UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Brittany R. Tovar, Plaintiff, vs. Essentia Health, Innovis Health, LLC dba Essentia Health West, HealthPartners, Inc., and HealthPartners Administrators, Inc. Defendants.	Case No.: 0:16-cv-00100- (DWF/LIB) **DEFENDANT ESSENTIA HEALTH AND INNOVIS HEALTH, LLC'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO AMEND COMPLAINT**

INTRODUCTION

Before the Court is Plaintiff's motion seeking leave to amend her complaint, following a final judgment dismissing all claims asserted against Defendants Essentia Health and Innovis Health, LLC dba Essentia Health West (collectively "Essentia"), affirmed on appeal by the Eighth Circuit. Tovar v. Essentia Health, 857 F.3d 771, 775 (8th Cir. 2017). Plaintiff's motion should be denied because of the lack of a sufficient showing by Plaintiff of new facts, or any explanation, for her failure to remedy the known defects in her initial complaint prior to entry of a final order of dismissal against these Defendants. Because amendment following a final judgment is "disfavored," Plaintiff's motion should be denied in the interests of upholding the finality of judgments.

Plaintiff's motion should be denied not only because of her undue delay, but also because of the futility of the amendment. Her proposed amended complaint is fatally

flawed and relief is barred by principles of res judicata, failure to exhaust administrative remedies under Employee Retirement Income Security Act of 1974 ("ERISA"), and Plaintiff's lack of economic damages. Moreover, final regulations implementing Section 1557 of the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. § 18116 ("Section 1557"), which form the basis of her purported action, have been stayed pending their review by the Department of Health and Human Services, establishing the futility of her amendment. Even if these regulations were not stayed, her proposed amended complaint establishes on its face that Essentia did not violate the regulations because it amended its group health insurance plan in a timely manner.

For these reasons, Essentia respectfully requests this Court deny Plaintiff's motion.

FACTUAL BACKGROUND

On January 15, 2016, Tovar initially commenced an action against Essentia and HealthPartners, Inc. (Doc No. 1.) In her original complaint, Tovar alleged her employer at the time, Essentia, maintained a group health insurance plan for its employees administered by HealthPartners as a third party administrator. (Id. at ¶¶ 21-24.) In 2014, Tovar's son became a beneficiary of the plan and was subsequently diagnosed with gender dysphoria. (Id. at ¶¶ 26-27.)

The plan described in Tovar's original complaint contained an exclusion for "[s]ervices and/or surgery for gender reassignment." (Id. at ¶ 25.) Due to this exclusion, Tovar alleged her son Reid Olson ("Olson") was "denied insurance coverage for health

care that his providers have deemed medically necessary." (Id. at ¶ 31.) In particular, Tovar alleged three instances of discrimination in her original complaint:

1. Tovar's son was prescribed a drug called Lupron. This drug is prescribed for treatment of painful menstruation, but can also temporarily suspend menstruation, which was the purpose of Tovar's son's prescription. (Id. at ¶¶ 35-37.) Tovar alleged Lupron was not covered under the plan for that purpose due to the exclusion. (Id. at ¶ 38.) Because the cost of the prescription was $9,000, she did not purchase the prescription. (Id. at ¶ 40.)
2. Tovar's son was also prescribed Androderm, a form of testosterone, to treat his gender dysphoria. (Id. at ¶ 42.) Coverage was also denied because the medicine was "for use by males only" and was "not covered for patient gender." (Id. at ¶ 43.) Tovar paid for this prescription out-of-pocket, but "Essentia later agreed" to reimburse Tovar. (Id. at ¶¶ 44-45.)
3. In December 2015, Tovar contacted HealthPartners to inquire about pre-authorization for gender reassignment surgery for her son. (Id. at ¶ 46.) She was allegedly told the surgery would not be authorized. (Id.)

