CIVIL ACTION NO. 25-CV-101

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ELINOR DASHWOOD, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF MARIANNE DAHSHWOOD AND A CLASS OF OTHERS SIMILARLY SITUATED,

Appellants,

v.

WILLOUGHBY HEALTH CARE CO., WILLOUGHBY RX, AND ABC PHARMACY, INC.,

Appellees.

Appeal from the
United States District Court for the
Eastern District of Tennessee

BRIEF OF APPELANTS

Team 13

Attorneys for Appellants

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JURISDICTIONAL STATEMENT

The United States District Court for the Eastern District of Tennessee had jurisdiction when dismissing both Count I and II. Mem. Op. & Order at 15.

The district court had federal question jurisdiction over Count II. 28 U.S.C 1331. This was plead on the face of the complaint. Compl. ¶ 2, 8-10. Further, ERISA provides, "district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter." 29 U.S.C. 1132(e)(1). The district court had original jurisdiction over Count II because the matter arises under a United States law, ERISA, which poses a federal question because it creates the cause of action.

The district court had supplemental jurisdiction over Count I because it "arises from a common nucleus of operative facts." Compl. ¶ 7; 28 U.S.C. 1367(a).

The United States Court of Appeals for the Sixth Circuit has appellate jurisdiction over final orders from district courts within the Sixth Circuit. 28 U.S.C. 1291. Appellants filed a timely appeal to the United States Court of Appeals for the Sixth Circuit.

ISSUES PRESENTED

I. Whether the district court erred in dismissing Count I with prejudice, either because the statutory based wrongful death claim is not preempted by ERISA, because the court abused its discretion by retaining supplemental jurisdiction after dismissing the federal anchor claim, or because amendment to plead an alternative common law negligence claim would not be futile.

II. Whether the District Court erred in dismissing Count II with prejudice, either because *Aldridge* conflicts with Supreme Court precedent regarding equitable surcharge, because Appellant stated a valid claim for disgorgement, or because the court failed to address the viable claim for declaratory judgment.

STATEMENT OF THE CASE

This case concerns a premature, tragic death caused by negligence and imprudence.[1] This appeal challenges an order granting a motion to dismiss so this death, and other harms caused by the same imprudence, can be remedied.

I. STATEMENT OF THE FACTS

The Parties and the Plan. Marianne Dashwood was a 28-year-old widow and the sole provider for her infant son. Compl. ¶ 16. She was a participant in the Cottage Press Healthcare Plan (the "Plan"), an ERISA-governed welfare benefit plan fully insured and administered by Defendant Willoughby Health Care Co. ("Willoughby Health"). *Id.* at ¶¶ 10, 11. Willoughby Health delegates the administration of prescription drug benefits to its subsidiary, Defendant Willoughby RX. *Id.* at ¶ 11. Willoughby RX acts as a Pharmacy Benefit Manager ("PBM") and a Plan fiduciary. *Id.* at ¶ 14. In 2021, Willoughby RX acquired Defendant ABC Pharmacy, Inc. *Id.* at ¶ 15.

The "Switch" Policy. Willoughby RX developed a formulary of preferred drugs for the Plan. *Id.* at ¶¶ 9, 11, 14. The Willoughby entities implemented a policy where they substitute prescribed medications with preferred formulary drugs that are cheaper and financially incentivized by manufactures. *Id. at* ¶ 22. Under this policy, Defendants switch medications without consulting a physician. *Id.* at ¶ 22.

[1] These facts are taken as alleged. Mem. Op. & Order at n. 1 (explaining how the court has "taken the facts as alleged") (citing F.R.C.P. 12(b)(6)).

Tennessee Acts. Tennessee recently passed Tennessee Code Section 63-1-202 (the "Tennessee law") which "forbids pharmacies and pharmacy benefit managers ("PBMs") from substituting drugs without the express written authorization of the patient's treating physician, and penalizes pharmacies and PBMs that do not obtain such authorization before switching medications." Compl. ¶ 3.

Marianne's Injury and Treatment. Marianne was hospitalized for a life-threatening staph infection. *Id.* at ¶ 17. Physicians successfully treated her with antibiotics. *Id.* She was discharged and given a prescription to help her recovery. *Id.*

The Fatal Substitution. Upon Marianne's discharge, Appellant Elinor Dashwood ("Dashwood"), Marianne's sister, presented the prescription to an ABC Pharmacy in Tennessee. *Id.* at ¶ 18. The pharmacy did not dispense the prescription. *Id.* Instead, following the Willoughby entities' formulary policy, it substituted the prescription with an alternative—a sulfamide. *Id.* at ¶¶ 18, 20.

Marianne's medical records documented and explicitly disclosed to her hospital team a severe allergy to sulfonamides. *Id.* at ¶ 20-21.

When Dashwood questioned the change, the ABC pharmacist stated that Willoughby had switched the prescription. *Id.* at ¶ 19. The pharmacist even falsely reassured Dashwood that it was merely a generic version. *Id.* at ¶¶ 19-20. At no point did anyone contact Marianne's physician to validate this substitution. *Id.* at ¶ 21.

Marianne's Death. Relying on the pharmacist's representation, Dashwood administered the medication. *Id.* at ¶ 19. After taking it for just over a day, Marianne suffered a severe allergic reaction and died. *Id.* at ¶ 23.

II. PROCEDURAL HISTORY

The Complaint. Dashwood filed suit in the Eastern District of Tennessee, asserting two counts: (1) a state law wrongful death claim against Willoughby RX and ABC Pharmacy, premised on Tennessee law, the state's patient-safety pharmacy law; and (2) an ERISA fiduciary breach claim against Willoughby Health and Willoughby RX, seeking a declaratory judgement, surcharge, and disgorgement of the ill-gotten gains from their drug-switching scheme. Compl. ¶¶ 1, 8-10.

The Motion to Dismiss. The district court granted a motion to dismiss for failure to state a claim, finding that ERISA preempted the state law wrongful death claim and the equitable relief sought for the fiduciary breach was unavailable under Section 502(a)(3). Mem. Op. & Order at 1, 15. The court dismissed both counts with prejudice. *Id.* Dashwood timely appealed.

SUMMARY OF THE ARGUMENT

The district court's errant dismissal of both counts creates a regulatory vacuum where lethal imprudence and professional negligence are immunized from liability.

Count I: The Wrongful Death Claim Is Not Preempted. The District Court erred in finding ERISA preempts this claim. Tennessee's statute does not refer to ERISA plans, nor does it have an impermissible connection with ERISA plans; it merely

establishes an ethical standard of care. Regardless, because the federal anchor claim failed, the court should have declined supplemental jurisdiction. Alternatively, the court erred by dismissing with prejudice because amendment is not futile given the plausibility of a common law negligence claim.

