IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

MARCIA G. FLEMING, *individually, as representative of a class of participants and beneficiaries of the Rollins, Inc. 401(k) Savings Plan and Western Industries Retirement Savings Plan*,	*	
Plaintiff,	*	
v.	*	1:19-CV-05732-ELR
ROLLINS, INC., et al.,	*	
Defendants.	*	

O R D E R

Presently before the Court is Defendants Rollins, Inc.; Western Industries-North; Paul Northen; John Wilson; Jerry Gahlhoof; James Benton; A. Keith Payne; and Teresa Smith's Motion to Dismiss Plaintiff's Amended Complaint. [Doc. 34]. The Court's reasoning and conclusions are set out below.

I. Background

Plaintiff Marcia G. Fleming brings this putative class action pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* ("ERISA"). See Am. Compl. [Doc. 25]. Defendant Rollins, Inc. ("Rollins") and its

subsidiary, Defendant Western Industries-North, LLC ("Western"), own pest control companies. Id. ¶¶ 29, 34. Defendants Rollins and Western each offer retirement plans to their employees: the Rollins 401(k) Savings Plan and the Western Industries Retirement Savings Plan (collectively, "the Plans"). Id. Pursuant to the terms of the Plans, Rollins and Western delegate the management and monitoring of the Plans to an Administrative Committee. Id. ¶¶ 31, 35. Defendants Paul E. Northen, John Wilson, Jerry Gahlhoff, James Benton, and A. Keith Payne are the members of the Plans' Administrative Committee, while Defendant Teresa Smith is the Plans' Retirement Plan Manager. Id. ¶¶ 38–39. Plaintiff Fleming is a former employee of Defendant Rollins and remains a participant in the Rollins 401(k) Savings Plan. Id. ¶ 27.

In her Amended Complaint, Plaintiff alleges Defendants breached the fiduciary duties they owe to the Plans pursuant to ERISA. Id. ¶¶ 4–5. Specifically, Plaintiff contends that Defendants: (1) improperly favored the economic interests of the Plans' recordkeeper—Prudential—allowing Prudential to collect excessively high fees from the Plans' participants; (2) imprudently selected and offered high cost funds with historically poor performance records; (3) funded excessive payments to service providers through trust assets; and (4) failed to adequately diversify the Plans' investments to minimize the risk of large losses. Id. ¶¶ 5–10, 50, 61, 80–81, 97–100, 103, 123–124.

According to Plaintiff, "the Plans did not specify any grievance procedure" for her claims. Id. ¶ 145. Thus, Plaintiff filed her Complaint on December 20, 2019. [Doc. 1]. On April 20, 2020, Defendants Rollins and Western filed a motion to dismiss Plaintiff's Complaint. [Doc. 16]. Subsequently, Plaintiff filed her Amended Complaint on May 11, 2020. [Doc. 25].[1] In response, on July 10, 2020, Defendants filed their motion to dismiss Plaintiff's Amended Complaint. [Doc. 34]. Having been fully briefed, Defendants' motion is now ripe for the Court's review.

II. Legal Standard

Before addressing the substance of Defendants' motion, the Court first sets forth the appropriate legal standard. In considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court accepts as true all of plaintiff's well-pled allegations and draws all inferences from those allegations in favor of the plaintiff. See e.g., Wagner v. Daewoo Heavy Inds. America Corp., 289 F.3d 1268, 1271 (11th Cir. 2002). The Court may consider the full text of documents referenced in, or central to, the allegations of the complaint. See Brooks v. Blue Cross and Blue Shield of Florida, Inc., 116 F.3d 1364, 1369 (11th Cir. 1997). If an allegation in the

[1] In light of the Amended Complaint, the Court denies Defendants Rollins and Western's motion to dismiss [Doc. 16] as moot. See Lowery v. Ala. Power Co., 483 F.3d 1184, 1219 (11th Cir. 2007) ("[A]n amended complaint supersedes the initial complaint and becomes the operative pleading in the case."); see also Byrom v. First Option Mortg., LLC, No. 1:18-CV-440-MHC-AJB, 2018 WL 3688971, at *2 (N.D. Ga. May 4, 2018), adopted by No. 1:18-CV-440-MHC-AJB, 2018 WL 3688941 (N.D. Ga. May 29, 2018) ("[T]he amended complaint renders moot the motion to dismiss the original complaint because that motion seeks to dismiss a pleading that has been superseded.").

complaint is based on a writing and the writing contradicts the allegation, the writing controls. See Assoc. Builders, Inc. v. Alabama Power Co., 505 F.2d 97, 100 (5th Cir. 1974).[2] In light of this standard, the Court has reviewed the Rollins Plan and the Western Plan.

