No. 19-15074

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOES ONE THROUGH FIVE,
On behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

v.

CVS PHARMACY, INC.; CAREMARK L.L.C.; CAREMARK CALIFORNIA SPECIALTY PHARMACY, L.L.C.; NATIONAL RAILROAD PASSENGER CORPORATION d/b/a AMTRAK; LOWE'S COMPANIES, INC.; and TIME WARNER, INC.
Defendants-Appellees.

ANSWERING BRIEF OF APPELLEE NATIONAL RAILROAD PASSENGER CORPORATION d/b/a AMTRAK

On Appeal from the United States District Court
for the Northern District of California
No. 3:18-cv-1031-EMC
Hon. Edward M. Chen

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CORPORATE DISCLOSURE STATEMENT

National Railroad Passenger Corporation d/b/a Amtrak ("Amtrak") is a District of Columbia corporation that was authorized to be created by the Rail Passenger Service Act, 49 U.S.C. §24101 et seq.

Amtrak has no parent corporations, but it has several subsidiaries. It has two wholly-owned subsidiaries: Passenger Railroad Insurance Limited ("PRIL") and Washington Terminal Company ("WTC").

The United States holds, through the U.S. Secretary of Transportation, 100% of Amtrak's preferred stock (109,396,994 shares at $100 par value). Amtrak's common stock (9,385,694 shares at $10 par value) is held by American Premier Underwriters, Inc. (55.8%; a wholly-owned, not publicly-traded, subsidiary of American Financial Group, Inc., which is publicly traded), Burlington Northern and Santa Fe LLC (35.7%; BNSF LLC is a wholly-owned, not publicly-traded, subsidiary of Berkshire Hathaway, which is publicly traded), Canadian Pacific Railway (6.3%), and Canadian National Railway (2.2%). None of Amtrak's stock is publicly traded.

Dated: August 7, 2019

MORGAN, LEWIS & BOCKIUS LLP

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NATIONAL RAILROAD
PASSENGER CORPORATION d/b/a
AMTRAK

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I. INTRODUCTION

The John Doe plaintiffs-appellants ("Does 1-5" or "Appellants") filed this lawsuit in an effort to change the terms of their respective employers' health insurance plans so that Does 1-5 can fill their prescriptions for HIV/AIDS "specialty" medications at any pharmacy of their choosing and have that pharmacy treated as an in-network provider. Does 1-5 filed their Complaint against multiple defendants, including defendant-appellee National Railroad Passenger Corporation d/b/a Amtrak ("Amtrak").

The district court dismissed the Complaint with prejudice against all defendants-appellees. Does 1-5 are only appealing the dismissal of one of their claims against Amtrak: a claim for prescription drug benefits due under ERISA (Count 5). ERISA § 502(a)(1)(B) authorizes suit to recover benefits due "under the terms" of a benefit plan. Count 5 therefore fails as a matter of law for a simple reason: Does 1-5 do not – and cannot – identify any term in their health plans that provides the benefit they are seeking.

Does 1-5 filed multiple iterations of their Complaint in the court below, submitted multiple opposition briefs in response to defendants' motions to dismiss, and have now offered an opening brief to this Court. Nowhere do they identify any provision in Amtrak's health plan that offers participants the benefit of filling prescriptions for their HIV/AIDS specialty medications, at any pharmacy of their

choosing, at in-network pricing. Recognizing their inability to overcome this pleading deficiency, Does 1-5 abandon the arguments they presented below in favor of a new, but equally unavailing, argument. They now contend that Amtrak failed to validly amend its benefit plan to require the use of a designated specialty pharmacy for specialty drug prescriptions. This contention – which Does 1-5 neither pled nor argued below – has not been preserved. Even if this Court considers this argument, however, it does nothing to cure the failure of Does 1-5 to identify a plan term that provides the benefit they are seeking. Accordingly, this Court should affirm dismissal of Count 5 of the Complaint.

Does 1-5 do not appeal any of their other claims against Amtrak (Counts 6 – 8) and do not appeal the district court's denial of leave to amend their Complaint. For these reasons, this Court should affirm dismissal of the case against Amtrak with prejudice.

II. STATEMENT OF JURISDICTION

Amtrak agrees with Appellants' jurisdictional statement.

III. ISSUES PRESENTED

1. Whether this Court should affirm dismissal of Does 1-5's claim for benefits due under ERISA (Count 5) against Amtrak, where Does 1-5 neither pled nor argued below the sole argument that they now make in their opening brief regarding Count 5.

2. Whether the district court properly dismissed Does 1-5's claim for benefits due under ERISA (Count 5) against Amtrak, where Does 1-5 concede that they must identify the specific health plan term providing the benefit they seek, yet have not identified any such term.

2. Whether Does 1-5 have waived appellate review of the district court's dismissal of their other claims against Amtrak (Counts 6 – 8) by failing to include any argument in their opening brief that the district court erred in dismissing these claims.

3. Whether Does 1-5 have waived the opportunity to appeal the district court's denial of leave to amend where they fail to challenge this aspect of the district court's decision in their opening brief.

