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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
8

9 REGENCE BLUESHIELD,

10 Plaintiff,

11 v.

12 SUSAN FINN,

13 Defendant.
14

No. 1:16-cv-03011-SAB

**ORDER RE: PENDING
MOTIONS**

15 Before the Court are Plaintiff's Motion to Dismiss Finn's Counterclaim and
16 Motion to Strike Jury Demand, ECF No. 26; Plaintiff's Motion for Judgment on
17 the Pleadings, ECF No. 31; Defendant's Motion to Continue Hearings, ECF No.
18 41; Defendant's Motion to Strike Inadmissible Portions of the Declaration of
19 Regence's Subrogation Coordinator, Lisa Jones, ECF No. 44; and Defendant's
20 Motion to Strike the Second Declaration of Regence's Lisa Jones, ECF No. 50.
21 The motions were heard without oral argument.

22 Plaintiff is represented by J. Gordon Howard and Medora Marisseau.
23 Defendant is represented by Douglas Nicholson.

24 **MOTIONS STANDARD**

25 **1. Fed. R. Civ. P. 12(b)(6)**

26 Pursuant to Fed. R. Civ. P. 12(b)(6), a defendant may move to dismiss a
27 complaint for "failure to state a claim upon which relief may be granted." In
28 analyzing motions to dismiss, the Court must accept as true all well-pleaded

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1 factual allegations. *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1043 (9th Cir.
2 2010).

3 For a complaint to survive a motion to dismiss, the non-conclusory “factual
4 content,” and reasonable inferences from that content, must be plausibly
5 suggestive of a claim entitling the plaintiff to relief. *Moss v. U.S. Secret Service*,
6 572 F.3d 962, 969 (9th Cir. 2009). “A claim has facial plausibility . . . when the
7 plaintiff pleads factual content that allows the court to draw the reasonable
8 inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting
9 *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “The plausibility standard is not akin
10 to a ‘probability requirement,’ but it asks for more than a sheer possibility that a
11 defendant has acted unlawfully.” *Id.* (citation omitted) “Where a complaint pleads
12 facts that are ‘merely consistent with’ a defendant's liability, it ‘stops short of the
13 line between possibility and plausibility of entitlement to relief.’ ” *Id.* (citation
14 omitted).

15 As the Supreme Court explained:

16 [A] court considering a motion to dismiss can choose to begin by
17 identifying pleadings that, because they are no more than conclusions,
18 are not entitled to the assumption of truth. While legal conclusions
19 can provide the framework of a complaint, they must be supported by
20 factual allegations. When there are well-pleaded factual allegations, a
21 court should assume their veracity and then determine whether they
22 plausibly give rise to an entitlement to relief.

21 *Ashcroft*, 556 U.S. at 679.

22 **2. Fed. R. Civ. P. 12(c)**

23 In reviewing a Fed. R. Civ. P. 12(c) motion for judgment on the pleadings,
24 the court must accept all factual allegations in the complaint as true and construe
25 them in the light most favorable to the non-moving party. *Fleming v. Pickard*, 581
26 F.3d 922, 925 (9th Cir. 2009). Judgment on the pleadings is properly granted when
27 there is no issue of material fact in dispute, and the moving party is entitled to
28 judgment as a matter of law. *Id.*

BACKGROUND FACTS

1
2 Plaintiff Regence Blueshield, an insurance company, is the administrator for
3 a Health & Benefit Plan (“Plan”) sponsored by Puget Sound Energy, Inc. (“PSE”).
4 Plaintiff brought suit to enforce the terms of the Plan and to obtain equitable relief.
5 The underlying dispute involves medical expenses paid by the Plan on behalf of
6 Defendant Susan Finn.

7 Defendant Finn receives medical coverage from PSE, her husband’s
8 employer. The medical coverage is provided to PSE employees pursuant to a
9 collective bargaining agreement with the International Brotherhood of Electrical
10 Workers Local Union no. 77.

11 In October, 2012, Defendant and her husband were riding bikes in
12 Ellensburg, Washington. Defendant was chased down by a large dog and knocked
13 off her bike. She sustained injuries, including injuries to her left shoulder. She
14 maintains she is unable to make full use of her shoulder, and there are no more
15 medical options available to improve or correct the problem. The Plan paid
16 \$45,363.44 for Defendant’s medical expenses.

17 Defendant and her husband sued the dog owner and the home owner in
18 Kittitas County Superior Court, and eventually settled with the dog owner for the
19 policy limit amount of \$100,000. The parties disagree about whether Defendant
20 needs to reimburse Plaintiff out of the settlement proceeds for the medical
21 expenses it paid. Their disagreement centers on which Plan was in effect at the
22 time of the accident.

