Case No. 22-55634

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHEN H. BAFFORD and EVELYN L. WILSON
on their own behalves and on behalf of a class of similarly situated
participants and beneficiaries, and LAURA BAFFORD,

Plaintiffs-Appellants,

v.

NORTHROP GRUMMAN CORPORATION; ADMINISTRATIVE
COMMITTEE OF THE NORTHROP GRUMMAN PENSION PLAN,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California

Case No. 2:18-cv-10219-ODW-E

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

Teresa S. Renaker, Esq.
Kirsten G. Scott
RENAKER SCOTT LLP
505 Montgomery Street, Suite 1125
San Francisco, CA 94104
(415) 653-1733

Elizabeth Hopkins, Esq.
Susan L. Meter, Esq.
KANTOR & KANTOR, LLP
19839 Nordhoff Street
Northridge, CA 91324
(818) 886-2525

Attorneys for Plaintiffs-Appellants

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INTRODUCTION

This is the second trip to the Ninth Circuit for Plaintiffs Stephen Bafford and Evelyn Wilson, two retired, long-time employees of Northrop Grumman Corporation, who are participants in the Northrop Grumman Pension Plan ("Plan"), and Stephen's wife Laura Bafford, who is a beneficiary under the Plan.

After the pension benefits on which they had carefully planned their retirements were slashed by more than half, the Baffords and Ms. Wilson brought suit against the Administrative Committee of the Northrop Grumman Pension Plan ("Committee"), the Plan Administrator, and Alight Solutions LLC (known as Hewitt during the time at issue), the Plan's outside administrative services provider, among other alleged fiduciaries of the Plan. Plaintiffs asserted violations of the Employee Retirement Income Security Act of 1974 ("ERISA") and, in the alternative, asserted claims for professional negligence and negligent misrepresentation under state law against Hewitt. The district court dismissed the case in its entirety, and the Plaintiffs appealed.

On that go-round, this Court affirmed the district court's dismissal of the fiduciary breach claims, reversed the dismissal of the state-law claims (which the district court, declining to exercise supplemental jurisdiction, then dismissed and which the Plaintiffs then filed in state court), and, as relevant here, directed the district court to allow the Plaintiffs to file an amended complaint alleging with more

specificity how the Committee failed to comply with ERISA Section 105, 29 U.S.C. § 1125. This provision of ERISA requires plan administrators to provide plan participants with pension benefit statements specifying the amount of their accrued benefits upon written request, and to automatically provide such statements to participants every three years or give them notice annually of how to obtain such statements.

On remand, Plaintiffs amended their complaint three times in response to orders from the district court to more specifically allege that the Committee had failed to provide them with benefit statements in compliance with the requirements of Section 105. As had previous iterations of the complaint, the amended versions of the complaint alleged that Mr. Bafford and Ms. Wilson had requested and were provided with pension benefit statements on numerous occasions over many years prior to their retirements but that after they retired, Northrop obtained a new service provider that caught and corrected a systemic error in the calculation of benefits for employees with employment histories with acquired companies, such as the Plaintiffs. Excerpts of Record ("ER") 22-23 (Dkt. 114 ¶¶ 51-61).[1] The Plaintiffs added allegations that, multiple times each year leading up to their retirements, Plaintiffs requested these pension benefit statements by logging onto the Northrop

[1] Unless otherwise specified, citations to paragraph numbers are references to the Fourth Amended Complaint, ER 12-32 (Dkt. 114).

benefits website and navigating onto the pension area of the website, as they had been instructed to do, at which point they were instructed to call a provided telephone number to obtain a written benefit statement. ¶¶ 30-35. The complaint also added allegations that the Committee never provided an automatic triennial pension benefit statement, nor did it provide annual notice of how to obtain such a statement. ¶¶ 36-38, 40-45,

The district court struck the Fourth Amended Complaint, explaining that Plaintiffs had failed to abide by its order to file a "reduced pleading that narrowed the issues solely to those related to failure to provide a triennial statement or notice of how to obtain one." ER 10 (Dkt. No. 115). In the court's view, the Plaintiffs' case against the Committee "is not about miscalculation; it is about failure to provide a statement, regardless of what the numbers on the statement may be." ER 11. However, the case that the Plaintiffs have chosen to bring alleges that the Committee violated its duties under ERISA Section 105 by repeatedly providing Plaintiffs with requested pension benefit statements that did not comply with Section 105 because they purported to be "estimates" that could be changed at any time and were, in fact, entirely inaccurate and unsuitable for their statutory purpose to apprise Plaintiffs, as plan participants and beneficiaries, where they stood with respect to their retirement benefits. Because it was clear at this point that the district court fundamentally disagreed with the Plaintiffs' theory of the case, the Plaintiffs informed the court of

their intent not to seek to further amend their complaint and asked the court to enter judgment. ER 6-7 (Dkt. No 116). The court did so. ER 4-5 (Dkt. No. 117). The Plaintiffs appealed and again stand before this Court.

