

Case No. 7:08-CV-163
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the Defendants' motion for summary judgment. [Doc. 74 at 48.]

For the following reasons, the Court **GRANTS** the Defendants' motion for summary judgment and accordingly **DENIES** the Plaintiff's cross-motion for summary judgment. Further, the Court **DISMISSES** the Plaintiff's state-law breach of contract claim without prejudice.

I. Background

With his complaint, Plaintiff Dennis Kelly seeks benefits allegedly due to him under a Supplemental Executive Retirement Plan ("SERP") and Post-Retirement Life Insurance Program ("RLIP"), as well as several other employee benefits plans maintained by his former employer Defendant Handy & Harman ("H&H"). [Doc. 1.] H&H hired Kelly as a director of internal audits in September 1985, ultimately promoting him to Vice President and Chief Financial Officer in 2001. After a disagreement about provisions in H&H's benefit plans and an investigation into Kelly's role in their creation, H&H fired Kelly in September 2005. Kelly subsequently applied for benefits and H&H denied his claim. After the Plan Administrators denied Kelly's final appeal, Kelly filed the instant lawsuit in this Court, seeking those benefits and others, as well as claiming breach of his employment agreement.

A. The Original H&H Plans and Proposed Amendments^{4/}

Defendant Handy & Harman, a manufacturer of electronic components and various industrial products, hired Plaintiff Dennis Kelly in 1985 as a director of internal audits. Over the next twenty

^{4/}In reviewing the Plan Administrator's determinations—which the parties agree are subject to the "abuse of discretion" standard—the Court confines its review to the administrative record. *Miller v. United Welfare Fund*, 72 F.3d 1066, 1071 (2d Cir. 1995). Although this Court permitted some additional discovery as to the existence of a potential conflict of interest, this discovery is properly limited to that issue. *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 174 (2d Cir. 2001) (noting that on issue "distinct from the reasonableness of plan Administrator's decision," court is not confined to the administrative record). Accordingly, the Court does not consider the additional evidence offered by the parties except to the extent it evidences a procedural defect in the Administrator's review, such as a conflict of interest.

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years, H&H promoted Kelly to various positions, including assistant controller (1989-1993), controller (1993-1998), vice president and controller (1998-2001), and finally vice president and chief financial officer (2001 to September 15, 2005). As one of the benefits of his senior management positions, Kelly participated in H&H's Supplemental Executive Retirement Plan ("SERP") and Post-Retirement Life Insurance Plan ("RLIP").

In February 1998, the H&H Board amended the company's existing SERP, adopting a plan document dated January 1, 1998 (the "January 1998 SERP"). [Doc. 51 at 64.] Relevant here, the January 1998 SERP contained a "Termination, Suspension or Amendment" clause, providing: "The Board of Directors of the Company in its sole discretion may terminate, suspend or amend the Supplemental Plan at any time or from time to time, in whole or in part . . ." [Doc. 51 at 67.] H&H had also adopted an Executive Post-Retirement Life Insurance Program ("RLIP") in February 1995 with the same amendment provisions. [Doc. 51 at 71.] As indicated, these plans both required approval from the Board of Directors before any amendment could become effective.

In March and April 1998, Defendant WHX Corporation ("WHX") completed a tender offer and acquired all the outstanding shares of H&H, making H&H a wholly-owned WHX subsidiary. [Doc. 51 at 11.] This acquisition triggered the January 1998 SERP's "change of control" provisions, generating a lump sum payment for Kelly. [Doc. 51 at 24.] On April 3, 1998, Kelly executed a Settlement and Release Agreement with H&H and WHX, whereby the Defendants agreed to pay Kelly a specified amount and Kelly agreed to release the Defendants from any claims arguably arising from the tender offer and acquisition. [Doc. 51 at 24.]

The Release also provided that "the Compensation Arrangements shall have no further force or effect after the Tender Closing . . ." [Doc. 51 at 26.] In turn, the Release defined the Compensation Agreements as the "agreements and arrangements listed on Schedule A," which

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included the January 1998 SERP.^{5/} [Doc. 51 at 32.] On September 2, 1998, however, Plaintiff Kelly signed a new employment agreement with H&H that stated he was “eligible to participate in the [H&H SERP] and the [H&H RLIP].” [Doc. 51 at 52.]

On August 5, 1998, H&H director and chief executive Robert LeBlanc attended a meeting of the WHX Board’s Compensation Committee. [Doc. 51 at 473.] According to the minutes, LeBlanc presented the Committee with several proposals regarding H&H’s stock option and incentive plans. [Doc. 51 at 474-75.] In addition, LeBlanc “discussed Handy & Harman’s SERP . . . and agreed to report back to the Compensation Committee on further proposals regarding the SERP.” [Doc. 51 at 475.] Handwritten notes from the meeting note that “rebuilding SERP impacts 6 people - Sr. officers,” and that someone is to “report back on development of SERP.” [Doc. 51 at 493.]

