20-202 (L)

20-3219 (CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellants,

v.

CIGNA CORPORATION and CIGNA PENSION PLAN,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Christopher J. Wright
HARRIS WILTSHIRE
& GRANNIS, LLP
1919 M St., NW, 8th Fl.
Washington, DC 20036
(202) 730-1325

Stephen R. Bruce
STEPHEN R. BRUCE LAW OFFICES
1667 K St., NW, Suite 410
Washington, D.C. 20006
(202) 289-1117

Counsel for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Miscellaneous

Introduction

The *Restatement (Third) of Trusts* provides that fiduciaries have a duty "at reasonable intervals on request, to provide beneficiaries with reports or accountings," "particularly material information needed by beneficiaries for the protection of their interests." *Id*. at §§82(2), 83. The duty to account originated in trust law, with cases like *Finley v. Lynn*, 10 U.S. 238, 250-52 (1810), where a former partner in a jewelry store sought an accounting of profits after the dissolution of a partnership. As with financial accountings, equitable accountings are not required based on the certainty that unaccounted for obligations will be found, but based on the beneficiaries' need for information and the potential for unaccounted obligations. When a court has issued an injunctive decree, *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 456-57 (1932), establishes that the enjoined party has a duty to "account" as for "an actual fiduciary relation." As the case law shows, it is not only injunctions to remedy civil rights violations or prison and other institutional conditions where "fully" carrying out fiduciary obligations is an issue, but cases like *Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. 2009), where trust funds have not been paid or are not fully accounted for.

Cigna's Opposition sets up a straw man that the Plaintiffs are demanding an "automatic" accounting. Indeed, the longest section in Cigna's Opposition is

entitled "ERISA Plan Participants Do Not Have an Automatic Right to an Accounting." Cigna phrases this lots of different ways, saying Plaintiffs argue that they are "entitled to accounting just because they asked for it," Opp. at 2, that they want an "accounting as a matter of right" or "automatic right," *id.* at 3, 16, 23, that "Plaintiffs argue that the District Court erred by requiring any showing at all for accounting," *id.* at 17, and that Plaintiffs want to be "automatically entitled," *id*. at 17, 30, or to have "an automatic requirement to account," *id*. at 28.

What is most incredible about these assertions is that in the same Opposition, Cigna recognizes that Plaintiffs are arguing for an accounting if "a significant amount of funds are not fully accounted for." Cigna even gives a two-part version of the standard as requiring "(1) a fiduciary duty is owed to them and (2) a significant amount of funds are not fully accounted for." Opp. at 11; *see also id.* at 3.

The most glaring flaw in the factual support for the District Court's decision below, and in Cigna's Opposition, is revealed by Cigna's assertions concerning the "evidence" it presented to the District Court. Cigna's Opposition refers to the "evidence" it presented to the District Court in seventeen places. But while Cigna calls this "record evidence," *id*. at 42, 57, Cigna provided no "records" to the Court, nor did it make any records available to Plaintiffs. Instead, Cigna submitted

two declarations, including one with a "Sur-Reply" to which Plaintiffs were not allowed to respond, in which a service-provider paid by Cigna attests to numbers of checks and notices mailed based on records that were never provided to the Plaintiffs for examination. JA242-43, 416-17. In asserting this is "record evidence," Cigna proceeds oblivious to Federal Rule of Evidence 1006 which provides that while a party may offer the court summaries of records, the proponent "must make the originals or duplicates" of the records "available for examination ... by other parties."

What Cigna's Opposition boils down to is that it wants the class members and the District Court to 'trust Cigna' on implementation of this relief, despite the "fraud" that led to the reformation and corresponding injunction, despite the multiple indications that Cigna is using "Company interpretations" of the Court's orders, and despite the "traditional" principles for an accounting and the rules of evidence requiring that any records that are summarized "must" be made "available" for "examination."

Cigna's counsel have assured the District Court that the Cigna officers who "affirmatively" misled the members of this class are long gone (even though Cigna never identified who they were), and in this Opposition Cigna attempts to cabin its "misleading statements" to "1998-1999" or "decades ago," Opp. at 2, 11, 21-22.

But the CFO for Cigna HealthCare in 1998-1999 has been the CEO of Cigna since 2009 and Cigna's assertion that it has been acting in the interest of plan participants since "decades ago" is belied not only by this case's history, but recent public records. Plaintiffs have pointed to Cigna's securities disclosures in 2016, after the District Court issued a remedial order unfavorable to Cigna, which stated that Cigna was identifying "open aspects" in the Court's orders and placing "Company interpretations" on them. Appellants' Br. at 12-13 (citing Dkt.#479-2). The position that Cigna has interpretive authority ***over*** the District Court's orders has never changed. Instead, on February 26, 2019, Cigna codified that position by adopting a plan amendment that expressly affords Cigna officers the authority "[t]o interpret and construe the Amara Orders." JA914 (in 20-202).

