ORAL ARGUMENT SCHEDULED FOR FEBRUARY 22, 2020 PURSUANT TO RULE 34 OF THIS COURT'S RULES

No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

JEAN LUC PICARD,

Plaintiff-Appellant,

v.

ENTERPRISE PERMANENTE, ET AL.,

Defendants-Cross Appellants.

On Appeal from the United States District Court
for the District of Columbia, Civil Action No. 19-cv-1701-BC
Honorable Judge Brian Cooper

BRIEF OF PLAINTIFF-APPELLANT JEAN LUC PICARD

TEAM 1
/s/ TEAM 1

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STATEMENT OF JURISDICTION

On October 1, 2018, Plaintiff-Appellant Captain Jean Luc Picard ("Picard"), the widower of Dr. Beverly Crusher ("Crusher"), as her estate's administrator and beneficiary, brought claims under sections 502(a)(1)(B) and 502(a)(3) of the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, to recover accidental death benefits under an ERISA-governed plan. 29 U.S.C. §§ 1132(a)(1)(B), (a)(3); Op. & Order 1 ("Op."). The United States District Court for the District of Columbia ("District Court") had subject-matter jurisdiction pursuant to 29 U.S.C. § 1132(a)(1)(B) and 28 U.S.C. § 1331.

On November 9, 2019, the District Court denied Picard's motion for summary judgment and granted summary judgment for Defendants-Cross Appellants ("ERISA Defendants"): Enterprise Permanente ("Enterprise"); Enterprise Permanente Life Insurance Plan ("the Plan"); Borg Life Assurance Co. of Baltimore, Maryland ("Borg" or "Plan Administrator"). Op. 11. The respective parties filed timely cross appeals in the United States Court of Appeals for the Thirteenth Circuit, which has jurisdiction over the appeal of the District Court's final order pursuant to 28 U.S.C. § 1291. *See* Op. 1. (R. 1-6.)

STATEMENT OF ISSUES

I. Under ERISA and contract law, did a widower and beneficiary to his wife's life insurance policy – containing an arbitration clause – appropriately select the

judicial forum to resolve a contractual dispute when his late wife never signed the life insurance policy and was enrolled automatically as a participant after successfully completing 90 days as a full-time employee?

II. Under ERISA law, was it unreasonable for a plan administrator to find that an on-call cardiologist was engaged in the "commission of a crime" – precluding recovery for accidental death benefits under a plan – when the cardiologist died in a car accident after responding to urgent text messages sent by her employer with life-saving instructions for treating a patient in cardiac arrest?

STATEMENT OF THE CASE

On December 31, 2017 at 11:38 PM, Crusher, Enterprise's on-call cardiologist,[1] received a text message from her employer indicating a patient required her attention. (R. 3.) Crusher responded that she would proceed to the hospital "ASAP." *Id*. At 12:09 AM, while driving, she received two additional text messages from Enterprise,[2] the first stressing that it was "awaiting physician instruction[]" for a patient in cardiac arrest and the second asking her whereabouts. (R. 4.) She responded at 12:10 AM, "[a]pprox. 15 minutes out," and implored the staff to "[p]erform CPR." *Id*. At 12:11 AM, Crusher died in a car accident, which the District of Columbia's Metropolitan Police Department ("MPD") determined

[1] Crusher was Enterprise's resident cardiologist since 2010. (R. 1.)
[2] Enterprise connected to Crusher's "flip" phone via MyText technology. *Id.*

was caused by "texting while driving, in violation of" the District of Columbia Official Code ("D.C. Code") and resulted in a $100 fine. (R. 4-5.)

Crusher was a participant in a welfare benefit plan that entitled her beneficiary, Picard, to recover "upon [her] accidental death in the line of duty." *See* Op. 2. (R. 1-3.) Nevertheless, his claim was denied by Borg, the Plan's funder and fiduciary,[3] which determined that her violation of D.C. Code § 50-1731.04 ("Distracted Driving Law") constituted the "commission of a crime," and thus precluded him from recovery under Section 2.2 ("Crime Exclusion")[4] of the group term life policy, Borg Life Insurance Policy ("Policy"). (R. 1, 5.) Though Borg, in its Claims Guidelines, informs Participants of its Crime Exclusion, it "has not always regarded violations of traffic laws as constituting 'commission of a crime.'" (R. 3.) Picard appealed pursuant to the Plan's internal appeals process. (R. 5.)

On September 1, 2018, Borg upheld its determination, but informed Picard that he "exhausted the internal appeals process" and that he "may initiate arbitration" to dispute the denial of benefits, which neither he nor ERISA Defendants subsequently pursued; Section 8.2 of the Policy ("Section 8.2") provides the arbitration clause and is "noted" in the Summary Plan Description. Op. 4, 6. (R. 2-

[3] The District Court determined that Borg is a fiduciary of the Plan. Op. 2. Therefore, both Borg and Enterprise are considered "Plan Administrators."

[4] Section 2.2 provides that the accidental death benefit is subject to an exclusion based on a loss "caused by, contributed to by, or resulting from an insured's attempt to commit or commission of a crime." Op. 2 (quoting Policy § 2.2).

