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United States Court of Appeals

for the

Second Circuit

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

Plaintiff-Respondent,

– v. –

FOOT LOCKER, INC. and FOOT LOCKER RETIREMENT PLAN,

Defendants-Petitioners.

ON PETITION FOR PERMISSION TO APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
NO. 07-CV-01358 (KBF)

RULE 23(f) PETITION FOR PERMISSION TO APPEAL FROM THE ORDER GRANTING MOTION FOR CLASS CERTIFICATION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel state as follows:

1. Defendant-Petitioner Foot Locker, Inc. has no parent company, and there is no publicly held company that owns a 10% or more interest in Foot Locker, Inc.

2. Defendant-Petitioner Foot Locker Retirement Plan has no parent company, and there is no publicly held company that owns a 10% or more interest in Foot Locker Retirement Plan.

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PRELIMINARY STATEMENT

This petition concerns a class action brought under ERISA's breach-of-fiduciary-duty provision. The district court certified a class of 16,000 current and former employees of Foot Locker who claim that they were deliberately misled about their benefits when the company modified its employee retirement plan nearly twenty years ago. Their central allegation is that the company failed to notify them about an effect called "wear-away"—a period during which their retirement benefits, as measured in actual, paid-out dollars, did not grow. The combined value of their claims is well over one hundred million dollars.

In assessing the Rule 23 factors, particularly the predominance requirement, the district court made two critical legal errors. Despite black-letter law that in an ERISA misrepresentation case, every member of the class must be able to prove individually that he relied on the alleged misrepresentations to his disadvantage, the court held that reliance here could be "presumed" on a class-wide basis because the communications at issue from the company were uniform. The court also ruled that the class could include every employee who worked for the company at the time of the 1996 retirement-plan conversion because, in the court's view, none of them had constructive notice of the fiduciary-breach claim.

Each of those rulings was a fundamental error that fatally infected the court's certification decision.

First, the district court's decision effectively eliminated the requirement that every class member must be able to show individual reliance. It thereby contradicted this Court's holding that reliance ordinarily "*cannot* be the subject of general proof" in a class action. *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 223 (2d Cir. 2008) (emphasis added).[1] This Court has specifically rejected the district court's reasoning, deciding that while common company communications may show that there was a class-wide *misrepresentation*, they cannot demonstrate class-wide *reliance*. *Id.* It was flatly improper, therefore, to "presume" reliance across the class.

Second, timeliness under ERISA's statute of limitations turns on highly individualized facts. The standard limitations period is six years. In situations of "fraud or concealment," the limitations period may be extended for up to six years from whenever the plaintiff received actual or constructive notice of the misrepresentation. But here, notice depends on individualized factual questions such as whether the class member's personalized benefit statement put him on notice that his benefits had not increased at the expected rate; it thus cannot be resolved on a blanket, class-wide basis. If the district court were correct that the clock does not start even when a participant terminates his relationship with Foot

[1] *Abrogated on other grounds by Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639 (2008).

Locker and receives his benefit statement, then the statute of limitations in many cases would *never* run. That would radically undermine the principles of repose that are codified in the ERISA statute.

The combined effect of these errors was to create a massive class, exposing the company to the risk of a staggeringly large judgment and imposing on it enormous pressure to settle, regardless of the case's merits. Rule 23(f) was designed for just such a situation, where there is a compelling need for this Court's intervention to overturn a class that never should have been certified. The Court should grant the petition and reverse or vacate the class certification order.

QUESTIONS PRESENTED

1. Did the district court err when it "presumed," without individual proof, that sixteen thousand Foot Locker employees all relied on the company's retirement-plan communications when they each decided to remain working at the company and to maintain their investment portfolios?

2. Did the district court err when it included thousands of Foot Locker employees in the class who received their benefits more than six years before suit was filed, because it held that none of them was on constructive notice of his or her claim?

STATEMENT OF FACTS AND PROCEEDINGS BELOW

Like many companies in the 1990s, Foot Locker transitioned its employee-retirement plan from a traditional defined-benefit to a cash-balance plan. Under the former plan, Foot Locker employees collected a monthly annuity upon reaching retirement age. The annuity amount was calculated based on the employee's salary and years of service.

Effective January 1, 1996, the plan was converted to a cash-balance formula. That new formula had two features relevant to this petition. First, employees for the first time were given the option of either collecting their retirement benefit as a lump sum upon termination or deferring payment and receiving a monthly annuity at retirement age. The lump-sum option proved to be popular: More than 70% of employees who have departed Foot Locker since 1996—including the sole named plaintiff in this suit—have opted to collect a lump sum. Second, each employee was assigned a notional cash-balance account, whose initial balance represented a discount of the total future annuity payments that the employee had earned under the prior formula as of the date of the plan conversion. Every month, the company added a percentage of the employee's salary to the notional account, and the account accrued interest at 6% per year.

Because ERISA prohibits plan amendments that reduce retirement benefits that had already accrued at the time of amendment, departing Foot Locker

employees who had accrued benefits under the pre-1996 plan were entitled to benefit payments based on the greater of the value of their pre-1996 benefits or their cash-account balance. *See* 29 U.S.C. § 1054(g). This "greater of" provision is at the center of this suit because it created the potential for "wear-away": According to the complaint, Foot Locker misled participants into believing that they would continuously accrue additional benefits when in fact their benefits were allegedly "frozen" at the pre-conversion level for a period of time.

The sole named plaintiff in this suit is a former Foot Locker employee, Geoffrey Osberg, who worked for the company between 1982 and 2002. Upon his termination, Osberg received a benefit statement showing that even though his cash-account balance was about $20,000, he was entitled to a minimum lump sum of about $25,000. *Osberg v. Foot Locker, Inc.*, 907 F. Supp. 2d 527, 531 (S.D.N.Y. 2012) ("*Osberg I*"). Osberg admitted that he was aware of the "greater of" provision set forth in the Summary Plan Description ("SPD") explaining that he would receive his pre-1996 benefit if it exceeded his cash balance. (Dkt. 84-44, Tr. 130:9-131:5.)[2] Logically, that should have tipped him off that his retirement benefit had experienced wear-away. Nevertheless, he claimed that he thought that the $25,000 lump sum was attributable to a technical calculation called "whipsaw,"

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[2] "Dkt." refers to docket entries in the district court proceedings, No. 07-cv-01358 (S.D.N.Y.).

unrelated to his pre-1996 benefit. (Dkt. 84-44, Tr. 50:15-51:23, 55:20-57:15, 130:9-131:17.)

