UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEOFFREY OSBERG **On behalf of himself and on behalf of all others similarly situated,** **Plaintiff,** **- against -** **FOOT LOCKER, INC.,** **FOOT LOCKER RETIREMENT PLAN,** **Defendants.**	:	**Case No.: 07 CV 1358 (KBF)**

CLASS COUNSEL'S NOTICE OF MOTION FOR ATTORNEYS' FEES AND EXPENSES, AND APPROVAL OF SERVICE AWARDS FOR PLAINTIFF AND TESTIFYING CLASS MEMBERS

PLEASE TAKE NOTICE that counsel for Plaintiff Geoffrey Osberg and the Class ("Class Counsel") will move the Honorable Katherine B. Forrest, United States District Judge, in Courtroom 23B at the United States Courthouse, 500 Pearl Street, New York, New York 10007-1312, pursuant to Fed. R. Civ. P. 23(h), for an award of common fund attorneys' fees and expenses from the Class's recovery under this Court's October 2015 judgment (Dkt. 399), and for approval of service awards to Mr. Osberg and the eight Class members who were deposed by Defendants and testified at the July 2015 trial, to be paid out of Counsel's fee award.

Specifically, Class Counsel move for:

- Common fund attorneys' fees of 33% of the $288,479,943 estimated value of the Class's net recovery under the October 2015 judgment formula (Dkt. 399 ¶ 2) calculated as of June 1, 2018;
- Reimbursement from the recovery of $1,520,057 in litigation expenses; and

- Service awards, to be paid out of Counsel's award, for Plaintiff Geoffrey Osberg in the amount of $50,000, and for each of the eight Class members who were deposed by Defendants and later testified at trial, in the amount of $15,000 each.

For the reasons summarized below and set forth in more detail in the memorandum, supporting declarations and exhibits accompanying this motion, Class Counsel respectfully submit each of these three requests should be granted.

1. Class Counsel's Fee Petition Should Be Granted as Fair and Reasonable

In February 2007, Class Counsel, on behalf of Geoffrey Osberg and a putative class of similarly situated persons, filed suit challenging the conversion of the Foot Locker Retirement Plan (the "Plan") from a traditional defined benefit pension plan to a "cash balance" plan.

Eight years later, following a two-week trial at which 21 fact witnesses and 3 experts testified, this Court issued its 83-page verdict in favor of the Class, finding the evidence "overwhelming" that Foot Locker had "egregious[ly]" violated ERISA's fiduciary standards of conduct by issuing "intentionally false and misleading" communications to Plan Participants. The Court said that the evidence presented by Class Counsel left "no doubt that Foot Locker committed equitable fraud. It sought and obtained cost savings by altering the Participants' Plan, but not disclosing the full extent or impact of those changes." *Osberg v. Foot Locker, Inc.*, 138 F.Supp.3d 517, 523-24, 558 (S.D.N.Y. 2015).

The road from the 2007 complaint to this Court's 2015 trial verdict for the Class, through the 2016-2017 battle in the Second Circuit, and finally ending with the Supreme Court's denial of *certiorari* in February 2018, was a long and arduous one. The two-week trial in 2015 was preceded by years of contentious fact and expert discovery, extensive motions practice, two rounds of summary judgment briefing, a merits review by the Second Circuit, repeated class certification briefing, and multiple petitions for decertification. Foot Locker (the successor to

Woolworth), one of the largest companies in the world, assisted by its high-powered litigators at the Proskauer and Gibson Dunn law firms, used every resource at their disposal to try to derail the Class's claims.

But the case is now successfully concluded: The parties have stipulated and their actuaries agree that the estimated value of the Class's total recovery under the judgment formula, with interest through June 1, 2018, is **$290 million**. See Ex. 1, Proposed Class Notice at 4 ¶ 1. The judgment amount is 100% of the relief sought in the complaint, a result achieved in class cases rarely if ever. But as this Court—seconded by the Court of Appeals—found after "the dust on this case ha[d] settled," 138 F.Supp.3d at 523, equity demanded no less. This means that, net of requested attorneys' fees ($95,198,381)[1] and expenses ($1,520,057), each member of the 16,400 member Class is now entitled to an additional pension benefit under the Plan with an estimated lump-sum present value of **$11,800** on average, which the vast majority of Class members can elect to receive, like their original lump sum, on a tax-deferred basis. Deutsch Decl. ¶ 3.

This is a very substantial recovery for the cashiers, salespeople, warehouse workers, secretaries, supervisors, and managers who went to work every day believing they were earning the additional pension benefits their employer intentionally led them to believe they were earning—and, for Counsel, a tremendously gratifying result, especially given the obstacles and risks the Class faced when this case began more than 11 years ago. From its inception and all the way through denial of Foot Locker's cert petition six weeks ago, this case had very high merits risk, very high statute of limitations risk, and very high class-certification risk that could have easily resulted in zero recovery for the Class—as is confirmed by the fact that this Court

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[1] $95,198,381 is 33% x ($290 million - $1,520,057 expenses), *i.e.*, 33% of the estimated value of the total recovery under the judgment formula calculated as of June 1, 2018, net of reimbursable expenses.

dismissed the case in its entirety with prejudice on multiple grounds in 2012. *See Osberg v. Foot Locker, Inc.*, 907 F.Supp.2d 527, 529, 533-35 & n.4 (S.D.N.Y. 2012) (granting summary judgment to Foot Locker on merits and statute of limitations, and suggesting the case could not have been properly certified as a class action anyway). But Class Counsel overcame that setback and continued to run what turned out to be a more than decade-long gauntlet of risk, in the end eliciting a ruling that "immediately becomes the polestar for claims of this nature." Ex. 3, *Reflections on Osberg v. Foot Locker*, July 7, 2017.[2]

Now, having carried the Class across the finish line, Counsel request a fee that appropriately reflects the tremendous obstacles and risks they overcame, the enormous expenditures of time and capital that required, the extraordinary results those efforts achieved for the Class—and that shows counsel in future cases that uncompromisingly pressing ahead, as Class Counsel did here, to achieve maximum recovery for their clients will be justly rewarded.

If ever there were a case where a one-third fee was appropriate and well-deserved, it is one such as this—which lasted more than a decade, involved a successful trial, two successful appeals, and achieved a recovery of a full 100% of the damages claimed. As shown in Counsel's memorandum, one-third is comfortably within the range of fees regularly awarded in high-risk cases like this that produce exceptional results. Indeed, the average or typical fee percentage even in settled class cases is in the 25% to 30% range. *See, e.g., Manual for Complex Litig.* § 14.121 (4th ed. 2007) ("attorneys' fees awarded under the percentage method are often between 25% and 30% of the fund"). An average by definition means some are above and some below. If this 100%-recovery, 11-year litigated-to-judgment case is not above average, it is hard to know what is.

[2] All exhibits referred to in this motion and the supporting memorandum are attached to the Gottesdiener Declaration (Dkt. 407).

"[T]he Court's major focus in fashioning a fee award is encouraging the bar to undertake future risks for the public good in tomorrow's cases." *In re AOL Time Warner, Inc. Secs. & ERISA Litig.,* 2006 WL 3057232, at *15 (S.D.N.Y. Oct. 25, 2006). Thus, the 33% award requested here is not merely appropriate compensation in light of the risks borne, time and effort expended, and outstanding results achieved, but to show counsel in future meritorious cases that it pays for them to assume the added risk, delay, and difficulties of litigating the case to judgment to secure complete relief for the class, as Counsel did here. This is a model case in which all of the central players—Class Counsel, Plaintiff Osberg, defense counsel, and the Courts—performed their jobs exactly the way the system wants them to, and 16,400 hard-working employees got the justice they deserved. Class Counsel's compensation should reflect their important role in achieving this exceptional outcome.

2. Class Counsel's Expense Reimbursement Request Should Be Granted

In the course of prosecuting this case over the past decade on behalf of the Class, Counsel incurred $1,520,057 in out-of-pocket expenses. The vast majority of these charges were for experts, including the Class's enrolled pension actuary, Mr. Deutsch, who has actively worked on the case for more than 11 years and testified at trial. The balance was for transcripts, class notices, computerized research, database management, court filings, duplication of documents, travel, and other incidental expenses typical of complex litigation that customarily would be charged to clients in non-contingency cases. Reimbursement should be approved because these expenditures were reasonable for a case of this complexity, scope, and duration.

3. The Requested Service Awards Should Be Approved

The service awards requested for Plaintiff Geoffrey Osberg in the amount of $50,000 and for the eight Class members who were deposed and testified at trial—Ada Cardona, Russell

Howard, Rita Welz, Ralph Campuzano, Doris Albright, Richard Schaeffer, Michael Steven and Ellen Glickfield—in the amount of $15,000 each, should also be approved as well-deserved, appropriate and in line with those awarded in other cases. Class Counsel's request to pay these awards out of their own award should also be approved as reasonable.

A proposed Order will be submitted separately via email to the Orders & Judgments Clerk pursuant to ECF Rule 18.2.

WHEREFORE, for the reasons set forth in Class Counsel's submissions and for such other reasons as may appear to the Court, Class Counsel respectfully request that the Court grant the instant motion.

Dated: April 5, 2018

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEOFFREY OSBERG	
On behalf of himself and on behalf of all others similarly situated,	**Case No.: 07 CV 1358 (KBF)**
Plaintiff,	
- against -	
FOOT LOCKER, INC.,	
FOOT LOCKER RETIREMENT PLAN,	
Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES AND EXPENSES, AND APPROVAL OF SERVICE AWARDS FOR PLAINTIFF AND TESTIFYING CLASS MEMBERS

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Counsel for Plaintiff and the Class ("Class Counsel") respectfully submit this memorandum of law in support of their motion under Fed. R. Civ. P. 23(h) for:

- Common fund attorneys' fees of 33% of the $288,479,943 estimated value of the Class's net recovery under the October 2015 judgment formula (Dkt. 399 ¶ 2) calculated as of June 1, 2018;
- Reimbursement from the recovery of $1,520,057 in litigation expenses; and
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I. PRELIMINARY STATEMENT

In February 2007, Class Counsel, on behalf of Geoffrey Osberg and a putative class of similarly situated persons, filed suit challenging the conversion of the Foot Locker Retirement Plan (the "Plan") from a traditional defined benefit pension plan to a "cash balance" plan.

Eight years later, following a two-week trial at which 21 fact witnesses and 3 experts testified, this Court issued its 83-page verdict in favor of the Class, finding the evidence "overwhelming" that Foot Locker had "egregious[ly]" violated ERISA's fiduciary standards of conduct by issuing "intentionally false and misleading" communications to Plan Participants. The Court said that the evidence presented by Class Counsel left "no doubt that Foot Locker committed equitable fraud. It sought and obtained cost savings by altering the Participants' Plan, but not disclosing the full extent or impact of those changes." As the Court explained: "To participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense is not to act 'solely in the interest of the participants and beneficiaries,'" as ERISA requires. Here, the evidence showed that "[f]rom the CFO of Woolworth stores to a cashier, no one understood what was going on." *Osberg v. Foot Locker, Inc.*, 138 F.Supp.3d 517, 523-24, 537, 551, 558 (S.D.N.Y. 2015).

The Court agreed with the Class that "[t]o remedy Foot Locker's misrepresentations, the

Plan must be reformed to actually provide the A plus B benefit that the misrepresentations inequitably caused Class members to reasonably expect." *Id.* at 560. *See also* Dkt. 399 ¶ 2 (judgment setting forth the recovery formula).

On appeal, Foot Locker argued that this Court had erred by: (1) awarding relief to participants whose claims should be barred by the statute of limitations; (2) concluding that ignorance of the plan's wear-away provision ("mistake"), a prerequisite to the equitable remedy of reformation, had been shown as to all class members; (3) ordering relief on participants' fiduciary breach claims without requiring individualized proof of detrimental reliance; and (4) using a formula for calculating relief that Foot Locker claimed was overly generous. The Second Circuit rejected each of these arguments, affirming this Court's judgment in all respects. 862 F.3d 198 (2d Cir. 2017).

Foot Locker retained the powerhouse firm Gibson Dunn to file a petition for a writ of *certiorari* asking the Supreme Court to review this Court's award of "sweeping equitable relief that could exceed $250 million to a class of 16,000 participants in the Foot Locker Retirement Plan." 2017 WL 5256228, No. 17-690 (2017). The Supreme Court was unmoved by the Company's pleas, denying Foot Locker's petition in February 2018. 2018 WL 942806 (U.S. Feb. 20, 2018).

This Court's October 2015 judgment is now final. The parties have stipulated and their actuaries agree that the estimated value of the Class's total recovery under the judgment formula (Dkt. 399 ¶ 2), with interest through June 1, 2018, is **$290 million**. *See* Ex. 1, Proposed Class Notice at 4 ¶ 1; Deutsch Decl. ¶ 2. This means that, net of requested attorneys' fees ($95,198,381)[1] and expenses ($1,520,057), each member of the 16,400 member Class is now entitled to an additional pension benefit under the Plan with an estimated lump-sum present value of **$11,800** on

[1] $95,198,381 is 33% x ($290 million - $1,520,057 expenses), *i.e.*, 33% of the estimated value of the total recovery under the judgment formula calculated as of June 1, 2018, net of reimbursable expenses.

average, which the vast majority of Class members can elect to receive, like their original lump sum, on a tax-deferred basis. Deutsch Decl. ¶ 3.

This is a very substantial recovery for the cashiers, salespeople, warehouse workers, secretaries, supervisors, and managers who went to work every day believing they were earning the pension benefits their employer led them to believe they were earning—and, for Counsel, tremendously gratifying, especially given the obstacles and risks the Class faced when this case began more than 11 years ago. From its inception and all the way through denial of Foot Locker's cert petition six weeks ago, this case had very high merits risk, very high statute of limitations risk, and very high class-certification risk that could have easily resulted in zero recovery for the Class—as is confirmed by the fact that this Court dismissed the case in its entirety with prejudice on multiple grounds in 2012. *See Osberg v. Foot Locker, Inc.*, 907 F.Supp.2d 527, 529, 533-35 & n.4 (S.D.N.Y. 2012) (granting summary judgment to Foot Locker on merits and statute of limitations, and suggesting the case could not have been properly certified as a class action anyway). But Class Counsel overcame that setback and continued to run what ultimately became a more than decade-long gauntlet of risk. *See* Gottesdiener Decl. ¶¶ 27-49. The end result was a ruling that "immediately becomes the polestar for claims of this nature." *See* Ex. 3, *Reflections on Osberg v. Foot Locker*, July 7, 2017.

Courts have long lamented that many plaintiffs' class action lawyers settle cases too early and too cheaply. That is not what happened here, even though settling would have guaranteed Counsel a handsome fee (at any of several stages of the cases) with no further risk:

- For example, in a November 2015 press release issued two months after this Court's post-trial judgment for the Class, Foot Locker disclosed what it estimated to be "a **$100** million liability resulting from this litigation." FL 2015 Q3 Results. But Class Counsel refused to settle, instead electing to (successfully) defend the trial judgment on appeal.
- Two months after the Court of Appeals ruling in 2017, Foot Locker increased its estimated liability to **$150** million. FL 2017 Q3 SEC Form 10-Q at 22. Counsel refused to settle.

- Foot Locker announced that it had retained Gibson Dunn to file a petition for *certiorari* with the Supreme Court. Uncowed, Counsel soldiered on.
- In February 2018, the Supreme Court denied cert and Foot Locker increased its estimated liability to **$278** million. FL 2018 Q4 Results.
- With interest, the parties agree that the final recovery amount has now grown to an estimated value of **$290** million as of June 1, 2018.

Counsel are extremely proud of this result, not merely because it is a substantial sum in dollar terms but, more importantly, because that large dollar amount reflects that Counsel obtained for members of the Class something that is rarely if ever achieved in a class action: **a 100% recovery of the Class's maximum possible damages claim**, as Mr. Deutsch confirms. Deutsch Decl. ¶ 4.[2]

It is well documented that virtually all class actions end, if not by dismissal or summary judgment in the defendant's favor, by settlement. *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 Empirical L. Studies 811, 812 (2010). Every settlement, by definition, is a compromise. Often that compromise means the class's maximum potential damages claim is exchanged for only pennies on the dollar. *See, e.g., In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 510 (S.D.N.Y. 2009) (granting 33.3% of a $586 million settlement where investors recouped an estimated 2% of losses).[3] But even those cases that recover a higher damages percentage that courts single out for special commendation still typically recover

[2] To illustrate the benefit to Class members of Counsel's dogged persistence in fighting for every last dollar, consider Mr. Osberg. Had Counsel settled the case after trial for a highly-favorable 60% of the maximum judgment amount ($174 million), Mr. Osberg's gross recovery would have been $16,409. Attorneys' fees likely would have reduced his net recovery to a figure between **$11,000-$13,000**. But since Class Counsel fought until the bitter end, Mr. Osberg's actual gross recovery is $27,321. Deutsch Decl. ¶ 6. If the Court were to award the standard 33% attorneys' fee for high-risk, high-success cases like this, his net recovery will be **$18,323** – *i.e.*, around *50% larger* than even a very favorable settlement would have given him.

[3] A paltry 2.5% of maximum damages was the median recovery in securities cases concluded in 2016. *See* Cornerstone Research, Securities Class Action Settlements: 2016 Review and Analysis, at 7 (2017). Between 1990 and 2015, recoveries in antitrust cases averaged a mere 19% of maximum damages. Connor & Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less Than Single Damages*, 100 Iowa L. Rev. 1997, 2010 (2015).

only a limited portion of the value of the class's claims.[4]

Here, by contrast, the $290 million judgment represents a complete recovery of the damages requested in the Complaint and 100% of what the Class could have conceivably have asked for. "[T]he quality of representation is best measured" by comparing the actual recovery with "**the extent of *possible* recovery**." *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 55 (2d Cir. 2000) (emphasis added). Trials in high-stakes class action cases are rare. Rarer still are cases that go to trial, are decided in the class's favor, and then instead of settling are defended on appeal. But a case that does all that *and* concludes with the class recovering 100% of their maximum potential damages claim—as happened here—may be unprecedented. Class Counsel could only have accomplished this feat by doing what plaintiffs' class action lawyers almost never do: take defendants to trial and then defend the class verdict on appeal to final judgment.

But even that tells only half of the story. As shown in Section II below, in order to deliver the 100% recovery, $290 million judgment to the Class, Counsel had to pitch the litigation equivalent of the perfect game for their clients—not only convincing the Court that the Class's version of all disputed material facts and points of law were correct, but also that complete relief for Foot Locker's violations could only be accomplished by adopting all aspects of the Class's damages model rather than Defendants' proposed alternatives. As shown below, if trial had the identical outcome it did on liability, but Class Counsel had failed to persuade as to any material fact or the Class's damages model, the total recovery would have shrunk to a mere *$75 million*—**$215 million less than it is today**. *Id.* ¶ 5. Considering the myriad risks of total *non*-recovery Class Counsel also faced throughout the past 11 years, the $290 million, 100% recovery outcome

[4] *See, e.g., In re Linerboard Antitrust Litig*., 2004 WL 1221350 at *4 (E.D. Pa. June 2, 2004) (granting counsel's 30% fee request in a $202 million settlement in part because they recovered a "highly favorable" 42 percent of the class's damages); *In re Bisys Sec. Litig*., 2007 WL 2049726, at *3 (S.D.N.Y. July 16, 2007) (similarly rewarding counsel because they recovered one-third of class damages, saying "relatively few cases have involved . . . as positive a final result").

makes this case among the most successful class actions ever. *See* Ex. 2, "Truth or Consequences (180 Million of Them)," *Los Angeles & San Fran. Daily Journal* (Sept. 22, 2017).

