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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROBERT STOLEBARGER,
Plaintiff,

v.

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA,
Defendant.

Case No. [17-cv-06161-WHO](#)

**ORDER GRANTING MOTION TO
DISMISS STATE LAW CLAIMS**

Re: Dkt. No. 22

Plaintiff Robert Stolebarger alleges that defendant Prudential Insurance Company of America wrongly denied his claim for long-term disability (LTD) benefits under a Policy he secured through his former law firm. The only issue before me on Prudential’s motion to dismiss is whether Stolebarger’s state law claims are preempted by ERISA and must be dismissed. That question, in turn, depends on whether I may look to Policy documents that, according to Prudential, demonstrate that the Policy is governed by ERISA and does not fall within a safe harbor provision that would otherwise preserve Stolebarger’s state law claims. I conclude that I may review and rely on the Policy documents and that Stolebarger’s state law claims are preempted and, therefore, **DISMISSED** with prejudice.

BACKGROUND

I. OCCUPATION AND ONSET OF DISABILITY

Prior to the onset of his alleged disability, Stolebarger was a “litigation partner at a major international law firm, handling as lead counsel large and complex antitrust, intellectual property, and cyber security cases for several of the largest, most sophisticated, and most prestigious companies in the United States.” Complaint ¶ 9. In 2008, he was diagnosed as suffering from depression and anxiety. *Id.* ¶ 14. He sought help from a highly-regarded and board-certified

1 neurologist and psychiatrist, and attempted to continue his practice through early 2011. *Id.* But
2 starting in March 2011, he experienced a series of serious anxiety attacks that prevented him from
3 performing his work as a trial lawyer; he was placed on a leave of absence by his firm in August
4 2011. *Id.* ¶¶ 15-18. With medication and treatment, he resumed some work, although not in his
5 regular occupation but in more of an administrative role through 2013. *Id.* ¶ 22. By 2014, after
6 attempting to resume work in his “regular occupation” as a litigation trial lawyer, it was clear to
7 him that he could not continue with that work and he was placed on short-term leave by his firm
8 (Bryan Cave) from November 2014 through June 2015, when it was contemplated that he would
9 submit a LTD claim to Prudential (assuming no change in his condition). *Id.* ¶¶ 25-29. When July
10 2015 ended, Stolebarger, his doctor, and Bryan Cave “remained unanimously of the view that Mr.
11 Stolebarger was unable to return to work. Unable to work, he submitted his claim for benefits
12 (which would provide significantly less income than he had been earning as a trial lawyer) to
13 Prudential in August 2015.” *Id.* ¶ 30.

14 **II. LTD POLICY & PRUDENTIAL’S DENIAL**

15 Bryan Cave offered Stolebarger the opportunity to purchase and Stolebarger purchased his
16 LTD Policy from Prudential. He alleges that at all relevant times: (i) his premiums were paid
17 entirely by him, with no contribution from Bryan Cave; (ii) participation in the Policy and
18 purchase of the Policy were completely voluntary for all Bryan Cave personnel; (iii) the sole
19 functions of Bryan Cave in connection with the Policy were to permit Prudential to publicize the
20 program to Bryan Cave personnel and to collect premiums through payroll deductions and remit
21 them to Prudential; and (iv) Bryan Cave received no consideration in connection with the Policy,
22 with the possible exception of reasonable compensation for administrative services actually
23 rendered in connection with payroll deductions. Complaint ¶¶ 33-38.

24 Stolebarger submitted his LTD claim to Prudential in August 2015. *Id.* ¶ 53. In November
25 2015, Prudential denied his claim because it determined that he was able to perform his job
26 functions. *Id.* ¶¶ 53, 57. Stolebarger appealed Prudential’s denial of benefits on May 4, 2016,
27 and again on March 24, 2017. *Id.* ¶¶ 64, 72. Prudential finally denied his second appeal on May
28 5, 2017. *Id.* ¶ 73.

1 Stolebarger filed this Complaint in October 2017, and asserts claims under California law
2 for breach of contract, breach of the covenant of good faith and fair dealing, and for violation of
3 California’s Unfair Competition Law (UCL). In the alternative, he asserts a claim for violation of
4 the Employee Retirement Income Security Act of 1974 (ERISA). Prudential moves to dismiss
5 only his state law claims, arguing that they are preempted by ERISA and relying in part on alleged
6 Policy documents explaining the governing terms. Stolebarger opposes, arguing that whether the
7 Policy at issue is governed by ERISA is disputed and cannot be decided on a motion to dismiss
8 and, in any event, his section 17200 UCL claim is not preempted.

