Added by VC: TEAM 5

**THE THIRD ANNUAL**
**ELLEN A. (NELL) HENNESSY EMPLOYEE BENEFITS**
**MOOT COURT COMPETITION**

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**UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH DISTRICT**

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Jean Luc PICARD

Plaintiff-Appellant,

v.

ENTERPRISE PERMANENTE, ENTERPRISE LIFE INSURANCE PLAN, and BORG LIFE ASSURANCE CO.,

Defendants-Appellees.

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On Appeal from the United States District Court
For the District of Columbia
19-cv-1701-BC
**(The Honorable Brian Cooper)**

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# BRIEF OF APPELLANT

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**Judge's Brief - TEAM #5**

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## JURISDICTIONAL STATEMENT

The District Court has jurisdiction of this case (19-cv-1701-BC) pursuant to 29 U.S.C. § 1132 (e)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"). The district court's federal question jurisdiction was based on violations of ERISA when Appellant brought action under 29 U.S.C. § 502(a)(1)(B) and 29 U.S.C. § 502(a)(3). This Court of Appeals has jurisdiction of this case pursuant to 28 U.S.C. § 1291.

## ISSUE PRESENTED

I. Whether the District Court properly declined to enforce the arbitration clause in Section 8.2 of the Policy when Dr. Crusher did not consent to arbitration and the Plan inconsistently applied the provision?

II. Whether the District Court erred in finding that the Plan administrator reasonably concluded that Dr. Crusher was engaged in the commission of a crime for purposes of the Plan when the Plan does not define crime and based its decision entirely on a speculative police report?

## STATEMENT OF THE CASE

Plaintiff-Appellant, Jean Luc Picard ("Picard") is the administrator of his late wife's estate as well as the beneficiary of her life insurance policy which is provided through her employer Defendant-Cross Appellee Enterprise Permanente ("Enterprise"). Rec. at 1. Picard's wife Beverly Crusher, M.D. ("Dr. Crusher") was employed by one of Enterprise's medical facilities, Enterprise Permanente Hospital

("hospital") located in Bethesda, Maryland since 1992. *Id.* Her work as a resident cardiologist required her to be on call thirteen weekends out of the year. Rec. at 3. Dr. Crusher was on call the weekend of her death whereby she was alerted that a patient went into cardiac arrest and attempted to get to the hospital to attend to the patient. Rec. at 3-4.

Upon Dr. Crusher's death Picard filed two claims for benefits, pursuant to the Policy: (1) a claim for $350,000 under the life insurance benefit, and (2) a claim for $1,000,000 for Dr. Crusher's accidental death in the line of duty with. Rec. at 1. The plan administrator and Defendant-Cross Appellee Borg Life Assurance Co. of Baltimore ("Borg") initially determined that Picard was entitled to receive the life insurance benefit up to $250,000 and was not entitled to receive the $1,000,000 death benefit because of Section 2.2 of the group term life insurance policy (the "Policy") that Enterprise purchased from Borg. Rec. at 5.

Following Borg's initial determination, Picard appealed the portion that denied the death benefit. Rec. at 5. Borg issued a final determination on September 1, 2018 notifying Picard that he had exhausted the internal appeals process and could seek arbitration if he would like. *Id.*

On October 1, 2018 Picard filed a civil suit in the United States District Court for the District of Columbia (the "District Court") under Section 502(a)(1)(B) and 502(a)(3) of ERISA against Enterprise and Borg (the "Defendants"). Rec. at 5; *Picard v. Enterprise Permanent et. al.*, NO.: 19-cv-1701-BC (D. Ct. D.C. Nov. 9,

2019). Picard's complaint included the appropriate plan documents, the insurance policy, as well as the documents in the written record from the internal claims procedure. *Id.* Appellee Borg subsequently filed a motion for summary judgement asking that the complaint be dismissed because Picard did not initiate the arbitration clause located in Section 8.2 of the Policy and to deny Picard's claim for accidental death benefits because of the crimes exclusion clause in Section 2.2 of the Policy. *Id.*

