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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

RUBY CHACKO,

Plaintiff,

vs.

AT&T UMBRELLA BENEFIT PLAN NO. 3,

Defendant.

CASE NO.: 2:19-cv-01837-JAM-DB

**REQUEST FOR RECONSIDERATION BY
THE DISTRICT COURT OF
MAGISTRATE JUDGE'S RULING**

[Fed.R.Civ.P. 72(a); L.R. 303]

Hon. John A. Mendez

Pursuant to Fed.R.Civ.P. 72(a) and Local Rule 303, Plaintiff Ruby Chacko hereby submits Request for Reconsideration by the District Court of Magistrate Judge's Ruling ("Reconsideration Request") related to the March 16, 2019 Order (D.E. # 29) on Plaintiff's motion to compel. This Reconsideration Request is accompanied by the Declaration of Michelle L. Roberts In Support of Request for Reconsideration by the District Court of Magistrate Judge's Ruling ("Roberts Decl."). This Request incorporates the Joint Statement Re Discovery Disagreement and related filings (D.E. #s 25-25-2), and the Transcript of Proceedings Re: Plaintiff's Motion to Compel Discovery Responses (D.E. #31).

I. RELEVANT PROCEDURAL BACKGROUND

Plaintiff Ruby Chacko was a participant in the Defendant AT&T Umbrella Benefit Plan No. 3 (“the Plan”), an employee-benefit plan which provides, among other things, long-term disability (“LTD”) benefits. The Plan is governed by the Employee Retirement Income Security Act of 1974 (“ERISA”). Plaintiff filed the present action on September 13, 2019 (D.E. #1) seeking primarily reinstatement of her LTD benefits.

A discovery dispute arose among the parties which culminated in the filing of the Joint Statement Re Discovery Disagreement (D.E. #s 19, 25 (revised)). The essence of the dispute is whether any discovery in this ERISA-governed case is allowed where it is undisputed that abuse of discretion review applies to the Plan’s benefit determination. Plaintiff moved to compel discovery in the following three areas: (1) the completeness of the Administrative Record; (2) conflict of interest discovery concerning the relationship between the Plan and its third-party administrator, Sedgwick; and (3) conflict of interest discovery concerning a vendor and physician retained by Sedgwick to evaluate Plaintiff’s LTD claim. *See* Joint Statement, D.E. #25 at 2-13.

On March 13, 2020, Magistrate Judge Deborah Barnes held a telephonic hearing on Plaintiff’s motion to compel. Roberts Decl, ¶ 2, Exh. A (Transcript of Proceedings). On March 16, 2020, Magistrate Judge Barnes issued an order granting Plaintiff’s motion with respect to the completeness of the Administrative Record and denying the motion in all other respects. D.E. 29 (“Discovery Order”).

II. THE MARCH 16, 2020 DISCOVERY ORDER

As it pertains to the present Reconsideration Request, the Discovery Order denied all “conflict-of interest discovery.” D.E. #26 at 2. The Court reasoned that there is no conflict of interest where the Plan’s administrator delegates the duty to decide claims to a third party. *Id.* at 3. The court also referenced the undersigned’s reliance at oral argument on *Demer v. IBM Corporation LTD Plan*, 835 F.3d 893 (9th Cir. 2016), but distinguished that case on the basis that the Ninth Circuit was presented with “evidence of a conflict of interest,” and the administrator both decided and paid the claims. *Id.* at 4. Finally, the court declined to grant discovery because

1 Plaintiff “presented nothing to show even the appearance of a conflict of interest which would
2 justify conflict-of-interest discovery.” *Id.*