Based on these allegations, Tovar asserted three counts in her original complaint. The first two counts were employment discrimination claims against Essentia. Tovar alleged in these counts that Essentia, as her employer, violated both Title VII and the MHRA's bar on sex discrimination by excluding coverage for gender reassignment services or surgery. (Id. at ¶¶ 53, 59.) In her third count, Tovar asserted an ACA claim

against HealthPartners, alleging that HealthPartners discriminated against Tovar in violation of Section 1557 by serving as the third-party administrator for the Essentia plan and enforcing the exclusion. For each count, Tovar alleged the violations caused her and her family "economic and emotional distress." (Id. at ¶¶ 54, 60, 64.)

Both Essentia and HealthPartners moved to dismiss Tovar's action. Essentia moved to dismiss the action pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted on the grounds that she lacked statutory standing under either Title VII or the MHRA because she never suffered any discriminatory action on the basis of her sex or gender identity; all actions related to her son, who was neither a party nor an employee of Essentia. (Doc No. 11 at 4-5.) HealthPartners moved to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction on the grounds that Tovar lacked standing, as she was not personally discriminated against and her alleged injuries were not traceable to HealthPartners. (Doc No. 13 at 8-11.) HealthPartners further argued her claims were moot because she suffered no economic harm. (Id. at 12.) Alternatively, HealthPartners moved to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted both because there were no allegations that Tovar exhausted her administrative remedies under ERISA and because of its claim that Essentia, not HealthPartners, was responsible for the exclusion in the plan. (Id. at 16-20.)[1]

[1] Essentia denies that it was responsible for the plan design or the exclusion in the plan and reserves all rights and defenses should Plaintiff's motion be granted. Essentia also notes that several paragraphs of Plaintiff's proposed amended complaint outline that HealthPartners was, in fact, responsible for the plan exclusion, as outlined later herein.

On May 11, 2016, the district court granted both Essentia and HealthPartners's motions to dismiss. (Doc No. 22.) With respect to Essentia, the district court agreed that Tovar was not an aggrieved party entitled to assert a Title VII or MHRA claim. Her alleged injuries were strictly vicarious in nature, as they were "due to" her son being allegedly denied medical care. (Id. at 16.) With respect to HealthPartners, the district court also agreed that Tovar's alleged injuries were not fairly traceable to HealthPartners because HealthPartners Administrators, Inc. ("HPAI") was the third-party administrator for the plan and Tovar failed to join HPAI as a party to the action. (Id. at 5.) Moreover, the district court determined Tovar's complaint further failed because Tovar alleged no discriminatory action by HealthPartners (or HPAI) in administering the plan. (Id. at 7.) Accordingly, the district court dismissed the employment discrimination claims of Counts I and II against Essentia with prejudice and the ACA claim of Count III against HealthPartners without prejudice. (Id. at 16.) Judgment was entered the same day. (Doc No. 23.)

Following the court's order, Tovar moved to amend the Judgment, asking that the court's dismissal of Count III be changed to with prejudice in order to allow her to appeal the decision in its entirety. In response, HealthPartners suggested amending the complaint to join HPAI as a defendant so that a final judgment on the proposed amended complaint could allow the Eighth Circuit to address Tovar's arguments in a single appeal, including HPAI. Tovar agreed and requested that the complaint be amended to add HPAI as a defendant.

Despite the fact Tovar was plainly on notice of the parties' arguments and facts regarding the deficiencies in her complaint from the filing of the Defendants' motions for dismissal, Tovar did not seek at any time to amend to add Olson as a plaintiff either directly or in a representative capacity, nor did she seek leave to name Essentia as a defendant with regard to the Section 1557 claim. The district court granted her limited motion to amend on June 23, 2016, adding HPAI as a defendant to Count III and dismissing all claims in the newly amended complaint with prejudice. (Doc No. 32.)

Tovar then appealed the decision to the Eighth Circuit Court of Appeals. With respect to Essentia, the Eighth Circuit affirmed the district court's decision, holding Tovar did not state a cognizable employment discrimination claim under Title VII or the MHRA on her own behalf. Tovar, 857 F.3d at 775. With respect to HealthPartners and HPAI, the Eighth Circuit reversed, however, holding that Tovar had standing and her alleged injuries could be traceable to HealthPartners or HPAI as the plan's originators, notwithstanding the fact that Essentia adopted the plan. Id. at 778. The court further remanded the case to the district court to determine HealthPartners' alternative argument that her claim should be dismissed for failure to state a claim under the ACA. Id. at 779.

