IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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HERLING TROTTER, *et al.*,	*	
Plaintiffs	*	
v.	*	**CIVIL No. 1:11-cv-03422-JKB**
KENNEDY KRIEGER INSTITUTE, INC., *et al.*,	*	
	*	
Defendants		
	*	

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MEMORANDUM

In Re: **Hartford Defendants' Motion to Dismiss (ECF No. 8)**
Defendant Kennedy Krieger's Motion to Dismiss (ECF No. 12)
Plaintiffs' 1st Motion for Leave to File Surreply (ECF No. 24)
Plaintiffs' 2nd Motion for Leave to File Surreply (ECF No. 25)

Herling Trotter and the Estate of Richard Noel ("Plaintiffs") brought this suit against Kennedy Krieger Institute, Inc. ("Kennedy Krieger"), Hartford Life Insurance Co., and Hartford Life Group Insurance Co. ("Hartford" or "Hartford Defendants") (collectively "Defendants"), to recover insurance proceeds allegedly due under a life insurance policy as well as damages for alleged breach of contract, breach of fiduciary duty, and civil conspiracy. All Defendants have moved to dismiss the complaint for failure to state a claim upon which relief can be granted. The parties have exchanged responses and replies with respect to both motions and Plaintiffs have moved for leave to file surreplies. The issues have been briefed and no oral argument is required. Local Rule 105.6. For the reasons explained below, Plaintiffs' motions for leave to file surreplies (ECF Nos. 24 & 25) are DENIED AS MOOT, Defendants' Motions to Dismiss

(ECF Nos. 8 & 12) are HELD IN ABEYANCE, and Plaintiffs are DIRECTED to file an amended complaint consistent with the following memorandum.

I. BACKGROUND

Plaintiff Herling Trotter is the widow of Richard Noel ("The Deceased") as well as the representative of his estate, which is also a plaintiff in this case. Mrs. Trotter is also an employee of Kennedy Krieger, where she has worked since 2001. As part of her employee benefits package, Mrs. Trotter had an option to purchase an insurance policy for her husband from Hartford through Kennedy Krieger's group plan, which she did in January of 2003. Kennedy Krieger subsequently began deducting policy premium payments of $3.33 from each of Mrs. Trotter's paychecks. In April of 2005, Mrs. Trotter requested an increase in the policy coverage to $50,000.00. Kennedy Krieger accordingly increased her deductions to $9.46 per paycheck. Mrs. Trotter continued to pay these premiums until August 13, 2009, when her husband died. Shortly thereafter, she submitted a claim for payment under the policy. In October of 2009, she received a "declination letter" from Kennedy Krieger advising her that the claim would not be paid because she had failed to submit a Personal Health Statement for The Deceased at the time she purchased the policy, and The Deceased therefore had never been "officially approved" by Hartford. (Compl. ¶ 17, ECF No. 2). After unsuccessfully seeking assistance from her supervisor, Mrs. Trotter retained counsel, who wrote to Kennedy Krieger and demanded that Mrs. Trotter's claim be paid. Kennedy Krieger retained its own counsel, who advised Mrs. Trotter's counsel that Kenney Krieger was attempting to persuade Hartford to pay the claim and suggested that Mrs. Trotter sign a release for The Deceased's medical records so that it could show Hartford that The Deceased would have been insurable at the time Mrs. Trotter applied for enrollment in the policy. Mrs. Trotter signed the release and Kennedy Krieger obtained the

relevant records. Kennedy Krieger's counsel then informed Mrs. Trotter that The Deceased's medical records showed that in 2002, before Mrs. Trotter submitted her application, The Deceased had documented high blood pressure and had been treated for diabetes, making him uninsurable.

