

**No. 18-1989**

**IN THE UNITED STATES  
COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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**REMA DAWSON-MURDOCK,**

Plaintiff-Appellant,

vs.

**NATIONAL COUNSELING GROUP, INC.;**  
**NATIONAL COUNSELING GROUP, INC. PLAN,**

Defendants-Appellees.

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
CASE NO. 3:18-cv-00058-JAG

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**APPELLANT'S OPENING BRIEF**

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiff	Plaintiff's Counsel
Rema Dawson-Murdock	Elizabeth Hopkins Michelle L. Roberts KANTOR & KANTOR LLP

Defendants	Defendant's Counsel
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DATED: November 16, 2018

/s/ Elizabeth Hopkins  
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**STATEMENT REGARDING ORAL ARGUMENT**

Plaintiff-Appellant Rema Dawson-Murdock contends that oral argument would be helpful to the Court in its consideration of the case because the appeal raises, among other issues, important questions concerning fiduciary status and duties under an ERISA-governed life insurance plan.

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**JURISDICTIONAL STATEMENT**

The district court had jurisdiction under 28 U.S.C. § 1331 over this action asserting claims for breach of fiduciary duty under Section 502(a)(3) of the Employee Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(a)(3), as well as independent jurisdiction over the state-law tort and breach-of-contract claims. 28 U.S.C. § 1367. Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction over this appeal from a final judgment entered by the district court on August 7, 2018. Docket No. 13, Appendix (“A”) at A-084. Plaintiff timely filed a Notice of Appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1) on August 20, 2018. Docket No. 14, A-085.

**STATEMENT OF ISSUES**

Defendant National Counseling Group, Inc. (NCG), sponsored a life insurance plan governed by ERISA and insured by Unum Life Insurance Company of America (Unum), in which its employee, Wayne Murdock, was a participant prior to his death on August 30, 2016. Despite being the plan administrator and named fiduciary under the plan, NCG failed to inform Mr. Murdock that he was no longer eligible to participate in the plan when he switched to part-time work in March 2016, but that he could convert his coverage to an individual policy; instead, NCG continued to collect premiums from Mr. Murdock until the time of his death. After Unum denied the claim for benefits made by Plaintiff, Mr.

Murdock's widow and the beneficiary of his life insurance policy, the Vice President of Human Resources for NCG informed Plaintiff that she need not appeal the denial to Unum because NCG would pay her the benefits. Relying on this promise, Plaintiff did not appeal the denial of benefits. After NCG refused to pay, Plaintiff filed this suit alleging fiduciary breaches. The questions presented for review are:

1. Whether Defendant NCG, the named plan administrator, was acting as a fiduciary when it failed to inform decedent that he was no longer eligible for life insurance benefits under the plan but could instead convert to individual coverage.
2. Whether NCG was acting as a fiduciary when the company, acting through its Vice President of Human Resources, erroneously informed Plaintiff that she need not appeal the denial of benefits because NCG would pay her claim.

### **STATEMENT OF THE CASE**

Plaintiff Rema Dawson-Murdock filed this action on January 25, 2018.

Docket No. 1, A-004. Defendants filed a motion to dismiss on March 30, 2018.

Docket No. 6.

On August 7, 2018, the district court entered an order granting Defendants' motion to dismiss, concluding that, even though NCG was the plan administrator,

