

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

TRUSTEES ON BEHALF OF THE  
NORTHERN CALIFORNIA GENERAL  
TEAMSTERS SECURITY FUND,

Plaintiff,

vs.

FRESNO FRENCH BREAD BAKERY,  
INC., et al.,

Defendants.

CASE NO. CV F 12-0187 LJO BAM

**ORDER ON DEFENDANTS’ F.R.Civ.P. 12  
MOTION TO DISMISS**  
(Doc. 16.)

---

**INTRODUCTION**

Defendants seek to dismiss as legally barred and preempted by federal law plaintiff employee benefit plan trustees’ claims arising from payment of medical benefits for defendant Alvin Lewis’ (“Mr. Lewis”) daughter Sheila LeFevre (“Ms. LeFevre”), who was ineligible for medical benefits. The plaintiff trustees respond that they seek appropriate equitable relief under the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. §§ 1001, et seq., and that ERISA does not preempt their state law claims. Mr. Lewis and defendant Fresno French Bread Bakery, Inc. (“FFBB”) style their motion as proceeding under F.R.Civ.P. 12(b)(6), although Mr. Lewis and FFBB (collectively “defendants”) filed

1 an answer prior to their F.R.Civ.P. 12(b)(6) motion to dismiss. As such, this Court will treat defendants'  
2 motion as a F.R.Civ.P. 12(c) motion for judgment on the pleadings.<sup>1</sup> This Court considered defendants'  
3 motion on the record and VACATES the July 30, 2012 hearing, pursuant to Local Rule 230(g). For the  
4 reasons discussed below, this Court DISMISSES with leave to amend the plaintiff trustees' ERISA  
5 surcharge claim and DENIES dismissal of their other claims.

## 6 BACKGROUND<sup>2</sup>

### 7 Summary

8 The Northern California General Teamsters Security Fund ("fund") administers an employee  
9 benefits plan ("plan") which the trustees manage. FFBB produces baked goods for retail and commercial  
10 sale, and Mr. Lewis is FFBB's sole shareholder and chief executive officer. The FAC alleges ERISA  
11 equitable restitution and surcharge claims and California fraud claims to recover medical benefit  
12 payments for which trustees claim Ms. LeFevre as ineligible under the plan. Defendants challenge the  
13 claims as barred by ERISA. The trustees respond that they have properly pled their claims.

### 14 The Plan

15 FFBB is party to a collective bargaining agreement ("CBA") which requires FFBB to provide  
16 health benefits to FFBB's drivers and route salesmen who work more than 80 hours per month. The  
17 fund allows FFBB to provide health benefits to non-collectively bargained employees. Fund rules  
18 provide: "Coverage of non-bargaining unit employees shall be maintained by the employer through  
19 monthly contributions in the same manner and under the same terms and conditions as provided for  
20 bargaining unit employees of the employer under the collective bargaining agreement."

21 FFBB is also a party to a subscriber agreement that establishes fund participation terms and  
22 grants a power of attorney to the fund to administer the fund for FFBB.

---

23  
24  
25 <sup>1</sup> A F.R.Civ.P. 12(b)(6) "motion must be made *before* the responsive pleading." *Elvig v. Calvin Presbyterian*  
26 *Church*, 375 F.3d 951, 954 (9th Cir. 2004) (emphasis in original). However, a post-answer motion to dismiss for failure to  
state a claim may be treated as a motion for judgment on the pleadings under F.R.Civ.P. 12(c). *Elvig*, 375 F.3d at 954 (citing  
*Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980) (per curiam)).

27 <sup>2</sup> The factual recitation is derived generally from the First Amended Complaint ("FAC") of plaintiff Trustees  
28 on Behalf of the Northern California General Teamsters Security Fund ("trustees") as well as matters which this Court may  
consider on a F.R.Civ.P. 12(c) motion.

1 **Health Benefits For Ms. LeFevre**

2 The fund sent FFBB monthly billing statements to list employees for whom FFBB paid a  
3 contribution the prior month. FFBB submitted its monthly contributions to the fund with its monthly  
4 billing statements.

