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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

KATHERINE BAKER, et al.,

Plaintiffs,

v.

SAVE MART SUPERMARKETS,

Defendant.

CASE NO. 3:22-CV-04645-WHO

Judge William H. Orrick, III

DEFENDANT SAVE MART SUPERMARKETS LLC'S NOTICE OF MOTION AND MOTION TO DISMISS THE AMENDED COMPLAINT

Amended Complaint Filed Date: November 22, 2022

Date: March 1, 2023
Time: 2:00 PM
Place: Courtroom 2

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NOTICE OF MOTION AND MOTION

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that at 2:00 p.m. on March 1, 2023, or as soon thereafter as the matter may be heard, before the Honorable William H. Orrick, III, United States District Judge for the Northern District of California, Defendant Save Mart Supermarkets LLC ("Save Mart"), will and hereby does move for dismissal of this action pursuant to Federal Rule of Civil Procedure 12(b)(6).

Save Mart seeks dismissal of the above entitled action under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. This Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the papers on file in this matter, Save Mart's contemporaneously filed Request for Judicial Notice, the arguments of counsel, and any other matter the Court wishes to consider.

MEMORANDUM OF POINTS AND AUTHORITIES

Save Mart Supermarkets has long provided employees an array of medical and retirement benefits. But in response to the changing economic and competitive landscape over the last two decades, Save Mart has also needed to periodically modify, and even terminate, certain employee and retiree benefits on multiple occasions. In 2009, confronted with the Great Recession, Save Mart stopped paying 100% of active and retired employees' group premium costs. In 2016, Save Mart terminated group benefits and replaced them with the Select Health Reimbursement Arrangement (the "HRA benefit"), which provided $500 monthly contributions to eligible retirees and another $500 to their spouse. Later that same year, Save Mart terminated spousal benefits for Plan participants that did not retire before the end of 2017. Finally, in 2022, due to rising medical costs, Save Mart made the difficult decision to discontinue the HRA benefit (and thus retiree medical benefits in their entirety), to help ensure that its medical insurance benefits remained sustainable for active and future employees.

Save Mart's Select Retiree Health Benefit Plan explicitly "reserve[d] the right to terminate the Plan or any Benefit Program at any time." *See* Save Mart Request for Judicial Notice, Ex. A (the "Plan") at 37, § 10.02. Indeed, Save Mart plainly and clearly communicated its ability to modify or terminate Plan benefits to all employees, including Plaintiffs. The Save Mart Select Health Reimbursement Arrangement Summary Plan Description ("SPD") states:

> **Q-20. HOW LONG WILL THE PLAN REMAIN IN EFFECT?**
> Although the Sponsor expects to maintain the Plan indefinitely, ***it has the right to modify or terminate the Plan at any time for any reason***, including the right to change the classes of persons eligible for participation, ***and to reduce or eliminate the amount credited to HRA Accounts in the future***.

Id., Ex. B at 10 (emphasis added).

Unable to challenge Save Mart's Plan-compliant decision to terminate benefits, Plaintiffs mount a collateral attack by alleging Save Mart misled them to believe that the company's non-union Plan benefits would also be 'as good or better than' available union benefits—for which named Plaintiffs, as former Save Mart managers, were ineligible—and that this meant Save Mart's Plan benefits would be guaranteed for life. This theory is a serious stretch at best, and these purported misrepresentations form the crux of Plaintiffs' sole cause of action in their complaint: for breach of fiduciary duty under section 502(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(3).

Plaintiffs' initial complaint was riddled with deficiencies, as identified in Save Mart's initial motion to dismiss (ECF No. 19). Plaintiffs failed to cure those deficiencies in the Amended Complaint, which should be dismissed for multiple reasons. ***First***, Plaintiffs fail to allege a remediable wrong under Federal Rules of Civil Procedure 8 and 9(b). With respect to Rule 9(b), Plaintiffs' allegation that Save Mart affirmatively misrepresented that its benefits would always be 'as good as or better than' the benefits under the corresponding union plan lacks the required level of particularity. Specifically, Plaintiffs do not adequately plead the falsity of the alleged misrepresentation because Plaintiffs do not identify any relevant characteristics of the competing plans by which they might allegedly be compared. Similarly, as to the alleged misrepresentation that Plan benefits would be guaranteed for life, Plaintiffs do not allege any specific statements by Save Mart regarding the benefits that Plaintiffs would receive under the Save Mart Plan, rather than the named Plaintiffs' own alleged assumptions about those benefits.

Plaintiffs' allegations of affirmative misrepresentation fail under Rule 8 for these same reasons. Indeed, courts across the nation have confirmed that bare allegations about the relative quality—or supposed deficiencies—of an ERISA plan, without specific allegations about the relative features of the challenged plan and its comparators, preclude a court from inferring a breach of fiduciary duty. Independently dispositive, Plaintiffs do not plausibly allege their reliance on any of Save Mart's purported misrepresentations in connection with their decisions to accept promotions to management, which rendered them ineligible to participate in the union retirement plan.

Plaintiffs also do not plausibly allege a breach of fiduciary duty based on omission. As demonstrated by the Plan documents, Save Mart complied with all ERISA disclosure requirements. The Plan informed Plaintiffs that Save Mart "reserve[d] the right to terminate the Plan or any Benefit Program at any time." Plan at 37, § 10.02. And while ERISA imposes no duty on Save Mart to ***re***-inform Plaintiffs of Plan terms, Save Mart nonetheless communicated its discretionary authority to modify or terminate Plan benefits in plain language—in a Q&A format, the SPD explicitly answered a question about the duration of Plan benefits by stating that Save Mart "expects to maintain the Plan indefinitely" but retained discretion to "modify or terminate the Plan at any time for any reason." SPD at 10. That was true. Moreover, Plaintiffs did not even need to read the SPD to be fully aware Save Mart had the authority to modify or terminate Plan benefits. Save Mart's prior termination of group health benefits, followed by

Save Mart's subsequent termination of spousal HRA benefits for some eligible retirees in 2016, provided Plaintiffs with clear, unmistakable notice that Save Mart not only retained, but in fact exercised, its ability to modify or terminate Plan benefits. There was no omission of Save Mart's discretionary authority to modify or terminate Plan benefits—neither in policy nor in practice.

Second, Plaintiffs' prayer for reformation, injunction, and surcharge are all foreclosed by law. Reformation requires a showing of fraud or mistake in the creation of plan terms, such that rewriting those terms is necessary to give effect to the parties' intentions. *Skinner v. Northrop Grumman Ret. Plan B*, 673 F.3d 1162, 1166 (9th Cir. 2012). Plaintiffs fail to allege either. Under even the most favorable reading, Plaintiffs do not allege that the *Plan terms* were the result of fraud or mistake; rather, they allege Save Mart misrepresented the duration and quality of benefits long after the Plan terms were established.