On October 27, 2011, Plaintiffs filed the instant complaint in the Circuit Court for Baltimore City, raising State common law claims for breach of contract, breach of fiduciary duty, and civil conspiracy. Defendants removed the case to this Court on the grounds that Plaintiffs' claims were preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(1)(B). (Notice of Removal, ECF No. 1). Defendants have now moved to dismiss the complaint on the grounds that, when properly construed as an ERISA action for recovery of benefits, it fails to state a claim. (ECF Nos. 8 & 12). The parties have exchanged responses and replies, but Plaintiffs seek the Court's leave to file surreplies on the grounds that Defendants allegedly raised new issues and arguments in their replies that were not presented in the original motions. (ECF Nos. 24 & 25).

II. LEGAL STANDARD

A. Fed. R. Civ. P. 12(b)(6): Motion to Dismiss

A motion to dismiss under FED. R. CIV. P. 12(b)(6) is a test of the legal sufficiency of a complaint. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). To pass this test, a complaint need only present enough factual content to render its claims "plausible on [their] face" and enable the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). The plaintiff may not, however, rely on naked assertions, speculation, or legal conclusions. *Bell Atlantic v. Twombly*, 550 U.S. 544, 556-57 (2007). In assessing the merits of a motion to dismiss, the court must take

all well-pled factual allegations in the complaint as true and construe them in the light most favorable to the Plaintiff. *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997). If after viewing the complaint in this light the court cannot infer more than "the mere possibility of misconduct," then the motion should be granted and the complaint dismissed. *Iqbal*, 129 S.Ct. at 1950.

B. Motion for Leave to File Surreply

Local Rule 105.2(a) prohibits parties from filing surreplies without leave of the court. A court will permit a surreply, however, "when the moving party would be unable to contest matters presented to the court for the first time in the opposing party's reply." *Khoury v. Meserve*, 268 F.Supp.2d 600, 605 (D. Md. 2003), *aff'd*, 85 F.App'x. 960 (4th Cir. 2004) (citation omitted).

III. ANALYSIS

Defendants claim that Plaintiffs' state law causes of action are preempted by ERISA because they relate to The Deceased's life insurance policy, which they allege is an employee benefit plan. *See, e.g., Retail Industry Leaders Ass'n v. Fielder*, 475 F.3d 180, 191 (4th Cir. 2007) ("§ 514(a) of ERISA broadly preempts 'any and all State laws insofar as they may now or hereafter relate to any employee benefit plan' . . . .") (citing 29 U.S.C. § 1144(a)). Plaintiffs concede that the policy is an employee benefit plan, governed by ERISA, and that two of their claims, breach of contract and breach of fiduciary duty, are preempted. (Pl.'s Resp. 8-9, ECF No. 16). They maintain, however, that their claim of civil conspiracy is not.

The Court agrees that Plaintiffs' claims for breach of contract and breach of fiduciary duty are preempted. A State law cause of action "relates to" an employee benefits plan, and thus is preempted, if it "makes specific reference to, and . . . is premised on, the existence of a . . .

plan" or if "in order to prevail, [the] plaintiff must plead, and the court must find that an ERISA plan exists" or even if "the court's inquiry must be directed to the plan." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 140 (1990); *accord Griggs v. E.I. DuPont de Nemours & Co.*, 237 F.3d 371, 377 (2001). Here, the contract that Plaintiffs claim Defendants breached is an employee benefits plan, and the fiduciary duty that Plaintiffs claim Defendants breached was the duty to ensure that the plan went into and remained in full force and effect, which duty they allegedly incurred by accepting Mrs. Trotter's payment of premiums. These claims obviously direct the Court's inquiry to an employee benefits plan.

The Court also finds that Plaintiffs' civil conspiracy claim is preempted. Plaintiffs allege that Defendants "conspired to illegally decline Plaintiffs' justified life insurance claim." (Compl. 6, ECF No. 2). On its face, this claim directs the Court's inquiry to the plan. Plaintiffs argue, however, that the claim is not preempted for two reasons: (1) it seeks to redress Defendants' alleged efforts to "deprive [them] of their statutory rights" under the Maryland Insurance Code, § 17-303, and therefore does not relate to the plan; and (2) ERISA does not preempt § 17-303 because it is a State law that regulates insurance, *see* 29 U.S.C. § 1144(b)(2)(A) ("[N]othing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities."). The Court finds these arguments to be without merit.

