

1 neurological injuries which have prevented him from working as a
2 cardiologist. (Second Am. Compl. ¶ 9 (#18).) Since the injuries,
3 Kaufman has worked in an administrative position. (Id.) Kaufman
4 was insured under a long-term disability benefits plan ("the Plan")
5 issued by Defendant Unum Life Insurance Company of America ("Unum").
6 (Id. ¶ 6-8.) The Plan is an employee welfare benefit plan governed
7 by the Employee Retirement Income Security Act of 1974 ("ERISA").
8 (D's Mot. for Summary Judgment at 2 (#55).) Kaufman submitted a
9 claim to Unum for long-term disability benefits. (Second Am.
10 Compl. ¶ 10 (#18).) Unum determined that Kaufman was eligible for
11 benefits, with certain reductions pertaining to his current
12 earnings. (D's Mot. for Summary Judgment at 2 (#55).) Unum
13 terminated all benefit payments when Kaufman's income reached eighty
14 percent of Kaufman's pre-disability income. (Id.) Unum also
15 determined that there had been an overpayment of benefits due to
16 errors in Kaufman's reported income. (Id.) Kaufman disputes that
17 there was any overpayment, and claims that his benefits should never
18 have been reduced by his post-disability income under the terms of
19 the long-term disability plan issued by Unum. (Second Am. Compl. ¶
20 11 (#18).)

21 On April 13, 2006, Kaufman sued Unum in Clark County, Nevada.
22 On May 18, 2006, Unum removed (#1) the action from the Clark County
23 Nevada District Court to the United States District Court for the
24 District of Nevada. On May 11, 2007, Kaufman filed an amended
25 complaint (#11), along with the Cardiovascular Center of Southern
26 Nevada Long Term Disability Plan as an additional plaintiff. On May
27 25, 2007, Unum filed its answer (#12) to the amended complaint

1 (#11), with counterclaims for equitable restitution and unjust
2 enrichment for the amount of the allegedly overpaid benefits. On
3 September 14, 2007, Kaufman filed his second amended complaint
4 (#18), along with a stipulation that all claims of the
5 Cardiovascular Center of Southern Nevada Long Term Disability Plan
6 were being dismissed with prejudice. On October 4, 2007, Unum filed
7 its answer (#21) to the second amended complaint (#18).

8 On September 10, 2010, Unum filed its motion for summary
9 judgment (#55). On November 5, 2010, Kaufman filed his response and
10 cross-motion for summary judgment (##63, 64) to Unum's motion for
11 summary judgment (#55). On December 3, 2010, Unum filed its reply
12 (#67) in support of its motion for summary judgment (#55) and
13 response (#68) to the cross-motion for summary judgment (#64). On
14 December 17, 2010, Kaufman filed a reply (#69) in support of his
15 cross-motion for summary judgment (#64). On January 31, 2011, Unum
16 filed a notice of supplemental authority (#70) relating to its
17 motion for summary judgment (#55). On February 3, 2011, Kaufman
18 filed his response (#71) to Unum's notice of supplemental authority
19 (#70). On July 5, 2011, Kaufman filed a notice of supplemental
20 authority (#74). On July 7, 2011, a hearing was held on the motion
21 for summary judgment (#55) and the cross-motion for summary judgment
22 (#64).

23 24 **II. Standard of Review**

25 **A. Legal Standard for Summary Judgment**

26 Summary judgment allows courts to avoid unnecessary trials
27 where no material factual dispute exists. N.W. Motorcycle Ass'n v.

1 U.S. Dep't of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994). The court
2 must view the evidence and the inferences arising therefrom in the
3 light most favorable to the nonmoving party, Bagdadi v. Nazar, 84
4 F.3d 1194, 1197 (9th Cir. 1996), and should award summary judgment
5 where no genuine issues of material fact remain in dispute and the
6 moving party is entitled to judgment as a matter of law. FED. R.
7 Civ. P. 56(c). Judgment as a matter of law is appropriate where
8 there is no legally sufficient evidentiary basis for a reasonable
9 jury to find for the nonmoving party. FED. R. CIV. P. 50(a). Where
10 reasonable minds could differ on the material facts at issue,
11 however, summary judgment should not be granted. Warren v. City of
12 Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 116 S.Ct.
13 1261 (1996).

