08-3388(L)

08-3460 (XAP)

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**JANICE C. AMARA, GISELA R. BRODERICK, ANNETTE S. GLANZ,
individually and on behalf of all others similarly situated,
Plaintiffs-Appellants-Cross-Appellees,**

v.

**CIGNA CORPORATION and CIGNA PENSION PLAN,
Defendants-Appellees-Cross-Appellants.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

**BRIEF *AMICI CURIAE* OF AARP AND NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLANTS
URGING REVERSAL**

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STATEMENTS OF INTEREST

AARP is a nonpartisan, nonprofit membership organization of 40 million persons age 50 or older, that helps people 50+ have independence, choice and control in ways that are beneficial and affordable to them and society. In the states within the Second Circuit's jurisdiction, AARP represents almost 3.4 million individuals of the over 50 population. Through educational and advocacy efforts, AARP seeks to increase the availability, security, equity, and adequacy of public and private pension, health, disability and other employee benefits.

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. NELA and its 68 state and local affiliates have over 3,000 attorneys who are committed to working on behalf o those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

AARP's members, NELA members' clients, and other older Americans depend on the Employee Retirement Income Security Act (ERISA) to protect their rights under private employer-sponsored employee benefit plans. 29 U.S.C. § 1001 *et seq*. In particular, ERISA's protections, and the ability to enforce these

protections, are of vital concern to older workers and retirees, since the quality of their lives in retirement depends heavily on their eligibility for and the amount of their pensions.

Understandably, in cash balance conversions, if employees do not receive information to which they are entitled, it will be impossible for them to determine what, if any, actions they must take to protect their rights, or to make informed decisions concerning their benefits and employment. When employees fail to receive required information, Congress's carefully crafted reporting and disclosure scheme and the protections which flow from that scheme are effectively destroyed.

Because a large number of AARP's members and NELA members' clients are employee benefit plan participants who need information to make informed decisions concerning their benefits, AARP and NELA have a substantial interest in the resolution of the issues herein. In light of the significance of the issues presented by this case, AARP and NELA respectfully submit this brief on remedies for violation of ERISA § 204(h) to facilitate a full consideration by the Court of this issue.

ARGUMENT

I. THE STRUCTURE AND PURPOSES OF ERISA DICTATE THAT ANY REMEDY FOR DEFENDANTS' VIOLATIONS MUST VINDICATE PLAINTIFFS' VITALLY IMPORTANT RETIREMENT EXPECTATIONS.

A. ERISA's Notice Requirements Are Meant to Secure Retirement Expectations Which Cash Balance Conversions Seriously Affect.

1. ERISA's Notice Requirements Are Designed to Inform Participants and Beneficiaries of the Benefits They Should Expect – or Not Expect – from a Plan, Thus Enabling Them to Plan for Their Retirements.

ERISA's central purpose is to protect "employees' justified expectations of receiving the benefits their employers promise them." *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743 (2004). It is not only ERISA's vesting and accrual rules that further this goal, but ERISA's notice requirements as well. Indeed, before employees can have definite expectations *at all* – and plan their retirement accordingly – a plan must tell its employees both the current terms of the plan, and inform them when future benefit accruals will significantly decrease. For participants and beneficiaries, these notice requirements, which are embodied in ERISA §§ 102 and 204(h), are the most important of ERISA's disclosure provisions. These vital requirements are the crux of this case.

ERISA § 102 requires plans to distribute Summary Plan Descriptions ("SPDs") and Summaries of Material Modifications ("SMMs") to their participants and beneficiaries. An SPD must identify the plan's source of financing, explain its rules for eligibility, vesting and accrual, and summarize its claims and appeals process, among other things. 29 U.S.C. § 1022(b). A plan must issue an SMM whenever it makes "any material modification in the terms of the plan." *Id*. § 1022(a). And an average plan participant must be able to understand the information a plan provides in an SPD or SMM. *Id*.

Under ERISA § 204(h), pension plans must also inform their participants when they significantly reduce the rate of future benefit accrual. 29 U.S.C. § 1054(h)(1). Like SPDs and SMMs, it must be able to be understood by an average plan participant. *Id.* § 1054(h)(2).

