

No. _____

Supreme Court of The United States

Norine Cave

Petitioner,

v.

Delta Dental Of California,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
for the Ninth Circuit

APPENDIX

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NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 18 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NORINE SYLVIA CAVE,

Plaintiff-Appellant,

v.

DELTA DENTAL OF CALIFORNIA,

Defendant-Appellee,

and

DELTA OF CALIFORNIA,

Defendant.

No. 18-17134

D.C. No. 3:18-cv-01205-WHO

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
William Horsley Orrick, District Judge, Presiding

Submitted December 11, 2019**

Before: WALLACE, CANBY, and TASHIMA, Circuit Judges.

Norine Sylvia Cave appeals pro se from the district court's judgment in her

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

action under the Employee Retirement Income Security Act of 1974 (“ERISA”). We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Hebbe v. Piller*, 627 F.3d 338, 341 (9th Cir. 2010) (dismissal under Fed. R. Civ. P. 12(b)(6)); *Toguchi v. Chung*, 391 F.3d 1051, 1056 (9th Cir. 2004) (summary judgment). We affirm.

The district court properly dismissed Cave’s breach of fiduciary duty claim because Cave failed to allege facts sufficient to state a plausible claim. *See* 29 U.S.C. §§ 1132(a)(2), 1132(a)(3); *Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 954 (9th Cir. 2014) (“A claim [under § 1132(a)(3)] fails if the plaintiff cannot establish . . . that the remedy sought is appropriate equitable relief” (citation and internal quotation marks omitted)); *Wise v. Verizon Commc’ns, Inc.*, 600 F.3d 1180, 1189 (9th Cir. 2010) (“To allege a fiduciary breach under § 1132(a)(2), [the plaintiff] must allege that the fiduciary injured the benefit plan or otherwise jeopardize[d] the entire plan or put at risk plan assets.” (citation and internal quotation marks omitted, some alterations in original)).

The district court properly granted summary judgment on Cave’s claim for penalties because Cave failed to raise a genuine dispute of material fact as to whether defendant failed to produce documents that a plan administrator is required to produce. *See Lee v. ING Groep, N.V.*, 829 F.3d 1158, 1162 (9th Cir. 2016) (“Penalties under 29 U.S.C. § 1132(c)(1) can only be assessed against plan

administrators for failing to produce documents that they are required to produce as plan administrators.” (citation and internal quotation marks omitted)).

We do not consider matters not specifically and distinctly raised and argued in the opening brief. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

We reject as without merit Cave’s contentions that counsel for defendant and the district judge had conflicts of interest.

AFFIRMED.

NINTH CIRCUIT ORDER

Case: 18-17134, 03/23/2020, ID: 11638378, DktEntry: 25, Page 1 of 1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 23 2020

MOLLY C. DWYER, CLERK
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Plaintiff-Appellant,

v.

DELTA DENTAL OF CALIFORNIA,

Defendant-Appellee,

and

DELTA OF CALIFORNIA,

Defendant.

No. 18-17134

D.C. No. 3:18-cv-01205-WHO
Northern District of California,
San Francisco

ORDER

Before: WALLACE, CANBY, and TASHIMA, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Cave's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 24) are denied.

No further filings will be entertained in this closed case.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAR 31 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NORINE SYLVIA CAVE,

Plaintiff - Appellant,

v.

DELTA DENTAL OF CALIFORNIA,

Defendant - Appellee,

and

DELTA OF CALIFORNIA,

Defendant.

No. 18-17134

D.C. No. 3:18-cv-01205-WHO

U.S. District Court for Northern
California, San Francisco

MANDATE

The judgment of this Court, entered December 18, 2019, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Rhonda Roberts
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORINE SYLVIA CAVE,
Plaintiff,

v.

DELTA DENTAL OF CALIFORNIA,
Defendant.

Case No. 18-cv-01205-WHO

**ORDER GRANTING MOTION TO
DISMISS**

Re: Dkt. No. 10, 12, 18

INTRODUCTION

Plaintiff Norine Sylvia Cave brings this action against defendant Delta Dental of California ("Delta Dental"), alleging claims of bad faith and a violation of Cave's civil rights under the Health Insurance Portability and Accountability Act (HIPAA). Delta Dental moves to dismiss all claims against it. Because I find that Cave's alleged claims fail as a matter of law, I DISMISS WITH PREJUDICE Cave's bad faith and HIPAA claims. But given Rule 15's liberal amendment standard, I GRANT Cave's request to amend her complaint to add claims under section 502 of the Employee Retirement Income Security Act (ERISA).

BACKGROUND

Cave obtained dental benefits through the Entertainment Industry Flex Plan, group number 07578-00001. Complaint (Compl.), Ex. G at 1 (Dkt. No. 1). On October 21, 2013, Cave consulted with Dr. Suvidha Sachdeva of Coast Dental of Georgia for dental services. *Id.* ¶ 4. As a part of that consultation, Cave received a comprehensive exam and Dr. Sachdeva recommended crown replacements of allegedly fractured veneers on teeth #8 and #9, indicating that the teeth could no longer support veneers due to decay. *Id.* Approximately three months later, Dr. Sachdeva initiated the procedure to replace the crowns on teeth #8 and #9. *Id.* The next day Dr. Sachdeva submitted a benefits claim to Delta Dental for the crowns. *Id.*

United States District Court
Northern District of California

United States District Court
Northern District of California

1 On April 30, 2014, Cave filed a grievance with Delta Dental, indicating that she suspected
2 that Dr. Sachdeva had committed fraud in recommending crown replacements. *Id.* Specifically,
3 upon review of Cave's x-rays and documentation, other doctors suggested that teeth #8 and #9 did
4 not require replacement of the veneers. *Id.* Cave believes that Dr. Sachdeva diagnosed otherwise
5 in order to receive payment for the unnecessary dental treatment. *Id.* She alleges that once she
6 filed this grievance, Delta Dental should have examined all records and x-rays to determine
7 whether she actually needed her veneers replaced rather than approved the claim by Dr. Sachdeva.
8 *Id.* ¶ 11.

9 Delta Dental (a California corporation) responded to Cave's grievance, informing her that
10 California Health and Safety Code section 1371.5, provides that Delta Dental and Dr. Sachdeva
11 are responsible for their own acts or omissions and not liable for the acts and omissions of each
12 other. *Id.* ¶ 5, Ex. B. It also advised her that "the diagnosis for crowns for [her] teeth numbers 8
13 and 9 were one of the appropriate treatments of choice due to Dr. Sachdeva's documentation that
14 the existing veneers 8 and 9 were chipped." *Id.*, Ex. B. But it further told her that it was "unable
15 to confirm or deny the acceptability of [] crown numbers 8 and 9" because Dr. Sachdeva did not
16 submit x-rays of diagnostic quality, meaning that Delta Dental's dental consultant could not have
17 determined whether she needed new crowns prior to Dr. Sachdeva's decision to replace her
18 veneers. *Id.* Cave alleges that a proper review of the x-rays should have resulted in Delta Dental
19 not paying the claim because the x-rays did not reveal any condition that would justify crown
20 treatments. *Id.* ¶ 6.

