No. 19-15074

In The

United States Court of Appeals

For The Ninth Circuit

JOHN DOE ONE, JOHN DOE TWO, JOHN DOE THREE, JOHN DOE FOUR AND JOHN DOE 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.

On Appeal From The United States District Court
For the Northern District of California, Western Division
Case No. 3:18-cv-01031-EMC
(Hon. Edward M. Chen)

DEFENDANT-APPELLEE LOWE'S COMPANIES, INC.'S ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee Lowe's Companies, Inc. ("LCI") makes the following disclosures:

No publicly held corporation owns a stake of ten percent or more in LCI and LCI has no parent corporation. LCI is not aware of any other corporations, unincorporated associations, partnerships or other business entities which are not parties that have a financial interest in the outcome of the litigation.

August 7, 2019

/s/ Phillip J. Eskenazi
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I. INTRODUCTION

Plaintiffs-Appellants seek to rewrite their employers' welfare benefits plans to offer a term their plans do not provide. They have no legal basis for such relief, so the trial court properly dismissed their claims. This Court should affirm that judgment.

Appellants live with HIV/AIDS. In their Opening Brief and the operative complaint, the Corrected First Amended Complaint ("FAC"), Appellants allege certain challenges that those living with HIV/AIDS face, including various forms of purported discrimination. And amicus curiae echo certain of these points about the seriousness of HIV/AIDS. But this appeal—certainly as to Appellee Lowe's Companies, Inc. ("LCI")—concerns a straightforward issue regarding whether Appellant John Doe Five ("the LCI Appellant") was denied benefits under the Lowe's Welfare Plan pursuant to Section 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001, *et seq.* ("ERISA"). (Appellants' Opening Brief ("AOB") at 54-57.) And when one sifts through the commentary and extraneous argument, and focuses on the sole remaining cause of action asserted against LCI, it is abundantly clear that the trial court correctly held that the LCI Appellant failed to state a cause of action for a denial of benefits under ERISA as a matter of law because the FAC failed to identify a specific plan term that confers the benefit he seeks.

The LCI Appellant argues that the subject Lowe's Welfare Plan requires plan participants to purchase specialty medications, including medications used to treat HIV/AIDS, through a particular pharmacy to receive the benefit of lower, "in-network" pricing. He further argues that he should be able to purchase those specialty medications from an "out-of-network" pharmacy of his choice (what he calls his "community pharmacy") while still receiving the benefit of lower, "in-network" pricing. But the FAC and the judicially noticeable documents defining the scope of the prescription drug benefit at issue both make clear that the Lowe's Welfare Plan does not offer such a benefit and, hence, the LCI Appellant could not identify a specific plan term that confers the benefit in question. Moreover, ERISA does not require employers to offer a welfare benefit plan at all, and it freely permits employers and plan sponsors to change or terminate benefit plans at will. Accordingly, the trial court properly dismissed the LCI Appellant's denial of benefits claim pursuant to ERISA Section 502(a)(1)(B).

The LCI Appellant now tries to reverse field and plead a new theory found nowhere in the FAC nor his opposition to LCI's motion to dismiss. The LCI Appellant now contends that the Lowe's Welfare Benefit Plan was not validly amended to require specialty medications to be purchased through a particular pharmacy to receive the benefit of lower, "in-network" pricing. As explained in further detail below, however, this Court should affirm the judgment because: (1)

the trial court correctly held that the LCI Appellant's denial of benefits claim failed as a matter of law because he failed to allege the existence of a specific plan term that entitles him to the benefit he seeks; and (2) the LCI Appellant's arguments turning on the validity of the amendment to the Lowe's Welfare Plan have been waived because he did not plead or brief those issues. In fact, to the contrary, he expressly conceded during oral argument that the Lowe's Welfare Plan was validly amended.

II. STATEMENT OF ISSUES PRESENTED

1. Whether the trial court correctly held that the LCI Appellant's cause of action for a denial of benefits under ERISA Section 502(a)(1)(B) failed as a matter of law because the FAC failed to identify a specific plan term that confers the benefit he seeks.

2. Whether the LCI Appellant waived the argument that a purportedly invalid amendment of the Lowe's Welfare Plan resulted in a denial of a benefit to which he was entitled by failing to raise the issue sufficiently for the trial court to rule on it.

