IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

RUAN SEXTON	)	
	)	
Plaintiff	)	**No. 1:13-cv-07761**
	)	
vs.	)	**Judge Ronald Guzman**
	)	
STANDARD INSURANCE COMPANY	)	**Magistrate Judge Mary Rowland**
	)	
Defendant	)	

STANDARD INSURANCE COMPANY'S
REPLY IN SUPPORT OF ITS MOTION TO DISMISS
COUNT II OF PLAINTIFF'S SECOND AMENDED COMPLAINT

Defendant Standard Insurance Company ("Standard"), by its attorneys Warren von Schleicher and Jacqueline J. Herring of Smith von Schleicher & Associates, submits its Reply in Support of its Motion to Dismiss Count II of Plaintiff's Second Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6).

INTRODUCTION

The plaintiff Ruan Sexton ("Sexton"), in Count I of her Second Amended Complaint, asserts a straightforward claim to recover disability benefits and prejudgment interest under ERISA §502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B). In Count II, she improperly endeavors to multiply ERISA's remedies by repackaging her benefit claim as a breach of fiduciary duty claim under ERISA §502(a)(3), 29 U.S.C. §1132(a)(3), for which she seeks "equitable" disgorgement of "ill-gotten" gains. She specifically alleges in the Second Amended Complaint that disgorgement is

authorized by *Rochow v. Life Ins. Co. of N. Am.*, 737 F.3d 415 (6th Cir. 2013), in which the plaintiff was awarded benefits under §502(a)(1)(B) and a $3.8 Million windfall for disgorgement of profits under §502(a)(3).[1] Circuit Judge McKeague's prescient dissent in *Rochow* criticized the panel majority's ruling as "an end run around the limitations placed on the use of §502(a)(3)" and "willfully blind to the negative repercussions that undoubtedly will ensue." *Id.* at 431, 434-435. Given the *Rochow* panel's dramatic departure from Supreme Court and Circuit precedent, the Sixth Circuit vacated the panel's decision and voted to rehear the case *en banc*. *Rochow v. Life Ins. Co. of N. Am.*, No. 12-2074, *Rehearing en Banc Granted, Opinion Vacated* (6th Cir. Feb. 19, 2014).

Rochow is the sole basis alleged by Sexton in the Second Amended Complaint to support her §502(a)(3) claim. (Sec. Am. Compl. ¶ 33). She cannot cite the vacated *Rochow* decision as precedent in her Response to Standard's Motion to Dismiss. So she tries to portray her §502(a)(3) claim as premised on a breach of fiduciary duty that is separate and distinct from her §502(a)(1)(B) benefit claim. She proclaims that her §502(a)(3) claim is premised on a breach of trust, whereas her §502(a)(1)(B) claim is premised on a breach of contract.

But Sexton fails to allege a separate breach of trust independent of Standard's decision to deny her disability claim. Her §502(a)(3) and §502(a)(1)(B) claims are founded on precisely the same conduct, namely, the denial of disability benefits. Sexton cannot transform a garden-variety benefit dispute into a §502(a)(3) claim for breach of trust and multiply ERISA's remedies. Nor

---

[1] The $3.8 Million awarded to the plaintiff in *Rochow* would be tantamount to awarding prejudgment interest at the annual rate of 25%. See Petition for Rehearing *En Banc* of Defendant-Appellant in *Rochow*, Case No. 12-2074 (6th Cir.), ECF Doc. # 006111917156, pg. 7 n. 4 (filed Dec. 20, 2013).

does Sexton's demand for disgorgement of profits or "ill-gotten gains" fall within the category of appropriate *equitable* relief under §502(a)(3). Claims for disgorgement or restitution may be classified as either legal or equitable depending on the nature of the duty breached. When the foundation of a claim for disgorgement is the fiduciary's refusal to approve benefits under the terms of an ERISA plan, then disgorgement constitutes purely legal relief. Because Sexton's claim for disgorgement of profits is founded on Standard's decision to deny her disability claim, disgorgement is properly classified as legal relief and therefore is unavailable under §502(a)(3).

Sexton touts the potential deterrent effect of disgorgement on insurers of ERISA plans, by raising the financial stakes of incorrect disability claim decisions. Sexton's emphasis on deterrence rather than compensation lays bare the objective of her disgorgement claim, which is to obtain punitive damages in an ordinary benefit dispute. ERISA is a remedial statute enacted to provide make-whole relief to participants and beneficiaries, and not a punitive statute to punish improper claim denials by giving financial windfalls to plaintiffs.

