

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

VIRGINIA C. MOON, on her own behalf and on behalf of the Peters Rush Habib & McKenna 401(k) Profit Sharing Plan,

Plaintiff,

DAVID H. RUSH, MARK A. HABIB,
and JAMES P. MCKENNA,

Defendants.

No. 2:11-CV-03102-GEB-CKD

ORDER GRANTING IN PART AND
DENYING IN PART MOTIONS FOR
SUMMARY JUDGMENT

AND RELATED COUNTERCLAIM.

Plaintiff and Counter-Defendant Moon and Defendants Rush, Habib, and McKenna (collectively the "Defendants") each move for summary judgment on claims one through five in Plaintiff's Complaint ("Compl."). Defendants also seek summary judgment on the six remaining claims in the Complaint. Counter-Claimant Rush seeks summary judgment on all three claims in his Second Amended Counterclaim ("Countercl.").

I. **LEGAL STANDARD**

2 A party seeking summary judgment bears the initial
3 burden of demonstrating the absence of a genuine issue of
4 material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323
5 (1986). "A fact is 'material' when . . . it could affect the
6 outcome of the case." Thrifty Oil Co. v. Bank of Am. Nat'l Trust
7 & Sav. Ass'n, 322 F.3d 1039, 1046 (9th Cir. 2003) (quoting
8 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). An
9 issue of material fact is "genuine" when "the evidence is such
10 that a reasonable jury could return a verdict for the nonmoving
11 party." Anderson, 477 U.S. at 248.

If the movant satisfies its "initial burden," "the nonmoving party must set forth, by affidavit or as otherwise provided in Fed. Rule Civ. Proc. ("Rule") 56, 'specific facts showing that there is a genuine issue for trial.'" T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (quoting former Rule 56(e)). Summary judgment "evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be drawn in favor of that party." Sec. & Exch. Comm'n v. Todd, 642 F.3d 1207, 1215 (9th Cir. 2011) (citing Johnson v. Paradise Valley Unified Sch. Dist., 251 F.3d 1222, 1227 (9th Cir. 2001)).

Further, Local Rule 260(b) prescribes:

24 Any party opposing a motion for summary
25 judgment . . . [must] reproduce the itemized
26 facts in the [moving party's] Statement of
27 Undisputed Facts and admit those facts that
28 are undisputed and deny those that are
disputed, including with each denial a
citation to the particular portions of any
pleading, affidavit, deposition,
interrogatory answer, admission, or other

1 document relied upon in support of that
2 denial.

3 If the nonmovant does not "specifically . . .
4 [controvert duly supported] facts identified in the [movant's]
5 statement of undisputed facts," the nonmovant "is deemed to have
6 admitted the validity of the facts contained in the [movant's]
7 statement." Beard v. Banks, 548 U.S. 521, 527 (2006).

8 Because a district court has no independent
9 duty "to scour the record in search of a
10 genuine issue of triable fact," and may "rely
11 on the nonmoving party to identify with
12 reasonable particularity the evidence that
13 precludes summary judgment," . . . the
14 district court . . . [is] under no obligation
15 to undertake a cumbersome review of the
16 record on the [nonmoving party's] behalf.

17 Simmons v. Navajo Cnty., Ariz., 609 F.3d 1011, 1017
18 (9th Cir. 2010) (quoting Keenan v. Allan, 91 F.3d 1275, 1279 (9th
19 Cir. 1996)).

20 **II. STATEMENT OF UNCONTROVERTED FACTS**

21 The following uncontroverted facts concern the motions.

22 **A. The Marriage/Dissolution of Moon and Rush**

23 Rush and Moon were married on March 21, 1977. (Pl.
24 Resp. Defs. SUF ("Defs. SUF") ¶ 1, ECF No. 119.) Moon filed a
25 petition in state family court for dissolution of the marriage in
September 1994. (Defs. SUF ¶ 14.) In connection with their divorce, Rush
and Moon entered into a domestic relations order ("DRO") "which
was intended to divide the marital community's assets in the
[Peters, Rush, Habib & McKenna] 401(k) Profit Sharing Plan ("the
Plan")." (Defs. SUF ¶ 19.) The DRO was signed and filed in
September 1995, and the final dissolution was entered on
September 26, 1995. (Defs. SUF ¶¶ 23, 18.)

Moon, through her family law counsel, served a copy of the DRO on Rush at his home address on October 31, 1995. (Defs. SUF ¶ 27.) Moon did not present the DRO to David Fuller, who was then the Plan Administrator. (Defs. SUF ¶¶ 33, 35.)

The Plan currently holds a 20.2881% interest in a 40-acre Property at 1525 Dayton Road in Chico, California ("the Property") "for Moon's benefit." (Defs. SUF ¶ 74.)

B. The Plan

The Plan maintains separate accounts for each individual participant and/or beneficiary. (Defs. Resp. Pl. SUF "Pl. SUF") ¶ 1, ECF No. 111.) Each participant and/or beneficiary of the Plan is permitted to direct the investments of the assets in his or her account. (Pl. SUF ¶ 2.)

Rush was a Discretionary Trustee of the Plan until January 1, 2013, at which time he became a Special Trustee. (Pl. SUF ¶ 3.) He has never been a Plan Administrator. (Defs. SUF ¶ 30.) Habib is the current Plan Administrator. (Pl. SUF ¶ 4.) McKenna is a Trustee of the Plan. (Pl. SUF ¶ 5.)

When Rush received the DRO from Moon in 1995, he did not share it with other Plan Trustees. (Pl. SUF ¶ 12.)

C. The Property

Sometime in 1995 or 1996 after the divorce, Moon took over complete control of the Property. (Defs. SUF ¶ 56.) Moon personally held a 79.7119% interest in the Property and the Plan held a 20.2881% interest. (Defs. SUF ¶ 55.) In 1997 Rush loaned Moon \$75,000, and they agreed Moon would sell Rush a 49% ownership interest in the Property with the loan used as partial payment. (Defs. SUF ¶¶ 75-76.) In 1998 or 1999, Rush became a

1 partial owner of the Property; he personally owned a 49%
2 interest, Moon personally held a 30.7119% interest, and the Plan
3 held a 20.2881% interest. (Defs. SUF ¶¶ 81-82.) Moon and Rush
4 dispute the terms of their 49% ownership agreement. However, it
5 is uncontested that Rush deposited income generated by the
6 Property "into Moon's checking account in Chico." (Defs. SUF ¶
7 88.) Moon transferred 2% of her personal ownership interest to
8 Rush in January 2000, resulting in Rush having a 51% interest in
9 the Property, Moon personally having a 28.7119% interest, and the
10 Plan having a 20.2881% interest. (Defs. SUF ¶ 99.)

11 In early 2000, Rush told Moon she owed him 49% of the
12 Property's "net" rental income "for calendar year 1999," which
13 she paid. (Defs. SUF ¶ 94.) In 2002, he sent her an accounting
14 statement through December 31, 2001, which Moon paid. In June
15 2003, Rush sent Moon an accounting for 2002, which she paid.
16 (Defs. SUF ¶¶ 108-09.) Rush sent Moon accounting statements for
17 2003-2008. (Defs. SUF ¶¶ 116, 121, 126, 131, 137). Moon received
18 the 2003-2008 statements, but did not pay Rush. (Defs. SUF ¶¶
19 117, 119, 122, 124, 127, 129, 132, 135, 139, 141.)