Plaintiffs' requested injunctive relief is similarly improper. Plaintiffs seek an injunction requiring Save Mart to administer the Plan with respect to Plaintiffs in a manner consistent with the terms of the Plan prior to the benefit termination in June 2022. But the applicable terms of the Plan *explicitly permitted* the termination at issue. As a result, either Plaintiffs' requested injunction is nonsensical or it actually seeks compensatory damages under the guise of equitable relief, which ERISA prohibits. *See Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 1520 (9th Cir. 1993), *as amended on denial of reh'g* (Mar. 22, 1994) ("[E]quitable relief in the form of the recovery of compensatory damages is not an available remedy under 29 U.S.C. § 1132(a)(3) . . . .").

Furthermore, as to both reformation and injunctive relief, Plaintiffs cannot receive through an equitable remedy a benefit that is inconsistent with the express terms of the Plan—*i.e.*, a lifetime HRA benefit that Save Mart cannot modify or terminate. *Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 962 (9th Cir. 2014) ("Equitable remedies are not available where the claim 'would result in a payment of benefits that would be inconsistent with the written plan.'").

Plaintiffs' request for a surcharge is also disallowed. Plaintiffs do not plead facts establishing actionable harm or unjust enrichment caused by the alleged misrepresentations (as opposed to the Plan-compliant benefit termination). Instead of restoring them with a "make whole" payment, Plaintiffs' surcharge would enrich them beyond what is provided in the Plan. It therefore exceeds the permissible scope of equitable surcharges under established law.

Finally, Plaintiffs' claim fails for a slew of additional reasons: Plaintiffs' claim is time-barred; Save Mart was not acting in a fiduciary capacity when it decided to terminate the HRA benefit; and Plaintiffs are disallowed from obtaining the benefits they seek because those benefits are inconsistent with the Plan. For these reasons and those below, the Amended Complaint should be dismissed.

BACKGROUND

Save Mart is a regional grocer that operates stores in California and western Nevada. Amend. Compl. ¶ 16. The company's Select Retiree Health Benefit Plan "provides health care benefits to eligible retirees and their dependents." *Id.* ¶ 18. Over the last thirteen years, Save Mart has modified or terminated components of the Plan on at least four occasions. First, in 2009, Save Mart stopped paying 100% of active and retired employees' group premium costs. Amend. Compl. Ex. C. at 1. Second, in 2016, Save Mart terminated group benefits and replaced them with the Select Health Reimbursement Arrangement, which provided $500 monthly contributions to eligible retirees and another $500 to their spouse. Amend. Compl. ¶ 19. Third, later that same year, Save Mart terminated spousal benefits for Plan participants that did not retire before the end of 2017. *Id.* ¶ 42. Finally, in 2022, Save Mart terminated the HRA benefit for all participants. *Id.* ¶ 37.

Plaintiffs are former non-union Save Mart employees who retired in or before 2017 and participated in the HRA benefit program prior to its termination. *Id.* ¶¶ 6, 11-15, 41-42, 47, 49-61, 62-69, 70-78, 79-86. Plaintiffs allege that they received letters informing them that if they failed to retire before December 31, 2017, they would lose HRA benefits for their spouses. *Id.* ¶ 33.

Save Mart's history of modifying or terminating Plan benefits was consistent with the discretionary authority provided in Plan documents. As Plaintiffs acknowledge, the Plan's terms explicitly "allowed Save Mart to terminate the [HRA benefit] program at any time, including for employees who retired before December 31, 2017." *Id.* ¶ 36. The Plan document is clear: "The Company reserves the right to terminate the Plan or any Benefit Program at any time . . . ." Plan at 37, § 10.02. And the Plan's Summary Plan Description ("SPD") explained to employees (including Plaintiffs) that, "[a]lthough the Sponsor expects to maintain the Plan indefinitely, it has the right to modify or terminate the Plan at any time for any reason, including the right . . . to reduce or eliminate the amount credited to HRA Accounts in the future." SPD

at 10 ("Q-20. How Long Will The Plan Remain In Effect?").[1] Despite these repeated disclosures and Save Mart's admitted historical practice of using its reserved discretionary authority, Plaintiffs filed this lawsuit several months after the June 2022 termination of the HRA benefit. Amend. Compl. ¶ 37.

On August 11, 2022, Plaintiffs filed their initial Complaint. Plaintiffs alleged that Save Mart made unidentified "written and verbal" representations that the HRA benefit would continue for life, which they contend was false and misleading, in order to dissuade participation in the union, and to induce Plaintiffs to continue working for Save Mart as long as it took to become eligible for the HRA benefit and subsequently take early retirement to avoid losing the benefit for their spouses. Initial Compl. ¶¶ 2, 4, 18, 28, 46, 53, 61, 68, 75. According to the initial Complaint, these unidentified misrepresentations occurred on unidentified dates and times over a six-year period, *id.* ¶ 20, through unidentified "direct communications" with unidentified human resources (HR) employees and executives, *id.* ¶ 21, and in unidentified "written materials" and presentations that purportedly failed to mention Save Mart's authority to modify or terminate the Plan. *Id.* ¶¶ 22-23. Save Mart moved to dismiss on October 17, 2022. ECF No. 19.

On November 22, 2022, Plaintiffs filed the Amended Complaint. This time, Plaintiffs included affidavits from three former Save Mart Human Resources employees. *See generally* ECF Nos. 24-4, 24-5, 24-6. Plaintiffs now allegedly recall being told that *all* of their benefits were guaranteed for life—including the previously terminated ones predating the HRA—and reframe their allegations to focus on the claim that Save Mart deliberately misled employees as part of a coordinated anti-union campaign by representing that Plan benefits would always be as good or better than unidentified and unspecified union benefits. Amend. Compl. ¶¶ 1, 2, 4, 17, 21, 22-26, 27, 50, 52, 53, 54, 62, 63, 72, 73, 74, 81.

[1] As discussed further in Save Mart's contemporaneously filed Request for Judicial Notice, because Plaintiffs repeatedly reference the Plan document and SPD in the Amended Complaint and rely on them as a basis for their claim, the Plan and SPD documents are subject to judicial notice and can be considered at this stage as incorporated by reference into the Amend. Complaint. *See, e.g., Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). The Plan and SPD are attached as Exhibits A and B to the Request for Judicial Notice.

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) requires dismissal for failure to state a claim for relief under Rule 8(a)(2). In evaluating a motion under Rule 12(b)(6), the Court need not accept as true legal conclusions unsupported by facts, and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Nor do "'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). A plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 556 U.S. at 679 (quotation marks omitted).

ARGUMENT

Under section 502(a)(3) of ERISA, "[a] civil action may be brought . . . by a participant, beneficiary, or fiduciary . . . (B) to obtain other appropriate equitable relief (i) to redress [any act or practice which violates any provision of this subchapter or the terms of the plan] or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3). Section 1132(a)(3) thus imposes two prongs: Plaintiffs "must prove both (1) that there is a ***remediable wrong***, *i.e.,* that [Plaintiffs] seek[] relief to redress a violation of ERISA or the terms of a plan, . . . and (2) that the relief sought is ***appropriate equitable relief***." *Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 954 (9th Cir. 2014) (emphasis added) (citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993)). Because Plaintiffs fail to allege both prongs, in addition to the Amended Complaint's host of other deficiencies, their claim must be dismissed.

