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8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA
 10 SAN FRANCISCO / OAKLAND DIVISION

11 NICOLE GLAUS, individually and on behalf)
 12 of a class of all other persons similarly)
 13 situated,)

13 Plaintiff,

14 v.

15 KAISER FOUNDATION HEALTH PLAN,)
 16 INC.,)

16 Defendant.

Case No. C 09-02232 MEJ

DEFENDANT KAISER
 FOUNDATION HEALTH PLAN'S
 NOTICE OF MOTION AND
 MOTION TO DISMISS AND, IN THE
 ALTERNATIVE, MOTION FOR
 MORE DEFINITE STATEMENT;
 MEMORANDUM

Accompanying documents: Request
 for Judicial Notice and Declaration of
 Maria Borje Bonkowski

DATE: Aug. 13, 2009
 TIME: 10:00 a.m.
 CTRM.: B

20 TO PLAINTIFF NICOLE GLAUS AND HER ATTORNEY OF RECORD:

21 PLEASE TAKE NOTICE that at 10:00 a.m., on August 13, 2009, in Courtroom B
 22 of the above-named Court located at 450 Golden Gate Ave., San Francisco, California,
 23 defendant Kaiser Foundation Health Plan, Inc., will move the Court to dismiss each
 24 Count of the Complaint pursuant to Rule 12(b)(6), Fed. R. Civ. Pro., on the ground that
 25 plaintiff has failed to adequately plead that she has exhausted her administrative remedy
 26 under the applicable employee welfare-benefit-plan agreement and, therefore, has failed
 27 to state a cause of action on which relief can be granted. In the alternative, defendant will
 28 move, pursuant to Rule 12 (e), *id.*, for a more definite statement about whether she has

MOTION TO DISMISS, NO. C 09-02232 MEJ

1 exhausted her administrative remedy.

2 The motions are based on this Notice, the attached memorandum of points and
3 authorities, request for judicial notice and Declaration of Maria Borje-Bonkowski, and
4 such further evidence that the Court may consider at the hearing of the motions.

5 Respectfully submitted,

6 Dated: July 9, 2009

MARION'S INN

7
8 By: _____
Brian S. Lee

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10 Attorneys for Defendant Kaiser Foundation
Health Plan, Inc.

11
12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 Before a group health plan participant brings a court action under section 502 of
14 the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1132, the
15 participant is first required to exhaust her administrative remedy under section 503 of
16 ERISA, 29 U.S.C. § 1133. The Complaint here attempts to meet this fundamental
17 requirement with a bald, one sentence conclusion. More is required so that the Court and
18 the parties do not waste time and other resources on a case that cannot meet a critical
19 threshold condition for judicial relief. Defendant Kaiser Foundation Health Plan
20 (“Kaiser”) therefore moves for an order dismiss the complaint for failure to state a cause
21 of action or for a more definite statement.

22
23 **I**

24 **SUMMARY OF PLAINTIFF’S CLAIMS**

25
26 At all relevant times, plaintiff Nicole Glaus received health care coverage as a
27 participant in an ERISA employee welfare benefit plan sponsored by her employer, Stead
28 Automotive Group. Stead Automotive established the plan by entering into a group

1 agreement with Kaiser. Participants who enroll under this group agreement are also
2 referred to as “members.” Complaint ¶¶ 4 & 6. The terms and conditions that govern
3 plaintiff’s rights and obligations under the plan are set forth in a document called the
4 Evidence of Coverage or “EOC.” *Id.* ¶ 9. The EOC was provided to plan participants.
5 *Id.* It is well established that the Court can, on motion to dismiss, take judicial notice of
6 undisputed contracts that are referred to in the complaint.¹

7 The EOC contains a third party liability (“TPL”) lien provision that allows Kaiser
8 to recoup the value or cost of the health care services that are provided to an injured
9 Kaiser member when the member obtains a settlement or other recovery from the third
10 party tortfeasor who allegedly caused the injury. If the member paid for a portion of
11 these health care services in the form of a copayment or other member cost share
12 obligation, the TPL lien provision entitles the member to a credit for such payments.
13 Complaint ¶¶ 10 & 17; RJN, Exh. A at 53.

14 The gravamen of the complaint is the allegation that Kaiser failed to grant plaintiff
15 a credit for two copayments in the total amount of \$20.00. Plaintiff alleges that other
16 Kaiser members who were participants or beneficiaries in ERISA employee welfare
17 benefit plans were also deprived of credits for applicable member cost share payments
18 and seeks to prosecute a class action on their behalf. Complaint ¶¶ 28 - 36.

19 The EOC provides for a process whereby aggrieved members can assert a claim
20 for money or health services to which they are allegedly entitled under the EOC. This
21 process is set forth in the “Dispute Resolution” section of the EOC. In pertinent part, this
22 section states:

23 **“Grievances** [¶] We are committed to providing you with quality

24
25 ¹ As explained more fully in the attached Request for Judicial Notice (“RJN”), the
26 Court may take judicial notice of the EOC under Fed. R. Evid. 452(h) because the
27 Complaint explicitly relies on its provisions and the EOC is not subject to any dispute as
28 to its authenticity. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994); *Parrino v. FHP,*
Inc., 146 F.3d 699, 705-706 (9th Cir. 1998); *Kurtcu v. U.S. Parking, Inc.*, 2008 U.S. Dist.
Lexis 51302, *2 n.1, *4 (N.D. Cal 2008).

1 care and with a timely response to your concerns. You can discuss
 2 your concerns with our Member Services representatives at most
 Plan Facilities, or you can call our Member Service Call Center. [¶]
 3 You can file a grievance for any issue. Your grievance must explain
 your issue, such as the reasons why you believe a decision was in
 4 error or why you are dissatisfied about Services you received. You
 must submit your grievance orally or in writing within 180 days of
 5 the date of the incident that caused your dissatisfaction as follows:
 [providing methods and locations by which a plan member may
 6 submit a grievance²].” RJN, Exh. A at 56.

7 Had Ms. Glaus filed a grievance and had she been dissatisfied with the result, she would
 8 have been directed to additional dispute resolution options.³ *Id.*

9 Stead Automotive delegated to Kaiser the authority to review claims under the
 10 dispute resolution procedure. In particular, the group agreement provides:

11 **“Delegation of Claims Review**

12 Health Plan is a named fiduciary to review claims under this
 Agreement. Group delegates to Health Plan the discretion to
 13 determine whether a Member is entitled to benefits under this
 Agreement. In making these determinations, Health Plan has
 14 discretionary authority to review claims in accord with the
 procedures contained in this Agreement and to construe this
 15 Agreement to determine whether the Member is entitled to benefits.”
 RJN, Exh. A at 8.

16 Although Kaiser has no record of plaintiff having utilized this administrative dispute
 17 resolution process, the Complaint baldly asserts: “Ms. Glaus has exhausted her
 18 administrative remedies under the Stead Plan and the EOC.” Complaint ¶ 27.

19
 20
 21 ² Those methods / locations are as follows: “• To a Member Services
 22 representative at your local Member Services Department at a Plan Facility (please refer
 to Your Guidebook for locations), or by calling our Member Service Call Center [¶] •
 23 Through our Web site at **kp.org** [¶] • To the following location for claims described
 24 under "Emergency, Post-stabilization, and Out-of-Area Urgent Care" under "Requests for
 Payment" in the "Requests for Payment or Services" section: [¶] Kaiser Permanente[,]
 25 Special Services Unit[,] P.O. Box 23280[,] Oakland, CA 94623”

26 ³ The EOC provides: “We will send you a confirmation letter within five days
 27 after we receive your grievance. We will send you our written decision within 30 days
 after we receive your grievance. If we do not approve your request, we will tell you the
 28 reasons and about additional dispute resolution options” (RJN, Exh. A at 57.)

II

**PLAINTIFF'S CLAIM FOR BENEFITS UNDER
SECTION 502(a)(1)(B) OF ERISA FAILS TO ADEQUATELY
PLEAD FACTS SHOWING THAT PLAINTIFF HAS
EXHAUSTED HER ADMINISTRATIVE REMEDY**

The first count of the complaint is a claim for benefits under section 502(a)(1)(B) of ERISA, 29 U.S.C. §1132(a)(1)(B). Such a claim cannot be prosecuted if the plaintiff failed to exhaust her administrative remedies under the applicable ERISA plan agreement and section 503 of ERISA, 29 U.S.C. §1133. *Amato v. Bernard*, 618 F.2d 559, 567-568 (9th Cir. 1980). The exhaustion requirement serves several policy objectives. As the Ninth Circuit explained in *Amato*, ERISA administrative procedures “help to reduce the number of frivolous lawsuits under ERISA; to promote the consistent treatment of claims for benefits; to provide a nonadversarial method of claims settlement; and to minimize the costs of claims settlement for all concerned.” *Id.* at 567. Furthermore, the exhaustion requirement enables plan fiduciaries to “expertly and efficiently manage their funds by preventing premature judicial intervention in their decision-making processes.” *Id.* Lastly, a “primary reason” for the exhaustion requirement is that “prior fully considered actions by [plan fiduciaries] interpreting their plans and perhaps also further refining and defining the problem in given cases, may well assist the courts when they are called upon to resolve the controversies.” *Id.* (citations omitted); *accord Diaz v. United Agric. Employee Welfare Benefit Plan & Trust*, 50 F.3d 1478, 1486 (9th Cir. 1995).

Because exhaustion is a mandatory pre-condition to judicial relief and because of the underlying policies, a bare conclusory allegation should not operate as a free pass to full-blown litigation. A plaintiff is presumably aware of whether she invoked the plan’s claim review procedure and, if so, how the plan’s claim review fiduciary disposed of the claim. The Southern District of New York, for example, held that a complaint like the one here, alleging only that “[plaintiff] has exhausted his administrative remedies,” was too conclusory and insufficient to survive a motion to dismiss. *DeVito v. Local 553 Pension Fund*, 34 E.B.C. (BNA) 2342, 2005 U.S. Dist. Lexis 1036, *20. (S.D.N.Y. 2005).

1 The *DeVito* court observed that “[a] plaintiff questioning the specific denial of benefits
2 must either exhaust his or her administrative remedies or demonstrate that doing so would
3 be futile.” *Id.* Noting that the plan at issue in *DeVito* “sets forth the procedures for
4 administrative review of a denial of benefits,” the court found that the plaintiff “has not
5 pleaded any facts indicating he requested such a review here.” *Id.*; *cf. Spinidex Phys.*
6 *Therapy USA v. United Healthcare of Ariz.*, 2009 U.S. Dist. Lexis 40030, *71 (held
7 sufficient to allege “Plaintiffs have exhausted all required administrative appeals
8 process”).

9 The holding in *DeVito* is reinforced by the caselaw that has construed similar
10 exhaustion requirements under other federal statutes. *Garcia v. Kaiser Found. Hosps.*,
11 2008 U.S. Dist. Lexis 96166, *9 (C.D. Cal. 2008) (granting motion to dismiss in action
12 under section 301 of LMRA, 29 U.S.C. § 185, for failure to plead that plaintiff exhausted
13 the grievance procedures in collective bargaining agreement, or was justified in not doing
14 so, and that union breached its duty of fair representation in handling that grievance);
15 *Mendes v. W.M. Lyles Co.*, 2008 U.S. Dist. Lexis 6480, *38 (E.D. Cal. 2008) (granting
16 motion to dismiss LRMA § 301 claim for failure to plead compliance or excuse with
17 grievance procedures provided in collective bargaining agreement).

18 Enforcement of the exhaustion requirement at the outset of litigation is especially
19 desirable in a putative class action. As the Southern District of Illinois cogently
20 explained, the potential for numerous plaintiffs “underscores the benefit of there being a
21 full administrative examination of these [underlying] issues.” *Williams v. Rohm and*
22 *Haas Pension Plan*, 31 E.B.C. (BNA) 1686, 2003 U.S. Dist. Lexis 17313, *14 (S.D. Ill.
23 2003) (granting motion to dismiss putative class action complaint alleging breach of
24 ERISA fiduciary duty and statutory claims). This is because “[t]he defendant, in having a
25 more thorough understanding of the claims of the class, may determine whether broad
26 based relief is appropriate, and the plaintiffs, if unsatisfied with the outcome of the
27 administrative process, could still proceed in court in pursuit of an adequate remedy.”
28 *Id.*; *accord Frishberg v. Deloitte & Touche Pension Plan*, 2008 U.S. Dist. Lexis 65343,

1 *16-*17 (D. Conn. 2008) (granting motion to dismiss putative ERISA class action claim
2 for improper denial of benefits).

3 Plaintiff's complaint fails to plead any facts to establish an essential requirement to
4 plead an ERISA claim for recovery of benefits. A mere conclusory allegation is not
5 sufficient. Therefore, the plaintiff's first cause of action should be dismissed.

