

1 While a Starwood employee, Plaintiff also elected to participate in a long-term
2 disability plan (the “LTD Plan”) sponsored by Starwood. (Compl. ¶ 12.) Defendant Unum
3 issued disability benefits under the LTD Plan to participating Starwood employees through
4 a group insurance policy. (Compl. ¶ 12.) The LTD Plan provided benefits for Plaintiff in the
5 amount of 60% of his monthly earnings for a period of 18 months following his disability.
6 (Compl. ¶ 13.)

7 Plaintiff allegedly suffered a loss under both the VW and LTD Plans when he became
8 totally disabled on June 8, 2007, following an operation for coronary stenting to address his
9 coronary artery disease. (Compl. ¶¶ 17, 21.) Plaintiff filed for benefits with Provident under
10 the VW Plan. (Compl. ¶ 18.) On August 6, 2007, Provident granted Plaintiff’s application
11 for benefits. (*Id.*) But in December of that same year, Provident stopped paying benefits
12 under the VW Plan. (*Id.*) Plaintiff had also applied for benefits under the LTD Plan, but his
13 application was denied. (Compl. ¶ 19.) He appealed the denial of benefits under both plans
14 unsuccessfully. (Compl. ¶ 20.) And he never received a decision on a second, later appeal.
15 (*Id.*)

16 Plaintiff brings two causes of action against Defendants: (1) a claim pursuant to the
17 Employee Retirement Security Act, 29 U.S.C. § 1001, *et seq.* for benefits denied under the
18 LTD Plan and the VW Plan;¹ and (2) a claim for breach of the implied covenant of good faith
19 and fair dealing arising out of the denial of benefits under the VW Plan. Defendants move
20 for summary judgment on the second claim.

21 22 II. STANDARD

23 Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil Pro-
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25 ¹ In the text of Plaintiff’s Complaint, he entitles his first cause of action simply a
26 “claim for benefits,” and does not specify that the claim is made pursuant to ERISA. But the
27 caption to Plaintiff’s Complaint indicates that he brings a “complaint for relief under ERISA”
28 and “bad faith breach of the insurance contract (i.e. tortious breach of the implied covenant
of good faith and fair dealing).” Moreover, Plaintiff describes the “Nature of the Action” in his
Complaint as “an action under the Employee Retirement Security Act” Thus, the Court
assumes Plaintiff brings his first cause of action for the denial of benefits under ERISA.

1 cedure if the moving party demonstrates the absence of a genuine issue of material fact and
2 entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322
3 (1986). A fact is material when, under the governing substantive law, it could affect the
4 outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Freeman*
5 *v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997). A dispute is genuine if a reasonable jury could
6 return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248.

7 A party seeking summary judgment always bears the initial burden of establishing the
8 absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving party
9 can satisfy this burden in two ways: (1) by presenting evidence that negates an essential
10 element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party
11 failed to establish an essential element of the nonmoving party's case on which the
12 nonmoving party bears the burden of proving at trial. *Id.* at 322-23. "Disputes over irrelevant
13 or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elec. Serv., Inc.*
14 *v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

15 Once the moving party establishes the absence of genuine issues of material fact, the
16 burden shifts to the nonmoving party to set forth facts showing that a genuine issue of
17 disputed fact remains. *Celotex*, 477 U.S. at 314. The nonmoving party cannot oppose a
18 properly supported summary judgment motion by "rest[ing] on mere allegations or denials
19 of his pleadings." *Anderson*, 477 U.S. at 256. When ruling on a summary judgment motion,
20 the court must view all inferences drawn from the underlying facts in the light most favorable
21 to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,
22 587 (1986).

23 24 **III. DISCUSSION**

25 Defendants argue that ERISA preempts Plaintiff's state-law claim for breach of the
26 implied covenant of good faith and fair dealing based on their failure to pay benefits under
27 the VW Plan. Defendants initially contend that the VW Plan qualifies as an employee
28 welfare benefit plan on its own. Alternatively, Defendants argue that even if the VW Plan

1 is not an ERISA plan, it is part of a multi-benefit ERISA plan.