Section 17-303 of the Maryland Insurance Code provides that "Each policy of group life insurance shall contain a provision that . . . the policy is incontestable, except for non-payment of premiums, after the policy has been in force for 2 years after its date of issue." MD. CODE. ANN., INS. LAW § 17-303. Plaintiffs allege that Defendants conspired with one another to violate this provision by contesting The Deceased's life insurance policy when it had been in force for more

than two years and Mrs. Trotter had paid all the premiums. In the first place, this claim obviously relates to the plan because, to prevail[1] on the theory outlined above, Plaintiffs would need to plead, and the Court would have to find, that a plan exists and had been in force for more than two years at the time Mrs. Trotter submitted her claim. *See Ingersoll-Rand*, 498 U.S. at 140. In the second place, even though § 17-303 may not, itself, be preempted by ERISA,[2] Plaintiffs' claim is. Section 17-303 only regulates the terms that an insurer must include in a group life insurance policy before it may be lawfully "delivered" in Maryland. It does not purport to regulate the conduct of any party after a policy has been delivered. With respect to The Deceased's policy, the Hartford Defendants have complied with the regulation by including the following provision: "**When can this plan be contested?** Except for non-payment of premium, the Policy cannot be contested after two years from the Policy Effective Date." (Policy at 38, ECF No. 8-4, Ex. A:2). This provision is now an operative term of the policy. Any claim that Defendants wrongfully contested the policy, or that they conspired to do so, is therefore a breach of contract claim,[3] which, as explained above, is preempted.

The fact that Plaintiffs' claims are preempted does not, however, automatically mean that they must be dismissed. Rather, if a plaintiff's state law claims are completely preempted by ERISA, then a court should construe them as ERISA claims. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 210 (2004). Claims are completely preempted if "an individual brings suit

[1] All of this is assuming, without deciding, that Plaintiffs have substantive rights under § 17-303 that can be enforced through a private cause of action, which is highly doubtful.

[2] Under the Supreme Court's case law, a state regulation is "saved" from preemption by ERISA if it is specifically directed toward the insurance industry and if it "alter[s] or control[s] the actual terms of insurance policies." *See Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 338 (2003). Section 17-303 of the Maryland Insurance Code clearly meets both criteria.

[3] To the extent Plaintiffs argue that civil conspiracy is a cause of action independent of an underlying tort or contract claim, they are mistaken. *Alleco Inc. v. Harry & Jeanette Weinberg Foundation, Inc.*, 340 Md. 176, 189-90, 665 A.2d 1038, 1045 (Md. 1995) ("The statement by the Court of Special Appeals, that civil conspiracy is recognized in Maryland as an independent tort, is simply incorrect. This Court has consistently held that 'conspiracy' is not a separate tort capable of independently sustaining an award of damages in the absence of other tortious injury to the plaintiff.") (internal quotation marks and citation omitted).

complaining of a denial of coverage . . . where the individual is entitled to such coverage only because of the terms of an ERISA-regulated employee benefit plan, and where no legal duty (state or federal) independent of ERISA or the plan terms is violated." *Id*. The parties agree that Plaintiffs' breach of contract and breach of fiduciary duty claims meet these criteria, and the Court further finds that the civil conspiracy claim, which, as explained above, is really another a breach of contract claim, meets them as well.

