



**FILED**  
**ALAMEDA COUNTY**

**MAY 05 2020**

**CLERK OF THE SUPERIOR COURT**  
By: [Signature]  
**DEPUTY**

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF ALAMEDA

JASON MASS, et al,  
  
Plaintiff,  
  
v.

No. RG17-879223

ORDER GRANTING  
THE MOTION OF PLAINTIFFS FOR  
CLASS CERTIFICATION

THE REGENTS OF THE UNIVERSITY OF  
CALIFORNIA, et al,  
  
Defendants.

Date: 4/24/20  
Time: 10:00 AM  
Dept.: 21

The motion of Plaintiffs for class certification came on regularly for hearing on 4/24/20, in Department 21, the Honorable Winifred Y. Smith presiding. Plaintiffs and Defendants appeared at the hearing through counsel of record. The Court, after full consideration of all papers submitted in support and opposition to the motion, as well as the oral arguments of counsel, decides as follows: IT IS HEREBY ORDERED: The motion of Plaintiff for class certification is GRANTED.

**BACKGROUND**

On 10/8/17, plaintiffs filed the original complaint which alleged that the "monthly benefits of plan members who are no longer working for the University cease to increase as of

1 age 60.” (Cpt, para 26.) The complaint asserted three claims: (1) breach of contract under  
2 UCRP 12.0; (2) breach of fiduciary duty by not informing beneficiaries that benefits plateau after  
3 age 60; and (3) declaratory relief regarding the construction of UCRP 12.0.  
4

5 In the Stipulation filed 3/14/18, para 4, the parties agreed to present to the court the  
6 stipulated issue of whether “UCRP 12.10 imposes a legal duty on The Regents to pay retroactive  
7 monthly retirement benefits for periods of time prior to the date on which a UCRP member  
8 submits a request for benefits under the plan.”

9 The MSA order of 8/29/18 interpreted UCRP 12.0 and held “as a matter of interpretation  
10 that UCRP 12.10 does not impose a legal duty on The Regents to pay retroactive monthly  
11 retirement benefits for periods of time prior to the date on which a UCRP member submits a  
12 request for benefits under the plan.” The MSA Order did not adjudicate any cause of action.  
13 The MSA Order states, “The motion does not address whether the Regents had a fiduciary duty  
14 to inform plan members of the terms of the plan and whether the Regents breached any such  
15 duty.”  
16

17 The Second Amended Complaint filed 4/26/19 asserts a single cause of action for breach  
18 of fiduciary duty.  
19

## 20 21 PROCEDURE – DEFINING THE CLAIM IN THE CASE

22 At the hearing on 1/31/20 and at the hearing on 4/24/20, the Regents argued that the  
23 court’s tentative decision redefined plaintiffs’ claim and that this caused prejudice to the Regents.  
24

25 The pleadings define the claims. “To assess predominance, a court “must examine the  
26 issues framed by the pleadings and the law applicable to the causes of action alleged.” (*Brinker*

1 *Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1024.) It is therefore useful for the  
2 court to have a clear understanding of the claims at the class certification stage. “The threshold  
3 task for determining whether a class action is appropriate in a particular case is to inquire  
4 whether the substantive law governing the plaintiffs' claims renders *those claims* amenable to  
5 class treatment.” (*Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1, 51.) (Italics added.) (See  
6 also *Naranjo v. Spectrum Security Services, Inc.* (2019) 40 Cal.App.5th 444, 479.) (Regents  
7 Oppo at 18:5-13.)

8  
9 The Original Complaint filed 10/18/17 alleged three causes of action: (1) breach of  
10 contract, the contract being the retirement plan and contract provision being section 12.10 , (2)  
11 breach of the Constitutional fiduciary duty to “clearly and completely inform Plan members  
12 about the terms of the Plan” (Cpt para 80) and that postponing a claim after age 60 would result  
13 in a forfeiture of the benefits that would have been paid during the period of postponement (Cpt  
14 para 82(b)), and (3) declaratory relief regarding the legal right under the Plan and under section  
15 12.10 specifically (Cpt para 86-87).

16  
17 The MSA order of 8/29/18, consistent with the stipulation of the parties, did not  
18 adjudicate any cause of action. The MSA Order states, “The motion does not address whether  
19 the Regents had a fiduciary duty to inform plan members of the terms of the plan and whether the  
20 Regents breached any such duty.”

21  
22 The First Amended Complaint filed 2/8/19 asserted the same thee causes of action as the  
23 original complaint. The order of 4/9/19 directed plaintiffs to state only claims that are consistent  
24 with the MSA Order of 8/29/18.