14 The moving party bears the burden of informing the court of the
15 basis for its motion, together with evidence demonstrating the
16 absence of any genuine issue of material fact. Celotex Corp. v.
17 Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met
18 its burden, the party opposing the motion may not rest upon mere
19 allegations or denials in the pleadings, but must set forth specific
20 facts showing that there exists a genuine issue for trial. Anderson
21 v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Although the
22 parties may submit evidence in an inadmissible form – namely,
23 depositions, admissions, interrogatory answers, and affidavits –
24 only evidence which might be admissible at trial may be considered
25 by a trial court in ruling on a motion for summary judgment. FED.
26 R. Civ. P. 56(c); Beyene v. Coleman Sec. Servs., Inc., 854 F.2d 1179,
27 1181 (9th Cir. 1988).

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1 In deciding whether to grant summary judgment, a court must
2 take three necessary steps: (1) it must determine whether a fact is
3 material; (2) it must determine whether there exists a genuine issue
4 for the trier of fact, as determined by the documents submitted to
5 the court; and (3) it must consider that evidence in light of the
6 appropriate standard of proof. Anderson, 477 U.S. at 248. Summary
7 judgment is not proper if material factual issues exist for trial.
8 B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1264 (9th Cir.
9 1999). "As to materiality, only disputes over facts that might
10 affect the outcome of the suit under the governing law will properly
11 preclude the entry of summary judgment." Anderson, 477 U.S. at 248.
12 Disputes over irrelevant or unnecessary facts should not be
13 considered. Id. Where there is a complete failure of proof on an
14 essential element of the nonmoving party's case, all other facts
15 become immaterial, and the moving party is entitled to judgment as a
16 matter of law. Celotex, 477 U.S. at 323. Summary judgment is not a
17 disfavored procedural shortcut, but rather an integral part of the
18 federal rules as a whole. Id.

19 **B. Standard of Review for Cases Arising Under ERISA**

20 The applicable standard of review of ERISA disability benefits
21 is de novo unless the plan gives the administrator discretionary
22 authority to determine eligibility for benefits, in which case the
23 more deferential abuse of discretion standard applies. Metropolitan
24 Life Ins. Co. v. Glenn, 554 U.S. 105, 111 (2008). However, when the
25 plan gives discretion to an administrator who "operate[s] under a
26 conflict of interest, that conflict must be weighed as a 'factor in
27 determining whether there is an abuse of discretion.'" Id. (quoting
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1 Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 103 (1989).
2 In this case, while the Plan gives Unum discretionary authority as
3 the administrator, Unum is also the insurer of the Plan, creating a
4 conflict of interest which we must consider when evaluating Unum's
5 determinations regarding Kaufman's benefits. See id. However, a
6 court "may not merely substitute [its] view for that of the fact
7 finder," and should consider whether the plan administrator acted
8 illogically, implausibly, or without support in inferences that
9 could reasonably be drawn from facts in the record. Salomaa v.
10 Honda Long Term Disability Plan, 642 F.3d 666, 676 (9th Cir. 2011).

11 When interpreting terms in an ERISA plan, "the starting point
12 is the wording of the plan." Abatie v. Alta Health and Life Ins.
13 Co., 458 F.3d 955, 963 (9th Cir. 2006). "When disputes arise,
14 courts should first look to explicit language of the agreement to
15 determine, if possible, the clear intent of the parties." Gilliam
16 v. Nevada Power Co., 488 F.3d 1189, 1194 (9th Cir. 2007) (quoting
17 Armistead v. Vernitron Corp., 944 F.2d 1287, 1293 (6th Cir. 1991)).
18 However, the usual rule that ambiguities will be construed in favor
19 of the insured no longer applies when a plan administrator has
20 discretion to interpret the policy. Ehrensaft v. Dimension Works
21 Inc. Long Term Disability Plan, 33 Fed. Appx. 908, 910 (9th Cir.
22 2002)

23 Under Ninth Circuit law, interpretation of an ERISA insurance
24 policy is "governed by a uniform body of federal law." Evans v.
25 Safeco Life Ins. Co., 916 F.2d 1437, 1441 (9th Cir. 1990) (quoting
26 Sampson v. Mutual Benefit Life Ins. Co., 863 F.2d 108, 109-110 (1st
27 Cir. 1988). ERISA, however, excludes from preemption "any law of
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1 any State which regulates insurance.” 29 U.S.C. § 1144(b)(2)(A);
2 Evans, 916 F.2d at 1440.

3 Kaufman contends that California law requiring that courts
4 deviate from the explicit policy definition of “total disability” in
5 the occupational policy context controls. See Hangarter v.
6 Provident Life and Acc. Ins. Co., 373 F.3d 998, 1006 (9th Cir.
7 2004); Erreca v. Western States Life Ins. Co., 121 P.2d 689 (Cal.
8 1942). We disagree. This case is governed by ERISA, and not by
9 California state law. In an unpublished opinion, the Ninth Circuit
10 affirmed a district court case holding that “Nevada state law does
11 not govern the interpretation of the term ‘total disability’ in
12 Standard Insurance’s long term disability policy.” Buchanan v.
13 Standard Ins. Co., No. 05-16651, 2007 WL 2988756, at *1 (9th Cir.
14 2007). Rather, “[t]he interpretation of terms in an ERISA insurance
15 policy is governed by federal common law, not state law.” Id. We
16 therefore reject Kaufman’s contention that California state law
17 interpreting the term “total disability” applies to this case.
18 Furthermore, even if we look to state law to interpret this
19 insurance policy, we would look to Nevada law, which has not adopted
20 Erreca.

22 III. Statute of Limitations

23 In ERISA actions, the statute of limitations is provided by
24 state law. Northern California Retail Clerks Unions and Food Emp’rs
25 Joint Pension Trust Fund v. Jumbo Markets, Inc., 906 F.2d 1371, 1372
26 (9th Cir. 1990). Under Nevada law, the statute of limitations for
27 actions founded on a written contract is six years. NEV. REV. STAT. §

1 11.190(1). In ERISA underpayment cases, “[t]he statute of
2 limitations did not begin to run until [Plaintiff] had reason to
3 know of the underpayment.” Jumbo Markets, 906 F.2d at 1373.

4 Unum first broached its statute of limitations defense in its
5 reply (#67) in support of its motion for summary judgment (#55) and
6 as a response (#68) to Kaufman’s cross-motion for summary judgment
7 (#64).

8 Previously, failure to raise the statute of limitations as an
9 affirmative defense was considered waiver of the defense. See, e.g.,
10 389 Orange Street Partners v. Arnold, 179 F.3d 656, 663 n.3 (9th
11 Cir. 1999). In Randle v. Crawford, the Ninth Circuit considers a
12 waiver of statute of limitations argument. 604 F.3d 1047, 1052 (9th
13 Cir. 2010). The Ninth Circuit quotes a previous opinion, in which
14 it stated that “[t]here is no dispute that [the] statute of
15 limitations [for habeas petitions] is an affirmative defense. . . .
16 Accordingly, Federal Rules of Civil Procedure 8(c) and 12(b) require
17 that the state raise the statute of limitations in its first
18 responsive pleading to avoid waiving the defense.” Id. (quoting
19 Morrison v. Mahoney, 399 F.3d 1042, 1046 (9th Cir. 2005)). The
20 Ninth Circuit stated that a “pleading” is a complaint or answer, a
21 reply to a counterclaim, an answer to a cross-claim, and a third-
22 party complaint or answer. In an unpublished opinion, the Ninth
23 Circuit briefly stated that “the DEA litigated [the plaintiff’s]
24 claim for roughly seven years to a decision on the merits before the
25 agency, and failed to affirmatively set forth statute of limitations
26 as a defense in its first responsive pleading before the district
27 court as required by Fed. R. Civ. P. 8(c). As a result, we conclude

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1 that the Government waived its timeliness objection." Burnett v.
2 Mukasey, 256 Fed. Appx. 940, 940 (9th Cir. 2007).

