14-3748

United States Court of Appeals
for the Second Circuit

GEOFFREY OSBERG, on behalf of himself and
on behalf of 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)

PLAINTIFF-RESPONDENT'S ANSWER IN OPPOSITION TO DEFENDANTS-PETITIONERS' RULE 23(f) PETITION FOR PERMISSION TO APPEAL FROM THE ORDER GRANTING MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

Behind Foot Locker's fabricated account of the district court's order certifying Plaintiff's ERISA misrepresentation plan reformation claim, and its fictionalized statement of the relevant facts, lies a case that is a mirror-image of *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011) ("*Amara III*") and equally suited for class certification. As shown below, Foot Locker's Rule 23(f) petition should be denied because Foot Locker cannot show that the certification order (1) will effectively terminate the litigation and the district court's decision is questionable, or (2) implicates a legal question about which there is a compelling need for immediate resolution. *In re Sumitomo Copper Litig.*, 262 F.3d 134, 139 (2d Cir. 2001).

As a threshold matter, there can be no immediate need for interlocutory review because the petition itself is premature. Currently pending before the district court is Plaintiff's motion (RA-43-62) to certify his recently-reinstated ERISA § 102 summary plan description violation claim ("SPD claim") pled as a separate count of the amended complaint, in addition to the § 404 fiduciary duty claim which the district court already certified. If the district court certifies the SPD claim, that would effectively moot the central question Foot Locker's petition for interlocutory review presents: Does an ERISA misrepresentation plan reformation claim premised on a violation of ERISA § 404's fiduciary duty

provision – in contrast to a violation of ERISA § 102's SPD provisions – require proof of detrimental reliance? Certification of Plaintiff's § 102 claim would moot that question because Foot Locker has admitted that a misrepresentation claim premised on a violation of § 102 (the specific provision addressed in *Amara*) does ***not*** require proof of reliance.[1]

In a status conference last month, the district court said that it saw no reason why Plaintiff's § 102 claim should not be certified, but wanted to give Foot Locker an opportunity to tell the court if it had any objections that were "different" from the company's objections to certification of the § 404 claim. RA-24. Foot Locker responded with a letter that identified no § 102-specific objections. RA-40-41. Thus, the district court will likely soon certify the § 102 claim, mooting the principal question Foot Locker says must be answered immediately. There is accordingly no "compelling" reason for this Court to get involved at this time. Interlocutory review of certification orders should be "rare[]," *Sumitomo*, 262 F.3d at 140, but rarer still should there be review where the Court would be wade into a not fully-ripe dispute.

The Court should therefore deny the current petition with leave granted to renew or refile it within 14 days of the date the district court rules on Plaintiff's

[1] *See, e.g.,* Defs. Class. Opp., Doc. 174 at 1-2 (Foot Locker arguing that "the mo[st] significant difference [between this case and *Amara*] is that, unlike *Amara*, this case is now limited to a claim for [§ 404] breach of fiduciary duty, which requires a showing of detrimental reliance as a condition for finding liability").

motion to certify his SPD claim.[2]

A separate threshold reason for denying the petition is that the purportedly important legal question of class action law that Foot Locker says requires this Court's immediate attention already *has* this Court's attention in another case: namely, *Amara v. CIGNA Corp.* CIGNA has appealed the district court's December 2012 entry of final judgment in favor of the certified class following remand from the Supreme Court. The case has been fully briefed and was argued in February 2014. As it happens, one of CIGNA's main arguments for overturning the district court's judgment is that the case should not have been certified as a class action because CIGNA contends there is a requirement for "individualized" proof in an ERISA misrepresentation plan reformation action. *See* Nos. 13-447, 13-526 (2d Cir.), Defs. Brs., Doc. 123 at 28-32, Doc. 153 at 7-15, 22-23.[3]

Meanwhile, Foot Locker's challenge to Judge Forrest's finding that a showing of reliance is not required in such a case and that proof of reliance, if needed, can be made on the basis of class-wide evidence, is substantively identical to CIGNA's challenge to Judge Arterton's finding that individualized proof is not

[2] Judge Forrest has indicated that she expects to resolve Plaintiffs' motion on or about October 28, immediately after receiving Foot Locker's response, without the need to hear from Plaintiff in reply. *See* RA-64.

