

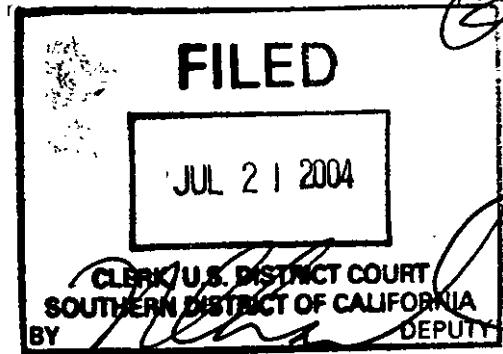
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7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

11 JAY KEVIN SELZNICK, D.M.D., M.D., et
al.,

13 Plaintiffs,

14 v.

15 XELAN, INC. aka XELAN, a California
corporation, et al.,

17 Defendants.

CASE NO. 04 CV 1038 L (JFS)

Action Filed May 20, 2004

DEFENDANT L. DONALD GUESS, D.M.D.
aka LEWIS D. GUESS, D.M.D.'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTIONS
(1) TO DISMISS FOR FAILURE TO STATE A
CLAIM UNDER FEDERAL RULE OF CIVIL
PROCEDURE 12(b)(6) AND (2) TO STRIKE
UNDER FEDERAL RULE OF CIVIL
PROCEDURE 12(f)

18 Date: September 27, 2004
19 Time: 10:30 a.m.
Courtroom: 14

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I.

INTRODUCTION

Plaintiffs' Complaint is a studied exercise in artful pleading, in which Plaintiffs attempt to bring individual claims for compensatory and punitive damages by availing themselves of the protections of the Employee Retirement and Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, while avoiding both the limitations on the remedies available under ERISA and that statute's broad preemptive effect. Moving party, Defendant Donald Guess ("Dr. Guess"), will show that Plaintiffs' Complaint against him should be dismissed for failure to state a claim upon which relief can be granted because (1) the remedies sought by Plaintiffs are not authorized by ERISA, and (2) Plaintiffs' state law claims are completely preempted by ERISA. Because Plaintiffs cannot state a claim for relief based upon their allegations, amendment would be futile and the dismissal of the Complaint against Dr. Guess should be with prejudice.

II.

STATEMENT OF FACTS

This case is brought by four plaintiffs, including two individuals, Dr. Jay Selznick and Brandy Rowland; a corporation, Double R Oral & Maxillofacial Surgery, Inc. ("Double R"); and "an employee benefits plan under ERISA," Double R Oral & Maxillofacial Surgery, Inc. Employee Benefits Plan (the "Plan"). Double R is alleged to be the "employer plan sponsor and Plan Administrator, under ERISA...." Complaint ¶ 1.

In addition to Dr. Guess, the moving party here, defendants include multiple corporations and trusts, as well as three insurance companies.

The Complaint alleges five claims for relief under ERISA and five supplemental state claims. The gravamen of the Complaint is that employer Double R adopted an employee benefits plan under ERISA, which in turn participated in several trusts to provide employee benefits, such as pension benefits, malpractice insurance, disability insurance and life insurance, but this benefits program has proven unsatisfactory to Plaintiffs. Plaintiffs seek to rescind

1 participation in the benefits plan and obtain restitution of payments made for those benefits,
2 which damages allegedly exceed \$1.7 million. Complaint ¶¶ 2, 4, 5.

3 Federal subject matter jurisdiction is predicated upon this Court's federal question
4 jurisdiction, based upon an allegation that the case involves interpretation and administration of
5 an ERISA employee benefits plan, as to which federal jurisdiction is provided under 29 U.S.C.
6 § 1132. Complaint ¶ 8.¹

7 With regard to the purported ERISA claims, Plaintiffs' first claim is for
8 declaratory relief, seeking a determination that defendant Xelan Welfare Benefit Trust ("Xelan
9 WBT") is not an ERISA-regulated employee benefits plan, and therefore Plaintiffs' claims are
10 not subject to ERISA preemption. Complaint ¶¶ 168, 171, 172. "Plaintiffs desire a judicial
11 determination as to the nature of Xelan WBT and whether it is subject only to ERISA, or subject
12 to all applicable state laws and state causes of action." *Id.* ¶ 176.

13 Plaintiffs' second claim alleges breach of fiduciary duty both under ERISA
14 Section 502(a)(3), and under ERISA Section 502(a)(2) (incorporating relief under ERISA
15 Section 409). Plaintiffs allege a failure to make required disclosures under ERISA, including
16 insurance commissions. *Id.* ¶ 187. "Plaintiffs...offer to rescind and restore to Defendants all
17 right, title and interest in and to the life insurance policies and demand that Defendants restore to
18 Plaintiffs all funds paid as alleged.... Accordingly, Plaintiffs seek damages in excess of the sum
19 of \$1,700,000.00...." *Id.* ¶ 196.

20 Plaintiffs third claim for relief is for Section 502(c) ERISA penalties, enforced
21 through ERISA Section 502(a)(1)(A). Plaintiffs claim that Dr. Guess, as an ERISA plan
22 fiduciary, is liable for statutory penalties for failure to provide plan information under Section
23 502(c), relying upon the statutory language which provides that penalties may be assessed
24 against the "plan administrator." Complaint ¶¶ 209, 218.

25
26 ¹ ERISA Section 502(a) provides for concurrent state and federal court jurisdiction over
27 actions to recover benefits due or to enforce or clarify rights under ERISA-covered plans; all
28 other ERISA actions are within the exclusive jurisdiction of the federal courts. *See* 29 U.S.C.
§ 1132(a)(1), (e)(1).

1 Plaintiffs' fourth claim for relief seeks an accounting. *Id.* ¶¶ 223-228. Plaintiffs
2 do not cite any authority under ERISA for this relief. *Id.*

3 Plaintiffs' fifth claim for relief alleges breach of fiduciary duty under multiple
4 sections of ERISA and common law. As a result of multiple alleged instances of non-disclosure,
5 misrepresentations, and self-dealing, Plaintiffs allege that they "have been damaged in an amount
6 well in excess of \$1.7 million...." *Id.* ¶ 248.

7 Plaintiffs remaining claims are supplemental state law claims, including
8 (1) negligent misrepresentation in persuading Plaintiffs to participate in employee welfare
9 benefit plans (sixth claim); (2) fraud and deceit in inducing Plaintiffs to participate in employee
10 welfare benefit plans, causing Plaintiffs to contribute over \$1.5 million to the plans (seventh
11 claim); (3) fraud and deceit during the administration of the Xelan WBT plan based upon
12 continued assurances during that plan period (eighth claim); (4) breach of the implied covenant
13 of good faith and fair dealing (ninth claim); and (5) violation of California's Unfair Competition
14 Act and Unfair Practices Act (tenth claim).

15 In addition to compensatory damages and restitution, plaintiffs seek punitive
16 damages. Complaint ¶¶ 287, 301, 311; *id.* at 63.

17 The Complaint includes a demand for a jury trial. *See* Complaint at 61:12-13.

18 III.

19 STANDARD FOR RELIEF

20 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal
21 sufficiency of the complaint; the motion should be granted where plaintiff can prove no set of
22 facts in support of his claims which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41,
23 45-46 (1957); *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 248 (9th Cir. 1997). In resolving a
24 Rule 12(b)(6) motion, a court must (1) construe the complaint in the light most favorable to
25 plaintiff; (2) accept all well-pleaded factual allegations as true; and (3) determine whether
26 plaintiff can prove any set of facts that would support relief. *Cahill v. Liberty Mutual Ins. Co.*,
27 80 F.3d 336, 337-38 (9th Cir. 1996). The court is not required to accept as true, however,
28

1 conclusory allegations which are contradicted by documents referred to in the complaint.

2 *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998).

