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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

KEVIN E. BYBEE, JOHN R. SCHOLZ, SALLY A. DILL, and VICTOR H. DRUMHELLER, as individuals and plan participants in The Continental Retirement Plan; on behalf of themselves and all others similarly situated; and on behalf of The Continental Retirement Plan; Plaintiffs, vs. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, a labor organization; JAMES HOFFA, in his official capacity as the General President of the International Brotherhood of Teamsters; PETER FINN, in his official capacity as the Principal Officer of Teamsters Local 856; CHRISTOPHER GRISWOLD, in his official capacity as the Principal Officer of Teamsters Local 986; PAUL STRIPLING, in his official capacity as Principal Officer of Teamsters Local 781; GEORGE MIRANDA, in his official capacity as Principal Officer of Teamsters Local 210; UNITED AIRLINES, INC., a Delaware corporation; UNITED AIRLINES HOLDINGS, INC., a Delaware corp.; the UNITED AIRLINES HOLDINGS' ADMINISTRATIVE COMMITTEE, named fiduciary of The Continental Retirement Plan. Defendants.	Case No.: 3:18-cv-06632-JD **PLAINTIFFS' OPPOSITION TO THE DEFENDANTS UNITED AIRLINES, INC., UNITED AIRLINES HOLDINGS, INC., AND THE UNITED AIRLINES HOLDINGS' ADMINISTRATIVE COMMITTEE'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)** Hearing Date: February 4, 2021 Hearing Time: 10:00 a.m. Hearing Place: Courtroom 11 (19th Floor) Judge: Hon. James Donato

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PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants move to dismiss all of Plaintiffs' claims pursuant to Rule 12(b)(1), lack of subject matter jurisdiction and Rule 12(b)(6), failure to state a claim, pursuant to the Railway Labor Act, 45 U.S.C. §§ 151 et seq. ("RLA"). As will be shown below, the Court has subject matter jurisdiction over Plaintiffs' claims because Plaintiffs' claims are non-minor statutory claims under the RLA and under the Employment Retirement Income Security Act. 29 U.S.C. 1001 et seq., ("ERISA") and because Defendants repudiated the RLA mandated administrative remedy by its own conduct in barring Plaintiffs' numerous attempts to exhaust those procedures and because any further attempts would be futile, exempting Plaintiffs' claims from the arbitral Board. Accordingly, the Court should deny Defendants' motion in its entirety.

II. STATEMENT OF FACTS

Plaintiffs are all long time United Airlines, Inc. ("United") employees. SAC ⁋⁋44-52. In 2005, United and its parent company, United Airlines Holdings, Inc. ("UAH"), in bankruptcy proceedings forced massive contractual concessions on its labor force, including termination of the United mechanics' pension. SAC ⁋⁋74-102. In lieu of the pension and for massive wage reductions, United and UAH entered into Letter of Agreement 05-03M ("LOA 05-03M") with United's mechanics, which provided defined contribution benefits, profit sharing benefits, and a future pension election should United and/or UAH ever "maintain" another single employer plan. Id. UAH acquired Continental Airlines ("Continental") on or about May 2, 2010 and merged United with Continental no later than October 1, 2010. SAC ⁋⁋ 144-156. United and UAH began "maintaining" the single employer defined benefit plan of merged Continental, the Continental Airlines Retirement Plan ("CARP"), no later than October 1, 2010, triggering the vested future