3. Whether the LCI Appellant's admission in the trial court that LCI validly amended the Lowe's Welfare Plan precludes his argument in this Court that Lowe's did not validly amend the Lowe's Welfare Plan.

4. Whether the trial court acted within its discretion in denying the LCI Appellant leave to amend.

III. STATEMENT OF THE CASE

A. Factual Background

1. The Lowe's Welfare Plan's Prescription Drug Benefit

LCI serves as the Plan Sponsor and Plan Administrator (*i.e.*, the named fiduciary) for the Lowe's Welfare Plan, which is offered to eligible employees of LCI and participating affiliates. (3 SER 449.)[1,2] Among many other benefits, the Lowe's Welfare Plan offers prescription drug coverage to eligible employees. (3 SER 511.) In its capacity as the Plan Administrator, LCI is expressly "authorized to delegate its administrative duties" to others, including outside administrative services providers, to ensure eligible employees receive the benefits to which they are entitled, including prescription drug coverage. (3 SER 449.)

On January 1, 2013, LCI and CaremarkPCS Health, LLC ("Caremark") entered into a contract called the Prescription Services Benefit Agreement (the "Agreement"), pursuant to which Caremark manages the prescription drug benefit offered by Lowe's Welfare Plan. (3 SER 333.) Among other things, the

[1] The LCI Appellant withdrew his objections to LCI's Request for Judicial Notice during oral argument on the motion to dismiss. (EOR 161:19-24.)
[2] LCI cites to the Supplemental Excerpt of Record in the following manner: "[volume] SER [page]."

Agreement requires Caremark to: (1) provide mail delivery for prescriptions (3 SER 336, ¶2.2); (2) operate a retail pharmacy network for prescription drugs and related services (3 SER 336-37, ¶2.3); (3) provide customer service support for plan participants; and (4) provide "specialty pharmacy products and services," which includes the provision of "Specialty Drugs" specified in the Agreement. (3 SER 335-36, ¶¶1.28, 1.29, 2.2). "Specialty Drugs," include, but are not limited to, HIV/AIDS medications. (3 SER 374 (Specialty Fee Schedule).)

On January 1, 2016, LCI and Caremark entered into the "Third Amendment To Prescription Benefits Services Agreement" (the "Third Amendment"). Among other things, the Third Amendment: (1) replaces the Specialty Fee Schedule in the original Agreement with a new pricing schedule (3 SER 421-23, ¶10); and (2) provides that "Specialty pricing is contingent upon the use of [Caremark's] specialty pharmacies. Claims for specialty products will not be processed through the retail network, except for those specialty drugs that [Caremark's] Specialty pharmacies are unable to dispense." (3 SER 424, ¶16(xviii).) Thus, as of January 1, 2016, plan participants, including the LCI Appellant, became required to use Caremark's Specialty Pharmacy ("CVS/Specialty") for HIV/AIDS medications and other Specialty Drugs to obtain the benefit of in-network prices.

2. Appellants' Factual Allegations

Appellant Does, proceeding anonymously, are afflicted with HIV/AIDS. (EOR 16.) One of the five, the LCI Appellant, allegedly is employed by LCI, and avails himself of the Lowe's Welfare Plan's prescription drug benefit. (EOR 21.) Appellants allege that the CVS Defendants recently changed the terms of the benefit by rolling out a new "Program." (EOR 16-17, 19-21.) The Program allegedly applies to a host of specialty medications, which include, but are not limited to, HIV/AIDS medications. (EOR 16-17, 19-21, 47-71.) Under the terms of the new Program, the LCI Appellant allegedly must obtain his HIV/AIDS medicine through CVS/Specialty to ensure that he receives lower, in-network pricing for his expensive medications. (EOR 16-17, 47-71.)

CVS/Specialty, in turn, allegedly offers two methods of delivery: (1) delivery by mail to the LCI Appellant's home; or (2) delivery to a CVS Pharmacy where the LCI Appellant can pick up his medication. (EOR 16-17.) Thus, while the LCI Appellant alleges that he still may purchase his medications at the out-of-network pharmacy of his choice, he may not do so and still receive the benefit of lower, in-network pricing available under Lowe's Welfare Plan. (EOR 16-17, 47-71.)

