IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STEVEN K. BUSTER,

Plaintiff,

v.

COMPENSATION COMMITTEE OF THE BOARD OF DIRECTORS OF MECHANICS BANK; MECHANICS BANK SUPPLEMENTAL EXECUTIVE RETIREMENT PLAN; and MECHANICS BANK, a California Corporation,

Defendants.
_____/

No. C 16-01146 WHA

ORDER DENYING MOTION FOR JUDGMENT AS A MATTER OF LAW AND SETTING FORTH FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

Plaintiff, a former bank executive, brought this ERISA action for benefits and equitable relief against his former employer bank, the bank's top-hat plan, and its plan administrator. After a three-day bench trial, defendants moved for judgment as a matter of law on plaintiff's claim for benefits. This order **DENIES** defendants' motion and **GRANTS** plaintiff relief based on the trial record and the findings of fact and conclusions of law set forth below.

PROCEDURAL HISTORY

Plaintiff Steven Buster brought this action against his former employer, Mechanics Bank; its ERISA top-hat plan, the Supplemental Executive Retirement Plan (SERP); and the plan administrator, the compensation committee of the bank's board of directors (collectively,

"the bank"). After a prior order denied its motion to dismiss (Dkt. No. 67), the bank answered and counterclaimed for declaratory relief and breach of contract (Dkt. No. 76). The bank's counterclaims remained inert until trial. Another prior order also denied the bank's motion for summary judgment on all of Buster's claims and Buster's cross-motion for summary judgment on his claim for benefits (Dkt. No. 93).

This action then proceeded to a three-day bench trial, during which the Court heard testimony from Buster; Dianne Felton, a director of the bank and former chairman of its board of directors; Daniel Albert, another director of the bank and former chairman of its compensation committee; Judith Ditchey, former director of human resources at the bank and *ex officio* member of its compensation committee; Thomas Leong, former finance manager at the bank; Clinton Chew, former chief financial officer at the bank; and Nathan Duda, current chief financial officer at the bank. In addition to live witness testimony, the trial record includes a jointly-submitted pretrial statement with stipulated facts, separately-submitted trial briefs, separately-submitted proposed findings of fact and conclusions of law, and closing arguments from both sides.

Stipulated facts and any proposed finding of fact expressly agreed to by the opposing side at least in part shall be deemed adopted to the extent agreed upon, even if not expressly stated herein. Citations to the record herein are provided only as to particulars that may assist the court of appeals. All declarative statements herein are factual findings.

FINDINGS OF FACT

1. The essence of this case is that *both* sides to this dispute understood the retirement agreement and release in question to preserve Buster's entitlement to his accrued SERP benefits once he reached the age of 65. No one involved believed to the contrary. Two years after the execution of the retirement agreement and release, however, the bank reversed field. In order to save itself over a million dollars, the bank took the new and opposite position that the retirement agreement and release had extinguished Buster's entitlement to those benefits. This order will hold both sides to their original intent.

2. Buster worked as president and chief executive officer at the bank from 2004 to 2012. An offer letter dated June 4, 2004, set forth his terms of employment. In relevant part, the offer letter provided for an annual bonus targeted at one hundred percent of Buster's base salary, dependent on performance (except the bonus for Buster's first year, which the offer letter guaranteed). The offer letter also provided for severance pay in the event of Buster's termination (other than for cause) "equal to twelve months of base salary and bonus," to be calculated using his then-current base salary and most recently-received bonus. In addition, the offer letter provided for Buster's participation in the SERP.

3. On December 31, 2008, the bank "froze" the SERP and adopted the Executive Retirement Plan (ERP), in which Buster alone participated. The freeze stopped Buster from accruing further SERP benefits but did not wipe out his already-accrued SERP benefits, which by then amounted to approximately $1.3 million.

4. Fast forward to the autumn of 2012. The bank's board of directors decided to terminate Buster's employment. Over the remainder of 2012, Buster and the bank had several communications, both in-person and via email, regarding the terms of his departure. To understand the context of these communications — and thus whether the parties intended that Buster remain entitled to his accrued SERP benefits — it is useful to understand what benefits Buster could reasonably have expected (and the bank could reasonably have had in mind) as background to any severance package.

5. At that time, Buster's base salary was $530,000, and his most recently-received bonus (for 2011) amounted to just over half a million dollars. He had received bonuses averaging around approximately ninety percent of his base salary for each year of his tenure at the bank. He had already worked for most of 2012, and both sides wanted him to work through the end of 2012. He also participated in both the bank's pension and 401(k) plans and had earned retirement benefits thereunder in addition to his accrued SERP and ERP benefits. In short, both sides could reasonably have expected the following to factor into negotiations over Buster's severance package:

ITEM	AMOUNT
Severance pay (per 2004 offer letter)	Approximately one million dollars
2012 bonus (expected)	Approximately half a million dollars
Accrued SERP benefits	Approximately $1.3 million
Accrued ERP benefits	Approximately $1.8 million
Accrued pension and 401(k) benefits	Unknown (subsequently paid by the bank and not in dispute here)

6. Felton, who served as chairman of the bank's board of directors at the time, discussed with Buster its decision to terminate him during an in-person meeting on November 1. During that meeting, Buster asked Felton about his SERP benefits. Felton merely responded that the bank's compensation committee was in charge of those benefits. At the time, Felton also served as a member of the bank's compensation committee and counted Albert, who served as chairman of the bank's compensation committee at the time, as a longtime personal friend.

