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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL MITCHELL,	)	Case No. CV 05-00810 DDP (RNBx)
	)	
Plaintiff,	)	<b>FINDINGS OF FACT AND CONCLUSIONS</b>
	)	<b>OF LAW</b>
v.	)	
	)	
METROPOLITAN LIFE INSURANCE	)	
COMPANY; CB RICHARD ELLIS	)	
LONG TERM DISABILITY PLAN;	)	
UNUM LIFE INSURANCE COMPANY	)	
OF AMERICA; <del>CB RICHARD ELLIS</del>	)	
<del>MEDICAL PLAN; CB RICHARD</del>	)	
<del>ELLIS LIFE INSURANCE PLAN;</del>	)	
<del>CB RICHARD ELLIS</del>	)	
<del>PENSION/RETIREMENT PLAN,</del>	)	
	)	
Defendants.	)	
	)	

Plaintiff Michael Mitchell brings this action under 29 U.S.C. section 1132(a)(1)(B) seeking long-term disability ("LTD") benefits pursuant to a benefit plan provided by his employer, CB Richard Ellis ("CBRE"). Mitchell claims a disability for several health problems, including chronic fatigue syndrome, restless legs syndrome, hemochromatosis, and depression.

From January 1, 2000 until December 1, 2003, the LTD plan was administered under a group insurance policy by Defendant and

1 cross-claimant UNUM Life Insurance Company of America ("UNUM"). As  
2 of January 1, 2004, the LTD plan was administered under a group  
3 insurance policy by Defendant Metropolitan Life Insurance Company  
4 ("MET").

5 In April 2004, when MET covered the plan, Mitchell filed with  
6 MET for LTD benefits. In his initial administrative claim with  
7 MET, Mitchell stated that his disability began in October 2003,  
8 when UNUM covered the plan. MET initially denied Mitchell's claim  
9 because he was "still working." MET then denied Mitchell's appeal  
10 based upon a lack of objective evidence that Mitchell was disabled  
11 under the plan. After the appeal, Mitchell instituted this action.  
12 For the first time during the litigation, MET raised the defense  
13 that it was not the responsible claims administrator or insurer  
14 because Mitchell's alleged disability had started in October 2003  
15 when he was covered under the UNUM policy. MET argued that UNUM  
16 was the responsible administrator and insurer.

17 Mitchell next filed an administrative claim for LTD benefits  
18 with UNUM. UNUM denied Mitchell's claim because it found that he  
19 did not suffer from a disability and that the late filing of the  
20 claim prejudiced its evaluation. On appeal, UNUM additionally  
21 found that Mitchell was still working after the date of his claimed  
22 disability, rendering him ineligible for LTD benefits. Mitchell  
23 then added UNUM to this action.

24 After considering the written submissions and documentary  
25 evidence of the parties, and hearing oral argument, the Court  
26 adopts the following Findings of Fact and Conclusions of Law. The  
27 Court holds that MET abused its discretion in denying Mitchell's

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1 claim, and that MET is the responsible claims administrator and  
2 insurer for Mitchell's disability.

3 **FINDINGS OF FACT<sup>1</sup>**

4 **I. The Parties**

- 5 1. Plaintiff Michael Mitchell has been an employee of CB  
6 Richard Ellis ("CBRE") since 1983. He is currently a  
7 vice president of sales.
- 8 2. CBRE, Mitchell's employer, is a company that specializes  
9 in real estate services.
- 10 3. Defendant Metropolitan Life Insurance Company ("MET")  
11 issues insurance policies, including disability insurance  
12 coverage for employee benefit plans.
- 13 4. Defendant and cross-claimant UNUM Life Insurance Company  
14 of America ("UNUM") issues insurance policies, including  
15 disability insurance coverage for employee benefit plans.  
16 UNUM is a subsidiary of UNUMProvident Corporation.

17 **II. The UNUM Disability Insurance Policy**

- 18 5. Effective January 1, 2000, UNUM issued its insurance  
19 policy ("UNUM Policy") to CBRE, providing LTD benefits  
20 for eligible employees. (UNUM 34.) UNUM was the insurer  
21 and claims administrator for the policy.
- 22 6. The relevant portion of the UNUM Policy on coverage  
23 provides:  
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27 <sup>1</sup> Unless otherwise noted, all facts come from either the MET  
28 Administrative Record ("MET") or the UNUM Administrative Record  
("UNUM").

1 WHEN DOES YOUR COVERAGE END? Your coverage under the policy  
2 or a plan ends on the earliest of: the date the policy or plan  
3 is cancelled . . .

4 UNUM will provide coverage for a payable claim which occurs  
5 while you are covered under the policy or plan. (UNUM 45.)

6 7. The UNUM POLICY defines "disability" as follows:

7 [Y]ou are limited from performing the material and substantial  
8 duties of your regular occupation due to your sickness or  
9 injury; and

10 [Y]ou have a 20% or more loss in your indexed monthly earnings  
11 due to the same sickness or injury; and

12 [D]uring the elimination period,<sup>2</sup> you are unable to perform  
13 any of the material and substantial duties of your regular  
14 occupation.

15 After 24 months of payments you are disabled when UNUM  
16 determines that due to the same sickness or injury, you are  
17 unable to perform the duties of any gainful occupation for  
18 which you are reasonably fitted by education, training or  
19 experience. (UNUM 47) (emphasis omitted).

20 8. To be eligible for LTD benefits, the UNUM Policy requires  
21 that a beneficiary be "continuously disabled through  
22 [the] elimination period." The elimination period is 90  
23 days. (UNUM 47).

24 9. The UNUM Policy requests written notice of a claim within  
25 30 days of the starting date of disability and requires  
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27 <sup>2</sup> Under the UNUM policy, elimination period is "a period of  
28 continuous disability which must be satisfied before you are  
eligible to receive benefits from UNUM." (UNUM 66.)

1 written notice within 90 days of a claimant's elimination  
2 period. UNUM allows written notice for up to a year  
3 after the elimination period when it not possible to meet  
4 the 90-day requirement. (UNUM 38.).

5 10. Under the Policy, UNUM was the claims administrator. The  
6 Policy provides: "When making a benefit determination  
7 under the policy UNUM has discretionary authority to  
8 determine eligibility for benefits and to interpret the  
9 terms and provisions of the policy." (UNUM 43.)

10 **III. The MET Disability Insurance Policy**

11 11. On January 1, 2004, MET replaced UNUM as the  
12 administrator and insurer of the CBRE plan. MET issued a  
13 new insurance policy ("MET Policy") to cover the CBRE LTD  
14 benefits plan.