Count II: The Requested Remedies Are Equitable. The district court erred by dismissing the fiduciary breach claim based on a misapplication of *Aldridge*. Dashwood stated a valid claim for disgorgement. The district court conflated permissible disgorgement with impermissible surcharge though Dashwood plausibly alleged the former. The district court also erred by ignoring a plausible claim for declaratory judgment. Finally, *en banc* review to overrule *Aldridge* is needed, for it with Supreme Court precedent, under which both surcharge and disgorgement are equitable remedies.

Therefore, this Court should reverse the dismissal and remand to the district court for further proceedings.

ARGUMENT

The district court erred by granting Defendants' motion to dismiss when Dashwood had stated a plausible claim for both Counts I and II.

This error is reviewable *de novo* as a matter of law.[2] Granted, judges generally have discretion to refuse leave to amend. *Turner v. Dean*, 844 F.2d 789 (6th Cir. 1988)

[2] The district court does not have discretion over whether to dismiss a claim; rather, to survive a motion to dismiss, a complaint must simply "contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted).

(applying abuse of discretion standard). However, when the district court rejects the possibility of an amendment solely for futility, the decision is reviewable *de novo*. *Martin v. Associated Truck Lines, Inc.*, 801 F.2d 246, 248 (6th Cir. 1986). The district court dismissed for futility both Counts I and II with prejudice. Mem. Op. & Order at 15. That use of discretion is therefore reviewable *de novo*.

III. THE DISTRICT COURT ERRED IN DISMISSING COUNT I BECAUSE THE WRONGFUL DEATH CLAIM IS NOT PREEMPTED, AND ALTERNATIVELY, SHOULD HAVE BEEN DISMISSED WITHOUT PREJUDICE.

The district court erred by dismissing Count I with prejudice. **(A)** Tennessee law is not preempted by ERISA; the statute neither refers to nor has an impermissible connection with ERISA plans but rather creates an independent ethical duty for pharmacists. **(B)** If the court finds that Count II—the federal anchor claim—fails, it should dismiss Count I—the supplemental claim—without prejudice. **(C)** Finally, amendment would not be futile, so the court erred when dismissing Count I with prejudice.

A. ERISA Does Not Preempt Count I Because Tennessee law Regulates Professional Safety Standards, Not Plan Administration.

Tennessee law provides a predicate for Dashwood's wrongful death complaint so long as ERISA preemptions fail to inhibit its application. While the text of ERISA seems peremptorily fatal to anything related to ERISA plans—ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to" ERISA plans—the Supreme Court has increasingly narrowed its interpretation of "relate to." 29 U.S.C. 1144(a).

"A law 'relates to' an employee benefit plan . . . if it has a *connection with* or *reference to* such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96–97 (1983) (emphasis added). First, the "reference to" test examines any potential direct relationship between the state law and ERISA. Second, the "connection with" test examines any potential indirect but effectual relationship.

Here, because the Tennessee law does not qualify under either of the "relate to" test's elements, the statute is not preempted by ERISA. In turn, the Tennessee law predicates Dashwood's wrongful death claim with an independent duty, and the district court's F.R.C.P. 12(b)(6) grant should be overturned.

1. *The Tennessee statute does not "refer to" ERISA plans because it regulates pharmacies regardless of plan status.*

"Where a State's law acts immediately and exclusively upon ERISA plans . . . or where the existence of ERISA plans is essential to the law's operation . . ." *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 319–320 (2016) (*quoting California Div. of Lab. Standards Enf't v. Dillingham Const., N.A., Inc.*, 519 U.S. 316, 117 (1997)).

The Supreme Court clarified that the immediacy element requires direct application of the state law to ERISA plans. For instance, an Arkansas law was not immediate because it did "not directly regulate health benefit plans at all . . . It affect[ed] plans only insofar as PBMs may pass along higher pharmacy rates to plans with which they contract." *Rutledge v. Pharm. Care Mgmt. Ass'n*, 592 U.S. 80, 88–89 (2020).

Further, for a law to act exclusively on ERISA plans, the law itself must apply to and only to ERISA plans. In *Rutledge*, the Supreme Court determined that Arkansas's law was not exclusive "because [it] applies to PBMs whether or not they manage an ERISA plan." *Id.*

Lastly, for ERISA plans to be essential to the law's operation, the Court asks if the regulated plans must be ERISA plans. The Supreme Court determined that Arkansas's law therefore "did not refer to ERISA plans because it imposed surcharges 'regardless of whether the commercial coverage [was] ultimately secured by an ERISA plan, private purchase, or otherwise.'" *Rutledge*, 592 U.S. at 89 (quoting *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995)); *see also California Div. of Lab. Standards Enf't,* 519 U.S. at 328 ("concluding that the relevant California law did not refer to ERISA plans because the apprenticeship programs it regulated did not *need to be* ERISA programs") (emphasis added).

In the case at hand, Tennessee law is not preempted by this "reference to" element because it does not act immediately and exclusively upon ERISA plans nor are the existence of ERISA plans essential to the law's operation.[3]

The Tennessee law does not immediately act on ERISA plans. As in *Rutledge*, the PBMs and pharmacies still determine what they cover in the benefit plans. *Rutledge*, 592 U.S. at 89. The Tennessee law merely regulates a standard of care for pharmaceutical

[3] The district court agreed that the "no reference" element does not preempt the Tennessee law. Mem. Op. & Order at n. 4.

professionals. Notably, even where this law might suggest immediacy, *Gobeille*'s explanation of the "reference to" test binds the first and second elements of immediate and exclusive together by the conjunction "and," requiring both elements to be fulfilled before invoking ERISA preemption. *Gobeille*, 577 U.S. at 319–320.

Concerning the second element, the Tennessee law operates inclusively rather than targeting and only targeting PBMs and pharmacies under ERISA plans. Analogous to Arkansas's law, the Tennessee law is not exclusive because it applies to PBMs and pharmacies "whether or not they manage an ERISA plan." *Rutledge*, 592 U.S. at 88–89.

Lastly, ERISA plans are not essential to the Tennessee law's operation. Like Arkansas's law in *Rutledge*, the Tennessee law regulates regardless of ERISA participation; all PBMs and pharmacies are affected alike. *Id.* Like in *California Div. of Lab. Standards Enf't*, plans do not need to be ERISA plans to have their pharmaceutical professionals regulated under the Tennessee law. 519 U.S. at 328. Thus, ERISA plans are not essential to the Tennessee law's operation.