Taken together, these provisions "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, at 11 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4639, 4649).[1] As the District Court

[1] The Supreme Court here was discussing yet another ERISA disclosure provision, 29 U.S.C. § 1024(b)(4), which requires an administrator to furnish a participant with a plan description, SPD, or certain other kinds of information upon written request.

noted in its decision on liability, "the purpose underlying ERISA's notice requirements" is "to protect employees' interests and their reasonable expectations." *Amara v. CIGNA Corp.*, 534 F. Supp. 2d 288, 337 (D. Conn. 2008). The disclosures allow a participant to know what benefits he may presently expect from the plan, and, if there is an amendment, to know if he should expect the future accrual of benefits to decrease and to plan accordingly. Without notice requirements, the vision of a secure retirement would be clouded with uncertainty and no participant could meaningfully plan for the future.

2. Benefit Reductions Significantly Impact Older Workers and Retirees.

The ability to plan for the future is all the more important in light of the serious effect benefit reductions have on retirees and workers nearing retirement. As one approaches the end of a career, it becomes increasingly difficult to react to benefit reductions so as to be prepared for retirement. People typically accumulate much of their retirement savings in the decade or so before they stop working. In particular, in traditional defined benefit plans, pension wealth tends to grow more rapidly in the years just before people qualify for benefits. RICHARD W. JOHNSON, ET AL., THE URBAN INSTITUTE, THE IMPACT OF LATE-CAREER HEALTH AND EMPLOYMENT SHOCKS ON SOCIAL SECURITY AND OTHER WEALTH 3-5 (Dec.

2007), http://www.urban.org/publications/411591.html (click on "PDF"). Consequently, reductions in those benefit formulas fall disproportionately hard on those people in the decade before retirement. As Alicia Munnell, Director of the Center for Retirement Research at Boston College, has noted, it is very difficult make up a significant loss of benefits if you are in your late 50s or early 60s. CAROLE FLECK, AARP BULLETIN, RETIREMENT ON HOLD: HOW LONG WILL YOU HAVE TO KEEP WORKING? (July 2008), http://bulletin.aarp.org/yourmoney/retirement/articles/retirement_on_hold.html.

For both workers and retirees, the serious consequences of benefit reductions range from finding it difficult to pay for essential items such as food, gas and medicine, prematurely withdrawing funds from their 401(k), IRA, or other investments and finding it difficult to pay their mortgage or rent. JEFFREY LOVE & GERARD RAINVILLE, AARP, THE ECONOMIC SLOWDOWN'S IMPACT ON MIDDLE-AGED AND OLDER AMERICANS 5 (May 2008), http://www.aarp.org/research/economy/trends/economy_survey.html (click on "Report (PDF)"). For many older workers, the reaction is to delay retirement. In 2006, the percentage of "U.S. baby-boomers in their 50s [who] plan[ned] to delay retirement at least two years because they lack the resources needed to retire at a similar age workers retired in the past" was 25%. ALBERT A. OKUNADE, THE FAILING PENSION

SYSTEM IN THE U.S. PRIVATE SECTOR: HAVE WE SEEN THE WORST YET?, BUSINESS PERSPECTIVES (Fall 2006), http://www.allbusiness.com/finance/4063439-1.html (citing Associated Press, 2006). In AARP's 2008 survey, The Economic Slowdown's Impact on Middle-Aged and Older Americans, that percentage rose to 33%; one-third of workers ages 55 to 64 said they postponed plans to retire due to shrinking portfolios. Some commentators expect this percentage to further rise in the future. *Id.*

For many older workers, working longer may be the only alternative where there have been benefit reductions. However, even that possibility is fraught with difficulties. It is more difficult for older workers than for younger workers to find work. In 2007, for example, the average unemployed worker under age 55 had been out of work 16.3 weeks, but the average unemployed worker over age 55 had been out of work 21.1 weeks. Moreover, age discrimination is still a significant factor when older workers are looking for work. In 2007, charges of age discrimination filed with the Equal Employment Opportunity Commission rose by 15%. SARA RIX, AARP PUBLIC POLICY INSTITUTE, UPDATE ON THE AGED 55+ WORKER: 2007 3 (May 2008), http://www.aarp.org/research/work/employment/aresearch-import-347.html (click on "2007 (PDF)").

For all these reasons, timely, accurate and complete disclosure is important to give employees an opportunity to react to and deal with reductions in the benefits.

