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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Teresa S. Renaker, Esq.
Kirsten G. Scott, Esq.
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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

STATE STATUTES

FEDERAL REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

The Plaintiffs in this case are Stephen Bafford and Evelyn Wilson, two participants in the Northrop Grumman Pension Plan ("Plan"), and Laura Bafford, Mr. Bafford's wife and beneficiary. The facts of this case and arguments on appeal are straightforward. Time and again during their long careers with Northrop Grumman, the Plaintiffs received statements of their accrued benefits that, unbeknownst to them, greatly overstated their benefits and were therefore inappropriate for retirement planning purposes. After Mr. Bafford and Ms. Wilson retired with the understanding that they would receive the amounts set forth in these statements, their pension benefits were reduced by more than half.

Plaintiffs argue that the Plan administrator, the Administrative Committee of the Northrop Grumman Pension Plan ("Committee"), failed to automatically provide them with a written pension benefit statement every three years, and likewise failed to provide them with accurate annual notices of how to obtain such statements. When the Plaintiffs nevertheless tried to make written requests for pension benefit statements through Northrop Grumman's online system, as they were told to do both in summary plan descriptions and in annual funding notices, they were directed to make a phone call to obtain these statements. When they did so, they were mailed inaccurate statements that overstated the monthly pension benefits that they would receive upon retirement. The Plaintiffs contend that the Committee violated Section

105 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1125, through its repeated failure, as Plan administrator, to provide accurate statements of the Plaintiffs' accrued benefits.

The Committee does not dispute that the purpose of ERISA Section 105, and indeed of ERISA's critically-important disclosure provisions in general, is to ensure that plan participants "know exactly where [they] stand 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 Committee does not explain how this goal is served through the Plaintiffs' receipt of greatly inaccurate pension benefit statements that purport to be only estimates that participants should not rely upon because the stated amounts may be changed at any time. Nor does the Committee explain how, if at all, the Plaintiffs and other Plan participants like them could ever have received an accurate statement of their benefits, instead faulting the Plaintiffs for following the prompts on the website they were directed to use in order to request and receive pension benefit statements.

Rather than address these problems head-on, the Committee responds by raising six reasons they believe the Plaintiffs have failed to state a claim and dismissal is warranted, only one of which bears any relationship to the issue that was addressed by the district court and raised in this appeal. None of these arguments, however, support dismissal of the Plaintiffs' Section 105 claim on the pleadings

given that the Plaintiffs plausibly allege that they were never provided with an automatic written benefit statement every three years, they did not receive accurate annual notices of how to obtain pension benefit statements, and the statements they nevertheless requested, received and relied upon misstated their benefits, not by a little but by a lot.

ARGUMENT

THE PLAINTIFFS HAVE STATED A PLAUSIBLE CLAIM THAT THE COMMITTEE VIOLATED ERISA SECTION 105

In enacting ERISA, Congress sought to protect plan participants "by requiring the disclosure and reporting to participants and beneficiaries of financial and other information [about their plans] . . . and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b). To this end, ERISA Section 105 requires that plan administrators provide plan participants with "pension benefit statements," mandating the timing and procedures for obtaining these statements, as well as the required contents, as described in the Plaintiffs' Opening Brief. Dkt. No. 8, at 29-30 of 39. Suffice it to say that procedurally, Section 105 requires that a plan administrator provide each participant with a pension benefit statement at least every 3 years, **and also** that the administrator provide these statements upon written request by either a plan participant or a beneficiary. 29 U.S.C. § 1025(a)(1)(B) (i), (ii). As an alternative to

automatically providing a pension benefit statement at least triennially, Section 105 allows a plan administrator 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). And chief among Section 105's substantive requirements is that the pension benefit statement "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) and that it do so "in a manner calculated to be understood" by the average participant. *Id.* § 1025(a)(2)(A)(iii). ERISA defines "accrued benefit" as the participant's benefit payable at normal retirement age, or its actuarial equivalent. *See* 29 U.S.C. § 1002(23)(A). Thus, Section 105(a) requires that plan administrators provide participants with plain statements of the benefits that they will receive upon retirement.