7. During November 2012, members of the bank's board of directors continued to debate the terms of Buster's severance package among themselves (and without Buster's participation). The record does not show that the bank's board of directors ever decided to offer Buster anything in exchange for waiving accrued SERP benefits, even as it tapped Attorney Judith Keyes, outside counsel for the bank, to draft his final retirement agreement and release.

8. On November 18, 2012, while Attorney Keyes was drafting Buster's final retirement agreement and release, Felton emailed Albert about its key terms. She specifically said the bank was "obligated to pay by contract" $530,000 plus $503,000, referring to Buster's severance pay pursuant to his 2004 offer letter, as well as $1,799,855.69 for his accrued ERP benefits. She also mentioned that the bank intended to offer Buster one million dollars "to accept the terms of his early retirement," adding that "[t]his amount represents his Bonus for [2012] and an amount roughly equal to the [ERP] contribution that would have been made had he stayed until [December 2013]."[1]

[1] Felton mistakenly referred to the ERP as "SERP" in her email (*see* Tr. 198:25–202:7), but her meaning is clear from the email itself, which identified the exact amount of Buster's accrued ERP benefits and added that he would have accrued additional benefits in 2013, an impossibility under the "frozen" SERP.

9. The next day, on November 19, 2012, Albert also met with Buster in-person to discuss his impending termination. During that meeting, Albert presented Buster with a "discussion points" document that had been approved by the bank's board of directors. That document indicated, consistent with Felton's November 18 email, that Buster would receive (1) the severance pay required by his 2004 offer letter, (2) his ERP benefits, and (3) one million dollars in "retirement pay" to ensure "an amicable and smooth transition." The document did not mention Buster's SERP, pension, or 401(k) benefits. Buster has since received both his pension and 401(k) benefits — but, inconsistently, not his SERP benefits (*see* Tr. 65:11–65:16, 259:16–259:22).

10. This order finds that — as reflected in Felton's November 18 email — the bank offered Buster one million dollars of "retirement pay" representing a rough estimate of the value of his expected 2012 bonus plus the ERP benefits that would have further accrued for him had he stayed through 2013. The bank offered this not necessarily because it thought Buster had any legal entitlement to either a bonus for 2012 or ERP benefits through 2013, but because it wanted him to accept his termination amicably. The bank's contrary litigation position (that it offered Buster the one million dollars to secure his waiver of approximately $1.3 million in vested and accrued SERP benefits with no 2012 bonus on the table) is not credible.

11. For his part, Albert testified in deposition (as read into the record at trial) that he could not recall how the bank's board of directors arrived at the one million dollar figure for Buster's "retirement pay." Later, however, he testified at trial that the bank's board of directors specifically considered the value of Buster's SERP benefits in coming up with the one million dollar figure. He further testified at trial that he believed the bank "was honoring its SERP obligation to Mr. Buster by paying him the $1 million." In light of his earlier "don't recall" testimony on this very subject, Albert's sudden burst of "recollection" at trial was not credible.

12. For her part, Felton testified at trial that the bank's compensation committee specifically considered Buster's SERP benefits during its internal debate over his termination and factored the value of those benefits into the one million dollars of "retirement pay" (Tr. 228:9–228:21). This testimony was not credible because it contradicted Felton's own

November 18 email to Albert, which, as stated, had characterized the one million dollars of "retirement pay" as representing a rough estimate of the value of Buster's expected 2012 bonus plus the ERP benefits that would have further accrued for him had he stayed through 2013.

13. Aside from being more credible, Buster's version of events also better comports with the objective financial circumstances surrounding his termination. According to the bank's position in this litigation, Buster would have received one million dollars of "retirement pay" instead of the 2012 bonus and accrued SERP benefits that he expected. The bank's position would have been a harsh compromise against Buster since, from his point of view, he would have lost nearly two million dollars of expected value (approximately $1.3 million in SERP benefits plus an expectancy of approximately half a million dollars in bonus pay) in exchange for only one million dollars of "retirement pay" — not counting substantial tax penalties he would have expected to incur as a result of an early payout of accrued SERP benefits (*see* Tr. 71:9–71:20, 80:19–80:22). On this record, the bank could not reasonably have expected Buster to accept such a harsh compromise. The bank's position is therefore inconsistent with its own representation that it offered Buster one million dollars of "retirement pay" to ensure "an amicable and smooth transition."[2]

14. In contrast, according to Buster's position in this litigation, he would have received one million dollars of "retirement pay" that, per Felton's November 18 email, represented the value of his expected 2012 bonus plus the ERP benefits that would have further accrued for him had he stayed through 2013. Buster's position would perhaps have been a mildly generous compromise in his favor. This is consistent, however, with the bank's stated purpose of ensuring "an amicable and smooth transition." And, as explained, it is consistent with objective evidence in the record that the bank never intended the one million dollars of "retirement pay" to replace Buster's accrued SERP benefits.

[2] The bank's argument that it had no legal obligation to pay Buster any bonus for 2012 misses the point. Whether or not the bank's argument is correct as a legal matter, the bottom line remains that Buster could reasonably have expected to receive a bonus for working through 2012, and the bank could reasonably have expected conflict — including litigation — if it simply refused to pay him any bonus at all. This alone makes Buster's expected 2012 bonus a legitimate factor to consider in calibrating his severance package, especially in light of the bank's desire to ensure "an amicable and smooth transition." Buster's reasonable belief that he would also have suffered tax penalties had he waived his accrued SERP benefits is just icing on the cake.