Appellants also allege they have a strong preference for their out-of-network, "community pharmacies" and contend that the Program is inferior for

various reasons beyond the alleged pricing differential. (EOR 22-25 (Doe One), 25-29 (Doe Two), 29-32 (Doe Three), 32-34 (Doe Four), 34-38 (Doe Five). For example, they allege that the pharmacists at their community pharmacies are more responsive and knowledgeable about both HIV/AIDS and Appellants' personal medical histories. (*See, e.g.*, EOR 27-28, 31-32, 33-34.) Appellants also allege other service-related complaints, including that mail deliveries have been unpredictable and late. (*See, e.g.*, EOR 23, 27, 30-31, 32-33.)

Appellants further allege they have not been permitted to opt-out of the Program, despite repeated requests. (EOR 18, 24, 28-29, 30, 37-38.) They do not, however, allege that the Program permits its beneficiaries to opt-out of the requirement that plan participants must use an in-network pharmacy to receive in-network pricing.

Based on the foregoing, on behalf of themselves and other similarly situated plan participants, the LCI Appellant seeks the ability to purchase his medications at out-of-network pharmacies while paying in-network prices, and equitable monetary relief, among other remedies. (EOR 18, 96, 99, 101, 102-103.)

B. Procedural Background

Appellants filed their original complaint in the United States District Court for the Northern District of California on February 16, 2018, and the operative Corrected First Amended Class Action Complaint ("FAC") on June 18, 2018.

(EOR 1, 7.) The FAC alleged a total of eight causes of action and, in addition to LCI, named CVS Pharmacy, Inc., Caremark LLC., Caremark California Specialty Pharmacy, LLC (collectively "CVS"), Amtrak, and Time Warner, Inc. as defendants. (EOR 14-105.) Of those eight causes of action, four were alleged against LCI: (1) a benefits claim under Employee Retirement Income Security Act of 1974 ("ERISA") Section 502(a)(1)(B), (2) breach of fiduciary duty under ERISA Section 502(a)(3), (3) a claim for "full and fair review" under ERISA Section 502(a)(3), and (4) a claim for declaratory relief. (*Id*.)

On July 27, 2018, LCI filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the ground that the sole plaintiff to allege any claims against LCI (*i.e.*, the LCI Appellant) had failed to state any claim upon which relief may be granted. (EOR 9.) In support of its motion, LCI also filed a Request For Judicial Notice of the Summary Plan Description for the Lowe's Welfare Plan and the Prescription Benefit Services Agreement between LCI and CaremarkPCS Health, LLC.[3] As noted above, Appellants withdrew their objections to LCI's Request For Judicial Notice. (EOR 161:19-24.) The other defendants also filed motions to dismiss.

[3] Where, as here, an ERISA plaintiff's pleading puts the scope of an ERISA plan at issue, "Plan-related documents" are subject to judicial notice, even where those documents are not explicitly referenced in the complaint. *Lorenz v. Safeway, Inc.*, 241 F. Supp. 3d 1005, 1012 (N.D. Cal. 2017).

On September 27, 2018, the Honorable Edward Chen heard the Defendants' respective motions to dismiss. (EOR 106-178.) In his December 12, 2018 ruling, Judge Chen granted each of Defendants' motions to dismiss in their entirety and with prejudice. (EOR 179-218.)

The LCI Appellant, along with other the other Appellants, filed a Notice of Appeal on January 11, 2019.[4] (EOR 219-224.) On June 6, 2029, Appellants filed their Opening Brief.

IV. SUMMARY OF ARGUMENT

A. The LCI Appellant's theory of the case is fundamentally flawed because he sued to receive a benefit that he desires, but that the Lowe's Welfare Benefit Plan does not offer. Accordingly, the trial court correctly held that the LCI Appellant's denial of benefits claim under ERISA Section 502(a)(1)(B) failed as a matter of law because he failed to allege the existence of a specific plan term that entitles him to the benefit he seeks. *See, e.g., Steelman v. Prudential Ins. Co. of Am.*, 2007 WL 1080656, at *7 (E.D. Cal. Apr. 4, 2007) (granting motion to dismiss where the plaintiff failed to "identify a specific plan term that confers the benefit in question.") (internal quotation marks omitted). Thus, the trial court properly dismissed the FAC.