it was not acting as a fiduciary with respect to the alleged breaches. Docket No. 13, A-084. First, relying on the Fourth Circuit's unpublished decision in *Moon v. BWX Techs., Inc.*, 577 F. App'x 224, 231 (4th Cir. 2014), and on guidance issued by the Department of Labor at 29 C.F.R. § 2509.75-8 (D-2), the Court concluded that "[t]he statutory definition limits ERISA fiduciary conduct to a narrow scope of activities." Docket No. 12, A-079. The court recognized that "the Plan names NCG as a fiduciary." *Id.* at A-080. Nevertheless, analogizing to *Moon*, the district court held that "[c]ollecting premium payments and failing to notify Murdock of his ineligibility qualify as administrative, not fiduciary functions." *Id.* at A-080 (citing *Moon*, 577 F. App'x at 231). Moreover, citing another unpublished Fourth Circuit decision, the court concluded that the company Vice President "telling Dawson-Murdock that NCG would take care of the claim and she would no longer need to communicate with Unum does not meet the narrow definition of a fiduciary activity, even if [the Vice President] misstated this information." Docket No. 12, A-080 (citing *Estate of Weeks v. Advance Stores Co., Inc.*, 99 F. App'x 470, 476-77 (4th Cir. 2004) (unpublished)). The Court therefore concluded that "[t]he complaint fails to establish that NCG's conduct meets the ERISA fiduciary duty definition," and dismissed the counts predicated on breach of fiduciary duty under ERISA. Docket No. 12, A-081.

The court also dismissed Ms. Dawson-Murdock's state-law claims, holding that these claims were preempted by ERISA because they "'relate to' her husband's group life insurance plan." Docket No. 12, A-082.

### **STATEMENT OF FACTS**

Mr. Murdock was an employee of NCG until his death on August 30, 2016. Docket No. 1, A-005 (¶ 7). He elected \$150,000 in life insurance coverage under the National Counseling Group, Inc. Plan (the "Plan"), an ERISA-governed employee benefit plan sponsored by NCG, and paid premiums to obtain this coverage. *Id.* at A-005 (¶¶ 3, 9-10). Benefits under the Plan were insured by Unum, which also decided claims for Plan benefits. *Id.* at A-005 (¶ 8). NCG was the named fiduciary administrator under the Plan. *Id.* at A-008 (¶¶ 32, 38).

Ms. Dawson-Murdock was designated as the primary beneficiary of her husband's benefits under the Plan. Docket No. 1, A-005 (¶ 11). As such, she submitted a claim for Plan benefits following her husband's death. *Id.* at A-006 (¶ 14). While the claim was pending, she contacted NCG on numerous occasions and corresponded with Christopher Baham, NCG's Vice President of Human Resources. *Id.* at A-006 (¶ 15). On October 24, 2016, Mr. Baham sent Ms. Dawson-Murdock an email informing her that Unum had denied her claim, but that NCG did "not want to delay your receiving these benefits any further, so we are going to pay you the claim amount directly, and then we will be working on this

issue with the insurance company.” *Id.* at A-006 (¶ 16). This email further informed Plaintiff that she would “not have to deal with UNUM insurance company going forward,” but that Mr. Baham “would work with the [NCG] accounting department on getting this payment to you as soon as possible.” *Id.*

Unum sent Ms. Dawson-Murdock a letter dated October 27, 2016, stating that Unum was denying her claim on the basis that Mr. Murdock had switched to working part-time for NCG in March of 2016, and he was therefore ineligible for coverage under the Plan. Docket No. 1, A-006 (¶ 17). NCG had either not informed Mr. Murdock about his right under the Plan to convert his coverage to an individual policy, or had misinformed him about this, *id.* at A-008 (¶ 33), and Mr. Murdock had not switched to individual coverage, although he continued to pay premiums. A-006 (¶ 17).

Even though Ms. Dawson-Murdock disagreed with Unum’s determination, she did not appeal the denial based on NCG’s representations that it would pay directly for her benefits. Docket No. 1, A-006 (¶ 18). Instead, she continued to correspond via email with Mr. Baham for the next several months, who repeatedly informed her that the company was working through the details but that NCG would pay her claim. *Id.* at A-006-07 (¶¶ 18-24). However, in January, the tenor of the emails began to change until, on February 21, 2017, Mr. Baham sent an email indicating he needed to have a phone call with Ms. Dawson-Murdock. *Id.* at

A-007 (¶¶ 25-29). During this phone call, Mr. Baham informed Plaintiff that NCG had decided that it would not pay her claim. *Id.* at A-008 (¶¶ 30). By this point, the time limit for appealing the denial to Unum had run. *Id.* at A-009 (¶ 42). Consequently, Ms. Dawson-Murdock filed this suit to be made whole for the life insurance benefits she lost as a result of NCG's fiduciary breaches and false promises.