21 In May 2014, Cave requested copies of the treatment plan and x-rays submitted to Delta
22 Dental by Dr. Sachdeva for her review. *Id.* ¶ 7. Delta Dental denied the request, stating that
23 California Health and Safety Code section 1370 protects the documents that Cave requested from
24 discovery. *Id.*, Ex. C. It advised her that she could request copies of treatment notes from the
25 dentist directly under section 123110 of California's Health and Safety Code, requiring that a
26 dentist provide copies of x-rays and records upon written request. *Id.* It also noted that Georgia
27 may have a similar law. *Id.*

28 On September 10, 2014, Cave responded to Delta Dental's letter with "viable and

1 On April 30, 2014, Cave filed a grievance with Delta Dental, indicating that she suspected
2 that Dr. Sachdeva had committed fraud in recommending crown replacements. *Id.* Specifically,
3 upon review of Cave's x-rays and documentation, other doctors suggested that teeth #8 and #9 did
4 not require replacement of the veneers. *Id.* Cave believes that Dr. Sachdeva diagnosed otherwise
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13 and 9 were one of the appropriate treatments of choice due to Dr. Sachdeva's documentation that
14 the existing veneers 8 and 9 were chipped." *Id.*, Ex. B. But it further told her that it was "unable
15 to confirm or deny the acceptability of [] crown numbers 8 and 9" because Dr. Sachdeva did not
16 submit x-rays of diagnostic quality, meaning that Delta Dental's dental consultant could not have
17 determined whether she needed new crowns prior to Dr. Sachdeva's decision to replace her
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20 treatments. *Id.* ¶ 6.

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22 Dental by Dr. Sachdeva for her review. *Id.* ¶ 7. Delta Dental denied the request, stating that
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24 discovery. *Id.*, Ex. C. It advised her that she could request copies of treatment notes from the
25 dentist directly under section 123110 of California's Health and Safety Code, requiring that a
26 dentist provide copies of x-rays and records upon written request. *Id.* It also noted that Georgia
27 may have a similar law. *Id.*

28 On September 10, 2014, Cave responded to Delta Dental's letter with "viable and

1 dismiss, the plaintiff must allege “enough facts to state a claim to relief that is plausible on its
2 face.” *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible
3 when the plaintiff pleads facts that “allow the court to draw the reasonable inference that the
4 defendant is liable for the misconduct alleged.” *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
5 (citation omitted). There must be “more than a sheer possibility that a defendant has acted
6 unlawfully.” *Id.* While courts do not require “heightened fact pleading of specifics,” a plaintiff
7 must allege facts sufficient to “raise a right to relief above the speculative level.” *See Twombly*,
8 550 U.S. at 555, 570.

9 In deciding whether the plaintiff has stated a claim upon which relief can be granted, the
10 Court accepts the plaintiff’s allegations as true and draws all reasonable inferences in favor of the
11 plaintiff. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court
12 is not required to accept as true “allegations that are merely conclusory, unwarranted deductions of
13 fact, or unreasonable inferences.” *See In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir.
14 2008).

15 Pro se pleadings must be held to a less stringent standard than those drafted by lawyers.
16 *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). Nevertheless, a complaint, or portion thereof,
17 should be dismissed if it fails to set forth “enough facts to state a claim to relief that is plausible on
18 its face.” *Twombly*, 550 U.S. at 554. “[A] district court should not dismiss a pro se complaint
19 without leave to amend unless it is absolutely clear that the deficiencies of the complaint could not
20 be cured by amendment.” *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (quotations
21 omitted).

22 DISCUSSION

23 I. CONTINUANCE

24 Following the completion of the briefing on Delta Dental’s motion to dismiss, Cave filed a
25 motion “for continuance,” asking me to continue the hearing on Delta Dental’s motion to dismiss
26 until sometime after the Department of Health and Human Services Office of Civil Rights had
27 fully investigated and resolved a complaint filed by Cave. Dkt. No. 18. It is unclear who the DHS
28 OCR complaint was filed against or what grounds were asserted in that complaint. It appears that

1 Cave may be complaining about Delta Dental's failure to provide her with copies of her "full
2 medical records" (Dkt. No. 18 ¶ 4) and/or about a potential violation of HIPAA. Dkt. No. 19
3 (Delta's Oppo. to Continuance) at 2.

4 As explained below, I conclude that Cave cannot state claims for bad faith and violation of
5 HIPAA as a matter of law and that those claims must be dismissed with prejudice. There is no
6 need to delay the decision on Delta Dental's motion; there is nothing that could come out of the
7 DHS OCR investigation that would affect my resolution of those issues. Therefore, Cave's
8 motion to continue is DENIED.

9 **II. BAD FAITH**

10 Cave alleges that Delta Dental conducted itself in bad faith when it undertook several
11 actions related to its payment of the claim filed by Dr. Sachdeva: (i) failing to substantiate the
12 need for treatment as dictated by its own standards and procedures, and therefore supporting Dr.
13 Sachdeva's allegedly fraudulent claim; (ii) supporting "chipped veneers" as the basis for crown
14 placements where there was no evidence; (iii) repeatedly denying Cave's request for review/copy
15 of full medical/dental records; and (iv) misapplying California's Evidence Code section 1157 and
16 Health and Safety Code section 1370 to prevent release of her medical records. Compl. ¶ 16.²
17 Delta Dental contends that Cave's bad faith claim must be dismissed because it is preempted by
18 ERISA. Even if the bad faith claim is not preempted, Delta Dental asserts that it is barred because
19 liability for bad faith is limited to situations where benefits due are withheld or denied and it is
20 time-barred by the applicable statute of limitations.

21 Where an insurance policy is governed by ERISA, state law claims related to the
22 processing of claims under that policy are preempted by ERISA. See *Chamblin v. Reliance Stand.*
23 *Life Ins. Co.*, 168 F. Supp. 2d 1168, 1177 (N.D. Cal. 2001) ("a plaintiff who brings a cause of
24 action for bad faith against an insurer who denies benefits under an ERISA benefit plan is bringing
25

26 ² A claim of bad faith such as the one that Cave alleges is also known as a claim for breach of the
27 implied covenant of good faith and fair dealing. See *Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 566,
28 574 (1973) ("[An insurer that] fails to deal fairly and in good faith with its insured by refusing,
without proper cause, to compensate its insured for a loss covered by the policy, such conduct may
give rise to a cause of action in tort for breach of an implied covenant of good faith and fair
dealing.").

a cause of action for the improper processing of a claim, that such a cause of action is related to the benefit plan and that the claim is therefore preempted by ERISA”) (relying on *Kanne v. Connecticut General Life Ins. Co.*, 867 F.2d 489 (9th Cir.1988)). Delta Dental asserts that the insurance policy under which Cave sought dental treatment is governed by ERISA, and Cave does not dispute this fact. Because Cave cannot bring a claim for “bad faith” under California law, any actionable claim related to Delta Dental’s processing of her claim must be asserted under ERISA. Cave’s “bad faith” claim, therefore, is DISMISSED WITH PREJUDICE.

That said, as clarified by her Opposition to the motion to dismiss (as well as the briefing with respect to her request for a continuance, addressed above), Cave seeks to address the substance of her bad faith claim as a breach of fiduciary duty claim under ERISA. See Dkt. Nos. 16, 20.³ As such, Cave is given leave to amend to assert a claim under ERISA with respect to her allegations that Delta Dental breached its fiduciary duties under ERISA by (i) failing to properly investigate the allegations of fraud by Dr. Sachdeva and (ii) failing to turn over Cave’s complete medical records and case file upon her request.⁴

III. VIOLATION OF CIVIL RIGHTS UNDER HIPAA

Cave alleges that, in rejecting her request to obtain and review her medical records, Delta Dental inappropriately relied on section 1370 of California’s Health and Safety Code in violation of her right to access her health information under HIPAA pursuant to 45 CFR section 164.524. However, there is no private right of action under HIPAA. *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1082 (9th Cir. 2007) (“HIPAA itself does not provide for a private right of

³ I recognize that Cave has not formally made a motion for leave to amend to allege a claim under ERISA, and only requests leave in her Reply in support of her motion for a continuance. Dkt. No. 20. However, given that she is proceeding pro se and given Rule 15’s liberal standards for amendment at the inception of a case, Cave is given leave to file an Amended Complaint asserting claims under ERISA.