20 From 2003 to mid-2009 Moon received 100% of the income
21 generated by the Property; specifically, \$225,500. (Defs. SUF ¶
22 143.) "Although Moon received \$225,500 in income from the
23 Property from 2003 to mid-2009, Moon did not report on her
24 federal income tax returns any income related to the Property for
25 tax years 2003-2009." (Defs. SUF ¶ 144.) "Moon has never offered
26 or made any effort to transmit any portion of the income she
27 received from the Property from 2003 to mid-2009 to the Plan,
28 despite her present argument that the Plan was entitled to

1 receive some portion of this income." (Defs. SUF ¶ 145.) "From
2 2003 to 2008, although Rush claimed credit for mortgage interest
3 and taxes paid by Moon, he also reported the entirety of all
4 income earned from rental of the Property, even though he
5 received none of it." (Defs. SUF ¶ 146.) "From 2003, when Moon
6 began retaining all rents for the Property, through at least June
7 2009, Moon paid alarm monitoring and property tax expenses for
8 the Property." (Defs. SUF ¶ 153.) Rush personally advanced
9 expenses for the Property in 2003-2008. (Defs. SUF ¶¶ 118, 123,
10 128, 133, 134, 140.)

11 In June 2009, Rush began retaining rents received for
12 the Property instead of depositing them into Moon's checking
13 account, and since January 1, 2013, Rush has deposited all income
14 from the Property into a segregated savings account. (Defs. SUF
15 ¶¶ 152, 254.)

16 **D. Property Valuations Over Time**

17 In 1997, a realtor estimated the Property was worth
18 between \$800,000 and \$850,000. (Defs. SUF ¶¶ 191-192.) In 2002,
19 the appraised value of the Property was \$1,150,000. (Defs. SUF ¶¶
20 193-194.) In November 2003 an appraiser opined that the Property
21 "was worth \$2,600,000" based on the assumption of an
22 extraordinary hypothetical condition that the property would not
23 be impacted by the Green Line. (Defs. SUF ¶¶ 171, 173.) The Green
24 Line is a boundary line in Chico outside of which development is
25 restricted to protect agricultural lands. (Defs. SUF ¶ 175.)
26 "Moon's expert witness . . . stated that, 'According to the Chico
27 City and Butte County planners, the likelihood of altering the
28 Green Line at this location is very low.'" (Defs. SUF ¶ 176.)

1 In 2009, the Property was appraised at \$850,000, and in
2 2014, different appraisers valued the Property: one at \$500,000
3 and the other at \$850,000. (Defs. SUF ¶¶ 199, 205, 216.)

4 **E. Moon's Requests for Plan Assets Information**

5 Habib became the Plan Administrator in either 1996 or
6 1997. (Defs. SUF ¶ 36.) Moon did not provide him with a copy of
7 the DRO until 2010. (Defs. SUF ¶ 38.)

8 On February 25, 2010, Moon's counsel wrote Habib
9 requesting plan documents, including a pension benefit statement.
10 (Defs. SUF ¶ 233.)

11 Habib acknowledged the letter on March 4, 2010. (Defs.
12 SUF ¶ 242.) On April 10, 2010, Moon's counsel informed Habib that
13 his thirty-day period to respond to her document request had
14 expired, and counsel reiterated the request for documents. (Pl.
15 SUF ¶ 23.)

16 On or around June 2, 2010, Habib informed Moon's
17 counsel "that he was unable to provide any of the documents
18 requested in the February 25, 2010 letter until he received a
19 written authorization signed by Moon, which was not included with
20 the February 25, 2010 letter." (Defs. SUF ¶ 243, Pl. SUF ¶ 24.)
21 Moon provided written authorization through her counsel on June
22 16, 2010, and Habib provided the requested documents on June 22,
23 2010. (Defs. SUF ¶¶ 244-245.)

24 Prior to Habib's June 2010 request for Moon's written
25 authorization to release the documents to her attorney, Moon had
26 never received communication from the Plan about the DRO and had
27 not been provided a pension benefit statement. (Pl. SUF ¶ 27;
28 Defs. SUF ¶ 241.) Habib has not provided Moon with a pension

1 benefit statement since his June 2010 communication. (Pl. SUF ¶
2 29.)

3 In October 2011, Moon's attorney sent a letter to Habib
4 requesting formal notice that the DRO had gone through the Plan's
5 qualification process. Habib responded in November 2011 that the
6 Plan did not consider the DRO qualified. (Defs. SUF ¶ 247-249.)
7 The Plan first established procedures for qualifying a DRO in
8 November 2011. (Pl. SUF ¶ 32.)

9 **III. DISCUSSION**

10 **A. Qualification of Moon's DRO**

11 Moon alleges in several of her claims that Defendants
12 violated statutory duties owed to her under the Employee
13 Retirement Income Security Act ("ERISA"), as a result of her
14 alternate payee Plan beneficiary status and their status as
15 fiduciaries of the Plan.

16 Under ERISA a fiduciary owes duties to plan
17 beneficiaries. See 29 U.S.C. § 1104(a)(1) (setting forth the
18 fiduciary duties under ERISA, which include the duty to act "with
19 the care, skill, prudence, and diligence under the circumstances
20 then prevailing that a prudent man acting in like capacity and
21 familiar with such matters would use ..."). Further a plan
22 "trustee is a fiduciary" under ERISA, N.L.R.B. v. Amax Coal Co.,
23 453 U.S. 322, 334 (1981), and "ERISA assigns to plan
24 administrators the fiduciary duty to ensure that an alternate
25 payee's rights are protected." Stewart v. Thorpe Holding Co.
Profit Sharing Plan, 207 F.3d 1143, 1156 (9th Cir. 2000). Rush,
McKenna and Habib are Plan Trustees and Habib is also a Plan
Administrator. (Pl. SUF ¶¶ 3-5.) Therefore, each Defendant owes a

1 fiduciary duty to plan beneficiaries.

2 ERISA "confers beneficiary status on a nonparticipant
3 spouse . . . in only narrow circumstances delineated by its
4 provisions." Boggs v. Boggs, 520 U.S. 833, 846 (1997). The ERISA
5 statutory definition of "beneficiary" includes "[a] person who is
6 an alternate payee under a qualified domestic relations order
7 ["QDRO"]." 29 U.S.C. § 1056(d)(3)(J). "A QDRO is a subset of
8 'domestic relations orders' that recognizes the right of an
9 alternate payee to 'receive all or a portion of the benefits
10 payable with respect to a participant under the plan.'" Hamilton
11 v. Wash. State Plumbing & Pipefitting Indus. Pension Plan, 433
12 F.3d 1091, 1096 (9th Cir. 2006) (citation omitted). "The term
13 'alternate payee' means any . . . former spouse. . . of a
14 participant who is recognized by a domestic relations order as
15 having a right to receive all, or a portion of, the benefits
16 payable under a plan." 29 U.S.C. § 1056(d)(3)(K).

