UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

REMY RENAULT, Plaintiff, v. UNUM LIFE INSURANCE COMPANY OF AMERICA AND THE THOMSON REUTERS LONG TERM DISABILITY PLAN, Defendants.	Case No. CV 16-7078 FMO (KSx) **ORDER REVERSING AND REMANDING ADMINISTRATIVE DETERMINATION RE: ERISA BENEFITS**

On September 21, 2016, plaintiff Remy Renault ("Renault" or "plaintiff") filed the instant action, seeking recovery of benefits under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, et seq. (See Dkt. 1, Complaint). The Complaint asserts a single cause of action against Unum Life Insurance Company of America ("Unum") and The Thomson Reuters Long Term Disability Plan ("LTD Plan") (collectively, "defendants") for improper denial of long-term disability benefits under a group long-term disability plan ("Plan") issued to plaintiff's employer, Thomson-Reuters Findlaw ("Thomson-Reuters"). (See id. at ¶ 1; UA-POL-LTD-000001-UA-POL-LTD-000044).[1] Defendants answered the Complaint on October 24, 2016. (See Dkt. 11, Answer). The parties filed cross motions for summary judgment, (see Dkt. 29,

[1] Defendant lodged the Administrative Record ("AR") with the court, UA-CL-LTD-000001-001778 and UA-POL-LTD-000001-000044. (See Dkt. 18, Notice of Lodging Electronic Copy of AR). References to the lodged record are by bates number.

"Motion"), which the court shall construe as motions for judgment pursuant to Federal Rule of Civil Procedure 52(a). This order comprises the findings of fact and conclusions of law required by Rule 52(a).[2]

STANDARD OF REVIEW

The court reviews challenges to an ERISA plan's denial of benefits de novo "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 109 S.Ct. 948, 956-57 (1989) ("Firestone Tire"). Here, the parties agree that the court's review should be de novo. (See Dkt. 29-1, Joint Brief at 1). When review is de novo, "the court does not give deference to the claim administrator's decision, but rather determines in the first instance if the claimant has adequately established that he or she is disabled under the terms of the plan." Muniz v. Amec Constr. Mgmt. Inc., 623 F.3d 1290, 1295-96 (9th Cir. 2010); see Abatie v. Alta Health & Life Ins. Co., 458 F.3d 955, 963 (9th Cir. 2006) (en banc) (when a court reviews the denial of benefits de novo, the court "simply proceeds to evaluate whether the plan administrator correctly or incorrectly denied benefits").

A claimant challenging a plan administrator's decision bears the burden of proving entitlement to benefits by a preponderance of the evidence. See Shaw v. Life Ins. Co. of N. Am., 144 F.Supp.3d 1114, 1123 (C.D. Cal. 2015); Muniz, 623 F.3d at 1294 ("As concluded by other circuit courts which have addressed the question, when the court reviews a plan administrator's decision under the de novo standard of review, the burden of proof is placed on the claimant."). In a trial on the record, the court "can evaluate the persuasiveness of conflicting testimony and decide which is more likely true." Kearney v. Standard Ins. Co., 175 F.3d 1084, 1095 (9th Cir.), cert. denied, 528 U.S. 964 (1999); see Schramm v. CNA Fin. Corp. Insured Grp. Benefits Program, 718 F.Supp.2d 1151, 1162 (N.D. Cal. 2010) (noting that, in reviewing the administrative

[2] To the extent that any conclusions of law are inadvertently labeled as findings of fact (or vice versa), the findings and conclusions shall be considered "in [their] true light, regardless of the label that the . . . court may have placed on [them]." Tri-Tron Int'l v. Velto, 525 F.2d 432, 435 (9th Cir. 1975).

record, "the Court evaluates the persuasiveness of each party's case, which necessarily entails making reasonable inferences where appropriate").

FINDINGS OF FACTS

Plaintiff began work as a salesperson for Thompson-Reuters on December 2, 2013. (See Dkt. 29-1, Joint Brief Re: Cross Motions for Summary Judgment ("Joint Brief") at 2; Dkt. 29-2, Declaration of Remy Renault ("Renault Decl.") at ¶ 2; UA-CL-LTD-000218). After suffering a severe back injury, plaintiff was rendered disabled on September 27, 2014. (See UA-CL-LTD-000218).