5 In October 2009, FFBB added Ms. LeFevre’s name to FFBB’s billing statement and remitted a  
6 contribution for her. FFBB also paid a contribution to the fund for Ms. LeFevre for November and  
7 December 2009 during which Ms. LeFevre obtained medical treatment from several providers totaling  
8 \$320,244.50 and which the fund paid.

9 Ms. LeFevre was ineligible for health benefits in that she was neither a collectively bargained  
10 employee nor a non-collectively bargained employee who worked more than 80 hours per month. After  
11 the fund learned that Ms. LeFevre was ineligible for health benefits, it obtained partial refunds but a  
12 \$263,135.24 balance remains which the trustees seek to recover from defendants.

13 **The Trustees’ Claims**

14 The FAC alleges that this is “an action by the fiduciaries of an employee benefit plan for  
15 appropriate equitable relief.” The FAC alleges against defendants a (first) ERISA equitable restitution  
16 claim under 29 U.S.C. 1132(a)(3) and (third) fraudulent deceit and (fourth) negligent misrepresentation  
17 claims that defendants misrepresented Ms. LeFevre’s eligibility to induce the fund to pay \$263,135.24  
18 which remains unreturned from medical providers. The FAC alleges against Mr. Lewis a (second)  
19 ERISA surcharge claim that his reporting Ms. LeFevre as fund eligible breached trust and fiduciary  
20 duties to other fund participants.

21 **DISCUSSION**

22 **F.R.Civ.P. 12(c) Motion For Judgment On The Pleadings Standards**

23 Defendants argue that they are not plan fiduciaries and thus are not liable for a restitution or a  
24 surcharge under ERISA, which defendants further contend preempts the FAC’s fraud claims. The  
25 trustees respond that they seek “appropriate equitable relief” under ERISA which does not preempt the  
26 California fraud claims.

27 F.R.Civ.P. 12(c) permits a party to seek judgment on the pleadings “[a]fter the pleadings are  
28 closed – but early enough not to delay trial.” “A motion for judgment on the pleadings should be granted

1 where it appears the moving party is entitled to judgment as a matter of law.” *Geraci v. Homestreet*  
2 *Bank*, 347 F.3d 749, 751 (9<sup>th</sup> Cir. 2003). A “judgment on the pleadings is appropriate when, even if all  
3 allegations in the complaint are true, the moving party is entitled to judgment as a matter of law.”  
4 *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 670 (9<sup>th</sup> Cir. 1993).

5 “A judgment on the pleadings is a decision on the merits.” *3550 Stevens Creek Associates v.*  
6 *Barclays Bank of California*, 915 F.2d 1355, 1356 (9<sup>th</sup> Cir. 1990), *cert. denied*, 500 U.S. 917, 111 S.Ct.  
7 2014 (1991). A F.R.Civ.P. 12(c) motion “is designed to dispose of cases where the material facts are not  
8 in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and  
9 any judicially noticed facts.” *Herbert Abstract Co. v. Touchstone Props., Ltd.*, 914 F.2d 74, 76 (5<sup>th</sup> Cir.  
10 1990) (per curiam). “[T]he central issue is whether, in light most favorable to the plaintiff, the complaint  
11 states a valid claim for relief.” *Hughes v. Tobacco Inst., Inc.*, 278 F.3d 417, 420 (5<sup>th</sup> Cir. 2001).

12 Courts dismiss complaints under F.R.Civ.P. 12(c) for either of two reasons: “(1) lack of a  
13 cognizable legal theory, or (2) insufficient facts under a cognizable legal theory.” *Gutierrez v. RWD*  
14 *Technologies, Inc.*, 279 F.Supp.2d 1223, 1224 (E.D. Cal. 2003). The standards for deciding F.R.Civ.P.  
15 12(b)(6) and F.R.Civ.P. 12(c) motions are the same. *Great Plains Trust v. Morgan Stanley Dean Witter*,  
16 313 F.3d 305, 313, n. 8 (5<sup>th</sup> Cir. 2002). “A Rule 12(c) motion challenges the legal sufficiency of the  
17 opposing party's pleadings and operates in much the same manner as a motion to dismiss under Rule  
18 12(b)(6).” *Morgan v. County of Yolo*, 436 F.Supp.2d 1152, 1154-1155 (E.D. Cal. 2006).