Tovar petitioned the Eighth Circuit for rehearing en banc. This petition was denied on July 6, 2017. (Doc No. 42.) Thus, the controversy as to Essentia had ended and the judgment of the district court was final.

Tovar now belatedly seeks leave to amend her complaint again, this time seeking to add Olson as a plaintiff, and to add Essentia as a defendant under her ACA claims,

previously asserted only against HealthPartners and HPAI. (Doc No. 56-1.) The ACA claim, in the proposed amended complaint, now asserts that "Essentia discriminated against Plaintiff Olson in violation of Section 1557 of the [ACA] by providing insurance . . . that contained a discriminatory exclusion . . . ." (Id. at ¶ 80.)

Tovar contends that new facts dictate amendment. On review, however, certain "new" allegations in the proposed amended complaint simply describe HealthPartners' (not Essentia's) involvement in designing the plan at issue. (Id. at ¶¶ 25-33.) In fact, new allegations in Plaintiff's proposed amended complaint simply highlight HealthPartners responsibility for plan design, averring that "Essentia did not design the plan itself. Instead, it looked to HealthPartners to provide options for coverage" and asserting that specific exclusions were never discussed with Essentia. (Id. at ¶¶ 26, 29). Although these facts are arguably "new," they simply do not in any way support Plaintiff's proposed amendment to belatedly name Essentia as a defendant under the ACA claim.

Other allegations relate to Tovar's "appeal" of coverage decisions and her discussions with HealthPartners. Notably, these facts were known to Tovar at the time of her original complaint and no material new facts relate to Essentia. Moreover, despite her vague assertions of appeal of benefit denials, Tovar's proposed amended complaint contains no assertions that Tovar or Olson met the requirement of exhaustion of the plan appeal remedies under ERISA. (Id. at ¶¶ 36, 38-41, 48-56.) Tovar's proposed additional allegations relate to Olson's treatments and confirm that neither Tovar nor Olson suffered

any out-of-pocket costs and that Tovar merely contacted HealthPartners to ask about "pre-authorization" for gender reassignment surgery for Olson, but was told it would not be covered. (Id. at ¶ 62 (confirming Tovar did not pay for Lupron); ¶¶ 66-67 (confirming Tovar was reimbursed for Androderm costs); ¶ 68 (alleging only that Tovar contacted HealthPartners about "pre-authorization" for gender reassignment surgery).

The proposed amended complaint confirms, as asserted by Essentia previously, that Tovar no longer works for Essentia. (Id. at ¶ 16.) Her last day of employment with Essentia was July 29, 2016, and she no longer maintains insurance under Essentia's plan. (Id. at ¶¶ 16, 73) Finally, Tovar's proposed amended complaint confirms that Essentia eliminated the gender reassignment exclusion in its policy as of the end of 2015. (Id. at ¶¶ 67, 73.)

LAW AND ARGUMENT

In the absence of an opposing party's written consent, a party may only amend its pleadings with the court's leave pursuant to Federal Rule of Civil Procedure 15)(a)(2). Fed.R.Civ.P. 15(a)(2). Though this rule further provides the district court "should freely give leave [to amend] when justice so requires," the Eighth Circuit Court of Appeals has expressly noted that "different considerations apply to motions filed after dismissal" of a party or action. U.S. ex rel. Roop v. Hypoguard USA, Inc., 559 F.3d 818, 823 (8th Cir. 2009). In fact, there is a "more restrictive standard" when courts in this circuit analyze motions to amend because "interests of finality dictate that leave to amend should be less

freely available after a final order has been entered." Streambend Props. II, LLC v. Ivy Tower Minneapolis, LLC, 781 F.3d 1003, 1010 (8th Cir. 2015); Roop, 559 F.3d at 823.