As they have since the beginning, the Plaintiffs seek – through statutory penalties and make-whole monetary relief – to vindicate their rights under ERISA Section 105 and to remedy the harm they have suffered as a result of the Committee's failure to meet the requirements of this provision by providing accurate pension benefit statements showing their accrued benefits. The Plaintiffs fundamentally disagree with the district court's conclusion that Section 105 of ERISA, a key disclosure provision at the heart of ERISA's protective scheme, simply requires that pension plan administrators provide a piece of paper to plan participants with a number purporting to "estimate" their accrued pension benefits at retirement and does not require that number be even close to accurate. To the contrary, Section 105 contains detailed requirements for the contents of a pension benefit statement. Given that ERISA was expressly designed to require disclosures in order to let plan participants know where they stand with respect to their benefits, and to ensure that they are given the retirement benefits they have been promised, the district court's reading of the statute is in error.

JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction under 28 U.S.C. § 1331 to decide this case arising under ERISA and under ERISA Section 502(e) and (f), 29 U.S.C. § 1132(e), (f), the specific jurisdictional provisions for ERISA claims. Pursuant to 28 U.S.C. § 1291, the Court has jurisdiction over this appeal from a final judgment entered by the district court on June 1, 2022. ER 4-5 (Dkt. No. 117). Plaintiffs timely filed a notice of appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1) on June 30, 2022. ER 170 (Dkt. No. 118).

STATEMENT OF THE ISSUE

Whether the Plaintiffs have plausibly stated a claim that the Committee violated its duties as plan administrator under ERISA Section 105 through its repeated failure to provide them with accurate pension benefit statements.

STATEMENT OF THE CASE

I. Statement of Relevant Facts

Plaintiffs Stephen Bafford and Evelyn Wilson are both participants in the Plan, and Plaintiff Laura Bafford is a beneficiary under the Plan through her husband. ¶¶ 6-8. Both Mr. Bafford and Ms. Wilson worked for Northrop, then for TRW, and then for Northrop again after Northrop acquired TRW in 2002. ¶¶ 20, 21, 23, 24, 26. During their first period of Northrop employment, both accrued benefits under the Plan, including under sub-plans entitled the Northrop Grumman Retirement Plan and the Grumman Pension Plan. ¶ 22. Then, as TRW employees,

they accrued benefits under the TRW Pension Plan ("TRW Plan"). ¶ 28. After Northrop's acquisition of TRW, they continued to accrue benefits under the TRW Plan, which Northrop renamed the Northrop Grumman Space and Missile Systems Salaried Employees Pension Plan. ¶ 29. They also continued to accrue service credit towards retirement under the Plan during their second period of Northrop employment. ¶ 15. But, unbeknownst to the Plaintiffs, they were not entitled, under the terms of the Plan, to have their salaries from their second period of Northrop employment used in calculating their pensions. *Id*.

As a defined benefit pension plan, the Plan provides its participants with a fixed monthly payment during retirement based on a pension formula set forth in the Plan. ¶ 12. The formula that applies to the Plaintiffs is the final average pay formula in effect before the Plan's conversion to a cash balance formula in 2003. ¶¶ 13-15. This formula bases a participant's benefit amount on his or her final average salary, years of service at employment termination, and age at benefit commencement. ¶ 13. But for the Plaintiffs and other employees who returned to Northrop from TRW, although their age and years of service continued to increase during their second period of Northrop employment, under the Plan terms, their final average salaries were based only on the first period. ¶ 15.

During their second period of Northrop employment, Mr. Bafford and Ms. Wilson each requested and received numerous statements misinforming them

of their pension benefits under the Plan. ¶¶ 30-33. *See also* ER 85-86 (Dkt. 101, Third Amended Complaint ¶¶ 36-40). For instance, in requesting the pension benefit statements and planning for his retirement over a period of more than six years, Mr. Bafford tested various combinations of retirement dates between September 2015 and April 2017, and benefit commencement dates between October 2015 and May 2017. ER 85 (Dkt. No. 101, Third Amended Complaint ¶ 37). Given these variables, the statements of course varied with respect to the precise amount of the stated benefits. But each of the dozen statements he received between March 2010 and June 2016 showed a 100 percent joint-and-survivor annuity benefit of over $2,000 per month, and showed this benefit calculated to the penny. *Id.* Moreover, as would be expected, the statements that were based on the same assumptions yielded the same result: for example, on three occasions between February 2013 and June 2016, Mr. Bafford requested a statement of his benefit if he terminated employment in September 2016 and commenced his pension in October 2016; each statement showed a 100 percent joint-and-survivor benefit of $2,114.41 per month. *Id.*

Likewise, in planning for her retirement, Ms. Wilson received numerous benefit statements over the years and relied on these statements. For instance, she requested statements for her two Plan benefits in February 2011, assuming employment termination in May 2011 and benefit commencement in June 2011.

ER 86 (Dkt. No. 101, Third Amended Complaint ¶ 39). The statements showed a 50 percent joint-and-survivor annuity benefit of $1,412.78 for the Plan and $101.72 for the Grumman Pension Plan, based on Ms. Wilson's salary from 2009, 2010, and 2011 – years from second period of Northrop employment. *Id.*

Each time Mr. Bafford and Ms. Wilson sought to obtain a pension benefits statement, they made a written request by going to the Northrop benefits website, as they had been expressly instructed to do in the summary plan description and by Northrop management. ¶¶ 30, 33, 35 , 43 & Exh. B. Once on the website, they would type in their names, social security numbers and/or employee identification numbers. ¶ 30. Plaintiffs would then navigate to the pension area of the website by clicking on menu options. *Id*. At that point, although the website allowed Plaintiffs to view statements that had previously been sent to them by mail, the website would respond to their written requests for new benefit statements with a message that they would have to call a provided telephone number to receive a statement of their benefits. ¶ 31. The Plaintiffs would then call the telephone number as instructed, give their name, social security number and/or employee identification number, and provide the projected employment termination date or dates and benefit commencement date or dates for which they wished to get a statement. ¶ 32. They then received a statement by mail, *id*., which, as described above, stated that it was an "estimate," and was in fact grossly inaccurate.

The Plaintiffs were aware that other employees could make written requests online to receive pension benefit statements, instead of also having to call, as they themselves had previously been able to do. *See* ¶ 33. For this reason and because they had been informed by management that online statements would become available, each time they wished to receive a new statement, they would first make an online request on the website before ultimately calling the number provided to complete the request. ¶¶ 33, 34.

While they were still employed, the Plaintiffs were never provided any information about their pension benefit amounts other than the inaccurate "estimates" they received in response to their requests, and the Committee never provided an automatic statement every three years as required by Section 105(a). ¶ 36. Nor were the Plaintiffs ever provided with sufficient annual notice of how to obtain pension benefit statements. ¶¶ 43-45.

Thus, after years of planning, in July 2016, Mr. Bafford requested and received paperwork to commence his pension under the Plan as of October 1, 2016, following an employment termination date of September 2, 2016. ER 90-91 (Dkt. No. 101, Third Amended Complaint ¶ 43). The paperwork included a "Retirement Plan Pension Calculation Statement" showing that Mr. Bafford's 100 percent joint-and-survivor annuity benefit would be $2,114.41 per month, just as promised in the previously provided statements. *Id.* Mr. Bafford elected to retire on

those terms. ER 91 (Dkt. No. 101, Third Amended Complaint ¶ 44). In order to commence his pension, Northrop required Mr. Bafford to certify that he had elected the 100 percent joint-and-survivor annuity, that the amount would be $2,114.41 per month, and that if he predeceased his wife, she would receive $2,114.41 per month. *Id*. Pursuant to his election, the Plan paid Mr. Bafford $2,114.41 per month starting in October 2016. ER 91 (Dkt. No. 101, Third Amended Complaint ¶ 46).

Similarly, in November 2013, Ms. Wilson requested that her employment terminate in January 2014 and that her benefits commence in February 2014. ER 90 (Dkt. No. 101, Third Amended Complaint ¶ 41). Hewitt furnished her statements showing 50 percent joint-and-survivor benefits of $1,630.11 for the Plan and $117.36 for the Grumman Pension Plan, based on her salary from her final three years of Northrop employment. *Id.* Ms. Wilson retired as planned and began receiving her benefits in these amounts. ER 90-91 (Dkt. No. 101, Third Amended Complaint ¶¶ 42-44).

The Plaintiffs' plans to live in retirement on the pension amounts they had been promised, however, were dashed when Northrop sent Mr. Bafford and Ms. Wilson "Pension Plan Recalculation Notices" in January and February 2017, informing them that their benefits would be cut by more than half, and that they would be required to repay money to the Plan because the Plan had "overpaid" them through no fault of their own. ER 91-93 (Dkt. No. 101, Third Amended Complaint

¶¶ 49-55). The Plan reduced Mr. Bafford's monthly benefit from $2,114.41 to $807.89 and Ms. Wilson's from $1,747.47 to $823.93, drastically reducing their incomes for the remainder of their lives. ER 92-93 (Dkt. No. 101, Third Amended Complaint ¶ 50, 53). Northrop also demanded that Ms. Wilson, who had retired three years earlier, repay the alleged "overpayment" of $35,000. ER 93 (Dkt. No. 101, Third Amended Complaint ¶ 55). The notices stated that the prior calculations of the Retirees' benefits over more than six years had been incorrectly based on final average salary from the Retirees' second period of Northrop employment. ER 92-93 (Dkt. No. 101, Third Amended Complaint ¶¶ 51, 53).

