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

AMICI CURIAE BRIEF OF THE ERISA INDUSTRY COMMITTEE AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLEES

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STATEMENT PURSUANT TO FED. R. APP. P. 26.1

The ERISA Industry Committee and the Chamber of Commerce of the United States of America are non-profit, tax-exempt organizations incorporated in the District of Columbia.

The ERISA Industry Committee and the Chamber of Commerce of the United States of America have no parent corporations, and no publicly held corporation owns more than 10% of their stock or membership interests.

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The ERISA Industry Committee ("ERIC") and the Chamber of Commerce of the United States of America ("the Chamber") respectfully submit this *amici curiae* brief in support of the request of Appellees, Foot Locker, Inc., and Foot Locker Retirement Plan (collectively, "Foot Locker"), that the decision of the District Court be affirmed. All parties have consented to the filing of this brief.

INTEREST OF AMICI CURIAE

ERIC is a nonprofit organization representing America's largest private employers sponsoring pension, savings, healthcare, disability, and other employee benefit plans that provide benefits to millions of active workers, retired persons, and their families nationwide.[1] ERIC's members do business in more than one State and many have employees in all fifty States. ERIC frequently participates as *amicus curiae* in cases that have the potential for far-reaching effects on employee benefit design or administration under the Employment Retirement Income Security Act of 1974 ("ERISA"), as amended.[2]

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[1] Under Fed. R. App. P. 29(c)(5), ERIC and the Chamber certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of the brief; and no person other than ERIC or the Chamber or their members contributed money intended to fund the preparation or submission of the brief.

[2] *See, e.g.*, *Conkright v. Frommert*, 130 S. Ct. 1640 (2010); *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248 (2008); *Beck v. PACE Int'l Union*, 551 U.S. 96 (2007); *General Dynamics Land Sys, Inc.. v. Cline,* 540 U.S. 581 (2004); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing the interests of over 300,000 direct members and indirectly representing an underlying membership of three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber has filed numerous *amicus curiae* briefs in ERISA cases before the Supreme Court and the federal courts of appeals on issues of vital concern to the nation's business community.[3]

This is such a case. As sponsors of employee benefit plans of all types governed by ERISA, the members of ERIC and the Chamber have a substantial interest in knowing that courts will not rewrite the express terms of their plans or otherwise impose remedies that cause plan liabilities to expand out of all proportion to those intended. No business should have to sustain liabilities that third parties have discretion to alter unilaterally. Existing law provides rigorous standards for determining when judicial intervention of the type sought here is

[3] *See, e.g.*, *Heimeshoff v. Hartford Life & Accident Ins. Co.*, No. 12-729 (S. Ct.); *U.S. Airways v. McCutchen*, 133 S. Ct. 1537 (2013); *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011); *Conkright v. Frommert*, 130 S. Ct. 1640 (2010); *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248 (2008); *Beck v. PACE Int'l Union*, 551 U.S. 96 (2007); *Frommert v. Conkright*, No. 12-0067 (2d Cir.).

warranted. Appellant and his *amicus* the Department of Labor ("DOL") seek to re-write and drain those standards of any meaningful content. If they succeed, the outcome will undermine the foundation on which ERISA's system of voluntary, employer-provided benefits rests, to the detriment of both employers and employees. Accordingly, ERIC and the Chamber respectfully submit this brief as *amici curiae* in support of Appellees.

SUMMARY OF ARGUMENT

Appellant's claims rest on three interrelated arguments, all of which are incorrect: (1) that ERISA required Foot Locker to inform employees about the possible period of lump-sum "wear-away" following conversion of its traditional defined-benefits pension plan to a cash-balance plan that included a new lump-sum payment option, (2) that Foot Locker's alleged failure to do so constituted a breach of fiduciary duty and a violation of ERISA's summary plan description ("SPD") notice requirements, and (3) that, as an equitable remedy, the Foot Locker Retirement Plan ("Foot Locker Plan" or "Plan") should be reformed and a surcharge imposed for the difference between what Appellant claims he expected and what the Plan expressly provided. Because Appellant's assertions are unsupported by — and indeed are contrary to — the actual requirements of ERISA and traditional principles of equity, the District Court's entry of summary judgment in favor of Foot Locker was proper and should be affirmed.

"Wear-away" is a term of art describing a pattern of pension accruals as a participant continues to work. It does not describe a benefit formula or the terms of a plan, which are the mandated topics for an SPD. As shown below, ERISA did not require Foot Locker to discuss wear-away when it converted to the Plan in 1996, and it would be *in*equitable now to impose such a mandate retroactively. Even if Foot Locker's communications to participants about the conversion had been errant in some respect (and they were not), Appellant has not satisfied the heightened requirements for obtaining the equitable remedies of reformation and surcharge.

