13-187-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-Appellant

-v.-

FOOT LOCKER, INC., and
FOOT LOCKER RETIREMENT PLAN,
Defendants-Appellees

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

BRIEF FOR PLAINTIFF-APPELLANT

ELI GOTTESDIENER
GOTTESDIENER LAW FIRM, PLLC
498 7th Street
Brooklyn, New York 11215
(718) 788-1500
(718) 788-1650 (facsimile)
Attorney for Plaintiff-Appellant

MYRON D. RUMELD
PROSKAUER ROSE LLP
11 Times Square
New York, NY 10036
(212) 969-3021
(212) 969-2900 (facsimile)
Attorney for Defendants-Appellees

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PRELIMINARY STATEMENT

This appeal seeks reversal of (1) the district court's September 2009 order dismissing, for failure to state a claim, one count of Plaintiff Geoffrey Osberg's 2007 class action complaint against his former employer, Foot Locker, Inc. (the "Company"), and the defined benefit pension plan it sponsors and administers, the Foot Locker Retirement Plan (collectively, "Foot Locker" or "Defendants"), alleging violations of ERISA's 204(h) disclosure standards in connection with significantly-adverse changes to the Plan; and (2) the court's subsequent December 2012 order, granting Defendants' motion for summary judgment as to the complaint's two remaining counts on the ground that Plaintiff failed to show that Defendants' alleged misconduct caused him any harm.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §1331 and 29 U.S.C. §1132(e)(1). This Court has jurisdiction under 28 U.S.C. §1291.

The district court's judgment entered December 12, 2012 (SA52) made final the district court's order of December 6, 2012 (SA37), granting Defendants' motion for summary judgment on Counts Three and Four (Plaintiff's summary plan description and fiduciary breach claims) and denying as moot Plaintiff's motion for class certification and motion for spoliation sanctions.[1]

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[1] "SA__" refers to items in the Special Appendix.

The December 12, 2012 judgment also made final the September 16, 2009 order (SA1), granting Defendants' motion to dismiss Count Two (the 204(h) claim), and the November 15, 2011 (SA29) and December 12, 2011 (SA33) orders denying reconsideration of that dismissal.

Plaintiff timely filed a notice of appeal on January 11, 2013. JA1594.[2]

ISSUES PRESENTED FOR REVIEW

1. Defective ERISA §204(h) Notice Issue

Does Plaintiff state a claim that Foot Locker violated ERISA §204(h)'s requirement that employees be given advance notice of an amendment which substantially reduces the rate of future pension accruals, where the notice Foot Locker distributed did not disclose the cash balance plan amendment's benefit-freeze provisions that triggered Foot Locker's notice obligations in the first place?

2. Contract-Based Remedy Issue

Is Plaintiff entitled to trial on his request that the Pension Plan be equitably reformed to remove the benefit-freeze provisions which the evidence shows were fraudulently or inequitably inserted into the formal plan document such that it failed to reflect "the real contract," *Cigna Corp. v. Amara*, 131 S.Ct. 1866, 1880 (2011) ("*Amara III*"), that Foot Locker offered Plaintiff and that he accepted by continuing in service with the Company after the 1996 cash balance conversion?

[2] "JA__" refers to items in the Joint Appendix.

3. Breach of Trust-Based Remedy Issue

Should the order granting Defendants summary judgment on Plaintiff's request for equitable surcharge be reversed because there are triable issues as to whether Foot Locker's surreptitious freeze of his pension benefits for 7 years harmed him?

4. Statute of Limitations Issue – Count Three Only

Should the order granting Defendants summary judgment as to Count Three on the basis of the statute of limitations be reversed because the court found that when Plaintiff was paid a lump sum that was $5,000 *more* than his account balance, which the SPD said would regularly occur due to an IRS rule, he should have figured out that he had been *injured*?

5. Spoliation Issue

Was summary judgment on Counts Three and Four premature because Plaintiff's motion for spoliation sanctions showed Foot Locker deliberately failed to distribute a litigation hold for more than three years after litigation commenced and consequently may have destroyed the evidence that Plaintiff supposedly lacked to withstand summary judgment?

STATEMENT OF THE CASE

Plaintiff filed this action in February 2007. JA394. In April 2007, Defendants moved to dismiss the complaint. Docs.10-15. In September 2009, the Honorable Deborah A. Batts granted the motion in part and denied it in part. SA1-28. Judge Batts dismissed Count One, alleging age discrimination (not at issue on appeal), and Count Two, alleging violations of ERISA §204(h). Counts Three and Four, the summary plan description and fiduciary breach counts, were upheld on the merits and against Defendants' statute of limitations challenges.

The defense motion's main merits argument was that the summary plan description ("SPD") – which Defendants did not issue until a year after the conversion – adequately disclosed to employees that they would or could experience a temporary "wearway" freeze in pension accruals because it (Defendants claimed) disclosed "that the frozen benefit establishing the initial account balance in the Plan would be calculated based on a 9% discount rate, and that Plan participants electing to receive a lump-sum distribution would receive the greater of either their frozen benefit under the prior formula or the cash balance benefit." SA25.

Judge Batts disagreed, holding that the SPD did not fairly notify employees that their pensions had been temporarily frozen. Judge Batts found it "insufficient" for Foot Locker to make disjointed, fine-print disclosure of technicalities instead of a simple, coherent explanation reasonably calculated "to inform participants that they would experience a reduction in benefit accrual and varying periods of wear-away upon the Plan conversion." SA25-26, 656 F. Supp. 2d at 374 (*citing* ERISA §102, which requires that SPDs "be written in a manner calculated to be understood by the average plan participant"). She further found that the SPD's disclosure of a conversion using a 9% discount rate "**can hardly be expected to be meaningful and understood by the average plan participant** without further explanation as to the effect of that rate – that is, that it would create initial opening account balances that were significantly smaller than participants' to-date accrued benefit balances under the old Plan." SA26 (emphasis added). Judge Batts also thought Foot Locker's "**disclosures appear[ed] particularly obscure or unimportant** next to repeated assertions in the SPD that the initial account balance under the amended Plan would be 'equal to the actuarial equivalent lump sum value of your accrued benefit...as of [December] 31, [1995].'" *Id.* (emphasis added).

As to the Count Four fiduciary breach claim, Judge Batts ruled that "Plaintiff has stated a claim for breach of fiduciary duty based on Defendants' allegedly materially false and misleading statements that concealed or failed to reveal that participants' benefits under the cash balance formula would be lower than under the pre-1996 Plan, and that a sometimes lengthy period of wear-away would occur." SA27-28.

Judge Batts also rejected Foot Locker's defense that Plaintiff's SPD and fiduciary breach claims were time-barred. On the fiduciary breach claim, which the parties agree is governed by ERISA §413's statutory limitations period, Judge Batts denied Defendants' motion, holding that within the applicable limitations period "Plaintiff could not have been expected to discover the breach based on the documents provided by Defendants." SA19.

On the SPD claim, which the parties agree is not governed by ERISA §413's statutory limitations period, Judge Batts similarly rejected Foot Locker's argument that its disclosures had caused Plaintiff's claim to accrue within the limitations period. Judge Batts ruled that she could not conclude Plaintiff should have discovered on his own "that his initial account balance under the amended Plan would be significantly smaller than his frozen accrued benefit, and that he would experience a lengthy period of wear-away before accruing any new benefits." SA18. In addition, Judge Batts rejected Defendants' contention that C.P.L.R. §214(2)'s three-year limitations period for claims "'to recover upon liability, penalty or forfeiture created or imposed by statute'" supplied the most analogous state limitations period to borrow for Plaintiff's SPD claim, holding that "as the Second Circuit has repeatedly stated, the judicially inferred statute of limitations for ERISA actions in New York State is six years, based on the statute of limitations for contract actions under C.P.L.R. 213." SA15.

Discovery commenced in early 2010, but the case was stayed after the Supreme Court granted *certiorari* in *Amara* based on both parties' and Judge Batts' agreement that *Amara* and this case "overlap[ped]" legally and factually. JA454-456. Once *Amara III* came down, Plaintiff moved for reconsideration of the dismissal of his ERISA §204(h) claim. Docs.41, 45. In November 2011, Judge Batts denied reconsideration, SA29-32; as did the Honorable Katherine B. Forrest, to whom the case was reassigned, *see* SA33-36.

During 2012, Plaintiff deposed over a dozen defense-side fact witnesses. Plaintiff also supplied expert opinions of a pension actuary, a behavioral economist, a financial economist, two different communications experts and an organizational justice expert. Additionally, both sides' experts were deposed.

In May 2012, Defendants moved for summary judgment on harm as to both the SPD and fiduciary breach counts, and on limitations grounds as to the SPD count. Docs.68-72. Plaintiff opposed, cross-moved for class certification, Docs.95-98, 117, and cross-moved for spoliation sanctions, contending that Foot Locker's destruction of evidence resulting from its deliberate failure to distribute a litigation hold for more than 3 years compelled denial of Defendants' summary judgment motion, premised as it was on the alleged lack of evidence Plaintiff had adduced in support of his claims. Doc.127 at 3-4.[3]

Argument was held on September 28, 2012. JA1531-59. On December 6, 2012, Judge Forrest (hereinafter generally "the district court") granted Defendants' motion in all respects, and denied as moot Plaintiff's spoliation and class motions. SA37-51. Plaintiff's timely notice of appeal followed on January 11, 2013. JA1594.[4]

STATEMENT OF FACTS

1. During 1995, Foot Locker (known at that time as Woolworth Corporation, JA872) decided that it wanted to cut its pension costs, but that it would not be feasible to openly freeze participants' benefits because that could be viewed as a sign of distress by Wall Street and would depress employee morale, potentially leading to a decline in employee productivity and backlash. JA755 (HR manager Carol Kanowicz, who served on Foot Locker's pension design Task Force, admitting among other things that a "freeze that was openly discussed as a freeze was a nonstarter...no matter how much money it saved"); JA569 (Senior VP Thomson testifying that the Company believed analysts would view a freeze negatively; the Company wanted "something that would be viewed by employees

[3] "Doc.__" refers to items on the district court docket.