### **STANDARD OF REVIEW**

The Court reviews de novo a district court's grant of a motion to dismiss. *Weidman v. Exxon Mobil Corp.*, 776 F.3d 214, 2119 (4th Cir. 2015). Under this standard, a complaint "must contain sufficient facts to state a claim that is 'plausible on its face.'" *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In making this determination, the reviewing court must "draw all reasonable inferences in favor of the plaintiff." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009).

### **SUMMARY OF THE ARGUMENT**

Ms. Dawson-Murdock was denied life insurance benefits under an ERISA-governed plan on the life of her husband, who had paid the premiums to his employer until the date of his death. His employer, a named plan fiduciary, accepted his premiums and never informed him of his loss of eligibility for

coverage due to the change in his employment status. His employer also promised his grieving wife that it would pay her the life insurance benefit and advised her to not appeal the denial of benefits to Unum because the company was “working through a separate insurance company to pay out [the] benefits.” Docket No. 1, A-007 (¶22). After months of reassurances that the money was coming, and after Ms. Dawson-Murdock lost her right to pursue the life insurance benefit claim with Unum, the company reneged on its promise and disclaimed any liability to Ms. Dawson-Murdock. Under these circumstances, the district court erred by finding no viable claim to remedy these clear fiduciary breaches.

The premise of Ms. Dawson-Murdock’s argument is simple: ERISA plan fiduciaries are obligated under the Fourth Circuit’s decision in *Griggs v. E.I. Dupont de Nemours & Co.*, 237 F.3d 371, 380–81 (4th Cir. 2001), to accurately convey material information to beneficiaries, including material information that the beneficiary did not specifically request, because fiduciaries cannot remain silent when doing so will inure to the beneficiaries’ detriment. NCG, as the named plan administrator, was a plan fiduciary and was acting as such when it: (1) failed to inform Mr. Murdock that his part-time work status rendered him ineligible for life insurance coverage but continued to take his premiums; and (2) misled Ms. Dawson-Murdock by promising to pay her the life benefit and causing her to miss

the deadline to appeal Unum's claim denial and the opportunity to establish Mr. Murdock's eligibility for coverage.

First, NCG breached a fundamental duty that it had as a plan fiduciary in the Fourth Circuit to inform Mr. Murdock that he was eligible under the Plan to convert to an individual policy when and if he became ineligible to participate in the plan because he was no longer a full-time employee. *See Griggs*, 237 F.3d at 380–81. Instead of giving Mr. Murdock the information he needed to convert to individual life insurance coverage, NCG continued to accept and pass along Mr. Murdock's life insurance premiums in a way which misled him to believe he continued to have coverage. The district court erred by relying on *Moon*, 577 App'x at 224, to find that NCG's conduct was not a fiduciary action since the *Moon* defendant was not the named plan fiduciary as NCG was in this case. Moreover, NCG had a responsibility under the life insurance policy in this case to accurately report to Unum when its employees lose coverage under the policy, which it did not do. Docket No. 7-1, A-028.

Second, NCG, through its Vice President of Human Resources, acted as a fiduciary when it gave multiple false assurances to Ms. Dawson-Murdock that the company would pay her the plan benefit. Knowingly deceiving a plan beneficiary about her benefits is inconsistent with the duty of loyalty owed by fiduciaries under ERISA. *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996). In addition, the Vice



President advised Ms. Dawson-Murdock that she need not communicate further with Unum, advice that she followed to her detriment by missing an important appeal deadline. Ms. Dawson-Murdock might have been able to establish her husband's eligibility for coverage had NCG not advised her to stop communicating with Unum. As the named Plan fiduciary, NCG cannot mislead a beneficiary to her detriment in this way and then shield itself from liability by claiming that it was not acting as an ERISA plan fiduciary when it misled Plaintiff as to her benefits.