17 Further, Moon argues that the California Court of
18 Appeal held in In re Marriage of Rush, C070841, 2014 WL 2795475
19 (Cal. Ct. App. June 20, 2014) (unpublished disposition) that the
20 DRO is qualified and therefore, she is a beneficiary under the
21 Plan.

22 Defendants counter that Moon has not established she a
23 beneficiary under the Plan, and argue that "[n]either the
24 September 26, 1995 domestic relations order nor the California
25 Court of Appeals decision in In re Marriage of Rush establish
26 that 'Moon is a beneficiary of the Plan.'" (Pl. SUF ¶ 11.)

27 Defendants' argument disregards the content of the DRO
28 and the evident holding In re Marriage of Rush. The appellate

1 court held in In re Marriage of Rush that the subject DRO is
2 "presumptively qualified, subject only to modifications agreed
3 upon by the parties or ordered by the court to save the DRO from
4 being legally ineffective." Id. at *2.

5 Further, the context in which In re Marriage of Rush
6 issued, indicates the decision rebuked Habib's attempt to avoid
7 his obligations to Moon under the Plan. In December 2011, after
8 Moon's counsel requested written confirmation from Plan
9 Administrator Habib that Moon's DRO was qualified, Habib
10 responded that it was not qualified and then intervened in the
11 long dormant divorce proceedings between Moon and Rush seeking to
12 have the state court determine if Moon's DRO was qualified. The
13 state court held the DRO was not qualified "because it did 'not
14 provide a basis for determining what is [Rush's] separate
15 interest in the plan and what is the community interests.'" Id.
16 at *3 (alterations in original). Moon appealed, and the Court of
17 Appeal reversed in In re Marriage of Rush, holding the family
18 court's "ruling on qualification was erroneous." Id. at *5-6. The
19 Court of Appeal stated:

20 The 'pivotal question' [in determining if a
21 DRO is qualified] is whether the dissolution
22 order contains enough information for the
23 plan administrator to make an informed
decision about distribution. Substantial
compliance with the requirements is
sufficient.

24 Inclusion of the term "community
25 interest" in the DRO does not render the DRO
unqualified. The wording may create some
ambiguity in this case, but not enough to
render the plan unqualified at such a late
date.

26
27 Community property interests are those
28 acquired during marriage. [Rush] declared

1 that he could not distinguish contributions
2 he made to the plan during his marriage to
3 [Moon] from those he made beforehand.
4 However, both [Rush] and Habib had access to
5 the plan's records, including the dates and
6 amounts for [Rush's] contributions to the
7 plan. Neither claimed to have made an attempt
8 to identify or trace [Rush's] separate
9 property interest.

10 Before the dissolution, [Rush] and
11 [Moon] were required by law to disclose to
12 one another and to the family court "[a]ll
13 material facts and information regarding the
14 characterization of all assets and
15 liabilities." When parties divide pension
16 assets, the party with better access to
17 information about the assets "must acquire
18 and disclose such information to the other
19 spouse." In this case, [Rush] necessarily had
superior (and perhaps exclusive) access to
information about his own pension assets,
including the extent to which his pension
fund's investment in the disputed real
property was traceable to separate rather
than community property. He had an
affirmative duty to discover and disclose the
facts to [Moon] before they dissolved their
marriage and he offers no explanation for not
disclosing the same facts to his law partner,
the plan administrator, in order to identify
and segregate any separate property
interests. Tellingly, [Rush] did not ask the
family court to characterize some or all of
the disputed property interest as separate;
he asked the family court to declare the
order he had negotiated unqualified and
ineffective.

20 Id. at *3-4 (citations omitted).

21 The appellate court also explained in In re Marriage of
22 Rush that the Plan's challenge to Moon's status as a Plan
23 beneficiary was untimely, stating:

24 If a plan administrator fails to timely
25 object to a DRO, however, "it makes no sense
26 to punish a spouse for a plan's dereliction."
27 Rather, a DRO may be declared a QDRO based on
28 the plan administrator's inaction. And the
plan need not be a party to a dissolution
proceeding to be bound by the terms of a
QDRO.

The plan's request for a declaration that the DRO was not qualified—brought 16 years after [Rush] signed the DRO as a party and trustee, and 18 months after the plan administrator acknowledged it in writing—was unreasonable and untimely. . . .

A QDRO does not create a new property interest, but renders enforceable an already existing interest, so the alternate payee's right to an enforceable QDRO is presumed during any period of DRO refinement. Here, the DRO was clearly intended by [Rush] and [Moon], and by the family court in 1995, to effectively transfer the entire community share of the disputed property to [Moon]. The family court's ruling on qualification was erroneous.

The family court order. . . is reversed.

Id. at *5-6 (emphasis and citations omitted).

It is evident that the state court DRO is a QDRO under ERISA and that the Plan Administrator's indication otherwise is not supported by the record. Further, Moon is an alternate payee under the QDRO and a Plan beneficiary within the meaning of 29 U.S.C. § 1056(d)(3)(K).

B. Claims 1 and 2: Breach of Statutory Duty

1. **Claim 1: 29 U.S.C. § 1025(a)**

Moon and Habib each seek summary judgment on claim one in Moon's Complaint, in which Moon alleges that as Plan Administrator Habib breached the statutory duty he owed her under ERISA 29 U.S.C. § 1025(a), which require him to provide her a pension benefit statement at least once each calendar quarter beginning January 1, 2007. Habib has only sent Moon one pension benefit statement for the second quarter of 2010. (Pl. SUF ¶¶ 27, 29; Defs. SUF ¶ 241.)

Section 1025(a) prescribes in part:

The administrator of an individual account plan . . . shall furnish a pension benefit statement--

(i) at least once each calendar quarter to a participant or beneficiary who has the right to direct the investment of assets in his or her account under the plan

It is uncontroverted that beneficiaries of the Plan are permitted to direct the investment of the assets in their own accounts. (Pl. SUF ¶ 2.) It is also uncontroverted that Habib has been the Plan Administrator since 2007; that prior to June 22, 2010 he never provided Moon with a pension benefit statement; and since June 22, 2010 he has not provided Moon with another pension benefit statement. (Defs. SUF ¶ 26; Pl. SUF ¶¶ 27-29.) Therefore, Moon has shown Plan Administrator Habib violated his statutory duty pursuant to § 1025(a).

2. Claim 2: 29 U.S.C. § 1024(b)(4)

Moon and Habib each seek summary judgment on claim two in Moon's Complaint, in which Moon alleges that as Plan Administrator Habib breached the statutory duty he owed her, ERISA under 29 U.S.C. § 1024(b)(4), which requires him to timely provide her requested plan documents. Section 1024(b)(4) provides that "[t]he administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated." 29 U.S.C. § 1132(c)(1) requires a Plan Administrator to respond within thirty days of a written request

1 or risk sanctions of up to \$110 per day for delay.

