15-3602-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-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

BRIEF FOR AMICUS CURIAE SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR IN SUPPORT OF PLAINTIFF-APPELLEE REQUESTING AFFIRMANCE

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QUESTIONS PRESENTED

This appeal arises from a class action brought by plaintiff Geoffrey Osberg, a former employee of defendant Foot Locker, Inc. (Foot Locker, or Company) and a participant in the Foot Locker Retirement Plan (Plan). Plaintiff alleges that Foot Locker violated numerous provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq., when it made misrepresentations regarding the Plan's conversion in 1996 from a traditional defined benefit plan to a cash balance plan. Specifically, plaintiff asserts that both prior to the cash balance plan conversion and in subsequent summary plan descriptions (SPDs), Foot Locker, the Plan's sponsor, administrator, and named fiduciary, violated ERISA by intentionally misrepresenting to plan participants that their retirement benefits would continue to increase after the conversion. Plaintiff asserts that the conversion, in fact, was designed to and actually did cause many participants, including Osberg, to experience a sometimes-lengthy period during which participants temporarily stopped accruing benefits.

After a previous appeal, this Court vacated the district court's dismissal of the case. On remand, the district court certified a class, conducted a bench trial, and issued an order and final judgment in Osberg's and the class's favor, ruling that Foot Locker, through inaccurate SPDs and other communications, purposefully misled plan participants about the conversion, which was designed to save Foot

Locker money at their expense. The court held that these actions by Foot Locker, a Plan fiduciary, violated ERISA section 102(a), 29 U.S.C. § 1022(a), and ERISA section 404(a)(1), 29 U.S.C. § 1104(a)(1). The court ordered the plan to be reformed to provide the benefits that Foot Locker had promised. Defendants have appealed that order and final judgment, and the Secretary's brief addresses the following questions:

1. Whether the district court correctly concluded that plaintiffs' claims for fiduciary breach violations were timely under ERISA's "fraud or concealment" provision.

2. Whether the participants were required to show that they detrimentally relied on Foot Locker's misrepresentations in order to establish that Foot Locker breached its fiduciary duties and to obtain class-wide relief in the form of reformation.

3. Whether the district court correctly found that the plaintiffs established that Foot Locker's misstatements caused them to have a mistaken understanding of how their benefits would accrue after the cash balance plan conversion.

THE SECRETARY'S INTEREST

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

STATEMENT OF THE CASE

Plaintiff Geoffrey Osberg was an employee of defendant Foot Locker from 1982 to 2002. Joint App'x (JA) 1107. Throughout that time, Osberg participated in the Foot Locker Retirement Plan. See id. at 1106–16. Prior to January 1, 1996, the Plan was a traditional defined benefit plan that paid participants a monthly retirement benefit tied to their compensation and years of service with the Company. Id. at 3462. Effective January 1, 1996, however, Foot Locker converted the Plan to a "cash balance" plan, which, while still subject to the rules governing defined benefit plans, operates more like a defined contribution plan. Id. at 3463. Under the amended cash balance plan, a participant's benefit is expressed as a hypothetical, or notional, account balance, which is increased by two factors: (1) "compensation credits," which are based on a percentage of the participant's earnings and which Foot Locker contributes annually to participants' accounts; and (2) a 6% annual rate of interest. Id. at 3477. Upon retirement or termination of employment, participants can elect to receive their account balances either as a lump sum or in monthly installments. Id. at 3465. For employees who participated in the Plan as of December 31, 1995, and consistent with ERISA's anti-cutback rule, 29 U.S.C. § 1054(g), which prohibits ERISA plans from reducing accrued benefits through plan amendments, Foot Locker guaranteed that their benefit under the amended Plan would not be less than their accrued Plan benefit as of December 31, 1995 (pre-1996 Plan). JA 3465–66, 3504.

Before the conversion, Foot Locker promised participants that the amended Plan would pay them benefits under an "A plus B" approach: participants would be entitled to their accrued benefit under the pre-1996 Plan (Part A), plus the continued accrual of benefits under the cash balance plan (Part B). JA 3504. For example, in a November 17, 1995 memorandum from Foot Locker's corporate benefits department to "all employees" announcing the impending conversion (1995 Memorandum), Foot Locker told participants that, under the soon-to-be-amended Plan, their "accrued benefit as of December 31, 1995 [would be] actuarially converted to an initial account balance." Id. at 2141. Furthermore, far from informing participants that their benefits would not be subject to a no-growth period after the conversion, the 1995 Memorandum stated that their "account balance[s] w[ould] increase in two ways" – namely, through annual interest and compensation credits. Id. at 2141–42.