[3] *See also* RA-11-14, RA-18, Oral Arg. Tr. (reflecting panel's considerable skepticism of CIGNA's arguments that individualized issues prevented class certification).

required, *see Amara v. Cigna Corp.*, 925 F. Supp. 2d 242 (D. Conn. 2012) ("*Amara IV*"). Given that the *Amara* panel's ruling can be expected to issue in the near future, there is no compelling need for another panel to take up the effectively identical question now.

Even if not denied for either of the two preceding reasons, Foot Locker's petition should be denied because Foot Locker still cannot establish that the district court's class certification order warrants immediate appeal. First, while the petition floats rhetoric suggesting that this is the rare case where certification of the class will effectively force Foot Locker to settle, Foot Locker fails to cite any evidence to corroborate its conclusory contention. Although that should end the inquiry under the first *Sumitomo* test, Foot Locker cannot make the required demonstration under the latter half of the first test either: Foot Locker fails to make a "substantial showing" that the district court's decision is questionable "taking into account the discretion the district judge possesses in implementing Rule 23, and the correspondingly deferential standard of appellate review." *Sumitomo*, 262 F.3d at 139. That is because Judge Forrest's ruling is not only correct but faithful to this Court's holding in this case earlier this year that, in light of *Amara*, "[t]o obtain contract reformation, equity does not demand a showing of actual harm." *Osberg v. Foot Locker, Inc.*, 555 F.App'x. 77, 80 (2d Cir. 2014) (*Osberg III*). The district court was correct to find that Foot Locker's objection to

class certification – that class members must show "reliance on misrepresentations or omissions to establish a § 404(a) violation or entitlement to the remedy of reformation," A-8 – was nothing more than a backdoor attempt to inject a detrimental reliance requirement into Plaintiff's ERISA plan reformation claim, contrary to the specific instructions of both *Amara* and *Osberg III*. *See* A-8-10.

Judge Forrest's further ruling that under *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108 (2d Cir. 2013), any required proof of reliance could be made on the basis of class-wide evidence such that individualized issues would not predominate is well-supported by the facts ("there is no evidence before the Court that any particular plaintiff received materially individualized [communications]," A-8) and is entitled to substantial deference. *See Amara IV*, 925 F. Supp. 2d at 262 (an ERISA reformation claim "can be resolved classwide . . . because in the context of ERISA plans, mistake is measured by the plan participants' reasonable expectations of the plan – an objective standard susceptible to proof through common questions of fact").

Although Foot Locker purports also to challenge Judge Forrest's rejection of its statute of limitations defense, Rule 23(f) authorizes *only* an appeal of a grant or denial of class action certification. The fact that a merits ruling was included in the order granting class certification does not make the ruling immediately reviewable. In any event, the ruling is sound: agreeing with the Department of Labor's

analysis submitted in an amicus brief, *see* 2013 WL 2354113 (2d Cir.) ("DOL Amicus Br."), Judge Forrest rightly found that, based on the misleading summaries their fiduciaries provided to them, participants could not have been expected to discover on their own that those materials were deceptive in their depiction of the new plan as providing participants with benefits that it did not in fact provide, since whatever truthful information the materials contained was "sparse" and "required deep knowledge of or familiarity with pension calculations and possibly ERISA to properly evaluate." A-12; RA-28.[4] The district court's further ruling – that, to the extent any limitations challenge remains viable, the applicable constructive knowledge test is an objective one that can be assessed on a class-wide basis and that individualized issues would not predominate – is also well-supported by the record and entitled to substantial deference.

For the same reasons outlined above as well as others discussed below, review cannot be had under the second *Sumitomo* test either. There is no plausible argument that either aspect of the district court's ruling implicates "a novel legal question . . . of fundamental importance to the development of the law of class actions [that] is likely to escape effective review after entry of final judgment" that "compel[s]" this Court's immediate attention. *Sumitomo*, 262 F.3d at 140.

[4] *See* DOL Amicus Br. at 12 ("given the complexity of wear away, [participants could not] have discerned from the [materials given to them] that the cash balance conversion, which Foot Locker billed as beneficial to participants, would actually result in a benefits freeze").