On April 16, 2015, Unum notified Renault it was approving her claim for disability benefits, in the monthly amount of $3,125.01. (See UA-CL-LTD-000587-88). On April 21, 2015, plaintiff questioned Unum's calculation of her benefits. (See id.). Unum responded, stating that it had arrived at the monthly amount by calculating her earnings "for 2 full calendar years prior to [her] disability date which would be for 2012 and 2013." (UA-CL-LTD-000612).

On April 11, 2016, Renault submitted a formal appeal of Unum's LTD benefit calculation, asserting that Unum failed to act in her best interests and failed to reasonably interpret the Plan to include all of her income in its calculation. (See UA-CL-LTD-001307-UA-CL-LTD-001311 & UA-CL-LTD-001332). On May 31, 2016, Unum upheld its LTD benefit calculation. (See UA-CL-LTD-001435).

Under the Plan, plaintiff's monthly disability benefit is 50% of her "[M]onthly [E]arnings." (See UA-POL-LTD-000005). The Plan defines Monthly Earnings in two separate sections. In the Glossary section, "MONTHLY EARNINGS means your gross monthly income from your Employer as defined in the plan." (UA-POL-LTD-000033). The Plan does not define "gross monthly income." (See, generally, UA-POL-LTD). In its Certificate of Coverage section, the Plan defines "Monthly Earnings" for commissioned employees as follows:

> "Monthly Earnings" means your current monthly base salary from your employer plus the monthly average of the commissions paid during the previous two calendar years or fraction thereof. Earnings include your total income before taxes, any deductions made for elective deferrals to a non-

> qualified deferred compensation plan, and pre-tax contributions to a qualified deferred compensation plan, Section 125 plan, or flexible spending account. It does not include income received from annual incentive pay/bonuses, overtime pay, shift differential, any other extra compensation, contests, awards, or income received from sources other than your employer. ¶ Commissioned amounts will be frozen each January 1 based on the monthly average of the previous two calendar years, or fraction thereof.

(UA-POL-LTD-000019). In addition, the Plan imposes a 180-day "elimination period" after an individual files for disability. (See UA-POL-LTD-000018). No benefits are paid until the elimination period expires. (See id.).

The various categories of income plaintiff earned in 2014 (January 1 - September 28) consist of the following: (a) Advanced Commission Pay ($1,470.58), (b) Award A/P ($300.00), (c) Commission ($20,709.99), (d) Holiday–Paid ($2,596.21), (e) Life Insurance Taxable Income ($19.32), (f) Other Sales Compensation ($25,687.53), (g) Referral Bonus ($2,000.00), (h) Regular Earnings Salary ($56,538.52), and (i) Sales Award ($507.09); Total $109,829.24. (See UA-CL-LTD-000450). Unum is, and has been, paying monthly benefits based only on plaintiff's 2014 base salary. (See UA-CL-LTD-001435).

CONCLUSIONS OF LAW

"In a Rule 52 motion . . . the court does not determine whether there is an issue of material fact, but actually decides whether the plaintiff is [entitled to benefits] under the policy." Vaccaro v. Liberty Life Assurance Co. of Bos., 2017 WL 5564910, *1 (N.D. Cal. 2017) (alteration in original). Here, the parties agree that plaintiff is entitled to benefits under the Plan. The issue before the court is the interpretation of the Plan as it relates to the amount of benefits payable.

I. INTERPRETATION OF THE PLAN'S PROVISIONS REGARDING MONTHLY EARNINGS.

"Although an ERISA plan is a contract, ERISA does not contain a body of contract law to govern the interpretation and enforcement of employee benefit plans. Courts therefore normally apply contract principles derived from state law . . . guided by the policies expressed in ERISA and other federal labor laws. These principles comprise a nationally uniform federal common law

applied in the ERISA context." Moody v. Liberty Life Assurance Co. of Bos., 595 F.Supp.2d 1090, 1098 (N.D. Cal. 2009) (internal quotation marks and citations omitted). The "terms in a pension plan should be interpreted in an ordinary and popular sense as would a [person] of average intelligence and experience." McDaniel v. Chevron Corp., 203 F.3d 1099, 1110 (9th Cir. 2000) (internal quotation marks omitted) (alteration in original). "When disputes arise as to the meaning of one or more terms, [the court] first look[s] to the explicit language of the agreement to determine the clear intent of the parties." Id. "An ambiguity exists when the terms or words of a pension plan are subject to more than one reasonable interpretation." Id. (citation omitted).

