

1 UNITED STATES DISTRICT COURT  
2 FOR THE EASTERN DISTRICT OF CALIFORNIA  
3

4 BARRY STRAWN,

5 Plaintiff,

6 v.

7 FEDERAL EXPRESS CORPORATION LONG  
8 TERM DISABILITY PLAN,

9 Defendant.  
10

1:10-cv-02254 OWW SKO

MEMORANDUM DECISION AND ORDER  
RE PLAINTIFF'S MOTION TO  
STRIKE AND MOTION REGARDING  
THE STANDARD OF REVIEW

(DOCS. 16, 15)

11 I. INTRODUCTION

12 Plaintiff Barry Strawn ("Plaintiff") proceeds with this  
13 action for long term disability benefits under the Federal  
14 Express Corporation Long Term Disability Plan ("Defendant" or  
15 "LTD Plan") pursuant to the Employee Retirement Income Security  
16 Act of 1974 ("ERISA"). Before the court is Plaintiff's motion to  
17 strike. Doc. 16. Defendant filed an opposition (Doc. 20), to  
18 which Plaintiff replied (Doc. 22). Also before the court is  
19 Plaintiff's motion regarding the standard of review (Doc. 15).  
20 Defendants filed an opposition (Doc. 19), to which Plaintiff  
21 replied (Doc. 23). Both motions were heard August 29, 2011.  
22  
23

24 II. FACTUAL BACKGROUND

25 Plaintiff was an employee of Federal Express Corporation  
26 ("Federal Express") and a participant in the LTD Plan. Doc. 1, ¶  
27 3. Plaintiff contends that he became "totally disabled" within  
28

1 the meaning of the LTD plan. Plaintiff made a claim for long-term  
2 disability benefits under the LTD Plan to Aetna Life Insurance  
3 Company ("Aetna"), the LTD Plan's claims paying administrator.  
4 *Id.* at ¶¶ 6, 8. Aetna initially accepted and paid Plaintiff's  
5 claim for long-term disability benefits. *Id.* at ¶ 8. On May 17,  
6 2010, Aetna denied Plaintiff's claim for continued benefits. *Id.*  
7 at ¶ 9. Plaintiff filed an appeal, which Aetna denied on November  
8 10, 2010. *Id.* Plaintiff filed this lawsuit on December 6, 2010.  
9 Doc. 1.

11 The parties participated in a scheduling conference on June  
12 2, 2011. Doc. 12. A scheduling conference order mandated: (1)  
13 Defendant to provide Plaintiff with the administrative record on  
14 or before June 15, 2011; (2) the parties to make initial  
15 disclosures on or before July 7, 2011; (3) the administrative  
16 record to be filed on or before July 7, 2011; and (4) either (i)  
17 the parties to agree on the appropriate standard of review by  
18 July 18, 2011, or (ii) Plaintiff to file a motion to determine  
19 the appropriate standard of review by July 18, 2011. Doc. 12, 6.

### 22 III. MOTION TO STRIKE

23 Plaintiff moves to strike: (1) the complete administrative  
24 record filed July 7, 2011; (2) Amendment to Service Agreement  
25 between Federal Express and Aetna dated September 1, 2008; and  
26 (3) excerpts of the Summary Plan Description of the LTD Plan,  
27 attached as Exhibit A to the declaration of Robin Marsh, a Senior  
28

1 Paralegal in Federal Express' legal department declaration.

2 A. LEGAL STANDARD

3 Federal Rule of Civil Procedure 26(a)(1)(A)(ii) provides  
4 that "a party must, without awaiting a discovery request, provide  
5 to the other parties . . . a copy--or a description by category  
6 and location--of all documents, electrically stored information,  
7 and tangible things that the disclosing party has in its  
8 possession, custody, or control and may use to support its claims  
9 or defenses, unless the use would be solely for impeachment."  
10 Fed. R. Civ. P. 26(a)(1)(A)(ii).