3. Older Workers Have Experienced Significant Losses of Expected Benefits in Cash Balance Conversions.

Cash balance conversions are a particularly common way for companies to reduce the future pension benefits of their employees, especially older ones. These conversions have had their worst impact on older workers. Even rulings in favor of companies sponsoring cash balance plans find that "older workers" "have been getting the worst of both worlds as a result of these [cash balance] conversions" because they "were too young to derive much benefit from the traditional 'final average pay' design, but ... too old to have gotten an early start in their careers on the benefits of a cash balance plan." *Eaton v. Onan Corp.*, 117 F. Supp. 2d 812, 818, 831 n.9 & 832 (S.D. Ind. 2000). In *Campbell v. BankBoston, N.A.*, 327 F.3d 1, 5, 8 (1st Cir. 2003), Campbell's "pension benefits stop[ped] accruing" in his "final years of service" when his "expectation was that during these years the benefits would build up the most." The U.S. Government Accountability Office ("GAO") released a report on benefit reductions under cash balance conversions entitled Private Pensions: Information on Cash Balance

Pension Plans, which found that older workers experience greater losses of expected benefits than younger workers; the median benefit reduction for workers at age 30 at the conversion was $59 per month versus $238 per month for workers at age 50. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-42, PRIVATE PENSIONS: IMPLICATIONS OF CONVERSIONS TO CASH BALANCE PLANS 36-38 (2005).

Benefit reductions like these have been hidden from employees behind the illusion of a new form of benefits. A survey by PriceWaterhouseCoopers found that in nearly three-quarters of the conversions with 20% or more reductions, employees receive "either general information or only a hint of potential reductions." PriceWaterHouse Coopers, *Survey of Cash Balance Conversions,* BENEFITS QUARTERLY, 1st Quarter 2001, at 22. An earlier GAO report also found a lack of disclosure. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HEHS-00-185, PRIVATE PENSIONS: IMPLICATIONS OF CONVERSIONS TO CASH BALANCE PLANS 35-37 (2000). A May 5, 1999 Wall Street Journal article broke the story of conferences in which actuaries discussed how cash balance conversions "masked" benefit reductions until employees retire because "[t]here is very little comparison that can be done between the two plans." Ellen E. Schultz, *Actuaries Become Red-Faced Over Recorded Pension Talk*, WALL ST. J., May 5, 1999 at C1. The article

quotes an October 1998 Society of Actuaries' meeting where consulting actuaries joked about the employees' confusion.

Amy Viener, an actuary at William M. Mercer Inc., noted: “You switch to a cash balance plan where the people are probably getting smaller benefits, at least the older-longer-service people; but they are really happy, and they think you are great for doing it.”

An actuary with Watson Wyatt Worldwide who spoke on a panel called “Introduction to Cash Balance/Pension Equity Plans” alongside Ms. Viener, is heard saying on a tape: “It is not until they are ready to retire that they understand how little they are actually getting.” “Right, but they're happy while they're employed,” responded Ms. Viener of Mercer. *Id.*

CIGNA was no different than these other employers in attempting to hide these reductions. *Amara*, 534 F. Supp. 2d at 338-42. Indeed, the district court found that “CIGNA wished to avoid the employee backlash likely to result from a thorough discussion” of these changes to the pension plan. *Id.* at 344.

These substantial benefit reductions and the ease with which they can be masked demonstrates the wisdom in ERISA's requirements that plans make timely, accurate and complete disclosure of significant reductions in rates of benefit accruals.

B. Because ERISA Plans Are Contracts, Substantive Violations of ERISA's Notice Requirements Are Breaches of Contract.

ERISA rests ultimately on the law of contract, for an ERISA plan is a contract. *See Feifer v. Prudential Ins. Co. of Am.*, 306 F.3d 1202, 1210 (2d Cir. 2002) (to interpret ERISA plan terms, "we apply a federal common law of contract"); *Herzberger v. Standard Ins. Co.*, 205 F.3d 327, 330 (7th Cir. 2000) ("An ERISA plan is a contract . . . ."); *Haley v. Paul Revere Life Ins. Co.*, 77 F.3d 84, 88 (4th Cir. 1996) ("[A]n ERISA plan is contractual in nature . . . ."); *Kemmerer v. ICI Americas Inc.*, 70 F.3d 281, 287 (3d Cir. 1995) ("[B]reach of contract principles, applied as a matter of federal common law, govern disputes arising out of plan documents."); *see also* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995). To breach the terms of a plan, therefore, is to breach a contract.

