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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Mark McGlasson,
Plaintiff,
vs.
Long Term Disability Coverage for All Active Full-Time and Part-Time Employees, other than those classified by the Employer as Pilots, who are U.S. residents and whose Total Annual Cash Compensation is between \$60,000 and \$199,999, excluding temporary and seasonal Employees, an ERISA benefit plan; The Prudential Insurance Company of America, a plan fiduciary; and JPMorgan Chase Bank, N.A., a plan administrator,
Defendants.

2:15-cv-01512 JWS
ORDER AND OPINION
[Re: Motions at Docket 14 & 27]

I. MOTION PRESENTED

At docket 14, Defendants The Prudential Insurance Company of America (“Prudential”), Long Term Disability Coverage for All Active Full-Time and Part-Time Employees, other than those classified by the Employer as Pilots, who are U.S. residents and whose Total Annual Cash Compensation is between \$60,000 and \$199,999, excluding temporary and seasonal Employees, an ERISA benefit plan (the “Plan”), and JPMorgan Chase Bank (“JPMorgan”) (collectively, “Defendants”) move to

1 dismiss all counts in the complaint submitted by Plaintiff Mark McGlasson (“Plaintiff”),
2 pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon
3 which relief can be granted. Plaintiff responds at docket 23. Defendant replies at
4 docket 26. Plaintiff requests oral argument, but it would not be of additional assistance
5 to the court.

6 At docket 27, Plaintiff filed a Motion to Strike Portion of Defendants’ Reply in
7 Support of Their Motion to Dismiss, arguing that Defendants raised an immaterial matter
8 in their motion to dismiss when they asserted that Plaintiff’s LTD benefits are not
9 exempt from Plaintiff’s bankruptcy estate. Defendants respond at docket 33. Plaintiff
10 replies at docket 34.

11 II. BACKGROUND

12 This action arises under the Employment Retirement Income Security Act of
13 1974 (“ERISA”). Plaintiff worked as a manager for JPMorgan. He participated in and
14 was a beneficiary of the Plan, which is an ERISA benefit plan offering short-term
15 disability (“STD”) and long-term disability (“LTD”) benefits for certain JPMorgan
16 employees. Prudential insures and administers the claims for JPMorgan under the
17 Plan.

18 In 2009, following back surgery, Plaintiff applied for and received STD benefits
19 under the Plan. He returned to work, but then had to have neck surgery in April 2011
20 and again received STD benefits. Due to continuing difficulties with his back and neck,
21 Plaintiff stopped working on August 29, 2011, and applied for LTD benefits. He was
22 approved for such benefits effective February 27, 2012, and continued to receive them
23 until September 18, 2013. Plaintiff’s claim for LTD benefits beyond that date was
24 denied by Prudential in a letter dated April 7, 2014. After an appeal, Prudential upheld
25 the decision to terminate LTD benefits by letter dated August 18, 2014. Plaintiff
26 submitted a voluntary second appeal by letter dated February 13, 2015. Prudential
27 denied the appeal by letter dated April 27, 2015. During the appeal process, in July of
28 2014, Plaintiff filed for bankruptcy.

1 Plaintiff filed the lawsuit against Defendants in August of 2015. The Complaint
2 alleges three causes of action. Count I is for the recovery of plan benefits against
3 Prudential and the Plan pursuant to 29 U.S.C. § 1132(a)(1)(B). Counts II and III¹ are for
4 breach of fiduciary duty against Prudential and JPMorgan, respectively, pursuant to 29
5 U.S.C. § 1132(a)(3).²

6 Defendants seek dismissal of Count I based upon judicial estoppel because
7 Plaintiff failed to disclose his claim for LTD benefits in his bankruptcy petition. After
8 Defendants filed the motion to dismiss, highlighting Plaintiff's failure to disclose, Plaintiff
9 reopened the bankruptcy petition and therefore argues that judicial estoppel should not
10 be applied because the omission was not intentional. Defendants also seek dismissal
11 of Counts II and III arguing that Plaintiff is not seeking "appropriate equitable relief" but,
12 rather, is improperly repackaging his benefits-denial claim. Plaintiff argues that there is
13 no categorical bar to raising both a claim for benefits under § 1132(a)(1)(B) and a claim
14 for equitable relief, including monetary surcharges, for a breach of fiduciary duty under
15 §1132(a)(3) and that he should be allowed to proceed with both claims, particularly at
16 this early stage in the litigation.

