13-187-cv

IN THE 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 OF AMICUS CURIAE SETH D. HARRIS, ACTING SECRETARY
OF THE UNITED STATES DEPARTMENT OF LABOR,
IN SUPPORT OF APPELLANT REQUESTING REVERSAL

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THE SECRETARY'S INTEREST

The Secretary of Labor is vested with primary regulatory and enforcement authority for Title I of the Employee Retirement Income Security Act (ERISA), see 29 U.S.C. §§ 1134, 1135, a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983). The Secretary thus has a substantial interest in ensuring that ERISA plan participants and beneficiaries are fully and accurately apprised of their rights under their plans, that they have a full and accessible set of remedies to redress instances of inadequate notice, and that they are not prematurely barred access to court when they seek to exercise those remedies.

STATEMENT OF THE ISSUES

1. Whether, for purposes of withstanding summary judgment, plaintiff made a sufficient showing of harm for a surcharge remedy under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), by proffering evidence that Foot Locker failed to accurately inform him and other plan participants that their benefits would be frozen during a "wear-away" period, that he in fact suffered such a benefit freeze, and that Foot Locker would not have frozen benefits had it been obligated to openly disclose the freeze.

2. Whether, for purposes of withstanding summary judgment, plaintiff proffered sufficient evidence for the court to exercise its equitable authority under section 502(a)(3) to reform the plan to provide the benefits that Foot Locker led plaintiff to believe he would receive.

3. Whether plaintiff's claim alleging inadequate summary plan descriptions in violation of 29 U.S.C. § 1022(a), accrued for statute of limitations purposes in 2002 under the federal common law's "discovery rule" when plaintiff received a lump-sum distribution from his pension plan.

STATEMENT OF THE CASE

Plaintiff Geoffrey Osberg was an employee of Foot Locker or one of its predecessor companies from 1982 to 2002. JA 470. Throughout that time, Osberg participated in the Foot Locker Retirement Plan ("Plan"). Id. Prior to January 1, 1996, the Plan was a traditional defined benefit plan that paid participants a monthly retirement benefit tied to their compensation and years of service with the company ("pre-1996 Plan"). JA 1379. Effective January 1, 1996, however, Foot Locker converted the Plan to a so-called "cash balance" plan, which, while still subject to the rules governing defined benefit plans, looks more like a defined contribution plan ("Cash Balance Plan"). JA 1388. Under the Cash Balance Plan, a participant's benefit is expressed as a hypothetical, or notional account balance that is increased annually by two factors: (1) "compensation credits" based on a

percentage of the participant's earnings, and (2) a 6% rate of interest on the account balance. JA 1389-90. Upon retirement or termination of employment, participants can elect to receive their account balances either as a lump-sum or in monthly installments. JA 1393-94. For employees who participated in the pre-1996 Plan, and consistent with ERISA's anti-cutback rule, 29 U.S.C. § 1054(g) (which prohibits ERISA plans from reducing accrued benefits and optional forms of benefits through plan amendments), Foot Locker guaranteed that their benefit under the Cash Balance Plan would not be less than their accrued benefit as of December 31, 1995. JA 305.

This case concerns whether Foot Locker, both before and after the cash balance conversion, misled employees who participated in the pre-1996 Plan as to the rate at which they would accrue benefits under the Cash Balance Plan. Plaintiff alleges that, instead of advising participants that they were being asked to work for an extended period without earning any additional retirement benefits, as was allegedly true for most of the Plan's participants, Foot Locker's disclosures suggested that participants would continue to accrue additional benefits as part of their compensation package. See JA 485-87. Thus, prior to the conversion, Foot Locker suggested to participants that the Cash Balance Plan would pay them benefits under an "A plus B" approach: participants would be entitled to their accrued benefit under the pre-1996 Plan (Part A), plus additional benefits under the

Cash Balance Plan (Part B). In a November 17, 1995 memorandum from Foot Locker's corporate benefits department announcing the impending conversion ("November 1995 Memo"), Foot Locker told participants that, under the soon-to-be amended Plan, their "accrued benefit as of December 31, 1995 [would be] actuarially converted to an initial account balance." JA 143. According to the November 1995 Memo, that starting account balance would then "increase in two ways" – namely, through annual interest and compensation credits. Id. (emphasis added).

Following the conversion, Foot Locker reiterated to participants that their initial account balances under the Cash Balance Plan were the actuarial equivalent of their accrued benefit under the pre-1996 Plan, and that they would continue to accrue benefits following the conversion. In an SPD dated September 30, 1996 ("the 1996 SPD"), under the heading "How Your Retirement Benefit is Determined," Foot Locker explained that a participant's initial account balance "is equal to the actuarial equivalent lump-sum value of your accrued benefit under the Plan as of December 31, 1995." JA 305. This section similarly described a participant's "initial account balance" as "the value of your Plan benefit as of December 31, 1995, before the Plan was amended." JA 304. The SPD's introduction also equated participants' initial account balances with their accrued benefits: "To accomplish this change [to the Cash Balance Plan], participants'

accrued benefits as of December 31, 1995 were converted to initial account balances." JA 294. Under the heading "The Amount of Your Retirement Benefit," the SPD then illustrated how the account balance of a hypothetical participant with 10 years of service with Foot Locker as of January 1, 1996 would grow consistently over the ensuing three years. JA 307.