As this Court—seconded by the Court of Appeals—ultimately found after "the dust on this case ha[d] settled" following the two-week trial, 138 F.Supp.3d at 523, equity demanded no less than complete relief for the members of the Class. But that does not mean it was easy getting it for them. To the contrary, the road from the 2007 complaint to this Court's 2015 trial verdict for the Class, through the 2016-17 battle in the Second Circuit, and finally ending with the Supreme Court's denial of *certiorari* in February 2018, was a long and arduous one. *See* Ex. 3, *Reflections on Osberg v. Foot Locker*, July 7, 2017 ("anyone who litigates in this area knows that it is very hard – and most circuits have adopted a range of doctrinal hurdles making it so – to get courts to award, on equitable relief grounds, any benefits different than those expressly authorized under the plan's terms, even where there is evidence that the plan communications to the employees did not spell out those benefits accurately").

Now, having carried the Class across the finish line, Counsel request a fee that appropriately reflects the tremendous obstacles and risks they overcame, the enormous expenditures of time and capital that required, the extraordinary results those efforts achieved for the Class—and that shows counsel in future cases that pressing ahead, as Class Counsel did here, to achieve maximum recovery for their clients will be justly rewarded.

If ever there were a case where a one-third fee was appropriate and well-deserved, it is one such as this—which lasted more than a decade, involved a successful trial, two successful appeals, and achieved a 100% recovery for the Class.[5] As shown below, one-third is comfortably within the range of fees regularly awarded in high-risk cases like this that produce exceptional results. Indeed, the average or typical fee percentage even in <u>settled</u> class cases is in the 25% to 30% range.

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[5] Counsel sometimes refer to their 33% request as "one-third" for simplicity.

See, e.g., Manual for Complex Litig. § 14.121 (4th ed. 2007) ("attorneys' fees awarded under the percentage method are often between 25% and 30% of the fund"). An average by definition means some are above and some below. If this 100%-recovery, 11-year litigated-to-judgment case is not above average, it is hard to know what is.

The large size of the common fund is no reason to effectively *deem* this case to be merely average (by reducing the fee percentage) when it obviously is not. If anything, the size of the fund is a reason to increase the fee percentage in a case like this. As shown below, there are numerous of instances even in *settled* cases involving large ($100 million-plus) "mega-funds" where courts—including many within this Circuit—have awarded attorneys' fees that equal or exceed the 33% fee sought here, in circumstances that do not approach the efficacy and value that Class Counsel's tenacity and commitment created for the Class here. It is true that in securities and mass tort cases where a cents-on-the-dollar settlement has produced a large common fund, some courts have found it appropriate to scale down the attorneys' fee. But Counsel are unaware of even a single case in which a court reduced the percentage award based on the size of the fund in a case like this that produced a successful judgment after trial—much less one that won a ***100% recovery*** for the class.

"[T]he Court's major focus in fashioning a fee award is encouraging the bar to undertake future risks for the public good in tomorrow's cases." *In re AOL Time Warner, Inc. Secs. & ERISA Litig.,* 2006 WL 3057232, at *15 (S.D.N.Y. Oct. 25, 2006). Thus, the 33% award requested here is not merely appropriate compensation in light of the risks borne, time and effort expended, and outstanding results achieved, but to show counsel in future meritorious cases that it pays for them to assume the added risk, delay, and difficulties of litigating the case to judgment to secure complete relief for the class, as Counsel did here. This is a model case in which all of the central players—Class Counsel, Mr. Osberg, defense counsel, and the Courts—performed their jobs exactly the way the system wants them to, and 16,400 hard-working employees got the justice they

deserved. Class Counsel's compensation should reflect their important role in achieving this exceptional outcome.

II. CREATION OF THE 100% RECOVERY, $290 MILLION FUND

As outlined above, to achieve the extraordinary result in this case, Counsel not only had to prove all of the elements of the Class's claims at trial (on a class-wide basis for all 16,400 members of the Class), but also to convince the Court that the Class's versions of all disputed material facts and damage calculation models were correct. Counsel proved, under the heightened "clear and convincing" standard of proof applicable to equitable plan reformation claims, that:

1. Fraud: Foot Locker equitably defrauded pension plan participants.

2. Mistake: As a result, none of the 16,400 members of the Class understood the adverse impact that the 1996 cash-balance conversion had on their pension benefits.

Class Counsel also established by a preponderance of the evidence that:

3. Violation of SPD Standards (ERISA § 102): The Summary Plan Description ("SPD") violated ERISA's minimum content and clarity standards.

4. Breach of Fiduciary Duty (ERISA § 404): Other plan communications violated Defendants' fiduciary duty to communicate clearly with participants about the Plan.

5. Statute of Limitations: The Class's claims were not barred by ERISA's 3-year statute of limitations—despite the fact that the complaint was filed in 2007, more than 10 years after the 1996 cash-balance conversion.

Proving these elements was no simple task, as the intensely litigated 11-year history of this case reflects. The Class ultimately prevailed only because, through tireless efforts in discovery and case development, Counsel was able to prove to the Court's satisfaction at trial:

1. That the SPD and other communications promised opening account balances equal to the value of their already-earned pension annuities as of the 12/31/95 conversion date.

2. That participants' opening account balances were not in fact the actuarially-equivalent value of their already-earned pension annuities as 12/31/95.

3. That the SPD did not inform participants they were not, or might not be, earning additional benefits for a period of time following the 1996 cash-balance plan conversion.

4. That none of the individualized communications that Foot Locker showed had been

given to thousands of participants informed participants that they might not be earning additional benefits for a period of time following the conversion.

5. That management was aware of the disconnect between what the plan summaries promised and what the plan actually provided.

Establishing the elements of the Class's claim for equitable plan reformation was challenging. Yet had Counsel proven only the foundational facts and points of law just summarized, the Class would have received ***less than half*** of the relief they sought. *See* Deutsch Decl. ¶ 5. To prove entitlement to 100% of the relief sought in the Complaint, Counsel also had to convince the Court of all five of the following *additional* facts:

1. That the only way to fulfill Foot Locker's promise of a no-wear-away conversion was to give participants corrected opening balances instead of preserving their 12/31/95 annuity-based accrued benefits (as Defendants urged was the appropriate remedy);

2. *And* to calculate the opening balances using a discount rate of 6%;

3. *And* to preclude Foot Locker from applying a pre-retirement mortality discount (no PRMD) in the calculation.

4. That Foot Locker should be required to honor its promise to give senior employees an "enhancement" to their equal-value opening balances.

5. That Foot Locker should further be required to honor its promise to give employees who received lump sums a "whipsaw" bonus.

Foot Locker fought each of these "complete relief" facts tooth and nail. For good reason: these five additional facts that Counsel were able to prove at trial (and then defend in the Second Circuit) increased the Class's recovery from what would have been about $75 million to $290 million—*i.e.*, ***an increase in damages of $215 million***. *See* Deutsch Decl. ¶ 6. Clearly, these last $215 million of damages were even harder to win than the baseline $75 million. And it is neither an exaggeration nor immodest for Counsel to say that securing that additional $215 million for the Class is attributable solely to Counsel's refusal to settle for the substantial $75 million damages award participants surely would have been satisfied with, Counsel's determination to press forward to recover the maximum damages possible, and Counsel's exacting preparation, effective advocacy, and skillful presentation (with the able assistance of Mr. Deutsch) of the Class's

damages model showing the Court that properly-calculated opening balances—plus the promised seniority enhancement and whipsaw bonus—were the only way to make plan participants whole.

III. THE REQUESTED FEE IS FAIR AND REASONABLE

A. The Requested Fee is Reasonable and Appropriate Under the Second Circuit's Preferred Percentage-Based Method

Class Counsel recognize that the $95.2 million fee requested—33% of the $290 million fund created by the judgment minus expenses—is a lot of money. But a 33% fee in this case is both appropriate and well-deserved. Class Counsel devoted more than a decade of time and effort to a complicated and difficult case that, it was clear from the outset, could have been lost or derailed at any number of stages, starting with motions to dismiss through class certification, summary judgment, *Daubert* challenges, multiple petitions for decertification, trial, two Second Circuit appeals, Foot Locker's bid for Supreme Court review, and much more in between. "[T]here is no injustice in requiring plaintiff class members to shoulder the burden of compensating counsel for prosecuting the class's case without any assurance of compensation," *Florin v. Nationsbank of Ga.*, 34 F.3d 560, 565 (7th Cir. 1994) (ERISA case), especially a case that, due to Counsel's skill and effort, yielded such an unparalleled outcome for the Class.

Plaintiffs' counsel routinely receive on average around 27% fees in cases that often settle for cents on the dollar, *see Newberg on Class Actions* § 15:83 (5th ed. Dec. 2017 update) (26.9% in this Circuit for the 2006-2011 period). To award less than one-third in this 100%-recovery, tried-to-verdict, defended-on-appeal case could make counsel in future cases doubt that taking a defendant to trial is worth the extra risk and trouble: settling may seem more safe, predictable, and profitable. *See In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71, 80 (S.D.N.Y. 2000) (reducing counsel's percentage as size of fund increases "can create an incentive to settle quickly and cheaply when the returns to effort are highest" and discourage counsel from "investing additional time and

maximizing plaintiffs' recovery"). As the Second Circuit held long ago, sitting *en banc* in a rare litigated-to-judgment class case, "[f]ee awards should not be so structured as to encourage such conduct." *Van Gemert v. Boeing Co.*, 590 F.2d 433, 441 (2d Cir. 1978) (*en banc*), *aff'd*, 444 U.S. 472 (1980) (holding that when counsel obtain a greater recovery for the class by taking the case to trial, counsel must be rewarded out of that additional upside attributable to the increased risk and effort of trial).

Applying the "percentage method" of fee calculation favored in this Circuit confirms that the requested fee is reasonable. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 121 (2d Cir. 2005) ("The trend in this Circuit is toward the percentage method"). The percentage method provides "appropriate financial incentives" necessary to "attract well-qualified plaintiffs' counsel who are able to take a case to trial" and "directly align[s] [the] interests of the class and its counsel." *In re WorldCom, Inc.,* 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005). The fee request for 33% of the common fund is reasonable on its face. *E.g., Donoghue v. Morgan Stanley High Yield Fund*, 2012 WL 6097654, at *2 (S.D.N.Y. Dec. 7, 2012) ("attorney[s]'s fees of one-third or less of the settlement amount are customarily found to be reasonable") (collecting cases).

As noted above, the large size of the recovery here is no reason to reduce Counsel's fee percentage, particularly in a litigated-to-judgment case like this where the last $215 million of damages were harder to win than the baseline $75 million. Reducing the fee percentage with the size of the common fund can make sense in the *settlement* context if (i) a case settles very quickly, (ii) was aided by a prior government investigation, (iii) required comparatively little work, (iv) exposed counsel to comparatively little risk, (v) yielded a large amount but a disappointingly small percentage of individual class members' damages, and/or (vi) where the large size of the recovery is simply the mathematical result of the class's size, not anything plaintiffs' lawyers can legitimately claim credit for bringing about. *See* 5 Rubenstein, *Newberg on Class Actions* § 15:80

(5th ed. Dec. 2017 update). But there is obviously nothing like that going on here.[6]

Even in cases that *settled*, there are numerous instances involving mega-funds where courts, including many within this Circuit, have awarded attorneys' fees that equal or exceed the 33% fee sought here, in circumstances plainly involving less risk, less work, less difficulty and/or less than complete recovery of class members' damages:

CASE	SETTLEMENT	PERCENTAGE AWARDED
Bain Partners	$590 million	33.3%
IPO (S.D.N.Y. 2009)	$510 million	33.3%
Vitamins	$365 million	34.6%
Tricor	$316 million	33.3%
U.S. Food Service (D. Conn. 2014)	$297 million	33.3%
Relafen Direct RX Purch.	$242 million	33.3%
Busiprone (S.D.N.Y. 2003)	$220 million	33.3%
DeLoach v. Phillip Morris	$212 million	33.3%
Neurontin Antitrust	$191 million	33.3%
Titanium Dioxide Antitrust Lit	$163.5 million	33.3%
Haddock (D. Conn. 2017)(ERISA)[7]	$140 million	35%

These settled cases show that this Court could award Class Counsel a 33.3% fee without leaving the beaten path. Consider, for example, *In re U.S. Foodservice, Inc. Pricing Litig*., a fraud case in which class counsel faced a high class certification risk similar to that Class Counsel faced here. When *U.S. Foodservice* settled, for $297 million, the court, applying the *Goldberger* factors, awarded plaintiffs' counsel a full 33.3% fee. *Id.*, 07-md-1894, Dkt. 521 at 5 (D. Conn. Dec. 9, 2014). Before it settled, *U.S. Foodservice* had been to the Court of Appeals on a Rule 23(f)

[6] This case did not settle and took more than a decade. Not only was Counsel unaided by any prior or subsequent government investigation, the case concerned wrongdoing that would have forever remained hidden had Counsel not detected it; prosecuting it took an enormous amount of work and investment of Counsel's time and money; the clients could not have asked for a better result; and the fund reached mega-fund proportions solely because of Counsel's skill, effort, and clear presentation at trial (and again on appeal) of the appropriate make-whole damages model. *See Linerboard*, 2004 WL 1221350 at *31 (because highly favorable settlement was attributable to counsel's skill, it would "penalize them for their success" to apply the mega-fund "increase-decrease" approach in that $200 million case); *In re Vitamins Antitrust Litig*., 2001 WL 34312839, at *11 (D.D.C. July 16, 2001) (awarding 34.6% of $365 million, saying "it is not fair to penalize counsel for obtaining fine results for their clients").

[7] *See* Gottesdiener Decl. ¶ 5 for full citations.

petition (the instant case was reviewed twice on the merits by the Court of Appeals, which in addition also twice declined Foot Locker's Rule 23(f) petitions), it had been pending 8 years (the instant case has been pending 11 years), and the parties engaged in considerable discovery: for example, plaintiffs' counsel took 37 depositions (as compared to the 40 depositions taken in the instant case, *see* Gottesdiener Decl. ¶ 2). Dkt. 510-1 at 1-5. But counsel in *U.S. Foodservice* were clearly exposed to less risk than Class Counsel here because that case settled ***prior to any ruling on summary judgment***, *id.*, whereas here Class Counsel endured *two* rounds of defense summary judgment motions, a full-blown trial, and Defendants' challenges of the judgment in the Court of Appeals and on a petition for *certiorari* in the Supreme Court. Moreover, whereas in this case Counsel recovered 100% of Class members' damages, the best that counsel could say in *U.S. Foodservice* was that they had recovered a "significant" percentage of class members' damages and, in requesting approval of the settlement, cite a case which held approval was appropriate where class members were receiving a mere *8%* of the damages they suffered. Dkt. 510-1 at 26; Dkt. 499-2 at 10; *id.* Dkt. 499-3 ¶ 5.

There is thus ample precedent for a one-third fee from recoveries in high-risk mega-fund cases like this, even in those where the result was not nearly as impressive as the one achieved here. Indeed, here, because Class Counsel (1) took the case through a successful trial, a successful appeal, and to the steps of the Supreme Court; *and* (2) pitched the perfect game that was necessary to achieve a 100% recovery of the Class damages, a fee of *more* than 33% could readily be justified. *Compare Haddock v. Nationwide Financial Services, Inc.*, 01-cv-1552, Dkt. 601 (D. Conn. Apr. 9, 2015) (awarding, under *Goldberger*, **35%** of a $140 million settlement in an ERISA fiduciary breach case which lasted 13 years but was settled before trial while a motion for summary judgment was pending, *see id.* Dkt. 598-1 at 3-10).

While few class cases go to trial and result in multi-hundred-million-dollar verdicts, and

fewer still are reviewed on (and survive) appeal, research reveals three cases roughly comparable to this one, each confirming the reasonableness of a one-third fee here. The leading and most impressive of these cases is *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185 (S.D. Fla. 2006), which also lasted more than a decade, went to trial, was appealed to the Supreme Court, and delivered a billion dollar mega-fund recovery. *Id.* at 1193-97. The court would have awarded 33.3% but for counsel's voluntary 2% reduced fee request (to 31.33%) in recognition of the fact that they *ultimately settled* the case, lowering the class's recovery to 92% of claimed damages. *Id.* at 1203-05.[8]

It is unsurprising, consistent with the discussion above, that *Allapattah* flatly rejected an objection that the amount of counsel's fee should decline as the recovery amount increases, explaining that "while [this so-called "megafund approach"] may have validity when there is a large settlement ***short of a full trial*** . . . the rationale has no reasonable application" in the subset of rare cases like this one involving a large recovery secured after a risky trial and appeal. *Id.* at 1212-13 (emphasis added). *Accord Urethane*, 2016 WL 4060156, at *6. Indeed, *Allapattah* observed that class cases that counsel take to trial and win are so infrequent, and so unlike cases that settle—in terms of the risks assumed, efforts expended, and recoveries achieved—that "the more appropriate measure of a reasonable percentage" in cases like this is "by reference to the market rate for a contingent fee in private commercial cases tried to judgment and reviewed on appeal," *Allapattah*, 454 F. Supp. 2d at 1203, 1211. This is consistent with *Goldberger*, which

[8] Two other cases like *Allapattah* and roughly comparable to this one, with high percentage recoveries for class members that went to trial and on appeal before settling, are *In re Urethane Antitrust Litigation*, 2016 WL 4060156, at *6-7 (D. Kan. July 29, 2016) (awarding 33.3% fee in case that settled for $835 million after a trial that produced a $1.06 billion judgment due to trebling, explaining "the circumstances of this case justify the highest award, and in light of the great risk assumed by counsel, the requested one-third award would not provide an excessive or improper windfall to counsel in this case"); and *In re Apollo Group Secs. Litig.*, 2012 WL 1378677, at *7 (D. Ariz. Apr. 20, 2012) (awarding 33.3% following $145 million post-judgment settlement, noting that this "exceptional result" "could not have been achieved without Class Counsel's willingness to pursue this risky case throughout trial and beyond").

emphasizes that district courts should strive to replicate market compensation. *Goldberger*, 209 F.3d at 52 ("market rates, where available, are the ideal proxy for [class counsel's] compensation"). Since *Goldberger*, there is a clear recognition in the courts that in non-class commercial contingency fee litigation, a 30% to 40% contingency fee is typical, confirming the reasonableness of Class Counsel's 33% request here.[9]

Allapattah recognized that from a market perspective, when counsel's and the class's economic interests are aligned as they are under the percentage-of-the-fund method, fee-setting is a positive-sum game, not a zero-sum competition. The relevant question becomes not "What is the lowest possible fee?" but "What fee would a group of claimants rationally have agreed to pay when this lawsuit began?"[10] Informed purchasers of contingent legal services know that a higher attorney's fee can mean a larger expected net recovery for a claimant because a skilled lawyer will take the case, expend effort on it, and increase the value of the client's claim by an amount that exceeds the lawyer's fee. That is perfectly illustrated in this case. Lawyers who thought that their recovery would not be directly commensurate with what they won for the class (*e.g.,* would be capped or subjected to arbitrary declining percentage reductions) would never have run the risks Class Counsel ran here.