The District Court found the arbitration clause to be unenforceable. Op. at 7. They reasoned that enforcing the arbitration clause would go against the values of arbitration. *Id*. The District Court acknowledged that arbitration clauses were traditionally not enforced in the ERISA context because that would be deciding a statutory right rather than resolving a contractual dispute. Op. at 6-7. In regards to the death benefit, the District Court granted the Appellee's motion for summary judgement concluding that, although they did not view texting while driving as a crime, Dr. Crusher did commit a crime while responding to the red alert because in the District of Columbia her actions were considered texting which is a crime in the District of Columbia. Op. at 8. Both Appellee and Appellant filed cross appeals challenging the District Court's determination in the United States Court of Appeals for the Thirteenth Circuit. Rec. at 6. Picard is challenging the District Court's grant of the Appellee's motion for summary judgement and Appellees are challenging the District Court's ruling that the arbitration clause is unenforceable. *Id*.

## STATEMENT OF THE FACTS

Picard tragically lost his wife Dr. Crusher in a car crash while she was attempting to get to the hospital in order to save a patient who had gone into cardiac arrest . As a full time employee, Dr. Crusher participated in Enterprise Life Insurance Plan (hereinafter the "Plan"). The Plan is administered by Borg.

Dr. Crusher, who achieved her medical degree from Starfleet Academy School of Medicine, was serving as the on call resident cardiologist at the hospital in Bethesda, Maryland the day of her death, December 31, 2017. At 12:09 a.m., Dr. Crusher received a message from the hospital that her patient William Riker ("Riker") had stopped breathing and gone into full cardiac arrest. The message was sent as a red alert signifying that it was urgent. Previous messages sent to Dr. Crusher's cellphone indicated that Riker had been admitted to Enterprise Bethesda Hospital with chest pains and shortness of breath. Dr. Crusher, as was her responsibility as the cardiologist on call, responded back to these messages that she would be there to assist Riker as soon as possible. Panicked, the nurse followed-up her text message to Dr. Crusher at 12:09 a.m. with another text message asking for instructions as well as asking where Dr. Crusher was located. Dr. Crusher messaged the nurse back immediately at 12:10 a.m. with instructions to perform CPR on Riker. She also messaged the nurse that she was fifteen minutes away while insisting that the nurse continue perform CPR on Riker. Immediately after sending those critical

messages that could help save Riker's life, Dr. Crushers Volkswagen crashed into a utility pole killing her on impact.

Dr. Crusher's cellular device, much like her 1969 Volkswagen Beetle, was an antiquated flip phone. Although her phone was a flip phone, she was still able to access patient records on the device via Enterprise's record keeping application called MyHealth by utilizing her phone's text messaging system.

Following Dr. Crusher's fatal car accident, Washington, D.C. Metropolitan Police Department ("MPD") concluded that Dr. Crusher violated city code by responding to the red alert that was sent to her by the nurse attempting to treat Riker. In MPD's opinion, Dr. Crusher was traveling at an excessive speed and using a device without a hands-free accessory despite the D.C. code allowing for the use of a cellular device for the purposes of contacting a hospital. Dr. Crusher's penalty was $100.

Dr. Crusher was a participant in the Plan established by her employer. Rec. at 3. The Plan is an employee welfare plan as defined in ERISA. Rec. at 1. The Plan provides for two benefits to its participants: (1) life insurance coverage paying up to 1x salary, and (2) an additional death benefit of $1,000,000 upon the employee's accidental death in the line of duty. *Id.* The Plan is funded by a group life insurance policy that Enterprise purchases from Borg. *Id.* The Plan's Policy includes a crime exclusion clause that exempts the Plan from covering losses that were the result of the commission of a crime. *Id.*; Policy Section 2.2. The Policy further authorizes

Borg to make final decisions regarding claims filed under the Plan. Rec. at 2. The Policy also includes an arbitration clause that calls for disputes relating to the Policy to be settled by arbitration. *Id.*

After the tragic death of his wife, Picard filed two claims for benefits under the Plan: (1) a claim for $350,000 under the life insurance benefit, and (2) a claim for $1,000,000 for Dr. Crusher's accidental death in the line of duty. Rec. at 5. Borg made the initial determination. *Id.* According to the Policy, Borg has agreed to act as Enterprise's agent when processing claims pertaining to the Plan. Rec. at 2; Policy Section 3.1. Borg's obligation as Enterprise's agent is to provide "expertise and make all initial decisions regarding claims that are filed" under the Plan. *Id*.; Policy Section 3.2(a). The policy also gives Borg the authority to make all final decisions regarding claims filed under the Plan. *Id*.; Policy Section 3.2(b).