In reality, however, the initial account balances of employees who participated in the pre-1996 Plan were not the "actuarial equivalent lump sum value" of the accrued benefits to which they would have been entitled as a pay-out as of December 31, 1995, but rather something less, a discrepancy that caused most participants to temporarily stop accruing benefits following the cash balance conversion. In the context of defined benefit plans, ERISA defines "accrued benefit" as "the individual's accrued benefit under the plan . . . expressed in the form of an annual annuity at normal retirement age." 29 U.S.C. 1002(23)(A). The lump-sum actuarial equivalent of a participant's accrued benefit is derived by projecting the future value of the participant's annuity payments, and then discounting that sum to a present value to account for the time value of money. See Berger v. Xerox Corp. Ret. Income Guarantee Plan, 338 F.3d 755, 759 (7th Cir. 2003) ("The basic tradeoff involved in determining actuarial equivalence between a lump-sum and an accrued pension benefit is between a present and a

future value, and the method of equating them is the application of a discount rate to the future value.").

Key to this calculation is the discount rate, "which is simply an interest rate used to shrink a future value to its present equivalent." Berger, 338 F.3d at 759. The higher the discount rate, the lower the present lump-sum value of the annuity. When participants elect to receive their benefits in a lump-sum upon retirement or separation from employment, plans must pay a lump-sum that is no less than the lump-sum determined using the discount rate and mortality table prescribed in Treasury regulations issued pursuant to IRC section 417(e)(3). See 29 U.S.C. § 1055(g)(3). The discount rate used under those regulations is the average yield on 30-year Treasury Constant Maturities ("30-year Treasury rate"). 26 C.F.R. § 1.417(e)-1(d); Esden v. Bank of Boston, 229 F.3d 154, 159 (2d Cir. 2000) (explaining that in calculating actuarial equivalent lump-sums, "the discount rate is prescribed by statute"). Consistent with this requirement, this was the method prescribed by the Cash Balance Plan. See JA 256. Thus, a participant in the Foot Locker Plan who retired on February 1, 1996, and elected to receive his benefit in a lump-sum, would have been entitled to have his minimum lump-sum benefit determined by a discount rate equivalent to the 30-year Treasury rate then in effect (in conjunction with the prescribed mortality table). At the time of the conversion

in December 1995, this rate was 6.06%. See http://www.irs.gov/Retirement-Plans/Weighted-Average-Interest-Rate-Table.

To be sure, the IRC and IRS guidance did not specify how opening account balances must be determined for the time period in which the conversion occurred. The discount rate under section 417(e)(3) need only have been used to determine the minimum amount of a benefit paid out in a lump-sum. Nevertheless, because the 1996 SPD informed participants that their opening balances would equal the "actuarial equivalent lump sum value" of their accrued benefit under the old plan, it strongly suggested that initial account balances would be determined in the same manner used to generate a participant’s minimum lump-sum benefit. But instead of using the applicable 30-year Treasury rate to calculate the initial account balance (6.06%), Foot Locker applied a discount rate of 9%. JA 1391. Foot Locker's use of a higher discount rate than the one prescribed by ERISA, the Internal Revenue Code, and the Plan itself for determining actuarial equivalent lump-sums meant that participants' initial account balances were much less than their ERISA-protected accrued benefits under the pre-1996 Plan, and thus much less than the amount that participants would have expected as the "actuarial equivalent lump sum value of [their] accrued benefits" promised by Foot Locker.

As a result, many employees who participated in the pre-1996 Plan – who were entitled, at a minimum, to their accrued benefit under the pre-1996 Plan – did

not accrue any new benefits following the conversion until their lesser account balances, through annual interest and compensation credits, caught up with, or "wore away," their ERISA-protected accrued benefits under the pre-1996 Plan. SA 41-42. In Mr. Osberg's case, because the deficit between his initial account balance and his accrued benefit under the pre-1996 Plan was so substantial, he did not accrue any new benefits between 1996 and his retirement in 2002. JA 481, 1407-09.

