IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

DUKE ENERGY BENEFITS COMMITTEE, Plaintiff, v. BRIDGET HEAFNER and DEMAYO LAW OFFICES, LLP, Defendants.	CIVIL ACTION NO. 3:21-CV-355

COMPLAINT

NOW COMES Plaintiff, DUKE ENERGY BENEFITS COMMITTEE ("Plaintiff" or "Committee"), in its capacity as Plan Administrator and fiduciary for the Duke Energy Medical Plan (the "Plan"), and files this Complaint showing the Court as follows:

NATURE OF ACTION

1. This is an action to enforce the terms of the Plan and to obtain appropriate equitable relief as authorized by the federal common law and statutory scheme of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*

JURISDICTION

2. This Court has original and exclusive jurisdiction over Plaintiff's claims for relief pursuant to ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

VENUE

3. Venue is proper pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because Defendant Bridget Heafner ("Heafner") and Defendant DeMayo Law Offices, LLP ("DeMayo") reside and do business in this judicial district, and at least some of the funds at issue are being held

in this judicial district.

PARTIES

4. The Committee is the named Plan Administrator for the Plan and a fiduciary of the Plan. The Committee's principal place of business is located at 550 South Tyron Street, DEC38D, Charlotte, NC 28202.

5. The Plan is an employee welfare benefit plan within the meaning of ERISA § 3(1), 29 U.S.C. § 1002(1).

6. Upon information and belief, Heafner is a citizen of the Charlotte, North Carolina area. At all times relevant hereto, Heafner was a participant or beneficiary in the Plan within the meaning of ERISA § 3(7), (8).

7. DeMayo is a law firm based in Charlotte, North Carolina. DeMayo represented Heafner in connection with a legal action relating to injuries Heafner suffered in connection with a motor vehicle accident occurring on or about September 18, 2018. DeMayo is believed to hold funds that are subject to the Plan's equitable lien.

FACTS

8. The Plan provides welfare benefits – specifically group medical insurance benefits – to eligible employees of Duke Energy Corporation ("Duke Energy") that participate in the Plan and their dependents.

9. A copy of the Plan is attached hereto as Exhibit A. ("Plan Document").

10. The Plan has several coverage option programs, the terms of which are set forth in booklets for each such coverage options that are attached to and included with the Plan Document. (Ex. A, second page entitled "Important Notice" ("The attached Medical Plan booklets and summaries of benefits describe your Medical Plan benefits, applicable deductible, co-pay and co-insurance information, how to submit a claim for Medical Plan benefits and other important

information about your Medical Plan"); Ex A, p. 1 ("Based on your location and employee or retiree group, there are various Medical Plan coverage options available….").

11. The coverage option booklets for each of the coverage option programs are specifically incorporated into the Plan by express reference in the Plan Document, and together the Plan Document and these booklets constitute the Summary Plan Description ("SPD") for the Plan. (Ex A., second page entitled "Important Notice" ("This General Information booklet for The Duke Energy Medical Plan ("Medical Plan") provides information that is applicable to all Medical Plan coverage options. … This General Information booklet, together with the Medical Plan booklets and summaries of benefits, is the Summary Plan Description (SPD) for the Medical Plan….").

12. One of the coverage option programs under the Plan is the Duke Energy Active Medical Plan Health Savings Plan Option 1 ("Active Medical Program"), a health benefit program administered by UnitedHealthcare. A copy of the coverage option booklet for the Active Medical Program, which is incorporated into the Plan Document by reference and is part of the SPD for the Plan, is attached hereto as Exhibit B. ("Active Medical Program SPD").

13. The Active Medical Program is a self-funded ERISA plan funded directly by Duke Energy through general assets it has set aside in a trust for medical claims. (Ex. A, p. 27 ("All Medical Plan claims except for post-retirement coverage for non-key employees are paid from the Duke Energy Corporation Welfare Benefits Trust VEBA I").)

14. The Plan Document confirms that Duke Energy is the "Plan Sponsor" for the Plan. (Ex. A, p. 27.) The Plan Document also specifies that the Committee serves as the "Plan Administrator" of the Plan. (Ex. A, p. 27.)

