Document Penalties under ERISA § 502(c) for an administrator's failure to supply requested documents

Who can plan participants and beneficiaries hold accountable?

Remarks to the American Conference Institute's
9th National Advanced Forum on Litigating Disability Insurance Claims
Ritz Carlton Coconut Grove, Miami, Florida,
February 22nd and 23rd, 2006

By Pamela I. Atkins

I would like to thank the attorneys and paralegals in my office for their efforts in litigating many document penalty 502(c) claims. In particular, I am very appreciative of the efforts of my associate and friend attorney Kurt Ward.

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Who can plan participants and beneficiaries hold accountable?

I. Introduction.

Increasing litigation over disability benefits provided pursuant to ERISA governed welfare benefit plans has spawned interesting arguments concerning the withholding of documents and available document penalties under 502(c). These remarks, the accompanying power point presentation, and the attached pleading abstracts address some of the issues which commonly arise in disability insurance litigation in the context of ERISA 502(c) document penalties.

In lieu of a detailed paper, this presenter opted instead to provide the power point outline and real world examples of her law firm's recent pleadings on the issue setting forth the relevant case law and arguments. The abstracts demonstrate the practical implications of litigating the 502(c) claim and include the following pleadings:

1) Plaintiff's response opposing insurer's motion to dismiss plaintiff's 502(c) claim *Ferree v. Life Insurance Company of North America "LINA", a subsidiary of CIGNA Corp., et. al.* Civil Action No. 1:05-CV-2266-WSD,

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Northern District Georgia (2005) (pending case). Also included are excerpts of the Ferree Complaint related to the 502(c) claims.

2) Plaintiff's response to employer/plan administrator's partial motion for summary judgment on 502(c) claim; *Palmeri v. The Coca-ColaCompany, et. al., Civil Action No.* 1:01-CV-3498-TWT, Northern District Georgia (2001) (pending case).

3) Plaintiff/Appellee/Cross-Appellant's excerpts from 11th Circuit Appellee brief and reply seeking to uphold district court's granting of 502(c) penalties; *Hamall-Desai v. Fortis*, 370 F.Supp.2d 1283, 1311-14 (N.D. Ga. 2004) *affirmed* No. 05-11869 (11th Cir. February 2, 2006).

These pleadings appear in the public court records; and therefore, have not been redacted.

In addition, attached is redacted correspondence in a case litigated several years ago involving arguments over who was responsible (employer v. insurer) for producing documents and paying potential 502(c) penalties. These letters have been redacted since the case has since resolved, but without a confidentiality agreement. Many times the entity who should have respond to requests for documents by a plan participant becomes a critical focus of litigation and creates real issues in dispute between the employer who

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may be the named plan administrator and the insurer who actually administers the claims for benefits. Often such conflict prevents representation by a single defense counsel.

Once all the permeations of 502(c) claims are understood, counsel can make informed decisions on how to effectively ask for documents and respond to requests for documents. Plaintiffs and their counsel should take caution to make complete, detailed, written requests for documents and send such requests by certified mail to all plan and claim administrators and follow-up on such requests. Administrators should take caution to abide by the Department of Labor's stated policy of full disclosure to plan participants and beneficiaries by producing the documents requested by plan participants/beneficiaries if the administrator is in possession of such documents and the documents are expressly enumerated within section 1024 or fall with the catch-all phrase as a plan document or under the DOL regulations. Requests should be interpreted broadly not narrowly to include any documents under which the plan is established or operated, claim file documents, and any documents representing guidelines or policy statements.

The implications of the failure to produce requested documents can extend beyond document penalties and indicate the failure to provide a "full and fair" review of a claim denial as required by ERISA. In a recent case, this author argued before an Eleventh

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Circuit panel, the Court of Appeals upheld a district court decision awarding 502(c) penalties against the insurer acting as administrator, claims fiduciary for withholding of claim file documents. In its totality, the case presented a picture of an insurer who intentionally and wrongfully withheld documents requested pursuant to ERISA and the DOL's full-and-fair review regulations while continuing to generate evidence from biased reviewers to support an earlier claim denial. While counsel for the insurer-claims administrator aggressively argued that the district court abused its discretion in awarding statutory penalties pursuant to ERISA 1132(c) against the insurer (acting as administrator, claims fiduciary) the overwhelming evidence demonstrated that Fortis was the *de facto* plan administrator, was in possession of the documents requested and withheld the documents from Plaintiff despite clear written requests for such documents. *Hamall-Desai v. Fortis*, 370 F.Supp.2d 1283, 1311-14 (N.D. Ga. 2004) *affirmed* No. 05-11869 (11th Cir. February 2, 2006).

The power point presentation discusses some of the key issues and case law that both plaintiff and defense attorneys confront in the context of litigating these claims based on the following outline:

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I. Introduction

A. ERISA allows the imposition of such penalties pursuant to 29 U.S.C. § 1132(A)(1)(a) & (c); ERISA § 502(A)(1)(a) & (c) provides for penalties of $110.00 per day against administrators that refuse to supply information required to be produced under ERISA as follows:

> (c)(1) ***Any administrator***….[who fails to provide certain information]
>
> (B) who fails or refuses to comply with a request for ***any information*** which such administrator is ***required by this subchapter to furnish*** to ***a participant or beneficiary*** (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

[emphasis added]

The ERISA subchapter requires administrator's to produce information under two different statutory provisions: 29 U.S.C. § 1024; *and* 29 U.S.C. § 1029.

Pursuant to ERISA § 104:

> The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary, plan description, and the latest annual report, any terminal

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> report, the bargaining agreement, trust agreement, contract, or **other instruments under which the plan is established or operated**.

ERISA § 104(b)(4). [emphasis added]

And, pursuant to ERISA § 109:

> Format and content of summary plan description, annual report, etc., required to be furnished to plan participants and beneficiaries
>
> **The Secretary may prescribe the format and content of** the summary plan description, the summary of the annual report described in section 1024(b)(3) of this title and **any other report, statements or documents** (other than the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated), **which are required to be furnished or made available to plan participants and beneficiaries receiving benefits under the plan.**

ERISA § 109(c).

Thus, ERISA's document penalty provisions apply when an administrator withholds the plan documents specifically discussed in ERISA § 104(b)(4) and when an administrator withholds other reports, statements or documents that are required to be furnished or made available to plan participants.

B. "Statutory penalties are provided for the failure or refusal to furnish information upon request to a participant or beneficiary." See, e.g., *Mohally v. Kendall Health Care Products Co., Inc.*, 903 F.Supp. 1530, 1538 (M.D. Ga. 1995).

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II. Plan Participant's [Beneficiary's] Request for Documents

A. All Plan Documents

B. All Relevant Documents

1. Claim File Documents
2. Policies, procedures, guidelines, and claims manuals

III. What Documents Must Be Provided?

A. Duties of Administrator to Provide Documents

B. Plan Documents:

1. Enumerated documents under 29 U.S.C. § 1024
   a. the Plan,
   b. the Plan's SPD,
   c. the latest Annual Report,
   d. the Plan's Trust Agreement,
   e. any Contract relating to the Plan,
   f. other instruments under which the Plan is established/operated
2. All "other instruments under which the plan is established or operated" specifically required under 29 U.S.C. § 1024
3. DOL Advisory Opinion 96-14A (July 31, 1996)
   a. What constitutes plan documents under ERISA § 104
   b. Plan documents include any internal procedures, rules, guidelines, protocols, etc. (i.e., "instruments under which the plan is established or operated"); DOL clearly states that procedure manuals must be disclosed:
      i. any documents that specifies procedures….to be applied in determining…a participant's or beneficiary's benefit entitlement….would be an instrument under which the plan is established or operated" (regardless of whether it's contained in document designated as the plan document)

C. Documents Required to be Provided by DOL Regulations:

1. Reading § 502(c) and 109(c) together
   a. Secretary is given authority to establish the format and content of what documents are required to be produced "by this subchapter."
   b. "***Any administrator*** . . . (B) who fails or refuses to comply with a request for any information which such administrator is required by

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this subchapter to furnish to . . .may in the court's discretion be personally liable" for a § 502(c) penalty.

c. Secretary has general authority under "this subchapter" to "prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this title." 29 U.S.C. § 1135; ERISA § 505.

2. Old Regulations:
   a. 29 C.F.R. § 2560.503-1(g)(ii)(2000)
   b. "review pertinent documents"
   c. what constitutes a "pertinent" document
   d. preamble to this regulation;
   e. pertinent documents are "all plan documents and other papers which affect the claim." 42 Fed. Reg. 27426

3. New Regulations:
   a. The Secretary of Labor's ERISA claim procedures regulations, set out in 29 C.F.R. § 2560.503-1 (h)(2)(iii)(2002) describe what documents an administrator must provide specifically included provisions requiring the disclosure of internal rules, guidelines, or protocols.
   b. In order to provide a full and fair review, a claimant **shall be** provided, upon request and free of charge, reasonable access to, and copies of, all documents, records, and other information ***relevant*** to the claimant's claim for benefits.
   c. Whether a document, record, or other information is ***relevant*** to a claim for benefits shall be determined by reference to paragraph (m)(8) of this section.
   d. 29 C.F.R. § 2560.503-1(m)(8)(2002).

A document, record, or other information shall be considered "relevant" to a claimant's claim if such document, record, or other information.

(i) Was relied upon in making the benefit determination;

(ii) Was submitted, considered, or generated in the

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course of making the benefit determination, without regard to whether such document, record, or other information was relied upon in making the benefit determination;

(iii) Demonstrates compliance with the administrative processes and safeguards required pursuant to paragraph (b)(5) of this section in making the benefit determination; or

(iv) In the case of a group health plan or a plan providing disability benefits, constitutes a statement of policy or guidance with respect to the plan concerning the denied treatment option or benefit for the claimant's diagnosis, without regard to whether such advice or statement was relied upon in making the benefit determination.

e. Further,"[i]n the case of an adverse benefit determination on review, the plan administrator shall provide such access to, and copies of, documents records, and other information described in paragraphs (j)(3), (j)(4), and (j)(5) …"

f. 29 C.F.R. § 2560.503-1(j)(5)(i)(2002)

"If an internal rule, guideline, protocol or other similar criterion was relied upon in making the adverse determination … a copy of the rule, guideline, protocol, or other similar criterion will be provided free of charge to the claimant upon request."

4. New Regs meant to "clarify" the old regulations

a. Clarification of the 1977 regulation's requirement that claimants be afforded access to "pertinent documents"

i. substantial public confusion concerning the meaning of the term "pertinent"

ii. pertinent replaced with the term "relevant."

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b. a document would be considered "relevant" to a claim whether or not such document was in fact relied upon by the plan in making the adverse benefit determination.

c. preamble to the proposal—the DOL believed that these changes would **make clear** that **claimants must be provided access to all of the information present in the claims record, whether or not that information was relied upon by the plan in denying the claim and whether or not that information was favorable to the claimant.**

d. Such full disclosure, which is what the 1977 regulation contemplated, is necessary to enable claimants to understand the record on which the decision was made and to assess whether a further appeal would be justified.

e. DOL believes that this specification of the scope of the required disclosure of "relevant" documents will serve the interests of both claimants and plans by providing clarity as to plans' disclosure obligations, while providing claimants with adequate access to the information necessary to determine whether to pursue further appeal.

f. Therefore: pertinent and relevant documents are all papers which affect or relate to the claim, including all documents or writings that relate to or reflect the claim investigation, procedures used (i.e., claims manual, training manual, policy guidelines, etc…), analysis performed, conclusions reached, and documents that reflect the decision making process including how evidence was weighed and treated and evaluated, relevant to the requirement of reasoned and principled decision making.

5. *Hamall-Desai v. Fortis Ben. Ins. Co.*, 370 F.Supp.2d 1283, 1311-15 (N.D. Ga. 2004) *affirmed* No. 05-11869 (11th Cir. February 2, 2006) (district court assessed statutory penalties for failing to produce documents requested under 29 U.S.C. § 1029(c) & 29 C.F.R. § 2560.503-1).

6. Administrators Argument

a. statutory penalties can only be imposed, as a matter of law, for withholding the documents enumerated under 29 U.S.C. § 1024;

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IV. Plan Participants' Rights to Enforce Obligations

A. "Congress' purpose in enacting the ERISA disclosure provisions was to ensure that 'the individual participant knows exactly where he stands with respect to the plan.'" *Hamilton v. Mecca, Inc.*, 903 F.Supp. 1540 (S.D. Ga. 1996) quoting *Firestone Tire and Rubber Co. v. Bruch,* 489 U.S. 101, 118, 109 S.Ct. 948, 958, 103 L.Ed.2d 80 (1989) quoting H.R. Rep. No. 93-533, p. 11 (1973), reprinted in 1974 U.S.C. C.A.N. 4639, 4649.

