No. 03-2024

In the

United States Court of Appeals for the District of Columbia

ORAL ARGUMENTS MARCH 2023

J.D. and K.D.,

APPELLANTS

V.

UNIVERSAL HEALTH INSURANCE CO.,

APPELLEE.

ON APPEAL
IN THE THE DISTRICT OF COLUMBIA

TEAM #3
COUNSEL FOR APPELLANTS

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JURISDICTIONAL STATEMENT

This is an action arising out of § 502(a)(1)(B) and § 502(a)(3) the Employee Retirement Income Security Act ("ERISA").[1] ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1) specifies that the federal district courts have exclusive jurisdiction over actions under ERISA § 502(a)(3). Thus, the District Court for the District of Columbia had exclusive subject matter jurisdiction under 29 U.S.C. § 1132(e)(1). Additionally, because ERISA is a federal law, the District Court had federal question jurisdiction under 28 U.S.C. § 1131 (indicating district courts shall have original jurisdiction of all civil actions arising under the laws of the United States).

This Court, the District of Columbia Court of Appeals, has jurisdiction under 28 U.S.C. § 1291, as this is the appeal of a final decision by a District Court for the District of Columbia. The district court's dismissal may be considered final as it effectively concludes the case from the district court's perspective. *Ciralsky v. CIA,* 355 F.3d 661, 666 (D.C. Cir. 2004), *Dukore v. District of Columbia*, 799 F.3d 1137, 1140 (D.C. Cir. 2015).

[1] Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. ERISA § 502(a)(1)(B) is 29 U.S.C. § 1132(a)(1)(B) the purposes of this brief (as ERISA § 502(a)(1)(B)). Likewise, § 502(a)(3) is also 29 U.S.C. §1132(a)(3), but it will be cited to only by § 502(a)(3).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Does K.D. have cause to proceed anomalously if the case contains sensitive information about K.D. that can harm her if it is made public?

II. Are plaintiffs injured by ERISA violations left without an adequate remedy under § 502 (a)(1)(B) and thus permitted to bring a claim for equitable relief under § 502 (a)(3)?

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Appellants K.D. and J.D. are insured by Universal Health Insurance Co. ("Universal"). Mem. Order at 27. K.D. and J.D. filed a lawsuit against Universal seeking to recover medical expenses they incurred to treat K.D.'s mental health and substance use disorder, conditions that only developed because K.D. was sexually assaulted as an adolescent. Compl. ¶ 7.

K.D. managed her depression and anxiety until her sexual her assault, but the psychological toll of the assault intensified her mental illness to where she could no longer cope. *Id.* The psychological toll of the assault intensified her mental illness to where she could no longer cope. *Id.* Needing help, K.D. went through an intense treatment program at the facility "Road to Recovery," but it did not improve her condition. *Id.* ¶ 9. After professional help failed K.D., she attempted to self-

medicate, turning to substances. *Id.* ¶ 7. This usage eventually developed into substance abuse. *Id.* ¶ 13.

Falling further into her depression, K.D. cut her wrist in an attempt at suicide. *Id.* ¶ 10. Because she attempted suicide, K.D. was admitted to a psychiatric hospital where she was kept under doctor supervision for three weeks. *Id.* Upon discharge, the doctors recommended that she receive "partial hospitalization" at Road to Recovery - the facility that previously failed her. *Id.*

Before beginning this treatment, K.D. overdosed, and subsequently spent another three weeks in the psychiatric hospital. *Id.* ¶ 11. This time, the doctors discharged her with different recommendation; instead of Road to Recovery, they recommended she receive residential treatment at Lifeline Inc., a facility that could treat *both* her mental illness and her substance use disorder. *Id.* ¶ 2. The treatment team at Road to Recovery agreed. *Id.*

K.D. and J.D. then sought authorization to send K.D. to Lifeline Inc. to have it be covered by Universal. Id. Universal's insurance plan ("Plan") offers coverage for *medically necessary* mental health and substance use disorder services. *Id.* ¶ 8 This includes residential treatment. id. Based on its own internal guidelines, to qualify, "a less intense level of care would not result in significant improvement," for the patient. *Id.*; *see also* Ex. A. Universal agreed to cover three weeks of stay at Lifeline inc., and K.D. began her stay there. *Id.* ¶ 12, 13.

But after the initial three weeks, Universal sent a letter indicating that it would not pay for any more treatment at Lifeline. *Id.* ¶14. A physician from Universal determined that because K.D. could be treated by "partial hospitalization" at Road to Recovery, as recommended before the overdose, her stay at Lifeline was no longer medically necessary. *Id.*; *see* Ex. B.

Lifeline Inc. provided K.D. with a team of doctors and healthcare professionals who specialized in treating substance use disorders, mental illness, their relation to each other, and precipitating traumas. *Id.* ¶ 13. Both the director of Lifeline and K.D.'s treating psychiatrist cautioned that K.D. continued to be at high risk of relapse and mortality if she did not have round-the-clock monitoring and care. *Id.* ¶ 15-16. J.D. similarly felt the stay at Lifeline was necessary, and consequently appealed Universal's decision. *Id.* ¶ 15. When the appeal failed, J.D. took a second mortgage on her home to finance the costly expense of her daughter's treatment. *Id.* ¶ 16. After twelve months at Lifeline, K.D.'s treatment team determined she was stable enough for discharge. *Id*. ¶ 17. While K.D. remains at risk of relapse, she successfully manages her conditions at college. *Id.* ¶ 18; *see also* Dr. Smith Decl. at 7. She continues to see her Lifeline doctor on an outpatient basis. *Id.* at 1.