Sexton has an available remedy for the denial of benefits under §502(a)(1)(B). She cannot repackage the same claim, based on the same alleged breach of duty, as a request for equitable relief under §502(a)(3). Sexton fails to state a legally plausible claim for equitable relief under §502(a)(3), warranting dismissal of Count II of the Second Amended Complaint with prejudice.

ARGUMENT

Congress established §502(a)(1)(B) as the exclusive remedy for plan participants whose claims for benefits have been denied. By contrast, §502(a)(3) serves as ERISA's "catchall"

provision, providing a "safety net, offering appropriate equitable relief" when ERISA affords no other statutory remedy. *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996). When a plaintiff can assert a claim to recover benefits under §502(a)(1)(B), the plaintiff is foreclosed from seeking equitable remedies to redress the same conduct under §502(a)(3). *Id.* at 515.

Varity Corp. prohibits plaintiffs from repackaging denial of benefit claims into breach of fiduciary duty claims under §502(a)(3). As articulated by the Seventh Circuit, "a denial-of-benefits claim may only be pursued under section 1132(a)(1)(B)." *Kenseth v. Dean Health Plan, Inc.*, 610 F.3d 452, 482 (7th Cir. 2010) (citing *Varity Corp.*, 516 U.S. at 515). "Notwithstanding the obstacles to relief under section 1132(a)(1)(B), Kenseth may not obtain comparable relief under the guise of a claim for breach of fiduciary duty." *Id.* at 483 (citing *Varity Corp.*, 516 U.S. at 513-515).

Standard, in its Memorandum, cites extensive case law from this district dismissing §502(a)(3) breach of fiduciary duty claims that are repackaged denial of benefit claims. (Def. Mem. pgs. 7-10). Sexton disregards that substantial legal authority on the arbitrary basis that the cited cases were decided prior to *Cigna Corp. v. Amara*, 131 S.Ct. 1866 (2011). (Pl. Resp. pgs. 3, 10). *Amara* acknowledged that courts, in limited circumstances when a fiduciary misrepresents a plan term, may reform the plan and order monetary relief as a "surcharge," which is a form of equitable relief. *Id.* at 1879-1880. Sexton argues that because equitable relief may include monetary relief as in *Amara*, her claim for disgorgement of profits also constitutes equitable relief available under §502(a)(3). But *Amara* did not abrogate *Varity Corp.* or invite plaintiffs to

disguise routine denial of benefit claims as claims for equitable relief under §502(a)(3). Sexton's counsel made the same *Amara* argument in *Krase v. Life Ins. Co. of N. Am.*, No. 11 C 7659, 2012 WL 4483506 (N.D. Ill. Sept. 27, 2012), and the court rejected it and dismissed the plaintiff's §502(a)(3) claim:

> [W]e do not read *Amara* to alter the rule announced in *Varity* and its progeny. Even if the relief that Krase is seeking can accurately be called an equitable 'surcharge,' it does not change the fact that relief is available under subsection (a)(1)(B) and therefore unavailable under subsection (a)(3).

Id. at *2.

Courts consistently dismiss §502(a)(3) claims that are repackaged denial of benefit claims post-*Amara*, including this Court. See *Crane v. Sartain*, No. 11 C 1743, 2012 WL 4483788, at *6 (N.D. Ill. Sept. 27, 2012) ("[A]s to §1132(a)(3), 'binding precedent dictates that [Crane] cannot seek relief under ERISA §502(a)(3) because [he] can seek and [is] seeking relief under ERISA §502(a)(1)(B).'") (quoting *Lewis v. Aetna Ins. Agency, Inc.*, 749 F.Supp.2d 852, 858 (S.D. Ill. 2010)); *Kenseth*, 610 F.3d at 482 ("However, a denial-of-benefits claim may only be pursued under section 1132(a)(1)(B)."). See also *Nemitz v. Metro. Life Ins. Co.*, No. 12 C 8039, 2013 WL 3944292, at *3 (N.D. Ill. July 31, 2013); *Schatzel v. Central States S.E. & S.W. Areas Pension Fund*, 941 F.Supp.2d 999, 1008 (N.D. Ill. 2013); *Krok v. Univ. of Chicago*, No. 11-cv-01092, 2012 WL 1117733, at *4 (N.D. Ill. Apr. 3, 2012).