19 “When considering a motion for judgment on the pleadings, this court may consider facts that  
20 ‘are contained in materials of which the court may take judicial notice.’” *Heliotrope General, Inc. v.*  
21 *Ford Motor Co.*, 189 F.3d 971, 981, n. 18 (9<sup>th</sup> Cir. 1999) (citation omitted). A motion for judgment on  
22 the pleadings may be granted if, after assessing the complaint and matters for which judicial notice is  
23 proper, it appears “beyond doubt that the [non-moving party] cannot prove any facts that would support  
24 his claim for relief.” *Morgan v. County of Yolo*, 436 F.Supp.2d 1152, 1155 (E.D. Cal. 2006), *aff’d*, 277  
25 Fed.Appx. 734 (9<sup>th</sup> Cir. 2008).

26 A fact subject to judicial notice is not subject to reasonable dispute because it “(1) is generally  
27 known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined  
28 from sources whose accuracy cannot be reasonably questioned.” F.R.Evid. 201(b). A “court may take

1 judicial notice of ‘matters of public record.’” *Lee v. City of Los Angeles*, 250 F.3d 669, 689 (9<sup>th</sup> Cir.  
2 2001). Such a fact is “conclusive” and “precludes either party from introducing evidence to disprove  
3 that fact.” *Metropolitan Creditors' Trust v. Pricewaterhousecoopers, LLP*, 463 F.Supp.2d 1193, 1197  
4 (E.D. Wash. 2006).

5 With these standards in mind, this Court turns to defendants’ challenges to the FAC’s claims.

### 6 **ERISA Fiduciaries**

7 ERISA authorizes a civil action “by a participant, beneficiary, or fiduciary (A) to enjoin any act  
8 or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other  
9 appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this  
10 subchapter or the terms of the plan.” 29 U.S.C. § 1132(a)(3) (“section 1132(a)(3)”).

11 Defendants argue that they are not subject to ERISA liability in the absence of their discretionary,  
12 and in turn, fiduciary duty to the plan. Defendants rely on ERISA’s definition of fiduciary, which  
13 provides in part:

14 . . . a person is a fiduciary with respect to a plan to the extent (i) he exercises any  
15 discretionary authority or discretionary control respecting management of such plan or  
16 exercises any authority or control respecting management or disposition of its assets, (ii)  
17 he renders investment advice for a fee or other compensation, direct or indirect, with  
18 respect to any moneys or other property of such plan, or has any authority or  
19 responsibility to do so, or (iii) he has any discretionary authority or discretionary  
20 responsibility in the administration of such plan.

21 29 U.S.C. § 1002(21)(A).

22 Defendants identify their limited non-discretionary plan duties to sign a subscriber agreement,  
23 to decide whether to include non-collectively bargained employees, to identify employees working more  
24 than 80 hours, and to pay premiums for such employees. Defendants assign all discretionary duties to  
25 the trustees given that, according to the subscriber agreement, FFBB grants a power of attorney to the  
26 trustees to administer the fund for FFBB. Defendants disavow obligations to determiner employee  
27 eligibility for medical benefits.

28 For further support, defendants rely on 29 C.F.R. § 2509.75-8, which identifies the following as  
“purely ministerial functions”:

1. “Application of rules determining eligibility for participation or benefits”;
2. “Calculation of services and compensation credits for benefits”;

- 1 3. "Preparation of employee communications material";
- 2 4. "Maintenance of participants' service and employment records";
- 3 5. "Preparation of reports required by government agencies";
- 4 6. "Calculation of benefits";
- 5 7. "Orientation of new participants and advising participants of their rights and options
- 6 under the plan";
- 7 8. "Collection of contributions and application of contributions as provided in the plan";
- 8 9. "Preparation of reports concerning participants' benefits";
- 9 10. "Processing of claims"; and
- 10 11. "Making recommendations to others for decisions with respect to plan administration."