III. Defendants' Motion to Dismiss [Doc. 34]

Having set forth the relevant legal standard, the Court now turns to the substance of Defendants' motion to dismiss. In their motion, Defendants argue that Plaintiff's Amended Complaint should be dismissed for five (5) reasons:

> (1) the claims raised in Plaintiff's [Amended Complaint] are barred by Plaintiff's failure to exhaust her administrative remedies prior to filing suit; (2) Plaintiff lacks standing to pursue any claims; (3) the [Amended Complaint] fails to state a plausible claim for breach of fiduciary duty or any violation of ERISA; (4) the [Amended Complaint] is a 'shotgun pleading' that fails to meet the standards of Federal Rule 8(a); and (5) Plaintiff's claims are barred by ERISA's statute of repose to the extent they are based on allegations of conduct more than 6 years old.

[Doc. 34 at 2]. As an initial matter, the Court will address the threshold issue raised by Defendants regarding Plaintiff's alleged failure to exhaust her administrative remedies.

[2] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit decided before October 1, 1981.

A. Exhaustion of Administrative Remedies

In the Eleventh Circuit, it is "well-settled that 'plaintiffs in ERISA actions must exhaust available administrative remedies before suing in federal court.'" Perrino v. S. Bell Tel. & Tel. Co., 209 F.3d 1309, 1315 (11th Cir. 2000) (quoting Counts v. Am. Gen. Life & Accident Ins. Co., 111 F.3d 105, 108 (11th Cir. 1997)). "This requirement applies to actions in which the plaintiff sues individually as well as actions where the plaintiff sues as a representative of a putative class." In re Managed Care Litig., 298 F.Supp.2d 1259, 1295 (S.D. Fla. 2003). Moreover, within the Eleventh Circuit, this "exhaustion doctrine" is not limited to claims for benefits under any particular plan but also applies to claims arising from the substantive provisions of ERISA. See Perrino, 209 F.3d at 1315 n.6; Bickley v. Caremark RX, Inc., 461 F.3d 1325, 1328 (11th Cir. 2006) ("This exhaustion requirement applies equally to claims for benefits and claims for violation of ERISA itself."). Thus, the exhaustion doctrine applies to claims based upon the defendant's alleged breach of ERISA-imposed fiduciary duties, which are the claims at issue in this case. See Bickley, 461 F.3d at 1327; [see Doc. 25]. Several important policies underlie the exhaustion requirement. As the Eleventh Circuit explained:

> [a]dministrative claim-resolution procedures reduce the number of frivolous lawsuits under ERISA, minimize the cost of dispute resolution, enhance the plan's trustees' ability to carry out their fiduciary duties expertly and efficiently by preventing premature judicial intervention in the decision-making process, and allow prior

> fully considered actions by pension plan trustees to assist courts if the dispute is eventually litigated.

Mason v. Continental Group, Inc., 763 F.2d 1219, 1227 (11th Cir. 2000).

A district court possesses discretion to excuse the exhaustion requirement, however, the Eleventh Circuit instructs that doing so is only proper in two (2) situations: (1) when requiring a plaintiff-claimant to resort to administrative remedies "would be futile or the remedy would be inadequate" or (2) "where a claimant is denied 'meaningful access' to the administrative review scheme in place." See Perrino, 209 F.3d at 1315–16 (quoting Counts, 111 F.3d at 108). A review of the case law demonstrates the narrow scope of these exceptions to the administrative remedy exhaustion requirement. See id. ("[W]e strictly enforce an exhaustion requirement on plaintiffs bringing ERISA claims in federal court with certain caveats reserved for exceptional circumstances."); Spivey v. S. Co., 427 F. Supp. 2d 1144, 1149 (N.D. Ga. 2006) (stating that "decisions within this Circuit illustrate[] a pronounced disinclination to dispense with exhaustion except where the failure to exhaust falls within a limited number of recognized exceptions."); Bickley v. Caremark Rx, Inc., 361 F. Supp. 2d 1317, 1336 (N.D. Ga. 2004) (explaining that a litigant wishing to avail himself of the exceptions to the exhaustion rule bears a "heavy burden"); Byars v. Coca–Cola Co., 1:01–CV–3124–TWT, 2004 WL 1595399, at *2–3 (N.D. Ga. Mar. 18, 2004) ("The Eleventh Circuit applies the

exhaustion doctrine in a strict fashion, and is disinclined to excuse . . . [a litigant's non-]compliance").

However, pursuant to Department of Labor ("DOL") regulations, a plaintiff's administrative remedies are automatically "deemed exhausted" where the plan in question does not comply with ERISA's requirements for claim procedures.[3] See 29 C.F.R. § 2560.503–1(l) (2000). Specifically, the DOL regulations provide:

> [i]n the case of the failure of a plan to establish or follow claims procedures consistent with the requirements of this section, a claimant shall be deemed to have exhausted the administrative remedies available under the plan and shall be entitled to pursue any available remedies under section 502(a) of [ERISA] on the basis that the plan has failed to provide a reasonable claims procedure that would yield a decision on the merits of the claim.

See id.

In the instant case, Defendants contend that Plaintiff has failed to exhaust her administrative remedies and that such failure bars her claims. [Doc. 34-1 at 9–11]. In response, Plaintiff argues that her failure to initiate or exhaust the administrative process under the Plans is not fatal to her suit for two (2) reasons. [Doc. 37 at 10–12]. First, she claims that the Plans do not provide for an administrative procedure for the breach of fiduciary duty claims brought here, and thus, her administrative

[3] The Department of Labor is the federal agency tasked with regulating ERISA. See Nichols v. Se. Health Plan of Alabama, Inc., 859 F. Supp. 553, 557 (S.D. Ala. 1993) ("Congress intended in ERISA to delegate to the Secretary of Labor broad policy-making discretion in the promulgation of regulations to fill in the gaps[.]") (citing Meredith v. Time Ins. Co., 980 F.2d 352, 357 (5th Cir. 1993)).

remedies should be "deemed exhausted." [Id. at 10]. Second, Plaintiff posits that her failure to exhaust her supposed administrative remedies falls within the recognized exception of futility. [Id. at 12]. The Court addresses Plaintiff's arguments in turn.

First, Plaintiff contends that her claims should be "deemed exhausted" because the Plans do not provide administrative procedures for statutory violations of ERISA. [Doc. 37 at 10]. According to Plaintiff, the Plans provide grievance procedures for "only two types of claims: (1) those 'relating to the amount of any payment due under the Plans' and (2) those concerning 'failure or error in implementing an investment direction with respect to a claimant's Account[.]'" [Id. at 12]. Thus, Plaintiff argues that these deficiencies allows her to pursue her claims directly in federal court because there is no administrative procedure that she could have resorted to. [Id.]

However, the Court finds Plaintiff's reading of the Plans incomplete. As Defendants point out, the Plans define a claim as "any grievance, complaint or claim concerning any aspect of the operation or administration of the Plan or Trust, including but not limited to claims for benefits and complaints concerning the investments of Plan assets[.]" [See Docs. 34-4 at 65–66; 34-5 at 71; 38 at 3–4]. Additionally, the terms of the Plans provide that "[t]he Administrative Committee . . . will have complete control of the administration of the Plan hereunder, with all

powers necessary to enable it [to] properly [] carry out its duties," including the duty "to construe the Plan and to determine all questions that shall arise thereunder." [See Docs. 34-4 at 70; 34-5 at 75].

The provisions above mirror the language used in the employee retirement plan at issue in a similar case: Lanfear v. Home Depot, Inc., 536 F.3d 1217 (11th Cir. 2008). In Lanfear, former employees filed a complaint against Home Depot, without first exhausting their administrative remedies, for breach of fiduciary duty in the administration of a retirement plan. Id. at 1217. The former employees maintained that exhaustion was not required because the plan's provisions regarding the review and appeal process only referred to a "claim for benefits." Id. at 1224. Ultimately, the Eleventh Circuit held that the relevant plan's broad definition of "claim"—coupled with the discretion granted to the plan administrators—were "sufficient to establish the availability of an administrative remedy" for breach of fiduciary duty. Id.

The Court finds that Lanfear is instructive here. The administrative procedures provided in the Plans at issue contemplate the same broad range of grievances and discretion to the Administrative Committee. [See Docs. 34-4 at 65–66, 70; 34-5 at 71, 75]. Therefore, because the Plans' provisions would encompass Plaintiff's claims for statutory breaches of fiduciary duty, the Court finds that

Plaintiff cannot be deemed to have exhausted her administrative remedies. Accord Lanfear, 536 F.3d at 1224.

Second, Plaintiff argues the Court should, in any case, excuse any failure to exhaust her administrative remedies pursuant to the exception for futility. [Id. at 14]. Specifically, Plaintiff contends that engaging in the administrative processes provided by the Plans would not serve the purposes of the exhaustion requirement and would amount to an "empty exercise in legal formalism." [Id. at 14–15].

