

HON. RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

JAMES McNELIS,

Plaintiff

v.

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA,

Defendant.

No. 2:19-cv-01590-RAJ

FIRST AMENDED COMPLAINT FOR
DECLARATION OF RIGHT TO BENEFITS;
FOR RECOVERY OF BENEFITS; FOR
CLARIFICATION OF RIGHT TO FUTURE
BENEFITS; AND FOR BREACH OF
FIDUCIARY DUTIES

COMES NOW THE PLAINTIFF, James McNelis, and alleges as follows:

I. NATURE OF ACTION

1.1 This action arises under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*

1.2 Pursuant to 29 U.S.C. § 1132(a)(1)(B), Mr. McNelis seeks a declaration of his right to disability benefits under an ERISA-governed employee benefit plan and an order directing Defendant The Prudential Insurance Company of America (“Prudential”) to pay those benefits.

1 1.3 Mr. McNelis alleges that Prudential breached its fiduciary duties towards him and,
2 pursuant to 29 U.S.C. § 1132(a)(3), respectfully asks this Court to order appropriate equitable
3 relief to redress those violations, and to enjoin Prudential from further violations of its duties.
4

5 **II. JURISDICTION AND VENUE**

6 2.1 This Court’s jurisdiction is invoked pursuant to 28 U.S.C. § 1331 and 29 U.S.C. §
7 1132(e)(1).

8 2.2 Venue is proper pursuant to 29 U.S.C. § 1132(e)(2) and 28 U.S.C. § 1391.

9 **III. PARTIES**

10 3.1 Plaintiff James McNelis is an adult residing in King County, Washington.

11 3.2 Defendant The Prudential Insurance Company of America is a foreign corporation
12 engaged in the business of insurance and authorized to sell insurance in Washington State.
13

14 **IV. FACTUAL ALLEGATIONS**

15 4.1 Defendant The Prudential Insurance Company of America is a company organized
16 under the laws of the State of New Jersey.

17 4.2 Prudential is engaged in the business of insurance and is authorized to sell insurance,
18 including disability insurance, in Washington State. Prudential resides, or may be found, in the
19 Western District of Washington.

20 4.3 Microsoft Corporation (“Microsoft”) is an “employer” as that term is defined by 29
21 U.S.C. § 1002(5).

22 4.4 Microsoft maintains an “employee benefit plan” within the meaning of 29 U.S.C. §
23 1002(3) in order to provide various benefits to its employees (“the Plan”).
24

25 4.5 Among other benefits, the Plan provides long-term disability (“LTD”) benefits to
26 qualified Plan participants who become disabled within the meaning of the Plan.
27

1 4.6 The Plan’s long-term disability benefits are provided through an insurance policy
2 Prudential issued to Microsoft, Policy Number G-43994-WA (“the Policy” or “the LTD Policy”).

3 4.7 The Plan and/or Plan Administrator delegated to Prudential the authority to approve
4 or deny claims for LTD benefits under the Plan, and authority to approve or deny appeals of
5 denied LTD claims.
6

7 4.8 By approving or denying LTD benefit claims, and/or by approving or denying LTD
8 appeals, Prudential exercises control over the management or disposition of Plan assets.

9 4.9 Pursuant to law and/or through a contractual relationship with the Plan and/or the
10 Plan Administrator, Prudential exercises discretionary authority or discretionary responsibility in
11 the administration of the Plan.

12 4.10 Prudential is a “fiduciary” as that term is defined by 29 U.S.C. § 1002(21), with
13 respect to those portions of the Plan which concern long-term disability benefits.
14

15 4.11 Alternatively or additionally, Prudential is a “functional” fiduciary.

16 4.12 Mr. McNelis was an “employee” within the meaning of 29 U.S.C. § 1002(6), of
17 Microsoft, where he worked as Senior Software Development Engineer, specializing in the
18 architectural design of large computer network systems.

19 4.13 Mr. McNelis is a “participant” within the meaning of 29 U.S.C. § 1002(7), of the
20 Plan.
21

22 4.14 Mr. McNelis is a “beneficiary” within the meaning of 29 U.S.C. § 1002(8), of the
23 Plan.

24 4.15 The Plan’s definition of “disability” as set forth in the Policy states in part:

25 How Does Prudential Define Disability?
26
27

1 You are disabled when Prudential determines that, due to your sickness or
2 injury:

- 3
- 4 • you are unable to perform the material and substantial duties of your
5 regular occupation, or you have a 20% or more loss in your monthly
6 earnings; and
 - 7 • you are under the regular care of a doctor, and

8 After 24 months of payments, you are disabled when Prudential determines
9 that due to the same sickness or injury:

- 10
- 11 • you are unable to perform the duties of any gainful occupation for which
12 you are reasonably fitted by education, training or experience; and
 - 13 • you are under the regular care of a doctor.

14 4.16 The Policy states that “gainful occupation” means

15 an occupation, including self employment that is or can be expected to
16 provide you with an income within 12 months of your return to work, that
17 exceeds:

- 18 • 80% of your indexed monthly earnings, if you are working: or
- 19 • 60% of your monthly earnings, if you are not working.

20 4.17 The Policy limits benefits for disabilities “due in whole or part to mental illness” to
21 24 months. It defines “mental illness” as “a psychiatric or psychological condition regardless of
22 cause” and states that such “conditions are usually treated by a mental health provider or other
23 qualified provider using psychotherapy, psychotropic drugs, or other similar methods of
24 treatment as standardly accepted in the practice of medicine.”

25 4.18 Prudential has repeatedly and falsely asserted that Mr. McNelis’ disability is
26 due to mental illness, in order to limit the amount of money it must pay him.

27 4.19 In addition to insuring and administering long-term disability benefits under the
group disability insurance policy it sold Microsoft, Prudential also administers claims by

1 Microsoft employees seeking paid disability leave under Microsoft’s Short Term Disability
2 Leave of Absence Policy (“the STD Policy”).

3 4.20 In order to receive paid leave under the STD Policy an eligible Microsoft employee
4 “must be unable to perform the material and substantial duties of [their] regular occupation due
5 to a sickness or injury.”
6

7 4.21 The maximum period of paid leave a Microsoft employee may receive under the
8 STD Policy on any specific claim is 26 weeks, or 182 days.

9 4.22 Under the LTD Policy, Prudential begins paying LTD benefits to a qualified and
10 disabled Plan participant after a 182-day “elimination period.”

11 4.23 Beginning in approximately 2004, Mr. McNelis experienced occasional fatigue,
12 weakness and diffuse pain. Despite that, he exercised extensively, maintained good physical
13 health and was very active. In a 2014 declaration he stated:
14

15 . . . in 2003 I was working at Microsoft as a permanent part time employee at 30
16 hours per week. I had a business doing Rolfing Structural integration, as well as a
17 counseling business that required another 25 hours per week. . . . Physically I was
18 in very good shape and did weight training PHA (peripheral heart action training)
as well as an hour of cardio five days a week. I was able to do 45 sets of weight
training in 50 minutes and with the cardio I was able to cover 9 miles in an hour
on an elliptical trainer.

19 4.24 In 2013 Mr. McNelis’ fatigue, weakness and diffuse pain worsened. Because his
20 symptoms were interfering with his work, he went out on medical leave.
21

22 4.25 On or about October 15, 2013, Mr. McNelis became disabled within the meaning of
23 the Plan, and became disabled under the STD Policy, as, due to sickness, he was unable to
24 perform the material and substantial duties of his regular occupation, had a 20% or more loss in
25 his monthly earnings; and was under the regular care of a doctor.
26
27

1 4.26 Mr. McNelis applied to Prudential for paid leave under the STD Policy and for LTD
2 benefits under the Plan.

3 4.27 On April 24, 2014, Prudential directed Mr. McNelis to complete an “Activities of
4 Daily Living Questionnaire” and have a doctor complete an “Attending Physician Statement.”

5 4.28 Mr. McNelis completed the Questionnaire. He described disrupted sleep, stating
6 that he was up several times a night and slept during the day. He did laundry, trash, recycling
7 and car care, but hired someone to help with other household work. Explaining why he did not
8 dust, mop, vacuum, wash dishes or do home repairs, he wrote: “being on my feet too long causes
9 dizziness. I also feel extremely weak, if I do too much I can’t function at all for days or weeks.”

10 4.29 Marvin Roman, M.D., completed the Attending Physician Statement and identified
11 three diagnoses: ICD-9 780.71 (Chronic Fatigue Syndrome); ICD-9 780.2 (syncope and
12 collapse); and ICD-9 323.9 (unspecified causes of encephalitis, myelitis, and encephalomyelitis).
13 He said Mr. McNelis would be evaluated by a cardiologist and a rheumatologist.
14

15 4.30 Rheumatologist Carl Brodie, M.D., evaluated Mr. McNelis on May 12, 2014. He
16 found: “Chronic fatigue and pain, intermittent since 2003. Multiple possible diagnoses for this
17 constellation of symptoms ranging from chronic fatigue syndrome, fibromyalgia, sleep apnea
18 and AI dz [autoimmune disease].”
19

20 4.31 Prudential received Dr. Roman’s Attending Physician Statement on June 20, 2014,
21 along with a June 6, 2014 chart note from cardiologist Howard Lewis, M.D., stating Mr.
22 McNelis had “intermittent episodes” of near loss of consciousness since 2004, and that those
23 “fairly compelling” episodes had “gotten worse over the past several months and can occur
24 several times per week.” Dr. Lewis wrote:
25

26 Regarding his dyspnea on exertion, I am impressed by the fact that he used to be a
27 vigorous athlete and is now short of breath with only mild levels of exertion.

1 Therefore I would like to quantify his exercise performance with exercise
2 treadmill testing and then follow up accordingly.

3 4.32 Prudential did not wait for the treadmill testing report. It did not contact Dr. Brodie
4 or Dr. Lewis. It denied Mr. McNelis STD and LTD benefits by letter dated June 27, 2014,
5 stating, “[y]ou report that your chronic fatigue, chronic pain, and cognitive issues preclude you
6 from working. However, you report that you are able to complete all of your activities of daily
7 living.”

8 4.33 On June 11, 2014, Mr. McNelis underwent the treadmill testing Dr. Lewis ordered.
9 The test had to be stopped because he became lightheaded and had a “significant” and
10 “inappropriate” drop in blood pressure.

11 4.34 Dr. Brodie continued to see Mr. McNelis. His notes document Mr. McNelis’
12 chronic fatigue and exhaustion; diffuse musculoskeletal pain; lightheadedness and spontaneous
13 dizziness; nausea and digestive problems; and diminished fine motor control.

14 4.35 Mr. McNelis appealed Prudential’s denial of paid short-term disability leave and its
15 denial of his application for LTD benefits. He provided a declaration stating in part:
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17
18 Currently and for more than the past year, my experience of life and myself has
19 changed dramatically. Each morning starts with a sore throat pain (8 on a scale of
20 1-10), and extreme weakness. It takes me several hours to get ready for the day.
21 My sleep cycle is disrupted so I rarely sleep through the night, and if I do it is
22 non-recuperative. I require time to sleep during the day nearly every day. If I
23 stand on my feet or exercise the result is potential syncope. A single meeting
24 causes extreme fatigue. My thought processes are slower, and I am unable to
25 understand complex concepts like before. . . . This condition has robbed me of
26 my since of well-being, my physical strength and the many sources of connection
27 and fulfillment in my life.

4.36 Mr. McNelis’ appeal included a declaration from Dr. Brodie, stating in part:

There are multiple possible diagnoses for Mr. McNelis’ symptoms, including
chronic fatigue syndrome (“CFS”), fibromyalgia, sleep apnea and various
autoimmune disorders. CFS is a severe, incapacitating fatigue that is not improved
by bed rest and that is often worsened by physical activity or mental exertion. It is

1 an all-encompassing fatigue that can dramatically reduce a person's activity level
2 and stamina. Fibromyalgia is a type of muscular or soft-tissue rheumatism that
3 principally affects muscles and their attachment to bones, commonly accompanied
4 by widespread musculoskeletal pain, muscle stiffness, sleep disturbances, fatigue,
5 lack of concentration, changes in mood or thinking, anxiety and depression.

6 While Mr. McNelis cannot yet be given a definite diagnosis, there is no doubt that
7 he experiences the symptoms he reports. . . .

8 I am treating Mr. McNelis with gabapentin, for his pain, and hydroxychloroquine,
9 an anti-malarial and anti-inflammatory medication sometimes used to treat auto-
10 immune disorders. . . . Due to the exhaustion, fatigue and pain caused by his
11 illness or illnesses, Mr. McNelis is presently unable to perform the material and
12 substantial duties of his job and most likely has been unable to do so since
13 September 19, 2013.

14 4.37 Mr. McNelis also provided a report from neuropsychologist Rochelle Winnett,
15 Ph.D., who evaluated him on February 25, 2015 and diagnosed:

16 1. Cognitive disorder (mild select verbal fluency, complex visual-spatial retrieval,
17 Subtle executive functioning inefficiencies, lower than expected visual-spatial
18 problem solving skills, significantly impaired processing speed).

19 2. Weakness, chronic (ongoing workup for fibromyalgia or chronic fatigue
20 syndrome).

21 3. Major depressive disorder, recurrent, moderate severity.

22 4.38 Dr. Winnett stated: "At the present time, I think that the specific nature of his
23 cognitive difficulties would make returning to work at his current job problematical given his
24 impaired processing speed."

25 4.39 Although it knew Mr. McNelis underwent a full neuropsychological evaluation on
26 February 25, 2015, Prudential demanded he be evaluated by Oregon neuropsychologist Michael
27 Villanueva, Psy.D., less than three weeks later, on March 13, 2015.

4.40 Having Mr. McNelis undergo a second neuropsychological evaluation so soon after
the first contravened a widely accepted principle that neuropsychological evaluations must not be

1 done too close in time to one another, because “test familiarity” or “practice effects” cause
2 inaccurate test results.

3 4.41 Dr. Villanueva performed the evaluation of Mr. McNelis while engaged by PsyBar,
4 LLC.

5 4.42 Prudential paid to have Dr. Villanueva review at least 105 disability claim files in
6 2014-2015.

7 4.43 On information and belief, Prudential paid Dr. Villanueva over \$250,000 a year in
8 2014 and 2015 to provide purportedly independent opinions.

9 4.44 Dr. Villanueva understands that most group disability insurance policies limit
10 benefits for disabilities caused by mental illness to 24 months.

11 4.45 Dr. Villanueva did not dispute Dr. Winnett’s assessment and found “Probable
12 Neurocognitive Disorder - Mild, with Difficulties with Processing Speed and Visuospatial
13 Function.” He listed that diagnosis fourth and last, however, after “Depression – Chronic”;
14 “Alcohol Abuse in Sustained Remission” and “Somatic Symptom Disorder.” Mr. McNelis last
15 consumed alcohol nine years before Dr. Villanueva’s evaluation.

16 4.46 Prudential obtained a paper records review or “peer review” from Oklahoma doctor
17 Russell Green, M.D., who opined on or about January 16, 2015 that Mr. McNelis “does not have
18 any medically necessary restrictions and/or limitations from any one condition or combination of
19 conditions from October 15, 2013 forward.”

20 4.47 Dr. Green performed this work while engaged by “Reliable Review Services,” a
21 subsidiary or division of ExamWorks Group, Inc.

22 4.48 Dr. Green provided Prudential a second opinion on or about March 15, 2015.
23 Having reviewed new information, including Dr. Brodie’s declaration described above in
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1 Paragraph 4.36, Dr. Green stated “the documentation does not alter the opinions offered in the
2 original submission which was dated 01/16/2015.”

3 4.49 On or about March 31, 2015, Prudential agreed Mr. McNelis was disabled effective
4 October 15, 2013, and entitled to paid short-term disability leave and LTD benefits.

5 4.50 Dr. Green’s opinion that Mr. McNelis had no “medically necessary restrictions”
6 from October 13, 2013 forward was incorrect, as Prudential ultimately approved Mr. McNelis’
7 claim for paid short-term disability leave and long term disability benefits for the entire period
8 from October 15, 2013 through January 2, 2019.

9 4.51 On April 11, 2015, Mr. McNelis received the first disability benefits since he
10 stopped work 18 months earlier in September 2013.

11 4.52 On June 25, 2015, Prudential began a surreptitious investigation of Mr. McNelis,
12 including “attempted discreet telephonic contact” with his mother; interrogation of his neighbors;
13 “Internet Mining”; surveillance of his home; and a “local pharmacy canvass in order to confirm
14 and obtain information relating to the claimant.”

15 4.53 Prudential’s investigation of Mr. McNelis produced no information contradicting
16 his reports or those of his doctors regarding his health, his symptoms or his activities.

17 4.54 On or about December 15, 2015, Prudential advised Mr. McNelis that it would
18 terminate his LTD benefits effective April 15, 2016, under the Policy’s 24-month limitation for
19 disability caused by “mental illness.” It admitted he “likely [has] a lack of sustainable and
20 predictable full time work capacity” but claimed that disability was caused by “behavioral health
21 conditions, but not by identified physical conditions.”

22 4.55 On or about May 23, 2016, Mr. McNelis appealed Prudential’s April 15, 2016
23 termination of his LTD benefits. He provided a statement from rheumatologist Dr. Brodie,
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1 rejecting Prudential’s claim that Mr. McNelis was unable to work due to mental illness. Dr.
2 Brodie stated in part:

3 I am aware of Mr. McNelis’ history of lifelong depression, and that he takes
4 antidepressant medication. I do not believe that condition disables him. Millions
5 of people suffer from depression and use such medications. Mr. McNelis was
6 able despite that condition not only to work, but to hold exceptionally demanding
7 jobs such as his most recent position at Microsoft. If depression prevented him
8 from working, it would have done so long ago. . . . there is ample objective
9 clinical evidence Mr. McNelis has an autoimmune disorder, and that is the far
10 more likely cause of his debilitating fatigue and pain, rather than a long-standing
11 mood disorder.

