




1           The parties have filed cross-motions for summary judgment under Federal Rule of Civil  
2 Procedure 56. Having considered the briefing and the oral argument presented at the hearing on  
3 June 13, 2019, the Court GRANTS Defendants’ motion and DENIES Plaintiffs’ motion.

4           **I. BACKGROUND**

5           *Creation of the Plan*

6           The Plan was created in response to concerns raised by Jeff Allen, NetApp’s Chief  
7 Financial Officer (“CFO”), in 2003. Warmenhoven Decl. ¶ 2, ECF 56-3. Allen was  
8 contemplating retirement but he was worried about obtaining private medical insurance in light of  
9  *Id.* Daniel Warmenhoven, the company’s Chief Executive  
10 Officer (“CEO”), tasked the Human Resources Department and the Compensation Committee  
11 (“Comp Committee”) to work on creating a medical insurance plan for senior executives at  
12 Allen’s level. *Id.* Warmenhoven believed that such a plan would not only address Allen’s  
13 concerns but also would be a significant incentive for top executives to remain at NetApp in the  
14 competitive Silicon Valley environment. Warmenhoven Decl. ¶ 8. After approximately two  
15 years, the Comp Committee adopted the Plan, effective May 1, 2005. Warmenhoven Decl. ¶ 3.

16           *Power Points*

17           A two-page Power Point presentation was created, highlighting the terms of the Plan.  
18 Warmenhoven Decl. ¶ 3 & Exh. 1 (May 2005 Power Point), ECF 56-3. The Power Point stated  
19 that the Plan provides medical coverage “as a fully-insured plan” to “Retired 16b officers”<sup>2</sup> with a  
20 minimum of five years of service and a minimum age of 50, whose age plus years of service  
21 doubled is equal to or greater than 65. *Id.* The Power Point indicated that the Plan was insured  
22 through the CIGNA HealthCare Open Access Plus plan for Retirees; premiums would be paid by  
23 the company; and participants would be entitled to an “Unlimited lifetime maximum benefit” for  
24 themselves and their families. *Id.* Finally, the Power Point stated that any company acquiring  
25 NetApp would be required to provide the same or equivalent Plan “for the lives of the eligible  
26 employees.” *Id.*

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<sup>2</sup> See Securities and Exchange Act of 1934, § 16(b), 15 U.S.C. § 78p(b).

1 Updated versions of the original May 2005 Power Point were provided to senior executives  
2 as they became eligible to participate in the Plan. *See, e.g.*, Warmenhoven Decl. ¶ 9 & Exh. 4  
3 (March 2014 Power Point), ECF 56-3; Salmon Decl. ¶ 2 & Exh. 1 (August 2009 Power Point),  
4 ECF 56-4; Deenihan Decl. ¶ 2 & Exh. 1 (Undated Power Point), ECF 56-5; Georgens Decl. ¶ 3 &  
5 Exh. 1 (February 2012 Power Point), ECF 56-6; Gerstenberger Decl. ¶ 3 & Exh. 1 (December  
6 2015 Power Point), ECF 56-7; Clifton Decl. ¶ 2 & Exh. 1 (March 2013 Power Point), ECF 56-8.  
7 While all versions of the Power Point indicated that the Plan provides lifetime medical benefits,  
8 some versions stated so expressly: “Plan provides medical benefits for the retiree’s lifetime.”  
9 Georgens Decl. Exh. 1 (February 2012 Power Point), ECF 56-6; Gerstenberger Exh. 1 (December  
10 2015 Power Point), ECF 56-7; Clifton Decl. Exh. 1 (March 2013 Power Point), ECF 56-8. The  
11 parties agreed at the hearing that for purposes of the cross-motions for summary judgment, all the  
12 Power Points may be considered materially identical with respect to the language providing for  
13 lifetime medical benefits.

14 *Insurance Certificates*

15 CIGNA was the original Plan underwriter. Kurose Decl. ¶ 7 & Exh. 5, ECF 73. CIGNA  
16 issued a Certificate of Coverage effective May 1, 2005, the date the Plan took effect, and it  
17 periodically issued new Certificates of Coverage, including for years 2009, 2010, 2011, and 2012.  
18 *See* Kurose Decl. ¶¶ 7-11 & Exhs. 5-9.

19 Effective January 1, 2013, United Healthcare (“UHC”) replaced CIGNA as the Plan  
20 underwriter. Kurose Decl. ¶ 12 & Exh. 10, ECF 73. UHC issued a Certificate of Coverage  
21 effective January 1, 2013, and it issued new Certificates of Coverage for years 2014, 2015, and  
22 2016. Kurose Decl. ¶¶ 10-15 & Exhs. 10-13.

23 The legal significance of these Certificates is disputed by the parties, as discussed below.

24 *Plan Participants*

25 Jeff Allen, who is not a party to this suit, was the only Plan participant from 2005 through  
26 2011. Warmenhoven Decl., ¶¶ 4, 7, ECF 56-3. Plaintiff Steven Gomo, who served as the  
27 company’s Executive Vice President of Finance and Chief Financial Officer from 2004 until his  
28 retirement at the end of 2011, became the second Plan participant to receive benefits, starting in

1 2012. Gomo Decl. ¶¶ 2-3, ECF 56-2. Plaintiff Edward Deenihan, the company’s Senior Vice  
2 President for Global Sales from 2000 to 2003 and Executive Vice President for Global Services  
3 from 2003 until his retirement in September 2013, began receiving Plan benefits in 2013.  
4 Deenihan Decl. ¶¶ 2-4, ECF 56-5. Plaintiff Daniel Warmenhoven, NetApp’s CEO at the time of  
5 his retirement, became a Plan beneficiary in 2014. Warmenhoven Decl. ¶ 9, ECF 56-3. Plaintiff  
6 Tom Georgens, who succeeded Warmenhoven as CEO in 2009 and served in that position until  
7 his retirement, began receiving Plan benefits in 2015. Georgens Decl. ¶ 2, ECF 56-6. Plaintiff  
8 Richard Clifton, an Executive Vice President for Customer Success, began participating in the  
9 Plan upon his retirement in 2015. Clifton Decl. ¶ 2, ECF 56-8. Plaintiff Tom Gerstenberger  
10 became a Plan participant upon his retirement in July 2016. Gerstenberger Decl. ¶ 2, ECF 56-7.

