IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WILLIAM PALMERI,

Plaintiff,

v.

CITADEL BROADCASTING, et al.,

Defendants.

CIVIL ACTION NO. 3:17-cv-00764

(JUDGE CAPUTO)

MEMORANDUM

Presently before the Court is a Motion to Dismiss (Doc. 4) filed by Defendants Cumulus Intermediate Holdings Inc. f/n/a Citadel Broadcasting Corporation, and Cumulus Media Inc. (collectively "Defendants"). For the reasons that follow, Defendants' Motion will be granted.

I. Background

The well-pleaded facts as set forth in Plaintiff's Complaint (Doc. 1-2) are as follows:

Plaintiff William Palmeri began working at Citadel Broadcasting Corporation on September 30, 2003. Mr. Palmeri was promoted to the position of Market Manager, a position he held with the company until his involuntary separation on June 29, 2012.[1] At the time of his termination, Mr. Palmeri had been an employee of the Defendants' companies for approximately nine (9) years. As a Market Manager, Mr. Palmeri was provided quarterly goals to meet within his market and among his sales staff. On April 23, 2012, Mr. Palmeri was provided with confirmed quarterly sales goals for the second quarter of 2012. At the time he received the confirmed quarterly sales goals for the second quarter of 2012, the quarter had already begun. On June 29, 2012–the last day of the second quarter–Mr. Palmeri was terminated for not meeting his quarterly sales goals. Mr. Palmeri was fired

[1] Citadel Broadcasting Corporation was acquired by Defendant Cumulus Media, Inc. on September 16, 2011. (Compl. ¶ 21.)

before the end of the second quarter. Mr. Palmeri alleges that Defendants' decision to terminate him prior to the end of the quarter allowed Defendants to avoid reviewing the sales goals and created a pretextual basis for terminating him "for cause." This allowed Defendants to attempt to avoid paying Mr. Palmeri under the new severance plan (the "Plan") created by Defendant Cumulus Media Inc., the successor parent company.

Palmeri was eligible for severance payments under the Plan (Ex. A, Doc. 1-2), which equaled approximately eighteen (18) weeks of pay.[2] At a base pay of $2,788.46 per week at the time of his termination, Mr. Palmeri was allegedly entitled to $50,192.28 in severance pay. However, Mr. Palmeri received only two (2) weeks of additional base pay. Moreover, upon his termination, Mr. Palmeri was provided with a separation agreement that failed to provide any information as to his health insurance benefits or his opportunity to continue his benefits through the COBRA program. Mr. Palmeri alleges that Defendants failed to properly and appropriately provide him with benefits and severance compensation. Plaintiff does not dispute that the Plan at issue is controlled by ERISA. (*See* Br. in Opp'n 3-4, Doc. 11.)

II. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint, in whole or in part, for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). When considering a Rule 12(b)(6) motion, the Court's role is limited to determining if a plaintiff is entitled to offer evidence in support of her claims. *See Semerenko v. Cendant Corp.*, 223 F.3d 165, 173 (3d Cir. 2000). The Court does not consider whether a plaintiff will ultimately prevail. *Id.* A defendant bears the burden of establishing that a plaintiff's complaint fails to state a claim. *See Gould Elecs. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000).

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[2] Per the terms of the Plan, "upon a qualifying termination of employment each Full-Time employee shall receive a severance payment equal to two (2) weeks of Base Pay for each Year of Service. . . ."

A pleading that states a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The statement required by Rule 8(a)(2) must "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Detailed factual allegations are not required. *Twombly*, 550 U.S. at 555. However, mere conclusory statements will not do; "a complaint must do more than allege the plaintiff's entitlement to relief." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). Instead, a complaint must "show" this entitlement by alleging sufficient facts. *Id*. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009). As such, "[t]he touchstone of the pleading standard is plausibility." *Bistrian v. Levi*, 696 F.3d 352, 365 (3d Cir. 2012).

The inquiry at the motion to dismiss stage is "normally broken into three parts: (1) identifying the elements of the claim, (2) reviewing the complaint to strike conclusory allegations, and then (3) looking at the well-pleaded components of the complaint and evaluating whether all of the elements identified in part one of the inquiry are sufficiently alleged." *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011).

