15-3602-cv

United States Court of Appeals
For the Second Circuit

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

Plaintiff-Appellee,

v.

FOOT LOCKER, INC., and Foot Locker Retirement Plan,

Defendants-Appellants.

On Appeal From The United States District Court
for the Southern District of New York
No. 07-CV-1358-KBF

BRIEF FOR THE AMERICAN BENEFITS COUNCIL, THE ERISA INDUSTRY COMMITTEE, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS URGING REVERSAL

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

The American Benefits Council, 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. They have no parent corporations, and no publicly held corporation owns more than 10% of their stock or membership interests.

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. THE DISTRICT COURT'S FAILURE TO REQUIRE PROOF OF DETRIMENTAL RELIANCE THREATENS THE HEALTH AND STABILITY OF ERISA PLANS 6

A. Detrimental Reliance Is An Element Of A Fiduciary-Misrepresentation Claim 6

B. The District Court's Failure To Require Individualized Proof Of Detrimental Reliance Was Error 10

C. The District Court's Ruling Will Harm Plan Participants and Discourage Employers From Providing Or Maintaining Employee Benefit Plans 15

II. THE DISTRICT COURT'S ERRONEOUS INTERPRETATION OF THE CONSTRUCTIVE-NOTICE STANDARD UNDERMINES EMPLOYER-SPONSORED RETIREMENT PLANS 20

A. The District Court Erroneously Conflated Constructive Notice With Subjective Understanding 20

B. The District Court's Statute-of-Limitations Ruling Threatens The System of Employer-Sponsored Retirement Plans 26

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Amara v. CIGNA Corp.,
775 F.3d 510 (2d Cir. 2014)....................10

Becnel v. Deutsche Bank, AG,
507 F. App'x 71 (2d Cir. 2013)....................21

Bell v. Pfizer, Inc.,
626 F.3d 66 (2d Cir. 2010)....................6, 11

Bridge v. Phx. Bond & Indem. Co.,
553 U.S. 639 (2008)....................11

Carey v. Int'l Bhd. of Elec. Workers Local 363 Pension Plan,
201 F.3d 44 (2d Cir. 1999)....................25

Carr v. Int'l Game Tech.,
No. 09-cv-584, 2012 WL 909437 (D. Nev. Mar. 16, 2012)....................10

Cigna Corp. v. Amara,
563 U.S. 421 (2011)....................9, 10

Conkright v. Frommert,
559 U.S. 506 (2010)....................5, 15, 19, 27

Cotter v. E. Conference of Teamsters Ret. Plan,
898 F.2d 424 (4th Cir. 1990)....................25

Cummings by Techmeier v. Briggs & Stratton Ret. Plan,
797 F.2d 383 (7th Cir. 1986)....................17, 18

Estate of Dermady v. Eastman Kodak Co.,
136 F. Supp. 2d 181 (W.D.N.Y. 2001)....................7

Goodman v. Genworth Fin. Wealth Mgmt., Inc.,
300 F.R.D. 90 (E.D.N.Y. 2014)....................7, 11

Greeley v. Fairview Health Services,
479 F.3d 612 (8th Cir. 2007) 7

Guilbert v. Gardner,
480 F.3d 140 (2d Cir. 2007)...21

In re Computer Scis. Corp. ERISA Litig.,
635 F. Supp. 2d 1128 (C.D. Cal. 2009) 7

In re Foodservice Inc. Pricing Litigation,
729 F.3d 108 (2d Cir. 2013)...11, 12, 13

In re Unisys Corp. Retiree Med. Benefits ERISA Litig.,
579 F.3d 220 (3d Cir. 2009)...6

J. Geils Band Employee Ben. Plan v. Smith Barney Shearson, Inc.,
76 F.3d 1245 (1st Cir. 1996)..21, 22, 23

Kenney v. State St. Corp.,
No. 09 cv 10750, 2011 WL 4344452 (D. Mass. Sept. 15, 2011)..10

Kenseth v. Dean Health Plan, Inc.,
610 F.3d 452 (7th Cir. 2010) 16

Killian v. Concert Health Plan,
742 F. 3d 651 (7th Cir. 2013) (en banc) 9

King v. Pension Trust Fund of the Pension Hospitalization & Benefit Plan of the Elec. Indus.,
131 F. App'x 740 (2d Cir. 2005)..6

LaRue v. DeWolff, Boberg & Associates, Inc.,
552 U.S. 248 (2008)...19

Levin v. Credit Suisse, Inc.,
No. 11 Civ. 5252 (RJS), 2013 WL 1296312 (S.D.N.Y. Mar. 19, 2013) 7

Martin v. Consultants & Administrators, Inc.,
966 F.2d 1078 (7th Cir. 1992) 22

Martino-Catt v. E.I duPont Nemours & Co.,
317 F. Supp. 2d 914 (S.D. Iowa 2004) 7

McLaughlin v. Am. Tobacco Co.,
522 F.3d 215 (2d Cir. 2008)....................11, 13

Noble v. Chrysler Motors Corp.,
32 F.3d 997 (6th Cir. 1994)....................24

Novella v. Westchester Cnty.,
661 F.3d 128 (2d Cir. 2011)....................21, 24

Osberg v. Foot Locker, Inc.,
No. 14-3748....................9, 12

Owen v. Regence Bluecross Blueshield of Utah,
388 F. Supp. 2d 1335 (D. Utah 2005)....................7