17 **III. STANDARD OF REVIEW**

18 Rule 12(b)(6) tests the legal sufficiency of a plaintiff's claims. In reviewing such a
19 motion, "[a]ll allegations of material fact in the complaint are taken as true and
20 construed in the light most favorable to the nonmoving party."³ To be assumed true, the
21 allegations "may not simply recite the elements of a cause of action, but must contain
22 sufficient allegations of underlying facts to give fair notice and to enable the opposing
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24 ¹Plaintiff erroneously labels Count III as another Count II. The parties agree to refer to
the breach of fiduciary duty claim against JPMorgan as Count III.

25 ²Plaintiff also sought relief for breach of fiduciary duty against Prudential under 29 U.S.C.
26 § 1132(a)(2), but the parties stipulated to the dismissal of those portions of Counts II and III that
27 seek relief under § 1132(a)(2) (Doc. 22), and the court entered an order granting dismissal to
that extent (Doc. 23).

28 ³*Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997).

1 party to defend itself effectively.”⁴ Dismissal for failure to state a claim can be based on
2 either “the lack of a cognizable legal theory or the absence of sufficient facts alleged
3 under a cognizable legal theory.”⁵ “Conclusory allegations of law . . . are insufficient to
4 defeat a motion to dismiss.”⁶

5 To avoid dismissal, a plaintiff must plead facts sufficient to “state a claim to relief
6 that is plausible on its face.”⁷ “A claim has facial plausibility when the plaintiff pleads
7 factual content that allows the court to draw the reasonable inference that the defendant
8 is liable for the misconduct alleged.”⁸ “The plausibility standard is not akin to a
9 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant
10 has acted unlawfully.”⁹ “Where a complaint pleads facts that are ‘merely consistent
11 with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility
12 of entitlement to relief.’”¹⁰ “In sum, for a complaint to survive a motion to dismiss, the
13 non-conclusory ‘factual content,’ and reasonable inferences from that content, must be
14 plausibly suggestive of a claim entitling the plaintiff to relief.”¹¹

15 **IV. DISCUSSION**

16 “The civil enforcement provisions of ERISA, codified in § 1132(a), are ‘the
17 exclusive vehicle for actions by ERISA-plan participants and beneficiaries asserting
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19 ⁴*Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

20 ⁵*Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

21 ⁶*Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001).

22 ⁷*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550
23 U.S. 544, 570 (2007)).

24 ⁸*Id.*

25 ⁹*Id.* (citing *Twombly*, 550 U.S. at 556).

26 ¹⁰*Id.* (quoting *Twombly*, 550 U.S. at 557).

27 ¹¹*Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009); see also *Starr*, 652 F.3d
28 at 1216.

1 improper processing of a claim for benefits.”¹² Under § 1132(a)(1)(B), a plan participant
2 may bring suit “to recover benefits due to him under the terms of his plan, to enforce his
3 rights under the terms of the plan, or to clarify his rights to future benefits under the
4 terms of the plan.”¹³ Under § 1132(a)(3) a plan participant may bring suit to “(A) enjoy
5 any act or practice which violates any provision of this subchapter or the terms of the
6 plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or
7 (ii) to enforce any provision of this subchapter or the terms of the plan.”¹⁴ Plaintiff’s
8 complaint raises a claim under both § 1132(a)(1)(B) (Count I) and § 1132(a)(3)
9 (Counts II and III). In Count I, Plaintiff seeks recovery of LTD benefits due under the
10 terms of the Plan, as well as recovery of attorney’s fees and prejudgment interest. In
11 Count II, Plaintiff seeks an injunction against Prudential to prevent certain, specific
12 claims processing conduct, as well as a surcharge for extra-contractual losses Plaintiff
13 suffered as a result of Prudential’s conduct. Count III simply seeks a generic injunction
14 against JPMorgan.

15 Preliminarily, the court notes that Plaintiff cannot seek an injunction against
16 Defendants on behalf of other plan participants similarly situated, because he has not
17 brought a class action lawsuit. Moreover, § 1132(a)(2) is the ERISA provision that
18 provides a remedy for injuries to the Plan as a whole, but Plaintiff has conceded that he
19 cannot bring such a claim and has stipulated to dismiss his complaint to the extent it
20 seeks relief under §1132(a)(2). Therefore, Plaintiff’s request for an injunction in
21 Counts II and III is necessarily limited to an injunction for his sole benefit to bar certain
22 conduct on the part of Defendants in the event the parties have future interactions
23 related to Plaintiff’s LTD benefits after the lawsuit is resolved.