3, 5.)[5] At the time, the Plan only pursued mandatory arbitration "if all parties consented to it[,]" but since 2019, the Plan "strictly enforced the arbitration provision in Section 8.2 . . . ." (R. 3.) Crusher was "automatically enrolled" in the Plan, and – like all participants – she never signed or negotiated the Policy. Op. 7. (R. 2.)

Moreover, the District Court's "close attention to facts" with respect to arbitration assisted its finding that "until the time of Dr. Crusher's accident, the Policy's arbitration clause was inconsistently applied[,]" and that ERISA Defendants did "nothing more than . . . cynical[ly] attempt to use obscure legal forms to delay the fair and efficient resolution of a dispute in a forum conceived for such purposes—a court of law." *Id.* But, the District Court seemed to ignore other facts when it affirmed the Plan Administrator's contention that found that it was not bound by the "common meaning" of the term crime. Op 7. And even though the District Court concedes that it does not believe "texting while driving [is] a crime[,]" the MPD's inexplicable rejection of Crusher's emergency use exception nonetheless "bolster[ed]" its "confidence." Op. 10. On cross-motions for summary judgment, the District Court denied Picard's and granted ERISA Defendant's, holding that

[5] Section 8.2, the arbitration clause, states

> [a]ny controversy or claim arising out of or relating to this Policy, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with the Employment Arbitration Rules and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

(R. 6.)

although the arbitration clause under Section 8.2 was unenforceable under the Plan's terms, the Plan Administrator's conclusion that Crusher engaged in the "commission of a crime" under the Plan was reasonable. Op. 1, 6-7. (R. 5.) Both of these issues are on cross-appeal before the Court. (R. 6.)

SUMMARY OF THE ARGUMENT

ERISA was enacted to "protect contractually defined benefits," *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985), and "to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines*, 463 U.S. 85, 90 (1983).

In this dispute, contract and agency law provide no avenue to bind Crusher or Picard – the Plan's participant and beneficiary, respectively – to the mandatory arbitration provision in Section 8.2, as they were neither parties to the agreement nor consented to the provision. Furthermore, inadvertently or not, ERISA Defendants waived their rights to arbitrate this dispute by invoking the judicial process. Not only are the ERISA Defendants now precluded from compelling arbitration, but by reneging on their election of a judicial forum, they are frustrating the arbitration process by squandering valuable time and wasting financial resources of all parties – including those of the Court. The District Court's finding that the Policy's arbitration clause is unenforceable against Picard should be affirmed.

On the other hand, the District Court erred in concluding that it was reasonable for the Plan Administrator to deny Picard's accidental death benefits based on the Policy's Crime Exclusion. To begin, without an explicit delineation of the Policy's scope of coverage, the exclusion must be interpreted based on Crusher's reasonable understanding of the word "crime." Furthermore, a plain reading of the District of Columbia's distracted driving statute begets only one reasonable conclusion: distracted driving is a civil infraction, not a criminal offense. Even more circumspect is the District Court's conclusion that the Plan, governed by ERISA, would reasonably exclude from coverage an injury resulting from an activity directed *and* required by Crusher's employer. Finding Crusher's actions criminal would send a chilling effect to all on-call emergency personnel whose careers are dedicated to saving lives. With an unjustified reliance on the MPD's conclusion that Crusher, without exception, violated the law, the District Court ignored the facts in the record before it and erroneously granted ERISA Defendants' motion for summary judgment. The Court should reverse.

STANDARD OF REVIEW

Summary judgment is appropriate if, viewing the evidence in the light most favorable to the non-moving party, the Court finds "that there is no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). The party seeking summary judgment must "demonstrate the

absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A dispute is "genuine" if a reasonable fact-finder could find for the non-moving party; and a fact is "material" if it can affect the outcome of a case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Moreover, "[t]he rule governing cross-motions for summary judgment . . . is that neither party waives the right to a full trial on the merits by filing its own motion; each side concedes that no material facts are at issue only for the purposes of its own motion." *Hodes v. U.S. Dep't of Treasury*, 967 F. Supp. 2d 369, 373 (D.D.C. 2013) (internal citation omitted).

ARGUMENT

I. ERISA DEFENDANTS WAIVED THEIR ARBITRATION CLAUSE, AND LACK SUPPORT FROM CONTRACT OR AGENCY PRINCIPLES TO ENFORCE IT UNDER ERISA.

Contract rights, including the right to arbitrate, are waivable either expressly or implicitly. *See Nicholas v. KBR, Inc.*, 565 F.3d 904, 907 (5th Cir. 2009); *Auto. Mechanics Local 701 Welfare & Pension Funds v. Vanguard Car Rental USA, Inc.*, 502 F.3d 740, 747 (7th Cir. 2007). A party waives arbitration by belatedly seeking it after (1) "substantially invok[ing] the judicial process [(2)] to the detriment or prejudice of the other party." *Nicholas*, 565 F.3d at 907-08 (quoting *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 497 (5th Cir. 1986)).

A. ERISA Defendants Substantially Invoked the Judicial Process by Seeking Summary Judgment and Never Moving to Compel Arbitration.