Sexton insists that her §502(a)(3) claim arises from a breach of trust and properly seeks equitable restitution or disgorgement of "ill-gotten gains," citing *Mondry v. Am. Family Mut. Ins.*

Co., 557 F.3d 781 (7th Cir. 2009) and *Clair v. Harris Trust & Sav. Bank*, 190 F.3d 495 (7th Cir. 1999). (Pl. Resp. pg. 7, 11-12). The Seventh Circuit in *Mondry* and *Clair* found that the plaintiffs' claims for disgorgement of interest on benefits sought equitable restitution rather than legal relief. Sexton generalizes that all claims for disgorgement must be equitable claims arising from a breach of trust, including her §502(a)(3) claim in Count II.

But not all claims for disgorgement sound in equity. Claims for disgorgement of interest arising from a breach of a contractual obligation to pay benefits are legal in nature, whereas claims for disgorgement arising from a non-contractual breach of fiduciary duty are equitable in nature. As the Seventh Circuit explained in *Mondry*, "Restitution amounts to a legal remedy in some circumstances and an equitable remedy in others." *Mondry*, 557 F.3d at 809 (citations omitted). "[I]t is a legal remedy when sought in a case at law (for example, a suit for breach of contract) and an equitable remedy when sought in an equity case…." "[H]owever, restitution is equitable when it is sought by a person complaining of a breach of trust." *Id.* (quoting *Clair*, 190 F.3d at 498) (internal quotation marks omitted). The employer in *Mondry* (American Family) failed to timely produce plan documents to the plaintiff in violation of 29 U.S.C. §1024(b)(4), which delayed the plaintiff from perfecting her claim for medical expense benefits. The employer's violation of its fiduciary duty to produce documents constituted a breach of trust. Although the claims administrator (Cigna) approved payment of benefits, the plaintiff was deprived of the time value of money as a result of the employer's delay. The Seventh Circuit held that the plaintiff stated a cognizable claim against the employer for equitable restitution.

Sexton's claim for disgorgement fundamentally seeks legal relief, because her claim arises from Standard's denial of benefits, which is a contractual claim. Sexton fails to allege that Standard breached any fiduciary duty separate and distinct from its duty to administer her claim and provide benefits in compliance with ERISA and the terms of the Plan. The contractual nature of Standard's alleged breach of duty defines her requested remedy of disgorgement as legal relief, not equitable relief, and therefore disgorgement is unavailable under ERISA's "safety net" of §502(a)(3). Sexton's remedy properly lies in §502(a)(1)(B). Section 502(a)(1)(B) "specifically provides a remedy for breaches of fiduciary duty with respect to the interpretation of plan documents and the payment of claims … that runs directly to the injured beneficiary." *Varity Corp.*, 516 U.S. at 512.

Sexton's disgorgement theory, at its core, is a repackaged benefit claim masquerading as a claim for equitable relief. The conduct that forms the basis of her benefit claim under §502(a)(1)(B) in Count I is the same conduct that forms the basis of her purported §502(a)(3) claim in Count II. Her §502(a)(3) claim incorporates all the allegations of her §502(a)(1)(B) claim, alleges the unremarkable conclusion that Standard denial of benefits "constitutes a breach of fiduciary duty" and Standard has been "unjustly enriched," and cites the vacated *Rochow* decision as the basis for her disgorgement claim. (Sec. Am. Compl. ¶¶ 30-33). Disgorgement encompasses payment of withheld benefits plus interest or gains on benefits, which is the mirror image of Sexton's §502(a)(1)(B) benefit claim in Count I, dressed in the language of equity. Sexton tries to disguise the true nature of her purported §502(a)(3) claim by seeking partial

disgorgement rather than full disgorgement, seeking to skim the profits derived from unpaid benefits rather than disgorgement of benefits *and* profits. She cannot manufacture a claim for breach of fiduciary duty by splitting her remedies between §502(a)(1)(B) and §502(a)(3), seeking payment of benefits under the former and disgorgement of profits under the latter.