I. The District Court Must "Fairly Apply" the "Traditional" Equitable Principles for an Accounting.

In *Rudenko v. Costello*, 286 F.3d 51, 64-65 (2d Cir. 2002), this Court ruled that "[e]ven when the district courts have 'wide discretion exercising their equitable powers,' ... 'discretionary choices are not left to a court's inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" The Supreme Court has likewise held that while "the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts," "such

discretion must be exercised consistent with traditional principles in equity," and the district court must "fairly apply" those principles. *eBay v. MercExchange*, 547 U.S. 388, 393-94 (2006).

To ensure that these equitable standards are satisfied, a district court's opinion on a motion does not always have to have explicit findings, but it does have to allow for appellate review. As *Miranda v. Bennett*, 322 F.3d 171, 175 (2d Cir. 2003), ruled, "we will proceed with review of a district court's decision even where it lacks findings 'if we are able to discern enough solid facts from the record to permit us to render a decision.'" But "we, like other appellate courts, remand to the district court when the record is insufficiently clear to permit us to determine the basis for the district court's decision." *Id*.

The case law is also clear that the de novo or virtually de novo review that this Court applies to questions of law does not mean that a district court can skip the legal or equitable standard and leave it to this Court to say what the law is on a de novo basis. "A district court's conclusions of law are reviewed de novo ..., but it is normally useful to have those conclusions articulated." *Miranda, supra*, 322 F.3d at 175; *accord, Rudenko, supra*, 286 F.3d at 64-65 ("Except in those rare areas in which the standard of review is entirely de novo, we cannot perform this function where the record is inadequate to reveal the basis for the district court's

decision").

Here, the District Court recognized that it "indeed has the authority to order a post judgment accounting." SA8-9. But the District Court's decision never identified any equitable principles it was applying and thus cannot be said to "fairly apply" those principles. While the District Court cited *Finley v. Lynn*, as support for its authority to order an accounting, the District Court did not propose any standard other than that it has the "authority" and did not draw any principles from *Finley*. Going by the terms of the District Court's decision, the standard for an accounting is that the motion is to be denied if the enjoined party provides "'acceptable explanation[s]' for the 'potential problems with Defendants' compliance' that Plaintiffs have raised," including through factual assertions of the counsel for the enjoined party and summaries of records that are never made available for examination. SA11.[1]

The District Court recognized that Plaintiffs had "attempt[ed] to marshal case law from across the centuries" on the right to an accounting. SA9 n.4. But the District Court dismissed all of the cases Plaintiffs marshaled by saying that "None

[1] In denying reconsideration, the District Court did not say that Cigna's explanations for the "potential problems" with compliance were "acceptable," but just said "Plaintiffs failed to offer a persuasive substantive legal justification for why an accounting should be ordered." SA13.

of those considerations are relevant here." *Id.* The District Court distinguished *Cobell v. Norton*, 428 F.3d 1070 (D.C. Cir. 2005), as a case in which an accounting was "statutorily required" by a 1994 Reform Act. SA9 n.4. But the District Court overlooked the 2009 decision in *Cobell v. Salazar*, 573 F.3d 808, 810-13 (D.C. Cir. 2009), which Plaintiffs cited, *see* JA250, holding that an accounting may be obtained "under traditional equitable principles" and that while the 1994 Act "required a full accounting," "Congress will never appropriate the funds necessary to conduct such an accounting." In the same footnote, the District Court distinguished *Knowlton v. Anheuser-Busch Cos. Pension Plan*, 849 F.3d 422, 432 (8th Cir. 2017), on an incorrect basis. In *Knowlton*, there were issues about a defendant's implementation of a "final judgment" and the District Court was ordered to consider whether "certain records will assist" the Plaintiffs "to verify that the plan administrator has correctly calculated and distributed enhanced benefits to class members." But the District Court here distinguished *Knowlton* as a case where there were still "adjudications" to be made, never explaining how that differs from here.[2]

The District Court's dismissal of the relevance of all of the accounting cases

[2] Cigna's Opposition follows the District Court in limiting *Cobell* to a "mandatory statutory requirement," without citing *Cobell v. Salazar*. Opp. at 21, 24. *Knowlton* is also not cited.

Plaintiffs marshaled leaves open the question of the District Court's standards. If all of the "considerations" the Plaintiffs "marshaled" were "not relevant," the District Court could be expected to identify some equitable considerations that are relevant. But the District Court never even looked to the *Restatement of Trusts* for guidance.

