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7 UNITED STATES DISTRICT COURT  
8 EASTERN DISTRICT OF CALIFORNIA  
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10 VIRGINIA C. MOON, on her own  
11 behalf and on behalf of the  
12 Peters Rush Habib & McKenna  
401(k) Profit Sharing Plan,

13 Plaintiff,

14 v.

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

16 Defendants.  
17  
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AND RELATED COUNTERCLAIM.

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

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

21 Plaintiff and Counter-Defendant Moon and Defendants  
22 Rush, Habib, and McKenna (collectively the "Defendants") each  
23 move for summary judgment on claims one through five in  
24 Plaintiff's Complaint ("Compl."). Defendants also seek summary  
25 judgment on the six remaining claims in the Complaint. Counter-  
26 Claimant Rush seeks summary judgment on all three claims in his  
27 Second Amended Counterclaim ("Countercl.").  
28

1 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.

12 If the movant satisfies its "initial burden," "the  
13 nonmoving party must set forth, by affidavit or as otherwise  
14 provided in Fed. Rule Civ. Proc. ("Rule") 56, 'specific facts  
15 showing that there is a genuine issue for trial.'" T.W. Elec.  
16 Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630  
17 (9th Cir. 1987) (quoting former Rule 56(e)). Summary judgment  
18 "evidence must be viewed in the light most favorable to the  
19 nonmoving party, and all reasonable inferences must be drawn in  
20 favor of that party." Sec. & Exch. Comm'n v. Todd, 642 F.3d 1207,  
21 1215 (9th Cir. 2011) (citing Johnson v. Paradise Valley Unified  
22 Sch. Dist., 251 F.3d 1222, 1227 (9th Cir. 2001)).

23 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  
26 1994. (Defs. SUF ¶ 14.) In connection with their divorce, Rush  
27 and Moon entered into a domestic relations order ("DRO") "which  
28 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.)

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

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

#### 8 **B. The Plan**

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

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

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

#### 21 **C. The Property**

22 Sometime in 1995 or 1996 after the divorce, Moon took  
23 over complete control of the Property. (Defs. SUF ¶ 56.) Moon  
24 personally held a 79.7119% interest in the Property and the Plan  
25 held a 20.2881% interest. (Defs. SUF ¶ 55.) In 1997 Rush loaned  
26 Moon \$75,000, and they agreed Moon would sell Rush a 49%  
27 ownership interest in the Property with the loan used as partial  
28 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 uncontroverted 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.  
26 Profit Sharing Plan, 207 F.3d 1143, 1156 (9th Cir. 2000). Rush,  
27 McKenna and Habib are Plan Trustees and Habib is also a Plan  
28 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  
24 decision about distribution. Substantial  
25 compliance with the requirements is  
26 sufficient.

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

Community property interests are those  
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  
20 superior (and perhaps exclusive) access to  
21 information about his own pension assets,  
22 including the extent to which his pension  
23 fund's investment in the disputed real  
24 property was traceable to separate rather  
25 than community property. He had an  
26 affirmative duty to discover and disclose the  
27 facts to [Moon] before they dissolved their  
28 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.

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.

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

7           . . . .

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

19          The family court order. . . is reversed.

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

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

26               **B.    Claims 1 and 2: Breach of Statutory Duty**

27               **1.    Claim 1: 29 U.S.C. § 1025(a)**

28          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.)

1           Section 1025(a) prescribes in part:

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

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

9           It is uncontroverted that beneficiaries of the Plan are  
10          permitted to direct the investment of the assets in their own  
11          accounts. (Pl. SUF ¶ 2.) It is also uncontroverted that Habib has  
12          been the Plan Administrator since 2007; that prior to June 22,  
13          2010 he never provided Moon with a pension benefit statement; and  
14          since June 22, 2010 he has not provided Moon with another pension  
15          benefit statement. (Defs. SUF ¶ 26; Pl. SUF ¶¶ 27-29.) Therefore,  
16          Moon has shown Plan Administrator Habib violated his statutory  
17          duty pursuant to § 1025(a).

18                   **2. Claim 2: 29 U.S.C. § 1024(b)(4)**

19          Moon and Habib each seek summary judgment on claim two  
20          in Moon's Complaint, in which Moon alleges that as Plan  
21          Administrator Habib breached the statutory duty he owed her,  
22          ERISA under 29 U.S.C § 1024(b)(4), which requires him to timely  
23          provide her requested plan documents. Section 1024(b)(4) provides  
24          that "[t]he administrator shall, upon written request of any  
25          participant or beneficiary, furnish a copy of the latest updated  
26          summary plan description, and the latest annual report, any  
27          terminal report, the bargaining agreement, trust agreement,  
28          contract, or other instruments under which the plan is  
29          established or operated." 29 U.S.C. § 1132(c)(1) requires a Plan  
30          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  
28 receipt of an authorization signed by the  
29 plan participant. A [P]lan [A]dministrator  
30 who fails to take either of these steps  
31 within the thirty day period imposed by 29  
32 U.S.C. § 1132(c) is subject to the fines  
33 authorized by that same provision, at the  
34 discretion of the district court.