II. Procedural History

A. The Original Case

In December 2018, Mr. Bafford (along with his wife and beneficiary, Laura Bafford), filed a complaint under ERISA seeking the full amount of the benefits that he had been promised in the benefit statements and that he had been receiving in retirement until the recalculations performed in 2016, plus statutory penalties and, if Hewitt were found not to be a fiduciary, state-law damages from Hewitt. Dkt. 1. Earlier in 2018, Ms. Wilson had filed a separate complaint under ERISA based on the recalculation of her benefits, also seeking what she had been promised and had been receiving for several years in retirement. *Evelyn L. Wilson v. The Northrop Grumman Pension Plan, et al.*, No. 2:18-cv-05353-PA-GJS (C.D. Cal.). In March

2019, Ms. Wilson and Mr. Bafford learned of the other's suit. The parties stipulated to dismiss Ms. Wilson's case without prejudice to allow her to join the Baffords' case, which the district court granted. The Baffords and Ms. Wilson then filed a First Amended Complaint, restating the case as a class action and joining Ms. Wilson as a named plaintiff. ER 146-69 (Dkt. No. 32).

Defendants filed motions to dismiss, which the Plaintiffs opposed. *See* Dkts. 40-42, 49. The district court granted Defendants' motions. Dkt. No. 68. Among other things, the court held that the Plaintiffs failed to state ERISA fiduciary breach claims against any of the Defendants and that the Plaintiffs likewise failed to state a claim that the Committee violated ERISA Section 105 because, the court concluded, the Plaintiffs' online requests for pension benefit statements did not constitute "written requests." *Id*. at 11. Finally, the court dismissed the Plaintiffs' alternative state-law claims against Hewitt for professional negligence and negligent misrepresentation on the ground that ERISA preempted those claims. *Id*. at 11-13.

B. The First Appeal

On appeal, this Court affirmed in part and reversed in part. *Bafford v. Northrop Grumman Corp.*, 994 F.3d 1020 (9th Cir. 2021). The Court affirmed the dismissal of the ERISA fiduciary breach claims, concluding that Hewitt was not acting in a fiduciary capacity in miscalculating the Plaintiffs' retirement benefits and

that, as a consequence, neither Northrop nor the Committee breached their fiduciary duties in failing to ensure that Hewitt properly calculated the benefits. *Id.* at 1028.

As most relevant here, however, turning to the ERISA Section 105(a)(1)(B) claim against the Committee, the Court pointed out that "[t]he Committee's escape from liability on the fiduciary duty claim does not necessarily exonerate it from its other statutory obligations." 994 F.3d at 1029. The Court then held that the claim failed under the first clause of Section 105, subsection (a)(1)(B)(i), because the operative complaint did not allege that the Committee failed to give annual notice of how to obtain a pension benefit statement. *Id.* The Court determined that whether the Plaintiffs had stated a claim under the second clause, Section 105(a)(1)(B)(ii), presented "a more difficult question" given that the district court had dismissed the claim based on its conclusion that the complaint "did not adequately allege that Plaintiffs' requests for pension benefit statements were 'written.'" *Id.* In the Court's view, the district court erred in concluding that a request for a pension benefit statement submitted through an online platform could never constitute a "written" request, noting that "writing" encompasses any "'intentional recording of words in a visual form.'" *Id.* at 1030 (quoting *Writing*, Black's Law Dictionary (11th ed. 2019)). The Court found that the operative complaint did not contain specific allegations about the manner in which the Plaintiffs submitted their requests through the online platform, but concluded that the claim would survive if the Plaintiffs could

allege the "'intentional recording of words in a visual form' that conveyed a request for a pension benefit statement." *Id.* This Court therefore directed the district court to allow the Plaintiffs to file an amended complaint with respect to their claim under Section 105(a). *Id.* at 1032.

Finally, this Court determined that the district court erred in concluding that ERISA pre-empted the state-law professional negligence and negligent misrepresentation claims against Hewitt. *Id.* at 1031. The Court reasoned that these claims do not have a "reference to or connection with" the ERISA Plan given Hewitt's status as a non-fiduciary with respect to the actions at issue, and that depriving the Plaintiffs of a remedy for the alleged wrongs "would be inconsistent with ERISA's purpose." *Id.* at 1031-32.

C. The Remand

On remand, the Plaintiffs filed a Second Amended Complaint adding allegations describing the Plaintiffs' attempts to file written requests for benefits through the online portal, as well as allegations that the Committee violated Section 105(a)(1)(B)(i) by failing to provide them with either triennial statements or annual notice of how to obtain statements and by failing to provide accurate statements in response to written requests. ER 132-134, 140-141 (Dkt. 83, ¶¶ 40A-K, 81, 81A, 85). The district court again dismissed.

The court reasoned that ERISA Section 105 does not obligate plan administrators providing pension benefits statements to ensure that the information in the statements is accurate. ER 115 (Dkt. 100, p. 9). The court found that "[n]owhere in [Section 105] – either in the provisions relevant to this lawsuit or elsewhere, or to any of its subdivisions – is there any language suggesting that an inaccuracy in a statement constitutes an ERISA violation." *Id.* As further support for this notion, the court pointed to ERISA's civil penalty provision, 29 U.S.C. § 1132(c), which is keyed to the number of days during which a plan administrator fails to comply with the disclosure provisions. *Id.* From this, the court concluded that Congress meant only to incentivize speed, not accuracy, with respect to requests from participants for information. ER 115-16 (Dkt. 100, pp. 9-10). Furthermore, the court reasoned that even if the inaccuracies in the statements technically violated Section 105, because there were no allegations that the inaccuracies were "active, deliberate or in bad faith," the Plaintiffs had therefore failed to plead that the Committee had breached its duty of loyalty under ERISA. ER 118 (Dkt. 100, p. 12).