25  
26 The Second Amended Complaint filed 4/26/19 asserts a single cause of action for breach  
of fiduciary duty. The 2AC sets out the claim that the Regents breached its fiduciary duty by

1 failing to adequately inform the members of the class. (2AC, paras 6, 35, 36, 38, 54, 60, 62, 65,  
2 72, 75, and 77(b) and (d). Somewhat inconsistent with an equitable claim for breach of fiduciary  
3 duty, the 2AC also sought “actual damages” as a remedy. (2AC at 79(h).)  
4

5 Plaintiff’s motion for class certification filed 8/14/19 defines the breach of fiduciary duty  
6 claim that plaintiffs seek to certify at pages 1-2, 8, 12, 14, and 20. The Regent’s Opposition filed  
7 12/13/19 describes the breach of fiduciary duty claim at page 18:14-18, stating “Plaintiffs’  
8 remaining theory of recovery is ...”

9 The Regents argued at the hearing on 4/14/20 that the Plaintiffs are implicitly continuing  
10 to prosecute the claim for breach of contract because plaintiffs continue to use the words “forfeit”  
11 are “forfeiture.” The Regents reads the claim for breach of fiduciary duty as asserting that the  
12 members of the class had contract rights to benefits and that the benefits were “forfeited.” The  
13 Regents is correct that there is a difference between a “forfeiture” of benefits (a plan member had  
14 a contract right to benefits that was forfeited) and a loss of the opportunity to get benefits (a plan  
15 member had a right contingent on making a claim, was not informed of the need to make a claim,  
16 and lost benefits). Plaintiffs did continue to use the word “forfeiture” in their Second Amended  
17 Complaint and the motion for class certification.  
18  
19

20 A fair reading of the Second Amended Complaint, however, is that plaintiffs are asserting  
21 that the Regents had a fiduciary duty to inform them that under the terms of the Plan the monthly  
22 payment does not increase after age 60 and that if a member does not make a claim at age 60 then  
23 she or he loses a month of retirement benefits with each passing month. (2AC, para 4,35, 36,  
24 77(b).) The Regents understood the claim and argued, “Plaintiffs’ motion for certification of a  
25  
26

1 class with respect to this “failure to inform” claim should be denied for three reasons.” (Oppo at  
2 9:1-2.)

3  
4 Before the hearing on 1/24/20, the court issued a tentative decision that asked plaintiffs to  
5 clarify whether the claim was (1) a claim for breach of fiduciary duty in equity seeking injunctive  
6 relief; (2) a claim for breach of fiduciary duty in equity seeking both equitable relief and  
7 incidental damages, (3) a claim at law for breach of fiduciary duty, or (4) a claim at law for  
8 fraudulent concealment where the duty to disclose arose from a fiduciary duty. (Order of  
9 1/24/20.) At the hearing on 1/31/20, counsel for plaintiff stated that in the Second Amended  
10 Complaint filed 4/26/19 plaintiffs were pursuing a claim in equity seeking injunctive relief as  
11 described by the court in its tentative decision. (Order of 2/4/20.)  
12

13 The Second Amended Complaint and the motion for class certification adequately  
14 describe the claim. The court is satisfied that the tentative order issued before the hearing on  
15 4/24/20 and this final order do no alter the claim asserted by the plaintiffs.

16  
17 At the hearing on 4/24/20, the Regents argued that the court’s alleged reframing of the  
18 claim in the Second Amended Complaint deprived the Regents of the opportunity to challenge  
19 the claim by way of motion for judgment on the pleadings or motion for summary judgment. In  
20 fact, the preferred procedure is for the court to decide class certification before the court decides  
21 the merits of a claim. If class certification is granted, then following completion of the notice  
22 and opt out period the Regents can seek dismissal of the claim and then any order and judgment  
23 will bind all the members of the class. (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069,  
24 1083.)  
25  
26

1 PROCEDURE – CONCERNS WITH ONE-WAY INTEVENTION.

2 The court previously granted summary summary adjudication in favor of the Regents on  
3 the Plan section 12.10 contract interpretation issue. (Order of 8/29/18.) This presents concerns  
4 about one-way intervention because members of a class could opt-out of the class, avoid being  
5 bound by the order on summary adjudication, and pursue their own claims. (*Fireside Bank v.*  
6 *Superior Court* (2007) 40 Cal.4th 1069, 1078-1084.)  
7

8 The Regents stipulated to the court hearing the motion for summary adjudication before  
9 hearing a motion for class certification. (Stip filed 3/14/18, para 6.) The pages of the stipulation  
10 have the name of The Regents' counsel printed in the lower left of each page, indicating that  
11 counsel for the Regents prepared the stipulation. The stipulation states that the Regents will file  
12 a motion for summary adjudication and the Regents filed that motion. (Stip filed 3/14/18, para  
13 4].) By entering into the stipulation and then filing the motion the Regents waived any right to  
14 assert that it was prejudiced by resolution of the issue presented for summary adjudication before  
15 the motion for class certification.  
16