The plan in this case is a "defined benefit" pension plan, which is so called because it "promises to pay employees, upon retirement, a fixed benefit under a formula that takes into account factors such as final salary and years of service with the employer." *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 637 (1990). Thus, each participant, "upon retirement, is entitled to a fixed periodic payment." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999) (internal quotation marks omitted). In a defined benefit plan, "the benefits to be received by employees are

fixed and the employer's contribution is adjusted to whatever level is necessary to provide those benefits." *Nachman Corp. v. Pension Ben. Guar. Corp.*, 446 U.S. 359, 364 n.5 (1980) (internal quotation marks omitted). Because the benefit is fixed according to the plan formula, a participant's accrued benefit is always a known, precise amount. It is never necessary – or appropriate – to "estimate" a defined benefit.

To be sure, as with any mathematical formula, one can change the result by changing the inputs – for example, by substituting in a different number for the participant's current years of service, such as his years of service if he terminates employment on a different date, or by substituting for normal retirement age a participant's age if he commences receiving his pension at a different future date. But changing these variables does not transform the calculation into an estimate: the benefit amount is still fixed by the plan's formula. Thus, between 2013 and 2016, Mr. Bafford asked three times what his defined benefit would be if he terminated employment in September 2016 and commenced his benefit in October 2016. ER 85, ¶ 37. Each time he received the same answer, $2,114.41, and that is the amount that he began receiving when he retired under those circumstances. ER 85, ¶ 37; ER 90-91, ¶¶ 43-46. That this amount consistently was far too high establishes that the Committee did not live up to its responsibility to provide a statement to Mr. Bafford

of his "accrued benefit" under Section 105, just as it failed to do so for Ms. Wilson.

Because the Plaintiffs plausibly allege that Committee never provided benefit statements in compliance with ERISA Section 105, even though the Plaintiffs followed the instructions they were given for obtaining a statement, they have stated a claim.

A. The Plaintiffs Allege That They Repeatedly Requested Pension Benefit Statements

The Committee makes six arguments that dismissal on the pleadings is nevertheless warranted. First, the Committee insists that Mr. Bafford and Ms. Wilson never requested pension benefit statements, as the Plaintiffs allege they did. Instead, according to the Committee, the retirees requested some other statement not subject to Section 105, which the Committee refers to as "projection of future benefits" that it says it provides as an "extra service," although what purpose it serves is as unclear as the statements were unreliable.

At most, the Committee's assertion raises a factual dispute, since the Plaintiffs expressly allege that they requested "statements" not "estimates." Fourth Amended Complaint ¶¶ 30-33.[1] Such a dispute is not appropriate for resolution on a motion to dismiss. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). Moreover, if

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

it is true that the Committee only ever provided "estimates" of benefits, as the Committee asserts, this further supports the Plaintiffs' argument that the Committee violated Section 105(a) because when the Plaintiffs followed the instructions in the only notice that they were ever given about how to obtain statements of their accrued benefits, they did not receive such statements.

Calling a statement an "estimate" does not make it so. As with any defined benefit plan, the Plan's benefit formula permits a precise calculation of the participant's benefit as of any future date. Of course, that a benefit can be calculated does not guarantee it will be paid; every pension benefit statement is to some degree contingent. For example, if an unmarried participant dies before he commences receiving his pension, no benefit will be paid to anyone, notwithstanding that the participant had a vested benefit at death. Nonetheless, before that participant died, it was possible, and required, to tell him what his pension would be on a future date if he lived.

The Committee argues that it was only required to apply the Plan formula correctly in telling participants the amount of their benefit payable if they terminated employment immediately, and not if they asked for a statement that assumed a future termination date, because the latter calculation would include years of service that the participant had not yet worked. This argument suffers from two principal

defects. First, again, if the statements that Plaintiffs received were not statements of their accrued benefits, then the Committee violated the requirement to provide such a statement automatically every three years. Thus, arguing that the information Plaintiffs received did not reflect their accrued benefits does not assist the Committee. Second, the proposed distinction is irrelevant because Plaintiffs allege that the Committee's statements here were just as erroneous when the employment termination date was immediate as when it was in the future. Whether calculating Mr. Bafford's October 2016 pension in February 2013 or July 2016, the Committee produced the same answer. ER 85, ¶ 37; ER 90-91, ¶¶ 43-46. The Committee applied a formula consistently in calculating these benefits, as a defined benefit plan requires. Unfortunately, it failed to follow the formula set forth in the Plan, resulting in inaccurate calculations throughout the years when Plaintiffs were planning for their retirements and into their retirements.[2]

For these reasons, Plaintiffs have adequately alleged that the Committee violated Section 105(a)(1)(B)(i).