Initially, the Plan Administrator granted Picard's claim for the life insurance benefit in the amount of $250,000 and denied his claim for the accidental death benefit in its entirety. *Id.* Borg's initial reasoning for denying the accidental death benefit was because they determined that Dr. Crusher was committing a crime during her accident by texting and driving. *Id*. Picard challenged Borg's initial determination by following the Policy's claim procedures process and filing an appeal. *Id*. Borg ultimately upheld their initial decision to deny Picard the accidental death benefit. *Id*. Picard then filed suit. *Id*.

## STATEMENT OF THE ARGUMENT

The district court correctly held that the arbitration clause in the Policy was unenforceable. First, an arbitration clause is a contractual agreement and therefore unenforceable to noncontracting parties. Here, Picard was not a party to Dr. Crusher and the Policy's contract to arbitrate. He was merely a beneficiary to the Dr. Crusher's benefits. Second, the presumption of arbitrability under the Federal Arbitration Act (FAA), does not apply to Picard because enforcing it would interfere with Picard's ability to access the judicial system as was the intent of Congress when it enacted ERISA.

The District Court incorrectly held that great deference should be given to the Plan Administrator. A less deferential standard should be applied instead. In granting summary judgment, the district court "gave great deference" to the Defendants – Appellees. This deference was improper because Borg had a conflict of interest that affected its determination. Picard can point to several factors that show the conflict of interest impacted Borg's decision such as the inconsistent treatment of its arbitration clause, the coincidental timing of the strict enforcement of the arbitration clause, and the Plan's inconsistent treatment of traffic violations under the crime exclusion.

## ARGUMENT

### I. The District Court correctly held that the arbitration agreement is unenforceable because Picard was not a party to the arbitration agreement and Enterprise cannot compel a non-signatory to arbitration for the purpose of circumventing the judicial system.

Whether or not a dispute is arbitrable is generally a "question of judicial determination."[1] Where an arbitration clause is present in a contract involving commerce, the FAA governs.[2] There is a presumption of arbitrability where a contract contains an arbitration clause.[3] However, a party can overcome this presumption.[4] For an arbitration clause to be enforced, the party seeking to enforce the clause must show: 1) a written agreement to arbitrate exists, 2) the dispute it is seeking to arbitrate falls within the scope of the arbitration agreement, and 3) the party seeking to arbitrate has not waived its right to arbitration.[5] While federal policy favors arbitration, it does not mandate arbitration when these three elements are not met.

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[1] *CardioNet, Inc. v. Cigna Health Corp*., 751 F.3d 165, 171 (2014).
[2] 9 U.S.C. §2*; see also Rent A Center, West, Inc. v. Jackson*, 561 U.S. 63, 130 (2010) (stating that the FAA shows that arbitration is a matter of contracts); *Goodwin v. Elkins & Co.*, 730 F.2d 99, 108 (3d. Cir. 1984) (set forth that arbitration agreements are contracts that fall within the scope of the FAA).
[3] *At&t Technologies Inc. v. Communication Workers of America*, 475 U.S. 643, 605 (1987).
[4] *Id.*
[5] *Brennan v. King*, 139 F.3d 258, 263–67 (1st Cir.1998).

A. The District Court Correctly Held That The Arbitration Clause Should Not Be Enforced Against Picard Because He Did Not Consent To Arbitration And Arbitration Clauses Are Contractual Agreements.