While the documents expressly highlighted the "growth" participants could expect to receive in their cash balance accounts, see supra pp. 4-5, Foot Locker did not disclose either in its November 1995 Memo or in the 1996 SPD that many participants, like plaintiff, would work for an extended period of time without accruing any additional benefits.[1] This omission persisted in the "Personal Benefit Statements" Foot Locker issued to participants in the years following the conversion, which advised participants only of their account balances with no indication that this amount might be less than their pre-1996 accrued benefit. See JA 371-76. And while the "Pension Options Form" plaintiff was issued upon his separation from employment – six years after he had stopped accruing benefits – indicated that the lump-sum distribution to which he was entitled ($25,695.96)

[1] According to the Plaintiff's actuarial expert, the accrual of benefits was frozen for 98.6% of participants in the pre-1996 plan, JA 898, and the average expected wear-away period as of the conversion date was 3.98 years. Id. at 913.

exceeded his account balance ($20,093.78), JA 387, there was no indication even then that this higher lump-sum amount stemmed from plaintiff's pre-1996 Plan benefit, as this form nowhere mentioned the pre-1996 Plan. See JA 305. There is no other evidence in the record suggesting that Foot Locker ever notified Osberg that his pre-1996 Plan benefit was greater than his account balance.

Acting on behalf of a putative class of all individuals who participated in the Foot Locker Plan both before and after January 1, 1996, plaintiff brought suit on February 23, 2007 against Foot Locker and (nominally) the Plan. The now-amended complaint asserts four claims under ERISA section 502(a), only two of which – Counts Three and Four – are relevant to this brief. Count Three alleges that defendants, by issuing SPDs that failed to disclose the amended Plan's wear-away effects, violated ERISA section 102(a), 29 U.S.C. § 1022(a), which requires SPDs to clearly and accurately inform participants about their rights and benefits under their plans. JA 130-32. In Count Four, plaintiff claims that defendants, through their misrepresentations and omissions described above, violated the fiduciary standards set out in ERISA section 404(a), 29 U.S.C. 1104(a). JA 133-35. To remedy the violations asserted in both counts, plaintiff sought equitable relief under section 502(a)(3).

The district court entered summary judgment for defendants on Counts Three and Four. See SA 37-51. The court first held that the Count Three claim

alleging inadequate SPDs in violation of section 102(a), accrued in 2002, when plaintiff received a lump-sum distribution from the Plan in an amount greater than his account balance statement, which the court found should have alerted plaintiff to the wear-away. Id. at 45-47. Thus, the court concluded that this claim was time-barred by the applicable three-year statute of limitations borrowed from New York law. Id. The court additionally held that, in any event, plaintiff could not demonstrate that defendants' actions and omissions entitled him to the equitable remedies of surcharge and reformation sought in Counts Three and Four. Id. at 47-50.[2]

SUMMARY OF ARGUMENT

This Court should reverse the district court's entry of summary judgment for Foot Locker on plaintiff's claims for equitable relief under section 502(a)(3) to redress Foot Locker's asserted violations of ERISA's summary-plan-description and fiduciary-duty provisions (sections 102(a) and 404(a)). The district court disposed of both claims on the grounds that plaintiff had failed to offer sufficient evidence that Foot Locker's inadequate and misleading disclosures entitled him to the two equitable remedies he sought on those claims, surcharge and reformation.

As to surcharge, the district court impermissibly weighed the evidence plaintiff offered in support of that remedy's actual-harm requirement and further

[2] Because the court had earlier dismissed Counts I and II, see SA 1-28, this disposed of the case in its entirety.

drew inferences in favor of Foot Locker, the party moving for summary judgment. Plaintiff established that he incurred a years-long benefits freeze and indicated that this likely would not have happened if not for Foot Locker's misleading notices. Ignoring this evidence of harm, the district court instead found that the Cash Balance Plan – despite freezing plaintiff's benefits – was nevertheless beneficial to plaintiff because it paid him benefits in a lump-sum (unlike the pre-1996 Plan). The court posited that plaintiff might have preferred the lump-sum even if Foot Locker had disclosed the freeze. However, this type of evidence weighing and inference drawing is not permissible on summary judgment.

The district court made these same errors in rejecting a reformation remedy, which the court erroneously conflated with surcharge. In so doing, the court failed to apply the distinct standards for obtaining reformation as articulated by the Supreme Court in CIGNA Corp. v. Amara, 131 S. Ct. 1866 (2011) – namely, inequitable conduct by Foot Locker, and mistake on plaintiff's part. Properly analyzed, plaintiff proffered more than sufficient evidence to withstand summary judgment on reformation, as he showed that Foot Locker's communications failed to accurately describe the Cash Balance Plan's wear-away effects (inequitable conduct) and that he had been misled by those communications (mistake).

