No. 22-_____

In the

Supreme Court of the United States

JANICE C. AMARA, GISELA S. BRODERICK, AND ANNETTE S. GLANZ, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

CIGNA CORPORATION AND CIGNA PENSION PLAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the final-judgment and merger rules, a final, appealable decision under 28 U.S.C. §1291 normally comes at the end of district court proceedings, at which point all interlocutory decisions that are not moot merge into the final judgment and are within the scope of appellate review.

A majority of the courts of appeals do not distinguish between prejudgment and postjudgment proceedings in determining finality. Instead, they apply the rule that a postjudgment order "is deemed final if it disposes of all the issues raised in the motion that initially sparked the postjudgment proceedings" and is "apparently the last order to be entered in the action." *Mayer v. Wall St. Equity Grp., Inc.*, 672 F.3d 1222, 1224 (11th Cir. 2012).

However, the Second Circuit and two other circuits treat the resolution of matters within postjudgment proceedings "differently." App. 15a. They apply a so-called "pragmatic finality" approach which can require that postjudgment orders be treated as final and immediately appealed using standards that Wright & Miller (§3913) describes as "case-by-case" and "elastic."

The Question Presented is:

May litigants wait until the end of postjudgment proceedings to appeal, with the scope of appeal including all related postjudgment decisions, or is the right to appeal postjudgment orders subject to case-by-case balancing?

PARTIES TO THE PROCEEDING

Petitioners are Janice C. Amara, Gisela R. Broderick, and Annette S. Glanz, individually and on behalf of all others similarly situated, who were the Plaintiffs and Appellants below.

Respondents are Cigna Corporation and the Cigna Pension Plan, who were the Defendants and Appellees below.

CORPORATE DISCLOSURE STATEMENT

Petitioners and the similarly-situated members of the 27,000 person class they represent are all individual persons who are not corporations.

RELATED PROCEEDINGS

The proceedings related to this Petition are:

Opinion, United States Court of Appeals for the Second Circuit, *Amara v. Cigna Corp.*, No. 20-202 (November 10, 2022),

Order Denying Plaintiffs' Motion for Reconsideration of Ruling on Enforcement and Sanctions (D. Conn. 01-cv-2361 January 10, 2020),

Ruling on Plaintiffs' Motion to Enforce Court Rulings and for Sanctions (D. Conn. 01-cv-2361 01-cv-2361 August 16, 2019),

Ruling on Attorneys' Fees, Incentive Awards, and Expenses (D. Conn. 01-cv-2361 November 29, 2018),

Ruling on Methodology for Calculating Attorneys' Fees (D. Conn. 01-cv-2361 October 17, 2018),

Ruling on Plaintiffs' Motion for Reconsideration of Ruling on Interest Rates (D. Conn. 01-cv-2361 November 7, 2017),

Ruling on Defendants' Motion for Clarification and Correction of Judgment (D. Conn. 01-cv-2361 July 14, 2017),

Revised Ruling on Proposed Methodology and Request for Order of Compliance Plan (D. Conn. 01-cv-2361 January 10, 2017), and

Ruling on Proposed Methodology and Request for Order of Compliance Plan (D. Conn. 01-cv-2361 January 14, 2016).

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PETITION FOR A WRIT OF CERTIORARI

This case is an ideal vehicle for this Court to provide much-needed clarification concerning the application of "finality" to postjudgment proceedings for purposes of 28 U.S.C. §1291.

Early in its analysis, the Second Circuit states that "the postjudgment finality inquiry takes us into rocky terrain, since determining what constitutes a final decision can be [especially] tricky in that context." Slip. Op. 15. In its decision, the Second Circuit invoked a preference for a "practical, not technical" application of finality, but it adopted a case-by-case balancing approach that will require parties to pursue piecemeal appeals lest they lose their right to challenge interlocutory decisions. Two other circuits similarly apply pragmatic finality in the form of ad hoc balancing to determine when a postjudgment order is final for purposes of appeal.

Six circuits led by the Seventh and Eleventh Circuits have rejected that approach and hold that a party is "entitled to wait until the proceedings [a]re over and then appeal, bringing before us all the nonmoot interlocutory rulings adverse to him." *Solis v. Current Dev. Corp.*, 557 F.3d 772, 776 (7th Cir. 2009). The Second Circuit's references to a "rocky terrain" and that finality determinations "can be tricky" are actually quotes from *Solis*, where the Seventh Circuit went on to say:

> But the impetus for the postjudgment proceedings is a good place to start—an order that addresses all the issues raised in the motion that sparked the

> postjudgment proceedings is treated as final for purposes of section 1291.

In this case, following the majority rule would allow Petitioners to challenge district court decisions that together denied them approximately $100 million in retirement benefits. Those challenges involved decisions on interpretations and proposals by Cigna that are inconsistent with the relief mandate and the terms of the pension plan, and that only serve to reduce the retirement benefits that class members are provided to Cigna's financial advantage.

This Court should grant the petition to resolve this conflict over appellate jurisdiction and adopt the rule followed by the majority of circuits, under which litigants may wait until the end of postjudgment proceedings to appeal, with the scope of appeal including all postjudgment decisions.

OPINIONS BELOW

The decision of the Second Circuit below is reproduced at 1a-33a in the Appendix and reported at 53 F.4th 241. Eight District Court rulings and orders leading up to that decision are reproduced at App. 35a-167a.

JURISDICTION

The Second Circuit issued its decision on November 10, 2022, App. 1a-3a, and denied a timely petition for rehearing on January 12, 2023, 34a Accordingly, this Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Judiciary Act of 1891, also known as the Evarts Act, as amended and currently codified in 28 U.S.C. §1291, provided that the then newly-created courts of appeals "shall have jurisdiction from all final decisions of the district courts of the United States ...."

Under the Rules Enabling Act, as amended in 1990 and codified at 28 U.S.C. § 2072(c), this Court is authorized to prescribe general rules that "may define when a ruling of district court is final for the purposes of appeal under section 1291." Reproduced at App. 214a-215a. Pursuant to 28 U.S.C. § 2072(b), "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." *Id.*

As amended effective December 1, 2021, Rule 3(c)(5) of the Federal Rules of Appellate Procedure provides that "a notice of appeal encompasses the final judgment ... if the notice designates ... an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties." App. 216a-217a. As amended effective the same date, Rule 3(c)(4) of the Federal Rules of Appellate Procedure provides that "[t]he notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal." *Id.*

STATEMENT OF THE CASE

This petition stems from a decades-long effort by a class of 27,000 Cigna employees to recover wrongfully denied retirement benefits. After one decision from

this Court, two trips to the Second Circuit, and countless district court orders, it was established that the pension plan sponsored by respondent Cigna was required to be "reformed" to remedy Cigna's "affirmatively misleading representations" about retirement benefits after a change from a pension plan that was called Part A to a plan that was called Part B. The reformation provided that all of the "class members will receive (1) the full value of "their accrued benefits under Part A," including early retirement benefits, in annuity form; and (2) "their accrued benefits under Part B," in annuity or lump sum form. 925 F.Supp.2d 242, 265 (D.Conn. 2012).

After the Second Circuit affirmed this relief in 2014, the case shifted to a postjudgment phase of enforcing the reformation to ensure that Cigna provided "the full value" of the wrongfully denied benefits to remedy Cigna's misleading representations. See *Cigna Corp. v. Amara*, 563 U.S. at 434-35. As the postjudgment proceedings stretched into 2017, the district court made rulings on the methodology for calculating those benefits, but disputes kept cropping up. Wanting to avoid "further delays" in former employees actually receiving relief, the district court ordered that at least the portions of those benefits that Cigna no longer disputed had to be paid immediately. Whether "additional benefits" that Cigna disputed were to be provided under the reformation was an issue to be decided after a "motion to enforce."

At that point, more postjudgment litigation was not merely foreseeable by the district court, it was foreseen. Although the district court had ruled on the

general methodologies, the parties were disputing valuable details of that methodology. Everyone, including Cigna, knew that if Cigna applied the methodology using the "Company interpretations" that it had earlier revealed, petitioners would seek further relief.

A. The Prejudgment Proceedings.

In 2008, Judge Mark Kravitz ordered a "reformation" of the Cigna Pension Plan to remedy "affirmatively misleading statements" Cigna had made to its employees about their retirement benefits, as the employees had proven in a lengthy bench trial. 559 F.Supp.2d at 206. The Second Circuit affirmed his "well-reasoned and scholarly opinion." 348 Fed.Appx. at 627. On certiorari, this Court ruled that reformation was not an available form of relief under ERISA §502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B), the section on which Judge Kravitz had grounded it, but that it "closely resembled" the reformation available under ERISA §502(a)(3), which authorizes "appropriate equitable relief." 563 U.S. at 440.

After Judge Kravitz's untimely death in 2012, this case was reassigned to Judge Janet Arterton, who ordered reformation, this time under ERISA §502(a)(3), adopting Judge Kravitz's "careful calibration of the interests at stake" in his 2008 relief decision. 925 F.Supp.2d at 265. The 2014 decision by the Second Circuit affirmed the reformation as "appropriate equitable relief" to remedy Cigna's "fraud" by providing for all class members to receive "the full value" of the "A+B" retirement benefits, "including early retirement benefits," and "the

insulation from interest-rate risk under the Part A plan." 775 F.3d 510, at 515-16, 518.

B. The Postjudgment Proceedings.

Once the Second Circuit affirmed the reformation in 2014, the subsequent proceedings became proceedings "to enforce the plan as reformed." 563 U.S. at 435. On remand, the District Court ruled that for remedy payments to begin issuing to class members, it needed to issue orders on the "methodology" for implementing the reformation, "the proper calculation of the present value of the common fund recovery," the attorneys' fee award, and "notices" to class members. App. 69a, 70a-71a.

The rulings on the methodology and the valuation of the recovery proved to be a less "mechanical process" than the District Court had anticipated. *Compare* 925 F.Supp.2d at 264. The District Court issued a calculation methodology ruling in January 2016, and then revised that ruling in January 2017. Cigna then moved to modify the "revised" ruling.

In July 2017, the District Court, over Plaintiffs' objections, modified part of the revised ruling on the interest rates that should be used to calculate a "set off" to allow Cigna to use higher rates. Plaintiffs had objected that this was contrary to Judge Kravitz's "explicit instructions" and the principles in the Second Circuit's affirmance. App. 88a-89a; 130a-132a.

After the District Court denied reconsideration of the July 2017 ruling, Plaintiffs filed the "Notice of Value of Common Fund" on December 1, 2017 as the

District Court had instructed them to do. But "Cigna disputed Plaintiffs' common-fund valuation." 6a. Those disputes focused on Cigna's desire to make more use of higher interest rates as well as older mortality tables for annuitization, and to restrict the payments of early retirement benefits. Dkt.#520 in D. Conn. No. 01-cv-02361 ("Response to Plaintiffs' Notice of Value"), at 10-11.

The District Court recognized there were still "methodological disputes" between the parties, but ruled that it was not going to "relitigate any of the methodology" at that time because this would "further delay" commencement of the relief. App. 177a-182a. The District Court told Plaintiffs' counsel that Cigna had not "done anything yet" and that Plaintiffs could file a "motion to enforce" if Cigna implemented the relief based on its disputed interpretations. 182a The District Court warned Cigna it was "on full notice" that it proceeded at its own "risk" if the Plaintiffs prevailed on the motion to enforce. 181a, 208a.

The District Court made the same rulings in written orders issued in October 2018 and November 2018. The October 2018 Order recognized the "methodological disputes" about the "remedy amounts paid to class members" that the parties "agree" exist, App. 71a-72a, and ordered:

> [T]he Defendant implements its interpretation of the reformed plan at its own 'risk[,]' if it is later found to have done so in violation of its fiduciary duties or previous court orders….[I]f there is [a] further amount of money thereafter that

> [Defendant] will owe as a result of erroneously calculated benefits, then the Court will order a supplement … and may require [Defendant] to shoulder it.

Id. The District Court again ruled in the November 2018 order that:

> In the event Plaintiffs file and prevail on a motion to enforce their interpretation of the requirements on Cigna and the Court's previous rulings, resulting in additional benefits to be paid class members, Cigna will be required to pay appropriate attorney's fees on any such additional remedy amounts found to be due.

App. 62a. The November 2018 order relatedly directed Cigna and Class counsel to "exchange their individual results for each class member for inclusion in Plaintiffs' website benefit statement and in Cigna's mailed notices." 69a. Cigna was directed to mail the notices with both its individual results and Class counsel's results. *Id.*[1]

Plaintiffs filed the "motion to enforce" the reformation and the prior methodology orders at the start of April 2019. But in an August 2019 ruling, the

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[1] Cigna's "Status Report Regarding Defendants' Implementation of the Remedy" shows that the notices Cigna mailed in early 2019 accordingly highlighted Cigna's and Plaintiffs' differing calculations of the relief amounts, and stated that "additional benefits" would be paid if Plaintiffs prevailed on the disputes. *See* Doc. 53 in CA2 20-2319, at JA87, 91, 98.

District Court granted the motion only in part. The District Court granted the motion to enforce on "small benefit cashouts," but it otherwise denied Plaintiffs any additional benefits. *See* App. 45a-55a. Plaintiffs moved for reconsideration on the basis that the unfavorable rulings on interest and mortality rates and early retirement benefits did not conform with the 2014 Second Circuit mandate, the prior methodology rulings, or statutory requirements in ERISA. But the District Court denied Plaintiffs' motion for reconsideration on January 10, 2020. 35a-44a.

C. The Appeal.

Plaintiffs filed a notice of appeal to the Second Circuit five days after the denial of reconsideration. The notice of appeal designated the August 2019 Ruling along with the July 2017 Ruling (and the denials of reconsideration of both rulings) as the challenged rulings. Doc. 1 in CA2 No. 20-202.

Six months after the notice of appeal, Cigna filed a motion to dismiss any appeal of the "Methodology Rulings," arguing that those orders had as a group become "final" orders in November 2017 after Plaintiffs' motion to reconsider the July 2017 ruling was denied. Doc. 63 in CA2 No. 20-202, at 2. Plaintiffs opposed the motion on the basis of the final judgment and merger rules, pointing out that the District Court had not designated the July 2017 ruling or either of its earlier methodology orders as final appealable orders and that it had expressly foreseen that the last order would be on the motion to enforce. Cigna's motion was subsequently referred to the merits panel.

In its November 2022 decision, the Second Circuit dismissed Plaintiffs' appeal of the July 2017 Ruling on jurisdictional grounds, App. 23a-26a, and it also dismissed Plaintiffs' appeal of the other "Methodology Orders" on jurisdictional grounds, 9a-10a, 23a, 26a, 32a. The decision held that Plaintiffs' appeal of those Rulings was untimely even though it had been filed within 30 days of the district court's final decision denying Plaintiffs' motion to enforce. The Second Circuit was unsure whether the final decision triggering Plaintiffs' obligation to appeal was the November 2017 decision or the November 2018 decision, but decided it did not "need to decide" that issue, 24a n.7, and held that Plaintiffs should not have waited for the denial of their motion to enforce to appeal the earlier interlocutory orders.

A petition for rehearing or rehearing en banc of the Second Circuit's decision was denied on January 12, 2023. App. 33a-34a.This petition for certiorari is timely under the 90-day period in S.Ct. Rule 13.

REASONS FOR GRANTING THE PETITION

Section 1291 of Title 28 of the United States Code provides that the courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States." Despite the mandatory nature of this rule, there is a long-standing conflict in the circuits about what constitutes a "final decision" requiring appeal under 28 U.S.C. § 1291 in the context of postjudgment proceedings. Under the majority approach, parties may wait until the final postjudgment decision has been issued and then appeal that decision along with

all preceding interlocutory decisions – which is the general rule enunciated in *Digital Equipment Corp. v. Desktop Direct*, 511 U.S. 863, 868 (1994) ("a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated"). This is a clear rule which eliminates the need for piecemeal appeals while preserving the right to appellate review of adverse rulings.

In contrast, the Second Circuit's approach is that in postjudgment proceedings, "pragmatic" considerations may outweigh the policy "against piecemeal appeals" and if an appeal is not taken from an order that is pragmatically final, the right to appellate review may be forfeited. The Eighth and Ninth Circuits also use this pragmatic approach.

What constitutes a "final decision" under Section 1291 is a fundamental question relating to the jurisdiction of the courts of appeals. This case presents the opportunity for this Court to make clear that, whether the case involves prejudgment or postjudgment orders, a party may not be deprived of the right to appeal under elastic, indefinite, or post hoc standards, but instead may wait until a final decision resolves all disputes between the parties before appealing.

I. The Courts of Appeals Need Guidance on the Finality of Postjudgment Orders for Purposes of Appeal.

In the words of *Weber v. McGrogan*, 939 F.3d 232, 237 (3d Cir. 2019), this petition presents an opportunity for this Court to clean up the "mess"

concerning finality that originated from the now largely-abandoned opinion in *Gillsepie v. U.S. Steel*, 379 U.S. 148 (1964). *Gillespie* ruled that issues of "finality" under §1291 are "frequently so close a question that decision of that issue either way can be supported with equally forceful arguments," and that in those "twilight zone" situations, a "practical rather than technical construction" may be used with "the most important considerations [being] 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'" 379 U.S. at 152-54. As *Weber* describes it: armed with those concepts, "and usually citing noble goals, circuit courts have side-stepped the finality requirement of §1291, relying on the oft-quoted preference for a '"practical rather than a technical construction' of the law. And so, exceptions sprouted like dandelions." 939 F.3d at 237.

This Court revisited *Gillespie*'s determination of finality by a case-by-case weighing of interests in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). Seeing that there was practically no end to case-by-case balancing, *Coopers & Lybrand* warned that "if *Gillespie* were extended beyond the unique facts of that case, §1291 would be stripped of all significance." 437 U.S. at 477 n.30. In *Johnson v. Jones*, 515 U.S. 304, 315 (1995), this Court returned to the same topic, rejecting "ad hoc balancing to decide issues of appealability," holding that "[w]e of course decide appealability for categories of orders rather than individual orders." This petition presents the opportunity to revisit the exceptions to finality that have now sprouted like dandelions "in the context of postjudgment proceedings."

A. The Circuits Are Split on How to Analyze Finality in Postjudgment Proceedings.

In this case, the Second Circuit stated that "finality principles apply differently in the postjudgment context" and then that "a practical rather than a technical construction of finality is especially appropriate in the postjudgment context." App. 15a-17a. As indicated, the majority of the circuits do not, however, apply finality principles "differently in the postjudgment context," but instead treat post-judgment proceedings "as a free-standing litigation .... Thus an order is deemed final if it disposes of all the issues raised in the motion that initially sparked the postjudgment proceedings" and is "apparently the last order to be entered in the action." *Mayer v. Wall St. Equity Grp.*, 672 F.3d 1222, 1224 (11th Cir. 2012).

The Second Circuit's approach conflicts not only with *Mayer*, but also with the Seventh Circuit's decision in *Solis v. Current Dev. Corp.*, 557 F.3d 772, 775 (7th Cir. 2009), a case which, like this one, involved postjudgment orders for the calculation of retirement benefits. In *Solis*, the defendant "described what was left to do—the final calculation of the amount of money each former participant would receive—as nothing more than a ministerial detail that would not affect the finality of the court's order." The Seventh Circuit rejected that argument, stating: "That's a stretch. The payments were one of the twin purposes of the suit and involved millions of dollars, to be divvied up amongst nearly 40 beneficiaries. Determining the payments wasn't a matter of simply plugging numbers into a court-approved equation, as [the defendant] would have us believe. The parties

had, and indeed continue to have, substantial disagreements regarding the figures. Therefore, we conclude that the postjudgment proceedings were not final until the court determined the distribution figures." Simply stated, this case is indistinguishable.

B. The Circuit Split Is Deep, Longstanding, and Active.

The circuit split on the finality of postjudgment proceedings that this case reflects is deep, longstanding, and active, but also scarcely acknowledged. The Seventh Circuit recognized the split in an opinion by Judge Posner in *Bogard v. Wright*, 159 F.3d 1060 (7th Cir. 1998). *Bogard* rejected the use of "pragmatic finality" in the context of postjudgment proceedings, and gave the Second Circuit's decision in *United States v. International Brotherhood of Teamsters*, 931 F.2d 177, 183 (2d Cir. 1991), and the Ninth Circuit's decision in *Stone v. City and County of San Francisco*, 968 F.2d 850, 855 (9th Cir. 1992), as examples of the conflicting "pragmatic finality" approach. 159 F.3d at 1063. The Seventh Circuit's rejection of "pragmatic finality" in postjudgment proceedings was reiterated by Judge Wood in *Gautreaux v. Chicago Housing Authority*, 178 F.3d 951, 956 (7th Cir. 1999).

In 2012, the Eleventh Circuit issued its *Mayer v. Wall St. Equity* decision holding that postjudgment proceedings should be treated like "a free-standing litigation," with Professor Bryan Lammon later writing about how, in contrast, some other circuits were continuing to use *Gillespie*'s "ad hoc balancing" to decide postjudgment finality. *See* "Dizzying Gillespie: The Exaggerated Death of the Balancing

Approach and the Inescapable Allure of Flexibility in Appellate Jurisdiction," 51 *U. Rich. L. Rev.* 371, 372-79, 393-400 (2017).

On the other side of the circuit split, the Ninth Circuit's 2021 decision in *Flores v. Garland*, 3 F.4th 1145, 1154 & n.6 (9th Cir. 2021), has also acknowledged the conflict, recognizing that *Bogard* rejected the "pragmatic finality" approach that the Ninth Circuit took in *Stone*, but "leav[ing] the resolution of that tension for another day."

As detailed further below, the conflict is extensive. Six circuits agree that the final decision rule in postjudgment proceedings is the same rule that applies generally, while three circuits approach finality on an ad hoc case-by-case basis.[2]

1. The "complete-proceedings" approach.

Six courts of appeals use what petitioners call the "complete-proceedings" approach to appeals of postjudgment orders. These courts treat post-judgment proceedings as a separate piece of litigation. A final, appealable decision comes once the district

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[2] To avoid confusion, petitioners point out that a third approach applies in bankruptcy proceedings. In *Ritzen Grp, Inc. v. Jackson Masonry, LLC*, 140 S.Ct. 582, 586 (2020), this Court distinguished the finality rule that "normally" applies under §1291 from appeals in bankruptcy cases under 28 U.S.C. 158(a). *Ritzen* held that because such cases embrace "an aggregation of individual controversies," "[o]rders in bankruptcy cases qualify as 'final' when they definitively dispose of discrete disputes within the overarching bankruptcy case." No circuit on either side of the split has suggested that the 28 U.S.C. 158(a) "finality" standard applies to postjudgment orders like the ones at issue here.

court resolves all of the postjudgment proceedings. The Seventh Circuit has the most decisions explaining this approach, followed by the Eleventh Circuit, and then decisions in the First, Third, Sixth, and Tenth Circuits.

The Seventh Circuit. Even before *Bogard* and *Gautreaux*, the Seventh Circuit decided *ACORN v. Illinois State Bd. of Elections,* 75 F.3d 304, 305-6 (7th Cir. 1996), which ruled that a postjudgment order interpreting an injunction was "not final in any ordinary sense of the word, since compliance proceedings continue before the district court."

As discussed, the Seventh Circuit's 2009 decision in *Solis*, 557 F.3d at 776, addressed postjudgment relief in the form of retirement benefits, much like the relief mandated in this case but with the opposite result in terms of appellate jurisdiction. In *Solis*, the Seventh Circuit held that postjudgment proceedings were not over until the district court determined the payments to all beneficiaries of an employee-benefits plan. *Id*. So an order setting the prejudgment interest rate was not a final order for purposes of appeal even though it completely resolved that issue. But a later order resolving the final payments to all participants was a final order, with the scope of that appeal including all orders entered in the postjudgment proceedings. The appellant thus "was entitled to wait until the proceedings were over and then appeal, bringing before [the court] all the nonmoot interlocutory rulings adverse to him." "To hold otherwise," the court added, "would invite litigants to appeal every procedural order that follows the entry

of a consent decree, resulting in 'an unmanageable proliferation of appeals.'" 557 F.3d at 776.

In *JPMorgan Chase Bank, N.A. v. Asia Pulp & Paper Co., Ltd.*, 707 F.3d 853, 867-78 (7th Cir. 2013), the Seventh Circuit similarly held that a post-judgment order refusing to stay enforcement of asset-discovery citations was not final. The court said that it treats postjudgment proceedings "like a freestanding lawsuit and look[s] for the final decision in that proceeding to determine the scope of appellate review." "In other words, the question is whether the district court's order completely disposes of the postjudgment proceedings, not a single issue within those proceedings." *Id*.

In *JMS Development Co. v. Bulk Petroleum Corp.*, 337 F.3d 822, 827 (7th Cir. 2003), the Seventh Circuit reiterated that an order requiring parties to pay environmental cleanup costs was not final until the amount of those costs was ultimately determined. There would be a final decision once the district court had nothing left to determine with respect to the cleanup, and the cost order would merge into that judgment. *Id*.

The Eleventh Circuit. In *Mayer*, 672 F.3d at 1224, the Eleventh Circuit held that a postjudgment order rejecting attorneys' fees for one side was not final until the district court resolved the other side's fees. The court explained that postjudgment decisions are subject to the same finality tests as judgments on the merits. Most recently, in *SEC v. Mut. Benefits Corp.*, 2022 U.S. App. LEXIS 28713, *6 (11th Cir. 10/17/2022), the Eleventh Circuit followed *Mayer in* holding that an order approving procedures on how to

sell insurance policies to wind down a trust was not a final order because that process was still "ongoing."

The First Circuit. In *Caribbean Mgmt. Grp., Inc. v. Erikon LLC,* 966 F.3d 35, 40 (1st Cir. 2020), the First Circuit held that an order denying leave to execute a judgment was final, as it marked the end of post-judgment collection efforts. The court said that it treated postjudgment proceedings as a separate lawsuit, distinct from the suit that led to the initial judgment. *Id*. Under the approach, orders in post-judgment proceedings are final if they "leave[] the district court with no further work to resolve the post-judgment dispute and, thus, end[] the postjudgment proceeding." *Id*.; *see also Whitfield v. Municipality of Fajardo,* 564 F.3d 40, 45–46 (1st Cir. 2009).

The Third Circuit. The Third Circuit uses the complete-proceedings approach but is slightly different than the other circuits in that it uses the term "practical finality" to describe its approach. In *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 24 F.4th 242, 254-255 (3d Cir. 2022), the Third Circuit thus held that a "postjudgment order is final when it leaves nothing to be done in the case save to superintend, ministerially, the execution of the decree." While the Third Circuit used the term "practical finality," it made clear that its version of that term "requires us to determine whether the District Court's judicial role is over," which was not the case because there were still "multiple legal" issues as a result of which "[m]ore appeals will likely follow." *Accord, Isidor Paiewonsky Assocs. v. Sharp Properties*, 998 F.2d 145, 150 (3d Cir. 1993) (defining "[a] final decision [as] one which disposes of the whole

subject, gives all the relief that was contemplated, provides with reasonable completeness, for giving effect to the judgment and leaves nothing to be done … save to superintend, ministerially, the execution of the decree").

The Sixth Circuit. In *JPMorgan Chase Bank, N.A. v. Winget*, 920 F.3d 1103, 1108 (6th Cir. 2019), the Sixth Circuit held that an interim attorney's fee award in postjudgment proceedings was not final. The court said that it treats postjudgment proceedings "as a separate lawsuit from the action which produced the underlying judgment." Therefore, there would be no final decision "until the district court complete[d] the postjudgment proceedings." *Id*. at 1106; *see also Local 1982, International Longshoremen's Association v. Midwest Terminals of Toledo, International, Inc.*, 944 F.3d 607, 612 (6th Cir. 2019) (Thapar, J., concurring) ("our circuit (like others) has explained that courts should view finality in postjudgment proceedings the same way they view finality more generally: they should ask whether the decision ends the post-judgment litigation").

The Tenth Circuit. The Tenth Circuit's recent decision in *In re Syngenta AG MIR 162 Corn Litigation*, 61F.4th 1126, 1171-72 (10th Cir. 2023), holds that appeals challenging various orders on the allocation of attorneys' fees were not final, as they came before a final order allocating those fees. The court noted that "courts tend to treat postjudgment proceedings as standalone litigation units subject to the same finality rules that apply to prejudgment merits proceedings." *Id*. at 1171. Despite the unlikelihood of the district court revisiting the fees

orders, no order had yet resolved all issues. *Id*. at 1172-73. *Accord, McClendon v. City of Albuquerque*, 630 F.3d 1288, 1293 (10th Cir. 2011) (Gorsuch, J.) (holding that to be final, a postjudgment order must "signal the litigation is over" and "disassociate the district court from the case.").

2. The "pragmatic finality" approach.

On the other side of this circuit split are the courts that follow what *Bogard* described as the "pragmatic finality" approach to postjudgment appeals. Typically invoking the language of discretion with references to weighing, balancing, and the likelihood of future proceedings, these courts hold that the resolution of whether discrete orders in postjudgment proceedings are final for purposes of appeal depends on the circumstances. As the Seventh Circuit observed, the standards used in this balancing or weighing are largely "formless" and "indefinite." *Bogard,* 159 F.3d at 163. As petitioners further discuss below, these decisions disregard the foundational policy in §1291 "against piecemeal appeals," *see, e.g.*, *Microsoft v. Baker*, 137 S.Ct. 1702, 1707 (2017), in favor of "the chance that litigation at hand might be speeded, or a 'particular injustice' averted by a prompt appellate court decision." *Digital Equip. Corp.*, 511 U.S. at 868 (citation omitted).

Three circuits, the Second, Eighth and Ninth Circuits, have issued decisions endorsing this "pragmatic" view of postjudgment proceedings:

The Second Circuit. The Second Circuit's decision in this case not only embraces *Gillespie*, but it is packed with references to balancing, weighing, and

the prospects or likelihood of future proceedings, not for any entire category of postjudgment proceedings, but only in the "litigation at hand." As examples, the Second Circuit gave "less weight" to avoiding piecemeal appeals, afforded "correspondingly greater weight" to the danger of injustice by delay, "weigh[ed] heavily" that Cigna began payments before Plaintiffs appealed, and found "little prospect" of further proceedings. App. 16a-17a, 24a-26a.

The decision below is not alone within the Second Circuit in bringing this language of "pragmatic" balancing to bear on the finality of postjudgment proceedings. In *United States v. Yonkers Board of Education*, 946 F.2d 180, 183 (2d Cir. 1991), the Second Circuit held that a variety of orders entered in the ongoing supervision of a consent decree—including a refusal to recuse and the entry of a protective order—were final. The court explained only that "[i]n cases involving a protracted remedial phase, we must give '§ 1291 a practical rather than a technical construction.'" In *United States v. International Brotherhood of Teamsters*, 931 F.2d 177, 182-83 (2d Cir. 1991), the Second Circuit also held that an order concerning the elections of union officials, entered as part of an ongoing consent decree, was final under a "flexible" approach to finality.[3]

[3] *United States v. Yalincak*, 853 F.3d 629, 639-41 (2d Cir. 2017), is difficult to categorize because it combines the phrase "practical construction of finality" with the majority approach that in "postjudgment collection proceedings," "the relevant final decision" is "the subsequent judgment that concludes the collection proceedings."

The Eighth Circuit. In *Tweedle v. State Farm Fire & Cas. Co.*, 527 F.3d 664, 668 (8th Cir. 2008), the Eighth Circuit used a "practical" approach to override a "District Judge's "expressed view that this case is not yet final for purposes of appeal," with the Eighth Circuit instead ruling that "we have jurisdiction to determine our own jurisdiction … regardless of the District Court's belief as to finality." Thus, the Eighth Circuit held that a variety of postjudgment orders were final and appealable despite other unresolved matters pending in the district court. The Eighth Circuit acknowledged the possibility that this would produce a subsequent appeal, but held that the possibility of piecemeal appeals did not preclude practical finality. *Id*.

In *Giove v. Stanko*, 49 F.3d 1338, 1342 (8th Cir. 1995), the Eighth Circuit similarly held that post-judgment orders overruling objections to writs of execution were final, even though the underlying collection proceeding was not over. The Eighth Circuit stated that in the postjudgment context, it "give[s] special attention to the competing interests at the heart of every finality question—limiting inconvenient and piecemeal appeals versus denying justice by delaying the appeal." *Id*. The court was not concerned about piecemeal review because "further proceedings [would] not produce an order that [was] any more final on the issues presented" and the appealed "mini-dispute[s] [were] over insofar as the district court [was] concerned." *Id*. at 1342; *see also Miller v. Alamo*, 975 F.2d 547, 550 (8th Cir. 1992) (holding that the resolution of a "mini-dispute" was final, as it was "over insofar as the district court is concerned; nothing the

court could do in the future will make its decision any more final").

The Ninth Circuit. The Ninth Circuit has repeatedly applied what it calls "practical" rules in postjudgment cases, although it often emphasizes that there will be "no other opportunity for review" of the order it considers practically final. *See United States v. State of Washington*, 761 F.2d 1404, 1407 (9th Cir. 1985) (holding that an order approving an interim allocation plan was a final decision "because there is little danger of piecemeal review and because this is the only opportunity for meaningful review"); *Stone v. City and County of San Francisco*, 968 F.2d 850, 855 (9th Cir. 1992) (holding that a contempt citation issued in ongoing oversight of a consent decree was final because "pragmatic concerns cut in favor of finding the contempt order to be final"; following *Gillespie*, the court balanced "the inconvenience of piecemeal review on the one hand and the danger of denying justice by delay on the other," and determined that an immediate appeal would not encourage piecemeal litigation and had no potential for interference with the district court's overseeing the consent decree). *See also United States v. Ray*, 375 F.3d 980, 986 (9th Cir. 2004) ("unless [postjudgment] orders are found final, there is often little prospect that further proceedings will occur to make them final"); *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1064-65 (9th Cir. 2010) (under a "practical" approach, concluding that there would be no "future opportunity for review" unless an interlocutory appeal was allowed); *Flores v. Garland*, 3 F.4th 1145, 1153-54 (9th Cir. 2021) ("[f]ollowing *Armstrong*, we conclude that the September 21 Order is a final

decision" because the government "is unlikely to have any opportunity to appeal [the Order] unless we exercise jurisdiction").

In short, three circuits are wedded to "pragmatic finality" on the ground that postjudgment proceedings should often be treated differently, while six circuits treat postjudgment proceedings as free-standing standalone litigation in which the final decision is the decision that resolves all of the issues that "initially sparked the postjudgment proceedings." *See, e.g., Mayer,* 672 F.3d at 1224.

II. Despite the Limitation of *Gillespie* to Its "Unique Facts," *Gillespie* "Balancing" Is Still Active in the Postjudgment Context.

Based on the Second, Eighth and Ninth Circuit's decisions, there is absolutely no denying that this Court's long-abandoned *Gillespie* decision is still actively in use "in the postjudgment context." Practically all of the circuits, including the Second and the Ninth Circuits, have decisions holding that *Gillespie* is a dead letter. *See, e.g., In re Chateaugay Corp.*, 922 F.2d 86, 91 (2d Cir. 1990); *Solis v. Jasmine Hall Care Homes, Inc.*, 610 F.3d 541, 544-45 (9th Cir. 2010). But *Gillespie* continues to be applied in postjudgment proceedings in the Second, Eighth and Ninth Circuits—even though *Gillespie* itself did not involve any postjudgment orders or proceedings.

Here, the Second Circuit adopted *Gillespie*'s ruling that a final decision "does not necessarily mean the last order possible to be made in a case" and then decided that postjudgment proceedings should be treated "differently" and that "a practical …

construction of finality is *especially* appropriate in the postjudgment context." App. 15a (emph. in original). The Second Circuit then engaged in an ad hoc balancing that gave "less weight" to avoiding piecemeal appeals and "correspondingly greater weight" to an injustice it believed Cigna would suffer if Plaintiffs' appeal was not resolved on jurisdictional grounds. *Id*. at 15a-16a, 24a-26a.

A. This Court Limited *Gillespie* Because It Makes Finality an Elastic, Indefinite, Case-by-Case Determination.

This Court has held that it is especially important that jurisdictional rules be clear. As the Court stated unanimously in *Hall v. Hall*, 138 S. Ct. 1118, 1131 (2018), the "normal rule" is that a "final decision" is one that resolves all the disputes between the parties. This "normal rule" "provides clear guidance to litigants." Exceptions diminish the clarity of that guidance, so any "exceptions to such a critical step in litigation ... should not be undertaken lightly." *Id.*

Because the standards for "pragmatic finality" are essentially "formless," they also do not provide "clear guidance," including on such basics as whether the "pragmatic" standards are based on the "litigation at hand" or are "categorical" as described in *Johnson v. Jones*, 515 U.S. at 315. Wright & Miller devotes an entire section of its treatise on federal procedure to "pragmatic finality" describing it as an "elastic" and "individualized" approach to appellate jurisdiction with "little indication of the balancing factors deemed relevant." *Federal Practice and Procedure*, §3913.

Similar to Wright & Miller, *Bogard* explains that "pragmatic finality" is a "formless" and "nebulous concept" even though "there are other, clearer ways to address the concern [with orders with irreparable consequences] that lies behind it." 159 F.3d at 1063. *Bogard* recognized that not all postjudgment proceedings have a "natural terminus," but ruled that, even then, the solution is not to "pick and choose among" the orders issued in "complex and protracted" proceedings "on the basis of the nebulous concept of 'pragmatic finality.'" *Id*.

B. *Gillespie*'s "Pragmatic Finality" Fosters "Piecemeal Appeals" and "Ad Hoc" Decision-making.

"Pragmatic finality" is not just elastic and formless, as Wright & Miller and *Bogard* say, but by virtue of those qualities it leads to "piecemeal appeals and "ad hoc" decision-making. *In Digital Equipment Corp*., 511 U.S. at 868, this Court held that appellate jurisdiction should not be determined by ad-hoc, case-by-case balancing based on "the chance that the litigation at hand might be speeded, or a 'particular injustice' averted … by a prompt appellate court decision." The Seventh Circuit reinforced this point in *Bogard* by observing that if the perceived injustice is because some interlocutory postjudgment orders "have irrevocable consequences," the appeals court should look at whether mandamus is available, rather than designate an order as "final" to avert a harm that is "not so egregious as to warrant immediate appellate intervention" under the "orthodox" route. 159 F.3d at 1063. In *Coopers & Lybrand v. Livesay*, 437 U.S. at 474-75, this Court made the related point that

§1292(b) already addresses concerns with irreparable consequences by offering an "immediate appeal" through a certification from the "trial court."

