. to Mot. to Dismiss at 56 (D. Ct. Dkt. 76) (citing *Miller v. Int'l Paper Co.*, No. 12 Civ. 7071 (LAK) (JLC), 2013 WL 3833038 (S.D.N.Y. July 24, 2013)). And although Ms. Sullivan-Mestecky did not cite *CIGNA* directly on this score, she did cite the *Miller* decision, which plainly encompasses the exact argument she made in her opening brief to this Court:

> Although relief pursuant to ERISA § 502(a)(3) must be "equitable," the Supreme Court recently clarified in *Amara* that this does not necessarily preclude a court from granting monetary relief. Rather, the Supreme Court found that several traditional equitable remedies could be available to an ERISA beneficiary who brings a successful claim for breach of fiduciary duty under Section 502(a)(3). These may include a "surcharge" remedy wherein a beneficiary receives "monetary compensation for a loss resulting from a trustee's breach of duty."

Id. at *4 (quoting *CIGNA*, 563 U.S. at 439-41 (internal quotation marks omitted)). Thus, Defendants' waiver argument is wrong on its own terms.

Moreover, courts have repeatedly held—in rejecting Defendants' exact waiver argument—that a plaintiff may pursue monetary make-whole relief under

Section 1132(a)(3) regardless of whether her complaint used the magic word "surcharge." *E.g.*, *Kenseth*, 722 F.3d at 880-81 (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)).

The reason for this is simple. *CIGNA* held that make-whole monetary relief is available against a breaching fiduciary because it "*closely resembles*" surcharge—a traditional equitable remedy. 563 U.S. at 440 (emphasis added). *CIGNA* did not require plaintiffs to bring a surcharge claim *as such*; it held that courts may award money damages to remedy a fiduciary breach (i.e., *exactly* what Defendants say Ms. Sullivan-Mestecky argued to the district court) because money damages against a breaching fiduciary *resemble* the equitable remedy of surcharge and are therefore licensed under Section 1132(a)(3). *Id.* at 440-42. That is why courts interpreting *CIGNA* have held that "under *CIGNA*, Kenseth may seek make-whole *money damages* as an equitable remedy under section 1132(a)(3)." *See Kenseth*, 722 F.3d at 882 (emphasis added).

"Courts must focus on the substance of the relief sought and the allegations pleaded, not on the label used." *Gearlds*, 709 F.3d at 452. Accordingly, "ask[ing] to be made whole in the form of compensation for lost benefits" is all that a plaintiff need do under Section 1132(a)(3). *Kenseth*, 772 F.3d at 880. And Defendants concede that is what Ms. Sullivan-Mestecky did here.

Indeed, Defendants' real argument is that Ms. Sullivan-Mestecky failed to cite the best case law *in support of* her argument below. *See, e.g.*, Verizon Br. 34-35. Perhaps Ms. Sullivan-Mestecky should have cited more than the *Miller* case, but that is a far cry from failing to raise the argument. Defendants offer no authority for the proposition that where an argument was otherwise raised before the district court, the failure to cite the most persuasive cases results in appellate waiver. Thus, while Defendants can dispute on the merits whether make-whole monetary relief is available, they cannot credibly say Ms. Sullivan-Mestecky never asked for it.

2. The law is absolutely clear that Ms. Sullivan-Mestecky may obtain make-whole monetary relief to remedy Defendants' fiduciary breach.

The reason for Defendants' focus on waiver is obvious: their merits position on the availability of Ms. Sullivan-Mestecky's requested relief is indefensible. As this Court recognized yet again in *DeRogatis*, under *CIGNA v. Amara*, an ERISA beneficiary may obtain make-whole monetary relief (i.e., the equivalent of money damages) to remedy a fiduciary breach like the one that occurred here. 904 F.3d at 199-200.

That is what this Court and every other circuit to address the issue have repeatedly held. *See, e.g.*, *Amara v. CIGNA Corp.*, 775 F.3d 510, 518 (2d Cir. 2014) (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, Inc. v. UnitedHealth Grp.*, 798 F.3d 125, 134-35 (2d Cir. 2015) (following *CIGNA*, a plaintiff may pursue "surcharge"—"monetary 'compensation' for a loss resulting from a fiduciary's breach"); *see also, e.g.*, *Silva v. Met. 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*, 709 F.3d 448 (money damages available under *CIGNA*); *McCravy*, 690 F.3d 176 (same); *Skinner v. Northrop Grumman Ret. Plan B*, 673 F.3d 1162, 1166 (9th Cir. 2012) (same).

In short, the law is absolutely clear that Ms. Sullivan-Mestecky may pursue the make-whole monetary relief that she requests. There are no serious arguments to the contrary. The district court accordingly erred in dismissing Ms. Sullivan-Mestecky's fiduciary breach claim under Section 1132(a)(3), and this Court should vacate and remand.