Courts will not rewrite the terms of written agreements absent clear and convincing evidence that documented terms conflict with the parties' actual intentions due to mutual mistake or fraud. *See CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1879, 1884 (2011). Appellant presented no colorable evidence of either circumstance. Nor will courts impose an equitable surcharge without a showing of "actual harm" caused by the alleged wrong. *Id.* at 1880-81. Appellant's theory of harm — that with more information about wear-away employees would have risen up and Foot Locker would have adopted a more lucrative plan — is completely speculative and belied by the indisputable evidence of its dire economic condition. The attempt by Appellant and DOL on appeal to shift the evidentiary burden onto Foot Locker to disprove Appellant's claimed harm is simply new lipstick on the "likely harm" presumption that *Amara* expressly rejected. *Id*. Finally, Appellant's claims asserted under 29 U.S.C. §§ 1022 and 1024(h) are barred by the statute of limitations because his claim accrued no later than when he received his lump-sum retirement payment under the Plan, which happened more than three years prior to his filing suit.

ARGUMENT

I. ERISA Does Not Require Foot Locker To Describe Wear-Away.

SPDs are summaries of plan terms, to be written in plain, concise language. They are not required to include an analysis of the impact of those terms on plan participants' varying situations, no matter how speculative or uncertain. Otherwise, SPDs would be voluminous, and their content inaccessible. Finding fault where such an analysis is lacking − or even rewriting the plan because of this perceived omission − would undermine ERISA, not promote it. In this case, the alleged omission concerns "wear-away," a common and lawful pattern of pension accruals that is a consequence of plan terms and does not need to be covered in a summary of plan terms.

A. Wear-away is a common occurrence in pension plans.

Wear-away is a period during which a pension benefit, when expressed in a particular form such as a lump sum or an annuity, does not increase. Appellant and his amici seek to portray wear-away as a deviation from the norm. They imply that pension benefits ordinarily accrue in linear fashion as an employee performs work for the plan sponsor, much as the employee receives a regular paycheck for each period of work performed.

Pension accruals, however, do not remotely resemble paychecks and never have. The implication that they so do fundamentally misconstrues the nature of pension plans, which are designed to reward employees for the entire period of their service with the plan sponsor, not discrete portions. As a result, pension plans generally calculate benefits over long periods of time based on numerous factors that reflect the ultimate total pension the plan sponsor wishes to provide for the employee's entire period of service. Pay and service are two such factors. Pay, for example, typically is measured as an average spread over many years. *See, e.g.*, 26 C.F.R. § 1.411(b)-1(b)(3)(ii)(A) & (iii) Ex. 1 & 2 (examples of pay measured as (a) highest 3-year average in last 10 years of service, and (b) average over all years of service). Service itself is measured according to arcane ERISA conventions under which variations over a career in the sequence in which service is rendered can have a profound impact on the ultimate benefit provided. *See, e.g.*, 29 C.F.R. §§ 2530.200b-2 & -3 (multiple, alternative service crediting methods); 26 C.F.R. § 1.410(a)-7 (additional elapsed time service crediting method, including service spanning rules); 26 U.S.C. § 411(a)(6)(E) (break-in-service rules, including, *inter alia*, special rules for 1- and 5-year breaks in service, when pre-break service may be ignored, and absences due to maternity, paternity, or adoption). In addition, many pension plans increase benefits dramatically for long-service employees upon certain milestone events, such as attaining early retirement eligibility, when the value of a participant's benefit may double or triple.

These factors and numerous others taken into account in calculating employees' pensions inevitably cause accruals to vary significantly over time and from employee to employee. Perhaps more importantly, the factors can interact with one another in ways that are idiosyncratic and difficult to predict. Far from linear, the resulting pattern of accruals frequently resembles a series of peaks, valleys, and plateaus, as benefit accruals accelerate, decelerate, and stagnate at different times in the employee's career.

To be sure, ERISA and the Internal Revenue Code contain a requirement that pension benefits accrue at least ratably, or nearly ratably, over an employee's career. *See* 29 U.S.C. § 204(b)(1)(A)-(C); 26 U.S.C. § 411(b)(1)(A)-(C). But implementing this requirement proved a challenge for the drafters of both the statute and the implementing regulations. To overcome the natural and inevitable variability in pension accruals, the drafters were forced to assume away virtually all sources of that variability. As a result, the requirement generally is applied by disregarding plan amendments, early retirement subsidies, benefits that commence before or after normal retirement age and increases in future accrual rates under the plan (even when such increases are promised to occur), and by treating compensation, service, Social Security, cost-of-living, and "all relevant factors used to compute benefits" as remaining constant now and in the future. *See* 29 U.S.C. § 204(b)(1)(A)-(C); 26 U.S.C. § 411(b)(1)(A)-(C)*; see also, e.g.*, 26 C.F.R. § 1.411(b)-1(b)(2)(ii)(A)-(E) (disregarding for this purpose, respectively, plan amendments, future accrual rate increases, early retirement benefits, changes in any relevant benefit computation factor, and benefit accruals (or lack thereof) after normal retirement age). As one court put it, Congress wished to ensure that "fluctuations in a formula's accrual rate resulting from externalities to the [p]lan" would not cause it to fail the requirement. *Carollo v. Cement & Concrete Workers Dist. Council Pension Plan*, 964 F. Supp. 677, 682-83 (E.D.N.Y. 1997).