However, the court found that it was plausible that Plaintiffs had stated or could state a claim that the Committee had failed to provide a triennial pension benefit statement or annual notice of how to obtain a pension benefit statement and had failed to provide any statements in response to the Plaintiffs' requests. ER 119 (Dkt. 100, p. 13). Nevertheless, because, in the court's view, the allegations about

a failure to provide statements were intertwined with the allegations that the statements were inaccurate, the court concluded that it was impossible to determine if the Plaintiffs had stated such claims. *Id*. The court therefore dismissed the Section 105 claim with "narrow" leave to amend to assert such claims, with case-specific supporting facts. *Id*.

Finally, turning to the state-law claims which the Ninth Circuit had concluded were not preempted by ERISA, the district court ordered the Plaintiffs to show cause why it should exercise supplemental jurisdiction over these claims, whether or not they chose to amend with respect to the ERISA Section 105 claim. ER 120-121 (Dkt. 100, p. 14-15).

The Plaintiffs filed a Third Amended Complaint, adding further allegations describing how the Plaintiffs attempted to make written requests for benefit statements through the online portal and how the Committee failed to automatically provide triennial statements or notice of how to obtain such statements. ER 86-90 (Dkt. No. 101, ¶¶ 40A-40K). The Plaintiffs also filed a response to the court's order to show cause, arguing that the court should exercise supplemental jurisdiction over the state-law claims against Hewitt and that, in any event, they had asserted and stated sufficient allegations to support diversity jurisdiction. ER 68-76 (Dkt. No. 102). Hewitt filed a non-opposition concurring that the district court had diversity jurisdiction. ER 62-67 (Dkt. No. 103).

The court issued a second order to show cause, requesting further briefing on the asserted diversity jurisdiction and, after such briefing, issued an order dismissing those claims, without prejudice, finding no diversity jurisdiction and declining to extend supplemental jurisdiction over the state law claims. ER 59-61, 44-58 (Dkt. No. 109, 111). Next, the court ordered the Plaintiffs to file a Fourth Amended Complaint "to conform with the court's rulings in the case thus far," by omitting "(1) all factual allegations and causes of action asserted against [Hewitt] and (2) all allegations related to the assertion that the statements that Defendants sent Plaintiffs were inaccurate." ER 43 (Dkt. No. 113, p. 2).

The Plaintiffs promptly filed a Fourth Amended Complaint that deleted all but the Seventh Claim for Relief against the Committee for violations of ERISA Section 105 and contained a truncated statement of the facts. ER 12-32 (Dkt. No. 114). Specifically, as directed by the district court, Plaintiffs removed the descriptions of the statement errors set forth at paragraphs 32 through 40 of the Third Amended Complaint. However, Plaintiffs retained allegations pertaining to their pension election paperwork and the post-retirement benefit reductions. ¶¶ 46-61. The court issued an order striking the complaint because it continued to discuss the Committee's "calculation errors, the overestimates and overpayments [to] Plaintiffs, and the harm they suffered as a result." ER 11 (Dkt. No. 115, p. 2). The court ordered the Plaintiffs to either file "an appropriately narrowed amended complaint

or an appropriate motion or request" within 14 days. *Id.* Because the order effectively prohibited the Plaintiffs from alleging that they had suffered harm, the Plaintiffs declined to file another amended complaint (or motion) and asked the court to enter final judgment. ER 6-9 (Dkt. No. 116). The court did so, ER 4-5 (Dkt. No. 117), and this appeal followed.

SUMMARY OF ARGUMENT

ERISA is a remedial statute designed to "protect . . . the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants of standards of conduct, responsibility and obligation for fiduciaries of plans." 29 U.S.C. § 1001(b). One of the primary ways in which Congress sought to accomplish these laudatory goals is through the disclosure provisions in the first section of ERISA, which Congress intended to significantly strengthen the weak and ineffective disclosure provisions of the predecessor statute, so that plan participants would be kept informed of where they stood with respect to the pensions.

One such provision is at issue in this appeal. ERISA Section 105(a) charges plan administrators of defined benefit pension plans with the obligation to furnish a pension benefit statement to each participant every three years (or alternatively, by informing participants annually of how they may access such benefit statements), and also requires that statements be provided to participants upon written request.

29 U.S.C. § 1025(a)(1)(B)(i), (ii). Importantly, Section 105(a) specifies that the required disclosure "shall indicate, on the basis of the latest available information," the plan participant's "total benefits accrued." 29 U.S.C. § 1025(a)(2)(A)(i)(I). An "accrued benefit" under the statute is defined as the participant's benefit payable at normal retirement age, or its actuarial equivalent. See 29 U.S.C. § 1002(23)(A). In other words, the notice required under Section 105(a) is designed to inform plan participants, "in a manner calculated to be understood" by the average participant, 29 U.S.C. § 1025(a)(2)(A)(iii), precisely the amount of the pension benefits they are entitled to receive upon retirement.