I. PLAINTIFFS FAIL TO PLEAD A REMEDIABLE WRONG.

A. Plaintiffs Fail to Allege Actionable Misrepresentations Supporting A Claim for Breach of Fiduciary Duty.

Federal Rule of Civil Procedure 8(a) requires Plaintiffs' ERISA claim for breach of fiduciary duty to contain sufficient non-conclusory "factual content [to] allow[] the court to draw the reasonable inference," that Save Mart breached its fiduciary duty. *Iqbal*, 556 U.S. at 663. Concurrently, because Plaintiffs' claim is premised on alleged misrepresentations, and therefore sounds in fraud, it must comply with Rule 9(b)'s heightened pleading standard. *See Meridian Project Sys., Inc. v. Hardin Constr. Co.,*

LLC, 404 F. Supp. 2d 1214, 1219 (E.D. Cal. 2005) ("It is well–settled in the Ninth Circuit that misrepresentation claims are a species of fraud, which must meet Rule 9(b)'s particularity requirement.").[2] Specifically, Plaintiffs claim that, in order to dissuade participation in the union and to induce Plaintiffs' continued employment and/or early retirement, Save Mart made written and verbal misrepresentations to Plaintiffs that (1) Save Mart's non-union Plan benefits would always be as good or better than union benefits, and therefore would continue for life; and (2) that eligible employees who retired on or before December 31, 2017, would keep their HRA and spousal benefits until the death of the retiree. Amend. Compl. ¶¶ 1, 2, 4. But Plaintiffs fail to explain how these statements were false or misleading, let alone actionable. As a result, Plaintiffs' allegations of "written and verbal representations" to support their fraud-based breach of fiduciary duty claim fail to satisfy either Rule 8(a) or Rule 9(b), requiring dismissal of their claim. Amend. Compl. ¶¶ 60, 68, 77, 85; *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103, 1107 (9th Cir. 2003).

1. Plaintiffs Fail to Allege the Falsity of Any Affirmative Misrepresentation with Particularity As Required by Rule 9(b).

To start, Plaintiffs' allegations that Save Mart misled them fall short of Rule 9(b)'s particularity requirement. When alleging misrepresentation, Rule 9(b) requires Plaintiffs to state the circumstances constituting the misrepresentation "with particularity." Fed. R. Civ. P. 9(b). Particularity requires, at a minimum, "the who, what, when, where, and how of the misconduct charged," *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009), "as well as what is false or misleading about [the] statement, and why it is false," *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) (internal quotation marks omitted). This is no technicality: "Rule 9(b) ensures that allegations of fraud are specific enough to give defendants notice of the particular misconduct which is alleged to constitute

[2] *See, e.g.*, *In re Calpine Corp. ERISA Litig.*, No. C 03-1685 SBA, 2005 WL 3288469, at *7 (N.D. Cal. Dec. 5, 2005) (applying Rule 9(b) to ERISA breach of fiduciary duty claim); *In re Syncor ERISA Litig.*, 351 F. Supp. 2d 970, 978 (C.D. Cal. 2004) (applying Rule 9(b) to ERISA claims "grounded generally" on allegations including "alleged misstatements, and omissions"); *Vivien v. Worldcom, Inc.*, No. C 02-01329 WHA, 2002 WL 31640557, at *6-7 (N.D. Cal. July 26, 2002) (dismissing for failure to comply with Rule 9(b) an ERISA breach of fiduciary duty claim premised on "false, misleading, incomplete, and inaccurate disclosures and representations to the Plan's participants").

the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985).

Plaintiffs fall short of the Rule 9(b) standard because they do not allege the ***falsity*** of the alleged misrepresentation with particularity, as they have not alleged facts regarding the relative benefits of the union and non-union employee health plans sufficient to establish that Save Mart actionably misrepresented the nature of Plan benefits when it purportedly stated that Plan benefits would be as good or better than union benefits. *Cafasso*, 637 F.3d at 1055. Instead, Plaintiffs relied on their own subjective interpretations of vague alleged statements to extrapolate an implied promise that Save Mart would never modify or terminate Plan benefits. *See, e.g.*, Amend. Compl. ¶ 24, 25, 53, 54, 62, 71, 72, 81 (*see, e.g.*, ¶ 54 ("the understanding on the part of the employees was that as long as one met the eligibility requirements, they would retain the retiree medical benefits for life.")).[3] In order to establish a misrepresentation about the relative value of two benefit plans, a plaintiff must explain "why" that statement is "false." *Cafasso*, 637 F.3d at 1055. Saying that one plan is as good as or better than another is a subjective assessment. And, subjectively, employees might measure health plans using a variety of metrics (e.g., the scope of coverage, cost, deductibles, governance, etc.). Amend. Compl. ¶ 3.[4] Although Plaintiffs assert that Save Mart's Plan offered subpar governance terms, they neglect to mention any other aspect of the plans. Unsurprisingly, Plaintiffs also fail to explain how weaker governance factors renders Save Mart's description of the Plan's relative benefits false or misleading.

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[3] Of course, Plaintiffs knew that Save Mart could and did modify Plan benefits at the latest by April 2016, when Save Mart eliminated group coverage in favor of the HRA benefit. Amend. Compl. ¶ 19. Save Mart's ability to modify or terminate Plan benefits was again made clear to Plaintiffs in 2016 or 2017, when Save Mart sent Plaintiffs retirement eligibility letters informing them of its intention to discontinue the spousal benefit for active and future employees. *Id.* ¶¶ 42, 66, 75, 77, 82. Moreover, Plaintiffs knew that even *union benefits* could be terminated through collective bargaining. *Id.* ¶ 3.

[4] Save Mart also notes that this case is pled as a class action. It is absurd to attempt to prosecute a class action where the underlying theory of the case is based on what would necessarily be individualized, subjective assessments by each alleged class member considering the relative benefits of two undefined, hypothetical, future plans. While the suggestion of class certification is preposterous, Save Mart has taken heed from this Court's prior decisions and is not asking for the class allegations to be stricken at this time. *See Juarez v. Citibank, N.A.*, No. 16-cv-01987-WHO, 2016 WL 44547914, at *5 (N.D. Cal. Sept. 1, 2016). Save Mart reserves to do so if the named plaintiffs can plead a substantive claim on the merits (which, respectively, the Amended Complaint does not properly do).

In sum, Plaintiffs' vague and generalized allegations of misrepresentation are not remotely close to being "specific enough to give [Save Mart] notice of the particular misconduct . . . so that [it] can defend against the charge and not just deny that [it has] done anything wrong." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). Therefore, to the extent it is based on affirmative misrepresentations, Plaintiffs' claim must be dismissed as deficient under Rule 9(b).

