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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Crisandra Leu,  
Plaintiff,  
vs.  
Cox Long-Term Disability Plan; Cox  
Communications, Inc. Pension Plan; Cox  
Enterprises Inc.; Aetna Life Insurance  
Company,  
Defendants.

No. 2:08-CV-00889-PHX-JAT

**ORDER**

On April 24, 2009, Defendants Cox Long-Term Disability Plan, Cox Communications, Inc. Pension Plan, Cox Enterprises Inc., and Aetna Life Insurance Company (collectively “Cox”) filed a Motion for Protective Order. (Doc. 29.) On May 15, 2009, Plaintiff Crisandra Leu (“Leu”) filed a Response to the Motion for Protective Order. (Doc. 34.) On June 3, 2009, Defendants filed a Reply in Support Re Motion for Protective Order. (Doc. 39.) After reviewing the parties’ filings, the Court now holds that Plaintiff will be allowed very limited discovery.

1 **BACKGROUND**

2 On October 16, 1989, Plaintiff began employment with Cox. (Compl ¶ 8; Answer ¶  
3 8.) Cox Enterprises, Inc. sponsored, administered, self-insured, and self-funded a long-term  
4 disability plan (“LTD Plan”) that is part of an Employee Retirement Income Security Act  
5 (“ERISA”) Employee Welfare Benefit Plan. (Compl ¶ 3; Answer ¶ 3.) Subsequent to her  
6 employment with Cox, Plaintiff became a covered employee under the LTD Plan and a  
7 “participant” as defined by 29 U.S.C. §1002(7). (Compl ¶ 7; Answer ¶ 7.) Plaintiff now seeks  
8 disability income benefits from the LTD Plan pursuant to §502(a)(1)(B) of ERISA, 29  
9 U.S.C. §1132(a)(1)(B). (Compl ¶ 7; Answer ¶ 7.)

10 Plaintiff alleges she was injured on or about September 5, 2006. (Doc. 34 at 2.)  
11 Plaintiff underwent a surgery on or about the middle of November 2006. (Compl. ¶ 11;  
12 Answer ¶ 11.) After her surgery, Plaintiff returned to work for the Defendants on or about  
13 the middle of January 2007, but subsequently stopped working. (Compl. ¶ 12; Answer ¶ 12.)  
14 In February 2007, Plaintiff filed an application for long term disability benefits through the  
15 LTD Plan and Aetna. (Compl. ¶ 13; Answer ¶ 13.) Pursuant to the terms of the Plan, Plaintiff  
16 had to remain continuously disabled from performing her prior occupation with Cox for a  
17 minimum of twenty-six weeks, the plan’s elimination period, in order to be eligible for long  
18 term disability benefits. (Compl. ¶ 14 Answer ¶ 18.) Plaintiff asserts that her elimination  
19 period began September 5, 2006 and should have ended on March 4, 2007. (Doc. 34 at 3.)  
20 Plaintiff further asserts that Aetna erroneously determined her elimination period began on  
21 either February 29, 2007, after her final day of work before leaving permanently, or January  
22 18, 2007, the first day she missed work after returning. (Doc. 34 at 3; Doc. 39 at 7.)  
23 Moreover, Plaintiff asserts that Aetna’s alleged misapplication of disability dates resulted in  
24 the failure of one of Aetna’s peer reviewers to consider critical evidence of her disability.  
25 (Doc. 34 at 4.) Defendants deny that they erroneously calculated or applied Plaintiff’s  
26 disability dates in its decision. (Doc. 39 at 7-9.)