As a consequence of the natural and inevitable variability in pension accruals, periods of wear-away in pension plans occur frequently and for a variety of lawful reasons. *See, e.g.*, 26 C.F.R. § 1.410(b)-3(a)(2)(iii) (enumerating multiple circumstances under which an employee's benefit might not increase). For example, wear-away may occur when a plan's formula is amended because ERISA's "anti-cutback" rule requires an employee to receive the greater of (a) the benefits accrued prior to the plan amendment, or (b) the benefits accrued under the plan as amended. *Id.* § 1.411(d)-3(a)(4), Ex. 2 (recognizing wear-away as a valid method for satisfying the anti-cutback rule); *see also id.* § 1.401(a)(4)-

13(c)(4)(ii) & (iii) (approving wear-away approaches to amending plan formulas). Treasury regulations subject pension accruals to certain limitations that can cause benefits not to increase for a period. *See, e.g.*, *id.* § 1.415(b)-1(a)(1) (dollar and percentage-of-pay limits); *id.* § 1.436-1(e) (funding-based limits on additional accruals). Changes in law also may lead to wear-away. *See, e.g.*, Rev. Proc. 94-13, Part II, 1994-1 C.B. 566 (plan may offer greater of (a) benefit for service before change in law based on old, higher compensation limit, or (b) benefit for all service based on new, lower compensation limit); *see also* Pub. L. No. 99-514 § 1106(i)(3), 100 Stat. 2085, 2425-26 (1986) (same for change in law reducing limit on benefits). Similarly, in retirement plans that coordinate pension benefits with Social Security, increases in Social Security benefits, Social Security-covered compensation, or the Social Security wage base can induce long periods of wear-away. *See, e.g.*, *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 512-17 (1981) (describing effect of Social Security integration on pension accruals); *see also* 26 U.S.C. § 401(a)(15) (permitting but limiting impact of Social Security integration on pension accruals); 26 U.S.C. § 401(l)(3) (same); 26 C.F.R. § 1.401(l)-3 (same). A variety of other factors can also contribute to wear-away, including changes in interest rates and employee pay and service over time.

As a result, the existence, extent, and duration of wear-away depend on myriad external factors, the effects of which cannot be predicted accurately in advance and vary significantly from individual to individual. ERISA has never required SPDs to set forth how and why a participant's pattern of benefit accruals might rise or fall or plateau due to the interaction and influence of these external factors. And with good reason, since implementing such a requirement would pose an administrative and stochastic nightmare for plans and their administrators. The number of potential permutations are simply too great.

B. ERISA does not require disclosure of wear-away in an SPD.

An SPD need only provide a summary of the participants' "rights and obligations under the plan." 29 U.S.C. § 1022(a). This would include a summary of the key terms of the plan but not an explanation of the effect of those terms on the participant. *See, e.g.*, *Tomlinson v. El Paso Corp.*, 653 F.3d 1281, 1295-1296 (10th Cir. 2011) ("a wear-away period is a consequence of the change in plan terms" that need not be disclosed in an SPD absent deceit) (internal quotations and citation omitted).

ERISA and its implementing regulations specify when a plan must disclose the effect of plan terms, and this is not one of those enumerated circumstances. For example, a specific disclosure is required to inform participants when future accruals will decrease as a result of a plan amendments. 29 U.S.C. § 1054(h). Other disclosures are required to describe the relative value of distribution options offered to participants. 26 C.F.R. § 1.417(a)(3)-1(c)(1)(iv). Another set of disclosures are required when benefits are suspended as an employee continues to work. 29 C.F.R. § 2530.203-3(a).

Because ERISA is a "comprehensive and reticulated statute," *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980), it would be highly disruptive and surprising for a court to impose a general duty to disclose in an SPD not merely a summary of the plan's terms but also an analysis of the effect of these terms on participants in varying situations. Appellant's argument to the contrary contradicts the well-established purpose of an SPD — to serve as an easily accessible, "clear, simple communication" of plan benefits for participants. *Amara*, 131 S. Ct. at 1877. "Larding the summary with minutiae . . . defeat[s] that document's function: to provide a capsule guide in simple language for employees." *Herrmann v. Cencom Cable Assocs., Inc.*, 978 F.2d 978, 984 (7th Cir. 1992).

If there is any failure of disclosure here, the fault lies with DOL. The DOL issued its SPD regulations in 1977 and has amended them several times since. *See* 29 C.F.R. § 2520.102-3 (mandated contents of summary plan description). Those regulations nowhere state that patterns of pension accruals (wear-away or otherwise) must be addressed in the SPD. If the Department truly believed that the ERISA statute authorizes the agency to require the disclosure of wear-away effects in the SPD, the DOL could have amended its regulations to specify such a requirement. *Cf. Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) ("It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.").