3 Dismissal is appropriate where plaintiff has included allegations disclosing an
4 absolute defense or bar to recovery: "If the pleadings establish facts compelling a decision one
5 way, that is as good as if depositions and other expensively obtained evidence on summary
6 judgment establishes identical facts." *Weisbuch v. County of Los Angeles*, 119 F.3d 778, 783 n.1
7 (9th Cir. 1997). Thus, plaintiffs can plead themselves out of court by alleging particulars that
8 show that they have no legal claim, and they are not saved by alleging legal conclusions
9 inconsistent with the pleaded facts. *Id.* See also *Bender v. Suburban Hospital, Inc.*, 159 F.3d
10 186, 192 (4th Cir. 1998) ("while notice pleading does not demand that a complaint expound the
11 facts, a plaintiff who does so is bound by such exposition").

12 Where a plaintiff fails to attach to the complaint documents upon which the
13 complaint is based, defendant may attach such documents to a Rule 12(b)(6) motion to show that
14 the referenced documents do not support plaintiff's claim. See *Branch v. Tunnell*, 14 F.3d 449,
15 453-54 (9th Cir.), *cert. denied*, 512 U.S. 1219 (1994). The Court may consider the full text of a
16 document, even though the complaint relies only upon part of the document. *In re Stac*
17 *Electronics Securities Litig.*, 89 F.3d 1399, 1405 n.4 (9th Cir. 1996).

18 Consideration by the Court of a document not physically attached to the
19 complaint is proper on a Rule 12(b)(6) motion if (1) the complaint refers to such document;
20 (2) the document is central to plaintiff's claim; and (3) no party questions the document's
21 authenticity. *Branch*, 14 F.3d at 454; see also *Chambers v. Time Warner, Inc.*, 282 F.3d 147,
22 153 n.3 (2d Cir. 2002). This approach prevents "a plaintiff with a legally deficient claim [from
23 surviving] a motion to dismiss simply by failing to attach a dispositive document on which it
24 relied." *Pension Benefit Guaranty Corp. v. White Consolidated Industries, Inc.*, 998 F.2d 1192,
25 1196 (3rd Cir. 1993).

26 Indeed, the Ninth Circuit has eschewed the requirement that the dispositive
27 document be mentioned in the complaint to prevent plaintiffs from "deliberately omitting
28 reference to documents upon which their claims are based." *Parrino v. FHP, Inc.*, 146 F.3d

1 699, 705-706 & n.4 (9th Cir. 1998). This rule was adopted in the specific context of an ERISA
2 case, where plaintiff's complaint referred to an ERISA plan, but did not mention the documents
3 governing plan membership and coverage. Because such documents were essential to plaintiff's
4 claim, they properly were considered by the court in ruling on defendant's Rule 12(b)(6) motion
5 to dismiss. *Id.*

6 Because Plaintiffs' Complaint here turns upon the ERISA plan documents, the
7 Court should consider these documents in support of Dr. Guess' motion to dismiss, and such
8 consideration does not convert the motion into one for summary judgment. *Id.*

9 Finally, a motion to strike under Federal Rule of Civil Procedure 12(f) is properly
10 granted to strike the prayer for relief where the damages sought are not recoverable as a matter of
11 law, or where there is an improper jury demand. *E.g., Bureerong v. Uvawas*, 922 F. Supp. 1450,
12 1479 n.34 (C.D. Cal. 1996).

13 Upon the grant of a Rule 12 motion, the Court may deny leave to amend if it finds
14 that amendment would be futile because plaintiff cannot state a claim as a matter of law. *See,*
15 *e.g., Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995), *cert. denied*, 489 U.S. 1091 (1989).

16 IV.

17 ARGUMENT

18 A. ERISA PROVIDES A COMPREHENSIVE STATUTORY SCHEME THAT 19 GOVERNS THE RELIEF AVAILABLE TO PLAINTIFFS

20 Plaintiffs' claims reflect an obvious attempt to artfully plead around the statutory
21 framework provided by ERISA. Because ERISA significantly limits the remedies available to
22 individual claimants, and precludes all relief sought by Plaintiffs here, a brief introduction to the
23 ERISA scheme is necessary.

24 ERISA Section 502(a), 29 U.S.C. § 1132(a), governs which particular claims are
25 available to individuals (i.e., beneficiaries or participants in an ERISA plan) to enforce ERISA.
26 "Congress intended Section 502(a) to be the exclusive remedy for rights guaranteed under
27 ERISA...." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 144 (1990). The "detailed
28 provisions of Section 502(a) set forth a comprehensive civil enforcement scheme that represents

1 a careful balancing of the need for prompt and fair claims settlement procedures against the
2 public interest in encouraging the formation of employee benefit plans.” *Pilot Life Ins. Co. v.*
3 *Dedeaux*, 481 U.S. 41, 54 (1987). As *Pilot Life* further states:

4 The policy choices reflected in the inclusion of certain remedies
5 and the exclusion of others under the federal scheme would be
6 completely undermined if ERISA-plan participants and
7 beneficiaries were free to obtain remedies under state law that
8 Congress rejected in ERISA. “The six carefully integrated civil
9 enforcement provisions found in § 502(a) of the statute as finally
10 enacted...provide strong evidence that Congress did *not* intend to
authorize other remedies that it simply forgot to incorporate
expressly.” [¶] The deliberate care with which ERISA’s civil
enforcement remedies were drafted and the balancing of policies
embodied in its choice of remedies argue strongly for the
conclusion that ERISA’s civil enforcement remedies were intended
to be exclusive.

11 *Id.* (quoting *Massachusetts Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985)) (emphasis in
12 original) (citations omitted).

13 The primary enforcement mechanism available to individuals is set forth in
14 ERISA Section 502(a)(1)(B), which provides a contract-based cause of action to plan
15 participants and beneficiaries. *Id.* Specifically, ERISA Section 502(a)(1)(B) provides these
16 parties with standing to bring civil actions for recovery of benefits, to enforce rights under a plan
17 and to clarify rights under a plan. 29 U.S.C. § 1132(a)(1)(B).

18 In addition, ERISA Section 502(a)(2) permits civil actions to be brought by
19 participants for relief under ERISA Section 409 for breaches of ERISA’s fiduciary duty
20 provisions. 29 U.S.C. § 1132(a)(2). Relief under Section 409, however, is limited to relief *for*
21 *the plan itself*, and does not encompass individual claims for relief. *Massachusetts Mutual Life*
22 *Ins. Co. v. Russell*, 473 U.S. 134, 140-41 (1985). Thus, while individuals can sue under Section
23 409 by way of Section 502(a)(2), they can seek relief on behalf of the plan only, not for
24 individual claims. *Id.*

25 Individuals can also sue for breach of fiduciary duty under ERISA Section
26 502(a)(3). Unlike Section 409 actions, however, individuals are limited to seeking “other
27 appropriate equitable relief” under Section 502(a)(3). *See* 29 U.S.C. § 1132(a)(3). “Other
28 appropriate equitable relief” may not consist of disguised claims for money damages. *See, e.g.,*

1 *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993); *Watkins v. Westinghouse Hanford Co.*, 12
2 F.3d 1517, 1527-28 (9th Cir. 1993); *Kuhl v. Lincoln Nat'l Health Plan*, 999 F.2d 298, 304 (8th
3 Cir. 1993) (compensatory damages not available under ERISA). In addition, no claim for breach
4 of fiduciary duty is available under this section when Section 502(a)(1)(B) affords a remedy.
5 *See, e.g., Varsity Corp. v. Howe*, 516 U.S. 489, 515 (1996); *Geissal v. Moore Medical Corp.*, 338
6 F.3d 926, 933 (8th Cir. 2003).

7 As will be discussed in more detail below, these carefully circumscribed
8 provisions for individual relief under ERISA are terminal to Plaintiffs' Complaint in this case:
9 (1) all of Plaintiffs' state law claims for relief are preempted by ERISA, and Plaintiffs are limited
10 to the specified remedies under ERISA, even where ERISA does not provide a remedy for the
11 harm alleged; (2) Plaintiffs' purported ERISA claims are not authorized by ERISA; for example,
12 plaintiffs cannot sue for monetary damages, including either compensatory or punitive damages;
13 (3) Plaintiffs do not state a valid claim for breach of fiduciary duty under Section 502(a)(2)
14 because they cannot sue for individual relief; (4) Plaintiffs do not state a valid claim for relief
15 for breach of fiduciary duty under Section 502(a)(3) because "other appropriate equitable relief"
16 does not include claims for legal restitution; and (5) Plaintiffs' claim for ERISA statutory
17 penalties fails because it can only be brought against the plan administrator. In addition, as
18 discussed immediately below, two of the four Plaintiffs are not proper parties under ERISA.

19 **B. TWO OF THE FOUR PLAINTIFFS DO NOT HAVE STANDING TO SUE**
20 **UNDER ERISA**

21 In addition to the two Plan participants, Dr. Selznick and Ms. Rowland, this
22 lawsuit is also brought *by the employer* under the Plan, Double R, and *by the Plan itself*. These
23 latter two plaintiffs lack standing to sue under ERISA, and their claims should be dismissed with
24 prejudice.

25 ERISA Section 502(a) specifies four classes of parties which may bring the
26 authorized statutory claims. *See* 29 U.S.C. § 1132(a). These classes are (1) participants,
27 (2) beneficiaries, (3) fiduciaries and (4) the Secretary of Labor. Employers and the benefits plan
28 itself are not enumerated proper parties. *Id.* As to private parties, then, only plan participants,

1 beneficiaries and fiduciaries have the right to sue on Section 502(a) claims. *Cripps v. Life Ins.*
2 *Co. of No. America*, 980 F.2d 1261, 1265 (9th Cir. 1992). No other person has standing to
3 maintain an ERISA action. *Harris v. Provident Life & Acc. Ins. Co.*, 26 F.3d 930, 933 (9th Cir.
4 1994); *Alexander v. Electronic Data Systems Corp.*, 13 F.3d 940, 947 (6th Cir. 1994).

5 Specifically applying this limiting language, the courts have determined that a
6 benefits plan itself, as a non-enumerated party, may *not* may sue for relief under ERISA. *See*,
7 *e.g.*, *Carpenters Fringe Benefits Fund of Ill. v. Bi-State Loading Dock Specialists, Inc.*, 790 F.
8 Supp. 1410, 1410-11 (S.D. Ill. 1992) (welfare and pension plans are not enumerated parties with
9 standing to bring ERISA actions); *Buttram v. Central States, etc.*, 781 F. Supp. 1429, 1430 (E.D.
10 Mo. 1992) (same). Thus, because it has no standing to sue under ERISA, the claims of the Plan
11 here should be dismissed with prejudice.

12 Likewise, the courts have held that employers, as non-enumerated parties, also
13 lack standing to sue under ERISA. *See, e.g.*, *Fugarino v. Hartford Life and Accident Ins. Co.*,
14 969 F.2d 178, 185-86 (6th Cir. 1992), *cert. denied*, 507 U.S. 966 (1993); *Giardono v. Jones*, 867
15 F.2d 409, 411 (7th Cir. 1989); *Grand Union Co. v. Food Employers Labor Relations Ass'n*, 808
16 F.2d 66, 71 (D.C. Cir. 1987); *Dime Coal Co., Inc. v. Combs*, 796 F.2d 394, 396-97 (11th Cir.
17 1986). Thus, Double R's claims, too, should be dismissed with prejudice.²

18 **C. PLAINTIFFS' "ERISA CLAIMS" FAIL TO STATE A CLAIM UPON WHICH**
19 **RELIEF CAN BE GRANTED**

20 As to the two remaining plaintiffs, they allege five "ERISA Claims." Complaint
21 at 1. Each claim will be addressed in the order alleged in the Complaint.

22 **1. Plaintiffs' Claim for Declaratory Relief Should be Dismissed With**
23 **Prejudice**

24 ² While some circuits have extended standing to non-enumerated parties under a theory of
25 federal common law, the Ninth Circuit has limited development of federal common law
26 under ERISA to the interpretation of rights and obligations under the specific remedies found
27 in Section 502(a). *See Pacificare Inc. v. Martin*, 34 F.3d 834, 836 (9th Cir. 1994) (rejecting
28 the creation of new federal common law causes of action under ERISA).

1 Plaintiffs' first ERISA claim seeks declaratory relief. Plaintiffs seek a
2 determination that defendant Xelan Welfare Benefit Trust ("Xelan WBT") is not an ERISA-
3 regulated plan and therefore Plaintiffs' claims are not subject to ERISA preemption. Complaint
4 ¶¶ 168, 171, 172. This claim fails as a matter of law on several grounds.

5 First, plaintiffs' jurisdictional allegation in support of federal subject matter
6 jurisdiction alleges federal question jurisdiction under 28 U.S.C. § 1331, based upon an alleged
7 dispute *as to ERISA plan formation and administration* under ERISA Section 502, 29 U.S.C. §
8 1132(a), (c), (e), (f) and (g). Complaint ¶ 8. Among the plans in issue are the Xelan WBT. *See,*
9 *e.g.,* Complaint ¶¶ 12, 22, 34, 36, 86, 107, 215, 242. Indeed, Plaintiffs allege that Xelan WBT is
10 a plan administrator and fiduciary under ERISA. *E.g.,* Complaint ¶ 208. Plaintiffs further allege
11 that "Xelan WBT is a proper party defendant pursuant to ERISA," Complaint ¶ 22, and
12 Plaintiffs incorporate that allegation by reference into their declaratory relief claim. Complaint
13 ¶ 158. Thus, Plaintiffs base this Court's jurisdiction *solely* upon the allegation that this dispute
14 centers on formation and administration of an ERISA plan, subject to construction and
15 enforcement under federal law. Complaint ¶ 8.³

16 Plaintiffs' assertion that jurisdiction is based on ERISA, such that federal subject
17 matter jurisdiction lies over the Complaint, precludes Plaintiffs' attempts to argue in the
18 alternative, i.e. that the dispute does *not* center on an ERISA benefit plan. Stated differently, if
19 the dispute does not involve ERISA, there is no federal jurisdiction over Plaintiffs' claims and
20 Plaintiffs' claims fail on that ground. *See, e.g., Harris v. Provident Life and Accident Ins. Co.,*
21 *26 F.3d 930, 933 (9th Cir. 1994)* (where plaintiff not an ERISA plan participant at time of filing
22 lawsuit, such that plan not governed by ERISA, plaintiff could not establish federal subject
23 matter jurisdiction based on ERISA, nor was there jurisdiction over supplemental state claims).
24 *See generally Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 810 (1988)* (a

25 ³ The Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, merely creates a *remedy* in cases
26 otherwise within federal jurisdiction; it is not an independent basis of federal question
27 jurisdiction. *See American Cas. Co. of Reading, Penn. v. Krieger, 181 F.3d 1113, 1118 (9th*
28 *Cir. 1999).*

1 claim supported by alternative theories is not sufficient for federal question jurisdiction unless
2 federal law is essential to each of those theories). *See also Duncan v. Stuetzle*, 76 F.3d 1480,
3 1486 (9th Cir. 1996) (claims did not arise under federal law where alternative claims could be
4 based either on federal law or state law).⁴ Accordingly, Plaintiffs' declaratory relief claim is
5 barred by their own ERISA-based jurisdictional and other allegations. *See generally Weisbuch v.*
6 *County of Los Angeles*, 119 F.3d 778, 783 n.1 (9th Cir. 1997).

7 Second, it is evident from the face of the Complaint that Xelan WBT *is* an
8 employee benefit plan governed by ERISA. An ERISA "employee benefit plan" is broadly
9 defined as any plan established or maintained by an employer or employee organization for the
10 purpose of providing medical, unemployment, vacation, retirement, or similar benefits or
11 services. 29 U.S.C. § 1002(1). Plaintiffs' factual allegations regarding Xelan WBT establish
12 that it falls within the ERISA plan definition as a matter of law. *See* Complaint ¶¶ 12, 22-24,
13 34, 51-52.⁵

14 Third, Plaintiffs allege on the face of their Complaint that the Plan is "an
15 employee benefits plan under ERISA," Complaint at 1, and they invoke ERISA law throughout
16 the Complaint. *E.g.*, Complaint ¶¶ 8, 9, 156, 178 *et. seq.* As will be discussed in detail below,
17 ERISA completely preempts state law claims and provides only limited remedies, which do not
18 include the form of declaratory relief sought here. *See, e.g., Olson v. General Dynamics*, 960
19 F.2d 1418, 1423 (9th Cir. 1991), *cert. denied*, 504 U.S. 986 (1992) (affirming district court's
20 refusal to authorize declaratory relief remedy; claim governed by ERISA and ERISA did not
21 provide such remedy); *Washington v. Humana Health Plan*, 883 F. Supp. 264, 266 & n.1 (N.D.

22 _____
23 ⁴ Jurisdiction cannot be saved through the Court's supplemental jurisdiction. A valid federal
24 claim must be pleaded *before* a federal court can exercise supplemental jurisdiction over state
25 claims. *Hunter v. United Van Lines*, 746 F.2d 635, 649 (9th Cir. 1984) ("It makes no sense
26 to speak of pendent jurisdiction until after a court has independently acquired jurisdiction
27 over a federal cause of action.").

28 ⁵ ERISA does *not* require that an "employee benefit plan" qualify for IRS Section 419 tax
treatment for ERISA to govern. *See* 29 U.S.C. § 1144(a) (ERISA preempts all state laws,
including common laws, that "relate to" an employee benefit plan) (discussed *infra*).

1 Ill. 1995); *see also Chicago Pneumatic Tool Co. v. Smith*, 890 F. Supp. 100, 130-32 (N.D.N.Y.
2 1995). Because ERISA does not provide a declaratory relief remedy of the type sought here,
3 Plaintiffs' purported ERISA declaratory relief claim fails on this ground, as well.

4 **2. Plaintiffs' Claim for Rescission and Restitution Under ERISA**
5 **Sections 502(a)(2), 502(a)(3) and State Insurance Law Fails As a**
6 **Matter of Law**

7 Plaintiffs' second claim for relief alleges breach of fiduciary duty under ERISA
8 Sections 502(a)(2) and 502(a)(3), or alternatively under state insurance law, and seeks the
9 remedy of money damages, couched in terms of restitution and rescission. There are numerous
10 defects in this claim, which warrant dismissal with prejudice.

11 **a. A Breach of Fiduciary Duty Claim Seeking Monetary Damages**
12 **Must be Brought on Behalf of the Plan, not to Benefit an Individual**

13 As discussed at the outset, there are two types of breach of fiduciary duty claims
14 that may be brought by an individual under ERISA. ERISA Section 409 claims, brought through
15 ERISA Section 502(a)(2), provide the broader range of remedies, but they may be brought by an
16 individual only suing on behalf of the plan itself, i.e. not for individual relief. In *Massachusetts*
17 *Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 142-44 (1985), the Supreme Court held that
18 ERISA Section 409(a), 29 U.S.C. § 1109(a), provides relief only for a *plan* and not for an
19 individual participant or beneficiary.⁶ Here, Plaintiffs seek monetary damages, rescission and
20 restitution on their own behalf, not on behalf of the ERISA plan, making their claims improper
21 under ERISA Section 502(a)(2) (incorporating Section 409). *Massachusetts Mutual Life Ins. Co.*
22 *v. Russell*, 473 U.S. at 142-44.

23 The second form of breach of fiduciary claim under ERISA is available to an
24 individual who cannot assert a contract claim for denial of benefits under Section 502(a)(1)(B).

25 ⁶ This limitation upon remedies in ERISA is consonant with the statute's purpose, which is
26 aimed at protection of the integrity of pension plans, rather than at direct protection of individual
27 participants. *See generally McLeod v. Oregon Lithoprint Inc.*, 102 F.3d 376, 379 (9th Cir. 1996).

1 Where the beneficiary can make a claim for benefits under ERISA § 502(a)(1)(B), that provides
2 an adequate remedy, making additional equitable relief not appropriate. *Wald v. Southwestern*
3 *Bell Corp. Customcare Medi. Plan*, 83 F.3d 1002, 1006 (9th Cir. 1996); *Forsyth v. Humana,*
4 *Inc.*, 114 F.3d 1467, 1474-75 (9th Cir. 1997), *aff'd*, 525 U.S. 299 (1999). Plaintiffs' claim under
5 Section 502(a)(3) fails because they have not alleged that they cannot bring an action for benefits
6 due under Section 502(a)(1)(B). *Wald v. Southwestern Bell Corp. Customcare Medi. Plan*, 83
7 F.3d at 1006.

8 In addition, while an individual may sue for breach of fiduciary duty under
9 Section 502(a)(3), he is limited only to "other appropriate equitable relief." *Varity Corp. v.*
10 *Howe*, 516 U.S. 489, 515 (1996). Such relief *does not include monetary damages*, either
11 compensatory or punitive. *See Mertens v. Hewitt Associates*, 508 U.S. 248, 255 (1993). *See also*
12 *Harsch v. Eisenberg*, 956 F.2d 651, 656-60 (9th Cir. 1992) (no compensatory, extra-contractual
13 or punitive damages available for breach of fiduciary duty claim under Section 502(a)(3)), *cert.*
14 *denied sub nom. Bihler v. Eisenberg*, 506 U.S. 818 (1992).

15 This limitation is derived from the reluctance to add to the ERISA enforcement
16 scheme that was "crafted with such evident care." *Massachusetts Mutual Life Ins. Co. v. Russell*,
17 473 U.S. at 147. Section 502(a)(1)(B) provides a beneficiary only with a right to recover
18 benefits. As a result, claims for other forms of money damages (such as compensatory or
19 punitive damages) generally are precluded, and they cannot be engrafted onto the statute as a
20 claim for "other appropriate equitable relief" under Section 502(a)(3). *Mertens v. Hewitt*
21 *Assocs.*, 508 U.S. at 255. *See also Farr v. U.S. West Communications, Inc.*, 151 F.3d 908, 916
22 (9th Cir. 1998) (plaintiff alleging that defendants misrepresented tax benefits of pension plan
23 could not recover consequential damages under Section 502(a)(3)); *Bast v. Prudential Ins. Co.*,
24 150 F.3d 1003, 1009-1010 (9th Cir. 1998). *Cf. FMC Med. Plan v. Owens*, 122 F.3d 1258, 1261
25 (9th Cir. 1997) (an action for reimbursement of payments received by a third party does not
26 constitute an action for appropriate equitable relief; such an action is "essentially a breach of
27 contract claim for monetary relief and therefore not an action for equitable relief"). Because
28 Plaintiffs' Complaint plainly seeks relief in the form of monetary damages (both compensatory

1 and punitive), *see, e.g.*, Complaint ¶¶ 196, 248, Plaintiffs' claim is improper under ERISA
2 Section 502(a)(3).

3 **b. Rescission and Restitution are Impermissible Remedies Under**
4 **Section 502(a)(3) Where, As Here, Plaintiffs' Claim is a Disguised**
5 **Claim for Monetary Damages**

6 As discussed, ERISA Section 502(a)(3), which provides the relief available to
7 plan participants as individuals, authorizes only "other appropriate equitable relief." This does
8 not mean all equitable relief, however, but only relief as appropriate and within the statutory
9 definition. *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996). While Plaintiffs attempt to style
10 their claim as one for "restitution" in an effort to escape the prohibition on money damages, the
11 courts do not allow such "restitutionary" claims, which are nothing more than disguised claims
12 for monetary damages, not recoverable under ERISA Section 502(a)(3). *Bast v. Prudential Ins.*
13 *Co.*, 150 F.3d 1003, 1009-1010 (9th Cir. 1998) (Section 502(a)(3) did not permit restitutionary
14 remedy that was equivalent of awarding plaintiffs money damages, even where plaintiffs left
15 without any remedy because of preemption of state law claims); *Serpa v. SBC*
16 *Telecommunications, Inc.*, ___ F. Supp. 2d ___, 2004 WestLaw 1161383, *5 (N.D. Cal. May 24,
17 2004) (claims for legal restitution are unavailable under Section 502(a)(3) equitable remedies).

