

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-61840-CIV-MORENO/SELTZER

APEX TOXICOLOGY, LLC,,

Plaintiff ,

vs.

UNITED HEALTHCARE INSURANCE COMPANY,  
UNITED HEALTHCARE SERVICES, INC.,  
et al.,

Defendants.

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**REPORT AND RECOMMENDATION**

**THIS CAUSE** is before the Court on Defendants' Motion to Dismiss Plaintiff's Amended Complaint (DE 100) for failure to state a claim upon which relief can be granted, which has been referred to the undersigned Magistrate Judge for a report and recommendation (DE 116) pursuant to 28 U.S.C. § 636(b) and the Magistrate Judge Rules of the Local Rules of the Southern District of Florida. For the reasons stated below, it is **RECOMMENDED** that Defendants' Motion to Dismiss Plaintiff's Amended Complaint (DE 100) be **DENIED**.

**I. BACKGROUND**

This is an action under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and its governing regulations, as well as state laws for the non-ERISA plans, concerning United Healthcare's alleged refusal to provide coverage and denial of benefits for toxicology services in conjunction with the urine testing of patients who were admitted to substance abuse facilities (DE 88, ¶ 1). Plaintiff, Apex Toxicology, LLC

("Apex") provides toxicology laboratory services to rehabilitation centers specializing in addiction. Defendants are several plans that provide health insurance benefits to members ("the Plan Defendants") and United HealthCare, which is the claims administrator and third-party administrator for the Plan Defendants.

Apex's original Complaint (DE 1) was dismissed by the District Court without prejudice (DE 86), with leave for Apex to "amend its complaint to specifically allege the appellate procedures available under each of the Plans and the steps it took to comply with those procedures, or, alternatively, the precise reasons why exhaustion would be futile" (DE 86). The District Court's Order also stated that "[a] motion to dismiss for failure to exhaust administrative remedies may be filed no later than **July 20, 2018**" (DE 86) (emphasis in original). Apex filed an Amended Complaint (DE 88), and Defendants filed a motion to dismiss for failure to exhaust administrative remedies<sup>1</sup> (DE 100). The parties have fully briefed the issue (DE 104) (DE 108) and the matter is ripe for review.

A. Amended Complaint

The Amended Complaint does not describe the appeals procedures available under each of the Plans and the steps Apex took to comply with those procedures. Rather, the Amended Complaint explains why Apex believes that exhaustion of the appeals process would have been futile. Apex alleges that United "pended" its claims and transferred the claims to United's Special Investigative Unit ("SIU"), which is an in-house investigative department that investigates what United considers to be fraud and abuse [DE 88, ¶¶50-51].

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<sup>1</sup> In their Motion to Dismiss [DE 100], Defendants reserve their rights to argue additional grounds for dismissal if necessary. These include lack of standing, failure to allege facts that would support a plausible claim, improper venue, statute of limitations, and failure to state a claim upon which relief can be granted.

Apex, however, does acknowledge that “[p]ending a claim means that it is not paid and thereby constitutes an adverse benefit determination under ERISA” [DE 88, ¶ 55].

Apex asserts that once its claims were transferred to the Special Investigative Unit, the SIU and its investigators had “sole and exclusive jurisdiction” over the claims and that all appeals and communications had to be routed through the SIU [DE 88, ¶ 54]. According to Apex, “United’s regular appeals staff possessed no jurisdiction to overrule a SIU decision to pend Apex’s claim and pay the claim, which would have the effect of mooted the purported investigation. Sending appeals to United’s appeals staff would represent a patently futile course of action because these staff were divested of the authority to reprocess the claims” [DE 88, ¶ 54]. Rather, Apex cites correspondence between it and United’s legal staff regarding the status of and non-payment of the claims, including requests for more information made by United’s legal staff. Accordingly, Apex contends that “there was no reasonable administrative scheme available to Apex” [DE 88, ¶ 64].

