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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 JENS BOY,

12 Plaintiff,

13 v.

14 ADMINISTRATIVE COMMITTEE FOR
15 ZIMMER BIOMET HOLDINGS, INC. et
16 al.,

17 Defendants.

Case No.: 16-CV-197-CAB-BLM

**ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT**

[Doc. Nos. 67, 76]

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19 This matter is before the Court on Defendants’ motion for summary judgment. The
20 motion has been fully briefed¹ and a hearing was held on May 25, 2017. For the reasons
21 set forth below, the motion is granted.

22 **I. Background**

23 Plaintiff was Vice President, Global Sales, for Zimmer Dental, Inc. (“Zimmer
24 Dental”) from August 2008 through March 6, 2015. First Am. Complaint (“FAC”) ¶ 4.
25 Zimmer Dental’s business is focused on supplying dental products and technology to
26 clients around the world. *Id.* While employed by Zimmer Dental, Plaintiff was a
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28 ¹ Plaintiff’s motion for leave to file a sur-reply [Doc. No. 76] is **GRANTED**.

1 participant in Defendant Zimmer Biomet Holdings, Inc. Restated Severance Plan (the
2 “Plan”). *Id.* ¶ 1. Zimmer Biomet Holdings, Inc., formerly Zimmer Holdings, Inc.
3 (“Zimmer Holdings”) is the Plan’s sponsor.² *Id.* ¶ 5. Defendant Administrative Committee
4 for Zimmer Biomet Holdings, Inc., formerly Zimmer Holdings, Inc. (the “Committee”) is
5 the Plan’s administrator. *Id.* ¶ 7. The Committee’s members at all relevant times were
6 Dennis Cultice, Karen Monroe, and Lance Irwin. *Id.* ¶ 12.

7 The Plan specifies that a participant will not be eligible to receive benefits if his
8 employment is terminated for, among other things:

9 Willful misconduct or activity deemed actually or potentially detrimental to
10 the interests of the Company, which may include, but is not limited to,
11 dishonesty; theft; violation of one or more Company policies

12 Any act or omission causing, or having potential to cause, significant harm or
13 loss to the Company, its officers and/or employees.

14 Moore Dec., Ex. B at 88.

15 On March 3, 2015, Nathaniel Hwang, Zimmer’s compliance officer and senior
16 healthcare counsel, sent an email concerning Plaintiff to Bill Fisher and Chad Phipps,
17 Zimmer’s senior vice president-global human resources and general counsel, respectively,
18 with the subject line “Termination Approval Request.” *Id.*, Ex. A. at 27, 29. The text of
19 the email stated that the basis for termination was “Serious misconduct” and provided the
20 following “Summary of key facts and reasoning:”

21 A recent investigation, which was triggered by a Compliance Hotline report
22 that certain Zimmer Dental leaders were engaging in inappropriate and
23 fraudulent sales activity in an effort to ensure a year-end bonus payout from
24 which they would personally benefit, confirmed that Jens did in fact engage
25 in such inappropriate and fraudulent activity for such a purpose. When

26 ² The FAC also identifies Zimmer, Inc., as a subsidiary of Zimmer Holdings and an affiliate of Zimmer
27 Dental. Meanwhile, the parties’ summary judgment briefs frequently refer to the various Zimmer entities
28 collectively as “Zimmer.” Because the parties do not place any significance on corporate formalities
among the various Zimmer corporate entities, the Court assumes such formalities are irrelevant to the
issues in this case and will also use “Zimmer” to refer to such entities collectively.

1 interviewed, Jens refused to acknowledge wrongdoing or to accept any
2 accountability for any of his actions.

3 Though the sales amounts involved were immaterial from a financial
4 reporting perspective, the actions Jens engaged in are considered dishonesty
5 and fraud. These actions resulted in the falsification of company records,
6 which is serious misconduct under Zimmer's Code of Business Conduct and
7 behavior of employees policy. Accordingly, Jim Crines (as acting VP over
8 the global businesses) and I are jointly recommending Jens' immediate
9 separation from employment. Based on the reason for termination, Jens
10 would not be eligible for any offer of severance benefits.

11 *Id.* Fisher and Phipps both responded to Hwang's email approving the termination without
12 any mention of his eligibility for severance benefits. *Id.*

13 Three days later, on March 6, 2015, Crines sent Plaintiff a letter terminating his
14 employment and stating that he would be ineligible for severance benefits under the Plan.