The gravamen of Osberg's complaint is that plan communications fraudulently misled him about the 1996 conversion by representing that he would continuously accrue additional benefits under the cash-balance plan when he, in fact, did not. Osberg asserted claims under two provisions of ERISA: Pursuant to § 404(a), he alleged that plan fiduciaries breached their duties by making materially false statements regarding post-conversion benefits, *see* 29 U.S.C. § 1132(a); and for the same reason, he alleged that Foot Locker's SPD failed to meet the disclosure requirements set forth in ERISA § 102, 29 U.S.C. § 1022.[3]

The district court dismissed both claims. It held that Osberg had failed to plead "actual harm," which it said was a prerequisite to the only remedies (reformation and surcharge) that he sought under either claim. *Osberg I*, 907 F. Supp. 2d at 534. Indeed, the court found that Osberg's harm allegations were "entirely speculative" because they failed to explain how his lump-sum distribution would have been greater had he been told the truth about the wear-away period. *Id.* With respect to the SPD claim, the district court independently found it time-barred. *Id.* at 533. According to the court, Osberg should have known that the SPD had concealed the wear-away period the moment that he received his lump

[3] Two additional claims were dismissed and have no bearing on this petition.

sum and account statement and thereby learned that his minimum benefit exceeded his cash-account balance. *Id.* And since he had received the payment and statement outside the statutory period, his SPD claim was too late. *Id.*

In a summary order, this Court reversed in part the district court's dismissal. *Osberg v. Foot Locker, Inc.*, 555 F. App'x 77 (2d Cir. 2014) ("*Osberg II*"). The Court held that the reformation remedy sought by Osberg does not necessarily require a showing of actual harm, and therefore the district court erred by dismissing it. *Id.* at 80.

On remand, Osberg moved to certify a class of similarly situated Foot Locker employees under Fed. R. Civ. P. 23(b)(3). Without conducting oral argument, the district court granted the motion. The court recognized that the major obstacle was the predominance requirement. It reasoned first that although every class member needs to prove reliance to establish a fiduciary-breach claim, "reliance may be presumed" across the class. (A-8.) It next determined that the entire class was entitled to invoke the "fraud or concealment" exception to ERISA's statute of limitations, *see* 29 U.S.C. § 1113, pursuant to which the statute of limitations runs six years from when the participant was on actual or constructive notice of the claim. (A-10-12.) Applying that exception, the court concluded that *no* class member had been on actual or constructive notice of the

fiduciary-breach claim, even though many had received account statements showing that wear-away had occurred. (A-12.)

Based on those rulings, the court certified the following class:

> All persons who were participants in the Foot Locker Retirement Plan as of December 31, 1995, who had at least one Hour of Service on or after January 1, 1996 (as defined under the Plan), and who were either paid a benefit from the Plan after December 31, 1995 or are still entitled to a benefit from the Plan; and the beneficiaries and estates of such persons and alternate payees under a Qualified Domestic Relations Order.

(A-12.) Notably, the class encompasses thousands of former employees whose employment with Foot Locker was terminated nearly two decades ago, shortly after the cash-balance conversion, when Foot Locker was experiencing serious financial difficulties. While certifying the fiduciary-breach claim, the district court also restored Osberg's SPD claim but did not certify it for class treatment. (A-14.)

STANDARD FOR GRANTING REVIEW

Under Federal Rule of Civil Procedure 23(f), this Court will grant review of a class certification order if (1) "the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable," or (2) "the certification order implicates a legal question about which there is a compelling need for immediate resolution." *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 76 (2d Cir. 2004) (quotation marks omitted). Here, both standards are met.

REASONS FOR GRANTING THE PETITION

A. The District Court's Ruling That Reliance May Be "Presumed" Across The Class Was Wrong As A Matter of Law.

The district court committed legal error when it held that reliance could be "presumed" across the class. Consequently, the court's reasoning that common issues will predominate over individual ones was fundamentally flawed.

As an initial matter, it is beyond cavil that the fiduciary-duty claim, which is predicated on a misrepresentation, requires proof of detrimental reliance. *See, e.g.*, *Bell v. Pfizer, Inc.*, 626 F.3d 66, 75 (2d Cir. 2010); *Burstein v. Ret. Account Plan for Emps. of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 389-90 (3d Cir. 2003). To prevail under § 404, each putative class member will need to demonstrate that he or she engaged in a particular course of action that inured to his or her disadvantage as the result of an alleged misrepresentation. *See Goodman v. Genworth Fin. Wealth Mgmt., Inc.*, 300 F.R.D. 90, 102 (E.D.N.Y. 2014).

Reliance is the classic example of an element that "cannot be the subject of general proof." *McLaughlin*, 522 F.3d at 223 (collecting cases). Showing that the reason for each class member's action was a misrepresentation or omission will ordinarily require individualized proof, and such proof "often . . . presents the obstacle to class certification." *Goodman*, 300 F.R.D. at 102; *see also In re Initial Public Offerings Secs. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006) ("*In re IPO*") ("[E]stablishing reliance individually by members of the class would defeat the

requirement of Rule 23 that common questions of law or fact predominate over questions affecting only individual members."); *In re Unisys Corp. Retiree Med. Benefits Litig.*, No. 0969, 2003 WL 252106, at *5 (E.D. Pa. Feb. 4, 2003) (denying certification in ERISA case because reliance could not be resolved on classwide basis); Advisory Notes to Fed. R. Civ. P. 23(b) (where there is "material variation" in the kinds or degrees of reliance by different individuals, a fraud action may be unsuited for class treatment).

Rather than confront the individualized nature of the claimed reliance here, the district court thought that it could "presume" reliance across the class because Foot Locker had allegedly sent "common," misleading communications to every class member. (A-8.) But this Court rejected that precise line of reasoning in *McLaughlin*. 522 F.3d at 223. *McLaughlin* explained that while a uniform communication may be used to demonstrate the *existence* of a class-wide misrepresentation, that is only "half of the equation." *Id.* The "other half"—reliance—is not subject to class-wide treatment unless the alleged misrepresentation is the sole plausible explanation for every member's detrimental act. *Id.* at 223-25. In most cases, the reasons for class members' conduct are multifarious, making class certification unwarranted. *See Goodman*, 300 F.R.D. at 107 (noting that "the Second Circuit has required that the inference of reliance . . . be almost inescapable in order to support class certification").

Thus, in *McLaughlin* itself, this Court reversed the certification of a class of smokers of "light" cigarettes who alleged that the cigarette maker had made fraudulent health claims in its advertising. 522 F.3d at 222. Although every class member had heard the same false health claims, the Court refused to presume that each had bought the cigarettes on account of those claims. *Id.* at 223-24. To the contrary, people "could have elected to purchase light cigarettes for any number of reasons, including a preference for the taste or a feeling that smoking Lights was 'cool.'" *Id.* at 225. And because the class members did not necessarily act with a common motivation, individualized inquiry would be required to determine which members had actually relied on the false health claims—thereby defeating the cohesiveness of the class. *Id.* at 223-25.

