

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

KATHLEEN KINDELAN, :  
Plaintiff, :  
 :  
v. : CA 08-329 ML  
 :  
DISABILITY MANAGEMENT :  
ALTERNATIVES, LLC, UNITEDHEALTH :  
GROUP SHORT TERM DISABILITY PLAN, :  
Defendants. :

**MEMORANDUM AND ORDER**  
**DENYING IN PART AND RULING MOOT IN PART**  
**MOTION FOR PROTECTIVE ORDER**

Before the Court is the Motion for Protective Order of Disability Management Alternatives, LLC, United Health Group Short Term Disability Plan (Doc. #17) ("Motion"). Defendants Disability Management Alternatives, LLC ("DMA") and UnitedHealth Group Short Term Disability Plan<sup>1</sup> (the "STD Plan") (collectively "Defendants") seek a protective order prohibiting Plaintiff Kathleen Kindelan ("Plaintiff") from obtaining discovery beyond the administrative record. Motion at 1. In particular, Defendants seek to preclude Plaintiff from taking the deposition of a representative of DMA pursuant to a recently issued notice

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<sup>1</sup> Defendants identify the plan as the "United Health Group Short Term Disability Plan." Motion at 1. However, the Complaint and Exhibit D to Defendants' memorandum identify the plan as the "UnitedHealth Group Short Term Disability Plan" (the "STD Plan"). See Memorandum in Support of Motion for Protective Order of Disability Management Alternatives, LLC, United Health Group Short Term Disability Plan ("Defendants' Mem."), Exhibit ("Ex.") D (Short Term Disability Plan Section). The Court identifies the STD Plan as stated in the Complaint and Defendants' Mem., Ex. D.

of deposition.<sup>2</sup> See Memorandum in Support of Motion for Protective Order of Disability Management Alternatives, LLC, United Health Group Short Term Disability Plan ("Defendants' Mem."). Defendants contend that the discovery is prohibited under ERISA<sup>3</sup> and that it is irrelevant to the issues in this case. See id. at 3.

Plaintiff has filed an objection to the Motion. See Objection to Motion for Protective Order of Disability Management Alternatives, LLC, United Health Group Short Term Disability Plan (Doc. #18) ("Objection"). A hearing was held on October 15, 2009. Thereafter, the matter was taken under advisement.

## **I. Facts**

Plaintiff was employed as a clinical care manager by UnitedHealth Group, Inc.<sup>4</sup> ("UnitedHealth Group"). See Complaint ¶¶ 2, 7; Defendants' Mem. at 1. As a fringe benefit, UnitedHealth Group provided its employees with long term disability ("LTD") and short term disability ("STD") benefits.

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<sup>2</sup> A copy of the amended notice of deposition is attached to Defendants' memorandum. See Defendants' Mem., Ex. A (Amended Notice of Deposition). Hereafter, the Court cites directly to the Amended Notice of Deposition.

<sup>3</sup> ERISA is the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 1461,

<sup>4</sup> Plaintiff in her memorandum states that she was employed by "United Health." Complaint ¶ 2. Defendants identify Plaintiff's employer as "UnitedHealth Group, Inc. ('UnitedHealth Group'), the sponsor of the [STD] Plan." Defendants' Mem. at 1. The Court adopts Defendants' identification of Plaintiff's employer.

See Complaint ¶ 2. STD benefits are provided by the STD Plan, id. ¶ 3, and both the STD Plan and the LTD Plan are subject to ERISA, id. ¶¶ 2-3. UnitedHealth Group is the STD Plan Administrator, see Defendants' Mem., Ex. D (Short-Term Disability Plan Section) at 2, 17, and DMA is the Claims Administrator, see id., Ex. D at 2. According to the UnitedHealth Group Benefits Handbook, DMA is "an unrelated third-party administrator . . .," id. at 2, to whom UnitedHealth Group "has delegated responsibility and authority for administering claims . . .," id.

