Anne B. Shaver (CA Bar No. 255928)
Michelle A. Lamy (CA Bar No. 308174)
Benjamin A. Trouvais (CA Bar No. 353034)
LIEFF CABRASER HEIMANN & BERNSTEIN LLP
275 Battery St., 29th Floor
San Francisco, CA 94111
Phone: (415) 956-1000
Fax: (415) 956-1008

James P. Keenley (CA Bar No. 253106)
Emily A. Bolt (CA Bar No. 253109)
BOLT KEENLEY KIM LLP
2855 Telegraph Ave., Suite 517
Berkeley, CA 94705
Phone: (510) 225-0696
Fax: (510) 225-1095

Matthew J. Matern (CA Bar No. 159798)
Mikael H. Stahle (CA Bar No. 182599)
Erin R. Hutchins (CA Bar No. 346557)
Joyce P. Lee (CA Bar No. 352425)
MATERN LAW GROUP, PC
1230 Rosecrans Ave., Suite 200
Manhattan Beach, CA 90266
Phone: (310) 531-1900
Fax: (310) 531-1901

Attorneys for Plaintiffs and the Proposed Class

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KATHERINE BAKER, JOSÉ LUNA, EDGAR POPKE, and DENNY G. WRASKE, Jr., on behalf of themselves and all others similarly situated, Plaintiffs, v. SAVE MART SUPERMARKETS and SAVE MART SELECT RETIREE HEALTH BENEFIT PLAN, Defendants.	Case No.: 3:22-cv-4645-AMO **PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** **Hearing** **Date/Time: October 3, 2024 at 2:00 pm** **Location: Courtroom 10**

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NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD: PLEASE TAKE NOTICE that on October 3, 2024 at 2:00 pm, before the Honorable Araceli Martínez-Olguín of the United States District Court for the Northern District of California, Plaintiffs Katherine Baker, José Luna, Edgar Popke, and Denny G. Wraske ("Plaintiffs") will and hereby do move for an order certifying the case as a class action pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(1), (b)(2), and/or (b)(3). This motion is based upon the accompanying memorandum of points and authorities, the Declaration of Anne B. Shaver and the exhibits thereto, the pleadings and papers on file in this action, and such other matters as may be properly presented to the Court at the time of or after hearing on this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case arises out of a decision by Defendants Save Mart Supermarkets and Save Mart Select Retiree Health Benefit Plan (the "Plan") (collectively "Save Mart") to eliminate lifetime retiree health benefits for its non-union retirees in 2022. For many decades prior to that decision, Save Mart made common, uniform representations to its employees that if they worked long enough to qualify for retiree medical benefits, those benefits would be theirs for life. With its about-face in 2022, Save Mart not only failed to comply with the Plan terms for modifying a benefit program, and therefore failed even to effectuate a termination, but also breached its fiduciary duty to Plaintiffs and the proposed Class.

When Save Mart attempted to terminate retiree benefits in 2022, it failed to follow a basic requirement of the Plan: use of a formal "written instrument" that was "duly executed on behalf of the Company." Declaration of Anne B. Shaver ("Shaver Decl."), EX1, at §10.02. Instead, Save Mart distributed a letter to retirees in April 2022, purporting to discontinue benefits as of June 2022. *Id*., EX2. This haste is unsurprising: Though Save Mart had been owned by the same family since its founding 70 years ago, this letter came within a month of Save Mart's acquisition by a private equity firm. More importantly, this haste is fatal to Save Mart's attempt to terminate the Plan. Indeed, Save Mart all but acknowledged as much in a document produced in this litigation not two

weeks ago, which purports to "ratify the termination of the HRA Plan, effective as of the Original Termination Date; [or] in the event a court of competent jurisdiction makes a final and binding determination that the termination of the HRA Plan on the Original Termination Date is invalid, the Company wishes to terminate the HRA Plan . . . effective as of [April 30, 2024]." *Id.*, EX3, at SAVEMART00106473. Whether the 2022 termination was, in fact, invalid is a binary "yes/no" question, the answer to which is identical for *all* proposed Class members. Because it shares this "fatal similarity" across the Class, it is a common question appropriate for class treatment. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 470 (2013).

Even if Save Mart had properly terminated the Plan, Save Mart's actions in 2022 revealed that its decades of common, uniform representations that the retiree medical benefit was for life were, in fact, misrepresentations. These misrepresentations took three primary forms. First, Save Mart trained its Human Resources staff that retiree health benefits lasted for the retiree's lifetime, and that staff in turn told this to employees. *See infra* § II.B.1. There was absolutely no confusion within the Save Mart administration about consistency in the delivery of this message; indeed, it was repeatedly delivered to employees by owner Bob Piccinini himself. *Id.* Second, Save Mart annually distributed retirement benefit summaries stating that retiree medical benefit coverage would end "upon the death of the retiree"—a statement that Human Resources pointed to when describing the lifetime benefits. *See infra* § II.B.2. Third, Save Mart aggressively tried to dissuade employees from unionization by advertising widely that the company provided benefits "as good as or better than" the union's benefits. *See infra* § II.B.3. However, all these representations were false because the benefits were not guaranteed for life. In fact, the Plan contained language permitting Save Mart to unilaterally terminate non-union retiree medical benefits any time it wanted. By contrast, the union's lifetime benefits were protected by collective bargaining agreements and considerably more secure than the non-union benefits.[1]

[1] This reality was just borne out by Save Mart's recent attempt to retroactively amend the Plan to cure its faulty termination of the HRA program. The document states that on July 14, 2023, an arbitrator ruled that terminating the program for Teamster union members who were participants in the Plan was a violation of the company's collective bargaining agreement with the Teamsters and that Save Mart was required to reinstate the Plan for these workers. Shaver Decl., EX3, at SAVEMART00106473.

Plaintiffs, on behalf of themselves and the proposed Class, allege that through these actions: (1) Save Mart failed to properly terminate the benefits, and therefore Save Mart owes them all benefits it should have paid from June 2022 to the present under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (hereinafter, "Benefits Due Claim");[2] and (2) Save Mart breached its fiduciary duty to Plaintiffs and the Class by misrepresenting the terms of the Plan under ERISA § 404(a)(1), 29 U.S.C. § 1321(a)(1), for which Plaintiffs seek the equitable remedies of surcharge or reformation pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (hereinafter, "Misrepresentation Claim"). *See, e.g., Warmenhoven v. NetApp, Inc.*, 13 F.4th 717 (9th Cir. 2021) (reversing summary judgment for fiduciary on claim that it misrepresented that a retirement plan provided lifetime medical benefits in presentations to employees, when in fact the formal plan included no such guarantee).

Plaintiffs seek certification of a Class consisting of the non-union participants in the retiree Plan at the time of its termination, as well as non-union Save Mart employees who retired and met the eligibility criteria to become participants in the Plan at any time between when Save Mart announced the termination on April 22, 2022 and the resolution of this action. This Class consists of Save Mart's longest serving and most dedicated employees, as earning Save Mart's retiree medical benefits was no small feat. An employee had to meet one of the following criteria: if hired before 2010: (a) age 55 with 30 years of service; (b) age 60 with 15 years of service; (c) age 65 with 10 years of service; or, if hired in 2010 or later: (d) age 60 with at least 25 years of service. Shaver Decl., EX1, at App. C. Thus, Plaintiffs and the Class dedicated their careers, or major portions thereof, to Save Mart in order to qualify for these medical benefits,[3] which Save Mart

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[2] As to the Benefits Due Claim, Plaintiffs also have a claim for equitable relief to redress violations of the Plan terms under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). ECF No. 70 ("SAC"), Count III. Both the Benefits Due Claim (Count II) and equitable relief claim (Count III) are based on the same underlying theory: that Save Mart failed to comply with the Plan terms for terminating benefit programs by way of a formal written instrument.

[3] Shaver Decl., D11, Declaration of John Aiello ("Aiello Decl."), ¶ 1 (worked for Save Mart for 28 years); *id.*, D12, Declaration of Joseph Andrade ("Andrade Decl."), ¶ 1 (49 years); *id.*, D1, Declaration of Katherine Baker ("Baker Decl."), ¶ 1 (28 years); *id.*, D13, Declaration of Chris Boele ("Boele Decl."), ¶1 (34 years); *id.*, D14, Declaration of Terry Bray ("Bray Decl."), ¶1 (29 years); *id.*, D15, Declaration of Mike Brown ("Brown Decl."), ¶ 1 (36 years); *id.*, D16, Declaration of Marilyn Cardoza ("Cardoza Decl."), ¶1 (29 years); *id.*, D17, Declaration of Michael Cargill ("Cargill Decl."), ¶ 1 (33 years); *id.*, D18, Declaration of Curtis Castleton ("Castleton Decl."), ¶ 1 (38 years); *id.*, D19, Declaration of Joseph Chu ("Chu Decl."), ¶ 1 (50

promised would last for the duration of their lives.

Plaintiffs' claims are ideally suited for class certification. The requirements of Rule 23(a) are easily met: Class members number in the hundreds, the questions of law and fact concerning Save Mart's conduct are the same for all Class members, Plaintiffs' claims are typical of the Class, and Plaintiffs and their counsel will adequately represent the Class. Rule 23(b)(1) is satisfied because adjudication of these issues for one Class member would effectively resolve the issues for all Class members, and separate actions by individual Class members would create the risk of inconsistent standards of conduct for the fiduciary (Save Mart). The claims also meet the requirements of Rule 23(b)(2) because Save Mart has acted on grounds that apply generally to the Class and Plaintiffs seek an injunctive remedy to provide relief to all Class members. Finally and alternatively, the Class may be certified under 23(b)(3) because common questions of law and fact predominate and a class action is superior to other methods for resolving these claims.

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years); *id.*, D20, Declaration of William Cook ("Cook Decl."), ¶ 1 (30 years); *id.*, D21, Declaration of Edward Corvelo ("Corvelo Decl."), ¶ 1 (45 years); *id.*, D22, Declaration of Dale Dalrymple ("Dalrymple Decl."), ¶1 (26 years); *id.*, D23, Declaration of Rex Dickenson ("Dickenson Decl."), ¶ 1 (18 years); *id.*, D24, Declaration of Julie Di Francia ("Di Francia Decl."), ¶ 1 (28 years); *id.*, D25, Declaration of Michael Doktor ("Doktor Decl."), ¶ 1 (38 years); *id.*, D26, Declaration of Mark Endres ("Endres Decl."), ¶ 1 (41 years); *id.*, D27, Declaration of Peter Finnerty ("Finnerty Decl."), ¶ 1 (21 years); *id.*, D28, Declaration of Jamie Gatzman ("Gatzman Decl."), ¶ 1 (24 years); *id.*, D29, Declaration of Janine Hatchet ("Hatchet Decl."), ¶ 1 (29 years); *id.*, D30, Declaration of John Heck ("Heck Decl."), ¶ 1 (31 years); *id.*, D31, Declaration of Artemas Ryce Hopkins ("Hopkins Decl."), ¶ 1 (44 years); *id.*, D32, Declaration of Judith Ingram ("Ingram Decl."), ¶ 1 (19 years); *id.*, D33, Declaration of William Jaques ("Jaques Decl."), ¶ 1 (40 years); *id.*, D34, Declaration of Anthony Kirst ("Kirst Decl."), ¶ 1 (38 years); *id.*, D35, Declaration of Linda Kline ("Kline Decl."), ¶ 1 (36 years); *id.*, D36, Declaration of Toni Koch ("Koch Decl."), ¶ 1 (31 years); *id.*, D2, Declaration of José Luna ("Luna Decl."), ¶ 1 (33 years); *id.*, D38, Declaration of Lori McGuffey ("McGuffey Decl."), ¶ 1 (35 years); *id.*, D39, Declaration of Jeffry Meader ("Meader Decl."), ¶1 (40 years); *id.*, D40, Declaration of Bonnie Medina ("Medina Decl."), ¶ 1 (34 years); *id.*, D41, Declaration of Daniel Miller ("Miller Decl."), ¶ 1 (28 years); *id.*, D42, Declaration of Donna Moschetti ("Moschetti Decl."), ¶ 1 (32 years); *id.*, D43, Declaration of Jerry Musso ("Musso Decl."), ¶ 1 (33 years); *id.*, D44, Declaration of Jonathan Ow ("Ow Decl."), ¶ 1 (28 years); *id.*, D45, Declaration of Melanie Parker ("Parker Decl."), ¶ 1 (33 years); *id.*, D46, Declaration of Richard Piccinini ("Piccinini Decl."), ¶ 1 (37 years); *id.*, D3, Declaration of Edgar Popke ("Popke Decl."), ¶ 1 (39 years); *id.*, D49, Declaration of Kevin Smith ("Smith Decl."), ¶ 1 (41 years); *id.*, D50, Declaration of Kimberley Snodgrass ("Snodgrass Decl."), ¶ 1 (35 years); *id.*, D51, Declaration of Lucille Stafford ("Stafford Decl."), ¶ 1 (28 years); *id.*, D52, Declaration of Kelee Swisher ("Swisher Decl."), ¶ 1 (41 years); *id.*, D53, Declaration of Lawrence Szeto ("Szeto Decl."), ¶ 1 (45 years); *id.*, D54, Declaration of Roy Torres ("Torres Decl."), ¶ 1 (39 years); *id.*, D55, Declaration of Allan Walker ("Walker Decl."), ¶ 1 (36 years); *id.*, D56, Declaration of Richard Ward ("Ward Decl."), ¶ 1 (40 years); *id.*, D4, Declaration of Denny Wraske ("Wraske Decl."), ¶ 1 (46 years).

II. STATEMENT OF FACTS

A. The Plan Terms and Purported Plan Termination

Save Mart adopted the Save Mart Select Health Benefit Plan in 1982, providing benefits for both active employees and retirees who met the age and service requirements in that plan. Shaver Decl., EX1 at § 1.01. That plan was amended and restated at various times over the years. In 2012, active employees were spun off into their own plan, leaving the retirees in a separate plan now called the Save Mart Select Retiree Health Benefit Plan (referred to herein as the "Plan").[4] *Id*. Save Mart has lost all written copies of the Plan from prior to 2010. Shaver Decl., CT1, Deposition of Tami Basey ("Basey Dep.") at 23:20-24:13. Thus, for the 1982 to 2010 time period, the parties must rely on witness memory and a handful of summary documents referencing the Plan terms then in existence.

The mechanisms for providing benefits to retirees who met the eligibility criteria changed in various ways over the years, culminating in a Health Reimbursement Arrangement ("HRA") established in 2015. The HRA provided eligible retirees and their spouses cash credits to HRA accounts that could be used to pay for qualified medical expenses or for health insurance premiums. Shaver Decl., EX6. The retiree and spouse received $500 each per month before the retiree reached age 65, and $300 each per month thereafter. *Id*., at SAVEMART00008620. Participants were also able to accrue unused funds in their HRA account to save for such time as they had need of them. *Id*. At the time Save Mart ceased operating the Plan in 2022, hundreds of retirees were holding tens of thousands of dollars in their accounts that they had been saving for expensive medical procedures.[5] All of this accrued benefit liability reverted back as a windfall to Save Mart when it

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[4] The terms of the Plan in effect at the time Save Mart ceased providing benefits in 2022 are set forth in two documents: the Save Mart Select Retiree Health Benefit Plan As Amended and Restated Effective January 1, 2012 (Shaver Decl., EX1), which includes two amendments, one adopted April 1, 2016 that implemented the HRA benefit program (Shaver Decl., EX4), and another adopted July 1, 2018 that made changes to the HRA program eligibility rules (Shaver Decl., EX5)—these documents collectively are referred to herein as the Plan Document. The detailed terms of the HRA benefit program are set forth in a separate document entitled "Save Mart Select Health Reimbursement Arrangement Summary Plan Description" (referred to herein as the "SPD"). Shaver Decl., EX6.

[5] Shaver Decl., EX10 (spreadsheet of Class member data showing that almost 200 Class members forfeited money to Save Mart); Hatchet Decl., ¶ 10 (forfeited $3,000 to $4,000); Parker Decl., ¶ 10 (forfeited $11,250); Ward Decl., ¶ 10 (forfeited $11,000).

stopped operating the Plan, leaving the retirees empty-handed. Shaver Decl., EX7, at SAVEMART00021318, EX8, at SAVEMART00025121.