II. STATUTORY BACKGROUND

Congress passed Employment Retirement Income Security Act ("ERISA") to impose fiduciary duties on benefit plan providers, such that they must maintain the

interest of their beneficiaries. ERISA § 404(a).[2] Universal is subject to ERISA as it provides the Appellants with such a plan through J.D.'s employment. Compl. ¶ 3.

As a provision of ERISA, Universal must adhere to the Mental Health Parity and Addiction Equity Act ("Parity Act"). The Parity Act compels providers to treat mental health and physical health conditions equally within health insurance plans. 29 U.S.C. § 1185a(a)(3)(A)(ii). To safeguard against discriminatory practices, the Act also prohibits insurance plan administrators from applying "separate treatment limitations" only to mental health benefits. *Id.*

Accordingly, providers violate the Parity Act by refusing "to pay for higher-cost therapies until it can be shown that a lower-cost therapy is not effective (*also known as fail-first policies*…)." 29 C.F.R. § 2590.712(c)(4)(ii) (emphasis added). Fail-first policies do not have to be explicitly written, policies that allow for fail-first scenarios will also violate Parity. *Christine S. v. Blue Cross Shield of New Mexico*, 428 F.Supp.3d 1209, 1219 (Dist. Ct. D. Utah 2019) (stating fail-first policies can occur even if not expressed, but only in "as-applied").

[2] While ERISA was passed to target the mismanagement of private pension plans, its scope covers many employer-sponsored benefits, including employer-sponsored insurance plans.

III. PROCEDURAL HISTORY

J.D. and K.D. sued Universal to recover the remainder of the expense of K.D.'s medical care at Lifeline. They brought the suit in District Court for The District of Columbia.

In Count I, Appellants assert that "KD [was] entitled, under the terms of the Plan, to coverage of her complete course of residential treatment at Lifeline, and that Universal wrongfully denied her claim for benefits under the Plan." Compl. ¶ 20. Count I further request that Universal "clarify [a beneficiary's] rights to future benefits under the terms of the plan." *Id.* Count I is brought under ERISA §502(a)(1)(B), which allows beneficiaries "to recover benefits due to him *under the terms of his plan,* to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." ERISA § 502(a)(1)(B).

In Count II, Appellants make two assertions that Universal violated 29 U.S.C. § 1185a(a)(3)(A)(ii) by having a "fail-first" policy. In the in the first, they claim Universal violated Parity

> "by applying a "fail first" policy that required that K.D. be treated at and fail at a lower level of care before she could receive treatment to recovery 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."

Id. ¶ 27.

In the second assertion, Appellants argue the existence of the (fail-first) policy violated Parity's ban of "separate treatment limitations" *only* for mental health and substance use benefits, as there is no similar fail-first for approving for long-term inpatient care for physical conditions. *Id.* ¶ 28.

Count II requests an "injunction requiring Universal to follow the terms of the Plan in making future benefit determinations and to refrain from applying internal guidelines inconsistent with the parity provisions of ERISA" and "other appropriate equitable relief as the Court deems necessary and proper to protect the interests of Plaintiff under the Plan." *Id.* ¶ 7. In Count II they seek equitable relief under ERISA Section §502(a)(3), in the form of an injunction and equitable surcharge to remedy a violation of ERISA's Parity provision. *Id.*

Because K.D. continues to live with her mental illness and lives with risk of relapse, K.D. and J.D. have not disclosed their names to protect K.D., but the lower court directed Appellants to show cause for why they should be permitted to proceed using initials—since K.D. is no longer a minor. *See* Op. at 3 (completing her treatment at 18 and filing suit at age 19).

Appellants filed a Motion to Proceed Anonymously and included a letter from K.D.'s doctor stating K.D.'s sensitivity about her past drug use and shame about spending a year in a residential treatment facility. Dr. Smith Decl. at 2. K.D.'s diagnosed anxiety could couple with her fears that she will be rejected if her medical

history is made public. *Id.* Under penalty of perjury, her doctor affirmed that K.D. could relapse if she were forced to proceed in this matter under her name. *Id.*

Universal filed a response opposing the Appellants' motion. Defendant filed its own motion to dismiss J.D. as a plaintiff and to dismiss Count II (the "Parity Act claim"). The United States District Court for The District of Columbia granted the Appellee's Motion to Dismiss Count II, finding that it was duplicative of Count I. It also denied the plaintiffs Motion to Proceed Anonymously, and in doing so dismissed the case. Op. at 1, 11.

SUMMARY OF THE ARGUMENT

This Court should hold that the district court abused its discretion when it held that K.D. had to reveal her identity to proceed with the litigation. The information at stake in this case is extremely sensitive. Revealing the information would cause K.D. extreme mental and physical harm. Additionally, forcing parties in this type of litigation to reveal their identities would have a chilling effect on future ERISA litigation, which would adversely impact access to healthcare. Thus, the District Court abused its discretion.