15. Albert also informed Buster during their November 19 meeting that the bank's board of directors had approved his retirement agreement and release, which were non-negotiable. The retirement agreement had to be signed by noon that Friday, November 23. Albert mentioned that Buster could seek legal advice but did not consider it his responsibility to make sure Buster understood the terms presented to him. Indeed, to Albert, the retirement agreement and release read like "Greek" (Tr. 257:4–257:17). Albert and Buster did not discuss the SERP during their November 19 meeting.

16. At some point after his November 19 meeting with Albert but still in November 2012, Buster handwrote a reference to the SERP and the amount of $8,540 under the November 20 date in his Day-Timer. This reference reflected his contemporaneous expectation that he remained entitled to receive monthly SERP benefits upon reaching the age of 65.

17. On November 21, 2012, Felton again met with Buster in-person and gave him the formal retirement agreement and release. No one else was present at that meeting. The retirement agreement provided in part (TX 1 at 2):

> [T]his Agreement extends to and fully releases the Bank and any and all Releasees from all claims of every nature and kind, known or unknown, suspected or unsuspected, vested or contingent, past or present, arising from or attributable to the Bank or any Releasee including but not limited to claims arising under . . . the Employee Retirement Income Security Act . . . any other civil rights law, attorney fee law, or Executive benefits law, and any other law or tort. The only exceptions to this release are claims for workers' compensation, claims for unemployment compensation, and claims for indemnification.

The appended release included substantially identical release provisions. The retirement agreement also provided that, regardless of whether Buster signed the appended release, the bank would pay the severance pay required by his 2004 offer letter and his accrued ERP benefits. Moreover, the bank would pay Buster one million dollars of "retirement pay" if he signed the appended release by the official end of his employment on December 31, 2012 (*id.* at 1, 3). The agreement did not mention Buster's SERP, pension, or 401(k) benefits.

18. Buster read and signed the retirement agreement during his November 21 meeting with Felton. During that meeting, Felton and Buster also discussed the reason behind the November 23 signing deadline for the retirement agreement, *i.e.*, the bank intended to issue

a press release about Buster's departure that day because it fell on Thanksgiving weekend and would minimize media attention. *Both* sides preferred this low-key approach.

19. Buster specifically asked Felton during their November 21 meeting about his SERP, pension, and 401(k) benefits, and she replied that the retirement agreement and release would not affect any SERP, pension, or 401(k) benefits he had earned and vested (Tr. 67:7–67:22). Felton's reply reflected the bank's understanding at the time.

20. Felton's contrary testimony that she never discussed the SERP with Buster during their November 21 meeting (Tr. 229:17–230:7) was not credible for several reasons. *First*, as discussed, her testimony concerning what Buster's one million dollars of "retirement pay" represented undermined her credibility. *Second*, Felton could not accurately recall another significant detail about her November 21 meeting with Buster. She testified that Ditchey, another key bank witness, actually brought the retirement agreement and release into that meeting (Tr. 208:2–209:9). Ditchey, however, testified that she did not attend the November 21 meeting between Felton and Buster (Tr. 419:6–419:8), and the record contains no other evidence of Ditchey's presence in that meeting. *Third*, Felton gave conflicting explanations for her purported belief that Buster had no entitlement to any SERP benefits. In deposition (as read into the record at trial), she testified that she believed the bank's compensation committee had complete discretion over whether or not to pay Buster his SERP benefits since it "froze" the SERP in 2008. She further testified in deposition that she held this belief as of the time of her deposition on February 7, 2017, but testified at trial that she actually held the belief much earlier, when the board of directors "awarded the ERP" to Buster. At trial, however, she testified that Buster's entitlement to SERP benefits was actually extinguished by his signing of the release upon his termination on December 31, 2012, and that she never told Buster about the bank's board of directors having discretion over his accrued SERP benefits because she "felt it was up to the Compensation Committee" to do so (*see* Tr. 202:8–207:5) — even though she herself served on the bank's compensation committee at the time. In short, Felton's testimony, as a whole, was simply not credible.

21. When he signed the retirement agreement, Buster believed that the one million dollars of "retirement pay" did not cover the value of his accrued SERP benefits, and that he would have suffered severe tax penalties had he accepted an "early payout" for those benefits. He therefore would "[a]bsolutely not" have signed the retirement agreement had he known the bank would later claim that he waived his SERP benefits by doing so (Tr. 70:12–71:20).

22. Also on November 21, 2012, at 8:22 p.m. — *after* Felton's meeting with Buster — Garrett Lambert, the bank's treasurer at the time, emailed Albert to respond to the latter's request for a description of "the benefits earned by Steven Buster under the various Pension, SERP and ERP plans." In that November 21 email, Lambert noted Buster's "pending 12/31/2012 termination/retirement date" and stated in relevant part that the SERP "will be paying Steven Buster a single life annuity (age 65 normal) retirement benefit of approximately $8,540 per month." Lambert also mentioned in his November 21 email that the SERP "was simultaneously frozen along with the underlying qualified pension plan on 12/31/2008." Lambert copied Buster, Ditchey, Leong, Chew, and Richard Stephenson (the bank's general counsel at the time) on his November 21 email. That email was strong proof that everyone involved understood that Buster had not waived his SERP benefits. Indeed, they were actively planning to fulfill the bank's obligation to pay him those benefits on a monthly basis once he reached the age of 65. The bank's machinations to get around the email proved fantastic.