Moreover, disgorgement of profits is not necessary for Sexton to obtain complete relief under §502(a)(1)(B). In ERISA benefit disputes arising under §502(a)(1)(B), courts have discretion to award prejudgment interest on unpaid benefits. See *Fritcher v. Health Care Serv. Corp.*, 301 F.3d 811, 820 (7th Cir. 2002); *Hines v. Hartford Life Ins. Co.*, No. 10–0265–DRH, 2012 WL 6004149, at *1 (S.D. Ill. Nov. 30, 2012). Prejudgment interest makes the plaintiff whole, and must not provide a windfall. *First Nat'l Bank of Chicago v. Standard Bank & Trust*, 172 F.3d 472, 480 (7th Cir. 2002). Sexton acknowledges that prejudgment interest is available under §502(a)(1)(B), and she specifically requests prejudgment interest in Count I of her Second Amended Complaint. (Pl. Resp. pg. 8). Nothing in ERISA authorizes plaintiffs in §502(a)(1)(B) benefit cases to assert §502(a)(3) claims in the alternative, and choose the larger remedy at the conclusion of the litigation. Courts consistently dismiss §502(a)(3) claims that are plead in the alternative to §502(a)(1)(B) benefit claims. See *Crane*, 2012 WL 4483788, at *6; *Nemitz*, 2013 WL 3944292, at *3; *Schatzel*, 941 F.Supp.2d at 1008.

Sexton does not seek disgorgement under §502(a)(3) as a "safety net" when ERISA provides no other statutory remedy. She improperly endeavors to use §502(a)(3) to obtain a punitive windfall, in violation of *Varity Corp.* She argues that disgorgement would serve as a deterrent and

"promote greater accuracy in claim decisions," by increasing the financial stakes of incorrect claim determinations.[2] (Pl. Resp. pg. 14). Sexton's financial deterrence argument is tantamount to a request for punitive damages, which ERISA does not allow. See *Henry v. Champlain Enter., Inc.*, 445 F.3d 610, 624 (2nd Cir. 2006) ("The aim of ERISA is to make the plaintiffs whole, but not to give them a windfall.") (internal quotation and citation omitted). ERISA reflects "a careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (internal quotations omitted). Sexton cannot use the threat of a punitive windfall to alter congressional incentives and obtain remedies that ERISA does not to permit.

Fundamentally, Sexton seeks legal relief in Count II of the Second Amended Complaint and not equitable relief. Her disgorgement theory arises from Standard's denial of her claim for disability benefits, and she fails to allege any breach of fiduciary duty separate and distinct from the duty to properly administer and pay disability claims. Sexton states a cognizable claim for payment of benefits and interest under §502(a)(1)(B). She is foreclosed for seeking additional relief for the same alleged conduct under the rubric of §502(a)(3), warranting dismissal of Count II as a matter of law.

---

[2] Sexton argues that disgorgement would not be necessary if insurers placed disputed benefits in segregated accounts. (Pl. Resp. pg. 9). This would impose on insurers the impossible burden of managing hundreds of thousands of segregated accounts from the inception of every disability claim until the claim is paid or litigated to conclusion. Sexton's segregated account solution creates the kind of senseless administrative costs that ERISA was designed to prevent.

CONCLUSION

Sexton fails to state a legally viable claim for breach of fiduciary duty under §502(a)(3). Her claim for disgorgement of profits arises from the same breach of duty that provides the basis for her §502(a)(1)(B) claim and does not constitute "equitable" relief under §502(a)(3). She has an adequate legal remedy under §502(a)(1)(B), and is precluded from asserting an alternative claim under §502(a)(3). Nor may Sexton pursue punitive damages under the guise of equitable relief. Accordingly, Sexton's §502(a)(3) claim in Count II of the Second Amended Complaint should be dismissed with prejudice.

WHEREFORE, Standard Insurance Company respectfully requests dismissal of Count II of the Second Amended Complaint with prejudice, and an award of attorneys' fees pursuant to 29 U.S.C. §1132(g) and the Federal Rules of Civil Procedure.

Respectfully submitted,

By: */s/ Warren von Schleicher*
Attorney for Defendant,
Standard Insurance Company

Warren von Schleicher (IL- 6197189)
Jacqueline J. Herring (IL-6282246)
SMITH | VON SCHLEICHER + ASSOCIATES
180 N. LaSalle St. Suite 3130
Chicago, Illinois 60601
P 312.541.0300 | F 312.541.0933
warren.vonschleicher@svs-law.com
jackie.herring@svs-law.com

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the attorney of record listed below:

Mark D. DeBofsky
Martina B. Sherman
DeBofsky & Associates, P.C.
200 W. Madison St., Suite 2670
Chicago, Illinois 60606
mdebofsky@debofsky.com
msherman@debofsky.com

/s/ Warren von Schleicher
SMITH | VON SCHLEICHER + ASSOCIATES
180 N. LaSalle Street Suite 3130
Chicago, Illinois 60601
P 312.541.0300 | F 312.541.0933
warren.vonschleicher@svs-law.com