As of 2012, the Plan Document contained a reservation of rights at section 10.02, stating as follows: "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." Shaver Decl., EX1, at § 10.02. This reservation of rights was not in the original Plan adopted in 1982. *Id.*, D6, Declaration of Beth Fugate ("Fugate Decl."), ¶ 9. Benefits Manager Beth Fugate recalls that Save Mart added the reservation of rights during an amendment process in the 1990's. *Id*. When Save Mart added this language, it did so only in the fine print of the Plan documents, and did not otherwise alert employees that the promise of lifetime benefits had just been seriously qualified. *Id.*, ¶ 10 ("Save Mart did not announce or publicize this change to the Plan language. To my knowledge, there was no statement of material modification or other announcement that pointed out this change in the Plan language to Save Mart employees. The language was simply inserted in the back of the Plan booklet."). Save Mart also did not alert its Human Resources staff that anything had changed. *Id.*, D5, Declaration of Vickie Kay Del Re ("Del Re Decl."), ¶ 12 ("I was not aware that the Summary Plan Description or the Plan document contained language stating that Save Mart reserved the right to modify or terminate the retiree medical benefits. No one at Save Mart ever communicated to me that this was written in the Plan documents or trained me to tell employees about this provision in the Plan."); Fugate Decl., ¶ 11 ("I did not think that this change to the Plan language had any practical significance because all of the non-union retirees were receiving their benefits, the benefits were good, and Save Mart was representing that the benefits would keep going. I believed that this language was simply boiler-plate legalese and did not think it outweighed the promises Save Mart was making to its employees about lifetime retiree medical benefits."). The Human Resources Department continued to make assurances to employees that retirement benefits were "lifetime benefits" and would always be as good as or better than the union's benefits. *See infra* § II.B.1.

When Save Mart terminated the HRA benefit program in 2022, it did not do so in compliance with section 10.02, quoted above. That is, it did not adopt a formal "written instrument"

that was "duly executed on behalf of the Company." In this litigation, Save Mart has taken the position that a letter sent out to retirees notifying them of the decision to terminate the program, and/or a contract modification with the administrator of the program, constitute the "written instrument" required by section 10.02. Shaver Decl., EX11, at 3-4. No doubt realizing the implausibility of this legal position, it also produced for the first time on June 19, 2024 a "Manager Consent" document executed on April 30, 2024 by the Plan sponsor. This "Manager Consent" purports to "ratify" the 2022 termination, or, alternatively, terminate the HRA benefit program effective April 30, 2024. *Id*., EX3, at SAVEMART00106473. This is effectively a concession that the 2022 termination was faulty. Regardless, as relevant to this Motion, the answer to the question of whether these documents meet the written instrument requirement in the Plan will be the same for all Class members.

B. Save Mart's Classwide Misrepresentations About the Plan Terms

From 1982 to 2022, Save Mart made continuous, uniform misrepresentations to its employees regarding the terms of the Plan, both in written communications and through official company representatives at large group meetings. The classwide misrepresentations fall into three general categories: 1) communications from the Human Resources Department that retiree medical benefits would last for the lifetime of the retiree; 2) written benefit summaries stating that retiree medical benefit coverage lasted until the death of the retiree, and omitting any reference to Save Mart's reservation of rights; and 3) communications from Human Resources and senior company executives that non-union benefits would always be as good as or better than the union benefits. These misrepresentations and omissions were made on a uniform basis to all Class members.

1. Classwide Communications From the Human Resources Department

There is no question that Save Mart trained its Human Resources staff to deliver the message that the Plan offered a lifetime benefit. Six of those Human Resources professionals have themselves submitted sworn declarations confirming their training and communications to Class members on this point. And fifty Class members have also submitted declarations regarding HR's representations, which uniformly affirm that the message from Save Mart was clear: once earned, the benefits would last for life.

Wendy Kennedy, Vickie Del Re, Kit Tharp, Beth Fugate, Valerie Vallo, and Debbie Murillo all worked in Save Mart's Human Resources Department during the relevant time period.[6] Each of these Human Resources professionals had job responsibilities that included communicating with employees about the non-union retirement benefits.[7] They all understood that the retiree medical benefit was a lifetime benefit; in other words, if an employee worked long enough to attain eligibility, the benefits were theirs for life.[8] They were all trained to describe it to employees accordingly, and they did so.[9] When they gave presentations to employees about retirement benefits, they all assured employees that the retiree medical benefit would last for the lifetime of the retiree.[10] They were **not** trained to advise employees that Save Mart had the option to terminate the benefits at any time, and they did not do so.[11] Rather, they genuinely believed that the benefits

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[6] Ms. Kennedy was a Vice President of Human Resources and worked at Save Mart from 1991 to 2010. Shaver Decl., D7, Declaration of Wendy Kennedy ("Kennedy Decl."), at ¶ 3. Ms. Del Re was a Benefits Manager and worked at Save Mart from 1982 to 2013. Del Re Decl., ¶¶ 2-3. Ms. Tharp was a Manager of Recruiting and worked at Save Mart from 1985 to 2015. Shaver Decl., D9, Declaration of Kathleen Tharp ("Tharp Decl."), ¶ 3. Ms. Fugate was a Benefits Manager and worked for Save Mart from 1984 to 2005. Fugate Decl., ¶ 1. Ms. Vallo was a Manager of Employee Relations and worked for Save Mart from 1986 to 2017. Shaver Decl., D10, Declaration of Valerie Vallo ("Vallo Decl."), ¶ 3. Ms. Murillo was a Senior Manager of Benefits and worked for Save Mart from 2012 to 2022. *Id.*, D8, Declaration of Deborah Murillo ("Murillo Decl."), ¶ 2.

[7] Kennedy Decl., ¶ 8; Del Re Decl., ¶ 5; Tharp Decl., ¶ 5; Fugate Decl., ¶ 2; Vallo Decl., ¶¶ 5-6; Murillo Decl., ¶ 3.

[8] Del Re Decl., ¶ 4 ("The common understanding in the benefits department was that once the retirement benefits were earned, they were locked in for life—and that is how we described the benefits to the rest of the company."); Fugate Decl., ¶ 3 ("My understanding of the retiree health benefit was that it was a lifetime benefit. I knew that the owner Bob Piccinini and all of the executives received the same retiree health benefits as the non-union employees, and the messaging from the top down was that if an employee met the eligibility requirements then they were theirs until the death of the retiree."); *see also* Kennedy Decl., ¶ 10 (same); Tharp Decl., ¶ 9 (same); Vallo Decl., ¶¶ 6, 14 (same); Murillo Decl., ¶ 5 (same).

[9] *Id.*

[10] Kennedy Decl., ¶¶ 10-11; Del Re Decl., ¶¶ 5, 7; Tharp Decl., ¶¶ 5-8; Fugate Decl., ¶¶ 6-7; Vallo Decl., ¶ 11; Murillo Decl., ¶ 3.

[11] Del Re Decl., ¶ 9 ("I never heard anyone at Save Mart state that the retiree medical benefits could be taken away or that Save Mart had reserved the right to take away these benefits.") and ¶ 8 ("I and the other Human Resources representatives never told non-union employees that Save Mart could take away their retiree medical benefits."); Fugate Decl., ¶¶ 3, 10-12 ("I never heard or was a part of any conversations where Save Mart representatives discussed taking away the retiree medical benefits. I had an open channel of communication with Bob Piccinini and spoke freely with him….In all the conversations we had about the company and about benefits, he never told me that he or anyone at the company planned to take away the retiree medical benefits or that it was even a potential future option."); *see also* Kennedy Decl., ¶ 16; Del Re Decl., ¶ 12; Tharp

were guaranteed for life.[12]

Class members attest to attending meetings where Human Resources staff described retiree medical benefits as "lifetime benefits." Andrade Decl., ¶ 7 ("I had one on one discussions with Save Mart HR representatives [Wendy Kennedy and Valerie Vallo] and was told that lifetime benefits were 'the way it has always been' and would continue."); Cardoza Decl., ¶ 5 ("Throughout the meeting, Save Mart's Human Resources representatives spoke about retirement benefits and represented that such benefits would last for the lifetime of the retiree."); Cook Decl., ¶¶ 6-7 ("Wendy [Kennedy], other HR representatives, corporate executives, and even Bob Piccinini would tell us during these presentations that the non-union benefits would . . . always be for the life of the retiree. . . . [Wendy] also told new hires that if they worked for Save Mart long enough to earn the retiree medical benefits, Save Mart would give them medical benefits for the rest of their lives after retirement."); Corvelo Decl., ¶ 6 ("Kit [Tharp] told the interviewee directly that the non-union retiree medical benefits would last for their life."); Di Francia Decl., ¶ 6 ("I recall hearing Human Resources representatives Beth Fugate and Vicki Del Re stating that retiree medical benefits were lifetime benefits."); Hatchet Decl., ¶¶ 6-7 ("I recall at this meeting that one of the meeting's organizers—someone who worked in Save Mart's HR department—told us that retiree health benefits would last for the lifetime of the retiree."); Musso Decl., ¶ 8 ("During these meetings, Steve [Beaver], Wendy [Kennedy], Vickie [Del Re], and Valerie [Vallo] . . . described the non-union retiree medical benefit as a lifetime benefit."); Torres Decl., ¶ 4 ("In describing the retiree medical benefit, [Kit Tharp and Art Patch] promised me that it would last for my entire life after retirement[.]"); Swisher Decl., ¶ 6 ("I specifically recall attending such meetings at the Human Resources annex building, where Debbie Murillo and Vickie Del Re . . . describe[ed] the retiree health benefit as a 'lifetime benefit.'"); *see also* Aiello Decl., ¶¶ 6-7 (same); Baker Decl., ¶ 8 (same); Boele Decl., ¶ 6 (same); Bray Decl., ¶ 6 (same); Castleton Decl., ¶ 6 (same); Chu Decl., ¶ 4 (same); Dalrymple Decl., ¶ 6 (same); Finnerty Decl., ¶¶ 4-5 (same); Kirst Decl., ¶¶ 4-5 (same); Koch Decl., ¶ 4 (same); Luna Decl., ¶¶ 5-7 (same); Piccinini Decl., ¶ 4 (same); Shaver Decl., D48,

Decl., ¶ 14; Vallo Decl., ¶ 14; Murillo Decl., ¶ 5.