23. Those machinations centered on the bank's witnesses blaming each other, often inconsistently, for allowing over one million dollars of accrual to remain on the bank's books in favor of Buster, and for allowing Lambert's supposedly-mistaken email to go unchallenged. Albert testified that Ditchey bore the responsibility to correct Lambert's supposed mistake (Tr. 263:1–263:7, 264:14–266:22, 274:10–274:19). In his counsel-prepared declaration (as read into the record at trial), however, Albert had blamed the bank's board of directors for failing to inform the bank's finance department of Buster's supposed waiver of accrued SERP benefits (Tr. 275:8–276:3). Ditchey, on the other hand, blamed the bank's board of directors and compensation committee (Tr. 372:4–372:10, 376:2–376:11). Leong also pointed to the bank's board of directors as the entity responsible for correcting the bank's finance department's

supposed mistake (Tr. 438:2–438:15). Ultimately, no one in the bank corrected the supposed mistake, and the liability for Buster's accrued SERP benefits remained on the bank's books for approximately two more years.

24. In summary, the bank officials who testified at trial offered conflicting and incredible testimony regarding who bore responsibility for informing the bank's finance department about Buster's supposed waiver of accrued SERP benefits. Albert's testimony on this point, in particular, was simply astonishing. The far more likely explanation is that all bank officials involved who knew that Buster had signed the retirement agreement also shared the understanding that he had not waived his accrued SERP benefits as a result — and this order so finds. This is the explanation most consistent with the objective evidence in the record about the bank officials' actions and internal communications.

25. At the time of Lambert's November 21 email, Buster knew that he remained free to revoke the retirement agreement until he signed the appended release. He did not, however, seek legal advice about either. Lambert's November 21 email — and the people who saw it — comforted and assured him that, as Felton had represented, his accrued SERP benefits remained intact notwithstanding his signing of the retirement agreement.

26. At some point after he signed the retirement agreement but before he signed the appended release, Buster again handwrote a reference to the SERP in his Day-Timer — this time for the amount of $1.3 million, closely approximating the total value of his accrued SERP benefits at the time.

27. On November 26, 2012, Chew emailed Albert to say that Buster's ERP benefits would fully accrue by December 31, 2012, when his employment at the bank formally ended, and that "[t]he Pension and SERP [were] vested and accrued and [would] pay out their respective deferred annuity amounts when Buster reache[d] 65." Albert knew that Chew was preparing the bank's financial records based in part on his understanding that Buster remained entitled to SERP benefits (Tr. 282:8–282:11). Nevertheless, on the same day that he received it, Albert forwarded Chew's email to Felton and other bank officials.

28. Again, this order finds that Albert and all other bank officials involved shared Chew's understanding that Buster remained entitled to SERP benefits, and that the finger-pointing between the bank's witnesses was simply not credible. Again, Albert blamed the bank's human resources department for not correcting the supposed mistake in Chew's November 26 email. Felton, on the other hand, testified that Albert bore responsibility for communicating with Chew regarding Buster's retirement agreement. Felton herself likewise took no corrective action in response to Chew's November 26 email, and attempted to foist responsibility for such corrections on to Ditchey and Stephenson (Tr. 217:11–218:18). The far more likely explanation adopted by this order is that, at the time of Chew's November 26 email, Albert, Felton, and other bank officials continued to believe that the bank still owed and would continue to owe Buster payment of his accrued SERP benefits notwithstanding his signing of the retirement agreement and release.

29. On December 14, 2012, Leong emailed Buster a forwarded report from Frank Svrcek, the bank's pension actuary, that contained the final statements for Buster's accrued benefits under his pension and the SERP, as well as SERP benefit election forms and benefit calculations. Leong also copied Ditchey on that email.

30. On December 31, 2012, Buster signed the release appended to his retirement agreement. He would not have signed the release had he known that it purported to waive his accrued SERP benefits (Tr. 80:8–80:22).

31. In March 2014, in connection with his guarantee of his son-in-law and daughter's mortgage refinance, Buster wrote a letter to their mortgage broker representing that his supporting income included a monthly SERP benefit from the bank in the amount of $8,530, showing his subjective belief, as of March 2014, that he remained entitled to SERP benefits. This is also consistent with objective evidence from Buster's Day-Timer notes showing that he continued to hold this belief during and after his termination.

32. All agree that the accuracy of the bank's financial records remained important. Indeed, Felton testified at trial that the board of directors saw those records on a monthly basis (Tr. 213:14–215:17). Throughout 2013, however, the bank's financial records continued to

reflect its full liability for Buster's accrued SERP benefits. The bank's finance department did not learn of the bank's litigation position that Buster had waived those benefits until November 2014 — approximately two years after the waiver supposedly occurred. Felton also testified at trial that she did not realize the bank had carried a liability for Buster's accrued SERP benefits on its books until approximately two years after his supposed waiver of those benefits. Once again, Felton's testimony was simply not credible.

33. To put it briefly, according to the bank's narrative, its top officials involved in Buster's termination all believed that Buster had waived his accrued SERP benefits. They all *knew* that the finance department was going about its business with the supposedly mistaken understanding that Buster had retained entitlement to those benefits. They all willfully ignored the mistake as "not their job" to correct. And none of them realized — despite regular review of the bank's financial records — that the bank therefore carried liability for Buster's accrued SERP benefits on its books for approximately *two years*. This astounding narrative beggars belief. The far more likely explanation adopted by this order — indeed, the only plausible one, on this record — is that, during those years, the bank and its officials continued to believe that Buster remained entitled to his accrued SERP benefits.

