

The Honorable Richard A. Jones

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UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JUSTIN PENWELL; GEORGIA BAKKE-  
TULL; JORDAN ENYEART; and  
MILDRED UZOMA,

Plaintiffs,

v.

PROVIDENCE HEALTH & SERVICES,

Defendant.

Civil Action No. 2:19-cv-01786-RAJ

**ORDER GRANTING MOTION TO  
DISMISS**

This matter is before the Court on Defendant’s motion to dismiss. For the following reasons, the motion is **GRANTED**.

**I. BACKGROUND**

The following is taken from Plaintiffs’ complaint, which is assumed to be true for the purposes of this motion to dismiss, along with any judicially noticed documents.

*Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007). Plaintiffs Jordan Enyeart, Justin Penwell, Georgia Bakke-Tull, and Mildred Uzoma (collectively “Plaintiffs”) are

1 employees of Providence Health & Services (“Providence” or “Defendant”) and  
2 participants in the Swedish Health Services Employee Benefits Plan (“Swedish Welfare  
3 Plan”) and/or the Providence Health & Services Employee Benefits Plan (“Providence  
4 Welfare Plan”) (collectively, the “Plans”). According to Plaintiffs, Providence is the plan  
5 administrator of both Plans.<sup>1</sup>

6 In early 2019, after observing an increase in their premiums, Plaintiffs began  
7 requesting network pricing information from Providence. Dkt. # 1 at ¶ 11. Plaintiffs  
8 sought several categories of documents including: (1) the annual renewal document for  
9 2019, 2018, and 2017, (2) a complete schedule or set of schedules of the negotiated  
10 payment rates applicable to each of the Plans’ participating network providers (“Network  
11 Providers”) for goods and services provided to participants that are covered by the Plans,  
12 (3) a complete set of each of the contracts or agreements between the Plans and each  
13 Network Provider, (4) all documents specifying the methodology by which actual  
14 payment amounts to plan providers are determined, as well as the underlying data and  
15 information by which such payment rates are determined, and (5) any other documents  
16 under which the Plans are maintained or administered. *Id.* at ¶ 12.

17 Plaintiffs based these requests on ERISA section 104(b) which requires a plan  
18 administrator “upon written request of any participant or beneficiary” to “furnish a copy  
19 of the latest updated summary plan description, and the latest annual report, any terminal  
20 report, the bargaining agreement, trust agreement, contract, or other instruments under  
21 which the plan is established or operated.” 29 U.S.C. § 1024(b)(4); *Id.* at ¶ 14. After  
22 receiving Plaintiffs’ initial request, the plan administrators for each plan provided  
23 Plaintiffs with the complete plan documents, including amendments, the summary plan

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24 <sup>1</sup> Providence claims that it is not the plan administrator for either Plan but “reserves that  
25 argument” for the purposes of its motion to dismiss because permitting Plaintiffs to  
26 amend their complaint to name the correct Plan Administrators “would be futile” given  
other deficiencies in the complaint. Dkt. # 12 at 6.

1 descriptions, and the open enrollment information for the 2017, 2018, and 2019 plan  
2 years for the Plans. *Id.* at ¶ 16; Dkt. # 13, Ex. 2. However, Providence informed  
3 Plaintiffs that it did not possess the other information requested such as provider fee  
4 schedules or network provider contracts or agreements. *See* Dkt. # 13, Ex. 2 (“We do not  
5 possess other documents that would be responsive to your request such as schedules of  
6 negotiated payment rates as the Plan Administrator does not determine payment rates and  
7 the Plan does not contract with ‘Network Providers.’ ”).

8 In response, Plaintiffs issued a second set of document requests for the same  
9 information. Dkt. # 1 at ¶¶ 20-21. Once again, Providence informed Plaintiffs that it did  
10 not have the requested documents, noting that for some categories of documents the  
11 information simply did not exist. *See* Dkt. # 1 at ¶¶ 25-26; Dkt. # 13, Ex. 4 (“Neither the  
12 Plan nor Plan Administrator has contracts with Network Providers.”). Undeterred,  
13 Plaintiffs submitted a third set of requests, noting that “ERISA [requires] a plan  
14 administrator to create and produce documents that it does not have, when such  
15 documents are required to be furnished.” Dkt. # 13, Ex. 5. Providence did not respond to  
16 Plaintiffs’ final request. Dkt. # 1 at ¶ 28.

17 On November 4, 2019, Plaintiffs sued Providence under ERISA section 502(c), 29  
18 U.S.C. §1132(c), seeking specific performance and civil penalties based on Providence’s  
19 alleged failure to provide the requested documents and information under 29 U.S.C. §  
20 1024(b). *See generally* Dkt. # 1. Providence now moves to dismiss Plaintiffs’ complaint  
21 for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Dkt. # 12.