V. Who May Be Sued for a Failure to Provide Documents under ERISA 502(c)

A. Any Administrator – Who is an Administrator?

1. 29 U.S.C. § 1132(c)
2. "Any administrator" is subject to ERISA statutory penalties;
3. Various cases inadvertently misquoting the specific statutory language or hold contrary to specific statutory language

B. De Facto Plan Administrators

1. Case Law:

a. *Rosen v. TRW*, 979 F.2d 191, 193-194 (11th Cir. 1992)(adopting the *de facto* plan administrator doctrine) citing *Law v. Ernst & Young*, 956 F.2d 364, 373 (1st Cir. 1992)("To hold that the entity not named as administrator in the plan documents may not be held liable under § 1132(c), even though it actually controls the dissemination of plan information, would cut off the remedy Congress intended to create");

b. *Hamilton v. Allen Bradley Co.*, 244 F.3d 819, 824 (11th Cir. 2001);

c. *Garren v. John Hancock*, 114 F.3d 186, 187 (11th Cir. 1997)(proper defendant in ERISA action is party controlling administration of plan citing *Daniel v. Eaton Corp.*, 839 F.2d 263, 266 (6th Cir.) cert denied 488 U.S. 826 (1988));

d. *Cheal v. LINA*, 330 F.Supp.2d 1347, 1356-58 (N.D. Ga. 2004)(insurer acting as administrator, claims fiduciary may be subject to 1132(c) penalties)

e. *Krawczyk v. Harnischfeger Corp.*, 869 F.Supp. 613, 630-631 (E.D. Wis. 1994);

f. *DeLeon v. Bristol-Myers Squibb Co. LTD Plan*, 203 F.Supp.2d 1181, 1194-95 (D. Or. 2002);

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VI. Amount of the Penalty

A. Up to $110 per day, per document

29 C.F.R. § 2575.502c-1 sets the penalty award at $110.00 per day

B. Prejudice is <u>NOT</u> Required

1. Cases: Intentional or bad faith conduct is NOT required for imposing penalties

a. argument has been rejected by every Circuit.

i. First Circuit:

Sullivan v. Raytheon Co., 262 F.3d 41, 52 (1st Cir. 2001); *Rodriguez-Abreu v. Chase Manhattan Bank*, 986 F.2d 580, 588-589 (1st Cir. 1993);

ii. Second Circuit:

McDonald, 320 F.3d at 163 (2d Cir. 2003);

iii. Third Circuit:

Gillis v. Hoechst Celanese Corp., 4 F.3d 1137, 1148 (3rd Cir. 1993);

iv. Fourth Circuit:

Glocker v. W.R. Grace & Co., 68 F.3d 460, 1995 WL 600468, **3 (4th Cir. 1995)(Exhibit 4);

v. Fifth Circuit:

Godwin v. Sun Life Assur. Co. of Canada, 980 F.2d 323, 327 (5th Cir. 1992);

vi. Sixth Circuit:

Daniel v. Eaton Corp., 839 F.2d 263, 268 (6th Cir. 1988) <u>cert. denied</u> 488 U.S. 826, 109 S.Ct. 76 (1988);

vii. Seventh Circuit:

Harsch v. Eisenberg, 956 F.2d 651, 662 (7th Cir. 1992) <u>cert. denied</u> 506 U.S. 818, 113 S.Ct. 61 (1992); *Ziaee v. Vest*, 916 F.2d 1204, 1210 (7th Cir. 1990)("judge may, but need not, consider the provable injury when exercising" discretion; remanding $49,120 award due to lack of reasoning in decision);

viii: Eighth Circuit:

Kerr v. Vatterott & Co., 184 F.3d 938, 948 (8th Cir. 1999);

ix. Ninth Circuit:

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Advisory Comm. for Stock Ownership & Trust for Employees of Montana Bancsystem, Inc. v. Kuhn, 76 F.3d 384, 1996 WL 29259, 1996 U.S. App. LEXIS 2273 at 22-23 (9th Cir. 1996);

x. Tenth Circuit:

Moothart v. Bell, 21 F.3d 1499, 1506 (10th Cir. 1994)

xi. Eleventh Circuit:

Curry v. Contract Fabricators Inc. Profit Sharing Plan, 891 F.2d 842, 850 (11th Cir. 1990) abrogated regarding attorneys' fees *Murphy v. Reliance Std. Life Ins. Co.*, 247 F.3d 1313 (11th Cir. 2001) ("prejudice … is not a prerequisite to an award of a civil penalty under section 1132(c)."

Daughtrey v. Honeywell, Inc., 3 F.3d 1488, 1494 (11th Cir. 1993) (reaffirming Curry; 'prejudice is not a prerequisite to an award of civil penalties' under section 1132(c); nature of punitive damages designed to punish the intransigent administrator and to teach ERISA fiduciaries a needed lesson; intended to punish noncompliance with the employer or administrator's disclosure obligations; reversal error to require prejudice.)

Sandlin v. Iron Workers Dist. Council, 716 F.Supp. 571, 574 (N.D. Ala. 1988)(awarding $15,000 under § 1132(c)) *affirmed memorandum opinion* 884 F.2d 585 (11th Cir. 1989).

C. Burden on Administrator to Know What Documents to Produce

Villagomez v. AT&T Pension Plan, 1991 WL 21178 (N.D. Ill. 1991)(administrators have far greater power than plan beneficiaries; beneficiary is not required to know the contents of the applicable plan, or keep copious records regarding it)

D. Factors Considered in Determining the Penalty

i. pattern of conscious choices to decline to disclose and the recalcitrance in providing documents that claimants are entitled to under ERISA.

ii. a variety of factors to decide whether to award penalties under § 502(c), but the five factors most commonly used by the courts in assessing § 502(c) penalties are: "(1) bad faith or intentional conduct of the plan administrator, (2) length of delay, (3) number of requests made, (4) documents withheld, and (5) prejudice to the participant." Gorini v. AMP Inc., 94 Fed. Appx. 913, 919-920 (3d Cir. 2004).

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iii. pattern of conscious choices severely penalized by the court in *Gorini v. AMP Inc.*, 94 Fed. Appx. 913 (3rd Cir. 2004) (affirming an award totaling $160,780 and stating that the claimant does not need to negate a windfall because the burden in on the insurer)

E. Many Courts Have Awarded the Maximum Penalty in Effect at Time

Law v. Ernst & Young, 956 F.2d 364, 375 (1st Cir. 1992)(affirming penalty of $100 per day); *Gorini*, 94 Fed. Appx. 913 (3rd Cir. 2004)(affirming an award totaling $160,780)(Exhibit 7); *Daniels v. Thomas & Betts Corp.*, 263 F.3d 66, 79-80 (3rd Cir. 2001)(affirming $100 per day); *Kollman v. Hewitt Assoc.*, 2005 WL 2746659 (E.D. Pa. 2005)($100 per day); *Freitag v. Pan Am. World Airways, Inc.*, 702 F.Supp. 128, 132 (E.D. Vir. 1988)($100 per day); *Tait v. Barbknecht & Tait Profit Sharing Plan*, 997 F.Supp. 763 (N.D. Tex. 1998)($100 per day); *Gatlin v. Nat. Healthcare Corp.*, 16 Fed. Appx. 283 (6th Cir. 2001)(Exhibit 8)($100 per day); *Krawczyk v. Harnischfeger Corp.*, 869 F.Supp. 613, 632 (E.D. Wis. 1994)($100 per day – totaling $2,200) affirmed 41 F.3d 276 (7th Cir. 1994); *Kreuger Intl v. Blank*, 225 F.3d 806, 811 (7th Cir. 2000)(affirming $100 per day); *Villagomez v. AT&T Pension Plan*, 1991 WL 21178 (N.D. Ill. 1991)($100 per day); *Brown v. Aventis Pharma.*, 342 F.3d 822, 825-826 (8th Cir. 2003)(affirming maximum penalty); *Koegan v. Towers, Perrin, Forster & Crosby*, 2003 WL 21058167 (D. Minn. 2003)($100 per day); *Conger v. Univ. Marketing, Inc.*, 2000 WL 1818521 (D. Or. 2000)(Exhibit 9)($100 per day).

See also *Pagovich v. Moskowitz*, 865 F.Supp. 130, 137-138 (S.D.N.Y. 1994)($75 per day); *Boyadjian v. CIGNA Co.*, 973 F.Supp. 500 (D. N.J. 1997)($75 per day – totaling $57,975 & listing decisions from around the country); *Lampkins v. Golden*, 104 F.3d 361 (6th Cir. 1996)($75 per day).

F. Within the District Court's Discretion

Imposition of penalties; reviewed by on appeal for abuse of discretion.

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PLEADING EXAMPLE ONE – RESPONSE TO MTD

THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THOMAS M. FERREE	)	
	)	
Plaintiff	)	
	)	CIVIL ACTION NO.:
v.	)	
	)	1:05-CV-2266-WSD
LIFE INSURANCE COMPANY OF	)	
NORTH AMERICA, (“LINA”),	)	
a subsidiary of the CIGNA	)	
Corporation (“CIGNA”), et. al.	)	
	)	
Defendants.	)	

PLAINTIFF’S RESPONSE TO DEFENDANT LIFE INSURANCE COMPANY OF NORTH AMERICA’S MOTION TO PARTIALLY DISMISS PLAINTIFF’S COMPLAINT

Comes now THOMAS M. FERREE (“Ferree” or “Plaintiff”) and files this Response opposing the Life Insurance Company of North America’s (“LINA”) Motion to partially dismiss Plaintiff’s complaint (Dkt 19). Plaintiff’s Count V claims for statutory penalties should not be dismissed because LINA failed to produce the information Plaintiff expressly requested on several occasions, and LINA is, therefore, subject to ERISA penalties. Plaintiff’s Counts VIII, IX, and X state law claims are not preempted

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by ERISA because Plaintiff's state law claims do not seek ERISA § 502(a) relief, are not akin to ERISA § 502(a) claims, do not arise out of a "refusal of benefits" and do not "relate to" the ERISA Plan.

I. STANDARD OF REVIEW FOR A MOTION TO DISMISS

On a Motion to Dismiss, pursuant to Rule 12(b)(6), the Court must consider all allegations in the Plaintiff=s Complaint as true and in the light most favorable to the Plaintiff. See *Powell v. United States*, 945 F.2d 374 (11th Cir. 1991); *F.T.C. v. Citigroup, Inc.*, 239 F.Supp. 2d 1302 (N.D. Ga. 2001). In reaching it=s decision, A[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.@ *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); see also *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *F.T.C.*, 239 F.Supp. 2d at 1305-1306.

The standard to be applied by the Court on a motion to dismiss was succinctly stated in *F.T.C.*, 239 F.Supp. 2d at 1305-1306:

> The purpose of a Rule 12(b)(6) motion is to determine whether the plaintiff's complaint adequately states a claim for relief. A motion to dismiss concerns only the complaint's legal sufficiency and is not a procedure for resolving factual questions or for addressing the merits of the case. *See* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* ' 1356 (2d ed.1990). Consequently, the Court's inquiry is limited to the contents of the complaint. *GSW, Inc. v. Long County,* 999 F.2d 1508, 1510 (11th Cir.1993).

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> A motion to dismiss under Rule 12(b)(6) is viewed with disfavor and is rarely granted. Wright & Miller, ' 357 at 321. The Supreme Court has determined that a complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts" which would entitle plaintiff to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).
>
> Furthermore, the court should not grant a motion to dismiss merely because the complaint does not state with precision every element of the offense necessary for recovery. In fact, a complaint is sufficient if it contains "allegations from which an inference can be drawn that evidence on these material points will be introduced at trial." 5 Wright & Miller, ' 1216 at 154, 156-59. Finally, in considering a motion to dismiss, the complaint's allegations must be accepted as true and construed in the light most favorable to the plaintiff. *See Powell v. United States,* 945 F.2d 374, 375 (11th Cir. 1991).

This deference to the Plaintiff, the non-movant, is in accordance with FRCP 8, which only requires claimants to file a short and plain statement of the claim sufficiently putting the defendants on notice of the claim and the grounds upon which it relies. See *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002). ANotice pleading . . . relies on liberal discovery rules and summary judgment motions to define disputed facts and issues to dispose of unmeritorious claims.@ *Id*. at 512. Therefore, this Rule 12(b)(6) motion does not provide a means for the Court to evaluate the underlying merits of this case. *Id.*; *GSW, Inc. v. Long County*, 999 F.2d 1508 (11th Cir. 1993); *F.T.C.*, 239 F.Supp. 2d at 1305.

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In Summary, A[a] motion to dismiss under Rule 12(b)(6) is viewed with disfavor and is rarely granted.@ *F.T.C.*, 239 F.Supp. 2d at 1305.

II. PLAINTIFF'S ERISA STATUTORY PENALTY CLAIMS

Plaintiff's Complaint - Count V (Dkt 1 ¶¶ 324-340), seeks statutory penalties against LINA for withholding documents Ferree expressly requested, in writing pursuant to ERISA, and with notice that he would seek statutory penalties should such documents be wrongfully withheld. As argued herein, based on the allegation of Plaintiff's complaint, the express language of the ERISA statute, the express directives of the Department of Labor, and Plaintiff's specific written requests for documents, Plaintiff has stated a meritorious claim subjecting LINA to potential penalties under ERISA for the withholding of documents. LINA's motion to dismiss Plaintiff's claim should be DENIED.

For support of its motion to dismiss Plaintiff's document penalty claim, LINA almost exclusively relies on this Court's decision in *Brucks v. The Coca-Cola Co.*, 1:03-CV-2492-WSD (N.D. Ga. 2005); however, the plaintiff in *Brucks* filed a motion for reconsideration of that decision.[1] Based on the Brucks' motion for reconsideration and

[1] *Brucks v. The Coca-Cola Co.*, 1:03-CV-2492-WSD (N.D. Ga. 2005). See *Brucks* (Dkt 68).

the argument stated herein, Plaintiff contends that his document penalty claim is should not be dismissed.