A person who was not a party to an arbitration agreement cannot be forced to arbitrate.[6] As established by the FAA, arbitration clauses are contracts.[7] The right to compel arbitration is therefore a contractual right.[8] Contracts require mutual assent, so a party cannot be bound to a contract to which they did not agree or enter.[9] A party "seeking to substitute an arbitral forum for a judicial forum must show, at a bare minimum, that the protagonists have agreed to arbitrate some claims."[10] The Supreme Court has warned courts that they should be cautious about compelling parties to arbitration who did not agree to an arbitration clause.[11] Arbitration under the FAA requires a party to consent to arbitration, not to be coerced into arbitration.[12]

Here, Picard was not a party to the contract between Dr. Crusher and Enterprise whereby they agreed to arbitrate claims relating to the policy.[13] Since

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[6] *EEOC v. Waffle House, Inc*., 534 U.S. 279, 294 (2002).
[7] *Volt Info. Sciences, Inc. v. Bd. of Tr. of Leland Stanford Junior Univ*., 489 U.S. 468, 478-79 (1989).
[8] *Britton v. Co-Op Banking Group*, 4 F.3d 742, 744 (9th Cir. 1993).
[9] *United Steelworkers of America v. Warrior and Gulf Navigation Co*., 363 U.S. 574, 582 (1960).
[10] *McCarthy v. Azure*, 22 F.3d 351, 354–55 (1st Cir.1994).
[11] *InterGen N.V. v. Grina*, 344 F.3d 134, 143 (1st Cir. 2003).
[12] *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 7 F.3d 1110, 1114 (3d Cir. 1993); *see also Waffle House*, 534 U.S. at 294 (finding that the FAA does not give courts the permission to force arbitration upon parties who are not a part of an agreement to arbitrate).
[13] Rec. at 3.

Picard was not a signatory to the arbitration clause, he should not be coerced into upholding a contract to which he did not voluntarily enter. While ERISA claims are arbitrable even though they raise statutory claims, no contractual agreement exists between Picard and Enterprise to arbitrate any statutory claims.[14] The contract between Dr. Crusher and Enterprise therefore cannot be forced upon Picard.

The ability to compel a party to arbitrate comes from the authority of a contract.[15] In *Dorman v. Charles*, 780 Fed.Appx 510, 512 (9th Cir. 2019), the Ninth Circuit Court of Appeals recently held that arbitration is to be compelled where a plan expressly agreed in their plan documents to arbitrate disputes.[16] Our case stands in clear contrast to *Dorman* where the claimant there was found to be bound by the arbitration provision because he participated in the plan for nearly a year while the provision was effective[17].

Here, Picard never participated in the plan; he was simply a beneficiary. As a beneficiary, he never signed plan documents or otherwise subjected himself to the Plan's arbitration provision by actively participating in the Plan. While signatories have been required to arbitrate in other cases at the request of non-signatories

[14] *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013).
[15] *See* Charles Lee. Eisen, *What Arbitration Agreement? Compelling Non-Signatories to Arbitrate*, 56-JUL Disp. Resol. J. 40 (2001).
[16] *Dorman v. Charles*, 780 Fed.Appx 510, 512 (9th Cir. 2019).
[17] *Id.*

because of the close relationship between the entities involved,[18] no such situation exists here. Accordingly, this court should affirm the District Court's decision not to enforce the arbitration clause because Picard did not consent to arbitration.

B. Federal Policies That Call For The Court To Presume Arbitration As A Default Do Not Extend To Picard.

Congressional policy regarding the FAA favors arbitration clauses.[19] This policy does not extend to determining the parties who are bound by an arbitration agreement.[20] The general policy goals of the FAA are not applicable when determining whether or not a party agreed to arbitration, which is a private contractual obligation.[21] However, a court's determination is not inconsistent with this federal policy where the court has determined that an arbitration clause should not be enforced because the party seeking to compel arbitration did not prove his or her case.[22]

Congress made it clear that it intended for ERISA to provide for "ready access to the federal courts."[23] Properly applying Congress' intent requires that Picard be guaranteed access to the judicial system. Ultimately, this access to the judicial

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[18] *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc*,, 10 F.3d 753, 757 (11th Cir. 1993).
[19] *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24 (1983).
[20] *See Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069, 1074 (5th Cir. 2002) (finding that the purpose of the FAA is 'to make arbitration agreements as enforceable as other contracts, but not more so.').
[21] *Waffle House*, 534 U.S. at 279.
[22] *McCarthy*, 22 F.3d at 355.
[23] 29 U.S.C. §1001(b) (2018).

system nullifies the arbitration clause as it would prevent Picard from using the judicial system to resolve his dispute. Furthermore, Picard is empowered by Congress to bring a civil action to recover the benefits of his wife's life insurance policy.[24] As the District Court noted in its opinion, Enterprise failed to initiate arbitration itself.[25] If Enterprise felt that arbitration was the next step, the appropriate action would have been to file a motion to compel arbitration. However, Enterprises' actions serve to show that it simply used the unenforceable arbitration provision to circumvent the judicial system, interfere with Picard's right to access the court system, and have the entire case dismissed. Thus, Congress' intent to provide ERISA claimants with access to the judicial system should be respected.