The District Court found the D.C. Circuit's unpublished decision in *Kifafi v. Hilton Hotels*, 752 Fed.Appx. 8 (D.C. Cir. 2019), where Amara's lead counsel represents the plaintiffs in another class action that produced a permanent injunction to provide retirement benefits, "to be instructive" or "useful guidance." SA9, 10 n.5. But *Kifafi* only ruled that "the district court did not abuse its discretion when it concluded [in 2015] that Hilton was adequately complying with its current duties under the permanent injunction and that the court would no longer exercise supervisory jurisdiction." 752 Fed.Appx. at 9 (emph. added). Despite the end of "supervisory jurisdiction," *Kifafi* expressly ruled that "[s]hould the implementation break down, class members retain the enforcement rights of a party to a permanent injunction." *Id*. In addition to the focus on "supervisory jurisdiction," the distinguishing aspect to *Kifafi* was that the District Court had for the first two years of implementation required Hilton to provide records to the Plaintiffs (*see* 79 F.Supp.3d at 97) – which Cigna has never done here.

On appeal, the Cigna Defendants' defense of the District Court's decisions shifts from page to page. In a heading, Cigna refers to "in the Standard [the District Court] Applied ... for an Accounting," Opp. at 15: But Cigna never identifies what "standard" District Court applied for an accounting. Cigna cites (on 34) *Jackson v. Fed. Exp.,* 766 F.3d 189, 195 (2d Cir. 2014), which is a case in which the District Court's "legal reasoning" was "perfectly obvious." But here it is not "perfectly obvious" what the District Court's legal reasoning was.

One thing is clear from comparing Cigna's briefs here and below: Cigna opposed the accounting motion below on a different basis than it opposes it on appeal. Cigna said below that Plaintiffs had to show "contempt" before it could be required to account. JA237, 410. Now, Cigna agrees at least in one place that the equitable principles for an accounting involve a showing that: "(1) a fiduciary duty is owed ... , and (2) a significant amount of funds are not fully accounted for." Opp. at 11.

Cigna nevertheless argues that all of the cases that Plaintiffs have cited on the duty to account are "inapposite." *Id*. at 24-25. And Cigna tries to distinguish the *Restatement of Trusts* by offering a nearly-identical misreading to the one to which Plaintiffs already responded below and in the opening brief. *Compare* Opp. at 25 n.7 *with* JA249 and Appellants' Br. at 19 n.3.

Cigna offers a new argument that providing an accounting of its implementation "would run contrary to the carefully crafted disclosure provisions of ERISA." Opp. at 11, 28. Cigna says that "[i]f Plaintiffs' theory held water, that requirement would attach to virtually all ERISA plans." *Id*. at 28. But *Pender v. Bank of America*, 788 F.3d 354, 364-67 (4th Cir. 2015), and every case that has addressed this issue has ruled that accountings are part of the "appropriate equitable relief" that is provided by ERISA §502(a)(3), 29 U.S.C. 1132(a)(3). Cigna's proposition that if an accounting is not specified by name in ERISA "elaborate scheme," Opp. at 28, Congress must not want participants to have it would undercut ERISA's provision for "appropriate equitable relief." Despite the Supreme Court's ruling in *Cigna Corp. v. Amara*, 563 U.S. 421 (2011), Cigna has still not learned that "appropriate equitable relief" includes "those categories of relief" "typically available in equity," *id*. at 439, which definitely includes an "accounting."

II. The District Court Never Made the Findings and Rulings that Cigna's Opposition Attributes to It.

Even when law students learn how to read cases, it is a big mistake to confuse a court's recitations of a party's positions with judicial findings in that party's favor. This Circuit has also warned about "the imprudence of wholesale

adoption of a party's position" because it leaves the appellate court "deprived of ... helpful guidance" in reviewing the decision. *Miranda, supra*, 322 F.3d at 175, 177.

Cigna says in one place that findings are not required, Opp. at 34, but throughout the rest of its Opposition acts like the District Court made findings. The only material close to findings that the District Court made, however, was in one paragraph related to whether "the current amounts owed to Class Members have been remitted," and even then the Court "accepted" a representation by Cigna and what a declarant "averred." SA11. The District Court's statement that the District Court found Cigna's "explanations" of the "potential problems with compliance" that Plaintiffs have raised to be "acceptable" is not connected to that paragraph, except in part to the issue of an accounting for 1,000 missing payments. SA11.

Plaintiffs filed a motion for reconsideration inviting the District Court to explain "the legal basis for the decision" but the District Court declined to do so. SA13-14. To fill in the gaps in the District Court's decision, Cigna's Opposition offers an assortment of findings that the District Court did not make. First, Cigna's Opposition repeatedly suggests that the District Court made findings or rulings when it was reciting Cigna's positions. *See, e.g.*, Opp. at 33-34 (twice), 36, 39

(twice), 41, 43 (twice). Some of the recitations that Cigna re-purposes as findings or rulings were assertions by Cigna's counsel that Plaintiffs pointed out are "not evidence." *See, e.g.*, Opp. at 12-13 n.4 ("[T]he majority of the court-ordered retirement benefits are in the form of annuities ... and this is the reason why they remain unpaid").

