15-3602-cv

United States Court of Appeals

for the

Second Circuit

GEOFFREY OSBERG, on behalf of himself
and on behalf of all others similarly situated,

Plaintiff-Appellee,

– v. –

FOOT LOCKER, INC., FOOT LOCKER RETIREMENT PLAN,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR DEFENDANTS-APPELLANTS

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RULE 26.1 STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel of Defendants-Appellants, Foot Locker, Inc. and Foot Locker Retirement Plan, certifies that Defendants-Appellants have no parent companies and there are no publicly held corporations that own 10% or more of their stock.

Dated: February 16, 2016

Respectfully submitted,

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PRELIMINARY STATEMENT

Appellant Foot Locker changed its employee retirement plan (the "Plan") in January 1996. Nearly 20 years later, the district court found that the company had failed to explain to its employees with sufficient clarity one ramification of the Plan amendment: the possibility that their retirement benefits might not grow for a period of time—a phenomenon known as "wear-away." Based on that finding, the court determined that Foot Locker had committed two ERISA violations: first, it breached its fiduciary duty to make accurate disclosures; and second, it violated the statutory requirements governing its Summary Plan Description ("SPD"). To remedy those violations, the district court ordered Foot Locker to pay more than $180 million to a class of more than 16,000 Plan participants.

The question in this appeal is not whether some of Foot Locker's disclosures could have been clearer. It is whether the disclosure violations found by the court warranted the relief that was ordered. In fact, not only was the court's award grossly excessive, but it plainly violated many of the legal rules governing claims against ERISA plans and plan fiduciaries.

To begin with, the district court extended relief to thousands of employees whose claims expired years ago. More than two-thirds of the class members terminated their employment with Foot Locker and cashed out of the Plan by 1998, some nine years before this suit was brought. When they and others left, they

received statements that should have alerted them that wear-away had occurred; and some had already received individualized communications that explained how their benefits were calculated. The district court proclaimed that not one of Foot Locker's employees could have figured out that wear-away was occurring. Not only is that demonstrably untrue, but by the court's reasoning, this action could have been brought twenty years from now and it would still be timely.

Moreover, there was no showing that participants actually *relied* on Foot Locker's disclosures to their detriment. While detrimental reliance is not required for an SPD violation, it is a critical element for showing fiduciary breach based on a misrepresentation. There was no such evidence here. Instead, the district court found a class-wide fiduciary breach based merely on generalized evidence that class members *misunderstood* how the amendments worked. Even that finding was misplaced in light of the individualized communications described above and the evidence that some participants were aware that they were not accruing additional benefits. But in any event, a class-wide misunderstanding does not prove reliance, and without reliance there can be no fiduciary breach.

Finally, the size of the award represented a massive overreach in comparison to the type of misunderstanding that the company's disclosures allegedly fostered. If class members shared a mistaken belief that they would not suffer wear-away, as the court found, then the remedy should have redressed the wear-away and nothing

more. Instead, the court invented an entirely new method of calculating damages that gave huge windfalls to class members—including many class members who did not suffer wear-away at all.

The combined effect of these errors was staggering. Foot Locker estimates that the vast bulk of the damages awarded—well over $100 million—will go to class members whose claims were time-barred, who did not rely on the company's statements, or who suffered little or no wear-away. The district court was supposed to fashion an equitable remedy, but there was no equity in the rulings that it handed down. The decision must be reversed.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this case under 28 U.S.C. § 1331 because the asserted claims arise under a federal statute, the Employee Retirement Income Security Act ("ERISA").

The district court entered final judgment in this matter on October 5, 2015, *see* Joint Appendix 3542 (hereinafter "A__"), Special Appendix 1 (hereinafter "SPA__"), and Foot Locker timely filed a notice of appeal on November 3, 2015, *see* A3544. Accordingly, this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the district court err by including within the certified class thousands of former employees whose claims were time-barred, or as to whom there was an individualized issue as to whether their claims were time-barred?

2. Did the district court err when it held that Foot Locker breached its fiduciary duties to the entire class even though there was no evidence that any employee detrimentally relied on Foot Locker's Plan communications?

3. Did the district court err when it ordered class-wide reformation relief even though common evidence cannot establish that every class member shared the same mistaken understanding about the Plan?

4. Did the district court err in ordering a form of reformation relief that will give thousands of participants more than what is needed to remedy their misunderstanding, including relief for many participants who were not harmed at all?

STATEMENT OF THE CASE

A. Background

1. The Plan Conversion

Foot Locker is a leading global retailer of athletic shoes and apparel. In the early 1990s, the company (then known as the Woolworth Corporation) was in economic turmoil. Over a five-year period starting around 1991, the company

incurred nearly $500 million in losses, and its stock price dropped by half. (A418, A1778 at 560:8-13.) By May 1995, it was $1.6 billion in debt and likely only a few months away from bankruptcy. (*See* A722 at 102:22-103:2, A1778 at 560:8-561:2.)

To save the company, Foot Locker underwent a massive restructuring. It closed entire retail divisions and engaged in widespread cost-cutting efforts, losing nearly half of its total workforce between 1996 and 1998. (A419, A1178-79 ¶ 78.)

Part of the company's restructuring involved changing its retirement-benefit Plan to cut costs and better tailor benefits to the modern, mobile workforce. (A1927-28 at 1148:20-1149:11.) Under its former Plan, Foot Locker employees collected a monthly annuity upon reaching retirement age, which was calculated based on an employee's salary and years of service. (A3462; SPA6.) Effective January 1, 1996, Foot Locker—like many other companies during that period—converted to a cash-balance formula. (A3463; SPA7.)

The new formula had two features that are relevant to this appeal. First, employees for the first time were given the option of collecting their retirement benefit as a lump sum instead of as an annuity. (A3037-38, A3463; SPA7.) The overwhelming majority of participants, most of whom left the company within three years of the Plan conversion, well before reaching retirement age, elected to take a lump sum. (A3467; SPA11.)

Second, the method for accruing benefits changed. Under the new Plan formula, each employee was assigned a notional cash-balance account on January 1, 1996. (A2346, A2351, A2357-58, A2393-94, A3463; SPA7.) The initial value of an employee's account was determined by converting into a lump sum the annuity that the employee had earned prior to 1996, using a mortality assumption and a 9% discount rate. (A2357-58, A2444-52, A3463; SPA7.) Participants who were 50 years old or older with 15 or more years of service at the time of the Plan conversion received a percentage enhancement to their starting account balances. (A2357-58, A3467; SPA11.) Thereafter, Foot Locker added a percentage of the employee's salary to his notional account every year (recorded as "compensation credits"), and the account accrued interest at 6% per year (recorded as "interest credits"). (A2346, A2351, A2357-58, A2393-94, A3464; SPA8.)

ERISA prohibits plan amendments that reduce the retirement benefits that an employee has already accrued. 29 U.S.C. § 1054(g). For that reason, departing Foot Locker employees who had accrued benefits under the old Plan were entitled to the greater of (i) the benefit they had accrued prior to the Plan conversion, or (ii) the benefit generated by the new cash-balance formula. (A2346-48, A2405, A3464; SPA8.) ERISA dictates that the lump-sum value of the pre-conversion benefit is calculated at the time the employee departs and elects a lump-sum benefit, by discounting the annuity that the employee had earned prior to 1996

using a mortality assumption and the rate prescribed by § 417(e) of the Internal Revenue Code (the "417(e) rate") that is in effect at that time. (*See* 26 U.S.C. § 417(e); A1119-20, A2444-52.)

The Plan's "greater of" provision is at the center of this suit because it created the potential for "wear-away," a period during which an employee's retirement benefit did not increase because his cash-balance account was less than the lump-sum value of his pre-1996 benefit, notwithstanding the addition of compensation and interest credits to the account. (A3460, A3464; SPA4, SPA8.) Participants who took lump sums upon termination could experience wear-away because their initial account balances were calculated using a 9% discount rate, while the 417(e) rate used to discount the pre-1996 benefit was less than 9% in the years following the Plan conversion. (*See* A2575, A3345, A3500; SPA44.) Consequently, for many employees who left the company, the lump-sum value of their pre-1996 annuity exceeded their cash balance, meaning that the credits they earned after conversion had no ultimate effect on their retirement benefit. (A3461; SPA5.) Others may have derived some value from their credits, but less than expected. At no point did any participant actually lose the value of the benefits that he had already accrued.

2. The Plan Communications

In December 1996, Foot Locker sent an SPD to each of its employees, as required by statute. (*See* 29 U.S.C. § 1024(b)(1); A3473; SPA17.) The SPD informed employees that the Plan had "changed from a traditional pension plan to a cash balance pension plan." (A2145.). It explained that the opening cash balance would be the "actuarial equivalent lump sum value" of an employee's accrued benefit as of December 31, 1995, which would be converted "based upon a 9% rate of interest" and IRS mortality tables. (A2150.) It also explained that when employees terminated employment, their retirement benefit would be "the greater of the amount determined under the Plan as amended on January 1, 1996 or [their] accrued benefit as of December 31, 1995." (A2156.)

In addition to the SPD, Foot Locker explained the Plan amendments to many employees through several types of individualized communications. Some of these communications made clear that their retirement benefits might not increase—or, at the time of termination, had not increased—for a period of time.

a. In the months following the Plan amendment, members of Foot Locker's Corporate Benefits Department met with large groups of employees at several district offices to explain the changes to the benefit program. (A509 at 163:12-164:4, A509-10 at 164:11-165:8, A522 at 214:12-215:22, A1146 ¶ 30, A1132 ¶ 15, A1753 at 467:2-469:1, A1997-98 at 1424:6-1426:14.) For example,

in Greenville, South Carolina, employees were given a memo explaining that their initial account balances were calculated using a 9% discount rate; and that when an employee left the company, a "minimum lump sum" benefit, calculated using a 6.06% rate (the 417(e) rate then in effect) might exceed the account balance. (A3115.) If so, employees would receive the minimum lump sum instead of their account balance. (*Id.*) Attached to the memo were hypothetical illustrations of these calculations, which showed that the minimum lump sum was based on the pre-1996 "accrued benefit," and that when an employee's account balance was less than his minimum lump sum, the employee would receive the latter upon terminating employment. (*See, e.g.*, A3117-18, A1880-81 at 964:24-968:9.) Similar materials were distributed at several other Foot Locker locations. (A1146 ¶ 30; *see* A1998 at 1425:19-1426:10.)

b. Other information was provided in response to telephone and written inquiries from participants. The written responses were often prepared to respond to numerous participants who posed similar questions.[1] At least some of the inquiring participants appeared to know that they were experiencing wear-away

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[1] *See* A1898-99 at 1030:7-1035:10, A1125-27 ¶¶ 22, 25-26, A1146-47 ¶ 31; A3205 (internal request for explanations to give participants) and A3126-27 (response to participant); A3150-51 (internal request for guidance on how to respond to 19 participant requests for explanation of relationship between accrued benefit and account balance) and A2786-88 (exemplar response); A3132-33 (response sent to participant, virtually identical to A2786-88).

because they specifically asked why their retirement benefit was not growing over time. (*See, e.g.,* A3205.) For example, one participant who had received a benefit estimate asked: "Why is the $33,457.91 shown as the 'Annual Accrued Benefit as of 3/1/97' [on the benefit estimate] the same as that shown on my Retirement Plan Statement for <u>12/31/95</u>[?]" (emphasis in original) (A3271-72; *see* A3157.) In response, the participant was advised that his pre-1996 accrued benefit was $33,457.91 and that upon termination he would be entitled to the greater of his pre-1996 accrued benefit or the accrued benefit generated by the cash-balance Plan. (A3159-60.)

c. Foot Locker also provided participants with detailed calculations that demonstrated the relationship between a participant's account balance, pre-1996 benefit, and minimum lump sum. For instance, one detailed calculation advised a participant that: (i) his initial, enhanced account balance was $63,857.26, which was calculated by applying a 9% interest rate and mortality assumption to the accrued benefit as of December 31, 1995; (ii) with pay and interest credits, the balance grew to $87,662.01 by April 1, 2000; and yet, despite the addition of these credits, (iii) as of April 1, 2000—over four years after the Plan conversion—he would still receive his minimum lump sum of $95,846.58, which was based on his pre-1996 accrued benefit. (A3139-41; *see also* A3184-91 (calculation of annuity benefit), A3322-25.)

Foot Locker prepared and distributed similar benefit estimates to employees upon request, or shortly before an employee was expected to leave. (A1897 at 1025:17-1026:16, A1989 at 1391:10-1392:6, A1996-97 at 1419:20-1424:4.) In many cases, the participants' minimum lump sums (calculated as of the time of the estimate) were shown to exceed their account balances. (*See*, *e.g.*, A1989-90 at 1392:15-1393:4, A3137, A3165, A3177-78, A3310.)

d. Upon termination, every employee received a statement showing his anticipated retirement benefit. Like the other statements described above, these showed both the participant's account balance and the lump sum to which the participant was entitled, if that lump sum was greater. If an employee was still in wear-away, the lump sum would be greater than his account balance, again indicating that any compensation credits or interest had not increased his ultimate retirement benefit. (*See*, *e.g.*, A2563, A3143, A3146.) And for employees in wear-away electing an annuity, the amount of the annuity would equal their pre-1996 annuity benefit, as reflected in benefit statements they previously received. (*See*, *e.g.*, A2169.)

B. Procedural History

1. The Complaint

In 2007, a former Foot Locker employee, Geoffrey Osberg, brought a putative class action, alleging that the company misled its employees into believing

that their retirement benefits would grow, when in fact their benefits were temporarily "frozen" at their pre-1996 levels. (*See* A58-65.)[2] The complaint alleged that the SPD and other Plan communications were misleading because they did not explicitly warn of the possibility of wear-away in a manner that employees could understand. (*See* A118-35.)

As relevant here, the complaint asserted two causes of action under ERISA. First, it alleged that Foot Locker breached its fiduciary duties by making materially false statements, *see* ERISA § 404(a), 29 U.S.C. § 1132(a); and second, it alleged that the company's SPD failed to meet the disclosure requirements set forth in ERISA § 102, 29 U.S.C. § 1022. (A125-35.) In conjunction with both claims, Osberg sought equitable relief in the form of reformation and surcharge. (*See* A140-41.)

2. The Summary-Judgment Ruling and the First Appeal

Following the close of discovery, Foot Locker successfully moved for summary judgment on both of Osberg's claims. The district court held that Osberg could not prove that he had suffered "actual harm," which the court said was a prerequisite to reformation and surcharge. (*See* A180-83.) The court concluded that Osberg's theory of harm was "entirely speculative" because he could not show

[2] The record shows that Osberg did not bring this suit on his own initiative but was contacted by an attorney who asked him to serve as class representative. (A1742-43 at 425:16-427:19, A3226-37).

that even if he or other participants had been explicitly told about wear-away and complained, that would have somehow caused the company to award them greater benefits. (*See* A181-83.) And since Osberg could not prove harm, his claims for reformation and surcharge relief necessarily failed. (*See* A180-83.)

In addition, the court found that Osberg's SPD claim was time-barred by the three-year statute of limitations. (*See* A178-80.)[3] According to the court, Osberg was on notice that he had suffered wear-away when he ended his employment with Foot Locker in 2002. (A179.) Since the SPD had explained how Osberg's benefit was calculated, and since upon his departure he had received a lump-sum payment that was greater than his cash balance, the court concluded that "Osberg needn't have been an actuary to realize that his benefit had been frozen as a result of the cash balance conversion." (*Id.*) If that were not the rule, the court explained, "[t]he alternative would be unacceptable: that a former employee who neglects to read even the summary plan documents could wait for an indeterminate number of years until an ERISA-savvy lawyer happens to come along and advise the retiree that he or she has a claim." (A179-80.)

[3] ERISA provides a statute of limitations only for fiduciary-breach claims. For other claims, courts borrow the most analogous state-law limitations period. Here, the district court determined that the most analogous statute of limitations was the three-year period applicable to claims for statutory violations under New York law. (A3536; SPA80.)

In a summary order, this Court reversed in part. (*See* A187-94.) The Court held that the reformation remedy sought by Osberg did *not* require a showing of actual harm, and therefore the absence of such harm was not a valid basis to grant summary judgment to Foot Locker. (*See* A191-92.) The Court did not overturn the district court's ruling that Osberg's SPD claim was time-barred, however, nor did it overturn the dismissal of the surcharge claim. (*See* A191, A193-94.)[4]

3. *The Class-Certification Decision on Remand*

On remand, Osberg moved under Fed. R. Civ. P. 23(b)(3) to certify a class of Foot Locker employees who he claimed were similarly situated. At the same time, he asked the district court to reconsider its ruling that his SPD claim was time-barred.

The district court granted both motions. With respect to class certification, the court held that there were common questions of law and fact among the putative class members, including whether Foot Locker had breached its fiduciary and statutory duties by failing to disclose the potential for wear-away. (A229-30; SPA91-92.)[5]

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[4] Although the Court suggested that Osberg might seek also to reinstate his claim for surcharge relief, on remand he elected not to do so, and thus not to pursue a theory of actual harm. (A239; SPA101.) Consequently, reformation is the only type of relief at issue in this appeal.

[5] The district court's decision on class certification spanned two opinions, one on September 22, 2014 (A224; SPA86) and the other, which incorporated the first, on

The court also held that those common questions predominated over any individual ones. (A229-30, A240-52; SPA91-92, SPA102-114.) It concluded that the reliance element of the fiduciary-breach claim could be proven for all class members using "generalized" evidence, and therefore presented no obstacle to certification. (A232, A249-50; SPA94, SPA111-12.) The court also held that there were no individualized issues with respect to Foot Locker's statute-of-limitations defense because the statute had not run on *any* class member. (A233-35, A250-52; SPA95-97, SPA112-14.) It reasoned that the putative class members were not sufficiently steeped in ERISA to understand that they might have suffered wear-away—even if they had read the SPD, received individualized communications explaining how their benefit was calculated, and received a benefit based on their pre-1996 annuity upon departing the company. (A235; SPA97.) Based on that restrictive view, the court also reversed its earlier dismissal of Osberg's SPD claim on statute-of-limitations grounds. (A236-37; SPA98-99.)

Accordingly, the district court certified a class for purposes of both claims consisting of every Foot Locker employee who was working for the company during the 1996 Plan conversion. (A253; SPA115.) The class consisted of over 16,000 current and former employees, including more than 10,000 who had left the

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November 7, 2014 (A238; SPA100.) This brief cites the two orders interchangeably.

company and received their retirement benefit more than six years prior to the commencement of this suit. (A226; SPA88; *see* A994.)

4. The Bench Trial

Following certification, the district court conducted a two-week bench trial. A number of witnesses, including several class members, testified that they did not understand that wear-away had occurred. Others acknowledged, however, that Foot Locker had provided them with information demonstrating how their benefits were calculated.

For example, witness Michael Steven testified about a benefits estimate that he requested and received in late 1996, which showed clearly that his retirement benefit at that time was not increasing. The estimate provided the following calculations:

Initial Account Balance as of 1/1/96:		
Accrued Benefit as of 12/31/95:		$32,006.66
Factor ('83GA 9%):		X4.39495
Initial Account Balance:		**$140,667.67**
Estimated Account Balance As of 12/31/96:		
Initial Account Balance:		$140,667.67
Interest (@ 6%):		8,440.06
Compensation Credits		
178,233.34 x .02 =	3,564.67	
(178,233.34-22.000) x .01=	+1,562.33	
Total compensation Credits:		5,127.00
Estimated Account Balance as of 12/31/96		**$154,234.73**

Minimum Lump Sum As of 12/31/96:

Accrued Benefit As of 12/31/95:	$32,006.66
Factor (Gatt Mortality 6.06%):	X7.02407
Minimum Lump Sum As of 12/31/96:	**$224,817.02**

(A2770.)

The benefits estimate showed that Steven's cash-balance account had increased in value from $140,667.67 on January 1, 1996, to $154,234.73 on December 31, 1996. Yet, his minimum lump sum was more than $70,000 higher at $224,817.02. The reason for the discrepancy was wear-away: Steven's pre-conversion benefit produced a lump sum that was greater than his cash-balance account, even with a year's worth of compensation and interest credits added in. Steven testified that he had understood this point even then. So long as his minimum lump sum remained larger than his account balance, he knew that any credits added to the latter "didn't matter." (A1986 at 1379:10-1380:17.)

Likewise, witness Ada Cardona testified that upon leaving the company, she received an account statement showing that: (i) her initial account balance (with an enhancement) of $55,192.43 was calculated by applying a 9% interest rate and mortality assumption to her accrued benefit as of December 31, 1995; (ii) as a result of pay and interest credits, her account balance had grown to $65,755.94 by November 1, 1997; and (iii) her annuity entitlement as of November 1, 1997 would be the same as her pre-1996 annuity ($721.46) because it was larger than the annuity based on her account balance ($477.58). (A1746-47 at 438:20-439:1,

439:25-443:12; *see* A2687-89.) As with Mr. Steven, these figures showed that the pay and interest credits had not increased Cardona's retirement benefit. Nevertheless, Cardona testified that she did not pay attention to the information contained in her account statement because she was focused only on the "bottom line" or "final amount." (A1746 at 438:16-440:4.)

5. The District Court's Post-Trial Rulings

The district court found in favor of the plaintiff class on both ERISA claims. The court held that Foot Locker had provided participants with false and misleading descriptions of the amended Plan, causing them to believe erroneously that they were continuously accruing new retirement benefits. (A3527, A3531; SPA71, 75.) It held that the SPD did not disclose wear-away in a sufficiently clear manner, and that the company's individualized communications did not correct participants' misunderstanding. (A3528; SPA72.) It called Foot Locker's behavior "equitable fraud" because the company had amended the Plan without "disclosing the full extent or impact of those changes." (A3533; SPA77.)

The court also held that the statute of limitations had not run on either claim for any class member—even though more than 10,000 of the class members terminated their employment with Foot Locker more than six years prior to the filing of suit. (A3536-38; SPA80-82; *see* A994.) In the court's view, neither claim accrued until each class member learned about wear-away from class counsel

because no one could have figured out that they had experienced wear-away just from reading communications from Foot Locker. (A3537-38; SPA81-82.) And, according to the court, ERISA's six-year statute of repose did not bar the fiduciary breach claims of any of the class members because ERISA's "fraud or concealment" exception applied. (*See* 29 U.S.C. § 1113; A3536-37; SPA80-81.)

As a remedy, the court reformed the Plan supposedly to comport with the class members' mistaken expectation that they would not experience wear-away. Under the reformation order, all class members will receive (i) a new starting-balance benefit, calculated using a 6% discount rate (as opposed to the 9% used to calculate an employee's opening balance), and with no reduction for mortality; *plus* (ii) seniority enhancements; *plus* (iii) pay credits (and associated interest) that were promised to participants for their work after the cash-balance conversion. (A3539; SPA83.) The district court effectively acknowledged that its remedial order went beyond the "*A+B*" remedy authorized by this Court in *Amara v. CIGNA Corp.*, 775 F.3d 510 (2d Cir. 2014) ("*Amara IV*"). (A3502-04; SPA46-48.)

Under the court's formula, Foot Locker must pay over $180 million to the plaintiff class. (*See* A1005.) That is more than triple what would have been required under the *A+B* remedy. (*Compare* A1315-16 ¶ 81 (Foot Locker's expert calculating $25 million in wear-away losses before pre-judgment interest) *with*

A1005 (class's expert calculating $91 million in losses before pre-judgment interest).)

This timely appeal followed.

SUMMARY OF ARGUMENT

I. The class certified by the district court improperly included more than ten thousand participants whose claims are time-barred, or for whom the statute of limitations presents an individualized issue that is not amenable to class-wide resolution.

With respect to the SPD claim, the statute of limitations runs three years from "constructive notice," defined as when a participant "knew or should have known" that he has been harmed. Every participant who left Foot Locker and collected a lump sum while in wear-away was on constructive notice of his SPD claim. At that time, those class members received an account statement showing that their lump-sum benefit was greater than their cash balance. That information was a red flag that any benefits they accrued after Plan conversion did nothing to increase their retirement benefits—in other words, that they were experiencing wear-away. Participants who elected an annuity while in wear-away were likewise on constructive notice of a claim, because the amount of their annuity was the same as the annuity that they had earned for the period preceding the cash-balance conversion. Accordingly, any participant who was in wear-away when he

collected his lump sum, and who departed more than three years before the suit was filed in 2007, was time-barred.

Among those class members who left employment more than three years before 2007, but who were *not* in wear-away at the time, many nevertheless received personalized communications that informed them about the possibility that wear-away might occur at some time. When those members terminated employment, they were under a duty to inquire whether they had in fact experienced wear-away; their SPD claim therefore started to run at that time. To determine which class members received such communications is a highly individualized inquiry. Thus, participants who terminated employment more than three years before 2007, even if not actively experiencing wear-away, should not have been included within the certified class because the timeliness of their claims cannot be determined on a class-wide basis.

With respect to the fiduciary-breach claim, the statute of repose expired six years from the last breaching act—*i.e.*, the last date when a participant could have received a misrepresentation from Foot Locker; which in this case was the date of termination. The district court tolled the statute by invoking the "fraud or concealment" exception, which extends the limitations period to six years from constructive notice. But that exception does not apply here because the district court did not find common-law fraud, which is a prerequisite. Moreover, even if

the exception did apply, just as with the SPD claim, participants who left Foot Locker more than six years before 2007 were either on constructive notice of wear-away, or else the timeliness of their claims cannot be determined absent individualized inquiry into the communications that they received from Foot Locker. Either way, they should not have been included within the fiduciary-breach class.

II. Time and again, this Court has said that an ERISA breach-of-fiduciary duty claim based on a misrepresentation by a plan fiduciary cannot succeed unless a plaintiff proves that he relied on the misrepresentation to his detriment. *See, e.g.*, *Bell v. Pfizer, Inc.*, 626 F.3d 66, 75 (2d Cir. 2010). Recognizing the difficulty of proving reliance across the class, the district court claimed that it could use "generalized" evidence—such as the SPD and certain assumptions about class members' beliefs—to infer class-wide reliance. That was wrong. "Generalized" proof of reliance is permissible only when the *sole* possible explanation for a detrimental act is that it was performed in response to a misleading statement. Here, the only possible act of reliance—a class member's decision to remain employed at Foot Locker—could have been driven by myriad motives other than a misunderstanding about the Plan. Consequently, the district court's use of generalized evidence to infer reliance was error.

The district court claimed that some "individualized" evidence supported its conclusion as well. But the only "individualized" evidence it cited showed that class members may have *mistakenly believed* that wear-away would not occur. Proof of a misunderstanding is not sufficient to show reliance. Accordingly, the district court should have dismissed the class fiduciary-breach claim.[6]

III. The district court had no basis for concluding that every class member shared the same mistaken understanding about wear-away, and therefore no basis to order reformation for the entire class. Mistake is a subjective state of mind. The fact that a handful of witnesses testified that they misunderstood the potential for wear-away does not mean that the same mistaken understanding can be attributed to all 16,000 class members. In fact, the record shows that class members received a variety of individualized communications from Foot Locker discussing how retirement benefits were calculated. At least several class members even asked Foot Locker why their retirement benefits were not growing—a clear sign that they *did* understand that they were experiencing wear-away.

[6] The district court's failure to dismiss the fiduciary-breach claim has practical significance because the statute-of-limitations period for the SPD claim is shorter than for the fiduciary-breach claim. Furthermore, even if the SPD class was not limited to the three-year limitations period, the SPD claims of class members who terminated employment before December 1996 would still be barred because the SPD was not distributed before then. (A3473; SPA17.)

IV. Even if the district court were correct about liability, its order for reformation relief was improper because it gave class members more than what was required to redress their misunderstanding about wear-away. The Supreme Court held that the equitable remedy of reformation must be designed to give parties who are misled what they mistakenly expected to receive. *CIGNA Corp. v. Amara*, 563 U.S. 421, 443 (2011) ("*Amara II*"). The district court was crystal clear about the mistake that was supposedly shared by all class members: They did not understand that they might experience (or were experiencing) wear-away. Consequently, any reformation relief must be tailored to ensure that class members receive the benefits that they thought they were accruing during wear-away—nothing more and nothing less.

In *Amara IV*, this Court explained that reformation can address wear-away by giving class members the full value of the benefit that they had earned before a plan conversion, plus all of the benefits that they thought they were accruing after the conversion. 775 F.3d at 531-32. The district court rejected the *Amara* approach, however, in favor of one that gives most class members more than what is necessary to redress wear-away. (*See* A3502-09; SPA46-53.) Indeed, under the district court's formula, hundreds of class members *who did not experience wear-away* will receive windfalls. Since the district court's reformation remedy is

excessive as compared to the class-wide mistake, the remedial order must be vacated.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's legal conclusions, including its interpretation and application of a statute of limitations. *City of Pontiac Gen. Emps.' Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 173 (2d Cir. 2011). A district court's award of equitable relief is reviewed for abuse of discretion, but to the extent that the award relies on conclusions of law, it is reviewed *de novo*. *Amara IV*, 775 F.3d at 519. Similarly, subsidiary legal conclusions that undergird a class certification order receive *de novo* review. *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 18 (2d Cir. 2003).