[4] On June 29, 2019, the Court granted the Appellants' motion to correct a clerical error that omitted John Doe Five from the caption page [Dkt 45].

B. The LCI Appellant now argues on appeal that a purportedly invalid amendment of the Lowe's Welfare Plan resulted in the alleged denial of the benefit to which he was entitled, but he has waived that argument because: (1) he did not plead or brief the issue in the trial court; and (2) he expressly conceded during oral argument on the motion to dismiss that the Lowe's Welfare Plan had, in fact, been validly amended. *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318, 1322 (9th Cir.2012) (an issue will "be deemed waived on appeal if the argument was not raised sufficiently for the trial court to rule on it.") (quotation marks omitted); *Pye v. Mitchell*, 574 F.2d 476, 480 (9th Cir. 1978) ("Where an issue is conceded below, it cannot be raised for the first time on appeal."). Thus, the LCI Appellant's arguments about the amendment are not properly before this Court.

C. The LCI Appellant's arguments about the amendment to the Lowe's Welfare Plan fail on the merits in any event. With respect to prior versions of the Welfare Plan, the LCI Appellant has not (and cannot) identify a specific plan term that confers the benefit he seeks. Nor can the LCI Appellant establish that the amended version of the prescription drug program eliminates any benefit to which he was entitled.

D. The trial court acted within its discretion by denying leave to amend. The LCI Appellant already had been afforded an opportunity to amend his complaint, his legal theory is not cognizable as a matter of law, and he can plead

no facts that would state a claim upon which relief can be granted under that theory. Accordingly, amendment would be futile.

V. ARGUMENT

A. The Trial Court Correctly Held That The LCI Appellant's Cause Of Action For Denial of Benefits Under ERISA Section 502(a)(1)(B) Failed To State A Claim Upon Which Relief May Be Granted

1. ERISA Governs Welfare Benefit Plans

Employee welfare benefit plans, such as Lowe's Welfare Plan, are governed by ERISA. ERISA neither requires employers to establish benefit plans nor mandates "what kind of benefits employers must provide if they choose to have such a plan." *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003) (internal quotation marks omitted). Indeed, "employers have large leeway" to design benefit plans "as they see fit." *Id.* Employers also "are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *M & G Polymers USA, LLC v. Tackett*, 135 S.Ct. 926, 933 (2015) (internal quotation marks omitted). Thus, employers are free to reduce or eliminate plan benefits at will. *See, e.g., Cinelli v. Sec. Pac. Corp.*, 61 F.3d 1437, 1441 (9th Cir. 1995) ("Because benefits under a [benefit] 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.").

2. The LCI Appellant Failed To Allege The Existence Of A Specific Plan Term That Confers The Benefit He Seeks

Under ERISA Section 502(a)(1)(B), a plan participant or beneficiary may bring a civil action seeking to "recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. §1132(a)(1)(B). As Judge Chen correctly recognized, to state a claim under ERISA Section 502(a)(1)(B), a plaintiff must allege: (1) the existence of an ERISA plan; and (2) identify the provisions under the plan that entitle them to benefits. (EOR 202, citing *B.R. v. Beacon Health Options*, 2017 WL 5665667, at *3 (N.D. Cal. Nov. 27, 2017) and *Steelman v. Prudential Ins. Co. of Am.*, 2007 WL 1080656, at *7 (E.D. Cal. Apr. 4, 2007) ("A plaintiff who brings a claim for benefits under ERISA must identify a specific plan term that confers the benefit in question."). *See also Raygoza v. ConAgra Foods, Inc. Welfare Benefit Wrap Plan*, 2016 WL 9454419, at *5 (C.D. Cal. Nov. 4, 2016) (similar). Simply alleging violations of the plan "without reference to the terms of the controlling plans" is insufficient. *Forest Ambulatory Surgical Assocs., L.P. v. United HealthCare Ins. Co.*, 2011 WL 2748724, at *5 (N.D. Cal. July 13, 2011).