2. Plaintiffs Fail to Plausibly Allege An Affirmative Misrepresentation Under Rule 8(a).

Plaintiffs' allegations are also insufficient to carry their burden under Rule 8(a). Plaintiffs' claim for breach of the duties of loyalty and prudence distills to Plaintiffs' bare and unsupported conclusion that the unidentified union plan's unidentified benefits are as a whole better than those offered by Save Mart's Plan. But in ERISA breach of fiduciary duty class action cases, the Supreme Court and circuit courts of appeal have consistently held that plaintiffs cannot establish a plausible claim for breach simply by stating that features of one plan are better or worse than another. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). *See also Albert v. Oshkosh Corp.*, 47 F.4th 570, 579-80 (7th Cir. 2022) (dismissing an amended complaint's claim for breach of the duty of prudence because "the amended complaint is devoid of allegations as to the quality or type of . . . services the comparator plans provided"); *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1169 (6th Cir. 2022) (internal citations omitted) (concluding that plaintiff failed to state a plausible claim for breach of the duty of prudence because "she also alleges no facts concerning other factors relevant to determining whether a fee is excessive under the circumstances"); *Davis v. Wash. Univ. in St. Louis*, 960 F.3d 478, 484 (8th Cir. 2020) (quoting *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 822 (8th Cir. 2018)) (explaining that "[a] complaint cannot simply make a bare allegation that" one plan is superior to another, "[r]ather, it 'must provide a sound basis for comparison—a meaningful benchmark.'"). To survive a motion to dismiss, a court must engage in "context-sensitive scrutiny of a complaint's allegations" to "divide the plausible sheep from the meritless goats." *Dudenhoeffer*, 573 U.S. at 425. Yet, Plaintiffs have not provided this Court with sufficient, or any, factual allegations about the union plan to discern one from the other.

Moreover, no person could reasonably interpret Save Mart employees' alleged generic statements that Plan benefits would always be "as good or better than the union's" to mean that Save Mart would, at

all times, provide beneficiaries with *specific* benefits. Rather, Plaintiffs knew that, subject to the collective bargaining process, ***even the union plan benefits could change***. Amend. Compl. ¶ 3, 17. For instance, in exchange for better health benefits in the short-term, or to save jobs, among many other reasons, the union could bargain away benefits provided to retirees. *See, e.g., Allied Chem. & Alkali Workers of Am. Local Union No. 1. v. Pittsburg Plate Glass Co.*, 404 U.S. 157, 181 (1971) ("[h]aving once found it advantageous to bargain for improvements in pensioners' benefits, active workers are not forever thereafter bound to that view or obliged to negotiate in behalf of retirees again. To the contrary, they are free to decide . . . that current income is preferable to greater certainty in their own retirement benefits, or, indeed, to their retirement benefits altogether"); *McNamara-Blad v. Ass'n of Pro. Flight Attendants*, 275 F.3d 1165, 1172 (9th Cir. 2002) (quoting *Allied Chem.*, 404 U.S. at 181 n.20) (reiterating that "retirees are not employees under the National Labor Relations Act," and that "[s]ince retirees are not members of the bargaining unit, the bargaining agent is under no statutory duty to represent them in negotiations with the employer.") (internal quotation marks omitted). Unions agree to such changes all the time. Hence, even if Plaintiffs believed Save Mart's Plan would always amorphously shift to match any changes in the union plan, they simply could not expect either plan to retain any specific benefit in the future.

Plaintiffs' allegations regarding the contents of written documents received during their tenure also fail to plead an affirmative misrepresentation. Specifically, Plaintiffs claim they received Plan pamphlets informing them that health coverage ends "[u]pon the death of the" beneficiary. Amend. Compl. ¶¶ 28, 30. In Plaintiffs' view, this guaranteed them specific lifetime benefits that could not be modified or terminated. But that is not what the pamphlets say. Rather, those documents clarify that, pursuant to then-applicable versions of the Plan, estates, spouses, and dependents would not receive any additional benefits after the death of a former employee. Rather than vesting a right to receive benefits until the death of the retiree, the pamphlets establish only that benefits under the Plan have an expiration date.

In effect, Plaintiffs claim that, by sending its employees an annual leaflet about their benefits to be read in conjunction with the Plan documents, the company misrepresented the nature of Plan benefits. But nothing in the pamphlets contradicts the plain language of the Plan documents, which, as Plaintiffs concede, "stated that Save Mart retained the discretion to terminate the Plan and any of its component benefits at any time, including retroactively." Amend. Compl. ¶ 31; Plan at 37, § 10.02. The SPD is clear

and accurate: while Save Mart ***expected*** the Plan to be maintained indefinitely, Save Mart could nonetheless modify or terminate the Plan, including the HRA benefit, at any time. SPD at 10 ("Q-20. How Long Will The Plan Remain In Effect? ***Although the Sponsor expects*** to maintain the Plan indefinitely, it has the right to modify or terminate the Plan at any time for any reason, including the right . . . to reduce or eliminate the amount credited to HRA Accounts in the future.").

Hence, even if Plaintiffs sufficiently alleged that Save Mart told Plaintiffs that it expected retiree health benefits to continue for their life, that is not an affirmative misrepresentation giving rise to a cause of action. There were no iron clad guarantees, ever. Any such alleged statements would be consistent both with Save Mart's expectations regarding the duration of the Plan per the SPD and with Save Mart's discretionary authority to modify or terminate Plan benefits as provided in the Plan documents. Because Plaintiffs have "fail[ed] to allege any affirmative misrepresentations," their claim for breach of fiduciary duty must be dismissed as deficient under Rule 8. *Mciver v. Metro. Life Ins. Co.*, No. SA-CV-21-01967-DOC-ADS, 2022 WL 3013199, at *5 (C.D. Cal. May 23, 2022) (dismissing complaint that "fail[ed] to allege any affirmative misrepresentations" where there were no allegations of inadequate detail in SPD, which set forth terms of insurance policy that explained extent of coverage); *Vest v. Resolute FP US Inc.*, 905 F.3d 985, 989 (6th Cir. 2018) (holding plaintiff did not adequately plead ERISA breach of fiduciary duty claim because "complaint fail[ed] to allege either a misrepresentation or inaccurate statement").

B. Plaintiffs Fail to Allege Actionable Omissions Supporting A Claim for Breach of Fiduciary Duty.

Plaintiffs' claims also fail under any applicable pleading standard to the extent they allege that Save Mart breached its fiduciary duty by failing to disclose or omitting the fact that Save Mart could modify or terminate retiree health benefits at any time for any reason. At the threshold, there are no allegations that Save Mart failed to comply with any disclosure provisions in Title I of ERISA, 29 U.S.C. § 1021. *Stahl v. Tony's Bldg. Materials, Inc.*, 875 F.2d 1404, 1407 (9th Cir. 1989) (quoting 29 U.S.C. § 1022) ("[A] summary plan description shall contain a description of 'circumstances which may result in disqualification, ineligibility, or denial or loss of benefits.'"); *Mciver*, 2022 WL 3013199, at *4 ("As fiduciaries, there is no additional duty to provide individualized notice if the SPD was adequate." (citing

Stahl, 875 F.2d at 1409)). Plaintiffs apparently received the Plan documents, Amend. Compl. ¶ 21, and do not allege that these documents were inadequate or ambiguous, nor could they.