25 ¹²*Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 953 (9th Cir. 2014) (quoting *Pilot*
26 *Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52 (1987)).

27 ¹³29 U.S.C. § 1132(a)(1)(B).

28 ¹⁴29 U.S.C. § 1132(a)(3).

1 **A. Count I**

2 Defendants seek dismissal of Count I based upon judicial estoppel because
3 Plaintiff failed to disclose his pending claim for LTD benefits in his bankruptcy schedule
4 of assets. “[J]udicial estoppel is an equitable doctrine invoked by a court at its
5 discretion.”¹⁵ “[I]t precludes a party from gaining an advantage by asserting one position,
6 and then later seeking an advantage by taking a clearly inconsistent position.”¹⁶ In
7 doing so, it prevents a litigant from “playing fast and loose with the courts” and protects
8 the integrity of the judicial process.¹⁷ While there is no formula for determining when to
9 apply judicial estoppel, typically courts look at three factors: (1) whether the party’s
10 position is clearly inconsistent with his prior position; (2) whether the party succeeded in
11 getting the first court to accept his earlier position; and 3) whether the party would
12 derive an unfair advantage or impose an unfair detriment on another party if not
13 estopped.¹⁸

14 “In the bankruptcy context, the federal courts have developed a basic default
15 rule: If a plaintiff-debtor omits a pending (or soon to be filed) lawsuit from the bankruptcy
16 schedules and obtains a discharge (or plan confirmation), judicial estoppel bars the
17 action.”¹⁹ The reason for such a rule is that the Bankruptcy Code and rules impose a
18 duty upon debtors to include contingent or unliquidated claims as assets.²⁰ “[I]f the
19 plaintiff-debtor represented in the bankruptcy case that no claim existed, so he or she is
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22 ¹⁵*New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (internal quotation marks omitted).

23 ¹⁶*Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001).

24 ¹⁷*Id.*

25 ¹⁸*New Hampshire*, 532 U.S. at 750-51.

26 ¹⁹*Ah Quin v. Cty. of Kauai Dep’t of Transp.*, 733 F.3d 267, 271 (9th Cir. 2013).

27 ²⁰*Hamilton*, 270 F.3d at 785.

1 estopped from representing in the lawsuit that a claim *does* exist.”²¹ However, a
2 plaintiff-debtor can avoid the application of judicial estoppel when the omission was
3 inadvertent or a mistake. What constitutes an inadvertent or mistaken omission is
4 defined narrowly in a situation where the plaintiff-debtor has not reopened bankruptcy
5 proceedings to correct the initial error—in such a situation courts ask “whether the
6 debtor knew about the claim when he or she filed the bankruptcy schedules and
7 whether the debtor had a motive to conceal the claim.”²² If, however, the plaintiff-debtor
8 reopens bankruptcy proceedings and corrects the error, a less restrictive meaning of
9 inadvertence or mistake is applied—in such a situation the court looks more broadly at
10 the plaintiff-debtor’s subjective intent. That is, “[t]he relevant inquiry is not limited to the
11 plaintiff’s knowledge of the pending claim and the universal motive to conceal a potential
12 asset.”²³ Rather, the court looks at whether the omission was made without the intent to
13 conceal.²⁴

14 Here, Plaintiff has recently reopened his bankruptcy proceedings, and therefore,
15 the court must consider Plaintiff’s subjective intent when omitting his LTD benefits claim
16 from his bankruptcy schedule. Of particular note is that Plaintiff submitted a declaration
17 to the court averring that he had no intent to conceal his potential LTD benefits from the
18 bankruptcy court.²⁵ While it is generally not appropriate to consider outside evidence at
19 the motion-to-dismiss stage, courts have recognized that some evidentiary analysis is
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21 ²¹*Ah Quin*, 733 F.3d at 271.

22 ²²*Id.*

23 ²³*Id.* at 276-77.