11  
12 Federal Rule of Civil Procedure 37 "gives teeth" to Rule  
13 26's disclosure requirements, and is a "self-executing,"  
14 "automatic" sanction. *Goodman v. Staples the Office Superstore,*  
15 *LLC*, 644 F.3d 817, \*24 (9<sup>th</sup> Cir. 2011). If a party fails to  
16 provide information in compliance with Rule 26(a), "the party is  
17 not allowed to use that information or witness to supply evidence  
18 on a motion, at a hearing, or at a trial, unless the failure was  
19 substantially justified or is harmless." Fed. R. Civ. P. 37(c).  
20 The party facing sanctions for belated disclosure has the burden  
21 to show that its failure to comply with Rule 26 was justified or  
22 harmless. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d  
23 1101, 1107 (9<sup>th</sup> Cir. 2001).

24  
25  
26 B. ANALYSIS

27 1. Local Rule 251(b)

28 Defendant points out that Plaintiff has not satisfied the

1 Eastern District of California Local Rule 251(b)'s threshold  
2 requirement of conferring before filing a motion pursuant to  
3 Federal Rule of Civil Procedure 26. Local Rule 251(b) requires:

4 Except as hereinafter set forth, a motion made pursuant to  
5 Fed. R. Civ. P. 26 through 37, including any motion to  
6 exceed discovery limitations or motion for protective order,  
7 shall not be heard unless (1) the parties have conferred and  
8 attempted to resolve their differences, and (2) the parties  
9 have set forth their differences and the bases therefor in a  
10 Joint Statement re Discovery Disagreement. Counsel for all  
11 interested parties shall confer in advance of the filing of  
12 the motion or in advance of the hearing of the motion in a  
13 good faith effort to resolve the differences that are the  
14 subject of the motion. Counsel for the moving party or  
15 prospective moving party shall be responsible for arranging  
16 the conference, which shall be held at a time and place and  
17 in a manner mutually convenient to counsel.

18 E.D. Cal. R. 251(b). Plaintiff does not respond to Defendant's  
19 argument or address his failure to comply with Local Rule 251(b).

20 Plaintiff's motion to strike is DENIED for failure to comply  
21 with Local Rule 251(b). Even if Plaintiff had satisfied Local  
22 Rule 251(b), his motion to strike would be DENIED for the  
23 following reasons.

24 2. July 7, 2011 Administrative Record

25 Plaintiff moves to strike the 2,682-page administrative  
26 record filed July 7, 2011, almost two months after Defendant gave  
27 Plaintiff a 1,710-page administrative record. Plaintiff's counsel  
28 asserts that he spent a substantial amount of time scanning,  
organizing, and bookmarking the original administrative record,  
and that production of an entirely new record would unfairly  
result in substantial extra work. Plaintiff asks that the

1 administrative record be reorganized with the original  
2 administrative record in front, followed by the new material.

3 The June 2, 2011 scheduling conference order required  
4 Defendant to give Plaintiff the administrative record on or  
5 before June 15, 2011. Doc. 12, 6. Federal Express received a  
6 1,710-page administrative record from Aetna, and gave Plaintiff  
7 that version of the administrative record on May 11, 2011. On May  
8 15, 2011, Plaintiff's counsel sent Federal Express a letter  
9 questioning the completeness of the administrative record.  
10

11 Ms. Marsh declares that she then conducted a page-by-page  
12 review of the administrative record and confirmed that it was  
13 incomplete. Doc. 19-1, ¶ 17. Ms. Marsh declares that on Monday,  
14 May 16, 2011, she requested a complete copy of Plaintiff's appeal  
15 brief from Aetna, and was in contact with Aetna over the next  
16 several weeks to obtain a correct copy of the administrative  
17 record. *Id.* at ¶¶ 17-18. Ms. Marsh declares that Aetna compiled a  
18 correct copy of Plaintiff's appeal brief on or about June 27,  
19 2011. *Id.* at ¶ 19. Ms. Marsh declares that she: (1) manually  
20 bates-labeled the administrative record on June 27 and 28, 2011;  
21 (2) sent a paper copy to Aetna for final review on June 29, 2011,  
22 *Id.* at ¶ 22; (3) redacted the administrative record on July 5,  
23 2011; (4) and made two copies of it on July 6, 2011, *Id.* at ¶ 25.  
24 Defendant filed a paper copy of the administrative record on July  
25 7, 2011. Doc. 13. Ms. Marsh declares and provides documentation  
26  
27  
28

