UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIARA YACHTS, INC.,

Plaintiff,

v.

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Defendant.

_____/

CASE No. 1:22-cv-603

HON. ROBERT J. JONKER

OPINION AND ORDER

INTRODUCTION

Tiara Yachts contracted with Blue Cross Blue Shield of Michigan (BCBSM) to administer its self-insured employee health benefit plan. The plan was subject to the Employee Retirement Income Security Act of 1974 (ERISA). After the contractual relationship ended, Tiara Yachts brought this civil action claiming that BCBSM breached two substantive ERISA duties, namely, its fiduciary duty and a duty not to engage in certain types of transactions. On February 27, 2023, the Court granted BCBSM's Rule 12(b)(6) motion and dismissed this case. The matter is now before the Court on a number of post-judgment motions. In the first motion, Tiara Yachts moves under Rule 59(e) for the Court to reconsider its February 23, 2023, decision. (ECF No. 28). To the extent there were any deficiencies in the Complaint, Tiara Yachts separately moves for leave to file an amended complaint. (ECF No. 32). BCBSM opposes both motions, and separately moves for an award of attorney fees and costs. (ECF No. 25). Tiara Yachts opposes BCBSM's

motion. For the reasons that follow, the Court denies all three motions. The Court adheres to its February 23, 2023, decision.

MOTIONS TO ALTER / AMEND & LEAVE TO FILE AMENDED COMPLAINT

Tiara Yachts moves under Rule 59(e) to alter or amend the Court's decision granting BCBSM's motion to dismiss. Tiara Yachts reasons that its Complaint plausibly alleged that BCBSM squandered Plan assets through the use of "flip logic;" knowingly making improper payments for claims using plan assets; and by paying itself fees based on the amount of plan assets that were improperly paid out. Section 1132(a)(2) and 1132(a)(3), Tiara Yachts further contends, authorizes the relief it seeks. And while maintaining that it had done enough to pass muster under Rule 12, to the extent there are any deficiencies Tiara Yachts separately seeks leave to file an amended complaint. Tiara Yachts' motion fails to pass the high bar under Rule 59(e). And the Court determines that any amended pleading would be futile. Accordingly, the Court denies the two motions.

1. Motion to Alter or Amend Judgment

Rule 59(e) permits a party to move a court to alter or amend a judgment within twenty-eight days of the judgment's entry. Relief under Rule 59(e) "is an extraordinary remedy and should be granted sparingly because of the interests in finality and conservation of scare judicial resources." *United States ex rel. Am. Textile Mfrs. Inst., Inc. v. The Limited, Inc.*, 179 F.R.D. 541, 547 (S.D. Ohio 1997) (citations omitted). Rule 59(e) may not "be used to re-litigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, § 2810.1 (2012). A court may alter or amend judgment under Rule 59(e) if there exists "(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling

law; or (4) a need to prevent manifest injustice." *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005).

To state a claim for breach of fiduciary duty, a plaintiff must allege that a defendant was acting as a fiduciary with respect to the conduct at issue. *Pegram v. Herdrich*, 530 U.S. 211, 746–47 (2000). "Though ERISA fiduciary status is broadly triggered with any control over plan assets, the inquiry in each case is granular, 'ask[ing] whether [an entity] is a fiduciary with respect to the particular act in question.'" *Chelf v. Prudential Ins. Co. of Am.*, 31 F.4th 459, 464 (6th Cir. 2022) (citing *Pipefitters Local 636 Ins. Fund v. Blue Cross & Blue Shield of Mich.*, 722 F.3d 861, 866 (6th Cir. 2013)). "[A]n entity that exercises *any* authority or control over [the] disposition of a plan's assets becomes a fiduciary." *Id.* (quoting *Guyan Int'l Inc. v. Prof'l Benefits Adm'rs, Inc.*, 689 F.3d 793, 798 (6th Cir. 2012)) (emphasis in original). The Court determined that Tiara Yachts failed to plausibly allege a breach of fiduciary duty claim related to the flip logic and claims processing allegations because the allegations in the Complaint were "all a systemwide method for paying providers, not some individual exercise of discretion." (Op. & Ord. at 10, ECF No. 23, PageID.475).