24 ²⁴*Id.*

25 ²⁵This fact distinguishes the situation from *Dzakula v. McHugh*, 746 F.3d 399 (9th Cir.
26 2014). In *Dzakula*, the appeals court upheld the district court’s application of judicial estoppel
27 where the plaintiff failed to include her discrimination claim in her bankruptcy schedules. The
28 appeals court stressed that the plaintiff failed to present any evidence explaining her failure to
include the action on her bankruptcy schedules. *Id.* at 401.

1 warranted when looking at a plaintiff-debtor's subjective intent in regard to his
2 bankruptcy filings.²⁶ Plaintiff's declaration states as follows:

3 7. When we hired Oswald Law Group to represent us in the bankruptcy
4 proceedings, I was always candid about my LTD matter and my disabled
5 status. I discussed the LTD claim and my receipt of Social Security Disability
6 Insurance benefits with [the attorney] from Oswald Law Group when we met
7 in person prior to filing. I thought that Oswald Law Group was taking care of
8 appropriately listing my LTD claims and any other disability issues in the
9 bankruptcy petition.

10 8. I reviewed the voluntary petition before signing it, and it looked fine to me.
11 If I knew that appealing Prudential's denial of LTD benefits meant that those
12 LTD benefits were an asset, even though I was not receiving any benefits,
13 then I would have spoke up to include them. . . . I have no expertise in
14 bankruptcy law and believed that the filings provided the necessary
15 information.

16 10. . . . In signing the bankruptcy paperwork, I assumed everything was fine
17 based on my limited knowledge. The disability benefits were listed in the
18 Statement of Financial Affairs section, so we absolutely were not hiding the
19 benefits or related claims. I would have gladly listed the LTD claims as an
20 assert if I knew to do that.²⁷

21 These statements are sufficient at this stage to show that there was no intent to conceal
22 on the part of Plaintiff. That is, the court "finds it plausible that Plaintiff's omission of his
23 potential claims against Defendants was mistaken or inadvertent."²⁸ He disclosed them
24 to his attorney and listed his LTD benefits in the financial affairs section of the
25 bankruptcy petition. While it remains to be seen why the bankruptcy attorney did not
26 properly list the claim for LTD benefits as an asset, the court must look at the subjective
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28 ²⁶See *Dzakula*, 746 F.3d at 401 (noting that the plaintiff "presented no evidence, by affidavit or otherwise, explaining her initial failure to include the action on her bankruptcy schedules"); see also *Zyla v. Am. Red Cross Blood Servs.*, No. 13-cv-2464, 2014 WL 3868235, at *8 (N.D. Cal. Aug. 6, 2014) ("[A]lthough courts do not typically looks outside the pleadings to decide a motion to dismiss, the Court finds it necessary to consider [the plaintiff's] declaration in deciding whether the inadvertence/mistake exception applies.").

²⁷Doc. 23-1 at pp.22-23.

²⁸*Powell v. Wells Fargo Home Mortg.*, No. 14-cv-04248, 2015 WL 4719660, at *6 (N.D. Cal. Aug. 7, 2015).

1 intent of the plaintiff-debtor, not his counsel.²⁹ While Defendants contend that Plaintiff's
2 declaration is self-serving, they do not put forth any evidence to suggest, or even
3 specifically argue, that it contains false statements. Of note, Defendants do not disagree
4 that Plaintiff disclosed his LTD benefits in the financial affairs section of his petition.³⁰
5 Even if there are factual disputes regarding the veracity of Plaintiff's declaration, the
6 court cannot dismiss Plaintiff's claim for benefits pursuant to a Rule 12(b)(6) motion
7 based on such a dispute. "This finding does not, however, preclude the parties from
8 pursuing further factual development for further adjudication as to whether judicial
9 estoppel applies."³¹

10 **B. Counts II and III**

11 In Counts II and III, Plaintiff asserts a fiduciary misconduct claim against
12 Prudential and JPMorgan, respectively, under § 1132(a)(3). In *Variety Corp. v. Howe*,³²
13 the Supreme Court held that § 1132(a)(3) authorizes lawsuits for individualized
14 equitable relief. The Court further explained that § 1132(a)(3) is a "catchall" provision
15 designed to provide "appropriate equitable relief for injuries caused by violations that
16 [§ 1132] does not elsewhere adequately remedy."³³ That is, when § 1132(a)(1)(B)
17 provides adequate relief for a plaintiff's injury, equitable relief under § 1132(a)(3) is not
18 "likely" or "normally" appropriate.³⁴ Defendants argue that Plaintiff's § 1132(a)(3) claims

20 ²⁹*Zyla*, 2014 WL 3868235, at *7; see also *Just Film, Inc., Merch. Servs., Inc.*, 873 F.
21 Supp. 2d 1171, 1179 (N.D. Cal. 2012) (finding no bad faith where the plaintiff disclosed pending
22 lawsuit to bankruptcy attorney who failed to include it in the bankruptcy schedules).