On October 30, 1998, the subsidiary H&H Board of Directors—consisting of LeBlanc, Arnold Nance, Stewart Tabin, and Neale Trangucci—met to consider the benefits proposals. [Doc. 51 at 498.] According to the minutes, chief executive LeBlanc and general counsel Paul Dixon reviewed the proposed and revised compensation plans, including the Management Incentive Plans, the Long-Term Incentive Plan, and the SERP.^{6/} [*Id.* at 2.] Ultimately, the H&H Board agreed “in concept” with these proposed plans and agreed to refer “the SERP, including a bonus at the 100% level . . . for discussion and approval to the [parent company] WHX Board of Directors.” [Doc. 51 at 499.] Both H&H chief executive LeBlanc and general counsel Dixon participated in the H&H

^{5/}The Defendants dispute that the termination provision applied to the full January 1998 SERP, instead saying that the provision referred only to the “immediate payment obligations that were due as a result of the change of control.” [Doc. 70 at 17.]

^{6/}Dixon also served as corporate secretary and recorded the minutes of the October 30, 1998, meeting. [Doc. 51 at 499.]

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SERP plan and both would benefit from any enhancement to the benefits under the plans.

On November 5, 1998, LeBlanc and Dixon presented the compensation and incentive plans to the WHX Board's Compensation Committee. [Doc. 51 at 500.] The minutes reflect that general counsel Dixon "reviewed . . . the structure of H&H's existing incentive and compensation plans. He further described the proposed changes to such plans and new plans which the management of H&H believed to be in the best interests of H&H." [Doc. 51 at 502.] After the Committee questioned LeBlanc and Dixon about the proposals, LeBlanc and Dixon "agreed to finalize the proposed plan for final approval at the next compensation committee meeting."^{7/} [Id.]

B. Development and Circulation of the August 1998 SERP

Meanwhile, H&H general counsel Dixon and Plaintiff Kelly continued work on specific changes to the SERP with the assistance of H&H outside counsel Alfred Wheeler and consultants at Watson Wyatt. For example, in June 1999, Dixon sent Wheeler a letter indicating that H&H had increased the level of insurance coverage under the SERP. [Doc. 51 at 108.]

In December 1999, Eugene Sullivan of Watson Wyatt finished a draft of the proposed SERP and sent a copy to Dixon. [Doc. 51 at 120.] Outside attorney Wheeler read this draft and then created his own, sending it to Dixon and Plaintiff Kelly on August 22, 2001. [Doc. 51 at 133.] After receiving feedback from Kelly, [Doc. 51 at 180], Wheeler made revisions to the draft and sent these revisions, as well as a proposed Amendment to the RLIP, to Dixon and Kelly on December 11, 2001. [Doc. 51 at 181.] In October 2002, outside attorney Wheeler further corresponded with

^{7/}At its February 2, 1999, meeting, the WHX Board's Compensation Committee passed a resolution acknowledging and approving the methodology of bonus payments to be made under the H&H 1998 Management Incentive Plan and Long-Term Incentive Plan. The Committee also formally approved the H&H's Board's adoption of the Management Incentive Plan for 1999. [Doc. 51 at 539.] At an August 4, 1999, meeting, the Compensation Committee ratified the "approval and implementation by the Board of Directors of Handy & Harman of the Handy & Harman Long-Term Incentive Plan." [Doc. 51 at 595.] The Committee took no action at either meeting relative to the SERP.

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Dixon and Kelly regarding a potential reduction of the normal retirement age under the SERP. [Doc. 51 at 240.] Ultimately, on February 13, 2003, outside attorney Wheeler sent H&H general counsel Dixon and Plaintiff Kelly a final version of the proposed SERP, dated as of August 1, 1998, as well as an Amendment to the RLIP. [Doc. 51 at 284.] Dixon signed the documents as general counsel for H&H that same day. [Doc. 51 at 85.]

Both during and after the August 1998 SERP's creation, H&H paid two parting officers under its terms. First, when H&H director Nance left in 2001, Plaintiff Kelly instructed a consultant at Watson Wyatt to calculate his accrued benefit and a lump sum benefit payment using the August 1998 SERP. [Doc. 51 at 122.] Kelly then forwarded these calculations to Nance. [Doc. 51 at 456.]

Second, when H&H chief executive LeBlanc left the company in spring 2003, the H&H Board of Directors—composed of Garen Smith, Tabin, Trangucci, Neil Arnold, and new H&H chief executive Daniel Murphy—approved a lump sum payment to LeBlanc using figures from the August 1998 SERP. [Doc. 51 at 470-71.] Part of the H&H Board's Unanimous Written Consent, stated:

WHEREAS, the Company has in place the Supplemental Executive Retirement Plan as Amended and Restated as of August 1, 1998 . . . THEREFORE, it is RESOLVED, that Robert D. LeBlanc be paid a lump sum payment from the Supplemental Executive Retirement Plan in the amount as directed by the Company's advisors, thereby terminating his participation in the aforesaid Plan; . . .

[Doc. 51 at 470.]

In another distribution of the August 1998 SERP a few months later, H&H general counsel Dixon sent copies of that document as well as the Amended RLIP and a SERP election form to SERP beneficiaries WHX CFO Robert Hynes, H&H chief executive Murphy, H&H controller and WHX assistant controller Mario Arena, H&H executive vice president Tom Brouillard, H&H vice president of human resources Peter Marciniak, and Plaintiff Kelly. [Doc. 51 at 342.] These beneficiaries executed SERP benefit election forms, which Dixon then forwarded to outside counsel

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Wheeler. [Doc. 51 at 368.]

C. The WHX Bankruptcy & Plaintiff Kelly's Termination

On March 7, 2005, WHX filed for Chapter 11 bankruptcy. In analyzing the company's liabilities for purposes of the bankruptcy reorganization plan, Tabin asked Plaintiff Kelly to provide calculations for potential payments that would be due to Kelly and other H&H executives under the various provisions of the H&H SERP.

On March 2, 2005, Plaintiff Kelly provided Tabin with his initial calculations based on the August 1998 SERP—calculations which showed significant change in control liabilities. [Doc. 51 at 380.] These calculations raised some concern at H&H and WHX, initially leading to several drafts of a memorandum stating that the companies had never adopted the August 1998 SERP and outlining the material differences between the two plans. [Doc. 51 at 383-390.] Ultimately, both an outside consultant at Towers Perrin and H&H vice president Marciniak provided the companies with comparisons of the two SERPs. According to Marciniak's calculations, the January 1998 SERP would require a benefits payment of approximately \$1.3 million while the most generous version of the August 1998 SERP would require a payment of \$14.5 million.

As a result of these discrepancies, the H&H Board of Directors authorized the formation of a Special Investigation Committee (the "SIC")—composed of Arnold, Trangucci, and Tabin—to review how the August 1998 SERP was created and whether it had ever become effective. [Doc. 54-75 at 13.] The SIC retained the firm of Olshan Grundman Frome Rosenzweig & Wolosky LLP to conduct the formal investigation. [*Id.*]

In May 2005, Olshan partners Kenneth Rubinstein and Herbert Ross reviewed documents and conducted interviews of various WHX and H&H current and former employees, including H&H director Arnold, general counsel Dixon, WHX CFO Hynes, Plaintiff Kelly, former chief executive

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LeBlanc, H&H vice president Marciniak, H&H chief executive Murphy, former H&H director Nance, H&H director Tabin, and H&H director Trangucci. [Doc. 52-11 at 4-5, Doc. 54-75 at 4.] In its final report, the Olshan firm concluded that the “August 1998 SERP was never properly adopted or implemented . . . and, therefore, the appropriate SERP upon which the Company should base all future benefits and calculations is the [January 1998 SERP].” [Doc. 54-75 at 10.]

At its June 3, 2005, meeting, the H&H Board adopted the findings of the SIC—which had adopted the findings of the Olshan firm—and resolved that “the purported amendment to the January SERP was never adopted by the Company.” [Doc. 54-56 at 4.] On June 28, 2005, the H&H Board formally amended the change in control provisions of the January 1998 SERP to provide that the pending WHX Chapter 11 bankruptcy “shall not constitute a ‘change of control’ of the Company.” [Doc. 54-56 at 13.]

The H&H Board then held a special meeting on July 14, 2005, to discuss the creation of the August 1998 SERP. [Doc. 54-57 at 2.] The Board first interviewed general counsel Dixon and then separately interviewed Plaintiff Kelly. [*Id.* at 3.] When Plaintiff Kelly brought up the fact that the Board had approved severance payments for former H &H director Nance in 2001 and former chief executive LeBlanc in 2003 using calculations from the August 1998 SERP, director Tabin responded, “That was one time.” [Doc. 52-4 at 33-34.]

On September 15, 2005, H&H terminated Plaintiff Kelly’s employment. [Doc. 54-58 at 2.] According to the termination notice, H&H found that Kelly had violated paragraph 7(a) of his Employment Agreement by attempting to amend the SERP and other benefit plans for his own benefit without Board approval, for failing to disclose the existence of the plan documents, for failing to cooperate with the SIC investigation, and for causing material losses to the company. [*Id.*]

After his termination, Plaintiff Kelly submitted a claim for benefits under the various H&H

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employment and ERISA benefits plans. On July 6, 2006, the H&H Compensation Committee adopted claims procedures under the SERP and RLIP, [Doc. 46-9 at 2], and on July 12, 2006, appointed Louis Klein the Claim Administrator. [Doc. 54-61 at 3.] Klein denied Plaintiff Kelly's claim for benefits under the August 1998 SERP and RLIP in a nine page letter dated September 27, 2006. [Doc. 54-63.] After requesting and receiving extensive documentary records from H&H, Kelly appealed Klein's determination. [Doc. 46-14.] The Plan Administrator, the H&H Compensation Committee, affirmed Klein's decision on February 8, 2007. [Doc. 46-15 at 2-3.]

As a result, Plaintiff Kelly filed the instant lawsuit on January 8, 2008, asserting claims for: (1) breach of Kelly's H&H employment agreement; (2) a declaratory judgment on Kelly's entitlement to various plan benefits; (3) benefits due under ERISA as to the August 1998 SERP; (4) benefits due under ERISA as to the H&H/WHX Pension Plan, H&H Life Insurance Program, and Medical Plan; (5) breach of contract as to the Bonus Plan, Incentive Plan, and Option Plan; (6) interference with protected ERISA rights; (7) attorneys fees under ERISA; and (8) indemnification. [Doc. 1.]

Plaintiff Kelly has since withdrawn his claims as to the Medical Plan in Count IV, the Incentive Plan and Option Plan in Count V, and the indemnification claim (Count VIII). [Doc. 74 at 47-48.] The Plaintiff also provisionally agrees to withdraw his claim as to the H&H/WHX Pension Plan in Count IV. [Doc. 74 at 47.]

The Defendants now move this Court to grant them summary judgment as to Plaintiff Kelly's remaining claims. Plaintiff Kelly opposes the motion and seeks summary judgment on the validity of the August 1998 SERP and Amended RLIP. The Defendants have replied, and the motions are now ripe for ruling.

II. Legal Standard

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Summary judgment is appropriate where the evidence submitted shows “that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c).

The moving party has the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-moving party’s case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *McLee v. Chrysler Corp.*, 109 F.3d 130, 134 (2d Cir. 1997). “A fact is material . . . if it might affect the outcome of the suit under the governing law.” *Mack v. Otis Elevator Co.*, 326 F.3d 116, 120 (2d Cir. 2003) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The moving party meets its burden by “informing the district court of the basis for its motion, and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp.*, 477 U.S. at 323 (quoting FED. R. CIV. P. 56(c)). However, the moving party is under no “express or implied” duty to “support its motion with affidavits or other similar materials negating the opponent’s claim.” *Id.*

Once the moving party satisfies its burden, the burden shifts to the nonmoving party to set forth specific facts showing a triable issue. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). It is not sufficient for the nonmoving party merely to show that there is some existence of doubt as to the material facts. *See id.* at 586. Nor can the nonmoving party rely upon the mere allegations or denials of its pleadings. FED. R. CIV. P. 56(e).

In deciding a motion for summary judgment, the Court views the factual evidence and draws all reasonable inferences in favor of the nonmoving party. *McPherson v. Coombe*, 174 F.3d 276, 279-80 (2d Cir. 1999). “The disputed issue does not have to be resolved conclusively in favor of

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the non-moving party, but that party is required to present some significant probative evidence that makes it necessary to resolve the parties' differing versions of the dispute at trial." *McClellan v. Smith*, 439 F.3d 137, 144 (2d Cir. 2006) (citing *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968)). Ultimately the Court must decide "whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Kulak v. City of New York*, 88 F.3d 63, 70 (2d Cir. 1996) (quoting *Anderson*, 477 U.S. at 242).

III. Analysis

This case centers on the validity of an August 1998 Supplemental Executive Retirement Plan and Post-Retirement Life Insurance Program. Because Plaintiff Dennis Kelly sought benefits under these plans and the Plan Administrator ultimately denied those claims, this Court first determines the appropriate standard of review for analyzing the Administrator's determinations. Applying this standard, the Court then examines whether the Administrator erred in denying Plaintiff Kelly's claims.

A. Standard of Review

When an ERISA plan gives the Plan Administrator discretionary authority to determine eligibility for benefits or to construe the terms of the plan, a reviewing court applies an abuse of discretion standard. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). Under this deferential standard, "a court may not overturn the administrator's denial of benefits unless its actions are found to be arbitrary and capricious, meaning 'without reason, unsupported by substantial evidence or erroneous as a matter of law.'" *Pagan v. NYNEX Pension Plan*, 52 F.3d 438, 442 (2d Cir. 1995); *see also Kinstler v. First Reliance Std. Life Ins. Co.*, 181 F.3d 243, 249 (2d Cir. 1999).

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When an Administrator acts with a conflict of interest, however, that conflict “should be weighed as a factor in determining whether there is an abuse of discretion.” *Metropolitan Life Ins. Co. v. Glenn*, 128 S.Ct. 2343 (2008) (internal quotations omitted). As the Second Circuit has held, the existence of a conflict of interest “does not make *de novo* review appropriate . . . even where the plaintiff shows that the conflict of interest affected the choice of a reasonable interpretation.” *McCauley v. First Unum Life Ins. Co.*, 551 F.3d 126, 133 (2d Cir. 2008).

Instead, the weight given to the conflict changes according to the evidence presented. *McCauley*, 551 F.3d at 133. Accordingly:

[W]here circumstances suggest a higher likelihood that [the conflict] affected the benefits decision, including, but not limited to, cases where an . . . administrator has a history of biased claims administration, the conflict of interest should prove more important (perhaps of great importance). It should prove less important (perhaps to the vanishing point) where the administrator has taken active steps to reduce potential bias and to promote accuracy, for example, by walling off claims administrators from those interested in firm finances, or by imposing management checks that penalize inaccurate decisionmaking irrespective of whom the inaccuracy benefits.

McCauley 551 F.3d at 133 (quoting *Glenn*, 128 S.Ct. at 2351) (internal quotations omitted).

The parties in this action essentially agree that the Claim and Plan Administrators are given discretion under the Plans and that they acted with some conflict of interest in denying Plaintiff Kelly’s claim for benefits. [Doc. 63 at 33; 74 at 29; 70 at 20-21.] They dispute, however, the weight this Court should give to the conflict. According to the Defendants, the conflict should play a minimal role because “the Claim and Plan Administrators’ determinations are based on a compelling documentary record.” [Doc. 63 at 33.] In contrast, Plaintiff Kelly says that “significant conflicts of interest” and repeated procedural flaws elevate the conflict of interest to primary importance. [Doc. 74 at 32.]

Considering both the administrative record and the supplemental evidence on the existence

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of a conflict, the Court finds that any potential conflict played a *de minis* role in the denial of Plaintiff Kelly's claim for benefits. Both claim administrator Klein and WHX director Smith, who wrote the Plan Administrator's decision, are independent directors of WHX, are not officers or employees of H&H, and were not involved in the decision to terminate Plaintiff Kelly.

Moreover, even if the Administrators acted with some personal conflict, they relied on a large documentary record, gave the Plaintiff's claims thorough treatment, and applied the appropriate standards of law governing corporate entities and employee benefits. Accordingly, the Court reviews the Administrator's denial of Kelly's benefit claims for an abuse of discretion, giving little weight to any conflict of interest the Administrator may have had.

B. The August 1998 SERP and Amended RLIP

In moving for summary judgment, the Defendants say that amending the January 1998 SERP and RLIP required Board approval, that the H&H Board never gave such approval, and therefore, the August 1998 SERP and Amended RLIP are not valid plan documents. [Doc. 63 at 12-15.] Responding, Plaintiff Kelly says that he had actual and implied authority to create the August 1998 SERP and Amended RLIP, that the H&H Board approved the August 1998 SERP in its meetings and use of the document, and that the Defendants independently ratified the August 1998 SERP and RLIP through their actions. [Doc. 74 at 37-46.]

Central to the outcome of the Plaintiff's claims are the standards for administering employee benefit plans under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.* ("ERISA"). Section 402(b)(3) of ERISA requires employers to "provide a procedure for amending [a benefit plan], and for identifying the persons who have authority to amend the plan, . . ." 29 U.S.C. § 1102(b)(3).

Once an employer establishes these procedures and identifies the amendment authority, the

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employer is bound by these determinations. *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 85 (1995) (noting that once company designates that person may take legally binding actions on its behalf in amending ERISA plans, company is bound by that determination). Thus, when a plan reserves amendment power to “the Company,” one must look only to “the Company” and not to any other person as the entity authorized to amend the plan. *Algie v. RCA Global Commc’ns, Inc.*, 60 F.3d 956, 960 (2d Cir. 1995) (citing *Curtiss-Wright*, 514 U.S. at 85). (internal quotations omitted).

Furthermore, courts apply principles of corporate law to determine who has authority to make decisions on behalf of an organization. *Curtiss-Wright*, 514 U.S. at 85 (whether amendment is valid will “depend on a fact-intensive inquiry, under applicable corporate law principles, into what persons or committees within [the company] possessed plan amendment authority, either by express delegation or implied, and whether those persons or committees actually approved the new plan provision”).

In this case, the January 1998 SERP and RLIP stated that only the “The Board of Directors of the Company” could amend those plans.^{8/} [Doc. 46-2 at 6; 46-16.] Accepting this fact as true, the Plaintiff nevertheless argues that the H&H Board delegated its authority to amend the Plans to LeBlanc, Dixon, and Plaintiff Kelly; that the Board did in fact amend the SERP at its October 30, 1998, meeting; and alternatively that the H&H Board ratified the amended SERP. The Claim and Plain Administrators determined otherwise.

1. Did the Board Delegate Its Authority to Amend the Plans?

As to the agency argument, Plaintiff Kelly essentially says that the H&H Board gave actual

^{8/} Because the Plans were amended and restated prior to the WHX acquisition, the phrase “the Company” referred to Handy & Harman. The parties do not dispute this conclusion. Moreover, the Court’s analysis below would not change if the phrase was expanded to include both H&H and WHX or WHX alone.

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authority to chief executive LeBlanc and general counsel Dixon to create the August 1998 SERP and Amended RLIP and that LeBlanc in turn delegated the task to Kelly. By virtue of this claimed open-ended delegation, Kelly says he had implied authority to create the new plans and exercise discretion as to their contents, even though the amended plans would give Kelly (and LeBlanc and Dixon) significantly greater benefits. In addition, Plaintiff Kelly says he could reasonably rely on LeBlanc's representations as well as the Company's use of various SERP formulas as evidence of his authority to create the plans.

The Administrator determined that the H & H Board never delegated its authority to amend the plans. The Court reviews this determination for an abuse of discretion.

An agent enjoys actual authority to bind a principal when the principal's manifestations to that agent, as reasonably understood by the agent, express the principal's assent that the agent act on the principal's behalf. Restatement (Third) of Agency § 3.01 (2006); *see also C.E. Towers Co. v. Trinidad & Tobago Airways Corp.*, 903 F. Supp. 515, 523 (S.D.N.Y. 1995). This actual authority also includes the implied authority to take those steps reasonably necessary to accomplish the principal's expressed objectives. Restatement (Third) of Agency § 2.02 (2006); *see also Columbia Broadcasting Sys., Inc. v. Stokely-Van Camp, Inc.*, 522 F.2d 369, 375-76 (2d Cir. 1975) (agent enjoys authority to engage in conduct incidental to express grant of authority or reasonably necessary to accomplish it).

The Court finds the current case distinguishable from *Aramony v. United Way of America*, 28 F. Supp. 2d 147 at 166-67 (S.D.N.Y. 1998) *aff'd in part and rev'd in part on other grounds*, *Aramony v. United Way Replacement Benefit Plan*, 191 F.3d 140 (2d Cir. 1999). In *Aramony*, the district court found sufficient evidence that the United Way's Board of Directors had delegated amending authority to certain corporate officers. In contrast, this Court finds that the

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Administrator's determination that the H&H Board never delegated its amendment authority was not arbitrary and capricious.

At its October 30, 1998, meeting, the Board merely "agree[d] in concept" with the SERP. Nothing in the minutes supports an argument that the Board delegated authority to LeBlanc to make changes to the SERP, especially major changes that would significantly benefit LeBlanc himself. Instead, the minutes indicate that the H&H Board actually referred the Plans to the WHX Board. As a wholly owned subsidiary of WHX, the referral makes sense.^{9/} Moreover, unlike the United Way Board in *Aramony*, there is no evidence in the administrative records suggesting that the H&H Board customarily approved employee benefit plans "in concept" and then left the specific terms to company executives.

Thus, this Court affirms the Administrator's determination that the H&H Board did not delegate authority to chief executive LeBlanc, general counsel Dixon, or Plaintiff Kelly to amend the January 1998 SERP or the RLIP. Moreover, in the absence of any actual authority to amend the plans, Plaintiff Kelly cannot claim to have any implied authority to do so either.

Nevertheless, Plaintiff Kelly argues that he reasonably relied on LeBlanc's statements regarding the Board's approval, essentially an argument that LeBlanc had apparent authority to amend the plans, which he in turn delegated to Kelly. [Doc. 74 at 36.] This argument fails for similar reasons. Under New York law, an agent has apparent authority if "a principle places the agent in a position where it appears that the agent has certain powers which he may or may not possess." *Telenor Mobile Commc'ns AS v. Storm LLC*, 584 F.3d 396, 411 (2d Cir. 2009). This authority arises from "written or spoken words or any other conduct of the principal which,

^{9/}Moreover, this referral carries the same weight regardless of whether WHX Board approval was ultimately necessary.

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reasonably interpreted, causes a third person to believe that the principle consents to have an act done on his behalf by the person purporting to act for him.” *Dinaco, Inc. v. Time Warner, Inc.*, 346 F.3d 64, 69 (2d Cir. 2003) (finding reliance unreasonable as a matter of law).

In this case, Plaintiff Kelly does not point to any words or conduct on the part of the H&H Board *directed toward him* that, reasonably interpreted, permit the conclusion that chief executive LeBlanc could amend the SERP or delegate that power to Kelly. As noted above, the only action taken by the H&H Board in reference to the SERP was to approve it in concept and to refer it. Whatever representations LeBlanc made to Kelly beyond this, “a person cannot, by his own acts, imbue himself with the apparent authority to act for a principle.” 724 N.Y.S.2d 447, 448 (N.Y. App. Div. 2001) (citing *Standard Funding Corp. v. Lewitt*, 678 N.E.2d 874, 877 (N.Y. 1997)). This case presents stark support for this rule. In effect, Kelly, an interested party, says he relied upon LeBlanc, another interested party, in believing that LeBlanc could unilaterally amend the SERP to greatly benefit LeBlanc and Kelly.

Plaintiff Kelly cannot have “reasonably relied” on any statements made by LeBlanc. Instead, only the Company’s representations to Kelly have importance. In this case, Kelly fails to produce sufficient evidence of any conduct or statements on the part of the Company permitting a reasonable inference that LeBlanc, Dixon, or Kelly had authority to amend the plans. Accordingly, the Court finds that the Administrator’s determination in this respect was not arbitrary and capricious.^{10/}

2. *Did the Board Itself Amend the SERP?*

^{10/}The Court notes that even under a *de novo* standard of review, Kelly has not produced sufficient evidence to avoid summary judgment on this claim. Accordingly, the amount of deference due the Administrator is not determinative here.

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In the alternative, the Plaintiff says that the H&H Board approved the August 1998 SERP at its October 30, 1998, meeting.^{11/} [Doc. 74 at 37.] To support this contention, the Plaintiff points to the minutes of the meeting, recorded by general counsel Dixon, which note: “After discussion and agreement in concept with respect to these proposed Plans, it was agreed that the Management Incentive Plan, the Long-Term Incentive Plan, and the SERP, including a bonus at the 100% level, would be referred for discussion and approval to the WHX Board of Directors.” Addressing this contention, the Plan Administrator found that this action by the H&H Board did not constitute an adoption of the proposed SERP.

The Court finds that this determination was not an abuse of discretion. Nowhere do the minutes of this meeting indicate that the Board did anything other than discuss and “agree[] in concept” to some potential changes to the existing SERP. Moreover, while the other plans discussed at the October 1998 meeting were later approved by WHX, there is no evidence that WHX adopted or approved even minor changes to the SERP, much the less the large enhancement of benefits provided by the August 1998 SERP.

New York’s Business Corporation Law provides that “the vote of a majority of the directors present at the time of the vote . . . shall be an act of the Board.” N.Y. Bus. Corp. Law § 708(d). Moreover, New York courts hold that a corporate board “speaks through its resolutions and bylaws.” *Boyle v. Petrie Stores Corp.*, 518 N.Y.S.2d 854, 859 (N.Y. Sup. Ct. 1987); *see also Knapp v. Rochester Dog Protective Ass’n*, 257 N.Y.S. 356, 358 (N.Y. App. Div. 1932) (“The plaintiff has failed to present the minutes of any meeting of the board of directors of the defendant at which a resolution was adopted, authorizing the execution of the alleged agreement upon which she seeks

^{11/}Plaintiff Kelly makes no argument that the H &H Board itself amended the RLIP. [Doc. 74 at 37-44.].

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to recover, or at which any such proposition was ever mentioned or discussed.”); *Hauben v. Morris*, 291 N.Y.S. 96, 106 (N.Y. Sup. Ct. 1936) (“It is well settled that a corporation can only act through its board of directors at a formal meeting in a formal way . . .”).

As evidence of some formal approval, the Plaintiff emphasizes the H&H Board’s Unanimous Written Consent, executed in April 2003 and stating that the company had “in place” the August 1998 SERP and directing a payment to outgoing chief executive LeBlanc under its terms. The Administrator determined, however, that the directors relied on self-interested Dixon and Plaintiff Kelly to calculate LeBlanc’s benefits and had no knowledge that the “August 1998 SERP” referenced in the UWC was an entirely new and enhanced SERP that Dixon and Kelly had drafted. Thus, this action cannot constitute adoption of the new SERP.

In light of the lack of evidence that the H&H or WHX Boards gave formal approval to the August 1998 SERP, the Court finds that the Administrator did not abuse its discretion in denying Plaintiff Kelly’s claim for benefits on this ground.

3. Did the Board Ratify the August 1998 SERP & Amended RLIP?

Finally, Plaintiff Kelly says that the H &H Board ratified the August 1998 SERP by using it to calculate various departure payouts, reporting it in a proxy statement, and retaining copies without objection.^{12/} Rejecting this argument, the Plan Administrator determined that any of these alleged acts of ratification were actually the result of general counsel Dixon and Plaintiff Kelly’s actions and that the H&H Board never knowingly used the August 1998 SERP in any manner

^{12/}Although the Plaintiff generally claims that the Defendants ratified the RLIP, the only evidence of ratification Kelly cites is the fact that he sent a copy of the RLIP to Tabin and that Dixon sent a copy to several H&H executives—only one of whom was on the H&H Board. Therefore, the Court finds that the Administrators did not abuse their discretion in denying Kelly benefits under the RLIP.

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First, although the Plaintiff generally claims that the Defendants ratified the RLIP, the only evidence of ratification Kelly cites is the fact that he sent a copy of the RLIP to H&H director Tabin and that Dixon sent a copy to several H&H executives—only one of whom was on the H&H Board. This evidence is simply inadequate to permit a finding of ratification under any standard of review. Therefore, the Court finds that the Administrator did not abuse its discretion in denying Kelly benefits under the RLIP.

As to the SERP, the Court similarly finds that the Administrator's determination was not an abuse of discretion. It is a basic proposition of the law of agency that "ratification requires knowledge by the principle of all the material facts of the transaction . . ." *Matter of Sterling Navigation Co., Ltd.*, 444 F. Supp. 1043, 1049 (S.D.N.Y. 1977) (holding that board could not ratify loan agreement when its members did not know all material facts about loan and no knowledge could be imputed to them). Moreover, a party cannot "effect a corporate ratification of his own unauthorized act by further action of his own, unknown to the company he purports to represent." *Id.* at 1049 (quoting *Giebler Mfg. Co. v. Karnenberg*, 92 N.Y.S. 843, 844 (N.Y. App. Div. 1905)).

According to the evidence in the record, general counsel Dixon and Plaintiff Kelly were responsible for providing figures for the various payouts made by H&H and for crafting the language produced in the proxy statements. Moreover, nowhere does the Plaintiff point to evidence that the H&H Board of Directors—as a whole—had knowledge of all the material changes made to the SERP at any point prior to its discovery in spring 2005.

The Administrator, therefore, did not misapply the law in determining that these actions were insufficient to constitute ratification of the SERP by the H&H Board.

Having reviewed each of the Plaintiff's challenges to the Administrator's determinations

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regarding the August 1998 SERP and Amended RLIP and having found these determinations to be reasonable, supported by substantial evidence, and not erroneous as a matter of law, the Court **GRANTS** summary judgment to the Defendants on the Plaintiff's claims for benefits under the August 1998 SERP and Amended RLIP.

C. The Remaining Claims

The Defendants further move for summary judgment on the Plaintiff's claims for benefits as to the Pension Plan, Medical Plan, Management Incentive Plan, and Bonus Plan, as well as his claim for indemnification. Since the filing of the Defendants' motion, the Plaintiff has voluntarily withdrawn his claims under all but the Bonus Plan. [Doc. 74 at 47-48.] Moreover, the Plaintiff has withdrawn his claim for indemnification. [Doc. 74 at 47.] Accordingly, the Court **DISMISSES** those claims without prejudice.

Regarding Plaintiff Kelly's claim under the Bonus Plan, the Defendants say he is not eligible to receive benefits under the Bonus Plan because he was terminated. Responding, the Plaintiff does not deny this contention but argues that but for his wrongful termination, he would have been eligible to receive this benefit.

As the Defendants assert in their reply, however, one who is admittedly ineligible to receive benefits under a plan cannot maintain an action against the plan for those benefits. Instead, Plaintiff Kelly may be able to recover those lost benefits as damages in his wrongful termination claim. Accordingly, the Court **DISMISSES** the claim against the Bonus Plan.

Finally, because this Court has dismissed all claims against the Defendants except for the Plaintiff's state law breach of contract claim and no independent basis for federal jurisdiction exists, the Court declines to continue to exercise supplemental jurisdiction over that claim. 28 U.S.C. §

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1367(c)(3); *see also Giordano v. City of New York*, 274 F.3d 740, 754 (2d Cir. 2001) (directing dismissal of state claim without prejudice after affirming summary judgment for defendant on federal claim); *see also Benjamin v. New York City Dep't of Health*, 144 Fed. App'x 140, 142 (2d Cir. 2005) (“[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims.”) (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988)).

Finding that comity and judicial economy weigh in favor of trying the Plaintiff's state-law claim in state court, the Court **DISMISSES** the state law breach of contract claim without prejudice.

IV. Conclusion


For the foregoing reasons, the Court **GRANTS** the Defendants' motion for summary judgment and accordingly **DENIES** the Plaintiff's cross-motion for summary judgment. Further, the Court **DISMISSES** the Plaintiff's state-law breach of contract claim without prejudice.

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The Court directs the Clerk to enter final judgment for the Defendants pursuant to Fed. R.
Civ. P. 58.

IT IS SO ORDERED.

Dated: February 10, 2010



JAMES S. GWIN
UNITED STATES DISTRICT JUDGE