The same is true here. The operative complaint lays out two possible theories of how class members relied on the alleged misrepresentations: (1) Employees remained working at Foot Locker because they thought that their retirement plan was better than it actually was; and (2) employees did not alter their retirement planning because they thought that they would receive more from the plan than they actually did. (*E.g.*, Compl. ¶ 62.)[4] But it is not plausible to

[4] In support of the surcharge remedy, Osberg alleged another theory: Foot Locker employees had relied on plan documents in not rebelling and forcing the company to change the terms of the plan. The district court found that theory entirely speculative and dismissed the surcharge claim. *See Osberg I*, 907 F. Supp. 2d at 534. Osberg is not pursuing that theory of recovery.

attribute every class member's employment or investment decisions to the purportedly uniform effects of the plan documents.

First, it is farfetched to presume that the sixteen thousand employees who comprise the class all hinged their decision to remain working at Foot Locker on their misguided impressions of the company's retirement plan—as opposed to their salary, other benefits, their inability to secure another job elsewhere, or any number of factors. *See Hudson v. Delta Airlines, Inc.*, 90 F.3d 451, 457 (11th Cir. 1996) (declining to presume class-wide reliance in ERISA suit because employment decisions are "highly individualized"). Employment decisions "are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify." *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 604 (2008). The named plaintiff is a case in point: The terms of the plan evidently did not dictate Osberg's employment decisions because he left Foot Locker for a company with no retirement plan whatsoever. (Dkt. 84-4, Tr. 17:10-21:3, 34:11-37:15.) Separating those class members who truly based their decision to stay at Foot Locker on the alleged misrepresentations from those who did not will require a complex, individualized inquiry that defeats predominance.

Second, there is no basis to presume that the class members all would have modified their investment portfolios had they been aware of the "truth" concerning the plan. Studies have shown that investment decisions are typically animated by

an array of complex motivations that differ from person to person. *See, e.g.*, Melissa A. Z. Knoll, *The Role of Behavioral Economics and Behavioral Decision Making in Americans' Retirement Savings Decisions*, 70 Social Security Bulletin No. 4 at 3 (2010), *available at* http://www.ssa.gov/policy/docs/ssb/v70n4/v70n4p1.pdf. Moreover, some class members likely would not have had the wherewithal to increase their investment savings even had they known about the wear-away. It is thus highly implausible that every single class member would have amended his or her investment behavior even with correct information about the plan.

The district court never discussed the two theories of reliance alleged in the complaint or attempted to explain why every class member could be presumed, without proof, to have engaged in one or the other form of behavior. Instead, the court reasoned that the fact pattern was "analogous" to two other cases where, unlike here, the *only* plausible explanation for the class members' acts of reliance was the false communications that each of them had received from the defendant.

In *In re Foodservice Inc. Pricing Litig.,* 729 F.3d 108, 119-20 (2d Cir. 2013) (cited at A-9), this Court presumed that various commercial customers overpaid for food products because they were overbilled—hardly an earthshattering proposition. There, the defendant's fraudulent act was submitting inflated invoices for payment. *Id.* at 118. This Court explained that in those circumstances "payment may constitute circumstantial proof of reliance" because there is a "reasonable inference

that customers who pay the amount specified in an inflated invoice would not have done so absent reliance upon the invoice's implicit representation that the invoiced amount was honestly owed." *Id.* at 120. This is mere common sense: No one willingly overpays for goods or services unless a bill is fraudulent. In such a scenario, reliance could be presumed across the class.

Klay v. Humana, Inc., 382 F.3d 1241 (11th Cir. 2004) (cited at A-9), is to similar effect. There, the fraud consisted of false representations by insurance companies that they would reimburse physicians for medically necessary services. *Id.* at 1259. The physicians alleged that they had entered into agreements with the insurance companies in reliance on those promises to pay. *Id.* The Eleventh Circuit agreed that the insurance companies' promises to pay were the "very consideration upon which those agreements are based." *Id.* Therefore, if a physician did enter into such an agreement, it is reasonable to presume that it was done in reliance on the reimbursement promise. *Id.*

Klay and *In re Foodservice* are thus highly unusual cases where class-wide reliance was acceptable because no other plausible explanation could be given for the individual members' actions. In the mine-run of cases, however, where class members likely were animated by different motivations—such as in *McLaughlin* and this case—it is improper to "presume" reliance across the class. *See, e.g.*, *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 665-66 (9th Cir. 2004) (declining to

certify where class members' acts could plausibly be attributed to factors other than fraudulent statements).

Contrary to the district court (A-8), the Supreme Court's decision in *Cigna Corp. v. Amara,* 131 S. Ct. 1866 (2011), provides no support for its conclusion. In *Amara*, the Court held that certain equitable *remedies* do not require a showing of detrimental reliance. *Id.* at 1881. But *Amara*—a case that did not address fiduciary-breach claims—said nothing about what is needed to establish *liability* under ERISA in the first instance.[5] Indeed, *Amara*'s discussion of detrimental reliance centers solely on ancient principles of equity rather than the requirements of the ERISA statute. *Amara* thus does not abrogate binding precedent holding that a § 404 claim predicated on a misrepresentation requires proof of detrimental reliance. *See Bell*, 626 F.3d at 75; *see also Kenney v. State St. Corp.*, No. 09-cv-10750, 2011 WL 4344452, at *7 (D. Mass. Sept. 15, 2011) ("[N]othing [in *Amara*] . . . suggests that a plaintiff's burden is lessened in regard to claims for negligent misrepresentation or omission nor that, having failed to alleged detrimental reliance, he may still be entitled to equitable relief . . . ."); *Carr v. Int'l Game Tech.*, No. 09-cv-584, 2012 WL 909437, at *3-4 (D. Nev. Mar. 16, 2012) (same).

[5] It is Foot Locker's position that under *Amara*, entitlement to the reformation remedy likewise cannot be resolved on a classwide basis in this case. But that issue need not be addressed here because the underlying § 404 liability is not susceptible to classwide treatment in the first instance.

In sum, the district court's certification decision flouts this Court's precedents that carefully limit the circumstances in which reliance may be presumed. *See, e.g.*, *McLaughlin*, 522 F.3d at 225 & n.7. Without such a presumption, individual issues would predominate over common issues. *See, e.g.*, *In re IPO*, 471 F.3d at 42. The class therefore should not have been certified.

B. Foot Locker's Statute-Of-Limitations Defense Against Class Members Who Terminated Their Employment More Than Six Years Prior To This Suit Raises Individualized Issues.