BACKGROUND

This is an action for plan reformation brought under ERISA § 502(a)(3) alleging that, in connection with the conversion of the Plan from a traditional defined benefit pension plan to a "cash balance" plan effective January 1, 1996, Foot Locker made false and deceptive statements to Plan participants as to what the new plan would provide in violation of ERISA's SPD disclosure requirements, *see* ERISA § 102(a), 29 U.S.C. § 1022(a), and Foot Locker's strict fiduciary duties of loyalty and prudence toward participants, *see* ERISA § 404(a), 29 U.S.C. § 1104(a). *See* DOL Amicus Br. at 20 (agreeing that "Plaintiff offered evidence that Foot Locker engaged in inequitable conduct by . . . actively encourag[ing] its employees to believe that they would receive additional retirement benefits as they performed their work each day when in reality their benefit accruals were frozen").

In the *Amara* case, which the district court recognized as similar to this case, *see* A-5, the Supreme Court confirmed that plan reformation is an equitable remedy available to employees when they and their employer came to an understanding, objectively-speaking, as to what the employer's pension plan would provide – what *Amara* referred to as "'the real contract,'" *id.* at 1879-80 (citing *Pomeroy*) – but the formal memorialization deviates materially from the offer objectively conveyed and accepted. *Id.* at 1881.

Earlier this year, this Court, in light of *Amara*, reinstated Plaintiff's request

for ERISA § 502(a)(3) reformation relief, holding that "[t]o obtain contract reformation, equity does not demand a showing of actual harm," *Osberg III*, 555 F.App'x. at 80, because a showing of actual "but-for" harm is generally not required to enforce a contract. *Id.* Rather, the actionable injury in a breach-of-contract case is the loss of the benefit-of-the-bargain objectively struck by the parties. Because reformation is a way of enforcing an agreement not reflected in the written contract, breach of the employer-employee pension bargain ("'the real contract,'" *Amara*, 131 S.Ct. at 1879-80), is all the harm that is needed. *Osberg III*, 555 F. App'x. at 80.

Following this Court's remand, in July 2014, the district court held that Plaintiff had proven that Foot Locker had improperly destroyed a considerable amount of evidentiary material that would have been favorable to his case and that he was therefore entitled to the inference that the missing material "would have provided evidence that," in breach of its fiduciary duties, "Foot Locker intentionally concealed the wear-away effect [*i.e.,* the long-term benefits freeze] caused by the conversion." 7/25/14 Order (Doc. 167) at 15-20.

Subsequently, in its September 24, 2014 order at issue here, the district court: (1) granted certification of Plaintiff's ERISA § 404 misrepresentation plan reformation claim under Rule 23(b)(3); (2) reinstated Plaintiff's previously-dismissed ERISA § 102 SPD misrepresentation plan reformation claim; and (3)

rejected Defendants' statute of limitations defense as to both the fiduciary breach and SPD claims. *See* A-5 (explaining that "[none of these questions] present difficult issues, particularly in light of *Amara*").

In its class ruling, based on its review of the extensive factual record the parties have amassed in this fully-discovered case, the district court rejected Foot Locker's argument that Plaintiff's § 404 misrepresentation plan reformation claim "requires a showing of detrimental reliance." Defs. Class Opp. (Doc. 174) at 1-3. The district court found that Foot Locker's argument that a plan participant must show "reliance on misrepresentations or omissions to establish a § 404(a) violation or entitlement to the remedy of reformation or surcharge . . . is ***incorrect.***" A-8 (emphasis added); *see also* A-9-10 ("[w]hile the Supreme Court found that reliance must be shown for estoppel claims, . . . the same is not true with respect to reformation of contract or imposition of surcharge following reformation – the two forms of relief sought here").