Indeed, *another* provision of ERISA (§ 204(h)) currently requires a description of the potential impact of a pension plan amendment. 29 U.S.C. § 1054(h) (notice of reduction in future benefits accruals). Treasury's implementing regulations for that new statutory provision expressly require a description of wear-away when a traditional pension plan is converted to a cash balance plan. 26 C.F.R. § 54.4980F-1, Q&A-11. This statutory provision and the implementing rules, however, were added several years *after* the Foot Locker Plan's cash-balance conversion and therefore do not apply here. 26 C.F.R. § 54.4980F-1, Q&A-18 (regulations generally effective Sept. 1, 2003). At the time Foot Locker converted its plan, § 204(h) required only a description of the terms of the amendment, not a description of its potential impact. *See Osberg v. Foot Locker, Inc.*, 656 F. Supp. 2d 361, 373 (S.D.N.Y. 2009). Thus, when Foot Locker converted to a cash-balance plan it had no obligation to discuss wear-away.

The courts, including the District Court in this case, have rejected attempts by participants, such as Appellant, to impose today's heightened notice requirement retroactively by judicial mandate.[4] *See, e.g.*, *Tomlinson*, 653 F.3d at 1292-94 (affirming dismissal of § 204(h) claim alleging failure to explain to participants that the cash balance formula would reduce the rate of future benefit accruals for certain employees). Imposing such a rule retroactively would be inequitable, as countless other similarly situated employers, with no prior notice of the DOL's litigation position on wear-away, could suddenly find themselves in non-compliance with SPD disclosure rules. The District Court's ruling should therefore be affirmed.

II. Appellant Cannot Satisfy The Equitable Standard For Reformation.

A. Reformation is an extreme remedy that is used sparingly.

Even if Foot Locker's communications were somehow actionable under ERISA, Appellant cannot make the case for judicial reformation of the Plan. "In dictum, the *Amara* Court stated that, under appropriate circumstances, [29 U.S.C. § 1102(a)(3)] may authorize three possible equitable remedies: estoppel, reformation, and surcharge." *See Skinner v. Northrop Grumman Ret. Plan B*, 673 F.3d 1162, 1165 (9th Cir. 2012) (rejecting reformation and surcharge claims). But

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[4] Significantly, the DOL has not joined in Appellant's appeal of the District Court's ruling on § 204(h).

the Supreme Court made clear that the traditional requirements in equity for obtaining any such relief must nonetheless be satisfied. *Amara*, 131 S. Ct. at 1879-80. This case meets none of them.

In equity, reformation is an "extraordinary" remedy to be "exercised with great caution." *See* 2 J. Story, Commentaries on Equity Jurisprudence § 973 (14th Ed. 1918); *Ivinson v. Hutton*, 98 U.S. 79, 83 (1878); *Nevius v. Dunlap*, 33 N.Y. 676, 680 (1865).[5] Because "[c]ourts of equity may compel parties to execute their agreements, but have no power to make agreements for them," *Baltzer v. Raleigh & A. R. Co.*, 115 U.S. 634, 645-46 (1885), there is a "heavy presumption" that the written instrument manifests the true intention of the parties, *George Backer Management Corp. v. Acme Quilting Co.*, 46 N.Y.2d 211, 219 (1978) (citation omitted); *see also* G. Bogert & G. Bogert, Trusts and Trustees § 991 (2012) (hereinafter "Bogert") ("Courts generally apply a presumption of correctness to the words of the trust."). To rebut this presumption requires "clear and convincing" evidence that the written document does not reflect the "true" intentions of the contracting parties or, in the case of a trust, of the settlor. *See, e.g.*, *Healy v. Rich*

[5] Appellant's claims for reformation and surcharge are governed by federal common law. *See Silverman v. Miranda*, 918 F. Supp. 2d 200, 214 n.13 (S.D.N.Y. 2013). Federal courts, however, may refer to the law of the forum state for guidance. *See id.*; *Scarangella v. Group Health, Inc.*, 2009 U.S. Dist. LEXIS 23457, at *47 (S.D.N.Y. Mar. 24, 2009).

Prods. Corp., 981 F.2d 68, 73 (2d Cir. 1992); *Young v. Verizon's Bell Atlantic Cash Balance Plan*, 615 F.3d 808, 820 (7th Cir. 2010).

Moreover, courts will not rewrite a written contract absent a material error caused by mutual mistake or fraud. *E.g.*, *Amara*, 113 S. Ct. at 1879 (citing cases); *Skinner*, 673 F.3d at 1166. Thus, courts in equity typically would reform a written agreement only in very narrow and clearly defined circumstances: (1) where the parties had reached agreement and then, when reduced to writing, key terms were altered due to mutual mistake or fraud, *see* J. Eaton, Handbook of Equity Jurisprudence, § 306, p. 618 (1901); or (2) where the terms of a trust do not reflect the settlor's intent due to wrongful conduct or drafting mistake. *See*, *e.g.*, *Young*, 615 F.3d at 821; Bogert, *supra*, § 991; Restatement (Third) of Trusts § 12.