[2] The Committee's reliance on *Cinotto v. Delta Air Lines, Inc.*, 674 F.3d 1285 (11th Cir. 2012), is badly misplaced. *Cinotto* had nothing to do with pension benefit statements. Rather, the *Cinotto* court held that ERISA's anti-cutback rule does not protect against reduction of a benefit that participants must work additional years to accrue. *Id.* at 1297.

B. In Requesting Pension Benefit Statements, the Plaintiffs Followed the Instructions in the Annual Funding Notices That the Committee Asserts Also Constitute the Annual Section 105 Notices

Second, the Committee says that the Plaintiffs failed to make their requests in writing as required under Section 105(a)(1)(B)(ii) because when they entered the requested information on the website (as they were told to do in order to obtain a pension benefit statement), they were then instructed to make their requests by telephone.

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. ¶¶ 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. That they were then directed to take an additional step – making a phone call – to obtain pension benefit statements does not defeat their claim that they initially made written requests for these statements, in exactly the manner the Committee directed. Indeed, the Plaintiffs were never told that there was an alternative method to make a written request. Thus, they made their written requests as best they could given the system that the Committee and its delegees set up.

Even if Plaintiffs failed to sufficiently allege that they made a "written request," no allegation of a written request is required to state a claim under Section

105(a)(1)(B)(i), as the Plaintiffs do. This subsection puts the onus of disclosure on the Plan administrator, by requiring the administrator to furnish a statement every three years to each participant, without requiring any written request by the participant, or to give notice of a method, that need not include a request in writing, for participants 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). Given that the Plaintiffs also allege that the Committee failed to provide them automatic statements every three years and failed to provide compliant pension benefit statements when they followed the directions in the annual funding notices that the Committee says meet its Section 105(a) obligations, whether or not they made these requests in writing is irrelevant in deciding whether they have stated a claim under Section 105(a).

C. ERISA Authorizes District Courts to Impose Penalties on Plan Administrators for Failure to Disclose Accurate Benefit Information Without Regard to Whether Participants Have Pled Bad Faith

Third, the Committee insists that Plaintiffs are not entitled to statutory penalties for any failure to meet Section 105 because that section, they say, only penalizes untimely disclosures, not inaccurate ones. This is the closest the Committee comes to addressing the primary issue that the district court decided, and that Plaintiffs raise on appeal. But perhaps in recognition of the weakness of this argument, they also assert that, in any event, bad faith is required for imposition of

the statutory penalties and the Plaintiffs failed to plead bad faith. Neither contention is true.

On remand, the district court concluded that regardless of the actual content of the pension benefit statement, the plan administrator complies with Section 105(a) so long as the administrator provides the participant with a pension benefit statement in a timely manner. The Committee, in this one respect, does not go quite so far. Instead of arguing that providing an inaccurate pension benefit statement complies with Section 105, the Committee makes the narrower argument that ERISA only permits penalties for untimely statements, not for inaccurate ones. But both the broader and narrower contention fail for the same reason. These contentions simply cannot be squared with the text of Section 105, which requires plan administrators to provide participants with pension benefit statements that inform them of their "total benefits accrued." 29 U.S.C. § 1025(a)(2)(A)(i)(I).

More broadly, any argument that the content of the Section 105(a) statement is irrelevant or insufficient to support a penalty is also in significant tension with the uniform case law from this Court and others correctly recognizing that ERISA requires plan fiduciaries (such as plan administrators) to provide complete and accurate information to participants, whether or not requested. *See*, *e.g.*, *Farr v. U.S. West Communications, Inc.*, 151 F.3d 908, 914 (9th Cir. 1998) (plan fiduciaries breached their duties under ERISA by failing to explain negative tax consequences

of participation in early retirement plan); *Estate of Becker v. Eastman Kodak Co.*, 120 F.3d 5, 8 (2d Cir. 1997) (discussing cases); *King v. Blue Cross & Blue Shield of Cal.*, 871 F.3d 730, 744 (9th Cir. 2017) ("A fiduciary has an obligation to convey complete and accurate information material to the beneficiary's circumstance, even when a beneficiary has not specifically asked for the information.") (internal quotation marks omitted)); *Barker v. Am. Mobil Power Corp.*, 64 F.3d 1397, 1403 (9th Cir. 1995) (same). If fiduciaries may be held liable for the consequences of their failure to disclose needed information even in the absence of a request, it is hard to imagine that ERISA in any way countenances the failure by a plan administrator to provide accurate information in statutorily-mandated pension benefit statements, particularly when the participants have requested this information.