23 Plaintiff maintains that the 2012 Plan, memorialized by the 2012 Summary
24 Plan Description (“SPD”), was in effect at the time of the accident. The 2012 SPD
25 has a Right of Reimbursement and Subrogation Recovery provision, which states,
26 in part, that coverage under the Plan will not be provided for any medical expenses
27 for treatment of an injury that may be recoverable from a third party. This
28 provision also states that acceptance or making a claim for benefit indicates that

1 the insured agreed that the Plan is entitled to reimbursement of the full amount of
2 benefits paid out of any settlement or recovery from any source. Most important,
3 the 2012 SPD provides that “[t]he Plan is entitled to reimbursement from the first
4 dollars received from any recovery.” ECF No. 1.

5 Defendant maintains the 2011 Plan was in effect at the time of the accident,
6 and that her husband never received a copy of the 2012 Plan until after this
7 litigation commenced. The 2011 Plan contains a “make-whole” provision, which
8 provides that Plaintiff’s right of reimbursement is not triggered unless and until
9 the insured has been fully compensated for his or her loss. The 2011 Plan also
10 specifically indicates that it is effective January 1, 2011, and that although
11 modifications and amendments can be made from time to time, no such
12 modifications or amendments will be effective until 30 days written notice has
13 been given to the members of the group.

14 **PROCEDURAL HISTORY**

15 On January 20, 2016, Plaintiff filed suit seeking to enforce the terms of the
16 Plan and for equitable relief pursuant to Employee Retirement Income Security
17 Act of 1974 (“ERISA”). It also sought a temporary restraining order enjoining
18 Defendant’s counsel from disbursing the settlement proceeds. The Court granted
19 the TRO and the parties stipulated to the entry of a preliminary injunction in which
20 Defendant’s counsel agreed to maintain the \$45,363,44 in his law firm’s IOLTA
21 trust.

22 In its First Amended Answer to the Complaint, Defendant asserted the
23 following state law counterclaims: (1) breach of contract; (2) breach of implied
24 covenant of good faith and fair dealing; (3) insurance bad faith; (4) violation of the
25 Washington Consumer Protection Act; (5) breach of fiduciary duty; (6) abuse of
26 process; and (7) negligence.

27 **ERISA**

28 The Employee Retirement Income Security Act (ERISA) was passed by

1 Congress to “protect . . . the interests of participants in employee benefit plans and
2 their beneficiaries” by setting out substantive regulatory requirements for
3 employee benefit plans and to “provid[e] for appropriate remedies, sanctions, and
4 ready access to the Federal Courts.” 29 U.S.C. § 1001(b). The purpose of ERISA
5 is to provide a uniform regulatory regime over employee benefit plans. *Aetna*
6 *Health Inc. v. Davila*, 542 U.S. 200, 208 (2004).

7 Only employee benefit plans within the meaning of 29 U.S.C. § 1002(1) are
8 subject to ERISA, which defines “employee welfare benefit plan” and “welfare
9 plan” as:

10 any plan, fund, or program which was heretofore or is hereafter
11 established or maintained by an employer or by an employee
12 organization, or by both, to the extent that such plan, fund, or
13 program was established or is maintained for the purpose of
14 providing for its participants or their beneficiaries, through the
15 purchase of insurance or otherwise, (A) medical, surgical, or hospital
16 care or benefits, or benefits in the event of sickness, accident,
17 disability, death or unemployment, or vacation benefits,
18 apprenticeship or other training programs, or day care centers,
19 scholarship funds, or prepaid legal services, or (B) any benefit
20 described in section 186(c) of this title (other than pensions on
21 retirement or death, and insurance to provide such pensions).

22 29 U.S.C. § 1191b defines the “term ‘group health plan’ as:

23 an employee welfare benefit plan to the extent that the plan provides
24 medical care . . . to employees or their dependents . . . directly or
25 through insurance, reimbursement, or otherwise. The term “medical
26 care” means amounts paid for (A) the diagnosis, cure, mitigation,
27 treatment, or prevention of disease, or amounts paid for the purpose of
28 affecting any structure or function of the body; (B) amounts paid for
transportation primarily for and essential to medical care referred to in
subparagraph (A), and (C) amounts paid for insurance covering
medical care referred to in subparagraphs (A) and (B). 29 U.S.C. §
1191b(a)(2).

Thus, an ERISA “employee welfare benefit plan” is” (1) a plan, fund, or
program; (2) established or maintained (3) by an employer; (4) for the purpose of

1 providing medical, surgical, hospital care, [or] sickness . . . benefits . . . (5) to the
2 participants or their beneficiaries. *Steen v. John Hancock Mut. Life Ins. Co.*, 106
3 F.3d 904, 916 (9th Cir. 1997).

