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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHN ZISK,
Plaintiff,
v.
**GANNETT COMPANY INCOME PROTECTION
PLAN, et al.,**
Defendants.

Case No. 14-cv-00391-YGR

**ORDER DENYING MOTION TO DISMISS
SECOND CAUSE OF ACTION**

Re: Dkt. No. 19

Plaintiff John Zisk (“Zisk”) filed suit bringing two causes of action under the Employee Retirement Income Security Act of 1974, as amended (“ERISA” or “the Act”), 29 U.S.C. § 1001 et seq. The first cause of action seeks to recover long-term disability (“LTD”) benefits from the Gannett Company Income Protection Plan (“the Plan”) pursuant to section 1132(a)(1)(B). The second cause of action is brought pursuant section 1132(a)(3) against Defendant Life Insurance Company of North America (“LINA”) as the fiduciary that administers claims against the Plan. In this cause of action Zisk seeks to recover equitable relief in the form of an equitable surcharge on account of LINA’s alleged breach of fiduciary duty and mishandling of his claim. With respect to this second cause of action, LINA has filed a Motion to Dismiss on the grounds that such a claim is not actionable against it and that the remedy Zisk seeks is unavailable as a matter of law.

Having carefully considered the papers submitted and the pleadings in this action, as well as the oral arguments of the parties at the October 14, 2014 hearing, and for the reasons set forth below, the Court finds that the plaintiff is not precluded from asserting his claim at this juncture and **DENIES** the Motion to Dismiss.

1 **I. SUMMARY OF ALLEGATIONS**

2 What follows is a summary of the allegations of Zisk’s First Amended Complaint
3 (“FAC”), which the Court accepts as true for purposes of this motion to dismiss. See *Diaz v.*
4 *International Longshoremen’s and Warehousemen’s Union*, 474 F.3d 1202, 1205 (9th Cir. 2007).
5 The FAC alleges that Zisk was an employee of Gannett Company and participated in the Plan.
6 (FAC ¶ 2.) Zisk suffers from symptoms of metastatic cancer and the treatment he has undergone
7 for that condition. The condition rendered him disabled and eligible for LTD benefits according to
8 the terms of the Plan. (FAC ¶ 3.)

9 Zisk alleges that when he claimed disability in May 2000, the Plan approved his claim and
10 began paying him LTD benefits. (FAC ¶¶ 4, 5.) In July 2012, LINA, acting as claim fiduciary,
11 terminated Zisk’s benefits on the stated ground that LINA had not been provided with updated
12 medical records. LINA advised Zisk that his continued satisfaction of the Plan’s definition of
13 disability could not be established and that benefits would be terminated. (FAC ¶ 5.) Zisk alleges
14 that in fact LINA did have the information necessary to establish his disability, but nevertheless
15 withheld benefits. (FAC ¶¶ 5-8.) Zisk appealed the termination of benefits on March 13, 2013,
16 pointing out that LINA had the information it needed to contact his providers for additional
17 medical information. (FAC ¶ 9.) On June 14, 2013, LINA advised Zisk its attempts to secure
18 updated medical information from his providers had been unsuccessful. Zisk alleges he
19 subsequently sent LINA updated medical records himself, but his benefits were still not reinstated.
20 (FAC ¶¶ 11, 12.)

21 On June 13, 2014, Zisk filed the instant action. In his claim for breach of fiduciary duty
22 against LINA, Zisk alleges that LINA breached its fiduciary duties by: (1) providing misleading
23 information about the status of his claim and its attempts to secure information from his medical
24 providers; and (2) failing to investigate, fully and adequately, the facts and circumstances
25 surrounding its determination to terminate his benefits, including the information already in its
26 possession. As a consequence of the alleged breaches, Zisk seeks “other appropriate equitable
27 relief” under 29 U.S.C. section 1132(a)(3) in the form an equitable surcharge to make him whole
28 for his losses occasioned by that breach. More particularly, Zisk alleges that he seeks, as an

1 equitable surcharge remedy: (i) attorneys’ fees incurred in connection with the administrative
2 appeal; (ii) penalties and interest that plaintiff incurred when he used his retirement account funds
3 in lieu of disability benefits; (iii) losses incurred from the sale of assets as a source of funds; (iv)
4 losses incurred when plaintiff’s home was burglarized because plaintiff could not afford to
5 maintain alarm and security services for his home because of the termination of his benefits; and
6 (v) such other and further relief as the Court may deem proper. (FAC ¶ 20.)