15. The Active Medical Program SPD, which is expressly incorporated into the Plan,

provides clear language as to the subrogation and reimbursement rights of the Plan. (Ex. B, pp. 106-110.) For example, in the "Subrogation and Reimbursement" section, the SPD explains:

> "The Plan has a right to subrogation and reimbursement. …
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> The right to reimbursement means that if it is alleged that any third party caused or is responsible for a Sickness or Injury for which you receive a settlement, judgment, or other recovery from any third party, you must use those proceeds to fully return to the Plan 100% of any Benefits you received for that Sickness or Injury. The right of reimbursement shall apply to any Benefits received at any time until the rights are extinguished, resolved or waived in writing. …
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> You agree as follows:
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> ■ You will cooperate with the Plan in protecting its legal and equitable rights to subrogation and reimbursement in a timely manner, including, but not limited to:
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> - Notifying the Plan, in writing, of any potential legal claim(s) you may have against any third party for acts which caused Benefits to be paid or become payable.
> - Providing any relevant information requested by the Plan.
> - Signing and/or delivering such documents as the Plan or its agents reasonably request to secure the subrogation and reimbursement claim.
> - Responding to requests for information about any accident or injuries.
> - Making court appearances.
> - Obtaining the Plan's consent or its agents' consent before releasing any party from liability or payment of medical expenses.
> - Complying with the terms of this section.
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> Your failure to cooperate with the Plan is considered a breach of contract. As such, the Plan has the right to terminate your Benefits, deny future Benefits, take legal action against you, and/or set off from any future Benefits the value of Benefits the Plan has paid relating to any Sickness or Injury alleged to have been caused or caused by any third party to the extent not recovered by the Plan due to you or your representative not cooperating with the Plan. If the Plan incurs attorneys' fees and costs in order to collect third party settlement funds held by you or your representative, the Plan has the right to recover those fees and costs from you. You will also be required to pay interest on any amounts you hold which should have been returned to the Plan.
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> ■ The Plan has a first priority right to receive payment on any claim against a third party before you receive payment from that third party. Further, the Plan's first priority right to payment is superior to any and all claims, debts or liens asserted by any medical providers, including but not limited to hospitals or emergency treatment facilities, that assert a right to payment from funds payable from or

recovered from an allegedly responsible third party and/or insurance carrier.

■ The Plan's subrogation and reimbursement rights apply to full and partial settlements, judgments, or other recoveries paid or payable to you or your representative, your estate, your heirs and beneficiaries, no matter how those proceeds are captioned or characterized. Payments include, but are not limited to, economic, non-economic, pecuniary, consortium and punitive damages. The Plan is not required to help you to pursue your claim for damages or personal injuries and no amount of associated costs, including attorneys' fees, shall be deducted from the Plan's recovery without the Plan's express written consent. No so-called "Fund Doctrine" or "Common Fund Doctrine" or "Attorney's Fund Doctrine" shall defeat this right.

■ Regardless of whether you have been fully compensated or made whole, the Plan may collect from you the proceeds of any full or partial recovery that you or your legal representative obtain, whether in the form of a settlement (either before or after any determination of liability) or judgment, no matter how those proceeds are captioned or characterized. Proceeds from which the Plan may collect include, but are not limited to, economic, non-economic, and punitive damages. No "collateral source" rule, any "Made-Whole Doctrine" or "Make-Whole Doctrine," claim of unjust enrichment, nor any other equitable limitation shall limit the Plan's subrogation and reimbursement rights.

■ Benefits paid by the Plan may also be considered to be Benefits advanced.

■ If you receive any payment from any party as a result of Sickness or Injury, and the Plan alleges some or all of those funds are due and owed to the Plan, you and/or your representative shall hold those funds in trust, either in a separate bank account in your name or in your representative's trust account.

■ By participating in and accepting Benefits from the Plan, you agree that (i) any amounts recovered by you from any third party shall constitute Plan assets to the extent of the amount of Plan Benefits provided on behalf of the Covered Person, (ii) you and your representative shall be fiduciaries of the Plan (within the meaning of ERISA) with respect to such amounts, and (iii) you shall be liable for and agree to pay any costs and fees (including reasonable attorney fees) incurred by the Plan to enforce its reimbursement rights.

■ The Plan's rights to recovery will not be reduced due to your own negligence.

■ By participating in and accepting Benefits from the Plan, you agree to assign to the Plan any benefits, claims or rights of recovery you have under any automobile policy - including no-fault benefits, PIP benefits and/or medical payment benefits - other coverage or against any third party, to the full extent of the Benefits the Plan has paid for the Sickness or Injury. By agreeing to provide this assignment in exchange for participating in and accepting Benefits, you acknowledge and

recognize the Plan's right to assert, pursue and recover on any such claim, whether or not you choose to pursue the claim, and you agree to this assignment voluntarily.

