Team 13

ORAL ARGUMENT SCHEDULED FOR MARCH 1, 2024

Civil Action No.23-CV-499

In the
United States Court of Appeals
For The Thirteenth Circuit

J.D. and K.D.,

Appellant,

v.

United Health Insurance Co.,

Appellee.

On Appeal from the United States District of Columbia
The Honorable Jacob K. Javits

BRIEF FOR APPELLANT

Team 13
Counsel for Appellant

January 12, 2024

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JURISDICTIONAL STATEMENT

This action was brought under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq*. The United States District Court for the District of Columbia had jurisdiction over this action pursuant to 29 U.S.C. § 1132(e)(1), as well as 28 U.S.C. §1331, as this action involves a federal question.

The United States Court of Appeals for the District of Columbia has jurisdiction under 28 U.S.C. § 1291. Appellant K.D. and J.D. filed a timely appeal in response to the final decision of the District Court.

ISSUES PRESENTED

1. Whether Appellants K.D. and J.D. should be allowed to proceed anonymously in order to protect their privacy interests?
2. Whether Appellants K.D. and J.D may bring simultaneous claims under ERISA Section 502(a)(1)(B) and Section 502(a)(3) when pleading alternative claims based on separate injuries with distinct remedies?

STATEMENT OF THE CASE

Statement of Facts

The healthcare plan of Plaintiff K.D. has failed to cover a significant portion of the expenses for treatment that ultimately enabled K.D.'s recovery.

K.D. is a nineteen-year-old female who has suffered from mental illness, substance use disorder, and sexual assault. (Compl. at ¶ 7).[1] Defendant Universal Health Insurance Co. ("Universal") insures and administers K.D.'s healthcare plan which only covers treatment of mental illness and substance use disorders that Universal deems "medically necessary." (*Id.* at ¶ 6, 8; Ex. B). The plan at issue, CIA Consulting LLC Healthcare Plan (the "Plan"), is an ERISA-governed employee welfare benefit plan sponsored by the employer of K.D.'s mother, Plaintiff J.D. (Compl. at ¶ 3). Both K.D. and J.D. were covered participants of the Plan at all relevant times. (*Id.* at ¶ 3, 4).

Universal applies its own guidelines in deciding whether a claim for benefits is medically necessary. (*Id.* at ¶ 8). These guidelines cover five increasing levels of care: (1) "outpatient," (2) "intensive outpatient" which is normally 2-3 times a week, (3) "partial hospitalization" which is defined as outpatient day treatment five

[1] For record citations hereinafter, "Compl." represents citations to the Complaint, "Ex." represents citations to an Exhibit, "Decl." represents citations to the declaration of Dr. Evelyn Smith, and "Op." represents citations to the District Court Memorandum Opinion and Order.

days a week, (4) "residential treatment," and (5) inpatient "hospitalization." (Op. at 2). When it comes to residential treatment, Universal imposes a requirement that "a less intense level of care would not result in significant improvement." (Ex. A).

K.D.'s relevant health record started in high school when she began to suffer from depression as a sophomore. (Compl. at ¶ 7). In the summer between her sophomore and junior year, she was sexually assaulted. (*Id.*). The assault exacerbated her depression, triggered anxiety, and led to social isolation. (*Id.*). She began drinking and using drugs – initially marijuana and eventually opioids. (*Id.*) K.D. had formerly been a gifted student but her enthusiasm for school started to wane during this time. (*Id.*)

In early 2022, following her assault, K.D. began receiving intensive outpatient treatment three days a week at a District of Columbia facility called Road to Recovery. (*Id.* at ¶ 9). Her Plan paid for this treatment, but the treatment was not successful, and her conditioned worsened. (*Id.*).

K.D.'s deteriorating condition was evidenced by the fact that she attempted suicide on March 1, 2022. (*Id.* at ¶ 10). She was first admitted to an emergency room and then to a psychiatric hospital for three weeks. (*Id.*). The psychiatric hospital recommended she receive treatment at a "partial hospitalization" level of care five days a week through Road to Recovery. (*Id.*). Subsequently, almost immediately after her release from the psychiatric hospital but before her partial

hospitalization could begin, K.D. overdosed on heroin that was laced with fentanyl. (*Id.* at ¶ 11). She was again admitted to the emergency room and then hospitalized for three weeks; Universal paid for this treatment. (*Id.*).

Per the recommendation of K.D.'s treatment team at Road to Recovery, K.D. was admitted to Lifeline Inc. for residential treatment in April 2022; she was eighteen-years-old at that time. (*Id.* at ¶ 12; Op. at 2). Lifeline, an inpatient treatment facility in Virginia, could treat both K.D.'s mental illness and substance use disorder. (Compl. at ¶ 12). Upon admittance to Lifeline, K.D. was comprehensively assessed by a team of experts: a family nurse practitioner, the director of Lifeline – a physician, and a psychiatrist – Dr. Evelyn Smith. (*Id.* at ¶ 13). These experts specialize in treating substance use disorders and related mental illness and precipitating trauma. (*Id.*). The team diagnosed K.D. with major depressive disorder, generalized anxiety disorder, and substance use disorder. (*Id.*).

Although Universal paid for three weeks of treatment at Lifeline, it denied benefits for the remainder of K.D.'s treatment there. (*Id.* at ¶ 14). Universal informed K.D. of this denial by sending her a letter at her home address. (Ex. B). A reviewing physician for Universal initially decided that K.D.'s residential treatment was no longer medically necessary because K.D. could be treated at a lower level of care (*Id.*). Universal failed to provide further explanation. (*Id.*). K.D.'s treatment team and her mother disagreed with Universal's decision, and

then filed an urgent appeal request in May 2022. (Compl. at ¶ 15). In response to the appeal, Universal affirmed its denial of K.D's benefits and reasoned that Universal could not reach K.D.'s provider by telephone which was needed for the review. (Ex. C). Universal again failed to provide further detail to support its initial denial of benefits. (*Id.*).

According to the expertise of the doctors at Lifeline, K.D. continued to be at a high risk of relapse and even mortality if she did not have round-the-clock monitoring and care. (Compl. at ¶ 16). Because of this warning, K.D.'s mother paid out-of-pocket for K.D. to continue treatment at Lifeline. (*Id.*). K.D. remained in residential treatment for an additional twelve months. (*Id.* at ¶ 17). J.D. took out a second mortgage on her home to pay for this treatment. (*Id.* at ¶ 16).