A party's "overt act" in court substantially invokes the judicial process by showing "a desire to resolve the arbitrable dispute through litigation rather than arbitration." *Id.* at 907 (quoting *Gulf Guar. Life Ins. Co. v. Connecticut Gen. Life Ins. Co.*, 304 F.3d 476, 484 (5th Cir. 2002)).[6] The court in *Nicholas*, 565 F.3d at 905-06, 908, affirmed that a widow "substantially invoked the judicial process" by filing a lawsuit under section 502(a)(1)(B) of ERISA against the "successor corporation of her deceased husband's former employer" for "failing to pay life insurance benefits" and by pursuing "claims for over ten months before invoking her right to arbitrate." The court affirmed in *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 389-90 (7th Cir. 1995) that a franchisor presumptively waived its drafted franchise agreement's arbitration clause that specified applicable disputes, rules, and location for arbitration, when invoking the judicial process by electing the "nonarbitral tribunal" to begin resolving a contractual dispute. An employer waived its right to arbitrate an ERISA dispute in *Vanguard*, 502 F.3d at 743, 746 (emphasis added), because the court found enforcing forum selection is not jurisdictional, maintained its jurisdiction, and noted that "the choice of an arbitral

[6] "A party generally invokes the judicial process by initially pursuing litigation of claims then reversing course and attempting to arbitrate those claims." *Id.*

forum can be *waived early in the proceedings*, and generally is waived once the party who later wants arbitration chooses a judicial forum."

As the widow in *Nicolas* filed a lawsuit under section 502(a)(1)(B) of ERISA, Picard filed suit in the District Court against Enterprise, the Plan, and Borg on October 1, 2018 and "substantially invoked the judicial process." (R. 5.) Even though Borg, on its behalf and the Plan's, sent the September 1, 2018 final determination that stated Picard "*may* initiate arbitration," and, as the drafter, knew of Section 8.2's applicable arbitral rules and disputes, Borg elected the District Court as the "nonarbitral tribunal" like the franchisor in *Cabinetree*, and worse, never even sought arbitration. (R. 5.) Similarly, Enterprise and the Plan knew of Section 8.2, and waived their right to arbitrate like the employer in *Vanguard*, by allowing discovery to proceed and never seeking arbitration. (R. 5.) Here, all parties have substantially invoked the judicial process, thereby waiving the right to arbitrate.[7]

B. ERISA Defendants Prejudiced Picard by Moving for Summary Judgment Instead of Moving to Compel Arbitration at the Start of Litigation.

Next, a party opposing arbitration must demonstrate a "modicum of prejudice," or "delay, expense, and damage to a party's legal position." *Nicholas*, 565 F.3d at 910; *In Re Tyco Int'l Ltd. Sec. Litig.*, 422 F.3d 41, 44 (1st Cir. 2005) (quoting *Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 12 (1st Cir. 2003)). *But see*

[7] Enterprise, Plan, and Borg fail to show *any* evidence of Crusher's knowledge of Section 8.2 under the Summary Plan Description. (R. 3.)

Cabinetree, 50 F.3d at 390 (finding ordinary contract law requires no evidence of prejudice). Based on a fact-dependent inquiry, a court shall find a "waiver of arbitration" when delay is combined with other considerations. *Id.* A party may show its prejudiced position, when its opponent – without demanding arbitration – "engages in pretrial activity inconsistent with an intent to arbitrate," and then later moves to compel it. *Id.* (quoting *Republic Ins. Co. v. PAICO Receivables, LLC*, 383 F.3d 341, 347 (5th Cir. 2004)). An opponent that reneges on its election to use the court to resolve its contractual dispute with a party, and later moves to compel arbitration frustrates arbitration's goal to limit costs. *See Nicolas*, 565 F.3d at 907. *See also Cabinetree*, 50 F.3d at 391 (noting a forum's selection "should be made at the earliest possible opportunity" and "failure . . . to move promptly for arbitration is powerful evidence . . . against arbitration").

Like the successor corporation in *Nicholas*, Picard "would be prejudiced by having to re-litigate in the arbitration forum the ERISA issue[s]" that are already known to and may be re-determined by this Court; the Court must prevent Enterprise, the Plan, and Borg from using the widow's scheme in *Nicholas*, of belatedly seeking arbitration after litigating for "over ten months" and coercing an opponent to incur litigation expenses. *Nicholas*, 565 F.3d at 910-11. In *Khan v. Parsons Global Services*, 521 F.3d 421, 427-28 (D.C. Cir. 2008), the court reversed a motion to compel arbitration since the employer's "conscious decision" to move

for summary judgment "invited the district court to consider the merits" of the employee's claim "based on matters outside of the pleadings[.]" *See also Sweater Bee by Banff, Ltd. v. Manhattan Indus., Inc.*, 754 F.2d 457, 461, 465 (2d Cir. 1985) (finding a motion for summary judgment precludes arbitration by "waiver").

Here, the ERISA Defendants made as "conscious" a decision as the employer in *Khan*, to move for summary judgment and seek a court's review of the merits beyond pleadings, i.e., the merits of the record's facts. (R. 1-6.) To change to an arbitral forum after over a year of litigation will cause "delay, expense, and damage" to Picard greater than the "over ten months" and similar to the incurred litigation expenses in *Nicolas*. *See* Op. 11. (R. 5.)