1 Plaintiff submitted documents to Aetna in support of her long term disability claim.  
2 (Compl. ¶ 18; Answer ¶ 18.) On May 29, 2007, Aetna informed Plaintiff it was denying her  
3 claim for long term disability benefits. (Compl. ¶ 19; Answer ¶ 19.) On June 4, 2007,  
4 Plaintiff exercised her right to administrative appeal under 29 U.S.C. §1133 and the  
5 provisions of the LTD Plan. (Compl. ¶ 21; Answer ¶ 21.) On appeal, Plaintiff submitted  
6 documents, that were allegedly from treating physicians and other medical professionals  
7 confirming she was disabled.(Compl. ¶ 21.) On October 9, 2007 the Plan, through Aetna,  
8 notified Plaintiff she did not meet the definition of disability and that it was reaffirming its  
9 previous decision to deny her long term disability claim. (Compl. ¶ 23; Answer ¶ 23.)  
10 Plaintiff thereafter filed suit, alleging that the Plan and Aetna operated under a conflict of  
11 interest, and that the claims administration agreement between them incentivized  
12 parsimonious claims granting, resulting in Plaintiff's denial of a full and fair review of her  
13 claim pursuant to 29 U.S.C. § 1133(2) and 29 C.F.R. § 2560.503-1(g)(1), (h)(2).(Compl. ¶  
14 30-33.)

## 15 ANALYSIS

### 16 *Standard of Review*

17 Because the discovery allowed in ERISA is directly related to the standard of review  
18 employed by the Court, the Court must determine the applicable standard of review as a  
19 threshold matter. *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 967 (9th Cir. 2006) (en  
20 banc). A district court reviews a denial of benefits de novo unless the plan gives the  
21 administrator discretionary authority to determine eligibility for benefits or to construe the  
22 terms of the plan. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). If the  
23 plan unambiguously grants discretionary authority to the plan administrator, then the  
24 administrator's decision is reviewed for abuse of discretion. *Metro. Life Ins. Co. v. Glenn*,  
25 128 S. Ct. 2343, 2348 (2008); *Burke v. Pitney Bowes Inc. Long Term Disability Plan*, 544  
26 F.3d 1016, 1023-24 (9th Cir. 2008) (citing *Abatie*, 458 F. 3d at 963). Generally, when  
27 applying an abuse of discretion standard to an ERISA plan, the district court's review is  
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1 limited to the administrative record. *Burke*, 544 F. 3d at 1027-28 (citing *Abatie*, 458 F.3d at  
2 970). Furthermore, “[i]f a benefit plan gives discretion to an administrator or fiduciary who  
3 is operating under a conflict of interest, that conflict must be weighed as a factor in  
4 determining whether there is an abuse of discretion.” *Glenn*, 128 S.Ct. at 2348 (emphasis in  
5 original, internal quotations omitted).

6 Here, “the plan administrator is specifically empowered to exercise discretion in the  
7 interpretation of the terms of the plans or programs.” (Doc. 29 Ex. 3. at 2.) Because the plan  
8 unambiguously grants discretionary authority to the plan administrator, the abuse of  
9 discretion standard applies. However, before this Court limits its review to the administrative  
10 record, the Court must determine if a conflict of interest or procedural irregularity alters the  
11 permitted scope of evidence.

#### 12 *Conflict of Interest*

13 “A conflict of interest arises in an ERISA case when the entity that administers the  
14 plan . . . both determines whether an employee is eligible for benefits and pays benefits out  
15 of its own pockets.” *Glenn*, 128 S. Ct. at 2346 (2008). A ‘structural conflict of interest’ exists  
16 when an insurer operates as both the plan administrator and the funding source for benefits.  
17 *Abatie*, 458 F.3d at 965-67; *Tremain v. Bell Indus., Inc.*, 196 F.3d 970, 976 (9th Cir. 1999).  
18 Structural conflicts can be neutralized by delegating claims administration responsibilities  
19 to third parties; however, delegation of claims administration does not negate a structural  
20 conflict outright. *See Hamma v. Intel Corp.*, 2009 WL 799283, at \*3 (E.D. Cal. 2009) (using  
21 the delegation of claims administration as a significant factor in assessing the impact of that  
22 conflict in a denial of benefits claim); *Mazur v. Pacific Telesis Group Comprehensive*  
23 *Disability Benefits Plan*, 2008 WL 564796, at \*2 (N.D.Cal. 2008) (same); *Wallace v. Intel*  
24 *Corp.*, 2006 WL 2709839 \*6 (D. Ariz. 2006) (same). The delegation of claims administration  
25 to a third-party does not ensure against a structural conflict of interest because some  
26 employers may nevertheless influence the third-party administrator’s decision making. *See*  
27 *e.g. Nord v. Black & Decker Disability Plan*, 296 F.3d 823 (9th Cir. 2002), *rev’d on other*