7 **II. ANALYSIS**

8 LINA challenges the second claim for relief under Section 1132(a)(3) on several grounds.
9 The Court considers each in turn.

10 **A. Individual Action for Breach of Fiduciary Duty Under Section 1132(a)(3)**

11 First, LINA argues that under Ninth Circuit authority a breach of fiduciary duty action
12 premised upon the alleged mishandling of a claim for benefits is not cognizable, relying
13 principally on *Ford v. MCI Comm. Corp. Health & Welfare Plan*, 399 F.3d 1076 (9th Cir. 2005).
14 Under a closer reading, however, the Court finds that proffered authorities do not preclude such a
15 claim as a matter of law.

16 The main thrust of the *Ford* court’s decision was that no claim could be stated against a
17 **claim** administrator for breach of fiduciary duty, but instead a claim could only be made against a
18 plan administrator or the plan itself. This holding was expressly overruled by the Ninth Circuit in
19 *Cyr v. Reliance Standard Life Ins. Co.*, 642 F.3d 1202 (9th Cir. 2011). Also, the portion of the
20 *Ford* opinion cited by LINA analyzed the viability of an individual mishandling claim under 29
21 U.S.C. section 1132(a)(2), which is not at issue in this action. *Ford*, 399 F.3d at 1082.¹

22 By contrast, Supreme Court and Ninth Circuit authorities have both authorized a claim
23 under section 1132(a)(3) for a fiduciary’s improper handling of an individual benefit claim in
24 violation of its fiduciary duties. See *Varity Corp. v Howe*, 516 U.S. 489, 510-11 (1996)
25 (“subsection (3)...[is] broad enough to cover individual relief for breach of a fiduciary obligation”
26

27 ¹ With respect to a claim under 1132(a)(2), the *Ford* court rejected relief because section
28 1132(a)(2) only authorizes relief for violations of section 1109, a portion of the Act concerning the
relationship between the fiduciary and the employee benefit plan as a whole. *Id.*

1 including determination of entitlement to benefits); *Paulsen v. CNF Inc.*, 559 F.3d 1061, 1075 (9th
2 Cir. 2009) (“[u]nlike 29 U.S.C. § 1132(a)(2), which requires that relief sought must be on behalf
3 of the entire plan, the Supreme Court has held that a participant or beneficiary has standing
4 pursuant to section 1132(a)(3) to seek individual recovery in the form of “appropriate equitable
5 relief,” citing *Varity*); *Peralta v. Hispanic Bus., Inc.*, 419 F.3d 1064, 1075 (9th Cir. 2005)
6 (“[i]ndividual substantive relief under ERISA is available where an employer actively and
7 deliberately misleads its employees to their detriment”); see also *CIGNA Corp. v. Amara*,
8 ___U.S. ___, 131 S. Ct. 1866, 1881–82 (2011), (“[t]o obtain relief by surcharge for violations of §§
9 102(a) and 104(b) [under section 1132(a)(3)], a plan participant or beneficiary must show that the
10 violation injured him or her”) (emphasis supplied). In *Varity*, the Supreme Court held the
11 individual claimants, though foreclosed from seeking individual remedies under section
12 1132(a)(2), and unable to show they had benefits due them under section 1132(a)(1)(B), could
13 nevertheless proceed under 1132(a)(3) for other appropriate, individual equitable relief. *Id.* at
14 515.² In so holding, *Varity* rejected the idea that section 1132(a)(3) remedies were only to benefit
15 the plan, not individuals.

16 In sum, the Court’s review of the controlling authorities here does not support dismissal as
17 a matter of law of a claim under section 1132(a)(3) for individual relief on account of a breach of
18 fiduciary duties by a claims administrator such as LINA.

19 **B. Consistency of Claims for Relief Under Both Section 1132(a)(1)(B)**
20 **and Section 1132(a)(3)**

21 LINA next contends that Zisk has an adequate remedy under section 1132(a)(1)(B),
22 rendering “other equitable relief” under section 1132(a)(3) unavailable as a matter of law. A claim
23 for relief under section (a)(1)(B) does not automatically preclude a claim under section (a)(3),
24 particularly at the pleading stage. Courts of this district have found that (a)(3) claims remain
25 viable even when an (a)(1)(B) claim is asserted, particularly where the relief sought in connection
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27 ² Consequently, LINA’s citations to *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148
28 (1985) and *Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986) as limiting relief under section
1132(a)(3) to relief inuring to the benefit of the plan only are both unavailing.