Consequently, the Tennessee law does not qualify for preemption under the "reference to" element. The statute does not immediately act on ERISA; and, even if it does, then the inclusive rather than exclusive action on ERISA plans fails the element's conjunctive requirement for preemption. Lastly, ERISA plans are not essential to the Tennessee law's operations. Therefore, the "reference to" test does not preempt the Tennessee law.

2. The Tennessee statute has no "connection with" ERISA plans because it mandates medical safety without dictating benefit structures.

Despite attempts to delineate an evaluation, the Supreme Court "has given the phrase 'connection with' a more amorphous (if broader) scope. It has said that this synonym for the phrase 'relates to' offers 'no more help' as a linguistic matter." *Aldridge v. Regions Bank*, 144 F.4th 828, 838–39 (6th Cir. 2025) (quoting *Travelers*, 514 U.S. at 656).

For the last two decades, the Sixth Circuit has distilled these matters down to a two-pronged test: "(1) the law at issue must mandate (or effectively mandate) something, and (2) that mandate must fall within the area that Congress intended ERISA to control exclusively." *Associated Builders & Contractors v. Michigan Dep't of Lab. & Econ. Growth*, 543 F.3d 275, 281 (6th Cir. 2008). Distinctively, this is a conjunctive analysis. *Id.* at 282.

The first prong, that the law must mandate something, relies on plain interpretation. *Id.* This Circuit found that a Michigan law "plainly contain[ed] mandates" because it required apprentice electricians to register, adhere to strict staffing ratios, and participate in approved training programs. *Id.* Thus, the first prong is met if the statute commands action in the plain sense.

The second prong, that the mandate falls within the area Congress intended ERISA to control exclusively, focuses on "whether that something falls within the scope of issues that ERISA prohibits the States from regulating." *Id.* While ERISA does

prohibit states from regulating substantive administrative matters, "ERISA does not pre-empt state rate regulations that merely increase costs or alter incentives for ERISA plans without forcing plans to adopt any particular scheme of substantive coverage." *Rutledge*, 592 U.S. at 88.

Additionally, "ERISA does not have a preemptive connection to generally applicable state laws that regulate things far afield of ERISA plans [such as garnishing laws] applied to the garnishment of a debtor's ERISA benefits." *Aldridge*, 144 F.4th at 840. Conversely, beneficiary designations, specific benefit plans, and reporting requirements imposed upon ERISA plans were deemed within the exclusive purview of ERISA, triggering preemption of these laws. *Id.* at 841.

In this case, Tennessee law mandates something, because it primarily "forbids pharmacies and [PBMs] from substituting drugs without the express written authorization of the patient's treating physician." Compl. ¶ 3.

Yet, the Tennessee law does not fall into the areas Congress wanted ERISA to control exclusively, let alone into anything ERISA expressly prohibits. It does not attempt to designate who may receive benefits of the plan, dictate which benefits must be covered, nor impose administratively-taxing reporting requirements. *Id.* Unlike ERISA that revolutionizes employee benefit plans and rights, it introduces a standard of care pharmaceutical personnel must employ when evaluating substitutional drugs for recipients—regardless of ERISA.

Like in *Aldridge* where economic impacts from garnishment laws are free from ERISA preemption, this Tennessee law regulating the ethical duties of pharmaceutical personnel does not target the wheelhouse of employee benefits Congress set out to standardize. *Aldridge*, 144 F.4th at 841. Since regulating pharmaceutical safety is not exclusive to ERISA[4] nor intended to be so, the Tennessee law is not prohibited by ERISA.

Consequently, while the Tennessee law does mandate something, it does not fall within the area Congress intended ERISA to control. The Tennessee law therefore is not preempted by the "connection with" element.

3. Count I is not "completely preempted" because the statute creates a legal duty independent of ERISA plan terms.

In addition to the foregoing, complete preemption applies against a state-law case "if an individual brings suit complaining of a denial of coverage for medical care, where the individual is entitled to such coverage only because of the terms of an ERISA-regulated employee benefit plan, and where no legal duty (state or federal) independent of ERISA or the plan terms is violated." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 210 (2004). The Supreme Court simplified, "if an individual, at some point in time, could have brought his claim under ERISA § 502(a)(1)(B), and where there is no other

[4] Tennessee pharmacists owe a duty of ordinary care to their customers. *Pittman v. Upjohn Co.*, 890 S.W.2d 425 (Tenn. 1994).

independent legal duty that is implicated by a defendant's actions, then the individual's cause of action is completely pre-empted . . ." *Id.*

Here, Dashwood's case is not completely preempted because there was not a denial of medical coverage, could not have brought her claim under ERISA, and because there was a legal duty independent of ERISA. There was no denial of coverage because Willoughby Health fully insured Dashwood's prescription. Mem. Op. & Order at 3. Instead of providing her with the prescribed medication, the pharmacy substituted her medication for a cheaper option. *Id.* at 4. Even though substitutions are permissible, the pharmacy breached its duty to consult the prescribing doctor first. *Id.* at 4.

Dashwood could not have brought her claim under Section 502(a)(1)(B) because she did not seek to recover benefits, enforce her rights, or clarify her rights. The pharmacy's negligence to comply with the Tennessee law is an issue unto itself, independent of Dashwood's fulfilled benefits and plan rights.

Regardless, the pharmaceutical company had a duty independent of ERISA that they failed to comply with. This duty stands on its own as state law, having passed both elements of the "relate to" test. Since the pharmaceutical personnel failed their medical duty outside of ERISA to call Dashwood's prescribing doctor to ensure the substitution would be safe, Dashwood's claim does not fall under complete preemption.

Thus, due to her claim arising not from a denial of benefits nor under Section 502(a)(1)(B) but a lapse in medical legal requirements derived from violating an independent duty, Dashwood's case does not fall under complete preemption.

Ultimately, the Tennessee law is not preempted by the "relate to" test because neither the "reference to" nor the "connection with" elements preempt it. In turn, the Dashwood plausibly plead a wrongful death claim based on the Tennessee law. Therefore, the motion to dismiss should be reversed and the claim remanded for further proceedings.

B. The District Court Abused Its Discretion by Retaining Jurisdiction Over Count I After Dismissing the Federal Anchor.

Even if ERISA preempts Count I, the district court abused its discretion by dismissing the claim with prejudice. For, after dismissing Count II, it should have dismissed Count I without prejudice. The court's power to hear Count I relied entirely on supplemental jurisdiction which in this case should have been declined once the federal anchor claim—Count II—was dismissed.