1 that the administrative record was sent via overnight delivery to  
2 Plaintiff's counsel on July 7, 2011 and was received July 8,  
3 2011. *Id.* at ¶ 27-28. Plaintiff's counsel declares that he did  
4 not "see" the administrative record until Sunday, July 10, 2011.  
5 Doc. 16-1, ¶ 25.

6  
7 Defendant provided Plaintiff with what it believed was the  
8 administrative record thirteen days before the June 15, 2011  
9 deadline, and took steps to obtain the complete record when it  
10 learned that it did not possess the complete record. The Federal  
11 Rules of Civil Procedure recognize that parties must often  
12 supplement or correct their initial disclosures "in a timely  
13 manner if the party learns that in some material respect the  
14 disclosure or response is incomplete or incorrect." Fed. R. Civ.  
15 P. 26(e)(1)(A). Defendant timely filed a complete copy of the  
16 administrative record on July 7, 2011, and provided Plaintiff  
17 with the complete administrative record July 8, 2011, ten days  
18 before the deadline to determine, or file a motion to determine,  
19 the proper standard of review. There is no evidence that  
20 Defendant was at fault for the delay in providing Plaintiff the  
21 complete administrative record. Defendant has provided evidence  
22 that the incomplete record resulted from a malfunction at Aetna's  
23 facility. Plaintiff does not point to any provision in ERISA or  
24 federal law that authorizes an order instructing Defendant to  
25 reorganize the evidentiary record for Plaintiff's convenience.  
26  
27  
28

1 There is no evidence that the delay in providing the complete  
2 administrative record was prejudicial. If necessary, the parties  
3 could have requested an extension of time to file a motion to  
4 determine the standard of review.

5 Plaintiff's motion to strike the administrative record filed  
6 July 7, 2011 is DENIED.  
7

8 3. Amendment to the Service Agreement

9 Plaintiff also moves to strike the Amendment to the Service  
10 Agreement. The scheduling conference order mandated initial  
11 disclosures on or before July 7, 2011. Doc. 12. Plaintiff asserts  
12 that he did not receive the Amendment to Service Agreement until  
13 July 11, 2012, four days late.

14 Rule 26(a)(1)(A)(ii) requires a party to provide "a copy *or*  
15 *a description by category and location.*" Fed. R. Civ. P.  
16 26(a)(1)(A)(ii) (emphasis added). Defense counsel emailed  
17 Plaintiff's counsel on July 5, 2011 disclosing the Amendment to  
18 the Service Agreement and stating that a redacted copy would be  
19 sent. Contrary to Plaintiff's argument, Rule 26(a)(1)(A)(ii) does  
20 not require actual production of documents. *Forbes v. 21<sup>st</sup> Century*  
21 *Ins. Co.*, 258 F.R.D. 335, 338 (C.D. Ariz. 2009); Fed. R. Civ. P.  
22 26 advisory committee's note on 1993 amend. The other party is  
23 "expected to obtain the documents desired by proceeding under  
24 Rule 34 or through informal requests." *Id.* Defendant provided  
25 Plaintiff with a copy of the Amendment to Service Agreement on  
26  
27  
28

1 July 11, 2011.

2 Rule 26(a)(4) provides that "[u]nless the court orders  
3 otherwise, all disclosures under Rule 26(a) must be in writing,  
4 signed and served." Fed. R. Civ. P. 26(a)(4). There is no  
5 indication that Defendant's email was served as required by Rule  
6 26(e). Defendant contends, however, that Plaintiff also did not  
7 serve signed, written disclosures to Defendant before July 7,  
8 2011.  
9

