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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BEVERLY OAKS PHYSICIANS)
SURGICAL CENTER, LLC, A)
California Limited)
Liability Company)
Plaintiff,)
v.)
BLUE CROSS BLUE SHIELD OF)
ILLINOIS; and Does 1)
through 100;)
Defendants.)

CV 18-3866-RSWL-JPR
**ORDER re: Defendant's
Motion to Dismiss [13]**

Currently before the Court is Defendant Blue Cross Blue Shield of Illinois' ("Defendant") Motion to Dismiss [13] ("Motion"). Having reviewed all papers submitted pertaining to this Motion, the Court **NOW FINDS AND RULES AS FOLLOWS:** the Court **GRANTS** Defendant's Motion **WITH LEAVE TO AMEND.**

1 I. BACKGROUND

2 A. Factual Background

3 Plaintiff Beverly Oaks Physicians Surgical Center
4 ("Plaintiff") is an ambulatory surgery center located
5 in Sherman Oaks, California. Compl. ¶ 4, ECF No. 1.
6 Defendant Blue Cross Blue Shield of Illinois
7 ("Defendant") is a managed care company that, among
8 other things, insures and/or administers employer
9 health plans typically governed by ERISA. Id. ¶ 6.
10 Defendant carries out its health insurance business
11 activities in each state where covered employees and
12 their dependents are located. Id. ¶ 8. Plaintiff
13 brings this Action as the assignee of patients seeking
14 recovery of ERISA benefits they allege Defendant owes
15 them. Id. ¶ 26.

16 Plaintiff provided surgery center facility services
17 to fourteen patients enrolled in health plans governed
18 by ERISA. Id. ¶ 14, 24. When the patients came to
19 Plaintiff for surgery center services, they presented
20 medical insurance cards in the name of Defendant. Id.
21 ¶ 16. Plaintiff alleges that each of the fourteen
22 patients assigned their health plan benefits to
23 Plaintiff, and that Plaintiff submitted 27 claims for
24 the services provided to Defendant. Id. ¶ 17.

25 Plaintiff is an "out-of-network" provider for each
26 claim at issue, so its custom was to contact a
27 Defendant representative by telephone to discuss the
28 proposed surgery in advance, and the representative

1 would advise Plaintiff whether the surgery would be
2 covered under that patient's plan. Id. ¶ 18.
3 Plaintiff alleges that at no time during any of these
4 communications did Defendant indicate it would assert
5 an "anti-assignment clause" in any ERISA Plan as a
6 basis to bar payment. Id. ¶ 20. Plaintiff also
7 alleges that neither did Defendant assert an anti-
8 assignment clause during the administrative review
9 phase, in which Defendant provided "Explanation[s] of
10 Benefits" to Plaintiff to explain the underpayments or
11 non-payments with respect to the claims submitted. Id.
12 ¶¶ 28-29. Plaintiff alleges that the aggregate
13 amounts billed for the claims is \$1,406,499.25 and the
14 aggregate amounts Defendant paid is \$130,683.57. Id.
15 ¶¶ 17, 21; id. Ex. C. Plaintiff now seeks recovery for
16 the underpayment or denial of benefits for the claims
17 submitted to Defendant. Id. ¶ 39.

18 **B. Procedural Background**

19 Plaintiff filed its Complaint [1] on May 9, 2018
20 for recovery of benefits under ERISA. Defendant filed
21 the instant Motion [13] on August 6, 2018. Plaintiff
22 filed its Opposition [14] on August 31, 2018, and
23 Defendant filed its Reply on September 11, 2018 [15].

24 **II. DISCUSSION**

25 **A. Legal Standard**

26 Federal Rule of Civil Procedure 12(b)(6) allows a
27 party to move for dismissal of one or more claims if
28 the pleading fails to state a claim upon which relief

1 can be granted. A complaint must "contain sufficient
2 factual matter, accepted as true, to state a claim to
3 relief that is plausible on its face." Ashcroft v.
4 Iqbal, 556 U.S. 662, 678 (2009)(quotation omitted).
5 Dismissal is warranted for a "lack of a cognizable
6 legal theory or the absence of sufficient facts alleged
7 under a cognizable legal theory." Balistreri v.
8 Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
9 1988)(citation omitted).