9 **LEGAL STANDARD**

10 ERISA expressly preempts state laws “insofar as they may now or hereafter relate to any
11 employee benefit plan,” 29 U.S.C. § 1144(a) except for state “law[s] ... which regulat[e] insurance,
12 banking, or securities.” 29 U.S.C. § 1144(b)(2)(A). In addition, in light of ERISA’s
13 comprehensive scheme of civil remedies to enforce ERISA’s provisions, any state law cause of
14 action “that would fall within the scope of this scheme of remedies is preempted as conflicting
15 with the intended exclusivity of the ERISA remedial scheme.” *Cleghorn v. Blue Shield of*
16 *California*, 408 F.3d 1222, 1225 (9th Cir. 2005).

17 However, under ERISA’s safe harbor provision, insurance policies will not be considered
18 ERISA-governed plans if the policy offered by an insurer to employees satisfies four criteria: “(1)
19 No contributions are made by an employer or employee organization; (2) Participation the
20 program is completely voluntary for employees or members; (3) The sole functions of the
21 employer or employee organization with respect to the program are, without endorsing the
22 program, to permit the insurer to publicize the program to employees or members, to collect
23 premiums through payroll deductions or dues checkoffs and to remit them to the insurer; and (4)
24 The employer or employee organization receives no consideration in the form of cash or otherwise
25 in connection with the program, other than reasonable compensation, excluding any profit, for
26 administrative services actually rendered in connection with payroll deductions or dues
27 checkoffs.” 29 C.F.R. § 2510.3-1(j). The Ninth Circuit has “uniformly adopted the position that a
28 group insurance plan cannot be excluded from ERISA coverage when an employer fails to satisfy

1 any one of the four requirements of the safe harbor regulation.” *Stuart v. UNUM Life Ins. Co. of*
2 *Am.*, 217 F.3d 1145, 1153 (9th Cir. 2000).

3 The parties dispute whether the Prudential Policy at issue here falls within that safe harbor,
4 thus preserving the state law claims, and whether that issue can be resolved when the Complaint
5 alleges that all four safe harbor criteria are met but Prudential relies on documents which it
6 contends govern the Policy and show as a matter of law the safe harbor criteria are not all met.

7 **DISCUSSION**

8 **I. THE PRUDENTIAL PLAN DOES NOT FALL WITHIN THE SAFE HARBOR**

9 **A. The Governing Documents**

10 In moving to dismiss the state law claims, Prudential relies on documents attached to the
11 Declaration of Jane Edwards, Dkt. No. 22-1. According to Prudential and Edwards: (i) Exhibit A
12 is the Group Insurance Contract (Group Contract) for the Bryan Cave Policy; (ii) Exhibit B are
13 amendments to the Group Insurance Contract; (iii) Exhibit C is a copy of the LTD Booklet-
14 Certificate issued under the Group Contract and applicable to partners under the Group Contract;
15 (iv) Exhibit D is the LTD Booklet-Certificate applicable to legal assistants and administrative staff
16 under the Group Contract; (v) Exhibit E is the LTD Booklet-Certificate applicable to associates,
17 directors, counsel, and staff lawyers; (vi) Exhibit F is the LTD Booklet-Certificate applicable to
18 the Chief Operating Officers and principals; and (vii) Exhibit G is the LTD Booklet-Certificate
19 applicable to Of Counsel and Of Counsel independent contractors.

20 Prudential argues that these documents are appropriate for my review on this motion
21 because their terms are incorporated by reference as governing documents of the Policy. *U.S. v.*
22 *Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (“The doctrine of incorporation by reference may apply,
23 for example, when a plaintiff’s claim about insurance coverage is based on the contents of a
24 coverage plan. . . .”); *see also Greger v. Unum Group*, 2016 WL 7495477, at *1 (C.D. Cal. Apr. 8,
25 2016) (rejecting argument that because plaintiff’s claims were not based on other certificates, the
26 court could not consider those other certificates as incorporated on a motion to dismiss). It points
27 out that Stolebarger quotes in his Complaint substantial portions of the Policy as explained in
28 Exhibit C, the LTD Booklet-Certificate applicable to Partners under the Group Contract.

1 Complaint ¶¶ 39-46 (Partner Booklet). Prudential also notes that in Exhibit A, the Group
2 Contract, the certificates (Exhibits C – G) are expressly incorporated into and “made a part of the
3 Group Contract.” Group Contract at 2.