Following the conversion, Foot Locker reiterated to participants that their initial account balances were the actuarial equivalent of their pre-1996 accrued benefit, and that they would continue to accrue benefits under the amended Plan. In an SPD distributed by Foot Locker in December 1996 (the "1996 SPD"), the Company explained in a section titled "How Your Retirement Benefit is Determined" that a participant's initial account balance was "equal to the actuarial equivalent lump sum value of your accrued benefit under the Plan as of December 31, 1995." JA 2155 (The Woolworth Retirement Plan: Summary Plan Description (Dec. 1996) at 10)); id. at 3479. This section of the 1996 SPD similarly described a participant's "initial account balance" as "the value of your Plan benefit as of December 31, 1995, before the Plan was amended." Id. at 2155, 3478. The SPD's introduction also equated participants' initial account balances with their accrued benefits: "To accomplish this change [to a cash balance plan], participants' accrued benefits as of December 31, 1995 were converted to initial account balances." Id. at 2145. The SPD then illustrated how the account balance of a hypothetical participant with 10 years of service with Foot Locker as of January 1, 1996, would consistently grow over the ensuing three years under the Amended Plan. Id. at 2158.

Yet in reality, the Amended Plan's initial account balances were not the "actuarial equivalent lump sum value" of the plan participants' pre-1996 accrued benefits, but rather something far less – a discrepancy that caused most participants to temporarily stop accruing benefits following the cash balance conversion. In the context of defined benefit plans, ERISA defines "accrued benefit" as "the individual's accrued benefit under the plan . . . expressed in the form of an annual annuity at normal retirement age," 29 U.S.C. § 1003(23)(A), with the Foot Locker Plan, in turn, generally defining "normal retirement age" as age 65, JA 2150. The lump-sum actuarial equivalent of a participant's accrued benefit – i.e., of their age-65 annuity – is the present lump-sum amount that, when increased by an assumed rate of interest over a period of time until the participant turns 65, will grow to become equivalent to the lump-sum value of the annuity owed at age 65. See Esden v. Bank of Bos., 229 F.3d 154, 159 (2d Cir. 2000) (explaining that for normal retirement annuity benefits under defined benefit plans, "[a]ny distribution in optional form (such as a lump sum) must be no less than the actuarial equivalent of such benefit. For a cash balance plan this calculation involves projecting the cash balance forward and then discounting back to present value.").

The assumed annual rate of interest applied to the present lump sum is vital to this calculation: the higher the interest rate, the lower the present lump-sum. Because this interest rate operates to discount the participant's age-65 lump-sum benefit to its present lump-sum equivalent, it is often referred to as a "discount rate." ERISA section 205(g)(3), 29 U.S.C. § 1055(g)(3), requires that plans calculate the present lump-sum value of an annuity using the discount rate prescribed in Treasury regulations issued pursuant to the Internal Revenue Code, 26 U.S.C. § 417(e)(3), which is equivalent to the annual interest rate applicable to 30-year Treasury Bonds (a rate the Internal Revenue Service determines on a monthly basis). 26 C.F.R. § 1.417(e)-1(d); see Esden, 229 F.3d at 159 (explaining that in calculating actuarial equivalent lump sums, "the discount rate is prescribed by statute"); JA 3465; accord Berger v. Xerox Ret. Income Guar. Plan, 338 F. 3d 755, 760 (7th Cir. 2003). Thus, a Plan participant who retired on January 1, 1996, and elected to receive her benefit in a lump sum would have been entitled to have her lump-sum benefit determined by a discount rate equivalent to the 30-year T-Bond rate then in effect. See JA 2446. When the conversion occurred, this rate was 6.06%. See JA 963.

But Foot Locker did not use the 6.06% rate to convert participants' accrued benefits into initial account balances. Instead, Foot Locker applied a 9% discount rate. JA 3463–65. Foot Locker's use of a higher discount rate than the one established by ERISA for determining actuarial equivalent lump sums meant that participants' initial account balances were not, as Foot Locker represented to its participants, the "actuarial equivalent lump sum value of [their] accrued benefits," but rather something less than that. Id. at 3464–65. As a result, employees who participated in the pre-1996 Plan – i.e., Plan participants who were entitled under

ERISA to receive at least their accrued benefit under the pre-1996 Plan – did not accrue any new benefits following the conversion until their lesser account balances, through annual interest and compensation credits, caught up with, or "wore away," their accrued benefit under the pre-1996 Plan. Id.