The Eighth Circuit Court of Appeals is also clear that motions for leave to amend a complaint post-judgment are "disfavored." Ash v. Anderson Merchandisers, LLC, 799 F.3d 957, 962 (8th Cir. 2015); Roop, 559 F.3d at 824. A district court may appropriately deny leave to amend where there are "compelling reasons such as undue delay, bad faith, or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of the amendment, even when doing so will necessarily prevent resolution on the merits." Ash, 799 F.3d at 963 (citations and quotations omitted). The district court further has "considerable discretion" to deny a post-judgment motion for leave to amend, and such decision will be upheld in the absence of an abuse of such discretion. Roop, 559 F.3d at 824; see also Forman v. Davis, 371 U.S. 178, 182 (1962) (holding a district court abuses its discretion if it does not provide "any justifying reason" for denying a motion for leave to amend).

I. This Court should deny Tovar's motion to amend the complaint as against Essentia due to her undue delay in bringing her motion after Essentia has obtained a final judgment in its favor.

Tovar has unduly delayed bringing a proposed amended complaint and has provided no evidence that her delay is justified. "Unexcused delay is sufficient to justify the court's denial [of a motion for leave to amend the complaint] if the party is seeking to amend the pleadings after the district court has dismissed the claims it seeks to amend, particularly when the plaintiff was put on notice of the need to change the pleadings

before the complaint was dismissed, but failed to do so." Ash, 799 F.3d at 962. Here, prior to the dismissal of Essentia, Tovar had clear notice regarding the potential need to add her son as a plaintiff and add Essentia to the ACA claim that was originally asserted against only HealthPartners. HealthPartners filed a motion to dismiss the claim and argued numerous times in its brief that Essentia, not HealthPartners, was responsible for the plan at issue. For whatever reasons, Tovar chose to stand by her original complaint, asserting separate claims under the ACA against HealthPartners and under Title VII and the MHRA against Essentia. The district court ultimately dismissed all claims against Essentia and HealthPartners, specifically noting Essentia's potential responsibility for the plan at issue, which Tovar now belatedly attempts to assert. (Doc No. 22 at 7.)

After the district court entered judgment in favor of Essentia and HealthPartners, Tovar moved the court to amend the complaint. Rather than attempting to add her son as a party or add Essentia to the ACA claim at that earlier point in the litigation, and before a final judgment on appeal, Tovar chose for reasons unknown to seek leave to amend her complaint only to add HPAI to the ACA claim. She made no argument or attempt to add Olson as a plaintiff or assert additional claims against Essentia.

Before, during, and after the motions to dismiss – indeed, virtually from the inception of this matter – Tovar has been on notice regarding the possibility of adding Essentia to the ACA claim or adding her son as a plaintiff. She inexplicably chose not to add Essentia and her opportunity to request leave to amend post-judgment has passed. Ash, 799 F.3d at 963-64 (holding there was no abuse of discretion in denying a motion

for leave to amend a complaint post-judgment when the plaintiffs were put on notice of possible deficiencies through a motion to dismiss and had an opportunity to request leave to amend before the court ruled on the motion). Tovar should not be permitted to change her tactical decision declining to add Essentia to the ACA claim or her son as a plaintiff prior to Essentia's dismissal from this action. Id. at 964 n.3 (noting it is not "fundamentally unfair" for plaintiffs to make the tactical decision to request leave to amend or stand by the complaint).

Tovar's present motion for leave to amend the complaint comes only after the Eighth Circuit Court of Appeals ruled on her original complaint, affirmed the employment discrimination claims pertaining to Essentia, and reversed the ACA claim against HealthPartners. Essentia has received a final judgment in its favor, yet Tovar impermissibly seeks to re-add Essentia to this claim and include Olson as a named plaintiff, presumably because she has been unsuccessful in the employment discrimination claims against Essentia. Hawks v. J.P. Morgan Chase Bank, 591 F.3d 1043, 1050 (8th Cir. 2010) (stating "[a] district court does not abuse its discretion in denying a plaintiff leave to amend the pleadings to change the theory of their case after the complaint has been dismissed under Rule 12(b)(6)"); Roop, 559 F.3d at 825 (holding the district court did not abuse its discretion in denying a motion to amend post-judgment to assert an entirely new claim); see also Humphreys v. Roche Biomedical Labs., Inc., 990 F.2d 1078, 1082 (8th Cir. 1993) (stating "a district court does not abuse its discretion in refusing to allow amendment of pleadings to change the theory of the case if the

