

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT STANLEY GORDON
Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY
Respondent.

APPELLANT'S SUPPLEMENTAL EXCERPTS OF RECORD
VOLUME 1 OF 1

Robert Gordon
106 Vista Prieta Court
Santa Cruz CA, 95062
831-345-6551
wwwrobertgordon@aol.com (no dot after www)

1 plaintiff had worked for Borland, that fact alone did not establish that he was eligible to participate
 2 in the Plan on the date of alleged onset of disability.¹

3 MetLife's ability to evaluate plaintiff's claim was substantially hampered by the fact that
 4 more than seven years had elapsed between the date when plaintiff last worked at Borland and the
 5 date he first made a claim to MetLife (see Cornell Declaration, Ex. B), seeking LTD benefits under
 6 the Plan. In fact, some of plaintiff's very recently provided records, which he submitted to
 7 MetLife following the parties' agreement that MetLife would entertain a voluntary remand, appear
 8 to show that, contrary to his statements to MetLife in making his claim under the Plan, he may
 9 have stopped working because he was fired from his job at Borland – not because he was
 10 "disabled" within the meaning of the Borland plan, as he alleged in his claim to MetLife some
 11 seven years later.²

12 In the third and fourth weeks of December 2011, following a mediation on December 9,
 13 counsel for plaintiff and MetLife negotiated the terms of a voluntary remand to MetLife of
 14 plaintiff's claim under the Plan, and a stay of the litigation, so that MetLife could consider
 15 additional evidence regarding plaintiff's possible eligibility for coverage under the Plan at the time
 16 he stopped working.³ As part of the agreement, the parties filed a stipulation, which the Court

17 ¹ The Plan provides that certain terms and provisions must be met in order for a claimant to
 18 be entitled to LTD benefits. One of those requirements is that the claimant be entitled to
 19 coverage under the Plan on the date he or she stops working. MetLife investigated whether
 20 plaintiff was, indeed, entitled to be covered under the Plan when he stopped working, but
 21 based upon the information provided, coverage could not be confirmed. See Declaration of
 22 Erin Cornell, filed herewith, at Ex. A.

23 ² For instance, on December 30, 2011, plaintiff submitted to MetLife's counsel, for
 24 transmission to MetLife to be considered on the remand, documents from a wrongful
 25 termination suit he brought against Borland – which, of course, is a rather different picture
 26 of his reason for leaving work from that portrayed in his claim to MetLife, where he
 27 asserted that it was due to a disability that he had stopped working at Borland. See Cornell
 28 Declaration, at para. 4 and Ex. C.

29 ³ Subsequent to the mediation, there were discussions between counsel for plaintiff and
 30 MetLife, including on December 14, 2011, about the fact that plaintiff had documents that
 31 he had obtained in a wrongful termination suit he brought against Borland, and that those
 32 documents might be supportive of his claimed eligibility for LTD coverage under the
 33 Borland long term disability plan. In addition, plaintiff's counsel wished to pursue a
 34 subpoena to Borland and/or its successor, to see whether additional documents might exist
 35 (he has since advised, however, that there are no such additional documents). Declaration
 36 of Rebecca Hull, filed herewith, para. 2. At no time prior to the filing of the stipulation
 37 (ECF No. 24) did plaintiff ever indicate any intent to seek an award of attorney's fees based
 38 upon MetLife's agreement that it would consider newly submitted evidence, nor did

EXHIBIT 1

From: Questions CA09Operation

To: wwwrobertgordon

Sent: Thursday, April 23, 2020 11:58 AM

Subject: RE: Some questions

1. A few years ago, I submitted some documents to the defendant (MetLife) in my case as evidence for them to investigate, before it became a lawsuit. One of them is a list that describes what all of the documents are and how many pages in each one. This was put into their administrative record with all the other documents. However, after receiving a copy of the administrative record, I discovered that many of them are missing or altered (made illegible) violating FRCP 37(e), committing spoliation of evidence. My former attorney wrote to them, asking them for those documents eight times, but they refused to send them. Can I re-submit my copies of them myself as attachments to my appeal's opening brief? Or, am I required to file a motion? What would that be?

As a pro se litigant, you are permitted to attach these documents to your brief without the need for a motion.

Metropolitan Life Insurance Company
MetLife Disability PO Box 14590, Lexington KY 40511-4590
Phone: 1-866-729-9200 Fax: 1-800-230-8531



121228013646 0072

December 20, 2012

Paul Fleishman, Esq.
The Fleishman Law Firm
5850 Canoga Avenue, 4th Floor
Woodland Hills, CA 91367

Re: Robert Gordon
Claim #: 721001110484
Employer: Borland Software Corporation
Report #: 104870

Dear Mr. Fleishman:

This letter is in response to your December 12, 2012 correspondence.

Mr. Gordon was a participant in the Borland Software Corporation long term disability plan (the "Plan"), an employee welfare benefit plan governed by the provisions of the Employee Retirement Income Security Act of 1974 as amended, 29 U.S.C. §§ 1001, *et seq.* ("ERISA").

Under ERISA and its implementing regulations, a plan participant whose claim has been denied, or their duly authorized representative, is entitled to review relevant documents. 29 C.F.R. § 2560.503-1(h)(2)(iii). A complete copy of Mr. Gordon's claim file, which contains all relevant communications and all records that may exist of any conversations that were had regarding your client's claim, is enclosed.

I trust that this responds to your request for information. Should you have any further questions, please submit your request to me in writing at the address above.

Sincerely,

Margie Calderon
Sr. LTD Claims Specialist
MetLife Disability

COPY

1 DANZ & GERBER
2 STEPHEN F. DANZ, SBN 68318
3 13418 VENTURA BOULEVARD
4 SHERMAN OAKS, CA 91423
5 Tel: (818) 783-7300
6 Fax: (818) 995-7159
7
8 Attorney for Plaintiff
9 ROBERT GORDON

FILED

JUN 27 2002
BARBARA J. FOX
CLERK
BY JUDI CLARK
DEPUTY, SANTA CRUZ COUNTY

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF SANTA CRUZ

10
11
12 ROBERT GORDON,) Case No. CV 143754
13 Plaintiff) [Unlimited Civil Case]
14) [Amount demanded exceeds \$25,000]
15) FIRST AMENDED
16) COMPLAINT FOR DAMAGES
17) BASED UPON:
18 vs.)
19)
20 BORLAND SOFTWARE)
21 CORPORATION, a Delaware)
22 corporation; PAUL VAN LANGEN, an)
23 individual; TERI CAMPBELL, an)
24 individual; and DOES 1-100, inclusive,)
25 Defendants.)
26
27
28

1) WRONGFUL TERMINATION
IN VIOLATION OF PUBLIC
POLICY;
2) VIOLATION OF THE
CALIFORNIA FAIR
EMPLOYMENT & HOUSING
ACT;
3) BREACH OF THE COVENANT
OF GOOD CAUSE;
4) SLANDER;
5) ASSAULT & BATTERY
6) FALSE IMPRISONMENT
7) LABOR CODE VIOLATIONS
8.) VIOLATION OF THE
CALIFORNIA UNFAIR
COMPETITION STATUTE
[Bus. & Prof. Code § 17200, *et seq.*];
9.) INTENTIONAL INFILCTION
OF EMOTIONAL DISTRESS
10) DECLARATION OF RIGHTS

DEMAND FOR JURY TRIAL

PRELIMINARY ALLEGATIONS

Plaintiff ROBERT GORDON, upon information and belief, alleges the following:

1. Plaintiff ROBERT GORDON (hereinafter "Plaintiff") is an individual and at all times herein mentioned was residing in Santa Cruz County, State of California.

2. Defendant BORLAND SOFTWARE CORPORATION. (hereinafter "BORLAND") is a Delaware corporation doing business in the City of Scotts Valley, County of Santa Cruz, California.

3. Defendant PAUL VAN LANGEN (hereinafter "VAN LANGEN") is an individual, and was at all times relevant herein employed by Defendant BORLAND as an Applications Director, and was Plaintiff's supervisor. At all times relevant herein Defendant VAN LANGEN resided, and does now reside, in the County of Monterey, State of California.

4. Defendant TERI CAMPBELL (hereinafter "CAMPBELL") is an individual, and was at all times relevant herein employed by Defendant BORLAND as a managerial employee in said Defendant's Human Resources department. At all times relevant herein Defendant CAMPBELL resided, and does now reside, in the County of Santa Cruz, State of California.

5. The full extent of the facts linking the fictitiously designated Defendants with the causes of action alleged herein is unknown to Plaintiff. In addition, the true names and capacities, whether individual, plural, corporate, partnership, associate, or otherwise of Defendant DOES 1 through 100, are unknown to Plaintiff at this time. Plaintiff therefore sues said Defendants by such fictitious names and will ask leave of Court to amend this Complaint to show their true names and capacities when ascertained. Said Defendants are sued as principals and/or agents, and employees of said principals, and the acts performed by them as agents, and employees were performed partly within and partly outside of the course and scope of their authority and employment. Based on information and belief, Plaintiff alleges that each and every Defendant designated as a DOE was responsible for the events

1 referred to herein and in some manner caused the injuries to the Plaintiff as hereinafter
2 alleged. Plaintiff will amend this Complaint to state the manner in which each fictitious
3 Defendant is so responsible.

4 6. At all times herein mentioned, each of the Defendants and the supervisors and
5 the employees of each Defendants are the acts of each other Defendant because said persons
6 or entities were the parent company, principals, owners, supervisors, employees, and/or
7 co-venturers of said Defendants, and further, upon discovery of said acts, Defendant ratified
8 and adopted such action and activity.

9 7. Plaintiff was originally hired as a Technical Support Engineer in or about
10 November 1989 by a predecessor company, which Defendant BORLAND took over in or
11 about 1991. Plaintiff's position at the time of the termination of his employment with
12 Defendant BORLAND was Staff Systems Programmer. In said position, plaintiff was
13 earning \$96,500 per year plus \$1,500 monthly for being "on call", and earned other fringe
14 benefits according to proof. Plaintiff received approximately \$10,000 per year in quarterly
15 bonuses for exemplary performance notwithstanding his physical disabilities as alleged
16 elsewhere in this complaint.

17 8. In the last approximately two and one half years of Plaintiff's employment,
18 there were many turnovers in the managerial personnel at Defendant BORLAND, including
19 the managers who directly supervised Plaintiff. Defendant BORLAND also began hiring
20 primarily younger (under the age of 40), inexperienced, employees to fill vacancies.
21 Plaintiff, who is 49 years of age, complained to a manager of Human Resources about his
22 concern that his own position might be replaced by a younger worker. In fact, plaintiff was
23 replaced by a substantially younger worker.

