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DWIGHT D. MATHEWS, OTIS C. JOINER, ERNEST L. OLIVER, FRED SMITH, CAROLYN WHATLEY, RAUL TOVAR, CHARLES N. HORD, THOMAS MOUNGOVAN, BILL BUCHANAN, JOSEPH S. PIAZZA, DANIEL J. DREESMAN, EVERETT M. MILLER, ALBERT MUNN, TOMMY LEE RUSH, Plaintiffs, v. CHEVRON CORPORATION, Defendant.

No. C 00-04824 WHA

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2002 U.S. Dist. LEXIS 7738

April 23, 2002, Decided

DISPOSITION: Court entered its findings of fact and conclusions of law.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiffs, employees, sued defendant employer under § 502(a)(3) of the Employee Retirement Income Security Act (ERISA), specifically 29 U.S.C.S. § 1132(a)(3), alleging breach of fiduciary duty in violation of 29 U.S.C.S. § 1104(a)(1). The matter went to a bench trial. The court set forth its findings and conclusions of law.

OVERVIEW: The employee alleged they were misinformed about the prospective availability of the involuntary termination option at their facility. They were told by management that no volunteers would be solicited at their facility. They then retired. Shortly thereafter, volunteers were, in fact, solicited at their facility. The employees alleged that they would have received greater benefits had they postponed their retirements and instead "volunteered" for "involuntary terminations." The court held that there was no inconsistency in holding that, as to the rank and file, the human resources reversal triggered a disclosure duty under the actively-misinform test but did not, standing alone, trigger a duty under the "serious-consideration" test. The general manager should not have been representing that a final decision had been made against the involuntary retirement benefit when, in fact, the employer's decision-making had not yet run its course. There was no duty to correct statements that did not, in their specific context, violate ERISA, even if they were later proven to have been incorrect. A money-damage award was prohibited by ERISA, however, equitable relief was not proscribed.

OUTCOME: Judgment was entered in favor of six of the employees and the employer was ordered to take all steps within its authority to modify the plan records to show that they were involuntarily discharged as of the date of their separations, and to ensure that the six employees were provided the involuntary retirement benefits. The court reserved jurisdiction to enforce the equitable decree.

CORE TERMS: site, refinery, duty, staff, retirement, manager, rank and file, e-mail, involuntarily, actively, rumor, retired, fiduciary, general manager, misinformation, announcement, workforce, attrition, reversal, surplus, beneficiary, disclosure, final decision, termination, misinform, severance, package, plan administrator, communicate, message

LexisNexis (TM) HEADNOTES - Core Concepts –

Section 502(a)(3) of the Employee Retirement Income Security Act (ERISA), specifically 29 U.S.C.S. 1132(a)(3), authorizes civil actions by retirement-plan beneficiaries to obtain equitable relief to redress violations of ERISA. Section 404(a)(1) of the Employee Retirement Income Security Act (ERISA), specifically 29 U.S.C.S. 1104(a)(1), provides that a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries.

Under Employee Retirement Income Security Act (ERISA), to establish a claim for breach of fiduciary duty based on alleged misstatements to a beneficiary concerning a retirement plan, a plaintiff must show that the defendant was acting in a fiduciary capacity when it made the alleged misrepresentations. Depending on what an

employer, who is also a plan administrator, is doing at any given time it may or may not be acting as an ERISA fiduciary and, correspondingly, may or may not be liable under ERISA. For example, purely business decisions are not governed by the fiduciary standards of 29 U.S.C.S. § 1104. Likewise, a company does not act in a fiduciary capacity when deciding to amend or to terminate a benefits plan. On the other hand, an employer does act as a fiduciary when it conveys information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation.

Under the Employee Retirement Income Security Act (ERISA), at all times a fiduciary-employer has a duty not to "actively misinform" plan participants and beneficiaries when conveying information about the likely future of plan benefits. In addition, when "serious consideration" is under way to alter benefits, a fiduciary-employer must so advise to inquiring participants and to any participants it previously told it would keep informed.

Under Employee Retirement Income Security Act (ERISA), a plan or plan amendment is under "serious consideration" when (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change. These three parts are not isolated criteria but related elements that must be analyzed together in an "inherently fact-specific" review to determine when the employer first seriously considered implementing a proposed change in benefits. The goal of this test is for employees to learn of potential changes when the company's deliberations have reached a level when an employee should reasonably factor the potential change into an employment decision.

Under Employee Retirement Income Security Act (ERISA), when serious consideration of a plan has begun, a fiduciary-employer must communicate to inquiring plan participants any potential plan or plan amendment and the fact that it is being seriously considered. It is not a defense to liability under ERISA that a supervisor was unaware that such consideration had commenced and thus responded ignorantly but truthfully to the employee's inquiry. Furthermore, after serious consideration begins and where (and only where) an employer has previously promised an employee that it would keep him or her abreast of any changes in a benefits plan, it has a duty to inform the employee that serious consideration has commenced.

Under Employee Retirement Income Security Act (ERISA), at all times, an employer has the affirmative baseline duty not to "actively misinform" a beneficiary in any material respect so as to induce him or her to retire earlier than he or she would otherwise. To "actively misinform," a statement must either (1) be known as false or (2) have no reasonable basis in fact (i.e., be made with reckless disregard as to its truth or falsity). Conversely, a statement that accurately indicates an employer's intent at a particular time and has a reasonable basis in fact is not misleading and

therefore does not "actively misinform." In other words, mere mispredictions are not actionable.

The United States District Court for the Northern District of California holds that under Employee Retirement Income Security Act (ERISA), employers are deemed to intend the reasonably foreseeable consequences of their misinformation when that misinformation induces earlier-than-otherwise retirements.

With regard to the Employee Retirement Income Security Act, the United States Court of Appeals for the Ninth Circuit holds that an employer can actively mislead even before any "serious consideration" duties arise.

Section 404(a)(1) of the Employee Retirement Income Security Act (ERISA), specifically 29 U.S.C.S. § 1104(a)(1) applies only to fiduciary duties. ERISA imposes no duties upon employer actions that are purely business decisions rather than fiduciary decisions.

With regard to Employee Retirement Income Security Act, conveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation is a fiduciary act as a plan administrator.

One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or his agent as if he were such.