In October of 2007 Plaintiff applied for STD benefits. Complaint ¶¶ 16-17. Although her claim was initially approved, see id. ¶ 18, she was subsequently notified that her benefits were being stopped, see id. ¶ 19, and then notified that her claim for STD benefits had been denied, see id. ¶ 20. Plaintiff appealed the denial of benefits. See id. ¶ 22. DMA reaffirmed the denial in a three page letter to Plaintiff dated February 21, 2008. See Memorandum in Support of Objection to Motion for Protective Order of Disability Management Alternatives, LLC, United Health Group Short Term Disability Plan ("Plaintiff's Mem."), Ex. 2 (Letter from DMA to Plaintiff of 2/21/08). In the letter, DMA stated that Dr. Amy Hopkins ("Dr. Hopkins") had "performed an independent medical file review on February 18, 2008<sub>[,]</sub> and determined that your medical records do not support an inability to perform your required job duties as of October 1,

2007.” Id. at 2. In the summary portion of the letter, DMA stated that the determination that Plaintiff was not disabled was “based on the medical evidence submitted and gathered during the appeal review.” Id. at 3.

Plaintiff commenced this action for judicial review on August 29, 2008. See Docket. Defendants filed the instant Motion on September 30, 2009, and Plaintiff filed her Objection on October 1, 2009. See id. On October 8, 2009, Defendants filed a reply memorandum. See id.

## **II. Discovery Sought**

Plaintiff seeks to take a Rule 30(b)(6) deposition of a representative of DMA regarding five topics: 1) the decision-making process employed in Plaintiff’s claim for STD benefits pursuant to the STD Plan; 2) the policies and procedures utilized by DMA with respect to determining the eligibility for benefits pursuant to the STD Plan; 3) the frequency with which Dr. Hopkins has performed services for DMA and/or the STD Plan and/or the UnitedHealth Long Term Disability Plan (the “LTD Plan”), the nature of the services, and the amount and manner in which she has been compensated; 4) the business relationship between the STD Plan and DMA, including the frequency with which DMA has performed services for the STD Plan, the nature of the services, and the amount and manner of compensation; and 5) the business relationship between the LTD Plan and DMA, including the

frequency with which DMA has performed services for the LTD Plan, the nature of the services, and the amount and manner of compensation. See Amended Notice of Deposition at 1-2.

### **III. ERISA Law**

“ERISA benefit-denial cases typically are adjudicated on the record compiled before the plan administrator. Because full-blown discovery would reconfigure that record and distort judicial review, courts have permitted only modest, specifically targeted discovery in such cases.” Denmark v. Liberty Life Assurance Co. of Boston, 566 F.3d 1, 10 (1<sup>st</sup> Cir. 2009). Thus, “some very good reason is needed to overcome the strong presumption that the record on review is limited to the record before the administrator.” Id. (quoting Liston v. Unum Corp. Officer Sev. Plan, 330 F.3d 19, 23 (1<sup>st</sup> Cir. 2003)).

Where the entity that administers an employee benefit plan both determines whether an employee is eligible for benefits and pays benefits out of its own pocket, this dual role creates a structural conflict of interest. Metro. Life Ins. Co. v. Glenn, U.S. , 128 S.Ct. 2343, 2348 (2008); see also Denmark v. Liberty Life Assurance Co. of Boston, 566 F.3d at 5 n.2 (calling “such instances structural conflicts, in contradistinction to actual conflicts (*i.e.*, instances in which the fiduciary’s decision was in fact motivated by a conflicting interest)”). “[C]ourts are duty-bound to inquire into what steps a plan

administrator has taken to insulate the decisionmaking process against the potentially pernicious effects of structural conflicts.” Denmark v. Liberty Life Assurance Co. of Boston, 566 F.3d at 9.

Where the administrative record does not contain the procedures which the plan administrator has used to prevent or mitigate the effect of structural conflict, conflict-oriented discovery may be permitted to reveal those procedures. Id. at 10. However, “such discovery must be allowed sparingly and, if allowed at all, must be narrowly tailored so as to leave the substantive record essentially undisturbed.” Id. But cf. id. at 12 (Lipez, J., concurring) (“Decreeing in this case that such discovery must be allowed sparingly, or confined to certain categories, is an unwarranted signal that discovery into the existence of an actual conflict is disfavored.”).