[4] The court also denied as moot Defendants' motions to strike Plaintiff's Rule 56.1 statement of facts and to exclude portions of Plaintiff's experts' testimony on *Daubert* grounds. SA39.

in a positive way"); JA30 (5/1/95 presentation identifying "[l]oss of associate morale and confidence" and "[n]egative publicity" among the "Cons" of even a temporary benefit freeze). *See also* JA597, 614-15, 1381-83, 1421-27.

2. Ultimately, Foot Locker decided to temporarily freeze the Plan without disclosing that it was doing so. JA757 (Ms. Kanowicz admitting that an undisclosed freeze "was the way of squaring the circle, of reducing costs and cutting benefits but still appearing attractive to participants, whereas, an open freeze would have been unacceptable"). *See also* JA836-38, 886, 919, 1430-33, 1437, 1454-55, 1460.

3. Foot Locker implemented the surreptitious freeze by inserting benefit-freeze provisions into the January 1, 1996 amendment converting the Plan from one that expressed benefits in the form of an annual annuity at age 65 to a "cash balance" plan that expressed benefits in terms of a hypothetical account. The benefit-freeze provisions defined employees' opening account balances under the amended Plan as an amount less than the full value of the annuity benefit they had already earned under the old Plan. *See* Doc.16 at 2 & n.2, Doc.16-5 (showing that Plaintiff's January 1, 1996 cash value of the annuity he had then accrued was nearly $15,000); JA377 (showing that Foot Locker only credited $6,411.67 into Plaintiff's opening account); JA692 (HR VP Patricia Peck admitting that benefit-freeze provisions were concealed from employees by "mix[ing] [them] in with all

the conversion complication”).

4. Below-full-value initial account balances meant that growth in the accounts after the conversion did not equate to growth in employees’ pension entitlements. JA1384, 1390, 1432-33. The conversion amendment account-setback provisions thereby froze pension accruals until credits to employees’ accounts wore away the built-in deficit in value. *See* JA884-91. *Compare Amara III*, 131 S.Ct. at 1872-74 (describing the same concealed-freeze “wearaway” strategy Cigna implemented in 1998 with the assistance of Mercer, the same consulting firm that advised Foot Locker, *see* JA1386-87).

5. Defendants concealed from employees that the opening balances would be and were below full value.

A. Defendants admitted for purposes of their summary judgment motion that Foot Locker could have “issued better communications concerning” the benefit freeze. Doc.69 at 12.

B. In fact, nowhere in any communications given to employees about the new plan ***or*** in any proposal summaries given by HR to senior management (which were substantially identical to employee communications) is there the slightest hint that opening balances would be and were below full value. JA696 (HR VP admitting same), 831 (unimpeached conclusion of Dr. Stratman, one of Plaintiff’s communications experts, after extensive study of the record).

C. Similarly, nothing in any of these communications – to employees and senior management – disclosed or gave any hint that the proposed cash balance plan conversion amendment included provisions that would implement a workforce-wide benefit freeze. JA722 (defense witness admission of same); JA830 (Stratman's unimpeached conclusion).

D. To the contrary, as explained below and as numerous defense witnesses admitted, participant communications affirmatively stated or implied that the conversion would be and was done at full value, that there would ***not*** be a freeze, and that employees would continue to earn new benefits just as before but in an easier-to-understand form.

(1) <u>September 1995 Announcement Letter</u>. On September 15, 1995, the Company issued a 1-page letter to all employees from both its CEO and its President announcing that Foot Locker was "excited" to "introduc[e] important changes to update the company's retirement plans" that "will put [the Company] alongside today's best retailing companies." JA142. The Announcement Letter said that each employee would receive "an individual account, to which the **company will make a yearly contribution**" that would give employees "a better ability to monitor their benefits" and to "see their individual account balance grow each year and know its value" (emphasis added). The Letter did not tell employees that the "accounts" were merely hypothetical accounts, but

instead implied they were real accounts to which actual cash "contributions" would be made. The Letter caused employees, including Linda Ine, the head of the Company's employee communications operations and chiefly responsible for communicating the new plan to the workforce, to mistakenly think this meant that an employee's benefit was "picking up where it left off and just continuing forward [with new accruals]." JA634.

(2) November 1995 Highlights Memo. Two months later, employees received a November 17, 1995 3-page memorandum purporting to provide participants with "[h]ighlights" of the new cash balance plan. JA143. The Memo began by reminding employees of the Announcement Letter and, carrying forward the message that Letter had conveyed, told employees that their new account benefit would be created by "actuarially converting" their "accrued benefit as of December 31, 1995...to an initial account balance." The Memo described the initial account balance as representing the same "benefit" the employee had earned under the old Plan as of the date of the conversion, just in a different form.

(3) January 1996 Benefit Statement. In January 1996, Defendants sent employees a 1-page personalized benefit statement that, on the left, showed the employee's annuity benefit under the old Plan, and, on the right, the employee's "Amended Plan" initial account balance. JA146. As a Task Force member admitted, the "general simple message" to employees was that they should

"look at one side, look at the other and in [their] mind put an equal sign between them." JA737.

(4) July 1996 Statement. In July 1996, Defendants provided another 1-page pension statement as part of an 11-page personalized brochure describing each employee's benefits. JA275-83. The brochure displayed the "account balance as of January 1, 1996," but did not show or reference the participant's annuity benefit earned under the old Plan. This omission reinforced the (incorrect) idea that the account balance was the only thing an employee needed to know to understand what his benefit was under the Plan post-conversion – *i.e.*, that the annuity that had been earned under the old Plan was no longer relevant because it had been converted at full value into the account balance. JA848-49.

(5) December 1996 SPD. In December 1996, Defendants distributed an SPD that, under the heading "How Your Retirement Benefit Is Determined," told employees that "[y]our 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," plus annual pay and interest credits. JA304 (emphasis added).

E. Defense witnesses admitted that Foot Locker's goal was for employees not to know about the freeze. *E.g.*, JA747, 755 (Ms. Kanowicz admitting that the Task Force made the decision to add benefit-freeze provisions to the cash balance plan because the new plan still "appeared to be an attractive benefit plan, yet it was reducing costs and benefit levels in a way that it wasn't easily perceived that way by participants"; Foot Locker "understood that people would perceive the addition of pay credits and interest credits to their account as growth in their benefit...and made sure that nothing was said to people to disabuse them of that idea"). *See also* JA753, 1454.

F. Defense witnesses also conceded that the concealment effort was successful. *E.g.*, JA724, 756 (Ms. Kanowicz admitting that "nobody noticed" the benefit freeze even after they received their benefit, and that employees would have understood the freeze "if we spelled it out" but "[w]e didn't spell it out"). *See also* JA265, 704, 726, 1460.

G. Even HR managers directly involved in implementing and communicating the conversion did not understand from the disclosures that their own benefits had been frozen, and remained unaware of that fact, including after two of them received their pension distribution, until their depositions in this case. JA639, 655 (Ine and Salomone learning to their surprise that they had earned no new benefits post-conversion when they had always believed the opposite to be true based on what the Company had told them), JA647, 650 (Flesses, current pension specialist who similarly "had no idea" and had firmly believed from the communications that the new plan was a "better value" after the conversion than it was before).

H. Mr. Osberg did not learn his pension had been frozen for 7 years after the conversion, even after he received his benefit in 2002. Based on the information given to him, which he reviewed carefully, Mr. Osberg (mistakenly) believed he had accrued new, post-conversion benefits of nearly $20,000 (the difference between his $6,000 initial account balance and the $26,000 lump sum he received from the Plan, which lump sum Defendants falsely told him was "based on" his account balance). In fact, the lump sum was the actuarial present value of the annuity benefit he had earned as of December 31, 1995, a fact Defendants never told him. Similarly, Defendants never told him that the $11,000 of Company contributions to his account (which Defendants told him represented new pension accruals) were forfeited when the Plan paid him an amount that was based solely on his pre-conversion accrued benefit. JA544-546, 926. Only in 2006, did Mr. Osberg learn of this when a lawyer pursuing an unrelated claim on his behalf discovered the plan provisions at issue. JA1460.

I. Defendants' actuarial expert admitted, after reviewing the same materials given to Plaintiff, that it would have been reasonable for Plaintiff to think that his $26,000 benefit payment was based solely on his account balance and that his benefit had increased by $20,000 of new benefits after the conversion. JA1179-83.

6. Plaintiff's evidence shows that if Defendants had thought they had to disclose the below-value opening account balances and the freeze, Foot Locker senior management would have adopted the plan design that it thought it *had* adopted, *i.e.*, the same cash balance plan except without the benefit-freeze provisions (or at worst a plan under which Plaintiff would have accrued *some* new benefits). Doc.87 at 9-11; JA1336, 1347-48, 1414-19.

A. Defendants did not dispute for purposes of their summary judgment motion that Plaintiff can prove that "had Defendants issued better communications concerning the operation of the [benefit-freeze provision] or had management understood these issues better" – *i.e.*, if management had been told of the freeze provision and had also been told that the freeze would have to be disclosed to employees – "the Company would have been obligated to amend the Plan differently ***so as to remove the* [*freeze provision*]**." Doc.69 at 12 (emphasis added).