2 Moon contends in her capacity as a Plan beneficiary she
3 sent Habib a written request for plan documents dated February
4 25, 2010. Habib acknowledged receipt of the letter on March 4,
5 2010. (Defs. SUF ¶ 242.) Moon argues Habib "did not provide the
6 [requested] documents until June 22, 2010." (Pl. Mot. 10:11.)
7 Habib counters he has not violated § 1024(b)(4) because he
8 provided Moon copies of the requested documents eight days after
9 Moon sent him, through her attorney, written authorization to
10 release the requested documents to her attorney. (Defs. Unsealed
11 Notice & Mot. Summ. J. ("Defs. Mot.") 8:15-17, ECF No. 107.)
12 Habib contends his obligation to respond to Moon's document
13 request did not commence until he received a written
14 authorization from Moon authorizing her attorney to receive the
15 documents on her behalf.

16 A Plan Administrator is not "obliged to disclose any
17 documents to [a Plaintiff's] attorney without written
18 authorization from" the beneficiary. Bartling v. Fruehauf Corp.,
19 29 F.3d 1062, 1072 (6th Cir. 1994). However:

20 a [P]lan [A]dministrator is not entitled to
21 ignore a request for pension benefits
22 information made by an attorney on behalf of
23 a participant . . . Instead, a [P]lan
24 [A]dministrator must either provide the
25 requested information to the plan beneficiary
26 . . . or must . . . inform the attorney that
27 the information will be released upon the
receipt of an authorization signed by the
plan participant. A [P]lan [A]dministrator
who fails to take either of these steps
within the thirty day period imposed by 29
U.S.C. § 1132(c) is subject to the fines
authorized by that same provision, at the
discretion of the district court.

28 Minadeo v. ICI Paints, 398 F.3d 751, 758 (6th Cir. 2005).

1 Since it is uncontroverted that Habib received Moon's
2 February 25, 2010 plan document request by March 4, 2010, he had
3 an obligation to respond within thirty days, by either providing
4 the requested documents to Moon or informing Moon's attorney that
5 the documents would only be released upon receipt of written
6 authorization from Moon. He did neither. (Defs. SUF ¶ 244.) Habib
7 did not provide Moon with the documents until well beyond the
8 thirty day statutory period within which he was required to
9 respond. Therefore, Moon has shown Habib violated § 1024(b) (4).

10 **3. Statutory Penalties**

11 An administrator who fails to comply with his duties
12 under either section 1025(a) or section 1024(b), "may in the
13 court's discretion be personally liable" to the requesting
14 beneficiary for statutory penalties. 29 U.S.C. § 1132(c)(1); 29
15 C.F.R. §2575.502c-1 (increasing the maximum statutory penalty
16 from \$100 per day to \$110 per day for violations occurring after
17 July 29, 1997). "Whether to impose statutory penalties and the
18 amount of those penalties (up to \$110 a day) is discretionary."
19 Hemphill v. Estate of Ryskamp, 619 F. Supp. 2d 954, 975 (E.D.
20 Cal. 2008). "Appropriate factors to be considered . . . include
21 [1] bad faith or intentional misconduct on the part of the
22 administrator, [2] the length of the delay, [3] the number of
23 requests made and documents withheld, and [4] the existence of
24 any prejudice to the participant or beneficiary." Hemphill, at
25 976 (citing Romero v. SmithKline Beecham, 309 F.3d 113, 129 (3d
26 Cir. 2002)); Zann Kwan v. Andalex Group LLC, 737 F.3d 834, 848
27 (2nd Cir. 2013) (same). Section 1132 penalties are "meant to be
28 in the nature of punitive damages, designed more for the purpose

of punishing the violator than compensating the participant or beneficiary." Scott v. Suncoast Beverage Sales, Ltd., 295 F.3d 1223, 1232 (11th Cir. 2002); see also Starr v. Metro Sys., Inc. 461 F.3d 1036, 1040 (8th Cir. 2006) ("The purpose of [ERISA's statutory penalties] is to provide plan administrators with an incentive to comply with the requirements of ERISA. . . and to punish noncompliance.").

a. **Penalties for Claim One**

1. Bad Faith or Intentional Misconduct

15 Plan Administrator Habib argues his failure to provide
16 Moon a pension benefit statement was not because of bad faith or
17 intentional misconduct, since he was not the Plan Administrator
18 when Moon's DRO was signed and he did not have knowledge of the
19 DRO until 2010.

20 Moon argues Habib's lack of knowledge about the "QDRO
21 prior to 2010" does not prevent a finding that he acted in bad
22 faith for failing to provide her quarterly pension benefit
23 statements because he "knew about Mr. Rush's divorce from Ms.
24 Moon, and was aware for years that both the Plan and Ms. Moon
25 individually owned interests in the . . . [P]roperty, but never
26 asked Mr. Rush or anyone else whether any Plan assets were
27 involved in the divorce settlement or whether the divorce
28 affected the Plan in any way." (Pl. Mot. 12:11-16.) Moon also

1 argues that Habib's bad faith is evidenced by his refusal to
2 provide her quarterly pension benefit statements even after the
3 California appellate court ruled that the DRO is qualified.

4 Moon has not shown that Habib's failure to provide her
5 with quarterly pension benefit statements before his receipt of
6 Moon's February 25, 2010 letter demonstrates that his failure
7 stemmed from bad faith or intentional misconduct. However, Habib
8 did not begin sending Moon quarterly pension benefit statements
9 after he received the February 25, 2010 letter from Moon's
10 counsel. This failure continued even after the California
11 appellate court made clear in In re Marriage of Rush, C070841,
12 2014 WL 2795475, at *2, on June 20, 2014 that Moon is a
13 beneficiary of the Plan pursuant to the DRO which "is
14 presumptively qualified". Therefore, Moon has shown that Habib
15 acted in bad faith or committed intentional misconduct when he
16 failed to provide her quarterly pension benefit statements after
17 receiving the February 25, 2010 communication.

2. Length of Delay

19 Moon argues Habib continues to violate § 1025(a)
20 because he has not provided her with a quarterly pension benefit
21 statement since June 2010, and she is entitled to one each
22 calendar quarter. (Pl. SUF ¶ 29.) Habib failed to respond to this
23 argument. Therefore, Habib's delay in providing Moon with
24 quarterly pension benefit statements is ongoing since he has not
25 provided Moon with a quarterly pension benefit statement since
26 June 2010 and his ongoing violation weighs in favor of imposing a
27 penalty.

28 |||

3. Number of Requests

2 Habib argues Moon's single request for a pension
3 benefit statement weighs against imposing a penalty. Moon
4 counters that unlike her written request for plan documents,
5 ERISA does not require her to request pension benefit statements
6 before Habib's obligation to provide them to her is triggered.

4. Prejudice

1 (as opposed to Rush's asserted separate property portion)." (Pl.
2 Mot. 11:10-14.) She also argues she was "hampered in her ability
3 to pursue fiduciary breach claims based on Defendants'
4 administration of the Plan and Rush's self-dealing with respect
5 to the Property because she had no idea there was any issue with
6 the QDRO's allocation of the Plan's interest in the Property to
7 her" as a result of Habib's failure to perform his duties as Plan
8 Administrator. (Pl. Reply ISO Mot. Summ. J. ("Pl. Mot. Reply,")
9 8:6-9, ECF No. 120.)