This court should affirm the District Court's decision not to enforce the arbitration agreement because 1) federal policy favoring arbitration agreements does not extend to Picard here, and 2) enforcing it will interfere with Picard's ability to access the judicial system in accordance with the intent of Congress when it enacted ERISA.

[24] 29 U.S.C. §1132(a)(1)(B (2018) (providing that a participants and beneficiaries have the right to bring a civil action in order to recover the benefits due to them under plan terms).
[25] *Picard v. Enterprise Permanent et. al.*, NO.: 19-cv-1701-BC, 7 (D. Ct. D.C. Nov. 9, 2019).

## II. This Court Should Reverse and Remand This Case Back to the District Court to Enter Summary Judgment in Favor of the Appellant Because Borg's Determination was Arbitrary and Capricious.

### A. Borg's Determination Was Arbitrary And Capricious Because It Was Not Supported By Substantial Evidence.

A plan administrator's decision will be upheld under the arbitrary and capricious standard "if it is the result of a deliberate, principled reasoning process, and is rational in light of the plan's provisions."[26] Its decision reviewed under this standard must be upheld if it is supported by substantial evidence.[27] Substantial evidence to support an administrator's decision exist if the evidence is "rational in light of the plan's provisions."[28] "The administrator's decision may be arbitrary and capricious if it relied on an interpretation of the plan that found no support in the text, or where the administrator 'cherry-pick[s evidence] in hopes of obtaining a favorable report.'"[29] The obligation under ERISA to review the administrative record in order to determine whether the plan administrator's decision was arbitrary

[26] *Cooper v. Life Ins. Co. of N. Am.,* 486 F.3d 157, 165 (6th Cir. 2007).
[27] *Lanier v. Metro. Life Ins. Co.*, 692 F. Supp. 2d 775, 786 (E.D. Mich. 2010) (citing *Baker v. United Mine Workers of Am. Health & Ret. Funds,* 929 F.2d 1140, 1144 (6th Cir.1991)).
[28] *Lanier v. Metro. Life Ins. Co.*, 692 F. Supp. 2d 775, 786 (E.D. Mich. 2010).
[29] *Lanier v. Metro. Life Ins. Co.*, 692 F. Supp. 2d 775, 786 (E.D. Mich. 2010) (citing *Spangler v. Lockheed Martin Energy Sys., Inc.*, 313 F.3d 356, 362 (6th Cir. 2002)).

and capacious "inherently includes some review of the quality and quantity of the … evidence and the opinions on both sides."[30,31]

An ERISA benefits determination is not supported by substantial evidence, when the plan fails to conduct a meaningful review of both sides of the issue.[32] Several courts have considered whether a plan administrator's determination was supported by substantial evidence. The district court in *Boyer* found that the plan administrator's determination lacked substantial evidence when it determined the insured's behavior was criminal based only on a witness statement and the police report.[33] The plan administrator failed to conduct a meaningful review of the car accident because it did not contact the reporting officers, investigators, prosecutors, or any authority to obtain substantial evidence regarding the participant's death.[34] The plan administrator solely relied on unsubstantiated and speculative information contained in the police report.[35] Contrastingly, in *Whitaker v. Hartford Life & Acc. Ins. Co.*, the plan participant brought an action against the plan administrator