11 Plaintiff Robert Salmon signed a severance agreement with NetApp in 2016 and began  
12 working for another company. Salmon Suppl. Decl. ¶¶ 2-3, ECF 81-2. His severance agreement  
13 provided that he “will receive executive retiree medical benefits.” Salmon Suppl. Decl. Exh. 1.  
14 Salmon has not enrolled in the Plan, and he is receiving medical benefits from his current  
15 employer. Kurose Decl. ¶ 22. He nonetheless claims that he is entitled to lifetime medical  
16 benefits under the Plan. Salmon Suppl. Decl. ¶¶ 2-3.

17 *2016 Amendment to the Plan*

18 In 2016, NetApp amended the Plan effective January 1, 2017, changing it “from a fully-  
19 insured health plan through which benefits were provided under a group health insurance policy to  
20 a self-funded health reimbursement arrangement (‘HRA’) that reimburses eligible retirees’  
21 premium payments for individual insurance covering the retirees and their dependents during the  
22 period from January 1, 2017 through December 31, 2019.” Kurose Decl. ¶ 19 & Exh. 14  
23 (Consolidated Plan and Summary Plan Description), ECF 73. NetApp retained a concierge broker  
24 service to help Plan participants find suitable individual health insurance policies. *Id.* As  
25 amended, the Plan will terminate at the end of 2019, at which time NetApp will provide each  
26 retiree participant a lump sum equal to two years of projected health care premium costs. *Id.*  
27 Under the amended the Plan, NetApp’s obligations to retiree participants will be completed upon  
28 the payment of the lump sum. *Id.* NetApp issued a Consolidated Plan and Summary Plan

1 Description, effective January 1, 2017, memorializing the amendments to the Plan. Kurose Decl.  
2 Exh. 14 (Consolidated Plan and Summary Plan Description), ECF 73.

3 Plaintiffs sue NetApp and the Plan, asserting two claims under ERISA. In Claim 1,  
4 brought under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), Plaintiffs seek a  
5 determination that they are entitled to lifetime medical benefits under the Plan. In Claim 2,  
6 brought under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), Plaintiffs assert that if they are not  
7 entitled to lifetime medical benefits, Defendants breached fiduciary duties by misrepresenting the  
8 terms of the Plan, thus entitling them to equitable relief.

## 9 **II. LEGAL STANDARD**

10 “A party is entitled to summary judgment if the ‘movant shows that there is no genuine  
11 dispute as to any material fact and the movant is entitled to judgment as a matter of law.’” *City of*  
12 *Pomona v. SQM North America Corp.*, 750 F.3d 1036, 1049 (9th Cir. 2014) (quoting Fed. R. Civ.  
13 P. 56(a)). “The moving party initially bears the burden of proving the absence of a genuine issue  
14 of material fact.” *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010).

15 “Where the moving party meets that burden, the burden then shifts to the non-moving  
16 party to designate specific facts demonstrating the existence of genuine issues for trial.” *In re*  
17 *Oracle Corp.*, 627 F.3d at 387. “[T]he non-moving party must come forth with evidence from  
18 which a jury could reasonably render a verdict in the non-moving party’s favor.” *Id.* “The court  
19 must view the evidence in the light most favorable to the nonmovant and draw all reasonable  
20 inferences in the nonmovant’s favor.” *City of Pomona*, 750 F.3d at 1049. “Where the record  
21 taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no  
22 genuine issue for trial.” *Id.* (internal quotation marks and citation omitted).

## 23 **III. DISCUSSION**

24 Before turning to the parties’ substantive arguments, the Court addresses Defendants’  
25 request for judicial notice and Plaintiffs’ evidentiary objections. Next, the Court discusses the  
26 legal requirements for establishment of an ERISA plan. Finally, the Court takes up the parties’  
27 arguments with respect to Claims 1 and 2.

28

1           **A. Defendants’ Request for Judicial Notice / Plaintiffs’ Evidentiary Objections**

2                   **1. Defendants’ Request for Judicial Notice**

3           Defendants have filed a request for judicial notice (“RJN”) of twelve documents. *See*  
4           Defendants’ RJN, ECF 77. Exhibits 1-8 to the RJN are excerpts of SEC filings reflecting Plaintiffs’  
5           compensation. Exhibits 9-11 are excerpts of SEC filings reflecting cost-saving measures  
6           undertaken by NetApp. Exhibit 12 is a fact sheet regarding young adults and the Affordable Care  
7           Act, published online by the United States Department of Labor.

8           Plaintiffs object to the RJN, arguing that all of the documents are irrelevant to the issues  
9           before the Court on the cross-motions and should be excluded under Federal Rule of Evidence  
10          401. Plaintiffs also argue that the documents reflecting their compensation should be excluded as  
11          prejudicial under Federal Rule of Evidence 403.

12          SEC filings and documents published by a government agency generally are subject to  
13          judicial notice. *See Northstar Fin. Advisors Inc. v. Schwab Investments*, 779 F.3d 1036, 1043 (9th  
14          Cir. 2015) (judicial notice of publicly filed SEC documents is proper); *Daniels-Hall v. Nat’l Educ.*  
15          *Ass’n*, 629 F.3d 992, 998-99 (9th Cir. 2010) (granting judicial notice of information contained on a  
16          government website). The documents are relevant to Defendants’ position that the Plan was  
17          terminated in response to changing economic conditions, and they are not unduly prejudicial to  
18          Plaintiffs. Accordingly, Defendants’ request for judicial notice is GRANTED.

19                   **2. Plaintiffs’ Evidentiary Objections**

20          Plaintiffs object to several other documents submitted by Defendants. First, Plaintiffs  
21          object to the expert report of Curtis R. Donley, who has “been retained to provide an opinion on  
22          common practices with respect to documentation for fully-insured employer-sponsored health  
23          plans.” Kang Decl. Exh. 3 (Donley Report) at ¶ 6, ECF 72-3. Mr. Donley also has “been asked to  
24          review certificates of coverages and PowerPoint presentations relating to the Plan and to provide  
25          an opinion about the customary usage of these types of documents” based on his thirty-five years  
26          of experience in the field of employee benefits. *Id.* Plaintiffs contend that Mr. Donley’s opinions  
27          on these topics are excludable under Federal Rule of Evidence 702, because he is being asked to  
28          opine regarding the ultimate legal issue of what Plan documents control. This objection is

1 OVERRULED. Mr. Donley’s opinions as to industry practice are appropriate and within the  
2 scope of his expertise.

3 Plaintiffs also raises a Rule 702 objection to Mr. Donley’s expert rebuttal report on the  
4 basis that it discusses a report of Plaintiffs’ expert which has not been submitted into evidence.  
5 *See* Kang Decl. Exh. 4 (Donley Rebuttal Report), ECF 72-4. This objection is OVERRULED.  
6 The Court will disregard irrelevant portions of the report, if any.

7 Plaintiffs object to statements by Defendants’ witnesses Lesley Kurose and Nancy  
8 Saunders, in which they refer to the Certificates of Coverage as Plan documents. *See* Kurose  
9 Decl. ¶¶ 7-15, ECF 73; Saunders Decl. ¶¶ 3, 11, ECF 74. Lesley Kurose is NetApp’s Senior  
10 Director of Global Benefits, and Nancy Saunders is NetApp’s Vice President of Human  
11 Resources. Both have personal knowledge regarding the manner in which the Certificates of  
12 Coverage were treated by the Benefits and Human Resources departments, i.e., as Plan documents.  
13 These objections are OVERRULED.

14 **B. Welfare Benefit plans**

15 “ERISA was enacted in 1974 to govern the administration of two kinds of employee  
16 benefit plans: welfare benefit plans and pension benefit plans.” *Pisciotta v. Teledyne Indus., Inc.*,  
17 91 F.3d 1326, 1329 (9th Cir. 1996). Pension benefit plans provide retirement income or result in  
18 deferral of income, while welfare benefit plans provide additional benefits such as life insurance  
19 or disability coverage. *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 933 (2015).

20 The parties do not agree on which ERISA provision governs the creation of an ERISA  
21 plan, or what features a document must have in order to qualify as an ERISA plan. Plaintiffs  
22 argue that the relevant statute is 29 U.S.C. § 1002(1), while Defendants argue that 29 U.S.C. §  
23 1102(b) controls. The Court agrees with Defendants that § 1102(b) controls, and it explains below  
24 why Plaintiffs’ reliance on § 1002(1) is misplaced.

25 The Ninth Circuit has held expressly that pursuant to § 1102(b), “ERISA requires that  
26 every employee benefits plan include (1) a procedure for establishing and carrying out a funding  
27 policy, (2) the procedure for the allocation of responsibilities for operation and administration of  
28 the plan, (3) a procedure for amending the plan and the identity of persons with the authority to do

1 so, and (4) the basis on which payments are made to and from the plan.” *Mull for Mull v. Motion*  
2 *Picture Indus. Health Plan*, 865 F.3d 1207, 1209 (9th Cir. 2017) (citing 29 U.S.C. § 1102(b)); *see*  
3 *also Cinelli*, 61 F.3d at 1441 (9th Cir. 1995) (listing same four requirements for ERISA plan). A  
4 document that does not meet all four requirements does not constitute an ERISA plan. *Mull*, 865  
5 F.3d at 1209-10. However, an ERISA plan may be comprised of two documents that together  
6 meet the four requirements of § 1102(b). *Id.*

7 “Unlike pension plans, welfare plans are not subject to the vesting requirements of  
8 ERISA.” *Cinelli*, 61 F.3d at 1441. “Because benefits under a welfare plan are generally neither  
9 vested nor accrued, an employer may amend or terminate benefits pursuant to the terms of the plan  
10 at any time.” *Id.* “It is accepted, however, that the parties may themselves set out by agreement or  
11 by private design, as set out in plan documents, whether retiree welfare benefits vest, or whether  
12 they may be terminated.” *Id.* (internal quotation marks and citation omitted). “A contractual  
13 agreement for vesting of benefits must be found in the plan documents.” *Id.*

14 **C. Claim 1 for Benefits under the Plan**

15 In Claim 1, Plaintiffs seek a determination that they have a vested right in lifetime medical  
16 benefits under the Plan. The claim is brought under ERISA section 502(a)(1)(B), which  
17 authorizes a plan participant or beneficiary to bring a civil action “to recover benefits due to him  
18 under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights  
19 to future benefits under the terms of the plan.” 29 U.S.C. § 1132(a)(1)(B). Both sides seek  
20 summary judgment on this claim.

21 **1. The Plan Documents**

22 In order to determine whether the Plan documents contain a contractual agreement for  
23 vesting of lifetime medical benefits, the Court must identify the Plan documents. Plaintiffs argue  
24 that the Power Points constitute the Plan. Defendants argue that the Certificates of Coverage  
25 constitute the Plan.

26 **a. Power Points**

27 The Court first considers whether the Power Points qualify as Plan documents. They are  
28 missing at least two of the four required elements under 29 U.S.C. § 1102(b), as they do not



1 address allocation of responsibilities for operation and administration of the Plan, nor do they  
2 disclose the procedure for amending the Plan and the identity of persons with authority to amend.  
3 *See Mull*, 865 F.3d at 1209; *see also* 29 U.S.C. § 1102(b). In *Mull*, the Ninth Circuit found that a  
4 Trust Agreement meeting three of the four requirements did not qualify as an ERISA plan because  
5 it did not meet the fourth requirement. *Mull* 865 F.3d at 1209. Similarly, in *Cinelli*, the Ninth  
6 Circuit found that the “Security Pacific Board Resolution” and the “Flamson letter” did not qualify  
7 as plan documents under ERISA because they “contained no information on amendment  
8 procedures” and did not “describe a procedure for plan operation and administration.” *Cinelli*, 61  
9 F.3d at 1442. For the same reasons, this Court concludes that the Power Points are not the Plan.

10 Plaintiffs do not contend that the Power Points meet the § 1102(b) requirements for an  
11 ERISA plan. Instead, they argue that § 1102(b) – titled “Requisite features of plan” – is irrelevant  
12 to determining the requisite features of a plan. According to Plaintiffs, a document need only have  
13 the features described in 29 U.S.C. § 1002 – titled “Definitions” – in order to constitute an ERISA  
14 plan. Under § 1002, the term “employee welfare benefit plan” is defined to “mean any plan, fund,  
15 or program which was heretofore or is hereafter established or maintained by an employer or by an  
16 employee organization, or by both, to the extent that such plan, fund, or program was established  
17 or is maintained for the purpose of providing for its participants or their beneficiaries, through the  
18 purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits. . . .” 29  
19 U.S.C. § 1002(1). Based on that statutory definition, Plaintiffs argue that a document qualifies as  
20 an ERISA plan if it is: (1) a plan, fund or program (2) established (3) by an employer (4) for  
21 purposes of providing medical benefits (5) to participants or their beneficiaries. *See* Pls.’ Reply at  
22 2, ECF 81.

23 Plaintiffs’ argument is contrary to the Ninth Circuit’s holdings in *Mull* and *Cinelli*,  
24 discussed above. Plaintiffs rely primarily on Eleventh Circuit case, *Donovan v. Dillingham*, 688  
25 F.2d 1367 (11th Cir. 1982). *Donovan* held that “a ‘plan, fund, or program’ under ERISA is  
26 established if from the surrounding circumstances a reasonable person can ascertain the intended  
27 benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits.”  
28 *Id.* at 1373. The Court does not find the citation to *Donovan* persuasive in the face of more recent

1 Ninth Circuit authority to the contrary. This is particularly true given the Ninth Circuit’s  
2 observation in *Cinelli* that “*Donovan* is limited to instances where a formal plan is absent and the  
3 question remains whether a de facto plan has been created.” *Cinelli v. Sec. Pac. Corp.*, 61 F.3d at  
4 1443. In the present case, the parties agree that there is a formal ERISA plan – the dispute is what  
5 documents constitute the Plan. Accordingly, *Donovan* does not apply.

6 Plaintiffs argue that “[t]he Ninth Circuit has adopted the *Donovan v. Dillingham* standard,”  
7 citing *Golden Gate Rest. Ass’n v. City & Cty. of San Francisco*, 546 F.3d 639, 651 (9th Cir. 2008).  
8 See Pls.’ Reply at 2, ECF 81. In *Golden Gate*, the Ninth Circuit observed that it had relied on the  
9 *Donovan* criteria in three cases, including *Scott v. Gulf Oil Corp.*, 754 F.2d 1499 (9th Cir.1985),  
10 another case upon which Plaintiffs rely in their briefing. The Ninth Circuit stated in *Golden Gate*  
11 that, “In *Scott*, we relied on the criteria set forth in *Donovan* to hold that an agreement to provide  
12 severance pay to terminated employees at a rate of two weeks’ salary for each year of employment  
13 was sufficient to establish an ERISA plan.” *Golden Gate*, 546 F.3d at 652. However, the Ninth  
14 Circuit opined that “[t]he outcome of *Scott* is almost certainly no longer good law in light of the  
15 Supreme Court’s subsequent decisions. . . .” *Id.* The Ninth Circuit observed that in another case,  
16 *Winterrowd v. American General Annuity Ins. Co.*, 321 F.3d 933 (9th Cir. 2003), it held that  
17 “satisfying the *Donovan* criteria was a necessary but not sufficient condition for the creation of an  
18 ERISA plan.” *Golden Gate*, 546 F.3d at 652. Nothing in the *Golden Gate* decision suggests that  
19 *Donovan* is controlling here.

20 Plaintiffs rely heavily on another out-of-circuit case, *Deboard v. Sunshine Min. & Ref. Co.*,  
21 208 F.3d 1228 (10th Cir. 2000). In *Deboard*, the Tenth Circuit found that letters from the  
22 employer to employees offering a lifetime guarantee of insurance benefits, “satisfied the minimum  
23 requirements for establishing an ERISA plan.” *Id.* at 1238. *Deboard* might appear persuasive at  
24 first blush given that the plaintiffs in that case, like Plaintiffs here, asserted that informal  
25 documents constituted an ERISA plan with vested lifetime insurance benefits. However, upon  
26 closer examination it is clear that *Deboard* is distinguishable from the present case.

27 In *Deboard*, the employer sent its employees letters offering a lifetime guarantee of  
28 insurance benefits to those persons who took voluntary early retirement. *Deboard*, 208 F.3d at

1 1232-34. Based upon the representations in the letters, the plaintiffs voluntarily retired. *Id.* at  
2 1233-34. The employer subsequently discontinued payment of insurance premiums on behalf of  
3 the plaintiffs, stating that the plaintiffs must pay future premiums in order to retain insurance  
4 coverage. *Id.* at 1234. The plaintiffs filed suit under ERISA, and the district court granted them  
5 partial summary judgment based on its conclusion that the employer’s letters created a new  
6 welfare benefit plan under ERISA. *Id.* at 1237.

7 The Tenth Circuit agreed, finding that the “letters satisfied the minimum requirements for  
8 establishing an ERISA plan.” *Id.* at 1238. That conclusion was based in part on the Tenth  
9 Circuit’s observations that “[n]ot only did the letters specify a funding mechanism for the plan  
10 (i.e., that Woods would pay the health insurance premiums), they also allocated ongoing  
11 operational and administrative responsibilities to the employer.” *Id.* at 1238-39. Those are, nearly  
12 verbatim, two of the requirements for establishment of an ERISA plan under 29 U.S.C. § 1102(b),  
13 as recited by *Mull* and *Cinelli*. The Tenth Circuit’s articulation of those criteria therefore does  
14 little to convince this Court that reliance on *Mull* and *Cinelli* is in error.

15 The *Deboard* court found that the letters standing alone established a new plan, and that  
16 the employer’s assertion that its pre-existing welfare benefit plan applied was unsupported by the  
17 record. *See Deboard*, 208 F.3d at 1238. In the present case, however, the Power Points standing  
18 alone do not satisfy the requirements of an ERISA plan, and the record evidence establishes that  
19 the Power Points expressly referenced the CIGNA and UHC policies as the source of benefits.  
20 Finally, there is no evidence that Plaintiffs in the present case traded early retirement for coverage  
21 under the plan, as in *Deboard*. These significant factual differences distinguish *Deboard* from the  
22 present case. This Court concludes that, applying the Ninth Circuit standards articulated in *Mull*  
23 and *Cinelli* to the facts presented here, the Power Points are not the Plan. The Power Points are  
24 merely informal documents that summarized benefits then being offered under the Plan.

25 **b. Certificates of Coverage**

26 The Court next considers whether the Certificates of Coverage qualify as Plan documents.  
27 Again, the elements required to establish an ERISA plan are “(1) a procedure for establishing and  
28 carrying out a funding policy, (2) the procedure for the allocation of responsibilities for operation

1 and administration of the plan, (3) a procedure for amending the plan and the identity of persons  
2 with the authority to do so, and (4) the basis on which payments are made to and from the plan.”  
3 *Mull*, 865 F.3d at 1209 (citing 29 U.S.C. § 1102(b)).