IV. STATEMENT OF THE CASE

A. Does 1-5 Allege That They Receive Prescription Drug Benefits Through Plans Controlled and Administered by the CVS Defendants and Sponsored by the Employer Defendants, Under Which Specialty Medications are Provided Through a Designated Specialty Pharmacy.

The five anonymous "John Doe" appellants allege that they are enrollees in health plans whose prescription drug benefits are controlled and administered by "CVS Caremark." Excerpt of the Record ("EOR") 16-17 at ¶ 1. Does 1-5 define "CVS Caremark" as CVS Pharmacy, Inc., Caremark, L.L.C., and Caremark California Specialty Pharmacy, L.L.C. (the "CVS Defendants"). EOR 16. Does 1-

5 claim that Amtrak, Lowe's Companies, Inc. ("Lowe's"), and Time Warner, Inc. ("Time Warner") (collectively, the "Employer Defendants") are their plan sponsors, but the Complaint did not reveal which John Doe is associated with which employer. EOR 17 at ¶ 2. Amtrak allegedly is the plan sponsor for only one of the John Doe appellants. EOR 21 at ¶ 15.

Does 1-5 are prescribed medications for the treatment or prevention of HIV/AIDS. EOR 16-17 at ¶ 1, 19-21 at ¶¶ 9-13. These HIV/AIDS medications are considered "specialty medications" under their respective plans. *Id.* Generally, specialty medications are drugs that require special handling or monitoring to ensure that the patient is taking correct and timely doses. As Does 1-5 acknowledge, specialty medications under their respective plans are not limited to those that treat HIV/AIDS. EOR 76 at ¶ 120.

According to the Complaint, "[m]any enrollees" in health plans controlled and administered by CVS Caremark must obtain their HIV/AIDS specialty medications from CVS Caremark's specialty pharmacy, Caremark Specialty Pharmacy d/b/a CVS/Specialty and/or Caremark California Specialty Pharmacy, L.L.C. ("CSP"). EOR 16-17 at ¶ 1. Does 1-5 call this aspect of plan design outlining the requirements for obtaining specialty medications "the Program." *Id.* Under the Program, CSP delivers specialty medications by mail or ships them to a CVS retail pharmacy for in-store pick up. *Id.*

Unless Does 1-5 follow the terms of their plans and obtain their HIV/AIDS specialty medications from CSP, they allegedly must pay more out-of-pocket or pay an uninsured, full cash price. EOR 16-17 at ¶ 1, 38 at ¶ 68. Does 1-5 allege that their plans do not allow them to opt-out of the Program, or if they do allow it, they have not been notified of such option. EOR 18 at ¶ 3.

Does 1-5 object to the Program because they wish to fill their HIV/AIDS specialty medications at the pharmacies of their choosing and have those pharmacies treated as in-network providers. EOR 96 at ¶ 201 ("Plaintiffs seek the benefit of continued access to community pharmacies as an 'in-network' benefit…."); EOR 19 at ¶ 9 (John Doe 1 must pay full-price to obtain his HIV/AIDS specialty medication from the "pharmacy of his choice or use the Program he does not wish to use").

B. Procedural History

Insisting that they should receive access to the pharmacies of their choice at in-network pricing, Does 1-5 filed their original complaint against the CVS Defendants and Amtrak on February 16, 2018. EOR 182. Does 1-5 asserted a number of claims against the CVS Defendants, including: violation of the Affordable Care Act (Count 1); violation of the Americans with Disabilities Act (Count 2); violation of the Unruh Civil Rights Act (Count 3); violation of the California Business & Professions Code (Count 4); a claim for benefits due under the Employee Retirement Income Security Act ("ERISA") (Count 5); a claim for breach of

fiduciary duties under ERISA (Count 6); a claim for failure to provide full and fair review under ERISA (Count 7); and a claim for declaratory relief (Count 8). D. Ct. Dkt. 1 at 1-2. Does 1-5's claims against Amtrak included only the three ERISA claims and a claim for declaratory relief. *Id.*

Amtrak moved to dismiss the original complaint under Federal Rule of Civil Procedure 12(b)(6). D. Ct. Dkt. 67. As to the claim for benefits due (Count 5), Amtrak argued that that claim must be dismissed because Does 1-5 failed to identify the specific plan provision that purportedly provided them with the benefit they sought, *i.e.*, the option of filling their HIV/AIDS specialty medications at any pharmacy of their choosing and having in-network pricing apply. D. Ct. Dkt. 67 at 9-10.

Rather than oppose the motion, on June 14, 2018, Does 1-5 filed an amended complaint. D. Ct. Dkt. 72. The amended complaint added John Doe 5 as a plaintiff and added Lowe's and Time Warner as additional Employer Defendants. *Id.* Otherwise, Does 1-5 asserted the same claims as in their original complaint. *Id.* On June 18, 2018, Does 1-5 filed a corrected amended complaint (the operative "Complaint") to remove two CVS entities that they had erroneously included as defendants. EOR 14-16 & n.1.

Because the Complaint did not address the deficiencies in Amtrak's original motion to dismiss, Amtrak moved to dismiss again on the same grounds.[1] D. Ct. Dkt. 89. In their opposition to Amtrak's motion to dismiss, Does 1-5 did not dispute that, to assert a claim for benefits due, they were required to identify the specific plan provision purportedly conferring that benefit. Supplemental Excerpt of Record ("SER") 24-26.

C. The District Court's Decision

The district court below found that Does 1-5 failed to assert plausible claims against Amtrak and the other defendants, and accordingly, dismissed the Complaint with prejudice. EOR 179-80. With respect to the four claims against the Employer Defendants (Counts 5 – 8), the district court held that Does 1-5 failed to satisfy the pleading standards in Federal Rule of Civil Procedure 8(a) and failed to state a claim under Federal Rule of Civil Procedure 12(b)(6).[2] EOR 211-217. Does 1-5 only appeal the dismissal of one of their claims against Amtrak: their ERISA claim for benefits due (Count 5).

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[1] The CVS Defendants, Lowe's, and Time Warner each filed motions to dismiss the Complaint as well. D. Ct. Dkt. 87; D. Ct. Dkt. 97; and D. Ct. Dkt. 113.

[2] The district court held that Does 1-5 failed to meet the pleading standards under Rule 8(a) because the Complaint does not reveal which John Doe is associated with which employer. EOR 212-13. Does 1-5 do not challenge this ruling on appeal, and therefore, have waived the opportunity to do so. *See, e.g.*, *Clark v. Arnold*, 769 F.3d 711, 731 (9th Cir. 2014) (this Court will review only issues that an appellant argues specifically and distinctly in an opening brief).

V. STANDARD OF REVIEW

The Court reviews de novo an order granting a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See, e.g.*, *Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 652 (9th Cir. 2019); *Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011). Dismissal without leave to amend is proper where "it is clear, upon de novo review, that the complaint would not be saved by any amendment." *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892-93 (9th Cir. 2010) (internal quotations and citation omitted). In addition, this Court may affirm on any ground that has support in the record, whether or not the district court decision relied on those same grounds. *See, e.g.*, *Cigna Prop. & Cas. Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 418 (9th Cir. 1998).

VI. SUMMARY OF THE ARGUMENT

Recognizing their inability to overcome the pleading deficiency in their claim for benefits due under ERISA (Count 5), Does 1-5 abandon the arguments they presented below in favor of a new, but equally unavailing, argument. Specifically, in their opening brief, Does 1-5 argue that because there were no allegations or evidence that Amtrak validly amended its plan to implement the Program, the district court erred in dismissing Count 5. The contention that Amtrak did not validly amend its plan – which Does 1-5 neither pled nor argued below – has not been preserved for appeal. For this reason alone, the Court should affirm dismissal of Count 5.

Even if the Court does consider Does 1-5's new argument, the Court should still affirm dismissal of Count 5. To state a claim for benefits due under ERISA § 502(a)(1)(B), Does 1-5 must identify the specific plan term that provides the benefit they are seeking. Here, they are seeking to fill their HIV/AIDS specialty medications at any pharmacy of their choosing and have that pharmacy treated as an in-network provider. Nonetheless, despite multiple opportunities to do so, Does 1-5 have failed to identify any specific term in Amtrak's health plan that purportedly provides them with this benefit. Does 1-5's new argument that Amtrak did not validly amend its plan does nothing to cure their failure to identify a plan term that provides the benefit they are seeking. Because Does 1-5 fail to satisfy this fundamental element of a plausible claim for benefits due, the Court should affirm dismissal of Count 5.

Additionally, the Court can affirm the district court's dismissal of Count 5 for two independent reasons. First, even if the Program reduced or eliminated a benefit previously offered to Does 1-5, ERISA permits that reduction. Second, Does 1-5 do not allege any wrongdoing by Amtrak that violates ERISA.

Finally, Does 1-5 did not appeal dismissal of any of their other claims against Amtrak (Counts 6 – 8) and, therefore, they have waived any argument that the district court erred in dismissing those claims. Does 1-5 also did not appeal the district court's denial of leave to amend, and this argument is similarly waived.

VII. ARGUMENT

A. Does 1-5 Did Not Preserve For Appeal Their New Argument Regarding Plan Amendment; Therefore, The Court Should Refuse To Consider It And Affirm Dismissal Of Their Claim For Benefits Due Under ERISA (Count 5).

In their opening brief, Does 1-5 do not meaningfully contest the district court's grounds for dismissing their claim for benefits due under ERISA (Count 5).[3] Instead, Does 1-5 proffer a new argument that they did not make at the district court level. According to Does 1-5, because there are no allegations or evidence that Amtrak validly amended its plan to implement the Program, they state a plausible claim for benefits due. Opening Br. 55-56. But, Does 1-5 do not allege anywhere in their Complaint or in their briefing to the district court that Amtrak did not validly amend its plan. Thus, Does 1-5 did not preserve this argument for appeal and the Court should refuse to consider it.