B. This was an unavoidable concession. Management specifically rejected an openly-imposed freeze even though it would have saved significantly more money than the cash balance freeze that was implemented without their knowledge or specific consent. JA1421-23; Doc.99 at 6 (defense concession that senior management "did not understand" they were approving a benefit freeze when they approved the cash balance conversion in September 1995). Moreover, HR VP Peck admitted that the Company could not have disclosed the cash balance freeze provisions (which did not apply to post-conversion new hires) because current employees would have viewed it as a "kick in the face" which "wasn't an acceptable option." JA685. *See also* JA650 (current pension specialist Flesses agreeing that "if people at the time were told" they "wouldn't have accepted it").

C. Defendants contend that Foot Locker was in a "precarious financial position" that made deep pension cuts inevitable, Doc.69 at 19, but Plaintiff's financial economics expert testified that Foot Locker was by no means in such dire straits that it believed cash savings were justified regardless of their impact on the Company's business operations. *See* Doc.84-62 at 3; Doc.84-78 at 74:6-8. Moreover, there is considerable evidence that the marginal savings from the addition of the benefit freeze provisions to the cash balance conversion was not of a magnitude that would have been viewed as make-or-break or even material for the Company but instead "amounted to just 0.05%...of FL's annual expenses" and would not have "'mov[ed] the needle' in the mind of management." Doc.84-62 at 5-6.

D. The documented conclusion reached and directly shown in the reports and testimony of Plaintiff's behavioral finance, organizational justice, and actuarial experts is: had senior management been told of the proposed freeze and informed that employees would also have to be told, the Company would have adopted the plan senior management *thought they had* adopted, *i.e.*, the plan actually implemented except without the undisclosed freeze provisions. JA769-70, 1093-95, 1336, 1347; Doc.71-35 at 10.

STANDARD OF REVIEW

The district court's determinations on motions to dismiss and summary judgment must be reviewed *de novo*. *Frommert v. Conkright*, 433 F.3d 254, 262 (2d Cir. 2006).

SUMMARY OF ARGUMENT

In *Amara III*, employees sued their employer/plan administrator for having issued communications designed to make them believe its conversion of the company's traditional pension plan into a "cash balance" plan did *not* mean a temporary freeze in the growth of their retirement benefits. As the Supreme Court explained, Cigna intentionally neglected to tell employees that Cigna's "initial deposit [into their cash balance accounts] did not 'represen[t] the full value of the benefit' that employees had 'earned for service before'" the conversion, and that "it would take [an] employee several additional years of work simply to catch up (under the new plan) to where he had already been (under the old plan) as of January 1, 1998 – a phenomenon known in pension jargon as 'wear away,' *see* 534

F.Supp.2d [288,] 303-304 [(“*Amara I*”)](referring to respondents’ requiring 6 to 10 years to catch up).” *Amara III*, 131 S.Ct. at 1873-74.

Unsurprisingly, the Supreme Court, this Court in *Amara v. Cigna Corp.*, 348 F.App’x 627 (2d Cir. 2009) (“*Amara II*”), and the district court in *Amara I* all concluded that Cigna’s failure to properly disclose in advance that the cash balance plan included provisions that would cause a complete cessation of new benefit accruals for a time – *i.e.*, “benefit-freeze” provisions – was unacceptable and tainted the otherwise lawful plan change. Finding that Congress, in requiring proper disclosures, would not have deprived employees a monetary remedy in this circumstance, the Supreme Court held that such relief, unavailable under ERISA §502(a)(1)(B), is available in equity under ERISA §502(a)(3). 131 S.Ct. at 1879-1881.

Amara I, which this Court affirmed in *Amara II*, originally awarded the Cigna plaintiffs under ERISA §502(a)(1)(B), the remedy of plan reformation: Cigna was ordered to conform the terms of the formal plan document, into which it had fraudulently or inequitably inserted benefit-freeze provisions, to match the terms of the no-freeze pension plan its communications effectively offered employees, which offer they accepted by continuing in service for the company. Under ERISA §502(a)(3), the Supreme Court in *Amara III* endorsed, in appropriate cases, that contract-based remedy, *i.e.*:

(1) Equitable reformation, *see* 131 S.Ct. at 1879-81, but also

(2) The invalidation of harmful amendment provisions under ERISA §204(h), *id.* at 1874-75, which requires that employees be given advance notice of unfavorable plan changes – a provision and remedy that Justice Scalia described in his concurring opinion as "a natural fit" in cases like *Amara*, *id.* at 1884, and

(3) Equitable surcharge – namely, damages and/or unjust enrichment relief following a breach of trust resulting in the loss of the ERISA-guaranteed right to frank disclosures regarding adverse plan benefit changes and the opportunity to contest or respond to such changes. *Id.* at 1880-81; *accord id.* at 1885 (Scalia and Thomas, JJ., concurring).

On remand from the Supreme Court, the *Amara* district court ("*Amara IV*"), in a decision that discussed this case and came down three weeks after the summary judgment decision issued here, found monetary relief under ERISA §502(a)(3) appropriate, via both the contract-based reformation remedy and the breach of trust-based surcharge remedy, and re-imposed the same reformation remedy it had imposed in *Amara I* under ERISA §502(a)(1)(B) (which encompassed relief for both the 204(h) violation and surcharge as well).[5] *Accord Koehler v. Aetna Health Inc.* 683 F.3d 182, 189 (5th Cir. 2012) ("even if the plan's language *un*ambiguously supports the administrator's decision, a beneficiary may

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[5] That ruling is currently the subject of cross appeals in Case Nos. 13-447, 13-526.

still seek to hold the administrator to conflicting terms in the plan summary through a breach-of-fiduciary-duty claim under §[502](a)(3)") (citing *Amara III* and *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996)).

* * *

This case is *Amara* – except without the remedy, because the district court mishandled each of Plaintiff's three identical-to-*Amara* requests for relief in ways irreconcilable with *Amara*. As in *Amara*, Foot Locker froze pension benefits but concealed the freeze from employees. *See* Statement of Facts ("SOF") above ¶3-5G. The Company wanted to cut pension costs but determined that it was infeasible to cut openly – particularly a freeze – so it did so in secret, hiding the truth behind deceptive communications and the mask of a new benefit form based on notional accounts. *Id.* ¶¶1-5G. As in *Amara*, Foot Locker "converted" employees' accrued-to-date annuity benefits into opening account balances that were considerably below the full value of the already-earned annuities. *Id.* ¶¶3-4. In Plaintiff's case, his accrued benefit was worth nearly $15,000 on the January 1, 1996 conversion date, but Foot Locker falsely told him that it was worth only about $6,000 and credited only that amount to his new account. *Id.* ¶3. Foot Locker never corrected this false representation, *i.e.*, that everything Plaintiff had earned under the former plan had been transferred into his new plan account and that he was continuing to earn new benefits going-forward without interruption.

Id. ¶5F-F, H-I.

As in *Amara*, Foot Locker falsely told Plaintiff and the rest of its workforce that the Company would be contributing new money to participants' accounts and that as they watched their account balances grow, they would be watching their benefits grow. *Id.* ¶¶5D1-5E. Having no reason to suspect that his employer (and Plan fiduciary) was lying to him, Plaintiff did not know that the "contributions" he was working for were "wearing away" the deficit in his initial account balance, or that by the time he left Foot Locker 7 years later, he had not earned a penny of new benefits, a fact the Company successfully disguised even when it paid him. *Id.* ¶5H-I. For more than 10 years after the conversion, no one outside Foot Locker's pension design team learned that pension accruals had been suspended until a lawyer pursuing an unrelated claim on Plaintiff's behalf discovered the fraud in 2006. *Id.* ¶¶5E-H. In district court below, Plaintiff showed on the record he amassed (rivaling that in *Amara*), each of the three paths to recovery endorsed by the Supreme Court in *Amara* should be available to him here. The district court found not one of them applied – yet provided no explanation as to how relief could be available to Cigna's employees but, on near-identical facts, not Foot Locker's.

Respectfully, reversal is required for the reasons shown below.

I. Plaintiff's 204(h) Claim Should Be Reinstated

Amara I, affirmed by this Court in *Amara II*, found that Cigna violated

ERISA §204(h), which provides that a plan cannot be amended to significantly reduce the rate of future benefit accrual unless preceded by adequate notice to employees "setting forth" the plan amendments in a summary calculated to be understood by the average plan participant. *Lonecke v. City Group Pension Plan,* 584 F.3d 457, 470 (2d Cir. 2009). Here, the district court (first, Judge Batts in 2009, then Judge Forrest in denying reconsideration in 2011 but expressing agreement with the 2009 ruling) found that Plaintiff failed to state a claim under the same version of the statute that was at issue in *Amara I* and *II* and that was discussed at length in the Supreme Court majority and concurring opinions in *Amara III*. However, Plaintiff alleged and showed that the notice Foot Locker distributed provided a materially false and incomplete summary of the conversion amendment – to the point that it did not disclose in any way the amendment's benefit-freeze provisions, which were the provisions that required Foot Locker to issue a notice in the first place, and indeed affirmatively implied that such provisions did not exist.

The judges below did not agree with Plaintiff's characterization – but they did not disagree either: rather, they declined to examine Plaintiff's contentions or subject the notice to analysis because they accepted Defendants' incorrect assertion that prior to 2001, when Congress increased the detail and specificity required for 204(h) notices, the 1986-to-2000 version of the statute permitted essentially any piece of paper to comply, provided it said *something* about the amendment and gave its effective date. But the fact that Congress expanded the statute's scope in 2001 cannot mean that the pre-amendment version of the statute was pointless or tolerated giving employees a "notice" that falsely and incompletely summarized the amendment's key provisions, as multiple defense witnesses conceded in their depositions that Foot Locker's notice did here. *See Tomlinson v. El Paso Corp.*, 653 F.3d 1281, 1293 (10th Cir. 2011) ("It does not follow" that merely because §204(h)'s disclosure standards were changed in 2001 to require individualized disclosures, that generally applicable cash balance conversion benefit-freeze provisions did not need to be disclosed at all under the pre-2001 version of the statute).