## 22 II. LEGAL STANDARD

23 Under Fed. R. Civ. P. 12(b)(6), a court may dismiss a complaint for failure to state  
24 a claim. The court must assume the truth of the complaint’s factual allegations and credit  
25 all reasonable inferences arising from those allegations. *Sanders v. Brown*, 504 F.3d 903,  
26 910 (9th Cir. 2007). A court “need not accept as true conclusory allegations that are

1 contradicted by documents referred to in the complaint.” *Manzarek v. St. Paul Fire &*  
2 *Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Instead, the plaintiff must point to  
3 factual allegations that “state a claim to relief that is plausible on its face.” *Bell Atl.*  
4 *Corp. v. Twombly*, 550 U.S. 544, 568 (2007). If the plaintiff succeeds, the complaint  
5 avoids dismissal if there is “any set of facts consistent with the allegations in the  
6 complaint” that would entitle the plaintiff to relief. *Id.* at 563; *Ashcroft v. Iqbal*, 556 U.S.  
7 662, 678 (2009).

8 On a motion to dismiss, a court typically considers only the contents of the  
9 complaint. However, a court is permitted to take judicial notice of facts that are  
10 incorporated by reference in the complaint. *United States v. Ritchie*, 342 F.3d 903, 908  
11 (9th Cir. 2003) (“A court may . . . consider certain materials documents attached to the  
12 complaint, documents incorporated by reference in the complaint”); *Mir v. Little Co. of*  
13 *Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988) (“[I]t is proper for the district court to  
14 ‘take judicial notice of matters of public record outside the pleadings’ and consider them  
15 for purposes of the motion to dismiss.’ ”). With these principles in mind, the Court turns  
16 to the instant motion.

### 17 III. DISCUSSION

18 Plaintiffs’ complaint asserts a single claim under ERISA section 502(c)(1), 29  
19 U.S.C. § 1132(c)(1) which provides that a plan administrator is subject to fines if they  
20 violate ERISA section 104(b). 29 U.S.C. § 1132(c)(1). Under section 104(b), a plan  
21 administrator must “upon written request of any participant or beneficiary, furnish a copy  
22 of the latest updated summary plan description, and the latest annual report, any terminal  
23 report, the bargaining agreement, trust agreement, contract, or other instruments under  
24 which the plan is established or operated.” 29 U.S.C. § 1024(b)(4).

25 Plaintiffs are requesting three categories of documents: (1) a complete schedule or  
26 set of schedules of the negotiated payment rates applicable to each of the Plan’s

1 participating network providers for goods and services provided to Plan participants that  
2 are covered by the Plan, (2) a complete set of each of the contracts or other agreements  
3 between the Plan and each Network Provider, and (3) all documents specifying the  
4 methodology by which actual payment amounts to plan providers are determined, as well  
5 as the underlying data and information by which such payment rates are determined.  
6 Dkt. # 15 at 11. Because Plaintiffs’ requests do not fall within one of the expressly  
7 enumerated categories of information, the question is whether Plaintiffs’ requests fall  
8 within the catch-all provision: “other instrument[s] under which the plan is established or  
9 operated.” Providence argues that Plaintiffs’ requests go well beyond the scope of  
10 section 104(b) by requesting large swaths of network provider pricing information,  
11 completely unrelated to any claim determination or benefit.

12         The Ninth Circuit has adopted a narrow interpretation of the catch-all provision.  
13 *See Hughes Salaried Retirees Action Comm. v. Adm’r of the Hughes Non-Bargaining*  
14 *Ret. Plan*, 72 F.3d 686, 691 (9th Cir. 1995); *Shaver v. Operating Eng’rs Local 428*  
15 *Pension Trust Fund*, 332 F3d 1198, 1201–02 (9th Cir. 2003). In *Hughes*, the Ninth  
16 Circuit concluded that the phrase “other instrument[s]” should be interpreted as  
17 describing other instruments “similar in nature” to the documents expressly delineated in  
18 section 104(b). *Hughes*, at 689 (“[I]t is well established that ‘words grouped in a list  
19 should be given related meaning’ ”). Relevant documents include “documents that  
20 provide individual participants with information about the plan and benefits.” *Id.* at 690.  
21 This is supported by the legislative history which shows that section 104(b) documents  
22 are intended to inform an individual plan participant exactly where he “stands with  
23 respect to the plan—what benefits he may be entitled to, what circumstances may  
24 preclude him from obtaining benefits, what procedures he must follow to obtain benefits,  
25 and who are the persons to whom the management and investment of his plan funds have  
26 been entrusted.” *Hughes*, at 690 (quoting S. Rep. No. 127, 93d Cong., 2d Sess. (1974),

1 reprinted in 1974 U.S.C.C.A.N. 4838, 4863).