amendment is offered after summary judgment has been granted against the party, and no valid reason is shown for the failure to present the new theory at an earlier time"). Her attempt at a "second bite" at Essentia should not be condoned, particularly post-judgment and post-appeal. Ash, 799 F.3d at 963 (affirming the district court's denial of a motion to amend filed only nine days after the court granted a motion to dismiss).

Importantly, all of the "new" allegations in the proposed amended complaint as they relate to Essentia are not, in fact, new. Some allegations pertain to the plan itself, but they relate only to HealthPartners' involvement with the plan. Other facts pertain to the alleged "appeals" by Tovar for medical treatment, but these facts were entirely known and available to Tovar when she filed her original complaint. While Tovar cursorily suggests in her briefing that "[s]ome of these facts were discovered based on the file Tovar obtained from the Equal Employment Opportunity Commission," she does not state what facts were discovered, when they were discovered, or whether they affect the alleged proposed amended complaint as against Essentia.[2] (Doc No. 55 at 1.) She simply has not established any "new" facts justifying her proposed amended complaint nearly twenty-two months after it initially commenced. See Cooper v. Shumway, 780 F.2d 27, 29 (10th Cir. 1985) (declining to allow an amended complaint after final judgment because "all of the allegations raised in the amended complaint either were or could have been raised in the original complaint"); In re Star Gas Securities Litigation, 241 F.R.D.

[2] Interestingly, counsel for Essentia also requested and received the file from the Equal Employment Opportunity Commission well before the hearing and decision on the motions to dismiss.

428, 432-33 (D. Conn. 2007) (denying plaintiff's motion to amend the complaint because the proposed amendments could have been advanced previously).

To allow Tovar to amend her complaint at this stage would upset the finality of the judgment obtained by Essentia. As stated by Judge Breyer (then a judge in the First Circuit Court of Appeals),

> To require the district court to permit amendment here would allow plaintiffs to pursue a case to judgment and then, if they lose, to reopen the case by amending their complaint to take account of the court's decision. Such a practice would dramatically undermine the ordinary rules governing the finality of judicial decisions, and should not be sanctioned in the absence of compelling circumstances.

James v. Watt, 716 F.2d 71, 78 (1st Cir. 1983). Tovar has not provided any compelling circumstances to reopen Essentia to litigation in this case, given that there are no new allegations as to Essentia. This Court, therefore, should deny her motion to amend the complaint to add an ACA claim against Essentia.

II. This Court should deny Tovar's motion to amend the complaint due to its futility and failure to state a claim upon which relief can be granted.

Though this Court need only find undue delay in amending the complaint, as outlined above, Tovar's proposed amended complaint is also futile as against Essentia, which provides an additional ground for denying her motion for leave to amend. See Ash, 799 N.W.2d at 963. "Futility . . . exists when the claim would not withstand a motion to dismiss for failure to state a claim upon which relief can be granted." Streambend Props. III, LLC v. Sexton Lofts, LLC, 297 F.R.D. 349, 357 (D. Minn. 2014).

Tovar's proposed amended complaint fails against Essentia in several respects, as addressed in turn below.

A. Tovar's proposed amended complaint is barred by res judicata.

"[R]es judicata is considered a finality doctrine which dictates that there be an end to litigation." Sondel v. Nw. Airlines, Inc., 56 F.3d 934, 937 (8th Cir. 1995) (citation and quotations omitted). This doctrine provides that a "judgment on the merits constitutes an *absolute bar* to a second suit for the same cause of action, and is conclusive between parties and privies, not only as to every other matter which was actually litigated, but also as to every matter which might have been litigated therein." Id. at 938 (emphasis added). Res judicata applies to the proposed amended complaint proposed by Tovar and, consequently, bars the purported new ACA claim against Essentia.

