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7 UNITED STATES DISTRICT COURT  
8 SOUTHERN DISTRICT OF CALIFORNIA  
9

10 ROBERT RAYA,

11 Plaintiff,

Case No.: 19-cv-2295-WQH-AHG

12 v.

**ORDER**

13 DAVID BARKA; NOORI BARKA;  
14 EVELYN BARKA;  
15 CALBIOTECH, INC.;  
16 CALBIOTECH, INC. 401(k)  
17 PROFIT SHARING PLAN;  
18 CALBIOTECH, INC. PENSION  
19 PLAN,

Defendants.

HAYES, Judge:

20 The matter before the Court is the Motion to Dismiss Plaintiff's First Amended  
21 Complaint, or Motion for a More Definite Statement and Motion to Strike Portions of  
22 Plaintiff's First Amended Complaint filed by Defendants David Barka, Noori Barka,  
23 Evelyn Barka, Calbiotech, Inc., Calbiotech, Inc. 401(k) Profit Sharing Plan, and  
24 Calbiotech, Inc. Pension Plan. (ECF No. 40).

25 **I. PROCEDURAL BACKGROUND**

26 On December 2, 2019, Plaintiff Robert Raya, proceeding *pro se*, filed a Complaint  
27 against Defendants David Barka, Noori Barka, Evelyn Barka, Calbiotech, Inc.  
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1 (“Calbiotech”), Calbiotech, Inc. 401(k) Profit Sharing Plan (“401(k) Plan”), Calbiotech,  
2 Inc. Pension Plan (“Pension Plan”), and Erba Mannheim. (ECF No. 1). Raya brought  
3 claims against Defendants under the Employee Retirement Income Security Act of 1974  
4 (“ERISA”) and California state law.

5 On February 14, 2020, Defendants David Barka, Noori Barka, Evelyn Barka,  
6 Calbiotech, 401(k) Plan, and Pension Plan filed a Motion to Dismiss the Complaint. (ECF  
7 No. 14). On June 25, 2020, the Court issued an Order granting the Motion to Dismiss and  
8 dismissing the Complaint without prejudice. (ECF No. 19).

9 On July 27, 2020, the Court issued an Order dismissing the action against Defendant  
10 Erba Mannheim without prejudice for failure to serve. (ECF No. 20).

11 On November 24, 2020, the Court issued an Order granting Raya leave to file an  
12 amended complaint. (ECF No. 38). On December 9, 2020, Raya filed a First Amended  
13 Complaint (“FAC”) against Defendants David Barka, Noori Barka, Evelyn Barka,  
14 Calbiotech, 401(k) Plan, and Pension Plan. (ECF No. 39).

15 On December 22, 2020, Defendants filed a Motion to Dismiss the FAC, or Motion  
16 for a More Definite Statement and Motion to Strike Portions of the FAC. (ECF No. 40).  
17 Defendants move to dismiss the FAC pursuant to Rule 12(b)(6) of the Federal Rules of  
18 Civil Procedure for failure to state a claim upon which relief can be granted. In the  
19 alternative, Defendants move to dismiss the FAC for failure to comply with Court order  
20 pursuant to Rule 41(b), for a more definite statement pursuant to Rule 12(e), and to strike  
21 the entirety of the FAC or portions thereof pursuant to Rule 12(f).

22 On January 12, 2021, Raya filed an Opposition to the Motion to Dismiss. (ECF No.  
23 43). On January 15, 2021, Defendants filed a Reply. (ECF No. 44).

## 24 **II. ALLEGATIONS IN THE FAC**

25 Plaintiff Raya is a former employee of Defendant Calbiotech. Raya worked as a full-  
26 time scientist for Calbiotech beginning in May 2008 and ending in December 2016.

27 Calbiotech is the administrator of the Pension Plan, which took effect on September  
28 1, 2008. Defendants David Barka, Noori Barka, and Evelyn Barka are trustees and

1 fiduciaries of the Pension Plan. The Pension Plan “confers eligibility on all regular  
2 employees” and “does not describe any exclusionary provisions that could apply” to Raya.  
3 (ECF No. 39 ¶¶ 15-16). Between 2008 and “at least 2017,” no information about the  
4 Pension Plan was provided to Raya or any other regular employee. (*Id.* ¶ 18). Calbiotech  
5 and the fiduciaries intentionally hid the existence of the Pension Plan. “Raya and other  
6 eligible employees were not allowed to enroll” in the Pension Plan. (*Id.* ¶ 16). The only  
7 employees allowed to enroll in the Pension Plan were four immediate family members of  
8 Noori Barka, the founder and President/CEO of Calbiotech.

9       Raya discovered the existence of the Pension Plan in January 2018 and requested  
10 that Calbiotech review Raya’s eligibility for the Pension Plan. Calbiotech determined that  
11 Raya was ineligible based on an exclusionary provision that had been inserted into the  
12 Pension Plan after a 2011 rewrite. The 2011 exclusionary provision could not have  
13 prevented Raya’s eligibility in 2008.

14       In April 2018, Raya submitted a claim for benefits and requested to be enrolled in  
15 the Pension Plan as of his date of eligibility in 2008. In January 2019, “Defendants claimed  
16 to have just discovered a plan Amendment executed in Dec[ember] 2008, which limited  
17 Pension Plan eligibility to the CEO and four named immediate family members of the  
18 CEO, plus two other named employees, while excluding all other employees.” (*Id.* ¶ 25).  
19 The Amendment was not part of the complete Pension Plan documents that Raya received  
20 in 2018 and was not included in original Pension Plan documents filed with the IRS. The  
21 amendment “displays signs of backdating” and “contains the name of an employee who  
22 was unknown to [Calbiotech] before she was hired for the first time in 2011.” (*Id.* ¶ 28).

23       Calbiotech is also the administrator of the 401(k) Plan, which took effect on  
24 September 1, 2008. David Barka, Noori Barka, and Evelyn Barka are trustees and  
25 fiduciaries of the 401(k) Plan. Raya enrolled in the 401(k) Plan in 2010. Raya and other  
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1 regular employees were never provided with documents describing the 401(k) Plan.<sup>1</sup> From  
2 2009 through 2017, David Barka, the Vice President of Calbiotech, provided oral  
3 descriptions of the 401(k) Plan. David Barka “described all employer contributions as  
4 being totally and completely discretionary.” (*Id.* ¶ 33). “Plan documents finally acquired  
5 in 2018 describe employer contributions as mandatory or automatic.” (*Id.* ¶ 34).  
6 “Calbiotech failed to make [its] mandatory contributions year after year.” (*Id.* ¶ 35). The  
7 failure or refusal of Calbiotech and the fiduciaries to provide Raya with 401(k) Plan  
8 documents “prevented [ ] Raya from identifying hundreds of missed or reduced  
9 contributions to his 401(k) account . . . .” (*Id.*).