1 pension election in LOA 05-03M. Id. Over the next six years, the Union Defendants representing
2 Plaintiffs repeatedly stated LOA 05-03M rights were being guarded and enforced; Plaintiffs
3 learned of the abandonment these rights with the August 2016 joint agreement proposal. SAC
4 ⁋⁋324-367. Plaintiffs grieved the failed enforcement prior to the vote. Id. Defendants ignored and
5 purposely stalled the grievance process, stonewalling Plaintiffs at all turns. Id. Without any notice
6 or process, Defendants informed some of the Plaintiffs their grievances had been withdrawn with
7 prejudice, citing a self-serving memo drafted by the Union Defendants attorney responsible for
8 negotiations, Edward Gleason ("Gleason"), as justification. SAC ⁋⁋ 392-401. Plaintiffs did not
9 consent to Gleason substituting for the contractual process and vehemently protested the Union
10 substituting Gleason for the contractual grievance process. SAC ⁋⁋392-409. Plaintiffs continued
11 to pursue all contractual and statutory administrative remedies; however, the Union Defendants
12 barred Plaintiffs from doing so. SAC ⁋⁋ 401-409. Plaintiffs then turned to United to complete
13 the grievance process; however, United refused Plaintiffs' statutory rights. SAC ⁋⁋ 410-416.
14 Having no other place to turn for a remedy, Plaintiffs filed the present action with this Court.

II. LEGAL STANDARD

Rule 8(a) requires a plaintiff to plead each claim with enough specificity to "give the defendant fair notice of what the claim is and the grounds upon which it rests;" it "must contain sufficient factual matter, accepted as true, to 'state a claim for relief plausible on its face.' " Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). A Rule 12(b)(1) attack can be facial or factual. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). A facial attack alleges the facts are insufficient to invoke federal jurisdiction; a factual attack disputes the truth of the facts. Id. A Rule 12(b)(6) attack disputes the complaint pled nonconclusory factual allegation, accepted as true to state a plausible claim for relief. Ashcroft v. Iqbal, 556 U.S. 662, 679–80 (2009).

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III. ARGUMENT

A. Count I Should Not Be Dismissed Because Plaintiffs Pled Facts Establishing Plaintiffs' Claims are Major Disputes or Non-Minor Statutory Disputes.

1. Plaintiff's Claim for Breach of Contract Is A Not a Minor Dispute and Therefore, This Court Has Subject Matter Jurisdiction.

Defendants argue Plaintiffs' claims are strictly limited to an interpretation of the CBA; and, therefore, assert that these are minor disputes. Plaintiffs' claims arose during the status quo period modifying the CBA and as such are properly classified as "major" disputes. Consol. Rail Corp. v. Ry. Labor Executives' Ass'n, 491 U.S. 299, 302 (1989) (quoting Elgin, J. & E. Ry. Co. v. Burley, 325 U.S. 711, 723 (1945). "When no reasonable contractual interpretation justifies the claim, the dispute is major." Wheeling & Lake Erie Ry. Co. v. Bhd. of Locomotive Eng'rs & Trainmen, 789 F.3d 681, 692 (6th Cir. 2015). And, Plaintiffs' allege claims arising out of breaches of ERISA's fiduciary provisions, and such claims are non-minor statutory disputes. Plaintiffs also allege a non-minor breach of fair representation claim against the union which federal courts have jurisdiction over. Steele v. Louisville Nashville R.R., 323 U.S. 192 (1944).

In order to prevail, Defendants must do more than state they disagree with the Plaintiffs' assertions. Defendants fail to provide any rationale for taking the actions that Plaintiffs allege breached the CBA. Plaintiffs, conversely, allege Defendants impermissibly and unilaterally changed final, binding terms of LOA 05-03M, transforming a pension election vested in Plaintiffs for one vested in Defendants. Moreover, Defendants offer no evidence to support their contention that CARP is not a single employer plan to counter Plaintiffs' many allegations CARP is in fact a single employer plan and always has been. Nor do Defendants offer any evidence or argument to meet Defendants burden under the "arguably justified" standard as to how the terms of the profit-sharing plan ("PSP") and the Continental mechanics CBA provide a right for the

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Continental mechanics to participate in the PSP. Plaintiffs allege plausible facts that not only did Continental mechanics have no right to PSP monies generally, but Continental mechanics had no right to Plaintiffs' PSP monies. This assertion is based on the terms of the PSP, the Continental mechanics CBA which surrendered the right to participate in a profit-sharing plan, and evidence the two mechanics groups were to operate under their separate CBAs until a joint agreement could be reached. Defendants do not refute this overwhelming evidence nor make any attempt to reconcile the pilots' arbitration decision Defendants lost on exactly these facts.