In its motion, Tiara Yachts contends that the Court's decision on this point was incorrect because it required BCBSM to have individual discretion in order to act as a fiduciary. Sixth Circuit case law, it points out, is to the contrary. *See Pipefitters Loc. 636 v. Blue Cross & Blue Shield of Michigan*, 213 F. App'x 473, 476 (6th Cir. 2007) (noting that "[d]iscretion in the disposition of plan assets is not required" for an administrator to be deemed a fiduciary under Section 1002(21)(A)). The Court does not read its decision as requiring Tiara Yachts to allege BCBSM had discretion over the disposition of Plan assets to be an ERISA fiduciary. And there is no dispute that BCBSM controlled Tiara Yachts' sponsored Plan assets. But it is not enough, for

Tiara Yachts' claim of breach, that BCBSM controlled the Tiara Yachts' Plan assets. *Pipefitters*, 722 F.3d at 866.

The Court determined that BCBSM was not acting in a fiduciary capacity when it came to the allegations related to flip logics and claims processing. The Court's reasoning was based on *DeLuca v. BCBSM*, 628 F.3d 743 (6th Cir. 2010) and the Court's determination that the allegations in the Complaint constituted "a business decision that has an effect on an ERISA plan not subject to fiduciary standards. *Id.* at 747 (citing *Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 718 (6th Cir. 2000). Tiara Yachts disagrees and believes the Court improperly recast its allegations as a contractual claim when, in reality, it alleged a breach of fiduciary duty by alleging BCBSM knowingly wasted Plan assets. It maintains that the Court's decision on this point was a misapplication of *DeLuca*. In support, Tiara Yachts cites to the Sixth Circuit's decision in *Saginaw Chippewa Indian Tribe of Michigan v. Blue Cross Blue Shield of Michigan*, 748 F. App'x 12 (6th Cir. 2018). Yet that case is much different than this one. In that case the plaintiff sued BCBSM, claiming that it had breached its ERISA fiduciary duties by "failing to take advantage of federal regulations that permit Indian Tribes to pay reduced rates for services provided by Medicare participating hospitals." *Saginaw Chippewa Indian Tribe of Michigan v. Blue Cross Blue Shield of Michigan*, 748 F. App'x 12, 14 (6th Cir. 2018). The Tribe alleged that BCBSM "directed the Tribe to pay standard contract rates for health services, even when these services were eligible" for a lower rate. *Id.* at 20. The Court of Appeals determined that this was enough to state a claim that BCBSM breached its fiduciary duties under ERISA. *Id.* But this case is not about what BCBSM directed Tiara Yachts, or its sponsored Plan, to do. Rather, as the Court previously determined, it involves the way BCBSM ran its overall claims processing work, generally applicable to its consumers, all in the interest of ensuring beneficiaries receive full and

uninterrupted healthcare. That is not to say that it did not have an effect on Tiara Yachts' sponsored Plan. Rather it was a "business decision that has an effect on an ERISA plan" not subject to fiduciary standards. *DeLuca*, 628 F.3d at 746. It was not conduct that "constitutes 'management' or 'administration' of *the plan.*" *Id.* Tiara Yachts musters other arguments relating to Rule 8. The Court adheres to its February decision that addresses those arguments.

The Court further maintains that Tiara Yachts failed to state a claim with respect to the Shared Savings Program. In its motion, Tiara Yachts largely rehashes its argument that this case is more like *Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of* Michigan, 751 F.3d 740 (6th Cir. 2014) and *Pipefitters Loc. 636 Ins. Fund v. Blue Cross Blue Shield of Michigan*, 722 F.3d 861 (6th Cir. 2013) than *Seaway Food Town, Inc. v. Medical Mutual of Ohio*, 347 F.3d 610 (6th Cir. 2003). Tiara Yachts says that it has alleged BCBSM had discretionary authority with respect to the fees it collected, and that the amounts it took from the Plan were within BCBSM's "unilateral control." Put succinctly, it says, BCBSM had discretionary authority and unilateral control over the fees assessed.