10 In 2012, Raya took out a loan from his 401(k) account and began to repay the loan  
11 through automatic deductions from his biweekly paychecks. Between 2012 and 2016,  
12 \$85.36 was deducted from each of Raya’s paychecks to repay the loan. David Barka was  
13 responsible for remitting the entire \$85.36 to Principal Financial, the third-party  
14 administrator and service provider of the 401(k) Plan and Raya’s 401(k) loan. For over five  
15 years, David Barka remitted \$14.86 of each biweekly deduction to Principal Financial and  
16 kept the remaining \$70.50 for his personal use. Between July 9, 2018, and January 6, 2019,  
17 Raya made nine separate requests to Calbiotech for a record of deposits and payments made  
18 to Raya’s 401(k) account. Calbiotech has refused to acknowledge Raya’s requests.

19 Raya received notice of his termination from Calbiotech on November 29, 2016. “In  
20 the months and weeks just prior to termination,” Raya made multiple requests for  
21 documents describing the 401(k) Plan, which Calbiotech had been successful at hiding  
22 from participants. (*Id.* ¶ 42). On November 26, 2016, David Barka texted Raya, “It’s time  
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25 <sup>1</sup> On November 19, 2018, Raya filed a Complaint in a related case, *Raya v. Calbiotech, Inc.*, Case No. 18-  
26 cv-2643-WQH-AHG (S.D. Cal. 2018), arising from Calbiotech’s alleged failure to provide Raya with  
27 401(k) Plan documents (the “*Calbiotech Action*”). On May 12, 2020, the Court issued an Order granting  
28 in part and denying in part the Motion for Summary Judgment filed by Calbiotech. (*Calbiotech Action*,  
ECF No. 39). The parties settled, and on November 12, 2020, the Court granted the parties’ Joint Motion  
to Dismiss. (*Id.*, ECF No. 57).

1 we part ways.” (*Id.* ¶ 46). The next day, David Barka told Raya that “things were not  
2 working out.” (*Id.* ¶ 47). In January 2017, Calbiotech told the California Employment  
3 Development Department that Raya was terminated because his position was eliminated.  
4 In February 2017, Calbiotech hired another employee “to replace [ ] Raya and take over  
5 his former duties.” (*Id.* ¶ 49). Calbiotech “was not honest when describing [its]  
6 motivations” for terminating Raya. (*Id.* ¶ 50). Calbiotech terminated Raya to retaliate  
7 against him for requesting 401(k) Plan documents and to interfere with his right to receive  
8 401(k) Plan documents.

9 Raya brings the first claim against the 401(k) Plan, the Pension Plan, and “Plan  
10 Administrators” under 29 U.S.C. § 1132(a)(1)(B) to recover benefits due under the Pension  
11 Plan and the 401(k) Plan. (*Id.* at 11). Raya brings the second claim against “Fiduciaries”  
12 for breach of fiduciary duties under 29 U.S.C. §§ 1109(a) and 1132(a)(2). (*Id.* at 12). Raya  
13 brings the third claim against “Fiduciaries” for breach of fiduciary duties under 29 U.S.C.  
14 §§ 1109(a) and 1132(a)(3). (*Id.* at 13). Raya brings the fourth claim against David Barka,  
15 Noori Barka, and Calbiotech for ERISA interference under 29 U.S.C. §§ 1140 and  
16 1132(a)(3). Raya brings the fifth claim against “Fiduciaries” for breach of fiduciary duties  
17 under California state law. (*Id.* at 16). Raya brings the sixth claim against David Barka and  
18 Calbiotech for fraud and concealment under California state law. Raya brings the seventh  
19 claim against David Barka and Calbiotech for conversion under California state law. Raya  
20 seeks damages, including punitive damages, recovery of benefits, and equitable relief.

### 21 **III. LEGAL STANDARD**

22 Rule 12(b)(6) of the Federal Rules of Civil Procedure permits dismissal for “failure  
23 to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). In order to state  
24 a claim for relief, a pleading “must contain . . . a short and plain statement of the claim  
25 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Dismissal under Rule  
26 12(b)(6) is “proper only where there is no cognizable legal theory or an absence of  
27 sufficient facts alleged to support a cognizable legal theory.” *Shroyer v. New Cingular*  
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1 *Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (quoting *Navarro v. Block*, 250  
2 F.3d 729, 732 (9th Cir. 2001)).

3 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,  
4 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*,  
5 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).  
6 “A claim has facial plausibility when the plaintiff pleads factual content that allows the  
7 court to draw the reasonable inference that the defendant is liable for the misconduct  
8 alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). “[A] plaintiff’s obligation to provide the  
9 ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a  
10 formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S.  
11 at 555 (second alteration in original) (quoting Fed. R. Civ. P. 8(a)). The court must accept  
12 as true all “well-pleaded factual allegations[.]” *Iqbal*, 556 U.S. at 679. The court is not  
13 “required to accept as true allegations that are merely conclusory, unwarranted deductions  
14 of fact, or unreasonable inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988  
15 (9th Cir. 2001). “Courts have a duty to construe pro se pleadings liberally[.]” *Bernhardt v.*  
16 *Los Angeles Cty.*, 339 F.3d 920, 925 (9th Cir. 2003). “In sum, for a complaint to survive a  
17 motion to dismiss, the non-conclusory factual content, and reasonable inferences from that  
18 content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v.*  
19 *U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (citation omitted).

#### 20 **IV. ERISA CLAIMS**

##### 21 **a. Waiver/Release**

22 Defendants contend that Raya released the claims in the FAC by signing a Separation  
23 Agreement. Defendants contend that the Court ruled in the *Calbiotech* Action that Raya  
24 released all claims against Defendants arising prior to December 7, 2016. Defendants  
25 contend that the claims in the FAC arose prior to December 7, 2016, and should be  
26 dismissed with prejudice. Raya contends that he did not knowingly release ERISA claims.  
27 Raya contends that he did not intend to waive claims unknown at the time he signed the  
28

1 Separation Agreement. Raya contends that he alleges claims that arose after December 7,  
2 2016, and are not barred by the release.

3 Release and waiver are affirmative defenses. *See* Fed. R. Civ. P. 8(c)(1). “Dismissal  
4 under Rule 12(b)(6) on the basis of an affirmative defense is proper only if the defendant  
5 shows some obvious bar to securing relief on the face of the complaint.” *Asarco, LLC v.*  
6 *Union Pac. R.R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014), *as corrected* (Aug. 27, 2014).  
7 “If, from the allegations of the complaint as well as any judicially noticeable materials, an  
8 asserted defense raises disputed issues of fact, dismissal under Rule 12(b)(6) is improper.”  
9 *Id.* (citing *Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir. 1984) (per curiam)).

10 A party may waive ERISA claims by contract, as long as the waiver is “knowing[ ]  
11 and voluntar[y].” *Gonda v. Permanente Med. Grp.*, 691 F. App’x 397, 399 (9th Cir. 2017)  
12 (citing *Morais v. Cent. Beverage Corp. Union Emps.’ Supplemental Ret. Plan*, 167 F.3d  
13 709, 713 (1st Cir. 1999)). A waiver of ERISA claims is subject to “heightened scrutiny,”  
14 and the court is obligated to “scrutinize an ostensible waiver with care in order to ensure  
15 that it reflects the purposeful relinquishment of an employee’s rights.” *Morais*, 167 F.3d at  
16 713; *accord Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1012 (9th Cir. 1997). In  
17 determining whether a waiver of ERISA benefits was knowing and voluntary, the court  
18 considers the “circumstances and conditions under which the release was executed,”  
19 including the clarity and lack of ambiguity of the agreement, the plaintiff’s education and  
20 business experience, the presence of a noncoercive atmosphere, and whether the employee  
21 had the benefit of legal counsel. *Nilsson v. City of Mesa*, 503 F.3d 947, 952 (9th Cir. 2007)  
22 (quoting *Stroman v. W. Coast Grocery Co.*, 884 F.2d 458, 462 (9th Cir. 1989)).

23 On May 12, 2020, in the related *Calbiotech* Action, the Court issued an Order  
24 granting in part and denying in part Calbiotech’s unopposed Motion for Summary  
25 Judgment. (Ex. A to RJN, ECF No. 41-1)<sup>2</sup>. The Court stated, in relevant part:

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28 <sup>2</sup> The Court takes judicial notice of the Order granting in part and denying in part the Motion for Summary  
Judgment filed by Calbiotech in the related *Calbiotech* Action. *See* ECF No. 41; *Reyn’s Pasta Bella, LLC*

1 Raya's ERISA claim for statutory penalties based on Calbiotech's failure to  
2 provide Raya with Plan documents within thirty days of his requests on July  
3 26, 2016, and August 8, 2016, is "based on [ ] acts or omissions by  
4 [Calbiotech] . . . as of the date of execution of [the Separation Agreement] by  
5 [Raya] . . ." (Ex. B, ECF No. 36-5 at 3). Raya released these claims by signing  
6 the Separation Agreement.

7 (*Id.* at 10).

8 It is not apparent from the face of the FAC that Raya knowingly and voluntarily  
9 waived his right to assert the ERISA claims alleged in the FAC. *See Asarco*, 765 F.3d at  
10 1004; *see also Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001) ("On a rule  
11 12(b)(6) motion to dismiss, when a court takes judicial notice of another court's opinion,  
12 it may do so 'not for the truth of the facts recited therein, but for the existence of the  
13 opinion[.]'" (quoting *S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd.*,  
14 181 F.3d 410, 426-27 (3d Cir. 1999))), *overruled on other grounds by Galbraith v. Cty. of*  
15 *Santa Clara*, 307 F.3d 1119 (9th Cir. 2002)). At this stage in the litigation, the Court cannot  
16 conclude that the Separation Agreement bars Raya's ERISA claims.<sup>3</sup>

17 **b. Claim 1 – ERISA Benefits**

18 **i. Statute of Limitations**

19 Defendants contend that the first claim for ERISA benefits is time-barred.  
20 Defendants contend that a four-year statute of limitations applies to a claim for Pension  
21 Plan benefits. Defendants contend that the denial of Pension Plan benefits occurred on  
22 September 1, 2008, more than four years before Raya filed the initial Complaint.

23 \_\_\_\_\_  
24 *v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) (it is appropriate to take judicial notice of court  
25 filings and other matters of public record, such as filings in related litigation). The Court declines to take  
26 judicial notice of the Separation Agreement because the Separation Agreement is not referenced in the  
27 FAC and does not form the basis of Raya's claims. *See ECF No. 41; United States v. Ritchie*, 342 F.3d  
28 903, 908 (9th Cir. 2003) ("Even if a document is not attached to a complaint, it may be incorporated by  
reference into a complaint if the plaintiff refers extensively to the document or the document forms the  
basis of the plaintiff's claim.").

<sup>3</sup> The Court expresses no opinion on whether the Separation Agreement bars the state law claims at this stage in the litigation, because it is unnecessary for this Order. *See infra* Section II.

1 Defendants contend that the 401(k) Plan provides that a claim for benefits must be filed no  
2 later than the earlier of “180 days following the date of [the final written administrative  
3 determination]” or “three years following proof of loss.” (ECF No. 40-1 at 13-14).  
4 Defendants contend that Raya filed the initial Complaint 216 days after the final written  
5 administrative determination of the claim for 401(k) Plan benefits and more than three  
6 years after the “proof of loss” on November 29, 2016. (*Id.*). Raya contends that the doctrine  
7 of fraudulent concealment tolls the statutes of limitations. Raya contends that the  
8 fiduciaries “prevented [Raya] from discovering any violations or losses in either plan until  
9 the fraud was discovered in 2018.” (ECF No. 43 at 6).

10 The statute of limitations is an affirmative defense. *See* Fed. R. Civ. P. 8(c)(1). A  
11 plaintiff fails to state a claim where his failure to comply with the applicable statute of  
12 limitations is “apparent from the face of the complaint.” *Seven Arts Filmed Entm’t Ltd. v.*  
13 *Content Media Corp. PLC*, 733 F.3d 1251, 1254 (9th Cir. 2013) (quoting *Conerly v.*  
14 *Westinghouse Elec. Corp.*, 628 F.2d 117, 119 (9th Cir. 1980)). The “statute of limitations  
15 for an ERISA cause of action based on a claim for benefits under a written contractual  
16 policy in California” is four years from the date of accrual. *Wetzel v. Lou Ehlers Cadillac*  
17 *Grp. Long Term Disability Ins. Program*, 222 F.3d 643, 648 (9th Cir. 2000); Cal. Civ. Proc.  
18 Code § 337. “[T]he accrual of an ERISA cause of action is determined by federal, rather  
19 than state, law.” *Wetzel*, 222 F.3d at 649. “[U]nder federal law, an ERISA cause of action  
20 accrues either at the time benefits are actually denied or when the insured has reason to  
21 know that the claim has been denied.” *Id.* (citations omitted).

22 Parties may contract for a different limitations period in an ERISA plan. *See*  
23 *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. 99, 109 (2013). The court “must  
24 give effect to the Plan’s limitations provision unless [the court] determine[s] either that the  
25 period is unreasonably short, or that a ‘controlling statute’ prevents the limitations  
26 provision from taking effect.” *Id.* (quoting *Order of United Commercial Travelers v. Wolfe*,  
27 331 U.S. 586, 608 (1947)).  
28

1 In this case, Raya brings the first claim under 29 U.S.C. § 1132(a)(1)(B) to recover  
2 benefits under the Pension Plan and the 401(k) Plan. Raya alleges that between 2008 and  
3 “at least 2017,” no information about the Pension Plan was provided to Raya or any other  
4 regular employee. (ECF No. 39 ¶ 18). Raya alleges that he discovered the existence of the  
5 Pension Plan in January 2018. Raya alleges that he submitted a claim for benefits under  
6 the Pension Plan in April 2018, and Calbiotech denied the claim for benefits in January  
7 2019. Raya filed the initial Complaint on December 2, 2019, less than a year after he alleges  
8 that Calbiotech denied the claim for Pension Plan benefits. Taking the facts alleged in the  
9 FAC as true, it is not apparent from the face of the complaint that the claim for Pension  
10 Plan benefits is barred by the statute of limitations. *See Seven Arts*, 733 F.3d at 1254.