Defendants fail to contradict or offer contrary evidence with respect to the statements in the Gleason memo providing that on December 9, 2010, Defendants knew Plaintiffs' rights had vested and needed to be honored; however, Defendants did not want to do it because Defendants could not afford it. The two cases cited by Defendants do not change this analysis. Neither case involved concerted and deceitful conduct by both employer and union to thwart a grievant's attempts to comply with grievance procedures. *See* U.S. Airlines Pilots Ass'n ex rel. Cleary v. U.S. Airways, Inc., 859 F. Supp. 2d 283, 305 (E.D.N.Y. 2012); Local 591, Transp. Workers Union of Am. v. Am. Airlines, No. 15 C 652 (N.D. Ill. June 19, 2015). Moreover, Plaintiffs do not claim access to the grievance process was slow, but that access to the grievance process was prohibited entirely on the false premise Plaintiffs had no right to the administrative remedy.

2. Plaintiffs Have Established a Basis for the Court to Exercise Subject Matter Jurisdiction.

Defendants next argue there is but a "narrow exception" to the exclusivity of the Board. If there are any "exceptions," the Board is not a jurisdictional mandate since only Congress and the Constitution can dictate jurisdiction. Because courts recognize exceptions to the RLA arbitral requirement, such a mandate cannot be jurisdictional because "subject matter jurisdiction . . . can never be forfeited or waived." Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) (quotations

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omitted). Nothing in RLA § 184 "clearly states" that its provisions limit the jurisdiction of federal district courts, and thus, under Arbaugh, the statute would appear not to implicate subject matter jurisdiction at all. 45 U.S.C. § 184; see Union Pac. R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region, 558 U.S. 67, 81–84 (2009). Alternatively, Plaintiffs' allegations permit the Court to exercise jurisdiction under these "narrow exceptions."

Plaintiffs alleged a hybrid action - claims for breach of contract against their employer and a breach of fair representation claim against their union. Courts are permitted to exercise jurisdiction when these two claims are joined in a single action. Beckington v. Amer. Airlines, Inc., 926 F.3d 595, 617 (9th Cir. 2019). "If . . . employees allege that their employer and their union 'acted in concert' to discriminate against them, such that arbitration before a panel of employer and union representatives would be 'absolutely futile,' we have held that the employees can 'circumvent the statutory administrative remedies' and join their breach-of-contract claim against the employer with their breach-of-duty claim against the union in federal court." Id. (quoting Bautista v. Pan Am. World Airlines, Inc., 828 F.2d 546, 551 (9th Cir. 1987). And, Plaintiffs alleged both the union and Defendants repudiated the grievance machinery by refusing to allow Plaintiffs access to these procedures, by lying about Plaintiffs' ability to access these procedures, and by endorsing an entirely pretextual "memorandum" by an interested and conflicted union attorney to be the basis for Plaintiffs exclusion from the administrative remedy. In Dean v. Trans World Airlines, the Ninth Circuit held repeated unheeded complaints, union-controlled grievance procedures, and a plaintiff's unsuccessful attempts to pursue administrative remedies, warrant judicial forum. 924 F.2d 805, 811 (9th Cir. 1991). "When employer's conduct amounts to a repudiation of the remedial procedures specified in the contract," a court has jurisdiction to hear the matter. Vaca v. Sipes, 386 U.S. 171, 185–86 (1967). Finally, a court may

exercise jurisdiction over violations of the RLA without regard to the court's characterization of the dispute as major or minor where judicial intervention is required to give effect to statutory rights. *See* Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Employees v. Atchison, Topeka & Santa Fe Ry. Co., 847 F.2d 403, 408 (7th Cir. 1988) (citations omitted). Defendants own authority held Congress left a life line of judicial intervention where "but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands Congress had written into the Railway Labor Act." U.S. Airlines Pilots Ass'n ex rel. Cleary v. U.S. Airways, Inc., 859 F. Supp. 2d 283, 305 (E.D.N.Y. 2012). A "remedy administered by the union [and] by the company to pass on claims by the very employees whose rights they have been charged with neglecting and betraying" is no remedy. Czosek v. O'Mara, 397 U.S. 25 (1970); Glover v. St. Louis-San Francisco Railway Co., 393 U.S. 324 (1969); Conley v. Gibson, 355 U.S. 41 (1957); Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192 (1944).