The disclosures that plans must make to their participants – SMMs, SPDs, and ERISA § 204(h) notices – are part of that contract. An SPD becomes part of the contract underlying a plan once it is given to participants, *see, e.g.*, *Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 381 (3d Cir. 2003); *Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90, 97 (2d Cir. 2001), and an SMM should be treated no

differently. A plan participant should be able to rely on an SMM just as much as on an SPD. If that were not true, then the requirement that an average plan participant be able to understand an SMM would be purposeless. *See* 29 U.S.C. § 1022(a). It is unquestionable, moreover, that the quality of notice that SMMs and SPDs must give to participants is precisely the same. *Compare Chambless v. Masters, Mates & Pilots Pension Plan*, 772 F.2d 1032, 1040 (2d Cir. 1985) (holding that an SMM was inadequate because it failed to explain the "full import" of a plan amendment), *with Layaou v. Xerox Corp*., 238 F.3d 205, 210 (2d Cir. 2001) (stating that the standard set forth in *Chambless* applies to SPDs). The substance of SPDs and SMMs being the same, both must be treated as part of the plan itself.

Similarly, disclosures made under ERISA § 204(h), which requires notice of amendments that significantly reduce the rate of future benefit accrual, are also part of a plan's contractual framework. Just like SMMs and SPDs, § 204(h) notices are designed to let participants know what they should expect in benefits from a plan. *See Davidson v. Canteen Corp*., 957 F.2d 1404, 1407 (7th Cir. 1992); *see also Hirt v. Equitable Ret. Plan for Employees, Managers and Agents*, 441 F. Supp. 2d 516, 538 (S.D.N.Y. 2006) (interpreting ERISA § 204(h) so as to "recogniz[e] the importance of adequate notice and meeting of expectations"),

aff'd, 533 F.3d 102 (2d Cir. 2008). The history of ERISA § 204(h) also shows unmistakably that a §204(h) notice is meant to be an enforceable part of an ERISA plan: Congress originally required a § 204(h) notice to "set[] forth the plan amendment" *itself,* and in 2001 essentially codified the existing 1998 Treasury Regulations to clarify that the notice, like SPDs and SMMs, be able to be understood by the average participant. *Compare* 26 C.F.R. § 1.411(d)-6, Q&A 10 (1998)[2] *with* ERISA § 204(h)(2) *as amended by* Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 659(b), 115 Stat. 38, 139-41 (codified at 29 U.S.C. § 1054(h)).

Recognizing that these notices are part of an ERISA plan's contractual framework has an important, though hardly surprising, consequence: a plan must abide by the terms that its notices set forth. If a plan doesn't follow those terms, it has breached its contract. The participants of the plan are then entitled to the well-established remedies of contract law.

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[2] The District Court held that the 1998 Treasury regulations were applicable to the case for purposes of interpreting the 1986 statute, 29 U.S.C. § 1054(h) (1986). *See Amara*, 534 F. Supp. 2d at 336 n.30.

C. Because the Plan in This Case Has Breached Its Contract, Any Remedy Must Put the Plaintiffs in the Position They Expected to Occupy If the Plan Had Performed Its Contract.

The protection of plan participants' reasonable expectations is central not only to ERISA's disclosure provisions, *see supra* Part I.A.1, but also to general principles of contract law. The vindication of those expectations, therefore, must be equally central to the remedy in this case.[3] *See Feifer*, 306 F.3d at 1210 (federal common law of pensions is "informed both by general principles of contract law and by ERISA's purposes as manifested in its specific provisions").

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[3] ERISA's legislative history makes it plain that contractual remedies available at common law should also be available under ERISA. As both the House Education and Labor and Senate Education and Labor Committees said of the aims of the statute's remedial provisions:

> The enforcement provisions have been designed specifically to provide both the Secretary [of Labor] and participants and beneficiaries with broad remedies for redressing or preventing violations of the Act. The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts. . . .

H.R. REP. NO. 93-533, at 17 (1973), *as reprinted* in 1974 U.S.C.C.A.N. 4639, 4655; *see also* S. REP. NO. 93-127, at 35 (1973), *as reprinted* in 1974 U.S.C.C.A.N. 4838, 4871. These statements "support the view that the creation of an adequate and, indeed, improved remedial scheme for the benefit of participants and beneficiaries was an important goal." *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 145 (2d Cir. 1999).

