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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

JONATHAN DAVIDSON, et al.,

Plaintiffs,

v.

HEWLETT-PACKARD COMPANY, et al.,

Defendants.

Case No. [5:16-cv-01928-EJD](#)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS**

Re: Dkt. No. 155

Pro se Plaintiffs Jonathan Davidson and Corinna Davidson (“Plaintiffs”) bring claims arising from Defendants’ decision to end his medical care at a rehabilitation center and transfer him to custodial care at home. Presently before the Court is Defendants’ motion to dismiss the Third Amended Complaint (“TAC”) pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Court finds it appropriate to take the motion under submission for decision without oral argument pursuant to Civil Local Rule 7–1(b). For the reasons set forth below, Defendants’ motion to dismiss is granted in part and denied in part.

I. BACKGROUND¹

Mr. Davidson suffers from amyotrophic lateral sclerosis (“ALS”), or Lou Gehrig’s disease. TAC ¶ 6. He is unable to move major muscles in his body and is connected to feeding and breathing tubes to survive. *Id.* Mr. Davidson was diagnosed with ALS in 2009. In 2014, his

¹ The Background is a summary of the allegations in the TAC.

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1 condition required him to move into a “skilled care” facility at Reche Canyon Rehabilitation
2 Center. *Id.* ¶ 55.

3 Pursuant to his wife’s employment at Hewlett-Packard, Mr. Davidson received medical
4 treatment as a covered dependent under the medical benefit program offered through the Hewlett-
5 Packard Company Comprehensive Welfare Benefits Plan (the “Plan”). The Plan is an employee
6 welfare benefit plan subject to the Employee Retirement Income Security Act of 1974 (“ERISA”).

7 In 2015, Hewlett Packard Enterprise Co. (“HPE”) agreed to provide skilled care coverage
8 for an unlimited number of days. An employee from HPE, Robyn Young, called Plaintiffs and
9 stated that HPE was going to take care of Mr. Davidson, that he could move into the skilled
10 facility Plaintiffs had found, and that there would no longer be a 120-day review that could end his
11 care. *Id.* ¶ 62. In a follow-up call, Ms. Young stated that they would have healthcare insurance
12 for the remainder of Mr. Davidson’s life. *Id.* Ms. Young also sent an email with additional
13 contact information and explained that an “override has been placed in Mr. Davidson’s account to
14 allow for coverage for an unlimited number of days. As such, there will be no 120-day limit on
15 this benefit and he will not be required to move to a different facility.” *Id.* ¶ 64. Plaintiffs
16 understood this to be a promise that HPE would provide skilled care that is separate from the Plan.
17 *Pls.’ Opp.* 6 (Dkt. No. 156).² At present, Mr. Davidson is receiving custodial nursing care.

18 Plaintiffs initially filed their complaint in April 2016 asserting claims under state law and
19 ERISA. Plaintiffs made amendments over the years in response to two previous motions to
20 dismiss. See Dkt. Nos. 1, 39, 82. In 2017, Defendants moved to dismiss the Second Amended
21 Complaint on multiple grounds. Among other things, Defendants asserted that the ERISA claim
22 was moot because Mr. Davidson had not experienced a denial of benefits. Defendants also
23 asserted that to the extent the Second Amended Complaint sought clarification as to Mr.
24 Davidson’s future rights under the ERISA plan, the claim was not ripe. Defendants also argued

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26 ² Defendants represent that HPE formalized this agreement to provide health and welfare benefits
27 to Mr. Davidson in a Supplemental Program. *Defs.’ Mot. to Dismiss Third Am. Compl.* 3.
28 Plaintiffs disagree. *Pls.’ Opp.* 7.

1 that ERISA preempted Plaintiffs’ state law claims, that the privacy claim was insufficiently pled,
2 and that the claims against the individual defendants should be dismissed because they are not
3 fiduciaries under ERISA.

4 While the motion to dismiss was pending, Plaintiffs sought leave to file the TAC to
5 remove the ERISA claim “[w]ithout prejudice to raising ERISA issues in the future” if Defendants
6 violate their obligations under ERISA. Pls.’ Motion to Amend Complaint 4. The court granted
7 Plaintiffs’ motion and denied Defendants’ motion to dismiss. *See* Order Denying Defendants’
8 Motion to Dismiss; Granting Plaintiffs’ Motions For Leave To File Amended Complaint; Granting
9 Plaintiffs’ Motion To Consolidate (“Order”). Dkt. No. 143. The court held that Plaintiffs’
10 proposed amendments were not futile because none of the claims were subject to dismissal on any
11 of the grounds raised in Defendants’ motions to dismiss. The court directed Plaintiffs to file the
12 TAC as a separate docket entry. Plaintiffs’ TAC alleges the following state law claims:
13 intentional infliction of emotional distress (count 1), fraud and misrepresentation (count 2),
14 invasion of privacy (count 3), negligence (count 4), bad faith (count 5), and unfair competition
15 (count 6). Plaintiffs allege that they have continued to struggle against attempts by Defendants to
16 disrupt Mr. Davidson’s care. Defendants allegedly threatened to transfer Ms. Davidson to another
17 company and to end her health care plan (¶¶ 8-9); surveilled and monitored Plaintiffs’ activities
18 (¶ 28); improperly accessed and disseminated Plaintiffs’ private health care information (*id.*);
19 avoided payments by switching Plaintiffs’ primary care to Medicare without any request or notice
20 (¶ 71); failed to pay for proper food and equipment (¶ 72, 73); and repeatedly called the Elite
21 Health Providers facility in an attempt to have Mr. Davidson ejected (¶ 88).