This Court has held that a statute-of-limitations defense can defeat class certification if it requires adjudication on a member-by-member basis. *Novella v. Westchester Cnty.*, 661 F.3d 128, 148-49 (2d Cir. 2011). That is precisely the situation here: The timeliness of the claim of a class member who left Foot Locker more than six years prior to commencement of this suit turns on the timing and extent of that individual member's knowledge, as well as on communications from Foot Locker that are unique to that member. Consequently, Foot Locker's statute-of-limitations defense cannot be resolved absent individualized inquiry.

As a general rule, an ERISA action must be brought within six years of the alleged breach or three years from when the plaintiff had actual knowledge of the breach, whichever is sooner. 29 U.S.C. § 1113. There is one notable exception: In cases of "fraud or concealment," an action must be brought within six years of

when a plaintiff discovers, or "with due diligence should have discovered," the breach. *Id.*; *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 190 (2d Cir. 2001).

Although its order was not explicit on this point, by including in the class thousands of employees who had received their retirement benefits more than six years prior to suit, the district court implicitly ruled that every such class member could take advantage of the extended "fraud or concealment" limitations period. Even if that ruling were correct,[6] the statute should have run for those employees when they had actual or constructive knowledge of their claim. *See Caputo*, 267 F.3d at 190; *see also J. Geils Band Emp. Ben. Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1254 (1st Cir. 1996); *Larson v. Northrop Corp.*, 21 F.3d 1164, 1171-72 (D.C. Cir. 1994). Notably, that is the same accrual standard as the one that was not amenable to class-wide application in *Novella*. 661 F.3d at 147-48.

Whether and when a particular class member "knew or should have known" of his § 404 claim depends on facts unique to that member. A class member is on constructive notice when there are "sufficient storm warnings to alert a reasonable person to the possibility that there were either misleading statements or significant

[6] The district court's ruling that every class member could take advantage of the fraud or concealment exception itself was error. To invoke the exception, a member must demonstrate that there has been either a fraud or a *fraudulent* concealment. *Caputo*, 267 F.3d at 190. Establishing fraud or fraudulent concealment, in turn, requires showing "reasonable reliance," *id.* at 190; *see also Watson v. Consol. Edison of N.Y.*, 645 F. Supp. 2d 291, 295-96 (S.D.N.Y. 2009), which not every class member can demonstrate, *see* Point A, *supra*.

omissions involved." *J. Geils*, 76 F.3d at 1255. Once those "storm warnings" appear, the plaintiff is under a duty to inquire into whether a misrepresentation has occurred. *See Martin v. Consultants & Adm'rs, Inc.*, 966 F.2d 1078, 1098-99 (7th Cir. 1992). Even an unsophisticated investor has the duty to "apply his common sense to the facts that are given to him in determining whether further investigation is needed." *J. Geils*, 76 F.3d at 1259 (quotation marks and alteration omitted).

Here, for thousands of class members who left Foot Locker and received their benefit statements more than six years prior to commencement of suit, there is an individualized issue of whether their claims are time-barred. Many of these employees (including Osberg) received account statements showing that their notional cash balances were less than the lump sums that they collected. That discrepancy should have alerted them that something was amiss. *See id.* at 1258 (holding that account statement showing discrepancy between purchase price and market value of bonds should have alerted investor "to the possibility that fraudulent statements may have been made in connection with the bonds' value"); *see also Thompson v. Ret. Plan for Emps. of S.C. Johnson & Sons, Inc.*, 651 F.3d 600, 606-07 (7th Cir. 2011) (holding that payment of lump sum, combined with SPD, put class members on constructive notice that they would not receive additional disputed payment, and thus of their ERISA claim). With any reasonable degree of inquiry, they would have learned the reason for the discrepancy—*i.e.*,

that wear-away had occurred. Thus, determining which class members were on constructive notice outside the statutory period will require inquiry into the content and timing of the account statements received by each member.

The district court tried to dispense with this requisite individualized inquiry by ruling that the account statements did not put *any* class member on actual or constructive notice of the wear-away. (A-12.) In the court's view, the statements and distributions were "sparse" information that required a "deep knowledge of . . . ERISA to properly evaluate." (*Id.*) In effect, the court held that the ERISA statute is too complicated for any employee to figure out that he has a claim.

But that analysis misses the point. Constructive notice does not mean that an employee must be able to connect all the dots on his own and determine whether he has an ERISA claim. Rather, it means that the employee has enough information to prompt a reasonable inquiry that would lead to the discovery of a wrong. *Caputo*, 267 F.3d at 192-93. Indeed, if the district court's view of constructive notice carries the day, the statute of limitations would *never* run on any employee in a § 404 case in which fraud or concealment is alleged until a lawyer calls up—as happened to Osberg here[7]—and expressly informs the employee of a potential claim. Indeed, under the district court's reasoning, the present suit could have been brought 25 years from now, and the claims of

[7] *See Osberg I*, 907 F. Supp. 2d at 529; Dkt. 71-21.

employees who departed in 1996 (or their estates) would still be timely. That cannot be the correct rule. Under the proper view of actual or constructive notice, the district court will need to determine claim accrual on an individualized basis.

* * *

"A district court's ruling on the certification issue is often the most significant decision rendered" in class-action proceedings. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). Given the potential damages at issue, "class certification creates insurmountable pressure on defendants to settle," regardless of the merits, "whereas individual trials would not." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). This case is no exception. Even though Foot Locker believes that the class claims are meritless, the prospect of potentially massive damages, especially in light of the district court's decision to include in its certification order employees who departed the company as long as eighteen years ago, creates intense settlement pressure. Because the district court's decision is, at a minimum, "questionable," and because it raises several "legal question[s] about which there is a compelling need for immediate resolution," *Hevesi*, 366 F.3d at 76 (quotation marks omitted), this Court's review is warranted.

CONCLUSION

The petition for permission to appeal should be granted and, following merits briefing, this Court should reverse or vacate the order granting certification.

Respectfully submitted,

October 7, 2014

s/ Myron D. Rumeld

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14-

United States Court of Appeals

for the

Second Circuit

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

Plaintiff-Respondent,

– v. –

FOOT LOCKER, INC. and FOOT LOCKER RETIREMENT PLAN,

Defendants-Petitioners.

ON PETITION FOR PERMISSION TO APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
NO. 07-CV-01358 (KBF)

RULE 23(f) PETITION FOR PERMISSION TO APPEAL FROM THE NOVEMBER 7, 2014 ORDER GRANTING MOTION FOR CLASS CERTIFICATION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel state as follows:

1. Defendant-Petitioner Foot Locker, Inc. has no parent company, and there is no publicly held company that owns a 10% or more interest in Foot Locker, Inc.
2. Defendant-Petitioner Foot Locker Retirement Plan has no parent company, and there is no publicly held company that owns a 10% or more interest in Foot Locker Retirement Plan.