23 ³⁰The court has no other basis to conclude that this statement is untrue because the
24 bankruptcy petition was not attached to the motion to dismiss even though Defendants indicated
in their memorandum that the petition was filed as an attached exhibit. See doc. 15 at p. 5.

25 ³¹*Powell*, 2015 WL 4719660, at *6.

26 ³²516 U.S. 489 (1996)

27 ³³*Id.* at 512.

28 ³⁴*Id.* at 515.

1 should be dismissed because Count I will provide adequate relief to address Plaintiff's
2 injury and therefore additional equitable relief is not appropriate.

3 The Ninth Circuit most recently addressed § 1132(a)(3) in *Wise v. Verizon*
4 *Communications, Inc.*³⁵ The Ninth Circuit applied *Variety* to bar a claim for breach of
5 fiduciary duty under § 1132(a)(3) where the plaintiff sought equitable relief in the form of
6 an award of past and future benefits and removal of the plan administrators as
7 fiduciaries. The court explained that the requested relief was duplicative of relief she
8 sought under other ERISA provisions. Here, Plaintiff's complaint does not on its face
9 run afoul of *Wise* because Counts II and III do not request the same remedy as Count I.
10 Count I seeks to recover all benefits due under the terms of the Plan, to enforce his
11 rights under the Plan, and to recover attorney's fees and prejudgment interest.³⁶
12 Count II seeks to enjoin Prudential from using "neighborhood canvassing," seeking
13 overpayment resulting from social security disability insurance benefits, using "flight
14 paths" as a way to deny benefits based on financial liability instead of the merits, and
15 seeking an independent medical examination on appeal in order to toll ERISA
16 deadlines.³⁷ Count III simply seeks to "enjoin any act or practice by Defendants, which
17 violates ERISA or the Plan" and obtain "other appropriate equitable relief that is
18 traditionally available in equity."³⁸

19 Count II also seeks monetary relief in the form of a surcharge based on the debt
20 and bankruptcy attorneys' fees he incurred because of Prudential's breaching conduct.³⁹

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24 ³⁵600 F.3d 1180 (9th Cir. 2010).

25 ³⁶Doc. 1 at pp. 25-26.

26 ³⁷Doc. 1 at pp. 27-32.

27 ³⁸Doc. 1 at p. 34.

28 ³⁹Doc. 1 at p. 26.

1 However, based on *CIGNA Corp. v. Amara*,⁴⁰ the fact that Plaintiff seeks monetary
2 compensation in both Count I and Count II does not make the requests duplicative. In
3 *Amara*, the Supreme Court held that reformation of a pension plan was not a remedy
4 available under § 1132(a)(1)(B), but it also went on to address whether such a remedy
5 could be considered “appropriate equitable relief” under § 1132(a)(3). The Court
6 defined that term as “those categories of relief that, traditionally speaking . . . were
7 typically available in equity.”⁴¹ It explained that equitable relief can take the form of
8 monetary compensation, referred to as a surcharge. “The surcharge remedy was
9 extended to a breach of trust committed by a fiduciary encompassing any violation of a
10 duty imposed upon that fiduciary” and could be imposed to compensate a plaintiff “for a
11 loss resulting from a trustee’s breach of duty, or to prevent the trustee’s unjust
12 enrichment.”⁴² While the Court’s discussion of the specific types of equitable relief in
13 *Amara* is dicta, the court nonetheless applies it as persuasive authority.⁴³ Indeed, in
14 *Gabriel v. Alaska Pension Fund*,⁴⁴ the Ninth Circuit recognized that, based on *Amara*,
15 monetary compensation is not necessarily barred as a potential remedy under
16 § 1132(a)(3) as long as the claim is brought by a beneficiary against a plan fiduciary for
17 losses resulting from a trustee’s breach of duty or to prevent a trustee’s unjust
18 enrichment.⁴⁵ In Count II, Plaintiff seeks the imposition of a surcharge to compensate
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21 ⁴⁰563 U.S. 421 (2011).