11 The FAC does not allege facts about the timing of the administrative claim for  
12 benefits under the 401(k) Plan.<sup>4</sup> Taking the facts alleged in the FAC as true, it is not  
13 apparent from the face of the FAC that the claim for 401(k) Plan benefits is barred by the  
14 statute of limitations. *See Seven Arts*, 733 F.3d at 1254.

## 15 **ii. Standing**

16 Defendants contend that Raya lacks standing because he was never a participant or  
17 beneficiary of the Pension Plan. Defendants contend that the 2008 and 2011 amendments  
18 to the Pension Plan exclude Raya from participation. Defendants contend that Raya’s status  
19 as a participant in the 401(k) Plan ceased when he received a complete and final distribution  
20 of his 401(k) Plan account on November 14, 2018. Raya contends that he is a participant  
21 in the Pension Plan and the 401(k) Plan because he is or may become eligible to receive a  
22 benefit from both Plans. (ECF No. 43).

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25 <sup>4</sup> The Court declines to take judicial notice of the final written determination of Raya’s administrative  
26 appeal of his claim for benefits. *See* ECF No. 41; *Ritchie*, 342 F.3d at 908. The Court further declines to  
27 take judicial notice of the most recent version of the 401(k) Plan, because judicial notice of the requested  
28 document is unnecessary for this Order. *See* ECF No. 41; *Asvesta v. Petroutsas*, 580 F.3d 1000, 1010 n.12  
(9th Cir. 2009) (denying request for judicial notice where judicial notice would be “unnecessary”).  
Defendants request that the Court draw inferences in favor of Defendants from these documents, which is  
not appropriate on a motion to dismiss.

1 To bring a claim for benefits under ERISA, the plaintiff “must be an ERISA  
2 ‘participant’ or ‘beneficiary’ who may be entitled to benefits under the Plans.” *Crotty v.*  
3 *Cook*, 121 F.3d 541, 544 (9th Cir. 1997). 29 U.S.C. § 1132(a) provides that a “participant  
4 or beneficiary” may bring a civil action “to recover benefits due to him under the terms of  
5 his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future  
6 benefits under the terms of the plan[.]” 29 U.S.C. § 1132(a)(1)(B). The term ‘participant’  
7 means ‘any employee or former employee of an employer . . . who is or may become  
8 eligible to receive a benefit of any type from an employee benefit plan which covers  
9 employees of such employer.’” *Crotty*, 121 F.3d at 544 (quoting 29 U.S.C. § 1002(7)).  
10 “In order to establish that [a former employee] may become eligible for benefits, a claimant  
11 must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2)  
12 eligibility requirements will be fulfilled in the future.” *Id.* (alteration in original) (quoting  
13 *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117-18 (1989)).

14 In this case, Raya alleges that he became eligible to enroll in the Pension Plan in  
15 September 2008. Raya alleges that Calbiotech and the fiduciaries hid the existence of the  
16 Pension Plan and did not allow Raya or other eligible employees to enroll. Raya alleges  
17 that he discovered the existence of the Pension Plan in January 2018 and requested that  
18 Calbiotech review Raya’s eligibility for the Pension Plan. Raya alleges that Calbiotech  
19 determined that Raya was ineligible under an exclusionary provision that had been inserted  
20 into the Pension Plan after a 2011 rewrite and could not have prevented Raya’s eligibility  
21 in 2008. Raya alleges that in April 2018, he submitted a claim for benefits and requested  
22 to be enrolled in the Pension Plan as of his date of eligibility in 2008. Raya alleges that  
23 Calbiotech denied his claim for benefits based on a newly discovered Plan amendment,  
24 which was not included in the Pension Plan documents provided to Raya or filed with the  
25 IRS and which “displays signs of backdating.” (ECF No. 39 ¶ 28).

26 Taking the facts alleged in the FAC as true, Raya states facts sufficient to support an  
27 inference that the 2011 amendment to the Pension Plan would not prevent Raya from  
28 enrolling in and receiving Pension Plan benefits beginning in 2008. Raya disputes the

1 authenticity of the 2008 Pension Plan amendment. The contents of the 2008 Pension Plan  
2 amendment are not properly considered on a motion to dismiss. The Court concludes that  
3 Raya states a “colorable claim that [ ] he . . . will prevail in a suit for benefits” under the  
4 Pension Plan. *Crotty*, 121 F.3d at 544 (quoting *Firestone Tire*, 489 U.S. at 117-18).

5 Raya further alleges that he enrolled in the 401(k) Plan in 2010. Raya alleges that  
6 from 2009 through 2017, David Barka “described all employer contributions as being  
7 totally and completely discretionary.” (ECF No. 39 ¶ 33). Raya alleges that “Plan  
8 documents finally acquired in 2018 describe employer contributions as mandatory or  
9 automatic.” (*Id.* ¶ 34). Raya alleges that “[a]utomatic or mandatory employer contributions  
10 described in the 401(k) Plan documents were never made to [ ] Raya’s account between  
11 2008 and 2019[,] resulting in missed contributions and losses . . . .” (*Id.* ¶ 63).

12 Taking the facts alleged in the FAC as true, Raya states facts sufficient to support an  
13 inference that a final distribution of the funds in Raya’s 401(k) account would not bar Raya  
14 from recovering amounts that were never contributed to the 401(k) account. The Court  
15 concludes that Raya states a “colorable claim that [ ] he . . . will prevail in a suit for benefits”  
16 under the 401(k) Plan. *Crotty*, 121 F.3d at 544 (quoting *Firestone Tire*, 489 U.S. at 117-  
17 18). The Court concludes that Raya states facts sufficient at this stage in the litigation to  
18 support an inference that he is a participant in the Pension Plan and the 401(k) Plan and  
19 has standing to assert the first claim for ERISA benefits.

### 20 **iii. Failure to State a Claim**

21 Defendants contend that Raya fails to state a plausible claim that he is entitled to  
22 benefits under the terms of the 401(k) Plan. Defendants contend that Raya fails to reference  
23 specific terms in the 401(k) Plan that support a claim for benefits. Raya contends that “[t]he  
24 FAC identifies the specific plan terms that confer the benefits in question (however  
25 inartfully), as all mandatory or automatic employer contributions detailed in all versions or  
26 rewrites of the 401(k) Plan Document between 2008 and 2017.” (ECF No. 43 at 7).

27 ERISA provides a right of action for plan participants or beneficiaries “to recover  
28 benefits due . . . under the terms of [a] plan, to enforce [ ] rights under the terms of the plan,

1 or to clarify [ ] rights to future benefits under the terms of the plan.” 29 U.S.C. §  
2 1132(a)(1)(B). “To plead a violation of the statute, a plaintiff must . . . identify ‘the  
3 provisions of the plan that entitle [them] to benefits.’” *Doe v. CVS Pharm., Inc.*, 982 F. 3d  
4 1204, 1213 (9th Cir. 2020) (quoting *Almont Ambulatory Surgery Ctr., LLC v. UnitedHealth*  
5 *Grp., Inc.*, 99 F. Supp. 3d 1110, 1155 (C.D. Cal. 2015)), *reh’g en banc denied*, 2021 U.S.  
6 App. LEXIS 1242 (9th Cir. Jan. 15, 2021), *pet. for cert. filed* (Mar. 26, 2021) (No. 20-  
7 1374).