## ARGUMENT

### ***I. The District Court Erred in Holding that Defendant NCG, the Plan Administrator and Named Fiduciary, Was Not Acting in a Fiduciary Capacity with Respect to the Breaches Alleged in this Case***

ERISA is a remedial statute designed to “protect . . . the interests of participants in employee benefit plans and their beneficiaries” by setting forth “standards of conduct, responsibility, and obligation for fiduciaries of plans.” 29 U.S.C. § 1001(b). *See also Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n.8 (1985) (ERISA was enacted to “establish judicially enforceable standards to ensure honest, faithful, and competent management of pension and welfare funds”). These fiduciary standards, drawn from the law of trusts, are the “highest known to the law.” *Tatum v. RJR Inv. Committee*, 761 F.3d 346, 356 (4th Cir. 2014) (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982)).

ERISA section 404 requires fiduciaries to act “solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan,” as well as with the utmost prudence and care in their dealings with ERISA plans. 29 U.S.C. §§ 1104(a)(1)(A), (B).

In keeping with the trust law underpinnings of the statute, ERISA requires that every employee benefit plan be established and maintained pursuant to a written plan document that expressly provides for one or more named fiduciaries charged with managing and administering the plan. 29 U.S.C. § 1102(a)(1), (2). And although ERISA requires that any assets of the plan be held in trust by a trustee, the statute broadly defines the term fiduciary, not just “in terms of formal trusteeship, but in *functional* terms of control and authority over the plan, see 29 U.S.C. § 1002(21)(A), thus expanding the universe of persons subject to fiduciary duties – and to damages – under [29 U.S.C. § 1109].” *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993). *See also Custer v. Pan Am. Life Ins. Co.*, 12 F.3d 410, 423 n.3 (4th Cir. 1993) (citing *Mertens* and noting that “the concept of a fiduciary under ERISA is broader than the common law concept of a trustee”). Moreover, in keeping with the remedial nature of ERISA, its provisions must “be liberally construed in favor of protecting the participants in employee benefits.” *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 123 (4th Cir. 1991).

Rather than liberally construing the statute to protect Ms. Dawson-Murdock, and recognizing that the statutory definition of fiduciary represents an expansion of the common law conception of fiduciary designed to protect the interests of plan participants and beneficiaries in receiving the benefits they were promised, the district court erroneously read the statutory definition as limiting “ERISA fiduciary conduct to a narrow scope of activities.” Docket No. 12, A-079; *see also id.* at A-080 (referring to the “narrow definition of a fiduciary activity” in ERISA). Based on this fundamental misconception, the court erroneously concluded that the named Plan administrator could utterly fail to protect the interests of Mr. Murdock, a Plan participant, in ensuring that his premiums would go toward life insurance benefits for his wife, and then, after his death, mislead his widow and Plan beneficiary so that she failed to protect her own interest in receiving the insurance benefits. This cramped interpretation of fiduciary activity and responsibility runs counter to the statute and directly conflicts with controlling Fourth Circuit and Supreme Court precedent, which recognize that informing plan participants about their benefits is not only fiduciary activity, it is the fiduciary activity at the heart of the statute.