Plaintiff's Complaint alleges that LINA is an administrator which as discussed herein is all that is necessary for liability under the statute. Because Plaintiff also alleged that LINA is a *de facto* plan administrator subject to ERISA statutory penalties (Dkt 1 ¶ 327, 338, 339), LINA does not challenge Plaintiff's standing to bring a cause of action against LINA as a claims administrator (a *de facto* plan administrator) for ERISA statutory penalties.[2] Moreover, LINA does not dispute that Ferree requested copies of all plan documents (including LINA's policies, procedures, guidelines, and claims manual) and all relevant documents (including LINA requested medical reviews, LINA requested audits, etc…). (Dkt 1 ¶¶ 120, 169, 170, 172, 279-292.) And, LINA does not dispute that ERISA allows the imposition of such penalties pursuant to 29 U.S.C. § 1132(A)(1)(a) &

[2] See *Rosen v. TRW*, 979 F.2d 191, 193-194 (11th Cir. 1992)(adopting the *de facto* plan administrator doctrine) citing *Law v. Ernst & Young*, 956 F.2d 364, 373 (1st Cir. 1992)("To hold that the entity not named as administrator in the plan documents may not be held liable under § 1132(c), even though it actually controls the dissemination of plan information, would cut off the remedy Congress intended to create"); *Hamilton v. Allen Bradley Co.*, 244 F.3d 819, 824 (11th Cir. 2001); *Garren v. John Hancock*, 114 F.3d 186, 187 (11th Cir. 1997)(proper defendant in ERISA action is party controlling administration of plan citing *Daniel v. Eaton Corp.*, 839 F.2d 263, 266 (6th Cir.) cert denied 488 U.S. 826 (1988)); *Cheal v. LINA*, 330 F.Supp.2d 1347, 1356-58 (N.D. Ga. 2004)(insurer acting as administrator, claims fiduciary may be subject to 1132(c) penalties).

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(c); ERISA § 502(c). However, LINA contends that it is not subject to penalties for failing to produce the documents Ferree requested.

LINA claims that statutory penalties can only be imposed, as a matter of law, for withholding the documents discussed under 29 U.S.C. § 1024; ERISA § 104, and curiously attempts to argue that Plaintiff has not alleged a failure of LINA to provide documents required to be provided under ERISA § 104; a fact that is contrary to Plaintiff's allegations. Hence, LINA asks this Court to ignore the DOL's advisory opinions on what constitute plan documents under ERISA § 104, and LINA asks this Court to completely ignore another ERISA subchapter provision - 29 U.S.C. § 1029; ERISA § 109.

As the cases cited above - *infra.* fn. 2 - demonstrate, "Any administrator" is subject to ERISA statutory penalties. See also 29 U.S.C. § 1132(c). Thus, even if LINA string cites cases in its Reply that conclude these penalties may only be assessed against "Plan administrators," LINA is wrong. And, any case holding that only the plan administrator, as opposed to *any administrator* as set forth in the statute, either has inadvertently misquoted the specific statutory language or has held directly contrary to the specific statutory language. Further, if LINA's Reply string cites cases stating that LINA is not responsible for disclosing its documents showing procedures or methodologies for

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determining claims, those cases have not addressed Advisory Opinion 96-14A (July 31, 1996)(Exhibit 1) where the DOL clearly stated that procedure manuals must be disclosed:

> Consistent with this Congressional intent, it is the view of the Department of Labor that, for purposes of section 104(b)(2) and 104(b)(4), **any document that specifies procedures, formulas, methodologies, or schedules to be applied in determining** or calculating **a participant's or beneficiary's benefit entitlement under an employee benefit plan would constitute an instrument under which the plan is established or operated**, regardless of whether such information is contained in a document designated as the "plan document."

(Exhibit 1, pg. 2; *note*, 29 U.S.C. § 1024 requires disclosure of "other instruments under which the plan is established or operated.")

29 U.S.C. § 1132(A)(1)(a) & (c); ERISA § 502(A)(1)(a) & (c) provides for penalties of $110.00 per day[3] against administrators that refuse to supply information required to be produced under ERISA.

> (c)(1) ***Any administrator***....[who fails to provide certain information]
>
> (B) who fails or refuses to comply with a request for ***<u>any information</u>*** which such administrator is ***required by <u>this subchapter</u> to furnish*** to ***a participant or beneficiary*** (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the

[3] 29 C.F.R. § 2575.502c-1 sets the penalty award at $110.00 per day.

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> court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

[emphasis added] Thus, by the express language, the penalty is due to be paid by any administrator who fails or refuses to comply with a request for information ***"which such administrator is required by this subchapter to furnish to a participant or beneficiary."***

The ERISA subchapter requires administrator's to produce information under two different statutory provisions: 29 U.S.C. § 1024; *and* 29 U.S.C. § 1029. Pursuant to ERISA § 104:

> The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or **other instruments under which the plan is established or operated**.

ERISA § 104(b)(4). [emphasis added] And, pursuant to ERISA § 109:

> Format and content of summary plan description, annual report, etc., required to be furnished to plan participants and beneficiaries
>
> **The Secretary may prescribe the format and content of** the summary plan description, the summary of the annual report

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> described in section 1024(b)(3) of this title and **any other report, statements or documents** (other than the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated), **which are required to be furnished or made available to plan participants and beneficiaries receiving benefits under the plan.**

ERISA § 109(c). Thus, ERISA's document penalty provisions apply when an administrator withholds the plan documents specifically discussed in ERISA § 104(b)(4) and when an administrator withholds other reports, statements or documents that are required to be furnished or made available to plan participants.

A. Penalties for Withholding 29 U.S.C. § 1024 Documents

LINA does not dispute that penalties can be imposed for withholding the documents required to be produced by ERISA § 104.[4] However, LINA contends that its guidelines are not Plan documents. LINA is wrong because Plan documents include any internal procedures, rules, guidelines, protocols, etc. (i.e., "instruments under which the plan is established or operated"). See Department of Labor Advisory Opinion 96-14A

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[4] LINA cites this Court's recent decision in *Brucks v. The Coca-Cola Co.*, 2005 WL 2429132, *15 (N.D. Ga. 2005) for authority on imposing penalties against administrators that withhold documents required to be produced by ERISA § 104; however, the plaintiff in *Brucks* filed a motion for reconsideration of that decision. *Infra.* fn. 1.

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(July 31, 1996)(Exhibit 1);[5] see also 65 FR 70246-01, fn. 24. Thus, LINA failed to produce documents that ERISA § 104(b) requires.

Therefore, for all the forgoing reasons, LINA based on the express language of the ERISA statute, the express directives of the Department of Labor, and Plaintiff's specific written requests for documents, LINA is subject to ERISA's penalty provisions, and LINA's motion to dismiss Plaintiff's claim should be DENIED.

B. Penalties for Withholding 29 U.S.C. § 1029 Documents

LINA is subject to ERISA's penalty provisions for failing to produce pertinent documents required to be produced pursuant to ERISA § 109. Reading § 502(c) and 109(c) together, the Secretary is given authority to establish the format and content of what documents are required to be produced "by this subchapter." Therefore, "***Any administrator*** . . . (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to . . .may in the court's discretion be personally liable" for a § 502(c) penalty. Also, the Secretary has general

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5 When an agency administering a regulation provides an answer to an issue that is silent or ambiguous in the regulation, the question before the court is whether the agency's answer is based on a permissible construction of the regulation. See *Chevron USA, Inc. v. National Resources Defense Counsel, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984); cited by *Torres v. Pittston Co.*, 346 F.3d 1324, 1333 n. 11 (11th Cir. 2003).

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authority under "this subchapter" to "prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this title." 29 U.S.C. § 1135; ERISA § 505.

Pursuant to these statutes, the Secretary promulgated 29 C.F.R. § 2560.503-1(g), which allowed claimant's to "review pertinent documents" upon receiving a denial of benefits. 29 C.F.R. § 2560.503-1(g)(ii)(2000). The Secretary provided further explanation of what constitutes a "pertinent" document. In the preamble to this regulation discussed "pertinent" documents, pertinent documents are "all plan documents and other papers which affect the claim." 42 Fed. Reg. 27426.

Additionally, when the Department of Labor amended this regulation, the DOL specifically included provisions requiring the disclosure of internal rules, guidelines, or protocols. The Secretary of Labor's ERISA claim procedures regulations, set out in 29 C.F.R. § 2560.503-1 (h)(2)(iii)(2002) describe what documents an administrator must provide. The regulations state that, in order to provide a full and fair review, a claimant **shall be** provided, upon request and free of charge, reasonable access to, and copies of, all documents, records, and other information ***relevant*** to the claimant's claim for benefits. Whether a document, record, or other information is ***relevant*** to a claim for benefits shall be determined by reference to paragraph (m)(8) of this section. The

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Secretary explains at Paragraph (m)(8) what documents are relevant to the claim, and are thus required to be produced under ERISA:

> A document, record, or other information shall be considered "relevant" to a claimant's claim if such document, record, or other information.
>
> (i) Was relied upon in making the benefit determination;
>
> (ii) Was submitted, considered, or generated in the course of making the benefit determination, without regard to whether such document, record, or other information was relied upon in making the benefit determination;
>
> (iii) Demonstrates compliance with the administrative processes and safeguards required pursuant to paragraph (b)(5) of this section in making the benefit determination; or
>
> (iv) In the case of a group health plan or a plan providing disability benefits, constitutes a statement of policy or guidance with respect to the plan concerning the denied treatment option or benefit for the claimant's diagnosis, without regard to whether such advice or statement was relied upon in making the benefit determination.

29 C.F.R. § 2560.503-1(m)(8)(2002). Further,"[i]n the case of an adverse benefit determination on review, the plan administrator shall provide such access to, and copies of, documents records, and other information described in paragraphs (j)(3), (j)(4), and (j)(5) …"[6] "If an internal rule, guideline, protocol or other similar criterion was relied

[6] 29 C.F.R. § 2560.503-1(i)(5)(2002).

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upon in making the adverse determination … a copy of the rule, guideline, protocol, or other similar criterion will be provided free of charge to the claimant upon request." 29 C.F.R. § 2560.503-1(j)(5)(i)(2002).

Thus, pertinent documents are all papers which affect or relate to the claim, including all documents or writings that relate to or reflect the claim investigation, procedures used (i.e., claims manual, training manual, policy guidelines, etc…), analysis performed, conclusions reached, and documents that reflect the decision making process including how evidence was weighed and treated and evaluated, relevant to the requirement of reasoned and principled decision making.[7] Therefore, LINA is

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[7] The purpose of 29 C.F.R. § 2560.503-1 is "to assure the fairness of a plan's claim review procedure." *Russo v. Hartford Life and Acc. Ins. Co.*, Dept. of Labor amicus brief (Exhibit 2, pg. 9.) Administrators must produce all documents relied upon in making the final benefit determination (*id.*), and administrators must give claimants the right to review evidence used to deny a claim with reasonable time to address it. See *CWA/IU Pension Plan v. Weinstein*, 107 F.3d 139, 143-144 (2d Cir. 1997); *Grossmuller v. Int'l Union of UAW*, 715 F.2d 853, 858-59 (3rd Cir. 1983); *Harte v. Bethlehem Steele*, 214 F.3d 446, 451 (3rd Cir. 2000); *Ellis v. Metropolitan Life*, 126 F.3d 228, 238 (4th Cir. 1997); *Vega v. Nat. Life. Ins.*, 188 F.3d 287, 299 (5th Cir. 1999)(en banc); *Krohn v. Huron Mem. Hosp.*, 173 F.3d 542, 547-549 (6th Cir. 1999); *Wilczynski v. Lumbermens Mut. Cas. Co.*, 93 F.3d 397, 402 n. 3 (7th Cir. 1996); *Shea v. Esensten*, 107 F.3d 625, 629 (8th Cir.) cert. denied, 118 S.Ct. 297 (1997); *Friedrich v. Intel Corp.*, 181 F.3d 1105, 1111 (9th Cir. 1999); and *Eddy v. Colonial Life Ins. Co. of Amer.*, 287 App. D.C. 76, 919 F.2d 747 (D.C. Cir. 1990).

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subject to statutory penalties for withholding pertinent documents,[8] and LINA's motion to dismiss Plaintiff's claim should be DENIED.

III. PLAINTIFF'S STATE LAW CLAIMS

DELETED – NOT RELEVANT TO PAPER TOPIC

CONCLUSION

For all of the above-stated reasons, Plaintiff's claims are meritorious and LINA Motion should be DENIED.

Dated:

/s/ Pamela I. Atkins
PAMELA I. ATKINS
Georgia State Bar No. 026302
Attorney for Plaintiff Thomas Ferree

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[8] The Court in *Hamall-Desai v. Fortis Ben. Ins. Co.*, 370 F.Supp.2d 1283, 1311-15 (N.D. Ga. 2004) assessed statutory penalties for failing to produce documents requested under 29 U.S.C. § 1029(c) & 29 C.F.R. § 2560.503-1.

THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

	)	
THOMAS M. FERREE	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.:
v.	)	
	)	________________________
LIFE INSURANCE COMPANY OF	)	
NORTH AMERICA, ("LINA");	)	
CIGNA;	)	
ADC TELECOMMUNICATIONS, INC.	)	
LONG TERM DISABILITY PLAN;	)	
ADC TELECOMMUNICATIONS, INC.;	)	
RECOVERY SERVICES	)	
INTERNATIONAL, INC.;	)	
and	)	
ADVANTAGE 2000 CONSULTANTS.	)	
Defendants.	)	
__________________________________	)	

COMPLAINT

COMES NOW Plaintiff THOMAS FERREE, by and through his attorney, and files this Complaint against Defendants. Plaintiff Mr. Ferree alleges several ERISA causes of action. Against LINA, CIGNA and the LTD Plan for wrongful termination/denial of long term disability ("LTD") insurance benefits under the ADC Telecommunications, Inc. Long Term Disability Plan, an ERISA welfare benefit plan, sponsored by ADC Telecommunications, Inc. and funded by a policy of insurance,

underwritten and administered by, Life Insurance Company of North American ("LINA") and CIGNA. Against Defendants LINA and CIGNA, Plaintiff Mr. Ferree also alleges causes of action resulting from breaches of fiduciary duties; failure to provide documents; attorney fees and costs. Against ADC Telecommunications as the named Plan Administrator, Plaintiff Mr. Ferree seeks to clarify his rights to benefits under the various ADC Employee Benefit Plans. Additionally, Plaintiff Mr. Ferree alleges several Non-ERISA causes of action. Against Recovery Services International, Plaintiff Mr. Ferree alleges causes of action for violating the Unfair Debt Collection Practices Act. Against LINA, CIGNA, and Advantage 2000, Plaintiff Mr. Ferree alleges the tort of negligent misrepresentation along with punitive damages because both Defendants misrepresented the terms of the Plan and ERISA's requirements to Mr. Ferree and caused Mr. Ferree serious economic damages. Against LINA/CIGNA, Plaintiff Mr. Ferree alleges the tort of conversion along with punitive damages because LINA/CIGNA following the termination of Mr. Ferree's claim misappropriated and retained Mr. Ferree's personal property without authority. Plaintiff Mr. Ferree also seeks attorneys' fees and litigation costs/expenses related to his Non-ERISA causes of action and a trial by jury.