17  
18 PROCEDURE – CONCERNS WITH CASE MANAGEMENT

19 The Regents argues that the court should not grant the motion for class certification of the  
20 claim for breach of fiduciary duty because the court previously granted summary adjudication on  
21 the Plan section 12.10 issue. (Order of 8/29/18.) The Regents states concern that if the fiduciary  
22 duty claim goes through trial on a class basis, and then the section 12.10 issue goes to the Court  
23 of Appeal on an individual basis, that the resulting proceedings might be problematic.  
24  
25  
26

1 The court is concerned with effective case management. (CRC 3.700, Std Jud Admin  
2 3.10.)<sup>1</sup> The court will not deny class certification based on concerns about potential case  
3 management problems following a potential appeal following a potential trial. There are limits  
4 to anticipating potential problems. In addition, the Regents stipulated to having the court resolve  
5 the Plan section 12.10 issue before class certification. (Stip filed 3/14/18.) The Regents cannot  
6 reasonably oppose the motion for class certification based on the potential case management  
7 consequences of that stipulation.  
8

9  
10 STANDARDS FOR CLASS CERTIFICATION.

11 “The party advocating class treatment must demonstrate the existence of an ascertainable  
12 and sufficiently numerous class, a well-defined community of interest, and substantial benefits  
13 from certification that render proceeding as a class superior to the alternatives.... In turn, the  
14 ‘community of interest requirement embodies three factors: (1) predominant common questions  
15 of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class  
16 representatives who can adequately represent the class.” (*Brinker Restaurant Corp. v. Superior*  
17 *Court* (2012) 53 Cal.4th 1004, 1021.) (See also *Duran v. U.S. Bank Nat. Assn* (2014) 59 Cal.4<sup>th</sup>  
18 1, 28; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) Other relevant considerations  
19 include the probability that each class member will come forward ultimately to prove his or her  
20 separate claim to a portion of the total recovery and whether the class approach would actually  
21 serve to deter and redress alleged wrongdoing. (*Linder*, 23 Cal.4<sup>th</sup> at 435.)  
22  
23

24  
25 <sup>1</sup> This is a case management concern, not a trial management concern. (Compare *Duran*  
26 *v. U.S. Bank National Assn.* (2018) 19 Cal.App.5th 630, 647 [“the party [seeking class  
certification] must still demonstrate that the illegal effects of this conduct can be proven  
efficiently and manageably within a class setting”].)

1 The trial of a class action involves the balancing of many factors to ensure that plaintiffs  
2 and defendants get a fair trial and the parties and the judicial system recognize the benefits of the  
3 class mechanism. The court may not alter substantive law to accommodate the class action  
4 procedure (*Discover Bank v. Superior Court* (2005) 36 Cal. 4th 148, 161) but the court should be  
5 “procedurally innovative” in managing class actions (*Duran*, 59 Cal.4<sup>th</sup> at 57 [Werdegar, conc];  
6 *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 339-340.)  
7

8  
9 NUMERIOSITY (PRACTICALITY OF BRINGING ALL CLASS MEMBERS BEFORE THE  
10 COURT).

11 Legal Standard. The statutory touchstone for numerosity is whether there are so many  
12 class members that “it is impracticable to bring them all before the court.” (CCP 382.)  
13 Although “[n]o set number is required as a matter of law for the maintenance of a class action,”  
14 classes of more than 30 to 40 class members generally satisfy the numerosity requirement  
15 because at that point, joinder is not practical. (*Hendershot v. Ready to Roll Transportation, Inc.*  
16 (2014) 228 Cal.App.4th 1213, 1222; *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 934.)  
17

18 Facts of this case. The proposed class is approximately 5,400 members. (Brome Dec.,  
19 para 11.) This is sufficiently numerous.  
20

21 ASCERTAINABILITY  
22

23 Legal standard. A class is ascertainable when it is defined “in terms of objective  
24 characteristics and common transactional facts” that make “the ultimate identification of class  
25 members possible when that identification becomes necessary.” The class definition must be  
26 “sufficient to allow a member of [the class] to identify himself or herself as having a right to



1 recover based on the [class] description.” (*Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5<sup>th</sup> 955,  
2 980.) A plaintiff is not required to identify the individual members of the class at the class  
3 certification stage. (*Noel*, 7 Cal.5<sup>th</sup> at 982; (*Harper v. 24 Hour Fitness* (2008) 167 Cal.App.4<sup>th</sup>  
4 966, 976-977; *Medrazo v. Honda of North Hollywood* (2008) 166 Cal.App.4<sup>th</sup> 89, 101.)

5 The need to define the class with reference to objective characteristics and common  
6 transactional facts might mean that the class definition is slightly under-inclusive or over-  
7 inclusive. (*Ghazayan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4<sup>th</sup> 1524, 1528–1529, 1533  
8 fn 8.)

