No. 03-2024

UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

J.D. and K.D.,

Appellants,

v.

UNIVERSAL HEALTH INSURANCE CO.,

Appellee.

On Appeal from the United States District Court for the District of Columbia, No. 23-cv-499 (Hon. Jacob K. Javits, District Judge)

BRIEF FOR APPELLEE UNIVERSAL

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January 12, 2024

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Considering the customary and constitutionally embedded presumption of openness in judicial proceedings and any prejudice to the opposing party, does the district court properly deny a motion to proceed anonymously, when the movants state a private interest in concealing one's history of mental illness and substance abuse, but do not allege any of the other judicially recognized factors?

II. Should this Court allow a claimant to maintain a claim for equitable relief under 29 U.S.C. § 1132(a)(3) when her other claim for relief under 29 U.S.C. § 1132(a)(1)(B) is highly similar in both legal theory and the resulting remedy?

STATEMENT OF THE CASE

Factual Background

Universal Health Insurance Co. ("Universal") has provided both plaintiffs with medical insurance for half a decade under plaintiff J.D.'s employee welfare benefit plan ("Plan"). Complaint, 1.

Around 2018, plaintiff K.D., a covered beneficiary of Universal, began to suffer from depression. Compl. at 2. A sexual assault between her sophomore and junior years caused K.D.'s depression and anxiety to worsen, and she began to drink and abuse drugs, from marijuana to heroin. Compl. at 2. Universal paid for K.D.'s intensive outpatient treatment three days a week for her depression and anxiety at Road to Recovery. Compl. at 2-3. Unfortunately, the treatment was not successful. Compl. at 3.

When K.D. attempted suicide on March 1, 2022, she received immediate inpatient care for three weeks covered by Universal, first in the emergency room and then at a psychiatric hospital. Compl. at 3. Before K.D. began her "partial hospitalization" treatment, K.D. overdosed on heroin laced with fentanyl. Compl. at 3. Universal paid for K.D.'s care from the emergency room to three weeks in the hospital.

Compl. at 3. Following the recommendations of K.D.'s doctor and treatment team at Road to Recovery, Universal approved three weeks of "residential treatment" at Lifeline Inc. to treat both her mental illness and substance abuse disorder. Compl. at 3. Residential treatment means a 24-hour, 7-days-a-week facility-based program that provides assessment, diagnostic services, and active health treatment to members who do not require the intensity of care offered in inpatient hospitalization and for whom a less intense level of care would not result in significant improvement. Exhibit A.

On April 18, 2022, a treatment team at Lifeline performed K.D.'s entry assessment and diagnosis, confirming her depression, anxiety, and substance abuse disorders. Compl. at 3. Universal paid for K.D.'s three weeks of residential treatment. Compl. at 3. On May 9, 2022, Universal informed K.D. and J.D. that a reviewing physician at Universal, Dr. James Matzer, determined that residential treatment was no longer medically necessary and that K.D. could begin the "partial hospitalization" treatment planned before she attempted suicide. Compl. at 5. The information from Lifeline indicated that K.D. (1) did not need round-the-clock structured care, (2) was not a danger to

themselves or others, and (3) could be safely treated at a lower level of care. Ex. B at 1.

Under the plaintiffs' Plan, Universal provides coverage for medically necessary mental health and substance abuse disorder services, including residential treatment. Compl. at 2. When a doctor determines that the beneficiary could progress at a less intense level of care, Universal will continue to cover the appropriate level of care. Compl. at 2. Because medical records indicated that K.D. had progressed and was no longer actively suicidal, Dr. Matzer denied the request for further residential treatment but pre-approved partial hospitalization services. Ex. B at 2. Dr. Lawrence upheld this determination that K.D. could improve at a lower level after reviewing all of K.D.'s submitted clinical information. Ex. C at 1.

Despite these records showing K.D.'s progress, the director of Lifeline and K.D.'s treating physician cautioned J.D. that K.D. continued to be at high risk. Compl. at 4. As such, J.D. paid out-of-pocket for K.D.'s continued treatment at Lifeline by taking out a second mortgage on her home. Compl. at 4. After twelve more months, K.D.'s treatment team determined that she could receive continued treatment

on an outpatient basis. Compl. at 4. Dr. Evelyn Smith stated that by May 2023, K.D. was in recovery from her addiction, her depression and anxiety were under control, and she had hope for the future. Smith Declaration, 2.

In the fall of 2023, K.D. enrolled in college. Compl. at 4. In outpatient care, she continues to do well from a psychiatric standpoint and has begun to reconnect with her peers. Smith Dec. at 2.

