IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Norma Zell for the Estate of John E. Zell, and Norma Zell, Plaintiffs, v. Abbygail Emily Neves, and Airgas, Inc. Comprehensive Welfare Benefits Plan, Defendants.	)	Civil Action No.: 7:19-cv-01304-TMC **ORDER**

This matter is before the court on Plaintiffs'[1] motion to remand (ECF No. 5) and Defendant Airgas, Inc. Comprehensive Welfare Benefits Plan's ("Airgas") motion to dismiss (ECF No. 7). In their motion to remand, Plaintiffs argue that this court lacks subject matter jurisdiction over the case. (ECF No. 5). Defendant Airgas responded (ECF No. 17), and Plaintiffs replied (ECF No. 20). In its motion to dismiss, Defendant Airgas argues that Plaintiffs have failed to exhaust their administrative remedies. (ECF No. 7). Plaintiffs responded, (ECF No. 13), and Defendant Airgas replied (ECF No. 19). This matter is now ripe for review.[2]

I. BACKGROUND AND PROCEDURAL HISTORY

[1] Plaintiff Norma Zell has brought this lawsuit both in her individual capacity and as personal representative for her husband's estate. Accordingly, the court will refer to "plaintiffs" in the plural form when appropriate.

[2] The court notes that while Defendant Neves and Plaintiffs have alluded to various requests for relief within their filings throughout this action, the only motions properly before this court are the motion to remand (ECF No. 5) and motion to dismiss (ECF No. 7). All parties are represented by counsel, and the court is not required to liberally construe counsel's arguments as motions where not filed accordingly. Therefore, the court will only address the motion to remand and motion to dismiss.

Plaintiffs filed this action in the Spartanburg County Court of Common Pleas, seeking approval of a proposed settlement arising from a wrongful death petition and a declaration from the court that Defendants have no ERISA[3] rights in the settlement proceeds "under the terms of Defendant AIRGAS'S benefit plan." (ECF No. 1-1). The Complaint alleges that on April 11, 2018, Defendant Abbygail Neves ("Neves") caused a rear-end collision that resulted in John Zell ("Decedent") being fatally injured. *Id.* at 1–2. Following the collision, Decedent was hospitalized until his death on April 16, 2019. *Id.* at 4.

It is uncontested that Airgas paid out various health benefits as a result of this car accident, pursuant to a contract between Decedent and Airgas for various employee benefits. Such employee benefit plan is governed by ERISA, 29 U.S.C. § 1001 *et seq.* (ECF Nos. 5-1 at 3; 17 at 1). In total, Airgas paid medical bills in the amount of $138,303.34, for Decedent's injuries related to the collision. (ECF NO. 7-1 at 3).

According to Plaintiffs, they have reached a settlement agreement with Decedent's underinsured motorist carrier and Defendant Neves, as to the purported survival action, wrongful death claims, and loss of consortium, without the need to file a lawsuit regarding liability. *Id.* at 4. Plaintiffs seek for this court to approve such settlement. *Id.* Plaintiffs also seek for the court to declare that Defendant Airgas[4] has "no right of recovery to benefits payable to Norma Zell, the wrongful death beneficiaries, or the Estate of [Decedent]" because they contend that a South Carolina statute, S.C. Code Ann. § 38-77-160, prohibits such subrogation. *Id.* at 8 – 13.

[3] Employee Retirement Income Security Program, 29 U.S.C. § 1001 *et seq.*

[4] Decedent had a contract with Airgas to provide for various employee benefits, including health benefits. It is undisputed that Airgas paid out various health benefits as a result of Decedent's car accident. It appears from the pleadings that UnitedHealthcare Services, Inc. acts as the Plan Administrator for Defendant Airgas. (ECF No. 1-1 at 6). UnitedHealthcare Services, Inc. allegedly hired OPTUM to file a lien against the potential settlement on behalf of Airgas. *Id.* at 7–9. Neither OPTUM nor UnitedHealthcare Services, Inc. are parties to this case.