The Committee failed to meet its obligations under ERISA Section 105(a) as Plan administrator because the only statements it provided to the Plaintiffs did not inform them of the amounts they were entitled to receive under the Plan when they retired, but instead told them they would receive two to three times those amounts. Thus, the Committee provided the Plaintiffs only with what it referred to as "estimates" that, as it turned out, were wholly inaccurate and unsuitable for retirement planning purposes.

The district court erred in concluding that Section 105(a) is unconcerned with the content or accuracy of the statements it requires plan administrators to provide. This reading completely ignores the statutory requirement that participants be

informed of their accrued benefits and renders meaningless the statutory goal that disclosure requirements more fully protect plan participants.

Moreover, as repled multiple times on remand, the complaint makes clear that the Committee otherwise failed to meet the requirements of Section 105(a). The Committee did not provide automatic statements every three years, nor did it provide notice annually of how to obtain such statements, since the only notices it arguably provided incorrectly informed the Plaintiffs that they could obtain statements through the online portal when they could not, and resulted in the Plaintiffs receiving inaccurate "estimates" that the Committee contends are not pension benefit statements. Moreover, as alleged, the Plaintiffs made written requests for statements through the portal, where they were then informed that they would have to make a phone call to complete their requests. Again, however, the statements they received each time did not meet the requirements of Section 105(a).

For these reasons, this Court should reverse the dismissal of the claim against the Committee for violating Section 105(a).

STANDARD OF REVIEW

The Ninth Circuit reviews a district court's grant of a motion to dismiss for failure to state a claim de novo. *Brewster v. Sun Trust Mortg., Inc.*, 742 F.3d 876, 877 (9th Cir. 2014). The dismissal should be reversed if the pleaded claim is plausible on its face, that is, if "the plaintiff pleads factual content that allows the

court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This standard does not require a plaintiff to prove his or her case, but only that the allegations in a complaint plead "more than a sheer possibility that the defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. The reviewing court must accept the allegations of the complaint as true and construe the pleadings in the light most favorable to the non-moving party. *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012). The court draws all reasonable inferences in favor of the plaintiff. *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1043 n.2 (9th Cir. 2008).

ARGUMENT

THE PLAINTIFFS HAVE STATED A PLAUSIBLE CLAIM THAT THE COMMITTEE VIOLATED ERISA SECTION 105 BY REPEATEDLY PROVIDING THE PLAINTIFFS WITH INACCURATE BENEFIT STATEMENTS

One of Congress' primary objectives in enacting ERISA was to provide plan participants with greater disclosure protection. *See* 29 U.S.C. § 1001(b) (listing, among ERISA's central policy goals, the requirement for "disclosure and reporting to participants and beneficiaries of financial and other information with respect" to their plans); 29 U.S.C. § 1001(a) (finding that, "owing to the lack of employee information and adequate safeguards concerning [employee benefit plans'] operation, it is desirable in the interests of employees . . . that disclosure be made

and safeguards be provided with respect to the establishment, operation, and administration of such plans"). This was because Congress had determined the prior Welfare and Pension Plans Disclosure Act was deficient with respect to its disclosure requirements. H.R. Rep. No. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5171 ("The conferees also improved a number of House and Senate provisions which are vital for the protection of the pension rights of employees. This includes full disclosure of the features and operation of pension plans."); *Board of Trustees of the CWA/ITU Negotiated Pension Plan v. Weinstein,* 107 F.3d 139, 143-44 (2d Cir. 1997) (noting that "Congress enacted broader disclosure requirements in ERISA" because it found "that the Disclosure Act was weak in its limited disclosure requirements, and inadequate in protecting rights and benefits due workers") (internal quotation marks and citations omitted).

Thus, "Congress' purpose in enacting the ERISA disclosure provisions" was to "ensur[e] that 'the individual participant knows *exactly* where he stands with respect to the plan,'" *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 118 (1989) (quoting H.R. Rep. No. 93–533, p. 11 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649) (emphasis added). Indeed, to further underscore the primary importance of these provisions, Congress placed ERISA's "Reporting and Disclosure" provisions in Part 1 of Title I. 29 U.S.C. §§ 1021-30.

Section 105 of Part 1 is entitled "Reporting of Participant's Benefit Rights." It dictates that "[t]he administrator of a defined benefit plan . . . shall furnish a pension benefit statement . . . (i) at least every 3 years to each participant . . . *and* (ii) to a participant or beneficiary of the plan upon written request." 29 U.S.C. § 1025(a)(1)(B)(i), (ii) (emphasis added). The statement "shall indicate" the participant's "total accrued benefits," and may be delivered in any form that is reasonably accessible to the participant. 29 U.S.C. § 1025(a)(2). The administrator may fulfill its obligation to provide a pension benefit statement to each employee at least every three years by providing employees with an annual notice of how to obtain a statement. 29 U.S.C. § 1025(a)(1)(B)(i), (3)(A). These requirements, as with most of ERISA's obligations, are enforced through Section 502, ERISA's civil enforcement provision, which, among other things, allows a plan participant to seek injunctive and other "appropriate equitable relief" to remedy any violation of the statute. 29 U.S.C. § 1132(a)(3). Moreover, Section 502(c) provides that "[a]ny administrator (A) who fails to meet the requirements" of Section 105(a) "with respect to a participant or beneficiary . . . shall be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure . . . , and the court may in its discretion order such other relief as it deems proper." 29 U.S.C. § 1132(c)(1). Thus, Congress took the disclosure provisions, including Section 105(a), so seriously that it provided for daily penalties, now up to $110 a