8 In this case, Raya alleges that the 401(k) Plan document “describe[s] employer  
9 contributions as mandatory or automatic.” (ECF No. 39 ¶ 24). Raya alleges that Calbiotech  
10 failed to make mandatory contributions for nine years, resulting in “missed or reduced  
11 contributions to [Raya’s] 401(k) account . . . .” (*Id.* ¶ 35). Taking the facts alleged in the  
12 FAC as true, and construing the *pro se* pleading liberally, Raya sufficiently identifies the  
13 provision of the 401(k) Plan that confers the benefits alleged in the FAC. *See In re*  
14 *Wellpoint Out-of-Network ‘UCR’ Rates Litig.*, 864 F. Supp. 2d 1002, 1041 (C.D. Cal. 2011)  
15 (plaintiff sufficiently identified provisions of ERISA plan by alleging that “WellPoint  
16 promise[s] to reimburse for out-of-network services at a percentage of the lesser of either  
17 (i) the actual amount of their medical bills or (ii) the usual, customary and reasonable rate”  
18 and “WellPoint healthcare plans represent that ONS will be reimbursed based on UCR  
19 determinations”). The Motion to Dismiss the first claim for ERISA benefits is denied.<sup>5</sup>

20 **c. Claims 2 & 3 – Breach of ERISA Fiduciary Duties**

21 **i. Statute of Limitations**

22 Defendants contend that the second and third claims for breach of ERISA fiduciary  
23 duties are time-barred. Defendants “incorporate by reference the arguments set forth in  
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26 <sup>5</sup> Defendants’ request that the Court order Raya to provide a more definite statement is denied. The Court  
27 finds that the claim for ERISA benefits is not “so vague or ambiguous that [Defendants] cannot reasonably  
28 prepare a response.” Fed. R. Civ. P. 12(e); *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1461 (C.D. Cal.  
1996) (“[A] motion for a more definite statement should not be granted unless the defendant literally  
cannot frame a responsive pleading.”).

1 their original Motion to Dismiss.” (ECF No. 40-1 at 15). In the original Motion to Dismiss,  
2 Defendants contend that the “alleged conduct purported to constitute a breach of ERISA  
3 fiduciary duty occurred more than three years, and more than six years, prior to Plaintiff  
4 filing the instant action.” (ECF No. 14-1 at 18). Raya contends that the doctrine of  
5 fraudulent concealment tolls the statute of limitations. Raya contends that the fiduciaries  
6 “prevented [Raya] from discovering any violations or losses in either plan until the fraud  
7 was discovered in 2018.” (ECF No. 43 at 6).

8 29 U.S.C. § 1113 provides the statute of limitations for a claim for breach of  
9 fiduciary duty under ERISA. Section 1113 provides:

10 No action may be commenced under this subchapter with respect to a  
11 fiduciary’s breach of any responsibility, duty, or obligation under this part, or  
12 with respect to a violation of this part, after the earlier of —

13 (1) six years after (A) the date of the last action which constituted a part of the  
14 breach or violation, or (B) in the case of an omission the latest date on which  
15 the fiduciary could have cured the breach or violation, or

16 (2) three years after the earliest date on which the plaintiff had actual  
17 knowledge of the breach or violation;

18 except that in the case of fraud or concealment, such action may be  
19 commenced not later than six years after the date of discovery of such breach  
20 or violation.

21 29 U.S.C. § 1113. “The statute of limitations itself indicates a two-step analysis of accrual  
22 of an ERISA action: first, when did the alleged ‘breach or violation’ occur; and second,  
23 when did [the plaintiff] have ‘actual knowledge’ of the breach or violation?” *Ziegler v.*  
24 *Conn. Gen. Life Ins. Co.*, 916 F.2d 548, 550 (9th Cir. 1990). Actual knowledge of the  
25 breach or violation “is triggered by . . . knowledge of the transaction that constituted the  
26 alleged violation[.]” *Blanton v. Anzalone*, 760 F.2d 989, 992 (9th Cir. 1985). Actual  
27 knowledge does not require knowledge of the legal consequences of the transaction. *Id.*

28 In this case, Raya alleges that Calbiotech, David Barka, Noori Barka, and Evelyn  
Barka breached their ERISA fiduciary duties by: 1) intentionally withholding documents

1 for the Pension Plan and the 401(k) Plan, resulting in missed contributions and losses in  
2 2008, 2009, 2011, 2016, 2018, and 2019; 2) misleading participants regarding Calbiotech’s  
3 mandatory contributions to the 401(k) Plan between 2008 and 2017; 3) failing to disclose  
4 the existence of the Pension Plan between 2008 and 2018; 4) failing to remit employee  
5 payroll deductions to 401(k) Plan accounts between 2009 and 2017; 5) introducing an  
6 invalid, backdated, and fraudulent document describing an illegal amendment to the  
7 Pension Plan in 2019; and 6) introducing an illegal Pension Plan amendment in 2008. (*See*  
8 ECF No. 39 ¶¶ 69, 72). Raya alleges that he did not discover the existence of the Pension  
9 Plan, the failure to remit employee payroll deductions to 401(k) accounts, missed employer  
10 contributions to the 401(k) Plan, or the existence of the 2008 amendment to the Pension  
11 Plan until 2018.

12       Raya filed the initial Complaint on December 2, 2019. Taking the facts alleged in  
13 the FAC as true, Raya states facts sufficient to support an inference that many of the alleged  
14 breaches or violations occurred less than three years before Raya filed the Complaint. Raya  
15 further states facts sufficient to support an inference that Raya did not have actual  
16 knowledge of many of the alleged breaches or violations until 2018, less than two years  
17 before he filed the initial Complaint. Taking the facts alleged in the FAC as true, it is not  
18 apparent from the face of the complaint that the claims for breach of ERISA fiduciary  
19 duties are barred by the statute of limitations. *See Seven Arts*, 733 F.3d at 1254; *see also*  
20 *Ziegler*, 916 F.2d at 552 (“We stress that an ERISA plaintiff’s cause of action cannot accrue  
21 and the statute of limitations cannot begin to run until the plaintiff has actual knowledge of  
22 the breach, regardless of when the breach actually occurred.”).

23                   **ii. Failure to State a Claim**

24       Defendants contend that Raya fails to state a claim under 29 U.S.C. § 1132(a)(2)  
25 because he does not allege any injury to a retirement plan. Defendants contend that Raya  
26 fails to state a claim under 29 U.S.C. § 1132(a)(3) because the claim is duplicative of the  
27 first claim for ERISA benefits under § 1132(a)(1)(B). Raya contends that he alleges losses  
28

1 to both Plans. Raya contends that the remedies available under § 1132(a)(1)(B) “are neither  
2 adequate nor available to provide full and fair relief.” (ECF No. 43 at 7).

3 Raya brings the second claim for breach of ERISA fiduciary duties under 29 U.S.C.  
4 § 1132(a)(2). Section 1132(a)(2) permits “a participant, beneficiary, or fiduciary” to bring  
5 a civil action for appropriate relief under 29 U.S.C. § 1109(a). 29 U.S.C. § 1132(a)(2).  
6 Section 1109(a) provides:

7 Any person who is a fiduciary with respect to a plan who breaches any of the  
8 responsibilities, obligations, or duties imposed upon fiduciaries by this  
9 subchapter shall be personally liable to make good to such plan any losses to  
10 the plan resulting from each such breach, and to restore to such plan any  
11 profits of such fiduciary which have been made through use of assets of the  
12 plan by the fiduciary, and shall be subject to such other equitable or remedial  
13 relief as the court may deem appropriate, including removal of such fiduciary.

14 29 U.S.C. § 1109(a). Section 1132(a)(2) “gives a remedy for injuries to the ERISA plan as  
15 a whole, but not for injuries suffered by individual participants as a result of a fiduciary  
16 breach.” *Wise v. Verizon Comm’n, Inc.*, 600 F.3d 1180, 1189 (9th Cir. 2010) (citing *LaRue*  
17 *v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 254 (2008)). To state a claim under §  
18 1132(a)(2), the plaintiff “must allege that the fiduciary injured the benefit plan or otherwise  
19 jeopardized the entire plan or put at risk plan assets.” *Id.* (citations omitted).

20 In this case, Raya alleges Calbiotech failed to make mandatory contributions to the  
21 401(k) Plan. Raya alleges that the fiduciaries “misled participants” regarding Calbiotech’s  
22 mandatory contributions, “resulting in missed employer contributions and losses to the  
23 [401(k)] [P]lan . . . .” (ECF No. 39 ¶ 69). Raya alleges that the fiduciaries failed to disclose  
24 the existence of the Pension Plan to eligible employees, “resulting in a failure to enroll  
25 eligible employees and missed contributions to the Pension Plan . . . .” (*Id.*). Taking the  
26 facts alleged in the FAC as true, Raya alleges harm to the Pension Plan and the 401(k) Plan  
27 sufficient to state a claim under § 1132(a)(2).

28 Raya brings the third claim for breach of ERISA fiduciary duties under 29 U.S.C. §  
1132(a)(3). Section 1132(a)(3) provides that a plan participant may bring a civil action

1 “(A) to enjoin any act or practice which violates any provision of this title or the terms of  
2 the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or  
3 (ii) to enforce any provisions of this title or the terms of the plan.” 29 U.S.C. § 1132(a)(3).  
4 “Unlike [a claim for harm to the plan under] 29 U.S.C. § 1132(a)(2) . . . a participant or  
5 beneficiary has standing pursuant to section 1132(a)(3) to seek individual recovery . . . .”  
6 *Paulsen v. CNF Inc.*, 559 F.3d 1061, 1075 (9th Cir. 2009). Section 1132(a)(3) is a “catchall  
7 provision[ ] [that] act[s] as a safety net, offering appropriate equitable relief for injuries  
8 caused by violations that [§ 1132] does not elsewhere adequately remedy.” *Moyle v. Liberty*  
9 *Mut. Ret. Benefit Plan*, 823 F.3d 948, 959 (9th Cir. 2016) (alterations in original) (quoting  
10 *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996)). A plaintiff “may not resort to this  
11 equitable catchall provision to seek the same relief” that a claim for ERISA benefits under  
12 § 1132(a)(1)(B) affords. *Wise*, 600 F.3d at 1190. However, claims under § 1132(a)(1)(B)  
13 and § 1132(a)(3) “may proceed simultaneously so long as there is no double recovery.”  
14 *Moyle*, 823 F.3d at 961.

15 In this case, Raya seeks equitable relief including the removal of Defendants as  
16 fiduciaries and trustees for the 401(k) Plan and the Pension Plan. (*See* ECF No. 39 at 19).  
17 “Under the broad remedial provision of ERISA . . . removal of fiduciaries [is] an  
18 appropriate remedy upon findings of imprudence, divided loyalties, and prohibited  
19 transactions.” *Donovan v. Mazzola*, 716 F.2d 1226, 1238-39 (9th Cir. 1983), *as amended*  
20 (Oct. 3, 1983). The Court concludes that at this stage in the litigation, Raya may pursue  
21 remedies on the first claim for ERISA benefits under § 1132(a)(1)(B) and on the third claim  
22 under § 1132(a)(3). The Motion to Dismiss the second and third claims for breach of  
23 ERISA fiduciary duties is denied.<sup>6</sup>

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28 <sup>6</sup> Defendants’ request that the Court order Raya to provide a more definite statement is denied. *See* Fed.  
R. Civ. P. 12(e); *Bureerong*, 922 F. Supp. at 1461.

1                   **iii. Defendant Evelyn Barka**

2           Defendants contend that Evelyn Barka is not a proper Defendant because she is not  
3 a named trustee of the 401(k) Plan or the Pension Plan. Defendants contend that the  
4 allegations that Evelyn Barka breached her fiduciary duties are conclusory. Raya contends  
5 that Evelyn Barka is a named trustee of the 401(k) Plan and is a proper Defendant in this  
6 action.

7           29 U.S.C. § 1109 permits a claim for breach of fiduciary duty against “[a]ny person  
8 who is a fiduciary.” 29 U.S.C. § 1109(a). 29 U.S.C. § 1002 provides that a person is a  
9 fiduciary if they are a “named fiduciary” or

10           to the extent (i) he exercises any discretionary authority or discretionary  
11 control respecting management of such plan or exercises any authority or  
12 control respecting management or disposition of its assets, (ii) he renders  
13 investment advice for a fee or other compensation, direct or indirect, with  
14 respect to any moneys or other property of such plan, or has any authority or  
15 responsibility to do so, or (iii) he has any discretionary authority or  
16 discretionary responsibility in the administration of such plan.

17 29 U.S.C. § 1002(21)(A).

18           In this case, Raya alleges that Evelyn Barka “is a named Trustee and a fiduciary” for  
19 the 401(k) Plan and the Pension Plan. (ECF No. 39 ¶ 10). Raya attaches to his Opposition  
20 to the Motion to Dismiss a 401(k) Plan Adoption Agreement executed on December 30,  
21 2009, by “TRUSTEE” Evelyn Barka, which is a proper subject of judicial notice and  
22 consideration on a motion to dismiss. (*See* Ex. A to Opposition, ECF No. 43 at 42). Raya’s  
23 claims for breach of ERISA fiduciary duties are based, in part, on alleged violations by  
24 “[a]ll fiduciaries” regarding the 401(k) Plan that occurred as early as 2008. (*See* ECF No.  
25 39 ¶¶ 69, 72). The Court concludes that the allegations against Evelyn Barka are sufficient  
26 to state a claim at this stage in the litigation. The Motion to Dismiss Defendant Evelyn  
27 Barka is denied.

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1                   **d. Claim 4 – ERISA Interference**

2                   Defendants contend that the fourth claim for ERISA interference is time-barred.  
3 Defendants “incorporate by reference the arguments set forth in their original Motion to  
4 Dismiss.” (ECF No. 40-1 at 15). In the original Motion to Dismiss, Defendants contend  
5 that a two-year statute of limitations applies, and Raya filed the initial Complaint more than  
6 two years after he was terminated in November 2016. Raya contends that the doctrine of  
7 fraudulent concealment tolls the statute of limitations.

8                   29 U.S.C. § 1140 prevents employers from discharging a participant “because of a  
9 specific intent to interfere with ERISA rights . . . .” *Dytrt v. Mountain State Tel. & Tel. Co.*,  
10 921 F.2d 889, 896 (9th Cir. 1990) (citations omitted); *see* 29 U.S.C. § 1140. The statute of  
11 limitations for an ERISA interference claim borrows the two-year statute of limitations for  
12 a state law claim for wrongful termination in violation of public policy. *See Burrey v. Pac.*  
13 *Gas & Elec. Co.*, 159 F.3d 388, 396 (9th Cir. 1998); *Prue v. Brady Co./San Diego, Inc.*,  
14 242 Cal. App. 4th 1367, 1382 (2015); Cal. Civ. Proc. Code § 335.1.

15                   The Court of Appeals for the Ninth Circuit has not considered when a cause of action  
16 for ERISA interference accrues. The Courts of Appeals for the First, Third, and Seventh  
17 Circuits agree that a cause of action “accrues when the decision to terminate is made and  
18 the employee is informed of the pending termination.” *Jakimas v. Hoffmann-LaRoche, Inc.*,  
19 485 F.3d 770, 780 (3d Cir. 2007), *as amended* (May 31, 2007); *see Edes v. Verizon*  
20 *Commc’ns, Inc.*, 417 F.3d 133, 139 (1st Cir. 2005) (same); *Tolle v. Carroll Touch, Inc.*,  
21 977 F.2d 1129, 1140-41 (7th Cir. 1992) (same); *see also Del. State Coll. v. Ricks*, 449 U.S.  
22 250, 258 (1980) (holding that a cause of action under Title VII accrues at the time an  
23 employment decision is made and communicated to the employee).

24                   In this case, Raya alleges that he received notice of his termination on November 29,  
25 2016. Raya alleges that his termination was in retaliation for “exercising his rights under  
26 ERISA to request Plan Documents.” (ECF No. 39 ¶ 78). Raya alleges that he had been  
27 demanding to see plan documents since July 2016, and “[r]ather than allow [ ] Raya to  
28 view the 401(k) Plan documents, Calbiotech [ ] made the decision to terminate [ ] Raya.”

1 (*Id.* ¶ 44). Raya alleges that at the time of his termination, “Raya still had not received any  
2 Plan Documents.” (*Id.* ¶ 45).

3         Raya filed the initial Complaint on December 2, 2019. The facts alleged in the FAC  
4 support an inference that Raya discovered the allegedly unlawful act on November 29,  
5 2016, when he received notice of his termination. The facts alleged in the FAC support an  
6 inference that at the time of Raya’s termination, Raya knew that he had requested Plan  
7 documents and that Calbiotech failed to provide the requested documents. Taking the facts  
8 alleged in the FAC as true, the Complaint was filed more than two years after Raya knew  
9 of the allegedly wrongful act. Raya fails to allege facts that support an inference that  
10 fraudulent concealment tolls the statute of limitations for ERISA interference. *See Volk v.*  
11 *D.A. Davidson & Co.*, 816 F.2d 1406, 1415-16 (9th Cir. 1987) (the plaintiff “must plead  
12 with particularity the facts giving rise to the fraudulent concealment claim and must  
13 establish that they used due diligence in trying to uncover the facts”). The Court concludes  
14 that Raya’s failure to comply with the statute of limitations is apparent from the face of the  
15 complaint. *See Seven Arts*, 733 F.3d at 1254. The Motion to Dismiss the fourth claim for  
16 ERISA interference is granted.

## 17     **II. STATE LAW CLAIMS**

18         Defendants contend that the fifth, sixth, and seventh claims for violations of  
19 California state law are preempted by ERISA. Defendants contend that the state law claims  
20 relate to actions taken in administering an ERISA plan and arise out of fiduciary  
21 relationships that ERISA regulates. Raya contends that the state law claims are independent  
22 of the operation of any ERISA plan. Raya contends that the state law claims do not involve  
23 actions, funds, or assets that are dependent on the existence of any ERISA plan.

24         “The purpose of ERISA is to provide a uniform regulatory regime over employee  
25 benefit plans.” *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). “To this end, ERISA  
26 includes expansive pre-emption provisions[.]” *Id.* 29 U.S.C. § 1144(a) provides that “the  
27 provisions of this title and title IV shall supersede any and all State laws insofar as they  
28 may now or hereafter relate to any employee benefit plan described in section 4(a) [29

1 U.S.C. § 1003(a)] and not exempt under section 4(b) [29 U.S.C. § 1003(b)].” 29 U.S.C. §  
2 1144(a). 29 U.S.C. § 1144(a). “A law relates to an employee benefit plan, in the normal  
3 sense of the phrase, if it has a connection with or reference to such a plan.” *Ingersoll-Rand*  
4 *Co. v. McClendon*, 498 U.S. 133, 129 (1990) (quoting *Shaw v. Delta Air Lines, Inc.*, 463  
5 U.S. 85, 96-97 (1983)).

6 A state law claim has “reference to” an ERISA plan if the claim is premised on the  
7 existence of an ERISA plan, or if existence of the ERISA plan is essential to the survival  
8 of the state law claim. *See Cal. Div. of Labor Standards Enforcement v. Dillingham*  
9 *Constr., N.A.*, 519 U.S. 316, 325 (1997); *Providence Health Plan v. McDowell*, 385 F.3d  
10 1168, 1172 (9th Cir. 2004), *as amended* (Oct. 1, 2004). “In determining whether a claim  
11 has a ‘connection with’ an employee benefit plan, courts in this circuit use a relationship  
12 test.” *Providence Health Plan*, 385 F.3d at 1172. Under the relationship test, a state law  
13 claim has a connection with an ERISA plan if the state claim encroaches upon relationships  
14 regulated by ERISA, such as the relationship between plan and plan member, plan and  
15 employer, and plan and trustee. *See Abraham v. Norcal Waste Sys.*, 265 F.3d 811, 820-21  
16 (9th Cir. 2001); *Providence Health Plan*, 385 F.3d at 1172. “[A] core factor leading to the  
17 conclusion that a state law claim is preempted is that the claim bears on an ERISA-  
18 regulated relationship.” *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 201 F.3d  
19 1212, 1219 (9th Cir. 2000), *as amended on denial of reh’g* (Apr. 5, 2000).

20 In this case, Raya brings the fifth through seventh claims for breach of fiduciary  
21 duties, fraud and concealment, and conversion under California state law. Raya alleges that  
22 Defendants misappropriated deductions from Raya’s biweekly paychecks to repay a loan  
23 from Raya’s 401(k) account. Raya alleges that the funds “were intended to be deposited  
24 into a 401(k) account . . . and never became Plan assets or part of a retirement account.”  
25 (ECF No. 39 ¶¶ 87, 95, 106). These allegations that form the basis of the state law claims  
26 are also used to support the ERISA claims based on the 401(k) Plan. ERISA regulates the  
27 alleged fiduciary relationships, and the conduct allegedly occurred after the creation of the  
28 401(k) Plan, involves Plan assets, and relates to the administration of the 401(k) Plan. *See*

1 29 C.F.R. § 2510.3-102(a)(1) (“[T]he assets of the plan include amounts . . . for  
2 contribution or repayment of a participant loan to the plan[.]”). The Court concludes that  
3 the state law claims have “a connection with or reference to” an ERISA plan and are  
4 preempted by ERISA. *Ingersoll-Rand Co.*, 498 U.S. at 129 (quoting *Shaw*, 463 U.S. at 96-  
5 97). The Motion to Dismiss the fifth, sixth, and seventh claims for violations of California  
6 state law is granted.<sup>7</sup>

### 7 **III. JURY TRIAL**

8 Defendants request that the Court strike Raya’s demand for a jury trial under Rule  
9 12(f) of the Federal Rules of Civil Procedure because there is no right to a jury trial under  
10 ERISA. Raya contends that he does not request a jury trial for his ERISA claims.

11 Rule 12(f) provides that the court “may strike from a pleading an insufficient defense  
12 or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). In  
13 the prayer for relief in the FAC, Raya “demands a jury trial for the claims in which a jury  
14 is permitted.” (ECF No. 39 ¶ 110). There is no right to a jury trial on the remaining ERISA  
15 claims. *See Thomas v. Or. Fruit Prods. Co.*, 228 F.3d 991, 997 (9th Cir. 2000). The Court  
16 concludes that the request for a jury trial is immaterial under Rule 12(f). The request to  
17 strike the demand for a jury trial is granted.

### 18 **IV. FAILURE TO COMPLY WITH COURT ORDER**

19 Defendants contend that the Court should dismiss the FAC in its entirety under Rule  
20 41(b) of the Federal Rules of Civil Procedure. Defendants contend that the FAC includes  
21 claims and factual allegations that were not included in the proposed amended complaint  
22 the Court authorized Raya to file in its Order granting the Motion for Leave to Amend.  
23 Defendants contend that the FAC was filed two days after the Court-imposed deadline.  
24 Defendants alternatively request that the Court “strike any and all additional/modified  
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26  
27 <sup>7</sup> The Court declines to take judicial notice of the U.S. Department of Labor investigatory findings letter  
28 and the California Employment Development Department notice received by Calbiotech, because judicial  
notice of the requested documents is unnecessary for this Order. *See* ECF No. 41; *Asvesta*, 580 F.3d at  
1010 n.12.

1 claims and factual allegations that were not presented in the Proposed Amended  
2 Complaint” under Rule 12(f). (ECF No. 40-1 at 33). Raya contends that the changes in the  
3 FAC “represent Plaintiff’s sincere attempts to further define and clarify claims and to  
4 further correct technical pleading deficiencies.” (ECF No. 43 at 11). Raya contends that his  
5 filing of the FAC was timely under the Federal and Local Rules and was delayed by the  
6 COVID-19 pandemic.

7 Rule 41(b) provides, “If the plaintiff fails to . . . comply with these rules or a court  
8 order, a defendant may move to dismiss the action or any claim against it.” Fed. R. Civ. P.  
9 41(b).

10 In determining whether to dismiss a claim for failure to prosecute or failure to  
11 comply with a court order, the Court must weigh the following factors: (1) the  
12 public’s interest in expeditious resolution of litigation; (2) the court’s need to  
13 manage its docket; (3) the risk of prejudice to defendants/respondents; (4) the  
14 availability of less drastic alternatives; and (5) the public policy favoring  
15 disposition of cases on their merits.

16 *Pagtalunan v. Galaza*, 291 F.3d 639, 643 (9th Cir. 2002) (citing *Ferdik v. Bonzelet*, 963  
17 F.2d 1258, 1260-61 (9th Cir. 1992)).

18 In this case, the Court granted Raya permission to file the proposed FAC attached to  
19 the Motion for Leave to File Amended Complaint on or before December 8, 2020. (*See*  
20 ECF No. 38 at 4). The FAC that Raya filed improperly includes a new claim for conversion  
21 and additional factual allegations that were not included in the proposed FAC that the Court  
22 granted Raya permission to file. The FAC was filed one day late. *See* CivLR 7.1(e)(4) (the  
23 extension of time to serve opposing parties for parties not authorized to use the electronic  
24 case filing system “does not extend court filing deadlines”). However, the unauthorized  
25 claim for conversion has been dismissed. Defendants have fully briefed, and the Court has  
26 analyzed, the Motion to Dismiss the FAC. The Court concludes that the *Pagtalunan* factors  
27 weigh against dismissal. The request to dismiss the FAC in its entirety under Rule 41(b) is  
28 denied.

1 Motions to strike are generally disfavored and “should not be granted unless it is  
2 clear that the matter to be stricken could have no possible bearing on the subject matter of  
3 the litigation.” *Neveau v. City of Fresno*, 392 F. Supp. 2d 1159, 1170 (E.D. Cal. 2005)  
4 (citing *Colaprico v. Sun Microsystems, Inc.*, 758 F. Supp. 1335, 1339 (N.D. Cal. 1991)).  
5 Courts often require that the moving party make a showing of prejudice before granting a  
6 motion to strike. *See, e.g., Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1528 (9th Cir. 1993),  
7 *rev’d on other grounds by Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). The decision to  
8 grant or deny a motion to strike under Rule 12(f) is within the discretion of the court. *See*  
9 *id.* The Court cannot conclude that the additional factual allegations included in the FAC  
10 filed without leave of court “could have no possible bearing on the subject matter of the  
11 litigation.” *Neveau*, 392 F. Supp. 2d at 1170 (citing *Colaprico*, 758 F. Supp. at 1339). The  
12 request to strike the additional claims and factual allegations not presented in the proposed  
13 FAC is denied.

14 **V. CONCLUSION**

15 IT IS HEREBY ORDERED that the Motion to Dismiss Plaintiff’s First Amended  
16 Complaint, or Motion for a More Definite Statement and Motion to Strike Portions of  
17 Plaintiff’s First Amended Complaint (ECF No. 40) is granted as to the fourth through  
18 seventh claims, and as to the request to strike the request for a jury trial, and is otherwise  
19 denied.

20 Dated: June 3, 2021

21   
22 Hon. William Q. Hayes  
23 United States District Court  
24  
25  
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28