HARRINGTON, FOXX, DUBROW & CANTER, LLP
KEVIN P. McNAMARA, State Bar No. 180690
COLLEEN R. SMITH, State Bar No. 209719
1055 West Seventh Street, 29th Floor
Los Angeles, California 90017-2547
Telephone: (213) 489-3222

Attorneys for Defendant, RELIANCE STANDARD LIFE INSURANCE COMPANY

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CARI-ANNE PITMAN RODRIGUEZ, Administratrix of the Estate of DANA F. PITMAN, Plaintiff, v. ATG, Inc., a corporation, RELIANCE STANDARD LIFE INSURANCE COMPANY, a corporation, and DOES 1 through 25, Defendants.	Case No.: C 03-04189 CRB (ARB) **DEFENDANT'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT, OR ALTERNATIVELY, FOR JUDGMENT ON THE RECORD AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** **[Concurrently filed with; Declaration of Kevin P. McNamara; [Proposed] Order]** **DATE: April 2, 2004** **TIME: 10:00 A.M.** **CRTRM: 8 (San Francisco)**

TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on April 2, 2004 at 10:00 a.m., or as soon thereafter as counsel may be heard in courtroom 8 of the above-entitled Court Defendant RELIANCE STANDARD LIFE INSURANCE COMPANY ("RELIANCE STANDARD") will move this Court for an order entering summary judgment in its favor and against Plaintiff, CARI-ANNE PITMAN RODRIGUEZ, Administratrix of the Estate of Dana F. Pitman, pursuant to Federal Rules of Civil Procedure, Rule

56. In the alternative, RELIANCE STANDARD seeks judgment on the record under Federal Rules of Civil Procedure, Rule 52(a).

This motion is made on the ground that there is no triable issue of material fact, and that RELIANCE STANDARD is entitled to judgment in this ERISA case as a matter of law.

Said motion is based on this notice, the concurrently filed Memorandum of Points and Authorities in support thereof, the concurrently filed Declaration of Kevin P. McNamara, with exhibits attached thereto, and upon such oral and documentary evidence as may be presented at or before the time of hearing of said motion.

DATED: February 23, 2004

HARRINGTON, FOXX, DUBROW & CANTER, LLP

BY:_____
KEVIN P. McNAMARA
Attorneys for Defendant
RELIANCE STANDARD LIFE INSURANCE COMPANY

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Reliance Standard Life Insurance Company ("Reliance Standard") moves this court to enter judgment in its favor on plaintiff's claim for life insurance benefits. Plaintiff appears to concede that no benefits are owed under the terms stated in the life insurance policy. Instead, Plaintiff argues that she is entitled to benefits based on representations allegedly made to the insured by the policy holder. For the reasons stated below, no statement made by the policy holder can be binding on Reliance Standard. Accordingly, since there is no coverage under the terms of the policy, Reliance Standard is entitled to judgment in its favor.

II.

FACTUAL BACKGROUND

Reliance Standard issued a group life policy to ATG Inc. under Policy No. GL 126749. A copy of the group life policy is attached as Exhibit "A" to the declaration of Kevin P. McNamara ["McNamara decl."]. The parties are now in agreement that the Reliance Standard policy qualifies as an employee benefit plan that is governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.S. §§ 1001 *et seq.* The policy provides life insurance coverage for eligible and qualified employees of ATG Inc. To be eligible for coverage, a person must be an "active, full-time employee" of the company. See Exhibit "A" at

page 1.0. The policy also has a waiting period before an individual can become eligible for coverage. The waiting period for Mr. Pitman was 90 days "of continuous full-time employment." See Exhibit "A" at pages 1.0 and 4.0. After identifying the waiting period, the policy next states that an individual's "effective date" is "the first of the Policy month coinciding with or next following completion of the Waiting Period." See Exhibit "A" at page 1.0.

The facts surrounding Mr. Pitman's claim and their application to the policy are not in dispute. Mr. Pitman began his employment with ATG Inc. on June 1, 2000. He stopped working on August 30, 2000 and died the following day, on August 31, 2000. Mr. Pitman would have satisfied the 90 day waiting period on August 30, 2000. Accordingly, his individual coverage would have begun on the first of the policy month following his completion of the waiting period, September 1, 2000. Unfortunately, he died prior to this date.