These exacting requirements for reformation are particularly important in the context of an ERISA plan, given the purpose and nature of the statute.[6] "ERISA represents a careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." *Conkright v. Frommert*, 130 S. Ct. 1640, 1648-49 (2010) (internal quotation marks and citation omitted). The "plan document rule" plays a central role in maintaining

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[6] Although legislative materials contemporaneous to ERISA's enactment reflect an expectation that courts would develop a federal common law of rights and obligations under ERISA, the Supreme Court has instructed the courts to be mindful of the language, structure, and objectives of ERISA. *See Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

this balance. *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995) ("[A]nother of ERISA's core functional requirements . . . [is] that 'every employee benefit plan shall be established and maintained *pursuant to a written instrument*.'") (quoting 29 U.S.C. § 1102(a)(1)) (emphasis in original). In fact, ERISA's scheme "is built around the reliance on the face of written plan documents." *Id*. The written plan "specif[ies] the basis on which payments are made to and from the plan," 29 U.S.C. § 1102(a)(1), to protect the plan's actuarial soundness by preventing plan administrators from paying benefits not authorized in the written plan. *See Perreca v. Gluck*, 295 F.3d 215, 225 (2d Cir. 2002).

To ensure that ERISA's objectives of "efficiency, predictability, and uniformity" in plan interpretation and administration are respected, *Conkright,* 130 S. Ct. at 1649, only in the most extraordinary circumstance would judicial reformation of a plan's terms ever be appropriate. This case is not such an occasion.

B. Reformation is not available because there was no evidence of mutual mistake or fraud.

Appellant was unable to muster colorable evidence, much less evidence that is "clear and convincing," to support his argument that Foot Locker did not intend to adopt the Plan as written. Appellant's claim that, had Foot Locker fully appreciated the wear-away effect, it would instead have promulgated an "A plus

B" plan[7] (or another plan more lucrative than the actual Plan) rests on pure speculation. *Osberg v. Foot Locker, Inc.*, 907 F. Supp. 2d 527, 534 (S.D.N.Y. 2012).

The record is replete with evidence that Foot Locker was in dire economic straits and converted to a cash-balance plan to reduce future retirement expense. Over a three-year period from January 1, 1993 to December 31, 1995, Foot Locker's parent company's stock price declined from $29.37 to $13. (JA1378.) As of May 1995, the company was approximately $1.6 billion in debt and estimated to be within six to nine months of going bankrupt. (JA573 at 30:11-17.) From 1996 to 1998, the Company separated approximately 44,000 employees. (JA1378.) Appellant's deposition evidence shows, at most, that some directors may not have fully realized the wear-away characteristics of the approved Plan. But there is no testimony or other evidence suggesting that a *more* expensive "A plus B" plan was ever under consideration, let alone was Foot Locker's intention.

In an attempt to force his claim into the narrow set of circumstances justifying reformation, Appellant argues that the allegedly deficient SPD

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[7] A traditional "A plus B" approach refers to a requirement that the preserved benefit from the old formula be added to all new accruals after the conversion. *See* Barry Kozak & Joshua Waldbeser, *Much Ado About the Meaning of 'Benefit Accrual'*, 40 J. Marshall L. Rev. 867, 895 (2007). Appellant sought the calculation of benefits under this "A + B" method, where "A," the participant's full benefit calculated under the old plan, is added to "B," the benefit accruals under the new Plan. (JA1411-12 ¶ 41.)

constituted the "true agreement" between him and Foot Locker. But *Amara* forecloses any argument that the SPD forged a contractual bond between Foot Locker and Appellant. *See Amara*, 131 S. Ct. at 1878; *accord, e.g.*, *Skinner*, 673 F.3d at 1165 (noting *Amara* "overruled . . . prior decisions that had treated SPD language as if it were an enforceable part of the retirement plan"). The SPD is not the Plan or a part of the Plan. *Amara*, 131 S. Ct. at 1878. Summary documents "provide communication with beneficiaries *about* the plan, but . . . their statements do not themselves constitute the *terms* of the plan." *Id.* (emphasis in original).

Appellant's argument also fails on its own terms, because the SPD about which he complains was issued *after* the plan conversion. (JA317.) This timing is consistent with an SPD's established function as a description of existing plan terms rather than as a notice of prospective plan amendment. Thus, Foot Locker's SPD cannot serve as the basis of a purported agreement formed with Appellant prior to conversion of the Plan and thereafter mistakenly documented in the Plan document. In sum, Appellant's request for reformation based on mutual mistake fails both as a matter of law and the undisputed factual record.