[12] Kennedy Decl., ¶ 10; Del Re Decl., ¶ 14; Tharp Decl., ¶ 9; Fugate Decl., ¶ 13; Vallo Decl., ¶¶ 6, 14; Murillo Decl., ¶ 5.

Declaration of Karen Richards ("K. Richards Decl."), ¶ 6 (same); Smith Decl., ¶ 7 (same); Szeto Decl., ¶ 5 (same); Ward Decl., ¶ 5 (same).

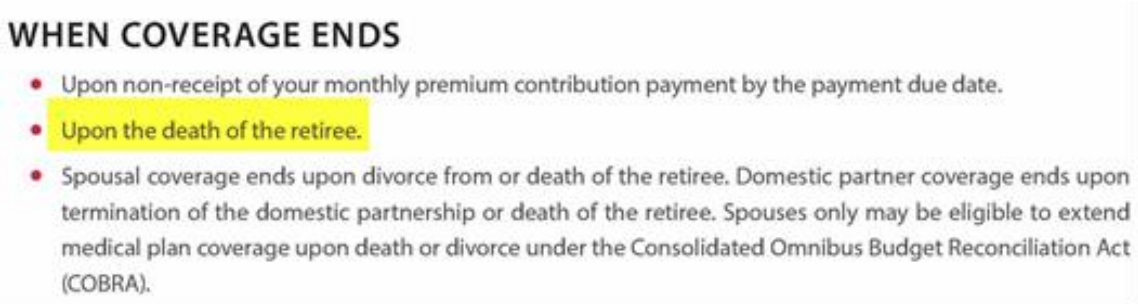
The message from Save Mart was clear and consistent throughout the relevant time period: work long enough to earn retirement benefits, and they are yours for life. Indeed, this message was driven home repeatedly by Save Mart founder Bob Piccinini. Mr. Piccinini told employees that they were his family, and that he would make sure they were taken care of in retirement. He emphasized the lifetime retiree medical benefit as a way that he would repay employees for their work building up the company. Cargill Decl., ¶ 5 ("I distinctly remember Bob saying to me, 'You don't have to worry about medical benefits, you're always going to have medical benefits.' . . . Bob often reiterated his belief . . . that his employees were loyal to Save Mart and that Save Mart would remain loyal to the employees in return, even in retirement."); Corvelo Decl., ¶ 8 ("Bob often described us Save Mart employees as a 'family,' expressing that he wanted to take care of us, even in retirement."); Di Francia Decl., ¶ 4 ("[Bob] said to us: when you retire and start to age, that is when you will really need your medical benefits and I want to make sure you're taken care of because you've built this company."); Kline Decl., ¶ 7 ("Bob always told his employees that he would take care of them, even in retirement. He was deeply loyal, and he felt a sense of personal responsibility for his workers."); Meader Decl., ¶ 7 ("Every winter, Bob visited every Save Mart store during his yearly 'store tour.' During these visits, Bob told employees that they were his 'family,' and that it was therefore his duty to take care of them, even in retirement. Bob made similar statements at the yearly employee awards ceremonies, and he made similar statements each year at the company's Christmas party."); Miller Decl., ¶¶ 4-5 ("Bob . . . expressed to me that he intended for these retiree health benefits to stay. . . . Save Mart had a culture of taking care of employees in their retirement by providing lifetime medical care, and it had always been that way[.]"); Musso Decl., ¶ 10 ("Bob knew how dedicated and loyal we were, and he told us during the yearly Store Manager of the Year reception and his annual Christmas store tour that he would repay our dedication and loyalty by always taking care of us, even in retirement."); Ow Decl., ¶ 7 ("Bob told us that we were joining the Save Mart 'family' and that he would therefore always take care of us, even in retirement. Bob repeated this messaging throughout my time at Save Mart, but

especially in the first few years after the Albertsons acquisitions."); Torres Decl., ¶ 8 ("At every turn, Bob told us that we were his 'family,' and that it was therefore his duty to take care of us, even in retirement. . . . During some of [Bob's store] visits, he took me aside and told me that he sought to take care of me for my entire retirement by providing the retiree medical benefit. He told me the same thing at an awards ceremony in 1999 when I received the Store Manager of the Year award."); Walker Decl., ¶ 4 ("In [manager] meetings, at least twice a year, Bob Piccinini would say that we would have our benefits for life after we retired. This included retiree health benefits under the Plan."); *see also* Aiello Decl., ¶ 6 (same); Boele Decl., ¶ 7 (same); Cook Decl., ¶ 8 (same); Hatchet Decl., ¶ 6 (same); Hopkins Decl., ¶¶ 4-5 (same); Koch Decl., ¶ 4 (same); Shaver Decl., D37, Declaration of Oscar Lawrence ("Lawrence Decl.,"), ¶¶ 5-6 (same); Luna Decl., ¶ 7 (same); McGuffey Decl., ¶ 5 (same); Parker Decl., ¶ 7 (same); Shaver Decl., D47, Declaration of Barry Richards ("B. Richards Decl."), ¶ 5 (same); Snodgrass Decl., ¶ 7 (same); Szeto Decl., ¶ 5 (same); Ward Decl., ¶ 6 (same); Wraske Decl., ¶ 7 (same). *See also* Vallo Decl., ¶ 15 ("Save Mart portrayed a company ethos of taking care of its employees, which was fostered by the owner Bob Piccinini. It was widely understood both within Human Resources and companywide that Save Mart would take care of eligible retirees for life. There was a culture of longevity and a system of reward for longevity at Save Mart—employees stayed with the company for decades, and the company fostered a feeling of trust that it would always take care of its employees.").

2. Written Benefits Summaries Distributed to Employees

Save Mart misrepresented the Plan and omitted key information in written pamphlets summarizing retiree medical benefits. The Human Resources Department updated the retiree medical benefit pamphlet annually and distributed it to employees during open enrollment season.[13] It contained a description of the medical care available, the eligibility requirements, and a statement that coverage would end "upon the death of retiree," as shown in the following excerpt:

[13] Del Re Decl., ¶ 10 (describing process for distributing pamphlets annually to employees whereby employees were required to sign a verification of receipt in order to ensure delivery to every employee); Murillo Decl., ¶ 6.



WHEN COVERAGE ENDS

- Upon non-receipt of your monthly premium contribution payment by the payment due date.
- Upon the death of the retiree.
- Spousal coverage ends upon divorce from or death of the retiree. Domestic partner coverage ends upon termination of the domestic partnership or death of the retiree. Spouses only may be eligible to extend medical plan coverage upon death or divorce under the Consolidated Omnibus Budget Reconciliation Act (COBRA).

Shaver Decl., EX12, at SAVEMART00009330 (highlight added).[14] These brochures omitted language cautioning retirees not to rely on the availability of health benefits because those benefits could be taken away at any time. *Id.* Plaintiffs and Class members understood the statements in these brochures to mean that once non-union employees achieved the requirements for participating in the Plan, their health care benefits would be provided for the rest of their lives.[15]

Moreover, Human Resources staff relied on these pamphlets and believed the statement that coverage would end "upon the death of the employee" to be accurate and consistent with their representations to employees about lifetime benefits. Vallo Decl., ¶ 15 ("This pamphlet was mailed out to employees on an annual basis. . . . The pamphlet contained useful information that we wanted to share widely so employees would have the information they needed regarding benefits. 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. . . . I would have told anyone who asked me that this provision means the benefit would last for the duration of the retiree's life."); Del Re Decl., ¶ 10 ("I believe the statement that retiree health coverage ends 'upon the death of the retiree' is consistent with what the Benefits Department always told employees about the duration of the retiree health benefit: that once earned, the benefit would last for the life of the retiree."); Tharp

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[14] *See also* Shaver Decl., EX13, EX14, EX15, EX16, EX17, EX18, EX19, EX20, EX21 (pamphlets from 2015, 2014, 2013, 2012, 2011, 2009, 2008, 2007, and 2006 containing identical language). Save Mart has lost earlier versions of this pamphlet, but Vickie Del Re affirms that, "To my memory the pamphlets always contained this language that retiree health coverage ended 'upon the death of the retiree.'" Del Re Decl., ¶ 10.

