

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANTONIO PRADO,)	Case No. 09-4419 SC
)	
Plaintiff,)	MEMORANDUM OF DECISION,
)	FINDINGS OF FACT, AND
v.)	<u>CONCLUSIONS OF LAW</u>
)	
ALLIED DOMEcq SPIRITS AND WINE)	
GROUP DISABILITY INCOME POLICY,)	
)	
Defendant.)	
_____)	
)	
LIBERTY LIFE ASSURANCE COMPANY OF)	
BOSTON,)	
)	
Real Party in Interest.)	
_____)	

I. INTRODUCTION

Plaintiff Antonio Prado ("Prado" or "Plaintiff") commenced this action against the Allied Domecq Spirits and Wine Group Disability Income Policy ("Allied" or "the Plan"), bringing three causes of action: (1) failure to extend disability benefits in accordance with the Plan and the Employee Retirement Income Security Act of 1974 ("ERISA"), 28 U.S.C. § 1132; (2) violation of section 10111.2 of California's Insurance Code; and (3) failure to produce records under 29 U.S.C. § 1332(c) and 29 C.F.R. § 2560.503-1. The Real Party in Interest is the Claims Administrator, Liberty Life Assurance Company of Boston ("Liberty" or "Defendant"). Plaintiff and Liberty have now moved for judgment pursuant to Rule

1 52 of the Federal Rules of Civil Procedure. ECF Nos. 40 ("Pl.'s
2 Mot."), 49 ("Def.'s Opp'n"), 44 ("Def.'s Mot."), 68 ("Pl.'s
3 Opp'n"), 73 ("Def.'s Reply").¹ Trial occurred on June 6, 2011,
4 during which the Court requested both parties submit proposed
5 findings of fact and conclusions of law. ECF No. 77. The parties
6 have complied with the Court's request. ECF Nos. 81 ("Def.'s
7 FFCL"), 82 ("Pl.'s FFCL"). Having read and considered the parties'
8 respective submissions, the Court rules as follows.

9
10 **II. FINDINGS OF FACT**

11 **A. Evidence Considered by the Court**

12 As the Court will discuss infra, abuse-of-discretion review of
13 an ERISA claim denial is generally limited to the administrative
14 record; that is, the papers the insurer had when it denied the
15 claim. Jebian v. Hewlett-Packard Co. Emp. Benefits Org. Income
16 Prot. Plan, 349 F.3d 1098, 1110 (9th Cir. 2003). However, if the
17 denial is made by an administrator operating under a conflict of
18 interest, the court has discretion to permit discovery beyond the
19 administrative record into the nature, extent, and effect of this
20 conflict on the administrator's decision-making process. Welch v.
21 Met. Life Ins. Co., 480 F.3d 942, 949-50 (9th Cir. 2007).

22 Similarly, if an administrator presents a new reason for its denial
23 in its final administrative decision, the claimant is entitled to
24 present evidence regarding that denial and to have the district
25 court consider it. Saffron v. Wells Fargo & Co. Long Term
26 Disability Plan, 522 F.3d 863, 872 (9th Cir. 2008). Evidence

27
28 ¹ Plaintiff's Motion was erroneously electronically filed as a
trial brief.

1 considered beyond the administrative record "need not satisfy the
2 strict rules for the admissibility of evidence in a civil trial,
3 and may be considered so long as it is relevant, probative, and
4 bears a satisfactory indicia of reliability." Tremain v. Bell
5 Indus., Inc., 196 F.3d 970, 978 (9th Cir. 1999).

6 On August 2, 2010, the Court determined that Liberty operated
7 under a conflict of interest and permitted Plaintiff to conduct
8 limited discovery into the "nature, extent, and effect of Liberty's
9 conflict of interest on its decision-making process." ECF No. 35
10 ("Aug. 2, 2010 Order").

11 With this framework in mind, the Court evaluates the
12 admissibility of evidence submitted by the parties.

13 1. The Claim File

14 Liberty submits the Claim File ("CF"), which it alleges is the
15 complete record on which Liberty based its denial of Plaintiff's
16 benefits claim and his subsequent appeal. Gray Decl. Ex C ("CF").²
17 The Claim File consists of 4090 pages of records and one DVD
18 containing surveillance video of Plaintiff from September and
19 October 2009. Plaintiff does not challenge the authenticity of the
20 Claim File; in fact, it contains numerous documents Plaintiff
21 submitted to Liberty in support of his claim.

22 2. The Plan Documents

23 Liberty submits copies of what it alleges are the Policy and
24 the Summary Plan Description; these are the plan documents Liberty
25 provided to Plaintiff during the claims process. McNerney Decl.
26
27

28 ² Lisa Gray ("Gray"), appeal review consultant for Liberty, filed a
declaration in support of Liberty's Motion. ECF No. 47.

1 Exs. A ("Policy"), B ("SPD").³ Plaintiff alleges that Defendant
2 has failed to provide the Plan document and disputes whether the
3 two produced documents accurately reflect the terms of the Plan.
4 Pl.'s Mot. at 23. Plaintiff alleges that the Plan which he
5 participated in is titled "Hiram Walker & Sons Long-Term Disability
6 Plan Number 507," and that Liberty has produced no such plan. Id.
7 Plaintiff states: "Without the Plan, who knows whether there is a
8 difference between the insurance policy, which Liberty has been
9 using as if it were the Plan, and the Plan itself." Pl.'s Mot. at
10 24.

11 The SPD is clearly identified as the summary plan description
12 of "Hiram Walker & Sons Inc. Long Term Disability Plan Number 507."
13 SPD at 26.⁴ The Policy contains no mention of "Hiram Walker &
14 Sons" or "Plan Number 507," and identifies Allied Domecq Spirits
15 and Wine as the Plan's sponsor. Policy at 2. Both the Policy and
16 the SPD bear the same policy number: GF3-841-431862-01. Policy at
17 1; SPD at 3. To authenticate the Policy and SPD, Liberty submits
18 the declaration of Carolyn McNerney ("McNerney"), who identifies
19 herself as the current "Assistant Corporate Secretary for Pernod
20 Ricard USA," an "affiliated company" that she claims currently
21 administers the Plan. Id. ¶ 1. McNerney states: "I can declare
22 that [the Policy and the SPD] are true and authentic copies of the
23 Group Disability Income Policy issued to Allied Domecq Spirits and
24 Wine . . . and the operative Summary Plan Description." Id. ¶ 2.

25
26 ³ Carolyn McNerney ("McNerney") filed a declaration in support of
Liberty's Motion. ECF No. 48.

27
28 ⁴ In this Circuit, the SPD constitutes a plan document that "should
be considered when interpreting an ERISA plan." Bergt v. Ret. Plan
for Pilots Employed by Mark Air, Inc., 293 F.3d 1139, 1143 (9th
Cir. 2002).

1 McNerney declares that when Allied purchased Hiram Walker-Gooderham
2 & Worts of Canada in 1987, "the Hiram Walker & Sons Long-Term
3 Disability Plan Number 507 became known as the Allied Domecq
4 Spirits & Wine USA Inc. and Subsidiary & Affiliated Companies Group
5 Welfare Insurance Plan for Employees in the US." Id. ¶ 4.

6 McNerney states that "after a diligent and complete search, no
7 other plan documents have been located." Id. ¶ 9.⁵

8 In light of the above, the Court finds that the Policy and SPD
9 produced during the claim process contain satisfactory indicia of
10 reliability, and accepts the terms provided in the Policy and the
11 Summary as the terms of the Plan.

12 3. Other Evidence Submitted by Liberty

13 Liberty submits the declaration of Paula McGee ("McGee"),
14 litigation manager of disability claims for Liberty. ECF No. 45.
15 McGee declares that through her position as litigation manager, she
16 is familiar with Liberty's claims and underwriting operations, as
17 well as Plaintiff's claim. Id. ¶ 2.

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21 ⁵ In its August 2, 2010 Order, the Court sustained Plaintiff's
22 objection to a similar declaration by McNerney in which she
23 attempted to authenticate these plan documents, and permitted
24 Plaintiff to conduct discovery of the plan documents. Aug. 2, 2010
25 Order at 13. While Liberty was uncooperative in responding to
26 Plaintiff's discovery requests, as the Court discusses infra,
27 Liberty did produce a document that it identified as "Group Income
28 Disability Policy GF3-841-431862-01" and five amendments to it.
Cogan Decl. Ex. D. ("Exhibit D"). Both the Policy produced during
the claims process and Exhibit D bear the same policy number ("GF3-
841-431862-01"). The first pages of both documents differ (Exhibit
D is signed by the "secretary" and "president," while the Policy is
not). Id. at 2. Exhibit D includes Allied's application for group
insurance, id. at 40, while the Policy does not. Exhibit D
contains Amendments 1 through 5, Ex. D. at 41-52, while the Policy
produced during the claims process does not. Otherwise, the two
documents appear to be identical.