10 Plaintiff's motion to strike the Amendment to Service  
11 Agreement is DENIED.

12 4. Summary Plan Description

13 In his reply to Defendant's opposition, Plaintiff includes a  
14 motion to strike Exhibit A to Ms. Marsh's declaration. Exhibit A  
15 contains excerpts of the LTD Plan's Summary Plan Description.  
16 Plaintiff contends that the excerpts of the Summary Plan  
17 Description were not included in Defendant's Rule 26(a)  
18 disclosures, was not filed in the administrative record, and was  
19 not seen by either the court or Plaintiff's counsel until  
20 Defendant filed its opposition to Plaintiff's motions on August  
21 15, 2011.  
22

23 Because Plaintiff's motion to strike is raised for the first  
24 time in a reply brief, it will not be considered. "The district  
25 court need not consider arguments raised for the first time in a  
26 reply brief." *Zamani v. Carnes*, 491 F.3d 990, 997 (9<sup>th</sup> Cir. 2007).  
27  
28



1 Plaintiff's motion to strike the Summary Plan Description is  
2 DENIED.

3 IV. MOTION REGARDING THE STANDARD OF REVIEW

4 Plaintiff moves for a determination that the standard of  
5 review of the denial of Plaintiff's benefit claim is *de novo*.  
6 Defendant counters that the standard of review should be  
7 "arbitrary and capricious," which the Ninth Circuit equates with  
8 the "abuse of discretion" standard. *See Canseco v. Constr.*  
9 *Laborers Pension Trust*, 93 F.3d 600, 609 (9<sup>th</sup> Cir. 1996).  
10 Plaintiff's motion will be treated as a motion for partial  
11 summary judgment as to the standard of review.  
12

13 A. LEGAL STANDARD

14 Summary judgment is proper if "the pleadings, the discovery  
15 and disclosure materials on file, and any affidavits show that  
16 there is no genuine issue as to any material fact and that the  
17 movant is entitled to judgment as a matter of law." Fed. R. Civ.  
18 P. 56.  
19

20 The moving party bears the initial burden of "informing the  
21 district court of the basis for its motion, and identifying those  
22 portions of the pleadings, depositions, answers to  
23 interrogatories, and admissions on file, together with the  
24 affidavits, if any, which it believes demonstrate the absence of  
25 a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477  
26 U.S. 317, 323, 106 S.Ct. 2548 (1986) (internal quotation marks  
27  
28

1 omitted). A fact is material if it could affect the outcome of  
2 the suit under the governing substantive law; "irrelevant" or  
3 "unnecessary" factual disputes will not be counted. *Anderson v.*  
4 *Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986).

5 If the moving party would bear the burden of proof on an  
6 issue at trial, it must "affirmatively demonstrate that no  
7 reasonable trier of fact could find other than for the moving  
8 party." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9<sup>th</sup>  
9 Cir. 2007). In contrast, if the non-moving party bears the burden  
10 of proof on an issue, the moving party can prevail by "merely  
11 pointing out that there is an absence of evidence" to support the  
12 non-moving party's case. *Id.*

13  
14 When the moving party meets its burden, the "adverse party  
15 may not rest upon the mere allegations or denials of the adverse  
16 party's pleadings, but the adverse party's response, by  
17 affidavits or as otherwise provided in this rule, must set forth  
18 specific facts showing that there is a genuine issue for trial."  
19 Fed. R. Civ. P. 56(e).

20  
21 In ruling on a motion for summary judgment, a court does not  
22 make credibility determinations or weigh evidence. See *Anderson*,  
23 477 U.S. at 255. Rather, "[t]he evidence of the non-movant is to  
24 be believed, and all justifiable inferences are to be drawn in  
25 his favor." *Id.* Only admissible evidence may be considered in  
26 deciding a motion for summary judgment. Fed. R. Civ. P. 56(e).

1 "Conclusory, speculative testimony in affidavits and moving  
2 papers is insufficient to raise genuine issues of fact and defeat  
3 summary judgment." *Soremekun*, 509 F.3d at 984.