OMITTED PARAGRAPHS 1-292

LINA/CIGNA's Withholding of Relevant Documents Requested in Writing by Counsel for Mr. Ferree

293. After Mr. Ferree submitted his LTD application, only LINA/CIGNA interacted with Mr. Ferree about the merits of his LTD claim. Moreover, LINA/CIGNA made all decisions relating to Mr. Ferree's claim and controlled the claim handling and appeal process and thus, the administration of the plan/policy.

294. In order to obtain a full and fair review of his claim and in order to participate in the claim process, Mr. Ferree, through counsel, requested that he be provided with the complete contents of the claim file and all relevant documents. Such requests were made in great detail, in writing, in December 2003 and December 2004. And were also followed up on in other written reminders and requests to LINA/CIGNA during 2003-2005.

295. Mr. Ferree's requests cited to the applicable ERISA regulations in his request for relevant documents stating that a document or record or other information will be deemed "relevant" to the claimants claim if it was relied upon in making the benefit determination, and even if not relied upon in the determination, it was either submitted, considered or generated in the course of making the determination or demonstrates compliance with the administrative process or safeguards ensuring consistent application of plan provisions or constitutes a statement of policy or

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guidance with respect to the plan concerning the denied benefits.

296. In response to the request for documents by counsel for Mr. Ferree, Brenda Barlett, Appeals Claims Examiner for CIGNA certified on January 20, 2004 that attached documents (786 pages inclusive of the certification) represented "a true and correct copy of the original claim file of Thomas Ferree as it has been maintained by Life Insurance Company of North America (LINA)."

297. Review of the claims file and receipt of subsequent information from third parties has made it clear that CIGNA/LINA failed to provide all relevant documents as the term relevant is defined under the DOL regulations.

298. Therefore, a December 2004 letter to LINA/CIGNA stated:"Once again, we are requesting that we be provided with all relevant documents" and continued as follows:

> "We expect CIGNA to provide us with any and all evidence that was in anyway, directly or indirectly, related to the determination on this claim including, but not limited to **all medical records in your file, including any and all reports of your consultants and reviewers, and any and all communications to or from your claims handlers, consultants, reviewers, medical experts or vocational experts, including reports obtained from Advantage 2000 Consultants, Intracorp, the Smith Group,** and any information obtained through any reinsurer on the policy."
>
> "We expect to be provided with every piece of information or physical or electronic evidence or evidence from any methods of transmission including paper, disk, tape, EDI or TYPHOON system concerning Mr. Ferree's claim

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including any information containing Mr. Ferree's name or file/claim number or Social Security number or making any reference whatsoever to Mr. Ferree. Any such information should be provided regardless of your company's individual definition of claim file."

"We also request that you provide us with **all policies, procedures and guidelines** pertaining to the handling, evaluation and approval or denial of disability claims including CIGNA / LINA's claim manuals, guidelines, procedure bulletins, policies or the like and any other written material including internal or external memorandums that were directly or indirectly utilized in the evaluation of this claim or in the training or instruction of those employees, consultants or reviewers on the evaluation of like or similar types of claims."

"These requests for information should be considered as continuing requests for the duration of this case, and we expect to be provided with all pertinent information as the record is supplemented."

299. LINA/CIGNA did not provide all the information requested and did not update the information provided as the record was supplemented.

300. LINA/CIGNA did not provide all medical records, reports of consultants and reviewers, all communications to or from your claims handlers, consultants, reviewers, medical experts and vocational experts, reports obtained from Advantage 2000, Intracorp, and the Smith Group. LINA/CIGNA also did not provide any policies, procedures or guidelines.

301. Counsel for Mr. Ferree also made a specific request for ***Smith Group Audit Documents*** and Claim Review and Issues/Responses stating as follows:

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> It is apparent from the review of the claim file that Mr. Ferree's claim was examined by the Smith Group as part of their audit of CIGNA /LINA claims, and Mr. Ferree's case was one of four cases of particular concern during the audit. Enclosed as exhibit 11 is a copy of the Smith Group Disability and Reinsurance Consultants Services Guide. Please identify all services described which have been performed for CIGNA / LINA and specifically state which services had any connection with the handling or termination of Mr. Ferree's claim.
>
> The claim file is missing the "Smith Review Audit" and TSG documents and the "Claim Review" of Mr. Ferree's claim by the Smith Group. Please provide all TSG documents and Smith Group documents related in any way to Mr. Ferree's claim. Please provide all issues or inquiries raised by the Smith Group and all responses that were provided to the Smith Group. Also please provide all policies, procedures, guidelines related to the Smith Group Audit.

302. LINA/CIGNA did not provide any of The Smith Group ("TSG") information requested, including the claim review of Mr. Ferree's claim by The Smith Group.

303. Counsel for Mr. Ferree made a specific request for all **Recovery Services International, Inc. Documents (RSI) as follows:**

> It is apparent that CIGNA / LINA utilized Recovery Services International to collect a Social Security "overpayment" from Mr. Ferree. The claim file has no documents concerning this debt collection. Please provide all documents or things that were provided to or obtained from Recovery Services International in connection with Mr. Ferree's claim. In addition, please provide all policies procedures or guidelines for collection of such overpayments and utilization of Recovery Services International.

304. LINA/CIGNA did not provide any of the Recovery Services International (RSI) Documents requested.

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305. LINA/CIGNA did not provide documentation to Mr. Ferree as the record was supplemented as requested and withheld from Mr. Ferree Dr. Sonne's peer report and the information sent to and received from Dr. Sonne.

306. Thus, because LINA/CIGNA controlled the administration of the LTD Plan and Policy and because LINA/CIGNA withheld documents, LINA/CIGNA is subject to 1132(c) penalties. *Cheal v. LINA*, 330 F. Supp.2d 1347, 1356-58 (N.D. Ga. 2004)(Insurer acting as administrator, claims fiduciary may be subject to 1132(c) penalties).

OMITTED PARAGRAPHS 307-323

ERISA CLAIMS FOR RELIEF COUNT V

PENALTY AGAINST DEFENDANTS LINA / CIGNA AS THE CLAIMS ADMINISTRATOR AND THE ACTING DE FACTO PLAN ADMINISTRATOR FOR FAILURE TO PROVIDE DOCUMENTS

PURSUANT TO 29 U.S.C. § 1132 (c)(1)

324. Plaintiff Mr. Ferree incorporates the allegations set forth in all preceding paragraphs above as if set forth in full herein.

325. Plaintiff Mr. Ferree through counsel made repeated written requests for documents from Defendants LINA/CIGNA and LINA/CIGNA failed to provide certain documents and Mr. Ferree was harmed by LINA/CIGNA's failure to provide such

documents and LINA/CIGNA should be required to pay the maximum penalty for the withholding of documents pursuant to ERISA.

326. Mr. Ferree as a participant and beneficiary has a right to enforce this obligation and seek redress of an administrator's violation. ERISA § 502(c), "a civil action may be brought (1) by a participant or beneficiary (A) for relief provided for in subsection (c) of this section."

327. LINA/CIGNA was the claims administrator for the LTD Plan and controlled the entire claims and appeals process following Mr. Ferree's initial application for benefits.

328. Administrators have an obligation to provide information including a duty to respond to written requests for information about the employee benefits and the documents relevant to a claim for benefits and participants and beneficiaries have a cause of action if they do not provide the information.

329. ERISA § 502(c), 29 U.S.C. § 1132(c) provides for penalties for an administrator's refusal to supply required information. Under that section of ERISA:

> (1) ***Any*** administrator….[who fails to provide certain information]
>
> (B) who fails or refuses to comply with a request for any information which such administrator is ***required by this subchapter to furnish*** to ***a participant or beneficiary*** (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to

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> the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

330. The penalty is due to be paid by any administrator who fails or refuses to comply with a request for information ***"which such administrator is required by this subchapter to furnish to a participant or beneficiary."***

331. This penalty applies to the failure to provide the documents relevant to the plan: "(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated." The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence. ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4).

332. In addition to the summary plan descriptions and other documents under which the plan is operated, ERISA § 109(c), 29 U.S.C. § 1029 provides that the Secretary of

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Labor may also prescribe what other documents should be furnished:

> (c) Format and content of summary plan description, annual report, etc., required to be furnished to plan participants and beneficiaries. The Secretary may prescribe the format and content of the summary plan description, the summary of the annual report described in section 1024(b)(3) of this title and ***any other report, statements or documents*** (other than the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated), ***which are required to be furnished or made available to plan participants and beneficiaries receiving benefits under the plan.***
> [emphasis added]

333. Pursuant to §109(c) and 502(c) together, the Secretary is given authority to establish the format and content of what documents are required to be produced "by this subchapter." Therefore, "Any administrator . . . (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to . . .may in the court's discretion be personally liable" for a § 502(c) penalty.

334. Also, the Secretary has general authority under "this subchapter" to "prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this title. ERISA § 505, 29 U.S.C. § 1135.

335. The Secretary of Labor's ERISA claim procedures regulations, set out in 29 C.F.R. § 2560.503-1 (h)(2)(iii) describe what documents an administrator must provide.

336. The regulations state that, in order to provide a full and fair review, a claimant

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shall be provided, upon request and free of charge, reasonable access to, and copies of, all documents, records, and other information ***relevant*** to the claimant's claim for benefits. Whether a document, record, or other information is ***relevant*** to a claim for benefits shall be determined by reference to paragraph (m)(8) of this section.

337. The Secretary explains at Paragraph (m)(8) what documents are relevant to the claim, and are thus required to be produced under ERISA:

> A document, record, or other information shall be considered "relevant" to a claimant's claim if such document, record, or other information.
>
> (i) Was relied upon in making the benefit determination;
>
> (ii) Was submitted, considered, or generated in the course of making the benefit determination, without regard to whether such document, record, or other information was relied upon in making the benefit determination;
>
> (iii) Demonstrates compliance with the administrative processes and safeguards required pursuant to paragraph (b)(5) of this section in making the benefit determination; or
>
> (iv) In the case of a group health plan or a plan providing disability benefits, constitutes a statement of policy or guidance with respect to the plan concerning the denied treatment option or benefit for the claimant's diagnosis, without regard to whether such advice or statement was relied upon in making the benefit determination.

338. LINA/CIGNA had an obligation to provide all the documents relevant to a claim that are required to be provided by the Department of Labor's ERISA claims regulations.

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339. LINA/CIGNA as the claims administrator and de facto plan administrator was in possession of all the documents requested by Mr. Ferree. Moreover LINA/CIGNA was the only entity with any obligation to provide the documents that was also in possession of the documents requested.

340. LINA/CIGNA failed to provide the information requested to be provided under ERISA regulations within 30 days and failed to provide all the information requested that ERISA requires be provided.

OMITTED PARAGRAPHS 341-369

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PLEADING EXAMPLE TWO – RESPONSE TO MSJ

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MICHELLE PALMERI,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.
v.	)	
	)	1:01-CV-3498-TWT
THE COCA-COLA COMPANY, et al	)	
	)	
Defendants.	)	

PLAINTIFF'S RESPONSE TO THE COCA-COLA DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PLAINTIFF'S ERISA § 502(c) CLAIMS

Comes Now MICHELLE PALMERI ("Plaintiff" or "Palmeri") showing the Court that Palmeri's request for ERISA penalties should be awarded and the Coca-Cola Defendants' partial motion for summary judgment (Dkt 78) should be denied.

The Coca-Cola Defendants attempt to lead this Court into reversible error by misrepresenting the facts of this matter and the law associated with document penalty claims. As to the facts, the Coca-Cola Defendants claim that "it is undisputed that the Coca-Cola Defendants responded to the sole request for documents Plaintiff made upon them" (Dkt 78, pg. 2), but the Coca-Cola Defendants neglect to inform the Court that

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Coca-Cola's response was dilatory by 324 days. As to the law, the Coca-Cola Defendants claim that penalties can not be awarded without a showing of intentional conduct or bad faith. (Dkt 78, pg. 2.) However, no Circuit requires a showing of prejudice to award statutory penalties, and the Eleventh Circuit recognizes that neither prejudice nor bad faith is required to award statutory penalties. Moreover, numerous courts have awarded the maximum penalty allowed when considering facts and circumstances similar to this matter. See, e.g., *Hamall-Desai v. Fortis*, 370 F.Supp.2d 1283, 1311-14 (N.D. Ga. 2004) affirmed No. 05-11869 (11th Cir. February 2, 2006)(Exhibit 1)(affirming penalties at $100 per day against a claims administrator for withholding medical record reviews obtained by the claims administrator and expressly requested by the claimant).

I. The Coca-Cola Defendants Violated ERISA's Disclosure Requirements

"Statutory penalties are provided for the failure or refusal to furnish information upon request to a participant or beneficiary." *Mohally v. Kendall Health Care Products Co., Inc.*, 903 F.Supp. 1530, 1538 (M.D. Ga. 1995). Here, the undisputed evidence proves that statutory penalties should be awarded because both the Coca-Cola Defendants and the Reliastar Defendants failed or refused to furnish information after receiving Palmeri's express request.