The Court addressed these arguments in its previous decision and Tiara Yachts offers nothing new to demonstrate the Court erred. As the Court determined from the allegations and pleadings in the Complaint, the ASCs provided that BCBSM could retain a contractually fixed percentage of 30% of recovered third-party payments as an administrative fee. Furthermore, the Complaint detailed that the Shared Savings Program contemplates four services, and the pleading went on to describe how the first, second, and fourth services are performed by third-party vendors. (Compl. ¶¶ 73-77). Those vendors may not have been the ones that ended up with the fee, but that does not mean that BCBSM had unilateral control over the fees assessed.

Finally, Tiara Yachts contests the Court's determination that ERISA did not provide a pathway for Tiara Yachts to recover on the alleged overpayments. Tiara Yachts motion, however, confuses the discussion concerning overpayments with the discussion of the Shared Savings Program. The Court did not determine that Section 1132(a)(3) never allowed for recovery of monetary relief. Rather, the Court determined that monetary relief for the alleged overpayments (something separate from the Shared Savings Plan) were not available under Section 1132(a)(3). The remainder of Tiara Yachts' motion restates its argument that it can recover for alleged overpayments under *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011). The Court previously addressed this argument and adheres to its decision.

Tiara Yachts also disputes the Court's determination that it could not pursue relief under Section 1132(a)(2). Tiara Yachts contends that it seeks relief for the Plan, on behalf of the Plan. But, as the Court described in its previous decision, this is not what the Complaint actually asked for. Tiara Yachts points to allegations in the Complaint regarding alleged misconduct towards Plan assets, but when it comes to the particular relief requested, the Complaint all along requested relief directed to Tiara Yachts, not the Plan. As the master of the Complaint, Tiara Yachts sought "restitution to Tiara Yachts for all improper misuses of Tiara Yachts' Plan assets." (ECF No. 1, PageID.22). This is not relief for the Plan.

For all these reasons, the Court determines that Tiara Yachts has not met its burden under FED. R. CIV. P. 59(e). Accordingly, the Court denies the motion to alter or amend judgment.

2. Motion to Amend

Separately, Tiara Yachts seeks leave to file an amended complaint. The proposed amended complaint (ECF No. 33-2) seeks to amend the case caption to clarify that the case is brought by Tiara Yachts "as plan sponsor for the Tiara Yachts, Inc. Health and Welfare Benefit Plan." (ECF

No. 33-2, PageID.732). Relatedly, the proposed pleading seeks, among other things, to award "restitution to Tiara Yachts, on behalf of its Plan, for all improper misuses of Tiara Yachts Plan assets." (ECF No. 33-2, PageID.758). The proposed pleading also seeks to bolster some of the areas the Court found were deficient for purposes of Rule 8 that, it says, show even more clearly that BCBSM owed fiduciary duties to the Tiara Yachts' sponsored Plan and that BCBSM breached those duties to the detriment of the Plan.

A plaintiff cannot amend their complaint after entry of judgment unless the amendment satisfies the requirements of Rule 59 or 60, in addition to the requirements of Rule 15. *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 615-16 (6th Cir. 2010); *see also Morse v. McWhorter*, 290 F.3d 795, 800 (2002) ("Following entry of final judgment, a party may not seek to amend their complaint without first moving to alter, set aside or vacate judgment pursuant to either Rule 59 or Rule 60 of the Federal Rules of Civil Procedure."); *In re Ferro Corp. Derivative Litig.*, 511 F.3d 611, 624 (6th Cir. 2008) (unless post-judgment relief is granted, the district court lacks power to grant a motion to amend the complaint). Here, courts consider such factors as "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." *Morse*, 290 F.3d at 800. In the post-judgment context, courts also consider "the finality of judgments and the expeditious termination of litigation" along with the movant's "explanation for failing to seek leave to amend prior to the entry of judgment." *Id.*

