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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHN J. O'ROURKE,
Plaintiff,

v.

NORTHERN CALIFORNIA ELECTRICAL
WORKERS PENSION PLAN, et al.,
Defendants.

Case No. [3:16-cv-02007-WHO](#)

**ORDER ON CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

Re: Dkt. No. 62, 65

INTRODUCTION

This lawsuit concerns plaintiff John J. O'Rourke's claim for early retirement benefits. He currently works as the Ninth District Vice President of the International Brotherhood of Electrical Workers ("IBEW"), but previously worked as an electrician for approximately 20 years and then Business Manager in IBEW Local 6, during which time he served as a labor trustee on the Board and acted as chair for several years. He left his position with Local 6 in March 2012 to accept a representative position in the IBEW.

At the time he left Local 6, the Board had not finalized a 2010 action in which it agreed to consider a change to the suspension of benefits rule that would provide an exemption from prohibited employment for work performed for Local or National AFL-CIO affiliates, including the IBEW. In 2014, the Board denied O'Rourke's application for early retirement benefits under the Northern California Electrical Workers Pension Plan because it interpreted "prohibited employment" to include his work with the IBEW.

Prior to fact discovery, I considered the parties' cross-motions for summary judgment on O'Rourke's first claim for benefits pursuant to the Plan under ERISA section 502(a)(1)(B). I granted defendants' motion; although both parties presented plausible interpretations of the

1 ambiguous Plan, O'Rourke failed to demonstrate that the Board had abused its discretion in
2 interpreting the prohibited employment provision to include his IBEW work.

3 Fact discovery has now closed, and O'Rourke raises a motion to reconsider my prior order
4 based on new evidence, clear error, and extraordinary circumstances. In the alternative, he argues
5 that he is entitled to summary judgment on his second claim, that the Board breached its fiduciary
6 duty pursuant to ERISA section 502(a)(3) when it failed to follow through on the 2010 action
7 approving the concept that IBEW work is not prohibited employment. Defendants filed a cross
8 motion for summary judgment on this claim, arguing that it fails as a matter of law because the act
9 of amending a plan is a settlor function, not a fiduciary duty. To the extent he can state a claim for
10 breach of fiduciary duty for failure to keep him informed, it insists that the evidence demonstrates
11 he was fully informed. It also contends that he cannot satisfy the requirements for his requested
12 forms of equitable relief, estoppel and reformation.

13 Because O'Rourke fails to present any material new evidence, establish clear error, or
14 demonstrate extraordinary circumstances justifying his motion for reconsideration, it is DENIED.
15 O'Rourke's second claim fails on several grounds. Assuming that he can state a claim, the
16 undisputed evidence indicates that he was fully informed on the status of the Board's failure to
17 finalize the 2010 action. Even if I accepted his contention that the Board failed to provide reliable
18 information, he cannot establish the requisite elements for his requested relief. Defendants'
19 motion for summary judgment is GRANTED.

20 **BACKGROUND¹**

21 **I. FACTUAL BACKGROUND**

22 **A. The Pension Plan**

23 Defendant Northern California Electrical Workers Pension Plan (the "Plan") is a
24 multiemployer defined benefit pension plan. Complaint ("Compl.") (Dkt. No. 1) ¶ 5; Answer
25 ("Ans.") (Dkt. No. 15) ¶ 5; Administrative Record ("AR") 204.² The parties agree that the Plan is

26 _____
27 ¹ A significant portion of the background is copied from the prior order on the parties' cross
28 motions for summary judgment. Additional facts are inserted when necessary.

² The Administrative Record is comprised of certain exhibits containing the Bates number prefix

1 covered by the Employee Retirement Income Security Act of 1974 (“ERISA”). The Plan provides
2 for three types of benefits: (1) normal pension; (2) early pension; and (3) disability pension. AR
3 197. Pension benefits are paid from the Northern California Electrical Workers Pension Trust to
4 which employers under the Plan contribute. AR 373.

5 Defendant Board of Trustees of the Northern California Electrical Workers Pension Trust
6 (the “Board”) has an equal number of Management Trustees and Labor Trustees appointed
7 respectively by the San Francisco Electrical Contractors Association, Inc., and Local 6 of the
8 International Brotherhood of Electrical Workers (“Local 6”). AR 374, 378, 382. The Plan vests
9 the Board with “the exclusive power and discretion to interpret the provisions of the Plan and any
10 rules issued under the Plan, and to determine all questions arising under the Plan including
11 eligibility for benefits.” AR 218. The “Plan’s provisions are designed and intended to comply
12 with the Code and ERISA, as amended, and the construction and interpretation of the Plan shall be
13 consistent with the Code, ERISA, and the Trust Agreement.”³ AR 218. The Board “may amend
14 or modify [the] Plan, provided that no amendment or modification may reduce any accrued benefit
15 except as permitted or required by ERISA and the Code, including regulations thereunder.” AR
16 218.

17 The Plan provides for suspension of early retirement benefits when a retiree works in
18 “prohibited employment.” AR 206. It defines “prohibited employment” before normal retirement
19 age as “the performance of services in any capacity in the Electrical Industry.”⁴ AR 207.

21 “NCEW PP-O’Rourke” and attached as exhibit H to the Declaration of Clarissa Kang (Dkt. No.
22 63).

23 ³ The Plan defines the “Code” as the Internal Revenue Code of 1986, and “ERISA” as the statute
24 “as applied by regulations issued thereunder.” AR 195. The “Trust Agreement” refers to the
25 Northern California Electrical Workers Pension Trust. *See* AR 370.

26 ⁴ The Plan provides a narrower definition of prohibited employment *after* normal retirement age:
27 “‘Prohibited Employment’ . . . means the performance of services of 40 hours or more during the
28 month: (1) in the ten San Francisco Bay Area counties . . . ; (2) in work the type performed by
Employees covered by the Plan on date the Participant’s pension commenced . . . ; and (3)
requiring directly or indirectly the use of the same skills employed by Employees on the date the
Participant’s pension commenced . . . , including any supervision of employees in the same trade
or craft or directly or indirectly using the same skills as Employees covered by the Plan on the date
the Participant’s pension commenced[.]” AR 207.

1 “Electrical Industry” is defined as “all branches of the Electrical Trade in the United States.” AR
2 195. The Plan does not define “Electrical Trade.”

3 The Plan contains four exceptions to the Prohibited Employment rule, including:
4 work (i) as a private or public building or electrical inspector, (ii) as
5 an instructor in a Taft-Hartley Trust apprentice and training
6 program, (iii) in sales of electrical equipment or products or (iv) in
7 the manufacturing or marketing of electrical or electronic products
8 and systems which does not substitute for on-site fabrication
9 protected or sought to be protected under a Collective Bargaining
10 Agreement.

11 AR 207.

12 Although not a part of the Plan, the summary plan description (“SPD”)⁵ notes, “Prohibited
13 Employment is interpreted in the broadest manner.” AR 297. It further states:

14 Prohibited Employment includes, but is not limited to, (1) work in
15 employment of the type performed by Employees covered by the
16 Plan whether or not under a Collective Bargaining Agreement, also
17 known as Covered Employment; (2) work which requires directly or
18 indirectly the use of the same skills used by Employees covered by
19 the Plan on the date of the pension became effective [sic]; (3) work
20 in employment for compensation or wages of any kind or for profit
21 in the Electrical Industry; (4) work for profit as an owner or partner
22 in any business directly or indirectly connected with the Electrical
23 Industry; and (5) work where you supervise Employees in the same
24 trade or craft or directly or indirectly use the same skills as
25 Employees covered by the Plan on the date you retire. It also
26 includes any employment with a contributing Employer or any
27 employment under any Collective Bargaining Agreement to which
28 the Union is party, or any employment with the Union.⁶

The term Electrical Industry means all branches of the Electrical Industry. This includes working as a supervisor, estimator, salesman, consultant, or self-employed in any branch of the Electrical Industry, or any other work involving any electrical knowledge you have acquired as a Participant.