3 **III. LEGAL STANDARD**

4 Local Rule 303 provides that “[a] party seeking reconsideration of the Magistrate Judge’s
5 ruling shall file a request for reconsideration by a Judge . . . [s]uch request shall specifically
6 designate the ruling, or part thereof, objected to and the basis for that objection.” Local Rule
7 303(c). “The standard that the assigned Judge shall use in all such requests is the ‘clearly
8 erroneous or contrary to law’ standard set forth in 28 U.S.C. § 636(b)(1)(A).” Local Rule 303(f).
9 The clear error standard is “significantly deferential” and is met when “the reviewing court is left
10 with a ‘definite and firm conviction that a mistake has been committed.’” *Cohen v. U.S. Dist.*
11 *Court for N. Dist. of California*, 586 F.3d 703, 708 (9th Cir. 2009) (citations omitted). The
12 “clearly erroneous” standard applies to a Magistrate Judge’s factual findings. *Morgal v. Maricopa*
13 *Cty. Bd. of Sup’rs*, 284 F.R.D. 452, 458 (D. Ariz. 2012). A Magistrate Judge’s decision is
14 “contrary to law” if it applies incorrect legal standards, fails to consider elements of applicable
15 standards, or fails to apply or misapplies relevant statutes, case law, or rules of procedure. *Id.* at
16 459.

17 **IV. THE ORDER WITH RESPECT TO CONFLICT OF INTEREST DISCOVERY IS** 18 **CONTRARY TO LAW**

19 **a. Plaintiff Is Not Required to Make a Showing of Conflict of Interest to Justify** 20 **Discovery.**

21 The Discovery Order is contrary to law where it states that Plaintiff must first present
22 evidence of conflict in order to justify discovery. The Court cites to a Tenth Circuit case to
23 support this proposition. D.E. #29, citing to *Murphy v. Deloitte & Touche Group Ins. Plan*, 619
24 F.3d 1151, 1163 (10th Cir. 2010). However, the weight of authority within this circuit does not
25 require a plaintiff to make a threshold showing that an administrator’s decision was influenced by
26 a conflict of interest before she can engage in discovery. *Villanueva v. Life Ins. Co. of N. Am.*, No.
27 1:12-CV-1263 AWI-BAM, 2013 WL 398878, at *2 (E.D. Cal. Jan. 31, 2013); *Meguerditchian v.*
28 *Fed. Express Corp. Long Term Disability Plan*, 2018 WL 5794477, at *2 (C.D. Cal. Nov. 5, 2018)
(A finding of a structural conflict of interest is not necessary for a plaintiff to conduct discovery);

1 *see also Klein v. Nw. Mut. Life Ins. Co.*, 806 F. Supp. 2d 1120, 1128 (S.D. Cal. 2011) (“[A]
 2 plaintiff must be given the chance to discover relevant evidence as to the nature, extent and effect
 3 of the conflict”); *Harper v. Unum Life Ins. Co. of Am.*, No. 106CV0893 AWI DLB, 2007 WL
 4 1792004, at *5 (E.D. Cal. June 19, 2007) (Plaintiff entitled to discovery exploring structural
 5 conflict of interest, but not discovery related to whether the Plan’s decision was correct).

6 Moreover, the Ninth Circuit has not articulated any preliminary showing requirement for a
 7 district court to permit discovery. The Ninth Circuit held in *Abatie v. Alta Health & Life Ins. Co.*,
 8 458 F.3d 955 (9th Cir. 2006) that “[t]he District Court may, in its discretion, consider evidence
 9 outside the administrative record to decide the nature, extent and effect on the decision-making
 10 process of any conflict of interest.” *Id.* at 970. *Abatie* did not expressly mention discovery, but in
 11 *Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942, 949 (9th Cir. 2007), a case involving review of
 12 a district court’s attorneys’ fees award, the Ninth Circuit recognized that discovery aimed at
 13 demonstrating a conflict of interest was appropriate. *See also Wilcox v. Wells Fargo & Co. Long*
 14 *Term Disability Plan*, 287 F. App’x 602, 603-04 (9th Cir. 2008) (noting that *Abatie* and *Glenn*
 15 permit consideration of evidence outside of the administrative record to determine the appropriate
 16 weight to accord the conflict of interest factor and ordering the district court to reconsider
 17 plaintiff’s discovery requests).

