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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

RICHA NARANG,

Plaintiff,

v.

GERBER LIFE INSURANCE COMPANY,
et al.,

Defendants.

Case No. 18-CV-04500-LHK

**ORDER GRANTING MOTION TO
DISMISS WITHOUT PREJUDICE**

Re: Dkt. No. 18

Plaintiff Richa Narang (“Plaintiff”) filed her original complaint in the Superior Court of California on July 2, 2015. ECF No. 1-3. On June 27, 2018, Plaintiff amended her original complaint and added Gerber Life Insurance Company (“Gerber”) as a Defendant. *Id.* On July 25, 2018, Gerber removed the action to federal court on the ground that the Plaintiff’s claims against Gerber arise under and are preempted by the Employee Retirement Income Security Act of 1974 (“ERISA”). ECF No. 1. The claims against all other Defendants in this action have been severed and remanded. ECF No. 29. Before the Court is Gerber’s motion to dismiss the first amended complaint, or in the alternative, motion for summary judgment. ECF No. 18 (“Mot.”). Having considered the parties’ briefs, the relevant law, and the record in this case, the Court GRANTS Gerber’s motion to dismiss without prejudice.

1 **I. BACKGROUND**

2 **A. Factual Background**

3 Plaintiff Richa Narang is a California resident and the spouse of decedent Rajiv Narang.
4 FAC ¶ 1. Defendant Gerber is a New York corporation that does business in California as an
5 insurance corporation. *Id.* ¶ 6. On July 4, 2013, Plaintiff’s spouse, Rajiv Narang drowned in the
6 swimming pool that was on the property the Narangs were leasing in Santa Clara County. *Id.* ¶¶
7 15–21; Opp’n at 1.

8 Rajiv Narang was insured by his employer eBay, Inc. through Gerber Life Insurance, and
9 Plaintiff Richa Narang is the third-party beneficiary to that Gerber Insurance Policy. FAC ¶ 22;
10 Opp’n at 1–2. As discussed below, Plaintiff sued Gerber to recover \$2 million in benefits due to
11 the loss of her husband. FAC ¶ 22.

12 **B. Procedural History**

13 On July 2, 2015, Plaintiff filed in the Superior Court of California a complaint asserting
14 claims of negligence, premises liability, and failure to disclose against Defendants Bhupesh Patel
15 and Shivaun E. Patel (the property owners of the property with the pool); Realty World Santa
16 Clara Valley (a property management company); and Robert Zuvela (an agent and broker
17 affiliated with Realty World Santa Clara Valley) (collectively, “Tort Defendants”). ECF No. 18-2;
18 *see also* FAC ¶¶ 1–5. This complaint also named Doe Defendants 1 to 100. ECF No. 18-2.

19 On June 27, 2018,¹ Plaintiff filed her first amended complaint (“FAC”) in the Superior
20 Court of California. *See* FAC. In addition to the original claims against the Tort Defendants, the
21 FAC added Gerber as a Defendant and asserted three state law causes of action against Gerber:
22 breach of contract, bad faith claims handling, and unfair business practices. *Id.* In particular,
23 Plaintiff alleged against Gerber that:

24 22. At the time of his passing and in consideration of the payment of premiums made
25 by Plaintiff, Defendant [Gerber], by its duly authorized agents, executed policy
26 number PAI-2034 and ADD-2036, (hereinafter collectively “Policy”), in which

27 ¹ The state court record made available by the parties does not explain the gap between the filing
28 of Plaintiff’s original complaint on July 2, 2015 and the filing of Plaintiff’s FAC on June 27, 2018.

1 Defendant [Gerber] insured Plaintiff against bodily injury arising out of Accidental
2 Death and Loss of Use Benefit in an aggregate amount of two million dollars
(\$2,000,000.00). Plaintiff was the direct beneficiary of this insurance policy.

3 23. Plaintiff made a timely claim to Defendant [Gerber] under the Policy based on
4 the fact that the Public Health Department of the County of Santa Clara found that
5 the immediate cause of the death of Rajiv Narang was “freshwater drowning” as
reflected on the Certificate of Death dated July 17, 2013.

6 24. Defendant [Gerber] denied the timely claim of Plaintiff and has refused to pay
7 on the Policy claiming that the cause of [death of] Rajiv Narang was due to a
“disease.”