AR 297.

⁵ The SPD states that if there is “any ambiguity or conflict between [the SPD] and the Plan, the Plan will govern.” AR 235.

⁶ “Union” is defined elsewhere in the SPD and in the Plan as “Local 6 of the International Brotherhood of Electrical Workers” and also referred to as “IBEW Local 6.” AR 196.

1 Participants may obtain an advanced determination of whether their post-retirement
2 employment would be Prohibited Employment. AR 208; O'Rourke Dep. at 116:12–18 (Kang
3 Decl., Ex. A; Dkt. No. 63-1).

4 **B. O'Rourke's Covered Employment**

5 O'Rourke worked as an electrician for approximately 20 years and then worked for Local 6
6 as a "Business Manager/Financial Secretary" from July 1999 to March 2012. Ans. ¶ 8; O'Rourke
7 Dep. at 26:9–10; 44:14–21, 51:5–6. Local 6 has approximately 2600 members. Doherty Dep. at
8 28:16–18 (Renaker Decl., Ex. C; Dkt. No. 70-3). The Local 6 business manager organizes the
9 jurisdiction and supervises a staff that currently consists of eight business representatives, a full-
10 time organizer, and five clerical workers. *Id.* at 16:21–19:25, 23:22–24.

11 While working for Local 6, O'Rourke served as a Labor Trustee on the Board and acted as
12 Chair for several years. *Id.* ¶ 8. Both positions—electrician and local union official—were
13 covered employment and established O'Rourke's 30 years of service to qualify him for an early
14 retirement pension under the Plan when he turned 55 years old.

15 **C. Plan Amendments While O'Rourke was on the Board**

16 During O'Rourke's time on the Board, two amendments to the Plan's prohibited
17 employment provisions were adopted. AR 18, 53. In 2002, the Board adopted an amendment to
18 eliminate case-by-case waivers to the suspension of benefits rules for direct management
19 positions, such as project management, estimator, and human resources positions. AR 18; *see also*
20 O'Rourke Dep. at 58:23–59:21, 62:22–64:5, 168:2–170:15. The Board adopted this amendment
21 because it "recogniz[ed] that the . . . suspension rules which provided for waivers for direct
22 management positions created an inequity by allowing 'alumni' employees the opportunity to
23 draw pension benefits and retiree health coverage when bargaining unit employees are prohibited
24 from doing so."⁷ AR 18, 34; O'Rourke Dep. at 40:23–41:3, 59:22–60:1, 169:15–170:15. In 2006,

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27 ⁷ The Plan defines "alumni employee" as "an individual employed in a nonbargaining unit
28 position with an Employer who was previously employed for an Employer under a Collective
Bargaining Agreement; provided, however, that such term shall not include any proprietor or
partner of an unincorporated employer." AR 195.

1 the Board amended the prohibited employment provision to include the four enumerated
2 exceptions. AR 50, 53.

3 **D. September 2010 Board Meeting**

4 At the September 23, 2010 Board meeting, O'Rourke "proposed consideration of a change
5 to the suspension benefits rules that would provide an exemption from prohibited employment for
6 work performed for Local or National AFL-CIO affiliates such as the IBEW, Labor Council, State
7 Associations, and Building Trades Council, as well as the ability to enter into alumni subscription
8 agreements that would allow non-retired Participants who work for those entities to continue
9 participating in the [Trust]." AR 82. O'Rourke recommended that the Board approve the
10 proposal at that meeting "with review of the Plan and Trust documents by Co-Counsel to
11 determine what changes, if any, are required to accomplish this." AR 82; *see also* Paganini Dep.
12 at 53:11–16 (Kang Decl., Ex. C; Dkt. No. 63-3). The meeting minutes state, "M/S/C to concur
13 with the recommendation." AR 82.

14 O'Rourke's declaration, submitted to the Board at a later date, states, "My 2010 proposal
15 was unanimously accepted. As the Chair of the Board of Trustees, I did not make a motion or
16 vote on the motion." AR 359; *see* 2015 O'Rourke Decl. ¶ 7 (Kang Decl., Ex. I; Dkt. No. 63-10).
17 Additionally, the "Plan Administrator and Trust counsel stated at the meeting in 2010 that they did
18 not believe an amendment would be required." AR 359. A trustee alternate who attended the
19 meeting, however, testified that he believed an amendment would have been necessary because
20 O'Rourke's proposal did not fall within one of the four enumerated exceptions. Bamberger Dep.
21 at 51:21–52:12 (Kang Decl., Ex. D; Dkt. No. 63-4).

22 **E. O'Rourke Leaves Local 6 to Work for the IBEW**

23 A representative from the IBEW first approached O'Rourke about accepting a position
24 with the IBEW in September 2001. O'Rourke Dep. at 76:19–77:8. He was approached several
25 more times over the years before he finally indicated an interest in 2011. *Id.* at 77:9–83:22. Prior
26 to accepting, he "want[ed] to check on [his] pension ... to preserve and protect that." *Id.* at 83:16–
27 18.

1 In August or September 2011, he spoke with Judith Fisher, the Plan’s administrator. *Id.* at
2 83:24–84:6. According to O’Rourke, he consulted Fisher because he would not leave Local 6
3 unless he knew he had his pension “locked down.” *Id.* at 84:15–19. He testified that she “r[a]n
4 some numbers” and advised him not to leave until he turned 52 and a half, and he would be
5 eligible for his pension at 55. *Id.* at 85:7–12. He does not recall explicitly asking her if he would
6 be eligible for his early retirement pension if he accepted the position at IBEW because it was
7 “kind of a given.” *Id.* at 90:17–91:12. According to Fisher, they did discuss his eligibility in the
8 context of his potential employment with IBEW and she told him she “thought that [the
9 exemption] would be approved eventually, an amendment.” Fisher Dep. at 30:4–17; *see also id.* at
10 33:24–34:4 (Kang Decl., Ex. B; Dkt. No. 63-2).

11 In February 2012, O’Rourke gave notice that he intended to leave his position with Local 6
12 to work as a representative for the International Brotherhood of Electrical Workers, Ninth District
13 (“IBEW Ninth District”). Ans. ¶ 9; AR 98. At that time, Fisher emailed Plan counsel, noting that
14 no action had been taken following the September 2010 meeting and requesting counsel prepare
15 something for the next Board meeting. AR 98. At the time he gave notice, O’Rourke knew that
16 the Plan had not been amended, but he did not think an amendment was necessary. O’Rourke
17 Dep. at 73:19–74:14. In March 2012, O’Rourke left his position with IBEW Local 6. AR 361.

