UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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LISA FELTINGTON

Plaintiff,

-against-

HARTFORD LIFE INSURANCE COMPANY,

Defendant.

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MEMORANDUM & ORDER
CV 14-6616 (GRB)

GARY R. BROWN, United States District Judge:

In military and law enforcement situations, a "warning shot," sometimes known as "a shot across the bow," encompasses a discharge of lethal force directed to avoid harm while conveying a serious message. In soccer, referees use a "yellow card" to similar effect. The goal of the warning shot is to persuade its subject to change course or desist in certain actions to avoid dire consequences while confirming the shooter's readiness to engage. In its review, counsel should make no mistake: this opinion constitutes a warning shot.

In this action, plaintiff Lisa Feltington seeks a determination by the defendant Hartford Life terminating her long-term disability benefits under a private employer-provided disability policy. It seems astonishing that a matter of this relative simplicity – essentially a review of an insurance proceeding record with limited discovery and no right to trial – has entered its seventh year of litigation. Review of this case in conjunction with the instant application and pending summary judgment motion reveals that much of that delay is attributable to the tactics of counsel,

who have litigated this matter in a vituperative and dilatory manner.[1] The result has been a mind-numbing elevation of form over substance which had devolved into a conflagration that all but extinguished the search for truth.

Currently, Hartford Life vehemently objects to an unremarkable ruling by the Honorable James Wicks, United States Magistrate Judge, relating to the expansion of the record to include one document which has been subject to unbridled motion practice. Hartford Life predicates its objections upon scattershot assertions, identified below. None of these representations are completely true. Some are half-truths. Others don't even rise to that level. Taken together, they reveal troubling behavior by counsel, emblematic of other facets of this over-litigated case.

The efforts of the defendant's attorneys in this case exceed traditional notions of zealous advocacy[2] with seeming disregard for the duty of candor toward the Court. The objection distorts the record and launches baseless attacks upon the United States Magistrate Judge assigned to this case, claiming, *inter alia*, that he acted *ultra vires* in rendering his decision. Such conduct cannot be condoned. Thus, the Court overrules defendant's objections to Magistrate Judge Wick's Order supplementing the record and affirms the Order in its entirety.

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[1] While this opinion catalogs troubling conduct by counsel for defendant, plaintiff's counsel is not entirely blameless. Plaintiff's contributions to the massive delays in this case include making a formal motion to strike based upon the font size and concomitant word counts used in his adversary's brief. *See* DE 80-84. Such frivolity did not help.

[2] While often referred to as a kind of shorthand, "zealous advocacy" no longer appears in the professional conduct rules, which contain further moderating elements. The commentary to the ABA rule on diligence, while mentioning zeal, notes:

> A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. [ ] The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

ABA Model Rule 1.3. Notably, the New York Rules omit any reference to "zeal", even in the commentary. Saunders, P., "Whatever Happened to 'Zealous Advocacy," *NYLJ*, Mar. 11, 2011.

Moreover, over defendant's vehement objection and meritless opposition, discovery of its claims policies has produced startling information, as it appears that Hartford Life maintained policies and practices relating to handling of disability claims that may be contrary to law or bear upon the Company's structural conflict of interest in such matters. Therefore, in order to afford the parties a final opportunity to resolve this matter, pursue alternative avenues, or address the deficiencies in their motion papers, the pending motions for summary judgment are denied without prejudice to renewal consistent with this decision.

BACKGROUND

The seven-year litigative history of this action challenging a finding regarding disability benefits need not be reiterated here. The docket in this matter – containing close to 100 entries in addition to the 1,000-page administrative record[3] – has become so very overburdened that even defendant's counsel deploys shortcuts in its papers. DE 74 at 7 n.2. ("For a detailed discussion of the relevant facts, Defendant respectfully refers the Court to the Statement of Facts section of its Opposition to Plaintiff's Letter Motion to Expand the Administrative Record (Doc. No. 43) and Defendant's Rule 56.1 Statement[4] of Material Facts (Doc. No. 49)"). Notably, the Rule 56.1 statement runs more than 125 numbered paragraphs – some of which are disputed -- spread over 19 pages, such that its incorporation by reference proves less than helpful. Many of the allegations and some of the unwieldy history of this matter are summarized in orders by Judges Tomlinson and Wicks, familiarity with which is assumed. DE 19, 40, 69.