10 In ruling on a 12(b)(6) motion, a court may
11 generally consider only allegations contained in the
12 pleadings, exhibits attached to the complaint, and
13 matters properly subject to judicial notice. Swartz v.
14 KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007). A court
15 must presume all factual allegations of the complaint
16 to be true and draw all reasonable inferences in favor
17 of the non-moving party. Klarfeld v. United States,
18 944 F.2d 583, 585 (9th Cir. 1991). The question is not
19 whether the plaintiff will ultimately prevail, but
20 whether the plaintiff is entitled to present evidence
21 to support the claims. Jackson v. Birmingham Bd. of
22 Educ., 544 U.S. 167, 184 (2005) (quoting Scheuer v.
23 Rhodes, 416 U.S. 232, 236 (1974)). While a complaint
24 need not contain detailed factual allegations, a
25 plaintiff must provide more than "labels and
26 conclusions" or "a formulaic recitation of the elements
27 of a cause of action." Bell Atl. Corp. v. Twombly, 550
28 U.S. 544, 555 (2007). However, a complaint "should not

1 be dismissed under Rule 12(b)(6) 'unless it appears
2 beyond doubt that the plaintiff can prove no set of
3 facts in support of his claim which would entitle him
4 to relief.'" Balistreri, 901 F.2d at 699 (citing
5 Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

6 **B. Discussion**

7 1. Standing under ERISA § 1132(a)(1)

8 To have standing to state a claim under ERISA, "a
9 plaintiff must fall within one of ERISA's nine specific
10 civil enforcement provisions, each of which details who
11 may bring suit and what remedies are available."

12 Reynolds Metals Co. v. Ellis, 202 F.3d 1246, 1247 (9th
13 Cir. 2000) (citing 29 U.S.C. §§ 1132(a)(1)-(9)).

14 ERISA's civil enforcement provision, 29 U.S.C. §
15 1132(a), identifies plan participants, beneficiaries,
16 fiduciaries, and the Secretary of Labor as "[p]ersons
17 empowered to bring a civil action." See Misic v. Bldg.
18 Serv. Emps. Health & Welfare Trust, 789 F.2d 1374, 1378
19 (9th Cir. 1986). A non-participant health care
20 provider cannot bring claims for benefits on its own
21 behalf, but must do so "derivatively, relying on its
22 patient's assignments of their benefits claims."

23 Spinedex Physical Therapy USA Inc. v. United Healthcare
24 of Arizona, Inc., 770 F.3d 1282, 1289 (9th Cir. 2014).

25 Here, Plaintiff is a health care provider and
26 neither a participant nor a beneficiary itself.
27 Plaintiff alleges it has standing to sue under ERISA as
28 an assignee of benefits due to Plan members and their

1 dependents. Compl. ¶¶ 25-27. Defendant argues that
2 Plaintiff lacks standing because at least 20 of the 27
3 claims at issue were made under plans containing anti-
4 assignment provisions. Notwithstanding any plausible
5 allegations regarding standing, Plaintiff may lack
6 standing if the relevant plans at issue here contain
7 valid and unambiguous anti-assignment provisions. See
8 Spinedex, 770 F.3d at 1296 (affirming district court's
9 holding that an anti-assignment provision prevented
10 patients from assigning claims); Davidowitz v. Delta
11 Dental Plan of Cal., Inc., 946 F.2d 1476, 1477 (9th
12 Cir. 1991)("ERISA welfare plan payments are not
13 assignable in the face of an express non-assignment
14 clause in the plan."); Long Beach Mem'l. Med. Ctr. v.
15 Cal. Mart Empl. Benefit Plan, No. 97-56624, 1999 U.S.
16 App LEXIS 3346, at *2 (9th Cir. Feb. 22, 1999)("Because
17 this court has held that non-assignment clauses are
18 valid under ERISA, the district court did not err by
19 concluding that Medical Center failed to state a claim
20 because it lacked standing.").

21 Defendant attached three exhibits to its Motion
22 that include: (1) Summary Plan Description for the
23 Teamsters Western Region & Local 177 Health Care Plan;
24 (2) Summary Plan Description for the Williams Lea
25 Health Care Plan; and (3) Summary Plan Description for
26 the Woodward, Inc. Health Care Plan, (collectively, the
27 "Plan documents"). Dissen Decl. ¶¶ 4-6, ECF No. 13-2.
28 Ordinarily, a court may look only at the face of the