22 **II. LEGAL STANDARD**

23 Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim with sufficient
24 specificity to “give the defendant fair notice of what the . . . claim is and the grounds upon which
25 it rests.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations omitted).

26 A complaint which falls short of the Rule 8(a) standard may be dismissed if it fails to state a claim

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1 upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). “Dismissal under Rule 12(b)(6) is
2 appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support
3 a cognizable legal theory.” *Mendondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th
4 Cir. 2008). Moreover, the factual allegations “must be enough to raise a right to relief above the
5 speculative level” such that a claim “is plausible on its face.” *Twombly*, 550 U.S. at 555, 570.

6 When deciding whether to grant a motion to dismiss, the court generally “may not consider
7 any material beyond the pleadings.” *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d
8 1542, 1555 n.19 (9th Cir. 1990). The court must accept as true all “well-pleaded factual
9 allegations.” *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The court must also construe the alleged
10 facts in the light most favorable to the plaintiff. *Love v. United States*, 915 F.2d 1242, 1245 (9th
11 Cir. 1998). “[M]aterial which is properly submitted as part of the complaint may be considered.”
12 *Hal Roach Studios*, 896 F.2d at 1555 n.19. But “courts are not bound to accept as true a legal
13 conclusion couched as a factual allegation.” *Twombly*, 550 U.S. at 555. Pro se pleadings, as is the
14 case here, must be liberally construed. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th
15 Cir. 1990).

16 **III. DISCUSSION**

17 **A. Whether the 2015 Agreement is an ERISA Plan**

18 Defendants’ motion to dismiss the TAC is largely duplicative of their motion to dismiss
19 the Second Amended Complaint. However, Defendants present one central issue that was not
20 squarely before the court previously: whether Ms. Young’s 2015 agreement to provide skilled
21 care is an ERISA plan.³ With the benefit of full briefing, the court finds that the 2015 agreement
22 is an ERISA plan.

23 ERISA’s coverage extends to “any plan, fund, or program” established or maintained by an
24 employer for the purpose of providing employee welfare benefits to its employees and their

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³ Contrary to Plaintiffs’ assertion, the law of the case does not prevent the court from considering the issues raised in Defendants’ motion to dismiss the TAC.

1 beneficiaries. 29 U.S.C. § 1002(1). ERISA coverage extends to an arrangement sufficiently
2 specific to “enable a reasonable person to ‘ascertain the intended benefits, beneficiaries, source of
3 financing, and procedures for receiving benefits.’” *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1504
4 (9th Cir. 1985) (quoting *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (en banc)).
5 ERISA does not require a formal, written plan. *Donovan*, 688 F.2d at 1372. Once it is determined
6 that ERISA covers a plan, however, ERISA’s fiduciary and reporting provisions require the plan
7 to be established pursuant to a written instrument. *Id.*

8 In *Scott*, the plaintiffs alleged that defendant Gulf Oil Corporation “expressly and
9 impliedly promised . . . to pay and has paid severance pay benefits to those employees whose
10 employment was terminated involuntarily for reasons other than cause.” *Scott*, 688 F. 2d 1373,
11 1504 n. 2. The benefit was “generally a sum equal to two weeks of salary for each year of
12 employment with defendant.” *Id.* at 1505. The Ninth Circuit determined that these allegations, if
13 true, would enable a reasonable person to “ascertain the intended benefits, beneficiaries, source of
14 financing, and procedures for receiving benefits.” *Id.* at 1504 (citing *Donovan*, 688 F.2d at 1373).
15 The Ninth Circuit stated, “[t]hat is clearly a sufficient allegation of the establishment of an ERISA
16 plan. *Id.*”⁴

17 Like *Scott*, the TAC includes a sufficient allegation of the establishment of an ERISA plan.
18 HPE promised to take care of Mr. Davidson. TAC ¶ 62. Ms. Young stated that Mr. Davidson