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PRELIMINARY STATEMENT

This petition addresses the second instance in which the district court has improperly certified a class of 16,000 current and former Foot Locker employees who allege that they were misled about the terms of the company's 1996 retirement-plan conversion. The gravamen of the class complaint is that Foot Locker failed to inform its employees that under the new retirement plan they would experience "wear away"—a period during which their retirement benefits would not grow.

In September 2014, the district court certified a breach-of-fiduciary-duty claim brought by the class under ERISA § 404. According to the court, reliance—an element of the certified claim—posed no barrier to certification because it supposedly could be "presumed" across the class. Foot Locker timely submitted a petition under Fed. R. Civ. P. 23(f) to appeal that decision because it violates the predominance requirement. That petition is pending.

Now, in an effort to salvage its September order, the district court has taken the remarkable step of issuing a *second* certification order that both attempts to shore up the reasoning in its earlier order and certifies an *additional* claim brought under ERISA § 102. In the end, however, the district court only compounded its previous errors, both on ERISA law and the requirements for class actions.

First, the district court still has not justified its decision to certify a fiduciary-breach claim where an element of that claim is individual, detrimental reliance on

the alleged misrepresentations regarding the cash-balance plan. Although the court purported to scrutinize Second Circuit precedent more assiduously this time around, it reached the identical, erroneous conclusion that it could dispense with individualized proof of reliance. The forms of "presumed" reliance identified by the court are not even supported by the facts of the case. The only plausible form of detrimental reliance—remaining employed at Foot Locker—is not alleged by Osberg and could not be proven on a classwide basis because every class member's decision to remain at Foot Locker was not necessarily the result of misrepresentations about the company's retirement plan. If allowed to stand, the district court's decision to certify the fiduciary-breach claim would not only undermine decades-old Second Circuit precedent but would also subject retirement plans to enormous exposure for any mistaken communication to plan participants.

Second, the district court adhered to its mistaken view that Foot Locker's statute-of-limitations defense is no obstacle to certification of either the § 102 or § 404 claims because employees are not sufficiently steeped in ERISA to know when they have a claim. On that view, an ERISA communication claim like this one would *never* be untimely. This Court, however, has held that the limitations period runs when a participant is on constructive notice of the claim, meaning that he has knowledge of the facts giving rise to the claim or a duty to inquire further. And determining when that clock starts running is a highly individualized exercise.

Third, the district court failed to appreciate that to qualify for the reformation relief sought under § 102, each class member will need to demonstrate that he or she was misled by the SPD. Centuries of equity jurisprudence teach that unless a party has a mistaken understanding of a written instrument, reformation is unavailable. And the facts of this case are not conducive to presuming that every class member had the requisite mistaken mindset required for reformation.

The net result of these errors is that on the basis of a claim filed by a single employee many years after he left the company without complaint, Foot Locker now faces an alleged liability of more than $100 million to thousands of present and former employees—all without any showing that they labored under a misunderstanding about their benefits, that they were influenced by such a misunderstanding, or that they lacked the information from which to formulate their claims years earlier, when Foot Locker could have better defended against them. This case thus warrants immediate appellate review.[1]

[1] Since the district court did not withdraw its original September 24, 2014 order certifying the ERISA § 404 fiduciary-breach claim, that order remains in effect. To avoid duplication, this Rule 23(f) petition is intended to supplement Foot Locker's previous petition and to address the court's November 7 order.

QUESTIONS PRESENTED

1. Did the district court err by again "presuming" that *every one* of the 16,000 class members relied on company retirement-plan communications?

2. Was it error to conclude that *every* class member employed by Foot Locker in 1996 had timely claims in 2007, even though there were individualized issues concerning when members were on constructive notice of their claims?

3. Was it error to certify an SPD claim that seeks reformation relief even though common evidence cannot establish that the SPD caused every class member to have a mistaken understanding of Foot Locker's retirement plan?

STATEMENT OF FACTS AND PROCEEDINGS BELOW

In its earlier Rule 23(f) petition, Foot Locker provided background relevant to its 1996 conversion to a cash-balance retirement plan. (*See* Pet. in Case No. 14-3748 (Oct. 7, 2014).) A brief summary of that background is provided here.

Prior to the 1996 conversion, Foot Locker employees who reached retirement age were paid a monthly annuity based on the employee's salary and years of service. Effective January 1, 1996, the plan was converted to a cash-balance formula. Under the new plan, each employee was assigned a cash-balance account, whose initial balance was calculated by actuarially converting the total future annuity payments that the employee had earned as of January 1, 1996. Every month, the company added a percentage of the employee's salary to the cash-balance account, and the account earned interest at 6% annually.

Because ERISA prohibits plan amendments that reduce retirement benefits already accrued, 29 U.S.C. § 1054(g), departing Foot Locker employees who had accrued benefits under the pre-1996 plan were entitled to distributions based on the greater of the value of their pre-1996 benefits or their cash-account balance. This "greater of" provision is at the center of this suit because it created the potential for "wear-away": According to the complaint, Foot Locker misled participants into believing that they would continuously accrue additional benefits, when in fact their benefits were allegedly "frozen" at the pre-conversion level for a period of time. On that basis, named-plaintiff Geoffrey Osberg asserts claims for fiduciary breach under ERISA § 404, 29 U.S.C. § 1104, and for violation of the rules governing summary plan descriptions ("SPDs") under ERISA § 102, 29 U.S.C. § 1022.

On September 24, 2014, the district court certified the § 404 claim. The court reasoned that although every class member needs to prove reliance to establish a fiduciary-breach claim, "reliance may be presumed" across the class. It further concluded that Foot Locker's statute-of-limitations defense presented no obstacle to certification because *no* class member had been on actual or constructive notice of the § 404 claim, even though many had received individualized communications suggesting that wear-away had occurred.

On October 7, Foot Locker petitioned this Court under Rule 23(f) for interlocutory review of the September 24 order. A few days later, Osberg asked

the district court to reconsider that order because he also had misgivings about the court's "presumed reliance" rationale. (Dkt. No. 192.) In Osberg's view, the court should have certified the § 404 claim, not because reliance can be "presumed" but because reliance is not an element of a § 404 claim in the first place. Recognizing that both parties disputed its rationale, the district court announced that it would "seriously reconsider" the September 24 order. (Dkt. No. 211.) Osberg concurrently moved the district court to certify his § 102 claim.