4 The CIGNA and UHC Certificates satisfy all four requirements.<sup>3</sup> With respect to the first  
5 and fourth elements, the Certificates provide a procedure for establishing and carrying out a  
6 funding policy, and specify the basis on which payments are made to and from the Plan. Each of  
7 the CIGNA Certificates “certifies that it insures certain Retirees for the benefits provided by the  
8 following policy(s).” Kurose Decl. Exh. 5 (CIGNA 2005 Certificate) at NETAPP 42; Exh. 6  
9 (CIGNA 2009 Certificate) at NETAPP 106; Exh. 7 (CIGNA 2010 Certificate) at NETAPP 176;  
10 Exh. 8 (CIGNA 2011 Certificate) at NETAPP 248; Exh. 9 (CIGNA 2012 Certificate) at NETAPP  
11 317, ECF 73. The UHC Certificates explain that benefits are provided pursuant to identified  
12 policies obtained by NetApp from UHC. *See* Kurose Decl. Exh. 10 (UHC 2013 Certificate) at  
13 NETAPP 554; Exh. 11 (UHC 2014 Certificate) at NETAPP 718; Exh. 12 (UHC 2015 Certificate)  
14 at NETAPP 885; Exh. 13 (UHC 2016 Certificate) at NETAPP 926.

15 As Plaintiffs point out, the CIGNA Certificates incorrectly state that the cost of the Plan is  
16 shared by the employee and the employer, when in fact the cost of the Plan is paid solely by  
17 NetApp. *See* Kurose Decl. Exh. 5 (CIGNA 2005 Certificate) at NETAPP 59; Exh. 6 (CIGNA  
18 2009 Certificate) at NETAPP 58; Exh. 7 (CIGNA 2010 Certificate) at NETAPP 60; Exh. 8  
19 (CIGNA 2011 Certificate) at NETAPP 58; Exh. 9 (CIGNA 2012 Certificate) at NETAPP 59, ECF  
20 73. The UHC Certificates also state that the employee must pay a portion of the Plan costs. *See*  
21 Kurose Decl. Exh. 10 (UHC 2013 Certificate) at NETAPP 418; Exh. 11 (UHC 2014 Certificate) at  
22 NETAPP 597; Exh. 12 (UHC 2015 Certificate) at NETAPP 762; Exh. 13 (UHC 2016 Certificate)  
23 at NETAPP 928. The Court agrees with Defendants that this inconsistency is immaterial. There

24 \_\_\_\_\_  
25 <sup>3</sup> Plaintiffs argue that the CIGNA Certificates are irrelevant here because none of the Plaintiffs  
26 began participating in the Plan while CIGNA was the insurer. However, Plaintiff Gomo entered  
27 the plan in 2012 following his retirement at the end of 2011. *See* Gomo Decl. ¶¶ 3-5, ECF 56-2.  
28 CIGNA provided the Plan benefits for 2012, and it was not replaced by UHC until 2013. *See*  
Kurose Decl. Exh 9 (CIGNA 2012 Certificate), Exh. 10 (UHC 2013 Certificate), ECF 73.  
Moreover, the fact that the CIGNA 2005 Certificate was issued contemporaneously with the May  
2005 creation of the Plan supports Defendants’ position that the Certificates are the Plan  
documents.

1 is no dispute that NetApp and all Plan participants understood that the Plan was fully insured  
2 through coverage purchased first from CIGNA and later from UHC. Plaintiffs do not contend that  
3 the erroneous statements regarding employee responsibility for costs led to confusion as to  
4 whether Plan participants actually had to pay costs.

5 With respect to the second element, the Certificates describe allocation of responsibilities  
6 for operation and administration of the Plan. The CIGNA Certificates identify NetApp as the Plan  
7 sponsor and NetApp’s Chief Legal Counsel as the Plan administrator, and include a section on  
8 “Discretionary Authority” delegating to CIGNA responsibility for determining eligibility for  
9 benefits and resolving claims. Kurose Decl. Exh. 5 (CIGNA 2005 Certificate) at NETAPP 92-93;  
10 Exh. 6 (CIGNA 2009 Certificate) at NETAPP 159-60; Exh. 7 (CIGNA 2010 Certificate) at  
11 NETAPP 231-32; Exh. 8 (CIGNA 2011 Certificate) at NETAPP 301-03; Exh. 9 (CIGNA 2012  
12 Certificate) at NETAPP 371-72, ECF 73. Most of the UHC Certificates similarly identify NetApp  
13 as the Plan sponsor and Plan administrator, and delegate to UHC the responsibility for claims  
14 processing, claims payment, and handling appeals. *See* Kurose Decl. Exh. 10 (UHC 2013  
15 Certificate) at NETAPP 554; Exh. 11 (UHC 2014 Certificate) at NETAPP 718; Exh. 12 (UHC  
16 2015 Certificate) at NETAPP 885. The UHC 2016 Certificate does not identify NetApp by name  
17 as the Plan sponsor and Plan administrator, but it makes clear that the “Enrolling Group” is  
18 responsible for enrollment in the plan and payment to UHC, while UHC is responsible for claims  
19 processing. *See* Kurose Decl. Exh. 13 (UHC 2016 Certificate) at NETAPP 984-86.

20 Finally, with respect to the third element, the Certificates explain how the Plan may be  
21 amended and identify persons with the authority to do so. The CIGNA Certificates provide that:  
22 “The Employer as Plan Sponsor reserves the right to, at any time, change or terminate benefits  
23 under the Plan, to change or terminate the eligibility of classes of employees to be covered by the  
24 Plan, to amend or eliminate any other plan term or condition, and to terminate the whole plan or  
25 any part of it.” Kurose Decl. Exh. 5 (CIGNA 2005 Certificate) at NETAPP 92; Exh. 6 (CIGNA  
26 2009 Certificate) at NETAPP 302; Exh. 7 (CIGNA 2010 Certificate) at NETAPP 231; Exh. 8  
27 (CIGNA 2011 Certificate) at NETAPP 302; Exh. 9 (CIGNA 2012 Certificate) at NETAPP 371,  
28 ECF 73. The UHC Certificates contain similar provisions permitting amendment or termination

1 of the Plan. *See* Kurose Decl. Exh. 10 (UHC 2013 Certificate) at NETAPP 473 (“To the extent  
2 permitted by law we reserve the right, in our sole discretion and without your approval, to change,  
3 interpret, modify, withdraw or add Benefits or terminate the Policy.”); Exh. 11 (UHC 2014  
4 Certificate) at NETAPP 719 (“Your employer, as the Plan Sponsor, has the right to amend or  
5 terminate this Plan at any time.”); Exh. 12 (UHC 2015 Certificate) at NETAPP 886 (“Your  
6 employer, as the Plan Sponsor, has the right to amend or terminate this Plan at any time.”); Exh.  
7 13 (UHC 2016 Certificate) at NETAPP 986 (“To the extent permitted by law, we reserve the right  
8 to change, modify, withdraw or add Benefits or terminate the Policy.”).

9 Plaintiffs argue that the Certificates cannot be the Plan documents because the titles of the  
10 plans referenced in the Certificates do not match the title of the Plan at issue here. For example,  
11 the CIGNA 2005 Certificate of Coverage refers to both the “Open Access Plus Medical Benefits  
12 Retiree Medical Plan” and the “Network Appliance Inc Group Welfare Plan.” *See* Kurose Decl.  
13 Exh. 5 (CIGNA 2005 Certificate) at NETAPP 34, 91. As Defendants point out, the Power Points  
14 themselves were inconsistent with respect to the Plan name, although those differences were more  
15 minor than the differences between the Plan names in the Power Points and the Plan names in the  
16 Certificates. *See, e.g.*, Warmenhoven Decl. Exh. 1 (May 2005 Power Point) (“Executive  
17 Retirement Medical Plan”), ECF 56-3; Warmenhoven Decl. Exh. 4 (March 2014 Power Point)  
18 (“Executive Medical Retirement Plan”), ECF 56-3; Salmon Decl. Exh. 1 (August 2009 Power  
19 Point) (“Executive Retiree Medical Plan”), ECF 56-4. Moreover, the original May 2005 Power  
20 Point expressly referenced the “Open Access Plus Medical Benefits Retiree Medical Plan” named  
21 in the CIGNA 2005 Certificate. *See* Warmenhoven Decl. Exh. 1 (May 2005 Power Point), ECF  
22 56-3; Kurose Decl. Exh. 5 (CIGNA 2005 Certificate) at NETAPP 34. All of the Power Points  
23 indicated that the Plan was fully insured, and specified the insurer as either CIGNA or UHC.  
24 Accordingly, the fact that the CIGNA and UHC Certificates did not accurately reflect the name of  
25 the Plan is immaterial.

26 Plaintiffs contend that the Certificates contain boilerplate provisions that do not apply to  
27 the unique Plan offered to NetApp’s most senior executives. While the Certificates do reference  
28 many circumstances that would not be expected to apply to senior executives – for example, a

1 beneficiary's military leave of absence – Defendants note that the Plan covers not only senior  
2 executives, but also their dependents, to whom such provisions may apply.

3 To the extent Plaintiffs contend that the CIGNA and UHC Certificates are completely  
4 unrelated to the Plan, and relate instead to policies covering the general NetApp workforce, that  
5 contention is belied by the record. Nancy Saunders, NetApp's Vice President of Human  
6 Resource, testified that NetApp did not purchase insurance coverage for its general workforce, and  
7 that the plan applicable to the general workforce is self-funded. Saunders Dep. 114:3-7, Kang.  
8 Suppl. Decl. Exh. 1, ECF 83-1. Ms. Saunders testified that the Certificates reflect the insurance  
9 coverage purchased specifically to provide benefits under the Plan. *Id.* Ms. Saunders also stated  
10 in her declaration and supplemental declaration that the Certificates were provided by CIGNA and  
11 UHC in connection with the Plan and were treated by NetApp as the Plan documents. Saunders  
12 Decl. ¶ 3, ECF 74; Saunders Suppl. Decl. ¶¶ 2-3, ECF 84.

13 The Court is satisfied that the Certificates are the source of benefits under the Plan, that the  
14 Certificates meet the requirements for an ERISA plan, and that the inconsistencies pointed out by  
15 Plaintiffs are immaterial.

16 **2. No Vested Right to Lifetime Benefits**

17 The Court's determination that the Certificates are the Plan documents is fatal to Plaintiffs'  
18 claim that they have a vested right to lifetime medical benefits. As discussed above, welfare  
19 benefit plans generally may be amended or terminated at any time. *See Cinelli*, 61 F.3d at 1441.  
20 While an employer may provide for vesting of benefits in plan documents, there is no provision in  
21 the Certificates guaranteeing lifetime medical benefits for Plan participants. To the contrary, the  
22 Certificates contain express provisions permitting amendment or termination. *See* Kurose Decl.  
23 Exh. 5 (CIGNA 2005 Certificate); Exh. 6 (CIGNA 2009 Certificate); Exh. 7 (CIGNA 2010  
24 Certificate); Exh. 8 (CIGNA 2011 Certificate); Exh. 9 (CIGNA 2012 Certificate); Exh. 10 (UHC  
25 2013 Certificate); Exh. 11 (UHC 2014 Certificate); Exh. 12 (UHC 2015 Certificate); Exh. 13  
26 (UHC 2016 Certificate), ECF 73.

27 Plaintiffs argue that Defendants cannot establish that they reserved the right to terminate  
28 the Plan, because Defendants never prepared and distributed a Summary Plan Description

1 reflecting such reservation of rights. Under ERISA, “an employer must provide employees with a  
2 written Summary Plan Description (“SPD”) which describes the employees’ plan.” *Pisciotta*, 91  
3 F.3d at 1329. Plaintiffs have it backward. Defendants do not need to establish that they reserved  
4 the right to terminate the Plan – under the law, the default is that an employer may terminate a  
5 welfare benefit plan at any time. *See Cinelli*, 61 F.3d at 1441. It is Plaintiffs who need to  
6 establish the existence of a contractual agreement for vesting of benefits in the plan documents.  
7 *See id.* As discussed above, Plaintiffs have not done so. The Court concludes that the provision of  
8 “lifetime” benefits, without more, is not a clear disavowal of Defendants’ express reservation of  
9 the right to change or terminate benefits at any time set forth in the Plan documents.

10 The Court notes that Defendants contend that the Certificates were both the Plan and the  
11 SPD. Defendants submit the testimony of Ms. Saunders that the Certificates served as the SPD.  
12 Saunders Dep. 128:7-14, Kang Decl. Exh. 9, ECF 72. They also submit the opinion of their  
13 industry expert, Curtis R. Donley, that “it is considered common within the industry in fully-  
14 insured benefit arrangements for the insurer’s certificate of coverage to serve as the plan sponsor’s  
15 written plan document and summary plan description for a ‘welfare benefit plan.’” Donley Report  
16 ¶ 9, Kang Decl. Exh. 3, ECF 72. The Court need not determine whether the Certificates constitute  
17 the SPD for purposes of adjudicating the parties’ motions with respect to Claim 1. Even if  
18 Defendants failed to provide a SPD, such failure would not result in the substantive relief sought  
19 by Plaintiffs. As the Ninth Circuit held in *Pisciotta*: “Nor does the fact that Teledyne failed to  
20 produce a SPD to the district court for the time period between 1977 to 1987 mean that Appellants  
21 are entitled to lifetime medical benefits. Any ERISA claimant who suffers because of a  
22 fiduciary’s failure to comply with ERISA’s procedural requirements is ordinarily not entitled to a  
23 substantive remedy such as the retroactive reinstatement of benefits.” *Pisciotta*, 91 F.3d at 1330.