#### **IV. Standard of Review**

In determining whether to allow Plaintiff to conduct the discovery sought, the Court bears in mind the standard of review which applies in ERISA cases. The Supreme Court held in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948 (1989), that when an ERISA-regulated plan vests discretion in the plan administrator, the latter’s resolution of claims must be reviewed deferentially. Denmark v. Liberty Life Assurance Co. of Boston, 566 F.3d at 5; see also D & H Therapy Assocs. v. Boston

Mut. Life Ins. Co., F.Supp.2d , 2009 WL 2825748, at \*5 (D.R.I. Sept. 2, 2009) (concluding “that the deferential standard remains the appropriate standard of review for the decision of a plan administrator vested with discretion over benefit determinations”). Absent such a delegation of discretionary authority, a plan administrator’s decisions are to be reviewed de novo.<sup>5</sup> Denmark, 566 F.3d at 6. Where plan documents delegate discretionary authority to the plan administrator (whether or not structurally conflicted), courts should review benefit-denial decisions for abuse of discretion, considering any conflict as one of a myriad of relevant factors. Id. at 7; see also D & H Therapy Assocs. v. Boston Mut. Life Ins. Co., 2009 WL 2825748, at \*5 (determining whether or not insurer’s termination of disability benefits was reasonable and supported by substantial evidence in case where plan administrator had discretion to determine eligibility for benefits but had delegated that responsibility to a third party claims administrator).

In the instant case the STD Plan vests the Plan Administrator, UnitedHealth Group, with discretion over benefits determinations. See Defendants’ Mem., Ex. D at 1. Accordingly, a deferential standard of review will apply. Denmark, 566 F.3d at 5; see also D & H Therapy Assocs., 2009 WL 2825748, at \*5.

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<sup>5</sup> To the extent that the parties may disagree about the applicable standard of review, such disagreement does not affect the Court’s resolution of the instant Motion.

## **V. Discussion**

### **A. Question Presented**

The question presented by the instant Motion is whether Plaintiff has shown "some very good reason ... to overcome the strong presumption that the record on review is limited to the record before the administrator." Denmark, 566 F.3d at 10. The Court will determine whether Plaintiff has made this showing with respect to each deposition topic. However, before doing so, the Court addresses a procedural objection raised by Defendants.

### **B. Timeliness of Deposition Notice**

Defendants complain that Plaintiff served the notice of deposition which prompted the instant Motion "less than one week prior to the proposed deposition date (October 1, 2009), and less than two weeks prior to the dispositive motion deadline in this case (October 5, 2009)." Defendants' Mem. at 5. In apparent response, Plaintiff states: that Defendants' counsel requested and received several extensions of time to answer the complaint; that at the May 5, 2009, Rule 16 conference the parties agreed to resolve this matter by way of cross-motions for summary judgment and that no orders regarding discovery were made; and that the parties agreed to exchange documents as necessary. See Plaintiff's Mem. at 4. Plaintiff further states that Defendants provided a copy of her claim file on or about August 18, 2009, but that it lacked documentation which Plaintiff sought. See id.

Thus, Plaintiff appears to contend that the lateness of the deposition notice is at least partly attributable to Defendants' actions.

The Court does not find Plaintiff's explanation for the tardiness of the notice of deposition completely satisfying as Plaintiff clearly could have served it earlier notwithstanding the delays and obstacles attributable to Defendants.

Nevertheless, the Court declines to preclude the requested deposition on timeliness grounds because the temporal concerns raised by Defendant have been ameliorated by subsequent developments. On October 1, 2009, Chief Judge Mary M. Lisi granted a joint motion filed by the parties to modify the scheduling order. See Docket. As a result the dispositive motion deadline has now been postponed "for a reasonable time, or until a date no sooner than ten (10) days following the Court's resolution of the motion for protective order contemplated by Defendants, and motion for leave contemplated by Plaintiff."<sup>6</sup> Joint Motion to Modify Scheduling Order (Doc. #16) at 2. Thus, the problem originally presented by the looming dispositive motion deadline has been removed. As for the shortness of the notice of the deposition, that concern has been negated by the

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<sup>6</sup> The motion for leave refers to Plaintiff's stated intent to "file a motion for leave to amend her complaint to add a claim or claims to seek long term disability benefits." Joint Motion to Modify Scheduling Order (Doc. #16) at 2.

filing of the instant Motion and the fact that no deposition will occur until the Court rules on the Motion. Accordingly, to the extent the Motion seeks a protective order on grounds of timeliness, the Motion is denied.