1 complaint to decide a motion to dismiss." Van Buskirk
2 v. Cable News Network, Inc., 284 F.3d 977, 980 (9th
3 Cir. 2002). However, "a district court ruling on a
4 motion to dismiss may consider a document the
5 authenticity of which is not contested, and upon which
6 the plaintiff's complaint necessarily relies." Almont
7 Ambulatory Surgery Ctr., LLC v. UnitedHealth Group,
8 Inc., 99 F. Supp. 3d 1110, 1124-25 (C.D. Cal.
9 2015)(citing Parrino v. FHP, Inc., 146 F.3d 699, 706
10 (9th Cir. 1998) (footnote omitted)), *superseded by*
11 *statute on unrelated grounds in* McManus v. Mcmanus Fin.
12 Consultants, Inc., 552 Fed.Appx. 713 (9th Cir. 2014).
13 The incorporation by reference doctrine "permits a
14 district court to consider documents 'whose contents
15 are alleged in a complaint and whose authenticity no
16 party questions, but which are not physically attached
17 to the [plaintiff's] pleadings.'" Branch v. Tunnell,
18 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other*
19 *grounds by* Galbraith v. County of Santa Clara, 307 F.3d
20 1119 (9th Cir. 2002). Plaintiff does not identify any
21 of its members' plans by name in the Complaint and
22 instead references the plans generally as the "ERSIA
23 Plans." See generally Compl. While Plaintiff does not
24 explicitly refer to the names of the three Plan
25 documents, Plaintiff's Complaint relies on the Plan
26 documents because it is by those documents that
27 Plaintiff requests recovery as an assigned beneficiary
28 of those plan members. Moreover, Plaintiff does not

1 dispute the authenticity of the Plan documents. In
2 fact, Plaintiff acknowledges the Plan documents are the
3 plans that it relies on for 13 of its 14 patients.
4 Opp'n at 7:24-8:2 (referencing the Dissen decl. and
5 arguing, "there is no need for plaintiff's Complaint to
6 be amended to identify ERISA Plans that have already
7 been identified" by Ms. Dissen). Thus, the Court may
8 appropriately consider the Plan documents.

9 Upon review of the Plan documents, fourteen of the
10 claims at issue are under the Teamsters Western Region
11 & Local 177 Health Care Plan, which provides that
12 "[b]enefits are not assignable, although the Fund will
13 honor qualified medical child support orders." Dissen
14 Decl., Ex. A 45, ECF No. 13-2. Five of the claims at
15 issue are under the Williams Lea Inc. Health Care Plan,
16 and one claim is under the Woodward Inc. Health Care
17 Plan, both providing that the plans are "expressly non-
18 assignable." See id., Ex. B at 106. Together, the
19 Plan documents account for 13 of the 14 patients
20 Plaintiff is seeking recovery for.¹

21 Plaintiff argues that the anti-assignment clauses
22 should not be given effect because estoppel and waiver
23 preclude application of the provisions. The Court
24 takes these in turn in the following sections.

25
26 ¹ Patients A-D, F-J, L, and N, were enrolled in Teamsters
27 Western Region & Local 177 Health Care Plan; Patient K was
28 enrolled in Williams Lea Inc. Health Care Plan; and Patient M was
enrolled in Woodward, Inc. Health Care Plan. Dissen Decl. ¶¶ 4-
6. This leaves Patient E whose plan is unaccounted for.

1 a. *Estoppel*

2 Estoppel principles can apply to an ERISA claim for
3 recovery of benefits. Almont Ambulatory Surgery Ctr.,
4 LLC v. UnitedHealth Group, Inc., 99 F. Supp. 3d 1110,
5 1135 (C.D. Cal. 2015)(citing Gabriel v. Alaska Electric
6 Pension Fund, 755 F.3d 647, 655-58 (9th Cir. 2014)).

7 In order for estoppel to apply to a substantive claim
8 for ERISA benefits, several elements must be pleaded.

9 First, the party invoking estoppel must allege the
10 traditional elements of estoppel: "(1) the party to be
11 estopped must know the facts; (2) he must intend that
12 his conduct shall be acted on or must so act that the
13 party asserting the estoppel has a right to believe it
14 is so intended; (3) the latter must be ignorant of the
15 true facts; and (4) he must rely on the former's
16 conduct to his injury." See id. (citations omitted).

17 In addition to the traditional elements, a party
18 asserting estoppel "must also allege: (1) extraordinary
19 circumstances; (2) 'that the provisions of the plan at
20 issue were ambiguous such that reasonable persons could
21 disagree as to their meaning or effect'; and (3) that
22 the representations made about the plan were an
23 interpretation of the plan, not an amendment or
24 modification of the plan." See id. (citations
25 omitted).