1 grounds, 538 U.S. 822 (2003) (finding that the defendant’s delegation of claim  
2 administration duties to a third-party merely consisted of processing claims and making  
3 recommendations as to whether to grant or deny benefits, leaving the final decision-making  
4 authority to the plan administrator); *Williams v. BellSouth Telecomms., Inc.*, 373 F.3d 1132,  
5 1135-37 (11th Cir. 2004) (finding the employer of a self-insured disability plan delegated  
6 claims processing to third party, but could still instruct the claims administrator how to  
7 dispose of specific claims); *Wallace v. Intel Corp.*, 2006 WL 27909839, at \*6 (finding that  
8 although the defendant had contracted with a third-party to administer the plan, the defendant  
9 still had a financial influence over the third-party administrator under the contract which  
10 “rendered the third-party susceptible to the taint of the defendant’s conflict”).

11 A court must weigh any conflict of interest under which the plan administrator labors  
12 and should “consider evidence outside of the administrative record” to decide the conflict’s  
13 “nature, extent, and effect on the [plan administrator’s] decision making process”. *Nolan v.*  
14 *Heald College*, 551 F.3d 1148, 1153 (9th Cir. 2009); *Abatie*, 458 F.3d at 970. “Because an  
15 ERISA plaintiff may be permitted to supplement the administrative record with evidence of  
16 a conflict of interest . . . some discovery aimed at demonstrating a conflict of interest may  
17 [be] appropriate.” *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 949-50 (9th Cir. 2007)  
18 (emphasis in original). *See also Gullidge v. Hartford Life & Accident Ins. Co.*, 501 F. Supp.  
19 2d 1280, 1283 (C.D. Cal. 2007) (citing *Welch* for the proposition that discovery into whether  
20 a conflict of interest existed is appropriate). The discovery may ‘unmask’ the nature, extent,  
21 and effect of the conflict on the decision making process. *Wilcox v. Wells Fargo & Co. Long*  
22 *Term Disability Plan*, 287 Fed.Appx. 602, 604 (9th Cir. 2008). However, “[w]hether to  
23 permit discovery into the nature, extent, and effect of the Plan’s structural conflict of interest  
24 is also a matter within the district court’s discretion.” *Burke*, 544 F.3d at 1028 n.15. Any  
25 discovery that is allowed should be narrowly tailored to illuminate the “nature, extent, and  
26 effect” of a conflict of interest on a decision making process and should not be so broad as  
27 to constitute a fishing expedition. *See Mazur v. Pacific Telesis Group Comprehensive*

1 *Disability Bens. Plan*, 2008 WL 564796, at \*2 (N.D. Cal. 2008); *Toven v. Metro. Life. Ins.*  
2 *Co.*, 517 F.Supp.2d 1174, 1176 (C.D. Cal. 2007); *Groom v. Standard Ins. Co.*, 492 F.Supp.2d  
3 1202, 1205 (C.D. Cal. 2007); see also *Bartholomew v. Unum Life Ins. Co.*, 579 F.Supp.2d  
4 1339, 1342 (W.D. Wash. 2008).

5 It is undisputed that Cox self-funds its long term disability plan. (Doc. 29 at 2; Doc.  
6 29 Ex. 1 at 2.) Cox is also the plan administrator. (Doc. 34 Ex. E.) As a plan administrator  
7 of a self-insured fund, a structural conflict of interest exists pursuant to *Abatie. Abatie*, 458  
8 F.3d at 965-67. Defendants argue that the delegation of claim administration to Aetna negates  
9 any structural conflict of interest. (Doc. 29 at 5.) Unlike the clear dual role conflict of interest  
10 that existed in *Glenn*, where the plan administrator was also the claims administrator, the LTD  
11 Plan delegates its claims administration to Aetna. However, “the Ninth Circuit has not  
12 addressed whether a structural conflict of interest can be eliminated by contractually  
13 delegating authority to a third-party administrator.” Mazur, 2008 WL 564796, at \*1. Even  
14 though a plan delegates administration to a third party, courts have found that a plan  
15 administrator may still be susceptible to conflict, and “have suggested that a conflicted plan  
16 administrator may find it advisable to bring forth affirmative evidence ‘demonstrating that  
17 it used truly independent medical examiners or a neutral, independent review process; that  
18 its employees do not have incentives to deny claims; that its interpretations of the plan have  
19 been consistent among patients; or that it has minimized any potential financial gain through  
20 structure of its business.’” *Wallace*, 2008 WL 564796, at \*2 (quoting *Abatie*, 458 F.3d at  
21 969, n.7). A *per se* rule that eliminates structural conflict upon delegation of claim  
22 administration “seems contrary to the [Ninth] Circuit’s broad statement that ‘plaintiffs will  
23 have the benefit of an abuse of discretion review that always considers the inherent conflict  
24 when a plan administrator is also the fiduciary, even in the absence of ‘smoking gun’  
25 evidence of conflict.’” *Id.* (quoting *Abatie*, 458 F.3d at 969, n.7.)

26 Defendants affirmatively submitted a statement from the Aetna team leader that Cox  
27 played no role in Aetna’s claim evaluation or decision, strongly indicating that the  
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1 relationship between the LTD Plan and Aetna does not present the dual role conflict as it did  
2 in *Glenn*. (Doc. 29 Ex. 1 ¶¶8-10.) Plaintiff alleges that a conflict nevertheless persists  
3 because of alleged financial incentives to manage claims in a parsimonious manner. (Doc.  
4 34 at 11.) While the evidence submitted by the Defendants strongly suggests that Cox did not  
5 give any instructions or direction in handling Plaintiff's claim, the evidence does not clearly  
6 reveal whether the LTD Plan agreement with Aetna may or may not influence Aetna's claim  
7 management. Aetna's claims administrators may have evaluated Plaintiff's claim without any  
8 direct input from Cox, but it does not necessarily follow that their claim management  
9 practices are unmotivated by any incentives in their agreement with the LTD Plan. Because  
10 it would be presumptuous to infer that Aetna's claim management is neutral and independent  
11 *per se*, very limited discovery into the financial agreement between Aetna and the LTD Plan  
12 would not be wholly inappropriate. Thus, Plaintiff is only entitled to discovery that is  
13 narrowly tailored to unmask financial incentives Plaintiff alleges is in the agreement between  
14 Aetna and Cox to manage claims parsimoniously. Accordingly, only Plaintiff's requests 6  
15 and 13 are narrow enough to warrant production, as requests 7-12 are so broad that they  
16 constitute a fishing expedition. Other documents sought that are neither plan documents nor  
17 part of the administrative record<sup>1</sup> are denied. Similarly, interrogatory questions that fall  
18 outside the scope of incentivized parsimonious claim management or the administrative  
19 record are not allowed. Plaintiff's request for peer review reports are granted, but are limited  
20 to those peer review reports that were in the record at the time of Aetna's decision. Plaintiff's  
21 request for an extension of time to complete discovery is granted, but will only be extended  
22 30 days in respect of the dispositive motion deadline.

23 Defendants contend that discovery should not be allowed in the absence of some  
24 preliminary showing of conflict of interest beyond their allegations. (Doc. 39 at 10.) This  
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27 <sup>1</sup>The administrative record consists of those materials in the record at the time  
28 Defendants' decision was made. *Haynes v. United States*, 891 F.2d 235, 238 (9th Cir.1989).

1 approach has been adopted by the First Circuit, prohibiting claimants to pursue conflict of  
2 interest discovery, unless they can demonstrate a threshold showing of bias beyond a  
3 structural conflict of interest. *See e.g. Sansby v. Prudential Ins. Co. Of Am.*, 2009 WL  
4 799468, at \*2 (D. Mass. 2009); *McGahey v. Harvard Univ. Flexible Benefits Plan*, 2009 WL  
5 799464, at \*2-3 (D. Mass. 2009). However, the ruling in *Wilcox* is instructive and guides this  
6 Court’s determination that the Ninth Circuit contradicts the First Circuit’s approach pursuant  
7 to *Glenn* and *Abatie*. 287 Fed. Appx. 602, 604. In *Wilcox*, the district court would not permit  
8 discovery unless there was a substantial showing of a conflict of interest that would likely  
9 have changed the standard of review. *Id.* at 602. However, the Ninth Circuit ordered the  
10 district court to reconsider discovery requests to obtain evidence of a conflict of interest,  
11 explaining that evidence outside of the administrative record was permitted under *Abatie* and  
12 *Glenn*, and proper in order to determine the appropriate weight to accord a conflict of  
13 interest. *Id.* at 4. Thus, the ruling in *Wilcox* suggests that discovery is appropriate without  
14 requiring Plaintiff to demonstrate more than a structural conflict of interest.

#### 15 *Procedural Irregularities*

16 “[T]he district court may consider evidence outside the administrative record if it  
17 determines that procedural irregularities prevented the full development of the administrative  
18 record.” *Burke*, 544 F.3d at 1028; *Abatie*, 458 F.3d at 970. De novo review is appropriate  
19 only “[w]hen an administrator engages in wholesale and flagrant violations of the procedural  
20 requirements of ERISA” that “alter the substantive relationship between the employer and  
21 employee, thereby causing the beneficiary substantive harm.” *Abatie*, 458 F.3d at 971  
22 (holding that a change in reasoning of a denial can be a procedural irregularity because the  
23 plan participant is foreclosed from presenting any response to the new reason). *See also*  
24 *Burke*, 544 F.3d at 1029 (finding a procedural irregularity where a “Committee considered  
25 a basis for terminating benefits on appeal that was not part of the Plan’s initial decision to  
26 terminate [claimant’s] benefits”); *Saffon v. Wells Fargo & Co. Long Term Disability Plan*,

1 522 F.3d 863 (9th Cir. 2008) (finding a procedural irregularity where the plan communicated  
2 directly with the plaintiff's doctors without advising the plaintiff of the communication).

3 A 'smaller' procedural irregularity, on the other hand, will not change the standard  
4 of review from abuse of discretion to de novo. *Abatie*, 458 F.3d at 971 (citing *Gatti v.*  
5 *Reliance Standard Life Ins. Co.*, 415 F.3d 978, 985 (9th Cir. 2005)). When an abuse of  
6 discretion standard applies, the Court may consider evidence that could have been a part of  
7 the record that the administrator reviewed to make its decision. *Jebian v. Hewlett-Packard*  
8 *Co. Employee Benefits Org. Income Prot. Plan*, 349 F.3d 1098, 1110 (9th Cir. 2003). "A  
9 procedural irregularity, like a conflict of interest, is a matter to be weighed in deciding  
10 whether an administrator's decision was an abuse of discretion." *Abatie*, 458 F. 3d at 972.

11 Here, Plaintiff asserts that the Defendants' use of a wrong date for disability  
12 constituted a procedural violation that resulted in a denial of a full or fair review of her claim.  
13 (Doc. 34 at 2.) Unlike *Abatie*, where the insurer "tack[ed] on a new reason for denying  
14 benefits" in its final decision, or *Burke*, where a Committee considered a new basis for  
15 terminating benefits on appeal, Aetna's alleged procedural violation does not rise to the level  
16 of 'flagrant defalcation' that would warrant de novo review, altering the scope of discovery.  
17 In *Abatie*, the procedural irregularity precluded the plan participant from responding to a  
18 denial of benefits, which effectively denied her a full or fair review of her claim pursuant to  
19 29 C.F.R. § 2560.503-1(g)(1), (h)(2). *Abatie*, 458 F.3d at 974; 29 USCS § 1133. Even if the  
20 Court were to presume that Aetna erroneously applied the proper disability dates to her  
21 elimination period, Plaintiff has not demonstrated that she was precluded from responding  
22 to a denial of benefits, or that she was denied a meaningful dialogue over Aetna's decision  
23 to deny her benefits. Rather, Aetna's decision and appeal on record indicate to the contrary:  
24 the record shows that Aetna communicated the disability dates it used and entertained  
25 Plaintiff's appeal. (Doc. 39 Ex. 8.)

26 Smaller procedural irregularities, reviewed under an abuse of discretion, may still  
27 allow a court to consider evidence outside of the administrative record *when the*

1 *irregularities have prevented full development of the administrative record. Abatie*, 458 F.  
2 3d at 973 (emphasis added). Even if the Court were to consider Aetna’s application of  
3 disability dates as a small procedural irregularity, the Plaintiff has not suggested how this  
4 “prevented [the] full development of the administrative record.” *Id. See e.g. Sheakalee v.*  
5 *Fortis Benefits Ins. Co.*, 2009 WL 772820 (E.D. Cal. 2009) (prohibiting Plaintiff from  
6 providing evidence until Plaintiff could provide an offer of proof from the administrative  
7 record showing specifically how the record was not fully developed). Here, Plaintiff has not  
8 shown how her discovery requests would unmask evidence that would be in the  
9 administrative record had there been no procedural irregularity. Whether or not Defendants’  
10 calculation of disability dates in determining Plaintiffs elimination period was an abuse of  
11 discretion goes to the merits of Plaintiff’s complaint, and is not considered here.

12 To the extent that Plaintiff is entitled to any discovery in relation to a procedural  
13 irregularity, Plaintiff is entitled to discovery of procedural guidelines and policies that were  
14 in place at the time of its decision. “Under ERISA, an employee benefit plan’s internal  
15 review procedures must be included in the plan’s written documents . . . .” *Vaught v.*  
16 *Scottsdale Healthcare Corp. Health Plan*, 546 F.3d 620, 627 (9th Cir. 2008). Pursuant to 29  
17 C.F.R. § 2560.503-1(h)(2)(iii), it is required that claimants be given access to all “relevant”  
18 documents to participants whose benefits claims were denied with a “full and fair review”.  
19 *See Glista v. UNUM Life Ins. Co. of Am.*, 378 F.3d 113, 123 (1st Cir. 2004). “Relevant”  
20 documents include “statements of policy or guidance with respect to the plan concerning the  
21 denied treatment option or benefit for the claimant’s diagnosis, without regard to whether  
22 such advice or statement was relied upon in making the benefit determination.” §  
23 2560.503-1(m)(8)(iv). Accordingly, Plaintiff’s discovery requests for procedural guidelines  
24 and policies that were in place at the time of its decision are allowable, and only include  
25 document requests 20 and 21, and interrogatories 9 and 10, subject to limitations. These  
26 requests ask for, *inter alia*, procedural guidelines relating to the handling or decision-making  
27 procedures for disability claims. Any inquiries that are outside the scope of procedural policy  
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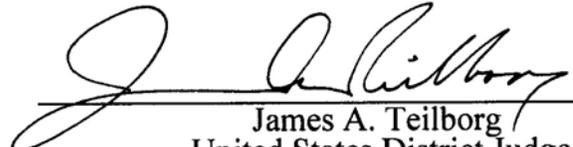
1 in place at the time of the decision, or that are irrelevant to the calculation or usage of  
2 disability dates constitute a fishing expedition and are unallowable.

3 Accordingly,

4 **IT IS ORDERED** that the scope of discovery is limited to the administrative record  
5 with the exception of those documents and inquiries narrowly tailored to the claims  
6 management agreement between Aetna and Cox, the peer review reports in the record at the  
7 time of the Defendants' decision, and the procedural policies and guidelines in place at the  
8 time of the Defendants' decision.

9 **IT IS FURTHER ORDERED** that the discovery deadline will be extended 30 days.

10 DATED this 24<sup>th</sup> day of July, 2009.

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14 James A. Teilborg  
15 United States District Judge  
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