Defendant Airgas removed this case to federal court on the basis of federal question jurisdiction, arguing that the case falls within the purview of ERISA. (ECF No. 1).[5] Specifically, Defendant Airgas contends that Plaintiffs' claims relate to the employee benefit plan (the "Plan") that paid out medical benefits for Decedent following his car accident. Thereafter, Plaintiffs filed a Motion to Remand. (ECF No. 5). While Plaintiffs seem to agree that the Plan in question is generally subject to ERISA[6], they argue that Plaintiffs do not fall within the meaning of "covered persons" under the Plan and that, therefore, the Plan's subrogation clause is inapplicable as to their interests. (ECF No. 5-1 at 4–5). Accordingly, Plaintiffs contend that ERISA does not govern this case, and, therefore, that this court lacks subject matter jurisdiction. *Id.* Defendant Airgas responded, arguing that Plaintiff's claims are related to the Plan and that the state statute on which Plaintiffs rely is preempted by ERISA, and, therefore, removal was proper pursuant to 28 U.S.C. § 1331.[7] Plaintiffs replied, arguing that they are not asking the court to "interpret" the Plan as Defendant Airgas suggests, but rather to hold that "covered persons" – which they consider to be an unambiguous definition – does not include them. (ECF No. 20). Accordingly, Plaintiffs contend that because they are not "covered persons" under the Plan, they are not subject to the Plan's subrogation clause.[8] *Id.* The motion to remand is now ripe for review.

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[5] At the time of removal, Defendant Abbygail Neves ("Neves") had not yet been served in the case, and, therefore, her consent was not required for removal pursuant to 28 U.S.C. § 1446(b)(2)(a).

[6] In fact, Plaintiffs refer to the plan in question as "this ERISA Plan." (ECF No. 5 at 1).

[7] Specifically, Airgas contends that Plaintiffs' claims "concern, involve and relate to the administration of the Plan – an employee benefit plan governed by ERISA." (ECF No. 17 at 2). At the very least, Airgas contends that the proposed settlement includes survival act claims that belonged to the Decedent and survived his death, to which Airgas has subrogation rights under the ERISA Plan. *Id.* at 10 – 11. Furthermore, Airgas argues that Plaintiffs' motion to remand "contains extensive argument about the terms of the Plan and how they should be applied," which in its view "only provides additional support for the conclusion that Plaintiffs' claims will require the Court to interpret the Plan and evaluate how the terms of the Plan should be applied to the claims of [Decedent's] estate." *Id.* at 2.

[8] Plaintiffs also contend that any reference to the Summary Plan Description ("SPD") is not relevant because the Plan, not the SPD, contains the contract terms of the plan for purposes of ERISA. (ECF No. 20 at 6).

Defendant Airgas filed a motion to dismiss for failure to state a claim, in which it argues that Plaintiffs were required to exhaust their administrative remedies under the terms of the Plan before they filed this action. (ECF No. 7). Accordingly, Defendant Airgas contends that Plaintiffs' claims are premature and are not yet ripe for this court's review. (ECF No. 7-1 at 2). Plaintiffs responded, arguing first, that they were not required to exhaust remedies because Defendants have no ERISA rights and, second, that to the extent they were required to exhaust remedies, they did so and any further attempt would be futile. (ECF No. 13). Defendant Airgas replied. The motion to dismiss is now ripe for review.

II. MOTION TO REMAND

The district courts have original jurisdiction over cases governed by ERISA, and claims brought in state court concerning qualifying employee benefit plans are removable to federal court. 29 U.S.C. § 1001, et seq; *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987). ERISA defines a qualifying employee benefit plan as "any plan, fund or program established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise . . . benefits in the event of sickness, accident, disability, [or] death." 29 U.S.C. § 1002(1).

Both parties agree that the Plan is an employee benefit plan that falls within the scope of ERISA generally. (ECF Nos. 1 at 4; 5 at 1; 5-1 at 3 n.3, 5; 17 at 1; 20). The dispute in this case revolves around whether Airgas can assert subrogation rights against the settlement proceeds under the Plan. Specifically, as to such subrogation rights, the Plan provides as follows:

> As a condition for receiving benefits under the Plan, each Covered Person agrees to and grants the Plan the right to subrogation, the right to reimbursement, and the right to recovery as set forth herein. When a Covered Person becomes sick or injured as a result of the act or omission of another person or party and the Covered Person received benefits under the Plan for such injuries, the Covered Person must reimburse the Plan for benefits received from all recoveries from a third party

> (whether by lawsuit, settlement, or otherwise), and the Plan's share of the recovery will not be reduced because the Covered Person has not received full damages for the claim, unless the Plan agrees, in writing, to such reduction . . . .

Plan Document § 10.03, at (ECF No. 7-2 at 193). The Plan further provides that

> [a]s a condition to participation in or the receipt of benefits under the Plan, each covered Person agrees that the Plan will have the right to subrogation with respect to the full amount of benefits paid to or on behalf of a Covered Person as the result of an injury, illness, disability, or death that is or may be the responsibility of any third Party. The Plan will also have a lien upon any recovery from such Third Party to the full amount of benefits paid and may, at is option, file suit or intervene in any pending lawsuit to secure and protect its rights. . . .