26 Plaintiff's Complaint combines its allegation for
27 waiver and estoppel by pleading that Defendant did not
28 assert an anti-assignment clause in the course of its

1 pre-surgery telephone communications with Plaintiff's
2 representatives, and in the course of the post-surgery
3 administrative review process. Compl. ¶ 29. Plaintiff
4 alleges facts showing a reliance on Defendant's
5 representations made during pre-surgery phone calls
6 that each patient's proposed surgeries would be
7 covered, and that "[b]ut for the advance telephone
8 representations of the Defendant entity representatives
9 in affirming Plaintiff's right to receive payment,"
10 Plaintiff would not have provided the surgery services.
11 Id. ¶¶ 18-19. While Plaintiff alleges Defendant had
12 "knowledge of Plaintiff's status of an assignee," see
13 id., Plaintiff does not allege that Defendant made
14 representations during these calls that the benefits
15 discussed were assignable, or that Defendant intended
16 Plaintiff to believe they were assignable. See Brand
17 Tarzana Surgical Inst., Inc. v. Int'l Longshore &
18 Warehouse Union-pacific Mar. Ass'n Welfare Plan, No. CV
19 14-3191 FMO (AGRx), 2016 WL 3480782, at *7 (C.D. Cal.
20 Mar. 8, 2016)(plaintiff had not stated a claim that the
21 plan was estopped from relying on its anti-assignment
22 clause because "[a] representation that Brand was
23 eligible to receive Plan benefits is not a
24 misrepresentation regarding the existence or
25 applicability of an anti-assignment provision").
26 Plaintiff argues that Defendant failed to disclose the
27 anti-assignment provisions, however Plaintiff did not
28 allege that the Plan documents containing such

1 provisions were not available or accessible to
2 Plaintiff or its patients. See Care First Surgical
3 Ctr. v. ILWU-PMA Welfare Plan, No. CV 14-01480 MMM
4 (AGRx), 2014 WL 12573014, at *15 (C.D. Cal. 2014)
5 (finding plaintiff failed to adequately allege plan
6 agreements were not available to it).

7 Because Plaintiff does not allege any
8 misrepresentations about the anti-assignment provisions
9 itself, Plaintiff does not plead sufficient facts
10 supporting an estoppel claim.

11 b. *Waiver*

12 "Waiver is often described as the intentional
13 relinquishment of a known right." Gordon v. Deloitte &
14 Touche, LLP Group Long Term Disability Plan, 749 F.3d
15 746, 752 (9th Cir. 2014). When an insurer communicates
16 a denial of a claim, it must state a reason for the
17 denial and it will not be permitted to later rely on
18 alternate reasons not presented in the denial letter.
19 See, e.g., Harlick v. Blue Shield of California, 686
20 F.3d 699, 719 (9th Cir.2012) ("A plan administrator may
21 not fail to give a reason for a benefits denial during
22 the administrative process and then raise that reason
23 for the first time when the denial is challenged in
24 federal court, unless the plan beneficiary has waived
25 any objection to the reason being advanced for the
26 first time during the judicial proceeding.").

27 Plaintiff alleges that Defendant waived the anti-
28 assignment clause by failing to assert it during the

1 administrative review process. Compl. ¶¶ 28-30.
2 Defendant argues that the anti-assignment provision is
3 a litigation defense, not a substantive basis for claim
4 denial, thus it was not relevant to raise until
5 Plaintiff sought to sue as an assignee. Indeed,
6 several courts, including the Ninth Circuit, have held
7 that when raising the anti-assignment provision to
8 contest standing, it is not waived for failure to raise
9 it during the claim administration process. See Eden
10 Surgical Ctr. v. Cognizant Tech. Sols. Corp., 720 F.
11 App'x 862, 863 (9th Cir. 2018); Brand Tarzana Surgical
12 Inst., Inc. v. Int'l Longshore & Warehouse Union-Pac.
13 Mar. Ass'n Welfare Plan, 706 F. App'x 442, 443 (9th
14 Cir. 2017)(finding no need to raise the anti-assignment
15 provision during claim administration process because
16 it is a "litigation defense, not a substantive basis
17 for claim denial").