12 4.56 Dr. Brodie described the “objective clinical evidence” that a physical illness
13 disabled Mr. McNelis:

14 Mr. McNelis has repeatedly shown objective evidence of some kind of
15 autoimmune disorder. His Complement C3 and C4 levels are chronically low or
16 borderline low on multiple tests. Complement C3 and C4 blood tests measures
17 the activity of certain proteins that are part of the complement system. The
18 proteins work with the immune system and play a role in the development of
19 inflammation. When the complement system is “turned on” during inflammation,
20 levels of complement proteins may go down. . . .

21 The normal range for Complement C3 is 90-200. Mr. McNelis’ C3 has been
22 consistently low or borderline low. On March 1, 2016, it was 103. On December
23 17, 2015, it was 82. On October 9, 2014, Mr. McNelis’ C3 level was 76. On
24 May 12, 2014, it was 90.

25 Mr. McNelis’ Complement C4 level has been as low as possible and still be
26 within the normal range of 15.0 to 55.0. . . .

27 Testing also shows Mr. McNelis has elevated CPK levels. CPK is an enzyme
associated with muscle abnormalities, and is elevated when a person’s muscles
are injured or inflamed. On March 1, 2016, Mr. McNelis’ CPK was 788, nearly
twice the upper limit of normal. (Normal CPK ranges are 55-400.) On March
31, 2016, it was 764. These elevated CPK levels are consistent with the myositis
(muscle inflammation) Mr. McNelis reports in his legs.

4.57 Mr. McNelis’ May 23, 2016 appeal included a statement from psychologist Steven
Reed, Ph.D., who also refuted Prudential’s claim that mental illness disabled Mr. McNelis. Dr.
Reed stated in part:

1
2 It is very clear to me that his current occupational difficulties are not caused by
3 his anxiety or depression. Jim has had depression and anxiety for his entire life,
4 coming from a very difficult childhood, and those conditions were never a
5 deterrent or a barrier for him to become quite successful and hardworking. Like
6 many other people who have had difficult childhood experiences, Jim has very
7 strong survival skills and an exceptionally strong sense of independence. It is
8 antithetical to survival for a person from such a background not to work. For such
9 people, and certainly for Jim, independence and self-sufficiency are key to
10 managing anxiety and depression. Jim is highly motivated to work, to be
11 successful and to be independent. It is anathema to him to be dependent on
12 others, whether those others be people or insurance companies.

13
14 Jim has been extraordinarily successful in his career, both financially and in his
15 professional accomplishments. Those are strong motivators, reinforcing his
16 desire to continue to work, just as they were strong motivators during his 27-year
17 work history. Given his well-developed survival skills and his ability to manage
18 his depression and anxiety, there would have to be a new factor to account for
19 why Jim is presently no longer able to work, something other than his long-
20 standing depression and anxiety. That new factor must be something organic,
21 something physical in nature. Jim's present inability to work is, as his treating
22 rheumatologist states, the result of a physical illness, and is not due to any
23 psychological condition.

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25 4.58 Mr. McNelis' May 23, 2016 appeal also included a report from Theodore Becker,
26 Ph.D., regarding a two-day performance-based physical capacity evaluation Mr. McNelis
27 underwent. The testing took 13.5 hours.

4.59 Dr. Becker was licensed as a physical therapist in 1974. He obtained a doctorate
degree in 1984 after studies in Biomechanics, Anatomy, Growth and Motor Development and
Human Performance. He has taught and lectured on work physiology, biomechanics, physical
capacity evaluations and evaluation of the impact of chronic fatigue.

4.60 Dr. Becker's report of Mr. McNelis' physical capacity evaluation stated:

There is a profile of biomechanical fatigue, positive clinical physiological
dysfunction and work physiological profiles show that the examinee should be
considered work intolerant. The physiological response shows that competitive
and predictable sustained work is absent for all levels of category according to the
Dictionary of Occupational Titles.

1 4.61 In response to Mr. McNelis' May 23, 2016 appeal, Prudential obtained a peer
2 review from Mark Burns, M.D., through MES Peer Review Services, a subsidiary or division of
3 ExamWorks Group, Inc.

4 4.62 Prudential asked Dr. Burns whether Mr. McNelis had "any medically necessary
5 restrictions and/ or limitations from any one condition or combination of conditions from April
6 15, 2016 forward[.]"

7 4.63 In a report dated June 23, 2016, Dr. Burns declined to opine on Dr. Becker's
8 physical capacity evaluation – but stated that Mr. McNelis had "no restrictions" in his ability to
9 sit, stand, walk, reach, lift and carry.

10 4.64 Dr. Burns' opinion that Mr. McNelis had no restrictions from April 15, 2016
11 forward was incorrect, as Prudential ultimately found Mr. McNelis disabled and paid him LTD
12 benefits from April 15, 2016 through January 2, 2019.

13 4.65 Also in response to Mr. McNelis' May 23, 2016 appeal, Prudential engaged a
14 physical therapist through MES Peer Review Services, Bethany Weinmann.

15 4.66 Ms. Weinmann obtained her New Jersey physical therapy license three years
16 earlier, on November 29, 2012. Her report provided no account of her credentials.

17 4.67 Prudential asked Ms. Weinmann if Mr. McNelis had "any medically necessary
18 restrictions and/or limitations from any one condition or combination of conditions from
19 April 15, 2016 forward."

20 4.68 Ms. Weinmann's report stated that Mr. McNelis "has complained about some
21 generalized aches and pains."

1 4.69 Ms. Weinmann's report stated "it seems that Mr. McNelis spends a good portion of
2 time in bed or sleeping. The significant reduction of physical activity may play a part in his
3 symptoms."

4 4.70 Ms. Weinmann stated that the "restrictions/ limitations" Dr. Becker identified "are
5 not medically necessary."
6

7 4.71 Ms. Weinmann's opinions were incorrect, as Prudential ultimately found Mr.
8 McNelis disabled and paid him LTD benefits from April 15, 2016 through January 2, 2019.

9 4.72 At Prudential's request, Dr. Burns provided an addendum opinion through MES
10 Peer Review Services in a report dated August 3, 2016. He reviewed new information regarding
11 Mr. McNelis and stated: "My opinion has not changed."
12

13 4.73 Dr. Burns' August 3, 2016 was incorrect, as Prudential ultimately found Mr.
14 McNelis disabled and paid him LTD benefits from April 15, 2016 through January 2, 2019.

15 4.74 On or about July 20, 2016, Prudential denied Mr. McNelis' May 23, 2016 appeal.
16 It advised him that "[d]ocumentation of cognitive deficits, an important complaint, was lacking."
17

18 4.75 Given Prudential's stated reason for denying his May 23, 2016 appeal, Mr. McNelis
19 obtained a neuropsychological evaluation in order to document the "cognitive deficits"
20 Prudential deemed "lacking."
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22 4.76 Neuropsychologist Glenn Goodwin, Ph.D., evaluated Mr. McNelis on December 5
23 and 6, 2016.

24 4.77 Dr. Goodwin's report states that he found Mr. McNelis had "a clear and compelling
25 pattern of deficits in processing speed, affecting graphomotor speed, visual motor speed and
26 persistence, nonverbal fluency, simple sequencing and on an attentional task requiring visual
27 aspects of scanning, sustained concentration and processing speed."

1 4.78 Dr. Goodwin further stated Mr. McNelis had “a clear and compelling pattern of
2 weaknesses in visual working memory and visual memory compared with expectations based on
3 his general ability” and that he had a “pattern of weakness in both immediate and delayed
4 memory processing also compared with his general ability.”

5
6 4.79 Dr. Villanueva had listed “depression” as Mr. McNelis’ first diagnosis in his report;
7 Dr. Goodwin stated this “hierarchy of diagnostic formulation really doesn’t make much clinical
8 sense[.]”

9 4.80 Dr. Goodwin rejected the notion that Mr. McNelis’ cognitive deficits were due to
10 depression or anxiety. Referring to Mr. McNelis’ lifelong history of depression he stated: “it is
11 quite clear that this psychiatric condition has been and continues to be insufficient in explaining
12 the extent of his neurocognitive problems.”

13
14 4.81 On or about January 6, 2017, Mr. McNelis submitted a second appeal to Prudential,
15 providing, among other documents, Dr. Goodwin’s report.

16 4.82 Mr. McNelis’ January 6, 2017 appeal also included a letter from Dr. Reed stating,
17 “I concur that Mr. McNelis’ depression does not account for his neurocognitive problems.
18 Furthermore, his depression is not a contributing factor or even a secondary factor affecting his
19 present inability to work.” Dr. Reed stated that given Mr. McNelis’ “job history, his
20 psychological and neuropsychological evaluations, and subjective symptoms” his “current
21 occupational impairment is clearly related to his physical illness.”

22
23 4.83 Mr. McNelis’ January 6, 2017 appeal also included a statement from Dr. Brodie,
24 who wrote: “I agree with Dr. Goodwin that Mr. McNelis’ long-standing depression does not
25 account for his neurocognitive problems.” Dr. Brodie also wrote:

26 As I have also previously stated, Mr. McNelis, due to his chronic pain and fatigue,
27 is unable to perform the duties of any gainful occupation for which he is

1 reasonably fitted by education, training or experience. His physical capacities
2 were thoroughly evaluated by Theodore Becker, PhD., and I agree with Dr.
3 Becker's conclusion that Mr. McNelis lacks the physical capacity for competitive
and predictable sustained work at any level including sedentary work.