■ The Plan may, at its option, take necessary and appropriate action to preserve its rights under these provisions, including but not limited to, providing or exchanging medical payment information with an insurer, the insurer's legal representative or other third party, filing an ERISA reimbursement lawsuit to recover the full amount of medical Benefits you receive for the Sickness or Injury out of any settlement, judgment or other recovery from any third party considered responsible and filing suit in your name or your estate's name, which does not obligate the Plan in any way to pay you part of any recovery the Plan might obtain. Any ERISA reimbursement lawsuit stemming from a refusal to refund Benefits as required under the terms of the Plan is governed by a six-year statute of limitations.

■ You may not accept any settlement that does not fully reimburse the Plan, without its written approval.

■ The Plan has the authority and discretion to resolve all disputes regarding the interpretation of the language stated herein.

■ In the case of your death, giving rise to any wrongful death or survival claim, the provisions of this section apply to your estate, the personal representative of your estate, and your heirs or beneficiaries. In the case of your death the Plan's right of reimbursement and right of subrogation shall apply if a claim can be brought on behalf of you or your estate that can include a claim for past medical expenses or damages. The obligation to reimburse the Plan is not extinguished by a release of claims or settlement agreement of any kind.

■ No allocation of damages, settlement funds or any other recovery, by you, your estate, the personal representative of your estate, your heirs, your beneficiaries or any other person or party, shall be valid if it does not reimburse the Plan for 100% of its interest unless the Plan provides written consent to the allocation.

■ The provisions of this section apply to the parents, guardian, or other representative of a Dependent child who incurs a Sickness or Injury caused by a third party. If a parent or guardian may bring a claim for damages arising out of a minor's Sickness or Injury, the terms of this subrogation and reimbursement clause shall apply to that claim.

■ If a third party causes or is alleged to have caused you to suffer a Sickness or Injury while you are covered under this Plan, the provisions of this section continue to apply, even after you are no longer covered.

■ In the event that you do not abide by the terms of the Plan pertaining to reimbursement, the Plan may terminate Benefits to you, your dependents or the participant, deny future Benefits, take legal action against you, and/or set off from

> any future Benefits the value of Benefits the Plan has paid relating to any Sickness or Injury alleged to have been caused or caused by any third party to the extent not recovered by the Plan due to your failure to abide by the terms of the Plan. If the Plan incurs attorneys' fees and costs in order to collect third party settlement funds held by you or your representative, the Plan has the right to recover those fees and costs from you. You will also be required to pay interest on any amounts you hold which should have been returned to the Plan.
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> The Plan and all Administrators administering the terms and conditions of the Plan's subrogation and reimbursement rights have such powers and duties as are necessary to discharge its duties and functions, including the exercise of its discretionary authority to (1) construe and enforce the terms of the Plan's subrogation and reimbursement rights and (2) make determinations with respect to the subrogation amounts and reimbursements owed to the Plan.

(Ex. B, pp. 106-109.)

16. On or about September 18, 2018, Heafner was involved in a motor vehicle accident ("Accident") wherein she sustained injuries.

17. To date, the Plan has paid $36,698.52 in medical expenses on behalf of Heafner for treatment of the injuries she sustained as result of the Accident.

18. The Plan paid the benefits referenced in the paragraph above, and Heafner accepted them, under the express condition contained in the Plan that Heafner would reimburse the Plan for any benefits paid or disbursed by the Plan if she received a recovery from any third party.

19. Subsequent to the Accident, Heafner retained counsel, DeMayo, to pursue tort recovery related to the Accident from third party insurers.

20. On December 17, 2018, Optum, the Active Medical Program's reimbursement and recovery agent[1], sent a letter to DeMayo notifying it of the Plan's lien and claim for reimbursement from any recovery Heafner received from any third party.

21. Similarly, on December 28, 2019, the Plan sent a letter to Heafner notifying it of

[1] For the remainder of the Facts section, all communications to and by the Plan are through the Plan's reimbursement/recovery agent.

the Plan's lien and claim for reimbursement from any recovery Heafner received from any third party.

22. DeMayo sent an letter communication to Optum, the Medical Program's reimbursement and recovery agent, acknowledging the Plan's lien and claim for reimbursement from any recovery Heafner received from any third party and stating that they would counsel Heafner of her legal obligations relating to the Plan's lien.

23. On May 2, 2019, via facsimile, the Plan requested an update on the settlement negotiations for Heafner's tort case from DeMayo. DeMayo responded on June 3, 2019, via email, advising that Heafner was still receiving treatment for her injuries and asking for an updated accounting of the Plan's lien interest. On June 9, 2019, the Plan provided DeMayo with an updated accounting of the Plan's lien interest as requested via facsimile transmission.