[15] *See* B. Richards Decl., ¶ 6 ("I read this pamphlet and believed it to be an accurate representation that the retirement benefits were guaranteed to me for life, once I had worked long enough to earn them."); *see also* Aiello Decl., ¶ 5 (same); Andrade Decl., ¶ 4 (same); Baker Decl., ¶ 7 (same); Boele Decl., ¶ 5 (same); Bray Decl., ¶ 4 (same); Brown Decl., ¶ 5 (same); Cardoza Decl., ¶ 4 (same); Castleton Decl., ¶ 5 (same); Chu Decl., ¶ 5 (same); Cook Decl., ¶ 5 (same); Corvelo Decl., ¶ 7 (same); Dalrymple Decl., ¶ 5 (same); Di Francia Decl., ¶ 5 (same); Doktor Decl., ¶ 5 (same); Hatchet Decl., ¶ 5 (same); Ingram Decl., ¶ 5 (same); Jaques Decl., ¶ 6 (same); Kline Decl., ¶ 6 (same); Luna Decl., ¶ 9 (same); Medina Decl., ¶ 5 (same); Musso Decl., ¶ 7 (same); Ow Decl., ¶ 5 (same); Popke Decl., ¶ 7 (same); Snodgrass Decl., ¶ 5 (same); Stafford Decl., ¶ 5 (same); Swisher Decl., ¶ 5 (same); Wraske Decl., ¶ 8 (same).

Decl., ¶ 12 (same); Murillo Decl., ¶ 6 (same); Kennedy Decl., ¶ 16 (pamphlet did not advise employees of Save Mart's reservation of rights); Fugate Decl., ¶ 10 ("The new language with the reservation of rights was not highlighted" in written communications.).

Human Resources staff further understood that non-union employees were relying on these pamphlets as their main source of written information for details regarding the retiree medical benefits offered to non-union employees. Del Re Decl. ¶ 11 ("I believe employees relied on the shorter benefits pamphlets that were provided annually during open enrollment."); *see also* Tharp Decl., ¶ 12; Vallo Decl., ¶ 15.

3. Promises that Benefits Will Always Be As Good As or Better than Union Benefits

As part of Save Mart's efforts to discourage union participation by its workforce, it repeatedly represented to employees that there was no reason to pay dues to the union because non-union benefits, including retiree medical care, would always be "as good as or better than" those enjoyed by union employees.[16]

This message was company gospel and hammered home at meetings called "roadshows," where Human Resources representatives and other company spokespeople—sometimes even owner Bob Piccinini himself—visited Save Mart grocery stores and spoke with as many employees as possible to dissuade them from voting for the union or to encourage unionized stores to vote the

[16] Fugate Decl., ¶ 4-7 ("I and other Human Resources personnel would talk with as many non-union employees as we could about benefits, and we would tell them that "their 'benefits would always be as good as or better than the union's.' . . . We would say things like: 'I don't know why you'd want to join the union, your benefits are as good or better and it doesn't cost you the union dues.'"); Del Re Decl., ¶¶ 6-7 (same); Kennedy Decl., ¶¶ 13-15 (same); Tharp Decl., ¶¶ 5-8 (same); Vallo Decl., ¶¶ 5, 8-11 (same); *see also* Aiello Decl., ¶¶ 4, 6-7 ("I recall frequently hearing and being told that the non-union benefits 'would always be as good as or better than the union's benefits.'"); Baker Decl., ¶¶ 5-6, 8 (same); Boele Decl., ¶¶ 4, 6-7 (same); Cargill Decl., ¶ 4 (same); Castleton Decl., ¶¶ 4, 6-7 (same); Cook Decl., ¶¶ 4, 6-8 (same); Corvelo Decl., ¶¶ 4-6 (same); Dickenson Decl., ¶ 4 (same); Di Francia Decl., ¶ 7 (same); Endres Decl., ¶¶ 4-6 (same); Gatzman Decl., ¶ 4 (same); Hatchet Decl., ¶ 4 (same); Ingram Decl., ¶ 4 (same); Jaques Decl., ¶ 5 (same); Kline Decl., ¶¶ 4-5 (same); Koch Decl., ¶¶ 4-5 (same); Luna Decl., ¶¶ 5, 8 (same); McGuffey Decl., ¶ 4 (same); Meader Decl., ¶¶ 4-6 (same); Medina Decl., ¶ 4 (same); Miller Decl., ¶ 4 (same); Moschetti Decl., ¶¶ 4-6 (same); Musso Decl., ¶¶ 4-6, 8 (same); Ow Decl., ¶ 4 (same); Parker Decl., ¶ 4 (same); Piccinini Decl., ¶¶ 4-5 (same); Popke Decl., ¶¶ 5-6 (same); K. Richards Decl., ¶ 5 (same); Smith Decl., ¶¶ 4-6 (same); Snodgrass Decl., ¶ 4 (same); Stafford Decl., ¶¶ 4, 6 (same); Swisher Decl., ¶ 4 (same); Szeto Decl., ¶ 4 (same); Ward Decl., ¶ 4 (same); Wraske Decl., ¶¶ 5-6 (same).

union out.[17] The Human Resources staff involved "repeatedly told non-union employees that their benefits would 'always be as good or better than the union's benefits.' Retiree medical benefits were encompassed within this promise." Del Re Decl., ¶ 6.[18] This assurance was so widespread that it became part of the company culture.[19]

This message is evidenced in contemporaneous writings as well. For example, in a pamphlet

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[17] Del Re Decl., ¶¶ 6-7 ("One of my responsibilities was visiting stores to discuss the advantages to non-union employees of stores remaining non-unionized by talking about how generous the non-union employee benefits were. These meetings were informally referred to internally as 'the roadshow.' . . . At all of these roadshows, I and the other HR representatives repeatedly told non-union employees that their benefits would 'always be as good or better than the union's benefits.'"); Fugate Decl., ¶¶ 4 ("An important part of my role within Human Resources was pitching how generous the non-union benefits packages were and specifically that they were as good or better than the union benefits. It was less expensive for Save Mart to provide benefits to employees through the self-insured company plan than it was to pay the union to provide benefits. This was one reason why Save Mart worked hard to try to convince employees not to join the union."); Kennedy Decl., ¶ 14 (same); Tharp Decl., ¶¶ 6-8 (same); Vallo Decl., ¶¶ 5, 9-11 (same); *see also* Aiello Decl., ¶ 4 ("While I was an Assistant Manager and still a member of the union, Bob Piccinini and Bob Midboe called me into a meeting and Bob Midboe told me: 'We're trying to make a bunch of our stores non-union so we can have leverage against the union,' and he asked me if I could help them promote the company's non-union benefits."); Cook Decl. ¶ 4 ("I recall that, as a general matter, part of the company's strategy to convince people not to join the union was to promise that company benefits would always be as good as or better than union benefits."); Musso Decl. ¶¶ 4, 6 ("Save Mart called a meeting of all the new hires to explain why we should not vote to join the union. . . . During the meeting, Bob [Midboe] told us that we should not join the union because our non-union benefits—which included the lifetime retiree medical benefit—would always be as good as or better than the union benefit."); Smith Decl. ¶ 5 ("The company passed out pamphlets to customers entering the store and took out advertisements in many local newspapers. I recall that these pamphlets and newspaper advertisements assured customers that non-union employees' benefits would always be as good as or better than the union benefits."); Corvelo Decl. ¶ 5 ("[T]he HR representatives argued that the non-union benefits were just as good as, if not better than, the union benefits, but were actually more valuable because workers wouldn't need to pay any union dues to receive them. I believe the HR representatives made these statements in attempt to prevent unionization.").

[18] *See also* Fugate Decl., ¶¶ 4-7; Kennedy Decl., ¶¶ 12-14; Tharp Decl., ¶ 6; Vallo Decl., ¶¶ 5, 8.