But, in *Chappel v. Laboratory Corp. of America*, 232 F.3d 719, 724 (9th Cir. 2000), the court found "no inconsistency between the right to arbitrate and a litigation defense premised on that right[,]" when an ERISA-governed plan and plan administrator "promptly filed a motion to dismiss based on the arbitration clause" and the participant failed to "show that the defendants knew of their right to arbitrate, acted inconsistently with that right, and, in doing so, prejudiced [the participant] by their actions." Simply put, the Plan and Borg are nothing like the ERISA-governed plan and plan administrator in *Chappel*, because they knew of their arbitral right under Section 8.2, "acted inconsistently with that right, and, in doing so, prejudiced" Picard by moving for summary judgment on those grounds, when prior to 2019, they

only pursued arbitration "if all parties consented to it" and only since 2019, did the Plan "strictly enforce[e] the arbitration provision in Section 8.2 . . . ." Op. 1, 6. (R. 3, 5.) Picard filed his complaint before this change. *See* Op. 1.

In the instant action, the District Court based its finding that arbitration cannot be compelled on "close attention to facts" and noted that "until the time of Dr. Crusher's accident, the Policy's arbitration clause was *inconsistently applied*." Op. 7 (emphasis added). Moreover, the District Court found "nothing more than a cynical attempt to use obscure legal forms to *delay the fair and efficient resolution of a dispute in a forum* conceived for such purposes—a court of law." *Id.* The Plan's final determination even stated that Picard "*exhausted* the internal appeals process[,]" and that he "*may* initiate arbitration . . . ." Op. 4 (emphasis added). Accordingly, no reasonable jury would find that ERISA Defendants did not presumptively waive Section 8.2.

C. Even if the Court Finds No Waiver, Section 8.2's Enforceability Fails on the Merits as Crusher was a Nonparty Without Consent or Intent to be Bound.

As a matter of contract, an arbitration clause is enforceable on (1) parties' agreed upon ERISA claims when (2) no "legal constraints external to the parties' agreement" exclude arbitrability. *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986); *Williams v. Imhoff*, 203 F.3d 758, 764 (10th Cir. 2000) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614,

628 (1985)).[8] States' contract law applies to arbitrability analysis and its "twin pillars of consent and intent[.]" *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Peabody Holding Co., LLC v. United Mine Workers of Am., Int'l Union*, 665 F.3d 96, 103 (4th Cir. 2012).[9]

The Federal Arbitration Act ("FAA") favors a "liberal federal policy" when interpreting arbitrability's scope, but not when determining parties bound to arbitration. *Comer v. Micor, Inc.*, 436 F.3d 1098, 1104 n.11 (9th Cir. 2006). Under the FAA, courts found an enforceable arbitration clause for ERISA claims in *Bird v. Shearson Lehman/American Express, Inc.*, 926 F.2d 116, 117, 121 (2d Cir. 1991) and in *Kramer v. Smith Barney*, 80 F.3d 1080, 1082, 1084 (5th Cir. 1996), when a retirement plan's trustee signed a customer agreement and could not "complain that his rights were bargained away by a third party[,]" and when a beneficiary that served as a trustee signed a licensed broker's customer agreement, respectively. *See also Davis Vision, Inc. v. Maryland Optometric Ass'n*, 187 F. App'x 299, 301 (4th Cir. 2006) (finding enforceable arbitration clause against association members, as contracts' "parties" and "signatories"). *But see McCann v. Royal Group, Inc.*, 77 F. App'x 552, 553-54 (2003) (enforcing arbitration clause on ERISA claims

[8] Arbitration clauses provide a "choice of an alternative, nonjudicial forum" to resolve contractual disputes. *Cabinetree*, 50 F.3d at 390.

[9] The record fails to stipulate the Policy's choice of law principles, so ordinary common law from several jurisdictions will be provided here.

"inextricably intertwined" with employment contract, when nonsignatory corporation moved to compel arbitration).

As an initial matter, the District Court found Section 8.2 unenforceable under public policy and impliedly held that Crusher was a nonparty as she "was 'simply a participant in trusts managed by others for her benefit.'" Op. 7 (quoting *Comer*, 436 F.3d at 1102). (R. 2.)[10] Dissimilar to the trustees in *Bird* and in *Kramer*, Crusher signed no "contracts" containing arbitration clauses, and was a nonparty to the Policy unlike association members that were contracts' "parties" in *Davis Vision*. Op. 7. Crusher neither bargained nor signed away her rights as the trustee did in *Bird*; indeed, no Plan participants negotiated the Policy or ever signed it. *Id.* Section 8.2 is unenforceable against Crusher, a nonsignatory, but is enforceable against its parties, ERISA Defendants. *See id*. Furthermore, Picard as Crusher's administrator, did not move to compel arbitration against signatories as in *McCann*. (R. 5.)

D. Contract and Agency Principles Cannot Bind Crusher to Section 8.2, as She was the Policy's Nonsignatory.

An arbitration clause becomes enforceable against a nonsignatory only if she is "akin" to an underlying agreement's signatory under "ordinary principles of contract and agency." *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber &*

[10] Section 8.2 falls under the FAA as "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract[.]" 9 U.S.C. § 2.

Resin Intermediates, S.A.S., 269 F.3d 187, 194-95 (3d Cir. 2001). Courts tend to interpret a contract's arbitrability, when a signatory tries to enforce an arbitration clause against a nonsignatory. *Davis Vision*, 187 F. App'x at 303. "Under narrow circumstances," a contract binds a nonsignatory: incorporation by reference, assumption, agency, and estoppel. *Id.* Here, none of these principles may apply.