Plan Document § 10.03(a), at (ECF No. 7-2 at 193).

The parties disagree as to whether the Plan's subrogation clause reaches Plaintiffs' proposed settlement to give Airgas subrogation rights pursuant to the ERISA Plan. Under South Carolina law, benefits paid pursuant to underinsured motorist coverage are not subject to subrogation.[9] *See* S.C. Code Ann. § 38-77-160. Accordingly, the key inquiry is whether ERISA preempts application of the South Carolina statute under the circumstances of *this* case. *See McInnis v. Provident Life & Accident Ins. Co.*, 21 F.3d 586, 588 (4th Cir. 1994).

ERISA contains three provisions that are central to the question of pre-emption: the preemption clause, the savings clause, and the deemer clause. *FMC Corp. v. Holliday*, 498, U.S. 52, 57 (1990). First, under the "preemption clause," unless provided otherwise in the savings clause, "the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). For purposes of the preemption clause, a law "relates to an employee benefit

[9] Plaintiffs also note that Airgas "refuses to comply with S.C. Code Ann. § 38-71-190, which requires health insurers share any of the procurement costs and make equitable adjustments to alleged subrogation liens." (ECF No. 1-1 at 9). However, the nature of Plaintiffs' Complaint and the relief Plaintiffs seek seem to focus on there being no subrogation interest under the ERISA Plan, not on Airgas's refusal to reconfigure their potential lien.

plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96-97 (1983).

Second, under the "savings clause," except as provided in the deemer clause, "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A). Third, under the "deemer clause," "[n]either an employee benefit plan . . . nor any trust established under such plan, shall be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies [or] insurance contracts . . . ." 29 U.S.C. § 1144(b)(2)(B).

A. Application of the Preemption Clause

Plaintiffs argue that because Plaintiffs are not "covered persons" under the Plan, the subrogation clause does not apply to them, and, therefore, Defendant Airgas has no ERISA rights as to their claims for wrongful death, survival, and loss of consortium. (ECF No. 5). Defendant Airgas contends that Plaintiffs' underlying claims, which have resulted in a potential settlement, "concern, involve, and relate to the administration of the Plan" and that Plaintiffs' attempt at interpreting the definitions under the Plan further evidence that there is a federal question in this case regarding ERISA. (ECF No. 17).

Here, Norma Zell filed this lawsuit in her individual capacity as to a loss of consortium claim and as personal representative of Decedent's estate as to claims of wrongful death and survival. (ECF No. 1-1). Plaintiffs pled these claims together in their first cause of action for "wrongful death settlement petition." (ECF No. 1-1 at 3). According to the Complaint, Plaintiffs have reached a potential settlement agreement with Defendant Neves and with Decedent's underinsured motorist carrier regarding all of Plaintiffs' underlying claims surrounding Decedent's

collision. *Id.* at 4. Plaintiffs essentially seek for the court to approve the settlement as to all underlying claims.

Because Plaintiffs concede that the Plan itself is governed by ERISA, the initial inquiry is whether this settlement is subject to the Plan in general. The court finds that it is. As the master of their Complaint, Plaintiffs have set forth a petition for settlement approval that inextricably intertwines all three underlying claims of wrongful death, survival, and loss of consortium into one proposed settlement. *See* (ECF No. 1-1). Plaintiffs contend that their wrongful death, loss of consortium, and survival act tort claims are all "too tenuous, remote, or peripheral to warrant a finding that they relate to the plan" because they are based on Plaintiffs' "independent, individual legal claims." (ECF No. 5-1 at 2–3) (citing *Liberty Corp. v. NCNB Nat. Bank of South Carolina*, 984 F.2d 1383 (4th Cir. 1993)).

In *Liberty Corporation v. NCNB National Bank of South Carolina*, the Fourth Circuit determined that the decedent in the wrongful death action had agreed to subrogate "only his right to recover from third parties compensation for his medical expenses," and that, therefore, such subrogation agreement did not extend to the decedent's beneficiaries' right to recover for wrongful death. 984 F.2d at 1388. Because the ERISA plan in question did not have any subrogation right under the Plan as to any wrongful death settlement proceeds, the Fourth Circuit held that a state statute's cap on medical expenses did not "relate to" the Plan within the meaning of ERISA. *Id.* at 1389.