24. On October 2, 2019, via voicemail, the Plan requested an update on the settlement negotiations for Heafner's tort case from DeMayo. DeMayo responded on December 30, 2019, via email, advising that possible resolution of the matter was being negotiated and asking for an updated accounting of the Plan's lien interest. On January 6, 2020, the Plan provided DeMayo with an updated accounting of the Plan's lien interest as requested via facsimile transmission.

25. On February 10, 2020, via email, the Plan requested an update on the settlement negotiations for Heafner's tort case from DeMayo. DeMayo responded the next day, February 11, 2020, via email, advising that possible resolution of the matter was still being negotiated.

26. On March 23, 2020, via email, the Plan again requested an update on the settlement negotiations for Heafner's tort case from DeMayo. DeMayo responded the next day, March 24, 2020, via a phone call, advising that the person the Plan had been communicating with at DeMayo was no longer with the firm, and the Plan left a voicemail for the newly assigned DeMayo

representative for the matter. Subsequently, on March 26, 2020, the Plan received an email from the newly assigned DeMayo representative advising that possible resolution of the matter was still being negotiated with the applicable insurers, and asking for an updated accounting of the Plan's lien interest. On March 30, 2020, the Plan provided DeMayo with an updated accounting of the Plan's lien interest as requested via facsimile transmission.

27. On May 5, 2020, via email, the Plan again requested an update on the settlement negotiations for Heafner's tort case from DeMayo. DeMayo responded on May 7, 2020, via email, advising that possible resolution of the matter was still being negotiated and again asking for an updated accounting of the Plan's lien interest. On May 13, 2020, the Plan provided DeMayo with an updated accounting of the Plan's lien interest as requested via facsimile transmission.

28. On July 24, 2020, via email, the Plan again requested an update on the settlement negotiations for Heafner's tort case from DeMayo. DeMayo responded on July, 29, 2020, via email, advising that possible resolution of the matter was still being negotiated and stating that "our firm will reach out to you once the case is settled."

29. On September 3, 2020, via email, the Plan again requested an update on the settlement negotiations for Heafner's tort case from DeMayo. DeMayo responded on September 8, 2020, via email, advising "no updates."

30. On October 15, 2020, via email, the Plan again requested an update on the settlement negotiations for Heafner's tort case from DeMayo. DeMayo responded on October 20, 2020, via email, advising that "Case is settled. Please allow more time – thank you."

31. Subsequently, without any further communication, on November 10, 2020, the Plan received a check from DeMayo in the amount of $28,140.94. This amount was $8,557.58 less than the Plan's lien amount against the settlement recovery. DeMayo acknowledged in its cover letter

enclosing the check that "we understand this does not satisfy the equitable lien and obligations between our client and your client…."

32. The Plan returned this amount to DeMayo, noting that it was below the Plan's $36,698.52 lien amount against the settlement recovery.

33. In response to the Plan's further efforts to obtain reimbursement for the remaining lien interest, DeMayo advised legal counsel representing the Plan's interest that in settlement of her tort claims, Heafner recovered $100,000 from the applicable insurance companies. However, despite being fully aware of the Plan's $36,698.52 first priority lien amount against the settlement recovery, DeMayo also advised the Plan that amounts from the recovery were to be paid to other medical providers and to DeMayo for attorneys' fees, and that $28,140.94 was the full amount it, on behalf of Heafner, was authorized to remit to the Plan for its lien interest. DeMayo further advised that if the Plan did not accept this amount, it would send this money to the Heafner and the Plan would have to pursue recovery from Heafner.

34. Despite Heafner and DeMayo's clear knowledge of the Plan's interest in any settlement proceeds arising from the Accident, upon information and belief, Defendants entered into settlement agreements with third parties and received at least $100,000 in settlement funds related to the Accident ("Settlement Funds").

35. The Settlement Funds exceed the Plan's $36,698.52 first priority lien amount against Heafner's settlement recovery, and the Plan has requested reimbursement for the medical expenses it paid out on behalf of Heafner related to the Accident from Heafner's third party recovery (and not to exceed the amount of such recovery), yet Heafner has refused to fully reimburse the Plan out of the Settlement Funds she received in settlement for Accident-related injuries.

36. Heafner and DeMayo have intentionally frustrated the Plan's efforts to protect its reimbursement rights by acknowledging the Plan's valid lien interest in the Settlement Funds, entering into a settlement and obtaining Settlement Funds related to the Accident, and yet failing to properly reimburse the Plan from that recovery. Heafner and DeMayo were fully aware of the Plan's interest at the time (a) they consummated any Accident-related settlement, and (b) obtained the Settlement Funds from which the Plan seeks reimbursement.