Mr. Osberg's situation exemplifies this problem. Because the deficit between his initial account balance and his pre-1996 accrued benefit was so substantial, he did not accrue any new benefits between 1996 and his retirement in 2002. JA 1108–09. Foot Locker did not disclose in its 1995 Memorandum that it would calculate initial account balances under the Amended Plan using a 9% discount rate as opposed to the required 6.06% rate; nor did it otherwise mention the possibility of wear away. See JA 2141. The 1996 SPD mentioned a 9% interest rate only once, in a definitional section, which stated that the "initial account balance" would be "determined actuarially based upon a 9% rate of interest and the mortality table set forth in IRS rulings." JA 2150. The SPD did not advise participants that the Plan's application of the interest rate was inconsistent with the SPD's express promise that they would receive "the actuarial equivalent" of their accrued benefits, nor did it explain how the interest rate factored into the benefit calculation. Nowhere did the 1996 SPD explain that using this rate would result in an extended wear-away period, during which participants would work for Foot Locker without accruing additional retirement benefits. See id. at 2144–67.

Upon retiring in 2002, plaintiff elected to receive his benefits in a lump sum. Though his benefits election statement indicated his lump-sum distribution ($25,695.96) exceeded his account balance under the cash balance plan ($20,093.78), JA 176, there was no indication in that statement that this higher lump-sum amount stemmed from his pre-1996 Plan benefit, see JA 1004.

PROCEDURAL HISTORY

Acting on behalf of a putative class, plaintiff filed his original complaint on February 23, 2007, and filed an amended complaint against Foot Locker, Inc. on January 9, 2012. Dkt. Nos. 53, 57. As relevant, the amended complaint alleges that Foot Locker (1) violated ERISA section 102(a), 29 U.S.C. § 1022(a), by issuing SPDs that failed to disclose the Amended Plan's wear-away effects; and (2) violated its fiduciary duties under ERISA section 404(a), 29 U.S.C. § 1104(a), through its actions and omissions described above. Dkt. 57 (Am. Compl. at ¶¶ 88–114). Among other things, it seeks equitable relief in the form of reformation of the plan in order to give the participants what they were promised, and then benefits as calculated under the reformed Plan. Id. at p. 40 (Prayer for Relief ¶¶ D, E).

The district court granted defendant's motion for summary judgment in its entirety on December 6, 2012, thereby dismissing the case. JA 184.

On appeal, however, this Court reversed the district court's decision. JA 202. First, this Court determined plaintiff's section 404(a) claim was timely. Id. at 199. Second, this Court concluded "that the district court erroneously applied an 'actual harm' requirement" given plaintiff's requested remedy of contract reformation, which would afford him "the total relief sought" in the form of additional benefits under the Plan's reformed terms. Id. at 200–202.

On remand, the district court certified plaintiff's proposed class of Plan participants in a September 24, 2014 order. JA 226. After a bench trial, the district court made extensive findings of fact and issued an order and final judgment in favor of the participants. Id. at 3459–3543. The court credited the testimony of plaintiff and other class members that they did not understand the cash balance plan conversion might cause them to suffer a wear-away period. Id. at 3467–92. This was true, the court determined, even for the testifying class members who received individual communications from defendants about their retirement benefits and how they were calculated. Id. at 3459 n.2 ("There is no evidence in the record that any average Plan Participant ever understood that he or she was subject to wear-away, even once his or her benefits commenced."). Further, the court found, based on the credited testimony of Foot Locker management, that (1) Foot Locker converted its retirement plan to a cash balance plan in part to save costs; (2) Foot Locker management knew prior to the conversion that it would cause Plan participants to suffer lengthy wear-away periods; and (3) Foot Locker management thought the conversion "had the advantage of being able to obscure what was an effective [benefits] freeze, without the accompanying negative publicity, loss of morale, and decreased ability to hire and retain workers." Id. at 3467–85. The court also found that none of Foot Locker's communications with employees about the conversion described the possibility of wear-away, or "the difference between a Participant's accrued benefit under the old Plan and . . . her cash balance under the new," and that those statements were therefore "intentionally false and misleading." Id. at 3473–74. In particular, the SPD distributed to employees in December 1996 "contained a number of intentionally false misstatements," including its description of how the cash balance plan's initial account balance would be calculated and how the initial account balance related to a participant's vested benefits as of December 31, 1995. Id. at 3477–85.