18 Notably, in cases subject to *de novo* review, where a structural conflict of interest is
 19 deemed less or not relevant, district courts in the Ninth Circuit have allowed discovery into the
 20 credibility of reviewing physicians. *See e.g. Wojno v. Cigna Grp. Ins.*, No. CV 10-07238-JAK
 21 JEMX, 2011 WL 3236025, at *2 (C.D. Cal. July 21, 2011) (allowing discovery because plaintiff
 22 “explained the relevance” of the payment information to the doctor’s credibility); *Bourland v.*
 23 *Hartford Life & Acc. Ins. Co.*, No. C13-6056 BHS, 2014 WL 4748218, at *3 (W.D. Wash. Sept.
 24 24, 2014) (allowing discovery on Hartford’s financial relationship with the medical reviewers and
 25 the reviewing service because it is “relevant” to the court’s evaluation of the medical opinions);
 26 *Gonda v. Permanente Med. Grp., Inc.*, 300 F.R.D. 609, 615 (N.D. Cal. 2014) (permitting
 27 discovery about the independent medical evaluator’s credibility and insurer’s decision making
 28 with respect to selecting the evaluator); *Waggener v. UNUM Life Ins. Co. of Am.*, 238 F. Supp. 2d

1 1179, 1187 (S.D. Cal. 2002) (permitting discovery of information regarding the independence or
 2 neutrality of the physicians utilized by Unum for medical opinions relative to Waggener's
 3 disability claim). As the undersigned explained at the oral argument, if doctors hired by the Plan
 4 are paid a large amount of money to review many claims for the plan over time, that is precisely
 5 the type of "conflict" the *Demer* court found relevant. Roberts Decl., ¶2, Exh. A at 5:24-6:6.

6 **b. The Order Misconstrues Ninth Circuit Precedent Which Justifies Conflict of**
 7 **Interest Discovery.**

8 The Discovery Order applies too narrow of a reading of the Ninth Circuit's decision in
 9 *Demer v. IBM Corporation LTD Plan* to justify denial of discovery in this case. It is correct that
 10 *Demer* involved a fully insured disability plan, but the conflict of interest analysis cannot be read
 11 to apply to only fully insured plans. In *Demer*, the plaintiff alleged that there was (1) a structural
 12 conflict of interest since MetLife both decided claims for the disability plan and was responsible
 13 for paying those claims; and (2) at least two of the doctors that MetLife hired to review the
 14 medical records "have performed a significant number of reviews for MetLife and have received
 15 significant compensation for their services." *Demer*, 835 F.3d at 900. The court then analyzed
 16 these two areas of conflict separately: the structural conflict of interest and the financial conflict
 17 of independent physician consultants. *Id.* at 900-903. With respect to the latter, the Ninth Circuit
 18 explained,

19 This alleged conflict of interest is distinct from the purported structural conflict of interest
 20 discussed above. The lack of any structural conflict of interest on the part of MetLife does
 21 not preclude MetLife from having a conflict of interest based on an [Independent Physician
 22 Consultant's] financial interests; the factors that raise the possibility of a structural conflict
 23 relate to the incentives applicable to MetLife's *claims department*, whereas the factors that
 24 raise the possibility of a financial conflict relate to the incentives applicable to MetLife's
 25 *retained experts*. Even if MetLife operated with no structural conflict, reliance on the
 26 reports of its retained experts who have a financial incentive to make findings favorable to
 27 MetLife may warrant skepticism.

28 *Demer*, 835 F.3d at 901-02 (emphasis in original). As the court recognized, these are two distinct
 types of conflict: if a Plan relies on retained experts who have a financial incentive to make
 findings favorable to the Plan, skepticism is warranted. Nothing in the Ninth Circuit's opinion
 suggests that retained experts' conflict only matters if there is an attendant structural conflict of

1 interest. The court made clear that the financial conflict of interest of doctors on whom an
2 administrator relies warrants skepticism in reviewing the doctors' conclusions. *Id.* at 907.

3 The Ninth Circuit also noted that it is the plaintiff's burden to produce evidence of a
4 financial conflict sufficient to warrant a degree of skepticism. In *Demer*, the plaintiff offered
5 evidence that MetLife's reviewing doctors

6 have earned a substantial amount of money from MetLife (\$125,000–\$175,000 each year)
7 and have performed a substantial number of reviews for the company as well (200–300
8 reviews/addendums each year). The magnitudes of these numbers, particularly when
9 combined, raise a fair inference that there is a financial conflict which influenced the IPCs'
10 assessments, and thus such conflict should be considered as a factor in reviewing
11 MetLife's decision for abuse of discretion.