Further, the D.C. Court of Appeals should reverse the motion to dismiss Count II because the § 502(a)(3) claim is not duplicative of Appellants' § 502(a)(1)(B) claim. The seminal Supreme Court decision on § 502(a) claims in *Varity* only prevents the repackaging of benefits if a party will be made whole by another

subsection. *Varity Corp. v. Howe,* 516 U.S. 489 (1996). However, the Appellants' § 502(a)(1)(B) claims only allows for recovery of wrongfully denied benefit payments and clarification of future benefits; this clarification of rights under Universal's current policy does not provide full relief. Appellants assert the existence of a fail-first provision as well as inequal application of criteria to solely mental health treatment—in violation of Parity. These violations only can be remedied by an injunctive order. Since these distinct claims seeks distinct remedies, J.D. and K.D. must be able to plead both counts.

ARGUMENT

I. The District Court Abused Its' Discretion When It Held that K.D. Had to Use Her Full Name to Proceed.

Federal Rule of Civil Procedure 10(a) requires that all cases and pleadings carry the full name of the parties. Fed. R. Civ. P. 10(a). However, most Circuits Courts have created exceptions for cases like this one, where the background information is extremely sensitive or another compelling reason for anonymity exists. *Doe. V Stegall*, 653 F.2d 180, 186 (5th Cir. 1981). This Court should find that the District Court abused its discretion when it ignored these grounds for making an exception to the Rule 10(a) requirement. *In re Sealed Case*, 931 F.3d. 92, 96 (D.C. Cir. 2019). A court can abuse its discretion in three ways: it can fail to examine judicially recognized factors, it can use flawed or erroneous reasoning, or it can

decide a case arbitrarily or by a general rule. *Doe v. Doe*, 85 F.4th 206, 210 (4th Cir. 2023) (citing *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993).

The test to determine if K.D. may use her initials in this matter is a multi-factor totality of the circumstances test. *See In re Sealed Case*, 931 F.3d at 96. As this Court previously stated, "[t]his balancing test is necessarily flexible and fact driven. As a starting point, we weigh … five non-exhaustive factors." *See In re Sealed Case*, 971 F.3d 324, 326 (D.C. Cir. 2020). Those factors include (1) whether the plaintiff has a legitimate reason for hiding her identity or is doing so only to avoid annoyance, (2) whether she would suffer retaliatory mental or physical harm from revealing her identity, and (3) the ages of the parties seeking to obscure their identities. *Id.* 326–27. The last two factors, whether the plaintiff is suing a private entity or the government and the risk of unfairness to the defendant, are not relevant here. Unfairness is usually discussed in defamation cases, where the risk of false accusations plays a large role. The same is true of the identity of the defendant, which is only a factor if the defendant is at risk of damaging his reputation. *See id.*; *see also Doe v. Doe*, 85 F.4th 206, 211 (4th Cir. 2023). Courts also consider the severity of harm to the plaintiff if her identity is revealed, the reasonableness of her request to shield her identity, and her level of vulnerability in the litigation. *See Does I–XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000).

The District Court abused its discretion because it "failed to examine judicially recognized factors." *Doe v. Doe*, 85 F.4th 206, 210 (4th Cir. 2023) The court did not adequately consider; (a) the sensitive nature of the information at stake in this case, (b) the real and potential harms to K.D. if her name becomes public knowledge, or (c) the chilling effect the decision would have on ERISA litigation of this type.

A. K.D. Should Remain Anonymous Because the Information at Stake Is Extremely Sensitive

K.D. asks to the court for permission to use initials in this suit instead of her name because of the extremely sensitive information that is discussed in the case. While the issue before the court is an insurance claim, that claim cannot be litigated without discussing the causes of K.D.'s insurance claim. When courts discuss insurance claims, they must also discuss the plaintiff's underlying medical conditions. For example, in *Alice F. v. Health Care Service Corp.*, the Northern District of Illinois, before turning to the denied insurance benefits, discussed the plaintiff's "mental health problems, learning disabilities, and other behavioral issues" and stated that she abused drugs and had been sexually assaulted as a minor. 367 F. Supp. 3d 817, 822–23 (N.D. Ill. 2019). K.D.'s case is very similar. She was also a victim of sexual assault as minor and suffered from substance abuse, and these events underlie the treatment for which she seeks insurance coverage. Compl. at ¶ 7–8. Like the Northern District of Illinois, the District Court will discuss K.D.'s

medical history and her treatment in depth before determining her insurance claim. *See Alice F.*, 367 F. Supp. 3d at 822–23. Thus, the district court will discuss extremely sensitive information.

In *In re Sealed Case*, this Court noted that identities are usually only concealed in cases that involve "intimate issues such as sexual activities, reproductive rights, bodily autonomy, *medical concerns,* or the *identity of abused minors*." *In re Sealed Case*, 971 F.3d 324, 327 (emphasis added). This Court found the refinery's business records were not sufficiently private to justify keeping the information sealed because it did not fall under any of the categories listed above. *Id.*

By contrast, this case falls into at least one category. K.D.'s insurance claims, as previously established will discuss her medical records, treatment, and diagnoses. *See* Dr. Smith Decl. at 1–2. K.D.'s medical records contain information that is not public knowledge and involves information that is considered "intimate" *Id.*; *see also In re Sealed Case*, 971 F.3d at 327. Additionally, K.D.'s assault will likely be mentioned as a cause of her substance use, meaning that the district court will discuss the sexual abuse of a minor, which this Court has explicitly stated is a protected category. *See In re Sealed Case*, 971 F.3d at 327.