A. Coca-Cola Received Palmeri's Written Request for Documents

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The Coca-Cola Defendants admit that Plaintiff, on March 19, 2001, "requested a copy of the plan documents, documents used in the denial of Plaintiff's claim, and … other 'relevant' and 'pertinent' documents." (Dkt 78, pg. 3.) The Coca-Cola Defendants must admit this fact because the Coca-Cola Defendants signed a return receipt card accepting delivery of Plaintiff's written request. (Dkt 81, SUMF 47 & Exh. 3.)

B. ERISA Requires Documents to be Produced

Congress specifically listed the documents that must be furnished when requested by an ERISA plan participant.

> The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated **summary, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated**. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

29 U.S.C. § 1024(b)(4) [emphasis added].[9] The terms of this statute are straightforward, and § 1024; ERISA § 104 requires disclosure of the Plan, the Plan's SPD, the latest

[9] Even the recent decision within the Northern District of Georgia that favored the Coca-Cola Defendants held that this penalty applies to any administrator that withholds documents requested and required to be produced under 29 U.S.C. § 1024. See *Brucks v. Coca-Cola*, 391 F.Supp.2d 1193 (N.D. Ga. 2005)("[1132(c)'s] phrase "under this

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Annual Report, the Plan's Trust Agreement, any Contract relating to the Plan, and other instruments under which the Plan is established or operated. To the degree "other instruments" needs further defining, the DOL clearly stated in Advisory Opinion 96-14A (July 31, 1996)(Exhibit 2) that procedure manuals must be disclosed:

> Consistent with this Congressional intent, it is the view of the Department of Labor that, for purposes of section 104(b)(2) and 104(b)(4), **any document that specifies procedures, formulas, methodologies, or schedules to be applied in determining** or calculating **a participant's or beneficiary's benefit entitlement under an employee benefit plan would constitute an instrument under which the plan is established or operated**, regardless of whether such information is contained in a document designated as the "plan document.

(Exhibit 2, pg. 2) [emphasis added][10] see also 65 FR 70246-01, fn. 24; *Teen Help, Inc. v. Operating Engineers Health and Welfare Trust Fund*, 1999 WL 1069756, *3 (N.D. Cal. 1999)(Exhibit 3)(DOL's Advisory Opinion 96-14A, requiring administrators to disclose review criteria, is reasonable).

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subchapter" (*i.e.,* ERISA) clearly embraces an administrator's failure or refusal to provide the documents identified in Section 1024, namely "the latest updated summary plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated").

[10] When an agency administering a regulation provides an answer to an issue that is silent or ambiguous in the regulation, the question before the court is whether the agency's answer is based on a permissible construction of the regulation. See *Chevron USA, Inc. v. National Resources Defense Counsel, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984); cited by *Torres v. Pittston Co.*, 346 F.3d 1324, 1333 n. 11 (11th Cir. 2003).

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In accordance with ERISA's disclosure requirements, numerous documents associated with this matter constitute the Plan, the Plan's Summary Plan Description, and other reporting documents for the Plan. (Dkt 81 SUMF 64 & Exh. 4; Dkt 56 ¶ 6(b).) Specifically:

1. (Dkt 51, Exh. 1-A at 1-49) is a true and correct copy of the Plan document, effective as of January 1, 1989, see (Dkt 56 ¶ 77);
2. (Dkt 51, Exh. 1-B at 41-42) is a true and correct copy of The First 1994 Amendment to The Coca-Cola Long Term Disability Income Plan, see (Dkt 77 SUMF ¶ 4);
3. (Dkt 51, Exh. 1-D) is a Consent Resolution of the Committee regarding the Plan, see (Dkt 77 SUMF ¶ 6);
4. (Dkt 51, Exh. 1-E) is a Consent Resolution of the Committee regarding the Plan, see (Dkt 77 SUMF ¶ 6);
5. (Dkt 51, Exh. 1-F) is a Consent Resolution of the Committee regarding the Plan, see (Dkt 77 SUMF ¶ 6);
6. (Dkt 51, Exh. 1-H) is part of the Plan's Summary Plan Description in effect during the relevant time period, see (Dkt 56 ¶ 78);

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7. (Dkt 51, Exh. 1-I) is part of the Plan's Summary Plan Description in effect during the relevant time period, see (Dkt 56 ¶ 78);

8. (Dkt 51, Exh. 1-J) is part of the Plan's Summary Plan Description in effect during the relevant time period, see (Dkt 56 ¶ 78);

9. (Dkt 51, Exh. 1-K) is a true and correct copy of the Plan's Trust Agreement, see (Dkt 77 SUMF ¶ 2);

Additional documents constitute contracts related to the Plan. Specifically:

10. (Dkt 51, Exh. 1-O) is a true and correct copy of a contract under which the Plan is operated – Administrative Services Agreement, see (Dkt 76 SUMF ¶ 11 – Lato Aff., Exh. 4); and

11. (Dkt 51, Exh. 1-P) is a true and correct copy of a contract under which the Plan is operated – Endorsement to Administrative Services Agreement. (Dkt 76 SUMF ¶ 19 – Lato Aff., Exh. 5).

And, there are other annual reports, bargaining agreements, contracts, or other instruments under which the Plan is established or operated. [11]

Thus, Palmeri's written request for Plan documents required the Coca-Cola Defendants to furnish at least 17 Plan documents.

[11] See six additional documents, (Dkt 51, Exh. 1-G, 1-L, 1-N, 1-Q, 1-R, 1-S).

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C. ERISA Required Coca-Cola to Timely Produce Plan Documents

ERISA required the Coca-Cola Defendants to timely furnish these 17 Plan documents or begin accruing a statutory penalty. Under 29 U.S.C. § 1132(c), ERISA provides a penalty of up to $110 per day[12] for the failure to provide plan documents.

> Any Administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary . . . by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S.C. § 1132(c). The statute could not more plainly state that the requested documents must be produced "within 30 days after such request." When Coca-Cola received Palmeri's March 19, 2001 written request for documents, § 1132(c) required Coca-Cola to produce the 17 Plan documents discussed above on or before April 18, 2001 or begin accruing statutory penalties.

D. Coca-Cola's Failure or Refusal to Furnish Requested Documents

The Coca-Cola Defendants failed or refused to timely furnish the 17 Plan documents ERISA required them to produce upon receiving Palmeri's written request.

[12] 29 C.F.R. § 2575.502c-1 sets the penalty award at $110.00 per day.

The Coca-Cola Defendants admitted in their Answer that, after receiving Palmeri's March 19, 2001 request for documents, they provided no documents to Palmeri until after Palmeri instigated litigation. (Dkt 51 ¶ 158; Dkt 56 ¶ 158.)[13] In fact, the Coca-Cola Defendants waited until March 8, 2002 (324 days past the 30-day deadline) to provide any documents to Palmeri. (Dkt 81 SUMF 64 & Exh. 4.)

Knowing they committed undeniable violations of ERISA's disclosure requirements, Coca-Cola attempts to ameliorate the penalty amount that should be awarded. Coca-Cola claims that it sent Plaintiff a complete copy of the Summary Plan Description on April 3, 2001 via NATLSCO. (Dkt 78, pg. 4.) This claim is incredibly suspect and can not be proven.

First, the Coca-Cola version of the Plan's SPD is different than the Reliastar version of the Plan's SPD.[14] The Coca-Cola Defendants claim that the Plan's SPD is comprised of three documents: (i) the Plan's SPD Booklet with 1997 Material Modifications - (Dkt 51, Exh. 1-H); (ii) the Plan's Administrative Information Booklet - (Dkt 51, Exh. 1-I); and (iii) the Plan's 1998 & 1999 Material Modifications - (Dkt 51,

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[13] The record also indicates that Palmeri herself requested her "complete summary LTD Plan," which must be provided under 29 U.S.C. § 1024 on August 3, 2000. (PRS 000032.)

[14] Plaintiff's Second Amended Complaint apprised Defendants of this fact, but at that time, neither Defendant admitted that Palmeri did not receive the Plan's complete SPD from Reliastar. (Compare Dkt 51 ¶ 157 with Dkt 55 ¶ 157 & Dkt 56 ¶ 157.)

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Exh. 1-J). See (Dkt 56 ¶ 78). *On the other hand*, the Reliastar Defendants contend that the Plan's SPD is comprised of only one document: the Plan's SPD Booklet with 1997 Material Modifications. (Dkt 76, Lato Aff. ¶ 5 & Exh. 2.)[15]

Second, the Coca-Cola Defendants cite only a NATLSCO cover letter for evidence that ***the complete*** SPD was sent to Palmeri. This cover letter does not indicate the exact contents of the "SPD" document sent to Palmeri by Reliastar, nor does this cover letter even prove that Reliastar sent any "SPD" document to Palmeri.

Third, nothing in Coca-Cola's initial disclosures or supplements to initial disclosures indicates that Coca-Cola has a reason to alter from the position set forth in its Answer. The Coca-Cola Defendants affirmatively stated in their Answer that "they are without sufficient information or knowledge to form a belief as to" whether the SPD provided to Palmeri by NATLSCO was complete. (Dkt 51 ¶ 157; Dkt 56 ¶ 157.)

Thus, Coca-Cola can not successfully cast doubt upon Palmeri's evidence that Coca-Cola was tardy by 324 days in providing 17 Plan documents as a response to

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[15] Of note, the SPD sent to Palmeri by Reliastar does not contain instructions for appealing a denied claim. See (Dkt 76, Lato Aff., Exh. 2, pg. 12; (Coca-Cola 000064). Thus, the SPD provided by Reliastar did not comply with ERISA requirements for an SPD; 29 U.S.C. § 1022(b) requires the procedures for submitting claims to be included in a Plan's SPD.

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Palmeri's request for documents.[16] Even considering Coca-Cola's recently found agency defense as to one incomplete document that fails to comply with ERISA requirements for the content of an SPD being provided to Palmeri by Reliastar, the undisputed facts remain that Coca-Cola wrongfully withheld at least 16 Plan documents for a total of 324 days, and Coca-Cola accumulated an ERISA document penalty of up to $570,240.00.[17]

II. Criteria for Assessing ERISA Penalties

Coca-Cola distorts the criteria for assessing ERISA penalties by claiming that Plaintiff must show that "Coca-Cola intentionally withheld documents or otherwise acted in bad faith" (Dkt 78, pg. 2) and that Plaintiff must make a complaint about the sufficiency of the documents produced.

A. Prejudice and/or Bad Faith Are Not Required to Assess Penalties

"Congress' purpose in enacting the ERISA disclosure provisions was to ensure that 'the individual participant knows exactly where he stands with respect to the plan.'" *Hamilton v. Mecca, Inc.*, 903 F.Supp. 1540 (S.D. Ga. 1996) quoting *Firestone Tire and Rubber Co. v. Bruch,* 489 U.S. 101, 118, 109 S.Ct. 948, 958, 103 L.Ed.2d 80 (1989) quoting H.R. Rep. No. 93-533, p. 11 (1973), reprinted in 1974 U.S.C. C.A.N. 4639, 4649.

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16 17 documents x 324 days = 5,508 document penalty days;
5,508 document penalty days x $110 / day = $605,880.00 in penalties.

17 16 documents x 324 days = 5,184 document penalty days;
5,184 document penalty days x $110 / day = $570,240.00 in penalties.

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In *Curry*,[18] the Eleventh Circuit followed the purpose of ERISA and took measures to ensure that participants know exactly where their stand with respect to the plan – the Eleventh Circuit held that "prejudice … is not a prerequisite to an award of a civil penalty under section 1132(c)."[19]

This principle is now well-founded in the Eleventh Circuit. In *Daughtrey*, the court confirmed and expounded upon this position:

> In *Curry* … we clarified … that 'prejudice is not a prerequisite to an award of civil penalties' under section 1132(c) …

[18] *Curry v. Contract Fabricators Inc. Profit Sharing Plan*, 891 F.2d 842, 850 (11th Cir. 1990) abrogated regarding attorneys' fees *Murphy v. Reliance Std. Life Ins. Co.*, 247 F.3d 1313 (11th Cir. 2001).

[19] Coca-Cola's argument that the Second Circuit, under *Devlin v. Empire BCBS*, 274 F.3d 76, 90 (2d Cir. 2001), requires a showing of "intentional failure" or "bad faith" is also inaccurate. In *Devlin*, the courts stated:

> In assessing a claim for penalties, courts have considered various factors, including 'bad faith or intentional conduct on the part of the administrator, the length of the delay, the number of requests made and documents withheld, and the existence of any prejudice to the participant or beneficiary'... On remand, the district court should evaluate this claim in light of these factors.

Id. By ordering the lower court to "evaluate this claim in light of these factors," the Second Circuit did not state each factor must be met; the Second Circuit did not state that any certain factor must be met; in fact, the Second Circuit later stated that "bad faith" and/or "prejudice" are not requirements for awarding penalties. See *McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund*, 320 F.3d 151, 163 (2d Cir. 2003)(noting the "absence of aggravating factors such as bad faith, prejudice, or multiple requests for information," the Second Circuit affirmed the lower court's penalty award of $15 per day – totaling $1,065).

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> Additionally, the penalty range of up to $100 per day is unrelated to any injury suffered by the plan participant, suggesting that section 1132(c) is intended to punish noncompliance with the employer or administrator's disclosure obligations.

Daughtrey v. Honeywell, Inc., 3 F.3d 1488, 1494 (11th Cir. 1993). Also recognizing previous Eleventh Circuit precedent established by *Sandlin*,[20] the Eleventh Circuit re-affirmed that "[an 1132(c) penalty] is in the nature of punitive damages designed to punish the intransigent administrator and to teach ERISA fiduciaries a needed lesson." *Daughtrey*, 3 F.3d at fn. 11. The "mere absence of bad faith" does not excuse an administrator from being penalized for the failure to timely provide information. *Id.* at 1494.