Under the Employee Retirement Income Security Act with regard to a claim for breach of fiduciary duty, with respect to disclosure duties resulting from "serious consideration," the United States Court of Appeals for the Ninth Circuit holds that there is no duty to track down employees who made inquiry and to give them updates absent a promise to do so. But even with a promise, that duty will arise only once serious consideration had begun.

The United States District Court for the Northern District of California holds that as to active misinformation, the duty to correct is immediate upon the promulgation of a statement that actively misinforms in violation of Employee Retirement Income

Security Act (ERISA), but only as to those who actually rely on the misinformation. Conversely, there is no duty to correct statements that do not, in their specific context, violate ERISA, even if they are later proven to have been incorrect.

A money-damage award is prohibited by Employee Retirement Income Security Act. Equitable relief, however, is not proscribed.

COUNSEL: [*1] For DWIGHT D. MATHEWS, ISSIAH MILTON, LEROY P. BATEMAN, OTIS C. JOINER, ERNEST L. OLIVER, FRED SMITH, CAROLYN WHATLEY, RAUL TOVAR, CHARLES N. HORD, RONALD MORTON, THOMAS MOUNGOVAN, JESSE RONALD CARLOCK, BILL BUCHANAN, JOSEPH S. PIAZZA, DANIEL J. DREESMAN, EVERETT M. MILLER, ALBERT MUNN, TOMMIE LEE RUSH, MILAN JEROME RAPO, SR., Plaintiffs: Michael F. Ram, Anna M. Rossi, Levy Ram & Olson LLP, Joni S. Jacobs, Levy Ram Olson & Rossi LLP, San Francisco, CA.

For DWIGHT D. MATHEWS, ISSIAH MILTON, LEROY P. BATEMAN, OTIS C. JOINER, ERNEST L. OLIVER, FRED SMITH, CAROLYN WHATLEY, RAUL TOVAR, CHARLES N. HORD, RONALD MORTON, THOMAS MOUNGOVAN, JESSE RONALD CARLOCK, BILL BUCHANAN, JOSEPH S. PIAZZA, DANIEL J. DREESMAN, EVERETT M. MILLER, ALBERT MUNN, TOMMIE LEE RUSH, MILAN JEROME RAPO, SR., Plaintiffs: Thomas G. Moukawsher, Moukawsher & Walsh, LLC, Groton, CT.

For CHEVRON CORPORATION, defendant: Kim Zeldin, Craig E. Stewart, Pillsbury Winthrop LLP, San Francisco, CA.

For CHEVRON CORPORATION, defendant: Howard Shapiro, Robert Rachal, Shook, Hardy & Bacon LLP, New Orleans, LA.

JUDGES: WILLIAM ALSUP, UNITED STATES DISTRICT JUDGE.

OPINIONBY: WILLIAM ALSUP

OPINION: FINDINGS OF FACT; CONCLUSIONS OF LAW; [*2] AND ORDER GRANTING RELIEF

INTRODUCTION

In this ERISA case, plaintiff employees would have received greater benefits had they postponed their retirements and instead "volunteered" for "involuntary terminations." They allege they were misinformed about the prospective availability of such an option at their facility. They concededly knew (or should have known) that the company's retirement plan had been amended to authorize the benefit. They were told by management, however, that no volunteers would be solicited at their facility. They then retired. Shortly thereafter, volunteers were, in fact, solicited at their facility. Had plaintiffs remained as employees and volunteered, it is stipulated they would have been involuntarily terminated and thus would have received the enhanced benefit. After a bench trial, this order sets forth the Court's findings and conclusions of law. This order concludes that six of the ten remaining plaintiffs are entitled to relief.

----- Footnotes -----

By summary judgment dated February 26, 2002, the claims of five plaintiffs were rejected as based on events occurring before the critical date of February 26, 1999.

----- End Footnotes----- [*3]

FINDINGS OF FACT

Chevron Corporation was (and remains) the plan sponsor and plan administrator of the Chevron Corporation Retirement Plan. On February 23, 1999, Chevron announced to all Chevron employees a "special enhanced benefit" available through the plan. The new benefit was called the "Special Involuntary Termination Enhancement" or SITE. Under SITE, any plan participant involuntarily terminated without cause during the SITE window (March 1 to December 31, 1999) would receive an enhanced benefit. In part, the important "blue-top" announcement made by the vice chairman of Chevron, David O'Reilly, stated (TX 9):

If you work in an organization that has or develops a surplus of employees this year, local management will notify you whether your employment will be involuntarily terminated. Even though only involuntarily terminated employees are eligible for the SITE program, if you are in a group with a surplus of employees your management may ask if you are interested in terminating your employment. Your management will take your interest into consideration but that is not a guarantee that you will be eligible for the SITE program.

The obvious question on everyone's [*4] mind is: How will this affect me personally? I will try to keep you informed on the overall progress of our cost-reduction efforts, and I'm counting on your local management to communicate changes that might affect you. I'm also encouraging them to make use of programs that have been successful in the past, such as redeployment, educational assistance and outplacement assistance.

The SITE program was adopted to achieve workforce reductions. For some time, Chevron had recognized that it needed to substantially trim its workforce in its various subsidiaries. SITE gave workers an incentive to volunteer to be discharged.

----- Footnotes -----

"Blue-top" because of the distinctive blue stripe across the top of the announcement.

----- End Footnotes-----

An important feature of the program was the SITE solicitation letter. This letter -- if and when sent to various employees -- invited them to express a preference for involuntary termination. This was also known as the "self-tap" feature. While those

who stepped forward and tapped themselves had no guarantee [*5] of receiving a termination, their preferences were to be taken into consideration by management in deciding who, if anyone, to terminate. As the parties have stipulated:

Management determined whether and how employees were involuntarily terminated during the window period. Management could include a voluntary, "self tap" option. An employee could indicate he or she wanted to be considered for involuntary termination (and thus the SITE benefit). Such "self taps," however, were not conclusive. Management ultimately chose whether to acknowledge and respond to an employee's preference, and conversely, could terminate an employee who had not tapped himself.

In the actual event, the vast majority of self-tapping volunteers were, in fact, selected for involuntary termination. It is stipulated herein that all of the plaintiffs, had they expressed such interest, would have been selected for involuntary termination. At the Richmond refinery, where all plaintiffs worked, no one was ultimately discharged during the window period who had not volunteered. Throughout the company, some 16,000 of Chevron's 39,000 employees were designated as surplus and thus eligible for SITE benefits upon [*6] involuntarily termination.

