UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MARTIN J. WALSH, Secretary of Labor, United States Department of Labor,

Plaintiff

v.

MACY'S, INC., ANTHEM BLUE CROSS LIFE AND HEALTH INSURANCE COMPANY, CONNECTICUT GENERAL LIFE INSURANCE COMPANY, and the MACY'S, INC., WELFARE BENEFITS PLAN,

Defendants.

DOCKET NO. 17-cv-00541

JUDGE DOUGLAS R. COLE

DEFENDANTS' RULE 12(b)(6) MOTION TO DISMISS

Under Federal Rule of Civil Procedure 12(b)(6), Defendants Macy's Inc. and Macy's Inc. Welfare Benefits Plan (collectively "Defendants"), move to dismiss the re-pled Count Eight in the Second Amended Complaint ("SAC") filed by Plaintiff Martin J. Walsh, Secretary of Labor, United States Department of Labor ("Secretary"). The facts and law in support of this Motion are fully set forth in the Memorandum in Support attached and incorporated here by reference.

Respectfully submitted,

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MEMORANDUM OF LAW IN SUPPORT MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6) BY DEFENDANTS MACY'S, INC. AND MACY'S, INC. WELFARE BENEFITS PLAN

I. INTRODUCTION AND SUMMARY OF ARGUMENT.

The third time is not the charm. Here, to overcome deficiencies that would otherwise thwart his third attempt to attach liability to Defendants, the Secretary relies on numerous conclusory, inconsistent, or legally incorrect statements. In particular, to avoid satisfying the pleading requirements imposed by the Court, the Secretary attempts to shift the burden to Macy's (and, by extension, to all wellness programs) to prove compliance with wellness program regulations, creating a "guilty until proven innocent" assumption that does not square with the underlying statutory language or its purpose. The Secretary also attempts to prove by assertion that Macy's acted as a fiduciary when it did not. Finally, the Secretary again seeks relief to which he is not statutorily entitled.

But this is not the first time the Court has confronted the Secretary's erroneous assertions. Defendants moved to dismiss the First Amended Complaint ("FAC"), and the Court dismissed many of the Secretary's claims with prejudice. First, as to the Health Plan's Tobacco Surcharge Wellness Program (the "TSWP" or "Wellness Program"), the Secretary challenged the Health Plan's offering of an alternative standard to avoid the surcharge for those who did not quit tobacco use. For Health Plan Years 2011 to 2013, the Court dismissed with prejudice the Secretary's claims for fiduciary breach, but the Court allowed the claims of an alleged discriminatory wellness program to proceed.

For Health Plan Years 2014 forward, the Court dismissed the claims for a discriminatory wellness program and breach of fiduciary duty, but granted the Secretary leave to amend and re-plead allegations regarding the alternative standard if the Secretary could allege plausible claims

consistent with the Court's prior rulings. Dkt. No. 47, p. 44 (noting conclusory "information and belief" allegations were insufficient but allowing leave to amend if he could plead detailed "who, what, where, when, how or why" factual support). The Court also held that the Secretary had not sufficiently alleged a plausible breach of fiduciary duty claim against Macy's because he did not show Macy's acted as a fiduciary rather than a settlor. *Id*. at pp. 45, 48-49.

The Secretary's third effort does not remedy these pleading flaws. First, the Wellness Program does not bear the burden of proving it did not violate Section 702(b). Rather, the Secretary bears the burden of proving that the Wellness Program *did* violate ERISA § 702(b) for the plan years at issue, but as set forth below, his factual allegations are insufficient to state a plausible claim.

Second, the SAC's Count Eight, in which the Secretary seeks to replead the claims the Court dismissed without prejudice, alleges only potential ministerial mistakes in administering the Wellness Program for Plan Years 2014-2015, and fails to identify and allege any specific violations in administering the Wellness Program for Plan Years after 2015.[1] But as detailed below, those alleged mistakes do not amount to fiduciary, discretionary conduct.

Third, the Secretary simply repleads the same ERISA duty of loyalty and prohibited transactions claims the Court has already dismissed, without providing any new evidence or theories of alleged fiduciary conduct.

Finally, if any ministerial errors caused any participant to lose rewards due under the Health Plan's Wellness Program (the Secretary's SAC has not established this and only speculates that it may have happened), the Health Plan participants can properly address this by making a claim for

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[1] The SAC does not set forth any factual allegations giving rise to any violation after July 2016. *See* SAC, *e.g.*, ¶¶ 117-18.

benefits under ERISA § 502(a)(1)(b). The availability of that relief to participants precludes a claim for relief by the Secretary under ERISA § 502(a)(5). For these reasons, Count Eight of the SAC should be dismissed with prejudice.

II. PROCEDURAL HISTORY.

A. The Secretary's Serial Complaints and the Court's Ruling Granting in Large Part Macy's Motion to Dismiss.

On August 16, 2017, then-Secretary of Labor R. Alexander Acosta filed a civil action against Macy's, Inc., Anthem Blue Cross Life and Health Insurance Company, Connecticut General Life Insurance Company, and the Macy's, Inc. Welfare Benefits Plan. Dkt No. 1. The Secretary then filed a First Amended Complaint ("FAC") on August 29, 2017, alleging several claims including breach of fiduciary duty and violations of ERISA Sections 404(a)(1)(A), 404(a)(1)(D), 406(a)(1)(D), 406(b)(1), 406(b)(2), and 702. Dkt. No. 4.[2] On October 1, 2018, Defendants moved to dismiss under Fed. R. Civ. P. 12(b)(6). Dkt. No. 37. The Secretary timely opposed. Dkt. No. 41. On November 17, 2021, the Court granted in part and denied in part Macy's and the Health Plan's motion.[3] Because they impact the analysis of the claims in the SAC, the Court's specific rulings on the claims are discussed below.

1. The Section 702(b) discriminatory Wellness Program claims for 2011-2013.

For Plan Years 2011 and 2012, the Secretary alleged that the Health Plan provided no reasonable alternative standard for individuals for whom it was unreasonably difficult because of a medical condition or medically inadvisable to cease using tobacco products, and that the Health

[2] The facts alleged in the FAC are set forth in detail in the Court's prior rulings. *See* Dkt. No. 47, 56.

[3] The Court also dismissed with prejudice all claims arising out of the out-of-network reimbursement methodology.

Plan failed to notify individuals of the possibility of completing a reasonable alternative standard. For Plan Year 2013, the Secretary alleged that the Wellness Program violated ERISA because the Health Plan documents indicated that the Health Plan would not provide retroactive reimbursement of the full annual tobacco surcharge to individuals who completed the reasonable alternative standard during the Plan Year.

On these allegations, the Court held the Secretary could proceed on his ERISA § 702(b) claim for Plan Years 2011-13. The Court noted, however, that Macy's has potentially significant defenses on the merits to these claims, including the factual issue of whether any participant subject to a Tobacco Surcharge can show he could qualify for this alternative standard by showing it was unreasonably difficult due to a medical condition or medically inadvisable to quit smoking. *See* Dkt. No. 47, pp. 35-36.[4]

2. The fiduciary claims for 2011-2013 did not survive.

The Court dismissed with prejudice all fiduciary claims for Plan Years 2011-2013, including those for breach of fiduciary duty of loyalty and prohibited transactions. Dkt. No. 47, pp. 7-8 & 45-48. The Court dismissed these claims, finding Macy's acted as a settlor, rather than as a fiduciary, in determining which benefits its employees would receive. Dkt. No. 47, p. 14. The Secretary did not move to reconsider dismissal of the claims for breach of the fiduciary duty of loyalty and prohibited transaction. Dkt. No. 56, p. 2 n. 2.

3. The Court dismissed the ERISA § 702(b) and fiduciary breach claims for Plan Years 2014 and following with leave to replead narrowly defined claims.

[4] Notably, nicotine addiction (which is what the Secretary used to justify the medical need for an exception to tobacco cessation) can be addressed by various products, including over-the-counter ones, that do not require continued tobacco use with its attendant ill health affect.

For Plan Years 2014 and following, the Court concluded that the Tobacco Affidavit in place beginning in Plan Year 2014 offered the required reasonable alternative. *See* Dkt. No. 47, pp. 42-44. In support of his allegations challenging the alternative standard, the Secretary had contended on "information and belief" that "not all Health Plan participants who completed a purported reasonable alternative under the TSWP … avoided or were reimbursed the Tobacco Surcharge" for the Plan Year. *Id.,* p. 44. The Court found this conclusory statement insufficient to plead a plausible claim for relief under ERISA § 702(b), but the Court allowed the Secretary to amend if "he can provide further factual support sufficient to render his claim plausible." *See* Dkt. No. 47, pp. 42-49. In so holding, the Court instructed that the Secretary must plead the "who, what, where, when, how or why" of these mistakes. *Id.* (*quoting Total Benefits Planning Agency Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 437 (6th Cir. 2008)).

Together with his allegations of a discriminatory wellness program, the Secretary also alleged that Macy's breached fiduciary duties as part of the Wellness Program. Specifically, the Secretary alleged that Macy's failure to follow plan documents gave rise to a claim for violation of fiduciary duty. Dismissing those claims, the Court noted that under *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000), the Secretary must show Macy's was acting in a fiduciary capacity "when taking the action subject to complaint." Dkt. No. 47, p. 46.

The Court then found that the Secretary had not set forth a plausible allegation Macy's mismanaged or misappropriated plan assets, nor that Macy's implementation of an alleged discriminatory program according to its design is fiduciary conduct. *Id.* at pp. 46-47. But consistent with its ruling on the ERISA § 702(b) claim for this time period, the Court granted the Secretary leave to amend his complaint if he can replead a plausible claim that Macy's breached its fiduciary duty under ERISA § 404(a)(1)(D) to follow these plan documents. *Id.* at p. 49.\

B. The Secretary's Motion for Reconsideration.

On December 15, 2021, the Secretary moved for reconsideration, Dkt. No. 52, which the Court denied on February 10, 2022.[5] Dkt. No. 56. The Secretary argued Macy's was a fiduciary because Macy's was "determining which participants were charged the Tobacco Surcharge; determining which participants (if any) were reimbursed the Tobacco Surcharge; withholding the Tobacco Surcharge from participants' paychecks; selecting [Cigna] and [Anthem] as the service providers to provide tobacco cessation programs; and directing Cigna and Anthem on how to report completions of the tobacco cessation programs." *Id*. at pp. 7-8. The Secretary also alleged that Macy's, as a fiduciary, breached its fiduciary duty by failing to disregard illegal plan terms. ("ERISA fiduciaries always have the discretion to disregard alleged illegal plan terms" and therefore act in a fiduciary capacity whenever they fail to do so.) *Id*. at p. 10.