Procedural History

K.D. and J.D. filed suit in the U.S. District Court for the District of Columbia using their initials. Memorandum Opinion and Order, 3. K.D. and J.D. filed Count I against Universal, alleging an improper denial of benefits under the Plan and seeking a remedy under 29 U.S.C. § 1132(a)(1)(B). Complaint, 5. K.D. and J.D. also filed Count II against Universal for violating The Mental Health Parity and Addiction Equity Act of 2008 under 29 U.S.C. § 1185a and are seeking equitable surcharge and an injunction under 29 U.S.C. § 1132(a)(3). Mem. Op. and Order at 3. The district court directed K.D. and J.D. to show cause as to why they should be permitted to proceed using initials. Mem. Op. and Order at 3. In response, K.D. and J.D. filed a motion to proceed

anonymously. Mem. Op. and Order at 3. Universal moved to dismiss Count II and to dismiss J.D. as a plaintiff. Mem. Op. and Order at 4. The district court denied K.D. and J.D.'s motion to proceed anonymously and granted Universal's motion to dismiss Count II. Mem. Op. and Order 1. Because K.D. and J.D. refused to proceed with the suit if they could not do so anonymously, the district court dismissed the suit. Mem. Op. and Order at 10-11. K.D. and J.D. appealed the district court's decision to this Court.

STANDARD OF REVIEW

The legal standard for appellate review of a district court's decision to grant or deny a motion to proceed under a pseudonym is abuse of discretion. *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993).

The ability of a claimant to assert a claim for relief under both 29 U.S.C. § 1132(a)(1)(B) and 29 U.S.C. § 1132(a)(3) is a legal question which courts review de novo. *In re S.W.*, 124 A.3d 89, 95 (D.C. Cir. 2015).

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in denying the appellants' motion to proceed under a pseudonym, i.e., anonymously.

Because the right of public access is essential to the American judicial system and the Federal Rules of Civil Procedure require parties to file under their real names without exception, district courts begin with a presumption against anonymity. Some courts have allowed parties to proceed anonymously despite the constitutional and congressional direction. The majority of circuits require district courts to balance the movant's stated privacy interest against the public's interest in open court proceedings and prejudice to the opposing party. Some courts have adopted factors to aid in the district court's exercise of discretion. This Court adopted the former approach in *United States v. Microsoft Corp.*

Reviewing the district court's decision under either method, both the judicially recognized factors and the balance of interest weigh against anonymity. Both Appellants rely on the Appellant K.D.'s privacy interest in concealing her history of mental illness and substance abuse. First, the judicially recognized factors relevant to this case weigh against anonymity. The Appellant's privacy interest does not outweigh the minimal risk of retaliatory harm, the adult ages of the Appellants, the Appellee's private status, and the alternative

mechanisms for protecting the Appellant's sensitive information, e.g., filing under seal. Second, balancing the privacy interest against the public interest and prejudice to the Appellee weighs against anonymity. Thus, the district court did not abuse its discretion by considering the relevant factors and balancing the interests in denying the motion.

The district court correctly held that Appellants may not maintain their claims under both 29 U.S.C. § 1132(a)(3) and 29 U.S.C. § 1132(a)(1)(B). The starting point for the analysis is the U.S. Supreme Court's holding that a claimant may not assert a claim under 29 U.S.C. § 1132(a)(3) when she has an adequate remedy available to her elsewhere in § 1132(a). Appellants do have available to them a three-part remedy under § 1132(a)(1)(B) that meets the standard of adequacy set forth by the Supreme Court. Some courts hold that this Supreme Court holding prohibits claimants from reaping a double recovery and that claimants, therefore, cannot maintain both claims if they recover similar remedies under both subsections. Because the equitable surcharge and injunction Appellants seek under § 1132(a)(3) is too similar to the relief available to them under § 1132(a)(1)(B).

Some courts hold that a claimant may maintain their claims under both subsections if they are pleading alternative, as opposed to redundant, theories of liability. The theories that Appellants are asserting here are essentially the same: that Appellee wrongfully denied K.D. her benefits under the Plan's terms. Additionally, relief under § 1132(a)(3) would result in an increase in insurance costs, not only for Appellee's customers but millions of customers nationally. For these reasons, this Court should affirm the district court's judgment and dismiss Count II of Appellants' complaint.

ARGUMENT

I. This Court should affirm the denial of anonymity because the district court correctly applied the balancing test and factors to the facts at bar.

The Federal Rules of Civil Procedure and the Local Civil Rules for the District of Columbia require that complaints must name all the parties. *Qualls v. Rumsfeld*, 228 F.R.D. 8, 10 (D.D.C. 2005). Neither set of rules makes any provision for pseudonymous litigation. *Id.*; Fed. R. Civ. P. 10(a) (the title of the complaint must name all the parties); LCvR 5.1(c) (the first filing by or on behalf of a party shall have in the caption the name and full residence address of the party). The Supreme Court and this Court have never expressly condoned party anonymity; yet, they have done so implicitly. *Id*; *See e.g. Roe v. Wade*, 410 U.S. 113 (1973), *Doe v. Sullivan*, 938 F.2d 1370 (D.C. Cir. 1991). Since anonymity is not authorized by statute nor precedent, courts begin with a presumption against anonymous or pseudonymous pleading. *Doe v. Del Rio*, 241 F.R.D. 154, 156 (S.D.N.Y 2006). The burden is on the plaintiff to show that she has a substantial privacy right which outweighs the "customary and constitutionally embedded presumption of openness in judicial proceedings." *Plaintiff B v. Francis*, 631 F.3d 1310, 1315 (11th Cir. 2011) (citing *Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992)).