24 9. Because of Plaintiff's significant work experience and technical skills,
25 Plaintiff's supervisors came to rely on him, and assigned Plaintiff a very heavy workload.
26 Defendant VAN LANGEN also constantly pressured Plaintiff, and was verbally and
27 emotionally abusive, often screaming at Plaintiff, and sometimes sending Plaintiff email
28 containing crude and offensive language. During the first week of April, 2002, VAN

1 LANGEN physically kicked plaintiff in the leg. Said kicking and assault was not accidental
2 as defendant physically turned around to kick plaintiff as they passed each other. While
3 defendant had playfully squeezed plaintiff's hand or engaged in other frivolous touching on
4 prior occasions, on this occasion, defendant intended to and actually did cause damages to
5 plaintiff. Plaintiff had a bruise for approximately one and a half weeks following the
6 incident. Said kicking was very painful to plaintiff who complained to defendant's
7 Administrative Assistant. She claimed that defendant was under "a lot of stress (or
8 pressure)" from his boss. Defendant VAN LANGEN also berated Plaintiff when Plaintiff
9 took time off to seek medical consultation and/or treatment for himself, or to tend to the
10 medical needs of his disabled daughter. Plaintiff complained repeatedly about the abusive
11 treatment and harassment from Defendant VAN LANGEN to the Human Resources
12 department of Defendant BORLAND, but the issue was never resolved.

13 10. Plaintiff often worked between 50 and 100 hours per week.

14 11. Despite the pressures of his job and the long hours, Plaintiff performed in a
15 fully satisfactory manner, receiving good performance reviews, and pay increases the most
16 recent of \$3000 in or about the early Spring of 2001. Plaintiff was the only member of his
17 department to receive a pay raise in said time period.

18 12. However, the high volume of work, long hours, and continued harassment by
19 Defendant VAN LANGEN, began to take it's toll on Plaintiff, physically and emotionally.
20 Plaintiff began treating with his physician for symptoms including but not limited to
21 migraine headaches and high blood pressure. Plaintiff also consulted with a psychiatrist
22 concerning work-related stress symptoms, in or about January 2002.

23 13. On April 18, 2002 Plaintiff became ill while at and due in substantial part to
24 work. He went home and checked his blood pressure, and finding it to be significantly
25 elevated, Plaintiff immediately contacted his physician and scheduled an appointment for the
26 following day.

27 14. On April 19, 2002, Plaintiff also consulted with a Workers' Compensation
28 physician provided through Defendant BORLAND's insurance carrier. The Workers'

1 Compensation physician recommended that Plaintiff be off work on temporary disability
2 leave for one week.

3 15. On April 26, 2002 Plaintiff obtained a note from his doctor allowing him to
4 return to work, but stating that Plaintiff should be reassigned to a different department, "if he
5 is to avoid further flare-ups....". Plaintiff had previously discussed the possibility of
6 transferring to a different department with management of Defendant BORLAND, and there
7 were a number of other suitable positions to which Plaintiff could have transferred.

8 16. On April 29, 2002 Plaintiff returned to work, and met with Defendant
9 CAMPBELL. Defendant CAMPBELL told Plaintiff that it was not acceptable for him to
10 return to work with any restrictions, and that he should contact his physician and get the
11 doctor to approve Plaintiff to return to work in his usual department. Feeling pressured in
12 that regard, Plaintiff obtained a medical release allowing him to return to work on that basis.

13 17. On or about April 30, 2002 Plaintiff met with Defendant CAMPBELL. She
14 explained that Plaintiff's immediate supervisor, Defendant VAN LANGEN, was away from
15 work on jury duty, and that Plaintiff should just go about his business as usual, which
16 Plaintiff did.

17 18. On May 1, 2002 Defendant VAN LANGEN called Plaintiff to a meeting.
18 Also present at that meeting was Defendant CAMPBELL. Plaintiff was presented with a
19 letter concerning his employment, which he was asked to sign. Plaintiff asked to have time
20 to review it. The letter seemed to suggest that there were deficiencies in Plaintiff's work
21 performance, even though no such deficiencies has been previously brought to Plaintiff's
22 attention. In fact, plaintiff had received at least one exceptional prior review.

23 19. Defendant CAMPBELL then started reading the letter aloud. Again, Plaintiff
24 indicated he would like to have some time to review the letter. At that point, Defendants
25 CAMPBELL and VAN LANGEN both jumped up and approached Plaintiff in a threatening
26 manner which placed Plaintiff in fear of bodily injury, insisting that Plaintiff not leave the
27 room with the letter. Plaintiff said that he would like to have his attorney review the letter
28 and advise him about it, as his workman's compensation attorney had advised him to do if

1 plaintiff was in fact presented with any documentation while at work. Each defendant was
2 aware that plaintiff was referring to his already-retained workman's compensation attorney
3 and that in fact was whom plaintiff had elected to have represent him with regard to any
4 employment issues. Defendants acted in part to deny plaintiff a spokesperson of his own
5 choosing, in violation of Labor Code 923. Defendant CAMPBELL told Plaintiff that he was
6 being suspended, effective immediately, and that she was going to call Security and
7 demanded that plaintiff "wait here".

8 20. Plaintiff then turned and walked out the door. Defendant CAMPBELL asked
9 for Plaintiff's employee identification badge, and Plaintiff gave it to her. At this time,
10 Defendant CAMPBELL was on her cell phone with the Security department, proclaiming
11 loudly that she wanted the facility "locked down". This also frightened Plaintiff, and in fear
12 of his physical safety he began to hurry to the building exit, his heart racing. Defendant
13 CAMPBELL ran after Plaintiff until he left the facility in plain view of all other employees
14 in the department.

15 21. Plaintiff was later sent a letter, dated May 1, 2002 and signed by the Vice
16 President of Defendant BORLAND's Human Resources Department, which stated in
17 pertinent part as follows :

18 " This morning you participated in a meeting regarding your
19 performance issues with your manager Paul Van Langen, and
20 your HR representative, Teri Campbell. At the end of that
conversation, due to your behavior, you were advised by Teri that
you were suspended until further notice.

21 "We have since discussed your actions during this meeting. This
22 letter is to advise you that due to your performance issues, and
23 your actions during this morning's meeting, we have decided to
terminate your employment with Borland, effective
immediately."

24 22. As stated above, Plaintiff was a long term employee of Defendant BORLAND,
25 who had received regular performance reviews and salary increases recognizing his
26 satisfactory performance throughout his employment.

27 23. All of the foregoing and following actions taken toward Plaintiff that are
28 alleged in this complaint were carried out by managerial employees acting in a deliberate,

1 cold, callous, malicious, oppressive, and intentional manner in order to injure and damage the
2 Plaintiff while said employees were acting partially within and partially outside of the course
3 and scope of their employment with defendant.

4

5 **FIRST CAUSE OF ACTION**

6 **WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY**
7 **(Against Defendants BORLAND and DOES 1-100)**

8

9 24. Plaintiff realleges and incorporates paragraphs 1-23 of the Preliminary
10 Allegations as though fully set forth hereat.

11 25. It was, and is, the public policy of the State of California, as set forth in the
12 Fair Employment and Housing Act, California Government Code § 12900, et seq., that
13 employees not be discriminated against, nor subjected to differential terms and conditions of
14 employment, on account of age and/or disability, and that disabled employees be given
15 reasonable accommodation when requested.

16 26. It is further the public policy of the State of California, as set forth in California
17 Labor Code Section 132a, that there should not be discrimination against workers who are
18 injured in the course and scope of their employment. Additionally, Labor Code 923 provides
19 that no person shall be treated adversely who advises his employer that he has retained an
20 attorney to represent him in negotiations and/or lawsuits against the employer. All of the
21 activities complained about herein are further violations of public policy of the State of
22 California based on Business and Professions Code Sections 17200-17500 ("Unfair Business
23 Practices").

24 27. Plaintiff was not afforded reasonable accommodation when it was requested of
25 Defendant BORLAND. Further, the termination of Plaintiff's employment was motivated in
26 part by Plaintiff's age (over 40), and disability (industrial injury, Attention Deficit Disorder,
27 Dyslexia), all in violation of the public policies described hereinabove. Defendants further
28 have demanded that plaintiff take vacation time as and in place of his entitlement to Family

1 | Medical Leave time.

2 28. As a direct and proximate result of the actions of Defendants, including the
3 termination of Plaintiff's employment in violation of the public policy of the State of
4 California, Plaintiff has suffered and will continue to suffer pain and suffering, and extreme
5 and severe mental anguish and emotional distress; Plaintiff has further suffered and will
6 continue to suffer a loss of earnings and other employment benefits; whereby Plaintiff is
7 entitled to general compensatory damages in amounts to be proven at trial.

8 29. The conduct of Defendants described hereinabove was outrageous and was
9 done with malice, fraud and oppression and with conscious disregard for Plaintiff's rights
10 and with the intent, design and purpose of injuring Plaintiff. Defendant BORLAND through
11 its officers, managing agents and/or its supervisors, authorized, condoned and/or ratified the
12 unlawful conduct described hereinabove. By reason thereof, Plaintiff is entitled to an award
13 of punitive damages in an amount according to proof at time of trial.

SECOND CAUSE OF ACTION

VIOLATION OF CALIFORNIA FAIR EMPLOYMENT & HOUSING ACT
(Against BORLAND, ALL DOES)

19 30. Plaintiff realleges and incorporates paragraphs 1-23 of the Preliminary
20 Allegations as though fully set forth hereat.

21 31. At all times hereinafter mentioned, Defendants were employers or other entities
22 or persons who were required to comply with the California Fair Employment and Housing
23 Act in respect to employment practices and, specifically, were prohibited from discriminating
24 against any employees based on age (over forty) or disability.

25 32. At all times hereinafter mentioned, Plaintiff was an employee protected by the
26 California Fair Employment and Housing Act and, specifically, against practices which
27 constituted discrimination or discriminatory treatment based on his disability.

28 33. On or about May 20, 2002, Plaintiff filed a charge of discrimination against

1 Defendants with the California Department of Fair Employment and Housing, alleging that
2 Defendants violated the Act on account of their actions as aforesaid, based on discrimination
3 due to Plaintiff's pre-existing and work related disabilities and age. A true and accurate copy
4 of said charge is attached herewith and referred to as Exhibit "A", as if fully incorporated by
5 reference herein.

6 34. On or about May 21, 2002, the Department of Fair Employment and Housing
7 issued to Plaintiff a notice advising of his right to commence this action within a period of
8 one year, and this action has been commenced within said time period. A true and accurate
9 copy of said charge is attached herewith and referred to as Exhibit "B", as if fully
10 incorporated by reference herein.

11 35. As a direct and proximate result of the actions of the Defendants, Plaintiff
12 sustained and will sustain monetary damages which will be established by proof at trial.

13 36. As a further direct and proximate result of the actions of the Defendants,
14 Plaintiff has sustained severe emotional distress and mental anguish, and has been damaged
15 thereby; the amount of such damages will be established by proof at trial.