The IRS, charged by Congress with construing 204(h) and issuing implementing regulations, found the pre-2001 statute the opposite of pointless: the IRS interpreted the statute as requiring a summary of the amendment written in a way that it could be "understood by the average participant." Because a review of Foot Locker's false and incomplete notice shows it unquestionably flunks that test, Plaintiff's 204(h) claim seeking to have the Plan's benefit-freeze provisions voided should be reinstated.

II. Summary Judgment on Plaintiff's Plan Reformation Request Was Improper.

Foot Locker's summary judgment strategy (with regard to both Plaintiff's request for reformation *and* surcharge relief) was: (1) *do not dispute* for purposes of the motion that Plaintiff can prove that by concealing the benefit freeze, Defendants violated ERISA's disclosure requirements and (2) *do not dispute* that but for those violations, the freeze would not have been included, but (3) *argue* that the violations are irrelevant unless Plaintiff can establish the "particular alternative formula" that the Company would have adopted had the violations not occurred, because only then could Plaintiff show that he had been harmed by the violations. Doc.69 at 2, 12-13, 17-20; Doc.99 at 1-4.

In opposition, Plaintiff attempted to explain to the district court that Defendants' argument was mistaken as to Plaintiff's request for <u>breach of trust-damages</u> ("equitable surcharge") and was of no relevance whatsoever to Plaintiff's straightforward <u>contract-based</u> request for "equitable reformation." Plaintiff explained that in *Amara*, the Supreme Court warned lower courts not to impose conditions on requests for relief that equity courts would not have imposed, 131 S.Ct. at 1881, and that comparing Foot Locker's motion to *Amara*'s discussion of the elements of equitable reformation, the court would see that Foot Locker had essentially invented a requirement that did not exist. Plaintiff showed that summary judgment on reformation in Foot Locker's favor was precluded because Defendants did not and could not dispute that Plaintiff has evidence establishing: (1) the existence of a binding contract between Foot Locker and its employees which, (2) due to Foot Locker's fraudulent or inequitable conduct, was (3) not accurately reflected in the formal plan document.

Unfortunately, the district court focused solely on Defendants' (incorrect) surcharge arguments and never examined Plaintiff's reformation claim under the correct framework – as the *Amara IV* district court expressly recognized and discussed at length in its (correct) reformation analysis. *Amara IV*, No. 3:01 cv 2361 (JBA), 2012 WL 6649587, *6 n.7 (D. Conn. Dec. 20, 2012) (rejecting the analysis of the district court here because it improperly "analyz[ed] reformation and surcharge together" rather than according to their distinct requirements using a "one-size-fits-all approach" that "does not square with [the Supreme Court's *Amara III* ruling]").

The district court's failure to distinguish Plaintiff's request for plan reformation from his distinct request for the equitable remedy of surcharge, its imposition of preconditions to relief foreign to reformation, and its failures to correctly construe the facts in Plaintiff's favor as non-movant compel reversal of its reformation ruling.

III. Summary Judgment on Plaintiff's Surcharge Request Was Improper.

As indicated below, Defendants placed all their summary judgment eggs in one (surcharge) basket and succeeded in convincing the district court to accept a proposition that neither Defendants nor the district court supported with citation to authority and that runs counter to the normal standards and burdens imposed on party-plaintiffs throughout civil law.

Plaintiff showed triable issues of fact as to his entitlement to equitable surcharge, *i.e.*, a make-whole-damages or disgorgement-of-ill-gotten-gains remedy for breach of trust. Equitable relief principles do not require the perfect proof the district court demanded. If that were the standard, relief would practically never be available for communications-related violations. Here too the district court effectively undid *Amara*.

In any event, the district court erred by ignoring Plaintiff's proof establishing, even under the district court's exacting standard, just what his benefits would have been: *i.e.*, the same benefits due under the adopted plan except without the freeze. At a minimum, Plaintiff established that any fallback design Foot Locker could have adopted (among the options senior management had not already rejected) would have improved Plaintiff's lot – so even assuming the Company would not have adopted the same cash balance conversion it did but without the freeze, whatever design it would have settled on would have benefitted Plaintiff. No more was required of him at this stage of the proceedings.

IV. Defendants Are Not Entitled to Judgment on Limitations Grounds on Plaintiff's SPD Claim

The district court also erred in granting Defendants summary judgment as to Count Three on the statute of limitations. The court committed three distinct errors.

First, the district court erred in rejecting the established rule in this Circuit – and the holding of Judge Batts who ruled on the identical issue in this case in 2009 – that the statute of limitations on an SPD claim is 6 years and not 3 years, as the district court ruled.

Second, there are triable issues as to whether Plaintiff should have figured out by the time he received payment in 2002 that the SPD his fiduciary provided him a year after the conversion was flawed and deceptive. The district court missed this for two basic reasons: (1) it ignored Judge Batts' prior finding that "Plaintiff could not have been expected to discover the breach based on the documents provided by Defendants," and (2) it misunderstood and misstated the core facts upon which its claim-accrual finding depended.

Third, the district court erred in failing to recognize that there are triable issues as to whether the running of the statute had been tolled by Foot Locker's concealment of the benefit freeze.

V. Summary Judgment Was In Any Event Premature Prior to a Decision on Plaintiff's Spoliation Motion

The district court also erred in reaching Defendants' motion without first rendering a decision on Plaintiff's motion to sanction Foot Locker for its post-litigation destruction of potentially relevant documents.

ARGUMENT

I. Plaintiff's 204(h) Claim Should Be Reinstated

The Complaint states a viable claim that Foot Locker violated ERISA §204(h) when it froze pension accruals without providing proper advance notice to employees.

A. The Law and Test

This Court has repeatedly emphasized §204(h)'s critical purpose of alerting employees of a proposed reduction in future benefits accruals so that they have an "opportunity to take timely action in response...[such as] seeking injunctive relief, altering their retirement investment strategies, or perhaps considering other employment." *Frommert*, 433 F.3d at 266. *Accord Lonecke*, 584 F.3d at 465 ("In order to safeguard benefits promised to employees and to ensure that employees can form realistic expectations about the benefits that they will receive, ERISA prohibits employers from reducing the accrual of future benefits without adequate notice to plan participants").

ERISA §204(h) as it existed at the time Foot Locker converted the Plan to a cash balance plan provided that a company could not amend its plan "so as to provide for a significant reduction in the rate of future benefit accrual" without proper advance written notice to plan participants "setting forth the plan amendment." SA57, ERISA §204(h), Pub.L. 99-272, 100 Stat. 82 §11006 (1986).

Under regulations (that Defendants said were in effect at the time), the plan administrator could satisfy this requirement by giving employees "a summary of the amendment, rather than the text of the amendment, if the summary is written in a manner calculated to be understood by the average plan participant." SA57, Treas. Reg. §1.411(d)-6T, Q&A-10.[6]

Courts analyzing the pre-2001 version of the statute and regulations at issue here have held that a compliant notice had to satisfy two tests:

(1) The notice had to disclose the essential terms of the amended (that is, new) benefit formula so that "participants [could] compare this formula to their prior benefits formula." *Lonecke*, 584 F.3d at 471. and

(2) The notice had to contain enough information that it "properly alerted Plan participants that the amendments could result in a reduction in rates of benefit accrual." *Id.* at 470-71.[7]

[6] In 2001, the statute and implementing regulations were amended to "require a much more detailed and individualized assessment of the effects of plan changes." *Tomlinson*, 653 F.3d at 1293.

[7] *Accord Charles v. Pepco Holdings, Inc.*, 314 F.App'x 450, 463 (3d Cir. 2008) (Ambro, J. dissenting on different grounds) (a 204(h)-compliant notice had to "make clear to participants, either directly or through inferences that the average plan participant can be expected to draw," that the amendment would or could reduce benefit accruals for some employees).

B. Foot Locker's "Notice" Fails Both Parts of the Two-Part Test

1. The Highlights Memo Provided Zero Information About One-Half of the Amended Benefit Formula

Under the benefit formula that was in effect before the Plan was amended effective January 1, 1996 (the "1995 Benefit Formula"), each employee's benefit was defined as an annual benefit (annuity) commencing at age 65 equal to the sum of 1% of each year's compensation plus 0.5% of each year's compensation in excess of $10,800. JA884. The cash balance conversion amendment fundamentally changed things. Under the 1996 Cash Balance Formula, an employee's pension benefit was defined in terms of the balance of an employee's "account." JA155-57. An employee's account balance was defined as an amount equal to the sum of: (1) the employee's "Initial Account Balance" and (2) subsequently added "pay credits" and interest. *Id.* In other words:

$$\textbf{Cash Balance Account} = \boxed{\text{Initial Account Balance}} + \boxed{\text{Pay Credits and Interest Credits}}$$

Plan §1.23 set forth the formula used to calculate the Initial Account Balance, while Plan §§1.24 and 5.03 set forth the formulas used to calculate pay credits and interest. JA166-67, 204-05.

Defendants do not dispute that the provisions of the January 1, 1996 cash balance conversion amendment that replaced the 1995 Benefit Formula with the

1996 Cash Balance Formula "provide[d] for a significant reduction in the rate of future benefit accrual" (i.e., to zero for virtually all employees), and thus triggered the requirement that the Plan administrator (Foot Locker, JA513) give employees an advance written notice "setting forth" or summarizing the new Cash Balance Formula so that employees could "compare this formula to their prior benefits formula," *Lonecke*, 584 F.3d at 471. But the 1995 Highlights Memo that Foot Locker says satisfied this requirement did not do that: it only summarized, in any meaningful way, *half* of the new formula.

As depicted above, the 1996 Cash Balance Formula consisted of two parts. The Highlights Memo described in detail the interest and pay credit formulas depicted in the second box above. JA144. But the Memo did not summarize the formula that the Plan would use to calculate the Initial Account Balance depicted in box 1. Without that information, constituting one-half of the amended benefit formula, an employee would have no idea what his Cash Balance Benefit would be under the new plan – and thus no way to "compare this formula to their prior benefits formula." Employees would know how their *account balances* would *grow* after January 1, 1996, but would have no sense of what their *benefit* might actually *be* under the new formula.

Worse, going to the very heart of §204(h), without information about the starting account balance, employees had no way of knowing how ***fast*** their benefits would grow under the new formula – *i.e.*, what their "rate of future benefit accrual" would be under the new formula – the very information that a 204(h) notice is supposed to disclose. "Wait," one might think – "I don't need to know where my account *starts* to know how fast it is *growing*. The account will grow at the rate that pay and interest credits are added to my account." But as intuitive as that seems, it is a trick – indeed, the trick that was the central ruse of the cash balance plan's benefit-freeze provisions, and what allowed Foot Locker to freeze the Plan without employees figuring out what had happened.

The trick was this. Unbeknownst to anyone outside the Task Force, every participant in the Plan was given an account that effectively started out with a ***negative balance*** (when compared to the previously accrued, protected benefit). As a result, what appeared to be "growth" in the account was not growth at all – the Company's "contributions" were actually just wearing away the starting deficit. Only after an employee had worked long enough to dig his way out of the hole the conversion had dropped him into and "catch up (under the new plan) to where he had already been (under the old plan)," *Amara III*, 131 S.Ct. at 1874, would the employee's benefit actually start growing again. But between the date of the conversion and the date each employee had worked long enough to get back "to where he had already been," his benefit *looked* like it was growing at the same rate as the Company's "contributions" plus interest – but the rate of accrual in fact was *zero*. *See Amara I*, 534 F.Supp.2d at 303-04. So the Highlight Memo's failure to summarize how the Initial Account Balance would be calculated *mattered* immensely – without it, employees were completely in the dark about what their benefits would be under the amended 1996 Cash Balance Formula.

As essentially every defense witness admitted in their depositions, Foot Locker's 204(h) notice did not disclose a single fact that might allow someone not-in-the-know to discover this truth. Instead, all the Highlights Memo said about the Initial Account Balance was this:

> "Initial Account Balance: Your accrued benefit as of December 31, 1995 is actuarially converted to an initial account balance."

JA143. This conveyed no useful information about the rate of future accrual. Without knowing ***how*** the 1995 benefit would be "actuarially converted" – *i.e.*, the method the actuaries would use (generally) and assumptions they would make about interest rates and longevity, it would be literally impossible for a participant to know how the new 1996 Cash Balance Formula was *really* going to work, in even the most general sense.

The way the new formula was going to work (and did work) for a typical employee was that benefits would be frozen for several months or years following the conversion while the employee's account was catching back up "to where he had already been," and then if it ever caught up (it *never* did for about 60% of employees), the employee's benefits would start growing again in the manner described on pages 2-3 of the Highlights Memo. *Id*. But nobody knew this truth about how the formula was actually going to work – because it was impossible to know unless they knew that the "actuarial conversion" Foot Locker planned to use (and did use) – which in effect cooked the books to produce Initial Account Balances that were far less than the full value of what employees had already earned under the 1995 Benefit Formula. SOF ¶5F-G. Indeed, as defense witness after defense witness admitted, that was exactly the point: to hide the benefit freeze in "the conversion complication." SOF ¶3.

Because Foot Locker's notice neither set forth nor summarized one-half of the amended benefit formula – the half that happened to contain the amendment's "wearaway" benefit-freeze provisions – it necessarily violated §204(h). *See Hurlic v. Southern California Gas Co.*, 539 F.3d 1024, 1038 (9th Cir. 2008) ("Plaintiffs were entitled to receive notice of the wear-away provision"); *Custer v. SNET*, No. 05cv1444, 2008 WL 222558, *13 (D. Conn. Jan. 25, 2008) ("how a participant's opening account balance is calculated").

2. The Notice Also Contained Material Misrepresentations Falsely Suggesting That There Would Be No Benefit Freeze

The Highlights Memo's failure to disclose the single most important element of the amended benefit formula is by itself more than enough to require reinstatement of the Complaint's 204(h) claim. But the Memo is irretrievably flawed for another, independent reason: it falsely suggests that the conversion was an equal value, no-freeze conversion.

The Highlight Memo's opening sentence incorporates by reference the September 1995 Announcement Letter that falsely told employees that the cash balance conversion would give them "a better ability to monitor their benefits" because they would able to "**see their individual account balance grow each year**" and "know its value." JA142 (emphasis added). As a number of defense witnesses admitted, an average employee reading that message would conclude that after the conversion, their "account" was their "benefit" and that since their account would "grow each year" so would their benefits. *See* JA580, 734.

The remainder of the Memo continues this same theme, explaining to employees that "[e]ffective January 1, 1996, your benefit will be expressed as an account balance," showing how the account will increase with pay and interest credits, and telling employees that "[a]t termination of employment, provided you are vested, you will have the option of taking a lump sum payment equal to your account balance." The message is unmistakable. Your benefit is now your account balance – watch it grow and you are watching your benefit grow. As Judge Kravitz found after reviewing Cigna's eerily-similar summaries, *Amara I*, 534 F.Supp.2d at 339-41, 348-50: after reading summaries like these, "plan participants would reasonably believe that wear away was not a component of, or a likely result of, [the cash balance plan conversion]." *Id.* at 350. What other conclusion could they draw? The notion of not giving an employee equal value for something that he or she already earned in exchange for his or her service to the employer would strike the average participant as unlawful. That such a thing would be done *en masse* and in an otherwise public manner would be unthinkable.

* * *

Unfortunately, neither Judge Batts nor Judge Forrest recognized that Foot Locker's Highlights Memo was defective in the multiple ways described above, because neither of them examined the Memo to determine if it adequately summarized the 1996 Plan's amendments to the benefit formula. Judge Batts, with Judge Forrest subsequently indicating her agreement, mistakenly accepted Defendants' argument that the Memo satisfied the statute because it disclosed the *fact* that the Pension Plan was being amended and when the changes would take effect. SA25. Defendants convinced the district court that this was the holding in *Bilello v. JPMorgan Chase Retirement Plan*, 649 F.Supp.2d 142 (S.D.N.Y. 2009), but it was not. In *Bilello*, the plaintiff-employees ***conceded*** that the 204(h) notice at issue fully "set forth" the terms of the amendment. *Id.* at 161. As a result, the *Bilello* court concluded that there was no need for it to actually read the notice to see whether it contained an accurate and complete summary of the relevant plan amendment's material terms. *Id.* Here, the district court was required to actually read the Highlights Memo and analyze whether it complied with §204(h).

II. Summary Judgment on Plaintiff's Plan Reformation Request Was Improper

The district court erred in granting Defendants summary judgment on Plaintiff's request for equitable reformation. In *Amara III*, the Supreme Court held that reformation is available in appropriate cases to participants when a plan sponsor/administrator such as Cigna or Foot Locker fraudulently or inequitably represents a pension plan as providing benefits that its later-memorialized fine print does not. 131 S.Ct. at 1879, 1881. Here, the plan terms that Foot Locker described in the official summaries provided to employees constituted an offer that, once accepted by employees, established the "real contract" that defined the parties' obligations to one another, and employees are entitled to ask the Court to reform the terms of the plan document to make it reflect that real contract. *Id.* at 1879-80. Both before and after their case went to the Supreme Court, the *Amara* plaintiffs were awarded precisely the kind of conversion-without-freeze reformation relief that Plaintiff seeks here, to remedy the incorrect conversion-with-freeze formula their employer deceptively inserted into the plan, and that the Supreme Court explicitly endorsed in *Amara III*. *See Amara IV*, 2012 WL 6649587, *5-8 (ordering plan reformation following remand).

Plaintiff has ample evidence that the Plan should be reformed due to Defendants' fraud or inequitable conduct so that it matches the parties' "real contract," *Amara III*, 131 S.Ct. at 1880 – that is, the no-freeze version of the cash balance plan that Foot Locker offered and Plaintiff then accepted through performance, *i.e.*, continuing to work for the Company post-conversion. Like the district court's opinion, Defendants' summary judgment brief barely mentioned reformation – one footnote obliquely suggested a possible (groundless) objection, Doc.69 at 15 n.11 – but other than that, Defendants' strategy was to blur the distinctions *Amara III* admonishes the courts to keep clear between equitable remedies (here, between reformation and surcharge) and argue that reformation is unavailable to Plaintiff because he supposedly cannot prove the type of "actual harm" necessary to support surcharge relief. But that is unsustainable, because *Amara III* does *not* "superimpos[e] a monolithic requirement of 'actual harm' on any equitable remedy sought under ERISA §502(a)(3)." *Amara IV*, 2012 WL 6649587, *6 n.7.

In saddling Plaintiff with its flawed conception of "actual harm" (including for surcharge purposes, *see* Argument III below), the district court, like Defendants, ignored *Amara III*'s admonition to the lower courts that "any requirement of harm must come from the law of equity" and they have no power to fashion additional prerequisites that are not "impose[d]" by "the specific remedy being contemplated." 131 S.Ct. at 1881-82. As *Amara IV* explains in detail, no support for the district court's "actual harm" limitation can be found in *Amara III* or anywhere else. Rather, the opposite is true.

Reformation is a simple contract-based remedy for situations in which parties come to an understanding but when reducing it to a formal writing, omit a provision agreed upon or insert one not agreed upon, either as a result of mutual mistake, or through fraud or inequitable conduct by one side. *Id.* at 1880. The goal of reformation is to conform the writing to what was already agreed. *Id.*

Because it sounds in contract, the harm that is reformation's purpose to alleviate is to a plaintiff's *contract-expectation rights*, arising upon contract formation, which are or may be impaired when, for example, it emerges that once a plaintiff and defendant had made their agreement, the defendant went away and, without telling plaintiff, wrote it up in a way materially at variance with what had actually been agreed. Contract principles dictate that when this plaintiff's case comes to court, he will have sufficiently proven harm to his contract-expectation rights (and entitlement to defendant's performance under the real contract) so long as he can sufficiently prove the real contract and that defendant's memorialization of it fails in a material way to reflect what had been agreed.[8]

In the hundreds of years that equity courts have fielded reformation requests, never once has the question been asked, as the district court effectively asked here,

[8] A party that objectively conveys its agreement to particular contract terms, but with its fingers crossed, is precluded from later claiming there was no meeting of the minds sufficient to form a contract. *See Hand v. Dayton-Hudson*, 775 F.2d 757, 761 (6th Cir. 1985) ("Although the defendant...never personally intended to agree to pay [what he objectively promised], his awareness of the plaintiff's understanding prevented him from ever claiming there was no "meeting of the minds").

what contract *would* the parties have made had the defendant not acted improperly? The question was and always is simply, what *did* the parties objectively agree, and did the defendant fraudulently or inequitably try to vary the terms in the formal written instrument? *See, e.g.*, *Amara III*, 131 S.Ct. at 1881 (omitting any mention of any additional "harm" requirement in detailing the elements of reformation); *Ivinson v. Hutton*, 98 U.S. 79, 82 (1878) ("[c]ontroversies of the kind often arise in respect to policies of insurance; and the rule is, when once the contract is agreed to, the underwriters are bound to [reflect] it in the policy, and if they omit to do [so], the insured have a right to insist upon a perfect conformity to the original agreement" with no showing of additional "actual harm" required).

Nonetheless, apparently without recognizing that it was doing so, the district court – citing no case, conducting no analysis, and providing no explanation – imposed a requirement of a showing of *additional* "actual harm" using an invented standard that completely ignored the harm to the plaintiff's contract-expectation rights, the remedying of which is what reformation is about – and *all* that it is about.

In addition to being precluded by *Amara III* and this Court's decision in *Amara II*, the district court's "reformation" rule is foreclosed by this Court's decision in *Feifer v. Prudential Ins. Co. of Am.*, 306 F.3d 1202 (2d Cir. 2002). In

Feifer, plaintiffs sought long-term disability benefits without any offsets for Social Security or workers' compensation which they contended they had been promised in an SPD. The district court found for the defense in part because it held the plaintiffs could not show either detrimental reliance upon, "or prejudice" (*i.e.*, "actual harm") on having been told they would receive no-offset benefits if they became disabled. *Id.* at 1207. This Court reversed and held that (1) the SPD, when objectively viewed, promised no-offset benefits, (2) the plaintiffs accepted the SPD's terms by continuing in employment until becoming disabled, (3) the parties thereby formed a binding unilateral contract, (4) plaintiffs had the right to insist upon defendants' performance under that contract, and (5) plaintiffs did not have to show reliance *or prejudice* because their claim sounded in contract:

> [W]e are unaware of caselaw to the effect that a plaintiff must show reliance or prejudice to enforce terms of a plan. Such a limitation on the reliance or prejudice requirement is consistent with the principle that an action under ERISA to enforce plan terms sounds in contract, and a plaintiff generally need not show equitable factors such as reliance or prejudice to enforce contractual terms.... Because [plaintiffs] seek to enforce plan terms...**there is no need for a showing of reliance or prejudice for them to establish their claims.**

Id. at 1213 (emphasis added).

Here, there is no question that Defendants were and are not entitled to summary judgment on Plaintiff's reformation request because the evidence raises (at a minimum) triable issues as to Plaintiff's entitlement to reformation:

1. Foot Locker made an offer, beginning right after the Board gave its

approval to a cash balance plan design that did *not* contain a freeze, via the September 1995 Announcement Letter communicating that no-freeze plan to participants. *Fiefer*, 306 F.3d at 1210; *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 89 (2d Cir. 2001). In between those dates and the finalizing of the formal May 1996 plan document, Defendants renewed and reiterated the offer of a no-freeze cash balance plan in other communications repeating and detailing its terms, and continued to do so on a regular basis after May 1996, never alerting participants to any change in the offer's terms.

2. Plaintiff accepted the terms of the no-freeze plan offer by continuing to work for the Company. *Fiefer*, *supra*; *Devlin*, 274 F.3d at 84 (2d Cir. 2001). *McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008) ("[offerees'] objective actions indicate acceptance of the offer"); *Hand*, 775 F.2d at 761 (same).

3. Foot Locker was guilty of fraud or inequitable conduct in inserting freeze provisions into the formal plan document and not disclosing, indeed actively concealing, what it had done. *See, e.g., Varity*, 516 U.S. at 507-15 (affirming where, to save money, the employer lied to employees to get them to switch plans, the equitable remedy for which was to order employees reinstated under the prior plan and pay benefits due); *Tokio Marine & Fire Ins. Co. v. National Union Fire Ins. Co.*, 91 F.2d 964, 966-67 (2d Cir. 1937) (ordering reformation based on inequitable conduct).

4. The differences between the real and memorialized contracts "'material[ly]… affect[ed]' the 'substance' of the [real] contract," 131 S.Ct. at 1881 (citation omitted).

Contrary to what the district court held, Plaintiff did not have to prove anything more than the historical facts set forth above, none of which Defendants attempted to refute for purposes of summary judgment or otherwise, and in effect all of which the district court's analysis of his reformation claim completely ignored.

A pension plan is not a gift, it is a contract – and ERISA's chief purpose is to protect "contractually defined benefits." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985). Under the "real" unilateral contract made here, Plaintiff acquired "a right no less contractual than if the plan were expressly bargained for." *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1, 5 (1st Cir. 1978) (citation omitted). Plaintiff's harm is not receiving what he was promised and being stuck with the no-new-benefit version the HR department wrote up. The district court was wrong to withhold relief on grounds having nothing to do with the relief requested. *Id.* at 2-7 (pre-ERISA case not conditioning relief on a finding of actual harm; holding where financially distressed employer changed the plan "but that change was never explained to plaintiffs" and the employer was "guilty of misrepresentation," "the plaintiffs had a contractual right to their pensions" on the terms represented to them notwithstanding the plan's literal terms; a company's "financial difficulties can[not] excuse its performance of its contractual pension obligations").

III. Summary Judgment on Plaintiff's Surcharge Request Was Improper

The district court committed numerous errors, both factual and legal, in granting Defendants summary judgment on Plaintiff's request for equitable surcharge relief.

Plaintiff's evidence, taken in the light most favorable to him, sufficiently shows a genuine factual dispute as to the extent Defendants' concealment of benefit-freeze provisions in the cash balance formula harmed him. In other words, there is a genuine dispute as to the extent Plaintiff would have earned *some* additional benefits had candor prevailed between January 1, 1996 and Plaintiff's termination of employment in 2002.

The district court's contrary conclusion – and repeated assertions that Plaintiff had "no evidence that..." or "no evidence of..." – resulted from: (1) overlooking *Amara III*'s clear description of "actual harm" in this context; (2) holding Plaintiff to a standard of proof much higher than *Amara III*'s preponderance of the evidence standard; (3) failing to apply the venerable "wrongdoer" principle that holds uncertainties in fixing damages against the wrongdoer; and (4) misunderstanding the evidence and Plaintiff's basic argument as to what the evidence shows.

Indeed, the district court appears to have been unaware of *Amara III*'s holding regarding what "actual harm" means in this context. The Supreme Court unanimously agreed that without more, an employee-participant's loss of the ERISA-protected right to contest unfavorable plan changes due to materially-misleading disclosures is a sufficient injury ("actual harm") entitling participants to surcharge relief:

> [A]ctual harm – proved (under the default rule for civil cases) by a preponderance of the evidence...may sometimes consist of detrimental reliance, but it might also come from the **loss of a right protected by ERISA** or its trust-law antecedents. In the present case, it is not difficult to imagine how the failure to provide proper summary information, in violation of the statute, injured employees even if they did not themselves act in reliance on summary documents – which they might not themselves have seen…. We doubt that Congress would have wanted to bar those employees from relief.

131 S.Ct. at 1881 (emphasis added); *accord id.* at 1885 (Scalia and Thomas, JJ. concurring) ("harm stemming from...the lost opportunity to contest or react to the switch").

That Plaintiff suffered actual harm here is essentially not disputed. Defendants do not dispute for purposes of summary judgment that by concealing the benefit freeze, they violated ERISA's disclosure requirements; nor do Defendants dispute that absent those violations, Foot Locker would not have been able to include the benefit-freeze provisions in the new cash balance plan. SOF ¶¶

5A, 5F, 6A. It follows that Plaintiff and his co-workers not only lost their right to contest the concealed freeze but that such loss ***mattered*****:** absent the violations, the economically injurious benefit-freeze provisions would not have been in the Plan.[9] Thus, it was undisputed for summary judgment purposes that Plaintiff can establish violation, materiality, causation *and* harm. The real question is not *whether* Defendants' violations caused harm, but the *extent* of that harm, *i.e.*, the amount of damages.

The *amount*, as opposed to the existence, of damages is a classic question appropriate for resolution only at trial. That is especially true in trust law, where it is well established that once a beneficiary shows that a trustee's breach of duty caused some loss, "uncertainties in fixing damages will be resolved against the [trustee]." *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985).

What that means is that Plaintiff only needed to show that he has evidence on which, construed in the light most favorable to him and drawing all inferences and resolving all ambiguities in his favor, a fact-finder could reasonably conclude that the plan the Company would have maintained with the benefit-freeze provisions removed (that it concedes for purpose of its motion would have happened) would have been better for Mr. Osberg than the design adopted in 1996,

[9] The district court acknowledges this central passage of *Amara III*, but reached the opposite point. The court wrongly attributes to p.1167 of *Amara III* a platitudinous statement that a plaintiff is not harmed by "mere[]...errors or omissions," SA48 – a point not made anywhere in the text of *Amara*, which, like this case, concerns deliberately deceptive, material misrepresentations.

under which Plaintiff earned *no benefits at all*.

Plaintiff amply made this showing. He showed with concrete evidence that senior management would have gone ahead with the adoption of the same cash balance plan that was implemented except without the freeze – *i.e.*, the plan that senior management *thought* they were adopting. *See* SOF ¶6 (citing to extensive evidentiary support from documents produced in discovery and fact and expert witnesses). This was all that was required to shift the burden to Defendants, who can prove better than Plaintiff can what they would have done had they chosen to follow the law rather than break it, to dis-establish the causal connection between Defendants' law violations and Plaintiff's loss of benefits, as explained in *Amara IV*'s discussion of the proper evidentiary framework here. *Amara IV*, 2012 WL 6649587, *11. But even without burden-shifting, Plaintiff produced more than enough evidence to establish a genuine issue of fact for trial. *See Kuebel v. Black & Decker Inc.*, 643 F.3d 352, 363 (2d Cir. 2011) (district court improperly granted summary judgment "[b]ecause Kuebel could not prove his damages with precision" due to employer's wrongdoing).

When not overlooking Plaintiffs' evidence entirely, the district court misconstrued it, negated it (by saying that the inference to be drawn was not necessarily helpful to Plaintiff) or drew no favorable inference from it -- apparently all because the district court failed to truly understand Plaintiff's argument.

For example, the court said that Plaintiff "presents no evidence as to what type of pension plan would have been adopted as an alternative to the cash balance plan." SA49. But Defendants do not dispute that Plaintiff can show senior management "did not intend to freeze benefits," Doc.99 at 2, *i.e.*, wanted employees to have an actually increasing pension benefit; and Plaintiff presented concrete evidence that (i) the Company wanted a cash balance plan; and (ii) the projected cost the Board would have seen for the no-freeze version of the plan versus the one with the freeze-provisions slipped-in would have made no practical difference to the Board's decision-making. The result (a reasonable fact-finder certainly could conclude): same plan but without the freeze provisions.

The court also said "[e]ven if, [1] as plaintiff's evidence suggests, some members of the board thought they were adopting a plan without a freeze, [2] there is no evidence that the board considered a true 'A plus B' approach' [3] along with the costs associated with such a plan." But [1] is flatly inconsistent with [2] -- the Board *did* consider a no-freeze ("A plus B") approach: that was the plan the Board thought it was adopting and wanted to adopt, *i.e.*, to provide employees with continued benefit growth.[10] As for the fact that the Board did not explicitly consider the increased costs of a no-freeze plan would have been seen as a

[10] Indeed, as Plaintiff argued below, the disconnect between what the Board thought it approved – the same no-freeze cash balance plan offered to and accepted by employees – and the technical terms memorialized in the formal Plan document, supports Plaintiff's request that the Plan be reformed based on mutual mistake. *See Simmons Creek Coal Co. v. Doran*, 142 U.S. 417, 435 (1892).

veritable drop-in-the-bucket compared to what management saw as incredibly negative consequences of going public with a freeze: Plaintiff's actuarial and two economics experts provided (uncontroverted) evidence -- nowhere even indirectly referenced in the opinion below -- that the additional costs involved with providing equal value pensions were insubstantial and would not have dissuaded the Board from adopting a cash balance plan without a freeze. SOF ¶6C; JA943, 960-61; Doc.84-62 at 5-6.

The court also said that Plaintiff does not "present evidence to raise a material dispute that he was harmed economically by the conversion." SA48. The court appears to say that this is at least in part because a lump sum option became available to Plaintiff that was not previously available. *Id.* But the availability of a lump sum form of payment has absolutely nothing to do with the fact that Plaintiff's benefit was frozen for a number of years and that he was not told of that fact.

Further, the fact that the district court held Plaintiff to an impermissibly high evidentiary standard can be seen in its statements like "there is no evidence in the record that **every** potential ERISA-compliant alternative plan would have been better for plaintiff" and Plaintiff could not prove that had history unfolded the way it should have that the plan "would have **necessarily** been better than" the plan that was actually implemented. SA44, 49 (emphasis added). This sounds like proof beyond a reasonable doubt rather than the *Amara* preponderance standard.

Given that Plaintiff earned *no new benefits* from the date of conversion until the date he retired, JA523, and that it was not disputed that Foot Locker senior management expressly rejected a benefit freeze, it is difficult to see how, judged against the correct *Amara III* standard, the amount of damages is not a question for trial. The district court said that "Plaintiff has presented no evidence to show that he did worse under the lump sum option as awarded as compared to any other conceivable ERISA-compliant plan option." SA48. But that is not the standard. Plaintiff has to present evidence based on which a fact-finder could reasonably conclude he would have done better. He has done that and is now entitled to present his case at trial.

IV. Defendants Are Not Entitled to Judgment on Limitations Grounds on Plaintiff's SPD Claim

The district court's statute of limitations ruling on the SPD count cannot stand for three distinct reasons: it used the wrong limitations period; Defendants did not and cannot show that the period began running upon payment; and the court overlooked the fact that Defendants' fraudulent concealment tolled its further running.

A. The Correct Limitations Period is 6 Years, Not 3 Years

The district court erred when it ignored this Court's established precedents and overruled Judge Batts' earlier decision here by finding that Plaintiff's defective-SPD claim is governed by a 3-year rather than a 6-year limitations period. The entirety of the district court's reasoning was: "*Amara* has now clarified that an SPD is not a contract – its terms are not subject to enforcement. *Amara*, 131 S.Ct. at 1880. ***Therefore***, the appropriate limitations period is the three year period governing statutory violations." SA46 (emphasis added). But the "therefore" does not follow, as explained below.

First, the court failed to cite a single case in which a court in this Circuit has used the 3-year period under C.P.L.R. 214(2) and failed to recognize that this provision applies **only** to statutorily-created liabilities that did not exist at common law. *See Harnett v. NYC Transit Auth.*, 86 N.Y.2d 438, 444 (1995). Trustees have been liable for not making candid disclosures to their beneficiaries for hundreds of years -- this was certainly not a recent ERISA innovation.

Second, the court ignored that, as Judge Kravitz explained in *Amara I*:

> ***Every decision of the Second Circuit*** that the Court has found holds that the most closely analogous state statute of limitations for employee benefit claims similar to Plaintiffs' is [the 6-year period] for written contracts...even when the claim is that a company's plan does not comply with ERISA's <u>statutory requirements</u>…. [and] several district courts that have recently considered claims…regarding the **conversion of a traditional defined benefit plan to a cash balance plan** have held that the six-year statute of limitations period for written contracts applies.

Amara I, 534 F.Supp.2d at 311-13 (emphasis added).

Notwithstanding the district court's "therefore," the Supreme Court said nothing in *Amara III* to alter this analysis. It is true that *Amara III* holds that the terms of an SPD are not themselves "terms of the plan for purposes of §502(a)(1)(B)," but it also holds that an SPD *can* be used to help establish what the actual contract between the employer and its employees was so that the court can reform the formal plan terms to match. *Amara III*, 131 S.Ct. at 1879. That is the situation here.

B. The SPD Claim Did Not Accrue Upon Payment

The district court also erred in finding on summary judgment that Plaintiff should have figured out by the time he received payment in 2002 that the SPD his fiduciary provided him a year after the conversion was flawed and deceptive.

According to the district court, based on "three pieces of information" Defendants cherry-picked from the communications given to employees, "Osberg needn't have been an actuary to realize that his benefit had been frozen…. If he did not come to such an actual realization,…he should have." SA46. This assertion gets things backwards. As a threshold matter, it ignores (and does not reconcile with) Judge Batts' prior finding that "Plaintiff could not have been expected to discover the breach based on the documents provided by Defendants," SA19. It also disregards Plaintiff's evidence that Defendants (very successfully) used the SPD and other written communications to deliberately deceive employees into thinking there was no freeze (SOF ¶5). The court also made the mistake of construing these facts in the light most favorable to the defense.

But even more basically, the district court got its facts wrong. Here is some of the evidence that bears on whether Mr. Osberg should have been able to figure out at the point of payment that he had been snookered:

- The concealment and misdirection strategy was so successful that three defense witnesses – each of whom were **benefits personnel** involved in communicating the new plan to employees – testified that they **did not themselves know *until their depositions*** in 2012 that their benefits had been frozen. SOF ¶5G. *See also* JA722, 756 ("nobody noticed," even after they were paid, that their "benefit[] [was] frozen").

- Contrary to the district court's suggestion that Mr. Osberg did not uncover the secret-freeze scheme because he had "neglect[ed] to read even the summary plan documents," SA47, Mr. Osberg testified that he *had* carefully reviewed the SPD and the other summaries given to him, but those summaries, as shown below, implied that growth in his cash balance account was growth in his benefit. JA560.

- After reviewing the same three items the district court thought made the fraud obvious, *Defendants'* actuarial expert conceded that an average participant "***wouldn't* be able to tell**" that his benefits had been frozen – even at the time benefits were paid – and that Mr. Osberg could have reasonably believed that his lump sum was derived from his cash balance account rather than his frozen accrued benefit. JA1180-83 (emphasis added).

- Judge Batts concluded that two of the three pieces of information Judge Forrest said would have made the existence of a pension freeze jump off the page to participants were "particularly obscure or unimportant" and could "hardly be expected to be meaningful and understood by the average plan participant." SA26.

Nonetheless, the district court found that Mr. Osberg should have figured out that the SPD he had been given in December 1996 was defective and that he had been *injured* because the 1-page benefit distribution form Defendants gave him in

October 2002 showed that he was entitled to a lump sum pension benefit that was $5,000 *more* than the balance in his lump sum account. But in *Novella v. Westchester County*, 661 F.3d 128 (2d Cir. 2011), this Court explained that even "receiving a *lower* pension payment is not [necessarily] enough to put a pensioner on notice of a [violation]," because it may not be a red flag that anything is amiss. *Id.* at 148 (emphasis added).

By the same logic, it is hard to see how Mr. Osberg's receipt of a *higher* benefit than what was in his account should have alerted him to the fact that he had been bamboozled. *See id.* at 146 (*citing Young v. Verizon's Bell Atl. Cash Balance Plan*, 615 F.3d 808, 816 (7th Cir. 2010): a claim does not accrue if the lump sum payment was "not so inconsistent with [a participant's] current claim for additional benefits as to serve as a clear repudiation").

The district court reasoned that the 2002 benefit distribution form should have tipped off Mr. Osberg that his pension had been frozen for 7 years, because the district court *thought* that it explicitly showed him that he would be receiving a payment equal to the benefit he earned under the old Plan as of December 31, 1995. SA43, 46-47 (repeating this "finding" on three separate occasions). But the form itself showed no such thing. At the top of the form was a section with details about Plaintiff's age, work history, and marital status. In then had a section in the middle of the page that looked like this:

> Account Balance as of Benefit Payment Commencement Date: $20,093.78
>
> Based on the information shown above, please select one of the following forms of benefits available to you on the Benefit Payment Commencement Date shown above:
>
> ☐ Qualified 50% Joint and Survivor Annuity: $138.41
> (with $69.21 payable to your spouse upon your death)
>
> ☐ Lump Sum (payable October 01, 2002): $25,695.96

JA387.

The court felt the fact that the "Lump Sum" was about $5,000 larger than the "Account Balance" was a dead giveaway that Mr. Osberg's pension had been frozen for 7 years. But that conclusion is baseless. As shown above, Defendants' actuarial expert conceded that an average employee "wouldn't be able" to tell from that information that benefits had been frozen. JA1179-83.

The reason is that the distribution form says nothing about **<u>why</u>** the $25,695.96 "Lump Sum" amount was different than the Account Balance. If the form had explicitly said "$25,695.96 is the value of the annuity benefit you had earned under the prior Plan as of December 31, 1995 before the cash balance conversion," then Mr. Osberg would have known he had not earned anything more after the conversion. But the form does not say that. To the contrary, it says: that the Lump Sum was **"[b]ased on"** the $20,093 Account Balance – which had *grown* significantly from its starting balance of about $6,000 on the January 1, 1996 conversion date, which would have led any reasonable person to think his pension had grown, not been frozen.

As Mr. Osberg and Defendants' actuarial expert both testified, there was nothing surprising about the fact that the Lump Sum was larger than the Account Balance. Under the heading "How Your Retirement Benefit Is Determined," the SPD explains that, upon termination of employment:

> 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.

JA305 (underlining added). A similar explanation is given following an example that illustrated how an employee's account balance would grow over time:

> The lump sum payable to you is the greater of your account balance or the amount determined under federal law and IRS regulations.

JA307 (underlining added).

Based on these disclosures in the SPD, Mr. Osberg reasonably assumed that the $25,695 "lump sum payable" amount on his benefit form was the result of "one of the IRS adjustments that had to be made to reach the lump sum amount." JA546. Defendants' actuarial expert agreed that was a reasonable interpretation, because the "federal law and IRS regulations" could have easily produced a result – based *solely on the Cash Balance Account* – similar in magnitude to the $25,695 paid to Mr. Osberg. JA1183.

All of the evidence thus points to the conclusion that an average employee would not – indeed, *could* not – have figured out, based on the information provided, that Foot Locker had duped him into working pension-free for almost 7 years.

C. Defendants Are Equitably Estopped From Asserting that Plaintiff's SPD Claim is Time-Barred Because They Issued Misleading Communications Suggesting There Was No Freeze

Where the facts show that a defendant engaged in conduct calculated to conceal from the plaintiff the existence of his or her cause of action, the defendant is equitably estopped from asserting that the plaintiff's claim is time-barred. *Veltri v. Building Service 32B-J Pension Fund*, 393 F.3d 318, 323-24 (2d Cir. 2004).

The clear message of the cash balance plan communications given to Plaintiff between 1995 and 2002 was that benefits had grown since the conversion without interruption. When Defendants gave Plaintiff his 2002 benefit distribution form, the form is so blasé about the Lump Sum being higher than the Account Balance that Plaintiff would have had no reason to suspect anything was wrong. As Defendants themselves described the larger $26,695 Lump Sum, "the benefit Plaintiff received when his employment terminated was equivalent to his [December 31, 1995] accrued benefit *as substantially increased* and valued as of [his benefit payment date]." JA523 (emphasis added).

This is a tall tale. Plaintiff's December 31, 1995 benefit did not increase at all. Instead, its present value did because a dollar in 1996 was worth double in 2002. But this "increased benefit" portrayal is indicative of the tricks one can play with complicated mathematical concepts like "actuarial present value" – exactly the tricks Defendants did play in its communications with employees. The Company's deliberately-deceptive actions that "concealed effectively" the pension freeze, SA19, precludes it from arguing that Plaintiff's defective SPD claim is time barred. *See, e.g., Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078, 1101 (7th Cir. 1992) (Posner, J., concurring) (defendant is estopped from arguing claim is untimely if he "fobs [plaintiff] off with some elaborate, and elaborately fraudulent tale, as a result of which the plaintiff loses months in discovering that the defendant's wrongdoing was responsible for his financial disaster").

V. Summary Judgment Was Premature Before a Ruling on Plaintiff's Spoliation Motion.

The district court's position on harm was that Plaintiff had two options: produce speculation-free, smoking-gun proof of an actual backup-plan entitling Plaintiff to at least $1 of new post-conversion benefits *or* proof (tantamount to beyond a reasonable doubt) that there was no conceivable ERISA-compliant plan that would have made Plaintiff even worse off. Given that position, the court's refusal to decide Plaintiff's spoliation sanctions motion, improper in and of itself, did not even make sense on its own terms.

Plaintiff's motion demonstrated that for *3 years* after the onset of litigation Defendants deliberately failed to issue a "litigation hold" notice, resulting in the loss of potentially decisive evidence including notes of: (1) key HR meetings discussing the benefit-freeze provisions and (2) HR presentations of its cash balance plan recommendations to top management. Doc.132 at 9 & nn.10-11. Plaintiff's motion showed that a summary judgment motion premised on a lack of evidence by parties that had so brazenly violated their obligations should be denied outright and/or one or more adverse inferences should be drawn against Defendants -- substantively, on the merits and on their limitations defense.

Defendants told the district court at oral argument that it could "go ahead and decide the summary judgment motion without getting into the spoliation motion" because, while they admitted that they "don't know whether management had [a] conversation" regarding an alternative plan, they were (contradictorily) sure that "there's nothing in these allegedly missing documents that will answer the question about what management would have done." JA1534-38. Over Plaintiff's objection, the district court accepted Defendants' assurances that nothing was destroyed that would have helped Plaintiff when at a minimum it should have, given the egregiousness of Defendants' spoliation, denied their motion and/or drawn an adverse inference that there was indeed an on-the-shelf contingency plan that would have benefitted Plaintiff. *See* Docs.127, 132.

CONCLUSION

WHEREFORE, for the reasons set forth above, for such additional reasons as Plaintiff may later adduce and/or for such other reasons as may appear to the Court, Plaintiff's motion should be granted.

Dated: May 17, 2013

Respectfully submitted,

s/*Eli Gottesdiener*

Eli Gottesdiener
Gottesdiener Law Firm, PLLC
498 7th Street
Brooklyn, New York 11215
Telephone: (718) 788-1500
Telecopier: (718) 788-1650
Email: eli@gottesdienerlaw.com

Attorney for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)

The undersigned, counsel of record for the Plaintiff-Appellant, furnishes the following in compliance with Fed. R. App. P. 32(a)(7):

I hereby certify that this brief conforms to the rules contained in Fed. R. App. P. 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 13,985 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: May 17, 2013

s/ *Eli Gottesdiener*

Eli Gottesdiener
GOTTESDIENER LAW FIRM, PLLC
498 7th Street
Brooklyn, New York 11215
Email: eli@gottesdienerlaw.com
Telephone: (718) 788-1500
Telecopier: (718) 788-1650

Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

The undersigned, counsel of record for the Plaintiffs-Appellees, hereby certifies that on May 17, 2013, a true and correct copy of the foregoing Brief and Required Special Appendix of Plaintiff-Appellant was filed with the Clerk of the Court via ECF. Further, Plaintiff-Appellant's Brief and Required Special Appendix was served upon Defendants' counsel via ECF:

Myron D. Rumeld
PROSKAUER ROSE LLP
11 Times Square
New York, NY 10036
(212) 969-3021
(212) 969-2900 (facsimile)

Attorney for Defendants-Appellees

s/ *Eli Gottesdiener*
Eli Gottesdiener
GOTTESDIENER LAW FIRM, PLLC
498 7th Street
Brooklyn, New York 11215
Email: eli@gottesdienerlaw.com
Telephone: (718) 788-1500
Telecopier: (718) 788-1650

Attorney for Plaintiff-Appellant