4. The district court lacked original jurisdiction over Count I because it is not an ERISA civil enforcement action.

The District Court lacked original federal question jurisdiction over Count I. This Circuit has recognized a "strict bifurcation" between "complete preemption" under Section 502(a) and "express preemption" under Section 514(a). *Aldridge*, 144 F.4th at 828. While the former creates federal jurisdiction, the latter is merely a defense that "could not 'independently confer federal subject matter jurisdiction.'" *Ward v. Alt. Health Delivery Sys.*, 261 F.3d 624, 627 (6th Cir. 2001). Thus, a state law claim only creates a federal question if it is "the equivalent of an ERISA civil enforcement action under 29 U.S.C. § 1132(a)(1)(B)." *Id.* For such are "necessarily federal in character" only

because plaintiffs explicitly "sought to recover benefits" promised under their plan. *Cromwell v. Equicor-Equitable HCA Corp.,* 944 F.2d 1272, 1277 (6th Cir. 1991).

But Dashwood does not seek to recover the cost of drugs denied by the PBM; she seeks damages for the wrongful death of her sister caused by the Defendants' professional negligence based on a duty arising under a state duty. Thus, Count I does not arise under the Plan's terms and is not "the equivalent of an ERISA civil enforcement action." *See Ward*, 261 F.3d at 627.

Therefore, Count I cannot provide federal subject matter jurisdiction. *Id.* Rather, the district court's authority over Count I was strictly supplemental.

5. This Circuit's "strong presumption" required dismissing the state claim without prejudice.

Because the District Court's jurisdiction over Count I was supplemental, it was "bounded by constitutional and prudential limits on the use of federal judicial power." *Musson Theatrical v. Fed. Express Corp.*, 89 F.3d 1244, 1254 (6th Cir. 1996).[5]

District courts may "decline to exercise supplemental jurisdiction" when: (1) the issue presents a novel issue of state law; (2) the state law claim predominates, (3) all federal claims are dismissed, or (4) there are exceptional circumstances. 28 U.S.C.S. 1367(c).

[5] By dismissing Count I with prejudice, the district court acting contrary to *Gibbs'* principle that "[c]ertainly, if the federal claims are dismissed before trial . . . the state claims should be dismissed as well." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

Count I did present a novel issue of state law for which the state courts should have the first bite of the apple. Compl. ¶ 3. Count I also predominated over the federal claim, for Dashwood claimed $10,000,000 for Count I—an amount likely to exceed the value of Count II. Compl. at p. 10. And the only federal claim was dismissed.

Further, under the "amended *Gibbs* dictum" consistently applied by this Circuit, "[a]fter a 12(b)(6) dismissal, there is a strong presumption in favor of dismissing supplemental claims." *Musson*, 89 F.3d at 1254 (affirming the district court's grant of a 12(b)(6) motion on a federal claim, but vacating its judgement on a state supplemental claim, to order that the state claim be dismissed without prejudice).[6]

Therefore, even if exceptional circumstances do not pertain, the balance of factors, viewed in light of this Circuit's strong presumption of dismissing a state supplemental claim after a 12(b)(6) dismissal of the federal claim, strongly suggests that the court should not have exercised supplemental jurisdiction over Count I after it dismissed Count II. Therefore, this Court should vacate the dismissal of Count I and remand with instructions to dismiss without prejudice.

C. The District Court Abused Its Discretion in Dismissing Count I with Prejudice Because Amendment Would Not Be Futile.

Even if this Court affirms that ERISA preempts a claim based on Tennessee law, and even if it were proper to exercise supplemental jurisdiction, the district court

[6] *Eg. Taylor v. First of America Bank-Wayne*, 973 F.2d 1284, 1287 (6th Cir. 1992); *Aschinger v. Columbus Showcase Co.*, 934 F.2d 1402, 1412 (6th Cir. 1991); *Gaff v. Fed. Deposit Ins. Corp.*, 828 F.2d 1145 (6th Cir. 1987).

nonetheless abused its discretion by dismissing Count I with prejudice. Amendments should be freely given.[7] In this case, dismissal with prejudice would only be appropriate when amendment is futile.[8]

Here, Dashwood could plausibly allege a common law professional negligence claim that is entirely independent of Tennessee law and thus more clearly avoids issues of ERISA preemption. Under Tennessee common law, pharmacists owe a duty of ordinary care to their customers. *Med. Shoppe - Jonesborough v. DEA*, 300 F. App'x 409, 412 (6th Cir. 2008) (describing a pharmacist's duty of care to exercise professional judgement and common sense as required by professional standards, regulations, and norms). By dispensing a drug to which the patient had a documented allergy, and falsely identifying it as a generic equivalent, the pharmacy plausibly breached a professional standard of care. Compl. ¶¶ 19-21.

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[7] Granted, Dashwood had already amended once as a matter of course. Compl. ¶ 1.; Fed. R. Civ. P. 15(a)(1). But the District Court should have "freely given[n] leave" to amend, for "justice so requires." *Id.*. Generally, courts should grant leave to amend liberally. *Ellison v. Ford Motor Co.*, 847 F.2d 297, 300 (6th Cir. 1988) ("The Rules put forth a liberal policy of permitting amendments in order to ensure determination of claims on their merits.").

[8] *See Morse v. McWhorter*, 290 F.3d 795, 800 (6th Cir. 2002) (listing reasons for dismissing with prejudice including "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.") (citations removed). But the district court only suggested that it dismissed with prejudice because "any further amendment would be futile." Mem. Op. & Order at 1, 15. Thus, futility is the only factor relevant to the appropriateness of dismissal with prejudice in this case.

Therefore, amending is not futile. This Court should reverse the dismissal with prejudice and remand with instructions to grant leave to amend.

IV. THE DISTRICT COURT ERRED IN DISMISSING COUNT II BECAUSE DASHWOOD SEEKS TRADITIONAL EQUITABLE REMEDIES.

Dashwood stated a claim for fiduciary breach of the duties of loyalty and prudence in violation of ERISA. *Id.* at ¶¶ 34-43. She plausibly alleged that Defendants' actions are remediable through equitable relief surcharging them for the direct financial harm she and the class members suffered, and for disgorgement of all amounts by which defendants profited through their drug switching program. *Id.* at ¶¶ 42-43.

The district court erred by dismissing this claim with prejudice, holding that the claim is not remediable under ERISA because Dashwood did not plausibly plead for an appropriate equitable relief under Section 502(a)(3). Mem. Op. & Order at 15.