Pfahler v. National Latex Prods. Co.,
517 F.3d 816 (6th Cir. 2007)....................6

S.M. v. Oxford Health Plans (N.Y.), Inc.,
94 F. Supp. 3d 481, 513 (S.D.N.Y. 2015)....................6

Stark v. Mars, Inc.,
879 F. Supp. 2d 752 (S.D. Ohio 2012)....................7

Thompson v. Ret. Plan for Employees of S.C. Johnson & Son, Inc.,
651 F.3d 600 (7th Cir. 2011)....................21, 25

Vasquez v. Soto,
877 N.Y.S.2d 467 (N.Y. App. Div. 2009)....................8

Veltri v. Bldg. Serv. 32B-J Pension Fund,
393 F.3d 318 (2d Cir. 2004)....................26

Winnett v. Caterpillar, Inc.,
609 F.3d 404 (6th Cir. 2010)....................24

Wiseman v. First Citizens Bank & Trust Co.,
215 F.R.D. 507 (W.D.N.C. 2003)....................7

Withey v. Perales,
920 F. 2d 156 (2nd Cir. 1990)....................26

Young v. Verizon's Bell Atl. Cash Balance Plan,
615 F.3d 808 (7th Cir. 2010)....................18

STATUTES

29 U.S.C. § 1022 .... 4, 9, 21

29 U.S.C. § 1054 9

29 U.S.C. § 1104 .... 4, 9

29 U.S.C. § 1113 20

N.Y. C.P.L.R. § 214 21

OTHER AUTHORITIES

H.R. Rep. No. 93-533 (1973), reprinted in 1974 U.S.C.C.A.N. 4639 18

Importance of Defined Benefit Plans for Retirement Income Adequacy, Employee Benefits Research Institute (2011), available at https://www.ebri.org/pdf/notespdf/EBRI_Notes_08_August-11.PPACA-DBplans.pdf 19

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Restatement (Second) of Torts § 525 8

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Restatement (Second) of Torts § 552(1) 8

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INTEREST OF AMICI CURIAE[1]

Three organizations—the American Benefits Council, the ERISA Industry Committee, and the Chamber of Commerce of the United States of America—representing varying constituencies, jointly file this brief as they share concerns about the interpretation and application of the Employee Retirement Income Security Act of 1974, as amended, ("ERISA") to plan sponsors.

The American Benefits Council (the "Council") is a national nonprofit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 400 members are primarily large multistate U.S. employers that provide employee benefits to active and retired workers and their families. The Council's membership also includes organizations that provide employee benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering virtually all Americans who participate in employer-sponsored benefit programs. The Council frequently participates as *amicus curiae*

[1]Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Second Circuit Local Rule 29.1(b), *amici* 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 or entity, other than *amici*, their counsel, or their members, contributed money intended to fund the preparation or submission of this brief. All parties have consented to this brief's submission.

in cases with the potential to affect the design and administration of employee benefit plans under ERISA.

The ERISA Industry Committee ("ERIC") is a nonprofit organization representing America's largest employers that maintain ERISA-covered pension, healthcare, disability, and other employee benefit plans. As the voice of large employer plan sponsors on public policies impacting their ability to provide benefits to millions of active workers, retired persons, and their families nationwide, ERIC frequently participates as *amicus curiae* in cases that have the potential for far-reaching effects on employee benefit plan design or administration.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It directly represents approximately 300,000 members and indirectly represents the interests of more than three million companies 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 the Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *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.

This is such a case. As sponsors of employee benefit plans of all types governed by ERISA, *amici*'s members have a substantial interest in knowing that courts will correctly interpret and apply established law controlling these plans. The conditions required for sound plan administration—including stability, predictability, and the ability to plan and reasonably anticipate pension funding needs for the future—are undermined by legal rules that do not clearly delineate when and under what circumstances plan sponsors will be held liable to their participants. In this case, however, the District Court broke from established precedent and expanded plan liabilities out of all proportion to those intended. If allowed to stand, the District Court's legally erroneous decision will undermine the foundation on which ERISA's system of voluntary, employer-provided benefits rests, to the detriment of both employers and employees. Accordingly, the Council, ERIC, and the Chamber respectfully submit this brief as *amici curiae* in support of Appellants.

SUMMARY OF ARGUMENT

Plaintiff-Appellee Geoffrey Osberg, a retired employee of Foot Locker, Inc., filed this putative class action on behalf of over 16,000 current and former Foot Locker employees. Osberg alleged that Foot Locker, in converting its traditional defined-benefit pension plan to a cash-balance form of defined-benefit plan, violated ERISA by (1) making false and misleading statements in its summary plan

descriptions ("SPDs"), *see* ERISA § 102(a), 29 U.S.C. § 1022(a); and (2) breaching fiduciary duties in making materially false and misleading statements, *see* ERISA § 404(a), 29 U.S.C. § 1104(a).[2] Both claims were premised on the theory that Foot Locker failed to explain with sufficient clarity the phenomenon known as "wear-away," *i.e.*, the possibility that some employees' retirement benefits might be frozen at pre-conversion levels for a period of time.