2         Additionally, several courts considering the scope of an ERISA fiduciary’s duty to  
3 disclose in similar contexts have concluded that ERISA does not mandate disclosure of  
4 generalized network pricing information unless the information requested consists of  
5 legal documents that plainly set out a participant’s rights and duties under the plan. *See*  
6 *e.g., DeBartolo v. Blue Cross/Blue Shield of Ill.*, No. 01 C 5940, 2001 WL 1403012, at \*7  
7 (N.D. Ill. Nov. 9, 2001) (holding that information regarding “usual and customary  
8 charges” is not the type of information an ERISA plan administrator is required to  
9 disclose under 29 U.S.C. § 1024(b)(4)); *In re WellPoint, Inc. Out-of-Network UCR Rates*  
10 *Litig.*, 903 F. Supp. 2d 880, 921–22 (C.D. Cal. 2012) (collecting cases).

11         Here, Plaintiffs’ complaint contains no factual allegations showing how the  
12 requested information will inform “plan participants and beneficiaries about their rights  
13 under the plan.” Indeed, Plaintiffs make no effort to connect their incredibly broad  
14 information requests to their rights and duties under the Plan. Instead, Plaintiffs recite the  
15 statutory elements in conclusory fashion, labeling each category of requested documents  
16 or data as “instruments under which the Plans are established or operated.” *See* Dkt. # 1  
17 at ¶¶ 33-38. This is insufficient. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555  
18 (2007) (“[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’  
19 requires more than labels and conclusions, and a formulaic recitation of the elements of a  
20 cause of action will not do”). Additionally, it appears that some of the information  
21 requested by Plaintiffs does not constitute formal documents governing the Plans. *See*  
22 *Bd. of Trustees of the CWA/ITU Negotiated Pension Plan v. Weinstein*, 107 F.3d 139,  
23 142–143 (2d Cir. 1997); *Shaver*, 332 F.3d at 1202.

24         In response to Defendant’s motion to dismiss, Plaintiffs allege for the first time  
25 that the network pricing documents they seek have a “direct effect on the out-of-pocket  
26 costs” for participants. *See* Dkt. 15 at 11. But new factual allegations raised in an

1 opposition brief will not rescue a complaint from dismissal under Rule 12(b)(6). *See*  
2 *Schneider v. Cal. Dept. of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (“In  
3 determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the  
4 complaint to a plaintiff’s moving papers, such as a memorandum in opposition to a  
5 defendant’s motion to dismiss.”) (citation omitted); *Car Carriers, Inc. v. Ford Motor Co.*,  
6 745 F.2d 1101, 1107 (7th Cir.1984) (“[I]t is axiomatic that the complaint may not be  
7 amended by the briefs in opposition to a motion to dismiss.”). The Court will not  
8 consider any new facts included in Plaintiffs’ opposition briefing. Accordingly, the Court  
9 finds that Plaintiffs have failed to state a claim for relief under ERISA section 502(c)(1).  
10 *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 568 (2007).

11 Providence alternatively argues that Plaintiffs’ complaint should be dismissed  
12 because some of the information Plaintiffs are requesting does not exist or is not in  
13 Providence’s possession. For example, Providence contends that it does not possess the  
14 contracts or agreements with network providers because such contracts are between the  
15 provider and the third-party claims administrator. Because the Court is already  
16 dismissing Plaintiffs’ complaint on other grounds, the Court will not address this  
17 apparent factual dispute. Nor will the Court address Providence’s allegation that  
18 Plaintiffs lack standing to pursue this action as this argument was improperly raised for  
19 the first time in Providence’s reply brief. *United States v. Boyce*, 148 F. Supp. 2d 1069,  
20 1085 (2001) (holding that it is improper for a party to raise a new argument in a reply  
21 brief, because the opposing party may be deprived of an opportunity to respond.).

#### 22 IV. CONCLUSION

23 For the above reasons, the Court finds that Plaintiffs’ complaint fails to state a  
24 claim for relief under Rule 12(b)(6). Defendant’s motion is **GRANTED** and Plaintiffs’  
25 complaint is **DISMISSED** without prejudice. **Within fourteen (14) days from the date**  
26 **of this Order**, Plaintiffs may file an amended complaint addressing the deficiencies

1 described above. If Plaintiffs do not file an amended complaint within that time, the  
2 Court may dismiss this action.

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4 DATED this 5th day of June, 2020.

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7 The Honorable Richard A. Jones  
8 United States District Judge  
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