11 The regulation continues that a person who performs such functions "for an employee benefit plan within  
12 a framework of policies, interpretations, rules, practices and procedures made by other persons is not a  
13 fiduciary because such person does not have discretionary authority or discretionary control respecting  
14 management of the plan, does not exercise any authority or control respecting management or disposition  
15 of the assets of the plan, and does not render investment advice with respect to any money or other  
16 property of the plan and has no authority or responsibility to do so." Defendants conclude they are not  
17 plan fiduciaries.

18 The trustees respond that whether defendants are plan fiduciaries "makes no difference" in that  
19 section 1132(a)(3) entitles the trustees to "appropriate equitable relief" which the ERISA claims seek.

20 This Court agrees with the trustees in that "ERISA is available where the defendant 'actively and  
21 deliberately' misleads the plaintiff to the plaintiff's detriment." *Northwest Adm'rs, Inc. v. Cutter*, 328  
22 Fed.Appx. 577, 578 (9<sup>th</sup> Cir. 2009) (equitable restitution available for medical benefits paid for woman  
23 whom defendant misrepresented as his wife). As such, this Court turns to merits of the FAC's claims.

### 24 **Equitable Restitution**

25 Defendants contend that the FAC's (first) equitable restitution claim seeks legal relief which is  
26 unavailable under ERISA. The trustees respond that section 1132(a)(3) authorizes the FAC's equitable  
27 restitution claim.

28 "ERISA does not authorize suits for money damages against non-fiduciaries who knowingly

1 participate in a fiduciary's breach of a fiduciary duty.” *Trustees ex rel. Teamsters Benefit Trust v.*  
2 *Doctors Medical Center of Modesto, Inc.*, 286 F.Supp.2d 1234, 1237 (N.D. Cal. 2003). Defendants  
3 attribute the trustees to seek “nothing other than compensatory damages – monetary relief for all losses  
4 their plan sustained as a result of the alleged breach of fiduciary duties. Money damages are, of course,  
5 the classic form of legal relief.” *Mertens v. Hewitt Associates*, 508 U.S. 248, 255, 113 S.Ct. 2063 (1993)  
6 (affirming dismissal of claims by a class of pension plan participants for equitable relief against the  
7 plan's actuary after the plan became insufficiently funded and was terminated).

8 Defendants contend that the trustees lack an equitable claim, such as a lien. Defendants  
9 characterize the FAC’s ERISA equitable restitution claim as a legal contract breach “by enrollment of  
10 an ineligible employee.” To decide whether requested restitutionary relief is equitable or legal, the U.S.  
11 Supreme Court asks if the relief would have been equitable “[i]n the days of the divided bench.” *Great-*  
12 *West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212, 122 S.Ct. 708 (2002)). A “feature of  
13 equitable restitution” is that it seeks “to impose a constructive trust or equitable lien on ‘particular funds  
14 or property in the defendant's possession.’” *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S.  
15 356, 362, 126 S.Ct. 1869 (2006) (quoting *Knudson*, 534 U.S. at 213, 122 S.Ct. 708). A plaintiff “must  
16 still establish that the basis for its claim is equitable.” *Sereboff*, 547 U.S. at 363, 126 S.Ct. 1869.  
17 Whether the remedy “is legal or equitable depends on ‘the basis for [the plaintiff's] claim’ and the nature  
18 of the underlying remedies sought.” *Knudson*, 534 U.S. at 213, 122 S.Ct. 708.

19 Defendants dispute that the FAC’s ERISA equitable restitution claim “would have been filed in  
20 a court of equity.” Defendants characterize the claim’s “essence” as “a legal one, for damages caused  
21 to the Plan by the alleged misconduct of the defendants” given the absence of allegations that defendants  
22 “received funds which belonged to the Plan, which is the essence of the claim in equity.”