This Court should reverse and remand for five reasons. **(A)** This Panel should recommend *en banc* review because *Aldridge* relies on flawed interpretation of Supreme Court precedent and should be overruled. **(B)** Without *Aldridge*, Dashwood plausibly alleged a remediable loss via equitable surcharge. **(C)** Even under *Aldridge*, Dashwood plausibly claimed a disgorgement remedy that the court incorrectly conflated with surcharge. **(D)** Alternatively, the court erred by dismissing with prejudice because Dashwood could successfully amend to allege more specific, discoverable facts. **(E)** Finally, regardless of other arguments, the court failed to consider Dashwood's valid request for declaratory judgment.

D. *Aldridge* Should Be Overruled *En Banc*.

Aldridge was incorrectly decided and ultimately should be overruled insofar as relating to its analysis of equitable claims under Section 502(a)(3).[9] Though this Panel cannot overrule *Aldridge*, it should call the issue to the full court's attention for *en banc* review.[10] Ultimately, this Circuit should overrule *Aldridge* and reverse and remand to the district court to consider the plausibility of Dashwood's remedies under 502(a)(3) consistently with *Amara*, specifically its recognition that surcharge is an equitable remedy. *CIGNA Corp. v. Amara*, 563 U.S. 421, 422-23 (2011).

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[9] This argument was properly preserved. This Circuit's precedent requires parties to present their claims notwithstanding adverse circuit authority. *See Wright v. Spaulding*, 939 F.3d 695, n.3 (6th Cir. 2019) (rejecting futility based on binding circuit precedent as a justification for failing to preserve a claim); see also *Reed v. Ross*, 468 U.S. 1, 7-9 (1984) (noting that futility resulting from adverse circuit precedent does not necessarily create good cause to avoid preservation). But Sixth Circuit precedent also does not demand the empty formality of asking a district court to disregard binding precedent. Dashwood challenged the motion to dismiss Count II on the ground that the relief sought through surcharge is equitable relief under Section 502(a)(3). Mem. Op. & Order at 13. The district court rejected that squarely because it directly contradicted *Aldridge*. *Id.* Because Dashwood advanced a theory that conflicts with *Aldridge's* limitations, and the district court resolved that claim by applying *Aldridge*, the question of whether Aldridge is itself correct is fairly included in the issue of whether surcharge is appropriate equitable relief under Section 502(a)(3). Thus, Dashwood satisfied her obligation to preserve this argument.

[10] The prior-panel rule prohibits a panel from overruling the decision of another, unless a subsequent Supreme Court decision requires it. *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985) ("A panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision."); *RLR Invs., LLC v. City of Pigeon Forge*, 4 F.4th 380, 390 (6th Cir. 2021) ("In the Sixth Circuit, a three-judge panel may not overturn a prior decision unless a Supreme Court decision "mandates modification" of our precedent.") (citations omitted); *see also* Fed. R. App. P. 40(c).

The incorrectness of *Aldridge* follows from four key considerations: (1) *Aldridge* erred by not following the Supreme Court's judicial dicta in *Amara* without substantial reason for disregarding it; (2) *Aldridge* incorrectly interpreted *Amara*, *Mertens*, and *Montanile* by pitting *Amara* against *Mertens*; (3) *Aldridge* resulted in furthering a circuit split that puts this Circuit in the minority and works against the purpose of ERISA; and (4) *stare decisis* does not weigh against overruling in this case.

6. The Sixth Circuit should follow Supreme Court dicta when there is no substantial reason for disregarding it as in this case.

The court in *Aldridge* rightly recognized its prerogative to "refuse to follow the Supreme Court's dicta if we have a substantial reason" for the refusal, but it neglected to recognize its corollary duty to follow Supreme Court dicta absent a substantial reason. *Aldridge*, 144 F.4th at 849. There was not a substantial reason to refuse to follow *Amara's* dicta.

The Sixth Circuit follows Supreme Court dicta when there is not a substantial reason to reject it. *United States v. Marlow*, 278 F.3d 581, 588 (6th Cir. 2002); *ACLU of Ky. v. McCreary Cty.* 607 F.3d 439, 447 (6th Cir. 2010). This standard aligns with a broad consensus that Supreme Court dicta may serve as binding authority.[11]

[11] The Sixth Circuit's deference to Supreme Court dicta is not an anomaly but reflects a widely embraced standard across federal appellate courts. *See, e.g.*, *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996) (holding that the court "considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements"); *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991) (stating that appellate courts are bound by "considered dicta almost as firmly as by the Court's outright holdings"). *See generally* David

A substantial reason to not follow Supreme Court dicta exists if one of three alternative, independent considerations are met: the dicta is aged, subsequent statements from the Supreme Court enfeeble the dicta, or there is compelling authority to the contrary. *Marlow*, 278 F.3d at n. 7.

The court in *Aldridge* did not consider all three possible grounds but disposed of *Amara's* dicta solely on the ground that subsequent statements enfeebled it. *Aldridge*, 144 F.4th at 849 ("The Supreme Court has since distanced itself from *Amara*'s dicta.").[12]

But the *Amara* dicta is not enfeebled by subsequent statements.

Granted, the Supreme Court clarified that *Amara* did not definitively expand the availability of equitable remedies beyond what *Mertens* provided. *Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Ben. Plan*, 577 U.S. 136, 148 n.3 (2016). The Court characterized the dicta in *Amara* as "not essential to resolving that case" and clarified that *Amara* reaffirmed the traditional distinction between legal and equitable relief, thereby not expanding beyond *Mertens*. *Id.; see Mertens v. Hewitt Assocs.*, 508 U.S. 248, 253 (1993).

Based on this development, the Fourth Circuit overruled its prior precedent that aligned with *Amara's* dicta. *Rose v. PSA Airlines, Inc.,* 80 F.4th 488, 505 (4th Cir. 2023). This Circuit followed suit in *Aldridge*, explicitly endorsing *Rose*'s reading that *Montanile*

Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 Wm. & Mary L. Rev. 2021, 2022 (2013) (demonstrating empirically that lower courts "hardly ever refuse to follow a statement from a higher court because it is dictum").

[12] Because *Aldridge* only considered the subsequent statements factor, this analysis focuses on that point. But the other two factors, age and compelling contrary authority, similarly do not provide a substantial reason in this case.

precludes "make-whole" remedies and enfeebles *Amara's* dicta. *Aldridge*, 144 F.4th at 847.

But multiple circuit courts have continued to recognize the applicability of *Amara*'s dicta even after *Montanile.* For example, the Ninth Circuit elevated the *Amara* dicta to the status of "controlling authority." *Moyle v. Liberty Mut. Ret. Benefit Plan*, 823 F.3d 948, 960 (9th Cir. 2016). Similarly, the Second Circuit conceded that *Amara*'s discussion of potential equitable remedies was "arguably dicta," but rather than ignore it in light of *Montanile,* the court applied *Amara's* reasoning. *Laurent v. PricewaterhouseCoopers LLP*, 945 F.3d 739, 748 (2d Cir. 2019).

The continued reliance on *Amara* suggests that *Montanile* did not clearly enfeeble *Amara*'s guidance on equitable remedies against fiduciaries. Rather, *Montanile* clarified tracing rules for non-fiduciary liens and left intact *Amara*'s application of surcharge against fiduciaries.

Therefore, *Montanile* does not clearly and substantively reject *Amar's* guidance. It does not enfeeble it. The Sixth Circuit thus remains bound by its obligation to heed the Supreme Court's considered dicta, rendering the *Aldridge* court's departure an error.13

[13] Further, reliance upon Sixth Circuit precedent that preceded *Amara* and contradicts its dicta is likewise problematic. For example, *Aldridge* acknowledged that *Helfrich* deviates from *Amara* and yet held that *Helfrich* remains binding absent a substantial reason to defer to *Amara*'s dicta. *Aldridge*, 144 F.4th at 849 (applying *Helfrich v. PNC Bank, Ky., Inc.*, 267 F.3d 477, 480-82 (6th Cir. 2001)). This reasoning fails because *Amara*'s subsequent dicta supersedes *Helfrich*, removing any basis for continuing to follow the pre-*Amara* precedent. Indeed, *Aldridge* itself conceded that subsequent Sixth Circuit jurisprudence has recognized surcharge as an equitable remedy—a contravention of

7. Most circuits align with the Supreme Court in considering surcharge to be a form of equitable relief against fiduciaries.

Further, though *Aldridge* may interpret *Amara* and *Mertens* as directly opposed, the two decisions should be read consistently. *Mertens* established that equitable relief under Section 502(a)(3) includes only remedies "that were typically available in equity." *Mertens*, 508 U.S. at 256. *Amara* provided more pertinent historical analysis to show which remedies fit that requirement when the defendant is a fiduciary. *Amara*, 563 U.S. at 423.

Most circuits conclude that *Mertens* and *Amara* operate consistently: because courts of equity possessed the exclusive power to provide monetary compensation—surcharge—for a trustee's breach of duty, such relief remains "typically available in equity" under *Mertens*' standard.[14] This interpretation preserves the limitations of *Mertens*

Helfrich's holding. *Aldridge*, 144 F.4th at 849 ("And some of our unpublished cases have mentioned surcharge in passing as a potential remedy after *Amara*.") (citing *Brown v. United of Omaha Life Ins.*, 661 F. App'x 852, 860 (6th Cir. 2016); *Stiso v. Int'l Steel Grp.*, 604 F. App'x 494, 500 (6th Cir. 2015)).

[14] *See, e.g.*, *Raniero Gimeno v. NCHMD, Inc.*, 38 F.4th 910, 914–15 (11th Cir. 2022) (joining the Second, Fifth, Seventh, Eighth, and Ninth Circuits in holding that while *Mertens* limited relief against non-fiduciaries, *Amara* clarified that traditional equitable remedies against fiduciaries include monetary surcharge); *Sullivan-Mestecky v. Verizon Commc'ns Inc.*, 961 F.3d 91, 103 n.44 (2d Cir. 2020) (confirming that monetary payment remains a category of traditionally equitable relief when remedying a breach of trust); *Moyle*, 823 F.3d 965 (9th Cir. 2016) (cementing the framework that *Amara* permits claims for surcharge where fiduciaries fail to provide accurate plan information); *Silva v. Metro. Life Ins. Co.*, 762 F.3d 711, 725 (8th Cir. 2014); *Kenseth v. Dean Health Plan, Inc.*, 722 F.3d 869 (7th Cir. 2013) (explaining that because the defendant was a fiduciary analogous to a trustee—unlike the non-fiduciary in *Mertens*—the requested monetary make-whole relief constituted an equitable remedy); *Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448, 452 (5th

while respecting the conclusions of *Amara* and *Montanile*, thereby creating a unified reading of Supreme Court precedent that permits surcharge as a form of equitable relief against fiduciaries.

8. Aldridge works against the uniformity of common law central to ERISA.

ERISA's aims are best furthered when its federal common law is uniform and clear.[15] This benefits employers by protecting them from "administering their plans differently in each State." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 10 (1987) (quoting *Shaw v. Delta Air Lines*, 463 U.S. 85, 105 (1983)). A significant deviation from the norm thus undercuts ERISA's purpose.

Aldridge cuts against the uniformity of how Section 502(a)(3) equitable claims are adjudicated. A national plan administrator now faces a liability regime in the Sixth Circuit that is fundamentally different from the majority of other circuits.

9. Overruling Aldridge would not be contrary to the principle of stare decisis.

Finally, *stare decisis* does not suggest *Aldridge* should remain binding law. The majority of the factors considered by the Supreme Court for overruling previous interpretations of statutes cut in favor of not applying *stare decisis* to *Aldridge*. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024) (outlining and applying the four factors: "the

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Cir. 2013) (relying on this fiduciary distinction to reverse prior restrictive precedents and authorizing make-whole relief for fiduciary breaches).

[15]A central goal of ERISA is "establish[ing] a uniform administrative scheme which provides a set of standard procedures to guide processing of claims and disbursement of benefits." *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001) (quoting *Fort Halifax Packing Co.* v. *Coyne,* 482 U.S. 1, 9 (1987)).

quality of [the precedent's] reasoning, the workability of the rule it established . . . reliance on the decision," and consistency with other areas of law) (quoting *Knick v. Twp. of Scott*, 588 U.S. 180, 203 (2019)).

First, the quality of reasoning in *Aldridge* is questionable. It not only bears the weaknesses hitherto explored, but also simply runs contrary to the majority of circuits, and to the Sixth Circuit's previous understanding.[16]

Second, though the *Aldridge* rule is judicially tractable, it is less workable for plan administrators and participants who will need to manage jurisdictional disparities.