Not only has Cigna confused the District Court's recitation of its positions with judicial findings, but it has created findings and holdings that go well beyond even the District Court's recitations of Cigna's positions. Thus, Cigna tries to 'help' the District Court's decision satisfy this Court's standards for review by setting out a multiplicity of findings that Cigna apparently thinks the District Court could have made, and acting as if the District Court made them, to wit, Cigna's Opposition makes up findings and rulings in which the District Court:

> "held Plaintiffs failed to make ... a showing" that "a significant amount of funds are not fully accounted for," *id*. at 3;
>
> "held, Cigna complied with the remedy methodology ordered by the District Court," *id*. at 4, *see also id*. at 15;
>
> "found all amounts that were currently owed to Class Members had been properly remitted," *id*. at 9;
>
> "based on the sworn declarations ... rejected Plaintiffs' allegations that there were funds unaccounted for," *id*.;
>
> "concluded that the declaration submitted by Plaintiffs' counsel did

not constitute evidence of non-compliance by Cigna," *id*. at 9 n.3;

"found that Prudential 'mailed checks to 8,962 people,'" *id*. at 9;

"also found that the Plan was properly initiating new annuity payments on an ongoing basis 'as new class members reach normal or early retirement age under the plan and become entitled to commence their [benefits],'" *id*.;

"found that as to those former employees who were entitled to small benefit cashouts before taking their Part B benefits, 'Prudential issued checks to all but 12' of them, who had died," *id*. at 9-10;

made a "finding that Cigna's record evidence rebutted Plaintiffs' claims of supposed "discrepancies" in the value and administration of the remedy," *id*. at 12;

"for Cigna" only "considered ... sworn declarations by the individuals involved with administration of the retirement plan at issue attesting to their work," *id*. at 12, *see also id.* at 13;

"concluded that ... Cigna's sworn testimony ... demonstrated Cigna's compliance with the District Court's orders," *id*. at 19,

"denied Plaintiffs' Motion for Accounting based on its finding that Cigna had properly and diligently complied with all its orders," *id*. at 57;

"Based on detailed evidence of Cigna's efforts to comply with its orders, ... correctly concluded that an accounting was not legally justified," *id*.

Whether these statements are considered standing alone or in combination with the recitations of Cigna' positions described as if the Court adopted them, this is an extraordinary number of findings and rulings that the Cigna Defendants

are incorrectly attributing to the District Court: thirteen made-up findings or rulings, plus nine recitations of Cigna's positions as if they were findings or rulings. Simply stated, this Court cannot accept findings or rulings that the District Court did not make; nor should this Court inadvertently accept them by failing to appreciate the sharp practices in which Cigna and its counsel are engaged.

This is not the first time Plaintiffs have encountered this kind of rewriting of the District Court's decisions. Plaintiffs prepared a table below for the District Court of all the changes in the terms of the District Court's 2016-2019 orders that Cigna was making, some less subtle than others. That summary is attached at JA918-20 (in 20-202). The pervasive rewriting of district court decisions in an appellate brief presents an obvious challenge to this Court's ability to rely on that brief for purposes of review.

III. As Occurred Below, Cigna's Opposition Relies on Summaries of Records that Were Not Made Available to the Plaintiffs and Factual Assertions by Counsel That Are "Not Evidence."

As stated, Cigna's Opposition emphasizes the "evidence" it presented to the District Court in seventeen places. Cigna's Opposition says the District Court relied heavily on the "sworn declarations by the individuals involved with administration of the retirement plans at issue attesting to their work." Opp. at 12. Actually, Cigna's declarant attested only that he provides "actuarial services" (JA

242, 416) and never attested to any "involve[ment]" or "work" in "administration of the retirement plans." As stated, moreover, Cigna is oblivious to FRE 1006, which provides that – whether a declarant is engaged in administrative or actuarial services – any records that the declarant summarizes "must" be made "available" for "examination" before the summary can be admitted. The 1972 Advisory Committee Notes state that this rule recognizes the practice of admitting "summaries of voluminous books, records or documents" with "appropriate safeguards."

Cigna also still relies on the assertions of its counsel that this Court has repeatedly held are "not evidence." *See* Appellants' Br. at 27, 42 (citing, inter alia, *Rosales v. Barr*, 2020 WL 7350244, 2020 U.S. App. LEXIS 39193 (2d Cir. 12/15/2020). In this Opposition, Cigna's counsel just assert, for example, with no support, that "different actuarial assumptions" "explain the difference" in "the present value of the remedy." Opp. at 44.

To indirectly address Plaintiffs' point about the reliance on the assertions from counsel, Cigna offers a distinction the District Court never drew, asserting that "for Cigna" the District Court "considered ... sworn declarations by the individuals involved with administration of the retirement plan at issue attesting to their work." *Id*. at 12; *see also id.* at 13. The District Court's decisions offer no

support for the position that the District Court was not considering Cigna's counsel's assertions when it referred to Cigna's "explanations" for the "potential problems" in compliance. SA11.