4 4.84 Mr. McNelis' January 6, 2017 appeal included Dr. Becker's response to Ms.
5 Weinmann's report. Dr. Becker stated that Ms. Weinmann had not identified credentials meeting
6 the American Physical Therapist Association guidelines for evaluating functional capacity, and
7 did not otherwise "identify academic or professional certifications or achievements related to
8 work physiology and associated determinations of full time work tolerance." He noted that she
9 provided no "documentation and/or scientific support for her opinions."
10

11 4.85 In response to Mr. McNelis' January 6, 2017 appeal, Prudential, using MES Peer
12 Review Services, obtained the opinion of another physical therapist, Jennifer Delaney, licensed
13 in New York. Ms. Delaney's report cited two journal articles extolling the benefit of exercise for
14 patients with fibromyalgia or chronic fatigue. She said Ms. Weinmann's report "suggests" Mr.
15 McNelis could perform sedentary work, and noted her concurrence with that opinion.
16

17 4.86 Ms. Delaney's opinions were incorrect, as Prudential ultimately found Mr. McNelis
18 disabled and paid him LTD benefits from April 15, 2016 through January 2, 2019.

19 4.87 Also in response to Mr. McNelis' January 6, 2017 appeal, Prudential engaged a
20 neuropsychologist from Georgia, Nick DeFilippis, Ph.D.

21 4.88 Dr. DeFilippis frequently performs examinations and peer reviews for disability
22 insurers, and speaks at events hosted by and for disability insurance companies.
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24 4.89 Dr. DeFilippis understands that most group disability insurance policies limit
25 benefits for disabilities caused by mental illness to 24 months.
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1 4.90 At least three United States District Courts have rejected opinions offered by Dr.
2 DeFilippis to support a disability insurer's claim that a person was disabled by mental illness,
3 rather than physical illness.

4 4.91 Dr. DeFilippis stated that Mr. McNelis' "diagnoses of chronic fatigue syndrome and
5 autoimmune disorder" were "outside of [his] specialty." He then opined that "as of 12/22/2016"
6 Mr. McNelis "has mild cognitive difficulties that would interfere with his reliability and work
7 performance." These problems, he said, were "caused by psychological problems."

8 4.92 Dr. DeFilippis' opinion that Mr. McNelis' disability was due to psychological
9 problems was incorrect, as Prudential continued to find Mr. McNelis disabled under the Plan and
10 entitled to LTD benefits after the Plan's 24-month mental illness limitation ended on April 15,
11 2016, paying him LTD benefits until January 2, 2019.

12 4.93 Also in response to Mr. McNelis' January 6, 2017 appeal Prudential again engaged
13 Dr. Mark Burns, through MES Peer Review Services. It provided Dr. Burns new information
14 regarding Mr. McNelis, and asked him if the information "alter[s] your prior assessment?"

15 4.94 Dr. Burns issued a report on or about January 31, 2017 stating: "It does not. My
16 assessment has not changed."

17 4.95 Dr. Burns' opinion regarding Mr. McNelis set forth in his January 31, 2017 report
18 was incorrect, as Prudential ultimately found Mr. McNelis disabled and paid him LTD benefits
19 from April 15, 2016 through January 2, 2019.

20 4.96 On or about February 22, 2017, Prudential denied Mr. McNelis' January 6, 2017
21 appeal. Prudential admitted that Mr. McNelis was disabled from work – and again claimed this
22 was due to "psychological problems."

1 4.97 On or about February 28, 2017, Mr. McNelis filed a civil action in this Court, Case
2 2:17-cv-00314-RAJ *McNelis v. The Prudential Insurance Company of America*.

3 4.98 On or about June 2, 2017, pursuant to this Court's standing Order directing parties
4 to confer before filing any motion, Mr. McNelis' attorney provided Prudential a summary of the
5 factual and legal basis for a dispositive motion Mr. McNelis intended to file refuting Prudential's
6 claim that his disability was psychological in nature, and asking the Court to declare Mr.
7 McNelis disabled and entitled to LTD benefits under the Plan.
8

9 4.99 On or about June 14, 2017, Prudential offered Mr. McNelis \$150,000 in exchange
10 for dismissal of his lawsuit and waiver of all rights under the Policy and under the Plan.

11 4.100 The lifetime value of Mr. McNelis' claim at that time if he did not recover from
12 his disability – benefits from April 15, 2016 to May 17, 2034 – exceeded \$1,975,000.00.

13 4.101 Mr. McNelis declined Prudential's offer and advised Prudential he would continue
14 preparing the dispositive motion.
15

16 4.102 On or about July 28, 2017, before Mr. McNelis filed his dispositive motion,
17 Prudential reinstated his benefit claim.

18 4.103 Mr. McNelis therefore dismissed his civil action on July 31, 2017.

19 4.104 On February 12, 2018, six and a half months after Mr. McNelis dismissed his civil
20 action, Prudential directed him to attend an examination with neuropsychologist James Bryan,
21 Ph.D., on March 19, 2018.
22

23 4.105 Mr. McNelis wrote Prudential on February 15, 2018. He reminded Prudential that
24 he had already undergone *three* complete neuropsychological evaluations and that Prudential's
25 neuropsychologist consultant, Dr. DeFilippis, stated that the most recent testing done by Dr.
26
27

1 Goodwin, had been “appropriate” and that Mr. McNelis’ participation in that testing had been
2 valid and marked by good effort.

3 4.106 Mr. McNelis’ February 15, 2018 letter cited and enclosed scholarly articles
4 describing the well-established fact that repeat neuropsychological testing results in false
5 appearances of improvement and mistaken conclusions, due to test familiarity or “practice
6 effects.”
7

8 4.107 Mr. McNelis’ February 15, 2018 letter provided information questioning
9 Prudential’s relationship with Dr. Bryan, Dr. Bryan’s bias, and his conduct during past
10 evaluations of disability claimants he performed for Prudential.

11 4.108 Mr. McNelis’ February 15, 2018 letter to Prudential stated in part:

12 Prudential’s wish to subject Mr. McNelis to a fourth neuropsychological
13 evaluation when its most recently retained neuropsychologist consultant found Dr.
14 Goodwin’s December 2016 testing valid, and when the impact of practice effects
15 is undisputed, makes no clinical sense. . . .

16 There is yet another concern with Prudential’s proposed evaluation. It has been
17 scarcely six months since Prudential and Mr. McNelis concluded litigation in U.S.
18 District Court for the Western District of Washington. . . .

19 Given how little time has passed since that action was dismissed, Prudential’s
20 present effort to obtain yet another neuropsychological evaluation, to do so
21 despite the well-known impact of practice effects with repeat testing, to seek such
22 an evaluation only a little over one year since the last evaluation, and to enlist an
23 evaluator with evident bias, is plainly a strategic effort to find some grounds to
24 strike Mr. McNelis from the ledger of claimants to whom it must pay benefits.

25 . . . Prudential has repeatedly and wrongly denied Mr. McNelis the benefits he is
26 entitled to under the Plan. It responded to the federal lawsuit he was compelled to
27 file by attempting to settle his claim for cheap. It agreed to pay him benefits on
condition that he dismiss the lawsuit and then, mere months later, demands he
undergo a fourth and entirely unnecessary neuropsychological evaluation, when
there is already an ample body of neuropsychological data, and such serial
evaluations only invite error.

These facts do not describe the exercise of fiduciary duties. They show Prudential
treating Mr. McNelis “as an adversary bent on denying his claim and oblivious to

1 its fiduciary obligations as administrator of the LTD Plan.” *Friedrich v. Intel*
2 *Corp.*, 181 F.3d 1105, 1110 (9th Cir. 1999) . . .

3 We respectfully invite Prudential to reconsider this course, and its demand that
4 Mr. McNelis undergo further neuropsychological evaluation.

5 4.109 Prudential canceled the March 19, 2018 neuropsychological evaluation with Dr.
6 Bryant.

7 4.110 Then, on or about September 20, 2018, Prudential advised Mr. McNelis that it had
8 scheduled neuropsychologist Karen Sanders, Ph.D., to evaluate him on October 2, 2018.

9 4.111 Prudential arranged for surreptitious surveillance of Mr. McNelis to take place on
10 the day of, and the days before and after, the October 2, 2018 evaluation.

11 4.112 Prudential conducted 18 hours of surveillance of Mr. McNelis over September 30
12 and October 1, 2 and 3, 2018.

13 4.113 Due to a serious infection, Mr. McNelis was unable to attend the October 2, 2018
14 evaluation with Dr. Sanders.

15 4.114 Prudential re-scheduled the evaluation with Dr. Sanders for November 1, 2018.

16 4.115 Prudential again ordered surveillance of Mr. McNelis for the day of the
17 examination, and the days before and after.

18 4.116 Prudential obtained 24 hours of surveillance of Mr. McNelis on October 31 and
19 November 1 and 2, 2018.

20 4.117 The main fruit of Prudential’s seven days of surveillance was over an hour of
21 video taken of Mr. McNelis on October 1, 2018, while he was in a coffee shop. One can see his
22 facial expressions and movements throughout much of the video.

23 4.118 At Mr. McNelis’ request, psychiatrist Mark Koenen, M.D., reviewed the
24
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26
27

1 surveillance videos. Dr. Koenen noted that the videos “do not suggest any significant mood
2 problems, nor is there any indication of psychomotor retardation.”