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3 **1. Existence of an Employee Welfare Benefit Plan**

4 “The purpose of ERISA is to provide a uniform regulatory regime over employee
5 benefit plans.” *Aetna Health Inc. V. Davila*, 542 U.S. 200, 208 (2004). The Act defines an
6 employee welfare benefit plan as:

7 any plan, fund or program . . . established or maintained by an employer or
8 employee organization, or by both, to the extent that such plan, fund, or
9 program was established or is maintained for the purpose of providing for its
10 participants or their beneficiaries, through the purchase of insurance or
11 otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the
12 events of sickness, accident, disability, death, or unemployment 29
13 U.S.C. § 1002(1).

14 ERISA’s regulatory regime contains a “comprehensive civil enforcement scheme,” set
15 forth at 29 U.S.C. § 1132(a), which is exclusive of state law remedies. *See Pilot Life Ins. Co.*
16 *v. Dedeaux*, 481 U.S. 41, 54–56 (1987). “Any state law cause of action that duplicates,
17 supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear
18 congressional intent to make the ERISA remedy exclusive and is therefore preempted.”
19 *Aetna*, 542 U.S. at 209 (citations omitted). Thus, if the VW Plan qualifies as an employee
20 welfare benefit plan, ERISA will preempt Plaintiff’s breach of the implied covenant of good
21 faith and fair dealing claim based on the denial of benefits under that Plan.

22 The VW Plan may qualify as an employee welfare benefit plan in one of two ways.
23 First, the VW Plan alone may constitute an employee welfare benefit plan as defined in
24 Section 1002(1). Second, even if the VW Plan is not itself an ERISA plan, the VW Plan may
25 exist as a component of a larger, ERISA-regulated, multi-benefit program. The Court
26 addresses separately the two potential avenues for ERISA coverage.

27 **A. Is the VW Plan an employee welfare benefit plan on its own?**

28 Defendants first argue that the VW Plan, alone, constitutes an ERISA employee
welfare benefit plan as defined in Section 1002(1). Plaintiff disagrees, arguing that the VW
Plan, by itself, does not qualify as an ERISA plan. It is Defendants’ burden to establish the

1 existence of an ERISA plan. See *Kanne v. Conn. Gen. Life Ins. Co.*, 867 F.2d 489, 492 n.
2 4 (9th Cir. 1988).

3 An ERISA plan is (1) a plan, fund or program (2) established or maintained (3) by an
4 employer or by an employee organization, or by both (4) for the purpose of providing
5 insurance benefits (5) to the participants or their beneficiaries. See *Steen v. John Hancock*
6 *Mut. Life Ins. Co.*, 106 F.3d 904, 916 (9th Cir. 1997); 29 U.S.C. § 1002(1). An employer can
7 establish an ERISA plan “rather easily.” Establishing one requires nothing “more than
8 arrang[ing] for a ‘group-type insurance program.’” *Credit Managers Ass’n of S. Cal. v.*
9 *Kennesaw Life & Accident Ins. Co.*, 809 F.2d 617, 625 (9th Cir. 1987). And that is exactly
10 what Starwood did here.

11 Starwood chose Providence’s short-term disability insurance coverage and made the
12 plan available to its employees for supplemental coverage. Essentially, it arranged for a
13 group-type insurance program, which, according to the Ninth Circuit, is enough to establish
14 a plan. *Kennesaw Life*, 809 F.2d at 625. Nothing more is required.

15 It is unclear exactly why Plaintiff believes that the VW Plan is not an ERISA plan.
16 Plaintiff does not challenge any of the five elements listed above. Instead, he argues that
17 ERISA plans must be in writing. But the “existence of a written instrument is not a
18 prerequisite to ERISA coverage.” *Palmer v. Bainbridge Disposal, Inc.*, No. 08cv5067, 2009
19 WL 267199, at *4 (W.D. Wash. Feb. 9, 2009) (citing *Scott v. Gulf Oil Corp.*, 754 F.2d 1499,
20 1503 (9th Cir. 1985) *abrogated on other grounds by Fort Halifax Packing Co., Inc. v. Coyne*,
21 482 U.S. 1 (1987)); see also *Donovan v. Dillingham*, 688 F.2d 1367, 1372 (11th Cir. 1982)
22 (“There is no requirement of a formal, written plan . . .”). He also argues that Defendants
23 failed to file a form 5500, which is an ERISA-related administrative form, but does not cite
24 any case law showing why failure to do so would negate the existence of an ERISA plan.
25 In short, none of Plaintiff’s arguments are convincing.

26 Still, the VW Plan may be excluded from ERISA under the so-called “safe harbor”
27 regulations. If a plan meets all four elements of the safe harbor, then ERISA does not
28 govern it, even if the program otherwise meets the Section 1002(1) definition. The safe

1 harbor regulation provides that

2 the terms 'employee welfare benefit plan' and 'welfare plan' shall not include
3 a group or group-type insurance program offered by an insurer to employees
or members of an employee organization, under which:

- 4 (1) No contributions are made by an employer or employee
5 organization;
- 6 (2) Participation in the program is completely voluntary for
7 employees or members;
- 8 (3) The sole functions of the employer or employee organization
9 with respect to the program are, without endorsing the
10 program, to permit the insurer to publicize the program to
11 employees or members, to collect premiums through payroll
12 deductions or dues checkoffs and to remit them to the insurer;
13 and
- 14 (4) The employer or employee organization receives no
15 consideration in the form of cash or otherwise in
16 connection with the program, other than reasonable
17 compensation, excluding any profit, for administrative
18 services actually rendered in connection with payroll
19 deductions or dues checkoffs.

20 29 C.F.R. § 2510.3-1(j).

21 "[A]n employer's failure to satisfy just one requirement of the safe harbor regulation
22 conclusively demonstrates that an otherwise qualified group insurance plan is an employee
23 welfare benefit plan under ERISA," *Stuart v. UNUM Life Ins. Co of Amer.*, 217 F.3d 1145,
24 1150 (9th Cir. 2000). The parties agree that the VW Plan satisfies each element of the safe
25 harbor except one: the third element.

26 That element prohibits the employer from endorsing the program, and the employer's
27 sole functions can only be "to permit the insurer to publicize the program to employees or
28 members, to collect premiums through payroll deductions or dues checkoffs and to remit
them to the insurer." 29 C.F.R. § 2510.3-1(j)(3). "A finding of endorsement is appropriate
if, upon examining all the relevant circumstances, there is some factual showing on the
record of substantial employer involvement in the creation or administration of the plan."
Thompson v. American Home Assur. Co., 95 F.3d 429, 436 (6th Cir. 1996). If an employer
is "more than a mere advertiser of group insurance," the plan is outside of the safe harbor
provision. *Kanne*, 867 F.2d at 493.

1 Starwood did a number of things that gave it a role in the creation and administration
2 of the VW Plan that went beyond the “sole functions” of collecting premiums and letting
3 Provident advertise. The first is that Starwood worked closely with UnumProvident (the
4 parent company of Defendants Unum and Provident) in creating and implementing the VW
5 Plan.² (Rogers Decl. ¶ 8.) The Vice President of Global Benefits at Starwood worked with
6 a National Account Manager at UnumProvident to develop a comprehensive benefits
7 package for Starwood employees. *Id.* Starwood and UnumProvident held meetings to
8 discuss the integration of the VW Plan with the other short- and long-term disability
9 programs. *Id.* at ¶ 8–9. And Starwood gave input on the website for the VW Plan and on
10 UnumProvident’s call system for benefits. *Id.* at ¶ 12.

11 Starwood, Unum and Provident also executed a Performance Agreement related to
12 the insurance programs, including the VW Plan. (Rogers Decl. Ex. 5.) The agreement was
13 essentially a quality-control mechanism, which required Unum and Provident to meet certain
14 targets regarding their handling of VW Plan claims. At least 95 percent of the time, the
15 claims had to be entered into the claims system within twenty-four hours of receipt, and they
16 had to be paid, denied, marked pending within five days. *Id.* at Ex. 5, Attachment C, 39.
17 Provident also had to submit semi-annual audits of its performance, and it had to pay a
18 penalty if it failed to meet its targets.

19 Starwood’s involvement in the creation and implementation of the VW Plan, as well
20 as the execution of the Performance Agreement, are enough to put the VW Plan outside of
21 the safe harbor. Starwood’s “sole functions . . . with respect to the program” were not just
22 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.”

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25 ² Plaintiff objects to paragraph 6 of the Rogers Declaration. Although the Court here
26 cites to paragraph 8, Plaintiff also makes general objections regarding the foundation for
27 Rogers’ knowledge of the VW Plan. Plaintiff claims that Rogers’ declaration is only relevant
28 if it addresses the VW Plan’s administration in 2007, when Plaintiff bought his policy. But
Rogers’ testimony about the VW Plan’s implementation is relevant to whether the safe
harbor regulation applies. Moreover, Rogers has worked for UnumProvident since 1999 and
was involved in the sale and implementation of insurance products for Starwood, including
the VW Plan. This is a sufficient foundation to show personal knowledge of the facts the
Court cites.

1 29 C.F.R. § 2510.3-1(j)(3). It also helped create the plan and monitor it through semi-annual
2 audits. The VW Plan is not exempted from ERISA by the safe harbor regulation.

3 Plaintiff points to a letter sent by Sue Kuba, who appears to work for Starwood, during
4 discovery. In it she wrote that “while Starwood offers to facilitate premium payments through
5 payroll deductions for a voluntary short-term disability buy-up plan it’s not a plan which is
6 sponsored by Starwood. The agreement is between Unum and the individual.” This
7 statement is insufficient to create a genuine dispute of material fact. A person’s belief about
8 whether a plan is governed by ERISA is irrelevant. *See Meredith v. Time Ins. Co.*, 980 F.2d
9 352, 354 (5th Cir. 1993); *Peckham v. Gem State Mut. of Utah*, 964 F.2d 1043, 1049, n.11
10 (10th Cir. 1992). And even assuming what Ms. Kuba says is true, her statement does not
11 contradict Rogers’ declaration that UnumProvident was involved in the creation and
12 implementation of the VW Plan, and that it monitored the plan through the Performance
13 Agreement and semi-annual audits.

14 Because the VW Plan is an ERISA plan on its own, the Court does not consider
15 Defendants’ argument that it is a part of a multi-benefit ERISA plan.

17 **2. ERISA Claim Preemption**

18 Under section 514(a) of ERISA, 29 U.S.C. § 1144(a), state-law claims that “relate to”
19 an ERISA plan are preempted. Preemption under section 514(a) is an affirmative defense
20 sometimes called “conflict preemption.”

21 State-law claims are *completely preempted* by ERISA and are recharacterized as
22 claims arising under federal law where the state law claim “relates to” an ERISA plan within
23 the meaning of section 514(a) *and* falls within the scope of ERISA’s civil enforcement
24 provisions set forth in section 502(a) of ERISA, 29 U.S.C. §1132(a). *Metropolitan Life Ins.*
25 *Co., v. Taylor*, 481 U.S. 58 (1987). State-law claims for breach of contract and breach of the
26 implied covenant of good faith and fair dealing are preempted if they arise out of ERISA
27 plans. *See, e.g., Tinger v. Pixley-Richards West, Inc.*, 953 F.2d 1124, 1131 (9th Cir. 1992).

28 Plaintiff’s state-law claim for breach of the implied covenant of good faith and fair

1 dealing arises out of his claim for benefits under the VW Plan and is therefore preempted.
2 See *id.* If he also alleges a breach of contract claim, that claim is also preempted. See *id.*

3 Defendants ask the Court to strike Plaintiff's demand for extra-contractual and
4 punitive damages. Those types of damages are unavailable under ERISA, *Mass. Mut. Life*
5 *Ins. Co. v. Russell*, 473 U.S. 134, 146–47 (1985), and the Court **STRIKES** them. They also
6 ask the Court to strike Plaintiff's demand for a jury trial. There is no right to a jury trial on
7 ERISA claims, *Thomas v. Or. Fruit Prods. Co.*, 228 F.3d 991, 995–997 (9th Cir. 2000), and
8 the Court **STRIKES** Plaintiff's request for a jury trial.

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IV. CONCLUSION

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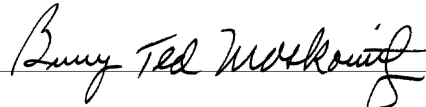
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For the foregoing reasons, the Court **GRANTS** Defendants' motion for partial
summary judgment [Doc. 32]. Plaintiff's state-law claims for breach of contract and breach
of the implied covenant of good faith and fair dealing are dismissed. The Court **STRIKES**
Plaintiff's request for extra-contractual and punitive damages, and his request for a jury trial.
IT IS SO ORDERED.

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DATED: September 16, 2010

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Honorable Barry Ted Moskowitz
United States District Judge

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