16 37. The actions of the Defendants complained of herein were done maliciously and
17 oppressively, by reason whereof Plaintiff is entitled to an award of punitive damages, the
18 amount of such damages to be established by proof at trial.

19 38. Plaintiff is entitled to an injunction requiring Defendants to reinstate his
20 employment, and, further, not to discriminate against Plaintiff on account of his age and/or
21 disability in the future.

22 39. Plaintiff is entitled to an award of reasonable attorney's fees in connection with
23 prosecution of this action.

24 40. Plaintiff is entitled to prejudgment interest under and by virtue of any provision
25 of law entitling him thereto.

THIRD CAUSE OF ACTION

BREACH OF THE COVENANT OF GOOD CAUSE

1 (Against Defendants BORLAND and DOES 1-100)

2

3 41. Plaintiff repeats and realleges paragraphs 1-23 of this Complaint as if set forth

4 fully herein.

5 42. Plaintiff was a long term employee of defendants and by virtue of that long

6 term relationship was entitled to be treated in good faith. Because of the longevity of

7 Plaintiff's employment with Defendant BORLAND (in excess of 12 years), together with

8 promotions, raises, and favorable performance reviews, and also because of Defendant

9 BORLAND's written policies and BORLAND's officials' statements of company practices,

10 Plaintiff had an implied-in-fact contract to be dismissed only for good cause.

11 43. The law imposed duties on Defendants BORLAND and DOES 1 through 100

12 in connection with the employment agreement to act fairly and in good faith towards

13 Plaintiff. Defendants covenanted to give full cooperation to Plaintiff in his performance

14 under the employment agreement and to refrain from any act which would prevent or impede

15 any of the conditions of the employment agreement from being performed, which would

16 deny the employment agreement, or which would prevent Plaintiff from receiving the

17 benefits of the employment agreement. Plaintiff is further informed and believes that each act

18 taken by defendants in derogation of his rights to good cause and fair warning violated one or

19 more written procedures and policies of defendant BORLAND.

20 44. From and after May 1, 2002, Defendants BORLAND and DOES 1 through

21 100 breached these duties imposed by law in connection with the employment agreement by

22 terminating Plaintiff's employment, without probable cause and in bad faith.

23 45. As a direct and proximate result of the bad faith actions of Defendants, and

24 each of them, Plaintiff has suffered damages as a direct and proximate result of this violation

25 and seeks all damages allowed by law, according to proof at time of trial.

26

27 **FOURTH CAUSE OF ACTION**

28 **SLANDER**

[Against Defendants BORLAND and DOES 1-100]

46. Plaintiff realleges and incorporates paragraphs 1-23 of the Preliminary Allegations as though fully set forth hereat.

47. Defendants made false and defamatory written statements concerning Plaintiff's employment performance.

48. Plaintiff will be required to repeat the false and defamatory statements made by Defendants, by self-publication, in that in future job interviews, Plaintiff must reveal to prospective employers that he was terminated from his employment with Defendant BORLAND for cause, which was false.

49. As a direct and proximate result of the bad faith actions of Defendants, and each of them, Plaintiff has suffered damages as a direct and proximate result of this violation and seeks all damages allowed by law, according to proof at time of trial.

FIFTH CAUSE OF ACTION

ASSAULT AND BATTERY

Violation of Penal Code Section 240, ET AL

[Against Defendants VAN LANGEN, CAMPBELL and DOES 1-100]

50. Plaintiff realleges and incorporates paragraphs 1-23 of the Preliminary Allegations, as though fully set forth hereat.

51. California Penal Code Section 240 defines "assault" as an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another. As stated hereinabove, Defendants CAMPBELL and VAN LANGEN approached Plaintiff in a threatening manner which placed Plaintiff in fear of bodily injury. Additionally, plaintiff alleges that VAN LANGEN battered plaintiff during the first week of April, 2002, as alleged in paragraph 9 of this Complaint.

52. As a direct and proximate result of the bad faith actions of Defendants, and

1 each of them, Plaintiff has suffered damages as a direct and proximate result of this violation,
2 including but not limited to severe emotional distress and mental anguish, and seeks all
3 damages allowed by law, according to proof at time of trial.

4 **SIXTH CAUSE OF ACTION**

5 **AGAINST BORLAND, CAMPELL, ALL DOES**
6 **FALSE IMPRISONMENT**

7 53. Plaintiff repeats and realleges paragraphs 1-23 of this complaint as if set forth
8 fully herein.

9 54. On or about May 1, 2002, defendant CAMPBELL, as alleged in paragraph 9 of
10 this Complaint, called defendant BORLAND's security department in plaintiff's immediate
11 presence as plaintiff was preparing to leave the workplace and demanded that security "lock
12 down, Mod. F". (Mod F refers to the building in which plaintiff was located). Plaintiff
13 overheard this remark and was placed in immediate apprehension that he would be confined
14 to Mod F.

15 55. Plaintiff has suffered the non-consensual, intentional confinement of his person (as
16 defined in paragraph 54, see Schanafelt vs. Seaboard Finance Co., 108 Cal. App2d 420, 423
17 (1951) without lawful privilege for an appreciable length of time, however, short, which
18 caused plaintiff damages and harm.

19 **SEVENTH CAUSE OF ACTION**

20 **LABOR CODE VIOLATIONS**

21 **AGAINST BORLAND, ALL DOES**

22 56. Plaintiff repeats and realleges paragraphs 1-23 of this complaint as if set forth
23 fully herein.

24 57. Plaintiff was denied a spokesperson of his own choosing and in so denying
25 plaintiff his right to have an attorney represent him, defendants have violated Labor Code
26 923. Plaintiff is informed and believes and thereon alleges that defendants have violated the
27 Labor Code in other specific ways according to proof.

1 58. Plaintiff has been damaged as a direct and proximate result of each such failure to
2 pay wages due and seeks recovery of same, together with all statutory penalties allowed by
3 law.

EIGHTH CAUSE OF ACTION

VIOLATION OF THE CALIFORNIA UNFAIR COMPETITION STATUTE

[Bus. & Prof. Code § 17200, et seq.]

[Against Defendants BORLAND and DOES 1-100]

9 59. Plaintiff realleges and incorporates paragraphs 1-23 of the Preliminary
10 Allegations, as though fully set forth hereat.

11 60. Plaintiff brings this cause of action against Defendants pursuant to Business
12 and Professions Code § 17203.

13 61. Plaintiff requests an award of Attorneys fees in an amount to be established by
14 proof at time of trial. Plaintiff further requests injunctive relief including but not limited to
15 requiring Defendants to disgorge all moneys obtained by them through the unlawful business
16 practices outlined above.

17 62. Plaintiff further requests, pursuant to Business and Professions Code § 17203,
18 injunctive relief ordering Defendant BORLAND to cease and desist from violating the
19 Government Code of California, Section 12940, as interpreted to include industrially-injured
20 workers.

NINTH CAUSE OF ACTION

INTENTIONAL INFILCTION OF EMOTIONAL DISTRESS

[Against ALL Defendants]

26 63 Plaintiff realleges and incorporates paragraphs 1-23 of the Preliminary
27 Allegations, as though fully set forth hereat.

28 64. The aforesaid acts were done with the intent of causing Plaintiff to suffer

1 severe emotional distress and did cause Plaintiff to suffer extreme and severe mental anguish
2 and emotional distress. At numerous times during plaintiff's employment, defendant VAN
3 LANGEN would run into plaintiff's work area, make physically threatening gestures which
4 placed plaintiff in fear of great bodily harm and threatened to fire plaintiff.

5 65. The conduct of Defendants described hereinabove was outrageous and was
6 done with malice, fraud and oppression and with conscious disregard for Plaintiff's rights and
7 with the intent, design and purpose of injuring Plaintiff. Defendant BORLAND, through its
8 officers, managing agents and/or its supervisors, authorized, condoned and/or ratified the
9 unlawful conduct described hereinabove. By reason thereof, Plaintiff is entitled to an award
10 of punitive damages in an amount according to proof at time of trial.

11 65. As a direct and proximate result of Defendant's action, Plaintiff has suffered
12 and will continue to suffer extreme and severe mental anguish and emotional distress;
13 Plaintiff has further suffered and will continue to suffer a loss of earnings and other
14 employment benefits; whereby Plaintiff is entitled to general compensatory damages in
15 amounts to be proven at trial.

TENTH CAUSE OF ACTION

DECLARATION OF RIGHTS RE NON ENFORCABILITY OF ARBITRATION

AGREEMENT

AGAINST ALL DEFENDANTS

20 66. Plaintiff repeats paragraphs 1-23 of this complaint as if set forth fully herein.

21 67. On or about May 24, 2000, plaintiff and defendants entered into a "retention bonus
22 agreement". Said agreement provided, inter alia, at paragraph 6, that the parties would refer
23 any claims (including statutory claims) to arbitration. A true and accurate copy of this
24 agreement is attached herewith and fully enclosed by reference, and known as Exhibit "C".

25 68. Plaintiff seeks a declaration of rights that said arbitration agreement is not
26 enforceable. Said declaration is based on the procedural and substantive unconscionability of
27 the agreement and the fact that said agreement violates the laws of the State of California as
28 set forth in Armendirez vs. Foundation Health Systems in California and Circuit City in the

1 Ninth Circuit. Plaintiff alleges that said arbitration provision does not provide for payment of
2 all costs of arbitration by defendant; that defendant reserves unto itself the right to go to court
3 to seek injunctive relief in court; that plaintiff is hereby seeking injunctive relief in court;
4 said agreement does not provide for severability of illegal and void provisions and thus the
5 entire arbitration agreement must be stricken.

6 69. On or about July 30, 2001, plaintiff and defendants entered into a new agreement,
7 attached hereto and fully incorporated by reference as Exhibit "D ". Said agreement
8 specifically stated at paragraph 8 that

9 "This agreement, together with any accepted offer letter for your employment,
10 constitutes the full and complete understanding between you and Borland with respect to the
11 subject matter hereof and supersedes all prior and contemporaneous representations and
12 understandings, whether written or oral, all of which are hereby called to the extent they are
13 not specifically merged into this agreement. There are no other promises, agreements, or
representations, oral or written, upon which you have relied in entering into employment
with Borland." As said Exhibit does not contain any arbitration provision, there is in effect
no valid, current agreement to arbitrate between the parties.

14 70. There is no just, expeditious remedy at law other than the declaration of this court
15 that said arbitration agreement in exhibit is void and unenforceable. Plaintiff will be
16 irreparably damaged unless this court enters an ORDER declaring said agreement void and
17 voidable by plaintiff.