Turning to the law, the court began its analysis by noting that ERISA section 502(a)(3) entitles plan participants to obtain "appropriate equitable relief" to redress statutory violations, such as the violations of ERISA's prudence and loyalty provisions in ERISA section 404, 29 U.S.C. § 1104, and the violations of ERISA's

SPD requirements in ERISA section 102(a), 29 U.S.C. § 1122(a), asserted by the class. JA 3510. More specifically, with regard to the reformation remedy sought by the class, the court noted that he "must show: (1) violations of ERISA §§ 404(a) and 102(a), based on a preponderance of the evidence; (2a) mistake or ignorance by employees of 'the truth about their retirement benefits,' based on clear and convincing evidence; and (2b) 'fraud or similar inequitable conduct' by the plan fiduciaries, based on clear and convincing evidence." Id. (quoting Amara v. CIGNA Corp., 775 F.3d 510, 525–31 (2d Cir.2014)).

The court then determined that Foot Locker was a fiduciary by virtue of being the Plan administrator and being granted discretionary authority to administer the Plan. JA 3518–19. The court next held, based on its extensive factual findings concerning Foot Locker's desire to cut the costs of its pension plan through a deliberate scheme to mislead the participants about their benefits under the converted Plan, that Foot Locker violated ERISA's duty of loyalty under section 404(a)(1)(A) by "plac[ing] its interests above those of Plan Participants" when it converted to the cash balance plan. Id. at 3520–21. Similarly, "by implementing a plan conversion that effectively eliminated additional benefit growth for a period of years," while at the same time misleading participants about those wear-away effects, the court determined that Foot Locker likewise violated ERISA's duty of prudence under section 404(a)(1)(B). Id. at 3522–23. Finally, the court determined that defendant had violated ERISA section 102(a), because "the SPD was not written clearly," did not sufficiently explain how the pre-1996 benefit related to the Amended Plan's initial account balance, and falsely stated that the conversion methodology "result[ed] in actuarial equivalence." Id. at 3526–27.

Next, the court reaffirmed the prior ruling it made when certifying the proposed class that, while plaintiffs had the burden of proving the existence of class-wide misrepresentations about the Plan conversion, which it met, this did "not require proof of individualized reliance" on those misrepresentations. JA 3529–30. Moreover, the court concluded that, in any event, "there is overwhelming trial evidence that, if legally necessary, plaintiffs have proven a reasonable inference of class-wide reliance." Id. at 3529. Indeed, the court pointed out that "Foot Locker admitted at trial that the very purpose of keeping wear-away secret was to avoid negative publicity, loss of morale, and inability to hire and retain employees." Id. at 3529.

Turning to the elements needed to obtain a reformation remedy, the district court ruled that the class had shown "by clear and convincing evidence," based primarily on class members' credited testimony and Foot Locker's communications with them, that "[p]articipants reasonably but mistakenly believed that their pension benefits were equal to the sum of (A) the benefit each Participant earned under the Plan's traditional 'defined benefit' annuity formula for service through

December 31, 1995, plus (B) the benefits Foot Locker told Participants they were earning under the Plan's 'cash balance' account formula for service after January 1, 1996." JA 3530–31. Therefore, plaintiffs had sufficiently shown class-wide mistake for purposes of obtaining reformation. Id. at 3531.

The court also concluded that the class had shown Foot Locker engaged in both fraud and inequitable conduct. The court reasoned that there was "no doubt" the class had met its burden of showing equitable fraud, which does not require a showing of intent to deceive or defraud, because "Foot Locker sought and obtained cost savings by altering the Participants' Plan, but [did] not disclos[e] the full extent or impact of those changes." JA 3532–33. Moreover, the court concluded that the class had sufficiently shown Foot Locker engaged in "inequitable conduct" as well, given that its withholding of information from the class induced its mistake. Id. at 3534–35.

Finally, the court addressed defendants' argument that the class should be modified to exclude members whose claims allegedly were barred by the applicable statutes of limitations. JA 3536. The court concluded that the class's section 404 claims were subject to the statutory "fraud or concealment" exception in ERISA section 413, 29 U.S.C. § 1113, making the limitations period six years from when the class members discovered the fiduciary breach. Id. at 3537. This was so, the court reasoned, because the class members did not understand that they were subject to wear-away due to Foot Locker's misrepresentations and omissions, even after they received or began receiving Plan benefits, and "[t]here [wa]s no evidence of a single Class member who was aware or reasonably could have been aware of wear-away outside the statutes of limitations." Id. Furthermore, the court disagreed with defendant that class members who terminated their employment with Foot Locker prior to suit were on notice of their wear-away claims. The court explained that "class members' receipt of benefits was insufficient" to give them "notice of their claims." Id.

The district court therefore issued an order and final judgment in favor of the participants, ordering class-wide relief in the form of reformation and payment of additional benefits under the reformed Plan. JA 3541–43.