First, there has been a final judgment on the merits in favor of Essentia, as the district court previously granted Essentia's motion to dismiss the employment discrimination claims asserted against it. Ruple v. City of Vermillion, S.D., 714 F.2d 860, 862 (8th Cir. 1983) (providing that a party may raise res judicata as a defense from a judgment entered on a motion to dismiss). Though there was no pending ACA claim against Essentia at the time, res judicata bars not only those claims actually litigated, but those claims that could have been raised, as well. MacIntyre v. Lender Processing Servs., Inc., 2012 WL 4872678, at *3 (D. Minn. Oct. 15, 2012). By attempting to assert a new ACA claim against Essentia that was known to the parties early in the proceedings, Tovar

has "merely presented different legal claims which spring from the same set of facts," which is impermissible under the res judicata doctrine. Id.

Moreover, contrary to Tovar's assertion, Olson is in privity with Tovar under the circumstances of this case and Tovar should not be permitted to add him as a party in this action. In general, "privity involves a person so identified in interest with another that he represents the same legal right." Sondel, 56 F.3d at 938. Privity also "expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties." Id. Thus, a nonparty is bound by a prior adjudication when his "interests are represented by a party to the original action." Id.

The original complaint in this action was expressly premised on an alleged denial of health insurance benefits to Olson, not Tovar. Though Tovar maintained the plan through her previous employer, the alleged discriminatory actions revolved around the care provided to Olson, not Tovar. For unknown reasons, Tovar failed to initially name Olson as a party in any capacity. Tovar now seeks to do so with the same counsel representing both Tovar and Olson, further suggesting that Olson's purported ACA claim against Essentia is so closely aligned with the original complaint that it must be barred. His active self-interest in the previous suit—whereby any decision in favor of Tovar would have directly affected his benefits as the beneficiary—must bar subsequent actions

against Essentia based on the same facts. See id. at 940 (holding that a nonparty who has a interest in the outcome is barred from relitigating an action).

Tovar has cited to only one case from the Fifth Circuit, Freeman v. Lester Coggins Trucking, Inc., 771 F.2d 860 (5th Cir. 1985), to argue that a parent-child relationship alone is not sufficient to create preclusion. (Doc No. 55 at 9.) Even if this may be true for relatives asserting *independent* causes of action, this case is entirely distinguishable because Tovar's original complaint was wholly premised on the beneficiary benefits sought and allegedly denied to Olson. Freeman, 771 F.2d at 863. Both Essentia and HealthPartners raised to Tovar that she was the wrong plaintiff for this action because there was no discriminatory action affecting her. It was her decision to not name Olson initially or bring this case is a representative fashion. This decision is fatal to the proposed amended complaint because the final judgment as to Essentia and the ACA claim Tovar proposes to add against Essentia could plainly have been brought in the initial action. This entire matter has always been about discrimination against Olson. Although Olson was a minor when the suit commenced, Tovar could have sued in a representative capacity, and failed to do so. The inextricable relationship of Olson to the initial action creates privity sufficient to bar Olson's claim. Because the proposed amended complaint is barred by res judicata, it will not withstand a motion to dismiss for failure to state a claim, and this Court should exercise its broad discretion to deny Tovar's motion for leave to amend.

B. Tovar's proposed amended complaint fails to allege that she or Olson exhausted ERISA administrative remedies.

Tovar's proposed amended complaint further is futile because it lacks sufficient allegations that she or her son exhausted administrative remedies required under ERISA. Section 510 of ERISA provides that "[i]t shall be unlawful for any person to . . . discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the provisions of an employee benefit plan." 29 U.S.C. § 1140. ERISA further contains administrative remedies for claimants, and if "a claimant fails to pursue and exhaust administrative remedies that are clearly required under a particular ERISA plan, his claim for relief is barred." Chorosevic v. MetLife Choices, 600 F.3d 934, 941 (8th Cir. 2010).