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**A. *As the Plan Administrator and Named Fiduciary, NCG Owed the Decedent a Well-Established Fiduciary Duty to Inform Him of Facts He Needed to Know to Protect His Interests, and NCG was Acting in a Fiduciary Capacity When It Failed to Live up to this Duty***

In *Varity*, the Supreme Court clarified that plan administrators act as fiduciaries when they “answer[] beneficiaries’ questions about the meaning of the terms of a plan so that those beneficiaries can more easily obtain the plan’s benefits.” *Id.* at 502–03. The Court instructed that administrators perform a fiduciary function when they provide information to help “beneficiaries to make [] informed choice[s]” about the plan, whether that information concerns the benefits currently available under the plan, or the ongoing integrity of the plan itself. *Id.* at 502. Although the Court in *Varity* specifically reserved the question of “whether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative, or in response to employee inquiries,” many courts, including the Fourth Circuit, have held that a fiduciary has an obligation to accurately convey material information to beneficiaries, including material information that the beneficiary did not specifically request. *See Griggs*, 237 F.3d at 380–81; *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574, 590 (7th Cir.2000); *Harte v. Bethlehem Steel Corp.*, 214 F.3d 446, 452 (3d Cir.); *Krohn v. Huron Mem’l Hosp.*, 173 F.3d 542, 547–48, 550 (6th Cir. 1999); *Barker v. Am. Mobil Power*

*Corp.*, 64 F.3d 1397, 1403 (9th Cir. 1995); *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 750–52 (D.C. Cir. 1990).

Thus, in *Griggs*, the Fourth Circuit held that when the plan participant's employer, DuPont, failed to inform the participant that his rollover of pension benefits was not possible under the Tax Code, DuPont breached its duty as a named fiduciary under the plan and was responsible for making the participant whole for the negative tax consequences of the rollover. 237 F.3d at 381-82. The Fourth Circuit relied on the fact that ERISA Section 404, 29 U.S.C. § 1104, incorporates common law trust duties, including the duty of loyalty that encompasses a “duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection.” *Id.* at 380 (quoting the Restatement (Second) of Trusts § 173 cmt. d).

In other words, *Griggs* held that “the duty to inform ‘entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful.’” *Id.* at 380 (quoting *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993) (reversing grant of summary judgment to employer on beneficiary's claim that employer breached its fiduciary duty to affirmatively inform beneficiary of COBRA benefits where there was evidence that employer knew beneficiary had

unpaid medical expenses that would be reimbursed by an election under COBRA)). This duty to inform is especially strong where “an ERISA fiduciary that knows or should know that a beneficiary labors under a material misunderstanding of plan benefits that will inure to his detriment cannot remain silent [and] that misunderstanding was fostered by the fiduciary’s own material representations or omissions.” *Griggs*, 237 F.3d at 380. *Griggs* cited as an example the *Eddy* case from the D.C. Circuit, which held that ““when an ineligible person contributes to a fund, a fiduciary has a duty to inform him of his ineligibility within a reasonable time after the [fiduciary] acquired knowledge of that ineligibility.”” *Id.* (quoting *Eddy*, 919 F.2d at 751 (alteration in original) (internal quotation marks omitted)). Thus, far from being a ministerial concern, *Griggs* recognized that the duty to disclose this kind of material information about eligibility for employee benefits ““is the core of a fiduciary’s responsibility, animating the common law of trusts long before the enactment of ERISA.”” *Griggs*, 237 F.3d at 380 (quoting *Eddy*, 919 F.2d at 750).

These cases are exactly on point and establish that, in the Fourth Circuit, Defendant had a fundamental fiduciary duty, which it breached, to inform Mr. Murdock, the Plan participant, that he was eligible under the Plan to convert to an individual policy when and if he became ineligible to participate in the Plan because he was no longer a full-time employee. Here, the district court correctly

recognized that NCG was the Plan administrator and the named fiduciary under the Plan. As a fiduciary, NCG had a duty to Mr. Murdock “to inform him of his ineligibility within a reasonable time,” rather than allow “an ineligible person” to continue to contribute. *Eddy*, 919 F.2d at 751. By remaining silent, and indeed fostering the decedent’s misunderstanding that he was still covered under the plan by continuing to accept and pass on his life insurance premiums, there can be no doubt that Defendant breached its fiduciary duty of loyalty in precisely the way recognized in *Griggs* and the cases cited therein.