Nor is the contention that Section 105 and the related penalty provision in Section 502(c) are unconcerned with the content of the pension benefit statements consistent with (much less required by) ERISA's text. To the contrary, ERISA Section 502(c) gives courts the discretionary authority to impose personal liability up to $110 a day on any administrator that "fails to meet the **requirements** of . . . section 105(a)," 29 U.S.C. § 1132(c) (emphasis added); *see* 29 C.F.R. § 2575.502c-1 (raising the daily penalty to $110). These "requirements" plainly encompass the

mandate in Section 105(a) that pension benefit statements inform participants of their accrued benefit in the form of a precise amount that they will receive upon retirement: their defined benefit. A timely but inaccurate statement is worse than useless to a participant trying to plan for his retirement. The penalty in ERISA Section 502(c) is thus among the "appropriate remedies" that Congress saw fit to impose on administrators that fail to comply with the critically-important "disclosure and reporting" requirement in Section 105. 29 U.S.C. § 1001(b).

And just as the Committee misses the mark in arguing that the district court lacks discretionary authority to impose penalties on it for its failure to provide pension benefits statements that accurately reflected the Plaintiffs' accrued benefits, the Committee is likewise mistaken that a penalty may only be imposed where the participants plead and show bad faith on the part of the administrator. There is no such requirement in the text of Sections 105(a) or 502(c)(1), and a number of courts have thus correctly held that bad faith is not a prerequisite to imposition of a penalty under Section 502(c)(1). *E.g.*, *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1494-95 (11th Cir. 1993); *Villalobos v. Downey Grinding Co.*, No. SACV 19-150, 2020 WL 2620309, at *6 (C.D. Cal. April 6, 2020) (rejecting defendants' argument that no penalty was available for providing pension benefit statement that lacked required information absent evidence of bad faith or intentional misconduct). *See also* I.

Berio LeBeau et al., Employee Benefits Law, Ch. 12, pp. 12-13 (BNA 4th ed. 2017) (noting that "the circuits are generally in accord that" bad faith is not a prerequisite to the recovery of Section 502(c) penalties).

Indeed, any claims of good or bad faith can be factored into the district court's discretionary determination concerning the appropriateness and amount of any imposed penalty, after the parties have engaged in discovery on the nature of the Committee's conduct with respect to the misstatements. *See*, *e.g.*, *Gamino v. KPC Healthcare Holdings*, No. 5:20-cv-01126, 2021 WL 162643, at *7 (C.D. Cal. Jan. 15, 2021) (in case seeking penalties for failure to include required information in a summary plan description, the court holds that exercise of discretion with regard to penalties should occur at summary judgment or trial, not on a motion to dismiss). This point is illustrated by the decision in *Christensen v. Qwest Pension Plan*, 462 F.3d 913 (8th Cir. 2006). There, the Eighth Circuit affirmed a district court decision on summary judgment that penalties were inappropriate despite a violation of Section 105(a), given, among other factors, that the participant could have detected the error had he read the statement more carefully. *Id.* at 919. Nothing in *Christensen* supports dismissal for failure to state a claim particularly where, as here, bad faith can plausibly be inferred based on the persistent and protracted nature of the misstatements. ER 84-91, Third Amended Complaint ("TAC") ¶¶ 32-46. For

these reasons, bad faith need not be pled and a failure to do so is not grounds for dismissal.[3]

D. This Court's Prior Remand Order Did Not Preclude the Plaintiffs From Repleading or the District Court From Considering Whether the Complaint as Amended Stated a Plausible Claim That the Committee Met the Requirements of Section 105(a)(1)(B)(i) With Respect to Annual Notice

Fourth, the Committee contends that this Court's remand decision only allowed the Plaintiffs to replead under the second clause of 105(a)(1)(B), 29 U.S.C. § 1025(a)(1)(B)(ii), for failure to provide pension benefit statements upon written request, and thus precluded them from repleading under the alternative method of complying with the first clause, through annual notice of how to obtain a pension benefit statement.[4]