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[30] *Lanier v. Metro. Life Ins. Co.*, 692 F. Supp. 2d 775, 786 (E.D. Mich. 2010).
[31] *See generally* C.F.R. § 2560.503-1(h)(1). Every employee benefit plan shall establish and maintain a procedure by which a claimant shall have a reasonable opportunity to appeal an adverse benefit determination to an appropriate named fiduciary of the plan, and under which there will be a full and fair review of the claim and the adverse benefit determination.
[32] *Id.*
[33] *Boyer v. Schneider Elec. Holdings, Inc. Life & Accident Plan,* 350 F. Supp. 3d 854, 865 (W.D. Mo. 2018).
[34] *Id.*
[35] *Id.*

alleging that the denial of long-term disability benefits was arbitration and capricious.[36] The district court in *Whitaker* held that the plan administrator's determination was not arbitrary and capricious because the plan administrator obtained the opinion of two independent medical professions to assess the participant's condition before denying his claim.[37]

Here, Borg's determination was not supported by substantial evidence because it failed to conduct a meaningful review of both sides of the issue. C.F.R.§2560.501-1(h)(2) requires that the plan administrator make a full and fair review of an adverse benefits determination. Here, the plan administrator deferred all of its review to the police report by the MPD and the D.C. council.[38] There is no evidence in the record that shows Borg ever contacted the reporting officers, investigators, or any authority to obtain additional evidence regarding the crash. *See* r. at 1- 6. Additionally, Borg failed to obtain independent forensic analysis regarding the crash. *See* r. at 1- 6. Indeed, Dr. Crusher's last text message was sent a full minute before the estimated time of the crash, which raises a substantial doubt as to whether distracted driving was the reason for the crash and not a number of other possible causes. R. at 4. Borg's review is the "cherry pick[ing]" of evidence that the court in

[36] *Whitaker v. Hartford Life & Acc. Ins. Co.,* 404 F.3d 947 (6th Cir. 2005).
[37] *Id.*
[38] *Picard v. Enterprise Permanent et. al.*, NO.: 19-cv-1701-BC, 7 (D. Ct. D.C. Nov. 9, 2019).

*Spangler v. Lockheed Martin Energy Sys., Inc.*, warns against.[39] Similarly, the court in *Boyer* found that when the plan administrator failed to contact the reporting officers, investigators, or obtain evidence of the actual speed limit in the area of the crash, the plan lacked substantial evidence for its determination.[40] This can be distinguished from *Whitaker* because the plan administrator conducted an independent medical review of the participant's medical condition.[41]

Borg's application of the crime exclusion was arbitrary and capricious. Borg lacked substantial evidence to support its adverse benefit determination. Therefore, this Court should reverse and remand this case to the district court to grant summary judgment in favor of Picard.

B. In the Alternative, Should This Court Hold That the District Court Should Not Be Reversed, Then This Court Should Require the District Court to Review Borg's Determination Under A Less Deferential Standard of Review.

Borg's determination should be reviewed under a less deferential standard because it abused its discretion in denying Picard's claim. Borg had a conflict of interest that infiltrated the decision-making process, which resulted in an abuse of discretion.

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[39] *Spangler v. Lockheed Martin Energy Sys., Inc.*, 313 F.3d 356, 362 (6th Cir. 2002).
[40] *Boyer v. Schneider Elec. Holdings, Inc. Life & Accident Plan,* 350 F. Supp. 3d 854, 867 (W.D. Mo. 2018).
[41] *Whitaker v. Hartford Life & Acc. Ins. Co.,* 404 F.3d 947, 950 (6th Cir. 2005).

Under *Firestone Tire & Rubber Co. v. Bruch*, a plan administrator's denial of benefits challenged under §1132(a)(1)(B) must be reviewed *de novo* unless the "benefit plan expressly gives the plan administrator or fiduciary discretionary authority" to determine eligible for benefits or to construe the plan's terms in which case a deferential standard of review is appropriate. [42] However, even if a plan gives the plan fiduciary discretionary authority, the deferential standard may be lost, if the plan administrator abuses his or her discretionary authority, resulting in a less deferential standard up to *de novo* review.[43] Courts look to the totality of the circumstances in determining whether a plan administrator abused his or her discretion in denying plan benefits.[44]

A plan administrator has a conflict of interest when, "exercising discretion over a situation for which it incurs 'direct, immediate expenses as a result of benefit determinations favorable to plan participants.'"[45] ERISA does not speak directly to the standard of review a court should use to scrutinize a plan administrator's determination when a conflict exists, but it imports trust law that squarely answers the question. When a trustee operates under a conflict of interest, "that conflict *must*