B. Count II Collusion in Union's Breach of its Duty of Fair Representation, Should Not Be Dismissed but Upheld Because Plaintiffs Sufficiently Pled a Hybrid Action.

Plaintiffs have sufficiently and plausibly pled a hybrid action - a breach of contract by the employer and a breach of fair representation by the union. Plaintiffs sufficiently pled "collusion" and concerted effort on behalf of the Teamsters and United as a basis for the Court to exercise subject matter jurisdiction over Plaintiffs' claims. Joinder of the employer also allows the court to award the plaintiff full relief from the results of the union's breach. *See* Frandsen v. Brotherhood of Railway, Airline and Steamship Clerks, 782 F.2d 674, 686 (7th Cir.1986). Based on the foregoing, Plaintiffs' claim should not be dismissed.

C. Count III for Violations of Statutory Due Process Should Not Be Dismissed Because RLA Provides Statutory Right for Plaintiffs' to Process Grievances and the Court Can Imply a Private Right of Action in Favor of Plaintiffs.

Airline employees have individual statutory right under the RLA to access grievance and arbitration process mandated by RLA Section 204, with or without the certified union as a party. 45 U.S.C. § 184; Elgin, 325 US 711, 733; Santiago v. United Airlines, 969 F.Supp 2d 955; Stevens v. Local 2707, 504 F.Supp 332 (W.D. Wash 1980); Pratt v. United Airlines, 468 F.Supp 508, 513 (N.D. Cal. 1978); Pyles v. United Airlines, 79 F.3d 1046, 1052, n.9 (11th Cir 1996); Miklavic v. USAir, 21 F.3d 551 (3rd Cir. 1994); Kaschak v. Con Rail, 707 F.2d 902, 909-910 (6th Cir. 1983). As the cited cases hold, RLA contemplates three entities: employer, employee, and union and each party maintains a distinct right to enforce the obligations of the other two.

Defendants have been here before. Multiple federal courts have expressly found against Defendants on this very issue. "An individual employee has a right to bring a grievance before an adjustment board based on the text of RLA Section 204, 45 U.S.C. § 184." Santiago v. United Air Lines, Inc., at 966-69. "Nothing in § 184 suggests that the union and employer could agree to place a limitation upon an individual employee's right to unilaterally seek relief before an adjustment board." Id. Knowing this, and having been a party to this clear and express directive from the court just a few years prior, United adamantly refused to permit Plaintiffs to access the board remedy Plaintiffs' requested and now tells the Court the case was wrongly decided. And, the cases cited by Defendants are distinguishable because the employee in question was a probationary employee and one had not begun the grievance process. Capraro v. United Parcel Serv. Co., 993 F.2d 328, 335-37 (3d Cir. 1993); Whitaker v. Am. Airlines, Inc., 285 F.3d 940, 944-45 (11th Cir. 2002). The Plaintiffs in this case are not probationary employees, having decades off honorable and dedicated employment with United, and started the grievance process.

Defendants argue there is no private right of action for Plaintiffs to bring this claim forward. Plaintiffs disagree. Not only did Congress specifically include Plaintiffs as a particular

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group designed to benefit from the RLA, courts have implied private rights of action from the statute before. Bhd. of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 377–78 (1969). RLA Section 2 First was "designed to be a legal obligation, enforceable by whatever appropriate means might be developed on a case-by-case basis." Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Intern., 238 F.3d 1300 (2001) (quoting Chicago & N.W. Ry. Co. v. United Transp. Union, 402 U.S. 570, 577 (1971)). And, courts have implied a private right of action against a union under the statute when a union fails to live up to its duties to its represented members. The duty of fair representation claim is a judicially created private right of action crafted for employee union members under the RLA to vindicate important rights provided to employees by Congress. Steele v. Louisville Nashville R.R., 323 U.S. 192 (1944).

Application of Cort factors, generally used to find an implied right, tip the scales in favor. Cort v. Ash, 422 U.S. 66 (1975). Plaintiffs are an entity the statute was designed to protect; Congress expressly sought to provide a remedy to employees for grievances; implication of a remedy would be consistent with ensuring grievants are not left remediless, and under RLA, employee grievances are confined to federal law. Most importantly, absent separate enforcement rights "exercisable by the individual employee, there would be no check on possible collusion between the employer and the union to the detriment of some or all of the individuals." Steele, at 192. The Court can and should imply a private right of action if one does not already exist. The facts in this case reveal exceptional circumstances necessitating judicial intervention. Plaintiffs have sufficiently and plausibly alleged concerted effort motivated by financial self-interest and gain by Defendants at the expense of Plaintiffs. But for the jurisdiction of the Court, Plaintiffs would have no manner or means to remedy such abuses of power. In fact, to not find a private right of action would value the administrative scheme more than its primary purpose.

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D. Counts V, VI, VII, IX, and X for Violations of ERISA Should Not Be Dismissed Because Plaintiffs Have Sufficiently Pled All Claims.

ERISA provides the Court with subject matter jurisdiction over ERISA claims. Because ERISA claims present a federal question, Rule 12(b)(1) is not a basis for dismissal. Presumably, Defendants move to dismiss all of Plaintiffs' ERISA claims under Rule 12(b)(6); however, Plaintiffs have plausibly stated a claim upon which relief can be granted because Plaintiffs allege Defendants owe ERISA fiduciary duties of loyalty and prudence to the participants because the Defendants exercise discretionary authority and/or discretionary control over the plans at issue, i.e., CARP, the profit-sharing plan, and the defined contribution pension plan ("401k"). The failure of Defendants to follow the plan documents and put the interests of the plans participants foremost is a violation of those duties.

1. Plaintiffs' Claims Are Not Precluded by the RLA Because These Claims Seek Plan-Wide Relief and Are Not Individual Claims for Benefits and Plaintiffs' Claims Are Not Concerned with Duties Created by the CBA.

"The Supreme Court has expressly rejected the idea that 'all employment-related disputes, including those based on statutory or common law' fall under the exclusive jurisdiction of the system board of Adjustment." Pearson v. N.W. Airlines, Inc., 659 F. Supp. 2d 1084, 1090 (C.D. Cal. 2009. ERISA and the RLA are both federal statutes; one does not preempt the other, the query is which statute did Congress intend to take precedence. The Ninth Circuit has emphasized the general focus of the preclusion analysis is the source of the rights at issue. Saridakis v. United Airlines, 166 F.3d 1272, 1276 (9th Cir.1999); *see also* Espinal v. Northwest Airlines, 90 F.3d 1452, 1456 (9th Cir.1996). The RLA requires deference only when construction of, not mere reference to, a CBA's provisions is necessary to adjudicate a claim. Haralson v. United Airlines, Inc., 224 F. Supp. 3d 928 (N.D. Cal. 2016). ERISA is a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans" and "to

1 provide a uniform regulatory regime over employee benefit plans." Shaw v. Delta Air Lines,
2 Inc., 463 U.S. 85, 90 (1983); Aetna Health Inc. v. Davila, 542 U.S. 200, 208 (2004). The claims
3 in this action are brought seeking equitable relief on behalf of the plans, pursuant to ERISA §
4 502. The claims are brought on behalf of individual plan participants seeking individual claims
5 for benefits. Summers v. UAL Corp. ESOP Comm., 2005 WL 1323262, 2005 U.S. Dist. LEXIS
6 11745, Case No. 03–CV–1537 (N.D. Ill. Feb. 17, 2005).

7 None of the cases cited by Defendants support a different result. Alaska Airlines Inc. v.
8 Schurke, 898 F.3d 904, 919-21 (9th Cir. 2018) concerned the RLA preempting independent state
9 law claims, not federal statute preclusion. Long v. Flying Tiger Line, Inc. Fixed Pension Plan for
10 Pilots, 994 F.2d 692 (9th Cir. 1993), the court only lacked jurisdiction because plaintiffs sought
11 to overturn an arbitration decision. Oakey v. US Airways Pilots Disability Income Plan, 723 F.3d
12 227, 229 (D.C. Cir. 2013) and Everett v. USAir Grp., Inc., 927 F. Supp. 478, 483 (D.D.C. 1996),
13 are similarly inapplicable because plaintiffs in those cases sought individual benefits and not plan
14 wide relief and because the plan terms to be interpreted were in fact contained in the CBA.

15 Plaintiffs' claims closer to the facts in Air Line Pilots Ass'n v. Northwest Airlines, 627
16 F.2d 272, 277-78 (D.C.Cir.1980). The court of appeals for the DC Circuit held an independent
17 ERISA claim may arise out of the same facts as an arbitrable claim and that a district court has
18 jurisdiction over that sort of separate statutory claim if it is genuinely independent of the correct
19 construction of the collective bargaining agreement. In Northwest, ALPA alleged Northwest
20 unreasonably delayed payments due under the collectively bargained pension plan, thus
21 accumulating interest to itself and thereby violating the terms of the plan as well as Northwest's
22 fiduciary duty under ERISA to act only for the benefit of plan participants. The court held that
23 ALPA's fiduciary duty claim was an independent, non arbitrable claim because even if
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Northwest's conduct was permissible under the proper interpretation and application of the plan, it still might have constituted a breach of Northwest's fiduciary duties under ERISA. Id. at 277. These are our facts. ERISA expressly provides exclusive federal court subject matter jurisdiction over claims for breach of fiduciary duties and plan wide relief. 29 U.S.C. § 1132(a)(3); Varity Corp. v. Howe, 516 U.S. 489 (1996) (injunctive relief is an adequate remedy when a plaintiff seeks plan-wide injunctive relief not individual-benefit payments.). Only injunctive relief of the type available under § 1132(a)(3) will provide the complete relief sought by Plaintiffs. CIGNA Corp. v. Amara, 563 U.S. 421, 422 (2011). The arbitration board could not provide the relief requested because Plaintiffs seek plan wide relief and not individual claims for benefits. The board would have no power to order the type of equitable relief requested by Plaintiffs.

2. Plaintiffs' ERISA Claims Concerning PSP Must Not Be Dismissed Because Plaintiffs State a Claim the PSP is an ERISA Covered Plan.

Plaintiffs allegations are presumed true for purposes of deciding this motion. Plaintiffs alleged the PSP is subject to ERISA and therefore, unless Defendants can provide substantial and sufficient proof to overcome these allegations, dismissal under Rule 12(b)(6) should be denied. Simply stating the plan is not subject to ERISA is not enough especially since profit sharing plans are generally subject to ERISA. Since Defendants offer no argument to the contrary, Plaintiffs sufficiently and plausibly alleged this claim. Defendants have not overcome the presumption that the Plaintiffs' allegations are true and therefore, dismissal is not warranted. *See* Roderick v Mazzetti & Assoc., No. C 04-2436 MHP, at 7 (N.D. Cal. Nov. 9, 2004).

3. Non-PSP ERISA Claims Should Not Be Dismissed.

a. Count V Should Not be Dismissed Because Plaintiffs Have Stated a Claim for Breach of Fiduciary Duty.