18 Indeed, the Supreme Court recently has confirmed the unavailability of legal
19 restitutionary remedies under ERISA. In *Great-West Life & Annuity Insurance Co. v. Knudson*,
20 534 U.S. 204, 209-14 (2002), the Supreme Court disallowed a claim for restitution as a form of
21 "other appropriate equitable relief" available to an individual claimant under ERISA Section
22 502(a)(3). Specifically, the Court distinguished between claims for "legal restitution"—not
23 permissible under ERISA—and the narrow class of permissible "equitable restitution" claims.
24 *Id.* at 213-14. Equitable restitution does *not* include situations in which a plaintiff seeks to
25 "obtain judgment imposing a merely personal liability upon defendant to pay a sum of money."
26 *Id.* at 213. Where the property in question has been dissipated, as in the case of money not held
27 in a segregated account, plaintiff is merely a general creditor and any claim for money damages
28 is one for legal restitution, which is not actionable under Section 502(a)(3). *Id.* at 213-16. The

1 *only* claims actionable under Section 502(a)(3) are for equitable restitution, in the nature of a lien
2 or constructive trust on specific property. *Id.* at 214-16. The Court summarized the rule:

3 Thus, for restitution to lie in equity, the action generally
4 must seek not to impose personal liability on the defendant but to
5 restore to the plaintiff particular funds or property in the
6 defendant's possession.

6 *Id.* at 214.

7 Plaintiffs' claims against Dr. Guess are precisely the form of legal restitution, i.e.,
8 a general claim for money not contained in any identified fund, that the Supreme Court has
9 disallowed as an ERISA remedy. *Id.* at 213-16. *See also Caffey v. Unum Life Ins. Co.*, 302 F.3d
10 576, 583-84 (6th Cir. 2002) (after *Great-West*, restitutionary claims limited to monies held in
11 constructive trust or an identifiable fund); *accord Horvath v. Keystone Health Plan East, Inc.*,
12 333 F.3d 450 457 n.3 (3rd Cir. 2003) (dictum that remedy of restitution of insurance premiums
13 allegedly overpaid as a result of nondisclosure is foreclosed by *Great-West*).

14 Following upon *Great-West*, the Ninth Circuit has confirmed the extremely
15 limited scope of restitution under ERISA Section 502(a)(3), disallowing a claim for equitable
16 restitution even where the funds *were* held in an identifiable account. *Westaff (USA) Inc. v. Arce*,
17 298 F.3d 1164, 1166-67 (9th Cir. 2002) (affirming dismissal), *cert. denied*, 537 U.S. 1111
18 (2003). The Ninth Circuit has made clear that a valid claim for restitution under Section
19 502(a)(3) will lie only in very narrow circumstances where specific property, consisting of an
20 identifiable asset, is at issue. *See Honolulu Joint Apprenticeship and Training Committee, etc. v.*
21 *Foster*, 332 F.2d 1234, 1237-39 (9th Cir. 2003) (referring to "steadily shrinking field of
22 'appropriate equitable relief'; "restitution is available only in limited circumstances, where there
23 is an identifiable *res*"; declining on theory of unjust enrichment and rescission to allow Section
24 502(a)(3) claim to recover monies paid under contract).

25 A recent decision by another district court in this Circuit confirms that Plaintiffs'
26 claim for rescission is not a proper ERISA remedy. In *Ram Technical Services v. Koresko*, __ F.
27 Supp. 2d ___, 2004 WestLaw 1050888 (D. Ore. April 15, 2004), plaintiffs alleged that
28 defendants fraudulently induced them to set up a benefits plan for themselves and their company,

1 and that the plan did not meet plaintiffs' expectations. *Id.* at *1. As here, plaintiffs sought
2 rescission of the plan. *Id.* The district court granted defendants' motion to dismiss, finding that
3 rescission did not constitute "appropriate equitable relief" under ERISA Section 502(a)(3). *Id.* at
4 *3-*4. *See also Fuller v. Liberty Life Assurance of Boston*, 302 F. Supp. 2d 525, 532 (W.D.N.C.
5 2004) (no viable claim for restitution under Section 502(a)(3) where plaintiff seeks monetary
6 recovery; "There is no contention that the disputed funds have been held separately by
7 Defendants; they are simply a part of the VEBA trust or are in the Defendants' personal
8 possession. Plaintiff is, therefore, not seeking to recover any particular fund but is merely trying
9 to impose general liability on Defendants"). Because Plaintiffs here similarly seek legal
10 restitution, i.e., recovery of general monies, their claim, too, is invalid under ERISA.

11 Finally, as discussed in detail below, state law claims for compensatory and
12 punitive damages, including Plaintiffs' alternative claims based on the California Insurance
13 Code, fail on the basis of the application of ERISA's preemption provision. *Pilot Life Ins. Co. v.*
14 *Dedeaux*, 481 U.S. 41, 53-54 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 62-63
15 (1987).

16 In sum, Plaintiffs' second claim for relief for breach of fiduciary duty fails on
17 three grounds: (1) Section 502(a)(2) provides relief only for the ERISA plan itself, not the
18 individual damages claims as alleged here; (2) Section 502(a)(3) authorizes only "appropriate
19 equitable relief," not legal restitution in the form of money damages as sought here; and (3)
20 ERISA preempts Plaintiffs' alternative state law theory of recovery.

21 **3. Plaintiffs' Claim for a Statutory Nondisclosure Penalty Fails as A**
22 **Matter of Law**

23 Plaintiffs' third claim seeks to recover statutory penalties under ERISA Section
24 502(a)(1)(A) (incorporating Section 502(c)). As a matter of law, however, such penalties are
25 *only* recoverable against the plan administrator. *See* 29 U.S.C. § 1132(a)(1)(A). *See also*
26 *Averhart v. US West Management Pension Plan*, 46 F.3d 1480, 1489 (10th Cir. 1994) (Section
27 502(c) penalties may be awarded only against the plan administrator); *Moran v. Aetna Life Ins.*
28 *Co.*, 872 F.2d 296, 299-300 (9th Cir. 1989). Indeed, Plaintiffs' allegations confirm this law.

1 Complaint ¶¶ 209, 218.

2 Because Dr. Guess is not alleged to be the plan administrator, *see* Complaint
3 ¶¶ 1, 208, this claim should be dismissed with prejudice as to Dr. Guess.

4 **4. Plaintiffs' Claim for an Accounting Fails As a Matter of Law**

5 Without citation to any statutory authority, Plaintiffs seek an accounting. The
6 detailed scheme of ERISA does not provide any such remedy, however. Because Plaintiffs seek
7 a remedy not authorized in the exclusive statutory scheme, Plaintiffs' fourth claim fails as a
8 matter of law.

9 **5. Plaintiffs' Claim for Breach of Fiduciary Duty, Fraud and**
10 **Misrepresentation Under ERISA Fails as A Matter of Law**

11 Plaintiffs' fifth claim for relief is a "catch-all" claim, which reasserts breach of
12 fiduciary duty as alleged in the second claim, and adds allegations of multiple breaches of
13 fiduciary duties imposed under specific sections of ERISA. This claim fails for the reasons
14 discussed above as to plaintiffs' breach of fiduciary duty claim, *i.e.*, Plaintiffs' Section 502(a)(2)
15 claim fails because Plaintiffs seek individual relief, not relief on behalf of the plan; and
16 Plaintiffs' Section 502(a)(3) claim fails Plaintiffs' claim is for money damages, which is legal
17 restitutionary relief that does not qualify as "other appropriate equitable relief" under Section
18 502(a)(2).

19 In addition, as discussed at length below, to the extent that plaintiffs attempt to
20 style this claim as a state law claim for common law breach of fiduciary duty, *see* Complaint ¶
21 230, it is completely preempted by ERISA's precise and limited remedies for alleged breaches of
22 fiduciary duty. *See Davidian v. Southern California Meat Cutters Union & Food Employees*
23 *Ben. Fund*, 859 F.2d 134, 135 (9th Cir. 1988); *Smith v. Provident Bank*, 170 F.3d 609, 613 (6th
24 Cir. 1999) ("Common law breach of fiduciary claims are clearly preempted by ERISA"); *Kramer*
25 *v. Smith Barney*, 80 F.3d 1080, 1082-83 (5th Cir. 1996).

26 **D. PLAINTIFFS' PENDENT STATE CLAIMS FAIL AS A MATTER OF LAW**

27 **1. ERISA Broadly Preempts State Law Claims, Including Tort Claims**

28 The preemptive effect of certain federal statutes, such as ERISA, is so powerful

1 that it gives rise to so-called “complete preemption,” displacing all state law causes of action that
2 “relate to” a federally-regulated employee benefit plan. The effect of this complete preemption
3 is that plaintiff’s “artful pleading of state law” claims cannot evade the essential federal nature of
4 the lawsuit because the only cognizable claim is federal. *See Metropolitan Life Ins. Co. v.*
5 *Taylor*, 481 U.S. 58, 66-67 (1987).

6 ERISA’s preemptive rule is contained in its express provision stating that ERISA
7 will “supersede any and all State laws” to the extent that those laws “relate to” any employee
8 benefit plan that is subject to ERISA. ERISA § 514(a), 29 U.S.C. § 1144(a). ERISA Section
9 514(a) has been described as ““one of the broadest preemption clauses ever enacted by
10 Congress.”” *San Francisco Culinary Bartenders & Serv. Employees Welfare Fund v. Lucin*, 76
11 F.3d 295, 298 (9th Cir. 1996) (quoting *PM Group Life Ins. v. Western Growers Assur. Trust*, 953
12 F.2d 543, 545 (9th Cir. 1992)). The Supreme Court has observed that the language is
13 “deliberately expansive,” *Pilot Life*, 481 U.S. at 45-46, and “conspicuous for its breadth.” *FMC*
14 *Corp. v. Holliday*, 498 U.S. 52, 57 (1990).

15 ERISA’s preemptive force is so strong that where state law claims fall within the
16 scope of ERISA’s enforcement provisions, state law is not merely displaced, it is replaced with
17 an ERISA claim. *Pilot Life*, 481 U.S. at 54-55; *Harris v. Provident Life & Acc. Ins. Co.*, 26 F.3d
18 930, 934 (9th Cir. 1994). Accordingly, ERISA Section 502(a) provides the exclusive claims and
19 remedies for violations of ERISA. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. at 60.

20 For preemption purposes, ERISA defines “state law” to include “all laws,
21 *decisions*, rules, regulations, or other State action having the effect of law.” ERISA § 514(c)(1),
22 29 U.S.C. § 1144(c)(1) (emphasis added). Thus, state common law claims that “relate to”
23 ERISA plans are preempted, including state common law tort causes of action. *See, e.g., Pilot*
24 *Life*, 481 U.S. at 43-44.

25 In a very recent decision, the Supreme Court unanimously affirmed the broad
26 sweep of ERISA preemption. *Aetna Health Inc. v. Davila*, 124 S. Ct. 2488 [2004 Daily Journal
27 D.A.R. 7380] (July 21, 2004). In *Davila*, the Court reiterated the congressional objective that
28 ERISA Section 502(a) provide an “integrated enforcement mechanism” to ensure that employee

1 benefit plan regulation is “exclusively a federal concern.” 124 S. Ct. at 2495 (quoting *Allessi v.*
2 *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)). The Court held that any state law cause
3 of action that duplicates, supplements, or supplants ERISA’s civil enforcement remedy conflicts
4 with clear congressional intent to make ERISA’s remedies exclusive, and is therefore preempted.
5 *Id.* The Court further emphasized that a plaintiff should not be permitted to evade ERISA’s
6 exclusivity by artful pleading. *Id.* at 2497. The fact that a state cause of action attempts to
7 authorize remedies beyond those authorized in ERISA Section 502(a) does not avoid
8 preemption. *Id.*

9 In *Davila*, because the interpretation of a federal employee benefit plan formed an
10 essential part of the claim, and the claim would exist only because of the administration of an
11 ERISA-regulated plan, the state law claims were wholly preempted, even if pleaded in tort rather
12 than contract. *Id.* at 2498. The Court concluded:

13 Congress’ intent to make the ERISA civil enforcement
14 mechanism exclusive would be undermined if state causes of
15 action that supplement the ERISA § 502(a) remedies were
permitted, even if the elements of the state cause of action did not
precisely duplicate the elements of an ERISA claim.

16 *Id.* at 2499.

17 Critically for present purposes, ERISA’s complete preemption extends to claims
18 for which there is no ERISA remedy, including a claim that an ERISA plan administrator (or
19 other ERISA entity) misrepresented the benefits payable under, or the tax consequences of, the
20 plan. *See, e.g., Farr v. U.S. West Communications, Inc.*, 151 F.3d 908, 913 (9th Cir. 1998);
21 *Olson v. General Dynamics Corp.*, 960 F.2d 1418, 1422-23 (9th Cir. 1991), *cert. denied*, 504
22 U.S. 986 (1997); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1470 (11th Cir. 1986). As detailed
23 below, ERISA preempts such state law fraud and misrepresentation claims, even though
24 Plaintiffs are without a remedy under ERISA.

25 Plaintiffs’ Complaint alleges five “supplemental” state claims. Complaint at 1.
26 Given ERISA’s complete preemptive effect, each of Plaintiffs’ state law claims, discussed below
27 in the order alleged, is preempted by ERISA and invalid as a matter of law.

28

1 2. ERISA Preempts Plaintiffs' State Law Fraud and Negligent
2 Misrepresentation Claims

3 Plaintiffs' sixth, seventh and eight claims allege fraud and misrepresentation
4 relating to the representation of plan benefits and plan administration. The courts repeatedly
5 have found that ERISA's preemption of state law tort claims encompasses claims for fraud and
6 misrepresentation. *See, e.g., Maez v. Mountain States Tel. & Tel.*, 54 F.3d 1488, 1496 (10th Cir.
7 1995) (state law claims of misrepresentation "relate to" an employee benefits plan and therefore
8 are preempted); *Vartanian v. Monsanto Co.*, 14 F.3d 697, 700 (1st Cir. 1994) (plaintiff's claims
9 preempted where plaintiff allegedly induced to accept early retirement based on
10 misrepresentations regarding plan benefits); *Sanson v. General Motors Corp*, 966 F.2d 618, 621
11 (11th Cir. 1992); *Hermann Hosp. v. MEBA Med. & Benefits Plan*, 959 F.2d 569, 576-79 (5th Cir.
12 1992) (hospital's claims for negligent misrepresentation and fraud preempted); *Hansen v.*
13 *Continental Ins. Co.*, 940 F.2d 971, 979 (5th Cir. 1991) (misrepresentation, fraud and deceptive
14 practices claims preempted); *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1276
15 (6th Cir. 1991); *Gibson v. Prudential Ins. Co.*, 915 F.2d 414 (9th Cir 1990) (fraud preempted);
16 *Olson v. General Dynamics Corp.*, 960 F.2d 1418, 1420-21 (9th Cir. 1991), *cert. denied*, 504
17 U.S. 986 (1992); *Straub v. Western Union Tel.*, 851 F.2d 1262, 1264 (10th Cir. 1988)
18 (misrepresentation preempted); *Reid v. Gruntal & Co., Inc.*, 760 F. Supp. 945, 949 (D. Me.
19 1991) (fraud, negligent misrepresentation, breach of fiduciary duty preempted); *Variety*
20 *Children's Hosp. Inc. v. Century Med. Health Plan, Inc.*, 57 F.3d 1040, 1042 (11th Cir. 1995)
21 (misrepresentation preempted).

22 The leading Ninth Circuit case on this point is *Olson v. General Dynamics Corp.*,
23 960 F.2d 1418, 1420-21 (9th Cir. 1991), *cert. denied*, 504 U.S. 986 (1992), a case arising out of
24 this District, and affirming the District Court's summary judgment for defendants. In *Olson*, the
25 district court found that a retiree's fraud claim, alleging that the level of retirement benefits that
26 would be available under the plan had been misrepresented to him, was preempted by ERISA.
27 *Id.* at 1419-20. The appellate court affirmed the finding that this claim "related to" an employee
28 benefit plan, and hence was preempted. *Id.* at 1422-23. This was so despite the result that

1 plaintiff would be left without a remedy under ERISA, as well as state law. *Id.*

2 Since *Olson*, the Ninth Circuit repeatedly has held that claims based upon alleged
3 misrepresentations regarding the benefits or terms of an employee benefit plan are preempted by
4 ERISA. Thus, for example, employees' state law claim regarding the alleged misrepresentation
5 of tax consequences of benefits distribution "related to" plan administration and hence was
6 preempted by federal law. *Farr v. U.S. West Communications, Inc.*, 151 F.3d 908, 913 (9th Cir.
7 1998). The plan's tax consequences were "part of the overall mix of information relied upon by
8 Plaintiffs in making their decision to participate in the plan." *Id.*

9 Given the established rule of preemption of state law fraud and misrepresentation
10 claims relating to an employee benefits plan, Plaintiffs' sixth, seventh and eighth claims for
11 relief, alleging fraud, deceit and negligent misrepresentation under California common law, are
12 preempted by ERISA. Despite Plaintiffs' best efforts to plead around ERISA, it is obvious that
13 their state law claims—*each of which incorporate by reference the ERISA allegations*—relate to
14 an employee benefits plan.

15 In their sixth and seventh claims, while expressly incorporating all the prior
16 ERISA plan-based allegations, Plaintiffs attempt to avoid ERISA preemption by alleging "pre-
17 plan" fraud and misrepresentation. It is precisely these types of alleged misrepresentations of
18 plan benefits and tax consequences that the Ninth Circuit has found are preempted by ERISA,
19 however. *See Farr v. U.S. West Communications, Inc.*, 151 F.3d at 913; *Olson v. General*
20 *Dynamics Corp.*, 960 F.2d at 1420-23.

21 Moreover, other Circuits, too, hold that where the alleged "pre-plan" fraud and
22 misrepresentation claims are inextricable from claims based upon ERISA itself, as here, the pre-
23 plan claims are preempted. *Lion's Volunteer Blind Indus., Inc. v. Automated Group Admin., Inc.*,
24 195 F.3d 803, 807-809 (6th Cir. 1999) (allegation that timing of misrepresentation was in pre-
25 plan period will not preclude preemption); *Carlo v. Reed Rolled Thread Die Co.*, 49 F.3d 790,
26 793-94 (1st Cir. 1995); *Vartanian v. Monsanto Co.*, 14 F.3d 697, 700 (1st Cir. 1994);
27 *Consolidated Beef Industries, Inc. v. New York Life Ins. Co.*, 949 F.2d 960, 963-64 (8th Cir.
28 1991); *Toomey v. Jones*, 855 F. Supp. 19 (D. Mass. 1994); *see also Mackay v. Grumman Allied*

1 *Industries, Inc.*, 993 F. Supp. 1068, 1070-72 (W.D. Mich. 1997); *Cerasoli v. Xomed, Inc.*, 952 F.
2 Supp. 152, 156 (W.D.N.Y. 1997); *Macomber v. Digital Equipment Corp.*, 865 F. Supp. 65, 70-
3 72 (D.N.H. 1994).

4 A recent district court decision from this Circuit thoroughly considered, and
5 rejected, a claim akin to Plaintiffs' herein. In *Serpa v. SBC Telecommunications, Inc.*, ___ F.
6 Supp. 2d ___, 2004 WestLaw 1161383 (N.D. Cal. May 24, 2004), the court found that an
7 employee's claims of negligence, promissory estoppel, fraud and unfair business practices were
8 preempted by ERISA, and dismissed those claims under Rule 12. The court found such
9 preemption despite plaintiff's allegations of being misinformed as to benefits to be provided. *Id.*
10 *3. The court found that plaintiff's claim plainly related to an ERISA plan because had the plan
11 paid out the amount that plaintiff expected, the alleged state law claims would have no basis in
12 fact or law. *Id.*

13 Here, Plaintiffs allege that defendants engaged in series of misrepresentations and
14 non-disclosures, most of which occurred during the *post*-December 1998 plan period. *E.g.*,
15 Complaint ¶¶ 65, 72, 74, 76-78, 84, 88, 99, 106, 112, 113-114, 277, 292. Under these
16 circumstances, ERISA preemption applies to all claims for fraud and misrepresentation. *See also*
17 *Griggs v. E.I. Dupont De Nemours & Co.*, 237 F.3d 371, 378 (4th Cir. 2001) (negligent
18 misrepresentation claim preempted where alleged misrepresentation influenced employee's
19 decision to participate in the ERISA plan); *Christenson v. Mutual Life Ins. Co. of N.Y.*, 950 F.
20 Supp. 179, 180-81 (N.D. Tex. 1996) (state law claim against insurer for allegedly
21 misrepresenting coverage under ERISA plan preempted); *accord Hall v. BlueCross/Blue Shield*
22 *of Ala.*, 134 F.3d 1063, 1065 (11th Cir. 1998) (ERISA preempts a fraudulent inducement claim
23 that an insurer and its licensed agent marketed and sold an insurance policy that allegedly
24 differed from the plan that agents had proposed); *Reliable Home Health Care, Inc. v. Union*
25 *Cent. Ins. Co.*, 295 F.3d 505, 515 (5th Cir. 2002) (ERISA preempts fraudulent inducement claim
26 that insurance agent made false representations because the underlying conduct involved the
27 creation, operation and subsequent failure of the plan which could not be severed from plan).

28 In sum, Plaintiffs' sixth, seventh and eighth claims for common law fraud, deceit

1 and misrepresentation all are preempted by ERISA, requiring dismissal.

2 **3. ERISA Preempts Plaintiffs' State Law Claim for Breach of the**
3 **Implied Covenant of Good Faith and Fair Dealing**

4 ERISA preemption law also establishes that Plaintiffs' ninth claim, for breach of
5 the implied covenant of good faith and fair dealing (i.e. bad faith), is preempted by federal law
6 under ERISA. Indeed, the United States Supreme Court has resolved this issue. *Pilot Life*, 481
7 U.S. at 57 (Mississippi bad faith law preempted).

8 Likewise, the Ninth Circuit and other circuits have also found state law bad faith
9 claims preempted by ERISA. *Conover v. Aetna US Health Care, Inc.*, 320 F.3d 1076, 1079-80
10 (10th Cir. 2003) (claims under state insurance bad faith law preempted); *Bast v. Prudential Ins.*
11 *Co. of Am.*, 150 F.3d 1003, 1008 (9th Cir. 1998) (plaintiffs' claims under provisions of
12 Washington insurance code prohibiting bad faith are preempted even though plaintiffs are left
13 without a remedy); *Dytrt v. Mountain State Tel. & Tel. Co.*, 921 F.2d 889, 896 (9th Cir. 1990)
14 (state law claim for breach of implied covenant of good faith and fair dealing preempted); *Kanne*
15 *v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489, 493 (9th Cir. 1988), *cert. denied*, 492 U.S. 906
16 (1989) (claim under California unfair insurance practices statute preempted); *Chamblin v.*
17 *Reliance Standard Life Ins. Co.*, 168 F. Supp. 2d 1168, 1177 (N.D. Cal. 2001) (California's bad
18 faith tort claim preempted by ERISA); *Jabour v. CIGNA Healthcare of Cal., Inc.*, 162 F. Supp.
19 2d 1119, 1128-29 (C.D. Cal. 2001) (California's bad faith tort claim preempted). *See also Kelley*
20 *v. Sears, Roebuck & Co.*, 882 F.2d 453, 455 (10th Cir. 1989); *Martin v. Pate*, 749 F. Supp. 242,
21 245 (S.D. Ala. 1990) ("It appears well settled that claims for bad faith refusal to pay benefits are
22 within ERISA's preemptive sweep"), *aff'd sub nom. Martin v. Continental Investors*, 934 F.2d
23 1265 (11th Cir. 1991); *Pachuta v. Unumprovident Corp.*, 242 F. Supp. 2d 752, 758-64 (D. Haw.
24 2002) (claim for bad faith denial of insurance benefits preempted by ERISA) (applying Hawaii
25 law).