To the contrary, nothing in this Court's prior Order precluded the Plaintiffs from amending the complaint to address the perceived deficiency that this Court

---

[3] The Committee complains that a plan administrator should not be subject to unpredictable financial risk, and penalizing the Committee might cause employers to stop offering pension plans. But unpredictable financial risk is exactly what the Committee subjected its Plan participants to when it carelessly overstated their pension benefits over many years. Plaintiffs tried to find out the amount of their pensions so that they could plan their retirements – but the Committee failed them. Plan administrators are able to avoid the adverse financial consequence of being subjected to the Section 105 penalties Congress provided by providing accurate pension information. Participants have no way to avoid the devasting financial consequences of inaccurate pension information.

[4] The Committee does not dispute that the Plaintiffs plausibly allege that it failed to provide pension benefits statements automatically every three years, the primary method of meeting the requirement of 29 U.S.C. § 1025(a)(1)(B)(i).

identified with regard to the first clause. Although this Court focused on whether the Plaintiffs had alleged that they made a written request pursuant to Section 105(a)(1)(1)(B)(ii), the remand Order simply directed the district court to allow the Plaintiffs "to file an amended complaint," *Bafford v. Northrop Grumman Corp.*, 994 F.3d 1020, 1030 (9th Cir. 2021), and the district court did so with respect to the Section 105(a) claim. Given this, the district court acted properly in permitting and considering the amended allegations with respect to the annual notice (although, as argued herein and in the Plaintiffs' Opening Brief, the court erred in concluding that the Committee complied with the annual notice requirement).

The cases that the Committee cites do not establish that this was a limited remand order that circumscribed the manner in which it directed the district court to allow the Plaintiffs to amend the complaint with respect to their Section 105 claim. Indeed, this Court's decision in *U.S. v. Washington*, 172 F.3d 1116 (9th Cir. 1999), supports that it was not. There, the defendant argued that the Ninth Circuit's express statement that the remand was for "the limited purpose of recalculating his base offense level" precluded the district court from arriving at the same sentence by applying adjustments and upward departures. *Id.* at 1118. The Ninth Circuit rejected this argument because "the mandate did not prohibit adjustments to the base offense

level nor proscribe a departure" and did not "circumscribe the manner in which the court could apply other guideline provisions." *Id.* at 1119.

Similarly, "because Plaintiffs could plead facts adequate to allege they made written requests," the Ninth Circuit here "direct[ed] the district court to permit Plaintiffs to file an amended complaint." *Bafford*, 994 F.3d at 1032. Nothing in the Order circumscribes the manner in which Plaintiffs can amend their complaint, particularly with respect to the Section 105 claim, or prohibits Plaintiffs from amending to correct the deficiency that the Ninth Circuit identified with respect to the requirement to provide statements of accrued benefits.

Moreover, in *Washington*, the Ninth Circuit noted that the government had previously pointed out that if the sentence were reversed, it would "seek a similar sentence through upward departure," yet the remand order did not prohibit such departures. *Washington*, 172 F.3d at 1119 (citing government's brief on first appeal). Likewise, here, both the Ninth Circuit and the Committee were well aware that Plaintiffs sought to pursue their Third Claim based on violations of both subsections of Section 105(a)(1)(B). *See* 9th Cir. No. 20-55222, Dkt. No. 18, pp. 46-47 of 61 (Plaintiffs arguing that this Court erred in dismissing the Third Claim because violation of subsection (b)(2)(B)(i) does not require a written request); Dkt. No. 33, p. 79 of 85 (Committee disputing Plaintiffs' position). In light of these

arguments, this Court could have, but did not, prohibit amendment to allege facts pertaining to subsection (i).

In contrast, in *U.S. v. Davis*, 519 F.3d 926 (9th Cir. 2008) (per curiam), the Ninth Circuit "issued a limited remand" by issuing "instructions to the district court to take two specific actions." *Id.* Similarly, in *Mendez-Gutierrez v. Gonzales*, 444 F.3d 1168, 1173 (9th Cir. 2006) this Court held that Board of Immigration Appeals was bound by remand order "requiring specific action." Here, by remanding with an order to allow the Plaintiffs to amend their complaint, specifically with respect to their claim under Section 105(a), this Court bound the district court to do so. In allowing the Plaintiffs to amend that claim to allege violations under both applicable provisions, the district court was following the remand Order, not acting in defiance of it.