The district court’s reliance on the Fourth Circuit’s unpublished decision in *Moon* was in error because that decision is distinguishable. In *Moon*, the estate of a plan participant brought suit in state court alleging breach of contract and estoppel against the participant’s employer and others after the insurer denied life insurance benefits under an ERISA plan. After the case was removed to federal court and a fiduciary breach claim was added, the Fourth Circuit held that the employer’s acceptance of the life insurance premiums of the participant and its failure to inform him that he was no longer eligible to participate in the plan, did not make the company a fiduciary under ERISA. *Moon*, 577 App’x at 231. Critically, however, the court pointed out that the governing plan document made another corporate entity, that had not been named as a defendant, the plan fiduciary administrator. *Id.* at 232. Here, by contrast, there is no question that NCG was the

named fiduciary and administrator under the Plan, Docket No. 12, A-080, and, as such, *Griggs* establishes that it had a fiduciary obligation to act to protect the interests of Mr. Murdock as a Plan participant. *Griggs*, 237 F.3d at 380. And far from being a ministerial responsibility, *Griggs* also establishes that the duty to disclose information critical for a participant to protect his interests “is the core of a fiduciary’s responsibility, animating the common law of trusts long before the enactment of ERISA.” *Id.* at 380 (quoting *Eddy*, 919 F.2d at 750). Therefore, the Department of Labor guidance at 29 C.F.R. § 2509.75-8 (D-2), which opines that persons who have “no power to make any decisions as to plan policy, interpretations, practices or procedures” but who perform certain “purely ministerial functions,” is simply not on point.

***B. As the Plan Administrator and Named Fiduciary, NCG Owed Plaintiff, a Beneficiary Under the Plan, a Well-Established Fiduciary Duty Not to Mislead Her Concerning her Benefits Under the Plan, and NCG was Acting in a Fiduciary Capacity When It Violated this Duty***

In addition to failing to inform Mr. Murdock that he could and needed to convert his Plan policy to an individual life insurance policy after he began working part-time, NCG misinformed his widow about its intention to pay her the benefits her husband had elected and paid for. Thus, when Ms. Dawson-Murdock inquired about her benefits following Mr. Murdock’s death, Defendant, acting through its Vice President of Human Resources, incorrectly and repeatedly told her



that she need not appeal the denial of benefits by UNUM because NCG was going to pay her benefits. Contrary to the district court's conclusion that these communications were not fiduciary activity, the Supreme Court in *Varity* explicitly held that plan administrators act as fiduciaries when they "answer[] beneficiaries' questions" about plan benefits. 516 U.S. at 502-03.

In *Varity*, the Court concluded that the company's actions in misleading plan beneficiaries about their future benefits fell "within the statutory definition of 'fiduciary' acts," reasoning that conveying information about plan benefits is "an exercise of a power "appropriate" to carrying out an important plan purpose." *Id.* at 502. Therefore, under *Varity*, it is clear that NCG was acting in a fiduciary capacity when it responded to Plaintiff's inquiries about her benefits under the life insurance plan in which her husband was a participant. And it is equally clear that by misinforming her that the company would pay her these benefits, and by later reneging on this promise, Defendant NCG breached its fiduciary duties because, as *Varity* unsurprisingly pointed out, "[l]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA." 516 U.S. at 506 (quoting *Peoria Union Stock Yards Co. Ret. Plan v. Penn Mut. Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir.1983)).

Thus, *Varity* is the controlling authority here, and it establishes that Mr. Baham's communications with Ms. Dawson-Murdock on behalf of NCG, the

named plan fiduciary and administrator, were fiduciary in nature. In holding to the contrary, the district court relied on another unpublished and, as it turns out, equally distinguishable, Fourth Circuit decision. Docket No. 12, A-079 (citing *Estate of Weeks*, 99 F. App'x at 476-77).