[42] *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 (1989).
[43] *West v. Aetna Life Ins. Co*., 171 F. Supp. 2d 856, 870 (N.D. Iowa 2001).
[44] *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 117, 128 (2008).
[45] *Brown v. Blue Cross & Blue Shield of Ala., Inc.,* 898 F.2d 1556, 1561 (11th Cir. 1990) (quoting *de Nobel v. Vitro Corp.,* 885 F.2d 1180, 1191 (4th Cir. 1989)).

be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'"[46] In cases where a conflict exists, even when there is no evidence that the conflict effected the decision, "the conduct of the trustee in the administration of the trust will be subject to *especially careful scrutiny."*[47] For "a serious conflict of interest, the proper deference to give the [plan administrator's] decisions may be…zero."[48]

A duel role administrator abuses his discretion when a conflict of interest infiltrates the decision-making process.[49] In *Stephan v. Unum Life Ins. Co. of Am*., the claimant sought long-term disability insurance benefits after becoming permanently disabled from Unum, the third-party insurance company.[50] Without consideration of the conflict of interest, the district court granted summary judgment for Unum when it determined the claimant's annual bonus was not calculable in his long-term disability payments.[51] Unum had a history of bias decision-making, questionable plan language interpretations, and inconsistent treatment of premium

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[46] *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 (1989) (quoting Restatement (Second) of Trusts § 187, cmt. d (1959) ("Second Restatement").

[47] Restatement (Third) of Trusts § 37, cmt. f(1) (2001) (emphasis added) ("Third Restatement").

[48] *Van Boxel v. Journal Co. Emp'ees Pension Trust*, 836 F.2d 1048, 1052-53 (7th Cir. 1987).

[49] *Whalen v. Standard Ins. Co*., No. SACV080878DOCMLG, 2009 WL 3756651, at *7 (C.D. Cal. Nov. 5, 2009 (citing *Montour v. Hartford Life & Acc. Ins. Co*., 588 F.3d 623 (9th Cir. 2009)).

[50] *Stephan v. Unum Life Ins. Co. of Am*., 697 F.3d 917, 935 (9th Cir. 2012).

[51] *Id.*

payments as employee compensation.[52] The claimant appealed and the Ninth Circuit Court of Appeals remanded the case back to the district court to reconsider the weight of Unum's conflict of interest in determining whether Unum abused its discretion.[53]

Similarly, in *Montour v. Hartford Life & Acc. Ins. Co*., the participant in a long-term disability insurance plan governed by ERISA brought an action in court against the plan administrator (Hartford), challenging its decision to terminate his benefits.[54] Harford had a conflict of interest because it decided the claims that it was also responsible for paying.[55] Hartford did not utilize procedures to help ensure a full and fair review process, conduct an independent investigation of Montour's disability (i.e. pure paper review), of address the Social Security Administration's determination that Montour was in fact disabled.[56] The district court granted summary judgment in favor of Hartford without consideration of the role that the conflict of interest played in Hartford's decision-making process.[57] The Ninth Circuit Court of Appeals reversed the lower court's decision in favor of the plan and

[52] *Id* at 934.
[53] *Id.* at 939.
[54] *Montour v. Hartford Life & Acc. Ins. Co*., 588 F.3d 623 (9th Cir. 2009).
[55] *Id.*
[56] *Id* at 630.
[57] *Id.*

remanded the case to the district court to enter summary judgment in favor of Montour.[58]

Contrastingly, in *Boyd v. ConAgra Foods, Inc.*, a former employee brought an action against his employer seeking to recover severance benefits under an ERISA plan and alleged a breach of fiduciary duty because the plan administrator was the decider and payor of plan claims.[59] The district court held in favor of the plan because the employer had procedural safeguards surrounding its administration of the plan which decreased the weight the court afforded to the conflict of interest in deciding whether the employer abused its discretion.[60]

Similarly, in *Meguerditchian v. Aetna Life Ins. Co*., the plan participant brought an action against his employer's short-term disability plan and claimed that the paying administrator abused its decision in denying the benefit.[61] The plan had no procedural irregularities or biased claims history and the administers reasons for denial were always consistent.[62] The Ninth Circuit Court of Appeals held that the conflict of interest did not impact the decision-making process and the appropriate standard of review was abuse of discretion standard without enhanced skepticism.[63]

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[58] *Id* at 637.
[59] *Boyd v. ConAgra Foods, Inc.,* 879 F.3d 314 (8th Cir. 2018).
[60] Id at 322.
[61] *Meguerditchian v. Aetna Life Ins. Co*., 999 F. Supp. 2d 1180 (C.D. Cal. 2014), aff'd, 648 F. App'x 605 (9th Cir. 2016).
[62] *Id* at 1186.
[63] *Id* at 1189.