15 12. The Met Policy is comprised of a master plan document and  
16 a summary plan description.<sup>3</sup>

17 13. The MET Policy's master plan has a section entitled  
18 "Special Rules For Groups Previously Insured Under A Plan  
19 Of Disability Income Insurance." The stated purpose of  
20 the rules are "[t]o prevent a loss of insurance because

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21  
22 <sup>3</sup> The master plan sets forth the terms and conditions of an  
23 insurance policy. ERISA requires that participants and  
24 beneficiaries of an employee benefit plan receive a summary plan  
25 description that is "written in a manner calculated to be  
26 understood by the average plan participant, and shall be  
27 sufficiently accurate and comprehensive to reasonably apprise such  
28 participants and beneficiaries of their rights and obligations  
under the plan." 29 U.S.C. § 1022(a); Pisciotta v. Teledyne Indus.,  
91 F.3d 1326, 1329 (9th Cir. 1996) ("The SPD [summary plan  
description] is the statutorily established means of informing  
participants of the terms of the plan and its benefits.") (citation  
omitted). The Ninth Circuit recognizes a summary plan description  
as part of an ERISA plan. Bergt v. Ret. Plan for Pilots Employed by  
MarkAir, Inc., 293 F.3d 1139, 1143 (9th Cir. 2002).

1 of a change in insurance carriers." (MET 27.) The  
2 "Special Rules" section contains "Rules for When  
3 Insurance Takes Effect if You were insured Under the  
4 Prior Plan on the Day Before the Replacement Date." It  
5 provides in relevant part:

6 If You are Actively at Work on the day before the Replacement  
7 Date, You will become insured for Disability Income Insurance  
8 under this certificate on the Replacement Date.

9 If You are not Actively at Work on the day before the  
10 Replacement Date, You will become insured for Disability  
11 Income Insurance under this certificate on the date You return  
12 to Active Work. (MET 27.)

13 14. The MET master plan defines "Actively at Work" or "Active  
14 Work" to mean "You are performing all of the usual and  
15 customary duties of Your job on a Full-Time basis." (MET  
16 20). The MET summary plan defines "Actively at Work" or  
17 "Active Work" to mean "Being on the job as required of an  
18 employee or Independent Contractor of CBRE." (MET 220.)

19 15. The "Special Rules" section also contains "Rules for Pre-  
20 existing Conditions" that provides:

21 In determining whether a Disability is due to a Pre-existing  
22 Condition, We will credit You for any time You were insured  
23 under the Prior Plan. If Your Disability is due to a Pre-  
24 existing Condition as described in this certificate, but would  
25 not have been due to a pre-existing condition under the Prior  
26 Plan, We will pay a benefit equal to the lesser of: the  
27 benefit amount under this certificate; or the disability  
28

1 income insurance benefit that would have been payable to you  
2 under the Prior Plan. (MET 27.)

3 16. The MET Policy's master plan defines "Disabled or  
4 Disability" as meaning that "[d]ue to Sickness or as a  
5 direct result of accidental injury:

6 You are receiving appropriate care and treatment and complying  
7 with the requirements of such treatment; and

8 You are unable to earn:

9 during the elimination period and the next 24 months of  
10 sickness or accidental injury, unable to earn more than 80% of  
11 your pre-disability earnings at your own occupation for any  
12 employer in the local economy; and

13 After such period, unable to earn more than 80% of your pre-  
14 disability earnings at your own occupation for any employer in  
15 your local economy at any gainful occupation for which you are  
16 reasonably qualified taking into account your training,  
17 education, and experience." (MET 20.)

18 17. The MET Policy defines "disability" at two locations in  
19 the summary plan. First, under the "Plan Benefits"  
20 section, it states:

21 You will be considered disabled under the LTD Plan when  
22 MetLife determines that you are unable to perform your regular  
23 job functions due to sickness, or as a direct result of  
24 accidental injury, the employee is receiving appropriate care  
25 and treatment and complying with the requirements of such  
26 treatment and is:

27 During the elimination period and the next 24 months of  
28 sickness or accidental injury, unable to earn more than 80% of

1 their pre-disability earnings at own occupation for any  
 2 employer in the local economy;  
 3 After such period, unable to earn more than 80% of their pre-  
 4 disability earnings at own occupation for any employer in the  
 5 local economy at any gainful occupation for which they are  
 6 reasonably qualified taking into account their training, prior  
 7 education, or experience. (MET 257.)

8 Second, under the "Definitions" section, "disability" is  
 9 defined as "a condition in which a person is unable to  
 10 perform the material and substantial duties of his/her  
 11 regular occupation due to illness or injury. Or, after  
 12 24 months of receiving [LTD] payments, a condition in  
 13 which a person is unable, due to the same illness or  
 14 injury, to perform the duties of any gainful occupation  
 15 for which he or she is reasonably fitted by education,  
 16 training or experience." (MET 270.)

17 18. The MET Policy's summary plan identifies MET as the claim  
 18 administrator for LTD benefits. The Policy states that  
 19 MET has "exclusive, complete, and final discretionary  
 20 authority to interpret and apply Plan provisions and to  
 21 determine related facts with regard to:

- 22 Determining a participant's eligibility to receive benefits
- 23 Processing claims
- 24 Paying benefits
- 25 Making determinations on appeals of claim denials."
- 26 (MET 268.)

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1 **IV. Mitchell's History of Illness**

2 19. Michael Mitchell claims to suffer from several health  
3 problems, including but not limited to chronic fatigue  
4 syndrome ("CFS"), hemochromatosis,<sup>4</sup> restless leg syndrome  
5 ("RLS"),<sup>5</sup> knee osteoarthritis, sleep apnea, and  
6 depression.

7 20. In 2001, Mitchell suffered increasingly worse health  
8 problems. In February 2001, he was diagnosed with RLS.  
9 (MET 134.) In March 2001, Mitchell had a Fibromyalgia  
10 Initial Evaluation conducted by Dr. Silverman, the  
11 director of Cedars-Sinai Medical Center's fibromyalgia  
12 program. Dr. Silverman did not find fibromyalgia, but  
13 did note a history of chronic fatigue. At that time, Dr.  
14 Silverman found no significant limitation in daily  
15 activities. (MET 112, 114.)

16 21. In September and October 2003, Mitchell went to the Mayo  
17 Clinic Sleep Disorder Center. The Mayo Clinic  
18 specialists diagnosed Mitchell with CFS, probable major  
19 depression, RLS, and mild sleep apnea. The Mayo Clinic's  
20 report stated that "[t]he predominant problem is that of  
21 long-standing chronic fatigue syndrome. . . ." The Mayo  
22 Clinic report recommended that Mitchell undergo a  
23 multimodal treatment program for chronic fatigue. (MET  
24 177-182.) Throughout the remainder of 2003 and 2004,

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25  
26 <sup>4</sup> Hemochromatosis is a disorder where iron-containing pigments  
27 collect in a person's tissues, resulting in joint or abdominal  
28 pain, weakness, and fatigue.

<sup>5</sup> RLS is a neurological condition that causes a person to need  
to move their legs frequently.