The district court also erroneously dismissed plaintiff's section 102(a) claim as untimely. Under federal common law, plaintiff's claim did not accrue until he

discovered or reasonably should have discovered the violations. Under the applicable regulations, the SPD should have disclosed in a "manner calculated to be understood by the average plan participant" the possibility that his benefit accruals would be frozen for an extended period. The disclosures here did no such thing, but instead suggested that participants would continuously accrue benefits under the Cash Balance Plan. Particularly given the complexity of wear away, it was error to hold that plaintiff should have discerned from the scattered assortment of clues identified by the district court that the cash balance conversion, which Foot Locker billed as beneficial to participants, would actually result in a benefits freeze.

ARGUMENT

I. PLAINTIFF PROFERRED SUFFICIENT EVIDENCE TO WITHSTAND SUMMARY JUDGMENT ON HIS ENTITLEMENT TO A SURCHARGE REMEDY

Counts Three and Four of the Amended Complaint both arise under ERISA section 502(a)(3), which authorizes claims for "appropriate equitable relief" to redress ERISA violations. 29 U.S.C. § 1132(a)(3) (SA 75). As the Supreme Court has repeatedly explained, "equitable relief" means "the kinds of relief 'typically available in equity' in the days of 'the divided bench,' before law and equity merged." US Airways, Inc. v. McCutchen, 133 S. Ct. 1537, 1544 (2013) (quoting Mertens v. Hewitt Associates, 508 U.S. 248, 256 (1993)). To the extent a plaintiff

must satisfy certain requirements before obtaining a given equitable remedy, therefore, "it is because the specific remedy being contemplated imposes such a requirement" as determined by "looking to the law of equity." Amara, 131 S. Ct. at 1881.

In Amara – a case, like this one, alleging ERISA notice violations associated with a cash balance conversion – the Supreme Court identified surcharge as among the equitable remedies available to the plaintiffs. Amara, 131 S. Ct. at 1880. The Court explained that "[e]quity courts possessed the power to provide relief in the form of monetary 'compensation' for a loss resulting from a trustee's breach of duty," a remedy "sometimes called a surcharge." Id. Equity courts took a "flexible approach" to surcharge by "'mold[ing] the relief to protect the rights of the beneficiary according to the situation involved.'" Id. at 1881 (quoting G.T. Bogert & G. G. Bogert, Trusts and Trustees § 861, at 4 (rev.2d ed. 1995)). Thus, a plaintiff seeking surcharge "need only show harm and causation," as "proved (under the default rule for civil cases) by a preponderance of the evidence." Id. at 1881.

The district court held that Osberg fell short of these hurdles for two reasons. First, the court found that he failed to "present evidence to raise a material dispute of fact that he was harmed economically by the conversion." SA 48. The district court noted that plaintiff chose to receive not an annuity but instead a lump-sum –

which was unavailable under the pre-1996 Plan if the actuarial present value of a participant's accrued benefit exceeded $3500, as plaintiff's did – and explained that "employees value the opportunity to obtain a sum immediately that they can spend or invest in an effort to receive higher returns than they would earn under an annuity." Id. The court further found that even if plaintiff had suffered harm, he failed to demonstrate that Foot Locker's notice violations were the cause of it. Although the plaintiff presented evidence that Foot Locker likely would not have adopted the same plan if it had been forced to explain the wear-away feature to its employees, the district court faulted plaintiff for "present[ing] no evidence as to what type of pension plan would have been adopted as an alternative to the cash balance plan had participants known of a wear-away period, and further, whether those plans would have necessarily been better than the lump sum he received." SA 49-50.

Both strands of the district court's actual-harm analysis – harm and causation – are faulty. In deeming plaintiff economically unharmed by the cash-balance conversion, the district court prematurely donned its fact-finder cap and impermissibly tipped the scales in Foot Locker's favor. "On a motion for summary judgment, the court is not to weigh the evidence, or assess the credibility of the witnesses, or resolve issues of fact, but only to determine whether there are issues

to be tried." United States v. Rem, 38 F.3d 634, 643 (2d Cir. 1994). Yet evidence weighing is precisely what the district court did here.

Plaintiff squarely presented evidence of "actual harm" – the freezing of his pension benefits following the cash-balance conversion that lasted until his departure from the company. The district court simply chose to discount this harm because the Cash Balance Plan, while freezing benefits, nonetheless afforded participants a lump-sum option (unlike the pre-1996 Plan), which "employees value." SA 48. While the court might have been free to consider employee preference for a lump-sum if it had been weighing the evidence at trial, it was not permitted to do so at the summary judgment stage. Certainly, there is little basis in logic – or in evidence of record – to conclude that employees would necessarily prefer to receive a benefit that was worth less than what they thought they were promised, as long as they could receive the smaller benefit up-front in a single cash payment. Further, for purposes of resolving a summary judgment motion, "the court must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought." Rem, 38 F.3d at 643. The court did the opposite here.