[3] As the defendant filed the administrative record – initially divided into three sections, but then further subdivided into ten subsections – without providing any table of contents, index, or guidance as to which pages are contained in which section, finding a particular document is reminiscent of playing the game *Battleship*. According to its makers, *Battleship* "brings together competition, strategy, and excitement!" *See hasbro.com*. The exercise of locating a document in this case, by contrast, is simple misery.

[4] In December 2021, the parties filed cross-motions for summary judgment. DE 77, 78.

DISCUSSION

This decision is rendered in accordance with the well-established standards of review of an objection to a non-dispositive order by a magistrate judge. *See, e.g., Mullen v. City of Syracuse,* 582 F. App'x 58, 61 (2d Cir. 2014) ("Where, as here, the district court has referred a non-dispositive matter to a magistrate judge for decision, the district court shall set aside the order only insofar as it 'is clearly erroneous or is contrary to law.'" (*quoting* Fed.R.Civ.P. 72(a))). As will be seen, since this Court had previously ruled against defendant on the very issue raised here, the standard of review is largely irrelevant.

1. *Judge Tomlinson Declined to Decide the Motion to Enlarge the Record and Never Suggested that this Matter had to be Resolved by the Assigned District Judge*

In a lengthy, detailed opinion, Judge Tomlinson ruled on plaintiff's motion for extra-record discovery. *Feltington v. Hartford Life Ins. Co.,* 2021 WL 2474213, at *1 (E.D.N.Y. June 17, 2021). Her description of the communications surrounding the termination of plaintiff's disability benefits proves insightful:

> Dr. Small provided Hartford with a Medical Record Review report ("MRR"), dated September 12, 2014, regarding his review of Plaintiff's medical file. *See* MRR, annexed as Ex. B to Pl.'s Mot. [DE 17]. According to the MRR, Dr. Small reviewed the following documentation in Plaintiff's file: (1) MRI reports and x-ray reports; (2) records from Dr. Farrugia, Dr. Reginald Rosseau, M.D., Dr. Porges, and Dr. Fazzini; (3) Dr. Dawodu's IME report; (4) the FCE Report from Best; (5) and two surveillance videos of the Plaintiff. *See id*. at 000356-00361. In summarizing the FCE Report, the MRR states:
>
> > An unusual functional capacity evaluation, *which is unsigned* , is reviewed from Best Physical Therapy. This was performed on May 16, 2014. The pertinent findings from this evaluation purport that the claimant could only lift 16lbs, and only from a 24 inch high level. She could carry in front 16lbs and to either side 14lbs. She could push 42lbs and pull 43lbs. She was allegedly found to have a poor sitting tolerance. The individual who completed this report concluded that 'the claimant's physical abilities do not match the job description of a quality assurance coordinator' because:

> She could not sit for frequent and continuous periods of time without trunk flexion and rotation.
>
> She could walk only rarely.
>
> She could not reach overhead.
>
> She could only lift 16lbs from a 24 inch height.
>
> She could only side-carry 14lbs. Her right hand coordination was 'less than average; particularly, with fine and gross motor skills.'
>
> *The author of this report who is, at this time, anonymous*, concluded that the claimant was 'unable to do light work' and also concluded that the claimant was 'unable to do sedentary work.'

Id. at 000359-000360 (emphasis supplied). Ultimately, Dr. Small concluded that the "unsigned" FCE Report by Best "appears to be less than objective" because its findings "are inconsistent with the findings at the examination performed by Dr. Dawodu" as well as Plaintiff's "activity level displayed on the surveillance videos" observed by Dr. Small. *Id.* at 000362.

Under the subheading entitled "Attending Physician Contact Documentation," the MRR states that Dr. Small "ha[d] not been asked to contact an [Attending Physician] regarding the [Plaintiff]," but that he "ha[d] been asked to contact Best Physical Therapy Associates." *Id*. at 000361. According to Dr. Small,

> On August 9, 2014 at 2pm Central Standard Time I placed a call to [Best at] 914 708.6548. I reached a recorded voicemail message from a Karen Cavenaugh asking for me to leave a message. I left my name and return phone number. I called again on August 10, 2014 at 1:15 pm Central Standard Time again reaching voicemail. I left another message to return my call. On August 11, 2014 at 10:30 am Central Standard Time, I placed a third call and reached the same voicemail. Once again, I left a message to return my call.

Id. Thus, according to the MRR, Dr. Small never spoke with a representative at Best, despite his multiple attempts to do so.

2021 WL 2474213, at *3. She then notes that "Greenberg's response makes clear that 'the events described by Dr. Small never occurred.'" *Id.* at *4. Judge Tomlinson further noted that, according to plaintiff:

> Hartford "used Dr. Small's version of events" to support its decision to affirm the denial of Plaintiff's long-term disability benefits. *Id.* at 2. Specifically, Hartford "disparage[ed]" the FCE Report "by stating that Dr. Small's calls to Best Physical Therapy to discuss Plaintiff's level of function had not been returned" and by "repeat[ing] Dr. Small's comment that Best's report was unsigned and that the author remains unknown."

Id. at *5. She also held, without disputation, that Hartford labored under a "structural conflict of interest," in that the Company "both evaluates claims for benefits and pays benefits claims" *Id.* at *7. Judge Tomlinson observed that such a structural conflict of interest supported plaintiff's application for discovery outside of the administrative record, and ultimately granted some of plaintiff's requests. And, of course, "a conflict of interest is to be '*weighed as a factor* in determining whether there [wa]s an abuse of discretion.'" *McCauley v. First Unum Life Ins. Co.*, 551 F.3d 126, 128 (2d Cir. 2008) (quoting *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 115 (2008)).

Judge Tomlinson, always a careful and thorough jurist, diligently noted that "the decision as to whether to allow discovery is distinct from the decision as to whether to allow consideration of additional evidence." *Feltington,* 2021 WL 2474213, at *9. She expressly limited her decision to the discovery questions before her, noting that whether the record should be supplemented should await the completion of discovery sought. "Thus, even if discovery outside the administrative record is permitted, a plaintiff must then make a showing of good cause before the district court may consider the information obtained via discovery in reviewing a plan administrator's benefits determination." *Id*. at *8.

Relying on non-contextual excerpts of her detailed work, defendant attempts to twist Judge Tomlinson's ruling into a preemptive prohibition against resolution of a motion to supplement by a magistrate judge, arguing as follows:

- "In her Amended Discovery Order, Judge Tomlinson rejected Plaintiff's attempt to expand the Administrative Record, holding that the question of whether the Administrative Record

should be expanded must be made by a separate application to the District Court." DE 74 at 10 (citing DE 40 at 17, 25).

- "Judge Wicks should never have considered this motion and instead, referred the issue back to District Judge Brown, as Magistrate Judge Tomlinson had already done in her prior order on the very same issue." *Id.* at 11.

- "Magistrate Tomlinson previously ruled in her Amended Memorandum and Order dated June 17, 2021 (Doc. No. 40), that the question of whether the Administrative Record should be expanded must be made by a separate application to the *district judge*." DE 84 at 6 (emphasis in the original).

- "Even though that ruling is law of the case, Plaintiff ignored it, and then addressed her Letter Motion to expand the record to Magistrate Judge Tomlinson, not District Judge Brown." *Id.*

Judge Tomlinson's rulings were, of course, nothing of the sort. Defendant's arguments to the contrary are simply false.

2. The Court Granted the Motion to Expand the Record Over Defendant's Objection, and Never Ruled that the Matter Could Not Be Considered by the Assigned Magistrate Judge

In its brief, defendant describes rulings at a pre-motion conference[5] before the undersigned as follows:

> Judge Brown stated that he would consider this motion, including whether the Administrative Record should be expanded to include the letter from Ms. Greenburg, at the time he ruled on the parties' motions for summary judgment.
>
> . . .
>
> Judge Brown stated that he (not Judge Wicks) would consider Plaintiff's argument regarding expanding the Administrative Record.

DE 74 at 7, 11; *cf. id.* at 5 ("[T]he governing legal authority and a previous Order issued in this matter require any request to expand the Administrative Record to be considered and determined by the sitting District Judge, not by the Magistrate Judge"). In support, counsel cites two things: the order *scheduling* the conference and letters of counsel containing their recollections of what

[5] To add to the confusion, defendant repeatedly conflates the date of the October 20 conference with the October 9, 2021 order scheduling that conference. That date was the date of the order scheduling the conference, which was held on October 20. DE 74 at 6, 10, 11.

was said during the conference. *Id.* (citing DE 62, 63 and Electronic Order of October 9, 2021). Yet, as reflected in the transcript of the October 20 the Court did *not* direct that it would consider expanding the record at a later date. Regarding the Greenburg letter, at the conference, the Court ruled "I deem this admitted." DE 85 at 29. How counsel can construe this as the Court deferring its decision and expressing a prohibition against Judge Wicks deciding the matter remains a mystery.

Counsel's assertion that "Judge Brown stated that he (not Judge Wicks) would consider Plaintiff's argument" is undermined by yet another fact: at the time of the October 20, 2021 conference, Judge Wicks had not yet been assigned to the case. *See* Electronic Order dated November 2, 2021. Indeed, because of the passing of Judge Tomlinson, there was no magistrate judge assigned to this case as of October 20, 2021. Thus, counsel's representation that the undersigned made a ruling excluding consideration by a magistrate judge constitutes misconstruction bordering on falsehood.

But it gets worse. Having effectively lost the motion, defense counsel tried and failed to persuade Judge Wicks to decide it in its favor, and now has the unbridled temerity to argue that Judge Wicks impermissibly considered the matter.

> At oral argument, Judge Wicks posed the following question to defense counsel:
>
> > But I want to hear from Mr. Mazzola on why we shouldn't allow – in my discretion, why the Susan Greenberg letter of October 14th, 2014 shouldn't be permitted. . . . Why shouldn't that be permitted as a supplementation to the record?

DE 86 at 6. Defense forcefully reiterated many of his arguments against supplementing the record. *Id.* at 6-16. Counsel never argued that Judge Wicks was unauthorized to consider the motion; indeed, counsel's argument suggested the opposite. *See, e.g., id.*, at 10 ("one other thing I just want your Honor to consider"). That alone is grounds to reject the objection. *Nolasco v. United*

States, 358 F. Supp. 2d 224, 231 n. 13 (S.D.N.Y. 2004) ("A party may not raise an objection to an issue it never brought before the Magistrate Judge") (collecting cases).

Counsel never advised Judge Wicks that the undersigned had already ruled against him on the issue, seeking an opportunity for reconsideration of the issue. However, Judge Wicks, who was – as always – well prepared,[6] raised the question of the Court's prior ruling admitting the Greenburg letter:

> JUDGE WICKS: I think even Judge Brown indicated – he teed it up for you to make the arguments, but I think he wanted to see this letter, what it looks like, no?
>
> . . .
>
> MR. MAZZOLA: Well, I think Judge Brown was just – you know, that was at the end of the conference and he was saying, I review everything.

DE 86 at 8. This characterization substantially varies from this Court's ruling. DE 85 at 29 ("Then it is deemed admitted. I am accepting it.").

3. Judge Wicks Was Fully Authorized to Consider the Motion

Hartford Life argues that:

- "Plaintiff's Motion to Expand the Administrative Record was never referred to Judge Wicks for hearing and determination and District Judge Brown had previously informed the parties that he would decide the Motion." DE 74 at 5-6.
- "Judge Brown did not refer this Motion for review by Magistrate Judge Wicks." *Id.* at 7.

Meanwhile, Rule II(e)(1) of this Court's individual rules provides in part:

> **Matters Referred to the Assigned Magistrate Judge.** All discovery and non-dispositive pretrial motions and applications are to be made to the Magistrate Judge in accordance with that Magistrate Judge's individual rules.

Cf. Simmons v. Casella, 2020 WL 1026798, at *2 (E.D.N.Y. Mar. 3, 2020) ("Pursuant to 28 U.S.C. § 636(b)(1)(A), a district judge 'may designate a magistrate judge to hear and determine any [nondispositive] pretrial matter,' not otherwise expressly excluded therein."). The use of the word

[6] As no one had, as yet, apparently ordered a transcript of the pre-motion conference, it appears that Judge Wicks reviewed the audio recording of the conference.

"All" in this rule drives defendant's arguments into the realm of the ludicrous. And while the question of expanding the administrative record is often intertwined with a district judge's summary judgment ruling, resolution of this issue by an assigned magistrate judge is not unprecedented. *See, e.g., Parker v. Reliance Standard Life Ins. Co.,* 2000 WL 97362, at *1 (S.D.N.Y. Jan. 27, 2000), *abrogated by Locher v. Unum Life Ins. Co. of Am.,* 389 F.3d 288 (2d Cir. 2004); *Khan v. Provident Life & Accident Ins. Co.,* 386 F. Supp. 3d 251, 273 (W.D.N.Y. 2019); *Gregory v. Metro. Life Ins. Co.,* 648 F. Supp. 2d 591, 605 (D. Vt. 2009). Thus, the contention that Judge Wicks' ruling was unauthorized is entirely without merit.

4. *Judge Wicks' Determination Was Substantively Correct as the Subject Letter Must Be Considered by the Court*

So, what is all the controversy about? At its core, the supplementation of the record centers on the Greenburg letter. The substance of that letter consists of the following:

> I am in receipt of the letter you forwarded to me from The Hartford regarding Ms. Lisa Feltington. I performed a Functional Capacity Evaluation (FCE) on May 16, 2014, on Ms. Feltington. The Hartford letter insinuates that the author of the report is unknown, but I bring your attention to the very first page of the report, which indicates that the FCE was performed by me at our Pelham facility. Further, I feel that the letter consistently misquotes me and takes information out of context. This is grossly unfair. The FCE is a three-hour examination conducted by a Physical Therapist, where the client actually performs a variety of work related tasks. The data is collected and analyzed. A comprehensive report is written, which includes a list of at least 11 consistency checkpoints. This is not an IME, where the patient is examined only briefly. Rather, it is based on actual functional ability observed by a Physical Therapist with specific training in this highly skilled test, directing and monitoring 30 different tasks that cross validate each other. In addition, an extensive physical assessment is done before the testing so that the therapist can assess the client's level of condition and strength for safety reasons, before the testing begins.
>
> The letter goes on to say that Dr. Small called the BEST office on August 9, 10, and 11th. Dr. Small did call once and left a message for me to call him back, which I did. He wanted to ask me questions about the FCE but I informed him that I would need to reread the file as it had been some time since the FCE had been performed. Dr. Small indicated that I should call him back after I had a chance to review the file. I asked a member of my office staff to phone him and ask him to

> submit a list of written questions that he had about the FCE so that I could be prepared for the next phone call. I was told that the call had been placed to him and a message had been left. To my knowledge, Dr. Small never called back.

DE 42 at 6. That's it. Two paragraphs totaling 361 words. Over a course of years, the parties have filed repeated, voluminous motions on the issue of whether these two paragraphs, which serve to clarify several factual matters in Hartford Life's determination, should be considered by the Court.

Defendant argues that "Judge Wicks held (albeit erroneously) . . . that Hartford disregarded the FCE, which again, is belied by Hartford's final appeal determination letter that discusses the substance of the FCE, and shows it was not 'disregarded.'" DE 84 at 7. Though defendant accuses his adversary of "semantic word games" in this respect, it is defense counsel who is engaging in etymological hair-splitting. *Id.* While it is true that Hartford Life did not disregard[7] the report, it certainly discredited and denigrated the report based upon the fact that it was unsigned as well as Greenburg's purported unwillingness to contact Dr. Small. This becomes obvious when one considers the excerpts of Hartford's decision quoted and highlighted by Judge Tomlinson. *Feltington*, 2021 WL 2474213, at *3 (noting Hartford's reference to "[a]n unusual functional capacity evaluation, *which is unsigned*," and emphasizing that *"[t]he author of this report who is, at this time, anonymous*") (emphasis original). Reading these descriptions, one might infer that the FCE report was prepared by someone entirely unqualified, or perhaps by the plaintiff herself. Thus, the Greenburg letter, which clarifies these seemingly critical concerns (and was ignored by Hartford) must be considered in connection with this matter.

5. *Hartford's Blanket Policy of Refusing to Consider Post-Appeal Information May Prove Highly Relevant to Resolution of this Matter*

[7] Judge Wicks' order (which was drafted quickly as a courtesy to the parties and the Court) uses the word "disregard," but the import is clear. As Judge Tomlinson found earlier, Hartford Life relied upon the absence of a signature and erroneous information about contact between Greenburg and Dr. Small to "disparage" the report. *Feltington*, 2021 WL 2474213, at *5.

And the plot thickens.

While not central to the resolution of defendant's objection, counsel argues that "while Plaintiff sought discovery from Hartford to determine whether it had any internal procedure governing its handling of such late submissions, that effort yielded nothing relevant to these proceedings." DE 74 at 15. To the contrary, the discovery produced as a result of that effort may prove quite important.

The rancorous goings-on in this case produced several short excerpts from Hartford Life's claims manual. Plaintiff hoped that the Company's refusal to consider the Greenburg letter constituted a deviation from its internal policy. What plaintiff uncovered, however, is something potentially far more interesting.

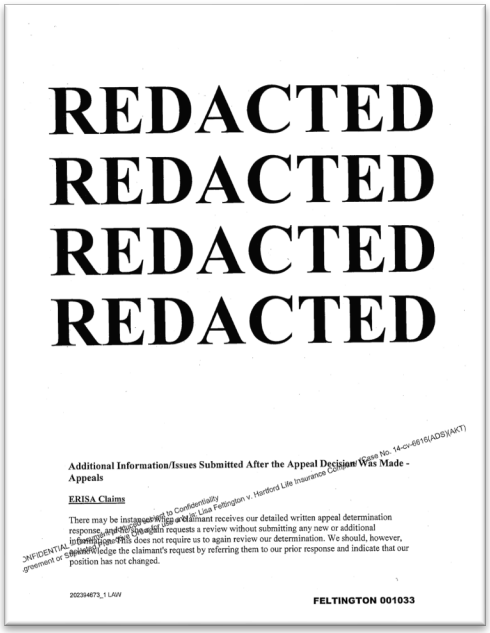
The parties literally quarreled for years over the production of this internal policy information, which required multiple rounds of discovery and court orders to obtain. In 2015, Hartford Life initiated its determined effort to avoid any discovery outside the administrative record. DE 18. In March 2016, in lieu of a 30(b)(6) witness, Judge Tomlinson directed defendant to produce its internal policies regarding reconsideration or reopening contained in its claims manual, something she reconfirmed in an amended version of that order. DE 40 at 27. In April 2016, the parties submitted and Judge Tomlinson "so ordered" a confidentiality order to permit the production of these records. DE 25.

After production of these records, Hartford Life next battled to have them filed under seal, keeping them out of public view. DE 59, 60, 65, 67. Its argument that release of these policies would place Hartford Life "at a competitive disadvantage by allowing its competitors access to its internal policy without providing any benefit to Hartford or the general public" borders on

delusion.[8] DE 65 at 2. Remarkably, when asked to produce authority establishing that such claims handling procedures could be ordered sealed, counsel was forced to concede that he could not cite a single case supporting his argument. DE 86 at 18.

Hartford Life's Post-Decision ERISA Policy

Ultimately, Hartford produced what it deemed to be relevant sections of the claims manual. DE 65-1. That production, reminiscent of intelligence reports provided to the Warren Commission[9], looked like this:


REDACTED
REDACTED
REDACTED
REDACTED

Additional Information/Issues Submitted After the Appeal Decision Was Made - Appeals

ERISA Claims

There may be instances where a claimant receives our detailed written appeal determination response, and then the claimant requests a review without submitting any new or additional information. This does not require us to again review our determination. We should, however, acknowledge the claimant's request by referring them to our prior response and indicate that our position has not changed.

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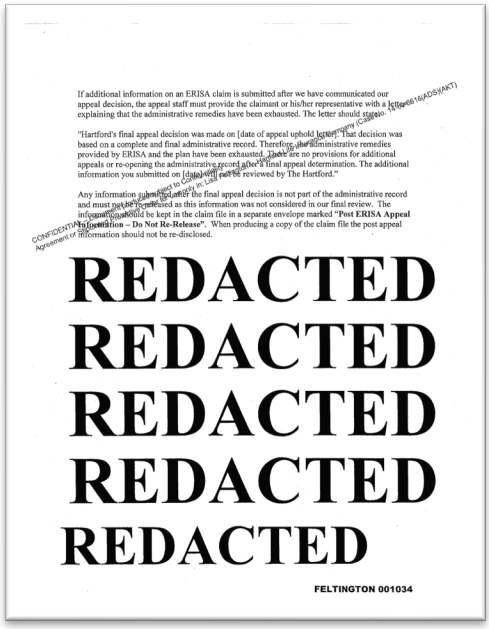
If additional information on an ERISA claim is submitted after we have communicated our appeal decision, the appeal staff must provide the claimant or his/her representative with a letter explaining that the administrative remedies have been exhausted. The letter should state:

"Hartford's final appeal decision was made on [date of appeal uphold letter]. That decision was based on a complete and final administrative record. Therefore, the administrative remedies provided by ERISA and the plan have been exhausted. There are no provisions for additional appeals or re-opening the administrative record after a final appeal determination. The additional information you submitted on [date] will not be reviewed by The Hartford."

Any information submitted after the final appeal decision is not part of the administrative record and must not be considered as this information was not considered in our final review. The information should be kept in the claim file in a separate envelope marked **"Post ERISA Appeal Information – Do Not Re-Release"**. When producing a copy of the claim file the post appeal information should not be re-disclosed.

REDACTED
REDACTED
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The unredacted portion of the policy provided as follows:

> **Additional Information/Issues Submitted After the Appeal Decision Was Made – Appeals**
>
> **ERISA Claims**

[8] When challenged on such assertions, the Company produced a sworn statement averring, *inter alia*, that the subject claims procedure "is the product of . . . experience in the marketplace for more than 200 years." DE 87-1. Given that ERISA was enacted in 1974, this is somewhat difficult to reconcile.

[9] https://www.archives.gov/publications/prologue/2017/fall/jfk-records

> There may be instances when a claimant receives our detailed written appeal determination response, and he/she again requests a review without submitting any new or additional information. This does not require us to again review our determination. We should, however, acknowledge the claimant's request by referring them to our prior response and indicate that our position has not changed.
>
> If additional information on an ERISA claim is submitted after we have communicated our appeal decision, the appeal staff must provide the claimant or his/her representative with a letter explaining that the administrative remedies have been exhausted. The letter should state:
>
> "Hartford's final appeal decision was made on [date of appeal uphold letter]. That decision was based on a complete and final administrative record. Therefore, the administrative remedies provided by ERISA and the plan have been exhausted. There are no provisions for additional appeals or re-opening the administrative record after a final appeal determination. The additional information you submitted on [date] will not be reviewed by The Hartford."
>
> Any information submitted after the final appeal decision is not part of the administrative record and must not be re-released as this information was not considered in our final review. The information should be kept in the claim file in a separate envelope marked **"Post ERISA Appeal Information – Do Not Re-Release"**. When producing a copy of the claim file the post appeal information should not be re-disclosed.

DE 65-1. So it seems that Hartford Life, as a matter of company policy, directs its decision makers to deny any request for reconsideration after issuing a decision, even if new information is submitted with that request, and irrespective of the nature of that information. Hypothetically, if Hartford Life's claims received unimpeachable information that they had rendered a decision about the *wrong claimant*, they must, according to policy, ignore such information and stand by their decision. That's something.

In elevating the Hartford Life's closing of the record to the level of the sacrosanct, the Company misses a fundamental feature of human nature: we all make mistakes. It's the reason that erasers are fastened to the end of pencils. It explains the existence of the "delete" key on computer keyboards. It's the reason why this Court, and others, have mechanisms for

reconsideration.[10] And yet the claims group at Hartford Life, by policy, is prohibited from even contemplating that it may have erred.

Another odd feature of this policy is the sealing of the post-decisional information in a specially-marked envelope which "should not be re-disclosed." Presumably, this suggests a conscious effort to avoid including such information in the administrative record and, by extension, making this information unavailable to claimants, their counsel and reviewing courts. And Hartford Life's forceful campaign to keep this policy undisclosed and secret in this litigation can suggest only one thing: claimants surely remain unaware of its existence.

Hartford Life's Post-Decisional Policy as to Non-ERISA Participants

Yet there's more. As part of its review, this Court issued an order seeking a cleaner copy of these pages and directed that the pages be produced entirely unredacted and unaltered.[11] Part of the page which had previously been redacted contains the following provision:

> **Non-ERISA claims**
>
> Because non-ERISA claims are not subject to ERISA's regulatory requirements, the receipt of additional information should receive additional handling and/or evaluation (or at least a second look) by the Appeal staff to try to identify if there is any basis supporting a change in our appeal decision before closing the file. If the additional information does not indicate that we should change our original decision we will notify the claimant that we have reviewed the additional information and that we will not alter our appeal decision. The additional information reviewed for non-ERISA claims is part of the administrative record.
>
> **It is important that Appeals Specialists remember that the process for handling post-appeal information differs for ERISA vs. Non-ERISA governed claims**

[10] Both the Federal District Court and the Federal Courts of Appeal have mechanisms for further consideration where "a point of law or fact has been . . . overlooked or misapprehended" by a court. FRAP 40 (D)(2); *cf.* FRCP 59 & 60. Thus, one Court of Appeals vacated its decision and reinstated a criminal conviction where "because of an error in the official transcript, we misapprehended the *facts* upon which our opinion was based." *United States v. Mageno*, 786 F.3d 768, 774 (9th Cir. 2015).

[11] Counsel had assured Judge Wicks that the redacted portions of the pages constituted nothing but "irrelevant stuff." DE 86 at 17. Given the history set forth in this opinion, doubts remained.

DE 88 (emphasis original).

Taken together, these policies could well raise questions that may be relevant to these proceedings:

1. Whether Hartford Life's Post-Decision ERISA policy is consistent with its obligation, as set forth in 29 U.S.C.A. § 1133 to "afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review;"
2. The manner in which Hartford Life's Post-Decision ERISA policy be weighed in connection with the structural conflict under which the Company operates;
3. Whether Hartford Life's blanket policy renders its decision in this instance arbitrary and capricious;
4. Whether Hartford Life's Post-Decision ERISA policy, its determination to keep this policy secret and its sealing of post-decision information – runs afoul of its duties of disclosure to claimants;[12] and
5. Whether Hartford Life's policies, which treat ERISA claimants less favorably than non-ERISA claimant, comports with the statutory and regulatory scheme.

These questions belie the argument that the policies produced are entirely irrelevant and are to be addressed in any renewed motions by the parties.

CONCLUSION

For the reasons set forth, the objections to Judge Wicks rulings are overruled and that Order is affirmed.

[12] An enlightening discussion of some of these duties can be found in *Hughes v. Hartford Life & Accident Ins. Co.*, 368 F. Supp. 3d 386 (D. Conn. 2019).

Which brings us to next steps. This matter has gone on far too long, and further unnecessary delays are unacceptable. The parties may continue to pursue summary judgment on the current record. Even a cursory review reveals, however, that those papers include positions that can be described as dubious, given the matters set forth in this opinion, and that there may be other issues that should be raised and briefed. Therefore, the summary judgment motions are denied without prejudice to refiling.

Remarkably, most of the matters discussed herein have little to do with the critical question in this case: the evidence as to plaintiff's disability. As this Court has previously noted during oral argument, the evidence reviewed when this matter was first decided by defendant many years ago raised questions as to plaintiff's disability, including the veracity of her subjective reporting. DE 85 at 7-12. Moreover, in the intervening period, most likely, plaintiff's condition has changed to some degree. Therefore, the parties should consider whether another approach to this case -- such as a voluntary remand, settlement, arbitration or mediation – might be appropriate.

Failing that, the parties should submit a revised summary judgment schedule within thirty days of the date of this order. Re-briefing should incorporate the matters raised in this opinion as well as any other issues the parties wish to raise.

SO ORDERED.

Dated: Central Islip, New York
February 17, 2022

/s/ Gary R. Brown
HON. GARY R. BROWN
United States District Judge