18 In April 2012, Plan counsel provided a draft Plan amendment, adding an exception to
19 prohibited employment for work “as an employee of the IBEW International Union.” AR 102,
20 104. The management trustees noted that the proposed amendment did not accurately reflect the
21 September 2010 proposal because it did not extend to management-side organizations, such as the
22 electrical contractors’ association. Coleman Dep. at 94:22–95:21 (Renaker Decl., Ex. B; Dkt. No.
23 70-2). The meeting minutes state that at the September 2010 meeting, “the Trustees approved the
24 concept of a change to the suspension of benefits rules that would provide an exemption from
25 prohibited employment for work performed for Local or National AFL-CIO affiliates, such as the
26 IBEW,” and “Co-Counsel was asked to determine what changes, if any, are required to
27 accomplish this.” AR 102. According to one trustee, any time the subject of prohibited
28 employment came up, the conversation “became very heated.” Donovan Dep. at 56:15–57:3

1 (Renaker Decl. ISO Opp'n, Ex. A; Dkt. No. 77-1). The trustees repeatedly tabled the amendment.⁸
 2 *Id.* at 57:5–12; *see also* Doherty Dep. at 118:6–10 (Kang Decl., Ex. F; Dkt. No. 63-6); Coleman
 3 Dep. at 94:6–9 (Kang Decl., Ex. G; Dkt. No. 63-7).

4 The Board did not discuss the amendment again until the November 2013 meeting, when
 5 Trustee John Doherty requested that the matter be placed on the agenda for the March 2014
 6 meeting. AR 101-102, 108-111. At the March 19, 2014 meeting, the Board discussed a memo
 7 drafted by Plan counsel six days earlier addressing “whether a plan participant’s employment
 8 performing administrative or organizing work for a labor union (such as the IBEW International
 9 Office) or an employers association (such as NECA) constitutes ‘Prohibited Employment’ and is
 10 therefore grounds for suspension of early retirement benefits under [the Plan] as currently
 11 written.” AR 115. The March 2014 Memo concluded that such work was not prohibited
 12 employment, explaining:

13 Reference to the exceptions listed in the Plan Document, the
 14 discussion of “Prohibited Employment” in the [SPD], and relevant
 15 ERISA case law and regulations all indicate that term ‘Electrical
 16 Trade’ is properly interpreted as limited to performing services
 17 involving the technical skills and knowledge of an electrician.
 Administrative or organizing work for a labor union or employers’
 association cannot be said to be performance of ‘Electrical Trade’
 services. Because the Plan’s current definition of ‘Prohibited
 Employment’ does not prohibit such work, no amendment to the
 plan is necessary to clarify that such work is permitted.

18 AR 115.

19 Two Labor Trustees “expressed strong disagreement with the legal opinion.” *Id.* Trustee
 20 Doherty stated, “because Local 6 participates as a covered employer in the Plan under a
 21 subscription agreement, that type of employment for Local 6, or any other IBEW for that matter, is
 22 considered ‘covered employment’ and is, therefore subject to suspension of benefits.” *Id.* He
 23 considered allowing a participant to receive a local pension while working for the International
 24 union as “double dipping.” *Id.*

25 Trustee Matthew Bamberger pointed out that the Plan “defines ‘prohibited employment’ in
 26 the broadest sense” and that “in early 2000, the Plan was amended to allow administrative and
 27 _____

28 ⁸ Defendants assert that the Board “declined to adopt [the] proposed Plan amendment[.]” Defs.’
 MSJ at 7:13–14. But, as O’Rourke points out, the issue was simply tabled and never voted on.

1 case-by-case exemptions from prohibited employment, but that these exemptions were later
2 eliminated because of the unfairness of allowing some participants to continue working while
3 drawing their pensions, when others were prohibited from doing so.” AR 120. He was concerned
4 that “the inconsistent or new interpretation . . . would result in unfairness or inequity if individuals
5 are allowed to draw a pension while working for the International given the types of employment
6 for which exemption requests have been denied since that time.” *Id.* The Board requested counsel
7 to research the matter further and look into the Plan’s past practices in dealing with suspension of
8 benefits. *Id.*

9 Plan Counsel prepared a second memorandum on August 13, 2014. AR 121-125.

10 **F. O’Rourke Applies for Early Pension Benefits and is Denied**

11 In June 2014, O’Rourke submitted an application for unreduced early retirement pension
12 benefits to begin in September 2014. AR 361-62. Neither party disputes that O’Rourke met the
13 criteria: 55 years old and 30 years of service. Worried about a potential problem with O’Rourke’s
14 employment with the IBEW Ninth District, Fisher brought O’Rourke’s application to the Board.
15 Fisher Dep. at 112:2–13.

16 At the August 14, 2014 meeting, the Board reviewed Plan Counsel’s August memo. AR
17 121-127. Counsel concluded:

18 In view of these decisions and history of Board discussions, we
19 agree that at times the Board has interpreted the definition of
20 Prohibited Employment more broadly to include work that may not
21 specifically bear upon or utilize skills and experience obtained by
22 work in the electrical trade. For that reason, we do not believe that
23 the Board should categorically exempt any work unless it satisfies
24 one of the existing four exceptions in the Plan. Rather, as has been
25 the practice in all other cases, we think the best course is for the
26 Board to base its determination on careful consideration of all the
27 facts and circumstances that may be submitted regarding the nature
28 of the work in question.

Id. After considering the memo, the Board authorized Fisher to request from O’Rourke a written
job description and a statement explaining why he believed his work at IBEW was not prohibited
under the Plan. AR 127.

Around November 2014, O’Rourke became the Vice President of the IBEW Ninth District,
overseeing the entire Ninth District. Ans. ¶ 9; AR 359. In response to the Board’s request,

1 O'Rourke submitted a letter noting that he served as Vice President of the IBEW Ninth District,
2 which is comprised of six states, 65 local unions, and 129,000 members.⁹ AR 348. O'Rourke also
3 stated, "My duties are purely administrative and do not require, directly or indirectly, the use of
4 the same skills employed by electricians in an electrical trade or craft. Furthermore, my
5 responsibilities do not include supervising employees in said trade or craft. My employment . . .
6 does not require the technical skills of an electrician." AR 348. In December 2014, the Board
7 considered O'Rourke's letter, but did not reach a decision. AR 349; *see* 12/14 Fisher letter (Kang
8 Decl. ¶ 18, Ex. P; Dkt. No. 63-17).

9 In January 2015, O'Rourke's attorney wrote to the Plan demanding it pay O'Rourke's
10 pension benefits. AR 149-51.

11 In March 2015, the Board met and decided to deny O'Rourke's application "because the
12 work he is performing does not meet one of the exceptions to the suspension of benefits provisions
13 of the Plan." AR 168. On March 27, 2015, Plan counsel sent O'Rourke a letter detailing reasons
14 for finding that his employment constituted "prohibited employment." AR 350-52 ("Application
15 Denial Letter"). The Application Denial Letter noted that the Plan provides only four limited
16 exceptions to the prohibited employment rule and that the action taken in September 2010 was
17 insufficient to implement the proposed exception because no amendment had been adopted. AR
18 350-51. The letter further explained:

19 The Plan . . . does not limit application of the suspension rule to early retirees who
20 continue to use technical electrician skills in their post-retirement work. Rather, it
21 requires suspension of benefits whenever an early retiree, not falling within any of
22 the four enumerated exceptions, is performing services in any capacity in the
23 Electrical Industry. Applying this broad language, the Board has determined that
work as a marketing representative or a project manager, or in other positions
which likewise do not entail the use of the technical skills of an electrician,
nevertheless constitutes the performance of services in the Electrical Industry, and

24
25 ⁹ In the Prior Order, I found that "[t]he administrative record contains sufficient information
26 regarding O'Rourke's position with the IBEW Ninth District[,] and denied defendants' Request
27 for Judicial Notice of a printout of the homepage of the IBEW Ninth District. I nonetheless
28 consider additional evidence regarding the nature of O'Rourke's IBEW employment in deciding
the current cross-motions, including the fact that only 32 of the 64 IBEW Ninth District local
unions are electrical construction locals like Local 6. O'Rourke Dep. at 193:4-12 (Renaker Decl.,
Ex. G; Dkt. No. 71-1). O'Rourke testified that he "represent[s] people who work in a variety of
capacities that are not specifically related in any way, shape, or form to the electrical industry,"
including "people who work in assembly of medical goods" and "teachers." *Id.* at 193:13-21.