There was an important local-option aspect to the program. Although the plan amendment was company-wide, it was ultimately to be left to each local general manager to decide whether to send out SITE preference letters and, if so, to which employees, at least as to the "rank-and-file" employees (as they are described by the parties). Thus, after the benefit was announced, large unanswered questions loomed over the stacks of each refinery: Would SITE be used at all and, if so, for which categories of employees?

As stated, Chevron envisioned SITE as a workforce-reduction tool. The Chevron announcement stated (TX 9) that headquarters was "counting on your local management to communicate changes that might affect you." Employees with questions "about eligibility for the SITE program 'were referred to' local HR [Human Resources] Business Partner or local management" (*ibid.*).

* * *

One of Chevron's facilities was its historic refinery in Richmond, California. Richmond was part of Chevron Products Company, an unincorporated division of Chevron U.S.A., Inc., in turn a wholly-owned subsidiary of Chevron Corporation. All of the plaintiffs, as stated, worked [*7] at the Richmond refinery and were, to use the nomenclature of the case, "rank-and-file" employees rather than management or Human Resources staff, a distinction that eventually developed into an important part of the story. As anticipated by the Chevron announcement, the local management at the Richmond refinery received many inquiries from workers, including most plaintiffs. Chevron workers knew that on occasion, the company would dangle severance packages before them to induce severances and thus eliminate jobs. n3

- - - - - Footnotes - - - - -

n3 Prior to the adoption of SITE, Chevron had a long-standing general practice of paying out-of-till severance pay under various severance plans collectively referred to as the Surplus Employee Severance Pay Program (SESP). Each year, Chevron approved a new unexecuted prototype SESP plan and delegated authority to the HR vice president to adopt severance plans based on that prototype. If an operating company or business unit then wanted to terminate employees through a reduction in force, it would request that the corporation's HR vice president adopt a specific SESP plan for that reduction in force. Chevron employees -- including plaintiffs -- were well aware of Chevron's practice of offering what they colloquially referred to as a "package" if they were involuntarily terminated as part of a downsizing. Those had been funded from corporate earnings. In contrast, SITE was funded via the retirement plan, which Chevron viewed as grossly overfunded.

- - - - - End Footnotes- - - - - [*8]

Consistently with the original announcement, the general manager of the Richmond facility or his agents regularly responded to employee inquiries. The general manager at Richmond was Bill Steelman. His message was unambiguous and relentlessly firm. Although Richmond was under pressure to reduce its wage burden, Mr. Steelman stated that the Richmond policy was and would continue to be reliance on attrition -- not involuntary terminations -- to solve its admitted workforce surplus. Mr. Steelman had already pledged to his workforce that, in exchange for cooperating with work process/downsizing re-arrangements, no employee would be fired except for cause. Attrition and attrition only was his watchword. He felt that the involuntary-termination aspect of the SITE program would violate his pledge -- even as to employees who volunteered to be fired. His views were promulgated and well known throughout the Richmond facility. n4 For example, the Rumor Buster, a company website at Richmond to respond to refinery rumors and questions, carried these entries:

Comment: Are there any plans for a retirement package to be offered for some of the layoffs and cutbacks?

Response: [*9] Bill Steelman and the RRMT have been saying for almost two years now that we must get more competitive to survive long term and the way to get there is through well established efficient work practices and reduced manpower levels. As part of this message, we have also been saying that there is lots of work to do and as we get more efficient with our work process we will not be laying people off. As long as individuals are willing to do different work, we do not need to artificially cut back our employment levels. We will let attrition take care of this reduction over time. This is still the driving philosophy of our management team. *Therefore, I can say to you that we are not planning to have a severance package here at Richmond [voluntarily or involuntarily] in the foreseeable future.* We too have seen and heard the rumors of a Corporate Severance Policy. I can confirm that the Corporation is working on some form of Severance Plan; however, I can also confirm that if it comes it will not be a blanket plan that applies to everyone in the Corp. Each individual operating company or operation will have to apply IF they have identified surplus employees AND they need to reduce [*10] their numbers quickly. We have neither of these needs at this time. n5

(TX 18) (posted 2/19/99) [brackets in the original] (emphasis added).

* * *

Comment: Why can't we open up the severance program to all eligible employees? Although I am not close to retirement age, it would be a nice incentive to take the money and market my skills elsewhere. Unfortunately for Mama Chevron, employee team commitment or not, I am not alone in this thinking. It all boils down to "show me the money" and let me do my retirement calcs to see if I can make it with or without Big Mama Blue.

Response: As stated in RB 64-2/99, the refinery does not have plans to utilize the enhanced Corporate Severance Plan. As I have mentioned over the past several years, we need to reduce the total number of people required to operate the Richmond Refinery. *Any reduction in people required at Richmond needs to be done in the context of making sure that we operate the refinery safely, reliably and without incidents.* We are taking additional steps to reduce the number of Chevron employees required to maintain and safely operate the Richmond Refinery. We need to reduce the total number [*11] of Chevron employees from our current total of about 1500 employees to about 1250 employees; however, this should occur through attrition.

* * *

I have carefully considered the option of a severance package, but I do not believe we have all of the organizational capability (work processes and culture) that we need to operate with 250 less employees at this time. I believe that we can create that organizational capability over the next couple of years. *The rate at which we can take on additional capability is about equal to our attrition rate.* Stated in another way, we will, through natural attrition, reduce our employee base by about 250 employees over the next couple of years; and it will take us a couple of years to be able to physically operate with 250 less employees. *This decision is consistent with my promise that we would not involuntarily terminate employees as we create new organizational capability that will allow us to operate more competitively and with fewer employees.* It is also very consistent with my promise to operate this refinery safely, reliably, and incident free.

(TX 19) (posted 3/1/99) (emphasis in original).

Comment: How can [*12] the Company justify involuntarily terminating employees in one part of the Company, when there are employees who are willing to voluntarily terminate in other parts of the Company (such as Richmond Refinery). This seems somewhat unfair to those being involuntarily "sited." Since the whole idea of the recent Richmond reorganization is to decrease manpower, why is it that Richmond employees who would happily volunteer to be part of this program are being excluded?