⁴ Even if not preempted by ERISA, Cave’s bad faith claim would still fail as a matter of law for the additional reason that an alleged failure to investigate an insured’s claim properly may constitute a breach of the implied covenant of good faith and fair dealing *only* if such failure results in wrongfully denied benefits. *Egan v. Mut. of Omaha Ins. Co.*, 24 Cal.3d 809, 817 (1979). Here, there is no allegation that Delta Dental failed to pay or denied Cave’s claim for benefits. I need not reach Delta Dental’s third argument, regarding the statute of limitations, which depends on whether Cave’s bad faith claim sounds in tort or breach of contract. See *Archdale v. Am. Intern. Specialty Lines Ins. Co.*, 154 Cal. App. 4th 449, 468 (Cal. App. 2d Dist. 2007).

United States District Court
Northern District of California

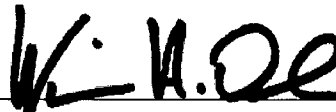
1 action”); *see also* 65 Fed. Reg. 82601 (Dec. 28, 2000) (“Under HIPAA, individuals do not have a
2 right to court action.”). HIPAA “specifically indicates that the Secretary of Health and Human
3 Services shall pursue the action against an alleged offender, not a private individual.” *Johnson v.*
4 *Quander*, 370 F. Supp. 2d 79, 100 (D.D.C. 2005) (citation omitted). This means that only the
5 government can bring a claim against Delta Dental for violation of HIPAA. Accordingly, because
6 Cave cannot bring a claim under HIPAA, her second cause of action is DISMISSED WITH
7 PREJUDICE. As with her bad faith claim, Cave is given leave to amend to assert a claim under
8 ERISA with respect to the alleged improper denial of access to her medical records.

9 **CONCLUSION**

10 For the reasons discussed above, Cave’s claims for bad faith and violation of civil rights
11 under HIPAA are DISMISSED WITH PREJUDICE. However, Cave is given leave to amend for
12 the limited purpose of pleading claims for breach of fiduciary duty under ERISA related to Delta’s
13 processing of her claim and the alleged failure to provide her with the documents she requested. If
14 Cave wishes to take advantage of this limited leave to amend, she must file an Amended
15 Complaint asserting claims under ERISA within twenty (20) days of the date of this Order.

16 **IT IS SO ORDERED.**

17 Dated: May 30, 2018

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20 William H. Orrick
21 United States District Judge
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORINE SYLVIA CAVE,
Plaintiff,
v.
DELTA OF CALIFORNIA,
Defendant.

Case No. 18-cv-01205-WHO

ORDER ON MOTION TO DISMISS

Re: Dkt. Nos. 37, 39

INTRODUCTION

Plaintiff Norine Sylvia Cave brings this action against defendant Delta Dental of California ("Delta Dental"), asserting claims related to a "fraudulent" and unnecessary procedure her former dentist provided to her. Cave argues that Delta Dental is at fault because it: (i) should never have approved payment to the dentist for the procedure; (ii) failed to fully investigate her grievance and fraud allegation (*e.g.*, investigate whether the claim ("Claim") by her dentist should have been approved and paid); and (iii) failed to provide her with all copies related to its approval of the Claim and its investigation of her grievance. However, as explained below, there is no authority under ERISA by which Cave can challenge Delta Dental's decision to reimburse or otherwise pay the Claim submitted by her dentist and no grounds to hold it liable to Cave regarding the investigation of her grievance about the payment. There is authority for requiring Delta Dental to provide Cave with copies of all records related to the handling of the Claim and investigation of her grievance; as described below, it has done that.

While Cave is obviously upset about the procedure performed by her dentist, which she asserts was unnecessary and resulted in pain and suffering, there is no viable claim Cave can assert against Delta Dental with respect to those injuries. Therefore, its motion to dismiss is GRANTED and this case is DISMISSED WITH PREJUDICE.

United States District Court
Northern District of California

BACKGROUND

On October 21, 2013, Cave consulted with Dr. Suvidha Sachdeva of Coast Dental of Georgia for dental services. First Amended Complaint ("FAC") ¶ 22 (Dkt. No. 36). As a part of that consultation, Cave received a comprehensive exam. Dr. Sachdeva recommended crown replacements of allegedly fractured veneers on teeth #8 and #9, indicating that the teeth could no longer support veneers due to decay. *Id.* Dr. Sachdeva based this recommendation on x-rays taken at the consultation, which she used to mislead Cave concerning the condition of her veneers as well as the condition of her teeth. *Id.*

On January 1, 2014, Cave obtained benefits through The Entertainment Industry Flex Plan ("Flex Plan"), group number 07578-00001 (an ERISA plan). She returned to Dr. Sachdeva on January 27, 2014 for the procedure to replace the crowns on teeth #8 and #9 as recommended by Dr. Sachdeva. *Id.* Dr. Sachdeva subsequently submitted a benefits Claim to Delta Dental for the crowns. *Id.*

Due to "great concern and realization of Dr. Sachdeva's falsified diagnosis," on April 30, 2014, Cave filed a grievance with Delta Dental, indicating that she suspected that Dr. Sachdeva had committed fraud in "wrongfully and intentionally" recommending crown replacements. *Id.* ¶ 23. Specifically, upon review of Cave's x-rays and documentation, other doctors suggested that teeth #8 and #9 did not have the amount of decay that would require replacement of the veneers. *Id.* Seemingly because of these alternate diagnosis, Dr. Sachdeva recanted that she detected the decay through the x-rays, but rather that she had relied on visual means to detect decay. *Id.* But Dr. Sachdeva could not provide any documentation to substantiate such visual means and did not document such decay in her patient notes dated January 27, 2014, merely noting that "patient wants crowns." *Id.* Cave believes that Dr. Sachdeva diagnosed otherwise in order to receive payment for the unnecessary dental treatment. *Id.* ¶ 24. She alleges that once she filed her grievance with Delta Dental, it should have examined all records and x-rays to determine whether Cave actually needed her veneers replaced, rather than simply approve the Claim by Dr. Sachdeva. *Id.* ¶ 11.

On May 28, 2014, Delta Dental responded to Cave's grievance, informing her that under California Health and Safety Code section 1371.5, Delta Dental and Dr. Sachdeva are responsible

1 for their own acts or omissions and not liable for the acts and omissions of each other. *Id.* ¶ 25,
 2 Ex. 102. It also advised Cave that “the diagnosis for crowns for [her] teeth numbers 8 and 9 were
 3 one of the appropriate treatments of choice due to Dr. Sachdeva’s documentation that the existing
 4 veneers 8 and 9 were chipped.” *Id.*, Ex. 102. It explained that it was “unable to confirm or deny
 5 the acceptability of [] crown numbers 8 and 9” because Dr. Sachdeva did not submit x-rays of
 6 diagnostic quality, meaning that Delta Dental’s dental consultant could not have determined
 7 whether she needed new crowns prior to Dr. Sachdeva’s decision to replace her veneers. *Id.* Cave
 8 alleges that “[t]his admission clearly violates Delta’s required policy to evaluate and determine
 9 every proposed treatment plan in the case of two or more crowns.” *Id.* ¶ 28. Specifically, she
 10 contends that “Delta was required, by its own policies, to deny the proposed treatment plan
 11 submitted by Dr. Sachdeva of Coast, based on insufficient x-rays as cited in their May 28, 2014
 12 response letter.” *Id.* She asserts that a proper review of the x-rays should have resulted in Delta
 13 Dental not paying the Claim because the x-rays did not reveal any condition that would justify
 14 crown treatments. *Id.* ¶ 30.