However, Plaintiffs' reliance on *Liberty* is misplaced. As Plaintiffs stated in their motion to remand, "[u]nder the South Carolina's [sic] survival act statute, claims for injuries to a person who dies (e.g. conscious pain and suffering) survive, and those claims may be brought by the Estate through the Personal Representative." (ECF No. 5-1 at 2) (citing S.C. Code Ann. § 15-5-

90). Survival actions are brought for claims based on "damages preceding death, which were inflicted on and belonged to the decedent." *McInnis*, 21 F.3d at 589; *see also Welch v. Epstein*, 536 S.E.2d 408, 420–21 (S.C. Ct. App. 2000) (differentiating survival actions from wrongful death actions). In South Carolina, "[a]ppropriate damages in survival actions include those for medical, surgical, and hospital bills, conscious pain, suffering, and mental distress *of the deceased*" prior to his death. *Welch*, 536 S.E.2d at 420–421 (emphasis added). In *Liberty*, the sole underlying claim at issue was one for wrongful death, a claim which belonged to decedent's family members, not the decedent. However, here, at least part of the proposed settlement, which has been presented to this court as one intertwined settlement, includes claims that initially belonged to the Decedent prior to his death and then survived to his estate. It is not contested that Decedent was a "covered person" under the Plan. Accordingly, the court concludes that under the facts of this case, Plaintiffs' proposed settlement, and, therefore, the question of whether Defendant Airgas has subrogation rights to such settlement based on the South Carolina statute precluding subrogation in cases involving underinsured motorist coverage, are sufficiently related to the Plan to fall within the purview of ERISA. *See FMC Corp.*, 498 U.S. at 59 (recognizing ERISA's broad scope).

In addition to the underlying claims and potential settlement implicating ERISA concerns, the statute itself relates to the employee benefit plan because it has a "connection with or reference to such a plan." *See id.* Here, Section 10.03(a) of the Plan specifically states that the Plan has the "right of subrogation with respect to the full amount of benefits paid to or on behalf of a Covered Person as the result of an injury, illness, disability, or death that is or may be the responsibility of any Third Party." (ECF No. 7-2 at 193). Accordingly, South Carolina's statute prohibiting subrogation of benefits paid by uninsured and underinsured motorist coverage where damages exceed the limits of liability of the at-fault party in motor vehicle accidents, conflicts directly with

the Plan, which this court finds to provide a sufficient basis for finding that the law "relates" to an employee benefit plan. *See also Signh v. Prudential Health Care Plan, Inc.*, 335 F.3d 278, 291 (4th Cir. 2003) (discussing a plan's possible subrogation interests and holding that "when the validity, interpretation or applicability of a plan term governs the participant's entitlement to a benefit or its amount, the claim for such benefit falls within the scope of § 502(a) of ERISA). Therefore, this matter is preempted unless saved by the savings clause.

B. Savings Clause

While the preemption clause does create a broad area of "exclusive federal concern" when a state law relates or connects to an employee benefit plan governed by ERISA, the savings clause "returns to the States the power to enforce those state laws that 'regulate insurance' except as provided in the deemer clause." *FMC Corp*. 498 U.S. at 58; *see also* 29 U.S.C. § 1144(b)(2)A). There is no dispute that the S.C. Code Ann. § 38-77-160 regulates insurance. In fact, section 38 of the South Carolina code is specifically titled "Insurance." "It does not merely have an impact on the insurance industry; it is aimed at it." *FMC Corp.*, 498 U.S. at 61. Accordingly, unless South Carolina's statute prohibiting subrogation in cases involving underinsured motorist coverage is "excluded from the reach of the savings clause by virtue of the deemer clause," it is not preempted. *Id.*

C. Deemer Clause

Under the deemer clause "an employee benefit plan governed by ERISA shall not be 'deemed' an insurance company, insurer, or engaged in the business of insurance for purposes of state laws 'purporting to regulate' insurance companies or insurance contracts." *Id.* at 58. The Supreme Court has "read the deemer clause to exempt self-funded ERISA plans from state laws that 'regulate insurance' within the meaning of the savings clause." *Id.* at 61. Accordingly, self-funded plans

"are exempt from state regulation insofar as that regulation 'relates to' the plans. State laws directed toward the plans are preempted because they relate to an employee benefit plan but are not 'saved' because they do not regulate insurance." *Id.* However, if a plan is insured rather than self-funded, it is subject to state insurance regulation. *Id.* In essence, "if a plan is insured, a State may regulate it indirectly through regulation of its insurer and its insurer's insurance contracts; if the plan is uninsured, the State may not regulate it." *Id.* at 64. Accordingly, the key question is whether the Plan in this case was a self-funded or insured Plan.