10 Moon also submits a declaration in which she declares
11 that she "did not know before 2011 that Mr. Rush believe[d] that
12 he has a separate property interest in the Plan's share of the
13 [Property] or that there was any problem with the QDRO." (Decl.
14 Moon ISO Opp'n Countercl. Rush's MSJ ¶ 14, ECF No. 117.)

15 Moon has shown she is still deprived of quarterly
16 pension benefit statements. Although it is unclear whether she
17 has suffered prejudice as a result of Habib's ERISA statutory
18 violations, a lack of prejudice does not exonerate Habib's
19 failure to timely provide Moon with Plan documents. Godwin v. Sun
20 Life Assur. Co. of Canada, 980 F.2d 323, 327 (5th Cir. 1992)
21 ("section 1132 does not require the claimant to show he was
22 prejudiced to be entitled to penalties"); Kaiser Permanente Emp.
23 Pension Plan v. Bertozzi, 849 F. Supp. 692, 702 (N.D. Cal. 1994)
24 ("Although prejudice is not required to prevail on a section
25 1132(c) penalty claim, most courts do inquire as to whether the
26 claimant has suffered some type of prejudice before exercising
27 the discretion vested in them under section 1132(c).").

28 Considering the factors involved with the statutory

penalty decision, Moon's motion for statutory penalties is granted and Habib's motion is denied. Habib is ordered to pay Moon \$20 a day for his failure to provide Moon with pension benefit statements for two quarters in 2010 beginning on July 1, 2010 and until the date this order issues. See Treadwell v. Schweiker, 698 F.2d 137, 138 n.1 (2d Cir. 1983) (finding a calendar quarter to mean the period of three months ending on March 31, June 30, September 30, or December 31).

b. Penalties for Claim Two

10 Moon also seeks the maximum statutory penalty under §
11 1024(b)(4) for each of the eighty-seven days that Habib delayed
12 in providing her the requested plan documents, arguing the
13 penalty should be calculated from the date her counsel mailed
14 Habib a request for Plan documents, February 25, 2010.

1. Bad Faith or Intentional Misconduct

16 Habib argues he did not engage in any conduct that
17 could be characterized as bad faith, and timely responded to
18 Moon's inquiry and request; and that he did not know about Moon's
19 DRO until 2010.

20 Moon argues Habib acted in bad faith when he failed to
21 timely provide her with the documents she requested since "if Mr.
22 Habib was actually concerned about an unauthorized request for
23 information, he could have sent documents directly to Ms. Moon"
24 rather than to her counsel and because he did not, "[h]is delay
25 is indicative of bad faith." (Pl. Mot. 13:15-17.)

26 Moon has not shown that Habib's decision to communicate
27 with Moon through counsel rather than directly evinces bad faith
28 or intentional misconduct.

2. Length of Delay

11 Moon rejoins that Habib cannot justify his delay by
12 focusing on the date Moon provided him with written authorization
13 to release the documents because Habib did not communicate his
14 need for Moon's written authorization until at least three months
15 after her initial request.

Moon's counsel and Habib).

3. Number of Requests

Habib argues Moon's single request for Plan documents weighs against imposing a penalty. Moon counters that in addition to the request in her February 25, 2010 letter, her counsel also told Habib on April 19, 2010 and June 1, 2010 that Habib had not responded to the request in the February 25, 2010 letter. (ECF Nos. 100-17, 100-19, 100-21.)

4. Prejudice

Moon has not shown that she was prejudiced by Habib's delay in responding to her document request.

Considering the factors involved with the statutory penalty decision, Moon's motion for statutory penalties is granted and Habib motions is denied. Habib is ordered to pay \$30 a day for each of the eighty days he violated 29 U.S.C. § 1024 from when he sent notice to Moon's counsel that he had received her request for documents on March 4, 2010 until he provided the documents on June 22, 2010. (Defs. SUF ¶¶ 241, 245.)

C. Claims 3-7: Prohibited or Conflict of Interest

Transactions; Breach of Fiduciary Duty

Moon seeks summary judgment on claims three through five. Rush seeks summary judgment on claims three through seven, and Defendants Habib and McKenna seek summary judgment on claims five and six. Moon alleges in claims three through seven that certain Defendants, in their capacity as a Plan Trustee, breached one or more fiduciary duties owed to the Plan.

1. Application of 29 U.S.C. § 1113

Defendants argue claims three through seven are barred

1 by the limitations periods prescribed in 29 U.S.C. § 1113 are "to
2 the extent they rely on any events that occurred earlier than (1)
3 October 28, 2004, if Moon had no knowledge of the underlying
4 events, or (2) October 28, 2007, if she had such knowledge."
5 (Defs. Mot." 11:8-11.)

6 29 U.S.C. § 1113 prescribes:

7 No action may be commenced . . . with respect
8 to a fiduciary's breach of any
responsibility, duty, or obligation . . .
9 after the earlier of--

10 (1) six years after (A) the date of the last
action which constituted a part of the breach
11 or violation, or (B) in the case of an
omission the latest date on which the
fiduciary could have cured the breach or
12 violation, or

13 (2) three years after the earliest date on
which the plaintiff had actual knowledge of
14 the breach or violation; except that in the
case of fraud or concealment, such action may
15 be commenced not later than six years after
the date of discovery of such breach or
16 violation.

17 **a. Claims Three, Four and Seven Alleging Rush**
18 **Breached His Fiduciary Duties as a Plan**
19 **Trustee**

20 The third, fourth, and seventh claims in the Complaint
21 concern Rush's dual role as a Trustee of the Plan and a part
22 owner of the Property in his individual capacity. Moon alleges
23 while in this dual role Rush breached his fiduciary duties as
24 Plan Trustee by entering agreements "for the payment of rent to
25 him[self] on Plan property, . . . failing to transmit the Plan's
26 share of the rents to the Plan," "making decisions regarding
27 leasing, maintaining and selling the [Property]," and "placing
28 himself in a conflicted position with respect to the Plan. . . by

1 taking for himself rents and tax benefits attributable to the
2 Property owned by the Plan." (Compl. ¶¶ 69, 74, 91.)

3 Rush purchased and has maintained an individual
4 interest in the Property since 1999. (Pl. SUF ¶ 14.) Moon
5 testified during her deposition that Rush is at least partially
6 responsible for managing the Property and collecting rents from
7 the tenants. (Huss Decl. Ex. 2 ("Moon Dep. Tr.") 96:11-16, ECF
8 NO. 90-2.) Rush testified during his deposition that Moon is not
9 always involved with the decisions he made regarding the
10 Property. (Waslow Decl. Opp'n, Ex. 2 (Dep. David Rush) 210:6-23.)
11 Neither party provides evidence demonstrating precisely when Rush
12 allegedly engaged in the asserted prohibited transactions.

13 Disputed evidence precludes deciding precisely whether
14 or when Moon had actual knowledge of the asserted violations and
15 when was the "latest date on which [Rush] could have cured the
16 breach or violation." 29 U.S.C. § 1113. Therefore, Moon's motion
17 on claims three and four and Rush's time barred motion on claims
18 three, four and seven are denied.