3 4.119 Prudential did not provide the October 1, 2018 surveillance video to Dr. Sanders.

4 4.120 Dr. Sanders evaluated Mr. McNelis on November 1, 2018.

5 4.121 Dr. Sanders performed that evaluation while engaged by PsyBar, LLC.

6 4.122 Dr. Sanders provided Prudential a report, stating Mr. McNelis’ cognitive testing
7 was improved from prior testing.
8

9 4.123 Dr. Sanders stated she was “not able to comment on non-psychological
10 restrictions, as this is outside the scope of my professional license and training.”

11 4.124 Asked to describe any limitations her testing identified, Dr. Sanders stated:

12 Any task that requires quick response could be impaired with this slowed motor
13 issue. He may also have difficulty with work tasks that require quick response.
14 Learn and execute new computer programs and computer skills, 40% slower.

15 4.125 Dr. Sanders stated that the motor slowing she found “may” be due to depression.

16 4.126 Dr. Sanders’ report failed to document facts supporting the claim that Mr. McNelis
17 was disabled by depression.

18 4.127 On December 13, 2018, Prudential in-house vocational expert Steve Lambert, MS,
19 CRC, determined that Mr. McNelis remained unable to earn 60% of his pre-disability earnings.

20 4.128 As of December 13, 2018, then, Prudential recognized that Mr. McNelis remained
21 disabled from “any occupation” under the Plan’s definition of that term described above in
22 Paragraphs 4.15 and 4.16.
23

24 4.129 On or about January 2, 2019, however, Prudential terminated Mr. McNelis’ LTD
25 benefits, claiming, as it had done three years earlier, that Mr. McNelis was disabled by mental
26 illness. It wrote:
27

1 Neuropsychological Testing noted a slight decrease in motor speed likely due to
2 residual impact of major depressive disorder in form of psychomotor retardation.
3 Benefits for mental illnesses are limited to 24 months and this limitation has
expired.

4 4.130 On or about June 25, 2019, Mr. McNelis appealed this termination of his benefits.

5 4.131 Mr. McNelis' June 25, 2019 appeal included a statement from psychologist Dr.
6 Reed, stating Mr. McNelis' longstanding depression was well managed, had "never impaired"
7 Mr. McNelis' "ability to succeed professionally" and that his "depression is not a contributing
8 factor, or even a secondary factor, affecting his present inability to work."
9

10 4.132 Mr. McNelis' June 25, 2019 appeal included a report from psychiatrist Dr.
11 Koenen, who, following record review and examination of Mr. McNelis, found "no evidence that
12 mood or anxiety disorders are a significant source of impairment for Mr. McNelis [at] the present
13 time."

14 4.133 Mr. McNelis' June 25, 2019 appeal included a report from a second two-day
15 physical capacity evaluation performed by Dr. Becker on March 14 and 15, 2019, stating Mr.
16 McNelis remained "work intolerant" and that "competitive and predictable sustained work is
17 absent for all levels of category according to the Dictionary of Occupational Titles."
18

19 4.134 Mr. McNelis' June 25, 2019 appeal advised Prudential that it had mistakenly
20 obtained a report from Dr. Norman Burns, believing the report, as Prudential had requested, was
21 from Dr. Mark Burns.

22 4.135 As stated above, Prudential had obtained reports regarding Mr. McNelis from Dr.
23 Mark Burns dated June 23, 2016, August 3, 2016 and January 31, 2017.

24 4.136 On July 17, 2018, Prudential again sought Dr. Burn's opinion. It wrote to MES
25 Peer Review Services on July 17, 2018:
26

27 Thank you for Dr. Mark Burns' prior review of Mr. McNelis' file.

1 We are in receipt of additional medical records. Upon our evaluation of Dr.
2 Burns' file review report, we note that these records had not been included in his
3 review.

4 We ask that Dr. Burns review these additional records and provide us with his or
5 her professional opinion in response to the questions below:

6 1. Does review of the attached documentation alter your prior assessment? If so,
7 please detail how and why it alters your assessment, pointing to specific
8 documentation in support of your opinion.

9 4.137 A doctor with the surname "Burns" complied with Prudential's July 17, 2018
10 request regarding Mr. McNelis. He reviewed the "additional records" and wrote in a report
11 dated July 26, 2018 that the "provided medical documentation does not alter my prior
12 assessment."

13 4.138 Prudential recorded its receipt of that report on July 26, 2018 in a claims note
14 stating, "Mark R. Burns, MD – report sent to claim & DCM."

15 4.139 The July 26, 2018 report, however, was not written by Dr. Mark Burns.

16 4.140 Rather than rheumatologist Mark Burns, M.D., MES Peer Review Services
17 provided the "additional medical records" to neurologist Norman Burns, M.D.

18 4.141 Dr. Norman Burns wrote the July 26, 2018 report.

19 4.142 Dr. Burns falsely referred to his "prior assessment" of Mr. McNelis.

20 4.143 Prudential's claim file contains nothing suggesting that Dr. Norman Burns ever
21 reviewed any documents regarding Mr. McNelis before July 17, 2018, and nothing suggesting
22 Dr. Norman Burns had ever provided any opinion regarding Mr. McNelis before July 17, 2018.

23 4.144 On information and belief, Dr. Norman Burns had never heard of James McNelis
24 before July 17, 2018.

25 4.145 Mr. McNelis' June 25, 2019 appeal included a declaration from the board-certified
26 rheumatologist who took over his care when Dr. Brodie retired, Richard Neiman, M.D.,
27

1 4.146 Dr. Neiman’s declaration described Mr. McNelis’ illness as follows:

2 Mr. McNelis continues to describe core symptoms of disabling fatigue with post-
3 exertional malaise, diffuse pain, unrefreshing sleep and cognitive difficulties.
4 Other symptoms have included an intention tremor, light-headedness with near
5 loss of consciousness, and urinary frequency at night. Having previously been
6 active and in good health, these fluctuating symptoms emerged following a
7 prolonged episode of intractable nausea, vomiting and diarrhea with onset in
8 November 2003. . . .

9 Objective evidence that accompanies the symptoms described above, includes
10 the following:

- 11 a. Mr. McNelis’ consistent account of fatigue was quantified objectively
12 by Theodore Becker, Ph.D. in January 2016 and March 2019 as part of
13 Performance-Based Physical Capacity Evaluations. Both assessments
14 took place over two days and noted “biomechanical fatigue” and
15 “physiological dysfunction” during repetitive activity leading to a
16 conclusion that Mr. McNelis should be considered “work intolerant”.
- 17 b. Specific deficits of cognitive function have been consistently detected
18 by repeated neuropsychological evaluations.
- 19 c. Between 2014 and 2016, Dr. Brodie noted evidence of weight loss,
20 fluctuating tenderness and swelling in his left wrist and hand, right hip
21 and foot tenderness, lower back pain and myofascial trigger-point
22 tenderness. Laboratory evidence of immune system activation
23 included serological markers from blood tests indicating persistently
24 low Complement (C3). Complement proteins work with the immune
25 system and play a role in the development of inflammation. When the
26 complement system is activated during inflammation, levels of C3
27 may go down.
- d. Since March 2016, blood tests have shown persistently elevated
Creatine Phosphokinase (CPK). CPK is an enzyme found in muscle
tissue that, when elevated in the blood, can indicate muscle tissue
injury. A muscle biopsy in December 2017 was notable for reduced
activity of two enzymes (NADH cytochrome c reductase and succinate
cytochrome c reductase) involved in cellular energy production, yet
the reduced activity was just short of the significance threshold for a
definitive diagnosis. Although swollen mitochondria were noted on
electron microscopy, features for a definitive diagnosis of

1 mitochondrial and metabolic myopathies were not identified in
2 histochemical, biochemical, and ultrastructural studies. Therefore, as
3 muscle biopsy results were neither normal nor sufficiently abnormal to
4 independently confirm a specific muscle disorder, correlation with
5 other clinical information was advised by the pathologist. This
6 indicates uncertainty and the inability of these tests to rule out a
7 muscle disorder.

8 It is not unusual for diagnostic conceptualization of a case of this complexity to
9 evolve over time in relation to changing evidence:

- 10 a. Between 2014 and 2016, Dr. Brodie interpreted the reported symptoms,
11 examination findings and laboratory results, as evidence of autoimmune
12 disease that justified treatment for a working diagnosis of
13 Undifferentiated Connective Tissue Disease (UCTD). Under the
14 International Classification of Disease, 10th Edition (ICD-10), this would
15 be coded as M35.9: *Systemic involvement of connective tissue,
16 unspecified*. UCTD describes a pattern characterized by clinical signs
17 and symptoms together with serological markers of systemic
18 autoimmune diseases that do not fulfil the criteria for a “defined”
19 Connective Tissue Disease (CTD). CTDs are a family of autoimmune
20 diseases that includes well “defined” conditions such as Rheumatoid
21 Arthritis or Systemic Lupus Erythematosus. The diagnosis of UCTD
22 remains a complex area of Rheumatology due to the subtlety and
23 variability of signs and symptoms and the continuing evolution of
24 international consensus on diagnostic criteria. Complicating the
25 diagnostic process for Mr. McNelis has been the absence of other
26 serological markers for autoimmune disease, such as Antinuclear
27 Antibodies (ANA) which are normally associated with a diagnosis of
UCTD. However, as these markers are not 100% sensitive, autoimmune
CTD could not be ruled out given the clinical context.
- b. Since 2016, the persistently elevated CPK in the context of pain,
weakness and fatigability on repetitive activity, gave me reason to
suspect that Mr. McNelis has an Idiopathic Muscle Disease. Although
investigations such as an electromyography and nerve conduction study
were essentially normal in October 2017, a muscle biopsy in December
2017 showed mild abnormalities that could not confirm a definitive
diagnosis but may indicate the presence of mitochondrial disease.
Mitochondria are responsible for producing energy within cells and
Mitochondrial Myopathies are another complex area of medicine due to

1 the wide range of clinical features that can affect virtually any organ,
2 particularly those with high energy requirements, such as skeletal
3 muscle and nerve cells. No cures exist for Mitochondrial Myopathies,
many syndromes of which have not yet been fully characterized.

