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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

GEORGE MERZIOTIS, an individual,  
  
Plaintiff,  
  
vs.  
  
KAISER FOUNDATION HEALTH PLAN,  
INC., and DOES 1 through 20, inclusive,  
  
Defendants.

CASE NO. 10cv0686-LAB (WVG)  
**ORDER ON PARTIAL SUMMARY  
JUDGMENT**

This is an ERISA case involving Kaiser’s refusal to reimburse Merziotis for emergency medical expenses he incurred while traveling abroad. Now before the Court is Merziotis’s motion for partial summary judgment on the appropriate standard of review of that refusal. The Court rules on the motion with some hesitation. There is no pending dispositive motion in this case, and what Merziotis wants, in essence, is an advisory opinion on how the Court will ultimately rule on such a motion.

Kaiser argues that the appropriate standard of review is abuse of discretion because the plan document gives the health plan administrator, Kaiser Foundation Health Plan, discretion to review claims and determine whether a member is entitled to benefits. Merziotis argues that if abuse of discretion is in fact the correct standard, then the Court must be cautious in its review of the denial because Kaiser has a conflict of interest: it is both the funding source of the plan and the plan administrator. Merziotis also argues that the

1 Court may consider evidence beyond the administrative record to determine the degree of  
2 Kaiser's conflict.

3 Typically, the Court reviews the denial of ERISA benefits de novo. *Salomaa v. Honda*  
4 *Long Term Disability Plan*, 642 F.3d 666, 673 (9th Cir. 2011). In order to shift the standard  
5 of review to the more lenient "abuse of discretion" standard, the plan must "unambiguously  
6 provide *discretion* to the administrator." *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955,  
7 963 (9th Cir. 2006) (emphasis added). Discretion allows the administrator to determine who  
8 is eligible for benefits or otherwise construe the terms of the plan. *Id.* at 963. In this case, the  
9 language of the plan states:

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11 Health Plan is a named fiduciary to review claims under this Agreement.  
12 Group delegates to Health Plan the discretion to determine whether a  
13 Member is entitled to benefits under this Agreement. In making these  
14 determinations, Health Plan has discretionary authority to review claims in  
accord with the procedures contained in this Agreement and to construe  
this Agreement to determine whether the Member is entitled to benefits.

14

15 This language clearly shows that discretion lies with the plan administrator.

16 The Ninth Circuit has also held, however, that a "conflict of interest" exists where the  
17 "insurer acts as both funding source and administrator." *Salomaa*, 642 F.3d at 674; *see also*  
18 *Abatie*, 458 F.3d at 965 n.5 (interpreting *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S.  
19 101 (1989) to hold that a conflict exists when a plan administrator is also the sole source of  
20 funding). The court in *Abatie* called this type of situation a "structural conflict of interest." 458  
21 F.3d at 965. Where a conflict exists, it must be "weighed as a factor in determining whether  
22 there is an abuse of discretion," *id.*, and the significance of that factor will depend on the  
23 circumstances of the particular case. *See Salomaa*, 642 F.3d at 674. Specifically, abuse of  
24 discretion review should be informed by the "nature, extent, and effect on the  
25 decision-making process of any conflict of interest that may appear in the record." *Abatie*,  
26 458 F.3d at 967.

27 Further, a court applies "different levels of skepticism on account of conflicts of  
28 interest, depending on various factors such as inconsistent reasons for denial or evidence

1 of malice." *Salomaa*, 642 F.3d at 674. When reviewing a denial of benefits under a conflict  
2 of interest, a court "must determine the extent to which the conflict influenced the  
3 administrator's decision and discount to that extent the deference [it] accord[s] the  
4 administrator's decision." *Id.* (citing *Saffon v. Wells Fargo & Co. Long Term Disability Plan*,  
5 522 F.3d 863, 868 (9th Cir. 2008)). A district court must decide in each case how much  
6 weight to give the plan administrator's reasons for denying coverage. An "egregious conflict"  
7 may be given more weight, and therefore an abuse of discretion more readily found, than a  
8 "minor, technical conflict . . ." *Abatie*, 458 F.3d at 968. The level of skepticism a court gives  
9 to a conflict of interest may be low if the conflict of interest is unaccompanied, for example,  
10 "by any evidence of malice, of self-dealing, or of a parsimonious claims-granting history."  
11 *Id.* On the other hand, a conflict may be weighed more heavily if, for example, the  
12 administrator "provides inconsistent reasons for denial; fails adequately to investigate a claim  
13 or ask the plaintiff for necessary evidence; fails to credit a claimant's reliable evidence; or  
14 has repeatedly denied benefits to deserving participants by interpreting plan terms incorrectly  
15 or by making decisions against the weight of evidence in the record." *Id.* (citations omitted).

16 Under closer scrutiny, a conflicted administrator "may find it advisable to bring forth  
17 affirmative evidence" showing that its decision making process was not influenced by any  
18 conflict. *Id.* at 969 The Ninth Circuit has noted that this could be helpful in determining  
19 whether the plan administrator abused its discretion or not. *Id.* For example, "the  
20 administrator might demonstrate that it used truly independent medical examiners or a  
21 neutral, independent review process; that its employees do not have incentives to deny  
22 claims; that its interpretations of the plan have been consistent among patients; or that it has  
23 minimized any potential financial gain through structure of its business (for example, through  
24 a retroactive payment system)." *Id.* at 969, n.7.

25 In determining how skeptical to be where a conflict of interest is present, affording  
26 various weight to the factors mentioned, the Ninth Circuit has admitted that this skepticism  
27 standard is "a hard standard to apply." *Salomaa*, 642 F.3d at 675. The Supreme Court has  
28 emphasized that a court's task in weighing of a conflict "does not consist of a detailed set of

1 instructions . . . ." *Salomaa*, 674– 5 (quoting *Metropolitan Life Insurance Co. v. Glenn*, 554  
2 U.S. 105, 119 (2008)). The Supreme Court further refined this standard in *Conkright v.*  
3 *Frommert*, 130 S.Ct. 1640 (2010), holding that "a deferential standard of review remains  
4 appropriate even in the face of a conflict." *Id.* at 1646. It also noted, however, that "[a]pplying  
5 a deferential standard of review does not mean that the plan administrator will prevail on the  
6 merits." *Id.* at 1651. "Deference" is not a "talismanic word [ ] that can avoid the process of  
7 judgment." *Salomaa*, 642 F.3d at 675 (citation omitted). What deference means is that the  
8 plan administrator's interpretation of the plan "will not be disturbed if reasonable." *Conkright*,  
9 130 S.Ct at 1651 (quoting *Firestone*, 489 U.S., at 111) (internal quotation marks  
10 omitted). Therefore, the court will judge the reasonableness of Kaiser Foundation Health  
11 Plan's denial in light of a conflict of interest, and under the particular circumstances of this  
12 case.

13         The court now turns to defining the abuse of discretion standard. The test for abuse  
14 of discretion is whether a court is left with a "definite and firm conviction that a mistake has  
15 been committed," and a court cannot simply substitute its view for that of the fact finder.  
16 *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc). To do this, the  
17 court considers whether the application of a correct legal standard was "(1) illogical, (2)  
18 implausible, or (3) without support in inferences that may be drawn from the facts in the  
19 record." The Ninth Circuit has held that this "standard makes sense in the ERISA  
20 context . . . ." *Salomaa*, 642 F.3d at 675–76.

21         Plaintiff argues that it should have the opportunity to conduct discovery into matters  
22 outside the administrative record and to offer extrinsic evidence at the time of trial. The issue  
23 of discovery is not currently before the Court, but Plaintiff's argument makes reference to a  
24 court's consideration of the record. Under the abuse of discretion standard, review is limited  
25 to the record before the plan administrator. *Abatie*, 458 F.3d at 970. However, consideration  
26 of evidence outside of the administrative record is permitted in order to determine how much  
27 weight to give a conflict of interest. Therefore, a district court may consider evidence outside  
28 the administrative record "to decide the nature, extent, and effect on the decision-making

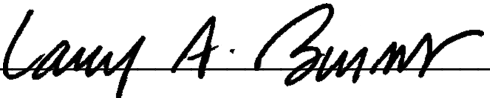
1 process of any conflict of interest." *Id.* This is the extent of a court's ability to consider  
2 evidence outside of the record, and once a conflict has been established by outside  
3 evidence or otherwise, the decision on the merits must rest on the administrative record  
4 itself. *Id.*

5 The language in the plan shows that discretion to determine eligibility for benefits lies  
6 with the plan administrator in this case. The abuse of discretion standard is therefore the  
7 appropriate standard here, and will be applied in a manner consistent with the law surveyed  
8 in this opinion. Plaintiff's motion for partial summary judgment is therefore **GRANTED**.

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**IT IS SO ORDERED.**

DATED: 10-4-11

  
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**HONORABLE LARRY ALAN BURNS**  
United States District Judge