As to causation, the district court ignored substantial record evidence suggesting that Foot Locker never would have frozen plaintiff's benefits in the first place had the company been forthcoming about it. In deposition testimony, a Foot

Locker official involved in planning the cash balance conversion confirmed that the company had flatly rejected retaining the pre-1996 Plan and simply freezing benefits. JA 755 (Q: "A freeze that was openly discussed as a freeze was a nonstarter from the team's point of view as a proposal no matter how much money it saved." A: "True."). As a Foot Locker Vice President explained, such a freeze on pre-1996 Plan benefits would have had an unacceptably deleterious effect on employee morale. JA 568. In contrast, the conversion to the Cash Balance Plan was accomplished in a way that effectively – and surreptitiously – permitted Foot Locker to freeze benefits while avoiding employee backlash. On these facts, a reasonable trier of fact could conclude that Foot Locker would not have frozen benefits in this manner if it had felt compelled to do so openly, as the law required. JA 757 (Q: "was [the cash balance conversion with wear-away] 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." A: "Correct.").

This evidence was more than enough to get plaintiff past summary judgment on causation. Ryder Energy Distrib. Corp. v. Merrill Lynch Commodities, Inc., 865 F.2d 492, 493 (2d Cir.1989) (When a party moves for summary judgment on causation, the burden shifts to the non-movant to present "persuasive evidence that its claim of causation [is] not 'implausible.'"). At a minimum, because Foot Locker

allegedly was less than candid about the rate at which benefits accrued under the Cash Balance Plan, employees lost the right to object to the Plan on this basis, and the record evidence of Foot Locker's sensitivity to employee morale suggested that such objections might well have dissuaded Foot Locker from making the changes.

Aside from its disregard for the record evidence of a direct causal link between Foot Locker's SPD violation and the benefits freeze, the district court's demand that plaintiff prove that he "necessarily" would have been better off if Foot Locker had complied with its ERISA notice obligations is incorrect. SA 49. The Supreme Court requires "actual harm" to be proved "by a preponderance of the evidence," Amara, 131 S. Ct. at 1881, meaning that harm is more likely than not. To the extent the district court placed a standard approaching certainty on plaintiff, it is inconsistent with Amara.

It is also at odds with Second Circuit precedent. As this Court stated in In re Beck Indus., Inc., 605 F.2d 624, 636 (2d Cir. 1979), "[c]ourts do not take kindly to arguments by fiduciaries who have breached their obligations that, if they had not done this, everything would have been the same." Rather, "'as between innocent beneficiaries and a defaulting fiduciary, the latter should bear the risk of uncertainty as to the consequences of its breach of duty.'" Id. (quoting Estate of Stetson, 345 A.2d 679, 690 (1975)). Similarly, in Donovan v. Bierwirth, 754 F.2d 1049 (2d Cir. 1985), the Court explained that, in determining the proper measure

of damages that resulted from fiduciary breaches in imprudently investing plan assets in employer stock, "the court should presume that the funds would have been used in the most profitable" alternative investment. Id. at 1056. The fiduciary could then rebut this presumption by proving that the funds, had they been properly invested, would in fact have earned something less. Placing "[t]he burden of proving that the funds would have earned less than that amount [] on the fiduciaries found to be in breach of their duty" represents "nothing more than application of the principle that, once a breach of trust is established, uncertainties in fixing damages will be resolved against the wrongdoer." Id. Here, by requiring plaintiff to prove precisely "what type of pension plan would have been adopted as an alternative to the cash balance plan had participants known of a 'wear away' period," the district resolved these uncertainties against plaintiff. SA 49.

Furthermore, the district court's insistence that plaintiff prove "that he was harmed economically," id. at 48 (emphasis added), and that no such economic harm would have resulted had Foot Locker properly disclosed the freeze, id. at 49-50, is erroneous. In noting that "actual harm . . . might also come from the loss of a right protected by ERISA or its trust-law antecedents," Amara, 131 S. Ct. at 1881, the Amara Court suggested that a plaintiff need only establish a causal connection between a fiduciary breach and the loss of an ERISA-protected right (such as the right to receive accurate SPDs). But see Skinner v. Northrop

Grumman Retirement Plan B, 673 F.3d 1162, 1167 (9th Cir. 2012) (disagreeing that loss of a right to an accurate SPD is itself harm). And, as in Amara, because the plaintiff was misinformed about the true nature of the change, he lost forever the right to object. Especially in tandem with the substantial evidence that Foot Locker might not have adopted the change if it had to clearly inform its employees of the freeze associated with the wear-away, plaintiff showed more than enough to get past summary judgment and to receive at least some monetary recovery unless Foot Locker can establish that he would not have fared better if Foot Locker had complied with its statutory obligations.