4 Although a unifying diagnosis to account for all of Mr. McNelis' symptoms has
5 not yet been confirmed, it is my opinion that Mr. McNelis has a disease affecting
6 his muscle tissue. It is not unusual for muscle disorders to have an insidious onset
7 with signs and symptoms that evolve over several years before a specific
8 diagnosis can be confirmed. The following list of differential diagnoses includes
a range of explanations for his difficulties based on the available evidence.

9 a. At present, Mr. McNelis has a working diagnosis of an idiopathic
10 muscle disease. Under ICD-10, this would be coded as G72.9:
11 *Myopathy, unspecified*. Myopathies are neuromuscular disorders in
12 which the primary symptom is muscle weakness due to dysfunction of
13 muscle fiber. More specifically, the evidence available thus far points to
14 a Mitochondrial Myopathy. Under ICD-10, this would be coded as
15 G71.3: *Mitochondrial myopathy, not elsewhere classified*. The main
16 symptoms of mitochondrial myopathy are muscle fatigue, weakness,
17 exercise intolerance and occasionally, a wide range of neurological
18 symptoms. The severity of any of these symptoms varies greatly
19 between individuals. Alternatively, further development of his illness
20 may reveal a diagnosis of an Idiopathic Inflammatory Myopathy. Under
21 ICD-10, this would be coded as G72.49: *Other inflammatory and
immune myopathies, not elsewhere classified*. Idiopathic Inflammatory
22 Myopathies are a group of disorders characterized by inflammation of
23 skeletal muscles. The primary symptom of idiopathic inflammatory
24 myopathy is muscle weakness, which develops gradually over a period
25 of weeks to months or even years. Other symptoms include joint pain
26 and fatigue.

27 b. Mr. McNelis attracted a diagnosis of Myalgic Encephalitis /
Chronic Fatigue Syndrome (ME/CFS) and Fibromyalgia in the past after
contact with the AMEN clinic in 2006 and 2010. If causes could be
identified for the laboratory abnormalities described above or if they
could be discounted as irrelevant findings, he would continue to meet
criteria for these conditions which are often viewed as part of the same
disease spectrum. There is no laboratory test to confirm either
condition, yet an important diagnostic consideration is to rule out other
causes with overlapping symptoms. Under ICD-10, ME/CFS would be

1 coded as R53.82: *Chronic fatigue syndrome, NOS*. ME/CFS is a
2 debilitating disorder characterized by profound fatigue that is not
3 improved by bed rest and that may be worsened by physical or mental
4 activity. Symptoms affect several body systems and may include
5 weakness, muscle pain, impaired cognitive function, and insomnia,
6 which result in reduced participation in daily activities. Under ICD-10,
7 Fibromyalgia would be coded as M79.7: *Fibromyalgia*. Fibromyalgia is
8 a chronic disorder that causes widespread pain, fatigue, and changes in
9 sleep, mood and cognition.

10 c. Other explanations that I believe can be ruled out:

11 i. Isolated HyperCKemia, which could account for the
12 persistently raised serum CPK, yet this diagnosis would only be
13 accurate if the presence of elevated CPK levels were not
14 associated with reduced muscle function which is not the case
15 for Mr. McNelis.

16 ii. Mr. McNelis has a history of Major Depressive Disorder, for
17 which he takes antidepressant medication (Wellbutrin) and
18 engages in psychotherapy. Since first meeting Mr. McNelis in
19 March 2017, I have consistently noted the absence of signs and
20 symptoms of active depression. I do not think Major
21 Depressive Disorder is the most likely explanation for his
22 difficulties, especially in context of the laboratory abnormalities
23 described above.

24 ...

25 Mr. McNelis is incapable of sustained predictable employment due to his chronic pain
26 and fatigue. I believe his disability is due to an Idiopathic Muscle Disease, a working
27 diagnosis based on quantified exercise intolerance and a constellation of objective
findings. It is not unusual for an individual to have a range of differential diagnoses and
the absence of a specific diagnosis in no way supports the notion that no disease is
present.

4.147 On August 7, 2019, in response to Mr. McNelis' June 25, 2018 appeal, Prudential
wrote Mr. McNelis that it had scheduled an appointment for him with Frank Marinkovich, M.D.,
to take place on August 30, 2019.

1 4.148 Dr. Marinkovich publicly and expressly endorsed the approach to sickness set
2 forth in Healing the Whole Man, by Joan Hunter. The book’s first page states:

3 We serve a big God who more than covers any lack of medical knowledge or
4 exact prayers as we step out in faith. I use this book in my office and have seen
5 great results!

Frank Marinkovich, M.D.

6 4.149 Healing the Whole Man provides the following remedy for “Brain Damage”:

- 7 1. Lay hands on the head commanding a creative miracle – “a new brain.”
- 8 2. Command all the nerves to function normally and any memory loss to be
9 restored.
- 10 3. If caused by a stroke, command the spirit of death to go.

11 4.150 Healing the Whole Man provides the following remedy for “Down Syndrome”
12 [sic]:

- 13 1. Cast out the spirit of Down Syndrome.
- 14 2. Lay hands on the person’s head and command a new brain.
- 15 3. Command the cells to revert to the correct number of chromosomes
16 and for the extra chromosome to go.
- 17 4. Command the body to be healed and function normally.
- 18 5. Command the facial features to be normal.

19 4.151 Healing the Whole Man provides this remedy for “Homosexuality/Lesbianism”:

- 20 1. Lead them in a prayer of repentance of idolatry.
- 21 2. Have them repent of sexual sins, if necessary (no details need to be spoken).
- 22 3. Lead them in the prayer to break ungodly covenants.
- 23 4. Cast out the spirit of homosexuality/lesbianism.
- 24 5. Lead them in a prayer of repentance to break word curses.
- 25 6. Minister to the emptiness in their heart. Speak peace to them.
- 26
- 27

1 4.152 On August 26, 2019, MES Solutions wrote Mr. McNelis advising that the
2 examination with Dr. Marinkovich was re-scheduled to September 18, 2019.

3 4.153 On August 28, 2019, Prudential wrote Mr. McNelis that it had re-scheduled Dr.
4 Marinkovich's examination to take place on September 23, 2019.

5 4.154 On August 9, 2019, Mr. McNelis asked to videotape Dr. Marinkovich's
6 examination.

7 4.155 Prudential told Mr. McNelis he could not videotape the examination.

8 4.156 A federal regulation states that before an ERISA plan "can issue an adverse benefit
9 determination on review on a disability benefit claim based on a new or additional rationale, the
10 plan administrator shall provide the claimant, free of charge, with the rationale; the rationale
11 must be provided as soon as possible and sufficiently in advance of the date on which the notice
12 of adverse benefit determination on review is required to be provided . . . to give the claimant a
13 reasonable opportunity to respond prior to that date."
14

15 4.157 On August 9, 2019, Mr. McNelis asked Prudential to provide a copy of Dr.
16 Marinkovich's report after he examined Mr. McNelis, to allow Mr. McNelis an opportunity to
17 respond to that report before Prudential made a decision on his appeal.
18

19 4.158 Prudential told Mr. McNelis it would not provide a copy of Dr. Marinkovich's
20 report until after it made a decision on his appeal, because the regulation quoted above in
21 Paragraph 4.156 did not apply to Mr. McNelis' claim.
22

23 4.159 On September 13, 2019, Mr. McNelis asked Prudential to provide a list of the
24 documents it provided Dr. Marinkovich to review.

25 4.160 Prudential refused to provide Mr. McNelis a list of such documents.
26
27

1 4.161 On September 13, 2019, Mr. McNelis asked Prudential to provide a copy of the
2 questions it had asked Dr. Marinkovich to answer.

3 4.162 Prudential refused to provide a list of those questions.

4 4.163 On September 23, 2019, Mr. McNelis sent Prudential a copy of Dr. Marinkovich's
5 endorsement of Healing the Whole Man and the excerpts from that book quoted above, among
6 others. He urged Prudential to "review this information and carefully assess Dr. Marinkovich's
7 professional judgment before acting in reliance on his opinions."

8 4.164 Dr. Marinkovich examined Mr. McNelis on September 23, 2019. His physical
9 examination of Mr. McNelis lasted 18 minutes.