[19] Kennedy Decl., ¶ 12 ("These statements were made so regularly by management, supervisors, and Human Resources personnel that it was commonly understood and repeated by and amongst Save Mart employees. I along with the Human Resources employees whom I supervised all believed these messages one hundred percent."); *see also* Stafford Decl., ¶ 4 ("This was stated so consistently and by so many people that it was as if it was in the ether at the company."); Miller Decl., ¶ 5 ("Save Mart had a culture of taking care of employees in their retirement by providing lifetime medical care, and it had always been that way, a large reason why I remained at Save Mart for many years."); Heck Decl., ¶ 4 ("I believed this to be true through my career as the "family culture" at Save Mart was routinely emphasized by Save Mart management. Save Mart management also routinely talked about the "Golden 85" and the lifetime medical benefits that came with it."); Dickenson Decl., ¶ 5 ("Save Mart had a created a culture where retiree benefits had always been for the lifetime or the retiree and it would continue to be that way, a large reason why I remained at Save Mart for many years."); Ward Decl., ¶ 4 (same); Koch Decl., ¶ 5 (same).

given to workers to discourage union participation called "Save Mart Answers Your Questions About Unions," Save Mart told its non-union workers that "your wages and fringe benefits are much better than the union contract covering employees in this area and [] there is nothing that the union can offer you . . . . If you compare, you[] will see that . . . your benefits are already better, or equal to, the benefits in a union store." Shaver Decl., EX22, at PLTF000003135, 37. Newspaper articles from 1984 and 1985 contain quotes from Save Mart representatives that employees do not need the union because "wages and benefits are equal to, and in some cases better than, those in effect at the union stores," and "all employees of the supermarket—regardless of their union status—receive the same wages and benefits." *Id.*, EX23, EX24.

Save Mart's anti-union messaging about its benefit programs was a misrepresentation because it simply was not true that Save Mart would always, or ever did, offer benefits as good as or better than those offered to its unionized workforce. The messaging elided a key difference between the retiree medical benefits offered to non-union workers and those enjoyed by union employees: Save Mart had quietly reserved to itself the authority to unilaterally terminate retiree medical benefits for non-union employees at any time, making this population uniquely vulnerable to changing financial priorities or ownership at the company, whereas eliminating such benefits for union retirees required collective bargaining and could not simply be done unilaterally.[20] This is not speculation. In fact, Save Mart attempted to eliminate the HRA plan for its union employees in 2022, and this attempt was rejected by an arbitrator on July 14, 2023 as violating the applicable collective bargaining agreement. *Id.*, EX3. By order of the arbitrator, Save Mart's union retirees therefore continue to enjoy healthcare benefits to this day, while non-union retirees were left with nothing. *Id.* Thus, Save Mart's refrain that company benefits would always be as good as or better than the union's was a common, uniform misrepresentation.

[20] *See* Fugate Decl., ¶ 7 ("I knew that union members' retiree medical benefits were lifetime benefits that the company could not unilaterally take away. I recall employees asking questions such as: 'The union promises me benefits for the rest of my life, what do you guys have?' I responded to these questions by telling them the non-union benefits would always be as good as or better than the union's benefits, by which I meant that the non-union benefits would last for the life of the retiree, just like the union benefits would; this was my understanding of the company's policy, and this is what I believe the employees understood my answers to mean.").

III. LEGAL STANDARD

Class certification is required where the four prerequisites of Rule 23(a) and at least one of the requirements of Rule 23(b) are satisfied. Fed. R. Civ. P. 23; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-14 (1997). An analysis of whether a class can be certified may "entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). However, "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen*, 568 U.S. at 466. *See also Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1133 (9th Cir. 2016) ("We consider merits questions at the class certification stage only to the extent they are relevant to whether Rule 23 requirements have been met."). Once the elements of Rule 23 are met, a district court does not have discretion to deny certification of a class. *See Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010) ("By its terms [Rule 23] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action").

IV. ARGUMENT

Courts regularly certify classes to pursue claims of benefits due under ERISA § 502(a)(1)(B) and breach of fiduciary duty based on misrepresentation under ERISA § 502(a)(3). *See, e.g., Moyle v. Liberty Mutual Ret. Benefit Plan*, No. 10-2179 DMS (BLM), 2012 WL 13149097 (S.D. Cal. Apr. 10, 2012), *affirmed* 823 F.3d 948, 964 (9th Cir. 2016) (benefits due and misrepresentation); *Fremont General Corp. Litig.*, No. 07-02693-JHN-FFMx, 2010 WL 3168088 (C.D. Cal. Apr. 15, 2010) (misrepresentation); *In re Computer Sciences Corp. ERISA Litig.*, No. 08–02398 SJO (JWJx), 2009 WL 7527872, at *2 (C.D. Cal. 2008) (misrepresentation) ("CSC I"); *Hurtado v. Rainbow Disposal Co.*, No. 17-01605-JLS-DFM, 2019 WL 1771797 (C.D. Cal. Apr. 22, 2019) (misrepresentation); *Cockerill v. Corteva, Inc.*, 345 F.R.D. 81 (E.D. Pa. 2023) (benefits due and misrepresentation); *Osberg v. Foot Locker, Inc.*, No. 07-1358 (KBF), 2014 WL 5796686 (S.D.N.Y. Sep. 24, 2014) (misrepresentation). In line with this tradition and as demonstrated below, this case satisfies all the requirements of Rules 23(a) and 23(b).

A. The Class Meets Each of the Rule 23(a) Criteria.

Rule 23(a) provides that a class must satisfy the following four preconditions: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims and defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). All these criteria are satisfied here.

1. The Class Members Are So Numerous That Joinder Would Be Impracticable.

The Class consists of 482 members. Shaver Decl., ¶ 96. Courts readily find classes "numbering in the hundreds to be sufficient to satisfy the numerosity requirement." *Campbell v. PricewaterhouseCoopers, LLP*, 253 F.R.D. 586, 594 (E.D. Cal. 2008) (citing cases). *See also Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 506 (N.D. Cal. 2012) (noting that "100 or more plaintiffs leads to a presumption of numerosity").

2. Plaintiffs' Claims Raise Common Questions Whose Common Answers Will Drive Resolution of the Litigation.

"The requirement of 'commonality' means that class members' claims 'must depend upon a common contention' and that the 'common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1153 (9th Cir. 2016) (quoting *Dukes*, 564 U.S. 338). "To satisfy Rule 23(a)(2) commonality, even a single common question will do." *Torres*, 835 F.3d at 1133 (cleaned up).

The Benefits Due Claim raises a single and *identical* liability question: whether Save Mart properly terminated the retiree medical benefits in compliance with the Plan terms.[21] If it did, the Benefits Due claim fails for every single Class member alike; if it did not, the claim succeeds and

[21] The Supreme Court has made it clear that plan sponsors are required to adhere to the amendment and termination procedures contained within the benefit plans they sponsor and that amendments or terminations of plans that do not so comply are invalid. *Curtiss-Wright Corp. v. Schoonenjongen*, 514 U.S. 73, 85-86 (1995) (holding that ERISA "follows standard trust law principles" in dictating that "whatever level of specificity a company ultimately chooses, in an amendment procedure or elsewhere, it is bound to that level.").

all Class members are entitled to the unpaid benefits pursuant to ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), and appropriate equitable relief to redress violations of the Plan terms under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(1)(B). This is a question of law, the answer to which cannot vary from Class member to Class member because it focuses entirely on the conduct of Save Mart. Save Mart cannot have terminated (or not terminated) the benefits with a "written instrument adopted by the Board of Directors or its designee and duly executed on behalf of the Company," within the meaning of ERISA, any more so for one Class member than for another. Because the answer to this common question will "drive the resolution of the ligation," class certification is appropriate. *Dukes*, 564 U.S. at 350. Indeed, the Supreme Court has made clear that when a question poses this sort of "fatal similarity," it is appropriate for class treatment. *Amgen*, 568 U.S. at 470.

The Misrepresentation Claim likewise raises common questions, the answers to which focus on the conduct of Save Mart—not any one Class member. "[T]he appropriate focus of a breach of fiduciary duty claim under ERISA is the conduct of the defendants, not the plaintiffs." *CSC I*, 2009 WL 7527872, at *2. To prevail on a claim for breach of fiduciary duty based on misrepresentation, plaintiffs must show: (1) defendant's status as a fiduciary; (2) a misrepresentation by defendant; (3) the misrepresentation was material; and (4) *maybe*, detrimental reliance on the misrepresentation. *Hurtado*, 2019 WL 1771797, at *7; *RJ v. Cigna Health & Life Ins. Co.*, 625 F. Supp. 3d 951, 956 (N.D. Cal. 2022). The first three elements undoubtedly entail questions common to the entire Class. First, was Save Mart acting as a fiduciary at the times it characterized the Plan's terms to employees? Second, did Save Mart's statements and omissions misrepresent the Plan's terms? Third, were the misrepresentations material?[22] The answer to all of these questions is binary—yes or no—and all will be answered for the Class in the same way based on common evidence of Save Mart's conduct.