1 with each claim is distinct. Cf. *Sconiers v. First Unum Life Ins. Co.*, 830 F.Supp.2d 772, 777
2 (N.D.Cal. 2011) (WHA) (section 1132(a)(3) claim for reformation and section 1132(a)(1)(B)
3 claim for benefits could both proceed because equitable relief was based on a separate theory,
4 affirmative misrepresentations about plaintiff’s claim); *Echague v. Metro. Life Ins. Co.*, 12-CV-
5 00640-WHO, 2014 WL 2089331 at *12 (N.D. Cal. May 19, 2014) (claim under section 1132(a)(3)
6 is not foreclosed by claim under 1132(a)(1)(B), though relief sought was similar). *Caplan v. CNA*
7 *Short Term Disability Plan*, 479 F. Supp. 2d 1108, 1113 (N.D. Cal. 2007) (dismissing section
8 1132(a)(3) claim to the extent duplicative, but denying dismissal insofar as other equitable relief
9 might not be available under 1132(a)(1)(B)); *Brady v. United of Omaha Life Ins. Co.*, 902
10 F.Supp.2d 1274, 1279–1285 (N.D.Cal.2012) (granting motion to dismiss Section 1132(a)(3)
11 claims seeking equitable relief duplicative of forms of relief available under plaintiff’s other
12 claims).

13 As alleged here, Zisk’s claim under section 1132(a)(3) seeks remedies against LINA only.
14 The remedies sought are distinct from the unpaid benefits alleged in connection with his claim
15 against the Plan under section 1132(a)(1)(B). (Compare FAC at ¶¶ 15-16 with ¶¶ 18-21.)
16 Dismissal on these grounds is not warranted.

17 **C. Availability of Equitable Surcharge Remedy Under Section 1132(a)(3)**

18 Lastly, LINA argues that extracontractual monetary compensation or “equitable
19 surcharge,” as sought here by Zisk, is not available as a remedy for an alleged breach of fiduciary
20 duty under section 1132(a)(3). Specifically, LINA argues that the recent Ninth Circuit decision in
21 *Gabriel v. Alaska Electrical Pension Fund*, 755 F.3d 647 (9th Cir. 2014), interpreting the Supreme
22 Court’s holding in *Amara*, precludes Zisk’s equitable surcharge claim. The Court finds that the
23 state of the law in this area is unsettled as to the proper contours of an equitable surcharge remedy.

24 In *Amara*, the Supreme Court outlined three types of equitable remedies available under
25 section 1132(a)(3): (1) reformation; (2) estoppel; and (3) surcharge; the latter of which Zisk seeks
26 here. *Amara*, 131 S. Ct. at 1879-80. In discussing the surcharge remedy, *Amara* clarified that
27 equitable relief for a breach of fiduciary duty can take the form of a money payment, noting that
28 “[e]quity courts possessed the power to provide relief in the form of monetary ‘compensation’ for

1 a loss resulting from a trustee’s breach of duty, or to prevent the trustee’s unjust enrichment.”
2 Amara, 131 S. Ct. at 1880 (citing RESTATEMENT (THIRD) OF TRUSTS § 95, and Comment a (Tent.
3 Draft No. 5, Mar. 2, 2009)). “Indeed, prior to the merger of law and equity this kind of monetary
4 remedy against a trustee, sometimes called a ‘surcharge,’ was ‘exclusively equitable.’” Id. (citing
5 Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456, 464 (1939) and RESTATEMENT
6 (THIRD) OF TRUSTS § 95, and Comment a.)

7 Subsequent to Amara, the Ninth Circuit held that a trustee or fiduciary that breaches its
8 duties could be liable to compensate an individual beneficiary in an amount that “will put the
9 beneficiary in the position he or she would have attained *but for the trustee’s* breach.” Skinner v.
10 Northrop Grumman Ret. Plan B, 673 F.3d 1162, 1167 (9th Cir. 2012) (emphasis supplied). In
11 order to be entitled to such relief, the beneficiary must show that it suffered a harm caused by the
12 fiduciary’s breach of duty. Id. In reviewing a grant of summary judgment in favor of a fiduciary,
13 the Ninth Circuit in Skinner found no proof of a harm giving rise to a right to compensatory relief,
14 since the claimants offered no evidence that they were injured due to a change in their positions or
15 reliance on inaccurate plan documents. Id.