In granting relief in favor of the class on both claims, the District Court committed a number of fundamental errors. *Amici* highlight two that are of particular concern to its members. *First*, it is black-letter law that a fiduciary-breach claim based on an alleged misrepresentation requires proof of detrimental reliance. Yet the District Court found Foot Locker liable without requiring individualized proof that any class member—not even the class representative—relied on an alleged misstatement to his or her detriment; instead, it held that reliance could be inferred on a class-wide basis. This ruling violates well-established circuit precedent holding that, except in certain rare circumstances not applicable here, reliance may not be inferred or presumed from generalized or circumstantial evidence. Moreover, it effectively vitiates the detrimental-reliance requirement, exposing plan sponsors to potentially massive liability regardless of whether plan participants relied on (or were even aware of) an offending

[2] Two additional claims were dismissed and are not at issue here.

communication. *Second*, it is well established that the statute of limitations for each of the claims at issue here begins to run when a plan participant is on constructive notice of his claims—*i.e.*, when he possesses sufficient information to render those claims discoverable with reasonable diligence. The District Court, however, conflated constructive notice with subjective understanding, ruling that class members' claims are perpetually timely so long as they profess ignorance of their claims.

If allowed to stand, each of the District Court's rulings would set a dangerous precedent. "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*, 559 U.S. 506, 517 (2010) (quotation marks omitted). The District Court's detrimental-reliance decision would upset that balance by rendering ERISA plan administrators guarantors of accuracy even if a communication error has no harmful consequence. Moreover, because the District Court's limitations ruling eliminated any meaningful accrual date for the claims at issue, employers' liability would be virtually endless. Upholding the District Court's rulings would threaten the financial soundness of existing plans, encourage plan administrators to issue needlessly complex and prolix communications, and deter employers either from "offering ERISA plans in

the first place" or continuing to maintain the plans they have. *Id.* (quotation marks and alterations omitted).

ARGUMENT

I. THE DISTRICT COURT'S FAILURE TO REQUIRE PROOF OF DETRIMENTAL RELIANCE THREATENS THE HEALTH AND STABILITY OF ERISA PLANS

A. Detrimental Reliance Is An Element Of A Fiduciary-Misrepresentation Claim

It is well established that a fiduciary-breach claim based on an alleged misrepresentation requires proof of detrimental reliance. *See, e.g.*, *Bell v. Pfizer, Inc.*, 626 F.3d 66, 75 (2d Cir. 2010) ("[W]here a plaintiff asserts a breach of fiduciary claim based on a material misrepresentation or omission, the plaintiff must establish detrimental reliance."); *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 579 F.3d 220, 228 (3d Cir. 2009) ("To establish [a breach of fiduciary duty under ERISA], a plaintiff must demonstrate that . . . [he] detrimentally relied on the misrepresentation or inadequate disclosure."); *Pfahler v. National Latex Prods. Co.*, 517 F.3d 816, 830 (6th Cir. 2007) ("To establish a breach of fiduciary duty claim based upon misrepresentations regarding coverage under an ERISA plan, a plaintiff must show . . . that the plaintiff relied on those misrepresentations to his detriment.") (quotation marks and alterations omitted).[3]

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[3] *See also, e.g.*, *King v. Pension Trust Fund of the Pension Hospitalization & Benefit Plan of the Elec. Indus.*, 131 F. App'x 740, 742 (2d Cir. 2005); *S.M. v.*

"Detrimental reliance means that the plaintiff took action, resulting in some detriment, that he would not have taken had he known that the terms of the plan were otherwise or that he failed, to his detriment, to take action that he would have taken had he known that the terms of the plans were otherwise." *Greeley v. Fairview Health Services*, 479 F.3d 612, 614 (8th Cir. 2007). *See also Goodman v. Genworth Fin. Wealth Mgmt., Inc.*, 300 F.R.D. 90, 102 (E.D.N.Y. 2014) ("The traditional (and most direct) way a plaintiff can demonstrate reliance is by showing that he was *aware of* a company's statement *and engaged in a relevant transaction . . . based on* that specific misrepresentation.") (quotation marks omitted) (emphasis added).

The detrimental-reliance requirement is a familiar one. In the analogous context of common-law torts premised on a misrepresentation, reliance is an essential element. In an action for negligent misrepresentation, for example, a defendant who "supplies false information for the guidance of others in their

(continued…)

Oxford Health Plans (N.Y.), Inc., 94 F. Supp. 3d 481, 513 (S.D.N.Y. 2015); *Levin v. Credit Suisse, Inc.*, No. 11 Civ. 5252 (RJS), 2013 WL 1296312, at *2 (S.D.N.Y. Mar. 19, 2013); *Stark v. Mars, Inc.*, 879 F. Supp. 2d 752, 772 (S.D. Ohio 2012); *In re Computer Scis. Corp. ERISA Litig.*, 635 F. Supp. 2d 1128, 1140 (C.D. Cal. 2009); *Owen v. Regence Bluecross Blueshield of Utah*, 388 F. Supp. 2d 1335, 1338 (D. Utah 2005); *Martino-Catt v. E.I duPont Nemours & Co.*, 317 F. Supp. 2d 914, 927 (S.D. Iowa 2004); *Wiseman v. First Citizens Bank & Trust Co.*, 215 F.R.D. 507, 510 (W.D.N.C. 2003); *Estate of Dermady v. Eastman Kodak Co.*, 136 F. Supp. 2d 181, 189 (W.D.N.Y. 2001).