15 After Delta Dental’s “erroneous support of Dr. Sachdeva’s treatment plan with its clear
 16 discrepancies,” Cave requested copies of the treatment plan and x-rays submitted to Delta Dental
 17 by Dr. Sachdeva for her review. *Id.* ¶ 31. Delta Dental denied the request, stating that California
 18 Health and Safety Code section 1370 protects the documents that Cave requested from discovery.
 19 *Id.* ¶ 32, Ex. 103. It advised her that she could request copies of treatment notes from the dentist
 20 directly under section 123110 of California’s Health and Safety Code, which requires a dentist to
 21 provide copies of x-rays and records upon written request. *Id.*, Ex. 103. It noted that Georgia,
 22 where Cave resides, may have a similar law. *Id.*

23 On September 10, 2014, Cave responded to Delta Dental’s letter, providing it with “viable
 24 and sufficient” x-rays in addition to photographs of teeth #8 and #9, taken both before and after
 25 the new crowns. *Id.* ¶ 36. According to Cave, these documents demonstrate that her healthy tooth
 26 structure made Dr. Sachdeva’s crown placements unnecessary. *Id.* These documents were given
 27 to Delta Dental by Cave to reveal and support her contention that Dr. Sachdeva committed fraud.
 28 *Id.* It responded to this new information in a letter dated October 4, 2014, standing by its prior

United States District Court
Northern District of California

determination that it was Dr. Sachdeva's responsibility—and not Delta Dental's—to choose the appropriate treatment plan and it presumed that Dr. Sachdeva had provided Cave with the risk and benefits of the treatment. *Id.*, Ex. 105.

On November 1, 2016, Cave served Delta Dental with a request for "production of documents to a non-party" in connection with litigation she had commenced against Dr. Sachdeva in Fulton County, Georgia. *Id.* ¶ 41. This request included "All records of insurance, including policies and declarations, claims history and correspondence to and from providers submitting claims or providers that have treated the insured from January 1, 2010 through today, that in any way represents dental treatment, or reimbursement for dental treatment [Cave]." *Id.* Delta Dental objected to the request for production based on California Evidence Code section 1157 and Health and Safety Code section 1370. Cave asserts that those sections do not apply and do not prevent Delta from releasing the requested records, because her request was not made for a peer review board report. *Id.* ¶ 42.

On January 24, 2018, Cave filed this action in the Superior Court of California, County of San Francisco. Delta Dental removed the case to this court on February 23, 2018. It moved to dismiss and in May 2018, I granted its motion, finding that Cave's cause of action for bad faith was preempted by the Employee Retirement Income Security Act of 1974 (ERISA) and that she could not bring a cause of action under the Health Insurance Portability and Accountability Act of 1996 (HIPAA). May 2018 Order (Dkt. No. 29). I dismissed Cave's initial causes of action with prejudice, meaning that Cave cannot reassert them. But I did grant Cave leave to amend her complaint to assert a breach of fiduciary duty claim under ERISA. *Id.* She filed the FAC and now asserts four causes of action: (1) breach of fiduciary duty under ERISA, (2) breach of implied covenant of good faith, (3) for penalties under section 502(c) of ERISA, and (4) "wrong disbursement." Delta Dental moved to dismiss, arguing that the causes of action Cave asserts and the relief she seeks are not viable given the limited remedies allowed under ERISA.

I held a hearing on Delta Dental's motion on August 15, 2018. At that hearing, I explained my views that Cave's allegations could not state actionable causes of action given ERISA's limited remedy provisions, with the exception that ERISA generally requires Delta Dental to

1 produce to Cave all material records it had regarding the processing of Dr. Sachdeva's Claim and
2 Cave's grievance. Therefore, I directed the parties to meet and confer to identify what, if any
3 documents, Delta Dental had that were relevant to Cave's grievance and had not been produced. I
4 then directed defense counsel to file a declaration identifying whether the parties continue to
5 disagree about records not provided and, if so, the documents Ms. Cave thinks are missing. Dkt.
6 No. 41. Defense counsel filed that affidavit on August 22, 2018. Pursuant to my direction, Cave
7 then filed a response regarding Delta's original and supplemental production of documents on
8 August 29, 2018. Dkt. Nos. 42, 43.¹

9 LEGAL STANDARD

10 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint
11 if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to
12 dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its
13 face." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible
14 when the plaintiff pleads facts that "allow the court to draw the reasonable inference that the
15 defendant is liable for the misconduct alleged." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
16 (citation omitted). There must be "more than a sheer possibility that a defendant has acted
17 unlawfully." *Id.* While courts do not require "heightened fact pleading of specifics," a plaintiff
18 must allege facts sufficient to "raise a right to relief above the speculative level." *See Twombly*,
19 550 U.S. at 555, 570.

20 In deciding whether the plaintiff has stated a claim upon which relief can be granted, the
21 Court accepts the plaintiff's allegations as true and draws all reasonable inferences in favor of the
22 plaintiff. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court
23 is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of
24

25 ¹ By doing so, I gave the parties notice that I would be considering materials outside of the
26 pleadings and gave them a sufficient opportunity to submit evidence on this narrow issue. That
27 process essentially converted this narrow claim – whether Delta provided Cave all relevant
28 documents in its possession regarding Cave's claim – into one to be determined under Rule 56.
See, e.g., In re Rothery, 143 F.3d 546, 549 (9th Cir. 1998). Both sides have been "fairly
appraised" by my requesting evidence outside the pleadings and the parties' submission of those
materials. *Id.*

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fact, or unreasonable inferences.” *See In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

Pro se pleadings must be held to a less stringent standard than those drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). Nevertheless, a complaint, or portion thereof, should be dismissed if it fails to set forth “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 554. “[A] district court should not dismiss a pro se complaint without leave to amend unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment.” *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (quotations omitted).

DISCUSSION

I. BREACH OF FIDUCIARY DUTY

In the FAC, Cave alleges that Delta Dental breached its fiduciary duty under ERISA in the following ways: (1) by not verifying the authenticity of the x-rays submitted by Dr. Sachdeva prior to disbursement of plan benefits; (2) by not properly adhering to its own guidelines “put in place to comply with ERISA guidelines requiring it to act in the best interests of its participants”; (3) by failing to thoroughly investigate her allegation of fraud by Dr. Sachdeva; (4) by willfully withholding her protected health information (“PHI”) and other information regarding its investigation of Dr. Sachdeva’s Claim and Cave’s grievance; and (5) by wrongfully disbursing funds to Dr. Sachdeva for the procedure. FAC ¶¶ 44-46, 49-50, 52-53. Cave seeks relief under sections 502(a)(2), 502(a)(3), and 502(c) of ERISA. *See id.* ¶¶ 16-17, 20, 38, 44-45, 51-53, 55. In terms of relief, Cave seeks the “restoration” of the money back to Delta Dental that it paid Dr. Sachdeva for the procedure, an order compelling it to provide Cave with her “full medical records,” penalties for the failure to produce the records, and punitive damages due to its failure to follow its own protocols in paying claims and investigating fraud, as well for its refusal for provide Cave her medical records. *Id.* ¶¶ 56-59.

A. Section 502(a)(2)

Section 502(a)(2) allows the Secretary of Labor, participants, beneficiaries, and fiduciaries to bring suit for breaches of fiduciary duty. 29 U.S.C. § 1132(a)(2). The purpose of Section

502(a)(2) is to “give[] a remedy for injuries to the ERISA plan as a whole ... not for injuries suffered by individual participants as a result of a fiduciary breach.” *Wise v. Verizon Commc'ns Inc.*, 600 F.3d 1180, 1189 (9th Cir.2010). After considering both the statutory language in ERISA and its legislative history, the Supreme Court concluded that ERISA’s “draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary.” *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 141 (1985). The Court noted that “the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators” and that “the common interest shared by all four classes [who may bring suit under Section 502(a)(2)] is in the financial integrity of the plan.” *Id.* at 140 n. 8, 141 n. 9. Therefore, to state a claim for fiduciary breach under Section 502(a)(2), a plaintiff “must allege that the fiduciary injured the benefit plan or otherwise jeopardized the entire plan or put at risk plan assets.” *Wise*, 600 F.3d at 1189.