Moreover, there is no evidence whatsoever that Foot Locker engaged in any fraud, the only other possible basis for reformation. The absence of any evidence of intentional misrepresentation or self-dealing by Foot Locker distinguishes the case at the bar from *Amara*. In that case, the district court held based on specific facts that "CIGNA affirmatively misled and prevented employees from obtaining information that would have aided them in evaluating the distinctions between the old and new plans," *Amara v. Cigna Corp*., 2012 WL 6649587, at *6 (D. Conn. Dec. 20, 2012); *see also Amara*, 131 S. Ct. at 1872 ("CIGNA's initial descriptions of its new plan were significantly incomplete and misled its employees"); *id*. at 1874 ("CIGNA intentionally misled its employees"). Based on such findings, the *Amara* district court on remand held that the fraud requirement was satisfied and reformed the CIGNA plan. *Amara*, 2012 WL 6649587, at *6 ("Here, Plaintiffs have established a basis for this Court to reform the CIGNA Pension Plan due to CIGNA's fraud paired with Plaintiff's unilateral mistake.").

In contrast, Appellant has not proffered any evidence of, much less established, deliberate misstatement or concealment on the part of Foot Locker. Instead, the record reflects that Foot Locker provided extensive communications regarding the Plan, including information enabling participants to realize that wear-away could occur. *See* Appellees' Br. at 12-15. There is no evidence of any scheme or design by Foot Locker to mislead and withhold information from Plan participants. The mere fact that Appellant may have misinterpreted certain communications or failed to seek clarification of perceived ambiguities cannot possibly justify the extraordinary relief of reforming the Foot Locker Plan. Such a standard would effectively convert all SPDs and similar non-contractual communications *about* retirement plans into potential sources of strict liability *of* the plan, vesting individual participants with broad power to alter the terms, conditions, and costs of retirement plans adopted by their employers. That outcome, and the ensuing litigation it would foster, would upset the "careful balancing," *Conkright*, 130 S. Ct. at 1648-49, on which ERISA is based and would thwart Congress's objective to encourage corporate-sponsored retirement benefits.

C. Applying reformation to benefit a subset of participants would be inequitable.

Appellant's theory of recovery, if accepted, would yield a patently inequitable result: the transfer of plan assets from one group of participants to another. Appellant argues that the Plan should be reformed to provide terms that would affect disbursement of Plan assets to him and a putative class of certain participants, consisting of the difference between what Appellant claims that he expected and what the Plan expressly provided. This theory of reformation would result in a transfer of Plan assets to a subset of participants who, like Appellant, worked at Foot Locker both before and after conversion and experienced wear-away. But other participants in the Plan who retired prior to conversion or otherwise did not experience wear-away would receive no additional benefits. From these participants' perspective, reformation would result in the dilution of Plan assets available to pay benefits. ERISA abhors such an outcome. *See Cummings by Techmeier v. Briggs & Stratton Ret. Plan*, 797 F.2d 383, 389 (7th

Cir. 1986) ("Forcing trustees of a plan to pay benefits which are not part of the written terms of the program disrupts the actuarial balance of the Plan and potentially jeopardizes the pension rights of other legitimately entitled to receive them.").

III. Appellant Cannot Satisfy The Equitable Standard For Surcharge.

A. Surcharge is traditionally imposed to compensate losses resulting from misuse of trust assets, not for alleged disclosure violations.

Equity recognizes the remedy of surcharge if a breach of trust causes actual economic harm or unjustly enriches the wrongdoer. *See Skinner*, 673 F.3d at 1167; *see also* Restatement (Second) of Trusts § 205. The beneficiary can obtain compensation for losses incurred as a result of a breach of trust. *See Amara*, 131 S. Ct. at 1881; *see also* 4 A. Scott & W. Fratcher, Trusts § 24.9, p. 1686 (5th ed. 2007) (hereinafter "Scott").

Courts of equity apply surcharge to remedy breaches of trust having a direct impact on trust assets, traditionally in the context of investment decisions and property transactions. For example, liability under surcharge may arise from self-dealing transactions of trust property, unauthorized sales of trust assets, improper investments with trust money, mismanagement of trust assets, failures to exercise duties to purchase or sell trust property, and similar breaches involving the misuse of trust assets. *See* 3 Scott, *supra*, §§ 208-211 (4th ed. 1988); Restatement (Second) of Trusts § 206, cmts. b - j.

Appellant and his amicus DOL seek to impose surcharge in a fundamentally different context: to compensate for an alleged expectation of greater benefits payments arising from a communication about the trust. This argument is unsupported in equity. Appellant does not allege (much less show) any losses to the trust estate, financial gain by the trustee, or profit that would have accrued to the trust but for the alleged fiduciary breaches. *See* 4 Scott, *supra*, § 24.9, pp. 1686-87 (5th ed.). Although surcharge may be appropriate where a trustee committed an independent breach of trust involving misuse of trust property and then sought to conceal it, *see, e.g.*, *In re Estate of Janes*, 223 A.D.2d 20, 30-32 (N.Y. App. Div. 4th Dep't 1996), Appellant and the DOL have cited no authority showing that surcharge is traditionally available in equity to remedy nondisclosures or misstatements alone.[8]

There is no dispute that Foot Locker lawfully amended the Plan and no allegation or evidence that Foot Locker somehow misused trust assets. To the contrary, Foot Locker ensured that employees would not lose benefits that had accrued under the then-existing plan in compliance with Treasury Regulations that

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[8] As discussed in the prior section, the *Amara* court on remand imposed surcharge based on express findings that the defendant Cigna had "affirmatively misled and prevented employees from obtaining information that would have aided them in evaluating the distinctions between the old and new plans," resulting in actual harm to the participants. *Amara*, 2012 WL 6649587, at *6. That ruling is on appeal to this Circuit. By contrast, there is no finding or evidence of fraud in this case.

expressly recognize "wear away" as a permissible means to comply with ERISA's anti-cutback rule. *See* 26 C.F.R. Ch. I, § 1.411(d)-3(a)(4) Ex. 2.