Having received the Plan document and SPD, which both indisputably disclosed the information Plaintiffs claim was omitted, Plaintiffs cannot argue that Save Mart breached its fiduciary duty by failing to *re-inform* Plaintiffs about the same information. No such duty existed here. "An affirmative duty of disclosure arises under ERISA only when a fiduciary responds to inquiries from plan participants or promises to keep participants updated on future developments affecting the plan." *In re Calpine Corp.*, 2005 WL 1431506, at *7 (N.D. Cal. Mar. 31, 2005); *see also Bins v. Exxon Co. U.S.A.*, 220 F.3d 1042, 1053 (9th Cir. 2000) ("ERISA fiduciary does not have an affirmative duty prior to final approval and general dissemination of plan changes to volunteer information to employees who have not specifically alerted the fiduciary to the fact that such information is material to them.").

Plaintiffs do not allege that Save Mart promised to provide them with additional information or updates on those issues. *See Black v. Greater Bay Bancorp Exec. Supplemental Comp. Benefits Plan*, No. 16-CV-00486-EDL, 2017 WL 8948732, at *12 (N.D. Cal. Jan. 18, 2017) (concluding plaintiffs "have not and cannot allege" defendant had an affirmative fiduciary duty to tell plaintiffs its interpretation of plan, in part, because no allegation of promise by defendant). Ultimately, Plaintiffs' complaint is that Save Mart failed to re-inform them of the Plan's conspicuous discretionary termination provision. But Save Mart's "failure to notify Plaintiff[s] of specific policy provisions" or "failure to notify or keep Plaintiff apprised of potential Plan changes beyond the SPD is not contrary to ERISA provisions under relevant caselaw" and is "not a breach of any fiduciary duty." *Mciver*, 2022 WL 3013199, at *5 (holding failure to notify plaintiff of specific policy provisions was not breach of fiduciary duty).

In sum, Plaintiffs also do not plausibly allege that Save Mart's purported representations contained inaccurate information about the HRA benefit that would require additional disclosure. As discussed above, the Plan documents explained that "[a]lthough the Sponsor expects to maintain the Plan indefinitely, it has the right to modify or terminate the Plan at any time for any reason, including the right . . . to reduce or eliminate the amount credited to HRA Accounts in the future." SPD at 10 ("Q-20. How Long Will The Plan Remain In Effect?"). Save Mart's alleged representations contained in the Complaint

are consistent with that expressed expectation and Plan authority. Accordingly, there was nothing inaccurate about Save Mart's alleged representations that would require further disclosure.

C. Plaintiffs Fail to Plead Their Reliance on Any Save Mart Statements Prior to 2017.

Plaintiffs' claim must also be dismissed because Plaintiffs fail to establish "reasonable and detrimental reliance on" a specifically identified misrepresentation in making any employment decisions prior to 2017. *Poore v. Simpson Paper Co.*, 566 F.3d 922, 928 (9th Cir. 2009) (quoting *Pisciotta v. Teledyne Indus., Inc.*, 91 F.3d 1326, 1331 (9th Cir. 1996) (per curiam) (citing *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 58 F.3d 896, 907 (3d Cir. 1995))). Specifically, Plaintiffs fail to establish that, in accepting multiple management-level promotions, they could have reasonably believed that they were guaranteed specific benefits or that those so-called promises factored into their decisions to take substantially higher paying jobs. And, in that same vein, Plaintiffs also fail to plead any facts sufficient to establish that any supposed reliance was, in fact, detrimental.

For instance, Jose Luna claims that he first heard the purported misrepresentation in 1984, when he joined a non-unionized store. Amend. Compl. ¶ 62. However, he does not allege that he voted against unionizing or otherwise decided to remain at a non-union store based on the recruiters' statements about the relative benefit packages. Moreover, although Luna states that he was promoted to a managerial position in 1989 before relocating to a unionized Save Mart location, *id.* ¶ 63, and that management "reassured [him] . . . that his benefits as a non-union employee would be as good as or better than the union's benefits," his management position rendered him ineligible for union membership at the new store, regardless, *id.*; *see also* ¶¶ 50, 71, 79. Luna never claims to have conditioned his acceptance of the promotion, let alone his decision to remain in the role for 24 years, on Save Mart's alleged representation regarding the Plan's benefits. Accordingly, Luna has failed to demonstrate reasonable reliance on Save Mart's purported misrepresentation, and therefore cannot establish that Save Mart's statements constituted a breach of its fiduciary duty. *See Poore*, 566 F.3d at 928.

Next, Edgar Popke claims to have received union benefits for the first 25 years of his employment at Save Mart, and to have deferred a promotion to a non-union position "for several years because of the additional hours of work it would require and the young age of his children." Amend. Compl. ¶ 71. Popke does not, however, allege that the loss of union benefits factored into his decision. Quite the opposite,

Popke avows that he did not speak to his managers about the changes to his benefit package until *after* he "decided to accept a promotion[.]" *Id.* His statement is a concession that he did not rely on any alleged misrepresentation in accepting a promotion. Because Popke therefore cannot establish a necessary element of his fiduciary duty claim against Save Mart, it must be dismissed. *Poore*, 566 F.3d at 928.

For his part, Denny Wraske, Jr. alleges that he received union benefits for the first 14 years of his tenure with Save Mart, until his promotion to management in 1985. Amend. Compl. ¶ 79. Unlike Luna and Popke, Wraske does not claim ever to have inquired, or even to have learned, about the relative benefits packages before or at the time of his promotion. Consequently, he cannot establish reliance on Save Mart's statements regarding the non-union benefits package, and thus cannot demonstrate that those statements constituted a breach of Save Mart's fiduciary duties. *Poore*, 566 F.3d at 928.

For her part, Katherine Baker claims that she forfeited her union status in 1991 based on a manager's comments about the Plan's relative benefits at the time. Amend. Compl. ¶ 50. But Baker does not suggest she ever considered—or, would have considered, absent Save Mart's alleged misrepresentations—a ***demotion*** to a sub-management position in order to qualify for union benefits, in lieu of accepting promotions to General Merchandise Supervisor in 1994, Grocery Supervisor in 2001, or Senior Director of Operations in 2006. *Id.* ¶ 51. Nor would any such decisions have made any sense. Furthermore, Baker does not claim that she viewed, or relied on, her manager's alleged 1989 description of the Plan's benefits as a guarantee of lifetime retirement benefits; rather, she pleads reliance only to the extent that he assured her she would "preserv[e] her medical benefits" given the "medical needs of her family[.]" *Id.* ¶ 50. None of Baker's allegations, construed in the most favorable light possible, establish that, in 1991, she gave a single thought to a retirement plan for which she was not then-eligible. Consequently, Baker too cannot demonstrate reliance on any purported misrepresentations regarding lifetime retirement benefits, dooming her claim for a breach of fiduciary duty. *Poore*, 566 F.3d at 928.

Regardless, even if Plaintiffs could show that they reasonably relied on Save Mart's alleged statements in accepting their various promotions, they simply do not plead any facts to support a plausible inference that their reliance was ***detrimental***. *See Poore*, 566 F.3d at 928. Plaintiffs' failure to do so is understandable: to establish detrimental reliance, Plaintiffs would need to ask this Court to believe that had they foregone multiple promotions—as well as the accompanying salary increases, 401(k) matches,

and previously accrued benefits—to remain in non-management positions (thereby entitling them to union retirement benefits) then twenty years later they would be in better financial positions than they are currently in. Amend. Compl. ¶¶ 61, 69, 78, 86. That position is dubious at best. This Court need not accept such "conclusory" and "speculative" allegations, especially given their facial implausibility. *Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 653 (9th Cir. 2019) (quoting *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1051 (9th Cir. 2014)); *Skinner*, 673 F.3d at 1167. As a result, Plaintiffs cannot establish the elements necessary to make out a plausible claim for breach of fiduciary duty.

II. PLAINTIFFS FAIL TO PLEAD APPROPRIATE EQUITABLE RELIEF.

Plaintiffs' ERISA breach of fiduciary duty claim also fails because Plaintiffs "cannot establish the second prong, that the remedy sought is 'appropriate equitable relief' under § 1132(a)(3)(B), regardless of whether 'a remediable wrong has been alleged.'" *Gabriel*, 773 F.3d at 954 (quoting 29 U.S.C. § 1132(a)(3)(B) and *Mertens*, 508 U.S. at 254).

A. Plaintiffs' Failure to Adequately Plead Fraud or Mistake Precludes Reformation.

"The power to reform contracts is available only in the event of mistake or fraud." *Gabriel*, 773 F.3d at 955. Because Plaintiffs have failed to adequately plead fraud or mistake, their request for reformation must be denied as a matter of law. *See, e.g.*, *Skinner*, 673 F.3d at 1166 (affirming determination that reformation was improper); *Cont'l Ins. Co. of N.Y. v. Cotten*, 427 F.2d 48, 53 (9th Cir. 1970) ("Since fraud and mutual mistake are absent in this case, reformation was improper.").

"Under a fraud theory, a plaintiff may obtain reformation when either (1) [a trust] was procured by wrongful conduct, such as undue influence, duress, or fraud, or (2) a party's assent [to a contract] was induced by the other party's misrepresentations as to the terms or effect of the contract and he was justified in relying on the other party's misrepresentations." *Gabriel*, 773 F.3d at 955 (internal quotation marks omitted). But Plaintiffs have made no allegation that the ***Plan*** "contains terms that were induced by fraud, duress, or undue influence." *Skinner*, 673 F.3d at 1166. Instead, the alleged fraud is that Save Mart misrepresented the Plan in later communications to suppress employee unionization efforts and induce Plaintiffs' retirement. Amend. Compl. ¶¶ 4, 5, 60, 68, 77, 85, 92. This is not the type of fraud that warrants reformation, as there is no allegation that the ***Plan's terms*** were the result of fraud such that they need to be rewritten. Indeed, this court has already acknowledged that "[s]tatements made by fiduciaries that are

contrary to clear and express terms of the plan are an insufficient basis for reformation." *Bush v. Liberty Life Assurance Co. of Boston*, 77 F. Supp. 3d 900, 909 (N.D. Cal. 2015).

For similar reasons, Plaintiffs likewise cannot obtain reformation based on mistake. A plaintiff may obtain reformation based on mistake if: (1) a mistake of fact or law affected the terms of a plan and there is evidence of the employer's true intent; or (2) both parties to the plan were mistaken about the content or effect of the plan and the plan must be reformed to capture the parties' meeting of the minds. *Gomo v. NetApp, Inc.*, No. 17-cv-02990-BLF, 2022 WL 16972492, at *3 (N.D. Cal. Nov. 16, 2022) (quoting *Gabriel*, 773 F.3d at 954). To carry their burden with respect to the former, plaintiffs would need to plead "that [the Plan administrator's] true intent was to give up its legal right to amend the Plan at any time, and that the Plan's terms did not reflect that intent due to a mistake on [the administrator's] part." *Id.* (citing *Warmenhoven v. NetApp, Inc.*, 13 F.4th 717, 723 (9th Cir. 2021)). They do not and cannot do so here. At most, Plaintiffs suggest that Save Mart's former Vice President of HR, Wendy Kennedy, believed that "Save Mart would provide eligible non-union retirees with health care benefits . . . for the duration of their lives[.]" Amend. Compl. ¶ 23 (quoting Kennedy Decl. ¶ 8). But Kennedy was neither the Plan administrator nor even the highest-ranking member of the HR department. *Id.* Consequently, her alleged unilateral mistake cannot establish Save Mart's intent to forfeit its legal right to amend plan benefits at any time. *See Gomo*, 2022 WL 16972492, at *4. For the same reason, Plaintiffs' attempts to establish mutual mistake fare no better. Even *if* Plaintiffs never read the SPD in order to learn about their own health benefits, they have pled no facts sufficient to establish that Save Mart was unaware of its ability to terminate those benefits until 2022. Quite the opposite: as Plaintiffs explicitly plead, in 2009 Save Mart stopped covering premium contributions entirely, then, in 2016 Save Mart terminated previous benefits provided by the 2010 health plan in favor of the HRA benefit, and in 2017 Save Mart terminated spousal HRA benefits for certain participants based on their date of retirement. Amend. Compl. ¶¶ 19, 33; Amend. Compl. Ex. C. at 1.

B. Plaintiffs Cannot Pursue an Injunction That Would Result in Benefits Payments Inconsistent with the Plan and ERISA Law, and in the Absence of Irreparable Harm.

No matter which way this Court construes it, Plaintiffs' request for injunctive relief should be denied. Either the requested injunction is a moot request to administer the Plan in accordance with its

own terms (which Save Mart has already done), or it is an impermissible attempt to recover compensatory damages that would result in the payment of benefits inconsistent with the Plan. Moreover, either way, Plaintiffs fail to establish irreparable harm.

Plaintiffs seek "an injunction requiring Save Mart to administer the Plan with respect to Plaintiffs . . . in a manner consistent with the terms of the Plan in existence prior to the elimination of the HRA benefit in 2022." Amend. Compl. at 24. But Save Mart already administered (and is administering) the Plan consistent with the pre-termination terms, which expressly permitted Save Mart to terminate Plan benefits at any time. *Id.* ¶ 31.

Accordingly, Plaintiffs do not seek a benefit *re*instatement, but rather a novel benefit inconsistent with the Plan—one forcing Save Mart to provide Plaintiffs and their spouses with a lifetime HRA benefit that Save Mart cannot modify or revoke. But "[e]quitable remedies are not available where the claim 'would result in a payment of benefits that would be inconsistent with the written plan,'" and, because Plaintiffs' requested relief is inconsistent with the Plan, it is impermissible as a matter of law. *See Gabriel*, 773 F.3d at 962; *Greany v. W. Farm Bureau Life Ins. Co.*, 973 F.2d 812, 822 (9th Cir. 1992) (holding equitable estoppel claim could not result in benefits payment inconsistent with written plan). Hence, in *Gabriel*, the Ninth Circuit held that a plausible misrepresentation claim could not entitle a plaintiff to an equitable remedy allowing him to participate in a benefits program because "the order [plaintiff] seeks here necessarily would require violating the terms of the Plan by deeming an ineligible person to be eligible for pension benefits[.]" *Id.* So too here. In fact, Plaintiffs are effectively seeking compensatory damages—$1,000 each month for the rest of their lives to compensate for the terminated HRA benefit, Amend. Compl. ¶ 19—which is not appropriate equitable relief under section 1132(a)(3), either. *Watkins*, 12 F.3d at 1520 ("[E]quitable relief in the form of the recovery of compensatory damages is not an available remedy under 29 U.S.C. § 1132(a)(3)." (citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993)).

Finally, Plaintiffs fail to establish their entitlement to injunctive relief because, "[a]ccording to well-established principles of equity," that remedy requires a showing of irreparable harm. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390-92 (2006). "[A] major departure from the long tradition of equity practice should not be lightly implied," and nothing in the text of ERISA "indicates that Congress intended such a departure." *Id.* at 391-92. Plaintiffs do not and cannot identify any irreparable harm.

C. Plaintiffs Cannot Pursue a Surcharge Because They Fail to Allege Actual Harm or Unjust Enrichment Caused by the Alleged Breach and Because the Requested Surcharge Exceeds Make-Whole Relief.

This Court should dismiss Plaintiffs' request for a surcharge. To obtain a surcharge, Plaintiffs must plead facts establishing either that they were actually harmed by Save Mart's purported breach of fiduciary duty or that Save Mart was unjustly enriched due to the breach. *Skinner*, 673 F.3d at 1167. Here, Plaintiffs do neither. Plaintiffs' alleged harms are too speculative to support a surcharge, and Plaintiffs do not allege that Save Mart's unjust enrichment was caused by the breach (as opposed to the Plan-permitted benefit termination).

Specifically, Plaintiffs allege the following harms: continuing employment (Amend. Compl. ¶¶ 2, 30), foregoing union membership (*id.* ¶ 2), and taking early retirement (*id.* ¶¶ 61, 69, 78, 86).[5] The Fourth Circuit found nearly identical alleged harms—making "life altering decisions," including "further employment" and "investment decisions"—too "speculative and undefined" to support a surcharge remedy. *Ret. Comm. of DAK Ams. LLC v. Brewer*, 867 F.3d 471, 486 (4th Cir. 2017). Plaintiffs' asserted harms are equally speculative and undefined. For example, Plaintiffs allege that the misrepresentations dissuaded employees from joining a union and thus deprived them of the union medical benefit. But just like Save Mart's Plan, the union's benefits were, and are, not guaranteed. *See* Amend. Compl. ¶ 3 (alleging the union benefits can be eliminated during the collective bargaining process). Nevertheless, Plaintiffs ask this Court to believe that, had they only known that Save Mart could likewise discontinue certain Plan benefits, then they would have taken their chances with the union plan. But, as explained above, *see supra* pp. 13-15, that means that Plaintiffs would also have foregone multiple, and significant, promotions over the ensuing decades to remain in union-eligible sub-management positions. That makes little sense. In any event one can hardly imagine a set of decisions more based upon "speculat[ion]" and conjecture. *Brewer*, 867 F.3d 471.

[5] Notably, Plaintiffs do not allege that the loss of the HRA benefit was a result of the breach of fiduciary duty. Nor can they, as the termination of that benefit was fully permitted by the Plan. This too dooms their surcharge claim. *See, e.g.*, *Petroff v. Ret. Benefit Plan of Am. Airlines, Inc.*, No. LACV14-02866-JAK, 2015 WL 13917970, at *11–12 (C.D. Cal. July 28, 2015) (dismissing surcharge claim for failure to allege causation).

Second, a surcharge is impermissible because it would do more than make Plaintiffs whole. "Through surcharge, a beneficiary may seek 'make-whole relief,'"—"the remedy that will put the beneficiary in the position he or she would have attained but for the trustee's breach." *Castillo v. Metro. Life Ins. Co.*, 970 F.3d 1224, 1230 (9th Cir. 2020) (quoting *CIGNA Corp. v. Amara*, 563 U.S. 421, 442 (2011)); *Skinner*, 673 F.3d at 1167). Plaintiffs seek an equitable surcharge in part "to compensate Plaintiffs and the Class for the loss of the HRA benefit[.]" Amend. Compl. ¶ 92. But Plaintiffs cannot obtain compensation for the loss of the … HRA benefit because the termination of that benefit was expressly permitted by the Plan. Hence, instead of making Plaintiffs whole, a surcharge would allow them to profit from the alleged misrepresentations. But a surcharge is not a punitive damage remedy and should not be treated as one. *See*, *e.g.*, *Seekatz v. Metro. Life Ins. Co.*, No. 3:15-cv-00017-RRB, 2016 WL 5429647, at *6 (D. Alaska Sep. 26, 2016) ("[T]he remedial goal of ERISA is not to put a plaintiff in a better position than they would be but for the defendant's wrongdoing." (citing *Amara*, 563 U.S. at 441–42; *Rochow v. Life Ins. Co. of N. Am.*, 780 F.3d 364, 376 (6th Cir. 2015)).

III. PLAINTIFFS' SOLE CAUSE OF ACTION IS TIME-BARRED.

This Court should dismiss Plaintiffs' claims for alleged misrepresentation based on ERISA's applicable three-and-six-year statutes of limitations. Section 413 of ERISA provides three different statutes of limitations for breach of fiduciary duty claims. 29 U.S.C. § 1113. Plaintiffs must file suit either: (1) within six years of "the date of the last action which constituted a part of the breach or violation," or, for cases involving breach of omission, "the latest date on which the fiduciary could have cured the breach or violation"; (2) within three years of "the earliest date on which the plaintiff had actual knowledge of the breach or violation"; or (3) "in the case of fraud or concealment," within six years of "the date of discovery" of the breach." 29 U.S.C. § 1113(1)-(2). *See also Intel Corp. Inv. Pol. Comm. v. Sulyma*, 140 S. Ct. 768, 774 (2020) (describing ERISA's three time bars). Section 1113 "require[s] only a 'breach or violation' to start the" clock. *Tibble v. Edison Int'l*, 575 U.S. 523, 527 (2015).

At the outset, Plaintiffs do not plead any facts sufficient to establish a claim that Save Mart acted fraudulently with respect to, or otherwise attempted to conceal, any alleged misrepresentations. In the Ninth Circuit, § 1113's six-year statute of limitations will only apply in lieu of the otherwise applicable three-year period for cases involving actual knowledge "when a defendant has 'taken steps to *hide* [its]

breach of fiduciary duty.'" *Guenther v. Lockheed Martin Corp.*, 972 F.3d 1043, 1057 (9th Cir. 2020) (citing *Barker v. Am. Mobil Power Corp.*, 64 F.3d 1397, 1402 (9th Cir. 1995)) (emphasis adopted). Here, Plaintiffs concede that terms of the Plan and its SPD clearly and unambiguously reserved Save Mart's right to modify or terminate their benefits "at any time for any reason." Amend. Compl. ¶ 21. Even stipulating to Plaintiffs' spurious claim that Save Mart misrepresented the meaning of that term to its own employees, Amend. Compl. ¶ 21, Plaintiffs do not pretend that they ever discussed termination rights with any Save Mart representatives, or that Save Mart ever attempted to conceal them. Consequently, they cannot establish fraud or concealment. *Guenther*, 972 F.3d at 1057. And, as a result, § 1113 bars Plaintiffs' claims within three years "of the earliest date on which the plaintiff had actual knowledge of the breach or violation." 29 U.S.C. § 1113(2).

ERISA's three-year statute of limitations thus bars any action brought after December 31, 2020, because, according to their Amended Complaint, Plaintiffs had actual knowledge as early as 2009, and certainly no later than 2016 that the Plan benefits were subject to change at Save Mart's discretion, apparently rendering them inferior to the benefits provided by the union plan, and that Save Mart could terminate certain or all aspects of the Plan. But despite having "actual knowledge" of Save Mart's termination powers in 2016, Plaintiffs slept on their claims for more than three years, until filing this lawsuit in August 2022.

"[A]ctual knowledge can be proved through 'inference from circumstantial evidence,'" *Sulyma*, 140 S. Ct. at 779 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)), and through evidence of a plaintiff's "willful blindness," *id.* (citing *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011)). Here, Plaintiffs' allegations establish both. Plaintiffs were employed by Save Mart prior to the end of 2015, when "the Plan provided group medical benefits to retirees and their dependents and contributed toward the premiums for that coverage." Amend. Compl. ¶¶ 11-14, 19. Thus, Plaintiffs had actual knowledge regarding Save Mart's authority to unilaterally modify or terminate Plan benefits ***in 2016*** because, as they explicitly plead, at that time "Save Mart modified the Plan to provide funding to a Health Reimbursement Account in lieu of premium contributions." *Id.* ¶ 19. Similarly providing Plaintiffs with actual knowledge of Save Mart's authority to unilaterally modify or terminate Plan benefits was Save Mart's April 2016 letter informing them that the allegedly guaranteed "spousal benefit would not be

available to employees who retired after" December 31, 2017. *Id.* ¶ 33. And, of course, Save Mart clearly and unambiguously told them that it retained the right to terminate their benefits at any time, and for any reason, in both the terms of their Plan and the SPD. Plaintiffs cannot avoid a finding of "actual knowledge" by willfully blinding themselves and refusing to draw conclusions from the Plan Documents, SPD, and Save Mart's 2016 actions until it repeated them in 2022.

IV. SAVE MART WAS NOT ACTING AS A FIDUCIARY WHEN IT TERMINATED THE HRA BENEFIT.

Before Plaintiffs can allege a breach of fiduciary duty, they must satisfy "the threshold issue of whether the defendants were acting in a fiduciary or an employer capacity when the acts in question took place." *Kalda v. Sioux Valley Physician Partners, Inc.*, 481 F.3d 639, 644 (8th Cir. 2007). The employer-fiduciary must "wear the fiduciary hat when making fiduciary decisions." *Pegram v. Herdich*, 530 U.S. 211, 225 (2000). Normal business decisions with collateral effects on prospective, contingent benefits need not be made in the interest of Plan participants. *Hickan v. Tosco Corp.*, 840 F.2d 564, 566 (8th Cir. 1988); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986) ("ERISA does not prohibit an employer from acting in accordance with its interests as employer when not administering the plan."). Here, because Save Mart's decision to terminate the HRA benefit was a business function, not a fiduciary one, it cannot constitute a breach of fiduciary duty. "Business not regulated by ERISA has been widely held to include decisions *to amend or terminate ERISA plans*; as part of a balance between the employer's need to manage its business and Congress's 'desire to regulate' ERISA plans, an employer is given broader discretion to act with regard to a plan when it does so as employer, instead of as fiduciary." *Izzarelli v. Rexene Prods. Co.*, 24 F.3d 1506, 1524 (5th Cir. 1994). "[I]n general, an employer that decides to terminate, amend, or renegotiate a plan does not act as a fiduciary, *and thus cannot violate its fiduciary duty*, provided that the benefits reduced or eliminated are not accrued or vested at the time, and that the amendment does not otherwise violate ERISA or other express terms of the plan." *Izzarelli*, 24 F.3d at 1524. In other words, "ERISA simply does not prevent a company from eliminating previously offered benefits that are neither vested nor accrued." *Id.* at n. 32. Save Mart's decision to terminate the HRA benefit from the Plan was not a fiduciary act, and thus, cannot constitute a breach of fiduciary duty.

V. PLAINTIFFS ARE NOT ENTITLED TO THE BENEFITS THEY SEEK, AS THE PLAN DOCUMENTS ALLOW TERMINATION OF THE HRA BENEFIT.

Finally, Plaintiffs' sole cause of action is a disguised claim for denial of benefits under 29 U.S.C. § 1132(a)(1)(B) that should be dismissed because Plaintiffs are not entitled to the retiree health benefits that they seek to have reinstated. "A plaintiff who brings a claim for benefits under ERISA must identify a specific plan term that confers the benefit in question." *Stewart v. Nat'l Educ. Ass'n*, 404 F. Supp. 2d 122, 130 (D.D.C. 2005) *aff'd*, 471 F.3d 169 (D.C. Cir. 2006). "The Court may . . . dismiss an action if the plaintiff is not entitled to a benefit they seek under the ERISA-regulated plan." *Id.*; *Steelman v. Prudential Ins. Co. of Am.*, No. CIV S-06-2746 LKKGGH, 2007 WL 1080656, at *7 (E.D. Cal. Apr. 4, 2007) (same); *Cox v. Reliance Standard Life Ins. Co.*, No. 13-CV-00104 AWI JLT, 2013 WL 2156546, at *8 (E.D. Cal. May 17, 2013) (same). Accordingly, Plaintiffs' claim should be denied because they cannot identify a Plan provision that provides them with a retiree medical benefit—HRA or otherwise—that is guaranteed for life, as the Plan documents make clear that Save Mart can modify or terminate the Plan, including the HRA benefit, at any time for any reason. Plan at 37, § 10.02; SPD at 10; *see, e.g.*, *Akhlaghi v. Cigna Corp.*, No. 19-CV-03754-JST, 2019 WL 13067381, at *3 (N.D. Cal. Oct. 23, 2019) (dismissing claim for benefits where plaintiff-beneficiary failed to identify any provisions that afforded her benefits).

CONCLUSION

For the foregoing reasons, Plaintiffs' Complaint should be dismissed, as Plaintiffs have failed to state a claim for relief under Rules 12(b)(6) and 9(b).

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Respectfully submitted,

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