The Court declined to find that any of these allegations, even if true, meant that Macy's acted as a fiduciary, because no relationship exists between these allegations and the purported violation of failing to include a reasonable alternative standard. *Id.* at pp. 8-9. In so holding, the Court reiterated that, "[i]in every case charging breach of ERISA fiduciary duty…the threshold question is…whether [the defendant] was acting as a fiduciary…when taking the action subject to the complaint." Dkt. No. 56, p. 6, citing *Pegram*, 530 U.S. at 226. Because a party (such as Macy's) can act in different capacities relative to employee benefits, the key question is what capacity Macy's acted in when taking the challenged conduct. *Id.* at p. 7.

[5] In its Opinion, the Court noted the Secretary asked only for reconsideration of its dismissal of the claims made under ERISA § 404(a)(1)(D) for breach of fiduciary duty relating to the Wellness Program during Plan Years 2011-2013. The Secretary did not seek reconsideration of the Court's dismissal with prejudice of the Secretary's breach of ERISA's fiduciary duty of loyalty claims under ERISA § 404(a)(1)(A)(ii) and prohibited transaction claims under ERISA § 406. Dkt. No. 56, p. 2 & n.2.

Finally, as for the Secretary's ERISA § 404(a)(1)(D) claim regarding the fiduciary duty to follow plan documents, the Court rejected the Secretary's argument that the Health Plan had a fiduciary duty to disregard plan terms that allegedly violated ERISA §702(b). *Id.* at pp. 9-22.

C. The Third Time Is Not the Charm.

On March 14, 2022 the Secretary filed the SAC, his third complaint. Dkt. No. 57 p. 1 n.2. Count Eight of the SAC contains the Secretary's re-pled claims on the alleged mistakes Macy's made in implementing the alternative standard provided in the Tobacco Affidavit in 2014 and forward Plan Years. In support of his re-pled ERISA § 702(b) claim, the Secretary makes two allegations. First, he identifies 17 individuals who were refunded Tobacco Surcharges after the 2014-2015 Plan Years, to suggest, without any specific factual allegations, that other errors during the 2014-2015 period may have occurred. SAC ¶ 134b. Second, he contends an inaccurate phone number may have been provided to some unidentified subset of participants for some part of this period for the tobacco cessation program. SAC ¶ 144. As set forth below in the Argument section, neither of these factual allegations is sufficient to cure the flaws the Court identified in its rulings on Defendants' original motion to dismiss.

Aside from those two allegations, the rest of the SAC repleads claims this Court has already rejected (the Secretary concedes he re-pled dismissed claims to preserve them for appeal, SAC p. 1 n.2). For instance, regarding the Tobacco Affidavit, the Court has already concluded that the version in place beginning in Plan Year 2014 offered the required reasonable alternative. *See* Dkt. No. 47, pp. 42-44. Specifically, the Tobacco Affidavit required signatories who completed the reasonable alternative standard to check a box for either of two options, only one of which involves being tobacco-free or working toward achieving that status. Noting that the Secretary had mis-characterized the Affidavit, the Court held that it is not plausible to infer that the signatories who

check the box sharing that they still use tobacco products will have to pay the Tobacco Surcharge. Dkt. No. 47, pp., 43-44.

Disregarding the Court's finding, the Secretary deletes his earlier allegations related to the Tobacco Affidavit and asserts new allegations inconsistent with the Court's prior ruling that the Tobacco Affidavit provided a reasonable alternative standard. In other, words, the Secretary's SAC attempts to ignore what the Court already concluded was a reasonable alternative standard provided by the Health Plan.

Specifically, the Secretary concedes at ¶¶ 119 and 120 that Macy's instructed Aetna and Cigna in late 2013 and early 2014 to offer alternative standards to those who were still using tobacco (and the Court had ruled the Tobacco Affidavit used during this period did just this). Notwithstanding, at ¶¶ 123-127 the Secretary argues the Health Plan imposed a tobacco-free requirement, and contends these allegations are "apart from the Tobacco Affidavit." Although unclear and not factually supported, the re-pled 702(b) claim appears to be based on the notion that Macy's, as plan sponsor, created a wellness program that surcharged tobacco users unless they self-attested they were tobacco-free, or completed a tobacco cessation program that ultimately required some (unidentified) Health Plan participants to meet the original standard of being tobacco free. SAC, ¶ 113.