Initially, "for purposes of th[e] motion to remand," Plaintiffs accepted Airgas's claim that the Plan was a "self-insured ERISA benefit plan" but "reserve[d] the right to challenge that allegation if the case [was] not remanded to the State court." (ECF No. 5-1 at 3 n.3). Because the issue of whether the Plan is self-funded or insured speaks directly to issues of comity and federalism in this case and, necessarily, determines whether this court has jurisdiction over the matter, the court issued a text order instructing to the parties to clarify their positions regarding whether the benefit plan is a self-insured/self-funded plan. (ECF No. 25).

Plaintiffs now contend that the Plan is an insured plan. (ECF No. 26). Plaintiffs base this assertion on the fact that the Plan document states that it "may be funded or unfunded, insured or uninsured, or a combination thereof." (ECF No. 26 at 1) (citing ECF No. 7-2 at 160). Plaintiffs further contend that the Plan checked "insurance" on its annual Form 5500[10] disclosures when asked about the Plan funding arrangement. (ECF No. 26 at 1) (citing ECF No. 26-1 at 2). Plaintiffs argue that the Form 5500 disclosures reveal "significant" health insurance premiums that amount to more than mere stop loss insurance. (ECF No. 26 at 2). Additionally, Plaintiffs allege that they received a letter from Optum, who asserted it was hired by "United Healthcare Services" regarding

[10] This form is required pursuant to 29 C.F.R. § 2520.103-1(b)(1).

the subrogation interest prior to the filing of this lawsuit. *Id.* Plaintiffs contend that this assertion is important because any potential subrogation is "primarily (or exclusively) for the economic benefit of a health insurance company." *Id.*

Defendant Airgas continues to assert that the Plan is a self-insured plan. Defendant argues that the Summary Plan Description ("SPD") identifies the source of funding for the Plan, and specifically states that "Airgas, Inc. is solely responsible for paying Benefits described." (ECF No. 27 at 5). Additionally, Defendant states that when describing the "type of administration," the SPD states that the Plan is a "self-funded welfare Plan" and identifies "self-insured" as the basis of plan administration. (ECF No. 27 at 5).

The Plan itself does not set forth the funding arrangement of the Plan, but, rather, describes how the Plan *may* be funded. *See* (ECF No. 7-2 at 180–81). While the SPD does not govern the terms of the Plan, the SPD does speak to the arrangement of the Plan and the source of funding. In fact, the Code of Federal Regulations dictates that the SPD of an ERISA Plan *must* include "[t]he sources of contributions of the plan . . . and the method by which the amount of contribution is calculated," 29 C.F.R. § 2520.102-3(p), and "[t]he identity of any funding medium used for the accumulation of assets through which benefits are provided" including "any insurance company, trust fund, or other institution, organization, or entity which maintains a fund on behalf of the plan or through which the plan is funded or benefits are provided," 29 C.F.R. § 2520.102-3(q).

Here, the SPD specifically states that Airgas is "solely responsible for paying Benefits described in the SPD" and that the cost of coverage is shared by the covered person and Airgas, Inc. (ECF No. 7-2 at 11). The SPD further notes that Airgas is "solely responsible" for "funding of Benefits" and for "timely payment of the service fee to UnitedHealthcare," who Airgas contracted with to provide claims administrative services under the Plan. *Id.* at 117. As to the

administration of the Plan, the SPD states that the Plan is a "self-funded welfare Plan" and notes that the Plan is "self-insured." *Id.* at 138. It lists the source of Plan contributions as "employee and company" and the source of benefits as "assets of the company." *Id.* Accordingly, based on the language of the SPD, it appears that the Plan is self-funded and not insured.

However, Plaintiffs assert that in the annual Form 5500s that Airgas files with the Department of Labor, Defendant lists "significant" insurance coverage that contradicts the finding that the Plan is self-funded. (ECF No. 26). Plaintiffs provided the court with the subject Form 5500s from 2017. (ECF No. 26-1). In those reports, Airgas is listed as the "Name of Plan" subject to the report. *Id.* at 1. As for the Plan funding arrangement and Plan benefit arrangement, Defendant Airgas selected both "insurance" and "general assets of the sponsor." *Id.* at 2. Because Airgas indicated that insurance partially funded the Plan arrangement, it provided the requisite insurance information schedules. *Id.* As to each of these insurance information schedules, Defendant Airgas is described as the subject Plan. *Id.* at 4, 8, 12, 16, 20, 24, 28, 32, 36. Each insurance information schedule indicates the total number of premiums or subscriptions paid to the insurance carrier during the 2017 report period. *Id.* at 7, 11, 15, 19, 23, 27, 31, 35. Plaintiffs contend that the "significant" nature of these premiums indicates that the Plan is really an insured plan. (ECF No. 26).