16 Most recently, the Ninth Circuit in Gabriel held that an equitable surcharge remedy is only
17 available to make the trust whole, not to make an individual beneficiary whole for his losses.
18 Gabriel, 755 F.3d at 659. The Gabriel court held that no surcharge remedy could be awarded
19 except in cases of unjust enrichment of the fiduciary at the expense of the trust, or to recoup losses
20 to the trust estate. Id. at 660.

21 As a preliminary matter, the Gabriel decision is not final, given that a petition for
22 rehearing en banc is pending. Reliance on Gabriel as a basis to dismiss the complaint at its outset
23 risks the improper preclusion, or at least significant delay in prosecution, of an otherwise viable
24 claim for recovery of lost disability benefits. See, e.g., Carver v. Lehman, 558 F.3d 869, 879 &
25 n.6 (9th Cir. 2009) (“No opinion of this circuit becomes final until the mandate issues,” and
26 reliance on a non-final decision is a “gamble”); United States v. Ruiz, 935 F.2d 1033 (9th Cir.
27 1991) (while petition for rehearing was pending, decision “was not yet fixed as settled Ninth
28 Circuit law”).

1 Leaving aside the question of whether the Ninth Circuit will take up the Gabriel panel’s
2 opinion for review en banc, and what decision it might make if it does, this Court is left with the
3 task of harmonizing the Ninth Circuit’s holdings in Skinner and Gabriel with the Supreme Court’s
4 holdings in Amara. The Supreme Court in Amara endorsed the surcharge remedy as one available
5 under section 1132(a)(3) on the principle that equity courts traditionally ordered that the “trust or
6 beneficiary [be] made whole following a trustee’s breach of trust.” Amara, 131 S. Ct. at 1881
7 (emphasis added). “In such instances equity courts would ‘mold the relief to protect the rights of
8 the beneficiary according to the situation involved.’” Id. (quoting George Gleason Bogert, et. al.,
9 THE LAW OF TRUSTS AND TRUSTEES § 861 at 4, emphasis added). In Skinner, the Ninth Circuit
10 rejected compensatory damages to the beneficiaries as a surcharge remedy because the beneficiary
11 plaintiffs did not establish reliance, not because such a remedy was limited to liability to the trust.
12 Skinner, 673 F.3d at 1167. Indeed, the comments to the portion of the Restatement (Third) of
13 Trusts cited by Skinner (and Gabriel) note that a fiduciary of the trust may be liable to “make the
14 trust and its beneficiaries whole...” including an allocation of “some or all of the surcharged
15 amount directly to one or more of the beneficiaries.” RESTATEMENT (THIRD) OF TRUSTS § 100
16 (2012) at Comments a and a(2) (emphasis supplied)³; cf. Skinner, 673 F.3d at 1167; Gabriel, 755
17 F.3d at 660.

18 Four other circuits have held that Amara opens the door to monetary relief under a
19 surcharge theory that will make a beneficiary whole for losses caused by a breach of fiduciary
20 duty. See McCravy v. Metro. Life Ins. Co., 690 F.3d 176, 180-81 (4th Cir.2012) (plaintiff
21 permitted to seek as surcharge the amount of life insurance proceeds lost because of breach under
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23 ³ This section reads:

- 24 A trustee who commits a breach of trust is chargeable with
25 (a) the amount required to restore the values of the trust estate and
26 trust distributions to what they would have been if the portion of the
27 trust affected by the breach had been properly administered; or
28 (b) the amount of any benefit to the trustee personally as a result of
the breach.

RESTATEMENT (THIRD) OF TRUSTS § 100 (emphasis supplied). This language indicates that a trustee or fiduciary who has breached its duty must not only pay those monies necessary to restore what was taken from the trust estate, but must also pay those monies to necessary to put the beneficiaries of trust distributions in the position they would have had but for the breach.

