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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

KATHERINE BAKER, JOSE LUNA, EDGAR POPKE, and DENNY G. WRASKE, Jr., on behalf of themselves and all others similarly situated, Plaintiffs, v. SAVE MART SUPERMARKETS Defendant.	Case No.: 3:22-cv-4645-WHO **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS** **Hearing** **Date/Time: March 29, 2023 at 2:00 PM** **Location: Videoconference**

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INTRODUCTION

This case arises out of a decision by Defendant Save Mart Supermarkets ("Save Mart") to eliminate retiree health benefits for its non-union employees in 2022. For many decades prior to that decision, Save Mart made repeated misrepresentations to Plaintiffs and all other similarly situated members of the proposed Class about those benefits, which were part of the Save Mart Select Retiree Health Benefit Plan (the "Plan"). Specifically, Save Mart promised that the Plan provided benefits as good as or better than the union's benefits and that those benefits would be provided for the life of eligible retirees. As alleged in the First Amended Complaint (the "complaint" or "FAC") (ECF No. 24), Save Mart made these misrepresentations both verbally and in writing over the course of decades in order to suppress union activity, to induce employees to work for the long duration necessary to obtain retiree benefits, and to persuade eligible employees to retire early.

Plaintiffs Jose Luna, Katherine Baker, Denny Wraske and Edward Popke, along with a proposed Class of similarly situated employees, relied on Save Mart's statements in making critically important decisions, including devoting their entire careers to Save Mart and retiring years earlier than they otherwise would have in order to preserve their spouses' health benefits. In 2022, immediately upon its acquisition from the founding owner's family by a private equity firm, Save Mart broke faith with Plaintiffs and the Class by eliminating the retiree medical benefit. This resulted in Plaintiffs and the Class suffering significant financial harm: they lost a valuable medical benefit that they had spent long years working to obtain and reasonably believed they would have for the rest of their lives. Plaintiffs and the proposed Subclass of individuals who retired early in reliance on Save Mart's misrepresentations also lost years of income from work, active employee health benefits for themselves and their spouses, and retirement savings.

The allegations in the complaint are exceptionally detailed and affirmed by the sworn statements of three of the Human Resources ("HR") employees who actually made many of the alleged misrepresentations on Save Mart's behalf at the direction of company leaders. Save Mart's motion fails because the complaint pleads the facts necessary to state a claim for breach of fiduciary duty under the Employee Retirement Income Security Act ("ERISA") and to warrant appropriate

equitable relief in the form of surcharge and reformation. Save Mart's arguments with respect to the statute of limitations are incorrect because Plaintiffs filed their claim within five months of acquiring knowledge of the underlying breaches in 2022. Save Mart's remaining arguments—that it was not a fiduciary and that Plaintiffs bring a denial of benefits claim under a different provision of ERISA—are simply mischaracterizations of the complaint and fail for this reason. Accordingly, Save Mart's motion to dismiss should be denied in its entirety.[1]

STATEMENT OF FACTS

I. The Save Mart Retiree Medical Plan

Save Mart is the largest regional grocer in California: it employs tens of thousands of people and generates billions of dollars in annual revenue. FAC ¶ 16. Save Mart employees receive different benefits from the company depending on whether they are union members or non-union employees. FAC ¶ 17. Most of the union employees receive benefits through the UFCW & Employers Trust pursuant to collective bargaining agreements. FAC ¶ 17. Non-union employees receive benefits pursuant to the terms of benefit plans adopted by Save Mart in its capacity as the sponsor of those plans. FAC ¶ 17.

Save Mart adopted the Plan to provide retiree medical benefits to its non-union employees and their spouses. FAC ¶ 18. Obtaining the benefits provided by the Plan was no easy task as it required employees to complete decades of service with Save Mart in order to meet the eligibility requirements. FAC ¶ 6. Plaintiffs were dedicated employees who devoted nearly their entire working lives to Save Mart. FAC ¶ 6. Plaintiffs and the Class put in these years in return for the promise that upon retirement they would receive benefits for themselves and their spouses for the duration of their lives. FAC ¶ 6.

The retiree medical benefits provided by the Plan were substantial and made an important contribution to the financial security of Save Mart retirees. FAC ¶ 19. From its inception until the end of 2015, the Plan provided group medical benefits to retirees and their dependents. FAC ¶ 19. Starting in 2016, Save Mart modified the Plan to provide funding for a Health Reimbursement

[1] In the alternative, should the Court grant Save Mart's motion, Plaintiffs respectfully request leave to amend the complaint.

Account in lieu of premium contributions (the "HRA benefit"). FAC ¶ 19. The HRA benefit consisted of a monthly $500 contribution to a health reimbursement account for each eligible retiree and an additional $500 for their spouse. FAC ¶ 19. The HRA benefit is quite valuable: an eligible retiree and their spouse could use the money accrued in their HRA account to pay for qualified medical expenses, including the premiums for individual health insurance coverage. FAC ¶ 19. Under the terms of the Plan, monthly contributions for each retiree accumulated without limit until they were used for qualified medical expenses. FAC ¶ 19. Members of Save Mart's HR department communicated to employees that the HRA benefit would accumulate up to the retiree's death, that it could not be taken away, and that there was no deadline by which the amounts in the HRA needed to be used. FAC ¶ 19.

At the time that it implemented the HRA benefit, Save Mart told retirement-eligible employees that if they retired before December 31, 2017, they would retain the benefit for their spouses, but that the spousal benefit would not be available to employees who retired after this date. FAC ¶ 33. The HR professionals responsible for communicating with employees about the benefit were trained to tell employees that the HRA benefit would belong to them until they died. FAC ¶ 33. Plaintiffs, in reliance on these representations, retired years earlier than they otherwise would have to lock in the HRA benefit for their spouses. FAC ¶¶ 57-61, 66-69, 75-78, 82-86.

In April 2022, shortly after it was acquired by private equity firm Kingswood Capital Management, LP, Save Mart announced that it was eliminating the non-union retiree medical benefit entirely. FAC ¶ 37. Plan participants were given until June 2022to use the funds accumulated in their HRA for covered medical expenses. FAC ¶ 37. After June 2022, all of the funds still accumulated in the HRA accounts reverted to Save Mart. FAC ¶ 37. As a result of the 2022 changes, non-union employees, including those who had already met the eligibility requirements to receive Plan benefits and had already retired, no longer have any form of retiree medical benefits. FAC ¶ 4.

II. Save Mart's Misrepresentations

Save Mart was the administrator of the Plan within the meaning of ERISA § 3(16), 29 U.S.C. § 1002(16)(A)(i). FAC ¶ 15. As such, it was a fiduciary of the Plan within the meaning of

ERISA § 3(21), 29 U.S.C. § 1002(21). In its capacity as Plan Administrator, Save Mart made numerous oral and written misrepresentations about the terms of the Plan in order to suppress union activity, to persuade employees to work for the company for decades to obtain the Plan benefits, and to improve its own bottom line by inducing employees to retiree earlier than they otherwise would have. FAC ¶¶ 2, 4.