SUMMARY OF THE ARGUMENT

1. The district court properly concluded that plaintiffs timely filed their complaint asserting fiduciary breach claims under ERISA's provision allowing suit within six years of discovery of a statutory breach or violation in cases involving "fraud or concealment." Contrary to Foot Locker's assertion, plaintiffs were not required to establish the elements of common law fraud, including intentionality and reliance, to show concealment for purposes of this statutory provision. This Court in Caputo v. Pfizer long ago rejected just such an argument, which conflates the terms "fraud" and "concealment," despite the use of the disjunctive term "or" in

the provision. Because the district court did not commit clear error in finding that Foot Locker, a fiduciary under the pension Plan, failed to explain and instead actively concealed how the cash balance conversion would affect Plan participants, the court correctly held that plaintiffs were entitled to file suit within six years of discovering the breaches.

2. Foot Locker likewise errs in arguing that each member of the class must demonstrate that he or she detrimentally relied on Foot Locker's misrepresentations in order to establish that Foot Locker breached its duties as a fiduciary and to obtain equitable relief in the form of reformation. As with Foot Locker's "fraudulent concealment" argument, this argument simply ignores this Court's own precedent. In Amara v. CIGNA, this Court, after remand from the Supreme Court, soundly rejected the argument that that plan participants and beneficiaries need to show detrimental reliance to obtain reformation under section 502(a)(3) as relief for fiduciary misrepresentations and omissions. And, contrary to Foot Locker's argument, no pre-Amara case from this Circuit actually holds that each member of a class of plan participants must establish detrimental reliance to prove a fiduciary breach based on misrepresentations or to obtain reformation as relief, nor does any other cited case so hold. Here, the district court found, based on extensive testimonial and documentary evidence, that Foot Locker misstated the effects of the conversion to a cash balance plan, and intentionally obscured the fact that the

conversion was designed to save it a great deal of money by effectively causing a benefits freeze for many employees. These findings are not clear error and fully support the court's conclusion that Foot Locker acted disloyally to its employees and that, as a consequence, plaintiffs were entitled to reformation of the Plan to pay them what Foot Locker promised.

3. Just as each class member need not establish detrimental reliance, each and every member need not show mistake in order to obtain reformation. Again, in arguing to the contrary, Foot Locker ignores this Court's decision in Amara, which concluded that plan participants can prove mistake for purposes of reformation "through generalized circumstantial evidence in appropriate cases," such as where "defendants have made uniform misrepresentations about an agreement's contents and have undertaken efforts to conceal its effect." That is what the plaintiffs have done here, as the district court found.

ARGUMENT

I. The District Court Correctly Applied the "Fraud or Concealment" Provision of ERISA Section 413 to Conclude that the Fiduciary Breach Claims Were Timely

Pursuant to ERISA section 413, an action for breach of an ERISA fiduciary duty must be brought within:

> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the

> latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation.

29 U.S.C. § 1113. However, the statute also provides that, "in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation." Id.; see Janese v. Fay, 692 F.3d 221, 228 (2d Cir. 2012).

Based on its extensive and well-supported factual findings, the district court correctly concluded that the "fraud or concealment" limitations period was applicable to plaintiff's section 404(a) claims, and that the claims were timely under that provision. Foot Locker argues this was error because the district court concluded only that it had engaged in equitable fraud, and not common-law fraud, which, according to Foot Locker, requires a showing of both fraudulent intent and reliance. Appellant's Br. 36-37. This is true, Foot Locker argues, even for "the 'concealment' prong," which Foot Locker describes as "requir[ing] a showing of fraudulent concealment." Id. Foot Locker is mistaken.

First, even if a showing of fraudulent intent were required, the district court in fact found that Foot Locker's communications with participants were "intentionally false and misleading," JA 3474, and that, as we discuss below, the participants reasonably but mistakenly believed what they had falsely been told.

See infra at 28-29. In any event, even if plaintiffs were required and failed to establish common-law fraud to come within the first prong, plaintiffs established that Foot Locker concealed its breaches for purposes of the second prong through the false and misleading SPDs and other communications to its employees and their dependents. Foot Locker's argument to the contrary conflates the fraud and concealment prongs of the statutory provision and thus asks the court to ignore Congress's use of the disjunctive term "or" in section 413, United States v. Woods, 134 S. Ct. 557, 567 (2013) (the term "or" in "ordinary use is almost always disjunctive, that is, the words it connects are to be given separate meanings"), and asks this Court to issue a decision in conflict with its own precedent.