34. This order further finds that, based on the record as a whole, Buster never knowingly and voluntarily waived his entitlement to accrued SERP benefits — notwithstanding his signing of the retirement agreement and release in connection with his termination in 2012.

35. In mid-2014, Ford Financial Fund II, L.P., an investment firm, reviewed the bank's financial records in connection with a potential deal to purchase a majority interest in the bank. In September 2014, Ford publicly announced that it had made a tender offer to do so, subject to closing. The strength of the bank's financial statements then acquired heightened significance. With the Ford deal in the works, the bank now had incentive to make its financial statements look as good as possible.

36. In November 2014, while Ford's tender offer hung fire and during a meeting of the bank's retirement plan committee, Leong said that payment of Buster's accrued SERP benefits would commence in 2015 when Buster reached the age of 65. In response, Ditchey —

who up until that point had had no apparent role in designing, implementing, or interpreting the terms of Buster's termination — claimed the bank owed no further payments to Buster under his retirement agreement. When Leong then asked to see documentation supporting Ditchey's statement, she provided only an excerpt of the retirement agreement. Leong could not discern the supposed waiver of Buster's accrued SERP benefits from that excerpt and followed up with Ditchey again to see written confirmation that the bank did not owe Buster any such benefits. On December 18, 2014, Ditchey responded by simply repeating via email that the bank had no further obligations to pay any SERP benefits to Buster.

37. Leong then notified Svrcek that the bank needed an adjustment to reflect its position that it owed no SERP benefits to Buster. At some point between December 2014 and February 2015, while the Ford deal remained pending, the bank reversed the accrual of those benefits on its books. That reversal of $1,227,196 increased the bank's overall earnings and improved its balance sheet. At some point in 2015, after the reversal, Ford completed its purchase of a majority interest in the bank. The record does not outright indicate that, by reversing its accrual of Buster's SERP benefits, the bank, in the end, actually obtained any advantage in its transaction with Ford. The circumstances nevertheless indicate that the bank had, due to the pendency of the Ford deal, enhanced incentives to make its financial statements look stronger. The Ford deal provided both opportunity and motive for the bank to reverse field and to deny Buster his SERP benefits.

38. On May 12, 2015, Buster reached out to Ditchey to ask about his accrued SERP benefits. On May 13, Ditchey responded with an email that stated, "you do not have a remaining SERP per the retirement agreement you signed 11/23/12 and again on 12/31/12." This was the first-ever bank communication to Buster that his accrued SERP benefits were in trouble. On May 20, Attorney Keyes informed Buster in writing that his retirement agreement precluded any claim for SERP benefits.

39. On July 1, 2015, counsel for Buster responded by letter and asserted a formal claim for benefits under the SERP. That letter specifically alleged that, before he signed the retirement agreement and release, Buster received oral confirmation from Felton that neither

would affect his SERP, pension, or 401(k) benefits. On September 28, the bank's compensation committee denied Buster's claim via a letter signed by Mark Wilson.

40. On November 4, 2015, counsel for Buster responded with a letter of appeal. The appeal appended a letter from Buster again alleging that Felton had orally confirmed that his entitlement to accrued SERP benefits would remain intact despite the retirement agreement and release, and further alleging that Buster had received written confirmation of Felton's position in Lambert's email to Albert on November 21, 2012. On December 30, 2015, the bank's compensation committee also rejected Buster's appeal of its denial via a letter signed by Albert. Buster exhausted the administrative process for his claim.

CONCLUSIONS OF LAW

1. PLAINTIFF'S CLAIM FOR BENEFITS.

A. Standard of Review.

ERISA provides claimants with a federal cause of action to recover benefits due under an ERISA plan. 29 U.S.C. 1132(a)(1)(B). Here, the denial of Buster's claim for benefits is reviewed for abuse of discretion (*see* Dkt. No. 93 at 8). If the plan administrator has a structural conflict of interest, however, that conflict must be weighed as a factor in determining whether it abused its discretion. Here, all agree that the bank's compensation committee, as a subset of its board of directors, has a structural conflict of interest because the bank itself, via its compensation committee, both funded the SERP and evaluated claims thereunder.

The weight of the conflict factor, however, depends on the degree to which the conflict appears to have improperly influenced the compensation committee's decision. As our court of appeals has explained, the reviewing court "should adjust the level of skepticism with which it reviews a potentially biased plan administrator's explanation for its decision in accordance with the facts and circumstances of the case." *Montour v. Hartford Life & Accident Ins. Co.*, 588 F.3d 623, 629–31 (9th Cir. 2009) (quotations and citations omitted). A reviewing court may consider extra-record evidence in order to determine how much weight to give a conflict of interest. *See Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 969–70 (2006); *Nolan v. Heald Coll.*, 551 F.3d 1148, 1153–54 (9th Cir. 2009). Here, the extra-record evidence is telling.

First, as stated, the bank's compensation committee is a subset of its board of directors. Even assuming some change in its constituency over time, the membership of the compensation committee that assessed Buster's claim shared at least some overlap with the membership of the board of directors that orchestrated his termination from the bank. Indeed, Albert, who played a vital role in the events surrounding and after Buster's departure, signed off on the compensation committee's final denial of his claim. Both Albert and Felton gave testimony to the effect that Buster's termination (and to at least some extent, his employment) was an unpleasant process for the board of directors. Felton even indicated that some on the board of directors felt Buster deserved nothing in the separation. On this record, it is improbable that the bank officials that had so emphatically wished to be rid of Buster dispassionately received and objectively assessed his claim for nearly $1.3 million in SERP benefits approximately two years after they thought they had washed their hands of him.