business transactions, is subject to liability for pecuniary loss caused to them by their *justifiable reliance* upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." Restatement (Second) of Torts § 552(1) (emphasis added). *See also, e.g.*, *Vasquez v. Soto*, 877 N.Y.S.2d 467, 468 (N.Y. App. Div. 2009) ("an element of a cause of action sounding in fraud or negligent misrepresentation is reasonable or justifiable reliance on the misrepresentation"). The same requirement applies in an action for fraudulent misrepresentation; "[o]ne who fraudulently makes a misrepresentation . . . for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his *justifiable reliance* upon the misrepresentation." Restatement (Second) of Torts § 525 (emphasis added). Similarly, "[i]f a statute requires information to be furnished . . . for the protection of a particular class of persons, one who makes a fraudulent misrepresentation in so doing is subject to liability to the persons for pecuniary loss suffered through their *justifiable reliance* upon the misrepresentation in a transaction of the kind in which the statute is intended to protect them." Restatement (Second) of Torts § 536 (emphasis added).

Contrary to Osberg's assertion,[4] the Supreme Court's decision in *Cigna Corp. v. Amara*, 563 U.S. 421 (2011), did not alter or eliminate the detrimental-reliance requirement for fiduciary-misrepresentation claims. There were only two claims at issue in *Amara*: (1) an SPD claim brought pursuant to ERISA § 102; and (2) a notice claim brought pursuant to ERISA § 204(h), 29 U.S.C. § 1054(h). *Amara*, 563 U.S. at 432. The *Amara* decision, therefore, says nothing about the substantive elements of a fiduciary-misrepresentation claim under ERISA § 404.[5] Indeed, *Amara* did not consider the substantive elements of *any* ERISA claim; it merely held that certain equitable *remedies* do not require a showing of detrimental reliance. *Id.* at 443. Because *Amara* does not address the elements required to establish liability in the first instance, it does not abrogate binding precedent holding that a fiduciary- misrepresentation claim requires proof of detrimental reliance. *See, e.g.*, *Killian v. Concert Health Plan*, 742 F. 3d 651, 658, 671 & n.50

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[4] *See*, *e.g.*, Plaintiff-Respondent's Answer in Opposition to Defendants-Petitioners' Rule 23(f) Petition, *Osberg v. Foot Locker, Inc.*, No. 14-3748 at Dkt. No. 8, p. 15 (2d Cir. Oct. 20, 2014) ("It follows from *Amara* . . . that since there is no standard for harm under § 404, there is no requirement that plan participants must prove harm (in the form of reliance or otherwise) to establish a § 404 violation.").

[5] Importantly, the SPD and notice violations in *Amara* could be proven without a showing of "harm" because the statutory provisions at issue there have no reliance element; instead, a violation occurs if certain disclosures fail to adhere to the requirements delineated in the statute. *See* 29 U.S.C. §§ 1022, 1054(h). In contrast to this essentially strict liability standard, a fiduciary-misrepresentation claim requires a showing of detrimental reliance before the question of relief can be addressed.

(7th Cir. 2013) (en banc) (requiring proof that the plan's alleged fiduciary breach caused harm before addressing the availability of equitable relief); *Kenney v. State St. Corp.*, No. 09 cv 10750, 2011 WL 4344452, at *7 (D. Mass. Sept. 15, 2011) ("[N]othing [in *Amara*] . . . suggests that a plaintiff's burden is lessened in regard to claims for negligent misrepresentation or omission nor that, having failed to allege detrimental reliance, he may still be entitled to equitable relief . . . ."); *Carr v. Int'l Game Tech.*, No. 09-cv-584, 2012 WL 909437, at *4 (D. Nev. Mar. 16, 2012) ("The Court did not analyze whether detrimental reliance is an element of a claim for misrepresentation in violation of fiduciary duties arising under ERISA.").[6]

B. The District Court's Failure To Require Individualized Proof Of Detrimental Reliance Was Error

Although the District Court recognized that detrimental reliance is an element of plaintiffs' fiduciary-misrepresentation claims, it held that reliance could be inferred from the mere fact that plaintiffs received "common, class-wide communications." Joint Appendix 231-32 (hereinafter "A___"). The court's analysis does not withstand scrutiny. As an initial matter, plaintiffs must show

[6] The Second Circuit's decision in *Amara v. CIGNA Corp.*, 775 F.3d 510 (2d Cir. 2014), which affirmed the district court's decision granting reformation to the plaintiff class following the Supreme Court's remand, is similarly silent on the elements of a fiduciary-misrepresentation claim. Although the Second Circuit confirmed that a plaintiff alleging an SPD violation need not show "actual harm" to obtain reformation, *id.* at 525 n.12, the Second Circuit never considered whether a fiduciary-misrepresentation claim requires proof of detrimental reliance.

both fiduciary error (misrepresentation) *and* reliance. *Bell*, 626 F.3d at 73-75. While proof that class-wide communications contained misrepresentations may serve as common evidence of fiduciary *error*, it does nothing to establish *reliance*. Accordingly, "proof of misrepresentation—even widespread and uniform misrepresentation—only satisfies half of the equation." *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 223 (2d Cir. 2008), *abrogated on other grounds by Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639 (2008). "[T]he other half, reliance on the misrepresentation, cannot be the subject of general proof." *Id.* To the contrary, *individualized* proof is ordinarily required to establish that each given class member was aware of the misrepresentation and took some detrimental action in reliance on that misrepresentation. *Id*. "[T]he reliance element," therefore, often "presents [an] obstacle to class certification." *Goodman*, 300 F.R.D. at 102.