Section 1109 of ERISA contemplates suit to remedy harm to the plan itself. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985). As before, the basic allegation in Tiara Yachts' proposed amended pleading is that BCBSM wasted plan assets which Tiara Yachts now

seeks to recover on behalf of the Plan. Yet, the same fundamental issues related to the theories of breach in claims processing, claims data, and the Shared Savings Plan remain in the proposed amended complaint. Even viewed in the light most favorable to the plaintiff, the allegations in Tiara Yachts' proposed complaint are still that BCBSM paid actual claims submitted by actual rates charged by those providers for services actually provided to Plan beneficiaries. Tiara Yacht's theory is that some of those claims should have been paid at lower rates. But this is not an ERISA fiduciary breach claim under *DeLuca*. The same holds true with respect to Tiara Yachts' claim regarding the Shared Savings Program. The amended pleading still alleges BCBSM used this program to "capitalize on its own misconduct and mismanagement" which, it says, are the alleged errors in flip logic, claims data and claims processing. That Tiara Yachts agreed that BCBSM would retain thirty percent of the savings is immaterial, Tiara Yachts claims, because the amount of "recoveries" were in the "unilateral" control of BCBSM. There is nothing new or different here from the allegations in the original Complaint. And as the Court determined in its February 2023 decision and in the above discussion on Tiara Yachts' motion to alter or amend, these allegations fail to state a claim of breach of fiduciary duty under ERISA.

MOTION FOR ATTORNEYS' FEES AND COSTS

1. Legal Standards

ERISA § 502 provides, "[i]n any action under this subchapter. . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). The Supreme Court's decision in *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242 (2010), clarified that a fee claimant need not be a "prevailing party" to be eligible for attorney's fees under ERISA's fee-shifting statute. *Id.* at 254. Rather, eligibility for attorney's fees merely requires that the claimant achieve "some degree of

success on the merits." *Id.* "Under § 502(g)(2) of ERISA (29 U.S.C. § 1132(g)(2)), the award of reasonable attorney fees is mandatory where a fiduciary has sued successfully to enforce an employer's obligation to make contributions to a multi-employer plan. In any other action under ERISA, however, the statute provides that 'the court in its discretion *may* allow a reasonable attorney's fee and costs of action to either party.' ERISA § 502(g)(1) (29 U.S.C. § 1132(g)(1))." *Foltice v. Guardsman Prods., Inc.*, 98 F.3d 933, 936 (6th Cir. 1996)). There is "no presumption as to whether attorney fees will be awarded." *Id.* (citing *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1301-02 (6th Cir. 1991)). A five-factor test articulated in *Secretary of Labor v. King*, 775 F.2d 666 (6th Cir. 1985), has become a practical benchmark for whether to avoid fees. These factors include:

> (1) the degree of the opposing party's culpability or bad faith; (2) the opposing party's ability to satisfy an award of attorney's fees; (3) the deterrent effect of an award on other persons under similar circumstances; (4) whether the party requesting fees sought to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA; and (5) the relative merits of the parties' positions.

King, 775 F.2d at 669. "[W]hile the five-factor *King* test is not required [after *Hardt*], it still has validity in helping courts determine whether or not to award fees to a party that achieves some degree of success on the merits." *Ciaramitaro v. Unum Life Ins. Co. of Am.*, 521 F. App'x 430, 437 (6th Cir. 2013); *see also Hardt*, 560 U.S .at 255 n.8 (observing that after a court has determined that a claimant has achieved some success on the merits, a court "may" consider the five-factor test). "The *King* factors are not statutory, and so should be looked at holistically, with no one factor 'necessarily dispositive.'" *Warner v. DSM Pharma Chems. N. Am. Inc.*, 452 F. App'x 677, 681 (6th Cir. 2011) (quoting *Foltice*, 98 F.3d at 937).