Cigna's Opposition suggests later that to the extent the explanations on which the District Court relied are based on "factual statements" from its counsel, they were only about "documents Class Counsel themselves submitted" or to "point[] out ... that Plaintiffs' argument was based on inapt comparisons of values that were calculated using different assumptions at different times and included amounts payable for decades into the future." Opp. at 32-33. Again, even if this were true, the District Court's decisions do not draw any such distinction related to the "explanations" the District Court considered "acceptable."

IV. Plaintiffs Have Amply Justified Requiring an Equitable Accounting of Cigna's Implementation of the Relief.

To obtain an accounting, Plaintiffs need to show a fiduciary duty and a significant issue or issues about which the enjoined fiduciaries have information that they are refusing to share. In *State Dep't of Soc. Servs. v. Leavitt*, 523 F.3d 1025, 1035 (9th Cir. 2008), the Ninth Circuit remanded where there were "significant questions regarding noncompliance." Here, even without the new evidence, Plaintiffs have already presented evidence of "significant questions

regarding noncompliance." For example, Plaintiffs showed thousands of cases where Cigna has denied relief without providing the information on how to perfect the claim or appeal the denial that ERISA requires. Plaintiffs have also offered evidence of new restrictions on relief that were unknown to Plaintiffs but known to Cigna at the time Plaintiffs' motion and reply were filed below.

In terms of the number of pages devoted to law and facts, Cigna's Opposition appears to be a "fact-oriented" response. In the Argument section of Cigna's Opposition, twenty pages (35-45 and 47-56) are devoted to factual matters. Basically, Cigna seems to concede that if Plaintiffs are correct about any of what Cigna disparages as a "hodgepodge" of issues, an accounting would be required, and that the same applies to the "brand new evidence." Accordingly, Cigna not very credibly contends that Plaintiffs are incorrect about each and every one of their five issues, as well as all of the new evidence. Cigna is so intent on this scorched-earth approach that it describes a September 1, 2020 Notice as a notice "from Prudential to one participant," Opp. at 47, even though it obviously is a Notice that Prudential sent to hundreds or thousands of class members eligible for retirement.

A. Cigna's Much Lower Public and Non-Public Valuations of the Relief Warrant an Accounting.

The much lower public and non-public valuations of the relief in Cigna's 2019 10Q's and in its Form 5500 Annual Return and Actuarial Valuation Report show that at least $25 million in relief is unaccounted for. As Plaintiffs showed at pages 30-33 of the opening brief, the District Court valued the relief it ordered at $152.5 million, excluding attorney's fees, but in subsequent valuations, Cigna has progressively lowered this amount to $96.6 million, without explanation. First, in March of 2019 Cigna certified in a 10Q that the present value of the relief was $142 million, JA370, which was $10.5 million less, with no explanation of the difference. Second, in Cigna's Form 5500 for 2019, the present value of the relief was listed as $110 million, JA452-53, again without explanation. And then, Cigna's Actuarial Valuation Report for 2020 certified $96.6 million as the value of the relief, JA453, with no explanation for the $55.9 million difference between the District Court's valuation of $152.5 million and Cigna's 2020 valuation of $96.6 million.

Cigna does not contest that the Form 5500 for 2019 only became publicly available on October 15, 2020. Cigna also does not contest that the Actuarial Valuation Report for 2020 was only provided to Plaintiffs' counsel on January 19,

2021. Neither of these much lower valuations was available to the District Court before its August 6, 2020 and September 10, 2020 decisions denying an accounting and denying reconsideration.

Cigna's counsel now asserts that the District Court's $152.5 million figure included "tens of millions of dollars in remedy benefit payments paid to various class members in 2019." Opp. at 52. The citations in Cigna's Opposition to JA 239-40 provide a more precise figure of $30 million. Even if that amount was fully paid out in 2019, and not included in the $110 million and $96.6 million valuations, $25.9 million is not accounted for ($152.5 million - $30 million = $122.5 million, which is $25.9 million more than $96.6 million).

Cigna's counsel next asserts that "different actuarial assumptions" "explain the difference in the present value of the remedy." Opp. at 44, 51. But Cigna's actuarial declarants have not attested to this and another likely reason shown in the Actuarial Valuation Report for 2020, to which they certified, is that Cigna is calculating the amounts of the Amara relief differently than in 2018. *See* JA454-56 (setting out "Plan provisions" and "assumptions" "specific to additional benefits provided due to the Amara litigation"); *see also* JA458 ("form of payment elected under Part B impacts the amount of the Amara benefit"). An accounting is warranted because Cigna has fiduciary duties to the class members and the Court

and has not accounted for at least $25 million in benefits. *See, e.g., Finley*, 10 U.S. at 250 (ordering accounting even if it was "not probable" that additional profits were owed).