19 **b. Claims Five and Six**

20 Moon alleges in her fifth claim that in violation of
21 Defendants' fiduciary duties imposed by ERISA Defendants "failed
22 to ensure that the Plan made a determination as to qualification
23 [of Moon's DRO], [failed to] notif[y] Ms. Moon of such
24 determination within a reasonable period of time, [failed to]
25 segregate[] the assets allocated to Ms. Moon in a separate
26 account, or provide[] her with an initial accounting or periodic
27 statement of account" and "fail[ed] to properly establish written
28 procedures to determine the qualified status of the QDRO and

1 inform Ms. Moon ... of these procedures." (Compl. ¶¶ 80-81).

2 Moon alleges in her sixth claim that Defendants
3 "breached their [fiduciary] duties as Trustees . . . by . . .
4 failing to investigate, oversee, and account for the Plan's
5 investment . . . in the [Property]." (Compl. ¶ 87.)

6 Here too disputed evidence precludes deciding precisely
7 whether or when Moon had actual of the asserted violations and
8 when was the "latest date on which [Defendants] could have cured
9 the breach or violation." 29 U.S.C. § 1113. Therefore, each
10 motion is denied.

11 **2. Claims 3, 4 and 7 Concerning Whether Rush Breached
12 His Fiduciary Duties to the Plan**

13 Rush seeks summary judgment on claims three, four and
14 seven, in which Moon alleges he breached his fiduciary duties to
15 the Plan, arguing "discovery . . . reveal[s] . . . no basis in
16 fact" to support the claims. (Defs. Mot. 15:19-20.)

17 Moon counters that the facts show Rush made unilateral
18 decisions regarding the sale and management of the Property at a
19 time when he was acting in a dual capacity as Plan fiduciary and
20 individual owner of an interest in the Property, which violated
21 his fiduciary duties to the Plan. (Pl. Opp'n Defs. Mot. Summ. J.
22 ("Defs. Mot. Opp'n") 22:23-24, ECF No. 115.)

23 ERISA requires that a fiduciary "discharge his duties
24 with respect to a plan solely in the interest of the participants
25 and beneficiaries and . . . for the exclusive purpose of . . .
26 providing benefits to participants and their beneficiaries." 29
27 U.S.C. § 1104(a)(1). ERISA further requires that "[a] fiduciary
28 with respect to a plan shall not ... deal with the assets of the

1 plan in his own interest or for his own account." Id. § 1106(b).

2 However, disputed factual issues concerning whether
3 Rush's actions breached his fiduciary duties preclude decision on
4 the motion. Therefore, Rush's motion on these claims is denied.

5 **3. Claim 5 Concerning Whether Defendants Breached
6 Their Fiduciary Duties to the Plan**

7 Defendants seek summary judgment on Moon's fifth claim
8 in which she alleges they failed to establish written procedures
9 to determine if her DRO was qualified in violation of 29 U.S.C. §
10 1056(d) (3).

11 **a. McKenna**

12 Defendant McKenna argues he is entitled to summary
13 judgment because Moon has alleged "no facts or evidence"
14 regarding his involvement. (Defs. Mot. 122:12-13.)

15 Moon did not counter McKenna's showing that the record
16 is devoid of facts to support the claim against him with
17 "specific facts showing that there is a genuine issue for trial."
18 T.W. Elec. Serv., Inc., 809 F.2d at 630 (quoting former Rule
19 56(e)). Therefore, McKenna's summary judgment motion is granted
20 on claim five.

21 **b. Rush and Habib**

22 Rush and Habib argue they cannot be held liable for
23 failing in 1995 "to properly establish written procedures to
24 determine the qualified status of the QDRO and [and for failing
25 to] inform Ms. Moon . . . of these procedures" since they had no
26 obligation to do these things until Moon presented the QDRO to
27 the Plan Administrator in 2010.

28 Moon counters that under the terms of the QDRO,

1 presenting it to Rush was sufficient to trigger Rush's and
2 Habib's obligations to her. Moon argues it is uncontroverted both
3 that she mailed the QDRO to Rush in 1995 and that the Plan did
4 not establish written procedures to determine whether a domestic
5 relation order is qualified until fifteen years later.

6 "Upon obtaining a domestic relations order in a state
7 court proceeding, an alternate payee who seeks to establish a
8 right to payment . . . must present the order to the pension plan
9 administrator for determination of whether it is a QDRO." Trs. of
10 Dirs. Guild of Am.-Producer Pension Benefits Plans v. Tise, 234
11 F.3d 415, 410 (9th Cir. 2000).

12 During their divorce proceeding Moon and Rush signed a
13 DRO designed to divide their community assets in the Plan. (Defs.
14 SUF ¶ 20.) Moon's family law counsel drafted the DRO, which
15 states in part: "The undersigned parties and/or fully authorized
16 agents agree . . . that the parties including claimant plan . . .
17 shall be bound by the following orders of the court." (Wasow
18 Decl. MSJ, Ex. 8, ("DRO") ECF No. 100-8.) (emphasis added). At
19 the time Moon and Rush signed the DRO, Rush was a Trustee of the
20 Plan. (Pl. SUF ¶ 3.) The DRO also contains a
21 "Notice/Identification" section detailing how each party: Rush,
22 Moon and the Plan, was to receive notices relating to the DRO.
23 In the notice section, Rush made a handwritten interlineation to
24 the draft Moon's family law counsel prepared. (Wasow Decl. MSJ,
25 ("DRO") Ex. 8 ("DRO"), ECF No. 100-8.) The draft includes the
26 following information about the Plan's contact information:
27 "Name: Peters et al Profit Sharing Plan f/b/o David H. Rush c/o
28 Administrator: David H. Rush Address: 414 Salem Street, Chico,

1 California." (Id.) In the signed copy, Rush crossed out the word
2 "Administrator" and wrote "Trustee" in its place. (Id.) Moon
3 mailed a copy of the DRO to Rush's home address, 635 Paseo
4 Companeros, Chico, CA, 95926 in 1995. (Defs. SUF ¶ 27.) Rush
5 received the DRO, but did not share it with any other Plan
6 Trustee or the then-Plan Administrator David Fuller. (Defs. SUF ¶
7 33; Pl. SUF ¶ 12.)

8 Since Rush altered the DRO to indicate that he was a
9 Plan Trustee, but left his name as the person to receive notices
10 on behalf of the Plan, when he signed the DRO he authorized Moon
11 to send notice to the Plan through him. It is uncontested that
12 Moon sent Rush a copy of the DRO to his home address in 1995.
13 (Defs. SUF ¶ 27.) Defendants' argument that service on Rush was
14 improper because it was sent to his home address rather than his
15 work address as listed in the DRO is unsupported by authority.