15 The letter stated:

16 We recently concluded a through [sic] investigation that you engaged in
17 serious misconduct by deliberately engaging in fraudulent sales activity in an
18 effort to manipulate financial results to ensure that you and others would
19 receive certain bonus compensation. This dishonesty and falsification of
20 company records violated Zimmer's Code of Business Conduct and the
21 behavior of employees policy. As a result, your employment is terminated
22 effective as of the date set forth above.

23 Because you are being separated from employment for willful misconduct or
24 activity deemed actually or potentially detrimental to the interests of Zimmer,
25 in the form of dishonesty and violation of one or more Company policies, and
26 for acts causing, or having potential to cause, significant harm or loss to
27 Zimmer, you are not eligible for severance benefits under the terms of the
28 [Plan]. . . . The reasons for your discharge have been explained to you. . . .

Id. Ex. A at 23. The Committee did not participate in this initial decision to deny Plaintiff
severance benefits. *Id.* Ex. X.

By letter dated March 14, 2015, Plaintiff notified the Committee of his intent to
appeal the determination that he was ineligible for severance benefits and requested a copy
of the administrative record. *Id.* Ex. P. On March 20, 2015, Plaintiff sent another letter to

1 the Committee again requesting the administrative record along with certain other specified
2 documents to the extent such documents were not part of the administrative record. *Id.*,
3 Ex. Q. Plaintiff ultimately retained counsel to represent him in connection with his appeal.
4 *Id.* Ex. S. The Committee, meanwhile, was represented by the law firm of Faegre Baker
5 Daniels, which also serves as defense counsel in this lawsuit. *Id.* Ex. T.

6 On March 30, 2015, Michael Nader from Faegre Baker Daniels responded to
7 Plaintiff's request for the administrative record and provided what he asserted was "the
8 administrative record to date." *Id.* On March 31, 2015, Matthew Wilson, an HR Director
9 for Zimmer Dental, provided Plaintiff with a complete copy of his personnel file. *Id.* Ex.
10 U. On June 7, 2015, Mr. Nader provided Plaintiff's counsel with additional documents
11 that Plaintiff had requested. *Id.* Ex. W. On July 12, 2015, Mr. Nader notified Plaintiff's
12 counsel that he would have until August 31, 2015 to submit his appeal. *Id.* Ex. X.

13 On August 30, 2015, Plaintiff, through counsel, submitted his appeal of the denial
14 of severance benefits to the Committee. *Id.* Ex. A. On September 30, 2015, Mr. Nader
15 sent Plaintiff's counsel an email letting him know that the Committee was waiting for a
16 response from Zimmer, which it expected to receive by mid-October, and that the
17 Committee would give Plaintiff the opportunity to reply to the company's response. *Id.*
18 Ex. Y. On November 4, 2015, Zimmer responded to Plaintiff's appeal with a letter from
19 Mr. Hwang to the Committee. *Id.* Ex. Z. On November 23, 2015, Plaintiff submitted his
20 reply to Zimmer's response. *Id.* Ex. BB. On December 23, 2015, Mr. Nader, on behalf of
21 the Committee, sent Plaintiff's counsel a letter notifying him that the Committee had
22 denied Plaintiff's appeal. *Id.* Ex. C.

23 The Committee's decision letter discusses Plaintiff's arguments for why the initial
24 decision to deny him severance benefits was erroneous, along with the company's
25 response, and concludes that Plaintiff "intended to pre-ship goods and nonconforming
26 product contrary to normal Company business practice for the purpose of appearing to meet
27 2014 sales goals and earn a bonus." *Id.* Ex. C at 104. The letter further noted that "[f]or
28 each action reviewed, Mr. Boy provides a reason for his conduct. Each reason, however,

1 is undermined by his acknowledgment that the actions were to meet 2014 sales targets.”

2 *Id.* Ultimately, the Committee found that Plaintiff’s:

3 actions to pre-ship goods, ship products that did not meet a customer’s orders
4 or procedures, and request favors to book sales in 2014, are all actions that are
5 “actually or potentially detrimental to the interests of the Company.”
6 Furthermore, the Committee finds that his actions to seek favors from Hakuho
7 [a Zimmer Dental customer] could have potentially caused significant harm
8 to the Company by adversely affecting its relationship with Hakuho.

9 Given the potential harm to the Company and Mr. Boy’s self-interested
10 reasons to undertake such actions, the Committee finds the reasons for
11 separation, even if not constituting fraud, satisfy both of the foregoing reasons
12 that benefits are not payable under the terms of the Plan. As such, Mr. Boy’s
13 appeal is denied.

14 The Administrative Committee considered Mr. Boy’s assertion that he was
15 acting under the direction of his superior, Harold Flynn. Given Mr. Boy’s
16 longevity with the Company and senior position, the Administrative
17 Committee concluded that, even if true, Mr. Boy’s conduct is not excused. At
18 a minimum, Mr. Boy should have reported the alleged conduct to Mr. Flynn’s
19 supervisors. Mr. Flynn’s alleged actions and whether he should have been
20 terminated, as suggested in your letter, is not before the Administrative
21 Committee.

22 *Id.*

23 On January 26, 2016, Plaintiff filed the instant lawsuit under the Employee Retiree
24 Income Security Act of 1974 (“ERISA”). The FAC asserts two claims: (1) unlawful denial
25 of plan benefits in violation of 29 U.S.C. § 1132(a)(1)(B); and (2) penalties for failure to
26 provide relevant documentation relevant to his benefits claim in violation of 29 U.S.C. §
27 1132(c) and 29 C.F.R. 2560.503-1(h)(2)(iii). Defendants move for summary judgment on
28 both claims.

24 **II. Legal Standard**

25 Ordinarily, a party is entitled to summary judgment “if the pleadings, depositions,
26 answers to interrogatories, and admissions on file, together with the affidavits, if any, show
27 that there is no genuine issue as to any material fact and that the moving party is entitled
28 to a judgment as a matter of law.” *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

1 “[H]owever, [] where the abuse of discretion standard applies in an ERISA benefits denial
2 case, ‘a motion for summary judgment is merely the conduit to bring the legal question
3 before the district court and the usual tests of summary judgment, such as whether a
4 genuine dispute of material fact exists, do not apply.’” *Nolan v. Heald College*, 551 F.3d
5 1148, 1154 (9th Cir. 2009) (quoting *Bendixen v. Standard Ins. Co.*, 185 F.3d 939, 942 (9th
6 Cir. 1999)).

7 **III. Discussion**

8 **A. Unlawful Denial of Benefits, 29 U.S.C. § 1132(a)(1)(B)**

9 In their papers, both parties focus almost exclusively on the standard of review that
10 the Court should apply to Plaintiff’s unlawful denial of benefits claim. Defendants argue
11 that the Court is required to review the Committee’s decision denying severance benefits
12 under an abuse of discretion standard. Plaintiff, meanwhile, argues that the Court should
13 exercise de novo review. Ultimately, the Court need not resolve this dispute. Although
14 Plaintiff raises legitimate concerns about the procedures used by the Plan and the
15 Committee to administer Plaintiff’s claim, and whether, as a result of those procedures, the
16 Committee’s decision denying Plaintiff severance benefits warrants deference, the
17 Committee’s decision was correct even using a de novo review.

18 Plaintiff frames the question before the Committee, and before the Court in the
19 lawsuit, as a determination of whether Zimmer Dental was justified in terminating Plaintiff
20 for grounds that rendered him ineligible for severance benefits. In other words, according
21 to the Plaintiff, the question is whether Plaintiff actually committed willful misconduct or
22 some other wrongdoing that warranted his termination by Zimmer Dental. The Plan,
23 however, states that an employee is not eligible for benefits if his “*employment is*
24 *terminated for . . . [w]illful misconduct or activity deemed actually or potentially*
25 *detrimental to the interests of the Company, which may include, but is not limited to,*
26 *dishonesty; theft; violation of one or more Company policies” or for “[a]ny act or omission*
27 *causing, or having potential to cause, significant harm or loss to the Company, its officers*
28 *and/or employees,” is ineligible for benefits. Moore Dec., Ex. B at 88 (emphasis added).*

1 Thus, the question for the Committee, and now for this Court, is not whether Plaintiff
2 actually engaged in willful misconduct or took other actions that rendered him ineligible
3 for severance benefits. The question is only whether Zimmer Dental terminated Plaintiff
4 for willful misconduct or other actions that rendered him ineligible for severance benefits.
5 On this latter question, the answer is clear from the undisputed facts before the Court.