The Secretary acknowledges, however, that starting early in Plan Year 2016, Cigna had a telephonic option that did *not* require cessation to complete, and was appropriate for a reasonable alternative. SAC at ¶ 134a. The Secretary has not pled any specific facts alleging that participants who requested a reasonable alternative prior to that time (as opposed to participants who actually signed up wanting to quit smoking) were required to comply with the health factor program option under either the Cigna or Aetna programs instead of the a non- health factor option (*i.e.*, telephonic

classes or waiver of any cessation requirements for online classes when participating in the program as a reasonable alternative). In other words, the Secretary asks this Court to infer what he attempts to prove by speculation.

Finally, in support of his claim that Macy's breached its fiduciary duty to follow the Plan documents, the Secretary pleads only this conclusory allegation: "Alternatively, even if Macy's' formal statements and instructions stated a 'reasonable alternative standard' consistent with ERISA, Macy's, as the implementing fiduciary, did not prudently manage, represent, or follow the Tobacco Surcharge Wellness Program's terms and provide a reasonable alternative." Dkt. No. 57, ¶ 138.

III. APPLICABLE LEGAL STANDARDS.

Per the Court's earlier ruling, to survive a motion to dismiss, the Secretary "must make sufficient factual allegations that, taken as true, raise the likelihood of a legal claim that is more than possible, but indeed plausible." *Darby v. Childvine, Inc.*, 964 F.3d 440, 444 (6th Cir. 2020) (citing *Binno v. Am. Bar Ass'n*, 826 F.3d 338, 345-46 (6th Cir. 2016)). The Court need not accept as true a plaintiff's legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Accordingly, "bare allegations without any reference to the who, what, where, when, how or why" will not survive a motion to dismiss. *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross and Blue Shield*, 552 F.3d 430, 437 (6th Cir. 2008) (internal quotation marks omitted). Finally, and apropos here, the general principle that the Court accepts all factual allegations as true is inapplicable regarding internally inconsistent allegations, which need not (and indeed cannot) be accepted as true for purposes of a motion to dismiss. *Jiangbo Zhou v. Lincoln Electric Co.*, Case No.: 1:20-cv-00018, 2020 WL 2512865, at *4 (S.D. Ohio May 15, 2020).

IV. LAW AND ARGUMENT.

As set forth above, the only claims the Court allowed the Secretary to re-plead were for the 2014 and forward Plan Years, if the Secretary could cure the flaws the Court identified in the Secretary's earlier pleading. The Secretary has not done so. First, as detailed below, the Secretary bears the burden of showing that the Health Plan's wellness program violated ERISA § 702(b) for the plan years at issue. Count Eight does not meet it. At most, Count Eight identifies potential ministerial errors made in Plan Years 2014 and 2015[6] in implementing this program, but not fiduciary discretionary conduct.

Next, the SAC fails to establish that Macy's was a fiduciary for the action subject to complaint during these Plan Years. Instead, it asserts fiduciary claims this Court has already twice rejected. Finally, the remedy the Secretary seeks under ERISA § 502(a)(5) is not available here. Because the Secretary's amended Count Eight does not satisfy the *Twombly*/*Iqbal* plausibility standard, and because the Secretary fails to carry his burden of proof, the Court should dismiss these claims with prejudice.

A. The Secretary Bears the Burden of Stating a Plausible Claim for Violation of ERISA § 702(b) for 2014 and Forward Plan Years.

The entire SAC argument turns on the Secretary's critical misperception that the criteria set forth in 29 C.F.R. § 2590.702(f)(4) constitute an affirmative defense, such that all health plans that offer wellness programs with rewards or surcharges are presumed to violate ERISA unless they can prove otherwise.

Specifically, in the SAC the Secretary identifies the criteria a qualifying wellness program must satisfy under its post-2013 regulation to permit surcharges against participants, *Id.* at ¶ 114a-c, but he incorrectly contends these criteria constitute "an affirmative defense that can be used by

[6] The Secretary has not made any factual allegations for subsequent years.

plans and issuers in response to a claim that the plan or issuer discriminated under the HIPAA nondiscrimination provisions." *Id.*, ¶ 115 (citing and quoting *Incentives for Nondiscriminatory Wellness Programs in Group Health Plans*, 78 Fed. Reg. 33158, 33160 (June 3, 2013)).

As an initial proposition, the Secretary previously made this same argument that wellness programs are an affirmative defense., *See* Dkt. No. 41, Secretary's Opp. Motion to Dismiss, p. 2 (quoting same explanatory material). The Court's prior rulings, however, squarely place the burden on the Secretary to plead and prove a violation. *See, e.g.*, Dkt. No. 47, Motion to Dismiss Ruling, p. 44 (the Secretary's "information and belief" allegations are insufficient to show violation; the Secretary must plead the "who, what, where, when, how or why" of a violation); Dkt. No. 56, Motion to Reconsider Ruling, p. 20 n. 6 ("should the Secretary prove a violation occurred."), p. 22 ("if he proves that Macy's violated 1182…."). Not only is this ruling now the law of the case that should preclude further review,[7] it is also correct, since that ruling fits squarely within the statutory text, structure, and purpose of wellness programs provided by ERISA § 702(b)(2).

That section explicitly provides that *nothing* in its terms, which include non-discrimination for a health status-related factor, shall be construed to prevent a group health plan from offering premium discounts (or avoiding surcharges) "in return for adherence to programs of health promotion and disease prevention." 29 U.S.C. § 1182(b)(2), ERISA § 702(b)(2). Wellness programs that further "health promotion and disease prevention" are thus a critical part of what ERISA § 702(b) seeks to achieve, not a disfavored exception to it.