16 Habib argues that if the Plan received notice of the
17 QDRO when Moon mailed it to Rush in 1995, then he cannot be held
18 liable for the Plan's failure to qualify the DRO at that time
19 since he was not yet a Plan fiduciary. ERISA prescribes that "no
20 fiduciary shall be liable with respect to a breach of fiduciary
21 duty under this subchapter if such breach was committed before he
22 became a fiduciary." 29 U.S.C. § 1109(b). It is undisputed that
23 Moon served a copy of the QDRO on Rush in 1995 and that in 1995
24 Habib was not yet Plan Administrator. (Defs. SUF ¶¶ 27, 36.)
25 Therefore, Habib cannot be liable for a failure to act in 1995
26 because ERISA does not make him liable for breaches that preceded
27 his role as a fiduciary. Accordingly, Habib's motion for summary
28 judgment on claim five is granted and Moon's motion for summary

1 judgment against Habib on claim five is denied.

2 Rush argues that he cannot be held liable for claim
3 five because he has never been a Plan Administrator. Moon
4 acknowledges in her motion that the provisions of ERISA she
5 alleges Rush violated in claim five, 29 U.S.C. § 1056(d)(3)(G)-
6 (H) imposes "duties . . . on pension plan administrators." (Pl.
7 Mot. 13:28) (emphasis added). However, Moon counters that even
8 though Rush was never a Plan Administrator, the Ninth Circuit's
9 precedent in Stewart permits liability against him for violating
10 section 1056(d)(3). Moon contends in Stewart, the court imposed
11 section 1056(d)(3) liability on an ex-spouse who received notice
12 of a DRO when the ex-spouse was a Plan Trustee as Rush is here.

13 Rush replies that Stewart does not create liability
14 against an ex-spouse who is not a Plan Administrator, and that
15 the ex-spouse in Stewart was both a Trustee and Plan
16 Administrator.

17 Moon has not shown that Stewart authorizes liability
18 against Rush for failing to perform a Plan Administrator's duties
19 about which she complains. Stewart concerned the function of a
20 Plan Administrator. Stewart, 207 F.3d at 1143 (holding that each
21 member of the plan's committee of plan administrator's had
22 constructive notice of the DRO once plaintiff provided it to her
23 husband who was both a trustee and member of the committee of
24 plan administrators). The handwritten changes Rush made on the
25 DRO clarified his status where he crossed out the word
26 "Administrator" next to his name and replaced it with "Trustee."
27 (Wasow Decl. MSJ, Ex. 8 ("DRO"), ECF No. 100-8.) Therefore,
28 Rush's motion for summary judgment on claim five is granted.

4. Claim 6 Concerning Whether Defendants Breached
Their Fiduciary Duties to the Plan

3 Defendants seek summary judgment on Moon's sixth claim
4 in which Moon alleges they failed "to investigate, oversee, and
5 account for the Plan's investment[] [in the Property,]" arguing
6 Moon lacks credible evidence demonstrating the value of the
7 Property decreased between 2003 and 2009, and any alleged
8 decrease in value cannot be linked to the Defendants. (Defs. Mot.
9 19:15-20:19.)

10 Moon counters that appraisals of the Property
11 demonstrate a genuine issue as to whether the Property's value
12 decreased and that "Defendants have not demonstrated the absence
13 of any triable issues concerning their management and
14 administration of the Plan, nor have they shown by undisputed
15 facts that the Property has not suffered a diminution in value as
16 a result of their imprudent behavior." (Defs. Mot. Opp'n 25:6-8.)

17 A fiduciary's "duties are 'the highest known to law'"
18 and "[t]o enforce them, [a] court focuses on not only the merits
19 of the transaction, but also the thoroughness of the
20 investigation into the merits of the transaction." Howard v.
21 Shay, 100 F.3d 1484, 1488 (9th Cir. 1996). Each Defendant owed
22 the Plan a fiduciary duty.

23 Moon opposes the motion with evidence showing that
24 disputed facts preclude summary judgment. Moon submits the
25 following testimony on the issue of whether each Defendant
26 performed his fiduciary duties to the Plan by properly
27 investigating and evaluating the Plan's investment in the
28 Property. Rush gave deposition testimony that he did not know

1 anything about fiduciary obligations imposed by ERISA; Habib
2 gave deposition testimony that he did not recall the Property
3 ever being discussed at a meeting of the trustees; and McKenna's
4 gave deposition testimony that indicating he is not familiar with
5 the Plan and its administration. (Wasow Decl. Opp'n, Ex. 2 (Dep.
6 David Rush,) 40:11-13, ECF No. 116-2; Ex. 7 (Dep. Mark Habib,)
7 114:13-15, ECF No. 116-7; Ex. 10 (Dep. James McKenna,) 25:9-19;
8 29:4-17; 36:7-21; 55:9-16, ECF No. 116-10.)

9 It is uncontested that over time, appraisals of the
10 Property's value have decreased. The Property was valued at
11 \$2,600,000 in 2003 and \$850,000 in 2009 (Defs. SUF ¶¶ 173, 199.)
12 These appraisals and the Defendants' referenced deposition
13 testimony about the degree of care they used in investigating and
14 evaluating the Plan's investment in the Property preclude summary
15 judgment on this claim. Therefore, Defendants' motion for summary
16 judgment on claim six is denied.

17 **D. Claims 8 and 9: Accounting and Conversion; Rush's
18 Counter-Claims for Accounting; Breach of Oral and/or
19 Implied in Fact Contract; and Account Stated**

20 Rush seeks summary judgment on Moon's accounting and
21 conversion claims (eight and nine) in which Moon alleges since
22 2009, Rush has wrongfully withheld from her and the Plan income
23 he obtained from the Property. These claims depend on the terms
24 of the Property income agreement between Rush and Moon. Rush's
25 counterclaims for accounting, breach of oral/and or implied in
26 fact contract and accounts stated are also based on the terms of
27 the Property income agreement.

28 Rush argues "he and Moon agreed to split income and

1 expenses associated with [the Property] in proportion to their
2 ownership interests." (Counter Cl. Mot. 6: 17-20, ECF No. 99.)
3 Moon gave deposition testimony that under the Property income
4 agreement, Rush deposited all rents from the Property into Moon's
5 bank account, and she was entitled to retain all the rental
6 income. (Defs. SUF ¶¶ 88-89; Wasow Decl. Opp'n, Ex 1 (Dep.
7 Virginia Moon,) 94:16-23, 109:11-110:3, ECF No. 116-1.) Rush
8 rejoins the Property income agreement Moon describes is not
9 supported by "documentary evidence and [the] behavior of the
10 parties." (Defs. Mot. 21:20-22.)

11 Moon's deposition testimony and Rush's conduct create a
12 genuine issue of material fact regarding the terms of the
13 Property income agreement. Therefore, Rush's summary judgment
14 motion on Moon's accounting and conversion claims and his
15 counterclaims is denied.

16 Rush also argues his motion on Moon's accounting and
17 conversion claims and each of his counterclaims should be
18 granted, because the Property income agreement Moon testified to
19 in her deposition amounts to "federal income tax fraud," making
20 it legally unenforceable. (Defs. Mot. 21:17-21, 23:10-12.) Moon
21 testified that under the terms of their agreement, although she
22 was entitled to retain all income from the Property, she was not
23 required to report any of it on her tax returns. (Defs. SUF ¶¶
24 88-89, 93.) Rush argues such an agreement is legally
25 unenforceable, and when a court is faced with an unenforceable
26 agreement like the one Moon describes, it should "apply the[]
27 legal default," which would require "cotenants [to] share the
28 rental income received ... in accordance with their proportionate

1 undivided interests." (Defs. Mot. 23:27-24:13.)