day, *see* 29 C.F.R. § 2575.502c–1, that a court may assess against administrators who fail to provide plan participants and their beneficiaries with the information to which they are entitled.

A. ERISA Protects Participants by Requiring That Plan Administrators Disclose Accurate Benefit Information

Heedless of Congress' expressly stated goal to strengthen disclosure obligations with respect to pension plans to ensure that "the individual participant knows exactly where he stands with respect to the plan," H.R. Rep. No. 93–533, p. 11 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649, the district court concluded that the actual content of the Section 105 disclosure is irrelevant, so long as the plan administrator provides a pension benefit statement to the participant in a timely manner following a request. This reading renders meaningless the Section 105 requirement that plan administrators provide participants with pension benefit statements that inform them of their accrued benefit. *See* 29 U.S.C. § 1025(a)(2)(A)(i)(I) (requiring that a "pension benefit statement" "shall include, on the basis of the latest available information – the total benefits accrued"). It also ignores the requirement that the "statement shall be written in a manner calculated to be understood by the average plan participant." *Id.* § 1025(a)(2)(A)(iii).

ERISA defines "accrued benefit" to mean the participant's benefit expressed as an annual benefit beginning at normal retirement age, or the actuarial equivalent of that amount. 29 U.S.C. §§ 1002(23)(A), 1054(c)(3). The Plan defines "accrued

benefit" consistent with these rules. ER 16-17, 33-34 (Fourth Amended Complaint, Dkt. 114, ¶ 17 & Exh. A). Thus, contrary to the district court's conclusion that there is no language in Section 105 "suggesting that an inaccuracy in a statement constitutes an ERISA violation," ER 114 (Dkt. 100, p. 8), Section 105's requirement that the statement disclose the participant's accrued benefit in a manner calculated to be understood by the average participant is precisely such an indication. Indeed, it is not only an indication, but an explicit requirement of the statute.

Nor was the district court correct that the imposition of a daily penalty indicates that Congress was only concerned with the timing of disclosures, not their accuracy. ER 115-16 (Dkt. 100, pp. 9-10). To the contrary, the harm suffered by participants from inaccurate information in their pension benefit statements is certainly compounded by the length of time until the erroneous information is corrected, as here, where the Plaintiffs only learned the truth of the matter after they were already retired and had no real ability to make other plans for retirement. Moreover, the fact that ERISA imposes significant penalties for failures related to participant disclosure is an indication, underscored by the legislative history, of the importance that Congress attached to its requirements that plan participants be provided with the information they need to "know where [they] stand," and "enforce their rights." H.R. Rep. No. 533, 93rd Cong., 1st Sess. 11 (1973), *reprinted*

in 1974 U.S.C.C.A.N. 4639, 4649; S. Rep. No. 127, 93rd Cong., 1st Sess. 27 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4863.

Indeed, the Department of Labor, which enforces related ERISA disclosure requirements, and administrative law judges who decide disputes about such disclosures, have long taken the position that plan administrators who file Form 5500 annual reports that are not complete and accurate violate the statute and are subject to the same penalties as those who simply fail to file on time. *United States Department of Labor, Pension and Welfare Benefits Administration v. Rhode Island Bricklayers & Allied Craftsmen Pension Fund*, U.S. Department of Labor, Office of Administrative Law Judges, Boston, Massachusetts, No. 94-RIS-64 (May 30, 1995), https://www.oalj.dol.gov/PUBLIC/ERISA/DECISIONS/ALJ_DECISIONS/RIS/94RIS64A.HTM?_ga=2.174719266.1861006729.1663968263-484087696.1652292207; *see* 29 U.S.C. §§ 1023, 1024(a) (prescribing content and timing of annual report); *see also Ferrando v. United States*, 245 F.2d 582, 589 (9th Cir. 1957) (holding that timely filing of defective tax return did not protect taxpayers from assessment of late-filing penalty). Merely meeting a timing requirement is insufficient where content requirements are not also met. Just as with respect to filing inaccurate reports about plans, the disclosure of inaccurate information in a pension benefit statement is a pointless exercise and, indeed, is likely worse than not providing statements at all since plan participants undoubtedly rely on the statements

for their given purpose of helping them plan for retirement and "know where they stand." A participant who has received no statement knows that he does not know his pension amount; a participant who receives an inaccurate statement believes that he *does* know his pension amount, and will plan accordingly.