To be sure, reliance may be inferred in rare cases where the alleged misrepresentation is the sole plausible explanation for every class member's detrimental act. *See McLaughlin*, 522 F.3d at 223-25 & n.7; *see also Goodman*, 300 F.R.D. at 94 ("The Second Circuit has approved the use of circumstantial evidence to prove class-wide reliance in fraud cases . . . , but only where the inference of reliance is practically inescapable."). In *In re Foodservice Inc. Pricing Litigation*, 729 F.3d 108, 117-18 (2d Cir. 2013), for example, the defendant's fraudulent act was submitting inflated invoices for payment. "In cases

involving fraudulent overbilling," the court held, "payment may constitute circumstantial proof of reliance based on the reasonable inference that customers who pay the amount specified in an inflated invoice would not have done so absent reliance upon the invoice's implicit representation that the invoiced amount was honestly owed." *Id.* at 120.

In this case, however, it is impossible to draw such inferences. As an initial matter, class counsel excised all allegations of reliance from the operative complaint, placing a losing bet on the erroneous proposition that reliance is not an element of a fiduciary-misrepresentation claim. *Compare* A65-66 *with* A135-136.[7] Consequently, the amended complaint alleges no acts from which reliance can be inferred. That omission alone should be fatal to plaintiffs' fiduciary-misrepresentation claims. But in any event, the original complaint proposed only two possible theories of how class members relied on the alleged misrepresentations: (1) employees continued working at Foot Locker because they thought that their retirement benefits were growing; and (2) employees did not alter their retirement planning because they thought that they would receive more from the plan than they actually did. *See* A65-66. But the decision to remain

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[7] *See also* Plaintiff-Respondent's Answer in Opposition to Defendants-Petitioners' Rule 23(f) Petition, *Osberg v. Foot Locker, Inc.*, No. 14-3748 at Dkt. No. 8, p. 12 n.5 (2d Cir. Oct. 20, 2014) ("[T]he operative complaint is the *2012* amended complaint, which contains no 'reliance' allegations because Plaintiffs removed such allegations as irrelevant in light of *Amara*'s 2011 holding that reliance is not a required element of an ERISA plan reformation claim.").

employed at Footlocker is a "personal[,] idiosyncratic choice." *McLaughlin*, 522 F.3d at 225 n.7. Plaintiffs could have chosen to continue working for Foot Locker for any number of reasons, including job satisfaction or a lack of alternative employment options. Similarly, it is implausible to infer that all class members would have modified their investment portfolios had they been aware that their benefits were not growing. Investment decisions are typically motivated by a number of different factors, and class members may not have altered their investments even if they had known about wear-away. Accordingly, neither plaintiffs' continued employment at Foot Locker nor their maintenance of their existing investment portfolios constitutes "circumstantial proof of reliance." *In re Foodservice Inc. Pricing Litigation*, 729 F.3d at 120.

The District Court posited two additional theories of reliance. *First*, several class members testified at trial that they "believed" the statements in Foot Locker's communications; the District Court concluded that this testimony provided "strong evidence of generalized reliance." Special Appendix 73 (hereinafter "SPA___"). But whether certain class members "believed" the statements in Foot Locker's communications is beside the point; the relevant question is whether plaintiffs took some *action* in reliance on the alleged misstatements.

Second, the District Court suggested that plaintiffs' failure to complain about the pension plan conversion was itself evidence of reliance. SPA74. But the

conversion of the Foot Locker pension plan from a traditional pension to a cash-balance account also resulted in the addition of new features that benefited participating employees. Accordingly, some participants might have remained silent because they were pleased with the cash-balance plan's new option of collecting their earned retirement benefit in a lump sum upon termination of employment, instead of a monthly annuity upon retirement age. Indeed, the lump-sum option proved to be tremendously popular and was elected by the overwhelming majority of participants. *See* SPA11. In this context, the failure to complain does not provide circumstantial proof of class-wide reliance. Moreover, plaintiffs must show not only reliance, but *detrimental* reliance. Here, plaintiffs have offered no evidence that Foot Locker—which was then in dire financial straits, *see* SPA11, A418, A1778—could or would have abandoned the planned conversion even if employees had complained. Indeed, in dismissing plaintiff's surcharge claim, the District Court found plaintiff's failure-to-complain theory of harm "entirely speculative." A181. As the District Court explained, "Osberg . . . present[ed] 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." A182.

In sum, the District Court imposed a $180 million judgment against Foot Locker without requiring proof that any class member took any detrimental action in reliance on the offending statements. Indeed, not even the class representative was required to supply such proof; nor could he, as he left Foot Locker to join an employer that offered no retirement plan whatsoever. *See* A1739-40, at Tr. 413:23-414:8. This ruling was error and should be reversed.