II. PLAINTIFF PROFFERRED SUFFICIENT EVIDENCE TO WITHSTAND SUMMARY JUDGMENT ON HIS ENTITLEMENT TO A REFORMATION REMEDY

A second type of equitable relief sought by plaintiff is an order reforming the Plan to provide the benefits that the inadequate and misleading notices seemed to promise, but which the Plan did not in fact provide. JA 508. The Supreme Court in Amara listed reformation alongside surcharge as "a traditional power of an equity court," 131 S. Ct. at 1879, and one that thus "fall[s] within the scope of the term 'appropriate equitable relief' in § 502(a)(3)." Id. at 1880. The Amara Court further identified the requirements for reformation at equity, explaining that "[e]quity courts . . . would reform contracts to reflect the mutual understanding of the contracting parties where fraudulent suppressions, omissions, or insertions

materially affected the substance of the contract." Id. at 1881 (internal citations and quotations omitted). As the Court earlier put it, reformation is appropriate in the face of "a mutual mistake, or mistake on one side and fraud or inequitable conduct on the other." Simmons Creek Coal Co. v. Doran, 142 U.S. 417, 435 (1892); see Nechis v. Oxford Health Plans, Inc., 421 F.3d 96, 103 (2d. Cir. 2005) (recognizing "fraud, mutual mistake or terms violative of ERISA" as bases for reformation).

Applying the requirements for reformation by "looking to the law of equity," Amara, 131 S. Ct. at 1881 – inequitable conduct by Foot Locker and mistake on plaintiff's part – plaintiff presented ample evidence to withstand summary judgment. Plaintiff offered evidence that Foot Locker engaged in inequitable conduct by issuing SPDs that were, at best, unclear and, at worst, misleading, and otherwise actively encouraged its employees to believe that they would receive additional retirement benefits as they performed their work each day when in reality their benefit accruals were frozen. See JA 294, 304-305, 307. And, as plaintiff further testified, all of this led him to mistakenly believe that he continued to accrue benefits following the conversion. JA 561. If plaintiff proves his case, the court thus has authority to grant a reformation remedy ensuring that participants receive the full benefit of the bargain that Foot Locker led them to believe they had struck with their employer.

The district court disagreed, but it did so for reasons untethered to the requirements for reformation at equity. Indeed, the court did not even analyze whether Foot Locker's notices constituted inequitable conduct or whether plaintiff was mistaken about the actual terms of the Cash Balance Plan. Lumping reformation with surcharge, the court instead faulted plaintiff for failing to demonstrate harm because he elected to receive his benefits in a lump-sum, which he could not have received under the pre-1996 Plan. SA 48. Not only is this wrong for the same reasons it was wrong for surcharge, see Part I, supra, it also ignores the principal injury that reformation is meant to remedy: Foot Locker's failure to provide the benefits that it misled plaintiff into believing he would be receiving. See Amara, 131 S. Ct. at 1881 (reformation appropriate where misunderstanding is created by "fraudulent suppressions, omissions, or insertions"). Consequently, the district court's decision should be reversed and the case remanded so that the district court can evaluate plaintiff's entitlement to reformation under the standards imposed at equity, in light of the evidence offered by plaintiff.[3]

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[3] In this regard, there is no reason to think that "actual harm" is a separate requirement for reformation. The Supreme Court in Amara mentioned "actual harm" only when discussing the prerequisites for surcharge. 131 S. Ct. at 1881 ("a fiduciary can be surcharged under § 502(a)(3) only upon a showing of actual harm"). Thus, in reviewing the case on remand from the Supreme Court and Second Circuit, the district court in Amara expressly disagreed with the Osberg court's imposition of an actual harm standard for reformation, explaining that "the

Finally, we note that because surcharge and reformation are alternative remedies, an error on either remedy warrants reversal. Under a reformation remedy, plaintiff would be entitled to benefits under the Plan as reformed to comport with Foot Locker's representations of continual post-conversion accrual. This would entail awarding plaintiff benefits under the "A plus B" formula that Foot Locker led participants to expect – that is, plaintiff's accrued benefit under the pre-1996 Plan (Part A) plus additional benefits going forward under the Cash Balance Plan (Part B). This type of "make-whole" relief is the same relief plaintiff would be entitled to under a surcharge remedy. See Amara, 131 S. Ct. at 1881 (characterizing surcharge as a "flexible" remedy whereby equity courts "simply ordered a trust or beneficiary made whole following a trustee's breach of trust.").

