IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MICHAEL HARRISON, Plaintiff, v. THE PNC FINANCIAL SERVICES GROUP, et al., Defendants.	:	Case No. 3:12-cv-14 JUDGE WALTER H. RICE

DECISION AND ENTRY OVERRULING PLAINTIFF'S MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD (DOC. #30); SUSTAINING IN PART AND OVERRULING IN PART DEFENDANTS' MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD (DOC. #29); GRANTING JUDGMENT IN FAVOR OF DEFENDANTS ON THE CLAIMS FOR FAILURE TO PRODUCE DOCUMENTS (COUNT FOUR) AND FAILURE TO CONSIDER ALL OF CLAIMANT'S INFORMATION (COUNT FIVE) OF PLAINTIFF'S SECOND AMENDED COMPLAINT (DOC. #17); STRIKING THE CLAIM FOR BREACH OF FIDUCIARY DUTY (COUNT TWO) AND DISMISSING WITHOUT PREJUDICE THE CLAIM FOR ATTORNEYS' FEES (COUNT THREE); ORDER REMANDING THE CLAIM FOR BENEFITS (COUNT ONE) TO THE PLAN ADMINISTRATOR FOR A FULL AND FAIR REVIEW IN ACCORDANCE WITH THIS DECISION; TERMINATION ENTRY

Michael Harrison ("Plaintiff" or "Harrison") filed suit against The PNC Financial Services Group ("PNC Group"), The PNC Financial Services Group, Inc., ("PNC"), the National City Corporation Amended and Restated Management Severance Plan (the "Plan"), and the Compensation and Organization Committee of the Board of National City Corporation (the "Committee") (collectively,

"Defendants"), alleging that Defendants improperly denied his claim for severance benefits. Harrison seeks declaratory relief, an award of benefits, attorneys' fees and costs, civil penalties, and punitive damages based on his claims, all of which arise under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq*. This Court has jurisdiction over ERISA claims pursuant to 29 U.S.C. § 1132(e)(1).

Pending before the Court are the parties' Cross-Motions for Judgment on the Administrative Record. The Court has reviewed the arguments set forth in the parties' memoranda, the administrative record, and the applicable law. For the reasons set forth below, the Court OVERRULES Plaintiff's Motion (Doc. #30) and OVERRULES IN PART and SUSTAINS in PART Defendants' Motion (Doc. #29).

I. BACKGROUND AND PROCEDURAL HISTORY[1]

Harrison began working for National City Corporation ("National City") in June of 2005. 2d Am. Compl. ¶ 12 (Doc. #17 at 3); Answer ¶ 12 (Doc. #18 at 4). National City offered a severance plan, originally drafted in 2005, to certain of its senior employees. AR at 1, Plan § 1.1 (Doc. #19-1 at 1). On September 30, 2008, National City implemented an updated version of the severance plan, the National City Corporation Amended and Restated Management Severance Plan (the "Plan"). *Id.* The Plan's stated purpose was "to maximize the Corporation's

[1] A copy of the Administrative Record ("AR") has been filed with the Court. The AR consists of 120 pages and is split into three sections at Doc. #19-1, Doc. #19-2, and Doc. #19-3.

profitability and operating success by attracting and retaining key managerial, operational and executive employees and allowing them to focus on their responsibilities in the event of, and following, a Change in Control." *Id.* at 1, § 1.2. A "Change in Control" included a merger or other corporate reorganization. *Id.* at 2-5, § 2.1(d).

Only National City employees who met the Plan's definition of a "Participant" were eligible for severance benefits. *Id.* at 7, § 3. The Plan defined a "Participant" as:

> [A]n Employee whose job is assigned to a grade level within the range of grade level 1 through grade level 7 pursuant to the Corporation's system for grading jobs, excluding those Employees who are covered by an employment agreement, severance agreement, or other specialized plan at the earlier of the (i) time of termination or [ii] the Implementation Date that address severance benefits.

Id. at 6, § 2.1(r). The Plan defined the "Implementation Date" as the earliest of a series of events related to a corporate merger or restructuring. *Id.* at 6, § 2.1(m).

The benefits for an eligible Participant included a year of severance pay, which included the Participant's "base salary," bonuses and incentive pay, and, in lieu of employee benefits, an additional one quarter percentage of the participant's base salary. *Id.* at 8, § 4.1. The Plan set a fifteen month period as the "Protection Period," during which time a Participant would be eligible for severance benefits if he or she faced involuntarily termination. *Id.* at 7, §§ 2.1(u) & 3.1. In addition, the Plan allowed a Participant to voluntarily terminate his or her employment and

claim severance benefits in the event of either a salary reduction or a relocation to a new principal place of work more than 50 miles away. *Id.* at 7-8, § 3.2.

In December 2008, PNC acquired National City. 2d Am. Compl. ¶ 12 (Doc. #17 at 3); Answer ¶ 12 (Doc. #18 at 4). The Plan Administrator construed the Plan's defined "Implementation Date" as December 31, 2008, based on the Change of Control that occurred because of the acquisition. *Id.* at 35-36.[2]

On March 15, 2010, Harrison provided PNC with two weeks' written notice of his intent to voluntarily terminate his employment and formally requested severance benefits under the Plan. AR at 16 (Doc. #19-1 at 16). Harrison stated that PNC's enlargement of his "assigned geographic region" to nine states in addition to Ohio had the effect of changing his principal work location by a distance of more than 50 miles, thereby entitling him to "full severance benefits" under the Plan. *Id.*

On April 28, 2010, PNC, though a letter from John R. Johnson, its Chief Counsel, acknowledged that Harrison had asserted a claim for severance benefits under the Plan. *Id.* at 17. In the letter, PNC informed Harrison that he was not an eligible Participant in the Plan because he had not been promoted to the grade level of E07 until after the "Implementation Date" of December 31, 2008. *Id.* PNC advised Harrison that he was free to file a claim with the Plan Administrator. *Id.*

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[2] Harrison appears to accept the Plan Administrator's determination that the "Implementation Date" was December 31, 2008. Doc. #30 at 3-4.

On May 25, 2010, through counsel, Harrison submitted a claim for benefits to the Plan Administrator. *Id.* at 21. In the claim, Harrison asserted that he had been promoted to the E07 grade level that would qualify him for severance benefits before December 31, 2008: "Beginning in June 2005 and continuing through March 2007, Mr. Harrison was employed as the Midwest Division Sales Manager, which position was assigned an E07 grade level and was severance eligible." *Id.* at 22-23. Harrison also pointed out that he was "promoted to a Regional Manager position, which was identified as a 'severance eligible' position," on July 1, 2009.

In support of his claim, Harrison submitted five documents. The first document was an undated "Information Statement" from PNC stating that Harrison's PNC Job title was "MTG ORIG REGIONAL MGR" and his PNC Grade was 25. *Id.* at 26. Second, Harrison submitted an email chain containing emails dated October 1, 2009, and October 5, 2009. *Id.* at 27. The October 1, 2009, email was from Catherine Grover, to a group of persons that did not include Harrison. It stated that "a change [] will be effective January 1, 2010, for our Loan Officers and Supervising LOs," that would replace the "National City Severance Plan" with the "PNC Severance Plan." *Id.* at 27. Under the new plan, any "eliminate[d] Loan Officers" would be paid severance benefits based on their years of experience, as set forth on a schedule included with the email. *Id.* The October 5, 2009, email was from one of the recipients of Grover's email, who forwarded it to a group of persons that included Harrison.

Harrison also submitted a Memorandum dated June 26, 2009, from "Human Resources" to "Mortgage Origination Employees."[3] *Id.* at 28. The Memorandum stated that a review of positions had been performed to determine whether certain employees "would be eligible to participate in the National Severance Benefits Plan." *Id.* According to a table in the Memorandum, persons with the title "Mortgage Origination Regional Manager" were eligible for the National City Severance Benefits Plan. *Id.*

The fourth document that Harrison submitted contained a series of "Frequently Asked Questions" about the "Management Severance Plan." *Id.* at 30. It stated that the "contemplated transaction" with PNC would qualify as a "Change in Control" and summarized that plan's requirements for benefits eligibility. *Id.*

The fifth document that Harrison submitted with his claim was an email dated July 13, 2009, from a PNC manager that announced a reorganization of National City's "Midwest Division from four regions to six." *Id.* at 32. Harrison was identified as the Regional Manager of the Southwest Ohio and Central Ohio regions of the Midwest Division. *Id.* The email also contained an organizational chart that identified the employees above and below Harrison in the Midwest Division. *Id.* at 33.

On July 27, 2010, the Plan Administrator wrote to Harrison's attorney and informed him that Harrison's claim had been denied. *Id.* at 34. The Plan

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[3] The Memorandum was attached to Harrison's claim as Exhibit C. It appears that it was part of, or attached to, the October 1, 2009, email from Catherine Grover.

Administrator acknowledged receiving the documents that Harrison had submitted, but stated that none of them indicated that Harrison had the grade level of E07 as of December 31, 2008, that would entitle him to severance pay. *Id.* at 35. PNC's records indicated that Harrison's grade level was E50 as of that date, and the Plan Administrator therefore concluded that Harrison was not eligible for severance benefits under the Plan. *Id.*

On August 31, 2010, Harrison's attorney sent a letter to the Plan Administrator requesting "copies of all documents, files, records, and information, which directly or indirectly relate to or concern Mr. Harrison's demand for severance benefits," including his personnel file and a copy of the Plan. AR at 37 (Doc. #19-2 at 1). Follow up letters were sent on September 17, 2010, and September 23, 2010. *Id.* at 39-40.

On October 7, 2010, the Plan Administrator responded, but refused to provide all the documents that Harrison had requested, finding many of them "beyond the scope of what is required to be produced . . . under ERISA." *Id.* at 45. The Plan Administrator did provide documentation regarding Harrison's job title and grade as of December 31, 2008, and a copy of the Plan. *Id.* at 47-62.

Harrison's attorney wrote to the Plan Administrator on December 3, 2010, to make a "second level appeal" of the claim. AR at 78 (Doc. #19-3 at 1). The appeal asked the Plan Administrator to "review again [the] June 26, 2009, memorandum from Human Resources," as Harrison believed that it made him "eligible to participate in the National City Severance Benefits Plan." *Id.*

The Plan Administrator replied on December 17, 2010, informing Harrison that the Committee had reviewed his appeal and determined that he was not eligible for benefits. *Id.* at 81. The denial affirmed the ineligibility determination of Harrison's original claim, stating that PNC's records showed that Harrison did not have the required grade level as of December 31, 2008. *Id.* at 82. The Committee rejected Harrison's argument that the June 26, 2009, Human Resources Memorandum demonstrated otherwise:

> The Committee has further considered, and disagreed with, your argument that the June 26, 2009 Memorandum to Mortgage Origination Employees (the "Memorandum") acted to amend the terms of the Plan. Specifically, even assuming that the Memorandum could act to amend the terms of a severance arrangement (a point which the Committee does not concede), **the Memorandum explicitly addresses eligibility for severance benefits under the National City Severance Benefits Plan (the "NC Severance Plan"). The NC Severance Plan is separate and distinct from the Plan under which Mr. Harrison now seeks severance benefits, namely, the National City Management Severance Plan.** Therefore, as the Memorandum does not address eligibility for severance benefits under the terms of the Plan at issue, the Committee has determined that its provisions are irrelevant with respect to the question presently under consideration.

Id. (emphasis added). The Committee also stated that even if Harrison had made a claim under the NC Severance Plan, he would not have been eligible for benefits under it because his employment had not been involuntarily terminated. *Id.*

On February 4, 2011, Harrison wrote to the Plan Administrator to request a copy of the NC Severance Plan. *Id.* at 84. The Plan Administrator replied on March 4, 2011, and provided a copy of both the NC Severance

Plan and the "PNC Displacement Plan," another plan for severance benefits that was in effect in January of 2010.

On January 26, 2012, Harrison filed suit against PNC Group and PNC Financial Services, alleging the following five claims, all arising under ERISA: 1) a claim for recovery of benefits under 29 U.S.C. § 1132(a)(1)(B); 2) a claim for breach of fiduciary duty under 29 U.S.C. § 1132(a), arising from liability under 29 U.S.C. §§ 1104, 1105 & 1109; 3) a claim for attorney's fees under 29 U.S.C. § 1132(g); 4) a claim for failure to produce documents under 29 U.S.C. § 1132(c); and 5) a claim for liability under 29 U.S.C. § 1132(c) for failing to consider all information relevant to Harrison's claim, as required by 29 C.F.R. § 2560.503-1(h)(2). Doc. #1. Harrison sought declaratory relief, recovery of his benefits with interest, attorneys' fees and costs, all applicable ERISA civil penalties, and punitive damages. On May 5, 2012, Harrison filed an Amended Complaint, adding the Plan as a named defendant. Doc. #4.

Defendants filed a Motion to Dismiss for Failure to State a Claim on July 10, 2012. Doc. #8.

On March 13, 2013, the Court dismissed Count Two of the Amended Complaint, Harrison's claim for breach fiduciary duty under 29 U.S.C. § 1132(a), but overruled Defendants' Motion insofar as it sought dismissal of Harrison's other claims. Doc. #16. The Court also ordered Harrison to file a Third Amended Complaint that named the Committee as a Defendant. The parties were also ordered to file the complete administrative record with the Court, and a briefing

schedule for the filing of Cross-Motions for Judgment on the Administrative Record and Reply Memoranda was set.

Defendants filed their Motion for Judgment on the Administrative Record on November 8, 2013 (Doc. #29), and Plaintiff's motion was filed on November 11, 2013 (Doc. 30). On November 25, 2013, the parties filed Reply Memoranda. Doc. #31 (Defendants' Response in Opposition) & Doc. #32 (Plaintiff's Supplemental Brief in Support of Motion for Judgment on the Administrative Record).

II. STANDARD OF REVIEW

A *de novo* standard applies to the judicial review of denied ERISA benefits "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). If a plan "expressly affords discretion" to the plan administrator, a court must apply an arbitrary and capricious standard of review to the administrator's determinations. *Williams v. Int'l Paper Co.*, 227 F.3d 706, 711 (6th Cir. 2000) (citing *Firestone*, 489 U.S. at 109)). Here, Article 14 of the Plan states that the "Plan shall be administered by the Committee," and the "Committee shall have full power and authority to interpret, construe, and administer this Plan and its interpretations and construction hereof, and actions hereunder . . . shall be binding and conclusive on all persons for all purposes." AR at 12 (Doc. #19-1 at 12). As this Court previously

recognized, this language affords the Plan Administrator the discretion described in *Firestone*, and, therefore, the arbitrary and capricious standard of review applies to the Plan Administrator's decision to deny Harrison's claim for benefits. Doc. #16 at 15.

The arbitrary and capricious standard of review is the "least demanding form of judicial review" of a plan administrator's determination. *Williams*, 227 F.3d at 712. Under this standard, "the decision denying benefits must be upheld so long as it is 'the result of a deliberate, principled reasoning process and if it is supported by substantial evidence.'" *Cultrona v. Nationwide Life Ins. Co.*, 748 F.3d 698, 704 (6th Cir. 2014) (*quoting Helfman v. GE Grp. Life Assurance Co.*, 573 F.3d 383, 392 (6th Cir.2009)). Put another way, the arbitrary and capricious standard requires upholding the plan administrator's determination "if it is 'rational in light of the plan's provisions.'" *McClain v. Eaton Corp. Disability Plan*, 740 F.3d 1059, 1064 (6th Cir. 2014) (quoting *Marks v. Newcourt Credit Group, Inc.*, 342 F.3d 444, 457 (6th Cir. 2003)). Although the arbitrary and capricious standard is deferential, the "review is no mere formality," and a court does not, therefore, "merely rubber stamp the administrator's decision." *Glenn v. MetLife*, 461 F.3d 660, 666 (6th Cir. 2006) (quoting *Jones v. Metro. Life Ins. Co.*, 385 F.3d 654, 661 (6th Cir.2004)).

Because the "review of the decision of a plan administrator is limited to the administrative record," a court may "'consider only the facts known to the plan administrator' at the time of the decision." *Judge v. Metropolitan Life Ins. Co.*,

710 F.3d 651, 658 (6th Cir. 2013) (quoting *Yeager v. Reliance Standard Life Ins. Co.*, 88 F.3d 376, 381 (6th Cir.1996)).

III. ANALYSIS

The Court must address two preliminary matters before considering the parties' motions. First, Harrison repeated his claim for breach of fiduciary duty under 29 U.S.C. § 1132(a) in Count Two in the Second Amended Complaint, even though he was granted leave to amend for the sole purpose of naming the Committee as a Defendant. In its Decision and Entry of March 1, 2013, the Court dismissed Harrison's claim for breach of fiduciary duty with prejudice. Doc. #16. The Court will, therefore, strike Count Two from the Second Amended Complaint, in accordance with its discretion under Rule 12(f)(1) of the Federal Rules of Civil Procedure to strike "immaterial" matter from pleadings.

Second, it is clear that Harrison has abandoned all claims stated in the Second Amended Complaint except Count One, his claim for recovery of denied benefits under 29 U.S.C. § 1132(a)(1)(B), and Count Three, the claim for attorneys' fees under 29 U.S.C. § 1132(g). The arguments in support of his Motion for Judgment on the Administrative Record fail to support, or even mention, his claims under 29 U.S.C. § 1132(c) for failure to produce documents (Count Four) or failure to consider all information relevant to his claim (Count Five). Defendants' Motion for Judgment on the Administrative Record addresses each of those claims, but in his Reply Brief, Harrison again fails to support said claims.

Accordingly, the Court considers them waived, and will sustain Defendants' Motion for Judgment on the Administrative Record insofar as it seeks judgment in their favor on Count Four, failure to produce documents, and Count Five, failure to consider all information relevant to his claim.

Thus, the only remaining claims to address are Count One, Harrison's claim for recovery of denied benefits under 29 U.S.C. § 1132(a)(1)(B), and Count Three, the claim for attorneys' fees under 29 U.S.C. § 1132(g). The Court will consider each party's Motion for Judgment on the Administrative Record separately, starting with that of the Plaintiff.

A. Harrison's Motion for Judgment on the Administrative Record (Doc. #30)

In support of his Motion for Judgment on the Administrative Record, Harrison argues that the June 26, 2009, Human Resources Memorandum "changed the conditions associated with eligibility" because it stated that his position was one that PNC had reviewed and expressly determined to be eligible for severance benefits. Doc. #30 at 3-4, 5-7. Harrison compares the Memorandum to a summary plan description ("SPD"), and argues that "it is analogous to cases where there is an inconsistency between the SPD and the formal plan documents." *Id.* at 6. Citing *Haus v. Bechtel Jacobs Co., LLC*, 491 F.3d 557 (6th Cir. 2007), in which the Sixth Circuit stated that it had "previously held that where statements made in summary plan descriptions conflict with statements made in the plans themselves, the summary plan descriptions are

controlling," Harrison argues that the provisions of the Memorandum should "overrule" those of the Plan. *Id.*

Defendants make two counterarguments in response. First, they argue that the June 26, 2009, Human Resources Memorandum referred to the "National City Severance Benefits Plan," an "entirely different plan than the Plan at issue in this case," and is, therefore, of no relevance to Harrison's claims under the Plan. Doc. #31 at 11. Second, they argue that even if the Memorandum did address the Plan, or could somehow be construed as an SPD of the Plan, Harrison's argument that the provisions of an SPD can override the terms of an ERISA plan depends upon "rejected and overruled" cases, as recent Supreme Court authority holds that "the terms of an SPD cannot be enforced over conflicting terms of an employee benefit plan" in a claim for recovery of benefits under 29 U.S.C. § 1132(a)(1)(B). *Id.* at 11-12 (citing *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011) and *U.S. Airways, Inc. v. McCutcheon*, 133 S. Ct. 1537 (2013)).

As Defendants point out, the June 26, 2009, Human Resources Memorandum had no effect on Harrison's eligibility for severance benefits under the Plan for the simple reason that it concerned an entirely different ERISA plan. In two places, the Memorandum expressly stated that it addressed eligibility for the "National City Severance Benefits Plan." AR at 28 (Doc. #19-1 at 27). Furthermore, the email forwarded to Harrison, to which the Memorandum was attached, also referenced the "National City Severance Plan." *Id.* at 27. Harrison, however, brought his claim under "The National City Corporation Amended and

Restated Management Severance Plan." He referred to the Plan by its full name in his March 15, 2010, email that gave notice of his intent to terminate his employment. AR at 16 (Doc. #19-1 at 16). In the same email, Harrison stated that he was "requesting full severance benefits provided by Article 4" of the Plan. *Id.* After retaining counsel, Harrison made his May 25, 2010, claim to the Plan Administrator expressly under the Plan, and again invoked it by its full name. AR at 21 (Doc. #19-1 at 21).

In the December 17, 2010, denial of Harrison's second level appeal, the Plan Administrator addressed Harrison's argument that the Memorandum affected his eligibility for benefits under the Plan. The Plan Administrator stated that the June 26, 2009, Memorandum "explicitly addresses eligibility for severance benefits under the National City Severance Benefits Plan (the "NC Severance Plan"). The NC Severance Plan is separate and distinct from the Plan under which Mr. Harrison now seeks severance benefits, namely, the National City Management Severance Plan." AR at 82 (Doc. #19-3 at 5). Then, in response to a request made after the denial of his second level appeal, the Plan Administrator provided Harrison with a copy of the "National City Severance Benefits Plan." *Id.* at 85 (Doc. #19-3 at 8).

As the Plan Administrator explained, it is evident from the titles that they are two distinct plans. The fact that the June 26, 2009, Human Resources Memorandum stated that Harrison's position was eligible for benefits under one plan, the "National City Severance Benefits Plan," did not make his position eligible for benefits under a different plan, under which he made his claim.

Harrison also points to a "Frequently Asked Questions" ("FAQ") document for the "Management Severance Plan," which he argues clearly references the Plan, and asserts that it accompanied the June 26, 2009, Human Resources Memorandum. The FAQ does reference the Plan, as its summary of "[w]hat would trigger benefits under the Management Severance Plan" describes the eligibility requirements of the Plan, with specific reference to Article 3. However, in contrast to Harrison's assertion, it is not evident from the Administrative Record that this document "accompanied" the June 26, 2009, Human Resources Memorandum. The only thing apparent from the record itself is that Harrison himself attached it as an exhibit to his May 25, 2010, benefits claim as an exhibit separate from the Memorandum. Furthermore, the FAQ does not contain the heading or continue the pagination of the email trail and the attached Memorandum. Even if had been attached to the Memorandum, however, the FAQ refers to the "Management Severance Plan," while the Memorandum refers to the "National City Severance Benefits Plan." The FAQ, which referred to the Plan itself, only reinforces the fact that there were two distinct plans.

Harrison also argues that Defendants "should be estopped from denying" his eligibility under the Plan because they "have engaged in a pattern of referencing [] various severance plans under a variety of names, which although may not be calculated intentionally confuse employees, certainly has that effect." Doc. #32 at 3. Harrison did not plead a claim of ERISA estoppel and cannot raise the argument in his Reply Brief as a basis for obtaining judgment in his favor. Even if he had

plead such a claim, there is no evidence in the Administrative Record that Defendants "intended deception or such gross negligence as to amount to constructive fraud," or the "extraordinary circumstances" required to support a claim of ERISA estoppel. *Bloemker v. Laborers' Local 265 Pension Fund*, 605 F.3d 436, 444 (6th Cir. 2010).

In Harrison's Reply Brief, he complains that the Plan Administrator's statement that the plans were distinct "was not made to Plaintiff until six months after Plaintiff made his decision to resign and request severance benefits. Why not inform Plaintiff of this interpretation at the time he resigned? Why wait until it is too late for Mr. Harrison to retract his resignation?" Doc. #32 at 3-4. However, Harrison's resignation email made no mention of the June 26, 2009, Memorandum. AR at 16 (Doc. #19-1 at 16). Harrison's email referenced the Plan by its full name and invoked the specific provisions that addressed benefits eligibility, with no reference to any other document that was the basis for, or relevant to, his claim. Thus, there was no way for PNC to know that Harrison had decided to resign due to the mistaken belief that June 26, 2009, Memorandum affected his eligibility under the Plan. Furthermore, Harrison was put on notice *before* his employment terminated that he was not eligible for severance benefits under the Plan. *See* AR at 17 Doc. #19-1 at 17) (stating that Harrison had been "informed by Mr. Cartellone, prior to the effective date of your resignation, that you would not be eligible for benefits under the [Plan]"). Thus, Harrison was not blindsided by the claim denial after resigning, as he suggests in his Reply Brief.

Harrison's argument that the June 26, 2009, Memorandum is "analogous" to an SPD and should, therefore, be enforced over the terms of the Plan must also be rejected. As Defendants suggest, the argument relies on a proposition that probably cannot withstand the holding of *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011). In *Amara*, the Supreme Court rejected the argument that the terms of a SPD could be enforced in an action under 29 U.S.C. § 1132(a)(1)(B), such as Harrison's, which only allows a claim "to recover benefits due to [a participant] under the terms of his plan." *See Amara*, 131 S. Ct. at 1877 (holding that "the summary documents, important as they are, provide communication with beneficiaries *about* the plan, but [] their statements do not themselves constitute the *terms* of the plan for purposes of [29 U.S.C. § 1132(a)(1)(B)]"). Thus, even if the June 26, 2009, Memorandum did purport to communicate eligibility information under the Plan, or could otherwise be considered an SPD of the Plan, none of its terms could be enforced by a claim such as Harrison's, brought under 29 U.S.C. § 1132(a)(1)(B).

As *Amana* emphasizes, the terms of the Plan itself are what would entitle Harrison to any recovery. A claim for recovery of benefits under 29 U.S.C. § 1132(a)(1)(B) may only be brought "by a participant or beneficiary" of an ERISA plan. Here, the Plan's definition of a "Participant" was restricted to those employees "assigned to a grade level within the range of grade level 1 through grade level 7," but there is nothing in the Administrative Record to demonstrate that Harrison ever had the requisite grade level to qualify as a Participant.

According to a document dated January 1, 2009, Harrison's job grade was E50, and his "Grade Entry Date" was October 1, 2007. AR at 47 (Doc. #19-2 at 11). The only other primary documentation of Harrison's job grade in the Administrative Record is the undated "Information Statement" that Harrison submitted with his claim, which states that his "PNC Grade" is "25." Neither document establishes that Harrison had the grade level that the relevant Plan required of a Participant. Thus, Harrison cannot establish that he was entitled to recover any benefits under the Plan under 29 U.S.C. § 1132(a)(1)(B). Accordingly, his Motion for Judgment on the Administrative Record must be overruled.

B. Defendant's Motion for Judgment on the Administrative Record (Doc. #29)

Defendants argue that Harrison never qualified as a Participant under the unambiguous terms of the Plan. Doc. #21 at 18-21. According to Defendants, not only did the Plan's terms require a Participant to have "a grade level within the range of grade level 1 through grade level 7," a qualifying Participant also had to have that grade level as of December 31, 2008. *Id.* Because Harrison's job had a grade of E50 on December 31, 2008, Defendants argue that Harrison did not qualify as a Participant in the Plan. *Id.*

ERISA requires a plan to "be written in a manner calculated to be understood by the average plan participant." 29 U.S.C. § 1022(a). Under the arbitrary and capricious standard of review, a plan administrator's interpretation of an ERISA plan will be upheld if it is reasonable. *Morrison v. Marsh & McLennan Cos., Inc.*,

439 F.3d 295, 300 (6th Cir.2006). "When interpreting ERISA plan provisions, general principles of contract law apply; unambiguous terms are given their 'plain meaning in an ordinary and popular sense.'" *Lipker v. AK Steel Corp.*, 698 F.3d 923, 928 (6th Cir. 2012) (quoting *Farhner v. United Transp. Union Discipline Income Prot. Program*, 645 F.3d 338, 343 (6th Cir.2011)); *see also Hunter v. Caliber Sys., Inc.*, 220 F.3d 702 (6th Cir. 2000) (referring to "[g]eneral rules of contract interpretation incorporated as part of the federal common law" to guide courts in the construction of ERISA plans). "In interpreting a plan, the administrator must adhere to the plain meaning of its language as it would be construed by an ordinary person." *Morgan v. SKF USA, Inc.*, 385 F.3d 989, 992 (6th Cir. 2004).

Here, the disputed provision of the Plan is its definition of a Participant. In its entirety, the provision defines a "Participant" as:

> [A]n Employee whose job is assigned to a grade level within the range of grade level 1 through grade level 7 pursuant to the Corporation's system for grading jobs, excluding those Employees who are covered by an employment agreement, severance agreement, or other specialized plan at the earlier of the (i) time of termination or [ii] the Implementation Date that address severance benefits.

Id. at 6, § 2.1(r).

In its July 27, 2010, letter denying Harrison's claim, the Plan Administrator set forth the following interpretation the Plan's definition of "Participant":

> Pursuant to Section 2.1(r) of the Plan, a "participant" is defined as "an Employee whose job is assigned to a grade level within the range of grade level 1 through grade level 7 pursuant to the Corporation's system for grading jobs . . . at the earlier of the [] time of termination

> or Implementation Date . . . ." Section 2.1(m) of the Plan defines "implementation date" as the date upon which a change in control occurs, which in the present instance was December 31, 2008. Accordingly, to qualify as a participant in the Plan within the meaning of Section 2.1(r), Mr. Harrison must have achieved a job grade level of 1 through 7 as of December 31, 2008.

AR at 35 (Doc. #19-1 at 35) (ellipses and brackets in original).

The Plan Administrator's interpretation fails to "adhere to the plain meaning of its language as it would be construed by an ordinary person." *Morgan*, 385 F.3d at 992. The plain meaning of the Plan's definition of Participant is evident from the phrase "an Employee whose job is assigned to a grade level within the range of grade level 1 through grade level 7 pursuant to the Corporation's system for grading jobs." Excluded are "those Employees who are covered by an employment agreement, severance agreement, or other specialized plan at the earlier of the (i) time of termination or [ii] the Implementation Date that address severance benefits." In the original language of the Plan, an exclusion clause begins after the comma that marks the end of the general definition of a Participant, and it is only within the exclusion clause that the date requirement ("at the earlier of the (i) time of termination or [ii] the Implementation Date") appears. Thus, an Employee who would otherwise qualify as a Participant because his or her job is assigned the required grade level will be rendered ineligible if another "employment agreement, severance agreement, or other specialized plan" covers him or her on the earlier of the two possible dates. Furthermore, the date requirement is completely embedded within the exclusion clause in a position that

makes it only reasonable to apply it to an Employee covered by "an employment agreement, severance agreement, or other specialized plan." The date requirement follows the list of types of plans that would disqualify an employee, and appears before the dependent clause "that address severance benefits," which refers back to the list of disqualifying plans.

The Plan Administrator's interpretation, however, deletes all the language of the exclusion clause *except* the date requirement. The deletion has the effect of creating a new requirement for an eligible Participant: "an Employee whose job is assigned to a grade level within the range of grade level 1 through grade level 7 pursuant to the Corporation's system for grading jobs . . . at the earlier of the [] time of termination or Implementation Date . . . ." By excising the date requirement from the exclusion clause and imposing it on the language that precedes the clause, the Plan Administrator's interpretation materially alters the terms of eligibility.

Because of the discretion afforded to the Plan Administrator, the Court is cognizant of its obligation to defer to a reasonable interpretation of the Plan. "Discretion to interpret a plan, however, does not include the authority to add eligibility requirements to the plan." *Jones v. Metro. Life Ins. Co.*, 385 F.3d 654, 661 (6th Cir. 2004). In *Jones*, the Sixth Circuit held that it was arbitrary and capricious for the insurer to add eligibility requirements "under the guise of interpreting" an undefined term in an ERISA plan. The plan provided accidental injury benefits, but did not define "accident." *Id.* at 665. The plaintiff injured her

knee while squatting at work, but the insurer denied her claim because it interpreted an "accident" to require "unusual activity" or an "external force or event." Because neither requirement "exist[ed] in either the Plan documents or federal common law," the insurer's interpretation was held to be arbitrary and capricious. Here, although the date requirement existed in Section 2.1(r) of the Plan, it occurred in the exclusion clause that followed the eligibility requirement. The Plan Administrator's interpretation manipulated the language in Section 2.1(r) of the Plan and added an eligibility requirement that did not exist before. Under *Jones*, the Plan Administrator's interpretation was arbitrary and capricious.

As a result of this interpretation, the Plan Administrator found that only two facts were "relevant" to Harrison's claim: the fact that his "job title on December 31, 2008 was Mortgage District Manager," and the fact that "[h]is job grade on December 31, 2008, was E50." AR at 34 (Doc. #19-1 at 34). These facts were gleaned from a review of PNC's "job grade records as effective on December 31, 2008." *Id.* Because only these facts were considered, the Plan Administrator's denial of Harrison's claim was arbitrary and capricious.

Due to the temporal restriction that the Plan Administrator's interpretation imposed on the evidence considered, there is very little in the Administrative Record that demonstrates the grade level assigned to Harrison's job at the time he made his claim. There are two documents that touch on the issue, but neither of them is sufficiently probative to determine whether or not Harrison was eligible. The first is the "Information Statement" that Harrison submitted with his claim,

stating that his PNC Job title was "MTG ORIG REGIONAL MGR" and his PNC Grade was 25. *Id.* at 26. This document does not establish that Harrison had the required grade level, but it is also unknown if the Plan Administrator would find it relevant based on a plain reading of the eligibility requirements. For example, it is unknown if the PNC Grade is equivalent to a National City job grade "within the range of grade level 1 through grade level 7," as required by the Plan.

The second document relevant Harrison's grade level is the April 28, 2010, letter from PNC's counsel. AR at 17 (Doc. #19-1 at 17). Therein, PNC appears to acknowledge that Harrison did attain the grade level required to qualify as a Participant: "You were not promoted to a grade E07 until after December 31, 2008, and therefore you were never a participant in the [Plan] and are not entitled to benefits thereunder." *Id.* However, Harrison did not submit this letter with his claim, and it does not appear in the list of documents reviewed by the Plan Administrator. This Court may not review evidence that was not presented to the Plan Administrator when adjudicating the merits of an ERISA claim. *Wilkins v. Baptist Healthcare Sys., Inc.*, 150 F.3d 609, 615 (6th Cir. 1998).

Thus, the Court finds that there is insufficient evidence before it to determine whether or not Harrison is entitled to benefits under the Plan. Where an administrator has arbitrarily and capriciously denied a claim, yet the record does not clearly establish that the claimant is entitled to benefits, "the appropriate remedy is to remand to [the plan administrator] for a full and fair inquiry in accordance with this court's precedent." *Elliott v. Metropolitan Life Ins. Co.*, 473

F.3d 613, 623 (6th Cir. 2006). Accordingly, the Court must overrule Defendants' Motion for Judgment on the Administrative Record with regards to Count One, Harrison's claim for recovery of benefits under 29 U.S.C. § 1132(a)(1)(B), and will remand the claim for benefits to the Plan Administrator for a full and fair inquiry and review of same.