1 section 1132(a)(3), rather than being limited to premium refund under section 1132(a)(1)(B));
2 Gearlds v Entergy Svc., Inc., 709 F.3d 448, 452 (5th Cir. 2013) (plaintiff could seek surcharge
3 relief to be “made whole in the form of compensation for lost benefits”); Kenseth v. Dean Health
4 Plan, Inc., 722 F.3d 869, 883 (7th Cir. 2013) (plaintiff could seek “make-whole money damages
5 as an equitable remedy under section 1132(a)(3)” for losses caused by fiduciary’s provision of
6 false coverage information” which led to a “stack of medical bills” from undergoing a procedure
7 not paid for by her insurance); Silva v. Metro. Life Ins. Co., 762 F.3d 711, 725 (8th Cir. 2014)
8 (plaintiff could seek make whole relief in the form of payment of benefits owed under the plan as
9 remedy under section 1132(a)(3)). The Fourth Circuit in McCravy addressed the propriety of an
10 equitable remedy where an insurance plan participant brought an action against the administrator
11 that denied her benefits. McCravy, 690 F.3d 176, 180. As the Fourth Circuit noted:

12 ...with Amara, the Supreme Court clarified that remedies beyond
13 mere premium refunds—including the surcharge and equitable
14 estoppel remedies at issue here—are indeed available to ERISA
15 plaintiffs suing fiduciaries under Section 1132(a)(3). This makes
16 sense—otherwise, the stifled state of the law interpreting Section
17 1132(a)(3) would encourage abuse by fiduciaries. Indeed,
18 fiduciaries would have every incentive to wrongfully accept
19 premiums, even if they had no idea as to whether coverage
20 existed—or even if they affirmatively knew that it did not. The
21 biggest risk fiduciaries would face would be the return of their ill-
22 gotten gains, and even this risk would only materialize in the (likely
23 small) subset of circumstances where plan participants actually
24 needed the benefits for which they had paid....With Amara, the
25 Supreme Court has put these perverse incentives to rest and paved
26 the way for [plaintiffs] to seek a remedy beyond mere premium
27 refund.

28 McCravy, 690 F.3d at 182-83. The McCravy decision echoes the Supreme Court’s earlier opinion
in Varsity, which held that “ERISA’s basic purposes favor a reading of the third subsection [section
1132(a)(3)] that provides the plaintiffs with a remedy... it is hard to imagine why Congress would
want to immunize breaches of fiduciary obligation that harm individuals by denying injured
beneficiaries a remedy.” Varsity, 516 U.S. 489, 513.

Given the weight of the Supreme Court and other authority, and the uncertainty
surrounding the Gabriel decision, the Court is not prepared to grant dismissal of a section
1132(a)(3) claim at this stage. Zisk has alleged harm as a consequence of breaches of fiduciary

1 duty by LINA. He alleges LINA breached its fiduciary duties when it: (i) offered untrue reasons
2 for terminating his benefits; (ii) failed to convey facts and circumstances regarding his benefit
3 claims to him accurately and adequately; (iii) failed to investigate adequately; and (iv) made false
4 representations in connection with its refusal to reinstate his benefits. (FAC ¶¶ 7-12.) Zisk alleges
5 that he incurred consequential financial losses as a direct and proximate result of those breaches.
6 (FAC ¶¶ 18-20.) The claim is not duplicative of his first claim against Gannett. At the pleading
7 stage, Zisk’s allegations are sufficient to state a causal connection between the alleged breaches of
8 fiduciary duty and the injuries he claims to have sustained. In the absence of clear authority
9 barring an equitable surcharge remedy under these circumstances, and in light of the Supreme
10 Court and persuasive circuit court authority to the contrary, the Court will permit Zisk’s claim for
11 an equitable surcharge to remedy a breach of a fiduciary duty to proceed. The Court does not
12 reach the particulars of what may and may not be compensated through equitable surcharge, as
13 that inquiry is not properly before the Court at this time.

14 Consequently, the motion to dismiss on these grounds is denied.

15 **III. CONCLUSION**

16 Accordingly, the Motion to Dismiss is **DENIED**. Defendant LINA shall file its answer to
17 the second cause of action in Zisk’s FAC no later than November 21, 2014.

18 This terminates Docket No. 19.

19 **IT IS SO ORDERED.**

20 Dated: November 6, 2014

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22 **YVONNE GONZALEZ ROGERS**
23 **UNITED STATES DISTRICT JUDGE**

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