4 Under ERISA’s safe harbor regulation, certain group insurance programs
5 are excluded from ERISA’s definition of “employee welfare benefit plan” where

- 6 (1) the employer does not make any contributions,
- 7 (2) participation in the program is completely voluntary for
employees or members,
- 8 (3) the sole function of the employer is to permit the insurer to
9 publicize the program to employees, collect premiums through
10 payroll deductions, and remit them to the insurer, and
- 11 (4) the employer receives no compensation in the form of cash or
otherwise in connection with the program.

12 *Stuart v. UNUM Life Ins. Co. of Am.*, 217 F.3d 1145, 1149 (9th Cir. 2000).

13 A group insurance plan cannot be excluded from ERISA coverage if an
14 employer fails to satisfy any one of the four requirements of the safe harbor
15 regulation. *Id.* The existence of an ERISA plan is a question of fact, to be
16 answered in light of all the surrounding facts and circumstances from the point of
17 view of a reasonable person. *Kanne v. Conn. Gen. Life Ins. Co.*, 867 F.2d 489, 492
18 (9th Cir. 1988).

19 ERISA requires that welfare benefits plans be “established and maintained
20 pursuant to a written instrument.” § 1102(a)(1). In lieu of distribution of the full
21 text of the formal plan documents, ERISA requires that a summary plan
22 description (SPD) be distributed to participants and beneficiaries receiving
23 benefits. 29 U.S.C. §1022(a). The Summary Plan Description (“SPD”) is the
24 “statutorily established means of informing participants of the terms of the plan
25 and its benefits,” and serves as “the employee’s primary source of information
26 regarding employment benefits.” *Scharff v. Raytheon Co. Short Term Disability*
27 *Plan*, 581 F.3d 899, 904 (9th Cir. 2002).

28 ERISA permits participants, beneficiaries, and fiduciaries to bring suit to

1 enforce its provisions. A participant or beneficiary may bring a civil action under
2 § 502(a)(1) of ERISA to recover benefits due to her under the terms of her plan,
3 enforce rights under the terms of the plan, or to clarify rights to future benefits
4 under the terms of the plan. 29 U.S.C. § 1132(a)(1). A participant or beneficiary
5 may also bring a civil action to obtain statutory penalties if the plan administrator
6 fails to meet certain notice requirement. 29 U.S.C. § 1132(a)(2),(c). A participant,
7 beneficiary, or fiduciary may bring a civil action under § 502(a)(3) of ERISA “(A)
8 to enjoin any act or practice which violates any provision . . . of the terms of the
9 plan, or (B) to obtain other appropriate equitable relief (i) to redress such
10 violations or (ii) to enforce any provisions . . . of the terms of the plan. 29 U.S.C §
11 1132(a)(3). Section 502(a)(3) authorizes equitable remedies to enforce plan
12 terms.¹ *Sereboff v. Mid Atlantic Med. Servs. Inc.*, 547 U.S. 356, 363 (2006).

13 Generally, actions under §502(a)(3) to recover medical benefits paid for
14 injuries caused by third-parties are viewed as actions seeking to secure an
15 equitable lien by agreement. *US Airways, Inc. v. McCutchen*, __ U.S. __, 133 S.Ct.
16 1537, 1546 (2013). In order to do so, three criteria must be present: (1) a promise
17 by the beneficiary to reimburse the fiduciary for benefits paid under the plan in the
18 event of a recovery from a third party; (2) the reimbursement agreement must
19 specifically identify a particular fund, distinct from the beneficiary’s general
20 assets, from which the beneficiary will be reimbursed; and (3) the funds
21 specifically identified by the fiduciary must be within the possession and control
22 of the beneficiary. *Oregon Teamster Emp ’rs Trust v. Hillsboro Garbage*, 800 F.3d
23 1151, 1159 (9th Cir. 2015) (citation omitted).

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26 ¹ Under appropriate circumstances, section 502(a)(3) may authorize three possible
27 equitable remedies: estoppel, reformation, and surcharge. *CIGNA Corp. v. Amara*,
28 563 U.S. 421, 438-443 (2011).

1 ERISA includes expansive pre-emptive provisions found in § 514 (29
2 U.S.C. § 1144(a)). Congress intended for ERISA’s civil enforcement provisions to
3 provide exclusive remedies for ERISA-plan participants and beneficiaries. Pilot
4 Life Ins. Co. v. Dedeaux, 481 U.S. 41, 44-47 (1987). ERISA’s detailed provisions
5 set forth a comprehensive civil enforcement scheme that represents a careful
6 balancing of the need for prompt and fair claims settlement procedures against the
7 public interest in encouraging the formation of employee benefit plans. Id. “The
8 policy choices reflected in the inclusion of certain remedies and the exclusion of
9 others under the federal scheme would be completely under minded if ERISA-plan
10 participants and beneficiaries were free to obtain remedies under state law that
11 Congress rejected in ERISA.” Id. at 54. Additionally, any state-law cause of action
12 that duplicates, supplements, or supplants the ERISA civil enforcement remedy
13 conflicts with the clear congressional intent to make the ERISA remedy exclusive
14 and is pre-empted. Aetna Health Inc., 542 U.S. at 205.

15 ERISA contains a saving clause that exempts from the pre-emption clause
16 any state law that regulates insurance. § 514(b)(2)(B). Bad faith claims against
17 insurance companies, however, are not claims that “regulate” insurance. Bast v.
18 Prudential Ins. Co. of Am., 150 F.3d 1003, 1008 (9th Cir. 1998). To “regulate”
19 insurance, a law must not just have an impact on the insurance industry, but must
20 be specifically directed toward that industry. Pilot Life, 481 U.S. at 50.

21 ANALYSIS

22 Plaintiff is asking the Court to dismiss Defendant’s state law counterclaims
23 and is also seeking judgment on the pleadings. In addition, it is asking the Court to
24 strike Defendant’s request for a jury trial on her state counterclaims.

25 **1. Plaintiff’s Motion to Dismiss for Failure to State a Claim**

26 Plaintiff moves to dismiss Defendant’s state law claims, asserting they are
27 preempted by ERISA. Defendant’s main argument in opposition to Plaintiff’s
28 motion is that the Court does not have jurisdiction over this case because neither

1 the 2011 Plan nor the 2012 Plan is an ERISA plan. Defendant maintains the 2012
2 Plan is not in effect because her husband did not receive a copy of the 2012
3 Summary Plan Description, and also maintains an SPD is not sufficient under
4 ERISA to set the terms of the Plan. Because there is no ERISA document, there is
5 no ERISA Plan. Defendant then argues that the 2011 Plan is not an ERISA plan
6 because it was not self-funded. Under her theory, because the Court is not
7 interpreting an ERISA Plan, her state law claims are not pre-empted.

8 Here, both the 2011 Plan and the 2012 Plan are ERISA Plans because they
9 are plans, funds, or programs, established or maintained, by an employer for the
10 purpose of providing medical, surgical, hospital care or sickness benefits to the
11 participants or their beneficiaries. See Steen, 106 F.3d at 916. These facts have not
12 been disputed by Defendant. Whether a Plan is an ERISA plan does not depend on
13 whether the Plan is self-funded or insured. Similarly, whether the 2011 Plan or the
14 2012 Plan is an ERISA plan does not depend on whether Plaintiff acted as an
15 insurance company or an administrator of the Plan.

16 Moreover, an ERISA plan does not become a non-ERISA plan because the
17 employer does not follow certain ERISA requirements. See Scott v. Gulf Oil Corp.,
18 754 F.2d 1499, 1503 (9th Cir. 1985) (noting that failure to comply with ERISA
19 requirements is not a basis to escape ERISA obligations). Otherwise, violations of
20 the law would be encouraged, rather than discouraged.

21 Finally, Defendant has not established that the safe harbor provision applies
22 that would exempt the 2011 or the 2012 Plan from ERISA. Because both the 2011
23 Plan and the 2012 Plan are ERISA Plans, Defendant's state law counterclaims are
24 pre-empted. As such, Plaintiff's Motion to Dismiss is granted, and Defendant's
25 request for a jury trial is stricken.

26 **2. Plaintiff's Motion for Judgment on the Pleadings**

27 Plaintiff asks the Court to find that the terms of the 2012 Plan control and
28 the terms of the 2012 Plan establish that Defendant must reimburse the Plan for

1 medical benefits paid. Whether Plaintiff is entitled to judgment depends on
2 whether the 2011 Plan or the 2012 Plan controls. Here, questions of material fact
3 exist regarding which Plan was in effect at the time of the accident. As such,
4 judgment on the pleadings is not appropriate.

5 Accordingly, **IT IS HEREBY ORDERED:**

- 6 **1.** Plaintiff's Motion to Dismiss Finn's Counterclaim and Motion to Strike
7 Jury Demand, ECF No. 26, is **GRANTED**.
- 8 **2.** Plaintiff's Motion for Judgment on the Pleadings, ECF No. 31, is
9 **DENIED**.
- 10 **3.** Defendant's Motion to Continue Hearings, ECF No. 41, is **DENIED**.
- 11 **4.** Defendant's Motion to Expedite, ECF No. 43, is **GRANTED**.
- 12 **5.** Defendant's Motion to Strike Inadmissible Portions of the Declaration
13 of Regence's Subrogation Coordinator, ECF No. 44, is **DENIED**, as
14 moot.
- 15 **6.** Defendant's Motion to Strike the Second Declaration of Regence's Lisa
16 Jones, ECF No. 50, is **DENIED**, as moot.

17 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
18 file this Order and provide copies to counsel.

19 **DATED** this 24th day of June, 2016.



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A handwritten signature in blue ink that reads "Stanley A. Bastian".

25 Stanley A. Bastian
26 United States District Judge
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28