It is black-letter contract law that when a plaintiff has been injured by a breach of contract, he has a right to damages in an amount that will put him in "as good a position as he would have been in had the contract been performed." RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. a (1981); *see also Schwan-Stabilo Cosmetics GmbH & Co. v. PacificLink Int'l Corp.*, 401 F.3d 28, 34 (2d Cir. 2005) (recognizing that "plac[ing] the nonbreaching party in as good a position as it would have been had the contract been performed" is "a fundamental principle of contract law" (internal quotation omitted)). Here, applying the principle that a contract remedy should vindicate a plaintiff's expectations– and recognizing that protecting such an interest is also essential to ERISA's goals– means that the remedy in this case must fully enforce the terms of the disclosures that Defendants distributed to plan participants. Participants had every right to expect that Defendants would carry out those terms.

In this case, there were at least two ways the District Court could have enforced the plan participants' expectations. It could have provided the "benefits due under the terms of [the SMM]," 29 U.S.C. § 1132(a)(1)(B), a document that promised that the conversion to a cash balance plan would provide "comparable benefits" to participants. This Court has already approved such a course. In *Frommert v. Conkright (Frommert II)*, 535 F.3d 111 (2d Cir. 2008), a decision

issued after the District Court's remedy order in this case, the Court reviewed a remedy for inadequate notice in another cash balance case. There, the plan's disclosures to its participants had failed to disclose a so-called "phantom offset" in a plan amendment that reduced benefits, and so the District Court structured its remedy to meet "what a reasonable employee would have anticipated based on the not-very-clear language" of the disclosures. *Frommert v. Conkright*, 472 F. Supp. 2d 452, 458 (W.D.N.Y. 2007). Accordingly, it ordered a recalculation of benefits without the undisclosed phantom offset, and this Court affirmed that remedy. *See Frommert II*, 535 F.3d at 117-18. This remedy, the District Court held, was what a participant would have expected after reading the inadequate disclosures. *See Frommert*, 472 F. Supp. 2d at 457 ("I must interpret the Plan as written and consider what a reasonable employee would have understood to be the case . . . . The Court's task . . . is simply to determine, based on the language of the Plan and the SPD, what benefits are now due this group of rehired employees."). Here, of course, "comparable benefits" are what participants reading the SMM would have expected. The District Court's belief that this remedy was unavailable is patently erroneous.

However, even assuming *arguendo* that enforcing the SMM is inappropriate, there remains another way for the District Court to protect

participants' justified expectations: simply to reinstate Part A as "appropriate equitable relief" under 29 U.S.C. § 1132(a)(3). *See Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996) ("appropriate equitable relief" is a "catchall" provision which provides relief when ERISA's other remedial provisions do not). This relief is available to remedy the § 204(h) violation, to be sure. *See infra* Part II. It also protects the justified expectations CIGNA created with its misleading disclosures. CIGNA's purported § 204(h) notice failed to alert plan participants that their rate of benefit accrual would decrease significantly under Part B, instead telling them that the retirement program would be "significantly enhance[d]" and that there would be no "cost savings" for CIGNA. *Amara*, 534 F. Supp. 2d at 305. The SMM assured participants that CIGNA was "not reducing the overall amount it contributes for retirement benefits," and that they would receive "comparable benefits" under Part B. *Id.* at 339. These statements were misleading, and created the expectation that the cash balance conversion would change little if anything for participants' benefits. Returning to Part A would necessarily vindicate that expectation.

The remedy that the District Court provided leaves those expectations defeated, however. It may eliminate the "wear-away" problem–the fact that the beginning balances in Plan B's new cash balance accounts were less than the value

of the already-accrued benefits under Part A, *see Amara*, 534 F. Supp. 2d at 303-04, but it does nothing to restore what the District Court acknowledged to be the "noticeably higher benefit accrual rate under Part A." *Amara v. CIGNA Corp.*, 559 F. Supp. 2d 192, 209 (D. Conn. 2008). Contrary both to ERISA's structure and purposes and to venerable principles of contract law, the District Court's remedy does not put plan participants in as good a position as they would have occupied if Defendants had followed through on their promises. It is for that reason that the District Court's remedy must be vacated and this case remanded for further proceedings.