C. Defendants' additional arguments against Ms. Sullivan-Mestecky's Section 1132(a)(3) fiduciary breach claim also lack merit.

For the reasons explained above, Defendants' core contentions on Ms. Sullivan-Mestecky's fiduciary breach claim are incorrect. Defendants also raise a host of peripheral arguments that lack merit, which Ms. Sullivan-Mestecky addresses in turn.

First, Prudential argues that Ms. Sullivan-Mestecky may not assert both a benefits claim under Section 1132(a)(1)(B) and a fiduciary breach claim under Section 1132(a)(3). Prudential Br. 22-23, 31. But as the district court correctly recognized (A071-072), the Second Circuit has squarely rejected this argument. *See N.Y. State Psychiatric Ass'n*, 798 F.3d at 134 (holding that plaintiff may pursue claims under both Section 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)); *see also* Sullivan-Mestecky Br. 37 n.9.

Second, Prudential also contends that "[t]here is an important distinction between the denial of ***individual*** claims, which is the case Plaintiff makes here, and ***plan-wide*** mishandling of claims." Prudential Br. 22. Only the latter circumstance, according to Prudential, is remediable under Section 1132(a)(3). *Id.* That argument is entirely meritless. Many cases under Section 1132(a)(3) involve a fiduciary breach based on misrepresentations to an individual participant, rather than the plan as a whole. *See, e.g.*, *DeRogatis*, 904 F.3d at 199-200; *Pearce v. Chrysler Grp. LLC Pension Plan*, 893 F.3d 339, 347-48, 352 (6th Cir. 2018); *Silva*, 762 F.3d at 722; *Kenseth*, 722 F.3d at 882-83; *Gearlds*, 709 F.3d at 451-52; *McCravy*, 690 F.3d at 179.

Third, as to estoppel, Verizon recognizes that "[t]he extraordinary circumstances necessary to support an equitable estoppel claim under ERISA require conduct 'tantamount to fraud.'" Verizon Br. 55-56 (citation omitted). But it argues that "gross negligence" cannot be not enough to meet that standard. Verizon Br. 56. Incorrect.

As Ms. Sullivan-Mestecky explained in her opening brief, "[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) (footnote and internal quotation marks omitted). And courts have recognized that a fiduciary's "gross negligence" can amount to "constructive fraud" under ERISA. *Trs. of Mich. Laborers' Health Care Fund v. Gibbons*, 209 F.3d 587, 591 (6th Cir. 2000) (quoting *Brant v. Va. Coal & Iron Co.*, 93 U.S. 326, 335 (1876)). Here, a reasonable factfinder could certainly conclude that Defendants were at minimum grossly negligent. *See* Sullivan-Mestecky Br. 31-32.

Fourth, although Prudential does not appear to dispute that gross negligence can satisfy the extraordinary circumstances requirement for an estoppel claim, it argues estoppel fails here for a different reason: that Prudential never "promised" anything beyond "pay[ing] benefits in accordance with the terms of the GLI Plan." Prudential Br. 36. But a reasonable factfinder could easily construe Prudential's letter to Ms. Sullivan regarding her life insurance policy as a "promise" that Ms. Sullivan, in fact, had such a policy.

Fifth, as to reformation, Prudential's argument is inscrutable. It suggests that "the circumstances here do not present a situation of 'mutual mistake' between the parties," because the plan did not mislead "*all* its participants (as in [*CIGNA*])." Prudential Br. 33 (emphasis added). But *CIGNA* did not limit the reformation remedy to cases involving plan-wide classes of participants, and courts have not paused in permitting individual participants to pursue make-whole relief under the rubric of reformation. *See Pearce*, 893 F.3d at 347-48, 352 (holding that an individual participant may pursue reformation with respect to his own mistaken understanding of the plan).

Prudential goes on to admit that the reason for the parties' apparently erroneous understanding of Ms. Sullivan's benefit eligibility "comes down to a simple inadvertent ***mistake***." Prudential Br. 33. That is a circumstance in which monetary make-whole relief under the rubric of reformation is available. *See* Sullivan-Mestecky Br. 28.

Sixth, for its part, Verizon does not address reformation at all, except to say that it was "illogical and preposterous" for Ms. Sullivan-Mestecky to argue that a "mutual mistake" occurred here with respect to Ms. Sullivan's eligibility for life insurance. Verizon Br. 53. Here again, Verizon's argument is puzzling. *Its own theory of the case* is that a "data entry error" led to the "erroneous enrollment of Ms. Sullivan for Retiree Life Insurance" in the amount of 679,700. Verizon Br. 13 (emphasis omitted).

