No.17-690

IN THE

Supreme Court of the United States

FOOT LOCKER, INC. and
FOOT LOCKER RETIREMENT PLAN,

Petitioners,

v.

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

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

In accordance with Supreme Court Rule 15.8, Respondent submits this supplemental brief to address an Eighth Circuit case that Foot Locker cited for the first time in its reply brief because the decision was "issued only weeks ago" – *Boyd v. ConAgra Foods, Inc.*, No. 16-1763, 2018 WL 298705 (8th Cir. Jan. 5, 2018). *See* Reply 2, 7, 8.

Foot Locker asserts that *Boyd* is a new court of appeals decision in "direct conflict with" the Second Circuit's holding regarding the second question presented by the Petition: Whether detrimental reliance is an element of a fiduciary-breach claim. *See* Reply 7. The Second Circuit held that the question was resolved by *CIGNA v. Amara*, which held that detrimental reliance must be proved only if "'the specific remedy being contemplated imposes such a requirement.'" Pet. App. 26a (quoting *CIGNA Corp. v. Amara*, 563 U.S. 421, 443 (2011)). *See* Opp. 22. Foot Locker says that the Eighth Circuit disagrees and holds "detrimental reliance [to be] an essential element of ***any*** ERISA fiduciary-breach claim—without regard to the type of relief at issue." Reply 7 (Foot Locker's emphasis).

That is not the Eighth Circuit's position. The plaintiff in *Boyd* sought monetary relief (surcharge) for an alleged breach of fiduciary duty. Writing for the court, Judge Melloy held that:

> In asserting a breach of fiduciary duty, Boyd must show that he reasonably

> relied, to his detriment, on a material misrepresentation or omission. *See Yafei Huang v. Life Ins. Co. of N. Am.*, 801 F.3d 892, 900 (8th Cir. 2015).

Boyd, 2018 WL 298705 at *6. On its face, this appears to support Foot Locker's argument. But Judge Melloy's citation to *Yafei* – a decision he authored two years earlier – shows the truth is otherwise. *Yafei* explains that:

> The Supreme Court in *CIGNA Corp. v. Amara,* 563 U.S. 421, 131 S.Ct. 1866, 1881, 179 L.Ed.2d 843 (2011), recognized that an equitable claim for surcharge may be permitted in some situations based upon an ERISA fiduciary's breach of a duty towards a covered employee. The Court also noted that **"detrimental reliance" is not always required to prove an equitable claim alleging a breach of fiduciary duty**. *Id.* Rather, "[t]o the extent any such requirement arises, it is because the *specific remedy being contemplated* imposes such a requirement." *Id.*

Yafei, 801 F.3d at 900 (emphases added). *Yafei* goes on to explain that a showing of reliance was required in that case, because the remedy the plaintiff sought was "surcharge." *Id*. Looping back to *Boyd*, its holding is clear: Mr. Boyd was required to prove reliance because the specific remedy he sought was surcharge, not plan reformation.

CONCLUSION

Foot Locker's petition for writ of certiorari should be denied.

Respectfully submitted,

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