6 III

7 **PLAINTIFF CANNOT AVOID EXHAUSTION** 8 **BY ADDING AN ERISA INJUNCTION/RESTITUTION CLAIM**

9 Plaintiff's second claim for relief seeks an injunction under ERISA § 502(a)(3), 29
10 U.S.C. § 1132(a)(3), to require Kaiser, as a claims review fiduciary, to credit plaintiff
11 with her alleged cost-sharing payments. Complaint ¶¶ 45-50. Plaintiff claims entitlement
12 to this relief because an ERISA fiduciary is required to administer the plan for the
13 benefits of plan participants and beneficiaries and to administer the plan according to the
14 governing plan instruments. Complaint ¶¶ 50-51, *citing* ERISA § 404(a)(1)(A), 29 U.S.C.
15 § 1104(a)(1)(A), & ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). Plaintiff alleges
16 that the alleged failure to provide the credits unjustly enriched Kaiser in breach of its
17 fiduciary duty and the terms of the EOC, entitling the plaintiff to an injunction and other
18 equitable relief, including restitution and disgorgement of "profits." Complaint ¶¶ 53-55
19 & Prayer ¶¶ K & L.

20 Since plaintiff's section 502(a)(1)(B) benefits claim is sufficient to fully
21 compensate plaintiff for any harm suffered as a result of the alleged failure to credit,
22 plaintiff's section 502(a)(3) injunction claim cannot be maintained because money
23 damages are adequate. *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1475 (9th Cir. 1997),
24 *aff'd*, *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999). But before even making such a
25 claim, the plaintiff must first have exhausted her internal plan remedies. Plaintiff's
26 second claim therefore should be dismissed along with the first claim.

27 Plaintiff may try to pigeon-hole the injunction claim into the Ninth Circuit's
28 holding that statutory retaliation claims under ERISA § 510, 29 U.S.C. § 1140, are not

1 subject to exhaustion requirements. *Amaro v. Continental Can Co.*, 724 F.2d 747,
2 750-53 (9th Cir. 1984). Such an attempt would be to no avail. A claim for retaliation for
3 asserting ERISA rights is wholly a creature of statute that does not depend on the plan
4 administrator's internal review of the plaintiff's grievance or interpretation of plan
5 documents. *Id.* at 751.

6 Plaintiff's claim for benefits, coupled with a claim for an injunction, restitution
7 and disgorgement based on the same alleged denial of contractual benefits, however, is
8 precisely the opposite. It turns on the plan administrator's exercise of discretion in plan
9 administration and interpretation of the terms of the plan. Further, the benefits of
10 exhaustion – resolving disputes over plan terms internally without burdening the courts –
11 would be lost if a plaintiff could avoid exhaustion simply by adding an ERISA injunction
12 / restitution claim.

13 Indeed, the Ninth Circuit has held that the requirement to exhaust plan remedies
14 applies to benefits claims coupled with claims for alleged statutory violations under
15 ERISA or COBRA. *Diaz*, 50 F.3d at 1484. As the Ninth Circuit explained: “To be sure,
16 many employee claims for plan benefits may implicate statutory requirements imposed by
17 ERISA or COBRA (or perhaps other statutes, for that matter).” *Id.* “And when the
18 administrative resolution of those claims is then presented for judicial review, courts may
19 then be called upon to determine whether the plan administrators have construed or dealt
20 with those statutes in an appropriate manner.” *Id.* “But that prospect does not give a
21 claimant the license to attach a ‘statutory violation’ sticker to his or her claim and then to
22 use that label as an asserted justification for a total failure to pursue the congressionally
23 mandated internal appeal procedures.” *Id.* Plaintiff's second claim should be dismissed
24 for failure to exhaust internal plan remedies.

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IV**ALTERNATIVELY, THE COURT SHOULD REQUIRE
PLAINTIFF TO FILE A MORE DEFINITE STATEMENT
CONCERNING HER EFFORTS TO EXHAUST
ADMINISTRATIVE REMEDIES**

Alternatively, the Court should order the plaintiff to file a more definite statement of both alleged ERISA claims. The Court has discretion to make such an order if the complaint is “so vague and ambiguous that the party cannot reasonably prepare a response.” Fed. R. Civ. P. 12(e); *McHenry v. Renne*, 84 F.3d 1172, 1175 (9th Cir. 1996).

Plaintiff’s conclusory allegation that she has “exhausted administrative remedies” reveals nothing about what steps, if any, she took to obtain relief under the EOC’s administrative dispute resolution process, or the internal appeal process. A more specified pleading is needed so that the Court and the parties can focus on the issues that may serve as the basis for a dispositive motion or define the scope of discovery and the ultimate trial.

V

CONCLUSION

For the foregoing reasons, the Court should dismiss the plaintiff’s putative class action complaint in its entirety. Alternatively, the Court should order the plaintiff to file a more definite statement concerning her efforts to exhaust administrative remedies provided for in her Kaiser membership agreement.

Respectfully submitted,

Dated: July 9, 2009

MARION'S INN
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By: _____

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Health Plan, Inc.