III. PLAINTIFF'S ERISA SECTION 102(a) CLAIM DID NOT ACCRUE IN 2002 UPON RECEIPT OF HIS LUMP-SUM DISTRIBUTION

Section 102 of ERISA requires that SPDs be "sufficiently accurate and comprehensive to reasonably apprise . . . participants and beneficiaries of their rights and obligations under the plan" and that they "be written in a manner calculated to be understood by the average plan participant." 29 U.S.C. § 1022(a) (SA 55). Thus, the SPD must provide understandable notice of, among other

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Osberg court applies the 'actual harm' requirement too broadly," because the Supreme Court's decision in Amara "discusses the 'actual harm' requirement only in the context of surcharge." Amara v. CIGNA Corp., No. 3:01-cv-2361, 2012 WL 6649587, at *6, n.7 (D. Conn. Dec. 20, 2012).

things, "the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for non-forfeitable pension benefits; [and] circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." 29 U.S.C. § 1022(b) (SA 55). Labor Department regulations reinforce the SPD's critical role, mandating that it "must not have the effect [of] misleading, misinforming or failing to inform participants" and that "[a]ny description of exceptions, limitations, reductions, and other restrictions of plan benefits shall not be minimized." 29 C.F.R. § 2520.102-2(b) (SA 55).

The district court erred in finding plaintiff's claim (Count Three) alleging that the SPDs failed to meet these standards time barred. In the process, it undermined ERISA's requirement for clear disclosures calculated to be understood by the "average plan participant" by charging plaintiff with knowledge of SPD violations that he could have acquired only by expertly piecing together a few disparate clues that fell far short of the statutory and regulatory standards.

ERISA prescribes a statute of limitations only for violations of part 4 of Title I of ERISA, such as plaintiffs' fiduciary breach claim (Count Four). See 29 U.S.C. § 1113. For any other claim arising under ERISA section 502, such as a claim alleging a violation of section 102(a) (a violation of part 1 of Title I), "the controlling limitations period is that specified in the most nearly analogous state limitations statute." Miles v. New York State Teamsters Conference Pension &

Ret. Fund Employee Pension Ben. Plan, 698 F.2d 593, 598 (2d Cir. 1983). "[W]hen a federal court determines the limitations period by applying an analogous state statute of limitations, the court nevertheless looks to federal common law to determine the time at which the plaintiff's federal claim accrues." Guilbert v. Gardner, 480 F.3d 140, 149 (2d Cir. 2007). For this, "[a] federal court generally employs the 'discovery rule,' under which 'a plaintiff's cause of action accrues when he discovers, or with due diligence should have discovered, the injury that is the basis of the litigation.'" Id. (citing Union Pac. R. Co. v. Beckham, 138 F.3d 325, 330 (8th Cir.1998)). Here, plaintiff's section 102(a) claim accrued when he either discovered, or should have discovered, that, contrary to the 1996 SPD's promise of continuous post-conversion benefit accruals, his benefits were in fact frozen.

The court reasoned that plaintiff should have made this discovery upon receiving his lump-sum distribution in 2002 – five years prior to filing suit, and thus outside the applicable three-year statute of limitations (borrowed from New York's limitations period for statutory violations, N.Y. C.P.L.R. § 214). The district court deemed plaintiff's alleged knowledge of three facts in 2002 as sufficient to trigger constructive notice of the deficient SPDs: (1) that plaintiff was entitled to the greater of his pre-1996 Plan benefit or his account balance; (2) that "the initial cash balance would be discounted by a 9 percent interest rate, rather

than the (lower) 30-year Treasury rate;" and (3) that "he received a statement showing that the amount he had earned under the cash balance program was more than $5,000 less than the amount to which he was entitled under the defined benefit plan." SA 46. Armed with these facts, plaintiff, in the court's view, "needn't have been an actuary to realize that his benefit had been frozen as a result of the cash balance conversion." Id.

Even if knowledge of this combination of facts would somehow be sufficient to put the average participant on notice of wear-away and a consequent ERISA notice violation, the record is clear that at least two of these pieces of information were not known to plaintiff in 2002. First, there is nothing in the record to suggest that plaintiff had any reason to know that his initial account balance was "discounted" by a 9% interest rate instead of the lower 30-year Treasury rate. Id. The only mention of a 9% rate in the 1996 SPD comes in the definition of "initial account balance," which states that "this value is determined actuarially based upon a 9% rate of interest and the mortality table set forth in IRS rulings." JA 299. But the SPD nowhere explains that the 9% "rate of interest" operates as a "discount rate" that reduces, rather than increases, the amount of principal. Worse still, the SPD fails to explain the practical significance of the 9% interest rate: that it reduced participants' initial account balances to a level below their accrued benefits, and that this had the effect of starting plaintiff in a hole from which he

had to climb out before accruing additional benefits. This omission is particularly glaring given that the SPD elsewhere informs participants that their initial account balances are equivalent to "the value of your Plan benefit as of December 31, 1995, before the Plan was amended." JA 304. Having been told directly that their initial account balances and accrued benefits are the same, the average participant could not have been expected to conclude otherwise based on the unadorned statement that initial account balances are "determined actuarially based upon a 9% rate of interest."