K.D.'s residential treatment team ultimately determined that K.D. was in recovery and had improved such that continued mental health treatment on an outpatient basis would be sufficient. (*Id.* at ¶ 17). Subsequently, K.D. enrolled in college and continues to do well after remaining in residential care, where she finally received the sustained and intensive treatment she needed. (*Id.* at ¶ 18). Although K.D. continues to do well, K.D.'s treating psychiatrist at Lifeline, Dr. Smith, testified in a declaration dated July 20, 2023, about concerns for the future. (Decl. at ¶ 7-9). Specifically, Dr. Smith highlighted that K.D.'s "recovery is precarious and she could easily suffer a big set-back." (*Id.* at ¶ 7). Moreover, K.D.

is "sensitive" and "ashamed" about her past drug use and long-term treatment, and has expressed fears about others learning of her history. (*Id.* at ¶ 8-9).

Procedural History

J.D. and K.D. filed suit in the District Court for the District of Columbia on August 2, 2023. (Compl.)

The District Court was faced with two motions. (Op. at 1). First, Plaintiffs filed a Motion to Proceed Anonymously. (*Id.*). The Court denied this Motion after finding that the totality-of-the-circumstances did not support allowing plaintiffs to proceed under pseudonyms. (*Id.* at 5, 11). The Court ordered plaintiffs to file an amended complaint with their full names, but plaintiffs declined to do so. (*Id.* at 10-11). The Court acted in accordance with plaintiffs' request and dismissed the case to enable plaintiffs to appeal the ruling. (*Id.* at 11).

The second motion before the Court was Defendants' Motion to Dismiss Count II, the "Parity Act claim." (*Id.* at 1,4). The Court granted the Motion on the basis that the count for equitable relief under ERISA Section 502(a)(3) was duplicative of the claim for benefits asserted under ERISA Section 502(a)(1)(B) in Count I. (*Id.* at 10). The Court held that Count I, if successful, will allow the Court to grant the relief sought by Plaintiffs in Count II. (*Id.*).

Plaintiffs' appeal is now before Court of Appeals for the District of Columbia Circuit.

SUMMARY OF THE ARGUMENT

The District Court's denial of plaintiffs' Motion to Proceed Anonymously should be reversed. While there is a presumption in favor of openness in court proceedings, in some circumstances, the privacy interests of litigants overshadow that presumption. The result of a multi-factor balancing test shows that this case is one of those circumstances.

Plaintiff ("Appellant"/"K.D.") is a young female who has undergone intensive treatment for substance abuse and mental illness. Defendant Universal, a private health insurance company, denied part of K.D.'s claim for benefits in relation to this treatment. K.D. and her mother, J.D. (Plaintiff), seek to keep their identities private in light of the sensitive and highly personal nature of this lawsuit.

There are various considerations that support protecting plaintiffs' privacy interests. There will be no unfairness to defendant nor any detriment to the public if plaintiffs remain in pseudonym. On the other hand, there will be adverse consequences if plaintiffs are forced to disclose their names. One consequence is a risk of harm to K.D. since she is in a vulnerable state and her recovery is precarious. There is also a risk that disclosure will preclude the adjudication of meritorious claims, since parties with similar claims to K.D. may avoid using the court system out of fear that their identities will be exposed. An attempt to protect the plaintiffs' identities via alternative mechanisms, such as redacting information

or filing under seal, presents additional difficulties. Therefore, on balance, plaintiffs should be allowed to proceed anonymously.

Additionally, Appellant's complaint was improperly dismissed for equitable relief under ERISA Section 502(a)(3) as duplicative of the claim for benefits asserted under ERISA Section 502(a)(1)(B). The first issue addressed is K.D.'s claims cannot be properly laced as duplicative because K.D. is asserting an alternative theory of liability based on Defendant's non-compliance with the Mental Health Parity Act. Pleading in the alternative is an established right under the Federal Rules of Civil Procedure and nothing in the case law overrules Rule 8 of the Federal Rules of Civil Procedure. Further, K.D. could not properly plead ERISA Section 502(a)(3) claim under Section 502(a)(1)(B) because Section 502(a)(1)(B) allows a Plaintiff to assert their rights only under the terms of her plan. Because the Parity Act is not a term of a plan rather a separate statutory provision that all plans must follow, Section 502(a)(3) is K.D.'s only proper remedy.

The second issue addressed is whether simultaneous claims have been "repackaged," in which Courts have focused on whether plaintiffs allege that his or her ERISA claims seek to remedy distinct injuries. Appellant's alternative Section 502(a)(1)(B) and Section 502(a)(3) causes of action seek to rectify two independent injuries–the wrongful denial of benefits in this instance and being

subjected to a Plan that fails to comply with their statutory Parity Act rights–and providing a remedy for one does not resolve the other. Ultimately, clarification of future benefits is not a duplicative relief K.D. is seeking. Rather, K.D.'s Section 502(a)(3) claim is requesting an injunction to require Defendant's to comply with the Parity Act, not enforce the current terms of the plan.

ARGUMENT

The Appellants seek to proceed in pseudonym in light of the deeply personal nature of this suit, and request the opportunity to do so to protect their privacy. J.D. and K.D.'s ("K.D.") correctly plead simultaneous causes of action under Section 502(a)(1)(B) and Section 502(a)(3). K.D.'s claims were incorrectly dismissed by the district court because K.D. pleads alternative theories of Defendant's lability rather than duplicative claims and K.D.'s Section 502(a)(3) claim would be improperly pleaded if plead under Section 502(a)(1)(B). Further K.D. claims distinct injuries that require distinct remedies under Sections 502(a)(1)(B) and Section 502(a)(3). Thus, the district court improperly dismissed K.D.'s claims.

I. The District Court's Denial of Plaintiffs' Motion to Proceed Anonymously Should Be Reversed Because Plaintiffs' Need For Privacy Outweighs Any Purported Interest in Revealing Their Identities.

Federal Rule of Civil Procedure Rule 10(a) provides that "every pleading" in federal court must "name all the parties." The Rule does not specify that the names must be the true and correct legal names of all the parties. Jayne S. Ressler, *Privacy, Plaintiffs, and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*, 53 U. Kan. L. Rev. 195, 216 (2004). While legal precedent has established a presumption in favor of disclosing the full names of parties, this presumption is rebuttable and courts allow litigants to proceed anonymously in certain circumstances. *In re Sealed Case*, 931 F.3d 92, 96 (D.C. Cir. 2019).