18 Plaintiff argues it sufficiently pleads facts
19 showing Defendant knew Plaintiff was acting as an
20 assignee because Plaintiff has directly billed
21 Defendant. Compl. ¶ 21. Plaintiff alleges its billing
22 statements included the date and nature of services
23 rendered, the identity of the insured member and/or
24 dependent, and his or her applicable member Plan ID.
25 Id. ¶ 21; id. Ex. B., ECF No. 1-2. Plaintiff also
26 alleges each billing form has a checked box on the form
27 affirming Plaintiff was asserting its claim for payment
28 as an assignee. Id. ¶ 22. However, "direct

1 communications and payment are insufficient evidence of
2 a clear and convincing waiver of the non-assignment
3 provision." See Pac. Shores Hosp. v. Backus Hosp. Med.
4 Benefit Plan, No. CV 04-7935 ABC (PLAx), 2005 WL
5 8154685, at *3 (C.D. Cal. May 18, 2005)(granting motion
6 to dismiss for lack of standing due to anti-assignment
7 provision). As Defendant points out, the Teamsters
8 Western Region & Local 177 Health Care Plan explicitly
9 provides that benefits will be paid directly to the
10 provider or facility, "however, the fact that the Plan
11 may pay benefits directly to a provider does not give
12 such provider 'Beneficiary' status under ERISA."
13 Dissen Decl., Ex. A at 60. Accordingly, Plaintiff's
14 allegation of direct payments is insufficient. See
15 Care First, 2014 WL 12573014, at *17 (rejecting waiver
16 argument where "the plan agreements expressly
17 contemplate direct payment to persons"); Brand Tarzana,
18 706 F. App'x at 443 ("[N]othing about the direct
19 payment clauses suggests that providers rather than
20 beneficiaries are entitled to sue the Plan over the
21 breach of its obligation to make direct payments.")).
22 Ultimately, Plaintiff has not pleaded facts showing
23 Defendant intentionally relinquished any known rights
24 pertaining to the anti-assignment clauses and as such,
25 has not pleaded a valid waiver claim.

26 In sum, Defendant has shown that 13 of the 14
27 patients' plans contain anti-assignment provisions.
28 Because Plaintiff fails to adequately allege waiver and

1 estoppel, Plaintiff lacks standing to bring an ERISA
2 claim for those 13 patients. As to the remaining
3 patient, Plaintiff fails to allege this patient's plan
4 or any facts relating to its terms. This is
5 insufficient to state claim for recovery of benefits
6 under ERISA. Forest Ambulatory Surgical Assocs., L.P.
7 v. United HealthCare Ins. Co., No. 10-CV-04911-EJD,
8 2011 WL 2748724, at *5 (N.D. Cal. July 13, 2011)
9 ("Failure to identify the controlling ERISA plans makes
10 a complaint unclear and ambiguous."). Therefore, the
11 Court **GRANTS** Defendant's Motion to Dismiss.

12 2. Leave to Amend

13 A party may amend the complaint once "as a matter
14 of course" before a responsive pleading is served.
15 Fed. R. Civ. P. 15(a). After that, the "party may
16 amend the party's pleading only by leave of court or by
17 written consent of the adverse party and leave shall be
18 freely given when justice so requires." Id. Leave to
19 amend lies "within the sound discretion of the trial
20 court." United States v. Webb, 655 F.2d 977, 979 (9th
21 Cir. 1981). The Ninth Circuit has noted "on several
22 occasions . . . that the 'Supreme Court has instructed
23 the lower federal courts to heed carefully the command
24 of Rule 15(a), F[ed]. R. Civ. P., by freely granting
25 leave to amend when justice so requires.'" Gabrielson
26 v. Montgomery Ward & Co., 785 F.2d 762, 765 (9th Cir.
27 1986)(quoting Howey v. United States, 481 F.2d 1187,
28 1190 (9th Cir. 1973)). Here, Plaintiff has yet to file

1 an amended complaint. It is likely that Plaintiff will
2 be able to cure the factual deficiencies in these
3 claims upon amendment. Therefore, the Court **GRANTS**
4 leave to amend.

5 **III. CONCLUSION**

6 Based on the foregoing, the Court **GRANTS**
7 Defendant's Motion to Dismiss **WITH LEAVE TO AMEND.**
8 Plaintiff shall have 21 days from this date to file its
9 First Amended Complaint.

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12 **IT IS SO ORDERED.**

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14 DATED: November 8, 2018

s/ RONALD S.W. LEW

15 **HONORABLE RONALD S.W. LEW**
16 Senior U.S. District Judge
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