22 ⁴¹*Id.* at 439 (internal quotation marks omitted).

23 ⁴²*Id.* at 441-42.

24 ⁴³See *Valladolid v. Pac. Operations Offshore, LLP*, 604 F.3d 1126, 1131 (9th Cir. 2010)
25 (“Of course, we treat the considered dicta of the Supreme Court with greater weight and
26 deference ‘as prophecy of what that Court might hold.’” (quoting *United States v. Montero-
Camargo*, 208 F.3d 1122, 1132 n. 17 (9th Cir. 2000) (en banc))).

27 ⁴⁴773 F.3d 945 (9th Cir. 2014).

28 ⁴⁵*Id.* at 963.

1 him for the extra-contractual losses resulting from Prudential’s fiduciary breaches.
2 Thus, a surcharge could potentially be a non-duplicative, appropriate equitable remedy.
3 Defendants argue that even though Counts II and III may seek relief that is
4 distinct from the relief sought in Count I, they should nonetheless be dismissed because
5 they are based on the same allegedly wrongful conduct that forms the basis of
6 Count I—improper claims handling and denial—and therefore Count I will provide an
7 adequate remedy to address such conduct. There has been no subsequent Ninth
8 Circuit precedent discussing how *Amara* affects *Wise* and *Variety*, and there is no other
9 precedent that provides further guidance in determining when § 1132(a)(1)(B) will
10 necessarily provide adequate relief or that would clearly bar Plaintiff’s § 1132(a)(3)
11 claim at the outset as Defendants suggest. However, the court finds the Second
12 Circuit’s decision in *New York State Psychiatric Association, Inc. v. UnitedHealth*
13 *Group*,⁴⁶ to be persuasive. That case also involved a plaintiff bringing a claim under
14 § 1132(a)(1)(B) for wrongful denial of benefits and a claim under § 1132(a)(3) for breach
15 of fiduciary duty based on the wrongful denial of benefits. The court held that even
16 though the two claims were based on the same allegations of wrongful denial of
17 benefits, the plaintiff was not necessarily limited to a § 1132(a)(1)(B) cause of action.⁴⁷
18 It stressed that a plaintiff was only barred from obtaining a duplicative *remedy* under
19 ERISA. Therefore, it concluded that the district court must evaluate a plaintiff’s ERISA
20 claims under both sections before deciding whether recovery of benefits under
21 § 1132(a)(1)(B) fully compensates the plan participant for his injury, thereby rendering
22 any other remedy duplicative, or whether an additional equitable remedy is appropriate
23 to make the plan participant whole. Based on *New York Psychiatric Association*, at this
24 motion-to-dismiss stage, the court here cannot sufficiently determine whether recovery

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26 ⁴⁶798 F.3d 125 (2d Cir. 2015).

27 ⁴⁷*Id.* at 134 (“*Variety Corp.* did not eliminate a private *cause of action* for breach of
28 fiduciary duty when another potential remedy is available.” (quoting *Devlin v. Empire Blue*
Cross & Blue Shield, 274 F.3d 76, 89 (2d Cir. 2001))).

1 of benefits under § 1132(a)(1)(B) will provide adequate relief. Other courts in this
2 district and in this circuit have concluded similarly when confronted with such an issue in
3 a motion to dismiss.⁴⁸

4 Defendants cite the Sixth Circuit's en banc decision in *Rochow v. Life Insurance*
5 *Company of North America*⁴⁹ to argue that when allegations of wrongful denial of
6 benefits form the basis for both a claim under § 1132(a)(1)(B) and under § 1132(a)(3),
7 as is the case here, the claim under § 1132(a)(3) is categorically barred as duplicative
8 because there has not been a separate and distinct injury pled. In *Rochow*, the plaintiff
9 sought to recover under both § 1132(a)(1)(B) and § 1132(a)(3) for the defendant
10 insurance company's arbitrary and capricious denial of LTD benefits. Specifically, he
11 brought a standard claim under § 1132(a)(1)(B), for which he sought recovery of
12 benefits, and also a claim for breach of fiduciary duty under § 1132(a)(3) based on the
13 defendant's continued withholding of the wrongfully denied benefits, for which he sought
14 disgorgement of the profits defendants received as a result of its wrongful denial. The
15 Sixth Circuit found that the plaintiff's breach of fiduciary duty claim was essentially a
16 repackaging of his wrongful denial of benefits claim. It believed the plaintiff only
17 suffered a single injury for which he could be adequately made whole under
18 § 1132(a)(1)(B). Therefore, the court held that the plaintiff was not entitled to
19 disgorgement of profits under § 1132(a)(3).