C. The District Court's Ruling Will Harm Plan Participants and Discourage Employers From Providing Or Maintaining Employee Benefit Plans

The District Court's ruling has troubling implications for plan participants and sponsors alike. ERISA is "an enormously complex and detailed statute, and the plans that administrators must construe can be lengthy and complicated." *Conkright*, 559 U.S. at 509 (quotation marks and citation omitted). Plan administrators regularly communicate with participants about their plans, not merely through hard-copy SPDs, but also through Web portals and 1-800 toll-free call centers. In many cases, those Web portals and call centers are operated by large third-party administrators. Given the complexity of ERISA plans, the volume of communications, and the number of individuals and entities responsible for administering the plans, it is unsurprising that—as Chief Justice Roberts has observed—mistakes are sometimes made. *See id.* (Roberts, C.J.) ("People make mistakes. Even administrators of ERISA plans."). Particularly with respect to oral

communications—where inartfully-phrased benefits questions can lead to less-than-articulate and potentially misunderstood answers—some degree of imprecision is almost inevitable. *See, e.g.*, *Kenseth v. Dean Health Plan, Inc.*, 610 F.3d 452, 471 (7th Cir. 2010) ("Notwithstanding the primacy of the plan documents, because it is foreseeable if not inevitable that participants and beneficiaries will have questions for plan representatives about their benefits, our cases . . . recognize an obligation on the part of plan fiduciaries to anticipate such inquiries and to select and train personnel accordingly.").

Participants who rely on an administrator's error to their detriment should of course be made whole. But participants who did not rely on a less-than-clear communication (or for that matter did not rely on a clearly erroneous communication)—perhaps because they never accessed or read the offending document made available on-line, or never acted upon a received oral miscommunication—have suffered no harm. Construing ERISA to impose crippling liability without any proof of reliance is tantamount to a windfall, and would undermine the health of employer-sponsored ERISA plans in at least three ways.

First, granting relief to *all* plan participants, regardless of whether they relied on (or even read) an alleged misstatement, could threaten the fiscal integrity and ultimate survival of a given plan. "Sound administration of a pension plan

demands advance planning," "stability[,] and predictability." *Cummings by Techmeier v. Briggs & Stratton Ret. Plan*, 797 F.2d 383, 389 (7th Cir. 1986). A large, unexpected liability could cause a pension plan to lose its financial footing, with potentially devastating consequences to the company responsible for funding the plan. That is precisely what could happen if a flawed communication entitled each and every participant—whether or not harmed by the mistake—to relief.

Suppose, for example, that a plan entitles certain participants to benefits of $200 per month. Because of a typographical error, however, a plan communication purports to indicate that those participants are entitled to $2,000 a month. The relevant plan fiduciary discovers the error but fails to correct it for several weeks, and its tardiness is imprudent. If the plan or fiduciary is consequently compelled to pay the extra $1,800 in monthly benefits, regardless of whether or not the affected participants took any action in reliance on the misstatement, the plan sponsor (as the entity responsible to fund benefits), or imprudent fiduciary, would be saddled with an enormous, unanticipated financial burden. Thus, as courts have recognized, "[f]orcing 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

others legitimately entitled to receive them." *Cummings*, 797 F.2d at 389.[8]

Second, if any deficiency in a plan communication automatically guaranteed that participants would receive financial compensation, plan sponsors would be incentivized to issue needlessly prolix communications in an effort to avoid any conceivable misstep or oversimplification. Such was the case before ERISA, when the "average plan participant, even where he [was] furnished an explanation of his plan provisions, often [could not] comprehend them because of the technicalities and complexities of the language used." H.R. Rep. No. 93-533, at 7 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4646. The District Court's ruling would thus undermine one of Congress's aims in enacting ERISA: that "[d]escriptions of plans furnished to employees . . . be presented in a manner that an average and reasonable worker participant can understand intelligently." *Id.*

Third, exposing employers to massive liability for errors that may cause no harm would discourage employers from offering—and maintaining—employee benefit plans. In enacting ERISA, "Congress sought to create a system that is not so complex that administrative costs, or litigation expenses, unduly discourage

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[8] To be sure, the alleged flaws in the communications at issue here may be more serious than tardily-corrected scrivener's errors, but effectively eliminating the detrimental-reliance requirement as an element of a fiduciary-misrepresentation claim would have major ramifications even in cases involving minor mistakes. *Cf. Young v. Verizon's Bell Atl. Cash Balance Plan*, 615 F.3d 808, 817-20 (7th Cir. 2010) (collecting cases granting equitable reformation to correct scrivener's errors when participants have not relied on the error to their detriment).

employers from offering ERISA plans in the first place." *Conkright*, 559 U.S. at 517 (quotation marks and alterations omitted). Accordingly, "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." *Id.* (quotation marks and alterations omitted). Reasonable "safeguards" against excessive employer liability "encourage employers and others to undertake the voluntary step of providing medical and retirement benefits to plan participants." *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248, 259 (2008) (Roberts, C.J., concurring).