Save Mart repeatedly told existing employees, potential recruits, and the employees of other stores that Save Mart acquired over the years that the Plan provided benefits that were as good or better than the benefits enjoyed by union employees and that if they worked the decades necessary to obtain eligibility for the retiree medical Plan, they would enjoy those benefits for the rest of their lives. FAC ¶ 19, 21, 22. At all relevant times including through the present, the union plan provides eligible retirees with medical benefits for life. FAC ¶¶ 3-4. Three of Save Mart's HR representatives, whose job duties included communicating with employees about retirement benefits, submitted sworn declarations stating that they were trained to and did tell employees that non-union retirement benefits would be as good or better than the union's and were guaranteed for life. FAC ¶¶ 23-26; Declaration of Wendy Kennedy ("Kennedy Dec.") (ECF No. 24-4) at ¶ 12; Declaration of Kathleen Tharp ("Tharp Dec.") (ECF No. 24-5) at ¶ 6; Declaration of Valerie Vallo ("Vallo Dec.") (ECF No. 24-6) at ¶ 6. The Plaintiffs also allege that they were specifically told that Save Mart would provide benefits equal to or better than the union benefits. FAC ¶ 50 (Baker); FAC ¶¶ 63-63 (Luna); FAC ¶¶ 71-73 (Popke); FAC ¶ 81 (Wraske).

Save Mart's repeated representation that it would provide non-union employees with benefits as good or better than the union's was also made in writing. For example, in a pamphlet entitled "Save Mart Answers Your Questions About Unions," the company states, "We believe that your wages and fringe benefits are much better than the union contract covering employees in this area and that there is nothing that the union can offer you. . . ." FAC ¶ 2; Exh. A (ECF No. 24-1) at 1. The pamphlet goes on to say: "The fact is that employees at Save Mart's 'non-union' stores are receiving wages and fringe benefits that equal what employees get at Save Mart's union stores." Exh. A at 4. The pamphlet instructs employees to compare Save Mart's own "Manual of Working Conditions" to what the union offered, telling them "If your [sic] compare, you will see . . . that

your benefits are already better, or equal to, the benefits in a union store." Exh. A at 6. The pamphlet caps off these representations with the statement "there is nothing the union can offer you that Save Mart does not already provide." Exh. A at 7.

Save Mart also made these misrepresentations in written materials distributed to employees about the Plan, which stated that eligible employees would be covered by the Plan until they died. FAC ¶ 27. For example, Save Mart sent a pamphlet entitled "Save Mart Select Retiree Benefits" to each employee on an annual basis. FAC ¶ 28; Exh B. (ECF No. 24-2); Vallo Dec. ¶ 15; Tharp Dec. ¶ 12. That pamphlet explicitly states that coverage under the Plan ends "upon the death of the retiree" and that spousal and domestic partner coverage ends either upon divorce from the retiree or the "death of the retiree." FAC ¶ 28; Exh. B. This same representation was made in a document entitled "Save Mart Supermarkets 2010 Retiree Health Plan Highlights," which also states that coverage ends "upon the death of the retiree." FAC ¶ 30; Exh. C (ECF No. 24-3). The HR professionals whose jobs required them to communicate with employees about benefits relied on these documents in communicating with Save Mart employees. FAC ¶ 29; Tharp Dec. ¶ 12; Vallo Dec. ¶ 15. These employees understood these statements to mean that benefits would last until the retiree died and could not be taken away by Save Mart, and they communicated that understanding to Save Mart employees. FAC ¶ 29.

Save Mart made the same representations regarding the HRA benefit when it informed employees that they needed to retire before December 31, 2017 in order to lock in that benefit for their spouses. FAC ¶¶ 33-36, 57, 58, 66, 67, 75, 77, 85. Ms. Baker received a letter from Save Mart in 2017 advising her of her eligibility for retirement and stating that if she retired by December 31, 2017, she and her spouse would receive the HRA benefit, but if she did not retire by then, her spouse would lose the benefit. FAC ¶ 57. She believed that the terms of the letter were cut and dry: if she retired by the deadline, she and her spouse would receive the HRA benefit for her lifetime. FAC ¶ 57. She also attended an HR presentation about this letter and the HRA changes for all non-union employees from the twenty-eight stores that she supervised, at which many employees had questions about the HRA changes. At this meeting, Save Mart reiterated that so long as an employee met the eligibility requirements and retired by December 31, 2017, then the HRA benefit and

spousal benefit would last for the life of the retiree. FAC ¶ 58. Mr. Luna also received this letter and in 2017 he spoke with HR representative Ms. Vallo about the benefit: she told him that as long as he retired by December 31, 2017, he and his spouse would keep the HRA benefit for the rest of his life. FAC ¶ 67. Mr. Wraske and Mr. Popke had similar experiences with respect to the December 31, 2017 deadline and retired early based on the understanding that in so doing they would secure the HRA benefits for life. FAC ¶¶ 75-77, 82-85.

Save Mart's many representations to its workers that non-union employees would always enjoy benefits as good or better than their union counterparts and that these benefits would last for the duration of their lives were revealed to be false when the company abruptly terminated the non-union retiree medical program in 2022. This revealed to Plaintiffs, and to the declarants, that Save Mart had been directly misrepresenting the actual terms of the Plan, which unfortunately did not state that benefits were guaranteed for life but instead permitted Save Mart to eliminate the Plan at any time at its discretion. FAC ¶¶ 1, 36, 38. By contrast, union retirees continue to have retiree medical benefits to this day. FAC ¶¶ 4, 20.

III. Severe and Irreparable Harm to Plaintiffs

Plaintiffs and the Class lost a valuable retirement benefit: contributions toward the cost of their healthcare in retirement. FAC ¶ 4. For a time, the Plan provided that benefit in the form of group health insurance and contributions toward the premiums for that insurance for eligible retirees and their spouses. FAC ¶¶ 18, 19. Following the conversion to the HRA program in 2016, that benefit took the form of cash contributions to health reimbursement accounts for eligible retirees and their spouses of up to $12,000 per year, which Plan participants could use on eligible medical expenses, including premiums for health insurance. FAC ¶ 19. All of that has now been taken away, a severe financial loss to those retirees who put in the decades of service necessary to earn the benefit, and who now have to fund their medical care and health insurance on their own for the remainder of their lives. FAC ¶ 7.

In addition to the direct loss of the benefits, Plaintiffs and the proposed Subclass all retired earlier than they otherwise would have in reliance on Save Mart's representations that if they retired prior to December 31, 2017, they would lock in the HRA benefit for themselves and their spouses

for life. FAC ¶¶ 12, 13, 14, 57-58, 67, 75-77, 82-85. They forfeited years of income from work, years of health benefits as active employees, and years of additional retirement savings. FAC ¶¶ 61, 69, 78, 86. This is exactly what Save Mart wanted to happen when it imposed the December 31, 2017 retirement deadline: the entire purpose of that change was to drive up retirement numbers, which in turn enriched the company by saving it the money that it would have been paying these employees for their labor. FAC ¶ 33.

LEGAL STANDARDS

A complaint survives a motion to dismiss as long as it contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The court must construe all factual allegations in the light most favorable to the plaintiffs, drawing all reasonable inferences in their favor. *Ass'n for L.A. Deputy Sheriffs v. Cty. of L.A.*, 648 F.3d 986, 991 (9th Cir. 2011). A Rule 12(b)(6) motion to dismiss must be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Paulsen v. CNF, Inc.*, 391 F. Supp. 2d 804, 807 (N.D. Cal. 2005) (citations omitted). "As the Ninth Circuit has observed, 'The [Rule 12(b)(6)] motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted.'" *Id.* (quoting *Gilligan v. Jamco Develop. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997)).