Generally, this Court will not consider an issue raised for the first time on appeal. *See, e.g.*, *Clemens v. CenturyLink Inc.*, 874 F.3d 1113, 1117 (9th Cir. 2017). Although no "bright-line rule" exists to determine whether a litigant properly raised a matter at the district court level, a "workable standard" is that the argument "must be raised sufficiently for the trial court to rule on it." *W. Watersheds Project v. U.S. Dep't of the Interior*, 677 F.3d 922, 925 (9th Cir. 2012) (citing *In re E.R. Fegert*,

[3] Appellants therefore forfeit any challenge to the district court's ruling. *See, e.g.*, *Clark*, 769 F.3d at 731.

Inc., 887 F.2d 955, 957 (9th Cir. 1989) (internal quotations omitted)). This principle gives the district court the opportunity to reconsider its rulings and correct its errors. *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992). Vague references to an argument, without any legal reasoning, do not suffice. *See, e.g.*, *Washington v. Daley*, 173 F.3d 1158, 1169 n.13 (9th Cir. 1999).

The touchstone for determining whether Does 1-5 preserved their "plan amendment" argument is whether they raised it with sufficient specificity to provide the district court with an opportunity to rule on the argument. *See Whittaker*, 953 F.2d at 515; *W. Watersheds Project*, 677 F.3d at 925 (explaining that there is "no waiver if the issue was raised, the party took a position, and the district court ruled on it"). It is clear from the proceedings below that Does 1-5 did not raise their "plan amendment" argument with the requisite specificity.

First, nowhere in the Complaint do Does 1-5 allege that Amtrak failed to validly amend its plan. In their opening brief, Does 1-5 contend that one allegation in their 235-paragraph Complaint supports their "plan amendment" argument: the Program "caus[ed] a reduction in or elimination of benefits *without a change in actual coverage*." Opening Br. 55 (emphasis by Does 1-5). This one allegation is insufficient because Does 1-5 do not plausibly allege that Amtrak did not validly amend its plan to implement the Program.

To the contrary, Does 1-5 allege in the Complaint that Amtrak *did* change their benefits. Conspicuously, Does 1-5 do not claim that Amtrak made these changes without a proper plan amendment. For example, they allege:

> Defendants' *changes* to Class Members' *health plans'* drug benefit put Class Members' health and privacy at risk and reduce[d] or effectively eliminate[d] their drug benefit by requiring subscribers prescribed HIV/AIDS Medications to obtain those medications solely under the Program, particularly without the option to opt-out or receiving clear (or any) notice of the ability to do so.

EOR 84 at ¶ 147(b) (emphasis added); *see also* EOR 94-95 at ¶ 197.

Second, in their briefing to the district court, Does 1-5 do not argue that Amtrak failed to amend its plan. SER 24-33; SER 45-54. In fact, in their opposition to Amtrak's motion to dismiss, Does 1-5 expressly concede that Amtrak amended its plan. Nowhere, however, do they argue that this amendment was invalid. SER 30 ("Plaintiffs' have clearly alleged that, through amendment and [sic] of the plan and implementation of the Program, Amtrak intentionally discriminated against Plaintiffs because Plaintiffs are prescribed medications for the treatment or prevention of HIV/AIDS.");[4] *id.* at 24-25 (arguing that "'an amendment placing materially greater restrictions on the receipt of the benefit 'reduces' the benefit just as surely as a decrease in the size of the monthly benefit payment.'" (citation omitted)).

[4] In their Complaint, Does 1-5 do not assert any of their discrimination-based claims against Amtrak. *See* EOR 82-94.

Does 1-5 suggest that they preserved their "plan amendment" argument during oral argument before the district court, but they are incorrect. During oral argument on the breach of fiduciary duty claim (a dismissed claim that is not being appealed), Does 1-5's counsel stated that Does 1-5 "never alleged that the plans were validly amended to include the program." EOR 161. Counsel made this statement in connection with a different claim that the district court dismissed and that Does 1-5 are not appealing. Moreover, this statement references only the inverse of Does 1-5's current argument, and does not assert that Amtrak *failed* to validly amend its plan. Counsel's statements at oral argument are insufficient to preserve Does 1-5's argument for appeal. *See EIJ, Inc. v. United Parcel Serv., Inc.*, 233 F. App'x 600, 602 (9th Cir. Mar. 28, 2007) (refusing to consider appellant's argument on appeal where appellant "raised this issue for the first time in oral argument before the district court," and therefore the "argument was thus not properly raised before that court or this one"); *cf. Greisen v. Hanken*, 925 F.3d 1097, 1115 (9th Cir. 2019) (where a party "briefly asserted [his] argument for the first time in his reply brief on his renewed motion for judgment as a matter of law, … the district court appropriately declined to consider it.").