The plan at issue is an employee benefit plan, clearly governed by the ERISA regulations. 29 U.S.C. § 1002(3). As such, a claimant, such as Tovar or Olson, must exhaust the administrative remedies under ERISA before pursuing a claim for improperly denying benefits. Though the proposed amended complaint attempts to assert an ACA claim against Essentia, nothing within the ACA indicates an intention to modify these exhaustion requirements.

Tovar, however, has not asserted in the proposed amended complaint that she or Olson properly pursued and exhausted ERISA administrative remedies. In the proposed amended complaint, the only allegation of a denial of coverage without any later reimbursement was for Olson's Lupron prescription. While Tovar includes allegations related to her conversations with HealthPartners regarding the denial, she does not assert

that she formally appealed the decision. The proposed amended complaint is entirely silent in this regard and establishes the failure to exhaust administrative remedies.

The only alleged "appeal" by Tovar is a letter attached to the proposed amended complaint as Exhibit A. This letter, however, is insufficient to establish a proper appeal or exhaustion of ERISA administrative remedies. The letter relates to the exclusion in general terms only and is not specifically related to the denial of any particular claim for benefits, such as Lupron, which is the only prescription allegedly denied without reimbursement. Chorosevic, 600 F.3d at 942 (holding a claimant did not overcome the exhaustion defense with one letter because it did not reference the claims asserted in the lawsuit). In the absence of allegations that Tovar or Olson exhausted administrative remedies, the proposed amended complaint is futile as against Essentia.

C. Olson has not suffered any "economic harm" with respect to the purported ACA claim against Essentia.

The proposed amended complaint asserts that Essentia's alleged "violation of Section 1557 caused Olson economic harm and emotional distress." (Doc No. 56-1 at ¶ 81.) This allegation is unsupported by the proposed amended complaint. In fact, the proposed amended complaint itself confirms that neither Olson nor Tovar suffered any "economic harm."

Both the original and proposed amended complaint explain three instances when benefits were allegedly sought: (1) Olson's prescription for Lupron; (2) Olson's prescription for Androderm; and (3) Tovar asking for pre-authorization for Olson's gender reassignment surgery. None of these instances, however, resulted in any out-of-

pocket expenses for Tovar or Olson. The proposed amended complaint confirms that Tovar and Olson did not pay for the Lupron prescription because it allegedly was too costly. (Doc No. 56-1 at ¶ 62.) With respect to the Androderm, Tovar initially paid for the prescription, but she also admits Essentia later reimbursed her for the amounts. (Id. at ¶ 67.) Lastly, the pre-authorization contact did not result in any costs to Tovar or Olson, but was simply an apparently informal inquiry regarding whether the gender reassignment surgery would be covered. (Id. at ¶ 68.) Nothing in the proposed amended complaint asserts that Olson was denied any benefit or that either Tovar or Olson incurred any economic harm based on this conversation. Because there was no economic harm to Olson (or Tovar), this claim is futile.

D. The Section 1557 regulations upon which Tovar bases her action have been stayed, and, in any case, there undisputedly has been no violation of these regulations by Essentia.

There is further substantial doubt as to whether Tovar's proposed amended complaint asserting a Section 1557 claim against Essentia is valid, given the questionable legality of the regulations upon which she grounds her action.

Section 1557 of the ACA prohibits discrimination in health insurance on grounds set forth in Title IX, among other statutes. 42 U.S.C. § 18116. Title IX prohibits discrimination on the basis of sex. On May 18, 2016, the Department of Health and Human Services ("HHS") promulgated a final rule related to Section 1557, expanding "on the basis of sex," to include "discrimination on the basis of . . . gender identity." 81 Fed. Reg. 31468 (May 18, 2016) (codified at 45 C.F.R. § 92.4). On December 31, 2016,

however, the district court in the Northern District of Texas issued a nationwide injunction specifically related to enforcement of the regulations related to "gender identity," finding that HHS improperly expanded the definition of "sex" under Title IX. Franciscan Alliance, Inc. v. Burwell, 227 F. Supp. 3d 660, 695 (N.D. Tex. 2016).