18 WHEREFORE, Plaintiff prays judgment against Defendants as follows:

- 19 1. For general economic and non-economic damages according to proof;
- 20 2. For special damages according to proof;
- 21 3. For injunctive relief;
- 22 4. For punitive damages where allowed by law;
- 23 5. For prejudgment interest ;
- 24 6. For costs of suit incurred herein;
- 25 7. For attorney's fees as allowed by law, including but not limited to "private attorney
26 general" statutes contained in CCP 1021.5;
- 27 8. For such other and further relief as this Court deems just and proper, including but
28 not limited to a declaration that any so-called "arbitration agreement" by and between

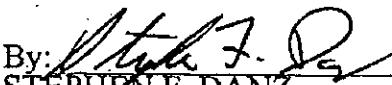
1 the parties is substantively and procedurally unfair to plaintiff and shall not be
2 enforced:
3 9. For trial by jury.

4

5 Dated: June 24, 2002

6 LAW OFFICES OF DANZ & GERBER

7

8 By: 
9 STEPHEN F. DANZ
10 Attorney for Plaintiff
11 ROBERT GORDON

**SETTLEMENT AGREEMENT
AND GENERAL RELEASE OF ALL CLAIMS**

THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE OF ALL CLAIMS (the "Agreement") is made and entered by, between and among Robert Gordon ("Gordon") and Borland Software Corporation ("Borland") as of the Effective Date provided in Section 16 below.

RECITALS

A. As used herein, "Borland" shall mean Borland Software Corporation, its successors, assigns, parents, subsidiaries, affiliates, related corporations, and all past and present officers, directors, employees and agents (in their individual and representative capacities);

B. As used herein, "Gordon" shall mean Robert Gordon, his heirs, executors, administrators, agents, attorneys, assigns, and any one claiming through him;

C. Gordon is a plaintiff and Borland is the remaining named defendant in Civil Action No. 143754 (the "Lawsuit"), now pending in the Superior Court of the State of California, County of Santa Cruz (the "Court");

D. Gordon and Borland (each, a "Party," and collectively, the "Parties") desire to settle the Lawsuit, including without limitation settling all matters that were raised or could have been raised by Gordon, completely and amicably, without further litigation;

E. The Parties have read this Agreement and have reviewed it with their respective legal counsel, who have answered all of their questions concerning this Agreement; and

F. The Parties enter into this Agreement freely, without coercion or duress, and in full and complete understanding of the legal rights each of them is or may be giving up by executing this Agreement.

TERMS

In consideration of the foregoing recitals, the mutual covenants and agreements contained in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties, intending to be legally bound hereby, agree as follows:

1. **Payment.** Within twenty-one (21) days after Borland receives this Agreement, fully executed by Gordon and his counsel: (1) Borland will issue a check payable to "Robert Gordon" in the amount of One Hundred Sixty-Nine Thousand One Hundred Sixty Five Dollars and Eighty-Nine Cents (\$169,165.89) ("Gordon Payment"); (2) Borland will issue a check payable to Gordon's counsel, "Stephen F. Danz of Danz & Gerber," in the amount of Eighty-Six Thousand Eight Hundred Thirty-Four Dollars and Eleven Cents (\$86,834.11) for payment of attorney's fees and costs, and Borland shall report this payment on a Form 1099; and (3) Borland will issue a check payable to Gordon's counsel, "R. Michael Hoffman," in the amount of Sixty-

Four Thousand Dollars (\$64,000) for payment of attorney's fees and costs, and Borland shall report this payment on a Form 1099.

1.1 Allocation. The Parties agree that eighty percent (80%) of the Gordon Payment, specifically the amount of One Hundred Thirty-Five Three Hundred Thirty-Two Dollars and Seventy-One Cents (\$135,332.71), is allocated to Gordon's release of claims for bodily injury and/or physical personal injury damages, and therefore Borland shall not withhold any amounts or issue Gordon a Form W-2 or Form 1099 with respect to such allocated amount. Borland shall not withhold any amounts and shall issue Gordon a Form 1099 with respect to the remaining twenty percent (20%) of the Gordon Payment, specifically the amount of Thirty-Three Thousand Eight Hundred Thirty-Three Dollars and Eighteen Cents (\$33,833.18).

1.2 Tax Liability. Gordon warrants that no advice or representation regarding the tax treatment of any payments hereunder has been made by Borland or its counsel. Gordon has consulted with a tax attorney of his choice regarding the tax consequences of the Agreement, apportionment of damages, structure of payments, and tax treatment of all amounts paid hereunder. In the event any federal, state or local taxing authority should determine that taxes are owing on the amounts paid under this agreement, Gordon shall assume full responsibility for the payment of those amounts and will defend, hold harmless and indemnify Borland in full for any taxes and withholdings for which Borland may become liable as a result of the payments hereunder except to the extent the amount represents taxes that are wholly Borland's responsibility as Gordon's former employer.

2. Dismissal. Simultaneously with the execution of this Agreement, (i) Gordon shall provide Borland with a fully-executed dismissal of the Lawsuit with prejudice, which Borland may file with the Court upon Borland's transmittal of the Settlement Payment to Gordon, and Gordon shall dismiss any other claims against Borland now pending in any forum (except his workers compensation claim) and shall bring no further claims relating in any way to the claims released hereunder, and (ii) Borland shall take all necessary and sufficient steps to withdraw all applications for legal fees that have been filed and are now pending with the Court. In addition to the foregoing, Gordon hereby represents and warrants that, prior to the date of this Agreement, he has dismissed all pending claims he has asserted against Teri Campbell ("Campbell") and/or Paul Van Langen ("Van Langen").

3. No Admission of Liability. This Agreement does not constitute and shall not be construed as an admission or acknowledgment of any liability by Borland or any other defendant in the Lawsuit, liability being expressly denied.

4. Representation by Counsel. Each Party acknowledges to the other Party that it has been represented by independent legal counsel of its own choice throughout all of the negotiations that preceded the execution of this Agreement. Each Party further acknowledges that he and it and his and its counsel have had adequate opportunity to make whatever investigation or inquiry they may deem necessary or desirable in connection with the subject matter of this Agreement prior to the execution hereof.

5. Release of All Claims. Except with respect to the obligations created by or arising out of this Agreement, Gordon hereby releases and forever discharges Borland, Campbell

and Van Langen from any and all liability and claims, debts, rights, actions, suits, damages, losses, costs, expenses, and demands whatsoever, in law or equity, of every kind, nature or description, whether known or unknown, fixed or contingent, which Gordon ever had, now has, or may hereafter acquire, by reason of any matter, cause or thing whatsoever accruing, occurring, or arising at any time on or prior to the date he signs this Agreement, in any way related to Gordon's employment relationship with Borland, the termination of that employment, any payments due or expected as a result of employment (with the exception of any claims for workers compensation benefits or any vested employee benefits or claims which may not be released as a matter of law) or otherwise. Included in the foregoing, but not in limitation thereof, Gordon specifically releases Borland from any and all claims arising under federal, state or local laws prohibiting employment discrimination based on age, sex, race, color, national origin, religion, handicap, or veteran status, including the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, or any statutory or common law claims arising out of any legal restrictions on Borland's right to terminate an employee. By his signature on this Agreement, Gordon's attorney Stephen F. Danz acknowledges full satisfaction of any claim by Gordon or his attorneys for attorney fees related to the Lawsuit.

6. **Waiver of Section 1542.** It is understood and agreed that this Agreement is intended to cover and does cover all claims or possible claims of every nature and kind whatsoever, whether known or unknown, suspected or unsuspected, or hereafter discovered or ascertained, and all rights under section 1542 of the Civil Code of California are hereby expressly waived. Gordon acknowledges that he is familiar with section 1542, which reads as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

Gordon hereby expressly, knowingly, and intentionally waives and relinquishes any and all rights which he has under section 1542, as well as under any other similar state or federal statute or common law principle.

7. **Transfer and Assignment.** Gordon represents and warrants that he has not heretofore transferred or assigned or purported to transfer or assign to any person, firm or corporation any claims, demands, obligations, losses, causes of action, damages, penalties, costs, expenses, attorneys' fees, liabilities or indemnities herein released, and Gordon agrees to indemnify and hold Borland harmless against any claims, demands, obligations, losses, causes of action, damages, penalties, costs, expenses, attorneys' fees, liabilities or indemnities arising out of or in connection with any such transfer, assignment or purported or claimed transfer or assignment. Gordon represents and warrants that neither he nor any assignee has filed any lawsuit (other than the Lawsuit) or arbitration against Borland.

8. **Letter of Reference.** Within thirty (30) days of receipt of this Agreement, fully-executed by Gordon and his counsel, Borland shall deliver to Gordon a letter, substantially in the

form attached hereto as Exhibit A, acknowledging Gordon's service to Borland. Gordon shall refer any and all prospective employers who seek a reference from Borland, to Borland's head of human resources, and upon receipt of any such contact such Borland human resources employee (a) shall respond by providing only the information in the aforesaid reference letter, the dates of Gordon's employment, his last position held and his base salary as of his termination date, and (b) shall not disclose that Borland terminated Gordon's employment.

9. **Workers Compensation.** Borland hereby agrees not to assert that this Agreement affects in any manner Gordon's pending claim for workers compensation benefits.

10. **Fees & Expenses.** Each Party shall bear their own fees, costs and expenses incurred in connection with the Lawsuit and this Agreement.

11. **Confidentiality.**

11.1 **This Agreement.** Gordon may disclose the settlement terms of this Agreement only to his attorneys, accountants, tax advisors, and necessary government authorities. In addition, Gordon may disclose the settlement terms of this Agreement as necessary to enforce the Agreement in accordance with its terms. Prior to disclosing these terms to any of the above-referenced persons, Gordon shall inform such persons of their obligations not to disclose the terms further. Disclosure of the terms of this Agreement by anyone to whom Gordon discloses them shall be treated as an unauthorized disclosure by Gordon. As used in this Section 11.1, the term "Gordon" shall also include his attorneys of record in this matter stated in Section 1 above.

11.2 **Employee Confidentiality Agreement.** Gordon acknowledges his continuing obligations under his Employee Confidentiality and Assignment of Inventions Agreement dated July 30, 2001, a copy of which is attached hereto as Exhibit B.

12. **Return of Borland Property.** Gordon acknowledges and agrees that he has returned all Borland documents (and all copies thereof) and other Borland property that Gordon has had in his possession at any time, including, without limitation, Borland files, notes, notebooks, correspondence, memoranda, agreements, drawings, records, business plans, forecasts, financial information, specifications, computer-recorded information, and tangible property (including, without limitation, company-issued laptop computer, credit cards, entry cards, identification badges and keys), and any materials of any kind that contain or embody any proprietary or confidential information of Borland (and all reproductions thereof in whole or in part).

13. **No Assistance.** Gordon agrees that he will not voluntarily provide assistance, information, or advice of any kind, directly or indirectly (including through agents or attorneys), to any person or entity in connection with such person or entity's assertion of any claim or cause of action of any kind, in court, arbitration or otherwise, against Borland, its parents, subsidiaries and affiliates, and each of their past, present and future officers, directors, employees, shareholders, contractors and attorneys, and he shall not suggest, induce or encourage any person or entity to do so. The foregoing sentence shall not prohibit Gordon from testifying truthfully under subpoena or providing other assistance under compulsion of law.