- 1 Mitchell underwent treatment, visiting at least twenty  
2 doctors and specialists during that time, and taking  
3 several medications. (MET 96, 129-131, 174-176.)
- 4 22. From December 2003, Mitchell began seeing Dr. Uy, an  
5 Assistant Professor of Psychiatry with the USC Department  
6 of Psychiatry. In a September 2004 letter to a MET case  
7 manager, Dr. Uy described Mitchell's depression, and the  
8 contribution of his other physical ailments to worsening  
9 symptoms of depression. Dr. Uy concluded that Mitchell's  
10 symptoms had not improved for nearly a year and that he  
11 would probably be "unable to perform adequately at work  
12 for at least a year." (MET 96-97.)
- 13 23. In February 2004, Mitchell went to Dr. Petzinger of the  
14 USC Neurology department. Mitchell's MRI was found to be  
15 "essentially unremarkable." Dr. Metzinger commented that  
16 Mitchell's behavior "seemed a little bit off." (MET  
17 131.) A subsequent neurophysiological evaluation of  
18 Mitchell performed by Dr. McCleary of USC Neurology  
19 "failed to highlight any impaired cognitive domains."  
20 Dr. McCleary noted that Mitchell was "experiencing a  
21 remarkably high level of emotional distress" that may be  
22 linked to his physical symptoms. (MET 134-139.) After  
23 this exam in June 2004, Dr. Petzinger reevaluated  
24 Mitchell, finding no improvement in his symptoms. (MET  
25 125-26.)
- 26 24. In August 2004, Mitchell again saw Dr. Silverman, who had  
27 become a UCLA Professor of Medicine. Dr. Silverman  
28 confirmed the diagnosis that Mitchell had CFS, major

1 depression, RLS, hemochromatosis, and osteoarthritis of  
2 the knees. In discussing Mitchell's CFS, Dr. Silverman  
3 stated that Mitchell was "unfortunately at this point  
4 disabled in that he cannot initiate new work or clients."  
5 Dr. Silverman recommended a pain program, including  
6 aquatic exercise. He also noted Mitchell's inability to  
7 tolerate most antidepressant medications. (MET 116-121.)

8 25. During this time, Mitchell also visited Dr. Ehresmann, a  
9 USC medical school rheumatologist. A November 2004 letter  
10 from Dr. Ehresmann summarizes Mitchell's history of  
11 illness. Dr. Ehresmann states that "patient's work  
12 capacity is impaired due to these medical factors." (MET  
13 91-93.)

14 26. Mitchell claims that these health problems were  
15 detrimental to his work performance. As Mitchell's  
16 compensation was commission-based, he suffered lost  
17 earnings. His earnings for the relevant period were as  
18 follows: (1) 2001 - \$163,000; (2) 2002 - \$239,000; (3)  
19 2003 - \$19,000; (4) 2004 - \$17,000; (5) 2005 - \$48,000;  
20 (6) 2006 - \$114,000; (7) 2007 - \$100,000 (through April  
21 2007). (Bernacchi Declaration ¶ 3, Ex. 1.)

22 **V. Mitchell's Claims for LTD Benefits**

23 **A. Mitchell's Claim Under the MET Policy**

24 27. In March 2004, three months after the MET Policy took  
25 effect, Mitchell contacted MET about filing a LTD  
26 benefits claim. In a March 17 letter, Mitchell explained  
27 that he was working Monday to Friday, 9 AM to 5 PM, but  
28 that his conditions, listed in the letter, had

1 "deteriorated to the point that I cannot do my job  
2 effectively." (MET 244.) In a March 23 phone call with  
3 MET personnel regarding LTD benefits, Mitchell explained  
4 that he did not plan to stop coming to work. He was  
5 informed that a continuous absence was required to  
6 qualify for LTD benefits. (MET 59.)

7 28. On April 15, 2004, Mitchell filed a claim with MET,  
8 arguing that his health conditions established a  
9 disability. On the claim form, Mitchell wrote that he  
10 was still working. Further, he stated that the  
11 disability began in October 2003, three months before the  
12 MET Policy began. Mitchell attached a statement  
13 regarding his conditions, an attending physician  
14 statement by Dr. Wollaston, and the Mayo Clinic Report.

15 29. Dr. Wollaston's statement indicated that Mitchell had  
16 hemochromatosis and osteoarthritis of the knee. He rated  
17 Mitchell as having a Class 3 psychological limitation,  
18 meaning Mitchell could handle only limited stress  
19 situations. He noted that stress could exacerbate  
20 Mitchell's fatigue and pain. Further, he advised that  
21 Mitchell only work part-time and recommended job  
22 modification. (MET 119-121.)

23 30. On April 23, 2004, MET denied Mitchell's claim. In its  
24 denial letter, MET provided the definition of disability  
25 from its master plan. (MET 167; see also MET 20.) MET  
26 determined that Mitchell did not meet its definition of  
27 disability, reasoning that Dr. Wollaston's statement did  
28 not note any work restrictions and Mitchell was in fact

1 still working. MET found that Mitchell was not disabled  
2 because he was capable of performing his own occupation,  
3 which was a sedentary position. (MET 167.)

4 31. On May 13, 2004, CBRE's Human Resources department sent  
5 to Mitchell by fax a copy of "the UNUM claim form that  
6 needs to be used instead of MetLife since this began  
7 prior to January 1, 2004." (UNUM 695.) The Court  
8 concludes that "this" refers to Mitchell's complaints of  
9 a disabling condition. The Court notes that the MET  
10 administrative record does not contain this fax.

11 32. After the denial, Mitchell called MET for an explanation  
12 of the denial. He was told that a person is disabled  
13 only if unable to function at less than a sedentary level  
14 of occupation due to their condition. (MET 61.)  
15 Mitchell then engaged in a series of correspondence with  
16 Teresa Barthlow, the MET senior LTD case management  
17 specialist who was the signatory to Mitchell's denial  
18 letter. (MET 159-168.) Mitchell was attempting to obtain  
19 clarification of the definition of disability under the  
20 MET Policy. Mitchell's first letter to Barthlow sought  
21 clarification of the meaning of disability in relation to  
22 his condition. Barthlow's response explained the MET  
23 appeal procedures. When Mitchell sent a second letter  
24 stating that his questions from the first letter were  
25 "unanswered," Barthlow responded as follows: "Although I  
26 do wish to be as helpful as possible with respect to your  
27 questions of the claim denial and/or appeal procedures I  
28 will not become engaged in a deliberation with you of the

1 Policy's definition of "Disabled or Disability. I  
2 apologize for any lack of communication or  
3 miscommunication you may feel towards my ability to  
4 answer your questions." (MET 159.)

5 33. On June 27, 2004, Mitchell informed MET by telephone that  
6 he intended to appeal the decision. The phone record  
7 indicates Mitchell stated that "he could perform the job  
8 since it was sedentary, but he could not earn as much  
9 because of chronic fatigue." (MET 61.)

10 34. In December 2004, now represented by counsel, Mitchell  
11 appealed the decision and included additional  
12 documentation of his medical conditions. Mitchell's  
13 counsel sent a letter to MET requesting that they  
14 exercise their contractual right to conduct an  
15 independent medical examination of Mitchell to determine  
16 his eligibility for LTD benefits. MET never conducted an  
17 independent medical examination. (MET 44.)

18 35. MET had Dr. Schmidt, one of its physician consultants,  
19 review Mitchell's case and prepare a report. In  
20 connection with his appeal, Mitchell included the medical  
21 reports and letters from specialists that the Court has  
22 recounted under the section "Mitchell's History of  
23 Illness" above. (MET 81-147.) Mitchell provided letters  
24 from co-workers that noted the impact of his health  
25 problems on his work. (MET 148.) He also included a  
26 personal medical diary that tracked his conditions. (MET  
27 186-226.) Dr. Schmidt reviewed these materials. At the  
28 time that she reviewed Mitchell's case, Dr. Schmidt

1 generally worked as a physician consultant for MET three  
2 days a week. (Deposition of Dr. Schmidt 13:6-8; 14:13-  
3 18.)

4 36. Dr. Schmidt concluded that the "[f]ile lacks sufficient  
5 medical [sic] to support objective evidence of a physical  
6 functional capacity impairment to a full-time sedentary  
7 position." (MET 77.) On several occasions in the  
8 report, Dr. Schmidt notes that the file lacks particular  
9 information: the lack of x-rays or MRI scans of his knees  
10 or neck, or other notes on his orthopedic problems; lack  
11 of lower extremity or vascular studies to substantiate  
12 leg pain; lack of doctor recommendations that CFS  
13 indicated ADL impairments or the need for a home health  
14 aide; lack of actual reports of sleep studies. However,  
15 Dr. Schmidt notes in her report that many of these  
16 records, x-rays, and studies were available, when she  
17 specifically refers to Mitchell's treating physicians'  
18 comments on those items. As to the diagnosis of  
19 Mitchell's depression, Schmidt stated that "I am not  
20 qualified to comment." (MET 77-78.)

21 37. Relying primarily on Dr. Schmidt's report, MET denied  
22 Mitchell's appeal. (MET 70-72.) In finding that  
23 Mitchell did not suffer from a disability, the appeal  
24 denial states: "The file contained no actual sleep study  
25 results or objective evidence of a functional impairment  
26 that would have prevented Mr. Mitchell from performing  
27 his own occupational job duties. The occupation of Vice  
28 President of Sales is sedentary. The definition of

1 disability indicates that you must be able to perform  
2 your own occupation." (MET 71-72.)

3 38. Thereafter, Mitchell proceeded to bring this ERISA action  
4 seeking to recover LTD benefits. Nearly one year into  
5 the litigation, MET for the first time raised the defense  
6 that Mitchell did not have coverage under the MET Policy  
7 in October 2003, the time that Mitchell asserted on his  
8 claim form as the start date of disability. Because  
9 Mitchell alleged a disability beginning before MET's  
10 coverage, MET argues that UNUM would be the administrator  
11 and insurer for Mitchell's claim. MET, therefore, argues  
12 that Mitchell's claim should have been filed with UNUM.  
13 Although Mitchell disputed MET's contention, the parties  
14 agreed to stay proceedings pending UNUM's administrative  
15 review of Mitchell's claim.

16 **B. Mitchell's Claim Under the UNUM Policy**

17 39. On October 3, 2005, Mitchell submitted his claim with  
18 UNUM. UNUM contacted Mitchell's counsel to explain the  
19 claim process and to obtain information, including a list  
20 of Mitchell's physicians. (UNUM 82-87; 228-230.) UNUM  
21 also contacted CBRE to obtain predisability earnings  
22 information, hours worked, and a job description. An e-  
23 mail response from CBRE personnel explained that  
24 "[Mitchell] is still working, as far as we know, but  
25 limited hours." (UNUM 89; 297.) A disability  
26 questionnaire from Mitchell to UNUM explained that his  
27 typical work day involved arrival at or around 10:00  
28



- 1 a.m., a lunch hour at noon, a nap in the afternoon, and  
2 leaving around 4:00 or 5:00 p.m. (UNUM 313-314.)
- 3 40. In June 2006, UNUM consultant Leor Ownby, R.N., conducted  
4 a nurse review of Mitchell's case. The nurse review  
5 provided a summary of Mitchell's conditions. Ownby  
6 concluded that the documentation did not support finding  
7 a disability in October 2003 that prevented Mitchell from  
8 working. Ownby stressed that Mitchell was "working" in  
9 October 2003 and thereafter. (UNUM 614-15.)
- 10 41. Around the same time, CBRE responded to UNUM's request  
11 for information regarding Mitchell's employment.  
12 Managing Director John Hollingsworth stated that his  
13 notes indicated Mitchell began "feeling the effects of  
14 his illness back in March 2004." He also stated that  
15 Mitchell was not a part-time employee, but rather, that  
16 his "illness limited him to half the working energy of  
17 other sales agents." (UNUM 636.)
- 18 42. In July 2006, UNUM's Debra Kile, M.D. conducted a  
19 physician review. Kile indicated a "lack of consensus  
20 regarding diagnoses and etiology of symptoms and  
21 functional consequences," but found that Mitchell's "loss  
22 of earnings [was] evident in 2003." She recommended that  
23 UNUM seek additional information. (UNUM 866-872.)
- 24 43. Mitchell provided additional information. On October 3,  
25 2006, Ownby again reviewed Mitchell's case. Ownby  
26 concluded that the records "demonstrated the claimant is  
27 somatically preoccupied with his subjective complaints of  
28 fatigue." She also stated that the records "did not

1 delineate clearly a period where claimant is totally  
2 impaired to perform his regular job." (UNUM 1688.) On  
3 October 10, 2006, Dr. Kile again reviewed Mitchell's  
4 case. Dr. Kile found a lack of consensus and lack of  
5 sufficient evidence to establish a disability.  
6 Specifically, she noted that the many diagnoses of  
7 fatigue did not support a lack of capacity to work;  
8 records showed only mild sleep apnea; x-ray findings  
9 indicated moderate osteoarthritis; and records did not  
10 support significant mental impairment. She also  
11 determined that Mitchell "has reportedly physically  
12 continued to go to work further supporting physical  
13 ability for at least sedentary activities." (UNUM 1699.)  
14 Both Ownby and Kile stated that review of the claim was  
15 prejudiced by its late filing. (UNUM 1688, 1700.)

16 44. UNUM also had a psychiatrist, Dr. Kevin Hayes, review  
17 Mitchell's case. He found that the records did not show  
18 a severe psychiatric condition. He noted that Mitchell's  
19 initial claim with MET did not list mental condition as a  
20 basis for the disability claim. Finally, he also noted  
21 prejudice due to late filing. (UNUM 1702-04.)

22 45. UNUM denied Mitchell's claim, finding insufficient  
23 information to support a disability and prejudice due to  
24 late filing. (UNUM 1730-36.) Mitchell appealed the  
25 decision. UNUM again conducted a nurse and physician  
26 review. Susan K. Pendleton, R.N. affirmed that records  
27 did not support restrictions or limitations from October  
28 2003 and that the review was prejudiced. (UNUM 1791-92.)

1 Dr. Beth Schnars, M.D. conducted an extensive analysis of  
2 the records. (UNUM 1823-31.) She concluded that  
3 Mitchell should be found to have a "[w]ork impairment  
4 from [date of disability] (after clarification of total  
5 work cessation) to 6/11/04 at which time full evaluation  
6 for significant organic pathology was excluded." (UNUM  
7 1830.) She recommended restricting Mitchell's work to  
8 sedentary activity. She also found the records were  
9 sufficient such that review did not suffer from prejudice  
10 of late filing. (UNUM 1830.)

11 46. UNUM conducted another psychiatric review. Dr. Malcolm  
12 Spica, P.H.D., determined that Mitchell did not have  
13 limitations from a psychiatric perspective. UNUM also  
14 had a vocational consultant conduct a vocational review  
15 to consider whether Mitchell's position was consistent  
16 with the restrictions outlined by Dr. Schnars. The  
17 consultant concluded that Mitchell's position was  
18 sedentary and thus complied with the restrictions.

19 47. On January 3, 2007, UNUM affirmed denial of Mitchell's  
20 claim on appeal. The letter denying the appeal cited the  
21 policy definition of disability. It noted that CBRE  
22 informed UNUM that Mitchell never stopped working and was  
23 claiming a disability based on reduced ability to earn.  
24 Thus, UNUM concluded that did not meet the definition of  
25 disability because he "continued to perform a portion of  
26 his material and substantial duties" through January 1,  
27 2004, which was the day after termination of the UNUM  
28 policy. (UNUM 1856-59.)

1  
2 **CONCLUSIONS OF LAW**

3 **I. Standard of Review**

- 4 1. ERISA provides for judicial review of a decision to deny  
5 benefits to an ERISA plan beneficiary. See 29 U.S.C. §§  
6 1132(a)(1)(B); 1132(e).<sup>6</sup>
- 7 2. ERISA benefits determinations are to be reviewed de novo,  
8 "unless the benefit plan gives the administrator or  
9 fiduciary discretionary authority to determine  
10 eligibility for benefits or to construe the terms of the  
11 plan." Firestone Tire & Rubber Co. v. Bruch, 489 U.S.  
12 101, 115 (1989). An ERISA benefits determination under a  
13 plan that "unambiguously" confers such discretionary  
14 authority shall be reviewed under an abuse of discretion  
15 standard. Kearney v. Standard Ins. Co., 175 F.3d 1084,  
16 1090 (9th Cir. 1999). In this case, both the MET Policy  
17 and UNUM Policy unambiguously confer discretion to  
18 determine eligibility for benefits and interpret plan  
19 terms.<sup>7</sup> Therefore, the Court reviews the MET and UNUM  
20 denials of benefits under an abuse of discretion  
21 standard.

22 **II. Mitchell's Claim With MET**

23 **A. MET's Conflict of Interest**

- 24 3. In Abatie v. Alta Health & Life Ins. Co., 458 F.3d 955,  
25 967-69 (9th Cir. 2006), the Ninth Circuit held that

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26 <sup>6</sup> MET and UNUM do not argue that they are not proper parties  
27 under 29 U.S.C. § 1132(a)(1)(B). See Everhart v. Allmerica Fin.  
Life Ins. Co., 275 F.3d 751, 754 (9th Cir. 2001).

28 <sup>7</sup> See Findings of Fact, Parts II and III, supra.

1 district courts should employ a case-by-case approach to  
2 abuse of discretion review in ERISA cases. Id. This  
3 approach allows district courts to consider the "kind of  
4 inherent conflict that exists when a plan administrator  
5 both administers the plan and funds it, as well as other  
6 forms of conflict." Id. at 967.

7 4. The Ninth Circuit has offered guidance on tailoring  
8 review to the particular facts and circumstances of a  
9 ERISA administrator's denial of benefits:

10 The level of skepticism with which a court views a conflicted  
11 administrator's decision may be low if a structural conflict  
12 of interest is unaccompanied, for example, by any evidence of  
13 malice, of self-dealing, or of a parsimonious claims-granting  
14 history. A court may weigh a conflict more heavily if, for  
15 example, the administrator provides inconsistent reasons for  
16 denial, fails adequately to investigate a claim or ask  
17 plaintiff for necessary evidence, fails to credit claimant's  
18 reliable evidence, or has repeatedly denied benefits to  
19 deserving participants by interpreting plan terms incorrectly  
20 or by making decisions against the weight of evidence in the  
21 record.

22 Id. at 968 (citations omitted).

23 5. Ultimately, the "district court, when faced with all the  
24 facts and circumstances, must decide in each case how  
25 much or how little to credit the [] administrator's  
26 reason for denying insurance coverage." Id. As the  
27 claims administrator and insurer, MET had an "inherent  
28 conflict of interest." Id.; see also Lang v. Long-Term

1            Disability Plan of Sponsor Applied Remote Technology,  
2            Inc., 125 F.3d 794, 797 (9th Cir. 1997). Based on the  
3            facts and circumstances of MET's administrative review,  
4            the Court finds that MET's reasons for denying Mitchell's  
5            claim should be reviewed with skepticism. As will be  
6            discussed further below, the Court finds that MET applied  
7            the wrong definition of disability, see Tremain v. Bell  
8            Industries, Inc., 196 F.3d 970, 977 (9th Cir. 1999),  
9            failed to credit Plaintiff's substantial evidence of  
10           serious medical conditions, see Black & Decker Disability  
11           Plan v. Nord, 538 U.S. 822, 830 (2003), and failed to  
12           adequately investigate the claim or request available  
13           evidence when the lack of that evidence in the file was  
14           part of the reason for denial, see Booton v. Lockheed  
15           Medical Benefit Plan, 110 F.3d 1461, 1463 (9th Cir.  
16           1997).<sup>8</sup> Where MET has engaged in several practices  
17           indicative of a significant conflict of interest, this

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22            <sup>8</sup> In addition, Mitchell argues that MET offered inconsistent  
23            reasons for denial of his claim, which would be another factor to  
24            be weighed in abuse of discretion analysis. See Lang, 125 F.3d at  
25            798-99. In the initial denial, MET found that Mitchell was still  
26            working and that he was able to perform a sedentary position. On  
27            appeal, MET found that insufficient objective evidence of a  
28            disability preventing Mitchell from performance of a sedentary  
             position. Although the Court does not find these reasons patently  
             inconsistent, the Court does weigh the fact that MET has applied an  
             objective evidence requirement that does not appear in the policy.  
             See infra Conclusions of Law, Part II.C.2. This is not so much  
             inconsistent as a procedural irregularity. See Abatie, 458 F.3d at  
             972-74. Further, that MET raises new arguments during litigation  
             is a separate issue that the Court will address below.

1 warrants heightened abuse of discretion review. See  
2 Abatie, 458 F.3d at 968.<sup>9</sup>

3 **B. MET's Conflicting Plan Definitions of Disability**

4 6. Federal common law principles of contract interpretation  
5 guide the interpretation of ERISA plan terms. Richardson  
6 v. Pension Plan of Bethlehem Steel Corp., 112 F.3d 982,  
7 985 (9th Cir. 1997). The terms of the plan should be  
8 interpreted "in an ordinary and popular sense as would a  
9 [person] of average intelligence and experience." Id.  
10 (internal quotation omitted). When parties dispute the  
11 meaning of plan terms, a court should "first look to the  
12 explicit language of the agreement to determine, if  
13 possible, the clear intent of the parties." Id.

14 7. In the Findings of Fact, the Court noted that MET's  
15 master plan and summary plan description had conflicting  
16 definitions of disability. The master plan provides that  
17 a person is disabled if "[d]ue to Sickness or as a direct  
18 result of accidental injury:

19 You are receiving appropriate care and treatment and complying  
20 with the requirements of such treatment; and

21 You are unable to earn:

22 during the elimination period and the next 24 months of  
23 sickness or accidental injury, unable to earn more than 80% of  
24

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25  
26 <sup>9</sup> While a court may consider extrinsic evidence to determine  
27 the proper level of judicial scrutiny when an administrator has a  
28 conflict of interest, Abatie, 458 F.3d at 970, MET has not offered  
extrinsic evidence to rebut the presence of factors that indicate a  
significant conflict of interest.

1 your pre-disability earnings at your own occupation for any  
2 employer in the local economy."

3 The summary plan description contains a more restrictive  
4 definition of disability. In addition to the terms from  
5 the master plan, the summary plan description also  
6 requires that a person be "unable to perform his/her  
7 regular job functions due to sickness or as a direct  
8 result of injury."<sup>10</sup> Here, Mitchell claims he was  
9 disabled under the master plan definition. MET counters  
10 that Mitchell was not disabled under the summary plan  
11 definition.

12 8. The Court finds that the master plan definition of  
13 disability unambiguously did not contain a regular job  
14 functions requirement, whereas the summary plan  
15 unambiguously did. When a master plan document and  
16 summary plan description contain conflicting provisions,  
17 the Ninth Circuit has held that the provision more  
18 favorable to the employee is controlling. Bergt, 293  
19 F.3d at 1145.<sup>11</sup> The Ninth Circuit has provided the  
20 following rationale for this principle:

21 Any burden of uncertainty created by careless or inaccurate  
22 drafting of the summary must be placed on those who do the  
23 drafting, and who are most able to bear that burden, and not

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24  
25 <sup>10</sup> Elsewhere in the summary plan description, MET defines  
26 "disability" as "a condition in which a person is unable to perform  
the material and substantial duties of his/her regular occupation  
due to illness or injury."

27 <sup>11</sup> As noted earlier, both the master plan document and  
28 summary plan description are part of the plan. Bergt, 293 F.3d at  
1143.



1 on the individual employee, who is powerless to affect the  
2 drafting of the summary or the policy and ill equipped to bear  
3 the financial hardship that might result from a misleading or  
4 confusing document. Accuracy is not a lot to ask.

5 Id., quoting Hansen v. Continental Ins. Co., 940 F.2d  
6 971, 982 (5th Cir. 1991). Given the conflicting  
7 provisions in MET's master plan and summary plan,<sup>12</sup> the  
8 Court reviews MET's decision under the master plan's  
9 definition of disability, which is more favorable to  
10 Mitchell. See Berqt, 293 F.3d at 1145.<sup>13</sup>

11 **C. MET's Denial of Mitchell's Claim**

12 **1. Mitchell's Initial Claim**

13 9. Although MET cited to the master plan definition in  
14 denying Mitchell's claim, (MET 167), MET simply failed to  
15 apply it to Mitchell's case. The master plan definition  
16 required only that due to sickness Mitchell 1) was  
17 receiving appropriate treatment and 2) was unable to earn  
18

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19 <sup>12</sup> At oral argument, MET initially asserted that the summary  
20 plan is controlling because it is the document that explains the  
21 plan to employees. When the Court inquired whether MET maintains  
22 this position for a summary plan materially inconsistent with the  
23 master plan, MET then asserted that the master plan and summary  
24 plan are not inconsistent. However, MET did not explain its  
25 assertion nor identify any ambiguity in the master plan's terms.  
26 The Court's finding is supported by MET's failure to explain a  
27 basis for viewing the master plan and summary plan definitions as  
28 consistent policy terms.

25 <sup>13</sup> The Court further notes that application of the master plan  
26 definition is appropriate since MET quoted the definition of  
27 disability from its master plan in full when it denied Mitchell's  
28 administrative claim and appeal. Although MET's trial briefs now  
cite to the more restrictive language from the summary plan  
description, the Court finds the master plan definition is  
controlling. Ninth Circuit authority and MET's own conduct support  
use of the master plan definition.

1 80% of his predisability earnings during the elimination  
2 period and the next 24 months. Mitchell provided  
3 evidence that he earned less than 80% of his  
4 predisability earnings and that he was receiving regular  
5 treatment for his conditions. However, MET's denial  
6 letter does not discuss these elements at all. Rather,  
7 MET determined that Mitchell was still working and  
8 capable of performing his sedentary position.

9 10. Due to the conflicting definitions of disability, MET had  
10 to apply the more favorable terms of the master plan.  
11 See Berqt, 293 F.3d at 1145 (recognizing that poor  
12 drafting, which results in conflicting terms, must be  
13 resolved against an ERISA defendant as drafter of the  
14 policy); see also Banuelos v. Constr. Laborers' Trust  
15 Funds for So. Cal., 382 F.3d 897, 904 (9th Cir. 2004)  
16 ("Courts will generally bind ERISA defendants to the more  
17 employee-favorable of two conflicting documents-even if  
18 one is erroneous."). Instead, MET disregarded that the  
19 master plan definition of disability unambiguously did  
20 not contain a requirement that a person be able to  
21 perform regular functions. MET in fact applied the more  
22 stringent summary plan definition of disability by  
23 inquiring into Mitchell's ability to perform regular job  
24 functions, notwithstanding its citation to the master  
25 plan definition. Accordingly, MET applied the wrong  
26 definition of disability. See Tremain, 196 F.3d at 977  
27 (finding the application of the wrong definition of  
28 disability was an abuse of discretion). Mitchell's

1 interpretation that he could still work and be disabled  
2 was reasonable in light of the conflicting provisions.  
3 The Court concludes that MET's denial, based upon  
4 application of the incorrect definition of disability,  
5 was an abuse of discretion.

6 11. Inconsistency between master plan and summary plan  
7 documents is a recurrent problem in ERISA cases. Summary  
8 plans, which are supposed to explain employer benefit  
9 plans to employees in succinct, clear language, routinely  
10 serve to obfuscate the meaning of plan terms by having  
11 terms that conflict with the master plan. The resulting  
12 confusion constitutes a disservice to the parties  
13 involved. Many employers bargain for particular policy  
14 provisions in benefit plans that they offer to employees,  
15 only to have inconsistencies blur those policy terms,  
16 often being interpreted by administrators in an ad hoc  
17 manner that restricts entitlement to benefits. When  
18 faced with two conflicting documents, employees cannot  
19 consult either for guidance, and are similarly subject to  
20 the risk that inconsistent terms will be exploited to  
21 impose greater restrictions on benefits. Steadfast  
22 adherence to a rule that resolves inconsistencies against  
23 the drafter will encourage the drafting of consistent  
24 plan documents that will better serve employers and  
25 employees alike, and avoid courts and lawyers having to  
26 needlessly determine the effect of conflicts in terms  
27 that arise from unnecessary drafting errors.

28

1                   **2. Mitchell's Appeal and Dr. Schmidt's Report**<sup>14</sup>

2           12. MET's denial on appeal was based primarily on Dr.  
3           Schmidt's report, which found no disability based upon a  
4           lack of objective evidence. Before even considering the  
5           report, the Court finds that MET could not deny  
6           Mitchell's claim based upon this objective evidence  
7           requirement. Nowhere in the plan terms is there an  
8           objective evidence requirement, nor does MET explain the  
9           basis for this requirement. MET cannot deny a claim  
10          based upon a lack of objective evidence unless that  
11          standard was made "clear, plain and conspicuous enough  
12          [in the Policy] to negate layman [Mitchell's] objectively  
13          reasonable expectations of coverage." Saltarelli v. Bob  
14          Baker Group Med. Trust et al., 35 F.3d 382, 387 (9th Cir.  
15          1994). The first mention of an objective evidence  
16          requirement in the administrative record was in MET's  
17          denial of Mitchell's appeal. MET cannot deny Mitchell's  
18          claims based on new standards not within its Policy. See  
19          Canseco v. Constr. Laborers Pension Trust for So. Cal.,  
20          93 F.3d 600, 608 (9th Cir. 1996) (holding that  
21          administrators "may not construe a plan so as to impose  
22          an additional requirement for eligibility that clashes  
23          with the terms of the plan").

24 \_\_\_\_\_  
25           <sup>14</sup> The Court incorporates its conclusions with respect to the  
26           initial claim for MET's denial on appeal, where it also effectively  
27           applied an incorrect definition of disability. Nevertheless, the  
28           Court considers the denial on appeal and the report of MET's  
          physician consultant, Dr. Schmidt. The Court notes that the master  
          plan definition would have allowed MET to deny benefits if  
          Mitchell's inability to earn was not "due to sickness." However,  
          MET never considered Mitchell's claim in this regard.

1 13. MET's reliance on objective evidence is problematic for  
2 medical conditions like Mitchell's that may not be  
3 amenable to objective verification. In cases involving  
4 chronic fatigue syndrome, the Ninth Circuit has held that  
5 subjective evidence is important because "CFS does not  
6 have a generally accepted 'dipstick' test." Friedrich v.  
7 Intel Corp., 181 F.3d 1105, 1112 (9th Cir. 1999); see  
8 also Rose v. Shalala, 34 F.3d 13, 18 (1st Cir. 1994)  
9 (recognizing that a "lack of objective proof is what one  
10 may expect in cases of CFS"). MET's application of an  
11 objective evidence requirement is inconsistent with  
12 medical opinion and case law that identifies the  
13 importance of subjective factors in diagnosis and  
14 treatment of conditions like CFS.

15 14. Additionally, MET applied this objective evidence  
16 requirement without informing Mitchell of the kind of  
17 evidence that could satisfy it. When Mitchell's appeal  
18 was denied, MET did not provide an explanation of  
19 objective evidence. The Court finds that MET failed to  
20 comply with 29 C.F.R. 2560.503(g)(iii) which requires "a  
21 description of any additional material or information  
22 necessary for the claimant to perfect the claim and an  
23 explanation of why such material or information is  
24 necessary." The Ninth Circuit has described this  
25 regulation as encouraging "meaningful dialogue between  
26 ERISA plan administrator and their beneficiaries."  
27 Booton, 110 F.3d at 1463. Instead, MET opted to find a  
28 lack of objective evidence without explanation how

1 Mitchell might meet the requirement. Cf. Boyd v. Aetna,  
2 438 F. Supp. 2d 1134, 1154 (C.D. Cal. 2006) (finding a  
3 significant procedural irregularity when a plan  
4 repeatedly informed claimant that there was "no objective  
5 evidence" without ever specifying what evidence would  
6 support a claim, albeit before Abatie).

7 15. Accordingly, the Court finds MET's application of an  
8 objective evidence requirement - written nowhere in its  
9 policy, inconsistent with evaluation of conditions like  
10 CFS, and without explanation of what evidence Mitchell  
11 could have provided to satisfy the requirement - to  
12 itself constitute an abuse of discretion.

13 16. Given the problems with requiring objective evidence in  
14 this case, the Court finds that Dr. Schmidt's report  
15 failed to credit Plaintiff's substantial evidence of  
16 serious medical conditions. See Nord, 538 U.S. at 834.<sup>15</sup>  
17 As discussed in the Findings of Fact, Mitchell's  
18 conditions were confirmed by the diagnoses of several  
19 treating physicians. These physicians offered the  
20 opinion that Mitchell was restricted in his ability to  
21 work due to those conditions. Although Dr. Schmidt was  
22 not bound to find a disability based on these opinions,  
23 Dr. Schmidt was required to accord some weight to those  
24

---

25 <sup>15</sup> The Court notes Plaintiff's arguments that Dr. Schmidt was  
26 unqualified and herself a conflicted consultant, as opposed to an  
27 independent reviewer of Mitchell's claim. That Dr. Schmidt worked  
28 for MET three days per week as a reviewer does suggest some degree  
of a conflict of interest and the Court has appropriately weighed  
that factor in tailoring its abuse of discretion review. (See  
Deposition of Dr. Schmidt 13:6-8; 14:13-18.).

1 opinions in reaching a decision. See id. at 834. Since  
2 she reviewed Mitchell's evidence under an unwritten and  
3 unexplained objective evidence requirement for a  
4 condition not amenable to objective verification, Dr.  
5 Schmidt imposed an improper standard of review on  
6 Mitchell's evidence, and as a result, his claimed  
7 disability.

8 17. This may explain why Dr. Schmidt's report concentrates on  
9 questioning much of Mitchell's evidence. Dr. Schmidt  
10 attributed a lack of objective evidence, in part, to the  
11 lack of documentation of particular tests. Yet Dr.  
12 Schmidt's report admits the existence of many of those  
13 tests in discussing the comments of treating physicians  
14 on those very tests. (MET 73-79.) The administrative  
15 record does not show that MET requested this available  
16 documentation prior to rejection of Mitchell's claim.  
17 However, an ERISA plan "shall provide to every claimant  
18 who is denied a claim for benefits written notice setting  
19 forth in a manner calculated to be understood by the  
20 claimant: . . . (3) A description of any additional  
21 material or information necessary for the claimant to  
22 perfect the claim and an explanation of why such material  
23 or information is necessary. . . ." 29 C.F.R. §  
24 2560.503-1(f); see also Booton, 110 F.3d at 1463. The  
25 Ninth Circuit has made clear that an administrator cannot  
26 base denial of a claim on a lack of information when it  
27 fails to request available information from the employee.  
28 See id. at 1464. However, MET never inquired into the

1 availability of the records or the tests, that it  
2 suggested would be useful evidence in its denial of  
3 Mitchell's claim.

4 18. Where MET had before it substantial, reliable evidence  
5 indicating the existence of a disability, it could not  
6 rely simply on a lack of evidence to deny Mitchell's  
7 claim. This is not a case where an administrator  
8 credited other reliable evidence over a claimant's  
9 treating physicians. The circumstances suggest that MET,  
10 a conflicted administrator, affirmatively sought to avoid  
11 obtaining additional evidence that could support a claim,  
12 perhaps in the interest of denying the claim for lack of  
13 evidence. This was an occasion when an independent  
14 medical examination was in order to determine the  
15 credibility of Mitchell's evidence.<sup>16</sup> MET did not  
16 exercise this option, choosing instead to assert a lack  
17 of evidence without attempting to confirm for itself  
18 whether Mitchell suffered from disabling conditions.

19 **3. MET's Determination That Mitchell Did Not Have a**  
20 **Disability Was an Abuse of Discretion.**

21 19. As a result of the serious problems with MET's  
22 adjudication of Mitchell's administrative claim, MET  
23 never determined whether Mitchell had a disability under  
24 the master plan definition of disability. The master  
25 plan definition required only that due to sickness

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26  
27 <sup>16</sup> The Court also notes that Dr. Schmidt concedes that she was  
28 not qualified to determine the disabling nature of at least some of  
Mitchell's conditions. (MET 77-78) (stating "I am not qualified to  
comment" with respect to Mitchell's depression).



1 Mitchell 1) was receiving appropriate treatment and 2)  
2 was unable to earn 80% of his predisability earnings  
3 during the elimination period and the next 24 months.  
4 Mitchell provided substantial evidence that his medical  
5 conditions impaired his capacity to work. Mitchell also  
6 showed that he earned less than 80% of his predisability  
7 earnings and that he was receiving regular treatment for  
8 his conditions. MET did not otherwise dispute that  
9 Mitchell was under "appropriate care" or that Mitchell  
10 was unable to earn more than 80% of predisability  
11 earnings. MET did not provide evidence that Mitchell's  
12 reduced earnings was due to a cause other than his  
13 medical conditions. Accordingly, under MET's master plan  
14 definition of disability, the Court finds that Mitchell  
15 had a disability. Therefore, the Court holds that MET  
16 abused its discretion in denying Mitchell's claim.

17 20. Nevertheless, the Court notes that MET's denial of  
18 benefits, based at least in part on the fact that  
19 Mitchell was "still working," is in tension with its  
20 argument that Mitchell needed to be unable to perform  
21 regular job functions. The fact that a person is "still  
22 working" does not settle whether that person is able to  
23 perform regular job functions. See, e.g., Hawkins v.  
24 First Union Corp. Long-Term Disability Plan, 326 F.3d  
25 914, 918 (7th Cir. 2003). Here, while Mitchell attended  
26 work on a full-time basis, substantial evidence indicates  
27 that he was unable to perform regular job functions.  
28 That MET appears to have equated being at work with being

1 able to perform regular job functions indicates its  
2 flawed approach to evaluating Mitchell's claim.  
3 Mitchell's physicians and supervisor attested to the  
4 significant work impairment associated with his medical  
5 conditions. MET's reliance on Mitchell's continued  
6 attendance at work, as well as the noted problems with  
7 the objective evidence requirement, do not satisfy the  
8 Court that MET properly considered whether Mitchell was  
9 able to perform regular job functions. Accordingly, even  
10 under the more stringent policy definition of disability,  
11 the Court holds that MET abused its discretion by denying  
12 that Mitchell was disabled.

13 21. In this case, MET had to use the controlling master plan  
14 definition of disability, but applied more stringent  
15 requirements from a conflicting summary plan definition.  
16 MET additionally applied an unwritten and unexplained  
17 objective evidence requirement. As a result, MET failed  
18 to credit Mitchell's reliable evidence. Under the MET  
19 policy, the Court finds that Mitchell had a disability.  
20 Therefore, the Court holds that MET abused its discretion  
21 in denying Mitchell's disability claim.

22 **E. MET Is The Responsible Administrator and Insurer**

23 22. Having determined that MET abused its discretion in  
24 denying Mitchell's disability claim, the only remaining  
25 question is whether MET is responsible as administrator  
26 and insurer for Mitchell's claim. This issue arises due  
27 to the change in coverage from UNUM to MET on January 1,  
28 2004. MET has argued for the first time in this

1 litigation that Mitchell has no claim because he was not  
2 covered by MET in October 2003, the claimed start date of  
3 disability. During administrative review, MET never  
4 offered this reason as a basis for denial of Mitchell's  
5 claim.

6 23. MET may not disavow that it was the administrator and  
7 insurer for Mitchell's claim when it never raised that  
8 reason during administrative review.<sup>17</sup> ERISA requires an  
9 administrator to set forth the specific reasons for  
10 denial of benefits. 29 U.S.C. 1133; 29 C.F.R. 2560.503-  
11 1. When doing so, an administrator must support the  
12 reasons for denial "with specific reference to the plan  
13 provisions that form the basis for the denial." Booton,  
14 110 F.3d at 1463. The Ninth Circuit has explained that  
15 district courts are limited to review of the reasons for  
16 denial asserted during the administrative process to  
17 prevent an administrator from sandbagging an employee "by  
18 a rationale the plan administrator adduces only after the  
19 suit has commenced." Jebian v. Hewlett Packard Co.  
20 Employee Benefits Org. Income Protection Plan, 349 F.3d  
21 1098, 1104-05 (9th Cir. 2003).

22 24. The Court adheres to the principle that an  
23 administrator's decision may be upheld, if at all, based  
24 upon the reasons provided during adjudication of the  
25 administrative claim. To hold otherwise would eschew the  
26

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27 <sup>17</sup> The Court rejects MET's argument that Mitchell's disability  
28 was a pre-existing condition for the same reason; Met never raised  
the argument in denial of Mitchell's claim.

1 ERISA policy that employee beneficiaries be candidly and  
2 clearly informed of the reasons that disability benefits  
3 are being denied, 29 U.S.C. 1133(1), and receive a "full  
4 and fair review" of their claim, 29 U.S.C. 1133(2). MET  
5 was certainly aware of the change in coverage and  
6 Mitchell's claimed beginning of disability.<sup>18</sup> However,  
7 during administrative review, MET never offered lack of  
8 coverage as a reason for denying Mitchell benefits. The  
9 Court, therefore, finds that MET has waived any argument  
10 that it is not the responsible administrator and insurer  
11 of Mitchell's claim. Mitchell is entitled to LTD  
12 benefits from MET.

#### 13 CONCLUSION

14 For the foregoing reasons, the Court finds that MET abused  
15 its discretion in administrative review of Mitchell's claim. MET  
16 abused its discretion in finding that Mitchell did not have a  
17 disability under the master plan definition of disability.  
18 Finally, the Court finds that MET waived its lack of coverage  
19 defense by not raising that reason during administrative review.  
20 Thus, the Court need not review Mitchell's administrative claim  
21 with UNUM.

22 The Court remands for purposes of a calculation of benefits in  
23 accordance with this order. Mitchell is entitled to LTD benefits  
24 under the MET policy for the 24-month period from October 2003 to

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25  
26 <sup>18</sup> The Court does not consider the fact that CBRE provided  
27 Mitchell with an UNUM claim form, subsequent to filing his  
28 disability claim, to have any bearing on the specific reasons MET  
offered for denying Mitchell's claim. Whether MET's argument has  
any basis is of no moment; MET never offered lack of coverage as a  
reason for denial.

1 September 2005, during which he was under regular medical care and  
2 experienced the requisite loss of earnings due to sickness.<sup>19</sup>

3

4 IT IS SO ORDERED.

5

6 Dated: December 3, 2007



7

DEAN D. PREGERSON  
United States District Judge

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24 <sup>19</sup> The Court does not consider whether Mitchell is entitled to  
25 any benefits beyond 24 months. The parties did not direct any  
26 arguments to the continuation of LTD benefits after 24 months,  
27 which is governed by different requirements than LTD benefits for  
28 an initial 24-month period. (See MET 20) (requiring after 24  
months that a person be "unable to earn more than 80% of your pre-  
disability earnings at your own occupation for any employer in your  
local economy at any gainful occupation for which you are  
reasonably qualified taking into account your training, education,  
and experience").