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20 ⁴ As Defendants point out, *Scott* is not an outlier. In *Deibler v. United Food and*
21 *Commercial Workers’ Local Union 23*, 973 F.2d 206, 210 (3rd Cir. 1992), the Third Circuit held
22 that minutes of a board meeting in which a union adopted a severance policy created an ERISA
23 plan. In *Williams v. Wright*, 927 F.2d 1540, 1543 (11th Cir. 1991), the company president set a
24 letter to a retiring employee in which he agreed the company would pay the employee \$500 every
25 month and provide other benefits. The Eleventh Circuit held that the letter created an ERISA plan.
26 In *Monk v. Performance Contrs., Inc.*, Civ. A. No. 10-1137, 2010 U.S. Dist. LEXIS 128467 (W.D.
27 La. Dec. 6, 2010), the plaintiff was rear-ended on his way home from work. Plaintiff alleged that
28 while he was being treated in the hospital emergency room, two employees agreed on behalf of the
defendant that defendant would pay all of plaintiff’s medical bills that he incurred as a result of the
accident. *Id.* at *2. Plaintiffs sued for breach of contract when defendant refused to pay. The
Monk court held that the promise created an ERISA plan. In *Parnello v. Time Ins. Co.*, Civ. A.
No. 91-20160, 1992 U.S. Dist. LEXIS 11422 (N.D. Ill. Mar. 9, 1992), the defendant orally
promised plaintiff that the company would provide health insurance as part of her employment
agreement. The *Parnello* court held that the oral agreement created an ERISA plan.

1 could move into the skilled care facility that Plaintiffs had found, and that there would no longer
2 be a 120-day review that could end in termination of his care. *Id.* In a follow-up call, Ms. Young
3 stated that they would have healthcare insurance for the remainder of Mr. Davidson’s life. Thus,
4 the intended benefits, beneficiaries, and source of financing are readily identified in the TAC. The
5 procedures for receiving benefits are not explicit. However, explicit procedures are not required to
6 create an ERISA plan so long as a reasonable person could ascertain the procedure for obtaining
7 benefits. *See e.g. Deibler v. United Food & Comm’l Workers’ Local Union 23*, 973 F.2d 206, 210
8 (3rd Cir. 1992) (citing *Donovan*, 688 F.2d at 1373) (“It is true that . . . the procedure for receiving
9 benefits were never made explicit, but it is enough if these can be ascertained from the
10 ‘surrounding circumstances.’”); *Petersen v. E.F. Johnson Co.*, No. 02-333, 2002 U.S. Dist. LEXIS
11 16052, 2002 WL 1975907, at *2 (D. Minn. Aug. 23, 2002) (“[W]hile the Program does not
12 explicitly contain procedures for receiving benefits, a reasonable person could ascertain the
13 informal procedures to follow.”). Here, a reasonable person could conclude that Plaintiffs’
14 medical benefits claims were to be submitted to HPE. In sum, the 2015 arrangement to provide
15 benefits created an ERISA plan.

16 Plaintiffs’ reliance on *Curtis v. Nevada Bonding Corp.*, 53 F.3d 1023 (9th Cir. 1995) is
17 misplaced. In *Curtis*, the plaintiff was promised his health and life benefits would take effect on
18 the first day of his employment. The parties agreed that the employer had a group insurance
19 policy that was governed by ERISA. Under the terms of that policy, however, a new employee
20 was not eligible for benefits during the first ninety days of employment. When plaintiff and his
21 family incurred some minor medical expenses, the defendants reimbursed plaintiff for the medical
22 expenses. When plaintiff later notified the defendants that he would be incurring significant
23 medical expenses to treat a malignant tumor, the defendants ceased reimbursing plaintiff. The
24 Ninth Circuit held that the oral promise and the parties’ “ad hoc arrangement” for medical expense
25 reimbursements were not sufficiently specific to “ascertain the intended benefits, beneficiaries,
26 source of financing, and procedures for receiving benefits” to create an ERISA plan. The present

1 case is distinguishable from *Curtis* because Ms. Young communicated specifics about the benefits
2 Plaintiffs would receive.

3 **B. Preemption**

4 ERISA preempts “any and all State laws insofar as they may now or hereafter relate to any
5 employee benefit plan” governed by ERISA. 29 U.S.C. § 1144(a); *Bui v. Am. Tel. & Tel. Co. Inc.*,
6 310 F.3d 1143, 1147 (9th Cir. 2002). The ERISA preemption clause covers state-law tort and
7 contract claims for improper processing of a claim for benefits. *Pilot Life Ins. Co. v. Dedeaux*,
8 481 U.S. 41, 48 (1987); *see also Johnson v. Dist. 2 Marine Eng’rs Beneficial Ass’n—Associated*
9 *Mar. Officers, Med. Plan*, 857 F.2d 514, 517 (9th Cir. 1988) (“Causes of action for fraud and
10 emotional distress are clearly state common-law claims for enforcement of plan benefits, matters
11 regulated by ERISA.”); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004) (holding that
12 because ERISA contains its own enforcement mechanism, “any state-law cause of action that
13 duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear
14 congressional intent to make the ERISA remedy exclusive and is therefore pre-empted”).