The district court rejected Foot Locker's argument that there were material differences in the plan communications it issued to participants. A-8 (finding "no evidence" that those communications were materially different or individualized). The court thus concluded that "[l]iability or non-liability as to a § 404(a) claim reasonably could be based on a factfinder's assessment of these common, class-wide communications." *Id.* Additionally, the court found that there was nothing

individualized about whether Foot Locker violated its fiduciary duties "by preparing and disseminating participant communications with the intent to conceal the wear-away freeze and/or that had the effect of concealing [the] wear-away," and nothing individualized about whether "there was a binding understanding of a no-freeze plan . . . coupled with participants' objective, reasonable (but mistaken) expectation that that was what the formal plan terms provided." A-6. Similarly, the district court found there was nothing individualized about whether Foot Locker "[took] advantage of employees' lack of full and accurate information . . . to obtain employees' services without actually providing them with the benefits Foot Locker told them they were earning in exchange for those services." *Id.*

The district court also found that under this Court's ruling in *In re U.S. Foodservice, supra*, any required proof of reliance could be made on the basis of class-wide evidence such that individualized issues would not predominate. A-9. This was another way of saying that an ERISA reformation claim "can be resolved classwide . . . because in the context of ERISA plans, mistake is measured by the plan participants' reasonable expectations of the plan – an objective standard susceptible to proof through common questions of fact." *Amara IV*, 925 F. Supp. 2d at 262.

ARGUMENT

I. The Certification Order Will Not Force Foot Locker to Settle Regardless of the Merits, and Foot Locker Fails to Make a Substantial Showing that the District Court's Decision is Questionable

As noted above, Foot Locker makes no effort to support its suggestion that Judge Forrest's ruling will force it to settle independent of the merits, and the company's unremittingly aggressive efforts to derail this nearly 8-year old case belie that suggestion. Foot Locker also fails to make any convincing showing that either aspect of the district court's ruling that it purports to challenge is questionable "taking into account the discretion the district judge possesses in implementing Rule 23, and the correspondingly deferential standard of appellate review." *Sumitomo*, 262 F.3d at 139.

Indeed, Foot Locker disentitles itself to have its challenge taken seriously by its extraordinarily disingenuous attempt to recast the reliance argument it made below and what Judge Forrest said in rejecting it. Foot Locker says that the key problem with the district court's order is that the court purportedly found "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*." Pet. at 3 (emphasis added). This is a complete fabrication: the district court did not say, and the parties below did not

brief, anything remotely like that or ever discuss that kind of reliance.[5] That is a sure sign Foot Locker knows that the argument it made below was and is a non-starter.

Below, Foot Locker's objection was that class members must show "reliance on misrepresentations or omissions to establish a § 404(a) violation or entitlement to the remedy of reformation," A-8. Judge Forrest rightly found that argument "incorrect." *Id.* Indeed, *Osberg III* forecloses it. In the briefing leading to *Osberg III*, Foot Locker argued that Plaintiff's fiduciary breach reformation claim was not viable because "Osberg specifically eschewed any [] theory of causation that would have necessitated **individualized showings of detrimental reliance** on the

[5] Knowing that it needed something to cite to support this entirely invented version of what the district court found, Foot Locker cites the allegations of Plaintiff's *original 2007 complaint*, dubbing it the "operative complaint." Pet. at 11. But in truth, the operative complaint is the ***2012*** amended complaint, which contains no "reliance" allegations because Plaintiffs removed such allegations as irrelevant in light of *Amara's* 2011 holding that reliance is not a required element of an ERISA plan reformation claim. Doc. 57. Foot Locker acknowledged just *two months ago* that all of the "reliance" allegations from the 2007 original complaint had been eliminated and appear nowhere in the operative 2012 amended complaint. Doc. 174 at 7-8. Yet Foot Locker now inexcusably pretends that the superseded 2007 complaint is still the operative complaint and fabricates (1) that Osberg's theory is that he and "sixteen thousand [other] Foot Locker employees all relied on the company's retirement-plan communications when they each decided to remain working at the company"; (2) that the district court premised its ruling on its agreement that Osberg must establish such reliance; and (3) that the court found that such reliance can be presumed. Pet. at 2, 11-13. It is both dishonest and unfair for Foot Locker to attack the district court for "never discuss[ing]," *id.* at 13, theories that Foot Locker knows Plaintiff removed from the actual 2012 "operative complaint."

plan communications." Defs. Br., 2013 WL 4768270, at *41 (emphasis added). In his reply brief, Plaintiff agreed that he had waived any theory that necessitated "individualized inquiries into each participant's state of mind to prove detrimental reliance" but explained that such a showing "is not required for reformation." Pl. Br., 2013 WL 5587225, at *18. This Court's ruling explicitly "disagree[d]" with Foot Locker's contention that, absent proof of individual reliance, "Osberg cannot show fraud or mutual mistake entitling him to reformation" – because, the Court explained, a party seeking reformation "need not show that the mistake has resulted in an inequality that adversely affects him." 555 F. App'x at 80-81.