9 “The court itself can and should redefine the class where the evidence before it shows  
10 such a redefined class would be ascertainable.” (*Marler v. E.M. Johansing, LLC* (2011) 199  
11 Cal.App.4<sup>th</sup> 1450, 1462.) (See also *Franchise Tax Bd. Limited Liability Corp. Tax Refund Cases*  
12 (2018) 25 Cal.App.5<sup>th</sup> 369, 711.)

13 Facts of this case. The proposed class definition identifies an ascertainable class. (2AC,  
14 para 67.)

15  
16  
17  
18 PREDOMINANCE OF COMMON QUESTIONS OF LAW AND FACT - LEGAL  
19 FRAMEWORK.

20 Plaintiff's burden on moving for class certification is not merely to show that some  
21 common issues exist, but, rather, to place substantial evidence in the record that common issues  
22 predominate. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal. 4<sup>th</sup> 1096, 1108.)

23 It is not necessary that every member of the proposed class be exposed to the allegedly  
24 wrongful practice and the practice was either consistently lawful or unlawful as to all members of  
25 the class. *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4<sup>th</sup> 319, addresses this in  
26

1 several places, stating, “Predominance is a comparative concept,” (34 Cal. 4<sup>th</sup> at 334), that the  
2 community of interest requirement does not mandate that class members' claims be uniform or  
3 identical, (34 Cal.4<sup>th</sup> at 338), that the “logic of predominance” does not require a plaintiff to  
4 prove that a defendant's policy was “either right as to all members of the class or wrong as to all  
5 members of the class,” (34 Cal. 4th at 338), and “the established legal standard for commonality  
6 ... is comparative,” (34 Cal.4<sup>th</sup> at 339).  
7

8 The determination of how much commonality is enough to warrant use of the class  
9 mechanism requires a fact specific evaluation of the claims, the common evidence, and the  
10 anticipated conduct of the trial. Commonality is determined with reference to the claims  
11 asserted. (*Hicks v. Kaufman and Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916 fn 22.)

12 The Court’s focus is on not just the presence or absence of individual issues but the *nature* of  
13 those issues and how significant they will be to the conduct of the trial. (*Dunbar v. Albertson's,*  
14 *Inc.* (2006) 141 Cal. App. 4th 1422, 1431-1432.)  
15

#### 16 17 NATURE OF THE CLAIM FOR BREACH OF FIDUCIARY DUTY

18 The Second Amended Complaint filed 4/26/19 now asserts a single claim for breach of  
19 fiduciary duty failure to inform beneficiaries that “no upward adjustment of benefits is made for  
20 late commencement after age 60.” (2AC, para 4.) The Regents describes the claim as an  
21 assertion that the Regents failed to adequately inform the members of the class “that the age  
22 factor .... plateaus at age 60.” (Oppo at 18:14-17.) The claim is in equity and seeks recovery of  
23 retroactive benefits, declaratory, and injunctive relief.  
24

25 The claim is not a claim for breach of the plan document. The Order of 8/29/18 granted  
26 the motion of the Regents for summary adjudication of that claim.

1 The claim for breach of fiduciary duty is not a claim at law for fraudulent concealment  
2 seeking the remedy of damages. A person who has a fiduciary duty can have a duty to disclose,  
3 which can then support a claim for fraudulent concealment. (*Bank of America Corp v. Superior*  
4 *Court* (2011) 198 Cal.App.4<sup>th</sup> 862, 870-871.) (See also Civil Code 1710(3).) The Second  
5 Amended Complaint filed 4/26/19 does not assert a claim for fraudulent concealment.  
6  
7

## 8 COMMONALITY

9 The claim for breach of fiduciary duty is an equitable claim that involves the elements of  
10 (1) duty, (2) breach, and (3) remedy.

11 Regarding the existence of a duty, “Whether a fiduciary duty exists is generally a question  
12 of law.” (*Marzec v. Public Employees’ Retirement System* (2015) 236 Cal.App.4th 889, 915.)  
13

14 The existence and nature of the asserted fiduciary duty will be common because it is the duty of  
15 disclosure allegedly owed to each member of the putative class.

16 Regarding breach, “Whether the defendant breached [a fiduciary duty] towards the  
17 plaintiff is a question of fact.” (*Marzec v. Public Employees’ Retirement System* (2015) 236  
18 Cal.App.4th 889, 915.) The Regents provided common written materials to the members of the  
19 class in the form of the Plan document, the Retirement Handbook, the Summary Plan Description  
20 (“SPD”), and the age 60 letters. (Brome Dec, Exhs 3, 4, 5, 8; Lorenz Dec., Exhs A, B, C, D.)  
21

22 The information in, or absent from, these written materials is the basis for the alleged breach of  
23 fiduciary duty. These common written materials are a sufficient common basis to determine  
24 whether the Regents breached the alleged fiduciary duty. (*Moen v. Regents of the University of*  
25 *California* (2018) 25 Cal.App.5th 845, 854-858 [reversing trial court order certifying class and  
26 holding that common employee benefits booklets can be basis for class claims despite potential

1 for individual understandings of the booklets].) There is a common factual basis for the claim  
2 that the Regents breached its fiduciary duty by failing to provide clear information about the age  
3 60 issue in the Summary Plan Description and the age 60 letters.