12 *Id.* at 902. The Discovery Order distinguished *Demer* on the basis that the plaintiff in that
13 case presented the court with evidence of conflict of interest. Though it is not explicitly stated in
14 the district court or Ninth Circuit opinion, *Demer* obtained the information about the reviewing
15 doctors through discovery at the district court. Roberts Decl. ¶ 3, Exh. B;¹ *see also Demer v. IBM*
16 *Corp. Plan*, 975 F. Supp. 2d 1059, 1078 (D. Ariz. 2013), rev'd and remanded sub nom. *Demer v.*
17 *IBM Corp. LTD Plan*, 835 F.3d 893 (9th Cir. 2016) (noting the information about the reviewing
18 doctors but not stating how the information was procured); Roberts Decl. ¶ 2, Exh. A ("...in the
19 *Demer* case the plaintiff offered the evidence [of what] the independent reviewers were paid"). In
20 other words, if not for the discovery that was allowed on the reviewers' financial conflict, the
21 plaintiff would have had no ability to ascertain whether a financial conflict influenced the doctors'
22 assessments.

23 Failure to permit discovery puts claimants in an untenable position of having the burden to
24 demonstrate conflict without the means necessary to do so. As Plaintiff pointed out in the Joint
25 Statement, courts have chastised plaintiffs for alleging conflicts of interest but not doing the
26 discovery necessary to prove it. *Wolberg v. AT&T Broadband Pension Plan*, 123 F.App'x. 840,
27 843 n.2 (10th Cir. 2005) (criticizing a plaintiff for simply mentioning the existence of a conflict of
28

¹ The undersigned represented Mr. Demer at the Ninth Circuit Court of Appeals. Attached to the accompanying declaration is a copy of the discovery responses that were produced in that case.

1 interest, but failing to pursue the matter and to seek discovery); *Demer*, 835 F.3d at 901 (“Mr.
2 *Demer* did not explain his failure to take a 30(b)(6) deposition on the structural conflict issue.”)

3 Lastly, as Plaintiff articulated in the Joint Statement, the Plan and Sedgwick have an
4 obligation to ensure that they retain vendors and doctors who are not financially conflicted. The
5 new ERISA Regulations that took effect January 1, 2018 require impartiality and support the
6 discovery Plaintiff seeks herein. The Regulation states, in pertinent part:

7 In the case of a plan providing disability benefits, the plan must ensure that all claims and
8 appeals for disability benefits are adjudicated in a manner designed to ensure the
9 independence and impartiality of the persons involved in making the decision.
10 Accordingly, decisions regarding hiring, compensation, termination, promotion, or other
11 similar matters with respect to any individual (such as a claims adjudicator or medical or
12 vocational expert) must not be made based upon the likelihood that the individual will
13 support the denial of benefits.

14 29 C.F.R. § 2560.503-1. This Regulation does not apply to just fully insured plans; it applies to all
15 plans providing disability benefits. The Plan cannot use financially conflicted reviewers and then
16 shield itself from discovery because it delegated administration to a third party. As the court in
17 *Demer* noted, “MetLife could have maintained records of its reviewers’ findings on claims to
18 show their neutrality in practice, but it did not.” *Demer*, 835 F.3d at 903. If a reviewer is
19 financially conflicted, that conflict must be weighed by the court in determining whether a claim
20 denial is an abuse of discretion. *Id.*

21 **c. Plaintiff’s Requested Discovery Goes to the Retained Expert’s Conflict of
22 Interest.**

23 As noted above, Plaintiff’s discovery requests on the conflict of interest issue fell into two
24 categories: conflict of interest discovery concerning the relationship between the Plan and its
25 third-party administrator, Sedgwick; and conflict of interest discovery concerning a vendor and
26 physician retained by Sedgwick to evaluate Plaintiff’s LTD claim. The Discovery Order lumped
27 these categories together and denied the requests on the basis that there is no structural conflict.
28 Because a structural conflict is not required for the second category of conflict of interest
discovery, Plaintiff requests reconsideration of the denial of the following requests:

Plaintiff’s Second Request of Production of Documents to Defendant:

RFP NO. 7: All DOCUMENTS describing, evidencing, constituting, or RELATING TO YOUR

or SEDGWICK's communications with NMR regarding PLAINTIFF's CLAIM or APPEAL.