20 Contrary to Defendant's assertion, *Rochow* does not clearly dictate that
21 § 1132(a)(3) claims based upon the wrongful denial of benefits be categorically barred
22 in a situation where the plaintiff also brings a § 1132(a)(1)(B) claim for wrongful denial of
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25 ⁴⁸See *Braun v. USAA Grp. Disability Income*, No. 13-cv-01923, 2014 WL 3339795, at *3
26 (D. Ariz. July 8, 2014); *Mullin v. Scottsdale Healthcare Corp. Long Term Disability Plan*, No. 15-
27 cv-01547, 2016 WL 107838, at *3-*4 (D. Ariz. Jan. 11, 2016); *A.F. v. Providence Health Plan*,
No. 13-cv-00776, 2016 WL 81796 (D. Or. Jan. 7, 2016).

28 ⁴⁹780 F.3d 364 (6th Cir. 2015) (en banc).

1 benefits.⁵⁰ The court in *Rochow* specifically stated that a claimant can bring
2 simultaneous claims under both sections “where the breach of fiduciary duty claim is
3 based on an *injury* separate and distinct from the denial of benefits *or* where the remedy
4 afforded by Congress under [§ 1132(a)(1)(B)] is otherwise shown to be inadequate.”⁵¹
5 Indeed, when determining whether the plaintiff was entitled to disgorgement of profits
6 under § 1132(a)(3), the court not only looked at the injury suffered but also at the
7 adequacy of the remedy available under § 1132(a)(1)(B) in making him whole. It
8 concluded that equitable relief in the form of disgorgement of the defendant’s profits
9 was not necessary to make the plaintiff whole, stressing that his “loss remained exactly
10 the same irrespective of the use made by [the defendant] of the withheld benefits.”⁵²
11 Thus, it disallowed disgorgement of profits as an appropriate equitable remedy under a
12 § 1132(a)(3). Unlike the plaintiff in *Rochow*, Plaintiff does not request disgorgement of
13 profits as a remedy.⁵³ Instead, the relief requested for Prudential’s violation of
14 § 1132(a)(3), in addition to an injunction, is a surcharge to compensate him for extra-
15 contractual losses suffered as a result of Prudential’s breach. *Rochow* does not
16 address such a situation. Moreover, Plaintiff specifically alleges that additional
17 monetary relief is necessary to make him whole, and the court cannot determine
18 whether this is true at the motion-to-dismiss stage.⁵⁴ Therefore, the court concludes

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20 ⁵⁰Indeed, *Rochow* was decided after the development of a full factual record.

21 ⁵¹*Id.* at 372 (stating that a claimant may simultaneously bring claims under both sections
22 “only where the breach of fiduciary duty claim is based on an *injury* separate and distinct from
23 the denial of benefits *or* where the remedy afforded by Congress under § [1132(a)(1)(B)] is
24 otherwise shown to be inadequate” (emphasis added to “or”).

25 ⁵²*Id.* at 374.

26 ⁵³Plaintiff asserts that Prudential was unjustly enriched but he does not ask for
27 disgorgement of profits.

28 ⁵⁴In *Rochow*, the court noted that the plaintiff did not make a showing that the benefits
recovered under §1132(a)(1)(B) were inadequate to make him whole but the court was making
its determination based on a complete record. The court here is reviewing the issue on a
motion to dismiss, based only on the complaint and without the benefit of a complete record.

1 that it should wait for a more fully developed record and summary judgment before
2 deciding whether the relief sought by Plaintiff under Counts II and III is duplicative of the
3 relief sought by Plaintiff under Count I.

4 **V. CONCLUSION**

5 Based on the preceding discussion, Defendants' motion to dismiss at docket 14
6 is DENIED.

7 Plaintiff's motion to strike at docket 27 is DENIED AS MOOT, given that the court
8 found dismissal of Count I unwarranted without addressing the issue of exemption of
9 LTD benefits from a bankruptcy estate.

10 DATED this 11th day of February 2016

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12
13 /s/ JOHN W. SEDWICK
14 SENIOR UNITED STATES DISTRICT JUDGE
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