4 At the hearing on 4/24/20 the Regents argued that the claim for breach of fiduciary duty  
5 has no merit. The Regents argued:

- 6
- 7 1. The claim for breach of fiduciary duty is barred by the MSA Order because the claim for  
8 breach of fiduciary duty is a repleading of the claim for breach of the plan document.

9 This raises questions regarding whether the claim for breach of fiduciary duty requires  
10 proof of a breach of contract, whether the claim for breach of fiduciary duty and the claim  
11 for breach of contract are the same primary right, and related matters.

- 12 2. The claim for breach of fiduciary duty has no merit because the plan document says what  
13 it says, and that the members of the Plan were responsible for reading the Plan document.

- 14 3. The claim for breach of fiduciary duty has no merit because the fiduciary duty of a  
15 retirement plan does not include the duty to provide individualized financial advice.

- 16 4. The claim for breach of fiduciary duty has no merit because the federal Age  
17 Discrimination in Employment Act (“ADEA”) prohibited the Plan from assuming that all  
18 members of the Plan would want to retire at age 60.  
19

20 The court does not resolve these merits issues at class certification. (*Linder*, 23 Cal.4<sup>th</sup> at 439-  
21 440 [“we view the question of certification as essentially a procedural one that does not ask  
22 whether an action is legally or factually meritorious”].) These defenses present common issues  
23 of law and fact that can be resolved on a classwide basis.  
24

25 The court has considered The Regents’ argument that individual liability issues will  
26 predominate on the question of whether The Regents conveyed additional explanatory

1 information to the class members. (Oppo at 19-20.) The Regents has support in *Duran v. U.S.*  
2 *Bank National Assn* (2014) 50 Cal.4<sup>th</sup> 1325, which stated “a defense in which *liability itself* is  
3 predicated on factual questions specific to individual claimants poses a much greater challenge to  
4 manageability” than individual questions about the calculation of damages. The Regents points  
5 to *Fairbanks v. Farmers New World Life Ins. Co.* (2011) 197 Cal.App.4<sup>th</sup> 544, 562, where the  
6 court stated, “a class certification denial will be upheld when individual evidence will be  
7 required to determine whether the representations at issue were actually made to each member of  
8 the class.”

10 The court finds that individualized issues will not predominate regarding the liability  
11 issue of what representations were made to which members of the class. The common  
12 representations were the Plan document, the Retirement Handbook, the SPD, and the age 60  
13 letters. (Brome Dec, Exhs 3, 4, 5, 8; Lorenz Dec., Exhs A, B, C, D.) The Regents has presented  
14 evidence that there was a class center and monthly webinars (Lorenz Dec., para 7-8), but does not  
15 present evidence that through the call center or webinars it affirmatively and clearly informed any  
16 significant number of the members of the class that monthly benefits did not increase after age  
17 60. The individualized issues regarding liability appear to be hypothetical. If not hypothetical,  
18 they appear to be few in number and overwhelmed by the common effect of the common written  
19 representations.  
20

21 The court has considered The Regents’ argument that the understanding and reliance of  
22 the members of the class will present individual liability issues. The court can determine on a  
23 classwide basis whether misstatements or omissions were material and whether reliance was  
24 reasonable. (*Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4<sup>th</sup> 1282,  
25 1292-1293 [“[i]t is sufficient for our present purposes to hold that if the trial court finds material  
26

1 misrepresentations were made to the class members, at least an inference of reliance would arise  
2 as to the entire class.”].) (See also *Moen v. Regents of the University of California* (2018) 25  
3 Cal.App.5th 845, 858; *McAdams v. Monier, Inc.* (2010) 182 Cal.App.4th 174, 182-186.)

4 Common evidence of the Plan’s representations will be the Plan document, the  
5 Retirement Handbook, the SPD, and the age 60 letters. Common evidence of the reasonableness  
6 or effectiveness of the communications could be in the form of the communications themselves,  
7 internal Plan discussions about the effectiveness of the communications, anecdotal call logs, and  
8 statistical evidence regarding the number or percentage of former University employees who  
9 made claims at or about age 60. This evidence would permit the court to determine on a  
10 classwide basis whether the Plan’s communications met the fiduciary standard of effectiveness.<sup>2</sup>

11 Regarding remedy, the claim is in equity and the court has discretion in fashioning  
12 equitable relief. (*Richardson v. Franc* (2015) 233 Cal.App.4th 744, 757; *Abers v. Rohrs* (2013)  
13 217 Cal.App.4th 1199, 1208.) Assuming a breach of fiduciary duty, the court could order  
14 equitable relief that would require the Regents to place the members of the class in the position  
15 they would have been in had the Regents provided adequate disclosures. The court does not pre-  
16 judge the case, but has considered potential class-wide remedies and how they might be crafted  
17 to provide an appropriate remedy and to also permit the Regents the opportunity to present any  
18 individual defenses.