In other words, the Court held that Osberg's plan reformation claim can succeed even though he "specifically eschewed any [] theory of causation that would have necessitated individualized showings of detrimental reliance," Defs. Br., 2013 WL 4768270, at *41. *Accord Amara III*, 131 S. Ct. at 1881 ("a showing of detrimental reliance . . . is not [a] necessary" element of an ERISA plan reformation claim). If Mr. Osberg can win his individual claim without a showing of reliance, then it follows that every other member of the class can too. *Accord Amara IV*, 925 F. Supp. 2d at 262 (an ERISA reformation claim "can be resolved classwide . . . because in the context of ERISA plans, mistake is measured by the plan participants' reasonable expectations of the plan – an objective standard

susceptible to proof through common questions of fact").[6]

Tellingly, Foot Locker's petition mentions *Osberg III* only once and misstates the case's holding. According to Foot Locker, *Osberg III* "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." Pet. at 7 (emphasis added). To the contrary, *Osberg III* unequivocally held that reformation does not require a showing of actual harm *at all*: "[t]o obtain contract reformation, equity does not demand a showing of actual harm." 555 F.App'x. at 80.

This follows from *Amara* and the statute itself. ERISA § 502(a)(3) authorizes the award of "appropriate equitable relief" to redress "any act or practice which violates any provision of this title," including a breach of the statutorily-created fiduciary duty of an administrator under ERISA § 404(a). As *Amara* explains, "The relevant substantive provisions of ERISA do not set forth ***any*** particular standard for determining harm. . . . Hence any requirement of harm must come from the law of equity." *Amara*, 131 S. Ct. at 1881 (emphasis added).

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[6] Foot Locker tells the Court that Judge Forrest supposedly *disagreed* with *Osberg III* and *Amara's* holdings that reliance is not required – *at all* – and held that "every class member needs to prove reliance to establish a fiduciary-breach claim." Pet. at 7. This is not what the district court held. To the contrary, consistent with *Amara* and *Osberg III,* Judge Forrest said that Foot Locker's premise "that putative class members must show individual reliance on misrepresentations or omissions to establish a § 404(a) violation or entitlement to the remedy of reformation or surcharge… **is incorrect**." A-8 (emphasis added); *see also* A-10 ("reliance must be shown for estoppel claims [but not] reformation of contract or imposition of surcharge following reformation – the two forms of relief sought here").

In other words, proving a *violation* of ERISA's "substantive provisions" does not require proof of harm; obviously, if there is no *standard* for harm under those provisions, there is no *requirement* for harm. Like the substantive provision specifically at issue in *Amara* (§ 102), the substantive provision at issue in Foot Locker's petition (§ 404), does not set forth a "standard for determining harm" but simply requires fiduciaries to act "solely in the interest of the participants and beneficiaries."

It follows from *Amara*, then, that since there is no standard for harm under § 404, there is no requirement that plan participants must prove harm (in the form of reliance or otherwise) to establish a § 404 violation. Simply put, a plan participant's reaction (or failure to react) has "nothing to do with whether [the defendant] breached its duty as a fiduciary" and thereby "violate[d]" a provision of ERISA. *Kenseth v. Dean Health Plan, Inc.*, 722 F.3d 869, 888 (7th Cir. 2013). Instead, "any requirement of harm" comes, if at all, in determining eligibility for *relief*; for equitable relief in the form of plan reformation under ERISA § 502(a)(3), reliance is not required. *Amara*, 131 S. Ct. at 1881.[7]

In the end, Foot Locker provides no support whatsoever for its contention

[7] The main cases Foot Locker cites to support its position are inapposite pre-*Amara III* cases, thus ignoring that "the Supreme Court's decision in *Amara* changed the legal landscape." *Silva v. Metropolitan Life Ins. Co.*, 762 F.3d 711, 722 (8th Cir. 2014). The two post-*Amara* cases Foot Locker cites are of no assistance to it here either.

