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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ELSIE I. LYBECKER, a  
single woman,  
  
Plaintiff,  
  
vs.  
  
UNION PACIFIC  
CORPORATION,  
  
Defendants.

NO. CV-13-0231-LRS

**ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT**

**BEFORE THE COURT** are the following cross-motions:  
Defendant Union Pacific Corp.'s ("Union Pacific") Motion for  
Summary Judgment (ECF No. 46); and Plaintiff's Motion for  
Summary Judgment (ECF No. 50). A telephonic hearing was  
held on December 4, 2014. Jaime Cole and Thomas Christina  
participated on behalf of the Defendant Union Pacific;  
Arthur Bistline and Mark Ellingsen participated on behalf of  
Plaintiff Lybecker. At the close of the hearing, the Court  
took the cross-motions under advisement. The Court has  
considered the oral and written arguments of counsel.

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1 **I. Undisputed Material Facts**

2 Plaintiff brought this action under the Federal  
3 Employee Retirement Income Security Act of 1974 ("ERISA"),  
4 29 U.S.C. § 1001, et seq. Plaintiff's claim is based solely  
5 on the statutory penalty provision she asserts against Union  
6 Pacific under ERISA §502(c)(1)(B), 29 U.S.C. §1132(c)(1)(B).

7 Daniel J. Angel ("Angel"), was an employee of Defendant  
8 Union Pacific Railroad Company. Prior to 2004, Angel had  
9 been married and divorced twice. Prior to 2002 and during  
10 all material times thereafter, Angel had four children, two  
11 who were biological children (Clayton and Natasha) and two  
12 who were adopted children (Roger and Kevin). During the  
13 period beginning in 2002 and through at least 2014, both of  
14 Angel's former wives were living. Prior to and at the time  
15 he went missing, Plaintiff and Angel had a relationship and  
16 maintained a residence together in Spokane, although Angel  
17 had moved out about six months before his disappearance.

18 On January 1, 2002, and for a considerable period  
19 before that date, Angel was eligible to contribute to the  
20 Union Pacific Corporation Thrift Plan ("Thrift Plan"). On  
21 September 28, 2002, Angel named Plaintiff the sole death  
22 beneficiary of any undistributed portion of his Thrift Plan  
23 account. On May 31, 2004, and for a considerable period  
24 before that date, Angel was eligible to elect to participate  
25 in a variety of welfare benefit plans subject to ERISA under  
26 the Flexible Benefits Program for Full Time Salaried and  
27

1 Full-Time Hourly Employees of Union Pacific. One of these  
2 welfare benefit plans was the Life and Accident Insurance  
3 Program (the "subject plan"), and coverage was issued and  
4 administered by Prudential Insurance Company of America  
5 ("Prudential").<sup>1</sup> A benefit of participating in the subject  
6 plan was the ability of the participant to secure an  
7 insurer's promise to make a payment on account of the  
8 participant's death while covered under the plan, and the  
9 right of the participant to name the payee at any time  
10 before death.

11 All aspects of claims administration under the subject  
12 plan were handled exclusively by Prudential. At the time  
13 specified for distribution of the death benefit, the person  
14 most recently named to receive the life insurance policy  
15 proceeds receives the proceeds. A change of death  
16 beneficiary was effective as of the date it was signed if  
17 and only if it was made on a form created by Prudential and  
18 Prudential receives the signed form.

19 On May 31, 2004 Angel named Plaintiff as the  
20 beneficiary under the Life Insurance Plan, on a Prudential  
21 form. Angel had elected to participate in the Life  
22 Insurance Plan and the amount of Angel's basic and  
23 supplemental life coverage was \$481,000.00. Angel's basic  
24 and supplemental Accidental Death coverage was \$567,000.00.  
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26  
27 <sup>1</sup>Defendant Prudential was dismissed on February 28,  
2014. ECF No. 44.

1 On November 14, 2004, Angel's boat was found drifting  
2 on Lake Pend Orielle in Idaho with no one on board. On  
3 November 15, 2004, Kootenai County Sheriff's Department  
4 interviewed Plaintiff during the course of the  
5 investigation. Plaintiff testified that the investigator  
6 told her it would take seven (7) years to obtain a death  
7 certificate in Idaho. She apparently did not question the  
8 accuracy of this information.

9 On November 16, 2004, the Sheriff's Department placed  
10 its investigation into Angel's disappearance on the inactive  
11 list and registered Angel as a missing adult on the NCIC  
12 database until the fall of 2012.

13 At all times surrounding the events underlying this  
14 action, i.e., after November 14, 2004, Union Pacific's Human  
15 Resources Department had a Human Resources Service Center  
16 ("the Service Center"). Employees of the Service Center had  
17 access to information regarding the identity of death  
18 beneficiaries, if any, of the Thrift Plan. Employees of the  
19 Service Center, however, did not have access to information  
20 regarding the identity of the death beneficiaries, if any,  
21 of the Group Life/AD&D Plan.<sup>2</sup>

22 If a Union Pacific employee's Thrift Plan beneficiary  
23 did not contact the Service Center with regard to an  
24 employee who had been reported deceased by the employee's  
25 coworker, supervisor, or family member, the practice of the  
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27 <sup>2</sup>ECF No. 65 at 19-20.

1 Service Center employees was to contact the beneficiary. The  
2 purpose of the contact was to inform the beneficiary that he  
3 or she was the death beneficiary of the employee's Thrift  
4 Plan account.

5 On December 16, 2004, Union Pacific wrote to Plaintiff  
6 indicating that she was the beneficiary of Angel's Thrift  
7 Plan, but that to process the account, she needed a death  
8 certificate. Plaintiff contends that Union Pacific did not  
9 inform her that she was the beneficiary of Angel's life  
10 insurance policy nor that Prudential was the insurance  
11 company that provided the life insurance policy. Union  
12 Pacific notes that only Prudential had information about  
13 death beneficiaries of life/AD&D coverages, because  
14 beneficiary designation forms and beneficiary designation  
15 change forms were effective only if received by Prudential  
16 and employees were not required to send these forms to  
17 Prudential through Union Pacific.

18 According to Plaintiff, after Angel's disappearance,  
19 Prudential refused to inform Lybecker of the identity of the  
20 beneficiary of Angel's life insurance policy because no  
21 death certificate had been issued for Angel.<sup>3</sup>

22 In 2009, a Union Pacific employee Mary Estrada spoke  
23 with Plaintiff by telephone about the letter she (Mary  
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25 <sup>3</sup>ECF No. 48-7, Cole Declaration, Exhibit G (copy of a  
26 letter dated March 25, 2013, from Plaintiff's counsel to  
27 Prudential.

1 Estrada) had sent to Plaintiff dated September 18, 2009.  
2 This letter was written to inquire why Plaintiff had not  
3 applied for a distribution of Angel's Thrift Plan Account.  
4 Plaintiff told Mary Estrada that she could not get a death  
5 certificate until seven years after Angel's disappearance.  
6 Plaintiff testified that Union Pacific called her each year  
7 about Angel's Thrift Plan account "[b]ecause I was the  
8 executor of the estate."

9 Plaintiff states she called Union Pacific, although the  
10 dates are not certain, to discuss the 2009 correspondence.  
11 Plaintiff states Shawna Smith from Union Pacific would not  
12 disclose any information, though, because there was no death  
13 certificate.

14 It is undisputed that Plaintiff did not make any  
15 written request to Union Pacific for information or  
16 documents relating to the subject plan until after she  
17 obtained counsel in the fall of 2012. ECF No. 65 at 21. The  
18 record provides that Plaintiff allegedly made two oral  
19 requests, however, in November and December 2004.

20 On June 14, 2012, Plaintiff filed a Petition in the  
21 District Court for the First Judicial of Idaho (In the  
22 Matter of Daniel James Angel), consistent with earlier  
23 information regarding the 7 year time frame to obtain a  
24 death certificate. Plaintiff requested a judgment declaring  
25 Angel deceased after seven and a half years missing.

26 ///

1 On August 15, 2012, Plaintiff retained counsel. On  
2 August 21, 2012, Plaintiff's counsel's paralegal sent an  
3 email to Union Pacific to follow up with an email to Shawna  
4 Smith regarding Angel's 401(k) distribution for Plaintiff.  
5 On September 11, 2012, Plaintiff's counsel's paralegal  
6 emailed Shawna Smith at Union Pacific requesting assistance  
7 on receiving policy details as she had a "dilemma with  
8 Prudential and MetLife."

9 On September 11, 2012, an Amended Petition for  
10 Declaratory Relief was filed on Plaintiff's behalf in Matter  
11 of Angel in Idaho state court. In the Amended Petition,  
12 Plaintiff named Prudential as a defendant, alleging that  
13 Prudential "is an insurance company who issued a life  
14 insurance policy on Daniel James Angel."

15 On or about September 17, 2012, Shawna Smith from Union  
16 Pacific informed Plaintiff's counsel that Prudential was the  
17 life insurance provider. On October 15, 2012, the Idaho  
18 state court entered its original Order on the merits in  
19 Matter of Angel. On October 23, 2012, the Idaho state court  
20 entered an amended order declaring Angel legally dead.

21 On or about October 29, 2012, Ms. Shawna Smith of Union  
22 Pacific communicated with Plaintiff's counsel that Union  
23 Pacific would accept the Declaratory Judgment in place of  
24 the death certificate to process Angel's account.

25 In fall of 2012, Plaintiff submitted her claim to  
26 Prudential for the life insurance and accidental death  
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1 benefits. On or about October 30, 2012, Plaintiff's counsel  
2 obtained Thrift Plan account balance information from Union  
3 Pacific. On November 6, 2012, Plaintiff authorized the  
4 distribution of Angel's account balance under the Thrift  
5 Plan. On November 14, 2012, a copy of the Death Certificate  
6 for Angel was forwarded to Ms. Shawna Smith of Union  
7 Pacific.

8 On November 14, 2012, Prudential received the  
9 beneficiary form, death certificate, sheriff's investigation  
10 records, and the obituary of Angel. ECF. No. 48-7 at 5.

11 On November 29, 2012, Prudential informed Plaintiff  
12 that it received a Group Life Accidental Insurance Claim.  
13 Prudential further indicated that it could not make a  
14 determination of the cause of Angel's death because the  
15 death certificate state "undetermined." Prudential stated  
16 that the file was being transferred to Prudential's Special  
17 Investigation Unit and that a determination should be made  
18 within thirty (30) days. Id.

19 On December 5, 2012, Prudential made the Basic Life and  
20 Optional Life benefits of the policy available to Plaintiff  
21 in the amount of \$405,000. Id.

22 On December 6, 2012, Plaintiff's counsel received  
23 notice directly from Rebecca Wanner (Senior Client Services  
24 Specialist for Prudential in Record Keeping Services) that  
25 Prudential had paid Plaintiff Basic Life and Optional Life

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1 Benefits on December 5, 2012, but that the Accidental Life  
2 Insurance Benefits required a more extensive investigation.

3 On or about December 10, 2012, Prudential made the  
4 balance of the Basic Life and Optional Life Benefits policy  
5 available to Plaintiff in the total sum of \$76,000.

6 On December 26, 2012, Prudential again informed  
7 Plaintiff that it could not make a determination of the  
8 cause of Angel's death because the death certificate stated  
9 "undetermined" and that the file was being transferred to  
10 Prudential's Special Investigation Unit and that a  
11 determination should be made within thirty (30) days. Id.

12 On January 23, 2013, Prudential once again informed  
13 Plaintiff that it could not make a determination of the  
14 cause of Angel's death because the death certificate stated  
15 "undetermined." Prudential indicated that the file was being  
16 transferred to Prudential's Special Investigation Unit and  
17 that a determination should be made within thirty (30) days.  
18 Id.

19 By letter dated January 31, 2013, Prudential denied  
20 that it had to pay the Accidental Death Benefits for Angel  
21 in the amount of \$567,000 on the ground that the manner of  
22 his death had been ruled undetermined and no proof existed  
23 of bodily injury. Id.

24 On February 21, 2013, Union Pacific provided the  
25 Summary Plan Description to Plaintiff's counsel, which  
26 identified Prudential as the life insurance carrier.  
27

1 On February 25, 2013, Plaintiff's counsel advised  
2 Prudential in writing that Prudential was, allegedly,  
3 unreasonably and intentionally denying payment of  
4 Plaintiff's claim. Plaintiff's counsel demanded that the  
5 claim be approved for payment by March 1, 2013, and that  
6 Prudential pay a portion of Plaintiff's legal fees. Id. On  
7 March 8, 2013, Prudential paid the Accidental Life Insurance  
8 Benefit in the amount of \$567,000.

9 On March 25, 2013, Plaintiff's counsel wrote to  
10 Prudential regarding Ms. Lybecker's dispute with Prudential,  
11 and enclosing a draft complaint. The letter stated, in  
12 part, that payment of the death benefits and acknowledgment  
13 that Plaintiff was entitled to accidental death benefits  
14 "does not include attorney's fees nor does it address  
15 interest on Ms. Lybecker 's money to which she is clearly  
16 entitled." The letter also stated:

17 Ms. Lybecker will file the proposed  
18 complaint attached to this  
19 correspondence if you do not agree to pay  
20 her the sum of \$350,000 in addition to the  
21 sums due under the Accidental Death  
22 portion of the insurance policy.  
23 The sum of \$350,000 is roughly double the  
24 amount of interest on the two paid  
25 benefits which were due to my client at  
26 least by November of 2005 which was one  
27 year after the date Mr. Angel disappeared.  
28 It is doubled because Prudential likely  
earned a rate of return on my clients  
money which more than doubled the  
rate utilized to calculate the  
interest owed . . .

26 ///

1 The draft complaint sent to Prudential would have named  
2 Prudential as the sole defendant in an action seeking a  
3 single, unliquidated sum of money, which amount couldn't be  
4 determined. ECF No. 15-16 (The draft complaint asked that  
5 Prudential be ordered to pay over either the profits earned  
6 by Prudential on the sums wrongfully withheld by Prudential,  
7 or the prejudgment interest on the sums wrongfully withheld  
8 by Prudential, whichever sum is greater.)

9 On May 20, 2013, before the instant action was filed,  
10 Prudential paid Plaintiff an additional amount of  
11 \$389,917.97 as an "interest adjustment", which amount was  
12 more than \$39,000 higher than the amount Plaintiff had  
13 demanded. Prudential paid Plaintiff the full amount of  
14 death/accidental death benefits to which Plaintiff deemed  
15 herself entitled, plus interest, totaling \$1,437,917.97.

16 On June 18, 2013, Plaintiff brought this action by  
17 filing her Complaint in federal court, listing both Union  
18 Pacific and Prudential. Plaintiff's Complaint and her First  
19 Amended Complaint, however, alleged that Prudential, and  
20 Prudential alone, wrongfully delayed payment to her of  
21 \$1,048,000 in death benefits ("As the direct and proximate  
22 result of Prudential's conduct complained of herein,  
23 Prudential retained funds which rightfully belonged to  
24 Plaintiff ..."). ECF Nos. 1, 27.

25 On January 16, 2014, Plaintiff filed her written  
26 request for an order dismissing Prudential from this action,  
27

1 without prejudice and with each party paying its own costs.  
2 In support of the motion, it was represented that "...prior  
3 to this action, Prudential paid Plaintiff all benefits, with  
4 interest, that were owing to her . . ." (ECF No. 40 at 1-2).

5 **II. Plaintiff's Motion for Summary Judgment As to Her**  
6 **Requesting Statutory Penalties Against Union Pacific**

7 As limited by her Amended Complaint, Plaintiff seeks a  
8 statutory penalty against Union Pacific under ERISA §  
9 502(c)(1)(B) based on two allegations: 1) that Plaintiff  
10 became a plan participant on June 7, 2004<sup>4</sup>; and 2) that  
11 Union Pacific refused Plaintiff's oral request for  
12 information regarding the subject plan. (ECF No. 27 at 6.)

13 Plaintiff argues the penalties commenced on the first  
14 date that Plaintiff requested the information, which she  
15 suggests could be determined at trial. ECF No. 27 at 6,  
16 Plaintiff's Amended Complaint. In the next paragraph of the  
17 Amended Complaint, Plaintiff alleges that she is entitled to  
18 judgment against Union Pacific for the sum of the statutory  
19 penalty from the date on which she first orally requested  
20 information on the subject plan to February 21, 2013, for a  
21 total penalty of \$349,910 (based on the statutory penalty of  
22 \$110/day as provided by 29 U.S.C. § 1132(c). Id. at 6-7.

23 Defendant Union Pacific, in its cross-motion and  
24 opposition to Plaintiff's summary judgment, asserts that  
25 since at least January 16, 2014, Plaintiff has lacked

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26  
27 <sup>4</sup>Angel named Lybecker as beneficiary of his life  
28 insurance policy on June 7, 2004. ECF No. 51-2, Ex. E.

1 statutory and Article III standing to pursue this action  
2 against Union Pacific. Union Pacific contends that  
3 Plaintiff was never a "participant" in the subject plan, as  
4 the term "participant" is defined for purposes of ERISA.  
5 Further, Union Pacific asserts, Plaintiff was not a  
6 "participant" or "beneficiary" (as those terms are  
7 defined in ERISA) on June 18, 2013, the date this action was  
8 commenced.

9 Defendant states that if Plaintiff called the Union  
10 Pacific Service Center in November, 2004, as she claims to  
11 have done, Plaintiff would have been told that she was the  
12 beneficiary of Angel's Thrift Plan account, even if she did  
13 not yet have a death certificate for Angel.<sup>5</sup> If Plaintiff  
14 had inquired about the subject plan, she would have been  
15 referred to Prudential, the sole claims administrator of  
16 that plan and the sole source of information regarding  
17 beneficiaries named by participants in the subject plan,  
18 without regard to whether she had a death certificate.<sup>6</sup>

19 Union Pacific's final point of contention is that  
20 before June 19, 2013, Plaintiff had received every benefit  
21 due to her under the subject plan, with what Plaintiff calls

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25 <sup>5</sup>Defendant's Statement of Facts Nos. 38-43, 62.

26 <sup>6</sup>Defendant's Statement of Facts, Nos. 8-9, 11-13, 45-49,  
27 62, 65.

1 "fair rate."<sup>7</sup> On or after June 19, 2013, Plaintiff had no  
2 cause of action against former defendant Prudential, the  
3 sole claims administrator of the subject plan, and lacked  
4 standing to bring any claim against Prudential.<sup>8</sup>

### 5 **III. Summary Judgment Standard**

6 To withstand a motion for summary judgment, the  
7 opposing party must set forth specific facts to show that  
8 there is a genuine issue of material fact in dispute.  
9 Fed.R.Civ.P. 56(e). A dispute about a material fact is  
10 genuine "if the evidence is such that a reasonable jury  
11 could return a verdict for the nonmoving party." *Anderson v.*  
12 *Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91  
13 L.Ed.2d 202 (1986). All facts in the record and inferences  
14 drawn therefrom must be viewed in the light most favorable  
15 to the nonmoving party. In the absence of genuine issues of  
16 disputed fact, "the moving party is entitled to judgment as  
17 a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317,  
18 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

### 19 **IV. DISCUSSION**

20 The parties' cross-motions for summary judgment raise  
21 the following two issues: (1) whether Plaintiff has standing  
22 to pursue her claims; and (2) whether UPC is subject to a  
23

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24 <sup>7</sup>Defendant's Statement of Facts Nos. 14-15, 65-66,  
25 68-70, 74-75, 76-77.

26 <sup>8</sup>Defendant's Statement of Facts Nos. 14-15, 66-67, 69,  
27 70.

1 penalty under ERISA § 502(c)(1) for its failure to timely  
2 produce documents. Each of these issues will be addressed  
3 in turn.

4 **A. Ms. Lybecker Does Not Have Standing**

5 To bring an ERISA cause of action for a statutory  
6 penalty, a party must have statutory standing. See §  
7 1132(a)(1)-(10); *Harris v. Provident Life and Accident Ins.*  
8 *Co.*, 26 F.3d 930, 933 (9th Cir. 1994). Under ERISA, only a  
9 "participant" or a "beneficiary" is entitled to request plan  
10 documents under 29 U.S.C. § 1132(c)(1) and seek penalties  
11 for the failure of their production. *Harris*, 26 F.3d at 933.

12 **1. Plaintiff Was Not a Participant in the Subject Plan**

13 Union Pacific asserts that in November 2004, Plaintiff  
14 was not a "participant" in the subject plan for purposes of  
15 requesting or receiving documents or information under  
16 ERISA. ERISA has only one statutory definition of  
17 "participant" for use throughout the Act:

18 The term "participant" means any employee  
19 or former employee of an employer, or any  
20 member or former member of an employee  
21 organization, who is or may become  
22 eligible to receive a benefit of any type  
23 from an employee benefit plan which covers  
24 employees of such employer or members of  
25 such organization, or whose beneficiaries  
26 may be eligible to receive any such  
27 benefit.

28 29 U.S.C. § 1002(7).

24 Plaintiff concedes that she is neither a current nor a  
25 former employee of Union Pacific. The Ninth Circuit case law  
26 has noted that the statutory definition of "participant" is  
27

1 sufficiently clear and only employees can be ERISA  
2 "participants." *Harper v. American Chambers Life Ins. Co.*,  
3 898 F.2d 1432, 1434 (9th Cir. 1990). Thus, Plaintiff could  
4 not have been a participant in the subject plan when any  
5 alleged oral requests for information were made.

6 **2. In June 2013, Plaintiff Was Neither a Participant**  
7 **Nor a Beneficiary**

8 UPC argues that Plaintiff has no statutory standing to  
9 bring this action for a penalty claim against UPC because  
10 §1132(a)(1)(A) provides that a civil action may be brought  
11 by a participant or beneficiary only, as determined when the  
12 action is brought. Subsection 1132(c)(1)(B) is the only  
13 provision that confers authority for a penalty based on a  
14 failure to supply documents following a request (specifically  
15 a written request) by a participant (or by a beneficiary if  
16 the beneficiary is in pay status).

17 A plaintiff cannot meet either statutory definition  
18 unless the plaintiff "is or may become eligible to receive a  
19 benefit" under the plan in issue. 29 U.S.C. § 1002(7), (8).  
20 However, at the pleading stage, a plaintiff who alleges a  
21 "colorable claim" of entitlement to a plan benefit is  
22 treated (at least provisionally) as satisfying the  
23 applicable definition for purposes of the standing  
24 requirement under Section 1132(a). *Firestone Tire and*  
25 *Rubber Co. v. Bruch*, 489 U.S. 101, 117-18 (1989).

26 Union Pacific asserts that at the beginning of this  
27 case, Plaintiff relied on her claim against Prudential as



1 the source of her "participant" status asserting that she  
2 had a "colorable claim" to life insurance plan benefits  
3 because she was entitled to "the greater of the profits  
4 Prudential earned on her money or interest on that money."  
5 This prayer for relief standing alone is not sufficient to  
6 satisfy the definition of "participant" or "beneficiary"  
7 under the colorable claim test because such claim must be  
8 for a benefit (and not solely interest or penalty) under the  
9 plan. Before June 18, 2013, Plaintiff had received every  
10 benefit due to her under the subject plan, with what  
11 Plaintiff calls "fair rate" for interest on the money  
12 Prudential earned on that benefit paid fully but not timely.

13 Plaintiff does not dispute that the Ninth Circuit has  
14 never held that payment of interest is a "benefit" for  
15 purposes of statutory standing analysis under Section  
16 1132(a)(1). The Court finds no case law to support the view  
17 that interest is considered a "benefit" in the ERISA sense  
18 of the word. When this action commenced, Plaintiff did not  
19 have any claim to any further payments from Prudential. The  
20 record shows that any claim Plaintiff may once have had  
21 against Prudential was extinguished in May 2013, before  
22 Prudential's dismissal and before this action was commenced.  
23 See "Order Re Motion to Dismiss Defendant Prudential," ECF  
24 No. 44.

25 In conclusion, the Court finds that only a colorable  
26 claim to an additional plan benefit might have supported a  
27

1 finding of Plaintiff's status as a "participant" or  
2 "beneficiary" for purposes of ERISA's exclusive  
3 jurisdictional provisions in Section 1132(a)(1)-(3). It  
4 follows that Plaintiff lacks standing. Union Pacific is  
5 entitled to judgment as a matter of law dismissing  
6 Plaintiff's claim. See 29 U.S.C. §1132(a)(1)(A).

### 7 **3. Written Request Never Made by Plaintiff**

8 Even if Plaintiff were a participant or beneficiary at  
9 the time of the commencement of the action, which the Court  
10 finds she was not, Plaintiff failed to make a written  
11 request for documents.

12 Plaintiff seeks a statutory penalty against Union  
13 Pacific only for an alleged failure to satisfy the  
14 requirements of 29 U.S.C. § 1132(c)(1)(B), and based on two  
15 oral requests allegedly made by Plaintiff to Union Pacific  
16 in 2004. One relevant statute, 29 U.S.C. § 1132(c)(1)(B),  
17 reads:

18 (c) Administrator's refusal to supply  
19 requested information; penalty for failure  
20 to provide annual report in complete form  
21 (1) Any administrator (B) who fails  
22 or refuses to comply with a  
23 request for any information which  
24 such administrator is required by  
25 this subchapter to furnish to a  
26 participant or beneficiary (unless  
27 such failure or refusal results  
28 from matters reasonably beyond the  
control of the administrator) by  
mailing the material requested to  
the last known address of the  
requesting participant or  
beneficiary within 30 days after  
such request may in the court's  
discretion be personally liable to

1 such participant or beneficiary in  
2 the amount of up to \$100 a day<sup>9</sup>  
3 from the date of such failure or  
4 refusal, and the court may in its  
5 discretion order such other relief  
6 as it deems proper.

7 Another relevant statute, 29 U.S.C. §1025(a) sets  
8 forth the writing requirement for participants (which  
9 Lybecker was not) and beneficiaries:

10 (a) Requirements to provide pension  
11 benefit statements

12 (1) Requirements

13 (A) Individual account plan  
14 The administrator of an individual account  
15 plan (other than a one-participant  
16 retirement plan described in section  
17 1021(i)(8)(B) of this title) **shall** furnish  
18 a pension benefit statement--

19 (i) at least once each calendar quarter to  
20 a participant or beneficiary who has the  
21 right to direct the investment of assets  
22 in his or her account under the plan,  
23 (ii) at least once each calendar year to a  
24 participant or beneficiary who has his or  
25 her own account under the plan but does  
26 not have the right to direct the  
27 investment of assets in that account, **and**  
28 (iii) **upon written request** to a plan  
29 beneficiary not described in clause (i) or  
30 (ii).

31 29 U.S.C. § 1025(a) [emphasis added.]

32 Plaintiff concedes that she did not make written  
33 request for the information. However, Lybecker argues she  
34 made oral request for the information and because she became  
35 a plan "participant" as of June 7, 2004 (when Angel named  
36 ///

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37 <sup>9</sup>See 29 C.F.R. § 2575.502c-1 (increasing the per diem  
38 penalty from \$100 to \$110).

1 her a beneficiary of the subject plan), she was not required  
2 to make a written request for information. ECF No. 15 at 3.

3 Union Pacific argues that the duty to provide documents  
4 within 30 days of a participant's or beneficiary's request  
5 does not arise under §1132(c)(1)(B) except under specified  
6 circumstances. See § 1132(c)(1)(B). One of those specified  
7 circumstances is that the plan administrator has failed to  
8 provide documents or information within 30 days of receipt  
9 of a written request for the documents or information. *Id.*

10 The Court finds that the reasoning set forth in  
11 *Porcellini v. Strassheim Printing Co., Inc.*, 578 F.Supp. 605  
12 (E.D.Pa.1983) and *Anderson v. Mortell*, 722 F.Supp. 462  
13 (N.D.Ill.1989), is sound and directly applicable to the  
14 present action, since, in her amended complaint, Plaintiff  
15 asks the court to impose the statutory penalty in § 1132(c)  
16 against Union Pacific for technical violations of ERISA. The  
17 Court agrees with Union Pacific's position that § 1132(c) is  
18 inapplicable because Lybecker failed to comply with the  
19 statute's requirement that requests for such information be  
20 made *in writing* and directed to the *plan administrator*.  
21 *Porcellini*, 578 F.Supp. at 611. Union Pacific did not  
22 receive the requests in writing and Prudential (not Union  
23 Pacific), was the plan administrator of the subject plan  
24 involved.

25 The court declines to tinker with ERISA's complex  
26 regulatory scheme. ERISA has been referred to as a  
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1 "comprehensive and reticulate" legislative scheme designed  
2 to promote the integrity of this country's private pension  
3 plans and to protect the vested expectations of plan  
4 participants and beneficiaries. *See Nachman Corp. v. Pension*  
5 *Benefit Guaranty Corp.*, 446 U.S. 359, 100 S.Ct. 1723, 64  
6 L.Ed.2d 354 (1980); *see also Pompano v. Michael Schiavone &*  
7 *Sons, Inc.*, 680 F.2d 911, 914 (2d Cir. 1982), *cert. denied*,  
8 459 U.S. 1039, 103 S.Ct. 454, 74 L.Ed.2d 607 (1982)  
9 ("ERISA's purpose is to secure guaranteed pension payments  
10 to participants by insuring the honest administration of  
11 financially sound plans."). By adopting § 1025(a) Congress  
12 has clearly manifested an intent to make plan participants  
13 or beneficiaries make requests in writing. Thus, the court  
14 construes the language of § 1025(a) to give effect to  
15 legislative intent.<sup>10</sup>

#### 16 **B. Statutory Penalty Will Not Be Imposed on UPC**

17 ERISA contains a disclosure provision that requires a  
18 plan administrator to, "upon written request of any  
19 participant or beneficiary, furnish a copy of the latest  
20 updated summary plan description, and the latest annual  
21 report, any terminal report, the bargaining agreement, trust  
22 agreement, contract, or other instruments under which the  
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25 <sup>10</sup>See H.R.Rep. No. 533, 93d Cong., 1st Sess. 12 (1973),  
reprinted in 1974 U.S.Code Cong. & Admin. News 4639, 5042.  
26 Furthermore, the use of the word "shall" is mandatory in  
statutory construction in the absence of any contrary  
27 intention expressed in the statute. C. Sands and N. Singer,  
2A Sutherland Stat. Const. § 57.03 at 643-44 (4th ed. 1984).