Determining whether a plaintiff may proceed anonymously or under a pseudonym involves a balancing test. Similar to many other circuit courts, this Court "balance[s] the litigant's legitimate interest in anonymity against countervailing interests in full disclosure." *Id.* Individual circuits have established their own multi-factor balancing tests, and this Circuit evaluates the following five factors:

> (1) whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of sensitive and highly personal nature; (2) whether identification poses a risk of retaliatory physical or mental harm to the requesting party or even more critically, to innocent non-parties; (3) the ages of the persons whose privacy interests are sought to be protected; (4) whether the action is against a governmental or private party; and, relatedly, (5) the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously.

Id. at 97. The balancing test "is necessarily flexible and fact driven" and the five factors are "non-exhaustive." *In Re Sealed Case*, 971 F.3d 325, 326 (D.C. Cir. 2020).

The District Court in this case discussed four factors that are outlined in different circuits' balancing tests. (Op. at 5). Two of the factors the Court discussed are not covered by the D.C. Circuit's factors listed above. Those two are "whether the public's interest in the litigation is furthered by requiring the plaintiff to disclose her identity," *Does I thru XXIII v. Advanced Textile Corp*., 214 F.3d 1058, 1068 (9th Cir. 2000), and "whether there are any alternative mechanisms for

protecting privacy interests," *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 685 (11th Cir. 2001). (Op. at 5). Those two factors will be addressed after a discussion of the five D.C. Circuit factors below. An application of all the factors reveals that the plaintiffs have an overriding interest in protecting their identities.

First, K.D. and J.D. have a legitimate justification for seeking to proceed anonymously. This case involves issues of mental illness and substance abuse. (Compl. at 7). Contrary to the District Court's opinion, (Op. at 5-6), courts have recognized these as sensitive and highly personal issues that are worthy of protection. For example, in *Doe v. Colautti*, a case involving mental illness, the plaintiff requested that defendant pay for care plaintiff received in a private psychiatric institution. 592 F.2d 704, 705 (3d Cir. 1979). The court permitted the plaintiff to proceed anonymously. *Id.* That is an example of a case where "the social stigma attached to the plaintiff's disclosure was found to be enough to overcome the presumption of openness in court proceedings." *Doe v. Frank*, 951 F.2d 320, 324 (11th Cir. 1992). In addition to mental illness, pseudonymity has been allowed in cases to prevent revelation of a party's history of drug or alcohol abuse. *See, e.g.*, *Smith v. U.S. Office of Pers. Mgmt.*, 80 F. Supp. 3d 575, 579 (E.D. Pa. 2014); *M.C. v. Jefferson City*, 6:22-CV-190, 2022 U.S. Dist. LEXIS 87339 at *1 (N.D.N.Y. Mar. 2, 2022).

The principle underlying this first factor of the balancing test is privacy, and the United States Supreme Court has recognized that a right to privacy exists in the Constitution. *Griswold v. Connecticut*, 381 U.S. 479 (1965). Privacy concerns are becoming increasingly relevant in court proceedings in light of today's technological landscape. *See* Keara Walsh, *Privacy Please ... Protecting the Pseudonymous Plaintiff*, 46 Seton Hall Legis. J. 839, 843-44 (2022). The D.C. District Court has recognized that "[w]ith the onset of electronic case filing [], any person may learn of a particular individual's lawsuit through a simple computer search . . . So . . . Plaintiffs' concerns [about disclosure] are not 'speculative and nonsensical.'" *J.W. v. Dist. of Columbia*, 318 F.R.D. 196, 200 (D.D.C. 2016). Here, if the plaintiffs' identities are disclosed, electronic filing would enable anyone to discover that this lawsuit was brought by K.D. and J.D. This leaves them vulnerable to being shunned, which implicates the next factor in the balancing test.

In terms of factor two, identifying plaintiffs poses a risk of mental harm to K.D. Dr. Evelyn Smith, K.D.'s long-term treating psychiatrist, testified about this risk in a declaration. (Decl. at ¶ 7-9). Dr. Smith stated that disclosure could specifically lead K.D. to "again become depressed and anxious and suffer a recurrence of substance use disorder." (*Id.* at ¶ 9). The District Court found the declaration to be of limited persuasive value because of its "equivocal nature," but the Court failed to explain how the declaration is equivocal. (Op. at 6).

In contrast to the District Court, other courts appear to give great weight to notes from professionals that support allegations that disclosure could negatively interfere with the condition of plaintiff. An example is *Doe v. Hartford Life and Accident Ins. Co.*, which involved a claim for benefits under ERISA. 237 F.R.D. 545, 546 (D.N.J. 2008). There, the court allowed the plaintiff to proceed in pseudonym where plaintiff's doctor corroborated concerns that disclosure of plaintiff's real name will aggravate plaintiff's condition and result in greater anxiety. *Id.* at 550. Similarly here, Dr. Smith opined that disclosure of K.D.'s real name could lead to relapse and again result in depression and anxiety. (Decl. at ¶ 9). Courts also prefer to caution against exacerbating psychological issues of the plaintiff. For example, in *Doe v. Cabrera*, the D.C. District Court stated that if it were "to force the plaintiff to reveal her identity, the Court would risk undermining the psychological treatment the plaintiff has already undergone . . . ." 307 F.R.D. 1, 6 (D.D.C. 2014). This is applicable here since K.D. "could easily suffer a big set-back." (Decl. at ¶ 7).

This Court should follow the lead of the abovementioned two cases that are factually similar to K.D.'s case and should recognize the risk of harm that would result from forcing K.D. and J.D. to reveal their identities.

With regard to factor three, K.D. was eighteen at the time of her treatment, and nineteen at the time this suit was filed. (Op. at 3). The District Court held that

since K.D. is not a minor, she is not in need of special protection. (*Id.* at 6). However, the D.C. District Court has in fact allowed young adults to proceed anonymously in light of their age. In *Doe v. De Amigos, LLC*, the plaintiff was eighteen at the time of the alleged incident and eighteen when she filed the complaint, and the court recognized "plaintiff was . . . and still is, a young adult college student, who may be more susceptible to scrutiny from peers than an older adult would be." No. 11-1755 (ABJ), 2012 U.S. Dist. LEXIS 190501, at *6 (D.D.C. Apr. 30, 2012).