### **C. Deposition Topics**

#### **1. Decision Making Process and Policies and Procedures**

With regard to the first two topics identified in the Amended Notice of Deposition, Plaintiff's counsel indicated at the hearing (in response to an inquiry from the Court) that opposing counsel's agreement to provide her with a copy of the STD Plan's "Claims and Appeals Procedures," Defendants' Mem., Ex. D at 13, eliminated the need for testimony regarding these matters (i.e., the decision making process employed with respect to Plaintiff's claim for STD benefits and the policies and procedures utilized by DMA to determine eligibility for STD benefits pursuant to the STD Plan). Accordingly, the Court rules that as to these two topics the Motion is moot.<sup>7</sup>

#### **2. Dr. Hopkins**

Plaintiff seeks to question DMA regarding the frequency with which Dr. Hopkins has performed services for DMA, the STD Plan, and the LTD Plan, the nature of those services, and the

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<sup>7</sup> In the interest of avoiding future discovery disputes regarding the provision of documents, the Court states that Plaintiff is entitled, at a minimum, to the documents constituting the summary plan description as those documents are identified on page 1 of the Short Term Disability Plan Section. See Defendants' Mem., Ex. D at 1.

compensation she has received for these services. In support of this request, Plaintiff argues that DMA's final denial of benefits was based almost verbatim upon a medical review done by Dr. Hopkins. See Plaintiff's Mem. at 4. After comparing Dr. Hopkins' February 18, 2008, report, see id., Ex. 1 (Dr. Hopkins' Report), with DMA's February 21, 2008, letter denying Plaintiff's appeal, see id., Ex. 2, the Court agrees with this assessment.

Plaintiff argues that "the validity of Dr. Hopkins' opinions has been called into question by numerous [f]ederal [c]ourts." Plaintiff's Mem. at 4. While this assertion overstates matters somewhat, several federal courts have been critical of or discounted Dr. Hopkins' opinions. In Wright v. Raytheon Co. Short Term Disability Plan, No. CV-05-604-TUC-CKJ (JCG), 2008 WL 4386728 (D. Ariz. Sept. 17, 2008), an action for judicial review of the denial of short term disability benefits, the court found that Dr. Hopkins had demonstrated bias against the plaintiff. See id. at \*12. The plaintiff's file had been referred to Dr. Hopkins, whom the claims administrator, MetLife, described as "an independent physician consultant."<sup>8</sup> Id. at \*3. In recommending that summary judgment be granted to the plaintiff, the court

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<sup>8</sup> The plaintiff in Wright disputed Dr. Hopkins' independence from MetLife, "noting that the amounts paid by MetLife to Dr. Hopkins increased from \$119,775 in 2001 to \$145,520.01 in 2004, and that Dr. Hopkins received total payments of \$498,832.51 from MetLife between 2001 and 2004." Wright v. Raytheon Co. Short Term Disability Plan, No. CV 05 604 TUC CKJ (JCG), 2008 WL 4386728, at \*3 (D. Ariz. Sept. 17, 2008).

quoted from a letter which the plaintiff's treating physician had written to MetLife after it denied plaintiff's claim for benefits.

I am gravely disturbed by your misrepresentation of the facts with regard to my discussion with your independent physician consultant<sup>[9]</sup> and your lack of due diligence in collecting further medical information regarding [plaintiff]'s health condition. You indicate in your letter that "it was concluded that you are out of work primarily due to work related stress." I spent over 30 minutes on the phone with your independent physician consultant explaining that this was definitely not the case. Indeed, this consultant seemed to have had a preconceived notion that stress was why the patient was out of work and that there was no cardiovascular disease contributing. I very clearly explained that this was not the case. Indeed, [plaintiff] has ongoing cardiac disease including ischemia and loss of function due to previous myocardial infarctions. Each time I expressed the belief to your consultant she would return to the fact that she felt that stress must be the major issue t[h]at was keeping him out of work.... Furthermore, I carefully explained to your physician that [plaintiff] has nonunion of the sternum resulting in severe pain and contributing to his disability, and yet you fail to mention that at all in your note.

Id. at \*4.

The court in Petroff v. Verizon North, Inc., No. CIV.A. 02-318 ERIE, 2004 WL 1047896 (W.D. Pa. May 4, 2004), was critical of "Dr. Hopkins' selective 'pick and choose' approach in reviewing the medical records in the case." Id. at \*13. The court further found that Dr. Hopkins had "completely mischaracterize[d]," id., the opinion of one of plaintiff's treating physicians as to her

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<sup>9</sup> MetLife's letter informing the plaintiff of the denial of his claim paraphrased portions of Dr. Hopkins' report. See id. at \*3 4.

ability to return to work, see id.