Defendants' explanation about why the data used for the "Amara" relief valuations in the Actuarial Valuation Report, the Form 5500, and the 10Q cannot be shared is equally flawed: They say that this is "not something shared with third parties." Opp. at 30. But beneficiaries to a trust are not "third parties," and the AVR shows that data on the "Amara" relief is being shared with Cigna's management. There is no reason why the data on the Amara relief can be shared with Cigna's management, but not with the persons who are to benefit from the trust's reformation.

B. Cigna Has Excluded Class Members from Relief Without Any Right to Contest the Exclusions.

Cigna offers no explanation for its failure to provide the class members who it has excluded from any relief with the benefit denial notices that ERISA requires. It is undisputed that Cigna has not provided any information on the right to contest the benefit denials as ERISA §503(2), 29 U.S.C. 1133(2), and the regulations at 29 C.F.R. 2560.503-1(g) and (h) require. Those regulations require the plan administrator to provide "the specific reason or reasons for the adverse

determination" and information on how to "perfect" the claim or appeal the denial. Plaintiffs do not contend that anywhere close to the total of 10,505 excluded individuals have a basis for perfecting their claims or for appealing. But Plaintiffs have emphasized 401 individuals who Cigna claims were "not vested" despite Class counsel's challenges, and 1,118 individuals who Cigna "zeroed out" of any relief when Plaintiffs had reasons to doubt Cigna's calculations, as indicating that a significant number of excluded class members have a basis for "perfecting" their claims or appealing.

Cigna's Opposition now says Plaintiffs "mentioned" the inadequate notices for excluded class members "only in passing in a paragraph of their declaration and failed to argue [this] in the body of their briefs to the District Court." Opp. at 37. But Plaintiffs' "argument" about this is in black-and-white in the District Court's decision at SA6 and SA8, and in the Plaintiffs' briefing and declaration filed with the District Court at JA257 and JA262. And Cigna's own response to this issue below is found at JA410. It is unclear how anyone believed the statement in Cigna's Opposition to be true – much less a basis to argue "waiver."

Cigna further contends that it is "demonstrably false" that "Cigna never provided form letters for the Court to review." Opp. at 40 (citing Dkt.#541-2 at Ex.B7). But as a February 19, 2019 "Status Report on Implementation" prepared

by Cigna admits, the District Court "did not adopt" the Proposed Order to which Cigna's "sample" letter was appended. Dkt.#567 at 4. The letters Cigna subsequently mailed to this group of class members in January 2019 were different in both form and content than this "sample," *see* Dkt.#564-2 at 20-22, and thereafter Cigna was "not willing to provide" Plaintiffs with any letters that it used on the ground that it was "unauthorized discovery." Dkt.#566-2.

Cigna's Opposition says the District Court "noted" that "Class counsel do not have standing to challenge these issues" of Cigna's exclusions of class members from any relief. Opp. at 39. But Cigna is again acting as if the District Court's recital is an adoption of Cigna's position. Cigna's counsel are the only ones who have ever said that "Class counsel do not have standing to challenge these issues."

C. Cigna Has Restricted Annuity Payments Without Providing Information on How to Initiate Them Subject to Those Restrictions.

Cigna's Opposition correctly states that Plaintiffs "suggest that Cigna did not properly inform individuals who were eligible for early retirement benefits at age 55, but had not taken their Part B benefits, how to elect benefits." Opp. at 36. Cigna diminishes its failure to provide class members with information on how to elect benefits as an "issue with the wording of these letters" or a "preference for

different language." *Id*. at 37. Cigna also asserts that "this is the subject of Plaintiffs' appeal in Case No. 20-202," *id.* at 13, which concerns Cigna's restriction of early retirement benefits by requiring class members to first elect Part B benefits. But Cigna's own statement reveals the distinct issue in this appeal: Cigna has conditioned the Part A relief payments on class members electing the Part B benefits without telling them "how to elect" benefits subject to that restriction.

Cigna quotes as if it were a ruling the District Court's recital of Cigna's position that "Cigna has notified [class members who are entitled to early retirement benefits under Part A] that they can commence the benefit if they so desired by taking Part B." Opp. at 36. Cigna says the District Court "stated [this] in the Accounting Order based on Prudential's testimony," *id.*, as though the District Court accepted Cigna's position as a sufficient explanation about "how to elect benefits." The District Court did no such thing, and evidently the notice that Cigna provided class members in early 2019 was so insufficient that Cigna mailed another letter in September 2019, which was not provided to Plaintiffs or the Court, providing some more information about "how to obtain a benefit distribution package," JA417, still without providing any form to elect a distribution.

As the new evidence shows, Cigna mailed another notice to these class members on September 1, 2020, telling them for the first time that the "form of payment elected under Part B impacts the amount of the Amara benefit." JA458. The District Court never approved any methodology under which "the form of payment elected under Part B impacts the amount of the Amara benefit." Cigna's Opposition asserts that the District Court "explicitly approved" this, Opp. at 13, but Cigna offers no cite where that occurred.

Still more critically, the Actuarial Valuation Report that was made available on January 19, 2021, reveals that Cigna has been violating a January 10, 2017 Ruling by the District Court against taking an "Offset" from the "A+B" relief that is calculated using so-called "floor interest rates" (which are higher interest rates) "[i]f such Part B payment was distributed as an annuity." JA455. Cigna's Opposition now says that "[t]he Actuarial Valuation Report says nothing about applying the floor interest rates to remedy payments or remedy payment offsets." Opp. at 53. The reason Cigna wants to avoid that is because the District Court's January 10, 2017 Ruling expressly "finds that use of floor rates is inappropriate for calculation of the offset" and that they "should be disregarded for purposes of calculating the offset." JA344 (in 20-202). This is exactly what the Actuarial Valuation Report reveals that Cigna is doing because if the "Part B payment was

distributed as an annuity," under the terms of the Part B Plan it has been calculated with the "floor interest rates." JA343-44 (in 20-202).

Cigna's Opposition tries to excuse the violation of the District Court's January 10, 2017 by saying there is only one email complaining about this, calling it "A Single Participant's Email." Opp. at 54. The number of complaints is, of course, irrelevant, and as Cigna and Prudential must be aware, it is also not true that there has been only one because Plaintiffs' counsel have more emails from class members about this, which Plaintiffs' counsel will provide on request.

D. Monthly Annuities That Were "Immediately" Due Did Not "Immediately" Commence.

Cigna's Opposition treats the District Court's recitation of pieces of two sentences from a supplement declaration as "accept[ing]" that when Cigna/Prudential said that "beginning in March 2019" it "commenced the process of initiating annuity payments for approximately 1,650 annuitants" Cigna/Prudential actually meant that all of those monthly annuity increases started "at the end of February 2019." Opp. at 40-41. The District Court "accepted" no such testimony, *see* SA11, nor could it have. As an earlier declaration from another actuarial declarant had stated, the "checks" that were "mailed" in February 2019 "to over 8,900 class members" were checks for "past due lump sum and back

remedy benefits." JA172. The same paragraph of his declaration goes on to state that "In March 2019, Prudential provided to those class members who were also entitled to begin immediate annuity benefits a form to elect the manner of payment (either for life, or for joint and survivor)." *Id.*; *see also* JA242. There were thus two processes: (1) mailing checks in February 2019 for past due lump sums and back benefits, and (2) providing forms in March 2019 to initiate annuity payments going forward. No declaration has ever averred to, or provided any records about, when the forms to elect the manner of payment were processed, or the numbers of individuals who did not return completed forms. The lessons of the GAO report on "missing participants" and MetLife's scandal about not paying "small annuities" is that notices/forms that are mailed out are not necessarily received, completed and returned, or processed and paid. *See* Appellants' Br. at 24-25 n.7.

E. Cigna Has Still Not Accounted for All of the Lump Sum and Back Benefit Payments that Were Due.

In a motion to release a supersedeas bond filed on January 14, 2020, Cigna represented to the District Court that the "Defendants have paid all amounts currently due to class members under the Plan as reformed." JA204. Even though no supporting declaration was filed with that motion, the District Court "accepted Cigna's representations that the current amounts owed to Class Members have been

remitted" for the purpose of releasing the supersedeas bond. SA11; JA233. Accepting a party's representations for such a purpose is obviously different than a judicial finding that all of the current amounts owed to class member have been remitted. *Compare* Opp. at 9. Plaintiffs also accepted Cigna's representations about the number of payments that it had made, but asked for an accounting of at least 1,000 more lump sum and back benefit payments that according to relief calculations Cigna had performed were due.

Cigna's Opposition acts as if Plaintiffs were "using outdated figures" when they pointed out that Cigna's count of "over 8,900 class members" who had been paid was short approximately 1,000 class members. Opp. at 43.[3] Cigna thus acts like Plaintiffs were at fault for Cigna's representation to the Court that "Defendants have paid *all* amounts currently due to class members," when Cigna had not done that. Cigna also leaves out that for 600 of the people who were not paid in February 2019, Plaintiffs had to file a motion to enforce the Court's order to pay small benefit cashouts and to secure a second court order dated August 16, 2019 on this. SA28-31 (in No. 20-202). Cigna leaves out that it still has provided no records on these payments, so that Plaintiffs to this day cannot identify who has not been paid.

[3] The Conclusion to Defendants' Opposition reverts to the "outdated figures" about "mailing lump sum checks to 8,962 people," with no mention of the additional 1,000 people. Opp. at 57.