In Caputo v. Pfizer, Inc., this Court "decline[d] to follow our sister circuits in fusing the phrase 'fraud or concealment' into the single term 'fraudulent concealment.'" 267 F.3d 181, 189 (2d Cir. 2001). Instead, the Caputo court explained that the terms "fraud" and "concealment" had distinct meanings when Congress passed ERISA. "'Fraud' was defined as 'a false representation of a matter of fact, whether by words or conduct, by false or misleading allegations or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury.'" Id. (quoting Black's Law Dictionary 788 (Rev. 4th ed.1968)). In contrast, "'concealment' was defined as 'withholding of something which one knows and which one, in duty, is bound to reveal.'" Id. at 189–90 (quoting Black's Law Dictionary 360 (Rev. 4th ed.1968)).

Applying these definitions, this Court concluded in Caputo that the pertinent section 413 provision is satisfied if there is either: (1) "fraud," which occurs when "a fiduciary . . . breached its duty by making a knowing misrepresentation or omission of a material fact to induce an employee/beneficiary to act to his detriment"; or (2) "concealment," which occurs if the fiduciary "engaged in acts to hinder the discovery of a breach of fiduciary duty." 267 F.3d at 190 (citation omitted). In other words, fraud or concealment occurs if the fiduciary engages in a knowing misrepresentation that has the intent to deceive or induce detrimental reliance, or either knowingly withholds pertinent information or actively conceals the underlying breach. See id. at 190.

Foot Locker suggests that this Court's opinion in Caputo held that to establish "concealment" under section 413 a plaintiff must show the same intentional fraud and reliance that they say is necessary under the first prong of the statutory test. Appellant's Br. 37 (citing Caputo, 267 F.3d at 190). It is true that Caputo acknowledges that the Second Circuit's interpretation of the fraud or concealment provision "overlaps somewhat with that of our sister circuits as we construe it to apply in cases of fraud or [fraudulent] concealment.'" 267 F.3d at 190. But, in the preceding paragraph, the Court stated both that "Congress [clearly] intended to provide a lengthier statute of limitations where the fiduciary breached its duty by misrepresenting or failing to disclose a fact that ERISA required the fiduciary to disclose," and that the term "concealment" would be "superfluous unless its common, independent meaning with respect to causes of action" applied to it, which the court described as "hinder[ing] the discovery of a breach of fiduciary duty." Id. (citations omitted). In other words, "fraud or concealment" occurs if the fiduciary engages in a knowing misrepresentation that has the intent to deceive or induce detrimental reliance or either knowingly withholds material information or actively conceals the underlying breach. Id. Contrary to Foot Locker's argument on appeal, this Court has therefore made clear that a plaintiff does not need to show an intent to defraud (or reliance on a misrepresentation) in order to come under the concealment prong of section 413.

The district court's extensive factual findings support its application of the "fraud or concealment" exception to plaintiff's section 404(a) claims because they establish that Foot Locker failed to explain and indeed actively concealed how the cash balance conversion would affect Plan participants, an effort it undertook to avoid the workplace turmoil it anticipated would occur upon full and truthful disclosure about the cash balance conversion's wear-away effects. JA 3467–73; see also Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Mich., 751 F.3d 740, 749 (6th Cir. 2014) (concealment prong satisfied where defendant lied to plan administrator about the hidden fees it was charging the plan). That this concealment occurred is further supported by the court's factual finding, based on testimony by numerous plan participants, JA 3467–93, that the "Class members did not understand that they were subject to wear-away as a result of Foot Locker's misrepresentations and omissions," id. at 3537 ("There is no evidence of a single Class member who was aware or reasonably could have been aware of wear-away outside of the statute of limitations.").

II. Plaintiffs Need Not Show Detrimental Reliance on Foot Locker's Misrepresentations to Establish that Foot Locker Breached its Fiduciary Duties Under ERISA Section 404(a), or to Obtain Equitable Relief for Such Misrepresentations in the Form of Reformation

Defendants mistakenly argue that each member of the class must demonstrate she detrimentally relied on Foot Locker's misrepresentations in order to establish that Foot Locker breached its duties as a fiduciary and to obtain reformation as "appropriate equitable relief" under section 502(a)(3). Appellant's Br. at 38–44. This argument was rejected by the Supreme Court and Second Circuit in Amara, and by the Second Circuit in its prior decision in this case.