The Fourth Circuit has made clear that mere stop-loss insurance coverage does not convert a self-funded or self-insured plan into an insured plan. *Thompson v. Talquin Bldg. Prods. Co.*, 928 F.2d 649, 653 (4th Cir. 1991). "Stop-loss insurance provides coverage to self-funded plans above a certain level of risk absorbed by the plan. It provides protection to the plan, not the plan's participants or beneficiaries, against any benefits payments over the specified level." *Am. Med. Sec., Inc. v. Barlett*, 111 F.3d 358, 361 (4th Cir. 1997). A stop-loss policy "does not itself provide

coverage for benefits." *Id.* at 362. Accordingly, for the purposes of ERISA, a Plan remains self-funded even if it has stop-loss insurance. *Thompson*, 928 F.2d at 653.

In this case, the court notes that Plaintiffs have contended that the "*Plan* uses substantial insurance coverage," not that the Plan has purchased separate health insurance for its covered persons. *See* (ECF No. 26 at 3). Additionally, from the face of the insurance information schedules Plaintiff has provided, it appears to the court that the premiums in question are paid to the insurance providers by Defendant Airgas, pursuant to a contract between Defendant Airgas and the individual insurance providers. *See* (ECF No. 26-1). These schedules were attached to the Form 5500, which was signed by Airgas's representative on July 29, 2018, *id.* at 1, and which is contemporaneous with the SPD provided to the court, *see* (ECF No. 7-2 at 2) (indicating an effective date of January 1, 2018). Neither party has represented that there were substantial changes to the SPD between the 2017 version and the 2018 revisions.

Accordingly, considering the SPD together with the Form 5500 and attachments, the court concludes that the insurance indicated in the Form 5500 is, in fact, stop-loss insurance, which does not convert the Plan into an insured plan. First, the court notes that the SPD specifically states numerous times that Airgas Inc. is "*solely responsible for paying Benefits*" to the covered persons. *See, e.g.,* (ECF No. 7-2 at 10, 11). While Plaintiffs contend that the amount of premiums paid indicates that the insurance is not stop-loss insurance, the court views the key question is not the *amount* of premiums, but rather, *who* is liable for the payment of benefits under the Plan. *Cf. Am. Med. Sec., Inc.*, 111 F.3d at 364 (discussing how the attachment point of stop-loss insurance is not the determining factor as to whether the insurance is truly stop-loss in nature and that the real issue is where the liability for benefits lies and if benefits would be paid if the Plan was insolvent). There is no indication in any of the filings that the purported insurance carriers listed in the

insurance information schedules pay any sort of benefit directly to the Plan's covered persons. Instead, it appears that their obligations are solely to Airgas, Inc. based on their contractual relationships. *See* (ECF No. 26-1). Airgas Inc. remains solely and directly liable to the covered persons for payment of any benefits, even though Airgas Inc. has purchased insurance. Therefore, the court finds that based on the evidence provided by the parties, the insurance listed in the Form 5500 and related attachments is mere stop-loss insurance that does not convert the Plan into an insured Plan. *See Thompson*, 928 F.3d at 653 (stating that because the subject plan remained directly liable to its employees for any amount of benefits owed, even though the plan had insurance, the plan remained self-funded for purposes of ERISA).[11]

Finally, as to the issue of UnitedHealthcare Services and Optum sending the letters to Plaintiffs, which Plaintiffs contend demonstrates that the attempted subrogation collection is primarily meant to benefit a health insurance company separate and apart from the Plan, Plaintiffs specifically reference a September 17, 2018, letter from Optum, which stated in the body of the text that "UnitedHealthcare Services ha[d] retained Optum," but also lists the represented Group associated with the Plan as "Airgas, Inc." (ECF No. 26-2 at 1). A similar letter, dated September 19, 2018, stated that it was sent to "follow up [on] prior communications" and that "Optum ha[d] been retained *for* the above group to pursue recovery of medical benefits that had been paid." *Id.* at 2 (emphasis added). Again, Airgas Inc. was listed as the Group related to the letter. *Id.* A letter dated October 5, 2018, contained the same language as the September 19th letter. *Id.* at 4.