Seventh, and finally, Defendants suggest that Ms. Sullivan-Mestecky suffered no harm as a result of their fiduciary breach. *E.g.*, Prudential Br. 31. But that argument, too, is incorrect. As an initial matter, courts have routinely held that beneficiaries suffer harm based on "the amount of the life insurance proceeds" the fiduciary wrongfully told the beneficiary she was entitled to. *Kenseth*, 722 F.3d at 881 (agreeing with *McCravy* that beneficiaries are "not limited to seeking a return of premiums," but rather may obtain "make-whole relief in the amount of the life insurance proceeds lost"); *Gearlds*, 709 F.3d at 451-52 (same). The same is true here, particularly in light of Ms. Sullivan-Mestecky's allegation that "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; *see Gearlds*, 709 F.3d at 451 (accepting plaintiff's allegation that he suffered harm because he "lost the opportunity to obtain alternate benefits").

But even beyond the lost insurance policy, Ms. Sullivan-Mestecky has suffered significant harm for which she would be entitled to relief: 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. A183-184.

* * *

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 Summary Judgment On Ms. Sullivan-Mestecky's Section 1132(a)(1)(B) Benefits Claim.

The district court also erred in granting summary judgment on Ms. Sullivan-Mestecky's claim for benefits under 29 U.S.C. § 1132(a)(1)(B). As Ms. Sullivan-Mestecky explained in her opening brief, there is no dispute that (regardless of whether she should have been enrolled in the first place) Ms. Sullivan was in fact enrolled in a life insurance policy of $582,600 when she died. The premiums on that policy had been paid. A355 (tax returns reflecting imputed income based on the premium payments for the full policy amount). And even if the policy should not have been issued, or should have been issued for a smaller coverage amount, it was not *per se* invalid under the terms of the GLI Plan. A280 ("clerical errors" do not invalidate insurance). None of that is disputed. It is also undisputed that Verizon and Prudential caught and corrected the supposed clerical error that led to Ms. Sullivan's enrollment only *after her death*. Verizon Br. 17-18; Prudential Br. 5.

Ms. Sullivan-Mestecky accordingly argued her "right to benefits vest[ed]—*i.e.*, performance bec[ame] due—at the time of the plan participant's death." *Blackshear v. Reliance Standard Life Ins. Co.*, 509 F.3d 634, 640-41 (4th Cir. 2007), *abrogated in part on other grounds as recognized by Williams v. Met. Life Ins. Co.*, 609 F.3d 622, 631 (4th Cir. 2010). Because her "rights under the plan vested at the moment [Ms. Sullivan] died," Verizon and Prudential could no longer correct their clerical error. *Id.* at 641. Doing so "had the effect of dispossessing [Ms. Sullivan-Mestecky] of rights that were already vested." *Id.*

The Defendants' central argument in response is that, unlike in *Blackshear*, the plan documents here were not themselves amended after Ms. Sullivan's death. Prudential Br. 16 ("However, the Blackshear decision provides no guidance here because, in this case, ***there was no post-death amendment of the plan that resulted in a reduction or elimination of benefits***."); Verizon Br. 62 ("However, unlike the circumstances presented by the instant case, the life insurance plan at issue in *Blackshear* was formally amended by the insurer, who then retroactively applied the amended policy to deprive the claimant of a death benefit that otherwise would have been due under the policy as it existed prior to the death of the participant."). But the Plan *was* retroactively amended here.

Defendants' argument ignores the simple fact that under the terms of the GLI Plan, *the underlying policy documents are part of the plan itself*. The GLI Plan 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. Thus, a change to the underlying life insurance policy—which necessarily occurred here when the plan decided not to pay out on the $582,600 policy based on a "corrected" calculation of the benefits due

(Prudential Br. 5)—is necessarily a change to the plan.[7] And under the reasoning of *Blackshear*, that was impermissible once Ms. Sullivan died and the life insurance benefits vested.[8]

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[7] Verizon's assertion that the underlying life insurance policy actually was *not* changed after Ms. Sullivan's death (Verizon Br. 62) is difficult to square with the undisputed fact that Prudential received premium payments for a policy worth $582,600, yet only paid out $11,400 once the "clerical error" was "corrected." Even if the certificate of coverage "mirrors the Plan's benefit provisions" in describing benefits generally (Verizon Br. 62), the "Insurance Contract" incorporated into the plan also includes "the individual applications . . . of the persons insured," which presumably reflect the individual coverage amounts to which Verizon and Prudential have concluded any given participant is entitled. A280.

[8] Verizon also states that Ms. Sullivan-Mestecky failed to raise this argument to the district court. Verizon Br. 60. In her opposition to Defendants' motion for summary judgment, however, Ms. Sullivan-Mestecky argued that Defendants were "prohibited from altering Ms. Sullivan's eligibility for benefits after she had died," specifically citing and discussing *Blackshear* and related authority. Sullivan-Mestecky Opp. to Def's. MSJ (D. Ct. Dkt. 128) at 37-39.

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: December 13, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Local Rule 32.1(a)(4)(B), this brief contains 5,657 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: December 13, 2018

/s/ John Stokes
John Stokes

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2018, I electronically filed the above document 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: December 13, 2018

/s/ John Stokes
John Stokes