ARGUMENT

Plaintiffs state a claim under ERISA § 502(a)(3) if they both (1) allege a remediable wrong, and (2) request appropriate equitable relief. *Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 954 (9th Cir. 2014) (citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993)). Here, Plaintiffs both state a claim for breach of fiduciary duty and for the equitable remedies reformation and surcharge. *See infra* §§ I-II. Because Save Mart's remaining attacks on the FAC—(3) that Plaintiffs' claim is time-barred, (4) that Save Mart was not acting as a fiduciary when it terminated the HRA Benefit, and (5) that Plaintiffs claim is actually one for denial of benefits—also all fail, Save Mart's motion should be denied. *See infra* §§ III-V.

I. Plaintiffs State a Claim for Breach of Fiduciary Duty

Plaintiffs allege sufficient facts to state a claim that Save Mart breached its fiduciary duties

by materially misrepresenting the terms of the Plan, and thus plead a remediable wrong. It is well established that fiduciaries of employee benefit plans have an affirmative duty to convey complete and accurate information about plan terms and a negative duty to refrain from providing misinformation. *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996); *see also Baker v. American Mobil Power Corp.*, 64 F.3d 1397, 1403 (9th Cir. 1995) (fiduciaries have duty to "convey complete and accurate information material to the beneficiaries circumstance"); *Kenseth v. Dean Health Plan, Inc.*, 610 F.3d 452, 466 (7th Cir. 2010) ("The duty to disclose material information is the core of a fiduciary's responsibility.") (citation omitted).

Here, Plaintiffs allege facts establishing that Save Mart repeatedly and systematically, both orally and in writing, represented that the Plan would provide benefits as good or better than the union's and that these benefits would last for the duration of eligible retirees' lives. These were misrepresentations because the Plan terms stated that Save Mart could terminate the Plan at any time, at its sole discretion, and there was never any guarantee that non-union benefits would be as good as union benefits. These facts, taken as true, are sufficient to state a claim for breach of fiduciary duty. *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439, 453 (6th Cir. 2002).

A. Rule 9(b) Does Not Apply to Misrepresentation Claims Under ERISA

Save Mart is wrong that Plaintiffs must satisfy Rule 9(b)'s pleading standard for fraud to state their claim. Mot. at 7, n.2.[2] The Ninth Circuit expressly declined to "extend Rule 9(b) beyond its plain terms" to reach "all breaches of fiduciary duty under ERISA." *Concha v. London*, 62 F.3d 1493, 1502 (9th Cir. 1995). Courts have since held that even in a case alleging "misrepresentations and omissions," "a claim for breach of fiduciary duty under ERISA is evaluated under the standard of Rule 8 and not that of Rule 9(b)." *In re First Am. Corp. ERISA Litig.*, No. SACV 07-01357-JVS, 2008 WL 5666637, at *7 (C.D. Cal. July 14, 2008).[3]

[2] The primary case Save Mart cites for this proposition—*Meridian Project Sys., Inc. v. Hardin Constr. Co, LLC*.—is not an ERISA case at all, but a copyright infringement case. 404 F. Supp. 2d 1214 (E.D. Cal. 2005). Save Mart's remaining authorities involved cases where, unlike here, fraud was squarely the gravamen of the claim. *See Vivien v. Worldcom, Inc.*, No. C 02-01329 WHA, 2002 WL 31640557, at *7 (N.D. Cal. July 26, 2002) (challenging "false SEC filings"); *In re Syncor ERISA Litig.*, 351 F. Supp. 2d 970, 978 (C.D. Cal. 2004) (challenging "bribery scheme"); *In re Calpine Corp. ERISA Litig.*, No. C 03-1685 SBA, 2005 WL 3288469, at *2 (N.D. Cal. Dec. 5, 2005) (challenging concealment of "relationship with Enron" in reporting earnings).

[3] *See also, e.g., In re Am. Int'l Grp., Inc. ERISA Litig. II*, No. 08 CIV. 5722 LTS KNF, 2011 WL

However, even if Rule 9(b) were applied, Plaintiffs readily satisfy its requirements. "The purpose of this rule is to ensure that defendants accused of the conduct specified have adequate notice of what they are alleged to have done, so that they may defend against the accusations." *Concha*, 62 F.3d at 1502. In light of the remarkable specificity of the FAC, it can hardly be credited that Save Mart lacks notice of Plaintiffs' allegations: the FAC provides specific examples, names the people involved, and identifies when, where, and how the statements were made. Save Mart's attacks on those allegations amount to a premature argument against their merits, which is improper on a motion to dismiss. *Ass'n for L.A. Deputy Sheriffs*, 648 F.3d at 991. Whether assessed under Rule 8 or Rule 9(b), Plaintiffs more than adequately *plead* a remedial wrong.

1. Plaintiffs' Allegations Satisfy Rule 8

Save Mart consistently and repeatedly promised—both orally and in writing—that the Plan would always be as good or better than the union benefits and would be provided *for life* to eligible retirees. Though not required at the pleading stage, Plaintiffs identify by name (and quote from) specific documents containing those misrepresentations, attach several examples as Exhibits to their complaint, and provide signed declarations from key employees who made oral misrepresentations at Save Mart's direction. FAC ¶¶ 22-39; Exhs. A-C; Kennedy Dec.; Tharp Dec.; Vallo Dec. This is more than enough to state a claim under Rule 8. *See* Fed. R. Civ. P. 8(a)(2) (requiring "a short and plain statement of the claim").

While Save Mart asserts that these allegations are "insufficient to carry [Plaintiffs'] burden under Rule 8(a)," each of Save Mart's arguments is actually an attack on the *merits* of Plaintiffs' claim, not on the specificity with which it is alleged. To wit: in response to Plaintiffs' allegation that the statement in the "Save Mart Select Retiree Benefits" pamphlet that coverage ends "[u]pon the death of the retiree" constitutes a statement that benefits "would last until the death of the

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1226459, at *8 (S.D.N.Y. Mar. 31, 2011) (holding that even "[a]llegations of knowing and intentional conduct do not transmogrify [ERISA] breach of fiduciary duty claims into causes of action for fraud"); *Jander v. Int'l Bus. Machines Corp*., 205 F. Supp. 3d 538, 542 (S.D.N.Y. 2016) ("[A]llegations similar to fraud do not implicate Rule 9(b) where the gravamen of the claim is grounded in ERISA.") (internal quotation and citation omitted); *Shales v. Schroeder Asphalt Servs., Inc*., No. 12 C 6987, 2013 WL 2242303, at *3 (N.D. Ill. May 21, 2013) ("Although the elements of common law fraud are typically pleaded in detail to comply with Rule 9(b), these elements are not required [where] plaintiffs' cause of action is predicated upon ERISA, not the common law.") (quoting *Thornton v. Evans*, 692 F.2d 1064, 1082 (7th Cir. 1982)).

retiree," FAC ¶ 30, Save Mart simply denies the allegation, contending "that is not what the pamphlets say," Mot. at 10. According to Save Mart, the quoted statement was merely a *clarification* that spouses and dependents would no longer receive benefits after the death of a retiree. *Id*. This creative (if not nonsensical) contention not only ignores the cardinal rule that factual allegations must be construed in favor of the plaintiff, it is also contradicted by sworn statements from the very Save Mart employees tasked with interpreting this document and communicating its meaning to employees. *See, e.g.*, Tharp Dec. ¶ 12 ("Where the pamphlet states: 'When Coverage Ends … Upon the death of the retiree,' I understood this to mean that benefits would last until the retiree died."). Save Mart's other arguments amount to similarly inappropriate attacks on the *merits* of Plaintiffs' allegations, not their sufficiency.[4]