Dismissal is appropriate only if, accepting as true all the facts alleged in the complaint, a plaintiff has not pleaded "enough facts to state a claim to relief that is plausible on its face," *Twombly*, 550 U.S. at 570, meaning enough factual allegations "'to raise a reasonable expectation that discovery will reveal evidence of'" each necessary element. *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (quoting *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679**.**

In deciding a motion to dismiss, the Court should consider the complaint, exhibits attached to the complaint, and matters of public record. *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010) (citing *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993)). The Court may also consider "undisputedly authentic" documents when the plaintiff's claims are based on the documents and the defendant has attached copies of the documents to the motion to dismiss. *Pension Benefit Guar. Corp.*, 998 F.2d at 1196. The Court need not assume that the plaintiff can prove facts that were not alleged in the complaint, *see City of Pittsburgh v. W. Penn Power Co.*, 147 F.3d 256, 263 & n.13 (3d Cir. 1998), or credit a complaint's "'bald assertions'" or "'legal conclusions,'" *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1429–30 (3d Cir. 1997)).

III. Discussion

Plaintiff filed a Writ of Summons in the Court of Common Pleas of Luzerne County on August 9, 2012. (Doc. 1-2.) The Complaint was filed on April 11, 2017 and contains two Counts: (1) breach of contract, and (2) unjust enrichment. Defendants removed the action to this Court on May 1, 2017, on the basis that Plaintiff's state-law claims are completely preempted pursuant to ERISA § 502(a). (*See* Doc. 1 ¶¶ 14-18.) On May 8, 2017, Defendants filed the instant Motion to Dismiss. (Doc. 4.) After Plaintiff failed to timely file a Brief in Opposition to Defendants' Motion, the Court ordered Plaintiff to file such a Brief within the time prescribed or risk the Court granting Defendants' Motion without a merits analysis. (Doc. 9.) Thereafter, Plaintiff filed a Brief in Opposition in accordance with the Court's Order. (Doc. 11.) Defendants filed a Reply Brief on July 5, 2017. (Doc. 12.) The matter is ripe for disposition.

A. Plaintiff's State-Law Claims Are Expressly Preempted

Plaintiff's state-law claims are expressly preempted by ERISA § 514(a) and therefore must be dismissed. "ERISA's express preemption provision provides that

ERISA's regulatory structure 'shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [subject to ERISA].'" *Menkes v. Prudential Ins. Co. of Am.*, 762 F.3d 285, 293 (3d Cir. 2014) (quoting 29 U.S.C. § 1144(a)). The text "relate to" is "given a broad, common-sense meaning, such that a state law 'relates to' an employee benefit plan" subject to ERISA "if it has a connection with or reference to such a plan." *Id.* at 294 (citation omitted). Notably, "[s]tate common law claims . . . routinely fall within the ambit of § 514." *Id.*

Here, Plaintiff's claims for breach of contract and unjust enrichment are expressly preempted, as they "explicitly require reference to [the Plan] and what it covers[.]" *Id.* at 296; *see Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47-48 (1987); *Hayes v. Reliance Standard Life Ins. Co.*, 92 F. Supp. 3d 276, 291 (M.D. Pa. 2015). Indeed, Plaintiff concedes that ERISA preempts his state-law claims. (Br. in Opp'n 4-6.) Rather than opposing the merits of Defendants' Motion, Plaintiff requests the Court to convert his state-law claims to ERISA claims or grant Plaintiff leave to amend. (*Id.* at 4 & n.1.) If Plaintiff wishes to pursue this action, he must file an amended complaint setting forth appropriate ERISA claims, and he will be granted leave to do so. *See Estate of Jennings v. Delta Air Lines, Inc.*, 126 F. Supp. 3d 461, 471 (D.N.J. 2015).

Defendants argue against granting Plaintiff leave to amend on the ground that he failed to exhaust his administrative remedies and, therefore, any amendment would be futile. (Br. in Supp. 8-12.) Defendants are correct that "a plaintiff cannot seek relief in the federal courts for an ERISA claim unless he or she has first exhausted available administrative remedies under the particular ERISA plan." *Harding v. Provident Life & Acc. Ins. Co.*, 809 F. Supp. 2d 403, 420 (W.D. Pa. 2011) (citing *D'Amico v. CBS Corp.*, 297 F.3d 287, 291 (3d Cir. 2002)). Thus, "[e]xcept in limited circumstances . . . a federal court will not entertain an ERISA claim unless the plaintiff has exhausted the remedies available under the plan." *Harrow v. Prudential Ins. Co. of Am.*, 279 F.3d 244, 249 (3d Cir. 2002)

(citations omitted). However, administrative exhaustion under ERISA is a judicially created non-jurisdictional affirmative defense, *see Metro. Life Ins. Co. v. Price*, 501 F.3d 271, 280 (3d Cir. 2007), for which Defendant bears the burden of proof, *see Jakimas v. Hoffmann-La Roche, Inc.*, 485 F.3d 770, 782 (3d Cir. 2007). Accordingly, Plaintiff's failure to allege that he exhausted his administrative remedies does not necessarily warrant dismissal on a Rule 12(b)(6) motion. *See Deblasio v. Cent. Metals, Inc.*, 2014 WL 2919557, at *3 (D.N.J. June 27, 2014). However, Plaintiff concedes that he did not exhaust his administrative remedies. (Br. in Opp'n 6.) Instead, Plaintiff attempts to demonstrate that exhaustion would have been futile by relying upon multiple documents attached to his Brief in Opposition that were not incorporated or attached to the Complaint. (*See id.* at 6-9.) As evidenced by Plaintiff's Brief, the question of futility "can be a fact-intensive inquiry, and therefore may be ill-suited for resolution on the pleadings." *NJSR Surgical Ctr., L.L.C. v. Horizon Blue Cross Blue Shield of N.J., Inc.*, 979 F. Supp. 2d 513, 525 (D.N.J. 2013); *see Metro. Life Ins. Co.*, 501 F.3d at 279 (explaining that the futility exception requires a court to engage in a "fact-sensitive balancing of factors"). Indeed, in order for the Court to assess whether it would have been futile for Plaintiff to exhaust his administrative remedies, the Court would have to consider extraneous documents and delve into matters outside of the pleadings.[3] The Court finds it more appropriate to dismiss Plaintiff's Complaint on the basis of

[3] For similar reasons, the Court declines to consider Defendants' statute of limitations argument at this stage. For one, this argument was first raised in Defendants' Reply Brief (Doc. 12), which is improper. *See Westawski v. Merck & Co., Inc.*, 2015 WL 463949, at *12 (E.D. Pa. Feb. 4, 2015). Additionally, it would require the Court to consider documents extraneous to the pleadings, which is also improper. *See Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1384 n.1 (3d Cir. 1994) (noting that a court may consider a statute of limitations argument in a motion to dismiss if "the *complaint* facially shows noncompliance with the limitations period and the affirmative defense clearly appears on the face of the pleading") (emphasis added). Defendants are free to raise this affirmative defense upon proper motion if Plaintiff elects to file an amended complaint.

express preemption, provide Plaintiff with an opportunity to amend in light of this Memorandum, and, if Plaintiff chooses to do so, consider the question of futility upon a proper motion. *See id.*

B. Leave to Amend

The Third Circuit has instructed that if a complaint is vulnerable to a 12(b)(6) dismissal, the district court must permit a curative amendment, unless an amendment would be inequitable or futile. *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 236 (3d Cir. 2008); *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108 (3d Cir. 2002) (citing *Shane v. Fauver*, 213 F.3d 113, 116 (3d Cir. 2000)). The Court will provide Plaintiff with an opportunity to file an amended complaint which sets forth appropriate ERISA claims. For the reasons stated above, the Court declines to decide whether exhaustion would have been futile upon Defendants' instant Motion to Dismiss. Considering that Defendants' only argument against granting leave in its Brief in Support is that Plaintiff's failure to exhaust renders any amendment futile, the Court has been presented with no convincing reason for denying Plaintiff's request for leave to amend under the circumstances of this case. Accordingly, Plaintiff will be granted leave to file an amended complaint in accordance with this Memorandum and accompanying Order. *See Estate of Jennings*, 126 F. Supp. 3d at 471.

IV. Conclusion

For the above stated reasons, Defendants' Motion to Dismiss (Doc. 4) will be granted.

An appropriate order follows.

July 24, 2017
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge