UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

SHARON A. KONTY,

Plaintiff,

v.

LIBERTY LIFE ASSURANCE COMPANY OF BOSTON, AND LOWE'S COMPANIES, INC.,

Defendants.

Civil Case No. 3:12-CV-00467-KI

OPINION AND ORDER

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KING, Judge:

Plaintiff Sharon Konty alleges an ERISA claim against Liberty Life Assurance Company of Boston ("Liberty") and Lowe's Companies, Inc. ("Lowe's") for statutory penalties arising from the alleged failure to produce various documents associated with the long term disability ("LTD") claim of Konty's late husband, a former Lowe's employee. Lowe's was the plan administrator of the ERISA plan ("Plan") providing the LTD benefits. Liberty was the claims administrator of the Plan. Before the court is defendants' Motion to Dismiss Second Amended Complaint [28]. For the reasons below, I grant the motion and dismiss the case.

ALLEGED FACTS

Liberty approved Andy Konty's LTD claim in July 2006 and began paying monthly LTD benefits. Liberty terminated the benefits in July 2008, reinstated them retroactively on October 20, 2008, terminated the benefits a second time in April 2009, and reinstated them in January 2010.

At various times, Konty requested documents from both Liberty and Lowe's which were related to the claim: (1) a narrative, audio recording, and photograph by a field investigator; (2) all documents exchanged between Liberty and Lowe's concerning the claim and decisions to investigate the claim, to complete file reviews on the claim, and to schedule an independent

medical examination ("IME"); (3) all documents exchanged between Liberty, Lowe's, and MLS (a medical review company) prior to the March 5, 2009 IME; (4) all documents provided by Liberty, Lowe's, or MLS to Dr. Takacs (the doctor performing the IME) before, during, and after the IME; (5) all documents exchanged between MLS and Dr. Takacs; (6) all documents exchanged between Lowe's and Konty since April 24, 2006, the date of Konty's disability; (7) all documents exchanged between Liberty and Lowe's related to the claim; (8) all documents related to Lowe's contact with Liberty on Konty's behalf on May 29, 2009; (9) all documents on Liberty's internal rules, guidelines, or protocols which were utilized in processing the claim; and (10) Liberty's claims-handling manual.

Although defendants provided other documents related to the Plan, Konty never received the requested documents.

LEGAL STANDARDS

Although a plaintiff need not allege detailed facts, a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) will be granted if the pleading fails to provide "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim rises above the speculative level "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009). The Court is required to "assume the veracity" of all well-pleaded factual allegations. Id. at 678. Thus, "for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to

relief." Moss v. U.S. Secret Serv., 572 F.3d 962, 929 (9th Cir. 2009) (citing Iqbal, 129 S. Ct. at 1949).

DISCUSSION

Plaintiff bases her claim on the following provision in ERISA, which provides for statutory penalties:

> (1) Any administrator
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> (A) [notice requirements]
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> (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter[1] to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100[2] a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

29 U.S.C. § 1132(c)(1)(B).

Defendants note Section 1132 only applies to "information which such administrator is required by this subchapter to furnish[.]" Id. According to defendants, the ERISA statute only authorizes penalties against a plan administrator for the failure to produce the particular plan documents specified in the statute, and not for the failure to provide documents generated during

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[1] The subchapter contains 29 U.S.C. §§1001-1191c.

[2] The amount was raised to $110 a day on July 29, 1997. 62 Fed. Reg. 40696.

a claim review. Defendants argue Section 1024 is the only provision in the referenced subchapter that requires administrators to provide documents. Section 1024 states:

> (4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. . . .

Id. § 1024(b)(4).

Defendants allegedly failed to provide documents generated in the claim review process, none of which are specified in Section 1024. Thus, defendants contend plaintiff fails to state a claim for relief.

Plaintiff relies on the Department of Labor regulation specifying duties of the plan administrator in the event of an adverse benefit determination:

> (j) Manner and content of notification of benefit determination on review. The plan administrator shall provide a claimant with written or electronic notification of a plan's benefit determination on review. . . . In the case of an adverse benefit determination, the notification shall set forth, in a manner calculated to be understood by the claimant–
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> . . . .
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> (3) A statement that the claimant is entitled to receive, upon request and free of charge, reasonable access to, and copies of, all documents, records, and other information relevant to the claimant's claim for benefits. Whether a document, record, or other information is relevant to a claim for benefits shall be determined by reference to paragraph (m)(8) of this section;
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> . . . .
>
> (5) In the case of a group health plan or a plan providing disability benefits–

> (i) If an internal rule, guideline, protocol, or other similar criterion was relied upon in making the adverse determination, either the specific rule, guideline, protocol, or other similar criterion; or a statement that such rule, guideline, protocol, or other similar criterion was relied upon in making the adverse determination and that a copy of the rule, guideline, protocol, or other similar criterion will be provided free of charge to the claimant upon request;

29 C.F.R. § 2560.503-l(j)(1)-(5).

Relevant documents, records, or other information are those "relied upon in making the benefit determination." Id. § 2560.503-l(m)(8).

I first note that I do not consider Cyr v. Reliance Standard Life Ins. Co., 642 F.3d 1202 (9th Cir. 2011), to be dispositive or even persuasive concerning the issue before me. Cyr addressed which entities were proper defendants in an ERISA action, in particular, an action to obtain benefits under Section 1132(a). Assuming both defendants are proper defendants in the Section 1132(c) claim before me, I will address whether that Section entitles plaintiff to penalties for failure to provide the requested documents.

According to plaintiff, the claims documents Konty requested are all relevant documents which defendants had to produce on request. Plaintiff cites Sconiers v. First Unum Life Ins. Co., 830 F. Supp. 2d 772, 780 (N.D. Cal. 2011), which attaches a flexible interpretation to the statutory language providing for production of documents the plan administrator is "required by this subchapter to furnish." 29 U.S.C. § 1132(c)(1)(B).

United States Magistrate Judge Janice Stewart has refused to accept this interpretation of Section 1132. She explains several Circuit Courts of Appeals limit 29 C.F.R. § 2560.503–1(h)[3] to the ERISA provision governing claims procedures, Section 1133:

> [T]he Third, Sixth, Seventh, and Eighth Circuits have held that 29 USC § 1132(c) may not be used to impose civil liability for the violation of 29 USC § 1133 or regulations implemented pursuant thereto. Brown v. J.B. Hunt Transport Servs., Inc., 586 F.3d 1079, 1089 (8th Cir. 2009) ("[W]e agree with our sister circuits that a plan administrator may not be penalized under § 1132(c) for a violation of the regulations to § 1133") (citing cases [from the Third and Sixth Circuits]); Wilczynski v. Lumbermens Mut. Cas. Co., 93 F.3d 397, 405–06 (7th Cir. 1996). These cases reason that the underlying regulation (29 CFR § 2560.503–1(h)) . . . is based on a statute (29 USC § 1133) which pertains only to claims for benefits. As with the regulation at issue in Brown, the statutory authority for 29 CFR § 2560.503–1(h)(2)(iii) is 29 USC § 1133 which pertains to "claims for benefits." Similarly, as did the regulations at issue in Wilczynski, the regulation at issue here "speaks only to the obligations of benefit plans" and, therefore, " section 1132(c) cannot be used to impose civil liability for the violation of section 1133 alleged." Wilczynski, 93 F.3d at 406.

Bielenberg v. ODS Health Plan, Inc., 744 F. Supp. 2d 1130, 1143-44 (D. Or. 2010) (footnotes omitted).

Moreover, plaintiff's case, Sconiers, relies on Sgro v. Danone Waters of N. Am., Inc., 532 F.3d 940, 944-45 (9th Cir. 2008). Judge Stewart ably explained why Sgro is not dispositive on this issue because the court never reached it:

> [Plaintiff] cites Sgro as Ninth Circuit authority for the proposition that a violation of 29 CFR § 2560.503–1(h)(2)(iii) is a proper vehicle for assessing penalties under 29 USC § 1132(c)(1). However, Sgro concluded that the claimant named an improper party and, therefore, never reached the issue whether a penalty claim is appropriate based on the regulation cited by [plaintiff]. This court is persuaded by the reasoning of the other circuits which have actually addressed the

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[3] 29 C.F.R. § 2560.503-l(h) describes the "full and fair" review process of an adverse benefit determination. Subsection (j), on which Konty relies, specifies the content of an adverse benefit determination notification. I an unpersuaded by plaintiff's argument that this difference is material.

> issue and declines to impose liability under 29 USC § 1132(c) for a violation of the regulations to 29 USC § 1133.

Bielenberg, 744 F. Supp. 2d at 1144.

I carefully considered Judge Stewart's reasoning, as well as the reasoning in the underlying cases. I adopt the analysis as my own. A violation of 29 C.F.R. § 2560.503–1(j) cannot trigger a penalty under Section 1132 because the documents called for in the regulation do not fall within the list of documents covered by Section 1132. Thus, plaintiff is not entitled to relief under Section 1132 for the alleged failure to produce the claim review documents.

Because I conclude the *plan* administrator could not be penalized under Section 1132 for failing to produce the claims documents Konty requested, it is unnecessary for me to decide whether a *claims* administrator can also be penalized under the same section.

CONCLUSION

Defendants' Motion to Dismiss Second Amended Complaint [28] is granted. This action is dismissed with prejudice.

IT IS SO ORDERED.

Dated this 30th day of October, 2012.

/s/ Garr M. King
Garr M. King
United States District Judge