10 4.165 Prudential denied Mr. McNelis' appeal on October 4, 2019, in express reliance on
11 Dr. Marinkovich's opinions as expressed in his report dated September 23, 2019.

12 4.166 Prudential apparently had not read that part of Mr. McNelis' June 25, 2019 appeal
13 explaining and documenting that Prudential mistakenly obtained a report from Dr. Norman
14 Burns when it had sought an addendum report from Dr. Mark Burns.

15 4.167 Prudential perpetuated and compounded its errors regarding Dr. Mark Burns and
16 Dr. Norman Burns, asking Dr. Marinkovich to "reference the clinical assessment in the file
17 completed by Dr. Norman M. Burn [sic] on June 16, 2016, and July 18, 2018" and to "provide a
18 detailed explanation as to why your opinion is the same or differs from this prior clinical
19 assessment."
20
21

22 4.168 Dr. Norman Burns had not provided Prudential any report regarding Mr. McNelis
23 before July 23, 2018.

24 4.169 Dr. Marinkovich's report states: "Records from Norman Burn [sic] have been
25 reviewed in this report. I am in agreement with Dr. Burn's conclusions."
26
27

1 4.170 Under the federal regulations governing ERISA claims practices, Prudential was
2 required to make a decision on Mr. McNelis’ appeal within 45 days after receiving the appeal,
3 that is, by August 12, 2019.

4 4.171 The federal regulations governing ERISA claims practices allow an additional 45
5 days if “special circumstances” exist.

6 4.172 No such special circumstances existed here to warrant Prudential’s delay in
7 deciding Mr. McNelis’ appeal.

8 4.173 Prudential has a written policy stating:

9 A decision must be made on an appeal within a reasonable period of time, but not
10 later than 45 days after receipt of the appeal, unless special circumstances beyond
11 Prudential’s control require an extension of time for processing the appeal.

12 4.174 There were no circumstances beyond Prudential’s control that required it to take
13 more than 45 days to decide Mr. McNelis’ appeal.

14 4.175 Even if there had been “special circumstances” allowing Prudential to take an
15 additional 45 days, those additional 45 days would have ended on September 26, 2019.

16 4.176 Prudential delayed deciding Mr. McNelis’ appeal because it wanted to obtain Dr.
17 Marinkovich’s opinion.

18 4.177 On October 4, 2019, Prudential, in reliance on Dr. Marinkovich’s opinions, denied
19 Mr. McNelis’ appeal.

20 4.178 The businesses from which Prudential obtained peer reviews and medical
21 examinations regarding Mr. McNelis provide thousands of peer reviews and reports to Prudential
22 each year.

23 4.179 Prudential pays the businesses from which it obtained peer reviews and medical
24 examinations regarding Mr. McNelis a substantial amount of money each year.

1 4.180 The businesses from which Prudential obtained peer reviews and medical
2 examinations regarding Mr. McNelis have financial incentives to provide reports favorable to
3 Prudential, that is, medical reports and/or peer reviews which support denials and terminations of
4 disability benefits, in order to continue their business relationship with Prudential.
5

6 4.181 The businesses from which Prudential obtained peer reviews and medical
7 examinations regarding Mr. McNelis exist to serve disability insurance companies.
8

9 4.182 The businesses from which Prudential obtained peer reviews and medical
10 examinations regarding Mr. McNelis are financially dependent upon the disability insurance
11 companies they serve.
12

13 4.183 The businesses from which Prudential obtained peer reviews and medical
14 examinations regarding Mr. McNelis are biased in favor of disability insurance companies.
15

16 4.184 Prudential uses and continues to use these businesses to obtain medical reports and
17 peer reviews because those businesses are biased in its favor.
18

19 4.185 Mr. McNelis has remained disabled under the Plan since January 2, 2019, in that
20 due to sickness he has been unable to perform the duties of any gainful occupation for which he
21 is reasonably fitted by education, training or experience, and he is under a doctor's regular care.
22

23 4.186 Mr. McNelis is disabled by a physical illness.
24

25 4.187 Prudential's claim that Mr. McNelis is disabled by a mental illness rather than a
26 physical illness is incorrect.
27

4.188 Prudential knowingly and deliberately maintains the falsehood that Mr. McNelis is
disabled by a mental illness, rather than a physical illness, to avoid paying his claim.

4.189 If Mr. McNelis remains disabled, the cost of his claim to Prudential from January
2, 2019 through the end of the maximum benefit period is approximately \$1,680,000.00.

1 4.190 Because it is both the decision-maker and the payor with respect to Mr. McNelis'
2 long-term disability benefits, Prudential has a conflict of interest.

3 4.191 Prudential's conflict of interest affected its management of Mr. McNelis' claim for
4 disability benefits and was the reason for its termination of his benefits.

5 4.192 Prudential owes fiduciary duties to Plan participants, including Mr. McNelis.

6 4.193 Prudential's fiduciary duties include, without limitation, the obligations:

- 7
- 8 A. to discharge its duties with complete and undivided loyalty to plan
9 participants without any dealing for its own benefit;
 - 10 B. to act for the exclusive benefit of plan participants;
 - 11 C. to exhibit the care, skill, prudence, and diligence that a prudent person
12 acting in like capacity would use in similar circumstances;
 - 13 D. to discharge its duties for the exclusive purpose of providing benefits
14 to participants and their beneficiaries;
 - 15 E. to act with due care to Plan participants and Plan beneficiaries;
 - 16 F. to comply with Plan terms;
 - 17 G. to deal fairly with Plan beneficiaries and convey complete and
18 accurate information material to a beneficiary's circumstances;
 - 19 H. to conduct an adequate investigation when considering a claim for
20 benefits; and
 - 21 I. to engage in meaningful dialogue with a beneficiary.

22 4.194 Prudential breached these and other fiduciary duties it owed to Mr. McNelis.

23 4.195 Mr. McNelis was actually harmed by Prudential's breach of its fiduciary duties.

24 4.196 Prudential's repeated breaches of its fiduciary duties to Mr. McNelis forced him to
25 submit multiple appeals to Prudential, and to incur substantial costs in doing so, including legal
26 fees and the costs to retain physicians and other experts to refute Prudential's false and shifting
27 justifications for denying benefits.

1 4.197 As a further consequence of Prudential’s breach of its fiduciary duties, Mr.
2 McNelis has suffered financial injury including without limitation being forced to sell valuable
3 stock and other assets in order to have money to pay rent and buy food.

4 4.198 Recovery of retroactive benefits is inadequate to make Mr. McNelis whole
5 because delayed recovery of those benefits results in additional financial harm.
6

7 4.199 Prudential obtains financial gain by delaying payment on valid claims, and by
8 denying and terminating valid claims, because it can invest the money it otherwise would be
9 paying to plan participants and beneficiaries such as Mr. McNelis.

10 4.200 Prudential violates ERISA in the manner described herein in order to increase its
11 profits.
12

13 4.201 Prudential was unjustly enriched by wrongfully withholding disability benefits
14 from Mr. McNelis, and only paying him those benefits after substantial delays.

15 4.202 Prudential consciously and intentionally breached its fiduciary duties to Mr.
16 McNelis, as it persisted in these violations even after Mr. McNelis advised Prudential on
17 February 15, 2018, as described above in Paragraph 4.108, that it was violating its fiduciary
18 duties.

19 4.203 Mr. McNelis’ June 25, 2019 appeal also expressly reminded Prudential of its
20 fiduciary duties. His appeal stated in part:
21

22 Prudential forgot something whilst managing Mr. McNelis’ claim – its duties as
23 an ERISA fiduciary, duties that are the “highest known to the law.” *Howard v.*
Shay, 100 F.3d 1484, 1488 (9th Cir. 1996).

24 . . .

25 In the long run – and Prudential is plainly waging a war of attrition – Prudential
26 has the capacity to outspend Mr. McNelis. It has the demonstrated ability to
27 deprive him of any regular and reliable source of income, having spent more time
not paying him than it has paying him (recall that Mr. McNelis received a timely

1 monthly benefit in only 27 months of the more than five years he has been
2 disabled). And it has the ability to force him to spend thousands of dollars to
3 recover what it should have paid him in the first place. Prudential knows how to
4 use a claimant's financial distress to its own advantage: by June 2017 when it
5 offered to pay Mr. McNelis \$150,000 in exchange for dismissal of his lawsuit and
6 wavier of all rights under the Policy, it had been 14 months since he last received
7 a benefit check.

8 . . .

9 Thankfully, Mr. McNelis has a remedy. 29 U.S.C. § 1132(a)(3) allows an ERISA
10 plan participant to bring an action "(A) to enjoin any act or practice which
11 violates any provision of this title or the terms of the plan, or (B) to obtain other
12 appropriate equitable relief (i) to redress such violations or (ii) to enforce any
13 provisions of this title or the terms of the plan." . . .

14 This claim, more than most, merits judicial attention and relief under 29 U.S.C. §
15 1132(a)(3).

16 4.204 Prudential was undeterred, and continued to violate its fiduciary obligations to
17 Mr. McNelis even after he submitted his June 25, 2019 appeal. This included its disregard for
18 the cogent and rational opinions of Drs. Neiman, Reed, Koenen and Becker, all of which
19 Prudential found trumped by Dr. Marinkovich's assessment of Mr. McNelis' complex illness. It
20 included Prudential's continuing reliance on Norman Burns, M.D.'s July 26, 2018 report, when
21 that report was premised upon a "prior assessment" he had never performed.