4 B. ANALYSIS

5 An ERISA plan administrator's decision is reviewed *de novo*,  
6 unless the plan document grants the administrator discretion to  
7 interpret the plan terms and determine eligibility for benefits.  
8 *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).  
9 If the plan confers discretionary authority to the administrator,  
10 then the administrator's decision will be reviewed for an abuse  
11 of discretion. *Id.* "[F]or a plan to alter the standard of review  
12 from the default *de novo* to the more lenient abuse of discretion,  
13 the plan must unambiguously provide discretion to the  
14 administrator." *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d  
15 955, 963 (9<sup>th</sup> Cir. 2006).  
16  
17

18 The Aetna Review Committee denied Plaintiff's appeal of his  
19 long term disability benefits under the LTD Plan. The applicable  
20 standard of review therefore hinges on whether the LTD Plan  
21 grants the Aetna Review Committee discretion to interpret the  
22 plan terms and determine eligibility for benefits.

23 The parties agree that the LTD Plan unambiguously grants  
24 discretion to Federal Express, the LTD Plan administrator.

25 Section 6.1 of the LTD Plan provides:

26  
27 [T]he Administrator's authority shall include, but shall not  
28 be limited to, the following powers:

1 (a) to construe any ambiguity and interpret any  
2 provision of the Plan or supply any omission or reconcile  
any inconsistencies in such manner as it deems proper;

3 (b) to determine eligibility for coverage under the  
4 Plan in accordance with its terms; and

5 (c) to decide all questions of eligibility for, and  
6 determine the amount, manner and time of payment of,  
7 benefits under the Plan in accordance with its  
8 interpretation of its terms.

9 Doc. 13, AR 02665. The Administrator is defined as "the Company"  
10 (*Id.* at AR 2609), which in turn is defined as "Federal Express  
11 Corporation" (*Id.* at AR 2611).

12 The main issue is whether the Aetna Review Committee  
13 properly received and was vested with Federal Express's  
14 discretionary authority to review Plaintiff's long-term  
15 disability claim. "[D]eference applies only when the decision is  
16 made by the body vested with discretion. 'When an unauthorized  
17 body that does not have fiduciary discretion to determine  
18 benefits eligibility renders such a decision . . . deferential  
19 review is not warranted.'" *Jebian v. Hewlett-Packard Co. Employee*  
20 *Benefits Org. Income Protection Plan*, 349 F.3d 1098, 1105 (9<sup>th</sup>  
21 Cir. 2001) (quoting *Sanford v. Harvard Indus.*, 262 F.3d 590, 597  
22 (6<sup>th</sup> Cir. 2001)).

23 Under ERISA, a named fiduciary may delegate its fiduciary  
24 responsibilities.

25 The instrument under which a plan is maintained may  
26 expressly provide for procedures (A) for allocating  
27 fiduciary responsibilities (other than trustee  
28 responsibilities) among named fiduciaries, (B) for named  
fiduciaries to designate persons other than named  
fiduciaries to carry out fiduciary responsibilities (other

1 than trustee responsibilities) under the plan.  
2 29 U.S.C. § 1105(c)(1); *Madden v. ITT Long Term Disability Plan*  
3 *for Salaried Employees*, 914 F.2d 1279, 1283 (9<sup>th</sup> Cir. 1990). Where  
4 an ERISA plan expressly gives the administrator or fiduciary  
5 discretionary authority to determine eligibility for benefits or  
6 to construe the terms of the plan, and the named fiduciary  
7 properly delegates its discretionary authority, then  
8 discretionary review applies to the designated ERISA fiduciary as  
9 well as its delegate. *Id.* at 1284. The focus is not on whether  
10 there is documentation of a transfer of discretionary authority  
11 from the named fiduciary to the delegate, but whether the ERISA  
12 plan contemplates the possibility of a transfer of discretionary  
13 authority to a third-party and whether there is evidence  
14 establishing delegation. *Shane v. Albertson's Inc. Employees*  
15 *Disability Plan*, 504 F.3d 1166, 1171 (9<sup>th</sup> Cir. 2007) (citing  
16 *Hensley v. Northwest Permanente P.C. Retirement Plan*, 258 F.3d  
17 986, 998 (9<sup>th</sup> Cir.2001), *overruled on other grounds by Abatie*, 458  
18 F.3d at 966 (holding that delegation of discretionary authority  
19 to third-party from identified plan fiduciary was sufficient  
20 because plan contemplated delegation; the plan did not require  
21 delegation to be in writing; and affidavits were submitted  
22 stating that delegation of discretionary authority took place)).