Due to the extremely sensitive information that the district court must discuss in its opinion, K.D. should be allowed to use her initials in this matter.

B. K.D. Will Suffer Extreme Emotional and Physical Harm if Her Identity is Revealed.

If K.D.'s identity is revealed, she will suffer extreme emotional and physical harm. This harm includes bullying, isolation, and a heightened risk of relapse, potentially leading to overdose, death, or both. *See Let's Talk About Stigma Reduction*, NCAPDA (2019) [hereinafter *Let's Talk About Stigma Reduction*], https://ncapda.org/stigma/?gclid=CjwKCAiA-bmsBhAGEiwAoaQNmsa6NcbCmfo7H8p_LFUzgLQXC00PG5aqRzEy_oFEs8bRc7FatHADxhoCtwkQAvD_BwE. Therefore, this Court should allow K.D. to use initials instead of her full name.

In *Plaintiff B v. Francis*, the Eleventh Circuit found that the threat of long-term damage to the plaintiff's reputation is cause for concealing the plaintiffs' identities. *See Plaintiff B v. Francis*, 631 F.3d 1310, 1311–13 (11th Cir. 2011). In this case, the underage plaintiffs were coerced into filming sexually explicit content. *Id.* The court noted that these plaintiffs would "permanently be linked with the videos containing the footage of them" if their identities were revealed. *Id.* at 1318. In addition to the harm of the underlying conduct (harm from the coerced sexual conduct on film), by publishing their names, the plaintiffs would forever become the girls from the footage. *See Id.* As such, if the court elected *not* to grant anonymity, it would force the plaintiffs to be further burdened simply for seeking a remedy through the Justice system. Thus, when a party would face devastating, permanent,

and unjust social consequences merely for seeking a remedy in court, the plaintiffs have cause for anonymity.

K.D. faces similar harm. She has done everything in her power to hide her past and keep it separate from her current life as a college student. Dr. Smith decl. 1–2. If her identity is made public, she will suffer immense shame, including online and in-person harassment and bullying from her peers. *Id.* And though K.D. has sought treatment, she is still recovering. *See* Dr. Smith decl. at 1–2. Dr. Smith, K.D.'s doctor, states that revealing K.D.'s identity would cause her to relapse due to her feelings of shame and the stigma attached to her condition. *Id.* According to the National Coalition Against Proscription Drug Abuse, stigmatization of those suffering from substance use disorder

> can lead to feelings of shame, isolation, and self-stigma, which can make it harder for people to seek help, access treatment, and maintain recovery. Stigma can also make it harder for people to find and keep employment, housing, and social support. In fact, around 90 percent of people with [substance use disorder] do not receive treatment.

Let's Talk About Stigma Reduction.

While K.D. is stable now, that recovery is fragile. Dr. Smith Decl. 1–2. As a recovering addict, K.D. has a 50 to 90 percent chance of relapse. Liyev Agenagnew & Chalachew Kassaw, *The Lifetime Prevalence and Factors Associated with Relapse Among Mentally Ill Patients at Jimma University Medical Center, Ethiopia: Cross Sectional Study*, 7 J. PSYCHOSOCIAL REHAB. & MENTAL HEALTH 211, 212

(2020). More importantly, factors contributing to a higher risk of relapse include a higher level of stress and reminders of old trauma. Jayakrishnan Menon & Arun Kandasamy, *Relapse Prevention*, 60 INDIAN J. PSYCHIATRY 473, 473–78 (2018). If K.D.'s identity is revealed, she will be under a significantly higher level of stress and will be reminded of her assault, and her subsequent substance use. *Id.* And if K.D. relapses, she is at a significant risk of overdose and death. Due to the severe harm K.D. faces if she reveals her identity, this Court should allow K.D. to proceed using her initials.

C. Forcing K.D. to Reveal Her Identity Would Have a Chilling Effect on ERISA Litigation.

The District Court erroneously stated that forcing K.D. to reveal her identity would not have a chilling effect on ERISA litigation. Op. at 6. Beneficiaries under ERISA will invariably want to litigate claims over private medical conditions. Thus, there will be plaintiffs, who would be forced to either expose private medical information they have a strong desire to keep private, or go without remedy. K.D. is a perfect example. K.D. suffered immense trauma and shame because of assault and drug use. Dr. Smith decl. 1–2. She does not want her drug use, overdose, and suicide attempt(s) from becoming public information, and if forced, she will dismiss her suit to ensure that information remains private. *Id.*; *see also* Op. at 10–11. However K.D. is also out of non-legal options and is forced sue Universal for refusing to cover the

cost of her treatment. *See* Compl. Ex. B. This leaves K.D. in a quandary. She could either reveal her identity and face public humiliation, shame, and likely a relapse of her conditions; or she and her mother could face crippling medical debt to pay for the treatment.