1 is thus prohibited employment. That some of those positions may require an
 2 electrician's background cannot be taken to mean that the performance of services
 3 in the Electrical Industry is constrained to those positions that require the skills of
 an electrician. The position Mr. O'Rourke holds, Vice President of the IBEW Ninth
 District, plainly contemplates the performance of services of some capacity in the
 Electrical Industry.

4 AR 351.

5 The letter also rejected O'Rourke's argument that "work for the International does not
 6 constitute work in the 'Electrical Industry' at all, as it is not work in which 'employers
 7 maintaining the Plan are engaged." *Id.* Instead, the letter found that is not the way "industry" is
 8 commonly used, noting the IBEW and National Electrical Contractors Association

9 have acted as industry partners for over a century, not only in the
 10 administration of their collective bargaining agreements, but also in
 11 electrical construction and marketing, in training and certification of
 electricians, in efforts to change the laws and regulations governing
 electrical contracting, and much more.

12 *Id.* Lastly, the letter stated that ERISA regulations regarding suspension of benefits after normal
 13 retirement age (65 years old) were inapplicable to suspension of early retirement benefits. *Id.*

14 **G. O'Rourke Appeals and is Denied Again**

15 On July 10, 2015, O'Rourke appealed the denial of his claim for benefits. AR 332-37. In
 16 support of his appeal, O'Rourke submitted a declaration describing his job duties as the Vice
 17 President of the IBEW Ninth District, stating:

18 My job is to promote the IBEW's mission of organizing workers
 19 into local unions, securing reasonable terms of employment
 20 including adequate pay and work hours, cultivating feelings of
 21 friendship among workers, and elevating the moral, intellectual and
 social conditions of members and their families. It is an
 administrative position.

22 I do not perform electrical work, supervise or oversee electrical
 23 work, teach electricians, work with electrical contractors, draft
 electrical specifications, or sell, construct, rent or repair electrical
 components in my current position.

24 My position with the IBEW does not require any manual or
 25 mechanical skill.

26 AR 359.

1 The Board met on August 11, 2015, and discussed O'Rourke's appeal letter and upheld the
2 denial of O'Rourke's application for early retirement benefits. 8/11/15 Meeting Minutes (Kang
3 Decl ¶ 20, Ex. R; Dkt. No. 63-19).

4 On September 11, 2015, Plan counsel sent a letter to O'Rourke's attorney detailing the
5 reasons for denying his appeal. AR 354 ("Appeal Denial Letter"). Noting that "Electrical Trade"
6 could be interpreted in multiple ways, counsel stated, "This Board has chosen to apply the term
7 broadly, such that 'Electrical Trade' . . . means any service in any capacity in the U.S. electrical
8 industry." AR 354. The letter further explained, "The reason for this interpretation is partly to
9 prevent retirees from simultaneously receiving pension benefits and working in a position that
10 might displace a non-pensioner, but also avoid providing an incentive for experienced electricians
11 to leave fieldwork for an administrative position in the industry and the substantial benefit costs
12 that would go with it." AR 354-55.

13 The Appeal Denial Letter also states that the reason for the four exceptions to the
14 prohibited employment rule "is based on a recognition that it is in the electrical industry's general
15 interest to allow an early retiree to perform certain ancillary functions for which it might otherwise
16 be difficult to find qualified individuals." AR 355.

17 Next, the letter asserts that its interpretation of "trade" is in line with the plain meaning of
18 the word. AR 355. For example, two ways that Webster's New World Dictionary (Third College
19 Edition) defines "trade" is "a means of earning one's living, occupation, work, or line of business"
20 and "all the persons or companies in a particular line of business of work." AR 355. Under this
21 meaning, the Board found:

22 IBEW Service is service within the Electrical Trade because Mr.
23 O'Rourke would be working for a union whose function is to
24 provide direct representation and support for workers within the
25 electrical trade. It does not matter whether IBEW Service is
26 administrative or actively working as an electrician; the "industry"
27 and the "trade" refers to both types of services. Therefore, unless an
28 exception applies, IBEW Service would constitute Prohibited
Employment.

AR 355. The letter notes that O'Rourke's current employment does not fit within any of the four
exceptions. AR 355-56.

1 Additionally, the letter addresses O'Rourke's September 2010 proposal. "The Board . . .
2 did not treat this adopted motion as an amendment. It did not contain an effective date, was not
3 clear as to its scope (for example, would it cover all AFL-CIO affiliates?), and wasn't clear as to
4 whether the action itself was an amendment." AR 356. Instead, the Board determined at its
5 March 2015 meeting that the recommendation required an amendment. AR 356. Therefore, "the
6 motion that carried in September 2010 was an agreement by the labor and management trustees, in
7 concept, to adopt an amendment in the future, generally consistent with the recommendation."
8 AR 356. However, no amendment was ever adopted.

9 **H. Additional Evidence**

10 In support of his motion for reconsideration, O'Rourke submitted declarations from current
11 and former IBEW representatives who have received pension benefits from their local union plans
12 while working for the IBEW. *See* Chilia Decl. ¶ 5; Mowry Decl. ¶¶ 3-4; Tilmont Decl. ¶ 5; Uno
13 Decl. ¶¶ 4-5 (Dkt. Nos. 66, 67, 68, 69). These individuals followed the same career path from
14 local union business manager to International official. Chilia Decl. ¶¶ 2-4; Mowry Decl. ¶ 2;
15 Tilmont Decl. ¶¶ 2-4; Uno Decl. ¶¶ 2-3. Many of them attested that drawing a local pension
16 while serving as an International representative is common practice and necessary to account for
17 the salary differential experienced by many business managers of metropolitan local unions who
18 leave to join the International union. Mowry Decl. ¶ 5; Tilmont Decl. ¶¶ 6-9.

19 **II. PROCEDURAL BACKGROUND**

20 On April 15, 2016, O'Rourke filed his complaint asserting two claims under the Employee
21 Retirement Income Security Act of 1974 ("ERISA"). Complaint (Dkt. No. 1). The first claim is
22 for benefits pursuant to the Plan under ERISA section 502(a)(1)(B). The second claim is for
23 breach of fiduciary duty under ERISA section 502(a)(3). On June 14, 2016, defendants filed their
24 answer. (Dkt. No. 15). The parties then filed cross-motions for partial summary judgment on
25 Claim One. O'Rourke's Motion for Summary Judgment (Dkt. No. 26); Defendants' Opposition
26 and Cross-Motion for Summary Judgment (Dkt. No. 29). On December 29, 2016, I granted
27 defendants' motion for summary judgment on O'Rourke's first claim because the Board did not
28

1 abuse its discretion interpreting the prohibited employment provision. Order Re Cross Mot. for
2 Partial Summ. J. (“Prior Order”)(Dkt. No. 40).

3 The parties proceeded through discovery, and then filed cross-motions for summary
4 judgment on Claim Two, breach of fiduciary duty. Defs.’ Mot. for Summ. J. (Dkt. No.
5 62)(“Defs.’ MSJ”); Pl.’s Mot. for Summ. J., Reconsideration (Dkt. No. 65). In his prayer for
6 relief, O’Rourke seeks a declaration that (1) defendants are estopped from denying his early
7 pension benefit and (2) the Plan is reformed to exempt IBEW work from prohibited employment.
8 Compl. at 7:17–21.