Defined-benefit plans, however, are fast becoming an endangered species. In 1975, there were 103,346 such plans; in 2013, there were just 44,163. *See* Private Pension Plan Bulletin Historical Tables and Graphs 1975-2013, U.S. Department of Labor, at p.1 (2015), available at http://www.dol.gov/ebsa/pdf/historicaltables.pdf.[9] Defined benefit plans are decreasing due to, *inter alia*, their complexity and unanticipated risk. *See, e.g.*, Retirement Trends in the United States Over the Past Quarter-Century, Employee Benefit Research Institute, at p. 1 (2007), available at https://www.ebri.org/pdf/publications/facts/0607fact.pdf (the decline in defined-benefit plans "reflect[s] pressures on defined benefit plan

[9] *See also* The Importance of Defined Benefit Plans for Retirement Income Adequacy, Employee Benefits Research Institute, at p. 7 (2011), available at https://www.ebri.org/pdf/notespdf/EBRI_Notes_08_August-11.PPACA-DBplans.pdf ("[T]he percentage of private-sector workers participating in an employment-based defined benefit plan decreased from 38 percent in 1979 to 15 percent in 2008.").

sponsors to control costs and funding volatility, in addition to increased regulatory burdens"). This trend will only accelerate if courts impose ever-more onerous and unpredictable burdens on such plans.

To be sure, it makes sound policy sense to enforce legal rules that encourage accurate plan communications. But authorizing fiduciary breach claims and awarding equitable relief to individuals who cannot make a showing of harm relating to an inaccurate communication hardly strikes the proper balance. Exposing employers to massive, disproportionate liabilities could deter employers from establishing employee-benefit plans, and could compel those employers with plans to end them.

II. THE DISTRICT COURT'S ERRONEOUS INTERPRETATION OF THE CONSTRUCTIVE-NOTICE STANDARD UNDERMINES EMPLOYER-SPONSORED RETIREMENT PLANS

A. The District Court Erroneously Conflated Constructive Notice With Subjective Understanding

Ordinarily, a claim for fiduciary breach must be filed no later than six years from the date of the breach. 29 U.S.C. § 1113. "[I]n the case of fraud or concealment,"[10] however, an action must be commenced "not later than six years after the date of discovery of such breach or violation." *Id.* The date of discovery

[10] Although not addressed in this brief, *amici* do not believe the fraud or concealment exception applies in this case for the reasons explained in Foot Locker's brief, *see* Appellants' Br. at 36-37. But even if it did, plaintiffs would still be required to bring their fiduciary-misrepresentation claims no later than six years after they were on constructive notice of the claim.

is the date on which the participant "discovers, or *with due diligence should have discovered*," the breach. *Guilbert v. Gardner*, 480 F.3d 140, 149 (2d Cir. 2007) (emphasis added). Accordingly, the statute of limitations begins to run when a participant is on constructive notice of the claim, *i.e.*, when the facts giving rise to the claim should have been discovered with the exercise of reasonable diligence. *See Novella v. Westchester Cnty.*, 661 F.3d 128, 147 & n.22 (2d Cir. 2011); *see also Becnel v. Deutsche Bank, AG*, 507 F. App'x 71, 73 (2d Cir. 2013) (a claim governed by the discovery rule is untimely if plaintiff had constructive notice of the facts giving rise to the claim outside the limitations period); *J. Geils Band Employee Ben. Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1254 (1st Cir. 1996) (the term "discovery" in the fraud or concealment exception "encompasses both actual and constructive discovery"). Similarly, an SPD claim under ERISA § 102 is subject to a three-year statute of limitations that begins to run when the participant has actual or constructive notice that the SPD was deficient.[11] Thus, the claims at issue in this case accrued no later than the date on which each participant had constructive notice of the alleged violations; SPD claims are untimely three

[11] *See Thompson v. Ret. Plan for Employees of S.C. Johnson & Son, Inc.*, 651 F.3d 600, 604 (7th Cir. 2011) ("accrual of ERISA claims is governed by federal law, although the statute of limitations itself is borrowed from state law"); N.Y. C.P.L.R. § 214 (under New York law, the limitations period for statutory violations is three years); *Novella*, 661 F.3d at 147 ("the statute of limitations will start to run . . . when there is enough information available to the pensioner to assure that he knows or reasonably should know of the miscalculation").

years after that date, and fiduciary-breach claims are untimely six years after that date.

A participant is on constructive notice of an ERISA disclosure claim when there are "sufficient storm warnings to alert a reasonable person to the possibility that there were either misleading statements or significant omissions involved." *J. Geils*, 76 F.3d at 1255 (quotation marks omitted). Once those "danger signals" appear, a participant must exercise "due diligence" in investigating whether he has a viable claim; he may not simply "bury [his] head[] in the sand." *Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078, 1099 (7th Cir. 1992).

In this case, participants who departed Foot Locker while still in wear-away were on constructive notice of their claims, because the value of those participants' lump-sum payments relative to the value of their cash-balance accounts should have alerted them to the possibility that they had not been accruing benefits after the conversion. Consider the case of the named plaintiff, Geoffrey Osberg. Osberg left the company while he was still in wear-away. Upon his termination of employment in 2002, Osberg received a statement from the plan administrator that showed that, even though his cash-account balance was about $20,000, he was entitled to a minimum lump sum of about $25,000. A176. Osberg admitted that he was aware of the "greater of" provision set forth in the SPD explaining that he would receive his pre-conversion, traditional pension amount if it exceeded his

post- conversion cash balance amount. *See* A179; A1741, at Tr. 419:15-420:13. Putting two and two together, Osberg should have realized that his retirement benefit had experienced wear-away; *i.e.*, that during the fully six years he remained employed at Foot Locker following the 1996 conversion, he had not earned a cash-balance pension amount that exceeded the pre-conversion pension amount to which he was entitled. At the very least, the difference between the value of Osberg's cash-balance account and the value of his lump-sum payment triggered a duty to investigate; if Osberg had asked a few basic questions, he could have discovered the reason for the discrepancy. Osberg's claims were thus discoverable with reasonable diligence on the day he left the company, and his claims accrued on that day.