23 The trustees argue that the key to the FAC’s equitable restitution claim is “the allegation of  
24 wrongdoing and fraud by defendants.” The Ninth Circuit Court of Appeals has recognized the remedy  
25 of restitution under section 1132(a)(3) in situations involving “ill-gotten gains,” such as “money obtained  
26 through fraud or wrongdoing.” *Cement Masons Health and Welfare Trust Fund for Northern Cali. v.*  
27 *Stone*, 197 F.3d 1003, 1006-07 (9th Cir.1999), *cert. denied*, 534 U.S. 1104, 122 S.Ct. 902 (2002); *see*  
28 *also Carpenters Health and Welfare Trust for So. Cal. v. Vonderharr*, 384 F.3d 667, 671 (9<sup>th</sup> Cir. 2004),

1 *cert. denied*, 546 U.S. 1030, 126 S.Ct. 729 (2005); *Reynolds Metals Co. v. Ellis*, 202 F.3d 1246, 1249  
2 (9th Cir.), *cert. denied*, 531 U.S. 1009, 121 S.Ct. 562 (2000). The district court in *Cutter* addressed  
3 defendant’s misrepresentation of a woman as his wife to obtain medical benefits and explained:

4 Plaintiff alleges fraud and/or wrongdoing by the Defendant in procuring medical benefits,  
5 which the Supreme Court in *Mertens* and the Ninth Circuit in *Stone, Vonderharr*, and  
6 *Ellis* have explicitly recognized as giving rise to equitable relief under ERISA. . . .  
Plaintiff’s theory is that Defendant, through fraud or misrepresentation, appropriated  
money he was never entitled to; this is unjust enrichment with a remedy in equity.

7 *Northwest Adm’rs, Inc. v. Cutter*, 2008 WL 217731, at \*6 (W.D. Wash. 2008), *aff’d*, 328 Fed.Appx. 577  
8 (9<sup>th</sup> Cir. 2009).

9 The ERISA equitable restitution claim alleges that defendants “intentionally misrepresented” that  
10 Ms. LeFevre was eligible for plan medical benefits although she did not meet plan requirements and that  
11 the fund paid benefits for Ms. LeFevre in reliance on defendants’ misrepresentations. The FAC  
12 adequately alleges that defendants falsified Ms. LeFevre’s eligibility for benefits to entitle the trustees  
13 to pursue equitable restitution. Like *Cutter*, the FAC’s theory is that defendants appropriated benefits  
14 for which Ms. LeFevre was unqualified through fraud or misrepresentation. The law has evolved in the  
15 ERISA context to support an equitable restitution claim to recover benefits paid for someone ineligible  
16 under an employee benefits plan. Defendants are not entitled to dismissal of the ERISA equitable  
17 restitution claim.

18 Moreover, defendants offer unavailing claims that their duty is limited to premium payments and  
19 that they need not determine employee eligibility. Such way of thinking would allow defendants to add  
20 anyone to the plan without consequence. ERISA purposes would be denigrated if an employer was  
21 required only to remit premiums without confirming a person’s eligibility under a plan.

### 22 Surcharge

23 Defendants challenge the FAC’s (second) ERISA surcharge claim in that Mr. Lewis is not a  
24 fiduciary subject to such claim.

25 Prior to the merger of law and equity, a monetary remedy against a trustee for money owed was  
26 sometimes called a “surcharge” and was “exclusively equitable.” *CIGNA Corp. v. Amara*, \_\_\_ U.S.  
27 \_\_\_, 131 S.Ct. 1866, 1880 (2011) (citing *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456,  
28 464, 59 S.Ct. 275 (1939)). “Equity courts possessed the power to provide relief in the form of monetary



1 ‘compensation’ for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust  
2 enrichment.” *Amara*, \_\_\_ U.S. \_\_\_, 131 S.Ct. at 1880. “The surcharge remedy extended to a breach of  
3 trust committed by a fiduciary encompassing any violation of a duty imposed upon that fiduciary.”  
4 *Amara*, \_\_\_ U.S. \_\_\_,131 S.Ct. at 1880; *see Mertens*, 508 U.S. at 2549-250, 113 S.Ct. 2063 (a nonfiduciary  
5 who knowingly participates in the breach of a fiduciary duty imposed by ERISA is not liable for losses  
6 that an employee benefit plan suffers as a result of the breach).

