



1           From May 1992 until December 2010, plaintiff was a  
2 physical therapist and 50% owner of XCEL Orthopaedic Physical  
3 Therapy, Inc. ("XCEL"), at which time she became the sole owner  
4 of XCEL. (Decl. of Rebecca Grey ("Grey Decl.") (Docket No. 51-  
5 3), Ex. 7.) On September 7, 1997, plaintiff purchased a  
6 Disability Income Policy ("the Bommarito Policy") from  
7 Northwestern Mutual. (Decl. of Lisa Duller ("Duller Decl.")  
8 (Docket No. 36-5), Ex. 25 at 18.) In the event of plaintiff's  
9 inability to engage in her "regular occupation," the policy  
10 provided monthly benefits until plaintiff's 70th birthday. (Grey  
11 Decl., Ex. 8.)

12           Plaintiff's former business partner, G.B.,<sup>1</sup> also  
13 purchased a disability insurance policy from Northwestern Mutual  
14 at this time. Additionally, Northwestern Mutual agent Steve  
15 Field ("Field") met with plaintiff and G.B. at XCEL's office  
16 several times. (Decl. of Sean P. Nalty ("Nalty Decl.") (Docket  
17 No. 36-3), Ex. 35 (Plaintiff's Dep.)) Plaintiff also allowed  
18 Field to meet with XCEL employees to discuss Northwestern  
19 Mutual's services, including its disability insurance. (Id.)

20           Beginning on December 31, 2006, plaintiff was involved  
21 in multiple events causing injuries to her cervical spine and  
22 left shoulder. (Id.) On or about November 24, 2009, plaintiff  
23 submitted a Request for Disability Benefits to Northwestern  
24 Mutual. (Decl. of Lisa Duller ("Duller Decl.") (Docket No. 36-5)  
25 ¶ 4.) In January 2010, the claim was approved. (Id.) At the  
26 time, the date of disability was established as September 27,

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27           <sup>1</sup> Initials of XCEL employees will be used throughout this  
28 order.

1 2007. (Id.)

2 Plaintiff received partial disability benefits for the  
3 time between December 26, 2007 and December 9, 2009. (Duller  
4 Decl. ¶ 4.) At that point, plaintiff had surgery. Thereafter,  
5 until August 26, 2013, she received total disability benefits  
6 from Northwestern Mutual under the Bommarito Policy. (Id. ¶ 5.)  
7 During this time, plaintiff represented to Northwestern Mutual on  
8 numerous occasions that she was not working at all. For example,  
9 on the Continuance of Disability Benefits Form that plaintiff  
10 signed on May 21, 2010, she answered "no" to the question of  
11 whether she had performed "any work of any kind at your prior  
12 occupation or at any other occupation whether or not you received  
13 any income." (Nalty Decl., Ex. 31 (Northwestern Mutual's First  
14 Set of Req. for Admissions), Req. 20.) When filing out the same  
15 form in August 2010, August 2011, November 2011, June 2012,  
16 December 2010, and October 2013, plaintiff repeatedly answered no  
17 to this question. (Id.)

18 Defendant also required plaintiff to apply for Social  
19 Security Disability Income benefits. (Grey Decl., Ex. 3  
20 (Majewski Dep.)) Accordingly, plaintiff submitted an  
21 application to the Social Security Administration. On May 5,  
22 2011, Northwestern Mutual informed plaintiff that the Social  
23 Security Administration had denied her application for benefits,  
24 and instructed her to appeal the decision. On August 9, 2012,  
25 plaintiff submitted to the Social Security Administration a  
26 Disability Report Appeal, in which she stated that she had not  
27 worked between February 27, 2012, and August 9, 2012. (Nalty  
28 Decl., Ex. 33 (Northwestern Mutual Second Set of Req. for

1 Admissions), Req. 33).) On November 1, 2013, Northwestern Mutual  
2 informed plaintiff that she had been awarded Social Security  
3 Disability Income Benefits. She was told that, as a result of  
4 this, her Northwestern Mutual benefits would be impacted. In  
5 addition, plaintiff was told she would need to reimburse  
6 Northwestern Mutual for an overpayment of benefits from November  
7 1, 2009 to July 26, 2013 in the amount of \$46,639.99.

8 On May 8, 2013, Northwestern Mutual was contacted by  
9 the California Department of Consumer Affairs and was told that  
10 plaintiff "was practicing physical therapy while receiving  
11 private disability insurance benefits." (Grey Decl., Ex. 8.)  
12 Because of this, Northwestern Mutual placed plaintiff under  
13 surveillance. (Declaration of Adam Kawa ("Kawa Decl.") ¶¶ 4-5,  
14 Exs. 16-20.)

15 On January 17, 2014, Northwestern Mutual sent a letter  
16 to plaintiff accusing her of intentionally misrepresenting her  
17 level of functioning, and informing her of its determination that  
18 she was neither partially nor totally disabled. (Grey Decl., Ex.  
19 1.) Plaintiff's claim file was closed and the policy was  
20 canceled. On February 11, 2014, defendant filed a fraud report  
21 with the California Department of Insurance, alleging that "the  
22 insured intentionally provided false and misleading information  
23 regarding her condition in order to fraudulently obtain benefits  
24 from Northwestern Mutual." (Grey Decl., Ex. 8.) On February 22,  
25 2016, the San Joaquin County District Attorney filed a criminal  
26 complaint against plaintiff, charging her with multiple counts of  
27 Fraudulent Claim for Insurance Payment, among other things.  
28 (Nalty Decl., Ex. 36 (Compl. in The People of the State of

1 California, Plaintiff, v. Devra Ann Bommarito, San Joaquin County  
2 Superior Court, DA Case: CR-2016-4112271).)

3 Plaintiff initiated this lawsuit on June 1, 2016,  
4 alleging breach of contract, breach of the implied obligation of  
5 good faith and fair dealing, and seeking declaratory relief.  
6 (Compl. (Docket No. 2).) On March 2, 2018, plaintiff filed a  
7 Motion for Disqualification of Counsel as well as a Motion to  
8 Strike Defendants' Motion for Summary Judgment. (Docket No. 40.)  
9 The court denied both motions on March 12, 2018. (Docket No.  
10 46.)

11 II. Motion for the Application of ERISA

12 Northwestern Mutual contends that plaintiff's state-law  
13 claims are preempted by ERISA. ERISA's preemption clause, 29  
14 U.S.C. § 1144(a), states that ERISA provisions "shall supersede .  
15 . . State laws" to the extent those laws "relate to employee  
16 benefit plans." In this case, whether ERISA preempts plaintiff's  
17 state-law claims requires examination of whether the Bommarito  
18 Policy constitutes part of an "employee benefit plan" such that  
19 it would be governed by ERISA.

20 Under ERISA § 3(1), 29 U.S.C. § 1002(1), an "employee  
21 welfare benefit plan" or "welfare plan" is:

22 (1) a plan, fund or program (2) established or  
23 maintained (3) by an employer or by an employee  
24 organization, or by both, (4) for the purpose of  
25 providing medical, surgical, hospital care,  
26 sickness, accident, disability, death,  
27 unemployment or vacation benefits . . . (5) to  
28 the participants or their beneficiaries.

27 Kanne v. Connecticut Gen. Life Ins. Co., 867 F.2d 489, 492 (9th  
28 Cir. 1989)(citing Donovan v. Dillingham, 688 F.2d 1367, 1371  
(11th Cir. 1982)).

1           The existence of an ERISA plan is a question of fact  
2 for the court, to be answered in light of all surrounding facts  
3 and circumstances. (Id.) The existence of an ERISA plan must be  
4 established by a preponderance of the evidence. (Id.)

5           A. Plan, Fund, or Program

6           Defendant argues that plaintiff and her XCEL co-owner  
7 G.B. set up a plan to provide employees with disability coverage.  
8 Plaintiff argues, conversely, that she did not intend to set up  
9 any such plan, and instead merely purchased an individual  
10 disability policy for herself. "In determining whether a plan,  
11 fund or program (pursuant to a writing or not) is a reality a  
12 court must determine whether from the surrounding circumstances a  
13 reasonable person could ascertain the intended benefits,  
14 beneficiaries, source of financing, and procedures for receiving  
15 benefits." Cinelli v. Security Pacific Corp., 61 F.3d 1436, 1441  
16 (9th Cir. 1995) (citing Donovan, 688 F.2d at 1373).

17           No single act alone is sufficient to constitute the  
18 establishment of a plan, fund, or program. For example, "the  
19 purchase of insurance does not conclusively establish a plan,  
20 fund, or program, but the purchase is evidence of the  
21 establishment of a plan, fund, or program." Donovan, 688 F.2d at  
22 1373 (cited with approval in Cinelli, 61 F.3d at 1441-42).  
23 Further, "the purchase of a group policy or multiple policies  
24 covering a class of employees offers substantial evidence that a  
25 plan, fund, or program has been established." (Id.)

26           The disability policy issued to plaintiff has a date of  
27 issue of August 7, 1997. (Duller Decl., Ex. 25.) The  
28 application, which was signed by plaintiff, indicated that the

1 premium would be paid "100% by employer," and noted that "an  
2 ERISA Disclosure Statement . . . is required whenever the  
3 employer is paying any part of the premium." (Seebach Decl.  
4 (Docket No. 36-8), Ex. 1 at 11.) An ERISA disclosure was in fact  
5 submitted. In addition, plaintiff signed and submitted Employer  
6 Statements which explained that "all employees" were in the class  
7 of employees that were eligible for this coverage. (Id. at 12.)  
8 The form further explained that XCEL would "demonstrate employer  
9 sponsorship" by, among other things, paying all or part of the  
10 premium, using payroll deduction, recommending the program to  
11 eligible employees through an endorsement letter, and allowing  
12 Northwestern Mutual agents to contact eligible employees on  
13 company time. (Id.)

14 Furthermore, between 1998 and 2002, XCEL employees  
15 B.B., M.K., J.O., C.H., M.C., G.L., L.E., J.S., and B.E. all  
16 applied for disability insurance from Northwestern Mutual.  
17 (Seebach Decl., Exs. 1-11.) The employees' applications were  
18 submitted with documents explaining that the premiums would be  
19 paid 100% by employer XCEL. (Id.) ERISA Disclosure were also  
20 submitted with each application.

21 This evidence establishes that disability insurance  
22 policies were issued by Northwestern Mutual to nine XCEL  
23 employees. Clearly, the intended benefit was to provide  
24 disability coverage to said employees. It is equally clear from  
25 the record that the persons benefitting are employees who applied  
26 for and qualified for disability coverage. The disability  
27 benefits were financed through the policies issued by  
28 Northwestern Mutual, and the procedures to apply for and collect

1 benefits are specified in each of the Policies. Accordingly, the  
2 court concludes that although this plan was accomplished through  
3 the issuance of a number of individual insurance policies, a plan  
4 was created because "from the surrounding circumstances a  
5 reasonable person can ascertain the intended benefits, a class of  
6 beneficiaries, the source of financing, and procedures for  
7 receiving benefits.'" Carver v. Westinghouse Hanford Co., 951  
8 F.2d 1083, 1087 (9th Cir. 1991) (citing Donovan, 688 F.2d at  
9 1373). Thus, defendant has satisfied the first element.

10 B. Established or Maintained by an Employer

11 The Ninth Circuit has recognized that an employer "can  
12 establish an ERISA plan rather easily. Even if an employer does  
13 no more than arrange for a 'group-type insurance program,' it can  
14 establish an ERISA plan, unless it is a mere advertiser who makes  
15 no contributions on behalf of its employees." Credit Managers  
16 Ass'n. v. Kennesaw Life & Acc. Ins. Co., 809 F.2d 617, 625 (9th  
17 Cir. 1987).

18 The evidence discussed in the previous section  
19 demonstrates that XCEL "established or maintained" a disability  
20 benefit plan. As explained, plaintiff signed Employer Statements  
21 that indicated that XCEL would demonstrate "employer sponsorship"  
22 by performing tasks that constitute endorsement of the Policies  
23 and the XCEL Plan. Furthermore, the signed forms indicated that  
24 XCEL would contribute 100% of premium costs. Accordingly, the  
25 court concludes that XCEL established and maintained a benefit  
26 plan.

27 C. Remaining Requirements

28 The third, fourth, and fifth requirements are easily



1 satisfied in this case. The plan must be provided by an  
2 employer, for the purpose of providing benefits, to participants  
3 or their beneficiaries. ERISA defines an "employer" as "any  
4 person acting directly as an employer, or indirectly in the  
5 interest of an employer, in relation to an employee benefit  
6 plan." 29 U.S.C. § 1002(5). XCEL clearly is an employer. The  
7 XCEL Plan was established to provide health, disability, and  
8 dental insurance, thereby satisfying the fourth requirement.  
9 Finally, the fifth requirement is satisfied because the Plan  
10 provided these benefits to all Plan participants, including  
11 plaintiff, as well as at least eight other XCEL employees who  
12 enrolled in and received disability insurance. Therefore, the  
13 court concludes that an ERISA Plan was established.

14 D. ERISA Exemptions

15 Plaintiff argues that even if an ERISA Plan was  
16 established, her policy is exempt from ERISA because of the Safe  
17 Harbor Provision created by 29 C.F.R. § 2510.3-1(j). The Safe  
18 Harbor exempts insurance policies from ERISA where (1) there are  
19 no employer contributions to coverage, (2) participation is  
20 completely voluntary, (3) the employer does not endorse the  
21 program, and (4) the employer receives no consideration for the  
22 program. 29 C.F.R. § 2510.3-1(j). For plaintiff to prevail on  
23 this point, she would need to prove that the plan meets all four  
24 requirements of the regulation. 29 C.F.R. 2510.3-1(j); Sgro v.  
25 Danone Waters of N. America, Inc., 532 F. 3d 940, 942 (9th Cir.  
26 2008) (court determined plan was not exempt from ERISA because  
27 plaintiff failed to allege that employer had made no contribution  
28 to the plan).

1           1.    Contributions and Payment

2           The parties dispute whether XCEL contributed to its  
3 employees' disability insurance policies. Plaintiff argues that  
4 XCEL never paid the policy premiums for employees, while  
5 defendant argues the opposite. However, XCEL need not have paid  
6 for the premiums in order to have contributed to the coverage.  
7 By facilitating discounted premiums through a multi-life premium  
8 discount, XCEL "contributed" to the program, regardless of  
9 whether it actually paid for the premiums or not.

10           Plaintiff's Disability Insurance Application indicated  
11 that she would apply for a "MultiLife" Plan, which would provide  
12 a Multilife Discount. (Seebach Decl., Ex. 1 at 3.) A MultiLife  
13 Discount Supplement was submitted with plaintiff's application,  
14 along with all XCEL employee applications. According to numerous  
15 California courts, a discount on an insurance policy premium  
16 constitutes an employer contribution. Zide v. Provident Life &  
17 Acc. Ins. Co., No. SACV 10-393 JVS, 2011 WL 12566818, at \*7-8  
18 (C.D. Cal. Apr. 13, 2011) (collecting cases). When "the  
19 employee receive[s] a benefit they would not have absent the  
20 action taken by their employers, [the] employer's action should  
21 be considered a 'contribution.'" (Id.) Thus, because plaintiff  
22 facilitated a discounted rate for employees, she contributed to  
23 the plan, regardless of who paid the premiums directly.

24           Plaintiff argues that even according to Seebach, a  
25 Northwestern Mutual employee, there is nothing in the record  
26 explicitly indicating that plaintiff and G.B. were made aware  
27 that a Multilife Supplement was submitted with their employees'  
28 applications. (Grey Decl., Ex. 6, (Seebach Dep.) at 167.)

1 However, even if plaintiff did not fill out the form herself, as  
2 she argues, she still signed it, and thus the court expects that  
3 she would have an awareness and understanding of the information  
4 contained within. Thus, whether there is anything in the record  
5 to explicitly indicate that plaintiff was informed that these  
6 forms would be submitted with each application is irrelevant.  
7 Her signature appears on each of them, and that is sufficient for  
8 the court to determine that she was aware of the Multilife  
9 Supplements and the Multilife Discounts.

10 Accordingly, the court concludes that XCEL contributed  
11 to its employees' coverage, and thus plaintiff cannot satisfy the  
12 first requirement. Because all factors of the safe harbor  
13 provision must be met, the court does not consider the remaining  
14 factors and instead concludes that the safe harbor provision does  
15 not exclude the plan at issue here from ERISA coverage. See  
16 Stuart v. UNUM Life Ins. Co. of America, 217 F.3d 1145, 1153 (9th  
17 Cir. 2000) (noting that "employers must satisfy all four  
18 requirements of the safe harbor regulation . . . to be exempt  
19 from ERISA coverage").

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21 E. Plaintiff's Claims are Governed by ERISA and State Law  
22 Claims are Preempted

23 The Ninth Circuit has continually held that state law  
24 claims arising out of a denial of ERISA plan benefits are  
25 preempted by ERISA. See, e.g., Cleghorn v. Blue Shield of  
26 California, 408 F.3d 1222 (9th Cir. 2005). In this case,  
27 plaintiff's Complaint is based on state law claims alleging that  
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1 Northwestern Mutual breached the terms of the Bommarito Policy  
2 and improperly processed plaintiff's claim for disability  
3 benefits. Because this is an ERISA governed plan, ERISA provides  
4 plaintiff with a specific and express cause of action for  
5 recovering such benefits. Accordingly, plaintiff's claims for  
6 relief for breach of contract, bad faith, and declaratory relief  
7 must be dismissed, with prejudice, because they are preempted by  
8 ERISA.

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10 III. Motion for Partial Summary Judgment and/or Summary  
Adjudication of the Bad Faith and Punitive Damages Claims

11 Defendant moves for summary judgment or summary  
12 adjudication on plaintiff's claims for Bad Faith and Punitive  
13 Damages, arguing that these claims fail as a matter of law.

14 A. Bad Faith Claim

15 "The key to a bad faith claim is whether or not the  
16 insurer's denial of coverage was reasonable. Under California  
17 law, a bad faith claim can be dismissed on summary judgment if  
18 the defendant can show that there was a genuine dispute as to  
19 coverage." Guebara v. Allstate Ins. Co., 237 F.3d 987, 992 (9th  
20 Cir. 2001). "The Ninth Circuit has frequently affirmed summary  
21 judgment orders in bad faith claims where the trial court's  
22 ruling was based on a genuine dispute over insurance coverage."  
23 Adams v. Allstate Ins. Co., 187 F. Supp. 2d 1207, 1214 (C.D. Cal.  
24 2002).

25 In this case, the record indicates that there was a  
26 genuine dispute as to whether plaintiff should have received  
27 disability insurance benefits and thus that Northwestern Mutual's  
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1 denial was reasonable. Despite plaintiff's multiple  
2 representations that she was performing no work of any kind, when  
3 questioned by defense counsel, plaintiff admitted that she had  
4 provided physical therapy services to patients "at times" and  
5 that she worked as a physical therapist "intermittently, on an  
6 as-needed, emergency basis" from 2010 forward. (Nalty Decl., Ex.  
7 5 (Plaintiff's Dep.).)

8 In addition, Dr. Bryan Coleman Salgado ("Dr. Salgado"),  
9 who works as an expert consultant for the California Department  
10 of Consumer Affairs, reviewed XCEL's records and identified 125  
11 patients that had received treatment from plaintiff between 2010  
12 and 2013. (Decl. of Bryan Coleman Salgado ("Salgado Decl.")  
13 (Docket No. 36-7) Delgado Decl., Ex. 12.) Northwestern Mutual  
14 asked physician consultant Henry M. Alba ("Dr. Alba") to review  
15 plaintiff's claim for disability benefits. (Declaration of Henry  
16 M. Alba ("Alba Decl.") (Docket No. 36-4).) Dr. Alba reviewed the  
17 video surveillance, medical records, and pharmacy records. Dr.  
18 Alba concluded that plaintiff "is clearly working fulltime.  
19 Therefore there is no limitations nor restrictions for her  
20 occupational duties as an owner/operator of a physical therapy  
21 clinic." (Id. ¶ 4, Ex. 23.) From this, Northwestern Mutual  
22 reached the conclusion that plaintiff had been "intentionally  
23 misrepresenting [her] level of functioning to obtain benefits  
24 that [she] knew [she was] not entitled to." (Nalty Decl., Ex. 38  
25 (Hyde Dep.).)

26 Despite plaintiff's assertion that she was not working  
27 at all, the evidence indicates otherwise. These alleged  
28 misrepresentations by plaintiff, which were serious enough to

1 result in a criminal prosecution,<sup>2</sup> certainly establish that  
2 Northwestern Mutual had a reasonable and just cause for the  
3 denial of the claim. Accordingly, the court concludes that  
4 Northwestern Mutual did not act in bad faith in denying  
5 plaintiff's benefits. The court makes no decision as to whether  
6 Northwestern Mutual's decision was correct, but instead merely  
7 concludes that there was a genuine dispute as to coverage.  
8 Accordingly, the court will grant summary judgment in favor of  
9 Northwestern Mutual as to plaintiff's claim of bad faith.

10 B. Punitive Damages Claim

11 "Punitive damages are appropriate if the defendant's  
12 acts are reprehensible, fraudulent or in blatant violation of law  
13 or policy. The mere carelessness or ignorance of the defendant  
14 does not justify the imposition of punitive damages." Tomaselli  
15 v. Transamerica Ins. Co., 25 Cal. App. 4th 1269, 1287 (4th Dist.  
16 1994). The court can summarily adjudicate plaintiff's punitive  
17 damage claim if "no rational jury could find the Plaintiff's  
18 evidence to be clear and convincing proof of malice, fraud or  
19 oppression." Hoch v. Allied-Signal, Inc., 24 Cal. App. 4th 48,  
20 58-61 (1st Dist. 1998).

21 The evidence relied on by Northwestern Mutual  
22 establishes, at the very least, that there is at least a genuine  
23 dispute over the existence of a disability. The dispute was so  
24 great, in fact, that it led to criminal charges against plaintiff  
25 for alleged fraud related to her benefits plan. Thus,  
26 Northwestern Mutual's denial of benefits was reasonable, and

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27 <sup>2</sup> The criminal trial has been continued until September  
28 4, 2018. (Docket No. 47.)

1 plaintiff cannot present clear and convincing evidence of malice,  
2 oppression, or fraud. Accordingly, plaintiff's punitive damages  
3 claim must be dismissed with prejudice.

4 IT IS HEREBY ORDERED that defendant's Motion for the  
5 Application of ERISA and its Motion for Summary Judgment of  
6 plaintiff's Claim for Relief for Bad Faith and Claim for Punitive  
7 Damages (Docket No. 36) be, and the same hereby are, GRANTED.

8 Dated: July 23, 2018

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10 WILLIAM B. SHUBB  
11 UNITED STATES DISTRICT JUDGE  
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