that an individualized showing of reliance by plan beneficiaries is required to obtain reformation. Instead, "reformation of the terms of the plan, in order to remedy the false or misleading information [] provided" to participants does not require "that 'detrimental reliance' must be proved before [that] remedy is decreed." *Amara*, 131 S. Ct. at 1879-81. This is consistent with the recognition that, because employee benefit plans are "unilateral" contracts, *e.g., Gibbs ex rel. Estate of Gibbs v. CIGNA Corp.,* 440 F.3d 571, 576 (2d Cir. 2006), employees become counterparties and manifest their assent to the pension contract's terms, as those terms have been communicated to them simply by remaining in service for the employer, *i.e.,* by performing their end of the bargain as offered to them. *E.g., Feifer v. Prudential Ins. Co. of America*, 306 F.3d 1202, 1211 (2d Cir. 2002). That makes employees' subjective understanding when doing so irrelevant. *E.g., McClung v. City of Sumner*, 548 F.3d 1219, 1230 (9th Cir. 2008) (because the "[offerees'] objective actions [*i.e.,* performance] indicate[d] acceptance of the offer," their subjective understandings of the offer were "irrelevant").

Equally unavailing is Foot Locker's attempt to question Judge Forrest's finding that any required proof of reliance could be made on the basis of class-wide evidence. That common-sense ruling was premised on a finding that Foot Locker does not and cannot challenge, namely that "there is no evidence before the Court that any particular plaintiff received materially individualized

[communications]." A-8. Judge Forrest's finding that common issues would thus predominate, based on her application of *In re U.S. Foodservice* (another case in which "[c]onjectural individualized questions of reliance [were] far more imaginative than real," 729 F.3d at 120 (quotation marks and citations omitted)), and the closely analogous facts of *Klay v. Humana*, 382 F.3d 1241, 1246, 1258-59 (11th Cir. 2004), is entitled to substantial deference. *See, e.g., New Jersey Carpenters Health Fund v. RALI Series 2006-Q01 Trust*, 477 F.App'x. 809, at *3 (2d Cir. 2012) (even where a different factfinder might interpret the same factual record differently, that does not render the district court's "competing" interpretation of the record invalid or subject it to appellate "second-guess[ing]").[8]

Foot Locker also fails to show Judge Forrest's limitations ruling is questionable or that Foot Locker even has the right to challenge it on interlocutory review.[9] Foot Locker instead misrepresents her findings.[10] Her actual finding is

[8] The holding from *McLaughlin v. American Tobacco Co*., 522 F.3d 215 (2d Cir. 2008) upon which Foot Locker places great weight – that individualized proof of reliance is necessary to support a civil RICO cause of action – was explicitly abrogated by the Supreme Court. *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 653 (2008).

[9] Foot Locker effectively concedes it is improperly challenging Judge Forrest's merits ruling when it frames the limitations question as: "Did the district court err when . . . it held that [no plan participant] was on constructive notice of his or her claim?" Pet. at 3; *see also id*. at 19 ("[t]he district court . . . rul[ed] that the account statements did not put *any* class member on actual or constructive notice of the wear-away") (emphasis in the original).

unexceptionable given the facts (which include Foot Locker's admission that despite an across-the-board freeze of all employees' pensions, *not a single one of the adversely-affected 16,000 employees complained)* and is identical to the judgment independently reached by both the Department of Labor and Judge Batts earlier in the case.[11] Under the circumstances, no average participant – "mere mortals" in Judge Forrest's words, A-14 – could have figured out the truth based on the communications that were provided. Foot Locker's objection that the

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[10] The court held that no class member's claim is time-barred because participants could not have been expected to discover on their own that the materials given to them were deceptive in their depiction of the new plan as providing participants with benefits that it did not in fact provide since whatever truthful information contained in Foot Locker's misleading plan summaries was "sparse" and "required deep knowledge of or familiarity with pension calculations and possibly ERISA to properly evaluate," A-12. Foot Locker misrepresents that ruling by editing out "**required deep knowledge of or familiarity with pension calculations**" and the caveat *"**possibly**"* preceding "knowledge . . . of ERISA" so it can argue that the district court erred by holding that "the ERISA statute is too complicated for any employee to figure out that he has a claim." Pet. at 19.