37. Heafner and/or DeMayo are in possession of the Settlement Funds from which reimbursement is sought.

COUNT I
CLAIM FOR EQUITABLE RELIEF UNDER ERISA § 502(A)(3)

38. Plaintiff re-states and re-alleges paragraphs 1 – 42 of the Complaint as if fully set forth herein.

39. The Plan has a right to reimbursement and/or an equitable lien by agreement "to amounts of the Benefits paid by the Plan" on Heafner's behalf as a result of the Accident. In the event the total amount of Heafner's accident-related Settlement Funds are less than the amount of benefits paid, the Plaintiff is not seeking to impose personal liability on Defendants, but rather seeks "appropriate equitable relief" to enforce the Plan's reimbursement provisions to the extent of recovery obtained by Defendants, and to be reimbursed out of such recovery.

40. The Plan language is sufficient under *Sereboff v. Mid-Atlantic Med. Servs., Inc.*, 547 U.S. 356, 362–63 (2006), and *U.S. Airways v. McCutchen*, 569 U.S. 88, 133 S. Ct. 1537, 1541, 185 L. Ed. 2d 654 (2013), to enable the Plan to place a constructive trust and/or equitable lien by agreement consisting of the benefits the Plan paid on behalf of Heafner, on any recovery Defendants received. Specifically, the Plan identifies the portion of the fund to which it is entitled ("100% of any Benefits you received for that … Injury"), and specifies the fund or funds from

which such reimbursement is to be had ("full and partial settlements, judgments, or other recoveries paid or payable to you or your representative, your estate, your heirs and beneficiaries, no matter how those proceeds are captioned or characterized"). (Ex. B, pp. 106-107.)

41. The Settlement Funds over which Plaintiff seeks appropriate equitable relief are in Defendants' possession and control.

42. The language of the Plan makes clear that the Plan is not attempting to recover from Heafner's general assets, but rather, the disputed funds constitute a specifically identified portion of amounts paid to Heafner from third parties as a result of the Accident.

43. The language of the Plan sufficiently disclaims the "made whole" or "common fund" doctrine or any other common law or equitable doctrine Defendants may cite to attempt to avoid or mitigate Heafner's obligations under the Plan.

44. Defendants have refused, despite numerous requests, to reimburse the Plan for benefits the Plan paid on Heafner's behalf out of Settlement Funds he received in connection with the Accident. Defendants' actions violate the terms of the Plan.

45. Heafner has been unjustly enriched by her refusal to reimburse the Plan for the medical benefits it paid on his behalf.

46. DeMayo has been unjustly enriched to the extent it withheld a portion of the settlement as attorneys' fees and costs, when those fees and costs were subject to the Plan's pre-existing equitable lien by agreement, which attached prior to any agreement between DeMayo and Heafner regarding the payment of attorneys' fees and costs.

47. Heafner and DeMayo engaged in wrongful conduct designed to frustrate and impede the Plan's efforts to enforce the Plan's reimbursement provisions.

48. As a result of the violation of the terms of the Plan and Defendants' other wrongful

conduct, the Plan has been harmed and Plaintiff seeks all appropriate equitable relief, pursuant to ERISA § 502(a)(3), to enforce the terms of the Plan, including:

a. The imposition of a constructive trust and/or equitable lien by agreement in favor of the Plan upon Settlement Funds in possession of Defendants which are subject to the Plan's subrogation/reimbursement rights;

b. A declaration of the Plan's ownership of the above-referenced Settlement Funds up to the full amount of payments made by the Plan for Heafner's medical expenses; and

c. An order directing DeMayo and Heafner, respectively, to pay or turn over such Settlement Funds, plus accumulated interest, to the Plan to the extent of its interest therein.

c. Attorneys' fees and costs under ERISA Section 502(g) and as within this Court's discretion, in light of Defendants' conduct

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that the Court enter a Judgment and Order in its favor ordering the following:

a. The imposition of a constructive trust or equitable lien by agreement in favor of the Plan upon the settlement proceeds identified herein, plus accumulated interest;

b. A declaration of the Plan's ownership of the above-referenced settlement proceeds up to the full amount of payments made by the Plan for Heafner's medical expenses;

c. Directing Defendants to pay or turn over such settlement proceeds, plus accumulated interest, to the Plan to the extent of its interest therein;

d. Awarding the Plan its attorneys' fees and costs against Defendants; and

e. Granting any such other equitable and legal relief to the Plan as this Court deems just and appropriate.

Respectfully submitted,

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Dated: July 20, 2021