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[7] *Dixie Fuel Co., LLC v. Dir., Office of Workers' Comp. Programs*, 820 F.3d 833, 843 (6th Cir. 2016) ("Under the law of the case doctrine, findings made at one stage in the litigation should not be reconsidered at subsequent stages of that same litigation.").

Cases like *Schaffer v. Weast*, 546 U.S. 49, 57–58 (2005), thus properly resolve the issue the Secretary seeks to re-argue here. In *Schaffer*, the Supreme Court held that the burden of persuasion in an administrative hearing challenging an individualized education program ("IEP") is properly placed upon the party seeking relief, whether that is the disabled child or the school district. The statute at issue, the Individuals with Disabilities Education Act ("IDEA") was silent on the allocation of the burden of persuasion, so the Court began with the ordinary, default rule that plaintiffs bear the burden to prove the essential aspects of their claims. Based on this default rule, and absent some reason to believe Congress intended otherwise, the burden of persuasion thus lies with the party seeking relief. *Id.* at 57-58.[8]

The *Schaffer* Court also held that the language of the IDEA did not support petitioners' contention that every IEP should be assumed invalid unless the school district proves that it is not. *Schaffer*, 546 U.S. at 58-61 (statutory words "due process" did not mandate Court to incorporate constitutional due process doctrine and apply balancing test; Court cannot conclude that Congress intended to adopt ideas that it failed to write into the text of the statute; putting burden on school districts would frustrate IDEA's purposes because of increased litigation and administrative costs). Here, the "nothing shall be construed" to interfere with wellness programs language in ERISA § 702(b)(2) makes this point with even stronger effect.

[8] Examples abound. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (standing) (the party invoking federal jurisdiction bears the burden of establishing elements of injury in fact, causal connection between the injury and the conduct complained of, and likelihood of redress by favorable decision); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993) (Title VII of the Civil Rights Act of 1964); *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 806 (1999) (Americans with Disabilities Act); *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999) (equal protection); *Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 593 (2001) (securities fraud); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (preliminary injunctions); *ML Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977) (First Amendment) (burden placed on respondent to show that his conduct was constitutionally protected and a substantial motivating factor in decision not to rehire him).

The "affirmative defense" language which the Secretary re-argues in the SAC (which he copied over from his earlier brief) is background material not included in the promulgated regulation. *See* SAC ¶ 115; *cf.* Dkt. No. 41, Sec.'s Opp. Brf. p. 2 (rejected argument quoting same background discussion of 2013 regulation). Indeed, it was not even included in the discussion of the proposed rule during the rulemaking process, so that interested parties could have responded to it. *See* 77 Fed. Reg. 70620 (Nov. 26, 2012) (notice of proposed rulemaking). Such nonbinding interpretations issued informally in agency opinion letters, "like [those] contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law," do not receive deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

The Secretary's SAC also cites *Meacham v. Knolls Atomic Power Lab*, 554 U.S. 84 (2008) for the proposition that "in order to demonstrate an entitlement to this [purported] affirmative defense, the plan must establish with evidence, including but not limited to records, that it meets the requirements of the exception." SAC, ¶ 116 (citing *Meacham,* 554 U.S. at 91 ("The burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits.")). The Secretary's reliance on *Meacham* is misguided here, and it provides no basis to upset the Court's earlier ruling requiring the Secretary to plead and prove violation.

In *Meacham*, the Supreme Court held that an employer defending a disparate-impact claim under the Age Discrimination in Employment Act of 1967 ("ADEA") bears both the burden of production and the burden of persuasion for the "reasonable factors other than age" ("RFOA") defense under 29 U.S.C. § 623(f)(1). The Court noted that the ADEA, by it terms, contains general prohibitions against age discrimination, subject to a separate provision creating exceptions "to take

any action otherwise prohibited" by those prohibitions, if that action was based on a RFOA. *Meacham*, 554 U.S. at 91. Based on this statutory structure and its "otherwise prohibited" statutory terms, the Court concluded RFOA had to be an affirmative defense that was an exception to the default rule of *Schaefer et al.* placing the burden of proof on the party seeking relief. *Id.* at 91-95.

ERISA § 702(b) is not organized in the same manner as the ADEA and has key differences in its statutory text. ERISA § 702(b) prohibits discrimination based on a health status-related factor while providing in the same statute that this prohibition shall *not* be construed to interfere with a group health plan offering premium discounts (or avoiding surcharges) for wellness programs that further "health promotion and disease prevention." 29 U.S.C. § 1182(b)(2), ERISA § 702(b)(2). Again, wellness programs that further "health promotion and disease prevention" are, by these statutory terms, a critical part of what ERISA § 702(b) seeks to achieve, not a disfavored exception to it.