Drawing on the law of trusts, ERISA's loyalty provision, codified in section 404(a), requires each plan fiduciary to "discharge his duties with respect to a plan solely in the interests of the participants and beneficiaries." 29 U.S.C. § 1132(a). It is therefore unsurprising and beyond dispute that "[t]o participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense" is a violation of ERISA's loyalty provision codified in section 404(a). Varity v. Howe, 516 U.S. 489, 506 (1996); see also id. (noting that "'[l]ying is inconsistent with the duty of loyalty,'" and that the "duty of loyalty requires trustee to deal fairly and honestly with beneficiaries") (citations omitted). Here, the court found, based on extensive testimonial and documentary evidence, that the SPDs and other communications from Foot Locker misstated the effects of the conversion to a cash balance plan, and intentionally obscured the fact, known by management, that the conversion was designed to save the company a great deal of money by effectively causing a benefits freeze for many employees. JA 3467–73. Not just do these findings fully support that Foot Locker committed fiduciary breaches under Varity, but further it is hard to imagine how the court could have drawn any other conclusion than that Foot Locker's actions were disloyal, regardless of whether each and every plan participant detrimentally relied on its misrepresentations.

The Second Circuit decisions Foot Locker cites for the proposition that an ERISA plaintiff must establish detrimental reliance to prove a fiduciary breach based on misrepresentations, Appellant's Br. at 38, are not to the contrary. In Bell v. Pfizer, Inc., 626 F.3d 66 (2d Cir. 2010), the court held that unintentional miscommunications that did not relate to a plan participant's status under an

ERISA plan could not support a fiduciary breach claim. Id. at 75, 77. Its statement that a plaintiff must establish detrimental reliance for a breach of fiduciary duty claim based on material misrepresentation was dicta (for which it cited an unpublished summary decision which did not address how to establish a fiduciary breach for misrepresentation), and did not go to what was necessary to establish an injury and entitlement to relief. Id. at 75 (citing King v. Pension Tr. Fund of Elec. Indus., 131 F. App'x 740, 742 (2d Cir. 2005)). And the other case cited by King was the Caputo decision, which did not state that proof of detrimental reliance is required to establish that misrepresentations are fiduciary breaches, but merely stated that a plaintiff can show "materiality" by showing a "substantial likelihood" that a reasonable employee would be misled, 267 F.3d at 192, a standard that the district court's decision here clearly met.

Moreover, for purposes of awarding equitable relief under ERISA section 502(a)(3), "any requirement of harm must come from the law of equity," CIGNA Corp. et al. v. Amara et al., 563 U.S. 441, 443 (2011), where, as here, the "relevant substantive provisions" do not "set forth any particular standard for determining harm." Id. Applying this principle, the Supreme Court in Amara rejected CIGNA's argument that a participant must always show detrimental reliance before a court can provide a remedy. 563 U.S. at 443 (the law of equity in the days of the divided bench lacked a "general principle that 'detrimental reliance' must be proved before a remedy is decreed"). Accord Amara, 775 F.3d at 532 n.12. Instead, although equity courts required a detrimental-reliance showing before awarding the remedy of estoppel, the Supreme Court recognized that a court could reform a contract to reflect the mutual understandings of the parties without a showing of detrimental reliance "where 'fraudulent suppressions, omissions, or insertions'" materially affected the contract. Amara, 563 U.S. at 443; see also Laurent v. PriceWaterhouseCoopers LLP, 963 F. Supp. 2d 310, 331 (S.D.N.Y. 2013) ("whereas estoppel requires detrimental reliance, no such requirement attaches to reformation or surcharge"), aff'd on other grounds, 794 F.3d 272 (2d Cir. 2015).

On remand, this Court addressed and rejected the precise argument Foot Locker makes here: that plan participants and beneficiaries need to show detrimental reliance to obtain reformation under section 502(a)(3) as relief for fiduciary misrepresentations and omissions. Amara v. CIGNA Corp., 775 F.3d 510, 525 n.12 (2d Cir. 2014) (citing Baltzer v. Raleigh & Augusta R. Co., 115 U.S. 634, 645 (1885); 1 Dobbs, Law of Remedies § 4.3(7) at 617 (2d ed. 1993)). This makes sense, because reformation is a way of enforcing an agreement that by virtue of fraud or mistake is not reflected in the written contract, and a showing of harm is generally not required to enforce a contract. See Feifer v. Prudential Ins. Co. of Am., 306 F.3d 1202, 1213 (2d Cir. 2002). Thus, in Amara, this Court allowed reformation without requiring a showing that class members detrimentally relied on misrepresentations in that case. Likewise, in the earlier appeal in this case, this Court already rejected the argument that Osberg and other members of the class were required to show "actual harm," including by establishing that they detrimentally relied on Foot Locker's misrepresentations. JA 192 ("To obtain contract reformation [for violations of ERISA sections 102(a) and 404(a)], equity does not demand a showing of actual harm.").