23  
24  
25  
26 The parties agree that the LTD Plan permits Federal Express  
27 to appoint an appeal committee, and that appeal committee has  
28

1 discretionary authority to review and decide appeals. Section  
2 5.3(c) of the LTD Plan provides:

3 (c) Decision on Review. The Administrator shall appoint an  
4 appeal committee for the purpose of conducting reviews of  
5 denial of benefits and providing the claimant with written  
6 notice of the decision reached by such committee.

6 *Id.* at AR 2656. Section 5.3(d) of the Plan provides:

7 (d) Authority of Appeal Committee. The appeal committee,  
8 appointed pursuant to Subsection (c), shall, subject to the  
9 requirements of the Code and ERISA, be empowered to  
10 interpret the Plan's provisions in its sole and exclusive  
11 discretion in accordance with its terms with respect to all  
12 matters properly brought before it pursuant to this Section  
13 5.3, including, but not limited to, matters relating to the  
14 eligibility of a claimant for benefits under the Plan. The  
15 determination of the appeal committee shall be made in a  
16 fair and consistent manner in accordance with the Plan's  
17 terms and its decision shall be final, subject only to a  
18 determination by a court of competent jurisdiction that the  
19 committee's decision was arbitrary and capricious.

15 *Id.* at AR 2659-2660 (emphasis added). Although Plaintiff argues  
16 that the LTD Plan does not permit delegation of its discretionary  
17 authority, Section 5.3(c) explicitly gives Federal Express the  
18 power to appoint an appeal committee to review denial of benefit  
19 claims. Plaintiff, however, contends that Federal Express'  
20 ability to delegate its fiduciary functions is limited by Section  
21 6.1 of the LTD Plan:

22 Nothing contained in this section shall prevent the  
23 Administrator from delegating non-fiduciary administrative  
24 duties to the Claims Paying Administrator or others as  
25 described in this Plan, the Plan's summary plan description  
26 or other document.

26 Doc. 13, AR 2666.

27 Defendant contends that Federal Express named the Aetna  
28

1 Review Committee as the "appeal committee" under Section 5.3(c)  
 2 of the LTD Plan, and that appointment was made possible by  
 3 Federal Express' delegation to Aetna Life Insurance Company the  
 4 task of appointing the appeal committee. Section 6.1 of the LTD  
 5 Plan permits Federal Express to delegate non-fiduciary  
 6 administrative duties to Aetna, the Claims Paying Administrator.  
 7

8 As evidence that the Aetna Review Committee is the appeals  
 9 committee, Defendant presents the Summary Plan Description, which  
 10 names the Aetna Appeals Committee as the group responsible for  
 11 final review of long-term disability claims:

12 Appeal a Claim Denial - Your Rights

13  
 14 You or your authorized representative can request a full and  
 15 fair review of a denied claim at what is referred to as the  
 16 "appeal" level. There are two levels of appeal of all claims  
 17 except disability, Group Legal Services and Group Long-Term  
 18 Care, which has one level of appeal. All appeals will be  
 reviewed by the appropriate claims paying administrator.  
 From the date that you receive the written denial of the  
 claim, you must submit your appeal request as outlined in  
 writing in the denial letter.