Plaintiff submitted a claim for benefits following the death of Mr. Pitman. The claim was denied on or about November 17, 2000. See denial letter dated November 17, 2000, a copy of which is attached as Exhibit "B" to McNamara decl. The denial letter identified the policy provisions which are summarized above and which provided the basis for the denial. As stated in the letter, "Mr. Pitman's death occurred prior to the scheduled effective date of his coverage, September 1, 2000. As Mr. Pitman died on August 31, 2000…he was not a member of the Eligible Class for this insurance and no life insurance coverage

was in effect on his behalf in accordance with the terms of the policy…" See Exhibit "B" at page 2.

The denial letter also referenced the fact that it did not appear that the employer had paid any premiums for coverage for Mr. Pitman. See Exhibit "A" at page 3. This demonstrates that even the employer did not believe that Mr. Pitman was eligible for coverage at the time of his death. Reliance Standard cannot be expected to pay benefits for a claim that is contrary to the terms of coverage, especially when no premiums were ever paid for this individual's coverage.

Plaintiff appealed the denial of the claim as required under ERISA and on March 30, 2001, Reliance Standard issued its final decision on the claim. A copy of the March 30, 2001 letter is attached as Exhibit "C" to McNamara decl. During the appeal, Plaintiff argued that the employer gave assurances that there was coverage under the Reliance Standard policy. Reliance Standard explained that under the terms of the policy, even if the employer could be considered its agent, it did not have the authority "to change or waive any part of the policy." See Exhibit "C" at page 2. The letter further explained that for a change in the policy to be valid, it "must be in writing" and "must also be signed by one of [Reliance Standard's] Executive Officers and attached to the policy." See Exhibit "C" at page 2. No such changes were made, however, which would affect Mr. Pitman's coverage.

The appeal denial letter once again set forth the terms of the policy regarding eligibility and when the coverage goes into effect. Based on those terms and the undisputed facts

presented, the letter again explained that there was no coverage owed. Having exhausted her administrative reviews, plaintiff responded by filing this lawsuit. For the reasons stated in this motion, Reliance Standard is entitled to judgment in its favor on the claims of plaintiff.

III.

ARGUMENT

Pursuant to Federal Rule of Civil Procedure 56, summary judgment shall be entered when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986). Rule 56(c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *See* Celotex, 477 U.S. at 322, 106 S.Ct. at 2552. It is the court's duty to determine whether there are any genuine issues of material fact which preclude judgment as a matter of law. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). The non-moving party may not depend solely upon the denials contained in the pleadings, but must refer the court to specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e).

Alternatively, Reliance Standard moves for judgment on the record pursuant to Rule 52. *See* Kearney v. Standard Insurance

Company, 175 F.3d 1084, 1094 (9th Cir. 1999). Citing to Federal Rule of Civil Procedure 52(a), the court in *Kearney* stated that in ERISA cases, the trial court should conduct a "trial on the record." *Id.* Review under Rule 52(a) allows the judge to evaluate the persuasiveness of conflicting testimony and decide which is more likely true. Kearney, 175 F.3d at 1095. Regardless of whether the instant motion is reviewed as a motion for summary judgment or as a motion for judgment on the record, Reliance Standard is entitled to judgment in its favor.

The Reliance Standard policy clearly grants full discretionary authority to Reliance Standard, as it contains the following language:

> Reliance Standard Life Insurance Company shall serve as the claims review fiduciary with respect to the insurance policy and the Plan. The claims review fiduciary has the discretionary authority to interpret the Plan and the insurance policy and to determine eligibility for benefits. Decisions by the claims review fiduciary shall be complete, final and binding on all parties.

See Exhibit "A" at page 11.0.

When a plan grants discretionary authority, as it does in this case, the deferential arbitrary and capricious standard of review is applied to the court's review of the decision. *See* Firestone Tire & Rubber Company v. Bruch, 489 U.S. 101, 115, 109 S.Ct. 948 (1989); *See also* Atwood v. Newmont Gold Company, Inc., 45 F.3d 1317, 1321 (9th Cir. 1995). Where the decision-maker is also the insurer of the plan, a court may consider the apparent conflict as a factor in deciding whether there was an abuse of discretion. *See* Tremain v. Bell Industries, Inc., 196 F.3d 970,

976 (9th Cir. 1999). In those cases, the court still uses the abuse of discretion standard, however, the court can be less deferential. *Id.;* Lang v. Long-Term Disability Plan of Sponsor Applied Remote Technology, Inc., 125 F.3d 794, 798 (9th Cir. 1997).

When a "serious" conflict of interest exists, a separate test is applied by the court. *See* Tremain, 196 F.3d at 976; *See also* McDaniel v. Chevron Corp., 203 F.3d 1099, 1108 (9th Cir. 2000). An apparent conflict of interest is not enough to invoke this stricter standard. *See* McDaniel, 203 F.3d at 110. Rather, the plan participant must present "material, probative evidence, beyond the mere fact of the apparent conflict, tending to show that the fiduciary's self-interest caused a breach of the administrator's fiduciary obligations." *See* McDaniel, 203 F.3d at 1108, *quoting* Atwood, 45 F.3d at 1222-23. If the plan participant produces evidence beyond the apparent conflict, then the plan fiduciary must produce evidence that the decision on the claim was not affected by the conflict of interest. *See* McDaniel, 203 F.3d at 1108. If the plan is unable to produce evidence that the conflict did not affect the decision, the decision will be reviewed by the court *de novo*. *Id.* If a plan meets its burden, the court will review the plan's decision under the abuse of discretion standard. *Id.*

Although an apparent conflict of interest exists because Reliance Standard is the insurer of the plan, there is no evidence that self-interest caused a breach of Reliance Standard's fiduciary responsibilities. As in Atwood, there is no evidence that any employee of defendant had a personal

motivation for the decision. *See* Atwood, 45 F.3d at 1323. Nor is there any evidence that Reliance Standard has taken inconsistent positions on its interpretation of the plan. McDaniel, 203 F.3d at 1109. As discussed below, the decision to deny benefits was based on the unambiguous terms o the plan as applied to the facts that were presented. Because Plaintiff has come forward with no evidence that the decision to deny the claim was tainted by self-interest, the decision must be reviewed under the deferential arbitrary and capricious standard.

As explained above, no benefits are payable under this policy since Mr. Pitman was never eligible for coverage. Mr. Pitman had to satisfy the Waiting Period. This is defined in the policy as 90 days of "continuous full-time employment." See Exhibit "A" at pages 1.0 and 4.0. After satisfying the waiting period, an individual's coverage becomes effective "the first of the Policy month coinciding with or next following completion of the Waiting Period." See Exhibit "A" at page 1.0. Mr. Pitman would have satisfied the waiting period on August 30, 2000. Therefore, his effective date of coverage would have been September 1, 2000 which was the first of the Policy Month following his completion of the waiting period. As Mr. Pitman died on August 31, 2000, he was not yet eligible for coverage.

Plaintiff appears to recognize that under the terms of the policy, there is no coverage. Therefore, she argues that Mr. Pitman was covered under the plan based on certain representations allegedly made by the employer. Those statements, however, even if they were made, cannot be relied on

by plaintiff to avoid the unambiguous terms in the Reliance Standard policy.

In a case that originated from the Ninth Circuit, the Supreme Court of the United States has already held that under the law of ERISA, the policy holder-employer cannot be deemed to be the agent of the insurer. *See* UNUM Life Ins. Co. of America v. Ward, 526 U.S. 358, 378 (1999). In Ward, the plaintiff argued that the notice he provided to his employer regarding his claim should be considered notice to the plan insurer since, according to the plaintiff, the Plan Administrator/employer acted as the insurer's agent. The Ninth Circuit agreed with the plaintiff based on California common law which deemed employers who administered insured plans to be the agent of the insurer as a matter of law.

The Supreme Court of the United states reversed the decision of the Ninth Circuit with respect to the employer's agency. The court held that "deeming the policy holder-employer the agent of the insurer would have a marked affect on plan administration." *Id.* The Court recognized that the contrary decision of the Ninth Circuit would impose "legal duties and consequences" that had not been "undertaken voluntarily." *Id.* Accordingly, the Court held that the agency law relied on by Plaintiff was invalid and that the employer cannot be considered the agent of the insurer. Likewise, since Mr. Pitman's employer cannot be considered an agent of Reliance Standard, no representations made by it can be binding.

No representations regarding coverage made by the employer can avoid the written terms in the policy for additional

reasons. The ERISA statute contains requirements for the manner in which benefit plans can be amended. Under ERISA, a plan must specify the procedure and persons authorized to amend the plan. *See* 29 U.S.C. § 1102(b)(3). *See also* Winterrowd v. American General Annuity Ins. 321 F.3d 933, 937 (9th Cir. 2003). "These amendment procedures, once set forth in a benefit plan, constrain the employer from amending the plan by other means." *Id.*

The Reliance Standard policy contains the following provision regarding changes to the policy:

> **CHANGES**
> No agent has authority to change or waive any part of the Policy. To be valid, any change or waiver must be in writing, it must also be signed by one of our Executive Officers and attached to the policy."

See Exhibit "A" at page 3.0.

Based on the provision of the policy referred to above as well as the law of this Circuit, no statement made by the employer can alter the terms of the Reliance Standard policy. Plaintiff cannot present to this court any change to the policy which is in writing, which has been signed by an Executive Officer of Reliance Standard and which is attached to the policy. Accordingly, there has been no valid change and the policy must be enforced as written.

This Circuit has recognized that language similar to the language in the Reliance Standard policy which identifies the manner in which the policy can be changed "was intended to keep insureds… from binding [the insurer] to promises made in extraneous documents…" *See* Grosz-Salomon v. Paul Revere Life

Ins. Co., 237 F.3d 1154, 1161 (9th Cir. 2001). The court held that for a change in coverage to be a valid part of the policy, "it must be amended in conformance with the policy provisions." *Id.* Based on the holding in this case as well, plaintiff does not have a valid argument that Reliance Standard is somehow bound by alleged statements made by the employer regarding coverage.

As long as there are no ambiguities, the terms in Reliance Standard's policy must be enforced as written. *See* Deegan v. Continental Cas. Co., 167 F.3d 502, 507 (9th Circ. 1999). As stated by the Ninth Circuit, "[i]f a reasonable interpretation favors the insurer and any other interpretation would be strained, no compulsion exists to torture or twist the language of the policy." *Id., quoting* Babikian v. Paul Revere Life Ins. Co., 63 F.3d 837, 840 (9th Circ. 1995). Here, the language does not favor coverage.

There is an additional reason why any alleged modification by the employer cannot be binding. While the exact nature of this alleged modification by ATG Inc. has not been identified by plaintiff, it is defendant's understanding that plaintiff is relying on an oral statement. ERISA does not allow unwritten modifications to a plan. Instead, ERISA requires that employee benefit plans "be established and maintained pursuant to a written instrument." *See* 29 U.S.C. § 1102(b)(3). "ERISA simply does not recognize the validity of oral or non-conforming written modifications to ERISA plans." *See* Health South Rehabilitation Hospital v. American National Red Cross, 101 F.3d 1005, 1010 (4th Cir. 1996).

Reliance Standard did not abuse its discretion when it decided that there was no coverage under the terms of the policy. Since Mr. Pitman died before the effective date of coverage, no benefits are owed to plaintiff. That result would be the same whether this court's review is deferential or *de novo*. Accordingly, and based on the undisputed facts, Reliance Standard is entitled to judgment in its favor.

IV.

CONCLUSION

For the reasons stated above, Reliance Standard is entitled to judgment in its favor. Mr. Pitman died before his coverage under the policy ever went into effect. Therefore, he was never insured under the Reliance Standard policy and no benefits are owed to plaintiff. Accordingly, defendant is entitled to judgment in its favor.

DATED: February 23, 2004

HARRINGTON, FOXX, DUBROW & CANTER, LLP

BY:_____
COLLEEN R. SMITH
Attorneys for Defendant
RELIANCE STANDARD LIFE INSURANCE COMPANY

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TABLE OF AUTHORITIES

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STATUTES

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1055 West Seventh Street, 29th Floor, Los Angeles, California 90017-2547.

On February 24, 2004, I served the foregoing document described as **DEFENDANT'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT, OR ALTERNATIVELY, FOR JUDGMENT ON THE RECORD AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** on all interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Robert M. Chilvers, Esq.
CHILVERS & TAYLOR, P.C.
83 Vista Marin Drive
San Rafael, CA 94903

[X] BY FEDERAL EXPRESS

☐ I deposited such envelope in a box or facility regularly maintained by the express service carrier in an envelope or package designated by the express service carrier with delivery fees provided for.

Executed on February 24, 2004, at Los Angeles, California.

[X] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Cora Ruvalcaba