ARGUMENT

I. THE CLASS INCLUDES THOUSANDS OF PARTICIPANTS WHOSE CLAIMS WERE TIME-BARRED.

The class certified by the district court includes *every one* of the 16,000 employees who worked for Foot Locker during the Plan conversion—including many members who departed Foot Locker and cashed out their retirement benefits well over six years before this suit was commenced in 2007. According to the court, *not one* of those employees was on notice of the SPD or fiduciary-breach claims until contacted by class counsel, and therefore no one's claim was time-barred.

That ruling was wrong because the district court failed to apply the concept of constructive notice. The court repeatedly emphasized that none of the witnesses professed to understand the effects of wear-away. But under the federal discovery rule, subjective understanding is not the sole test for claim accrual. The statute begins to run when the plaintiff knows of his claim or when he reasonably *should have known*. By ignoring the constructive-notice prong, the court revived thousands of claims that should have been time-barred.

A. The District Court Misapplied the Statute of Limitations for the SPD Claim.

The district court previously ruled that the limitations period for an SPD claim is three years. (A3536; SPA80.) Under the federal discovery rule, that period begins to run when a plaintiff, in the exercise of reasonable diligence, should have become aware that the SPD was deficient. *See Novella v. Westchester Cnty.*, 661 F.3d 128, 147 (2d Cir. 2011) (holding that ERISA claim accrues "when there is enough information available to the pensioner to assure that he knows or reasonably should know" that a violation has occurred). Put differently, the statute begins to run when the plaintiff is on constructive notice of the claim.

The test for constructive notice of an ERISA claim is whether there were "sufficient storm warnings to alert a reasonable person to the possibility that there were either misleading statements or significant omissions involved." *J. Geils*, 76 F.3d at 1255. Once those warnings appear, the plaintiff is under a duty to inquire

into whether a misrepresentation has in fact occurred. *See Martin v. Consultants & Adm'rs, Inc.*, 966 F.2d 1078, 1098-99 (7th Cir. 1992). Even an unsophisticated investor must "apply his common sense to the facts that are given to him in determining whether further investigation is needed." *J. Geils*, 76 F.3d at 1259 (quotation marks and alteration omitted); *see also Novella*, 661 F.3d at 147 & n.22 (holding that plaintiff is on notice of claim upon receiving information that makes claim "discoverable" with reasonable diligence).

According to these principles, thousands of employees should have been excluded from the class, either because their claims had expired, or because it would require an individualized inquiry to determine whether that was the case.

1. *Any Participants Who Left Foot Locker Before 2004 While In Wear-Away Were Time-Barred From Bringing SPD Claims.*

For those participants who were in wear-away when they left the company, and who elected to receive lump sums, the information that they received about their benefits put them on constructive notice of their SPD claims. Each received a statement showing that the lump sum he was receiving exceeded the value of his cash-balance account. That likely meant that his cash balance had lagged behind the actual value of his pension—and, thus, that any credits he had earned through service to the company did not increase his retirement benefit. In that situation, the participant had a duty to inquire further as to the reason for the discrepancy, which would have led him directly to the fact of wear-away. *See Novella*, 661 F.3d at

147 n.22 (noting that in "many cases," "the miscalculation will be apparent from the face of a payment check, or will readily be discoverable from *information furnished to pensioners by the pension plan* at the time the first check is issued, thereby starting the running of the statute of limitations") (emphasis added).

Participants who elected to receive their benefits as an annuity while still in wear-away received even clearer notice of their SPD claim. Upon termination, they were told the annuity amount that they could expect to receive. For participants still in wear-away, that figure would be unchanged from the annuity that they had earned before the Plan conversion, as previously disclosed to them in their benefit statements. (*See*, *e.g.*, A2169.)

The Seventh Circuit reached a similar conclusion based on information that employees received at termination in *Thompson v. Retirement Plan for Employees of S.C. Johnson & Son, Inc.*, 651 F.3d 600 (7th Cir. 2011). The company there operated a cash-balance plan that worked similarly to Foot Locker's. Because the benefit to which a cash-balance plan participant is entitled under ERISA is a retirement annuity, or the present value thereof, participants who elect to receive lump sums on termination are sometimes entitled by statute to amounts larger than the amount in their cash-balance accounts.[7] When the participants in *Thompson*

[7] In some circumstances, the lump-sum benefit generated by the cash-balance account—measured as the present value of the age-65 retirement annuity that can be purchased with the account balance—may turn out to be greater than the

left the company, they should have been awarded those enhanced amounts, but instead received only their cash balances, in an approach that was "concededly unlawful." *Id.* at 602. The Seventh Circuit nevertheless barred the claims of participants who took their lump sums more than six years before suit was commenced. The Court held that under the federal discovery rule, their claims accrued on the day that they received the deficient lump-sum payments, because that is when their entitlement to anything more was repudiated. *Id.* at 604.

The class plaintiffs argued that they were not aware of these technical deficiencies because they were not told how their lump sums were calculated. *Id.* at 606. But the Seventh Circuit "specifically reject[ed]" that argument. *Id.* Once the participants received their lump sums, they "underst[ood] that they had received their account balance and nothing more." *Id.* It was each participant's job to determine whether his award was lawful and correct. Otherwise, there would be "no accrual date" for their claims and a concomitant "nullification of the statute of limitations," which was an unacceptable outcome. *Id*. at 607.

The Foot Locker class members who left while in wear-away received more revealing information about their benefits than the *Thompson* participants. The former could see the difference between the lump sums they received and their

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amount in the notional cash-balance account. That increase in the lump-sum benefit, relative to the amount in the cash-balance account, is called "whipsaw." (A1724-25 at 353:21-355:16.)

account balances, and thereby determine that they may not have gained any benefits from the pay and interest credits added to their accounts. By contrast, the *Thompson* plaintiffs saw only one number, representing both the lump sum and the cash-balance account, and thereby somehow had to figure out that their benefits should have been larger. True, a Foot Locker employee might not immediately know *why* the discrepancy existed. Some participants even contended that they thought the discrepancy was attributable to legal requirements other than those giving rise to wear-away. (*See supra*, n.1; A1086-87 ¶ 17, A1113 ¶ 17, A1354 ¶ 27.) But the discrepancy itself was enough of a "warning" to trigger a duty to inquire further, and that inquiry would have uncovered the wear-away. *See, e.g.*, *J. Geils*, 76 F.3d at 1258 (holding that account statement showing difference between purchase price and market value of bonds should have alerted investor that "fraudulent statements may have been made in connection with the bonds' value").

At one time, the district court itself embraced this conclusion. In an earlier decision (before apparently changing its mind), it recognized that the ERISA disclosure claims in this case must accrue when class members cashed out and were told that their lump sums were greater than their account balances. (A178-80.) With that information, plus the SPD, a class member "needn't have been an actuary to realize that his benefit had been frozen as a result of the cash balance

conversion. If he did not come to such an actual realization, the evidence in the record is clear that he should have." (A179.)

As the Seventh Circuit did in *Thompson*, this Court has repeatedly insisted on the need for deadlines in ERISA cases. It rejected the idea that a pensioner could collect benefit checks for decades "without any obligation to inquire as to the correctness of the calculations underlying the benefit payments," and yet still bring a timely miscalculation claim. *Novella,* 661 F.3d at 147. To allow the tolling of the statute of limitations "'in perpetuity,' would thwart actuarial prediction of plan liability and thereby threaten the ability of pension plans to prepare in advance to meet financial obligations simultaneously to both beneficiaries and adverse litigants." *Veltri v. Bldg. Serv. 32B-J Pension Fund*, 393 F.3d 318, 325 (2d Cir. 2004). But that is precisely the effect of the rule adopted by the district court. Class members who terminated employment and who nevertheless failed to investigate why their lump sums were larger than their account balances, or why their annuities were no greater than the ones they had earned before the cash-balance conversion, should not be given the benefit of a perpetual disclosure claim.

2. Many Participants Were On Constructive Notice Of Wear-Away Because Of Individual Communications That They Received.

In addition, many class members received individualized communications explaining how their benefits were calculated, which were more than sufficient to alert them to the fact of wear-away. The benefit estimate sent to class member

Michael Steven is a case in point. (A2769-70.) It stated in plain English that his initial account balance was $140,667.67, which increased by about $13,500 during 1996 on account of interest and compensation credits. (A2770.) The estimate went on to state that his minimum lump sum as of December 31, 1996—*i.e.*, the amount that he was entitled to if he left employment at that time, based solely on his benefit accruals before 1996—was $224,817.02. (*Id.*) Thus, the estimate demonstrated to Steven that all of the money accumulating in his account balance likely would have no effect on the lump sum that he ultimately would receive. In fact, Steven testified that *he understood at the time* that so long as his minimum lump sum remained larger than his account balance, the credits added to his account balance "didn't matter." (A1986 at 1379:10-1380:17.) When Steven left Foot Locker and did receive more than his account balance, he was plainly on notice that he had suffered wear-away.

The same can be said for Ada Cardona, who received detailed correspondence showing how her annuity benefit was calculated. The document told her that her annuity was based on her pre-1996 benefit, even though credits had been accumulating in her account balance for almost two years, because her pre-1996 annuity was larger than the annuity generated by her cash balance. (A2687-89.)

The record is replete with other individualized communications that explained to class members that additions to their account balances likely would not affect their retirement benefits. For example, the slides shown to the employees at the Greenville, South Carolina facility gave examples of participants who would receive a lump sum based on their pre-1996 accrued benefit because it was larger than their cash balance. (*See* A3117-18.) Moreover, letters, detailed calculations, and benefit estimates were sent to participants with similar information, and benefit statements provided upon termination told participants in wear-away they would receive a minimum lump sum benefit that was larger than their cash-balance account. (*See, e.g.*, A3128-31, A3139-44, A3152-56, A3177, A3184-91, A3322-25.)

The district court gave short shrift to all of these communications, holding that the testifying class members did not understand their implications for wear-away. (A3536-38; SPA80-82.) Indeed, the court found that Steven "very credibly indicated a lack of real understanding as to what the calculation showed." (A3490; SPA34.) And similarly, with respect to Cardona, the court brushed aside her individualized letter by stating that "she credibly testified that she did not understand the calculations in the 2003 communication." (A3537 n.31; SPA81 n.31.).

But that was the wrong standard for determining whether the statute of limitations has begun to run. The question on constructive notice is not whether a particular class member *actually knew* that wear-away had occurred; it is whether he *could have figured out* with reasonable inquiry that it had. Indeed, as this Court has explained, constructive notice does not mean that an employee must be able to connect all the dots on his own and determine whether he has an ERISA claim; rather, it means that the employee has enough information to prompt a reasonable inquiry that would lead to the discovery of a wrong. *Caputo v. Pfizer, Inc*, 267 F.3d 181, 192-93 (2d Cir. 2001).

Participants who received individualized communications like the Steven or Cardona letters and then terminated employment had all of the information necessary to put them on constructive notice of wear-away. Accordingly, if they terminated employment more than three years before the suit was filed, their SPD claims were time-barred.

* * *

As a remedy, the Court should exclude from the SPD class all Foot Locker employees who left the company more than three years prior to the filing of suit in 2007. Many of these employees received individualized communications during their tenure alerting them to the possibility that they might suffer wear-away. If so, then their three-year clock for SPD claims would have run out.

To determine which employees received such communications, however, will require a "resource-intensive, claimant-by-claimant inquiry." *Novella*, 661 F.3d at 148. For that reason, there is a serious predominance problem. As this Court has recognized, the need for a "fact-dependent inquiry into each pensioner's accrual date" may lessen the value "*and indeed the availability*" of class actions. *Id.* (emphasis added). The only solution is to exclude from the SPD class *all* employees who left Foot Locker more than three years before 2007.

Even if the Court does not exclude every employee who departed before 2004, at the very least it should exclude the thousands of participants who departed before 2004 and were in wear-away at the time (or should enter judgment in Foot Locker's favor with respect to those claims). As discussed above, those participants' SPD claims were time-barred because of the statements they received on termination. Since their claims were untimely, they did not belong in the SPD class.

B. Participants Who Terminated Employment More Than Six Years Before Suit Was Filed Were Time-Barred From Asserting A Fiduciary-Breach Claim.

Application of ERISA's statute of repose to the fiduciary-breach claim ought to be straightforward. The statute says that suit must be brought no later than six years from the date of Foot Locker's last action that constituted a breach. 29 U.S.C. § 1113. For any employee who terminated employment and elected his

form of benefits more than six years before suit was commenced, the statute of repose necessarily ran because at that point whatever inaccurate communications Foot Locker had issued to the employee would have ended, as would any conceivable detrimental reliance thereon.

The district court rejected that straightforward approach. Instead, it relied on an exception in the ERISA repose provision, which states that "in the case of fraud or concealment," an action must be commenced "not later than six years after the date of discovery of such breach or violation." 29 U.S.C. § 1113. The term "date of discovery" is understood to mean the date when the employee "discovers or *with due diligence should have discovered*" the breach. *Caputo*, 267 F.3d at 192-93 (emphasis added); *see also J. Geils Band Emp. Ben. Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1254 (1st Cir. 1996); *Larson v. Northrop Corp.*, 21 F.3d 1164, 1171-72 (D.C. Cir. 1994). The district court held that the statute did not run until each class member was *told* about the alleged violation, which occurred in some instances almost 10 years after termination.

That ruling was plainly incorrect. *First*, the "fraud" prong of the "fraud or concealment" exception in § 1113 applies only where a plaintiff can prove the elements of ordinary, common-law fraud: (1) a material false representation or omission of an existing fact; (2) knowledge of falsity; (3) intent to defraud; (4) reasonable reliance; and (5) damages. *Caputo*, 267 F.3d at 191 (applying

exception). Similarly, the "concealment" prong requires a showing of *fraudulent* concealment. *Id.* at 190.

The district court, however, found that Foot Locker had committed "equitable fraud," *not* common-law fraud. (A3533; SPA77.) Despite their similar names, they are completely different concepts. Equitable fraud means simply that one party obtained an "undue advantage" by means of a breach of some duty. *Amara IV,* 775 F.3d at 526; *see also SEC v. Cap. Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963). As the district court correctly noted, equitable fraud lacks the key elements of common-law fraud: It does not require a showing of fraudulent intent, nor reasonable reliance on the misrepresentation. (A3532-33; SPA76-77.) The court's inability to find actual fraud is evident; had it been present, the entire discussion of reformation could have been far simpler.

Second, even if the "fraud or concealment" exception did apply, the clock would have been triggered by termination because that is when a departing employee "with due diligence should have discovered" that wear-away had occurred. *Caputo*, 267 F.3d at 192-93; *see* Point I.A, *supra*. Consequently, any participant who departed Foot Locker more than six years prior to this suit would be barred from bringing a fiduciary-breach claim under the "fraud or concealment" exception's six-year statute of limitations. Therefore, regardless of whether the

"fraud or concealment" exception applies, the class for the fiduciary-breach claim should exclude any participant who left Foot Locker before 2001.

II. THE DISTRICT COURT MISCONSTRUED THE LEGAL REQUIREMENTS FOR PROVING DETRIMENTAL RELIANCE.

It is hornbook law that an ERISA fiduciary-breach claim predicated on a misrepresentation requires proof of detrimental reliance. *See, e.g.*, *Bell v. Pfizer, Inc.*, 626 F.3d 66, 75 (2d Cir. 2010); *King v. Pension Trust Fund of the Elec. Indus.*, 131 F. App'x 740, 742 (2d Cir. 2005); *Burstein v. Ret. Account Plan for Emps. of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 387 (3d Cir. 2003). Accordingly, to prevail on the fiduciary-breach claim alleged here—as opposed to the SPD claim that was the subject of the *Amara* rulings—each class member must show that he took or avoided specific actions to his detriment on account of a misstatement in the Plan documents. *See Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011) ("The traditional (and most direct) way a plaintiff can demonstrate reliance is by showing that he was *aware of* a company's statement *and engaged in a relevant transaction . . . based on* that specific misrepresentation.") (emphasis added); *see also Greeley v. Fairview Health Services*, 479 F.3d 612, 614 (8th Cir. 2007) ("Detrimental reliance means that the plaintiff took action, resulting in some detriment, that he would not have taken had he known that the terms of the plan were otherwise[.]").

The district court gave two reasons for holding that detrimental reliance had been shown here. First, expressly invoking its earlier class-certification decision, the court held that class members could prove reliance based on "generalized" evidence. (A3529; SPA73 (citing A241-49, SPA103-111).) Second, the court stated that even if "individualized" evidence of reliance was legally necessary, the trial evidence showed that class members had relied on misstatements in the Plan documents. (A3529 n.27; SPA73 n.27.)

Both of those holdings, however, grew out of a fundamental misconception about the meaning and legal requirements for proving detrimental reliance. In the district court's view, a class member relied on the statements in the Plan documents if he had a mistaken belief about his retirement benefits. But that is not what reliance means. Reliance occurs when a class member takes a *detrimental act* on account of a misstatement in a plan document. There is no evidence that *any* class member—never mind the entire class—took any such detrimental act. For that reason, the district court's holding was wrong and must be reversed.

A. The Class Was Not Permitted to Rely on "Generalized" Proof of Reliance.

In its post-trial order, the district court reiterated its earlier ruling that the class was allowed to prove its case through "generalized" evidence—what it previously described as "common circumstantial evidence based on common facts as to misrepresentations and their method of dissemination and receipt." (A244;

SPA106.) For example, the court cited generic evidence that "[n]o Participant would have ignored the fact that their benefits were frozen without their knowledge." (A3529; SPA73; *see also* A248-49; SPA110.) Similarly, the court found it "simply incredible to believe that any employee would not rely on a representation that their compensation was growing with their continued service." (A3530 n.28; SPA74 n.28.) The court's earlier holding was based heavily on cases supposedly showing that generalized proof of this sort is sufficient to establish reliance.

That reading of the case law is flatly wrong, however. Only in rare cases—highly dissimilar from this one—is it permissible to prove reliance through generalized evidence. In this Circuit, "the inference of reliance" must be "almost inescapable" before such proof may be accepted. *Goodman v. Genworth Fin. Wealth Mgmt., Inc.*, 300 F.R.D. 90, 107 (E.D.N.Y. 2014). This case does not even come close.

The seminal decision on reliance is *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), a consumer class action brought against the producers of "light" cigarettes for making false advertising claims about the safety of their products. The plaintiffs argued that they collectively relied on the health claims when they bought the cigarettes and therefore did not need to prove reliance using individualized evidence. This Court rejected their argument. In the Court's view,

consumers "could have elected to purchase light cigarettes for any number of reasons, including a preference for the taste and a feeling that smoking Lights was 'cool.'" *Id.* at 225. Because the class members did not necessarily act with a common motivation, individualized proof was required to identify which class members had actually relied on the false health claims when they purchased the cigarettes, and which had not. *Id.* at 223-25.

McLaughlin thus held that even if every class member receives the same misleading communication, reliance cannot be presumed across the class if the alleged detrimental act is potentially motivated by factors other than the misleading communication. *Id.* at 225 n.7 (explaining that reliance will not be presumed when the act of reliance implicates a degree of "personal idiosyncratic choice").[8]

In a footnote, *McLaughlin* recognized a narrow exception where, "under certain conditions," reliance may be inferred. *Id.* at 225 & n.7. In some situations, such as purely "financial transaction[s]," the *only* plausible explanation for a detrimental act is that it was taken in reliance on a misrepresentation. *Id.* For instance, in *In re Foodservice Inc. Pricing Litigation*, 729 F.3d 108 (2d Cir. 2013), the defendant's fraudulent act was submitting inflated invoices for payment. This

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[8] Here, the record does not support a conclusion that each class member received the same communications concerning their retirement benefits. *See supra*, pp. 8-11. But even if it were otherwise, *McLaughlin* holds that reliance could not be presumed on that basis alone.

Court held that when customers paid the amount specified in an inflated invoice, the act of payment itself could constitute proof of reliance, because no one would have paid that amount absent reliance upon the invoice's implicit representation that it was correct. *Id.* at 120. Stated differently, reliance could be presumed because there was no other explanation for the detrimental act (*i.e.*, the overpayment) except that it was done in response to the fraudulent invoice. *Id.*; *see also Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004) (presuming reliance because the only explanation for plaintiffs entering into contracts to their detriment was certain false promises made by defendants).

The district court seized on the *McLaughlin* footnote and held that reliance here could be proved on a generalized basis because "it does not strain credulity to assume that *plaintiffs believed* what they were allegedly told about the change in pension plans." (A246; SPA108 (emphasis added).) But that assertion is decidedly wrong. First, the relevant inquiry is not whether the entire class "believed" misleading statements by Foot Locker; that question goes to mistake, not reliance. *McLaughlin*, 522 F.3d at 223.

Second, the *McLaughlin* footnote does not apply because one cannot presume that *every* class member undertook the same detrimental act for the same reasons. The only plausible act that could have constituted detrimental reliance in this case—remaining employed at Foot Locker—is quintessentially a "personal"

and "idiosyncratic" one. *McLaughlin*, 522 F.3d at 225 n.7. Decisions concerning employment "are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify." *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 604 (2008); *see also Hudson v. Delta Airlines, Inc.*, 90 F.3d 451, 457 (11th Cir. 1996) (declining to find class-wide reliance because employment decisions are "highly individualized").

It is therefore implausible—and, in any event, far from "inescapable," *Goodman*, 300 F.R.D. at 107—that every class member made decisions concerning his employment based on misleading Plan communications. *See Poulos v. Caesars World, Inc.*, 379 F.3d 654, 665-66 (9th Cir. 2004) (declining to presume reliance where class members' acts could plausibly be attributed to factors other than fraudulent statements). Ironically, the best proof in this regard is provided by Osberg himself. After he left Foot Locker, he joined a company with *no retirement plan whatsoever.* (A1739-40 at 413:23-414:8.) Nor was he alone in that regard. Class members Russell Howard, Ralph Campuzano, Doris Albright, and Richard Schaeffer testified that their subsequent employers did not offer defined-benefit pension plans. (*See* A1748 at 447:8-448:4, A1757 at 484:11-485:16, A1879 at 960:16-24, A1909-20 at 1076:1-1077:1.). Steven acknowledged that his decision to retire was not based on his understanding of his retirement

benefits. (*See* A1983 at 1366:4-8.). Plainly, the terms of the Plan did not dictate Osberg's—or other employees'—employment decisions.

B. There Was No Individualized Proof of Reliance.

As a fallback position, the district court stated in a footnote that if individualized proof was required, the class members had proved it. (A3529 n.27; SPA73 n.27.) But that position is unsustainable. The court cited no evidence that each and every class member took *specific actions because of* the company's communications. It could not, because there was none. What the court did cite was merely general evidence that class members mistakenly thought that their benefits were growing; that they did not complain about wear-away; and that some requested more information about their retirement benefits. (A3529-30; SPA73-74.) That evidence may show that some class members misunderstood the possibility of wear-away. But it does not begin to show *detrimental reliance*. *McLaughlin*, 522 F.3d at 223.[9]

[9] The complete absence of evidence of detrimental reliance was not an accident. It was class counsel's considered position, pressed vigorously at the class-certification phase, that reliance is not even an *element* of a fiduciary-breach claim. (*See Osberg v. Foot Locker, Inc.*, No. 14-3748 at Dkt. No. 8, pp. 12-17 (2d Cir. Oct. 20, 2014); *Osberg v. Foot Locker, Inc.*, No. 14-4376 at Dkt. No. 7, pp. 10-14 (2d Cir. Dec. 4, 2014); A1436 n.39.) Indeed, although plaintiffs' original class complaint contained allegations of reliance (A65-66 ¶ 62), those allegations were dropped from the amended complaint. (A136 ¶ 118.)

Without individualized proof of reliance, the class fiduciary-breach claim cannot stand. Accordingly, the judgment on that claim must be reversed.

III. THE DISTRICT COURT ERRED BY HOLDING THAT MISTAKE HAD BEEN PROVEN ACROSS THE CLASS.

To qualify for reformation, each class member was required to prove that he had a mistaken understanding concerning his retirement benefits. *Amara II*, 563 U.S. at 443 (citing 1 Joseph Story, Commentaries on Equity Jurisprudence § 154, at 149 (12th ed. 1877) ("Commentaries")). To support reformation, the mistake must be "clearly" demonstrated "by satisfactory proofs"; relief is "forbid[den] . . . whenever the evidence [of mistake] is loose, equivocal, or contradictory, or it is in its texture open to doubt, or to opposing presumptions." Commentaries § 157 (explaining that reformation may not be ordered unless proof of mistake is "unquestionable, and free from a reasonable doubt," similar to the degree of proof required in "criminal cases"); *see also Baltzer v. Raleigh & Augusta R.R. Co.*, 115 U.S. 634, 645 (1885) ("If the proofs are doubtful and unsatisfactory, and if the mistake is not made entirely plain, equity will withhold relief."), *cited in Amara II*, 563 U.S. at 443.

Here, there is no "satisfactory proof" that each and every class member shared a common misunderstanding about Foot Locker's Plan. In finding class-wide mistake, the district court relied on "class members' testimony and other [unspecified] evidence." (A3531; SPA75.) But at most, the testimony of a handful

of class members could support a finding that *those particular class members* were mistaken about their retirement benefits. It does not constitute "unquestionable" evidence that all 16,000 class members shared the same misunderstanding. Commentaries § 157.

In finding class-wide mistake, the district court also cited the "reasonable expectations" of a participant who read the Plan documents. (A3531; SPA75.) But the objective expectation of an average plan participant is not surrogate proof for subjective mistake; the proper test is whether each class member *actually* had a mistaken mindset. *See Zell v. Am. Seating Co.*, 138 F.2d 641, 647 n.20a (2d Cir. 1943) ("We may find that one cannot assert rights and powers [to reformation] unless he was actually, as well as reasonably, led to expect the performance for which he sues." (emphasis added)), *rev'd on other grounds*, 322 U.S. 709 (1944); *see also Beecher v. Able*, 575 F.2d 1010, 1015 (2d Cir. 1978) (noting that purpose of reformation is to amend contract to reflect the "intentions of the parties").

This Court in *Amara IV* did affirm a finding of class-wide mistake, in large part because the defendants there "made uniform misrepresentations" that nearly every class member read. 775 F.3d at 529-30. But that was not the case here. As explained above, scores of class members received individualized memos and account statements that explained in detail how their retirement benefits were calculated. (*See supra*, pp. 8-11.) The record shows that as a result of those

individualized communications, at least several class members recognized that their retirement benefit was not growing and demanded an explanation from Foot Locker why the credits to their account balances did not translate into a larger retirement benefit. (*See, e.g.*, A3271-72, A3157 (plan participant inquiring why his "accrued benefit" was the same in 1997 as on December 31, 1995); A3203 (similar inquiries from numerous participants).) Indeed, one witness, Linda Ine, testified that she fully understood that, when she left the company in 1999, her lump sum was based on her pre-1996 benefit and thus that she had not received the credits to her cash-balance account between 1996 and 1999. (A1893 at 1010:5-21.) Nevertheless, she testified that she had no complaints because she could take her benefit in the form of a lump sum—an option not available under the prior plan formula. *Id.*

A class member who did not actually misunderstand his retirement benefit is not eligible for reformation relief, *Amara II*, 563 U.S. at 443, and in any event would not have suffered harm sufficient to confer Article III standing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).[10] Since it is far from "unquestionable" that every one of the 16,000 class members here was mistaken

[10] The Supreme Court is currently considering whether the bare violation of a statute without concrete harm is sufficient to confer Article III standing. *See Spokeo, Inc. v. Robins*, U.S. No. 13-1339. If the Court were to decide that a statutory violation is insufficient, then class members who did not have a mistaken understanding about wear-away would have no standing to join the class.

about his retirement benefit, class-wide reformation was unwarranted. The Court should therefore enter judgment for Foot Locker or vacate the class certification due to the inherently individualized nature of the mistake inquiry.

IV. THE DISTRICT COURT'S REMEDY EXCEEDED THE CLASS'S INJURY, AND GAVE MANY CLASS MEMBERS AN UNDESERVED WINDFALL.

It is a venerable maxim that "[e]quity will not suffer a wrong without a remedy." *Indep. Wireless Tel. Co. v. Radio Corp. of Am.*, 269 U.S. 459, 472 (1929). A corollary is that an equitable remedy must not award a plaintiff *more* than is necessary to right the wrong that he suffered. 1 Dan B. Dobbs, Law of Remedies 121 (2d ed. 1993). As this Court has explained, "equity . . . abhors a windfall." *Prudential Ins. Co. of Am. v. S.S. Am. Lancer*, 870 F.2d 867, 871 (2d Cir. 1989); *see also United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323, 337 (1st Cir. 2003) (holding that equitable relief "should be 'no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs'" (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979))). These principles are particularly pertinent in ERISA cases, where courts must aim "to make the plaintiffs whole, but not to give them a windfall." *Henry v. Champlain Enters., Inc.*, 445 F.3d 610, 624 (2d Cir. 2006); *see also Harms v. Cavenham Forest Indus., Inc.,* 984 F.2d 686, 693 (5th Cir. 1993).

The district court violated these bedrock principles by imposing a sweeping remedy that gave many class members significantly more than what was needed to redress their injuries. According to the court, class members mistakenly believed that they would consistently accrue new retirement benefits on top of their pre-1996 benefit, when in fact many members experienced a wear-away period during which they accrued nothing. If so, the reformation order should have been tailored to redress *only* that injury. Thus, class members should have received their pre-1996 benefit plus the benefits that they expected to accrue going forward (including during any wear-away periods), and nothing more.

The district court's relief went much further, however. Hundreds of class members *who did not experience the effects of wear-away at all* will receive huge windfalls. As a result of the district court's faulty methodology, Foot Locker's liability is substantially more than *three times* what is necessary to address wear-away. (*See supra* pp. 19-20.) Accordingly, the district court's remedial order should be vacated and the case remanded for reconsideration of an appropriate remedy.

A. The Remedy Should Have Been Limited to Redressing Wear-Away, And Only To The Extent That Each Class Member Experienced It.

A contract may be reformed when there is clear and convincing evidence of fraud or inequitable conduct on the part of one party that leads to a mistaken understanding on the part of a counterparty. *Amara II*, 563 U.S. at 443. In that

situation, a court "may reform that writing to reflect the terms as represented to the innocent party." *Amara IV*, 775 F.3d at 524 (citing Restatement (Second) of Contracts § 166); *see also Grayson v. Buchanan*, 13 S.E. 457, 458 (Va. 1891) (if there is mistake by one party, and fraud or inequitable conduct by the other, reformation is available based on evidence showing what the true agreement was). But a contract may not be reformed in a manner that is contrary to the mistaken party's expectations because doing so would "foist upon the parties a contract they never made." 2 Dan B. Dobbs, Law of Remedies 748 (2d ed. 1993).

The mistaken understanding here, according to the district court, was class members' belief that they would continuously accrue additional retirement benefits under the new cash-balance Plan for as long as they kept working for Foot Locker. As the court explained in the section titled "Class-Wide Mistake":

> Participants reasonably but mistakenly believed that their pension benefits were equal to the sum of (A) the benefit each Participant earned under the Plan's traditional "defined benefit" annuity formula for service through December 31, 1995, plus (B) the benefits Foot Locker told Participants they were earning under the Plan's "cash balance" account formula for service after January 1, 1996.

(A3531; SPA75.) Stated differently, the court found that by virtue of Foot Locker's communications, class members were unaware that they were experiencing wear-away. Indeed, the district court used the term "wear-away" 142

times in its opinion, including every time that it described the class members' mistaken understanding.[11]

Because wear-away was the basis for the class-wide misunderstanding, reformation should have addressed wear-away and nothing more. As this is a class action, it was especially important that the model of damages align with the injury actually suffered by the class, and exclude anything else. *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013) (explaining that class action damages "must be consistent with [the] liability case"). Thus, the proper remedy here would resolve wear-away by providing class members with what they expected: the full value of their pre-1996 retirement benefit, in addition to the "growth" that they expected to receive each year after 1996.

B. The Correct Remedy Was To Award *A+B* Relief.

This Court has already shown how to apply *A+B* relief in a case involving wear-away. In *Amara IV*, participants alleged that a plan fiduciary had failed to disclose adequately the possibility of wear-away when the retirement plan changed

[11] The trial testimony also was consistent with that view of the misunderstanding. (*See, e.g.*, A3486; SPA30 (class member Cardona testifying that she "did not understand that she would not be receiving additional growth in her pension benefits"); A3487; SPA31 (class member Albright testifying that "she did not understand wear-away or that her pension benefits had not grown after the Plan change went into effect"); A3488; SPA32 (class member Howard testifying that he "looked at the growth [in his account balance] year to year" and therefore believed "that his pension benefit was growing the entire time he worked for the Company").)

from a fixed annuity plan to a cash-balance formula. 775 F.3d at 514-16. The Court approved a reformation that provided participants with an *A+B* benefit, with *A* being the annuity benefit earned under the prior plan and *B* being the benefit that participants thought they were earning for continued work. The same principles ought to apply here.[12]

1. The Correct "A" Benefit.

Under *Amara IV*'s approach, the *A* benefit for class members equals the value of the benefit that a class member had earned prior to the 1996 Plan conversion. Before conversion, class members' benefits took the form of deferred annuities.[13] For the 3% of class members who chose to receive an annuity upon leaving Foot Locker after conversion, their *A* benefit simply is their pre-1996 annuity. For the other 97% of class members who cashed out a lump sum, ERISA prescribes how to calculate their *A* benefit. To convert a future annuity into a lump sum, the statute requires using mortality assumptions and discounting the future annuity payments by the 417(e) interest rate that is in effect at the time the lump sum is taken. 29 U.S.C. § 1055(g)(3). Because the 417(e) rate changes from year

[12] In *Amara*, the district court ordered the *A* benefit paid in the form of an annuity. 775 F.3d at 518. Here, since many class members already received their retirement benefit as a lump sum, the *A* benefit must be converted into a lump sum.

[13] The sole exception was that employees who earned only a *de minimis* benefit were paid that benefit as a lump sum upon departing the company. (A3463 n.8; SPA7 n.8.)

to year, the *A* benefit for a particular class member can only be calculated when the member cashes out.

2. *The Correct "B" Benefit.*

A class member's *B* benefit corresponds to the additional benefit that he thought he was receiving under the post-conversion cash-balance formula. According to the district court, class members were promised that their retirement benefits would increase as a result of certain pay credits and interest earned on those pay credits, and that is what they expected. (A2157-58.)[14] Accordingly, to meet those expectations, the reformed *B* benefit should equal the pay credits that each member earned on their account balances—including credits earned during periods when a member was unknowingly in wear-away—as well as the promised 6% interest on those pay credits.[15] A lump-sum recipient would receive the *B* amount in a lump sum, while annuitants would receive the annuity that could be purchased from that *B* amount.

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[14] *See, e.g.,* A1354 ¶ 27 (class member Steven testifying that he believed "that my account balance had grown with compensation credits and interest credits . . . and that my lump sum was based on that growing account balance"); A1083-84 ¶¶ 10-13 (class member Campuzano testifying that he believed the growth in his account balance equaled growth in retirement benefit); A1112-13 ¶ 15 (class representative Osberg testifying that he thought pay credits represented an increase in his retirement benefit).

[15] Because under the *A*+*B* approach a class member's *A* benefit is calculated on the date that member cashes out of the Plan, the *A* benefit reflects the interest earned on the pre-1996 benefit until the time of distribution. (*See* A994.)

3. Enhancements.

Under the terms of Foot Locker's Plan, class members who met certain seniority criteria received percentage enhancements to their opening cash balances. (A2156.) In rejecting Foot Locker's proffered *A+B* relief, the district court mistakenly characterized Foot Locker's proposal as being one that removes the enhancement. (*See* A3505; SPA49.) In fact, the *A+B* relief proposed by Foot Locker would give participants the full value of the enhancements they were expecting. But those enhancements had the effect of increasing a class member's account balance and thus reducing—and in many cases, eliminating—wear-away, because wear-away was experienced only to the extent that a class member's account balance was worth less than his *A+B* benefit. *A+B* relief thus necessarily reduces the amount of wear-away relief to which a participant receiving an enhancement is entitled.

Accordingly, class members whose enhancements caused their account balances to be greater than their *A+B* benefit should receive no relief, since they did not experience any wear-away. Others who received an enhancement are entitled to relief only insofar as relief is needed to remove wear-away.

Reforming the Plan in this fashion is consistent with how enhancements were treated in *Amara*. There, participants who met certain seniority criteria were similarly promised enhancements to their opening balances. *See Amara v. CIGNA*

Corp., 534 F. Supp. 2d 288, 301, 308-09 (D. Conn. 2008) ("*Amara I*"), *vacated on other grounds by Amara II*, 563 U.S. 421. As the *Amara* court recognized, the enhancements lessened or eliminated any wear-away, and thus operated to reduce the need for reformation relief under the *A+B* formula. *See Amara v. CIGNA Corp.*, 925 F. Supp. 2d 242, 265 (D. Conn. 2012) ("*Amara III*").

C. The District Court's "Starting Balance" Approach Created Windfalls That Exceeded The Expectations of Class Members.

The district court rejected the *A+B* formula set out in *Amara* and instead adopted its own novel approach. It first recalculated every class member's opening account balance, using a 6% discount rate and no mortality assumption, and made that new opening balance a proxy for the member's pre-conversion benefit. (A3502-05, A3539; SPA46-49, SPA83.) It then added a post-conversion benefit consisting of (i) interest on the new opening balance, (ii) enhancements for eligible participants that were calculated as a percentage increase on the new opening balance, *and* (iii) the promised pay credits (plus interest). (A3505-06, A3539; SPA49-50, SPA83.) Remarkably, the district court acknowledged that its approach would sometimes "*do more*" than replicate participants' pre-conversion accrued benefit (A3504; SPA48 (quoting Foot Locker's expert, A2088-89 at 1776:6-1777:7)) (emphasis added), but it went ahead and did so anyway.

The primary flaw in the district court's approach is that it purported to remedy wear-away—*i.e.*, class members not receiving all of the *post-conversion*

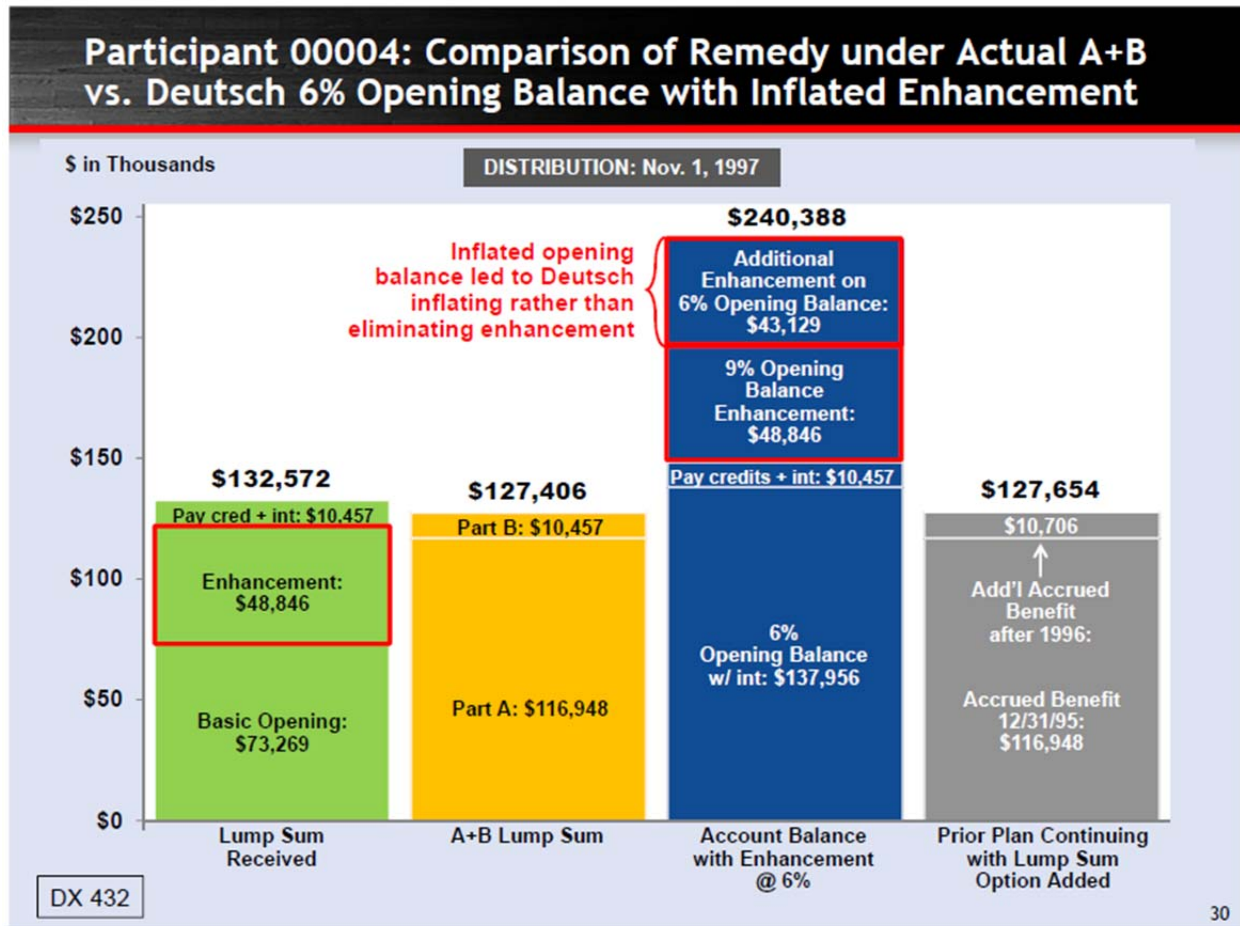
benefits that they expected—by increasing their *pre-conversion* benefit. Moreover, in its effort to fix what it viewed to be a problem with the pre-conversion "A" benefit, it applied an improper methodology insofar as it used a 6% discount rate and no mortality assumption. ERISA mandates that an annuity benefit must be converted into a lump sum by applying the 417(e) rate in effect at the time the participant terminates, as well as a mortality assumption.

The district court then compounded the error by adding seniority enhancements *on top of* that adjusted benefit. By adding the enhancements *after* it purported to fix wear-away, rather than before, the court provided an unwarranted windfall to participants. As stated above, the enhancements served to reduce wear-away by increasing a participant's opening account balance. Thus, participants who had received enhancements experienced less wear-away, and they should receive less relief. Under the district court's formula, however, participants eligible for enhancements will receive *more* relief than needed to remedy wear-away because the district court added enhancements as a bonus after wear-away had already been addressed. To make matters worse, the court gave eligible participants an even larger enhancement than they expected by recalculating the enhancement as a percentage of the newly augmented pre-conversion benefit.

The impropriety of the district court's formula becomes crystal clear when considering class members *who did not suffer wear-away at all*. At the time of the

Plan conversion, hundreds of class members received such large seniority enhancements that they did not experience the effects of wear-away. (A3501; SPA45.) In other words, when these members cashed out, they received their entire pre-1996 benefit and all of the compensation credits that they expected to receive (plus interest on those credits).

Nevertheless, under the district court's formula, those class members would receive a significant windfall. An example from the record illustrates the point.



(A3357.) In this chart, the green column represents what a certain class member actually received as his lump sum benefit. His opening account balance (plus

interest earned on the opening balance by the time he departed) was $73,269 using the Plan's 9% conversion formula. He received a seniority enhancement of $48,846. In the months following the 1996 Plan conversion, $10,457 in pay credits (plus associated interest) were added to his account, producing a total value of $132,572. And that is the lump sum that he actually received upon leaving the company.

As shown in the yellow column, this class member did not experience wear-away because the lump sum that he received – $132,572 – was *larger* than the value of his pre-1996 benefit ($116,948, as calculated using the methodology ERISA requires) plus the $10,457 in pay credits and associated interest that were added to his cash balance following the 1996 Plan conversion. Again, since he actually received more than he would have received even if every dollar of the pay credits and interest had counted, he suffered no injury, and therefore should not have received an award in this litigation.

The district court's formula, as depicted in the blue column, however, generates a windfall of $107,816 to this class member. Under the court's approach, it would recalculate the member's opening balance to total $137,956. On top of that, it would add the seniority enhancement and pay credits (plus

interest on the pay credits).[16] Moreover, even though this member was told that his seniority enhancement would be $48,846, the district court nearly doubled the promised enhancement by recalculating it based on the larger opening balance. There is no evidence that *anyone* expected to receive the inflated enhancement amounts that result from the district court's formula or that *anyone* expected the windfalls that the district court's formula gives to every class member.

The example discussed above is illustrative but not exhaustive. Indeed, under the district court's formulation, thousands of class members will receive significantly more than what is needed to redress the wear-away experienced by that member. The purpose of reformation is to give class members what they mistakenly expected to receive. *Amara IV*, 775 F.3d at 524. The only mistaken understanding held uniformly by class members concerned wear-away. (*See* A3531; SPA75.) Because the district court's formula does more than address wear-away, the court abused its discretion, and its remedy should be vacated in favor of the *A+B* approach approved in *Amara IV*. *See Comcast*, 133 S. Ct. at 1433.

[16] As depicted here, the $137,956 includes the interest that accumulated on the opening balance between January 1, 1996 and the member's cashing-out date.

CONCLUSION

For the foregoing reasons, the Court should: reverse the fiduciary-breach finding in favor of the class; preclude class recovery on the SPD claims, either entirely for failure to prove class-wide misunderstanding or at least for class members who terminated their employment more than three years before suit was filed; and vacate the district court's remedial order and remand the case for a proper formulation of reformation relief for any class members whose claims are not dismissed.

February 16, 2016

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,702 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman font.

Dated: February 16, 2016

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEOFFREY OSBERG

On behalf of himself and on behalf of all others similarly situated,

Plaintiff,

- against -

FOOT LOCKER, INC.,

FOOT LOCKER RETIREMENT PLAN,

Defendants.

Case No.: 07 CV 1358 (KBF)

~~[PROPOSED]~~ FINAL JUDGMENT

In accordance with the Court's September 29, 2015 Opinion and Order (Dkt. 393, as amended) ("Order"), it is hereby ORDERED and ADJUDGED as follows:

1. For the reasons set forth in the Court's Order, the Foot Locker Retirement Plan is hereby reformed to provide the "A" plus "B" pension benefit described in the Court's Order, net of any court-approved adjustments that will be specified in an amended final judgment following the adjudication of Plaintiff's and Class counsel's motion for an award under ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1) and/or the common benefit doctrine of attorneys' fees and expenses and incentive payments for the named plaintiff and testifying class members.

2. Specifically, the Plan is hereby reformed to provide additional benefits to each Participant member of the Class equal to (1) the excess, if any, of the A plus B benefits described in Section II.G of the Court's Order, over any such benefits already paid to the Participant; plus (2) prejudgment interest at a rate of 6% on any amounts due retirees for prior payments; minus (3) the Participant's allocable share of any approved common benefit attorney's fees and

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expenses, and any approved incentive payments for the named plaintiff and testifying class members, as ordered by the Court.

3. The Court orders and enjoins Foot Locker to enforce the Plan as thus reformed. However, the remedies provided in this Final Judgment are stayed to allow Defendants to pursue an appeal, including any certiorari petition. In addition, briefing and notice to the Class of Plaintiff's and Class counsel's motion for an award under ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1) and/or the common benefit doctrine of attorneys' fees and expenses and incentive payments approved for the named plaintiff and testifying class members is also stayed until 90 days after issuance of the Mandate from the Court of Appeals for the Second Circuit if there is an appeal, or 30 days after disposition (meaning petition is denied or the case is resolved if granted) of a certiorari petition to the United States Supreme Court if one is filed, or for 90 days if no notice of appeal is filed within 30 days of the entry of this Final Judgment.

SO ORDERED.

Dated: New York, New York
October 5, 2015

KATHERINE B. FORREST
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEOFFREY OSBERG, on behalf of himself and on behalf of all others similarly situated, Plaintiff, -v- FOOT LOCKER, INC. and FOOT LOCKER RETIREMENT PLAN, Defendants.	07 Civ. 1358 (KBF) **(CORRECTED[1])** OPINION & ORDER

KATHERINE B. FORREST, District Judge:

In this certified class action[2], current and former employees of Foot Locker, Inc. ("Foot Locker" or the "Company")—formerly known as the Woolworth Corporation—seek reformation of their pension plan to conform to the benefits they

[1] This Opinion and Order has been corrected to address the prejudgment interest issue as reflected in letters from counsel on October 2, 2015.

[2] On September 24, 2014, the Court certified a class defined as follows:

> All persons who were participants in the Foot Locker Retirement Plan as of December 31, 1995, who had at least one Hour of Service on or after January 1, 1996 (as defined under the Plan), and who were either paid a benefit from the Plan after December 31, 1995 or are still entitled to a benefit from the Plan; and the beneficiaries and estates of such persons and alternate payees under a Qualified Domestic Relations Order.

(Opinion & Order dated September 24, 2014 at 12, ECF No. 186.)

After the Court made its initial determination granting certification (ECF No. 186), Foot Locker moved for reconsideration. The Court then reconsidered its decision and issued an additional decision confirming its initial determination. (ECF No. 220.) The Court notes that the evidence presented at trial overwhelmingly supports the Court's determination. Foot Locker has urged that issues of reliance and the statute of limitations create a predominance of individualized issues. This argument is without merit and is incorrect as a factual matter. There is no evidence in the record that any average Plan Participant ever understood that he or she was subject to wear-away, even once his or her benefits commenced. The evidence overwhelmingly supports a contrary conclusion.

understood Foot Locker had promised them. The Class's claims are brought under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 et seq.

The Court held a bench trial from July 14, 2015 to July 27, 2015. Twenty-one fact witnesses testified—15 live[3] and six by deposition. The parties also called three expert witnesses: actuarial expert Lawrence Deutsch, E.A. and financial economist Clark L. Maxam, Ph.D. testified for the Class, and actuarial expert Lawrence Sher, F.S.A. testified for the defendants. The Court also received several dozen documents into evidence. This Opinion & Order constitutes the Court's findings of fact and conclusions of law.

The Class's core claim is that the Company failed to inform its employees (the "Participants") that plan changes that went into effect as of January 1, 1996 implemented an effective freeze on growth of the employees' pension benefits—such that, for a period of time, additional periods of service did not result in additional benefits. The Class asserts that both class-wide and individual communications failed to clearly describe that the vast majority of Participants would be in a period of "wear-away" during which new accruals would not increase the benefit to which the Participant was already entitled. By contrast, while Foot Locker does not contest that the vast majority of Participants were in a period of wear-away, it claims that the Plan communications adequately disclosed the necessary details of

[3] Named plaintiff Geoffrey Osberg and class members Ada Cardona, Michael Steven, Richard Schaeffer, Russell Howard, Ralph Campuzano, and Doris Albright testified via declaration and were subject to live cross-examination and re-direct.

changes to the Plan, including an adequate description of the actual benefit a Participant would receive. According to Foot Locker, Participants had the information necessary to inform them they were in a period of wear-away. The Company concedes that it did not describe wear-away explicitly because it believed it was too complicated and its variations and effects too unpredictable. According to Foot Locker, the additional disclosures might have had misled Participants into believing that they were entitled to a greater benefit than that to which they were entitled at termination.

Having considered all of the evidence, at long last the dust on this case has settled and the Court does not believe it presents a close call. The evidence is overwhelming that the changes in the Retirement Plan resulted in an effective freeze of pension benefit accruals—and that this freeze was not adequately disclosed to Participants. Some Participants were severely impacted, some moderately, and a few not at all. In this regard, the evidence is clear that (1) wear-away was an intended feature of the Plan, (2) Plan disclosures and other communications to Participants failed to disclose wear-away, (3) this lack of disclosure was intentional, (4) wear-away impacted thousands of employees—many, including the named plaintiff, terminated employment and were paid benefits while they were still in wear-away, (5) Participants did not understand that, as a result of wear-away, additional periods of service after January 1, 1996 would not and did not increase the benefit received, and (6) Appropriate disclosure would not have

been too confusing and had it been given, Participants would have understood the consequences of wear-away.[4]

Both parties have compared this case to Amara v. CIGNA Corp., which the Court discusses below. This case presents a more egregious set of circumstances than Amara. In Amara, wear-away resulted, in large part, from fluctuations in interest rates; here, by contrast, the structure of plan conversion guaranteed that most Participants would experience severe wear-away and that this was the expected source of cost savings to Foot Locker.

I. FINDINGS OF FACTS

Pursuant to Federal Rules of Civil Procedure 52, the Court's findings of fact and conclusions of law are set forth below.[5]

A. The January 1, 1996 Plan Amendment

Before 1996, benefits under Foot Locker's pension plan were defined as an annual benefit commencing at age 65 and continuing for life. (Expert Opening Report of Lawrence Deutsch, E.A. ("Deutsch Op. Report") at 5.)[6] This benefit was calculated on the basis of a Participant's compensation and years of service. (See id. at 2.) Under the prior Plan, Participants who retired or terminated before age 65

[4] Foot Locker contends that it would have been too confusing to describe wear-away to Participants. The Class's position is that Participants would have understood the information if appropriately disclosed, but instead Foot Locker deliberately obfuscated it.

[5] The Court makes its findings of fact based on the preponderance of the evidence. See Scientific Components Corp. v. Sirenza Microdevices, Inc., 399 F. App'x 637, 638 (2d Cir. 2010). The Court has also considered evidentiary objections lodged by the parties. With regard to any objections to evidence cited in this Opinion not individually addressed, the Court finds that they are without merit.

[6] The Court received the experts' reports and declarations as their direct testimony. They were then subject to cross-examination and redirect.

generally could either wait to start receiving benefits at age 65 or commence early retirement distributions between ages 55 and 65, as further explained below. (Id. at 5.)[7] Participants generally did not have the option to receive their benefits as a lump sum.[8]

Foot Locker converted the Plan to a cash balance plan as of January 1, 1996. Under the Amended Plan, Participants' age-65 annual benefit accrued as of December 31, 1995 (the "December 31, 1995 accrued benefit" or the "December 31, 1995 frozen accrued benefit") was converted into an initial account balance that would be used to calculate the benefit under the new formula. This conversion was effected in three steps:

1. First, the Plan calculated a lump sum value of the Participant's age-65 accrued benefit under the old Plan, as of December 31, 1995.
2. Second, the Plan discounted this age-65 lump sum to January 1, 1996, to reflect the time value of money.
3. Third, the Plan further discounted this January 1, 1996 present value by a mortality discount—to reflect the possibility that the Participant might not live until age 65.

(Deutsch Op. Report at 7.)

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[7] To the extent that Defendants object to portions of the Deutsch expert report, this Court has already resolved the admissibility issues at pretrial conferences in pretrial orders. Any further objections merely go to the weight of the evidence, which this Court has considered.

[8] There was a "de minimis" exception: if, at a Participant's termination, the present value of the Participant's pension benefit was less than $5,000 (or before July 1, 1998, $3,500), the benefit would be paid out in a single lump sum. (Deutsch Op. Report at 5 n.5; Deutsch Tr. 118:11-119:1.)

Critically, the conversion at steps 1 and 2 was accomplished using a 9% discount rate. Following the conversion, however, Participants' account balances were credited with pay credits and an interest credit at a fixed annual rate of 6%. (See id. at 7-8.) Thus, while Participants' growing account balances created the appearance of pension benefit growth, this appearance was deceptive: the initial conversion was accomplished using a 9% rate (and a mortality discount) but each Participant's account subsequently earned interest only at a 6% rate. As a result, the account balance under the new formula was—for a period of time (in many cases, years)—smaller than the December 31, 1995 accrued benefit. (See id.)

The disparity between the December 31, 1995 accrued benefit and the benefit under the new formula triggered ERISA's anti-cutback rule, which (with narrow exceptions inapplicable here) requires that a participant's benefit entitlement, once earned, never be reduced due to a plan amendment. (Id. at 3.) To comply with the anti-cutback rule, the new Plan calculated benefits based on a "greater of" formula. Under this formula, a Participant's actual pension benefit was the greater of the December 31, 1995 accrued benefit (the "A benefit") and the Participant's cash balance benefit (the "B benefit"). (Id.)[9] Until the cash balance caught up to and surpassed the December 31, 1995 accrued benefit, the Participant was in a period of wear-away. That is, his or her pension benefit did not grow despite continued

[9] The Court uses the terminology "A" and "B" benefits as a specifically defined in this Opinion. The literature on pension plans and case law may use those terms to describe a base benefit (the A) plus additional growth (the B). Here, as used in relation to the Plan conversion, the A and B benefits are defined differently; the A benefit is the old benefit and the B benefit is the new. As discussed below, Foot Locker did not intend the A and B benefits to be added together.

service. (Id. at 3-4.) As further explained below, the combined use of the 6% interest rate with the 9% discount rate mathematically guaranteed that most Participants would experience wear-away. This was understood by Foot Locker at the time and relied upon as a source of savings.

The "greater of" comparison between the A and B benefits was an annuity-to-annuity comparison that was accomplished via the following steps. First, the A benefit (the December 31, 1995 accrued benefit) was converted to an annuity. The B benefit (the Participant's cash balance benefit) was projected to age 65 with a fixed 6% interest rate, and converted to an annuity commencing at age 65. The last step was accomplished by using either the 6% rate or the applicable rate under Internal Revenue Code ("IRC") § 417(e) and the applicable mortality table under § 417(e). (See Deutsch Op. Report at 4, 6.) For the vast majority of Participants, the A benefit exceeded the B benefit. This meant that growth in the B benefit—the hypothetical account balance—due to additional service and interest credits did not represent any growth in the actual benefit a Participant would receive. (See id. at 4.)

Under the new Plan, Participants could choose to receive their pension benefit as a lump sum or an annuity. Under ERISA, a lump sum cannot be less than the present value of a participant's age-65 benefit using the interest rate and mortality assumptions required by IRC § 417(e). "Lump sum" wear-away is more difficult to estimate because the § 417(e) rate—and thus the lump sum value of the

December 31, 1995 frozen benefit—fluctuates from year to year. (Deutsch Op. Report at 16.)

The cash balance conversion was also accompanied by a new 401(k) plan.

Early Retirement Subsidy/Enhancement. The prior Plan included an early retirement subsidy, which worked as follows: Participants between age 55 and 65 had the option to receive early retirement benefits. For Participants with fewer than 15 years of service, early retirement benefits were equal to the Participant's age-65 benefit reduced by 6% per year for early commencement. (Deutsch Op. Report at 5; Deutsch Tr.[10] 115:19-20.) For Participants with at least 15 years of service, early retirement benefits were more favorable: they were equal to the Participant's age-65 benefit reduced by 4% per year for early commencement. (Deutsch Op. Report at 5; Deutsch Tr. 115:20-21.) In other words, if a Participant younger than 55 accrued at least 15 years of service, he or she was entitled to 60%—that is, 100% minus 4% x 10 years—of his or her accrued benefit payable as an annuity, though the Participant could not collect the annuity until 55 years old. (Sher Tr. 1506:12-1507:14.) For Participants who worked past the age of 55, the value of their early retirement benefit decreased annually until age 65, at which point it carried no additional value. (Sher Tr. 1510:3-13.) The early retirement subsidy was an expensive feature of the Plan. (Deutsch Tr. 127:15-128:1.)

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[10] "Tr. P:X-Y" or "[Last name] Tr. P:X-Y" refers to page P, lines X to Y of the trial transcript in this case. Where transcript dates are included, those citations refer to deposition transcripts.

To receive the value of this subsidy under the new Plan, Participants had to elect an annuity form of payment, not a lump sum. (Deutsch Tr. 128:2-6.) However, approximately 97% of Participants elected lump sums. (Deutsch Op. Report at 16.)

Under the new Plan, Participants who were at least age 50 and had at least 15 years of service on December 31, 1995 received an enhancement to their opening account balance. (Deutsch Op. Report at 8-9.) The size of the enhancement varied: at the optimal ages of 50 to 55, the enhancement was a 66.67% increase in the account balance; for Participants older than age 55, the enhancement decreased, disappearing at age 65. (Id. at 8-9.)

B. Internal Communications

At trial, the Court heard a significant amount of testimony—and received a large number of documents—regarding the internal process by which the January 1, 1996 Plan amendment was developed and implemented.

In late 1994 or early 1995, Foot Locker's management determined that, in light of the Company's poor financial condition, it was necessary for the Company to cut costs, including in connection with retirement benefits. (Declaration of Patricia A. Peck ("Peck Decl.") ¶ 3, ECF No. 333.) Roger N. Farah, Foot Locker's Chief Executive Officer at the time, specifically requested a recommendation with regard to cost savings available through the retirement plan. (See PX 24 (February); PX 632 (January).) A task force of four employees from the corporate benefits department was established: Tom Kiley, Carol Kanowicz, Marion Derham, and Pat

Peck. (See Peck Tr. 1112:3-12; PX 24.)[11] All four testified at trial (Kanowicz by deposition).

Peck had been the Vice President of Human Resources during the period at issue. In that capacity, she headed the Human Resources Department. (Peck Tr. 1103:14-20.) Peck reported to Barry Thomson, Foot Locker's Chief Administrative Officer and a member of the Chairman's Group. (Tr. 1105:14-22.) Peck was led the team responsible for coming up with recommended changes to the Plan and communication to Participants. She was ultimately the person responsible for deciding which Plan recommendation and option(s) to present to management. (See Tr. 1109:2-6, 1113:5-1114:4; Peck Decl. ¶ 3.) In understanding this assignment, Peck understood cost cutting was to play a significant role. (Tr. 1114:5-7.) Peck primarily worked with William M. Mercer Inc. ("Mercer"), the company's actuarial advisor and Kiley—an individual with the necessary expertise who Peck believed understood the ins and outs of pension plans. (Peck Decl. ¶ 3; Tr. 1116:1-7, 1116:12-1117:2.) Based on Mercer's advice, Kiley recommended that the Plan be converted

[11] All four of these individuals testified live or via videotaped deposition at trial. The Court found Patricia Peck to be particularly credible. She was forthcoming, careful, and appeared in all ways to be honest. The Court evaluated her testimony particularly carefully in light of a medical condition which had required significant chemotherapy and radiation. Foot Locker brought this out at the conclusion of Peck's testimony. The Court found that Peck's memory as to what had occurred was nevertheless clear; she differentiated between those events she could recall and those she could not. In contrast, the Court found Tom Kiley—who worked for Peck and was in charge of developing the recommendation to Peck for her to take to senior management—to substantially lack credibility. He was evasive and, until the Court remarked on his lack of recollection to counsel at a break, displayed little ability to interpret documents he had authored or received, reviewed, and used in his work. Other former employees in the benefits area, Carol Kanowicz and Marion Derham, were credible, though they had varying levels of recall. The Court also found the Class member witnesses credible and compelling. They uniformly testified to a lack of understanding that they had not received additional pension growth during the time they were employed after January 1, 1996.

to a cash balance plan—and that this change occur simultaneously with the institution of a 401(k) plan. (Peck Decl. ¶ 3; Tr. 1118:3-12.)[12]

In February 1995, Peck learned that there was an aspect of the proposed cash balance plan that would have the effect of suspending the accrual of new benefits to employees for a period of time. (See Peck Decl. ¶ 6; Tr. 1121:31-16; PX 84.) Notes that Peck took during a meeting with Mercer that month reflect that she was informed that the discount rate used to convert the benefit from the prior plan into an initial account balance interacted with the GATT (General Agreements on Tariff & Trade) rate to create a suspension of new accruals. (See PX 84; Peck Tr. 1121:17-1122:1.) Her notes also reflect that she wrote, "does not constitute partial plan termin[ation]; nothing more than plan amendment." (PX 84.) She later indicated in the same notes that there would be a "positive effect on P & L & contributions." (Id.) Peck understood wear-away. (Peck Tr. 1128:4-8.) She also understood that it was not a required feature of plan design. (Tr. 1129:11-14, 1129:24-1130:5.) In other words, to convert to a cash balance plan did not require wear-away. The Company had the option of choosing a combination of rates that would cause wear-away—but it could also choose rates that would not cause wear-away. (Id.) In terms of Foot Locker's choices, Peck understood that the rates chosen mathematically locked in wear-away. (Tr. 1130:9-14, 1130:21-1131:4.) Indeed, she

[12] At trial, Kiley testified that he originated the idea of a cash balance plan before cost cutting was even raised. (Kiley Tr. 943:3-21.) The Court does not credit this testimony. The Court credits the testimony of benefits manager Marion Derham and Peck, both of whom viewed Mercer as the originator of the idea. (Derham Tr. 1409:1-24, 1410:23-1412:7; Peck Tr. 1116:1-19; 1294:23-1295:6.)

conceded that she had to know this in order to do her job. (Tr. 1131:5-7, 1142:14-18.)

Peck also knew that the Plan conversion created the cost savings that the Company sought. (Tr. 1131:8-11.) She understood that the cost savings were based directly on the required feature that Participants would not earn any additional benefits for a period of time. (Tr. 1131:12-19.) She also knew that a decline in the GATT rate would worsen the wear-away for Participants. (Tr. 1132:10-16.) She further understood that, for a Participant in wear-away, increases in that Participant's cash balance account would not have increased any actual benefit to which that Participant was entitled. (Tr. 1133:1-9.) Pension benefits were part of an employee's total compensation. (Tr. 1135:6-8, 1135:17-23.) When an employee was in wear-away, his or her pension was not increasing in value; this was an effective decrease in such employee's compensation. (Tr. 1135:24-1136:4.)

Prior to May 1995, Peck had not made a determination as to the type of plan changes that would be recommended to management. (Tr. 1120:4-12.) Peck understood that a lump sum option could have been provided by way of amendment to the prior plan. (Tr. 1159:7-19.)

On May 1, 1995, Peck made a formal presentation to management regarding her recommendation changes to the pension program. (Tr. 1145:10-17; PX 10 (with Peck's notes); PX 632 (with Kiley's notes).) She understood that her assigned task had been to cut costs, not to make the Plan more beneficial for Participants. (Peck Tr. 1146:24-1147:3.) The task force had looked at several variations of the cash

balance formula—and chose the particular formula because of the level of savings it provided and because it was service-based, which was appropriate based on the emerging demographics of the Company. (PX 632; Peck Tr. 1149:6-11.) Peck's presentation to senior management reflected that an advantage of converting to a cash balance plan was "decreases [in] future company costs;" a disadvantage was that it would lead to a "permanent loss of retirement benefits." (PX 632.) The Company viewed announcing a temporary plan freeze as a "morale killer." (Peck Tr. 1155:16-19, 1164:13-16.) However, Peck agreed that wear-away was, in effect, a freeze. (Tr. 1160:10-13.) It was not announced as such. Conversion to a cash balance plan had the advantage of being able to obscure what was an effective freeze, without the accompanying negative publicity, loss of morale, and decreased ability to hire and retain workers. (Tr. 1157:16-1158:1, 1161:11-23.)

On July 20, 1995, a presentation was made to senior management—including Farah and Dale Hilpert, Foot Locker's Chief Operating Officer at the time—regarding the proposed changes in the pension program. (PX 101.) The presentation included cost savings expected in large part because of the wear-away effect. (PX 101.) Peck testified, and the Court credits, that senior management was involved throughout the decision making process. (See Peck Tr. 1114:23-1115:25, 1169:3-9, 21-25.)

On August 8, 1995, a presentation regarding the proposed changes in the retirement plan was made to the Company's Retirement Investment Committee. (PX 19; PX 147.) That presentation, which was made by Barry Thomson, included a

comparison of various defined benefit plan alternatives—and contained various benefit illustrations for the version of the cash balance plan that was ultimately selected. (PX 19; Peck Tr. 1176:7-10.)

On August 22, 1995, Peck sent the Board an abbreviated version of the August 8, 1995 presentation (PX 91) in order to enable to Board to review the materials in advance of a meeting scheduled for September 13, 1995. (Peck Tr. 1176:11-15, Tr. 1177:3-9.) On September 13, 1995, Thomson presented the proposed recommendations to the Board. (PX 37, PX 40.) The Board adopted the recommendations and, two days later, on September 15, 1995, a company-wide announcement letter was issued about the changes to the Plan. (PX 2.)

A year later, in September 1996, Peck learned that the wear-away period would be significantly longer than previously expected—and would last between four and five years. (Peck Tr. 1141:12-17; PX 9.) Prior to this point, both Peck and Kanowicz believed that wear-away was only expected to last two to three years. (Peck Tr. 1134:23-1135:5; Kanowicz 3/29/2012 Tr. 167:8-18.) On September 11, 1996, Mercer informed Foot Locker that the normal cost (e.g., annual cost to Foot Locker) under the new Plan was about $4 million and was expected to rise to about $10 million by the year 2000, when wear-away would end in about four years. (PX 9; Peck Tr. 1141:22-1142:13.)

Mercer's September 11, 1996 letter referenced wear-away explicitly—and indicated that extending the wear-away period would result "in some additional short term savings." (PX 9.) This letter was read by executives at the highest level:

Farah clearly read the September 11, 1996 letter because attached to that letter was Farah's memo to John Cannon and John Gillespie, dated September 10, 1996 (one day earlier), requesting a meeting with regard to the interest crediting rate on cash account balances. (PX 9; see also PX 113.) Peck informed at least one other senior executive, Barry Thomson, that wear-away was built into the Plan design and that everybody was going to be impacted by it. (Peck Tr. 1142:22-1143: 12.) The SPD was not in fact printed and distributed until December 1996, after Foot Locker understood that that wear-away would be prolonged. (PX 59; Peck Tr. 1227:25-1228:14.)

In November 1996, Peck made another presentation to senior management entitled "Review of Plan Options for Additional Cost Savings." (PX 11 (emphasis added).) The presentation referenced that Plan changes had been approved by senior management in July 1995, approved by the Board in September 1995, and implemented in January 1996. (Id.) These changes had resulted in savings of $6 million from 1995 to 1996. (Id.)

C. Employee Communications

Foot Locker communicated the changes to the retirement plan to employees in a series of communications. All of the communications—whether intended for company-wide dissemination or to individuals or regional groups—share core common characteristics. All failed to describe wear-away. All failed to clearly discuss the reasons for the difference between a Participant's accrued benefit under

the old Plan and his or her cash balance under the new. The Court finds that all the statements were intentionally false and misleading.

The changes in the pension program were first—and very misleadingly—introduced to Participants in a September 15, 1995 announcement letter from Farah and Hilpert. (PX 2.) The Company told employees that it was “excited” to announce that, after “listen[ing] to what associates have told us they would like to see,” it had decided to update its pension plan to “give associates a more competitive retirement benefits package.” (PX 2.) This communication announced the Plan changes as positive news when Foot Locker management knew that in fact the changes were, at best, a mixed bag: an effective temporary freeze of additional benefit accruals (a plain negative) would be accompanied by the introduction of a new 401(k) plan and the ability to take the pension benefit in a lump sum (two positives). (Peck Tr. 1179:20-25.) In addition, Foot Locker knew that, once out of wear-away, Participants would accrue additional benefits at a lower and slower rate. (Tr. 1180:23-1181:2.) Peck, who was involved in drafting the September 15, 1995 announcement letter to employees, characterized it as a “good news letter”—and that bad news was not included. (Tr. 1181:13-1182:9, 1184:16-25.) Peck testified that it was unnecessary to include the bad news because it (the bad news) “didn’t apply to everybody.” (Tr. 1184:23-1185:7.) The evidence was overwhelming, however, that all but a very small number of employees were known to be negatively impacted by the Plan change.

The September 15, 1995 announcement letter to employees states in part as follows:

> The other part of the new retirement benefit program provides several changes to The Woolworth Retirement Plan. These changes will provide participants with more flexibility and a better ability to monitor their benefits. Each plan participant will have an individual account, to which the company will make a yearly contribution. That contribution will be based on a new formula that will reflect percent of pay and years of service. Participants will be able to see their individual account balance grow each year, and know its value.

(PX 2.) Foot Locker knew at the time that the statement, "Participants will be able to see their individual account balance grow each year, and know its value," was false as to almost all Participants, because the account balance would have no "value" to Participants in wear-away. (Peck Tr. 1182:15-1183:17, 1184:2-4, 11:15.) At trial, Peck agreed that Participants would not know the value of their benefit while they were in wear-away unless they were specifically informed that they were in wear-away. (Tr. 1183:18-21.)

The next company-wide communication was distributed on November 17, 1995. (PX 4 (the "Highlights Memo").) Peck had direct involvement in drafting that memo as well. (Peck Decl. ¶ 16.) She again made an affirmative decision to leave out the negative aspects of the Plan changes. (Peck Tr. 1188:12-18.) Wear-away was not disclosed. (Tr. 1188:22-24.) Foot Locker knew at the time that it was a misleading statement for anyone in wear-away to state, as the Highlights Memo did, that "At termination of employment, provided you are vested, you will have the option of taking the lump sum payment equal to your account balance." (PX 4; Peck

Tr. 1188:25-1189:10, 1213:24-1214:11.) This statement obscured the fact that the accrued benefit was the sole true benefit for anyone in wear-away. (Of course, Participants had a lump sum versus annuity choice; that portion of the statement was true). The Highlights Memo further referred Participants to forthcoming statements of their estimated benefits. (PX 4 ("A statement showing your estimated benefits under the amended Plan will be mailed to you during December 1995."))

But as Kanowicz, who worked on the pension design team, explained during her deposition, the Company simply "left [the wear-away] part out" of communications with employees.[13] Both Kanowicz and Peck testified that they understood that the account balance increases did not mean anything while Participants were in wear-away. (Kanowicz 3/29/12 Tr. 166:18-167:7; Peck Tr. 1133:6-9). Furthermore, Kanowicz acknowledged that "if we spelled it out" for the employees, "they would have" understood that their benefits were being frozen. (Kanowicz 3/29/12 Tr. 195:12-16.) There were a number of ways to explain these effects in the numerous communications with employees. But the Company "didn't spell it out." (Kanowicz 3/29/12 Tr. 195:18-19.) Instead, Foot Locker knew that under its new Plan announcement, employees would mistakenly "perceive the [growth in] their account [balance] as growth in their benefit," but it "made sure that nothing was said to people to disabuse them of that idea" that their benefits

[13] The Court reviewed Kanowicz's videotaped deposition designations, which allowed the Court to make a credibility assessment based on her demeanor as well as the substance of her remarks. The Court found that Kanowicz, who was a defense witness, was forthright in her testimony. Her testimony supports rather than undercuts the Class's position in this case.

were growing. (Kanowicz 3/29/12 Tr. 363:19-364:6.) Although Peck stated that her original belief was that the wear-away would be a "short period of time" of two to three years, she agreed that she would want to know if an employer was freezing her pension for that "short" period. (Peck Tr. 1134:23-1135:5, 1136:11-14; 1136:25-1137:5, 1138:16-23.)

The Summary Plan Description ("SPD") was distributed in December 1996. (See PX 5; PX 59; Kiley Tr. 803:24-804:9.) The SPD contains a variety of statements that falsely indicated to Participants that their actual retirement benefits were fully reflected in their account balances—versus the factually correct statement that such benefits would often default to the December 31, 1995 accrued benefit under the "greater of" formula.

The SPD contained a number of intentionally false misstatements. The Introduction to the SPD states, "This SPD explains how you qualify for a pension" and "how that pension is determined." (PX 5 at FLPL0020.) The "Highlights" section contains the following bullet points next to "How Your Retirement Benefit Is Determined":

- *Account balances* are credited with 6% interest annually.
- *Compensation* credits, arrived at using a formula based on your *years of service* and *compensation*, are added to your *account balance* annually.

(Id. at FLPL0023 (italicization in original).[14]) The Highlights section refers Participants to page 11, which contains the following information under the heading "How Your Retirement Benefit is Determined":

> Your *Plan* benefit is based on the *account balance* you accrue, or earn, while a *participant*. That *account balance* is made up of:
>
> - Your *initial account balance*, which is the value of your *Plan* benefit as of December 31, 1995, before the *Plan* was amended;
> - interest credited to your *account balance*; and
> - additions to your *account balance*, called *compensation* credits, which are based on *years of service* and a percentage of *compensation*.
>
> When your employment terminates, you are entitled to receive payments on a monthly basis (an annuity) or in a lump sum. The annuity payable to you is determined in the following manner. Your *account balance* is increased by interest credits (as described below) to *normal retirement date*. The resulting amount is converted to an annuity using factors required by federal law and *IRS* regulations. The lump sum payable to you is the greater of your *account balance* or the amount determined by multiplying the annuity payable to you by factors required by federal law and *IRS* regulations.

(Id. at FLPL0030-31 (italicization in original).) Benefits manager Marion Derham conceded at trial that the "greater of" language did not disclose wear-away. (Derham Tr. 1431:19-1432:1.)

The SPD then contains a subsection entitled "Initial Account Balance." (PX 5 at FLPL0031.) This subsection contains a lengthy explanation, including complicated calculation concepts, followed by a single sentence that states, "Your

[14] Italicized terms are ones that are defined in the "Definition of Terms" section of the SPD.

accrued benefit at the time your employment terminates is the greater of the amount determined under the *Plan* as amended on January 1, 1996 or your accrued benefit as of December 31, 1995." (Id. (italicization in original).)

The term "accrued benefit"—italicized in the preceding sentence—is separately defined in the "Definition of Terms" section of the SPD as "[a] *participant's* accumulated *account balance* converted to a Single Life Annuity payable at normal retirement age." (PX 5 at FLPL0024 (italicization in original).) Substituting this definition into the preceding sentence leads to:

> Your accumulated account balance converted to a Single Life Annuity payable at normal retirement age at the time your employment terminates is the greater of the amount determined under the Plan as amended on January 1, 1996 or your accrued benefit as of December 31, 1995.

Deutsch testified—and the Court agrees—that this sentence is incorrect: it states that a Participant's account balance, not ultimate benefit, is the greater of the two formulas. (Deutsch Tr. 302:4-12.) Thus, even if a clever Participant carefully read the SPD and cross-referenced the SPD's provisions with the Definitions section, he or she still would not get a correct statement of the "greater of" comparison.

The term "initial account balance" is also defined in the Definitions section. That definition is as follows:

> If you were a participant in the Plan on December 31, 1995 and on January 1, 1996, you have an initial account balance. That balance is equal to the actuarial equivalent lump sum value of your accrued benefit (as determined under the terms of the Plan in effect on December 31, 1995) as of December 31, 1995. This value is determined actuarially based upon a 9% rate of interest and the mortality table set forth in IRS rulings.

(Id. at FLPL0025.) The SPD contains no further explanation of the meaning of "actuarial equivalent lump sum value" or "the 9% rate of interest." That phrase is highly technical and not accessible to most reasonably educated people, let alone the average Foot Locker employee, who had a high school level education. It is not immediately apparent to the lay person that the "9%" is being used as a discount rate.

The SPD also references "Interest Credits" as part of the calculation of a Participant's retirement benefits, stating, in pertinent part:

> Interest credits will help your *account balance* grow. On the last day of each *Plan year*, *account balances*, as of the first day of that *Plan* year will be credited with interest at the rate of 6% (1/2% per month).

(Id. at FLPL0031 (italicization in original).) The SPD fails to mention that this "growth" in the account balance did not represent any growth in the pension benefit for the vast majority of Participants.

Peck understood the importance of the SPD in terms of communicating the terms of the Plan amendment accurately to Participants. (Peck Tr. 1240:16-19.) She provided final approval of the SPD. (Tr. 1224:13-15, 1240:20-23, 1241:3-6.) At the time she provided her final approval, Peck knew that wear-away was anticipated to last for an additional three to four years—and that the Company's prior communications about the changes to the Plan contained statements that were false as to all Participants who were in wear-away. (Tr. 1241:7-20, 1242:1-3.)

Nonetheless, Peck did not use the SPD as an opportunity to correct these false statements. (Tr. 1241:21-25.)

Peck testified—and the Court agrees—that the statement in the SPD that "Your Plan benefit is based on the account balance you accrue, or earn, while a participant" was false for Participants in wear-away. (Peck Tr. 1244:12-16.) In fact, the entire SPD was focused on the account balance benefit (Tr. 1246:3-7) and was irrelevant to Participants in wear-away until they got out of wear-away (Tr. 1245:7-11, 1247:12-16). Peck knew that, with expected attrition, thousands of employees would terminate and leave the Company without ever getting out of wear-away. (Tr. 1245:15-19.) Nonetheless, wear-away was not disclosed anywhere in the SPD. (Tr. 1242:20-1243:1.) Peck conceded at trial that she had made an affirmative decision to limit the Company's communications with Participants to "good news"—and not mention that Participants would stop earning additional benefits for a period of time. (Tr. 1243:15-20.) Meanwhile, Peck's team was aware that it was through the wear-away that the cost savings sought by Farah were achieved. (Tr. 1243:25-1244:7.)

Peck acknowledged that she did not expect the average Participant to read the entire SPD—and that the average Participant would instead focus on the Highlights section. (Tr. 1248:24-1249:2, 1253:4-7.) She also agreed that the Highlights section does not reference wear-away. (Tr. 1249:8-11.) She agreed that Participants would not be familiar with the concept of wear-away and would have to be—as she was—educated about that concept. (Tr. 1250:12-16, 1250:25-1251:10,

1241:15-16.) Peck knew at the time she gave final approval to the SPD that almost everyone was in wear-away and would not be familiar with wear-away—and that she approved statements that were false for them, namely, that their Plan benefit was based on their account balance. (Tr. 1252:7-13.)

Misstatements were made to Participants year after year. (Tr. 1221:17-21, 1222:8-10.) For example, beginning in July 1996, employees received booklets setting forth their individualized "total compensation" statements. (Peck Tr. 1222:11-17; PX 7 at FLPL 3009.) The booklets listed the employee's current account balance in dollars, and the booklets after 1996 showed the previous year balance and the growth of that balance via compensation and interest credits. (PX 7 at FLPL 3011; PX 53 at FLPL 3092; PX 54 at FL-OSB 008522; PX 55, FL-OSB 008529; PX 56, FL-OSB 007545; PX 57 at FL-OSB 008365; PX 58, FLPL0017.) They advised employees, "You will want to compare this statement with those you receive in the future. It is a measure of your yearly progress, and as your time with the company increases, the value of many of your benefits will also increase." (PX 7 at FLPL 3008; PX 53 at FLPL 3087; PX 54 at FL-OSB 008519.) The booklets also claimed that "The cost of your benefits shown in this statement represents a significant portion of your total compensation," and that "Your Company . . . spends a substantial sum of money to . . . [provide] financial security for your retirement years." (PX 7 at FLPL 3009.)

Participants also received individualized annual pension plan statements, which stated that the account balance was the amount the Participant "could expect

to receive upon termination of employment or retirement if you accrue no further benefits and elect a Lump Sum form of payment." (PX6; see also PX 23.) Peck was involved in drafting these annual statements, which contained two columns—a column entitled "Current Plan," listing the estimated accrued benefit through December 31, 1995, and a column entitled "Amended Plan as of January 1, 1996," listing the estimated account balance as of January 1, 1996. (See PX 43; PX 6; Peck Tr. 1190:25-1191:5.) The "Amended Plan" column did not refer to the December 31, 1995 accrued benefit—or state the Participant would be entitled to the "greater of" the December 31, 1995 accrued benefit and the account balance. (See PX 43; PX 6; Peck Tr. 1192:3-11.) Instead, the "Amended Plan" column stated that the estimated account balance as of January 1, 1996 was what the Participant "could expect to receive." (PX 43)

Peck knew that this statement was false for anyone in wear-away. (Peck Tr. 1194:16-23, 1195:16-19, 1215:13-24.) In fact, if a Participant were to have been paid on January 1, 1996, the account balance would not be the payment he or she would receive; he or she would receive the December 31, 1995 accrued benefit. (Peck Tr. 1192:15-1193:4.) In many cases, the January 1, 1996 account balance was half of the lump sum value of the December 31, 1995 accrued benefit. (Peck Tr. 1194:11-15.) But like the annual booklets, Plan statements beginning in May 1997 showed annual account growth, reinforcing the message that the Participant's account size is equal to his benefit size. See PX 3 at FL-OSB 002244 ("Your benefit is expressed as an account balance that grows each year with interest and pay credits.")

Additional materials sent to some Participants describing the benefits they would receive also did not disclose wear-away. While some Participants – after individual inquiry – received additional statements that listed a "lump sum payable figure that was greater than the "initial account balance" or "accrued benefit" figures, (see, e.g., PX 339, PX 330, PX 390.), the statements did not explain that the differential was due to the fact that the initial account balance was not a meaningful figure that led to increased benefits over time. In fact, some statements showed the account balances increasing over time. (See, e.g., PX 330.)

Foot Locker has asserted that its communications with Participants were consistent with legal advice it was provided. However, the evidence does not support that counsel—inside or outside—had the full array of facts, including those facts necessary to provide a clear understanding of the number of Participants impacted by wear-away. (See Peck Tr. 1278:17-24.) Peck also did not ensure that outside counsel knew that wear-away could continue for a period of years. (Tr. 1277:22-1278:1, 1279:20-1280:6.) Finally, outside counsel had advised that the annual statements be revised to include the qualifier, "unless your accrued benefit as of December 31, 1995 (set forth in 5 above) is greater, on an actuarial equivalent basis." (PX 44.) Inside counsel, however, made no comments on the draft. (PX 625 ("No comments per Sheilagh Clarke," inside counsel).) Peck approved the statement's dissemination without change. (Peck Tr. 1220:8-11.) A follow-up statement went out in March 1996. (Tr. 1220:20-23.)

Foot Locker has also argued that the Plan changes provided certain benefits to employees—including the ability to receive retirement benefits in a lump sum and a 401(k) plan. This is supported by the evidence but ultimately irrelevant. The lump sum option could have been provided without any conversion to a cash balance plan, let alone to a cash balance plan that had mathematically locked-in wear-away. (Deutsch Tr. 124:17-125:7; see also id. 145:1-146:21.) Additionally, the rollout of the 401(k) cannot make up for the absence of clear communications as to what an employee's actual retirement benefit would be, or the fact and impact of wear-away on that benefit's growth.

D. Employee Reaction to Plan Communications

Perhaps the clearest indication that wear-away was not understood was the fact that not a single employee ever complained about it. This absence of complaint was the logical result of Foot Locker's false and misleading communications: employees simply did not know that wear-away was an issue for them.

At the time of the events in this case, the average Foot Locker employee earned an average of $22,000. (Peck Tr. 1135:14-15.) To communicate effectively with employees, Foot Locker's benefits employees had an assumption that employees had an eighth-grade level of education. (Ine Tr. 983:19-23.)

Ada Cardona, a class member who testified credibly at trial, is an example of an average employee. She worked for the company for a total of 40 years. (Cardona

Tr. 429:17-18.)[15] On the date that she retired, that is, after 40 years, she was earning $9.80 per hour. (Tr. 430:21-22.) Cardona reviewed the communications relating to the Plan changes sent to her. (Declaration of Ada Cardona ("Cardona Decl.") ¶ 5, ECF No. 325; Tr. 433:4-11.) She focused on the fact that the communications indicated that the pension plan would continue; she testified about the announcement letter, "I read it and I just thought the pension was still there, and that was it, you know?" (Tr. 433:10-11.) After reviewing the communications, she had no understanding as to what "conversion" the Highlights Memo (PX 4) referred, and did not understand that she would not be receiving additional growth in her pension benefits. (Cardona Decl. ¶ 12, Tr. 435:1-5.)

Ralph Campuzano, who worked at Woolworth until 1998, also testified credibly at trial. He testified that he read all of the Plan communications sent to him. (Declaration of Ralph Campuzano ("Campuzano Decl.") ¶ 5, ECF No. 328.) He read the Highlights Memo (PX 4) and believed that it indicated that his pension benefits would continue to grow. (Campuzano Decl. ¶ 9.) He would regularly receive Plan summaries and carefully saved them in his files. (PX 53, PX 61, PX 356.) Unbeknownst to him, they were in fact irrelevant to the pension benefit he actually stood to receive. Between 1996 and his termination, he was never out of wear-away.

[15] Cardona continues to work at another store for a different company today.

Doris Albright was also very credible. She worked at Woolworth between 1974 and 1996, and left only when the facility at which she worked was closed down. (Declaration of Doris Albright ("Albright Decl.") ¶ 1, ECF No. 329.) During the last two years of her employment, she was the administrative manager at the facility. In that capacity, she regularly interacted with employees at the facility regarding benefits issues. (Albright Decl. ¶¶ 2, 16, Tr. 964:24-965:13.) She did not understand wear-away or that her pension benefits had not grown after the Plan change went into effect. (Albright Decl. ¶ 4; Tr. 969:20-23, 970:2-4, 9-16.)

Richard Schaeffer is another class member who testified credibly at trial. He worked at Woolworth between 1975 and 1997, when the facility at which he worked was closed down. (Declaration of Richard Schaeffer ("Schaeffer Decl.") ¶ 1, ECF No. 326.) Schaeffer worked first as a forklift driver, then as a forklift supervisor, and finally as a rebuyer. (Id.) Based on the communications he received and reviewed about the changes to the Plan, Schaeffer believed that the old Plan formula was no longer relevant, that his benefit was now his account balance, and that this benefit would keep growing as he continued working for the Company. (Id. ¶¶ 6, 7; Schaeffer Tr. 1085:19-23.)

In 1997, Schaeffer contacted Foot Locker regarding his and his wife's pension benefit because he wanted to know the figure that he would be receiving when he and his wife would be let go. (Schaeffer Decl. ¶ 8; Schaeffer Tr. 1084:6-1085:10.) The evidence demonstrated that he intended to and did rely on the information Foot Locker provided. In reviewing the response he received from Foot Locker, Schaeffer

focused on the bottom line figure and did not fully understand the accompanying calculations. (PX 390; Schaeffer Decl. ¶ 9; Schaeffer Tr. 1089:12-20.) He did not understand from the letter and the calculations that his pension benefit had not been growing during 1996 and 1997. (Schaeffer Decl. ¶ 9; Schaeffer Tr. 1090:6-14.)

Russell Howard also testified credibly on behalf of the Class. Howard worked for Foot Locker between 1967 and 2003. (Declaration of Russell Howard ("Howard Decl.") ¶ 1, ECF No. 327.) Howard testified that he received and read through all of the communications about the Plan changes, skimming certain parts. (Howard Decl. ¶ 4; Howard Tr. 449:15-450:1, 452:13-18.) Like his fellow class members, Howard believed, based on the communications he received, that his pension benefit was growing the entire time he worked for the Company. (Howard Decl. ¶ 3.) His understanding was that his opening account balance reflected the full value of the benefit he had earned through December 31, 1995—and that this benefit would continue to grow with continued employment. (Id.) Howard testified credibly that he never suspected that his pension benefit had stopped growing while he worked for the Company: "I just looked at the growth year to year, saw that it was growing and that was it, yeah." (Howard Tr. 456:3-5.) In fact, his benefit was not growing.

Michael Steven, the former Chief Financial Officer of the Woolworth division—who holds a Master of Business Administration ("MBA") in Finance and is a licensed Certified Public Accountant ("CPA")—also testified on behalf of the Class. (Declaration of Michael T. Steven ("Steven Decl.") ¶¶ 1-2, ECF No. 340.) He credibly testified that, based on company communications, he believed that his prior

benefit was placed into—or somehow became—the basis for his cash balance account. (Steven Decl. ¶ 7; Steven Tr. 1367:1-3.) While he understood that there was an actuarial conversion process, he did not understand that the conversion resulted in a lower amount than that to which he was entitled as of December 31, 1995. (Steven Decl. ¶ 7; Steven Tr. 1367:13-20.) When he learned that there would be Plan changes, he asked Foot Locker to prepare an estimate of, as he characterized it, what his "wealth was worth." (Steven Tr. 1368:15-17.) In response to that request, he received a statement from Kiley dated January 19, 1996. (Steven Decl. ¶ 15; PX 329.) Comparing the estimated lump sum benefit in this statement to his opening account balance, Steven learned that the lump sum benefit was larger—but he assumed that the difference was due to various actuarial calculations. (Steven Decl. ¶ 15; Tr. 1369:20-1370:7.) His understanding from the estimate was that his pension would continue to increase with additional service. (Id.) In fact, it did not. The evidence established that Steven intended to and did rely on this information.

Steven made a second request later in 1996—and received another response from Kiley. (Steven Decl. ¶ 16; PX 330.) Even putting these two communications regarding his pension benefit together and seeing the differences between them did not reveal to him that he had not earned additional benefits during the intervening period of employment. (Steven Decl. ¶ 18.) For instance, when he saw the calculation of his initial account balance, he did not understand that the "9%" shown in the calculation had been used as a discount rate. (Steven Decl. ¶ 17; Tr.

1373:25-1374:4, 22-23.) At trial, counsel for Foot Locker walked Steven through the calculations provided to him—clearly with the view of demonstrating that he had all of the information that he needed before him to understand wear-away. This line of examination did not assist Foot Locker. Steven very credibly agreed to that with which he could agree, and very credibly indicated a lack of real understanding as to what the calculation showed.

Named plaintiff Geoffrey Osberg has spent over eight years litigating this case on behalf of the Class. He was a sales associate at Foot Locker and rose to the level of store manager; he is now a sales associate at a department store in Illinois. (Declaration of Geoffrey Osberg ("Osberg Decl.") ¶¶ 2-3, ECF No. 331.) His former colleagues at Foot Locker have been represented by him in this case. He testified credibly at trial that while he reviewed the Plan communications, he did not understand that his pension benefit was not growing with additional years of service. (Osberg Decl. ¶¶ 6-8; Tr. 418:12-25.) He recalled having received the initial communication in the fall of 1995 from Farah and Hilpert announcing the coming changes to the Plan. (Osberg Decl. ¶ 10.) He testified credibly that he recalled taking away from the letter that he should be "excited" about the changes and that they were positive changes for employees. (Id.)

The evidence at trial overwhelmingly supports that the Company intended Participants to rely on Plan communications, that they did, and that the communications failed to inform them of wear-away. Indeed, those communications were designed to conceal that information. Named plaintiff Osberg and class

members Cardona, Schaeffer, Steven, Howard, Campuzano, and Albright all testified credibly that despite receiving the company communications, they did not understand that they had ceased to earn additional pension benefits despite continued employment. From the CFO of Woolworth stores to a cashier, no one understood what was going on.

But there is even more evidence of the misleading nature of the communications than this. Even employees directly involved in pension benefits calculations did not understand the concept of wear-away—or that their accruals were effectively frozen for a period of time after the Plan conversion.

Ellen Glickfield testified on behalf of the Class. One of her job responsibilities in her 14-year employment as a pension clerk at Foot Locker was to calculate pension benefits, including after the January 1, 1996 Plan amendment. (Declaration of Ellen Glickfield ("Glickfield Decl.") ¶¶ 3-4, ECF No. 351.) She believed that her December 31, 1995 accrued benefit became an opening cash account balance. (Glickfield Decl. ¶ 15.) Even when she received a larger minimum lump sum ("MLS") than the cash balance, she did not understand what had occurred. When she noticed that the MLS was larger than her cash balance account, she attributed the difference to governmental regulations: "The MLS was just a possible extra amount that someone might get, even more than his or her account, because of a calculation the IRS required at the time of payment depending on interest rates." (Id. at ¶ 19; see also Glickfield Tr. 1400:5-23, 1402:4-8.)

Similarly, HR Department employee Sherry Flesses, who testified by deposition, thought she was "earning more pension benefits" and "had no idea that there was a freeze of [her] earning any pension benefit at the time"; she conceded that she would be "surprised" to learn that she had earned no new benefits. (Flesses 3/20/12 Tr. 127:17-128:3, 157:18-158:3.) Ms. Flesses "understood that you always were starting out with what you already earned, and then moving forward, you earned more." (Flesses 3/20/12 Tr. 154:18-22.) Ms. Flesses further testified that she "did not, in [her] wildest dreams, have any suspicion that Woolworth was creating opening account balances that were not of equal value to what somebody would have received the next day." (Flesses 3/20/12 Tr. 119:2-6.)

E. Fiduciary Responsibilities

The plan administrator is an ERISA fiduciary. See, e.g., Ladouceur v. Credit Lyonnais, 584 F.3d 510, 512 (2d Cir. 2009). Foot Locker was the plan administrator for the Foot Locker Retirement Plan. Nonetheless, the Company operated on the principle of caveat emptor with regard to Plan communications. (Peck Tr. 1290:13-21.)

Peck testified that she was a fiduciary of the Company. (Tr. 1280:10-14.) However, she had a poor understanding of her fiduciary duties. She testified that her responsibility included ensuring that funds were not misused; she did not express any understanding that she had a separate fiduciary duty as the plan administrator—though she conceded she was a plan administrator. (Tr. 1280:16-1281:4, 1282:2-4.) She testified that she did not consider either herself or the

Company a fiduciary to the Participants when drafting and issuing communications relating to the Plan changes. (Tr. 1282:19-1283:4.)

Woolworth's CEO at the time of the plan change, Roger Farah, testified live at trial. He was clearly annoyed at having to be present at the trial and was short tempered and resistant. Remarkably for a man in his position, he denied understanding what a fiduciary's obligations are and that he was a fiduciary with respect to Plan Participants. (Farah Tr. 539:14-20, 543:2-16.)

F. The Expert Witnesses

1. Deutsch

Deutsch is a very knowledgeable actuary. He testified as to a number of different topics—and the Court found his testimony highly credible in every respect.

Deutsch testified that "actuarial equivalent lump sum value" of a future payment is the amount which, when increased at an assumed rate of interest to the date of the future payment, equals the amount of the future payment. (Deutsch Tr. 120:16-121:2; see also Deutsch Op. Report at 2-3.) Deutsch opined—and the Court credits—the "actuarial equivalent lump sum value" of the December 31, 1995 accrued benefit could be reasonably calculated by using one of two alternative assumptions about the lump sum: (1) that the lump sum would be immediately cashed out and invested by the Participant at the 417(e) interest rate (6.06% at the time of the conversion), or (2) that the lump sum would remain in the Plan in the form of a Participant's opening account balance and be "invested" under the terms of the Plan (at a fixed 6% rate). (Deutsch Op. Report at 2-3; Tr. 180:19-181:20.)

Foot Locker's use of a 9% discount rate and a further mortality discount resulted in opening account balances that were not actuarially equivalent to the December 31, 1995 accrued benefit. (Deutsch Op. Report at 3; Tr. 153:2-25, 179:4-180:8, 184:6-25.) At trial, Kiley agreed that the use of a 9% discount rate did not result in a value that was actuarially equivalent to the December 31, 1995 accrued benefit. (Kiley Tr. 629:2-3, 629:7-15.) Accordingly, this testimony supports the Court's determination that Plan communications referring to a conversion to an actuarial equivalent lump sum were false and misleading.

With regard to mortality, Deutsch testified that any mortality discount used in calculating opening account balances needed to be accompanied by corresponding "survivorship" credits to the account over time—which was not done here. (Deutsch Tr. 183:12-184:2.)

Deutsch testified that a company's contribution to fund a pension plan generally consists of two parts: (1) the unfunded liability, which is the difference between the already earned liability and the assets, and (2) the annual normal cost. (Deutsch Tr. 132:16-133:25.) Under the unit credit funding method—which was used by the Plan both pre- and post-amendment—the unfunded liability is set as the value of the pension benefits earned to date, and the normal cost is set as the value of benefits earned during the year. (Deutsch Tr. 132:25-133:5; see also Sher Tr. 1459:3-10.) While unfunded liability is fixed and cannot be reduced, savings can be achieved in the normal cost by reducing future accrual of benefits. (Deutsch Tr. 133:6-11; Sher Tr. 1459:11-25; see also PX 9.) Foot Locker did just that by choosing

a conversion rate of 9%—which automatically resulted in a temporary suspension of future accruals for almost all employees.

Deutsch disagreed with Foot Locker's position that, under the new Plan, an employee only earned the right to a lump sum at the point that it was paid; according to Deutsch, every employee possessed the right to a lump sum on and after January 1, 1996, when the Plan was amended, even though the exact amount of that lump sum would not become known until it was paid. (Deutsch Tr. 161:13-163:18.) The Court agrees.

Deutsch testified that wear-away is, factually and by definition, equivalent to a temporary freeze. (Deutsch Tr. 169:6-12, 174:3-13.) Deutsch analyzed wear-away both in terms of "annuity" wear-away (analyzed by comparing the opening account balance and the December 31, 1995 accrued benefit on an annuity-to-annuity basis) and in terms of "lump sum" wear-away (analyzed by performing a lump sum-to-lump sum comparison). According to Deutsch, all Participants, even those who received the enhancement, experienced annuity wear-away. (Deutsch Op. Report at 12, 15.) With respect to lump sum wear-away, Deutsch acknowledged that there were a few people (only 223 out of many thousands) whose initial account balances were larger than the lump sum value of their December 31, 1995 frozen accrued benefit. (Deutsch Op. Report at 16; Tr. 196:4-25.) For the remaining 98.6% of Participants, however, the lump sum value of the December 31, 1995 frozen accrued benefit, as of January 1, 1996, exceeded the initial account balance by some amount. (Deutsch Op. Report at 16.)

2. Sher

Sher is also a knowledgeable actuary. He is plainly a qualified expert in pension plan design. The Court found his testimony helpful. Ultimately, however, his testimony clarified rather than undercut the Class's positions. That was ultimately due to the fact that the rationale for plan conversion—a topic on which Sher was articulate and clear—is ultimately irrelevant to the question of whether once the Plan was amended (for whatever reason), the Company fulfilled its fiduciary responsibilities to Participants and appropriately communicated the changes to them.

Sher conceded that there are a variety of ways in which cash balance plans can be designed. (Sher Tr. 1460:4-5.) The design can be adjusted to achieve whatever level of cost savings a company seeks to achieve—including none at all. (Tr. 1463:6-24.) Sher further agreed that wear-away is not a necessary part of the design of a cash balance plan (Tr. 1460:1-3), but that wear-away was expected for some period of time in connection with the design for the Foot Locker Retirement Plan. (Tr. 1459:11-21.) Sher's analysis estimated that, at the time of conversion, a two- to three-year period of wear-away was expected for most Participants. (Tr. 1578:25-1579:19.)

Sher testified that "actuarial equivalence" is a conversion of a pension benefit from one form to another using actuarial factors—and that this conversion should be cost-neutral from the perspective of the Plan. (Sher Tr. 1571:2-1573:1.) He testified that the January 1, 1996 Plan conversion had dual aspects from a cost

perspective. On the one hand, wear-away resulted in normal cost savings: the normal costs for employees in wear-away would be zero until they got out of wear-away; ongoing normal costs were only attributable to the relatively small segment not in wear-away. (Tr. 1457:8-14,1496:11-1497:1, 1500:4-12.) Normal cost savings from anticipated from wear-away directly reduced the Company's out-of-pocket costs. (Tr. 1712:25-1713:8.) These amounts flowed through to the minimum required contribution. (Id.) In other words, the anticipated wear-away resulted in an immediate bottom line cash savings to Foot Locker through normal cost reductions. (Tr. 1713:14-18.)

On the other hand, Sher testified that Participants' overwhelming selection of the lump sum option after January 1, 1996 resulted in certain increased costs. (Tr. 1457:15-1458:1, 1465:20-1466:13.) However, Sher agreed that these costs were to the Plan because the lump sums were paid out of the existing Plan assets (which were sufficient to cover them); the Company itself did not have to pay those amounts out of corporate cash flows. (Tr. 1468:3-18.) Moreover, the Company incurred savings through lower payroll costs as employees terminated and elected lump sum payments. (Tr. 1479:8-1480:15, 1493:24-1494:8.)

On cross-examination, Sher agreed that the Company did not have to increase the amount of cash that it put into the Plan in 1996 to pay for the costs of lump sum distributions. (Tr. 1716:15-19.) At that time, the Company's assumption

was that 100% of Participants would take an annuity. (Tr. 1716:21-1717:1.)[16] As a result of this assumption, the Company—which was contributing at minimum funding—incurred no cost as to Participants in wear-away. (Tr. 1717:19-1718:1.) On a prefunding basis, so long as the Company assumed that no one would elect a lump sum, the Company did not need to fund the cost of a lump sum. (Tr. 1718:2-5.) As a result, in the short term, the Company received immediate cash savings from the wear-away effect without any offsetting cash costs for the lump sums. (Tr. 1718:11-14.)

Sher had worked on a survey of companies that had undergone cash balance conversions. (Sher Tr. 1456:5-12; Sher Op. Report App'x. 3, ECF No. 338.) He testified that the survey showed that a significant majority of these companies highlighted the cash balance benefit in their annual benefit statements—and did not include information on the frozen protected benefit. (Sher Tr. 1596:11-25.) Sher also testified—based on his experience reviewing SPDs and advising companies undergoing cash balance conversions—that other companies' SPDs included information on wear-away only in that they set forth a "greater of" comparison between the benefit accrued under the prior Plan and the benefit accrued under the new formula. (Tr. 1609:12-1610:8.) Sher did not recall seeing any SPDs that told

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[16] On cross-examination, Sher testified that he was no longer sure that the Company had made a 100% annuity assumption. (Sher Tr. 1720:16-1722:19.) However, the 5500s—a required filing that ERISA plans must make to the U.S. Department of Labor—for 1996 (PX 995), 1997 (PX 211), and 1998 (PX 1546) indicate an assumed 100% annuity election. (See Sher Tr. 1723:19-1726:8.) Kanowicz signed the 5500s as the plan administrator—signing off on this assumption. The assumption changed in 1999 to 100% immediate lump sum. (PX 966 at FLOSB 16903; Sher Tr. 1726:9-1727:3, 1727:19-24.)

participants that additional periods of employment would not increase the frozen accrued benefit—or that additional work post-conversion would not result in growth of their pension benefit. (Tr. 1611:1-11; see also id. 1602:8-20.) Ultimately, these points are irrelevant to the Court's determination to whether here, Foot Locker fulfilled its legal obligations.

This portion of Sher's analysis was, in all events, flawed: in analyzing other companies' communications, Sher did not distinguish between companies that had converted using a formula that resulted in no wear-away or nominal wear-away and those whose conversion formulas did create wear-away. (Tr. 1598:25-1599:8.) Sher also did not track companies whose conversion formulas did not initially result in wear-away but created wear-away down the line. (Tr. 1599:9-1600:13.) In addition, Sher did not have any information as to the educational level or sophistication of the population reading the other companies' communications. (Tr. 1590:10-15, 1594:9-1595:5.) These flaws render Sher's testimony as to the industry practice with regard to communications irrelevant. Without knowing whether or not other companies' employees were of similar educational levels, and therefore could understand benefits information in a similar way to the class members here—and without knowing whether and when other companies' conversions to cash balance plans resulted in wear-away—the Court cannot meaningfully compare the communications at issue here with the communications issued by other companies.

Sher also testified as to the volatility of interest rates. He testified that the post-conversion 30-year Treasury rates were "extremely volatile" (Tr. 1619:6-11)

and opined that such volatility made predictions of the likely value of the frozen accrued benefit risky and perhaps misleading (Tr. 1625:1-24.) Sher supported this testimony with reference to his analysis of plaintiff Osberg's frozen accrued benefit at the beginning of each year. (Sher Tr. 1620:19-1623:13; DX 419.) As interest rates rose and declined, the lump sum value of Osberg's frozen accrued benefit rose and fell. For instance, in 1999, the value of his accrued benefit was $23,432, but in 2000 it had fallen to $17,605. (Sher Tr. 1622:14-19; DX 419.)

However, Sher acknowledged that, at least during 1996, even with the one-point swing referenced in an internal Foot Locker document as a rationale for not disclosing the frozen lump sum benefit (PX 164), a Participant who did not receive an enhancement would nonetheless still remain in wear-away—that is, his frozen accrued benefit would be higher than his initial account balance. (Sher Tr. 1631:2-1633:12.)

Actual interest rates are reflected in DX 417. The trend was downward—leading to an increase in the duration of the wear-away period. There is no evidence that Foot Locker or Mercer were predicting that rates would revert back to where they were over the past 15 years. (Sher Tr. 1735:11-21.) Foot Locker and Mercer, as sophisticated business parties, knew that there could be variability in interest rates. (Tr. 1736:2-13.) Mathematically, any decrease in rates would prolong wear-away for certain Participants. Under such circumstances, it was a breach of fiduciary duty for Foot Locker to have shifted the risk of interest rate variability to Participants.

Sher also testified about the effect that the enhancement that some Participants received under the new Plan on wear-away. To qualify for the enhancement to the opening account balance, Participants had to be age 50 and above and at least 15 years of service on December 31, 1995. The enhancement factor formula was as follows: the qualifying Participant's opening account balance was multiplied by 1 / [1 – 4% x (years to age 65, up to 10 years)]. The enhancement factor was highest for qualifying employees aged 50-55, who received a 66% increase in their account balances. (See Deutsch Op. Report at 8-9; Sher Tr. 1507:20-14). According to Sher, because of the enhancement, certain Participants never entered lump sum wear-away.[17] Sher testified that while there were not many such Participants (in the vicinity of several hundred, not thousands), they did exist. (Sher Tr. 1644:20-1645:1.) For example, for Participant 004—who took a distribution on November 1, 1997—the account balance on November 1, 1997 exceeded the sum of the frozen accrued benefit as well as interest and pay credits (the "A plus B" benefit). (Sher Tr. 1637:23-1639:25, DX 421). According to Sher, if a Participant's account balance is greater than the A plus B benefit, the Participant has received the full value of his or her accrued benefits and the interest and pay credits. (Tr. 1640:8-11.) According to Sher, Participant 004 was in wear-away during 1996 but was out of wear-away by January 1, 1997—and thus experienced

[17] Deutsch's position, on the other hand, is that all Participants were in annuity wear-away, even if some were not in lump sum wear-away as a result of the enhancement. (Deutsch Op. Report at 12, 15.)

no "wear-away effect." (Tr. 1640:12-21.) However, if the enhancement were included as part of the B benefit (which is, according to Sher, inappropriate), then Participant 004 would be subject to wear-away. (See DX 429.)

In another example that Sher discussed, a Participant received a distribution of her benefit on November 1, 1996. (DX 425.) While this Participant's initial account balance (which included the enhancement) was less than the lump sum value of the December 31, 1995 frozen accrued benefit, her account balance ultimately surpassed this value as a result of pay credit additions. (Sher Tr. 1641:18-1642:3.) As a result, this Participant's distribution was her account balance. (Tr. 1642:1-3.) Sher agreed that while this Participant was out of wear-away when she took her distribution, she had nonetheless experienced the wear-away effect. (Tr. 1642:25-1643:9.) According to Sher, had this Participant waited two additional months before receiving her distribution, she would not have experienced the wear-away effect. (Tr. 1643:21-1644:19.)

G. The Appropriate Remedy

The parties' experts disagree as to the appropriate remedy in the event that the Court finds that reformation is warranted.

According to Deutsch, the appropriate remedy is to convert the December 31, 1995 frozen accrued benefit into an initial account balance as of January 1, 1996 using a 6% interest rate with no pre-retirement mortality discount; increase the initial account balance as provided in the SPD for those Participants entitled to an enhancement; credit the resulting account balance with pay and interest credits

from January 1, 1996 through the date of benefit distribution; and projecting this figure using the "whipsaw" calculation to account for changes in interest rates.[18] (Deutsch Op. Report at 43-44.)

Sher agreed that Deutsch's approach eliminates wear-away—but testified that such an approach is properly called an "opening balance approach," not an "A plus B" approach. (Sher Tr. 1768:17-1769:5.) According to Sher, in an A plus B approach, the A benefit is the usually frozen accrued benefit under the prior Plan—and it is usually payable in whatever form was available under the prior Plan (here, generally an annuity). (Tr. 1545:2-14.) In Sher's version, there is no opening balance—and the B benefit consists of pay and interest credits starting in 1996. (Tr. 1545:13-1546:8.)[19] This A plus B approach was the approach used in Amara. See Amara v. CIGNA Corp., 925 F. Supp. 2d 242, 265 (D. Conn. 2012) ("Amara IV") (ordering class members "to receive (1) the full value of 'their accrued

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[18] A "whipsaw" calculation accounts for the "difference between the hypothetical value of a cash balance plan account at any given time and the value of the account as an annuity payable at normal retirement age." Laurent v. PricewaterhouseCoopers LLP, 794 F.3d 272, 275 (2d Cir. 2015). It is performed by taking a participant's account balance and projecting it to the normal retirement age using the plan's interest crediting rate, then converting that number to an annuity using the applicable interest rate, mortality table described in IRC § 417(e), and IRS regulations, then calculating the present value of that annuity by using the applicable interest rate, mortality table, and IRS regulations. According to Deutsch, this has nothing to do with the Participant's frozen accrued benefit as of December 31, 1995. (Deutsch Op. Report at 49-50.)

[19] Converting to Sher's version of an A plus B plan here would have locked in the frozen accrued benefit and required all new interest and pay credits to be additive to the overall Plan liability. (Sher Tr. 1547:17-1548:10.) Similarly, if the full value of the frozen accrued balance was used as the starting account balance, all interest and pay credit additions would add to overall Plan liability. By contrast, creating, as Foot Locker did here, an opening account balance that was lower than the full value of the frozen accrued benefit resulted in a period of wear-away during which the Plan liability did not increase. (Sher Tr. 1548:11-20.)

benefits under Part A,' including early retirement benefits, in annuity form; and (2) 'their accrued benefits under Part B,' in annuity or lump sum form").

According to Sher, the appropriate remedy is to calculate the present value of a Participant's December 31, 1995 frozen accrued benefit using the § 417(e) rate in effect in the year of termination (the "A") and add in pay and interest credits (the "B"). (Sher Tr. 1743:22-1744:10.)

The Court finds that Deutsch's approach—whether properly called an A plus B approach or, as Sher contends, an "opening balance" approach—is the appropriate approach here. Sher agreed that Deutsch's approach—by which December 31, 1995 frozen accrued benefit was converted into cash as of January 1, 1996 and nominally placed in the Participant's account—was the approach that was in fact promised to Participants, albeit using a 9% interest rate. (Sher Tr. 1769:7-13.) Sher also agreed that it was the prevalent approach in the 1980s and 1990s. (Tr. 1769:14-16.) Finally, Sher agreed that if Foot Locker promised employees that their opening account balance would at least replicate the December 31, 1995 accrued benefit, Deutsch's approach would fulfill that promise (and, in some circumstances, do more). (Tr. 1776:6-1777:7.) As further explained below, Foot Locker did make that promise—and it must be fulfilled.

The Court also agrees that Deutsch's calculation of the opening account balance—using a 6% interest rate and no further pre-retirement mortality discount—is appropriate. Sher testified that the determination of the interest rate used to calculate initial account balances is typically the result of significant

analytical work by companies planning a conversion. (Sher Tr. 1700:14-1701:15.) Among the facts to which a company would look would be prevailing corporate bond rates and 30-year Treasury rates; the potential impact on the funding of the Plan; and the potential volatility of interest rates. (Id.) Here, the § 417(e) rate in effect at the time of the Plan conversion was 6.06%—reflecting the average of the 30-year Treasury rates—and the Plan's interest crediting rate was 6%. Choosing 6% is therefore reasonable. Indeed, Sher agreed that any calculation that produced opening account balances that were smaller than those proposed by Deutsch would create a risk of wear-away. (Tr. 1770:11-20.) In particular, Sher agreed the use of a pre-retirement mortality discount in creating opening account balances would create wear-away in the absence of corresponding survivorship credits (which were not made here). (Tr. 1771:22-1772:13.)

The enhancement. One of the main disagreements between the parties is whether the enhancement for employees of a certain age and with years of service at the time of conversion provided for under the new Plan should be included as part of the remedy. The Class's position is that the enhancement should be included because it was expressly promised to Participants. According to the Class, once promised it cannot be withdrawn, even if Foot Locker would now prefer not to have made that promise. Foot Locker's position is that the enhancement should not be included because Participants' entitlement to the enhancement was tied to the use of a 9% discount rate; had Foot Locker used a 6% or 6.06% discount rate—that is, had the plan design not embodied wear-away—the enhancement likely would not

have been included. (Sher Tr. 1744:15-20, 1746:12-14, 1755:5-13.) According to Foot Locker, if the Court orders the Plan reformation to eliminate wear-away, the justification for the enhancement disappears and its inclusion would therefore provide an inappropriate windfall to the Class.

The Court finds that the enhancement is appropriately included as part of the B benefit. It was expressly promised to Participants in the SPD. Specifically, page 12 of the SPD provides:

> Account balances for participants who were age 50 or older with at least 15 years of service for vesting purposes as of December 31, 1995 were enhanced by a one-time formula. The initial account balance for participants who met these requirements was increased by a factor. The factor was determined as follows:
>
>> 1 minus 1/3 of one percent for each month from the later of your age on December 31, 1995 or the first day of the month nearest age 55 to normal retirement date.

(PX 5 at FLPL0031 (italicization omitted).) In other words, Foot Locker made a two-part promise to certain senior Participants: first, Foot Locker promised that these Participants would receive the same initial account balance calculation as the other Participants; second, Foot Locker promised that the (full) initial account balance would be multiplied by a factor (and the resulting sum deposited into the account). This clear promise must be enforced, regardless of whether Foot Locker would have made it had it decided not to build wear-away into the new Plan. See Amara v. CIGNA Corp., 775 F.3d 510, 524-25 & n.11 (2d Cir. 2014) ("Amara V") (explaining that the reasonable perceptions of the beneficiaries, not the employer's intent, determine the nature of the reformation remedy).

In any event, the evidence in the record contradicts Sher's position that the enhancement is tied to the use of a 9% discount rate in creating opening account balances. Peck testified that the enhancement was to replace the early retirement subsidy that went away. (Peck Tr. 1150:24-1151:7.) Mercer—whose word Kiley took as "gospel" (Kiley Tr. 504:25-505:1)—similarly stated that "there was concern that [P]articipants close to early retirement eligibility at the time of conversion to the cash balance format might have some slippage in their early retirement benefits, so a subsidy was added." (PX 1522.) In other words, there is evidence in the record that the enhancement would have been provided in lieu of the early retirement subsidy even in the absence of the structural wear-away that Foot Locker built into the Plan.

Whipsaw. The parties also disagree as to the Class's entitlement to so-called "whipsaw" payments. The Second Circuit defined and discussed the whipsaw calculation—which comes into play when a vested employee terminates before reaching normal retirement age—in its recent decision in Laurent v. PricewaterhouseCoopers LLP, No. 14-1179, 2015 WL 4477191 (2d Cir. July 23, 2015). The whipsaw calculation is performed to ensure that the terminated employee's cash balance account reflects interest credits that would have continued to accumulate through the employee's normal retirement age. Id. at *3. Under the whipsaw calculation, the account balance is increased by the plan's interest rate (here, 6%) multiplied by the time to normal retirement age, then discounted back to present value at a set rate (here, the § 417(e) rate). Id. Here, the whipsaw

calculation would result in an additional benefit to the employee whenever the § 417(e) rate was lower than 6% or 5.5%. (Deutsch Tr. 354:7-20, 396:8-397:1, Sher Tr. 1518:3-8.)

Prior to 2006, ERISA required whipsaw payments. See, e.g., Esden v. Bank of Boston, 229 F.3d 154, 172-73 (2d Cir. 2000). In 2006, however, Congress passed the Pension Protection Act ("PPA")—which "provided that plans did not fail to satisfy ERISA solely because they did not provide actuarial equivalence for participants who terminated employment before normal retirement age and took a lump-sum payment, and thus eliminated mandatory whipsaw payments." Laurent, 2015 WL 4477191, at *3 (citing 29 U.S.C. § 1053(f)(1)(B)).

The Class argues that whipsaw payments were indefeasibly part of the benefit that Foot Locker expressly promised Participants in the SPD. (Ltr. dated July 24, 2015, ECF No. 370.) By contrast, Foot Locker argues that, as a result of Congress's elimination of whipsaw in the PPA, the Plan is no longer subject to any whipsaw requirement. (Ltr. dated July 24, 2015, ECF No. 371.)

The Court finds that whipsaw payments are appropriately part of the benefit that Foot Locker promised to Participants. The SPD states that Participants may receive a lump sum that is higher than their account balance based on the requirements of "federal law and IRS regulations." (SPD at FLPL0031, FLPL0033.) Sher agreed that this language provided for whipsaw payments. (Sher Tr. 1518:9-10; see also id. 1520:2-9.) Sher testified that whipsaw could cause a Participant's benefits to be greater that the account balance—and that whipsaw would "of course"

"apply to this type of calculation," referring to page 14 of the SPD. (Sher Tr. 1617:5-15; see also id. 1617:13-15 ("I would have read [SPD page 14] to encompass . . . whipsaw, that is what was intended here").) While Sher initially testified that Participants may not have associated the reference to "federal law and IRS regulations" with whipsaw, he later conceded that "[i]f the plan terms call for a payment to be made, it should be made," regardless of whether Participants expected whipsaw payments. (Sher Tr. 1747:7-12, 1748:1-4.)

While the PPA eliminated mandatory whipsaw payments in 2006, the law is clear that the PPA is not retroactive. See Laurent, 2015 WL 4477191, at *3 (the "Pension Protection Act does not apply retroactively" (citing West v. AK Steel Corp., 484 F.3d 395, 412 (6th Cir. 2007))). As long as a Participant signed the distribution paperwork before the passage of the PPA, that Participant is entitled to whipsaw payments. See Laurent, 2015 WL 4477191, at *3 ("Plaintiffs filed this suit in 2006, and the distributions at issue in it predate the passage of the Pension Protection Act. The parties therefore agree that the Act does not apply to this case.").[20]

[20] Sher agreed that "[i]f the distribution was made pre-PPA, the [P]lan had whipsaw, the [P]lan would have to abide by it." (Sher Tr. 1750:3-4.) The disagreement between the parties thus appears to be as to Participants who signed the distribution paperwork pre-PPA but whose actual distribution took place post-PPA. The Court does not know how many such Participants there are, but the Class is correct that they are entitled to whipsaw payments. Signing the paperwork was the last step to effectuate the distributions. At that point, the employer made a commitment to a set distribution amount governed by the prevailing federal law at the time. Once the distribution paperwork was signed, the Participant was entitled to receive the amount provided for in that paperwork and required by law at the time, including any whipsaw payments—even if the actual distribution were delayed and the law changed in the meantime.

II. CONCLUSIONS OF LAW

ERISA § 502(a)(3) entitles plan participants to "appropriate equitable relief" as redress for "any act or practice which violates any provision of [ERISA]." 29 U.S.C. § 1132(a)(3). The Class claims that Foot Locker has violated sections 404(a) and 102(a) of ERISA by issuing materially false and misleading statements in the December 1996 SPD and various Summaries of Material Modifications ("SMMs")—including the September 1995 Announcement Letter, the November 1995 Highlights Memo, and the January 1996 Benefits Statement.

To obtain reformation, plaintiff must show: (1) violations of ERISA §§ 404(a) and 102(a), based on the preponderance of the evidence; (2a) mistake or ignorance by employees of "the truth about their retirement benefits," based on clear and convincing evidence; and (2b) "fraud or similar inequitable conduct" by the plan fiduciaries, based on clear and convincing evidence. Amara v. CIGNA Corp., 775 F.3d 510, 525-31 (2d Cir. 2014) ("Amara V"). Here, the Class has shown all of these elements and is therefore entitled to reformation of the Plan as further explained below. Before turning to these elements, the Court provides an overview of the Amara litigation—which has been cited repeatedly by the parties and is relevant to many of the issues here.

A. The Amara Litigation

The Amara litigation arose from the 1998 conversion of CIGNA's defined retirement benefit plan ("Part A") to a cash balance plan ("Part B"). CIGNA's original plan—Part A—granted beneficiaries defined benefits upon retirement,

generally in the form of an annuity determined based on a number of factors, such as the employee's salary, years of service, and age at retirement. CIGNA's new plan—Part B—provided benefits in the form of a cash balance, calculated on the basis of defined annual contributions. Employees who participated in the Part B plan[21] received a hypothetical opening account balance that was calculated by taking the participant's current annual benefit at normal retirement age (age 65), and computing the actuarial value of that benefit based on a 6.05% (or for some employees, 5.05%) interest rate and a GATT mortality table. Amara v. Cigna Corp., 534 F. Supp. 2d 288, 301 (D. Conn. 2008) ("Amara I"). The Part B account balances were subsequently supplemented with pay and interest credits. Id. The interest credits were based on a floating interest rate that was tied to yields of five-year Treasury bonds and subject to change at the beginning of each calendar year. Id. at 302. Under the Part B plan, an employee could choose at retirement to receive his or her account balance in lump sum form or as an annuity. Id. As here, CIGNA's new plan guaranteed—through an "A or B" formula—that employees would receive at least the value of their already accrued Part A benefits. Id.

Because of how opening balances were calculated under Part B, an employee's opening account balance was not always equivalent to the value of the employee's Part A accrued benefit, resulting in wear-away for "many, though by no means all, employees." Id. at 303. The wear-away effect was due to fluctuating

[21] Some employees were "grandfathered" under the old Part A plan. See Amara v. Cigna Corp., 534 F. Supp. 2d 288, 300 (D. Conn. 2008).

interest rates, as well as the fact that Part B benefits opening account balances were "discounted to account for the risk of pre-retirement mortality and did not include the value of certain benefits," such as a Social Security supplement. Id. Unlike here, however, wear-away was not structurally built into the conversion.

Through various communications, including two SPDs, CIGNA told employees that the new plan would "significantly enhance its retirement program," that "your benefit will grow steadily throughout your career," and that the opening balance in the new Part B plan was "equal" to the lump sum value of the pension benefit earned through December 31, 1997. Amara v. CIGNA Corp., 775 F.3d 510, 515 (2d Cir. 2014) ("Amara V"). Through individualized reports, CIGNA assured each employee that his or her initial account balance "represent[ed] the full value of the benefit [he or she] earned for service before 1998 payable to you at age 65." Id. CIGNA also stated in a newsletter introducing the new plan that it would not receive any cost savings from the conversion from Part A to Part B. Id. This was false: a contemporaneous internal expense projection revealed anticipated cost savings of approximately $10 million. Amara I, 534 F. Supp. 2d at 306.

In 2001, several plan participants filed a putative class action against CIGNA and the CIGNA pension plan. Plaintiffs claimed, inter alia, that defendants violated ERISA §§ 102(a) and 204(h), 29 U.S.C. §§ 1022(a) and 1054(h), by failing to give them proper notice of their benefits and misleading them regarding the nature of their benefits.

The district court granted plaintiffs' motion for class certification and, after trial, agreed that CIGNA had violated ERISA. Amara I, 534 F. Supp. 2d at 363. In particular, the district court found that CIGNA violated ERISA § 102 by failing to sufficiently disclose the possibility of wear-away, id. at 346, which "was both a structural phenomenon and one that CIGNA could, and did, predict," id. at 347. The district court determined that "various choices made by CIGNA in structuring the opening account balances under Part B practically ensured that wear-away would occur if interest rates fell." Id. at 347. The district court explained that "[t]he fact that wear-away might not have been intentional or the result of a single plan provision" was "irrelevant"—and noted that there was evidence indicating that CIGNA was in fact aware of the possibility of wear-away. Id. at 348. The district court rejected CIGNA's argument that "it was not required to provide notice of the possibility of wear-away because only a small number of employees were affected." Id.

The district court issued a separate decision regarding the appropriate relief. Amara v. CIGNA Corp., 559 F. Supp. 2d 192, 222 (D. Conn. 2008) ("Amara II"). Although plaintiffs indicated a preference for a declaration that Part B is void and an injunction ordering a return to Part A, the court ordered "A plus B" relief pursuant to ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B)[22], whereby the CIGNA

[22] ERISA § 502(a)(1)(B) allows a plan "participant or beneficiary" to bring an action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B).

plan would provide class members with "all accrued Part A benefits in the form those benefits were available under Part A, plus all accrued Part B benefits in the form those benefits are available under Part B." Id. at 214. The Second Circuit affirmed by summary order, Amara v. CIGNA Corp., 348 F. App'x 627 (2d Cir. 2009), and both parties petitioned for certiorari.

The Supreme Court granted defendant's petition for certiorari and, in a decision issued on May 16, 2011, vacated the Second Circuit's judgment and remanded the case—concluding that it was inappropriate to grant the "A plus B" remedy under § 502(a)(1)(B) because documents summarizing the plan could not "constitute the terms of the plan for purposes of § 502(a)(1)(B)." CIGNA Corp. v. Amara, 131 S. Ct. 1866, 1878 (2011) ("Amara III") (emphasis in original). The Supreme Court instructed the district court to consider on remand whether plaintiffs are entitled to relief under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), which provides for "appropriate equitable relief" to redress specified violations of ERISA or of plan terms. Id. at 1882.[23] The Court stated that "the relevant standard of harm will depend upon the equitable theory by which the District Court provides relief." Id. at 1871.

On remand, the district court denied CIGNA's motion to decertify the class and again ordered CIGNA to provide plaintiffs with A plus B benefits and new or

[23] On May 23, 2011, the Supreme Court also granted plaintiffs' petition for certiorari, see Amara v. CIGNA Corp., 131 S. Ct. 2900 (2011), which requested the Supreme Court to review the Second Circuit's affirmance of the district court's decision to order A plus B benefits rather than a return to the Part A plan.

corrected notices, this time under § 502(a)(3). Amara v. CIGNA Corp., 925 F. Supp. 2d 242, 265-66 (D. Conn. 2012) ("Amara IV").

On appeal, the Second Circuit affirmed. Amara v. CIGNA Corp., 775 F.3d 510 (2d Cir. 2014) ("Amara V"). The Second Circuit explained that reformation is properly analyzed under contract principles, id. at 525, and that the reasonable perceptions of the beneficiaries—not CIGNA's intent—determine the nature of the reformation remedy, see id. at 524-25 & n.11. Applying the principle that "[a] contract may be reformed due to the mutual mistake of both parties, or where one party is mistaken and the other commits fraud or engages in inequitable conduct," id. at 525 (citations omitted), the Second Circuit determined that plaintiffs "were required to show that defendants committed fraud or similar inequitable conduct and that such fraud reasonably caused plaintiffs to be mistaken about the terms of the pension plan," id. at 526 (citation omitted).[24] The Second Circuit addressed each of these requirements in turn.

The Second Circuit explained that equitable fraud "generally consists of 'obtaining an undue advantage by means of some act or omission which is unconscientious or a violation of good faith.'" Id. at 526 (citation omitted). In that regard, the Second Circuit cited the district court's findings in Amara I that (1) CIGNA employees experienced a lack of accurate information about the new plan, (2) CIGNA was aware of this fact, and (3) "CIGNA's misbehavior was designed to

[24] The Second Circuit held that "[t]raditional equitable principles do not require a separate showing of harm for reformation." Amara V, 775 F.3d at 525 n.12 (citations omitted).

'ease the transition to a less favorable retirement program.'" Id. at 526-27 (citations omitted). Based on these findings, the Second Circuit held that "the district court did not err in finding that defendants obtained undue advantage through these actions by avoiding adverse employee reactions." Id. at 527 (citation omitted). The Second Circuit noted that CIGNA had "concealed the possibility of wear-away from its employees and misled them about the conversion of their accrued benefits into the Part B plan"—and that "[b]y hiding the truth about the plan, CIGNA prevented all of its employees from becoming disaffected, spreading knowledge regarding the plan to others who stood to lose more from the benefit conversion, and from planning for their retirement." Id. (emphasis in original).

As to mistake, the Second Circuit rejected CIGNA's argument that determining mistake required an individualized inquiry into each class member's state of mind. Id. at 529. Rather, mistake could be proven through generalized circumstantial evidence, particularly where "defendants have made uniform misrepresentations about an agreement's contents and have undertaken efforts to conceal its effect." Id. (citations omitted). The Second Circuit held that the district court did not clearly err in determining that CIGNA's misrepresentations about the contents of the retirement plan were uniform—made through two SPDs, an SMM, and a 204(h) notice—"and helped to establish that the plaintiffs did not know the truth about their retirement benefits." Id. at 529-30 (citations omitted). Notably, the Second Circuit observed that CIGNA had not presented any evidence that any employee understood the plan change or its wear-away effect—and found no error

in "the district court's inference that informed employees, aware that their pension benefits were less valuable, would have protested the change, requested a higher salary, filed a lawsuit, or left for another employer." Id. at 530 (citation omitted). The Second Circuit also noted that CIGNA had "intentionally withheld details that would provide employees with a direct comparison of their benefits under Part A with their anticipated benefits under Part B." Id.[25]

The Court will now address each of the elements that the Class is required to prove in order to obtain reformation of the Plan.

B. ERISA's Fiduciary Duty and Disclosure Standards (§§ 404(a), 102)

Section 404 sets forth the fiduciary duty standards under ERISA. It provides, in pertinent part:

> (a) Prudent man standard of care
>
> (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the

[25] The Second Circuit also affirmed the district court's decision denying CIGNA's motion to decertify the class, Amara V, 775 F.3d at 519-24, and held that the district court did not abuse its discretion in limiting relief to A plus B benefits rather than ordering a return to the terms of CIGNA's original retirement plan, id. at 531-32.

> conduct of an enterprise of a like character and with like aims . . .

29 U.S.C. § 1104(a) [ERISA § 404(a)].

ERISA provides that a person is a fiduciary with respect to a plan—and therefore subject to ERISA fiduciary duties—"to the extent that he or she exercises any discretionary authority or discretionary control respecting management of the plan, or has any discretionary authority or discretionary responsibility in the administration of the plan." Bouboulis v. Transp. Workers Union of Am., 442 F.3d 55, 63 (2d Cir. 2006) (citing Varity Corp. v. Howe, 516 U.S. 489, 498 (1996) (internal quotation marks omitted)); see also 29 U.S.C. § 1002(21)(A). Thus, fiduciary status is imposed both on those "who have actually been granted discretionary authority, regardless of whether such authority is ever exercised" and on "those who exercise discretionary authority, regardless of whether such authority was ever granted." Bouboulis, 442 F.3d at 63. "The Supreme Court has held that when an employer communicates with plan participants about the contents of the plan, and when 'reasonable employees . . . could have thought that [the employer] was communicating with them both in its capacity as employer and in its capacity as plan administrator,' the employer can be found to be acting as a fiduciary under ERISA." Id. at 65 (quoting Varity, 516 U.S. at 503).

Here, the SPD explicitly provides that Foot Locker is the plan administrator (PX 5 at FLPL0026) and enjoys discretionary authority in the administration of the Plan:

> The company and the Retirement Investment Committee ("RIC") and Retirement Administration Committee ("RAC") of its Board of Directors administer the operation of the Plan. RIC is responsible for the selection of the investments of the Plan. RAC, on behalf of the company, is responsible for the general administration of the Plan. In carrying out its duties with respect to Plan administration, RAC has the exclusive right, power and authority, in its sole and absolute discretion, to administer, apply and interpret the Plan. RAC's decisions will be final, conclusive and binding on all parties.

(PX 5 at FLPL0037 (italicization omitted).) Thus, Foot Locker was a fiduciary by virtue of being plan administrator and having discretionary authority as set forth in the SPD. Moreover, there is an additional ground to find that Foot Locker owed the Class a fiduciary duty because reasonable employees would have believed that Foot Locker communicated with them as both an employer and a plan administrator in informing them about the changes to the Plan. See Bouboulis, 442 F.3d at 65-66. The SPD itself describes Foot Locker's fiduciary obligations as follows:

> ERISA imposes duties upon the people who are responsible for the operation of an employee benefit plan. The people who operate your Plan, called "fiduciaries" of the Plan, have a duty to do so prudently and in the interest of you and other Plan participants and beneficiaries. No one, including your employer, your union, or any other person, may fire you or otherwise discriminate against you in any way to prevent you from obtaining a benefit or exercising your rights under ERISA.

(PX 5 at FLPL0040 (italicization omitted).)

ERISA's fiduciary standards of conduct are "the highest known to the law." LaScala v. Scrufari, 479 F.3d 213, 219 (2d Cir. 2007) (quoting Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982)) (internal quotation mark omitted). They impose an unswerving "duty of loyalty" that requires a fiduciary to "discharge his

duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a) [ERISA § 404(a)]; see also Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co., 302 F.3d 18, 26 (2d Cir. 2002) (referring to this duty as a duty of loyalty). "To participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense is not to act 'solely in the interest of the participants and beneficiaries,'" as ERISA requires. Varity Corp. v. Howe, 516 U.S. 489, 506 (1996) (quoting ERISA § 404).

ERISA § 404(a) also imposes a "duty of care" that requires fiduciaries to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). Prudence is "measured according to the objective prudent person standard developed in the common law of trusts." Chao v. Merino, 452 F.3d 174, 182 (2d Cir. 2006) (quoting Katasaros v. Cody, 744 F.2d 270, 279 (2d Cir. 1984)).

Proper execution of fiduciary duties requires that fiduciaries' decisions "be made with an eye single to the interests of the participants and beneficiaries." Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir. 1982). Under ERISA § 404(a)(1), a fiduciary is not permitted to balance the interests of plan participants and the plan's sponsor: the focus on participants must be "exclusive." 29 U.S.C.

§ 1104(a)(1). As the facts above make clear, Foot Locker placed its interests above those of Plan Participants, thereby breaching its fiduciary duties.

"The most important way in which the fiduciary complies with its duty of care is to provide accurate and complete written explanations of the benefits available to plan participants and beneficiaries." Kenseth v. Dean Health Plan, Inc., 610 F.3d 452, 471 (7th Cir. 2010); see also Bixler v. Central Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1300 (3d Cir. 1993) (The duty to fully and accurately disclose and explain material information to plan participants "is the core of a fiduciary's responsibility" (citation and internal quotation marks omitted)). "Fiduciaries may be held liable for statements pertaining to future benefits if the fiduciary knows those statements are false or lack a reasonable basis in fact." Flanigan v. Gen. Elec. Co., 242 F.3d 78, 84 (2d Cir. 2001) (citation omitted). Fiduciaries may also be "liable for non-disclosure of information about a current plan when the omitted information was necessary to an employee's intelligent decision about retirement." Id. (citation omitted). In other words, "[w]hen a plan administrator affirmatively misrepresents the terms of a plan or fails to provide information when it knows that its failure to do so might cause harm, the plan administrator has breached its fiduciary duty to individual plan participants and beneficiaries." Devlin v. Empire Blue Cross & Blue Shield, 274 F.3d 76, 88 (2d Cir. 2001) (citation and internal quotation marks omitted omitted); see also Bixler, 12 F.3d at 1300 (the duty to inform "is a constant thread in the relationship between beneficiary and trustee; it entails not only a negative duty not to misinform, but

also an affirmative duty to inform when the trustee knows that silence might be harmful"); Mullins v. Pfizer, Inc., 23 F.3d 663, 669 (2d Cir. 1994) ("[A] plan administrator may not make affirmative material misrepresentations to plan participants about changes to an employee pension benefits plan." (citation and internal quotation marks omitted)). Importantly, the duty to inform "recognizes the disparity of training and knowledge that potentially exists between a lay beneficiary and a trained fiduciary. Thus . . . the fiduciary's obligations will not be excused merely because [a participant] failed to comprehend or ask about a technical aspect of the plan." Bixler, 12 F.3d at 1300. Here, the facts found by the Court demonstrate inaccurate and incomplete explanations of benefits and known falsity of certain statements. Foot Locker knew and expected that employees would rely on its statements to their detriment. There can be little doubt that acting under a mistaken belief additional work leads to additional benefits works to the actual detriment of the employer.

A court should not find that a fiduciary acted imprudently in violation of ERISA § 404(a)(1)(B) merely because, with the benefit of hindsight, a different decision might have turned out better. See DiFelice v. U.S. Airways, Inc., 497 F.3d 410, 412, 424 (4th Cir. 2007). The proper inquiry is whether under the circumstances then prevailing—not as seen in hindsight—the prudent person standard was met. 29 U.S.C. § 1104(a)(1)(B); see also Chao, 452 F.3d at 182. Here, Foot Locker intended to save money by implementing a plan conversion that effectively eliminated additional benefit growth for a period of years. The wear-

away effect was not the result of an unexpected change in economic conditions—for instance, a falling interest rate environment. It was the precise goal sought.

"While a trustee has a duty to seek independent advice where he lacks the requisite education, experience and skill, the trustee, nevertheless, must make his own decision based on that advice." United States v. Mason Tenders Dist. Council of Greater N.Y., 909 F. Supp. 882, 886 (S.D.N.Y. 1995) (citations omitted). Here, while Foot Locker reasonably sought the advice of Mercer, its actions in adopting a conversion that resulted in wear-away and failing to disclose that fact was ultimately a responsibility that it must bear as the plan fiduciary. ERISA supplements these general fiduciary standards with specific requirements governing the presentation and content of SPDs and SMMs. ERISA § 102 provides, in pertinent part:

> (a) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title [ERISA § 104(b)]. The summary plan description shall include the information described in subsection (b) of this section, **shall be written in a manner calculated to be understood by the average plan participant**, and **shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan**. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title [ERISA § 104(b)(1)].
>
> (b) The summary plan description shall contain the following information: . . . the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; **circumstances which may result in disqualification, ineligibility, or denial or loss of benefits** . . . .

29 U.S.C. § 1022 [ERISA § 102] (emphases added).

"SPDs are central to ERISA." Frommert v. Conkright, 738 F.3d 522, 531 (2d Cir. 2013). The SPD is supposed to be "a thorough and easy to understand summary of the benefit plan" that is "sufficiently accurate and comprehensive to apprise [plan] participants and beneficiaries of their rights and obligations under the plan." Layaou v. Xerox Corp., 238 F.3d 205, 209-11 (2d Cir. 2001); see also McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 191 (2d Cir. 2007) ("Section 102 and related provisions of ERISA require that a summary plan description be furnished to all participants and beneficiaries of an employee benefit plan and that it reasonably apprise participants and beneficiaries of their rights and obligations under the plan." (citations omitted)).

The same standards apply to SMMs which are required to be provided to employees when there is a "material modification in the terms of the plan and any change in the information required under [ERISA § 102(b)]." 29 U.S.C. § 1022(a). See Amara III, 131 S. Ct. at 1874-75; Amara I, 534 F. Supp. 2d at 344-48.

The SPD and the SMM work in tandem: the SPD must "clearly identify" in an understandable manner all the "circumstances which may result in disqualification, ineligibility, or denial [or] loss of benefits" and the SMM must describe "any change" in those circumstances. 29 U.S.C. § 1022(a), (b) [ERISA § 102]; 29 C.F.R. §§ 2520.102-3(1) and 2520.104b-3(a).

Department of Labor regulations explain the role of SPDs and SMMs in accurately and accessibly educating participants about how their plan works. See 29 C.F.R. § 2520.102-2, 102-3. In fulfilling the requirements of ERISA § 102, fiduciaries are required to "exercise considered judgment and discretion by taking into account such factors as the level of comprehension and education of typical participants in the plan and the complexity of the terms of the plan." 29 C.F.R. § 2520.102-2(a). Consideration of these factors will usually require fiduciaries to limit or avoid "technical jargon" and include "clarifying examples and illustrations" of how the plan works in practice. Id.

The regulations are insistent as to the fiduciaries' affirmative duty to make participants clearly "see" circumstances under which they will not receive the benefits described in the summary that they might otherwise reasonably expect to receive. The SPD thus must:

> clearly identif[y] circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture, suspension, offset, [or] reduction, or recovery . . . of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits [provided elsewhere in the summary].

29 C.F.R. § 2520.102-3(l).

Underscoring this affirmative duty to warn participants of the circumstances when they might not actually receive benefits the summary otherwise seems to be telling them they can expect, the regulations specifically direct that "[a]ny description of exception, limitations, reductions, and other restrictions of plan

benefits shall not be minimized, rendered obscure or otherwise made to appear unimportant." 29 C.F.R. § 2520.102-2(b); see also id. (requiring further that "[s]uch exceptions, limitations, reductions, or restrictions of plan benefits shall be described or summarized in a manner not less prominent than the . . . prominence used to describe or summarize plan benefits"). Restrictive plan provisions must be clearly cross-referenced with the description of the benefit. See id. The regulations expressly forbid fiduciaries from either playing up the positive features of the plan or downplaying the negative: "[t]he advantages and disadvantages of the plan shall be presented without either exaggerating the benefits or minimizing the limitations." Id.; see also id. (warning that the format of the SPD "must not have the effect to misleading, misinforming or failing to inform participants and beneficiaries").

The SPD must explain the "full import" of the plan's material terms. See Layaou, 238 F.3d at 211; see also Frommert, 433 F.3d at 260 (requiring an SPD to "set out in full" the plan's benefit calculation mechanics in a manner employees can appreciate); Wilkins v. Mason Tenders Dist. Council Pension Fund, 445 F.3d 572, 584 (2d Cir. 2006) ("Here, the Fund's SPD does not even mention the Policy, let alone explain its full import . . . . Obviously, it falls short of the high standards of clarity and completeness to which SPDs are held."). "[I]n addition to describing the individual provisions of the retirement plan and their import, an employer must also describe the interaction among those provisions if the result is likely to be material to plan participants." Amara I, 534 F. Supp. 2d at 345 (citations omitted);

see also Layaou, 238 F.3d at 209-11 (finding violation where SPD failed to warn employees about how an offset formula interacted with the plan's other formulas to reduce employees' benefits).

There is no doubt here that the SPD was not written clearly; Participants from a CFO level down failed to understand how their actual benefits would be calculated. The "actuarial equivalence" language on which Foot Locker relies, (PX 5 at FLPL 0025), is sufficiently removed from the comprehension of the average Plan Participant that Foot Locker could not have expected it to awaken them to the full import of what was occurring. Indeed, as Deutsch testified and this Court has credited, the conversion methodology did not, in any event, result in actuarial equivalence. (Deutsch Op. Report at 3; Deutsch Tr. 153:2-25, 179:4-180:8, 184:6-25.)

The Class has shown by a preponderance of the evidence that Foot Locker, acting as plan administrator, violated ERISA §§ 404(a) and 102 by providing participants materially false, misleading, and incomplete descriptions of the amended Plan. Foot Locker knew that virtually every Participant's pension earnings would be effectively frozen for a period of time as a result of the wear-away effect built-in to the January 1, 1996 Plan amendment. (See, e.g., Peck ¶ 6; PX 84; Peck Tr. 1121:11-16, 1128:4-8, 1130:9-14, 1130:21-1131:4.) Wear-away was certainly a material fact regarding the amended Plan, as virtually all Participants suffered from the phenomenon, and many employees' pension benefits did not grow for several years. Having knowingly created a pension plan that mathematically

locked in wear-away, Foot Locker had a duty to disclose and explain the wear-away effect "in a manner calculated to be understood by the average plan participant." ERISA § 102(a); see also Amara I, 534 F. Supp. 2d at 348 ("[t]he possibility of wear away was certainly a material fact [that was required to be disclosed under] 29 C.F.R. § 2520.102-2(b)"); id. (CIGNA had "a duty to inform plan participants of the possibility of wear-away in [the] notices and disclosures regarding [the new plan design]").

Foot Locker's disclosures in the SPD and other company-wide communications fell far short of the statutory requirements. The Court finds that not only did commonly available documents such as the SPD created class-wide misrepresentation, individualized communications with Participants also did nothing to disabuse Participants of the idea that their benefits were growing with their time of service. In fact, individualized plan statements reinforced the idea that the ever-changing account balance was – or at least was the basis of – what a Participant could expect to receive upon retirement. Individual communications with Participants also did not clarify the issue.[26]

As, inter alia, Kanowicz and Peck's testimony demonstrated, Foot Locker knew that employees would have the mistaken belief that a growing account

[26] Even those who received communications that there existed a minimum lump sum payment that may exceed their account balance were not told that the minimum lump sum was merely the equivalent of what they were entitled to under the old Plan. Indeed, testimony from those class members who received this information indicated that they were led to believe the minimum lump sum was based on the account balance plus a federal actuarial calculation. (See, e.g., Steven Decl. ¶ 15; Tr. 1369:20-1370:7.)

balance meant a growing benefit; it knew that it was leaving out wear-away, a concept that it could have easily explained and that employees would have easily understood. (See Kanowicz 3/29/12 Tr. 195:12-16; Peck Tr. 1243:15-20, 1244:12-16, 1242:20-1243:1; 1252:7-13.)

C. Class-Wide Reliance

The Court has already ruled that proof of class-wide misrepresentation does not require proof of individualized reliance.[27] (Opinion & Order, Nov. 7, 2014, ECF No. 220 at 4-12.) The evidence at trial does not prompt the Court to revisit its class certification decision. In fact, there is overwhelming trial evidence that, if legally necessary, plaintiffs have proven a reasonable inference of class-wide reliance.

The Court credits plaintiff's strong evidence of generalized reliance. No Participant would have ignored the fact that their benefits were frozen without their knowledge. Indeed, Foot Locker admitted at trial that the very purpose of keeping wear-away a secret was to avoid negative publicity, loss of morale, and inability to hire and retain employees. The Court further credits Class members' testimony that they read the Plan change announcements and believed that their benefits were growing, and that credits—including compensation credits based on their service—were contributing to that growth. Indeed, the fact that Foot Locker issued annual individualized account statements portraying the same picture is

[27] In any event, the Court also finds that the Class has demonstrated by a preponderance of the evidence that class members relied detrimentally on Foot Locker's misrepresentations.

strong evidence that Participants were expected to use the growing account balance as an indication that their continued service yielded growing benefits.

As a result of the company's failure to communicate wear-away, no employees lodged complaints against Foot Locker.[28] Affirmative evidence from Schaeffer and Steven showed that Participants were under the belief that their accrued benefits under the prior Plan was the foundation for an ever-growing retirement payout, since they requested more detail about the size of their pension benefits as useful information for understanding their financial status at retirement or termination. They had no idea that the size of their ultimate benefit did not correspond to their additional service at the company. (See, e.g., Steven Decl. ¶¶ 14, 29; Schaeffer Decl. ¶ 8, 7.) Finally, the Court also finds that defendant's arguments that some class members enjoyed working for Foot Locker for reasons other than retirement benefits and that some class members may not have had the ability to change their investment portfolios as an entirely meritless response to the core issue.

D. Class-Wide Mistake

Proving mistake for purposes of reformation requires showing that a party entered a contract "in ignorance or mistake of facts material to its operation." Amara V, 775 F.3d at 529. ERISA's central objective is to "protect employees' justified expectation of receiving the benefits their employers promise them."

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[28] The Court also finds persuasive the idea—shared by Foot Locker—that retirement benefits are part and parcel with the totality of the employee's compensation. (See Peck Tr. 1135:24-1136:4.) It is simply incredible to believe that any employee would not rely upon a representation that their compensation was growing with their continued service.

Amara V, 775 F.3d at 529 (citation omitted). "In the context of ERISA plans, mistake is measured by comparing the actual terms of the plan to the baseline of the beneficiaries' objective, reasonable expectations about the scope of benefits provided." Amara IV, 925 F. Supp. 2d at 253 (citations omitted), aff'd, Amara V, 775 F.3d at 529 (2d Cir. 2014) (agreeing that CIGNA's benefit summaries were "evidence of . . . what CIGNA's employees understood" and "helped to establish that the plaintiffs did not know the truth about their retirement benefits"). The "reasonable expectations" of plan participants are based on what the plan's sponsor and fiduciaries communicate to employees about the plan. Layaou, 238 F.3d at 209.

The Class has proven by clear and convincing evidence that, as a result of Foot Locker's false, misleading, and incomplete Plan descriptions, employees were ignorant of "the truth about their retirement benefits." Amara V, 775 F.3d at 529. Specifically, class members' testimony and other evidence demonstrated that the class members reasonably but mistakenly believed that growth in their cash balance benefit equaled growth in their pension benefit. In other words, Participants reasonably but mistakenly believed that their pension benefits were equal to the sum of (A) the benefit each Participant earned under the Plan's traditional "defined benefit" annuity formula for service through December 31, 1995, plus (B) the benefits Foot Locker told Participants they were earning under the Plan's "cash balance" account formula for service after January 1, 1996.

E. Fraud or Inequitable Conduct

To obtain plan reformation under ERISA § 502(a)(3), the Class must show that Foot Locker engaged in "fraud or inequitable conduct." See Amara V, 775 F.3d at 525.

Equitable fraud. In Amara V, the Second Circuit explained that equitable fraud "generally consists of obtaining an undue advantage by means of some act or omission which is unconscientious or a violation of good faith." Id. at 526 (internal quotation marks and citation omitted); see also Sec. & Exch. Comm'n v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 194 (1963) ("Fraud . . . in the sense of a court of equity properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another." (citation and internal quotation marks omitted)).

The law is clear that equitable fraud does not require a showing of intent to deceive or defraud. See Capital Gains, 375 U.S. at 193 ("Fraud has a broader meaning in equity (than at law) and intention to defraud or to misrepresent is not a necessary element." (citation and internal quotation marks omitted)); Fed. Trade Comm'n v. Algoma Lumber Co., 291 U.S. 67, 81 (1934) ("[T]here is a kind of fraud, as courts of equity have long perceived, in clinging to a benefit which is the product of misrepresentation, however innocently made." (citations omitted)); United States v. Von Barta, 635 F.2d 999, 1005, n.14 (2d Cir. 1980) ("Actual frauds are intentional frauds. Constructive frauds involve breaches of fiduciary or equitable duties where

an intent to deceive is lacking." (citation omitted)); Hammond v. Pennock, 61 N.Y. 145, 152 (1874) ("In equity, the right to relief is derived from the suppression or misrepresentation of a material fact, though there be no intent to defraud . . . . It is inequitable and unconscientious for a party to insist on holding the benefit of a contract which he has obtained through misrepresentations, however innocently made." (citations omitted)); D.R. Paskie & Co. v. Commercial Cas. Ins. Co., 229 N.Y.S. 121, 129 (N.Y. App. Div. 1928) ("The fraudulent intent need not be proven in an equity action, while at law such intent must be established." (citation omitted)).

The equitable fraud doctrine is not equivalent to strict liability because there is an "undue advantage" requirement. Compare Hay v. Star Fire Ins. Co., 77 N.Y. 235, 240 (1879) (holding an insurer committed equitable fraud and plaintiff was entitled to reformation when, without proper notice to plaintiff, the insurer renewed but changed the policy-contract in a way that reduced the plaintiff's coverage and advantaged the insurer), with AMEX Assurance Co. v. Caripedes, 316 F.3d 154, 161 (2d Cir. 2003) (equitable fraud not found because although defendant inadequately disclosed the policy change, the change did not benefit defendant; "[o]n the other hand, the undisclosed change made by the insurer in Hay was for its own benefit; for that reason, the insurer's failure to draw the insured's attention to it was described as a fraud"). Here, there is no doubt that Foot Locker committed equitable fraud. It sought and obtained cost savings by altering the Participants' Plan, but not disclosing the full extent or impact of those changes.

Inequitable conduct. "Inequitable conduct includes deception or even mere awareness of the other party's mistake combined with superior knowledge of the subject of that mistake." DS Parent, Inc. v. Teich, No. 5:13-CV-1489 LEK/DEP, 2014 WL 546358, at *4 (N.D.N.Y. Feb. 10, 2014) (citations omitted); see also Koam Produce, Inc. v. DiMare Homestead, Inc., 329 F.3d 123, 127 n.3 (2d Cir. 2003) ("Under New York law, in order for a court to allow rescission of a contract on the basis of a unilateral mistake, a party must establish that (i) he entered into a contract under a mistake of material fact, and that (ii) the other contracting party either knew or should have known that such mistake was being made." (quoting Kraft Foods, Inc. v. All These Brand Names, Inc., 213 F. Supp. 2d 326, 330 (S.D.N.Y. 2002)) (internal quotation marks omitted)); Middle E. Banking Co. v. State St. Bank Int'l, 821 F.2d 897, 906 (2d Cir. 1987) ("New York courts will, in some cases, rescind contracts and void releases even in the absence of fraud where unilateral mistake is established" and the mistake is "one which is known or ought to have been known to the other party" (citations and internal quotation marks omitted)).

The Second Circuit applied the "inequitable conduct" doctrine in Tokio Marine & Fire Ins. Co. v. Nat'l Union Fire Ins. Co., 91 F.2d 964 (2d Cir. 1937). In Tokio, an action to recover on a reinsurance policy, the defendant-appellee reinsurer (National) sought reformation of the policy on the ground of unilateral mistake coupled with inequitable conduct. Id. at 964. National's mistake arose because the final draft of the policy as provided by the primary insurer, plaintiff-appellant

Tokio, contained a change from the parties' informal understanding (reflected in an insurance "binder")—a change which National had not noticed. Id. at 966. Tokio—acting through its brokers—had "a well-settled practice" in its dealings with National "to call its attention to important changes by the submission of new binders with the forms"—but had not do so with respect to this particular change. Id. at 965.

The district court ordered reformation, and the Second Circuit affirmed. The Second Circuit explained that "the change made was such as to raise a reasonable inference of knowledge by the appellant of the mistake committed by the appellee"—and that "[m]istake was implicit" "in the silent acceptance of the altered agreement under the circumstances which prevailed." Id. Under such circumstances, "reformation would follow as of course." Id. The Second Circuit further noted that even though the district court had not made a finding of knowledge, "[t]he fact still remain[ed] . . . that the submission of the form under the circumstances related entailed a representation, however innocent and unmalicious, which induced the appellee's mistake." Id.

The Class has proven by clear and convincing evidence that Foot Locker has engaged in equitable fraud or inequitable conduct with respect to the January 1, 1996 Plan amendment.[29]

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[29] The Court notes that it makes this finding solely based on the evidence adduced at trial. While the Court had previously found that Foot Locker had spoliated documents, and determined that imposition of an adverse inference is warranted, the Court has not applied such an inference in reaching its determinations.

F. Statute of Limitations

Foot Locker argues that before relief may be imposed, the Class must be reduced to exclude class members whose claims are not within the applicable statute of limitations. As further explained below, no exclusions are warranted.

This Court previously determined that an SPD claim is subject to a three-year statute of limitations. See Osberg v. Foot Locker, Inc., 907 F. Supp. 2d 527, 533 (S.D.N.Y. 2012), aff'd in part, vacated in part, 555 F. App'x 77 (2d Cir. 2014) (summary order).[30] An SPD claim accrues when a plaintiff has sufficient information to allow him to understand the basis for his claim. See Novella v. Westchester Cnty., 661 F.3d 128, 147 & n.22 (2d Cir. 2011) (plaintiff is on notice of a claim when that claim is readily discoverable from information provided); Osberg, 907 F. Supp. at 533.

A breach of fiduciary duty claim must be brought within six years from the date of the breach, or, if a plaintiff has actual knowledge of the breach, within three years from such knowledge. 29 U.S.C. § 1113. This rule is subject to an exception in cases of fraud or concealment, in which case the limitations period runs six years from when the participant discovered the breach. See id. The fraud or concealment exception applies in "cases in which a fiduciary: (1) breached its duty by making a knowing misrepresentation or omission of a material fact to induce an employee/beneficiary to act to his detriment; or (2) engaged in acts to hinder the

[30] On appeal, the Second Circuit did not reach the question of whether an SPD claim is subject to a three- or six-year statute of limitations. See Osberg v. Foot Locker, Inc., 555 F. App'x 77, 80 (2d Cir. 2014) (summary order).

discovery of a breach of fiduciary duty." Caputo v. Pfizer, Inc., 267 F.3d 181, 190 (2d Cir. 2001) (citation omitted). Based on the evidence presented at trial, the Court finds that the fraud or concealment exception applies. The evidence at trial overwhelmingly established that Class members did not understand that they were subject to wear-away as a result of Foot Locker's misrepresentations and omissions. This was so even after they had received or begun receiving their Plan benefits. Plaintiffs' claims accrued when they learned – through counsel – of wear-away in 2005. (Osberg Decl. ¶¶ 4-5.) There is no evidence of a single Class member who was aware or reasonably could have been aware of wear-away outside of the statutes of limitations.

Foot Locker argues that class relief would be not be available to class members who terminated their employment more than three years (in the case of SPD claims) or six years (in the case of fiduciary breach claims) before suit commenced because there are individualized issues as to whether these Participants were on notice of their claims on or before the date of termination. This argument is without merit. As this Court previously determined, class members' receipt of benefits was insufficient to arm them with the information they needed to be on notice of their claims.[31] (Opinion & Order dated November 7, 2014

[31] Foot Locker contends that "Ada Cardona requested a clarification of her annuity benefit in 2003, six years after her employment terminated, and in response received a detailed explanation that put her fully on notice of the fact that her benefit had been calculated based on the pre-1996 accrued benefit and that her compensation and interest credits that had accumulated in her account did not contribute to her benefit." (Defs.' Proposed Findings of Fact & Conclusions of Law at 75, ECF No. 339.) However, at trial, Cardona credibly testified that she did not understand the calculations in the 2003 communication. (Cardona Tr. 438:16-439:11, 443:9-16; PX 160.)

at 14, ECF No. 220.) Moreover, there is no evidence that any of the communications that Foot Locker had provided to Participants informed the Participants that they were be subject to wear-away, even after their benefits were distributed. Mere transmission of cryptic communications—which were not generally comprehensible to Participants—is not sufficient to put those Participants on notice of their claims and trigger the statute of limitations. The world does not yet have commercially available x-ray vision; logically, Participants cannot see that which is hidden from them. Accordingly, the statute of limitations does not require any exclusions from the Class as certified.[32]

G. Remedy

In sum: The Class has proven by a preponderance of the evidence that Foot Locker violated ERISA §§ 404(a) and 102 by issuing false, misleading, and incomplete Plan descriptions. The Class has also proven by clear and convincing evidence that, as a result of Foot Locker's ERISA violations, employees reasonably but mistakenly believed that growth in their cash balance benefit equaled growth in their pension benefit—and that Foot Locker obtained an undue advantage vis-à-vis its workforce.

[32] Foot Locker also argues that any class members who terminated employment with Foot Locker before the SPD was distributed should be removed from the class for purposes of awarding relief. This argument also fails. The SPD was only one of the false and misleading communications that class members received; class members who left before the SPD was distributed are still entitled to relief on their claim for breach of fiduciary duty based on other false and misleading communications, such as the September 1995 Announcement Letter and the November 1995 Highlights Memo.

To remedy Foot Locker's misrepresentations, the Plan must be reformed to actually provide the A plus B benefit that the misrepresentations inequitably caused Class members to reasonably expect.

Starting with the A benefit, the September 1995 Announcement Letter, the November 1995 Highlights Memorandum, the January 1996 Plan Statement, the December 1996 SPD, and other Plan summaries promised that each Participant's December 31, 1995 accrued benefit would be fully preserved in the form of an account balance. The only way for the Plan to fulfill that promise is to give Participants an initial account balance as of January 1, 1996 equal to the December 31, 1995 accrued benefit discounted to present value using a 6% rate, with no further reduction for pre-mortality risk. (See Deutsch Op. Report at 43.)

As to the B benefit, to fulfill Foot Locker's promise that a Participant's pension benefit would include all of the benefits earned under the cash balance formula, the Plan must add to each Participant's initial account balance (the "A" benefit) the sum of: (1) any one-time enhancement to which the Participant is entitled under the terms of the Plan, applying the enhancement formula to the Participant's initial account balance as determined above; (2) compensation credits that the Participant was promised; (3) interest credits at the annual 6% rate promised under the Plan; and (4) any adjustments required by "federal law and IRS regulations" at the time of payment as described on pages 12 and 14 of the SPD. (See PX 5; PX 38; Deutsch Op. Report at 43-44.)

With respect to class members who have already retired, the Court orders that retirees and former employees shall be entitled to receive the difference in value between the full value of the A plus B benefit to which they are entitled and the benefit they received; and orders that any class member who has retired is entitled to prejudgment interest at a rate of 6% per annum (because it would be treated as an unpaid account balance, which would be credited with interest at 6%). (Deutsch Op. Report at 45.) Retirees and former employees shall receive past-due benefits in the same form the Participant elected at the time his or her benefit originally commenced.

For Class members who elected an annuity, the full value of the A plus B benefit would be equal to the A benefit (determined as the larger of the protected benefit or the A benefit converted to an annuity under the post amendment terms) and the B benefit (converted to an annuity under the post amendment terms). (Id. at 45-46.)

Accordingly, the Court orders that the Foot Locker Retirement Plan be reformed to provide the pension benefits described above, and orders and enjoins Foot Locker to enforce the Plan as thus reformed. The Court orders that all of the remedies provided in this Opinion & Order are to be stayed to allow the parties to pursue an appeal, if they so choose.

III. CONCLUSION

For the reasons set forth above, the Court finds in favor of the Class on all claims. The appropriate remedy is reformation of the Plan as discussed above. The parties shall submit an appropriate form of order not later than **October 13, 2015**. The Clerk of Court is directed to terminate this action.

SO ORDERED.

Dated: New York, New York
October 5, 2015

KATHERINE B. FORREST
United States District Judge

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DATE FILED: SEP 24 2014

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEOFFREY OSBERG, on behalf of himself and on behalf of all others similarly situated,

Plaintiff,

-v-

FOOT LOCKER, INC. et al.,

Defendants.

07-cv-1358 (KBF)

CORRECTED ORDER[1]

KATHERINE B. FORREST, District Judge

This lawsuit, commenced in 2007, alleges that certain changes Foot Locker, Inc. ("Foot Locker") made to its employee pension plan (referred to as the "Foot Locker Retirement Plan" or the "Plan"), violated various provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. Plaintiff alleges that Foot Locker breached its fiduciary duty in making materially false and misleading statements and omissions under § 404(a), 29 U.S.C. § 1104(a).[2] Plaintiff seeks relief pursuant to § 502(a)(3), 29 U.S.C. § 1132(a)(3), for reformation and surcharge.

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[1] The Court has clarified the discussion of the statute of limitations on page 12. The Court has made clear that the statute of limitations does not bar the claims even of those putative class members who received payments more than six years prior to the initiation of this suit.

[2] This Court had previously dismissed plaintiff's claim under ERISA § 102(a), 29 U.S.C. § 1022(a), as time-barred. That determination was challenged on appeal. The Second Circuit found that since the relief plaintiff sought under § 102(a) and § 404(a) was the same, it need not conclusively decide whether the § 102(a) claim was time-barred. Osberg v. Foot Locker, Inc., 555 F. App'x 77, 80 (2d Cir. 2014).

In particular, plaintiff contends that for the years prior to January 1, 1996, the Foot Locker Retirement Plan was a "'career average pay' plan that calculated and paid benefits according to a formula that based accruals on a specified percentage of employees' annual compensation." (Amended Complaint, ECF No. 57 ¶ 19 ("Am. Compl.").) By means of a plan amendment adopted in late 1995 and effective as of January 1, 1996, Foot Locker converted the Plan to a "cash balance" plan for years of service beginning on January 1, 1996, and froze accruals under the terms of the Plan as it had existed previously. (Id. ¶ 20.) Under the amended Plan, a hypothetical or notional account was created for each Plan participant; Foot Locker attributed to that account an amount it calculated as an "initial" or opening account balance. (Id. ¶ 21.) The calculation of that balance is at the heart of this dispute.

According to plaintiff, for each employee who had joined the Plan before the conversion, Foot Locker calculated the initial account balance by determining the actuarial equivalent lump sum value of previously accrued benefits based on a 9% rate of interest and a mortality table. (Am. Compl. ¶ 24.) A participant's notional cash balance account was, in contrast, adjusted on the first day of each calendar year by an "interest credit" of 6% per annum. (Id. ¶ 23.) For employees who remained active participants after the conversion to a cash balance plan, Foot Locker used a "greater of" formula under which participants were entitled to the greater of "(A) their 'frozen' benefit derived from the Plan terms as of December 31, 1995, or (B) their notional account balance calculated under the Plan's cash balance

formula as of the date of retirement or separation from service." (Id. ¶ 25.) According to plaintiff, Foot Locker's decision to use the 9% interest rate to establish opening account balances, combined with an annual 6% interest rate to calculate credits and a "greater of" formula, resulted in a period of time during which employees' frozen benefits were guaranteed to be greater than their notional account balances. (See e.g., id. ¶¶ 37-38.) Thus, the cash balance conversion had the "effect of an interest arbitrage." (Id. ¶ 45.)

There is one named plaintiff in this action, Geoffrey T. Osberg ("Osberg"). Osberg was employed by Foot Locker or one of its predecessor companies from 1982 to 2002. (Am. Compl. ¶ 5.) Osberg participated in the Plan during the entire twenty-year period of his employment. (Id.) He seeks to represent a putative class of approximately 16,000 individuals, defined as follows:

> All persons who were participants in the Foot Locker Retirement Plan as of December 31, 1995, who had at least one Hour of Service on or after January 1, 1996 (as defined under the Plan), and who were either paid a benefit from the Plan after December 31, 1995 or are still entitled to a benefit from the Plan; and the beneficiaries and estates of such persons and alternate payees under a Qualified Domestic Relations Order.

(See Am. Compl. ¶ 10; Mot. for Class Certification and Appointment of Class Counsel, ECF No. 158, at 13.)

Pending before this Court are plaintiff's motions for class certification and reinstatement of Count III, a claim pursuant to § 102(a). For the reasons set forth below, plaintiff's motions are GRANTED.

I. LEGAL STANDARDS FOR CLASS CERTIFICATION

A plaintiff seeking certification of a class must prove by a preponderance of the evidence that its proposed class meets the requirements of Rule 23(a) and, if those requirements are met, that the class is maintainable under at least one of the subdivisions of Rule 23(b). See Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2548 (2011); Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc., 546 F.3d 196, 202 (2d Cir. 2008). Plaintiff here seeks certification under Rule 23(b)(3).

Rule 23(a) provides that class certification may be appropriate if:

> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

Rule 23(b)(3) allows certification if "the questions of law or fact common to class members predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

Plaintiff bears the burden of demonstrating affirmative compliance with the requirements of Rule 23. Wal-Mart, 131 S. Ct. at 2551. In making a determination as to whether class certification is appropriate, the district court must "receive enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met." Teamsters Local 445, 546 F.3d at 204 (quoting

In re Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 41 (2d Cir. 2006)) (internal quotation marks omitted).

By virtue of the rather lengthy passage of time since this case was commenced, plaintiff's motions for class certification and reinstatement of Count III (surcharge) follow the guidance provided by the Supreme Court in CIGNA Corp. v. Amara, 131 S. Ct. 1866 (2011) (Amara III). Amara bears similarities to the case before this Court.

Amara was also a putative class action challenging an employer's conversion from a defined benefit plan to a cash balance plan. 131 S. Ct. at 1870. The district court certified a class and held a bench trial after which it reformed the contract and imposed a surcharge. See id. at 1870-71. The issue before the Supreme Court concerned the form and basis for relief. The Court held that reformation and surcharge were both appropriate equitable remedies pursuant to § 502(a)(3). See id. at 1878-80.

Neither the class certification motion nor the request to reinstate the § 102(a) claim present difficult issues, particularly in light of Amara.

II. CLASS CERTIFICATION

A. Numerosity

Numerosity is not an issue on this motion—defendants concede it and the proposed class consists of approximately 16,000 members. (Answer § 12; see also Expert Report of Lawrence Deutsch, ECF No. 84-23, at 1.)

B. Commonality and Predominance

Commonality is a contested issue, but it is quickly resolved in plaintiff's favor. Commonality requires a showing, through the existence of at least one "question[] of law or fact common to the class," Fed. R. Civ. P. 23(a)(2), that the representative's claims and those of the class "depend upon a common contention" which is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Wal-Mart, 131 S. Ct. at 2551. A court's analysis of commonality and predominance often merge, Newman v. RCN Telecom Servs., Inc., 238 F.R.D. 57, 73 n.12 (S.D.N.Y. 2006), and they do so here.

There are multiple common questions of law and fact in this case that will generate class-wide answers—and these common questions predominate over potentially unique issues. Among the common questions are:

> Whether Foot Locker violated ERISA's strict fiduciary standards by preparing and disseminating participant communications with the intent to conceal the wear-away and/or that had the effect of concealing wear-away.
>
> Whether there was a binding understanding of a no-freeze plan—that is, that the amended plan provided for an equal-value conversion from an annuity to an account balance format, with new benefits being added immediately, equal to the annual pay and interest credits posted to participants accounts, effective January 1, 1996—coupled with participants' objective, reasonable (but mistaken) expectation that that was what the formal plan terms provided.
>
> Whether Foot Locker violated its fiduciary duties by intentionally taking advantage of employees' lack of full and accurate information from the Company regarding the conversion to obtain employees' services without actually providing them with the benefits Foot Locker told them they were earning in exchange for those services.

There is nothing "individualized" about any of these questions. Regardless of whether the answer to each of these inquiries is affirmative or negative, the answer is identical as to each member of the class. Because "th[e] determination of [the] truth or falsity [of any of these questions] will resolve an issue that is central to the validity of [the class'] claims in one stroke," see Wal-Mart, 131 S. Ct. at 2551, commonality is satisfied.

C. Typicality

Typicality is also satisfied. Each class member's claim arises from the same course of events and is subject to the same proof—the changes in the Plan, planning for those changes by defendants, and communications about those changes. Defendants argue that individual issues will predominate as each class member may or may not be adversely affected by the changes in the Plan. However, based on the evidence before the Court on this motion (which may or may not alter before trial), the evidence is to the contrary: that any employee subject to the combination of the 9% discount rate used to calculate the initial account balance, and the 6% rate used to calculate additional accrual, would arguably experience a period of "wear-away" when he or she would not earn additional benefits. In this regard, for some period of time, the harm is common. (Notably, defendants have not offered a period of time when this calculation would change and work against a putative class member).

D. Adequacy

There is no reason to doubt that Osberg "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). He has the identical legal and effectively identical financial interest in this action as do the members of the proposed class. The fact that putative class members stand to benefit by potentially different amounts if successful in this action does not give rise to a conflict. See In re NASDAQ Mkt.-Makers Antitrust Litig., 169 F.R.D. 493, 513 (S.D.N.Y. 1996).

E. Reliance

Defendants contest class certification largely on the basis that individual issues of reliance will predominate over common ones. This assertion is premised on the view that putative class members must show individual reliance on misrepresentations or omissions to establish a § 404(a) violation or entitlement to the remedy of reformation or surcharge. This view is incorrect and has largely been foreclosed by Amara.

As an initial matter, plaintiff's claim here is that the breach of fiduciary duty (the § 404(a) claim) is evidenced by a course of common conduct—in which defendants acted in a uniform manner across the class. Plaintiff points to common materials, sent to all class members, as at the core of the alleged breach. Liability or non-liability as to a § 404(a) claim reasonably could be based on a factfinder's assessment of these common, class-wide communications. Indeed, there is no evidence before the Court that any particular plaintiff received materially

individualized materials which would suggest a weakness in plaintiff's form of proof.

Given this undifferentiated set of class-wide communications, plaintiff is correct that reliance may be presumed. The fact pattern is more analogous to that in Klay v. Humana, Inc., 382 F.3d 1241 (11th Cir. 2004), and In re U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108 (2d Cir. 2013), cert. denied, 134 S. Ct. 1938 (2014). In both of those cases, the plaintiffs were in notably disadvantaged positions and were unlikely themselves to discover the "truth" (in U.S. Foodservice, the inflated invoices, in Klay, the reduced physician reimbursements). Here, putative class members were in a similarly disadvantaged position: in a highly technical area of notional cash balance calculations, employees were unlikely to understand what the posited "discount rate" meant, and what impact a subsequent interest rate would have on their benefits. Put another way, "arbitrage" between the rates was a likely scenario in the interest-rate environment. Thus, at the liability stage, reliance does not present such unique issues as to require denial of certification.

Individual questions also do not predominate at the remedy phase. In the remedy phase, reliance is not required. In Amara, the Supreme Court stated that "there is no general principle that 'detrimental reliance' must be proved before a remedy decreed." Amara, 131 S. Ct. at 1881. Indeed, "[t]o the extent any such requirement arises, it is because the specific remedy being contemplated imposes such a requirement." Id.

While the Supreme Court found that reliance must be shown for estoppel claims, id., the same is not true with respect to reformation of contract or imposition of surcharge following reformation—the two forms of relief sought here. In particular, a surcharge claim based on a failure to provide proper summary information may injure an employee even in the absence of direct reliance. Id. Accordingly, in Amara, the Court found that to obtain relief by surcharge following reformation of contract required only a showing of harm and causation—not reliance. Id. Here, plaintiff has proffered evidence that putative class members were exposed to materially identical employee communications regarding the Plan changes at issue.

F. The Statute of Limitations

Defendants also argue that individual questions will arise with regard to the statute of limitations. There are two potentially applicable statutes: a three-year period for those who may have had actual notice of a breach, and a six-year period for those who did not.

It bears repeating that plaintiff's liability claim is premised on a violation of § 404(a)—a breach of fiduciary duty based upon false and misleading statements or omissions. There is no doubt that the law provides that any action for breach of fiduciary duty must be brought no later than six years from the date of the breach, or, if a plaintiff has actual knowledge, three years from such knowledge. The question with regard to class certification is whether a particular putative class

member may have his or her own facts with regard to knowledge—thereby causing unique questions to predominate over common ones.

According to defendants, there are thus at least two different possibilities for any given putative class member: that he or she had actual knowledge of a claim for breach, and thus his or her claim should have been brought sooner (that is, within three years of such knowledge)—or, that he or she did not.

Defendants argue that, in addition, a putative class member must bring suit within six years from the time that he or she discovers, or with reasonable diligence could have discovered, the fraud. Thus, defendants argue that they are entitled to know when each individual putative class member knew or should have known about his or her claim, and, based on such knowledge, defend against a particular claim as untimely. According to defendants, a putative class member who received a payment from the Plan more than six years prior to the time that plaintiff brought suit, knew or should have known of defendants' alleged breach then.

Defendants' arguments sweep too far.

As an initial matter, a claim for fraud or concealment under § 413 is not equivalent to a state law fraud claim. "It is well settled that fraud and concealment are distinct concepts with respect to 29 U.S.C. § 1113 [ERISA § 413]. That is, a trustee's conduct does not have to constitute fraudulent concealment under ERISA in order to trigger the six-year statute of limitations." Katzenberg v. Lazzari, 406 F. App'x. 559, 562 (2d Cir. 2011) (emphasis added). In fact, if a fiduciary "knowingly misrepresented" the value of the Plan, that conduct would fall within § 1113. Id.

The question, in short, is whether the statute runs or could run based upon a plaintiff's knowledge, versus a fiduciary's act. The answer is that the former is so unlikely (based on the nature of the alleged conduct) that it should not long detain us.

The argument that the statute of limitations bars claims of putative class members who received payments more than six years ago is foreclosed by the Court's finding that receiving a distribution does not trigger actual or even constructive knowledge. The information available to putative class members, even those who had received distributions, was sparse and required deep knowledge of or familiarity with pension calculations and possibly ERISA to properly evaluate. The same is true, and for the same reasons, with respect to a broader claim as to a three-year "actual knowledge" standard as to a participant's claim. Plaintiff's claims are thus suited to class treatment: plaintiff alleges that the fiduciary's concealment was experienced in a common way as it was in the form of common, class-wide documents disseminated to all and sundry.

Accordingly, this Court certifies the following class:

"All persons who were participants in the Foot Locker Retirement Plan as of December 31, 1995, who had at least one Hour of Service on or after January 1, 1996 (as defined under the Plan), and who were either paid a benefit from the Plan after December 31, 1995 or are still entitled to a benefit from the Plan; and the beneficiaries and estates of such persons and alternate payees under a Qualified Domestic Relations Order."

III. REINSTATING THE § 102(a) CLAIM

Plaintiff seeks reinstatement of his claim pursuant to § 102(a)—referring to it as the "surcharge" claim.[3] This Court previously dismissed the § 102(a) claim as time-barred. The Department of Labor ("DOL") submitted an amicus brief to the Second Circuit in which it argued that plaintiff's § 102(a) claim should not have been deemed time-barred given the sparse facts and particularized knowledge a layperson would have had to have brought to those facts. On appeal, the Second Circuit declined to determine whether the § 102(a) claim was time-barred in light of the fact that plaintiff's § 404(a) claim would have provided for complete relief. Plaintiff now seeks to reinstate his § 102(a) claim.

Defendants argue that this motion is procedurally improper—that it is in the nature of a motion for reconsideration of a decision issued some two years ago. (See Defs.' Mem. of Law in Opp'n to Pl.'s Mot. for Reinstatement of Count Three (SPD Claim), ECF No. 169, at 1.) This argument ignores the fact that the Second Circuit itself signaled that plaintiff could—at some even later stage, perhaps if surcharge following reformation were denied in connection with the § 404(a) claim—move for reinstatement of the § 102(a) claim. See Osberg, 555 F. App'x at 81. It would certainly appear that the Second Circuit was not troubled by the timing of such a motion and was not suggesting that local rules regarding motions for reconsideration should deter this Court from considering such a motion. Of course,

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[3] This is perhaps slightly misleading as "surcharge" may be a remedy imposed in connection with contract reformation. See Osberg, 555 F. App'x at 81.

during the pendency of any case, a court may review its prior rulings to prevent injustice.

Here, based on the facts presently before this Court, the Court finds that its prior ruling regarding the timeliness of the § 102(a) claim was error and reverses itself. While the evidence to which the Court cited no doubt existed, the Court was imposing on laypersons an obligation to study isolated pieces of information and to understand nuances of ERISA law. The point of many rules regarding summary plan descriptions and other communications to participants is that they are supposed to be comprehensible to mere mortals. Plaintiff alleges that the communications here were not. He has therefore sufficiently supported his claim that even receiving a distribution would not itself constitute "actual knowledge" in any real sense.

Accordingly, the Court reverses its prior ruling dismissing the § 102(a) claim.

IV. CONCLUSION

For the reasons set forth above, plaintiff's motions for class certification and reinstatement are GRANTED. The Clerk of Court is directed to terminate the motions at ECF Nos. 157 and 160.

SO ORDERED.

Dated: New York, New York
September 24, 2014

KATHERINE B. FORREST
United States District Judge

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEOFFREY OSBERG, on behalf of himself and on behalf of all others similarly situated,

Plaintiff,

-v-

FOOT LOCKER, INC. et al.,

Defendants.

07-cv-1358 (KBF)

OPINION & ORDER

KATHERINE B. FORREST, District Judge:

On September 24, 2014, this Court certified a class in the above captioned ERISA action. (ECF No. 186.) After further briefing, including submission of materials to the Second Circuit in connection with a petition for review under Rule 23(f), this Court notified the parties that it would reconsider its prior decision – but in doing so, it was not suggesting that it would necessarily alter its initial determination. (ECF No. 211.) In addition, plaintiffs have separately moved for this Court to amend its class certification ruling to include Count Three, the § 102 "Summary Plan Description" claim, in such certification. The instant Opinion resolves both of these issues in plaintiff's favor.

I. THE ISSUES

Defendant makes two main arguments as to why the Court erroneously determined that common issues predominate: (1) proof of reliance (which it asserts is a necessary element of plaintiffs' claims based on misrepresentations) necessarily

requires individualized inquiries and is not amenable to generalized proof; and (2) questions regarding whether each plaintiff's claim is within the statute of limitations also requires individual inquiry. After studying these questions again, reading any even potentially relevant case law in this area, and examining the record on this motion, the Court confirms its prior decision for all of the reasons set forth in its Opinion from September 24, 2014 as well as for the additional reasons set forth below.

II. PLAINTIFF'S CLAIMS

While plaintiff Osberg initially asserted four claims, at this time only two claims remain: Count Three, alleging violations of ERISA § 102(a), and Count Four, alleging violations of § 404(a). These counts seek plan reformation on the basis that defendant made false and material misstatements and omissions in its adoption of the 1995 pension plan amendment (effective as of January 1, 1996) in violation of §§102, 204(h) and 404(a).[1] Plan reformation is, as the Supreme Court found in CIGNA v. Amara, 131 S.Ct. 1866, 1879-80 (2011), essentially an equitable remedy.

Defendant asserts that for claims based on a misrepresentation, plaintiffs must prove individualized reliance. Plaintiffs argue that reliance is not a required element of either claim. This Court previously found, based, inter alia, on Amara, that detrimental reliance is not required in the context of a plan reformation claim. 131 S.Ct. at 1881 ("a showing of detrimental reliance…is not [a] necessary element

[1] In recent motion practice before this Court, it was found that plaintiffs may properly pursue equitable as well as legal remedies. Plaintiffs have stated that they do not seek the imposition of a "surcharge" as remedial relief. (Transcript of Conference on September 24, 2014, ECF No. 188, 12:13 – 14:20.)

of an ERISA plan reformation claim.") However, the propriety of class certification does not depend on that determination alone. Even if reliance is required, class certification on the facts before this Court is entirely supportable as reliance can be demonstrated on a generalized basis. Further, to the extent plaintiffs' claim relates to omissions, the law is clear that a demonstration of reliance is not required. This Court has also previously found, and does not here revisit, that there are no material differences in communications on which the alleged misrepresentations and omissions are based.

III. PREDOMINANCE

The Court has previously found that the elements of Rule 23(a) have been satisfied by a preponderance of the evidence. It does not appear that defendants have serious concerns with the Court's determination as to any issues other than predominance; they have framed their concerns in terms of the standards governing predominance.[2]

Predominance tests whether the proposed class is sufficiently cohesive to warrant adjudication by representation. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997); Myers v. Hertz Corp., 624 F.3d 537, 547 (2d Cir. 2010) ("The requirement's purpose is to ensure that the class will be certified only when it would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing

[2] Inclusion of the § 102 SPD Claim does not alter any of the Court's determinations with regards to the Rule 23 factors: the plaintiff group is the same, the questions are common, and typicality and adequacy are clear. The Court discusses predominance infra.

about other undesirable results.") (alteration, citations, and internal quotation marks omitted).

Whether the required elements of a claim may be demonstrated through generalized proof is the sine qua non of predominance. "Economies of time, effort and expense in fully resolving each plaintiff's claims will only be served, and the predominance requirement satisfied, if the plaintiffs can show that" the question at issue can be "answered with respect to the members of the class as a whole through generalized proof and that those common issues are more substantial than individualized ones." Myers, at 549 (alteration, citations, and internal quotation marks omitted); see also UFCW Local 1776 v. Eli Lilly & Co., 620 F.3d 121, 131 (2d Cir. 2010) ("Class-wide issues predominate if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these issues are more substantial than the issues subject only to individualized proof.")

That there may be some individualized issues does not necessarily defeat predominance—it is a question of the balance. See Public Employees' Retirement System of Mississippi v. Merrill Lynch & Co., Inc., 277 F.R.D. 97, 110–19 (S.D.N.Y. 2011); In re NYSE Specialists Secs. Litig., 260 F.R.D. 55, 74–77 (S.D.N.Y. 2009).

A. Reliance

Misrepresentation claims do not always require individualized proof of reliance. Defendant's assertion to the contrary simply ignores Second Circuit case

law. It is useful to discuss – in the order in which they were decided – a number of cases in this Circuit addressing the issue.

In 2002, the Second Circuit decided Moore v. Painewebber, Inc., 306 F.3d 1247 (2d Cir. 2002). The Court affirmed a denial of class certification on the basis that while there was evidence of uniform misrepresentations made to the proposed class, there was insufficient evidence that proposed class members had in fact received the materials containing the misrepresentations. Far from finding that misrepresentation claims could not be amenable to class certification, the Court instead explicitly held that class certification of fraud claims based on misrepresentations may be appropriate where those misrepresentations are materially uniform. Id. at 1249. In such cases, misrepresentations may be demonstrated using generalized rather than individualized proof. Id. The Court did not specifically address the difference between proof of the misrepresentation on a generalized basis versus proof of reliance. However, implicit in the Court's discussion is that when there is uniformity of misrepresentation, reliance may similarly be amenable to generalized proof. The Court's concern there was primarily focused on whether plaintiffs could prove receipt of the misrepresentations through generalized proof. Id. at 1253, 1255.

In Moore, the Court acknowledged that the Third Circuit had, at that time, considered the issue in the greatest depth. Id. at 1254. In cases before that Circuit, the outcomes of class certification motions had varied in misrepresentation cases depending upon the extent and nature of the evidence regarding uniformity in

misrepresentations. Id. at 1254-55. In Moore, the Second Circuit determined that the "district court did not abuse its discretion" in denying certification as proof of receipt was inadequate. Id. at 1255. It is reasonable to extrapolate that had the evidence of receipt been present, there may have been sufficient generalized circumstantial evidence of reliance for purposes of class certification. At least, that possibility was not foreclosed. (Otherwise, the decision would make little sense.)

In the case before this Court, plaintiffs have proffered extensive evidence that all class members were exposed to the uniform misrepresentations in a similar manner: through presentations, and mandatory and statutorily required distribution of the materials containing the misrepresentations. Thus, receipt of the materials containing the alleged misrepresentations is here not an issue.

In 2006, the Second Circuit decided In re Initial Public Offerings Securities Litigation, 471 F.3d 24 (2d Cir. 2006). In that case, the Second Circuit reviewed and affirmed a district court's refusal to certify a class on the basis that common questions predominated because (inter alia) there was insufficient evidence of plaintiffs' reliance on alleged misrepresentations. Id. at 42-43. In that case, plaintiffs recognized that reliance was an element of their claim, but asserted that they should be entitled to the rebuttable presumption of reliance set forth in Basic v. Levinson, 485 U.S. 224, 245-47 (1988). The Second Circuit disagreed. The Court stated that there was no factual basis to assert that an IPO market operated efficiently – and that presumed efficiency was at the core of the Basic presumption.

Id. Plaintiffs had not asserted another basis for proving reliance on a class-wide basis.

In the case before this Court, plaintiffs are not relying on a presumption unrelated to their particular facts. Instead, what they are asserting is more appropriately characterized as reliance upon generalized and common circumstantial evidence based on common facts as to misrepresentations and their method of dissemination and receipt. The IPO case is, simply put, unhelpful to the analysis of whether reliance here can be demonstrated on a class-wide basis.

The next case of note on this issue in the Second Circuit is McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 22-226 (2d Cir. 2008). Defendant here relies heavily on this case. McLaughlin contains an extended discussion of when reliance may and may not be amenable to generalized proof. The case concerned plaintiffs (a group of smokers) who alleged they had been harmed by false advertising of cigarettes. Id. at 220. They alleged that, based on false representations, they had been led to believe that defendants' cigarettes, "Lights", were healthier than full-flavored cigarettes. Id. Plaintiffs sought $800 billion in economic damages stemming from their purchases of Lights. Id. at 221. The district court certified a class of Lights smokers. Id. The Second Circuit reversed.

The Second Circuit found that to demonstrate causation, plaintiffs had to demonstrate reliance on defendants' alleged statements regarding Lights. Id. at 222. The district court had found that defendants had engaged in a national advertising campaign which had asserted that Lights were healthier than full-

flavored brands, and that the campaign had been conducted in a uniform manner. Id. at 223. Plaintiffs sought to defend the district court's certification with reference to Second Circuit's decision in Moore. Id. The Second Circuit in McLaughlin recognized that Moore had not directly addressed reliance – but instead had addressed whether the fact of a misrepresentation could be proven in a generalized manner. Id. The Court stated that "reliance on the misrepresentation, cannot be the subject of generalized proof. Individualized proof is needed to overcome the possibility that a member of the purported class purchased Lights for some reason other than the belief that Lights were a healthier alternative", and referred to taste or style differences. Id.

The Court in McLaughlin explicitly stated, "We need not go so far as to adopt the Fifth Circuit's blanket rule that a 'fraud class action cannot be certified when individual reliance will be an issue.'" Id. at 224 (citing Castano v. Am. Tobacco Co., 84 F.3d 734, 745 (5th Cir. 1996). The Court also quoted from the Advisory Committee Notes to Rule 23(b) which state, in part, "'[A] fraud perpetrated on numerous persons by use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class.'" Id. at 225. The Court rejected plaintiffs' argument that there should be a presumption of reliance based on the market shift of brand preferences from non-filtered to filtered cigarettes that they claim was due to defendants' campaign with regard to Lights. Id.

Importantly, in footnote 7, the Second Circuit differentiated between the type of personal preference factors that might impact whether a plaintiff relied on misrepresentations for a consumer good versus misrepresentations in connection with a financial transaction; "a financial transaction does not usually implicate the same type or degree of personal idiosyncratic choice as does a consumer purchase." Id. at n.7. The Court then found that this was the distinguishing factor between its outcome and the Eleventh Circuit's decision in Klay v. Humana, Inc., 382 F.3d 1241 (11th Cir. 2004). In Klay, plaintiffs had entered into contracts with defendants and that it did not strain credulity to conclude that in so doing, plaintiffs relied upon defendants' representations and assumed that they would be paid the amounts due. McLaughlin, 522 F.3d at n.7. The Second Circuit drew from this the following: "assuming that most individuals are led to believe that they will get paid when they sign a contract calling for payment is very different from assuming that most individuals purchase a consumer good in reliance upon an inference that they draw from its marketing and branding rather than for some other reason." Id.

The case before this Court is precisely that called out in footnote 7 of McLaughlin: a financial transaction in which it does not strain credulity to assume that plaintiffs believed what they were allegedly told about the change in pension plans, as well as the type of situation envisioned by the Advisory Committee Notes. McLaughlin does not – as it explicitly states – present a hard and fast rule that in all cases of misrepresentation, reliance must be shown on an individualized basis.

As the Second Circuit noted there, and the Court acknowledges here, it all depends on the particular case.

In 2013 the Second Circuit again addressed circumstances in which reliance may be demonstrated on a generalized basis. In re U.S. Foodservice Inc. v. Pricing Litigation, 729 F.3d 108 (2d Cir. 2013). In that case, U.S. Foodservice Inc. ("USF") was a nationwide food distributor. Id. at 112. It sold its food products to customers based on cost-plus contractual arrangements. Id. That is, it would add a percentage mark-up to its cost of acquisition. Id. One method of determining USF cost of acquisition was based on its own "invoice cost". Id. Plaintiffs alleged that USF had engaged in a scheme in which it artificially inflated the cost component of its contracts. Id. at 113. Plaintiffs alleged that USF's fraudulent practices were implemented as to all cost-plus customers. While customers would receive bills from USF, the invoices were general requests for payment and did not reveal the fraud. Id. The district court found evidence that defendant took steps to conceal the fraud from its customers. Id. at 114.

The Second Circuit affirmed the district court's certification of a class on the basis that "plaintiffs had demonstrated, and USF had failed to rebut, that the relevant issues were susceptible to generalized proof such that individualized questions would not predominate and render the class unmanageable." Id. at 116. The Court noted a district court's determination of the Rule 23 factors requires resolution of factual issues by a preponderance of the evidence, a burden born by the plaintiff. Id. at 117. The Second Circuit noted, "We have previously observed

that fraud claims based on uniform misrepresentations to all members of a class 'are appropriate subjects for class certification' because, unlike fraud claims in which there are material variations in the misrepresentations made to each class member, uniform misrepresentations create 'no need for a series of mini-trials.'" Id. at 118 (citing Moore, 306 F.3d at 1253.) The Court further found that the allegations in the case before it were most analogous to those in Klay v. Humana.

USF argued that customer reliance on inflated invoices could only be proven by individualized inquiry into the circumstances of each of its 75,000 customers. Id. at 119. The Second Circuit disagreed. While acknowledging its prior decision in McLaughlin, the Court nevertheless found that payment of inflated invoices could constitute circumstantial evidence of reliance on the accuracy of the invoice. Id. at 120. Notably, the Second Circuit found that USF had made an argument as to reliance – but did not have proof in the record supportive of that argument. Id. at 121.

So too in the case before this Court. First, this case concerns a change in pension plans resulting in lower payments to class members; such changes were allegedly effected through misrepresentations. As in In re U.S. Foodservice Inc, the fact that plaintiffs switched plans, and may have even received payment without complaint, may be circumstantial proof of plaintiffs' reliance on the truth of the alleged misrepresentations. Put differently, no reasonable juror would assume that a person knowingly receiving a pension benefit lower than that to which they are otherwise entitled would simply ignore that fact. Also, in this case, defendant has

argued that reliance may be an individualized inquiry, but has proffered not a shred of evidence in that regard. For instance, defendant has failed to proffer a declaration from a single class member who acknowledges that they did not rely on the materials provided to them regarding the pension plan amendment. Nor has defendant proffered any evidence that seriously undermines any of plaintiffs' uniformity of misrepresentation or assertions as to receipt. Accordingly, the law does not provide that reliance cannot be demonstrated on a generalized basis; and as a matter of fact, defendant has failed to rebut the factual showing by plaintiff.

1. Omission

Defendant largely ignores that this case is also pled as an omissions case. Reliance is presumed in cases where material omissions are asserted. Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-54 (1972); see also Titan Grp., Inc. v. Faggen, 513 F.2d 234, 239 (2d Cir. 1975) ("[I]n instances of total non-disclosure, as in Affiliated Ute, it is of course impossible to demonstrate reliance[.]"); Goodman v. Genworth Financial Wealth Management, Inc., 300 F.R.D. 90, 104 (E.D.N.Y. 2014) ("reliance is presumed when it would be impossible to prove.")

It is certainly true that the line between omission and misrepresentation can sometimes be difficult to draw – and one cannot turn every misrepresentation case into an omission case. However, plaintiffs' claim is not simply limited to words which would have changed a single misrepresentation into truth. Instead, plaintiffs' claim is also about specific information regarding the effect and duration of "wear-away" that was not disclosed to class members. This is a cognizable

omission. The proof of the alleged omission is – again – generalized; and reliance may be presumed. Accordingly, even if this Court were simply to have certified the class based on the omission alone, that would be enough.

B. Statute of Limitations

Defendants argue that the statute of limitations also provides individualized defenses which defeat predominance. However, defendants have failed to proffer evidence of even a single instance in which there would a need for such an individualized inquiry. Plaintiffs' evidence is the sole evidence before this Court – and their evidence is as to a timely claim by Mr. Osberg. Defendants' argument regarding theoretical views as to the statute of limitations must fail. Lawyers seeking to defeat class certification are well aware of the process: plaintiffs bear the burden of proving each of the elements of Rule 23 by a preponderance of the evidence; the burden the shifts to the defendant to rebut that evidence. See In re U.S. Foodservice Inc. v. Pricing Litigation, 729 F.3d at 117. Plaintiffs here have carried their burden; in response, defendant has offered only argument and not a shred of proof. That is insufficient. See Koss v. Wackenhut Corp., No. 03 Civ. 7679 (SCR), 2009 WL 928087, at *11 ("Defendants' argument assumes facts not in the record; moreover, this conclusory presumption is insufficient to overcome the strong predominance of questions of law and fact that are common to class members over any individualized questions.")

Defendant's argument regarding the statute of limitations relies heavily on the Second Circuit's decision in Novella v. Westchester Co., 661 F.3d 128 (2d Cir.

2011). They have misread that decision. There, plaintiff immediately caught a miscalculation of his pension benefits when he received notice as to the rates that would be used for such calculation. Id. at 134. He appealed the determination of rates used and those appeals were denied. Numerosity for purposes of class certification depended on whether other potential class members recognized an error in rate calculation within a six year period. Defendants in that case urged the Court to adopt a bright-line rule in which a pensioner's receipt of benefits would cause the statute to run – a "first payment rule." Id. at 144. The Court declined on the basis that that would place an undue burden on pensioners. Id. at 146. Instead, based on the facts at issue (a clear rate dispute -- disclosed by the defendant and contested by plaintiffs), the Court determined that "miscalculation can be imputed to a pensioner — and the statute of limitations will start to run — when there is enough information available to the pensioner to assure that he knows or reasonably should know of the miscalculation." Id. at 147.

Here, the facts are far different. First, there are well over 10,000 potential class members. Plaintiffs here allege that far from a clear disclosure of rates used, defendant has engaged in a scheme to prevent plaintiffs from learning of their misrepresentations. And that – in essence – even when plaintiffs receive benefits, they would have no way to know, and no reason to question at that time that they were receiving less than that to which they might be entitled. There is no reasonable way for payment alone to arm plaintiffs with the information they would need to be on notice of their claims. Accordingly, as the assertion that some

nameless plaintiff knew or should have known of a claim within an earlier time period is entirely theoretical as well as unreasonable to assume, this Court declines to find individualized issues predominate on that basis.

IV. THE SPD CLAIM

Plaintiff seeks to extend this Court's certification of the class to include the SPD claim, which is now part of the case. Defendant has opposed on generally similar bases as with regard to the § 404 claim. Those are dealt with in the Court's Opinion of September 24, 2014 and are applicable to the § 102 claim, and also in the instant Opinion. In addition, defendant argues that plan reformation for a § 102 claim requires individualized inquiry. This is incorrect. First, defendant's argument is again a merely theoretical one without any supporting proof. But, second, plan reformation would require plan change(s) applicable class-wide. To the extent defendant's argument bleeds into whether a particular plaintiff relied on the SPD, those reliance issues are dealt with elsewhere in this Opinion.

Inclusion of the SPD claim makes sense as the misrepresentations and omissions asserted in the SPD claim are the same as those at issue in the § 404 claim. The only question for this Court would be whether individualized inquiries would somehow predominate for that claim in a way they would not for the § 404 claim. They would not. Indeed, Amara indisputably holds that reliance is not an element of a § 102 claim. Amara, 131 S.Ct. at 1881-82. Thus, the SPD claim is included in the claims as to which the class has been certified.

V. CONCLUSION

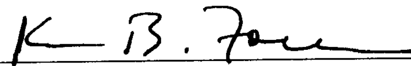
For all of the reasons set forth above, as well as the reasons set forth in this Court's Opinion dated September 24, 2014, the following class is certified:

> All persons who were participants in the Foot Locker Retirement Plan as of December 31, 1995, who had at least one Hour of Service on or after January 1, 1996 (as defined under the Plan), and who were either paid a benefit from the Plan after December 31, 1995, or are still entitled to a benefit from the Plan; and the beneficiaries and estates of such persons and alternate payees under a Qualified Domestic Relations Order.

The Clerk of Court is directed to terminate the motion at ECF No. 192.

SO ORDERED.

Dated: New York, New York
November 7, 2014



KATHERINE B. FORREST
United States District Judge