A similar finding regarding Dr. Hopkins was made by the court in Patrick v. Verizon Services Corp., Civil Action No. 07-766, 2009 WL 2043914 (W.D. Pa. July 8, 2009).<sup>10</sup> In rejecting the consultative reports of Dr. Hopkins and another physician, the Patrick court wrote:

In this case, however, the opinions of [plaintiff]'s treating physicians were not contradicted by *reliable evidence*. Instead, they were contradicted only by the conclusory reports of non-examining physicians who based their opinions on a patent mischaracterization of Dr. Donaldson's findings.

Id. at \*19.

In May v. Metropolitan Life Insurance Co., No. C 03-5056 CW, 2004 WL 2011460 (N.D. Cal. Sept. 9, 2004), the court found that "MetLife abused its discretion in crediting Dr. Hopkins' supposition over the actual evidence in the record." Id. at \*8. In making this finding, the court noted that the only evidence in the administrative record that the plaintiff was not disabled was Dr. Hopkins' report in which she had:

made the indisputably true statement that not all people diagnosed with fibromyalgia are disabled and then opined that Plaintiff might be one of those people. However, a suggestion that it is possible that Plaintiff is not disabled is not the same as evidence that she is not.

Id.

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<sup>10</sup> Although both the Petroff and Patrick opinions are from the U.S. District Court for the Western District of Pennsylvania, they are authored by different judges.

In Solomon v. Metropolitan Life Insurance Co., 628 F.Supp.2d 519 (S.D.N.Y. 2009), the court considered the issue of whether Dr. Hopkins was an "independent reviewing physician." Id. at 530.

[Dr. Hopkins] was employed on a regular basis by MetLife to review disability claims. Although MetLife describes Dr. Hopkins as an "independent reviewing physician," she derived 99% of her income in the years 2002-2004 from paper medical reviews for third parties, 58% to 63%, or over \$100,000, of which was derived from reviews for MetLife. To the extent Dr. Hopkins relied on MetLife for over half of her income, she was not "independent" at the time she reviewed [plaintiff's] file.

Id. The court went on to rule that to the extent that Dr. Hopkins based her findings that the plaintiff was not disabled on the view that fibromyalgia is not generally disabling, her conclusion did not constitute substantial evidence. Id. at 531.

Plaintiff also notes what this Court agrees is at least a curious anomaly in Dr. Hopkins' opinions. See Plaintiff's Mem. at 9. In Harris v. Aetna Life Insurance Co., 379 F.Supp.2d 1366 (N.D. Ga. 2005), the court, citing a July 10, 2003, memo by Dr. Hopkins, noted that "[Dr.] Hopkins provided no opinion regarding [plaintiff]'s psychiatric condition, acknowledging that [plaintiff]'s 'current mental health status ... is outside my area of expertise,'" id. at 1369 (quoting Dr. Hopkins' July 10, 2003, memo) (fourth alteration in original). Yet, this lack of expertise did not prevent Dr. Hopkins from opining around the same time that the claimant in Westphal v. Eastman Kodak Co., No.

05-CV-6120, 2006 WL 0720380 (W.D.N.Y. June 21, 2006), was not disabled as of March 20, 2003, based on a review of the records of the claimant's treating psychiatrist, id. at \*4.<sup>11</sup>

Similarly, in the excerpt from Dr. Hopkins' October 2004 report in Wright, quoted earlier in this Memorandum and Order, Dr. Hopkins stated: "While I cannot judge if [claimant] is significantly impaired from a psychiatric standpoint, there was no objective evidence in this file of any significant physical impairment." Wright, 2008 WL 4386728, at \*3. In Wright, the claimant's treating physician "noted that he did not think [p]laintiff could safely continue to work because the stress of work could shorten his life to within the next year." Id. Despite Dr. Hopkins' lack of psychiatric expertise (and her ultimate admission that she could not judge if the claimant was "significantly impaired from a psychiatric standpoint," id.), her report reflects that she questioned the treating physician