Finally, presuming all wellness programs violate ERISA unless the health plans can prove otherwise does not square with the purpose of ERISA § 702(b). Wellness programs are an important part of ERISA § 702(b) which Congress – through its "nothing shall be construed" language – encouraged employers to offer to further the critical goals of "health promotion or disease prevention." ERISA § 702(b); 29 C.F.R. § 2590.702(f); *see also* 111 P.L. 148, Part 1 of 3, 124 Stat. 119, 156-157 ("Patient Protection and Affordable Care Act" defining "wellness program" as a "program offered by an employer that is designed to promote health or prevent disease).

Indeed, the government reiterated its interest in promoting employer-based wellness programs by mandating that the Director of the CDC provide employers with technical assistance, consultation, tools, and other resources in evaluating employer-based wellness programs,

specifically to increase participation in those programs and ensure they are positively impacting employee health. 111 P.L. 148, Part 2 of 3, 124 Stat. 119, 583. Accepting the Secretary's premise that, contrary to the default rule of *Schaefer et al.*, wellness programs are presumed to violate the law unless proven otherwise would subject such programs to risky litigation and its attendant costs. Such risks and costs are contrary to the statutory goals of ERISA§ 702(b) and would disincentivize employers from offering these programs.

In short, the Secretary's contentions about who has the burden of proof do not harmonize with the statutory text and purpose. The Court correctly rejected the notion that any group health plan or employer is presumed to have violated the wellness program regulations unless they can prove otherwise, instead following the default rule putting the burden on the Secretary, where it belongs, to show a violation occurred.

B. The Secretary Has Not Met His Burden to Allege and Prove an ERISA § 702(b) Violation.

As to any alleged violation, the Court ruled for Plan Years 2014 and 2015 that the Tobacco Affidavit provided a reasonable alternative by allowing for relief from the Wellness Program's tobacco surcharge even if a participant still used tobacco. Dkt. No. 47, pp. 42-44. The Court said it would nonetheless allow the Secretary to allege, if possible, a plausible claim that not all plan participants who had completed a reasonable alternative were reimbursed a Tobacco Surcharge for the entire Plan Year. *Id.* at p.44. The Court noted that the Secretary needed to allege the "who, what, where, when, how or why" missing from the FAC to allege a plausible claim of violation. *Id.* The Secretary's SAC fails to do so.

In support of its ERISA § 702(b) claim in the SAC's amended Count Eight, the Secretary relies on two specific allegations that respond to the Court's command. First, the Secretary identifies 17 individuals who were refunded Tobacco Surcharges after the 2014-2015 Plan Years.

SAC ¶ 134b. Second, the Secretary identifies an inaccurate phone number provided to participants in non-Cigna or non-Aetna coverages for the tobacco cessation program. SAC ¶ 144.

1. Refunding surcharges does not support a plausible claim for a Section 702(b) violation.

As to the corrective makeup payments for the 17 individuals, the Supreme Court has made clear: "People make mistakes. Even administrators of ERISA plans." *Conkright v. Frommert*, 559 U.S. 506, 509 (2010) (refusing to find a violation of ERISA based on an "honest mistake" made by fiduciary). Here, as set forth below, the alleged the mistakes are ministerial, not fiduciary, but applying the reasoning in *Conkright* means these makeup payments show compliance with the law, not a violation of it. In other words, one cannot plausibly infer from the existence of these makeup payments that there must be others who similarly participated in the Health Plan's tobacco cessation program and were surcharged or did not complete the program because of the lawful Tobacco Affidavit's self-attestation requirement.

Yet this is precisely what the Secretary seeks to allege. SAC ¶ 134.b ("Given the thousands of participants who may have participated in the tobacco cessation programs, and the lack of records, the payment to seventeen individuals supports Macy's identification of a problem during the relevant time period but does not provide sufficient accounting for all harms caused to the participants who were surcharged or did not complete the program due to the self-attestation requirement."). The Secretary makes no factual allegation establishing a likelihood that more than these 17 affected individuals exist, and instead is asking the Court to make a speculative determination that they do. The Secretary thus fails to allege a plausible, non-speculative claim showing the "who, what, where, when, how or why" for any other individuals beyond these 17 identified and corrected individuals who were allegedly harmed, which is what the Court

specifically ordered. *See* Dkt. No. 47, p. 44. For these reasons, to the extent the Secretary's 702(b) violation is based on the refund of the surcharge, it should be dismissed with prejudice.

2. The Secretary's allegations regarding an inaccurate phone number do not state a plausible claim for a violation of Section 702(b).

The Secretary also identifies an inaccurate phone number allegedly given to Health Plan participants in a non-Cigna or non-Aetna covered tobacco cessation program for some unknown period during the 2014-2015 Plan Years. SAC ¶ 144 (admitting that "it is unclear when the "CareAllies" telephone number became incorrect" and that "Health Plan participants covered by a non-Cigna or non-Aetna insurance coverage option ***may*** not have had access to any online or telephone tobacco cessation program" during this time). In short, the Secretary concedes has no facts showing who, if anyone, was impacted by this clerical error and was not connected or rerouted to the CareAllies tobacco cessation program. *Id*. As such, the Secretary again has not pled a plausible, non-speculative claim showing the "who, what, where, when, how or why" affected by this clerical error. Because the Court cannot plausibly infer a claim based solely on the Secretary's speculation, the Secretary's 702(b) claim should be dismissed with prejudice.