8 FAC ¶¶ 22–24.

9 On July 25, 2018, Gerber removed the action to federal court pursuant to 28 U.S.C.
10 §§ 1331, 1441, and 1446 on the ground that Plaintiff’s three causes of action against Gerber—
11 breach of contract, bad faith claims handling, and unfair business practices—are predicated on the
12 allegation that Gerber wrongfully denied Plaintiff’s claim for insurance benefits, and that as a
13 result, ERISA preempts these state law claims against Gerber. ECF No. 1 ¶¶ 8, 14 (citing *Metro.*
14 *Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987)).

15 On July 27, 2018, Gerber filed a motion to sever and remand all of the causes of action
16 against the Tort Defendants to state court. ECF No. 2. After a series of extensions, Plaintiff filed
17 her response on September 7, 2018. ECF No. 17. In her response, Plaintiff explained that she
18 concurred that her claims against Defendant Gerber were properly removed to federal court, and
19 that the claims against the Tort Defendants should be remanded to state court. *Id.* On September
20 14, 2018, Gerber filed its reply. ECF No. 20. On October 12, 2018, the Court granted Gerber’s
21 motion to sever and remand the claims against the Tort Defendants to the Superior Court of
22 California. ECF No. 29. Accordingly, the only remaining claims and Defendant in this federal
23 action are Plaintiff’s claims against Gerber for breach of contract, bad faith claims handling, and
24 unfair business practices. *See id.* Gerber contends that these claims are preempted by ERISA. ECF
25 No. 1.

26 On September 14, 2018, Gerber filed its instant motion to dismiss the FAC, or in the
27 alternative, motion for summary judgment. *See Mot.* On October 14, 2018, Plaintiff untimely filed

1 her instant opposition to Gerber’s motion to dismiss the FAC, or in the alternative, motion for
2 summary judgment. ECF No. 32 (“Opp’n”). Gerber filed a proposed order on October 15, 2018,
3 ECF No. 34, and replied on October 19, 2018, ECF No. 35 (“Reply”).

4 **II. LEGAL STANDARD**

5 **A. Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(6)**

6 Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a complaint to include “a
7 short and plain statement of the claim showing that the pleader is entitled to relief.” A complaint
8 that fails to meet this standard may be dismissed pursuant to Federal Rule of Civil Procedure
9 12(b)(6). The United States Supreme Court has held that Rule 8(a) requires a plaintiff to plead
10 “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v.*
11 *Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads
12 factual content that allows the court to draw the reasonable inference that the defendant is liable
13 for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “The plausibility
14 standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a
15 defendant has acted unlawfully.” *Id.* (internal quotation marks omitted). For purposes of ruling on
16 a Rule 12(b)(6) motion, the Court “accept[s] factual allegations in the complaint as true and
17 construe[s] the pleadings in the light most favorable to the nonmoving party.” *Manzarek v. St.*
18 *Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

19 The Court, however, need not accept as true allegations contradicted by judicially
20 noticeable facts, *see Schwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and it “may look
21 beyond the plaintiff’s complaint to matters of public record” without converting the Rule 12(b)(6)
22 motion into a motion for summary judgment, *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir.
23 1995). Nor must the Court “assume the truth of legal conclusions merely because they are cast in
24 the form of factual allegations.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per
25 curiam) (internal quotation marks omitted). Mere “conclusory allegations of law and unwarranted
26 inferences are insufficient to defeat a motion to dismiss.” *Adams v. Johnson*, 355 F.3d 1179, 1183
27 (9th Cir. 2004).

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B. Leave to Amend

If the Court determines that a complaint should be dismissed, it must then decide whether to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend “shall be freely given when justice so requires,” bearing in mind “the underlying purpose of Rule 15 to facilitate decisions on the merits, rather than on the pleadings or technicalities.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (alterations and internal quotation marks omitted). When dismissing a complaint for failure to state a claim, “a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.” *Id.* at 1130 (internal quotation marks omitted). Accordingly, leave to amend generally shall be denied only if allowing amendment would unduly prejudice the opposing party, cause undue delay, or be futile, or if the moving party has acted in bad faith. *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 532 (9th Cir. 2008).

III. DISCUSSION

Gerber argues that Plaintiff’s breach of contract, bad faith claims handling, and unfair business practices claims against Gerber should be dismissed² because these state law claims are preempted by ERISA and therefore Plaintiff’s exclusive remedy is a claim for benefits pursuant to 29 U.S.C. § 1132(a)(1)(B). Mot. at 1, 8–10, 15–16. Gerber also argues that Plaintiff’s claims should be dismissed because: Plaintiff’s lawsuit is (1) barred by the ERISA Policies’ 3-year contractual limitation of actions provision; (2) barred by the 4-year statute of limitations on contract actions in California; and (3) barred because Plaintiff failed to exhaust administrative remedies by requesting an appeal as required by ERISA before initiating suit. *Id.* at 1–2, 10–15.

In her responsive brief, Plaintiff does not oppose Defendant’s argument that Plaintiff’s state law claims against Gerber are preempted by ERISA and that Plaintiff’s exclusive remedy is a claim for benefits pursuant to 29 U.S.C. § 1132(a)(1)(B). *See* Opp’n. As for Gerber’s other three

² Gerber also requests that the Court grant summary judgment in the alternative. *See* Mot. Because the Court dismisses Plaintiff’s suit against Gerber, Gerber’s motion for summary judgment in the alternative is DENIED as moot.

1 arguments, Plaintiff does not dispute the applicable statute of limitations or the exhaustion
2 requirement. *See id.* Instead, Plaintiff argues that the statute of limitations is tolled because of the
3 discovery rule. *Id.* at 2–3. Plaintiff argues second that the relation back doctrine applies to save her
4 claims from the statute of limitations. *Id.* at 3–6.

5 The Court GRANTS Gerber’s motion to dismiss on the grounds that Plaintiff has failed to
6 oppose Gerber’s contention that Plaintiff’s state law claims against Gerber are preempted by
7 ERISA. Therefore, the Court need not address Gerber’s arguments regarding the statute of
8 limitations or exhaustion.

9 Courts have previously held that a plaintiff’s failure to oppose a defendant’s argument was
10 a concession that such claims should be dismissed. *See, e.g., Marziano v. County of Marin*, No. C-
11 10-2740 EMC, 2010 WL 3895528, at *4 (N.D. Cal. Oct. 4, 2010) (construing plaintiff’s failure to
12 oppose defendants’ arguments as a concession that the claim should be dismissed); *Wooten v.*
13 *Countrywide Home Loans Inc.*, No. CIV S-11-1791 MCE DAD PS, 2012 WL 3463460, at *5
14 (E.D. Cal. Feb. 1, 2012) (“[P]laintiff’s original complaint contains claims which plaintiff did not
15 address in responding to defendants’ motions. . . . A failure to oppose a dispositive motion may be
16 construed as abandoning the subject claims.”); *GN Resound A/S v. Callpod, Inc.*, No. C 11-04673
17 SBA, 2013 WL 1190651 (N.D. Cal. Mar. 21, 2013) (construing plaintiff’s failure to oppose
18 defendant’s argument as a concession of said argument). The Court deems Plaintiff’s failure to
19 oppose Defendant’s contention that ERISA preemption applies a concession that Plaintiff’s state
20 law claims should be dismissed for ERISA preemption. Indeed, in her response to Gerber’s
21 motion to sever and remand the claims against the Tort Defendants, Plaintiff conceded that
22 Plaintiff’s claims against Gerber were preempted by ERISA. *See* ECF No. 17. Yet Plaintiff has
23 failed to amend her complaint to reflect these concessions.

24 Moreover, without ruling on the merits of Gerber’s contention, the Court notes that statutes
25 and case law support Gerber’s contention. As the Ninth Circuit has explained, “[t]here are two
26 strands of ERISA preemption: (1) ‘express’ preemption under ERISA § 514(a), 29 U.S.C. §
27 1144(a); and (2) preemption due to a ‘conflict’ with ERISA’s exclusive remedial scheme set forth

1 in [ERISA § 502(a),] 29 U.S.C. § 1132(a).” *Fossen v. Blue Cross and Blue Shield of Mont., Inc.*,
2 660 F.3d 1102, 1107 (9th Cir. 2011). “All of these preemption provisions defeat state-law causes
3 of action on the merits.” *Id.* At issue here, according to Defendant’s motion to dismiss, is the
4 second strand (ERISA § 502(a)). Under ERISA § 502(a), a civil enforcement action may be
5 brought:

6 (1) by a participant or beneficiary—

7 . . .
8 (B) to recover benefits due to him under the terms of his plan, to enforce his rights
9 under the terms of the plan, or to clarify his rights to future benefits under the
10 terms of the plan[.]

11 29 U.S.C. § 1132(a)(1)(B). Pursuant to this provision, a “state-law cause of action that duplicates,
12 supplements, or supplants the ERISA civil enforcement remedy” is preempted because it
13 “conflicts with the clear congressional intent to make the ERISA remedy exclusive.” *Aetna Health
14 Inc. v. Davila*, 542 U.S. 200, 209 (2004).

15 Furthermore, several courts have dismissed a complaint after finding that the plaintiff’s
16 state law causes of action were preempted by ERISA. *See, e.g., Cleghorn v. Blue Shield of
17 California*, 408 F.3d 1222, 1227 (9th Cir. 2005) (“Cleghorn’s state-law causes of action against
18 Blue Shield, arising from Blue Shield’s denial of benefits under an ERISA plan, conflict with the
19 exclusive civil enforcement scheme established by Congress in section 502(a) of ERISA. The state
20 law claims are preempted for that reason. We accordingly affirm the judgment of the district court
21 dismissing Cleghorn’s complaint.”); *Futterman v. Kaiser Foundation Health Plan, Inc.*, No. 13-
22 CV-5416-TEH, 2014 WL 825165, at *2 (N.D. Cal. Feb. 28, 2014) (“Here, Plaintiffs concede that
23 Mortenson’s breach of contract and breach of good faith and fair dealing claims are completely
24 preempted by ERISA and should be dismissed”); *Leonard v. Metlife Insurance Co.*, No. 2:12-CV-
25 10003-SVW-SS, 2013 WL 12210177 (C.D. Cal. Feb. 25, 2013) (finding plaintiff’s bad faith and
26 UCL claims preempted by ERISA and granting defendant’s motion to dismiss without prejudice);
27 *Saylor v. UNUM Life Ins. Co. of Am.*, No. SACV 11-0175 DOC (RZx), 2011 WL 2883320, at *3-
28 4 (C.D. Cal. July 15, 2011) (finding plaintiff’s state law negligent misrepresentation claim

1 preempted by ERISA and granting motion to dismiss that claim).

2 Accordingly, the Court GRANTS Defendant’s motion to dismiss. Defendant does not
3 oppose giving Plaintiff leave to amend. *See* Mot. at 16 (“Based on the above law, in the event that
4 this Court does not dismiss Plaintiff’s claims based on the applicable contractual limitation of
5 actions, statutory limitations of actions, or failure to exhaust administrative remedies, then this
6 Court should dismiss Plaintiff’s First Amended Complaint with leave to amend her Complaint to
7 allege claims for relief and remedies consistent with ERISA.”). Moreover, given Plaintiff’s
8 concession that her state law claims against Gerber are preempted by ERISA, the Court finds that
9 Plaintiff should be given an opportunity to amend her complaint to assert claims under ERISA.
10 *See, e.g., Futterman*, 2014 WL 825165, at *3 (“As all of Mortenson’s state law claims are
11 preempted and dismissed, Plaintiffs must now be given an opportunity to amend the complaint to
12 assert claims under ERISA.”). Accordingly, the Court dismisses Plaintiff’s complaint with leave to
13 amend.

14 **IV. CONCLUSION**

15 For the foregoing reasons, Defendant’s motion to dismiss is GRANTED without prejudice.
16 If Plaintiff elects to file a third amended complaint, Plaintiff must do so within 30 days of this
17 order. If Plaintiff fails to file an amended complaint within 30 days, Plaintiff’s case will be
18 dismissed with prejudice. Plaintiff may amend her complaint to assert ERISA claims without
19 further leave of the Court; otherwise, Plaintiff may not add new causes of action or new parties
20 without stipulation or leave of the Court. Additionally, Plaintiff’s putative third amended
21 complaint should address the other deficiencies identified in Gerber’s motion to dismiss or
22 possibly face dismissal with prejudice. Plaintiff’s putative third amended complaint should also
23 remove the Tort Defendants and the claims asserted against the Tort Defendants as per this
24 Court’s previous order granting the motion to sever and remand those Defendants and claims. ECF
25 No. 29.

26 **IT IS SO ORDERED.**

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Dated: December 21, 2018



LUCY H. KOH
United States District Judge