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<sup>11</sup> In fairness, Dr. Hopkins did not opine that the claimant in Westphal did not have a psychiatric disability. See Westphal v. Eastman Kodak Co., No. 05 CV 6120, at \*4 (W.D.N.Y. June 21, 2006). To the contrary, she wrote that "[t]he *primary issue in this case appears to be psychiatric*," id., while concluding that "[n]o physical impairment was objectively *documented* which would have prevented [claimant] from [returning to work full time], [in his] own or any occupation . . .," id. (second, third, and fourth alterations in original). Nevertheless, Dr. Hopkins' acknowledgment (that the primary issue in the case appeared to be psychiatric) raises the question of why she would render an opinion that the claimant "was not disabled," id., based solely on a review of his psychiatric records, id., when she considered the mental health status of another claimant to be outside her area of expertise, see Harris v. Aetna Life Ins. Co., 379 F.Supp.2d 1366, 1369 (N.D. Ga. 2005).

extensively on the subject of stress, id. Five days after this interview, MetLife informed the claimant that it was denying his claim for disability. See id. at \*4. The decision appears to have incorporated statements from Dr. Hopkins' report which recounted her interrogation of the treating physician regarding stress. See id. As previously noted, the decision prompted the treating physician to send the October 18, 2004, letter of protest, recounting his lengthy telephone conversation with Dr. Hopkins and her repeated statements "that stress must be the major issue t[h]at was keeping [the claimant] out of work." Wright, 2008 WL 4386728, at \*4.

Given the facts recounted in Westphal and Wright, it appears that Dr. Hopkins may not have always been as reticent in addressing mental health issues and their effect on a claimant's ability to work as she was in Harris. While there does not appear to be a mental health issue in the instant case, Plaintiff argues that the opinions cited above collectively raise a question as to whether Plaintiff was provided with the "full and fair review" of her STD claim mandated by 29 U.S.C. § 1133, given DMA's reliance on Dr. Hopkins' opinion for the denial.<sup>12</sup> See

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<sup>12</sup> 29 U.S.C. § 1133 provides in relevant part:

[E]very employee benefit plan shall

...

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a **full and**

Plaintiff's Mem. at 9. Plaintiff further argues that DMA's claim that Dr. Hopkins "performed an independent medical file review . . .," id., Ex. 2, is not susceptible to testing unless Plaintiff is granted the discovery she seeks.

In light of the foregoing, the Court is persuaded that Plaintiff has demonstrated a "very good reason," Denmark, 566 F.3d at 10, for allowing the discovery which she seeks with respect to Dr. Hopkins. Even applying a deferential standard of review, the Court will still be required to determine whether or not Defendants' decision to deny Plaintiff STD benefits "was reasonable and supported by substantial evidence." D & H Therapy Assocs., 2009 WL 2825748, at \*5. This Magistrate Judge concludes that the Court will be unable to make that determination unless it is able to make an informed judgment about what weight to give Dr. Hopkins' opinion. Cf. Solomon, 628 F.Supp.2d at 530-32 (reviewing denial of LTD benefits under arbitrary and capricious standard and finding that Dr. Hopkins' review was not "independent" because she relied upon MetLife for over half of her income and further finding that her opinion did not constitute substantial evidence to support MetLife's decision); Caplan v. CNA Fin. Corp., 544 F.Supp.2d 984, 989-93 (N.D. Cal.

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**fair review** by the appropriate named fiduciary of the decision denying the claim.

29 U.S.C. § 1133 (bold added).

2008) (concluding that it was an abuse of discretion for claims administrator to give conclusive weight to opinion of biased reviewing physician who was employed by entity to which claims administrator had paid more than \$13 million for review services); Wright, 2008 WL 4386728, at \*9-11 (applying abuse of discretion standard and finding evidence of bias where claims administrator, MetLife, had a close relationship with entity which employed reviewing cardiologist).

In particular, this Magistrate Judge concludes that the Court will be unable to make the determination with respect to whether or not Dr. Hopkins' review was in fact "independent" (as DMA claimed) unless the Court has available to it the same sort of information which was available to the court in Solomon, 628 F.Supp.2d at 530 (finding that Dr. Hopkins was not "independent" at the time she reviewed plaintiff's file when she relied on MetLife for over half of her income); id. at 532 (finding that "MetLife's denial was ... arbitrary and capricious in that it denied [plaintiff] the opportunity for a full and fair review as required by section 1133 of ERISA").<sup>13</sup> Accordingly, the Motion is denied to the extent that it seeks to preclude the discovery