On November 7, the district court announced that it would not withdraw its September 24 certification order. A3-15. Instead, the court doubled down on the "presumed reliance" rationale, devoting the bulk of its order to explaining why reliance purportedly can be presumed across the class. A4-13. At the same time, the court certified Osberg's SPD claim. A15. This second petition followed.

STANDARD FOR GRANTING REVIEW

Under Fed. R. Civ. P. 23(f), this Court will review a class certification order if (1) "the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable," or (2) "the certification order implicates a legal question about which there is a compelling need for immediate resolution." *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 76 (2d Cir. 2004) (citation omitted). Here, both standards are met.

REASONS FOR GRANTING THE PETITION

A. The District Court Erred By Ruling Again That Reliance May Be "Presumed" Across The Class.

1. *Reliance on Misrepresentations.*

In its previous Rule 23(f) petition, Foot Locker demonstrated that the district court erred in its September 24 order when it "presumed" reliance across the class. (*See* Oct. 2014 Pet. at 9-16.) As Foot Locker showed, this Court has held in a succession of cases—including principally *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008)—that reliance generally must be proven on an individual basis and cannot be presumed. Remarkably, the district court's September 24 order failed even to mention *McLaughlin.* In its November 7 order, the court labored mightily to square its conclusion with that precedent. As was the case last time, however, the district court's reasoning remains fundamentally flawed.[2]

Concerning whether reliance must be proven individually, *McLaughlin* drew a bright line between two types of fraud cases. In the standard case, the detrimental act on which the plaintiff's claim for relief hinges is potentially motivated by multiple reasons besides economic considerations. For example, a

[2] The district court stated in passing that reliance may not be an element of a § 404 claim at all. A3. As shown in the prior Rule 23(f) petition, however, that position is foreclosed by Second Circuit precedent, and the district court spent little time trying to justify it. *See, e.g.*, *Bell v. Pfizer, Inc.*, 626 F.3d 66, 75 (2d Cir. 2010); *King v. Pension Trust Fund of the Elec. Indus.*, 131 F. App'x 740, 742 (2d Cir. 2005).

decision whether to purchase particular consumer goods, such as the "light cigarettes" in *McLaughlin*, can turn on "any number of reasons," from a preference for their taste to a perception that smoking Lights is "cool." *Id.* at 225. Because such decisions implicate a degree of "personal idiosyncratic choice," *id.* at 225 n.7, a court is *not* justified in presuming that every member of a plaintiff class acted in reliance on an alleged misrepresentation by the defendant. As one lower court has summarized the law: "The Second Circuit has required that the inference of reliance . . . be *almost inescapable* in order to support class certification." *Goodman v. Genworth Fin. Wealth Mgmt., Inc.*, 300 F.R.D. 90, 107 (E.D.N.Y. 2014) (emphasis added).[3]

In a footnote, *McLaughlin* recognized that there is a second type of case where, "under certain conditions," reliance may be presumed. 522 F.3d at 225 & n.7. Those are cases involving purely "financial transactions," such as entering into a commercial contract or paying an invoice for a commercial service, where the plaintiff's conduct is motivated *solely* by economic considerations. *Id.* In such cases, it may be presumed that the plaintiff acted in reliance on "financial representations" made by the defendant. *Id.* According to *McLaughlin*, *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004) (cited at A9), which involved

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[3] *See also Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 435 (4th Cir. 2003) ("[T]he reliance element of . . . fraud and negligent misrepresentation claims is not readily susceptible to classwide proof."), *cited in McLaughlin*, 522 F.3d at 223.

representations by insurance companies that they would reimburse physicians for medically necessary services, was such a case. *See* 522 F.3d at 225 n.7.

Here, the district court banked its entire argument for presuming reliance on its view that this case falls "precisely" within *McLaughlin*'s second category because it involves purely "financial transactions." A9. In other words, the court held that *no* other factor played a role in *any* class member's decision.

But that position is untenable. To begin with, reliance cannot be presumed here because Osberg has expressly disavowed any form of reliance, and the forms of reliance imagined by the court in its ruling cannot be squared with the facts. For example, it is false that class members made decisions to "switch[] plans" (A11), as there was no choice of plans afforded to them. Nor could class members have decided to accept less than what they were "otherwise entitled" to (*id.*) because there is no dispute that participants received what they were owed under the plan, and there is no challenge to the legality of the plan terms here.

The only form of "reliance" that the class members could possibly have asserted was that they did not "vote with their feet" and quit Foot Locker because they were hoodwinked into thinking that their retirement benefits were better than they actually were. That assertion was expressly abandoned by Osberg, and for good reason, because that type of individualized reliance cannot be adjudicated on a classwide basis.

The decision whether to accept a change in pension benefits is not like the decision to buy shares of a mutual fund because it is bound up with the individual's *employment*. Indeed, it is difficult to imagine a decision that is more "personal" and "idiosyncratic" than the decision to quit or remain at a job. Employment decisions implicate one's identity, livelihood, social life, and much more. Accordingly, as the Supreme Court has recognized, employment decisions "are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify." *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 604 (2008). And precisely for that reason, it is inappropriate to presume classwide reliance in an ERISA suit because employment decisions are "highly individualized." *Hudson v. Delta Airlines, Inc.*, 90 F.3d 451, 457 (11th Cir. 1996). If anything, the employment decisions at issue here were likely even *more* influenced by the idiosyncrasies of class members than the consumer decisions in *McLaughlin*. In all events, there is certainly no reason to presume that *every* member made employment decisions based on false statements about the plan.[4]

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[4] The *U.S. Foodservice* case provides no help to Osberg because it plainly belongs in the second category (purely financial transactions), not the first. *See In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108 (2d Cir. 2013) (cited at A10-11). That case involved customers of a nationwide food distributor who allegedly overpaid in reliance on inflated invoices. In those circumstances, it was reasonable to presume that no factors other than economic considerations would matter. The district court's discussions of *Moore v. Painewebber, Inc.*, 306 F.3d 1247 (2d Cir. 2002), and *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006), both discussed at A5-7, are also largely beside the point. The court extrapolated from

Ironically, Osberg's own history proves the point. The terms of the plan evidently did not dictate his employment decisions because he later left Foot Locker to join a company with *no retirement plan whatsoever*. (Dkt. 84-44, Tr. 17:10-21:3, 34:11-37:15.) It is Osberg's burden to establish predominance, *see, e.g.*, *Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 29 (2d Cir. 2011), but his only pertinent evidence—his deposition testimony—cuts *against* presuming reliance.

In short, having failed to identify any plausible form of detrimental reliance, let alone one that fits within the narrow exception of financial decisions identified in *McLaughlin,* the district court should not have determined that it could presume reliance across the class. And absent a presumption of reliance, there is no basis for finding that common issues predominate, as required by Rule 23(b)(3).