In order to sustain this claim, Plaintiffs must allege: (1) the plan and the assets involved

are subject to ERISA; (2) at least one violator was a fiduciary; (3) the fiduciary violated one or more of ERISA sections; (4) sufficient evidence exists to satisfy the claim; and (5) each fiduciary violation is timely. Plaintiffs met this burden. Plaintiffs pled facts that CARP is a single employer plan subject to ERISA. SAC ⁋⁋ 54-56. Plaintiffs' complaint alleges Defendants, as fiduciaries of CARP, breached their fiduciary duties owed to CARP and its participants, by: (1) failing to objectively and adequately review CARP's plan documents and required filings with due care to ensure that each decision reflective of those documents and filings was prudent in violation of 29 U.S.C. §§ 1104 (a)(1)(A), (B) and (D); (2) taking positions contrary to the express terms of CARP plan documents in violation of their fiduciary duties in violation of ERISA, Id.; (3) permitting improper amendment to CARP despite clear and express language in CARP plan documents such amendments were prohibited, Id.; (4) providing false and misleading legal positions to CARP participants in an effort to deceive those participants as to their participation in CARP in violation of ERISA, Id.; and (5) failing to ensure all contributions were timely and correctly submitted to CARP in violation of ERISA. Id. SAC ⁋⁋ 459-469, 554-591, 604-619. These allegations, which must be taken as true for the purposes of this motion, establish breaches of fiduciary duties by the United Defendant fiduciaries. Finally, Plaintiffs' allegations also satisfy the timeliness element. At the earliest Plaintiffs' claims began to accrue on March 31, 2017. Plaintiffs filed this action for plan wide relief in the first instance on October 31, 2018. Dkt. No. 1. Under either ERISA limitations period, Plaintiffs' claims are timely. 29 U.S.C. § 1113.

b. Count VI Should Not Be Dismissed Because Plaintiffs Stated a Claim for Prohibited Transactions.

Plaintiffs correctly alleged several prohibited transactions, i.e., permitting United ERISA fiduciaries to deal with assets of the plan for their own interest in owed contributions being kept by United and UAH because they "could not afford" to pay them, by permitting United and UAH

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to engage in a transaction that constitutes "lending of money or other extension of credit between a plan and a party in interest," and in the case of the profit sharing plan monies, by diverting plan assets for purposes other than the exclusive benefit of the participants or their beneficiaries for anything other than the reasonable expenses of plan administration, contrary to the explicit terms of the plan documents. 29 U.S.C. §§ 1104(a)(1)(A), (B), and (C). United and UAH had actual first-hand knowledge acts taken violated the plan documents in the form of arbitration awards against them. SAC ¶¶ 339-344; Dkt. No. 49-1, Scholz Decl., Ex. G. Plaintiffs submit Plaintiffs sufficiently alleged prohibited transactions. If Plaintiffs' allegations are not readily understood, the proper remedy is to permit amendment, not dismissal.

c. Count VII Should Not be Dismissed Because Plaintiffs Have Sufficiently Alleged United or UAH Are ERISA Fiduciaries

Defendants argue Plaintiffs have not stated a claim for relief because United and UAH are not and cannot be plan fiduciaries and because the PSP is not subject to ERISA. Plaintiffs have alleged sufficient facts to show the PSP can be subject to ERISA - PSP monies are deposited into defined contribution plans, making the PSP subject to ERISA. And, the statute is clear, plan sponsors are recognized fiduciaries and plan administrators can be fiduciaries. United and UAH are plan sponsors and administrators of all plans plausibly alleging fiduciary status. United and UAH are either named fiduciaries pursuant to 29 U.S.C. § 1002(a)(1), or de facto fiduciaries within the meaning of 29 U.S.C. § 1002(21)(A). "Under ERISA, a person is deemed a fiduciary if they 'exercise discretionary authority or control respecting the management or administration of an employee benefit plan.' " Kyle Rys., Inc. v. Pacific Admin. Serv., Inc., 990 F.2d 513, 516 (9th Cir.1993)). "Fiduciary liability depends not on how one's duties are formally characterized in an ERISA plan, but rather upon functional terms of control and authority over the plan." IT Corp. v. General American Life Ins., 107 F.3d 1415, 1419 (9th Cir.1997)). Plaintiffs sufficiently