In *Estate of Weeks*, a plan sponsor and administrator sent its employee a letter informing him that he could convert his policy under a life insurance plan to an individual policy when he stopped working shortly before his death, but a human resources manager failed to inform his mother of the conversion right when she asked whether her son's life coverage had lapsed. *Id.* at 472-73. This Court held that the human resources manager was not herself acting as a fiduciary, and thus her failure to inform the participant's mother about the conversion right was not a fiduciary breach. *Id.* at 476-77. The Court reasoned that the human resources manager did not herself have any discretionary authority or control over the plan and, in answering questions about the participant's coverage, had "simply repeated information that was given to her by upper management or that had already been inputted into the company's computer database." *Id.* at 476.

Here, by contrast, the repeated promises to pay from Mr. Baham, NCG's Vice President of Human Resources, were made by "upper management," apparently on behalf of the company. If NCG means to suggest that Mr. Baham was somehow acting outside the scope of his authority, such a remote possibility is

not a reason to affirm the dismissal. Instead, it is one more reason that the parties should have the opportunity to explore this and any other factual issues on remand.

One final note on the district court's dismissal of Plaintiff's fiduciary breach claims. In a footnote, the court suggested that these claims might be precluded as "repackaged denial of benefits claims." Docket No. 12, A-081, n.4 (citing *Jenkins v. Int'l Ass'n of Bridge*, No.2:14-cv—526, 2015 WL 1291883, at \*8 (E.D. Va. Mar. 20, 2015)). This is not the case. Plaintiff's argument is that NCG's breaches prevented her from getting the life insurance benefits in one of two ways: (1) either Unum was correct that her husband was no longer eligible under the plan because he was working part-time at the time of his death, and NCG should have informed him of this fact and his right to convert to an individual policy; or (2) alternatively, Unum incorrectly denied benefits because her husband was working a sufficient number of hours prior to his death, and NCG's false promises prevented her from timely appealing Unum's denial.<sup>1</sup> Factual discovery is needed to determine which of these two possibilities is correct. But, in either event, Plaintiff's contention is that NCG's breaches stood in the way of her claim for benefits. And, in either event, Plaintiff is confident that, on remand, NCG will ultimately be found

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<sup>1</sup> Because she did not timely appeal the benefit denial, absent establishing the high bar of equitable tolling, Ms. Dawson-Murdock is now barred from pursuing her claim with Unum any further. See *Gayle v. United Parcel Serv., Inc.*, 401 F.3d 222, 229 (4th Cir. 2005).

responsible to make Plaintiff whole for the loss of insurance proceeds she suffered due to NCG's fiduciary breaches. *See Cigna Corp. v. Amara*, 563 U.S. 421, 442-43 (2011) (recognizing that courts have the power in ERISA cases to surcharge plan fiduciaries for losses resulting from fiduciary breaches); *McCravy v. Metropolitan Life Ins. Co.*, 690 F.3d 176, 181 (4th Cir. 2012) (finding that beneficiary can seek a surcharge remedy in the amount of lost life insurance benefits where participant's deceased daughter was no longer eligible for life insurance coverage due to her age but MetLife continued to accept premiums for her coverage).

### CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court reverse the district court's judgment dismissing the complaint, and allow this case to proceed to a determination on the merits.

DATED: November 16, 2018

KANTOR & KANTOR LLP

*/s/ Elizabeth Hopkins*

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Rema Dawson-Murdock

**CERTIFICATE OF COMPLIANCE**

I certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C)(i) and Fourth Circuit Rule 32(a)(5)(A), (7)(B)(i), that this brief is reproduced using Times New Roman 14-point type, uses a proportionately spaced typeface, and contains 4,733 words, including headings, quotations, and footnotes.

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KANTOR & KANTOR LLP

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I certify that on November 16, 2018 this document has been filed with the clerk of the court and served on all parties or their counsel of record through the CM/ECF system.

DATED: November 16, 2018

KANTOR & KANTOR LLP

/s/ Elizabeth Hopkins

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