#### B. Motion to Dismiss

Defendants argue that Apex’s Amended Complaint should be dismissed for several reasons: First, Apex failed to comply with the Court’s Order to allege each of the Plans’ appeals procedures and how it complied with those procedures. Second, Apex did not exhaust the administrative remedies available under the Plans, in violation of Eleventh Circuit law regarding exhaustion of remedies and the Plans’ contractual conditions precedent to litigation. Third, Apex’s failure to engage in the Plans’ administrative procedures precludes Apex from asserting that exhaustion of remedies was futile.

Apex responds that there were no available administrative procedures available to it because of the intervention of the Special Investigative Unit and, for that reason, it has pled futility. Additionally, Apex argues that it is deemed to have exhausted administrative remedies because United failed to comply with the ERISA regulations by not clearly identifying the reasons for non-payment of the claims and by refusing to produce documents and information relevant to each of the claims.

## II. DISCUSSION

### A. Motion to Dismiss Standards

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ ” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Although this pleading standard “does not require ‘detailed factual allegations,’ . . . it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation.” Id. (alteration added) (quoting Twombly, 550 U.S. at 555). Pleadings must contain “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Twombly, 550 U.S. at 555 (citation omitted). Indeed, “only a complaint that states a plausible claim for relief survives a motion to dismiss.” Iqbal, 556 U.S. at 679 (citing Twombly, 550 U.S. at 556). To meet this “plausibility standard,” a plaintiff must “plead[ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. at 678 (citing Twombly, 550 U.S. at 556).

When reviewing a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff and take the factual allegations therein as true. See Brooks v. Blue Cross & Blue Shield of Fla. Inc., 116 F.3d 1364, 1369 (11th Cir. 1997). However,

pleadings that “are no more than conclusions are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.” Iqbal, 556 U.S. at 678.

B. ERISA Exhaustion of Administrative Remedies

“The law is clear in [the Eleventh Circuit] that plaintiffs in ERISA actions must exhaust available administrative remedies before suing in federal court.” Bickley v. Caremark RX, Inc., 461 F.3d 1325, 1328 (11th Cir. 2006) (citation omitted). “Ordinarily, if a plan participant failed to take advantage of an available administrative appeal by pursuing it in compliance with a reasonable filing deadline, she has failed to exhaust her administrative remedies and that bars federal court review of her claim.” Watts v. Bellsouth Telecommunications, Inc., 316 F.3d 1203, 1206 (11th Cir. 2003).

The administrative exhaustion requirement is not found in the ERISA statute, but is, rather, “a court-imposed, policy-based requirement” adopted by the Eleventh Circuit in order to reduce frivolous lawsuits, to protect against inconsistent results, to minimize costs and to provide for a non-adversarial method of claims settlement. Id. at 1207, 1209 (citing Curry v. Contract Fabricators, Inc. Profit Sharing Plan, 891 F.2d 842, 846-47 (11th Cir. 1990), abrogated on other grounds by Murphy v. Reliance Standard Life Ins. Co., 247 F.3d 1313 (11th Cir. 2001)). Recognizing such, the court stated, “[w]e created the administrative exhaustion requirement, and we are still in the process of shaping it insofar as new factual scenarios are concerned.” Watts, 316 F.3d at 1207. Thus, the court reiterated that prior case law on failure to exhaust administrative remedies “cannot make law beyond the facts of the cases in which those decisions are announced.” Id.

A district court has discretion “to excuse the exhaustion requirement when resort to administrative remedies would be futile or the remedy inadequate . . . or where a claimant is denied ‘meaningful access’ to the administrative review schemes in place.” Perrino v. S. Bell Tel. & Tel. Co., 209 F.3d 1309, 1315 (11th Cir. 2000) (internal citations omitted). Apex has not set forth the administrative remedies available under each of the Plans; it has, however, set forth allegations tending to show that it lacked meaningful access to administrative remedies due to the transfer of its claims to United’s Special Investigative Unit. Thus, the undersigned concludes that Apex has complied with the Court’s Order directing it to “specifically allege the appellate procedures available under each of the Plans and the steps it took to comply with those procedures, or, alternatively, the precise reasons why exhaustion would be futile.” The issue for the Court, therefore, is whether Apex has sufficiently pled facts showing why exhaustion would be futile.