In holding otherwise, the District Court misconstrued the constructive-notice standard. The District Court held that the claims of each and every class member were timely because "[the] Class members did not understand that they were subject to wear-away as a result of Foot Locker's misrepresentations and omissions." SPA 81. But a participant's subjective understanding, or lack thereof, is not the issue. A participant need not have "subjectively gained knowledge that [his] fiduciary made material misrepresentations" in order for his claim to accrue. *J. Geils*, 76 F.3d at 1252; *id.* at 1252-55. Rather, his claim accrues when the information giving rise to the claim is discoverable through due diligence. Here,

participants who left the company while still in wear-away had all the information they needed to discover their potential claims. *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.'") (quoting *Noble v. Chrysler Motors Corp.*, 32 F.3d 997, 1000 (6th Cir. 1994)).

The District Court's opinion eviscerates the constructive-notice standard by making ignorance, or negligent refusal to review available data, a defense to constructive knowledge. Indeed, from an evidentiary standpoint, it will be virtually impossible to rebut a plaintiff's alleged failure to understand. The upshot of the District Court's ruling is that the statute of limitations will not begin to run until a lawyer approaches a potential plaintiff with a detailed roadmap for impending litigation. That could be 10, 20, or even 50 years from the date of the alleged breach, even if the facts giving rise to the claim were readily discoverable from the very beginning. *See Novella*, 661 F.3d at 146-47 (rejecting interpretation of statute of limitations that would allow a "pensioner [to] collect benefit checks for twenty or thirty years without any obligation to inquire as to the correctness of the calculations underlying the benefit payments").

Plaintiffs dispute that the limitations period began to run when they received their lump-sum payments, but they identify no alternative event when their claims would have accrued. Courts have rightly rejected "the anomalous result" that a statute of limitations "[does] not begin to run until after [a] lawsuit [is] filed." *See Cotter v. E. Conference of Teamsters Ret. Plan*, 898 F.2d 424, 429 (4th Cir. 1990). In *Thompson v. Retirement Plan for Employees of S.C. Johnson & Son, Inc.*, 651 F.3d 600 (7th Cir. 2011), for example, a company denied employees certain interest credits to their cash balance pension plans required by ERISA. *Id.* at 602. The class plaintiffs argued that their receipt of deficient lump-sum distributions did not start the running of the statute of limitations because they did not then understand their injury. *Id.* at 606. The Seventh Circuit disagreed, holding that once plaintiffs left the company and received statements showing that the requisite interest credits had not been added, plaintiffs were on notice of their claims. *Id.* at 606-07. The alternative would be "no accrual date" and, consequently, a "nullification of the statute of limitations." *Id.* at 607. The Seventh Circuit concluded that this was an unacceptable outcome. *Id.* So too here, accepting the District Court's reasoning would mean that plaintiffs' claims would not accrue—regardless of their lack of due diligence—until they were approached by an ERISA-savvy lawyer. This result would undermine the purpose of a statute of limitations. *See Carey v. Int'l Bhd. of Elec. Workers Local 363 Pension Plan*, 201

F.3d 44, 47 (2d Cir. 1999) ("Statutes of limitation serve several important policies, including rapid resolution of disputes, repose for those against whom a claim could be brought, and avoidance of litigation involving lost evidence or distorted testimony of witnesses.").

B. The District Court's Statute-of-Limitations Ruling Threatens The System of Employer-Sponsored Retirement Plans

Sanctioning the District Court's statute-of-limitations decision would have the same deleterious consequences as approving its detrimental-reliance ruling. *See supra* pp. 17-22. *First*, effectively suspending the statute of limitations "in perpetuity" would "thwart actuarial prediction of plan liability and thereby threaten the ability of pension plans to prepare in advance to meet financial obligations simultaneously to both beneficiaries and adverse litigants." *Veltri v. Bldg. Serv. 32B-J Pension Fund*, 393 F.3d 318, 325 (2d Cir. 2004) (quotation marks omitted). An unexpected liability resulting from a decades-old violation could imperil the health of a plan and undermine the plan sponsor's ability to provide pensions for employees and beneficiaries.

Second, exposing employers to limitless liability would encourage plan sponsors to issue lengthy and complex communications in an effort to avoid any potential oversights. Moreover, it would 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").

Third, eliminating the statute of limitations would "unduly discourage employers from offering ERISA plans in the first place." *Conkright*, 559 U.S. at 517 (quotation marks and alterations omitted). If employers knew that a mistake made long in the past could return to haunt them decades later, potentially bankrupting the company, they could conclude that offering or continuing to offer benefit plans to their employees is simply not worth the risk.

CONCLUSION

The District Court's rulings on detrimental reliance and the statute of limitations are legally erroneous. Moreover, they upset the "careful balanc[e] between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." *Conkright*, 559 U.S. at 517 (quotation marks omitted). The District Court's judgment should be reversed.

Respectfully submitted this 23rd day of February, 2016.

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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, 6,368 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). It has been prepared in a proportionally spaced typeface (Times New Roman) using 14-point font.

/s/ Evan Miller
Evan Miller

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users, who will be served by the appellate CM/ECF system.

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