35 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

1 of punishing the violator than compensating the participant or  
2 beneficiary." Scott v. Suncoast Beverage Sales, Ltd., 295 F.3d  
3 1223, 1232 (11th Cir. 2002); see also Starr v. Metro Sys., Inc.  
4 461 F.3d 1036, 1040 (8th Cir. 2006) ("The purpose of [ERISA's  
5 statutory penalties] is to provide plan administrators with an  
6 incentive to comply with the requirements of ERISA. . . and to  
7 punish noncompliance.").

8 **a. Penalties for Claim One**

9 Moon seeks the maximum statutory penalty under §  
10 1025(a) for every day in each calendar quarter in which Habib  
11 failed to provide her with a pension benefit statement from  
12 January 1, 2007 through the first quarter of 2010, and from the  
13 third quarter of 2010 to the present.

14 **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.

## 18 **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

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

#### 4. Prejudice

Habib argues Moon suffered no prejudice as a result of his failure to timely provide her with quarterly benefit statements, contending that from the time she and Rush signed the DRO in 1995 until 2009, she received 100% of the income attributable to the Plan under the DRO; and, therefore even if had been alerted to the dispute regarding her ownership in the Plan's interest in the Property she could not have received additional income from the Plan. Habib also argues any prejudice Moon claims to have suffered is due to her own inaction rather than his breach since she failed to communicate with the Plan Administrator for fifteen years after the DRO was entered.

Moon contends she "has invested years and many thousands of dollars in attorney's fees in trying to obtain a clear statement of her interest in the Plan, and since Defendants have repudiated the Pension Benefits Statement, she still does not even have one." (Pl. Mot., 11:8-10, ECF No. 97.) Moon further argues: "If she had been provided with complete and accurate quarterly statements as she should have been, she would have known since at least 2006 that there was a dispute as to her ownership of the Plan's interest in the . . . [P]roperty, because the statement would have had to indicate the value of her portion

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

1 penalty decision, Moon's motion for statutory penalties is  
2 granted and Habib's motion is denied. Habib is ordered to pay  
3 Moon \$20 a day for his failure to provide Moon with pension  
4 benefit statements for two quarters in 2010 beginning on July 1,  
5 2010 and until the date this order issues. See Treadwell v.  
6 Schweiker, 698 F.2d 137, 138 n.1 (2d Cir. 1983) (finding a  
7 calendar quarter to mean the period of three months ending on  
8 March 31, June 30, September 30, or December 31).

9 **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.

15 **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

Habib argues his delay in providing Moon the requested Plan documents was reasonable under the circumstances since Moon did not provide him with written authorization that he could release the Plan documents to her counsel until June 16, 2010, and he sent her the documents eight days after that authorization was received. (Defs. SUF ¶ 244-45.) Habib also argues his delay was caused by Moon's counsel since when Habib contacted her to discuss the matter in May 2010, she did not respond. (ECF No. 100-20.)

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

Habib's explanation for his delay in waiting until June 2010 to respond to Moon's request for Plan documents in her February 25, 2010 letter is not in compliance with § 1024(b). Although Habib argues Moon did not provide him with written authorization justifying release of the documents to her counsel until June 16, 2010, Habib did not request Moon's written authorization until earlier that month. (Def. SUF ¶¶ 244-245.) Habib has shown that e-mail communications with Moon's counsel evince that Moon's counsel was not immediately responsive to his attempts to speak with her. However, the e-mails contain nothing about Moon's written authorization being required before the requested documents would be provided. (Wasow Decl. MSJ Ex. 20, ("May 31 E-mail") ECF No. 100-20) (e-mail communication between

1 Moon's counsel and Habib).

2 **3. Number of Requests**

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

9 **4. Prejudice**

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

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

19 **C. Claims 3-7: Prohibited or Conflict of Interest**  
20 **Transactions; Breach of Fiduciary Duty**

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

27 **1. Application of 29 U.S.C. § 1113**

28 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  
9 responsibility, duty, or obligation . . .  
after the earlier of--

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

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

1                   **4. Claim 6 Concerning Whether Defendants Breached**  
2                   **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,) 114:13-15,  
7 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 uncontroverted 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.

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Dated: December 19, 2014

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