B. Appellant cannot show compensable loss caused by the alleged disclosure violations.

A party seeking surcharge must prove by a preponderance of the evidence both "actual harm" and a causal connection between injury and the claimed breach. *Amara*, 131 S. Ct. at 1881-82; *see also* 4 Scott, *supra*, § 24.9, p. 1693 (5th ed.) ("The trustee is not subject to surcharge for a breach of trust that results in no loss to the trust estate . . . [or] for any loss incurred or profit forgone, absent a breach of trust."). The District Court correctly held that Appellant was unable to prove either required element.

Appellant contends that he lost a chance to contest the Plan amendment, although *nothing* in the record suggests that employee input was solicited — or would have been considered — in connection with Foot Locker's decision to convert to a cash-balance plan. In any event, as the District Court reasoned, there is no evidence that Foot Locker had considered or would otherwise have adopted an "A plus B" plan — or even "*some* additional" (but unspecified) benefits as Appellant now argues on appeal (Appellant's Br. at 45) — in lieu of the plan that Foot Locker actually adopted. The company's survival was at stake, and the new plan was intended to cut retirement expenses in order to help forestall possible bankruptcy. *Osberg*, 907 F. Supp. 2d at 530-31. Against this backdrop, Appellant's theory of an "employee rebellion" is entirely implausible. *Id.* at 529. Simply stated, there is no genuine dispute that the Plan would have looked any different if Foot Locker's disclosures had contained all of the information about wear-away that Appellant contends (wrongly) was required under ERISA.

In asserting that "a plaintiff need only establish a causal connection between a fiduciary breach and the loss of an ERISA protected right," (DOL Amicus Br. at 18), the DOL erroneously equates "actual harm" with the receipt of an allegedly deficient SPD. As the Ninth Circuit acknowledged in rejecting a similar argument from participants, solely "being deprived of their statutory right to an accurate SPD is [not] a compensable harm." *Skinner*, 673 F.3d at 1167. "People make mistakes. Even administrators of ERISA plans." *Conkright*, 559 U.S. at 1644. The DOL's position would impermissibly impose strict liability "for every mistake in summary documents." *Skinner*, 673 F.3d at 1167.

Similarly, the DOL's argument that the evidence Appellant proffered was enough to "shift the burden to Defendants" (DOL Br. at 48) is a transparent attempt to reinstate the "likely harm" presumption that the Supreme Court has repudiated. "[A]ctual harm must be shown." *Amara*, 131 S. Ct. at 1882. Harm cannot be presumed. Because the harm alleged by Appellant is "entirely speculative," his claim was properly dismissed. *Osberg*, 907 F. Supp. 2d at 533.

IV. Appellant's Statutory Claims Accrued No Later Than When He Received His Lump-Sum Payout, And Thus Are Barred By The Statute of Limitations.

In addition, Appellant's claims under 29 U.S.C. § 1022 for alleged violations of the SPD notice requirements and his claim arising under 29 U.S.C. § 1024(h) are both time-barred. Because ERISA does not provide a limitations period for claims arising under 29 U.S.C. §§ 1022 and 1024(h), courts must apply "the most closely analogous statute of limitations under state law." *Muto v. CBS Corp.*, 668 F.3d 53, 57 (2d Cir. 2012).

Amara established that summary plan documents are not part of the plan and thus do not create contractual rights under ERISA. *Amara*, 131 S. Ct. at 1878; *see also Skinner*, 673 F.3d at 1165 (applying *Amara*). Accordingly, New York's six-year statute of limitations for contract claims is inapplicable to §§ 1022 and 1024(h) claims, and the District Court was correct to apply instead the three-year limitations period set forth in N.Y. C.P.L.R. § 214.