The court notes that the SPD for this Plan indicates that the Plan "administration is provided through one or more third party administrators." (ECF No. 7-2 at 138). The SPD further provides that "UnitedHealthcare is the Plan's Claims Administrator," and that its role is the "day-to-day

[11] Additionally, the court notes that at least initially in this case, Plaintiffs contended that the Plan was a self-funded ERISA Plan. (ECF No. 5-1 at 3 n.3).

administration of the Plan's coverage by the Plan Administrator." *Id.* at 137. Airgas, Inc. is the Plan Administrator. *Id.* Furthermore, the SPD states that "[a]lthough UnitedHealthcare will assist [covered persons] in many ways, it does not guarantee any Benefits. Airgas, Inc. is solely responsible for paying Benefits described in the SPD." *Id*. at 10. Airgas also specifically designated that in addition to Airgas, Inc., UnitedHealthcare had the authority and discretion to apply and interpret the terms and conditions of the Plan and the SPD. *Id.* at 118. Additionally, the SPD notes that "UnitedHealthcare and Optum Insight are related companies through common ownership by UnitedHealth Group."[12] *Id.* at 18. It appears to this court that contrary to what Plaintiffs contend, the Optum letters do not demonstrate that the attempted subrogation collection is for the "primary benefit of a health insurance company" but, rather, that UnitedHealthcare, acting in its capacity as Claims Administrator, utilized Optum to reach out to Plaintiffs regarding Airgas's potential subrogation interest. As a result, the court finds that the Plan is a self-funded Plan governed by ERISA. Because the Plan is a self-funded Plan, the deemer clause operates to exempt the Plan from state laws that "regulate insurance" within the meaning of the savings clause. *FMC Corp.*, 498 U.S. at 6.

D. CONCLUSION AS TO MOTION TO REMAND

Based on the foregoing, as it relates to this case, the application of S.C. Code Ann. § 38-77-160 is pre-empted by ERISA. Accordingly, ERISA necessarily preempts Plaintiffs' state law claims, which have been intertwined into one inseparable cause of action. Moreover, because Plaintiffs' state law claims fall within the scope of § 502(a) of ERISA, such claims are treated as federal causes of action over which this court has jurisdiction. *See Signh v. Prudential Health Care*

[12] *See also UnitedHealth Group Announces "Optum" Master Brand for its Health Services Businesses*, (April 11, 2011), https://www.unitedhealthgroup.com/newsroom/2011/0411optum.html (last visited Oct. 16, 2019) (stating that Optum is the main name for three subentities of Optum – Optum Insignt, OptumHealth, and OptumRx – which are all owned by UnitedHealth Group).

Plan, Inc., 335 F.3d 278, 291 (4th Cir. 2003) (discussing a plan's possible subrogation interests and holding that "when the validity, interpretation or applicability of a plan term governs the participant's entitlement to a benefit or its amount, the claim for such benefit falls within the scope of §502(a)" and is subject to federal jurisdiction). Accordingly, the court **DENIES** Plaintiffs' motion to remand (ECF No. 5).

III. MOTION TO DISMISS

A motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint or pleading. *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009). "[T]he legal sufficiency of a complaint is measured by whether it meets the standard stated in Rule 8 [of the Federal Rules of Civil Procedure] . . . and Rule 12(b)(6) (requiring that a complaint state a claim upon which relief can be granted)." *Id.* Rule 8(a)(2) requires that a pleading 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). This pleading standard requires that a complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 555 (2007).

In *Ashcroft v. Iqbal*, the United States Supreme Court stated that to survive a 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when [a party] pleads factual content that allows the court to draw the reasonable inference that the [opposing party] is liable for the misconduct alleged." *Id.* The plausibility standard "asks for more than a sheer possibility that a [party] has acted unlawfully." *Id.* Rather, "[i]t requires [a party] to articulate facts, when accepted as true, that 'show' that [the party] has stated a claim entitling [them] to relief[.]" *Francis*, 588

F.3d at 193 (*quoting Twombly*, 550 U.S. at 557). Such "factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. "Determining whether a complaint states [on its face] a plausible claim for relief [which can survive a motion to dismiss] will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S. Ct. at 1950. However, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' –"'that the pleader is entitled to relief.'" *Id.* (quoting Fed. R. Civ. P. 8(a)(2)).

Under limited circumstances, a court may consider documents beyond the complaint without converting the motion to dismiss to one for summary judgment. *Goldfarb v. Mayor & City Council of Baltimore*, 791 F.3d 500, 508 (4th Cir. 2015). A court may properly consider documents that are "explicitly incorporated into the complaint by reference and those attached to the complaint as exhibits. . . ." *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016) (citations omitted).