Third, there are no strong reliance interests on *Aldridge*; it was decided only months ago and has been cited primarily for procedural standards or its analysis of ERISA preemption. *Aldridge*, 144 F.4th 828.[17]

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[16] *See Stiso*, 604 F. App'x 500–01 (remanding with instructions to grant an appropriate equitable remedy, explicitly noting that such relief includes "make-whole relief in the form of money damages" pursuant to *Amara*); *Brown v. United of Omaha Life Ins. Co.*, 661 F. App'x 852, 860 (6th Cir. 2016) (remanding for a determination of equitable relief, expressly identifying surcharge as a potential remedy for injuries distinct from the denial of benefits); *see also Rochow v. Life Ins. Co. of N. Am.*, 780 F.3d 364, 372 (6th Cir. 2015) (en banc) (confirming that a claimant may pursue a make-whole remedy for a breach-of-fiduciary-duty claim).

[17] *See Aramark Servs., Inc. Grp. Health Plan v. Aetna Life Ins. Co.*, 162 F.4th 532 (5th Cir. 2025) (J. Jones, Dissenting) (citing *Aldridge* to suggest that the Fifth Circuit should follow it and *Rose*); *Acad. of Allergy & Asthma in Primary Care v. Amerigroup Tenn., Inc.*, 155 F.4th 795, 808 (6th Cir. 2025) (citing *Aldridge* solely for the procedural standard regarding appellate forfeiture); *Aetna Life Ins. Co. v. Bd. of Trs. of AGMA Health Fund*, No. 3:24-CV-1461, 2025 WL 2611947, at *4 (D. Conn. Sept. 10, 2025); *Laurel Hill Mgmt. Servs., Inc. v. La-Z-Boy Inc.*, No. 24-13230, 2025 WL 2231041, at *3 (E.D. Mich. Aug. 4, 2025) (citing *Aldridge* for preemption analysis); *Perrone v. Blue Cross Blue Shield of Mich.*, No. 1:24-CV-1313, 2025 WL 2027540, at *2 (W.D. Mich. July 21, 2025) (citing *Aldridge* for preemption analysis in a string citation).

Fourth, the *Aldridge* opinion is inconsistent with other areas of law because it results in a right without an accompanying remedy.[18]

Thus, the balance of factors suggests that *stare decisis* should not prevent this Circuit from overruling *Aldridge*.

In conclusion, *Aldridge's* holding that surcharge is not an equitable remedy against a fiduciary should be overruled by this Court *en banc*.

E. If *Aldridge* Is Overruled, Surcharge Qualifies as an Equitable Remedy Against Fiduciaries.

If *Aldridge* does not control, Dashwood plausibly alleged a harm that can be equitably remedied under Section 502(a)(3) through surcharge. Dashwood had two equitable avenues under *Amara*: "equity courts possessed the power to provide relief in the form of monetary 'compensation' for a loss resulting from a trustee's breach of duty [(surcharge)], or to prevent the trustee's unjust enrichment [(disgorgement)]." 563 U.S. 421, 441 (2011). Thus, because Section 502(a)(3) concerns remedies traditionally found in equity, Dashwood plausibly sought applicable remedies, including surcharge, and sought them against the appropriate fiduciaries.[19]

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[18] *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (recognizing the danger of "laws furnish[ing] no remedy for the violation of a vested legal right"); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971) (noting that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief") (citations omitted).

[19] Willoughby Health Care and Willoughby RX are fiduciaries. "Neither of the Willoughby Defendants dispute their fiduciary status." Mem. Op. & Order at 11. The district court thus erred by dismissing Count II by applying the strict limitations of

Thus, under *Amara*, Dashwood's request for lost earnings would not be legal "compensatory damages" that are not actionable under Section 502(a)(3) and would "eliminate[] Plaintiff's damage request." Mem. Op. & Order at 14. Instead, a monetary remedy to make a beneficiary whole for a breach of trust is permissible equitable surcharge. *Amara*, 563 U.S. at 442.

Therefore, Dashwood's request for surcharge constitutes a plausibly plea for equitable relief that qualifies under Section 502(a)(3).

F. Even Under *Aldridge*, the District Court Erred by Conflating Surcharge with Disgorgement and Misapplying Tracing Rules.

But even if *Aldridge* controls, the district court misapplied *Aldridge* by conflating the impermissible remedy of surcharge with the permissible equitable remedy of disgorgement, both of which Dashwood expressly distinguished. Further, the Court erred in its tracing analysis by treating commingled funds as general assets, overlooking how specific ill-gotten funds can be identified even within general accounts. Therefore, even under *Aldridge*, Dashwood plausibly stated a claim for relief.

10. The district court misapplied Aldridge by at times conflating impermissible surcharge and permissible restitution through disgorgement.

The district court erred by inconsistently conflating and distinguishing surcharge and disgorgement.[20] The court explicitly treated the latter as a species of the former—

Mertens which involved a non-fiduciary and *Montanile* which involving a participant. For these limitations do not apply when the defendant is a fiduciary.

[20] Precedent suggests that surcharge and disgorgement are distinct, the latter being a make-whole monetary remedy, and the latter being a form of restitution. *See Amara*, 563

incorrectly attributing the conflation to Dashwood—to wrongly conclude that *Aldridge* foreclosed both. Mem. Op. & Order at 13 ("Plaintiff seeks equitable relief under the aegis of a surcharge' remedy . . . Alternatively, but also under the umbrella of surcharge,' Plaintiff seeks disgorgement.").

But Dashwood did not suggest that disgorgement is a form of equitable surcharge. Instead, in her request for relief with respect to Count II, Dashwood expressly distinguished between the two remedies; "equitable surcharge" will apply "for the direct financial harm suffered . . . as a result of [Defendants'] fiduciary breaches," while "disgorgement" should target "all amounts by which [Defendants] profited through application of their drug switching program." Compl. p. 10.

This distinction aligns with *Aldridge*. For though *Aldridge* did specifically conclude that an "equitable surcharge" is not "equitable relief" under 502(a)(3), it also explicitly recognized that a "restitution remedy can qualify as either legal or equitable." *Aldridge* at 833-46 (citations omitted). Thus, though *Aldridge* never explicitly grapples with disgorgement by name, it describes it and cites to *Knudson* which considered it:

U.S. at 441-42 (compiling numerous definitions from treatises not only to show that surcharge was an equitable remedy, but also that it is a means to make one whole following a breach of fiduciary duty); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 215 (2002) (connecting restitution and disgorgement); *see also Id.* at 229 (2002) (Justice Ginsburg, dissenting) (citing Supreme Court precedent to suggest, in agreement with the majority, that an award would be restitutionary if it would "require the defendant to disgorge funds wrongfully withheld").

"For [disgorgement] to be equitable . . . [it] must seek *specific* "funds" . . . not a money judgment collectable from . . . general assets." *Id.* (citing *Knudson*, 534 U.S. at 207.).