6 In the March 6, 2015, letter terminating Plaintiff's employment, Zimmer Dental
7 stated that the reason for Plaintiff's termination was that he had "engaged in serious
8 misconduct by deliberately engaging in fraudulent sales activity," and that his actions
9 constituted "dishonesty" and "resulted in the falsification of company records, which is
10 serious misconduct under Zimmer's Code of Business Conduct and behavior of employees
11 policy." Moore Dec. Ex. A at 23. Plaintiff does not dispute that he actually performed the
12 acts that Zimmer Dental concluded to be "serious misconduct" in the letter or that Zimmer
13 Dental terminated Plaintiff based on this conclusion. Rather, Plaintiff simply disagrees
14 with Zimmer Dental's conclusion that his actions constituted willful misconduct and argues
15 that his actions were not inappropriate. However, in making a benefits decision, it is not
16 for the Committee or this Court to investigate whether Zimmer Dental was correct, or
17 justified, in its conclusions Plaintiff's actions constituted "willful misconduct" and in
18 terminating him based on those conclusions. The only relevant question here is whether
19 Zimmer Dental actually terminated Plaintiff for reasons that rendered him ineligible for
20 severance benefits. Plaintiff may not think he did anything the justified termination for
21 cause, but there is no dispute that Zimmer Dental terminated him for acts that it concluded
22 were willful misconduct. Accordingly, the Committee did not wrongfully deny Plaintiff
23 severance benefits under the Plan, and Defendants are entitled to summary judgment on
24 Plaintiff's first claim.

25 **B. Penalties for Failure to Provide Relevant Documentation, 29 U.S.C.**
26 **§ 1132(c) and 29 C.F.R. § 2560.503-1(h)(2)(iii)**

27 "Under 29 U.S.C. § 1132(c)(1), a plan administrator who 'fails or refuses to comply
28 with a request for any information which such administrator is required by this subchapter

1 to furnish . . . within 30 days after such request may in the court’s discretion be personally
2 liable to such participant or beneficiary in the amount of up to \$100 a day from the date of
3 such failure or refusal.” *Lee v. ING Groep, N.V.*, 829 F.3d 1158, 1160 (9th Cir. 2016).
4 On the other hand, “29 C.F.R. § 2560.503–1(h)(2)(iii) requires employee benefits plans to
5 ‘[p]rovide that a claimant shall be provided, upon request and free of charge, reasonable
6 access to, and copies of, all documents, records, and other information relevant to the
7 claimant’s claim for benefits.” *Id.* at 1160-61. In the amended complaint, Plaintiff states
8 that he is entitled to penalties from the Committee under 29 U.S.C. § 1132(c) because the
9 Committee “withheld and restricted [his] access to substantial portions of the records and
10 documentation that could contain evidence relevant to his appeal to the Administrative
11 Committee and the Plan.” [Doc. No. 12 at ¶ 29.] The amended complaint makes this claim
12 against the Committee but not against the Plan. [Doc. No. 12 at 7.]

13 In his opposition brief, Plaintiff argues only that summary judgment should be
14 denied on this claim because there is evidence that the Committee did not produce
15 information from a 10-K filing along with various emails and correspondence and therefore
16 did not comply with 29 C.F.R. § 2560.503–1(h)(2)(iii). [Doc. No. 72 at 25.] Regardless
17 of such evidence, the Committee, as Plan administrator, is entitled to summary judgment
18 on this claim because:

19 a failure to follow claims procedures imposed on benefits plans, such as
20 outlined in 29 C.F.R. § 2560.503–1(h)(2)(iii) does not give rise to penalties
21 under 29 U.S.C. § 1132(c)(1). “Plans” and “plan administrators” are separate
22 entities with separate definitions under ERISA. See 29 U.S.C. § 1002(1),
23 (2)(A), (3), (16)(A). Penalties under 29 U.S.C. § 1132(c)(1) can only be
24 assessed against “plan administrators” for failing to produce documents that
25 they are required to produce as plan administrators. 29 C.F.R. § 2560.503–
1(h)(2)(iii) does not impose any requirements on plan administrators, and so
cannot form the basis for a penalty under 29 U.S.C. § 1132(c)(1).

26 *Lee*, 829 F.3d at 1162.

1 **IV. Disposition**

2 In light of the foregoing, Defendants' motion for summary judgment is **GRANTED**.
3 The Clerk of Court is instructed to enter **JUDGMENT** in favor of Defendants and close
4 this case.

5 It is **SO ORDERED**.

6 Dated: June 13, 2017



Hon. Cathy Ann Bencivengo
United States District Judge

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