Second, Buster's claim arose after the bank had spent approximately two years believing and acting as if he remained entitled to SERP benefits, only to abruptly change course and reverse the accrual of those benefits on its books right around the time that it sought to sell a majority interest to Ford. For the bank's compensation committee to subsequently agree with Buster and admit that he did not waive his SERP benefits after all would have involved, at the very minimum, considerable embarrassment for the bank, its leadership, and at least one key member of the compensation committee — Albert. It would also have required the compensation committee to rule on the credibility of Felton, who held a longstanding leadership role in the bank and had personally served on both its compensation committee and board of directors. In short, the bank's compensation committee had considerable incentive to avoid agreeing with Buster, which would, of course, require denying his claim for SERP benefits.

Third, as explained below, the compensation committee's denial letters to Buster were riddled with illogical or implausible explanations for the denial, further indicating that bias against Buster, rather than objective consideration of the evidentiary record, played a driving role in the compensation committee's decision. In short, the record here indicates that the

bank's compensation committee had a significant conflict of interest warranting considerable skepticism in reviewing its decision, even for abuse of discretion.

B. Merits of the Claim.

The next question is whether, on the administrative record before it, the bank's compensation committee abused its discretion because its decision was illogical, implausible, or "without support in inferences that may be drawn from the facts in the record" — "with the qualification that a higher degree of skepticism is appropriate where," as here, "the administrator has a conflict of interest." *See Salomaa v. Honda Long Term Disability Plan*, 642 F.3d 666, 676 (9th Cir. 2011); *Jebian v. Hewlett-Packard Co. Employee Benefits Org. Income Prot. Plan*, 349 F.3d 1098, 1110 (9th Cir. 2003) (review for abuse of discretion on the merits of a claim for benefits is limited to the administrative record). Here, in denying both Buster's initial claim and his administrative appeal, the bank's compensation committee essentially concluded that (1) his retirement agreement and release unambiguously waived his accrued SERP benefits, (2) he knowingly and voluntarily agreed to that waiver of accrued SERP benefits, and (3) his claim therefore had to be denied (*see* TX 202, 208). Even reviewed solely on the administrative record, the bank's compensation committee's decision was illogical and implausible in numerous ways.

First, in its initial denial letter, the bank's compensation committee expressly relied upon the covenant not to sue in Buster's retirement agreement and release, which it specifically quoted as follows (TX 208 at 7 (all errors in original)):

> I have not and will not institute or cause to be instituted in any state or federal court or before any state or federal or other government agency any grievance, lawsuit, compliant, action or claim arising from or in any relating to my employment with the Bank or ending of that employment, or my not being hired by the Bank.

Immediately following the quote, the letter concluded, "Based upon the terms and provisions of the Agreement and Release, the Committee must deny Mr. Buster's claim for benefits under the SERP." This reliance on the above-quoted language, however, is inscrutable. Nothing about the quoted covenant not to sue prevented Buster from asserting a claim for SERP benefits with the compensation committee, which did not constitute a "state or federal court . . . or other

government agency." This entire section of the denial letter therefore appears to be a non sequitur with no apparent purpose other than to remind Buster that he supposedly could not sue the bank — a reminder that had no bearing on the merits of what the bank's compensation committee actually had to decide.

Second, a crucial component of this case is how to interpret the express identification of some benefits, but not others, in Buster's retirement agreement and release. Since its initial denial letter, the bank has espoused the theory that, because the retirement agreement and release expressly preserved Buster's ERP benefits but did not similarly preserve his SERP benefits, the latter must have been waived (*see, e.g.*, TX 208 at 9, 136 at 24). The bank's compensation committee also argued in its initial denial letter that it did not matter if the bank and the SERP were "separate legal entities" because the retirement agreement and release covered the SERP as an entity "affiliated" and "related" to the bank (*see* TX 208 at 8). As Buster points out, however, the bank had *not* withheld his pension and 401(k) benefits even though his retirement agreement and release did not expressly preserve those benefits, either.

In response, the bank has attempted repeatedly since its initial denial letter to distinguish those benefits, which would be paid from the bank's qualified trust with separate and distinct assets, from the SERP, which would be paid from the bank's own general assets (*see, e.g.*, *id.* at 8–9). As discussed at trial, however, the bank and the qualified trust are also "affiliated" and "related" entities such that the retirement agreement and release — under the bank's own broad reading — would have covered both if it intended to eliminate Buster's retirement benefits. The tension between the bank's inconsistent positions on this point came to a head at trial, when defense counsel finally shrugged and suggested that perhaps the bank paid Buster "something they didn't have to" in his pension and 401(k) benefits — a suggestion incompatible with the bank's own insistence that its disparate treatment of Buster's various retirement benefits was justified all along (*see* Tr. 144:23–147:7, 193:25–194:5).

Third, the bank's compensation committee acknowledged in evaluating Buster's claim that a key issue was whether Buster knowingly and voluntarily waived his accrued SERP benefits, taking into account non-exclusive factors including (1) his education and business

sophistication, (2) his and the bank's respective roles in determining the provisions of waiver, (3) the clarity of the waiver agreement, (4) the time he had to study the agreement, (5) whether he had independent advice, such as that of counsel, and (6) the consideration paid for the waiver (*see* TX 202 at 7, 208 at 7). In analyzing those factors, however, the bank's compensation committee completely ignored Buster's allegations that the bank's own officials, including Felton, led him to believe he would not waive those benefits by signing the retirement agreement and release. The bank's compensation committee justified its refusal to consider that evidence by deeming the language of the retirement agreement and release unambiguous as to the purported waiver. As a prior order explained, that was wrong (Dkt. No. 67 at 4–5).