9 LEGAL STANDARD

10 I. RECONSIDERATION OF ERISA CLAIM ONE – DENIAL OF BENEFITS

11 A party seeking reconsideration in the Northern District of California must first seek leave
12 of Court. Civil L. R. 7-9(a). The moving party must show reasonable diligence and one of the
13 following:

14 (1) that at the time of the motion for leave, a material difference in
15 fact or law exists from that which was presented to the court before
16 entry of the interlocutory order for which the reconsideration is
17 sought, and that in the exercise of reasonable diligence the party
18 applying for reconsideration did not know such fact or law at the
19 time of the interlocutory order; or (2) the emergence of new material
20 facts or a change of law occurring after the time of such order; or (3)
21 a manifest failure by the court to consider material facts which were
22 presented to the court before such interlocutory order.

23 Civil L. R. 7-9(b).

24 II. SUMMARY JUDGMENT OF ERISA CLAIM TWO – BREACH OF FIDUCIARY DUTY

25 “Sections 404 and 409 of ERISA impose respectively a duty of care with respect to the
26 management of existing trust funds, along with liability for breach of that duty, upon plan
27 fiduciaries.” *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996); *see* 29 U.S.C. §§ 1104(a),
28 1109(a).

Summary judgment on a claim or defense is appropriate “if the movant shows that there is
no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of
law.” Fed. R. Civ. P. 56(a). In order to prevail, a party moving for summary judgment must show
the absence of a genuine issue of material fact with respect to an essential element of the non-

1 moving party's claim, or to a defense on which the non-moving party will bear the burden of
2 persuasion at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has
3 made this showing, the burden then shifts to the party opposing summary judgment to identify
4 "specific facts showing there is a genuine issue for trial." *Id.* The party opposing summary
5 judgment must then present affirmative evidence from which a jury could return a verdict in that
6 party's favor. *Anderson v. Liberty Lobby*, 477 U.S. 242, 257 (1986).

7 On summary judgment, the Court draws all reasonable factual inferences in favor of the
8 non-movant. *Id.* at 255. In deciding a motion for summary judgment, "[c]redibility
9 determinations, the weighing of the evidence, and the drawing of legitimate inferences from the
10 facts are jury functions, not those of a judge." *Id.* However, conclusory and speculative testimony
11 does not raise genuine issues of fact and is insufficient to defeat summary judgment. *See*
12 *Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

13 DISCUSSION

14 O'Rourke spends the majority of his motion urging me to reconsider the Prior Order
15 granting defendants' motion for summary judgment on his claim for benefits. He then moves on
16 to argue, in the alternative, that I should grant summary judgment in his favor as to his second
17 claim for breach of fiduciary duty. This claim stems from his allegations that the Board failed to
18 (1) inform him that it considered the Prohibited Employment rule to cover work for the IBEW; (2)
19 determine whether the Plan required an explicit exemption for work with AFL-CIO affiliated
20 entities; and (3) amend the Plan to add an exemption, to the extent it was not amended at the
21 September 2010 meeting. Compl. ¶40.

22 Defendants argue that O'Rourke's second claim fails on several grounds. Defs.' MSJ at
23 10–11. First, the decision to amend a Plan is a settlor function, not a fiduciary act, so his claim
24 fails as a matter of law. Second, he was well informed about the Board's consideration of whether
25 IBEW work constituted Prohibited Work. Third, he cannot establish the elements of equitable
26 estoppel or reformation. And fourth, his claim is time-barred because he failed to file his lawsuit
27 within three years of his actual knowledge of defendants' alleged breach in April 2012.
28

1 **I. RECONSIDERATION OF CLAIM ONE¹⁰**

2 O'Rourke asks me to reconsider the Prior Order granting defendants' motion for summary
3 judgment on his claim for benefits. Even if I ignore the fact that he failed to obtain leave to file
4 the motion in accordance with the local rules, there is no basis for his motion.

5 **A. No New Evidence**

6 O'Rourke argues that new evidence clarifies the nature of his work, clearly demonstrating
7 the differences between his work as IBEW Ninth District Vice President and work as a Business
8 Manager for Local 6, and establishes that the Board abused its discretion by not considering this
9 evidence when it denied his claim. Reply ISO Pl.'s MSJ at 4–5. He insists that “[t]his evidence is
10 new in that it did not exist at the time of the Court’s prior order.” *Id.* at 5.¹¹ But this hardly
11 constitutes “new material facts.” Even if I considered the additional information to be “newly
12 discovered evidence,” it would not change the outcome.¹² The additional evidence demonstrates
13 that his current work involves a higher level of management and includes organizing workers
14 outside of the electrical industry, but it does not alter the conclusion that “the two positions
15 involve some overlapping skills, such as knowledge of union organizing.” Prior Order at 17. As
16 defendants point out, the requirement that prohibited employment be in the Electrical Industry
17 does not mean that it must be *exclusively in* the Electrical Industry. *See* AR 297 (summary plan
18

19 ¹⁰ Defendants argue that O'Rourke's motion is untimely because he could have filed it soon after
20 the Prior Order issued in December 2016. Defs.' Opp'n to Pl.'s MSJ at 16. Because it was
21 reasonable for O'Rourke to ask for reconsideration at the same time he sought summary judgment
22 on his second claim, I will ignore the timeliness issue and address the merits of his arguments.

23 ¹¹ Defendants argue that any “new” evidence would be “wholly outside of the administrative
24 record and outside of the evidence that the Court could have considered in Plaintiff's First
25 Motion.” Defs.' Opp'n to Pl.'s MSJ at 11. O'Rourke insists that the “new” evidence “is properly
26 considered in evaluating the Trustees' decision on abuse of discretion review because it
27 documents information that was available to the Trustees during the claim-and-appeal process.”
28 Pl.'s Reply at 5. Regardless of the characterization, I agree with defendants that any “new”
evidence is immaterial.

¹² Defendants point out that the question of overlapping skills and duties is only relevant to
suspension of normal retirement age benefits and O'Rourke is appealing the Board's denial of
early retirement benefits. I acknowledged this in the Prior Order, but nonetheless found the
comparison helpful to determining if the Board's interpretation conflicts with the Plan's plain
language. *See* Prior Order at 16–17.

1 description notes).¹³

2 More importantly, the “new” evidence does not alter the outcome here. I previously
 3 rejected O’Rourke’s argument that the Board abused its discretion when it denied his application
 4 based on a stated goal to attain consistency with prior determinations on suspension of benefits.
 5 He reframes that argument in his current motion—that the Board abused its discretion by failing to
 6 consider surrounding circumstances when interpreting the ambiguous Plan, such as “the fact that
 7 other IBEW local union pension plans permit former business managers to draw early pensions
 8 while working for the International union.” Pl.’s MSJ at 10. But the Board did consider this
 9 evidence. *E.g.*, Coleman Dep. at 33:8–20 (Renaker Decl., Ex. B; Dkt. No. 70-2). It simply
 10 elected to give it little weight relative to the Plan’s language and the prior determinations on
 11 suspensions of benefits.¹⁴ This does not amount to an abuse of discretion. *See* Prior Order at 24
 12 (finding no abuse of discretion because the Board was not required to interpret the Plan in the
 13 same way other Boards have interpreted their plans).

14 **B. No Clear Error**

15 O’Rourke asserts that the Prior Order contains two clear errors: (1) a misunderstanding of
 16 the purpose of the suspension of benefits provision, and (2) a misunderstanding of the Plan’s
 17 accrual of benefits provision.

18 O’Rourke insists that I misinterpreted the narrow exception to ERISA’s anti-forfeiture rule
 19 as “indicating a general rule that a plan can suspend benefits for work in any job that could
 20 theoretically be performed by a non-retired worker, unmoored from whether the work is a

21 _____
 22 ¹³ O’Rourke insists that “there are no significant overlapping duties and skills” between the two
 23 positions. Even if I accepted his representation I would not conclude that the Board abused its
 24 discretion in reaching a different conclusion. As I stated in the Prior Order, “both sides present
 25 plausible interpretations of the ambiguous Plan.” Prior Order at 1.

26 ¹⁴ O’Rourke points out that the plans considered by the Board likewise did not contain an explicit
 27 exemption for IBEW employment, which further supports his point that the Board “ignored
 28 information that ... the prohibited employment rule was not intended to permit suspension of
 benefits in his circumstances.” Reply ISO Pl.’s MSJ at 6. But this still does not demonstrate that
 the Board abused its discretion. As I previously held, the Board’s interpretation did not (1)
 “clearly conflict[] with the plain language”; (2) “render[] nugatory other provisions of the Plan”;
 or (3) “lack[] any rational nexus to the primary purpose of the Plan.” *See* Prior Order at 13–24
 (quoting *Tapley*, 728 F.3d at 1140).

1 bargaining-unit job.” Pl.’s MSJ at 13. He contends that IBEW employment does not “compete
2 with, [or] undercut the wages and working conditions of employees covered by the plan[.]” so it
3 should not constitute Prohibited Employment when viewed in the context of the purpose of the
4 suspension of benefits provision. He emphasizes that “an IBEW International Vice President does
5 not undermine IBEW members’ wages and working conditions; he works to improve them.” *Id.* at
6 12.

7 According to O’Rourke, the purpose of the suspension of benefits provision is to protect
8 *union* jobs, rather than “any job opportunity that a non-retired participant might wish to pursue.
9 *Id.* at 13. Because his positions with the IBEW could not be held by a bargaining unit member, he
10 insists that they should not be considered Prohibited Employment. Defendants once again point
11 out that the suspensions of benefits under ERISA section 203 are inapplicable to early retirement
12 benefits. They also underscore that O’Rourke previously raised the same argument that his IBEW
13 employment does not compete with bargaining unit jobs and they cite the local rule restricting
14 regurgitated arguments in a motion for reconsideration. Defs.’ Opp’n to Pl.’s MSJ at 13 (citing
15 L.R. 7-9(c)).

16 On the second point, O’Rourke highlights an “apparent inequity” that I noted in the Prior
17 Order; namely “that pensioners’ early retirement benefits would be suspended if they took a post-
18 retirement position with IBEW Local 6 because it is covered employment, but not if they worked
19 for the international union, even though both positions involve some level of organizing work.”
20 Prior Order at 20. He contends that this statement is clear error because “covered employment” is
21 employment during which an employee makes contributions to the Plan and accrues Plan benefits.
22 Early pension benefits are suspended during covered employment because a participant should not
23 be allowed to “simultaneously collect benefits and accrue additional credit to increase his benefit.”
24 Pl.’s MSJ at 15. In contrast, a person such as O’Rourke who is employed by the international
25 union does not accrue additional credits that increase his eventual benefits, therefore there is no
26 “apparent inequity.” If he is not permitted to collect his pension while working for the
27 international union, he suffers a “forfeiture” because he will never recoup those benefits.

28 Even if I ignore the procedural issues to address the merits of O’Rourke’s arguments, it

1 would not change the outcome here. My previous decision was constrained by the abuse of
 2 discretion standard, and O'Rourke has failed to identify any reason to reverse the conclusions in
 3 the Prior Order. He excises particular lines from the Prior Order to morph previously argued
 4 issues into clear error arguments, but neither of the purported "misunderstandings" would or could
 5 have led to a different result.¹⁵

6 **C. No Extraordinary Circumstances**

7 O'Rourke argues that this case presents extraordinary circumstances because "no court has
 8 ever held that the exception for suspension of benefits by a multiemployer plan could be invoked
 9 against a pensioner who was working *for the union*." Pl.'s MSJ at 15 (emphasis in original). He
 10 insists that I should not allow defendants to invoke a provision intended to protect organized labor
 11 for the purpose of undermining organized labor. *Id.*

12 O'Rourke relies on *Hurn v. Retirement Fund Trust of Plumbing, Heating & Piping*
 13 *Industry of Southern California*, 703 F.2d 386 (9th Cir. 1983), to insist that Congress intended the
 14 suspension of benefits provision to allow multiemployer plans to protect union jobs. Hurn was
 15 receiving early retirement benefits when he accepted a nomination for the presidency of his local
 16 union, a nonpaying office. *Id.* at 388. Even though he was not elected, the trustees voted to
 17 suspend his benefits while he was running for office, under a rule that dictated suspension of
 18 retirement benefits for "anyone engaging in 'employment or activity,' including 'labor relations,'
 19 in the building and construction industry." *Id.* at 390. The Ninth Circuit held that the rule was
 20 arbitrary and capricious because the union did not pay its president or contribute to his retirement,

21 _____
 22 ¹⁵ The parties dedicated significant time and space in both rounds of briefing and during oral
 23 argument to the issue of whether ERISA's anti-forfeiture provision in section 203 applies to early
 24 retirement benefits. The Ninth Circuit's first decision in the *Hurn* case suggests that defendants
 25 correctly assert that section 203 does not apply to early retirement benefits. *See Hurn v. Ret. Fund*
 26 *Tr. of Plumbing, Heating & Piping Indus. of S. California*, 648 F.2d 1252, 1253-54 (9th Cir.
 27 1981)(affirming the district court holding that Hurn could not state a claim under section 203
 28 because he "was not 65 [normal retirement age] during the period he suffered the suspension of
 benefits"); *Hurn v. Ret. Fund Tr. of Plumbing, Heating & Piping Indus. of S. California*, 703 F.2d
 386, 387 (9th Cir. 1983)(addressing Hurn's first case in which the court agreed with section
 203(a)'s inapplicability but remanded to allow Hurn to file an amended complaint under section
 302(c)(5) of the Labor Management Relations Act). I am sympathetic to O'Rourke's argument
 that the Board's denial of his early retirement benefits amounts to a "forfeiture" in the sense that
 he can never recoup these benefits. Although the issue of section 203's applicability does not
 dictate an outcome here, however, it strongly undercuts O'Rourke's policy-based arguments.

1 so “Hurn would not affect anyone’s job, wage, or benefits by winning office.” *Id.* In short, “[t]he
2 Fund ... had no reasons to discourage his candidacy.” *Id.*

3 Defendants distinguish *Hurn* because “O’Rourke is being well compensated as the Vice
4 President of the IBEW, Ninth District.” Opp’n to Pl.’s MSJ at 15 (citing O’Rourke Dep. at
5 117:10–13, Kang Decl., Ex. W; Dkt. No. 73). The *Hurn* court noted that Hurn “needed his
6 benefits, if anything, more than before because he now had the expense of campaigning to add to
7 his other expenses[,]” but it also indicated that “[h]is need for benefits during his campaign would
8 not have been reduced even were the presidency a paying office.” 703 F.2d at 390. For this
9 reason, *Hurn* is not particularly helpful. O’Rourke is handsomely compensated for his IBEW
10 office, but that does not inevitably lead to the conclusion that he does not need his early retirement
11 benefits. *See id.* But here, unlike in *Hurn*, the Board provided multiple reasons for denying
12 O’Rourke’s claim. In addition to “prevent[ing] retirees from simultaneously receiving pension
13 benefits and working in a position that might displace a non-pensioner[,]” AR 354, it also aims to
14 treat all participants equitably by adhering to the four enumerated exceptions to the Prohibited
15 Employment rule.

16 O’Rourke’s representation “[t]hat a provision enacted by Congress expressly for the
17 purpose of protecting organized labor is being invoked to undermine organized labor” is a bit
18 hyperbolic. The Board provided a “reasonable basis” for rejecting O’Rourke’s claim, and a
19 denial of claim benefits should not be equated to undermining organized labor. It remains true
20 that “[i]nterpreting the Plan to avoid inequity is a legitimate goal for a Board to pursue.” Prior
21 Order at 19. And, just as I indicated in the Prior Order, I understand O’Rourke’s position as well.
22 *See* Prior Order at 24 (finding no abuse of discretion but “[t]his is not to imply that I would have
23 interpreted the Plan in the same way as the Board.”); *supra* note 15. The parties were unable to
24 locate any cases in which a participant in a multiemployer plan has forfeited his benefits by
25 working for a union. But, as the parties acknowledged, that does not mean this has never
26 happened before. And, more importantly, my conclusion is not “endors[ing]” a purported
27 “inversion[.]” *See* Pl.’s MSJ at 16. I am bound to apply the law, and the law dictates that the
28 Board’s “interpretation of Plan language is entitled to a high level of deference and will not be

1 disturbed unless it is not grounded on *any* reasonable basis.” *Tapley v. Locals 302 and 612 of the*
 2 *Int’l Union of Operating Eng’rs-Emp’rs Constr. Indus. Ret. Plan*, 728 F.3d 1134, 1139 (9th Cir.
 3 2013)(emphasis in original)(internal quotation marks omitted).

4 O’Rourke has not convinced me that my previous decision was in error, and he has not
 5 shown new evidence warranting a different conclusion. His motion for reconsideration is
 6 DENIED.

7 **II. SUMMARY JUDGMENT ON CLAIM TWO¹⁶**

8 O’Rourke brought his second claim pursuant to ERISA § 502(a)(3), 29 U.S.C. §
 9 1132(a)(3), which allows a plan “participant, beneficiary, or fiduciary (A) to enjoin any act or
 10 practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain
 11 other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of
 12 this subchapter or the terms of the plan[.]” 29 U.S.C. § 1132(a)(3). “[E]quitable relief under §
 13 1132(a)(3) is not available if § 1132(a)(1)(B) provides an adequate remedy.” *Moyle v. Liberty*
 14 *Mut. Ret. Ben. Plan*, 823 F.3d 948, 959 (9th Cir. 2016). Since O’Rourke is not entitled to recover
 15 for his denial of benefits claim under 29 U.S.C. § 1132(a)(1)(B), I will proceed to analyze the
 16 availability of equitable relief. I must preface this discussion with O’Rourke’s admission that his
 17 facts “don’t fit neatly” into other breach of fiduciary duty cases.

18 **A. Whether the Board Acted As a Fiduciary Under ERISA**

19 Defendants argue that the Board’s decision not to amend the plan was a settlor function,
 20 not a fiduciary act. They further argue that “the breach of fiduciary duty pled in the Complaint
 21 does not stem from any alleged failures related to a Plan interpretation or implementation of an
 22 adopted Plan amendment[.]” so O’Rourke’s claim must fail. Reply ISO Defs.’ MSJ at 5 (Dkt. No.
 23 78). “In general, an employer’s decision to amend a pension plan concerns the composition or
 24 design of the plan itself and does not implicate the employer’s fiduciary duties which consist of
 25 such actions as the administration of the plan’s assets.” *Hughes Aircraft Co. v. Jacobson*, 525 U.S.

26
 27
 28 ¹⁶ Defendants statute of limitations argument is groundless. The undisputed evidence establishes
 that the Board continually tabled the issue of whether it would implement the September 2010
 action. Even at the time the Board denied O’Rourke’s application, the issue was still unresolved.

1 432, 444 (1999); *see also Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) (“Plan sponsors who
 2 alter the terms of a plan do not fall into the category of fiduciaries.”). But, if I accept O’Rourke’s
 3 perspective of the facts, his claim is not based on the Board’s purported failure to amend the Plan.
 4 He steadfastly maintains that the Plan did not need amendment at all because the September 2010
 5 action was sufficient. Rather, his claim is based on the Board’s failure to “implement” the
 6 September 2010 action—an act of plan *administration*. *See* Opp’n to Defs.’ MSJ at 12.

7 Under ERISA,

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

13 29 U.S.C. § 1002(21)(A). Here, the Board exercised its discretionary authority with respect to the
 14 disposition of the Plan’s assets when it decided to deny O’Rourke’s application for early
 15 retirement benefits because his IBEW employment fell within the definition of Prohibited
 16 Employment.

17 Contrary to defendants’ contentions, the Prior Order does not foreclose this conclusion. I
 18 previously held that “[t]he September 2010 meeting did not result in a formal amendment to the
 19 Plan that the Board was thereafter required to follow.” Prior Order at 21:23–24; *see also id.* at
 20 25:5–7 (“This explanation [of why amendment required], plus the lack of clarity noted in the
 21 Appeal Denial Letter, reasonably demonstrates that the Board was not bound by the concept it
 22 approved at the September 2010 meeting.”). But I went on to state, “[a]lthough the March 2014
 23 Memo later noted that an amendment was not required, the Board *ultimately decided against that*
 24 *advice.*” *Id.* at 22:7–8 (emphasis added).¹⁷ I concluded that the Board did not abuse its discretion

25 _____
 26 ¹⁷ At least as late as December 23, 2014, the Plan Manager indicated that “the Trustees were
 27 unable to agree on whether that employment constitutes prohibited employment under the Plan.”
 28 12/23/14 Letter from Fisher (Kang Decl., Ex. p; Dkt. No. 63-17). From this letter, it appears that
 the decision contemplated by the Board was not whether or not to amend the Plan, but whether or
 not O’Rourke’s employment with the IBEW constituted Prohibited Employment. Fisher’s
 deposition testimony suggests that his application would not be approved absent an amendment.

1 when it chose not to exempt IBEW work from the Prohibited Employment Rule because the Plan
2 had not been amended to include such an exemption. *Id.* at 22. Nonetheless, it could have
3 breached its fiduciary duty when it rejected the advice of counsel and determined that an
4 amendment was necessary to effectuate the September 2010 action.

5 In short, the gravamen of O'Rourke's challenge is not the Board's decision *not to amend*
6 the Plan; it is the Board's determination of his pension application, which was based on its view
7 that *an amendment was required* to conclude that IBEW work was exempted. I found that the
8 Board did not abuse its discretion when it determined that an amendment was required, but that
9 conclusion does not foreclose the possibility that the Board was acting as a fiduciary when it made
10 that decision. "[A]n employer's obligations as an ERISA fiduciary are not suspended while it
11 considers a proposal to amend an existing ERISA plan or to adopt a replacement plan." *Bins v.*
12 *Exxon Co. U.S.A.*, 220 F.3d 1042, 1047–48 (9th Cir. 2000); *but see id.* at 1053 ("[A]n employer's
13 serious consideration of a change to a plan does not, in and of itself, implicate ERISA's fiduciary
14 duties.").

15 The Board's fiduciary duties, outlined in 29 U.S.C. § 1104, remained in effect as it
16 contemplated whether an amendment was required to administer the funds in the manner sought
17 by O'Rourke's application. O'Rourke has at least presented a triable issue of fact as to whether
18 the Board ignored its duty to act on the September 2010 action. Defendants' first argument falls
19 short. I will accept O'Rourke's position that the Board acted as a fiduciary when it denied his
20 claim, and proceed to address the parties' remaining arguments.

