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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STEVEN POLNICKY,  
Plaintiff,

v.

LIBERTY LIFE ASSURANCE COMPANY OF  
BOSTON; WELLS FARGO & COMPANY  
LONG TERM DISABILITY PLAN,  
Defendants.

No. C 13-1478 SI

**ORDER GRANTING PLAINTIFF’S  
MOTION FOR SUMMARY JUDGMENT  
AND DENYING DEFENDANTS’  
MOTION FOR SUMMARY JUDGMENT**

Cross-motions for summary judgment, filed by plaintiff Steven Polnicky and defendants Liberty Life Assurance Company of Boston (“Liberty Life”) and Wells Fargo & Company Long Term Disability Plan (“the Plan”), are scheduled for hearing on November 22, 2013. Pursuant to Civil Local Rule 7-1(b), the Court determines that this matter is appropriate for resolution without oral argument and VACATES the hearing. For the reasons set forth below, the Court GRANTS plaintiff’s motion for summary judgment and DENIES defendants’ motion for summary judgment.

**BACKGROUND**

This is an action brought under the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1001 *et. seq.* The Plan is an “employee welfare benefit plan” under 29 U.S.C. § 1002(1). Docket No. 27, Morris Decl. ¶ 3. The Plan is established and sponsored by Wells Fargo & Company for the benefit of its employees. *Id.* The Plan is insured by a group disability income policy

1 issued by Liberty Life to Wells Fargo, Policy No. GF3-850-289424-01 (“the Policy”). *Id.* ¶ 4; Docket  
2 No. 26, McGee Decl. ¶ 3. The Policy has an effective date of January 1, 2010, and the Policy’s  
3 anniversaries occur each January 1st beginning in 2011. Docket No. 27-1, Morris Decl. Ex. A.

4 Plaintiff was employed by Wells Fargo and was a covered participant in the Plan. Docket No.  
5 1, Compl. ¶ 7. On March 30, 2011, plaintiff submitted a claim for disability benefits to Liberty Life  
6 under the Wells Fargo & Company Short Term Disability Plan with a disability date of March 30, 2011.  
7 Docket No. 26, McGee Decl. ¶ 8, Ex. C. Liberty Life approved plaintiff’s short term disability claim  
8 and plaintiff was paid benefits through September 27, 2011, the maximum duration for short term  
9 disability. *Id.* ¶ 10, Ex. E.

10 On August 12, 2011, Liberty Life began its investigation of plaintiff’s claim for long term  
11 disability benefits under the Plan. Docket No. 26, McGee Decl. ¶ 11, Ex. F. The disability date for  
12 plaintiff’s long term disability claim was also March 30, 2011. *Id.* On October 10, 2011, Liberty Life  
13 sent plaintiff a letter stating that he would receive long term disability benefits under the Policy while  
14 Liberty Life continued its investigation into his claim. *Id.* ¶ 12, Ex. G. On June 1, 2012, Liberty Life  
15 sent a letter to plaintiff stating that it had determined that plaintiff was not entitled to long term disability  
16 benefits under the Policy. *Id.* ¶ 13, Ex. H. Plaintiff appealed Liberty Life’s denial of benefits. *Id.* ¶ 14.  
17 On February 19, 2013, Liberty Life sent a letter to plaintiff denying his appeal and upholding its prior  
18 determination that he was not entitled to long term disability benefits under the Policy. *Id.* ¶ 14, Ex. I.

19 On April 2, 2013, plaintiff filed a complaint against defendants, alleging a cause of action under  
20 29 U.S.C. § 1132(a)(1)(B) to recover benefits due to him under the terms of his plan. Compl. ¶¶ 6-17.  
21 By the present motions, the parties move for summary adjudication of whether the de novo or abuse of  
22 discretion standard of review applies to plaintiff’s ERISA claim. Docket Nos. 25, 28.

## 23 24 **LEGAL STANDARD**

25 Summary judgment is proper “if the movant shows that there is no genuine dispute as to any  
26 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The  
27 moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact.  
28 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party, however, has no burden to



1 vested in the administrator when the words in the plan give the plan administrator the authority to  
2 interpret the plan's terms and to make final benefits determinations. *Id.* at 963-64.

3 Defendants argue that the abuse of discretion standard applies because the Plan as last amended  
4 in 2011 contains an express grant of discretionary authority to defendant Liberty Life. Docket No. 25,  
5 Def.'s Mot. at 5-6; Docket No. 38, Def.'s Reply at 2-4. Plaintiff argues that the de novo standard  
6 applies because any grant of discretionary authority contained in the Plan was rendered void and  
7 unenforceable by California Insurance Code § 10110.6 when the Plan was renewed on January 1, 2012.  
8 Docket No. 28-1, Pl.'s Mot. at 9-15.

9 California Insurance Code § 10110.6 provides in relevant part:

10 (a) If a policy, contract, certificate, or agreement offered, issued, delivered, or renewed,  
11 whether or not in California, that provides or funds life insurance or disability insurance  
12 coverage for any California resident contains a provision that reserves discretionary  
13 authority to the insurer, or an agent of the insurer, to determine eligibility for benefits or  
14 coverage, to interpret the terms of the policy, contract, certificate, or agreement, or to  
15 provide standards of interpretation or review that are inconsistent with the laws of this  
16 state, that provision is void and unenforceable.

17 (b) For purposes of this section, "renewed" means continued in force on or after the  
18 policy's anniversary date.

19 (c) For purposes of this section, the term "discretionary authority" means a policy  
20 provision that has the effect of conferring discretion on an insurer or other claim  
21 administrator to determine entitlement to benefits or interpret policy language that, in  
22 turn, could lead to a deferential standard of review by any reviewing court.

23 . . .

24 (g) This section is self-executing. If a life insurance or disability insurance policy,  
25 contract, certificate, or agreement contains a provision rendered void and unenforceable  
26 by this section, the parties to the policy, contract, certificate, or agreement and the courts  
27 shall treat that provision as void and unenforceable.

28 Cal. Ins. Code § 10110.6.<sup>1</sup> Section 10110.6 was made effective January 1, 2012. *Id.* The Policy at issue  
has an effective date of January 1, 2010 and states that policy anniversaries "shall occur each January  
1st beginning in 2011." Docket No. 27-1, Morris Decl. Ex. A at 1. Therefore, under Insurance Code  
§ 10110.6, when the Policy was continued in force after its January 1, 2012 anniversary date, any  
provision in the Policy attempting to confer discretionary authority to Liberty Life was rendered void

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<sup>1</sup> The parties do not dispute that California Insurance Code § 10110.6 applies to the Policy because plaintiff is a California resident. *See* Cal. Ins. Code § 10110.6(a).

1 and unenforceable. Cal. Ins. Code § 10110.6(a), (b); *see also* *Stephan v. Unum Life Ins. Co. of Am.*, 697  
2 F.3d 917, 927 (9th Cir. 2012) (“Under California law, ‘insurance policies are governed by the statutory  
3 and decisional law in force at the time the policy is issued. Such provisions are read into each policy  
4 thereunder, and become a part of the contract with full binding effect upon each party.’ This principle  
5 governs not only new policies but also renewals: Each renewal incorporates any changes in the law that  
6 occurred prior to the renewal.” (citations omitted)).

7 However, this determination does not end the Court’s analysis. The parties dispute whether the  
8 controlling plan is the Plan as it existed in 2011, when plaintiff first became disabled, or the Plan as it  
9 existed in 2013, when Liberty Life issued its final denial of plaintiff’s claim. Def.’s Mot. at 10-14; Pl.’s  
10 Mot. at 14-15. The Ninth Circuit has addressed this precise issue. In *Grosz-Salomon v. Paul Revere*  
11 *Life Ins. Co.*, the plaintiff became disabled prior to an amendment to the relevant plan in October 1993  
12 conferring discretionary authority to the defendant plan administrator, but the plaintiff’s claim for  
13 benefits was not denied until 1997. *See* 237 F.3d 1154, 1157-58 (9th Cir. 2001). The Ninth Circuit held  
14 that the amended plan was the controlling plan. *See id.* at 1160-61. The Ninth Circuit explained that  
15 an employee’s rights under an ERISA welfare benefit plan do not automatically vest and employers are  
16 free to amend or terminate ERISA welfare benefit plans unilaterally unless employees have bargained  
17 for contractually vested rights. *Id.* at 1160 & n.24. Therefore, the controlling plan was the plan that  
18 existed when the plaintiff’s ERISA cause of action accrued—at the time his benefits were denied. *See*  
19 *id.* at 1159-61; *see also* *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1501 (9th Cir. 1984)  
20 (“[A]n ERISA cause of action based on a denial of benefits accrues at the time the benefits are  
21 denied.”).<sup>2</sup> Here, defendants concede that plaintiff’s claim is for non-vested employee welfare benefits.

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23 <sup>2</sup> Defendants argue that under California law, an insured’s disability claim is governed by the  
24 terms of the insurance policy at the time the disability claim arose. Def.’s Mot. at 10-12; Def.’s Reply  
25 at 9-10. Even assuming defendants are correct, plaintiff’s claim is brought pursuant to ERISA, not  
26 California insurance law. Therefore, federal common law and the Ninth Circuit’s holding in  
27 *Grosz-Salomon* apply to the determination of the controlling plan, not the state law authorities cited by  
28 defendants. *See* *Wetzel v. Lou Ehlers Cadillac Group Long Term Disability Ins. Program*, 222 F.3d  
643, 649 (9th Cir. 2000) (“[T]he accrual of an ERISA cause of action is determined by federal, rather  
than state, law.”); *see also* *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1500 (9th Cir.  
1984) (“The courts are directed to formulate a nationally uniform federal common law to supplement  
the explicit provisions and general policies set out in ERISA, referring to and guided by principles of  
state law when appropriate, but governed by the federal policies at issue.”). In addition, although under

1 Def.'s Reply at 4, 7. Therefore, the controlling plan in this action is the plan that existed at the time  
2 plaintiff's benefits were denied, the Plan as it existed in 2013. *See Grosz-Salomon*, 237 F.3d at 1159-61.  
3 Because any provision in the controlling plan, the 2013 version of the Plan, attempting to confer  
4 discretionary authority to Liberty Life was rendered void and unenforceable by California Insurance  
5 Code § 10110.6, the de novo standard of review applies to plaintiff's claim.<sup>3</sup>

6 Defendants argue that this is an improper extension of *Grosz-Salomon* because that case merely  
7 holds that the amended plan in existence at the time of the final claim denial is the operative plan.  
8 Def.'s Reply at 2-3. Defendants further argue that *Grosz-Salomon* does not stand for the proposition  
9 that the plan language in effect at the time of the final claim denial, as modified by all prior legislative  
10 enactments, is the operative plan. *Id.* The Court disagrees. There is no language in *Grosz-Salomon*  
11 stating that its holding is limited to express amendments to the plan made by the plan sponsor and that  
12 its holding does not apply to amendments to the plan made by legislature. The Ninth Circuit has  
13 explained that any statutory provisions in force at the time of a policy renewal "are read into each  
14 policy thereunder, and become a part of the contract with full binding effect upon each party." *Stephan*,  
15 697 F.3d at 927 (quoting *Interins. Exch. of the Auto. Club of S. Cal. v. Ohio Cas. Ins. Co.*, 58 Cal. 2d  
16 142, 148 (1962)).<sup>4</sup>

17  
18 California insurance law, an insured's right to disability benefits becomes vested once the disability  
19 claim arises, Def.'s Reply at 9, an employee's rights under an ERISA welfare benefit plan do not  
20 automatically vest. *Grosz-Salomon*, 237 F.3d at 1160 & n.24; *see also Serrato by & Through Serrato*  
*v. John Hancock Life Ins. Co.*, 31 F.3d 882, 887 (9th Cir. 1994) ("ERISA preempts California's  
21 purported 'vesting' rule").

22 <sup>3</sup> Defendants argue that the application of Insurance Code § 10110.6 to plaintiff's claim is an  
23 impermissible retroactive application of the statute. Def.'s Mot. at 7-9; Def.'s Reply at 7-10. However,  
24 this argument relies on the incorrect premise that the Plan as it existed in 2011 is the controlling plan.  
Because the controlling plan is the Plan as it existed in 2013 after section 10110.6 was made effective  
on January 1, 2012, section 10110.6 is being applied prospectively to plaintiff's ERISA claim rather  
than retroactively.

25 <sup>4</sup> In their reply brief, defendants argue for the first time that a state legislative enactment of a  
26 statute governing insurance does not constitute an amendment to an ERISA plan. Def.'s Reply at 10-12.  
27 The Court notes that it was improper for defendants to wait until their reply brief to raise this argument.  
Moreover, defendants' argument is foreclosed by the Ninth Circuit's decision in *Stephan*, which held  
28 that any statutory provisions in force at the time of a policy renewal are read into the policy. *See* 697  
F.3d at 927; *see also UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 376 (1999) (rejecting the  
defendant's argument because it would leave states "powerless to alter the terms of the insurance

1 In addition, defendants' reliance on *Stephan v. Unum Life Ins. Co. of Am.*, 697 F.3d 917 (9th Cir.  
2 2012) is unpersuasive. Defendants argue that in *Stephan*, the Ninth Circuit analyzed the discretionary  
3 provision of the policy at issue in that case as it existed in 2007, even though the plaintiff's claim was  
4 denied in 2008 and the policy had an anniversary date of January 1. Docket No. 33, Def.'s Opp'n at 9-  
5 11. *Stephan* involved a California Settlement Agreement ("CSA") where the defendant plan  
6 administrator agreed to "discontinue use of a[ny] provision that has the effect of conferring unlimited  
7 discretion on [it] or other plan administrator to interpret policy language, or requires an "abuse of  
8 discretion" standard of review if a lawsuit ensues . . . in any California Contract sold after the date set  
9 forth in Section V.'" *Stephan*, 697 F.3d at 925. Defendants fail to note that in *Stephan* both parties  
10 agreed that under the CSA, "policies already extant on the CSA effective date and renewals of such  
11 policies are not subject to the Agreement's prohibition on discretionary authority provisions, whereas  
12 new policies sold after the CSA Effective Date are subject to the prohibition." *Id.* at 926. Because the  
13 policy at issue in *Stephan* was a renewal of a policy that was originally effective June 11, 1999, well  
14 before the effective date of the CSA, the policy was not subject to the CSA's prohibition on  
15 discretionary authority provisions, regardless of any subsequent renewals. *See id.* at 926-27. Therefore,  
16 the passing of the anniversary date on January 1, 2008 had no effect on the policy's discretionary  
17 authority provision, and that provision of the policy would have been the exact same in 2007, when the  
18 plaintiff became disabled, as it was in 2008, when the plaintiff's claim was denied. Accordingly, a  
19 determination of whether the controlling plan was the plan as it existed in 2007 or 2008 was unnecessary  
20 to the Ninth Circuit's analysis in *Stephan*. In contrast, here, California Insurance Code § 10110.6  
21 expressly applies to renewals, including policies "continued in force on or after the policy's anniversary  
22 date." Cal. Ins. Code § 10110.6(a), (b). Therefore, unlike the policy in *Stephan*, the discretionary  
23 authority provision of the Policy in this case was altered on the Policy's January 1, 2012 anniversary  
24 date, prior to the denial of plaintiff's claim.<sup>5</sup> Accordingly, because California Insurance Code § 10110.6

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26 relationship in ERISA plans").

27 <sup>5</sup> Defendants' reliance on *Robinson v. Metro. Life Ins. Co.*, 2013 U.S. Dist. LEXIS 44004 (E.D.  
28 Cal. Mar. 27, 2013) is also unpersuasive. Def.'s Mot. at 13-14. Unlike in the present case and  
*Grosz-Salomon*, *Robinson* did not involve an amendment to an ERISA plan after the plaintiff filed his

1 rendered void and unenforceable any provision in the Plan attempting to confer discretionary authority  
2 to Liberty Life, plaintiff has shown that as a matter of law the de novo standard of review applies to his  
3 ERISA claim.

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5 **CONCLUSION**

6 For the foregoing reasons, the Court GRANTS plaintiff's motion for summary judgment and  
7 DENIES defendants' motion for summary judgment.<sup>6</sup> Docket Nos. 25, 28.

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9 **IT IS SO ORDERED.**

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11 Dated: November 18, 2013

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14 SUSAN ILLSTON  
15 United States District Judge

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25 claim but prior to the denial of his claim. *Robinson* involved a plaintiff covered under a non-ERISA  
26 plan that was later turned into an ERISA plan after that plaintiff filed her disability claim. *See* 2013 U.S.  
27 Dist. LEXIS 44004, at \*2-3.

28 <sup>6</sup> Along with their opposition and reply brief, defendants filed objections to certain evidence  
submitted by plaintiff in support of his filings. Docket Nos. 34, 37. Because the Court's opinion does  
not reference or rely on the pieces of evidence at issue in the objections, the Court denies as moot  
defendants' objections.