The ERISA statute expressly grants courts discretion to award attorney's fees "to either party." 29 U.S.C. § 1132(g)(1). Nonetheless, in most ERISA cases, the nature of the *King* factors makes it less likely that the factors will favor an award to prevailing defendants. *See Huizinga v. Genzink Steel Supply & Welding Co.*, 984 F. Supp. 2d 741, 745 & 745 n.3 (W.D. Mich. 2013); *see also Toussaint v. JJ Weiser, Inc.*, 648 F.3d 108, 111 (2d Cir. 2011) ("*Hardt* also does not disturb our observation that "the five factors frequently should not be charged against ERISA plaintiffs" (citing *Salovaara v. Eckert*, 222 F.3d 19, 28 (2d Cir. 2000)); *West v. Greyhound Corp.*, 813 F.2d 951, 956 (9th Cir. 1987) (cautioning that the five factors "very frequently suggest that attorney's fees should not be charged against ERISA plaintiffs"); *Marquardt v. N. Am. Car Corp.*, 652 F.2d 715, 719-20 & n.6 (7th Cir. 1981) ("[U]sing the five-factor test, prevailing plaintiffs are more likely to be awarded attorney's fees than prevailing defendants. We recognize . . . that § 1132(g) differs from civil rights attorneys' fees provisions. But we believe that, although civil rights and ERISA plaintiffs may differ, some of the same factors militate against assessing attorneys' fees against plaintiffs in both types of cases.").

2. Discussion

In this case, BCBSM undoubtedly achieved a degree of success on Tiara Yachts' ERISA claims within the meaning of *Hardt*. In its response brief, however, Tiara Yachts argues that because BCBSM argued that it was not a fiduciary in the motion to dismiss it cannot, now, seek relief under Section 1132(g)(1).[1] The Court is satisfied that BCBSM may seek fees under Section

[1] BCBSM seeks to address this contention in a proposed reply brief (ECF No. 37) that Tiara Yachts opposes. The Court grants Tiara Yacht's motion for leave to file a reply. Under this district's local rules, reply briefs to nondispositive motions may only be filed with leave of the court and generally with a showing of good cause or that further briefing is necessary. BCBSM did not have the chance to address Tiara Yachts' argument before. Thus, this is not simply a rehashing of previous complaints or an attempt to get the last word.

1132(g)(1) on the procedural posture of this case. Tiara Yachts provides no case law to the contrary, and the Court is not persuaded by Tiara Yachts' argument because BCBSM has not disputed that it was an ERISA fiduciary for Tiara Yachts' sponsored Plan. Rather, the question here is whether it functioned in a fiduciary capacity with respect to the alleged harm and, if so, whether it breached those duties. The Court found that Tiara Yachts had not plausibly alleged as much. But that is a different question from whether BCBSM is a fiduciary for purposes of Section 1132(g)(1). The Court will therefore consider whether the *King* factors favor an award to BCBSM.

1. Culpability or Bad Faith of the Opposing Party

Under the first *King* factor, the Court considers "the degree of the opposing party's culpability or bad faith." *King*, 775 F.2d at 669. BCBSM sees bad faith based on three considerations: 1) Tiara Yachts brought this lawsuit even though it had signed a release when the parties terminated their Administrative Services Contract (ASC) agreement; 2) Tiara Yachts failed to allege that any errors in claims processing or claims data actually harmed its sponsored Plan, 3) Tiara Yachts pursued its claim seeking relief for itself, not for the Plan or for any beneficiary.

The Court does not see any evidence of culpability or bad faith. Rather, the Court finds that Tiara Yachts pursued its claims with a deeply held and rational belief that it could recover for BCBSM's alleged wasting of assets that it believed violated BCBSM's fiduciary duties. It believed that distinguished its claims from any contractual claims it might have had under the ASCs. While the Court ultimately determined that the allegations failed to state a claim under ERISA, the Court does not see the type of conduct or sparse pleading that would augur towards a finding of bad faith. This factor weighs against an award.