[11] *Osberg v. Foot Locker, Inc*., 656 F.Supp.2d 361, 371 (S.D.N.Y. 2009) (*Osberg I*) (holding both the § 102 or § 404 claims timely because it could not be said that Plaintiff should have discovered on his own "that his initial account balance under the amended Plan would be significantly smaller than his frozen accrued benefit, and that he would experience a lengthy period of wear-away before accruing any new benefits"); DOL Amicus Br. at *27 n.4, 29 ("[A Foot Locker Plan participant's] receipt of a lump-sum payment in an amount slightly above the amount in his cash balance account, where the Plan had previously informed participants in its SPD that such a discrepancy could occur for a reason that has nothing to do with wear-away, was not a 'red flag' that should have put plaintiff on notice that his benefits in fact [had been frozen]"; **even an actuarially sophisticated participant** would not necessarily have discovered the wear-away based on a benefits statement that showed a lump-sum payout in excess of the cash balance amount") (emphasis added).

district court's ruling is inconsistent with the statute's policy of "repose" ignores both that Congress did not establish a statute of *repose* for ERISA claims and that Foot Locker could have started the clock ticking anytime it wanted to: all it had to do was be honest.[12]

Foot Locker's assertion that "[w]hether and when a particular class member 'knew or should have known' of his § 404 claim depends on facts unique to that member" is incorrect: the district court explained that "there is no evidence before the Court that any particular plaintiff received materially individualized materials." A-8. The court properly concluded that "[g]iven this undifferentiated set of class-wide communications" (A-9), Foot Locker was simply wrong that the court would need to conduct 16,000 individual hearings to discern what participants knew and when. A-12.[13]

[12] Without taking direct issue with any of the district court's findings or the DOL's analysis, Foot Locker misrepresents Plaintiff's deposition testimony and pretends that it in fact made proper disclosure. Pet. at 4-6, 8, 18-19. But as the district court and the DOL concluded, "[h]aving been told directly that their initial account balances and accrued benefits are the same, the average participant could not have been expected to conclude otherwise based on" the "cryptic" and "scattered assortment of clues" Foot Locker provided that "certainly would not dispel the message conveyed by the rest of the SPD [and other communications] of inexorable benefit growth." 2013 WL 2354113, at *12, 26-28.

[13] *See Johnson v. Meriter Health Serv. Employee Ret. Plan*, 702 F.3d 364, 370 (7th Cir. 2012) (limitations defense could be resolved on a class-wide basis where defendant "failed to identify any communications to individual plan participants").

II. Neither Aspect of the Certification Order Presents a Question of Class Law that Compels this Court's Immediate Attention

For the reasons set forth above, neither aspect of the district court's ruling implicates "a novel legal question . . .of fundamental importance to the development of the law of class actions [that] is likely to escape effective review after entry of final judgment" that "compel[s]" this Court's immediate attention. *Sumitomo*, 262 F.3d at 140. First, Foot Locker's "reliance" challenge is likely to be mooted by the district court certification of Plaintiff's § 102 claim and/or otherwise resolved by the guidance that can be expected to issue soon from panel entrusted with ruling on CIGNA's substantively indistinguishable challenge and/or can be reviewed (as in *Amara*) after entry of final judgment. Second, Foot Locker's limitations ruling challenge presents no question of *class action* law but instead a challenge to a fact-bound determination that can be reviewed after entry of final judgment.

CONCLUSION

The petition should be denied.

Dated: October 20, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, counsel of record for the Plaintiff-Respondent, hereby certifies that on October 20, 2014, a true and correct copy of the foregoing Answer in Opposition to Defendants-Petitioners' Rule 23(f) Petition for Permission to Appeal from the Order Granting Motion for Class Certification was filed with the Clerk of the Court via email. Further, Plaintiff-Respondent's Answer in Opposition to Defendants-Petitioners' Rule 23(f) Petition was served upon Defendants' counsel via email:

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