This case is therefore nothing like the two cases Save Mart cites to attack Plaintiffs' misrepresentation allegations under Rule 8. In *Mciver v. Metro. Life Ins. Co.*, plaintiff sought to collect life insurance after his ex-wife passed away, but was denied because she ceased being a dependent upon their divorce. No. SA-CV-21-01967- DOC-ADS, 2022 WL 3013199, at *5 (C.D. Cal. May 23, 2022). The court found no actionable misrepresentation for the simple reason that none had occurred: the relevant policy explicitly covered only a "lawful spouse" and plaintiff's employer had *never stated otherwise*. *Id.* Here, it must be taken as true that the misrepresentations alleged in the complaint have in fact occurred. Similarly, in *Vest v. Resolute FP US Inc*., the wife of an employee who died while on disability leave filed suit against his employer, seeking to obtain coverage that ceased when he had stopped worked and starting drawing disability benefits. 905 F.3d 985, 986 (6th Cir. 2018). But again, unlike the allegations here, the employer had *never* stated that full coverage would be continue after a transition to disability. *Id.*

Meanwhile, Save Mart fails to cite the multiple circuits that have addressed substantially similar factual allegations as here and allowed the claims for breach of fiduciary duty to proceed, specifically holding that representations regarding lifetime benefits can form the basis of a remedial

[4] *See* Mot. at 9 (arguing that "no person could reasonably interpret" Save Mart's statements the way that Plaintiffs—and the employees making them—did); Mot. at 11 ("There were no iron clad guarantees, ever.").

wrong, even where plan documents contain a reservation of rights provision.[5] Plaintiffs' claims are closely analogous to those in *James v. Pirelli Armstrong Tire Corp*., 305 F.3d 439 (6th Cir. 2002), which has been cited with approval by the Ninth Circuit. *See Warmenhoven v. NetApp, Inc*., 13 F.4th 717, 727 (9th Cir. 2021). In James, the defendant induced plaintiffs to retire early in order to take advantage of retiree medical benefits by telling plaintiffs that the benefits would become less favorable should plaintiffs forego early retirement; defendant also told plaintiffs in various ways that the retiree benefits would be "for life" including in individual conversation and in group meetings and documents. 305 F.3d at 452-54. As the court explained, these misrepresentations were breaches of the defendant's fiduciary duty under ERISA:

> A breach of fiduciary duty occurs if (1) an early retiree asks a plan provider about the possibility of the plan changing and receives a misleading or inaccurate answer **or** (2) a plan provider *on its own initiative* provides misleading or inaccurate information about the future of the plan **or** (3) ERISA or its implementing regulations required the employer to forecast the future and the employer failed to do so.

Id. at 453 (bolding added; italics in original). Plaintiffs here allege more than sufficient facts to survive the instant motion to dismiss under this standard. FAC ¶¶ 2-5, 19, 21-36, 38-39.

Save Mart attempts to undercut Plaintiffs' allegations by citation to numerous inapposite cases alleging breach of the duty of prudence, which is a mischaracterization of Plaintiffs' claim. For example, Save Mart points to *Fifth Third Bancorp v. Dudenhoeffer*, in which the plaintiffs alleged that the fiduciaries of their employee stock ownership plan had invested in "overpriced and excessively risky" stocks. 573 U.S. 409, 409 (2014). While the Court noted that to "state a claim for breach of the duty of prudence . . . a plaintiff must plausibly allege an alternative action that the

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[5] *See, e.g.*, *In re Unisys Corp. Retiree Medical Ben. ERISA Litig*., 57 F.3d 1255, 1265 n.15 (3rd Cir. 1995) (allowing claim for breach of fiduciary duty to proceed where "some individuals specifically asked if their benefits would continue for life and were told they would, without any mention of the reservation of rights clauses" and where ""while [defendant] may not have anticipated ending the plans, it knew that it had the ability to do so and it knew that its employees were receiving answers to their specific inquiries that were vague, misleading and contradictory"); *McMunn v. Pirelli Tire, LLC*, 161 F.Supp.2d 97, 124 (2d Cir. 2001) ("[T]he particular context in which representations are made is crucial to assessing whether a representation about duration of benefits is accurate or misleading . . . . [W]here a company has deliberately fostered the belief that retirement benefits are lifetime benefits, and is aware that its employees incorrectly—if understandably—believe that their medical benefits will continue unchanged for the duration of their retirement . . . a reservation of rights in an SPD does not insulate the company from its obligation to provide 'complete and accurate information.'") (citation omitted).

defendant could have taken that . . . a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it;" that guidance is irrelevant here. *Id.* at 428. Plaintiffs do not allege that Save Mart breached its duty of prudence.[6] Instead, Plaintiffs allege that Save Mart breached its duty of loyalty by misrepresenting the terms of the Plan. Plaintiffs refer to the union benefits throughout the FAC because those benefits lie at the center of Save Mart's misrepresentations about its own plan, and because those misrepresentations relate directly to Save Mart's unilateral power to terminate the Plan—something it cannot do with the union benefits. This case seeks redress for those misrepresentations; it is not grounded in the theory that Save Mart acted imprudently with respect to the Plan's assets.[7]

2. Plaintiffs' Allegations Satisfy Rule 9(b)

Rule 9(b) is not applicable to Plaintiffs' claim for breach of fiduciary duty, but even if it were, Plaintiffs do allege Save Mart's misrepresentations "with particularity," Fed. R. Civ. P. 9(b), including "the who, what, when, where, and how" of those misrepresentations, *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009). Plaintiffs therefore satisfy Rule 9(b).

The complaint is remarkably detailed and more than sufficient to put Defendant on notice of the claim. Plaintiffs identify by name and attach documents containing the misrepresentations: the "Save Mart Answers Your Questions About Unions" pamphlet (FAC ¶ 2; Exh. A); the "Save Mart Select Retiree Benefits" pamphlet (*id.*; Exh. B); and the "Save Mart Supermarkets 2010 Retiree Health Plan Highlights" document (*id.* ¶ 30; Exh. C). Plaintiffs identify, by name, several individuals who made oral misrepresentations: John Bacon, Jerry Sauer, Steve Goodman, and Mike Silveria (Tharp Dec. ¶¶ 5-6); Dennis Nutson (FAC ¶ 50); Beth Fugate (FAC ¶ 65); and Steve Beaver and Bob Bauer (FAC ¶ 71). Plaintiffs identify the timing and context of certain oral misrepresentations (e.g., new store openings, FAC ¶ 22; "roadshow" or "kumbaya" meetings, Vallo

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[6] Save Mart's remaining duty of prudence cases are irrelevant for the same reason. *See Albert v. Oshkosh Corp.*, 47 F.4th 570, 579-80 (7th Cir. 2022); *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1169 (6th Cir. 2022); *Davis v. Wash. Univ. in St. Louis*, 960 F.3d 478, 484 (8th Cir. 2020).

[7] For the same reason, it is irrelevant that the union benefit available to certain Save Mart employees could *theoretically* change through collective bargaining. *See* Mot. at 10 (citing several cases for the unremarkable proposition that unions can and do negotiate). The fact that the union benefits are protected from unilateral termination by collective bargaining is key to what makes Save Mart's representation that the Plan was as good or better a misrepresentation.