First, as provided by the court in *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 777 (2d Cir. 1995), incorporation by reference normally applies when the *nonsignatory* tries to compel arbitration against a contract's party if "that party has entered into a separate contractual relationship with the nonsignatory which incorporates the existing arbitration clause." In *Thomson-CSF*, a nonsignatory parent company was not bound to its acquired subsidiary's working agreement, when it did not adopt any incorporated "document." *Id.* at 777. Correspondingly, ERISA Defendants fail to show that Crusher adopted either Section 8.2 itself or as "noted" in the Summary Plan Description by intent or consent because the Plan "automatically enrolled" her over ten years ago based on her full-time employee status. Op. 2. (R. 2, 3.)

Second, a clause may bind a nonsignatory that implicitly assumes the "obligation to arbitrate" from subsequent conduct. *Thomson-CSF*, 64 F.3d at 777. In *Thomson-CSF*, a parent company manifested no intent and "explicitly disavowed" to assume its subsidiary's obligation to arbitrate under the working agreement, and

filed a declaratory action of non-liability. *Id.* at 777. Similarly, ERISA Defendants fail to evince Crusher assumed an obligation to arbitrate, as they did not show that she even saw Section 8.2, and Picard filed the instant action. *See generally* Op. 1. (R. 1-6.)

Third, under agency law, an arbitration clause may bind a nonsignatory "if she is made a party to the contract by her principal acting on her behalf with actual, implied, or apparent authority." *Bel-Ray Co. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 445 (3d Cir. 1999); *Thomson-CSF*, 64 F.3d at 777. The *Thomson-CSF* court found a parent company was not bound to arbitrate under agency law because the relevant agreement "was entered into well before" the parent company bought the obligated subsidiary. *Thomson-CSF*, 64 F.3d at 777. Like the parent company in *Thomson-CSF*, Crusher became a Plan participant after the Policy was entered into, and Enterprise and the Plan independently chose to engage with Borg, so she was not their principal; thus, no agency relationship existed.

Fourth, courts recognize equitable estoppel as an avenue for binding nonsignatories to an arbitration clause. *Compare Thomson-CSF*, 64 F.3d at 778 (noting the Second Circuit has "bound nonsignatories to arbitration agreements under an estoppel theory") *with DuPont*, 269 F.3d at 199 (noting the Third Circuit has "never applied an equitable estoppel theory to bind" nonsignatories to arbitration agreements). In *Thomson-CSF*, the Second Circuit found that it was erroneous that

the parent company "derived direct benefit from" the subsidiary's working agreement, and that the parent company "cannot be estopped from denying" a nonexistent arbitration clause that it did not sign. *Id.* at 778-79. The court found lacking evidence that a nonsignatory, a third party beneficiary that passively "participa[ted] in trusts managed by others for his benefit" under ERISA, knowingly exploited agreements with arbitration clauses in *Comer*, 436 F.3d at 1100, 1102 (noting a beneficiary sued derivatively under section 502(a)(2) of ERISA, for a breach of fiduciary duty).[11] Crusher received the Policy as passively as the third party beneficiary in *Comer*. Op. 2. (R. 2.) In that same light, Crusher "cannot be estopped from denying" Section 8.2, which she never signed. Op. 7. Because Enterprise, the Plan, and Borg failed to provide any basis that Crusher and Picard were bound by Section 8.2, the Court must affirm the District Court's finding that no genuine disputes of material fact exist for failure to initiate arbitration and should not entertain a reading of the arbitration clause's words.

[11] "A third party beneficiary might in certain circumstances have the power to sue under a contract; it certainly cannot be bound to a contract it did not sign or otherwise assent to." *Id.* at 1102. *But see Dorman v. Charles Schwab Corp.*, 934 F.3d 1107, 1110 (9th Cir. 2019) (noting section 502(a)(2) of ERISA requires a plan's consent "to file [a derivative] action in court"). This action is unaffected by *Dorman*, as Picard brings his claims *directly*. *See id*; Op. 1.

II. UNDER ERISA, THE PLAN ADMINISTRATOR, BORG, UNREASONABLY DECIDED CRUSHER WAS ENGAGED IN THE COMMISSION OF A CRIME DURING HER ACCIDENTAL DEATH.

Though ERISA requires judicial deference to a fiduciary with discretion to construe "disputed or doubtful terms," an interpretation that results in the denial of benefits must be "reasonable" to survive arbitrary and capricious review. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111-12 (1989) (*quoting* G. Bogert & G. Bogert, Law of Trusts and Trustees § 559, at 169-171); *see also Mers v. Marriott Int'l Grp. Accidental Death & Dismemberment Plan*, 144 F.3d 1014, 1021 (7th Cir. 1998) (a denial of benefits must be "based on a reasonable interpretation of the plan documents"). Reversal of an administrator's denial of benefits is required if the decision is supported on "no reasonable grounds." *See Helms v. Gen. Dynamics Corp.*, 222 F. App'x 821, 827 (11th Cir. 2007) (holding that an administrator's rejection of a benefits claim was unreasonable because it relied on a nurse's subjective point of view rather than an independent medical inquiry). Accordingly, because Picard's accidental death benefits were unreasonably denied, the District Court's holding must be reversed.