The bank's compensation committee's refusal to investigate or even consider Buster's claims that he never knowingly and voluntarily waived his SERP benefits is all the more egregious given that the compensation committee itself, as a subcommittee of the bank's board of directors, surely knew at the time — even more than Buster did — how the bank's own past conduct gave the impression that no such waiver occurred. Indeed, Albert, who bore responsibility for much of that conduct, signed off on the compensation committee's second letter rejecting Buster's administrative appeal, which letter contained the bulk of the "knowing and voluntary" waiver analysis (*see* TX 202). In that same letter — and in a remarkable display of cognitive dissonance — Albert repeatedly noted how "difficult" it was to credit Buster's claim that he never knowingly and voluntarily waived his SERP benefits because of his employment history with the bank (*see id.* at 8, 11). It should have been at least equally difficult for the bank's compensation committee — and Albert in particular — to outright ignore its own knowledge of how the bank's own past conduct supported Buster's position.

Fourth, while the bank's compensation committee insisted that Buster had received significant compensation in exchange for signing his retirement agreement and release, it intentionally sidestepped the specific question of whether it made any sense to construe that compensation as consideration for waiving his SERP benefits, citing the "canon of contract interpretation that courts shall not inquire into the adequacy of consideration, so long as it is more than nominal" (*see* TX 202 at 12, 208 at 8). The question teed up by Buster's claim,

however, was not about the *adequacy* of some nominal consideration given in exchange for his accrued SERP benefits but about whether *any* consideration had been given in exchange for those benefits in the first place. This question bore on the issue of whether Buster actually knowingly and voluntarily waived his accrued SERP benefits, and the compensation committee offered no explanation as to why it could ignore the question altogether based on the aforementioned "canon of contract interpretation."

In short, on the information available to it, the bank's compensation committee's conclusion that Buster knowingly and voluntarily waived his accrued SERP benefits was illogical and implausible, particularly when viewed with increased skepticism in light of the compensation committee's significant conflict of interest. The compensation committee therefore abused its discretion in denying Buster's claim for benefits. For the same reasons, defendants' motion for judgment as a matter of law on this claim is **DENIED**.

2. PLAINTIFF'S CLAIMS FOR EQUITABLE RELIEF.

Buster urges equitable estoppel and equitable reformation of contract as alternative forms of relief. Given that he prevails on his claim for benefits, this order need not reach his alternative claims for relief. *See Moyle v. Liberty Mut. Retirement Ben. Plan*, 823 F.3d 948, 959–62 (9th Cir. 2016) (ERISA's equitable catchall provision "allows plaintiffs to plead alternative theories of relief without obtaining double recoveries").

It bears repeating, however, that from 2012 to 2014, *both* sides shared a reasonable and mutual understanding that Buster's retirement agreement and release did *not* affect his SERP benefits. To the extent that any language in the retirement agreement and release remains arguably inconsistent with this mutual understanding, this order rules that it is to be read to reflect the actual intent and agreement of both sides, *i.e.*, that Buster remained entitled to SERP benefits. *See Skinner v. Northrop Grumman Retirement Plan B*, 673 F.3d 1162, 1166 (9th Cir. 2012) ("[A] court may reform a contract to reflect the true intent of the parties if both parties were mistaken about the content or effect of the contract. The court may reform the contract to capture the terms upon which the parties had a meeting of the minds." (citations omitted)).

3. DEFENDANTS' COUNTERCLAIMS.

A. Declaratory Relief.

In its counterclaim, the bank sought "a declaratory judgment that, in the event it is determined that the Release executed by Buster is not enforceable *to give rise to a waiver by Buster of the benefits allegedly due to him under the SERP*, the Bank is entitled to recover from Buster the sum of $1 Million that it paid to Buster as Retirement Pay pursuant to the terms of the Release, plus interest . . ." (Dkt. No. 76 at 13 (emphasis added)). In its trial brief, however, the bank states that "its declaratory relief claim will only be triggered should the final outcome of this case render the Release unenforceable" (Dkt. No. 103 at 28). Similarly, Paragraph 15 of the retirement agreement and release, which forms the predicate for the bank's counterclaim, states, "in the event any portion of [Buster's] release of claims is determined not to be enforceable, [Buster] agrees to return to the Bank the Retirement Pay he received" (TX 1 at 5).

The actual outcome of this action is not that any part of Buster's retirement agreement and release is unenforceable. Rather, it is that no part of the retirement agreement and release affected his entitlement to SERP benefits in the first place, and neither Buster nor the bank had a contrary understanding until the bank's change of heart in 2014. Thus, as the bank itself recognizes, its claim for declaratory relief has not been "triggered" (*see* Dkt. No. 103 at 28).

B. Breach of Contract.

In its counterclaim, the bank also sought damages arising out of Buster's alleged breach of two provisions of his retirement agreement and release (Dkt. No. 76 at 11–12). The first provision at issue, in Paragraph 9 of the retirement agreement, stated (TX 1 at 4):

> [Buster] represents that he has not filed any charge, complaint, lawsuit, or claim against the Bank or any Releasee with any local, state or federal agency or court from the beginning of time to the date of execution of this Agreement and that he will not do so at any time hereafter based upon events occurring prior to date [*sic*] he signs this Agreement, excepting only a claim for unemployment compensation, workers' compensation, or indemnification.

A substantially similar provision appeared in Paragraph "g" of the release. The second provision at issue, in Paragraph "e" of the release, stated (*id.* at 6):

> I have not and will not institute or cause to be instituted in any state or federal court or before any state or federal or other

> government agency any grievance, lawsuit, complaint, action, or claim arising from or in any [*sic*] relating to my employment with the Bank or the ending of that employment, or my not being hired by the Bank.

As stated, despite their appearance in the pleadings, the bank's counterclaims remained inert for most of this litigation. Neither side brought up the counterclaims at the summary judgment stage. Nevertheless, the order denying both sides summary judgment acknowledged that, possibly, the bank could argue that Buster's future claims would be barred by Paragraph 9 of the retirement agreement. The order added, however, that the argument was "not sufficiently developed" on summary judgment and merely observed that it would be "worth consideration" at trial (*see* Dkt. No. 93 at 7).

Relying on the aforementioned comment in the order on summary judgment, the bank for the first time discussed its counterclaims in its trial brief, seeking approximately one million dollars in attorney's fees and costs or, "should the Court determine that Mr. Buster's breach was material," rescission to recoup the one million dollars of "retirement pay." The bank's trial brief, however, unhelpfully focused only on state contract law and did not meaningfully discuss the implications of ERISA (*see* Dkt. No. 103 at 20–24).

Buster's trial brief, on the other hand, largely ignored the bank's state law arguments and instead contended in conclusory fashion that ERISA preempts its breach of contract counterclaim, relying on ERISA's provision that it is "unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan," *see* 29 U.S.C. 1140, and on the assertion that, "[f]rom an equitable perspective . . . [t]o punish Plaintiff for Defendants' incompetence would be an injustice" (*see* Dkt. No. 100 at 8–9). *See Jakimas v. Hoffmann-La Roche, Inc.*, 485 F.3d 770, 781–84 (3d Cir. 2007) (rejecting tender back defense because "[a] plaintiff should not be deterred from bringing a meritorious claim" under ERISA).

Neither side offered any specific analysis on the questions of whether Buster's claims for relief actually fall within the scope of the provisions cited by the bank, and whether Buster,

by signing a covenant not to sue, could *prospectively* release claims for redress of a *future* ERISA violation that neither side could reasonably have foreseen when he signed the retirement agreement and release. These issues received no meaningful development at trial or in the parties' post-trial submissions.

As discussed, the trial record indicates that no dispute existed between Buster and the bank at the time of his termination because *both* sides understood that his retirement agreement and release would not affect his entitlement to SERP benefits. As far as the record shows, November 2014 marked the first time the bank gave any indication, even internally, that it would deviate from that mutual understanding, and Buster did not learn of the bank's change in position until he sought to claim his accrued benefits under the SERP in May 2015.

Under these circumstances, the bank has not carried its burden to show that Buster's claims for relief were "based upon events occurring prior to" November 21, 2012, so as to breach the covenant not to sue in Paragraph 9 of his retirement agreement. Nor has the bank carried its burden to show that Buster's claims for relief, which seek redress for ERISA violations as a result of the bank's change in position approximately two years *after* Buster's termination, arose from or related to his employment so as to breach the covenant not to sue in Paragraph "e" of the release.

Even if Paragraph "e" of the release could arguably be read as purporting to waive Buster's prospective right to sue for such violations, the bank has not carried its burden to show that such waiver would be valid for that purpose. The Supreme Court and our court of appeals have not yet spoken on this issue, but other courts have arrived at similar conclusions when faced with purported prospective waivers of future ERISA rights. *See, e.g.*, *Wright v. Sw. Bell Tel. Co.*, 925 F.2d 1288, 1293 (10th Cir. 1991) (covenant not to sue and release could not have constituted a knowing and voluntary waiver of right to sue under ERISA where, at the time the release was signed, the plaintiff had not yet asserted his ERISA claim and it was impossible for either side to know of the future claim); *Reighard v. Limbach Co., Inc.*, 158 F. Supp. 2d 730, 732–33 (E.D. Va. 2001) (Judge Thomas Ellis) ("[W]here, as here, a covenant not to sue purports to waive prospectively any future rights or claims under ERISA, the result, in effect, is

to grant the employer a license to violate ERISA in the future with impunity. ERISA rights are too important to permit this result.").

In short, the bank has not carried its burden to establish entitlement to the relief requested on its counterclaims.

CONCLUSION

Buster has indicated that payment of his accrued SERP benefits may require "actuarial computations . . . on the precise monthly payment amount" (Dkt. No. 100 at 13–14 & n.1). The parties shall therefore **MEET AND CONFER** and agree on a proposed form of judgment that accurately reflects the benefit payments owed to Buster, to be filed by **JULY 21 AT NOON**.

Both sides have indicated that they intend to seek attorney's fees under ERISA (*see* Dkt. Nos. 136 at 29–30, 139 at 58). *See* 29 U.S.C. 1132(g)(1) ("In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party."). This order is without prejudice to any timely motion for attorney's fees brought by Buster pursuant to our Civil Local Rules. The bank is not entitled to attorney's fees under Section 1132(g)(1). *See Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 255 (2010) ("[A] fees claimant must show 'some degree of success on the merits' before a court may award attorney's fees under § 1132(g)(1)." (citation omitted)).

IT IS SO ORDERED.

Dated: July 14, 2017.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE