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**UNITED STATES DISTRICT COURT**

**EASTERN DISTRICT OF CALIFORNIA**

RUBY CHACKO,

Plaintiff,

vs.

AT&T UMBRELLA BENEFIT PLAN NO. 3,

Defendant.

CASE NO.: 2:19-cv-01837-JAM-DB

**JOINT STATEMENT RE THIRD DISCOVERY DISAGREEMENT**

Date: November 6, 2020
Time: 10:00 a.m.
Courtroom: 27, 8th Floor
Location: 501 I Street
Sacramento, CA 95814

Pursuant to Eastern District Local Rule 251, the parties hereby submit the following Joint Statement in connection with Plaintiff's Third Motion to Compel Discovery Responses from Defendant AT&T Umbrella Benefits Plan No. 3 ("the Plan") to Plaintiff's Second Request for Production of Documents and First and Second Sets of Interrogatories, and Plaintiff's Motion for Terminating, Issue, Evidentiary, and Monetary Sanctions against the Plan.

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**TABLE OF CONTENTS**

**Page**

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# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Rules**



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## I. JOINT STATEMENT OF THE MOTION

This is Plaintiff's Third Motion to Compel discovery responses from Defendant pertaining to the conflicts of interests relevant to the disposition of this claim for disability benefits under the Employee Retirement Income Security Act of 1974 ("ERISA"). Plaintiff further requests that the Court award Plaintiff terminating, issue, evidentiary, and monetary sanctions against the Plan.

The Plan requests that the Court deny Plaintiff's Motion because it timely and completely responded to Plaintiff's discovery requests and requested responsive information from non-parties Sedgwick and NMR. (Ex. 7, Decl. of Stacey Campbell, ¶ 3). The Plan has no legal right to compel documents/information from Sedgwick or NMR and Plaintiff may subpoena the documents directly from Sedgwick and NMR. Plaintiff cannot show that the Plan acted with willfulness, bad faith or deception to warrant terminating sanctions, or any other sanctions. The Plan also seeks a protective order pursuant to Fed. R. Civ. P. 26(c)(1)(A) and (C), (1) forbidding Plaintiff from further discovery because the Plan has no further responsive information, and (2) requiring Plaintiff to seek discovery by a different method, such as enforcing her subpoena against NMR and/or subpoenaing the requested information from Sedgwick.

## II. PARTIES' STATEMENT OF THE CASE

This case involves a claim by Plaintiff for benefits under an ERISA-governed employee benefit plan in which she was a participant while employed by AT&T. Plaintiff brought this action for the purpose of recovering long-term disability ("LTD") benefits under the Plan.

This is the parties' third joint statement related to the disagreement set forth in the first and second joint statements filed on February 21, 2020 (Dkt. No. 25) and July 21, 2020 (Dkt. No. 42). The parties will not repeat the statements therein. This court granted Plaintiff's second motion to compel on August 11, 2020 (Dkt. No. 44). This dispute follows the Plan's responses to the discovery requests.

## III. JOINT STATEMENT OF THE DISCOVERY IN DISPUTE

### A. The Parties' Effort to Meet and Confer

On September 1, 2020, Plaintiff's lead attorney, Michelle Roberts, emailed the Plan's attorneys, Stacey Campbell and Johnathan Koonce, to meet and confer about the responses and

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Plaintiff's stated intent to file a third motion to compel and request for terminating sanctions. Ms. Roberts and Mr. Campbell met and conferred telephonically on September 2, 2020 and September 10, 2020, wherein Mr. Campbell advised Ms. Roberts on the Plan's attempts to request information and documents from Sedgwick and NMR that may be responsive to Plaintiff's discovery requests, as indicated in Mr. Campbell's Declaration. (Ex. 7, ¶¶ 4-8). Mr. Campbell provided that the Plan will respond with information it has, but neither Sedgwick nor NMR will produce any additional information without a subpoena to do so. Plaintiff sent the Plan's attorneys a draft of the joint statement on September 24, 2020. The Plan completed its section and sent it to Plaintiff's attorney on October 20, 2020. After completion of this joint statement, Mr. Campbell, Mr. Koonce, and Ms. Roberts met and conferred telephonically on October 26, 2020. They were not able to resolve the dispute or narrow the issues further.

**B. The Discovery Requests and Responses at Issue**

The Parties do not repeat the Plan's initial responses here, but they are included in the Second Joint Statement. *See* Dkt. No. 42.

**Plaintiff's Second Request of Production of Documents ("RFP") to Defendant:**

**RFP NO. 20:** All DOCUMENTS that describe any relationship between YOU or SEDGWICK and NMR, including, but not limited to, contracts, memoranda of understanding, service agreements, vendor agreements, policy letters, and invoices in effect during the RELEVANT TIME PERIOD.

**FIRST SUPPLEMENTAL RESPONSE**: Subject to and without waiving the foregoing objections, Defendant states that it conducted a reasonable inquiry and diligently searched its files, and requested that Sedgwick and NMR diligently search their files, for documents responsive to this Request. Defendant also requested that NMR diligently search its records for documents regarding its relationship with Sedgwick. NMR objects to Plaintiff's request, and, except for documents regarding compensation paid to independent medical examiners/reviewers, NMR believes that Sedgwick may have documents describing their business relationship. Sedgwick, in turn, states that it will not voluntarily produce confidential and/or proprietary business information concerning its business relationship with an entity that is not a party to this lawsuit without a

subpoena or court order compelling it to do so. Defendant has diligently searched and no responsive documents exist.

**RFP NO. 22:** All DOCUMENTS sent by NMR and received by YOU, AT&T, or SEDGWICK describing, evidencing, constituting, referring, or relating the business services that NMR would provide if engaged by YOU, AT&T, or SEDGWICK, including, but not limited to, any manuals, statements of NMR's mission, statements of NMR's philosophy, descriptions of physician procedures, referral guidelines, general descriptions of disability evaluation procedures, descriptions of medical disability management, descriptions of the medical review services provided by NMR, descriptions of the independent medical evaluation services provided by NMR, descriptions of NMR's medical consultation fee schedules, and descriptions of NMR's guidelines for reviewing physicians, from 2015 to the present.

**FIRST SUPPLENTAL RESPONSE**: Subject to and without waiving the foregoing objections, Defendant states that it conducted a reasonable inquiry and diligently searched its files, and requested that Sedgwick and NMR diligently search their files, for documents responsive to this Request. Defendant also requested that NMR diligently search its records for documents it sent to Sedgwick concerning the medical review services it provides. The Plan does not have documents concerning the services NMR would provide if it was engaged by the Plan. NMR, who is not a party to this litigation, believes that Sedgwick could be in possession of documents concerning promotional material regarding services NMR would provide if it was engaged by Sedgwick. Sedgwick, in turn, states that it will not voluntarily produce confidential and/or proprietary business information concerning its business relationship with an entity that is not a party to this lawsuit without a subpoena or court order compelling it to do so. Defendant has exhausted its search and has no responsive documents to Plaintiff's Request.

**RFP NO. 27:** All DOCUMENTS IDENTIFIED and/or relied upon in YOUR responses to PLAINTIFF's Interrogatories to YOU, Set One, served concurrently herewith.

**FIRST SUPPLEMENTAL RESPONSE**: No response.

**Plaintiff's First Set and Second Set of Interrogatories ("Rog") to Defendant:**

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**ROG NO. 9:** State the number of CLAIMS and APPEALS under the PLAN as to which NMR provided medical review services annually from 2015 to the present, indicating separately for each year.

**FIRST SUPPLEMENTAL RESPONSE:** Subject to and without waiving the foregoing objections and answers, Defendant states that it conducted a diligent search and reasonable inquiry for information responsive to this Interrogatory by searching its own records and requested that Sedgwick diligently search its records for responsive information regarding the number of claims and appeals under the Plan that NMR provided medical review services for, annually from 2017 to 2019. Neither the Plan nor the Plan Administrator possess information responsive to this Interrogatory. From its inquiry, Defendant understands that Sedgwick contracts with NMR to provide medical review services, and Sedgwick renders monthly, lump-sum payments to NMR for all services it provides, and such information is not itemized per client-entity.

Defendant requested that NMR diligently search its records for responsive information and, although NMR stands on its objections made in response to Plaintiff's Subpoena requesting the same information, it has informed Defendant that it believes Sedgwick may have information responsive to this request, but upon Defendant requesting information from Sedgwick, Sedgwick informed Defendant that it objects to disclosing information regarding the number of claims and appeals to which NMR provided medical review services without a subpoena. Defendant exhausted its efforts to obtain responsive information and has no such information in its possession to answer the interrogatory.

**ROG NO. 10:** State the number of CLAIMS and APPEALS under the PLAN as to which NMR provided medical review services that resulted in the approval of disability CLAIMS and/or APPEALS. Please indicate the number separately for each year from 2015 to the present.

**FIRST SUPPLEMENTAL RESPONSE:** Subject to and without waiving the foregoing objections and answers, Defendant states that it conducted a diligent search and reasonable inquiry for information responsive to this Interrogatory by searching its own records and requested that Sedgwick diligently search its records for responsive information regarding the number of claims and appeals under the Plan that NMR provided medical review services for that resulted in the

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approval of disability claims and/or appeals, annually from 2017 to 2019. Neither the Plan nor the Plan Administrator possess information responsive to this Interrogatory. From its inquiry, Defendant understands that Sedgwick contracts with NMR to provide medical review services, and Sedgwick renders monthly, lump-sum payments to NMR for all services it provides, and such information is not itemized per client-entity.

Defendant requested that NMR diligently search its records for responsive information and, although NMR stands on its objections made in response to Plaintiff's Subpoena requesting the same information, it has informed Defendant that it believes Sedgwick may have information responsive to this request, but upon Defendant requesting information from Sedgwick, Sedgwick informed Defendant that it objects to disclosing information regarding the number of claims and appeals to which NMR provided medical review services without a subpoena. Defendant exhausted its efforts to obtain responsive information and has no such information in its possession to answer the interrogatory.

**ROG NO. 11:** State the number of CLAIMS and APPEALS under the PLAN as to which NMR provided medical review services that resulted in the denial of disability CLAIMS and/or APPEALS. Please indicate the number separately for each year from 2015 to the present.

**FIRST SUPPLEMENTAL RESPONSE:** Subject to and without waiving the foregoing objections and answers, Defendant states that it conducted a diligent search and reasonable inquiry for information responsive to this Interrogatory by searching its own records and requested that Sedgwick diligently search its records for responsive information regarding the number of claims and appeals under the Plan that NMR provided medical review services for that resulted in the approval of disability claims and/or appeals, annually from 2017 to 2019. Neither the Plan nor the Plan Administrator possess information responsive to this Interrogatory. From its inquiry, Defendant understands that Sedgwick contracts with NMR to provide medical review services, and Sedgwick renders monthly, lump-sum payments to NMR for all services it provides, and such information is not itemized per client-entity.

Defendant requested that NMR diligently search its records for responsive information and, although NMR stands on its objections made in response to Plaintiff's Subpoena requesting

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the same information, it has informed Defendant that it believes Sedgwick may have information responsive to this request, but upon Defendant requesting information from Sedgwick, Sedgwick informed Defendant that it objects to disclosing information regarding the number of claims and appeals to which NMR provided medical review services without a subpoena. Defendant exhausted its efforts to obtain responsive information and has no such information in its possession to answer the interrogatory.

**ROG NO. 14:** State the number of CLAIMS and APPEALS under the PLAN for which Dr. Howard Grattan provided medical review services annually from 2015 to the present, indicating separately for each year.

**FIRST SUPPLEMENTAL RESPONSE:** Subject to and without waiving the foregoing objections and answers, Defendant states that it conducted a diligent search and reasonable inquiry for information responsive to this Interrogatory by searching its own records and requested that Sedgwick diligently search its records for responsive information regarding the number of claims and appeals under the Plan that Dr. Howard Grattan provided medical review services for between 2017 and 2019. Neither the Plan nor the Plan Administrator possess information responsive to this Interrogatory. From its inquiry, Defendant understands that Sedgwick contracts with NMR to provide medical review services, and Sedgwick renders monthly, lump-sum payments to NMR for all services it provides, and such information is neither itemized per client-entity nor is it itemized per independent medical examiner/reviewer providing review services.

Defendant requested that NMR diligently search its records for responsive information and, although NMR stands on its objections made in response to Plaintiff's Subpoena requesting the same information, it has informed Defendant that it believes Sedgwick may have information responsive to this request, but upon Defendant requesting information from Sedgwick, Sedgwick informed Defendant that it objects to disclosing information regarding the number of claims and appeals to which NMR and/or Dr. Grattan provided medical review services without a subpoena, to the extent it has responsive information. Defendant exhausted its efforts to obtain responsive information and has no such information in its possession to answer the interrogatory.

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**ROG NO. 15:** State the total compensation paid to Dr. Howard Grattan on behalf of the PLAN for medical review services each year from 2015 to the present.

**FIRST SUPPLEMENTAL RESPONSE:** Subject to and without waiving the foregoing objections and answers, Defendant states that it conducted a diligent search and reasonable inquiry for information responsive to this Interrogatory by searching its own records and requested that Sedgwick diligently search its records for responsive information regarding the total compensation NMR paid to Dr. Grattan for medical review services under the Plan between 2017 and 2019. Neither the Plan nor the Plan Administrator possess information responsive to this Interrogatory. From its inquiry, Defendant understands that Sedgwick contracts with NMR to provide medical review services, and Sedgwick renders monthly, lump-sum payments to NMR for all services it provides, and such information is neither itemized per client-entity nor is it itemized per independent medical examiner/reviewer providing review services. Further, neither Sedgwick nor the Plan provide any financial compensation to the medical professionals engaged to provide review services, including Dr. Grattan.

Defendant requested that NMR diligently search its records for information regarding the total amount of compensation it paid to Dr. Grattan for medical review services provided under the Plan between 2017 and 2019, to which NMR provided that it stands on its objections made in response to Plaintiff's Subpoena requesting the same information. NMR, which is not a party to this litigation, objects to disclosing information regarding compensation it pays to its independent medical examiners/reviewers without a subpoena or court order compelling it to do so. Defendant exhausted its efforts to obtain responsive information and has no such information in its possession to answer the Interrogatory.

**ROG NO. 18:** State the number of CLAIMS and APPEALS under the PLAN for which Dr. Howard Grattan provided medical review services where he opined that the claimant did not have the functional capacity for full-time work. Please indicate the number separately for each year from 2015 to the present.

**FIRST SUPPLEMENTAL RESPONSE:** Subject to and without waiving the foregoing objections and answers, including Defendant's objection that this Interrogatory seeks to ascertain

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facts pertinent to Plaintiff's claim on the merits, Defendant states that it has conducted a diligent search and reasonable inquiry for information responsive to this Interrogatory by searching its own records and requested that Sedgwick diligently search its records for information regarding the number of claims and appeals where Dr. Grattan opined that the claimant did not have the functional capacity to perform full-time work between 2017 and 2019. Neither the Plan nor the Plan Administrator have records which categorize this type of information. In light of Defendant's size, it would be unduly burdensome and costly for Defendant or Sedgwick to review claims and appeals for over a two-year period to find those which Dr. Grattan not only provided medical review services for, but also to find those which Dr. Grattan made a specific finding. Defendant further objects to this Interrogatory on the grounds that the information Plaintiff requests in this Interrogatory is not relevant to the assessment of a potential financial conflict of interest because there are a potentially endless number of reasons why Dr. Grattan may or may not have come to such a conclusion for any given claim or appeal regarding individuals who are not parties to this litigation.

Defendant requested that NMR diligently search its records for responsive information, to which NMR informed Defendant that it believes Sedgwick may have information responsive to this request. Upon Defendant requesting information from Sedgwick, Sedgwick informed Defendant that it objects to disclosing information regarding the number of claims and appeals where Dr. Grattan opined that the claimant did not have the functional capacity to perform full-time work between 2017 and 2019, without a subpoena, to the extent it has responsive information. Defendant exhausted its efforts to obtain responsive information and has no such information in its possession to answer the Interrogatory.

**ROG NO. 19:** State the number of CLAIMS and APPEALS under the PLAN for which Dr. Howard Grattan provided medical review services where he opined that the claimant did have functional capacity for full-time work or where he opined that the medical evidence did not support restrictions from full-time work. Please indicate the number separately for each year from 2015 to the present.

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**FIRST SUPPLEMENTAL RESPONSE:** Subject to and without waiving the foregoing objections and answers, including Defendant's objection that this Interrogatory seeks to ascertain facts pertinent to Plaintiff's claim on the merits, Defendant states that it has conducted a diligent search and reasonable inquiry for information responsive to this Interrogatory by searching its own records and requested that Sedgwick diligently search its records for information regarding the number of claims and appeals where Dr. Grattan opined that the claimant did have the functional capacity to perform full-time work or where he opined that the medical evidence did not support restrictions from full-time work between 2017 and 2019. Neither the Plan nor the Plan Administrator have records which categorize this type of information. In light of Defendant's size, it would be unduly burdensome and costly for Defendant or Sedgwick to review claims and appeals for over a two-year period to find those which Dr. Grattan not only provided medical review services for, but also to find those which Dr. Grattan made a specific finding. Defendant further objects to this Interrogatory on the grounds that the information Plaintiff requests in this Interrogatory is not relevant to the assessment of a potential financial conflict of interest because there are a potentially endless number of reasons why Dr. Grattan may or may not have come to such a conclusion for any given claim or appeal regarding individuals who are not parties to this litigation.

Defendant requested that NMR diligently search its records for responsive information, to which NMR informed Defendant that it believes Sedgwick may have information responsive to this request. Upon Defendant requesting information from Sedgwick, Sedgwick informed Defendant that it objects to disclosing information regarding the number of claims and appeals where Dr. Grattan opined that the claimant did have the functional capacity to perform full-time work or where he opined that the medical evidence did not support restrictions from full-time work between 2017 and 2019, without a subpoena, to the extent it has responsive information. Defendant exhausted its efforts to obtain responsive information and has no such information in its possession to answer the Interrogatory.

## IV. PLAINTIFF'S CONTENTIONS

### A. The Plan Waived Any Objection That It Does Not Have Possession or Control over the Information and Documents Maintained by Sedgwick or NMR.

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In the second joint statement, Plaintiff made the argument that the Plan has the legal right to obtain the information and documents responsive to Plaintiff's requests from Sedgwick. *See* Dkt. No. 42 (IV.B). The Plan *never* disputed this fact or represented that it did not have the contractual or legal right to the documents maintained by its own Claims Administrator or its vendor, NMR for services provided to the Plan. It just took the position it did not have to ask them to produce anything. *See id*. at V.D. ("The Plan has no obligation to compel the administrator, Sedgwick or NMR to produce documents and information that Plaintiff seeks because the information is not discoverable from the Plan."). Yet AT&T had no problem obtaining a self-serving affidavit from Sedgwick that it attempted to use to defeat Plaintiff's second motion to compel. At the August 7th hearing, Mr. Campbell made the following representations to the Court:

> MR. CAMPBELL: . . . . They ask for all documents between -- describing the relationship between the plan and NMR. **There's none**.

Roberts Declaration, Exh. 1 at 6:24-7:1 (emphasis added). Note that this is contrary to the Plan's first supplemental response to RFP No. 20. Mr. Campbell further states:

> MR. CAMPBELL: I understand. So your Honor, **I disagree that we haven't made an inquiry because we provided an affidavit from Sedgwick** which said they don't have relationship with –

*Id*. at 8:10-13 (emphasis added).

> MR. CAMPBELL: I'm sorry. So I disagree, from plaintiff's perspective, that there wasn't an ability to seek it. **We did go and ask Sedgwick**. **We provided a declaration where they also said, hey, we don't have any information as it relates to Dr. Grattan**. And so

*Id*. at 8:16-20 (emphasis added). This representation that Sedgwick does not have any information as it relates to Dr. Grattan is demonstrably false based on the Plan's first supplemental responses. The Plan now claims that Sedgwick refuses to produce it for the Plan. Upon confirming his client did not even ask its vendor, NMR, for the information, counsel stated the following:

> MR. CAMPBELL: But I do know that opposing counsel has subpoenaed the records from NMR, and NMR, from what I've seen of the responses, is that they don't have the information.

*Id*. at 9:7-9. This is a misrepresentation of NMR's response which may be found at Roberts Decl., Exh. 2. NMR makes burdensome objections but does not deny that it has the information and

documents this Court has decided is discoverable. The Plan's supplemental responses do not state that NMR told the Plan it does not have the information, only that it can get it from Sedgwick.

The Plan's failure to abide by its obligations under Rule 34 to raise this "lack of possession" objection in its initial discovery responses and then its failure to raise it in response to Plaintiff's arguments in the second joint statement should result in its waiver. If the Plan "did go and ask Sedgwick," it should have raised the claim that Sedgwick refuses to comply with its contractual obligation with AT&T to produce documents necessary for the Plan to defend itself in this litigation. Failure to do so has caused unnecessary delay and clogging the Court's docket with another motion to compel that Plaintiff should not be forced to file. The Plan's first supplemental responses are nothing short of gamesmanship and should not be rewarded. Plaintiff requests that the Court order the Plan to provide responses to the requests without any additional objections.

**B. The Plan's Objections Are Barred by The Doctrine of Offensive Nonmutual Issue Preclusion.**

Besides raising a waived objection that is contrary to past representations, the Plan's claim that it does not have control or possession of the requested information and documents is barred by offensive nonmutual issue preclusion because it litigated this precise issue previously and lost. The court has discretion to apply this doctrine in this case because all necessary factors are met.

> The application of offensive nonmutual issue preclusion is appropriate only if (1) there was a full and fair opportunity to litigate the identical issue in the prior action,[]; (2) the issue was actually litigated in the prior action []; (3) the issue was decided in a final judgment, []; and (4) the party against whom issue preclusion is asserted was a party or in privity with a party to the prior action [].

*Syverson v. Int'l Bus. Machines Corp.*, 472 F.3d 1072, 1078 (9th Cir. 2007) (internal citations omitted).

As demonstrated by the filings at Roberts Decl., Exh. 4, in a dispute over similar discovery requests, AT&T made the *exact* same argument about its possession and control of documents and information maintained by Sedgwick in the matter of *Doe v. AT & T W. Disability Benefits Program*, No. C-11-4603 DMR, 2012 WL 1669882 (N.D. Cal. May 14, 2012). The *Doe* court analyzed the contract between AT&T and Sedgwick and determined that the contract "provides Plaintiff with broad access to Sedgwick's and its subcontractors' information in the context of

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records, inspections, and audits." *Id*. at *3. The court determined that Defendant's legal right to demand that Sedgwick or any of Sedgwick's contractors grant it access to any documents or data related to its obligations under the Contract places the documents and data, and the information within them, within Defendant's control. *Id*. at *3-4. The Contract established the duties that Sedgwick must perform for Defendant in case of litigation "preparing the defense of litigated cases arising out of Disability Claims".... and appearing and testifying in court as a subject matter expert witness on Defendant's Plans, policies, and procedures if requested by Defendant or its attorney. *Id*. at *4. The court determined that these provisions establish a contractual obligation pursuant to which Defendant controls documents and information about the Plan's operations that are responsive to Plaintiff's discovery requests. *Id*. Sedgwick did not seek review of the *Doe* court's determination so it is a final decision.

The current iteration of the Contract between AT&T and Sedgwick contain similar provisions which likewise demonstrate that Defendant does continue to control documents and information requested by Plaintiff. *See* Dkt No. 25-2; *also at* Roberts Decl., Exh. 3. For example,

> **3.29 Records and Audits**
> a. [Sedgwick] shall maintain complete and accurate records relating to the Work and the performance of this Agreement. AT&T and its auditors . . . shall have the right to review such records ("AT&T Audits"), to verify the following:
> **1. the accuracy and integrity of [Sedgwick]'s invoices and AT&T's payment obligations hereunder;**
> 2. that the Work charged for was actually performed;
> 3. that the Work has been and is being provided in accordance with this Agreement;
> 4. the integrity of [Sedgwick]'s systems that process, store, support, maintain, and transmit AT&T data;
> **5. the performance of [Sedgwick]'s Subcontractors with respect to any portion of the Work; and**
> 6. that [Sedgwick] and its Subcontractors are complying with Laws.
> b. [Sedgwick] shall provide and shall require that its Subcontractors provide to AT&T . . . access at all reasonable times to:
> 1. any facility at which the Work or any portion thereof is being performed;
> 2. systems and assets used to provide the Work or any portion thereof;
> 3. [Sedgwick] employees and Subcontractor employees providing the Work or any portion thereof; and
> **4. all [Sedgwick] and Subcontractor records, including financial records relating to the invoices and payment obligations and supporting documentation, pertaining to the Work.**
> The scope of AT&T Audits shall also include:
> 1. practices and procedures used in performing the Work;
> 2. systems, communications and information technology used in performing the Work;
> 3. general controls and security practices and procedures;

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> **4. supporting information and calculations regarding invoices and compliance with service requirements;**
> **5. quality initiatives and quality assurance; and**
> 6. compliance with the terms of this Agreement.
> **AT&T's access to the records and other supporting documentation shall include the right to inspect and photocopy [Sedgwick]'s documentation and the documentation of its Subcontractors, and the right to retain copies thereof outside of their physical location with appropriate safeguards, if such retention is deemed reasonably necessary by AT&T.**

Exh. 3 at JS000008. Further, Sedgwick must "[a]ssist AT&T's counsel, if requested, in preparing the defense of litigated cases arising out of Disability [] Claims". Exh. 3 at JS000016. Finally:

> B. Legal Department
> . . .
> 4) [Sedgwick] will cooperate with AT&T in responding to legal claims that directly or indirectly relate to [Sedgwick]'s administration of AT&T's Programs or Plans.
> a) [Sedgwick] shall discuss case history with such attorney, provide a copy of the file to such attorney, and explain the way in which the Program or Plan at issue works and AT&T's Programs or Plans, policies, and procedures to such attorney.
> **b) [Sedgwick] further will provide AT&T attorneys or their designees complete access to all files or documents maintained by [Sedgwick] that are relevant to such claims or disputes, unless otherwise prohibited by law.**
> **c) By way of example only, [Sedgwick]'s representatives agree to provide affidavits, participate in depositions, and attend arbitration hearings or trials on behalf of AT&T and respond to inquiries in matters involving claims administered by [Sedgwick].**
> **d) [Sedgwick] shall appear and testify by affidavit, deposition, or in court as a subject matter expert witness on AT&T's Programs or Plans, policies, and procedures if requested by AT&T or its attorney.**

Exh. 3 at JS000021. Even if the Court finds that offensive nonmutual issue preclusion does not apply, the above-cited provisions in the governing contract make the Plan's objections wholly unsustainable, frivolous, and made in bad faith. Plaintiff requests that the Court order the Plan to exercise its legal and contractual rights and provide substantive responses to Plaintiff's discovery requests without any further objections.

### C. Terminating Sanctions Are Appropriate Here; In the Alternative, Issue, Evidentiary, and Monetary Sanctions Should Be Awarded.

This is Plaintiff's *third* motion to compel. Despite the Court's Order that Defendant provide responses to Plaintiff's requests, Defendant has continued to stonewall and waste Plaintiff's and the Court's resources. For this reason, Plaintiff requests the Court order terminating sanctions against the Plan. This Court is empowered by the federal rules and by its

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inherent authority to issue sanctions against a party. FRCP 37 authorizes a district court, in its discretion, to impose a wide range of sanctions when a party fails to comply with the rules of discovery or with court orders enforcing those rules. *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639 (1976); *Wyle v. R.J. Reynolds Indus., Inc*., 709 F.2d 585, 589 (9th Cir. 1983); Fed. R. Civ. P. 37(b)(2); *see id*. 37(c), 37(d). The central consideration for sanctions under Rule 37(b)(2) is "justice." *Valley Eng'rs Inc. v. Electric Eng'g Co.*, 158 F.3d 1051, 1056-57 (9th Cir. 1998). The Ninth Circuit has explained the need for Rule 37(b)(2) sanctions:

> Litigants who are willful in halting the discovery process act in opposition to the authority of the court and cause impermissible prejudice to their opponents. It is even more important to note, in this era of crowded dockets, that they also deprive other litigants of an opportunity to use the courts as a serious dispute-settlement mechanism.

*G-K Props v. Redev. Agency of the City of San Jose*, 577 F.2d 645, 647 (9th Cir. 1978). Where there is "willfulness, bad faith or fault," terminating sanctions such as rendering a default judgment may be appropriate. *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1096 (9th Cir. 2007). "[D]isobedient conduct not shown to be outside the control of the litigant is all that is required to demonstrate willfulness, bad faith, or fault." *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 948 (9th Cir. 1993) (quoting *Fjelstad v. Am. Honda Motor Co.*, 762 F.2d 1334, 1341 (9th Cir. 1985)). The Court also has inherent authority to issue sanctions. *Mark Indus., Ltd. v. Sea Captain's Choice, Inc.*, 50 F.3d 730, 732-33 (9th Cir. 1995). This circuit has recognized as part of a district court's inherent powers the "broad discretion to make discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial. Within this discretion lies the power . . . to exclude testimony of witnesses whose use at trial . . . would unfairly prejudice an opposing party." *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980) (citations omitted).

The Ninth Circuit has constructed a five-part test to determine whether a casedispositive sanction under Rule 37(b)(2) is just: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." *Id.* at 1096 (citations and footnotes omitted); *Valley Eng'grs Inc.*, 158 F.3d at 1057. Plaintiff submits that, given the gross misconduct in this case, terminating

sanctions are the appropriate remedy. The Plan will not be prejudiced by having to pay Plaintiff her rightfully owed disability benefits and her attorneys' fees and costs. The Court and the public will benefit from having this matter removed from the Court's already crowded docket.

In the alternative, Plaintiff requests that if the Court instead finds issue, evidentiary, or monetary sanctions are appropriate that Plaintiff be given the opportunity to submit additional briefing on the alternative form of sanctions due to the space constraints of this joint statement.

**D. The Plan's Request for a Protective Order Should be Denied.**

As the Court properly observed at the August 7th hearing, the Plan failed and continues to fail to take the proper steps to obtain a protective order. *See* Exh. 1 at 6:7-18. Plan's counsel appears to be aware of how the requested data is maintained by Sedgwick but failed to state that in the first supplemental responses. *See* Roberts Decl., Exh. 6. The Plan's slapdash request for a protective order should be denied.

## V. DEFENDANT'S CONTENTIONS

### A. The Plan Timely Responded to Plaintiff's Discovery Requests and Has Not Waived Any Objections

Plaintiff attempts to substantiate her claim that the Plan has waived its objections to lack of possession of responsive documents based upon inaccurate information. To respond to Plaintiff's discovery responses, the Plan sought responsive information from Sedgwick, which informed the Plan that it had no responsive information. Based upon that representation, the Plan responded to Plaintiff's discovery responses based upon counsel's knowledge and with the information the Plan possessed. After the August 7, 2020 hearing, the Plan's counsel went back to Sedgwick and NMR to request information responsive to Plaintiff's requests, as noted in Mr. Campbell's Declaration. (Ex. 7, ¶¶ 4-8). The Plan provided all documents and information it had in its First Supplemental Discovery Responses, detailed the steps it took to find responsive information, and also explained to Plaintiff's counsel that neither NMR nor Sedgwick would produce any additional documents or information—to the extent they were in possession of any—unless subpoenaed by a court to do so.

The discovery rules provide that the failure to timely respond to discovery requests will generally constitute a waiver of any objections thereto. *Sprague v. Fin. Credit Network, Inc.*, 1:18-

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CV-00035-SAB, 2018 WL 4616688, at *2 (E.D. Cal. Sept. 25, 2018) (citing Fed. R. Civ. P. 33(b)(4) ((“Any ground not stated in a timely objection [to an interrogatory] is waived unless the court, for good cause, excuses the failure”)). “Although Rule 34 does not contain an express provision that untimely objections are waived, courts have interpreted the rule regarding waiver consistent with Rule 33.” *Id*. (citations omitted). The Plan not only served timely responses to Plaintiff’s discovery requests under the discovery rules, but also timely complied with the Court’s August 11, 2020 Order, requiring the Plan to inquire into the existence of the requested documents and/or information, support its objections with specificity, and to respond to Plaintiff’s requests within 21-days. (*See* Doc. No. 44, at 2-3).

The Plan’s objections are sustainable, nonfrivolous, and not made in bad faith because the documents and/or information that Plaintiff seeks is not under the Plan’s control. Plaintiff cites *Doe* for the proposition that the Plan owns and controls the documents Sedgwick and its subcontractor NMR possess. However, the contract in *Doe* is different from the Service Agreement in this case.[1] Section 3.13(c) of the HR Services Agreement in this case provides that “neither Party has any obligation to the other Party with respect to information which… is lawfully received from a third party… [or] is independently developed by the receiving Party or a third party…” (*See* Ex. 8, § 3.13(c), Chacko AR000691). Section 3.25(1) provides that AT&T does not have any ownership rights over Sedgwick’s “independently developed materials.” (*Id*. at § 3.25(1), Chacko AR000703).

The documents and/or information at issue in Plaintiff’s Third Motion to Compel, such as information regarding the compensation of Dr. Grattan and any agreements between Sedgwick and NMR, are the type of records that the Plan has no legal right to obtain from either Sedgwick or NMR, especially when Sedgwick and NMR refuse to produce it without a valid subpoena. Plaintiff fails to cite to any provisions within the HR Services Agreement that requires the production of records relating to compensation NMR pays to its physicians. Plaintiff not only

[1] The *Doe* Agreement, effective April 14, 2003 through December 31, 2010 (extended via a 4th amendment from June 30, 2007 to December 31, 2010), is titled the “Agreement for Administration of Disability Claims under SBC Disability Plans and Administration of SBC’s Job Accommodation Process,” and is between Sedgwick Claims Management Services Inc. and SBC Communications Inc. *See Doe*, 2012 WL 1669882 at *3-4. The HR Services Agreement in this case is effective from May 1, 2015 to December 31, 2021 and is between Sedgwick and AT&T.

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assumes that such information is available, but also assumes that such information is categorized in a manner to ascertain the specific compensation NMR pays to a physician for review services provided to Sedgwick on behalf of the Plan.

For the reasons set forth above, the Plan does not have the same legal right under the HR Services Agreement to demand that Sedgwick or any of Sedgwick's contractors grant it access to any documents or data, in the same manner as the agreement in the *Doe* case, assuming that legal right existed in the *Doe* contract. For that reason, the HR Services Agreement does not place the documents and data, and the information within them, within the Plans control.

To the extent Plaintiff seeks information in NMR's possession, she should request that the Court enforce the subpoena she previously issued and, to the extent she seeks information Sedgwick may possess, she should subpoena those documents from Sedgwick. *See Katz v. Liberty Power Corp., LLC*, 18-CV-10506-ADB, 2018 WL 4398256, at *1 (D. Mass. Sept. 14, 2018) ("Plaintiffs, however, must enforce the document subpoenas they have served on the vendors to effectuate the production of documents.") (citing *GenOn Mid-Atl., LLC v. Stone & Webster, Inc.*, 282 F.R.D. 346, 356 (S.D.N.Y. 2012) (concluding that party had "an obligation to cause [a third party] to preserve its information, but [was] not liable for any unrelated shortcomings in [that third party's] actual production"); *Rockwood v. SKF USA Inc.*, 2009 WL 3698406, at *1 (D.N.H. Nov. 5, 2009) ("If defendant wants the documents sought by its document request, and which are in the hands of [the third party], it is ordered to subpoena them from [that third party].")).

### B. Offensive Nonmutual Issue Preclusion Is Improper Because the Agreement in *Doe* Is Different than the HR Services Agreement in this Case

The court has broad discretion to deny the application of offensive collateral estoppel where "the application of offensive estoppel would be unfair to a defendant." *Parklane Hosiery Co.*, 439 U.S. at 331. Offensive non-mutual issue preclusion is improper here because the issue in *Doe* is not identical to the issue in this case, there was not a full and fair opportunity to litigate an identical issue in *Doe*, and the potential shortcomings and indices of unfairness cut against issue preclusion.

As set forth in Section V.A. above, the controlling contract at issue in *Doe* is not the same as the HR Services Agreement in this case. The two agreements contain different language

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regarding the parties' rights, the ownership of information, and AT&T's right to perform an audit. Contrary to Plaintiff's argument, the issue of whether the Plan has a contractual right to demand documents and information from Sedgwick and/or NMR under the HR Services Agreement is not identical and has not been litigated. *See Syverson*, 472 F.3d at 1080 (finding that issues are not sufficiently identical for the purposes of offensive nonmutual issue preclusion where the prior court considered different facts in the prior litigation).

Moreover, the Plan had no incentive to contest the court's interpretation of the agreement and further defend the issue of control in the *Doe* case because, within days of the decision, the parties settled the matter and the case was dismissed. (*See* Ex. 9, *Doe* Docket Sheet, at p. 5-6). Thus, Plaintiff's argument that the Plan is precluded from claiming it lacks control over the documents and information she requests as a result of *Doe* is without merit and should be denied.

**C. The Plan Complied with the Court's Order and Discovery Rules**

Although courts generally have wide discretion to impose discovery sanctions, the court's discretion to impose terminating sanctions is narrower because "a terminating sanction, whether default judgment against a defendant or dismissal of a plaintiff's action, is very severe." *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1096 (9th Cir. 2007). Only willfulness, bad faith, and fault justify terminating sanctions. *Id*. Terminating sanctions are inappropriate here because, contrary to Plaintiff's assertions, the Plan complied with its obligations under the discovery rules as well as the Court's August 11, 2020 Order by inquiring whether Sedgwick or NMR had information responsive to Plaintiff's discovery requests and detailing its efforts to obtain the requested information. Plaintiff has no evidence of willfulness, bad faith or deception to warrant sanctions.

In responding to discovery requests, a reasonable inquiry must be made, and if no responsive documents exist, the responding party must so state with sufficient specificity to allow the Court to determine whether the party made a reasonable inquiry and exercised due diligence, pursuant to Fed. R. Civ. P. 26(g)(1). Rule 26(g) requires an attorney to certify that he has made a reasonable effort to assure that the client has provided all responsive information and documents available. *Perkins v. City of Modesto*, 119CV00126LJOEPG, 2020 WL 1333109, at *3–4 (E.D.

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Cal. Mar. 23, 2020). The Plan satisfied its obligation by (1) diligently searching for responsive information; (2) requesting responsive information from Sedgwick and NMR; and (3) explaining the specific steps taken to conduct the search and certifying that all responsive documents have been provided or that none exist within the Plan's possession. *See id*. at *9. Plaintiff's belief that the Plan possesses more documents is not a sufficient basis for compelling production, much less imposing sanctions. *See Loops, LLC v. Phoenix Trading, Inc.*, 594 F. Appx. 614, 619 (Fed. Cir. 2014) ("[A] party cannot be sanctioned on the basis of mere speculation"); *see also Grossman v. Directors Guild of Am., Inc.*, 2018 WL 5914242, at *5 (C.D. Cal. Aug. 22, 2018) ("A plaintiff's mere suspicion that additional documents must exist is an insufficient basis to grant a motion to compel.") (citations omitted)); *Ogden v. Bumble Bee Foods, LLC*, 292 F.R.D. 620, 628 (N.D. Cal. 2013) ("Absent evidence that [the defendant] is withholding documents in its possession, the court cannot issue an order compelling [the defendant] to produce documents it states it does not have.").

The five-part test warranting case-dispositive sanctions is not met. First, ERISA has an interest in expeditious resolution of litigation and as such, has prevented discovery in an effort to streamline ERISA cases. *See Boyd v. Bert Bell/Pete Rozelle NFL Players Retirement Plan*, 410 F.3d 1173, 1178 (9th Cir. 2005) (finding that in ERISA cases, discovery may be limited because the statute's primary goal is to provide inexpensive and expeditious resolution to employee benefits claims). This case is well within the timeframe of the Court's case management deadlines and summary judgment briefing schedule. The Court's hearing on the parties' dispositive motions is not until March 23, 2021, and based upon the parties' motion, the Court agreed to extend the Plaintiff's summary judgment deadline to January 12, 2021. (*See* Doc. 46). This case is on track to meet these deadlines and allow the Court to decide the case on the merits. The fact that the parties have encountered a discovery dispute is part of the litigation process, which should not result in the dismissal of the case simply because the parties disagree, especially when the Plan has taken all available steps to comply with Plaintiff's requests.

Plaintiff is not prejudiced because, instead of enforcing her subpoena issued to NMR or event attempting to subpoena information/documents from Sedgwick, she turned to the Plan in an

attempt to force it to produce documents it does not possess and has no legal right to demand. *See Adriana Int'l Corp. v. Thoeren,* 913 F.2d 1406, 1412 (9th Cir.1990) (finding that delay alone is not sufficient prejudice). Plaintiff is also not prejudiced because the Ninth Circuit already found that no conflict of interest exists between the Plan and its claim administrator, *Day v. AT&T Disability Income Plan*, 698 F.3d 1091 (9th Cir. 2012)(finding no conflict of interest exists because "[t]he Plan is funded by AT&T and not Sedgwick, and administered by Sedgwick and not AT&T."), and the court also rejected similar arguments that Plaintiff makes here: that a heightened abuse of discretion standard should apply because evidence of "the value of the financial arrangement between the medical group consultants and Sedgwick creates a 'financial incentive for the medical consulting group to deliver medical opinions in line with a pre-determined denial of benefits.' " *May v. AT&T Umbrella Ben. Plan No. 1*, C-11-02204 JCS, 2012 WL 1997810, at *13 (N.D. Cal. June 4, 2012), *aff'd,* 584 Fed. Appx. 674 (9th Cir. 2014) (citing *Burrows v. AT & T Umbrella Benefit Plan No. 1*, 2011 WL 996748, at *2–3 (N.D.Cal. Mar.21, 2011); *Edwards v. AT & T Disability Income Plan*, 2009 WL 650255, at *11 (N.D.Cal. Mar.11, 2009)).

Public policy and the policy in the Ninth Circuit dictates that cases should be decided on their merits, *Dreith v. Nu Image, Inc.*, 648 F.3d 779, 789 n. 1 (9th Cir. 2011), and, although the Plan maintains that sanctions of any kind are unwarranted, less drastic sanctions are available and no previous sanctions have been issued. *See Computer Task Group, Inc. v. Brotby,* 364 F.3d 1112 (9th Cir.2004) (warning of the possibility of dismissal or the imposition of monetary sanctions before terminating sanctions are appropriate, absent continued deceptive misconduct).The Plan is not willfully deceiving Plaintiff, nor is the Plan intentionally withholding documents or information from Plaintiff. Even assuming the documents and information Plaintiff seeks both exist and are within the "control" of the Plan pursuant to Rule 34 under a similar analysis as provided in *Doe*, such information is physically in the possession of third parties and not readily obtainable by the Plan. The Plan's actions do not demonstrate the type of willfulness, bad faith, or fault to impose terminating sanctions, evidentiary sanctions or monetary sanctions. *See Fjelstad*, 762 F.2d at 1339–40 (holding that Federal Rule 37(d) "did not give the district court authority to impose sanctions against" a party because the party "did not 'fail ... to serve answers or

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objections to interrogatories' " (quoting Fed. R. Civ. P. 37(d))); *see also Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992) ("[W]e [have] held that [Federal] Rule 37(d) does not extend to situations in which the rule is 'inapplicable by its very terms,' even when general discovery misconduct is alleged."

**D. The Plan Requests the Entry of a Protective Order**

Because the Plan has properly responded to Plaintiff's discovery, it requests that the Court sustain its objections to Plaintiff's discovery requests and issue a protective order, pursuant to Fed. R. Civ. P. 26(c)(1)(A), protecting the Plan from the undue burden and expense of further responding to Plaintiff's discovery, subject to the requirements of Fed. R. Civ. P. 26(e) requiring the Plan to supplement its responses. The Plan also seeks a protective order under Fed. R. Civ. P. 26(c)(1)(C) by having the Court prescribe a different discovery method than the one selected by Plaintiff, namely requiring Plaintiff to enforce her subpoena against NMR and/or to subpoena the requested information/documents from Sedgwick, instead of trying to force the Plan to produce information/documents that it does not possess. "The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense...." Fed. R. Civ. P. 26(c)(1); *see also Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004) ("After a showing of good cause, the district court may issue any protective order ... 'to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,' including any order prohibiting the requested discovery altogether, limiting the scope of discovery, or fixing the terms of disclosure."). Good cause exists here because the Plan has diligently searched and produced all documents and information in its possession, and a protective order is warranted to prevent further annoyance, oppression, undue burden and expense.

Dated: October 30, 2020

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The filing attorney attests that she has obtained concurrence in the filing of this document from the other signatory.

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