21 **B. O'Rourke Was Informed**

22 O'Rourke argues that the Board breached its fiduciary duty by failing to keep him
23 informed of the status of the September 2010 action. He correctly asserts that the Board
24 repeatedly tabled the issue of the September 2010 action and was in a veritable "state of
25 paralysis[.]" Pl.'s Opp'n at 12. But he incorrectly translates this inaction into a failure to inform
26 him.

27
28 Fisher Dep. at 29:20–30:13. O'Rourke, however, describes this testimony as her
"misconceptions." Pl.'s Opp'n to Defs.' MSJ at 4–6.

1 As an initial matter, O'Rourke fails to cite any precedent that the Board had a duty to
2 inform him on the status of the September 2010 action. Defendants, on the other hand, cite to *Bins*
3 *v. Exxon Co. U.S.A.* for the proposition that "[t]he Board's only obligation to inform O'Rourke
4 was to answer forthrightly any questions when he posed them[.]" Defs.' MSJ at 17 n.6 (citing
5 *Bins*, 220 F.3d 1042 (9th Cir. 2000)). The *Bins* court held that, "an ERISA fiduciary does not
6 have an affirmative duty prior to final approval and general dissemination of plan changes to
7 volunteer information to employees who have not specifically alerted the fiduciary to the fact that
8 such information is material to them." 220 F.3d at 1053. But "[i]f an employee, in the course of
9 inquiring about possible plan changes, asks to be kept abreast of any changes in the status of a
10 potential change and the employer provides assurances to that effect, then the employer will have
11 a fiduciary duty to follow up with that employee." *Id.* at 1054.

12 O'Rourke does not contend that he "ask[ed] to be kept abreast of any changes[.]" But he
13 aims to distinguish *Bins* because, in his case, "there was no question of a future benefit
14 improvement." Pl.'s Opp'n at 13. He insists that "the fiduciaries were well aware that [he] had
15 relied on the September 2010 action in accepting the position with the International[.]" *Id.* And
16 from this premise, he argues that the Board had a duty to provide him with complete and accurate
17 information. But in the absence of any precedent establishing the basis for such a duty, I cannot
18 conclude that the Board had such a duty, until he specifically inquired about his benefits through
19 his application.

20 Even if I were to find a duty to inform, the undisputed evidence demonstrates that he was
21 fully informed on the status of the September 2010 action via reports from plan manager Fisher
22 and trustee Donovan. O'Rourke Dep. at 109:14–110:23; Donovan Dep. at 83:5–16, *id.* at 91:8–
23 23; *see also* 2014 Letters from Fisher to O'Rourke (Kang Decl., Exs. M, U). He claims that these
24 reports "did him no good." But the fact that he was unhappy with the information he received
25 does not negate the fact that he received the information. O'Rourke has no basis to state a claim
26 for breach of fiduciary duty based on a failure to inform.

27 C. O'Rourke's Equitable Estoppel Theory Fails

28 "A beneficiary may recover benefits under ERISA based on an equitable estoppel theory, if

1 he shows: (1) a material misrepresentation; (2) reasonable and detrimental reliance on the
2 representation; (3) extraordinary circumstances; (4) the provisions of the plan at issue are
3 ambiguous, such that reasonable persons could disagree as to their meaning or effect; and (5) the
4 representations must have been made to the beneficiary involving an oral interpretation of the
5 plan.” *Renfro v. Funky Door Long Term Disability Plan*, 686 F.3d 1044, 1054 (9th Cir. 2012).¹⁸

6 A beneficiary cannot recover under an estoppel theory “in the face of contrary, written plan
7 provisions.” *Davidian v. S. California Meat Cutters Union and Food Employees Ben. Fund*, 859
8 F.2d 134, 134 (9th Cir. 1988).

9 Defendants argue that O’Rourke cannot establish that they made any misrepresentations to
10 him, that he reasonably relied on any misrepresentations, or that extraordinary circumstances exist.
11 Defs.’ MSJ at 18. O’Rourke insists that a misrepresentation is not necessary; rather, “what is
12 fundamentally required is a promise to which equity demands a fiduciary be held, and that does
13 not contradict the plan’s written terms.” Opp’n to MSJ at 14. But O’Rourke aims to stretch
14 estoppel principles a bit too far.¹⁹ He cannot identify a misrepresentation because there was none.
15 He held one perspective on the results of the September 2010 action, but the Board ultimately
16 decided a different interpretation was warranted. I previously concluded that this decision was not
17 an abuse of discretion. Neither does it amount to a misrepresentation.

18 **D. O’Rourke’s Is Not Entitled to Reformation**

19 In *Skinner v. Northrop Grumman Ret. Plan B*, the Ninth Circuit expressed uncertainty as to
20 “whether [it] should analyze reformation in the context of trust law or contract law because
21 retirement plan documents are similar to both trusts and contracts.” 673 F.3d 1162, 1166 (9th Cir.
22 2012). But either way, “reformation is proper only in cases of fraud and mistake.” *Id.*

23 _____
24 ¹⁸ O’Rourke elects to cite a different standard for his equitable estoppel claim, extracted from a
25 Ninth Circuit case quoting an Eleventh Circuit case, and discussing the claim in the context of a
26 preemption analysis. See Pl.’s Opp’n To MSJ at 13 (quoting *Greany v. W. Farm Bureau Life Ins.*
27 *Co.*, 973 F.2d 812, 821 (9th Cir. 1992), which, in turn, quoted *Alday v. Container Corp.*, 906 F.2d
28 660, 666 (11th Cir. 1990)). I choose to adopt a more recent recitation of the elements of equitable
estoppel, which subsumes the two elements indicated in *Greany*.

¹⁹ I agree with him that he may have justifiably relied on his own understanding of what the
September 2010 action accomplished, but this is not enough to establish his right to recover under
an estoppel theory.

1 I already concluded that “the Board’s interpretation does not conflict with the Plan’s plain
2 language, render any term nugatory, or lack a rational connection to the Plan’s purpose.” Prior
3 Order at 24:2–3. O’Rourke, however, argues, “[t]o the extent that the Plan terms permitted the
4 Board to interpret the Plan contrary to the September 2010 action, the Plan terms contain a
5 mistake, in that the parties did not intend the Plan to prohibit early retirees from working for the
6 International union.” Pl.’s Opp’n at 15. But he fails to demonstrate a disputed fact as to whether
7 the Plan contains a mistake. After he left, the Board reasonably determined that the 2010 Action
8 would require a Plan amendment, and it ultimately voted against that Amendment. This is
9 insufficient to demonstrate that the Plan terms contain a mistake.

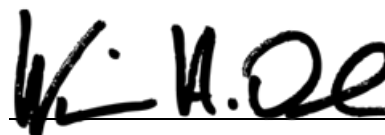
10 O’Rourke has not presented evidence establishing triable issues of fact regarding his
11 breach of fiduciary duty claim. Defendants’ motion for summary judgment is GRANTED.

12 CONCLUSION

13 As mentioned throughout this order and the Prior Order, I am sympathetic to O’Rourke’s
14 position. But his perception of unfair treatment is insufficient to garner a legal right to recovery.
15 Defendants’ motion for summary judgment is GRANTED. Judgment shall be entered
16 accordingly.

17 **IT IS SO ORDERED.**

18 Dated: November 2, 2017

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21 William H. Orrick
22 United States District Judge
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