7 Defendants further challenge the surcharge claim in that FFBB, not Mr. Lewis, is a party to the  
8 subscriber agreement for the fund and Mr. Lewis acted no more than as an agent for FFBB to complete  
9 or to direct completion of billing statements. Defendants contend that purported contract liability rests  
10 with FFBB as a disclosed principal.

11 The trustees characterize surcharge “as a remedy traditionally extended by courts of equity and  
12 therefore available under ERISA.” The trustees argue that surcharge is a proper remedy in that  
13 defendants breached their duty to the fund “to accurately report the employees they determined were  
14 eligible for benefits and not to report employees who were ineligible.” The trustees continue that  
15 defendants were unjustly enriched by the fund’s payment of Ms. LeFevre’s medical expenses that  
16 defendants otherwise would have paid to render surcharge an appropriate remedy to make the fund  
17 whole.

18 There is no dispute that defendants were obligated to accurately report employees who qualified  
19 for fund medical benefits. *See* 29 U.S.C. § 1059(a). The FAC alleges that defendants breached such  
20 obligation. However, based on the above authorities, the surcharge remedy may be imposed on trustees  
21 in the ERISA context. The FAC lacks facts that defendants qualify as trustees. The FAC merely alleges:  
22 “As a participant in the Fund, Defendant Lewis owed a fiduciary duty to all other participants in the  
23 Fund not to engage or participate in a breach of trust.” The FAC lacks allegations to support imposition  
24 of trustee or fiduciary duties on Mr. Lewis to support a surcharge remedy. As such, the ERISA  
25 surcharge claim is subject to dismissal with leave to amend.

### 26 **ERISA Preemption**

27 Defendants argues that ERISA preempts the FAC’s common law claims for fraud deceit and  
28 negligent misrepresentation.

1 “ERISA is a remedial statute which Congress enacted to protect employee pension benefit rights  
2 and to protect employers from conflicting and inconsistent state and local regulations of pension benefit  
3 plans.” *Shaw v. Delta Air Lines*, 463 U.S. 85, 90-91, 103 S.Ct. 2890, 2896-97, 77 L.Ed.2d 490 (1983).  
4 ERISA’s preemption clause states that ERISA’s provisions “shall supersede any and all State laws  
5 insofar as they may now or hereafter relate to any employee benefit plan . . .” 29 U.S.C. § 1144(a).  
6 ERISA’s preemption clause is “deliberately expansive,” *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-  
7 46, 107 S.Ct. 1549 (1987), and “contains one of the broadest preemption clauses ever enacted by  
8 Congress.” *Spain v. Aetna Life Ins. Co.*, 11 F.3d 129, 131 (9<sup>th</sup> Cir. 1993) (citations omitted), *cert.*  
9 *denied*, 511 U.S. 1052, 114 S.Ct. 1612 (1994).

10 The U.S. Supreme Court has emphasized the broad sweep of ERISA preemption:

11 “The pre-emption clause is conspicuous for its breadth.” Its “deliberately expansive”  
12 language was “designed to ‘establish pension plan regulation as exclusively a federal  
13 concern.’ ” The key to § 514(a) is found in the words “relate to.” Congress used those  
14 words in their broad sense, rejecting more limited pre-emption language that would have  
made the clause “applicable only to state laws relating to the specific subjects covered  
by ERISA.”

15 *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 138, 111 S.Ct. 478, 482, 112 L.Ed.2d 474 (1990) (citations  
16 omitted).

17 The Ninth Circuit likewise endorses a broad view of ERISA preemption and has held that  
18 “ERISA preempts common law theories of breach of contract implied in fact, promissory estoppel,  
19 estoppel by conduct, fraud and deceit, and breach of contract.” *Ellenburg v. Brockway, Inc.*, 763 F.2d  
20 1091, 1095 (9<sup>th</sup> Cir.1985) (citing *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1356-57 (9<sup>th</sup> Cir.1984), *cert.*  
21 *denied*, 474 U.S. 865, 106 S.Ct. 183, 88 L.Ed.2d 152 (1985)).