4 Stolebarger admits that Exhibits A & B are properly considered under the doctrine of
5 incorporation by reference,¹ but objects to incorporation and my reliance on Exhibits C-G
6 (Additional Documents) because he never saw those Additional Documents and those documents
7 are not mentioned in the Complaint. Oppo. at 6; Declaration of Robert Stolebarger (Dkt. No. 23-
8 1), ¶ 2. He also argues that the Additional Documents may not be authentic, may not be relevant
9 to this dispute, and reliance on them would impermissibly turn this motion into one for summary
10 judgment before Stolebarger has the opportunity to take discovery about their “authenticity and
11 effect.” Oppo. at 6. At oral argument, however, Stolebarger’s counsel admitted that Exhibit C
12 *can* be relied on because it *was* a document that had been produced to plaintiff and quoted in the
13 Complaint.

14 **B. The Safe Harbor**

15 Putting aside Exhibits D-G and reviewing only Exhibits A-C, the exhibits Stolebarger
16 admits may be incorporated by reference, it is clear that the Policy does not fall within ERISA’s
17 safe harbor.

18 Exhibit C is the “Bryan Cave LLP Partners Long Term Disability Plan.” Ex C at pg 1. At
19 pages 42-47 of the Plan is the “Summary Plan Description.” The SPD “is not part of the Group
20 Insurance Certificate. It has been provided by your Employer and included in your Booklet-
21 Certificate upon the Employer’s request.” *Id.* at 41. The SPD goes on to identify the Plan as
22 being governed by ERISA, the Plan Sponsor as Bryan Cave LLP, the Plan Administrator as Bryan
23 Cave LLP, the agency for service of legal process as Bryan Cave LLP, and Prudential as the
24 Claims Administrator. *Id.* at 42-43. These facts establish that Bryan Cave “endorsed” the Policy;
25 therefore, the Policy falls outside of the safe harbor under 29 C.F.R. § 2510.3-1(j)(3).

26 It is true that merely identifying an employer as the “plan administrator, plan sponsor, and
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¹ Oppo. at 7 n.1.

1 agent for service of process” does not, standing alone, compel a finding that a plan falls outside
2 the safe harbor. *See Zavora v. Paul Revere Life Ins. Co.*, 145 F.3d 1118, 1121 (9th Cir. 1998).
3 But there are additional facts here. The Policy is referred to as the “Bryan Cave” plan. *See*
4 *Hansen v. Contl. Ins. Co.*, 940 F.2d 971, 974 (5th Cir. 1991) (plan was referred to by employer as
5 “our plan”). And the SPD describing the plan as one governed by ERISA was “provided and
6 included” at Bryan Cave’s request. *See Zavora*, 145 F.3d at 1121 (fact that plan summary was
7 prepared by insurer indicated plan could fall within safe harbor).

8 The contents of Exhibit C (that have been incorporated by reference and are no longer
9 objected to by plaintiff) demonstrate that the Policy falls outside the safe harbor provision despite
10 plaintiff’s attempt to plead the contrary. *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295–96
11 (9th Cir. 1998) (“we are not required to accept as true conclusory allegations which are
12 contradicted by documents referred to in the complaint.”).

13 Although I do not need to rely on them, Exhibits D-G likewise support this conclusion. In
14 particular, the Booklet-Certificates for three categories of Bryan Cave employees establish that
15 Bryan Cave paid the premiums of those employees’ coverage under the LTD Policy. *See* Exs. D-
16 F (non-Partner Booklets) at 2; 29 C.F.R. § 2510.3-1(j)(1).²

17 The Policy at issue is governed by ERISA as a matter of law. Therefore, state law claims
18 that fall within the scope of ERISA’s remedial scheme are preempted.

19 **II. UNFAIR BUSINESS PRACTICES CLAIM**

20 Stolebarger argues that if I reject his safe harbor argument, his Section 17200 UCL claim
21 is still not preempted and should be allowed to proceed because through that claim he seeks to
22 vindicate not only his own interests, but those of others whose LTD coverage claims were
23 improperly denied by Prudential. *Oppo.* at 8-11.

24 Stolebarger first argues that his Section 17200 claim falls outside of ERISA’s express
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26 ² Stolebarger objects to the incorporation of these exhibits on the grounds that he has not had the
27 opportunity to depose anyone at Prudential or Bryan Cave about the “authenticity and effect” of
28 these documents. However, he points to no reason why the Edwards Declaration does not
adequately authenticate the documents for purposes of the incorporation by reference doctrine.
For example, he points to nothing in the Exhibits that he now admits can be considered (A-C) or in
Exhibits D-G to show that Exhibits D-G may not be what Edwards purports them to be.