C. Harrison's Claim for Attorney's Fees and Costs

In an ERISA action brought 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." 29 U.S.C. § 1132(g)(1). In *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242 (2010), the Supreme Court held that the statute does not require a fee claimant to be a "prevailing party" in an ERISA action to recover a fee award. Rather, an award may be given as long as the party achieves "some success on the merits." *Id.* at 256. In *Hardt*, the district court remanded the plaintiff's long term disability claim to the insurance carrier after finding that the carrier had relied on incomplete medical information when denying her claim. *Id.* at 248. Although the district court found "compelling evidence" of the plaintiff's complete disability, it remanded her claim so that the insurance carrier could cure its failure to comply with ERISA guidelines and provide the plaintiff with a full and fair review of her claim. After her claim was approved, the plaintiff filed a motion for attorneys' fees under 29 U.S.C. § 1132(g)(1), which the district court awarded. The Supreme Court upheld the award, finding that the plaintiff had achieved "some success on

the merits" because she had "persuaded the District Court to find that 'the plan administrator [] failed to comply with the ERISA guidelines' and 'that [she] did not get the kind of review to which she was entitled under applicable law.'" *Id.* at 255-256. Thus, a plaintiff who fails to obtain a judgment on a claim for recovery of benefits may still be entitled to attorneys' fees if she can show "some success on the merits." The Supreme Court expressly declined to decide the question of "whether a remand order, without more, constitutes 'some success on the merits' sufficient to make a party eligible for attorney's fees under § 1132(g)(1)." *Id.* at 256.

The Sixth Circuit answered that question in *McKay v. Reliance Standard Life Ins. Co.*, 428 F. App'x 537 (6th Cir. 2011). In *McKay*, the district court awarded attorneys' fees under 29 U.S.C. § 1132(g)(1) to a plaintiff whose case had been remanded for further consideration of his disability claim, which was ultimately denied. The denial was reviewed and upheld by the district court. When the insurer appealed the award of attorneys' fees to the plaintiff, the Sixth Circuit upheld it under *Hardt*, holding that the plaintiff had "'achieved some degree of success' by achieving a remand." *Id.* at 537. Thus, in the Sixth Circuit, a remand order may demonstrate sufficient success on the merits to authorize an award of attorney fees under attorneys' under 29 U.S.C. § 1132(g)(1). *Id*; *see also Thies v. Life Ins. Co. of North Am.*, 839 F. Supp. 2d 886, 894 (W.D. Ky. 2012) (applying *Hardy* and *McKay* and awarding attorneys' fees to plaintiff after remanding claim to defendants for full and fair review of accidental death benefits claim).

One crucial fact distinguishes Harrison from the plaintiffs in *Hardt* and *McKay* that makes it impossible, at the present, for him to litigate the issue of attorneys' fees under 29 U.S.C. § 1132(g)(1). The statute expressly restricts an award of attorneys' fees and costs to a party who is a "participant, beneficiary, or fiduciary" of an ERISA plan. In *Hardt* and *McKay*, the plaintiffs were unquestionably participants under the ERISA plan at issue. However, for Harrison, that is the central question of his claim, as his status as a Participant in the Plan has not yet been resolved. Moreover, that determination is the specific task of the Plan Administrator on remand. Thus, in spite of the fact that Harrison has achieved a remand order that might otherwise constitute "some success on the merits," it has not been determined that he is a "participant" that is entitled to an award of attorneys' fees under the statute. After the Plan Administrator's review, Harrison will either have been awarded benefits as a Participant, or he will seek review of a denial, which will result in a conclusive determination of whether he is a Plan Participant. In either case, he will be in a position to litigate his claim for attorneys' fees, which he cannot do at present. Accordingly, as neither party is entitled to judgment on Harrison's claim for attorneys' fees under 29 U.S.C. § 1132(g)(1), the parties' motions are overruled with respect to said claim, and it is dismissed without prejudice. After the Plan Administrator makes a full and fair review of Harrison's benefit claim, he may pursue his claim for attorneys' fees.

IV. CONCLUSION

For the reasons set forth above, the Court OVERRULES Plaintiff's Motion for Judgment on the Administrative Record (Doc. 30). Defendants' Motion for Judgment on the Administrative Record (Doc. #29) is SUSTAINED IN PART and OVERRULED IN PART. Defendants are granted judgment on Harrison's claims under 29 U.S.C. § 1132(c) for failure to produce documents (Count Four) and failure to consider all information relevant to his claim (Count Five).

In accordance with its discretion under Rule 12(f)(1) of the Federal Rules of Civil Procedure, the Court STRIKES Count Two of the Second Amended Complaint (Doc. #17, the claim for breach of fiduciary duty under 29 U.S.C. § 1132(a), because the Court previously dismissed said claim with prejudice.

Count Three of the Second Amended Complaint, the claim for attorneys' fees under 29 U.S.C. § 1132(g), is DISMISSED WITHOUT PREJUDICE to renewal after the Plan Administrator's full and fair review of Harrison's claim for benefits.

It is ORDERED that this case be remanded to the Plan Administrator for a full and fair review of Harrison's claim for recovery of benefits under 29 U.S.C. § 1132(a)(1)(B) (Count One), in accordance with this decision.

Date: August 26, 2014

WALTER H. RICE
UNITED STATES DISTRICT JUDGE