Therefore, *Aldridge* did not reject disgorgement but only conditioned it on successfully tracing the ill-gotten gains to something specific rather than to a general asset.[21] Thus, the district court, though inconsistent with its prior conflation, correctly recognized that Dashwood's claim for disgorgement is a request for restitution of ill-gotten gains that qualifies under Section 502(a)(3) if traced to something specific. Mem. Op. & Order at 14.[22]

11. Count II alleged sufficient facts to support a remedy of disgorgement.

The district court erred by dismissing Dashwood's disgorgement claim with prejudice because she did "not allege that the funds are still in [Willoughby RX's] possession." Mem. Op. & Order at 15.

But she effectively did. For even if Defendant's savings may be more difficult to identify generally, Mem. Op. & Order at 14, the rebates paid by the drug manufacturer to Willoughby RX are distinct, identifiable transfers of capital. Compl. ¶ 39.

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[21] A claim for disgorgement of ill-gotten gains remains a valid equitable remedy under Section 502(a)(3) so long as the plaintiff seeks "specific funds in the beneficiaries' possession." *Aldridg*e, 144 F.4th at 846; *see also Montanile* 577 U.S. at 145 (2016) ("[e]quitable remedies 'are, as a general rule, directed against some specific thing," and are "ordinarily enforceable only against a specifically identified fund.").

[22] But the district court's confusion continued even after, for in analyzing whether the restitution is specific, the court invoked "surcharge": "both the savings and the alleged payments from Bactrim's manufacturer went to Willoughby RX, not to Willoughby Health Care, which therefore cannot be surcharged for these amounts." Mem. Op. & Order at 14.

The district court further erred by treating the defendants' ill-gotten gains as general assets inaccessible through equitable means, rather than as a specific fund comingled with a general fund that may be accessible because the specific funds are nonetheless in the defendants' possession. For a claimant might identify specific funds within a fiduciary's possession by presuming that the fiduciary spends its rightly-held funds first, leaving the ill-gotten funds intact even if within a general account. *See Sereboff v. Mid Atl. Med. Servs.*, 547 U.S. 356, 359 (2006) (clarifying a "familiar rule of equity" that the plaintiff can follow a portion of the disputed funds still in the defendant's possession once that portion is identified); *see also* Restatement (Third) of Restitution § 59(2)(a) (2011).[23]

This is effectively what Dashwood alleged by identifying Defendants' savings and rebates. Compl. ¶ 39.

Therefore, Dashwood plausibly stated a claim for relief under Section 502(a)(3) and the motion to dismiss should have been denied.

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[23] The favorable tracing rule of Section 59(2)(a)—which attributes any dissipation of commingled funds to the wrongdoer's own assets first—applies explicitly whenever the recipient is a "defaulting fiduciary." Restatement (Third) of Restitution § 59(2)(a) (2011). A fiduciary qualifies as "defaulting" under Section 51 when they have been enriched by "misconduct," defined as an actionable interference with the claimant's legally protected interests, including a breach of the duty of loyalty. *See Id.* Section 59(2) (cross-referencing Section 51). Because Dashwood alleges that Willoughby RX obtained these rebates through a direct breach of its fiduciary duty of loyalty, she has alleged that Willoughby RX is a defaulting fiduciary. Consequently, this Court should apply the reasoning of Section 59(2)(a) to identify the traceable product of those rebates within Willoughby RX's general accounts, rather than impliedly assuming the funds are not specifically identifiable because of commingling.

G. Dismissal With Prejudice Was Improper; Amendment is Not Futile.

Further, by denying leave to amend, the district court effectively ruled that Dashwood cannot allege the existence of specific, traceable funds.

But it is possible. Dashwood could amend to unambiguously allege that ill-gotten gains are still in Willoughby RX's possession and that those funds are discoverable. This should be sufficient for Count II to survive a 12(b)(6) motion and go into discovery, where there is greater potential for specificity.

Therefore, amendment was not futile. Thus, even if dismissal was proper, this Court should reverse and remand with instructions to dismiss without prejudice.

H. The Claim for Declaratory Judgment Must Survive Dismissal.

The district court focused exclusively on the requests for surcharge and disgorgement, neglecting the first remedy pled: "[a] declaratory judgment that the action and omissions described herein violate ERISA." Compl. p. 10.

The court did acknowledge this request, noting that "Count II seeks declaratory, injunctive, and other appropriate equitable relief," but was ultimately silent on whether Dashwood plausibly made a claim for a declaratory judgment. Mem. Op. & Order at 15.[24]

This silence is fatal to the dismissal order because Section 502(a)(3) "has been interpreted as creating a cause of action for a declaratory judgment." *Thiokol Corp. v.*

[24] The District Court incorrectly stated that Plaintiff requested injunctive relief. Mem. Op. & Order at 15. Dashwood did not request injunctive relief. Compl. p. 10.

Dep't of Treasury, Revenue Div., 987 F.2d 376, 380 (6th Cir. 1993). Thus, because Dashwood plausibly claimed facts justifying declaratory relief under Section 502(a)(3), dismissal under Rule 12(b)(6) was improper. *See Clarke v. Amazon.com Servs. LLC*, 699 F. Supp. 3d 596, 604 (E.D. Ky. 2023) (explaining that where a plaintiff pleads any viable remedy, "Rule 12(b)(6) will be of no use," even if other requested remedies are unavailable).

Defendants may argue that a declaratory judgment is a hollow remedy for the estate of a deceased beneficiary. However, this ignores the representative nature of the suit. Count II was brought on behalf of a putative class of "participants . . . who were prescribed medications that were changed to formulary medications." Compl. ¶¶ 39-40. For the living class members subject to Defendants' ongoing drug-switching policy, a judicial declaration that these acts violate ERISA is necessary to prevent future harm.

Accordingly, even if this Court were to affirm the lower court's ruling on surcharge and disgorgement, the dismissal of Count II must be reversed to allow the claim for declaratory judgment to proceed.

CONCLUSION

As to Count I, this Court should reverse the dismissal because Tennessee law is not preempted by ERISA. Alternatively, the Court should *vacate the dismissal* and *remand* with instructions to dismiss the claim *without prejudice* so that it may be heard in state court or amended to plead common law negligence.

As to Count II, this Court should *reverse* the dismissal because Dashwood stated a valid claim for equitable relief under Section 502(a)(3), including disgorgement and declaratory judgment. This Panel should also recommend that the full Court review *Aldridge en banc* to restore the availability of equitable surcharge against fiduciaries.

Respectfully Submitted,

/s/ Team 13 Attorneys for Appellants