Finally, as further evidence that Does 1-5 did not sufficiently raise this argument below, the district court never mentioned it or ruled on it in its dismissal order. *See generally* EOR 179-218. Instead, the district court properly dismissed

Count 5 because Does 1-5 do not identify any plan provision providing the benefit they seek.[5]

B. The District Court Properly Dismissed Does 1-5's Claim For Benefits Due Under ERISA (Count 5).

Through their claim for benefits due under ERISA (Count 5), Does 1-5 seek the benefit of filling their HIV/AIDS specialty medications at any pharmacy of their choosing and having that pharmacy treated as an in-network provider. The district court properly dismissed their claim after finding that Does 1-5 fail to identify any specific plan term purportedly providing them with this benefit. Because Does 1-5 fail to satisfy this fundamental element of a plausible claim for benefits due, and because their new "plan amendment" argument does nothing to correct their pleading defect, the Court should affirm the district court's decision.

1. The Standard Applied to a Federal Rule of Civil Procedure 12(b)(6) Motion to Dismiss.

A court must dismiss a complaint or an individual claim therein if it "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations omitted). The Court will affirm the district

[5] As discussed further below, even if Does 1-5 had preserved their new "plan amendment" argument for appeal, this argument does nothing to cure the fatal defect in Count 5. *See* Section VII(B)(3) *infra*.

court's decision "where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 886 (9th Cir. 2018) (citations omitted). Although the Court accepts "as true all factual allegations," it does not "accept as true allegations that are conclusory." *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1051 (9th Cir. 2014). Nor does the Court consider factual assertions made for the first time on appeal, as "review is limited to the contents of the complaint." *Depot, Inc.*, 915 F.3d at 653 (citations omitted). The Court can affirm "on any basis fairly supported by the record." *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007).

2. The District Court Correctly Held That Does 1-5 Fail To State a Claim for Benefits Due Under ERISA (Count 5) Because They Do Not Identify Any Specific Plan Term Purportedly Providing the Benefit They Seek.

The district court correctly held that because Does 1-5 fail to identify any specific term in their benefit plans purportedly providing the benefit they seek, their claim for benefits due under ERISA is doomed. By the statute's plain terms, a claim for benefits due under ERISA § 502(a)(1)(B) authorizes a cause of action when a defendant denies a benefit that is actually provided by the applicable benefit plan. *See* 29 U.S.C. § 1132(a)(1)(B) (authorizing a plan participant to sue "to recover benefits due to him *under the terms of his plan* ….") (emphasis added); *see also Cigna Corp. v. Amara*, 563 U.S. 421, 435-36 (2011) (ERISA § 502(a)(1)(B) "speaks of '*enforc[ing*]' the 'terms of the plan,' not of *changing* them"); *Clair v. Harris Tr.*

& Sav. Bank, 190 F.3d 495, 497 (7th Cir. 1999) ("only benefits specified in the plan can be recovered in a suit under section 502(a)(1)(B)"); *Feifer v. Prudential Ins. Co. of Am.*, 306 F.3d 1202, 1208 (2d Cir. 2002) (ERISA § 502(a)(1)(B) "provides a right of action for employees to recover benefits to which they are entitled under the terms of an employee benefit plan"); *Hamilton v. Air Jamaica, Ltd.*, 945 F.2d 74, 78 (3d Cir. 1991) (ERISA "protects only those benefits provided in the plan").

Generalized allegations of entitlement to benefits do not state a claim under ERISA § 502(a)(1)(B). *Simi Surgical Ctr., Inc. v. Conn. Gen. Life Ins. Co.*, Case No. 2:17-cv-02685-SVW-AS, 2018 WL 6332285, at *3 (C.D. Cal. Jan. 4, 2018) (allegation that defendants "breached the terms and conditions" of the health insurance plan failed to state a plausible claim). Rather, as the district court correctly held, to state a viable claim for benefits due and survive a motion to dismiss, Does 1-5 must "identify a specific plan term that confers the benefit in question." *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 174 (D.C. Cir. 2006) (citations omitted); *accord Simi*, 2018 WL 6332285, at *3; *Raygoza v. ConAgra Foods, Inc. Welfare Benefit Wrap Plan*, No. CV 15–03741–AB (JCx), 2016 WL 9454419, at *5 (C.D. Cal. Nov. 4, 2016) ("Indispensible [sic] is the requirement that a plaintiff who brings a claim for benefits under ERISA must identify a specific plan term that confers the benefit in question.") (internal quotation marks and citation omitted); *see also Doe v. BlueCross BlueShield of Tenn., Inc.*, No. 2:17-cv-02793-TLP-cgc, 2018 WL

3625012, at *11 (W.D. Tenn. July 30, 2018) (dismissing state law breach of contract claim alleging defendants violated terms of health insurance plan by requiring employees to obtain HIV/AIDS specialty medications through a mail order program because plaintiff "fails to identify a specific provision of the health plan that Defendant has breached"), *aff'd*, No. 18-5897, 2019 WL 2353207, at *7 (6th Cir. May 1, 2019).

Here, Does 1-5 fail to meet this simple criterion. Despite having had three opportunities – in their complaint, amended complaint, and corrected amended complaint – Does 1-5 do not identify a specific plan term that purportedly confers the benefit of filling their HIV/AIDS specialty medications at any pharmacy of their choosing at in-network pricing. Does 1-5 filed their amended complaint and corrected amended complaint after Amtrak moved to dismiss their original complaint. In that motion to dismiss, Amtrak argued that Does 1-5 failed to state a plausible claim for benefits due because they did not identify the plan term purportedly providing them with the benefit they are seeking. D. Ct. Dkt. 67 at 9-10. Even with knowledge of Amtrak's argument, Does 1-5 still did not correct the pleading deficiency in their amended complaint or corrected amended complaint. Though Does 1-5 make a conclusory allegation that requiring them to obtain specialty drugs through the Program causes "a reduction in or elimination of

benefits" (EOR 94 ¶ 196), this generalized allegation is insufficient to allege a plausible claim for benefits due. *See Simi*, 2018 WL 6332285, at *3.

In Does 1-5's motion to dismiss briefing and in their opening brief to this Court, they do not dispute that they must identify a specific plan term providing the benefit they seek. Yet, Does 1-5 do not identify any such term. In one brief to the district court, Does 1-5 argued that they "allege that they are entitled to prescription medication benefits from the in-network pharmacist of their choice under the terms of their employer sponsored plans." SER 45. In support, Does 1-5 cite to a handful of paragraphs from the Complaint. *Id.* Even those paragraphs, presumably the most persuasive citations that Does 1-5 could identify, allege only that Does 1-5 are HIV positive, receive health insurance coverage from their employers, and that CVS administers the pharmacy benefit. EOR 22-23 at ¶ 20, 25 at ¶ 31, 29-30 at ¶ 43, 32 at ¶ 50, 34-35 at ¶ 58. These paragraphs say nothing about whether the plans provide Does 1-5 with the benefit of filling their HIV/AIDS specialty medications at pharmacies of their choosing at in-network pricing.

Does 1-5's failure to cite to a specific plan term is telling. As the district court noted, the most logical reading of the Complaint is that the plans do *not* allow participants to obtain their specialty drug medications from any pharmacy of their choosing and receive in-network pricing. EOR 202. For instance, the Complaint attributes the "designation of the community pharmacy as now being 'out-of-

network'" to "Defendants' changes to Class Members' health plans' prescription drug benefit." EOR 94-95 at ¶ 197. Additionally, John Doe 2 alleges that CVS Caremark "stated [to him that] there was no provision in [his] health plan allowing him to opt-out of the Program, nor would there be for 2018, and confirmed this policy applied to specialty HIV/AIDS Medications." EOR 28 at ¶ 40. Does 1-5 also contend that:

> The Program results in a reduction in or elimination of health plans' drug benefits, effectuated by transforming drug purchases at community pharmacies from an 'in-network' covered benefit to an 'out-of-network' payment. Under the Program, patients using a non-CVS community pharmacy will be considered going 'out-of-network' and will be subject to increased 'out-of-network' charges or may not have these medications covered at all.

EOR 38 at ¶ 68. These allegations suggest that the plans do *not* offer the benefit that Does 1-5 are seeking, and that a ruling in Does 1-5's favor on Count 5 would require the Court to rewrite the plans' terms. Of course, that remedy is not available under ERISA § 502(a)(1)(B). *See Amara*, 563 U.S. at 435-36 (ERISA § 502(a)(1)(B) "speaks of '*enforc[ing]*' the 'terms of the plan,' not of *changing* them").

Because the Complaint fails to plausibly allege that the plans provide the benefit that Does 1-5 are seeking – a fundamental element of a claim under ERISA § 502(a)(1)(B) – the Court should affirm the district court's dismissal of Count 5 with prejudice.

3. Does 1-5's New Argument Regarding Plan Amendment, Which They Did Not Preserve For Appeal, Does Not Cure The Fatal Defect In Count 5.

As explained above, in their opening brief, Does 1-5 do not meaningfully address the district court's reasoning in dismissing Count 5, but rather, assert a new argument that Amtrak did not validly amend its plan to implement the Program. Even if Does 1-5 did not waive this argument, it does not cure the fatal defect that necessitated dismissal of Count 5 in the first place. Either Amtrak's plan contains terms providing Does 1-5 with a right to fill their HIV/AIDS specialty medications at the pharmacy of their choice for in-network pricing, or the plan does not. If it does not, Does 1-5 cannot state a viable claim for benefits due under ERISA. As explained above, despite numerous opportunities, Does 1-5 still have not identified (and cannot identify) a specific term in Amtrak's plan purportedly providing the right to fill their HIV/AIDS specialty medications at the pharmacy of their choice for in-network pricing.

Does 1-5 try to fault Amtrak for not introducing evidence of its plan amendment during the motion to dismiss stage. Opening Br. at 56. This argument misconstrues the Federal Rules of Civil Procedure. Under *Twombly* and *Iqbal*, Does 1-5 bear the burden of alleging sufficient facts to state a plausible claim, which as explained above, and as the district court held, they have not done. It is not Amtrak's burden to introduce facts disproving those allegations on a motion to dismiss. Does

1-5's argument is particularly disingenuous considering that the Complaint does not allege that Amtrak failed to amend its plan.

4. The Court May Affirm the District Court's Decision For Two Alternative Reasons.

This Court's "review is not limited to a consideration of the grounds upon which the district court decided the issues; [it] can affirm the district court on any grounds supported by the record." *Weiser v. United States*, 959 F.2d 146, 147 (9th Cir. 1992). Here, the Court may affirm the district court's dismissal of Count 5 for two independent reasons. First, even if the Program reduced or eliminated a benefit previously offered to Does 1-5, ERISA permits that reduction. Second, Does 1-5 do not allege any acts by Amtrak in connection with their § 502(a)(1)(B) claim that is violative of ERISA.

a. Amtrak has discretion over the design of its plan, including prescription drug benefits, and therefore, implementing the Program does not violate ERISA.

"Nothing in ERISA requires employers to establish employee benefit plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). As a corollary, "ERISA mandates no minimum substantive content for employee welfare benefit plans, and therefore a court has no authority to draft the substantive content of such plans." *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353 (9th Cir. 1984), cert. denied, 474 U.S. 865. Instead, "employers have large leeway to design

… welfare plans as they see fit," *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003), and "are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans."[6] *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 933 (2015) (citations omitted). Thus, even if the Program reduced or eliminated a previously offered benefit, Amtrak has not violated ERISA.[7] *Cinelli v. Sec. Pac. Corp.*, 61 F.3d 1437, 1441 (9th Cir. 1995) ("Because benefits under a welfare plan are generally neither vested nor accrued, an employer may amend or terminate benefits pursuant to the terms of the plan at any time."); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986) ("ERISA simply does not prohibit a company from eliminating previously offered benefits that are neither vested nor accrued").

Nothing in ERISA requires Amtrak to offer prescription drug coverage to its employees, and ERISA certainly does not require Amtrak to permit its employees to fill their HIV/AIDS specialty medications at the pharmacy of their choosing and receive in-network pricing. Rather, the decision to offer prescription drug coverage, and the mechanism for delivering such coverage, lies within Amtrak's discretion. In

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[6] Amtrak's Plan is a "welfare plan," which ERISA defines as a plan providing employees with "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability [or] death." 29 U.S.C. § 1002(1).

[7] Of course, Does 1-5's failure to identify any term granting the benefit they seek belies the argument that Amtrak "reduced" or "eliminated" that benefit.

short, the Program is entirely consistent with ERISA, and for this reason, the Court should affirm the district court's dismissal of Count 5.

b. Does 1-5 do not allege wrongdoing by Amtrak in connection with their claim for benefits due.

In Count 5, Does 1-5 contend that "Defendants" violated their legal obligations under ERISA. EOR 94 at ¶ 196. But, the only alleged wrongdoing by *Amtrak* is entering into an agreement with CVS that did not provide participants the right to opt-out of the Program. That allegation does not state a claim for benefits due. In fact, it contradicts Does 1-5's argument that Amtrak's plan provides the right to utilize the pharmacy of Does 1-5's choice. Does 1-5 therefore fail to allege a claim for benefits due against Amtrak, and the Court can affirm dismissal of Count 5 for this additional reason.

C. Does 1-5 Do Not Appeal The District Court's Dismissal Of Their Other Claims Against Amtrak (Counts 6 – 8) And Have Now Waived Their Opportunity To Do So.

Does 1-5 do not appeal the district court's dismissal of their other claims against Amtrak, including their claim for breach of fiduciary duties under ERISA (Count 6), failure to provide a full and fair review under ERISA (Count 7), and declaratory relief (Count 8). Does 1-5 have waived any argument that the district court erred in dismissing these claims because they do not make any such argument in their opening brief. *See, e.g., Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011) ("We … do not consider the dismissed claims that

are not raised on appeal."); *see also Thompson v. Permanente Med. Grp., Inc.*, 623 F. App'x. 400, 401 (9th Cir. 2015) ("We do not consider matters not specifically and distinctly raised and argued in the opening brief…."); *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 n.6 (9th Cir. 1995) ("Because [appellant] did not raise this issue in his opening brief, we do not consider it.").

Does 1-5 do not challenge the district court's dismissal of their other two ERISA claims against Amtrak at all (Counts 6 and 7). They do not even mention these claims in their opening brief. Does 1-5 do make one passing reference to their declaratory relief claim (Count 8), but this is not sufficient to warrant appellate review of that claim. Specifically, one heading in their opening brief reads: "Appellants Properly Alleged a Denial-of-Benefits Claim Under ERISA and Declaratory Relief Because There Were No Allegations or Evidence That the Plans Were Validly Amended to Implement the Program." Opening Br. 54. Aside from this one reference in a heading, Does 1-5 do not mention their declaratory relief claim and make no argument that the district court erred in dismissing it. Appellants' passing reference, without any argument, is insufficient to preserve a challenge to the dismissal of their declaratory relief claim. *See Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1079 n.26 (9th Cir. 2008) ("It is well-established that a bare assertion in an appellate brief, with no supporting argument, is insufficient to preserve a claim on appeal."); *Daley*, 173 F.3d at 1169 n.13 (appellants abandon

an issue "by failing to support their assertions with reasoned argument"); *Clark*, 769 F.3d at 731 (this Court will review only issues which are argued specifically and distinctly in a party's opening brief).[8] Therefore, the Court should affirm dismissal of Does 1-5's declaratory relief claim (Count 8), as well as their other two ERISA claims (Counts 6 and 7), against Amtrak with prejudice.

D. Does 1-5 Do Not Appeal The District Court's Denial Of Leave To Amend And Have Now Waived Their Opportunity To Do So.

Regarding their claims against Amtrak, Does 1-5 do not challenge the district court's denial of leave to amend. In their opening brief, Does 1-5 assert only once that they should have been granted leave to amend, but make this assertion in connection with their discrimination-based claims against the CVS Defendants, not their claims against Amtrak. Opening Br. 45.[9] Therefore, because Does 1-5 fail in

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[8] Even if Does 1-5 did not waive this argument, the Court should still affirm dismissal of their standalone declaratory relief claim. Declaratory relief is not a cause of action, but a form of equitable relief that must be premised on a separate, standalone cause of action. *See Mayen v. Bank of Am. N.A.*, Case No. 14-cv-03757-JST, 2015 WL 179541, at *5 (N.D. Cal. Jan. 14, 2015) ("[D]eclaratory relief is not a standalone claim."). Because Does 1-5's ERISA claim for benefits due must be dismissed for the reasons stated herein, their declaratory relief claim should also be dismissed. *See, e.g., Anderson v. W. Conference of Teamsters Pension Tr. Fund*, No. CIV. A-92-1482 WBS, 1993 WL 413138, at *7 (E.D. Cal. June 22, 1993).

[9] Moreover, this assertion – that "[a]t a minimum, the district court should have granted Appellants leave to amend to allege sufficient detail regarding this claim" (Opening Br. 45) – without more, does not sufficiently preserve this issue for appeal, even for Appellants' discrimination-based claims. *See* Section VII(C)

their opening brief to challenge the district court's denial of leave to amend with respect to their claims against Amtrak, this argument has been waived. *See Galvani v. Galvani*, 544 F. App'x. 790, 791 (9th Cir. 2013) ("[Appellant] waived her challenge to the district court's denial of leave to amend by raising it for the first time in her reply brief"); *In re VeriFone Sec. Litig.*, 11 F.3d 865, 872 (9th Cir. 1993) ("On appeal, shareholders do not argue that leave to amend should have been granted, nor do they point to facts which might be added to save their complaint. Accordingly, the district court did not abuse its discretion in dismissing this action with prejudice."); *Thompson*, 623 Fed. Appx. at 401 ("We do not consider matters not specifically and distinctly raised and argued in the opening brief….").

Even if Does 1-5 have not waived this argument, this Court should still affirm dismissal of the Complaint without leave to amend. Dismissal without leave to amend is proper where "it is clear, upon de novo review, that the complaint would not be saved by any amendment." *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892-93 (9th Cir. 2010) (emphasis removed). As shown above, Does 1-5 cannot save Count 5 by amendment because, despite already having had multiple opportunities, Does 1-5 do not – and cannot – cite to any plan provision that

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supra (citing cases standing for the proposition that a generalized statement, without argument, is insufficient to preserve an issue for appeal).

purportedly provides them with the benefit they are seeking, and this is fatal to their claim. *See* Section VII(B)(2) *supra*.

In their various briefs, Does 1-5 have never explained how they could amend Count 5 to state a plausible claim. Through this silence, they implicitly admit that they cannot plead their claim to meet ERISA requirements.[10] *See, e.g.*, *Carrico v. City and Cty. of San Francisco*, 656 F.3d 1002, 1008 (9th Cir. 2011) (appellants' failure to propose any amendment to cure their pleading is "a demonstration of their inability (or, perhaps, unwillingness) to make the necessary amendment. Accordingly, we deny leave to amend as futile"); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1052 (9th Cir. 2008) ("Appellants fail to state what additional facts they would plead if given leave to amend, or what additional discovery they would conduct to discover such facts. Accordingly, amendment would be futile."). Therefore, this Court should not remand to allow an amendment, as amendment would be futile. *See McQuillon v. Schwarzenegger*, 369 F.3d 1091, 1099 (9th Cir. 2004) (leave to amend need not be granted where further amendment would be futile).

[10] Indeed, as stated above, Does 1-5 filed their Complaint after Amtrak moved to dismiss their original complaint. Does 1-5 failed to correct the defects in their Complaint even though Amtrak's motion to dismiss alerted them to these pleading defects.

VIII. CONCLUSION

For the reasons discussed above, Amtrak respectfully requests that this Court affirm the district court's dismissal of the Complaint against Amtrak with prejudice.

Dated: August 7, 2019

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Amtrak is not aware of any related cases pending in this Court.

Dated: August 7, 2019

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limits permitted by Circuit Rule 31-1. The brief is 6,780 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f). The brief's type size and type face comply with Federal Rule of Appellate Procedure 32(a)(5) and (6).

Dated: August 7, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Answering Brief of Appellee National Railroad Passenger Corporation d/b/a Amtrak with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on August 7, 2019.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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