26 **4. ERISA Preempts Plaintiffs' State Law Unfair Competition Claim**

27 Finally, ERISA law makes clear that Plaintiffs' claims for unfair business
28 practices under the California statutes—alleged in Plaintiffs' tenth claim for relief—are

1 preempted. *See, e.g., Elliot v. Fortis Benefits Ins. Co.*, 337 F.3d 1138, 1147 (9th Cir. 2003)
2 (claims under state unfair trade practices statute preempted) (applying Montana law); *Harris v.*
3 *Harvard Pilgrim Health Care, Inc.*, 208 F.3d 274, 281 (1st Cir. 2000) (claim under
4 Massachusetts unfair or deceptive trade practices statute preempted); *Roberson v. Equitable Life*
5 *Ins. Socy' of U.S.*, 661 F. Supp. 416, 423-24 (C.D. Cal. 1987) (claim under California's Unfair
6 Practices Act preempted), *aff'd*, 869 F.2d 1498 (9th Cir. 1989); *see also Anderson v. Human,*
7 *Inc.*, 24 F.3d 889 (7th Cir. 1994) (employee's claim of violation of state anti-deception law
8 arising from information provided to employee to assist choice of benefits and assertion that
9 employee was fraudulently induced to select certain option was preempted by ERISA).
10 Accordingly, Plaintiffs' tenth claim for relief also must be dismissed with prejudice.

11 **E. PLAINTIFFS' DEMAND FOR JURY TRIAL MUST BE STRICKEN AS ERISA**
12 **DOES NOT ALLOW TRIAL BY JURY**

13 Because individual claims brought under ERISA are equitable, not legal in nature,
14 there is no right to a jury trial. *See, e.g., Spinelli v. Gaughan*, 12 F.3d 853, 858 (9th Cir. 1993);
15 *Thomas v. Oregon Fruit Prods. Co.*, 228 F.3d 991, 997 (9th Cir. 2000). Thus, there is no right to
16 a jury trial under ERISA, including for claims of breach of fiduciary duty under Sections 409 and
17 502(a)(2). *See also Katsaros v. Cody*, 744 F.2d 270, 278 (2d Cir.), *cert. denied*, 469 U.S. 1072
18 (1984); *Shadoan v. Provident Life and Accident Ins. Co.*, 824 F. Supp. 907, 907-908 (C.D. Cal.
19 1993).

20 Accordingly, Plaintiffs' demand for jury trial should be stricken. *See Camp v.*
21 *Pacific Fin. Group*, 956 F. Supp. 1541, 1552 (C.D. Cal. 1997) (striking plaintiffs' demand for
22 jury trial, "as they had no right to [jury trial] in a claim for breach of fiduciary duty under
23 ERISA"); *Mathis v. American Group Life Ins. Co.*, 873 F. Supp. 1348, 1361-62 (E.D. Mo. 1994)
24 (striking jury demand as improper under ERISA).

25 **F. PLAINTIFFS' REQUEST FOR COMPENSATORY AND PUNITIVE DAMAGES**
26 **MUST BE STRICKEN AS ERISA DOES NOT ALLOW A DAMAGES**
27 **RECOVERY**

28 Compensatory and punitive damages sought by an individual beneficiary are not

1 recoverable under ERISA. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255-56 (1993);
2 *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985); *Bast v. Prudential Ins.*
3 *Co. of Am.*, 150 F.3d 1003, 1009 (9th Cir. 1998) (“Extracontractual, compensatory and punitive
4 damages are not available under ERISA”).

5 Accordingly, Plaintiffs’ prayer for compensatory and punitive damages should
6 be stricken. *See Camp v. Pacific Fin. Group*, 956 F. Supp. 1541, 1552 (C.D. Cal. 1997) (striking
7 plaintiffs’ prayer for punitive damages under ERISA).

8 **G. PLAINTIFFS’ FRAUD CLAIMS SHOULD BE DISMISSED FOR FAILURE TO**
9 **ALLEGE FRAUD WITH PARTICULARITY**

10 To survive dismissal, a complaint must plead fraud “with particularity.” Fed. R.
11 Civ. Proc. 9(b); *Desaigoudar v. Meyercord*, 223 F.3d 1020, 1022-23 (9th Cir. 200) (fraud must
12 be pleaded with a “high degree of meticulousness”).

13 Rule 9(b) requires that the complaint (1) specify the alleged fraudulent
14 representations; (2) allege the representations were false when made; (3) identify the speaker; (4)
15 state when and where the statements were made; and (5) state the manner in which the
16 representations were false and misleading. *See, e.g., DiLeo v. Ernst & Young*, 901 F.2d 624, 627
17 (7th Cir.), *cert. denied*, 498 U.S. 941 (1990) (“the who, what, when, where and how: the first
18 paragraph of any newspaper story”); *Arnold & Assocs., Inc. v. Misys Healthcare Systems*, 275 F.
19 Supp. 2d 1013, 1027 (D. Az. 2003).

20 Here, Plaintiffs’ Complaint fails to meet the particularity requirement. While
21 lengthy, the Complaint is devoid of any description of the specific statements made by the
22 specific defendants, and the when and where of such statements. Instead, Plaintiffs merely make
23 conclusory allegations of false statements by “defendants.”

24 Plaintiffs’ failure to plead fraud in compliance with Rule 9(b) warrants dismissal
25 for failure to state a claim under Rule 12(b)(6). *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d
26 1097, 1107-1108 (9th Cir. 2003).

27
28

V.

CONCLUSION

1
2
3 Plaintiffs have engaged in the common tactic of attempting to plead around
4 ERISA preemption of state law claims and ERISA's own limited remedies. The Court should
5 not be fooled: ERISA gives rise to complete federal preemption for matters which "relate to" an
6 employee benefits plan. Plaintiffs allege that the benefits at issue were obtained through a
7 federally-regulated ERISA plan, and they predicate federal jurisdiction on ERISA. Plaintiffs
8 seek relief under multiple sections of ERISA, and they incorporate those allegations into their
9 state law claims—each of which clearly relates to the underlying plan at issue. All of Plaintiffs'
10 state law claims are therefore preempted.

11 Plaintiffs' ERISA claims are equally deficient. Plaintiffs' ERISA claims seek
12 individual (not plan-based) monetary damages in the guise of restitutionary relief. ERISA does
13 not permit such claims; it is limited to (1) individual claims for benefits, (2) relief on behalf of
14 the plan, and (3) narrow equitable restitution for recovery of specific property subject to a lien or
15 constructive trust.

16 For these reasons, as well as those detailed above, Plaintiffs' Complaint should be
17 dismissed with prejudice.

18 Dated: July 21, 2004

Respectfully submitted,

19 LATHAM & WATKINS LLP
20 Michael J. Weaver
21 Kristine L. Wilkes

22 By *Kristine L. Wilkes*
23 Kristine L. Wilkes
24 Attorneys for Defendant
25 L. DONALD GUESS, D.M.D. aka
26 LEWIS D. GUESS, D.M.D.
27
28

PROOF OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 600 West Broadway, Suite 1800, San Diego, CA 92101-3375.

On July 21, 2004, I served the following document described as:

DEFENDANT L. DONALD GUESS, D.M.D. aka LEWIS D. GUESS, D.M.D.'S NOTICE OF MOTIONS (1) TO DISMISS FOR FAILURE TO STATE A CLAIM UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) AND (2) TO STRIKE UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(F)

DEFENDANT L. DONALD GUESS, D.M.D. AKA LEWIS D. GUESS, D.M.D.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS (1) TO DISMISS FOR FAILURE TO STATE A CLAIM UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) AND (2) TO STRIKE UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(f)

DECLARATION OF PATRICIA DE LA TORRE IN SUPPORT OF MOTIONS (1) TO DISMISS FOR FAILURE TO STATE A CLAIM UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) AND (2) TO STRIKE UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(f)

by serving a true copy of the above-described document in the following manner:

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I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 21, 2004, at San Diego, California.



Tracey R. White