"Where an ambiguity exists and the standard of review is de novo, the court applies the rule of contra proferentem, under which ambiguities in an insurance contract are construed against the insurer." Vaccaro, 2017 WL 5564910, at *10; see O'Neal v. Life Ins. Co. of N. Am., 10 F.Supp.3d 1132, 1136 (D. Mont. 2014) ("Terms that are not defined by the plan (and other ambiguities) are to be construed against the drafter of the plan."). The doctrine is applicable "if, after applying the normal principles of contractual construction, the insurance contract is fairly susceptible of two different interpretations[.]" Vaccaro, 2017 WL 5564910 at *10 (citing Kunin v. Benefit Tr. Life Ins. Co., 910 F.2d 534, 539 (9th Cir. 1990)); see Rosenthal-Zuckerman v. Epstein, Becker & Green Long Term Disability Plan, 39 F.Supp.3d 1103, 1108 (C.D. Cal. 2014) ("However, courts apply contra proferentem only if other rules of contract interpretation have failed to resolve the disputed issue.").

A. Whether Monthly Earnings Includes All Commissions.

The parties dispute the interpretation of "Monthly Earnings." Plaintiff contends that Monthly Earnings should include all of her 2014 earnings, including her commissions and monthly and quarterly bonuses. (See Dkt. 29-1, Joint Brief at 1 & 5-16). According to plaintiff, Unum's interpretation of the Plan is unfair and unreasonable, and because the Plan language is ambiguous, it must be construed against Unum. (See id. at 1).

Defendants respond that Unum is currently paying plaintiff all of the benefits to which she is entitled because, for a commissioned employee like plaintiff, only plaintiff's base salary and certain eligible commissions are to be included in Monthly Earnings. (See Dkt. 29-1, Joint Brief

at 1). According to Unum, "the previous two calendar years, or faction thereof" in the definition set forth in the Certificate of Coverage means that plaintiff's Monthly Earnings are limited to commissions plaintiff earned between December 2, 2013, and December 31, 2013, but not the commissions she earned in 2014. (See id. at 16).

Under the circumstances, the court is persuaded that the Plan ambiguous because it is unclear, if not contradictory, as to whether Monthly Earnings includes all of a "Commissioned Employee['s]" commissions. See Smith v. Jefferson Pilot Fin. Ins. Co., 607 F. Supp. 2d 266, 270 (D. Mass. 2009) ("Contract language is usually considered ambiguous where an agreement's terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of the words employed and obligations undertaken.") (quoting Smart v. Gillette Co. Long–Term Disability Plan, 70 F.3d 173, 178 (1st Cir. 1995)). The first sentence of the definition set forth in the Certificate of Coverage appears to be inconsistent with the second sentence and with the Glossary Definition. The second sentence in the Certificate of Coverage definition states that Month Earnings "includ[es] [plaintiff's] total income before taxes[,]" minus deductions irrelevant to the instant discussion. (See UA-POL-LTD-000019). Similarly, the Glossary Definition defines Monthly Earnings as "gross monthly income," i.e., monthly income before taxes. (UA-POL-LTD-000033). Under the federal tax code, gross monthly income includes all commissions. See 26 U.S.C. § 61(a)(1) ("[G]ross income means all income from whatever source derived, including . . . [c]ompensation for services, including. . . commissions[.]"). In other words, while one sentence of the Plan limits Monthly Earnings to some, but not all commissions, at least two others define Monthly Earnings to include all commissions. Such inconsistency renders the Plan ambiguous as to how to calculate Monthly Earnings with respect to commissions. See, e.g., Hawkins-Dean v. Metro. Life Ins. Co., 514 F. Supp. 2d 1197, 1200 (C.D. Cal. 2007) (finding plan ambiguous as to whether "bonus" or "earnings" included stock options, where plan was "silent on the issue" but "[did] state that the figures reported in Plaintiff's W-2 should be referenced when calculating her Basic Monthly Earnings" and "Plaintiff's W-2 refers to the stock options as part of the her total earnings"); Hyatt v. Mut. of Omaha Ins. Co., 149 So.3d 406, 411-12 (La. Ct. App. 2014) (finding disability benefits insurance policy ambiguous as to how to calculate

insured's earnings where application referred to "gross earnings" but attempted to define gross earnings as not including business expenses); see also Murch v. The Prudential Welfare Benefit Plan, 2006 WL 1418677, *6 (W.D. Wash. 2006) (holding that where "[t]he language of the text [of an ERISA plan] as a whole, . . . is self-contradictory[,]" "the contract is poorly written [and] Aetna's interpretation . . . must-be seen as unreasonable") (internal citation and quotation marks omitted).

Defendants request that the court consider two pieces of extrinsic evidence in support of its interpretation of the subject provision if the court finds the Plan ambiguous: (1) correspondence between employees of Thomson-Reuters and Unum regarding whether Thomson-Reuters agreed with Unum's interpretation of Monthly Earnings ("Correspondence A"); and (2) correspondence between plaintiff and an employee of Thomson-Reuters regarding Unum's calculation of her benefit amount ("Correspondence B"). (See Dkt. 29-1, Joint Brief at 29-31).

In ERISA cases where de novo review applies, "extrinsic evidence [may] be considered only under certain limited circumstances." Opeta v. Nw. Airlines Plan for Contract Employees, 484 F.3d 1211, 1217 (9th Cir. 2007); see Sean P. Nalty & Joshua Bachrach, A Comprehensive Analysis of the Ninth Circuit's Application of the Standards of Review Under ERISA, 48 TORT TRIAL & INS. PRAC. L.J. 651, 672 (2013) (referring to "the restrictive evidentiary rules governing ERISA's de novo review[,]" which "provide that evidence outside the administrative record generally is not admissible"). Specifically, "a district court should exercise its discretion to consider evidence outside of the administrative record only when circumstances clearly establish that additional evidence is necessary to conduct an adequate de novo review of the benefit decision." Opeta, 484 F.3d at 1217 (emphasis and internal quotation marks omitted). Circumstances in which extrinsic evidence outside the AR may be considered include:

> claims that require consideration of complex medical questions or issues regarding the credibility of medical experts; the availability of very limited administrative review procedures with little or no evidentiary record; the necessity of evidence regarding interpretation of the terms of the plan rather than specific historical facts; instances where the payor and the administrator are the same entity and the court is concerned about impartiality; claims

> which would have been insurance contract claims prior to ERISA; and circumstances in which there is additional evidence that the claimant could not have presented in the administrative process.

Id. (quoting Quesinberry v. Life Ins. Co. of N. Am., 987 F.2d 1017, 1027 (4th Cir. 1993) (en banc)).

As an initial matter, the circumstances here do not "clearly establish" that evidence outside the administrative record "is necessary to conduct an adequate de novo review of the benefit decision." Opeta, 484 F.3d at 1217 (emphasis and internal quotation marks omitted). As such, the court will not exercise its discretion to consider Correspondence B, evidence that is not in the AR. (See, generally, UA-CL-LTD-000001-001778). However, even assuming Correspondence B were admissible, neither it nor Correspondence A, individually or collectively, are sufficient to shed light on the parties' intent with respect to the Plan.

First, responses by a random company employee affirming the view of the claim administrator after an appeal does not constitute "clear extrinsic evidence of the intent of the Plan." Hickey, 995 F.2d at 1391-92. There is no reason to believe that this particular company employee – whose role is unidentified – had any insight into his employer's intent, let alone any involvement in the drafting of the underlying Plan agreement.

Second, even if there were evidence that this employee had a relevant role in the company today, his perspective on how to interpret the policy today does not necessarily shed light on what the parties' intent was at the time of drafting. Evidence so attenuated from the drafters' intentions is not the type of extrinsic evidence that is useful in resolving ambiguity. See Baldwin v. Univ. of Pittsburgh Med. Ctr., 636 F.3d 69, 76-77 (3d Cir. 2011) ("The proper focus of the extrinsic evidence in resolving an instance of latent ambiguity is the parties' objectively manifested linguistic reference regarding the ambiguous term, not their expectations. For example, if the evidence show[s] that the parties normally meant to refer to Canadian dollars when they used the term dollars, this [is] evidence of the right type. Evidence regarding a party's beliefs about the general ramifications of the contract [is not] the right type[.]") (internal citations and quotation marks omitted) (alterations in original).

Third, that plaintiff's employer and the claim administrator, ex post facto, corroborate Unum's interpretation does not, under the circumstances here, resolve the ambiguity. See Smith, 607 F.Supp.2d at 271-72 (finding that ambiguity could not be resolved by resort to extrinsic evidence where that evidence was "unenlightening" and "useless" "for determining the parties' intended meaning"). Here, deferring to extrinsic evidence offered by Unum – the drafter of the Plan – is improper because it would effectively circumvent contra proferentem and apply abuse of discretion, rather than de novo, review. See Kunin, 910 F.2d at 541 ("[A] baseball umpire should not defer to a baserunner's claim that he is safe[.]"); Kearney, 175 F.3d at 1088 (no deference to the decision by ERISA plan administrator under de novo review); Olcott v. Vision Plastics Inc. Health Care Plan, 2004 WL 1588226, *4 (D. Or. 2004) ("Under a de novo review standard, the court construes terms in ERISA plans like any contractual provision without deferring to either party's interpretation.") (internal quotation marks omitted).

Because ambiguity persists even after considering the admissible extrinsic evidence, the rule of contra proferentem applies. See Blankenship v. Liberty Life Assur. Co. of Bos., 486 F.3d 620, 625 (9th Cir. 2007) ("[I]f, after applying the normal principles of contractual construction, the insurance contract is fairly susceptible of two different interpretations, another rule of construction will be applied: the interpretation that is most favorable to the insured will be adopted.") (internal quotation marks omitted); Hughes v. Bos. Mut. Life Ins. Co., 26 F.3d 264, 270 n. 6 (1st Cir. 1994) (citing STEPHEN L. LIEBO, 13 APPLEMAN'S INSURANCE LAW AND PRACTICE § 7403, at 75 (Supp.1993), for the proposition that "when . . . ambiguity still remains after the resort to . . . extrinsic evidence[,] an ambiguous provision is to be construed against the insurer, and the court must interpret the plan according to the reasonable expectations of the insured"). In the instant case, plaintiff reasonably understood the Plan to include all of her commissions in her Monthly Earnings, either by interpreting "each January 1" in the Certificate of Coverage definition to refer to the January 1 after her disability date, or by reading the Plan as requiring an annual – as opposed to a one-time – freezing. (See Dkt. 29-1, Joint Brief at 9). Either interpretation would make January 1, 2015, the relevant freeze date. (See id.).

Defendants contend that plaintiff's interpretation is unreasonable because the Glossary Definition "defers to[] the more complete 'Monthly' Earnings provision set forth in the Plan[.]" (Dkt. 29-1, Joint Brief at 18). As such, defendants assert, an insured should understand that the Certificate of Coverage definition is "the controlling definition[that] provides the more complete recitation of the income that does and does not constitute Monthly Earnings under the terms of the Plan." (Id. at 19). In addition, according to defendants, plaintiff's reading impermissibly renders nugatory the "previous two calendar years" language in the Certificate of Coverage Definition. (See id. at 21). Defendants' contentions are unpersuasive.

Plaintiff's understanding is reasonable and consistent with the text of the Plan. For example, in addition to the two references to Monthly Earnings as pre-tax income, the term "each" in "[c]ommissioned amounts will be frozen each January 1," (UA-POL-LTD-000019), suggests that the calculation will be performed repeatedly, whereas reading the provision to require a one-time calculation, as does Unum, improperly renders the word nugatory. See Gilliam v. Nev. Power Co., 488 F.3d 1189, 1194 (9th Cir. 2007) ("[Courts should] endeavor to interpret each provision consistent with the entire document such that no provision is rendered nugatory.") (internal quotation marks omitted). In addition, the Plan does not specifically identify when – i.e., on which January 1 – the commissions calculation is to be made. See, e.g., Smith, 607 F.Supp.2d at 269-72 (applying rule of contra proferentem to determine benefits due under ERISA plan where plan did not specify a period over which beneficiary's "average monthly base salary" was to be calculated, and claimant interpreted to mean average monthly salary over entire period worked, not just twelve months prior to disability date).

Moreover, defendants acknowledge that, to arrive at their understanding that there is one, single, definition of Monthly Earnings – which excludes significant portions of the commissions earned by a commissioned employee – would require the synthesis of multiple, allegedly "complement[ary,]" definitions. (See Dkt. 29-1, Joint Brief at 20). Requiring insureds to parse through the entire Plan to clarify the definitions of terms the glossary purports to define would undermine the very purpose of having a glossary. Although a layperson might expect that she could find complete definitions of important terms in the glossary, see Glossary, MERRIAM-

WEBSTER (2019) (defining "glossary" as "a collection . . . of specialized terms with their meanings."), Unum's interpretation would, in effect, mean that a claimant could not rely on the meaning of the specialized term "Monthly Earnings" in the glossary, because the exclusion of some of her commissions from Monthly Earnings is housed elsewhere in the Plan. Such a benefit exclusion is "not conspicuous to attract the attention of a reasonable layman[,]" and is thus unenforceable. See, e.g., Saltarelli v. Bob Baker Grp. Med. Tr., 35 F.3d 382, 385-87 (9th Cir. 1994) (holding benefits exclusion unenforceable, and adopting doctrine of reasonable expectations, where exclusion would require a "coordinated reading" of separate definitions); Murch, 2006 WL 1418677, at *6 (holding exclusion unenforceable where "[a] plain-language reading of the main text of the [plan] leaves one with the impression that home health care of the type that was given Mr. Murch is covered [but] [g]lossary definitions in that document . . . contradict or leave unresolved the issue of whether and what kind of home health care is covered").

Given that plaintiff is a commissioned employee, that a significant portion of her pre-tax income was based on her commissions, (see UA-CL-LTD-000450), and that the Plan provides textual support for her expectation that her commissions would be included in her Monthly Earnings, it was reasonable for plaintiff to conclude that the freezing would be applied – if at all – on January 1, 2015, after her commissions were actually earned. See, e.g., Russell v. Prudential Ins. Co. of Am., 437 F.2d 602, 606 (5th Cir. 1971) (holding that "percentage of [company] profits" that employee earned as part of his salary was "in the nature of a commission or incentive pay" and should be included in earnings calculation); Hawkins-Dean, 514 F.Supp.2d at 1200 (finding plan ambiguous as to whether "bonus" or "earnings" included stock options, where plan was "silent on the issue" but "[did] state that the figures reported in Plaintiff's W-2 should be referenced when calculating her Basic Monthly Earnings" and "Plaintiff's W-2 refers to the stock options as part of the her total earnings"). In short, the Plan is ambiguous as to what constitutes monthly earnings, and plaintiff is entitled to a Monthly Earnings calculation that includes her 2014 commissions consistent with her reasonable expectations.

B. Whether Monthly Earnings Include Bonuses.

Additionally, plaintiff asserts that her monthly and quarterly bonuses should be included in her Monthly Earnings. According to plaintiff, the Certificate of Coverage definition excludes only "annual bonuses" from Monthly Earnings but is silent as to monthly and quarterly bonuses, rendering the Plan ambiguous as to whether monthly and quarterly bonuses should be included in the benefit calculation.[3] (See Dkt. 29-1, Joint Brief at 7). Because any ambiguity must be construed in favor of the insured, plaintiff argues that her definition should prevail. (See id.). The court agrees.

Citing only the first sentence of the Monthly Earnings provision, defendants assert that the language in the provision "does not leave the door open for bonus payments." (See Dkt. 29-1, Joint Brief at 23). Defendants, however, omit the subsequent portion of the provision, which states, in relevant part, that "[Monthly Earnings do] not include income received from annual incentive pay/bonuses, overtime pay, shift differential, any other extra compensation, contests, awards, or income received from sources other than your employer." (UA-POL-LTD-000019) (emphasis added). In other words, while the provision explicitly excludes annual bonuses, it is silent as to whether monthly or quarterly bonuses are excluded. "This demonstrates that when Defendants (who drafted the Disability Plan Policy) wanted to [exclude particular types of bonuses from] the definition [of Monthly Earnings], they knew how to do it. Accordingly, Defendants' decision to not mention [monthly and quarterly bonuses] in the definition of [Monthly Earnings] shows that the definition of [Monthly Earnings] does not [exclude monthly and quarterly bonuses]." See Rosenthal-Zuckerman, 39 F.Supp. at 1107.

Defendants contend that monthly and quarterly bonuses are excluded under the Plan's general exclusion of "other extra compensation," (UA-POL-LTD-000019), because plaintiff's monthly and quarterly bonuses are referenced on plaintiff's paystub as "Other Sales Compensation." (See Dkt. 29-1, Joint Brief at 23). However, if, as defendants claim, the "other extra compensation" exclusion in the first sentence of the provision unambiguously closed the door

[3] Plaintiff did not work a full year so she was not eligible to receive an annual bonus. (See Dkt. 29-1, Joint Brief at 2; Dkt. 29-2, Renault Decl. at ¶ 2; UA-CL-LTD-000218).

to bonuses, (see id.), the Plan would not have needed to state that Monthly Earnings do not include annual bonuses. In other words, the "annual incentive pay/bonuses" exclusion would be nugatory. The fact that the Plan, in spite of excluding "other extra compensation," also specifically excludes annual bonuses but not monthly or quarterly bonuses, tells a reasonable reader that annual bonuses are the only type of bonuses excluded. See Rosenthal-Zuckerman, 39 F.Supp.3d at 1107 (explaining the rule of contract interpretation expressio unius est exclusio alterius, "to express or include one thing implies the exclusion of the other, or of the alternative."); Barnes, 64 F.3d at 1393 ("Under the doctrine of expressio unius est exclusio alterius, we must assume that, we must assume that by expressly providing for subrogation in cases in which the Plan makes payment, the Plan document excludes subrogation when no payment is made.").

In short, the court finds that the Plan should be construed in plaintiff's favor consistent with her reasonable expectations and that plaintiff's monthly and quarterly bonuses should be included in her Monthly Earnings. See Saltarelli, 35 F.3d at 385-86 ("adopt[ing] the doctrine of reasonable expectations as a principle of the uniform federal common law informing interpretation of ERISA-governed insurance contracts").[4]

II. BENEFIT CALCULATION PROCESS.

ERISA requires a "full and fair review" by the administrative body of a plaintiff's disability benefits. See 29 U.S.C. § 1133(2); 29 C.F.R. 2560.503-1(h). Because Unum never included plaintiff's commissions, monthly bonuses, or quarterly bonuses in its Monthly Earnings calculation, and the court has determined that the Plan should be construed to include commissions and monthly and quarterly bonuses, the court remands the matter to the claims administrator to make an administrative determination as to the amount of benefits. This process will allow the claims administrator to conduct and justify its calculations in a claim-review setting and allow plaintiff an opportunity to question them. See 29 U.S.C. § 1133(2); 29 C.F.R. § 2560.503-1(h); Hawkins-Dean, 514 F.Supp.2d at 1200 (remanding to claim administrator for benefit-amount determination,

[4] Because the court finds the Plan ambiguous and that plaintiff's interpretation prevails, it does not consider plaintiff's other arguments that the administrator treated similarly situated claimants differently, (see Dkt. 29-1, Joint Brief at 13), or violated its fiduciary duties. (See id. at 15).

after finding that administrator should have included stock options as part of claimant's earnings for determining benefits due).

This Order is not intended for publication. Nor is it intended to be included in or submitted to any online service such as Westlaw or Lexis.

CONCLUSION

Based on the foregoing, IT IS ORDERED THAT:

1. The Joint Motion for Judgment **(Document No. 29)** is **granted in part** and **denied in part**.

2. The case is hereby **remanded** to the claims administrator for further proceedings consistent with this Order.

Dated this 1st day of February, 2019.

_____/s/_____
Fernando M. Olguin
United States District Judge