1 4. Evidence Submitted by Plaintiff

2 Plaintiff submits a declaration of Steven Moon ("Moon"), who
3 identifies himself as the work capacity evaluator who performed a
4 Functional Capacity Evaluation ("FCE") of Plaintiff on February 25,
5 2009. Moon Decl. ¶¶ 1-2.⁶ Moon's FCE report is included in the
6 Claim File. CF 0583-0592. In his declaration, Moon responds to
7 the surveillance footage taken in September and October 2009.
8 Plaintiff also submits his own declaration in which he responds to
9 this footage. ECF No. 42.⁷

10 Plaintiff also asks the Court to take judicial notice of the
11 Bristol Hospital 2008 Annual Report and a motion filed in an
12 unrelated action against Liberty in District Court for the Southern
13 District of Ohio. ECF No. 69. The Court finds that these
14 documents lack the indicia of reliability required under Tremain,
15 196 F.3d at 978, and it declines Plaintiff's request.

16 In finding the facts below, the Court relies on the evidence
17 above and the facts decided and actually litigated in the prior
18 denial-of-benefits action between the parties, Prado v. Allied
19 Domecq Spirits and Wine Gr. Disability Income Policy, No. 05-2716,
20 2008 WL 191985 (N.D. Cal. Jan. 22, 2008) ("Prado I").

21 **B. The Parties**

22 Plaintiff is a California resident; from February 1987 to
23 September 2003, he worked as a production manager for Mumm Napa
24 Valley ("Mumm"), a subsidiary of Allied Domecq Spirits and Wine.

25 _____
⁶ ECF No. 41.

26 _____
27 ⁷ Liberty objects to the declarations of Moon and Plaintiff. ECF
28 No. 52. The Court OVERRULES Liberty's objection, finding the
declarations relevant under Saffron, 522 F.3d at 872, as related to
a new reason for denial offered by Liberty in its final
administrative decision.

1 Prado I at 1. As a production manager, Plaintiff managed all
2 aspects of winery bottling and warehouse operations, including
3 overseeing bottling, quality control, warehousing, specialty
4 packaging, procurement, inventory, planning, and scheduling. CF
5 4083.

6 Liberty insured Plaintiff's long-term disability plan through
7 a group disability policy. Prado I at 1. Liberty served as the
8 claims administrator. Id.

9 **C. The Plan**

10 Plaintiff was a beneficiary of his employer's sponsored long-
11 term disability plan. Id. Under the Plan described in the
12 Policy, Liberty must pay out a monthly benefit to participants who
13 meet the definitions of "disabled" or "partially disabled." Policy
14 at 6. The Policy provides two definitions of "disability" -- one
15 for the first twenty-four-month period, and a second for the time
16 following this period. Policy at 4. A participant is disabled
17 during the first twenty-four months if he "is unable to perform all
18 the material and substantial duties of his occupation on an Active
19 Employment basis because of an injury or sickness." Policy at 4
20 (emphasis added). After this period, a person is disabled if he
21 "is unable to perform, with reasonable continuity, all of the
22 material and substantial duties of his own or any other occupation
23 for which he is or becomes reasonably fitted by training,
24 education, experience, age and physical and mental capacity." Id.
25 at 5 (emphasis added). The parties and the Court refer to these as
26 the "own occupation" and "any occupation" periods.

27 The Policy gives Liberty the authority, "in its sole
28 discretion, to construe the terms of this policy and to determine

1 benefit eligibility hereunder." Id. at 25. "Liberty's decisions
2 regarding construction of the terms of this policy and benefit
3 eligibility shall be conclusive and binding." Id. The Policy
4 requires that "[p]roof of claim must be given to Liberty." Id. at
5 27. This proof must cover the date the disability started, the
6 cause of the disability, and the degree of the disability. Id.

7 **D. Plaintiff's Injury**

8 Plaintiff first injured his back while employed with Mumm in
9 1989. CF 1399, 2308. While on the job, a three-to-four-hundred-
10 pound piece of machinery fell on him when a forklift chain became
11 loose. CF 1399. Although Plaintiff was injured, he continued to
12 work as a production manager for Mumm. Id. After chiropractic
13 care, physical therapy, and conservative treatment failed to
14 improve his chronic pain, Plaintiff sought treatment of a
15 neurosurgeon, Dr. Jay Levy ("Dr. Levy"), who performed an L5-S1
16 discectomy in 1991. Id.

17 The discectomy failed to cure Plaintiff's pain; Plaintiff
18 developed "internal derangement of his left knee," which was
19 treated with steroid injections. CF 1294. Plaintiff complained of
20 headaches, dizziness, blurred vision, and blackouts. CF 1400.
21 Plaintiff had arthroscopic surgery on his knee in August 1999. CF
22 1345. While the surgery helped, he still claimed to have knee
23 pain. He also complained of neck pain radiating into the left
24 shoulder and down the arm to the ring and little fingers, with
25 numbness, weakness, and tingling in the left arm. CF 1376. His
26 mobility and ability to lift weight were restricted. CF 1376,
27 1377.

28

1 On September 1, 2003, Plaintiff informed Liberty that his back
2 pain and headaches had escalated to the point that he could no
3 longer continue working. CF 0561. In October 2003, Dr. Levy
4 stated that a lumbar MRI scan showed L5-S1 disc collapse and a
5 cervical MRI scan showed spondylosis. CF 2309. Dr. Margaret A.
6 Schlatter ("Dr. Schlatter") evaluated Plaintiff on January 19,
7 2004. CF 1469. She reported that at the time, Plaintiff was
8 experiencing "daily chronic headaches" at a "10 out of 10
9 severity." Id. Dr. Schlatter noted that Plaintiff had "fairly
10 normal range of motion" in his neck and back and a typical gait.
11 CF 1470.

12 Plaintiff filed a disability benefits claim, which Liberty
13 received on March 25, 2004. CF 2309. On June 2, 2004, Liberty
14 denied Plaintiff's claim. CF 0561. Liberty provided the following
15 reason for the denial: "There is insufficient evidence to show
16 that you were disabled from the date you stopped working throughout
17 the Elimination Period. There is insufficient evidence on file to
18 support restrictions and limitations that preclude you from
19 performing your occupation from September, 2003, to the present."
20 Id. Plaintiff appealed the decision and, on August 4, 2004, after
21 further review, Liberty upheld its initial denial. Id.

22 During the pendency of the appeal, Plaintiff was referred to
23 an orthopedic spine surgeon, Dr. James Zucherman ("Dr. Zucherman").
24 CF 1852. Dr. Zucherman noted normal gait and hip flexion, but
25 recorded that Plaintiff had reported pain that was intense and
26 "made worse by sitting, rising from sitting, leaning forward,
27 walking, lying on the back, lying on the stomach, driving, coughing
28 or sneezing, and bending forward." CF 1852-1854. Dr. Zucherman

1 recommended surgery. Id. In January 2005, Dr. Zucherman performed
2 a prosthetic disk replacement at L5-S1. CF 2309. While this
3 procedure initially decreased Plaintiff's back pain and allowed for
4 normal movement, subsequent visits through the rest of 2005 and
5 2006 noted continued complaints of back pain and neck pain. Id.

6 Plaintiff then requested that Liberty reconsider its denial in
7 light of the treatment by Dr. Zucherman and other evidence. CF
8 0562. On May 6, 2005, Liberty informed Plaintiff that it would not
9 reconsider the claim because Plaintiff had already exhausted his
10 administrative remedies under ERISA. Id. Plaintiff filed suit
11 against Liberty, seeking review of Liberty's denial of benefits.
12 See Prado I (discussed in Part II.E, infra).

13 Plaintiff continued treatment with Dr. Zucherman during the
14 pendency of Prado I, experiencing continued symptoms in the neck
15 and lower back. CF 2309. Plaintiff was treated for his "chronic
16 back pain" by Dr. Maria Sheila Tabilon ("Dr. Tabilon") on January
17 27, 2006. CF 2632. An MRI scan performed in February 2006 showed
18 mild bulging discs at C4-5, C5-6, and C6-7. CF 1988. In April
19 2006, Dr. Zucherman reported that MRI scan showed degenerative disk
20 changes in the cervical spine with no protrusions, no stenosis, and
21 no neuroforaminal stenosis. Id. Dr. Zucherman consistently stated
22 that Plaintiff was totally disabled and unable to work. CF 2309.

23 Plaintiff responded to several Oswestry Low Back Disability
24 Questionnaires during his treatment, yielding scores ranging from
25 sixty percent to eighty-six percent. E.g., CF 0739, 0737, 1783,
26 1773.

27 On January 10, 2006, Plaintiff was evaluated by Dr. Jon
28 Sigurdson ("Dr. Sigurdson"). CF 1989. Dr. Sigurdson noted that

1 while Plaintiff "did get benefit and improvement" from Dr.
2 Zucherman's surgery, "the neck symptoms and headaches became more
3 of a problem and are now bothering him more than the low back." CF
4 1991. He concluded that the cause of Plaintiff's pain, including
5 his headaches, was his 1989 injury. CF 1993. He concluded that he
6 had a disability precluding heavy work, and was "temporarily
7 totally disabled as far as the neck and arms is concerned." Id.
8 He opined that "consideration of vocational rehabilitation and
9 ability to return to gainful employment would be premature." CF
10 1994.