Allapattah also discussed some of the cases Counsel cites above in the chart on p.12 that awarded 33.3% fees in settled mega-fund cases, explaining that:

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[9] "[A] one-third fee is a common benchmark in private contingency fee cases. That bench mark is then often adjusted upward to 40% or higher in the event of an appeal." *Allapattah*, 454 F.Supp.2d at 1212 (citations to studies and reports omitted). *Accord* David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 Ala. L. Rev. 335, 360 (2012) (one-third or more); *In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-85, 2005 WL 3008808, at *16 (D.N.J. Nov. 9, 2005) (finding "contingent fees between 30% and 40%" the norm in all cases, including cases brought by business entities "in non-class, commercial litigation").

[10] *See Third Circuit Task Force Report*, 208 F.R.D. 340, 373 (January 15, 2002) ("[t]he goal of appointment [of class counsel] should be to maximize the net recovery to the class and to provide fair compensation to the lawyer, not to obtain the lowest attorney fee. The lawyer who charges a higher fee may earn a proportionately higher recovery for the class than the lawyer who charges a lesser fee").

> decisions involving fee awards in class action *settlements* should not control the determination of an appropriate fee award in this [tried-to-verdict, defended-on-appeal] case. On the other hand, even many of those decisions have approved fee awards comparable to or higher than that requested here… [and] these decisions support the fee award requested here.

454 F. Supp. 2d at 1210-11 (emphasis added). The same is true in this case: none of the 33%-plus cases described above, such as *U.S. Foodservice* (33.3%) and *Haddock* (35%), were more impressive than this case in terms of risk, complexity, degree of effort required, difficulty, duration—and certainly not end result.

Further evidence that 33% was and is the market rate (or lower than the market rate) for Class Counsel's services in this case can be found in the fee agreement Mr. Osberg and Counsel made in late 2006, under which Mr. Osberg agreed that in exchange for Counsel's commitment to undertake the representation of him and the putative class on a wholly contingent basis, Counsel could seek a 33% common fund award. Osberg Decl. ¶¶ 3-5; Gottesdiener Decl. ¶¶ 6-11 & Ex. 3. In small stakes cases, this agreement would not have much weight, but Mr. Osberg, like most Class members, had a significant ($27,000-plus) claim, so his agreement to a pay one-third of any recovery to Counsel is objective evidence that it is the market rate.[11]

* * *

The reasonableness of the requested fee award here is also confirmed using the six-factor *Goldberger* test under which courts weigh "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of

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[11] *Cf. In re Cendant Corp. Litig*., 264 F.3d 201, 282 (3d Cir. 2001) ("[U]nder the PSLRA, courts should accord a presumption of reasonableness to any fee request submitted pursuant to a retainer agreement that was entered into between a properly-selected lead plaintiff and a properly-selected lead counsel"). Class members, by not opting-out after being informed that Counsel would ask to be paid out of whatever award they obtained for the Class, effectively agreed to a one-third fee, since the common perception among the general public (reflective of fact) is that counsel's fee in a contingency agreement is 33.3% or more of any recovery. *Boeing*, 590 F.2d at 439 n.14 ("Manifestly, plaintiffs in a 23(b)(3) class action, who have been provided with notice and an opportunity to opt out of the suit, must be said to have accepted the attorneys' services, and the benefits that may flow from them . . . [so] it is appropriate to charge them their Pro rata share"); *see, e.g.,* ABA: What Are Contingent Fees? (describing typical "one third" contingency fee).

representation; (5) the requested fee in relation to the [recovery]; and (6) public policy considerations." *Goldberger,* 209 F.3d at 50.

1. The Risks Surmounted and Results Achieved Justify the Request

As the discussion above reflects, under *Goldberger*, success and risk are the two most important factors in determining the reasonableness of attorneys' fees. *See id.* at 54-55. Here, the risks that Class Counsel confronted and surmounted, and the 100% damage recovery they achieved for the Class, clearly put this case in the very upper echelon of successful class actions and demonstrate the reasonableness of the requested fee. Class Counsel prevailed on every claim and damages theory and overcame every defense at trial and on appeal, and thus a full and complete recovery was achieved on behalf of the entire Class and every individual Class member. Counsel should receive a generous fee.

Goldberger clearly establishes that the riskier the case, the higher counsel's fee should be. 209 F.3d at 54. The magnitude of the risk undertaken by Class Counsel in this case is hard to overstate and beyond that in most reported cases. Eight points demonstrate that this was a very risky case indeed:

(i) The case did not follow on the heels of a government investigation. Class Counsel themselves detected the wrongdoing and then independently investigated the facts and enforced the law, without being able to rely on any parallel government investigation. They alone shouldered the burden of proving this case and, as discussed above and described below, there was significant risk in doing so. The case law recognizes that this supports a higher fee. *See, e.g., Wal-Mart Stores*, 396 F.3d at 122 ("extraordinary fee" warranted where "plaintiffs' counsel did not have the benefit of 'piggybacking' off of a previous [government action]").

(ii) When launched, there was no favorable precedent for this kind of case. When this case was filed in 2007, there were no favorable precedents for a case of this kind. *See* Signorille

Decl. ¶ 12 (AARP senior attorney who has specialized in pension and employee benefit litigation for 40 years and was responsible for monitoring cash balance conversion litigation since the mid-1990's). In fact, even after the landmark 2011 ruling by the Supreme Court in *Cigna Corp. v. Amara*, 563 U.S. 421 (2011), considerable risk remained, as this Court's merits dismissal in 2012 confirms. In 2007, given the lack of favorable precedent, few counsel, including few experienced ERISA counsel, were willing to commit to this kind of risky litigation that was certain to be a long, expensive, drawn-out fight under the best of circumstances. *See* Signorille Decl. ¶ 12 ("I am aware that several attorneys prominent in the ERISA plaintiffs' bar turned away cases involving cash balance conversions during that period as too risky"). This too suggests a higher fee is appropriate.

(iii) Class Counsel faced the real possibility that the evidentiary trail would be stale. When these claims were discovered in 2006 and the case filed in early 2007, more than 10 years had passed since the 1996 Plan conversion that was at the heart of the case. Counsel therefore faced the real possibility that the evidentiary trail would be stale or to some degree unrecoverable, making it all the more difficult to prove the putative class's claims. That indeed that turned out to be true because of Defendants' spoliation of a considerable cache of Foot Locker HR manager Carol Kanowicz's files, which greatly prejudiced Counsel during depositions and discovery. Tackling a vintage case raised the risks both legally and factually.[12]

(iv) Class Counsel faced the very high statute of limitations risk. As noted above, taking on a case where the key, operative events occurred more than 10 years prior to the filing date also entailed a significant risk of failure due to time-bar or laches (since this was an equitable action). The risk was always very high that this Court or the Court of Appeals would embrace

[12] Although the spoliation yielded the Class an adverse-inference instruction, *see* Dkt. 156, one cannot use an inference (like one can use documents) to control non-cooperative witnesses during questioning. Despite being hamstrung in this manner, Counsel so overwhelmingly proved the Class's case anyway that this Court had no need for the inference. *Osberg*, 138 F.Supp.3d at 559 n.29.

Defendants' accrual-upon-payment position and dismiss the case with prejudice, as this Court did as to Plaintiff's SPD claim in 2012, in a ruling that, if this Court had not reversed itself in 2014, almost certainly would have also doomed his fiduciary breach claim and this case in its entirety.

(v) Class certification was highly uncertain. As the Court's 2012 comments clearly indicated, class certification—a relatively low-risk proposition in many securities cases, due in part to the presence of the "fraud-on-the-market" presumption of reliance—was always a high-risk proposition in this case. This was essentially a fraud case, and courts are notoriously hesitant outside the securities context to certify such cases for class treatment: the reliance element in a fraud case is typically individualized in nature, meaning that common issues often do not predominate. So too Defendants could be expected to—and did—argue that individualized issues as to "mistake" (*i.e.*, who believed what, based on the individualized communications different members of the 16,400 Class received) and the statute of limitations (ditto). As the Court's own post-certification comments several months before trial indicated, *see* Gottesdiener Decl. ¶¶ 35-37, the risk was substantial that even after counsel surmounted the numerous hurdles to get the case certified, the class could nevertheless be decertified at a subsequent point, sending years of work and millions of dollars of time and money invested down the drain.

(vi) Class Counsel was taking on a Fortune 500 company and its high-powered lawyers. It was clear from the outset that anyone representing the putative class here would be required to both outlast and overcome a well-financed adversary with abundant financial and legal resources at their disposal. That was indeed the case.

(vii) Settlement, especially on favorable terms, was unlikely. ERISA cases are structurally riskier than the kind of relatively low-risk securities case addressed in *Goldberger*. There are only a handful of ERISA lawyers around the country prosecuting actions like the instant case, as most large class-action firms and ERISA lawyers shun them because the firms lack the

requisite expertise and the cases are too risky. *See* Signorille Decl. ¶ 12. This lack of enthusiasm contrasts sharply with the interest in securities-related cases. *See In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, 2006 WL 2789862 (S.D.N.Y. Sept. 28, 2006) (18 law firms sought lead counsel role, 24 law firms appeared for plaintiffs). Unlike securities and anti-trust defendants, ERISA plans and plan sponsors typically have very little incentive to settle even highly meritorious cases because they do not face the risk of jury trials, or of paying consequential or punitive damages, or liquidated double or treble damages. *See* Signorille Decl. ¶ 10. ERISA defendants know that if they lose, they will merely have to pay what they should have paid initially, with interest that is probably less than what the defendant is earning on the withheld funds. *Id.*

(viii) Class Counsel bore all these risks themselves. Typically, multiple plaintiffs' law firms file separate actions and then vie to be appointed lead counsel. But in this case, no other firm stepped forward to share in the risk and costs of prosecuting this action, let alone to compete for lead counsel role. Gottesdiener Decl. ¶ 12. Courts recognize such lack of competition "implies a higher fee" and that the plaintiffs' class action bar "saw this litigation as too risky for their practices." *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (affirming 27.5% fee award from $200 million settlement).

Class Counsel's willingness to stare down all these risks, and to persevere for 11 years without any guarantee of payment and in the face of painful setbacks, coupled with the 100% recovery of Class's damages, strongly supports the standard 33% fee percentage awarded in high-risk cases. *See Boeing*, 590 F.2d at 441.

2. The Case's Complexity and Magnitude Support a One-Third Fee

This was an extraordinarily difficult and complex case that required great dexterity and creativity to manage. The case's scope was also well above average both in terms of the period of time covered by the Class's claims (well over 20 years), and in terms of how long the litigation

itself has lasted—more than 11 years, which is nearly *four times* as long as the average class action, *See* Fitzpatrick, *Empirical Study*, at 820. Defendants contested nearly every aspect of this lawsuit, raising lack-of-standing objections, arguing that the case was time-barred, opposing class certification and filings two Rule 23(f) petitions in the Second Circuit, battling over discovery requests, twice moving for summary judgment, challenging expert witnesses and evidentiary proffers, vigorously defending on the merits, and advancing numerous alterative damages proposals in an effort to thwart the Class's complete recovery. Class Counsel were forced to litigate all of these issues—often more than once. Moreover, Counsel "faced the difficult task of proving their case almost exclusively through the testimony of [Defendants'] employees and former employees, who could be considered hostile witnesses." *In re Veeco Instruments, Inc. Sec. Litig.*, 2007 WL 4115808, at *7 (S.D.N.Y. Nov. 7, 2007).

3. The Fee Is Reasonable in Relation to the Recovery

Under *Goldberger*'s "fair percentage of the settlement [or recovery]" test, 209 F.3d at 50, courts evaluate the reasonableness of requested fee by looking to awards found reasonable in comparable cases. *E.g., In re Veeco*, 2007 WL 4115808, at *7. As shown above, a fee award representing 33% of a common fund of this size is well in line with practice in the federal courts even in many large *settlement* cases, including cases like *Allapattah*, *In re Urethane*, and *Apollo Group* that went to trial and were reviewed on appeal.

Empirical studies confirm that an award of 33% here would compare favorably with the fees awarded in other cases, even ignoring that this case was tried to verdict, reviewed on appeal, and the clients received everything they could possibly ask for. Miller & Eisenberg's 2004 study found "a remarkable uniformity in awards between roughly 30% to 33% of the settlement amount," regardless of the size of recovery. *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Studies 27, 33 (2004); *accord* Denise N. Martin, et al., "Recent Trends IV:

What Explains Filings and Settlements in Shareholder and Class Actions?" at 12-13 (NERA 1996) ("Regardless of case size, fees average 32% of the settlement"). Miller & Eisenberg's most recent study found that among class action settlements in this Circuit between 2009 and 2013 (116 cases), the mean fee was 28% and the median fee was 30%, *Attorney Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937, 950 (2017), making Class Counsel's request of 33% (in this 100% recovery litigated-to-judgment case) reasonable on its face.

Even looking solely at settled "mega-fund" cases, the data show Class Counsel's request (in this non-settled case) is also reasonable. Professor Fitzpatrick's study found that the mean and median percentages awarded for settlements between $250 million and $500 million were 17.8% and 19.5%, respectively, with a standard deviation of 7.9%. *See* Fitzpatrick, *Empirical Study*, *supra* at 839. Miller & Eisenberg say their data show that if a fee request falls within one standard deviation above the mean, it is presumptively reasonable; if within two standard deviations, it is reasonable if affirmatively justified. *See* Eisenberg & Miller (2004) at 74. Here, the unprecedented 100% recovery, the increased risks and difficulty posed by taking the case to trial and defending the judgment on appeal all the way to the Supreme Court, and the long duration and complex nature of the litigation easily meet the "affirmative justification" requirement. *See In re Relafen Antitrust Lit.*, 231 F.R.D. 52, 81 n.22 (D. Mass. 2005) (granting 33% fee from $75 million settlement where "the amount requested here falls just outside of one standard deviation," per Eisenberg & Miller).

4. Public Policy Also Strongly Supports the Requested Fee

Usually, this *Goldberger* factor boils down to asserting the need to "provid[e] lawyers with sufficient incentives to bring common fund cases that serve the public interest." 209 F.3d at 51. This, however, was no run-of-the-mill case or even garden-variety mega-fund case: it presents a model of how our civil justice system wants class counsel to act when undertaking a contingency

fee representation that has enormous potential value for the client, but poses great uncertainty and high risk, exceptional difficulty, and sometimes mind-numbing complexity. Counsel proceeded in exemplary fashion, with utter commitment, focused intensity, and a never-say-die attitude always centered on delivering the maximum recovery possible.

An additional reason for rewarding Counsel with the standard 33% contingency fee in a case like this is the policy imperative of demonstrating to other class counsel that once they bring a case, they need not fear that if they litigate the case to judgment and generate a mega-fund-size recovery for their clients, they will be rewarded at a rate lower than if they had settled for a lower recovery. Noting that "'litigated judgments are few, cheap settlements are common,'" the *Allapattah* court concluded:

> Absent an award of fees that adequately compensates Class Counsel [for having litigated the case to judgment], the entire purpose and function of class litigation under Rule 23 of the Federal Rules of Civil Procedure will be undermined and subverted to the interests of those lawyers who would prefer to take minor sums to serve their own self interest rather than obtaining real justice on behalf of their injured clients.

454 F.Supp.2d at 1217. If reasonable market rates are not awarded to successful attorneys, the most competent professional talent will employ their skills in other ways. Thus, public policy strongly favors the requested award. *Id.*

B. The Time and Effort Required, and the Lodestar "Cross-Check," Confirm the Appropriateness of the Requested Award

The substantial time and effort required to prosecute this action for 11 years, as well as the lodestar "cross-check," also confirm the reasonableness of the requested fee. "[W]here [the lodestar method is] used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court. Instead, the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case." *Goldberger*, 209 F.3d at 50.

Between 2006 and today, Class Counsel's firm—together with appellate and Supreme

Court specialist Julia Penny Clark of Bredhoff & Kaiser, PLLC, brought on board after trial to assist Class Counsel defend the judgment on appeal—has spent a combined total of 33,744.45 attorney and other professional support hours on this matter (excluding time spent on this petition), representing $19,666,331.50 in lodestar based on hourly rates that reflect "prevailing [rates] in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984). *See* Gottesdiener Decl. ¶¶ 53-57 & Ex. 5 (summary compilation of detailed time entries); Ex. 6 (detailed time entries).[13]

Thus, Counsel's request of 33% of the net judgment fund represents a 4.8 multiplier, which falls comfortably within the range of multipliers that courts regularly find reasonable.[14] The multiplier should reflect "the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors." *In re Bisys Sec. Litig.*, 2007 WL 2049726, at *3. Larger multipliers have been approved even in large *settled* mega-fund cases:

CASE	**SETTLEMENT**	**MULTIPLIER**
Doral (S.D.N.Y. 2007)	$130 million	10.3
Busiprone (S.D.N.Y. 2003)	$220 million	8.5
New England Carpenters	$350 million	8.3
Ramah	$940 million	7.1
Rite-Aid	$126 million	6.9
Credit Default Swaps (S.D.N.Y. 2016)	$1.9 billion	6.2
Cardinal Health	$600 million	6
Roberts v. Texaco (S.D.N.Y. 1995) [15]	$115 million	5.5

In this litigated-to-judgment case, the 4.8 multiplier is a mathematical expression of two positive features of this case: (1) the efficiency of the Class's lawyers working an intensely

[13] By letter filed simultaneously herewith, Class Counsel request permission to tender their detailed time entries *in camera*, as the Court allowed in *Board of Trustees of the Operating Engineers Pension Trust v. JPMorgan Chase Bank*, No. 09-cv-09333-KBF, Dkt. 157 (S.D.N.Y. Nov. 8, 2013).

[14] *See, e.g., Davis v. J.P. Morgan Chase & Co.*, 827 F.Supp.2d 172, 185 (W.D.N.Y. 2011) (approving 5.3 multiplier); *Yuzary v. HSBC Bank USA, N.A.*, 2013 WL 5492998, at *11 (S.D.N.Y. Oct. 2, 2013) (approving 7.6 multiplier) *Beckman v. KeyBank N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) (approving 6.3 multiplier).

[15] *See* Gottesdiener Decl. ¶ 54 for full citations.

demanding, complex matter over a long period, coupled with (2) their extraordinary achievement of a 100% recovery, $290 million fund. Especially when compared with cases of less complexity or achievement which resulted in multipliers larger than that sought in this case, this fee application cross checks well.