alleged facts United and UAH status are either de facto or de jure fiduciaries, which satisfies the Rule 8 pleading standard. Further, United's Form 5500 shows that United is a plan administrator and plan sponsor, which by definition makes it a fiduciary. Plaintiffs alleged United and UAH are the employers responsible for maintaining CARP, the 401(k) Plan, the profit-sharing plan, and other plans not relevant to the present action, making them fiduciaries. United and UAH admit as much in other filings provided to the federal government. Defendants incorrectly argue Plaintiffs' fiduciary duty claims should be dismissed as Plaintiffs did not exhaust administrative remedies under the Summary Plan Description. It is clear from this argument Defendants still do not understand Plaintiffs' claims. Plaintiffs are not seeking benefits for individual participants, which require exhaustion of administrative remedies; Plaintiffs are making claims for plan wide relief, which does not require any exhaustion of administrative remedies. 29 U.S.C. § 1132(a)(3).

d. Count IX Should Not Be Dismissed Because Plaintiffs State Claims for Violation of ERISA'S Duties of Prudence and Loyalty.

Defendants cite two cases in support of their argument a conflict of interests claim does not exist. In Re Constellation Energy Grp., Inc., 738 F. Supp. 2d 602, 614 (D. Md. 2010) and In Re McKesson HBOC, Inc. ERISA Litig., 391 F. Supp. 2d 812, 834 (N.D. Cal. 2005). The cited cases do not support this contention, rather the cases stand for the opposite, i.e., neither stands for the proposition there is no such thing as conflict of interests. "A fiduciary cannot contend 'that, although he had conflicting interests, he served his masters equally well ...'[,]" NLRB v. Amax Coal, 453 U.S. 322, 330 (1981) (quoting Woods v. City Nat'l Bank & Trust Co., 312 U.S. 262, 269 (1941). The gravamen of Plaintiffs' claim is that a fiduciary simply serving his employer's interests, at the expense of the plan's participants and beneficiaries, gives rise to a claim the fiduciary has engaged in conflicted, prohibited behavior resulting in a breach of fiduciary duties.

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e. Count X Should Not Be Dismissed Because Plaintiffs' Sufficiently Pled a Violation of Coverage Claim.

Plaintiffs incorrectly cite the wrong code section in Count X. The correct code section is 29 U.S.C. 1052(a)(1)(A) not 26 U.S.C. 1052(a)(1)(A). The correct section provides that once an employee becomes eligible to participate in an ERISA plan, a plan must enroll the employee no later than the first day of the plan year or six months after the date of satisfaction of the participation requirements, whichever is earlier. 29 U.S.C. § 1052(a)(4). Plaintiffs pled facts sufficient to establish the plan fiduciaries did not follow the plan documents and enroll all eligible participants on May 2, 2010 or October 1, 2010 as mandated by ERISA. 29 U.S.C. § 1052(a)(2).

E. Plaintiffs Should Be Permitted to Amend and Thus, Resolution on Defendants' Motion Should Be Postponed.

If the Court is inclined to grant any portion of Defendants' motion, Plaintiffs should be granted leave to amend. Defendants have not met their burden of showing an amendment would be futile or result in undue prejudice. Rule 15(a) is designed "to facilitate decision on the merits, rather than on the pleadings or technicalities." United States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981); Fed. R. Civ. P. 15(a). Dismissal prior to meaningful discovery would be premature and therefore, Plaintiffs should be permitted to collect discovery and amend.

IV. CONCLUSION

Defendants' motion should be denied in its entirety. Pursuant to this Court's standing order, counsel presenting this motion has less than six-years bar certification and therefore, oral argument is respectfully requested.

Dated: January 4, 2021

Respectfully submitted:

s/ Jane C. Mariani
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