

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

THOMAS A.GONDA, JR., M.D.,	)	Case No. 11-cv-01363-SC
	)	
Plaintiff,	)	ORDER GRANTING MOTION FOR
	)	<u>SUMMARY JUDGMENT</u>
v.	)	
	)	
THE PERMANENTE MEDICAL GROUP,	)	
INC.; and THE PERMANENTE MEDICAL	)	
GROUP, INC. LONG TERM DISABILITY	)	
PLAN FOR PHYSICIANS,	)	
	)	
Defendants.	)	
	)	
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**I. INTRODUCTION**

Now before the Court is Defendants The Permanente Medical Group, Inc. ("TPMG") and The Permanent Medical Group, Inc. Long Term Disability Plan for Physicians' ("TMPG Plan") motion for summary judgment. The motion is fully briefed<sup>1</sup> and appropriate for determination without oral argument per Civil Local Rule 7-1(b). For the reasons set forth below, Defendants' motion for summary judgment is GRANTED.

<sup>1</sup> ECF Nos. 67 ("Mot."), 71 ("Opp'n"), 80 ("Reply").

1     **II.   BACKGROUND**

2           Plaintiff Thomas A. Gonda, Jr. worked as a thoracic surgeon  
3 for Defendant TPMG at the Kaiser Foundation Hospitals ("Kaiser")  
4 until 2006. Mot. at 2-3; Opp'n at 1; ECF No. 49 ("Johnston Decl.  
5 I") Ex. A at LINA-GON 1652-53. In July of 2003, Dr. Gonda was hit  
6 by a car while riding a Segway to a kite festival. Opp'n at 6; ECF  
7 No. 73 ("Johnston Decl. II") Ex. A at LINA-GON 945, 1582. Though  
8 he began experiencing double vision, Dr. Gonda returned to work and  
9 performed heart surgery with one eye closed. Opp'n at 2; Johnston  
10 Decl. II Ex. A at 1582. Over the next few months, Dr. Gonda  
11 experienced headaches, memory loss, and difficulty focusing on and  
12 completing tasks. Id. at LINA-GON 1582. On September 7, 2003, Dr.  
13 Gonda underwent surgery to evacuate subdural hematomas. Johnston  
14 Decl. II Ex. B at PsyBar 75-76.

15           Dr. Gonda continued to have episodes of confusion over the  
16 next several years, during which he also struggled with substance  
17 abuse. In late October 2006, "he was driving, got lost, and  
18 couldn't organize his circumstances and numbers." Johnston Decl.  
19 II Ex. B. at PsyBar 67. The next day, his colleagues thought  
20 something was wrong while he was assisting with a surgery and took  
21 him to the emergency room. Id.

22           Dr. Gonda has had problems with alcohol abuse for over twenty  
23 years, and he has prescribed codeine for himself to deal with hand  
24 pain. Johnston Decl. I Ex. A at LINA-GON 1652-53. Dr. Gonda's  
25 alcohol abuse problems intensified following his head injury. Id.  
26 On December 21, 2006, Dr. Gonda slept through his first scheduled  
27 morning surgery as a result of alcohol and drug use. Upon his  
28 arrival at the hospital, he appeared confused. His coworkers took

1 him to the emergency room, where his blood work revealed opioids  
2 and benzodiazepines in his system and a blood alcohol level of .21.  
3 Johnston Decl. II Ex. B at PsyBar 59. Dr. Gonda entered a  
4 residential substance abuse treatment program and applied for long  
5 term disability ("LTD") benefits through the TPMG Plan. Johnston  
6 Decl. I Ex. A at LINA-GON 1653; ECF No. 67-9 ("Downey Decl.") ¶ 3.  
7 After completing the program in 2007, Dr. Gonda wished to return to  
8 work at TPMG as a surgeon, but TPMG and Kaiser refused and  
9 terminated his employment. Mot. at 3; Opp'n at 2.

10 Dr. Gonda received benefits under the TPMG Plan from June 21,  
11 2007 through October 7, 2010. Downey Decl. ¶ 3. Following  
12 completion of his substance abuse treatment program, Dr. Gonda  
13 returned to school to become certified as a California Addictions  
14 Counselor. Downey Decl. Ex. D at LINA-GON 1158. On October 11,  
15 2010, the Life Insurance Company of North America ("LINA"), which  
16 provided LTD insurance coverage for the TPMG Plan, informed Dr.  
17 Gonda it would no longer pay LTD benefits. Id. ¶¶ 2-3. Dr. Gonda  
18 twice appealed the denial of his LTD benefits claim, but LINA  
19 denied both appeals (on January 22, 2013 and May 31, 2013). Id. ¶  
20 3.

21 In December 2010, Dr. Gonda filed wrongful termination  
22 lawsuits against Kaiser and TPMG in state court, which were  
23 consolidated in arbitration. On March 22, 2011, Dr. Gonda filed  
24 the instant action, which brings claims under the Employee  
25 Retirement Income Security Act of 1974 ("ERISA") and for breach of  
26 fiduciary duty. ECF No. 1; ERISA is codified at 29 U.S.C. § 1001  
27 et seq. In November 2011, Dr. Gonda settled his arbitrations with  
28 TPMG and Kaiser. ECF No. 67 ("Higbee Decl.") Ex. D ("Settlement

1 Agreement"). The Settlement Agreement specified that

2 DR. GONDA and his agents, successors and assigns agree to  
3 release and forever discharge TPMG, KFH, Kaiser  
4 Foundation Health Plan, Inc., and each of their  
5 directors, officers, physicians, managers, attorneys,  
6 supervisors, employers, agents, successors, assigns,  
7 representatives, shareholders, parents, subsidiaries,  
8 related companies and facilities, past and present, and  
9 each of them, in their representative capacity and as  
10 individuals (collectively "RELEASED PARTIES"), of and  
11 from any and all claims, charges, demands, actions,  
12 obligations, liabilities, and causes of action of  
13 whatever kind or nature, whether known or unknown,  
14 suspected or unsuspected, which DR. GONDA now owns or  
15 holds or has at any time owned or held arising under,  
16 concerning or related to his employment by TPMG and  
17 Kaiser Foundation Health Plan credentials or his staff  
18 privileges at KFH whether based on tort, contract  
(implied, express or otherwise), common law, or any  
federal, state or local law, statute, ordinance or  
regulation, including, without limitation, all rights  
conferred upon Dr. Gonda pursuant to the California  
Business & Professions Code, the California Health &  
Safety Code, the California Fair Employment & Housing  
Act, the California Family Rights Act, the California  
Labor Code, the California Constitution, Title VII of the  
Civil Rights Act of 1964, the Age Discrimination in  
Employment Act, the Americans With Disabilities Act, the  
Rehabilitation Act of 1973, the Equal Pay Act; the Family  
and Medical Leave Act; the Employee Retirement Income  
Security Act, and Section 1981 of Title 42 of the United  
States Code, all as amended, including all claims for  
attorney fees incident thereto (collectively "RELEASED  
CLAIMS").

19 Settlement Agreement ¶ 1.

20 Defendants now move for summary judgment on the grounds that  
21 the Settlement Agreement bars all of Dr. Gonda's claims. Dr. Gonda  
22 opposes.

23  
24 **III. LEGAL STANDARD**

25 **A. Summary Judgment**

26 Entry of summary judgment is proper "if the movant shows that  
27 there is no genuine dispute as to any material fact and the movant  
28 is entitled to judgment as a matter of law." Fed. R. Civ. P.

1 56(a). Summary judgment should be granted if the evidence would  
2 require a directed verdict for the moving party. Anderson v.  
3 Liberty Lobby, Inc., 477 U.S. 242, 251 (1986). "A moving party  
4 without the ultimate burden of persuasion at trial -- usually, but  
5 not always, a defendant -- has both the initial burden of  
6 production and the ultimate burden of persuasion on a motion for  
7 summary judgment." Nissan Fire & Marine Ins. Co., Ltd. v. Fritz  
8 Cos., Inc., 210 F.3d 1099, 1102 (9th Cir. 2000).

9 "In order to carry its burden of production, the moving party  
10 must either produce evidence negating an essential element of the  
11 nonmoving party's claim or defense or show that the nonmoving party  
12 does not have enough evidence of an essential element to carry its  
13 ultimate burden of persuasion at trial." Id. "In order to carry  
14 its ultimate burden of persuasion on the motion, the moving party  
15 must persuade the court that there is no genuine issue of material  
16 fact." Id. "The evidence of the nonmovant is to be believed, and  
17 all justifiable inferences are to be drawn in his favor."  
18 Anderson, 477 U.S. at 255.

19 **B. Waiver of ERISA Benefits**

20 When determining whether an employee has waived his ERISA  
21 benefits, "courts are obligated to scrutinize an ostensible waiver  
22 with care in order to ensure that it reflects the purposeful  
23 relinquishment of an employee's rights." Morais v. Cent. Beverage  
24 Corp. Union Emps.' Supplemental Ret. Plan, 167 F.3d 709, 713 (1st  
25 Cir. 1999) (internal quotation marks omitted); see also Purney v.  
26 Reliastar Life Ins. Co., 681 F. Supp. 2d 1262, 1268 (D. Nev. 2010)  
27 (summarizing status of ERISA waiver defense in the circuit courts).  
28 A waiver of ERISA benefits must be knowing and voluntary. The

1 court must examine the totality of the circumstances to determine  
2 whether the waiver was made knowingly and voluntarily, but the  
3 Second Circuit has developed a widely used six-factor test to guide  
4 courts in that decision. Morais, 167 F.3d at 712-13. Those six  
5 factors are:

6  
7 1) the plaintiff's education and business experience, 2)  
8 the amount of time the plaintiff had possession of or  
9 access to the agreement before signing it, 3) the role of  
10 plaintiff in deciding the terms of the agreement, 4) the  
11 clarity of the agreement, 5) whether the plaintiff was  
12 represented by or consulted with an attorney, [as well as  
whether an employer encouraged the employee to consult an  
attorney and whether the employee had a fair opportunity  
to do so] and 6) whether the consideration given in  
exchange for the waiver exceeds employee benefits to  
which the employee was already entitled by contract or  
law.

13 Finz v. Schlesinger, 957 F.2d 78, 82 (2d Cir. 1992); see also  
14 Upadhyay v. Aetna Life Ins. Co. (Upadhyay I), No. C 13-1368 SI,  
15 2014 WL 186709, at \*4 (N.D. Cal. Jan. 16, 2014) (applying Finz  
16 test).

17  
18 **IV. DISCUSSION**

19 The only issue before the Court is whether the Settlement  
20 Agreement bars Dr. Gonda's claims against TPMG and the TPMG Plan.  
21 The Settlement Agreement specifically releases TPMG and its agents  
22 from any claims which Dr. Gonda held (or had previously held), and  
23 it specifically mentions ERISA claims. Settlement Agreement ¶ 1.  
24 Dr. Gonda argues that Defendants' motion should be denied for five  
25 reasons: (1) Defendants untimely raise an affirmative defense; (2)  
26 the Settlement Agreement is superseded by TPMG's agreements to  
27 proceed with Dr. Gonda's LINA appeals; (3) Defendants are estopped  
28 from arguing that the Settlement Agreement bars the claims; (4) the

1 parties did not intend the Settlement Agreement to bar Dr. Gonda's  
2 claims in this action; and (5) the motion for summary judgment is  
3 premature. The Court begins by determining whether consideration  
4 of the Settlement Agreement is appropriate at all. Then the Court  
5 proceeds to apply the Finz factors to determine whether Dr. Gonda's  
6 waiver of his ERISA claims was knowing and voluntary. Finally, the  
7 Court addresses Dr. Gonda's additional arguments.

8 **A. Untimely Affirmative Defense**

9 Dr. Gonda first argues that Defendants attempt to raise an  
10 untimely affirmative defense. The Court agreed, but permitted  
11 Defendants to amend their answer to add the proper affirmative  
12 defense. See ECF No. 94. Defendants filed their amended answer on  
13 February 10, 2015, and it now adequately pleads the appropriate  
14 affirmative defense. ECF No. 96 ("Amended Answer") ¶¶ 33-34.

15 **B. Supersession of the Settlement Agreement**

16 Dr. Gonda next argues that the Settlement Agreement has been  
17 superseded by agreements that are later in time and more specific  
18 than the release contained in the Settlement agreement. According  
19 to Dr. Gonda, LINA's willingness to consider Dr. Gonda's appeals  
20 constituted a superseding agreement that his ERISA claims had not  
21 been released. The subsequent agreements Dr. Gonda cites are the  
22 stipulations to stay this matter pending the outcome of Dr. Gonda's  
23 LINA appeals. See Opp'n at 16. This argument is problematic for a  
24 number of reasons.

25 First, courts in this District have held that a right to ERISA  
26 benefits and a right to bring an ERISA action in federal court are  
27 distinct: "Under the terms of the settlement agreement, plaintiff  
28 not only waived [his] right to benefits under the Plan, [he] also

1 waived [his] right to bring an ERISA action in federal court."  
2 Upadhyay I, 2014 WL 186709, at \*2. Thus the Court in Upadhyay held  
3 that even though the settlement agreement "could have served as a  
4 basis for denying benefits during the administrative process," the  
5 administrator's failure to rely on the agreement did not constitute  
6 waiver of the affirmative defense for the purposes of the federal  
7 lawsuit. The same is true here; LINA's decision not to use the  
8 Settlement Agreement as a basis for denying benefits during Dr.  
9 Gonda's administrative appeals does not preclude assertion of the  
10 Settlement Agreement as an affirmative defense in this action.

11 Second, it is unclear how LINA's willingness to hear Dr.  
12 Gonda's internal appeals could affect TPMG or the TPMG Plan's  
13 contractual rights under the Settlement Agreement. LINA is not a  
14 party to this lawsuit, and it was not a party to the Settlement  
15 Agreement. Dr. Gonda cites no authority for the proposition that a  
16 non-party (or even a party, for that matter) to a contract can  
17 waive another party's rights.

18 Third, even if TPMG (rather than LINA) had agreed to allow  
19 administrative appeals of Dr. Gonda's claims, that would not have  
20 constituted waiver of the release in the Settlement Agreement.  
21 Willingness to continue internal administrative appeals does not  
22 equate to a waiver of Defendants' contractual right to be released  
23 from Dr. Gonda's claims against them. Indeed, there is case law  
24 from this District almost directly on point. In Upadhyay, as in  
25 this case, the plaintiff settled a wrongful termination lawsuit  
26 with her employer in state court. Upadhyay v. Aetna Life Ins. Co.  
27 (Upadhyay II), No. C 13-01368 SI, 2014 WL 883456, at \*1 (N.D. Cal.  
28 Mar. 3, 2014). The settlement agreement included a general release



1 of claims. The plaintiff then applied for long-term disability  
2 benefits under a policy issued by the defendant, Aetna, to the  
3 plaintiff's employer, Symmetricom. Aetna denied the claim and the  
4 plaintiff's internal appeal. Id. In denying the appeal, Aetna  
5 sent the plaintiff a letter informing the plaintiff that she had a  
6 right to bring a civil action under ERISA. Id. at \*4. The  
7 plaintiff argued that that statement constituted waiver of the  
8 affirmative defense of release, and that Aetna was required to  
9 inform her that it intended to raise the affirmative defense of  
10 release. Id. The court held that Aetna's statement did not  
11 constitute wavier, and that Aenta was not required "to disclose  
12 what affirmative defenses it may assert if plaintiff brings an  
13 ERISA action against it in federal court." Id. at \*5.

14 Similarly, neither LINA's willingness to consider Dr. Gonda's  
15 appeals nor Defendants' agreement to stay this case during those  
16 appeals constituted waiver of an affirmative defense. LINA's  
17 completion of the administrative appeals did not affect Defendants'  
18 rights under the Settlement Agreement. Even if LINA had advised  
19 Dr. Gonda of his cause of action under ERISA, that more explicit  
20 recognition of his claim would not have limited the affirmative  
21 defenses that Defendants could assert in this case. Thus the Court  
22 finds that none of Defendants' actions or communications constitute  
23 an agreement that supersedes the Settlement Agreement.

24 **C. Estoppel**

25 Dr. Gonda next argues that Defendants are barred from raising  
26 the Settlement Agreement as a defense by equitable, promissory, and  
27 judicial estoppel. The equitable and promissory estoppel arguments  
28 are premised on the notion that Defendants represented to Dr. Gonda

1 that they would not raise the Settlement Agreement as an  
2 affirmative defense by agreeing to hear Dr. Gonda's appeals. See  
3 Opp'n at 17-20. For the reasons discussed previously, agreement to  
4 hear Dr. Gonda's administrative appeals was not a representation  
5 that Defendants would not raise the Settlement Agreement as an  
6 affirmative defense in court. The judicial estoppel argument is  
7 premised on the notion that Defendants have "represented to this  
8 Court for years that Dr. Gonda's disability claim was viable and  
9 was the subject of ongoing internal-appeal proceedings . . . ."  
10 Id. at 19. The second part of that statement -- that Defendants  
11 represented that Dr. Gonda's claim was the subject of ongoing  
12 internal-appeal proceedings -- is true. The first -- that  
13 Defendants indicated that his claim was viable -- is not. By  
14 allowing Dr. Gonda to pursue his internal appeals, Defendants did  
15 not admit that he had a viable cause of action in court. Nor did  
16 Defendants surrender their contractual right to be released from  
17 all ERISA causes of action that Dr. Gonda held against them.

18 **D. Application of the Settlement Agreement**

19 The previous three arguments -- untimely affirmative defense,  
20 supersession, and estoppel -- were all arguments which, if  
21 successful, would have prevented the Court from considering the  
22 Settlement Agreement's application to the claims in this case.  
23 Because the Court rejects each of those arguments, the Court now  
24 turns to the question of whether the Settlement Agreement releases  
25 Dr. Gonda's causes of action in this case.

26 **1. Knowing and Voluntary Waiver**

27 Waiver of ERISA benefits must be knowing and voluntary.  
28 Courts consider the totality of the circumstances in determining

1 whether a release was knowing and voluntary, but the Finz factors  
2 provide some guidance. In this case, the plaintiff is highly  
3 educated: he has a medical doctorate and practiced for years as a  
4 thoracic surgeon. Dr. Gonda acknowledged in the Settlement  
5 Agreement that he had a period of at least 21 days to consider the  
6 agreement and that he had been advised in writing to consult an  
7 attorney before signing it. Settlement Agreement ¶¶ 10(b), 10(e).  
8 In fact, Dr. Gonda was represented by counsel who fully explained  
9 the Settlement Agreement to him, and Dr. Gonda acknowledged his  
10 understanding of the agreement and its implications. Id. at 8.  
11 Additionally, the parties agreed that the consideration paid to Dr.  
12 Gonda was "compensation for alleged losses, injuries, legal, and  
13 medical expenses," and Dr. Gonda "acknowledge[d] and agree[d] that  
14 he would not be entitled to receive the Settlement Sum if he did  
15 not make the promises that he is making in this Agreement." Id. ¶¶  
16 4(a), 19.

17 The Settlement Agreement also clearly and unambiguously  
18 released all of Dr. Gonda's ERISA claims against TPMG and related  
19 parties. Dr. Gonda agreed to release "all . . . causes of action  
20 of whatever kind or nature, whether known or unknown, suspected or  
21 unsuspected, which DR. GONDA now owns or holds or has at any time  
22 owned or held . . . based on . . . any federal . . . statute . . .  
23 including, without limitation, all rights conferred upon Dr. Gonda  
24 pursuant to . . . the Employee Retirement Income Security  
25 Act . . . ." Id. ¶ 1. That language explicitly releases Dr.  
26 Gonda's ERISA claims against Defendants. Like other ERISA waivers  
27 that courts have upheld, the Settlement Agreement specifically  
28 mentioned ERISA. It also exempted certain benefits and claims --

1 specifically, Dr. Gonda's retirement benefits and potential  
2 California COBRA coverage -- but did not exempt any ERISA claims.  
3 Id. ¶¶ 5, 20. That is powerful evidence that the parties did  
4 intend to release all of Dr. Gonda's ERISA claims. See Parisi v.  
5 Kaiser Found. Health Plan Long Term Disability Plan, No. C 06-04359  
6 JSW, 2008 WL 220101, at \*2 (N.D. Cal. Jan. 25, 2008) (release  
7 exempted vested retirement and COBRA benefits, but not ERISA  
8 benefits); Bennett v. CNA Ins. Cos., No. C-99-03127 EDL, 2001 WL  
9 30533, at \*5 (N.D. Cal. Jan. 5, 2001) (release exempted vested  
10 pension benefits, but not disability benefits).

11 The Court finds, therefore, that on its face the Settlement  
12 Agreement constitutes a knowing and voluntary waiver of Dr. Gonda's  
13 ERISA claims against Defendants. However, Dr. Gonda argues for a  
14 number of reasons that the Settlement Agreement does not release  
15 the claims he brings in this lawsuit.

16 **2. Parties' Conduct During and After Settlement**  
17 **Negotiations**

18 Dr. Gonda makes two related arguments about the parties'  
19 conduct. First, he points out that Defendants did not seek  
20 dismissal of this action when the Settlement Agreement was signed  
21 but instead waited three years to raise the issue while Dr. Gonda's  
22 internal appeals were pending. The Court has recognized that  
23 Defendants' behavior was not what one would expect of parties that  
24 have been released. See ECF Nos. 84 at 3, 94 at 3-4. Second, Dr.  
25 Gonda points out his long-term disability benefits claim "was never  
26 even mentioned during the wrongful-termination settlement  
27 negotiations." Opp'n at 21. Defendants respond that because the  
28 Settlement Agreement is an unambiguous integrated contract,

1 extrinsic evidence cannot be used to contradict its terms.

2 **i. Governing Law**

3 The Court notes at the outset that there is a question as to  
4 which law governs the interpretation of the Settlement Agreement.  
5 The parties assume that California law governs because the  
6 Settlement Agreement specifies that California law applies. See  
7 Settlement Agreement ¶ 23 ("This Agreement is made and entered into  
8 in the State of California and shall in all respects be enforced  
9 and governed by California law."). However, a number of courts  
10 have held that federal common law preempts state law when  
11 interpreting a waiver of ERISA claims. See Shaver v. Siemens  
12 Corp., 670 F.3d 462, 497 n.28 (3d Cir. 2012) ("[A] contract that  
13 potentially affects rights protected by [ERISA] . . . is likely  
14 subject to interpretation in accordance with tenets of federal  
15 common law.") (internal quotation marks omitted); Morais, 167 F.3d  
16 at 711 ("It is well settled that federal common law applies both to  
17 interpret the provisions of an ERISA benefit plan and to resolve  
18 '[i]ssues of relinquishment of rights and waiver' when such side  
19 agreements affect the benefits provided by an ERISA plan.");  
20 Chaplin v. NationsCredit Corp., 307 F.3d 368, 372 (5th Cir. 2002)  
21 ("Federal common law controls the interpretation of a release of  
22 federal claims."); see also Bd. of Trustees of Hotel & Rest. Emps.  
23 Local 25 v. Madison Hotel, Inc., 97 F.3d 1479, 1486-87 (D.C. Cir.  
24 1996) ("Thus, even general common law causes of action, such as  
25 breach of contract, which were not specifically intended to apply  
26 to benefit plans covered by ERISA, will nonetheless be preempted  
27 insofar they affect ERISA-protected rights.").

28 The Ninth Circuit has held that federal common law applies to

1 the interpretation of ERISA policies but has not explicitly  
2 extended that holding to separate contracts that waive ERISA  
3 claims. See Evans v. Safeco Life Ins. Co., 916 F.2d 1437, 1439  
4 (9th Cir. 1990) ("[W]e hold that the interpretation of ERISA  
5 insurance policies is governed by a uniform federal common law.").  
6 However, the Ninth Circuit has also held that "[t]he interpretation  
7 of a settlement agreement is governed by principles of state  
8 contract law. This is so even where a federal cause of action is  
9 'settled' or 'released.'" Botefur v. City of Eagle Point, Or., 7  
10 F.3d 152, 156 (9th Cir. 1993).

11 There are compelling reasons to believe that the Ninth  
12 Circuit's general statement about the release of federal causes of  
13 action in Botefur might not apply to releases of ERISA claims.  
14 First, the Ninth Circuit has recognized that "ERISA contains one of  
15 the broadest preemption clauses ever enacted by Congress." Evans,  
16 916 F.2d at 1439. Second the Ninth Circuit "agree[s] with the  
17 conclusion of the First Circuit . . . that the interpretation of an  
18 ERISA insurance policy is 'governed by a uniform body of federal  
19 law.'" Id. at 1441. Third, the legislative history that the Ninth  
20 Circuit chronicled in Evans suggests that uniform principles for  
21 interpreting ERISA waivers would further Congress's purpose. See  
22 id. at 1440 ("ERISA's legislative history, discussed in a plethora  
23 of ERISA preemption decisions, undeniably demonstrates that  
24 Congress expects uniformity of decisions under ERISA."). Fourth,  
25 courts in the Ninth Circuit have consistently applied the Finz  
26 factors -- which are derived from federal common law -- to waivers  
27 of ERISA claims. See, e.g., Rombeiro v. Unum Ins. Co. of Am., 761  
28 F. Supp. 2d 862, 869 (N.D. Cal. 2010); Upadhyay I, 2014 WL 186709,

1 at \*4; Parisi, 2008 WL 220101, at \*4; Bennett, 2001 WL 30533, at \*5  
2 (N.D. Cal. Jan. 5, 2001).

3 Two district courts in the Ninth Circuit have held that  
4 federal common law applies to the interpretation of ERISA waivers.  
5 See Mull v. Motion Picture Indus. Health Plan, No. CV 12-06693-VBF-  
6 MAN, 2014 WL 1514812, at \*10 n.8 (C.D. Cal. Feb. 4, 2014) ("[T]he  
7 issue of whether a party in a federal lawsuit has waived its right  
8 to bring a cause of action under a federal statute is governed by  
9 federal law. . . . [T]his principle has properly been applied to  
10 the determination of whether a party has validly waived a right  
11 conferred by ERISA."); Zhu v. Fujitsu Grp. 401(K) Plan, No. C-03-  
12 1148RMW, 2004 WL 3252573, at \*3 (N.D. Cal. Mar. 3, 2004) ("Federal  
13 common law applies to interpret the provisions of an ERISA benefit  
14 plan and to resolve issues of relinquishment of rights and waiver  
15 when such side agreements affect the benefits provided by an ERISA  
16 plan.") (internal quotation marks omitted) (citing Morias, 167 F.3d  
17 at 711).

18 One court has even wrestled with the issue of whether a choice  
19 of law provision in an ERISA waiver can override the default  
20 application of federal common law. See Bd. of Trustees v. Valley  
21 Util. Servs., Inc., No. C-13-0271 EMC, 2013 WL 5817722, at \*2 (N.D.  
22 Cal. Oct. 29, 2013) ("[T]here are a number of cases holding that  
23 federal common law governs the enforceability of a settlement  
24 agreement which settles ERISA claims. . . . Here, the issue is  
25 further complicated because the parties agreed that the  
26 '[Settlement] Agreement shall be governed by, interpreted and  
27 construed in accordance with the laws of the State of  
28 California.'"). The Valley Utility Court pointed out that the

1 Ninth Circuit has held that "[w]here a choice of law is made by an  
2 ERISA contract, it should be followed, if not unreasonable or  
3 fundamentally unfair." Wang Labs., Inc. v. Kagan, 990 F.2d 1126,  
4 1128-29 (9th Cir. 1993).<sup>2</sup>

5 Some courts in this District have concluded rather  
6 perfunctorily that releases of ERISA claims are integrated  
7 contracts and therefore rejected extrinsic evidence. They have  
8 done so without specifying whether California or federal common law  
9 applies.<sup>3</sup> See Upadhyay I, 2014 WL 186709, at \*5 ("because the  
10 settlement agreement is an integrated contract and its terms are  
11 unambiguous, extrinsic evidence cannot be used to contradict the  
12 express terms of the release"); Parisi, 2008 WL 220101, at \*3 ("The  
13 Court also finds that the Release is integrated and unambiguous, so  
14 no extrinsic evidence is permitted."); Bennett, 2001 WL 30533, at  
15 \*4 ("The Settlement is integrated and unambiguous, so no extrinsic  
16 evidence is permitted.").

17 The Court finds that California law governs the Settlement  
18 Agreement, including the ERISA waiver. This Court is bound by the

19 \_\_\_\_\_  
20 <sup>2</sup> One district court has suggested that Wang was limited to the  
21 context of applying a state's statute of limitations. Hawthorne v.  
22 Zurich Am. Ins. Co., No. CV06-0374RSL, 2007 WL 1795319, at \*5 (W.D.  
23 Wash. June 18, 2007) ("Wang, however, involved the question of  
24 whether a choice of law provision could be looked to in deciding  
25 which state's statute of limitations law would be applied."). The  
26 Ninth Circuit has since clarified that Wang applies more broadly.  
27 See Fenberg v. Cowden Auto. Long Term Disability Plan, 259 F. App'x  
28 958, 959 (9th Cir. 2007) (applying Wang to determine standard of  
review for benefits denial).

25 <sup>3</sup> In fact, the plaintiff in Upadhyay made essentially the same  
26 argument as Dr. Gonda: that the failure to mention long-term  
27 disability benefits during settlement negotiations evinced an  
28 intention not to release ERISA claims. See Upadhyay I, 2014 WL  
186709, at \*5. The court rejected that argument because the  
release was integrated and unambiguous. Id.



1 Ninth Circuit's holding in Wang and must give force to the parties'  
2 choice of law provision. Because both Defendants and Dr. Gonda  
3 agree that California law applies, its application is clearly not  
4 unreasonable or unfair. However, as discussed briefly below, the  
5 Court would reach the same conclusion regardless of the law that  
6 applies.

7 **ii. Application**

8 In this case, the most compelling extrinsic evidence in Dr.  
9 Gonda's favor is the subsequent conduct of the parties. That type  
10 of evidence is specifically allowed by California law in some  
11 circumstances, so a deeper examination of its admissibility is  
12 warranted in this case. California law acknowledges the relevance  
13 of the parties' acts and conduct to the interpretation of a  
14 contract. See Cal. Civ. Proc. Code § 1856 ("The terms set forth in  
15 a writing described in subdivision (a) may be explained or  
16 supplemented by course of dealing or usage of trade or by course of  
17 performance."); U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc., 281  
18 F.3d 929, 937 (9th Cir. 2002) ("Under California law, a court may  
19 consider the subsequent acts and conduct of the parties in the  
20 execution of the contract in order to determine the intent of those  
21 parties.").

22 The contract at issue in this case contains an integration  
23 clause. See Settlement Agreement ¶ 26 ("This Agreement sets forth  
24 the entire understanding and agreement between the parties with  
25 respect to the subject matters herein and supersedes any prior or  
26 contemporaneous oral and/or written agreements, promises,  
27 inducements, or representations, if any, between the parties.").  
28 "Where, as here, the contract at issue is fully integrated,

1 California law allows the admission of parol evidence only if it is  
2 (1) 'relevant' to prove (2) 'a meaning to which the language of the  
3 instrument is reasonably susceptible.'" U.S. Cellular, 281 F.3d at  
4 938. The Court must consider the proposed extrinsic evidence  
5 before determining whether the Settlement Agreement is reasonably  
6 susceptible to multiple interpretations. See Pac. Gas & Elec. Co.  
7 v. G. W. Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 39-40 (Cal.  
8 1968) ("[R]ational interpretation requires at least a preliminary  
9 consideration of all credible evidence offered to prove the  
10 intention of the parties.").<sup>4</sup>

11 After considering the extrinsic evidence that Dr. Gonda has  
12 offered, the Court finds that there is no meaning to which the  
13 language of the Settlement Agreement is reasonably susceptible that  
14 permits Dr. Gonda's claims. The Settlement Agreement unequivocally  
15 and unambiguously releases TPMG from all of Dr. Gonda's ERISA's  
16 claims. In his twenty-five page opposition brief, Dr. Gonda does  
17 not propose any such reasonable meaning -- he never discusses the  
18 language of the Settlement Agreement at all. Dr. Gonda released  
19 "any and all claims, charges, demands, actions, obligations,  
20 liabilities, and causes of action of whatever kind or nature,

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21  
22 <sup>4</sup> It is important to recognize that Dr. Gonda never proposes an  
23 alternate interpretation of the contract. He argues that the  
24 parties never intended the Settlement Agreement to release the  
25 ERISA claims he brings in this action, but never proposes any  
26 interpretation of the contractual language consistent with that  
27 argument. California courts have held that extrinsic evidence must  
28 be considered to determine whether "the language of a contract, in  
the light of all the circumstances, is 'fairly susceptible of  
either one of the two interpretations contended for.'" Pac. Gas &  
Elec., 69 Cal. 2d at 40. Because only one interpretation of the  
Settlement Agreement is "contended for," the Court must guess at  
Dr. Gonda's favored interpretation.

1 whether known or unknown, suspected or unsuspected, which DR. GONDA  
2 now owns or holds or has at any time owned or held . . . ." Even  
3 knowing that Defendants waited so long to raise this defense and  
4 did not mention Dr. Gonda's ERISA claims during the settlement  
5 negotiations, there is simply no reasonable way to read that  
6 language in a manner that permits an exception. The language makes  
7 it obvious that the parties intended to release all of Dr. Gonda's  
8 claims, past or present, against Defendants. As a result, the  
9 Court need not consider the extrinsic evidence Dr. Gonda offers to  
10 interpret the contract.

11 It is important to reiterate that Dr. Gonda consulted with  
12 counsel during the settlement negotiations that produced the  
13 Settlement Agreement. Dr. Gonda's attorney signed a statement on  
14 the Settlement Agreement attesting that he fully explained the  
15 terms of the Settlement Agreement to Dr. Gonda, and that Dr. Gonda  
16 acknowledged his understanding of the document and its legal  
17 effect. See Settlement Agreement at LINA-GON 1979. Additionally,  
18 Dr. Gonda admits that he had at least 21 days to consider the  
19 Settlement Agreement. Id. ¶ 10(c). In part because of those  
20 facts, the Court found that Dr. Gonda's waiver of his ERISA claims  
21 against TPMG was knowing and voluntary. The facts that Dr. Gonda  
22 was represented by counsel and had ample time to consider the  
23 Settlement Agreement also reinforce the Court's willingness to  
24 implement the agreement's plain language.

25 The Court would reach the same result were it to apply federal  
26 common law. "The relevant federal substantive law includes the  
27 common-sense canons of contract interpretation derived from state  
28 law including the teaching that contracts containing unambiguous

1 language must be construed according to their plain and natural  
2 meaning." Morais, 167 F.3d at 712 (internal quotations and  
3 citations omitted). Additionally, "[a]s a general rule, a court  
4 should not consider extrinsic evidence to give meaning to a  
5 contract unless the contract's terms are vague or ambiguous. . . .  
6 In no event may extrinsic evidence be employed to contradict  
7 explicit contract language or to drain an agreement's text of all  
8 content save ink and paper." Id. at 713.

9       The Court has found that the waiver in the Settlement  
10 Agreement is unambiguous: it clearly waives all of Dr. Gonda's  
11 ERISA claims against the released parties. Any reading of the  
12 contract that includes an exception for the claims Dr. Gonda brings  
13 in this case would contradict the explicit language of the  
14 Settlement Agreement. As did the courts in Upadhyay, Parisi, and  
15 Bennett, the Court holds that Dr. Gonda may not use extrinsic  
16 evidence to contradict the terms of the Settlement Agreement.  
17 Therefore, the Settlement Agreement must be construed to mean what  
18 it says: Dr. Gonda has waived his ERISA claims against the released  
19 parties.

### 20                   **3. Separate Consideration**

21       Dr. Gonda also argues that waiver of his ERISA claims was  
22 unsupported by consideration. He points out that the money he  
23 received through the Settlement Agreement was divided into two  
24 payments: one "intended to compensate Plaintiff for alleged lost  
25 wages" and another "intended to compensate Plaintiff solely for  
26 alleged emotional distress." See Settlement Agreement ¶¶ 4(a)-(c).  
27 Because the consideration Dr. Gonda received was earmarked  
28 specifically for lost wages and emotional distress, Dr. Gonda

1 argues that his waiver was unsupported by separate consideration  
2 and therefore invalid. "This argument is meritless because  
3 California courts have long held that 'where the writing is plain  
4 and explicit and given for the express purpose of effecting a  
5 complete release of the obligation, a consideration is not  
6 necessary.'" Sheehan v. Atlanta Int'l Ins. Co., 812 F.2d 465, 470  
7 (9th Cir. 1987); see also Bacon v. Stiefel Labs., Inc., No. 09-  
8 21871-CV-KLNG, 2011 WL 4944122, at \*7 (S.D. Fla. Oct. 17, 2011) ("A  
9 number of courts . . . have held that . . . a release of ERISA  
10 claims which is included as part of a general release need not be  
11 separately bargained for or supported by separate consideration.").

#### 12 **4. Application to the TPMG Plan**

13 While the Settlement Agreement specifies TPMG as one of the  
14 released parties, it does not mention the TPMG plan. In two short  
15 sentences in his opposition brief, Dr. Gonda suggests that the  
16 failure to specify the TPMG Plan as a released party means that Dr.  
17 Gonda did not waive his claims against the TPMG Plan. See Opp'n at  
18 5, 21.

19 It is true that the Settlement Agreement does not name the  
20 TPMG Plan as a released party. It names "TPMG, KFH, Kaiser  
21 Foundation Health Plan, Inc., and each of their directors,  
22 officers, physicians, managers, attorneys, supervisors, employers,  
23 agents, successors, assigns, representatives, shareholders,  
24 parents, subsidiaries, related companies and facilities."  
25 Settlement Agreement ¶ 1. Defendants argue that the TPMG Plan was  
26 released as an agent, representative, or related company. See Mot.  
27 at 10. Indeed, TPMG's summary of the TPMG Plan states that "[t]he  
28 Plan is established and maintained by The Permanente Medical Group,

1 Inc., the Plan Sponsor," and that TPMG "may terminate, suspend,  
2 withdraw, or amend the Plan, in whole or in part, at any  
3 time . . . ." Downey Decl. Ex. C at LINA-GON 1856.

4 Under similar circumstances, the Eastern District of Michigan  
5 found that the long-term disability benefit plan "is merely a  
6 division of [the plan sponsor], not a separate entity as plaintiff  
7 asserts." Homenick v. Nat'l Steel Corp., No. 95-CV-75310-DT, 1996  
8 WL 426549, at \*3 (E.D. Mich. Feb. 22, 1996). The Ninth Circuit has  
9 indicated concurrence in an unpublished opinion. In Austin v. CCC  
10 Information Services, Inc. Benefit Plan, the Ninth Circuit analyzed  
11 a settlement agreement releasing the plaintiff's employer, its  
12 agents, and "'all persons acting under, by, through or in concert  
13 with' them." 225 F. App'x 671, 672 (9th Cir. 2007). The court  
14 held that "the Plan is an entity created and administered by  
15 [plaintiff's] former employer" and concluded "that the agreement's  
16 broad release clause clearly bars [plaintiff's] ERISA action." Id.  
17 The same is true here. As in Austin, the broad language of the  
18 Settlement Agreement bars Dr. Gonda's ERISA action against the TPMG  
19 Plan.

20 **E. Motion for Summary Judgment is Premature**

21 Finally, Dr. Gonda argues that the motion for summary judgment  
22 is premature. He cites Federal Rule of Civil Procedure 56(f),  
23 which permits the Court to grant summary judgment independent of  
24 the motion. See Opp'n at 23. It appears that Dr. Gonda intended  
25 to cite Rule 56(d). Rule 56(d) permits the Court to postpone  
26 ruling on a motion for summary judgment "[i]f a nonmovant shows by  
27 affidavit or declaration that, for specified reasons, it cannot  
28 present facts essential to justify its opposition." To prevail

1 under this Rule, a party opposing a motion for summary judgment  
2 must make "(a) a timely application which (b) specifically  
3 identifies (c) relevant information, (d) where there is some basis  
4 for believing that the information sought actually exists." Emp'rs  
5 Teamsters Local Nos. 175 & 505 Pension Tr. Fund v. Clorox Co., 353  
6 F.3d 1125, 1129-30 (9th Cir. 2004). "The burden is on the party  
7 seeking additional discovery to proffer sufficient facts to show  
8 that the evidence sought exists, and that it would prevent summary  
9 judgment." Chance v. Pac-Tel Teletrac Inc., 242 F.3d 1151, 1161  
10 n.6 (9th Cir. 2001). Additionally, "[t]he district court does not  
11 abuse its discretion by denying further discovery if . . . the  
12 movant fails to show how the information sought would preclude  
13 summary judgment." Cal. Union Ins. Co. v. Am. Diversified Sav.  
14 Bank, 914 F.2d 1271, 1278 (9th Cir. 1990) (citations omitted).

15 Dr. Gonda has not filed an affidavit or declaration that  
16 satisfies the burden established by the Ninth Circuit. In fact, he  
17 has filed no affidavit or declaration at all. In support of his  
18 request, Dr. Gonda cites Family Home and Finance Center, Inc. v.  
19 Federal Home Loan Mortgage Corp. Dr. Gonda apparently overlooks  
20 the fact that Family Home reiterates the Employers Teamsters  
21 requirements: "The requesting party must show: (1) it has set forth  
22 in affidavit form the specific facts it hopes to elicit from  
23 further discovery; (2) the facts sought exist; and (3) the sought-  
24 after facts are essential to oppose summary judgment." 525 F.3d  
25 822, 827 (9th Cir. 2008). Additionally, Family Home held that  
26 "[f]ailure to comply with these requirements is a proper ground for  
27 denying discovery and proceeding to summary judgment." Id.  
28 (internal quotation marks omitted). Thus the Court could deny Dr.

1 Gonda's Rule 56(d) request on the ground that Dr. Gonda failed to  
2 file a supporting affidavit alone.

3       The only support Dr. Gonda provides for his request is in his  
4 opposition brief. He seeks "inquiries into exactly what TPMG and  
5 its representatives believed the wrongful-termination settlement  
6 addressed, what was said during negotiations, and the like." Opp'n  
7 at 23. Dr. Gonda has equal access as Defendants to "what was said  
8 during negotiations," because he was there. Moreover, Dr. Gonda  
9 argues repeatedly that the LTD claim was never mentioned during the  
10 wrongful-termination settlement negotiations. Id. at 5, 21. So it  
11 is difficult to understand how discovery into what was said during  
12 the negotiations could provide Dr. Gonda with evidence essential to  
13 his opposition. Regarding what TPMG and its representatives  
14 believed the Settlement Agreement addressed, Dr. Gonda has offered  
15 no basis for his belief that Defendants' beliefs contain facts  
16 essential to his opposition. Indeed, to defeat Defendants' motion  
17 for summary judgment, Dr. Gonda must show that a genuine issue of  
18 material fact exists as to the meaning of the Settlement Agreement.  
19 That requires a showing of facts supporting a reasonable  
20 interpretation of the Settlement Agreement that permits Dr. Gonda's  
21 claims.

22       But Dr. Gonda has not offered any such interpretation of the  
23 language of the Settlement Agreement. Given the clear and broad  
24 language of the release contained in the Settlement Agreement, it  
25 is difficult to envision any evidence Dr. Gonda might find that is  
26 relevant to prove a meaning to which the Settlement Agreement is  
27 reasonably susceptible. Nor has Dr. Gonda specified any facts that  
28 might exist to support such an interpretation, nor any basis for



1 believing they exist. Thus Dr. Gonda has failed to show that the  
2 facts he seeks, if they exist, would prevent summary judgment.  
3 Because Dr. Gonda has not complied with the requirements of Rule  
4 56(d), and because the Court can find no basis for believing that  
5 Dr. Gonda's requested discovery might reveal facts essential to his  
6 opposition, the Court deems it appropriate to deny Dr. Gonda's Rule  
7 56(d) request and rule on the motion for summary judgment.<sup>5</sup>

8 **F. Other Claims**

9 In addition to his claim for ERISA benefits, Dr. Gonda brings  
10 claims for breach of fiduciary duty and statutory penalties. ECF  
11 No. 1 ("Compl.") ¶¶ 12-16. Dr. Gonda's complaint was filed on  
12 March 22, 2011, and he released all claims he held against  
13 Defendants in November 2011. As a result, and for the reasons  
14 described previously, the Settlement Agreement waived these claims  
15 as well.

16 ///

17 ///

18 \_\_\_\_\_  
19 <sup>5</sup> The Court notes that its prior holding that any discovery into  
20 the negotiations of the Settlement Agreement would necessarily be  
21 inadmissible was in error. See ECF No. 101, at 6. California law  
22 requires the Court to consider proffered extrinsic evidence before  
23 making a determination that a contract is not reasonably  
24 susceptible to a certain interpretation. See Pac. Gas & Elec., 69  
25 Cal. 2d 33 at 39-40. However, the Court still finds that it need  
26 not await additional discovery for two reasons. First, Dr. Gonda  
27 has not complied with the Rule 56(d) requirements. Second, Dr.  
28 Gonda has not proposed an interpretation of the language Settlement  
Agreement that permits his claims. Had Dr. Gonda submitted the  
requisite declaration or affidavit and proposed an interpretation  
of the Settlement Agreement, additional discovery might have been  
warranted prior to this ruling (pending the outcome of Defendants'  
motion for a protective order). Nor does this error affect the  
outcome of the motion for leave to file a motion for  
reconsideration. The Court determined the limited additional  
discovery potentially warranted on this issue, if allowed, would  
not unduly prejudice Dr. Gonda. See ECF No. 101 at 6-7.

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**V. CONCLUSION**

For the reasons set forth above, Defendants' motion for summary judgment is GRANTED with respect to all of plaintiff Thomas A. Gonda, Jr.'s claims against defendants The Permanente Medical Group, Inc. and The Permanente Medical Group, Inc. Long Term Disability Plan for Physicians.

IT IS SO ORDERED.

Dated: February 17, 2015

  
UNITED STATES DISTRICT JUDGE