For all these reasons, it is clear that Section 105(a) requires disclosure of a precise number: the participant's "total benefits accrued." 29 U.S.C. § 1025(a)(2)(i)(I). In this case, the numbers that the Committee disclosed to the Plaintiffs did not represent their accrued benefits, but rather represented about two to three times that amount. Therefore, the statements did not meet the Committee's obligations to inform the Plaintiffs of their "accrued benefit" under Section 105(a), and the Plaintiffs adequately allege a claim for violation of that provision.

B. The Plaintiffs Have Otherwise Adequately Pled Violations of ERISA Section 105

Section 105 requires the plan administrator to furnish each participant with a "pension benefit statement" "(i) at least every 3 years . . . *and* (ii) . . . upon written request." 29 U.S.C. § 1025(a)(1)(B)(i), (ii) (emphasis added). Section 105 allows the administrator, as an alternative to automatically providing a pension benefit statement at least triennially, to provide yearly "notice of the availability of the pension benefit statement and the ways in which the participant may obtain such statement." 29 U.S.C. § 1025(a)(3)(A). The Plaintiffs have pled facts plausibly alleging that the Committee failed to meet any of these requirements.

The Plaintiffs plausibly allege that they and other plan participants were never given automatic pension benefit statements during the relevant time period. ¶¶ 36, 70-72, 86-90. Likewise, the Plaintiffs adequately allege that they were never provided with sufficient notice of how to obtain pension benefit statements, but instead were only told, incorrectly, that they could obtain statements of their accrued benefits by logging into the online portal, when in fact they could not obtain statements through the portal; when they called the number provided, they were only given what the Committee refers to as "estimates" of their benefits, which turned out to be wholly inaccurate. ¶¶ 43-45.

Indeed, the Committee has taken the surprisingly self-defeating position, both on the previous appeal and before the district court, that it has never provided the Plaintiffs with the pension benefit statements required under Section 105(a), *see Bafford*, No. 20-5222 (9th Cir. Dkt. No. 33, p. 77), but that the Plaintiffs only ever "requested and received estimates of their future benefits rather than a statement of their accrued benefits under § 105(a)." Dkt. No. 84-1, 8:24-46. At most, this raises a factual dispute inappropriate for disposition on a motion to dismiss, *see Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009), since Plaintiffs allege that they requested "statements" not "estimates." ¶¶ 30-33. But even more saliently, this contention unintentionally highlights that the only notice that the Plaintiffs were ever given about how to obtain pension benefit statements with their accrued benefits did

not result in them obtaining such statements – and instead, as the Committee concedes, only provided a notice of how to obtain an "estimate." For these reasons, the Plaintiffs have adequately alleged that the Committee violated Section 105(a)(1)(B)(i).

Similarly, the Plaintiffs adequately allege that the Committee violated Section 105(a)(1)(B)(ii) by failing to provide pension benefit statements with their accrued benefits in response to their written requests. Specifically, the Plaintiffs allege that following the direction from the Committee, they typed in their name and Social Security or employee identification number on the online portal to request their benefit statements and were able in this manner to obtain previously mailed statements. ¶¶ 30, 34. The Plaintiffs thus made an "'intentional recording of words in a visual form' that conveyed a request for a pension benefit statement." *Bafford*, 994 F.3d at 1030. The fact that they were then directed to make a telephone call in order to obtain new statements does not detract from the fact that they first made written requests for these statements, in exactly the manner in which they had been directed by the Committee. Indeed, the words they recorded on the website prompted the website to respond that it could not generate a new pension benefit statement, showing that their words conveyed that request. ¶¶ 31, 34. Again, it is abundantly clear that the requirements of Section 105(a) are serious, and a shell game as a means of compliance will not suffice.

Moreover, any contention that the Plaintiffs failed to sufficiently allege that they made a "written request," does nothing to defeat their claim under Section 105(a)(1)(B)(i). Notably, this provision does not mandate a written request, but instead requires an administrator to furnish a statement every three years, regardless of any written request by the participant, or to give notice of a method, that need not include a request in writing, to obtain such statements. *See Crotty v. Cook*, 121 F.3d 541, 548 (9th Cir. 1997) (a participant need not make a written request for information ERISA requires be automatically provided).

CONCLUSION

For the reasons set forth above, the district court's judgment below should be reversed, and the case remanded for consideration on the merits of Plaintiffs' remaining claim against the Committee for violating ERISA Section 105.

DATED: September 28, 2022

Renaker Scott LLP
Kantor & Kantor LLP

/s/ Elizabeth Hopkins
Elizabeth Hopkins
Attorneys for Plaintiffs-Appellants
Stephen H. Bafford, Laura Bafford
and Evelyn L. Wilson

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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STATEMENT OF RELATED CASES

Plaintiffs-appellants are unaware of any related cases pending in this Court.

DATED: September 28, 2022

Renaker Scott LLP
Kantor & Kantor LLP

/s/ Elizabeth Hopkins
Elizabeth Hopkins
Attorneys for Plaintiffs-Appellants
Stephen H. Bafford, Laura Bafford
and Evelyn L. Wilson

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