Traditionally, one of the reasons courts have disallowed the use of pseudonyms in court is because it could make it difficult for the defendant to gain information during discovery. *See Coe v. County of Cook*, 162 F.3d 461, 498 (7th Cir. 1998) (holding that concealing a plaintiff's identify would make it impossible for judges to determine conflicts of interest); *Doe v. Doe*, 85 F.4th 206, 216 (4th Cir. 2023) (holding that concealing a plaintiff's identity makes discovery harder for the defendant). K.D. fears public recrimination if her identity is revealed. She can give her identity to the court and the Respondent if it is placed under a protective order to prevent it from being made public. *See* Fed. R. Civ. P. 26(c)(1)(A) (permitting the court to enter a protective order forbidding disclosure that would cause "annoyance, embarrassment, oppression, or undue burden or expense"). This would avoid the chilling effect entirely by protecting K.D.'s identity, while still ensuring that both the court and the Respondent have access to the necessary information.

Additionally, in most cases, courts have held that the public has a right to know who is bringing suit. But sometimes, the importance of the litigation will prevail over that interest. *See Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185,

190 (2d Cir. 2008) (holding that one factor in determining if parties should proceed anonymously is "whether, … there is an atypically weak public interest in knowing the litigants' identities"). K.D. is suing her insurance provider for failing to pay for necessary medical treatment. *See* Compl. ¶ 20. This litigation is important because if the insurance company is allowed to deny claims for urgent medical treatment and is not held accountable, then the quality of medical care available to the public will drastically decrease, as will the health outcomes of patients seeking treatment. But if K.D. is allowed to proceed using pseudonyms, then the insurance companies are more likely to approve future claims to avoid litigation, which would ensure that medical care remains affordable to the public.

D. The District Court Abused Its Discretion by overlooking regularly applied judicial principles

Other circuits have held that courts can abuse their discretion in three ways: by deciding a case arbitrarily or by a general rule, by failing to examine judicially recognized factors, or by using flawed or erroneous reasoning. *Doe v. Doe*, 85 F.4th 206, 210 (4th Cir. 2023) (citing *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993). The district court failed to give adequate weight to the harm that K.D. would face if her identity becomes public. Op. at 4–6. It also failed to analyze the public interest in allowing K.D. to continue the suit using her initials. *Id.* Finally, the district court failed to adequately consider the chilling effect that forcing K.D. to reveal her identity would have. *Id.* While the court did briefly address this factor, it simply

stated in a sentence that revealing K.D.'s identity would have no chilling effect. Op. at 6. Yet in doing so, the district court disregarded K.D.'s own statement that she did not wish to continue the case if her identity were revealed. *See* Op. at 10–11. The district court's failure to recognize this fact, along with the other flaws in its reasoning, constitute an abuse of discretion.

II. This Court Must Reverse the Lower Court's Motion to Dismiss Count II Because The Claims are not Duplicative

Respondent Universal owes fiduciary duties to its beneficiaries under ERISA. As beneficiaries, joint Appellants K.D. and J.D. assert Universal failed to protect their interests in two ways: (1) by denying payment of J.D.'s mental health benefits under the Plan, and (2) by creating a fail-first policy for mental health benefit claims in direct violation of the Parity Act. Compl. ¶ 20-29. J.D. and K.D. seek two distinct remedies to recover for the injuries that Universal caused. Compl. *Id.*

This case is not appealed on the merits; thus, the court need not address if they actually did "fail-first" or not, or if the policy is truly fail-first, rather this court must only consider if the counts were truly duplicative.

A. The Two Counts are Distinct Claims, thus Count II is Not a mere "Repackage" of Count I

i. Count I Addresses the Denial of Benefits and Count II Separately Addresses the Violation of ERISA, as a Result They Are Not Duplicative Claims

It is necessary to examine the claims of the two Counts to understand what injuries K.D. and K.D. seek to remedy. The injuries to be redressed in each count are mirrored in the section of ERISA it is rests upon, as such these will be discussed in tandem for each count.

In Count I, K.D. and J.D. claim they were entitled to full coverage under the terms of their Plan, and that Universal wrongfully denied K.D.'s claim for benefits. Compl. ¶ 24. A secondary part of Count I is the clarification of beneficiaries' rights to benefits under the terms of the Plan. Compl. ¶ 24. Accordingly, this claim is brought under ERISA § 502(a)(1), which allows beneficiaries "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan" 29 U.S.C. § 1132(a)(1)(B), ERISA § 502(a)(1)(B) (hereinafter § 502(a)(1)(B)) (emphasis added). Specifically, in Count I, K.D. and J.D. seek compensation for past medical bills that were wrongly denied under the terms of the Plan as written and clarity on what they are entitled to under the terms of the plan in the future. *Id.* ¶ 24.

In Count II, K.D. and J.D. assert that the Plan itself violates the Parity Act. Appellants make two assertions about the violations. The first assertion suggests that

the Appellants claim Universal violated Parity by implementing a "fail-first" policy, requiring K.D. to "fail at a lower level of care before she could receive treatment to recovery at a residential level of care." *Id.* ¶ 27. This is deemed a violation as it aligns with the definition of a "fail-first" policy under 29 C.F.R. § 2590.712(c)(4)(ii). The remedy for this interpretation involves removing the unlawful provision, and an injunction is necessary.