11 On May 15, 2007, the Social Security Administration ("SSA")
12 held a hearing to determine whether Plaintiff had become disabled
13 from any occupation since September 2, 2003. CF 0548. Dr.
14 Zucherman provided a medical source statement, in which he marked
15 that Plaintiff "has not been capable of performing sustained
16 SEDENTARY work on a regular and continuing basis." CF 0034. He
17 reported that Plaintiff must lie down for three hours a day, and
18 could sit a total of two hours a day, stand a total of one hour a
19 day and walk up to an hour a day. Id. Lifting and carrying was
20 limited to under five pounds and not more than an hour a day. Id.
21 The presiding Administrative Law Judge ("ALJ") found that Plaintiff
22 had been disabled from any occupation since September 2, 2003. CF
23 0548. The ALJ identified the following "severe impairments":
24 "degenerative disc disease of the cervical and lumbar spine; spinal
25 stenosis with radiculopathy of the cervical spine; [and] late
26 postoperative lumbar pain." Id. The ALJ accepted as credible
27 Plaintiff's rating of his pain at seven on a one-to-ten scale. Id.
28 ///

1 **E. Prado I**

2 On January 22, 2008, this Court issued summary judgment in
3 favor of Plaintiff in his then-pending action against Liberty. See
4 Prado I. The Court found that Liberty operated under a structural
5 conflict of interest as an entity that both made benefits
6 determinations and paid for them. Id. at 4. It noted several
7 instances in which this conflict appeared to influence Liberty's
8 denial decision. Specifically, Liberty had failed to provide
9 Plaintiff with guidance as to what information was necessary in
10 order for Plaintiff to perfect his claim. Id. at 5. It had failed
11 to conduct a "meaningful dialogue" with Plaintiff in deciding
12 whether to grant or to deny benefits by failing to use reasonable
13 diligence to contact Plaintiff's health provider. Id. at 7. The
14 Court found this conflict "is even manifest in the briefs submitted
15 to this Court," noting that Liberty had made statements in its
16 briefs that contradicted or mischaracterized the administrative
17 record. Id. at 8-9. Accordingly, the Court reviewed Liberty's
18 denial with discounted deference. Id. at 9.

19 The Court concluded that Liberty abused its discretion in
20 denying Plaintiff's claim. The Court wrote, "Liberty may not
21 ignore Plaintiff's subjective pain complaints and instead rely
22 solely on objective evidence if evidence of Plaintiff's pain is not
23 available." Id. at 20. The Court awarded long-term disability
24 benefits for the twenty-four month "own occupation" period, and it
25 remanded the claim to Liberty to determine if Plaintiff qualified
26 for benefits beyond the first twenty-four months based on the "any
27 occupation" definition of disability. Id. at 21.

28 ///

1 **F. Remand**

2 Following remand, Liberty assigned Plaintiff's claim to
3 Elizabeth Kiernan ("Kiernan"), a disability claims technical
4 specialist for Liberty. At that time, the Claim File consisted of
5 the entire record before this Court in Prado I, as well as workers'
6 compensation records and other medical records produced by
7 Plaintiff during Prado I. CF 0007, 3032-4089.

8 Kiernan sent Plaintiff's counsel a letter on July 9, 2008
9 requesting that Plaintiff complete several forms. On September 15,
10 2008, Plaintiff's counsel returned the completed forms to Kiernan.
11 CF 3028. In his responses to an activities questionnaire,
12 Plaintiff stated that he was able to sit, stand, or walk for
13 periods of ten to fifteen minutes. CF 3023. He stated that he
14 left the house daily and was able to drive his daughter to school
15 each day, work in his garden, and wash his car. Id. He reported
16 that he sometimes would help his wife with grocery shopping by
17 carrying "the light things." CR 3024. However, Plaintiff stated
18 that back pain, neck pain and headaches prevented him from
19 performing any gainful employment. CF 3025.

20 On September 15, 2008, Liberty requested additional medical
21 information from Plaintiff's identified providers for the period
22 from June 1, 2005 to present. Liberty also sent a letter to
23 Plaintiff's counsel notifying him of the request. CF 3020-3022.
24 On September 19, 2008, Plaintiff's counsel responded, and the
25 records sought were added to the Claim File. CF 2347-3011, 2316-
26 2346.

27 Liberty did not request an examination of Plaintiff. Rather,
28 Liberty referred the claim file to Dr. C. David Bomar ("Dr. Bomar")

1 for a paper review of Plaintiff's claim. Dr. Bomar filed his
2 review on October 28, 2008. CF 2308-2313. Dr. Bomar concluded
3 that the file did not support "inability to work full time as of
4 2/28/06 to the present." Id. Dr. Bomar found that Plaintiff would
5 be capable of full-time work so long as it was "restricted to light
6 work with no lifting over roughly 20 pounds occasionally and
7 avoidance of more than occasional bending, squatting, stooping or
8 kneeling." Id. Dr. Bomar noted that while Dr. Zucherman
9 consistently reported that Plaintiff was totally disabled and
10 unable to work, "there were a number of Independent Medical
11 Evaluations from several orthopedic surgeons and neurosurgeons from
12 the late 1990s up to 2006, most of which gave the claimant a light
13 work capacity with avoidance of heavy lifting." CF 2309. Dr.
14 Bomar concluded that while "[s]ome degree of chronic low back pain
15 would not be unexpected," "inability to sit, stand or walk
16 frequently would not be expected." CF 2310.

17 On October 29, 2008, Liberty sent Dr. Zucherman a letter
18 asking for additional information, requesting a response by
19 November 15, 2008. CF 2306-2307.

20 Liberty then referred the claim for a transferrable skills
21 analysis. CF 2233. Liberty's vocational case manager, Michael
22 Patrick Cooper ("Cooper"), reviewed the claim file and conducted a
23 labor market survey. CF 2233-2235. Based on Plaintiff's
24 background and experience and the physical restrictions and
25 limitations described by Dr. Bonar, Cooper determined that
26 Plaintiff was capable of full-time sedentary work and light work
27 capacity, identifying five suitable occupations: winery production
28 supervisor, wholesale wine sales representative, telephonic

1 customer service representative, office assistant-production plant,
2 and small parts assembly. Id. Cooper also stated that these
3 occupations existed within Plaintiff's local and regional economy.
4 Id.

5 Liberty then referred the claim file for an "independent peer
6 review" with Dr. Richard Kaplan ("Dr. Kaplan"). CF 2215-2230. Dr.
7 Kaplan did not examine Plaintiff personally. CF 2227. In his
8 December 17, 2008 report, Dr. Kaplan claimed that he had tried on
9 three occasions to contact Dr. Zucherman, but that Dr. Zucherman
10 did not respond. CF 2223. These calls were allegedly made on
11 December 18, 2008 at 3:07 a.m. EST, December 19, 2008 at 12:20 p.m.
12 EST, and December 22, 2008 at 9:46 a.m. EST. CF 2223.⁸ Dr. Kaplan
13 concluded that after reviewing Plaintiff's medical history: "I
14 cannot identify any restrictions and limitations as of 2/2/06." CF
15 2225. Dr. Kaplan stated: "any restrictions which are reported in
16 terms of cervical and lumbar range are essentially based on
17 subjective symptoms of pain with no objective anatomical basis for
18 those findings." Id. Dr. Kaplan stated: "as of the present time
19 the claimant's presentation is essentially that of subjective pain
20 with subjective limitations in spinal range of motion without any
21 anatomical lesion or physiological reason to explain these reported
22 symptoms." Id. Dr. Kaplan concluded that Plaintiff was able to
23 perform at the light physical demand level, writing: "a return to
24 some form of gainful employment . . . would not only be possible
25

26 ⁸ Plaintiff notes that Dr. Kaplan dated and signed his report on
27 December 17, 2008, which is before the dates on which Dr. Kaplan
28 claims these calls were made and not returned. Plaintiff argues
this is evidence that Dr. Kaplan had "no serious interest in Dr.
Zucherman's opinion," and suggests this "may explain why the
purported phone calls are made at odd times, such as the one
claimed to be made at 3:47 a.m." Pl.'s Mot. at 16-17.

1 but would also be highly recommended from a therapeutic
2 perspective." CF 2227.

3 Kiernan sent Dr. Zucherman a letter on January 13, 2009
4 requesting his response to Dr. Kaplan's report. Liberty made
5 several extensions of the deadline for Dr. Zucherman to respond,
6 ultimately extending it to February 28, 2009. CF 2198. Dr.
7 Zucherman did not respond by this deadline.

8 On March 2, 2009, Kiernan sent Plaintiff's counsel a letter
9 denying Plaintiff's claim for long term disability benefits,
10 finding that Plaintiff did not meet the definition of "disabled"
11 for the "any occupation" period. CF 2194-2917. The denial letter
12 did not identify Dr. Kaplan, Dr. Bonar, or Cooper by name, but it
13 did state that a board-certified orthopedic surgeon had reviewed
14 Plaintiff's claim and concluded that it did "not support inability
15 to work full time as of 2/28/06 to the present." CF 2195. The
16 denial letter noted Dr. Zucherman's failure to respond to Dr.
17 Kaplan's review. The denial letter noted that a vocational case
18 manager "has identified occupations in Mr. Prado's local and
19 regional area which are at the light level." CF 2196.

20 The denial letter informed Plaintiff of the procedure for
21 requesting a review of the denial. It stated that Plaintiff's
22 appeal should include "an opinion by Dr. Zucherman of the peer
23 review, any office notes, diagnostic test results, hospital
24 records, or any additional information which you feel will support
25 Mr. Prado's claim." CF 2196.