2. Opposing Party's Ability to Satisfy an Award

The Court next considers the opposing party's ability to satisfy an award.[2] Tiara Yachts does not dispute that it can satisfy the award but argues that the Court should also consider the self-funded nature of the Plan, and that a fee award would be out of Plan assets. Tiara Yachts, as Plan sponsor, is a separate entity from the Plan. Still, the second factor "is weighed more for exclusionary than for inclusionary purposes." *Gribble v. CIGNA Healthplan of Tennessee, Inc.*, 36 F.3d 1097 (6th Cir. 1994). Thus this factor weighs neither for nor against an award.

3. Deterrent Effect of an Award on Other Persons

The factor is an inquiry into the deterrent effect of an attorney's fee award on other parties, such as plan administrators, employers, or "others similarly situated" to the defendants. *Gaeth v. Hartford Life Ins. Co.*, 538 F.3d 524, 531 (6th Cir. 2008). BCBSM argues that an award against Tiara Yachts would deter opposing counsel from filing "copycat complaints" without determining whether any of the supposed errors in the base complaint affected a future client's plan.

This is not a case in which an award to the defendant is necessary to "discourage[e] other litigants from relentlessly pursuing groundless claims." *Credit Managers Ass'n of S. Cal. v. Kennesaw Life,* 25 F.3d 743, 748 (9th Cir. 1994). Rather, because the Court does not find culpability or bad faith by Tiara Yachts, the more likely effect of an award in this case would be to discourage good faith ERISA claimants from bringing claims in good faith. Many courts have reflected on the chilling effect that awarding attorney's fees against an ERISA plaintiff may have

[2] BCBSM contends that the Court should also consider opposing counsel's ability to satisfy an award, and should assess fees against both Tiara Yachts and Tiara Yachts' counsel. *King* speaks only to the "opposing party." It is true that fees were assessed against opposing counsel in *Moore v. Lafayette Life Ins. Co.*, 458 F.3d 416 (6th Cir. 2006). But those fees were assessed as sanctions under Rule 11 and 28 U.S.C. § 1927. BCBSM does not seek those sanctions here, and the Court does not see the type of conduct warranting those sanctions in any event.

on future good faith claimants. *See, e.g.*, *Toussaint v. JJ Weiser, Inc.*, 648 F.3d 108, 111 (2d Cir. 2011) (citing *Salovaara v. Eckert*, 222 F.3d 19, 28 (2d Cir. 2000)). This is one concern that may be taken into account in considering the deterrent effect of an award. This factor weighs against an award.

4. Common Benefit or Significant Legal Question

The fourth factor is whether the party requesting fees sought to confer a common benefit or resolve significant legal ERISA questions. Here, BCBSM sought only to protect itself in defending against Tiara Yachts' claims. BCBSM does not argue otherwise. This factor weighs against an award.

5. Relative Merits of the Parties' Positions

Finally, the Court considers the relative merits of the parties' positions. Here, BCBSM prevailed on Tiara Yachts' breach of fiduciary duty claims. But Tiara Yachts mustered authority and arguments as to why a contrary result should issue. The Court was not convinced that those arguments sufficed to state a *Twombly* plausible claim of fiduciary breach, but this was not a case where the claims and allegations in the complaint were entirely one-sided. Taken together, this factor slightly weighs against an award.

Altogether, the factors weigh against an attorneys' fees award to BCBSM. The Court will therefore deny the motion for attorneys' fees.

CONCLUSION

ACCORDINGLY, IT IS ORDERED that BCBSM's Motion for Attorney Fees and Costs (ECF No. 25) is **DENIED.**

IT IS FURTHER ORDERED that Tiara Yachts' Motion to Alter Judgment (ECF No. 28) is **DENIED.**

IT IS FURTHER ORDERED that Tiara Yachts' Motion for Leave to File an Amended Complaint (ECF No. 32) is **DENIED.**

IT IS FURTHER ORDERED that BCBSM's Motion for Leave to File a Reply Brief (ECF No. 37) is **GRANTED.**

Dated: February 21, 2024

/s/ Robert J. Jonker
ROBERT J. JONKER
UNITED STATES DISTRICT JUDGE