2. ***Reliance on Omissions.***

The district court added a second theory for presuming reliance across the class: Foot Locker's deception resulted from omissions, not misrepresentations, and therefore reliance follows as a matter of law under *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972). Tellingly, Osberg abandoned this argument after initially raising it because it suffers from multiple flaws.

To begin with, the *Affiliated Ute* presumption was adopted in the securities-fraud context, and there is no consensus as to whether it applies at all to ERISA

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those decisions only the inarguable proposition that whether reliance can be presumed in a given case depends on the facts of that case.

claims. *See Kenney v. State St. Corp.*, 754 F. Supp. 2d 288, 292-93 (D. Mass. 2010) (noting conflicting authority). Moreover, even if it does apply in the ERISA context, the presumption is narrow and can be invoked only where (1) it is otherwise "impossible" to prove reliance because there are no affirmative statements that can be tied to a detrimental act; and (2) there is a genuine basis to believe that there would have been a uniform reaction to the omitted information. *Goodman*, 300 F.R.D at 104. Neither criterion is met here.

First, although the district court deemed this an omissions case, the fraud alleged here is actually predicated on positive statements by Foot Locker. Indeed, the Amended Complaint is replete with allegations of affirmative misstatements. (*See, e.g.*, Dkt. No. 57, ¶¶ 81-84, 102, 105-06, 110-11.) Moreover, if there were no affirmative misrepresentations, Osberg could not demand that the plan be reformed to conform to affirmative promises allegedly made.[5] And where fraud is based on affirmative misrepresentations (even if omissions exacerbate those misrepresentations), *Affiliated Ute* is unavailable because it is possible to prove reliance. *See, e.g.*, *Starr v. Georgeson S'holder, Inc.*, 412 F.3d 103, 109 n.5 (2d Cir. 2005); *In re Moody's Corp. Sec. Litig.*, 274 F.R.D. 480, 493-94 (S.D.N.Y.

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[5] In his class certification motion, Osberg similarly alleged that Foot Locker "affirmatively stated or implied that the conversion would be and was done at full value, that there would *not* be a freeze, and that employees would still be continuously earning new benefits just as before, but in an easier-to-understand form." (Dkt. No. 158 at 7; *see also id.* at 11 (citing "inequitable conduct by Foot Locker in affirmatively misleading its employees").)

2011). Second, for reasons already stated, there is no basis to infer that every class member acted in response to alleged omissions concerning their retirement plans in the same way. Accordingly, the omissions theory provides no more authority for presuming reliance than did the misrepresentation theory.

B. Foot Locker's Statute-of-Limitations Defense Is Individualized.

As Foot Locker explained in its earlier Rule 23(f) petition, its statute-of-limitations defense to the certified § 404 claim cannot be resolved across the class in one stroke. For precisely the same reasons, that defense presents fatal predominance problems with respect to the § 102 claim, too. *See Novella v. Westchester Cnty.*, 661 F.3d 128, 148-49 (2d Cir. 2011) (noting that an individualized statute-of-limitations defense will "lessen . . . the availability[] of class actions").[6]

From a class perspective, the statute of limitations is even more significant for the § 102 claim because the limitations period is considerably shorter: three years, rather than six. *See Osberg v. Foot Locker, Inc.*, 907 F. Supp. 2d 527, 533 (S.D.N.Y. 2012) (borrowing three-year period for statutory violations to govern SPD claim) (citing N.Y. C.P.L.R. § 214), *vacated in part on other grounds*, 555 F.

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[6] *Novella* explains that an ERISA claim not involving a breach of fiduciary duty accrues when a participant is on constructive notice of his claim. 661 F.3d at 147. As Foot Locker demonstrated in its earlier petition, constructive notice imposes on participants a duty to inquire when they learn facts suggesting that a wrong may have occurred. (*See* Oct. 2014 Pet. at 17-19.)

App'x 77 (2d Cir. 2014). For the bulk of the class, Osberg's suit was filed more than three years after they had left Foot Locker. Thus, to be timely, those class members must rely on the argument that they were not on constructive notice of their claims—*i.e.*, "there [was not] enough information available to the pensioner to assure that he knows or reasonably should know of" his claim—even after they had left Foot Locker. *Novella*, 661 F.3d at 147. Foot Locker previously showed that application of the "knew or should have known" standard is unavoidably individualized because it depends on the precise mix of information that had been presented to each class member. (*See* Oct. 2014 Pet. at 16-20.)

In the November 7 order, the district court added little to its earlier flawed constructive-notice analysis. In the court's view, Foot Locker has offered "only argument" but no actual evidence that there are individualized accrual issues. A13. But that is flatly untrue. Foot Locker has provided abundant evidence of individualized communications to participants, as well as communications to groups of participants at certain locations, explaining how their benefits were calculated. For example, some individual employees in 1997 received letters informing them that because the company "just recently converted to an account balance plan[,] *[the] balances have not had a chance to build up very much*." Therefore, they were told, the "*lump sum generally works out to be greater than the account balance*." (Dkt. No. 175-6 (emphases added); *see also* Dkt. No. 174 at 6-7.) And other participants who were working at a location that was about to be

shut down were provided with specific examples showing how the "greater of" benefit formula worked, and thus how their pre-1996 benefit accruals might exceed their account balances. (Dkt. No. 175-5.) To evaluate Foot Locker's statute-of-limitations defense properly, the district court would have to determine whether any of those communications put a class member on constructive notice of a claim—an exceedingly individualized inquiry.

Even where a class member received "only" a lump-sum payment and a benefit statement, it is not "unreasonable" to hold that the member had enough information to be on constructive notice, contrary to what the district court said. A14-15. Osberg's own example proves the point. In his deposition, he admitted that when he left Foot Locker and received his benefit statement, he fully realized that his lump-sum payment exceeded his account balance. (Dkt. No. 87 at 22.) He thought, however, that the discrepancy was due to "whipsaw," an esoteric financial effect that can sometimes increase a participant's lump-sum payment. (*Id.*) And because he believed it was whipsaw, he argued, he had no reason to inquire and learn that, in fact, the discrepancy was the result of wear-away. (*Id.* at 23.)

Thus, Osberg himself recognized that the difference between his lump-sum payment and his account balance called for an explanation—only he believed that he had one: whipsaw. It is exceedingly unlikely that the average participant was aware of whipsaw; at the very least, showing otherwise would require an additional level of individualized inquiry. Accordingly, Foot Locker's statute-of-limitations

defense cannot be resolved without inquiring, at a minimum, into which class members received lump-sum distributions exceeding their account balances *and* which of those members attributed their discrepancy to whipsaw. Those individualized inquiries make both the § 102 and § 404 claims unsuitable for class treatment.