1 plan is established or operated." 29 U.S.C. § 1024(b)(4).  
2 Section 1132(c)(1)(B) gives teeth to this disclosure  
3 obligation, rendering a noncompliant administrator liable  
4 for up to \$110 per day for failing to produce requested plan  
5 documents within 30 days of the request. *Mondry v. Am.*  
6 *Family Mut. Ins.*, 557 F.3d 781, 793 (7th Cir.2009); 29  
7 C.F.R. § 2570.502c-1. A penalty is not mandatory, and the  
8 amount, if any, is left to the court's discretion. *Fenster*  
9 *v. Tepfer & Spitz, Ltd.*, 301 F.3d 851, 858 (7th Cir.2002).

10 To trigger this discretionary power to impose  
11 penalties, a beneficiary must establish that the plan  
12 administrator "was required to make available the requested  
13 information, that the [beneficiary] requested the  
14 information, and that the administrator failed to provide  
15 the information." *Kleinhans v. Lisle Sav. Profit Sharing*  
16 *Trust*, 810 F.2d 618, 622 (7th Cir.1987).

17 The Court found above that Plaintiff did not have a  
18 colorable claim to have supported finding that Plaintiff was  
19 a "participant" or "beneficiary" for purposes of ERISA's  
20 exclusive jurisdictional provisions in §1132(a)(1)-(3).  
21 Having found that Ms. Lybecker is not a participant or  
22 beneficiary of the Plan, she lacks standing to bring this  
23 claim under § 1132. See *Crotty v. Cook*, 121 F.3d 541, 544  
24 (9th Cir.1997).

25 Even if this Court had found that Plaintiff did have  
26 standing, based on the unique facts associated with this  
27

1 case, any untimely production of plan documents was  
2 complicated by the fact that Ms. Lybecker unreasonably  
3 relied on information provided by law enforcement that she  
4 could not obtain Angel's death certificate for 7 ½ years.  
5 See ECF No. 48-6, Ex. F at 2, Petition. Therefore, a viable  
6 argument could be made that the statutory penalty under §  
7 1132(c)(1) would not apply as such delay by the plan  
8 administrator (Prudential not Union Pacific) had causes  
9 other than the result of bad faith. Finally, in determining  
10 whether to impose a statutory penalty, the Court would look  
11 at the significance of any prejudice and harm to Plaintiff  
12 from a plan administrator's failure to timely produce the  
13 plan documents. Plaintiff received more than she requested  
14 from Prudential, who was voluntarily dismissed without  
15 prejudice from this case.

## 16 **V. Conclusion**

17 Plaintiff cannot satisfy requirements of  
18 §1132(a)(1)A) and as such cannot trigger the Court's  
19 §11132(c) "penalty power." Thus, Article III's  
20 "redressability" requirement is not satisfied in Plaintiff's  
21 claim against Union Pacific. It follows that Plaintiff  
22 cannot establish Article III standing to pursue her claim  
23 against Union Pacific. Accordingly,

24 **IT IS ORDERED** that:

25 1. Defendant Union Pacific's Motion For Summary  
26 Judgment, **ECF No. 46**, filed on October 15, 2014, is **GRANTED**.

1 Plaintiff's claim(s) are dismissed against Defendant Union  
2 Pacific with prejudice.

3 2. Plaintiff's Motion For Summary Judgment, **ECF No. 50**,  
4 filed October 15, 2014, is **DENIED**.

5 **IT IS SO ORDERED.** The District Court Executive is  
6 directed to enter this Order; enter judgment consistent with  
7 this order; and **CLOSE FILE**.

8 **DATED** this 12<sup>th</sup> day of January, 2015.

9  
10 *s/Lonny R. Suko*

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13 LONNY R. SUKO  
14 SENIOR UNITED STATES DISTRICT JUDGE  
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