The pleading defect in the FAC is that Appellants attempted to state a claim under ERISA Section 502(a)(1)(B) by complaining that the welfare benefit plans no longer offered a benefit they desired, not that they were denied a benefit that the plans actually offered. (EOR 94-96 (FAC); 1 SER 45.) Indeed, the FAC specifically alleged that the plans no longer offered "continued access to community pharmacies as an 'in-network' benefit." (EOR 96.)

On appeal, the LCI Appellant does not dispute that the FAC fails to identify a specific plan term that confers the benefit he seeks. (AOB 54-57.) Nor does the LCI Appellant otherwise identify such a specific plan term. (*Id.*) Accordingly, the trial court correctly found in granting the defendants' motions to dismiss that Appellants "have not identified the provisions of the plan that entitle them to the benefits they seek. Indeed, their challenge is to the overall scope of the plan, not denial of benefits under the plan." (EOR 202-03; 213-14.; *see also id.* at 202 (holding that Appellants "'seek the benefit of continued access to community pharmacies as an 'in-network' benefit' . . . [but] they are unable to point to any allegation in the complaint specifying which terms under the plans entitle them to such a benefit."[5] (quoting the FAC)).) The trial court's ruling is consistent with the governing "statutory language [which] speaks of '*enforc[ing]*' the 'terms of the

[5] The trial court also correctly held that the FAC failed to satisfy the pleading standard required by Rule 8(a) of the Federal Rules of Civil Procedure. (EOR 213.)

plan,' not of *changing* them." *CIGNA Corp. v. Amara*, 563 U.S. 421, 436 (2011) (emphasis in original) ("*Amara*"). Thus, the LCI Appellant's mere contention that the plan does not confer the benefit he seeks is fatal to his claim for benefits under ERISA Section 502(a)(1)(B).

3. The LCI Appellant's Request For Equitable Relief Confirms That He Failed To State A Claim Upon Which Relief May Be Granted Under ERISA Section 502(a)(1)(B)

Rather than asserting a claim for benefits under the plan as currently constituted, the LCI Appellant's claim is, in effect, a disguised request that asks the Court to "reform" the plan to offer a benefit it does not currently offer, or equitably estop LCI from denying that the LCI Appellant can obtain in-network pricing at an out-of-network pharmacy, notwithstanding the plan's actual terms. (*See* EOR 96, ¶202 (requesting "appropriate injunctive relief" and "equitable estoppel").) The LCI Appellant's request for such relief is fundamentally inconsistent with a claim for benefits under ERISA Section 502(a)(1)(B). *See Bush v. Liberty Life Assurance Co. of Boston*, 77 F. Supp. 3d 900, 908 (N.D. Cal. 2015) (reformation "is not available as a remedy pursuant to 502(a)(1)(B)"); *Amara*, 563 U.S. at 436 (analyzing the text of Section 502(a)(1)(B) and concluding that nothing "authorizes a court to alter [the plan's terms] . . . where that change, akin to the reform of a contract, seems less like the simple enforcement of a contract as written and more like an equitable remedy). Indeed, the LCI Appellant's request for equitable relief

confirms that the LCI Appellant's challenge, as the trial court put it, "is to the overall scope of the plan, not denial of benefits under the plan." (EOR 202.) As the authorities above establish, such a challenge under ERISA is properly subject to dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Accordingly, the Court should affirm the judgment for these reasons alone.

B. The LCI Appellant Has Waived His Arguments Turning On Whether The Lowe's Welfare Plan Was Validly Amended

1. The LCI Appellant Waived His Argument That The Lowe's Welfare Plan Was Invalidly Amended By Failing To Plead or Brief The Issue In The Trial Court

Under well-settled principles, issues will "'be deemed waived on appeal if the argument was not raised sufficiently for the trial court to rule on it.'" *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 510 (9th Cir. 2013) (quoting *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318, 1322 (9th Cir. 2012).) *See also Forbush v. J.C. Penney Co.*, 98 F.3d 817, 822 (5th Cir. 1996) ("[T]he Court will not allow a party to raise an issue for the first time on appeal merely because a party believes that he might prevail if given the opportunity to try a case again on a different theory.") (quoted by *Ecological Rights* and *Ruiz*). The rule ensures that this Court has a fully developed factual record, the benefit of the district court's analysis, and prevents unfairly surprising opponents with new

arguments on appeal. *Dream Palace v. County of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004).[6]

Ecological Rights is instructive. The plaintiff brought suit against defendants who owned and maintained utility poles that were treated with certain chemicals. *Ecological Rights*, 713 F.3d at 504. The plaintiff alleged the defendants had violated certain federal environmental statutes because the poles discharged the chemicals into the environment. *Id.* The district court dismissed the amended complaint for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6). *Id.*

This Court affirmed with respect to the defective theories the plaintiff had advanced in the trial court, but also considered an additional argument made on appeal. *Id.* at 510-11. The plaintiff had not raised the new argument in opposing the defendant's motion to dismiss. *Id.* at 510. Nor was the plaintiff's effort to point to isolated "words and phrases" in the complaint enough to establish that the theory had been adequately raised below. *Id.* at 511 ("these isolated fragments cannot bear the weight [the plaintiff] places upon them"). Accordingly, this Court concluded that because the plaintiff "never made this [new] argument in the

[6] This Court recognizes a few exceptions to this general rule, but the LCI Appellant does not argue that any apply here. *See, e.g., King v. AC & R Advertising*, 65 F3d 764, 769, fn. 1 (9th Cir. 1995) (holding that in "exceptional circumstances" the appellate court may consider an argument not raised below).

extensive motion proceedings in the district court, [it] therefore waived it." *Id.* at 510.

Here, the LCI Appellant argues that continued access to community pharmacies as an "in-network" benefit must exist by implication because "Appellants never alleged that the Plans were validly amended." (AOB 55.) But the absence of an allegation that the plans were validly amended is not equivalent to an affirmative allegation that the amendments to the plans were invalid.

Indeed, even a cursory review of the FAC reveals that neither the legal nor factual theory the LCI Appellant advanced below hinges on the purported invalidity of the amendment to the Lowe's Welfare Plan. (EOR 94-96.) *See Riggs v. Prober & Raphael*, 681 F.3d 1097, 1104 (9th Cir. 2012) (the plaintiff's arguments on appeal "are barred because she did not raise them in her complaint") ("*Prober*"). Nor did the LCI Appellant raise this issue, much less rely on this theory, in opposing LCI's motion to dismiss. (1 SER 35-58.) *See Ecological Rights*, 713 F.3d at 510 (plaintiff's waived theory on appeal that was not raised in opposition to motion to dismiss).[7]

[7] In fact, the LCI Appellant's opposition ignored LCI's arguments entirely. (1 SER 45-49.) *Cf. Durham v. Prudential Ins. Co. of Am.*, 2017 WL 7661482, at *2 (C.D. Cal. Apr. 26, 2017) ("Plaintiff does not respond to this argument, and therefore concedes it").

On appeal, the LCI Appellant attempts to shoehorn his new theory about the validity of the amendment into the FAC's allegations. To do so, the LCI Appellant relies on his allegation that "the Program 'caus[ed] a reduction in or elimination of benefits without a change in coverage[.]" (AOB 55 (emphasis in AOB omitted).) But the existence of this single, ambiguous, and selectively quoted excerpt from the FAC does not establish that the LCI Appellant properly raised the issue below. *See Ecological Rights*, 713 F.3d at 511 (plaintiff's identification of "isolated fragments" in complaint insufficient to preserve issue for review); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (explaining that a complaint must "possess enough heft" to show a plausible claim for relief) (cited by *Ecological Rights*). To the contrary, the LCI Appellant's inability to cite to the FAC on appeal to support his new theory confirms that it is not the legal theory that the parties litigated below. Thus, the LCI Appellant has waived his arguments based on the validity of the amendment for this reason alone.

2. The LCI Appellant Expressly Conceded The Lowe's Welfare Plan Was Validly Amended During Oral Argument

The LCI Appellant also expressly conceded during oral argument that the Lowe's Welfare Plan was validly amended. Concessions made during oral argument in the trial court on a motion to dismiss ERISA claims can foreclose the plaintiff's appeal. *Estate of Spinner v. Anthem Health Plans of Virginia, Inc.*, 388 Fed. Appx. 275, 278 (4th Cir. 2010) (holding that factual concessions made in the

trial court during hearing on motion to dismiss hearing were fatal to ERISA claims on appeal); *see In re Keller*, 568 B.R. 118, 125 (B.A.P. 9th Cir. 2017) (holding that a concession at oral argument waived an issue on appeal).

Here, Appellants' counsel informed Judge Chen:

> **To amend the plan validly under ERISA, you have to have some sort of writing signed by the sponsor that makes that change. And only one defendant has actually done that. And that's Lowe's.**

(EOR 173:23-174:1.) And:

> **Now, we're only talking about Lowe's here because no other defendant has put in any evidence that the program was validly implemented. But for Lowe's . . . based on these documents, have validly implemented the program.**

(EOR 175:15-19.) These concessions foreclose the LCI Appellant's argument in this Court that the Lowe's Welfare Plan was not validly amended. *Pye v. Mitchell*, 574 F.2d 476, 480 (9th Cir. 1978) ("Where an issue is conceded below, it cannot be raised for the first time on appeal."). This Court should affirm the judgment below for this additional, independent reason.

C. The LCI Appellant's Waived Arguments Fail On The Merits In Any Event

The LCI Appellant's arguments about the validity of the amendment to the Lowe's Welfare Plan lack merit in any event. On appeal, the LCI Appellant has reversed course to argue that the Lowe's Welfare Plan, as amended, does not cover

"Descovy and Prezcobix—the two drugs taken by John Doe Five, who is a member of the Lowe's Plan." (AOB 56; *cf.* EOR 23:1-5, 48:5-8, 48-49.) But the LCI Appellant does not contend that those two medications were listed in the formularies under the prior iterations of the challenged prescription drug program either. Nor has the LCI Appellant identified any specific plan term that conferred the benefit he seeks in the first instance. Thus, apart from being contrary to the theory he pleaded, the LCI Appellant still cannot establish that LCI's drug program, as amended, "results in a reduction in or elimination of health plans' drug benefits." (EOR 38, ¶68.) Accordingly, the LCI Appellant's arguments fail on their own terms as a matter of law.

D. The Trial Court Did Not Abuse Its Discretion By Denying The LCI Appellant Leave To Amend

As an initial matter, the LCI Appellant does not challenge the trial court's denial of leave to amend. Accordingly, he has waived the argument. *See Galvani v. Tokio Marine & Nichido Fire Ins. Co., Ltd.*, 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").

Moreover, this Court should affirm the trial court's decision in any event. This Court reviews a district court's denial of leave to amend for abuse of discretion. *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989). The district court's discretion is particularly broad where, as here, the

plaintiffs have previously amended their complaint. *Id.* "Denial of leave to amend is not an abuse of discretion where the pleadings before the court demonstrate that further amendment would be futile." *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987).

Here, the trial court did not abuse its discretion in denying the LCI Appellant leave to amend because further amendment would be futile. (EOR 217.) The legal theory that the LCI Appellant pleaded is not cognizable, and there is no set of facts that the LCI Appellant could plead to state a claim upon which relief can be granted. *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 742 (9th Cir. 2008) ("Leave to amend may be denied if a court determines that allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.") (internal quotation marks omitted). Nor did the LCI Appellant allege any facts in his opposition to LCI's motion to dismiss indicating otherwise. *Deutsch v. Turner Corp.*, 324 F.3d 692, 717-718 (9th Cir. 2003) (upholding denial of leave to amend on the basis of futility where facts proffered facts to the district court were insufficient and plaintiffs failed to offer additional facts on appeal). Accordingly, this Court should hold the trial court did not abuse its discretion in denying leave to amend.

VI. CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's order dismissing the LCI Appellant's claims against LCI with prejudice.

August 7, 2019

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STATEMENT OF RELATED CASES

There are no related cases of which LCI is aware.

August 7, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Local Rule 32-1, I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Ninth Circuit Local Rule 32-1 because, according to Microsoft Word, this brief contains 5,193 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

August 7, 2019

/s/ Phillip J. Eskenazi
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Lowe's Companies, Inc.

CERTIFICATE OF SERVICE

I, Phillip J. Eskenazi, counsel for Appellee, hereby certify that on August 7, 2019, I caused a true and correct copy of the foregoing Brief of Appellee Lowe's Companies, Inc. to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system.

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

August 7, 2019

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