The second claim in Count II argues that the limitation applies solely to mental health and substance abuse disorders, constituting a flaw in the policy itself. *Id.* ¶ 28. Since this term of the plan violates ERISA, it can only be remedied through an injunction, making the § 502 (a)(3) claim necessary to proceed on the merits.

Even if the court does not interpret the first claim as explicitly asserting a Parity Act violation, but rather views it as a claim about how the policy is being applied, Count II still encompasses two assertions. The second assertion contends that the guidelines exist only for mental health and substance use disorders, a limitation that violates the Parity Act. Id. ¶ 28. An ERISA violation requires an injunction for remedy, justifying the 502(a)(3) claim.

Regardless, Count II pertains to the legality of the plan's terms rather than the enforcement of the terms. Section 502(a)(3) is used “to enjoin any act or practice which violates any provision of this title or ... to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions ....” ERISA §

502(a)(3). While other § 502(a) sections of ERISA are specific, § 502(a)(3) calls for equitable relief as a broader catchall provision. *Varity*, 516 U.S. 489, 512 (1996). The provision acts as a "safety net" to catch injuries not properly remedied by other sections of ERISA. *Id.* Indeed, subsection 502(a)(3) is the only one that provides "appropriate equitable relief for any statutory violation." *Id.* (internal citations omitted).

Because Count I is a claim for "benefits due" to K.D. and J.D; Appellants believe that they should have received full coverage and seek remedy now. Compl. ¶ 20-24. In Count II, K.D. and J.D. claim they were injured because they were covered by a fail-first policy, which impermissibly limited their coverage. Compl. ¶ 27-28. This case is not appealed on the merits; thus, this Court must only consider if the counts were duplicative. Op. at 9.

ii. Based On The Distinct Claims That Require Distinct Remedies, The § 502(A)(3) Claim Is More Than A Mere Repackaging Of § 502(A)(1) By Standards Set Out In *Varity*

The District Court disregarded the nature of the two claims by mistakenly holding that the Parity violation was merely a "repackaging" of the denied benefits claim—meaning K.D. and J.D. would receive the same remedy whether they phrased their claim as denied benefits or reworded to assert a breach of duty. See Op. at 9-10. The district court misapplied the holding of *Varity* when it decided that Appellants brought two claims that sought the same relief. Op. at 9-10.

The *Varity* Court clarified that § 502(a)(3) allows "*appropriate*" relief—stating that multiple claims may be brought to provide adequate relief if that relief does not exist in another subsection. *See Varity*, 516 U.S. 489, 513-14 (1996) (emphasis in original). Thus, if there is an injury that is without remedy under § 502(a)(1), the § 502(a)(3) claim is not duplicative. *See Christine S. v. Blue Shield of New Mexico*, 428 F.Supp.3d 1209, 1218 (Dist. Ct. D. Utah 2019). The District Court correctly recognized that a § 502(a)(3) claim can be brought when there is not adequate relief under § 502(a)(1), but it erroneously determined the Appellants requested identical relief under § 502(a)(3) and that both claims could be resolved by one remedy. Op. at 9-10.

This Court does not have precedent on whether a fiduciary breach is duplicative, but the District Court examined two such cases. *See Anthony v. Int'l Ass'n of Machinists and Aerospace Workers Dist. Lodge One,* 378 F.Supp.3d 30, 44 (D.D.C. 2019); *Zalduondo v. Aetna Life Ins. Co.,* 845 F.Supp.2d 146, 155 (D.D.C 2012). In these two cases the plaintiffs each brought two claims: one under § 502(a)(1)(B) and the other under § 502(a)(3). *Anthony*, 378 F.Supp.3d at 44; *Zalduondo*, 845 F.Supp.2d at 155. In *Anthony* the court found there was "repackaging" because if both claims were granted, the plaintiff would recover the same remedy twice. 378 F.Supp.3d at 44. Also in *Anthony,* it is possible to deduce that the plaintiff could not receive any additional remedy under § 502(a)(3); in other

words, the § 502(a)(1) claim adequately remedied the § 502(a)(3) claim. *Id.* *Zalduondo* had a similar result, because the claims demanded the same remedy. 845 F.Supp. 2d at 155. The payment for the plaintiffs' medical bills would completely remedy the § 502(a)(3) "fiduciary breach" claim. *Id.*

Alternatively, K.D. and J.D. seek an order that *alters the policy provided to them*. *See* Compl. ¶29. Universal's Plan offers them less coverage than they are legally entitled to under the Parity Act. No monetary recovery will correct this violation or change their Plan accordingly. Unlike *Anthony* and *Zalduondo*, simply getting the "benefits due" will not *adequately* remedy the § 502(a)(3) claim for K.D. and J.D. Therefore, under the same reasoning of *Anthony* and *Zalduondo,* the Appellants in our case have not "repackaged," and the court below ruled incorrectly to find otherwise.