A. Under ERISA, an Ambiguous Term in a Plan Must be Reasonably Interpreted on its Ordinary Meaning and Construed Against the Drafter.

Language in a plan document is vital, as ERISA intends to guarantee reliance on a "benefit plan . . . established and maintained *pursuant to a written instrument*." 29 U.S.C. § 1102(a)(1) (emphasis added). *See also Firestone*, 489 U.S. at 115

(observing that an ERISA claim is "likely to turn on the interpretation of terms in the plan at issue"). A plan's provision that is reasonably understood by a "plain reading" is not ambiguous; but if it is "reasonably susceptible to more than one meaning," the provision must be understood by its reasonable, "ordinary and common meaning." *LaAsmar v. Phelps Dodge Corp. Life*, 605 F.3d 789, 804 (10th Cir. 2010); *Bill Gray Enters. v. Gourley*, 248 F.3d 206, 219 (3d Cir. 2001); *Am. Family Life Assurance Co. v. Bilyeu*, 921 F.2d 87, 89 (6th Cir. 1990). Thus, if a plan excludes coverage for losses related to the "commission of a crime" and fails to define the exclusion's scope or what constitutes a "crime," then the ambiguity must be construed against the drafter. *LaAsmar*, 605 F.3d at 805.

In *Bilyeu*, the court found the "crime exclusion" provision in an insurance policy of a decedent who died while driving under the influence of alcohol "sufficiently ambiguous" such that a reasonable person "would not have thought that [drunk driving] accidents . . . were excluded from coverage as a result of this provision." *Bilyeu*, 921 F.2d at 89-90. Similarly, the court in *LaAsmar* faced the task of construing a plan's ambiguous language when the administrator denied accidental death benefits after determining that a death resulting from drunk driving was not an "accident." *LaAsmar*, 605 F.3d at 802. The court reversed the administrator's denial based on a "reasonable" understanding of the word "accident," and, further, "constru[ed] all ambiguities against the drafter,"

admonishing ERISA providers to "draft plans that reasonable people can understand or pay for ambiguity." *Id*. at 805 (internal citation omitted). The plan provision at issue in *Gourley* was, by comparison, adequately drafted: Even though the rights bestowed upon the plan were "broad," they were unambiguous and reasonably understood through "a plain reading of the provision." *Gourley*, 248 F.3d at 219-20 ("While this provision contemplates broad rights to reimbursement, we do not believe this translates into ambiguity.").

Unlike the "broad" but unambiguous meaning of the disputed provision in *Gourley*, a "plain reading" of both Borg's Claims Guidelines and Section 2.2 of the Policy fails to set forth its scope of coverage for the Crime Exclusion. (R. 1, 3.) As with the plan in *Bilyeu* where it was unclear whether drunk driving accidents were considered "criminal" and precluded recovery of benefits, the ERISA Defendant's disputed Crime Exclusion does explicitly prohibit texting while driving. *Id*. It is reasonable, in fact, to understand that such an activity, "while unlawful," is *not criminal*. The *LaAsmar* court correctly rebuked drafters that leave plans open to interpretation and would likely reprimand Enterprise for drafting the Plan with a critical ambiguity, and construe it based on Picard's reasonable interpretation. Given that the term "crime" is "reasonably susceptible to more than one meaning," the District Court erred by construing the ambiguity in favor of the drafter and rejecting Picard's assertion that the Plan Administrator is bound by the "common

meaning" of an ambiguous term. Op. 7. Here, the common meaning of "crime" must prevail.

B. Although the MPD Determined Crusher "Violated the Law," the Conclusion that She "Committed a Crime" Under the Plan is Arbitrary and Capricious, as She Used Her Phone as Emergency Personnel.

The District of Columbia enacted the Distracted Driving Law in 2004 to prevent inattentive driving and enhance safety on its roads.[12] Section 50-1731.04 under Chapter 17A of Title 50 ("Motor and Non-Motor Vehicles and Traffic") of the District of Columbia Official Code ("D.C. Code"), within Subtitle VI ("Safety"), is between two common motor vehicle *safety regulations* requiring young children ride in federally approved car seats and passengers in a moving car wear seatbelts. D.C. Code, Title 50 §§ Chs. 17, 18. *See also Distracted Driving Safety Act of 2004, 2003 Bill Text DC B. 35*. First time offenders of the car seat regulation receive a $75 fine, while seatbelt violations result in points assessed against the driver. §§ 50-1706(a)(1), -1806(d)(1).

Correspondingly, a violation of the District of Columbia's Distracted Driving Law subjects the offender to a possible $100 fine, which is waived if she promptly "provides proof of acquisition of a hands-free accessory." § 50-1731.06(a). The statute explicitly provides that any violation of the Distracted Driving Law "shall be

[12] "Distracted driving" includes inattentive driving "caused by reading; writing, performing personal grooming, interacting with pets . . . or engaging in any other activity which causes distractions." D.C. Code § 50-1731.02(2).

processed and adjudicated" as a moving traffic infraction unless the violation is considered a "felony or misdemeanor" in the District of Columbia. §§ 50-1731.06(b), -2302.02(1). Simply put, violating the law does not automatically equate to a crime.

