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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AVERY ARMANI,)	CV 17-07814-RSWL-FFM
)	
Plaintiff,)	
)	ORDER re: Plaintiff's
v.)	Motion to Dismiss
)	Defendant's Counter-
)	Complaint [13]
)	
NORTHWESTERN MUTUAL LIFE)	
INSURANCE COMPANY, a)	
corporation; DOES 1 through)	
10,)	
)	
Defendants.)	
)	
)	

Currently before the Court is Plaintiff/Counter Defendant Avery Armani's ("Plaintiff") Motion to Dismiss Defendant/Counter-Claimant Northwestern Mutual Life Insurance Company's ("Defendant") Counter-Complaint ("Motion") [13]. Having reviewed all papers submitted pertaining to this Motion, the Court **NOW FINDS AND RULES AS FOLLOWS:** the Court **DENIES** Plaintiff's Motion.

1 I. BACKGROUND

2 A. Factual Background

3 Plaintiff began working full time at Renaissance
4 Insurance Agency, Inc. ("Renaissance") as a controller
5 in November 2008. Def.'s Countercl. Against Pl.
6 ("Countercl.") ¶ 6, ECF No. 10. Renaissance had an
7 "employee welfare benefit plan," which included a long
8 term disability ("LTD") policy. Id. ¶ 7. Defendant
9 issued the LTD policy to Renaissance, and Plaintiff was
10 a participant in this policy. Id. ¶¶ 7-8. Under the
11 terms of the LTD policy, after an initial twenty-four
12 months of disability payments, a person is "disabled"
13 only if he is either (1) "[u]nable to perform with
14 reasonable continuity the material duties of any
15 gainful occupation for which [he is] reasonably fitted
16 by education, training, and experience," or
17 (2) "[u]nable to earn more than 80% of [his] Indexed
18 Predisability Earnings." Id. ¶ 10. The policy
19 additionally states that any disability benefit will be
20 reduced by Income from Other Sources ("deductible
21 income"), which is defined, in part, as "[o]ne-half the
22 amount of your earnings from work while LTD Benefits
23 are payable." Def.'s Opp'n to Pl.'s Mot. to Dismiss
24 ("Opp'n") 10:2-4, ECF No. 15.

25 In May 2011, Plaintiff submitted a claim for LTD
26 benefits. Id. at 1:16-17. Defendant approved
27 Plaintiff's claim in July 2011 and closed his claim in
28 July 2013. Id. at 1:17-18. Subsequently, Plaintiff

1 sued Defendant, and this Court issued a judgment in
2 Plaintiff's favor on May 18, 2017. Countercl. ¶ 12.
3 The Court ordered Defendant to reinstate Plaintiff to
4 the LTD plan, pay Plaintiff all benefits and interest
5 owed from the date his claim was closed in July 2013 to
6 the date of the judgment, and pay benefits going
7 forward until Plaintiff is no longer eligible to
8 receive payments under the plan. Id. ¶ 13.

9 The day after the judgment, Defendant's counsel
10 sent an email to Plaintiff's counsel requesting
11 documentation of Plaintiff's deductible income from
12 July 2013 to the present. Id., Ex. A. On May 24,
13 2017, Plaintiff's counsel responded to this email,
14 stating that Plaintiff had "not been employed since he
15 became disabled." Id., Ex. D. Defendant's counsel
16 continued to follow up to request documentation
17 confirming this statement. Id. ¶ 19. On June 16,
18 2017, the attorneys spoke on the phone, and Plaintiff's
19 counsel again stated that Plaintiff had not earned any
20 income since filing his disability claim and refused to
21 provide Plaintiff's tax returns. Id., Ex. E.

22 On June 19, 2017, after Defendant's counsel
23 discovered that Plaintiff was employed as the Director
24 of Finance for Bolton & Company, Defendant's counsel
25 emailed Plaintiff's counsel requesting Plaintiff's tax
26 returns from 2013 through 2016. Id., Ex. G. In
27 response, Plaintiff's counsel admitted that Plaintiff
28 had been employed since April 2017. Id., Ex. H. In

1 light of the discovery that Plaintiff had been working,
2 Defendant's counsel expanded the scope of their
3 requests, asking for tax returns and accompanying
4 schedules from 2010 through 2016 and year-to-date pay
5 stubs for 2017. Id., Ex. J. Plaintiff eventually
6 provided his 2012 through 2016 tax returns and two 2017
7 pay stubs, but he did not provide year-to-date 2017 pay
8 information, 2010 through 2011 tax returns, or
9 attachments such as W-2's and K-1's. Id. ¶ 26, Ex. K.
10 The information Plaintiff did provide showed that he
11 had been earning income since at least 2012. Id. ¶ 26.

12 On July 21, 2017, Defendant's counsel emailed
13 Plaintiff's counsel informing him of the deficiencies
14 in his document production, which prevented Defendant
15 from accurately calculating the LTD benefits owed to
16 Plaintiff. Id. ¶ 27. Defendant claims that
17 Plaintiff's counsel did not respond. Id. ¶ 28.

18 Finally, on July 31, 2017, Defendant sent a letter
19 to Plaintiff's counsel stating that Defendant had
20 reopened Plaintiff's claim and, based on the documents
21 Plaintiff provided, determined that Plaintiff was only
22 eligible for disability payments up to December 31,
23 2015. Id., Ex. L. The letter further stated that
24 Defendant had overpaid Plaintiff from July 2011 through
25 July 2013 and Defendant had deducted such overpayment
26 from the arrears payment, which covered July 2013
27 through December 2015. Id.

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1 **B. Procedural Background**

2 On October 25, 2017, Plaintiff filed his Complaint
3 [1] seeking additional LTD benefits. Defendant
4 answered and filed a Counter-Complaint [10] on December
5 12, 2017, seeking relief under the theories of
6 intentional misrepresentation, concealment, fraud,
7 negligent misrepresentation, and equitable restitution
8 under § 502(a)(3) of the Employee Retirement Income
9 Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(3).
10 Plaintiff filed the instant Motion [13] on December 26,
11 2017, to which Defendant filed an Opposition [15] on
12 January 30, 2018. Plaintiff then filed his Reply [16]
13 on February 6, 2018.

14 **II. DISCUSSION**

15 **A. Legal Standard**

16 Federal Rule of Civil Procedure ("Rule") 12(b)(6)
17 allows a party to move for dismissal of one or more
18 claims if the pleading fails to state a claim upon
19 which relief can be granted. To survive a motion to
20 dismiss on 12(b)(6) grounds, "a complaint must contain
21 sufficient factual matter, accepted as true, to state a
22 claim to relief that is plausible on its face."
23 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)(internal
24 quotation marks omitted). "Dismissal can be based on
25 [a] lack of a cognizable legal theory or the absence of
26 sufficient facts alleged under a cognizable legal
27 theory." Balistreri v. Pacifica Police Dep't, 901 F.2d
28 696, 699 (9th Cir. 1990).

1 "In ruling on a 12(b)(6) motion, a court may
2 generally consider only allegations contained in the
3 pleadings, exhibits attached to the complaint, and
4 matters properly subject to judicial notice." Swartz
5 v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007). A
6 court must presume all factual allegations of the
7 complaint to be true and draw all reasonable inferences
8 in favor of the non-moving party. Klarfeld v. United
9 States, 944 F.2d 583, 585 (9th Cir. 1991).

10 The question presented by a motion to dismiss is
11 not whether the plaintiff will ultimately prevail, but
12 whether the plaintiff has alleged sufficient factual
13 grounds to support a plausible claim to relief, thereby
14 entitling the plaintiff to offer evidence in support of
15 its claim. Iqbal, 556 U.S. at 678; Swierkiewicz v.
16 Sorema N.A., 534 U.S. 506, 511 (2002). While a
17 complaint need not contain detailed factual
18 allegations, a plaintiff must provide more than "labels
19 and conclusions" or "a formulaic recitation of a cause
20 of action's elements." Bell Atl. Corp. v. Twombly, 550
21 U.S. 544, 555 (2007)(internal citation omitted).
22 However, "[a] complaint should not be dismissed under
23 Rule 12(b)(6) 'unless it appears beyond doubt that the
24 plaintiff can prove no set of facts in support of his
25 claim which would entitle him to relief.'" Balistreri,
26 901 F.2d at 699 (quoting Conley v. Gibson, 355 U.S. 41,
27 45-46 (1957)).

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1 **B. Discussion**

2 1. Intentional Misrepresentation, Negligent
3 Misrepresentation, and Fraud

4 "The essential elements of a count for intentional
5 misrepresentation are (1) a misrepresentation,
6 (2) knowledge of falsity, (3) intent to induce
7 reliance, (4) actual and justifiable reliance, and
8 (5) resulting damage."¹ Chapman v. Skype Inc., 162 Cal.
9 Rptr. 3d 864, 875 (Ct. App. 2013)(citation omitted).

10 "The essential elements of a claim for negligent
11 misrepresentation are the same as for intentional
12 misrepresentations, except that it does not require
13 knowledge of falsity, but instead requires a
14 misrepresentation of fact by a person who has no
15 reasonable grounds for believing it to be true." Cisco
16 Sys., Inc. v. STMicroelectronics, Inc., 77 F. Supp. 3d
17 887, 897 (N.D. Cal. 2014). Plaintiff's Motion only
18 discusses the justifiable reliance and damages
19 elements, so the Court will limit its analysis to these
20 two elements.

21 a. *Justifiable Reliance*

22 In his Motion, Plaintiff argues that "it is
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24 ¹ Fraud claims share these same elements. See Lazar v.
25 Supreme Court, 909 P.2d 981, 984 (Cal. 1996)(citation omitted).
26 Pursuant to Rule 9(b), to properly plead a fraud claim, a
27 plaintiff must plead each element with particularity. F.T.C. v.
28 Lights of Am., Inc., 760 F. Supp. 2d 848, 850 (C.D. Cal. 2010).
"This particularity requirement necessitates pleading facts which
'show how, when, where, to whom, and by what means the
representations were tendered.'" Stansfield v. Starkey, 269 Cal.
Rptr. 337, 345 (Ct. App. 1990)(citations omitted).

1 impossible for the defendant to have reasonably relied
2 on Mr. Armani's false statement of no employment."
3 However, "the reasonableness of reliance on a
4 misrepresentation is ordinarily a question of fact."
5 Anschutz Corp. v. Merrill Lynch & Co., 785 F. Supp. 2d
6 799, 827 (N.D. Cal. 2011). Plaintiff essentially
7 treats his Motion as a motion for summary judgment,
8 and, while this Action may be ripe for summary
9 judgment, such a motion is not currently before the
10 Court.

11 The Court "must accept all material allegations in
12 the complaint as true." Klarfeld, 944 F.2d at 585.
13 Here, Defendant alleges that it "justifiably relied on
14 the representations made by [Plaintiff] regarding his
15 work activity, earnings/income, and his inability to
16 work and/or perform certain related activities."
17 Countercl. ¶ 35. Defendant alleges that Plaintiff's
18 counsel, on behalf of Plaintiff, made statements
19 regarding Plaintiff's employment status and the amount
20 of income Plaintiff earned during the time Plaintiff
21 claims he was disabled. Id. ¶¶ 17, 20. Defendant then
22 took these statements into account when determining the
23 amount of LTD benefits to pay Plaintiff. Id. ¶¶ 35-36.
24 After construing these allegations "in the light most
25 favorable" to Defendant, see Klarfeld, 944 F.2d at 585,
26 Defendant's allegations are sufficient to withstand a
27 motion to dismiss.

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1 b. *Resulting Damages*

2 Plaintiff argues that Defendant has failed to
3 allege damages as a result of Plaintiff's
4 misrepresentation. Mot. 3:1-2. However, Defendant's
5 Counter-Complaint alleges that it is damaged because
6 "it paid LTD benefits to [Plaintiff] to which he was
7 not entitled." Countercl. ¶ 36. At the pleading
8 stage, Defendant merely must plead the fact of damages,
9 and there is no requirement that Defendant allege the
10 amount of damage. See Mendoza v. Zirkle Fruit Co., 301
11 F.3d 1163, 1171 (9th Cir. 2002)("[I]t is important to
12 distinguish between uncertainty in the fact of damage
13 and in the amount of damage."). Because Defendant has
14 alleged that Plaintiff's misrepresentations regarding
15 his employment and income earned during the time
16 Plaintiff claims he was disabled resulted in an
17 overpayment, Defendant has sufficiently pleaded the
18 damages element of his claims.

19 Defendant has sufficiently pleaded his intentional
20 misrepresentation, fraud, negligent misrepresentation
21 and concealment² claims, and the Court **DENIES**
22 Plaintiff's Motion as to these claims.

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25 ² Defendant's concealment claim is just another form of his
26 fraud claim and is thus evaluated the same as Defendant's fraud
27 claim for purposes of Plaintiff's Motion. See Sung v. Hamilton,
28 710 F. Supp. 2d 1036, 1047 (D. Haw. 2010)(treating a fraudulent
concealment claim as fraud based on alleged failures to disclose
information).

1 2. Equitable Restitution Under ERISA § 502(a)(3)

2 ERISA § 502(a)(3), as codified in 29 U.S.C.

3 § 1132(a)(3), is a catchall remedial provision that
4 authorizes a civil action

5 "by a participant, beneficiary, or fiduciary
6 (A) to enjoin any act or practice which violates
7 any provision of this subchapter or the terms of
8 the plan, or (B) to obtain other appropriate
9 equitable relief (i) to redress such violations
10 or (ii) to enforce any provisions of this
11 subchapter or the terms of the plan."

12 Varity Corp. v. Howe, 516 U.S. 489, 518 (1996)(quoting
13 29 U.S.C. § 1132(a)(3)). ERISA § 502(a)(3) acts "as a
14 safety net, offering appropriate equitable relief for
15 injuries caused by violations that § 502 does not
16 elsewhere adequately remedy." Id. at 490.

17 "[T]o state a cause of action under [ERISA
18 § 502(a)(3)], an ERISA plan must 'demonstrate (1) that
19 it is an ERISA fiduciary, and (2) that it is seeking
20 equitable, rather than legal, relief.'" Carpenters
21 Health & Welfare Tr. v. Vonderharr, 384 F.3d 667, 672
22 (9th Cir. 2004)(quotation omitted). Plaintiff does not
23 dispute that Defendant is a fiduciary under ERISA.
24 Thus, the only inquiry necessary to determine whether
25 Defendant has stated a claim under ERISA § 502(a)(3)(B)
26 is whether the relief that Defendant seeks is
27 "equitable."

28 "The law has evolved in the ERISA context to
29 support an equitable restitution claim to recover
30 benefits" paid due to fraud or wrongdoing—resulting in
31 ill-gotten gains. Trs. ex rel. N. Cal. Gen. Teamsters

1 Sec. Fund v. Fresno French Bread Bakery, Inc., No. CV F
2 12-0187 LJO BAM, 2012 WL 3062174, at *6 (E.D. Cal. July
3 25, 2012). “[T]o establish entitlement to the
4 restitution of the alleged ‘ill-gotten gains’ in this
5 case, plaintiffs must establish each of the elements of
6 a common law fraud claim.” Med. Benefits Adm’rs of MD,
7 Inc. v. Sierra R. Co., No. CIV. S-06-2408 FCD D, 2009
8 WL 2868716, at *6 (E.D. Cal. Sept. 2, 2009). As noted
9 above, Defendant has properly alleged a claim for
10 fraud. At the pleading stage, that is sufficient to
11 proceed with Defendant’s claim under ERISA § 502(a)(3).
12 Accordingly, the Court **DENIES** Plaintiff’s Motion as to
13 Defendant’s claim under ERISA § 502(a)(3).

14 **III. CONCLUSION**

15 Based on the foregoing, the Court **DENIES**
16 Plaintiff’s Motion.

17 **IT IS SO ORDERED.**

18
19 DATED: March 21, 2018

/s/ Ronald S. W. Lew

20 **HONORABLE RONALD S.W. LEW**
21 Senior U.S. District Judge
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