15 Plaintiffs’ claims arise out of several distinct sets of facts. First, at least Plaintiffs’
16 intentional infliction of emotional distress claim (Count I) and negligence claim (Count IV) arise
17 out of Defendants’ alleged threats to end his skilled care or provide for medical treatment. *See*,
18 *e.g.*, TAC ¶ 103 (alleging that “Defendants threatened to defy their promises, assurances, duties
19 and obligations in regard to his care or if his medical treatment and skilled care were evaded or
20 interrupted”). Second, at least Plaintiffs’ fraud and misrepresentation claim (Count II) and
21 negligence claim (Count IV) arise out of Defendants’ alleged false statements that Mr. Davidson
22 was not entitled to skilled care at a facility. *See, e.g.*, TAC ¶ 112 (referring to “statements and
23 representations that Jonathan Davidson was not entitled to have skilled medical care and skilled
24 care facilities”). These claims are preempted because they relate to the ERISA plan created in
25 2015. *See, e.g., Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47–48 (1987) (holding that state-law
26 claims are preempted if they “relate to” improper processing of a claim for benefits); *Spain v.*

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1 *Aetna Life Ins. Co.*, 11 F.3d 129, 131– 32 (9th Cir. 1993) (holding that ERISA preempted a
2 wrongful death claim based on a health plan administrator’s allegedly negligent decision to deny
3 eligibility for a bone marrow transplant); *Bast v. Prudential Ins. Co. of Am.*, 150 F.3d 1003, 1007–
4 08 (9th Cir. 1998) (also holding that ERISA preempted state-law claims related to denial of a bone
5 marrow transplant); *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988)
6 (holding that state-law claims arising from delayed insurance payments “are claims for improper
7 processing and therefore are preempted”). “Claimants simply cannot obtain relief by dressing up
8 an ERISA benefits claim in the garb of a state law tort.” *Dishman v. UNUM Life Ins. Co. of Am.*,
9 269 F.3d 974, 983 (9th Cir. 2001).

10 Third, Plaintiffs’ privacy claim (Count III) arises out of Defendants’ alleged improper
11 access of Mr. Davidson’s medical records and intrusion into Mr. Davidson’s computing and online
12 devices. *See, e.g.*, TAC ¶ 120 (alleging that Defendants have “used the Davidsons’ online
13 communication and their use of the United HealthCare website and portal to intrude in the laptop,
14 computing or communication devices of Jonathan and his family”). Defendants also allegedly
15 surveilled and monitored Plaintiffs to determine how long Mr. Davidson will survive. *Id.* “This
16 surveillance of the Davidsons has included the use of nurses, administrators, and other personnel
17 in [Mr. Davidson’s] care facilities to monitor and spy on the Davidsons and to report information
18 to United HealthCare and other Defendants, at times on a daily basis.” *Id.* Plaintiffs also allege
19 that Defendants have communicated, disseminated and publicly distributed Plaintiffs’ private
20 information and records to others that are not entitled or permitted to receive such information and
21 records. *Id.* This claim is not preempted. *Dishman*, 269 F.3d at 849 (holding that ERISA did not
22 preempt claim for invasion of privacy). Further, the court previously found that Plaintiffs’
23 allegations were sufficient to plausibly allege a claim for invasion of privacy. Defendants have
24 not presented any persuasive reason to reconsider the court’s ruling. Defendants’ motion to
25 dismiss the invasion of privacy claim is denied.

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C. Individual Defendants

Defendants renew their argument that the claims against Drs. Green, Stangel, Greenberg, Standig, and Does 1-50 should be dismissed because ERISA authorizes actions against individuals only if they act as fiduciaries, and doctors providing treatment do not act as fiduciaries. With the exception of the invasion of privacy claim, all claims asserted against these doctors and Does 1-50 are dismissed for the reasons set forth in the court’s previous Order Granting Defendants’ Motion To Dismiss Counts VI, VII, VIII, IX, and X of Plaintiff’s Amended Complaint (Dkt. No. 42).

IV. CONCLUSION AND ORDER

Defendants’ motion to dismiss is GRANTED as to all claims except Plaintiffs’ invasion of privacy claim. All claims against the individual defendants are DISMISSED except for Plaintiffs’ invasion of privacy claim. The dismissal is without leave to amend because Plaintiffs have now had several opportunities to amend their complaint and any further amendments are likely to be futile.

IT IS SO ORDERED.

Dated: August 15, 2019



EDWARD J. DAVILA
United States District Judge