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<sup>13</sup> At the hearing, the Court inquired of Defendants' counsel how the information regarding Dr. Hopkins' compensation came to be a part of the record in the cases which Plaintiff had cited. Defendants' counsel theorized that some discovery had been allowed in those cases. Although the Court did not articulate this response, it was tempted to respond: "Precisely."

noticed with respect to Dr. Hopkins.<sup>14</sup>

### **3. Relationship Between STD Plan and DMA**

Plaintiff next seeks to question DMA regarding the business relationship between it and the STD Plan, including the frequency with which DMA has performed services for the STD Plan, the nature of those services, and the compensation paid. See Amended Notice of Deposition. The Court again finds that Plaintiff has shown a “very good reason” for this discovery because without it this Court will be unable to make an informed judgment as to whether Plaintiff received the “full and fair review” mandated by the statute and whether the opinion rendered by Dr. Hopkins was “independent” and unbiased. In reaching this conclusion the Court is again influenced by the Caplan and Wright opinions which suggest that such discovery was allowed. (No other explanation for the presence of the facts cited in those opinions is apparent.)

This Court also reads Denmark as authorizing discovery where a “plan administrator has failed to detail its [conflict-ameliorating] procedures . . . .” Id. at 10. In the instant case, Defendants contend that no structural conflict exists because

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<sup>14</sup> Defendants contend that discovery with respect to the LTD Plan is not relevant because those benefits are not at issue at the present time. See Defendants’ Mem. at 5. However, discovery with respect to services performed by Dr. Hopkins for the LTD Plan would still be relevant with respect to determining her relationship with DMA and UnitedHealth Group and whether she may be reasonably considered unbiased.

"UnitedHealth Group delegated responsibility and authority for administering claims to DMA as an unrelated third-party administrator." Reply of Defendants Disability Management Alternatives, LLC, and United Health Group Short Term Disability Plan to Plaintiff's Opposition to Motion for Protective Order (Doc. #19) ("Defendants' Reply") at 2. However, apart from a statement to this effect in the STD Plan, see Defendants' Mem., Ex. D at 2, there is no evidence in the record to substantiate the claimed unrelatedness.

Thus, in the Court's view, the instant case is not far removed from one where the administrative record does not include "any evidence with respect to [the plan administrator's] conflict-ameliorating procedures." Denmark, 566 F.3d at 10. Here the record does not include any evidence with respect to DMA's alleged unrelatedness to UnitedHealth Group. Id. Accordingly, the Court concludes that it should exercise its discretion and allow some limited discovery on this issue. In doing so, the Court bears in mind the admonition that discovery on the issue of whether a structural conflict has morphed into an actual conflict "must be allowed sparingly and ... narrowly tailored so as to leave the substantive record essentially undisturbed." Id. The Court believes that the discovery allowed as a result of this Memorandum and Order comports with these requirements.

Therefore, the Motion is denied to the extent that it seeks to preclude the discovery noticed with respect to the relationship between the STD Plan and DMA.

#### **4. Relationship Between LTD Plan and DMA**

Lastly, Plaintiff seeks to question DMA regarding the business relationship between it and the LTD Plan, including the frequency with which it has performed services for the LTD Plan, the nature of those services, and the compensation paid. See Amended Notice of Deposition. Defendants contend that discovery with respect to the LTD Plan is not relevant because those benefits are not at issue at the present time. See Defendants' Mem. at 5. However, discovery with respect to services performed by DMA for the LTD Plan is still relevant with respect to determining the relationship between DMA and UnitedHealth Group and DMA's independence from UnitedHealth Group. Cf. Caplan, 544 F.Supp.2d at 989-93 (finding reviewing physician who was employed by entity to which claims administrator had paid more than \$13 million for review services was biased); Wright, 2008 WL 4386728, at \*9-11 (finding evidence of bias where claims administrator had a close relationship with entity which employed reviewing cardiologist). To the extent the Motion seeks to preclude the discovery noticed with respect to the relationship between the LTD Plan and DMA, the Motion is denied.

**VI. Conclusion**

For the reasons stated above, the Motion is denied to the extent that it seeks to preclude discovery with respect to the topics identified in the Amended Notice of Deposition as 3, 4, and 5. The Motion is moot to the extent that it seeks to preclude discovery with respect to the topics identified as 1 and 2.

So ordered.

ENTER:

/s/ David L. Martin  
DAVID L. MARTIN  
United States Magistrate Judge  
October 21, 2009