3 This strict rule, however, has been liberalized to some extent,
4 at least in cases outside of the habeas context, where the
5 Government may be held to a higher standard. In Magana v.
6 Commonwealth of the Northern Mariana Islands, the Ninth Circuit
7 stated that "defendants may raise an affirmative defense for the
8 first time in a motion for summary judgment only if the delay does
9 not prejudice the plaintiff." 107 F.3d 1436, 1446 (9th Cir. 1997).
10 In Magana, the Ninth Circuit concluded that there was no prejudice
11 because the defendant raised the statute of limitations defense
12 "three months after filing their answer." Id. Our case, however,
13 is distinguishable from Magana. In Venters v. City of Delphi, the
14 Court of Appeals for the Seventh Circuit considered a case similar
15 to ours. 123 F.3d 956, 968-69 (7th Cir. 1997). The Seventh Circuit
16 noted that appellate courts no longer find a technical failure to
17 comply with Rule 8(c) fatal. Id. at 968. However, the Seventh
18 Circuit noted that in order for Rule 8(c) to not be a nullity, the
19 defense should not be invoked "at the eleventh hour," but should be
20 brought at the earliest possible moment. Id. at 969. In Venters,
21 the Seventh Circuit refused to consider the defense, regardless of
22 its actual merits, because the defense was only brought in a reply
23 memorandum to a motion for summary judgment. Id. While in our
24 case, Plaintiff was given an opportunity to respond in his reply
25 brief in support of his cross-motion for summary judgment (#64), we
26 find that the great delay in bringing the defense has resulted in

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1 prejudice that does not warrant forgiving Defendant's failure to
2 assert the defense at an earlier time.

3 We agree with Kaufman that Unum's statute of limitations
4 argument is simply too late. This action was filed in 2006. Unum
5 did not plead statute of limitations in its answer (#21) to the
6 second amended complaint (#18), nor did Unum file a separate motion
7 to dismiss, or a motion for summary judgment, based on the statute
8 of limitations. Discovery was conducted, and the case has now been
9 pending for many years. If we were to decide the case on statute of
10 limitations grounds and conclude that Kaufman's claim is time-
11 barred, many years of costly litigation and discovery will have gone
12 to waste. We recognize that in some cases, the defense may only
13 become apparent after discovery, and therefore we are not stating
14 that there is a blanket rule that the defense may not be asserted
15 after discovery has been conducted. Without delving into the
16 merits, however, we note that Unum bases its statute of limitations
17 defense on the basis of a letter that Kaufman sent to Unum,
18 questioning Unum's decisions regarding his benefit calculations. We
19 do not see how that letter, if it is properly the basis of a statute
20 of limitations defense, could only be discovered four years after
21 the suit was filed, two years after discovery began, and after the
22 parties were prompted to file a pretrial order. We conclude,
23 therefore, that Unum has waived its statute of limitations defense
24 due to the prejudice Kaufman has suffered in having to confront the
25 defense too late in the time line of the litigation.

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1 IV. Discussion

2 In order to resolve Unum's motion for summary judgment (#55)
3 and Kaufman's cross-motion for summary judgment (#64), we will
4 consider whether Kaufman's benefits should be reduced by his post-
5 disability earnings, and if so, whether the benefits should be
6 reduced by all his income, or only by his monthly salary, and
7 whether Unum is entitled to repayment of overpaid benefits, if any.

8 **A. Unum Correctly Determined that Kaufman's Benefits Should Be**
9 **Reduced By Kaufman's Post-Disability Earnings.**

10 Unum initially paid out benefits to Kaufman with a reduction
11 for his post-disability income. Kaufman argues that Unum should not
12 have reduced Kaufman's benefits by his earnings. Under Kaufman's
13 interpretation of the policy, Kaufman is entitled to the maximum
14 monthly benefit of \$15,000 regardless of any other income, as long
15 as Kaufman is considered disabled. That is, Kaufman contends that
16 the policy protects Kaufman's ability to perform in his regular
17 occupation, and because Kaufman was unable to do so after his
18 disability, he is entitled to full benefits despite his ability to
19 work in other occupations.

20 The policy applies certain terms differently to the two
21 eligible classes. The eligible classes are Class 1, which is
22 comprised of physicians, and Class 2, comprised of all other
23 employees. Kaufman falls under Class 1. Class 1 employees are
24 eligible for a higher maximum monthly benefit, and are required to
25 make employee contributions, which Class 2 employees are not
26 required to do.

1 The policy sets out a general overview of benefits in its
2 "Amounts of Insurance" section. That section provides that for
3 Class 1 physicians, the amount of insurance is "60% (benefit
4 percentage) of basic monthly earnings not to exceed the maximum
5 monthly benefit, less other income benefits." ((Resp. to Mot. for
6 Summary Judgment Ex. 1, at 4 (#63-1).) Basic monthly earnings
7 refers to the insured's monthly rate of earnings from the employer
8 just prior to the disability date, but "does not include
9 commissions, bonuses, overtime pay and other extra compensation."
10 (Id. at 5.) Income benefits are, *inter alia*, amounts the insured is
11 eligible for under workers' compensation laws or other group
12 insurance plans. (Id. at 14.) The section then states "[n]ote:
13 This benefit is subject to reductions for earnings as provided in
14 the Monthly Benefit section of this policy." (Id. at 4.) The
15 "Amounts of Insurance" section then caps the maximum monthly benefit
16 for Class 1 physicians at \$15,000. (Id.)

17 The "Amounts of Insurance" for Class 2 employees contains the
18 same language, down to the note about "reductions for earnings,"
19 except that it caps the maximum monthly benefit for Class 2
20 employees at \$5,000. (Id.)

21 The "Monthly Benefit" section of the policy states that for
22 Class 1, the monthly benefit is the lesser of sixty percent of the
23 insured's basic monthly earnings or \$15,000, minus other income
24 benefits. (Id. at 13.) This language corresponds to the language
25 in the "Amounts of Insurance" section prior to the "Note" about
26 reductions for earnings. The "Monthly Benefit" section, however,
27 does not end there. It goes on to state that "if the insured is

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1 earning more than 20% of his indexed pre-disability earnings in his
2 regular occupation or another occupation," the monthly benefit will
3 be reduced by the insured's monthly earnings received while
4 disabled. (Id. at 14.) This part of the "Monthly Benefit" section
5 corresponds to the "Note" contained in the "Amounts of Insurance"
6 section stating that benefits are subject to reductions for earning
7 as provided in the "Monthly Benefit" section. While Kaufman argues
8 that this provision applies only to Class 2 employees, to read the
9 policy to apply that language only to Class 2 employees would be to
10 disregard the clear directive in the previous section that benefits
11 are subject to reductions in earnings as provided in the "Monthly
12 Benefit" section. That directive was clearly stated for both Class
13 1 and Class 2 beneficiaries. Our reading of the policy coincides
14 with Unum's initial determination of the amount of benefits to which
15 Kaufman was entitled. Nor did Kaufman dispute this interpretation
16 of the policy for many years. Kaufman relies heavily on the fact
17 that the "Monthly Benefit" section uses largely identical language
18 under the headings "Class 1" and "Class 2" concerning the basic
19 calculation of benefits, followed by a calculation of how to reduce
20 benefits by earnings, applicable to both classes. It is true that
21 Unum could have, perhaps, avoided any litigation on this issue by
22 more clearly labeling the latter part of the "Monthly Benefits"
23 section under a heading of "All Classes." Unum did not do so,
24 however, we find no difficulty in agreeing with Unum's
25 interpretation of the policy, considering that the "Amounts of
26 Insurance" section clearly gave notice that the "Monthly Benefits"

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1 section would set out a calculation for "reductions for earnings"
2 for Class 1 physicians, as well as Class 2 employees.

3 We do not find persuasive Kaufman's argument that the
4 "reductions for earnings" applies to the "less other income
5 benefits" language of the policy. The "less other income benefits"
6 language is already contained in the basic calculation of damages in
7 "Amounts of Insurance" before the "Note" that the benefit is subject
8 to earnings. Therefore, the policy indicates that the reductions
9 for earnings is something separate from the reduction for income
10 benefits. Furthermore, we agree with Unum that income benefits,
11 which are defined as benefits such as workers' compensation or group
12 insurance benefits, are not "earnings."

13 Any doubt about the applicability of the reduction for earnings
14 to Class 1 physicians is removed by examination of the summary plan
15 description ("SPD") provided by Kaufman and cited to by Unum in its
16 motion. (Ex. 1 (#34-2).) The SPD is referred to as a "copy of the
17 policy" by Kaufman. It appears to be a detailed overview of the
18 policy that was provided to Kaufman. The SPD only overviews the
19 policy as it applies to Class 1 physicians, and contains the
20 language that "[b]ut, if you are earning more than 20% of your
21 indexed pre-disability earnings in your regular occupation or
22 another occupation, then the monthly benefit will be figured as
23 follows"

24 Nor does the dispute over the use of the term "partial
25 disability" render our above conclusion incorrect. While the term
26 "partial disability" is only expressly defined under Class 2, the
27 definition of partial disability is included as one form of

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1 disability under Class 1. That is, a Class 1 employee, such as
2 Kaufman, is disabled if he is earning at least twenty percent less
3 per month in his regular occupation or another occupation due to an
4 injury or sickness. Whether the term "partial disability" is used
5 or not does not appear to make any difference to the monthly benefit
6 calculation, which does not refer to the term "partial disability"
7 to determine any applicable reductions. The "Monthly Benefit"
8 section merely sets out that benefits will be reduced if the insured
9 is earning a certain amount in his regular occupation or another
10 occupation. Nothing in that section hinges upon whether an employee
11 is labeled "disabled" or "partially disabled."

12 We also disagree with Kaufman's argument pertaining to the use
13 of "or" between the alternative definitions of "disabled" for Class
14 1 employees. The challenged provision provides that:

15 "Disability" and "disabled" mean that because of
16 injury or sickness:

17 1. the insured cannot perform each of the
18 material duties of his regular occupation; or

19 2. the insured while unable to perform all
20 of the material duties of his regular occupation
21 on a full-time basis, is:

22 a. performing at least one of the
23 material duties of his regular occupation or
24 another occupation on a part-time or full-time
25 basis; and

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1 b. earning currently at least 20% less
2 per month than his indexed pre-disability
3 earnings due to that same injury or sickness.
4 (Resp. to Mot. for Summary Judgment Ex. 1, at 11 (#63-1).) Kaufman
5 argues that he falls under the first definition of disabled, that
6 is, that "the insured cannot perform each of the material duties of
7 his regular occupation" and therefore necessarily qualified for a
8 full benefit. Nothing in the policy mandates such a conclusion. In
9 fact, Kaufman fell under the second definition at times because he
10 was undisputedly working as a medical administrator following his
11 injuries and earning at least 20% less per month than his indexed
12 pre-disability earnings. Regardless, even were we to find that
13 Kaufman also falls under the first definition, the policy does not
14 state that those falling under the first definition of disability
15 are entitled to maximum monthly benefits regardless of any post-
16 disability earnings.

17 Finally, while we do apply a heightened skepticism to Unum's
18 decisions in light of its conflict of interest as plan administrator
19 and provider, we note that the relevant standard is still abuse of
20 discretion, albeit not as deferential as in a case where no conflict
21 of interest exists. Here, however, even if we were to apply a de
22 novo standard of review, we would still agree with Unum's conclusion
23 that Kaufman's benefits should be reduced by his monthly earnings in
24 accordance with the policy.

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1 **B. Unum Did Not Abuse Its Discretion In Deciding that Kaufman's**
2 **Benefits Should Be Reduced By All His Monthly Earnings.**

3 While we conclude that Unum correctly applied the terms of the
4 policy when it determined that Kaufman's benefits must be reduced by
5 his post-disability earnings, we must also decide whether Unum
6 abused its discretion in calculating the amount of that reduction.
7 The policy provides that benefits will be reduced by an insured's
8 "monthly earnings" rather than specifying "basic monthly earnings"
9 or all monthly earnings. (Resp. to Mot. for Summary Judgment Ex. 1,
10 at 14 (#63-1).) Kaufman contends that Unum is not entitled to
11 reduce Kaufman's benefits by extra compensation separate from basic
12 monthly earnings. While Unum agrees that the term "basic monthly
13 earnings" is defined to exclude extra compensation such as
14 commissions, bonuses, and overtime pay, Unum claims that the use of
15 "monthly earnings" rather than the more specific "basic monthly
16 earnings" was used purposefully to allow Unum to differentiate
17 between two different circumstances. Specifically, when an insured
18 continues to work in his regular occupation, Unum claims that only
19 his basic monthly earnings would be used to reduce benefits.
20 However, when an insured works in a different occupation after
21 becoming disabled, as in Kaufman's case, all of the insured's
22 compensation is used to determine the reduction amount from the
23 baseline benefits calculation in order to prevent an insured from
24 structuring his income heavily on extra compensation to maximize his
25 disability benefits.

26 The policy does not define the term "monthly earnings" to
27 either exclude or include bonus compensation such as stock options,
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1 commissions, or bonuses. We conclude that, at the very least, there
2 is an ambiguity as to the definition of "monthly earnings." The
3 ambiguity is especially salient because under Unum's interpretation,
4 the term "monthly earnings" is defined differently for employees
5 working in their regular occupations and for employees working in
6 different occupations. This distinction is not made clear by policy
7 language. In a normal insurance contract case, this ambiguity would
8 be construed in favor of the insured, and Unum would not be entitled
9 to include all of Kaufman's earnings to reduce Kaufman's benefits.
10 See Blankenship v. Liberty Life Assur. Co. of Boston, 486 F.3d 620,
11 625 (9th Cir. 2007) . However, "the rule of *contra proferentem*-
12 under which ambiguous policy language is construed in favor of the
13 insured-does not apply on review for abuse of discretion."
14 Ehrensaft v. Dimension Works Inc. Long Term Disability Plan, 33 Fed.
15 Appx. 908, 910 (9th Cir. 2002).

16 The disability plan in this case undisputedly grants discretion
17 to Unum to interpret the policy. While we must consider Unum's
18 conflict of interest in this case as a factor, we are still not at
19 liberty to merely substitute our own judgment for Unum's in
20 interpreting the policy. See Conkright v. Frommert, 130 S.Ct. 1640,
21 1646 (2010) ("when the terms of a plan grant discretionary authority
22 to the plan administrator, a deferential standard of review remains
23 appropriate even in the face of a conflict."). The Ninth Circuit
24 recently stated that the test for abuse of discretion is whether "we
25 are left with a definite and firm conviction that a mistake has been
26 committed," although "a higher degree of skepticism is appropriate
27 where the administrator has a conflict of interest." Salomaa v.

1 Honda Long Term Disability Plan, 642 F.3d 666, 676 (9th Cir. 2011)
2 (quoting United States v. Hinkson, 585 F.3d 1247 (9th Cir. 2009) (en
3 banc)).

4 When a conflict of interest exists, the Ninth Circuit has held
5 that a court must consider whether the conflict influenced the
6 decision by the plan. Lang v. Long Term Disability Plan, 125 F.3d
7 794, 798 (9th Cir. 1997). The Ninth Circuit explained that a plan
8 may show that the conflict of interest did not affect its decision
9 by providing evidence that the “decision in fact benefitted the plan
10 as a whole and therefore the rest of the beneficiaries under the
11 plan.” Id. Unum asserts that its interpretation of the policy is
12 reasonable, and may not be disturbed upon review unless we find the
13 interpretation unreasonable. Unum is correct that we must find
14 Unum’s interpretation unreasonable in order to grant Kaufman’s claim
15 that only his basic monthly earnings may be used to calculate a
16 reduction in benefits.

17 The policy is of little help in this case. Unum could have
18 used the term “basic monthly earnings” which was defined to exclude
19 bonus compensation, but did not, which may indicate that all monthly
20 earnings were meant to be used in the calculation. However, that is
21 not Unum’s interpretation of the policy. Unum contends that the
22 term “monthly earnings” is construed separately based on whether the
23 insured is working for the same, or for a different employer. But
24 Unum failed to specifically provide guidance in the policy language
25 that benefits will be reduced differently if the insured changes
26 employers. Unum’s reading of the policy would be stronger if Unum

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1 used all monthly earnings regardless of whether the insured works
2 for the same, or a different employer.

3 However, Unum asserts that it has good reason to interpret the
4 policy as it does. The reason is that when an insured continues to
5 work for the same employer, Unum may be reasonably assured that the
6 insured continues to be paid in a similar manner to that which had
7 been used pre-disability. When an insured works for a different
8 employer, however, Unum argues that the insured may be in a position
9 to structure his or her income in a way such that "basic monthly
10 earnings" is low, but bonus compensation is high. If Unum were only
11 to reduce benefits by basic monthly earnings in such a case, the
12 insured would be entitled to a windfall, because the insured would
13 be earning extra income while being entitled to the same benefits as
14 an insured with little to no bonus compensation.

15 While we find that the policy language is unnecessarily
16 ambiguous, and Unum's interpretation only exacerbates that
17 ambiguity, we cannot find that Unum's apparent conflict of interest
18 led to an unreasonable reading of the policy. The policy does not
19 indicate whether basic monthly earnings or all monthly earnings
20 should be used to calculate reduction of benefits. The fact that
21 the policy did not use the defined term "basic monthly earnings"
22 lends some credence to Unum's claim that Kaufman's benefits must be
23 reduced by all his monthly earnings. Furthermore, Unum's
24 interpretation, while somewhat tortuous, is in accordance with the
25 Plan's goals of compensating employees who become disabled, rather
26 than rewarding or creating a windfall for employees who are in the
27 position to dictate the structure of their compensation, or to

28

1 otherwise manipulate the Plan in order to receive more benefits than
2 an equivalently-placed insured might receive. We conclude,
3 therefore, that Unum is entitled to reduce Kaufman's benefits by all
4 his monthly earnings, rather than merely his basic monthly earnings.

5 **C. Unum is Not Entitled to Repayment.**

6 Unum's counterclaim alleges that Unum overpaid Kaufman, and
7 that Unum is entitled to reimbursement of the overpayment. Kaufman
8 asserts that Unum has no right to repayment. Under 29 U.S.C. §
9 1132(a)(3), ERISA authorizes civil actions "to obtain other
10 appropriate equitable relief" to enforce ERISA or to redress any
11 violation of ERISA.

12 In Sereboff v. Mid Atlantic Medical Services, the Supreme Court
13 held that the plan has a right to reimbursement under 29 U.S.C. §
14 1132(a)(3) when the plan contains a provision requiring repayment.
15 547 U.S. 356, 360 (2006). In our case, however, the Plan only
16 refers to repayment of overpayment caused by awards received under
17 the United States Social Security Act, the Canada Pension Plan, or
18 the Quebec Pension Plan, or similar plans or acts. ((Resp. to Mot.
19 for Summary Judgment Ex. 1, at 15 (#63-1).) The Plan has no express
20 provision providing for repayment in the case that Unum
21 miscalculates the benefits due to an insured. Other courts have
22 refused to extend Sereboff to cases in which there is no express
23 agreement to repay; rather, the courts hold that the strict tracing
24 rules found in Great-West Life & Annuity Ins. Co. v. Knudson, 534
25 U.S. 204, 215 (2002), prohibit plans from recovering overpayment
26 unless the overpayment could be traced to particular funds or
27 property in the defendant's possession. See, e.g., Sivalingam v.

1 Unum Life Ins. Co. of America, 2011 WL 1584055 *11 (E.D. Pa. April
2 26, 2011); Fier v. Unum Life Ins. Co. of America, 2009 WL 3644187
3 *14 (D. Nev. November 3, 2009). Because Unum cannot impose an
4 equitable lien under a theory of restitution without providing
5 evidence of "particular funds or property" in Kaufman's possession,
6 we hold that Unum is not entitled to repayment of any overpayment
7 that Kaufman may have received under Unum's calculation of damages.

8 Unum further argues that it may recover its overpayment under
9 state law, if ERISA does not provide a remedy. In Cooperative Ben
10 Administrators Inc. v. Ogden, the Court of Appeals for the Fifth
11 Circuit held that "ERISA plan fiduciaries do not have a federal
12 common law right to sue a beneficiary for legal (as distinct from
13 equitable) relief on a theory of unjust enrichment or restitution"
14 because Congress "specifically contemplated the possibility of
15 extending to plan fiduciaries a right to sue a participant for money
16 damages and chose instead to limit fiduciaries' remedies to those
17 typically available in equity." 367 F.3d 323, 332, 336 (5th Cir.
18 2004).

19

20

IV. Conclusion

21 Under the policy, Unum is entitled to reduce Kaufman's benefits
22 by the amount of all his monthly earnings. Unum is not entitled,
23 however, to repayment of any overpayment made to Kaufman because
24 there was no express agreement to repay, and Unum has not provided
25 any evidence of particular funds or property to which the
26 overpayment can be traced.

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