While all circuits recognize that it is within the discretion of the district court to grant the "rare dispensation" of anonymity against the world, there is no standard test across federal courts. *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1464 (D.C. Cir. 1995). Most circuits require that district courts balancing a litigant's stated need for anonymity against the public's interest in full disclosure and any prejudice to the defendant. *Co. Doe v. Pub. Citizen*, 749 F.3d 246, 273 (4th Cir. 2014) (citing six circuit courts and holding that a district court has an independent obligation to ensure extraordinary circumstances support such a request). Some circuits have incorporated factors to aid district courts in balancing these interests, but again, there is no uniform list of factors. *See Frank*, 951 F.2d at 323 (the enumerated factors in *Steagall* were not intended as a rigid three-step test, nor was the presence of one meant to be dispositive). This Circuit Court has accepted the balancing test, but not a factor test. *See Microsoft Corp.*, 56 F.3d at 1464 (the court should take into account the risk of unfairness to the opposing party, as well as the presumption of openness in judicial proceedings).

This Court should affirm the district court's denial for the following reasons. First, the judicially recognized factors relevant to this case weigh against anonymity. Second, Appellant's privacy interest does not outweigh the right of public access and prejudice to the appellees. Third, the district court did not abuse its discretion because it properly considered the factors and balanced the interests.

A. The application of judicially recognized factors to Appellants' pleadings weighs against anonymity.

The district court did not abuse discretion because it adequately analyzed the factors relevant to this case. *Jacobson*, 6 F.3d at 239 (The judicial recognition of such factors serves as a guide to the proper exercise of discretion).[1] Federal precedent shows there is a range of factors and not every case or court requires the analysis of all factors. *See Sealed Plaintiff v. Sealed Defendant #1*, 537 F.3d 185, 190 (2d Cir. 2008) (listing ten judicially recognized factors); *c.f. M.M. v. Zavaras*, 139 F.3d 789, 804 (10th Cir. 1998) (listing five judicially recognized factors); *Francis*, 631 F.3d at 1316 (noting, the only relevant consideration of the

[1] The Fourth Circuit in *Jacobson* explained abuse of discretion can occur in a number of ways, including (1) a failure or refusal to exercise discretion, (2) failure to adequately take into account judicially recognized factors constraining its exercise, and (3) if discretion is flawed by erroneous factual or legal premises. *Jacobson*, 6 F.3d at 239. Because the district court evidently applied both the balancing test and factors, the relevant standard is the second.

three-party *SMU* test here is the second question). Accordingly, the district court did not abuse its discretion in limiting review to only considerations relevant to Appellants' complaint.

For comparison, some of the most commonly applied factors include: (1) whether the litigation involves matters of sensitive and highly personal nature, *Zavaras*, 139 F.3d at 803; (2) whether identification poses an extraordinary risk of retaliatory physical or mental harm, *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000); (3) the ages of persons whose privacy interest are to be protected, *Jacobson*, 6 F.3d at 238; (4) whether the action is against a governmental or private party, *Frank*, 951 F.2d at 323; and (5) whether there are any alternative mechanisms for protecting the confidentiality of the plaintiff, *Roe v. Aware Woman Ctr. for Choice*, 253 F.3d 678, 687 (11th Cir. 2001). Applying these judicially recognized factors to Appellants' pleadings, shows that the district court was correct in its decision to deny anonymity.

1. Appellant K.D.'s sensitive and highly personal information alone is not determinative.

The first factor considering whether the case involves a matter of sensitive and highly personal nature is the sole factor that may weigh

in favor of anonymity. Appellants argue that they should be allowed to proceed anonymously to protect K.D.'s privacy interests alone. Mem. Op. and Order at 4. Because the complaint does not offer any privacy interest for J.D., this Court should only consider K.D.'s anonymity. *See Doe v. Deschamps*, 64 F.R.D. 652, 653 (D. Montana 1974) (In a lawsuit challenging abortion statute, the court granted the patient-plaintiff anonymity but denied the doctor-plaintiff that ability).

Courts have not clearly defined a "matter of sensitive and highly personal nature." Instead, the circuits have recognized several "unusual" cases where the normal practice of disclosing parties' identities yields to a policy of protecting privacy in a very private matter. *S. Methodist Univ. Ass'n of Woman Law Students v. Wynne & Jaffe*, 599 F.2d 707, 712 (5th Cir. 1979). These cases concern birth control, abortion, homosexuality, or the welfare rights of illegitimate children or abandoned families. *Id*; *See Deschamps*, 64 F.R.D. at 653. However, unlike this case, many of these cases also had more than one factor weighing in favor of anonymity. *Wynne & Jaffe*, 599 F.2d at 713. By contrast, courts have often denied the protection of anonymity where the plaintiffs allege sexual assault and reputational or economic

interests. *See, e.g., Del Rio*, 241 F.R.D. at 159-62 (denied anonymity for plaintiffs alleging sexual abuse by police officer); *Pub. Citizen*, 749 F.3d at 274 (denied anonymity to prevent speculative and substantiated claims of harm to a plaintiff's reputational or economic interests). The wide array of cases granting and denying anonymity demonstrates that courts are not settled on what constitutes matters of sensitive and highly personal nature.