22 4.205 Prudential's October 4, 2019 letter explaining the basis for its denial of Mr.
23 McNelis' June 25, 2019 appeal is, for the most part, simply text copied and pasted from Dr.
24 Marinkovich's report.

25 4.206 Prudential performed no reasoned analysis of the issues presented by Mr.
26 McNelis' appeal. It simply adopted Dr. Marinkovich's opinions as its own, preferring them to
27 Dr. Neiman's account as set forth above in Paragraph 4.146. It did so after being advised that
Dr. Marinkovich endorsed the laying on of hands to "heal" Down's Syndrome, brain damage
and "Homosexuality/Lesbianism."

V. STATEMENT OF CLAIMS

Claim Under 29 U.S.C. 1132(a)(1)(B):

5.1.1 Mr. McNelis re-alleges and incorporates each and every of the preceding paragraphs as though fully set forth herein.

5.1.2 Mr. McNelis has been continuously disabled within the meaning of the Plan, and eligible and entitled to receive long-term disability benefits, since January 2, 2019.

5.1.3 By denying Mr. McNelis was disabled under the Plan, and by refusing to pay him disability benefits, Prudential violated the Plan and denied Mr. McNelis his rights under the Plan.

5.1.4 Pursuant to 29 U.S.C. § 1132(a)(1)(B), Mr. McNelis seeks to recover the long-term disability benefits due him under the Plan, to enforce his rights under the Plan and to clarify his rights to future benefits under the Plan.

5.1.5 Pursuant to 29 U.S.C. § 1132(a)(1)(B), Mr. McNelis seeks a Declaration from this Court, as described below, that he is entitled to long-term disability benefits under the Plan, and an Order directing Prudential to pay him those benefits in accordance with the Plan's terms.

5.1.6 Pursuant to 29 U.S.C. § 1132(a)(1)(B), Mr. McNelis asks this Court to order Prudential to pay him LTD benefits to the policy's maximum benefit duration, absent a showing of improvement in his medical condition, and absent a showing that he is capable of performing any "gainful occupation," as that term is defined in the Policy, productively, full-time, and without undue disruptions and/or absences due to his sickness and related symptoms.

Claim Under 29 U.S.C. 1132(a)(3):

5.2.1 Mr. McNelis re-alleges and incorporates each and every of the preceding paragraphs as though fully set forth herein.

1 5.2.2 29 U.S.C. § 1132(a)(3) provides that a civil action may be brought by a
2 “participant, beneficiary, or fiduciary to (A) enjoin any act or practice which violates any
3 provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable
4 relief (i) to redress such violations or (ii) to enforce any provision of this subchapter or the terms
5 of the plan.”
6

7 5.2.3 Prudential owes fiduciary duties to Plan participants and beneficiaries including
8 Mr. McNelis.

9 5.2.4 Prudential violated these duties by, among other acts and omissions:

- 10 A. soliciting medical and other opinions regarding Mr. McNelis from
11 businesses it knows to be biased in favor of disability insurance
12 companies;
- 13 B. soliciting medical and other opinions regarding Mr. McNelis from
14 consultants it knows to be biased in favor of disability insurance
15 companies;
- 16 C. failing to establish and maintain reasonable procedures governing the
17 management of disability benefit claims;
- 18 D. failing to establish and maintain reasonable procedures governing the
19 management appeals of disability benefit claims;
- 20 E. relying and continuing to rely upon opinions regarding Mr. McNelis that it
21 obtained from businesses even when presented with information
22 demonstrating or tending to demonstrate that those businesses were
23 biased;
- 24 F. continuing to rely upon the opinions it obtained from individual
25 consultants even when presented with information demonstrating or
26 tending to demonstrate that those consultants were biased and/or
27 unqualified and/or unreliable;
- G. failing to ensure that Mr. McNelis’ benefit claims and appeals were
 decided in a manner designed to ensure the independence and impartiality
 of the persons involved in making the decisions;

- 1 H. consciously, unreasonably and without justification terminating Mr.
2 McNelis' claim and denying his appeals, thereby compelling him to file
3 suit;
- 4 I. consciously and unreasonably failing to investigate all bases upon which
5 to pay and honor Mr. McNelis' claim, fairly and in good faith;
- 6 J. refusing to give Mr. McNelis' interests or the interests of the Plan at least
7 as much consideration as it gave its own;
- 8 K. consciously and unreasonably failing to adopt and implement reasonable
9 or proper standards applicable to the prompt and fair investigation,
10 processing and adjudication of Mr. McNelis' appeal, and related appeals
11 and/or similar appeals;
- 12 L. consciously and unreasonably engaging in a selective review of the
13 evidence presented in an effort to minimize the evidence supporting
14 continuation of benefits while focusing on evidence supporting
15 termination of benefits;
- 16 M. consciously and unreasonably ignoring information and documents
17 demonstrating that the consultant whom it had examine Mr. McNelis and
18 from whom it sought an opinion, Dr. Marinkovich, was unqualified;
- 19 N. delegating decision-making authority regarding the nature of Mr.
20 McNelis' complex sickness to an unqualified person, Dr. Marinkovich;
- 21 O. consciously and unreasonably failing to establish administrative processes
22 and safeguards to ensure and verify appropriately consistent decision
23 making;
- 24 P. consciously and unreasonably failing to train and/or supervise its
25 employees, to ensure that they are aware of, and follow, administrative
26 processes and safeguards intended to ensure and verify appropriate and
27 consistent decision making;
- Q. delaying decision on Mr. McNelis' appeals in violation of ERISA's claim
management regulations;
- R. acting in malice and bad faith towards Mr. McNelis;
- S. failing to act with due care towards Mr. McNelis;
- T. failing to conduct an adequate investigation when considering Mr.
McNelis' appeal, including failing to obtain information regarding the
qualifications of the doctors whose opinions it solicited;

1 U. failing to engage in a meaningful dialogue with Mr. McNelis;

2 V. failing to provide Mr. McNelis information; and

3 W. treating Mr. McNelis as an adversary.

4
5 5.2.5 Mr. McNelis is entitled to injunctive or other equitable relief under 29 U.S.C. §
6 1132(a)(3) to redress and/or remedy the injuries Prudential caused him by its breach of fiduciary
7 duties, and to make him whole from the injuries Prudential caused.

8
9 **VI. PRAYER FOR RELIEF**

10 Mr. McNelis prays for entry of judgment as follows:

11 6.1 That this Court declare that Mr. McNelis has been continuously disabled within the
12 meaning of the Plan and eligible and entitled to receive long-term disability benefits from
13 January 2, 2019 through the time of trial;

14 6.2 That this Court declare that Mr. McNelis is disabled by a physical illness and not by
15 any mental illness;

16 6.3 That this Court declare that Prudential, by terminating Mr. McNelis' disability
17 benefits on or about January 2, 2019, violated the terms of the Plan and denied Mr. McNelis his
18 rights under the Plan;

19 6.4 That this Court declare that Prudential, by falsely and repeatedly alleging that Mr.
20 McNelis is disabled by mental illness, rather than physical illness, violated the terms of the Plan
21 and denied Mr. McNelis his rights under the Plan;

22 6.5 That this Court order Prudential to pay Mr. McNelis the long-term disability benefits
23 he was entitled to receive since January 2, 2019 through the time of trial, with prejudgment
24 interest on each and every such monthly payment through the date judgment is entered herein;
25
26
27

1 6.6 That this Court find that Prudential breached its fiduciary duties to Mr. McNelis;

2 6.7 That this Court order appropriate equitable relief or remedies to redress Prudential's
3 breach of its fiduciary duties, including without limitation –

4 A. surcharge, to put Mr. McNelis in the position he would have attained but for
5 Prudential's breach of its fiduciary duties;

6 B. that Prudential return to Mr. McNelis any financial gain it obtained by its
7 breach of fiduciary duties;

8 C. an injunction directing Prudential to pay Mr. McNelis LTD benefits to the
9 policy's maximum benefit duration absent a showing of improvement in his
10 medical condition, and absent a showing that he is capable of performing any
11 "gainful occupation," as that term is defined in the Policy, productively, full-
12 time, and without undue disruptions and/or absences due to his sickness and
13 related symptoms;

14 D. an injunction directing Prudential to establish administrative processes and
15 safeguards to ensure and verify appropriately consistent decision making; and

16 E. an injunction directing Prudential to train and/or supervise its employees to
17 ensure that they are aware of, and follow, administrative processes and
18 safeguards intended to ensure and verify appropriate and consistent decision
19 making;
20 making;

21 6.8 That this Court order Prudential to pay Mr. McNelis his attorney's fees and costs
22 pursuant to 29 U.S.C. § 1132(g)(1);

23 6.9 That Mr. McNelis be awarded any additional and further relief which this Court finds
24 just and equitable.
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DATED this 14th day of October 2019.

LAW OFFICE OF MEL CRAWFORD

By s/Mel Crawford
Mel Crawford, WSBA #22930
Attorneys for Plaintiff