The parties have not presented a case of binding precedent that would control this dispute. Defendants, however, cite several principles to guide the Court’s decision: “[i]n the case of insurance claims, exhaustion of administrative remedies often involves an appeal of a claim denial to the insurer.” Kahane v. UNUM Life Ins. Co. of Am., 563 F.3d 1210, 1214-15 (11th Cir. 2009); communications between counsel do not constitute exhaustion of administrative remedies, Fla. Health Sciences. Ctr., Inc. v. Total Plastics, Inc., 496 Fed. Appx. 6, 9 (11th Cir. 2012); technical non-compliance with the ERISA regulations by the Plan does not excuse the exhaustion of remedies, Perrino, 209 F.3d 1309; a potential conflict in decisionmakers does not support a claim of futility, Lanfear v. Home Depot, Inc., 536 F.3d 1217, 1224–25 (11th Cir. 2008); and a claim of futility is

speculative where a claimant never filed an administrative claim and failed to make “a clear and positive showing of futility,” Bickley, 461 F.3d at 1330.

Most of the foregoing principles would appear to warrant dismissal. Apex acknowledges that pending the claims was tantamount to denying them, and thus, constituted an adverse benefit determination under ERISA [DE 88, ¶ 55]. Apex’s correspondence with United Healthcare’s in-house counsel attempting to resolve the impasse with the Special Investigative Unit does not satisfy the exhaustion requirement [DE 88, ¶ 67-94]. Apex does not allege any facts to support its claim that it availed itself of the Plans’ administrative appeals processes [DE 100, Ex. 5-15]. Yet, Defendants have not cited any Eleventh Circuit caselaw that would require dismissal of Apex’s claim of futility at this stage of the proceedings.

Apex alleges that no viable avenues of appeal were available because once claims were transferred to the Special Investigative Unit, that unit and its investigators

had sole and exclusive jurisdiction over all of its claims. This meant that all appeals and communications had to be routed through the SIU. United’s regular appeals staff possessed no jurisdiction to overrule a SIU decision to pend Apex’s claim and pay the claim, which would have had the effect of mooting the purported investigation. Sending appeals to United’s appeals staff would represent a patently futile course of action because these staff were divested of the authority to reprocess these claims [DE 88, ¶ 54].

These allegations “are sufficient to infer that an exception to pursuing administrative remedies may apply.” Rapid Tox Screen LLC v. Cigna Healthcare of Texas Inc., 2017 WL 3658841, at \*8 (N.D. Tex. Aug. 24, 2017) (denying motion to dismiss for failure to exhaust administrative remedies where complaint alleged diversion of claims to insurer’s special investigative unit ). Defendants deny that referral of claims to the Special Investigative Unit

divested the appeals division of jurisdiction. And Defendants' denial may ultimately be supported by the evidence. Apex, however, is entitled to present evidence in support of its allegations. If the evidence produced by Apex were to show that the appeals division had no authority to reprocess claims that were referred to the Special Investigative Unit, a finding of futility could be made. Apex has set forth more than conclusory allegations of futility and, therefore, the undersigned concludes that the Amended Complaint should not be dismissed for failure to exhaust administrative remedies.