Under this reasoning, the Eleventh Circuit reversed the lower court's decision not to award civil penalties because the lower court based its reasoning for not awarding benefits on the claimant's failure to show prejudice. *Daughtrey*, 3 F.3d at 1494. When the administrator offered no explanation for this delay except to assure the district court that the delay was not intentional, the Eleventh Circuit stated that "the undisputed facts of

[20] *Sandlin v. Iron Workers Dist. Council*, 716 F.Supp. 571, 574 (N.D. Ala. 1988)(awarding $15,000 under § 1132(c)) affirmed mem. opinion 884 F.2d 585 (11th Cir. 1989).

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this case require the district court to impose a penalty under section 1132(c)." *Id.* at 1494-95.[21]

Here, the Coca-Cola Defendants beg this court to adopt the initial reasoning of the lower court in *Daughtrey*, but such reasoning results in reversible error. In fact, the Coca-Cola Defendants position that intentional and bad faith conduct is required for imposing penalties has been rejected by every Circuit.[22] Thus, under the Eleventh Circuit's direction in *Daughtrey*, this Court should award penalties.

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[21] The Coca-Cola Defendants citation to "*Varity v. Howe*, 516 U.S. 489, 497 (1996)" (see Dkt 78, pg. 9) does not instruct the Court to stray from strict liability for penalizing document withholding violations. In *Varity*, 516 U.S. at 497, The Court discussed the need for lower courts to adopt a "prudent man rule" for ERISA's trust-like fiduciary standards. However, The Court in *Varity* distinguished § 502(c) violations from ERISA trust-like fiduciary violations. The Court stated that ERISA § 502(c) violations are not germane to - 502(c) violations are "wholly apart from" - ERISA's provisions governing fiduciary duties - "to the extent that ERISA does impose disclosure obligations, the Act already provides for civil liability and penalties for disclosure violations wholly apart from ERISA's provisions governing fiduciary duties." See *Varity*, 516 U.S. at 532.

[22] See *Sullivan v. Raytheon Co.*, 262 F.3d 41, 52 (1st Cir. 2001); *Rodriguez-Abreu v. Chase Manhattan Bank*, 986 F.2d 580, 588-589 (1st Cir. 1993); *McDonald*, 320 F.3d at 163 (2d Cir. 2003); *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1148 (3rd Cir. 1993); *Glocker v. W.R. Grace & Co.*, 68 F.3d 460, 1995 WL 600468, **3 (4th Cir. 1995)(Exhibit 4); *Godwin v. Sun Life Assur. Co. of Canada*, 980 F.2d 323, 327 (5th Cir. 1992); *Daniel v. Eaton Corp.*, 839 F.2d 263, 268 (6th Cir. 1988) cert. denied 488 U.S. 826, 109 S.Ct. 76 (1988); *Harsch v. Eisenberg*, 956 F.2d 651, 662 (7th Cir. 1992) cert. denied 506 U.S. 818, 113 S.Ct. 61 (1992); *Ziaee v. Vest*, 916 F.2d 1204, 1210 (7th Cir. 1990)("judge may, but need not, consider the provable injury when exercising" discretion; remanding $49,120 award due to lack of reasoning in decision); *Kerr v. Vatterott & Co.*, 184 F.3d 938, 948 (8th Cir. 1999); *Advisory Comm. for Stock Ownership*

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B. **"Sufficiency" Complaints Are Not Required to Assess Penalties**

In *Villagomez v. AT&T Pension Plan*, 1991 WL 21178 (N.D. Ill. 1991), the court explained that administrators have the burden of knowing what documents should be produced to the claimant.

> Section 1132 recognizes that [administrators] have far greater power than plan beneficiaries. Thus, [Section 1132] shifts a substantial burden to those administrators. The beneficiary is not required to know the contents of the applicable plan, or keep copious records regarding it -- the plan and its administrators are required to provide copies of plans, and quickly, when the beneficiary requests them.

Id. at *1. This is a logical statement for several reasons. First, if Palmeri did not receive numerous Plan documents, how does Palmeri know what she did not receive? Second, not every plan includes the numerous plan documents associated with the Plan at issue in this matter, so how would Palmeri know exactly what additional documents to request? Third, the Eleventh Circuit follows the logic that administrators bear the burden of providing beneficiaries with comprehensive but understandable Plan requirements.

For example, because Plan administrators know more about Plan documents than the average Plan participant, ERISA requires Plan administrators to reduce certain Plan

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& Trust for Employees of Montana Bancsystem, Inc. v. Kuhn, 76 F.3d 384, 1996 WL 29259, 1996 U.S. App. LEXIS 2273 at 22-23 (9th Cir. 1996)(Exhibit 5); *Moothart v. Bell*, 21 F.3d 1499, 1506 (10th Cir. 1994).

requirements into an easily understandable summary plan description ("SPD"). See 29 U.S.C. § 1022; ERISA § 102; *McKnight v. Southern Life and Health Ins. Co.*, 758 F.2d 1566, fn. 2 (11th Cir. 1985). Under this principle, the Eleventh Circuit defers to summary plan descriptions ("SPD's") over other plan documents when determining the terms of a plan that apply to a participant. See *Curran v. Kemper Nat. Svcs.*, 2005 WL 894840, *4 (11th Cir. 2005)(Exhibit 6).

Thus, Coca-Cola's argument (offered without any authority, see Dkt 78, pp. 4, 7-8) that Palmeri had to **RE**-request Plan documents is unfounded and inaccurate. Therefore, Palmeri's evidence that Coca-Cola failed or refused to comply with her document request meets the criteria for this Court to award penalties.

III. Determining an ERISA Penalty Amount

Palmeri should be awarded the maximum penalty amount. Although prejudice is not required to award document penalties, prejudice can be considered when determining an award. In this matter, Coca-Cola's refusal to provide the requested documents dramatically prejudiced and substantively harmed Palmeri.

First, it must be noted that Palmeri's mentally depressed state of mind during the time of her appeal was not far removed from being on suicide watch and being hospitalized. (PRS 000123.) Second, the lone document provided to Palmeri's counsel

by Reliastar[23] (PRS 000207) did not include appeal procedures for the Plan.[24] Third, the Defendants to this matter each base their claim for summary judgment on Palmeri's failure to exhaust her pre-litigation remedies, but: (a) Palmeri did not have access to Coca-Cola's manufactured interpretation (combining multiple documents) of the Plan's appeal procedure; or (b) the April 12, 2001 appeal uphold letter sent exclusively to Palmeri did not state that she "must" submit to a second level of appeal.[25] Fourth, other decisions about this Plan show that Coca-Cola has for years reaped the benefits of not distributing a copy of its Plan to the participants. In *Oliver v. Coca-Cola Co.*, 397 F.Supp.2d 1327, 1330 (N.D. Ala. 2005), the court recognized that few Plan participants knew the actual terms of the Plan and how the LTD does not allow an offset for SSA benefits because no plan participant challenged on record the Plan's actual terms about

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[23] The Reliastar Defendants contend that the Plan's SPD is comprised of only one document: the Plan's SPD Booklet with 1997 Material Modifications. (Dkt 76, Lato Aff. ¶ 5 & Exh. 2.)

[24] The Eleventh Circuit considers a claimants' access to Plan documents highly relevant when considering the application of the exhaustion doctrine. See *Springer v. Wal-Mart Assoc. Group Health Plan*, 908 F.2d 897, 899 (11th Cir. 1990)("[a]lthough the Plan, to which Springer had access, provides for a mandatory internal appeals process prior to bringing any lawsuit, Springer did not seek internal administrative review"); *Perrino v. Southern Bell T&T*, 209 F.3d 1309, 1317 (11th Cir. 2000)(similar to *Mason*, the plan's grievance procedures led to arbitration, but the claimants, with access and knowledge about the grievance procedure, directly filed suit).

[25] See (PRS 000209), which states: "If you disagree with this determination, in whole or in part, you may file a second written request for a review of your claim." This permissive statement does not convey a Plan requirement.

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offsetting. This activity fits within the pattern of conscious choices to decline to disclose and the recalcitrance in providing documents that claimants are entitled to under ERISA. Such conduct was severely penalized by the court in *Gorini v. AMP Inc.*, 94 Fed. Appx. 913 (3rd Cir. 2004) (affirming an award totaling $160,780 and stating that the claimant does not need to negate a windfall because the burden in on the insurer)(Exhibit 7).

Moreover, courts around the nation award the maximum penalty amount for ERISA disclosure violations.[26] The facts and circumstances leading those courts to award maximum penalties are similar to the facts and circumstances in this matter.

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[26] *Law v. Ernst & Young*, 956 F.2d 364, 375 (1st Cir. 1992)(affirming penalty of $100 per day); *Gorini*, 94 Fed. Appx. 913 (3rd Cir. 2004)(affirming an award totaling $160,780)(Exhibit 7); *Daniels v. Thomas & Betts Corp.*, 263 F.3d 66, 79-80 (3rd Cir. 2001)(affirming $100 per day); *Kollman v. Hewitt Assoc.*, 2005 WL 2746659 (E.D. Pa. 2005)($100 per day); *Freitag v. Pan Am. World Airways, Inc.*, 702 F.Supp. 128, 132 (E.D. Vir. 1988)($100 per day); *Tait v. Barbknecht & Tait Profit Sharing Plan*, 997 F.Supp. 763 (N.D. Tex. 1998)($100 per day); *Gatlin v. Nat. Healthcare Corp.*, 16 Fed. Appx. 283 (6th Cir. 2001)(Exhibit 8)($100 per day); *Krawczyk v. Harnischfeger Corp.*, 869 F.Supp. 613, 632 (E.D. Wis. 1994)($100 per day – totaling $2,200) affirmed 41 F.3d 276 (7th Cir. 1994); *Kreuger Intl v. Blank*, 225 F.3d 806, 811 (7th Cir. 2000)(affirming $100 per day); *Villagomez v. AT&T Pension Plan*, 1991 WL 21178 (N.D. Ill. 1991)($100 per day); *Brown v. Aventis Pharma.*, 342 F.3d 822, 825-826 (8th Cir. 2003)(affirming maximum penalty); *Koegan v. Towers, Perrin, Forster & Crosby*, 2003 WL 21058167 (D. Minn. 2003)($100 per day); *Conger v. Univ. Marketing, Inc.*, 2000 WL 1818521 (D. Or. 2000)(Exhibit 9)($100 per day).

See also *Pagovich v. Moskowitz*, 865 F.Supp. 130, 137-138 (S.D.N.Y. 1994)($75 per day); *Boyadjian v. CIGNA Co.*, 973 F.Supp. 500 (D. N.J. 1997)($75 per day – totaling $57,975 & listing decisions from around the country); *Lampkins v. Golden*, 104 F.3d 361 (6th Cir. 1996)($75 per day).

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In *Krawczyk*, the court awarded maximum penalties because, without access to all the plan documents, the claimant was forced to make an irrevocable decision affecting the remainder of his life. *Krawczyk*, 869 F.Supp. at 631-632. *Here*, Coca-Cola and Reliastar claim that Palmeri made an irrevocable decision that affected the totality of her benefits claim – that Palmeri failed to exhaust her appeal procedures.

Coca-Cola's rationale that the Plan (based upon merged provisions from multiple documents) allows more than one level of appeal is exclusively derived from the Plan and its amendments (Dkt 77, pp. 6-7), not the Plan's SPD or any part of the single document sent to Palmeri by Reliastar. No party to this case claims that Palmeri had access to the Plan when she was required to make a decision about submitting to a second round appeal. Thus, Palmeri is similar to *Krawczyk* in that both claimants were required to make long-term decisions about their claim without access to incredibly valuable information provided by the Plan.

Furthermore, the Plan's SPD Administrative Booklet (which Palmeri did not receive until litigation ensured) leads claimants to make irrevocable decisions that affect the remainder of their benefits because the Plan's SPD only requires one level of appeal. Plainly and succinctly, the Plan's SPD states that the decision made after the first appeal is final:

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> If your claim is denied, **you're entitled to a review** of the denial. Within 60 days after receiving the denial, you or your authorized representative may:
>
> - submit a written request to the claims review fiduciary for a review of the denial
> - look at relevant documents, and
> - submit issues and comments in writing
>
> Normally, within 60 days after your request for review is received (120 days, if you receive a written notice that extra time is needed to make a final decision), **you will be notified in writing of the decision on the review** and the specific reasons for the decision. **The decision will be final and binding on all parties.**

(Dkt 51, Exh. 1-I, pg. 87; Dkt 76, Lato Aff., Exh. 3, pg. 14 (Coca-Cola 000087).) According to Reliastar, Coca-Cola employees covered by the Plan received this portion of the SPD,[27] and it explained the legal rights and other legal and technical information regarding the Plan. (Dkt 76, Lato Aff. ¶ 6.) And, both Reliastar and Coca-Cola confirm

[27] In *Tait*, the court found that ERISA does not contain an "exception permitting an administrator to withhold documents already in the possession of the participant requesting them." *Tait*, 997 F.Supp. at 773. Moreover, although the administrator claimed that the colorable plan participant requesting documents was not in fact a plan participant, the court determined that administrator's failure to provide documents on this basis was not grounded in a good faith justification. *Id.* Under these facts, the court reasoned that Congress intended to apply a "financial stick" to dilatory administrators and a "financial carrot" for diligent participants, and the court awarded the maximum penalty. *Id.*

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that this Administrative Booklet was in effect at all times relevant to Palmeri's claim. (Dkt 56 ¶ 78; Dkt 76, Lato Aff. ¶ 6.)

Thus, just like the claimant in *Krawczyk*, Palmeri made a decision that affected the totality of her benefit without the Plan documents that confusingly direct her to proceed in a different manner, and under these circumstances, a maximum penalty award is merited.