As occurred here, the policy of §1291 that "pragmatic finality" most often sacrifices is the policy against "piecemeal appeals." As this Court has stated, "the foundation of [the statutory] policy is one against piecemeal litigation," *i.e.*, sending cases "up in fragments." *Catlin v. United States*, 324 U.S. 229, 233-34, 243 (1945). The decision by the Second Circuit in this case that the Plaintiffs were required to take at least two postjudgment appeals to preserve their rights is a stunning departure from this Court's consistent precedents that §1291's "policy" of waiting until the final decision to appeal is "inimical" to "piecemeal" appellate review. *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982). Piecemeal appeals "halt ... the orderly progress of a cause," *Cobbledick v. United States*, 309 U.S. 323, 325-26 (1940), and result in another form of waste of judicial resources. As *Van Cauwenberhe v. Biard*, 486 U.S. 517, 527-29 (1988), explains, "[a]llowing appeals from orders that involved considerations enmeshed in the merits of the dispute would waste judicial resources by requiring repetitive appellate review of substantive questions in the case."

The policy against "piecemeal appeals" further recognizes that fragmenting the proceedings before the district court by appellate court order "undermines the independence of the district judge" and "the deference that appellate courts owe to" that judge. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374-75 (1981). In this case, the district court

stated orally, and in two orders, that it was "putting Cigna to the test of doing it right, and then, upon the actual not doing it right – if that is in fact what happens – then there are remedies" through a "motion to enforce." App. 179a-181a. The Second Circuit's decision to retroactively require the Plaintiffs to have noticed an appeal before this process was over "undermines the independence of the district judge."

The courts of appeals have also always resisted rulings that produce "piecemeal appeals" because this not only "halts the orderly progress of a cause," but it can bring about a deluge of "precautionary" or "protective" appeals. As the Fifth Circuit ruled *en banc* in *Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, 401 (5th Cir. 1984), the finality rule "provide[s] a clear test so that needless precautionary appeals need not be taken lest substantive rights be lost." *Accord, Gateway KGMP Dev., Inc. v. Tecumseh Prods.*, 731 F.3d 586, 589 (6th Cir. 2013) ("[a]n indeterminate finality line … waste[s] judicial resources by spurring protective appeals from non-final orders"). *Exchange Nat'l Bank v. Daniels*, 763 F.2d 286, 290 (7th Cir. 1985), also emphasizes that requiring appeals from "potentially" final orders can "lead to pointless forfeitures as litigants inadvertently overlooked the possibility that a particular order might be characterized as a 'final decision.'" But there was no consideration of that here.

C. FRAP 3(c), As Amended in 2021, Is Inconsistent with the Pragmatic Finality Approach.

Petitioners respectfully submit that amendments by this Court to FRAP 3(c), which became effective

December 1, 2021 after oral argument had taken place in this case, support the complete-proceedings approach to finality that the six circuits cited above follow, and are inconsistent with the "pragmatic finality" approach that the Second Circuit and two others have taken.[4]

This FRAP 3(c) amendments were adopted by this Court on April 1, 2021 under the authority of the Rules Enabling Act at 28 U.S.C. §2072, which provides this Court with authority to "prescribe general rules of practice and procedure … for cases in the … courts of appeals" and has, since 1990, included authority to "define when a ruling of a district court is final for purposes of appeal." 28 U.S.C. §2072(c).

As described in the 2021 Advisory Committee Notes, the impetus for the FRAP 3(c) amendments was the decisions by some circuits that appellate jurisdiction was lacking if notices of appeal failed to designate one or more interlocutory orders that could have merged with the final order. To address the "traps for the unwary," Rule 3(c)(5) was amended to provide that a "notice of appeal encompasses the final judgment … if [it] designates … an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties." With that rule in place, Rule 3(c)(4) was amended to provide for the

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[4] This Court's April 14, 2021 Order provides that the FRAP 3(c) amendments are effective for "all proceedings then pending" "insofar as just and practicable." *See also Gonpo v. Sonam's Stonewalls & Art*, 41 F.4th 1, 9-11 (1st Cir. 2022); *Dawson v. Archambeau*, 2022 WL 16748511 (10th Cir. 11/7/22). The petitioners here brought the amended FRAP 3(c) to the Second Circuit's attention in the petition for rehearing, but the court denied the petition without addressing it.

merger rule, i.e., that "[t]he notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal."

The amendments to Rule 3(c) are "jurisdictional in nature." *Smith v. Barry*, 502 U.S. 244, 248-49 (1992). The 2021 Advisory Committee Notes could be read to inject one measure of uncertainty into the amended Rule by stating that "this general merger rule is subject to some exceptions and complications" that are left to "case law" to detail. But the decision at issue here is not about any exception or complication with the "merger rule," but about "finality."[5] With the 2021 amendments, this Court defined the final judgment to encompass "an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties." Whether or not this compels the complete-proceedings approach, it is clearly consistent with it and a further strike against using "pragmatic finality" to define an earlier order, whether it was issued prejudgment or postjudgment, as the "final" order.[6]

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[5] Case law on the "merger rule" is well-established. *See, e.g, Shannon v. GE*, 186 F.3d 186, 192 (2d Cir. 1999) (opinion by Sotomayor, J.) (the rules on final decisions and merger "advance the historic federal policy against piecemeal appeals, while preserving the right to appeal adverse rulings").

[6] If this Court were to determine that there is a reasonable probability the decision below rests on a premise about finality that the court of appeals would reject if given the opportunity to further consider the amended FRAP 3(c), petitioners request the Court summarily grant the petition, vacate the decision below, and remand for further proceedings.

III. This Case Is an Ideal Vehicle for Guidance on How to Determine the Finality of Post-judgment Orders.

This case squarely presents the issue on which the circuits are divided – whether litigants may wait until the end of postjudgment proceedings to appeal with the scope of that appeal including all nonmoot interlocutory decisions. The Second Circuit held that "finality principles apply differently in the postjudgment context," 15a, and went on to apply a "pragmatic" case-by-case balancing approach to decide that the last final order that the district court had issued in January 2020 was *not* the operative final order for purposes of appeal. This is contrary to the majority of circuits which hold that finality in postjudgment proceedings must be analyzed under the general rule.

For close to 27,000 class members, this case is a lifeline for their retirement because of Cigna's "affirmatively misleading representations" about their benefits and the mandate obtained after a decade and one-half of litigation that Cigna must provide "the full value" of the A+B retirement benefit relief to them. It is imperative that the rules on postjudgment orders should not make appellate review subject to "tricky" or "especially tricky" traps for the unwary that forfeit the right to enforce relief obtained after such litigation.

The Second Circuit, however, decided it "lacked jurisdiction" to enforce the mandate, even though there is no dispute that the notice of appeal was properly taken from the last final order in the enforcement proceedings. To reach that conclusion,

the Second Circuit relied on the moribund *Gillespie* that "the last order possible to be made in a case" is not "necessarily" the final decision, App. 15a, and then applied a balancing approach that afforded little or no weight to the policy against piecemeal appeals.

The Second Circuit's decision is contrary to the Seventh Circuit's decision in *Solis* about almost identical postjudgment retirement benefit orders. There, the Seventh Circuit held that a party in a postjudgment proceeding "was entitled to wait until the proceedings were over and then appeal, bringing ... all the unmoot interlocutory rulings adverse to him." 557 F.3d at 776. A majority of the circuits agree that no special finality rule is warranted for postjudgment orders. *See, e.g., United States v. Cos*, 498 F.3d 1115, 1122 (10th Cir. 2007) ("when it is not clear that a district court has resolved an issue, the time for filing a notice of appeal runs from the subsequent order the unambiguously does so").

But as petitioners have shown, the Second Circuit's decision to the contrary is not unique. The Eighth and Ninth Circuits have also concluded that the finality rules are to be applied differently in postjudgment cases and have used balancing from *Gillespie*. This split will not be resolved without a decision by this Court.

The Second Circuit's decision in this case is already being cited as precedent for a "pragmatic" approach to "finality." *Zanghi v. Callegari*, 2023 U.S. App. LEXIS 2313, *2-5 (2d Cir. 1/30/2023) (citing *Amara*, but still reaching the conclusion that order was not a final order). Wright, Miller & Cooper's February 2023 Update of §3916 on "Post-Judgment

Orders" cites the *Amara* decision as a ruling that the court of appeals "lacked jurisdiction over" "the district court's orders addressing the methodology for computing individual relief" because those "orders resolved important, but ancillary, postjudgment matters, and were thus final decisions permitting appellate review."

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APRIL 12, 2023

APPENDIX

TABLE OF APPENDICES

Appendix A

20-202(L)
Amara v. Cigna Corporation

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2021

(Argued: November 22, 2021 Decided: November 10. 2022)

Nos. 20-202 (L), 20-3219 (Con)

JANICE C. AMARA, GISELA R. BRODERICK, and ANNETTE S. GLANZ, individually and on behalf of others similarly situated,

Plaintiffs-Appellants,

-v.-

CIGNA CORPORATION and CIGNA PENSION PLAN,

Defendants-Appellees.[1]

Before: LIVINGSTON, *Chief Judge*, KEARSE and LEE, *Circuit Judges*.

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[1] The Clerk of Court is directed to amend the official caption as set forth above.

Plaintiffs-Appellants filed two appeals from postjudgment orders in the same case, which we have consolidated. In No. 20-202, Defendants-Appellees move to dismiss, arguing that we lack appellate jurisdiction. We conclude that a portion of Plaintiffs-Appellants' appeal is untimely, so we grant Defendants-Appellees' motion to dismiss in part. To the extent we have jurisdiction, we hold that the district court (Arterton, *J.*) did not abuse its discretion and so affirm on the merits in No. 20-202. Plaintiffs-Appellants also appeal in No. 20-3219 from the district court's denial of their motion for an equitable accounting, which Plaintiffs- Appellants filed in the district court after they appealed in No. 20-202. We conclude that the district court did not abuse its discretion in denying Plaintiffs-Appellants' motion, so we affirm.

In sum, in No. 20-202, we GRANT in part and DENY in part Defendant- Appellees' motion to dismiss. To the extent we have jurisdiction, we AFFIRM the district court's decision on the merits. In No. 20-3219, we AFFIRM the district court's order denying Plaintiffs-Appellants' motion for an equitable accounting.

FOR PLAINTIFFS-APPELLANTS: STEPHEN R. BRUCE (Allison C. Pienta, *on the brief*), Stephen R. Bruce Law Offices, Washington, D.C.

Christopher J. Wright, *on the brief*,

	Harris Wiltshire Grannis, LLP, Washington D.C.
FOR DEFENDANTS-APPELLEES:	A. KLAIR FITZPATRICK (Jeremy P. Blumenfeld, *on the brief*) Morgan, Lewis & Bockius LLP, Philadelphia, PA.

DEBRA ANN LIVINGSTON, *Chief Judge*:

In these consolidated appeals, Plaintiffs-Appellants Janice C. Amara, Gisela R. Broderick, and Annette S. Glanz (collectively, "Plaintiffs") appeal on behalf of a class from several postjudgment orders of the district court (Arterton, *J.*).

In their first appeal, No. 20-202, Plaintiffs challenge orders implementing a final judgment that, among other things, required Defendants-Appellees Cigna Corporation and CIGNA Pension Plan (collectively, "Cigna") to reform Cigna's pension plan to pay greater benefits to members of the plaintiff class. *See Amara v. CIGNA Corp.* (*Amara V*), 775 F.3d 510 (2d Cir. 2014). After we affirmed the final judgment in *Amara V*, the district court, in a series of four decisions, resolved disputes between the parties about the methodology Cigna would use to calculate the reformed pension benefits. More than a year later, Plaintiffs moved for sanctions against Cigna and for other relief. The district court denied that motion. On appeal, Plaintiffs seek to challenge both the district court's order denying sanctions and its earlier orders addressing the methodology for calculating benefits. Cigna moves to dismiss, principally arguing that we lack jurisdiction because Plaintiffs' appeal is untimely.

For the reasons explained below, we grant in part and deny in part Cigna's motion. Plaintiffs did not timely appeal from the district court's orders addressing the methodology for computing individual relief, so we lack jurisdiction over that portion of Plaintiffs' appeal. But we have jurisdiction over the

portion of Plaintiffs' appeal challenging the district court's order denying sanctions. Considering that order on the merits, we conclude that it was not an abuse of discretion and so affirm.

After Plaintiffs appealed in No. 20-202, they moved for an equitable accounting in the district court. The district court denied that motion, and Plaintiffs appealed again. Because the district court did not abuse its discretion in declining to order an equitable accounting, we also affirm in No. 20-3219.

BACKGROUND

Methodology Orders

We discussed the background of this litigation in *Amara V*, 775 F.3d at 513–19. *Amara V* affirmed the district court's final judgment ordering Cigna to reform its pension plan to pay greater benefits to Plaintiffs under Parts A and B of Cigna's pension plan ("A+B" remedy). On remand, the parties disputed how Cigna would calculate A+B benefits. The district court resolved those disputes in four orders. *See Amara v. Cigna Corp.* (*Amara VI*), Joint App'x in No. 20-202, at 198–219 (D. Conn. Jan. 14, 2016); *Amara v. Cigna Corp.* (*Amara VII*), 2017 WL 88968 (D. Conn. Jan. 10, 2017); *Amara v. CIGNA Corp.* (*Amara VIII*), 2017 WL 10902877 (D. Conn.

July 14, 2017); *Amara v. Cigna Corp.* (*Amara IX*, and together with *Amara VI*, *Amara VII*, and *Amara VIII*, the "Methodology Orders"), 2017 WL 5179230

(D. Conn. Nov. 7, 2017).[2] The Methodology Orders established how Cigna would calculate the dates from which sums were due under Part A or Part B, the dates from which prejudgment interest should be paid, and the prejudgment interest rate, among other issues. Joint App'x in No. 20-202, at 209 n.15; Special App'x in No. 20-202, at 14. The district court issued the last Methodology Order in November 2017.

Attorney's Fees Order

The next month, Plaintiffs requested attorney's fees based on their valuation of the plaintiff class's total recovery. In the first sentence of their December 2017 attorney's fees request, Plaintiffs asserted: "This Court has completed its orders on the methodology for computing individual relief under the A+B reformation in this class action." Plaintiffs' Notice of Value of Common Fund Recovery ("Plain- tiffs' 2017 Request for Attorney's Fees"), Ex. A to Cigna's Motion To Dismiss in No. 20-202 ("MTD"), at 1. Plaintiffs contended that they had computed "the value of the common fund recovery" "[i]n compliance with that methodology." *Id.* Plaintiffs also reported they would "deduct the fee award from the individual relief amounts and provide notice to the class of the benefits payable to them" after the court decided their fee request. *Id.*

Cigna disputed Plaintiffs' common-fund calculation, so the district court convened a status conference to address that issue in July 2018. At that

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[2] Unless otherwise indicated, we omit all internal citations, quotation marks, alterations, emphases, and footnotes from citations.

conference, Plaintiffs attempted to raise issues concerning the Methodology Orders. But the district court rebuffed Plaintiffs' attempt, instructing the parties in no uncertain terms that the time for litigating those issues had come and gone. *See* Joint App'x in No. 20-202, at 646 ("[W]e're not going to relitigate methodology; and to the extent there are issues that could have been brought up in the motions related to methodology and weren't, it's really too late."). The district court declined to "act[] in response to what appears to be the Plaintiffs' invitation for the relitigation of settled methodology disputes or perhaps new methodology disputes[.]" *Id.* at 671; *see also id.* at 652 ("I don't see that at this point we can or should be relitigating any of the methodology.").

The district court later adopted Plaintiffs' proposal for calculating attorney's fees. *Amara v. Cigna Corp.* (*Amara X*), 2018 WL 5077894 (D. Conn. Oct. 17, 2018). In so doing, the district court recognized that the parties' lingering dispute over attorney's fees prevented Cigna from paying A+B benefits. *See id.* at *1 ("The parties dispute the proper calculation of the present value of the common fund recovery, which must be determined in order for the Court to rule on Plaintiffs' pending motion for attorney's fees, which in turn must be ruled on in order for remedy payments to begin issuing to class members."). The district court subsequently awarded attorney's fees, emphasizing that Cigna should "avoid further delay in remedy payments to class members." *Amara v. Cigna Corp.* (*Amara XI*, or the "Attorney's Fees Order"), 2018 WL 6242496, at *3 (D. Conn. Nov. 29, 2018).

Cigna promptly began to calculate and pay A+B benefits. By December 29, 2018, Cigna had calculated remedy benefits for about 27,000 class members. Joint App'x in No. 20-202, at 882. By January 28, 2019, Cigna had sent remedy notices containing benefits calculations to all class members. *Id.* By February 27, 2019, Cigna had paid nearly $30 million in past due benefits to over 8,900 class members. *Id.* And by March 2019, Cigna had mailed a form to class members who were eligible for immediate annuity benefits that permitted them to elect the manner in which they would receive their annuity payments. *Id.*

Sanctions Order

In April 2019—almost six months after the district court awarded attorney's fees and over a year after the last Methodology Order—Plaintiffs moved to enforce the Methodology Orders and to hold Cigna in contempt and impose sanctions. They contended that Cigna had not complied with the final judgment or the Methodology Orders in calculating the A+B relief. The district court denied that motion. *See Amara v. Cigna Corp.* (*Amara XII*), 2019 WL 3854300 (D. Conn. Aug. 16, 2019); *Amara v. CIGNA Corp.* (*Amara XIII*, and together with *Amara XII*, the "Sanctions Order"), 2020 WL 127696 (D. Conn. Jan. 10, 2020). Plaintiffs appealed in No. 20-202 soon after, challenging both the Methodology Orders and the Sanctions Order.

Equitable Accounting

After appealing in No. 20-202, Plaintiffs moved in the district court for an "equitable accounting" of Cigna's efforts to satisfy the judgment. The district

court denied that motion, concluding that it had "previously accepted Cigna's representations that the current amounts owed to Class Members have been re- mitted and the judgment satisfied." *Amara v. Cigna Corp.* (*Amara XIV*), 2020 WL 4548135, at *5 (D. Conn. Aug. 6, 2020); *see also Amara v. Cigna Corp.* (*Amara XV*), Special App'x in No. 20-3219, at 13–14 (D. Conn. Sept. 10, 2020) (reaffirming on reconsideration that "Plaintiffs failed to offer a persuasive substantive legal justification for why an accounting should be ordered"). Plaintiffs timely appealed in No. 20-3219. We consolidated the appeals.

DISCUSSION

I. Appeal in No. 20-202

We consider first whether we have jurisdiction over Plaintiffs' appeal in No. 20-202. Plaintiffs purport to appeal from both the Methodology Orders and the Sanctions Order. Cigna moves to dismiss, arguing that we lack jurisdiction to review the Methodology Orders because they became final more than 30 days before Plaintiffs appealed. Cigna concedes that Plaintiffs' appeal from the Sanctions Order was timely but contends that we still lack jurisdiction because even that portion of Plaintiffs' appeal challenges the Methodology Orders "in substance." MTD 19.

We agree that Plaintiffs' appeal from the Methodology Orders is untimely. And though we have jurisdiction over the portion of Plaintiffs' appeal challenging the Sanctions Order, the scope of our

review is limited. Because Plaintiffs did not timely appeal the Methodology Orders, we consider only whether the district court correctly interpreted the Methodology Orders in the Sanctions Order—not whether the Methodology Orders themselves were correctly decided. We conclude that the district court did not abuse its discretion in the Sanctions Order, so we affirm on the merits to the extent we have jurisdiction.

A.

Congress has limited our jurisdiction in two respects relevant here. Under 28 U.S.C. § 1291, we may review only a district court's "final decisions." And under 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a)(1)(A), we have jurisdiction only if an aggrieved party appeals within 30 days after a district court issues a final decision.[3] This case turns principally on the meaning of § 1291. We begin with some general principles before turning to their application in the context of postjudgment orders.

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[3] By statute, a civil appeal must be filed "within thirty days." 28 U.S.C. § 2107(a); *see Hall v. Hall*, 138 S. Ct. 1118, 1124 (2018). And "[u]nder [Federal Rule of Appellate Procedure] 4(a), a notice of appeal in a civil case must be filed within 30 days after entry of judg[]ment." *Williams v. KFC Nat'l Mgmt. Co.*, 391 F.3d 411, 415 (2d Cir. 2004) (citing Fed. R. App. P. 4(a)(1)(A)). "[T]he timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Bowles v. Russell*, 551 U.S. 205, 214 (2007). This 30-day deadline is thus decidedly *in*flexible. *See id.* (noting that courts cannot "create equitable exceptions to jurisdictional requirements"); *accord Boechler, P.C. v. Commissioner*, 142 S. Ct. 1493, 1497 (2022).

"Under § 1291 of the Judicial Code, federal courts of appeals are empowered to review only 'final decisions of the district courts.'" *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1707 (2017) (quoting 28 U.S.C. § 1291). Section 1291's final-decision rule strikes a balance between "the competing considerations underlying all questions of finality—'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'" *Johnson v. Jones*, 515 U.S. 304, 315 (1995) (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974), in turn quoting *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950) (noting that these two "most important" "considerations . . . always compete in the question of appealability")).

"[T]he final judgment rule serves several salutary purposes." *Cunningham v. Hamilton Cnty.*, 527 U.S. 198, 203 (1999). It "preserves the proper balance between trial and appellate courts, minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice." *Microsoft*, 137 S. Ct. at 1712. It also "evinces a legislative judgment that restricting appellate review to final decisions prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy." *Coopers & Lybrand v. Live- say*, 437 U.S. 463, 471 (1978) (quoted in *Ashmore v. CGI Grp., Inc.*, 860 F.3d 80, 84 (2d Cir. 2017)); *see also Cobbledick v. United States*, 309 U.S. 323, 325 (1940); *Crosby v. Buchanan*, 90 U.S. (23 Wall.) 420, 453 (1874).

Under § 1291, "a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996). Interlocutory orders, like discovery orders, "typically merge with the judgment for purposes of appellate review." *Fielding v. Tollaksen*, 510 F.3d 175, 179 (2d Cir. 2007). Thus, § 1291 generally channels "all claims of error in[to] a single appeal." *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 586 (2020).

Often, determining whether a district court's order is final is simple enough. *See, e.g.*, *Hall*, 138 S. Ct. at 1124 ("The archetypal final decision is one that triggers the entry of judgment."). But not always. The Supreme Court has long recognized that "[n]o self-enforcing formula defining when a judgment is 'final' can be devised." *Republic Nat. Gas Co. v. Oklahoma*, 334 U.S. 62, 67 (1948); *see also Eisen*, 417 U.S. at 170 ("No verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future."); *Dickinson*, 338 U.S. at 511 (lamenting the "struggle of the courts[] sometimes to devise a formula that will encompass all situations and at other times to take hardship cases out from under the rigidity of previous declarations"). It has therefore in- structed "that finality is to be given a practical rather than a technical construction." *Microsoft*, 137 S. Ct. at 1712; *accord Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 375 (1981)

(citing, *inter alia*, *Whiting v. Bank of the U.S.*, 38 U.S. (13 Pet.) 6, 15 (1839)).

To be clear, the Court has also "expressly rejected efforts to reduce the finality requirement of § 1291 to a case-by-case determination," *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 439 (1985) (citing *Coopers & Lybrand*, 437 U.S. at 473–75), and practical construction is in no way inconsistent with the recognition of general rules.[4] *See Johnson*, 515 U.S. at 315 (rejecting use of "ad hoc balancing to decide issues of appealability); *see also In re Chateaugay Corp.*, 922 F.2d 86, 91 (2d Cir. 1990) (citing *Coopers & Lybrand*, 437 U.S. at 477 n.30). But a pragmatic, nontechnical "approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action': the touchstones of federal procedure." *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962) (quoting Fed. R. Civ. P. 1); *see also Parkinson v. April Indus., Inc.*, 520 F.2d 650, 653 (2d Cir. 1975) ("Giving the final judgment rule a practical rather than a technical construction has provided the courts with the flexibility necessary to avoid the potential harm which could result from" a rigid interpretation.).

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[4] By way of example, the Court has recognized that a pending motion for attorney's fees generally "does not prevent finality" because "its resolution [does] not alter the [underlying] order or moot or revise decisions embodied in the order." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988); *see also* 15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure, § 3915.6 (2d ed. Apr. 2022 update) [hereinafter Wright, Miller & Cooper] (same for pending order requesting sanctions).

B.

We next address how these principles apply postjudgment. More than a century ago, the Supreme Court held that postjudgment orders are usually subject to appellate review. *See In re Farmers' Loan & Trust Co.*, 129 U.S. 206, 213–14 (1889); *accord* Wright, Miller & Cooper, *supra*, § 3916; *Smith v. Halter*, 246 F.3d 1120, 1122 (8th Cir. 2001). But our jurisdiction in this context is still limited to district court "decisions" that are also "final" under § 1291. And the scope of review is limited to questions raised by the postjudgment matter. We consider each of these requirements in turn.

i.

We first take up when a district court's postjudgment order is "final." "In postjudgment proceedings, the meaning of a 'final decision' is less clear because the proceedings necessarily follow a final judgment." *Thomas v. Blue Cross & Blue Shield Ass'n*, 594 F.3d 823, 829 (11th Cir. 2010); *see also Solis v. Current Dev. Corp.*, 557 F.3d 772, 775–76 (7th Cir. 2009) (noting that the postjudgment finality "inquiry takes us into rocky terrain, since determining what constitutes a final decision can be [especially] tricky" in that context). "[W]hile 'a postjudgment order might seem final by definition because the judgment is already behind it,'" that is not so. *JPMorgan Chase Bank, N.A. v. Winget*, 920 F.3d 1103, 1106 (6th Cir. 2019) (quoting *Findley v. Blinken (In re Joint E. & S. Dists. Asbestos Litig.)*, 22 F.3d 755, 760 (7th Cir. 1994)); *see also United States v. Smathers*, 879 F.3d 453, 459 (2d Cir. 2018) ("An order in a postjudgment

proceeding is not necessarily a final decision simply because it follows the entry of judgment."). At the same time, a "decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case." *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152 (1964).

As then-Judge Gorsuch explained, "every postjudgment decision must be assessed on its *own terms* to determine whether it is a final decision amenable to appeal." *McClendon v. City of Albuquerque*, 630 F.3d 1288, 1293 (10th Cir. 2011). In other words, "[t]hough postjudgment decisions necessarily follow a final judgment, such orders are themselves subject to the test of finality." *Mamma Mia's Trattoria, Inc. v. Original Brooklyn Water Bagel Co.*, 768 F.3d 1320, 1325 (11th Cir. 2014); *see also Findley*, 22 F.3d at 760 ("[T]he requirements of finality must be met without reference to th[e] underlying [final] judgment.").

Though we look to general finality principles to determine postjudgment finality, these principles apply differently in the postjudgment context. We have observed "that a practical rather than a technical construction of finality is *especially* appropriate in the post-judgment context." *United States v. Yalincak*, 853 F.3d 629, 636 (2d Cir. 2017) (emphasis added) (internal quotation marks omitted); *see also United States v. Yonkers Bd. of Educ.*, 946 F.2d 180, 183 (2d Cir. 1991) ("[I]n cases involving a protracted remedial phase, we must give '§ 1291 a practical rather than a technical construction.'" (quoting *Firestone Tire*, 449 U.S. at 375) (internal quotation marks omitted); *United States v. Apple Inc.*,

787 F.3d 131, 137 (2d Cir. 2015). Postjudgment, there is often "little danger of interference with continuing trial court proceedings, and equally little danger of repetitious appellate con- sideration of related issues." Wright, Miller & Cooper, *supra*, § 3916. For that reason, "traditional concerns regarding piecemeal review carry less force during such proceedings." *Yalincak*, 853 F.3d at 636; *see also In re Am. Preferred Prescription, Inc.*, 255 F.3d 87, 93 (2d Cir. 2001); *United States v. Ray*, 375 F.3d 980, 986 (9th Cir. 2004); *Nat'l Football League Players' Concussion Inj. Litig.*, 923 F.3d 96, 106 (3d Cir. 2019). Thus, in assessing postjudgment finality, we give less weight to "the inconvenience and costs of piecemeal review" and correspondingly greater weight to "the danger of denying justice by delay." *Dickinson*, 338 U.S. at 511; *see also Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1064 (9th Cir. 2010).

Mindful of these principles, we conclude that a district court's postjudgment order is final when it "has finally disposed of [a] question, and there are no pending proceedings raising related questions." Wright, Miller & Cooper, *supra*, § 3916. This rule ensures that "the trial court's disposition of important questions that arise after a final judgment" are subject to appellate review. *Id.* The Supreme Court has long held that "most trial court decisions resolving important, but ancillary, matters that arise after the entry of judgment are" subject to appellate review. *Smith*, 246 F.3d at 1122 (citing *In re Farmers' Loan & Trust Co.*, 129 U.S. at 213–14). And once the district court has completely disposed of a postjudgment matter "if the orders are not found final, there is little prospect that further proceedings will occur to make

them final." Wright, Miller & Cooper, *supra*, § 3916; *accord Ray*, 375 F.3d at 986. "[I]f appeal is not allowed" in that circumstance, "there is a real risk that all opportunity for review will be lost." Wright, Miller & Cooper, *supra*, § 3916; *see also Ohntrup v. Firearms Ctr., Inc.*, 802 F.2d 676, 678 (3d Cir. 1986); *United States v. Washington*, 761 F.2d 1404, 1407 (9th Cir. 1985).

At the same time, we defer review until the district court has decided all *related* issues to prevent "piecemeal appeals of interlocutory orders in ongoing postjudgment proceedings." *JPMorgan Chase Bank, N.A. v. Asia Pulp & Paper, Co.*, 707 F.3d 853, 868 (7th Cir. 2013). "Appeal ordinarily should not be available as to any particular post-judgment proceeding before the trial court has reached its final disposition." Wright, Miller & Cooper, *supra*, § 3916; *see also Cadle Co. v. Neubauer*, 562 F.3d 369, 372 (5th Cir. 2009); *Findley*, 22 F.3d at 760. And as in the prejudgment context, interlocutory postjudgment orders "typically merge with the judgment" that concludes a postjudgment proceeding "for purposes of appellate review." *Fielding*, 510 F.3d at 179; *see Vera v. Republic of Cuba*, 802 F.3d 242, 247 (2d Cir. 2015).

Our cases illustrate these principles. We have held that we generally lack jurisdiction over appeals from postjudgment discovery orders, *Preferred Prescription,* 255 F.3d at 93, including orders granting subpoenas in postjudgment collection proceedings, *Vera*, 802 F.3d at 247; *United States v. Fried*, 386 F.2d 691, 693–95 (2d Cir. 1967) (Friendly, *J.*); *see also EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 205 (2d Cir. 2012) (concluding that a discovery order was non-

final because it did not "terminate [the] collection proceedings"). "[T]he 'relevant final decision' in such proceedings is the 'subsequent judgment that concludes the collection proceedings.'" *Yalincak*, 853 F.3d at 636 (quoting *Vera*, 802 F.3d at 247). But we have asserted jurisdiction over postjudgment orders denying motions for recusal of a district judge, *see Yonkers*, 946 F.2d at 183; *United States v. Bloomer*, 150 F.3d 146, 149 (2d Cir. 1998), and to disqualify a court-appointed monitor, *see Apple*, 787 F.3d at 137–38. In those cases, the district court "ha[d] reached its final disposition" on the relevant issue, Wright, Miller & Cooper, *supra*, § 3916, so its orders were final.

Postjudgment sanctions and contempt orders are particularly instructive examples. "Final disposition of a post-judgment motion for sanctions" generally "establishes a second final and appealable judgment." Wright, Miller & Cooper, *supra*, § 3915.6. So too, "[c]omplete disposition of contempt proceedings initiated to enforce a final judgment supports appeal." *Latino Officers Ass'n City of N.Y., Inc. v. City of New York*, 558 F.3d 159, 163 (2d Cir. 2009) (quoting Wright, Miller & Cooper, *supra*, § 3917 (3d ed. 2008)). "Appeal can be taken from an order that *denies* civil contempt sanctions," *id.* (emphasis added), because "no further district court action is necessary to give life to the denial," Wright, Miller & Cooper, *supra*, § 3917 n.66 (quoting *Sanders v. Monsanto Co.*, 574 F.2d 198, 199 (5th Cir. 1978)). And an order finding contempt *and* imposing sanctions is also "final." *See Latino Officers Ass'n*, 558 F.3d at 163; Wright, Miller & Cooper, *supra*, § 3917.

But "[a]n order adjudging a party in contempt unaccompanied by sanctions is not final." *In re Tronox Inc.*, 855 F.3d 84, 96 (2d Cir. 2017) (quoting *Forschner Grp., Inc. v. Arrow Trading Co.*, 124 F.3d 402, 410 (2d Cir. 1997)). If we considered the contempt finding alone, "any sanction imposed could then be challenged on appeal as an abuse of discretion." *Dove v. Atl. Capital Corp.*, 963 F.2d 15, 18 (2d Cir. 1992); *see also Cassidy v. Cassidy*, 950 F.2d 381, 382 (7th Cir. 1991). "Finality, in short, requires determination of both liability and sanction," even in the postjudgment context. Wright, Miller & Cooper, *supra*, § 3917.

ii.

Next, we consider when a district court's order qualifies as a "decision" under § 1291. The Supreme Court has held that we lack jurisdiction over appeals from ministerial orders. *See Blossom v. Milwaukee & Chicago R.R. Co.*, 68 U.S. (1 Wall.) 655, 657 (1864) ("[W]here the act complained of was a mere ministerial duty, necessarily growing out of the decree which was being carried into effect, no ap- peal would lie."); *see also Am. Ironworks & Erectors, Inc. v. N. Am. Constr. Corp.*, 248 F.3d 892, 898 (9th Cir. 2001) ("A mere ministerial order, such as an order executing a judgment or . . . an order to disburse funds from the court registry, is not a final appealable order."); *Isidor Paiewonsky Assocs. v. Sharp Props., Inc.*, 998 F.2d 145, 150 (3d Cir. 1993); *Reed Migraine Ctrs. of Tex. P.L.L.C. v. Chapman*, 987 F.3d 138, 140 (5th Cir. 2021); Wright, Miller & Cooper, *supra*, § 3916 (noting that some "postjudgment orders will involve ministerial or discretionary matters that are effectively unreviewable"). Ministerial orders do not

qualify as decisions under § 1291. *See Ray*, 375 F.3d at 986 n.7 (distinguishing "a *judicial* decision" from "an administrative or ministerial order from which appeal is not available").

"[T]he appropriate inquiry" for whether an order is substantive or ministerial "is whether the order . . . affects rights or creates liabilities not previously resolved by the adjudication on the merits." *Isidor Paiewonsky Assocs.*, 998 F.2d at 150. Ministerial orders are often final because district courts generally do not contemplate "further proceedings," *Bey v. City of New York*, 999 F.3d 157, 163 (2d Cir. 2021), when they issue "mere ministerial order[s], such as an order executing a judgment or . . . an order to disburse funds from the court registry," *Am. Iron- works & Erectors*, 248 F.3d at 898. But because these orders are not decisions, they are not subject to appellate review. *See Ray*, 375 F.3d at 986 n.7; *see also Muncy v. City of Dall.*, 123 F. App'x 601, 604 (5th Cir. 2005) (recognizing that "an appeal from a post-judgment order should not function as a second appeal of the judgment"); Part I.B.iii, *infra*.

Although we have distinguished between "substantive" and "ministerial" postjudgment orders in the past, *see Preferred Prescription*, 255 F.3d at 92–93 (citing *Isidor Paiewonsky Assocs.*, 998 F.2d at 150); *Cent. States, Se. and Sw. Areas Pension Fund v. Express Freight Lines, Inc.*, 971 F.2d 5, 6 (7th Cir. 1992)), we have used those terms imprecisely. We have referred to "post-judgment discovery orders" as non-appealable "ministerial" or "administrative" orders. *Id.* But postjudgment discovery orders are often more than "ministerial" because they typically

"affect[] rights or create[] liabilities"—for example, by requiring a party to turn over documents—"not previously resolved by the adjudication on the merits." *Isidor Paiewonsky Assocs.*, 998 F.2d at 150.[5] Even so, postjudgment discovery orders are of- ten not *immediately* appealable because, as in the prejudgment context, they are usually non-final "interlocutory decisions." *Baker v. F & F Inv.*, 470 F.2d 778, 780 n.3 (2d Cir. 1972); *see Vera*, 802 F.3d at 247.

Not always, however. "[T]he *denial* of a request for postjudgment discovery" is generally appealable when "no other route for obtaining appellate review is available." 19 George C. Pratt, Moore's Federal Practice — Civil § 202.13 & n.9 (3d ed. 2022) (citing *Cent. States*, 971 F.2d at 6; *Wilkinson v. FBI*, 922 F.2d 555, 558 (9th Cir. 1991); *Fehlhaber v. Fehlhaber*, 664 F.2d 260, 262 (11th Cir. 1981)) (emphasis added).[6] In

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[5] Indeed, most postjudgment orders are more than ministerial. *See* Wright, Miller & Cooper, *supra*, § 3916; *Reed Migraine*, 987 F.3d at 140; *United States v. Stewart*, 452 F.3d 266, 272 (3d Cir. 2006); *United States v. Doe*, 962 F.3d 139, 143 (4th Cir. 2020). Those substantive "post-judgment orders issued in 'cases involving a protracted remedial phase' have readily been deemed appealable" in this Circuit. *Preferred Prescription*, 255 F.3d at 93 (quoting *Yonkers*, 946 F.2d at 183)

[6] A postjudgment order *granting* a request for discovery, like "a district court's decision to compel compliance with a subpoena[,] . . . is generally not a 'final decision' and therefore is not immediately appealable." *Vera*, 802 F.3d at 246. "To obtain immediate appellate review of such an order absent § 1292(b) certification, the subpoenaed party must typically defy the district court's enforcement order, be held in contempt, and then appeal the contempt order, which is regarded as final under § 1291." *Id.* "This process . . .

other words, when a district court denies a request for postjudgment discovery and does not contemplate further proceedings, that order is generally appealable. By stating that postjudgment discovery orders are "ministerial," *Preferred Prescription,* 255 F.3d at 92–93, we may have inadvertently suggested that these orders never qualify as "final decisions" under § 1291. And more broadly, our prior cases may have suggested that any non-final postjudgment order is "ministerial" or "administrative." *See id.* But that conflates two distinct inquiries: whether a district court's order is final and whether it is substantive.

iii.