22 The trustees argue that ERISA does not preempt the FAC’s fraud claims in that they are  
23 “consistent with the purposes of ERISA” and neither interfere with nor compromise federal regulation  
24 of employee benefit plans. The trustees point to *Geller v. County Line Auto Sales, Inc.*, 86 F.3d 18 (2<sup>nd</sup>  
25 Cir.1996), where the Second Circuit Court of Appeals allowed benefit plan trustees to sue an employer  
26 who fraudulently obtained benefits for the girlfriend of an officer although she was not an employee and  
27 therefore ineligible for benefits. The Second Circuit permitted common law claims for fraud and  
28 restitution, rejecting the district court's conclusion that the claims “related to” the ERISA plan because

1 they “arose directly out of the allegedly improper administration of the plan.” *Geller*, 86 F.3d at 22. The  
2 Second Circuit concluded that the fraud claim would not “compromise the purpose of Congress” and  
3 would not “impede federal control over the regulation of employee benefit plans.” *Geller*, 86 F.3d at 23.  
4 The Second Circuit continued: “The unauthorized diminution of pension benefits – in the present case,  
5 the outright squandering of funds – is squarely at odds with the congressional purpose of protecting  
6 pension benefits.” *Geller*, 86 F.3d at 23.

7 The trustees also rely on *Trustees of AFTRA Health Fund v. Biondi*, 303 F.3d 765 (7<sup>th</sup> Cir. 2002),  
8 where the Seventh Circuit Court of Appeals permitted fund trustees’ common law fraud claims against  
9 a plan participant who misrepresented that he was married to his former wife to secure dependent  
10 coverage for her. The Seventh Circuit concluded that the trustees’ fraud claims were not preempted in  
11 that the fraud claims sought “to recoup monies that the Fund improperly expended as a result of a plan  
12 participant’s fraudulent conduct” and “to protect the financial integrity of the Fund, which is certainly  
13 in the Plan Participants’ and beneficiaries’ best interests, as well as being consistent with the Trustees’  
14 fiduciary obligations under ERISA.” *Biondi*, 303 F.3d at 775.

15 The parties point to no Ninth Circuit Court of Appeals authority on the precise preemption issue,  
16 and this Court is aware of none. Nonetheless, the rationale of the Second and Seventh Circuits is  
17 convincing. The trustees seek to recover monies which the fund paid based on the alleged  
18 misrepresented eligibility of Ms. LeFevre. The FAC’s fraud claims attempt to protect the fund’s  
19 integrity and the best interests of its beneficiaries. Defendants fail to demonstrate how the FAC’s fraud  
20 claims erode ERISA purposes. The fraud claims are not subject to dismissal.

### 21 CONCLUSION AND ORDER

22 For the reasons discussed above, this Court:

- 23 1. DENIES F.R.Civ.P. 12(c) relief as to the FAC’s (first) ERISA equitable restitution,  
24 (third) fraudulent deceit and (fourth) negligent misrepresentation claims;
- 25 2. DISMISSES with leave to amend the FAC’s (second) ERISA surcharge claim;
- 26 3. ORDERS the trustees, no later than August 8, 2012, to file and serve either (a) a second  
27 amended complaint to amend only the (second) ERISA surcharge claim; or (b) a  
28 statement that the trustees will not pursue an ERISA surcharge claim and will proceed

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

on their other claims as pled in the FAC. Unless this Court orders otherwise, the trustees are not permitted to amend or alter the (first) ERISA equitable restitution, (third) fraudulent deceit, and (fourth) negligent misrepresentation claims; and

- 4. ORDERS defendants, no later than August 24, 2012, to file and serve their response to the trustees' second amended complaint, or the FAC, if the trustees elect not to amend the (second) ERISA surcharge claim. Unless this Court orders otherwise, defendants are not permitted to pursue a F.R.Civ.P. 12 challenge to the (first) ERISA equitable restitution, (third) fraudulent deceit, and (fourth) negligent misrepresentation claims.

IT IS SO ORDERED.

**Dated: July 24, 2012**

**/s/ Lawrence J. O'Neill**  
**UNITED STATES DISTRICT JUDGE**