19 Plaintiffs argue that the trier of fact can presume that if every member of the class had  
20 been provided with adequate information then every member of the class would have elected to  
21 apply for retirement at age 60 so the court could order the Regents to award retroactive benefits  
22  
23  
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25  
26 <sup>2</sup> The court does not pre-judge or issue any orders on the admission or exclusion of specific evidence.

1 to all member of the class to age 60. (Opening at 15-16.) Plaintiffs have some support in *Hittle*  
2 *v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374, 390, but *Hittle*  
3 concerned an individual claim where the individual presented a declaration and the Supreme  
4 Court's analysis was based on *Hittle's* individual circumstances.

5  
6 The Regents argues that there will be individual reliance issues regarding whether each  
7 class member paid attention to the information provided, whether each class member relied in  
8 mistaken assumptions, and whether each class member intentionally decided not to retire at age  
9 60. (Oppo at 18-19.) The Regents' argument is supported by *Hataishi v. First American Home*  
10 *Buyers Protection Corp.* (2014) 223 Cal.App.4<sup>th</sup> 1454, 1468, which affirmed denial of class  
11 certification because "the determination whether an individual plaintiff had an objectively  
12 reasonable belief that his or her conversation ... would not be recorded will require  
13 individualized proof." The Regents' argument is, however, contrary to *McAdams v. Monier, Inc.*  
14 (2010) 182 Cal.App.4<sup>th</sup> 174, 183-184, which reversed denial of class certification and held that if  
15 there is materially deficient information then it can be sufficient to give rise to the inference of  
16 common reliance on the information. This case is more like *McAdams* because it concerns the  
17 adequacy of the defendant's affirmative statements and the permissible resulting inferences  
18 whereas *Hataishi* concerned the understandings of the absent class members in the absence of  
19 affirmative statements.  
20

21 The court is confident that if there is proof of a fiduciary duty and a breach of that  
22 fiduciary duty, then the court could fashion appropriate relief. For example, the court could order  
23 the Regents to provide notice to the plaintiffs similar to the Age 60 letter, except with clearer  
24 information, to permit the members of the class the opportunity to present claims with evidence  
25 demonstrating that they would have made retirement elections when they turned 60, to permit the  
26

1 court or the Regents (Plan section 11.07 and 11.08) to evaluate those claims and evidence, and to  
2 require the Regents to provide benefits effective as of age 60 when appropriate. (Oppo at 25:17-  
3 19 [arguing that class certification is not superior for determining individual monetary loss  
4 because the RASC already performs that function].) Such a remedy arguably could provide both  
5 adequate disclosures to the members of the class and permit a mechanism for individualized  
6 review of claims. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 339-340  
7 fn 12 ["Individualized hearings may sometimes efficiently be assigned to special masters"].) The  
8 court does not determine what equitable relief, if any, might be appropriate in this case – the  
9 court simply observes for purposes of class certification that the court could fashion appropriate  
10 classwide relief.  
11

#### 12 13 SUBSTANTIAL BENEFITS / SUPERIORITY

14  
15 "The party advocating class treatment must demonstrate ... substantial benefits from  
16 certification that render proceeding as a class superior to the alternatives." (*Brinker*, 53 Cal.4th  
17 at 1021.) "The ultimate question in [class actions] is whether ... the issues which may be  
18 jointly tried, when compared with those requiring separate adjudication, are so numerous or  
19 substantial that the maintenance of a class action would be advantageous to the judicial process  
20 and to the litigants." (*Lockheed Martin*, 29 Cal. 4th at 1104-1105.) (See also *Linder*, 23 Cal.4<sup>th</sup> at  
21 435 ["substantial benefits"].)  
22

23 "In deciding whether a class action would be superior to individual lawsuits, 'the court  
24 will usually consider [four factors]: [¶] [ (1) ] The interest of each member in controlling his or  
25 her own case personally; [¶] [ (2) ] The difficulties, if any, that are likely to be encountered in  
26 managing a class action; [¶] [ (3) ] The nature and extent of any litigation by individual class



1 members already in progress involving the same controversy; [and] [¶] [ (4) ] The desirability of  
2 consolidating all claims in a single action before a single court.’ ” (*Ali v. U.S.A. Cab Ltd.* (2009)  
3 176 Cal.App.4th 1333, 1353; *Harper v. 24 Hour Fitness, Inc.* (2008) 167 Cal.App.4th 966, 974.)