The district court's attempt to distinguish this case from *Novella* (A13-15) is mistaken. Foot Locker did not argue that *Novella*'s facts were perfectly analogous to those here. It cited *Novella* for its endorsement of the constructive-notice standard and that Court's recognition that individualized accrual issues can preclude class certification. Any factual differences between this case and *Novella* are completely beside the point.

C. Entitlement To Reformation Relief Is An Individualized Issue.

Certification of the § 102 claim fails for an additional reason: Each class member's entitlement to relief turns on facts that are specific to that member. The sole relief that Osberg seeks pursuant to his SPD claim is the equitable remedy of reformation. Whether a particular class member is entitled to reformation, however, depends on whether that member had a mistaken understanding of how his or her retirement benefits would be calculated on account of the SPD. Here, there is no basis for presuming such a mistake across the class.

In *Cigna Corp. v. Amara*, the Supreme Court clarified that the requirements for reformation relief originate in equity. 131 S. Ct. 1866, 1881 (2011). To

qualify for reformation based on fraud, a party must demonstrate that he had a mistaken understanding concerning a material term of a written contract that arose on account of "fraudulent suppressions, omissions, or insertions" by the counterparty. *Id.* (citing 1 Joseph Story, Commentaries on Equity Jurisprudence § 154, at 149 (12th ed. 1877) ("Commentaries")) (alterations omitted). The party seeking reformation must "clearly" demonstrate his mistaken state of mind "by satisfactory proofs"; relief is "forbid[den] . . . whenever the evidence [of mistake] is loose, equivocal, or contradictory, or it is in its texture open to doubt, or to opposing presumptions." Commentaries § 157, at 151-52; *see also Baltzer v. Raleigh & Augusta R.R. Co.*, 115 U.S. 634, 645 (1885) ("If the proofs are doubtful and unsatisfactory, and if the mistake is not made entirely plain, equity will withhold relief."), *cited in Amara*, 131 S. Ct. at 1881.

The district court did not explain how it could determine "mistake" across the class in one stroke.[7] Indeed, the court said almost nothing at all in certifying the SPD claim. A15. Conducting individualized inquiries into subjective mistake, however, would be unmanageable. And there is no basis for presuming mistake across the class. Thus, because there is no efficient way to resolve reformation for every class member, the certification of the SPD claim must be reversed.

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[7] In its SPD certification, the district court conflated reliance and mistake. A15. But those are independent concepts. Reliance (*i.e.*, taking a specific action in response to the SPD) is not necessarily required for reformation, whereas mistake (a faulty state of mind) is.

In *Amara*, following remand from the Supreme Court, the district court provided a rationale for certifying the SPD claim in that case. The court reasoned that statements contained in the SPD and elsewhere created "objective, reasonable expectations" that diverged from the actual terms of the plan. *Amara v. Cigna Corp.* ("*Amara II*"), 925 F. Supp. 2d 242, 253 (D. Conn. 2012). According to the court, those misguided "objective, reasonable expectations" were tantamount to a mistake that could be attributed to each class member. *Id.* at 253-54.

Although Osberg relied heavily on *Amara II* to support certification of the SPD claim here, that decision is inapposite and unpersuasive. The "objective expectations" of an average plan participant are not surrogate proof for subjective mistake. *See Zell v. Am. Seating Co.*, 138 F.2d 641, 647 n.20a (2d Cir. 1943) ("We may find that one cannot assert rights and powers [to reformation] unless he was *actually*, as well as reasonably, led to expect the performance for which he sues." (emphasis added)), *rev'd on other grounds*, 322 U.S. 709 (1944); *Beecher v. Able*, 575 F.2d 1010, 1015 (2d Cir. 1978) (noting that purpose of reformation is to amend contract to reflect the "intentions of the parties").

Even assuming that, in some instances, a court can look to the "objective expectations" of plan participants to presume a classwide mistake, this is not such a case. To begin with, in *Amara*, surveys showed that more than 90% of plan participants had "thoroughly" read the SPD. *See* Tr. Ex. 133 in *Amara II*, No. 01-

cv-2361 (D. Conn.). No such evidence exists here.[8] Furthermore, in *Amara,* the defendant company made explicit promises to plan participants that their opening account balances would equal the amount of benefits that they had already earned. 131 S. Ct. at 1872. As a result, the participants in *Amara* were left with the indelible but mistaken impression that their accruals going forward would be on top of benefits already accrued—*i.e.*, that wear-away would not happen.

Here, by contrast, Osberg does not allege that Foot Locker's SPD made an explicit promise of an "equal value" starting balance. Indeed, read literally, the SPD promised exactly what participants received: a starting balance calculated with a 9% discount rate and mortality assumption, and a benefit based on the greater of the account balance or the pre-1996 accrued benefit. Osberg's severest allegation is that the SPD was not sufficiently clear about wear-away and that it could be misinterpreted. (*See* Dkt. No. 57, ¶¶ 88-103.) As a result, Osberg's allegations are replete with conjecture about what participants "would think" and how they "would view" certain passages of the SPD. (*E.g.*, *id.* ¶ 96.)

Such speculation cannot clearly and convincingly prove mistake on the part of all 16,000 class members. Indeed, it is just as likely that many class members

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[8] Although the Supreme Court recognized that participants who did not read the SPD could still conceivably be harmed by it on the basis of discussions with other participants who did read the SPD, *see* 131 S. Ct. at 1881, such a finding would clearly require individualized inquiries, especially for a company like Foot Locker, whose employees worked in thousands of individual stores across the country.

never read the relevant SPD provisions or never thought about their retirement benefits. In fact, many class members left Foot Locker before the SPD was even distributed. (*See* Dkt. No. 175-2 at 12 (showing that the SPD was printed on September 30, 1996).) It is also likely that some participants understood from independent sources that wear-away would occur since, as noted above, many participants received more specific information as to how benefits were calculated. Consequently, since the only common evidence of mistake (the SPD) is susceptible to "opposing presumptions," Commentaries § 157, at 151-52, reformation cannot be resolved across the class in one stroke, and the § 102 claim cannot be certified.

* * *

"A district court's ruling on the certification issue is often the most significant decision rendered" in a class-action suit, *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980), because it "creates insurmountable pressure on defendants to settle." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). Here, settlement pressure on Foot Locker is enormous because classwide damages are alleged to exceed $100 million. (Dkt. Nos. 84-23 at 45; 108-1 at 3.) The November 7 order only ratcheted up that pressure by certifying a second claim. That order was incorrect and must be reversed.

CONCLUSION

The petition for permission to appeal should be granted and, following merits briefing, this Court should reverse or vacate the order granting certification.

Respectfully submitted,

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s/ Myron D. Rumeld

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