Response: As indicated in my earlier Rumor Buster (# 02-3/99) on this subject, I

do not believe we have all of the organizational capability (work processes and culture) that we need to operate with less employees at this time. I think that we will be able to operate with fewer employees in the future, but we need to further improve work processes and have better engagement of all of our people.

(TX 20) (posted 4/21/99).

- - - - - Footnotes - - - - -

Mr. Steelman also continuously shared this "improve work processes/downsize through attrition" approach with his management team and Richmond employees. He stated this approach in a June 24, 1997, Rumor Buster posting. In 1998, the Richmond HR department also analyzed and presented a report on attrition. The basic conclusion was that Richmond should be able to absorb over the next few years a percentage of retiring workers through improved work processes so as to become more competitive. [*13]

n5 For reasons stated hereafter, the February 19 statement has not been shown to have been actionable when first posted on the website. There is no evidence, however, that this Rumor Buster was ever deleted from the website. Beginning February 26, therefore, it did "actively misinform," as explained below.

- - - - - End Footnotes- - - - -

Similarly, at town-hall meetings at the refinery, Mr. Steelman adamantly opposed any use of SITE for any employees. When some of his own management team individually expressed interest in SITE for themselves, he told them, in effect, "Not at Richmond." When plaintiffs, all approaching tentative retirement dates, inquired of Richmond officials, they were told, "Not at Richmond."

With varying degrees of reliance on Mr. Steelman's opposition to SITE, plaintiffs -- all Richmond workers of retirement age -- decided to retire. These retirements occurred after February 23 and through July 1999. By mid-May, however, Mr. Steelman reversed himself and authorized SITE solicitation letters for the entire Richmond facility. This reversal came too late for all but one plaintiff, who had, in the meantime, [*14] closed shop on their Chevron careers. They missed out on the SITE benefit.

* * *

The critical question in this ERISA case involves an examination of the deliberations leading up to the mid-May reversal to determine when, if ever, the employer had a duty to alert imminent retirees of various deliberations and proposals in play within Chevron. The issue is complicated by the layers of management within Chevron. Mr. Steelman reported to Lance Gyorfi, the executive in charge of all refineries. Mr. Gyorfi carried out his responsibilities through the "Refinery Guidance Team." This consisted of all general managers of the six refineries in the United States, including

Mr. Steelman. The RGT met in person four times per year and had occasional telephone conferences in between. Plaintiffs focus their argument on the deliberations at the RGT level, one level above Mr. Steelman.

Chevron's style of governance gave considerable discretion to the general managers over the rank and file but insisted that general managers consult with one another before exercising their discretion on certain issues of company-wide importance. This mutual consultation strove to achieve maximum, all-refinery consistency [*15] while allowing for local variations as needed.

Three days after the SITE announcement (on February 23), the RGT held a telephone conference call (on February 26) attended by Mr. Gyorfi, all general managers, and RGT staff. SITE was the subject of the conference call. SITE was a "tool to help management handle any surplus of employees," according to Mr. Gyorfi's discussion notes for the meeting (TX 32). There was a large surplus to tackle, including at Richmond. One issue raised was "consistency across refining (or at least not inconsistent)," according to the discussion notes (TX 32). Mr. Gyorfi feared that local refineries might apply SITE inconsistently.

Mr. Gyorfi advised the conference-call participants that "some people at your facility may get SITE" because, at a minimum, the bloated Human Resources staff at the various refineries needed reduction (TX 32). It so happened that the Human Resources staff, spread across all the refineries, was substantially larger than needed. So were other job categories but the difference was that the HR staff, while reporting to local general managers, also had a "dotted line" reporting relationship to Alan Preston, the general manager of human [*16] resources of the Chevron Products Company. Senior Chevron executives saw SITE as a godsend to trim the fat. Thus, in the conference call, Mr. Gyorfi told the refinery managers that "probably" all refinery-level HR staff would receive SITE solicitation letters. Although none of the plaintiffs was on an HR staff, the direction taken for the HR staff eventually had implications, for reasons of uniformity and fairness, for the rank and file.

Another group whose SITE inclusion was controlled by RGT, not the general managers, was management, sometimes referred to as "Group 1" employees. Again, the direction ultimately taken for the management layer of the workforce would eventually have implications for labor.

At trial, Mr. Gyorfi gave important testimony concerning the need for his general managers to coordinate and to consult in deciding how to implement SITE (Tr. 254, 255, 259):

Q. At the conference call you discussed trying to reach an overall consensus about SITE for Refining, correct?

A. Yes.

* * *

Q. So you weren't just discussing Group 1's at this conference call, you were looking at the whole issue of, how are we going to handle SITE within Refining, right? [*17]

A. Yes.

Q. And you also discussed how to -- you also discussed the issue of whether to communicate anything about these discussions with employees, but ultimately chose not to make any communication at that point, correct?

A. That's correct.

* * *

Q. Fundamental to your view about consensus and the purpose of having these RGT-like discussions is that you didn't want refineries running off on their own without any consideration for what they were doing and how it would affect other refineries, correct?

A. Correct.

Q. And that was the whole purpose of talking about this sort of thing and deciding it as a group, right?

A. Correct.

* * *

Q. And I take it at that point also, because it was under discussion, and because it wasn't decided, nobody had any business telling anybody it was decided at that point, correct?

A. Correct.

In other words, Mr. Steelman and all general managers were allowed the ultimate say in how to handle SITE as to the rank and file but, as of February 26, Chevron expected its general managers to work the issue through the consensus process of RGT governance *before* making or announcing a final decision. As of February [*18] 26, therefore, all general managers knew, or should have known, that after mutual consultation, their own initial viewpoints might well change. The goal was to achieve uniformity except insofar as genuine local differences warranted variation. As Chevron itself stated in its post-trial brief (at 4), February was "too early" to reach any decisions and "this was the first chance for each RGT member to hear each other's thoughts on SITE." Even at this early stage, Mr. Gyorfi alerted the participants to the issue "what, if anything to communicate now" to "employees and unions"(TX 32). This had no impact on Mr. Steelman. His message was simply "Not at Richmond."

To pause and summarize, by the end of March and the beginning of April, there was no approved plan at the RGT level. The RGT generated communications and further RGT conference calls over several days in March. Information was still being gathered. Mr. Gyorfi and his staff were promoting the idea of using SITE for HR staff at the various refineries and had raised the issue of uniform treatment of all management-level employees. At Richmond, however, Mr. Steelman believed he already had a final plan, namely, not to use SITE at [*19] all. In fact, Mr. Steelman was the *only* general manager of the six who had made a decision by this time

period.