Even when we have jurisdiction over an appeal from a postjudgment order, our review is circumscribed. "The scope of appeal . . . should be restricted to the questions properly raised by the post-judgment motion; it should not extend to revive lost opportunities to appeal the underlying judgment." Wright, Miller & Cooper, *supra*, § 3916; *see also In re Lang*, 414 F.3d 1191, 1196 (10th Cir. 2005); *SEC v. Suter*, 832 F.2d 988, 990 (7th Cir. 1987). An appeal from a later order "does not give us jurisdiction to hear an untimely appeal from an earlier order, which was itself an appealable final order." *United States v. Gewin*, 759 F.3d 72, 77 (D.C. Cir. 2014). We must "identify the final decision in the postjudgment proceeding and confine any further appeal under section 1291 to that decision." *Bogard v. Wright*, 159 F.3d 1060, 1062 (7th Cir. 1998).

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recognizes only the contempt judgment, not the underlying enforcement or- der, as a final decision subject to appeal." *Id.*

Thus, "[a]n appeal taken only after disposition of [a motion for] sanctions does not support review of the judgment on the merits if the time for appealing the judgment ha[s] run." Wright, Miller & Cooper, *supra*, § 3915.6; *see also Halderman v. Pennhurst State Sch. & Hosp.*, 673 F.2d 628, 637 (3d Cir. 1982) ("[T]he merits of the underlying order may not be called into question in a post-judgment civil contempt proceeding." (citing *Oriel v. Russel*, 278 U.S. 358 (1929)). "Appeal is limited to new questions raised by the postjudgment order itself." Wright, Miller & Cooper, *supra*, § 3916; *see also Lothian Oil (USA), Inc. v. Sokol*, 526 F. App'x 105, 108 (2d Cir. 2013) (summary order).

C.

We now apply this legal framework to the facts of this case. The Methodology Orders and the Sanctions Order are postjudgment orders, so we apply the postjudgment appealability principles outlined above.

We conclude that we lack jurisdiction over Plaintiffs' appeal from the Methodology Orders because they became final more than 30 days before Plaintiffs appealed. And though we have jurisdiction over Plaintiffs' appeal from the Sanctions Order because Plaintiffs timely appealed, the scope of our review is narrow. We cannot consider whether the Methodology Orders were correctly decided because Plaintiffs did not timely appeal them. Because we conclude that the district court did not abuse its discretion in the Sanctions Order, we affirm on the merits to the extent we have jurisdiction.

i.

We begin with Plaintiffs' appeal from the Methodology Orders. The district court issued the last Methodology Order in November 2017. And it resolved Plaintiffs' request for attorney's fees in November 2018. Because Plaintiffs did not appeal until January 2020, their appeal is untimely, and we lack jurisdiction.

Plaintiffs contend that the Methodology Orders did not become final until the district court denied their motion to enforce and for other relief. We disagree. At the start, Cigna began paying benefits based on the Methodology Orders soon after the district court awarded attorney's fees. *See* Joint App'x in No. 20-202, at 882 (noting that Cigna paid $30 million in benefits by March 2019); *see also Amara XI*, 2018 WL 6242496, at *3 (emphasizing that Cigna should "avoid further delay in remedy payments to class members").[7] Cigna relied on the Methodology Orders to calculate those benefits. From a practical perspective, it was therefore essential for Plaintiffs (or Cigna, if it so chose) to appeal promptly. Because a "practical rather than a technical construction of finality is especially appropriate in the post-judgment context," *Yalincak*, 853 F.3d at 636 (internal

[7] Because Plaintiffs did not appeal within 30 days after the district court resolved the parties' attorney's fees dispute, we need not decide whether the Methodology Orders became final when the district court issued the last such order in November 2017 or whether the Attorney's Fees Order was the "final decision" under § 1291 into which the Methodology Orders merged. Either way, the *latest* Plaintiffs could appeal from the Methodology Orders was 30 days after the district court issued the Attorney's Fees Order.

quotation marks omitted), these facts weigh heavily against Plaintiffs' argument that the Method- ology Orders were not final even after Cigna began paying A+B benefits.

Plaintiffs' representations to the district court also undermine their argument that the Methodology Orders were non-final until they moved to enforce. In December 2017, Plaintiffs themselves contended that the district court "ha[d] completed its orders on the methodology for computing individual relief under the A+B reformation in this class action." Plaintiffs' 2017 Request for Attorney's Fees at 1. The district court agreed. *See, e.g.*, Joint App'x in No. 20-202, at 646 (noting in July 2018 that the parties would not be permitted to "relitigate method- ology; and to the extent there are issues that could have been brought up in the motions related to methodology and weren't, it's really too late"). These statements fortify our conclusion that the Methodology Orders became final long be- fore Plaintiffs appealed.

Plaintiffs' argument against finality is unpersuasive, moreover, because it implies that they could have challenged the Methodology Orders—and Cigna's calculation of reformed pension benefits for more than 27,500 individuals—at "some nebulous time in the future" when they decided to file a motion to enforce. *Martinez v. Carson*, 697 F.3d 1252, 1258 (10th Cir. 2012). Indeed, Plaintiffs' theory implies that the Methodology Orders were immune from appellate review (because they were non-final) *unless* Plaintiffs chose to move for further relief. But when the district court issued the Attorney's Fees Order, "there [was] little prospect that further proceedings

[would] occur to make [the Methodology Orders] final." Wright, Miller & Cooper, *supra*, § 3916. If the Methodology Orders were "not found final" at that time, "there [was] a real risk that all opportunity for re- view [would] be lost." *Id.*

Plaintiffs' motion to enforce and for sanctions only confirms their own view that the Methodology Orders "resolv[ed] important, but ancillary, [postjudgment] matters" and were thus "final decisions permitting appellate review." *Smith*, 246 F.3d at 1122 (citing *In re Farmers' Loan & Trust Co.*, 129 U.S. at 213–14). Similarly, "[f]inal disposition of a post-judgment motion for sanctions establishes a . . . final and appealable judgment." Wright, Miller & Cooper, *supra*, § 3915.6. And "[a]n appeal taken only after disposition of [a motion for] sanctions does not support review of the judgment on the merits if the time for appealing the judgment ha[s] run." *Id.* Indeed, the district court could not have revised the Methodology Orders and simultaneously held Cigna in contempt and imposed sanctions for violating the newly revised orders. Thus, Plaintiffs' motion for contempt and sanctions necessarily presupposes that the Methodology Orders were final before Plaintiffs filed that motion.

In sum, Plaintiffs' appeal from the Sanctions Order cannot "revive lost opportunities to appeal" the Methodology Orders. Wright, Miller & Cooper, *supra*, § 3916. Because Plaintiffs did not timely appeal from the Methodology Orders, we lack jurisdiction to the extent Plaintiffs seek to challenge those orders.

ii.

The Sanctions Order, in contrast, is a "substantive post-judgment order," *Preferred Prescription*, 255 F.3d at 93, from which Plaintiffs timely appealed. Because we have jurisdiction over this portion of Plaintiffs' appeal, we deny Cigna's motion to dismiss in part. But "[t]he scope of appeal" from a postjudgment order is "restricted to the questions properly raised by [that] motion." Wright, Miller & Cooper, *supra*, § 3916. Our review thus extends only to whether the district court properly *interpreted* the Methodology Orders in the Sanctions Order, not whether the Methodology Orders were correctly decided in the first instance.

Plaintiffs argue that the district court erred in the Sanctions Order, but we are not persuaded. Plaintiffs first contend that the district court misconstrued the Methodology Orders in the Sanctions Order. "When a district court interprets its own order, we apply an abuse-of-discretion standard." *PACA Tr. Creditors of Lenny Perry's Produce, Inc. v. Genecco Produce Inc.*, 913 F.3d 268, 275 (2d Cir. 2019). Plaintiffs argue that the district court misinterpreted the phrase "plan provisions in place at the time the lump sum was received" in one of the Methodology Orders to "refer[] to 'the mortality tables and interest rates' in effect at the time the lump sum was received." *Amara XII*, 2019 WL 3854300, at *1–2. On Plaintiffs' view, the Methodology Orders required Cigna to calculate benefits using the mortality tables and interest rates in effect at "the year of [a participant's] Part A eligibility"—that is, her retirement age. *Id.* at *2.

We are not persuaded that the district court abused its discretion in rejecting Plaintiffs' proposed

interpretation. To begin, the district court explained that it had previously rejected "*Cigna's* proposal to tether the interest rate/mortality table year to the year of Part A eligibility." *Id.* (emphasis added). "[G]iven [that] rejection," the district court found Cigna's proposed interpretation of the Methodology Orders more persuasive "[i]n context." *Id.* The district court also noted that it had held in the Methodology Orders that Cigna was "permitt[ed] . . . to calculate the amount owed to all class members that have already received benefits as a lump sum, without waiting until those participants reach retirement age under Part A." *Id.* Plaintiffs' argument conflicted with that explanation because it would require Cigna to wait until a participant reached retirement age to calculate her benefits. The district court finally observed that it had previously held in the Methodology Orders that "[f]ixing the interest rate at the rate available to a plan participant at the time he or she received the Part B lump sum captures the fact that plan participants had control to invest their money at that point in time." *Id.* The same was true for Plaintiffs' mortality-table-and-interest-rate argument in its motion for sanctions.

Plaintiffs also argue that the district court erred in concluding that they had waived certain arguments about the Methodology Orders. We review a district court's determination that a party has waived an argument for an abuse of discretion. *See Am. Trucking Ass'ns v. N.Y. State Thruway Auth.*, 886 F.3d 238, 244–45 (2d Cir. 2018). The district court "decline[d] to entertain" Plaintiffs' arguments about the methodology in the Sanctions Order because they "could have been brought up" sooner. *Amara XII*, 2019

WL 3854300, at *3. Plaintiffs have failed to show that this was an abuse of the district court's discretion. And because the district court did not abuse its discretion in the Sanctions Order, we affirm the court's denial of Plaintiffs' motion for sanctions on the merits.

I. Appeal in No. 20-3219

Plaintiffs also appeal the district court's denial of their motion for an equitable accounting. The Employee Retirement Income Security Act of 1974 ("ERISA") permits plaintiffs to seek "appropriate equitable relief." 29 U.S.C. § 1132(a)(3). We assume that the district court could award an equitable accounting here because neither party argues otherwise. "We review the district court's fashioning of equitable remedies under ERISA for abuse of discretion," *Frommert v. Conkright*, 913 F.3d 101, 107 (2d Cir. 2019), but "review the district court's findings of fact" only "for clear error," *Lauder v. First Unum Life Ins. Co.*, 284 F.3d 375, 379 (2d Cir. 2002).

We conclude that the district court did not err in denying Plaintiffs' motion for an equitable accounting. The district court held that Plaintiffs' request for "a post-judgment equitable accounting [was] unwarranted" because Cigna "ha[d] 'provided . . . acceptable explanations' for the 'potential problems with [its] compliance' that Plaintiffs ha[d] raised." *Amara XIV*, 2020 WL 4548135, at *5 (quoting *Kifafi v. Hilton Hotels Ret. Plan*, 79 F. Supp. 3d 93, 110 (D.D.C. 2015), *aff'd*, 752 F. App'x 8 (D.C. Cir. 2019)). The district court observed that it had "previously accepted Cigna's representations that the current

amounts owed to Class Members have been remitted and the judgment satisfied." *Id.* It also noted that Cigna had provided declarations from a "Vice President & Consulting Actuary with Prudential Retirement Insurance and Annuity Company" who "detail[ed] Cigna's efforts to satisfy the judgment." *Id.* at *3. After Plaintiffs filed a motion for clarification or reconsideration, the district court reaffirmed its conclusion that "Plaintiffs failed to offer a persuasive substantive legal justification for why an accounting should be ordered." *Amara XV*, Special App'x in No. 20-3219, at 13.

We disagree with Plaintiffs that these conclusions constituted an abuse of discretion. Plaintiffs largely rehash factual arguments—rejected by the district court—that allegedly show "substantial issues" with Cigna's implementation of the A+B relief. But the district court made a factual finding that Cigna had adequately complied with the final judgment. That finding was not clearly erroneous. And given this factual finding, we discern "no abuse of discretion in [the court's] denial of [Plaintiffs'] requests" for an equitable accounting. *Kifafi*, 752 F. App'x at 10.

Next, Plaintiffs assert that the district court erred by relying on the D.C. Circuit's unpublished opinion in *Kifafi*. But the district court recognized that "[w]hile of course . . . an unpublished opinion from another circuit has no binding effect, this Court may nonetheless consider that disposition as useful guidance." *Amara XIV*, 2020 WL 4548135, at *5 n.5. We have found persuasive unpublished opinions from other Circuits, *see, e.g.*, *United States v. Diaz*, 802 F.3d

234, 241 (2d Cir. 2015), and the district court did not err in citing *Kifafi* as "useful guidance."

Plaintiffs also argue that the district court erred by accepting factual representations from Cigna's counsel as "evidence." We disagree because the district court's opinion cited the parties' sworn declarations. *Amara XIV*, 2020 WL 4548135, at *3–5.

Plaintiffs finally contend that the district court erred in holding that it would "entertain no further post-trial motions" about the equitable accounting issue. *Amara XV*, Special App'x in No. 20-3219, at 13. But the district court so held in response to *Plaintiffs'* motion for "clarification" about whether its motion was "a final, immediately appealable post-judgment order." *Id.* The district court correctly observed that "[r]ipeness for appeal is a determination made by the Court of Appeals, not the District Court." *Id.* Still, the district court clarified (apparently for Plaintiffs' benefit) that it had "denied Plaintiff's request for [an] accounting and will entertain no further post-trial motions on this subject." *Id.* As Cigna notes, however, the district court did not "prohibit[] Plaintiffs from ever seeking relief in the future" on different grounds. Cigna Br. in No. 20-3219, at 47. We discern no abuse of discretion here.

CONCLUSION

We have considered Plaintiffs' remaining arguments and conclude that they lack merit.[8] In No.

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[8] Plaintiffs also move for the Court to take judicial notice of certain documents or to supplement the record to include those documents. That motion is DENIED. "Ordinarily,

20-202, we GRANT in part and DENY in part Cigna's motion to dismiss. We dismiss Plaintiffs' appeal from the Methodology Orders. We AFFIRM the Sanctions Order on the merits. In No. 20-3219, we AFFIRM the district court's order denying Plaintiffs' motion for an equitable accounting.

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material not included in the record on appeal will not be considered." *Loria v. Gorman*, 306 F.3d 1271, 1280 n.2 (2d Cir. 2002). We consider extra-record evidence on appeal only in "extraordinary circumstances." *Int'l Bus. Machs. Corp. v. Edelstein*, 526 F.2d 37, 45 (2d Cir. 1975). The documents Plaintiffs ask us to add to the record would make no difference in our resolution of this appeal and we discern no extraordinary circumstances justifying an expansion of the record on appeal.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of January, two thousand twenty-three.

Before: Debra Ann Livingston,
Chief Judge,
Amalya L. Kearse,
Eunice C. Lee,
Circuit Judges.

Janice C. Amara,
Gisela R. Broderick,
and Annette S. Glanz,
individually and on
behalf of others
similarly situated,

Plaintiffs-
Appellants,

v.

Cigna Corporation and
CIGNA Pension Plan,

Defendants-
Appellees.

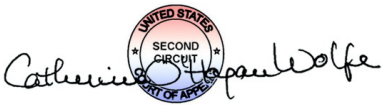
ORDER

Docket No: 20-202(L),
20-3219(CON)

Appellants, Janice C. Amara, Gisela R. Broderick and Annette S. Glanz, filed a petition for panel rehearing, or, in the alternative, for rehearing en banc. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing en banc.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan
Wolfe,
Clerk



Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JANICE C. AMARA *et al,* individually, and on behalf of others similarly situated, *Plaintiffs,* *v.* CIGNA CORP. AND CIGNA PENSION PLAN, *Defendants.*	Civil No. 3:0l-CV-2361 (JBA) January 10, 2020

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION OF RULING ON ENFORCEMENT AND SANCTIONS

On August 16, 2019, the Court issued a ruling [Doc. # 579] (the "Enforcement Ruling") that denied aspects of Plaintiffs' Motion to Enforce Court Rulings and for Sanctions [Doc. # 571] (the "Enforcement Motion"). Specifically, the Court ruled that Defendant Cigna was in compliance with an earlier ruling [Doc. # 486] (the "Methodology Ruling") that set forth the method for converting already-paid lump sum retirement benefits into annuities. (Enforcement

Ruling at 3- 4.) In reaching that conclusion, the Court clarified and reiterated its prior ruling that Cigna was to utilize the mortality tables and interest rates in effect at the time the lump sum was received. (*Id.*) Separately, the Court declined to entertain a methodological dispute regarding the payment of early retirement benefits because Plaintiffs had not pursued that issue in their motions related to methodology, and the Court also declined to consider arguments regarding Cigna's February 26, 2019 Plan Amendment that Plaintiffs made for the first time in reply briefing. (*Id.* at 4-5.)

On August 23, 2019, Plaintiffs moved for reconsideration [Doc. # 580] of these aspects of the Court's Enforcement Ruling.

For the reasons set forth below, Plaintiffs' Motion is DENIED.

I. Discussion[1]

Motions for reconsideration require the movant to set "forth concisely the matters or controlling decisions which [the movant] believes the Court overlooked in the initial decision or order." D. Conn. L. Civ. R. 7(c)l. The Second Circuit has explained that "[t]he major grounds justifying reconsideration are 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice."' *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992) (quoting 18B C. Wright, A. Miller, & E. Cooper,

[1] The Court assumes the parties' familiarity with this case's extensive background and history.

Federal Practice & Procedure § 4478). This standard is "strict," however, and reconsideration should be granted only if "the moving party can point to controlling decisions or data that the court overlooked-matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255,257 (2d Cir. 1995). If "the moving party seeks solely to relitigate an issue already decided," the court should deny the motion for reconsideration and adhere to its prior decision. *Id.*

In support of their motion, Plaintiffs make four principal arguments. First, Plaintiffs argue that the Enforcement Ruling's order as to the "'year(s) to be used to determine the interest rate and mortality table for calculating the annuity value of the lump sum distribution for purposes of determining the offset,'" (Reconsideration Motion at 7 (quoting Enforcement Ruling at 3)), should be reconsidered because it "simply adopts the 'Company Interpretation' that Cigna fabricated *after* this Court's January 2016 and January 2017 methodology rulings" and because the "Court never addresses the arguments Plaintiffs made about the reformation that the Second Circuit affirmed requiring Cigna to provide the 'full value' of the A+B relief, the plain terms of the 'the plan provisions' on the Applicable Interest Rate, the regulations prohibiting use of 'lookback' interest rates for present value calculations ... , and the language in the Section 204(h) notices that this Court approved," (*id.*). Second, Plaintiffs argue that it was error for the Court to treat their motion as to early retirement benefits as foreclosed because Cigna "had an obligation under Second Circuit

precedent to seek clarification or modification of the reformation and this Court's orders," (*id.* at 11 (citing *CBS Broadcasting v. FilmOn.com*, 814 F.3d 91, 99-100 (2016)), and because "this Court invited Plaintiffs to file a motion after refusing to hear Plaintiffs' arguments on these issues until Cigna 'implement[ed] its interpretation,'" (*id.* (citing Ruling on Methodology for Calculating Attorneys' Fees [Doc.# 550] at 1-2)). Third, Plaintiffs take the position that the Court was wrong to "'decline[] to consider'" arguments raised on reply related to Cigna's February 26, 2019 Plan Amendment "'to the extent that Plaintiffs raise[d] a new issue.'" (*Id.* at 5 (quoting Enforcement Ruling at 6).) Plaintiffs maintain that their arguments as to Cigna's February 26, 2019 Plan Amendment were properly raised because these arguments were intended "to show that Cigna was continuing the strategy expressly described in its 10-Ks and 10-Q's of applying the 'Company's interpretation' to 'open aspects' of this Court's orders." (*Id.*) Fourth, Plaintiffs contend that reconsideration is necessary because the Enforcement Ruling "does not address the standards for deciding Plaintiffs' motion." (*Id.* at 4.) To this point, Plaintiffs maintain that their Enforcement Motion should have been governed by the standards of an equitable decree and that Cigna as a fiduciary was required to "'diligently attempt to comply with the injunction in a reasonable manner' by seeking clarification from the court," (*id.* (citing *CBS Broadcasting*, 814 F.3d at 99- 100)), while Cigna has taken the position that the Enforcement Motion was governed by the contempt standard, (*id.* at 4).

Cigna generally responds that Plaintiffs "fail to identify any data or controlling decisions that the

court overlooked in the [Enforcement] Order" and that they "simply rehash the same arguments they have made - and the Court has rejected - for years, even citing to their own briefs as support" as to most issues. (Def.'s Opp. [Doc. # 585) at 1.) Cigna also specifically addresses Plaintiffs four arguments. First, Cigna opposes Plaintiffs' Reconsideration Motion on the basis that the Enforcement Ruling was correct on the merits, as "the Court did not misinterpret its prior methodology orders (Dkts. 459, 485, 486, 507, 517) on interest rates/mortality tables" that ordered "Cigna to convert the Part B amount already paid from a lump sum to an annuity in the year that the Part B amount was paid using the actual assumptions in place that year." (*Id.* at 2.) Second, Cigna states that the Court properly declined to entertain Plaintiffs' argument as to early retirement benefits because Plaintiffs "failed to timely object to the payment of remedy benefits as of the later of the earliest retirement date under Part A or the person's actual benefit commencement date," noting that "[t]his 'later of' approach has not changed since Cigna's 2015 filings." (*Id.* at 2.) Third, Cigna maintains that the Court properly refused to consider Plaintiffs' argument as to the February 26, 2019 Plan Amendment because it amounted to a "new argument and new evidence" raised "for the first time in Reply" and, further, "ha[d] no bearing" on the Enforcement Ruling entered by the Court. (*Id.* at 22.) Fourth, Cigna argues that the Court properly explained the standards it was applying in the Enforcement Ruling as it "interpreted and applied its own prior orders, explained the reasons for its decision, and concluded ... that Cigna's approach was correct under the A+B methodology ordered by the Court." (*Id.* at 20.)

The Court agrees with Cigna that Plaintiffs are essentially attempting to relitigate issues already decided. Plaintiffs' Reconsideration Motion does not present any previously overlooked decisions or facts, but instead restates the arguments presented in their Enforcement Motion and subsequent reply.

Although Plaintiffs insist that the Enforcement Ruling conflicts with "the reformation that this Court ordered and the Second Circuit affirmed in 2014," (Reconsideration Motion at 1), the Court cannot agree that it overlooked its previous ruling on reformation, *Amara v. CIGNA Corp.*, 925 F. Supp. 2d 242 (D. Conn. 2012), or the Second Circuit's opinion affirming that ruling, *Amara v. CIGNA Corp.*, 775 F.3d 510,513 (2d Cir. 2014). Indeed, both of those earlier rulings formed the basis of the very Methodology Ruling that Plaintiffs sought to enforce. The Enforcement Ruling necessarily considered and adhered to those earlier rulings, as the Enforcement Ruling simply reexamined the Methodology Ruling and reiterated the conclusions made there. For the Court to agree that the Enforcement Ruling conflicts with controlling authority would be to disturb the Methodology Ruling

itself.[2] Plaintiffs' argument as to controlling authority is thus unavailing.[3]

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[2] Relatedly, Plaintiffs have made arguments in both their Enforcement Motion and Reconsideration Motion regarding IRC § 417's requirements as to on annuities and interest rates, (see Pls.' Reconsideration Reply [Doc. # 586] at 6; Reconsideration Motion at 8; Enforcement Motion at 21-22), which were previously raised and litigated at the methodology phase, (see, e.g., Pls.'s Objs. to Cigna's Revised 204(h) Notices [Doc. # 464] at 17-25 (arguing that IRC § 417 and its implementing regulations prohibit "lookback" interest rates); Pls.' Response to Cigna's Submission on Methodology [Doc.# 437] at 43 (raising argument that "regulations allow 'look-backs' but for no more than five months")). The Court did not overlook these arguments previously in finalizing its methodology, and thus it has no obligation to revisit them now.

[3] To the extent that Plaintiffs raised other arguments as to controlling authority in their supplemental notices, these also fail.

In their First Notice of Supplemental Authority [Doc.# 581], Plaintiffs provided the Court with a collection of ten recent lawsuits from across the country that "challenge the use of 'old and outdated' interest rates and mortality tables in order to lower retirement benefits compared with retirement benefits calculated using current interest and mortality factors." (First Notice of Supplemental Authority at 2.) All of these cases are in the early stages of litigation, and none has produced an opinion that is binding on this court.

Plaintiffs also filed a Second Notice of Supplemental Authority [Doc. # 587] alerting the Court to the Second Circuit's recent decision in *Laurent v. PricewaterhouseCoopers LLP*, No. 18-487-CV, 2019 WL 7042414 (2d Cir. Dec. 23, 2019). In that case, the Second Circuit "authorize[d] district courts to grant equitable relief—including reformation—to remedy violations of subsection I of ERISA, even in the absence of mistake, fraud,

Plaintiffs' Reconsideration Motion also fails to identify any facts that the Court overlooked that would alter its conclusion. Plaintiffs argue that the Court should reconsider the Enforcement Ruling because it did not "address how named Plaintiff Annette Glanz's or deposition witness Steven Curlee's retirement benefits are being diminished by Cigna's use of 'lookback' interest rates and 'outdated,' and unlawful, mortality tables." (Reconsideration Motion at 1.) Plaintiffs had used these beneficiaries as examples to show how the use of interest rates and mortality tables in place at the time the lump sum was received "would cut into 'the full value' of the A+B relief." (Enforcement Motion at 26.) Although the Enforcement Ruling did not discuss these specific examples, they were presented in Plaintiffs' briefing along with the demonstration of how these beneficiaries would receive more compensation if the Court were to adopt the methodology that Plaintiffs now advance. The Court was not persuaded that this argument was relevant to enforcing the methodology *actually adopted*, and so did not address it in its ruling. Because the Court has previously considered these facts, the Court has no need to reconsider these facts now.

Plaintiffs' argument as to Cigna's February 26, 2019 Plan Amendment also fails to satisfy the standard for reconsideration. Plaintiffs introduced their argument that the Cigna Plan Amendment was

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or other conduct traditionally considered to be inequitable." *Id.* at *6. Although that case is controlling authority, the Court does not see how this proposition about the *availability* of a remedy is relevant to the enforcement of the remedy here.

"clearly contemptuous of the Class' rights under the reformation and the Court's methodology orders and of this Court's authority to enforce its own orders" on reply, (Pls.' Enforcement Reply [Doc.# 573) at 2), and, as such, the Court declined to consider this argument "to the extent that Plaintiffs raise a new issue," (Enforcement Ruling at 6 n.1). In doing so, the Court considered whether the Cigna Plan Amendment had relevance as to Plaintiffs' earlier arguments regarding the annuitization of the offsets but otherwise foreclosed any new argument that the Cigna Plan Amendment itself was contemptuous and in violation of the Court's earlier rulings. Such an approach was not manifestly unjust, as arguments made in a reply brief cannot be used to broaden the issues before the Court. *See Knipe v. Skinner*, 999 F.2d 708, 711 (2d Cir. 1993). Finally, Plaintiffs assert that reconsideration is necessary on the grounds that the Enforcement Ruling did not directly address the standard of review, citing *Beckford v. Portuondo*, 234 F.3d 128 (2d Cir. 2000), in support of this argument. In *Beckford*, the Second Circuit remanded a two-sentence summary judgment order and explained that the decision was "too spare to serve as a basis for [appellate] review." *Id.* at 130. The Court explained that the district court must explain the standard it applies to facts, and that it must set forth the "legal theory forming the basis of the ruling." *Id.* (quoting *Atkinson v. Jory*, 292 F.2d 169, 171 (10th Cir. 1961)). The eight-page Enforcement Ruling satisfied those requirements. In addressing what was ultimately a purely legal question, the Court provided references to its prior opinions and elaborated on the logic behind its earlier conclusions. Thus, the Court has set forth its "conclusions of law sufficient to permit appellate

review" of its Enforcement Ruling. *Badgley v. Santacroce*, 815 F.2d 888, 889 (2d Cir.1987).

In sum, Plaintiffs have not satisfied the strict standard for reconsideration, and the Court will not alter its Enforcement Ruling.

II. Conclusion

For the reasons set forth above, the Court DENIES Plaintiffs' Motion.

IT IS SO ORDERED.

_____/s/_____

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut this 10th day of January 2020.

Appendix D

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JANICE C. AMARA *et al,* individually, and on behalf of others similarly situated, *Plaintiffs,* *v.* CIGNA CORP. AND CIGNA PENSION PLAN, *Defendants.*	Civil No. 3:0l-CV-2361 (JBA) August 16, 2019

RULING ON PLAINTIFFS, MOTION TO ENFORCE COURT RULINGS AND FOR SANCTIONS

Plaintiffs move "that this Court grant their motion to enforce the Court's reformation and methodology rulings and sanction Cigna for calculating and paying individual remedy amounts under ... interpretations ... of this Court's orders that fail to comply with the Court's rulings." (Pls.' Mot. to Enforce Court Rulings and for Sanctions [Doc.# 571) at 1.) For the reasons set forth below, Plaintiffs' Motion is granted in part and denied in part.

I. Background

The Court assumes the parties' familiarity with this case's background and history. A summary of the case's history through January 10, 2017 can be found in the Court's Revised .Ruling on Proposed Methodology and Request for Order of Compliance Plan, issued on that date. ([Doc.# 486) at 2-5.) On July 14, 2017, the Court granted Cigna's motion for clarification of the January 2017 order. ([Doc.# 507).) On November 7, 2017, the Court denied Plaintiffs' subsequent motion for reconsideration. ([Doc.# 517).)

On October 17, 2018, after briefing by the parties, the Court adopted Plaintiffs' proposed interest rate and age assumption methodologies for the purpose of calculating the net present value of the remedy award and calculating the attorneys' fees to which Plaintiffs might be entitled. The Court also directed Defendants to provide the Court with an updated net present value calculation. ([Doc.# 550].) After further briefing by the parties, the Court on November 29, 2018 granted Plaintiffs' Motion for Attorneys' Fees in substantial part and directed Defendants to begin implementing the A+B remedy as quickly as possible, setting a schedule for the payment of past- due lump sums and back benefits. ([Doc.# 555] at 11.) After Defendants' subsequent motion for clarification, the Court ordered Defendants to pay small benefit cashouts on the same schedule. ([Doc.# 560] at 1-2.)

On April 5, 2019, Plaintiffs filed the instant Motion, asserting that "Cigna has violated the Court's rulings by:

(1) Using "lookback" interest rates from the date of the Part B lump sum distributions rather than

> from the Part A "Benefit Commencement Dates" to annuitize the offsets that this Court has allowed Cigna to take;
>
> (2) Using "outdated" mortality tables from the date of the Part B lump sum distributions rather than the "successor" mortality tables applicable under the plan provisions on the "Applicable Mortality Table" to annuitize the offsets that this Court has allowed Cigna to take;
>
> (3) Eliminating early retirement benefits until the "later of' the Part A early retirement age or the date the Part B cash balance account is distributed; and
>
> (4) Refusing to pay "small benefit cashouts" to class members who have not received their Part B cash balance accounts.

(Pls.' Mot. to Enforce Court Rulings and for Sanctions at 1-2.) The Court addresses each of these issues in turn.

II. Interest Rates and Mortality Tables

This Court previously addressed Plaintiffs' objection to "Defendants' [proposed] methodology for converting the already-paid lump sums into annuities for purposes of offsetting A+ B." (Revised Ruling on Proposed Methodology and Request for Order of Compliance Plan at 16.) Cigna had stated that when "'annuitizing the Part B benefits, ... [it) will use the mortality tables and interest rates actually in effect under the terms of Part B as of the later of the date the participant reaches earliest retirement age under

the terms of Part A or the participant's actual benefit commencement date."' *(Id.* (alterations in original).) The Court ruled "that the plan provisions in place at *the time the lump sum was received* should control ... and not, as Cigna argues, the plan in place at the later of the date the participant reaches earliest retirement age under Part A or the actual benefit commencement date." *(Id.* at 17 (emphasis in original).)

The parties now dispute, in essence, the year(s) to be used to determine the interest rate and mortality table for calculating the annuity value of the lump sum distribution for purposes of determining the offset. *(See* Ruling on Methodology for Calculating Attorneys' Fees at 2 n.l (noting but not reaching this legal disagreement).)

Plaintiffs argue that under the "plan provisions" referred to in the Court's previous ruling, the "Applicable Interest Rate" is "the rate in effect in the 'year which includes the Benefit Commencement Date.'" (Pls.' Mem. Supp. Mot. to Enforce Court Rulings and for Sanctions [Doc.# 571-1 at 16.) The Benefit Commencement Date is "the early or normal retirement age at which the benefits begin." *(Id.)* This date, in other words, is the year of Part A eligibility. Similarly, Plaintiffs argue the "plan provisions" should be read to refer to plan provisions on the Applicable Mortality Table, which calls for the use of successor tables prescribed by the Commissioner of Internal Revenue. *(Id.* at 25.) By contrast, Defendants contend that "[m]ore logically, the statement 'Plan provisions in effect when Part B was paid' refers to both the 'mortality tables and interest rates' in that year, given that the Court referred to both provisions

in the prior paragraph of its opinion." (Defs.' Opp'n to Mot. to Enforce Court Rulings and for Sanctions [Doc. # 572) at 20.)

The Court finds Defendants' application of the Court's previous ruling more persuasive. In context, given the Court's rejection of Cigna's proposal to tether the interest rate/mortality table year to the year of Part A eligibility, "plan provisions" refers to "the mortality tables and interest rates" in effect at the time the lump sum was received. *(See also* Revised Ruling on Proposed Methodology and Request for Order of Compliance Plan at 17 ("This methodology has the added benefit of permitting Cigna to calculate the amount owed to all class members that have already received benefits as a lump sum, without waiting until those participants reach retirement age under Part A ....").) (*Cf* Ruling on Defs.' Mot. for Clarification and Correction of Judgment [Doc. # 507] at 14 (in context of determining interest rate on lump sums already paid, "[f]ixing the interest rate at the rate available to a plan participant at the time he or she received the Part B lump sum captures the fact that plan participants had control to invest their money at that point in time.").) Accordingly, Plaintiffs' arguments on interest rates and mortality tables are unavailing.

III. Early Retirement Benefits

Next, Plaintiffs challenge what they characterize as Defendants' refusal to pay early retirement benefits until the "later of' the Part A early retirement date or the date the Part B cash account is distributed. (Pls.' Mem. Supp. Mot. to Enforce Court Rulings and

for Sanctions at 28.) Cigna contends that it complied with the Court's orders to calculate remedy benefits as of the later of the Part A remedy date or the date of Part B benefit commencement. (Defs.' Opp'n to Mot. to Enforce Court Rulings and for Sanctions at 28.)

As the Court noted in the July 25, 2018 telephonic status conference, "we're not going to relitigate methodology; and to the extent there are issues that could have been brought up in the motions related to methodology and weren't, it's really too late." ([Doc.# 538] at 4.) *(See also id.* at 10 ("So I don't see that at this point we can or should be relitigating any of the methodology.").)

Defendants, in opposition to Plaintiffs' Motion, argue that "[e]very time Cigna produced remedy calculations to Class Counsel in 2016, 2017, and 2018, it advised that 'Part A benefit will commence as of the earliest age allowed under Part A that is on or after the date that each participant received her original Part B benefit' and showed individual 'remedy annuity commencement dates.'" (Defs.' Opp'n to Mot. to Enforce Court Rulings and for Sanctions at 30 n. 24 (citing Ex. 4 to *id.).)* In their reply, Plaintiffs offer no explanation for their apparent failure during the methodology litigation to fully pursue the issue of whether the Court's previous orders authorize Defendants' challenged action on retirement benefits.

In light of the Court's previous admonition that the time has passed to address "issues that could have been brought up in the motions related to methodology and weren't," the Court declines to entertain this methodological dispute now.

IV. Small Benefit Cashouts

Finally, Plaintiffs assert that Cigna is improperly refusing to pay small benefit cashouts to approximately "1,400 class members who are otherwise due small benefit cashouts because the Part B cash balance benefits to which they are entitled have not yet been received." (Pls.' Mem. Supp. Mot. to Enforce Court Rulings and for Sanctions at 36-37.) Defendants respond that

> these individuals are not yet entitled to commence their remedy benefits because (a) approximately 800 are still employed by Cigna and therefore cannot commence any benefits under the terms of the Plan or ERISA; and (b) all of them have not yet commenced Part Band so the offset to their A+B remedy (Dkt. 507 at 12-13) - and therefore their net remedy amount - cannot be calculated until their actual amount of their Part B benefit is calculated and, at that time, their remedy benefit may (or may not) exceed the $5,000 small benefit cashout limit.

(Defs.' Opp'n to Mot. to Enforce Court Rulings and for Sanctions at 35-36.) In reply, Plaintiffs assert in a footnote that Defendants' argument related to active employees is a "red herring" because it is in fact not Plaintiffs' position that small benefit cashouts should be paid to active employees.[1] In light of the

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[1] Defendants move for leave to file a four-page sur-reply in opposition to Plaintiffs' Motion, contending that there is good cause to do so in light of Plaintiffs having "raised two new issues in their Reply that were not addressed in their Sanctions Motion or in Defendants' Opposition[,]" one of

clarification, the Court construes Plaintiffs' objection as only pertaining to the 600 remaining class members who may be entitled to small benefit cashouts, who are no longer active employees, and who have not yet commenced Part B.

On December 6, 2018, Defendants moved for clarification regarding the treatment of small benefit cashouts and rollovers. As relevant here, Defendants "request[ed] that the Court order that a class member is entitled to a small benefit cashout if the value of the future annuity payments to which the class member is entitled is less than $5,000 after deducting attorneys' fees, even if that class member also is entitled to (or received) retroactive payments or Part B cash balance benefits that, in the aggregate (together with the future annuity payments), would exceed $5,000." (Defs.' Mem. Supp. Mot. for Clarification [Doc. # 556-1] at 3.) Defendants requested this relief because while "[t]he IRS generally requires that a defined benefit plan pay benefits as an annuity absent an affirmative election

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which is the revelation that Plaintiffs do not in fact seek the payment of small benefit cashouts to active employees. (Doc.# 575 at 1.) While the Court does not understand why Plaintiffs originally described the issue as affecting 1,400 class members if they do not challenge Defendants' determination that active employees are not currently entitled to small benefit cashouts, Plaintiffs' clarification *narrows* the scope of dispute and so does not provide good cause for the filing of a sur-reply. Moreover, to the extent that Plaintiffs raise a new issue with respect to Cigna's February 26, 2019 Plan Amendment, the Court declines to consider those arguments by Plaintiffs. Accordingly, Defendants' Motion for Leave to File Sur-Reply is denied as moot.

by the participant[,]" and the "IRS provides an exception for 'small benefits' valued at $5,000 or less to allow them to be paid as a lump sum, without participant consent[,]" the relevant statutory provisions according to Defendants do not provide "clear guidance as to how the small benefit cashout rules should apply to the remedy payments ordered by this Court, where class members' total payments from the Plan may be comprised of three components: (1) a retroactive remedy payment with interest, (2) a future annuity remedy payment, and (3) a Part B cash balance benefit." *(Id.)*

Thus, Defendants requested by way of clarification that the Court order the Plan to pay small benefit cashouts "regardless of any retroactive payments or Part B cash balance benefits to which the class member also is entitled (or received)" and "even if that class member also is entitled to (or received) retroactive payments or Part B cash balance benefits that, in the aggregate (together with the future annuity payments), would exceed $5,000[,]" (Proposed Order to Cash Out Small Future Remedy Benefits and to Handle Rollover Elections of Remedy Benefits [Doc.# 556-4] at 1- 2), which the Court subsequently ordered, (Order to Cash Out Small Future Remedy Benefits and to Handle Rollover Elections of Remedy Benefits at 1-2.) Defendants made clear that the parties nonetheless disagreed "about whether A+B remedy payments can be paid before Part B amounts are paid to participants." (Proposed Order to Cash Out Small Future Remedy Benefits and to Handle Rollover Elections of Remedy Benefits at 2 n.2.)

Defendants put forward no specific explanation as to why, if Part B amounts are to be disregarded in the calculation of small benefit cashout eligibility, those participants' small benefit cashout amounts cannot be calculated and paid at this time. Accordingly, and in light of the Court's previous Order to Cash Out Small Future Remedy Benefits and to Handle Rollover Elections of Remedy Benefits, the Court now directs Defendants to pay those small benefit cashouts as promptly as possible and grants Plaintiffs' Motion in this limited respect.

While the Court adopts Plaintiffs' view that class members in this category should receive their small benefit cashouts without waiting for their Part B amounts to be paid, the Court declines to sanction Defendants. Sanctions against Defendants are not warranted given the opacity of the issue, the lack of evidence of bad faith, and the lack of evidence that Defendants failed to act in a reasonably diligent manner in attempting to comply with the Court's previous orders. *See EEOC v. Local 638,* 81 F.3d 1162, 1171 (2d Cir. 1996) ("A party may not be held in contempt unless the order violated by the contemnor is clear and unambiguous, the proof of non-compliance is clear and convincing, and the contemnor was not reasonably diligent in attempting to comply." (internal quotation marks and citation omitted)).

V. Conclusion

For the reasons set forth above, the Court GRANTS in part and DENIES in part Plaintiffs' Motion to Enforce Judgment and DENIES Defendants' Motion for Leave to File Sur-Reply. The Court directs Defendants to pay small benefit cashouts to participants who have not received their Part B cash balance accounts as promptly as possible.

IT IS SO ORDERED.

/s/

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut this 16th day of August 2019.

Appendix E

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JANICE C. AMARA *et al,* individually, and on behalf of others similarly situated, *Plaintiffs,* *v.* CIGNA CORP. AND CIGNA PENSION PLAN, *Defendants.*	Civil No. 3:0l-CV-2361 (JBA) November 29, 2018

RULING ON MOTION FOR ATTORNEYS' FEES, INCENTIVE AWARDS, AND EXPENSES

Plaintiffs have moved ([Doc. # 410]) for approval of their attorneys' fees, proposed incentive awards, and expenses in this class action brought under the Employee Retirement Income Security Act ("ERISA"). Having previously ruled on the methodology for calculating attorneys' fees, ([Doc.# 550]), and having considered Defendants' response to the Motion, ([Doc. # 421]), Plaintiffs' Reply, ([Doc. # 424]), and Defendants' Updated Present Value Calculation, ([Doc.# 551]), the Court now rules on Plaintiffs' Motion for Attorneys' Fees.

Plaintiffs seek attorneys' fees based on the "percentage of the fund" or the lodestar method in class actions that produce common fund recoveries. *See Goldberger v. Integrated Resources,* 209 F.3d 43, 47 (2d Cir. 2000). In this case, an award of attorneys' fees based on the percentage of the fund method "directly aligns the interests of the class and its counsel." *Wal-Mart v. Visa U.S.A. Inc.,* 396 F.3d 96, 122 (2d Cir. 2005).

In applying the percentage of the fund method, it is appropriate to award attorneys' fees as a percentage of the total funds made available," not "on the basis of claims made against the fund." *Masters v. Wilhelmina Model Agency, Inc.,* 473 F.3d 423,437 (2d Cir. 2007). In *Masters,* the Second Circuit recognized that "[t]he entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class." *Id.*

The parties' calculations of actual individual relief reflecting a value of the "A+B" recovery is significantly disputed. Plaintiffs calculate the recovery at $280.6 million; Defendants' updated present value calculation reflects a total value of $184,456,124 in relief to the class. ([Doc.# 551].) In addition to the monetary common fund recovery under the "qualified" portion of Cigna's Pension Fund, class members received additional non-monetary relief in the form of the August 2017 ERISA Section 204(h) notice disclosing the "true effect on their retirement benefits" resulting from the cash balance conversion. Moreover, Plaintiffs represent that almost 400 class members will be entitled to additional benefits from Cigna's Supplemental Pension Plan.

Under *Goldberger v. Integrated Resources,* 209 F.3d 43, 47 (2d Cir. 2000), "the traditional criteria in determining a reasonable common fund fee, includ[e]: (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 representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Id.* at 50.

All of the relevant *Goldberger* factors weigh in favor of the requested 17.5% fee award. With respect to the first and fourth factors, Plaintiffs' counsel have vigorously litigated this case for seventeen years before the district court, the Second Circuit, and the Supreme Court, expending over 12,000 hours. With respect to the second factor, the case raised novel questions of law and directly affected tens of thousands of class members. Significantly, the Supreme Court held that that the remedies ordered by the district court-including (1) "reformation of the terms of the plan in order to remedy the false or misleading information CIGNA provided[,]" (2) equitable estoppel, and (3) surcharge all "f[e]ll within the scope of the term 'appropriate equitable relief in [ERISA] § 502(a)(3)." *CIGNA Corp. v. Amara,* 563 U.S. 421, 440-42 (2011). As two observers noted, while the "the U.S. Department of Labor (DOL)" had long "taken the position that a much broader interpretation of section 502(a)(3) is warranted .... [l]ower courts ... were unwilling to adopt the DOL's position, believing that the Supreme Court's jurisprudence had conclusively narrowed the scope of section 502(a)(3)." Peter K. Stris & Victor O'Connell, *ERISA & Equity,* 29 ABA J. LAB. & EMP. L. 125, 128 (2013). But "[i]n a surprise to many, the Supreme

Court did what no lower court had been willing to do: it made clear in *CIGNA Corp. v. Amara* that the DOL's position [wa]s correct." *Id.* As a result, they concluded, "in many areas, *Amara* now permits plaintiffs to seek meaningful relief." *Id.*

The third *Goldberger* factor here is inapplicable as it relates to settled claims. With respect to the fifth factor, the requested fee here is reasonable in relation to the value of the total monetary recovery and in line with or below earlier fee awards.

Class counsel's requested fee award of 17.5% of the increased benefits is lower than percentage awards in other ERISA class actions in this Circuit. In *Haddock v. Nationwide Financial Services, Inc.,* No. 01-cv-1552 (SRU) (D. Conn. Apr. 10, 2015), Judge Underhill approved a 35% award of $49 million from a $140 million recovery, a lower financial recovery than here. *See also In re Colgate-Palmolive* Co. *ERISA Litig.,* 36 F. Supp. 3d 344,353 (S.D.N.Y. 2014) (25% award from a $45.9 million common fund); *Board of Trustees of the AFTRA Ret. Fund v. JPMorgan Chase Bank,* 2012 WL 2064907, *3 (S.D.N.Y. June 7, 2012) (25% of $150 million common fund); *Tedesco v. Bank of America,* No. 3:07 CV 1640 (JCH) (D. Conn. June 2, 2011) (19% of a $21 million settlement); *Richards v. Fleet Boston,* No. 3:04CV1638 (JCH) (D. Conn. Oct. 15, 2008) (21% of a $83.5 million settlement); *In re AOL Time Warner, Inc. ERISA Litig.,* 2007 WL 3145111, at *1 (S.D.N.Y. Oct. 26, 2007) (17.9% of $100 million recovery).

It is also consistent with percentage-of-fund fee awards in other jurisdictions. *See, e.g., Cooper v. IBM Personal Pension Plan,* 2005 WL 1981501, at *2 (S.D.

Ill. Aug. 16, 2005) (awarding 29% of first $250 million recovery; plus 25% of next $64 million); *Berger v. Xerox Corp. Ret. Income Guar. Plan,* 2004 U.S. Dist. LEXIS 1819, at *5-7 (S.D. Ill. Jan. 22, 2004) (29% of $240 million recovery).

When a percentage-of-the-fund method is used, a lodestar "cross-check" based on a summary of hours tests the reasonableness of the percentage. *Wal-Mart,* 396 F.3d at 123. While not required, using the lodestar method as a discretionary cross-check further demonstrates that the fee that Class counsel seeks is reasonable. A 17.5% award from a $184,456,124 common fund- the lower of the two numbers put forth by the parties in valuing the remedy payments to class members for the purposes of calculating attorneys' fees-would be $32,279,821.70. Based on the number of Class counsel's hours in the original fee motion, which results in a $6.794 million lodestar, the 17.5% requested award equates to a multiplier of 4.75. With a 14% increment for additional hours over the past two and one-half years and a 10% increment for higher hourly rates over the same period, the adjusted lodestar is $8.513 million, (Bruce Suppl. Decl. 2 [Doc.# 518- 2]), which equates to an implied multiplier of 3.79 on the adjusted lodestar.

These implied multipliers are in line with other comparable complex ERISA cases. *See, e.g., In re Colgate-Palmolive,* 36 F. Supp. 3d 344, 353 (S.D.N.Y. 2014) (multiplier of "five ... is on the high end" but "not unreasonable," observing that in fifty-three ERISA cases cited by the plaintiffs, "the implied multiplier ranged from less than one to eight times the lodestar, and nine cases had multipliers greater than four");

Williams v. Rohm & Haas Pension Plan, 658 F.3d 629,635 (7th Cir. 2011) (29% award implied multiplier of 5.85); *Kifafi v. Hilton Hotels Retirement Plan,* 999 F. Supp. 2d 88, 104 (D.D.C. 2013) (15% award implied multiplier of eight).

Finally, with respect to the sixth *Goldberger* factor, public policy weighs in favor of recognizing the risk and heretofore uncompensated labor expended by Plaintiffs' counsel over the course of this long-winding case.

Required by Fed. R. Civ. P. 23(h), notice of the fee request was provided to the members of the class on August 10, 2015. ([Doc.# 453].) Objections received were filed on October 23, 2015. Four objections to the requested 17.5% fee award were received from the 27,549 class members to whom the notice was mailed, i.e. less than .0001% of the class. The Court declines to adopt these objectors' view that CIGNA should be required to pay the fee award on top of the common fund recovery, except if additional benefits are ordered, as discussed below.

This small number of objections compared to 80% affirmative class responses without objections also weights in favor of this fee award. *See, e.g., Nolte v. Cigna Corp.,* 2013 U.S. Dist. LEXIS 184622, at *3 (C.D. Ill. Oct. 15, 2013) ("This Court finds the lack of any meaningful number of objections to be an unmistakable sign of the Class's overwhelming support for the Class Counsel's Application"); *In re Rite Aid Corp. Sec. Litig.,* 396 F.3d 294, 305 (3d Cir. 2005) ("absence of substantial objections by class

members to the fee requests weighed in favor of approving the fee request").

In order to avoid further delay in remedy payments to class members, the Court **GRANTS** Plaintiffs' Motion for Attorneys' Fees and awards attorneys' fees to Class counsel in the amount of 17.5% of the $184,456,124 common fund as valued by Defendants. The Court recognizes that the parties dispute each other's common fund valuation, ([Doc.## 551, 552, 553, 554]), pursuant to the Court's remedy rulings and the Court's Ruling on Methodology for Calculating Attorney's Fees, ([Doc.## 378,459,486,507,517, 550]). In the event that Plaintiffs file and prevail on a motion to enforce their interpretation of the requirements on Cigna and the Court's previous rulings, resulting in additional benefits to be paid to class members, Cigna will be required to pay appropriate attorney's fees on any such additional remedy amounts found to be due. If by contrast Plaintiffs file and prevail on a motion to enforce the Court's Ruling on Methodology for Calculating Attorney's Fees-which the Court understands would *not* result in any additional remedy amounts-Plaintiffs would not be able to recover "fees on fees" for their work securing those additional attorney's fees.

After payment of the fee award to Class counsel, CIGNA is authorized to deduct 17.5% from the increased individual benefits to which class members are entitled under the "A+B" relief awarded by the Court.

The Court further finds that the requested incentive awards for the named Plaintiffs and witnesses are reasonable, and CIGNA has not objected, ([Doc.# 421). Incentive awards or service awards are awarded to compensate named plaintiffs "for bearing the[] risks of [bringing an action], as well as for as any time he spent sitting for depositions and otherwise participating in the litigation as any plaintiff must do." *Espenscheid v. DirectSat USA, LLC,* 688 F.3d 872, 876-77 (7th Cir. 2012). The named Plaintiffs and other class members are represented to have been very active in this litigation, including participating in mediation sessions, attending non-trial court hearings, and taking on heavy perceived risk while still employed by CIGNA, e.g. Janice Amara. The requested awards are in line with those awarded in other complex class actions. *See, e.g., In re Vitamin* C *Antitrust Litig.,* 2012 WL 5289514, at *11 (E.D.N.Y. Oct. 23, 2012) (approving $50,000 incentive award for each of two class representatives); *Board of Trustees of AFTRA Retirement Fund,* 2012 WL 2064907 at *3 ($50,000 incentive awards to three class representatives); *Bellifemine v. Sanofi-Aventis U.S. LLC,* 2010 WL 3119374, at *7 (S.D.N.Y. Aug. 6, 2010) ($75,000 awards to five named plaintiffs and $25,000 to $60,000 awards to four class member witnesses); Kifafi, 999 F. Supp. 2d at 105 ($50,000 incentive award to lead plaintiff).

With respect to the one objection related to the incentive awards, courts have rejected isolated objections to awards that compensate the named Plaintiffs and witnesses for their active participation and assistance in the case and the personal risks they bore. *See, e.g., Sullivan v. DB Invs., Inc.,* 667 F.3d

273,333 n.65 (3d Cir. 2011) (rejecting "sole objection" to incentive award based on "the role played by the several class representatives and the risks taken by these parties in prosecuting this matter"); *In re Motor Fuel Temperature Sales Practices Litig.,* 271 F.R.D. 263, 293 (D.Kan. 2010) ("incentive awards to class representatives are justified ... to induce individuals to become named representatives, or to compensate them for personal risk incurred or additional effort and expertise provided for the benefit of the class").

It is therefore **ORDERED** that named Plaintiffs Janice Amara, Gisela Broderick and Annette Glanz shall each be awarded a class representative incentive award of $50,000; the five other trial witnesses, Bruce Charette, Robert Upton, Patricia Flannery, Barbara Hogan, and Lillian Jones, shall each be awarded incentive awards of $15,000; and the three other witnesses deposed by CIGNA, Steven Law, Mitchell Haber, and Steve Curlee, shall each be awarded $5,000. Class counsel shall pay the $240,000 in incentive awards from the 17.5% fee award.

It is **ORDERED** that within 30 days, CIGNA shall pay the 17.5% award to lead counsel for the Class, Stephen R. Bruce Law Offices, who shall distribute the $240,000 in incentive awards from that amount and allocate the attorneys' fees among the current and former counsel for the Plaintiffs in accordance with their fee agreements.

Class counsel have further requested direct payment by CIGNA of $480,680 in out-of-pocket expenses incurred to April 10, 2015 (which was the date of the original motion, *see* [Doc.# 410]), plus

$403,551 in out-of-pocket expenses incurred from that date to November 30, 2017, (Bruce Suppl. Decl. 3), plus $510,000 for anticipated future expenses in providing notice to the class about their individual benefits and monitoring implementation of the judgment for all class members.

It is well-established that counsel are entitled to the reimbursement of "reasonable out-of-pocket expenses incurred by the attorney and which are normally charged fee-paying clients," provided they are "incidental and necessary to the representation." *Reichman v. Bonsignore, Brignati & Mazzotta P.C.,* 818 F.2d 278,283 (2d Cir. 1987). Here, out of pocket expenses may also be awarded under this Court's equitable authority to surcharge to redress "a loss resulting from a trustee's breach of duty," *Amara,* 563 U.S. 421,441; *accord,* Bogert, *Trusts and Trustees* (3d ed.),§ 970, at 304-5; as well as this Court's inherent authority to manage the implementation of equitable relief, *see Riggs v. Johnson Cnty.,* 73 U.S. 166, 187 (1867). There were no objections from class members to this request, and even the persons who objected on other grounds affirmatively supported requiring CIGNA to pay for such expenses. ([Doc.# 453] at 4-5.)

CIGNA objects that Plaintiffs seek unrecoverable costs. ([Doc.# 421] at 13-16.) Specifically, CIGNA contends that (1) expert witness fees are not recoverable under ERISA beyond the per diem for witness attendance; and (2) Plaintiffs are not entitled to costs associated with monitoring of the Plan on an ongoing basis, because post-judgment monitoring was a remedy that Plaintiffs sought, but that was not awarded prior to final judgment. *(Id.)* CIGNA argues

that although such monitoring "might be appropriate in a civil rights case ... in order to ensure compliance with a consent decree ... similar 'monitoring' isn't appropriate as to the payment of benefits in an ERISA case." *(Id.* at 16.) While the Court has inherent authority to order post-judgment remedies to ensure compliance with the Court's grant of injunctive and other forms of equitable relief, the Court agrees that Plaintiffs have not shown their entitlement to post-judgment monitoring here, and so will not award those forward-looking costs sought by Plaintiffs.

With respect to the question of whether expert witness fees are recoverable, ERISA provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § l 132(g)(l). Under 28 U.S.C. § 182l(a)(l), "a witness in attendance at any court of the United States ... or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section." 28 U.S.C. § 1821 sets this per diem fee at $40. *Id.§* 1821(6).

The Supreme Court has held that "when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of§ 1821(b), absent contract or explicit statutory authority to the contrary." *Crawford Fitting* Co. *v. J. T. Gibbons, Inc.,* 482 U.S. 437,439 (1987). District courts within the Second Circuit have split on the question of whether expert fees are recoverable under ERISA beyond§ 182l's per diem, and the Second Circuit has not spoken on this question in any case decided after *Crawford.*

Plaintiffs cite the Eleventh Circuit's decision in *Evans v. Books-A-Million* for the proposition that "reasonable litigation expenses ... may be recovered under§ l132(g)(1) if itis the prevailing practice in the legal community to bill fee-paying clients separately for those expenses." 762 F.3d 1288, 1299 (11th Cir. 2014). While that proposition is no doubt true in general, *Crawford* would appear to require a different rule for the "reasonable litigation expense" of expert witness fees. Indeed, *Evans* did not involve a claim for expert witness fees, and the examples provided of what "reasonable litigation expenses" might fall into§ 1132(g)(l)'s coverage include "mediation, legal research, postage, and travel." *Id.*

Perplexingly, Plaintiffs also cite *Evans'* holding that§ l 132(g)(1) should be interpreted in a manner analogous to 42 U.S.C. § 1988. But§ 1988's own provision for attorney's fees has not been interpreted to include expert witness costs, except in one specific circumstance where Congress expressly amended the statute to make it so. In *West Virginia University Hospitals, Inc. v Casey,* the Supreme Court held-following *Crawford-that§* 1988 did not permit a grant of expert witness fees, noting that "at the time [42 U.S.C. § 1988] was enacted neither statutory nor judicial usage regarded the phrase 'attorney's fees' as embracing fees for experts' services." 499 U.S. 83, 97 (1991). Because Congress disagreed with that outcome in the context of anti-discrimination legislation, the legislative branch amended§ 1988 to expressly provide for the award of expert witness fees, but only in actions "to enforce a provision of section 1981 or 1981a of this title[,]" leaving 42 U.S.C. § 1983 and other covered statutes untouched. 42 U.S.C. §

1988(c). *See also Landgraf v. USI Film Prod.,* 511 U.S. 244,251 (1994) (observing that Congress made this amendment in apparent direct response to *Casey).* Accordingly, Plaintiffs' argument is unavailing.

Putting aside expert witness fees and projected future expenses, Class counsel had incurred expenses of $110,375.51 as of the date of their original fee motion, ([Doc. # 410-2] at 15), and expenses of $403,551.57 from April 10, 2015 through November 30, 2017. Class counsel's total $513,927.08 expenses incurred to November 30, 2017-excluding future expenses and expert witness expenses-are reasonable, incidental, and necessary to the representation of the class and will be awarded.

Accordingly, this Court **ORDERS** that Class Counsel shall be awarded a total of $513,927.08 in litigation expenses incurred through November 30, 2017. Those expenses shall be paid by CIGNA to lead counsel for the Class within 30 days of this Order and shall not be deducted from the common fund recovery or the common fund fee award.

Defendants noted in the joint status report of July 23, 2018 that they "remain ready to implement the Court's A+B remedy once the Court fixes the percentage of each class member's remedy amount to be awarded to class counsel and deducted from each class member's A+B remedy payments." ([Doc. # 535] at 10.) Now that the Court has fixed this percentage, Defendants should begin implementing the remedy as quickly as possible.

Within 30 days of this ruling, the parties must exchange their individual results for each class member for inclusion in Plaintiffs' website benefit statement and in Cigna's mailed notices. Cigna must mail these notices within 60 days of this ruling, and then pay any past due lump sums and back benefits no later than 30 days thereafter.

IT IS SO ORDERED.

/s/
Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut this 29th day of November 2018.

Appendix F

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JANICE C. AMARA *et al,* individually, and on behalf of others similarly situated, *Plaintiffs,* *v.* CIGNA CORP. AND CIGNA PENSION PLAN, *Defendants.*	Civil No. 3:0l-CV-2361 (JBA) October 17, 2018

RULING ON METHODOLOGY FOR CALCULATING ATTORNEYS' FEES

Pending before the Court are two disputes between the parties relating to the proper methodology for the calculation of attorneys' fees to be awarded to class counsel. For the reasons set forth below, the Court adopts Plaintiffs' proposed methodology on both questions.

I. Background

The Court assumes the parties' familiarity with this case's background and long history. The parties dispute the proper calculation of the present value of the common fund recovery, which must be determined

in order for the Court to rule on Plaintiffs' pending motion for attorneys' fees, which in turn must be ruled on in order for remedy payments to begin issuing to class members.

The parties agree that the differences in their respective calculations of the value of the common fund are attributable to four methodological disputes. At the July 25, 2018 telephonic status conference, Plaintiffs expressed their view that Defendant's approach to all four methodological disputes shows that Defendant intends to violate the Court's previous orders, a contention that Defendant rejected. The Court noted that "the plan administrator has its directives, has the legal principles to be used in administering [the plan], has the whole history of trial and appeal and rulings and decisions in this case; and if [going forward] they breach[] the fiduciary duty to act solely in the benefit of the beneficiaries that maximize their benefit, then there's . . . either another ERISA case that's brought or the Court retains continuing jurisdiction for remedy and possible contempt." ([Doc. # 538] at 10.) The Court further stated that it did not "see that at this point we can or should be relitigating any of the methodology[,]" but that Defendant implements its interpretation of the reformed plan at its own "risk[,]" if it is later found to have done so in violation of its fiduciary duties or previous court orders.

As subsequently clarified by emails to the Court, both parties agree that at least two of the methodological disputes at issue affect not only the present value of the common fund recovery but also

the actual remedy amounts paid to class members.[1] The Court made clear that with respect to these methodological issues, once the Court rules on the attorneys' fee petition, "if there is [a] further amount of money thereafter that [Defendant] will owe as a result of erroneously calculated benefits, then the Court will order a supplement and may not be limited to 17.5 percent, and may not take it out of the beneficiaries' portion but may require [Defendant] to shoulder it." (*Id.* at 23- 24.) As the Court explained, "the incentive for [Defendant] to get it right the first time is there, because the additional fees owed to the Plaintiffs" in this scenario will "come out of [Defendant]'s pot" and will not be taken out of class member remedy payments. (*Id.* at 25.)

Defendant contends, however, that at least two remaining methodological disputes affect only the calculation of attorneys' fees, and not the remedy amounts received by class members: the use of adjusted 25-year stabilization rates instead of IRC Section 417(e) rates for the calculation of the relief payments' present value, and Defendant's assumed payment dates for participants who have not yet commenced Part B benefits.

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[1] Specifically, in their emails to the Court, the parties appear to agree that the remedy amounts are affected by the year used to determine the interest rate for calculating the annuity value of the lump sum distribution for purposes of determining the offset, by the year used to determine the mortality table for calculating the annuity value of the lump sum distribution for purposes of determining the offset, and by the assumed age of payment for benefits to those who were eligible for early retirement. (*See* Email Exhibit attached to this Ruling.)

In light of the possibility that the dispute between the parties on these two methodological questions would not be captured going forward by any future cause of action by plan members for breach of fiduciary duty or contempt motion, the Court requested that the parties provide briefing on the two outstanding methodological disputes that, in the view of at least one party, affect only the calculation of attorneys' fees and not remedy amounts. It is this briefing that the Court now addresses.

II. Discussion

A. Interest Rates

Plaintiffs contend that the "Court should use the IRC § 417(e) interest rates for the 'determination of present value' of annuities to value the class' recovery[,]" (Pls.' Br. on Methodology [Doc. # 544] at 1), while Defendant contends that the present value of the recovery should be calculated using "the rates . . . prescribed by ERISA Section 303(h)," (Def.'s Br. on Methodology [Doc. # 546] at 6-7.)

Defendant's proposed rates come from 29 U.S.C. § 1083, which sets "[m]inimum funding standards for single-employer defined benefit pension plans[.]" *Id.* Subsection (h) therein establishes the "[a]cturial assumptions and methods" to be used in "the determination of any present value or other computation under this section[.]" *Id.* § 1083(h)(1). Plaintiffs argue that "the only interest rates this Court has used for A+B relief calculations have been the IRC § 417(e) interest rates[,]" and that "the same interest rates used to make the annuity calculations

must also be used to determine the present value of those benefits." (Pls.' Br. at 4-5.) While Defendant's reply brief addresses and challenges other arguments advanced by Plaintiffs, Defendant fails to address this argument. (*See generally* Def.'s Reply Br. at 2-4.) Defendant explains why it should not be bound by the rates that it uses in its SEC filings, (*id.* at 2-3), argues why it would be appropriate, on the merits, to adopt the Section 303(h) rates, (*id.* at 3-4), and advances policy arguments in favor of using the Section 303(h) 25-year stabilization rate, (*id.* at 4), but nowhere addresses Plaintiffs' contention that the rates used for calculating present value should match the rates used for A+B relief calculations.

In sum, the Court must decide whether the net present value should be calculated using the interest rates used in the Court's previous remedy rulings, or using the rates established by a portion of ERISA that sets funding standards for certain categories of pension plans—in the context of which the statute delineates a methodology for calculating the present value of future plan obligations. Neither party has identified any procedurally-apposite authority providing guidance on the proper method for calculating the net present value of an ERISA remedy for the purpose of determining attorneys' fees. Notwithstanding the absence of any such binding or persuasive authority presented by either party, the Court finds Plaintiffs' proposal to be more persuasive. Defendant fails to rebut Plaintiffs' common-sense argument that the interest rates used in the remedy rulings should similarly be used to calculate the net present value of the remedy. Moreover, Defendant fails to present any statutory or other authority

indicating that ERISA's methodology for calculating net present value in the context of minimum funding standards for single-employer defined benefit pension plans should be applied outside of that context, or in the attorneys' fees context specifically. Accordingly, the Court adopts Plaintiffs' proposed interest rates.

B. Assumed Payment Dates

The parties also contest Defendant's assumed payment dates for participants who have not yet commenced Part B benefits. Defendant proposes assuming an age 65 payment date for these class members, arguing that this assumption is both more administratively feasible[2] in light of the Court's remedy rulings and not unwarranted, providing various reasons why class members might choose to retire at 65 rather than earlier,[3] and stressing that its

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[2] "[F]or those participants who have not yet commenced Part B benefits, neither party knows the date on which the remedy actually will be calculated (i.e., whether the earliest retirement date under Part A will be earlier or later than actual Part B benefit commencement." (Def.'s Br. at 4.) "Moreover, for participants who are still active employees, neither party knows what the earliest retirement date under Part A will be, as participants are not eligible to receive Part A benefits while working, and some not currently eligible for early retirement may become eligible with additional service." (*Id.*)

[3] For example, Defendant suggests that because "the Plan does not permit commencement of benefits while actively employed[,]" "a class member who is actively employed may decide to work until (or after) age 65," and because given the fact that "for most early retirement eligible participants, commencing benefits before age 65 means a lower monthly benefit, . . . an individual who is in good health and expects to live longer than his or her actuarial life expectancy may

proposed "assumption will have no effect on the eventual remedy benefit to be paid to [class members], . . . because the remedy payments will be based on the actual age the participant elects to commence benefits." (Def.'s Br. at 5.)

Plaintiffs, by contrast, argue that an assumed payment date of age 65 means assuming that *no* class members in the group at issue will take advantage of early retirement benefits, and that attorneys' fees should be calculated on the basis of the more actuarially-valuable option that class members are entitled to choose. (Pls.' Br. at 8-10.)

Defendant responds that "the age 65 assumption" is "more reasonable" than Plaintiffs' proposed assumptions,[4] because "the actual commencement age is unknowable, and age 65 is the normal retirement age under the Plan." (Def.'s Reply at 5.) The Court finds this argument unconvincing in the context of evaluating the present value of remedy awards that may be greater or lesser depending on how class members choose to exercise their rights under the reformed Plan. Plaintiffs' proposed age assumptions are no more administratively difficult to adopt than Defendant's, and unlike Defendant's age 65 assumption, have the benefit of reflecting the maximum actuarial value of the relief that class

---

conclude that it is better to delay receipt of benefits." (Def.'s Br. at 5.)

[4] Plaintiffs suggest that "[t]he 'assumed payment dates for participants who have not yet commenced Part B benefits' should be the dates on which they are eligible for the valuable Part A early retirement benefits this Court ordered." (Pls.' Br. at 1.)

members in this category are entitled to if they choose it. While Defendant may be correct that some class members may choose not to take advantage of early retirement benefits for their own individual reasons, such as those suggested by Defendant in note 3 above, the Court cannot artificially diminish the value of the remedy for the purpose of determining attorneys' fees by assuming that *all* class members in this category will choose to forego early retirement. Accordingly, the Court adopts Plaintiffs' proposed age assumptions for this group, for the limited purpose of calculating attorneys' fees.

C. Plaintiffs' Declaration Filing

As part of their filing in response to the Court's requested briefing on the two disputes addressed here, Plaintiffs moved [Doc. # 545] for leave to file a supporting declaration of James E. Holland, Jr. Plaintiffs explain that

> Given the technical nature of Defendants' proposal to use IRC §430's adjusted 25- year stabilization rates to value the class' relief, Plaintiffs believe the Court will benefit from an explanation of the background of the 25-year stabilized rates from an expert such as Mr. Holland, who was the Internal Revenue Service's chief pension actuary before his retirement.

(Pls.' Mot. Permission to File Decl. at 1.) Defendant objects that Plaintiffs' "request to submit a declaration . . . would improperly expand their arguments beyond ten pages and/or improperly provide expert testimony from a new declarant

(James Holland)." (Def.'s Reply at 5.) The Court agrees with Defendant that consideration of the Holland Declaration would be improper, insofar as the Court specifically requested that the parties abide by specified page limits for legal briefs and did not request or invite any supporting declarations. Consideration of the Declaration would prejudice Defendant, who complied with the Court's request, and so Plaintiffs' motion for leave to file the declaration is denied.

III. Conclusion

For the reasons set forth above, the Court adopts Plaintiffs' proposed interest rate and age assumption methodologies for the purpose of calculating the net present value of the remedy award and calculating the attorneys' fees to which Plaintiffs may potentially be entitled. Defendant shall provide the Court with an updated net present value calculation in accordance with this Order by Wednesday, November 7, 2018.

IT IS SO ORDERED.

/s/

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut this 17th day of October 2018.

RE: 3:01-cv-02361-JBA - Amara v. CIGNA Corp, et al
Fitzpatrick, A. Klair
to:
Stephen Bruce, Joseph_Kolker@ctd.uscourts.gov, Allison Pienta, 'Christopher Wright', Blumenfeld, Jeremy P., Costello, Joseph J., Reiss, Stephanie Rosel
08/17/2018 02:05 PM
Hide Details
From: "Fitzpatrick, A. Klair" <klair.fitzpatrick@morganlewis.com> Sort List...
To: "Stephen Bruce" <stephen.bruce@prodigy.net>, "Joseph_Kolker@ctd.uscourts.gov" <Joseph_Kolker@ctd.uscourts.gov>, "Allison Pienta" <acaalim@verizon.net>, "'Christopher Wright'" <CWright@hwglaw.com>, "Blumenfeld, Jeremy P." <jeremy.blumenfeld@morganlewis.com>, "Costello, Joseph J." <joseph.costello@morganlewis.com>, "Reiss, Stephanie Rosel" <stephanie.reiss@morganlewis.com>
History: This message has been replied to.

Dear Mr. Kolker,

In response to the Court's most recent request--

1. Cigna agrees that the "use the of adjusted 25-year stabilization rates instead of IRC Section 417(e) rates for the calculation of the reliefs' present value" only affects attorneys' fees. Cigna

disagrees with Plaintiffs' statement below, but, per the Court's instruction, Cigna will not respond further.

2. Cigna agrees that the remedy amount is affected by the year used to determine the interest rate for calculating the annuity value of the lump sum distribution for purposes of determining the offset (the year of Part B payment versus the year of Part A eligibility or 2018).

3. Cigna agrees that the remedy amount is affected by the year used to determine the mortality table for calculating the annuity value of the lump sum distribution for purposes of determining the offset (the year of Part B payment versus 2018).

4. Cigna agrees that the remedy amounts are affected by the assumed age of payment for benefits to those who were eligible for early retirement (age 55 versus age 60 for some participants), but states that Cigna's assumed payment dates for participants who have not yet commenced Part B benefits are for present value attorneys' fees purposes only.

Please let us know if you have any questions or need further information.

A. Klair Fitzpatrick
Morgan, Lewis & Bockius LLP

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From: Stephen Bruce <stephen.bruce@prodigy.net>
Sent: Friday, August 17, 2018 10:15 AM
To: Joseph_Kolker@ctd.uscourts.gov; Allison Pienta <acaalim@verizon.net>; 'Christopher Wright' <CWright@hwglaw.com>; Blumenfeld, Jeremy P. <jeremy.blumenfeld@morganlewis.com>; Fitzpatrick, A. Klair <klair.fitzpatrick@morganlewis.com>; Costello, Joseph J. <joseph.costello@morganlewis.com>; Reiss, Stephanie Rosel <stephanie.reiss@morganlewis.com>
Subject: Re: 3:01-cv-02361-JBA - Amara v. CIGNA Corp, et al
[EXTERNAL EMAIL]

Mr. Kolker,

The answer is, Yes, all three of the other methodology disputes identified by Plaintiffs affect the actual relief that Class members receive, as well as affecting the present value of the recovery.

We only add our disagreement with the quoted position by Cigna's counsel that using the adjusted 25-year stabilization rates, rather than the IRC Section 417(e) rates, to calculate the relief's present value is "just about ...figuring out the[] attorneys' fees." Cigna

wants to take a real deduction of 17.5% from the actual relief that each member of the class will receive, while paying a 17.5% fee only on a valuation of the actual relief that Cigna would discount by over 21% through using these non-market stabilization rates.

Stephen Bruce

On 8/16/2018 6:55 PM,
Joseph_Kolker@ctd.uscourts.gov wrote:

> Counsel,
>
> In Plaintiffs' Reply in Support of Notice on Common Fund Recovery [Doc. # 524], Plaintiffs contended that "over 95% of the difference between the Class's $280.6 million value and Cigna's
>
> $136.1 million is due to four" methodological disputes between the parties. (*See id.* at 9.) With respect to one of those four issues, at the July 25, 2018 status conference Defense counsel represented that Defendants' proposed use of adjusted 25-year stabilization rates instead of IRC Section 417(e) rates for the calculation of the reliefs' present value "is not about the A+B methodology at all" but instead is "just about Plaintiffs trying to get a present value for purposes of figuring out their attorneys' fees."

The Court requests that both parties provide their position via e-mail--without explanation--on whether the three other methodology disputes identified by Plaintiffs affect *only* the calculation of the present value of the common fund recovery for the purpose of determining attorneys' fees, or alternately whether any of these methodology disputes affect the actual relief that Class members receive.

Thank you,

Joseph Kolker
Law Clerk to the Honorable Janet Bond Arterton
United States District Court
District of Connecticut

Appendix G

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JANICE C. AMARA *et al,* individually, and on behalf of others similarly situated, *Plaintiffs,* *v.* CIGNA CORP. AND CIGNA PENSION PLAN, *Defendants.*	Civil No. 3:0l-CV-2361 (JBA) November 7, 2017

RULING ON PLAINTIFFS' MOTION FOR RECONSIDERATION OF RULING ON INTEREST RATES

Plaintiffs move for reconsideration (Pls.' Mot. Reconsideration [Doc.# 508]) of the Court's July 14, 2017 Ruling on Defendants' Motion for Clarification and Correction of Judgment (hereinafter "July 14, 2017 Ruling" [Doc.# 507].) Plaintiffs ask the Court to "reinstate its [previous] ruling that interest between lump sum distribution dates and retirement dates ... be based on the 'yearly' rates, i.e., 'using the 30-year Treasury rate from the preceding November' for 'each year.'" (Pls.' Mot. Reconsideration at 14.) For the

reasons described below, Plaintiffs' Motion is DENIED.

I. Background

The Court assumes the parties' familiarity with this case's background and history. In the Court's most recent substantive Order in this case, the Court considered a request from Defendants that, *inter alia,* "the Court reconsider the portion of its [previous] ruling that instruct[ed] Cigna to use a floating rate to calculate prejudgment interest and interest on lump sums already paid and rule instead that the rate should be fixed at the rate available in the year the benefits commenced." (July 14, 2017 Ruling at 13.) The Court noted that the dispute between the parties amounted to a question of "whether the interest rate will be fixed at the rate available to a plan participant on the day he or she commenced receiving benefits or floated until the present, and then fixed at today's rate for the purposes of projecting the rate into the future." *(Id.* at 14.) The Court reasoned that "[i]nsofar as the parties agree that it is impractical to float the rate into the future, they are actually asking the Court to determine which fixed rate to apply." *(Id.)*

The Court found that "[f]ixing the interest rate at the rate available to a plan participant at the time he or she received the Part B lump sum captures the fact that plan participants had control to invest their money at that point in time." *(Id.)* The Court noted that "[s]hifting interest rate risk from the Plan to plan participants was one of the permissible justifications for Cigna's transition from Part A to Part B." *(Id.)* Accordingly, and "[i]n light of the parties' positions

that the interest rate will be fixed either at today's rate or at the rate available on the day a participant commenced receiving benefits, the Court reconsider[ed] its ruling on methodology and conclude[d] that it is more appropriate to fix the rate as of the date the benefits commence." *(Id.)* Plaintiffs timely filed the instant Motion challenging that decision. (Pls.' Mot. Reconsideration at l, 13.)

II. Discussion

Motions for reconsideration "shall be filed and served within seven (7) days of the filing of the decision or order from which such relief is sought, and shall be accompanied by a memorandum setting forth concisely the controlling decisions or data the movant believes the Court overlooked." D. Conn. L. Civ. R. 7(c) 1. The Second Circuit has explained that "[t]he major grounds justifying reconsideration are 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.,* 956 F.2d 1245, 1255 (2d Cir. 1992) (quoting 18B C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 4478). This standard is "strict" and reconsideration should be granted only if "the moving party can point to controlling decisions or data that the court overlooked-matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.,* 70 F.3d 255,257 (2d Cir. 1995). If "the moving party seeks solely to relitigate an issue already decided," the court should deny the motion for reconsideration and adhere to its prior decision. *Id.*

Plaintiffs ask the Court to "reinstate its [previous] ruling that interest between lump sum distribution dates and retirement dates ... be based on the 'yearly' rates, i.e., 'using the 30-year Treasury rate from the preceding November' for 'each year.'" (Pls.' Mot. Reconsideration at 14.) Plaintiffs contend that the Court, in granting Defendants' Motion for Clarification and Correction, failed to apply the requisite standard for motions for reconsideration. *(See id.* at 3) ("While this Court's decision describes the change in one place as a 'correction,' [July 14, 2017 Ruling at 2], the decision does not find any oversight or error but concludes it is 'more appropriate' to look back to the rate in the year of the lump sum distribution." (citation omitted).) But in the instant Motion, Plaintiffs fail to identify any "controlling decisions or data that the [C]ourt overlooked[,]" *Shrader,* 70 F.3d at 257 (2d Cir. 1995), in deciding this issue in the July 14, 2017 Ruling.

Plaintiffs argue throughout their Motion that the Court's decision to fix interest rates as of the date the benefit commenced is an unrealistic approximation of what a hypothetical risk-averse investor would have been likely to invest **in** at the time. *(See, e.g.,* Pls.' Mot. Reconsideration at 6) ("No plan participant did what Cigna's counsel now says all of them should have done, and no Cigna plan administrator or other fiduciary advised them to do that"; "Except in hindsight, no one, including Cigna, knew in 1998-2001 that buying a 30-year bond in that period was the best course as opposed to a more conventional, conservative, and diversified investment strategy[]"; "Cigna itself did not go out in the bond market in 1998-2001 and buy up 30-year Treasury bonds to

insulate either its retirement portfolio or its corporate portfolio as its counsel would now have this Court assume all participants should have done.") But Plaintiffs' argument proves too much: Plaintiffs do not explain why, if this is the case, Plaintiffs' proposal of using a variable interest rate for each year up through the present, then switching to a fixed interest rate, is any less artificial or more accurate an approximation of how a risk-averse investor would have acted.

Plaintiffs argue that it would be unfair to "permit the misleading or similarly inequitable conduct that led to the reformation to edge its way back in through the interest rates used for an offset." (Pls.' Mot. Reconsideration at 11.) But Plaintiffs do not explain how their proposal better reflects Plan Participants' reasonable expectations such that Plaintiffs should be entitled to reformation along those lines. *See Amara v. CIGNA Corp.,* 775 F.3d 510,526 (2d Cir. 2014) ("The facts required to satisfy the elements of reformation must be proven by clear and convincing evidence." (citations omitted)). As Plaintiffs acknowledge, "equity does not demand the lowest possible set off[.]" (Pls.' Mot. Reconsideration at 11.)

Plaintiffs argue, to this effect, that the *Frommert v. Conkright* line of decisions bars the use of "'phantom' interest rates to enhance offsets from ERISA relief." *(Id. (citing* 433 F.3d 254, 268 (2d Cir. 2006); 153 F.Supp.3d 599, 605 (W.D.N.Y. 2016).) But *Frommert* is inapposite, as it involved an ERISA violation by an employer who impermissibly used phantom interest rate offsets, and did not address the scope of a federal district court's discretion in crafting an equitable remedy. *See* 433 F.3d at 262 (ERISA's

objective of "protecting employees' justified expectations of receiving the benefits their employers promise them ... was thwarted ... [where] defendants attempted to implement the phantom account offset without properly amending the terms of the Plan or providing adequate notice to rehired employees that their benefits would be reduced because of the hypothetical growth attributed to their prior lump sum distributions." (internal quotation marks and citation omitted)). This argument, therefore, is unavailing.

The parties also offer dueling interpretations of Judge Kravitz's previous rulings on this issue. In 2008, Judge Kravitz held that "[t]he second fundamental premise of the Court's remedy is that the CIGNA Plan should receive full credit both for the lump sums already paid and for a reasonable amount of interest on those sums since the date of payment." *Amara v. CIGNA Corp.,* 559 F. Supp. 2d 192, 216 (D. Conn. 2008), *aff'd,* 348 F. App'x 627 (2d Cir. 2009), *vacated and remanded,* 563 U.S. 421 (2011), *and cert. granted, cause remanded,* 563 U.S. 1004 (2011). In the same decision, Judge Kravitz awarded prejudgment interest on past-due benefits owed to class members who have already retired, noting that "[p]rejudgment interest is especially appropriate here in light of the fact that the CIGNA Plan will be credited with a reasonable rate of return on its lump sum payments to retirees in the calculation of the equitable setoffs." *Id.* at 219-20. Elaborating on these principles, Judge Kravitz held the following:

> The Court does not consider the federal post-judgment interest rate, which is measured by

> interest on short-term, risk-free obligations, to be appropriate in this case. Rather, in the interest of fairness, the Court believes that the [pre-judgment interest] rate should be the same as that used with respect to the CIGNA Plan's lump sum payments, namely, a reasonable rate of return. Both the CIGNA Plan and the plan participants invested on a moderate-to long-range time horizon, given the former's interest in funding the Plan and the latter's interest in saving enough money to last throughout retirement. Thus, in light of these considerations, the Court believes that a reasonable and appropriate rate of interest for payments past due would be the rate used in the same time period by the CIGNA Plan to calculate the lump-sum present value of retiring participants' annuities (i.e., the equivalent actuarial value).

Id. at 220-21. Judge Kravitz explicitly held that these two rates should travel together, so in interpreting this decision, his analysis of the proper rate for prejudgment interest is wholly relevant in determining the methodology used to calculate the rate used for both purposes-prejudgment interest and the offset rate. With this in mind, Judge Kravitz held that the rate should reflect "a reasonable rate of return[,]" which Judge Kravitz further defined as the rate used "to calculate the lump-sum present value of retiring participants' annuities (i.e., the equivalent actuarial value)." *Id.* The Court's July 14, 2017 Order "conclude[d] that it is more appropriate to fix the rate as of the date the benefits commence[,]" and Plaintiffs have not shown why this is an inappropriate way to calculate the "present value of retiring participants'

annuities[,]" or more broadly why this rate does not reflect a "reasonable rate of return[.]" Plaintiffs' remaining arguments similarly fail to raise any "controlling decisions or data that the [C]ourt overlooked[,]" and accordingly, Plaintiffs' Motion must be denied. *See Shrader,* 70 F.3d at 257 (2d Cir. 1995).

III. Conclusion

For the reasons set forth above, the Court DENIES Plaintiffs' Motion.

IT IS SO ORDERED.

/s/

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut this 7th day of November 2017.

Appendix H

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JANICE C. AMARA *et al,* individually, and on behalf of others similarly situated, *Plaintiffs,* *v.* CIGNA CORP. AND CIGNA PENSION PLAN, *Defendants.*	Civil No. 3:0l-CV-2361 (JBA) July 14, 2017

RULING ON DEFENDANTS' MOTION FOR CLARIFICATION AND CORRECTION OF JUDGMENT

Defendants CIGNA Corp. and CIGNA Pension Plan (collectively, "Cigna") move for clarification and correction (Mot. for Correction [Doc. # 487]) with respect to three issues arising from the Court's January 10, 2017 Ruling on Plaintiff Class's Objections [Doc.# 485] ("2017 Ruling").[1] First, Cigna

[1] By the time the parties filed Opposition and Reply memoranda, they had reached agreement on a fourth area of dispute for which Cigna had initially sought reconsideration. Because of the parties' agreement, this Ruling does not address the fourth area of dispute.

seeks a definitive interpretation of A+ B relief for plan participants who have not yet commenced receiving benefits. Second, Cigna seeks clarification with respect to the interest rate to be used to calculate pre-judgment interest and interest credits on **lump** sums already paid. Third, Cigna requests that the Court modify its order concerning the interest rates for pre-judgment interest and interest on lump sums already paid to make it a fixed interest rate. At the end of this Ruling, the Court will briefly address the Section 204(h) notices, which can now be sent out.

I. Background

The parties' familiarity with the background of this case is presumed. This action began in 2001 when Plaintiff Janice C. Amara and other similarly situated individuals brought suit against Cigna alleging that Defendants violated the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1022(a), 1024(b), 1054(h), in 1998 when Cigna switched from a defined benefits pension plan ("Part A") to a cash balance plan ("Part B").

In 2008, after a bench trial, the late Judge Mark R. Kravitz found in Plaintiffs' favor, *see Amara v. CIGNA Corp.* ("Amara I"), 534 F. Supp. 2d 288 (D. Conn. 2008), and ordered damages in the amount of the sum of benefits each employee accrued under Part A and under Part B ("A+ B relief"), *see Amara v. CIGNA Corp.* ("Amara II"), 559 F. Supp. 2d 192 (D. Conn. 2008). In 2012, after the case had been to the Supreme Court, *see CIGNA Corp. v. Amara* ('Amara III"), 131 S. Ct. 1866 (2011), and remanded, this Court again ordered A+ B relief.

The parties subsequently disputed how A + B relief was to be implemented, prompting the Court to issue a Ruling on Methodology that clarified certain of the parties' methodological disputes. [Doc.# 459.] In attempting to apply this Court-ordered methodology, the parties again disagreed about how to calculate benefits for certain groups of plaintiffs and again sought clarification from the Court, in response to which the Court issued the 2017 Ruling [Doc.# 485] and a revised methodology [Doc. # 486]. Defendant now seeks clarification of the interpretation of one footnote of the 2017 Ruling in light of the Second Circuit's mandate concerning A+B relief, as well as correction of two aspects of the Ruling concerning interest rates. [Doc. # 487.]

II. Procedural Propriety

Cigna moves under Fed. R. Civ. P. 59 and 60. Fed. R. Civ. P. 59(e) permits a party to file a motion to alter or amend a judgment "no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 60(a) permits a court to

> correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

Fed. R. Civ. P. 60(a). One court in this Circuit has observed that

> Rule 60(a) allows a court to clarify a judgment in order to correct a failure to memorialize part of its decision, to reflect the necessary implications of the original order, to ensure that the court's purpose is fully implemented, or to permit enforcement. Rule 60(a) allows for clarification and explanation, consistent with the intent of the original judgment, even in the absence of ambiguity, if necessary for enforcement. [But] this broad rule does not allow a court to make corrections that, under the guise of mere clarification, reflect a new and subsequent intent because it perceives its original judgment to be incorrect. Rather, the interpretation must reflect the contemporaneous intent of the district court as evidenced by the record.

L.I. Head Start Child Dev. Servs., Inc. v. Econ. Opportunity Comm'n of Nassau Cty., Inc., 956 F. Supp. 2d 402, 410 (E.D.N.Y. 2013) (interior citations omitted). By contrast, motions for reconsideration under Rule 59(e) can be justified by one of three major considerations: "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Virgin Atlantic Airways, Ltd. v. Nat'l Mediation Bd.,* 956 F.2d 1245, 1255 (2d Cir. 1992) (citations and internal quotation marks omitted).

Plaintiffs object to Defendants' motion as impermissible reargument and claim that Cigna's willingness to seek reconsideration stands in tension with its prior opposition to Plaintiffs' request for reconsideration. However, with respect to the interpretation of the footnote, Cigna identifies a *bona*

fide ambiguity in the 2017 Ruling that could be mistakenly interpreted to contradict the underlying rationale for the remedy and to provide one sub-class of Plaintiffs with a windfall vis- a-vis other class members. To ensure that the Court's overarching intentions with respect to the remedy are properly carried out, the Court will entertain Cigna's motion with respect to the footnote. Further, because of the highly technical nature of the issues surrounding appropriate interest rates, the Court will entertain Plaintiffs motion with respect to those issues, as well.

III. Discussion

A. A + B Remedy

The parties dispute whether the Court's methodology requires Cigna to double-pay the portion of Part B attributable to the Initial Retirement Account for plan participants who have not yet commenced receiving benefits. The Initial Retirement Account was the opening balance in a plan participant's Part B cash balance account if he or she had accrued benefits under Part A; Cigna represented to such plan participants that this balance "was equal to the lump sum value of the pension benefit he or she earned through December 31, 1997 ... [but] the amount in each employee's initial retirement account actually *did not* reflect the entirety of that employee's Part A benefits ...."(Amara Vat 515 (emphasis in original).)

As an initial matter, Cigna observes that the methodology does not require double- payment for plan participants who have already taken their Part

B benefit as a lump sum. Because the Part B lump sum included the Initial Retirement Account, the Court permitted Cigna to offset the value of the Initial Retirement Account from the annuity remedy due under Part A. However, in discussing the 2016 Ruling's requirements regarding the calculation of A+ B relief for plan participants who have not yet taken their benefits, the Court stated that the methodology "could result in double-counting Part A in certain instances and required that result in order to avoid frustrating the reasonable expectations of plan beneficiaries who intended to take their benefits as a lump sum." (2016 Ruling on Methodology at 3.) The Court explained it

> followed Judge Kravitz in finding that 'to the extent there remains some risk of overpayment, it is equitable that CIGNA, having provided statutorily inadequate benefit elections forms, bear that risk.' Adhering to this principle, this Court ordered that Cigna is prohibited from deducting the Initial Retirement Account from Part B when calculating A + B relief for persons who have not yet taken their benefit, even if this leads to overpayment on Cigna's part. The purpose of this order was to avoid frustration of the reasonable expectations of plan participants. As the Court noted, permitting Cigna to deduct the Initial Retirement Account from the lump sum made available to the plan beneficiary would place a beneficiary who anticipated taking his or her benefits as a lump sum in an awkward position: "That individual, who may have been relying on her ability to take the whole $100,000 as a lump sum will be in for a rude surprise when she learns

> that in fact, she can only take $50,000 upon retirement and will have to wait years to receive the other $50,000." Ruling on Methodology at 10. For that reason, this Court prohibited Cigna from deducting the initial retirement account from the lump sum, even if this resulted in double-counting Part A.

(2017 Ruling at 3 n.1 (internal citations omitted).)

The Parties dispute whether the last sentence requires double payment of the portion of the annuity remedy amount due under Part A that is included in Part B as the Initial Retirement Account, or if, in the alternative, Cigna is permitted to offset the value of the Initial Retirement Account from the annuity remedy due under Part A. The Ruling is silent on this point.

Because the Defendant invokes the mandate rule, and because the proper interpretation of the methodology depends on understanding the Court's prior rulings on the remedy, a brief review of the litigation and relevant passages from the Court's rulings, are recited here.

1. Prior Rulings

In 2008, Judge Kravitz issued two rulings: one finding Cigna liable for violations of ERISA stemming from its failure to properly notify and disclose to plan participants the changes it made to their retirement plan in transitioning from a defined benefit plan ("Part A") to an account balance plan ("Part B") (Amara I), and one defining the proper remedy as "A + B" relief under ERISA § 502(a)(l)(B) according to

which "for the misrepresentations in CIGNA's notices, the Court orders that the CIGNA Plan provide class members with 'A+ B,' that is, all accrued Part A benefits in the form those benefits were available under Part A, plus all accrued Part B benefits in the form those benefits are available under Part B (Amara II).

In determining the appropriate relief for plan participants who had already taken their benefits under Part B as a lump sum (a sum that included the Initial Retirement Account), Judge Kravitz inquired whether those participants would be required to pay back the Initial Retirement Account in order to receive their full Part A annuity. Judge Kravitz considered Plaintiffs' position:

> Plaintiffs, for their part, reject the idea of a payback. Instead, they would institute an equitable setoff whereby the CIGNA Plan would be credited the amount of the lump sum payment (and reasonable interest), but would be responsible for pro rata annuity payments of the difference between the full-value Part A annuity payments and the monthly payments that would have resulted from an annuitization of the lump sum. This approach would allow retirees to receive the difference in value between the full-value Part A annuity (to which they are entitled under A+B) and the lump sum (which the retirees actually received), without any requirement of a payback.

Amara II at 215. Judge Kravitz endorsed the idea of a setoff, reasoning that these retirees should not be required to make a payback, but also that "the CIGNA

Plan should receive full credit both for the lump sums already paid and for a reasonable amount of interest on those sums since the date of payment." *Id.* at 216.

In reaching this remedy, Judge Kravitz rejected Plaintiffs' request to simply reinstate Part A for plan participants, rendering the plan modification void, and he rejected Defendant's contention that the plaintiffs were due no remedy. The parties appealed these rulings to the Second Circuit, which summarily affirmed, and then to the Supreme Court. The Supreme Court vacated the order of remedy, finding that ERISA Section§ 502(a)(l)(B) did not provide the District Court authority to reform CIGNA's plan, but noted that the equitable relief ordered by the Court may find sufficient authority in the catchall equitable provision of ERISA § 502(a)(3). Amara III at 438-39.

After the Supreme Court vacated the ruling, this Court found that ERISA § 502(a)(3) provided sufficient authority under the Court's equity powers to order the A+ B remedy originally contemplated by Judge Kravitz. *Amara v. Cigna Corp.,* 925 F.Supp.2d 242, (D. Conn. 2012) ("Amara IV"). The Court noted that the relief ordered by Judge Kravitz "was the result of careful calibration of the interests at stake." Amara IV at 265. It then reformed the contract so that "class members will receive (1) the full value of 'their accrued benefits under Part A,' including early retirement benefits, in annuity form; and (2) 'their accrued benefits under Part B,' in annuity or lump sum form." *Id.* (citing Amara II). However, the Court also ordered that

> With respect to class members who have already retired ... retirees and former employees will be entitled to receive the difference in value between the full-value of the Part A annuity (to which they are entitled under the 'A + B' approach) and the lump sum.

Id. By permitting recovery of only the difference in value, the Court ensured that Initial Retirement Account would not be counted twice, once as a portion of the lump sum and once as annuity.

In 2014, the Second Circuit affirmed the Court's ruling and determined that the Court did not abuse its discretion in ordering A+ B relief. *Amara v. CIGNA Corp.,* 775 F.3d 510,533 (2d Cir. 2014) ("Amara V"). Further, the Second Circuit reaffirmed one of the key reasons for ordering A+ B relief-the participants' reasonable expectations: "Plan participants had a reasonable expectation that Part B would protect *all* Part A benefits, including early retirement benefits and that Part B benefits would begin accruing immediately." *Id.* at 532 (internal citations and alterations omitted) (citing Amara II).

B. The Rulings on Methodology

To resolve some disagreements between the parties in the implementation of A+B relief, the Court set forth a methodology for calculating benefits in its 2016 Ruling. With respect to parties who had not yet commenced receiving benefits, the Court first addressed Cigna's proposal of "tak[ing] the current balance under Part B and subtract[ing] the Initial Retirement Account, so that 'B' includes only the

benefit credits and interest credits accrued under Part B." The Court rejected this proposal and "prohibit[ed] Cigna from deducting the Initial Retirement Account from Part B."

The Court reasoned that, on the one hand, Cigna's proposal conformed with Judge Kravitz's instruction that Cigna pay Plaintiffs "all of [their] Part A benefits in the form those benefits were previously offered under Part A, plus all the benefits [they] accrued under Part B, in whatever form those benefits are offered, without regard to the opening account balance." (2016 Ruling at 10-11 (citing Amara II, 559 F. Supp. 2d at 212) (emphasis added).) On the other hand, the Court noted that "participants should not be penalized for Cigna's misrepresentations, and participants who have been counting on receiving a lump sum under Part B should not be stripped of that right by the Court's remedy." *(Id.* at 11.)

The 2016 Ruling remained silent on whether Cigna was permitted to subtract the value of the Initial Retirement Account from the annuity remedy due under Part A. In e-mail correspondence with one another, the parties addressed their competing interpretations of the Court's 2016 Ruling on Methodology, Plaintiffs arguing that the Court's ruling clearly required double payment of the Initial Retirement Account as a portion of the lump sum and again as a portion of the annuity due under Part A, and Cigna arguing that such double payment would provide a windfall to class members who had not yet commenced receiving benefits vis-a-vis those who had already taken their benefits as a lump sum. The parties raised this dispute with the Court and the

Court addressed these competing interpretations in a footnote to its 2017 Ruling.

C. The Instant Dispute: Double-Payment of Part A

Defendant requests the Court to clarify or reconsider whether the 2017 Ruling required Cigna to double-pay the Initial Retirement Account, once as a portion of the lump sum under Part B and then again as a portion of the annuity remedy due under Part A. (Mot. for Correction at 4.) Cigna argues that double-payment is not required by the Ruling and that it should be permitted to offset the portion of the Part B lump sum attributable to the Initial Retirement Account from the annuity due under Part A. Cigna presents three main arguments. First, it argues that the Court has consistently permitted offset as a general matter and explicitly addressed this problem with respect to persons who have already received a lump sum under Part B. Second, it argues that permitting it to offset the Initial Retirement Account from Part A better captures the remedy as affirmed by the Second Circuit and the Supreme Court and that the Court's 2017 Ruling, if it in fact requires double-payment of Part A, violates the Mandate Rule. *(Id.* at 8-9.) Cigna points out that the Second Circuit described A+ B (also in a footnote) **in** the following manner:

> [t]he remedy ordered by Judge Kravitz consists only of the Part A benefits accrued through December 31, 1997, plus the Part B benefits accrued going forward from January 1, 1998. The 'A+B' remedy thus does not include the amount of

> Part B benefits resulting from the conversion of an employee's Part A benefits into a lump sum amount.

Amara Vat 517 n.3. Ordering Cigna to pay Part A once as part of the lump sum and then a second time, as an annuity, would violate the mandate from the Second Circuit that the A + B remedy "does not include the amount of Part B benefits resulting from the conversion of an employee's Part A benefits into a lump sum amount." *(Id.* at 11.)

Third, Cigna argues that requiring double-payment of Part A would treat those who have not commenced receiving benefits significantly better than those who have. With respect to those who have already taken their benefits as a lump sum, the Court permitted Cigna to set off the portion of the lump sum attributable to the Initial Retirement Account against the Part A benefits it paid to class members. Those class members receive as a Part A annuity only the difference between what would have been their full Part A benefits and the portion of Part A they received as a result of the lump sum payment. This offset ensured that Plaintiffs who had already received their benefits did not have to pay back the portion of Part A that had been translated into the Initial Retirement Account.

Plaintiffs object to Defendant's motion on several grounds. (Pl.'s Opposition to Mot. for Reconsideration ("Opp'n") [Doc. 492].) First, they argue that there was no ambiguity in the 2016 Ruling-rather, it necessarily required double payment of the Initial Retirement Account for participants who have not yet commenced

receiving benefits-and that therefore Defendant's motion is impermissible reargument. *(Id.* at 9.) Plaintiffs, however, do not address the fact that the 2016 Ruling was silent on the question of offset and the possible ambiguity this silence created.

Second, they argue that the Court did not violate the mandate rule because the Court's remedial authority is broad and because the Second Circuit affirmed the December 20, 2012 decision of this Court and Judge Kravitz's original, June 2008 ruling on appropriate relief, Amara II. Judge Kravitz's ruling on liability in turn stated that "{a]dditional issues, including the specific mechanisms for implementing the relief provided, will be addressed in a later decision." *Id.* Thus, Plaintiffs conclude, the Court was well within its equitable, discretionary powers in allowing double-payment of Part A for participants who have not commenced receiving benefits. (Opp'n at 14.)

Third, Plaintiffs argue that Cigna does not address the Court's justification for its Ruling, which was to make possible an immediate calculation of the remedy for each class member. *(Id.* at 15.)

Plaintiffs claim the issue of double payment is a "straw man" and insist that "this Court's Ruling does not provide a 'double payment' of either Part A or Part B; it simply provides for the A + B relief without eliminating the existing cash balance election." (Opp'n at 18.) At oral argument, Plaintiffs again reiterated that they did not seek double payment, but merely conservative assumptions in the calculation of A + B relief. Despite these assertions, Plaintiffs appear to

maintain that Cigna should not be permitted to offset the Initial Retirement Account from the annuity under Part A.

Plaintiffs' first argument-that the 2016 and 2017 Rulings consistently explicitly require a double-payment of the Initial Retirement Account-overlooks the Court's silence on the question of whether Cigna is permitted to offset the Initial Retirement Account from the annuity due under the Part A remedy. Plaintiffs' second argument, that the Court's remedial authority is broad, bolstered by a recent Notice of Supplemental Authority [Doc. # 505], merely highlights the scope of this Court's equitable powers in fashioning relief.

Plaintiffs third argument, which is its central argument, is that Defendant does not address the Court's reasons for prohibiting offset, which it claims were to permit calculation now of the remedy for each plan participant and to ensure that Cigna, as the party who was found liable, bears the risk of overpayment. This third argument overlooks the Court's actual central reason for prohibiting offset, which was to protect the reasonable expectations of plan participants. These reasonable expectations, however, cannot include receiving double credit for the Initial Retirement Account.

Plaintiffs refer the Court to the series of decisions in *Frommert,* in which the Second Circuit found that it was impermissible to use a "phantom offset" to reduce the amount of an annuity due under a retirement plan by an amount paid out previously as a lump sum for plaintiffs who had left the company,

taken a lump sum payout, been re-hired by the company and re-enrolled in the retirement plan. *Frommert v. Conkright,* 738 F.3d 522, 530 (2d Cir. 2013) (holding that permitting offset would make rehires materially worse off, but that the plan had not been amended to permit such offset); *see also Frommert v. Becker,* 153 F.Supp.3d 599, 605, 612 (W.D.N.Y. 2016)(reforming Xerox's plan to recalculate plaintiffs' benefits with no offset whatsoever.)

The instant case is different because, as Judge Kravitz found and succeeding courts have agreed, Part B is legally permissible and therefore the amendment to the plan was legally effective. Further, in Amara V, the Second Circuit affirmed the use of offsets with respect to persons who had already received lump sum payouts. For this reason, reference to *Frommert* is inapposite.

The Court intended the A + B remedy to be calculated uniformly across the entire class.

Forbidding Cigna from offsetting the portion of a Part B lump sum attributable to the Initial Retirement Account from the annuity due under the Part A remedy would provide a windfall to plan participants who have not commenced receiving benefits that they could not have reasonably expected and that would treat them materially differently from the portion of the class that has already received a lump sum. Thus, the Court clarifies its previous ruling. While Defendant remains prohibited from subtracting the Initial Retirement Account from the lump sum available under Part B, it is permitted to

offset the value of the Initial Retirement Account from the annuity due under Part A.

IV. Fixed or Floating Rate on Prejudgment Interest or Interest on Lump Sums Already Paid

Cigna next asks that the Court reconsider the portion of its ruling that instructs Cigna to use a floating rate to calculate prejudgment interest and interest on lump sums already paid and rule instead that the rate should be fixed at the rate available in the year the benefits commenced. (Mot. for Reconsideration at 19.)

Cigna provides three reasons for this request. *(Id.)* First, fixing the rate at the time of the lump sum is paid better embodies the principle that the value of the lump sum should be viewed from the point of view of the beneficiary, and that the rate available in the market at the time the beneficiary commenced receiving benefits is thus the appropriate rate to use. *(Id.* at 20.) Second, Cigna argues that both parties agree that a fixed rate should apply. *(Id.* at 21.) Third, for participants who have already received benefits, the fixed rate allows calculation now of remedy payments. *(Id.)*

Plaintiffs oppose this request, arguing that Cigna has brought forth no grounds for the Court to reconsider its Ruling: it points to neither facts that have been overlooked nor a change in the law. (Opp'n at 26.) However, despite Plaintiffs' opposition to Cigna's request that the rate be fixed, their position does not appear to be that the interest rate should float. Rather, they advocate varying the interest rate

for each year in the past and, when calculations must be projected into the future, fixing the interest rate at that one currently available: "As Plaintiffs have said many times, it is common to hold the rate in the computation year, here 2017, constant for future years because the rate in future years may be lower or higher." (Opp'n at 26-27.)

Defendant responds that

> Plaintiffs agree that rates should be fixed at some point in time but ask that they vary until 2017 and then be fixed. There is no basis for such a request. To the extent that the rate should be fixed at any time, it should be the year the person commenced benefits because that is consistent with the Second Circuit's rationale.

(Reply at 10.) This Reply identifies the true issue: whether the interest rate will be fixed at the rate available to a plan participant on the day he or she commenced receiving benefits or floated until the present, and then fixed at today's rate for the purposes of projecting the rate into the future. Insofar as the parties agree that it is impractical to float the rate into the future, they are actually asking the Court to determine which fixed rate to apply.

Fixing the interest rate at the rate available to a plan participant at the time he or she received the Part B lump sum captures the fact that plan participants had control to invest their money at that point in time. Shifting interest rate risk from the Plan to plan participants was one of the permissible justifications for Cigna's transition from Part A to

Part B. In light of the parties' positions that the interest rate will be fixed either at today's rate or at the rate available on the day a participant commenced receiving benefits, the Court reconsiders its ruling on methodology and concludes that it is more appropriate to fix the rate as of the date the benefits commence.

V. Use of Segment Rates to Calculate Prejudgment Interest or Interest on Lump Sums

Cigna seeks clarification on what the Court means by "Applicable Interest Rate" and whether it intends to define the Applicable Interest Rate as the 30-year Treasury rate even if the plan changes the definition of the term. Cigna argues that the Court ordered use of "the Applicable Interest Rate under the version of Part B in effect in the year" the beneficiary began receiving benefits, and that the definition of this Rate can change if the law and the plan change its definition. (Mot. for Reconsideration at 14.)

Cigna notes that the plan defines the Applicable Interest Rate in terms of 26 U.S.C. § 417(e)(3)(C), but that that section of the U.S. Code was amended **in** 2006 (effective 2008). Prior to 2006, it defined the applicable interest rate as the 30-year Treasury rate, but after 2006 (effective 2008), it defined that rate as the segmented rate defined by the Secretary of the Treasury.

Defendant amended the Plan in accord with this change in law and, "[a]s a result, for the Plan years 1998 through 2007, the 'Applicable Interest Rate' in the statute and the Plan equaled the 30-year Treasury rate for the relevant month, and beginning in 2008, it

equaled the segment rates as determined by the Secretary of the Treasury." (Mot. for Reconsideration at 17.)

Plaintiffs object that "§417(e) is inapplicable to interest credits on lump sums already paid (because those are prescribed neither by statute nor caselaw) nor to prejudgment interest (which is in the Court's discretion)." (Opp'n at 26.) Defendant does not respond to this argument in its Reply. Following Judge Kravitz's reasoning, the Court initially selected Plan's definition of 'Applicable Interest Rate' because it provided a "reasonable rate of return" and was "the rate used in the same time period" for which interest is due "to calculate the lump-sum present value of retiring participants' annuities (i.e., the equivalent actuarial value)." (2016 Ruling at 14 (quoting Amara II).) However, at the time Judge Kravitz originally crafted the remedy, he did not appear to be aware of the transition to segment rates.

Plaintiffs further object that the Court has already clearly adopted Plaintiffs' position that the 30-year Treasury rate should apply across the board, but in support of their argument, they quote the 2017 Ruling out of context and selectively, weaving together text from the body of the Ruling with a footnote.

Plaintiffs are correct that the interest rate on credits for lump sum payments is not prescribed by caselaw or statute. Rather, selection of the appropriate interest rate lies within the Court's discretion in crafting the remedy. Using the 30-year Treasury rate, as opposed to the segment rates,

provides three significant advantages. First, it conforms with the intentions of Judge Kravitz and therefore harmonizes the Rulings on A + B relief. Second, it provides a conservative rate in line with what a prudent investor might expect as a reasonable rate of return. Third, it eases the calculation of interest and prevents further methodological disputes about how to apply the segment rates.

VI.Section 204(h) Notice

In the Joint Status Report [Doc.# 488], the parties state that the Court's January 10, 2017 Order "resolved all of Plaintiffs' objections." (Joint Status Report at 4.) The Court has reviewed the parties' briefing regarding the 204(h) notices *(see* Pls.' Obj. § 204(h) Notice [Doc. # 464]; Defs.' Resp. [Doc. # 465]) and concludes that no further substantial, non-typographical changes are necessary (beyond updating social security offsets). The notices conform to federal regulations' requirements to provide "sufficient information for each applicable individual to determine the *approximate magnitude* of the expected reduction for that individual." 26 C.F.R. § 54.4980F-l, A-ll(a)(4)(ii)(A) (emphasis added). Further changes might make the notices more precise, but with the attendant risk of making them more complicated to calculate and more difficult to understand.

VII. Conclusion

For the foregoing reasons, the Court grants Cigna's motion for clarification or reconsideration. Cigna is permitted to offset the Initial Retirement

Account from the annuity due under the Part A remedy for plan participants who have not commenced receiving benefits and elect to take their Part B benefits as a lump sum. The rate used to calculate interest rate credits on lump sums already paid and prejudgment interest is fixed as of the date benefits commenced. For purposes of calculating the Applicable Interest Rate after the plan transitioned to segment rates, the parties are directed to continue using the 30-year Treasury rate.

IT IS SO ORDERED.

/s/

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut this 14th day of July 2017.

Appendix I

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JANICE C. AMARA *et al,* individually, and on behalf of others similarly situated, *Plaintiffs,* *v.* CIGNA CORP. AND CIGNA PENSION PLAN, *Defendants.*	Civil No. 3:0l-CV-2361 (JBA) January 10, 2017

REVISED RULING ON PROPOSED METHODOLOGY AND REQUEST FOR ORDER OF COMPLIANCE PLAN

Plaintiffs, the prevailing parties in this fifteen-year-old case under the Employee Retirement Income Security Act of 1974 ("ERISA"), seek [Doc.# 412] an order requiring Cigna to prepare and submit a compliance plan detailing its methodology and calculations with regard to each class member's anticipated remedy, as well as its plan for ensuring compliance with the Court's order. Plaintiffs additionally object [Doc. # 437] to Defendants'

proposed methodology and seek an order[1] [Doc.# 430] requiring Defendants to supplement their methodology with greater detail and more examples, or, in the alternative, seeking post-judgment discovery. For the following reasons, Plaintiffs' motion [Doc. # 412] for a compliance plan is denied, their motion [Doc. # 430] for an order requiring Cigna to supplement its methodology, or in the alternative for post-judgment discovery, is denied, and their objections [Doc. # 437] to Cigna's proposed methodology are sustained in part and overruled in part.

I. Background

The parties' familiarity with the background of this case is presumed. Briefly, this action began in 2001 when Plaintiff Janice C. Amara and other similarly situated individuals brought suit against Defendants CIGNA Corporation and the CIGNA Pension Plan (collectively "Cigna") alleging that Defendants violated the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1022(a), 1024(b), 1054(h), in switching, in 1998, from a defined benefits pension plan ("Part A") to a cash balance plan ("Part B").

In 2008, after a bench trial, the late Judge Mark R. Kravitz found in Plaintiffs' favor, *see Amara v. CIGNA Corp. ("Amara I"),* 534 F. Supp. 2d 288 (D. Conn. 2008), and ordered damages in the amount of the sum of benefits each employee accrued under Part A and under Part B ("A+ B relief"), *see Amara v. CIGNA*

[1] Plaintiffs, enigmatically, style their motions as a motion for extension of time.

Corp. ("Amara II"), 559 F. Supp. 2d 192 (D. Conn. 2008). In ordering A+ B relief, Judge Kravitz explained:

> Under A+ B, an employee would receive all of her Part A benefits in the form those benefits were previously offered under Part A, plus all the benefits she accrued under Part B, in whatever form those benefits are offered. Because there is no attempt to transition Part A benefits into the Part B accrual formula, there is no need for an opening account balance and thus no question of whether early retirement benefits are a part of that opening balance or not. Additionally, because any Part B accrued benefits would simply be tacked on to the Part A benefits, there would be no possibility of wear away.

Id. at 212. The Court recognized, however, that there would be some difficulties in implementing A+ B relief for individuals who had already received their benefits in a lump sum under Part B:

> The vast majority of retirees[2] elected a lump sum upon retirement, and that lump sum was intended

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[2] Judge Kravitz appears to have been under the impression that all individuals who have already received a lump sum were retired at the time they received that payment. However, unlike Part A, Part B permitted participants to receive their accrued benefits in lump sum or annuity form "as of the first day of the second month (or any later month) after [their] severance from employment which is prior to [their] Normal Retirement Date." (Part B, as amended Jan. l, 1998, § 5.3, Ex. B to Pls' Opp'n [Doc.# 437].) As a result, 87% of class members who have already commenced their benefits under Part B did so before they reached Part A's

> to be the actuarial equivalent of (at least some of) the retirees' Part A benefits, plus (at least some of) their Part B benefits. Due to the provisions of Part A, however, A+ B requires that Part A benefits be paid only in annuity form. The result is that the Court is faced with the question of how to convert a previously-paid lump sum into an annuity, in order to calculate the additional annuity to which a retiree may be entitled. This issue essentially boils down to whether retirees who elected a lump sum should be required to pay back a portion of that lump sum before being eligible to receive additional benefits in annuity form.

Id. at 214-15.

The Court unequivocally rejected the idea that payback should be required because "[t]o force retirees to come up with a possibly substantial amount of cash (especially in the current economic climate) in order to receive additional retirement benefits for which they are otherwise qualified is both unrealistic and contrary to the protective purposes embodied in ERISA." *Id.* at 216. However, Judge Kravitz also recognized that "the CIGNA plan should receive full credit for both the lump sums already paid and for a reasonable amount of interest on those sums since the date of payment." *Id.* Thus, "[o]nce the retiree's lump sum plus interest has been annuitized, the CIGNA Plan should subtract the resulting monthly payment from the monthly payment under the annuity originally available under Part A as of the date of the

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benefit commencement age. (Defs.' Methodology [Doc.# 428] at 21.)

employee's retirement. The retiree should then receive a lump sum of all past-due benefits as part of the date of judgment and a prospective stream of monthly payments of the difference going forward." *Id.* Further, "[b]ecause the default payment option for retirement benefits under ERISA ... is a qualified joint and survivor's annuity, the CIGNA Plan should offer these monthly payments for the duration of the employee's life and the applicable proportion of those payments for the life of the surviving spouse." *Id.* (footnote omitted).

Judge Kravitz noted that his intent was "that the lump sum plus interest and the annuity payments otherwise-due to date will be made as mathematically equivalent as possible, to minimize any overpayment on the CIGNA Plan's part." *Id.* at 217. However, he added, "to the extent there remains some risk of overpayment, ... it is equitable that CIGNA, having provided statutorily inadequate benefit elections forms, bear that risk." *Id.* The Court ordered Cigna to pay interest on "all benefits actually due between the implementation of Part B on January 1, 1998 and the date of judgment." *Id.* at 221. With respect to the amount of that interest, Judge Kravitz held that "the rate should be the same as that used with respect to the CIGNA Plan's lump sum payments, namely, a reasonable rate of return.... [A] reasonable and appropriate rate of interest for payments past due would be the rate used in the same time period by the CIGNA Plan to calculate the lump- sum present value of retiring participants' annuities (i.e., the equivalent actuarial value)." *Id.* at 220-21.

In 2012, after the case had been up to the Supreme Court, *see CIGNA Corp. v. Amara (Amara III),* 131 S. Ct. 1866 (2011), and remanded, this Court again ordered A+ B relief, finding that Judge Kravitz's remedial order "was the result of careful calibration of the interests at stake." (Mem. of Decision on Remedies [Doc.# 378) at 35.) The parties now dispute how A + B relief should actually be implemented.

II. Discussion

A. Cigna's Methodology

I. Calculating A

Cigna's proposed methodology for calculating A + B relief highlights a significant complication of which Judge Kravitz was apparently unaware, namely that "Cigna cannot simply plug-in the value of a class members' [sic] December 31, 1997 Part A annuity before conversion to an Initial Retirement Account[3] from its records" because Cigna has not maintained records of the amounts each class member accrued under Part A. (Defs.' Methodology at 6.) For this reason, Cigna asserts that before it can calculate A+ B, it "must calculate the value of [the] Part A annuity by unwinding the steps used to create the Initial Retirement Account." *(Id.)*

In order to understand how Cigna "unwinds the steps" to get from B to A, one first needs to understand how Cigna got from A to B. As the Court understands

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[3] The Initial Retirement Account is the opening balance under Part B, which was a lump sum (as compared to benefits under Part A which were annuitized).

it, Cigna's methodology for converting Part A into Part B is as follows:

> (1) [Gross Part A annuity[4]] - [Social Security offset[5]] x [conversion factor[6]] = Init. Retirement Acct.
>
> (2) [Init. Retirement Acct.] + [interest credits[7]) + [benefit credits[8]) = Part B Cash Balance

So, in order to "unwind" from Part B cash balance to Part A, Defendants do the following:

> (1) [Part B Cash Balance] - [benefit credits] - [interest credits) = [Init. Retirement Acct.]
>
> (2) [Init. Retirement Acct.]/ [conversion factor] + [Social Security offset]= [Gross Part A annuity]

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4 Before Part A Social Security offset.

5 Under Part B (age 62).

6 Used to convert from annuity to lump sum (based on applicable interest rates and mortality tables specified in Part B).

7 (Accrued under Part B). Part B provides that "[f]or each calendar quarter beginning on and after January 1, 1998, each Participant's Retirement Account shall be increased by an Interest Credit. A Participant's Retirement Account shall continue to receive Interest Credits under the end of the month preceding the Participant's Benefit Commencement Date . . . regardless of whether he continues in the employ of a Participating Company or a Related Company." (Part B, as amended Jan. l, 2010, § 4.2(a){l), Ex. C to Pls.' Opp'n to Methodology [Doc.# 437].)

8 (Accrued under Part B). *(See* Part B, as amended Jan. 1, 2010, § 4.1.)

(3) [Amt. Owed under Part A] = [Gross Part A annuity] - [age 65[9] Social Security offset]

For the most part, Plaintiffs do not appear to dispute that this is the correct method for calculating Part A; however, they contend that the Social Security offsets for Tier 2/New Formula[10] participants under Part A should not differ from the offsets under Part B. *(See* Pls.' Opp'n to Methodology at 24.)

For purposes of determining the amount due to Tier 2/New Formula participants under Part A, Cigna subtracts from the gross Part A annuity the age 65 Social Security offset, on the grounds that the terms of Part A specifically call for usage of an age 65 offset "unless the participant is early retirement eligible and retires early." (Defs.' Methodology at 7.) Plaintiffs appear to dispute that the language of Part A supports Defendants' position *(see* Pls.' Sur-Reply to Methodology [Doc.# 454-1] at 14), but they argue that even if Part A does provide for an age 65 offset to be used for Tier 2/New Formula participants, an age 62 Social Security offset should nonetheless be used because when Cigna actually calculated the participants' Initial Retirement Accounts in 1998, it used an age 62 offset *(see* Pls.' Opp'n at 24-35). In so arguing, Plaintiffs rely heavily on the testimony of

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9 For Tier 2/New Formula participants.

10 Part A encompasses two types of plans, alternately referred to as Tier 1 and 2 or Old Formula and New Formula. Tier 2/New Formula participants are essentially those individuals who joined the plan after 1988. Ninety-five percent of the class participants are Tier 2/New Formula. (Defs.' Methodology at 5.)

Defendants' actuarial expert, Lawrence Sher at an evidentiary hearing held on March 29, 2012.

During that hearing, Mr. Sher testified about his analysis of the "chapter files" Cigna had given him which contained data that had been used in converting Part A to Part B. (Mar. 29, 2012 Hrg. Tr., [Doc. # 384] at 167.) The files contained two columns of Social Security offsets, one of which was labeled "Age 62 Social Security Benefit," and the other of which was labeled "Age 65 Social Security Benefit." *(Id.* at 57-58.) In spite of the different labels, the figures in each column were equal, at least as to Tier 2/New Formula participants. *(Id.* at 58, 168.) Mr. Sher testified that it was not possible for the age 62 benefit to be the same as the age 65 benefit, and that based on his calculations, the figures in both columns in fact both represented age 62 benefits. *(Id.* at 58-60.) Using the age 62 offset, Mr. Sher was able to reproduce the opening account balances in the chapter files, demonstrating that Cigna used the age 62 offsets when it actually converted from Part A to Part B. *(Id.* at 60.)

Mr. Sher seemed to admit that Part Bin fact calls for an age 65 offset to be used, but he nonetheless concluded that "whether it was done because it was a mistake or whether somebody just decided that's how they interpreted that document," an age 62 offset was definitely used. *(Id.* at 183.) He added that he had confirmed with two unnamed individuals at Prudential, which was managing the database in 1998, that the Social Security offsets that were used "both in the opening balances and in the minimum calculations were based on an age 62 [Social Security

offset], not just for the [Tier 2] people that [he] would have expected that to be the case which are the people that had 55 points where you're actually looking at an age 62 benefit, but for the people who don't have 55 points where you're looking at an age 65 benefit." *(Id.* at 165-66, 173.)

In calculating the Part A benefit due to individuals with A+ B relief, however, Mr. Sher utilized an age 65 offset because the Part A plan called for the use of an age 65 offset. *(Id.* at 60-61.) He explained: "[B]ecause Part B decided to, for whatever reason, and I'm not sure what the reason is, decided to use age 62 [offsets] in these different cases where one might have expected they'd use an age 65 benefit, I thought that if we were starting from scratch, the frozen benefit in Part A should not be any different than what the Plan actually - Part A actually calls for.... I can't interpret Part A [as using an age 62 benefit]. I'm not sure whether I can interpret Part B that way, but somebody must have." *(Id.* at 182, 183.)

As Mr. Sher argued in 2012, Defendants now claim that the chapter files were only used to calculate the minimum benefit and opening account balances under Part B and are not relevant to Part A. Part A, they contend, must be calculated according to the terms of the Part A plan.

The terms of Part A appear to call for the use of an age 65 offset for any Tier 2/New Formula participant not early retirement eligible. *(See* Part A, Ex. A to Pls.' Opp'n, §§ 1.39 (defining "normal retirement age" as age 65 in most cases), 4.2(b)(3) (calculating normal retirement benefit by subtracting half of the

participant's annual primary old age insurance benefit at retirement age from accrued benefits), 4.3(a)(6). *Compare* Part A§ 4.2(b)(3) *with* Part A § 4.3(a)(6) (calculating early retirement benefit by subtracting half of the participant's annual primary old age insurance benefit available to him/her at age 62 from accrued benefits).) Nonetheless, the Court agrees with Plaintiffs that because an age 62 offset was used in calculating the minimum benefit and opening balance under Part B, in spite of the Plan language to the contrary, Cigna should not now be permitted to use an age 62 offset in calculating Part A, particularly as the minimum benefit under Part B is exactly the same as the Part A accrued benefit. Defendants offer no explanation for why it would be logical to deduct different amounts of Social Security under Part B than under Part A.

Further, because it is Defendants that failed to maintain records, necessitating this whole inquiry, to the extent there is some ambiguity due to the lack of records, that ambiguity should be construed against Defendants. Therefore, on the issue of Social Security offsets, the Court finds in Plaintiffs' favor. Defendants shall use an age 62 offset for calculating Tier 2/New Formula participants' Part A net benefit.

2. Calculating B

Plaintiffs additionally dispute Defendants' methodology with respect to Part B. In calculating the amount due under Part B, Defendants take the current balance under Part B and subtract the Initial Retirement Account, so that "B" includes only the

benefit credits and interest credits accrued under part B.

Plaintiffs contend that in doing so, Cigna is "tak[ing] away the existing lump sum option for the Initial Retirement Account, rather than simply providing the 'A + B' benefit increase in annuity form." (Pls.' Opp'n at 54.) Plaintiffs' argument can be understood by considering a hypothetical example. Suppose that a participant has $100,000 in her Part B cash balance account, of which $50,000 is from her opening balance. Absent A + B relief, she may take the whole $100,000 as a lump sum when she stops working at Cigna or retires. With Cigna's proposed methodology for A+ B relief, that same participant would only be able to take $50,000 as a lump sum, though she would still be credited with the remaining $50,000 under Part A (which she would receive as an annuity commencing at age 65, or earlier if she is early retirement eligible). That individual, who may have been relying on her ability to take the whole $100,000 as a lump sum will be in for a rude surprise when she learns that in fact, she can only take $50,000 upon retirement and will have to wait years to receive the other $50,000.

This raises an interesting dilemma. On the one hand, Cigna's methodology appears to be in line with Judge Kravitz's order that Cigna pay Plaintiffs "all of [their] Part A benefits in the form those benefits were previously offered under Part A, plus all the benefits [they] *accrued* under Part B, in whatever form those benefits are offered," without regard to the opening account balance. *Amara II,* 559 F. Supp. 2d at 212 (emphasis added). On the other hand, it is clear that

participants should not be penalized for Cigna's misrepresentations, and participants who have been counting on receiving a lump sum under Part B should not be stripped of that right by the Court's remedy. To that end, Judge Kravitz clearly held that "to the extent there remains some risk of overpayment, the Court finds it is equitable that CIGNA, having provided statutorily inadequate benefit elections forms, bear that risk." *Id.* at 217. Therefore, although this will inevitably lead to some overpayment on Cigna's part, Cigna is prohibited from deducting the Initial Retirement Account from Part B.

3. Calculating the Offsets for Participants who Received a Lump Sum

A unique set of difficulties is presented by participants who have already received a lump sum under Part B. Judge Kravitz instructed that such participants' lump sums plus a "reasonable amount of interest on those sums since the date of payment" should be annuitized and then subtracted from "the monthly payment under the annuity originally available under Part A as of the date of the employee's retirement." *Id.* at 216. The participants "should then receive a lump sum of all past-due benefits as of the date of judgment and a prospective stream of monthly payments of the difference going forward." *Id.* Participants whose lump sum payment exceeds the amount they would have received in annuity payments will not be required to pay back the difference. *Id.* Finally, participants who are owed past-due payments are entitled to pre-judgment interest of a reasonable amount.

Cigna's methodology can be expressed in equation form as follows:

A. Calculate Part A (as above):

(1) [Part B Cash Balance] - [benefit credits] - (interest credits] = [Init. Retirement Acct.]

(2) [Init. Retirement Acct.]/ [conversion factor] + [Social Security offset] = [Gross Part A annuity]

(3) [Gross Part A annuity] - [age 65 Social Security offset] =[Amt.Owed under Part A]

B. Calculate Part B as Annuity with Reasonable Interest:

(1) [Part B Cash Balance] - [Init. Retirement Acct.]= [Part B Lump Sum]

(2) [Part B Lump Sum] + [5.5% interest[11]] = [Part B Lump Sum Plus Interest]

(3) [Part B Lump Sum Plus Interest] *I* [conversion factor[12]] = [Part B Annuity Plus Interest]

C. Calculate Annuity Value of Amt. Already Paid as Lump Sum:

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11 From date of payment until earliest retirement date under Part A. (If benefit commencement date was prior to participant's earliest retirement date under Part A).

12 Based on interest rates and mortality tables in effect under Part Bat later of earliest retirement date or the date of payment.

(1) [Lump Sum Paid] + [5.5% interest[13]] = [Lump Sum Paid Plus Interest]

(2) [Lump Sum Paid Plus Interest]/ [conversion factor[14]] = [Annuity Amt. Paid Plus Interest]

D. Calculate Remedy Due:

(1) [Amt. Owed under Part A] + [Part B Annuity Plus Interest] = [A+ B Benefit as Annuity]

(2) [A+ B Benefit as Annuity] - [Annuity Amt. Paid Plus Interest] = [Annual Annuity Owed]

(3) [Annual Annuity Owed] / 12 = [Monthly Annuity Owed Going Forward[15]]

(4) [Monthly Annuity Owed] x [No. Months Btwn Payment Date & Current Date] = [Past Due Amt.]

(5) [Past Due Amt.] + [5.5% interest[16]] = [Amt. due Immediately[17]]

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13 From date of payment until earliest retirement date under Part A. (If benefit commencement date was prior to participant's earliest retirement date under Part A).

14 Based on interest rates and mortality tables in effect under Part Bat later of earliest retirement date or the date of payment.

15 Prospective stream of payments from later of earliest retirement date under Part A or date of Part B lump sum payment.

16 From later of earliest retirement date under Part A or actual date of payment until current date. This is the pre-judgment interest ordered by Judge Kravitz.

17 Past due payments.

Plaintiffs object to this methodology on several grounds. First, they argue that Cigna uses an inappropriate interest rate for pre-judgment interest and interest on overpayments. Second, they contend that Cigna uses an inappropriate interest rate **in** converting the Part B benefit to an annuity. Finally, they assert that Cigna's methodology is flawed with respect to the timing of benefit payouts. Each of these objections is addressed below.

a. Pre-Judgment Interest & Interest on Lump Sums Already Paid

Cigna proposes using a 5.5% interest rate for both pre-judgment interest and as interest on the lump sums Cigna already paid. Cigna justifies this rate by arguing that the Plan has earned a compound average rate of annual return of 5.99% since adopting Part B, so 5.5% is a modest and reasonable rate. (Defs.' Methodology at 23.) Further, Cigna contends that the Court has already "adopted" this rate as part of its bond order. *(Id.* at 23- 24.)

Plaintiffs respond that Defendants' proposal is "'absurd and contradictory' because for the years class members left their cash balance accounts under CIGNA's Plan, they could earn only 4.5%," as per the terms of Part B. (Pls.' Opp'n at 36.) Plaintiffs cite to § 4.2 of Part B, which states that "[t]he amount of the Interest Credit for any calendar quarter in a Plan Year shall be determined by applying the interest rate prescribed by paragraph 4.2(b) to the Participant's Retirement Accounts as of the last day of such calendar quarter." (Part B, as amended Jan. 1, 2010, § 4.2(a)(2).) Paragraph 4.2(b), in turn, provides that

"the interest rate for each calendar quarter in any Plan Year shall be the rate that yields an annual rate equal to the greater of:"

> (1) Four and one-half percent (the Floor Interest Rate), or
>
> (2) The lesser of nine percent, or the yield on 5-year U.S. Treasury Constant Maturities for the month of November of the preceding Plan Year plus 25 basis points.

(Id.§ 4.2(b).)[18] According to Plaintiffs, because "'[t]he lesser of nine percent, or the yield on 5-year U.S. Treasury Constant Maturities . . .' has been far below 2.5% since 2008, the operative interest crediting rate ... is 4.5%. Indeed, 4.5% has been the operative interest rate since 2002 (except for two years in which the rate was 4.7% and 4.83%)." (Pls.' Opp'n at 36.)

Cigna responds that the section of the Plan cited by Plaintiffs, which describes the interest credits that accrue on the cash balance accounts, is not relevant to the Court's considerations of what a reasonable interest rate might be on the lump sums already paid and no longer in the cash balance accounts.

Although there is some merit to both parties' arguments, they both appear to ignore Judge Kravitz's explicit instructions regarding what he considered a "reasonable and appropriate rate of interest." Judge Kravitz ordered that the rate of pre-judgment interest "should be the same as that used with respect to the [interest on] CIGNA Plan's lump

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[18] This language is identical to the 1998 version of the Plan.

sum payments, namely, a reasonable rate of return." *Amara II,* 559 F. Supp. 2d at 220. He went on to define a "reasonable rate of return" as "the rate used in the same time period" for which interest is due "to calculate the lump-sum present value of retiring participants' annuities (i.e., the equivalent actuarial value)." *Id.* at 221.

The Applicable Interest Rate used in calculating the lump sum present value of retiring participants' annuities is defined in the 1998 version of Part B as: "the annual rate of interest on 30-year Treasury securities, as specified by the Commissioner of Internal Revenue, for November of the year before the Plan Year which includes the Benefit Commencement Date." (Part B, as amended Jan. 1, 1998, § 1.6, Ex. B to Pls' Opp'n; *see also id.* § 7.l(a)(l) ("A Qualified Annuity for an unmarried Participant means a single life annuity for the life of the Participant which is of Equivalent Actuarial Value (determined using the Applicable Interest Rate and the Applicable Mortality Table) to the Participant's Accrued Benefit.").) The 2010 revisions to Part B add that "with respect to Benefit Commencement Dates on and after July 1, 2009, in no event shall the Qualified Annuity amount of a Participant's benefit ... be less than the amount produced by using the Applicable Interest Rate in effect as of July 1, 2009." (Part B, as amended Jan. 1, 2010, § 7.l(a)(l).)

Despite the 2010 revision introducing floor rates, the Court concludes for reasons stated in the Ruling on Plaintiff Class's Objections to Cigna's Revised 204(h) Notices [Doc. # 485] that the appropriate rate of interest used for calculating pre-judgment interest

and interest on lump sums already paid should be "the annual rate of interest on 30-year Treasury securities, as specified by the Commissioner of Internal Revenue, for November of the year before the Plan Year which includes the Benefit Commencement Date." (Part B, as amended Jan. 1, 1998, § 1.6, Ex. B to Pls' Opp'n; *see also id.* § 7.l(a)(l).) Cigna will receive credit for yearly interest in the amount of the annual rate of interest on 30-year Treasury securities for November of the year before the Plan Year. Similarly, each participant who is owed overdue payments will receive yearly interest from the date of payment until the date on which she is paid her past-due benefits, at a rate to be determined based on the Applicable Interest Rate under the version of Plan B in effect in the relevant year, without regard to the interest rate floor.

b. Interest used in Converting Lump Sum into Annuity

Plaintiffs next take issue with Defendants' methodology for converting the already- paid lump sums into annuities for purposes of offsetting A + B. As discussed above, the original Part B plan called for converting lump sums into annuities using "the annual rate of interest on 30-year Treasury securities, as specified by the Commissioner of Internal Revenue, for November of the year before the Plan Year which includes the Benefit Commencement Date" (Part B, as amended Jan. 1, 1998, § 1.6), but in January 2010, Cigna added to the Plan the caveat that "with respect to Benefit Commencement Dates on and after July 1, 2009, in no event shall the Qualified Annuity amount of a Participant's benefit ... be less than the amount produced by using the Applicable Interest Rate in

effect as of July 1, 2009" (Part B, as amended Jan. 1, 2010, § 7.l(a)(l)). Although the Court uses the Plan to guide its construction of relief, the Amendment to Part B setting a floor rate is inappropriate for calculating the rate used to convert lump sums to annuities or to calculate the offset. *(See* Ruling on Plaintiff Class's Objections to Cigna's Revised 204(h) Notices [Doc. # 485] at 5-6.)

Cigna states that "[wh]en annuitizing the Part B benefits, ... [it] will use the mortality tables and interest rates actually in effect under the terms of Part B as of the later of the date the participant reaches earliest retirement age under the terms of Part A or the participant's actual benefit commencement date." (Defs.' Methodology at 25.) Plaintiffs contend, however, that this methodology uses "a Plan provision adopted in 2009 **after** this Court's February 2008 liability and June 2008 relief decisions for the purposes of annuitizing offsets at pre-recession segment interest rates that are currently unavailable." (Pls.' Opp'n at 41-42.) They add that "CIGNA does not propose to go back and provide any participant with an increased annuity at these higher interest rates, but proposes to create phantom annuities solely for offset purposes that will 'minimize' the A + B relief." *(Id.* at 42.)

It is apparent to the Court that the plan provisions in place at *the time the lump sum was received* should control, except with regard to the interest rate floor, and not, as Cigna argues, the plan in place at the later of the date the participant reaches earliest retirement age under Part A or the actual benefit commencement date. This methodology has the added benefit of

permitting Cigna to calculate the amount owed to all class members that have already received benefits as a lump sum, without waiting until those participants reach retirement age under Part A, thus eliminating years of uncertainty and preventing this litigation from dragging on for another fifteen years.[19]

4. Omissions in the Methodology

Plaintiffs additionally assert that Defendants' methodology is incomplete, protesting that that "CIGNA's Submission does not set out any methodology for identifying who is eligible for early retirement benefits, qualified survivor's annuities, or the 'Free 30%' survivor's benefits, nor does it set out any methodology for identifying the class members who were victims of CIGNA's failure to disclose the 'relative value' of benefit options. CIGNA's Submission also does not set out any methodologies for calculating the increased benefits due to those class members." (Pls.' Opp'n at 57; *see* Pls.' Sur-Reply at 27.) Defendants do respond to any of these arguments, perhaps because they appear contrary to the Court's previous decision awarding only A + B relief and new § 204(h) notices, without additional relief for particular class members. As Judge Kravitz explained, A + B relief was intended to compensate victims for Cigna's misrepresentations that the opening balances would include the whole value of

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[19] This additionally resolves Plaintiffs objection to Cigna's assertion that "for the majority of already paid class members, th[e] offset calculation will not be performed until many years in the future when the participant reaches retirement eligibility under Part A (age 55 or 65)." (Defs.' Methodology at 24.)

their Part A benefits-including early retirement benefits, qualified survivor's annuities, and Free 30% survivor's benefits-when in fact they did not. *See Amara II,* 559 F. Supp. 2d at 211-13. Judge Kravitz did order that retirees eligible for additional monthly benefits under Part A be offered such payments for the duration of their lives and the applicable portion of those payments for the duration of their surviving spouses' lives. *Id.* at 216. But, Cigna provides a methodology for making such payments *(see* Defs.' Methodology at 4), to which Plaintiffs have not raised any specific objections. Accordingly, Plaintiffs objections to Cigna's methodology with respect to early retirement benefits, qualified survivor's annuities, Free 30% survivor's benefits, and "relative value" victims are overruled.

Plaintiffs additionally argue that Cigna's methodology does not include a sufficient number or variety of examples, specifically with regard to Tier 1 class members and early retirement class members. (Pls.' Mot. for Ext. of Time [Doc. # 430] ° 3; Pls.' Reply at 26- 27.) The Court disagrees; the methodology is sufficiently detailed, and Plaintiffs' motion for an order requiring supplementation is denied.

Finally, Plaintiffs object to the fact that "CIGNA's Submission and emails indicate that CIGNA intends to rely on its *ipse dixit* to disqualify over 9,000 class members from any A + B relief on the ground that they purportedly 'terminated without any vested benefit,' 'had no Part A benefit subject to conversion,' or 'were already entitled to an A + B benefit.'" (Pls.' Opp'n at 59; *see* Pls.' Sur-Reply at 28-30.) The Court agrees that more is required of Cigna. Cigna is

therefore ordered to, forthwith, provide Plaintiffs' counsel with records backing up its assertions that those individuals are not eligible for remedies.

B. Compliance Plan

Plaintiffs seek, for the third time *(see* Defs.' Opp'n Mot. for Compliance Plan [Doc. # 420] at 4-5), an order requiring Cigna to create a compliance plan that outlines how it will implement A + B relief *(see* Mem. Supp. Mot. for Compliance Plan [Doc. # 412]). Specifically, Plaintiffs seek:

> -The reformation of the Plan to effect the A+B relief for all class members in full and complete compliance with this Court's Orders;
>
> -The formulas, actuarial assumptions, and data inputs that will be used to implement that reformation (comparable to the methodology set out in the flow charts Mr. Rugeley prepared in support of the motion for attorneys' fees";
>
> -The procedures and schedule for outreach and notification of class members, surviving spouses and beneficiaries of the increased benefits, including procedures for locating class members, surviving spouses, and beneficiaries and confirming their addresses;
>
> -The benefit election forms, procedures, and schedule for making lump sum payments and commencing annuity distributions to class members, surviving spouses and beneficiaries;

> -Provisions to ensure CIGNA takes all reasonable steps to fulfill its obligations in compliance with the Court's Orders and on schedule, including but not limited to provisions for internal compliance audits and the supervision of implementation by a CIGNA executive officer;
>
> -Procedures for quarterly reporting to Class counsel with full supporting data related to calculations of class members' increased benefits, notifying class members of the increased benefits, making lump sum payments and annuity distributions, and any complaints or other inquiries from class members;
>
> -Provision for the submission of a certified and audited final report on implementation by CIGNA's CEO to this Court demonstrating that CIGNA has fully and completely complied with the Court's Orders.

(Id. at 8-9.)

Defendants object, on the grounds that: (1) a final judgment and mandate has been issued in this case and Plaintiffs cannot now seek additional forms of relief from the Court (Defs.' Opp'n Mot. for Compliance Plan at 2-6); (2) Plaintiffs' request is an untimely request to alter or amend the judgment *(id.* at 6-7); (3) there is no legal basis for ordering a compliance plan *(id.* at 7-10); and (4) the detailed plan sought by Plaintiffs is excessive and unnecessary *(id.* at 10-12).

As a preliminary matter, what Plaintiffs seek is not an "additional form of relief" or an alteration or

amendment of a final judgment, and as such, neither the final judgment and mandate rules nor Rule 59 is applicable here. Rather, Plaintiffs seek an order of the Court in aid of enforcement of its judgment, for which the Court has inherent authority. *Cf Riggs v. Johnson Cnty.,* 73 U.S. 166, 187 (1867) ("[T]he jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied.... Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution."). Nonetheless, the Court's power to issue orders in aid of execution is not limitless. "[B]ecause enforcement jurisdiction is a 'creature of necessity,' it extends only as far as required to effectuate a judgment." *Pafel v. Dipaola,* 399 F.3d 403,411 (1st Cir. 2005) (citing *Peacock v. Thomas,* 516 U.S. 349,359 (1996)).

Here, where Defendants have not shown themselves to be noncompliant and indeed have not as yet had an opportunity to comply due to the issues around the methodology, Plaintiffs' motion is premature.

III. Conclusion

For the foregoing reasons, Plaintiffs' request for an order requiring Defendants to provide a more detailed methodology [Doc.# 430] is DENIED, and Plaintiffs' motion [Doc. # 412] for a compliance plan is DENIED without prejudice to renew at a later date should Defendants fail to timely implement the Court-ordered remedy. Plaintiffs' objections [Doc. # 437] to

Defendants' methodology are OVERRULED in part and SUSTAINED in part, as follows:

(1) Defendants will use an age 62 offset for calculating Tier 2/New Formula participants' Part A net benefit;

(2) In calculating Part B, Cigna may not deduct the Initial Retirement Account from the current Part B balance;

(3) For each retiree who received a lump sum prior to July **1,** 2009, Cigna will receive credit for yearly interest in the amount of the annual rate of interest on 30-year Treasury securities for November of the year before the Plan Year. For each retiree who received a lump sum after July 1, 2009, Cigna will receive credit for the same yearly interest, but the interest rate floor will be the amount produced using the Applicable Interest Rate in effect as of July 1, 2009. Each participant who is owed overdue payments will receive yearly interest from the date of payment until the date on which she is paid her past-due benefits, at a rate to be determined based on the Applicable Interest Rate under the version of Plan B in effect in the relevant year;

(4) In converting the already-paid lump sums into annuities for purposes of offsetting A + B, the plan provisions in place at *the time the lump sum was received* control;

(5) Cigna is ordered to provide Plaintiffs' counsel with a list of all class members and the amount to which they are entitled under the above

methodology, if any. As to individuals claimed to be ineligible for remedies, Cigna shall provide to Plaintiffs' counsel records supporting its determination of ineligibility. Defendants shall advise the Court when the list and records have been served on Plaintiffs' counsel.

IT IS SO ORDERED.

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut this 10th day of January 2017.

Appendix J

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JANICE C. AMARA *et al,* individually, and on behalf of others similarly situated, *Plaintiffs,* *v.* CIGNA CORP. AND CIGNA PENSION PLAN, *Defendants.*	Civil No. 3:0l-CV-2361 (JBA) January 14, 2016

RULING ON PROPOSED METHODOLOGY AND REQUEST FOR ORDER OF COMPLIANCE PLAN

Plaintiffs, the prevailing parties in this fifteen-year-old case under the Employee Retirement Income Security Act of 1974 ("ERISA"), seek [Doc. # 412] an order requiring Cigna to prepare and submit a compliance plan detailing its methodology and calculations with regard to each class member's anticipated remedy, as well as its plan for ensuring compliance with the Court's order. Plaintiffs additionally object [Doc. # 437] to Defendants'

proposed methodology and seek an order[1] [Doc. # 430] requiring Defendants to supplement their methodology with greater detail and more examples, or, in the alternative, seeking post-judgment discovery. For the following reasons, Plaintiffs' motion [Doc. # 412] for a compliance plan is denied, their motion [Doc. # 430] for an order requiring Cigna to supplement its methodology, or in the alternative for post- judgment discovery, is denied, and their objections [Doc. # 437] to Cigna's proposed methodology are sustained in part and overruled in part.

I. Background

The parties' familiarity with the background of this case is presumed. Briefly, this action began in 2001 when Plaintiff Janice C. Amara and other similarly situated individuals brought suit against Defendants CIGNA Corporation and the CIGNA Pension Plan (collectively "Cigna") alleging that Defendants violated the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1022(a), 1024(b), 1054(h), in switching, in 1998, from a defined benefits pension plan ("Part A") to a cash balance plan ("Part B").

In 2008, after a bench trial, the late Judge Mark R. Kravitz found in Plaintiffs' favor, *see Amara v. CIGNA Corp.* ("*Amara I*"), 534 F. Supp. 2d 288 (D. Conn. 2008), and ordered damages in the amount of the sum of benefits each employee accrued under Part A and under Part B ("A + B relief"), *see Amara v. CIGNA*

[1] Plaintiffs, enigmatically, style their motions as a motion for extension of time.

Corp. ("*Amara II*"), 559 F. Supp. 2d 192 (D. Conn. 2008). In ordering A + B relief, Judge Kravitz explained:

> Under A + B, an employee would receive all of her Part A benefits in the form those benefits were previously offered under Part A, plus all the benefits she accrued under Part B, in whatever form those benefits are offered. Because there is no attempt to transition Part A benefits into the Part B accrual formula, there is no need for an opening account balance and thus no question of whether early retirement benefits are a part of that opening balance or not. Additionally, because any Part B accrued benefits would simply be tacked on to the Part A benefits, there would be no possibility of wear away.

Id. at 212. The Court recognized, however, that there would be some difficulties in implementing A + B relief for individuals who had already received their benefits in a lump sum under Part B:

> The vast majority of retirees[2] elected a lump sum upon retirement, and that lump sum was intended

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[2] Judge Kravitz appears to have been under the impression that all individuals who have already received a lump sum were retired at the time they received that payment. However, unlike Part A, Part B permitted participants to receive their accrued benefits in lump sum or annuity form "as of the first day of the second month (or any later month) after [their] severance from employment which is prior to [their] Normal Retirement Date." (Part B, as amended Jan. 1, 1998, § 5.3, Ex. B to Pls' Opp'n [Doc. # 437].) As a result, 87% of class members who have already commenced their benefits under Part B did so before they reached Part A's

> to be the actuarial equivalent of (at least some of) the retirees' Part A benefits, plus (at least some of) their Part B benefits. Due to the provisions of Part A, however, A + B requires that Part A benefits be paid only in annuity form. The result is that the Court is faced with the question of how to convert a previously-paid lump sum into an annuity, in order to calculate the additional annuity to which a retiree may be entitled. This issue essentially boils down to whether retirees who elected a lump sum should be required to pay back a portion of that lump sum before being eligible to receive additional benefits in annuity form.

Id. at 214–15.

The Court unequivocally rejected the idea that payback should be required because "[t]o force retirees to come up with a possibly substantial amount of cash (especially in the current economic climate) in order to receive additional retirement benefits for which they are otherwise qualified is both unrealistic and contrary to the protective purposes embodied in ERISA." *Id.* at 216. However, Judge Kravitz also recognized that "the CIGNA plan should receive full credit for both the lump sums already paid and for a reasonable amount of interest on those sums since the date of payment." *Id.* Thus, "[o]nce the retiree's lump sum plus interest has been annuitized, the CIGNA Plan should subtract the resulting monthly payment from the monthly payment under the annuity originally available under Part A as of the date of the

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benefit commencement age. (Defs.' Methodology [Doc. # 428] at 21.)

employee's retirement. The retiree should then receive a lump sum of all past-due benefits as part of the date of judgment and a prospective stream of monthly payments of the difference going forward." *Id.* Further, "[b]ecause the default payment option for retirement benefits under ERISA . . . is a qualified joint and survivor's annuity, the CIGNA Plan should offer these monthly payments for the duration of the employee's life and the applicable proportion of those payments for the life of the surviving spouse." *Id.* (footnote omitted).

Judge Kravitz noted that his intent was "that the lump sum plus interest and the annuity payments otherwise-due to date will be made as mathematically equivalent as possible, to minimize any overpayment on the CIGNA Plan's part." *Id.* at 217. However, he added, "to the extent there remains some risk of overpayment, . . . it is equitable that CIGNA, having provided statutorily inadequate benefit elections forms, bear that risk." *Id.*

The Court ordered Cigna to pay interest on "all benefits actually due between the implementation of Part B on January 1, 1998 and the date of judgment." *Id.* at 221. With respect to the amount of that interest, Judge Kravitz held that "the rate should be the same as that used with respect to the CIGNA Plan's lump sum payments, namely, a reasonable rate of return [A] reasonable and appropriate rate of interest for payments past due would be the rate used in the same time period by the CIGNA Plan to calculate the lump-sum present value of retiring participants' annuities (i.e., the equivalent actuarial value)." *Id.* at 220–21.

In 2012, after the case had been up to the Supreme Court, *see CIGNA Corp. v. Amara (Amara III)*, 131 S. Ct. 1866 (2011), and remanded, this Court again ordered A + B relief, finding that Judge Kravitz's remedial order "was the result of careful calibration of the interests at stake." (Mem. of Decision on Remedies [Doc. # 378] at 35.) The parties now dispute how A + B relief should actually be implemented.

II. Discussion

A. Cigna's Methodology

1. Calculating A

Cigna's proposed methodology for calculating A + B relief highlights a significant complication of which Judge Kravitz was apparently unaware, namely that "Cigna cannot simply plug-in the value of a class members' [sic] December 31, 1997 Part A annuity before conversion to an Initial Retirement Account[3] from its records" because Cigna has not maintained records of the amounts each class member accrued under Part A. (Defs.' Methodology at 6.) For this reason, Cigna asserts that before it can calculate A + B, it "must calculate the value of [the] Part A annuity by unwinding the steps used to create the Initial Retirement Account." (*Id.*)

In order to understand how Cigna "unwinds the steps" to get from B to A, one first needs to understand how Cigna got from A to B. As the Court understands

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[3] The Initial Retirement Account is the opening balance under Part B, which was a lump sum (as compared to benefits under Part A which were annuitized).

it, Cigna's methodology for converting Part A into Part B is as follows:

> (1) [Gross Part A annuity[4]] – [Social Security offset[5]] x [conversion factor[6]] = Init. Retirement Acct.
>
> (2) [Init. Retirement Acct.] + [interest credits[7]] + [benefit credits[8]] = Part B Cash Balance

So, in order to "unwind" from Part B cash balance to Part A, Defendants do the following:

> (1) [Part B Cash Balance] – [benefit credits] – [interest credits] = [Init. Retirement Acct.]
>
> (2) [Init. Retirement Acct.] / [conversion factor] + [Social Security offset] = [Gross Part A annuity]

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4 Before Part A Social Security offset.

5 Under Part B (age 62).

6 Used to convert from annuity to lump sum (based on applicable interest rates and mortality tables specified in Part B).

7 (Accrued under Part B). Part B provides that "[f]or each calendar quarter beginning on and after January 1, 1998, each Participant's Retirement Account shall be increased by an Interest Credit. A Participant's Retirement Account shall continue to receive Interest Credits under the end of the month preceding the Participant's Benefit Commencement Date . . . regardless of whether he continues in the employ of a Participating Company or a Related Company." (Part B, as amended Jan. 1, 2010, § 4.2(a)(1), Ex. C to Pls.' Opp'n to Methodology [Doc. # 437].)

8 (Accrued under Part B). (*See* Part B, as amended Jan. 1, 2010, § 4.1.)

(3) [Amt. Owed under Part A] = [Gross Part A annuity] – [age 65[9] Social Security offset]

For the most part, Plaintiffs do not appear to dispute that this is the correct method for calculating Part A; however, they contend that the Social Security offsets for Tier 2/New Formula[10] participants under Part A should not differ from the offsets under Part B. (*See* Pls.' Opp'n to Methodology at 24.)

For purposes of determining the amount due to Tier 2/New Formula participants under Part A, Cigna subtracts from the gross Part A annuity the age 65 Social Security offset, on the grounds that the terms of Part A specifically call for usage of an age 65 offset "unless the participant is early retirement eligible and retires early." (Defs.' Methodology at 7.) Plaintiffs appear to dispute that the language of Part A supports Defendants' position (see Pls.' Sur-Reply to Methodology [Doc. # 454-1] at 14), but they argue that even if Part A does provide for an age 65 offset to be used for Tier 2/New Formula participants, an age 62 Social Security offset should nonetheless be used because when Cigna actually calculated the participants' Initial Retirement Accounts in 1998, it used an age 62 offset (see Pls.' Opp'n at 24–35). In so arguing, Plaintiffs rely heavily on the testimony of

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9 For Tier 2/New Formula participants.

10 Part A encompasses two types of plans, alternately referred to as Tier 1 and 2 or Old Formula and New Formula. Tier 2/New Formula participants are essentially those individuals who joined the plan after 1988. Ninety-five percent of the class participants are Tier 2/New Formula. (Defs.' Methodology at 5.)

Defendants' actuarial expert, Lawrence Sher at an evidentiary hearing held on March 29, 2012.

During that hearing, Mr. Sher testified about his analysis of the "chapter files" Cigna had given him which contained data that had been used in converting Part A to Part B. (Mar. 29, 2012 Hrg. Tr., [Doc. # 384] at 167.) The files contained two columns of Social Security offsets, one of which was labeled "Age 62 Social Security Benefit," and the other of which was labeled "Age 65 Social Security Benefit." (Id. at 57–58.) In spite of the different labels, the figures in each column were equal, at least as to Tier 2/New Formula participants. (Id. at 58, 168.) Mr. Sher testified that it was not possible for the age 62 benefit to be the same as the age 65 benefit, and that based on his calculations, the figures in both columns in fact both represented age 62 benefits. (Id. at 58–60.) Using the age 62 offset, Mr. Sher was able to reproduce the opening account balances in the chapter files, demonstrating that Cigna used the age 62 offsets when it actually converted from Part A to Part B. (*Id*. at 60.)

Mr. Sher seemed to admit that Part B in fact calls for an age 65 offset to be used, but he nonetheless concluded that "whether it was done because it was a mistake or whether somebody just decided that's how they interpreted that document," an age 62 offset was definitely used. (*Id*. at 183.) He added that he had confirmed with two unnamed individuals at Prudential, which was managing the database in 1998, that the Social Security offsets that were used "both in the opening balances and in the minimum calculations were based on an age 62 [Social Security

offset], not just for the [Tier 2] people that [he] would have expected that to be the case which are the people that had 55 points where you're actually looking at an age 62 benefit, but for the people who don't have 55 points where you're looking at an age 65 benefit." (*Id.* at 165–66, 173.)

In calculating the Part A benefit due to individuals with A + B relief, however, Mr. Sher utilized an age 65 offset because the Part A plan called for the use of an age 65 offset. (*Id.* at 60–61.) He explained: "[B]ecause Part B decided to, for whatever reason, and I'm not sure what the reason is, decided to use age 62 [offsets] in these different cases where one might have expected they'd use an age 65 benefit, I thought that if we were starting from scratch, the frozen benefit in Part A should not be any different than what the Plan actually – Part A actually calls for I can't interpret Part A [as using an age 62 benefit]. I'm not sure whether I can interpret Part B that way, but somebody must have." (*Id.* at 182, 183.)

As Mr. Sher argued in 2012, Defendants now claim that the chapter files were only used to calculate the minimum benefit and opening account balances under Part B and are not relevant to Part A. Part A, they contend, must be calculated according to the terms of the Part A plan.

The terms of Part A appear to call for the use of an age 65 offset for any Tier 2/New Formula participant not early retirement eligible. (*See* Part A, Ex. A to Pls.' Opp'n, §§ 1.39 (defining "normal retirement age" as age 65 in most cases), 4.2(b)(3) (calculating normal retirement benefit by subtracting half of the

participant's annual primary old age insurance benefit at retirement age from accrued benefits), 4.3(a)(6). *Compare* Part A § 4.2(b)(3) *with* Part A § 4.3(a)(6) (calculating early retirement benefit by subtracting half of the participant's annual primary old age insurance benefit available to him/her at age 62 from accrued benefits).) Nonetheless, the Court agrees with Plaintiffs that because an age 62 offset was used in calculating the minimum benefit and opening balance under Part B, in spite of the Plan language to the contrary, Cigna should not now be permitted to use an age 62 offset in calculating Part A, particularly as the minimum benefit under Part B is exactly the same as the Part A accrued benefit. Defendants offer no explanation for why it would be logical to deduct different amounts of Social Security under Part B than under Part A.

Further, because it is Defendants that failed to maintain records, necessitating this whole inquiry, to the extent there is some ambiguity due to the lack of records, that ambiguity should be construed against Defendants. Therefore, on the issue of Social Security offsets, the Court finds in Plaintiffs' favor. Defendants shall use an age 62 offset for calculating Tier 2/New Formula participants' Part A net benefit.

2. Calculating B

Plaintiffs additionally dispute Defendants' methodology with respect to Part B. In calculating the amount due under Part B, Defendants take the current balance under Part B and subtract the Initial Retirement Account, so that "B" includes only the

benefit credits and interest credits accrued under part B.

Plaintiffs contend that in doing so, Cigna is "tak[ing] away the existing lump sum option for the Initial Retirement Account, rather than simply providing the 'A + B' benefit increase in annuity form." (Pls.' Opp'n at 54.) Plaintiffs' argument can be understood by considering a hypothetical example. Suppose that a participant has $100,000 in her Part B cash balance account, of which $50,000 is from her opening balance. Absent A + B relief, she may take the whole $100,000 as a lump sum when she stops working at Cigna or retires. With Cigna's proposed methodology for A + B relief, that same participant would only be able to take $50,000 as a lump sum, though she would still be credited with the remaining $50,000 under Part A (which she would receive as an annuity commencing at age 65, or earlier if she is early retirement eligible). That individual, who may have been relying on her ability to take the whole $100,000 as a lump sum will be in for a rude surprise when she learns that in fact, she can only take $50,000 upon retirement and will have to wait years to receive the other $50,000.

This raises an interesting dilemma. On the one hand, Cigna's methodology appears to be in line with Judge Kravitz's order that Cigna pay Plaintiffs "all of [their] Part A benefits in the form those benefits were previously offered under Part A, plus all the benefits [they] *accrued* under Part B, in whatever form those benefits are offered," without regard to the opening account balance. *Amara II*, 559 F. Supp. 2d at 212 (emphasis added). On the other hand, it is clear that

participants should not be penalized for Cigna's misrepresentations, and participants who have been counting on receiving a lump sum under Part B should not be stripped of that right by the Court's remedy. To that end, Judge Kravitz clearly held that "to the extent there remains some risk of overpayment, the Court finds it is equitable that CIGNA, having provided statutorily inadequate benefit elections forms, bear that risk." *Id*. at 217. Therefore, although this will inevitably lead to some overpayment on Cigna's part, Cigna is prohibited from deducting the Initial Retirement Account from Part B.

3. Calculating the Offsets for Participants who Received a Lump Sum

A unique set of difficulties is presented by participants who have already received a lump sum under Part B. Judge Kravitz instructed that such participants' lump sums plus a "reasonable amount of interest on those sums since the date of payment" should be annuitized and then subtracted from "the monthly payment under the annuity originally available under Part A as of the date of the employee's retirement." *Id*. at 216. The participants "should then receive a lump sum of all past-due benefits as of the date of judgment and a prospective stream of monthly payments of the difference going forward." *Id.* Participants whose lump sum payment exceeds the amount they would have received in annuity payments will not be required to pay back the difference. *Id.* Finally, participants who are owed past-due payments are entitled to pre-judgment interest of a reasonable amount.

Cigna's methodology can be expressed in equation form as follows:

A. Calculate Part A (as above):

(1) [Part B Cash Balance] – [benefit credits] – [interest credits] = [Init. Retirement Acct.]

(2) [Init. Retirement Acct.] / [conversion factor] + [Social Security offset] = [Gross Part A annuity]

(3) [Gross Part A annuity] – [age 65 Social Security offset] = [Amt. Owed under Part A]

B. Calculate Part B as Annuity with Reasonable Interest:

(1) [Part B Cash Balance] – [Init. Retirement Acct.] = [Part B Lump Sum]

(2) [Part B Lump Sum] + [5.5% interest[11]] = [Part B Lump Sum Plus Interest]

(3) [Part B Lump Sum Plus Interest] / [conversion factor[12]] = [Part B Annuity Plus Interest]

C. Calculate Annuity Value of Amt. Already Paid as Lump Sum:

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11 From date of payment until earliest retirement date under Part A. (If benefit commencement date was prior to participant's earliest retirement date under Part A).

12 Based on interest rates and mortality tables in effect under Part B at later of earliest retirement date or the date of payment.

(1) [Lump Sum Paid] + [5.5% interest[13]] = [Lump Sum Paid Plus Interest]

(2) [Lump Sum Paid Plus Interest] / [conversion factor[14]] = [Annuity Amt. Paid Plus Interest]

D. Calculate Remedy Due:

(1) [Amt. Owed under Part A] + [Part B Annuity Plus Interest] = [A + B Benefit as Annuity]

(2) [A + B Benefit as Annuity] – [Annuity Amt. Paid Plus Interest] = [Annual Annuity Owed]

(3) [Annual Annuity Owed] / 12 = [Monthly Annuity Owed Going Forward[15]]

(4) [Monthly Annuity Owed] x [No. Months Btwn Payment Date & Current Date] = [Past Due Amt.]

(5) [Past Due Amt.] + [5.5% interest[16]] = [Amt. due Immediately[17]]

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13 From date of payment until earliest retirement date under Part A. (If benefit commencement date was prior to participant's earliest retirement date under Part A).

14 Based on interest rates and mortality tables in effect under Part B at later of earliest retirement date or the date of payment.

15 Prospective stream of payments from later of earliest retirement date under Part A or date of Part B lump sum payment.

16 From later of earliest retirement date under Part A or actual date of payment until current date. This is the pre-judgment interest ordered by Judge Kravitz.

17 Past due payments.

Plaintiffs object to this methodology on several grounds. First, they argue that Cigna uses an inappropriate interest rate for pre-judgment interest and interest on overpayments. Second, they contend that Cigna uses an inappropriate interest rate in converting the Part B benefit to an annuity. Finally, they assert that Cigna's methodology is flawed with respect to the timing of benefit payouts. Each of these objections is addressed below.

a. Pre-Judgment Interest & Interest on Lump Sums Already Paid

Cigna proposes using a 5.5% interest rate for both pre-judgment interest and as interest on the lump sums Cigna already paid. Cigna justifies this rate by arguing that the Plan has earned a compound average rate of annual return of 5.99% since adopting Part B, so 5.5% is a modest and reasonable rate. (Defs.' Methodology at 23.) Further, Cigna contends that the Court has already "adopted" this rate as part of its bond order. (*Id.* at 23–24.)

Plaintiffs respond that Defendants' proposal is "'absurd and contradictory' because for the years class members left their cash balance accounts under CIGNA's Plan, they could earn only 4.5%," as per the terms of Part B. (Pls.' Opp'n at 36.) Plaintiffs cite to § 4.2 of Part B, which states that "[t]he amount of the Interest Credit for any calendar quarter in a Plan Year shall be determined by applying the interest rate prescribed by paragraph 4.2(b) to the Participant's Retirement Accounts as of the last day of such calendar quarter." (Part B, as amended Jan. 1, 2010, § 4.2(a)(2).) Paragraph 4.2(b), in turn, provides that

"the interest rate for each calendar quarter in any Plan Year shall be the rate that yields an annual rate equal to the greater of:"

> (1) Four and one-half percent (the Floor Interest Rate), or
>
> (2) The lesser of nine percent, or the yield on 5-year U.S. Treasury Constant Maturities for the month of November of the preceding Plan Year plus 25 basis points.

(*Id*. § 4.2(b).)[18] According to Plaintiffs, because "'[t]he lesser of nine percent, or the yield on 5-year U.S. Treasury Constant Maturities . . .' has been far below 2.5% since 2008, the operative interest crediting rate . . . is 4.5%. Indeed, 4.5% has been the operative interest rate since 2002 (except for two years in which the rate was 4.7% and 4.83%)." (Pls.' Opp'n at 36.)

Cigna responds that the section of the Plan cited by Plaintiffs, which describes the interest credits that accrue on the cash balance accounts, is not relevant to the Court's considerations of what a reasonable interest rate might be on the lump sums already paid and no longer in the cash balance accounts.

Although there is some merit to both parties' arguments, they both appear to ignore Judge Kravitz's explicit instructions regarding what he considered a "reasonable and appropriate rate of interest." Judge Kravitz ordered that the rate of pre-judgment interest "should be the same as that used with respect to the [interest on] CIGNA Plan's lump

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[18] This language is identical to the 1998 version of the Plan.

sum payments, namely, a reasonable rate of return." *Amara II*, 559 F. Supp. 2d at 220. He went on to define a "reasonable rate of return" as "the rate used in the same time period" for which interest is due "to calculate the lump-sum present value of retiring participants' annuities (i.e., the equivalent actuarial value)." *Id.* at 221.

The Applicable Interest Rate used in calculating the lump sum present value of retiring participants' annuities is defined in the 1998 version of Part B as: "the annual rate of interest on 30-year Treasury securities, as specified by the Commissioner of Internal Revenue, for November of the year before the Plan Year which includes the Benefit Commencement Date." (Part B, as amended Jan. 1, 1998, § 1.6, Ex. B to Pls' Opp'n; *see also id.* § 7.1(a)(1) ("A Qualified Annuity for an unmarried Participant means a single life annuity for the life of the Participant which is of Equivalent Actuarial Value (determined using the Applicable Interest Rate and the Applicable Mortality Table) to the Participant's Accrued Benefit.").) The 2010 revisions to Part B add that "with respect to Benefit Commencement Dates on and after July 1, 2009, in no event shall the Qualified Annuity amount of a Participant's benefit . . . be less than the amount produced by using the Applicable Interest Rate in effect as of July 1, 2009." (Part B, as amended Jan. 1, 2010, § 7.1(a)(1).)

It seems clear then, that these provisions should control Cigna's determinations of both the pre-judgment rate of interest and the interest on lump sums already paid. For each retiree who received a lump sum prior to July 1, 2009, Cigna will receive

credit for yearly interest in the amount of the annual rate of interest on 30-year Treasury securities for November of the year before the Plan Year. For each retiree who received a lump sum after July 1, 2009, Cigna will receive credit for the same yearly interest, but the interest rate floor will be the amount produced using the Applicable Interest Rate in effect as of July 1, 2009. Similarly, each participant who is owed overdue payments will receive yearly interest from the date of payment until the date on which she is paid her past-due benefits, at a rate to be determined based on the Applicable Interest Rate under the version of Plan B in effect in the relevant year.

b. Interest used in Converting Lump Sum into Annuity

Plaintiffs next take issue with Defendants' methodology for converting the already-paid lump sums into annuities for purposes of offsetting A + B. As discussed above, the original Part B plan called for converting lump sums into annuities using "the annual rate of interest on 30-year Treasury securities, as specified by the Commissioner of Internal Revenue, for November of the year before the Plan Year which includes the Benefit Commencement Date" (Part B, as amended Jan. 1, 1998, § 1.6), but in January 2010, Cigna added to the Plan the caveat that "with respect to Benefit Commencement Dates on and after July 1, 2009, in no event shall the Qualified Annuity amount of a Participant's benefit . . . be less than the amount produced by using the Applicable Interest Rate in effect as of July 1, 2009" (Part B, as amended Jan. 1, 2010, § 7.1(a)(1)). Thus, for benefit commencement dates on or after July 1, 2009, the interest rates used

to convert the cash balance account to an annuity cannot be lower than the November 2008 segment interest rates of 5.24%/5.69%/5.37%.

Cigna states that "[wh]en annuitizing the Part B benefits, . . . [it] will use the mortality tables and interest rates actually in effect under the terms of Part B as of the later of the date the participant reaches earliest retirement age under the terms of Part A or the participant's actual benefit commencement date." (Defs.' Methodology at 25.) Plaintiffs contend, however, that this methodology uses "a Plan provision adopted in 2009 **after** this Court's February 2008 liability and June 2008 relief decisions for the purposes of annuitizing offsets at pre-recession segment interest rates that are currently unavailable." (Pls.' Opp'n at 41–42.) They add that "CIGNA does not propose to go back and provide any participant with an increased annuity at these higher interest rates, but proposes to create phantom annuities solely for offset purposes that will 'minimize' the A + B relief." (*Id.* at 42.)

It is apparent to the Court that the plan provisions in place at *the time the lump sum was received* should control and not, as Cigna argues, the plan in place at the later of the date the participant reaches earliest retirement age under Part A or the actual benefit commencement date. This methodology has the added benefit of permitting Cigna to calculate the amount owed to all class members that have already received benefits as a lump sum, without waiting until those participants reach retirement age under Part A, thus

eliminating years of uncertainty and preventing this litigation from dragging on for another fifteen years.[19]

4. Omissions in the Methodology

Plaintiffs additionally assert that Defendants' methodology is incomplete, protesting that that "CIGNA's Submission does not set out any methodology for identifying who is eligible for early retirement benefits, qualified survivor's annuities, or the 'Free 30%' survivor's benefits, nor does it set out any methodology for identifying the class members who were victims of CIGNA's failure to disclose the 'relative value' of benefit options. CIGNA's Submission also does not set out any methodologies for calculating the increased benefits due to those class members." (Pls.' Opp'n at 57; *see* Pls.' Sur-Reply at 27.)

Defendants do respond to any of these arguments, perhaps because they appear contrary to the Court's previous decision awarding only A + B relief and new § 204(h) notices, without additional relief for particular class members. As Judge Kravitz explained, A + B relief was intended to compensate victims for Cigna's misrepresentations that the opening balances would include the whole value of their Part A benefits—including early retirement benefits, qualified survivor's annuities, and Free 30%

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[19] This additionally resolves Plaintiff's objection to Cigna's assertion that "for the majority of already paid class members, th[e] offset calculation will not be performed until many years in the future when the participant reaches retirement eligibility under Part A (age 55 or 65)." (Defs.' Methodology at 24.)

survivor's benefits—when in fact they did not. *See Amara II*, 559 F. Supp. 2d at 211–13. Judge Kravitz did order that retirees eligible for additional monthly benefits under Part A be offered such payments for the duration of their lives and the applicable portion of those payments for the duration of their surviving spouses' lives. *Id*. at 216. But, Cigna provides a methodology for making such payments (*see* Defs.' Methodology at 4), to which Plaintiffs have not raised any specific objections. Accordingly, Plaintiff's objections to Cigna's methodology with respect to early retirement benefits, qualified survivor's annuities, Free 30% survivor's benefits, and "relative value" victims are overruled.

Plaintiffs additionally argue that Cigna's methodology does not include a sufficient number or variety of examples, specifically with regard to Tier 1 class members and early retirement class members. (Pls.' Mot. for Ext. of Time [Doc. # 430] ¶ 3; Pls.' Reply at 26–27.) The Court disagrees; the methodology is sufficiently detailed, and Plaintiffs' motion for an order requiring supplementation is denied.

Finally, Plaintiffs object to the fact that "CIGNA's Submission and emails indicate that CIGNA intends to rely on its *ipse dixit* to disqualify over 9,000 class members from any A + B relief on the ground that they purportedly 'terminated without any vested benefit,' 'had no Part A benefit subject to conversion,' or 'were already entitled to an A + B benefit.'" (Pls.' Opp'n at 59; *see* Pls.' Sur-Reply at 28–30.) The Court agrees that more is required of Cigna. Cigna is therefore ordered to, forthwith, provide Plaintiffs'

counsel with records backing up its assertions that those individuals are not eligible for remedies.

B. Compliance Plan

Plaintiffs seek, for the third time (*see* Defs.' Opp'n Mot. for Compliance Plan [Doc. # 420] at 4–5), an order requiring Cigna to create a compliance plan that outlines how it will implement A + B relief (*see* Mem. Supp. Mot. for Compliance Plan [Doc. # 412]). Specifically, Plaintiffs seek:

> -The reformation of the Plan to effect the A+B relief for all class members in full and complete compliance with this Court's Orders;
>
> -The formulas, actuarial assumptions, and data inputs that will be used to implement that reformation (comparable to the methodology set out in the flow charts Mr. Rugeley prepared in support of the motion for attorneys' fees";
>
> -The procedures and schedule for outreach and notification of class members, surviving spouses and beneficiaries of the increased benefits, including procedures for locating class members, surviving spouses, and beneficiaries and confirming their addresses;
>
> -The benefit election forms, procedures, and schedule for making lump sum payments and commencing annuity distributions to class members, surviving spouses and beneficiaries;
>
> -Provisions to ensure CIGNA takes all reasonable steps to fulfill its obligations in compliance with

> the Court's Orders and on schedule, including but not limited to provisions for internal compliance audits and the supervision of implementation by a CIGNA executive officer;
>
> -Procedures for quarterly reporting to Class counsel with full supporting data related to calculations of class members' increased benefits, notifying class members of the increased benefits, making lump sum payments and annuity distributions, and any complaints or other inquiries from class members;
>
> -Provision for the submission of a certified and audited final report on implementation by CIGNA's CEO to this Court demonstrating that CIGNA has fully and completely complied with the Court's Orders.

(*Id.* at 8–9.)

Defendants object, on the grounds that: (1) a final judgment and mandate has been issued in this case and Plaintiffs cannot now seek additional forms of relief from the Court (Defs.' Opp'n Mot. for Compliance Plan at 2–6); (2) Plaintiffs' request is an untimely request to alter or amend the judgment (*id.* at 6–7); (3) there is no legal basis for ordering a compliance plan (*id.* at 7–10); and (4) the detailed plan sought by Plaintiffs is excessive and unnecessary (*id.* at 10–12).

As a preliminary matter, what Plaintiffs seek is not an "additional form of relief" or an alteration or amendment of a final judgment, and as such, neither the final judgment and mandate rules nor Rule 59 is

applicable here. Rather, Plaintiffs seek an order of the Court in aid of enforcement of its judgment, for which the Court has inherent authority. *Cf. Riggs v. Johnson Cnty.*, 73 U.S. 166, 187 (1867) ("[T]he jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied. . . . Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution."). Nonetheless, the Court's power to issue orders in aid of execution is not limitless. "[B]ecause enforcement jurisdiction is a 'creature of necessity,' it extends only as far as required to effectuate a judgment." *Fafel v. Dipaola*, 399 F.3d 403, 411 (1st Cir. 2005) (citing *Peacock v. Thomas*, 516 U.S. 349, 359 (1996)).

Here, where Defendants have not shown themselves to be noncompliant and indeed have not as yet had an opportunity to comply due to the issues around the methodology, Plaintiffs' motion is premature.

III. Conclusion

For the foregoing reasons, Plaintiffs' request for an order requiring Defendants to provide a more detailed methodology [Doc. # 430] is DENIED, and Plaintiffs' motion [Doc. # 412] for a compliance plan is DENIED without prejudice to renew at a later date should Defendants fail to timely implement the Court-ordered remedy. Plaintiffs' objections [Doc. # 437] to Defendants' methodology are OVERRULED in part and SUSTAINED in part, as follows:

(1) Defendants will use an age 62 offset for calculating Tier 2/New Formula participants' Part A net benefit;

(2) In calculating Part B, Cigna may not deduct the Initial Retirement Account from the current Part B balance;

(3) For each retiree who received a lump sum prior to July 1, 2009, Cigna will receive credit for yearly interest in the amount of the annual rate of interest on 30-year Treasury securities for November of the year before the Plan Year. For each retiree who received a lump sum after July 1, 2009, Cigna will receive credit for the same yearly interest, but the interest rate floor will be the amount produced using the Applicable Interest Rate in effect as of July 1, 2009. Each participant who is owed overdue payments will receive yearly interest from the date of payment until the date on which she is paid her past-due benefits, at a rate to be determined based on the Applicable Interest Rate under the version of Plan B in effect in the relevant year;

(4) In converting the already-paid lump sums into annuities for purposes of offsetting A + B, the plan provisions in place at *the time the lump sum was received* control;

(5) Cigna is ordered to provide Plaintiffs' counsel with a list of all class members and the amount to which they are entitled under the above methodology, if any. As to individuals claimed to be ineligible for remedies, Cigna shall provide to

Plaintiffs' counsel records supporting its determination of ineligibility. Defendants shall advise the Court when the list and records have been served on Plaintiffs' counsel.

IT IS SO ORDERED.

/s/

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut this 14th day of January 2016.

Appendix K

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JANICE C. AMARA *et al,* individually, and on behalf of others similarly situated, *Plaintiffs,* *v.* CIGNA CORP. AND CIGNA PENSION PLAN, *Defendants.*	Civil No. 3:0l-CV-2361 (JBA) July 25, 2018

TELEPHONIC STATUS CONFERENCE

BEFORE:

THE HONORABLE JANET BOND ARTERTON,
U.S.D.J.

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(Teleconference commenced at 3:42 p.m.)

THE COURT: Good afternoon, Counsel. This is *Amara v. CIGNA*, 01-CV-2361. Who is appearing for the Plaintiffs?

MR. BRUCE: Stephen Bruce and Allison Pienta; and at other locations, Chris Wright and Mike Walsh are also here.

THE COURT: All right. Mr. Bruce, I cannot hear you very well. Are you able to turn up your volume?

MR. BRUCE: Yes. Can you hear now?

THE COURT: Good. Much better. Okay. For the Defendant?

MR. BLUMENFELD: Good afternoon, Your Honor. This is Jeremy Blumenfeld from Morgan Lewis, and with me here is Klair Fitzpatrick.

THE COURT: All right. And we have a number of things to discuss. I'd like to ask you first about the matter that in your communications with the Court has confused whether I can at this point properly rule on the pending motion for attorneys' fees, which is the only motion that is pending. And my question that my law clerk conveyed to you is, How can the Court rule on that motion, that both sides seem to think they are waiting for, while the total size of the fund remains uncertain? Are you both in agreement that I can do that?

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MR. BRUCE: This is Stephen Bruce. I think the Court can do that, based on resolving those four issues that we're saying account for 95 percent of the difference between the two estimates. I think that the Court --

THE COURT: Okay. But that gets into a problem area because we're not going to relitigate methodology; and to the extent there are issues that could have been brought up in the motions related to methodology and weren't, it's really too late. So that's why I don't know whether just going to the motion for attorneys' fees and the percentage that is sought as the fee, whether it matters, in fact, what the size of the common fund actually turns out to be.

MR. BRUCE: I believe it does, Your Honor. But our point on those four differences, too, is that the position that CIGNA was raising are not in the Court's ruling, that every one of them is something that CIGNA wants to tack on to the Court's ruling, that the Court -- for example, the largest difference was by use of the Internal Revenue Code Section 430(h) interest rate, which were 2 percent higher than the interest rates that the Court used in the methodology. And the SEC IRC Section 430 interest rates were nowhere mentioned in any of the Court's rulings. So I think that CIGNA is reaching outside of the Court's ruling in an

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effort to lower the common fund value.

THE COURT: Okay, but that doesn't get at what is the basic query that I have, which is, even if the common fund amount is disputed, where the percentage fee is not disputed, can I go ahead and rule on the attorneys' fees petition? It's been pending for quite a while, and this is the first that it has been raised that -- somehow I can't -- that's my question, is: Can I proceed with the issues that have been raised on the motion for attorneys' fees and the Defendants' opposition without knowing the exact amount of the common fund?

MR. BLUMENFELD: Your Honor --

THE COURT: Okay. So, the Plaintiff says no. Let me hear from the Defendant.

MR. BLUMENFELD: Thank you, Your Honor. This is Jeremy Blumenfeld. I think Your Honor could rule on the appropriate percentage to award to counsel as a percentage of the benefits that are paid to class members. And say, for example, that counsel gets -- whatever the number is – 10 percent of the benefits that are due, and then class members would get 90 percent of the benefits due to them, this idea about calculating a present value of the common fund does not impact the amount of the remedy payment. But where it creates some difficulty is that counsel, I think, want their portion of the benefits payable sooner than the participant

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would be entitled to those benefits. In other words, these remedy payments are payable over time, and while some of it is due as a back-payment to individual

class members, much of it is due as streams of future annuity payments. And as long as the allocation is that counsel gets 10 percent of that stream of future annuity payments and the class member gets 90 percent of that stream of future annuity payments, or whatever the percentage is, you don't need to calculate a present value of that except, perhaps, I would say, for purposes of figuring out maybe whether the lodestar cross-check is reasonable or not, but I would say it's maybe possible to do that using either rate in order to determine that comfort level.

THE COURT: Now, as I read the Defendants' papers, you don't oppose the percentage, which, incidentally, what the parties got notice of in the June 25, 2015 Important Notice was that the Plaintiffs were requesting an award based on 17.5 percent of the increased benefits. Since that's the notice that they got and for which we have the four objections, why are we not just sticking with 17.5 percent?

MR. BLUMENFELD: I think, Your Honor, Plaintiffs have subsequently lowered the amount that they were asking for, but there is no objection to that percentage from us.

THE COURT: All right. So they lowered it because they, quote, "recalculated" and came up with a common fund

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value much higher. But that doesn't seem, to me, to affect the issues on the attorney fee petition; specifically, the notice that the Court sent out -- authorized to be sent -- specifically identifies that the

class counsel had estimated the total value of the benefit increase to be over 197 million and CIGNA to be significantly less than half of that. The fact that there is a dispute over how much it actually is I wouldn't think would drive the issues that are contained in either the motion for attorneys' fees or the response.

MR. BLUMENFELD: Your Honor, this is Jeremy Blumenfeld again. I agree with you, as long as the percentage that goes to class counsel doesn't get accelerated and paid earlier, essentially, than the benefit that would be paid to the class members.

THE COURT: All right. Now, that's a problem, because the ideal of finality in this litigation has an important place. And in your papers in which you suggest that the Plaintiffs' counsel would receive over the next decades a little flow of fees doesn't seem to be the best idea. But let me hear from the Plaintiffs on that issue. That would suggest that there is some formula for present value that might satisfy that. Or do you want to have a steady flow of little fees over the next ten or twenty years, Mr. Bruce?

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MR. BRUCE: I believe it would be even longer than that, Your Honor. The -- you know, the cases that we've cited were that attorneys' fees in class actions are not on a "claims made" basis, so that in doing the percentage out of each payment that was made to people when they made the appropriate elections and were contacted, that that would make this into a "claims made" case. And the case law -- I believe we

cited the *Wilhelmina* case in the Second Circuit -- is that class action fees are not on a "claims made" basis.

THE COURT: Okay. That may be. That doesn't mean that you get to have the full dollar value, does it, of claims paid out over time?

MR. BRUCE: I think it does, Your Honor. We – I mean, I have done class actions where we only got paid as people got paid, although those were always cases in which people were being paid lumps sums rather than annuities, so that -- you know, some of the people in this case won't start their annuities until 2030; and, so, you can be looking at a stream of payments going to 2070, at which point I am almost certainly not going to be alive. So it would be unprecedented to do it that way, and, so, I think that's where we come up with the common fund value. And that's what we did, for example, in the *Kifafi v. Hilton Hotels* cases, that we had a common fund value. The

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only problem here is then that CIGNA, you know, isn't cooperating in the valuation. In the *Hilton* case, we were within 5 percent of each other and Judge Kotelly compromised that difference. But, here, CIGNA is taking up new positions in opposing a common fund value, which is leading into this quagmire. And the problem is that the Defendant can't have that power to just say, "Well, we object," and then all of a sudden we're stalemated. It has to be based on the Court's rulings. And this is a Defendant who's subject to an equitable order to comply and to reform their plan, and they're taking it as a bargaining -- you know,

they're staking out bargaining positions, where they're going to reinterpret the Court's orders and stake out the worst position for us and best position for them, and somehow we're going to wind up in either a permanent stalemate or in a negotiation when we've got a final judgment from the Court and an equitable order of reformation. That's why we were bringing up the *Osberg* case. In the *Osberg* case, after the Defendants exhausted their avenues for appeal, they cooperated. And they cooperated in stipulating to a hundred percent recovery of the maximum possible damages. Not to, you know, a situation where they're reinterpreting even things that this Court said and ruled on the annuitization, interest and mortality rates to be used here. They're just rewriting the Court's order and

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acting like they have the right to do that.

THE COURT: Well, if the principle in this reformation is to maximize the benefit to the retirees, and if, as I understand the Defendants to be putting it, that everything is in place for the plan administrator to just pay out what is owed once they know what percentage gets withheld, then the plan administrator is under this same fiduciary obligation that CIGNA was originally, and breached. So it seems to me that the end of this case is that the plan administrator has its directives, has the legal principles to be used in administering, has the whole history of trial and appeal and rulings and decisions in this case; and if they breached the fiduciary duty to act solely in the benefit of the beneficiaries that maximize their

benefit, then there's another ERISA -- either another ERISA case that's brought or the Court retains continuing jurisdiction for remedy and possible contempt. So I don't see that at this point we can or should be relitigating any of the methodology. CIGNA does it at their risk.

MR. BRUCE: Your Honor, CIGNA has already announcedand has provided us with results where they are not following the Court's methodology. They are using different interest and mortality rates for annuitization than what the Court ordered, and they are not providing the early retirement

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benefits that the Court ordered.

MR. BLUMENFELD: Your Honor --

MR. BRUCE: The Court ordered that the class members receive the full values of the A+B reformation, and CIGNA is already announcing in their response to the common fund valuation and in their results that they are not following that. So I think that that has to be addressed now, and if it is addressed, then we've resolved the attorneys' fee issue, as well.

MR. BLUMENFELD: Your Honor, this is Mr. Blumenfeld. I disagree vehemently with what Mr. Bruce was saying. We are complying with the Court's order. With respect to early retirement benefits, for example, we made clear to Plaintiffs on numerous occasions that everyone who is eligible for an early retirement benefit, if they elect to commence their

benefits early, can do so. We're doing it consistent with the methodology that we originally proposed back in 2015, and where the Court's order overruled whatever objections Plaintiffs had at that point in time in its order in 2016 and again in 2017 on those issues. And the same thing is true with respect to those other issues. We are calculating benefits in accordance with the terms of Your Honor's order and the proposed methodology that we made for calculating the remedy payments as modified by the Court's orders on reconsideration in 2017.

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THE COURT: Okay. I understand that. You've already written that, and that's a bit generalized to deal with what I'm trying to get at, which is, Why should we be redoing this? Now, for instance, we talked about annuitizing the part B benefits using mortality tables and interest rates in effect as of the later -- the date the participant reaches the earliest retirement age under part A or the participant's actual benefit commencement date, so that the -- why are we not just leaving E.R.I.S.A. to take care of enforcing the fiduciary duties and taking it up not in these little piecemeal parts, but, for instance, if the plan provisions in place at the time the lump sum was received controls, et cetera? I mean, everybody can read the orders. Everybody can read all the previous decisions. The whole reason why "wear-away" came about. I don't understand why we're not just putting CIGNA to the test of doing it right, and then, upon the actual not doing of it right -- if that is, in fact, what happens -- then there are remedies.

MR. BRUCE: Because, Your Honor, CIGNA has already announced in their response that they are not going to do it right, and they have already --

THE COURT: Well, that's not really what they say; is it? They say they're going to do it right.

MR. BRUCE: No, it is -- they have rewritten this

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Court's order on using the plan provisions in place, as meaning the interest rate and the mortality tables in effect when the lump sum distribution was made, which may be back in 1998 or 2000, and then extended this Court's order on the interest credit to cover the annuitization interest rate and the mortality table.

THE COURT: That's fine.

MR. BRUCE: And that would violate --

THE COURT: That's fine. If you're right, then we will get Amara 2 or son of Amara. But it seems to me that we have come to the point where that's what has to happen. And that's -- I mean, when I asked you whether there's agreement as to the remaining areas of dispute, whether that drives these disparate calculations or whether there are other factors, I would like to have a response that looks at what we should be doing, not the substance of what is claimed to be wrong or claimed to be right about what Amara may do and hasn't yet done.

MR. BRUCE: But then, Your Honor, we would just be back in front of the Court with a motion to enforce the Court's orders.

THE COURT: Maybe so. You would then have what CIGNA has actually done without all of these -- you know, the record is just replete with these issues of adjustments that keep being made because -- I don't know -- Mr. -- I forget

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his name who already got paid his amount of money -- doesn't get it twice, et cetera. So that's why I'm saying CIGNA implements this at its peril, and we are here in the event that they have violated the terms of the plan as reformed. We have tried very hard to give principles of methodology to accomplish that end.

MR. BRUCE: Well, again, I think that CIGNA has sent us the results that they calculate, as this Court ordered, and those results show that CIGNA is not in compliance with the Court's order on annuitization interest rates and mortality and with early retirement benefits.

THE COURT: Okay.

MR. BRUCE: And those account for, you know, 75 percent of the difference between the two values and then placing -- using a much higher interest rate accounts for the other 25 percent. We have the -- and maybe the form of our -- that we need to file a motion to enforce the Court's orders and show cause why CIGNA is not in contempt.

THE COURT: But, see, that gets back -- Mr. Bruce, that gets back to exactly what I'm saying. They're not in contempt. They haven't done anything. There's nothing to enforce because they haven't implemented it yet. That's the point at which I think your complaints, of which they are well on notice, come into play.

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So if, in fact, they go forward, notwithstanding your demonstration of the inappropriateness, and we are back again, it doesn't look very good for CIGNA because they were on notice. On the other hand, it is possible you're not correct. And although I am not inviting an entire judicial career of this case, I am certainly happy to take that on. I just -- when you say they've given us results that are contrary to what the Court has ordered, that hasn't happened yet. I know that if they carry through with what they have provided to you without reconsideration, and so forth, you will believe that they are violating the Court's order. I can't take that up until they do it.

MR. BRUCE: No, I think, Your Honor, you can take it up. Your Honor ordered them to produce results in compliance with the Court's methodology rulings, and they did not do that. So there has already been a breach.

THE COURT: But I don't have that before me. I have no idea what they presented. I have only the blow-back as characterized in the arguments. So that's why this whole posture of the case seems so peculiar to me, is that, yes, we ordered them to do that; you have,

then, the opportunity to correct their errors, to point out what they're doing that is improper; and if they go ahead and do it and you're right, then they're in serious trouble. There was some theory -- there was some theory that

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you all could come to an agreement on a number or something ballparkish that you could fix a midpoint on. But that has not happened, so it seems to me that we need to move to the next step. We've sent the 204(h) notice about a year ago, the 23(h) notice was mailed almost two years ago. That has the 17.5 percent fee, notes the disputed amounts. And if you all agree that I can rule on and need to rule on the attorneys' fees, even in the face of your disparate calculations of the common fund, I will do that forthwith.

MR. BRUCE: Well, the only way that I see to do that would be to say that your ruling on the percent, the requested 15 percent of the undispute -- the currently undisputed amount, and that the difference will be taken up later.

THE COURT: Well, I'm still working at 17 and a half percent because there is this dispute. You lowered the amount that you told the people you were going to be seeking because you calculated the amount as so much more. I don't know whether you're right or not, but the notice that they have is 17.5 percent. The Defendant makes a peculiar argument -- if I may just interject something else. The Defendant makes this argument that it doesn't oppose the percentage fee,

but that the Plaintiffs shouldn't be allowed to recover for -- I don't remember -- the 1400 hours they spent monitoring and

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administering. Why does that matter if the percentage – if the fee is a percentage of the common fund? Mr. Blumenfeld.

MR. BLUMENFELD: It does not if the Court is going to award it as a percentage. It could matter for purposes of a lodestar cross-check, if the Court was interested in doing that. But as I said before, if the Court is going to rule that counsel get a percentage of the benefits that are owed, and if it's a percentage that is the basis for the Court's order and that is requested by class counsel, we don't have a problem with that.

THE COURT: So what if I were to order CIGNA to pay, in 30 days from the ruling, 17 and a half percent of the figure that the Defendant has given out as the value of the common fund, and thereafter, when the payments are made and the actual figure is apparent, additional monies plus interest on those fees would be promptly payable?

MR. BLUMENFELD: So, Your Honor, the difference -- there are two kinds of differences between the numbers that we suggested the benefits were worth and the numbers that Plaintiffs suggested the benefits were worth, and I think it's a misnomer to refer to this as a "common fund," because this is not one pot of money to be divided up. This is individual benefit amounts that go to individual class members

based on their particular circumstances, including when they commence their benefits, how long they

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live, and things of that nature. But if you were to award, for example, 17.5 percent of the number that we say would be the appropriate, essentially, value of the benefits and would have that impact on the plan's liabilities, then I don't think there would be any basis for awarding anything else after that because the difference in valuation methodology is just the present value of that stream of that future payments. And, so --

THE COURT: Not if your figure of 135 million – 136 million turns out to be too low.

MR. BLUMENFELD: In terms of the present value methodology, I think if you're talking about Plaintiffs' methodology for valuing the benefits, the overall benefits, then that's an apples-to-oranges comparison. But I take your point, Your Honor, that if we're not doing something in accordance with the Court's order, as a result we owe more in benefits on a future benefits stream than we thought we did, then yes, you could award 17.5 percent of that, too. But the big difference between the number that we have and the number that Plaintiffs have, both are present values but just using different methodologies for calculating the present value. They don't actually impact the amount that each class member would be getting over time.

THE COURT: So I guess --

MR. BRUCE: I'm not sure I follow that, Your

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Honor.

THE COURT: So I guess what I thought -- what I think I am hearing is that your 136 million is a present value on which I can levy 17.5 percent and order CIGNA to pay that immediately to the Plaintiffs' counsel and, thereafter, tidy up additional amounts that may be found to be owing in the process of tallying up what is paid out or what is calculated, on which the Plaintiffs are given notice they will get, discounted to present value going forward, or the value of wrong calculations made by CIGNA in the course of administering this reformed plan.

MR. BLUMENFELD: Your Honor, if what the Court is suggesting is that Plaintiffs' counsel would get 17.5 percent and then individual class members would proceed to get 82.5 percent of the benefits that we calculated for those class members in the form and in the time and manner to which those benefits are due, I think that's fine. And, yes, we recognize that if we were supposed to pay John Smith $100 and we paid him $50, then of the extra $50 class counsel would get some percentage, the 17.5 percent, and the class member would get their percentage.

MR. BRUCE: I guess what Your Honor is -- but one issue is, in CIGNA's calculations of the 136.1 million dollars, that CIGNA was using the Internal Revenue Code interest rates from Sections 430(h). So those are not

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covered in this Court's orders at all. And the interest rates that were used to value benefits in this Court's orders were all over 2 percent lower than that. And the interest rates that CIGNA uses in its financial statements to value its pension obligations are also over 2 percent lower than that. And, hopefully, CIGNA calculated the amount that is due, if the same interest and mortality rates are used in valuing the common fund is what we used, and they valued that as $172.9M back --

THE COURT: Yeah, I wanted to get to that, but finish up your thought.

MR. BRUCE: Back then in Mr. Henderson's declaration and that same figure is then in CIGNA's response brief.

THE COURT: So if what we're doing is this concept of maximizing the Plaintiffs' benefits, I wasn't sure why the Defendant was telling me that using the present value and the mortality rates that the Plaintiffs advocate would produce a certain higher figure. Is that because you're going to use that figure?

MR. BLUMENFELD: No, Your Honor. And to be clear, your orders did not order or direct that we use the mortality assumptions and interest rates that Plaintiffs are using for converting lump sums to annuities. And, in fact, Your Honor rejected the idea that you should use the interest rate and

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mortality assumption that a participant -- that would be in effect under the terms of part B, when that person was eligible for a benefit under part A, and made clear in your reconsideration orders, both the one from July of 2017 and then November of 2017, that you wanted us to use the interest rate that is in effect in the year somebody took their part B benefits and, in part, to do that -- because that would allow us to calculate the benefits for those individuals now, as opposed to having to wait until the person was eligible for their benefits under the terms of part A. And that's something that you specifically ruled on in addressing our proposed methodology, and I think you repeated it in Your Honor's order of January 10th of 2017, at Docket 484, 86. So what we are doing, in calculating the benefits, is calculating the benefits under the terms of the plan as reformed by you, but the methodology that Plaintiffs are talking about and that we expressed a number for, in terms of the valuation of that, is not what Your Honor ordered.

MR. BRUCE: Your Honor, may I interject that Mr. Blumenfeld's representations just now are completely false, and he really shouldn't be doing that.

THE COURT: Well, I'm looking at this order, and I'm reading to myself. It is apparent to the Court that the plan provisions in place at the time the lump sum was received should control, except with regard to the interest rate floor

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and not, as CIGNA argues, the plan in place at the later of the date the participant reaches earliest

retirement age under part A or the actual benefit commencement date. This methodology has the added benefit of permitting CIGNA to calculate the amount owed to all the class members that have already received benefits as a lump sum without waiting until those participants reach retirement age under part A, thus eliminating years of uncertainty in preventing this litigation from dragging on for another fifteen years. And that resolved the Plaintiffs' objection that's noted in Footnote 19. So I think this issue was addressed. How CIGNA turns out to administer its plan with that language is to be seen. I'm not going to go through a re -- we've done all of the disputes that were raised as to how the methodology should be formulated. It's something that could have been raised, wasn't raised. It's too late now. Now I think we're in a position to say the proof will be in the pudding, and the pudding should be the benefits that are sent to or declared to the participants. And then the Plaintiffs, if they believe that those are at odds with what the Court has ruled or what is required under applicable Treasury regulations or Internal Revenue Code provisions, that's when we should take it up. So it doesn't do us any good for the Plaintiffs to say, "CIGNA is dead wrong in interpreting the Court's

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rulings" and the Defendants saying "Oh no, we're right." That's just not going to move this along. So I think that my question about whether there's agreement as to the remaining areas of dispute that drive the disparate calculations is perhaps not a productive question, given that there seems to be no narrowing here that would get us to an agreed-upon

figure. The Defendant, are you standing behind your 136.1 million as the total present value of all the benefits owed to all the Plaintiffs under the reformed plan or do you want an opportunity to make a final go with a calculation that you will have to live with?

MR. BLUMENFELD: Your Honor, I'm sure since that calculation there has been additional interest; and so, if it would help the Court, we're certainly happy to provide an updated figure regarding that number. And I appreciate the Court probably doesn't want a lot of briefing associated with that, so we can just file a notice to that effect, if that's okay with the Court.

THE COURT: So if you update that, you need to understand that what I'm going to do is get Plaintiffs' counsel paid 30 days after I rule on the attorneys' fee petition, and it's going to be based on that number; and if there is further amount of money thereafter that CIGNA will owe as a result of erroneously calculated benefits, then the

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Court will order a supplement and may not be limited to 17.5 percent, and may not take it out of the beneficiaries' portion but may require CIGNA to shoulder it. I mean, those are the possibilities that we have. So if you will update that number -- you understand what I'm intending to do with it, what the consequences are of it being wrong -- then I think we can move ahead. And what that will do is get us to what I find quite problematic, unfortunately, about the Plaintiffs' intended -- I don't know what you call this thing -- notice to the Plaintiffs.

MR. BRUCE: Your Honor, if I -- can I go back just a minute?

THE COURT: Yes.

MR. BRUCE: So I think the issue -- I understand where the Court is going on the benefit; and, so, if CIGNA's position on the annuity interest rates and mortality tables continues and we persuade the Court that it's wrong, that there will be an adjustment?

THE COURT: Yes.

MR. BRUCE: But I think that the current thing of the 136.1 versus 172.9, that that needs to be addressed now, because they're placing a value on the undisputed benefit that is based on an ultra-high interest rate that they do not use for any other purposes, that they don't use this in their financial statements and it's not used in the Court's relief

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rulings. And, so, when we prove that these additional benefits are due to people, if it becomes hard to readdress that issue because the 136.1 would already be based on a set of interest rates that really were, you know, that shouldn't have been applied. So I think the Court --

THE COURT: Oh, I think we can make that adjustment with relative ease. And I think the incentive for CIGNA to get it right the first time is there, because the additional fees owed to the Plaintiffs, to class counsel, resulting from this "miscalculation" -- using your terms -- is going to come

out of CIGNA's pot, not the Plaintiff -- not the class members' pot. And, so, I think that that has two benefits: One is we have a forum for correcting the errors that are, let's just call them "institutional," because they're applied as terms of the plan and, by your telling, in breach of the fiduciary duty principles and the Court's orders; and B, it isn't going to burden the Plaintiffs recovery in any way.

MR. BRUCE: Well, I think the fact -- so the 136.1 is based on an effective interest rate of about 5.8 percent. The interest rate that CIGNA is using in its financial statements are 3.5 percent. If the undisputed benefits are valued based on the 5.81, then I'm not sure -- you know, when then we prove that there are additional benefits due class members, are those benefits going to be valued with 5.81 or 3.5 percent? Or are we then going to go back to the

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undisputed benefits to make an adjustment to them? It seems like that's an issue that would need to --

THE COURT: Well, they wouldn't be undisputed; would they?

MR. BRUCE: Well, but I think the value – the interest rate that is used to value the undisputed benefits is an issue that should be addressed now, in that CIGNA has calculated the value of those undisputed benefits with the set of interest rates that we're proposing and has come up with a number for that of 172.9. So I think it becomes awkward to unravel that at a later point because CIGNA owes more benefits to individuals.

THE COURT: I don't -- well, Mr. Blumenfeld.

MR. BLUMENFELD: Your Honor, the only thing I'll note, I think, is that this question about the interest rate to apply to this present value calculation is not about the A+B methodology at all. It is just about Plaintiffs trying to get a present value for purposes of figuring out their attorneys' fees. And the rate that we articulate and the rate that we set forth for calculating that amount is a rate that E.R.I.S.A. requires the plan to use for valuing its liabilities, and we say exactly that in the declaration that's in front of you. We said, Your Honor, that we would update that number to account for the passage of time, and certainly we are happy to do so.

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I understand the Court's order to be, that as a result of the Court's attorneys' fee award, once it issues it, we'll have to pay those amounts, and that counsel will get 17.5 percent, assuming that the Court grants the motion for that percentage, and then class members would get 82.5 percent of their benefits.

THE COURT: All right. It also takes away the potential for Plaintiffs' counsel being paid over the next thirty years, does it not, since it is based on present value?

MR. BLUMENFELD: That's correct, Your Honor. That present value calculation presupposes that the stream of future payments that would be going to class members, some percentage of that would be essentially calculated as a lump sum present value plan liability and paid to class counsel now.

THE COURT: All right. So I'm not going to wade into this interest and mortality -- interest rate dispute, because it's actually not before me. And that gets me to the pending motions to strike that the Defendants have filed. And I'd like to give you a ruling on those motions to strike. The first one, Docket Number 526, seeks to strike the Plaintiffs' reply brief in support of Plaintiffs' "Notice on Common Fund Recovery," arguing that the Plaintiffs Reply violates this Court's local rules regarding length and

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content of reply briefs. The Defendants cite Local Rule 7(d), which limits reply memoranda to 10 pages in length and restricts their content to matters raised in the memorandum to which it replies. The Plaintiffs respond that, by its own terms, Local Rule 7(d), quote, "motions procedures," end quote, applies only to replies to motions, rather than, quote, "notices," as the Plaintiffs have captioned their filed papers. While the Plaintiffs are technically right that this local rule applies only to motions, there is no analog in the local rules for, quote, "notices," and the Plaintiffs' strategic decision to file notices rather than motions for relief has complicated the Court's ability to facilitate an efficient resolution of this lengthy litigation. As a legal matter, because the notices are not motions for relief, they are, in effect, a nullity. Nonetheless, insofar as the Notice and the document purporting to be a reply in support of the notice serve as a sort of protracted status report on behalf of Plaintiffs, the Court declines to exercise its discretion to strike this reply. As another court in this district had noted, motions to strike, quote, "are not favored and will not be granted

unless it is clear that the allegations in question can have no possible bearing on the subject matter of the litigation," end quote, *Ruffino v. Murphy*, Number 3:09-CV-1287, 2009

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Westlaw 5064452, at *1, District of Connecticut, December 16, 2009. Because the Court will take no action in response to what appears to be the Plaintiffs' invitation for the relitigation of settled methodology disputes or perhaps new methodology disputes, which could have been but were never previously raised, there's no apparent prejudice to the Defendants. Accordingly, the Defendants' First Motion to Strike Plaintiffs' Reply Brief is denied. The Defendants' second Motion -- Number 531 – To Strike, addresses the Plaintiffs' reply in support of their notice of supplemental authority. Defendants argue that Plaintiffs' reply improperly and inaccurately attacks Defense counsel on a host of issues totally unrelated to the underlying notice of supplemental authority. In particular, Footnote 2 of Plaintiffs' reply, Docket 530, challenges Defense counsel's representation that Defense counsel has no alternative-fee arrangement with Defendants and references allegations made against Defense counsel in a completely unrelated case. Footnote 2 has no conceivable relevance to the supplemental authority or the only substantive issue that remains pending before the Court today -- that is, the pending motion to approve Plaintiffs' attorneys' fees. Accordingly, the Court will grant the Defendants' motion in part and will strike Footnote 2, but will deny Defendants'

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motion as to the remainder of the reply, which also will be treated as an unsolicited status report from Plaintiffs, on which the Court takes no action, thus there's no prejudice to Defendants in the denial of their motion. Accordingly, Defendants' Second Motion to Strike Plaintiffs' Reply, Number 531, is granted in part and denied in part. Now, let's move to the notice that the Plaintiff has stated its intention to publish with respect to individual relief amounts on a secure website. The Plaintiffs have provided, at the Court's request, an anonymized exemplar of the individual relief results statement that they intend to make available to class members on the secure website. Is that still your intention, Mr. Bruce?

MR. BRUCE: Yes, Your Honor.

THE COURT: This form and this notice is not authorized by the Court. It is not a true statement, insofar as it says, quote, "as a result of the U.S. District Court's decisions in this class action, the CIGNA pension plan has been ordered to pay you," and then it has specific amounts. For that reason, I think that it is both inappropriate and improper for this to be sent out unless and until there is an actual pension benefit either ordered by the Court, or announced by CIGNA which is not contested, or announced by CIGNA and contested and ruled on. This is a very different notice than Document 426,

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which set out all the history of the case, all the disputes that exist. Those disputes still exist, and the

notice serves no purpose that I can see that would be contemplated under Rule 23(d)(1)(B)(ii) -- that is, the Court may issue orders that give appropriate notice to some or all class members of the proposed extent of the judgment. So let me hear you on that, but I think there is -- I think this is a seriously inaccurate document that serves no purpose.

MR. BRUCE: Well, as to the purpose it serves, it serves an important purpose because people are really ready to learn the amounts that they're due here; and if these were individual clients, as the named Plaintiffs are, we would have already told them -- and we have already told the named Plaintiffs -- what we calculate the relief to be. So I'm hearing the -- I mean, I'm hearing the Court's concern about the wording of "the CIGNA pension plan has been ordered to pay you," and we can say that "As a result of the U.S. District Court's decisions in this class action, class counsel have calculated that the CIGNA pension plan will need to pay you" these amounts, or "will pay you" these amounts, but I think we do have to be able to communicate with the members of the class what we calculate based on this Court's order.

THE COURT: What if your calculation differs from

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CIGNA's? Of what benefit is that to your Plaintiff class?

MR. BRUCE: They need to know that, that their counsel, after, you know, working on the calculations, is calculating that they are due $100 a month, and then they receive a notice from CIGNA that they're

going to only pay them $50 a month, then they will know that we don't agree with that.

THE COURT: All right. So they know that you don't agree with that. And then what?

MR. BRUCE: Well, the immediate result is that we're providing the members of the class with the amounts that we calculate in good faith and that -- based on the Court's orders, and I think that's a basic responsibility to the members of the class. It's -- you know, it's often difficult to do that in a class of this size. But that's what these secure websites have enabled people to do, that we can communicate with them in the same way that we can communicate with Gigi Broderick and Annette Glanz, that we can tell them that you're due $100 a month. And that's what --

THE COURT: But if you say that the District Court has ordered that, you're not correct.

MR. BRUCE: Well, we're going to change -- the note says "The remedy amounts in this statement reflect class counsel's calculations in compliance with the relief methodology ordered by the Court." So we can make that the

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text where it does not say that "the CIGNA pension plan has been ordered to pay you" these amounts, but it says that "the CIGNA Pension Plan, according to class counsel's calculations, is required to pay you $100 a month." But I think we have to be able to communicate with our class and to let -- I mean, because they're demanding it, frankly, Your Honor,

and because that's -- you know, CIGNA doesn't have the right to communicate with our class members and tell them, somebody who's owed $100 a month, that they're only owed $50 a month. At some point we have to be able to tell that person that that calculation is not correct. And, hopefully, as Your Honor has said, hopefully CIGNA will reconsider these positions so that we don't have those kinds of disputes. But if they're not going to reconsider it, then we have to be able to communicate with our class members to tell them what's going on, because it can't be something that the Defendant can, in effect, gag the counsel for the Plaintiffs. I understand your concern about the wording, and we can address that, but we can't, you know, we can't be gagged on this.

THE COURT: Okay. Let me understand. What is it that CIGNA plans to do when it gives me an updated present value number? I take it, by doing that you have a list of 27,000 people and all of the benefits that you intend to pay

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them; is that correct?

MR. BLUMENFELD: That is correct, Your Honor, and we've already provided those calculations to Plaintiffs, most recently updated within the last month.

THE COURT: So if this notice were a notice that "CIGNA's going to pay X but class counsel calculates it should be X-plus," what's wrong with that?

MR. BLUMENFELD: Well, Your Honor, I guess there's a few things. One, when we look at the text of this communication, putting aside the fact that their numbers are not correct and not consistent with the Court's methodology, but, for example, they show the benefit payable at age 60 for the first individuals listed here. And what we explained in our proposed methodology under A+B and what the Court overruled Plaintiffs' objections with respect to is that it should be the age 65 benefit that is communicated to individuals. And, certainly, if somebody is eligible for an earlier retirement benefit, they can receive that benefit early and decide to commence that benefit early. But this is an issue that not only came up in the context of this remedy phase, but also came up in the underlying litigation, where counsel said that we had breached our obligations by not communicating to class members the value of subsidized early retirement benefits, and that they could receive benefits

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earlier than 65 and how much those benefits would be. And the Court rejected that claim and said we didn't have that obligation.

THE COURT: Okay. Which of the rulings, specifically, are you referring to that expressly rejected that proposition?

MR. BLUMENFELD: So, that was in 2008. And, Your Honor, I apologize. I don't remember if it was Judge Kravitz's --

THE COURT: It was Judge Kravitz.

MR. BLUMENFELD: -- liability ruling or remedy ruling on that issue. But it was one of those two rulings from 2008. And I know your ruling from January of 2006 [sic] and then again in January of 2007 [sic] said that you were -- let me find the language, Your Honor: CIGNA provides a methodology for making such payments, to which Plaintiffs have not raised any specific objections. Accordingly, Plaintiffs' objection to CIGNA's methodology with respect to early retirement benefits" -- that is, the benefit that's at issue in this particular portion of the notice -- qualified survivor annuities, Free 30 survivor benefits, and "relative value" victims are overruled. Again, that was Docket 486 at page 18. The other significant concern we have, aside from the confusion that will result if individuals are being told

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that their benefit is one set of numbers that are not correct and the questions that will cause people to ask Prudential, who serves as the plan's record-keeper for these purposes but who, frankly, can't answer questions about it because of the litigation, is on the cover page of that communication, where counsel says, "Please be advised that CIGNA and its administrator, Prudential Retirement, have not cooperated with class counsel in calculating these relief amounts"; and, particularly, with the imprimatur of the "Court order" reference, once you click through, that language was also very troubling to us.

THE COURT: All right. So, but here's what I think is appropriate. If the class members receive the Defendants' calculation of their benefit and their own counsel's calculation of their benefit, then the Plaintiffs' counsel, I suppose, in this notice will have to tell them what can be done about that. How are you going to do that?

MR. BRUCE: Well, we're going to represent them. We're going to bring it back before the Court. But people have to be informed of that. And as we saw over the last few weeks, that when, you know, when people are voicing their concerns, that's something they need to be able to do and that's something that we're responsive to, and they often bring additional information to us as a result of that. It makes it -- you know, it would be much better if CIGNA

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cooperated. But if CIGNA won't cooperate and it's trying to, for example, as Mr. Blumenfeld just said, it's trying to get rid of the full value of the early retirement benefits, and we talked about the full value of the early retirement benefits in the section 204(h) notice, and he's openly declaring that people are not going to receive that full value. So we need to be able to communicate that to people, and they will, you know, be able to communicate information back to us, and, you know, they can ask Prudential what's going on, and that's their right.

MR. BLUMENFELD: Your Honor --

THE COURT: So that's what I'm trying to get to, an end point. CIGNA announces the benefits. I think –

are there some benefits that are payable immediately? I think there are; right?

MR. BLUMENFELD: There are, Your Honor; yes.

THE COURT: Right. And pays those, et cetera. And then, as Plaintiffs' counsel says, we're going to dispute all the other ones where our clients want us to dispute them, and so forth -- and you've got to anticipate that we're going to need a Special Master to take care of those things. So you might as well be thinking about your nominations for a Special Master to take this up.

MR. BLUMENFELD: Your Honor, this is Mr. Blumenfeld.

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We have no problem with class counsel saying to class members that they disagree with our calculations -- they certainly are doing that in all of their filings -- but we do have serious concerns with them publishing numbers that have significant errors in them. And I'll go back to --

THE COURT: No, I'm sorry. But when you say their numbers have significant errors, they say the same about yours; and, so, what is obvious when CIGNA says, "This is what we, as fiduciaries bound by all the rules, the rulings, the decisions and relevant regulations and law, this is what we're going to pay," and the Plaintiffs' counsel says, "And this is what we calculate you should pay," then the issue is joined. But it doesn't seem very helpful for you to say they can't publish a number that's erroneous. Because that's the whole nub of it; isn't it?

MR. BLUMENFELD: Well, Your Honor, that would be, if we were just talking about the methodo -- the methodological issues -- sorry for tripping over my words there. But Bill Carter, being a good example of this circumstance, as we explained, he worked for twelve days after the cash balance conversion and took a lump sum shortly thereafter of about $300,000. Plaintiffs calculate --

MR. BRUCE: We corrected for Bill Carter already.

THE COURT: So I am assuming that this notice thing isn't something that's going out immediately, because it

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needs to be prepared. It needs to have Amara's payments [sic], future and current, and it can have Plaintiffs' counsel's different calculation if, in fact, they are – it is a different calculation, and then whatever instructions class counsel says about what it may do. Excuse me -- I said "Amara's payment." I meant CIGNA's. That's something that presumably will allow one more last pass for both sides to correct errors, such as the one that was just discussed, and so that what is promised to be sent out tomorrow would not be appropriate. But I don't disagree that this is a way in which the class members can receive, in a pretty useable form, information of what lies ahead. When I say "what lies ahead," I am assuming that as soon as the ruling on attorneys' fees is out, within 30 days of that CIGNA will not only pay class counsel the fee and, as we've discussed, the particulars of how that may be modified, but also make any payments to

Plaintiffs immediately and notify them what they will get monthly, or however you're going to do it. And all that would be done 30 days after the Court rules on the attorneys' fees. And that number, presumably, will be provided to Plaintiffs' counsel ASAP, so that it can prepare a modified notice, as we've discussed, that does not say "This is what the Court has ordered" as to

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either number. Doesn't that work?

MR. BLUMENFELD: Your Honor, this is Mr. Blumenfeld. Two things: One, if the Court is involved in the process of what those communications say, I think that would certainly be helpful, from our perspective, because of some of the issues you raised and some of the issues that I mentioned with the existing communication. And the second thing, Your Honor, is, I do think it would be -- I do think that Prudential, as the record-keeper for the plan, would likely need more than 30 days to start sending the payments to people, even the payments that are already due. We have spoken to them about the fact that this is an issue that's coming, but it's a lot of checks and a lot of benefits amount that need to go to people.

THE COURT: But you told me that -- I'm not going to find my note that I made -- that in January of 2018 you were going to have all this done.

MR. BLUMENFELD: That certainly is true with respect to the calculation of the amounts owed at normal retirement age, for example; and if somebody

wants to elect the benefits early or is receiving the benefits as a joint and survivor annuity and we don't know the spousal situation, that could have an impact on those things, as well.

THE COURT: So, Mr. Bruce, is there a form of notice that you think would be useful to the class members, like our

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prior notices that would be from the Court saying, This is what CIGNA says it's going to pay you, This is what your counsel says it ought to pay you, You should be in touch with your counsel through the secure website to discuss that with your counsel? I mean, I'm just making this up off the top of my head, but something that -- and that the Court will provide a process by which any challenges are adjudicated?

MR. BRUCE: I don't think the -- I think that the notice could be like the 204(h), where it could indicate that the Court approves something that -- I think it's probably better at this point -- as Your Honor had said earlier, the Court has issued the methodology rulings. And you've really already gone, you know, much, much farther than Judge Forrest did in the *Osberg* case in detailing what is appropriate. And I think that CIGNA has to take on the fiduciary responsibilities and not try to pass them off to the Court or put the Court in a situation where the Court is getting tremendous correspondence from the members of the class.

THE COURT: No, no. Oh, for Heaven's sake, no, I was not inviting that. Thank you. So I guess what I'd like,

at a minimum I'd like to approve anything that's going to go out, and you can just give it to me in some -- in the same anonymous form as you've done now. But this form that currently exists is troubling and should not go out. I think

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there is real benefit in having both numbers. It puts everybody's feet to the fire to be accurate.

MR. BRUCE: So, 30 days from now or 30 days from the Court's ruling, that CIGNA would be ordered to pay class counsel and to provide their new results to class counsel, and the Court would provide CIGNA with an additional 30 days to actually mail the notices? We have already worked with CIGNA on the content of notices. I mean, so it isn't like when we kept pushing on this because CIGNA wasn't making it a priority. So there's already been work on the content of notices, and I'm not -- I'm really not, you know, trying to make CIGNA -- well, I'm not trying to make CIGNA do this within 30 days, but it's not a long-term project.

THE COURT: I think that's right.

MR. BRUCE: It's something that -- we could do this with third-party contractors within 60 days from today.

THE COURT: Okay. Why don't you all go back to the the drawing board, draft a proposed order that will give the sequence that you all need and the substance to whatever is going to be included in that, and then we can get that out, because I don't want to issue

something today based on this colloquy that may have inadvertent deadlines that can't be met. Also, as I think of it, Mr. Bruce, could we have a

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Word version of your proposed order on attorneys' fees? I saw that we only have your PDF version.

MR. BRUCE: Yes.

THE COURT: And to the extent I can tinker from your Word version, I would appreciate it. You can e-mail that to Joey Kolker. Okay?

MR. BRUCE: Yes.

THE COURT: All right. So here's where I think we have ended up: A, the issues of disputes with respect to how the calculations are made will not be resolved at this – are not before the Court for resolution. The Defendant is on full notice of its -- that it will be held to its fiduciary obligations to prepare and pay -- prepare the notices of amounts due and pay the amounts forthwith; that the procedure for attorneys' fees will be that the calculation will be at the interim, this interim calculation -- well, I don't know what to call it -- is going to be based on the Defendants' updated 136.1 million, and that can be anticipated to be ordered 30 days after the ruling. The issues of what in addition, by way of costs and so forth, that remain in dispute will all be fleshed out in the Court's order. The amount paid, because it is the present value, will be paid immediately and not over time. And then the parties will submit -- the Plaintiff will submit a proposed notice to class that will take care of

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the matters that we raised. Anything else?

MR. BRUCE: Well, as the Court earlier said, that the order can give them full notice of their fiduciary duty to comply fully with the Court's rulings.

THE COURT: I'm sorry. Say that again.

MR. BRUCE: That the order can give CIGNA notice of its fiduciary duty to fully comply with the Court's rulings, including the reformation to provide the full value of the benefits.

THE COURT: I think that's a statement of law that I need not make. The question will come up whether they have complied with that -- whether they've complied with that will become the issue.

MR. BRUCE: Well, I think it gives CIGNA an instruction, which they apparently haven't had because of their 10-K and 10-Qs saying that they are looking for open aspects of the Court's orders in order to place the company's interpretation on those open aspects. So it doesn't seem like the concept of fiduciary duties and complying with an equitable order of reformation have gotten through to CIGNA and to its executives.

THE COURT: Well, I doubt that my words today are falling on deaf ears, so I don't think there's anything more we need to do. Okay. Is there anything else that needs to be

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addressed? Mr. Blumenfeld, you're going to get me the updated number when? I'm --

MR. BLUMENFELD: So --

THE COURT: Pardon?

MR. BLUMENFIELD: I didn't mean to interrupt you, Your Honor.

THE COURT: I'm going to be away next week, so I'm wondering if you can get that to me so that I have it when I get back?

MR. BLUMENFELD: Certainly I hope so, Your Honor. As you might expect, I'm not the one who does those calculations, nor is anybody else at our firm or, frankly, at CIGNA. So we'll ask for that as soon as possible; and certainly, if it's going to be more than two weeks, we will let Your Honor know what the issue is.

MR. BRUCE: I thought she was talking about the proposed order.

THE COURT: No, I'm talking about the proposed final revised amount that I will need for the attorneys' fee ruling. Why can't I have that by August 3?

MR. BLUMENFELD: Your Honor, certainly we can endeavor to do that. The issue is that it's not a calculation that we or CIGNA does. It's a calculation that their outside actuaries do.

THE COURT: Yeah. So tell them they need to get it

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to us by August 3.

MR. BLUMENFELD: Believe me, I will, Your Honor.

THE COURT: Okay. And then you're going to – the proposed order that memorializes what we're doing here, when will we get that? Can that be August 3, as well?

MR. BRUCE: Yes.

THE COURT: Mr. Bruce, that okay with you?

MR. BRUCE: That was my "yes."

THE COURT: Oh, that was your "yes." Okay.

MR. BRUCE: Yes.

THE COURT: Okay. August 3 we're going to get the proposed order that memorialized what we've determined to do today. August 3 we will get the Defendants' updated figure. Let me look at my list.

MR. BRUCE: We will refile the reply with the Footnote 2 taken out.

THE COURT: You know, I don't even think you need to bother. It's just -- you do what you want to do, but if it's -- I'm not taking it off the docket. I will reflect on the docket that it replaces the original, so that's fine. Okay. Anything else?

MR. BRUCE: And to have a transcript, who do we contact?

THE COURT: So, Tracy Gow is our court reporter, and her number is –

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THE REPORTER: (203) 910-0323.

THE COURT: Can you hear that?

MR. BRUCE: Yes. Thank you.

MR. BLUMENFELD: Yes.

THE COURT: Okay.

MR. BLUMENFELD: And, Your Honor, would Your Honor also like the proposed revised notice by August 3?

MR. BRUCE: The proposed -- from us or from you?

MR. BLUMENFELD: Or both.

THE COURT: So what I would like to -- yes, the revised notice means you've got to work together. I think we've set out what the parameters are of its content. Okay. That's a good idea. All right. This has been productive. Thank you very much. We are finished. Thank you.

(Teleconference concluded at 5:18 p.m.)

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COURT REPORTER'S TRANSCRIPT
CERTIFICATE

I hereby certify that the within and foregoing is a true and correct transcript taken from the proceedings in the above-entitled matter.

/s/ Tracy L. Gow

Tracy L. Gow, RPR

Official Court Reporter

Appendix L

RELEVANT STATUTORY AND REGULATORY PROVISIONS

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

FRAP 3. Appeal as of Right–How Taken

(a) Filing the Notice of Appeal.

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal.

(3) An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from any other district court judgment.

(4) An appeal by permission under 28 U.S.C. § 1292(b) or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6, respectively.

(b) Joint or Consolidated Appeals.

(1) When two or more parties are entitled to appeal from a district-court judgment or order, and their interests make joinder practicable, they may file a

joint notice of appeal. They may then proceed on appeal as a single appellant.

(2) When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the court of appeals.

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment--or the appealable order--from which the appeal is taken; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) The notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated

judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.

(5) In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates:

> (A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or
>
> (B) an order described in Rule 4(a)(4)(A).

(6) An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.

(7) An appeal must not be dismissed for informality of form or title of the notice of appeal, for failure to name a party whose intent to appeal is otherwise clear from the notice, or for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment.

(8) Forms 1A and 1B in the Appendix of Forms are suggested forms of notices of appeal.

(d) Serving the Notice of Appeal.

(1) The district clerk must serve notice of the filing of a notice of appeal by sending a copy to each party's counsel of record--excluding the appellant's--or, if a

party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant. The clerk must promptly send a copy of the notice of appeal and of the docket entries--and any later docket entries--to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk sends copies, with the date of sending. Service is sufficient despite the death of a party or the party's counsel.

(e) Payment of Fees. Upon filing a notice of appeal, the appellant must pay the district clerk all required fees. The district clerk receives the appellate docket fee on behalf of the court of appeals.