2 Rush does not support this argument with binding
3 authority. He does not cite any supporting state law and the
4 Ninth Circuit language he does cite is dicta. (Defs. Mot. 24:4-
5 13.) Therefore, Rush has not shown the argument is suitable for
6 summary judgment.

7 For the stated reasons, Rush's motion for summary
8 judgment on Moon's accounting and conversion claims and his
9 counterclaims for accounting, breach of oral and/or implied in
10 fact contract and account stated is denied.

11 **E. Claim 10: Waste**

12 Rush seeks summary judgment on Moon's tenth claim for
13 waste in which Moon alleges: "[u]nder Mr. Rush's negligent
14 property management, and as a result of Mr. Rush's tenant
15 selection and failure to care for the residence on the property
16 ... the appraised value of the . . . [Property] decreased from
17 \$2.6 million to \$850,000." (Compl. ¶ 106). Rush argues that
18 although Moon alleges Rush caused the Property value to
19 depreciate, she has not demonstrated the "actual fair market
20 valuation of the Property" or that "the decrease in [the
21 Property's] value [is attributable] to Rush." (Defs. Mot. 24:19-
22 21, 25:3-5.)

23 Moon counters with an appraiser's report showing that
24 at a time when Rush was involved in maintaining the Property, it
25 fell into such disrepair that "it would not be financially
26 feasible to rehabilitate" it because the cost of repair could not
27 be recaptured even if the Property was sold. (Huss Decl. MSJ, Ex
28 52 (Johnson Appraisal Report) at 35, ECF No. 93-1; Wasow Decl.

1 Opp'n, Ex. 2 (Dep. David Rush,) 24:1-8, ECF No. 116-2.)

2 Rush replies that the referenced appraiser's report is
3 based "on an 'extraordinary' hypothetical condition," that "has
4 never occurred and is highly unlikely to occur" (Defs.
5 Mot. 20:1-7.)

6 In California, "[w]aste is a tort actionable for the
7 protection of an owner of an interest in land." Cal. Dep't. of
8 Toxic Substances Control v. Payless Cleaners, College Cleaners,
9 368 F. Supp. 2d 1069, 1082 (E.D.Cal. 2005); see also Cal. Civ.
10 Code § 732. Waste includes "conduct, by both commission and
11 omission, on the part of the person in possession of the property
12 which impairs the value of the lender's security." Evans v. Cal.
13 Trailer Court, Inc., 28 Cal. App. 4th 540, 553 (1994).

14 The appraisal report on which Moon relies could support
15 drawing a reasonable inference that the Property's value
16 decreased during the period Rush managed it. (Huss Decl. MSJ, Ex
17 52 (Johnson Appraisal Report) at 35, ECF No. 93-1; Wasow Decl.
18 Opp'n, Ex. 2 (Dep. David Rush,) 24:1-8, ECF No. 116-2.) Although
19 Rush challenges the credibility of this appraisal, "[c]redibility
20 determinations. . . [are a] jury function[], not [the function
21 of] of a judge, whether ruling on a motion for summary judgment
22 or for a directed verdict." Anderson, 477 U.S. at 255.

23 Therefore, Rush's summary judgment motion on Moon's
24 waste claim is denied.

25 **F. Claim 11: Declaratory Relief**

26 Defendants seek summary judgment on Moon's declaratory
27 relief claim in which she requests "a declaration from the Court
28 that [she] is a beneficiary under the Plan and is entitled to a

1 segregated account within the Plan." Defendants argue Moon fails
2 to show she would benefit from declaratory relief since she "has
3 always personally received the benefit of the income from the
4 Plan's ownership interest in the Property." (Defs. Mot. 25:12-
5 14.)

6 However, Moon provides evidence that she has not
7 received any income from the Property in her individual capacity
8 or in her capacity as the Plan beneficiary since 2009. (Pl. SUF ¶
9 20.) Therefore, Defendants' summary judgment motion is denied.

10 **G. Moon's Statute of Limitations Defense against Rush's
11 Accounting Counterclaim**

12 Rush seeks summary judgment on Moon's statute of
13 limitations defense asserted against his accounting counterclaim.
14 Moon asserts Rush's accounting counterclaim is time-barred
15 because she ceased reimbursing him for Property expenses in 2003,
16 yet Rush did not raise his accounting counterclaim until well
17 after the statute of limitations expired.

18 Rush counters that the statute of limitations on this
19 claim did not begin running when Moon ceased reimbursing him in
20 2003 because, at that time, Moon continued to perform additional
21 obligations under the agreement by paying property taxes and
22 alarm monitoring expenses on the Property. Rush argues because
23 Moon continued to perform some of her contractual obligations,
24 the waiver of breach doctrine permitted Rush to "treat the
25 contract as still alive" by performing his obligations until he
26 decided to treat the contract as breached and ceased performing
27 his own obligations. Rush asserts he treated the contract as
28 breached in 2009 when he stopped depositing the Property's rental

1 income into Moon's account. Rush contends, therefore, the statute
2 of limitations on his accounting counterclaim began to run in
3 2009 when he failed to remit the rental income to Moon; and thus,
4 his claim was still timely when the parties entered into a
5 tolling agreement in 2010. (Counter Cl. Mot. 9:11-13.)

6 Moon replies that her agreement to pay property taxes
7 and alarm monitoring expenses on the Property was a separate
8 agreement from the Property income agreement and, therefore,
9 California law did not entitle Rush to "treat the contract as
10 still alive" when she ceased reimbursing him for expenses in
11 2003.

12 In California, "when there are ongoing contractual
13 obligations [under an agreement and one party ceases to perform
14 some of his or her contractual obligations,] the [other party to
15 the agreement] may elect to rely on the contract despite a
16 breach, and the statute of limitations does not begin to run
17 until [that party] has elected to treat the breach as terminating
18 the contract." Romano v. Rockwell Internat., Inc., 14 Cal. 4th
19 479, 489 (1996) (citing 1 Witkin, Summary of Cal. Law, (9th ed.
20 1987), Contracts, §§ 800-801, pp. 723-724).

21 Disputed factual issues exists on the question whether
22 Moon's agreement to pay property taxes and alarm monitoring
23 expenses was part of the Property income agreement or part of a
24 second subsequent agreement that preclude granting the motion.
25 Therefore, Rush's summary judgment motion is denied on this
26 issue.

27 ///

28 ///

IV. CONCLUSION

2 For the stated reasons, Plaintiff's summary judgment
3 motion is GRANTED IN PART and DENIED IN PART; Defendants' summary
4 judgment motion is GRANTED IN PART and DENIED IN PART; and
5 Counter-claimant's summary judgment motion is DENIED.

6 Dated: December 19, 2014

GARLAND E. BURRELL, JR.
Senior United States District Judge