26 On April 12, 2009, Plaintiff's counsel wrote Kiernan,
27 requesting the Claim File, "all ERISA plan documents," and a number
28 of other documents. CF 2189-2192. The list of documents sought

1 was extensive, and included twenty-six enumerated requests.
2 Plaintiff sought information on the orthopedic surgeon who reviewed
3 Plaintiff's claim, including "the number of reports prepared by
4 this physician for Liberty Life in each of the past three years,
5 and the number of those reports which were favorable to the
6 granting of or extension of disability benefits, and the number of
7 those reports which were favorable to the ending or termination of
8 disability benefits." CF 2189. Plaintiff also sought, inter alia,
9 "a list of things which you would accept to prove 'objective'
10 evidence of impairment due to pain"; "the policies and procedures
11 used by Liberty Life to assess 'self-reported' conditions, 'chronic
12 pain,' 'failed back syndrome,' and residual pain following back
13 surgery"; "all writings and records, whether or not in the claims
14 file, for each 'roundtable' or group conference which discussed the
15 claim of Antonio Prado"; "[a]ll plans or programs offered to
16 Liberty Life claims personnel which require, encourage or permit
17 those claims personnel to purchase or acquire Liberty Mutual
18 stock"; and "[a]ll policies and procedures of Liberty Life which
19 are designed to mitigate the structural conflict of interest of
20 Liberty Life in deciding which ERISA plan beneficiaries are
21 eligible for benefits and the financial interest of Liberty Life as
22 payor of those benefits." CF 2189-2192.

23 On April 30, 2009, Kiernan sent Plaintiff's counsel a copy of
24 the Claim File and the Policy, which she alleged was "all the
25 information that was received, reviewed, and considered in our
26 evaluation of Mr. Prado's claim." CF 2179. Kiernan claimed that
27 Allied, not Liberty, was the plan administrator, and so Liberty was
28 not under an obligation under ERISA to produce plan documents. Id.

1 Kiernan included the curriculum vitae of Dr. Bomar and Dr. Kaplan.
2 Id. Kiernan rejected Plaintiff's requests for additional documents
3 and information, writing: "We do not agree with your interpretation
4 of the scope of Liberty's disclosure requirements and we are unable
5 to respond to your extensive requests for information." Id.

6 On July 22, 2009, Plaintiff submitted his appeal; Liberty
7 received it on July 27, 2009. CF 0602, 0546-0547. Plaintiff
8 included with his appeal more than fifteen hundred pages of
9 documents. CF 0548-2176. The documents included a May 4, 2009
10 letter from Dr. Zucherman; Dr. Zucherman's medical records; medical
11 records from Kaiser Napa; a Functional Capacity Evaluation;
12 workers' compensation records; and the decision in Prado I.
13 Plaintiff also included the ALJ's decision in the SSA proceeding.
14 CF 0548-0555. Plaintiff restated his request for additional
15 information, claiming that he was entitled under 29 C.F.R. §
16 2560.503(m)(8)(3) and (b)(5) to documents which "demonstrate[]
17 compliance" with "administrative processes and safeguards designed
18 to ensure and to verify that claim determinations are made in
19 accordance with governing plan documents and that, where
20 appropriate, the plan provisions have been applied consistently
21 with respect to similarly situated claimants." CF 0546.
22 Plaintiff's counsel included a list of ten questions regarding
23 Liberty's claims procedure, such as:

24 In the event of a dispute between the opinion
25 of a treating physician and a consultant hired
26 by Liberty, do you always accept the view of
27 the Liberty consultant?

28

What would you consider to be sufficient
"objective" proof of impairment under the
circumstances of this claim? What is the

1 medical basis of your standard? Can you
2 provide some examples of what you would accept,
3 or what you have accepted in the past, as
4 sufficient "objective" proof of impairment for
5 individuals who have the same medical diagnoses
6 as Mr. Prado?

7

8 If you do not have written material which
9 provides guidance on these questions, then how
10 does Liberty ensure that similarly situated
11 claimants are treated alike?

12 CF 0546-0547.

13 Dr. Zucherman's May 4, 2009 response to Dr. Kaplan's review
14 stated that Plaintiff's "functional capacity is described in the
15 office notes of December 16, 2008, which indicate he can only sit
16 for a few minutes, walk about 1/4 of a mile, and do only very light
17 lifting." CF 0582. Dr. Zucherman noted that limitations "are
18 based on subjective complaints," but stated, "just because Mr.
19 Prado does not have focal neurologic findings, as Dr. Kaplan
20 reports, it does not mean that he is functionally capable." Id.
21 Dr. Zucherman wrote that while he was not a qualified medical
22 examiner, Plaintiff in December 2008 had Oswestry function score of
23 68, and "[i]n my experience, patients with a score this high are
24 not even able to do light work at full time. Part-light work duty
25 with a control over his workstation would be a reasonable
26 expectation, in my mind." Id.

27 The Functional Capacity Evaluation ("FCE") was performed by
28 Stephen Moon of Bay Area FCE, LLC on February 25, 2009. CF 0583.
It consisted of an eight-hour test "to address this client's
current work capacity" and "identify any limitations or
accommodations needed." Id. Moon reported that Plaintiff
completed only three of the eight hours of scheduled testing "due

1 to pain and headache complaints." Id. Plaintiff reached the sub-
2 part time ability at the sedentary level. Id. Moon concluded that
3 "no comments on his ability to work full time can be made at this
4 time." Moon also concluded that Plaintiff had "given variable to
5 high amounts of physical effort during testing." Id. Moon stated
6 that Plaintiff's subjective complaints of pain "appeared to
7 correlate with his observed behaviors during the testing that was
8 able to be completed." Id. Moon stated: "There were no obvious
9 inconsistencies with Mr. Prado's perceived abilities and his
10 observed tolerances and clinical performance during the testing
11 day." Id. The test included an Oswestry Low Back Disability
12 Questionnaire on which Plaintiff received a score of 74; Moon
13 stated that this score "represents the equivalent perception of
14 being crippled." CF 0587. Moon concluded that Plaintiff's
15 subjective reports of pain were "mostly reliable," based on "the
16 overall trend and outcomes of the pain questionnaires, subjective
17 ability log, repetitive motion testing, spinal and hand function
18 sorts, and the general correlation between his subjective
19 complaints and perceptions with his observed signs of discomfort."
20 CR 0592.

21 Kiernan acknowledged receipt of Plaintiff's appeal and
22 supporting documents in a July 28, 2009 letter. CF 0594. She
23 refused Plaintiff's requests for additional documentation,
24 referring to her April 30, 2009 letter. Id. The claim was
25 forwarded to Liberty's appeal review unit in Dover, New Hampshire,
26 and assigned to Liberty's appeal review consultant, Lisa Gray
27 ("Gray"). CF 0003.

28

1 On August 21, 2009, Plaintiff submitted to Liberty sixty pages
2 of additional medical literature, which Liberty added to the Claim
3 File. CF 0463-0538.

4 On August 26, 2009, Gray sent Plaintiff's counsel a letter
5 stating that additional time was needed to render a determination
6 on Plaintiff's appeal. CF 0461-0462. The letter stated, "we are
7 currently waiting for additional information from your office,
8 which is necessary to render full and fair determination" of
9 Plaintiff's appeal. Id. The letter did not identify the
10 information needed.

11 Also on August 26, 2009, Gray contracted with Horsemen
12 Investigation ("Horsemen") to perform a surveillance investigation
13 of Plaintiff's activities around his Napa, California home. CF
14 0542. In the investigation referral form, Gray wrote, "No
15 neurological findings however claimant reports being able (sic) to
16 work due to severe back and neck pain and headaches." Id.
17 "Claimant maintains he is only able to sit/stand for 30 minutes and
18 walk 20 minutes. States he can sit and drive a car for 30 minutes.
19 He maintains he does not pursue any hobbies nor do volunteer work
20 and does not participate in an exercise program." Horsemen
21 performed the surveillance of Plaintiff's residence on September 4,
22 5, 6, 7, and 10, 2009. CR 0391-0405.

23 On September 6, 2009, Plaintiff's counsel responded to Gray's
24 August 26, 2009 request for additional information, stating, "I am
25 not aware of any information that has been requested from us, which
26 we have not provided. The only information which Liberty requested
27 was a report from Dr. Zucherman, which was included with our
28 submission on July 22." CF 0423. For the third time, Plaintiff's

1 counsel renewed his request for "policies and procedures with
2 regard to how you assess claims where the work impairment is due to
3 pain and therefore subjective in nature." Id. He wrote: "If you
4 are aware of any tests or measurements which could be done and
5 which would measure the extent of work impairment, please let us
6 know. From our view, there is nothing which is better than the
7 Functional Capacity Evaluation which we forwarded to you on July
8 22." Id.

9 Plaintiff's counsel also renewed his request for information
10 concerning Dr. Kaplan. Plaintiff's counsel wrote that while Dr.
11 Kaplan was well-published, "we note that his publications do not
12 indicate any interest at all in the type of medical condition from
13 which Mr. Prado suffers." Plaintiff's counsel also noted that "Dr.
14 Kaplan has a relationship to a business called Disability and
15 Occupational Consultants . . . through which he acts as a
16 disability evaluator. However, every report of his which we have
17 been able to locate, and every reference to him in published
18 judicial opinions, refers to him as a defense evaluator -- in other
19 words, he seems to have a demonstrated pro-defense bias." Id.
20 Plaintiff's counsel noted that Dr. Kaplan had rendered an opinion
21 for an insurance carrier in a case involving another one of his
22 clients, writing: "The odds that a doctor with a reasonably sized
23 forensic practice located back east would be found on multiple
24 files of my solo practice in California must be quite small
25 Dr. Kaplan must be a very high volume source of defense medical
26 reports." Id. Plaintiff's counsel concluded that given these
27 concerns, "we think it fair to ask for the opportunity to comment
28 upon any bias of the consultant who is being used on the appeal,

1 and we request that you provide the identity of that consultant so
2 that we have an opportunity to comment upon his or her
3 credentials." Id.

4 On September 14, 2009, Horsemen reported to Gray on the
5 results of the surveillance. CF 0391-0424. Horsemen claimed that
6 it recorded video of Plaintiff raising the hood of a bronze Chevy
7 truck, "checking his mail," "pulling weeds," "placing five (5)-
8 gallon buckets into the bed of a truck," "moving three (3) trash
9 cans on wheels," "checking fluids in his pickup," as well as other
10 activities. CF 0391-0405. Horsemen acquired roughly twenty
11 minutes of video footage of some of these activities, which was
12 added to the Claim File. Horsemen observed no activity on the part
13 of Plaintiff during surveillance on September 6, 2009. CF 0399.
14 Horsemen's report stated that on each day Plaintiff was identified,
15 "Mr. Prado showed no visible signs of hesitation or restriction,
16 and did not utilize any discernible means of artificial support."
17 CF 0391, 0395, 0400, 0403.

18 On September 21, 2009, Plaintiff commenced this action,
19 claiming that Liberty had failed to make a timely ruling on the
20 pending appeal under 29 C.F.R. § 2560.503-1. Compl. ¶ 6. Liberty
21 received notice of the suit on September 29, 2009, but proceeded to
22 complete its review of the appeal. CF 0002.

23 On September 23, 2009, Gray again wrote Plaintiff's counsel
24 stating that Liberty would need additional time to complete review
25 of Plaintiff's appeal. CF 0406-0407. Gray claimed this extension
26 was necessary because the volume of records received on appeal was
27 so large and because Liberty wanted additional information to
28 clarify Plaintiff's functional capacity and abilities. Id. Gray

1 stated that Liberty had requested a physician who was board
2 certified in physical medicine and rehabilitation to review the
3 claim file, and had asked this physician to contact Dr. Zuckerman
4 to discuss Plaintiff's status. Id. Gray asked Plaintiff's counsel
5 to "inform Dr. Zucherman and his office staff that he will be
6 receiving a call from this reviewing physician in the next two
7 weeks." Id. Gray refused Plaintiff's counsel's renewed request
8 for additional documentation, and did not identify the reviewing
9 physician by name. Id. On October 1, 2009, Gray submitted
10 Plaintiff's claim to the consulting physician for complete review.
11 CF 0002.

12 On October 5, 2009, Horsemen performed another surveillance of
13 Plaintiff's residence. CF 0374. While no video was recorded of
14 Plaintiff, Horsemen claimed that Plaintiff rolled two trash cans
15 from the curbside to the back of his residence, drove to Napa
16 Valley Community College, and walked onto the campus and back to
17 his car after utilizing a computer room. CF 0374-0377.⁹

18
19 ⁹ Plaintiff argues that the Court should disregard all of the
20 surveillance evidence, alleging it was added to the administrative
21 record after the appeals process. Under 29 C.F.R. § 2560.503-
22 1(i)(1) and (i)(3)(i), an administrator has forty-five days to
23 decide a disability appeal, but may extend this time for an
24 additional forty-five days if the plan administrator determines
25 that an extension is required, provides written notice of the
26 extension, and indicates the special circumstances requiring an
27 extension of time and the date by which the plan expects to render
28 the determination on review. Liberty's August 26, 2009 letter --
sent less than forty-five days after its July 29, 2009 receipt of
Plaintiff's appeal -- sought to extend Liberty's time to respond an
additional forty-five days to October 26, 2009, but did not
indicate the special circumstances necessitating the extension.
Liberty's September 23, 2009 letter sought to extend Liberty's time
to respond and indicated the special circumstances necessitating
the extension, but was not filed within forty-five days of the
filing of the appeal. As such, both of Liberty's attempts to
extend review were procedurally defective. The Court finds these
procedural defects are not proper grounds to strike evidence from
the Claim File, however. Nor does the Court accept Plaintiff's

1 Dr. Gale Brown, Jr. ("Dr. Brown"), board certified in physical
2 medicine and rehabilitation, prepared a report dated October 8,
3 2009. CF 0359-0371. Dr. Brown's report provided a list of
4 "documentation reviewed," which included all the aforementioned
5 documents, including the SSA Disability report and the video
6 surveillance. CF 0359. Dr. Brown stated that her review addressed
7 Plaintiff's "physical impairments and ability to perform any
8 occupation full time, effective 2/29/06,"¹⁰ but "does not address
9 possible impairment related to chronic headaches and hypertension,
10 as these fall beyond my current areas of expertise." CF 0360. Dr.
11 Brown concluded that while partial physical impairment was
12 supported by the documentation, Plaintiff "should have been able to
13 resume full-time sedentary work by 2/29/06." CF 0360. Dr. Brown
14 concluded that "[i]nconsistencies noted in Mr. Prado's statements,
15 video surveillance data, and FCE performance raise questions
16 regarding historical credibility and motivation." Id. Dr. Brown
17 concluded that "[t]he FCE findings are considered unreliable in
18 assessing Mr. Prado's functional capacity," and that Plaintiff's
19 "reported severity of disability, as noted on Oswestry testing, is
20 inconsistent with his demonstrated capacity on video surveillance."
21 Id. Dr. Brown identified restrictions and limitations that would
22 apply to Plaintiff as of February 29, 2006: "Occasional
23 lift/carry/push/pull 10 pounds; No overhead work or repetitive
24 reaching over shoulder level; Occasional stand/walk, 30 minutes per
25

26 argument that it should disregard the surveillance video because
27 Liberty allegedly misrepresented its reason for requesting
28 additional time.

¹⁰ The Court takes judicial notice of the fact that February 29, 2006 is not a valid date, as 2006 was not a leap year.

1 session; Brief position change (<1 minute) during periods of
2 prolonged sitting, if needed." CF 0361.

3 Dr. Brown claimed to have made multiple attempts to contact
4 Dr. Zucherman to obtain his opinion "as to whether Mr. Prado could
5 have resumed full-time sedentary work by 2/29/06," with the first
6 attempt made on September 30, 2009. CF 0370. On October 8, 2009,
7 Brown faxed to Dr. Zucherman a letter asking that he respond to a
8 series of questions. CF 0383-0384.¹¹ On October 20, 2009, Gray
9 faxed Dr. Brown's letter to Dr. Zucherman a second time, asking him
10 to respond by October 30, 2009. CF 0357-0358. Gray also wrote
11 Plaintiff's counsel to advise that she needed more time to complete
12 the appeal because she was still waiting for a response from Dr.
13 Zucherman, and that if Dr. Zucherman did not respond by October 30,
14 2009, Liberty would render a determination without it. CF 0356-
15 0358. The next day, on October 21, 2009, Gray faxed Dr. Zucherman
16 again, stating that "under ERISA we have a requirement to render
17 our decision within 90 days and it has come to my attention that
18 the deadline will be October 25, 2009; therefore should you wish to
19 provide your opinion to the following questions, please do so by
20 October 25, 2009." CF 0353. Gray sent a copy of the letter to
21 Plaintiff's counsel.

22 Plaintiff's counsel responded to Gray in a letter sent by fax
23 on October 25, 2009. CF 0028. Plaintiff's counsel disagreed as to
24 the due date to complete the review, but stated, "we cannot obtain
25 a response from Dr. Zucherman in the small amount of time allowed."
26 Id. Plaintiff's counsel stated that a number of the questions

27 _____
28 ¹¹ Plaintiff argues that the fact that this letter was sent on the
same day Dr. Brown turned in her final report suggests Dr. Brown
was not truly interested in incorporating Dr. Zucherman's responses
into her report. Pl.'s Mot. at 20.

1 Liberty sought answered were included in prior statements by Dr.
2 Zucherman -- specifically, his January 10, 2006 and April 15, 2006
3 letters, and a February 27, 2007 SSA medical source statement. CR
4 0029.

5 Plaintiff's counsel also expressed concerns about the
6 objectiveness of Dr. Brown, enclosing a deposition from another
7 case which he claimed "shows this physician is essentially employed
8 full time working for Liberty Mutual." CF 0046-0101. In this
9 deposition, conducted October 25, 2009, Dr. Brown states that she
10 has not engaged in direct patient care since December 31, 2002;
11 that she has worked for Liberty since 2000; that she has worked
12 approximately thirty hours per week for Liberty during several of
13 those years; and that she reviewed more than one hundred claims for
14 Liberty in 2005. CF 0049, 0054. Plaintiff's counsel sought the
15 twenty-five most recent reports done for Liberty by Dr. Brown, with
16 the names of the claimants removed. CR 0029. Plaintiff's counsel
17 also included additional medical writing on evaluation of pain.

18 Id.

19 On October 27, 2009, Liberty upheld its denial of Plaintiff's
20 claim, confirming its earlier determination that Plaintiff was not
21 disabled from performing "any occupation." CF 0017-0025. In the
22 letter, Gray referenced the findings of Dr. Kaplan and Dr. Brown;
23 Dr. Zucherman's failure to respond to Dr. Brown's questions; the
24 surveillance reports; the Oswestry disability scoring; and the FCE.
25 Id. The SSA decision was not mentioned, although Gray did state
26 that Liberty had received the correspondence sent by Plaintiff's
27 counsel and considered this information. CF 0018. Gray stated
28 that the record demonstrated "[m]ultiple functional inconsistencies

1 and inconsistent pain behaviors . . . raising questions regarding
2 historical credibility and motivation." CF 0020.

3
4 **III. CONCLUSIONS OF LAW**

5 **A. Legal Standards**

6 1. Rule 52(a)

7 Federal Rule of Civil Procedure 52(a)(1) provides: "In an
8 action tried on the facts without a jury . . ., the court must find
9 the facts specially and state its conclusions of law separately."
10 In a Rule 52 motion, as opposed to a Rule 56 motion for summary
11 judgment, the court does not determine whether there is an issue of
12 material fact, but actually decides whether the plaintiff is
13 disabled under the policy. See Kearney v. Standard
14 Ins. Co., 175 F.3d 1084, 1095 (9th Cir. 1999). The court is to
15 "evaluate the persuasiveness of conflicting testimony," and make
16 findings of fact. Id.

17 2. ERISA Standard of Review

18 ERISA benefits determinations are to be reviewed de novo
19 unless the language of the plan documents gives the administrator
20 discretionary authority to determine eligibility for benefits or to
21 construe the terms of the plan. Met. Life Ins. Co. v. Glenn, 554
22 U.S. 105, 111-12 (2008). Where an administrator has retained
23 discretionary authority, abuse of discretion is the appropriate
24 standard of review. Id. A plan administrator that also acts as
25 the funding source for benefits operates under a "structural"
26 conflict of interest. Abatie v. Alta Health & Life Ins. Co., 458
27 F.3d 955, 965 (9th Cir. 2006). Such a conflict "must be weighed as
28 a factor in determining whether there is an abuse of discretion."

1 Glenn, 554 U.S. at 111-12. This is because "[a]n insurance company
2 that approaches claims-handling unfairly in an ERISA plan may have
3 an incentive to be more unfair than, say, a life insurer or auto-
4 liability insurer, because it cannot be subjected to the punitive
5 damages for bad faith that are the bogeymen of insurance companies
6 in those fields." Salomaa v. Honda Long Term Disability Plan, No.
7 --- F.3d ---, 2011 WL 2040934, at *7 (9th Cir. May 26, 2011). This
8 leads to an abuse-of-discretion standard "tempered by skepticism
9 commensurate with the plan administrator's conflict of interest."
10 Abatie, 458 F.3d at 959.

11 **B. Liberty's Conflict of Interest**

12 This Court has already found that Liberty operates under a
13 structural conflict of interest and ruled that the applicable
14 standard of review is "abuse of discretion tempered with skepticism
15 commensurate with Liberty's conflict of interest." Aug. 2, 2010
16 Order at 14. The Court must determine whether this conflict of
17 interest affected Liberty's decision to deny Plaintiff's claim, and
18 if it did, how much weight the Court should give it. Having
19 considered all of the evidence, the Court concludes that this
20 conflict had a considerable effect on the decisions Liberty made in
21 denying Plaintiff's claim.

22 First, the Court notes Liberty's marked hostility to any
23 evidence relating to Liberty's conflict of interest being shared
24 with Plaintiff during the claims process or put before the Court.
25 ERISA regulations provide that "the claims procedures of a plan
26 will not be deemed to provide a claimant with a reasonable
27 opportunity for a full and fair review" unless they provide the
28 claimant access to "all documents, records, and other information

1 relevant to the claimant's claim for benefits." 29 C.F.R. §
2 2560.503-1(h)(2)(iii). A document is "relevant" to a claim if it:

3 (i) Was relied upon in making the benefit
4 determination;

5 (ii) Was submitted, considered, or generated in
6 the course of making the benefit determination,
7 without regard to whether such document,
8 record, or other information was relied upon in
9 making the benefit determination;

10 (iii) Demonstrates compliance with the
11 administrative processes and safeguards
12 required pursuant to paragraph (b)(5) of this
13 section in making the benefit determination;¹²
14 or

15 (iv) In the case of a group health plan or a
16 plan providing disability benefits, constitutes
17 a statement of policy or guidance with respect
18 to the plan concerning the denied treatment
19 option or benefit for the claimant's diagnosis,
20 without regard to whether such advice or
21 statement was relied upon in making the benefit
22 determination.

23 29 C.F.R. § 2560.503-1(m)(8).

24 Plaintiff and his counsel made multiple attempts during the
25 claims process to acquire information relevant to determining the
26 effect of the conflict of interest, such as information on the
27 approval/denial rates of the reviewing doctors and "[a]ll policies
28 and procedures of Liberty Life which are designed to mitigate the
29 structural conflict of interest of Liberty." CF 2189-2192.
30 Liberty summarily rejected these requests, claiming that it had
31 submitted all the information "received, reviewed, and considered"
32 in evaluating Plaintiff's claim, and that it was under no
33 obligation under ERISA to produce additional information. CF 2179.

34 _____
35 ¹² Paragraph (b)(5) requires that "claims procedures contain
36 administrative processes and safeguards designed to ensure and to
37 verify that benefit claim determinations are made in accordance
38 with governing plan documents and that, where appropriate, the plan
39 provisions have been applied consistently with respect to similarly
40 situated claimants." 29 C.F.R. § 2560.503-1(b)(5).

1 There are two possible conclusions the Court can make from the
2 above. The first is that Liberty lacked administrative processes
3 and safeguards to ensure claim determinations were made in
4 accordance with plan documents and that similarly situated
5 claimants were treated similarly, and that no statements of policy
6 or guidance existed to guide Liberty's representatives in
7 evaluating Plaintiff's claim. The second is that Liberty had such
8 processes, safeguards, and policies, but refused to share them with
9 Plaintiff during the claims process. Either situation would
10 violate ERISA regulations.

11 Liberty's refusal to disclose relevant documents continued
12 into this action. The Court granted Plaintiff leave to conduct
13 limited discovery into the nature, extent, and effect of Liberty's
14 conflict of interest on its decision-making process. Aug. 2, 2010
15 Order. Plaintiff served on Liberty a request for such documents
16 under Federal Rule of Civil Procedure 34, but Liberty objected to
17 the requests as vague and ambiguous and "exceed[ing] the scope of
18 permissible discovery in ERISA." Padway Decl. Ex. 2 ("Def.'s
19 Resp.") at 24.¹³ Rather than produce evidence, Liberty stated, in
20 a response not attributed to a specific declarant, that it had
21 "employed a number of measures to insure that its claim
22 determinations are not influenced by financial considerations,"
23 including locating disability case managers in different offices,
24 cities and states than employees who make underwriting and premium
25 decisions. Id. at 25. Liberty continued: "at no time has the
26 compensation the claims personnel involved in the handling of
27

28 ¹³ Laurence F. Padway ("Padway"), counsel for Plaintiff, filed a
declaration in support of Plaintiff's Motion. ECF No. 43.

1 Plaintiff's claim or the appeal of claim determinations been based
2 on or determined according to the number of claims for disability
3 benefits that have been denied or terminated, including
4 plaintiff's." Id. This is an improper response to Plaintiff's
5 Rule 34 request. The sole evidence Liberty filed in support of its
6 Motion is the declaration of McGee, a litigation manager of
7 disability claims for Liberty, who declares that Liberty takes
8 steps "to ensure that a claim decision is not influenced by the
9 company's financial interests," such as geographically separating
10 disability case managers and underwriters and not compensating
11 claims personnel "according to the number of claims for disability
12 benefits that have been denied or terminated" or number of appeal
13 denials. McGee Decl. ¶¶ 1-4.¹⁴

14 Failure to present extrinsic evidence of an effort to assure
15 accurate and unbiased claims assessment, such as "statistics
16 regarding [the administrator's] rate of claims denials or how
17 frequently it contracts with the file reviewers it employ[s]," is a
18 factor according significant weight to the conflict of interest.
19 Montour v. Hartford Life & Acc. Ins. Co., 588 F.3d 623, 634 (9th
20 Cir. 2009). The Court finds that there is very little evidence of
21 an effort to limit the effect of Liberty's conflict of interest.
22 The Court also finds that by refusing to respond to Plaintiff's
23 requests for information, Plaintiff's right to a "full and fair
24 review" under 29 C.F.R. § 2560.503-1 was compromised.

25 _____
26 ¹⁴ Liberty offers its response to Plaintiff's Rule 34 request, as
27 well as the McGee declaration, as evidence that Liberty took steps
28 to minimize the effect of the conflict of interest. Def.'s Opp'n
at 4. The Court finds Liberty's Rule 34 response to be improper,
and it gives little weight to the statements of McGee, who admits
that she works within Liberty's litigation department and is
familiar with Plaintiff's claim.