Relevantly, Courts hesitate to find that mental illness alone is an exceptional circumstance that justifies a departure from the normal method of proceeding in federal courts. *Frank*, 951 F.2d at 323 (the fact that Appellant may suffer some personal embarrassment, standing alone, does not require granting a request to proceed under a pseudonym). For instance, the Seventh Circuit Court analyzed an analogous case under ERISA, where the insurer initially paid for the plaintiff's psychiatric treatment but later denied coverage. *Doe v. Blue Cross & Blue Shield United*, 112 F.3d 869, 872 (7th Cir. 1997). The plaintiff likewise moved to proceed under a fictitious name for fear of disclosure of his psychiatric records. *Id*. That court explained that the fact that the case involved a medical issue is insufficient to allow the

use of a fictitious name. *Id*. The court noted that mental illness is not such a badge of infamy or humiliation in the modern world that these facts should be an automatic ground for concealing her identity. *Id*.

While Appellant may feel ashamed of her past, to make mental illness automatic ground would be to propagate the view that mental illness is shameful. *Id*. Appellants' complaint provides that K.D. suffers from major depression and anxiety. Compl. at 2. Major depression is one of the most common disorders in the United States. *Major Depression*, National Institute of Mental Health (July 2023), https://www.nimh.nih.gov/health/statistics/major-depression. Globally, nearly four in ten adults aged fifteen and older either endure significant depression or anxiety themselves or have a close friend or family member who suffers from it. Dan Witters, *U.S. Depression Rates Reach New Highs*, Gallup (May 17, 2023), https://news.gallup.com/poll/505745/depression-rates-reach-new-highs.aspx. If courts were to grant anonymity for any history of common disorder, then potentially one-third of adult female plaintiffs and one-fifth of adult male plaintiffs could evade the mandate of Federal Rule 10(a). *See* Witters, *supra* (finding 36.7 of women now report having been

diagnosed with depression at some point, compared with 20.4% of men). These trends further demonstrate that the facts of this case do not justify an extraordinary break with precedent. *Microsoft Corp*., 56 F.3d at 1464 (D.C. Cir. 1995).

Contrary to Appellants' arguments, the district court did not fail to consider K.D.'s sensitive and highly personal information. The court acknowledged that K.D.'s mental health struggles and treatment are highly sensitive and personal. Mem. Op. at 6. While some courts have recognized serious mental illness qualifies as a sensitive and highly personal matter, this alone does not justify anonymity. The unique circuit case involving mental illness and permitting anonymity, *Doe v. Colautti* in the Third Circuit, did not consider the question of anonymity. *See Doe v. Colautti*, 592 F.2d 704 (3d Cir. 1979). The district court balanced this information against the fact that, if accepted, there would essentially be a presumption in favor of pseudonyms in all cases involving mental health or drug addiction treatment instead of a presumption against them as demanded by Rule 10(a) and the Constitution. Mem. Op. and Order at 6. Although Appellants' matter

involves sensitive information, all other judicially recognized factors weigh against anonymity.

2. The risk of retaliatory harm, the ages of Appellants, Appellee's private status, and alternative methods of protection weigh against anonymity.

The second factor, whether identification poses an extraordinary risk of retaliatory physical or mental harm, weighs against anonymity. Unlike the sensitive information, courts primarily accept that the plaintiffs must face greater threats of retaliation than the typical [E.R.I.S.A.] plaintiff, in other words, extraordinary harm. *See Wynne & Jaffe*, 599 F.2d at 713 (plaintiffs face no greater threat of retaliation than the typical plaintiff alleging Title VII violations); *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981) (the threat of hostile public reaction to a lawsuit, standing alone, will only with great rarity warrant public anonymity). These exceptional cases involve a real danger of physical harm or where disclosure of the plaintiff's identity would result in the injury litigated against. *E.g., Advanced Textile Corp.*, 214 F.3d at 1062 (plaintiff migrant workers sought anonymity because the defendants had power to deport them). The Ninth Circuit held that where pseudonyms are used to shield the anonymous party from retaliatory

harm, the district court should evaluate (1) the severity of the threatened harm; (2) the reasonableness of the anonymous party's fears; and (3) the anonymous party's vulnerability to such retaliation. *Id.*

Applying these considerations to the evidence demonstrates the district court's correct finding that Appellant did not face greater threats of retaliation than the typical plaintiff claiming insurance benefits. The severity of harm is negligible since the evidence does not mention any threat of harm to either K.D. Unlike in *Advanced Textile Corp*. or cases where plaintiffs must admit an intent to engage in illegal conduct, the injury litigated against will not result from disclosure. *E.g., Wade*, 410 U.S. (pregnant woman seeking to avoid prosecution had to admit intention to violate criminal abortion statute). While the injury litigated against, the denial of benefits, may occur again, this injury did not result from disclosure.