In this case, Defendant Airgas contends that Plaintiffs' claims must be dismissed because they did not exhaust their administrative remedies prior to filing this action. (ECF No. 7). As noted above, this court holds that ERISA governs this case. An ERISA claimant "generally is required to exhaust the remedies provided by the employee benefit plan" as a "prerequisite to an ERISA action for denial of benefits under 29 U.S.C. § 1132." *Makar v. Health Care Corp. of Mid-Atl.(CareFirst)*, 872 F.2d 80, 82 (4th Cir. 1989). Chapter 29 of the United States Code, section 1132 states that a civil action may be brought "to recover benefits due to [a person] 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 plan," 29 U.S.C. § 1132(a)(1)(B), or to "obtain other equitable relief" 29 U.S.C. §

1132(a)(3). The Fourth Circuit has made clear that "when the validity, interpretation or applicability of a plan term governs the participant's entitlement to a benefit or its amount, the claim for such a benefit falls within the scope of § 502(a)" of ERISA. *Singh*, 335 F.3d at 291. In fact, more specifically, where the "validity of [a] subrogation term" in an ERISA plan is in question to resolve a dispute, the Fourth Circuit has determined that "those claims are within the scope of § 502(a)" and relate to a claim for benefits. Accordingly, the court finds that this case, which seeks relief based on a claim for benefits under § 502(a), falls within the scope of 29 U.S.C. § 1132, and, therefore, the general rule that Plaintiffs must exhaust their remedies is applicable.

Plaintiffs contend that they have exhausted their administrative remedies because they sent letters to the recovery agent. (ECF No. 13 at 5). Airgas argues that this did not amount to exhaustion of their administrative remedies because the Plan and SPD set forth a specific procedure as to how a claimant must exhaust his or her remedies under the Plan prior to filing a federal law suit under ERISA. (ECF No. 19). The Plan provides that the Program Document will set forth the administrative claims procedures. (ECF No. 7-2 at 199). The Plan defines the Program Document as including the SPD. *Id*. at 166. The SPD provides a detailed description of how to file a claim or appeal within the administration of the Plan. *Id.* at 88–96. The SPD further states that no one can "bring any legal action against Airgas, Inc. or the Claims Administrator for any . . . reason unless [he or she] first completes all steps in the appeal process as described" in the SPD. *Id.* at 96.

There is no indication in the pleadings that Plaintiffs exhausted their administrative remedies as set forth in the SPD. As noted above, when ruling on a motion to dismiss under 12(b)(6), the court is generally limited to consider the matters set forth in the pleadings. However, even if the court were to consider the letters Plaintiffs attached to their response in opposition to

the motion to dismiss (ECF No. 13-1), the court notes sending emails to a recovery agent does not comply with the specific exhaustion process set forth in the SPD. There are no allegations in the pleadings that Plaintiffs ever utilized the Plan's claims or appeal process. Accordingly, the court agrees with Defendant that Plaintiffs have failed to show that they have exhausted their administrative remedies.

Nonetheless, Plaintiffs now claim that "any further efforts to exhaust such remedies would have been futile." (ECF No. 13). Plaintiffs did not set forth a futility argument in their pleadings, nor have Plaintiffs expounded on any such argument in their response to the motion to dismiss. Furthermore, no motion to amend the pleadings has been properly filed. Courts have required the "clear and positive" showing of futility before suspending the exhaustion requirement within the context of ERISA. *See Makar*, 872 F.2d at 83. The court finds that Plaintiffs have failed to meet this burden.

Accordingly, the court finds that this case is subject to dismissal because Plaintiffs failed to exhaust their administrative remedies set forth in the Plan and SPD.[13]

IV. CONCLUSION

Accordingly, the court **DENIES** Plaintiffs' motion to remand (ECF No. 5) and **GRANTS** Defendant Airgas's motion to dismiss (ECF No. 7).[14]

IT IS SO ORDERED.

s/Timothy M. Cain
United States District Judge

November 5, 2019
Anderson, South Carolina

[13] Plaintiffs also seem to rely on their argument that dismissal of this action would be "impractical" for the court and for the parties because of the nature of the case. However, the court notes that Plaintiffs were the masters of their complaint and could have pled this case in any way they saw appropriate. Additionally, the court is not inclined to find that an exhaustion of remedies would be futile based on the mere inconvenience to the Plaintiffs having to adhere to the proper procedure as set forth in the Plan and SPD regarding claims procedure.

[14] Such dismissal is without prejudice.