In another case, *Daniels*, the court awarded maximum penalties because the administrator refused to respond in any way over a very extended period of time and offered no explanation whatsoever for that refusal. *Daniels*, 263 F.3d at 79.[28] These facts are almost identical to the facts proven in this matter. *Here*, the Coca-Cola Defendants refused to respond in any way over a very extended period of time, and Coca-Cola offers no explanation for that refusal. Although Coca-Cola claims that it "oversaw a cooperative dialogue with Plaintiff's attorney," this claim actually confirms that Coca-Cola either intentionally or with gross negligence failed to provide Palmeri with the

[28] See also *Blank*, 225 F.3d at 811 (affirming $100 day award because "[administrator] failed to provide any explanation for the delay"); *Freitag*, 702 F.Supp. at 132 (since the requests for plan documents about the benefits of an airline going out of business were voluminous, the court found no bad faith by Pan Am. as the administrator, but the court awarded a maximum penalty because the documents should have been provided).

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complete Plan documents that she requested.[29] Thus, a maximum penalty should be imposed.

In *Kollman*, the participant requested documents on two occasions, and the administrator did not provide the requested documents until after litigation ensued. *Kollman*, 2005 WL 2746659 at *7. Recognizing that the documents withheld are the "most basic and informative documents subject to ERISA disclosure requirements," the court found that the administrator acted intentionally because ERISA's requirements mandate that administrators have procedures in place to comply with document requests. *Id*. The court also found that withholding documents prejudiced the claimant because he could not assess the merits of his claim without them. *Id.* Thus, the court assessed maximum penalties. *Id.*

<u>*Here*</u>, as discussed above, Palmeri seeks penalties for Coca-Cola withholding the most basic documents subject to ERISA disclosure; Palmeri seeks penalties because she did not have access to the Plan, which Defendants rely so heavily upon to defend this claim; and Palmeri seeks penalties because Coca-Cola did not provide documents until after litigation ensued. Thus, Palmeri was prejudiced by Coca-Cola's silence and refusal

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[29] Without questioning the integrity of defense counsel, Plaintiff is unable to confirm the truthfulness of Coca-Cola's statement that it "oversaw a cooperative dialogue with Plaintiff's attorney" because Plaintiff's counsel did not hear from any Coca-Cola employee or attorney until after litigation began.

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to respond, and just as maximum penalties were awarded in *Kollman* under these same circumstances, this Court should award maximum penalties.

CONCLUSION

Palmeri proved the necessary elements for a statutory penalty claim: (i) Palmeri requested Plan documents from Coca-Cola in writing; (ii) Coca-Cola received this request; and (iii) Coca-Cola failed or refused to furnish the requested information within 30 days. Palmeri also proved that Coca-Cola's decision to "oversee" Reliastar providing Palmeri with a partial SPD and Coca-Cola's decision not to provide the complete Plan documents (without any justification for doing so) illustrates grounds for imposing a maximum penalty. Therefore, this Court should DENY Coca-Cola's Motion to avoid statutory penalties (Dkt 78) and GRANT Palmeri's Motion for statutory penalties (Dkt 80).

Dated:

/s/ Pamela I. Atkins
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PLEADING EXAMPLE THREE—sections *concerning 502(c)* ***of***

ELEVENTH CIRCUIT **APPELLEE BRIEF**

and APPELLEE REPLY

(due to numerous issues on appeal, 502(c) *briefing was* **minimal)**

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DOCKET NO.: 05-11869-JJ and 05-12166-JJ

In The
United States Court of Appeals
For The Eleventh Circuit

EILEEN HAMALL-DESAI,	)	
	)	Appeal from the United
Plaintiff-Appellee-Cross Appellant	)	States District Court for
	)	the Northern District of
v.	)	Georgia, Atlanta Division
	)	
FORTIS BENEFITS INSURANCE	)	
COMPANY	)	No. 1:03-CV-1529
	)	
Defendant-Appellant-Cross Appellee	)	
	)	Honorable Beverly M. Martin
	)	Judge Presiding

RESPONSE BY APPELLEE & BRIEF OF CROSS-APPELLANT
EILEEN HAMALL-DESAI

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ORAL ARGUMENT REQUESTED

f. Fortis withheld documents, despite Desai's request for a full-and-fair review and copies of all documents, records and other information pertinent to her claim.

Pursuant to 29 U.S.C. § 1133, the DOL regulations require administrators to provide copies of "pertinent" documents upon a claimant's request.

> (g) Review Procedure
> 1) Every plan shall establish … a procedure by which a claimant … has a reasonable opportunity to appeal a denied claim … and under which a full and fair review of the claim and its denial may be obtained. Every such procedure shall include … provisions that a claimant … may:
> (i) Request a review upon written application to the plan;
> (ii) Review pertinent documents; and
> (iii) Submit issues and comments in writing.

29 C.F.R. § 2560.503-1(g)(2000); see also preamble defining "pertinent" documents as "all plan documents and other papers which affect the claim…" 42 FR 27426;[30] and, plan participants have the right "review pertinent documents relating to the denial…" 42 FR 27427. Therefore, all papers affecting the claim are pertinent documents, including documents on: retaining reviewers, performing analysis, reaching conclusions, and weighing evidence.

[30] In adopting new DOL regulations, DOL extensively discussed disclosure (65 FR 70246, pp. 12-17), so new regulations state that policy/procedure manuals must be disclosed upon request. 29 C.F.R. 2560.503-1(h)(2) & (m)(8), (i)(5) & (j)(3-5)(2002).

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The purpose of 29 C.F.R. § 2560.503-1 is "to assure the fairness of a plan's claim review procedure." *Dept. of Labor* amicus brief (Exhibit 9, pg. 9; Dkt 46, Exh. 8.) Administrators must produce all documents relied upon in making the final benefit determination (*id.*), and administrators must give claimants the right to review evidence used to deny a claim with reasonable time to address it. See *CWA/IU Pension Plan v. Weinstein*, 107 F.3d 139, 143-144 (2d Cir. 1997); *Grossmuller v. Int'l Union of UAW*, 715 F.2d 853, 858-59 (3rd Cir. 1983); *Harte v. Bethlehem Steele*, 214 F.3d 446, 451 (3rd Cir. 2000); *Ellis v. Metropolitan Life*, 126 F.3d 228, 238 (4th Cir. 1997); *Vega v. Nat. Life. Ins.*, 188 F.3d 287, 299 (5th Cir. 1999)(en banc); *Krohn v. Huron Mem. Hosp.*, 173 F.3d 542, 547-549 (6th Cir. 1999); *Wilczynski v. Lumbermens Mut. Cas. Co.*, 93 F.3d 397, 402 n. 3 (7th Cir. 1996); *Shea v. Esensten*, 107 F.3d 625, 629 (8th Cir.) cert. denied, 118 S.Ct. 297 (1997); *Friedrich v. Intel Corp.*, 181 F.3d 1105, 1111 (9th Cir. 1999); and *Eddy v. Colonial Life Ins. Co. of Amer.*, 287 App. D.C. 76, 919 F.2d 747 (D.C. Cir. 1990).

Here, Fortis received Desai's written 29 C.F.R. § 2560.503-1 requests for pertinent documents on January 21st, March 16th, April 21st, May 16th. (Dkt 46, 52 SUMF ¶ 55.) Acting with self-interest, Fortis ignored these written requests and failed to provide Desai

with voluminous documents,[31] including the medical opinions/reports Fortis generated to support its Final Denial. (Dkt 46, 52 SUMF ¶ 72.)

g. Fortis held the record open for Fortis' exclusive benefit

Accumulating undisclosed documents despite the claimant's request is not participating in ERISA's full-and-fair review. See *Abram v. Cargill*, 395 F.3d 882 (8th Cir. 2005)(without access to report relied upon by plan, claimant could not meaningfully participate in appeal process; "gamesmanship" inconsistent with ERISA full-and-fair review); *Kosiba v. Merck*, 384 F.3d 58 (3rd Cir. 2004)(procedural irregularity showed self-interest); *Killian v. Healthsource Prov.*, 152 F.3d 514, 520 (6th Cir. 1998)(curtailing consideration participants evidence while accumulating information to bolster denial showed self-interest).

Here, Fortis contends it rightfully withheld medical records detrimental to Desai because it ceased the possibility of a never-ending cycle. (Appellant Brief, pg. 47.) However, ERISA's full and fair review regulations require meaningful dialogue, *Dept. of Labor* amicus brief (Exhibit 9 pp. 9-11)("[t]here can hardly be meaningful dialogue between the claimant and the Plan administrator if evidence is revealed only after a final decision"). *Abram*, 395 F.3d at 886. Thus, Fortis acted with self-interest.

[31] (Dkt 46, 52 SUMF ¶¶ 60-62 - at a minimum: (Neubauer report), 63-65 (DeFilippis report), 66-68 (Porter report), 69-71 (Neulicht report), 75(c) (Korotkin report).)

Therefore, Fortis' wrong denial was also unreasonable and self-serving.

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7. Fortis Wrongfully Withheld Requested Documents, Statutory Penalties

ERISA 502(c); 29 U.S.C. § 1132(c) establishes that "Any Administrator" who fails to comply with participant's written request for documents is subject to penalties, and each violation is a separate violation. Fortis opposes fines by emphasizing strict interpretation of 29 U.S.C. § 1002(16)(A)'s term "Administrator." (Appellant Brief, pp. 43-44.) Hence, Fortis begs this Court to alter well-established Eleventh Circuit and First Circuit precedent.

The *Law v. Ernst & Young*, 956 F.2d 364, 373 (1st Cir. 1992) court recognized *de facto* plan administrators because: "To hold that the entity not named as administrator in the plan documents may not be held liable under § 1132(c), even though it actually controls the dissemination of plan information, would cut off the remedy Congress intended to create." *Id.* at 373. The Eleventh Circuit adopted the *de facto* plan administrator doctrine. *Rosen v. TRW*, 979 F.2d 191, 193-194 (11th Cir. 1992) citing *Law* and reasoning that Congress's intended remedies against administrators withholding information. And, this Court later remarked: "The key question on this issue is whether [the alleged *de facto* plan administrator] had sufficient decisional control over the claim

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process that would qualify it as a plan administrator under *Rosen*." *Hamilton v. Allen Bradley Co.*, 244 F.3d 819, 824 (11th Cir. 2001). The Eleventh Circuit's line of reasoning is consistent. See *Garren v. John Hancock*, 114 F.3d 186, 187 (11th Cir. 1997)(proper defendant in ERISA action is party controlling administration of plan citing *Daniel v. Eaton Corp.*, 839 F.2d 263, 266 (6th Cir.) cert denied 488 U.S. 826 (1988)). Thus, because Fortis controlled the Plan's administration and because Fortis withheld documents, Fortis is subject to 1132(c) penalties. *Cheal v. LINA*, 330 F. Supp.2d 1347, 1356-58 (N.D. Ga. 2004)(insurer acting as administrator, claims fiduciary may be subject to 1132(c) penalties).

a. Fortis Controlled the Administration of the Plan

The Plan states: "[Fortis] has the sole discretionary authority to determine eligibility for participation or benefits and to interpret the terms of the [Plan]. All determinations made by [Fortis] are conclusive and binding on all parties." (FBIC1002.) In contrast, *Garren* held that John Hancock was not the plan administrator because the plan granted exclusive responsibility and complete discretionary authority to GP - employer. Thus, under the Circuit's primary test for determining the plan administrator, Fortis was the *de facto* plan administrator.

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Further, indisputable facts show Fortis had sufficient decisional control over the claim process. Only Fortis interacted with Desai about her LTD claim. Fortis made all decisions relating to Desai's claim. Therefore, Fortis controlled the Plan's administration.

b. Fortis Withheld Documents Desai Requested

As discussed above (*infra.* § E. 5. f), Fortis withheld documents, and Fortis afforded Desai *no* opportunity to evaluate/rebut withheld reports before Desai exhausted her administrative remedies. Moreover, Fortis kept the record open to Desai's detriment (*infra.* § E. 5. g.). "Lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA."[32] Fortis' ongoing communications with Desai throughout 2000 neared the boundary of lying because Fortis built a case to rebut the clear support for Desai's LTD Claim without informing Desai or including her in the process. Such intentional deceit and stalwart refusal to participate in an ERISA full-and-fair review merits fully imposed statutory penalties.

c. Imposing Penalties

While the court correctly fined Fortis for withholding documents (Dkt 81, pp. 61-67; Dkt 94, pg. 6), the district court abused its discretion in awarding only $6,100 in penalties. The district court acknowledged 29 U.S.C. § 1132(c)'s requirement that each

[32] *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996).

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violation is separate violation (Dkt 81, pg. 66), but it limited penalties in three respects:

1) It only penalized Fortis for withholding *one* document, not voluminous documents actually withheld (Dkt 46, 52 SUMF ¶ 77 & Exh. 5, at least *20* documents);
2) It only penalized Fortis for withholding documents for *61 days* (April 28th - June 29th), but Fortis withheld documents for *1,108 days* (March 23, 2000 (Dkt 46, Exh. 5, pg. FBIC0298) to August 7, 2003 (Dkt 82, Exh. 2));
3) It only penalized Fortis at *$100 / day*, not *$110 / day*, see 29 C.F.R. § 2575.502c-1.

In *Gorini v. AMP, Inc.*, 94 Fed. Appx. 913 (3rd Cir. 2004) (Exhibit 10) the Third Circuit affirmed a $160,780 ERISA 502(c) award based on failing to provide four plan documents. Here, Fortis failed to provide numerous documents as valuable, if not more valuable, than certain plan documents; Fortis failed to provide detrimental medical reports and other documents showing how Fortis's secret actions against Desai. Withholding plan documents and withholding documents affecting the claim's outcome deny an ERISA full-and-fair review. Therefore, Fortis should at least be fined $121,880, imposing penalties at $110 / day for 1,108 days on *one* document, not 20.