More recently, the court granted a stay of the proceedings indefinitely upon HHS' request and indication to the court of its "desire to reassess the reasonableness, necessity, and efficacy of the [rule] challenged in the case." Franciscan Alliance, Inc. v. Price, 2017 WL 3616652, at *5 (N.D. Tex. July 10, 2017); see also Rumble v. Fairview Health Servs., 2017 WL 401940 (D. Minn. Jan. 30, 2017) (staying a plaintiff's Section 1557 claim pending more clarity on the regulations from other courts). The court noted that "HHS's reconsideration of the Rule may moot some or all of Plaintiff's claims . . . . " Franciscan Alliance, Inc. v. Price, 2017 WL 3616652, at *5.

Given the developments of the courts and the stated position of HHS in recent months related to the Section 1557 regulations, Tovar's purported ACA claim against Essentia is highly dubious. Even if she were able to assert a Section 1557 claim against Essentia (though enforcement of the regulation is stayed and revision by HHS is imminent), the proposed amended complaint establishes that Essentia did not violate the Section 1557 regulations by maintaining the plan at issue. The regulations expressly provide as follows:

> The effective date of this part shall be July 18, 2016, except to the extent that provisions of this part require changes to health insurance or group health plan benefit design (including covered benefits, benefits limitations or restrictions, and cost-sharing mechanisms, such as coinsurance, copayments, and deductibles), *such provisions, as they apply to health*

> *insurance or group health plan benefit design, have an applicability date of the first day of the first plan year* (in the individual market, policy year) *beginning on or after January 1, 2017*.

81 Fed. Reg. 31466 (codified at 45 C.F.R. § 92.1)

Essentia satisfied this regulation by eliminating the exclusion from its plan. In fact, Essentia far exceeded this regulation by eliminating the exclusion and applying the new plan a year earlier on January 1, 2016, far in advance of the regulatory requirement and in advance of many plans.[3] Tovar acknowledges Essentia's timely actions on the face of the proposed amended complaint, thus establishing that Essentia cannot be held liable under the proposed amended complaint for an alleged violation of the Section 1557 regulations. To allow her to amend her complaint would simply be futile, and this Court should accordingly deny her motion.

CONCLUSION

Essentia has successfully defended employment discrimination claims asserted by Tovar in the district court and on appeal. Tovar now attempts to bring Essentia back into this lawsuit by asserting a new claim, though this claim was already presented against another defendant and Tovar was fully apprised of the possible necessity to add Essentia to this claim prior to its dismissal. Tovar should not be permitted to re-open this case as to Essentia, who has obtained a final judgment in its favor. Essentia respectfully requests this Court deny Tovar's motion for leave to amend the complaint to assert any claims

[3] In its initial order granting the preliminary injunction against enforcement of the Section 1557 regulations, the Franciscan Alliance court noted that coverage plans under TRICARE, the military's insurance program, categorically excluded all coverage of surgical transition procedures. Franciscan Alliance Inc. v. Burwell, 227 F. Supp at 672.

against Essentia due to Tovar's undue delay, the strong presumption of finality of judgments, and the futility of her proposed claims.

VOGEL LAW FIRM

Dated: October 12, 2017

/s/ Lisa Edison-Smith

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Brittany R. Tovar,

Plaintiff(s)

v.

Essentia Health, Innovis Health, LLC dba Essentia Health West, HealthPartners, Inc., and HealthPartners Administrators, Inc.

Defendant(s)

LR 7.1(f) & LR 72.2(d)
CERTIFICATE OF COMPLIANCE

Case Number: 0:16-cv-00100-DWF/LIB

I, Lisa Edison-Smith, certify that the

- ■ Memorandum titled: **Defendant Essentia Health and Innovis Health, LLC's Memorandum in Opposition to Plaintiff's Motion to Amend Complaint** complies with Local Rule 7.1(f).

or

- □ Objection or Response to the Magistrate Judge's Ruling complies with Local Rule 72.2(d).

I further certify that, in preparation of the above document, I:

- ■ Used the following word processing program and version: **Microsoft Office Word 2007** and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

or

- □ Counted the words in the document.

I further certify that the above document contains the following number of words: **5,800**

Date: October 12, 2017

s/ *Lisa Edison-Smith*

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