Appellant's claim accrued — and the limitations period thus commenced — no later than when he received his lump-sum payout under the Plan. The limitations period for ERISA actions begins to run when the claimant knew or should have known of the alleged violation. *See, e.g., Bilello v. JPMorgan Chase Ret. Plan*, 607 F. Supp. 2d 586, 592 (S.D.N.Y. 2009) ("[C]ourts generally apply the 'discovery rule' to determine when an ERISA cause of action accrues, looking to when the plaintiff discovers, or with due diligence should have discovered, the injury that is the basis of the litigation.”). Receipt of benefits in the form of a lump-sum payment is ordinarily the latest possible accrual event for a claim of underpayment. *See Thompson v. Ret. Plan for Employees of S.C. Johnson & Sons, Inc.*, No. 07-CV-1047, 2010 U.S. Dist. LEXIS 29072, at *29-*31 (E.D. Wis. Mar. 26, 2010); *Fallin v. Commonwealth Indus.*, 521 F. Supp. 2d 592, 597 (W.D. Ky. 2007); *see also Miller v. Fortis Benefits Ins. Co.*, 475 F.3d 516, 521 (3d Cir. 2007) (“[R]epudiation by underpayment should ordinarily be made known to the beneficiary when he first receives his miscalculated benefit award.”). Appellant received his retirement benefits in a lump-sum payment in 2002 — more than five years prior to filing suit. This indisputable fact, without more, bars his §§ 1022 and 1024(h) claims.

Furthermore, Appellant was in fact put on notice that the Plan could result in wear-away when receiving summary disclosures in 1997 and again in 2002 when receiving communications about the availability of lump-sum payments. The SPD provided that participants were entitled to the greater of the benefit under the old plan or the cash balance amount under the new Plan. (JA305.) Appellant received a written explanation that his initial cash balance would be discounted by a 9% interest rate, rather than the lower 30-year Treasury rate. (JA299.) When Appellant retired from Foot Locker, he also received an election form specifying that the present value of his guaranteed minimum benefit under Foot Locker's legacy plan, payable to him as a lump sum, exceeded his account balance in the cash-balance plan. (JA546, 387). Thus, with information sufficient to alert Appellant to the fact that the amount that had accrued in his cash-balance account had not increased his retirement payment, Appellant knew or with the exercise of due diligence should have discovered the existence of wear-away. *See generally Winnett v. Caterpillar, Inc.*, 609 F.3d 404, 409 (6th Cir. 2010) ("[T]he asserted actual knowledge of plaintiffs is not determinative if they did not act as reasonable persons and, in effect, closed their eyes to evident and objective facts concerning the accrual of their right to sue."); *Romero v. Allstate Corp.*, 404 F.3d 212, 222 (3d Cir. 2005) ("[A] claim will accrue when the plaintiff discovers, or with diligence should have discovered, the injury that forms the basis for the claim").

Appellants and DOL dispute that the limitations period began to run when Appellant received his lump-sum payment, but they identify no alternative event when his claim would have accrued. This Circuit properly rejects theories that would postpone indefinitely the statute of limitations. *See, e.g.*, *Veltri v. Bldg. Serv. 32b-J Pension Fund*, 393 F.3d 318, 325 (2d Cir. 2004) ("We share the . . . concern that to allow tolling of the statute of limitations 'in perpetuity,' would thwart actuarial prediction of plan liability and thereby threaten the ability of pension plans to prepare in advance to meet financial obligations simultaneously to both beneficiaries and adverse litigants."); *cf. Conkright*, 130 S. Ct. at 1650-51 (emphasizing importance of actuarial certainty for plan funding). Appellant's and DOL's disregard of established accrual principles for applying the statute of limitations would also create an administrative nightmare, requiring a plan to maintain participants' benefit records in perpetuity so that the Plan could properly review, resolve, and defend against stale claims. *See Withey v. Perales*, 920 F. 2d 156, 159 (2nd Cir. 1990) ("[I]f there were no limitations period, administrative costs might burgeon because of the need to keep the files of all recipients perpetually available in the event hearings on underpayments were demanded").

Finally, Appellant's and DOL's position cannot be reconciled with the policy of repose that underlies all statutes of limitations. *See Bd. of Regents v. Tomanio*, 446 U.S. 478, 487-88 (1980). As correctly observed by the District Court, "a former employee who neglects to read even the summary plan documents could wait for an indeterminate number of years until an ERISA-savvy lawyer happens to come along and advise the retiree that he or she has a claim." *Osberg*, 907 F. Supp. 2d at 533. Because Appellant's and DOL's position "effectively would render the limitations period meaningless," *Carey v. IBEW Local 363 Pension Plan*, 201 F.3d 44, 49 (2d Cir. 1999), this Court should reject their arguments and affirm the ruling below.

CONCLUSION

For the reasons set forth above, the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 32(a)(7)(B)-(C), the undersigned counsel certifies as follows:

1. This brief complies with the type-volume limitation for an *amicus* brief under Fed. R. App. P. 32(a)(7)(B) (setting the maximum length for a party's principal brief at 14,000 words) and Fed. R. App. P. 29(d) (setting the maximum length of an *amicus* brief at one-half the maximum length for a party's principal brief) because this brief contains, according to the word count of the word processing system used to prepare this brief, 6,934 words, excluding those portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

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CERTIFICATE OF SERVICE

It is hereby certified that on September 6, 2013, the foregoing brief was electronically filed with the Clerk of the Court by using the Court's ECF system. Counsel for the Appellant and counsel for the Appellees are registered in this case on ECF and will be served with the brief via the ECF system.

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