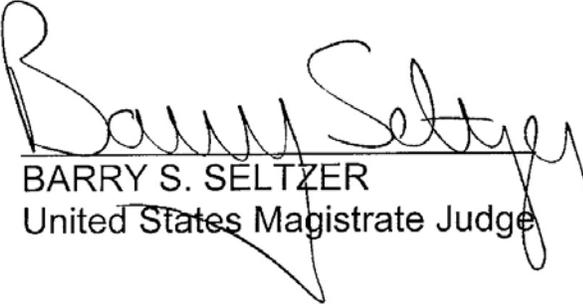
### III. CONCLUSION

For the reasons discussed above, the undersigned RECOMMENDS that Defendants' Motion to Dismiss the Amended Complaint [DE 88] be DENIED.

The parties will have fourteen (14) days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with the Honorable Federico A. Moreno, United States District Judge. Failure to file objections timely shall bar the parties from a de novo determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report except upon grounds of plain error

if necessary in the interest of justice. See 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140, 149 (1985); Henley v. Johnson, 885 F.2d 790, 794 (1989); 11th Cir. R. 3-1 (2016).

**DONE AND SUBMITTED** in Chambers, Fort Lauderdale, Florida, this 28th day of February 2018.



BARRY S. SELTZER  
United States Magistrate Judge

Copies furnished via CM/ECF to:

Hon. Federico A. Moreno  
Counsel of record via CM/ECF

UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF FLORIDA  
Fort Lauderdale Division

**Case Number: 17-61840-CIV-MORENO**

APEX TOXICOLOGY, LLC,

Plaintiff,

vs.

UNITED HEALTHCARE INSURANCE  
COMPANY; UNITED HEALTHCARE  
SERVICES, INC.; UNITED HEALTHCARE  
SERVICE LLC; JPMORGAN CHASE  
HEALTH CARE AND INSURANCE PLAN;  
GENERAL ELECTRIC HEALTH CARE  
PLAN; RELX, INC. MEDICAL PLAN; DST  
SYSTEMS, INC. MEDICAL PLAN;  
PEPSICO, INC. RETIREE HEALTH CARE  
AND GROUP INSURANCE PLAN; WELLS  
FARGO & COMPANY HEALTH PLAN;  
ORACLE AMERICAN, INC. FLEXIBLE  
BENEFIT PLAN; COMMERCE  
BANCSHARES, INC. COMPREHENSIVE  
MEDICAL PLAN; REINALT-THOMAS  
CORPORATION MEDICAL PLAN;  
CRACKER BARREL OLD COUNTRY  
STORE, INC. HEALTH AND WELFARE  
PLAN; NOVO NORDISK, INC. MEDICAL  
PLAN; DEPOSITORY TRUST AND  
CLEARING CORPORATION MEDICAL  
PLAN; BRISTOL-MYERS SQUIBB  
COMPANY HEALTH AND WELFARE  
PLAN; and JONES LANG LASALLE  
MEDICAL PLAN,

Defendants.

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**ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION  
AND ORDER DENYING MOTION TO DISMISS**

THE MATTER was referred to the Honorable Barry S. Seltzer, United States Magistrate Judge, for a Report and Recommendation on Defendant's Motion to Dismiss, filed on July 23, 2018. The Magistrate Judge filed a Report and Recommendation (D.E. 100) on February 28, 2019. The Court has reviewed the entire file and record. The Court has made a *de novo* review of the issues that the objections to the Magistrate Judge's Report and Recommendation present, and being otherwise fully advised in the premises, it is

**ADJUDGED** that United States Magistrate Judge Barry S. Seltzer's Report and Recommendation is **AFFIRMED** and **ADOPTED**. Accordingly, it is

**ADJUDGED** that Defendant's Motion to Dismiss is **DENIED**. Defendants must answer the Amended Complaint by no later than April 26, 2019.<sup>1</sup>

DONE AND ORDERED in Chambers at Miami, Florida, this 28<sup>th</sup> of March 2019.

  
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FEDERICO A. MORENO  
UNITED STATES DISTRICT JUDGE

Copies furnished to:

United States Magistrate Judge Barry S. Seltzer

Counsel of Record

<sup>1</sup> The Court will review the Defendants' arguments on standing on a motion for summary judgment.