C. The Secretary Seeks Relief to Which He is Not Entitled.

If the Secretary's allegations about these purported mistakes during the 2014-2015 Plan Years were true, Health Plan participants had an ERISA § 502(a)(1)(B) claim for benefits "to recover benefits due …under the terms of the plan." Thus, just as the Court previously dismissed the Secretary's out-of-network claims, so too should the Court now bar the Secretary from pursuing his claims for retrospective monetary relief for these claimed errors under § 502(a)(5). Dkt. No. 47, pp. 24-29 (detailing why Secretary cannot bring a claim under ERISA § 502(a)(5) when a participant can seek monetary relief under ERISA § 502(a)(1)(B)) (citing *Rochow* and *Tackett).*

Similarly, like the Secretary's earlier dismissed out-of-network claims, the SAC has no factual allegations of continuing violations of ERISA § 702(b) that would allow the Secretary to seek prospective injunctive relief. *Cf.* SAC ¶ 134.a (conceding Macy's offered a reasonable alternative after Plan Years 2014-2015). Simply put, because the Secretary has no remedy for the claims he alleges under 702(b), those claims must be dismissed.

D. The Secretary Fails to Establish that Macy's was Acting as a Fiduciary for the Challenged Conduct for Plan Years 2014 to 2015 or that He Has a Remedy for This Challenged Conduct.

The Secretary states in conclusory terms that Macy's acted as a fiduciary: "Macy's, in its capacity as the Health Plan's administrator, hired Cigna and Aetna to administer the tobacco cessation programs of the Wellness Program under Macy's direction, assigning them certain administerial functions, while retaining the fiduciary responsibility to monitor them in the performance of their duties." SAC, ¶ 119. The Secretary makes only one other perfunctory reference to Macy's acts as a fiduciary in Count Eight. The Secretary alleges that, "[a]lternatively, even if Macy's' formal statements and instructions stated a 'reasonable alternative standard' consistent with ERISA, Macy's, as the implementing fiduciary, did not prudently manage, represent, or follow the Tobacco Surcharge Wellness Program's terms and provide a reasonable alternative." Dkt. No. 57, ¶ 138

Drafting plan terms is a settlor function, Dkt. No. 56, p. 7, and the crux of the Secretary's SAC relates to plan design. *Id.*, ¶¶ 112-146. As the Secretary concedes, settlor conduct includes creating the program documents such as the Tobacco Affidavit, information sheets, Frequently Asked Questions, and the like. Per the Secretary, these are the documents and instruments governing the Health Plan, and they are the Health Plan documents under which the Wellness Program is established and operated. Dkt. No. 55, pp. 12-14.

The Secretary has also promulgated binding regulation that a party is not a fiduciary when acting subject to a framework of policies, interpretations, rules, practices, and procedures. *See* 29 C.F.R. § 2509.75-8(D-2 Q & A) (claims handling and Plan support services are not exercise of fiduciary duties when done subject to framework of policies and rules). As to the Secretary's allegations of mistakes in implementing the Wellness Program discussed above, he has not plausibly alleged Macy's acted with fiduciary discretion, nor can the Secretary recover on this theory under § 502(a)(5).

First, as to the failure to show fiduciary discretion, a fiduciary relationship does not exist where an administrator "performs purely ministerial functions such as processing claims, applying plan eligibility rules, communicating with employees, and calculating benefits." *Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield*, 654 F.3d 618, 623 (6th Cir. 2011), quoting *Baxter v. C.A. Muer Corp*., 941 F.2d 451, 455 (6th Cir. 1991). Accordingly, the Sixth Circuit has held that it will not "extend fiduciary status to every person who exercises 'mere possession, or custody, over plans' assets." *Briscoe v. Fine*, 444 F.3d 478, 494 (6th Cir. 2006) (quoting *Chao v. Day*, 436 F.3d 234, 237, 369 U.S. App. D.C. 272 (D.D.C. 2006)).

Indeed, numerous courts have held that the "power to err" is ministerial, not fiduciary. *See, e.g.*, *IT Corp. v. General American Life Ins. Co.,* 107 F.3d 1415, 1421 (9th Cir. 1997) (finding that "The power to err, as when a clerical employee types an erroneous code onto a computer screen, is not the kind of discretionary authority which turns an administrator into a fiduciary."); *Pohl v. Nat'l Benefits Consultants, Inc.,* 956 F.2d 126, 129 (7th Cir. 1992) (plan administrator not fiduciary and not liable for negligent misrepresentation when it merely performed the ministerial functions listed in ERISA regulations); *Denniston v. Taylor*, No. 98 Civ. 3579 (LTS), at *22 (S.D.N.Y. Feb. 5, 2004) ("Personal Statements themselves consisted in relevant part of benefit

calculations, the preparation of which was ministerial, required no exercise of discretion, and therefore did not, standing alone, implicate fiduciary conduct”),; *Edmonson v. Lincoln Nat’l Life Ins. Co.*, 777 F. Supp. 2d 869, 885 (E.D. Pa. 2011) (“calculation of the amount of benefits in accordance with a formula is a ministerial function”). *See also* 29 C.F.R. § 2509.75-8 (D-2 Q & A) (“purely ministerial functions … for an employee benefit plan within a framework of policies, interpretations, rules, practices and procedures” are not fiduciary acts).