RFP NO. 17: All DOCUMENTS RELATING TO financial bonuses, incentives, stock options or any other type of compensation program (beyond regular salary or wages) in effect for any individual handling, managing, overseeing or investigating PLAINTIFF's CLAIM and APPEAL for long- term disability benefits, including for all PERSONS IDENTIFIED in response to Interrogatory No. 6.

RFP NO. 19: All resumes and/or curricula vitae of all PERSONS IDENTIFIED in response to Interrogatory No. 6.

RFP NO. 20: All DOCUMENTS that describe any relationship between YOU or SEDGWICK and NMR, including, but not limited to, contracts, memoranda of understanding, service agreements, vendor agreements, policy letters, and invoices in effect during the RELEVANT TIME PERIOD.

RFP NO. 21: All DOCUMENTS that constitute or describe policies and procedures for selecting medical reviewers for disability CLAIMS and/or APPEALS during the RELEVANT TIME PERIOD.

RFP NO. 22: All DOCUMENTS sent by NMR and received by YOU, AT&T, or SEDGWICK describing, evidencing, constituting, referring, or relating the business services that NMR would provide if engaged by YOU, AT&T, or SEDGWICK, including, but not limited to, any manuals, statements of NMR's mission, statements of NMR's philosophy, descriptions of physician procedures, referral guidelines, general descriptions of disability evaluation procedures, descriptions of medical disability management, descriptions of the medical review services provided by NMR, descriptions of the independent medical evaluation services provided by NMR, descriptions of NMR's medical consultation fee schedules, and descriptions of NMR's guidelines for reviewing physicians, from 2015 to the present.

RFP NO. 26: All DOCUMENTS RELATING TO total compensation paid to Dr. Howard Grattan by YOU, SEDGWICK or NMR from 2015 to the present.

RFP NO. 27: All DOCUMENTS IDENTIFIED and/or relied upon in YOUR responses to PLAINTIFF's Interrogatories to YOU, Set One, served concurrently herewith.

Plaintiff's First Set of Interrogatories ("Rog") to Defendant:

ROG NO. 6: IDENTIFY each and every PERSON who reviewed, evaluated, made, or participated in any determination regarding PLAINTIFF's CLAIM or APPEAL.

ROG NO. 9: State the number of CLAIMS and APPEALS under the PLAN as to which NMR provided medical review services annually from 2015 to the present, indicating separately for each year.

ROG NO. 10: State the number of CLAIMS and APPEALS under the PLAN as to which NMR provided medical review services that resulted in the approval of disability CLAIMS and/or APPEALS. Please indicate the number separately for each year from 2015 to the present.

ROG NO. 11: State the number of CLAIMS and APPEALS under the PLAN as to which NMR provided medical review services that resulted in the denial of disability CLAIMS and/or APPEALS. Please indicate the number separately for each year from 2015 to the present.

ROG NO. 12: State the total compensation paid to Dr. Howard Grattan by YOU, SEDGWICK, and/or NMR from 2015 to the present.

ROG NO. 13: Describe the compensation arrangement between YOU, SEDGWICK, and/or NMR and Dr. Howard Grattan, including the basis of his compensation and how any bonuses are determined.

V. CONCLUSION

For the reasons stated above, Plaintiff requests reconsideration of the denial of all conflict-of-interest discovery in this case based on Ninth Circuit precedent which supports the need and relevance of discovery of financially conflicted vendors, even in the absence of a structural conflict of interest. Plaintiff requests an order requiring the Plan to respond to Request for Production Nos. 7, 17, 19-22, 26, and 27, and Interrogatories 6, 9, 10, 11, 12, and 13.

Dated: March 26, 2020

KANTOR & KANTOR, LLP

/s/Michelle L. Roberts

Michelle L. Roberts
Attorney for Plaintiff
RUBY CHACKO