To support her argument, Plaintiff relies on a Sixth Circuit case: Fallick v. Nationwide Mut. Ins. Co., 162 F.3d 410 (6th Cir. 1998). [Id.] However, the Court finds Fallick to be distinguishable from the case at hand.[4] The acrimonious lawsuit in Fallick had been pending in federal court for over two (2) years when the court excused the exhaustion requirement, over which time an extensive factual record had developed. Fallick, 162 F.3d at 420–21. The Sixth Circuit found that a return to the administrative process at that point would not lead to a resolution of the dispute or aid the court in its fact-finding, but rather, would only further inflame tensions between the parties and increase litigation costs. See id. at 420–21. In contrast, Plaintiff's lawsuit is at its infancy, and the development of a factual record through

[4] Separately, the Court notes that Sixth Circuit precedent is merely persuasive and not binding in the instant matter. Jones Creek Inv'rs, LLC v. Columbia City., Ga., 98 F. Supp. 3d 1279, 1306 (S.D. Ga. 2015)("While other Circuits' opinions are not binding on this Court, they may be looked to as persuasive authority when not in conflict with Eleventh Circuit holdings.").

the administrative process would benefit the Court. Thus, the Court disagrees that the purposes underlying the exhaustion requirement would not be served in this case.

Further, the Court notes that the Eleventh Circuit disfavors a finding of futility where a plaintiff has completely bypassed the administrative process, as is the case here. [Doc. 25 ¶¶ 144–150]; see Bickley, 461 F.3d at 1330 ("Bickley's claim of futility is merely speculative because he did not even attempt to pursue the administrative procedure available[.]"); Leggett v. Provident Life & Accident Ins. Co., No. 6:02-CV-1032-ORL-KRS, 2004 WL 291223, at *15 (M.D. Fla. Feb. 9, 2004), aff'd, Leggett v. Johnson Controls, 125 F. App'x 981 (11th Cir. 2004) (rejecting the futility exception where the plaintiff "didn't just fail to exhaust her administrative remedies; she failed to even *initiate* the process by filing a claim") (emphasis in original); Spivey, 427 F. Supp. 2d at 1155 ("[I]n this Circuit, where a plaintiff has failed to even attempt to obtain administrative review, the futility exception has often been held unavailable as a matter of law."). Therefore, the Court rejects Plaintiff's argument that her failure to exhaust her administrative remedies should be excused pursuant to the futility exception.

In sum, under the law of the Eleventh Circuit, Plaintiff was required exhaust the administrative remedy process available to her before filing suit but failed to do so. Plaintiff also falls short of meeting the high standard necessary for the Court to excuse her failure to exhaust the available administrative remedies pursuant to the

futility exception. Accordingly, the Court finds that Plaintiff's Amended Complaint is due to be dismissed.[5] [Doc. 34].

As a final matter, the Court notes Defendants request that Plaintiff's Amended Complaint be dismissed with prejudice. [See Doc. 34 at 2]. However, the Court finds the appropriate remedy to be dismissal without prejudice. See Watson v. Teledyne Techs. Inc. Pension Plan, No. 1:14-CV-0452-WSM, 2015 WL 2097610, at *2 (S.D. Ala. May 5, 2015) ("When the plaintiff has simply foregone an available administrative procedure, appellate courts have routinely approved of dismissal without prejudice."). Accordingly, the Court will grant in part and deny in part Defendants' motions to dismiss. Specifically, the Court will grant the request to dismiss Plaintiff's Amended Complaint, but denies Defendants' request to dismiss with prejudice.

IV. Conclusion

For the foregoing reasons, the Court **DENIES AS MOOT** Defendants Rollins, Inc. and Western Industries-North, LLC's Motion to Dismiss [Doc. 16] and **GRANTS IN PART AND DENIES IN PART** Defendants' Motion to Dismiss Plaintiff's Amended Complaint. [Doc. 34]. Specifically, the Court **GRANTS** Defendants' request to dismiss Plaintiff's Amended Complaint and **DENIES**

[5] In light of this ruling, the Court declines to reach the substance of the Defendants' remaining arguments in support of its motion to dismiss. [Doc. 34].

Defendants' request that Plaintiff's Amended Complaint be dismissed with prejudice. Accordingly, the Court **DISMISSES WITHOUT PREJUDICE** Plaintiff's Amended Complaint. [Doc. 25]. Finally, the Court **DIRECTS** the Clerk to **CLOSE** this case.

SO ORDERED, this 23rd day of November, 2020.

Eleanor L. Ross
United States District Judge
Northern District of Georgia