The only threat of harm alluded to is self-harm. Although undeniably severe, the risk of self-harm is neither retaliatory nor sufficiently alleged. Dr. Smith's declaration mentioned that K.D., as with all patients suffering from substance use disorder and mental

illness, could easily suffer a set-back or could again become depressed and anxious and suffer a recurrence of substance use. Smith Decl. at 2. To the contrary, Dr. Smith also stated that K.D. was in recovery from addiction and had her depression and anxiety under control in May 2023, and continues to do well from a psychiatric standpoint. Decl. at 2. The district court considered this evidence of harm and the equivocal nature of Dr. Smith's declaration of limited persuasive value. Mem. Op. at 6. Compared to *Advanced Textile Corp.*, Appellant does not have such significant evidence of extraordinary harm. Thus, the district court did not abuse its discretion by failing to consider the factor of possible harm.

Likewise, the third factor, the age of the requesting party at the time of filing, weighs against granting anonymity. If the case involves minors, this factor weighs heavily in favor of anonymity. For example, in *Stegall* the court found the fact the plaintiffs were children "especially persuasive." *Stegall*, 653 F.2d at 186; *See also, Jacobson*, 6 F.3d at 241 (noting, anonymity to guard non-party children from learning that the appellant was not their biological father was persuasive). However, K.D. was eighteen during the relevant period of

coverage and nineteen at the time of filing. Mem. Op. and Order at 3. Given Appellant's age, the concern that courts display for children of a tender age and their vulnerable status do not apply. *Doe v. Roman Cath. Diocese*, 2021 U.S. Dist. LEXIS 269614 (citing *Rose v. Beaumont Indep. School Dist.*, 240 F.R.D. 264, 268 (E.D. Tex. 2007) (finding that this factor did not weigh in favor of anonymity where the plaintiff was not a minor)). The district court accordingly considered that, although K.D. is young, she is not a minor and thus cannot show that she needs special protection. Mem. Op. and Order at 6.

The fourth factor, whether the defendant is a government actor or private party, also weighs against granting anonymity. Appellee is a private company authorized to transact in the District of Columbia. Compl. at 2. This factor is binary but distinguishes the elevated unfairness against private defendants. While suits challenging the validity of government activity involve no injury to the government's "reputation," the mere filing of civil action against private parties may cause damage to their good names and reputation. *Wynne & Jaffe*, 599 F.2d at 713. When a plaintiff challenges the government, courts are more likely to permit plaintiffs to proceed under a pseudonym than if an

individual has been accused publicly of wrongdoing. *Nat'l Ass'n of Waterfront Emps v. Chao*, 587 F.Supp. 2d 90, 99 n.9 (D.D.C. 2008); *Jacobson*, 6 F.3d at 240 n.3 (noting, it may be doubtful that the court would have thought a governmental-entity defendant as subject to prejudice as it thought Jackson, a private defendant). Therefore, the fact that Appellee is a private company weighs against permitting anonymity.

Although the district court did not expressly state that Appellee is a private party, the complaint clearly states that Appellee is a company that provides Appellants' employee healthcare plan. There is no evidence that Appellee is a government actor. Moreover, many courts did not consider this factor. *E.g.*, *Zavaras*, 139 F.3d, *Advanced Textile Corp.*, 214 F.3d, and *Pub. Citizen*, 749 F.3d. Because of the inconsistency among the courts and the obvious classification of Appellee as a private party, the lack of express consideration does not undercut the district court's balancing inquiry.

Finally, the fifth factor, whether there are any alternative mechanisms for protecting the confidentiality of the plaintiff, weighs against granting anonymity here. The district court emphasized the

Appellant's interest in protecting private and sensitive details of her treatment can be protected by redacting private information or sealing the medical and court records. Mem. Op. and Order at 7. Similarly, the Seventh Circuit noted should the appellant's psychiatric records contain material that would be highly embarrassing to the average person the judge could require that the material be placed under seal. *Blue Cross & Blue Shield United*, 112 F.3d at 872. Furthermore, that court stated that it would allow Appellants to refile the complaint under seal, ameliorating any such harm. Mem. Op. and Order at 7. Ultimately, the district court in this case found the alternative protection mechanisms factor weighed strongly against anonymity.

Even if Appellants did present sufficiently sensitive information, this factor alone does not outweigh the other four. Thus, the district court properly concluded that, under a totality-of-the-circumstances, consideration of these relevant factors does not support allowing plaintiff to proceed anonymously. Mem. Op. and Order at 5.

B. On balance, Appellants privacy interest does not outweigh the presumption of open proceedings and the prejudice to Appellees.

Americans' right of public access to court proceedings comes from the First Amendment, Sixth Amendment, and the common-law tradition that court proceedings are presumptively open to public scrutiny. *See Pub. Citizen*, 749 F.3d at 265. Public access serves to promote trustworthiness of the judicial process and to provide the public with a more complete understanding of the judicial system, including a better perception of fairness. *Littlejohn v. Bic Corp.*, 851 F.2d 637, 682 (3d Cir. 1988); *see Advanced Textile Corp.*, 214 F.3d at 1067 (stating, plaintiff's use of fictitious names runs afoul of the public's right of access to judicial proceedings). Accordingly, only exceptional circumstances can abrogate the right of public access.

Aligned with precedent, the district court stated that the public's interest in open court proceedings is always furthered by knowing the identity of the litigants. *See Frank*, 951 F.2d at 322 (noting the public's legitimate interest in knowing all of the facts involved, including the identities of the parties); This factor reflects the customary and constitutionally embedded presumption of openness in judicial

proceedings, and thus, always weighs against anonymity. *See Blue Cross & Blue Shield United*, 112 F.3d at 872 ("The people have a right to know who is using their courts").

Likewise, the risk of prejudice to the opposing party goes to the heart of the balancing argument and, in this case, weighs against anonymity. This Court has recognized that the public interest includes an interest in fairness to all parties. *Microsoft Corp.*, 56 F.3d at 1464. Basic fairness dictates that those among the defendant's accusers who want to participate in this suit must do so under their real names. *Wynne & Jaffe*, 599 F.2d at 713. The reasoning is that if the complaint's allegations are false, anonymity provides a shield behind which defamatory charges may be launched without shame or liability. *Doe v. Smith*, 429 F.3d 706, 710 (7th Cir. 2005). Similarly, this Court stated that a party forced to confront an anonymous plaintiff could suffer injury that might not be redressable in an ultimate appeal. *Microsoft Corp.*, 56 F.3d at 1457. Likewise, anonymity may confer an immunity which permits a plaintiff to hurl rhetorical weapons that could cause a unique kind of harm not faced in ordinary litigation. *Id*. Since Appellee

covers thousands of people in this jurisdiction, this action can potentially impact its reputation and service to many of its clients.

The implication of wrongdoing from permitting Appellant to proceed under a pseudonym causes serious biases impacting Appellee's right to a fair trial. *See Jacobson*, 6 F.3d at 240 (the very knowledge that pseudonyms were being used would convey the message to the fact-finder that the court thought there was merit to the plaintiff's claims of intangible harms). This court has noted that the issue of anonymity raises profound questions of fundamental fairness and perhaps due process. *Microsoft Corp.*, 56 F.3d at 1457. In this case, permitting Appellants to proceed anonymously will likely distract the jury from the purpose of this case: to recover health insurance benefits. This cause of action under ERISA distinguishes this case from the exceptional cases permitting anonymity. *C.f. Sealed Plaintiff*, 537 F.3d at 187 (alleged violation of her civil and constitutional rights); *Advanced Textile Corp.*, 214 F.3d at 1063 (alleging multiple violations of the Fair Labor Standards Act). Before trial, when liability has not been established, granting anonymity risks providing the plaintiff an unfair advantage at

trial. Thus, the risk of unfairness to Appellee weighs against anonymity.

The district court noted consideration of any prejudice that anonymity would pose to the opposing party. Although not analyzed in excruciating detail, the court framed the argument as a consideration of the relevant factors akin to other courts. In conclusion, the district court did not abuse its discretion in deciding no extraordinary circumstances support allowing Appellants to proceed anonymously.

II. This Court should affirm because Appellants may not recover under both § 1132(a)(1)(b) and § 1132(a)(3).

The Employment Retirement Income Security Act (ERISA) § 502, 29 U.S.C. § 1132, has several subsections that provide remedies to a plaintiff in the event of a statutory violation. § 1132(a)(1)(B) is designed to remedy the wrongful denial of insurance plan benefits, and § 1132(a)(3) allows a suit to be brought to recover equitable relief based on any ERISA or insurance plan-based violation. The U.S. Supreme Court clarified how courts should address suits in which plaintiffs plead under both statutory sections for relief. *Varity Corp. v. Howe*, 516 U.S. 489 (1996). Yet circuit courts are split on how to interpret the Supreme Court's holding. *See Rochow v. Life Ins. Co. of N. Am.*, 780 F.3d 364, 373

(6th Cir. 2015) (noting that a claimant can recover under § 502(a)(3) when she is recovering for a separate injury); *see also*, *Silva v. Metro. Life Ins. Co.*, 762 F.3d 711, 726 (8th Cir. 2014) (noting that claimants may recover under § 1132(a)(1)(B) and § 1132(a)(3) so long as the remedies are not similar); *see also*, *Whelehan v. Bank of Am. Pension Plan for Legacy Cos.-Fleet-Traditional Benefit*, 621 Fed.Appx. 70, 72 (2nd Cir. 2015) (noting that § 502(a)(3) may not be used by a claimant to pursue the same type of relief available in another subsection of § 502).