Nor is the Committee correct that the Fourth Amended Complaint (which the district court struck) establishes that the Committee did provide the required annual notice. Although it is true that the Fourth Amended Complaint attached documents entitled "Annual Funding Notice[s]" which, buried in the final sentence, instructed plan participants as to how to obtain a statement of their accrued benefits, the Plaintiffs also allege that the instructions were inaccurate in that the Plaintiffs could not obtain benefit statements directly through the website, as the annual funding

notices state.[5] In fact, when they tried to obtain pension statements on the website, they were directed to make a telephone call in order to request and receive such statements. ¶ 45. In addition, as the Committee is well aware, the Plaintiffs take the position that the statements they received after following these instructions did not comply with Section 105(a) because they did not disclose the Plaintiffs' actual accrued benefits.

Moreover, the Plaintiffs have not conceded that these annual funding notices would qualify as notice of how to obtain pension benefit statements under Section 105(a) even if they had provided accurate instructions on how to obtain accurate and compliant pension benefit statements. To the contrary, the Fourth Amended Complaint argues that they do not meet the alternative notice requirement in Section 105(a)(3)(A) because these documents are annual funding notices. ¶ 44. Nor do they indicate that they are intended to constitute "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), because they never mention "pension benefit statements" at all. *See* Dkt. No. 114-2, at 3, 5. For these reasons, the Plaintiffs have

[5] The fact that these annual funding notices also stated that participants could "call NGBC" to request a copy of their "accrued benefits" does not mean that the funding notices were accurate in informing participants that they could request their accrued benefits online when they could not. Nor was any telephone number provided in these statements.

not pled themselves out of court as the Committee contends by attaching three of these annual finding notices to the Fourth Amended Complaint.

E. The Plaintiffs' Section 105 Claims Are Timely

Fifth, the Committee argues that Plaintiffs' claims under Section 105 are untimely because they retired more than three years before filing suit. Their argument, however, ignores that the Plaintiffs retired in reliance on statements that, unbeknownst to them, were entirely inaccurate.

Under Ninth Circuit law, courts borrow California's three-year limitations period for actions "upon liability created by statute other than a penalty or forfeiture" for a claim for penalties pursuant to Section 502(c). *Stone v. Travelers Corp.*, 58 F.3d 434, 439 (9th Cir. 1995); *see* Cal. Code Civ. Pro. § 338(a). Although the limitations period is borrowed from state law, "[b]ecause the cause of action is federal, however, federal law determines" when the cause of action accrues. In the Ninth Circuit, a cause of action accrues "when the plaintiff knows or has reason to know of the injury that is the basis of the action." *N. Cal. Retail Clerks Unions & Food Emps. Joint Pension Tr. Fund v. Jumbo Markets, Inc.*, 906 F.2d 1371, 1372 (9th Cir. 1990).

Here, the Plaintiffs did not know or have reason to know that they were injured until they received "Pension Recalculations" informing them that their pension amounts had been vastly overstated and that the monthly pension checks they had

been receiving for months or years would be greatly reduced. ¶¶ 50, 51, 53, 56-58. Mr. Bafford received his first "Recalculation Notice" in December 2016, ¶ 53, and timely filed this lawsuit in December 2018. ECF No. 1. Ms. Wilson received her first "Recalculation Notice" in February 2017, ¶ 58, filed her initial lawsuit in June 2018, No. 2:18-cv-05353-PA-GJS, and later joined this suit in March 2019. ECF No. 32. Thus, both the Plaintiffs filed suit in a timely manner within three years of when they knew or had reason to know of the injuries that are the basis of this action, and the Committee's statute of limitations argument fails.

F. Whether or Not the Plaintiffs Are Entitled to Estoppel or Reformation, They Adequately Plead Entitlement to Surcharge

Finally, the Committee argues that dismissal is warranted because, they say, Plaintiffs are not entitled to estoppel or plan reformation, two of the remedies they seek. As with the Committee's argument that penalties are not appropriate, this argument is premature and not grounds for dismissal.