In her opposition, Cave asserts that “individual participants in defined contribution plans may recover losses incurred in their own accounts.” However, while a participant in a defined contribution plan may bring a section 502(a)(2) action for “fiduciary breaches that impair the value of plan assets in a participant’s individual account,” see *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248 (2008), there is no evidence that the Plan at issue² is a defined contribution plan (e.g., a defined contribution pension plan) or that Delta Dental’s action in impermissibly paying a claim has impaired the value of the Plan’s assets. See 29 U.S.C. § 1002(34) (“The term “individual account plan” or “defined contribution plan” means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant’s account”).

Moreover, as explained in *Wise*, in order to state a claim under this provision, Cave must allege facts showing that claims *other than her own* were mishandled. Cave has not. Given the narrow focus of her allegations, she cannot do so. *Wise*, 600 F.3d at 1189.

Cave has not stated and cannot state a claim under 502(a)(2).

² The Entertainment Industry Flex Plan.

B. Section 502(a)(3)

Under section 502(a)(3), a participant or beneficiary may bring a civil action “(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.” 29 U.S.C.A. § 1132(a)(3). The Supreme Court has construed “appropriate equitable relief” to mean the categories of relief that were typically available in equity courts before the merger of law and equity. *CIGNA Corp. v. Amara*, 563 U.S. 421, 438 (2011).

Remedies that are appropriate under section 502(a)(3) include injunctive relief, reformation of a plan, estoppel, or an “equitable surcharge.” *CIGNA Corp.*, 563 U.S. at 440. In contrast, the remedies of the sort Cave seeks here, including forcing Delta Dental to “take back” the funds it paid to Dr. Sachdeva and punitive damages, are not forms of equitable relief allowed under this section. *See, e.g., Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 218 (2002); *see also Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985) (502(a)(3) does not allow remedies for compensatory or punitive damages).³

II. FAILURE TO PRODUCE RECORDS AND REQUEST FOR PENALTIES UNDER SECTION 502(C)

The failure to provide plan documents to a plan participant can be an actionable breach of fiduciary duty. *See, e.g., Cultrona v. Nationwide Life Ins. Co.*, 748 F.3d 698, 706–07 (6th Cir. 2014); 29 U.S.C. § 1024(b)(4). The documents required to be produced under this section are documents regarding *the plan*, maintained by the plan administrator. *See id.* at 706–07 (The documents that “a plan administrator” must furnish to a participant or beneficiary include the plan, the summary plan description, annual or terminal reports, applicable bargaining or trust agreements or other instruments under which the plan is operated).

The documents sought by Cave were not relevant to the creation or operation of the Plan under which she was insured; instead, she sought documents regarding the approval of Dr.

³ Cave does not plead, and on the facts alleged cannot plead, that Delta owes her unpaid benefits under the Plan pursuant to 502(a)(1).

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Sachdeva's Claim and grievance investigation by Delta Dental. For this reason, Cave's request for penalties for failure to produce requested records fails. *See* 29 U.S.C. § 1132(c)(1)(B); 29 C.F.R. § 2575.502c-1 (increasing statutory damages from \$100 to \$110 a day); *see also Lee v. ING Groep, N.V.*, 829 F.3d 1158, 1162 (9th Cir. 2016) ("Penalties under 29 U.S.C. § 1132(c)(1) can only be assessed against 'plan administrators' for failing to produce documents that 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).").

Even though Cave cannot seek penalties against Delta Dental under Section 502(c), under 29 C.F.R. § 2560.503-1(h)(2)(iii), it was arguably required to provide Cave documents regarding its approval of Dr. Sachdeva's Claim and investigation of her grievance. *See* 29 C.F.R. § 2560.503-1 (h)(2)(iii) & (m)(8).⁴ Assuming that this is a viable cause of action, the record shows that Delta Dental has, albeit belatedly, complied with Cave's request for the material records regarding Dr. Sachdeva's Claim and her grievance.⁵

In the affidavit submitted by Delta Dental following the hearing on the motion to dismiss, it attests that it has provided all records regarding Dr. Sachdeva's Claim and Cave's grievance, making its most recent production on August 22, 2018. Dkt. No. 42. In Cave's response and in further correspondence submitted to the court, she identified records that she believes were missing from Delta Dental's most recent production. However, those documents were either in Cave's possession already (as having been sent *by her* to Delta Dental or to her dentist, or were

⁴ (h)(2)(iii) provides that "the claims procedures of a plan will not be deemed to provide a claimant with a reasonable opportunity for a full and fair review" unless the claims procedure provide that "a claimant shall be provided, 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." (m)(8) provides that documents which are "relevant" under (h)(2)(iii) include those: (i) relied upon in making the benefit determination; (ii) submitted, considered, or generated in the course of making the benefit determination, without regard to whether such document, record, or other information was relied upon in making the benefit determination; and (iii) demonstrate compliance with the administrative processes and safeguards required pursuant to paragraph (b)(5) of this section in making the benefit determination.

⁵ As noted, the parties were put on notice that I would be considering evidence outside of the pleadings, thereby converting the motion on this narrow issue into one under Rule 56.

1 produced by Delta Dental in 2016) or do not exist or are otherwise not in Delta Dental's
2 possession (e.g., diagnostic quality x-rays from Dr. Sachdeva, clinical notes used by Delta
3 Dental's consultants to approve the Claim or evaluate her grievance). Dkt. No. 43.⁶

4 Therefore, even if Delta Dental was in violation of ERISA's requirements when it failed to
5 initially provide Cave all of the documents relevant to the Claim and her grievance, it has
6 corrected that omission. As a result, no injunctive relief is appropriate. As noted above, punitive
7 or other damages are not available remedies under ERISA.

8 Therefore, Cave's claims under ERISA are dismissed WITH PREJUDICE.⁷

9 III. OTHER CLAIMS

10 As Cave acknowledges in her Opposition, in my prior Order I gave her leave to amend for
11 the limited purposes of pleading claims under ERISA. Oppo. at 5. To the extent she continues to
12 allege claims based on non-ERISA theories (e.g., breach of good faith and fair dealing and
13 "wrongful disbursement"), those claims cannot be stated for the reasons described in my prior
14 Order. Dkt. No. 29.

16 ⁶ In her response to Delta Dental's affidavit, Cave complains that the records produced show that
17 it violated its own policies by approving Dr. Sachdeva's Claim to perform the work on Cave
18 without possession of diagnostic quality x-rays. She also complains that, even considering the
19 inferior x-ray copies, it should have seen that the work contemplated and then performed by Dr.
20 Sachdeva was not appropriate and should not have been approved or paid. In addition, in
21 correspondence submitted to the court by Cave following the filing of Delta Dental's affidavit and
22 Cave's response, Cave again complains that Delta Dental has not produced documents
23 "substantiating" the basis of why it approved payment to Dr. Sachdeva for the procedure. Because
24 Cave is proceeding pro se, I will consider her September 13, 2018 and September 17, 2018 emails
25 and have them filed in the docket. However, those emails confirm that her main complaint is
26 Delta Dental's improper approval of Dr. Sachdeva's Claim for reimbursement for the procedure
27 performed on Cave, either because it did not have in its possession diagnostic quality x-rays or
28 because it did not properly review the x-rays it had and improperly approved the procedure. As
described in my prior and current Orders, those claims are not cognizable under ERISA as a
violation of Delta Dental's fiduciary duty to Cave.

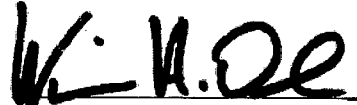
⁷ In addition, given the dismissal of her remaining claims, I need not consider whether Cave's
fiduciary duty claims are barred by the applicable statute of limitations. I note that if she could
assert a breach of fiduciary duty claim, under 29 U.S.C. § 1113(2), that claim should have been
filed within three years after the earliest date on which the plaintiff had actual knowledge of the
breach. Cave knew of the existence of Delta Dental's purported liability – failure to produce
documents and failure to follow its own policies regarding what claims would be approved and
how – back in 2014, more than three years prior to the date she filed her lawsuit. That additional
documents were produced in 2016 that she believes *confirm* her theory that Delta Dental failed to
follow its own policies does not alter that it knew of the existence of her claim back in 2014.

CONCLUSION

Cave's FAC is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

Dated: October 23, 2018

A handwritten signature in black ink, appearing to read "W. H. Orrick", is written over a horizontal line.

William H. Orrick
United States District Judge

United States District Court
Northern District of California

**Appellants Correspondence To The Court Concerning Possible Conflict
of Interest: Attention Clerk Of Court**

(1 of 22)

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No. 18-17134

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Norine Cave,

Plaintiff-Appellant,

v.

Delta Dental of California

Defendant-Appellee

On Appeal from the United States District Court for the Northern District of
California

Civil Case No. 3:18-cv-01205 WHO Honorable William H. Orrick

**APPELLANT'S CORRESPONDENCE TO THE COURT CONCERNING
POSSIBLE CONFLICT OF INTEREST: ATTENTION CLERK OF COURT**

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Delta Dental of California

Comes now Appellant, Norine Cave, in the above captioned action and respectfully requests the Court to review and consider the following Pursuant to 28 U.S. Code § 455, as to a possible conflict of interest in the above captioned appealed action 3:18-cv-01205 WHO.

1.

Information indicating possible conflict of interest has recently been discovered by Appellant, subsequent to the summary judgement via Rule 56 and subsequent to the Appellant's above captioned appeal.

2.

Appellant has recently discovered that attorney Angela Han was a judicial extern for the Honorable William H. Orrick, from January 2016 – May 2016, and is currently employed by Hinshaw & Culbertson LLP, San Francisco. Defendant, Delta Dental of California, is represented in the above captioned civil action by the same law firm, Hinshaw & Culbertson LLP by attorneys Dennis Rolstad, and Brian S. Whittemore. Plaintiff cites THE FOLLOWING:

- a. Hinshaw & Culbertson website listing San Francisco staff attorneys:
https://www.hinshawlaw.com/professionals.html?do_item_search=true&office=4
- b. Hinshaw and Culbertson website background of Associate, Angela Han:
<https://www.hinshawlaw.com/professionals-Angela-Han.html>
- c. Angela Han Linked in Biographical information:

<https://www.linkedin.com/in/angela-han-1b4b42104>

- d. Company background of Orrick, Herrington and Sutcliffe LLP at encyclopedia.com:
<https://www.encyclopedia.com/books/politics-and-business-magazines/orrick-herrington-and-sutcliffe-llp>

3.

Appellant has also recently learned that the law firm of Orrick, Herrington & Sutcliffe represented Delta Dental of California in a class action suit, CGC-14-538849 which was initiated April 22, 2014 and has settled and held subsequent hearings in term of its settlement/distribution disbursements as recently as of August of 2019, that is known to Appellant. The law firm bears the Honorable William H. Orrick's family name, dating back to 1910, as cited by encyclopedia.com, <https://www.encyclopedia.com/books/politics-and-business-magazines/orrick-herrington-and-sutcliffe-llp>. The referenced class action lawsuit (Superior Court of California San Francisco CGC-14-538849) was ongoing and concurrent (litigation and resolution) with Appellant's complaint against Delta Dental of California in district court (3:18-cv-01205 WHO) that was initiated in early 2018.

4.

2

Due to the above-mentioned affiliations, Appellant has genuine concerns and seeks to bring about an awareness of the possible issues related to the case currently on appeal with this Court.

In interest of fairness, impartiality and equity, Appellant humbly requests that this Court evaluate and consider the substance of the factors involved with respect to the Order [Summary Judgement, Rule 56] rendered on October 23, 2018, and subsequently appealed on or about November 2, 2018 by Appellant.

The aforementioned citations are included following this correspondence.

Respectfully submitted this 23rd day of September 2019

/s/ Norine Cave
Norine Cave

Norine Cave Pro Se



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A long-time San Francisco (/places/united-states-and-canada/us-political-geography/san-francisco) law firm known for its work in municipal bonds, Orrick, Herrington and Sutcliffe LLP has grown aggressively since the early 1990s, adding a variety of practices and opening offices around the world. The firm employs some 750 lawyers in 13 practice areas. Transactional practices include Bankruptcy and Debt Restructuring, Compensation and Benefits, Corporate Global Finance, Mergers and Acquisitions, Public Finance, Structured Finance, Real Estate, and Tax. Litigation practices include Litigation, Intellectual Property, Employment Law, and Securities Litigation. Clients include the likes of Salomon Smith Barney, Charles Schwab, and IBM. In addition to its San Francisco (/places/united-states-and-canada/us-political-geography/san-francisco) headquarters, Orrick maintains domestic offices in New York (/places/united-states-and-canada/us-political-geography/new-york) (largest in size), Los Angeles (/places/united-states-and-canada/us-political-geography/los-angeles), Orange County, Sacramento (/places/united-states-and-canada/us-political-geography/sacramento), Silicon Valley (/places/united-states-and-canada/miscellaneous-us-geography/silicon-valley), the Pacific Northwest, and Washington, D.C. International offices are

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[independent-states-and-baltic-nations/cis-and-baltic-political-geography/moscow](#), [Hong Kong \(/places/asia/chinese-political-geography/hong-kong\)](#), [Taipei \(/places/asia/taiwan-political-geography/taipei\)](#), and [Tokyo \(/places/asia/japanese-political-geography/tokyo\)](#). The driving force behind the firm's expansion is chief executive officer Ralph H. Baxter, Jr., who took the helm in 1990.

Firm Origins Date to 1860s

Orrick traces its lineage to attorney John R. Jarboe, Jr. He was born in 1836 in [Maryland \(/places/united-states-and-canada/us-political-geography/maryland\)](#) of French descent (his family had accompanied Lord Baltimore when he founded the city that bore his name) and spoke French as his native tongue. Injured as a child, he was confined to bed for three years and became quite studious. Although the youngest member of his class at [Yale University \(/social-sciences-and-law/education/colleges-us/yale-university\)](#), he graduated near the top in 1855. A year later he moved to California and taught briefly before deciding to study law in the San Francisco office of Jesse B. Hart, at a time when there were no law schools and attorneys "read" with those already established in the profession. In 1858 he became a clerk at Shattuck, Spencer & Reichert and in that same year was admitted to the bar and soon became a practicing attorney. According to company lore his examiners were so impressed by his knowledge of the law they dropped the subject and asked if the young man knew how to make a brandy punch. He replied that he did not, but confided that he had discovered an excellent one was served at a saloon across the street, adding, "And I would be pleased if the learned committee would join me in testing one." The attorneys quickly agreed upon a change of venue.

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Upon Reichert's death, the firm became Spencer & Jarboe, and following Spencer's death Jarboe practiced on his own for about eight months, his specialty real estate, before taking on partners. He became partners with Ralph C. Harrison in 1867, and they worked together until Harrison was elected to the Supreme Bench of the State. W.S. Goodfellow would join them, and in 1885 they founded Jarboe, Harrison & Goodfellow, the firm that Orrick considered its forefather. In 1891 Harrison was elected a justice to the California Supreme Court, and the partnership was dissolved. Two years later, Jarboe, always of poor health, died at the age of 57.