4 Each member has an interest in the case, but the interest in control varies with the issue.  
5 All members of the class have a common interest in having adequate information about the Plan  
6 so they can make informed decisions about when to make a claim for retirement benefits. (Reply  
7 at 12:27-28.) Each class member has, or had, an interest in controlling the date of her or his  
8 claim for retirement benefits. Regarding each member’s financial incentive to pursue a claim,  
9 the class members made, or failed to make, decisions to file claims for retirement benefits that  
10 had significant financial consequences. “[T]he size of individual claims does not necessarily  
11 have a bearing on the consideration of judicial efficiency favoring class actions.” (*Bell v.*  
12 *Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 745.) The court has considered these  
13 factors.  
14

15  
16 The difficulties that are likely to be encountered in managing a class action for breach of  
17 fiduciary duty are less of a challenge and burden than managing 5,400 individual claims for  
18 breach of fiduciary duty. “The relevant comparison lies between the costs and benefits of  
19 adjudicating plaintiffs’ claims in a class action and the costs and benefits of proceeding by  
20 numerous separate actions—not between the complexity of a class suit that must accommodate  
21 some individualized inquiries and the absence of any remedial proceeding whatsoever.” (*Sav-On*  
22 *Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 339 fn 10.)  
23

24 The Regents states that because “plaintiffs are seeking tort damages measured by the  
25 benefit formula in the UCRP, the Court would be required to create a mechanism for calculating  
26 the dollar amounts payable to each class member based on each class member’s age,

1 compensation, and years of service – a function that is already performed by the Defendants  
2 through the RASC.” (Oppo at 25:16-19.) This misstates that plaintiffs are seeking tort  
3 damages.<sup>3</sup> A defendant may not recast a plaintiff’s claims or the relief sought and then defeat  
4 class certification on the basis that a trial of the unasserted claims would not be manageable.

5  
6 The nature and extent of any litigation by individual class members already in progress  
7 involving the same controversy falls into two categories. First, there is no evidence that any of  
8 the approximately 5,400 members of the class other than the named plaintiffs have filed claims  
9 for breach of fiduciary duty. Second, the Regents argues that the two named plaintiffs are  
10 judicially estopped from arguing that a class action is superior because they stipulated to resolve  
11 the Plan section 12.10 issue of contract interpretation on an individual basis. (Stip filed 3/14/18.)  
12 In a turn of double-estoppel, the Regents prepared and signed the stipulation, so it is equitably  
13 estopped from asserting that the named plaintiffs are judicially estopped. Stated otherwise,  
14 judicial estoppel does not apply because the Stipulation was an agreement and as a result the two  
15 named plaintiffs were not “successful in asserting” the procedure in the Stipulation. Finally, the  
16 apparent purpose of the Stipulation was to further efficient case management by permitting the  
17 parties to address a significant issue before undertaking the expense of discovery and it was not  
18 an admission or concession regarding class certification. (Stip filed 3/14/18, para 2, 5, 6.)  
19

20 The desirability of consolidating the claims for breach of fiduciary duty in a single action  
21 before a single court is apparent. The Regents owes the same fiduciary duty to each member of  
22 the class and provided the same Plan Document, SPD, and form age 60 letter to each member of  
23

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24  
25 <sup>3</sup> Assuming plaintiffs were seeking damages, and assuming that plaintiffs could present  
26 admissible evidence of classwide damages, the trier of fact could determine damages in the  
aggregate. (*Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 746-751 [aggregate

1 the class. Resolution of the claims for breach of fiduciary duty in individual actions would run  
2 the risk of inconsistent results. (*In re Polaroid ERISA Litigation* (S.D. N.Y., 2006) 240 F.R.D.  
3 65, 77-78.)

4 At the hearing on 4/24/20, the Regents argued that the class mechanism is not superior  
5 because the process of providing class notice would place an undue burden on the Regents in  
6 light of the current COVID-19 restrictions. The California Supreme Court recently held that the  
7 court properly could consider the administrative costs of class certification and should do so in  
8 the context of evaluating “the costs and benefits of the class device.” (*Noel v. Thrifty Payless,*  
9 *Inc.* (2019) 7 Cal.5<sup>th</sup> 955, 978-979.) Under CRC 3.766 the court has substantial discretion in  
10 determining the mechanism of class notice. The court can order a plan of class notice  
11 appropriate to the circumstances of this case and the amount at stake for each member of the  
12 class. The court can also shift the cost and burden of class notice to plaintiffs. The court has  
13 considered the potential cost of class notice.  
14  
15

16 Considering all of the above, the court finds that a class action for breach of fiduciary  
17 duty would be superior to individual actions and would provide benefits to the court and to the  
18 litigants.  
19

#### 20 TYPICALITY.

21 The named Plaintiffs must be generally typical of the members of the putative classes  
22 even though each plaintiff’s specific factual situation is not the same as the specific factual  
23 situation of all the other class members. (*Medraza v. Honda of North Hollywood* (2008) 166  
24

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25  
26 damages]; *In re Cipro Cases I & II* (2004) 121 Cal.App.4th 402, 417 [allocation of aggregate  
damages among members of a class].)

1 Cal.App.4th 89, 99; *Wershba v. Apple Computer* (2001) 91 Cal. App. 4th 224, 238; *Daniels v.*  
2 *Centennial Group, Inc.* (1993) 16 Cal. App. 4th 467, 473.)

3 Plaintiff Mass is sufficiently typical. Plaintiff Graf is sufficiently typical.

#### 4 5 ADEQUACY.

6  
7 The responsibilities of a class representative fall into two categories: (1) to have no  
8 interests adverse to the class and (2) to select and monitor class counsel to ensure the vigorous  
9 prosecution of the case. (*Lazar v. Hertz* (1983) 143 Cal.App.3d 128, 141-142; *McGhee v. Bank*  
10 *of America* (1976) 60 Cal.App.3d 442, 450.) A class representative has a fiduciary duty to  
11 protect the interest of the absent class members throughout the litigation. (*Barboza v. West*  
12 *Coast Digital GSM, Inc.* (2009) 179 Cal.App.4th 540, 546.) (See also *Apple Computer v.*  
13 *Superior Court* (2005) 126 Cal.App.4<sup>th</sup> 1253, 1271 [named plaintiffs have an obligation to  
14 adequately monitor the case and advise counsel on the prosecution of the case].)

15  
16 The Court finds that Plaintiffs Mass and Graf are sufficiently motivated to adequately  
17 prosecute the claims of the class and they have no interests adverse to those of the class.

18 The Court finds that Plaintiffs Mass and Graf have selected competent class counsel and  
19 have indicated that they will monitor class counsel in the prosecution of the case.

#### 20 21 ALTERNATIVE PROCEDURES FOR HANDLING THE CONTROVERSY

22  
23 There are no alternate procedures for handling the controversy. There is no parallel law  
24 enforcement or administrative proceeding. (*Caro v. Procter & Gamble Co.* (1993) 18 Cal. App.  
25 4th 644, 660 [class certification denied in part because defendant had already entered in to  
26 consent decrees with public law enforcement entities].)

1 The Plan has an administrative procedure when members make individual claims for  
2 benefits. (Sharp Exh 30, (UCRP) sections 11.06 and 11.07.) The claim for breach of fiduciary  
3 duty, however, concerns the adequacy of the communications that would have provided the  
4 members with the ability to make informed decisions about when to submit claims for benefits.  
5

#### 6 7 DETERRING AND REDRESSING THE ALLEGED WRONGDOING

8 Trial courts have an obligation to consider the role of the class action in deterring and  
9 redressing wrongdoing. (*Linder*, 23 Cal.4<sup>th</sup> at 446.) A class action would be an effective means  
10 to redress any breach of fiduciary duty.  
11

#### 12 EVIDENCE

13 The Court has considered all the declarations submitted, as well as the exhibits attached  
14 thereto. There were no objections to evidence. The Court's consideration of the evidence is  
15 limited to the motion for class certification and should not be construed as an indication of  
16 admissibility in future motions or at trial.  
17

#### 18 19 DEFINITION OF CLASS AND CLAIM

20 The class is defined as stated in Second Amended Complaint, para 67.

21 The class is certified to prosecute a claim for breach of fiduciary duty seeking equitable  
22 relief.  
23

24 ///

25 ///

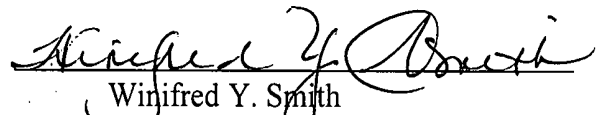
1 CLASS NOTICE

2 The court ORDERS that Plaintiffs must file a motion for class notice or a stipulation  
3 regarding class notice. (CRC 3.766(b).) Under Emergency Local Rule 1.8a, the Plaintiffs may  
4 file a stipulation. If a motion is required, then counsel must file a motion promptly after the court  
5 starts giving reservations for new hearings. The court orders counsel to check the court's  
6 website for press releases, FAQs, and new Local Rules as the court adapts to the COVID-19  
7 situation.  
8

9  
10 FURTHER PROCEEDINGS.

11 The next case management conference is set for 7/15/20 in Dept 21. The parties are  
12 required to file CMC statements.  
13

14 Dated: May 5, 2020

15   
16 Winifred Y. Smith  
17 Judge of the Superior Court  
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19  
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21  
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25  
26