Here, Borg had a conflict of interest that infiltrated its decision-making process. Under the Plan's provisions Sections 3.2(a) – (b), Borg agreed to act as Enterprise's agent for processing all claims, both initial and final determinations; thus, a conflict of interest existed. R. at 2. Borg has a history of inconsistently applying plan terms and enforcing plan provisions. R. at 3. Borg has also inconsistently regarded traffic violations as constituting the "commission of a crime." *Id*. Prior to 2019, Borg only enforced arbitration when all parties consented to it. *Id.* Since 2019 – after initiation of Picard's lawsuit – the plan strictly enforces the arbitration provision. *Id*. In totality, these factors show that the conflict of interest caused Borg to abuse its discretion which requires a remand to the district court to review Borg's decision under a less deferential standard.[64]

Additionally, Borg did not put procedural safeguards in place that would ensure a neutral decision-making process.[65] C.F.R. § 2560.503-1(h)(2)(iv) requires that the plan administrator "provide for a review that takes into account all comments, documents, records, and other information submitted by the claimant relating to the claim."[66]

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[64] *See Stephan v. Unum Life Ins. Co. of Am*., 697 F.3d 917, 935 (9th Cir. 2012) (remanding the case to the district court when it failed to consider the plan's inconsistent treatment of premiums and questionable interpretations).
[65] C.F.R. § 2560.503-1(h)(2)(iv).
[66] C.F.R. § 2560.503-1(h)(2)(iv). The record does not indicate whether additional documents were submitted by the Appellant. However, court precedent makes it clear that a full and fair review under C.F.R. § 2560.503-1(h)(2) should take into account evidence on both sides of the issue, regardless of whether the claimant

Here, Borg only relied on a "pure paper" review of the police report in denying Picard's claim without conducting an independent investigation or further review of the accident. R. at 5. Unlike the plans in *Boyd* and *Meguerditchian* which had procedure safeguards to ensure a neutral decision-making process,[67] had no procedural irregularities, and the administrators consistently applied plan terms.[68] Borg, therefore, has failed to satisfy C.F.R. § 2560.503-1(h)(2)(iv) in conducting a full and fair review of Picard's claim.

Accordingly, this Court should vacate the district court's decision and remand the case for review under a less deferential standard because Borg abused its discretion in denying Picard's claim. Borg has a conflict of interest that infiltrated the decision-making process, which resulted in an abuse of discretion.

## CONCLUSION

Appellant, Picard, requests that this Court reverse and remand this case back to the district court to enter summary judgment in his favor. In the alternative, should this Court hold that Picard is not entitled to a reversed judgment, Picard requests that

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submitted the evidence. *See generally*, *Whitaker v. Hartford Life & Acc. Ins. Co.,* 404 F.3d 947 (6th Cir. 2005) (finding that the plan conducted a full and fair review when the plan administrator got the medical opinion of two independent doctors to assess the claimant's medical condition before it denied the claim.)

[67] *Boyd v. ConAgra Foods, Inc.,* 879 F.3d 322 (8th Cir. 2018).

[68] *Meguerditchian v. Aetna Life Ins. Co*., 999 F. Supp. 2d 1186 (C.D. Cal. 2014), aff'd, 648 F. App'x 605 (9th Cir. 2016).

this Court remand this case back to the district court to be reviewed under a less deferential standard of review.

**CERTIFICATE OF SERVICE**

We hereby certify that i) the work product contained in all copies of our brief is in fact our work product, ii) we have complied fully with REDACTED REDACTED the honor code [redacted] and iii) we have complied with all Rules of the Competition.

Dated: January 17, 2019

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