1 Another factor is the administrator's "decision to conduct a
2 'pure paper' review . . . that is, to hire doctors to review
3 [plaintiff's] files rather than to conduct an in-person medical
4 evaluation of him." Montour, 588 F.3d at 634. Here, Drs. Bonar,
5 Kaplan, and Brown all completed pure paper reviews of Plaintiff's
6 file. Liberty alleges that no physical examination was performed
7 because the operative question was whether Plaintiff was disabled
8 as of February 2006, and so an inquiry into his current physical
9 status would be of little value. Following this logic, the 2009
10 surveillance video would be of little probative value of whether
11 Plaintiff was disabled in 2006, yet Liberty placed great weight on
12 the surveillance in its final benefits denial. As such, there are
13 internal logical conflicts within Liberty's argument.

14 Another factor in determining what weight to afford a conflict
15 of interest is a plan administrator's failure to respond to a
16 contrary SSA disability determination. Montour, 588 F.3d at 634.
17 "While ERISA plan administrators are not bound by the SSA's
18 determination, complete disregard for a contrary conclusion without
19 so much as an explanation raises questions about whether an adverse
20 benefits determination was the product of a principled and
21 deliberative reasoning process," and "may indicate a failure to
22 consider relevant evidence." Id. Liberty claims that it
23 considered the SSA decision in which Plaintiff was found to suffer
24 from a long-term disability, but there is nothing in the Claim File
25 to support this contention. Gray does not mention it by name in
26 the October 27, 2009 denial letter. In her report, Dr. Brown
27 states she considered it, but it is not discussed.

28

1 Another factor is Liberty's failure to provide Plaintiff with
2 guidance as to what sort of evidence Liberty would find acceptable
3 to establish a disability based on Plaintiff's pain. A plan
4 administrator denying benefits in the first instance must "notify
5 the claimant not just of the opportunity for internal agency review
6 of that decision but also of what additional information would be
7 necessary to perfect the claim." Montour, 588 F.3d at 636
8 (quotation marks omitted). In its initial claim denial, Liberty
9 suggested Plaintiff include "an opinion by Dr. Zucherman of the
10 peer review, any office notes, diagnostic test results, hospital
11 records, or any additional information which you feel will support
12 Mr. Prado's claim." CF 2196. Plaintiff asked again and again for
13 clarification as to what evidence Liberty would consider to be
14 credible objective evidence of Plaintiff's pain, and was rebuffed
15 repeatedly. Liberty's responses offered no guidance as to how
16 Plaintiff could perfect his claim. Liberty's failures are all the
17 more troubling given that the Court found in Prado I that Liberty
18 had "provided no guidance to Plaintiff for what, specifically,
19 Liberty needed in order to make an informed decision on Plaintiff's
20 claim." Prado I at 6.

21 Yet another factor is Liberty's reliance, at the eleventh
22 hour, on the surveillance footage. "[A]n administrator that adds,
23 in its final decision, a new reason for denial, a maneuver that has
24 the effect of insulating the rationale from review, contravenes the
25 purpose of ERISA." Abatie, 458 F.3d at 974. "This procedural
26 violation must be weighed ... in deciding whether [the
27 administrator] abused its discretion." Id. While Liberty's
28 initial denial was premised on a lack of evidence of physical

1 impairment, its final decision hinged on the Plaintiff's lack of
2 credibility in light of the surveillance footage. Furthermore,
3 Liberty's last-minute reliance on the surveillance footage did not
4 give Plaintiff an opportunity to respond to this basis for denial.

5 The Court also notes several tactics Liberty used which
6 Plaintiff alleges had the effect of compromising the fairness of
7 the claims process. Plaintiff points to Liberty's refusal to
8 promptly identify the names of its reviewing physicians; the
9 inconsistencies between the date of Dr. Kaplan's report and the
10 dates Dr. Kaplan alleges he attempted to contact Dr. Zucherman; the
11 fact that calls to Dr. Zucherman were made at odd hours; and the
12 fact that Liberty claimed an extension of the appeals period was
13 required due to outstanding requests for information when no such
14 outstanding requests existed. See Pl.'s Mot. While these may not
15 be actionable in themselves, they do create the impression that the
16 individuals handling and evaluating Plaintiff's claim on behalf of
17 Liberty were less interested in offering a neutral and fair
18 evaluation of Plaintiff's claim than they were in erecting
19 procedural roadblocks.

20 Finally, the Court considers the evidence in the Claim File
21 suggesting that Liberty's reviewing doctors operated under a
22 conflict of interest. The evidence submitted by Plaintiff suggests
23 Dr. Brown has not treated patients since 2002, and consults for
24 several disability insurers. CF 0048. She has stated that she
25 regularly worked upwards of thirty hours per week evaluating claims
26 for Liberty. CF 0049. Similar evidence suggests Drs. Bomar and
27 Kaplan operated under a conflict of interest. Liberty had the
28 opportunity to add to the Claim File evidence that the medical

1 examiners they contracted with where shielded from bias, but chose
2 not to do so.

3 The Court concludes that Liberty's conflict of interest had a
4 marked and pervasive effect on its claims determination process.
5 It tempers its abuse-of-discretion review accordingly.

6 **C. Abuse of Discretion**

7 When there is a conflict of interest, "a modicum of evidence
8 in the record supporting the administrator's decision will not
9 alone suffice." Montour, 588 F.3d at 626. A plan administrator
10 abuses its discretion if its decision is "(1) illogical, (2)
11 implausible, or (3) without support in inferences that may be drawn
12 from the facts in the record." Salomaa, 2011 WL 2040934, at *8.
13 In Salomaa, the Ninth Circuit reversed a plan administrator's
14 denial under this standard because (1) every doctor who examined
15 the plaintiff concluded that he was disabled; (2) the plan
16 administrator demanded objective tests to establish the existence
17 of a condition for which there are no objective tests; (3) the
18 administrator failed to consider an SSA disability award; (4) the
19 reasons for denial shifted as they were refuted, were largely
20 unsupported by the medical file, and only the denial stayed
21 constant; and (5) the plan administrator failed to engage in the
22 required "meaningful dialogue" with plaintiff. Id.

23 The Court finds many similarities between the present case and
24 Salomaa. Dr. Zucherman consistently concluded that Plaintiff was
25 totally disabled. Dr. Sigurdson concluded he suffered from a
26 disability precluding heavy work and was "temporarily totally
27 disabled as far as the neck and arms is concerned." CF 1993. No
28 doctor who examined Plaintiff around February 28, 2006 determined

1 that Plaintiff was capable of returning to full-time work. Liberty
2 had the opportunity and right under the Plan to examine Plaintiff,
3 but chose not to.

4 Second, while Liberty never demanded objective tests of
5 Plaintiff's pain, the reviewing doctors discounted Plaintiff's
6 self-reported pain as "subjective." It is clear from Dr. Kaplan's
7 report that the lack of objective evidence of disability was a
8 major factor in his conclusion that Plaintiff was not disabled, and
9 it is clear that he gave little weight to Plaintiff's subjective
10 reports of pain. CF 2225 (finding "no objective anatomical basis"
11 for restrictions, and concluding, "as of the present time the
12 claimant's presentation is essentially that of subjective pain with
13 subjective limitations in spinal range of motion without any
14 anatomical lesion or physiological reason to explain these reported
15 symptoms"). Liberty discounted the Oswestry scores and concluded
16 that the FCE testing was unreliable. Thus, while Liberty did not
17 demand objective tests, it placed little weight on Plaintiff's
18 subjective reports, discredited every objective test conducted and
19 submitted by Plaintiff, and refused to identify an objective test
20 that Liberty deemed acceptable.

21 Third, Liberty clearly failed to consider the SSA disability
22 award. It is not mentioned in the final denial letter, and is not
23 discussed in Dr. Brown's report.

24 Fourth, as stated above, Liberty's reasons for denial shifted
25 as they were refuted. The final reasons for denial are also
26 unsupported by the record. Liberty treats the surveillance footage
27 as a smoking gun, but a careful review of the record shows
28 otherwise. As Plaintiff points out, much of the activity Horsemen

1 claimed to have witnessed is not captured in the video footage.
2 The activity reported is not inconsistent with Plaintiff's self-
3 reported activity. In the questionnaire submitted in July 2008,
4 Plaintiff stated he could sit, stand, or walk for periods of ten to
5 fifteen minutes; that he left his house daily; and that he could
6 drive his daughter to work, tend to his garden, wash his car, and
7 carry light groceries. CF 3023-3024. This level of activity is
8 what is demonstrated in the surveillance video. Liberty submits
9 twenty minutes of surveillance footage -- culled from six days of
10 surveillance -- as evidence that Plaintiff could walk, stand, and
11 sit for periods of thirty minutes or longer. The evidence simply
12 does not show this. Furthermore, several doctors who performed in-
13 person evaluations of Plaintiff noted that his gait and range of
14 motion was normal. E.g., CF 1852-1854, 1470. Thus, the fact that
15 Plaintiff did not display "visible signs of hesitation or
16 restriction" is not inconsistent with the record.

17 That Liberty also premises its final denial on Dr. Zucherman's
18 failure to respond to Dr. Brown's request for information is
19 perplexing. Liberty did not explain to Plaintiff why Dr.
20 Zucherman's response was critical during the appeal, and it has
21 failed to do so in this action. Most of the information sought was
22 already in the record. Dr. Zucherman had made a determination that
23 as of February, 2006, Plaintiff was completely disabled. On May 4,
24 2009, he clarified that he was "not a qualified medical examiner"
25 and that the limitations were "based on subjective complaints," but
26 otherwise confirmed this determination, finding "part-time light
27 duty work with control over his workstation" to be a "reasonable
28 expectation." CF 0582.

1 There are other inconsistencies between Liberty's final denial
2 and the record. Dr. Brown clearly states that her report did not
3 address "possible impairment related to chronic headaches and
4 hypertension, as these fall beyond my current area of expertise."
5 CF 0360. But it is clear from the record that Plaintiff's
6 headaches were a major cause of his disability. Similarly, Dr.
7 Brown concludes that Plaintiff's activity would be restricted to
8 lifting, carrying, pushing, and pulling weights up to ten pounds,
9 that he could not perform overhead work, and that he would be
10 limited to "occasional walking or standing, for 30 minutes at a
11 time." CF 0361. These restrictions are inconsistent with the
12 restrictions Cooper considered when he identified five suitable
13 occupations for Plaintiff that existed within his local and
14 regional economy. CF 2233-2235. Cooper had assumed Plaintiff was
15 capable of lifting up to twenty pounds and would not otherwise be
16 restricted, save for "avoidance of more than occasional bending,
17 squatting, stooping or kneeling." CF 2308-2313.

18 Finally, Liberty clearly failed to engage in meaningful
19 dialogue with Plaintiff by failing to provide guidance on how to
20 perfect his claim, refusing Plaintiff's repeated requests for
21 information, and denying Plaintiff the opportunity to respond to
22 Dr. Brown's analysis of the surveillance video.

23 On the basis of the above, the Court finds Liberty abused its
24 discretion in denying Plaintiff's claim. Having considered the
25 evidence, the Court finds that Plaintiff is disabled under the "any
26 occupation" standard as of February 28, 2006, and is thus entitled
27 to long-term disability benefits under the Plan.

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1 **D. Plaintiff's Claim under California Insurance Code 10111.2**

2 Plaintiff has filed a separate claim against Liberty for
3 interest due under section 10111.2 of California's Insurance Code.
4 Pl.'s Mot at 25. Section 10111.2 provides for prejudgment interest
5 at a rate of ten percent. Cal. Ins. Code § 10111.2. Liberty
6 argues that section 10111.2 is preempted by ERISA. Many courts
7 have found that allowing a plaintiff to proceed with a state law
8 claim under section 10111.2 would effectively impose a mandatory
9 prejudgment interest rate of ten percent on successful ERISA
10 claims, improperly expanding the scope of ERISA damages and
11 supplementing the ERISA enforcement remedy. E.g., White v.
12 Coblentz, Patch and Bass LLP Long Term Disability Ins. Plan, No.
13 10-1855, 2011 WL 2531193, at *6 (N.D. Cal. June 24, 2011);
14 Turnispeed v. Educ. Mgmt. LLC's Emp. Disability Plan, No. 09-3811,
15 2010 WL 140384, at *4 (N.D. Cal. Jan. 13, 2010); Minton v. Deloitte
16 & Touche USA LLP Plan, 631 F. Supp. 2d 1213, 1220 (N.D. Cal. 2009).
17 Accordingly, the Court finds Plaintiff's claim for interest under
18 section 10111.2 to be preempted by ERISA, and finds for Liberty on
19 this claim.

20 **E. Plaintiff's Claim under 29 U.S.C. § 1332(c)**

21 Plaintiff argues that Liberty failed to provide documents
22 during the claims procedure, and thus Liberty must pay 29 U.S.C.
23 1332(c)'s daily statutory penalty for failing to provide documents.
24 Pl.'s Mot at 23. ERISA provides that any "administrator" who
25 "fails to comply with a request for any information which such
26 administrator is required by this subchapter to furnish to a
27 participant or beneficiary (unless such failure or refusal results
28 from matters reasonably beyond the control of the administrator)"

1 may be liable in the court's discretion for an amount up to \$100
2 per day from the date of such failure or refusal." 29 U.S.C. §
3 1332(c). Plaintiff claims that Liberty failed to produce the Plan
4 documents and "relevant" documents under 29 C.F.R. § 2560.503-
5 1(m)(8), and thus should be liable under section 1332(c).

6 Liberty argues that it served as the "claims administrator,"
7 and not the "plan administrator," and that section 1332(c) only
8 applies to plan administrators. Liberty also argues that section
9 1332(c) does not extend to "relevant" documents under 29 C.F.R. §
10 2560.503-1(m)(8), and that it produced all Plan documents during
11 the claims process.

12 The Court has determined that by failing to produce "relevant"
13 documents during the claims process, Liberty denied Plaintiff a
14 "full and fair review" of his claim. At issue is whether Liberty
15 should be subject to the \$100-per-day penalty under section 1332(c)
16 for this failure. By its terms, section 1332(c) is limited to
17 information required by "this subchapter." 29 U.S.C. § 1332(c).
18 As such, it does not extend to documents identified in 29 C.F.R. §
19 2560.503-1. See Ramos v. Bank of America, --- F. Supp. 2d ---,
20 2011 WL 900365, at *2 (N. D. Cal. Mar. 15, 2011) ("While §
21 2560.503-1 does impose requirements on plans with regard to claim
22 procedures, nothing in the statutory or regulatory scheme suggests
23 that an ERISA claimant may bring an action for civil penalties
24 under § 1132(c) for a plan's failure to comply with those
25 requirements."). The Court finds that Liberty satisfied its
26 disclosure duties under section 1132(c) by producing the Policy and
27 SPD, and finds for Liberty on this claim.

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1 **F. Attorneys' Fees**

2 Plaintiff additionally seeks attorneys' fees. Pl.'s FFCL ¶
3 85. 29 U.S.C. § 1132(g) allows the Court to award attorneys' fees
4 and costs in civil actions under ERISA. In Hummell v. S.E. Rykoff
5 & Co., the Ninth Circuit provided five factors that guide the
6 Court's exercise of discretion in this matter. 634 F.2d 446, 453
7 (9th Cir. 1980). These factors include: (1) the degree of the
8 opposing parties' culpability or bad faith; (2) the ability of the
9 opposing parties to satisfy an award of fees; (3) whether an award
10 of fees against the opposing parties would deter others from acting
11 under similar circumstances; (4) whether the parties requesting
12 fees sought to benefit all participants and beneficiaries of an
13 ERISA plan or to resolve a significant legal question regarding
14 ERISA; and (5) the relative merits of the parties' positions. Id.
15 A proper application of the factors generally results in an award
16 of fees and costs to plaintiffs who succeed on any significant
17 issue in litigation. Smith v. CMTA-IAM Pension Trust, 746 F.2d
18 587, 589 (9th Cir. 1984).

19 The Court finds that several of these factors favor an award
20 of attorneys' fees to Plaintiff -- chiefly, Liberty's actions
21 during the claims process and the current action in failing to
22 produce documents and in mischaracterizing the administrative
23 record border on bad faith. The Court finds that an award of
24 attorneys' fees may deter other claim administrators from engaging
25 in similar behavior. Accordingly, the Court finds an award of
26 attorneys' fees to Plaintiff to be appropriate.

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1 **IV. CONCLUSION**

2 For the forgoing reasons, the Court finds as follows:

- 3 • The Court finds in favor of Plaintiff Antonio Prado and
4 against Defendant Allied Domecq Spirits and Wine Group
5 Disability Income Policy and Real Party in Interest Liberty
6 Life Assurance Company of Boston on Plaintiff's first claim
7 for relief for failure to extend benefits under a long-term
8 disability plan covered by ERISA. Plaintiff is entitled to
9 back benefits from March 1, 2006 until the date thirty days
10 after the date of this Order. The parties are to meet and
11 confer on the amount of back benefits and file a stipulation
12 on that amount within fourteen (14) days of the date of this
13 Order. If the parties are unable to agree, they shall each
14 file within fourteen (14) days of the date of this Order a
15 letter brief not to exceed three pages setting forth their
16 position. Commencing thirty (30) days after the date of this
17 Order, Liberty shall pay Plaintiff monthly benefits as they
18 come due for so long as he remains disabled and eligible for
19 benefits under the policy.
- 20 • The Court finds in favor of Liberty and against Plaintiff on
21 Plaintiff's second claim for relief for interest under
22 California Insurance Code § 10111.2.
- 23 • The Court finds in favor of Liberty and against Plaintiff on
24 Plaintiff's third claim for relief for failure to produce
25 records under 29 U.S.C. § 1332(c).
- 26 • Plaintiff is entitled to attorneys' fees and costs under 29
27 U.S.C. § 1132(g). Within thirty (30) days of this Order,
28 Plaintiff shall file a motion for attorneys' fees, supported

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with appropriate evidence. Liberty shall have fourteen (14) days from to object to Plaintiff's motion or the evidence submitted in support of it. The Court will enter judgment in this action after it rules on Plaintiff's motion. If Plaintiff fails to file a motion for attorneys' fees within this timeframe, the Court will enter its final judgment in this action and close the case.

IT IS SO ORDERED.

Dated: July 22, 2011

UNITED STATES DISTRICT JUDGE