19 Appeal filing and processing timeframes are as follows:

Appeal Type	Deadline for Filing Appeal	Deadline for Extension of Filing an Appeal	Deadline for Final Determination	Group Responsible for Final Review
Disability Claims	180 days after receiving the claim denial notice	One 30-day extension is allowed if the extension request is received before the 45-day determination period runs out	45 days after receipt of the appeal and all supporting documentation	Aetna Appeals Committee

1 Doc. 19-1, Ex. A, 365, 366.

2  
3 Defendant contends that because the Summary Plan Description  
4 is an LTD Plan document, it is clear evidence that Federal  
5 Express as the LTD Plan administrator recognizes and has given  
6 authority to the Aetna Review Committee as the appeal committee.  
7 Summary plan documents "provide communication with beneficiaries  
8 about the plan," but "do not themselves constitute the *terms* of  
9 the plan . . ." *CIGNA Corp. v. Amara*, 131 S.Ct. 1866, 1878  
10 (2011) (emphasis in original). Although the Summary Plan  
11 Description is not a plan document, however, it is evidence that  
12 the Aetna Review Committee was appointed as the appeals  
13 committee.  
14

15 Plaintiff points out that the Summary Plan Description lists  
16 the Aetna *Appeals* Committee, not the Aetna *Review* Committee, as  
17 the group responsible for final review. Defendant asserts that  
18 the Aetna Appeals Committee specified in the Summary Plan  
19 Description is the same as the Aetna Review Committee. Defendant  
20 contends that while Aetna uses the term Aetna Review Committee,  
21 Federal Express uses the term Aetna Appeals Committee, but they  
22 are the same committee with interchangeable names. Defendant does  
23 not offer any declarations or other evidence to support this  
24 argument.  
25

26 Defendant further contends that the appointment of the Aetna  
27 Reviews Committee is evidenced by the Amendment to the Service  
28



1 Agreement, which Defendant argues is the contractual document  
2 evidencing the delegation between Federal Express and Aetna. The  
3 Amendment to the Service Agreement reads in pertinent part:

4 Be fully responsible for final appeal benefit determinations  
5 for the Short Term Disability Plans, and effective 9/1/08  
6 for Long Term Disability Plans, and for ensuring such  
7 determinations are in accordance with Employee Retirement  
8 Income Securities Act ("ERISA"), the Department of Labor  
9 regulations and the Standard Operating Processes. FedEx  
10 Express hereby delegates to Aetna discretionary authority to  
11 render eligibility and benefit determinations and otherwise  
12 interpret the terms of the Short Term and Long Term  
13 Disability Plans on appeal. FedEx Express acknowledges that  
14 it will not have the responsibility or final authority for  
15 making any final appeal benefit determinations on appeals  
16 received for claims filed under the Short Term Disability  
17 Plan on appeals received on or after 9/1/08 for claims filed  
18 under the Long Term Disability Plans.

19 Doc. 16-1, Ex. G, 1.

20 The issue here is whether the ERISA plan contemplates a  
21 transfer of discretionary authority to a third-party and whether  
22 there is evidence establishing delegation. *Shane*, 504 F.3d at  
23 1171. The LTD Plan permits Federal Express to delegate non-  
24 fiduciary duties to Aetna, and permits Federal Express to appoint  
25 an appeal committee. The LTD Plan grants discretionary authority  
26 to the appeal committee. Federal Express has provided the Summary  
27 Plan Description and Amendment to Services Agreement as evidence  
28 that Federal Express delegated authority to Aetna and the Aetna  
Review Committee was appointed the appeal committee. Based on the  
evidence presented, it cannot be concluded whether the proper  
delegations were made and whether the Aetna Appeal Committee is

1 interchangeably with the Aetna Review Committee. The standard of  
2 review cannot be decided as a matter of law and is reserved for  
3 trial. Plaintiff's motion that the standard of review is *de novo*  
4 is DENIED without prejudice.

5 Defendant did not file a cross-motion although it was  
6 authorized to do so.  
7

8 V. CONCLUSION

9 For the reasons stated:

- 10 1. Plaintiff's motion to strike is DENIED.
- 11 2. Plaintiff's motion that the standard of review is *de novo* is  
12 DENIED without prejudice.
- 13 3. Defendant shall submit a proposed form of order consistent  
14 with this memorandum decision within five (5) days following  
15 electronic service of this memorandum decision.  
16

17 SO ORDERED.

18 DATED: August 31, 2011

19 /s/ Oliver W. Wanger  
20 Oliver W. Wanger  
21 United States District Judge  
22  
23  
24  
25  
26  
27  
28