As in Amara, plaintiffs' section 404(a) claims in this case are based on Foot Locker's failure to provide accurate information and its affirmative misrepresentations about the cash balance conversion in SPDs and other communications to plan participants. And as in Amara, these omissions and misstatements by Foot Locker establish that Foot Locker breached its duties to Plan participants, and allow the court to reform the Plan to give the participants what Foot Locker led them to believe they would get, whether or not they demonstrated that they detrimentally relied on these communications. To the extent this conflicts with non-binding statements in the pre-Amara decisions Foot Locker cites, see Bell, 626 F.3d at 75; King, 131 F. App'x 740, 742, the Supreme Court's decision in Amara, and the subsequent decisions by this Court in Amara and in this case, have made clear that there is no need to establish detrimental reliance to obtain reformation as a remedy for misrepresentations of the kind at issue here. See Amara, 775 F.3d at 526 n.12; Osberg, 555 F. App'x at 80.[1]

III. Plaintiff Need Not Directly Show Mistake by Each Member of the Class in Order to Obtain Reformation

Foot Locker also argues that the district court erred by holding that plaintiffs established mistake for purposes of reformation because "there is no 'satisfactory proof' that each and every class member shared a common misunderstanding about Foot Locker's Plan," and "it is far from 'unquestionable' that every one of the 16,000 class members here was mistaken about his retirement benefit." Appellant's Br. at 47–48. Such a showing, however, is unnecessary.

In this Court's Amara decision on remand from the Supreme Court, it quite rightly concluded that plan participants can prove mistake for purposes of reformation "through generalized circumstantial evidence in appropriate cases." 775 F.3d at 529. As the court there pointed out, "[s]uch proof may be more than sufficient, moreover, in certain cases where, as here, defendants have made uniform misrepresentations about an agreement's contents and have undertaken

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[1] For the same reason, the Third Circuit decision that defendants cite – Burnstein v. Ret. Account Plan for Emps. of Allegheny Health Educ. & Research Found., 334 F.3d 365, 387 (3d Cir. 2003) – is questionable authority after Amara for the proposition that a claim for reformation based on fiduciary misrepresentations requires a showing of detrimental reliance. In any event, this case certainly does not hold that every member of the class must separately establish detrimental reliance.

efforts to conceal its effect." Id. at 529–30 (describing uniform misrepresentations occurring through class-wide distribution of misleading SPDs); see also Klay v. Humana, 382 F.3d 1241, 1258–59 (11th Cir. 2004) (ruling that, "based on the nature of the misrepresentations at issue," generalized circumstantial evidence "could lead a reasonable factfinder to conclude beyond a preponderance of the evidence that each individual plaintiff relied on the defendants' misrepresentations").

This is another such case. As in Amara, Foot Locker distributed SPDs to Plan participants that "contained a number of intentionally false misstatements," including its description of how the cash balance plan's initial account balance would be calculated and how the initial account balance related to a participant's vested benefits as of December 31, 1995. JA 3477–85. Here, the district court concluded on the basis of extensive facts established at trial that, in fact, the class "has proven by clear and convincing evidence that, as a result of Foot Locker's false, misleading, and incomplete Plan descriptions, employees were ignorant of the truth about their retirement benefits. Specifically, class members' testimony and other evidence demonstrated that the class members reasonably but mistakenly believed that growth in their cash balance benefit equaled growth in their pension benefit." Id. at 3531. Under Amara, the fact that the proof was circumstantial for much of the class is no basis for reversal, and the pre-Amara, non-ERISA cases that Foot Locker cites, Appellant's Br. at 46, are not to the contrary.[2]

[2] In Beecher v. Able, the Second Circuit refused to reform an already-approved settlement agreement simply because the number of claimants against the settlement fund proved to be less than had been estimated. 575 F.2d 1010, 1015 (2d Cir. 1978). Zell v. Am. Seating Co., was not about reformation at all, but concerned whether summary judgment was proper under the parole evidence rule or whether an oral promise that was contrary to a written contract should be considered. 138 F.2d 641 (2d Cir. 1943), rev'd on other grounds, 322 U.S. 709 (1944). And both cases are simply cited by Foot Locker for the unremarkable proposition that the purpose of reformation is to conform contracts to the expectations of the parties. See Appellant's Br. at 46.

CONCLUSION

For these reasons, the Secretary requests that this Court affirm the district court's order and final judgment in favor of plaintiffs.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of FED. R. APP. P. 28.1(e) and 32(a)(7)(B) because: this brief contains 6,819 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

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Dated: May 24, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2016, I electronically filed the Brief for the Amicus Curiae, Thomas E. Perez, Secretary of Labor, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all registered counsel of record.

/s/Eirik Cheverud
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