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DOCKET NO.: 05-11869-JJ and 05-12166-JJ

In The
United States Court of Appeals
For The Eleventh Circuit

EILEEN HAMALL-DESAI,	)	
	)	Appeal from the United
Plaintiff-Appellee-Cross Appellant	)	States District Court for
	)	the Northern District of
v.	)	Georgia, Atlanta Division
	)	
FORTIS BENEFITS INSURANCE	)	
COMPANY	)	No. 1:03-CV-1529
	)	
Defendant-Appellant-Cross Appellee	)	
	)	Honorable Beverly M. Martin
	)	Judge Presiding

REPY BY APPELLEE & CROSS-APPELLANT
EILEEN HAMALL-DESAI

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(C) FACTS EVIDENCING FORTIS WITHHOLDING DOCUMENTS

Although Desai submitted several written requests that all pertinent information be provided on a continuing basis - January 20, 2000; March 16, 2000; April 21, 2000; May 16, 2000 (Dkt 46, 52 ¶ 55), Fortis refused to comply. Around April 27th, Fortis began buttressing its claim file and withholding documents, e.g.:

1. Fortis' Claim Manual and Procedure Bulletins under which the LTD Policy insuring the Plan was administered. (Dkt 99, pp. 20-21; Dkt 104, pg. 14, 98.)
2. McGlaughlin's April 27th referral to committee (FBIC0188-190.)[33]
3. April 28th Committee Minutes. (FBIC0187.)
4. Neubauer's April 28th MEMO. (FBIC0149.)
5. Neubauer's April 28th review. (FBIC0183-86.)
6. McGlaughlin's April 28th re-referral to Hendler. (FBIC0159.)
7. McGlaughlin's May 8th requests to Network Medical Review ("NMR"). (FBIC0146-148.)
8. McGlaughlin's May 8th request to Neulicht for review. (FBIC0140-141.)
9. McGlaughlin's May 8th claim file recommendation. (FBIC0150.)

[33] This referral contained inaccurate information about Desai delivering a baby since onset. (FBIC0189.) Desai delivered a child in September 2000.

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10. McGlaughlin's May 15th re-referral of the claim to Turner. (FBIC0124.)

11. Jackson's May 24th MEMO to McGlaughlin. (FBIC0118.)

12. Jackson's May 24th letter to Korotkin. (FBIC0114.)

13. Jones's May 24th review. (FBIC0113.)

14. Porter's May 31st review. (FBIC0048-56.)

15. June 1st surveillance report. (FBIC0568-572.)

16. June 1st NMR invoice. (FBIC0058.)

17. DeFilippis's June 5th review. (FBIC0012-16.)

18. June 6th committee minutes. (FBIC0059.)

19. Neulicht's June 12th review. (FBIC0038-47.)

20. June 20th committee minutes. (FBIC0034.)

21. McGlauglin's June 28th memo to committee about SSA award (FBIC0009), but no record indicates a committee meeting to review Desai's SSA award discussed in McGlaughlin's memo. (FBIC0009.)

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3. Withholding Documents & Reduced Statutory Penalties

Fortis withheld more than 20 documents for over 1,000 days that detrimentally affected Desai. *Infra.* § 1. (C). The district court abused its discretion by only awarding statutory penalties for withholding one document for 61 days and doing so at a reduced rate. The real abuse of discretion by the court was not placing any penalty tied to the final production of the documents withheld. Instead the court, instituted the penalty only to the date of the final denial by Fortis, not to the actual receipt of any of the documents by Desai. This sends the wrong message to claim administrators. Fortis claims it exercised good faith in withholding documents. (Fortis Response Brief, pp. 21-24, 28.) Fortis is wrong, and the court should not dramatically reduce the ERISA penalty amount owed by Fortis from approximately $2 million[34] to $6,100.

Section 2560.503-1(g)(1)(ii)(2000) required Fortis to allow Desai an opportunity for reviewing pertinent documents. "Pertinent documents" under 42 Fed. Reg. 27426 are "all plan documents and other papers which affect the claim." Fortis misleadingly cites three cases[35] for the proposition that Fortis was only required to provide the documents it relied upon to support its First Denial. (Fortis Response Brief, pp. 22-23.)

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[34] 20 documents; $110 / day penalty; 1,000 days: 20 x $110 = $2,200; $2,200 x 1,000 = $2,200,000).

[35] *Grossmuller v. Intl. Union*, 715 F.2d 853 (3rd Cir. 1983); *Crocco v. Xerox Corp.*, 956 F.Supp. 129 (D. Conn. 1997); *Ellis v. MetLife*, 126 F.3d 228 (4th Cir. 1997).

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While the court in *Grossmuller* discussed the importance of claimant's "knowing what evidence the decision maker *relied upon*" - *Grossmuller* 715 F.2d at 858 fn. 5, the court did not have occasion to consider facts similar to this case.[36] So, Fortis' attempt to twist two words in a *Grossmuller* footnote - "relied upon" - into authority for withholding documents in good faith is misleading.

In *Crocco*, the central issue was whether an administrator is required to review all documents pertinent to a claim - *Crocco* 956 F.Supp. at 138-42. While Fortis failed to sufficiently review evidence supporting Desai's claim, *Crocco* did not authorize administrators to withhold evidence gathered during an appeal.

In *Ellis*, the court required administrators to inform claimants of their entitlement to review "pertinent documents upon which the initial denial decision was predicated." *Ellis* 126 F.3d at 237. However, the court refined its holding to the "initial denial" because it was not clear whether the claimant ever submitted a request to review pertinent documents on appeal. Thus, *Ellis* did not authorize administrators to withhold evidence gathered during an appeal.

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[36] *Grossmuller* 715 F.2d at 855-56 (administrator obtained tip claimant "working" while on disability; denied claim relying on private investigator oral and video testimony; denied claimant opportunity to present oral testimony). *Grossmuller* does not indicate the claimant expressly requested documents, and *Grossmuller* did not review facts where administrator withheld documents.

This Court should not condone fiduciary bias and misconduct. Just as courts instruct parties to engage in broad discovery during litigation - *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S.Ct. 385 (1947) & (Dkt 29, pg. 5), this Court should instruct administrators and claimants to engage in a full-and-fair review process. Without such the very foundation of ERISA and the reasons supporting a system without bad faith and consequential damages ceases to exist; claimants are refused an opportunity to review pertinent/relevant information in time to respond, administrators are able to issue a final denial based upon grounds/reviews revealed to the claimant for the first time after the final appeal denial, and **fiduciaries** are allowed to act in secret. See *Abram v. Cargill*, 395 F.3d 882 (8th Cir. 2005); *Kosiba* 384 F.3d 58; *Killian v. Healthsource Prov.*, 152 F.3d 514, 520 (6th Cir. 1998).[37]

Therefore, this Court should amend the penalty award to reflect an amount aligned with Congress' parameters. Desai's Response Brief (pp. 57-58) suggested a penalty of $121,880: withholding one document for 1,108 days at the authorized rate of $110/day. However, this Court may want to impose fines as Congress intended, imposing a penalty every day each document was withheld. See 29 U.S.C. § 1132(c).

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[37] See also *Russo v. Hartford Life*, 2002 WL 32138296 (S.D. Cal. 2002)(Exhibit 3); *Neiheisel* 2005 WL 1077593.

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EXAMPLE FOUR— correspondence concerning 502(c) and dispute between Employer/Plan Administrator & Insurer/Claim Administrator/De Facto Plan Administrator

REDACTED

I am writing to you in response to Mr. X=s letter dated July 31, 2002 and our subsequent telephone discussions concerning the following three issues: (1) Mr. B=s eligibility for other employee welfare benefit plans as alleged in count I, paragraph 60, (2) Q=s liability for failure to provide documents to Mr. B as alleged in count III of Plaintiff=s complaint, and (3) production of documents under which the Plan is operated or administered.

First, based on your representation and the representations of Q that Mr. B would not have been entitled to any other employee benefits (including continued non-cobra health insurance) as executive management had his long term disability benefits not been denied, Mr. B will not seek any such relief against Q. As a practical matter, I do not believe that this necessitates any amendment to the complaint at this time, including an amendment striking paragraph 60, since the paragraph just requests that to the extent Mr. B would have been entitled to such benefits that they be provided.

If this were the only basis for maintaining Q as a Defendant at this time, I would consent to a dismissal without prejudice as to Q. However, Q is the named plan administrator and maybe the only appropriate party for certain types of relief that the Court may in its discretion grant, and in addition, is potentially liable for the failure to provide documents as addressed in the following paragraphs. As we previously discussed, I would consider dismissing Q as a defendant, if CNA would simultaneously consent that they were the appropriate party to provide documents and that they were the plan administrator for all practical purposes. Unfortunately but understandably, it appears that it is the position of Mr. G, CNA=s counsel, that CNA cannot concede these points and might very well want to assert that Q as opposed to CNA was responsible for providing plan documents to Mr. B.

Second, with regard the specific contention that Count 3 of Plaintiff=s Complaint against Q contains a Afatal defect@ and that Q should be dismissed as a defendant in the case, I cannot agree. Mr. X=s letter of July 31, 2002 states that Mr. B=s March 16, 2001, letter in which Q was carbon copied placed no ERISA obligations on your client as plan administrator to provide Mr. B with documents that were requested therein. We disagree.

A request for documents under 29 U.S.C. ' 1024(b) necessitates a response from the plan administrator when it gives the administrator clear notice of what information the beneficiary desires. <u>Moothart v. Bell</u> 21 F.3d 1499, 1503 (10th Cir. 1994); <u>Curry v. Contract</u>

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Fabricators Profit Sharing Plan, 744 F.Supp. 1061 1066 (M.D. Ala. 1988) *aff=d,* 891 F.2d 842 (11th Cir. 1990). Clearly, Mr. B=s March 16 2001, letter provided Q with the requisite notice in order to necessitate a response. Specifically, Mr. B=s letter requested the name and address of the plan administrator, a copy of the summary plan description and policies, contracts or other relevant documents concerning Mr. B=s claim. The information Mr. B requested was clearly information that would Agrab@ the attention of a plan administrator as a request that would best be responded to by a plan administrator.

Additionally, I would like to direct your attention to Lidoshore v. Health Fund 917 et. al., 994 F.Supp. 229 (S.D.N.Y. 1998) which I mentioned during our phone conversations. (A copy is attached hereto). In Lidoshore, a plan participant sent a written request for an insurance contract to the subject Plan=s claims administrator. Id. at 9. The participant carbon copied the named plan administrator in her letter requesting the contract. Id. The court concluded that the plan administrator violated 29 U.S.C. ' 1024 by failing to respond to the participant=s request for the contract because the defendant plan administrator was on notice of the participant=s request for the contract by virtue of the fact that they had been carbon copied on letter the participant sent to the claims administrator. Id. Additionally, the court found that the plan administrator should have determined whether the claims administrator provided the participant with the requested information. Id. In the instant case, Q, the named plan administrator, failed to respond to Mr. B=s request for information when carbon copied on a request letter that was sent to a claims administrator. Q also failed to determine whether or not Continental Casualty Company (CAN), the claims administrator, provided Mr. B with the information he requested. It is clear that Q=s conduct violated 29 U.S.C. ' 1024 and that Q may be subject to ERISA=s statutory penalties of $110 day plus attorney=s fees for the above stated violations.

There is no dispute with regard to whether or not Q and CNA received Mr. B=s letter dated March 16, 2001. In addition, the letter specifically enumerated the documents Mr. B was seeking. Since this is the case, Q=s ERISA obligations as plan administrator provided that Q should have promptly responded to Mr. B=s request. I would be happy to discuss settlement of the claim for failure to provide documents to Mr. B, and the possible dismissal of Q as a defendant. Of course, we also would be open to discussions with CNA on settlement of the claim in its entirety.

> After reviewing my letter and in light of the above cited case law, I hope you will soften your position and understand that Mr. B=s 1132(c) claim against Q has merit and is not subject to dismissal or rule 11 sanctions. Please let me know if your clients are interested in settlement of the disputed issues.
>
> Finally, as discussed at the rule 26F conference the documents requested by Mr. B in the March 16, 2001 letter have yet to be provided by any of the

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defendants in the litigation. These documents include those documents under which the plan at issue in this case is established or operated or administered. I realize that the Judge issued an order suspending all discovery until such time as the parties filed cross motions on the standard of review; however, I cannot argue what the standard of review should be without appropriate plan documents. Furthermore, I think we should have some agreement among the parties as to what constitute the documents under which the plan is established, operated or administered. Based on the documents in my possession at the present time, which include only the CNA policy and the SPD, I am taking the position that the review is de novo because the SPD should not be entitled to expand the administrator=s rights as set forth in Plaintiff=s attachment to the preliminary planning report. So far, Q and CNA have both indicated through counsel that the SPD and the policy are the only plan documents. I am unclear if this is still defendants= position. Furthermore, neither defendant has been able to identify any discretionary language in the policy (with the exception of an amendment made after Mr. B=s date of disability) or the plan and only have only pointed to language in the SPD which is suppose to be a summary of the terms of the plan. It was my understanding that defendants were going to provide the documents requested by Mr. B following the rule 26F conference but did not do so in light of the Judge=s order concerning discovery.

At this time, I suggest that the parties enter into a consent motion to (1) file initial disclosures, (2) provide the documents set forth in the initial disclosures including the plan, the policy, the SPD, and any other documents under which the plan was established, operated or administered, and (3) extend the time for filing the cross motions on the standard of review issues to thirty days from receipt of the documents to be provided.

Please contact me to discuss these issues. I have left each of you messages concerning the same. Thank you for your time and I look forward to your responses.

Very Truly Yours,

PAMELA I. ATKINS
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********************END OF MATERIALS

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