Plainly put, the Secretary’s allegations of mistakes in implementing the Wellness Program discussed above do not plausibly support an argument that Macy’s was a fiduciary for that purpose. Like the Court’s rejection of the Secretary’s fiduciary claims with respect to Macy’s settlor acts in designing the program and ministerial acts in administering that design for Plan Years 2011-2013, the Secretary is attempting to replead the same arguments previously rejected by the Court.

Second, the Secretary cannot seek relief under ERISA § 502(a)(5) for these alleged mistakes he challenges as fiduciary breaches. As discussed above, the Health Plan participants can allege a § 502(a)(1)(B) claim for benefits to the extent the program deviated from the Health Plan terms. Thus, for the same reasons as above, this bars the Secretary from pursuing a claim for monetary relief for these alleged errors under 502(a)(5). Dkt. No. 47, pp. 24-29.

E. Just as the Court Rejected the Secretary’s Duty of Loyalty and Prohibited Transaction Claims for 2011-2013, so too Should the Court Reject Those Rehashed Claims for 2014-2015 and for Any Claims After 2015.

As noted, the Secretary’s SAC includes no factual allegations of violation with respect to Plan Years after 2015, while he concedes he re-pled dismissed claims in his SAC. The Court therefore cannot consider any alleged violations of the law beyond 2015. As to the Count Eight claim for relief, the Secretary again repleads dismissed ERISA duty of loyalty and prohibited transactions claims at SAC ¶¶ 145-146. In the Court’s earlier rulings, the Court rejected identical allegations for Plan Years 2011-2013. *See* Dkt. No. 47, pp. 7-8 & pp. 46-47. The Court dismissed

these identical allegations with prejudice, noting that (i)_there are no allegations Macy's mismanaged or misappropriated plan assets, and (ii) implementation of an alleged discriminatory program according to its design is not fiduciary conduct. *Id.* at pp. 46-47. The Secretary moved to reconsider only the fiduciary breach claims related to the duty to follow plan documents for these Plan Years, *see* Dkt. No. 56 p. 2 n.2 (noting Secretary failed to move to reconsider dismissal of his duty of loyalty and prohibited transaction claims), which was denied.

The Secretary's addition of a new ¶ 145 in its SAC for Plan Years 2014 forward does not change this. It is substantively the same allegation as in the Secretary's previous dismissed ¶ 40 – that Macy's Health Plan funding obligation diminishes either as the Health Plan pays out less, or to the extent the Health Plan collects more through Tobacco Surcharges under its Wellness Program. *Cf.* Dkt. No. 4, The Secretary's FAC at ¶ 40 with Dkt. No. 57, SAC at ¶¶ 40 & 145. As the Court has already explained, these types of allegations do not show a loss to the Health Plan. *See* Dkt. No. 47, pp. 19-21 & Dkt. No. p. 24-25. And as for the earlier dismissed claims, again the SAC has no allegations Macy's mismanaged or misappropriated the Plan's assets.

The Secretary's re-hashed duty of loyalty claim likewise fails. When Macy's was acting in a discretionary capacity related to program design, it acted as a settlor, not a fiduciary, and thus was free to design a wellness program and its surcharges as any employer/settlor in its own interest. *See*, e.g., Dkt. No. 56, pp. 6-7 (noting same). The Court should rule on this issue consistent with its rulings for Plan Years 2011-2013 and dismiss the Secretary's claim.

V. CONCLUSION.

The Secretary's SAC again challenges the Health Plan's Wellness program and its offering of an alternative standard for those who did not quit tobacco use, but he fails to fix the deficiencies the Court identified with his earlier pleadings. Instead, the Secretary alleges only potential

ministerial mistakes in administering the program for Plan Years 2014-2015 that are not fiduciary discretionary conduct. Further, if any Health Plan participants lost rewards under its Wellness Program, the participants can address this by making a claim for benefits under ERISA § 502(a)(1)(b), which precludes a claim for relief by the Secretary under ERISA § 502(a)(5). As a result, the Secretary's Count Eight for these Plan Years should be dismissed with prejudice.

Respectfully submitted,

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Counsel for Defendants Macy's Inc. and Macy's Inc. Welfare Benefits Plan

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2022, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to the parties of record.

/s/ Jeremy D. Smith

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

MARTIN J. WALSH, Secretary of Labor, **United States Department of Labor,** **Plaintiff** **v.** **MACY'S, INC., ANTHEM BLUE CROSS LIFE AND HEALTH INSURANCE COMPANY, CONNECTICUT GENERAL LIFE INSURANCE COMPANY, and the MACY'S, INC., WELFARE BENEFITS PLAN,** **Defendants.**	**DOCKET NO. 17-cv-00541** **JUDGE DOUGLAS R. COLE**

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Defendants Macy's, Inc. and Macy's, Inc., Welfare Benefits Plan (collectively, "Defendants" or "Macy's") Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) came before this Court. For good cause shown, Macy's Motion is GRANTED.

IT IS SO ORDERED.

____
Date

____
District Judge Douglas R. Cole

4857-6662-6846, v. 15