D. Under the Law of Trusts, a Remedy Must Put Plaintiffs in the Position They Would Have Occupied Without Defendants' Breaches of Trust.

Seeing ERISA plans as trusts is consistent with and complementary to a contractual view of ERISA plans. *See Herzberger*, 205 F.3d at 330 (stating that "by invoking their understanding of trust law" courts "treat an ERISA plan as a special kind of contract, in order to confer greater protection on . . . the participant or beneficiary"); *see also* Langbein, *supra*, at 663. The two remedies available to plaintiffs under contract law–either enforcing CIGNA's promise of "comparable" benefits or reinstating Part A–are also available under standard trust-law principles.

Under the law of trusts, trustees owe beneficiaries a duty to administer a trust in accordance with its terms and with applicable law. *See* RESTATEMENT (THIRD) OF TRUSTS § 76 (2007). Where the terms of the SMM conflict with those of the formal plan document, the SMM's terms govern the plan. *See supra* Part I.B (citing cases). When Defendants did not provide Plaintiffs with the "comparable" benefits they promised, they breached both the terms of the trust and their fiduciary duty. The standard remedy for a breach of trust is to put the beneficiary in the position he would occupy if the breach had not occurred – or here, if Defendants had administered the plan according to their promise. *See Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985) ("One appropriate remedy in cases of breach of fiduciary duty is the restoration of the trust beneficiaries to the position they would have occupied but for the breach of trust.").

Another available remedy is simply to reinstate the old plan. Defendants in this case committed a double breach of trust in their attempt to amend Part A. They violated ERISA § 204(h), and so failed to administer the trust in accordance with applicable law; they made misleading disclosures, and so violated their duty of loyalty. *See* RESTATEMENT (THIRD) OF TRUSTS § 76*; id.* § 78(3). Plaintiffs are therefore entitled to the traditional remedies of a court of equity: injunction and restitution. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993). Such relief in

this case means enjoining Part B and reinstating Part A. Indeed, this is precisely what other federal appellate courts have done in similar situations. *See Pell v. E.I. DuPont de Nemours & Co.*, 539 F.3d 292, 307-09 (3d Cir. 2008); *Griggs v. E.I. DuPont de Nemours & Co.*, 237 F.3d 71, 385-86 (4th Cir. 2001). It is not surprising that these remedies under the law of trusts dovetails with ERISA's statutory remedy under § 204(h), which is to render the plan amendment ineffective. *See infra* Part II.

II. THE PLAIN TEXT OF ERISA DEMONSTRATES THAT THE DISTRICT COURT SHOULD HAVE AWARDED THE PLAINTIFFS COMPLETE RELIEF FOR CIGNA'S VIOLATION OF SECTION 204(H).

The District Court below crafted a remedy that is fundamentally inconsistent with the purposes of the ERISA statute as a whole, and with ERISA § 204(h) in particular. One of the central purposes underlying the notice requirement in § 204(h) is "to protect employees' interests and their reasonable expectations." *Amara*, 534 F. Supp. 2d at 337. "A primary purpose of notice under § 204(h) is to provide employees the opportunity to learn about changes to their retirement plan and perhaps to complain or otherwise seek to modify those changes if they are unacceptable." *Id.*; *see also Frommert v. Conkright (Frommert I)*, 433 F.3d 254, 266 (2d Cir. 2006) (plaintiffs "were deprived of the opportunity

to take timely action in response to the purported 'amendment.' Such action might have included seeking injunctive relief, altering their retirement investment strategies, or perhaps considering other employment."); *Hurlic v. S. Cal. Gas Co.*, 539 F.3d 1024, 1038-39 (9th Cir. 2008) (allegations that "notice of the provision could have induced Plaintiffs to increase savings in other retirement vehicles or to consider other employment," and that they "were harmed because they did not know that they should be increasing their retirement savings to cover for the decreased benefits that they would earn under the amended Plan" stated a § 204(h) claim). Given the importance of participant expectations, it is only logical to render an amendment ineffective when a plan administrator creates false expectations by failing to provide sufficient warning that the plan amendment will reduce retirement benefits. Indeed, not only did the Defendants in this case fail to provide sufficient notice under ERISA § 204(h), but the District Court also found after trial that the Summary of Material Modification describing the amendment to be "downright misleading." *Amara*, 534 F. Supp. 2d at 296; *see also supra* Part I.