ERISA Section 502(a)(3) authorizes "other appropriate equitable relief" for a violation of the statute, and Section 502(c)(1) authorizes courts, in their discretion, to award "other relief" in addition to statutory penalties. 29 U.S.C. § 1132(a)(3), (c)(1). This relief includes make-whole monetary relief, known as surcharge, for losses stemming from "any violation of a duty imposed upon the fiduciary." *CIGNA Corp. v. Amara*, 563 U.S. 421, 442 (2011) (citations omitted). *See also id.* (holding

that a surcharge remedy "fall[s] within the scope of the term 'appropriate equitable relief' in § 502(a)(3)"). Thus, the Committee's final argument for dismissal can be quickly dispatched without the need to determine whether estoppel or plan reformation might ultimately be available as remedies, because it ignores that the Plaintiffs also seek other available remedies: penalties under Section 502(c), as discussed above, *infra*, at 10-14, and make-whole equitable relief in the form of surcharge. ER 31-32 (Fourth Amended Complaint Prayer for Relief ¶ D). Because the Committee makes no argument that surcharge would be unavailable to remedy a violation of Section 105(a), the Committee's argument for dismissal on remedial grounds again simply misses the mark.

The closest the Committee comes to disputing the availability of surcharge is its passing argument that the Plaintiffs' "alleged technical violation of ERISA's disclosure provisions cannot form the basis of substantive remedies other than permitted under §113(c) in the absence of 'exceptional circumstances, such as bad faith, active concealment, or fraud,' none of which Plaintiffs have alleged." Dkt. No. 17, at 62 of 67 (quoting *Watson v. Deaconess Waltham Hosp.*, 298 F.3d 102, 113 (1st Cir. 2002)). This argument lacks merit as there is nothing remotely technical about the Committee's Section 105(a) violations through their repeated misrepresentations to the Plaintiffs about their retirement benefits. Moreover,

Watson distinguished situations involving "technical violations" from cases in which the plaintiff has shown "prejudice." *Id.*; *see Ministeri v. Reliance Standard Life Ins. Co.*, 42 F.4th 14, 31 (1st Cir. 2022) (emphasizing that *Watson*'s restriction on substantive remedies does not apply where the plaintiff has shown prejudice). Here, Plaintiffs allege severe prejudice from the Committee's violations of Section 105, in that the Committee deprived them of the ability to plan for their retirements in any meaningful way. ¶ 64. Moreover, *Watson* involved a failure to disclose eligibility for disability benefits and is thus far afield from this case and a slim reed upon which to hang the argument that pension benefit statements don't much matter.

Moreover, both estoppel and reformation are, in fact, available equitable remedies under ERISA Section 502(a)(3) for the Committee's violations of Section 105(a)(1)(B). Estoppel holds the fiduciary "to what it had promised" and "operates to place the person entitled to the benefit in the same position he would have been had the representations been true." *Amara*, 563 U.S. at 441 (internal quotation marks omitted). Here, the Committee's delegee, Alight, represented to Mr. Bafford that his monthly benefit would be $2,114.41, and represented to Ms. Wilson that her benefit would be $1,630.11 per month. ¶¶ 46-50. Estoppel would hold the Committee – the Plan administrator and thus a fiduciary – to what it promised.

Plaintiffs sufficiently plead the elements of estoppel as set forth in the treatises cited by the Supreme Court in *Amara*: (1) words amounting to a misrepresentation of material facts (ER 85, TAC ¶¶ 36-40); (2) the Committee's knowledge, "either actual or implied, at the time the representations were made, that they were untrue" (ER 92-93, TAC ¶¶ 51, 54); (3) Plaintiffs' lack of knowledge of the truth (ER 82, TAC ¶ 18; ER 94, TAC ¶ 57); (4) the Committee's intent or expectation that the representations be acted upon (ER 87, TAC ¶ 40F); (5) the Plaintiffs' reliance (ER 93-94, TAC ¶¶ 56-58); and (6) detriment to the Plaintiffs (ER 91-94, TAC ¶¶ 50-55, 58). *See* J. Eaton, Handbook of Equity Jurisprudence § 62, p. 150 (1923) ("Eaton"); 3 S. Symons, Pomeroy's Equity Jurisprudence § 805, pp. 191-92 (5th ed. 1941).

