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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

29 RUBY CHACKO,  
30 Plaintiff,  
31 vs.  
32 AT&T UMBRELLA BENEFIT PLAN NO. 3,  
33 Defendant.

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

35 REQUEST FOR RECONSIDERATION BY  
36 THE DISTRICT COURT OF  
37 MAGISTRATE JUDGE'S RULING

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

39 Hon. John A. Mendez

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

1           **I. RELEVANT PROCEDURAL BACKGROUND**

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

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

15           On March 13, 2020, Magistrate Judge Deborah Barnes held a telephonic hearing on  
16 Plaintiff’s motion to compel. Roberts Decl., ¶ 2, Exh. A (Transcript of Proceedings). On March  
17 16, 2020, Magistrate Judge Barnes issued an order granting Plaintiff’s motion with respect to the  
18 completeness of the Administrative Record and denying the motion in all other respects. D.E. 29  
19 (“Discovery Order”).

20           **II. THE MARCH 16, 2020 DISCOVERY ORDER**

21           As it pertains to the present Reconsideration Request, the Discovery Order denied all  
22 “conflict-of interest discovery.” D.E. #26 at 2. The Court reasoned that there is no conflict of  
23 interest where the Plan’s administrator delegates the duty to decide claims to a third party. *Id.* at  
24 3. The court also referenced the undersigned’s reliance at oral argument on *Demer v. IBM*  
25 *Corporation LTD Plan*, 835 F.3d 893 (9th Cir. 2016), but distinguished that case on the basis that  
26 the Ninth Circuit was presented with “evidence of a conflict of interest,” and the administrator  
27 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  
Discovery.**

20 The Discovery Order is contrary to law where it states that Plaintiff must first present  
21 evidence of conflict in order to justify discovery. The Court cites to a Tenth Circuit case to  
22 support this proposition. D.E. #29, citing to *Murphy v. Deloitte & Touche Group Ins. Plan*, 619  
23 F.3d 1151, 1163 (10th Cir. 2010). However, the weight of authority within this circuit does not  
24 require a plaintiff to make a threshold showing that an administrator’s decision was influenced by  
25 a conflict of interest before she can engage in discovery. *Villanueva v. Life Ins. Co. of N. Am.*, No.  
26 1:12-CV-1263 AWI-BAM, 2013 WL 398878, at \*2 (E.D. Cal. Jan. 31, 2013); *Meguerditchian v.*  
27 *Fed. Express Corp. Long Term Disability Plan*, 2018 WL 5794477, at \*2 (C.D. Cal. Nov. 5, 2018)  
28 (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 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  
29 types of conflict: if a Plan relies on retained experts who have a financial incentive to make  
30 findings favorable to the Plan, skepticism is warranted. Nothing in the Ninth Circuit's opinion  
31 suggests that retained experts' conflict only matters if there is an attendant structural conflict of  
32

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;<sup>1</sup> *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  
 2 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  
similar matters with respect to any individual (such as a claims adjudicator or medical or  
vocational expert) must not be made based upon the likelihood that the individual will  
support the denial of benefits.

11 29 C.F.R. § 2560.503-1. This Regulation does not apply to just fully insured plans; it applies to all  
12 plans providing disability benefits. The Plan cannot use financially conflicted reviewers and then  
13 shield itself from discovery because it delegated administration to a third party. As the court in  
14 *Demer* noted, “MetLife could have maintained records of its reviewers’ findings on claims to  
15 show their neutrality in practice, but it did not.” *Demer*, 835 F.3d at 903. If a reviewer is  
16 financially conflicted, that conflict must be weighed by the court in determining whether a claim  
17 denial is an abuse of discretion. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 **V. CONCLUSION**

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

24 Dated: March 26, 2020

KANTOR & KANTOR, LLP

25 */s/Michelle L. Roberts*  
26 Michelle L. Roberts  
27 Attorney for Plaintiff  
RUBY CHACKO