- - - - - Footnotes - - - - -

To this end, on March 31, the RGT staff even approved a draft letter prepared by Richmond to send to its local unions stating that Richmond did not plan to utilize the program (TX 72). And, the letter was in fact sent.

- - - - - End Footnotes- - - - -

The issue, however, drew into sharper focus in mid-April in an important series of e-mails. Although in the Steelman e-mail dated April 21, described below, Mr. Steelman opposed use of SITE for his HR employees, he soon reversed himself, not as to all his workforce, but at least as to his HR employees. He committed to offering SITE at Richmond for its HR employees on April 22. The sequence was as follows (TX 15, 70):

. E-mail dated April 14: Preston to Steelman and other general managers. This e-mail made the case for using SITE for all HR employees throughout Chevron and stated a specific plan. *"Our current plan is to send out preference letters in April."* The e-mail [*20] was cast as a "heads up" and to "ask for your agreement." No plan was described for the rank and file.

. E-mail dated April 21: Steelman to Preston with copies to Gyorfi and many others. This e-mail made Mr. Steelman's case against offering SITE to HR employees in Richmond or to any other Richmond employee. His lead point was the need for equal treatment -- it *"would cause great rifts within the Refinery by allowing one select group of employees to potentially benefit by the SITE program."* He appended his Rumor Buster of March 1 to show how he had promulgated an attrition-only strategy for Richmond.

. E-mail dated April 22: Gyorfi to Steelman. This e-mail took Mr. Steelman to task for not understanding the SITE program and for wrongly viewing it as inconsistent with his job-security pledge (all caps in original):

We need to discuss. I understand your view but I think that you are not looking at it quite correctly. There seems to be confusion about what SITE is and is not. In my view you can offer it AND not go against your word. All the offer letter does is gain an understanding of a persons [sic] PREFERENCE. It does not guarantee that person they will be chosen [*21] nor does it obligate you to honor the persons [sic] request. YOU are the one to decide based on your needs and the performance of the person if you want to accept and exercise the SITE. If a person self nominates and you think it in your refinery's best interest to accept this person's nomination based on surplus and performance then how is that against your word of people not fearing losing employment?? They wanted it and you gave it to them!

What it does do is put you in the position of having to make choices and telling some or all people that you choose not to exercise SITE -- not everyone will love you for having to make these choices but tough choices consistent with our word and principles is what our jobs are about. Also using SITE will leave the message that where you can accommodate it you are treating people with special care and giving

them a gift of retirement.

I don't see how this is in conflict with your word or principles -- let's discuss.

E-mail dated April 22: Steelman to Preston, Gyorfi and many others. Significantly, in this e-mail, Steelman reversed himself as follows:

I still have concerns about the site [sic] preference letters [*22] for HR as I indicated in my earlier memo, *but I have changed my mind and I am willing to have the site preference letters sent to the Richmond HR people.* I am not at this time committing myself to act on any of the preferences.

- - - - - Footnotes - - - - -

Mr. Steelman testified that he sent his reversal e-mail before he read Mr. Gyorfi's e-mail. This order assumes that this is correct.

- - - - - End Footnotes- - - - -

The Steelman turnabout was a concrete and important event in two ways. *First*, it meant that Mr. Steelman's "Not at Richmond" pronouncement no longer accurately described even his own intentions and policy. *Second*, given Mr. Steelman's stated emphasis on treating all Richmond employees equally, his reversal as to some Richmond employees portended a reasonable prospect of reversal as to others, including plaintiffs. Although Chevron Vice Chairman O'Reilly had earlier stated that he was "counting on your local management to communicate changes that might affect you" (TX 9), the Richmond refinery nonetheless continued to let the workforce [*23] believe that there would be no SITE at Richmond. No corrective announcement was made at this time (mid-April). No effort was made, as far as the record shows, to delete the now-inaccurate Rumor Busters quoted above, including the one as recent as April 21. Had a corrective statement been issued, this order finds that certain plaintiffs who had not yet retired would have rescinded their proposed retirement dates, as the practice plainly let employees do, pending further developments.

The next event occurred in mid-May. By this point, all plaintiffs but one had irrevocably retired. The event was a RGT meeting in Pascagoula, Mississippi. At the meeting, the general managers and the RGT leadership again discussed how to apply SITE. Mr. Gyorfi argued that SITE letters should be sent to all management-level employees, a larger class than just HR staff. Since all such employees were mobile and worked company-wide and were regarded as a collective asset, they traditionally had been treated the same -- regardless of the current refinery to where they happened to be posted. Once again, Mr. Steelman resisted this extension of SITE. But he was soon persuaded to go along and said so. As acknowledged [*24] at trial, he knew the decision on this extension lay with the RGT.

At Pascagoula, once he reversed himself on the management-level employees, Mr. Steelman then had a "serious problem" and "was between a rock and a hard place." To avoid discrimination against his rank and file -- and to avoid the very rifts he had raised concern over earlier -- Mr. Steelman said to all other RGT members that he would have to offer SITE across the board at Richmond. He stated that he had a surplus of one hundred plus employees among the rank and file that might be addressed by SITE. n8 During the Pascagoula meeting, Mr. Steelman telephoned his HR manager and alerted him to the need to inform imminent retirees of a change in policy (TX 34). A few days later, on May 28, a formal notice went out to all employees (TX 50). In addition to explaining that SITE would be offered across the board, Mr. Steelman called a town-hall meeting to be entitled "Why We Need A SITE Program." Unfortunately, this notification came too late for virtually all plaintiffs.

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The weight of the testimony favors Mr. Gyorfi's version of the Pascagoula meeting, not Mr. Steelman's version.

----- End Footnotes----- [*25]

ANALYSIS AND CONCLUSIONS OF LAW

Plaintiffs have brought suit under Section 502(a)(3) of the Employee Retirement Income Security Act, 29 U.S.C. 1132(a)(3). This section authorizes civil actions by retirement-plan beneficiaries to obtain equitable relief to redress violations of the Act. Section 404(a)(1), 29 U.S.C. 1104(a)(1), meanwhile, provides that a fiduciary "shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries."