IV. THE REQUESTED EXPENSE REIMBURSEMENT SHOULD BE GRANTED

Counsel are also seeking reimbursement of the $1,520,057 in out-of-pocket expenses they incurred prosecuting this lawsuit. The vast majority of these charges were for experts, including the Class's actuary, Mr. Deutsch, who has actively worked on the case for more than 11 years. The balance was for transcripts, class notices, computerized research, database management, duplication of documents, and other incidental expenses typical of complex litigation that customarily would be charged to clients in non-contingency cases. *See* Gottesdiener Decl. ¶ 58 & Ex. 7 (detailing same). Where, as here, the expenses requested "reflect[ ] the typical costs of complex litigation . . . courts should not depart from the common practice in this Circuit of granting expense requests." *Pa. Pub. Sch. Emps.' Ret. Sys. v. Bank of Amer. Corp.*, 318 F.R.D. 19, 27 (S.D.N.Y. 2016).

V. THE REQUESTED SERVICE AWARDS SHOULD BE APPROVED

The Court should also authorize Counsel to pay out of their fee award a $50,000 service award to Plaintiff Geoffrey Osberg and $15,000 awards to Ada Cardona, Russell Howard, Rita Welz, Ralph Campuzano, Doris Albright, Richard Schaeffer, Michael Steven, and Ellen Glickfield who (like Mr. Osberg) were deposed and testified at trial—to compensate them for their efforts on behalf of the Class. These payments are well-deserved given Plaintiff's and these Class members' contribution in this action, *see* Gottesdiener Decl. ¶ 59, and as well within the range of previous awards of this kind. *E.g., Bd. of Trustees of AFTRA Ret. Fund*, 2012 WL 2064907 at *3 (S.D.N.Y. June 7, 2012).

CONCLUSION

WHEREFORE, for the reasons stated and such other reasons as may appear to the Court, Class Counsel respectfully request that the Court grant the instant motion in all respects.

Dated: April 5, 2018

Respectfully submitted,

s/ Eli Gottesdiener

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Attorneys for Plaintiff and the Class

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEOFFREY OSBERG **On behalf of himself and on behalf of all others similarly situated,** **Plaintiff,** **- against -** **FOOT LOCKER, INC.,** **FOOT LOCKER RETIREMENT PLAN,** **Defendants.**	:	**Case No.: 07 CV 1358 (KBF)**

DECLARATION OF ELI GOTTESDIENER

I, Eli Gottesdiener, declare under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. I am lead counsel to Plaintiff and the Class in the above-entitled action and a partner in Gottesdiener Law Firm, PLLC ("GLF"). I make this declaration based on my personal knowledge of the facts stated herein. Reference to "Class Counsel," "us" or "we" is a collective reference to GLF including myself and the lawyers employed by the firm.

I. Overview

2. The road from the 2007 complaint to this Court's 2015 trial verdict for the Class, through the 2016-17 battle in the Second Circuit, and finally ending with the Supreme Court's denial of *certiorari* in February 2018 was a long and arduous one. The two-week trial in 2015 was preceded by years of contentious fact and expert discovery (including 40 depositions), extensive motions practice, two rounds of summary judgment briefing, repeated class certification briefing and multiple petitions for decertification. Foot Locker (the successor to Woolworth), one of the largest companies in the world, assisted by its high-powered litigators at

the Proskauer and Gibson Dunn law firms, used every resource at their disposal to try to derail the Class's claims.

3. The case is now successfully concluded: The parties have stipulated and their actuaries agree that the estimated value of the Class's total recovery under the judgment formula, with interest through June 1, 2018, is $290 million. *See* Ex. 1, Proposed Class Notice at 4 ¶ 1. The judgment amount is 100% of the relief sought in the complaint, a result achieved in class cases rarely if ever.

4. As explained in more detail in the brief accompanying this motion and as detailed below, the case could have easily turned out quite differently. It could have been lost entirely on statute of limitations grounds, or on the Class' alleged inability (according to Foot Locker) to prove actionable fraud, or class-wide mistake, or reliance, or harm, or the uniformity of the Company's communications. Moreover, if trial had the identical outcome it did on liability but Class Counsel had failed to persuade the Court that it should adopt the Class's damages model rather than Foot Locker's, the Class's total recovery would have shrunk to a mere $75 million—$215 million less than it is today.

5. Counsel's brief contains a chart on page 12 providing examples of mega-fund cases that settled where courts have awarded attorneys' fees that equal or exceed the 33% fee sought here, in circumstances involving less risk, less work, less difficulty and/or less than complete recovery of class members' damages. The full citations of the referenced cases are: *Dahl v. Bain Capital Partners*, LLC, No. 07-cv-12388 (D. Mass. Feb. 2, 2015), Dkt. 1051, 1095 (33.3% fee from $590.5 million fund in an antitrust case that settled before class certification); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 510 (S.D.N.Y. 2009) (33.3% fee from a $510 million fund in a securities case that settled before trial); *In re Vitamins Antitrust Litig.*,

2001 WL 34312839, at *10, *14 (D.D.C. July 16, 2001) (34.6% fee from $365 million fund in that settled before trial and was assisted by criminal prosecutions and guilty pleas); *In re Tricor Direct Purchaser Antitrust Litig.*, No. 05-360, Dkt. 545 at 12 & No. 05-340, Dkt. No. 543 at 10 (D. Del. Oct. 28, 2009 & Apr. 23, 2009) (33.3% of $316 million fund in case settled before trial); *In re U.S. Foodservice, Inc. Pricing Litig*., 07-md-1894, Dkt. 521 at 5 (D. Conn. Dec. 9, 2014) (33.3% fee from $297 million fund in case settled prior to summary judgment); *In re Buspirone Antitrust Litig.,* 2003 U.S. Dist. LEXIS 26538, at * 11 (S.D.N.Y. Apr. 11, 2003) (33.3% of $220 million fund in case settled before trial); *DeLoach v. Philip Morris Cos.*, *Inc.*, 2003 WL 23094907, at *11 (M.D.N.C. Dec. 19, 2003) (33.3% award from $212 million cash portion of pre-trial settlement); *In re Neurontin Antitrust Litig.*, No. 02-1830, Dkt. 114 (D.N.J. Aug. 6, 2014) (33.3% of $191 million fund settled before trial); *In re Relafen Antitrust Litig.*, No. 01-12239, Dkt. 297 & 459 (D. Mass. April 9, 2004 & Oct. 13, 2005), Dkt. 297, 459 (33% of $242 million in settlements); *In re Titanium Dioxide Antitrust Litig.*, 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013) (33.3% fee from $163.5 million fund, settled before trial); *Haddock v. Nationwide Financial Services, Inc*., 01-cv-1552, Dkt. 601 (D. Conn. Apr. 9, 2015) (35% fee from a $140 million fund in case settled before trial while a motion for summary judgment was pending).

II. Summary of Legal Elements and Facts Class Counsel Proved at Trial

6. To create the $290 million fund and win an award equal to 100% of the relief sought in the complaint, Class Counsel not only had to prove all of the elements of the Class's claim, but also to convince the Court that the Class's versions of all disputed material facts and damage calculation models were correct. Counsel did precisely that. They proved, under the

heightened "clear and convincing" standard of proof applicable to equitable reformation claims, that:

- Fraud: Foot Locker equitably defrauded pension plan participants.

- Mistake: As a result, none of the 16,400 members of the Class understood the adverse impact that the 1996 cash-balance conversion had on their pension benefits.

Class Counsel also established by a preponderance of the evidence that:

- Violation of SPD Standards (ERISA § 102): The Summary Plan Description ("SPD") violated ERISA's minimum content standards.

- Breach of Fiduciary Duty (ERISA § 404): Other plan communications violated Defendants' fiduciary duty to communicate clearly with participants about the Plan.

- Statute of Limitations: The Class's claims were not barred by ERISA's 3-year statute of limitations—despite the fact that the complaint was filed in 2007, more than 10 years after the 1996 cash balance plan conversion.

7. Proving these elements was no simple task, as the intensely litigated, 11-year history of this case reflects. The Class ultimately prevailed only because, through tireless efforts in discovery and case development, Class Counsel was able to prove to the Court's satisfactions at trial all of the following facts:

- That the SPD and other plan communications promised opening account balances equal to the value of their already-earned pension annuities as of the 12/31/95 cash-balance conversion date.

- That participants' opening account balances were not in fact the actuarially-equivalent value of their already-earned pension annuities as 12/31/95.

- That the SPD did not inform participants they were not, or might not be, earning additional benefits for a period of time following the 1996 cash-balance plan conversion.

- That none of the individualized communications that Foot Locker showed had been given to thousands of participants informed participants that they might not be earning additional benefits for a period of time following the conversion.

- That management was aware of the disconnect between what the plan summaries promised and what the plan actually provided.

8. Establishing the elements of the Class's claim for equitable plan reformation was challenging. Yet had Counsel proven only these foundational facts and points of law, the Class would have received ***less than half*** of the relief they sought. *See* Deutsch Decl. ¶ 5. To prove entitlement to 100% of the relief sought in the Complaint, Counsel also had to convince the Court of all five of the following additional facts:

- That the only way to fulfill Foot Locker's promise of a no-wear-away conversion was to give participants an opening balance instead of preserving their 12/31/95 annuities (as Defendants urged was the appropriate remedy);
- *And* calculate the opening balances using a discount rate of 6%;
- *And* preclude Foot Locker from applying a pre-retirement mortality discount (no PRMD) in the calculation.
- That Foot Locker should be required to honor its promise to give senior employees an "enhancement" to their equal-value opening balances.
- That Foot Locker should further be required to honor its promise to give employees who received lump-sums a "whipsaw" bonus.

9. Foot Locker fought each of these "complete relief" facts tooth and nail. For good reason: these five additional facts that Counsel were able to prove at trial (and then defend in the Second Circuit) increased the Class's recovery from what would have been about $75 million to $290 million—*i.e.*, ***an increase in damages of $215 million***. *See* Deutsch Decl. ¶ 6. Clearly, these last $215 million of damages were even harder to win than the baseline $75 million—and it is neither an exaggeration nor immodest for Counsel to say that securing that additional $215 million for the Court is attributable solely to Counsel's refusal to settle for the substantial $75 million damages award participants surely would have been satisfied with, Counsel's determination to press forward to recover the maximum damages possible, and Counsel's exacting preparation, effective advocacy, and skillful presentation (with the able assistance of

Mr. Deutsch) of the Class's damages model showing the Court that properly-calculated opening balances were the only way to make plan participants whole—an exercise Counsel had to repeat in the Second Circuit when the Class's damages model had to be, albeit this time on a more favorable standard of review, defended all over again.

III. Detailed Case History and Background

9. In November 2006, Geoffrey Osberg retained Gottesdiener Law Firm to pursue claims individually, and as a representative of a class of current and former participants in the Foot Locker Retirement Plan (the "Plan"), that Foot Locker, Inc. failed to comply with ERISA and hence unlawfully calculated his and other plan participants' pension benefits—a claim he and the other 16,400 Class members never would have known they had if Class Counsel had not detected it in the course of investigating an entirely separate claim.

10. Based on our work in consultation with our experts—chief in importance among them being Mr. Deutsch—Mr. Osberg came to understand and claim via this action that he was entitled to additional benefits valued, in today's dollars, of more than $27,321. *See* Dkt. 1, Complaint ¶¶ 5, 33, 38, 54, 59-62, 72, 75, Prayer for Relief; Deutsch Decl. ¶ 7.

11. In a fully-informed, arms-length negotiation with Class Counsel, who advised him that the outcome of the case the outcome of the case was impossible to predict "and we will face a determined, well-funded adversary," Mr. Osberg agreed that in the event the lawsuit were successful, Counsel could "seek attorneys' fees out of assets obtained for you or the class as a result of judgment or settlement in such an action (typically known as a 'common fund' payment)" and that "you agree to permit the Firm to request fees not to exceed 33% of the present value of any settlement or verdict in favor of the class." Ex. 4, 11/22/16 Osberg-GLF Agreement; Osberg Decl. ¶ 3. Mr. Osberg did so having been advised that contingency fees in

putative class actions compensate attorneys not only for the attorneys' advocacy and the results ultimately obtained—but also for their willingness to expend the enormous time and out-of-pocket expense required to prosecute a major class action against a well-represented defendant, despite the very substantial risk that that massive expenditure of resources would never be compensated. *Id.* ¶ 4.

12. Mr. Osberg could not have afforded to pay Counsel an hourly fee plus costs, and would not have retained Class Counsel on that basis. Osberg Decl. ¶ 3. Instead, the standard fee agreement in the market for this type of case is a contingency fee where the plaintiffs' counsel expends all of the time and resources necessary to prosecute the case and only receives a percentage of the recovery—if plaintiffs prevail (or settle) and there is a recovery.

13. For GLF's part, we would not have agreed to undertake the representation if Mr. Osberg had not agreed to permit us to petition the Court for a percentage fee of up to 33%, given the readily-apparent risks and difficulties the case would present, the massive effort and expense that would be required to bring it to as successful a conclusion, and the likelihood that the litigation would last several years.[1]

14. At the time GLF was considering taking on this case, we had several opportunities that we could have and would have pursued had we not committed to this case, and knew that if we committed to this case we would have to forego those and other future opportunities so long as this case lasted.

[1] We are nationally recognized experts in ERISA pension benefit cases. *See, e.g.*, *Moody v. The Turner Corp*., 07-cv-692 (S.D. Ohio Oct. 18, 2011), Dkt. 146 ("Plaintiffs selected remarkable, talented—unique maybe—counsel, certainly counsel practicing at a level that few attain"); *Johnson v. Meriter Health Serv. Employee Retirement Plan*, 10-cv-426 (W.D. Wis. Jan. 5, 2015), Dkt. 487 at 16 ("[The class] should take . . . no small amount of satisfaction in the quality of the representation that [it] received." "[T]he . . . representation here by plaintiffs' counsel was outstanding").

15. No other law firm came forward to offer its services to the Class or individual participants, either before or after our firm filed suit. No other counsel came forward to compete for control of the case, proposed to the Court that it be appointed lead counsel at a lower fee structure, or offered to share in the case's risk and expense with our firm.

16. We believe that a one-third fee is also consistent with what Class members would expect, especially given the case's complete success. The Class is comprised solely of Foot Locker Plan participants who chose not to opt-out after being specifically notified that Class Counsel would seek payment from them out of any recoveries achieved. *See* Class Opt-Out Notice (Dkt. 194-1) ¶¶ 7-8, 11 (approved by the Court via 11/10/14 Order, Dkt. 221). The common perception among the general public (reflective of fact) is that counsel's fee in a contingency agreement is 33.3% or more of any recovery. *See, e.g.,* ABA: What Are Contingent Fees?

17. By not opting-out, the Class thus effectively agreed to a one-third fee. *See Van Gemert v. Boeing Co.*, 590 F.2d 433, 441, 439 n.14 (1978) (*en banc*), *aff'd*, 444 U.S. 472 (1980) ("Manifestly, plaintiffs in a 23(b)(3) class action, who have been provided with notice and an opportunity to opt out of the suit, must be said to have accepted the attorneys' services, and the benefits that may flow from them . . . [so] it is appropriate to charge them their Pro rata share").

18. In February 2007, Counsel filed suit on behalf of Mr. Osberg and a putative class of similarly-situated plan participants. Plaintiff alleged, among other things, that Foot Locker violated ERISA §§ 102 and 404(a) by, *inter alia*, failing to disclose "wear-away" caused by the Company's introduction of a new employee pension plan—a phenomenon which effectively amounted to an undisclosed freeze in pension benefits.

19. The case was assigned to Judge Batts, who granted Defendants' motion to dismiss in part and denied it in part. Dkt. 31. Over the next several years the case was extensively discovered by both sides, as to both class and the merits. *See*, *e.g.,* Dkt. 71 ¶¶ 26-38 listing and attaching the deposition transcripts and expert reports.

20. In November 2011, the case was transferred to Your Honor. Dkt. 49. With the Court's consent, Plaintiff filed an amended complaint in February 2012. Dkts. 53-57.

21. In May 2012, Defendants moved for summary judgment, arguing that Foot Locker's decision to convert its traditional retirement plan to a "cash balance" plan was a business decision that did not cause actionable harm; and that, in any event, Plaintiff's 2007 complaint challenging the 1996 amendment was time-barred under ERISA's 3-year statute of limitations. Dkts. 68-71, 99-101. Defendants also made *Daubert* challenges to three of Plaintiff's experts, including ERISA enrolled actuary Lawrence Deutsch. Dkts. 107-109, 118. Plaintiff opposed the motions (Dkts. 84-87, 104-105, 114) and moved for class certification. Dkts. 96-98, 110-111, 117.

22. In September 2012, the Court heard oral argument on Defendants' summary judgment motion and *Daubert* challenges. *See* Dkt. 136.

23. In December 2012, the Court granted Defendants' motion and dismissed Plaintiff's case with prejudice. *Osberg v. Foot Locker, Inc.*, 907 F.Supp.2d 527 (S.D.N.Y. 2012). The Court found that Foot Locker's decision to prospectively reduce the rate at which employees would accrue pension benefits was a cost-reduction measure the Company had implemented at a time when it was experiencing severe financial difficulties, and that it would be impossible for employees to prove that the pension cuts could be blamed on fiduciary violations rather than an ordinary business cost-cutting decision. *Id.* at 1, 11-14.

24. The Court also held that Plaintiff's claim was time-barred under ERISA's three-year statute of limitations, since the complaint was filed in 2007, more than 10 years after the 1996 cash-balance conversion and 5 years after Plaintiff retired and received his lump sum distribution of pension benefits. *Id*. at 9-11.

25. Regarding Plaintiff's motion for class certification, the Court said that "while the Court does not need to decide class certification in light of its decision herein, there would be significant issues with respect to commonality and typicality with any class: each class member may have been harmed or not harmed by the cash balance plan based upon their years of service and pre-and post-1996 plan balances. An inquiry into those claims would likely need to be individualized and plaintiff has not suggested a feasible means by which the Court could create subclasses that would meet the requirements of Fed.R.Civ.P. 23." *Id*. at 14 n.4.

26. Plaintiff appealed. The Court of Appeals reversed in part, ruling that employees were not required to prove that Foot Locker's ERISA violations caused "actual harm." Rather, employees could seek the equitable remedy of plan reformation if they could prove by clear and convincing evidence that the violations constituted fraud which caused them to be mistaken about the benefits they were earning. *Osberg v. Foot Locker, Inc.*, 555 Fed.Appx. 77, 80-81 (2d Cir. 2014). The case was remanded for a determination whether employees could prove those elements. *Id*. The Court of Appeals declined to address whether this Court had correctly concluded that Plaintiff's ERISA § 102 SPD claim was time-barred. *Id*. at 80.

27. On remand, Plaintiff faced two immediate hurdles to keep the case alive: the statute of limitations and class certification. Plaintiff moved for reconsideration of the Court's 2012 ruling finding the SPD claim time-barred. Dkts. 161-62, 169, 173. Plaintiff also asked the

Court to take a fresh look at his request for class certification and allow him to update his 2012 motion, which the Court agreed to. Dkts. 150, 157-58, 174-76.

28. In September 2014, the Court granted Plaintiff's motion for reconsideration of the dismissal of the SPD claim, reinstating that claim. Dkt. 186 at 12-14.

29. In the same Order, the Court also granted Plaintiff's motion to certify the case as a class action, but limited certification to Plaintiff's § 404 breach of fiduciary duty claim. *Id*. at 1-12; *see also* Dkts. 187-190 (endorsement of Defendants' request to defer consideration of the class certifiability of Plaintiff's § 102 SPD claim until after trial).

30. Defendants petitioned the Court of Appeals to grant review of the certification of the § 404 breach claim, which Plaintiff opposed. Dkts. 191, 204, 216. For his part, Plaintiff moved the Court to reconsider its decision to certify only the § 404 claim, which Defendants opposed. Dkts. 192-193, 210-211, 218. On November 7, 2014, the Court granted Plaintiff's motion to extend class certification to the § 102 SPD claim. Dkt. 220. Defendants then filed a second petition with the Court of Appeals seeking review of the Court's amended certification ruling, which Plaintiff opposed. Dkts. 230, 232. Several weeks later, the Court of Appeals denied both of Defendants' petitions. Dkt. 274.

31. Meanwhile, Plaintiff pursued a request that the Court sanction Foot Locker for its spoliation of evidence. Dkts. 102, 115, 126-29, 132, 153, 156. In July 2014, the Court agreed with Plaintiff and found that Foot Locker had improperly destroyed evidentiary material that would have been favorable to Plaintiff's case. Dkts. 165-68, 171-72.

32. With the case now certified as a Rule 23(b)(3) class action, in November 2014 the Court approved the parties jointly-agreed opt-out notice to the approximately 16,400 members of the covered class. Dkt. 221. The notice informed class members that: "If you timely submit a

notice that you wish to be excluded from the Class, the Court will exclude you from the Class, you will not share in any money recovered by or on behalf of the Class, and you will not be bound by any judgment in this class action." Dkt. 194-1, ¶ 8. The notice explained that for individuals who decided to remain in the Class: "If there are additional payments to be made – either as a result of a decision by the Court or a Court-approved settlement – you will also receive notice and an opportunity to be heard as to the reasonableness of any fees and expenses Class Counsel would ask the Court to approve to be paid out of such award." *Id.* at ¶ 7. A total of 21 people opted-out, some of whom were defense witnesses at trial or during depositions.

33. In October 2014, Defendants filed another motion for summary judgment, this time focusing on the "enhancement" that Foot Locker had added to the opening account balances of senior participants and the pre-retirement mortality discount ("PRMD") that had been used to calculate the opening balances of all participants. Dkts. 199-201, 286. Defendants asked for a preemptive ruling stating that if, after trial, the Court were to both rule for the Class on the merits and accept the Class's damages model—which called for recalculated opening account balances rather than mere preservation of participant's already-earned annuities—then those opening balances should be reduced by PRMD and the amount that senior participants had received as account enhancements. Defendants' proposal, if accepted, would have had the combined effect of reducing the damages claimed by the Class by about 50%. *See* Deutsch Decl. ¶ 8. Plaintiff opposed. Dkts. 277-80.

34. In April 2015, following oral argument (Dkts. 299, 309), the Court denied Defendants' request that it make a preemptive ruling regarding PRMD and the enhancement, Dkt. 302, but said it would focus on both issues at trial. Dkt. 309 at 9, 62-63, 68. The Court said

at the hearing that "the real swing I think is the enhancements, which I'm not sure I entirely get" and wanted the benefit of trial testimony. *Id*. at 9, 80-81.

35. Meanwhile, in January 2015, Defendants filed a letter arguing that the Court should reconsider its certification of the class in light of evidence proving "that there were numerous other communications – both written and oral – sent to thousands of participants, which described the operation of the Plan and its wear-away effect in much greater detail than the handful of company-wide communications identified by Osberg. . . . These communications defeat any finding, based on generalized evidence, that the entire class mistakenly thought they had been promised an 'equal value' benefit that would prevent any wear-away." Dkt. 260 at 4. Specifically, Foot Locker argued on page 4 of its letter that:

> The evidence of these communications will demonstrate that many participants had or should have had an understanding of their cash balance benefits that was very different from what Osberg would have the Court believe, and that these participants were in fact specifically advised that the starting balances in their cash balance account might be significantly less than - even as little as half as much as - the lump sum value of their pre-1996 accrued benefit. For example: In advance of the numerous closures of locations in the 1996-1997 time period, Human Resources ("HR") personnel visited the worksites being closed to provide explanations to departing employees about their benefits. Documentation of the communications at one such location in Greenville reveals that participants were also provided with illustrations showing precisely how the cash balance account and minimum, pre-1996 benefit was calculated. . . . Foot Locker's files [also] contain correspondence sent to inquiring participants providing an explanation of how the minimum benefit was calculated, and why that benefit would exceed the amount in the cash balance account. . . . [The letters] advised that '[b]ecause we just recently converted to an account balance plan and balances have not yet had a chance to build up very much, the minimum lump sum generally works out to be greater than the account balance.' [And] these same letters were used to guide the HR employees in Wisconsin when responding to the numerous telephone inquiries by participants seeking to understand how their cash balance benefits were calculated.

Id. at 4 (citations omitted). This clearly had an impact on the Court and raised anew the specter that the Court might be returning to the view it had expressed earlier in the case (*Osberg*, 907 F.Supp.2d at 14 n.4) that the case was uncertifiable—because two days later, the Court warned

"that the further development of the facts on page 4 of defendants' letter is potentially relevant to the long-term viability of the class and its composition." Dkt. 266.

36. In mid-April 2015, Defendants followed up with another brief arguing that in scores of "individualized" communications, "Foot Locker specifically alerted participants to the use of the mortality assumption, the use of the 9% interest rate, and the fact that the rate used to determine the lump sum value of the pre-1996 benefit was a lower rate that would generate a higher amount. As noted above, Foot Locker also provided examples showing the wear-away caused by these terms." Dkt. 301 at 4 (citations omitted). Defendants asserted that "[b]ecause the [individualized] communications here did alert participants to the facts giving rise to wear-away, . . . they demonstrate why class-wide liability and relief cannot be ordered here" and that, accordingly, "the Court should decertify the class." *Id.* at 5.

37. At an April 30, 2015 hearing addressing the communications and several other issues, the Court said it had "learned a lot more about arguments and learned a lot more about different, I would say, vulnerabilities in certain arguments on both sides." Dkt. 309 at 82. "I do think that, frankly, there is a lot of stuff on the individual communications." *Id.* "[T]hey're particularly relevant to reformation" and "whether there is clear and convincing evidence of fraud. I think that is both a legal standard question and a fact issue." *Id.* "[A]ll of the various individualized communications, the call center, the letters and the exhibits. That inferentially could be used to suggest that there is not clear and convincing evidence of fraud because it would seem to suggest gosh, it is not a very good fraud, at the time you're purporting to pursue your fraud, you're telling some people the truth." *Id.* at 3-4.

38. In light of the Court's remarks, Class Counsel tracked down all members of the Class who Foot Locker said had received the individualized communications and proposed that

all those willing to travel to New York (at Class Counsel's expense) be permitted to testify at trial. Dkts. 312, 321-3. The Court agreed, and postponed the trial to allow Defendants to depose the witnesses identified on the Class's trial witness list who had not been previously deposed. Dkt. 312. Foot Locker proceeded to depose the broad cross-section of witnesses Class Counsel had located, including former cashier Ada Cardona, forklift driver Richard Schaeffer, manager Doris Albright, CFO Michael Stevens, and several other Class members the Court said in its post-trial order were critically important to the Class's case. *Osberg v. Foot Locker, Inc.*, 138 F.Supp.3d 517, 535-37 (S.D.N.Y. 2015).

39. The Court presided over a two-week bench trial in July 2015 at which twenty-one fact witnesses (15 live and six by deposition) and three expert witnesses testified. The Court also received several dozen documents into evidence. *Id.* at 523.

40. After taking the case under advisement, the Court ruled in late September 2015 in an 83-page opinion and order that the Class had successfully carried its burdens of proof at trial on liability and damages (some elements of which, as noted above, required proof of "clear and convincing" evidence), found in favor of the Class on all claims and granted the Class all of the relief it sought. *Osberg*, 138 F.Supp.3d at 538. The Court ruled that Foot Locker had violated §§ 102 and 404(a) of ERISA and ordered that the Plan be reformed pursuant to § 502(a)(3) to conform to participants' mistaken but reasonable beliefs resulting from Foot Locker's materially false, misleading, and incomplete disclosures. *Osberg*, 138 F.Supp.3d at 560. Specifically, the Court found Foot Locker was liable to pay participants the difference between the benefits they had actually received and a full "A+B" benefit, *i.e.,*

> (A) The full value of the benefits that they had earned under the defined benefit plan for their service through December 31, 1995 consisting of an initial account balance as of January 1, 1996 equivalent to the value of their benefits under the defined

benefit plan as of December 31, 1995, discounted to present value using a six-percent rate and without the application of a mortality discount *plus*

(B) The benefits that Foot Locker told participants that they would earn beginning on January 1, 1996 under the cash balance plan—that is, credits for continued service and interest, and certain adjustments required under federal law (often referred to as "whipsaw"), as well as the one-time seniority enhancement available to those who were at least age 50 and had at least 15 years of service on December 31, 1995 that would be applied to the initial account balance as calculated in the "A benefit."

The Court specified in the judgment that the additional benefits Class members are due is the dollar amount equal to the result of the following formula:

(1) the excess, if any, of the A plus B benefits described in Section II.G of the Court's Order [Dkt. 398], over any such benefits already paid to the Participant; *plus* (2) prejudgment interest at a rate of 6% on any amounts due retirees for prior payments; *minus* (3) the Participant's allocable share of any approved common benefit attorney's fees and expenses . . . as ordered by the Court.

Dkt. 399 ¶ 2.

41. As reflected in element (3), and specified elsewhere in judgment, the judgment authorizes Class counsel, following the exhaustion of Defendants' rights of appeal, to apply to the Court for an allocation of "common benefit attorney's fees and expenses" from the common fund created by the judgment – *i.e.*, the sum of the amounts calculated under formula elements (1) and (2) for the benefit of Class members. *Id.* ¶¶ 2-3. The judgment also enjoined Foot Locker, after resolution of Class counsel's common-fund fee application, to enforce the Plan as reformed per item (1) and (2) above – *i.e.*, to pay the additional benefits won for Class members equal to the amounts calculated under the judgment formula. *Id.* ¶ 3.

42. Defendants filed their notice of appeal on November 3, 2015. Dkt. 400. Second Circuit briefing occurred in 2016, with both sides supported by amicus filings. *See* Dkt., No. 15-3602 (2d Cir.). Defendants presented four related but distinct grounds for reversal. Defendants argued that this Court erred by: (1) awarding relief to Plan participants whose SPD and/or

fiduciary breach claims were barred by the applicable statute of limitations—which, according to Defendants, was essentially all members of the Class; (2) ordering class-wide relief on participants' fiduciary breach claims without requiring individualized proof of detrimental reliance; (3) concluding that Plaintiff had proven mistake as to any Class member who had not testified at trial by clear and convincing evidence; and (4) using a formula for calculating relief that resulted in what Defendants termed a "windfall" to significant segment of the Class. *See* Defs.-Appellants' Br., 2016 WL 691188, 2d Cir. No. 15-3602 (Feb. 16, 2016).

43. If accepted, either argument (1) or argument (3) would have resulted in no or virtually no Class member receiving any relief whatsoever. Had either argument (2) or argument (4) been accepted, it would have reduced Class damages to a small fraction of the amount awarded in this Court's judgment.

44. Oral argument was held on January 25, 2017; the Court of Appeals issued its decision on July 6, 2017. It unanimously rejected each of Defendants' arguments and affirmed this Court's judgment in all respects. *Osberg v. Foot Locker*, 862 F.3d 198 (2d Cir. 2017). Regarding remedy, the Court of Appeals said "Defendants' arguments are not completely without theoretical appeal," but this Court had appropriately exercised its discretion in remedying the violations it found. *Id.* at 215.

45. Defendants petitioned for rehearing, 2d Cir. No. 15-3602, Dkt. 137, but their petition was denied. *Id.*, Dkt. 145.

46. On November 8, 2017, supported by the U.S. Chamber of Commerce as amicus, Foot Locker filed a petition for certiorari in the Supreme Court. Defs. Cert. Pet., No. 17-690, 2017 WL 5256228, *2 (Nov. 8, 2017).

47. Defendants presented two distinct questions for review. Defendants' first question presented asserted that this Court's judgment and the Court of Appeals decision affirming the judgment not only violated Fed. R. Civ. P. 23 and conflicted with decisions in other federal circuits, but deprived Defendants of due process of law and violated the Rules Enabling Act because the Court "reliev[ed] [P]laintiff[] of [his] burden of proving individualized elements of [his] claims in order to facilitate class certification." *Id.* at *2. In their second question presented, Defendants argued that review was needed because this Court improperly "eased the class's burden of proof in a second respect when it held that detrimental reliance is not an element of a claim for breach of fiduciary duty under ERISA § 404(a)" which, Defendants argued, "is flatly inconsistent with decisions from the Third and Sixth Circuits reaffirming in the wake of this Court's decision in *CIGNA Corp. v. Amara,* 563 U.S. 421 (2011), that detrimental reliance is an element of an ERISA breach-of-fiduciary-duty claim." *Id.* Defs. *Amicus* Br., 2017 WL 6350634, No. 17-690 (Dec. 11, 2017).

48. In two briefs filed in the Supreme Court, Plaintiff opposed Defendants' petition, arguing that, contrary to what Foot Locker, urged, the case was not worthy of Supreme Court review and, in any event, was correctly decided. *See* Pl.-Resp. Br. in Opp., No. 17-690, 2018 WL 389112 (Jan. 10, 2018); Pl.-Resp. Suppl. Br., No. 17-690, 2018 WL 637666 (Jan. 26, 2018).

49. In February 2018, the Supreme Court denied Foot Locker's petition for a writ of *certiorari*. 2018 WL 942806, No. 17-690 (U.S. Feb. 20, 2018).

IV. Security for the Final Judgment

50. Security for the judgment comes in the form of a Treas. Reg. §1.468B-1(c)(1) qualified trust that Foot Locker funded with a cash payment of $150 million on February 1, 2018. *See* FL 2017 Q4 Results (describing "the pre-funding of $150 million of the pension

litigation liability"). The trustee is Wells Fargo Bank, NA and the trust corpus is invested in a Wells Fargo money market account. The balance of the net payments that will be made to Class members under the judgment are secured by the Defendant Plan's trust which is running a substantial surplus, *see* Deutsch Decl. ¶ 9.

51. Foot Locker has indicated that it will pay the amount that the Court authorizes as attorneys' fees and expenses from the $150 million Wells Fargo fund. Foot Locker has advised the Class that it is also committed to make, in or before September 2018, an additional cash contribution to the Plan in the amount of no less than $127.5 million, and that the remaining portion of the fund with Wells Fargo will be available to provide further funding to the Plan, as needed, to satisfy the judgment. Because the Plan was substantially overfunded before the judgment, the availability of this funding should insure that the Plan will remain substantially overfunded even after the judgment.

V. Facts Regarding the Representation

52. Substantial time and effort has been expended to prosecute this action over the past 11 years. Between 2006 and today, our firm—together with appellate and Supreme Court specialist Julia Penny Clark of Bredhoff & Kaiser, PLLC, brought on board after trial to assist Class Counsel defend the judgment on appeal—has spent a combined total of 33,744.45 attorney and other professional support hours on this matter (excluding time spent on this petition), representing $19,666,331.50 in lodestar, based on hourly rates that reflect "prevailing [rates] in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation," *see Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984), *i.e.*, the Southern District of New York. *See Farbotko v. Clinton Cnty.*, 433 F.3d 204, 208 (2d Cir. 2005) (relevant community is "the district in which the court sits").

53. The determination of a reasonable rate entails "a case-specific inquiry into the prevailing market rates for counsel of similar experience and skill to the fee applicant's counsel," which may include "judicial notice of the rates awarded in prior cases and the court's own familiarity with the rates prevailing in the district." *Farbotko*, 433 F.3d at 209. Class Counsel's hourly rates range from $970 to $990 for partners, $725 for senior counsel, $495 to $695 for associates, and $125 to $240 for paralegals. These rates are lower than or comparable to the rates charged by Proskauer, counsel Defendants retained for this litigation, whose "standard hourly rates" range from "$935 to $1,550 for partners; $935 to $1,195 for senior counsel; $545 to $1,075 for associates; and $215 to $460 for paraprofessionals." *In re Breitburn Energy Partners, L.P.,* No. 16-11390 (S.D.N.Y. Bankr. Jan. 22, 2018), Dkt. 2144 ¶¶ 5, 7 (declaration of Proskauer partner in bankruptcy matter, specifying that these are "the standard hourly rates Proskauer charges clients in both bankruptcy and non-bankruptcy matters"). Counsel's rates are also lower than or comparable to rates found reasonable in other cases. *See, e.g., Anwar v. Fairfield Greenwich Ltd.*, 09-cv-118 (S.D.N.Y. May 6, 2016), Dkt. 1569 ¶¶ 21-23 (approving rates up to $1150 for partners, up to $950 for counsel, and up to $720 for associates, per Dkt. 1560 at 22 (citing similar cases)).

54. Counsel's brief contains a chart on page 24 providing examples of cases in which courts have approved multipliers of 5 and higher as reasonable in large settled cases. The full citations of the referenced cases are *In re Doral Financial Corp. Secs. Litig.*, No. 05-md-01706 (S.D.N.Y. July 17, 2007), Dkt. No. 107 at 5 ($130 million settlement, multiplier of 10.3); *In re Buspirone Antitrust Litig.,* No. 01–MD–1410, 2003 U.S. Dist. LEXIS 26538, at * 11 (S.D.N.Y. Apr. 11, 2003) ($220 million settlement, multiplier of 8.5); *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, 2009 WL 2408560, at *2 (D. Mass. Aug. 3, 2009) ($350

million settlement, multiplier of 8.3); *Ramah Navajo Chapter v. Jewell* 2016 WL 825710, at *23 (D.N.M. March 2, 2016) ($940 million settlement, multiplier of 7.1); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 589 (E.D. Pa. 2005) ($126 million settlement, multiplier of 6.9); *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524, at *17 (S.D.N.Y. Apr. 26, 2016) ($1.9 billion settlement, multiplier of 6.2); *In re Cardinal Health Inc. Sec. Litig.*, 528 F. Supp. 2d 752, 768 (S.D. Ohio 2007) ($600 million settlement, multiplier of 6); *Roberts v. Texaco, Inc.*, 979 F.Supp. 185, 198 (S.D.N.Y.1995) ($115 million settlement, multiplier of 5.5).

55. Exhibit 5 hereto is a summary by professional timekeeper of our detailed time entries for the work the firm's attorneys and paralegals performed in this case from 2006 to the present; Exhibit 6 is the detailed time entries themselves in chronological order including the timekeeper's initials and total billable time per entry. These billing compilations were compiled directly from the timekeeper's contemporaneously maintained timesheets and confirmed and in many instances modified (typically downward, in the exercise of billing judgment) based on other firm records reflecting the timekeeper's work. In the exercise of billing judgment, I instructed associates and the paralegals assisting them to locate and remove time records that were insufficiently described and/or that reflected time spent on arguably duplicative or unnecessary work that would not or may not have been billed to a fee-paying client.

56. The time claimed excludes the time devoted to preparing the instant motion and the time that counsel will be required that has not yet been billed, including for anticipated work in continuing to assist Class members in understanding the case's outcome and returning their election forms, responding to any objectors, and preparing for and appearing at the forthcoming hearing on this petition and, presumably, the entry of an amended final judgment. It also excludes the future time that will be spent after entry of the amended final judgment working

with Mr. Deutsch to render any other needed assistance to members of the Class or Defendants in connection with implementation of final judgment.

57. As detailed in Exhibit 7, Class Counsel request that the Court authorize reimbursement for the $1,520,057 out-of-pocket expenses advanced to prosecute this litigation since its inception in 2007. The vast majority of these expenses were for experts, including the Class's enrolled pension actuary who has actively worked on the case for more than 11 years and testified at trial: expert fees amount to $974,510.96. *See* Ex. 7 (detailing amounts charged by each expert). The remaining expenses, broken down in Ex. 7 by vendor where applicable, are: $142,210.48 for court reporter-deposition, court hearing and trial transcripts; $110,300.00 in notice administration costs from the 2014 and 2018 notices; $30,064.96 arising from travel required for some depositions and some experts (airfare, lodging, meals, cab fare); $147,867.60 for e-discovery consulting, database management, document processing, technical support, and related services; $26,923.32 for online legal research; $25,444.73 for two mediators; $21,336.35 for duplication (in-house and outside); $15,156.12 for lawsuit website hosting, maintenance, and design $4,282.70 for process servers; $2,754.25 for long distance telephone; $1,979.48 for overnight and regular mail; $928.00 for messenger services; $605.00 for district court and court of appeals filing fees, and $15,693.05 for other miscellaneous expenses directly related to the prosecution of this action. *Id.* All claimed expenses were necessary to the prosecution of this litigation, would normally have been billed to a client paying for counsel's services on a regular basis, and reasonable for a case of this duration and complexity. Receipts for all claimed expenses (or other proofs in the few cases where receipts could not be located) have been compiled and can be promptly supplied upon request.

58. The Court should also approve the service awards requested for Plaintiff Geoffrey Osberg in the amount of $50,000 and $15,000 each for Ada Cardona, Russell Howard, Rita Welz, Ralph Campuzano, Doris Albright, Richard Schaeffer, Michael Steven and Ellen Glickfield, the eight Class members who (like Mr. Osberg) were deposed and testified at trial. With the Court's permission, Class Counsel would pay these awards out of their own fee and expense award. These payments are well-deserved given Plaintiff's and these Class members' service in this action. Mr. Osberg in particular assisted enormously, in becoming well-prepared for his deposition upon which in some senses the viability of this entire action depended, attending (an unsuccessful) 2012 mediation session, and staying actively engaged and informed in all major aspects of the case over its long 11-year history. *See* Osberg Decl. ¶¶ 7-8. He of course also attended trial and testified as well. *Id.* The eight listed Class members also performed vital service in agreeing to undergo deposition and questioning at trial, which in many cases required out-of-town travel. All Class members for whom service awards are sought (including Mr. Osberg) were also required to respond to discovery requests, produce documents, and answer interrogatories. They all rendered exemplary service.

59. Exhibit 1 hereto is a true and correct copy of the Proposed Class Notice, *i.e.,* "Important Notice About Increased Retirement Benefits from the Foot Locker Retirement Plan and Proposed Attorneys' Fee and Expense Award." Defendants through counsel authorized undersigned to represent that the parties reached agreement on the content and wording of the Notice.

60. Exhibit 2 hereto is a copy of "Truth or Consequences (180 Million of Them)," *Los Angeles & San Francisco Daily Journal* (Sept. 22, 2017).

61. Exhibit 3 hereto is a copy of "*Reflections on Osberg v. Foot Locker*," Boston ERISA & Insurance Litigation Blog (July 7, 2017).

62. Exhibit 4 hereto is a true and correct copy of the November 22, 2006 agreement between Geoffrey Osberg and Gottesdiener Law Firm, PLLC ("Osberg-GLF Agreement").

63. Exhibit 5 hereto is summary of Counsel's detailed billing entries, by timekeeper, role, hours, rate and lodestar (subtotals and total).

64. Exhibit 6 hereto is Counsel's detailed billing entries by timekeeper, hours, rate and lodestar (subtotals and total).

65. Exhibit 7 hereto is a listing of Counsel's out-of-pocket expenses, by category, vendor and amount.

I, Eli Gottesdiener, pursuant to 28 U.S.C. § 1746, hereby declare under penalty of perjury that the foregoing is true and correct.

Dated: April 5, 2018

Respectfully submitted,

/s Eli Gottesdiener
Eli Gottesdiener

Osberg v. Foot Locker, Inc., et al., 07-cv-01358 (KBF) (S.D.N.Y.)

EXHIBIT 1

Notice to Class of Increased Benefits and Class Counsel's Fee Petition (Dkt. 407-1)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEOFFREY OSBERG,	:	
On behalf of himself and on behalf of all others similarly situated,	:	
Plaintiff,	:	**Case No.: 07 CV 1358 (KBF)**
v.	:	
FOOT LOCKER, INC. and	:	
FOOT LOCKER RETIREMENT PLAN,	:	
Defendants.	:	

Important Notice About Increased Retirement Benefits from the Foot Locker Retirement Plan and Proposed Attorneys' Fee and Expense Award

Your Increased Foot Locker Pension Benefits

You are receiving this Notice as part of the *Osberg v. Foot Locker* class action litigation in the United States District Court for the Southern District of New York. This litigation sought to remedy allegedly misleading disclosures by Foot Locker, Inc. about the 1996 amendment to the Foot Locker Retirement Plan—in particular, disclosures about the benefits employees would earn after the amendment. The remedy sought was increasing retirement benefits to current and former Foot Locker employees who participated in the Plan to match the benefits that Foot Locker allegedly told employees the amended Plan would provide (but which it did not provide). You have been identified as a current or former Foot Locker employee who may be entitled to an increased retirement benefit as a result of this class action lawsuit.

Before this litigation, when you ended your employment with Foot Locker (whether you already had, or would in the future), you were entitled to receive the greater of: (A) your benefit under the Plan under the Plan's prior traditional formula earned through December 31, 1995 (when that formula ceased to apply) or (B) your benefit under the Plan's new cash balance formula which went into effect on January 1, 1996. You could choose to receive this benefit as a lump sum or as an annuity. Your cash balance benefit was based on a cash balance account which included an opening account balance calculated based on the benefits you had earned under the prior formula as of December 31, 1995. It also included certain benefit credits that you earned for service after January 1, 1996 and interest earned at the rate of 6% per year, until you commenced benefits. If you met an age and service requirement on January 1, 1996 then you also received an enhancement to your new cash balance account.

As a result of this litigation, the Court has ordered that the Plan be reformed and that Foot Locker and the Foot Locker Plan pay all Class members increased benefits. Specifically, you will receive an ***additional pension benefit*** from the Foot Locker Retirement Plan calculated using the following formula set forth in the Court's ruling:

ADDITIONAL BENEFIT FORMULA

The benefit you earned under the Plan's prior formula earned through December 31, 1995, calculated in the manner directed by the Court

PLUS

An amount based upon the sum of the following credits to a cash balance account:

(1) If you met an age and service requirement, the enhancement percentage previously applied (in 1996) times the value of the prior-Plan benefit described above (valued as of 1/1/96);

(2) The cash balance credits promised under the Plan formula for service after January 1, 1996; and

(3) Interest credits on (1) and (2) at 6% per year from 1/1/96 until the date your benefit from the Plan was paid (or through today if you have not yet been paid a benefit)

MINUS

The value of benefits you were already paid, if any

INCREASED BY

Interest at 6% per year from the original payment date(s) (if you already received benefit payments) to the date of the additional payment that you will receive as a result of this lawsuit

MINUS

Your allocable share of court-approved attorneys' fees and expenses.

Details regarding the exact amount, manner, and timing of payment of your increased retirement benefits will be communicated to you separately by the Pension Plan administrator in a benefits election letter.

The *Osberg* Class Action Lawsuit

Geoffrey Osberg was a store manager who worked for Foot Locker for 20 years before leaving the Company and receiving a lump sum from the Plan in 2002. In February 2007, he filed a lawsuit against Foot Locker and the Foot Locker Plan on behalf of himself and over 16,000 similarly situated Plan participants and beneficiaries. The lawsuit alleged that, in connection with the conversion of the Plan from the prior traditional defined benefit pension plan formula to a "cash balance" plan formula effective January 1, 1996, Foot Locker made false and misleading statements to Plan participants as to the effect of the change and what Plan benefits earned after the change would be.

The lawsuit alleged that Foot Locker falsely told participants that the benefits they had earned as of December 31, 1995, prior to the change, were converted into initial account balances of equal value and that any subsequent additions to those account balances represented new additional benefits earned due to additional service. The lawsuit alleged that this was untrue because the benefits represented by the initial account balances in the cash balance plan were less than the benefits already earned prior to the change on January 1, 1996, and that Foot Locker failed to disclose this to employees.

In 2015, after a two-week trial, Judge Katherine B. Forrest of the United States District Court for the Southern District of New York ruled that Foot Locker had made false and misleading statements to participants that would lead them to incorrectly believe that the benefits represented by the initial account balances in the cash balance plan were equal to the benefits already earned as of December 31, 1995. The Court also found that Foot Locker made false and misleading statements that the additions to participants' cash balance accounts as a result of service after 1995 would result in participants earning increases in actual benefits payable from the Plan, when this was not always the case. The Court ruled that by making these statements to participants, Defendants violated their fiduciary duties under the Employee Retirement Income Security Act of 1974 ("ERISA") and ERISA's minimum requirements for summary plan descriptions ("SPDs"). The Court held that the appropriate remedy was that Foot Locker should pay participants what it promised in its participant communications, that is, that the post-1995 service that resulted in cash balance credits actually increased the participant's benefit. The Court held that that correction should be done by reforming the Plan to conform to the alleged promises made to participants. The Court thus ordered relief in the form of the "A+B" benefit formula described above. That ruling was affirmed on appeal in 2017 and in 2018, the United States Supreme Court denied Foot Locker's petition for review.

The Requests for Attorneys' Fees and Expenses

Prior to the 2015 trial and before any decision on the merits, the Court certified this case as a class action and ordered that you and the other members of the Class be given an opportunity to "opt-out" of the class action and either not pursue the certified claims or pursue them on your own, perhaps with your own attorney. You were informed that if you wished to remain part of the certified class the final outcome, whether favorable to Plaintiff or Defendants, would apply to you like all other Class members. You were also informed that if Plaintiff was successful and there were additional payments to be made by Foot Locker, you would receive notice and an opportunity to be heard as to the reasonableness of any fees and expenses Class Counsel would ask the Court to approve to be paid out of such award. This is that notice and your opportunity to object or comment.

The estimated value of the total recovery Class Counsel's efforts have won for the Class is $290 million, as of June 1, 2018 ("judgment amount"). Class Counsel are seeking attorneys' fees of one-third of the net judgment amount, *i.e.,* after the expenses described in the next sentence have been deducted. Class Counsel are also seeking reimbursement of the $1,520,057 in out-of-pocket expenses they incurred prosecuting this lawsuit, including the amount charged by the Class's enrolled pension actuary who has actively worked on the case for more than 11 years and testified at trial.

Included within this fee and expense request is a request for a $50,000 incentive award for Mr. Osberg, who shouldered the burden of this litigation on behalf of other Class members and $15,000 for the other eight Class member-witnesses who were deposed and testified at trial. Class Counsel is offering to pay these incentive awards out of Class Counsel's fee, rather than out of the Class's recovery.

You can obtain a copy of Class Counsel's motion for attorneys' fees, expenses, and incentive awards for Plaintiff Osberg and the eight testifying Class members free of charge, from the website that Class Counsel established for Class members (see address below). If the Court grants these requests, the approved amounts will be deducted from the total recovery and, pursuant to the court-approved formula described on page 2 of this Notice, will reduce the additional benefit payable to you as a result of this lawsuit. The deduction for lawsuit-related fees and expenses will only apply to any ***benefit increase*** to which you are entitled as a result of this lawsuit, not to any benefits you already had or would have received independent of this litigation.

Your Right to Object or Comment

If you wish to object or comment on the requests by Class Counsel for attorneys' fees and expenses from the judgment amount, please send your objections or comments to: Clerk of the Court, Office of the Clerk, United States District Court, Daniel Patrick Moynihan U.S. Courthouse, 500 Pearl Street, New York, NY 10007. The letter must be

post-marked no later than May 25, 2018. The Court will consider any objections or comments before making its final decision.

Complete Address Verification Form to Ensure Receipt of Future Notices

Whether or not you object or comment, if you are eligible to receive a retirement benefit increase as a result of this litigation, you will receive a future notice about how to obtain your increased benefit. Enclosed with this Notice is an Address Verification Form to confirm or update your current address to ensure that you receive future notices about your increased retirement benefit. Please complete the Address Verification Form as soon as possible and return it in the enclosed prepaid envelope. If you are the surviving spouse or beneficiary of a deceased former Foot Locker employee, please fill in your name, address, and relationship to the deceased former Foot Locker employee.

Additional Information

If you have questions or concerns, please contact Class Counsel:

Gottesdiener Law Firm, PLLC
498 7th Street
Brooklyn, NY 11215
Tel: 718.788.1500
Fax: 718.788.1650
info@gottesdienerlaw.com

A website at www.footlockerpensionclassaction.com that Class Counsel has created dedicated to the lawsuit includes this Notice, Class Counsel's fee petition, and answers to frequently asked questions.

This Notice is authorized by the United States District Court for the Southern District of New York, Hon. Katherine B. Forrest, United States District Judge.

Osberg v. Foot Locker Pension Class Action
c/o Notice Administrator
P.O. Box 1367
Blue Bell, PA 19422

Address Verification Form

ID #: ######
«FirstName» «LastName»
«Address1»
«Address2»
«City», «StateCd» «Zip»
«CountryCd»

Instructions:

- **Please confirm your address if correct, or update your address to ensure you receive future notices about your increased retirement benefit.**
- Complete this form as soon as possible and return it in the enclosed prepaid envelope.
- Note: If you are the surviving spouse or beneficiary of a deceased former Foot Locker employee, please fill in your name, address and relationship to the deceased former Foot Locker employee.

1. The address listed above is correct (circle one) YES NO

2. If your name and/or address differs from the one listed above, please make changes below:

Name: ____

Relationship to deceased former employee (if needed): ____________________

Address: ____

Address: ____

City, State, Zip: ____

Telephone Number: ____

Signature: ______________________________ Date: ______________

If you have any questions, please contact lead counsel for the Plaintiff class:

Gottesdiener Law Firm, PLLC
498 7th Street
Brooklyn, NY 11215
Tel: 718.788.1500
Fax: 718.788.1650
info@gottesdienerlaw.com

ID #: ######

Osberg v. Foot Locker, Inc., et al., 07-cv-01358 (KBF) (S.D.N.Y.)

EXHIBIT 2

"Truth or Consequences (180 million of them),"
Los Angeles & San Francisco
Daily Journal
(September 22, 2017)
(Dkt. 407-2)

LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
FRIDAY, SEPTEMBER 22, 2017

Truth or consequences (180 million of them)

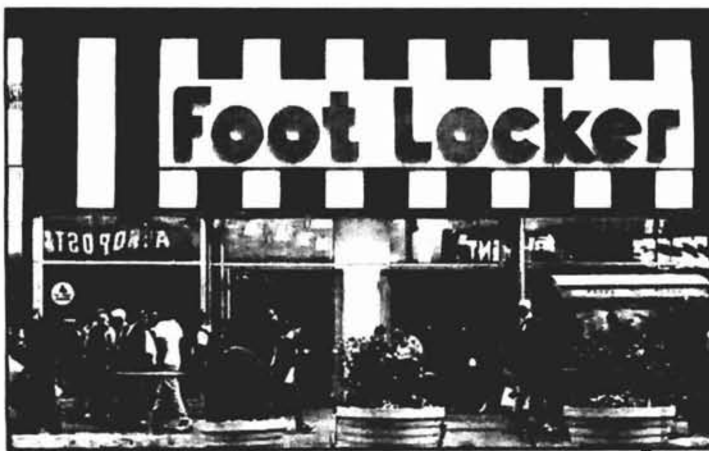
By Bob Blum

Tell the truth or face the consequences. For Foot Locker Retail Inc., the consequences are to pay employees $180 million. *Osberg v. Foot Locker*, 862 F. 3d 198 (2d. Cir, July 6, 2017). That's a heck of a big cost for learning that when the news is bad, say it. Don't hide it.

In the mid-1990s, Foot Locker was in trouble. Its share price had plummeted from about $30 to about $11; its revenue was following suit. So it had to cut costs. A standard play for employers in trouble is to cut pensions, and Foot Locker decided to do this. But Foot Locker was squeamish. Cutting pensions was a "morale killer," so Foot Locker decided to "obscure" what was really happening.

It's not hard to obscure pensions. Few understand them and there's a lot of behind-the-curtain actuarial stuff that makes them work. Foot Locker changed its pensions to be less generous. More to the point, Foot Locker used actuarial maneuvers to *freeze benefits for four to five years* for thousands of employees. They would work for four to five years after the change *without earning any* new pension benefits. No doubt, employees would not be happy with this news.

Foot Locker decided on disguise: Instead of telling employees what was happening, it sent out "good news." One key letter said that, "after listening to what associates have told us they would like to see," it had, "decided to update its pension plan to give associates a more competitive retirement benefits package." Foot Locker knew that the news was not good so at the least this statement was misleading. Foot Locker also said that the employees would be able to see their pension accounts "grow each year." The truth was quite different. Nothing grows in a freeze.



Shutterstock

The strategy was successful — in the short run. Apparently very few understood what had happened to their pensions. But by 2007, plaintiffs figured out the truth. When that happened they sued.

It took three district court decisions and one decision by the 2nd U.S. Circuit Court of Appeals to get to trial. By that time, the U.S. Supreme Court in *CIGNA vs. Amara*, 563 U.S. 443 (2011), had changed the law in plaintiff's favor, though not entirely. In *Foot Locker*, there were a number of legal issues including the limitations period, the standard required to obtain a remedy, and the remedy itself. But the case turned on the facts.

Trial testimony was awful for Foot Locker. The vice president of human resources said that she knew the information given was wrong. In fact she had made an "affirmative decision" to leave out the bad news. One of the pension design team said that they "made sure" that employees were not told anything that would contradict the idea that their pensions would grow. The former chief financial officer of a major division testified that he did not understand that his pension would be frozen. Even employees whose job was to calculate pensions did not understand the freeze. It probably did not help Foot Locker that it had destroyed 141 boxes of documents that could have been relevant to plaintiffs' case, though the court said that this did not affect the decision. Nor could it have helped that the former chief executive officer of a major division was clearly annoyed that he had to testify, to such an extent that this was called out in the court's opinion.

The district court found that the communications to employees were intentionally false and misleading, that Foot Locker obscured the facts, and that Foot Locker knew that employees would "mistakenly perceive" the new plan. The district court held foursquare for the employees. The deciding factor was that Foot Locker intentionally did not tell the truth even though as plan administrator it had a fiduciary responsibility under the Employee Retirement Income Security Act of 1974 to act for the benefit of the employees.

The district court decided that the plaintiffs should get what they reasonably believed that they were told they would get — the pension plan was to be reformed to undo the freeze. The court even gave additional benefits (a windfall?) to over 200 employees who had no pension loss with the change. What was remarkable is that the same judge previously had granted Foot Locker's motion to dismiss because she found no damages. After all, even if Foot Locker had told the truth, what could plaintiffs have done about it?

The 2nd Circuit reversed and remanded for the district court to determine if equitable remedies were appropriate. The trial testimony on remand clearly turned around the judge's opinion and this time the 2nd Circuit affirmed.

You have to ask why this case did not settle. Well before trial, Foot Locker surely knew the facts were not favorable, and the plaintiffs also must have been concerned about serious legal issues. There were several possible avenues for the parties to explore. There were legitimate limitations period issues. Compromise on technical actuarial factors (interest rates and mortality tables) might have been reasonable. The plaintiffs might have yielded on the windfall issue. Maybe they also would have considered a haircut for quick payment because some class members may not live long enough to otherwise collect. It may be difficult to find employment records back to 1996 and both sides might have wanted to find a way to resolve this issue. But perhaps "principle" took over. Major amicus briefs decrying the terrible effects on pension plans (for defendant) and on all employees (for plaintiff) were filed with the 2nd Circuit.

This loss will cost Foot Locker a bundle. Too bad. If Foot Locker had told the truth — even though the news was not good — there would have been no case and no liability.

BLUM

Bob Blum *is a mediator in the Bay Area. Reach him at BobBlumMediation.com.*

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Osberg v. Foot Locker, Inc., et al., 07-cv-01358 (KBF) (S.D.N.Y.)

EXHIBIT 3

"Reflections on the Second Circuit's Decision in *Osberg v. Foot Locker*," Boston ERISA & Insurance Litigation Blog Article (July 7, 2017) (Dkt. 407-3)

July 7, 2017

Reflections on the Second Circuit's Decision in Osberg v. Foot Locker

Posted By Stephen D. Rosenberg In Class Actions , Equitable Relief , Pensions
0 Comments
Permalink |

I was being interviewed by a reporter the other day and casually noted that I keep my twitter open on my computer all day for no other reason than to follow Bloomberg BNA's nearly instantaneous reporting of important new court decisions in the ERISA field. True to form, this morning I came into work to an article on, and a copy of the decision by, the Second Circuit yesterday in the long running pension class action case, *Osberg v. Foot Locker*, which concerns a claim for reformation of a pension plan to provide employees with the benefits they believed were promised in plan communications, rather than those actually provided under the plan's express terms themselves. You can find the Bloomberg BNA article on it here, and the decision itself here.

The decision is worth reading for a number of reasons, a few of which I will briefly touch on here. First, anyone who litigates in this area knows that it is very hard – and most circuits have adopted a range of doctrinal hurdles making it so – to get courts to award, on equitable relief grounds, any benefits different than those expressly authorized under the plan's terms, even where there is evidence that the plan communications to the employees did not spell out those benefits accurately. The Second Circuit, and the district court before it, granted the employees, through the tool of reformation, benefits beyond what the plan itself provides. The Second Circuit's decision, in my view, immediately becomes the polestar for claims of this nature, to the extent that lawyers for participants will look to it for guidance and support, and lawyers for plans will have to steer around it anytime a plaintiff seeks benefits beyond those expressly provided under a plan's terms.

Second, by ruling in favor of the employee class, the decision is actually a major setback for the defense bar and, in many ways, for plan sponsors' freedom of action in operating and, in particular amending, plans. Plan sponsors and fiduciaries have generally been very successful in limiting participants to recovering only the amount of pensions or other benefits authorized under the express, typically actuarially driven, terms of the formal written plan itself. This decision immediately becomes the leading support for the premise that courts should not so limit such recovery, and should instead look to what was promised to participants in deciding the amount of benefits owed to participants.

Third, from a pragmatic, educational perspective, if you have ever wanted a good description in plain English of cash balance plans and the concept of "wear away," you won't find a better one than the Second Circuit's explanation of those topics here.

Fourth, the Court provides an excellent explanation of what must actually be proven to reform a plan to provide the more extensive benefits that, relative to the plan's terms themselves, plan communications led participants to believe they would receive. For me personally, this is a very exciting development – having been a contracts geek in law school, I have longed for the day when reformation would become central to my practice, and thanks to the Second Circuit, that long awaited day has finally arrived. Hallelujah! The chorus of lawyer angels sing!

Osberg v. Foot Locker, Inc., et al., 07-cv-01358 (KBF) (S.D.N.Y.)

EXHIBIT 4

Agreement Between Geoffrey Osberg and Gottesdiener Law Firm (November 22, 2006) (Dkt. 407-4)

Gottesdiener Law Firm, PLLC

New York | Washington, D.C.
www.gottesdienerlaw.com

498 7th Street
Brooklyn, NY 11215
Tel: 718.788.1500
Fax: 718.788.1650

Eli Gottesdiener
eli@gottesdienerlaw.com

November 22, 2006

Privilege and Confidential
Contains/Reflects Attorney-Client Communications
Attorney Work Product

Geoffrey Osberg
19040 John Avenue
Country Club Hills, Illinois 60478

Re: Class action lawsuit re Foot Locker Inc. Retirement Plan

Dear Mr. Osberg:

This letter will confirm our agreement on the terms and conditions upon which Gottesdiener Law Firm, PLLC ("GLF", "the Firm" or "your attorneys") will represent you individually, and as a representative of a class of current and/or former participants in the Foot Locker Inc. Retirement Plan (the "Plan") in connection with claims that the Plan or Foot Locker Inc. and/or its subsidiary and affiliated companies ("Foot Locker") failed to comply with federal pension and tax laws in connection with the design and administration of that ERISA-governed pension plan and hence miscalculated your pension benefit.

1. **This is a privileged and confidential attorney-client communication that also contains attorney work-product.** It reflects information provided by you, the client, to and at the direction of your attorneys. You provided this information to your attorneys with the intention of obtaining legal advice and at the direction of counsel pursuant to their questions and requests. This document is intended by both attorney and client to remain strictly privileged and confidential.

2. The Firm agrees to represent you and other similarly situated participants in litigation against Foot Locker or related entities that will contend that the Plan miscalculated your pension benefit and the benefit of all others similarly situated. We cannot promise that we will be successful in prosecuting this case or that we will be able to obtain any money for you or the proposed class. You understand that the outcome of a lawsuit is very difficult to predict with any accuracy in advance and that we will face a determined, well-funded adversary.

3. **You will not be liable for any attorney's fees unless we recover for you and the class, either by way of settlement or trial.** Moreover, you will not be liable for the reimbursement of costs and out of pocket disbursements to counsel unless we recover for you and the class, either by way of settlement or trial.

4. In the event of a recovery, any attorney's fees payable to the Firm (and other firms with whom we may work on the matter) will be paid solely from an award ordered by the Court: (a) and imposed directly upon Foot Locker, Foot Locker-related Defendants or the Plan (typically, statutory attorney's fees); and/or (2) to be paid out of assets obtained for you or the class as a result of judgment or settlement in such an action (typically known as a "common fund" payment). The Firm and you agree to permit the Firm to request fees not to exceed 33% of the present value of any settlement or verdict in favor of the class.

5. The Firm may associate with additional counsel in representing you in the matter. **You will have no additional liability to such counsel or any other counsel** -- unless of course you choose to be represented by such counsel and agree to incur such liability (presumably in writing).

6. **The Firm will advance and be responsible for the necessary costs and all out-of-pocket disbursements for any litigation that might be filed – You are responsible for nothing in that regard.** If we are successful in obtaining a monetary recovery, at the conclusion of any litigation arising out of this matter, we will seek reimbursement of our costs and disbursements from any monies paid in settlement of this matter or by award of the Court. Otherwise, you have no liability to us.

7. **You agree to be a named plaintiff in the proposed action.** This means that you agree to serve as a representative of other class members. You agree to cooperate in the preparation and litigation of the case to the extent the Firm seeks your assistance and you agree to appear on reasonable notice for any deposition that the defense may seek to take. The Firm agrees to prepare you for any such deposition and schedule it for a time and place of your convenience. (We will pay any necessary travel, food and lodging expenses in connection with same). You also agree to provide the Firm with any relevant documents you may have in your possession, and answer any written questions the defense may ask of you through "interrogatories" sent to the Firm. (We will draft your responses and objections based on the information you provide). You also agree to assist as needed in communicating with potential class members, or identifying potential witnesses if you know of any. You have reviewed and signed the attached "Duties of a Class Representative."

8. With regard to any matters relating to settlement, before determining whether you will support or oppose any proposed settlement we may reach with the Defendants, you agree to consider the views and advice offered by counsel and consider the interests of the other class members whose interests you seek to represent in this matter, and not merely your own personal interests. That is an essential part of acting as a class representative. For example, the settlement may seem beneficial to you personally because of your own circumstances but you may not believe that, taken as a whole, it is fair to the group. On the other hand, you may be disappointed in what a settlement might pay you personally (if you were, for example, anticipating a larger amount), but think that under the circumstances and given the risks of going forward and

possibly losing the case entirely, the class would benefit if the settlement were accepted and approved by the court.

9. You agree that, in all respects involving this matter (not just settlement), you will fairly represent the interests of the other class members whom you seek to represent as members of the class.

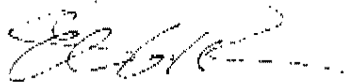
10. This retainer agreement does not obligate the Firm to prosecute an appeal from an adverse decision we may received from the trial judge. Any decision to represent you and the proposed class on appeal from an adverse decision must be reflected in a separate retainer agreement. However, the Firm is currently of the view that if the case is dismissed or the Defendants are granted summary judgment as to the Complaint in its entirety, the Firm would appeal such a ruling to the Court of Appeals.

11. In recognition of your contribution on behalf of the class, in the event the case is successful, we will request that the Court authorize or award to you (and any other similarly situated named plaintiffs) a special incentive or bonus payment commensurate with those contributions. We cannot promise that the Court will award such a payment or in what amount but consistent with our ethical responsibilities to the class as a whole we will use best efforts to obtain for you and other similarly situated named plaintiffs such additional payment.

12. This retainer agreement will be interpreted and enforced in accordance with the laws of New York, where the agreement is made.

If you agree to the terms of the agreement set forth above, please sign a copy of this letter and send a copy back to me (faxed or emailed signatures – including electronic signatures -- are equally valid), keeping an original for yourself as well.

Sincerely,



Eli Gottesdiener

AGREED TO AND ACCEPTED:

By:
Geoffrey Osberg

Dated: 11-22-06

Duties of Class Representatives

1. A class representative represents the interests of all members of his/her class in litigation to obtain relief for the class. In this case the proposed class is the group of Foot Locker employees who obtained a vested benefit under the Plan but were not paid the entirety of their accrued benefit based on the way the Plan was written and administered, or current employees who would not be paid their full accrued benefit if they sought to obtain a distribution today.

2. A class member has claims that are typical of those of the class, and thus involve common issues of law or of fact.

3. A class representative considers the interests of the class just as he/she would consider his own interests.

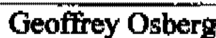
4. With the assistance of his/her lawyers, a class representative participates actively in the lawsuit, such as by testifying at deposition (if required) and trial (if any), and answering written interrogatories (if any), and by keeping generally aware of the status and progress of the lawsuit. A class representative does not need to understand the intricacies of the law but does have to have a general grasp of what the case is about, in a legal sense. A class representative is not required to be particularly sophisticated or knowledgeable with respect to the subject of the lawsuit. However, he/she should be interested, on a continuous basis, in the progress of the lawsuit, and must make every effort to provide his/her lawyers and the court with all relevant facts of which he/she is aware.

5. A class representative recognizes and accepts that any resolution of the lawsuit, such as by settlement or dismissal, is subject to court approval, and must be determined to be the best interests of the class as a whole.

6. A class representative volunteers to represent many other people with similar claims because he/she believes that it is important that all benefit from the lawsuit equally; because he/she believes that a class lawsuit will save time, money, and effort, and thus will benefit all parties, the class, and the court; and because he/she believes that the class action can be an important tool to assure compliance with the law.

I have reviewed and acknowledge my duties as a class representative.

Dated: 11-22-06 By: ______________________



Geoffrey Osberg

Osberg v. Foot Locker, Inc., et al., 07-cv-01358 (KBF) (S.D.N.Y.)

EXHIBIT 5

Summary of Counsel's Billing Entries (Dkt. 407-5)

Osberg v. Foot Locker, Inc., et al., 07-cv-01358 (KBF) (S.D.N.Y.)

Class Counsel's Billing Entries Summary
2007 - 2018

NAME	INITIALS	POSITION	HOURS	RATE	LODESTAR
Attorneys					
Gottesdiener, Eli	EG	Partner	9,118.45	$ 970.00	$ 8,844,896.50
Clark, Julia Penny	JPC	Partner (Bredhoff & Kaiser)	186.25	$ 990.00	$ 184,387.50
Sharpe, David N.	DNS	Senior Counsel	650.75	$ 725.00	$ 471,793.75
Carter, Andrew P.	APC	Senior Associate	1,038.50	$ 695.00	$ 721,757.50
Cohen, Steven D.	SDC	Senior Associate	4,154.50	$ 615.00	$ 2,555,017.50
Norgard, Matthew C.	MCN	Senior Associate	4,472.75	$ 615.00	$ 2,750,741.25
Dietz, Alice L.	ALD	Associate	877.25	$ 550.00	$ 482,487.50
Huang, Albert	AH	Associate	2,482.50	$ 495.00	$ 1,228,837.50
Paralegals					
Conover, Candis A.	CAC	Senior Paralegal	1,035.75	$ 175.00	$ 181,256.25
Pinon, Ramon	RP	Senior Paralegal/IT Specialist	2,010.50	$ 240.00	$ 482,520.00
Joseph, Dennis A.	DAJ	Senior Paralegal	4,578.00	$ 240.00	$ 1,098,720.00
Walled, Sid	SW	Paralegal	281.25	$ 125.00	$ 35,156.25
Vandenbulcke, Hanna	HV	Senior Paralegal	2,858.00	$ 220.00	$ 628,760.00
		Totals	**33,744.45**		**$ 19,666,331.50**

Osberg v. Foot Locker, Inc., et al., 07-cv-01358 (KBF) (S.D.N.Y.)

EXHIBIT 6

Counsel's Detailed Billing Entries
(Dkt. 407-6)

Osberg v. Foot Locker, Inc., et al., 07-cv-01358 (KBF) (S.D.N.Y.)

TO BE FILED WITH CHAMBERS
IN CAMERA

Osberg v. Foot Locker, Inc., et al., 07-cv-01358 (KBF) (S.D.N.Y.)

EXHIBIT 7

Counsel's Out-of-Pocket Expenses
(Dkt. 407-7)

Osberg v. Foot Locker, Inc., et al. , 07-cv-01358 (KBF) (S.D.N.Y.)

Litigation Expenses & Costs		
Service	**Charges**	**Sub-Total**
Experts		
LPD Consulting and Design, Ltd. (Actuarial Expert)	$ 803,177.53	
Trailcrest Capital Advisors, LLC (Financial Economics Expert)	$ 95,218.97	
James F. Stratman, Ph.D. (Communications Expert)	$ 27,857.35	
Truman F. Bewley (Behaviour Economics Expert)	$ 17,333.29	
Chester S. Spell, Ph.D. (Organizational Behavior Expert)	$ 12,321.82	
Richard L. Wiener, Ph.D. (Readability/Financial Literacy Expert)	$ 18,602.00	
		$ 974,510.96
Mediators		
Utz & Lattan, LLC	$ 13,023.47	
Loeb & Loeb, LLP	$ 12,421.26	
		$ 25,444.73
Deposition, Trial and Hearing Transcriptions		
Court Reporting Services	$ 142,210.48	
		$ 142,210.48
Notice Administration		
McGladrey & Pullen, LLP	$ 110,300.00	
		$ 110,300.00
Travel		
Travel (airfare, lodging, meals, cab fare)	$ 30,064.96	
		$ 30,064.96
E-Discovery Consulting, Database Management, Courtroom Graphics		
Impact TRIAL	$ 90,925.95	
Floating Pointe Corp.	$ 47,726.65	
HLP Integration	$ 9,215.00	
		$ 147,867.60
Duplication		
In-House Duplication	$ 9,247.79	
Outside Duplication	$ 12,088.56	
		$ 21,336.35
Lawsuit Website Hosting, Maintenance, Design		
Floating Pointe Corp.	$ 15,156.12	
		$ 15,156.12
Process Servers		
Process Servers	$ 4,282.70	
		$ 4,282.70
Long Distance Telephone		
Long Distance Telephone	$ 2,754.25	
		$ 2,754.25
Overnight and Regular Mail		
Overnight (FedEx, UPS, USPS)	$ 1,144.87	
Regular (USPS)	$ 834.61	
		$ 1,979.48
Messenger Services		
Local Courier/Messengers	$ 928.00	
		$ 928.00
Filing Fees		
Court Filing Fees	$ 605.00	
		$ 605.00
Online Legal Research		
Westlaw	$ 26,923.32	
		$ 26,923.32
Other		
Witness Fees and Expenses	$ 12,640.73	
Government Reports	$ 53.40	
Courtroom Equipment Rental	$ 2,998.92	
		$ 15,693.05
	Total	**$ 1,520,057.00**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEOFFREY OSBERG **On behalf of himself and on behalf of all others similarly situated,** **Plaintiff,** **- against -** **FOOT LOCKER, INC.,** **FOOT LOCKER RETIREMENT PLAN,** **Defendants.**	:	**Case No.: 07 CV 1358 (KBF)**

DECLARATION OF GEOFFREY OSBERG

I, Geoffrey Osberg, declare under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. My name is Geoffrey Osberg. I am the named plaintiff and sole class representative in this action, which I first brought in 2007.

2. I worked at multiple Foot Locker stores in Illinois from November 15, 1982 until September 11, 2002. I resigned from Foot Locker at age 48 to join another retailer. I am currently employed at Carson's department store in Orland Park, Illinois, where I have worked since 2007 as a sales associate. I am 64 years old.

3. I hired Gottesdiener Law Firm to pursue this matter on my behalf and on behalf of the class of similarly situated Foot Locker Plan participants on a contingency fee basis in 2006. My contract with them calls for the payment of 33% of any recovery, plus costs. (Exhibit 1 to Mr. Gottesdiener's declaration is a true and correct copy of that agreement). At the time I negotiated this agreement with them, I understood that I had a lot of money at stake—about as much as the $25,700 lump sum I originally received from Foot Locker in 2002. I thought it was

fair then and I think it is fair now to offer and to pay my lawyers 33% of what they won for me and the Class because I knew Foot Locker was undoubtedly going to fight the lawsuit vigorously, I could not afford to hire counsel on an hourly basis (and don't know anyone at Foot Locker who could), and there was a good chance the case could recover nothing at all and might take years no matter how it turned out.

4. I thought then and think now that 33% is a standard amount for a contingency fee contract, and understood that a contingency fee compensates counsel for the risk of losing, as well as for their expertise and willingness to foot the bill and take a risk on the case ultimately succeeding.

5. I understand that my attorneys have succeeded in obtaining a very large recovery for the Class. I understand that the total recovery against the Foot Locker Defendants has an estimated value of $290 million as of June 1, 2018. I support the attorneys' request for 33% of that recovery and for their fees and costs. I am very pleased with the result my attorneys achieved for me and the Class and think it is only fair that they be appropriately compensated for their hard work. If my attorneys had not won the trial and then fended off Foot Locker's appeals all the way to Supreme Court, I would not have been entitled to any additional payments at all; so I am more than happy to pay the Class's attorneys one-third of the amount that they won for us, even though it will reduce the amount I will receive from $27,321 to $18,323.

6. As I see it, and I'm sure others in the Class would see it, money doesn't grow on trees, and our attorneys did a terrific job fighting on our behalf—a fight they deserve to be paid for at a fair rate. The fact that the total amount our attorneys will receive is very large, approaching $100 million as I understand it, does not bother me: the total adds up to a large amount because the attorneys won meaningful additional pension benefits for me and more than

16,400 of my fellow co-workers. If each us had filed our own lawsuits, surely we would have each had to pay our lawyers a contingency fee of at least one-third and probably more. I don't see why the result should be any different here. None of us were forced to join or stay in this lawsuit. Since each of us are chipping in one-third of the amount won at trial on our behalf, and there are more than 16,000 of us, that is obviously going to add up to a big amount. The result is as it should be.

7. I have served as class representative to the best of my ability these past 11 years. Over the years, I was consulted several times about settlement possibilities and even attended a mediation in New York City in 2012 that was unsuccessful. I certainly agreed with my lawyers' decision to take this case to trial and defend the Court's judgment on appeal and in the Supreme Court.

8. During discovery, I assisted counsel by providing all documents I had about the Plan, preparing for many hours with counsel for my deposition, responding to Defendants' formal discovery demands, and then sitting for a lengthy deposition, all of which required me to take unpaid time off from work. The same is true for trial: I had to take unpaid time off from work to travel to New York, be prepared to testify at trial, attend the trial, and testify at trial.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 3, 2018

Geoffrey Osberg

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEOFFREY OSBERG **On behalf of himself and on behalf of all others similarly situated,** **Plaintiff,** **- against -** **FOOT LOCKER, INC.,** **FOOT LOCKER RETIREMENT PLAN,** **Defendants.**	:	**Case No.: 07 CV 1358 (KBF)**

DECLARATION OF GEOFFREY OSBERG

I, Geoffrey Osberg, declare under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. My name is Geoffrey Osberg. I am the named plaintiff and sole class representative in this action, which I first brought in 2007.

2. I worked at multiple Foot Locker stores in Illinois from November 15, 1982 until September 11, 2002. I resigned from Foot Locker at age 48 to join another retailer. I am currently employed at Carson's department store in Orland Park, Illinois, where I have worked since 2007 as a sales associate. I am 64 years old.

3. I hired Gottesdiener Law Firm to pursue this matter on my behalf and on behalf of the class of similarly situated Foot Locker Plan participants on a contingency fee basis in 2006. My contract with them calls for the payment of 33% of any recovery, plus costs. (Exhibit 1 to Mr. Gottesdiener's declaration is a true and correct copy of that agreement). At the time I negotiated this agreement with them, I understood that I had a lot of money at stake—about as much as the $25,700 lump sum I originally received from Foot Locker in 2002. I thought it was

fair then and I think it is fair now to offer and to pay my lawyers 33% of what they won for me and the Class because I knew Foot Locker was undoubtedly going to fight the lawsuit vigorously, I could not afford to hire counsel on an hourly basis (and don't know anyone at Foot Locker who could), and there was a good chance the case could recover nothing at all and might take years no matter how it turned out.

4. I thought then and think now that 33% is a standard amount for a contingency fee contract, and understood that a contingency fee compensates counsel for the risk of losing, as well as for their expertise and willingness to foot the bill and take a risk on the case ultimately succeeding.

5. I understand that my attorneys have succeeded in obtaining a very large recovery for the Class. I understand that the total recovery against the Foot Locker Defendants has an estimated value of $290 million as of June 1, 2018. I support the attorneys' request for 33% of that recovery and for their fees and costs. I am very pleased with the result my attorneys achieved for me and the Class and think it is only fair that they be appropriately compensated for their hard work. If my attorneys had not won the trial and then fended off Foot Locker's appeals all the way to Supreme Court, I would not have been entitled to any additional payments at all; so I am more than happy to pay the Class's attorneys one-third of the amount that they won for us, even though it will reduce the amount I will receive from $27,321 to $18,323.

6. As I see it, and I'm sure others in the Class would see it, money doesn't grow on trees, and our attorneys did a terrific job fighting on our behalf—a fight they deserve to be paid for at a fair rate. The fact that the total amount our attorneys will receive is very large, approaching $100 million as I understand it, does not bother me: the total adds up to a large amount because the attorneys won meaningful additional pension benefits for me and more than

16,400 of my fellow co-workers. If each us had filed our own lawsuits, surely we would have each had to pay our lawyers a contingency fee of at least one-third and probably more. I don't see why the result should be any different here. None of us were forced to join or stay in this lawsuit. Since each of us are chipping in one-third of the amount won at trial on our behalf, and there are more than 16,000 of us, that is obviously going to add up to a big amount. The result is as it should be.

7. I have served as class representative to the best of my ability these past 11 years. Over the years, I was consulted several times about settlement possibilities and even attended a mediation in New York City in 2012 that was unsuccessful. I certainly agreed with my lawyers' decision to take this case to trial and defend the Court's judgment on appeal and in the Supreme Court.

8. During discovery, I assisted counsel by providing all documents I had about the Plan, preparing for many hours with counsel for my deposition, responding to Defendants' formal discovery demands, and then sitting for a lengthy deposition, all of which required me to take unpaid time off from work. The same is true for trial: I had to take unpaid time off from work to travel to New York, be prepared to testify at trial, attend the trial, and testify at trial.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 3, 2018

Geoffrey Osberg

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEOFFREY OSBERG **On behalf of himself and on behalf of all others similarly situated,** **Plaintiff,** **- against -** **FOOT LOCKER, INC.,** **FOOT LOCKER RETIREMENT PLAN,** **Defendants.**	:	**Case No.: 07 CV 1358 (KBF)**

DECLARATION OF LAWRENCE DEUTSCH

I, Lawrence Deutsch, hereby declare that:

1. I am actuarial expert to Plaintiff and the Class in this case and am an Enrolled Actuary under ERISA. I make this declaration of my personal knowledge and review of data supplied by the Foot Locker defendants, and if called as a witness I could and would testify competently to the facts stated herein.

2. Based on my review of data supplied by the Foot Locker defendants, I estimate the value of the Class's recovery under the Court's October 2015 judgment formula as of June 1, 2018 is $290 million.

3. This means that, net of requested attorneys' fees and expenses, the judgment means that each member of the roughly 16,400 member Class is entitled to receive an additional pension benefit under the Plan with an estimated lump-sum present value of $11,800 on average, which the vast majority of Class members can elect to receive, like their original lump sum, on a tax-deferred basis.

4. The $290 million fund represents a 100% recovery of the Class's maximum possible damages claim.

5. If trial had the identical outcome it did on liability and baseline recovery, but Class Counsel had failed to persuade as to any material fact or aspect of the Class's damages model, the total recovery would have shrunk to a mere $75 million—$215 million less than it is today.

6. The fact that the Court was persuaded (1) that the only way to fulfill Foot Locker's promise of a no-wear-away conversion was (i) to give participants corrected opening balances instead of only preserving their 12/31/95 annuities based accrued benefits; (ii) to calculate the corrected opening balances using a discount rate of 6%; and (iii) to preclude Foot Locker from applying a pre-retirement mortality discount (no PRMD) in the calculation; (2) that Foot Locker should be required to honor its promise to give senior employees a generous "enhancement" on top of their recalculated no-wear-away opening balances; and (3) that Foot Locker should further be required to honor its promise to give employees who received lump-sums a "whipsaw" bonus, increased the Class's recovery from what would have been about $75 million to $290 million.

7. Under the judgment, Mr. Osberg is entitled to a recovery valued, in today's dollars, of $27,321.

8. In Defendants' October 2014 motion for summary judgment, they argued that the "enhancement" that Foot Locker had added to the opening account balances of senior participants should reduce damages claimed by the Class and that the pre-retirement mortality discount ("PRMD") that had been used, should continue to be used to calculate the corrected

opening balances, which would have the combined effect of reducing the damages claimed by the Class by about 50%. Dkts. 199-201, 286.

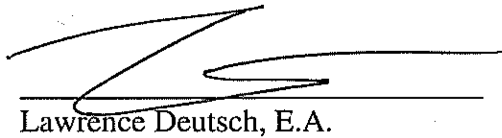
9. Based on my review of Defendant Plan's most recent IRS 5500 filing, the Defendant Plan's trust is running a substantial surplus. Because, as defense counsel has informed the Class, the portion of the judgment amount that the Court authorizes as attorneys' fees and expenses will be paid directly by Foot Locker (rather than out of Plan assets), and Foot Locker has committed to make an additional cash contribution to the Plan of no less than $127.5 million on or before September 15, 2018, the Plan should remain substantially overfunded even after the judgment.

10. The vast majority of Class members (about 80% of the total) originally received their Foot Locker Retirement Plan benefits as a lump sum. They will now be eligible to receive a second lump sum calculated in accordance with the Court's judgment formula; to receive it, they merely need to tell Defendants whether they want the money sent to an IRA (because the payment, like the original lump sum, will be tax-qualified) or to them directly.

11. About 5% of the Class originally elected an annuity (such as Ada Cardona, who testified at trial) and approximately 15% have not yet received any payment from the Plan (because they deferred payment or are still employed by Foot Locker). Annuitants benefit under the judgment in two ways: (1) they will be entitled to a cash payment representing the sum of all past monthly underpayments per the judgment formula since the day they commenced their benefit, together with 6% compound interest on the underpayments, from the date due until the date of the forthcoming payment is made; and (2) going-forward, they will be entitled to a corresponding increase in the on-going monthly payments they receive from the Plan.

12. Most of the Class members not yet paid have already terminated employment with Foot Locker and so can immediately access their share of the Class's net recovery which will take the form, both for them and for the other not-yet-paid Class members still employed by Foot Locker, of an immediate dollar-for-dollar increase to their notional plan account balance, which will ultimately be payable in a lump sum or as an increased annuity.

I, Lawrence Deutsch, pursuant to 28 U.S.C. § 1746, hereby declare under penalty of perjury that the foregoing is true and correct.



Dated: April 3, 2018

Lawrence Deutsch, E.A.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEOFFREY OSBERG **On behalf of himself and on behalf of all others similarly situated,** **Plaintiff,** **- against -** **FOOT LOCKER, INC.,** **FOOT LOCKER RETIREMENT PLAN,** **Defendants.**	:	**Case No.: 07 CV 1358 (KBF)**

DECLARATION OF MARY ELLEN SIGNORILLE

I, MARY ELLEN SIGNORILLE, hereby declare that:

1. I make this declaration of my personal knowledge, and if called as a witness, I could and would testify competently to the facts stated herein. I am not being compensated for my time in providing this declaration and I do not have any financial stake in the outcome of the above-referenced litigation.

2. I am a senior staff attorney with AARP Foundation Litigation, located in Washington, D.C. I received my law degree from The Catholic University of America, Columbus School of Law, and I hold a Masters (LLM) in Labor Law from Georgetown University Law Center. I am a member in good standing of the Bars of the District of Columbia and the State of Maryland. In addition to these state bar memberships, I am admitted to practice

before the U.S. District Court for the District of Columbia and Maryland, as well as the First, Third, Fourth, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuit Courts of Appeals, and the U.S. Supreme Court.

3. Since 1993, I have worked at AARP and its affiliated AARP Foundation Litigation, practicing almost exclusively in the area of pension and employee benefit litigation under the Employee Retirement Income Security Act (ERISA). I have prepared over 100 amicus curiae briefs on employee benefits issues on behalf of AARP and its millions of members in cases before the U.S. Supreme Court, and federal and state courts. I also provide substantive and technical guidance to individuals, employers, and attorneys on complex issues arising under the ERISA and the Internal Revenue Code. I also work with AARP's Government Affairs office to prepare AARP's comments to the regulatory agencies charged with enforcing ERISA including our comments to the Department of Labor on fees.

4. In addition to my work with AARP Foundation Litigation, I was elected to the charter class of the American College of Employee Benefits Counsel in 2000 and have formerly served as its President, Vice-President and Treasurer. I am currently a representative to the American Bar Association's Joint Council on Employee Benefits and am a past Chair. I have also served as the Plaintiff's Co-Chair to the ABA's Labor and Employment Law's Employee Benefit Committee, and a Co-Chair and Steering Committee member of the District of Columbia Bar's Labor and Employment Law Section. I am currently a Senior Editor of EMPLOYEE BENEFITS LAW, a well-known treatise in the field. I was chosen as one of the top benefits lawyers in the country by THE NATIONAL LAW JOURNAL. I have also lectured on the subject of employee benefits at the George Washington School of Law, Chicago-Kent College of Law, John Marshall School of Law, and New York University. Before joining AARP, I was in private

law practice where I represented national and local employee benefit plans, labor organizations and employers in litigation and other ERISA and employee benefits matters.

5. My legal work in the pension and employee benefit plan area has included the litigation of a broad spectrum of employee benefit and ERISA issues. This has included litigation regarding preemption, benefit claims, breaches of fiduciary duty, and the scope of relief available under the different subsections of ERISA's civil enforcement provisions. At present, virtually all of my work is in the employee benefit area.

6. My duties at AARP Foundation Litigation include keeping apprised of issues that may affect the financial security of AARP members. This includes keeping apprised of trends in the retirement plan market and issues arising in ERISA litigation

7. ERISA class actions brought by private attorneys are an important vehicle for enforcing those duties and ensuring the protection of ERISA plan participants' retirement savings. As the Eighth Circuit Court of Appeals has observed, the Department of Labor, which is charged with enforcing ERISA, "depends in part on private litigation to ensure compliance with the statute."[1] However, this area of the law is extremely complex, and requires a willingness to risk significant resources in time and money given the uncertainty of recovery and the protracted and sharply-contested nature of ERISA litigation.

8. In my experience consulting with attorneys involved in these cases, very few in the country have the necessary expertise, resources, and dedication necessary to effectively represent participants in ERISA cases. Complex ERISA litigation such as cash balance conversion litigation is highly specialized legal work that requires class counsel to invest

[1] *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 n.8 (8th Cir. 2009).

incredible amounts of time and very large sums of money. If the plaintiffs are unsuccessful, they face an enormous loss of their own time and resources.

9. Among my duties at AARP Foundation Litigation is to keep abreast of the current issues in ERISA litigation, to act as a clearinghouse for counsel trying ERISA cases, and to provide my expertise to attorneys litigating ERISA cases. During the past 25 years at AARP and its affiliated Foundation, I have received numerous phone calls and correspondence for assistance with cases. Unfortunately, far too many of them have been in cases where counsel did not have the requisite background to understand or recognize nuances in the law or were unaware of potential changes in the law.

10. I have been following cash balance plan litigation across the country for AARP since its inception in the 1990's. Because AARP participated as amicus in many of the cash balance cases, I am acquainted with most of the litigators on both sides of the cases and the issues raised in them. Because of the complexity of the statute, most ERISA litigation is abnormally risky. Cash balance cases, however, have always been among the riskiest of these cases. The litigation involves several layers of unsettled and complicated issues, the interrelationship of ERISA and the Tax Code, and high investment costs for actuarial expertise. Unlike securities and anti-trust defendants, ERISA plans and plan sponsors typically have very little incentive to settle even highly meritorious cases because they do not face the risk of jury trials, or of paying consequential or punitive damages, or liquidated double or treble damages. ERISA defendants know that if they lose they will merely have to pay what they should have paid initially, with interest that is probably less than what it is earning on the withheld funds.

11. I have worked with and consulted with Gottesdiener Law Firm ("GLF") on litigation, legislation, and regulations concerning cash balance plans. Mr. Gottesdiener is

considered a leading plaintiff's class action pension attorney and his firm is a significant competitor in the national market for plaintiffs' ERISA counsel in complex litigation. I am aware that other ERISA practitioners rely on him for his expertise and seek out his counsel when litigating cases.

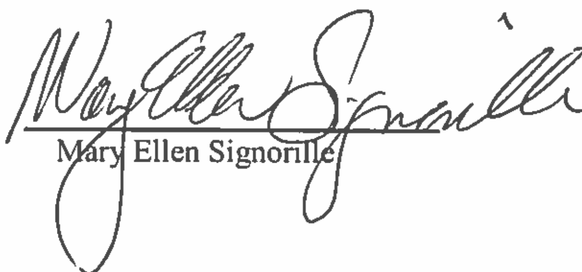
12. When this case was filed in 2007 there were no favorable precedents for a case of this kind. Based on my knowledge of the ERISA class action legal services market, I can say that there were few skilled ERISA practitioners or firms in the national ERISA market during the 2006-2007 timeframe who were willing and able to undertake plaintiff-side class litigation challenging cash balance conversions. GLF was among that small handful of firms. If I were to hypothesize an arm's length negotiation with an informed class in 2006-2007, based on the risky nature of this type of litigation and commitment of time and resources typically required, I believe any qualified firm would reasonably insist on a one-third-of-the-common-fund recovery plus costs as its fee. I would think that the hypothesized informed class would recognize that the market for such specialized class counsel was small and that if it wished to shift to counsel all of the case's risk, it would have to offer a suitably high reward – an award of one-third of the recovery plus costs. I was not surprised to learn that no other firm stepped forward to share in the risk of this case or tried to gain control of the case by offering itself as lead counsel. Indeed, I am aware that several attorneys prominent in the ERISA plaintiffs' bar turned away cases involving cash balance conversions during this period as too risky.

13. I believe there were no skilled-ERISA practitioners in the national ERISA market during 2006-2007 who would have undertaken this type of complex litigation on an hourly

contingency fee basis. I believe only a potential high upside from a percentage of a substantial common fund attracted the few practitioners willing to take a risk on these cases. Highly skilled lawyers will not undertake large, complex ERISA class actions without the promise of recovering substantially larger fees than they would expect to receive if they were paid hourly. This additional reward is the compensation for the high risk of non-payment.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 3, 2018 at Washington, D.C.



Mary Ellen Signorille