The only element of the Misrepresentation Claim that *arguably* could require individualized poof is the fourth, detrimental reliance. However, following the Supreme Court's decision in *Cigna*

[22] Materiality is based on a reasonable person standard, not a subjective standard. *See, e.g., In re Computer Sciences Corp. ERISA Litig.*, 635 F. Supp. 2d 1128, 1141 (C.D. Cal. 2009) ("A misrepresentation is material if there is a substantial likelihood that it would materially mislead a reasonable employee in making an adequately informed [plan investment] decision.").

Corp. v. Amara, 563 U.S. 421 (2011), several Courts of Appeal have held that detrimental reliance is no longer a required element of a misrepresentation claim where, as here, the remedy sought is surcharge or reformation. *See, e.g.*, *Osberg v. Foot Locker, Inc.*, 862 F.3d 198, 212 (2d Cir. 2017) ("Application of *Amara I*'s reasoning mandates the conclusion that detrimental reliance need not be shown where, as here, a plaintiff alleging a violation of § 404(a) seeks plan reformation under § 502(a)(3)"); *Silva v. Metropolitan Life Ins. Co.*, 762 F.3d 711, 720-23 (8th Cir. 2014) (noting that *Amara* "changed the legal landscape" and detrimental reliance is not required for surcharge or reformation remedies); *Cockerill*, 345 F.R.D. at 109 ("[T]his Court is unpersuaded that detrimental reliance remains an element of § 404(a)(1) claims in light of [*Amara*]."). The Ninth Circuit has suggested that it is in accord. *See Moyle*, 823 F.3d at 963 (citing *Amara* and analyzing whether plaintiffs had met lower standard of harm and causation rather than detrimental reliance). Regardless, *Moyle* made clear that even if detrimental reliance were required, "where the defendant's representations were allegedly made on a uniform and classwide basis, individual issues of reliance do not preclude class certification." *Id*. at 964-65. Numerous district courts have followed this approach when certifying classes in misrepresentation cases. *See Hurtado*, 2019 WL 1771797, at *7 ("Defendants ignore clear direction from the Ninth Circuit that 'where the defendant's representations were allegedly made on a uniform and classwide basis, individual issues of reliance do not preclude class certification' in ERISA cases.") (quoting *Moyle*, 823 F.3d at 964-65); *Fremont General*, 2010 WL 3168088, at *3 ("[T]he fact that Plaintiffs are also pursuing a negligent misrepresentation claim which may require proof of reliance does not negate commonality[.]"); *CSC I*, 2008 WL 7527872, at *2 ("[I]ndividual issues of reliance are not an issue[.]"); *Osberg*, 2014 WL 5796686, at *4 ("Plaintiff points to common materials, sent to all class members, as at the core of the alleged breach. . . . Given this undifferentiated set of class-wide communications, plaintiff is correct that reliance may be presumed."); *Cunningham v. Wawa*, 387 F. Supp. 3d 529, 543 (E.D. Pa. 2019) ("Even if detrimental reliance were required to establish a § 404 violation or seek equitable relief, such reliance could be presumed on a class-wide basis" in light of "common, class-wide communications."); *Nelson v. IPALCO Enters., Inc.*, No. IP02-477CHK, 2003 WL 23101792, at *5 (S.D. Ind. Sep. 30, 2003) (certifying misrepresentation claims

based on information "distributed or made available on a class-wide basis"); *Brieger v. Tellabs, Inc.*, 245 F.R.D. 345, 353 (N.D. Ill. 2007) ("[I]f alleged misrepresentations were made to class members in general, on a plan-wide basis (rather than individually or personally), then typicality is present and class certification is appropriate.") (citing cases).

Here, Plaintiffs allege exactly the kind of uniform, classwide communications that other courts have determined warranted class certification in the above cases. Save Mart benefits representatives were trained to represent that the retiree health benefit would last for life and attest that they did so for the entire course of their careers. Written pamphlets distributed classwide describe the benefit as lasting until the death of the retiree. Executives and HR staff repeated the company-wide mantra that company benefits would always be as good as or better than the union benefits. Accordingly, commonality is satisfied for the Misrepresentation Claim—if reliance is even still an element of a misrepresentation claim, individual issues of reliance do not preclude certification in the face of this overwhelmingly common company conduct.

3. Plaintiffs' Claims Are Typical of the Claims of the Class.

Under Rule 23(a)(3), "representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014). Plaintiffs' claims easily satisfy this standard. Plaintiffs suffered the same harm as did all Class members: Save Mart took away their retiree medical benefits after representing to them that those benefits would last for life—the same representation made to the Class as a whole. "Plaintiffs' claims are typical of the proposed class because they focus on the conduct of [Save Mart] as to the [Class] as a whole and not on conduct specific to any particular Plaintiff." *Hurtado*, 2019 WL 1771797, at *8; *see also CSC I*, 2008 WL 7527872, at *2 ("[B]ecause the Complaint contains allegations of plan-wide misrepresentations and non-disclosures, which by definition were not individualized, and the class seeks recovery for the Plan as a whole on the basis of these plan-wide misrepresentations and non-disclosures, Plaintiffs' claims are accordingly typical of those of the class as a whole.") (cleaned up); *Moyle*, 2012 WL 13149097, at *8 (finding that plaintiffs' claims were typical "because Defendants' representations regarding Plan benefits were the same as to all class members and affected all members in the same way."); *Kanawi v.*

Bechtel Corp., 254 F.R.D. 102, 110 (N.D. Cal. 2008) (finding class representatives were typical because "[p]laintiffs assert the same injury arising from the same course of conduct including, inter alia, . . . misleading participants[.]").

4. Plaintiffs and Plaintiffs' Counsel Will Adequately Represent the Class.

Rule 23(a)(4) involves resolving two questions "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Moyle*, 2012 WL 13149097, at *9. Plaintiffs and their counsel meet both requirements.

First, Plaintiffs and their counsel have no conflicts of interest with any members of the Class. Rather, their interests are entirely aligned: regaining the valuable retiree medical benefits that Save Mart took away in 2022, and being compensated for the loss of those benefits they have endured in the meantime. Plaintiffs do not stand to gain any more or any less than any other Class member. The reformation and surcharge they seek will benefit everyone alike, and to the exact same degree.

Plaintiffs have also shown that they will vigorously prosecute the action on behalf of the Class. They have each consulted extensively with counsel about their claims and the underlying facts, reviewed draft complaints, provided input on Rule 26(a) witnesses, helped prepare interrogatory responses, provided documents for production in the litigation, and are each scheduled to appear for a deposition later this month. Baker Decl., ¶ 11; Luna Decl., ¶ 13; Popke Decl., ¶ 10; Wraske Decl., ¶ 12. Plaintiffs also retained competent counsel with extensive experience in ERISA class action litigation. *See* Shaver Decl., ¶¶ 89-94 (detailing Lieff Cabraser Heimann & Bernstein, LLP's employment class action experience generally and ERISA class action cases specifically); Declaration of James P. Keenley ("Keenley Decl."), ¶¶ 3-4 (detailing Bolt Keenley Kim's exclusive focus as ERISA specialists, including in class cases); Declaration of Matthew J. Matern ("Matern Decl."), ¶¶ 4-12, 15-18 (detailing Matern Law Group, PC's employment class action experience). Counsel are well-qualified to represent the Class, and have shown they will do so vigorously. They filed two amended complaints, adding allegations and causes of action as their investigation unfolded. They defeated Save Mart's motion to dismiss. They

devoted substantial time and resources to negotiating discovery disputes, have reviewed and produced 766 client documents, reviewed 13,381 Save Mart documents, obtained the fifty Class member declarations filed with this motion, and taken a deposition of Save Mart's corporate representative. Shaver Decl., ¶ 97. Counsel are committed to continuing to invest the resources necessary to seek justice for the Save Mart retirees, including up through a trial. *Id*., ¶ 98; Keenley Decl., ¶ 6; Matern Decl., ¶ 13. Adequacy is satisfied.

B. The Class Satisfies Rule 23(b)(1), (b)(2), and (b)(3).

To certify a class, the Court need only find that one prong of Rule 23(b) is satisfied, though "a single case may be certified under more than one part of the rule." 2 Newberg and Rubenstein on Class Actions § 4:1 (6th ed.).[23] In this case, certification is warranted under all three prongs: (b)(1), (b)(2), and (b)(3).