Providing the Plaintiffs complete relief for CIGNA's violation of their rights under § 204(h) is consistent with the broader purposes of ERISA:

> [O]wing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries . . . that disclosure be made and safeguards be

> provided with respect to the establishment, operation, and administration of [ERISA] plans . . . .

29 U.S.C. § 1001(a). This purpose was correctly acknowledged by the District Court below:

> ERISA . . . emphasizes the importance of disclosure by employers to employees regarding the details of the company's pension plan, to enable employees to plan for their retirement and to make decisions of profound importance for their lives. This is where CIGNA failed to fulfill its obligations; the company did not provide its employees with the information they needed to understand the conversion from a traditional defined benefit plan to a cash balance plan and its effect on their retirement benefits.

Amara, 534 F. Supp. 2d at 296.

Moreover, ERISA § 204(h) itself explicitly provides that the failure to provide sufficient notice renders the amendment ineffective. As first enacted, § 204(h) provided:

> **Notice of Significant Reduction In Benefit Accruals**
>
> (h) A single-employer [pension] plan may not be amended so as to provide for a significant reduction in the rate of future benefit accrual, unless, after adoption of the plan amendment and not less than 15 days before the effective date of the plan amendment, the plan administrator provides a written notice, setting forth the plan amendment and its effective date, to (1) each participant in the plan, (2) each beneficiary who is an alternate payee . . . and (3) each employee organization representing participants in the plan.

Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 11006, 100 Stat. 82 (1986). Thus the plain language of the statute provides that a "plan may not be amended . . . unless . . . the plan administrator provides a written notice." The Second Circuit, in interpreting this statutory provision, has declared a plan amendment ineffective if it is adopted without complying with ERISA's advance notice requirements contained in ERISA § 204(h). *See Frommert I*, 433 F.3d at 268 (analyzing a later version of the 204(h) stating that "without such proper notice to Plan participants, the amendment was ineffective as to them"); *Frommert II*, 535 F.3d at 116 (referring to previous decision and reiterating that "we concluded . . . that Defendants-Appellants had impermissibly amended the ERISA plan to include [a phantom offset] mechanism in violation of 29 U.S.C. 1054(h)" and "remanded to the District Court to fashion a remedy for these violations"). Other courts are in accord. *See Prod. & Maint. Employees' Local 504 v. Roadmaster Corp.*, 954 F.2d 1397, 1404 (7th Cir. 1992) (because amendment that violated § 204(h) is "ineffective," "the plan continued in force as if it had not been amended"); *Buus v. WaMu Pension Plan*, No. C07-0903 MJP, 2007 WL 4510311, at *4 (W.D. Wa. Dec. 18, 2007) (finding that "the appropriate remedy under 29 U.S.C. § 1054(h)" is that the amendment "that reduced Plaintiffs' rate of benefit accrual should be disregarded"); *Koenig v. Intercontinental Life*

Corp., 880 F. Supp. 372, 376 (E.D. Pa. 1995) (stating that to remedy a § 204(h) violation, the plan "shall calculate plaintiffs' retirement benefits under the IIP Plan that was in effect before the attempted 1990 amendment"); *Pickering v. USX Corp.*, 809 F. Supp. 1501, 1564-65 (D. Ut. 1992) (because of § 204(h) violation, the prior plans "continue[] in force as if no amendment had occurred"). *Accord Hurlic*, 539 F.3d at 1038-39 (finding that provision of 204(h) notice is required as a prerequisite to amending a plan to prevent harm to participants).

Nevertheless, and contrary to the statutory text, binding Second Circuit authority, the law of the Seventh and Ninth Circuits and several other district courts across the country, the District Court rendered the amendment effective. In its remedial decision, it ordered Defendants to implement an "A+B" formula under which participants would earn cash balance credits back to the freeze of Part A, but did not reinstate participants to the prior plan provisions, or provide restitution for past due payments. Instead, it allowed Part B's new benefit accrual rules to go into effect. This is precisely the opposite result from what the law requires.