William Orrick Joins Firm in Early 1900s

Goodfellow carried on the firm's tradition, and in 1901 formed a new partnership with Charles Eells, who would play an important role following the 1906 earthquake that leveled San Francisco. Eells helped to save Fireman's Fund Insurance Company by implementing a reorganization plan that allowed the insurer to pay off some of its claims with company stock. The behind the Orrick name. William H. Orrick, joined the firm in 1910, the beginning of a 50-year tenure that would last until he was well into his 80s. Another attorney, Stanley Moore, joined the firm in 1914, and in that year the partnership changed its

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The Herrington in Orrick, Herrington and Sutcliffe LLP was George Herrington who became a partner in 1927 and joined the firm under unusual circumstance. Orrick was well known for his insistence on thoroughly researching his subjects, notorious for the prodigious assignments he gave to associates, but he also demanded as much effort from himself. While Herrington studied law at the [University of California \(/social-sciences-and-law/education/colleges-us/university-california\)](#), Berkeley's School of Law—Boalt Hall, he worked part-time at the library, charged with opening it on Sunday mornings. One more than one occasion he found Orrick sitting on the steps waiting to get in. Years later Orrick would quip that he only hired Herrington to make sure he showed up to work on time.

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Five years after Herrington, Eric Sutcliffe joined the firm in 1932. During this period the firm became involved in one of the most high profile bond issues in its history: the building of the [Golden Gate \(/places/united-states-and-canada/us-physical-geography/golden-gate\)](#) Bridge. While Sutcliffe contributed to the effort by providing research, Herrington played a key part in making sure the bridge was built. The [Golden Gate \(/places/united-states-and-canada/us-physical-geography/golden-gate\)](#) Ferry Company, backed by the deep pockets of its corporate parent, the Southern Pacific Railroad, fought against the bridge project which threatened to undercut its business and challenged the bond issue. When it ultimately passed, Herrington's reputation was established and the firm became a major West Coast law firm.

Sutcliffe would play a more prominent role in the future, however. In 1947 he became the firm's managing partner, the start of a 30-year tenure at the top. The modern era of the firm, which after a regular shuffle of partners settled on its present name in 1980, began after Sutcliffe's retirement. At the time, Orrick was a quiet, conservative law firm, content to stick to its knitting in San Francisco.

Orrick did not open its second office until 1983 when it set up shop in Sacramento. A new chairman, William McKee, appointed a year later had more ambitious goals. He had been with the firm since 1950 and was responsible for launching Orrick's tax practice. During his term as chairman from 1984 to 1986, McKee oversaw the upgrading of the firm's time-keeping methods and merit-based compensation, and modernized the business practices. He also opened the firm's first non-California office, establishing an important beachhead in [New York \(/places/united-states-and-canada/us-political-geography/new-york\)](#) City. Taking advantage of its reputation in California municipal bonds, Orrick was able to recruit half-a-dozen lawyers from a major [New York \(/places/united-states-and-canada/us-political-geography/new-york\)](#) law firm, Brown & Wood. While Orrick looked to make inroads with New York financial companies, other major San Francisco law firms were building up their [Silicon Valley \(/places/united-states-and-canada/miscellaneous-us-geography/silicon-valley\)](#) offices to attract more business from the high-technology sector. Orrick opted to stay out of Silicon Valley, a questionable move at the time, and instead opened an office in [Los Angeles \(/places/united-states-and-canada/us-political-geography/los-angeles\)](#) in 1985.

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Orrick's prospects in the New York market appeared dim after the passage of the 1986 [Tax Reform Act \(/social-sciences-and-](#)

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interest rates that scared off many insurance companies. Small firms exited the bond business, larger firms cut back, and Orrick was close to shuttering its New York office. Instead, it decided to expand, diversify the practice and also beef up its public finance practice. A key move came in July 1987 when Orrick lured away nine bond specialists from Hawkins Delafield, bringing with them some major clients, including New York City's Municipal Assistance Corp. and the Port Authority of New York and New Jersey ([/places/united-states-and-canada/us-political-geography/new-jersey](#)). As a result, business surged and in 1988 Orrick was involved in more bond business than any law firm in the country, according to trade newspaper *The Bond Buyer*, after ranking fourth the year before. The momentum stalled for the New York office by the end of the decade, and the firm was at a crossroads. It experienced some lackluster years, the average per partner profits dropped well below other leading San Francisco law firms, and some key lawyers defected.

New Chairman Leads Firm Into the 1990s

In 1990 the Orrick partners elected Ralph H. Baxter, Jr., a labor litigator, as their new chairman. He quickly took steps to improve the firm's balance sheet and grow partner profits to a much high level. He cut staff and eased out partners who were not producing enough work, and he also embraced a strategy of geographic expansion and placed less emphasis on the San Francisco market. At the time [Los Angeles \(/places/united-states-and-canada/us-political-geography/los-angeles\)](#) had 30 lawyers, New York 50, and San Francisco 175. Baxter's goal was to build the Los Angeles and New York offices to the same size as San Francisco. Because the California economy soon slowed, Baxter had to adjust his plans, cutting back on his Los Angeles aspiration. In 1983 Orrick opened a Washington, D.C., office, but New York remained the key to the firm's future. According to Krysten Crawford, writing for *The American Lawyer* in a 1998 profile on Baxter, "As the financial center of the world, New York is where the deals get done—the mergers, the project financings, the securitizations. New York is also the link to other markets such as London, [Hong Kong \(/places/asia/chinese-political-geography/hong-kong\)](#), and Latin American. In Baxter's mind, a firm that seeks to be a global player—a truly exceptional law firm—must first make a stand in New York."

Orrick used its ties to investment banks to build up existing practices and add others in New York. The first target was securitization (turning loans, mortgages, and the like into tradable securities), followed by project finance. The firm's success in New York in these areas then served to reinforce Orrick's position on the West Coast in securitization work. The size of the New York office grew steadily in the 1990s, reaching 165 lawyers by 1998 to become larger than the San Francisco office, which now employed 155 lawyers.

Company Perspectives:

The firm exists to help our clients achieve their goals and solve their problems by performing effective, challenging and innovative legal work on their behalf, with financial results that will permit the firm to advance and flourish.

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The 1990s also saw Orrick make a belated entry into the Silicon Valley. By this point its rivals had long since carved up the best corporate work, so in 1995 Orrick's new [Palo Alto \(/places/united-states-and-canada/us-political-geography/palo-alto\)](#) office focused on intellectual property litigation. To jumpstart the practice, the firm lured a high-profile litigation lawyer, Terrence McMahon, from a chief rival. McMahon, nicknamed "Mad Dog," was an impressive calling card for the office. "We don't intend

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One area sorely lacking in the late 1990s was Orrick's litigation capability. To address that need, Orrick entered into talks in 1987 to merge with an old-line New York law firm Donovan, Leisure, Newton & Irvine, which had been struggling since a decline in antitrust work in the 1980s and was now considered too small by many potential clients. It appeared to be a good fit for both firms, and Donovan, Leisure's partner voted to approve the merger, but talks faltered in early 1998, due in large part, according to press accounts, to a legal conflict: Donovan, Leisure was being sued by a mutual client. In the end, about 40 of Donovan, Leisure's 60 lawyers were hired by Orrick, which essentially took the ones it wanted, and Donovan, Leisure was dissolved. As a result, Baxter told the press, "We will now have one of the most complete law practices in New York City." While Orrick was acquiring a litigation practice, it was also taking steps to become an international law (/social-sciences-and-law/law/international-law/international-law) firm. A Tokyo office was opened in 1997, followed by a London office in 1998.

Orrick continued its aggressive expansion with the start of the 2000s, looking to grow both domestically and overseas. The firm opened an office in Seattle (/places/united-states-and-canada/us-political-geography/seattle) in 2000 to mainly seek work from clients involved in the Internet (/science-and-technology/computers-and-electrical-engineering/computers-and-computing/internet) and telecommunications industries. To beef up its Pacific Northwest presence, Orrick looked to add to its roster of lawyers. It soon identified a group of lawyers employed in Portland, Oregon-based Ater Wynne LLP, who were hired away in March 2003. Most of the lawyers worked in Ater Wynne's finance group, but what made them especially attractive was their involvement in the fast growing practice of Indian tribal deals, an area Orrick had begun to pursue. In one stroke, the firm became a leader in the practice area. Also in the United States (/places/united-states-and-canada/us-political-geography/united-states) during this period, Orrick opened an office in Orange County, California, by acquiring intellectual property lawyers from the firm Lyon & Lyon.

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Orrick was even more aggressive on the international front in the early 2000s. In 2002 it established an office in Paris by acquiring the 42-lawyer operation of Watson, Farley & Williams. It would focus on cross border and domestic transactions involving structured finance, leasing, and asset financing. A year later, Orrick hired 23 lawyers from Ernst & Young legal affiliate Studio Legale Tributario and opened an office in Milan, Italy, to help the firm in its cross-border business in Europe (/places/oceans-continent-and-polar-regions/oceans-and-continent/europe) and Asia (/places/oceans-continent-and-polar-regions/oceans-and-continent/asia). In 2004 a Rome office was added through the hiring of the 16-lawyer firm Studio Legale e Tributario, which focused on banking and finance and administrative law. In that same year, the Tokyo office expanded, hiring a number of lawyers, including its first partner to deal with South Korea (/places/asia/korean-political-geography/south-korea). Orrick opened an office in Moscow in 2005, and supplemented it with the launch of a Russian practice in London and Washington, D.C. By acquiring a 25 lawyer group from Coudert Brothers in 2005, Orrick also opened an office in Hong Kong (/places/asia/chinese-political-geography/hong-kong), which gave it entry to the potentially lucrative market of the People's Republic of China (/places/asia/chinese-political-geography/china).

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Key Dates:**1885:**

Law firm Jarboe, Harrison & Goodfellow established in San Francisco.

1910:

William H. Orrick joins firm.

1927:

George Herrington named partner.

1932:

Eric Sutcliffe joins firm.

1947:

Sutcliffe begins 30-year tenure as firm's managing partner.

1980:

Firms settles on name: Orrick, Herrington and Sutcliffe LLP.

1984:

New York office opens.

1990:

Ralph H. Baxter, Jr., named chairman.

1995:

Silicon Valley office opens.

1998:

London office opens.

2002:

Paris office opens.

2005:

Offices in Moscow and Hong Kong open.

Further Reading

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Kellher, Kevin, "Orrick, Herrington Joins Silicon Valley's legal Fray," *San Francisco Business*, March 24, 1995, p. 1.

Pearlman, Laura, "Alas, Poor Orrick," *American Lawyer*, May 2001, p. 21.

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of September, 2019, I electronically filed the foregoing, APPELLANT'S CORRESPONDENCE TO THE COURT CONCERNING POSSIBLE CONFLICT OF INTEREST: ATTENTION CLERK OF COURT, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Respectfully submitted this 23rd day of September 2019

/s/ Norine Cave
Norine Cave

Norine Cave, Appellant, Pro Se

**APPELLEES RESPONSE TO APPELLANTS CORRESPONDENCE
TO THE COURT CONCERNING POSSIBLE CONFLICT OF
INTEREST**

Case: 18-17134, 09/26/2019, ID: 11445059, DktEntry: 22-1, Page 1 of 4

NO. 18-17134

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NORINE CAVE,

Plaintiff-Appellant,

v.

DELTA DENTAL OF CALIFORNIA,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 3:18-cv-01205 WHO
Hon. William H. Orrick

**RESPONSE TO APPELLANT'S CORRESPONDENCE TO THE COURT
CONCERNING POSSIBLE CONFLICT OF INTEREST**

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Defendant-Appellee Delta Dental of California respectfully presents the following Response, and concurrently filed Declaration, to Appellant Norine Cave's correspondence concerning possible conflict of interest.

In sum, the Hinshaw & Culbertson associate at issue did not work on this suit while an extern for District Judge William Orrick, and indeed Appellant's suit was not filed until long after her externship had ended. (Declaration of Angela Han ("Han Decl.") ¶ 4.) Moreover, the associate has not worked on the defense of Appellant's suit while employed at Hinshaw. (*Id.* at ¶ 3.) Under applicable authorities there is no conflict of interest or possible disqualification. Moreover, it does not appear the Judge Orrick ever worked for the law firm bearing the name of his grandfather, Orrick, Herrington & Sutcliffe LLP ("the Orrick law firm"), a firm which has no involvement with Appellant's suit, and the existence of the Orrick law firm or its representation of Defendant-Appellee in another matter also does not present a conflict.

Angela Han

Angela Han is an associate attorney with Hinshaw & Culbertson, LLP, counsel for Defendant-Appellee here, and has been employed fulltime by Hinshaw & Culbertson since September 25, 2017 and was previously a summer associate for Hinshaw & Culbertson. (Han Decl, ¶ 1.) Angela Han served as a judicial extern for Judge Orrick from January 11, 2016 through April 22, 2016. (Han Decl, ¶ 2.) Ms. Han has not worked on this suit concerning Appellant while employed at Hinshaw & Culbertson, and did not have any contact with the suit while she was an extern for Judge Orrick. (Han Decl, ¶¶ 3-4.) Indeed the original complaint in this suit was not filed by Appellant until January 24, 2018, long after Ms. Han's judicial externship had ended. (Defendant-Appellee's Excerpts of Record at 251.)

California authorities provide that Ms. Han's prior judicial externship is not a conflict or disqualification of any kind. Vicarious disqualification, and hence

conflict, only exists if the former government lawyer had responsibility over the matter in dispute or acquired confidential information relating thereto while working for the government. *See Chambers v. Superior Court*, 121 Cal.App.3d 893, 902-903, 175 Cal.Rptr. 575, 581 (1981). Ms. Han had no responsibility over this suit at the time she was an extern, as this suit had not even been filed yet. California Rule of Professional Conduct 1.11(a) similarly provides that a lawyer who formerly served as a government employee shall not represent a client in a matter in which the lawyer participated personally and substantially as a public employee. As Ms. Han neither represents Defendant-Appellee here and did not participate in this suit in any manner as a public employee, she is neither conflicted nor disqualified.

Judge Orrick and the Orrick Law Firm

The information submitted by Appellant does not show that Judge Orrick ever worked at the Orrick law firm. Instead the materials show that the firm is named in part after William H. Orrick who joined the firm in 1910 and practiced there until the 1960's. (See Encyclopedia.com entry attached to Appellant's Correspondence, p. 2/9.) California authorities show that vicarious liability applies when a government employee was directly involved in a matter while previously a private lawyer. *See, e.g., San Francisco v. Cobra Solutions, Inc.*, 38 Cal.4th 839, 852-853, 43 Cal.Rptr.3d 771, 781-782 (2006). There is no evidence that Judge Orrick was involved in the suit in which the Orrick law firm represents Defendant-Appellee, and the fact that a San Francisco law firm bears the name of Judge Orrick's grandfather does not create any conflict or disqualification.

Conclusion

Neither Ms. Han's prior judicial externship with Judge Orrick, or Defendant-Appellee's representation by the Orrick law firm in another matter, creates a conflict or disqualification. Appellant's concerns should be set aside.

Respectfully Submitted,

DATED: September 26, 2019

HINSHAW & CULBERTSON LLP

By: s/ Dennis G. Rolstad
DENNIS G. ROLSTAD
Attorneys for Defendant-Appellee
DELTA DENTAL OF CALIFORNIA

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from this filing is
available in the
Clerk's Office.**