1. The Claims Meet the Requirements of Rule 23(b)(1).

"Most ERISA class action cases are certified under Rule 23(b)(1)" and "ERISA fiduciary litigation presents a paradigmatic example of a (b)(1) class." *Kanawi*, 254 F.R.D. at 111-12. This case may be certified pursuant to either 23(b)(1)(A) or 23(b)(1)(B).

a. Certification Under 23(b)(1)(A) Is Appropriate.

Rule 23(b)(1)(A) applies in "cases where the party is obliged by law to treat the members of the class alike . . . or where the party must treat all alike as a matter of practical necessity." *Amchem*, 521 U.S. at 614. ERISA cases are prime candidates because "ERISA requires plan administrators to treat all similarly situated participants in a consistent manner." *Moyle*, 2012 WL 13149097, at *10. Here, Plaintiffs' Benefits Due Claim and Misrepresentation Claim both seek to require Save Mart to reinstate the Plan and continue paying retiree medical benefits. As to both claims, the Court's decision will require the same result for the entire Class. Separate lawsuits have the potential for conflicting decisions that would make uniform administration of the Plan

[23] The critical difference between these prongs is that (b)(1) and (b)(2) classes are mandatory, non-opt out classes—if a person meets the class definition, they are in the class and are bound by the judgment in the case. Rule 23(b)(3) classes, by contrast, require notice to prospective class members and the opportunity to opt out of the class (and not be bound by the judgment). 2 Newberg and Rubenstein on Class Actions § 4:1 (6th ed.); *see also Moyle*, 2012 WL 13149097, at *9.

impossible—Save Mart cannot reform the Plan as to some, but not all, participants. *See, e.g.*, *id.* (certifying benefits due and misrepresentation claims under (b)(1)(A)); *Hurtado*, 2019 WL 1771797, at *10 (certifying under (b)(1)(A) where "[c]onflicting interpretations by separate tribunals" could "lead to an unclear set of standards of conduct for Defendants moving forward."); *Tom v. Com Dev USA, LLC*, No. 16-1363 PSG (GJSx), 2017 WL 8236268, at *4 (C.D. Cal. Sep. 18, 2017) ("ERISA cases are particularly appropriate for certification under 23(b)(1) because issues concerning plan interpretation make individual litigation by class members unwieldy."). In fact, it is difficult to imagine that Save Mart *wants* the continued existence (to say nothing of administration) of the Plan to vary from Class member to Class member, which is precisely why ERISA cases are so well-suited for certification under Rule 23(b)(1)(A).

b. Certification Under 23(b)(1)(B) Is Also Appropriate.

Rule 23(b)(1)(B) "covers cases in which judgement in an individual action inescapably will alter the substance of the rights of others having similar claims. . . . A classic example of such a case is one charging a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of beneficiaries[.]" *Hurtado*, 2019 WL 1771797, at *10 (cleaned up).

Here, Plaintiffs' claims focus entirely on actions by Save Mart that affected all participants and potential participants in the Plan similarly in causing them to believe that they enjoyed lifetime retiree medical benefits, and not on individualized representations made directly to the Plaintiffs. Thus, a determination in this action about whether Save Mart's conduct breached its fiduciary duties will necessarily affect the rights of other participants in the Plan besides just the Plaintiffs, and the relief sought would necessarily impose obligations on Save Mart that need to be applied uniformly to all Plan participants. Accordingly, certification under Rule 23(b)(1)(B) is also warranted here. *See In re Northrop Grumman Corp.*, No. 06–06213 MMM (JCx), 2011 WL 3505264, at *18 (C.D. Cal. Mar. 29, 2011) (finding Rule 23(b)(1)(B) satisfied where "plaintiffs assert § 502(a)(2) and (3) claims on behalf of the plan and allege breaches of fiduciary duty by defendants that will, if proved, affect every plan participant").

2. The Claims Meet the Requirements of Rule 23(b)(2).

Class certification under Rule 23(b)(2) is appropriate when (1) "the party opposing the class

has acted or refused to act on grounds that apply generally to the class" and (2) "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

First, the requirement that Save Mart must have acted on grounds generally applicable to the class as a whole is readily met because ERISA requires fiduciaries to treat similarly situated participants similarly. *Barnes v. AT&T*, 270 F.R.D. 488, 497 (N.D. Cal. 2010). Indeed, Save Mart purported to terminate the retiree medical benefit as to the Class as a whole. It also made common, classwide written and verbal misrepresentations about "lifetime" benefits to the Class as a whole.

Second, declaratory and injunctive relief is appropriate as to the Class as a whole. Plaintiffs seek a declaration that Save Mart did not properly terminate the retiree medical benefit and an order requiring it to reinstate the benefit and compensate Class members for missed payments. Plaintiffs also seek a declaration that Save Mart breached its fiduciary duties to Class members and an order providing appropriate equitable relief. *See, e.g.*, *Cunningham*, 387 F. Supp. 3d at 544 (certifying misrepresentation claim under (b)(2)); *Cockerill*, 345 F.R.D. at 114 ("Employers made uniform decisions that denied [benefits] to the members . . . . By the same token, injunctive or declaratory relief that reinstates such benefits . . . applies to all members.").

3. The Claims Meet the Requirements of Rule 23(b)(3).

Certification is appropriate under Rule 23(b)(3) where (1) common questions predominate over any questions affecting only individual members, and (2) class resolution is superior to other available methods for the fair and efficient adjudication of claims. Fed. R. Civ. P. 23(b)(3). For purposes of predominance, "an individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof." *Torres*, 835 F.3d at 1134 (cleaned up). "Predominance is not, however, a matter of nose counting. . . . It is an assessment of whether the proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* (cleaned up).

Common questions predominate with respect to Plaintiffs' Benefits Due claim. Indeed, the

entire claim is premised on the common question of whether Save Mart properly terminated the retiree medical benefit. This question will be answered with entirely common evidence of Save Mart's conduct and no individualized evidence specific to Class members. Likewise, for Plaintiffs' Misrepresentation Claim, "common issues predominate over individual issues because Defendants' representations to the putative class were uniform and even reliance and materiality are susceptible to class-wide proof." *Moyle*, 2012 WL 13149097, at *11. *See also In re CSC I*, 2008 WL 7527872, *4 (finding that the "overriding common issues" of whether defendants were fiduciaries and whether they breached their fiduciary duties would predominate over any individual questions); *Fremont General*, 2010 WL 3168088, at *7 ("As a common nucleus of facts and potential legal remedies involves the conduct Defendants took, or failed to take, in this action, Plaintiffs' claims are generally homogenous and suitable for adjudication by representation.").

A class action is also a superior method for resolution of Plaintiffs' claims, as measured by (A) the class members' interest in individually controlling the prosecution or defense of separate action; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentration the litigation of the claims in the particular forum; and (D) the likely difficulties in managing of a class action. Fed. R. Civ. P. 23(b)(3). The first factor is met because the cost of litigating a complex case of this kind dwarfs the individual entitlement to relief any individual class member would possess. The second factor is met because there is no other litigation. Third, concentrating the claims in this District is desirable as Save Mart operates in this District and many Class members live here. Finally, as all of the issues are common and the Complaint seeks injunctive and declaratory relief, there are no manageability issues that would weigh against certification. Determining the legality of Save Mart's conduct in a class action is far superior to the prospect of hundreds of individual actions. *See, e.g., In re CSC I*, 2008 WL 7527872, at *4; *Moyle*, 2012 WL 13149097, at *11; *Fremont General*, 2010 WL 3168088, at *8.

V. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court certify the Class pursuant to Rules 23(a) and 23(b)(1), 23(b)(2), and/or 23(b)(3).

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Respectfully submitted,

/s/ *Anne B. Shaver*
Anne B. Shaver

Anne B. Shaver (CA Bar No. 255928)
Michelle A. Lamy (CA Bar No. 308174)
Benjamin A. Trouvais (CA Bar No. 353034)
LIEFF CABRASER HEIMANN & BERNSTEIN LLP
275 Battery St., 29th Floor
San Francisco, CA 94111
Phone: (415) 956-1000
Fax: (415) 956-1008

James P. Keenley (CA Bar No. 253106)
Emily A. Bolt (CA Bar No. 253109)
BOLT KEENLEY KIM LLP
2855 Telegraph Ave., Suite 517
Berkeley, CA 94705
Phone: (510) 225-0696
Fax: (510) 225-1095

Matthew J. Matern (CA Bar No. 159798)
Mikael H. Stahle (CA Bar No. 182599)
MATERN LAW GROUP, PC
1230 Rosecrans Ave., Suite 200
Manhattan Beach, CA 90266
Phone: (310) 531-1900
Fax: (310) 531-1901

Attorneys for Plaintiffs and the Proposed Class