In this jurisdiction, felonies include crimes like arson, assault, burglary, and murder, *see* D.C. Code, Title 22, Chs. 1-35B, while misdemeanors are "offenses such as disorderly conduct [and] aggressive panhandling." *See* DC Misdemeanors, *available at* https://www.dccourts.gov/services/criminal-matters/dc-misdemeanors (last visited Jan. 11, 2020). Most importantly, the Distracted Driving Law is included in Section 50 alongside motor vehicle violations, subject to small *safety* fines, and not in Section 22, pertaining to *criminal* offenses. Based on this statutory scheme, there are "no reasonable grounds" for the Plan Administrator to conclude that Crusher's violation constituted a crime.[13]

Crusher, who was assessed the minimum penalty of $100 (R. 5.), was presumably a first-time offender. In fact, it is likely that if Crusher had been cited for this violation, she would have promptly acquired a hands-free accessory for her "flip" phone (R. 3.), and the penalty would have been waived. Furthermore, her offense would have been "processed and adjudicated" as a moving traffic violation,

[13] The Supreme Court has found before that statutes may be read "not only from its express language, but also from the *structure of the statutory scheme* . . . ." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340 (1984) (emphasis added).

since, at the time of her death, she was not engaged in a felony or misdemeanor – actions that *would* reasonably constitute a crime. The Plan Administrator disingenuously feigned a lack of "expertise to apply [its] own discretion in deciding when a crime had been committed," Op. 8, when a bare, cursory glance at the relevant provisions in the Code would have established that Crusher was no more a criminal than one who fails to buckle her safety belt.

The District Court cites statistics highlighting the problem of distracted driving and implies that it is comparable to drunk driving for which there is a "zero-tolerance policy" in the District of Columbia. Op. 9. Yet, the District Court fails to also note that even the first-time offender of the law against drunk driving in the District of Columbia is subject to no mandatory minimum jail time. *See* Metropolitan Police Department, Penalties for Drinking and Driving, *available at* https://mpdc.dc.gov/node/212542 (last visited Jan. 11, 2020).

The Distracted Driving Law makes an exception for "emergency use of a mobile phone, including calls to . . . a hospital" or "use of a mobile telephone by . . . emergency personnel . . . acting within the scope of official duties." § 50-1731.04(b)(1)-(2). It is unclear upon which prong of the exception the MPD relied in rejecting Picard's "plea that [Crusher be] excused from complying with the distracted driver's law because she was" as Enterprise's on-call doctor "acting within the scope of her official duties" by "responding to an emergency," and yet

the lower court's "confidence" in the Plan Administrator's denial was nonetheless "bolster[ed]" by the MPD's opaque and inexplicable conclusion. Op. 10. The parties do not dispute that Crusher was using her mobile telephone to contact a hospital in what was clearly an emergency involving the life of a patient. (R. 3-4.) The court's inference that the emergency exception does not apply to text messages is problematic given the statute's plain meaning, which excepts "emergency use of a mobile phone" without providing that "use" does not include use of a text message application.

Not only did the District Court erroneously affirm the Plan Administrator's conclusion that because MPD determined Crusher "violated the law," she had "committed a crime" for purposes of the Plan, but the court also mistakenly upheld the Plan Administrator's determination that Crusher's use fell outside of the statutory exception on the grounds that the Plan Administrator's interpretation was "reasonable." It was anything but reasonable.

C. Even if Crusher's "Violation" Constituted a Crime Under the Plan's Language, it is Unreasonable to Exclude Coverage for an Accident Resulting From an Activity Required by Crusher's Employer.

When reviewing an action for reasonableness, the appropriate question "is whether the administrator's action on the record before him was unreasonable." *Liston v. UNUM Corp. Officer Severance Plan*, 330 F.3d 19, 24 (1st Cir. 2003). A proper review of the record would identify whether the injury occurred while an

employee was performing an activity "required or directed" by her employer; such activities are reasonably included under a Plan's scope of coverage. *Lifson v. INA Life Ins. Co.*, 333 F.3d 349, 354 (2d Cir. 2003); *Courson v. Bert Bell NFL Player Ret. Plan*, 214 F.3d 136, 143 (3d Cir. 2000).

The court in *Courson* found it reasonable for a plan administrator to deny coverage to a former football player who alleged that his employer "supervised and condoned" an alcohol addiction that he claimed led to his degenerative heart condition years later. *Courson*, 214 F.3d at 140. Evidence of contemporaneous NFL policies revealed that alcohol abuse was, in fact, "expressly prohibit[ed]" and that alcohol consumption was not considered an activity "required," "directed," or "supervised" by his employer. *Id*. at 145. Indeed, it would be unreasonable for a Policy to insure the player against consequences of behavior it frowned upon in the first place. *Id*. at 146. By contrast, the court in *Lifson* granted the life insurance claim for the beneficiary of an employee fatally struck by a vehicle while driving home to commence her on-call status; even though she had not yet received any work-related messages, the court determined that a reasonable factfinder could conclude that her employer "encouraged and benefitted from" her journey home that evening. *Lifson*, 333 F.3d at 353-54.