To establish a claim for breach of fiduciary duty based on alleged misstatements to a beneficiary concerning a retirement plan, a plaintiff must show that the defendant was acting in a fiduciary capacity when it made the alleged misrepresentations. See *Varity Corp. v. Howe*, 516 U.S. 489, 498 (1996). Depending on what an employer, who is also a plan administrator, is doing at any given time it may or may not be acting as an ERISA fiduciary and, correspondingly, may or may not be liable under ERISA. For example, purely business decisions are not governed by the fiduciary standards of Section 1104. *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1162 [*26] --63 (6th Cir. 1988). Likewise, a company does not act in a fiduciary capacity when deciding to amend or to terminate a benefits plan. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). On the other hand, an employer does act as a fiduciary when it conveys information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation. *Varity*, 516 U.S. at 502.

This case turns on two separate disclosure duties imposed on fiduciary-employers. At all times a fiduciary-employer has a duty not to "actively misinform" plan participants and beneficiaries when conveying information about the likely future of plan benefits. *Wayne v. Pacific Bell*, 238 F.3d 1048, 1055 (9th Cir. 2001). In addition, when "serious consideration" is under way to alter benefits, a fiduciary-employer must so advise to inquiring participants and to any participants it

previously told it would keep informed.

A plan or plan amendment is under "serious consideration" when "(1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority [*27] to implement the change." *Bins v. Exxon Co. U.S.A.*, 220 F.3d 1042, 1048 (9th Cir. 2000) (en banc) (quoting *Fischer v. Philadelphia Elec. Co.*, 96 F.3d 1533, 1539 (3d Cir. 1996)). These three parts are not isolated criteria but related elements that must be analyzed together in an "inherently fact-specific" review to determine when the employer first seriously considered implementing a proposed change in benefits. *Ibid.* The goal of this test is for employees to "learn of potential changes when the company's deliberations have reached a level when an employee should reasonably factor the potential change into an employment decision." 220 F.3d at 1052 (quoting *Fischer*, 96 F.3d at 1541).

When serious consideration of a plan has begun, a fiduciary-employer must communicate to *inquiring* plan participants any potential plan or plan amendment and the fact that it is being seriously considered. *Bins*, 220 F.3d at 1054. It is not a defense to liability under ERISA that a supervisor was unaware that such consideration had commenced and thus responded ignorantly but truthfully to the employee's inquiry. *Id.* at 1050, n.6. Furthermore, [*28] after serious consideration begins and where (and only where) an employer has previously promised an employee that it would keep him or her abreast of any changes in a benefits plan, it has a duty to inform the employee that serious consideration has commenced. *Id.* at 1054.

1. Serious Consideration.

As stated, ERISA imposes two disclosure duties on fiduciary employers. The first arises once "serious consideration" commences, as described above. As to the "serious consideration" issue, the focus in this case must be at the RGT level, for this was where all undisclosed consideration was under way, Mr. Steelman having already disclosed his plans.

This order finds that the first time a "specific" proposal was being discussed for purposes of implementation by authorized senior management was mid-April. The specific proposal was to send SITE solicitation letters to all HR staff throughout all refineries (TX 70). The first such proposal was the e-mail dated April 14. By April 22, even Mr. Steelman had agreed to send the letters (TX 70 at 7426). No "specific" proposal was considered for any other group of employees prior to this time. Before then, the RGT was merely [*29] "gathering information, developing strategies and analyzing options" within the meaning of *Bins*, 220 F.3d at 1050, entailing no disclosure duty.

By mid-April, therefore, an ERISA duty arose to inform the HR staff of these deliberations. None of the plaintiffs, however, was HR staff. Since no specific plan was being discussed for the rank and file, no duty to inform them had yet arisen. In fact, the earliest date the record would support as to a specific plan for the rank and file would be mid-May -- the Pascagoula RGT meeting and its aftermath. Only one plaintiff, Daniel Dreesman, retired thereafter. Consequently, this disclosure argument does not aid any plaintiffs other than possibly Mr. Dreesman.

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This order holds that a plaintiff has standing to complain about violations of the "serious consideration" duty only if the "specific plan" under consideration would have benefitted him or her. See *Vartanian v. Monsanto Co.*, 131 F.3d 264, 272 (1st Cir. 1997).

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2. Actively [*30] Misinform.

The case is made more difficult by the fact that plaintiffs' inquiries were not answered by silence but by a vigorous "Not at Richmond" anthem, which proved thoroughly incorrect. We must ask when, if ever, did that refrain become active misinformation.

At all times, an employer has the affirmative baseline duty not to "actively misinform" a beneficiary in any material respect so as to induce him or her to retire earlier than he or she would otherwise. *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 124 (2d Cir. 1997). To "actively misinform," a statement must either (1) be known as false or (2) have no reasonable basis in fact (*i.e.*, be made with reckless disregard as to its truth or falsity). *Flanigan v. General Elec. Co.*, 242 F.3d 78, 84 (2d Cir. 2001) (citing *Ballone*); *Wayne v. Pacific Bell*, 238 F.3d at 1055 (9th Cir. 2001); *cf. Varsity*, 516 U.S. at 505. Conversely, a statement that accurately indicates an employer's intent at a particular time and has a reasonable basis in fact is not misleading and therefore does not "actively misinform." See *Taylor v. People's Natural Gas Co.*, 49 F.3d 982, 990 (3d Cir. 1995). [*31] In other words, "mere mispredictions are not actionable." *Ballone*, 109 F.3d at 125.

With regard to inducement, an important legal issue regarding scienter must be resolved. The Second Circuit held in *Ballone*, 109 F.3d at 124, as follows:

Applying these trustee-law principles, it is clear that Kodak may not actively misinform its plan beneficiaries about the availability of future retirement benefits *to induce them to retire earlier than they otherwise would*, regardless of whether or not it is seriously considering future plan changes (emphasis added).

The Ninth Circuit then adopted this rule in *Wayne*, 238 F.3d at 1050-51. The issue at hand is whether this means the employer must subjectively *intend* to induce earlier retirements. Or is it enough that the foreseeable *effect* of the misinformation would be to induce early retirements? Put differently, does ERISA presume employers intend the reasonably foreseeable consequences of their actions even when they, in fact, mean no harm? The issue is important here because Mr. Steelman, the Court is convinced, meant no harm to any employee and did not subjectively [*32] seek to induce retirements. If such scienter were required, Chevron would be entitled to judgment.

This order holds that, under ERISA, employers are deemed to intend the reasonably foreseeable consequences of their misinformation when that misinformation induces earlier-than-otherwise retirements. Given the fiduciary and trust roots of this branch of ERISA law, it would be hard to rule otherwise. See *Varsity*, 516 U.S. at 496.

* * *

The factual question thus reduces to when, if ever, along the critical February-May timeline, did Mr. Steelman's "Not at Richmond" advice to plan participants become misleading. Chevron argues that Mr. Steelman always had a reasonable basis in fact for his statements because, as the refinery general manager, he always had the final say at Richmond on local layoffs and on whether to send out SITE solicitation letters, at least as to the rank and file. Therefore, Chevron argues, he had a rock-solid basis for presuming that his policy would stand. A large part of the trial was consumed with the issue of allocation of authority within Chevron.

The Court disagrees with Chevron. Regardless of the authority issue, there ceased to be a reasonable [*33] basis for the "Not at Richmond" policy no later than April 22 when Mr. Steelman reversed himself and agreed to send out SITE letters for the HR staff at Richmond (TX 70). Until then, Chevron's message to Richmond employees had been *and continued to be* that SITE would not be used *at all* at Richmond. There is no evidence that Chevron removed the Rumor Busters from its website (TX 18--20). Presumably, they continued to be accessible by the rank and file (TX 18--20). Chevron -- and Mr. Steelman -- knew that this continuing message was false, re-issued yet again in a April 21 Rumor Buster, for Chevron then knew that *SITE would be used for at least some Richmond employees*. No corrective bulletin, however, was issued. Four plaintiffs retired after April 22.

It is true that no plaintiff was HR staff. The reversal as to HR staff, however, would have been a material development for the rank and file because (i) the steady Richmond anthem had been no SITE for *any* Richmond employee, period, and (ii) providing SITE for some employees portended providing SITE for yet more employees or even all employees, especially given Mr. Steelman's views on the need for equal treatment. In short, [*34] the April 22 reversal by Mr. Steelman suggested that the wall of resistance was crumbling.

There is no inconsistency in holding that, as to the rank and file, the HR reversal triggered a disclosure duty under the actively-misinform test but did not, standing alone, trigger a duty under the "serious-consideration" test. The difference lies in the fact that the steady stream of *continuing* statements became, as of April 22, materially inaccurate. The Ninth Circuit has held that an employer can actively mislead even before any "serious consideration" duties arise. *Wayne*, 238 F.3d at 1056, citing *Ballone*, 109 F.3d at 124. Chevron's violation occurred before the retirements of plaintiffs Everett Miller, Dwight Mathews, and Bill Buchanan. They shall be entitled to relief.

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TX 122 has a line indicator for plaintiff Miller that points to early April. This is incorrect. Miller retired on April 30, 1999.

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* * *

The broader question is whether Richmond management "actively misinformed" [*35] even before April 22. *Ballone* held that a company "actively misinforms" when it represents a decision has been made that no pension enhancements will be forthcoming without actually having made such a decision. This is so, *Ballone* held, even if the company's deliberations have not yet gelled sufficiently to trigger disclosure duties under the "serious consideration" test. 109 F.3d at 124. Plaintiffs argue that exactly this occurred at Richmond.

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Ballone, it is interesting to note, was decided and on the books in 1997, two years before Chevron's handling of these disclosure issues. *Bin* and *Wayne*, however, came later in 2000 and 2001.

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Plainly, here, Chevron told the plan participants that it had reached a final decision not to make SITE available at Richmond. The issue is whether Chevron knew that no final decision had yet been made. Chevron argues that, as the general manager, Mr. Steelman had the final say on layoffs and the use of the SITE letter for the rank and file. [*36] Thus, he had a reasonable basis for his well-known views. Again, the Court finds that Mr. Steelman was sincere and truly believed, at least early on, that he would not use SITE at Richmond.

But that is not the test. The test is whether the *employer* knew (or should reasonably have known) that a decision had not yet been made. This requires consideration of Chevron's corporate knowledge and how decisions were made at Chevron. Here, it was clear from February 26 onward that Mr. Gyorf and the RGT were seeking to coordinate the SITE strategy on an all-refineries basis. Chevron admits -- even emphasizes -- that it used a "consensus" style of management. Chevron itself, as already noted, recognizes in its post-trial brief (at 4) that late February "was 'too early' to reach any decisions" and that the February conference call "was the first chance for each RGT member to hear each other's thoughts on SITE." Until the consensus-building approach had run its course, no refinery general manager should have thought that Chevron had made a final decision. Mr. Steelman, in fact, was the *only* general manager of the six who had already made his mind up at this point, as Chevron concedes [*37] (Br. 4).

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Conversely, since it was not known prior to that time that SITE would be coordinated on a refinery-wide basis, and past practice had been that downsizing decisions were made at the refinery level, statements made before February 26 were not actively misleading.

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Put differently, Mr. Steelman was free to express a tentative view. He was free in the end to lay off whomever he wished among the rank and file. But Chevron required

him, via its form of consensus governance, to work the issue through the RGT before settling on a final decision, even for the rank and file. Consequently, as Mr. Gyorfi testified, Mr. Steelman should not have been representing that a final decision had been made against SITE when, in fact, Chevron's decision-making had not yet run its course. At a minimum, Mr. Steelman's pronouncements should have been qualified to say that the issue was still under consideration at the RGT level and that Richmond's position was subject to change. Thus, Chevron actively misinformed its Richmond [*38] workforce beginning February 26 by representing that a final decision had been made by Chevron when, in fact, Mr. Steelman knew or should have known that no final decision had been made.

3. Fiduciary Decision v. Business Decision.

As stated, Section 404(a)(1) applies only to fiduciary duties. ERISA imposes no duties upon employer actions that are purely business decisions rather than fiduciary decisions. Chevron urges that neither Mr. Steelman nor Mr. Gyorfi nor any of the other SITE implementers was acting in a fiduciary capacity. Rather, Chevron insists that they were acting simply as managers making downsizing decisions. The plan had already been amended and the amendment had already been publicized in February before the retirements at issue. The fiduciary-notification duties, Chevron argues, had already run their course. What remained was merely for general managers to decide on the extent of layoffs and the extent to which to use SITE to facilitate the layoffs. This, Chevron says, was a classic management decision. The present case is thus unlike the usual ERISA lawsuit involving failure to notify as to the development of an imminent plan amendment.

A variation of Chevron's [*39] argument was rejected by the Supreme Court in *Varity*, 516 U.S. at 502--03. The Supreme Court held that "conveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation" was a fiduciary act as a plan administrator. *Id.* at 502. In the present case, the formality of the amendment to the plan was only a preliminary step. It set the stage for the real decision -- whether and the extent to which employees would be invited to enlist for discharge and the SITE benefit. Although volunteers had no guarantee of an enhanced benefit, it was reasonably close to a certainty. In the actual event, as stated, almost everyone who volunteered received it. All plaintiffs herein would have, it is agreed. The workforce regarded it as the equivalent of a voluntary severance "package." Even Chevron management referred to it as a "package." Management itself felt obliged, at least by late May, to notify imminent retirees of the pending change in availability. To make informed decisions, plan participants needed to know whether the SITE benefit would be available at Richmond. *Significantly*, [*40] *the whole point of the dialogue was to help plan participants make informed choices about plan options.* This squarely fits the *Varity* rationale. *Varity*, therefore, requires rejection of Chevron's point.

Also, as in *Varity*, the employees here could reasonably have thought that management was communicating with them both in its capacity as employer and as plan administrator. The original "blue-top" announcement, for example, which clearly came from Chevron as the plan administrator, stated that local management would keep employees posted on the local implementation (TX 9). Richmond human-resources personnel, the cadre responsible for interfacing on plan benefits, broadcast the Steelman message. Again, even Mr. Steelman referred to SITE as a "package." In short, the employees were reasonable in believing that Chevron had chosen Mr. Steelman and the local HR department to inform plan participants concerning the

likely future of plan benefits. For these reasons, this order holds that the misinformation disseminated by the Richmond management was done in its role as a fiduciary within the meaning of ERISA.

4. Separate Entities.

Chevron Corporation, the plan sponsor [*41] and administrator, has tried to distance itself from the RGT and Richmond, insisting that they were separate entities. This effort must fail. The RGT and Mr. Steelman were acting as actual or ostensible agents clothed with authority by Chevron itself. The February 23 blue-top itself (from Chevron Corporation) made clear that the implementation of the SITE plan would be left to "local management" (TX 9). Chevron is bound by the acts and omissions of local management. *See Restatement (Second) of Agency § 267 (1957)* ("One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or his agent as if he were such").

5. Duty to Update.

Most plaintiffs herein have testified that they retired early in reliance on statements of Richmond management made after February 26, the date of the RGT conference call. That is the date this order holds that Richmond's unqualified policy statement became misleading, when it was clear to Richmond management that the issue [*42] was going to be worked through the consensus process. Certain plaintiffs, however, do not point to any such reliance on any statements before their retirements became irrevocable. They are:

. *Carolyn Whatley*. Ms. Whatley's retirement became irrevocable on February 26. At trial, she identified no communication on that date, much less any false communication that led her to finalize her retirement. All statements relied on by her were *before* February 26.

. *Fred Smith*. Mr. Smith retired on March 1. January 7 was his last day at the refinery. He went on vacation. He came in on March 1 for a retirement cake but, at trial, identified no communications on which he relied between February 26 and March 1. All statements he relied on were before January 7.

. *Thomas Moungovan*. Mr. Moungovan retired irrevocably on March 4: He relied solely on various statements "several months" (or earlier) before March 4. Those predated February 26.

These three could recover only if Chevron had a duty to track them down and to advise them that pre-February 26 statements by management were not final. With respect to disclosure duties resulting from "serious consideration, [*43] " the Ninth Circuit has held that there is no such duty to track down employees who made inquiry and to give them updates absent a promise to do so. *Bins*, 220 F.3d at 1053-54. But even with a promise, that duty would have arisen only once serious consideration had begun. Here, the first such serious consideration was well after all three of these plaintiffs had resigned. Thus, even though the original announcement on February 26 (TX 9) stated that Chevron was "counting on" the "local management

to communicate changes that might affect you," that triggered a duty to update only once serious consideration arose in mid-April, not sooner.

The Ninth Circuit has not addressed the update issue in the context of active misinformation. This order holds that, as to active misinformation, the duty to correct is immediate upon the promulgation of a statement that actively misinforms in violation of ERISA (but only as to those who actually rely on the misinformation).

Conversely, there is no duty to correct statements that do not, in their specific context, violate ERISA, even if they are later proven to have been incorrect. n13 As to the three plaintiffs above, they have [*44] shown reliance only on early pre-February 26 statements, information not shown herein to have been actionable when made. These three plaintiffs may not recover.

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n13 Of course, if those non-actionable but incorrect statements are later re-promulgated, such as by leaving them on a website as a continuing broadcast, then those re-promulgations may in the later set of circumstances become actionable.

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6. Daniel Dreesman.

Daniel Dreesman's case is different. Unlike all the others, Mr. Dreesman retired long after the reversal in policy was announced. He knew of the change. Chevron violated no duty to him. He failed to rescind his voluntary retirement solely because the *union* told him it would not approve SITE (as it needed to do but ultimately did). By no stretch could Chevron be blamed for the union's misinformation.

7. Relief.

Chevron Corporation is the plan administrator and sponsor. Chevron, through its agents, violated its fiduciary duty to plaintiffs Charles Hord, Albert Munn, Tommy Rush, Everett [*45] (Mike) Miller, Dwight Mathews, and Bill Buchanan. A money-damage award is prohibited by ERISA. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 151 L. Ed. 2d 635, 122 S. Ct. 708, 713 (2002). Equitable relief, however, is not proscribed. *Ibid.* To do equity and to cure its breach of its own fiduciary duties (based on acts and omissions of its agents), Chevron, as the plan administrator and sponsor, is hereby **ORDERED** to take all steps within its authority to modify the plan records to show that the foregoing six plaintiffs were involuntarily discharged as of the date of their separations, and to ensure that said six plaintiffs are provided the SITE benefit in accordance with said change. Judgment will be entered accordingly and the Court shall reserve jurisdiction to enforce the equitable decree.

IT IS SO ORDERED.

Dated: April 23, 2002.

WILLIAM ALSUP