B. Adequate Relief For The Parity Act Violation Must Be Remedied By An Injunction Under § 502(a)(3) Because It Requires Alteration Of The Policy

The court below erroneously ruled that "clarification of rights" as a remedy under § 502(a)(1) for denied benefits offers the Appellants *the same relief* as the injunction they seek under § 502(a)(3). Op. at 10. This has two errors; (a) Count II requires a policy change in the form of an injunction, and (b) § 502(a)(1) cannot offer such a change; that is no clarification of the policy under Count I will not be able to adequately provide the necessary relief.

K.D. and J.D.'s injuries cannot be adequately remedied under § 502(a)(1)(B) because one of the remedies needed is a correction of Universal's policy. *See* CIGNA Corp. v. Amara, 563 U.S. 421, 435-36 (2011); *Hill v. Blue Cross and Blue Cross Shield of Michigan,* 409 F.3d 710, 718 (6th Cir. 2005).

For plan-wide violations that can only be remedied by changing the insurance plan, adequate relief can *only* be found under § 502(a)(3). *Hill,* 409 F.3d 710, 718 (6th Cir. 2005). In *Hill*, the Sixth Circuit stated that the relief for benefits due does not change improper methodology of plan guidelines. *See id.* Only the injunctive relief available under § 502(a)(3) can change the methodology of the plan. *Id.* (citing *Fallick v. Nationwide Mut. Ins. Co*., 162 F.3d 410, 419-20 (6th Cir. 1998)) (noting that changing payment for miscalculations of benefits does not force the company to correct the underlying terms and a company is able to continue their noncompliant practices).

Similarly, Appellants cite a plan-wide violation. Compl. ¶ 26-28. Since plan-wide violations cannot be remedied under § 502(a)(1), Appellants will not be able to recover the relief they seek; thus, they require further *appropriate* equitable relief under § 502(a)(3). *See Hill,* 409 F.3d at 718; *see also Fallick* 162 F.3d at 419.

i. Remedies Under § 502(A)(1) Cannot Offer Adequate Relief Because Clarification of The Policy Will Not Be Able To Remedy The Violation

While § 502(a)(1) allows for the clarification of rights, it is not a comparable remedy to the injunctive relief sought. The Supreme Court in *Amara* determined that under § 502(a)(1), a court cannot alter the terms of a benefit plan because the statute explicitly includes the term "enforcing," not a term synonymous or indicative of "changing." *CIGNA Corp. v. Amara*, 563 U.S. 421, 435-36 (2011).; *see also Pender v. Bank of America Corp.,* 788 F.3d 354, 362 (4th Cir. 2015) (finding that § 502(a)(1) cannot be used to change terms of a plan.)

Because courts cannot alter terms through equitable relief under § 502(a)(1); they can do so through § 502(a)(3). *Amara*, 563 U.S. at 435. The District Court followed *Amara* in *Virtue v. Int'l Broth. of Teamsters Retirement & Family Protection Plan* to determine that a § 502(a)(1) claim did not remedy the plaintiff's injury. 886 F.Supp.2d 32, 35 (D.D.C. 2012). The steps required first that the plan must be altered and second that the new terms be enforced. *Id.*

Here, *clarifying* rights under the current policy is all § 502(a)(1) allows the lower court to order. Universal could simply pay the due medical bills and ensure that if this scenario occurred again, then it would approve K.D. for failing-first. That would be the clarification and enforcement of rights under the policy, yet the clarification would not correct fail-first policy. Universal, in light of all § 502(a)(1)

remedies, is not compelled to change the fail-first policy. To provide remedy for an ERISA violation, courts must allow a § 502(a)(3) claim. *See Amara*, 563 U.S. at 435; *see Varity*, 516 U.S. at 512

C. Count I And Count II May Be Pled As Alternate Theories Of Liability and may be Pled Simultaneously

Some circuit courts determine if ERISA claims are alternative, rather than duplicative. See *Silva v. Metropolitan Life Ins. Co.*, 762 F.3d 711, 726 (8th Cir. 2014); *see also* Moyle v. Liberty Mut. Retirement Ben. Plan, 823 F.3d 948, 961 (9th Cir. 2016). If Appellants argue the claims in the alternative, then duplicative remedies will not be sought. Because the district court did not hear the merits of Appellant's claims, the appropriate claim cannot yet be determined. Thus, both claims must be pled.

For example, in *Silva v. Metropolitan Life Ins. Co.* the Eighth Circuit explicitly stated that their interpretation of *Varity*, multiple *causes* of action may be pleaded to determine the most appropriate remedy. 762 F.3d 711, 726 (8th Cir. 2014); *see also* Moyle v. Liberty Mut. Retirement Ben. Plan, 823 F.3d 948, 961 (9th Cir. 2016) (finding plaintiff's presented multiple causes of action—denied benefits and a fiduciary breach from failure to disclose plan terms). The Eighth Circuit held that *Varity* meant barring "duplicate *recoveries* when a more specific section of the statute, such as § [502](a)(1)(B), provides a [similar] remedy." *See* 762 F.3d at 726. The *Silva* court noted that the motion to dismiss stage is too early to determine if

claims are alternative or what remedy will be appropriate. *Id.* at 727. "*[Amara]* substantially changes our understanding of the equitable relief available under section [502(a)(3)]. [The plaintiff] has argued for make-whole relief in the form of monetary compensation for a breach of fiduciary duty ... We now know that, in appropriate circumstances, that relief is available under section [502(a)(3)]." *Id.*

K.D. and J.D. claim simultaneous causes of action that do not require duplicative recoveries. Based on the Eight's Circuits reasoning in *Silva*, duplicative recoveries are the only limitation to multiple ERISA claims, yet the Appellants do not bring duplicative claims. 762 F.3d at 726-27. Further, Appellant's request for other appropriate remedies in addition to the injunction under Count II does not force her claim out of the equitable remedy category for § 502(a)(3). *See Amara*, 563 U.S. at 442 (Reasoning that traditional equity courts could assign compensatory damages for breaches of duty *or* unjust enrichment); *see also Silva*, 762 F.3d at 726. K.D. and J.D. could receive the equitable remedy of surcharge for the breach of duty of violating ERISA under § 502(a)(3) while still being able to receive payment for their medical bills. *Id.*

D. The Court Dismissed Count II prematurely, § 502(a)(3) Claims Must be Heard on the Merits

As the claims can be argued in the alternative, the motion to dismiss stage is too early. In *New York State Psychiatric Ass'n, Inc. v. UnitedHealth Group*, plaintiffs sued under both for benefits due and for breach of fiduciary duty for a

Parity Act violation. 798 F.3d 125, 128 (2d Cir. 2015). The Second Circuit found a § 502(a)(3) claim could not be dismissed because the motion to dismiss stage did not enlighten the court on the appropriate remedy. Id. at 134 (finding that with independent injuries, both could be argued, and the appropriate remedy could not yet be determined). The court emphasized that these two claims can be brought, and if both are deemed successful, then relief will be limited based on § 502(a)(1)(B) recovery. *Id.*; *but see Rochow v. Life Ins. Co. of North America,* 780 F.3d 364, 371 (6th Cir. 2015) (evaluating for two injuries but ultimately denying a § 502(a)(3) count because both claims stemmed only from the denied benefit. The court knew that allowing additional disgorgement would have provided the same payment).

Similarly, in *Christine S. v. Blue Cross Shield of New Mexico*, the plaintiffs brought a secondary claim under § 502(a)(3). 428 F.Supp.3d 1209, 1218 (Dist. Ct. D. Utah 2019) (noting equitable remedies for "any act or practice that violates another substantive provision of ERISA" is covered under § 502(a)(3) and since the Parity Act is a substantive provision of ERISA, violations of the provision are remedied through § 502(a)(3)). Here too, the plaintiff pled two distinct injuries—wrongfully denied benefits under her plan by not providing fair review and injury from failure to comply with the Parity Act—that must be heard on the merits. *See Id.* at 1229-1230.

K.D. and J.D.'s two counts are almost identical to *New York State Psychiatric Ass'n* and *Christine S. Further,* Appellants' appeal regarding the duplication of the counts is further indistinguishable from the aforementioned case. Compl. ¶ 20-29; *New York State Psychiatric Ass'n*, 798 F.3d 125 at 128; *see also Christine S.*, 428 F.Supp.3d at 1230. Notably, courts have viewed Parity Act violations as remediable distinctly under § 502(a)(3), so this Court should rule in a consistent manner. *Id.* Parity violations under § 502(a)(3) must be heard on the merits to ensure adequate relief.

Despite the district court's incorrect reasoning, Appellants will not be made whole by clarifying their rights based on Universal's current plan. Under *Varity*, claims cannot be repackaged to receive duplicative recovery, but Appellants assert distinct claims that require distinct relief. 516 U.S. at 513-14. Appellants must be able to assert both claims to ensure they are made whole, and therefore, this Court must reverse the District Court's dismissal of Count II.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the District Court's order granting the Motion to Dismiss Count II and reverse the order denying the Motion to Remain Anonymous.

Respectfully submitted,

ATTORNEYS FOR APPELLANT TEAM 3

APPENDIX A

29 U.S.C. § 1185(a)(3)(ii):

(3) FINANCIAL REQUIREMENTS AND TREATMENT LIMITATIONS

(A)In general—In the case of a group health plan (or health insurance coverage offered in connection with such a plan) that provides both medical and surgical benefits and mental health or substance use disorder benefits, such plan or coverage shall ensure that—

(ii)

the treatment limitations applicable to such mental health or substance use disorder benefits are no more restrictive than the predominant treatment limitations applied to substantially all medical and surgical benefits covered by the plan (or coverage) and there are no separate treatment limitations that are applicable only with respect to mental health or substance use disorder benefits.

29 U.S.C. § 1132(a)(1):

(a)PERSONS EMPOWERED TO BRING A CIVIL ACTIONA civil action may be brought—

(1)by a participant or beneficiary—

(A)

for the relief provided for in subsection (c) of this section, or

(B)

to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

29 U.S.C. § 1132(a)(3):

(3)by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

CERTIFICATION OF COMPLIANCE

(i) The work product contained in this brief is the work product of the members of this team only
(ii) Our team has complied fully with our law school honor code
(iii) Our team has complied fully with all Rules of the Competition
(iv) This brief complies with the word limitations as our brief is 8,145 words.

Respectfully,
ATTORNEYS FOR APPELLANT TEAM 3