Crusher died after she responded to two text messages sent by her employer, Enterprise. (R. 4.) The messages contained questions requiring her immediate

response to help save a patient's life. *Id*. Unlike the express prohibition on alcohol consumption by the employer in *Courson*, Enterprise "required" and "directed" Crusher to respond to its text messages, and even employed a system known as MyText portal to connect her phone to the hospital. (R. 3.) In fact, communication via text is a common Enterprise practice, given that Crusher's total contact with the hospital on the night she died was through text message. (R. 3-4.) If Enterprise wanted to "expressly prohibit" its employees from texting while driving, it would have called Crusher instead. Furthermore, just as the *Lifson* employer "encouraged and benefitted from" employing an on-call worker who had not yet received any assignments, it is reasonable to conclude that *anytime* Crusher was on-call, she was covered under the Plan, but this Court need not go that far, since Crusher was responding to an actual emergency. (R. 3.)

A proper review of the record would also establish whether the employer complied with all "administrative . . . reporting and disclosure requirements," *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1352 (9th Cir. 1984), including the mandate that ERISA employee benefit plans are "applied consistently with respect to similarly situated claimants." 29 C.F.R. § 2560.503-1(5). The parties stipulated that Borg's Crime Exclusion was inconsistently applied in that the "Plan has not always regarded violations of traffic laws as constituting the 'commission of a crime.'"[14] (R. 3.) This

[14] Also, Section 8.2 was also inconsistently applied.

ERISA non-compliance should have been relevant in determining that the plan administrator's action on the record was unreasonable.

Ultimately, the District Court failed to consider the question of whether the Plan Administrator took "reasonable" action based on the record before it. In its conclusion that it is reasonable for a Policy to exclude from coverage deaths that "could have been easily avoided if the policy-holder had exercised reasonable care regarding her own life and the life of others on the road,"[15] Op. 11, the District Court discarded the fact that Crusher could also have avoided her ultimate fate by ignoring her sacred Hippocratic oath to help the sick. Instead, Crusher responded. She died trying to save the life of another, which is not criminal.

CONCLUSION

For all the foregoing reasons, Plaintiff-Appellant Picard respectfully requests that this Court affirm the District Court's finding that the Policy's arbitration clause is unenforceable and reverse the grant of ERISA Defendants' Motion for Summary Judgment.

[15] Importantly, "[c]ourts have consistently rejected" the notion that any avoidable accident is precluded from recovery. *LaAsmar*, 605 F.3d at 804; *see also Kovach v. Zurich Am. Ins. Co.*, 587 F.3d 323, 330 (6th Cir. 2009) (finding courts must "refrain from allowing [their] moral judgments about drunk driving to influence . . . review of the [plan administrator's] interpretation of the relevant Plan provisions").

Respectfully Submitted,

/s/ TEAM 1

Counsel for Plaintiff-Appellant
Jean Luc Picard

Date: January 17, 2020

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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/s/ TEAM 1

Attorney for Jean Luc Picard

Dated: January 17, 2020

CERTIFICATE OF SERVICE

We hereby certify that on January 17, 2020, we electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Thirteenth Circuit by using the appellate CM/ECF system. Additionally, a paper copy of the foregoing was sent via U.S. first class mail to the Defendant-Cross Appellants' last known addresses.

/s/ TEAM 1

APPENDIX

29 U.S.C. § 1132(a).

(a) Persons empowered to bring a civil action. A *civil action may be brought*—

(1) *by a* participant or *beneficiary*—

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

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

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;

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

(emphasis added).

29 U.S.C. § 1132(e).

(e) Jurisdiction.

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 101(f)(1). State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and

process may be served in any other district where a defendant resides or may be found.

D.C. Code § 50-1731.04. Restricted use of mobile telephone and other electronic devices.

(a) No person shall use a mobile telephone or other electronic device while operating a moving motor vehicle in the District of Columbia unless the telephone or device is equipped with a hands-free accessory.

(b) The *provisions of this section shall not apply* to the following:

(1) Emergency use of a mobile telephone, including calls to 911 or 311, a hospital, an ambulance service provider, a fire department, a law enforcement agency, or a first-aid squad;

(2) *Use of a mobile telephone by* law enforcement and *emergency personnel* or by a driver of an authorized emergency vehicle, *acting within the scope of official duties*; or

(3) Initiating or terminating a telephone call, or turning the telephone on or off.

(emphasis added).

D.C. Code § 50-1731.06. Enforcement; fines and penalties.

(a) The penalty for violating § 50-1731.03, § 50-1731.04, or § 50-1731.05 shall be a fine of $100; provided, that, for a violation of § 50-1731.04, the fine shall be suspended for a first time violator who, subsequent to the violation but prior to the imposition of a fine, provides proof of acquisition of a hands-free accessory of the type required by this chapter. The suspension shall not apply to violations related to texting.

***

(b) A violation of the provisions of § 50-1731.03, § 50-1731.04, or § 50-1731.05 shall be processed and adjudicated under the provisions applicable to moving violations set forth in subchapter II of Chapter 23 of this title; provided, that no points shall be assessed for a violation of this chapter that does not contribute to an accident.

CERTIFICATE OF SERVICE – TEAM 1

As members of Team 1, we hereby submit the following confirmation:

The work product contained in all copies of Team 1's brief is the sole work product of the members of Team 1.

Team 1 has fully complied with its law school honor code in the completion of this brief.

Team 1 acknowledges its compliance with all Rules of the 2020 Hennessy Moot Court Competition to the best of its ability.

/s/ TEAM 1