This Court should affirm the judgment of the district court and dismiss Count II of Appellants' complaint for the following reasons. First, under the Supreme Court's holding in *Varity*, a plaintiff may not recover equitable relief under § 1132(a)(3) when she has an adequate remedy available under § 1132(a)(1)(B). Second, alternatively, under the test applied by Eighth Circuit, Appellants may not recover under both subsections of § 1132 because both the remedies and theories of liability are similar. Third, equitable relief under § 1132(a)(3) would be inherently coercive and has the potential to increase insurance costs to insurance customers nationally.

A. Under Varity, a plaintiff cannot elect to recover under § 1132(a)(3) when she has an adequate remedy under § 1132(a)(1)(B).

The U.S. Supreme Court has analyzed the structure of § 502 of ERISA, 29 U.S.C. § 1132, and asserted that it has four subsections focusing upon four distinct areas and two catchall subsections. *Varity Corp.*, 516 U.S. at 512. The Court identified that § 502(a)(1) addresses "wrongful denial of benefits and information," and that § 502(a)(3) is one of the catchall provisions. *Id.* The Court stated that this structure suggests that the catchall provisions, including § 502(a)(3), "act as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." *Id.*

The Supreme Court accurately delineated from the structure of § 1132 that § 1132(a)(3) acts only as a safety net. It would thus not make sense to apply the safety net when Appellants have an available remedy available to them under another subsection, namely § 1132(a)(1)(B). Not only would doing so be at odds with the Supreme Court's analysis of § 502 but it would also risk overcompensating Appellant for their losses.

The Supreme Court did not make any sort of exception to the Federal Pleading Rules of Civil Procedure allowing the assertion of

alternate or inconsistent claims when it articulated its analysis of § 502 of ERISA. Fed. R. Civ. P. 8(d)(3). Instead, the Court raised the threshold to maintain a claim for equitable relief under § 1132(a)(3) when another more specific subsection, here § 1132(a)(1)(B), offers an already extensive remedy to a claimant. § 1132(a)(1)(B)'s three-sided remedy allowing Appellants not only to recover the benefits of the Plan, but also to enforce K.D.'s rights under the terms of the Plan and clarify K.D.'s future rights under the terms of the Plan should meet any standard of adequacy articulable by this Court.

Thus, because Appellants have an adequate remedy available to them under § 1132(a)(1)(B), Appellants should not also be able to maintain a claim under the catchall provision of § 1132(a)(3).

B. Alternatively, the equitable relief sought under § 1132(a)(3) should be barred because it would result in a similar remedy as that sought under § 1132(a)(1)(B).

It is well founded that courts seek to prohibit plaintiffs from reaping double recoveries. *Medina v. D.C.*, 643 F.3d 323, 326 (D.C. Cir. 2011). Some circuit courts have held that the U.S. Supreme Court in *Varity* forbade plaintiffs from asserting claims under both sections § 1132(a)(3) and § 1132(a)(1)(B) when doing so would result in a double

recovery. *Silva*, 762 F.3d at 726. Specifically, the Eighth Circuit Court of Appeals recognized that plaintiffs may not seek "duplicate *recoveries* when a more specific section of the statute, such as § 1132(a)(1)(B), provides a remedy similar to what the plaintiff seeks under the equitable catchall provision." *Id*.

Even if this Court chooses to apply this test, Appellants may still not recover because the remedy available to them under § 1132(a)(1)(B) is similar to that they seek under § 1132(a)(3). First, the injunction Appellants seek under § 1132(a)(3) requiring Appellee to pay the cost of K.D.'s treatment should she relapse and require residential care in the future is a similar remedy to that available under § 1132(a)(1)(B). Second, the equitable surcharge Appellants seek under § 1132(a)(3) requiring Appellee to pay the costs of the Plan due to K.D. is a similar remedy to the recovery of plan benefits available under § 1132(a)(1)(B). Third, Appellants' theories of liability under both subsections are duplicative, rather than separate.

1. The injunction Appellants seeks under § 1132(a)(3) is a similar remedy to that available under § 1132(a)(1)(B).

The granting of injunctive relief under § 1132(a)(3) and statutory relief under § 1132(a)(1)(B) by this Court would result in an impermissible double recovery.

The injunction sought by Appellants would require Appellee to "follow the terms of the Plan in making future benefit determinations and to refrain from applying internal guidelines inconsistent with the terms of the Plan and requirements of ERISA." Compl. at 7. However, § 1132(a)(1)(B)'s language grants Appellants the right to relief that would serve her in a very similar way should such a future event occur. § 1132(a)(1)(B) allows K.D. to "clarify [her] rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). If the Court ruled in favor of Appellants on the merits of their § 1132(a)(1)(B) claim, the Court would then clarify Appellants' future rights under the Plan in a way consistent with the injunction they are seeking. While this relief is not strictly identical to an injunction, it is similar. And the Eighth Circuit's test forbids recovery under both subsections if the remedies are similar. Thus, Appellants may not recover under § 1132(a)(1)(B) and

additionally seek an injunction under § 1132(a)(3) because the remedies are too similar and would therefore result in the very double recovery that the Eighth Circuit has sought to prohibit.