In particular, the allegations support that the Committee had at least implied knowledge that the statements were incorrect, because the Committee had all the information necessary to determine that the statements were incorrect: the Committee knew the terms of the Plan and it knew the content of the statements. Implied knowledge is sufficient. Eaton, § 62, p. 150. The Committee did not recalculate the Plaintiffs' pensions after they retired based on new data; rather, it simply reviewed existing records and determined that it had misapplied the Plan terms for over six years. ER 92-93, TAC ¶¶ 51, 54. And the Committee plainly

intended for Plaintiffs to rely on the statements, instructing that they could use the statements as "a key part of planning for a financially secure retirement" and to "make informed decisions about how much to save on your own and how to diversify your 401(k) savings or other investments." ER 87, TAC ¶ 40F.

Furthermore, to the extent that additional elements are required to establish estoppel after *Amara*, which tied equitable remedies to the traditional elements as set forth in established treatises, those extra elements are adequately pled here. The circumstances are extraordinary: more than six years of pension statements, now admitted to be wildly inaccurate, and affecting numerous Plan participants. ER 85-86, TAC ¶¶ 36-40; ER 90, TAC ¶ 40K. The Committee asserts that the Plaintiffs have not alleged an ambiguity in the Plan terms or an interpretation of the Plan, but this argument falls flat. According to the Committee, its application of the Plan terms governing final average salary yielded one result for many years, but then, after the Plaintiffs' retirements, yielded a drastically different result. ER 91-93, TAC ¶¶ 50-54. Though the Committee wishes to attribute these facts to incompetence of a purely ministerial nature, another reasonable inference from these facts is that the Plan terms produced divergent results because the Plan terms are complex and ambiguous, and the Committee interpreted them differently at different times. After all, ERISA charges the Committee with the obligation to administer the Plan in

accordance with its written terms. 29 U.S.C. § 1104(a)(1)(D). In sum, the Plaintiffs adequately plead that estoppel is an appropriate remedy for the violations alleged.

Moreover, the Court could choose to reform the Plan. Reformation is appropriate to remedy "false or misleading information" provided by a plan administrator. *Amara*, 563 U.S. at 440-41. Here, the Plaintiffs sufficiently plead that the Committee provided false or misleading information. Whether it did so because it was mistaken as to the Plan terms, or because it deliberately chose to mislead the Plaintiffs to induce them to retire, or because it acted recklessly, are all reasonable inferences from the facts as pled. *See Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 961-62 (9th Cir. 2014). Which inference is supported when discovery is complete, and whether the district court chooses to award reformation as a result, are not matters for decision at the pleadings stage.

Thus, all of the Committee's arguments about available remedies are premature and not grounds for dismissal. This is particularly true given that the Committee does not even challenge the availability of a surcharge remedy, which would require the Committee rather than the Plan to make good on the losses suffered as a result of their failure to provide accurate pension benefit statements.

CONCLUSION

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

DATED: February 17, 2023

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

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 22-55634

I am the attorney or self-represented party.

This brief contains 6,196 **words,** including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- (•) complies with the word limit of Cir. R. 32-1.
- ( ) is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ( ) is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ( ) is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ( ) complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - [ ] it is a joint brief submitted by separately represented parties.
  - [ ] a party or parties are filing a single brief in response to multiple briefs.
  - [ ] a party or parties are filing a single brief in response to a longer joint brief.
- ( ) complies with the length limit designated by court order dated [ ].
- ( ) is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/Elizabeth Hopkins **Date** 2/17/23

*(use "*s/[typed name]*" to sign electronically-filed documents)*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 15. Certificate of Service for Electronic Filing

Instructions for this form: http://www.ca9.uscourts.gov/forms/form15instructions.pdf

9th Cir. Case Number(s) 22-55634

I hereby certify that I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

Service on Case Participants Who Are Registered for Electronic Filing:

☐ I certify that I served the foregoing/attached document(s) via email to all registered case participants on this date because it is a sealed filing or is submitted as an original petition or other original proceeding and therefore cannot be served via the Appellate Electronic Filing system.

Service on Case Participants Who Are NOT Registered for Electronic Filing:

☐ I certify that I served the foregoing/attached document(s) on this date by hand delivery, mail, third party commercial carrier for delivery within 3 calendar days, or, having obtained prior consent, by email to the following unregistered case participants *(list each name and mailing/email address)*:

Description of Document(s) *(required for all documents)*:

Reply Brief of Plaintiffs-Appellants

Signature s/Elizabeth Hopkins **Date** Feb 17, 2023

*(use "*s/[typed name]*" to sign electronically-filed documents)*

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov