NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

SHERRY YALI LIU, Plaintiff - Appellant, v. KAISER PERMANENTE EMPLOYEES PENSION PLAN FOR THE PERMANENTE MEDICAL GROUP, INC.; KAISER FOUNDATION HEALTH PLAN, INC., Defendants - Appellees.	No. 24-4303 D.C. No. 3:23-cv-03109-AMO MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Araceli Martinez-Olguin, District Judge, Presiding

Argued and Submitted October 20, 2025
San Francisco, California

Before: PAEZ, BEA, and FORREST, Circuit Judges.

Plaintiff Sherry Yali Liu ("Liu" or "Plaintiff") sued Kaiser Permanente Employees Pension Plan for the Permanente Medical Group, Inc., and Kaiser Foundation Health Plan, Inc. ("Defendants" or "Kaiser"), after Kaiser denied her

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

claim for benefits due to her sister, Ya-Xia Liu ("Ya-Xia" or "decedent"). Before her death, a benefit election was submitted online at Ya-Xia's request for a lump sum election of benefits and designating Liu as her beneficiary. Plaintiff's First Amended Complaint raises three claims under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(1)(B)–(a)(3).

We review de novo a district court's dismissal under Federal Rule of Civil Procedure 12(b)(6). "All allegations of material fact in the complaint are taken as true and construed in the light most favorable to Plaintiffs." *Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007, 1016 (9th Cir. 2020).

Exercising our jurisdiction under 28 U.S.C. § 1291, we affirm dismissal of the two claims discussed below.[1]

1. Plaintiff argues that she is entitled to Ya-Xia's death benefits "under the terms of h[er] plan," 29 U.S.C. § 1132(a)(1)(B), because the Plan incorporates 26 U.S.C. § 401(a)(9)(E), which in part defines "eligible designated beneficiary" as including an individual "who is not more than 10 years younger than the employee." *Id.* § 401(a)(9)(E)(ii). We disagree. The Plan incorporates § 401(a)(9) "as applicable," and the definition of "eligible designated beneficiary" in

[1] In an opinion filed concurrently with this memorandum, we reverse the district court's dismissal of Plaintiff's claim of entitlement to benefits under 29 U.S.C. § 1132 based on Ya-Xia's substantial compliance with the Plan's beneficiary-designation and benefit election requirements.

§ 401(a)(9)(E)(ii) is not "applicable" to the defined benefit plan in this case. *See id.* § 401(a)(9)(H)(vi); *id.* § 401(a)(9)(B)(ii)-(iii). We therefore affirm the district court's dismissal of Count 2.

2. Plaintiff also seeks a tax-gross up, surcharge, and reformation under 29 U.S.C. § 1132(a)(3). "[A] plaintiff who is a 'participant, beneficiary, or fiduciary' must prove both (1) that there is a remediable wrong," "and (2) that the relief sought is 'appropriate equitable relief.'" *Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 954 (9th Cir. 2014) (quoting 29 U.S.C. § 1132(a)(3)). First, Liu forfeited her reformation claim by failing to challenge the district court's dismissal in her opening brief. *Orr v. Plumb*, 884 F.3d 923, 932 (9th Cir. 2018). Second, while "§ 1132(a)(1)(B) and § 1132(a)(3) claims can proceed simultaneously if they plead distinct remedies," Plaintiff's surcharge claim for decedent's lump sum benefit does not allege a distinct remedy from her § 1132(a)(1) claim. *Moyle v. Liberty Mut. Ret. Ben. Plan*, 823 F.3d 948, 961 (9th Cir. 2016), *as amended on denial of reh'g and reh'g en banc* (Aug. 18, 2016). Third, with respect to Plaintiff's claim for "tax gross up" relief to remediate "any increased tax liabilities" due to Kaiser's failure to timely render payments owed, under our precedent, "[p]laintiffs may not recover their tax benefit losses under § 502(a)(3)." *Farr v. U.S. W. Commc'ns, Inc.*, 151 F.3d 908, 916 (9th Cir. 1998), *as amended* 179 F.3d 1252 (9th Cir. 1999). We therefore affirm the district court's dismissal of Plaintiff's § 1132(a)(3) claim.

The district court's dismissal of the claims discussed above is **AFFIRMED**.

Plaintiff shall recover her costs on appeal.