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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JOHN SENDER,  
Plaintiff,  
v.  
FRANKLIN RESOURCES INC,  
Defendant.

Case No. 11-cv-03828-EMC (SK)

**ORDER RE PARTIES' JOINT LETTER  
BRIEF OF FEBRUARY 12, 2016  
REGARDING ERISA DISCOVERY  
DISPUTE**

Regarding Docket No. 185

Before the Court is the parties' Letter Brief Regarding ERISA Discovery Dispute (Dkt. No. 185) in which Plaintiff John Sender seeks the depositions of five individuals and responses to written discovery from Defendant Franklin Resources ("Franklin"). The Court has reviewed and considered the brief, Plaintiff's Response to the February 18, 2016 Order (Dkt. No. 190), the record in this case, and the March 2, 2016 oral argument of the parties, and **HEREBY GRANTS IN PART AND DENIES IN PART** the discovery sought by Plaintiff. Specifically, Plaintiff's request for deposition testimony is **GRANTED IN PART**, but Plaintiff shall only be permitted to depose the representative(s) of Franklin designated on the specific topics set forth in this Order, consistent with the procedure set forth in Federal Rule of Civil Procedure 30(b)(6). The request to depose the specific individuals named is **DENIED**. Further, the request for Defendant's responses to written discovery is **DENIED**.

**A. Conflict of Interest is a Proper Subject for ERISA Discovery.**

Plaintiff seeks deposition testimony and written discovery to explore how Franklin's conflict of interest affected the administrative review of Plaintiff's claim. Judge Chen previously acknowledged the conflict of interest in this matter and the propriety of discovery on the subject. Specifically, he stated that, "given the obvious conflict of interest in this case, discovery is

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1 warranted to inform the Court’s review of the administrator’s decision on the Plaintiff’s claim for  
2 benefits.” (Dkt. No. 169, 2:5-10.) Judge Chen also recognized the limits to such discovery.  
3 “[W]hile discovery into a conflict of interest is permitted, it too ‘must be narrowly tailored to  
4 reveal the nature and extent of the conflict, and must not be a fishing expedition’” particularly in  
5 the context of ERISA, “where the use of deposition is an extraordinary measure that goes beyond  
6 the normal framework of ERISA appeals.” (Dkt. No. 181, 2:14-18 (citing *Zewdu v. Citigroup*  
7 *Long Term Disability Plan*, 264 F.R.D. 622, 626 (N.D. Cal. 2010).) Plaintiff previously sought to  
8 depose ten individuals. (Dkt. No. 179.) Given that the discovery sought was not narrowly drawn,  
9 Judge Chen ruled that Plaintiff had not demonstrated the need for depositions or the legal authority  
10 that such extraordinary measures are permissible in this case, but he acknowledged that Plaintiff  
11 may be able to make a showing in the future, justifying such discovery. (Dkt. No. 181, 2:19-23.)

12 In this new attempt at discovery, Plaintiff relies on *Stephan v. Unum Life Ins. Co. of*  
13 *America*, 697 F.3d 917 (9th Cir. 2012) in which the Ninth Circuit found reversible error where the  
14 district court failed to allow Plaintiff discovery into the “nature and impact of a conflict of  
15 interest” and weigh that conflict on summary judgment. *Id.* at 929. While review of a benefits  
16 determination is typically limited to the administrative record, “the evaluation of a conflict of  
17 interest is not so limited...evidence outside the administrative record is ‘properly considered’ in  
18 determining the extent to which a conflict of interest affected an administrator’s decision.” *Id.* at  
19 930 (citation omitted). Moreover, egregious procedural irregularities in the claims process could  
20 warrant a court’s *de novo* review of the administrator’s decision to deny benefits. *Abatie v. Alta*  
21 *Health & Life Insurance Co.*, 458 F.3d 955, 971, (9th Cir. 2009); *Sizemore v. PG&E Ret. Plan*,  
22 952 F. Supp.2d 894, 899 (N.D. Cal. 2013).

23 In the discovery dispute currently before the Court, Plaintiff has provided adequate legal  
24 authority to justify the need for some discovery. Discovery to determine evidence of Franklin’s  
25 conflict and bias and any procedural irregularity that may have occurred in the administration of  
26 Plaintiff’s claim is appropriate. However, that discovery must be limited in scope to the needs of  
27 the case in accordance with Rule 26 of the Federal Rules of Civil Procedure.

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**B. The Scope of Discovery.**

1 While discovery may be appropriate, its scope must be “proportionate to the needs of the  
2 case, considering the importance of the issues at stake in the action, the amount in controversy, the  
3 parties’ relative access to relevant information, the parties’ resources, the importance of the  
4 discovery in resolving the issues, and whether the burden or expense of the proposed discovery  
5 outweigh its likely benefit.” Fed.R.Civ.P. 26(b)(1). Here, Plaintiff specifically seeks to depose  
6 five individuals: Nicole Smith (Franklin Benefits Manager), R. Bradford Huss and Robert  
7 Schwartz (Franklin’s outside counsel), Dan Carr (Franklin in-house counsel), and Rupert Johnson,  
8 Jr. (Vice Chairman of Franklin at the time of administration of the claim). Plaintiff seeks these  
9 depositions “to unpack exactly how and to what extent Franklin’s conflict of interest affected that  
10 administration.” (Dkt. No. 185, 1-2.) Plaintiff also seeks responses to ten interrogatories and ten  
11 requests for administration on the subject of Franklin’s conflict of interest.  
12

13 While the issue of conflict is important to the appeal of this ERISA claim and the amount  
14 in controversy significant, the issue does not require the duplication of testimony by deposing five  
15 people and written discovery on the subject. Further, it is debatable whether the deponents noted  
16 are the appropriate individuals to testify on the subject of conflict or bias during the administration  
17 of the claim. Rather than deposing the foregoing individuals and propounding written discovery,  
18 Plaintiff shall be permitted to conduct more limited discovery on the subject of conflict, much of  
19 which was described in Plaintiff’s Response to the February 18, 2016 Order. (Dkt. No. 190.)  
20 Plaintiff shall be permitted the opportunity to conduct a Fed.R.Civ.P. 30(b)(6) deposition of the  
21 individual(s) knowledgeable of the following subjects:

- 22 (1) Steps taken to investigate the subject claim.
- 23 (2) The factual basis for the denial of the claim.
- 24 (3) Franklin’s information regarding the address of Plaintiff, including record of his  
25 address in 1982, information on this subject gained during the administration and  
26 investigation of the claim, the removal of termination distribution documentation with  
27 the wrong address from the exhibits provided to the administration committee.
- 28 (4) When the decision to prepare the denial of claim was made and by whom.

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- (5) Evidence that Plaintiff did or did not receive ESOP shares.
- (6) Procedures in place in 2007-08 to reduce bias in claim administration.
- (7) Communications between Plaintiff and Defendant’s representatives.

Based on the foregoing, the Defendant is ORDERED to designate individual(s) to testify on the foregoing, consistent with the provisions of Fed.R.Civ.P. 30(b)(6). The parties are ORDERED to meet and confer regarding the location and timing of the deposition(s). Plaintiff’s request to depose the five individuals previously noted and request to propound written discovery is hereby DENIED.

**IT IS SO ORDERED.**

Dated: March 2, 2016

  
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SALLIE KIM  
United States Magistrate Judge