The District Court here effectively allowed CIGNA to do an end run around § 204(h) by determining that CIGNA's use of a freeze justified the court's award of partial relief. *See Amara*, 559 F. Supp. 2d at 210. The District Court acknowledged that "by upholding the validity of the freeze amendment, and

consequently not ordering the invalidation of Part B, the Court has permitted CIGNA effectively to eviscerate the notice requirements of § 204(h)." *Id*. Other Courts have not limited relief based on such "sham" freeze amendments or other procedures to end run ERISA's § 204(h) requirements. *See Brody v. Enhance Reinsurance Co. Pension Plan*, No. 00 Civ. 9660 (LAP), 2003 WL 1213084, at *11 (S.D.N.Y. Mar. 17, 2003) ("It is not so obvious to this Court that when there is a freeze in benefits, along with the promise of retroactive benefit accruals once the new Plan is adopted, . . . any additional benefit accruals at all constitute an overall increase because the baseline is zero."). Rather than parsing relief based on specific amendments, the proper focus is to provide relief based on the series of amendments that effected the transition from the prior plan to the new plan. *See Koenig v. Intercontinental Life Corp*., 880 F. Supp. 372, 374 (E.D. Pa. 1995) (adopting a functional approach, holding "that § 1054(h) is triggered only by the label 'amendment' would place pension plan participants in a peculiarly precarious position at the mercy of semantics"). The 1998 Treasury Regulations provide further support that an amendment that affects the rate of future benefit accrual for purposes of ERISA § 204(h) is one that "is reasonably expected to change the amount of the future annual benefit commencing at normal retirement age." 26 C.F.R. § 1.411(d)-6, Q&A-5 (1998). Since both the "freeze" amendment

of Plan A, and the implementation amendment of Plan B changed the participants' retirement benefit commencing at normal retirement age – both amendments should be considered for purposes of fashioning a remedy for failure to provide a notice under § 204(h).

Congress clearly contemplated, in providing a specific remedy for a violation of § 204(h), that the remedy could be costly for the wrongdoing employers – indeed, § 204(h) only covers "significant" reductions in benefit accruals, and the relief for failing to notify beneficiaries of "significant" future reductions is to make them ineffective. *See* 29 U.S.C. § 1054(h). Yet the court below indicated that such relief was not available, and crafted its own remedy that provided less relief to the Plaintiffs here than is provided by the statute and applicable case law.

The remedy chosen by a court must restore the plaintiff in light of the violation of the plaintiff's legal rights. *See* 1 DAN B. DOBBS, LAW OF REMEDIES § 1.7, at 27-28 (2d ed. 1993) ("[A]nyone who wishes to formulate an appropriate remedy must know the nature and scope of the underlying right."); Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 165 (2008) ("The choice of remedy and the measure and administration of the remedy chosen pose a distinctive set of questions—logically separate from the liability

determination and usually considered subsequent to that determination—focused on what the court will do to correct or prevent the violation of legal rights that gives rise to liability.”). Moreover, courts must strictly adhere to the remedies provided in a specific statute. *Transamerican Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 19 (1979) (“[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.”); *Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.3d 846, 857 (7th Cir. 2002).

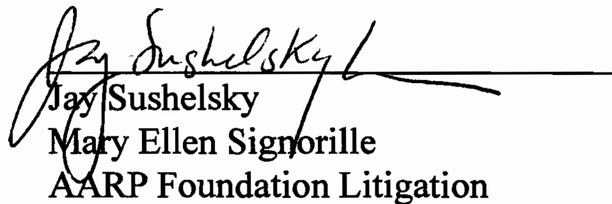
The District Court erred as a matter of law in not considering a remedy that provided benefits under Part A. A district court's "chosen remedy of an identified ERISA violation" is ordinarily reviewed "for an excess of allowable discretion." *Frommert II*, 535 F.3d at 117. Nevertheless, "[d]etermining what remedies are available under a statute is a question of statutory interpretation that requires de novo review." *Pell*, 539 F.3d at 305. In this case, the District Court concluded that relief was not available for the identified violations. Because the District Court precluded itself from considering the remedy clearly mandated by statute, *amici* request that the Court reverse and remand the District Court's June 13, 2008 Relief Decision with instructions that it provide complete relief for Defendants'

disclosure violations in the form of reinstating participants to the prior Part A provisions, or provide restitution for past due payments.

CONCLUSION

For the foregoing reasons, this Court should reverse that part of the District Court's decision which did not provide complete relief to participants. This Court should remand this case with instructions to the District Court to craft a remedy that vindicates Plaintiffs' justified expectations and complies with the governing statutes, either by awarding "comparable" benefits or fully reinstating Part A.

Respectfully submitted,



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