Plaintiff also had no reason to have been aware in 2002 of the third fact the district court imputes to him: "that the amount [plaintiff] had earned under the cash balance program was more than $5000 less than the amount to which he was entitled under the defined benefit plan." SA 46. The district court's factual support for this proposition is a benefits statement plaintiff was provided in 2002, which indicates that plaintiff's cash balance account balance was $20,093.78, whereas the "lump-sum" to which he was entitled was $25,695.96. See JA 387.

This statement nowhere indicates that the higher lump-sum amount was "the amount to which [Plaintiff] was entitled under the defined benefit plan." SA 46. Indeed, the statement does not even mention the pre-1996 Plan. Nor could plaintiff have reasonably been expected to discern on his own that the higher lump-sum amount listed on his benefits statement was his pre-1996 Plan benefit, since Foot

Locker expressly informed participants in SPDs that their lump-sum benefits might be greater than their account balances for a reason that has nothing to do with the pre-1996 Plan. In a section of the 1996 SPD entitled "How Your Retirement Benefit is Determined," the SPD explains that, upon termination of employment, participants' account balances would be increased by interest credits up to normal retirement date, and that "[t]he resulting amount is converted to an annuity using factors required by federal law and IRS regulations." JA 305. The SPD then explains that "[t]he lump sum payable to you is the greater of your account balance or the amount determined by multiplying the annuity payable to you by factors required by federal law and IRS regulations." Id. (emphasis added). Thus, the average participant would likely conclude – as plaintiff himself testified he did, JA 545 – that the reason his lump-sum amount exceeds his account balance is not because of a non-disclosed wear-away phenomenon, but rather because of the IRC-multipliers mentioned in the SPD itself.[4]

Thus, out of three pieces of information cited by the district court, plaintiff should have known only of one of them in 2002: that he was entitled to the greater of his pre-1996 Plan benefit or his Cash Balance Plan benefit. But the 1996 SPD's

[4] The record in this case demonstrates that even an actuarially sophisticated participant would not necessarily have discovered the wear-away based on a benefits statement that showed a lump-sum payout in excess of the cash balance amount. Foot Locker's own benefits manager testified that she learned that her benefits had worn away for the first time at her deposition, long after receiving her pension benefit from the Plan. See JA 639

minimum-benefit provision merely told participants that their benefits would not fall below a particular floor; it did not tell them that they would be stuck at that floor for years on end. In any event, this one sentence certainly would not dispel the message conveyed by the rest of the SPD (to say nothing of the November 1995 Memo) of inexorable benefit growth. As the district court found in its 2009 opinion denying Foot Locker's motion to dismiss plaintiff's section 102(a) claim (issued by Judge Batts), "[the] 1996 SPD's single reference to participants' 'greater-of' option was insufficient to inform participants of the reduced benefits under the amended Plan." SA 26.

Other courts have held that cryptic pieces of information of the type relied upon by the district court here are insufficient to trigger the statute of limitations on an ERISA claim, especially one involving a complex actuarial concept. In Young v. Verizon's Bell Atlantic Cash Balance Plan, 615 F.3d 808 (7th Cir. 2010), the plaintiff alleged that Verizon improperly calculated her lump-sum payout under her cash balance plan. Verizon argued that the plaintiff's claim accrued upon the plaintiff's mere receipt of her lump-sum benefit computed under Verizon's interpretation of the relevant plan terms. But as the Seventh Circuit recognized, at the time of the benefits payout "the parties' dispute over the correct interpretation of the Plan had not yet developed," and "nothing suggests that the $286,095 [lump-sum] payment that [the plaintiff] received should have been a red flag that she was

underpaid." Id. at 816. See also Thompson v. Retirement Plan for Employees of S.C. Johnson & Son, Inc., 651 F.3d 600, 602 (7th Cir. 2011) (characterizing communications that "offered only oblique guidance about the crucial flaw at issue" as a "mere collection of hints" that did not put plaintiffs on notice of their claims, particularly given "the obscurity of the right at issue").

Similarly, plaintiff's receipt of a lump-sum payment in an amount slightly above the amount in his cash balance account, where the Plan had previously informed participants in its SPD that such a discrepancy could occur for a reason that has nothing to do with wear-away, was not a "red flag" that should have put plaintiff on notice that his benefits in fact wore away and that the Plan failed to inform him of this possibility in its SPDs. Young, 615 F.3d at 816. Given the "obscurity" of the wear-away issue, see Thompson, 651 F.3d at 605, the communications cited by the district court were insufficient to put plaintiff on notice of his claims.

CONCLUSION

For these reasons, the Secretary requests that the district court's decision be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 32(a)(7)(B) -(C), I certify that this amicus brief uses a mono-spaced typeface of 14 characters per inch and contains 6,975 words.

Dated: May 24, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of May, 2013, true and correct copies of the foregoing Brief of the Amicus Curiae Seth D. Harris., Acting Secretary of the United States Department of Labor, in Support of Appellant Requesting Reversal, were served upon all counsel of record and this Court by ECF.

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