2. The equitable surcharge Appellants seek under § 1132(a)(3) is similar to the plan benefits available under § 1132(a)(1)(B).

Appellants may not recover equitable relief in the form of equitable surcharge under § 1132(a)(3) while simultaneously seeking relief under § 1132(a)(1)(B) because doing so would overcompensate Appellants.

The U.S. Supreme Court has held that equitable relief under § 1132(a)(3) can take the form of a money payment by equitable surcharge. *Cigna Corp. v. Amara*, 563 U.S. 421, 441-42 (2011). The goal of surcharge is that the "beneficiary [be] made whole." *Id.* at 444. The Court further made clear that, just as courts of equity did historically, surcharge provides relief "for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment." *Id.* at 441.

The equitable surcharge sought by Appellants would require Appellee to "pay the cost of K.D.'s treatment at Lifeline without application of the of the asserted 'fail first' policy." Mem. Op. and Order

10. Here, the only harm that K.D. suffered as a direct causal result of Appellee's actions was the denial of allegedly owed plan benefits. Any measurement of monetary relief beyond the plan benefits would risk overcompensating or undercompensating Appellants and would therefore conflict with the stated goal of equitable surcharge: to make the plaintiff whole. Further, the only unjust enrichment that Appellee could have obtained is the withheld plan benefits that Appellants claim were rightfully K.D.'s. Thus, the sole appropriate measure for the equitable surcharge sought by Appellant is the plan benefits.

Yet Appellants can recover the plan benefits under § 1132(a)(1)(B), which allows a plaintiff to "recover benefits due to him under the terms of his plan." 29 U.S.C. § 1132(a)(1)(B). Thus, under the Eighth Circuit's test, Appellants' recovery in the form of equitable surcharge under § 1132(a)(3) and plan benefits under § 1132(a)(1)(B) would be similar and would result in an impermissible double recovery and overcompensate Appellants.

3. Appellants should not be able to recover equitable relief under § 1132(a)(3) because their theory of liability for § 1185a is the same as that for § 1132(a)(1)(B).

Appellants should not be able to maintain their claims under both § 1132(a)(3) and § 1132(a)(1)(B) because their theory of liability is the same. The Eighth Circuit Court of Appeals held that a claimant may maintain her suit under § 1132(a)(1)(B) and § 1132(a)(3) if she pleads "two alternative–as opposed to duplicative–theories of liability…" *Silva*, 762 F.3d at 726. However, Appellants' claims under both statutes here are the same: that Appellee violated K.D.'s rights under the terms of the Plan.

§ 1185a is an amendment to ERISA that requires plans providing for "both medical and surgical benefits and mental health or substance use disorder benefits" must ensure that they do not impose more coverage restrictions on the latter than it imposes on the former. 29 U.S.C. § 1185a(a)(3)(A). Appellants argue that Appellee breached this requirement by requiring that K.D. fail at a lower level of care prior to receiving treatment at a residential level of care, "despite Plan terms that provided for residential treatment of her mental health and substance use disorder if medically necessary." Compl. at 6. Because of

this violation, Appellants argue that they are entitled to equitable remedies under § 1132(a)(3).

Yet Appellants essentially admit the true essence of their §1185a claim: a violation of the Plan's terms. Particularly, Appellants argue that the terms violated are those which provided for K.D. to have residential treatment. § 1132(a)(1)(B) provides this Court the ability to redress this injury by "[enforcing] [her] rights under the terms of the plan" and even allows K.D. to "recover benefits due to [her] under the terms of [her] plan." 29 U.S.C. § 1132(a)(1)(B). Thus, while on its face it may appear that these are to distinct theories of liability, they are, in essence, both based on the same theory: that K.D.'s rights under the Plan were violated. Therefore, Appellants should not be able to recover under both § 1132(a)(1)(B) and § 1132(a)(3) because they would be recovering based on the same theory of liability.

C. Relief under § 1132(a)(3) would be coercive and would have a disproportionately negative impact on Appellee, its clients, and other insurance providers.

The equitable relief Appellants seek through their Parity Act Claim should not be allowed to proceed due to its potential adverse effects to Appellee and its clients. Compliance with the injunction

Appellants seek would only serve to increase the amount of unnecessary regulation Appellee must adhere to. Modifying Appellee's coverage obligations would increase compliance costs to Appellee which, unfortunately, would likely be passed on to its customers in the form of increased insurance premiums.

Further, this effect would not be localized in its impact. Other insurance companies would take heed of such a ruling from this Court and proactively change their practices to be consistent with its holding so as to not risk liability. Consequently, this Court's decision has the potential not only to significantly hurt Appellee's customers, but millions of insurance customers around the United States.

CONCLUSION

For all these reasons, this Court should affirm the judgment of the district court denying anonymity and dismissing Count II of Appellants' complaint.