24 Defendants have established that the Plan did not create a vested interest in lifetime  
25 medical benefits and did not restrict Defendants’ ability to amend or terminate the Plan, thereby  
26 demonstrating their entitlement to summary judgment on Claim 1. Plaintiffs have failed to show  
27 the existence of any disputed facts that would preclude summary judgment for Defendants on  
28 Claim 1. Accordingly, Defendants’ motion for summary judgment is GRANTED as to Claim 1



1 and Plaintiffs’ motion for summary judgment is DENIED as to Claim 1.

2 **D. Claim 2 for Breach of Fiduciary Duties**

3 In Claim 2, Plaintiffs contend that NetApp breached its fiduciary duties “[b]y falsely  
4 representing the nature of benefits to be provided by [the Plan] if, in fact, they were not lifetime  
5 benefits but were subject to amendment or cancellation at the whim of the employer, NetApp.”  
6 Compl. ¶ 24. Plaintiffs seek equitable relief for this alleged breach. The claim is brought under  
7 ERISA § 502(a)(3), which authorizes a plan participant or beneficiary to bring a civil action “(A)  
8 to enjoin any act or practice which violates any provision of this subchapter or the terms of the  
9 plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to  
10 enforce any provisions of this subchapter or the terms of the plan.” 29 U.S.C. § 1132(a)(3).

11 Both sides seek summary judgment on this claim. The Court first discusses the applicable  
12 legal standards, and then it turns to the parties’ arguments.

13 **1. Breach of Fiduciary Duties under § 1132(a)(3)**

14 In order to prevail on a claim under § 1132(a)(3), “a plaintiff who is a participant,  
15 beneficiary, or fiduciary must prove both (1) that there is a remediable wrong, i.e., that the  
16 plaintiff seeks relief to redress a violation of ERISA or the terms of a plan; and (2) that the relief  
17 sought is appropriate equitable relief.” *Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 954  
18 (9th Cir. 2014) (internal quotation marks and citations omitted).

19 In *CIGNA Corp. v. Amara*, the Supreme Court identified three types of such traditional  
20 equitable remedies that may be available under § 1132(a)(3): reformation, equitable estoppel, and  
21 surcharge. 563 U.S. 421, 440-42 (2011). The Ninth Circuit discussed the three remedies and  
22 offered additional guidance in *Gabriel*. See *Gabriel*, 773 F.3d at 955-58. The Ninth Circuit  
23 observed that the Supreme Court has drawn heavily on trust law doctrine in interpreting ERISA,  
24 likening the ERISA plan fiduciary to a trustee and the ERISA plan to a trust. *Id.* at 954-55.

25 “First, appropriate equitable relief may include the reformation of the terms of the plan, in  
26 order to remedy the false or misleading information provided by a plan fiduciary.” *Gabriel*, 773  
27 F.3d at 955 (internal quotation marks and citation omitted). “The power to reform contracts is  
28 available only in the event of mistake or fraud.” *Id.* “A plaintiff may obtain reformation based on

1 mistake in two circumstances: (1) if there is evidence that a mistake of fact or law affected the  
2 terms of a trust instrument and if there is evidence of the settlor's true intent; or (2) if both parties  
3 to a contract were mistaken about the content or effect of the contract and the contract must be  
4 reformed to capture the terms upon which the parties had a meeting of the minds." *Id.* (internal  
5 quotation marks, citation, and alterations omitted). "Under a fraud theory, a plaintiff may obtain  
6 reformation when either (1) a trust was procured by wrongful conduct, such as undue influence,  
7 duress, or fraud, or (2) a party's assent to a contract was induced by the other party's  
8 misrepresentations as to the terms or effect of the contract and he was justified in relying on the  
9 other party's misrepresentations." *Id.*

10 "Second, appropriate equitable relief may include the remedy of equitable estoppel, which  
11 holds the fiduciary to what it had promised and operates to place the person entitled to its benefit  
12 in the same position he would have been in had the representations been true." *Gabriel*, 773 F.3d  
13 at 955 (internal quotation marks and citation omitted). "Under this theory of relief: (1) the party  
14 to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must  
15 so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must  
16 be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury." *Id.*  
17 (internal quotation marks and citation omitted). "[T]o maintain a federal equitable estoppel claim  
18 in the ERISA context, the party asserting estoppel must not only meet the traditional equitable  
19 estoppel requirements, but must also allege: (1) extraordinary circumstances; (2) that the  
20 provisions of the plan at issue were ambiguous such that reasonable persons could disagree as to  
21 their meaning or effect; and (3) that the representations made about the plan were an interpretation  
22 of the plan, not an amendment or modification of the plan." *Id.* at 957.

23 "Third, appropriate equitable relief also includes surcharge," that is, "monetary  
24 'compensation' for a loss resulting from a trustee's breach of duty, or to prevent the trustee's  
25 unjust enrichment." *Gabriel*, 773 at 957 (internal quotation marks and citation omitted). "[T]o  
26 obtain relief by surcharge for a breach of the ERISA trustee's duties, a plan participant or  
27 beneficiary must show that the violation injured him or her, but need only show harm and  
28 causation, not detrimental reliance." *Id.* at 957-58.



1 plan such as the one at issue here, the Court concludes that the Plan is not a top-hat plan.

2 Defendants therefore are not entitled to summary judgment based on their theory that the  
3 Plan is a top-hat plan.

4 **3. Remediable Wrong**

5 Turning to the elements of Plaintiffs' claim under § 1132(a)(3), the first element is a  
6 "remediable wrong," that is, "a violation of ERISA or the terms of a plan." *Gabriel*, 773 F.3d at  
7 954. Claim 2 of the complaint identifies ERISA section 404(a)(1) as the provision that was  
8 violated. Compl. ¶ 24. Section 404(a)(1) provides that "a fiduciary shall discharge his duties  
9 with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C.A. §  
10 1104(a). Plaintiffs allege that Defendants breached that provision by "falsely representing the  
11 nature of benefits to be provided." Compl. ¶ 24. In their motion, Plaintiffs assert that NetApp  
12 breached its fiduciary duties when "[f]or over 11 years NetApp repeatedly promised lifetime  
13 medical benefits." Pls.' Motion at 17, ECF 56.

14 Defendants argue that Plaintiffs cannot establish a breach of fiduciary duties based on this  
15 theory. The evidence in the record shows that NetApp initially intended to provide lifetime  
16 medical benefits to Plan participants. That intent was evidenced by the Power Points discussed at  
17 length above, as well as contemporaneous SEC filings stating that NetApp was providing lifetime  
18 medical benefits to qualifying executives as a method to retain senior executives. *See* Martin  
19 Decl. ¶¶ 11-17 & Exhs. 10-16, ECF 56-1. Defendants present evidence that providing lifetime  
20 medical benefits seemed feasible for the first several years – in fiscal year 2011 the projected  
21 liabilities for the Plan were only \$5.5 million. *See* Saunders Decl. Exh. 10 at NETAPP 1964, ECF  
22 68-12. As more senior executives eligible to participate in the Plan retired, the projected liabilities  
23 for the Plan increased. *See id.* By the end of 2016, the Plan had a projected future liability of  
24 approximately \$26 million. *Id.* During the same time frame, NetApp announced that it would lay  
25 off 500 employees. Defs.' RJN Exh. 9, ECF 77. NetApp was "under incredible pressure from  
26 [its] shareholders to reduce the cost structure of the company." Kurian Dep. 58:5-7, Kang Decl.  
27 Exh. 12, ECF 72-12. NetApp "looked at every conceivable aspect of the company" to try to  
28 reduce costs. *Id.* 58:20-22. At an August 2016 meeting, NetApp announced that the Plan would

1 have to be amended, and ultimately terminated, due to escalating liabilities. Saunders Decl. ¶ 16,  
2 ECF 74.

3 An employer's honest statements of present intention to provide benefits at a particular  
4 level do not give rise to liability for breach of fiduciary duties, simply because the employer later  
5 changes the benefits. *See Frahm v. Equitable Life Assur. Soc. of U.S.*, 137 F.3d 955, 960 (7th Cir.  
6 1998) (no breach of fiduciary duty where employer "did not set out to deceive or disadvantage  
7 plan participants"). Plaintiffs have not submitted any evidence, and none appears in the record,  
8 suggesting that NetApp did not intend to provide lifetime medical benefits under the Plan when it  
9 was adopted. NetApp's decision to terminate the Plan more than a decade later does not render its  
10 earlier conduct fraudulent.

11 The cases cited by Plaintiffs do not hold to the contrary. In *Amara*, the district court  
12 determined that the employer failed to give plan participants notice of changes in their benefits, in  
13 violation of its fiduciary obligations. *Amara*, 563 U.S. at 425. The question on appeal was  
14 whether ERISA authorized the form of relief granted by the district court. *Id.* The Supreme Court  
15 held that it did not, but it articulated three forms of equitable relief available for breach of  
16 fiduciary duties under ERISA: reformation, equitable estoppel, and surcharge. *Amara*, 563 U.S.  
17 at 440-42. In *Mathews v. Chevron Corp.*, 362 F.3d 1172, 1184 (9th Cir. 2004), a breach of  
18 fiduciary duty was found when the employer communicated misinformation that induced the  
19 plaintiffs to retire. Here, Plaintiffs have not presented evidence of a breach of fiduciary duties.

20 To the extent Plaintiffs argue that Defendants breached fiduciary duties by failing to  
21 disclose their authority to amend or terminate the Plan, such argument is not supported by this  
22 record. At least some of the Plan participants supervised the creation of the Plan. All of the Plan  
23 participants were sophisticated senior executives who served NetApp as CEOs, CFOs, or  
24 executive Vice Presidents. The Power Points clearly stated that the Plan was fully insured and  
25 referenced either CIGNA or UHC as the insurer. Plaintiffs therefore were on notice that their  
26 benefits were governed by insurance documents, and they do not dispute that insurance documents  
27 were available for their review at any time. As the Ninth Circuit held in *Pisciotta*, a reservation of  
28 rights contained in the Plan document is effective if the document was available for review by any

1 employee who wished to see it. *Pisciotta*, 91 F.3d at 1331. It is implausible to suggest that the  
2 CEO, CFO, and senior Vice Presidents could not review the documents upon request and  
3 Plaintiffs do not argue to the contrary.

4 In fact, it is undisputed that Plaintiffs were provided with a “retirement package” which  
5 generally included the Certificates of Coverage. Saunders Decl. ¶ 5, ECF 74. Plaintiffs concede  
6 in their reply brief that “upon nearing retirement they were provided a plethora of paperwork  
7 which often included the UHC Certificates.” Pls.’ Reply at 8, ECF 81. As discussed above, the  
8 Certificates contained unambiguous language granting Defendants authority to modify or  
9 terminate the Plan. On this record, no reasonable trier of fact could conclude that NetApp misled  
10 Plaintiffs – sophisticated individuals who held the most senior executive positions at the company  
11 – regarding the nature of the benefits offered under the Plan.

12 Defendants have demonstrated that Plaintiff cannot show a remediable wrong, and  
13 Plaintiffs have not presented evidence sufficient to create disputed facts. Accordingly,  
14 Defendants’ motion for summary judgment is GRANTED as to Claim 2 and Plaintiffs’ motion for  
15 summary judgment is DENIED as to Claim 2.

16 **4. Appropriate Equitable Relief**

17 Having concluded that Defendants are entitled to summary judgment based on lack of  
18 evidence of a remediable wrong, the Court need not address the parties’ arguments regarding  
19 appropriate equitable relief for such wrong.

20 **5. Plaintiff Salmon’s Standing**

21 Similarly, the Court need not determine whether Plaintiff Salmon has standing to sue, as  
22 even if he does have standing Defendants are entitled to summary judgment. The Court observes,  
23 however, that a § 1132(a)(3) claim may be brought by “a plaintiff who is a participant,  
24 beneficiary, or fiduciary” of the Plan. *Gabriel*, 773 F.3d at 954. It appears that Salmon is eligible  
25 to become a Plan participant or beneficiary based on the language of his severance agreement  
26 providing that he “will receive executive retiree medical benefits.” Salmon Suppl. Decl. Exh. 1.  
27 However, Salmon has not enrolled in the Plan. Kurose Decl. ¶ 22. He therefore is not a Plan  
28 participant or beneficiary. He does not contend that he is a Plan fiduciary. Because Salmon is not

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a participant, beneficiary, or fiduciary under the Plan, he lacks standing to proceed, and summary judgment against him is warranted on that basis as well.

**IV. ORDER**

Defendants’ motion for summary judgment is GRANTED, and Plaintiffs’ motion for summary judgment is DENIED.

Dated: September 9, 2019

  
BETH LABSON FREEMAN  
United States District Judge