A question remains, however, as to which provisions of ERISA's civil enforcement scheme best accommodate the allegations Plaintiffs have made and the remedies they seek. The conspiracy/breach of contract claims clearly fall under § 1132(a)(1)(B), which provides that:

> A civil action may be brought-- . . . by a participant or beneficiary-- . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

But, it is less clear how Plaintiffs' breach of fiduciary duty claim should be characterized. Defendants insist that it is merely another formulation of Plaintiffs' claim for benefits and thus also arises under § 1132(a)(1)(B). But, in their responses in opposition to dismissal, Plaintiffs suggest that they are instead pursuing equitable relief that ERISA affords for breaches of fiduciary duties, citing §§ 1105 and 1009(a). This is problematic because those sections relate to the liability of fiduciaries to a plan, not to individual participants.[4] There is, though, a similar provision for individual participants in § 1132(a)(3), which provides that:

> A civil action may be brought . . . **(3)** by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]

[4] It is also inconsistent with the complaint, which demands compensatory damages for Defendants' alleged breach of fiduciary duty, which is legal, not equitable, relief. (Compl. 6, ECF No. 2); *See Estate of Mattern v. Honeywell Int'l, Inc.*, 241 F.Supp.2d 540, 543 (D. Md. 2003).

But, this too raises problems because, if a plaintiff can obtain adequate relief through § 1132(a)(1)(B), a simultaneous action under § 1132(a)(3) is generally unavailable. *See Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996) ("[W]e should expect that where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be 'appropriate.'"); *accord Korotynska v. Metropolitan Life Ins. Co.*, 474 F.3d 101, 102 (4th Cir. 2006) ("Individualized equitable relief under § 1132(a)(3) is normally appropriate only for injuries that do not find adequate redress in ERISA's other provisions."). Courts in this district, however, have held that this is not an absolute bar to advancing both types of claims, so long as the equitable relief sought is clearly distinct from the claim for benefits. *England v. Marriott Int'l, Inc.*, 764 F.Supp.2d 761, 779 (D. Md. 2011).[5]

In view of the complexity of this issue and the seriousness of the consequences to Plaintiffs' case of any decision on the matter, the Court finds that Plaintiffs themselves must decide how they wish to formulate their claim(s) under ERISA. To that end, the Court will direct Plaintiffs to file an amended complaint consistent with the rulings in this memorandum.[6, 7] The Court will hold Defendants' motions to dismiss in abeyance until the amended complaint is received. Once Plaintiffs have filed their amended complaint, Defendants' motions to dismiss will be denied as moot, without prejudice. Defendants, of course, will have the opportunity to seek dismissal of the amended complaint if they believe there are grounds to do so. If Plaintiffs

[5] And, of course, a civil plaintiff is always entitled to request multiple, alternative, forms of relief, even if based on conflicting theories of liability. FED. R. CIV. P. 8(a)(3); *Polar Commc'ns Corp. v. Oncor Commc'ns, Inc.*, 927 F.Supp. 894, 896 (D. Md. 1996).

[6] The Court notes that Plaintiffs will also have an opportunity to remedy any deficiencies in the original complaint which the Defendants' motions to dismiss may have brought to their attention, particularly with regard to the pleading of facts surrounding Mrs. Trotter's alleged submission of her claim to Hartford, the availability of any administrative remedies, and any attempts she made to pursue those remedies or reasons why such pursuit would have been futile.

[7] Plaintiffs are also reminded that jury trials are unavailable for ERISA claims under either § 1132(a)(1)(B) or § 1132(a)(3). *Phelps v. C.T. Enterprises, Inc.*, 394 F.3d 213, 222 (4th Cir. 2005).

fail to file an amended complaint by the deadline stated in the attached Order, however, then the Defendants' current motions to dismiss will be granted. Plaintiffs' motions to file surreplies will be denied as moot.

IV. ORDER

Accordingly, it is ORDERED that:

(1) Plaintiffs' Motions for Leave to File Surreply (ECF Nos. 24 & 25) are DENIED;

(2) Defendants' Motions to Dismiss (ECF Nos. 8 & 12) are HELD IN ABEYANCE; and

(3) Plaintiffs are DIRECTED to file an amended complaint consistent with the preceding memorandum no later than the close of business on Tuesday, March 27, 2012.

Dated this 6th day of March, 2012

BY THE COURT:

/s/
James K. Bredar
United States District Judge