1 preemption provision because while Section 17200 is not codified in California’s Insurance Code,
2 it is regularly applied to unfair business practices in the insurance industry. Oppo. 9-10. However,
3 to fall under ERISA’s savings clause, the state law at issue must be “specifically directed toward
4 entities engaged in insurance” and “the state law must substantially affect the risk pooling
5 arrangement between the insurer and the insured.” *Kentucky Ass’n of Health Plans, Inc. v. Miller*,
6 538 U.S. 329, 342 (2003). Section 17200, which is codified in California’s Business and
7 Professions Code and applies broadly to all business practices, satisfies neither of those criteria.
8 *See Irigaray Dairy v. Dairy Employees Union Loc. No. 17 Christian Lab. Assn. of the U.S. of Am.*
9 *Pension Tr.*, 153 F. Supp. 3d 1217, 1256 (E.D. Cal. 2015).

10 As to conflict preemption, a state law claim is completely preempted by ERISA if the state
11 law claim meets a two-prong test. *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d
12 941, 947 (9th Cir. 2009) (citing *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004)). The first
13 prong is whether the claim could have been brought under ERISA, and the second is whether there
14 is another legal duty, independent of ERISA, that is implicated by a defendant’s actions. *Id.* at
15 947-49.

16 Stolebarger argues that the existence of an ERISA plan is not a critical factor in his Section
17 17200 claim and, therefore could not have been brought under ERISA. That is so, according to
18 Stolebarger, because his claim that Prudential has a practice of wrongfully denying LTD mental
19 health claims does not depend on whether the policies Prudential acted under were governed by
20 ERISA and in asserting this claim he is not attempting to recover benefits for those wrongly
21 denied but merely to stop Prudential’s unfair practice.

22 Stolebarger’s claim falls squarely within the holding of *Cleghorn v. Blue Shield of*
23 *California*, 408 F.3d 1222, 1226 (9th Cir. 2005). There, the Ninth Circuit found a purported class
24 claim under Section 17200 conflict preempted where “[t]he only factual basis for relief pleaded in
25 Cleghorn’s complaint is the refusal of Blue Shield to reimburse him for the emergency medical
26 care he received. Any duty or liability that Blue Shield had to reimburse him ‘would exist here
27 only because of [Blue Shield’s] administration of ERISA-regulated benefit plans.’” *Cleghorn*,
28 408 F.3d at 1226 (quoting *Davila*, 124 S.Ct. at 2498). Here, whether Stolebarger’s claim was

1 wrongly denied (which he asserts it was as part of a pattern by Prudential) depends upon the terms
2 of his ERISA-governed Policy. His standing, therefore, to bring the wrongful denial claim is
3 based on whether Prudential complied with his ERISA-governed LTD Policy. Whether or not
4 Prudential has a pattern of wrongly denying other claims will likewise turn on the terms of the
5 underlying policies, many if not most will be ERISA-governed policies.

6 Finally, that plaintiff intends to seek broader relief under his section 17200 claim – to
7 enjoin Prudential’s “wrongful denial practice” – does not save this claim from preemption.
8 Plaintiff fails to identify any duty arising under state law, *separate and apart from* the duties
9 Prudential bore under his ERISA-governed Policy, that was violated by the wrongful denials of
10 benefits. *Gibson v. Prudential Ins. Co. of Am.*, 915 F.2d 414, 417 (9th Cir. 1990) (preemption
11 applied where plaintiff was “not claiming that Prudential or the doctors had any duty to her
12 outside the proper administration of the benefit plan. There would be no relationship or cause of
13 action between the appellees and Gibson without the Plan. Thus, in this case, the claim originates
14 from the handling and disposition of Gibson’s claim for disability benefits and is directly
15 connected with the Plan.”).³ Even if he could identify a duty wholly separate from those imposed
16 by ERISA, he still has a standing issue because his own claim falls squarely within the duties
17 imposed by ERISA under his ERISA-governed Policy. *Cleghorn*, 408 F.3d at 1226 (“Even the
18 class claim does not aid Cleghorn, for he is a participant in an ERISA plan and brings his action
19 on behalf of others similarly situated. Cleghorn’s claim therefore cannot be regarded as
20 independent of ERISA.”).

21 Plaintiff’s Section 17200 UCL claim is preempted.

22 **CONCLUSION**

23 Defendant’s motion is GRANTED and plaintiff’s state law claims are dismissed. Because
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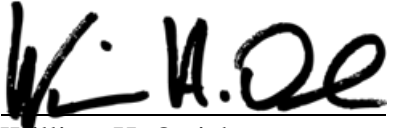
27 ³ Plaintiff argues that the duty at issue is an “independent legal duty” under California’s Insurance
28 Code to “make good faith determinations on the merits,” but doesn’t show how that allegedly
independent duty is separate from the duty imposed by ERISA under his Policy.

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there are no facts that plaintiff could assert to save these claims from preemption, the state law claims are DISMISSED WITH PREJUDUCE.

IT IS SO ORDERED.

Dated: May 18, 2018



William H. Orrick
United States District Judge