Here, K.D. recently transitioned out of teenagehood and became a college student, so she may still possess the immaturity of adolescence. Disclosing her full name would expose her sensitive history to the public, and she may not be equipped to handle the consequences of this due to her young age and her fragile mental state.

In addition, K.D.'s mother, J.D., should also be allowed to proceed anonymously because otherwise K.D.'s "identity would effectively be revealed in the court filing through a combination of the name of the parent . . . and the child's initials." *Eley v. Dist. Of Columbia*, No. 16-cv-806 (BAH/GMH), 2016 U.S. Dist. LEXIS 147955 at *4 (D.D.C. Oct. 25, 2016). K.D.'s and J.D.'s relationship is linked, especially because they are participants under the same health care plan,

(Compl. at ¶ 3-4), and thus share common privacy interests in that regard. All in all, factor three weighs in favor of anonymity.

With regard to factor four, "often anonymous litigation is more acceptable when defendant is a governmental body because government defendants do not share the concerns about reputation that private individuals have when they are publicly charged with wrongdoing." *M.A. v. Mayorkas*, No. 23-1843 (JEB), 2023 U.S. Dist. LEXIS 146323 at *13 (D.D.C. July 6, 2023). Since defendant here is a private health insurance company and not a governmental body, this is the only factor that weighs against anonymity.

Under the fifth factor of this Circuit's balancing test, there is no risk of unfairness to defendant Universal if plaintiffs proceed anonymously. In *Sealed*, 971 F.3d at 326 n.1, this Court stated that where a defendant knows of the plaintiff's identity, this factor is "not implicated." Moreover, there is no risk of unfairness where defendants have the necessary information to defend their claims. *See Mayorkas*, 2023 U.S. Dist. LEXIS 146323 at *14. Here, Universal knows the identities of the plaintiffs, evidenced by the letter Universal sent to K.D. at her home address. (Ex. B). Plaintiffs proceeding under pseudonyms will not affect Universal's ability to defend itself, so this factor weighs in favor of anonymity.

Turning to the public's interest in this case, the District Court incorrectly concluded that "the public's interest in open court is always furthered by knowing

the identity of the litigants." (Op. at 6). The rulings of other circuits directly contradict that statement. For example, in *Advanced Textile Corp*., the Ninth Circuit held that "[t]he public's interest in this case can be satisfied without revealing the plaintiffs' identities." 214 F.3d at 1069. The court provided another example of when knowing the identities of plaintiffs was not necessary: "the question whether there is a constitutional right to abortion is of immense public interest, but the public did not suffer by not knowing the plaintiff's true name in *Roe v. Wade*." *Id.* at 1072 n.15.

Furthermore, the public's interest in court proceedings is more relevant in some cases than in others. For example, the public has a strong interest in a matter involving public funds. *M.M. v. Zavaras*, 139 F.3d 798, 803 (10th Cir. 1998) (involving public funds used for an inmate in a state prison). Here, however, there are no public funds since plaintiffs are seeking coverage from a private health insurance company. (Compl. at ¶ 29).

Additionally, disclosing plaintiffs' identities is counter-productive since it actually may go against the interest of the public and may negatively impact the judicial system. The court in *Hartford Life* wisely pointed out that "if this Court denies Plaintiff's [anonymity] motion, there exists the possibility that he might not pursue his claim due to the stigmatization . . . This would preclude the adjudication of a possibly meritorious claim . . . ." 237 F.R.D. at 550. Here, K.D. and J.D. have

expressed their hesitation about using their full names in this suit. (Op. at 10). If they are forced to do so, this could prevent them from litigating a ripe issue, and it may discourage others who have similar claims from using the court system. Therefore, the public's interest in this case is not furthered by exposing the full names of K.D. and J.D.

The final point for consideration is whether there are alternative mechanisms for protecting privacy interests. The District Court held that that K.D. could have redacted private information, (Op. at 7), but redaction may make it impossible to understand the facts and the legal arguments. *See, e.g., Doe v. Neverson*, 820 F. App'x. 984, 987-88 (11th Cir. 2020). If the details about K.D.'s treatment were redacted, that would present difficulty since those details are key to understanding the claims against Universal.

The District Court also held that K.D. could have filed under seal, (Op. at 7), but the Court ignored the issues that attach when filing under seal. If the complaint is sealed, the public will know nothing about the issues being litigated, and "[p]ublic access to civil complaints before judicial action [] buttresses the institutional integrity of the judiciary." *Courthouse News Serv. v. Planet*, 947 F.3d 581, 592 (9th Cir. 2020). Additionally, in *United States v. Hubbard*, this Court explicated a six-factor test for determining whether seal should be permitted in a particular case. 650 F.2d 293, 317-22 (D.C. Cir. 1980). The District Court failed to

conduct the necessary analysis and inappropriately jumped to a conclusion by announcing that plaintiffs can refile under seal. (Op. at 7). These hurdles with attempting to protect privacy interests in other ways strengthens the position that plaintiffs' motion to proceed anonymously should have been granted.

In conclusion, out of the seven factors addressed above, all but one weigh in favor of Plaintiffs K.D. and J.D. proceeding anonymously. On balance, the adverse consequences that would arise from disclosure surpass the presumption of openness in court proceedings. Revealing the plaintiffs' identities will yield no constructive results, but pseudonymity will uphold privacy interests acknowledged by many courts in analogous cases. The District Court's denial of plaintiffs' Motion to Proceed Anonymously should be reversed.

II. This Court Should Find That Plaintiff May Bring Section 502(a)(1)(B) and Section 502(a)(3) of ERISA Simultaneously Because Section 502(a)(3) is Not a Repackaged Claim, Rather an Alternative Claim With Distinct Injuries In Which 502(a)(1)(B) Cannot Provide An Adequate Remedy of.

The basis for this appeal rests on the district courts holding that K.D. cannot simultaneously bring a Section 502(a)(1)(B) claim and a Section 502(a)(3) claim. The district court, lacking binding precedent, relied on sister circuits interpretation of two Supreme Court which addressed the relationship between ERISA claims brought under Section 502(a)(1)(B) and Section 502(a)(3); *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) and *CIGNA Corporation v. Amara*, 563 U.S. 421 (2011) ("Amara").

In *Varity*, 516 U.S. 489, the court described Section 502(a)(1)(B) as the proper remedy for the "wrongful denial of benefits and information" and Section 502(a)(3) as a "catchall" provision that acted "as a safety net" for injuries that any other subsection of 502 cannot provided adequate remedies for. *Id*. at 512. In supporting this distinction, the court asserted their concern regarding claimants "repackage[ing] [a] 'denial of benefits' claim as a claim for 'breach of fiduciary duty[.]" in order to avoid the "arbitrary and capricious" standard of review and afford themselves a less deferential review. *Id.* at 513-14.

In *Amara*, the court explained that when Section 502(a)(1)(b) does not provide adequate relief, a plaintiff may pursue remedies under Section 502(a)(3). *Amara*, 563 U.S. at 440. The court first explained the types of relief available under Section 503(a)(3) including reformation of contract, injunctions, restitutions, estopple, and mandamus. *Id*. at 439-442. The court then determined that Plaintiffs could pursue a monetary award against a defendant that provides a "make-whole" remedy under Section 502(a)(3). *Id*. at 441-42. This determination permitted plaintiffs to pursue claims under both Section 502(a)(1)(B) and Section 502(a)(3), after ruling that Section 502(a)(1)(B) remedies were unavailable. *Id*. at 444-45.

The Supreme Court has yet to address whether a plaintiff may simultaneously plead claims under Section 502(a)(1)(B) and Section 502(a)(3) creating a circuit split on the varying interpretations of *Varity* and *Amara*'s interplay. In the Sixth

Circuit the court in *Rochow v. Life Ins. Co. N. Am.*, 780 F.3d 364, 373 (6th Cir. 2015), understood *Varity* and *Amara* to mean plaintiffs may not seek "duplicative or redundant remedy … to redress the same injury." The Second, Eighth, and Ninth Circuits understood the interplay between *Varity* and *Amara* to mean an ERISA plaintiff may not obtain duplicative recovery under Section 502(a)(1)(B) and Section 502(a)(3) but may bring simultaneous causes of cation. *See New York State Psychiatric Assoc., Inc. v. UnitedHealth Group*, 789 F.3d 125, 134-25 (2d Cir. 2015); *Silva v. Metro Life Ins. Co.*, 762 F.3d 711, 726-27 (8th Cir. 2014); *Moyle v. Liberty Mut. Ret. Ben. Plan*, 823 F.3d 948 (9th Cir. 2016).

In analyzing these varying interpretations, the Tenth Circuit produced two questions shining light on the proper way to determine whether a plaintiff's simultaneous ERISA claims are duplicative: "(1) Has the plaintiff alleged alternative theories of liability or suffered district injuries to justify pursuing simultaneous causes of action under both Section 502(a)(1)(B) and Section 502(a)(3)?" And "(2) Dose the monetary damages available for causes of actions under Section 502(a)(1)(B) provide 'adequate relief' such that the prevailing plaintiff can be made whole and completely remedy her injury or injuries without restoring to equitable relief?" *Christine S. v. Blue Shield of N.M*, 428 F. Supp. 3d 1209, 1226 (D. Utah 2019). Additionally, the court must also determine if "the

plaintiff's injury or injuries are adequately remedied by her Section 502(a)(1)(B) cause of action. *Id.*

Circuits are split on what makes a claim duplicative. Some circuits focus on pleading an alternative theory rather than duplicative theories of liability, while other circuits ask whether the nature of the plaintiff's injury is distinct such that the plaintiff's two causes of action seek to remedy two separate theories. The district court incorrectly contends K.D.'s claims fail both analyses, and therefore the claims are duplicative. When analyzed properly, K.D.'s claims satisfies either interpretation of question one. K.D. has pled an alternative theory will be addressed first and K.D.'s causes of action seek to remedy two separate theories will be addressed second.

A. K.D. Asserts Alternative Theories of Liability Rather Than Duplicative Theories and Therefore the Court Should Find K.D. May Plead Section 502(a)(3) and Section 502(a)(1)(B) Simultaneously Additionally K.D.'s Section 502(a)(3) Claim Could Not be Properly Plead Under Section 502(a)(1)(B).

The district court incorrectly contends that Plaintiff's claim under "Section 502(a)(3) could have been brought as part of their 502(a)(1)(B) claim for benefits," making the claims duplicative. (OP. at 10). The district courts line of reasoning is wrong because plaintiff's causes of action are alterative, rather than duplicative and the Federal Rules of Civil Procedure allow pleading simultaneous claims. Further, K.D. could not have brought Section 502(a)(3) claim as a part of Section

502(a)(1)(B) claim because relief under Section 502(a)(1)(B) is limited to the terms of the plan.

A claim is not duplicative if a Plaintiff is asserting an alternative theory of liability. In *Silva*, Defendants challenged Plaintiff's attempt to amend his complaint to add a claim under Section 502(a)(3) after the initial complaint already claimed relief under Section 502(a)(1)(B). 762 F.3d at 711. The Eighth Circuit Court of Appeals, in interpreting *Varity*, reasoned that *Varity* does not limit the number of ways a party can initially seek relief at the motion to dismiss stage. Rather, the court reasoned that since "[Plaintiff] presents two alternative – as opposed to duplicative – theories of liability and is allowed to plead both." *Id*. at 726. *See Amara*, 563 U.S. at 438-40 (Refraining from holding plaintiffs would be barred from initially bringing a claim under 502(a)(3) simply because plaintiff had already brought a claim under 502(a)(1)(B)).

K.D.'s Section 502(a)(3) claim asserts an alternative theory of liability rather than a duplicative theory of lability and should not have been dismissed based on duplicity. K.D.'s section 502(a)(1)(B) claim alleged Defendant's liability resides within the improper denial of plan benefits. (Compl. 5). The basis of this cause of action lies in Defendant's coverage denial of the complete course of K.D.'s residential treatment. (*Id*.) In comparison, K.D.'s section 502(a)(3) claim alleges an alternative theory liability resting in Defendant's non-compliance with the Parity

Act. (*Id*. at 6). This cause of action relies on the various levels of care K.D. was required to experience prior to receiving coverage for residential level of care. The facts alleged provide that Defendants violated the Parity Act, which is not a term of K.D.'s plan, rather a separate statutory provision. Examining K.D.'s two causes of action, clearly presents two alternative theories of Defendant's liability. While the causes of actions are based on the same factual timeline, for both liabilities to arise, separate facts must have occurred. Therefore, K.D. presents two alterative theories of lability rather than duplicative theories.

Additionally, the Supreme Court's decision in *Varity* does not overrule the Federal Rules of Civil Procedure. Generally, the Federal Rules of Civil Procedure allow plaintiffs to plead alternative causes of action. Rule 8 states that "[a] pleading that states a claim for relief must…contain a demand for the relief sought, which may include relief in the alternative or different types of relief. Fed. R. Civ. P. 8(a)(3). While ERISA, as the district court states, "presents a special case," dismissing an "ERISA plaintiff's [Section 502(a)(3)] claim as duplicative at the pleading stage of a case would, in effect, require the plaintiff to elect a legal theory and would, therefore violation the '[Federal Rules of Civil Procedure].'" (OP. at 9); *Silva*, 762 F.3d at 726.

The very nature of these causes of action brought by K.D. empower a theory of alternative claims rather than duplicative claims. K.D.'s first cause of action is

seeking relief under Section 502(a)(1)(b). Section 502(a)(1)(B) permits a plaintiff to recover, enforce his rights, or to clarify his rights to future benefits *only* "under the terms if [his or her] plan." 29 U.S.C. § 1132(a)(1)(B). On the other hand, Plaintiff's second cause of action seeks relief under Section 502(a)(3). Section 502(a)(3) allows plaintiffs to seek traditional equitable remedies for "any act or practice" that violates another substantive provision of ERISA. 29 U.S.C. § 1132(a)(3). Thus, the relief sought under Section 502(a)(1)(B) is limited to violations within the scope of a plaintiff's plan, this is not the case for Section 502(a)(3). *Varity*, 516 U.S. at 489 (authorizing plaintiffs' recovery for defendants' breach of fiduciary duty under Section 502(a)(3) and noting that recovery under section 502(a)(1)(B) would be improper because plaintiffs were no longer members of the benefit plan).

Plaintiff's second cause of action is brought under the Parity Act. K.D. asserts Defendant violated the Mental Health Parity Act by requiring K.D. to be treated at a lower level of care and fail before she could receive treatment at a residential care level. (Compl. at 6). Through this claim, K.D. is not alleging she was denied benefits under her plan, rather that Defendant's violated an entire substantive provision of ERISA, the Parity Act. Because the Parity Act is a substantive provision of ERISA rather than a part of K.D.'s plan, K.D. is not authorized to seek remedy for this violation through 502(a)(1)(B); making

Plaintiff's only remedy thought Section 502(a)(3). *See A.F. Providence Health Plan*, 35 F. Supp. 3d 1298, 1304 (D. Or. 2014) (quoting 29 U.S.C. § 1132(a)(3) describing a civil action may be brought under Section 502(a)(3) when an act or practice violates any provision of ERISA's subchapters); *New York State Psychiatric Ass'n v. UnitedHealth Grp.*, 789 F.3d 125, 133 (2d Cir. 2015) ("Parity Act obligation is imposed on [a plan administrator] not by the Parity Act itself, but rather by § 502(a)(3)").

When a plaintiff's claim can only be brought under Section 502(a)(3), the claim cannot be a repackaged claim under Section 502(a)(1)(B). In *Christine S. v. Blue Cross Blue Shield of N.M.*, 428 F. Supp 3d 1209, 1214-17 (D. Utah 2019), Plaintiffs sued Defendant after an alleged wrongful denial of benefits for plaintiff's childcare at two residential treatment centers in violation of ERISA and the Mental Health Parity and Addiction Equity Act; brining an ERISA 502(a)(1)(B) and ERISA 502(a)(3) claims. The district court, in denying Defendant's duplicative claims argument and relying on *Varity* and *Amara*, reasoned because the language of Section 502(a)(1)(B) permits plaintiffs to recover benefits due under his or her plan and the court may not altern those terms to enforce other statutory rights, plaintiff's claims cannot be duplicative because the Parity Act provides separate statutory rights by that requiring insurers to treat mental health and medical coverage decision equally. *Id*. at 1229.

K.D.'s claims fall directly in line with plaintiff's claims in *Christine S.*, therefore this court should follow the district court's reasoning in the instant case. Like Plaintiffs in *Christine S.*, K.D. is also bringing a Section 502(a)(1)(B) claim for denial of benefits and a Section 502(a)(3) claim for injunctive relief requiring Defendant to comply with the requirements of the Parity Act. Since Plaintiff's second cause of action calls for Defendants to comply with a separate substantive provision of ERISA, the Parity Act, which is not a term of the K.D.'s plan, but rather a statutory provision that all plans must follow K.D.'s claims cannot be duplicative. Thus, the district courts assertion that Plaintiff's 502(a)(3) could have been brought under Section 502(a)(1)(B) incorrectly characterizes a statutory provision as a term of plaintiff's plan. Because Section 502(a)(1)(B) *only* allows for Plaintiff's to recover under the terms of a plan and not for any statutory provision, Plaintiff's Section 502(a)(3) claim would been incorrectly plead if brought under Section 502(a)(1)(B).

B. Even If The Courts Are Generally Right, They Are Wrong Here Because 502(A)(3) Seeks To Remedy In The Form Of An Injunction, That Is Separate And Distinct From Future Benefits Under Section 502(A)(1)(B).

The proper inquiry is whether plaintiff's simultaneous ERISA claims are actually duplicative, meaning they seek to remedy the same injury with repacked causes of action. If they are duplicative, *Varity* dictates that the plaintiff must pursue her claims under ERISA Section 502(a)(1)(B). The Court must also

determine if plaintiff's injury or injuries are adequately remedied by her ERISA Section 502(a)(1)(B) cause of action. If plaintiff's injury or injuries are adequately remedied by an award of money damages under ERISA Section 502(a)(1)(B), then she may not also recover equitable relief under ERISA Section 502(a)(3).

Varity and its progeny prohibit repackaging simultaneous claims under ERISA Section 502(a)(1)(B) and ERISA Section 502(a)(3). There is no legitimate concern here about impermissible claim "repackaging" when a benefits-claimant is seeking other appropriate equitable relief that is distinct. Impermissible repackaging is implicated whenever, in addition to the particular adequate remedy provided, a duplicative or redundant remedy is pursued to redress the same injury. *Rochow*, 780 F.3d at 373.

To determine whether simultaneous claims have been "repackaged," courts have focused on whether plaintiffs allege that his or her ERISA claims seek to remedy distinct injuries. The Courts generally describe Section 502(a)(1)(B) as the remedy for the "wrongful denial of benefits and information," while Section 502(a)(3) is a "catchall" that provides "'appropriate equitable relief' for 'any' statutory violation." *Varity*, 516 U.S. at 512. The Court noted that this "structure suggests that" the ERISA 'catchall' provisions [including Section 502(a)(3)] act as a safety net, offering appropriate equitable relief for injuries caused by violations that Section 502 does not elsewhere adequately remedy." *Id*. This distinction

allays the concern that "lawyers will complicate ordinary benefit claims by dressing them up in 'fiduciary duty' clothing" to pursue the same "repackage[d]" claim under Section 502(a)(3) instead of under Section 502(a)(1)(B). *Id*. at 514. According to *Varity*, the problem with repackaged claims was that a Plaintiff could avoid the *Firestone Tire* "arbitrary and capricious" review standard that favors plan administrators, and instead avail in less differential review under the "rigid level of conduct" expected of fiduciaries. *Id*. at 513-14.

In interpreting *Varity* and *Amara*, plaintiffs may pursue a Section 502(a)(3) claim where that claim is "based on an injury separate and distinct from the denial of benefits." *Rochow*, 780 F.3d at 372; *see also id*. at 384 (Stranch, J., dissenting) (articulating the rule that "where two distinct injuries exist. . . two remedies are necessary to make the plan participant or beneficiary whole); *A.F.,* 157 F. Supp. 3d at 920 (permitting dual ERISA claims where the claims "do not seek the same relief for the same injury, although they are based on the same alleged actions.").

Hill v. Blue Cross and Blue Shield of Michigan, 409 F.3d 710, 712 (6th Cir. 2005), recognizes an exception to *Varity* where "[o]nly injunctive relief of the type available under [Section 502(a)(3) would] provide the complete relief sought by Plaintiffs by requiring [Defendant] to alter the manner in which it administers all the Program's claims . . .." The court clarified the interplay of Section 502(a)(1)(B) and Section 502(a)(3). In *Hill*, plaintiffs brought a class-action lawsuit seeking

individual relief for wrongfully denied benefits under Section 502 (a)(1)(B) based upon defendant's alleged breach of its fiduciary duty. The district court dismissed the Section 502(a)(3) claim, finding that "these claims were merely repackaged claims for individual benefits and did not constitute actual fiduciary-duty claims." *Id*. at 717. In *Hill*, as in *Varity*, the primary purpose of ERISA was given effect – ensuring availability of an adequate remedy to make plaintiffs whole.

Contrastingly, in *Wilkins v. Baptist Healthcare System, Inc*., 150 F.3d 609 (6th Cir. 1998), Wilkins applied for long-term disability benefits and, after the plan administrator denied his claim, sued for benefits under Section 502(a)(1)(B) and for equitable relief under Section502(a)(3) based on breach of fiduciary duty. Whereas *Wilkins* involved the rejection of fiduciary-duty claims on the basis that they were disguised individual-benefit claims, in *Hill* the need for relief under the catchall provision arose out of a defect in plan-wide claim handling procedures, implicating a different injury. To remedy this separate and distinct injury, the Court permitted ultimately injunctive relief under Section 502(a)(3), not an additional award of monetary damages for the same denial of benefits.

The case here falls within the *Hill* exception to *Varity* and *Wilkins*. *Hill* distinguished between the denial of individual claims and plan-wide mishandling of claims as two distinct injuries. Section 502(a)(1)(B) provided relief for the denial of *Hill* plaintiffs' individual benefits, and Section 502(a)(3) remedied the

systemic plan-wide problems that posed a potential for future injury. Like *Hill,* K.D. seeks to remedy distinct injuries; remedies that are not one and the same injury or repackaged.

The Ninth's Circuit's analysis in *Moyle* is instructive on this issue. 823 F.3d at 948. In *Moyle*, plaintiffs sought to recover wrongfully withheld benefits under Section 502(a)(1)(B) and equitable relief under Section 502(a)(3) in the form of surcharge and reformation of their benefits plan to remedy defendant's alleged breach of fiduciary duty because of a "material lack of disclosure about the terms of a pension plan." *Id*. at 952, 960. The *Moyle* court ruled the claims were not duplicative and allowed both to proceed. *Id*. at 961. The Court recognized that plaintiffs sought "the payment of benefits under Section 502(a)(1)(B), but if that fails, [plaintiffs sought] and equitable remedy for the breach of fiduciary duty to disclose under Section 502(a)(3). *Id*. at 962. Thus, the Ninth Circuit ruled that plaintiffs could plead parallel ERISA claims seeking to remedy two distinct injuries – the wrongful denial of benefits and the failure to disclose material terms of the plan – and were merely prohibited from obtaining "double recovery" under the *Varity* framework. *Id*. at 961.

Likewise, the Sixth Circuit in *Gore v. El Paso Energy Corporation Long Term Disability Plan*, 477 F.3d 833, 841 (6th Cir. 2007) permitted simultaneous ERISA claims after finding plaintiff suffered distinct injuries. There, Plaintiff

sought monetary relief for wrongful denial of benefits under Section 502(a)(1)(B) and additional equitable relief for breach of fiduciary duty under Section 502(a)(3). *Id*. at 836. The Sixth Circuit reversed summary judgment on the Section 502(a)(3) claim because plaintiff had "alleged two separate and distinct injuries" to justify maintaining simultaneous ERISA causes of action. *Id*. at 840.

First, the plaintiff in *Gore* alleged under Section 502(a)(1)(B) that the plan administrator had wrongfully denied him benefits based on the terms of his plan. *Id*. Second, plaintiff alleged that the plan administrator had "breached its fiduciary duty by" misrepresenting his eligibility for benefits and making him "believe that he had two years of [eligible] benefits" when in reality he had only one year. *Id*. at 841. The court found that the plan administrator committed two distinct injuries – the wrongful denial of benefits and the misrepresentation that results in plaintiff's misconception of his eligibility for benefits–and plaintiff could pursue simultaneous causes of action to remedy both. *See Id*. at 840-41. The Court added that "[t]he fact that [plaintiff's] claim for an equitable remedy could have been resolved if his Section 502(a)(1)(B) claim was resolved in his favor does not mean that his claim is . . . barred." *Id*. at 841.

Furthermore, a district court in the Tenth Circuit has also permitted simultaneous ERISA claims seeking to remedy distinct injuries in *Faltermeier v. Aetna Life Ins. Co*., No. 15-CV-2255-JAR-TJJ, 2015 U.S. Dist. LEXIS 68720,

2015 WL 3440479 (D. Kan. May 28, 2015). In *Faltermeier*, the district court found that plaintiff had alleged two separate injuries: one for a wrongful denial of benefits based on the insurer's alleged arbitrary and capricious review of materials in the administrative record for his benefits and "a separate cause of action for breach of fiduciary duty arising out of Defendant's exclusion of relevant medical evidence from the administrative record." *Id*. Because the exclusion of medical evidence was not part of plaintiff's plan, he had to "seek another avenue to get [that] evidence" of wrongdoing "before the court." 2015 U.S. Dist. LEXIS 68720, [WL] at *2. Accordingly, the court ruled that plaintiff had not "merely restated the factual basis" for his two causes of action, and "[a]s in *Varity*, Plaintiff is entitled to assert a claim under Section 502(a)(3) because he may have no benefits due him under the terms of the plan." 2015 U.S. Dist. LEXIS 68720, [WL] at *2-3. The district court concluded that "[a]t this early stage of the proceedings, the Court finds that Plaintiff should be permitted to assert both claims." 2015 U.S. Dist. LEXIS 68720, [WL] at *3.

The circumstances of this case counsel in favor of the same result as *Moyle*, *Gore*, and *Faltermeier*. K.D. is entitled to assert claims under Section 502(a)(1)(B) and Section 502(a)(3) because Defendant committed two distinct injuries – the wrongful denial of benefits and failure to follow the terms of the Plan in making those benefit determinations. Under Section 502(a)(1)(B), Defendant violated the

face of the Plan by denying benefits for K.D.'s remainder at Lifeline. (Compl. at ¶ 14.) When a reviewing physician for Defendant initially decided that K.D.'s residential treatment was no longer medically necessary because K.D. could be "treated at a lower level of care." (Ex. B), Defendant failed to provide further explanation. (*Id.*). Thus, K.D. is seeking an injunction under 502(a)(3) requiring Defendant to follow the terms of the Plan in making future benefit determinations and to refrain from applying internal guidelines inconsistent with the party provisions of ERISA. This request for relief is not for themselves as Plaintiff in this litigation but for any other vulnerable recipient utilizing Defendant as a provider.

To elaborate, Defendant violated the Parity Act, enforced through Section 502(a)(3), by applying more stringent standards to their coverage determinations for mental health treatment as compared to analogous surgical/medical care. (Compl. at ¶ 28). The second injury is distinct from the alleged wrongful denial of benefits because K.D. was also deprived of their statutory entitlement to an insurance plan that complies with the Parity Act, even if a compliant plan would nonetheless still result in a denial of benefits for K.D.'s treatment at Lifeline. Accordingly, K.D.'s Section 502(a)(3) claim seeks to rectify past injury and prevent future recurrence by obtaining, among other relief, an injunction remedy related to Defendant's financial benefit obtained from violating the Parity Act. *See*

also NYPSA, 798 F.3d at 135 (describing the Parity Act injury in both past and prospective terms).

Additionally, the district court contends that K.D.'s Section 502(a)(3) claim would be remedied through ERISA Section 502(a)(1)(B) since Section 502(a)(1)(B) allows for clarifications regarding a claimant's future benefits under the terms of the plan. While this contention is correct, clarification of future benefits it is not the relief K.D. is seeking. Rather, K.D.'s Section 502(a)(3) claim is requesting an injunction to require Defendant's to comply with the Parity Act, not enforce the current terms of the plan. The Supreme Court's decision in Amara supports this distinction when the court reversed the lower courts holding "Section 502(a)(1)(B) authorizes courts to enforce a plan's terms, but not to change them." *Amara*, 563 U.S. at 436-38.

The district court also correctly notes that some circuit courts have prevented plaintiffs from seeking duplicative recoveries "when a more specific section of the statute, such as [Section 502(a)(1)(B),] provides a remedy similar to what plaintiff seeks under [Section 502(a)(3)]." However, determining whether Section 502(a)(1)(B) alone will provide plaintiff adequate relief is unclear at the motion to dismiss stage of litigation. *See Christine S.*, 428 F. Supp. 3d at 1232. Because of this several circuits have "declined to rule on the adequacy of a plaintiff's potential

recovery under Section 502(a)(1)(B) at a motion to dismiss because doing so is 'premature.'" *Id*.

Here, for example, the court could rule on the merits that Defendants correctly denied benefits to K.D. under the terms of her plan, which would require denying recovery under Section 502(a)(1)(B). But consistent with that ruling, the court could still find that the terms of the plan on it face or as applied by Defendant violates the Parity Act by imposing unequal standards to mental health treatment. This violation would *require* granting equitable relief to K.D. under Section 502(a)(3). The inverse is also true: upon further proceedings it could be found that Defendants wrongfully denied Plaintiffs' benefits based on the terms of the Plan but deny the Parity Act claim by finding Defendants do not apply unequal criteria to mental health benefits. The court could also find that Defendants violated Plaintiffs' rights under both theories, or under neither.

In short, K.D.'s alternative Section 502(a)(1)(B) and Section 502(a)(3) causes of action seek to rectify two independent injuries–the wrongful denial of benefits in this instance and being subjected to a Plan that fails to comply with their statutory Parity Act rights–and providing a remedy for one does not resolve the other. Therefore, K.D.'s two remedies are not duplicative and neither repackages the other. K.D. does not seek the same relief under her Section 502(a)(3) claims as she does under her Section 502(a)(1)(B) claim. The assertion

of both remedies are necessary, working in tandem, to make K.D. whole for Defendants' ERISA violations in this case. *See Rochow*, 780 F.3d at 383-84.

CONCLUSION

For the reasons started herein, this Court should reverse the district court's dismissal of Appellant's claims.

Respectfully, submitted,
/s/ Team 13

Attorneys for Plaintiff/Appellant

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