Dec. ¶ 5). And Plaintiffs submit declarations from three HR professionals—Kennedy, Tharp, and Vallo—who corroborate how and when these misrepresentations occurred. Plaintiffs also provide specific detail regarding their personal experiences with the misrepresentations. For example, Mr. Luna alleges that he attended a meeting for store managers in 2010 or 2011 at a brewery in Turlock where Beth Fugate described the retiree health benefits as lasting for the life of the retiree, and that he specifically asked his HR representative Ms. Vallo about the benefits and was told that if he retired by the end of 2017 that he and his spouse would both keep their HRA benefit for the duration of Mr. Luna's life. FAC at ¶ 65, 67.

In the face of this striking specificity, Save Mart responds that Plaintiffs' allegations amount to nothing more than "their own subjective interpretations of vague alleged statements." Mot. at 8. Again, this is a merits argument, not a challenge to the pleadings. *See supra* § I.A.1. And again, it is also plainly contradicted by the FAC, which includes declarations from the very Save Mart employees *who made the statements* about what the statements meant. Kennedy Dec. ¶ 15, Tharp Dec. ¶ 12, Vallo Dec. ¶ 15.

Save Mart also argues that Plaintiffs fail to allege the falsity of the company's misrepresentations or to explain "why" any statement was false. Mot. at 7-8. This is curious, as the falsity of Save Mart's statements is stated clearly in the very first paragraph of the FAC:

> These representations were false and misleading because they obscured that the Plan could in fact be eliminated at any time, and that Save Mart did in fact intend to (and did) eliminate the Plan as a cost-saving measure when that became advantageous to Save Mart, which occurred immediately upon Save Mart's acquisition by a private equity firm from the family that had owned the company since its founding 70 years ago.

FAC ¶ 1. There is no magic to understanding this allegation: Save Mart stated one thing, but delivered another.

Plaintiffs also allege with particularity the union that Save Mart compared itself with while making these misrepresentations—the UFCW—and further allege the specific features of the benefit program provided to UFCW members that make it superior to and considerably more secure than the Save Mart Plan. FAC ¶¶ 2, 3, 4, 17, 20, 90. The relevance of this comparison here is that Plaintiffs as well as the HR representatives responsible for disseminating messages about the non-

union benefit all understood that Save Mart was committed to always providing benefits equal to or greater than the union, which was false because Save Mart had in fact reserved for itself unilateral power to terminate the Plan.[8] FAC ¶ 8; Kennedy Dec. ¶ 15; Tharp Dec. ¶ 11; Vallo Dec. ¶ 9.

B. Plaintiffs Sufficiently Allege Breach of Save Mart's Duty to Disclose

Plaintiffs adequately allege that Save Mart breached its fiduciary duty by failing to disclose that it could—and ultimately did—terminate the Plan and the HRA benefit program. Specifically, Plaintiffs allege:

> A fiduciary's duties of loyalty and prudence include a *duty to disclose and inform*. These duties not only require that a fiduciary comply with the disclosure provisions in Title I of ERISA, but also require: (a) a negative duty not to misinform; (2) an affirmative duty to inform when the fiduciary knows or should know that silence might be harmful; and (3) a duty to convey complete and accurate information material to the circumstances of participants and beneficiaries.

FAC ¶ 89 (emphasis supplied). Plaintiffs further allege that Save Mart breached these duties by misrepresenting that the retiree health benefit was guaranteed for life and would always be as good or better than the union's. FAC ¶ 89. Plaintiffs also allege that they did not see or read anything that they understood to say that non-union retiree benefits could be terminated, and included sworn statements by the HR representatives who conveyed the messages about the retiree medical benefits that they also did not see any such writings. FAC ¶¶ 56-57; Kennedy Dec. ¶ 16; Vallo Dec. ¶ 15. Save Mart is therefore wrong that "there are no allegations that Save Mart failed to comply with any disclosure provisions in Title I of ERISA." Mot. at 11.

Save Mart is also wrong that the company had no affirmative duty to disclose complete information about the Plan—including that the Plan could be terminated at Save Mart's election—to Plaintiffs and other class members. Mot. at 12. In fact, Save Mart's own authority confirms that "when an employer communicates with its employees about a plan, fiduciary responsibilities come

[8] Save Mart also attempts to attack Plaintiffs' clear description of the company's misrepresentations (and the falsity of those misrepresentations) by suggesting that Plaintiffs could not possibility have believed that Save Mart *meant what it said* when it promised a lifetime benefit, because Save Mart had previously modified the Plan (in 2016 and 2017). Mot. at 8, n.3. This, too, challenges the veracity of what Plaintiffs allege, rather than accepting Plaintiffs' allegations as true (as required on a motion to dismiss). To the extent Save Mart believes the Plaintiffs—or any of the HR professionals who affirmed Plaintiffs' allegations in sworn declarations supporting the FAC—are being disingenuous, then Save Mart will be free to probe that belief through appropriate discovery.

into play." *Bins v. Exxon Co. U.S.A.*, 220 F.3d 1042, 1053 (9th Cir. 2000). "[This] entails not only a negative duty not to misinform but also an affirmative duty to inform when the trustee knows that silence might be harmful. In addition, the duty recognizes the disparity of training and knowledge that potentially exists between a lay beneficiary and a trained fiduciary. Thus, while the beneficiary may, at times, bear a burden of informing the fiduciary of her material circumstance, the fiduciary's obligations will not be excused merely because she failed to comprehend or ask about a technical aspect of the plan." *Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993).

Here, Plaintiffs detail numerous meetings and presentations at which Save Mart asserted that the retiree health benefit would last for the life of the eligible retiree, FAC ¶¶ 22-39, and Plaintiffs specifically aver that Save Mart made this representation in response to questions from employees, *id.* ¶¶ 2, 33, 58, 67; Kennedy Dec. ¶ 10, 12, 15; Tharp Dec. ¶¶ 9-14; Vallo Dec. ¶¶ 13-15, 19. Having engaged its employees in these conversations, Save Mart had an affirmative duty to provide complete and accurate information in response.[9] *See Varity*, 516 U.S. at 502 ("Conveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation, would seem to be an exercise of a power 'appropriate' to carrying out an important plan purpose."); *Kenseth*, 610 F.3d at 469-70 (holding that a reasonable fact finder could conclude a defendant breached its fiduciary duty by providing plaintiffs with phone numbers for customer service representatives but failing to disclose "that they could not rely on the advice that they were given" by the representatives, and by not advising plaintiffs "of a process by which they could obtain a binding determination as to" their questions, and noting defendant's alleged "lack of care in training the customer service representatives from whom it ha[d] encouraged plan participants to seek coverage information"). Save Mart breached that duty by repeatedly misrepresenting in writing that the benefit would last for life and by instructing HR personnel to repeat that misrepresentation orally.[10]

[9] Here, again, Save Mart's own authorities establish the sufficiency of Plaintiffs' allegations. *See In re Calpine Corp.*, No. C-03-1685 SBA, 2005 WL 1431506, at *7 (N.D. Cal. Mar. 31, 2005) (confirming that an "affirmative duty of disclosure arises under ERISA" when, as here, "a fiduciary responds to inquiries from plan participants").

[10] Save Mart repeatedly mischaracterizes Plaintiffs as alleging that Save Mart failed to "re-

C. Plaintiffs Need Not—But Do—Plead Detrimental Reliance

To the extent Save Mart argues that Plaintiffs must allege "reasonable and detrimental reliance" to seek *any remedy* for breach of fiduciary duty under ERISA, Save Mart is wrong. Indeed, the Supreme Court has made clear that to seek a surcharge—an equitable remedy that Plaintiffs seek here—a plaintiff need not allege "detrimental reliance" and "need only show harm and causation." *CIGNA Corp. v. Amara*, 563 U.S. 421, 444 (2011). Save Mart's contrary authorities not only predate *Amara*, they also concern a different remedy: equitable estoppel. *See Poore v. Simpson Paper Co.*, 566 F.3d 922, 928 (9th Cir. 2009) (describing requirements for "an equitable estoppel theory"); *Pisciotta v. Teledyne Indus., Inc.*, 91 F.3d 1326, 1331 (9th Cir. 1996) (same).

But even if Plaintiffs were required to plead detrimental reliance: they do. As Save Mart acknowledges, each Plaintiff alleges having first heard of and relied upon Save Mart's misrepresentations early and throughout their careers: Baker (FAC ¶ 50); Luna (*id.* ¶ 62); Popke (*id.* ¶ 71); and Wraske (*id.* ¶ 81-82). Defendant attempts to diminish Plaintiffs claims by asserting that it is "dubious" to the point of being facially implausible that Plaintiff's would have made different decisions about their careers absent Defendant's misrepresentations, pointing to the fact that Plaintiffs' careers, at times, involved work in managerial positions (as opposed to remaining in union employment). Mot. at 14-15. This rather contemptuous view of union employment is simply wrong: it is entirely plausible that a person might choose the benefits of working under a collective bargaining agreement over whatever Save Mart offered its managerial employees in compensation and benefits, and in order to make that choice one would need *complete and accurate information about the benefits*. It also misses the point: Plaintiffs allege that they relied on Save Mart's misrepresentations—to their detriment—*by continuing to work at Save Mart at all* (and not elsewhere) to accrue the necessary years of service at Save Mart required to earn retiree medical benefits only to have Save Mart refuse to provide those benefits. FAC ¶ 4.

Plaintiffs further allege detrimental reliance in their allegations that they retired years earlier

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inform" them of the SPD's termination provision. Mot. at 2, 12. But again, Save Mart's breach lies in its repeated and consistent misrepresentation that the benefit would be provided for life, and failure to disclose in any one of its many conversations with Plaintiffs and the Class—on this specific topic—that it retained the right to terminate the Plan.

than they had planned—forfeiting significant income, benefits, and savings—as a result of Save Mart's statements that they could only retain retiree medical benefits for their spouses if they retired by the end of 2017. FAC ¶¶ 12, 13, 14, 57-58, 67, 75-77, 82-85.

II. Plaintiffs Plead Facts Showing They Are Entitled to Equitable Relief

Save Mart's argument that the facts pled in the first amended complaint are insufficient to show their entitlement to equitable relief is incorrect. It is not necessary at the pleading stage to adjudicate which specific forms of equitable relief Plaintiffs should ultimately receive. The complaint is sufficient if there are facts showing entitlement to *any* form of appropriate equitable relief, and here the complaint states claims for at least two: surcharge and reformation.

Plaintiffs' claim is brought pursuant to ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3). In *Amara*, the Supreme Court considered the scope of equitable relief available under section 502(a)(3) to plan participants who had had been misled about the terms of their retirement plan. 563 U.S. at 428-432. The Court held that relief for these breaches was available under ERISA section 502(a)(3), including the two remedies that Plaintiffs seek in this case: surcharge, which is "relief in the form of monetary 'compensation' for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment"; and reformation, a remedy that empowers a court to change the terms of the Plan. *Id.* at 441-42; *see also Moyle v. Liberty Mut. Retirement Ben. Plan*, 823 F.3d 948, 960 (9th Cir. 2016) ("*Amara* makes it very clear that remedies such as reformation, surcharge, estoppel, and restitution are traditionally equitable remedies, and the fact that they take a monetary form does not alter this classification.").[11]

A. Plaintiffs Allege Sufficient Facts as to the Remedy of Equitable Surcharge

Equitable surcharge is a remedy available to make a plan participant whole for a fiduciary's breach of duty, either for unjust enrichment the fiduciary gained through its breach or for the harm caused by its breach. *Amara*, 563 U.S. at 441-42; *Skinner v. Northrop Grumman Retirement Plan B*, 673 F.3d 1162, 1167 (9th Cir. 2012); *Gabriel*, 773 F.3d at 957. In order to state a claim for

[11] *See also Silva v. Metropolitan Life Ins. Co.*, 762 F.3d 711, 722 (8th Cir. 2014); *Kenseth v. Dean Health Plan, Inc.*, 722 F.3d 869, 882 (7th Cir. 2013); *Stiso v. Int'l Steel Group*, 604 Fed. Appx. 494, 500 (6th Cir. 2015); *Gearlds v. Entergy Services, Inc.*, 709 F.3d 448, 452 (5th Cir.); *McCravy v. Metropolitan Life Ins. Co.*, 690 F.3d 176, 181-82 (4th Cir. 2012).

surcharge, a complaint must allege facts showing *either* that the beneficiaries were actually harmed *or* that the fiduciary was unjustly enriched. *Gomo v. NetApp, Inc.*, No. 17-cv-02990-BLF, 2022 WL 16972492, at *5-6 (N.D. Cal. Nov. 16, 2022). Here, Plaintiffs plead facts sufficient to establish a claim in both ways.

Plaintiffs allege they were actually harmed in several ways: they worked for decades at Save Mart to obtain eligibility for retiree benefits on the basis of representations that those benefits would always be as good as the union's and would be available for the duration of their lives, foregoing other employment opportunities, including union employment, in the process; they retired early, foregoing years of income and health benefits as active employees along with additional retirement savings, and they financially planned for their retirements based on the understanding that they would have retiree medical benefits for themselves and their spouses for life.

The Northern District of California recently considered the availability of surcharge in a similar case involving misrepresentations about the lifetime duration of retiree medical benefits. In *Gomo*, plaintiff CEO had been inaccurately told, like the Plaintiffs here, that he would receive lifetime retiree medical benefits. 2022 WL 16972492, at *5. The court denied summary judgment and held that surcharge was an available remedy because the plaintiff had presented evidence that the availability of the retiree medical benefits and the need to accrue sufficient age and years of service was a factor in his decision to continue his employment beyond when he otherwise might have left the company. *Id.* at *6. The court found this to be true despite the fact that the availability of retiree medical benefits was not, by his own testimony, a significant factor in his decision to retire and that it did not materially affect his net worth to have the benefits taken away. *Id.* at *5 (citing *Warmenhoven*, 13 F.4th at 728).

The facts alleged by Plaintiffs show greater harm than that experienced by the plaintiff in *Gomo*. Plaintiffs are not high-level executives, much less CEOs: they are career grocery store workers. They allege that they did base their decisions on when to retire, and in fact retired much earlier than they otherwise would have, specifically based on Save Mart's representations. FAC ¶¶ 12, 13, 14, 57-58, 67, 75-77, 82-85. Their financial positions today are thus dramatically worse off than what they would have been absent Save Mart's misrepresentations about the Plan. *Id.*

Plaintiffs also allege facts showing Save Mart's unjust enrichment, in not one but two ways. First, it wanted to induce Plaintiffs to retire early in order to save itself the costs of continuing to pay them for their work, and it was unjustly enriched by realizing those savings when it successfully induced them to retire. The complaint alleges, with the support of sworn declarants from Save Mart's HR department, that the purpose of these changes was to save money—that is, to enrich—and Plaintiffs allege Save Mart was successful in doing so. Second, Save Mart reclaimed for itself amounts that had already accrued in Plaintiffs' HRAs that were not used for covered medical expenses by June 2022, which for many Class members amounted to tens-of-thousands of dollars each. FAC ¶ 7. Since Save Mart had represented to Plaintiffs that HRA contributions could accumulate up to the retiree's death, could not be taken away, and that there was no deadline by which the amounts in the HRA needed to be used prior to the death of the retiree, Save Mart was unjustly enriched when it took that money back. FAC ¶ 19.[12]

B. Plaintiffs Allege Sufficient Facts as to the Remedy of Reformation

Reformation is a well-established equitable remedy available to plaintiffs alleging ERISA section 502(a)(3) claims. *See Amara*, 563 U.S. at 440 ("The power to reform contracts . . . is a traditional power of an equity court . . . ."). A court has the power to award reformation in cases of mistake or fraud. *See id.* (approving "the reformation of the terms of the plan, in order to remedy the false or misleading information [the Plan Administrator] provided"); *Skinner*, 673 F.3d at 1166 (same). Here, Plaintiffs allege facts sufficient to support a claim for reformation based on mistake, and if not mistake, then fraud.

Where a plaintiff's claim alleges mistake, "a court may reform a contract to reflect the true intent of the parties if both parties were mistaken about the content or effect of the contract," and "[t]he court may reform the contract to capture the terms upon which the parties had a meeting of the minds." *Skinner*, 673 F.3d at 1166. Plaintiffs allege sufficient facts as to their own mistaken

[12] This would also entitle Plaintiffs to the equitable remedy of an accounting for profits. *See Pender v. Bank of America Corp.*, 788 F.3d 354, 364-65 (4th Cir. 2015) (holding an accounting for profits constitutes "appropriate equitable relief" under Section 501(a)(3) and "requires the disgorgement of 'profits produced by property which in equity and good conscience belonged to the plaintiff,'" and noting this "is akin to a constructive trust, but lacks the requirement that plaintiffs 'identify a particular res containing the profits to be recovered'") (citation omitted).

belief that the Plan did not permit Save Mart to terminate their retiree medical benefits and to rescind the amounts already deposited into Plaintiffs' HRA accounts. Even if this mistake were later deemed to have been negligent—and Plaintiffs allege sufficient facts showing it was *not* negligent under the circumstances—this would not negate a claim for reformation based on mistake. *See Amara*, 563 U.S. at 443 ("Equity courts, for example, would reform contracts to reflect the mutual understanding of the contracting parties . . . even if the 'complaining part[y]' was negligent in not realizing its mistake, as long as its negligence did not fall below a standard of 'reasonable prudence.'") (citations omitted).

As to Save Mart's mistake, Plaintiffs allege that Save Mart's HR representatives regularly and repeatedly told them in meetings, trainings, and emails over the course of their employment that their retiree medical benefits would always be as good or better than the benefits provided to union employees. FAC ¶ 22. Plaintiffs further allege that Save Mart communicated to them orally and in writing over a period of many years that their benefits would last until their own death. FAC ¶ 28; Exh. B. Collectively, these pervasive statements and writings by Save Mart show that it was Save Mart's intent to provide to Plaintiffs a retiree medical benefit plan that was actually as good or better than the union's and would actually last until the death of the retiree, which would necessarily be a plan that did not include a provision permitting a subsequent purchaser of the company to swoop in and unilaterally eliminate retirement benefits. And, importantly, three of the Save Mart HR representatives who made these statements to Plaintiffs have now submitted sworn statements to this Court affirming that *they themselves* believed that was Save Mart's intent. Exhs. A-C; Kennedy Dec.; Tharp Dec.; Vallo Dec. In other words, Save Mart made a mistake in that the term of the Plan reserving its right to terminate the Plan did not effectuate its true intent to maintain the Plan for its employees for life. Save Mart's reliance on *Gomo* is ineffective to defeat Plaintiffs' claim for reformation based on mistake because here, unlike in *Gomo*, Plaintiffs allege numerous facts regarding Save Mart's professed intent, including: written documents expressly stating that the company's benefits were as good or better than the union's, declarations from the HR representatives who were responsible for communicating Save Mart's intent; and public verbal comments by founder Bob Piccinini and several other prominent executives. Such facts were

missing in *Gomo*, and are sufficient here to support a claim that the Save Mart's true intent did not accord with the actual Plan terms. 2022 WL 16972492, at *3.

To the extent that Save Mart's representations do not reflect its true intent (thereby rendering the Plan terms a mistake), then the complaint states a claim for reformation based on fraud. "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 (citing *Skinner*, 673 F.3d at 1166). If Save Mart's repeated statements that it would provide non-union retirees with medical benefits that were as good or better than the union's and that would last until the death of the retiree were *not* statements of Save Mart's actual intent, then those statements were lies, and thus fraudulent. By making those statements, Save Mart induced Plaintiffs to spend their entire careers working for them, and Plaintiffs were justified in relying on the statements because they came from official documents and HR personnel.[13]

III. Plaintiffs' Claim Is Timely

Plaintiffs filed their claim well within the applicable statutes of repose and limitations. A breach of fiduciary duty claim under ERISA is subject to a six-year statute of repose: "suit must be filed within six years of 'the date of the last action which constituted a part of the breach of violation.'" *Intel Corp. Inv. Pol. Comm. v. Sulyma*, 140 S. Ct. 768, 774 (2020) (quoting 29 U.S.C. § 1113). Plaintiffs satisfy this statute of repose by identifying events constituting a breach of fiduciary duty within six years of filing the complaint, including: annual dissemination of the "Save Mart Select Retiree Benefits" to each employee, which states that coverage under the Plan ends "upon the death of the retiree"; as well as oral statements in 2017 by HR representatives that if the Plaintiffs retired that year, they and their spouses' benefits would be locked in for life.

ERISA claims are also subject to a three-year statute of limitations that begins once a

[13] That one potential basis for one of multiple equitable remedies alleged in the complaint could ultimately be found to rest on a fraud theory after proper discovery still falls well short of rendering an ERISA breach of fiduciary duty claim reviewable under Rule 9(b), as this merely means that Plaintiffs were induced by and justifiably relied on Defendant's misrepresentations. *Gabriel*, 773 F.3d at 955; *In re First Am. Corp. ERISA Litig.*, 2008 WL 5666637, at *7.

plaintiff gains "actual knowledge" of the breach of fiduciary duty. *Id.* Save Mart announced its termination of the Plan in April 2022, giving Plaintiffs and the Class "actual knowledge" of its breach of fiduciary duty, and triggering the statute of limitations. FAC ¶ 37. Plaintiffs timely filed suit on August 11, 2022.

Save Mart argues that Plaintiffs' statute of limitations started to run in either 2009 or 2016 when Save Mart made modifications to the Plan. According to Save Mart, Plaintiffs had "actual knowledge" that Save Mart had breached its fiduciary duty by misrepresenting the nature of the Plan benefits either in 2009 (when the company switched from full to partial health insurance premium payments), or in 2016 (when it replaced premium payments with a monthly HRA payment). Save Mart's argument fails because these actions were merely modifications to the nature of the benefits: neither gave Plaintiffs "actual knowledge" that Save Mart could terminate retiree health benefits altogether.

Indeed, the Supreme Court recently made clear that this argument fails because, under § 1113, "actual knowledge" means just that: "real knowledge as distinguished from presumed knowledge or knowledge imputed to one." *Sulyma*, 140 S. Ct. at 776. In *Sulyma*, the plaintiff alleged that the defendant had breached its fiduciary duties by overinvesting in alternative assets. *Id.* at 774. Despite the fact that the plaintiff received "numerous disclosures" explaining the extent to which his retirement plans were invested in alternative assets, the Court held that he did not have "actual knowledge" of those facts because he did not read the disclosures. *Id.* at 775. The Court emphasized that other provisions of ERISA premise the triggering of a statute of limitations upon the date on which the plaintiff acquired or should have acquired knowledge of the existence of the cause of action, but not so for § 1113 governing breach of fiduciary duty. *Id.* at 777.

As in *Sulyma*, Save Mart's contention about what Plaintiffs *should have known* fails because "should have known" is not the standard.[14] Plaintiffs did not have actual knowledge that Save Mart

[14] Even if "should have known" were the standard (it is not), Save Mart still could not show that Plaintiffs should have known that a modification of benefits is equivalent to the right to terminate benefits altogether. As HR representative Tharp stated about the 2016 change: "My understanding was that while the methodology of how the retiree health benefits would be provided was changing, the benefits would still be provided to eligible retirees and their eligible spouses for the duration of the life of the retiree." Tharp Dec., ¶ 13. *See also* Vallo Dec., ¶ 13 (same).

could terminate the Plan until it did so in April 2022. Indeed, even the HR representatives whose job duties included explaining the Plan to employees did not know that Save Mart could terminate the Plan until it did so. Kennedy Dec. ¶ 12; Tharp Dec. ¶ 15; Vallo Dec. ¶¶ 18-19. Plaintiffs filed suit approximately five months after learning that Save Mart had misrepresented that their benefits would be for life, well within the statute of limitations. *See Crowhurst v. California Institute of Technology*, No. CV 96–5433 RAP (SHX), 1999 WL 1027033, at *15, n.1 (N.D. Cal. July 1, 1999) (holding that "[a] plaintiff only has knowledge of an ERISA violation where he has specific knowledge of the actual breach of duty upon which he sues," and finding that a plaintiff's early letters threatening suit did not show actual knowledge since they were predicated on different facts from the filed case) (quotation and citation omitted).

IV. Save Mart's Fiduciary Status at the Time It Terminated the HRA Benefit Is Unknown and Not a Basis for Dismissal

Save Mart's argument that it was not acting as a fiduciary at the time it terminated the HRA benefit is unsubstantiated as a factual matter and, even if it were true, not a basis on which to dismiss Plaintiff's claims, which are grounded in different conduct.

Plaintiffs' claim is not dependent on Save Mart having acted as a fiduciary when terminating the HRA benefit. The termination is not the alleged breach. The alleged breach is "misrepresenting that the company would provide health care benefits to eligible retirees and their spouses that were as good or better than those enjoyed by UFCW members, including by misrepresenting the duration of retiree and spousal medical benefits as lasting until the death of the retiree." FAC ¶ 90. Accordingly, Save Mart's argument is a mischaracterization of the claim.

Nevertheless, it is far from certain that Save Mart was not acting as a fiduciary when it eliminated the HRA benefit. When employers or unions are plan sponsors, they are capable of wearing "two hats" with respect to a benefit plan: that of the settlor of the trust and that of a fiduciary. *Pegram v. Hedrich*, 530 U.S. 211, 225-26 (2000). When an employer makes a decision to adopt, modify, or terminate a welfare benefit plan, that decision itself is not done in a fiduciary capacity, the decision is a settlor function. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). However, the implementation of that termination is an exercise of discretionary control of

the plan and therefore a fiduciary function. *Waller v. Blue Cross of California*, 32 F.3d 1337, 1342 (9th Cir. 1994). And when an employer is also the plan administrator, as Save Mart is here (FAC ¶ 15), it necessarily acts as a fiduciary when performing acts of plan administration. 29 C.F.R. § 2509.75-8, Q&A D-3.

There is no basis in the complaint from which the Court could conclude that Save Mart was definitively wearing its settlor hat when it purported to terminate the HRA benefit. It very well might have been performing an act of plan administration. The complaint alleges only that the company announced to employees that it was eliminating the HRA benefit effective June 2022 and that it did in fact cease making benefit payments. FAC ¶ 37. But there are no facts alleged in the complaint supporting Save Mart's contention that it was acting as the settlor when it did this, and it is entirely possible that Save Mart did not undertake this action in compliance with the Plan terms governing termination of benefit programs, which would render it an act of plan administration or, rather, misadministration.

Plaintiffs separately oppose Save Mart's request for judicial notice, but the terms of the Plan as reflected in the documents attached to that request state, in Section 10.02, under "Termination of the Plan" that "The Company reserves the right to terminate the Plan or any Benefit Program at any time as designated by a written instrument adopted by the Board of Directors or its designee and duly executed on behalf of the Company." ECF No. 26-1 at 37. Notably, there are no documents in the materials Save Mart proffers as a "true and correct" copy of the Plan document constituting a written instrument adopted by Save Mart's board or designee and duly executed on behalf of the company terminating the HRA benefit.

If the HRA benefit was not terminated in compliance with the written plan procedures for terminating the Plan or one of its component benefit programs, Save Mart's announcement of the elimination of the HRA benefit would not be a valid termination of the program because it is legally obligated to follow those procedures. *See Schoonejongen*, 514 U.S. at 84-85 ("[W]hatever level of specificity a company ultimately chooses, in an amendment procedure or elsewhere, it is bound to that level."). If that were the case, then Save Mart, which was the designated Plan Administrator, was acting as a fiduciary when it eliminated the HRA benefit because the "termination" was in fact

an act of plan administration: it was Save Mart's willful refusal to administer the Plan in accordance with its terms, which is a breach of fiduciary duty. *See Schoonejongen*, 514 U.S. at 84 (plan administrators "have a statutory responsibility actually to run the plan in accordance with the currently operative, governing plan documents").

Plaintiffs lack sufficient information to make a determination as to whether the HRA benefit was terminated in compliance with the Plan's procedures, despite repeatedly asking for this information, which Save Mart was legally obligated to provide, as explained in Plaintiffs' opposition to the request for judicial notice. Resolution of this issue is properly left for another day. For present purposes, it is enough that Save Mart's claim t is irrelevant to Plaintiff's misrepresentation claims and unsubstantiated as a factual matter, making it an inappropriate basis on which to dismiss the complaint.

V. Plaintiffs Do Not Assert a Section 502(a)(1)(B) Claim in Disguise

Save Mart's final argument is that Plaintiffs have not asserted a claim under ERISA section 502(a)(3) at all, but instead "a disguised claim for denial of benefits" under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). Mot. at 22. Save Mart does not bother to explain the reasoning behind this assertion, perhaps because taking it seriously requires one to ignore the entirety of the complaint. For purposes of evaluating Save Mart's motion, the Court should take at face value the only claim Plaintiffs actually bring-- a claim for breach of fiduciary duty under ERISA section 502(a)(3) grounded in Save Mart's misrepresentations. FAC ¶¶ 87-92. Save Mart's attempt to recharacterize that claim as something it plainly is not does not provide a basis on which to dismiss the complaint.

CONCLUSION

Plaintiffs respectfully request that the Court deny Defendant's motion because the allegations in the complaint are sufficient to state a claim that Defendant breached its fiduciary duties under ERISA by misrepresenting that Plan benefits would be guaranteed for life and always as good or better than the union's.

Dated: February 15, 2023

Respectfully submitted,

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