14. **Nondisparagement.** Gordon agrees not to disparage Borland, or its officers, directors, employees, shareholders and agents, in any manner likely to be harmful to them or their business, business reputation or personal reputation; *provided, however*, that Gordon will respond accurately and fully to any question, inquiry or request for information when required by legal process. Borland agrees that Paul Van Langen, Teri Campbell, Rong Sha and Chris Lee shall not disparage Gordon in any manner likely to be harmful to Gordon or his business or personal reputation; *provided, however*, that such individuals will respond accurately and fully to any question, inquiry or request for information when required by legal process.

15. Miscellaneous.

15.1 Applicable Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California, without regard to the conflicts or choice of laws principles thereof or of any other jurisdiction.

15.2 Binding Effect. This Agreement shall be binding upon the Parties and their respective legal representatives, successors, and, except as otherwise provided herein, its assigns.

15.3 Severability. If any provision of this Agreement shall be held to be illegal, invalid or unenforceable, that provision will be enforced to the maximum extent permissible so as to effect the intent of the Parties, and the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

15.4 Entire Agreement; Amendment. This Agreement, including any exhibits hereto, constitutes the entire and only agreement between the Parties and supersedes all previous and contemporaneous oral and written agreements, discussions, communications, negotiations, commitments and writings with respect to the subject matter hereof. The terms and conditions of this Agreement may be altered, modified, changed or amended only by a paper writing executed by duly authorized representatives the Parties.

15.5 Waiver of Rights. The observance of any term of this Agreement may be waived only by a writing signed by the Party to whose benefit the term accrued. Waiver of any provision of this Agreement, or the failure by either Party to enforce any provision of this Agreement, will not be deemed a waiver of future enforcement of that or any other provision.

15.6 Notice. All notices, demands, or other writings provided in this Agreement to be given, made or sent, or which may be given, made or sent, by either Party to the other, shall be deemed to have been fully given, made or sent when made in writing and deposited in the United States mail, first class, postage prepaid, or sent certified mail, return receipt requested, and addressed as follows:

If to Borland: Timothy Stevens, Esq.
Senior Vice President
100 Enterprise Way
Scotts Valley, California 95066-3249

With a copy to: Richard H. Frank, Esq.
 Cooley Godward LLP
 One Maritime Plaza, 20th Floor
 San Francisco, CA 94111

If to Gordon: Robert Gordon
 P.O. Box 66475
 Scotts Valley, CA 95067-6475

With a copy to: Stephen F. Danz, Esq.
 Danz & Gerber
 13418 Ventura Boulevard
 Sherman Oaks, CA 91423

or at such other address as either Party hereto may specify by notice given in accordance with this section.

15.7 Headings. The bold-faced and underlined headings contained in this Agreement are for convenience of reference only, shall not be deemed to be a part of this Agreement and shall not be referred to in connection with the construction or interpretation of this Agreement.

15.8 Counterparts. This Agreement may be executed by facsimile and in several counterparts, each of which shall constitute an original and all of which, when taken together, shall constitute one agreement.

15.9 Dispute Resolution. To ensure the rapid and economical resolution of any and all disputes that might arise in connection with this Agreement, the parties agree that any and all disputes, claims, and causes of action, in law or equity, arising from or relating to this Agreement or its enforcement, performance, breach, or interpretation, will be resolved solely and exclusively by final, binding, and confidential arbitration, by a single arbitrator, in San Francisco, California, and conducted by Judicial Arbitration & Mediation Services, Inc. ("JAMS") under its then-existing employment rules and procedures. Nothing in this section, however, is intended to prevent either party from obtaining injunctive relief in court to prevent irreparable harm pending the conclusion of any such arbitration.

15.10 Construction.

15.10.1 For purposes of this Agreement, whenever the context requires: the singular number shall include the plural, and vice versa; the masculine gender shall include the feminine and neuter genders; the feminine gender shall include the masculine and neuter genders; and the neuter gender shall include the masculine and feminine genders.

15.10.2 The Parties hereto agree that any rule of construction to the effect that ambiguities are to be resolved against the drafting Party shall not be applied in the construction or interpretation of this Agreement.

16. Gordon Understandings.

GORDON UNDERSTANDS THAT HE SHOULD CONSULT WITH AN ATTORNEY PRIOR TO SIGNING THIS AGREEMENT AND THAT HE IS GIVING UP ANY LEGAL CLAIMS HE HAS AGAINST BORLAND RELEASED ABOVE BY SIGNING THIS AGREEMENT. GORDON FURTHER UNDERSTANDS THAT HE HAS UP TO 21 DAYS TO CONSIDER THIS AGREEMENT, THAT HE MAY REVOKE IT AT ANY TIME DURING THE 7 DAYS AFTER HE SIGNS IT, AND THAT IT SHALL NOT BECOME EFFECTIVE UNTIL THE EIGHTH DAY AFTER HE SIGNS THE AGREEMENT ("THE EFFECTIVE DATE"). GORDON ACKNOWLEDGES THAT HE IS SIGNING THIS AGREEMENT KNOWINGLY, WILLINGLY AND VOLUNTARILY IN EXCHANGE FOR THE PAYMENT PROVIDED FOR IN SECTION 1.

IN WITNESS WHEREOF, THE PARTIES HAVE READ THE FOREGOING AND UNDERSTAND THE EFFECT OF THIS AGREEMENT. GORDON ACKNOWLEDGES THAT HE IS RELEASING LEGAL RIGHTS.

BORLAND SOFTWARE CORPORATION

By: _____ Dated: _____
Timothy Stevens
Senior Vice President

ROBERT GORDON

By: Robert Gordon Dated: 2/23/04
Robert Gordon

APPROVED AS TO FORM:

COOLEY GODWARD LLP

By: _____ Dated: _____
Richard H. Frank
Attorneys for Borland Software Corporation

DANZ & GERBER

By: Stephen F. Danz Dated: 2/23/04
Stephen F. Danz
Attorneys for Gordon

Sharon M. Beaty
248 Pismo Drive
La Selva Beach, CA 95078
Phone: 831-768-8333

Fax

To:	Steven Danz	From:	Sharon M. Beaty
Fax:	1-818-995-7159	Date:	August 6, 2002
Phone:	1-818-783-7300	Pages:	7, including this page
Re:	Robert Gordon		

Comments:

Hello Steve,

I thought it might be easier for you to review this information if I faxed it to you. I'm sending the following information:

Page 1-2: This cover sheet & notes

Page 3-4: Brief summary of my relevant history at Borland

Page 5: A bonus nomination form I wrote regarding Bob's performance (the bonus was awarded)

Page 6: Bob's 1997 performance rating

Page 7: Bob's 1998 performance rating

Re: Performance Ratings

I recalled after talking with you that Borland's policy in 1997 and 1998 did not require the managers to prepare a written review of an employee's performance unless that employee was being placed on an action plan as a result of poor performance. As a result of layoffs and attrition, the managers had so many direct reports and such heavy workloads that there simply wasn't time to write appraisals. Therefore, I completed an Excel spreadsheet by assigning a performance rating to each employee, and worked with my manager (I reported directly to the Chief Financial Officer) to assign a salary increase percentage, based on the total amount of money available to the department. Pages 3 and 4 show only Bob's ratings; I deleted all the other employees on this spreadsheet.

If you compare Bob's 1997 salary to his 1998 salary, you will note that his base salary in 1998 was much higher. During the year I was able to convince HR to re-level Bob's position since his responsibilities had increased since transferring to my department, and as a result he was being paid far less than the market rate for a Senior Systems Programmer.

I made no other changes to this worksheet other than to hide the data pertaining to other employees.

Re: HR Policies

I wasn't able to locate any old HR policies. I thought I might have saved some of this information, since one of my projects at Borland involved selecting and implementing a new HR application, so I got pretty

deep into HR policy while managing that project. I think there was an employee handbook that one of the current employees might be able to provide.

Re. Robert's Need for Accommodation

Regarding Bob's need for accommodation, I remember discussing this briefly with Bob's prior manager at the time that Bob transferred to my group. Bob later told me about his difficulty reading, his bad back, and some other details that I considered easy and reasonable to accommodate. Before Bob transferred into my department, I already had one employee with the same job title as Bob (Sr. Systems Programmer), who needed accommodation for dyslexia and some other disabilities. I had discussed this employee's accommodations with my HR representative in great detail. Bob's accommodation requirements were basically the same and required no new planning or extra effort. This other programmer is still working in the IS department at Borland, reporting to Mr. VanLangen, and presumably still being accommodated.

Hope you find this information useful. Feel free to call me if you have any questions.

Regards,

Sharon M. Beaty

Sharon M. Beaty
248 Pismo Drive
La Selva Beach, CA 95076
(831)768-8333

Page 2 of 7

SER 028

To: File
From: David Schwartz, Manager Compensation and Benefits
Re: Robert Gordon
Date: April 22, 2002

On Wednesday April 17, 2002, Robert Gordon asked if he could speak to me. This was not an unusual occurrence, as Gordon had been speaking to me regarding an ongoing benefit issue. This discussion pertained to a disagreement he was having with his manager surrounding an ICP objective. He described a situation that involved a project containing contact information for the entire company. He stated it had been assigned to him and had been recently reassigned to another employee.

Further details involved the lack of a project plan, which he felt was unnecessary, as it was a "half-day" project. Gordon went on to say that he felt he was being treated unfairly and communication between he and his manager and the Vice President of the IT department were at fault. He felt that the project was completed adequately and he was not being listened to and felt that people were out to get him. I advised him that he should be speaking to his HR representative rather than me, he voiced his concern that he could not trust anyone any more.

I observed him to be quite agitated, displaying very rapid eye movement, and a constant tapping with his feet while seated. I suggested to him further to discuss the situation with his manager and to document what was being required of him so the situation of would not be repeated. He said he was all ready doing this. After 20 minutes he began to show sign of relaxing. I asked him if he was okay and he said yes it had been good just getting it out.



Borland Software Corporation
100 Enterprise Way
Scotts Valley, CA 95066-3249
408-453-1000
www.borland.com

091224612026 003

April 26, 2002

Robert Gordon
REDACTED
Scotts Valley, CA 95066

Dear Robert,

After becoming medically disabled, you are eligible to begin your disability leave on the first day of hospitalization or eighth day following the onset of a disability that does not require hospitalization.

Short-term disability may last the duration of the disability, up to a maximum of twelve weeks or ninety days, measured from the onset of the disability. Short-term disability leave will run concurrently with leave taken under the Family and Medical leave policy.

A written statement from your doctor is required to verify your disability and that you are unable to work. This statement should include the effective date of your disability and the anticipated date of your return to work. If your disability continues past the anticipated return date, you are required to provide Borland with an updated note from your doctor.

During short-term disability, you are compensated the difference between state disability or workers' compensation benefits you receive (or would have received had prompt application been made) and a fixed percentage of your monthly salary as follows. Note: not all states provide coverage of short-term disability leave.

Weeks 1 and 2: Regular salary, less other social benefits including state disability or workers' compensation benefits.

Weeks 3 through 12: Borland will pay employees on disability leave 70% of their regular weekly gross salary, less other social benefits including state disability or workers' compensation benefits. This means the maximum an employee would receive at this time is 70% of their weekly salary. Sales employees' weekly earnings include their base pay plus commission potential at 100% of plan. Accelerators for Sales Employees' who are compensated based on achievement of a team quota, will be prorated based on the number of normal business days worked during the quarter/year.

091224012826 0049

After week 12, you may be eligible for Long-Term Disability. For your convenience, we have provided you with a state disability form should you elect file for State Disability.

If you have any questions, I can be reached at 831-431-1654.

Sincerely,

Celeste Tillman

Celeste Tillman
Benefits Analyst
Borland Software Corporation

109224001760 0321

May 1, 2002

Robert Gordon
REDACTED
Scotts Valley, CA 95066

Dear Robert,

This morning you participated in a meeting regarding your performance issues with your manager, Paul Van Langen, and your HR representative, Teri Campbell. At the end of that conversation, due to your behavior, you were advised by Teri that you were suspended until further notice.

We have since discussed your actions during this meeting. This letter is to advise you that due to your performance issues, and your actions during this morning's meeting, we have decided to terminate your employment with Borland, effective immediately.

The remainder of this letter includes important information regarding your benefits as you leave the Company. Please read this information carefully and let me know if you have any questions. I can be reached at (831) 431-1639.

1. Final regular pay:

We have included in this packet your final regular-earnings paycheck for the period though your termination date, May 1, 2002. All accrued vacation pay was included and all applicable withholdings were reflected.

2. Health Benefits:

After your term date, Borland will continue to pay coverage for Medical, Dental, Vision, Employee Assistance Program (EAP) and Prescription Drug Card plans for you and those already on the plans through, May 31, 2002 or until you have started other employment, whichever comes first. If you become enrolled in a new insurance plan, you will need to contact the Borland Benefits Department at 831-431-1654.

Information about continuing your medical, dental, vision, EAP and prescription drug coverage beyond May 31, 2002 will be mailed to you at your home as you approach the end of coverage date.

→ Your life insurance and disability coverage will end on May 1, 2002. If you wish to inquire about converting your life insurance please contact the Borland Benefits Department at 831-431-1654. Long-term disability insurance is not convertible to an individual plan.

3. Other Benefits Coverage:

- 401(k) Plan - If you are now or have ever been a participant in the Borland 401(k) plan, you will receive information in the mail from the Benefits department explaining your options for the money in your account. No contributions have been deducted from your final check.

100224001760 0322

- **Employee Stock Purchase Plan** – If you are currently enrolled in the Employee Stock Purchase Plan, no deductions have been made from your final check. A full refund has been included in your final check.
- **Vacation** – All unused vacation pay accrued through May 1, 2002 has been included in your final paycheck.
- **Stock Vesting** – All of your stock options (if applicable) stopped vesting on May 1, 2002 in accordance with the terms of your stock option agreement(s). You have a limited number of days from the end of your employment to exercise your vested stock option(s). Please refer to your option agreement(s) for further details. A closing statement, which summarizes your vested shares, option price and final date to exercise, will be mailed. Instructions for exercising your stock options will also be included.

4. Additional Information:

Eligibility of ICP bonus is subject to:

- All non-commissioned full and part time employees of the Borland Software Corporation are eligible for the plan.
- New hires are eligible to participate in the plan if they are on payroll during the first 21 days of the quarter.
- An employee who meets the criteria for plan participation must be employed by the Company on the last day of the quarter to receive the ICP payout.
- Commissioned employees, Contractors, Interns, and other temporary employee are not eligible for participation in the program.

A change of address needs to be completed and forwarded to: Payroll Manager, Borland Software Corporation, 100 Enterprise Way, Scotts Valley, CA 95066-3249, if the address listed on this letter is incorrect or if your address changes prior to the end of calendar year.

All final expense reports and supporting documentation need to be turned in to me by May 8, 2002. These expenses will be reimbursed properly.

Please send all remaining Borland Software Corporation property and equipment including cellular phone, computer equipment, your keys, credit cards, security badges, etc. to the Human Resources Department in Scotts Valley.

We thank you for your service to Borland and wish you well in your career endeavors.

Sincerely,

Christopher Lee
Vice President, Human Resources

CL/MN

State of California

DEPARTMENT OF SOCIAL SERVICES
Disability Evaluation Division
PO BOX 24225
Oakland, CA 94623
Hearing Impaired Only: Call 711-California Relay Service or TDD 866-806-7284

DMsylv

October 27, 2003

ROBERT S GORDON
PO BOX 66475
SCOTTS VALLEY, CA 95067

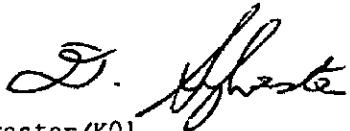
SSN: 065-46-7662
DDS CASE NUMBER: 482143

This letter concerns your application for Social Security Disability Benefits sent to this office for medical development and evaluation. To be disabled for these programs you must be unable to work because of an impairment which has lasted, or will last, for at least twelve (12) months.

Because your medical condition began recently, or because your condition has been complicated by further illness or surgery, it is necessary for us to hold your claim until your condition can be more completely evaluated. At that time, which in your case will be 1/02/04, we will be able to continue with the medical development of your claim. Then we will recontact your medical sources or you for additional information.

If you have any questions concerning this matter, please contact me. You may telephone me collect station-to-station at (510) 622-3705.

Sincerely,



Danny Sylvester/K01
c: Social Security Administration

EXHIBIT 5

8403713363
51.04.0015

Schedule A (Form 5500) 2002

Page 4

Original Use Only

Part II

Welfare Benefit Contract Information

If more than one contract covers the same group of employees of the same employer(s) or members of the same employee organization(s), the information may be combined for reporting purposes if such contracts are experience-rated as a unit. Where individual contracts are provided, the entire group of such individual contracts with each carrier may be treated as a unit for purposes on this report.

7 Benefit and contract type (check all applicable boxes)					
a <input type="checkbox"/> Health (other than dental or vision)	b <input checked="" type="checkbox"/> Dental	c <input type="checkbox"/> Vision	d <input checked="" type="checkbox"/> Life insurance		
b <input type="checkbox"/> Temporary disability (accident and sickness)	f <input checked="" type="checkbox"/> Long-term disability	g <input type="checkbox"/> Supplemental unemployment	h <input type="checkbox"/> Prescription drug		
i <input type="checkbox"/> Stop loss (large deductible)	j <input type="checkbox"/> HMO contract	k <input type="checkbox"/> PPO contract	l <input type="checkbox"/> Indemnity contract		
m <input checked="" type="checkbox"/> Other (specify) > AD&D					
8 Experience-rated contracts					
a Premiums: (1) Amount received					
(2) Increase (decrease) in amount due but unpaid					
(3) Increase (decrease) in unearned premium reserve					
(4) Earned ((1) + (2) - (3))					
b Benefit charges: (1) Claims paid					
(2) Increase (decrease) in claim reserves					
(3) Incurred claims (add (1) and (2))					
(4) Claims charged					
c Remainder of premium: (1) Retention charges (on an accrual basis) -					
(A) Commissions					
(B) Administrative service or other fees					
(C) Other specific acquisition costs					
(D) Other expenses					
(E) Taxes					
(F) Charges for risks or other contingencies					
(G) Other retention charges					
(H) Total retention					
(2) Dividends or retrospective rate refunds (These amounts were <input type="checkbox"/> paid in cash, or <input type="checkbox"/> credited.)					
d Status of policyholder reserves at end of year: (1) Amount held to provide benefits after retirement					
(2) Claim reserves					
(3) Other reserves					
e Dividends or retrospective rate refunds due. (Do not include amount entered in c(2))					
9 Nonexperience-rated contracts:					
a Total premiums or subscription charges paid to carrier	815294				
b If the carrier, service, or other organization incurred any specific costs in connection with the acquisition or retention of the contract or policy, other than reported in Part I, item 2 above, report amount	0				
Specify nature of costs: _____					

EXHIBIT 4

8403733383
15 04 0012

Use Only

OMB No. 1210-0110

2002

This Form is Open to
Public InspectionSCHEDULE A
(Form 5500)Department of the Treasury
Internal Revenue Service
Department of Labor
Pension and Welfare Benefits Administration
Pension Benefit Guaranty Corporation

Insurance Information

This schedule is required to be filed under section 104 of the
Employee Retirement Income Security Act of 1974.

* File as an attachment to Form 5500.

► Insurance companies are required to provide this information
pursuant to ERISA section 103(e)(2).

For calendar year 2002 or fiscal plan year beginning	04/01/2002	and ending	03/31/2003
A Name of plan BORLAND SOFTWARE CORPORATION EMPLOYEE BENEFITS PLAN	B Three-digit plan number ►	504	
C Plan sponsor's name as shown on the 2a of Form 5500 BORLAND SOFTWARE CORPORATION	D Employer identification Number	94-2895440	

Part I Information Concerning Insurance Contract Coverage, Fees, and Commissions

Provide information for each contract on a separate Schedule A. Individual contracts grouped as a unit in Parts II and III can be reported on a single Schedule A.

1 Coverage:

(a) Name of insurance carrier

METROPOLITAN LIFE INSURANCE COMPANY

(b) EIN	(c) NAIC code	(d) Contract or identification number	(e) Approximate number of persons covered at end of policy or contract year	Policy or contract year	
				(f) From	(g) To
13-5581829	65978	104970-G	600	01/01/2002	12/31/2002

2 Insurance fees and commissions paid to agents, brokers and other persons. Enter the total fees and total commissions below and list agents, brokers and other persons individually in descending order of the amount paid in the items on the following page(s) in Part I.

Totals

Total amount of commissions paid	Total fees paid / amount
59076	0

For Paperwork Reduction Act Notice and OMB Control Numbers, see the Instructions for Form 5500. v5.0 Schedule A (Form 5500) 2002

EXHIBIT 3

8403733363
151.04.0001Initial Use Date
OMB Nos. 1210-0110
1210-0008

2002

This Form is Open to
Public Inspection

Form 5500
 Department of the Treasury
 Internal Revenue Service
 Department of Labor
 Pension and Welfare Benefits
 Administration
 Pension Benefit Guaranty Corporation

Annual Return/Report of Employee Benefit Plan

This form is required to be filed under sections 104 and 408 of the Employee Retirement Income Security Act of 1974 (ERISA) and sections 6030, 6047(e), 6057(b), and 6068(a) of the Internal Revenue Code (the Code).

- Complete all entries in accordance with the instructions to the Form 8800.

Part I Annual Report Identification Information

For the calendar plan year 2002 or fiscal plan year beginning 04/01/2002 and ending 03/31/2003

A This return/report is for: (1) a multiemployer plan; (3) a multiple-employer plan; or
 (2) a single-employer plan (other than a multiple-employer plan); (4) a DFE (specify) _____

B This return/report is: (1) the first return/report filed for the plan; (3) the final return/report filed for the plan;
 (2) an amended return/report; (4) a short plan year return/report (less than 12 months)

C If the plan is a collectively-bargained plan, check here

D If filing under an extension of time or the DFVC program, check box and attach required information (see instructions)

Part II Basic Plan Information (Enter all requested information.)

1a Name of plan
BORLAND SOFTWARE CORPORATION
EMPLOYEE BENEFITS PLAN

1b Three-digit plan number (PN) ► **504**

1c Effective date of plan (mo., day, yr.)
04/01/1982

2a Plan sponsor's name and address (employer, if for a single-employer plan)

(Address should include room or suite no.)
BORLAND SOFTWARE CORPORATION

2b Employer Identification Number (EIN)
34-2895440

2c Sponsor's telephone number
831-431-1723

2d Business code (see instructions)
541519

100 ENTERPRISE WAY

SCOTTS VALLEY

CA 95066-3248

Caution: A penalty for the late or incomplete filing of this return/report will be assessed unless reasonable cause is established.

Under penalties of perjury and other penalties set forth in the instructions, I declare that I have examined this return/report, including accompanying schedules, statements and attachments, as well as the electronic version of this return/report if it is being filed electronically, and to the best of my knowledge and belief, it is true, correct and complete.

**SIGN
HERE!**

Signature of plan administrator

Date

Type or print name of individual signing as plan administrator

**SIGN
HERE!**

Signature of employer/plan sponsor/DFE

Date

Type or print name of individual signing as employer, plan sponsor or DFE

For Paperwork Reduction Act Notice and OMB Control Numbers, see the instructions for Form 8800.

v5.0

Form 5500 (2002)

091120041839 0071

THE FLEISHMAN LAW FIRM

*Charles J. Fleishman
Paul A. Fleishman,
a professional corporation
19839 Nordhoff St.
Northridge, CA 91324
telephone (818)350-6283; fax (818)350-6272
eris@erisbarriqtr.com*

November 13, 2009

MetLife Disability
PO Box 14592
Lexington KY, 40511

RE: Robert Gordon, SS#: REDACTED Claim#: 210910236071

Dear MetLife,

I have received your letter denying benefits to my client, Robert Gordon, dated November 7, 2009. It was sent directly to my client. I have provided MetLife with a designation of attorney form naming my office as Mr. Gordon's legal representative in this matter and on October 26, 2009 I specifically asked that you not directly contact my client. I will ask you again: **DO NOT DIRECTLY CONTACT MR. GORDON.** Any correspondence you wish to have with Mr. Gordon should take place through this office.

The reason you gave in your November 7th letter for denying Mr. Gordon his disability benefits is that he suffered from a work-related injury and the disability plan does not cover work related injuries. Please provide me with the Plan documents, including the SPD, and refer me to the language in the Plan that establishes the exclusion of disability arising from work related injuries.

Also, please send me the entire file related to Mr. Gordon's claim so that Mr. Gordon and I may better determine whether to appeal your denial.

Sincerely,


Paul Fleishman

091208046864 0009

THE FLEISHMAN LAW FIRM

*Charles J. Fleishman
Paul A. Fleishman
a professional corporation
19839 Nordhoff St.
Northridge, CA 91324
telephone (818)350-6285; fax (818)350-6272
erisa@erisarights.com*

December 4, 2009

MetLife Disability
PO Box 14592
Lexington KY, 40511

RE: Robert Gordon, SS#: REDACTED Claim#: 210910236071

Dear MetLife,

On November 13, 2009 I wrote you a letter seeking the Plain documents, including the SPD, relating to my client, Robert Gordon's, disability claim. I have not yet received any response from you regarding this. I also asked that you send me the entire file related to his claim so that Mr. Gordon and I could better determine whether to appeal your denial. Since you have made a negative termination regarding Mr. Gordon's claim, ERISA regulations require that you provide us with the requested materials. Please confirm that you have received this request and provide the requested materials as soon as possible.

Sincerely,

Paul Fleishman

Paul Fleishman

981224012026 0038

THE FLEISHMAN LAW FIRM

*Charles J. Fleishman
Paul A. Fleishman
a professional corporation
19839 Nordhoff St.
Northridge, CA 91324
telephone (818)330-6285; fax (818)330-6272
erisa@erisarights.com*

December 21, 2009

Sent by mail and fax to:

MetLife Disability
PO Box 14590
Lexington KY, 40511
Fax Number: (800)230-9531

RE: Robert Gordon, SS# REDACTED Claim# 210910236071

Dear MaryAnn Fogerty,

I have just received your letter dated December 14th. That letter was in response to a letter I had previously sent you requesting the Plan documents, including the SPD, relating to my client's long term disability claim and the entire file related to his claim. Thank you for providing the file relating to his claim.

It seems that there has been a miscommunication. You were under the impression that Mr. Gordon was seeking short term disability benefits. In fact he is seeking long term disability benefits. Attached hereto please find documentation showing that Mr. Gordon previously applied for and received short term disability benefits through his employer.

To be perfectly clear Mr. Gordon is now seeking long term disability benefits. Please provide me with the Plan documents relating to his Long Term Disability claim.

Sincerely,

Paul Fleishman
Paul Fleishman

RX FLOW SHEET

Patient Name: Gordon, Robert DOB: 10/21 REDACTED

EXHIBIT 14

11/20/2003

PATIENT PROFILE

Last Name- GORDON
 First Name- ROBERT S.
 Street- 1 HIGGATE
 City- SCOTTSVALLEY
 State- CA
 Zip- 95066
 Home- (831)429-5599
 Work-
 Birthdate- 10/21/ REDACTED
 Sex- M

Third Party- PCS
 Plan- XXX
 Group- 04519697
 Member- 065467662
 Family Code-
 Relationship- SELF
 Co-pay-

Cardholder Last- GORDON
 First- ROBERT S.
 Dependents-
 Card Expires- NONE
 Other Ins. Coverage (N)- N
 Ins. Company-

Allergies- NONE
 Diagnosis- NONE

DRUG PROFILE

GORDON, ROBERT S.	Qty	TAB MPH/ASB	0.000 2-240MG (KNOll PHARM. CO.) D. RESNECK
423070 TARKA	60	(KN)	\$10.00 CO-PAY BX RF- 5.00 EDS- 30
01/11/2002 LAA	60	(KN)	\$10.00 CO-PAY BX RF- 4.00 EDS- 30
02/23/2002 SSS	60	(KN)	\$10.00 CO-PAY PCS RF- 3.00 EDS- 30
04/23/2002 DMR	60		
424655 LORAZEPAM		TABLET	0.500 MG (PUREPAC) L. KADIS
01/17/2002 ARW	30	(PU)	\$5.00 CO-PAY BX RF- 3.00 EDS- 30
-427747 CELEXA		TABLET	20.000 MG (FOREST) L. KADIS
01/31/2002 DLH	30	(PO)	\$10.00 CO-PAY BX RF- 3.00 EDS- 30
430645 PROPOXYPHEN NAPSYLATE W/ TABLET			0.000 100-650M (MYLAN) D. RESNECK
02/13/2002 HMM	60	(MY)	\$5.00 CO-PAY BX RF- 4.00 EDS- 15
03/07/2002 DMR	60	(MY)	\$5.00 CO-PAY BX RF- 3.00 EDS- 15
03/30/2002 MIL	60	(MY)	\$5.00 CO-PAY BX RF- 2.00 EDS- 15
04/23/2002 DMR	60	(MY)	\$5.00 CO-PAY PCS RF- 1.00 EDS- 15
431050 TOPAMAX		TABLET	25.000 MG (MC NEIL) L. KADIS
02/14/2002 ARW	30	(MC)	\$10.00 CO-PAY BX RF- 3.00 EDS- 30
435534 TOPAMAX		TABLET	100.000 MG (MC NEIL) L. KADIS
03/07/2002 ARW	60	(MC)	\$10.00 CO-PAY BX RF- 3.00 EDS- 15
444930 LORAZEPAM		TABLET	1.000 MG (WATSON LABS. INC.) D. RESNECK-SANN
04/18/2002 ARW	10	(WA)	\$5.00 CO-PAY PCS RF- 0.00 EDS- 5
445608 AMBIEN		TABLET	10.000 MG (SEARLE) J. KOOPMAN/HALD
RTS 04/22/2002 SRE	20	(SE)	\$62.55 RF- 1.00 EDS- 20
04/22/2002 SRE	20	(SE)	\$10.00 CO-PAY PCS RF- 0.30 EDS- 14
446905 PAXIL		TABLET	10.000 MG (SMITHKLINE BEECH) D. ZWENG
04/29/2002 NER	60	(SM)	\$10.00 CO-PAY PCS RF- 0.00 EDS- 30

SER 042

EXHIBIT 15

Name: Robert GordonDate: 1/18/01Reason for visit: Shoulder pain15 years ago biker accident
= pain & dislocation (R)What medications do you take on a daily basis? Ibuprofen, Tylenol, Aciphex shoulder
Please list any allergies to medications: -Are you breast feeding or could you be pregnant? yes no periodically becomes painful
Do you smoke yes no How much? uses NSAID, post,When was you last tetanus booster? 5 yrs ago

PLEASE DO NOT FILL OUT BELOW THIS LINE

S: fever fatigue body aches runny nose cough sore throat headache sinus pressure
 ear pain abdominal pain dysuria nausea/vom diarrhea loss appetite rashes trouble sleeping

Past History/ROS:

O: Weight: 212 BP: 144/80 Pulse: _____ Temp: _____ O/ATM RR: _____

GENERAL: GENERAL

HEENT: disussed BP monitoring

NECK: neck

CARDIAC: RRM L is good but has

LUNGS: RRM L is good but has

ABD: full over post Shoulders

OTHER: = clicking in tendon.

Office tests: urine HCG: UA dipstick: EKG
 x-ray wet prep: PFT/NEB

A: 1) Tendinitis 7/26-10/31
2) HTN 4/6/99

P: Lab Tests: RSTC UA/culture blood _____
Studies ordered: XR/US other: _____

Referral:

Treatment:

Consider joint injectionIce therapy 3cc xylocaine Routine Health Maintenance reviewed Rx's given: _____

F/U: RTC

Medication	Site	# Refills	PHARMACY:
<u>Celebrex 200 mg</u>	<u>20 + QD</u>		<u>SVL</u>

Leah Erickson, CNM, FNP NMP# 550
Lic. FNP# 6288, CNM# 550

David Resnick-Szane, MD
Lic. # G25952 DEA # AS5813882

Provider: Leah EricksonDate: 11-28-01PT. Name (Please print): Robert GordonDOB: 10/14/74 REDACTED5403 Scotts Valley Dr. #A
Scotts Valley, CA 95066

Tel: (408) 438-5222

Fax: (408) 438-5229

60

EXHIBIT 9

(EXHIBIT 10 is the original document)

139513918216 9233

Gordon, Robert

AUG 29 1996

Following Discussion from 8/27/96 with Dr. Gordon

CO	NP	TPP
		200

DRUGS, DRUGS

8-29-96

1. This patient has severe neck pain and has voiced concern of a disruption of this office, being very angry with Dr. Tolosa, and being bottleneck with the front office staff, because he could not get Dr. Tolosa regarding the use of Dr. Gantin. The patient's problems are discussed under. He requires additional time and we must apologize for the inaction of the office, with Dr. Tolosa and the front office. His back problem is one of recurrent motions neck and back pain, which causes to continually see poor scores. He has seen multiple doctors, orthopedists, neurologists and has had various procedures done. To this patient it is very difficult to find anything that hasn't been done with this problem to offer his help. He has been through pain clinics, and has seen all sorts of doctors. Apparently he has not had referred blasts, or infections of this nature.

2. It was recommended at his suggestion that he see an orthopedist and authors over in this direction. The name of "Sagittal" was mentioned and he will be informally referred to this direction if he wishes to make his own appointments. No other treatment modalities are offered at this time, in this direction.

John G. Gantin, M.D.
Medical Director

Dolf Ickertz, MD

Gordon Appeal Records Page 25

ADMIN 000740

SER 44

EXHIBIT 10

Gordon, Robert

AUG 28 1996

Follow up DISCUSSIONS from 8-26-96 visit to Dr. Ishaq		
CO	BP	TMP/DP
		200

GORDON, ROBERT

8-26-96

S: This patient has severe neck pain and has caused somewhat of a disruption at this office, being very angry with Dr. Ishaq, and being belligerent with the front office staff, because he could not get his way regarding the use of MS Contin. The patient's problems are discussed today. He seems quite rational today and in fact apologizes for his behavior of the other day, with Dr. Ishaq and the front office. His basic problem is one of recurrent cervical neck and back pain, which comes in apparently two year waves. He has seen multiple doctors, orthopedists, neurosurgeon and has had various procedures done. To this examiner it is very difficult to find anything that hasn't been done with this gentleman to offer him help. He has been through pain clinics, and has seen all sorts of sides. Apparently he has not had epidural blocks, or injections of this nature.

P: 1. It was recommended, at his suggestion, that he see an orthopedist and perhaps move in this direction. The name of "Dolfectrix" was mentioned and he will be informally referred in that direction if he wishes to make his own appointment. No other treatment modalities are offered at this time, in this difficult management case.

Dolf Ichtertz, MD

(initial when read)

John B. Catlin, M.D./iv

EXHIBIT 11

(EXHIBIT 12 is the original document)

Los Gatos MRI[®]

800 Pollard Road S-8101
Los Gatos, California 95032
Tel: 408/356-8787
Fax: 408/356-8795

PATIENT: ROBERT GORDON

Page two

TYPE OF EXAMINATION AND DATE: MRI OF THE CERVICAL SPINE DATED 8/9/03

C5-6 has mild decrease in disc height. Slight degree of endplate hypertrophic changes are present. There is uncovertebral joint hypertrophic change bilaterally. A minimal diffuse disc bulge is also seen. These things in combination cause mild narrowing of the canal. There is a CSF space preserved surrounding the cord. Moderate bilateral neural foramen narrowing, right greater than left.

C6-7 has mild to moderate disc height decrease. Small uncovertebral joint hypertrophic changes are present predominantly on the right. There is a minimal diffuse disc bulge. These things in combination cause very minor narrowing of the canal. There is severe narrowing of the right neural foramen. No left neural foramen narrowing.

C7-T1 has normal disc height without stenosis.

SUPPRESSION:

1. C5-6 focal central disc protrusion contacting but not deforming the anterior edge of the cord.
2. C5-6 hypertrophic changes of the endplates and uncovertebral joints with a minimal disc bulge that causes very mild narrowing of the canal. No cord compression. Moderate bilateral neural foramen narrowing.
3. C6-7 hypertrophic changes most marked at the right uncovertebral joint. Small osteophytes and a minimal disc bulge are also seen. These things in combination cause severe right neural foramen narrowing with very mild narrowing of the canal.

Marie Motzko, M.D.
MM/As/CB/27/07/2013

THE BEST OF BOTH WORLDS IN ONE LOCATION

100

Gordon Appeal Records Page 49

130513016216 0247

SER 46

EXHIBIT 12

Los Gatos MRI*

800 Pollard Road S-B101
Los Gatos, California 95032
Tel 408.374.8897
Fax 408.374.8995

PATIENT: ROBERT GORDON

Page two

TYPE OF EXAMINATION AND DATE: MRI OF THE CERVICAL SPINE DATED 8/9/03

C5-6 has mild decrease in disc height. Slight degree of endplate hypertrophic changes are present. There is uncovertebral joint hypertrophic change bilaterally. A minimal diffuse disc bulge is also seen. These things in combination cause mild narrowing of the canal. There is a CSF space preserved surrounding the cord. Moderate bilateral neural foramen narrowing, right greater than left.

C6-7 has mild to moderate diffuse decrease in disc height. Small endplate osteophytes. Uncovertebral joint hypertrophic changes are present predominantly on the right. There is a minimal diffuse disc bulge. These things in combination cause very minor narrowing of the canal. There is severe narrowing of the right neural foramen. No left neural foramen narrowing.

C7-T1 has normal disc height without stenosis.

IMPRESSION:

1. C3-4 focal central disc protrusion contacting but not deforming the anterior edge of the cord.
2. C5-6 hypertrophic changes of the endplates and uncovertebral joints with a minimal disc bulge that causes very mild narrowing of the canal. No cord compression. Moderate bilateral neural foramen narrowing.
3. C6-7 hypertrophic changes most marked at the right uncovertebral joint. Small osteophytes and a minimal disc bulge are also seen. These things in combination cause severe right neural foramen narrowing with very mild narrowing of the canal.

Maria Matsumoto, M.D.
MM/cnD:8/27/3T:8/28/3

THE BEST OF BOTH WORLDS IN ONE LOCATION

**SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001**

October 28, 2021

Robert Gordon
106 Vista Prieta Court
Santa Cruz, CA 95062

RE: Gordon v. Metropolitan Life Insurance Company

Dear Mr. Gordon:

The above-entitled petition for writ of certiorari was postmarked October 22, 2021 and received October 27, 2021. The papers are returned for the following reason(s):

The petition fails to comply with the content requirements of Rule 14. A guide for in forma pauperis petitioners and a copy of the Rules of this Court are enclosed. The guide includes a form petition that may be used.

The appendix to the petition does not contain the following documents required by Rule 14.1(i):

The lower court opinion(s) must be appended.

It is impossible to determine the timeliness of the petition without the lower court opinions.

Please correct and resubmit as soon as possible. Unless the petition is submitted to this Office in corrected form within 60 days of the date of this letter, the petition will not be filed. Rule 14.5.

A copy of the corrected petition must be served on opposing counsel.

When making the required corrections to a petition, no change to the substance of the petition may be made.

Sincerely,
Scott S. Harris, Clerk
By: 
Clayton R. Higgins, Jr.
(202) 479-3019

Enclosures

FILED

NOT FOR PUBLICATION

JAN 04 2019

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT GORDON,

No. 17-16821

Plaintiff-Appellant,

D.C. No. 5:10-cv-05399-EJD

v.

MEMORANDUM*

METROPOLITAN LIFE INSURANCE
COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
Edward J. Davila, District Judge, Presiding

Submitted December 19, 2018**
San Francisco, California

Before: CALLAHAN, N.R. SMITH, and MURGUIA, Circuit Judges.

Robert Gordon brought suit against Metropolitan Life Insurance Company (MetLife) for its denial of longterm disability benefits under a plan governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

§§ 1001-1461. The district court granted summary judgment in MetLife's favor, applying an abuse of discretion standard. Because the district court applied the wrong standard, we reverse and remand.

The district court reviews a decision to deny benefits under an ERISA plan de novo "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan."

Gatti v. Reliance Standard Life Ins. Co., 415 F.3d 978, 981 (9th Cir. 2005) (quoting *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989)). "When the plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits, that determination is reviewed for abuse of discretion." *Id.* However, even where a plan gives discretionary authority to the administrator,¹ de novo review (rather than abuse of discretion review) applies when an administrator fails to actually exercise its discretion in the denial of benefits or when an administrator commits "wholesale and flagrant violations of the procedural requirements of ERISA, and . . . acts in utter disregard of the underlying purpose of the [benefit] plan[.]" *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 971-72 (9th Cir. 2006) (en banc).

¹It is undisputed that the benefit plan at issue gave MetLife discretionary authority.

Here, MetLife's denial of benefits is subject to de novo review, because (1) MetLife did not exercise its discretion when it failed to issue a final decision on Gordon's appeal of its initial denial of benefits, even years after the 90-day deadline to do so, and (2) that failure is a wholesale and flagrant violation of the requirements of both ERISA and the benefit plan. *See Abatie*, 458 F.3d at 971. Despite the district court's characterization that MetLife violated only timing requirements, MetLife's failure to issue a final decision on the appeal after years (and without explanation) is necessarily a violation of the procedural requirements for appeals set forth in ERISA. *See* 29 C.F.R. § 2560.503-1(h)-(j). Such action utterly disregards MetLife's obligations as a plan administrator.

Summary judgment in an ERISA case is only proper where there are no genuine disputes of material fact, and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Because the parties have produced conflicting medical opinions regarding Gordon's disability, those opinions create a genuine dispute of material fact. Accordingly, we reverse the district court's improper grant of summary judgment.

REVERSED and REMANDED.

Stanford Health Care

December 23, 2021

Patient: Robert Stanley Gordon

Referring physician:

Brendan Christopher Visser (Surgical Oncologist)

650-498-6000 (Work)

650-723-8748 (Fax)

875 Blake Wilbur Dr, MC 6560

Stanford, CA 94305

Procedure: LIVER BIOPSY 12/16/2021

Lab Result:

Procedure: IR CT LIVER BIOPSY

CLINICAL HISTORY: Pylorus sparing whipple in the setting of pancreatic adeno, new liver lesion.

MICROSCOPIC DESCRIPTION: The aspirate smears demonstrate rare cohesive clusters of malignant cells..