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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

STEPHEN COLACO, et al.,  
Plaintiffs,  
v.  
THE ASIC ADVANTAGE SIMPLIFIED  
EMPLOYEE PENSION PLAN, et al.,  
Defendants.

Case No. 13-cv-00972-HSG

**ORDER GRANTING MOTION TO  
DETERMINE ABUSE OF DISCRETION  
STANDARD OF REVIEW APPLIES**

Re: Dkt. No. 102

Pending before the Court is a motion to determine that the abuse of discretion standard of review will apply at trial brought by Defendants The ASIC Advantage Simplified Employee Pension Plan, ASIC Advantage, Inc., and Microsemi Corporation. Dkt. No. 102. The Court heard oral argument on December 1, 2016. For the reasons stated at the hearing and articulated below, the Court GRANTS the motion.<sup>1</sup>

Defendants assert that the applicable standard of review is abuse of discretion because the Simplified Employee Plan (the “SEP Plan”) “explicitly and repeatedly provides the employer with discretion to make or not make SEP Plan contributions.” Dkt. No. 102 (“Mot.”) at 1. Plaintiffs oppose the motion on three grounds: (1) the motion is untimely; (2) the Court should apply de novo review because the SEP Plan “does not clearly and unambiguously confer discretion on the plan administrator to interpret the plan or make claim decisions”; and (3) de novo review is

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<sup>1</sup> The Court construes Defendants’ motion as a motion for summary adjudication. *See e.g., Hinz v. Hewlett Packard Co. Disability Plan*, No. 10-CV-03633-LHK, 2011 WL 1230046, at \*1 (N.D. Cal. Mar. 30, 2011) (motion to determine standard of review brought as motion for summary adjudication); *Finley v. Hartford Life & Acc. Ins. Co.*, No. C 06-6247 CW, 2007 WL 2406872, at \*1 (N.D. Cal. Aug. 20, 2007) (same); *Kowalski v. Farella, Braun & Martel, LLP*, No. C-06-3341MMC, 2007 WL 2123324, at \*1 (N.D. Cal. July 23, 2007) (same); *Flores v. Prudential Ins. Co. of Am.*, No. C-03-5589 MMC, 2004 WL 2075448, at \*1 (N.D. Cal. Sept. 16, 2004) (same).

1 appropriate because the SEP Plan did not authorize ASIC to delegate its discretionary authority to  
2 Microsemi. *See* Dkt. No. 103 (“Opp’n”).

3 1. Although Plaintiffs’ argument that the pending motion is untimely has some  
4 persuasive force, the Court has an independent duty to determine the proper standard of review at  
5 trial. Accordingly, in order to ensure that this action is properly tried on its merits, the Court  
6 exercises its discretion to address the motion. *See Dukes v. Wal-Mart, Inc.*, 222 F.R.D. 189, 195  
7 (N.D. Cal. 2004) (exercising discretion to address untimely motion).

8 2. The Court finds that the appropriate standard of review is abuse of discretion  
9 because the SEP Plan unambiguously grants ASIC discretion to determine whether to make SEP  
10 Plan contributions. A denial of benefits challenged under 29 U.S.C. § 1132(a)(1)(B) “is to be  
11 reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary  
12 discretionary authority to determine eligibility for benefits or to construe the terms of the plan.”  
13 *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989); *see also Abatie v. Alta Health &*  
14 *Life Ins. Co.*, 458 F.3d 955, 963 (9th Cir.2006) (en banc) (“if the plan *does* confer discretionary  
15 authority as a matter of contractual agreement, then the standard of review shifts to abuse of  
16 discretion”).

17 In the section headed “Eligibility Requirements,” the plain language of the SEP Plan  
18 states that “[t]he employer agrees to provide *discretionary* contributions” to employees’ retirement  
19 accounts. *See* Dkt. No. 91-1 at AR0010 (emphasis added). The SEP Plan reiterates the  
20 discretionary nature of the contributions by instructing employers that they “are not required to  
21 make contributions every year” and informing employees that “[a]n employer is not required to  
22 make SEP contributions.” *Id.* at AR0010, AR0011.

23 Accordingly, the Court holds that the SEP Plan unambiguously confers on ASIC  
24 “discretionary authority to determine eligibility for benefits”: each year, ASIC had discretion to  
25 determine whether any employees would receive SEP Plan contributions. The applicable standard  
26 of review thus is abuse of discretion “informed by the nature, extent, and effect on the decision-  
27 making process of any conflict of interest that may appear in the record.” *See Abatie*, 458 F.3d at  
28 967.

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3. The Court’s conclusion is unchanged by Plaintiffs’ argument that ASIC improperly delegated its discretionary authority to Microsemi, thereby prompting de novo review. *See* Opp’n at 7-8. The four cases that Plaintiffs cite in support of this proposition are inapposite. *See Shane v. Albertson’s Inc.*, 504 F.3d 1166 (9th Cir. 2007); *Nelson v. EG & G Energy Measurements Grp., Inc.*, 37 F.3d 1384 (9th Cir. 1994); *Madden v. ITT Long Term Disability Plan for Salaried Employees*, 914 F.2d 1279 (9th Cir. 1990); *Anderson v. Unum Life Ins. Co. of Am.*, 414 F. Supp. 2d 1079 (M.D. Ala. 2006). Each of Plaintiffs’ authorities addresses the dissimilar situation in which an ERISA plan fiduciary attempts, properly or improperly, to delegate its authority over an ERISA plan. None of Plaintiffs’ citations contemplate the current scenario involving a plan fiduciary acquired by another entity that assumes “all of [the fiduciary’s] obligations and liabilities.” *See* Dkt. No. 25 ¶ 39.

\* \* \*

For the reasons above, the Court GRANTS Defendants’ motion to determine that the abuse of discretion standard applies to this action.

**IT IS SO ORDERED.**

Dated: December 2, 2016

  
HAYWOOD S. GILLIAM, JR.  
United States District Judge