Nor has Cigna provided any records on the approximately 300 estates and survivors of the deceased class members who Cigna admits it has still not paid.

Under FRE 1006, it is not "acceptable" for an enjoined party to have a witness belatedly testify that the estates or beneficiaries of approximately 100 class members have now been paid, that some efforts are still being made to locate another 300, and that "all but 12" small benefit cashouts have been paid, *see* JA242, without ever specifying the number that "all" represents, and without making any records "available" to the opposing party for "examination." The application of this rule is all the more compelling when the proponent of the summaries has fiduciary duties to class members.

V. The District Court Should Be Directed to Consider the New Evidence of Noncompliance and Entertain Further Motions for an Accounting.

Defendants' Opposition does not contest that there is "brand new evidence" related to Cigna's compliance that was available to Plaintiffs until after the District Court's decisions denying any accounting. Opp. at 14. The new evidence is contained in a Form 5500 report on the Cigna Pension Plan, an Actuarial Valuation Report, and a September 1, 2020 Notice to class members. JA441-460.[4]

[4] Contrary to Cigna's Opposition at 47, 49, Plaintiffs are not asking this Court to consider any "communication *from Plaintiffs' counsel* to the participant reflecting benefit calculations by Plaintiffs' counsel." The $359.49 amount in JA460 is *Cigna's* benefit calculation, included by Order of the Court. Dkt.#555

Cigna again argues against taking judicial notice of these documents under FRE 201(c) or FRAP 10(e) despite the specific provision in the FRE 201(d) for doing so "at any stage of the proceeding" and FRAP 10(e)'s provision for supplementation for the "most recent" material information. Cigna offers a new argument that the appellate record can never be supplemented in a case that is subject to an "abuse of discretion" standard. Opp. at 48. There is no support for that in FRE 201(c), FRAP 10(e), or the case law. Alternatively, Cigna maintains that the documents are "not relevant." *Id.* at 49. But these are Cigna's own documents and calculations, which this Court and the District Court may consider party admissions. Essentially, the new evidence should be considered in the same way FRCP 60(b)(2) provides for reopening a final order to consider "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial." The real question is what this Court does with the documents, and the answer is it normally remands if the facts in them appear significant enough to potentially change the outcome, which these facts clearly are, especially the violation of the District Court's January 10, 2017 Ruling revealed in the Actuarial Valuation Report and the September 1, 2020 Notice.

In the decision denying reconsideration, the District Court relatedly ruled

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(11/29/18) at 11.

that it "will entertain no further post-trial motions on this subject" of an accounting. SA13. Even Cigna's Opposition now concedes that "Cigna undeniably has a continuing obligation to comply with the terms of the reformed plan and this Court's orders" and that the District Court does not have the authority to "prohibit[] Plaintiffs from ever seeking relief in the future." Opp. at 47. Defendants distance themselves from this order further by saying "[t]he language of the [District] Court's order does not affect that obligation." *Id.* Thus, Defendants say they agree that the District Court must entertain further post-trial motions on the subject of an accounting, presumably including entertaining the new evidence that Plaintiffs-Appellants have presented this Court.

At the same time, Cigna acts as if it knows somehow that "[t]he language of the [District] Court's order" does not mean what it says, and that it was "just [saying] that it would not entertain further briefing regarding Plaintiffs' already decided motion for accounting," even though the District Court says "further post-trial motions on this subject" and not "further briefing." *Id*. If this Court were to "affirm" based on this type of assurance, there obviously may be future disputes and appeals if the District Court meant what it said, including about entertaining a motion to consider the new evidence.

Conclusion

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse and remand with instructions on the equitable principles for ordering an accounting and directions to "fairly apply" those principles to the evidence Plaintiffs have presented and the new evidence of noncompliance. The District Court should also be directed to follow FRE 1006's requirement that summarized records "must" be made "available" for examination and this Court's precedents that counsel's assertions in briefs are "not evidence."

Respectfully submitted,

s/ Stephen R. Bruce
Stephen R. Bruce
STEPHEN BRUCE LAW OFFICES
1667 K Street, NW, Suite 410
Washington, DC 20006
(202) 289-1117
stephen.bruce@prodigy.net

Christopher J. Wright
HARRIS WILTSHIRE GRANNIS
1919 M St., NW, 8th floor
Washington, DC 20036
(202) 730-1325
cwright@hwglaw.com

Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE WITH F.R.C.P. 32(a)

Under Fed. R. App. P. 32(g), the undersigned counsel certifies:

1. This brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B)(ii), 37(e), and Circuit Rule 32.1(a)(4) because this brief contains 6,974 words, excluding the parts exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately-spaced typeface using WordPerfect X4 in Times New Roman 14 point font in text and footnotes.

Dated: June 10, 2021

/s/ Stephen R. Bruce
Stephen R. Bruce
Attorney for Plaintiffs-Appellants