20-202

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

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Introduction

The named Plaintiffs and counsel have fought for nearly two decades to bring full relief to the 25,000 members of the class. The reformation of Cigna's Pension Plan was warranted by "Cigna's fraud" in "affirmatively and materially" misleading its employees about changes to their "Part A" retirement benefits while it "told them nothing" about the adverse side of those changes. 775 F.3d at 526, 530-31, 563 U.S. at 431. The reformation that this Court's 2014 decision affirmed requires that "the plan participants receive the full value of their Part A benefits, undiminished by wear away and inclusive of their early retirement benefits." 925 F.Supp. at 254-55. In a more formulaic manner, Cigna was ordered to provide class members "the full value of [their] accrued benefits under Part A, including early retirement benefits," "plus the Part B benefits accrued going forward from January 1, 1998." 775 F.3d at 517 n.3 and 518. This Court's 2014 opinion, the Supreme Court's 2011 decision, and the district court's prior 2008 and 2012 liability and remedies decisions explain the basis for this mandate, and what it means for the employees.

Despite having lost at trial and on two appeals, Cigna has persisted in relitigating issues that have already been decided, expressly or impliedly, in continuing efforts to identify "open" aspects in the court orders on "the full value"

of the relief in order to place "the Company's interpretation" on them and lessen the value of the relief. In the issues on appeal, Cigna obtained revisions to the mandate by one outright "modification" and by the district court "interpreting its own orders" contrary to the mandate and "declin[ing] to entertain" enforcement of the order that early retirement benefits be paid as the Part A Plan provides. Cigna does not dispute that those revisions have lessened the class members' recovery by "over $100 million." Opp. at 55.

Cigna's briefs below and its opposition here provide no good reasons for Cigna's restrictions on the payment of early retirement benefits or for using high "fixed" interest rates or "outdated" mortality tables to calculate offsets from the relief. Cigna's opposition fails to grapple with the Court's mandate, while it sows confusion by introducing three new defined and capitalized terms: "Remedy Determination Date," "Prejudgment Interest Rate," and "Offset Annuitization Variables," which Cigna sometimes calls the "Offset Annuitization Interest Rate." Opp. at 9-10, 40, 52-54. One would not know from Cigna's opposition, but none of these defined terms are from the district court's decisions. They are not even from Cigna's past briefing. Instead, Cigna has defined and capitalized them solely for this briefing, in which it uses them a stunning 80 times!

Cigna's defined terms are like "opposites" because not one of them means

what the name suggests:

– "Prejudgment Interest Rate" is defined by Cigna to include not just what lawyers and judges understand prejudgment interest to mean, but to cover interest "to Cigna for early payments made under Part B" (Opp. at 33), which Cigna also describes as though the class members were debtors who "owe Cigna interest." *Id.* at 35. Obviously, Prejudgment Interest Rate is not a good term to describe interest that is not prejudgment interest, but which allows Cigna, which was not the prevailing party, to inflate an offset from the relief with hypothetical credits.

–"Remedy Determination Date" is similarly not a "determination date" but is defined by Cigna to refer to the commencement date for early retirement benefit payments, Opp. at 10, 53, except with no reference to "early retirement" that corresponds with the Plan's terms or with the references in the mandate and prior decisions to providing the Part A early retirement benefits.

– "Offset Annuitization Variables" is also confusingly defined by Cigna to refer to the "fixed" interest rates and "outdated" mortality tables that Cigna wants to use to increase offsets from the relief, rather than the "variable" interest rates and mortality tables at retirement that this Court, the Supreme Court, and the district court prescribed, and that Cigna criticizes Plaintiffs for insisting on. *Compare* Opp. at 10 *with id.* at 33.

Since Cigna did not use these terms before and has defined them to mean something close to the opposite of what each term suggests, this Court would have to retranslate each of the 80 times these terms are used in Cigna's opposition brief. Rather than defend the district court's "declin[ing] to entertain" the issue of Cigna's restrictions on the payment of "early retirement benefits," Cigna says, for instance, that the district court did not abuse its discretion concerning the "Remedy Determination Date" and that the Plaintiff class "waived" any challenge to it, Opp. at 27-32. Respectfully, these are rabbit holes that this Court should not go down.

I. The Scope of the Mandate Includes the Payment of Early Retirement Benefits and the Interest and Mortality Factors Allowed for Any Offset to Be Taken Out of the Relief by the Cigna Defendants.

Throughout practically all of its brief, Cigna repeats that the standard of review is for "abuse of discretion," and that review should be "highly deferential" because the district court has "broad discretion" and is owed "substantial deference." Opp. at 3, 19, 20-22, 24-27, 31-33, 40-41, 44-45. But then, in the last section of its brief, Cigna concedes that the standard of review for conformity with the mandate is "de novo." *Id*. at 48.

That last section contests not one of the principles related to enforcing mandates that Plaintiffs-Appellants' opening brief laid out. Indeed, Cigna cites with approval *In re Coudert Bros., LLP*, 809 F.3d 94 (2d Cir. 2015), Opp. at 49,

which is the *same case* Appellants cited under its full name of *Statek Corp. v. Dev. Specialists, Inc.* In *Statek/Coudert*, this Court held that "we review de novo whether the judgment comports with [the] mandate," 809 F.3d at 98 (citing *Carroll v. Blinken*, 42 F.3d 122, 126 (2d Cir. 1994)) and that "the lower court must carry out its duty to give the mandate 'full effect'" and "cannot vary it, or examine it for any other purpose than execution; ... or review it, even for apparent error, ... or intermeddle with it, further than to settle so much as has been remanded." Discretion is thus "cabined by the mandate." *Id.* at 98 (citing *Puricelli v. Republic of Argentina*, 797 F.3d 213, 217 (2d Cir. 2015)). "The district court must follow 'both the specific dictates of the remand order as well as the broader 'spirit of the mandate.'" *Id*. at 99.

The quote on which Cigna relies goes on to explain that to decide whether an issue was left "open," the court must examine "the scope of a mandate," which "may extend beyond express holdings, and precludes relitigation both of "matters expressly decided" and "issues impliedly resolved." 809 F.3d at 99. In *Statek/Coudert*, even though the mandate "did not expressly address ... the merits," the decision of the bankrupcy court was within the scope of the mandate because this Court had "impliedly foreclosed" the ground on which the bankruptcy court relied and the bankruptcy court's "decision fell short of *applying* [the rules] – it

merely *considered* them." *Id.* at 99 (emph. in orig.). "The absence of a 'clear answer'" was "no reason to abandon the issue to be decided pursuant to the mandate," or to "read[] out other words from our decree." *Id.* at 100-101.

As this indicates, the mandate is not only a single sentence or sentences in this Court's decision, but it encompasses what is "expressly" and "impliedly resolved" in the entire opinion. The lower court is further "barred from reconsidering or modifying any of its prior decisions that have been ruled on by the court of appeals. *Burrell v. United States*, 467 F.3d 160, 165 (2d Cir. 2006).

Cigna contests none of this, nor does it directly contest the longstanding principle that "[c]ourts of equity can no more disregard statutory ... requirements and provisions than can courts of law." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327-28 (2015); *accord*, *Magniac v. Thomson*, 56 U.S. 281, 302 (1854); *Rees v. Watertown*, 86 U.S. 107, 122 (1874).

This Court's 2014 decision established the mandate by affirming the district court's order to provide "the full value of [their] accrued benefits under Part A, including early retirement benefits," "plus the Part B benefits accrued going forward from January 1, 1998." 775 F.3d at 517 n.3 and 518. Not only is this a clear mandate, but there were extraordinarily-detailed decisions from this Court, the Supreme Court, and the district court in 2008 and 2012 to apply to give "full

effect" to this mandate.

But, here, the district court "declin[ed] to entertain" the issue about early retirement benefits that is clearly part of the mandate, and said it had decided the interest rate and mortality issues on the basis that Cigna's positions were "more persuasive" or "more appropriate" without resort to the mandate. SA14, SA27. By giving Cigna more opportunities to relitigate key parts of what had already been resolved, the district court's "decision[s] fell short of applying" the mandate's letter and spirit. This Court's 2014 decision foreclosed the district court from allowing Cigna either to take away "valuable" early retirement benefits or the "valuable" "insulation from interest-risk" provided by the accrued benefits under the Part A Plan. While this Court's decision and the decisions that it affirmed did not make the remand into the "mechanical process" the district court expected, 925 F.Supp. at 264, the district court had to return to the mandate and the analysis and instructions in the prior decisions to determine how its discretion was "cabined."

Cigna's opposition characterizes the "specific interest rates," "mortality assumptions" and "timing" of early retirement benefits as "details," *id*. at 1, 5, 29, and it asserts that "crafting the specific calculations needed to implement the A+B methodology" is not within the "compass" of the mandate. *Id*. at 32, 49. To support this, Cigna offers only conclusory assertions that:

– "those issues were not discussed by the Court in the 2014 appeal," *id.* at 5;

– "none of these methodology issues were addressed or implicated in the district court's 2012 *Amara IV* opinion or this Court's 2014 *Amara V* affirmance," *id.* at 19;

– this Court's 2014 decision "did not expressly or impliedly consider the three methodology issues that Plaintiffs challenge in their appeal now," *id.* at 49;

– "those issues were [not] addressed in any way by this Court's prior decision in that appeal," *id.* at 51; and

– "Plaintiffs ... cannot point to any language of this Court's mandate that is violated by the district court's rulings on the methodology issues they challenge." Opp. at 51.

On every one of these issues, however, Plaintiffs-Appellants' opening brief pointed to extensive language from the decisions of the district court, this Court, and the Supreme Court showing that:

– "the full value" of the A+B reform "includ[es] early retirement benefits," which are to be "automatically" provided because if an employee does not commence that benefit "at the earliest opportunity to obtain the subsidized benefit – say, 55 – the value of that benefit diminishes with each passing year," *see* Br. at 27-28;

– "the full value" of the "accrued benefits under Part A" includes the "valuable" "insulation from interest-rate risk," *id*. at 37-39;

– the interest added to lump sums already paid for the offset allowed to Cigna is to be determined "in each year" (aka "yearly") using §417(e) interest rates, *id.* at 45;

– any offset from the A+B relief based on the lump sums already paid

plus interest credits is to be made "as mathematically equivalent as possible" to the "annuity payments otherwise-due," *id*. at 48-49;

– if it is not "possible" to make the lump sum plus interest "mathematically equivalent" to the annuity payments otherwise-due, Cigna must "bear that risk," *id*. at 38-39; and

– the "price of an annuity" at retirement age "depends upon ... mortality assumptions at that time." *id*. at 54-56,

The categorical dismissals in Cigna's opposition imply that Cigna does not find a single one of these instructions to be applicable. Cigna even goes so far as to suggest that the mandate to provide "the full value" is "vague[]," saying that if taken to its extreme, it is "infinite." Opp. at 55. To top those assertions, Cigna suggests that its duty to carry out the mandate to provide "the full value" of the relief does not even "necessarily favor payment over non-payment." *Id*. at 56 (citing *Testa v. Becker*, 910 F.3d 677 (2d Cir. 2018)). Obviously, Cigna is trying to turn the mandate around. The mandated "full value" expressly includes "early retirement benefits," and providing "the full value" of the A+B relief necessarily means any offset must be "reasonable and appropriate" under the instructions Judge Kravitz gave and Judge Arterton and this Court affirmed, with Cigna "bear[ing] the risk" if it is not "possible" to make the lump sum plus interest "mathematically equivalent" to the annuity payments otherwise-due.

Cigna tries to avoid Judge Kravitz's 2008 remedies decision by saying it was

"vacated" technically. *Id*. at 54. But the Supreme Court's 2011 decision, Judge Arterton's 2012 decision on remand, and this Court in 2014 all adopted Judge Kravitz's analysis of early retirement benefits, interest rates, and mortality. Judge Arterton summed this up by saying that "[n]either party has put forward compelling reasons why ... this Court should alter the form of relief granted four years ago." 925 F.Supp.2d at 249. This Court said that Judge Arterton "incorporated Judge Kravitz's equitable analysis, which in turn incorporated the facts found in his prior opinion." 775 F.3d at 532.

Cigna's defense of unfettered district court discretion also asks this Court to ignore the related statutory requirements, including the prohibition in the Supreme Court's *Heinz* decision on the imposition of "materially greater restrictions on receipt" of early retirement benefits and the Treasury Department's rules against the use of "lookback" interest rates and "outdated" mortality tables in determining present values. According to Cigna, this Court should just accept Cigna's conclusory assertion that none of these rules apply -- even though the district court actually made no such determinations.

A. The District Court Erred in "Declin[ing] to Entertain" the Issue of Cigna's Restrictions on the Payment of Early Retirement Benefits.

District courts do not have discretion to "decline to entertain" issues about the mandate. Cigna does not deny that its Part A Plan provided employees with generous and "valuable" early retirement benefits and that the mandate requires it to provide "the full value" of those benefits. The mandate left no opening for Cigna to impose additional restrictions on the payment of early retirement benefits.

While maintaining its position that these issues "were not addressed in any way," Cigna indirectly responds to some of the instructions Appellants quoted on early retirement. Most astonishingly, Cigna boldly asserts that the mandate does not require it to provide early retirement benefits that "mirror the plan terms in every way." Opp. at 47-48. There is nothing in the mandate to support this and Cigna expressly proposed to the district court that it would provide the Part A early retirement benefits "in the same form, and at the same time" as in "§4.3" of the Plan. JA91-92; *see also* JA98, 799-802.

Cigna also contests Judge Kravitz's instruction "that the Part A early retirement benefits should be 'automatically provided.'" Opp. at 53. Cigna asserts that this instruction "was premised on his understanding that, for unpaid participants, their Part B Initial Retirement Account would be converted back into Part A annuity benefit and paid out as an annuity." *Id.* Actually, Judge Kravitz

expressly said that this instruction was because class members "should not now be penalized, and prevented from receiving benefits for which they are otherwise qualified, simply because CIGNA failed to provide them with accurate information at the time the retirees made their original choice among benefit options." 559 F.Supp. at 219. Thus, class members like trial witness Lillian Jones were to "automatically" be provided their valuable early retirement benefits, rather than being "penalized" based on the age when they had taken a Part B distribution.

Not only is the provision of early retirement benefits expressed in this mandate and these prior decisions, but in *Central Laborers v. Heinz*, 541 U.S. at 740, the Supreme Court unequivocally ruled that under ERISA §204(g)'s anti-cutback protection "placing materially greater restrictions on the receipt" of early retirement benefits "reduces the benefit just as surely as a decrease in the size of the monthly payment." Cigna dismisses *Heinz* as "only implicated where a plan amendment reduces certain benefits." But "reformed" is defined as "amended" or "corrected," *see, e.g., Webster's Third New Int'l Dictionary*, and both this Court and the Supreme Court describe reformation as involving "two steps": "first, an order that "the terms of the plan [be] reformed," ... and second, an order that the plan administrator "enforce the plan as reformed." 775 F.3d at 522-23 (quoting 563 U.S. at 435, 131 S.Ct. at 1876); *accord*, *Laurent v. PricewaterhouseCoopers, LLP*,

945 F.3d 739, 749 (2d Cir. 2019).[1]

The district court never applied *Heinz* or determined whether the letter and spirit of the mandate allowed Cigna to impose this new and material restriction on payment of early retirement benefits. Instead, the district court "declined to entertain" the issue because Appellants did not "fully pursue it." SA27-28. Appellants' opening brief has gone over in great detail the record related to this, showing that Plaintiffs raised this issue in a timely manner. Br. at 30-37. Because Cigna does not contest any of those citations to the record, Appellants will not repeat them all here.

Cigna turns to decisions on "waiver." *See* Opp. at 27, 31-32. But Cigna points to no place where the district court found "waiver" and Cigna never even cites the elements for "waiver." Cigna miscites *Brown v. City of New York*, 862 F.3d 182, 187 (2d Cir. 2017), which only holds that an abuse of discretion standard applies to a determination that a party has *not* waived an argument. *Brown* does not give a district court "discretion" to find waiver when there is no "intentional

[1] *Cottillion v. United Refining Co.*, 781 F.3d 47, 55 (3d Cir.), *cert. denied*, 136 S.Ct. 198 (2015), also recognizes that ERISA §204(g) protects against a "sub rosa amendment." If any doubt could still remain about *Heinz*'s applicability, Cigna adopted a formal "amendment" in February 2019 to make the remedy benefits "payable ... at the time and in the form and amount as provided in the Amara Orders." JA914.

relinquishment of a known right." *Accord, United States v. Yousef*, 327 F.3d 56, 155 (2d Cir. 2003).

Without a district court determination of "waiver,"Cigna moves to an outright fiction that Cigna proposed this restriction on payment of early retirement benefits in 2015 and, without objection from the Plaintiffs, the district court "adopted" it in the January 2016 Ruling. Cigna thus represents that "the district court held that remedy payments would be calculated at the '*later of* earliest retirement age under Part A or actual date of payment' of Part B benefits." Opp. at 12. On the next page, Cigna essentially repeats the same assertion, saying that the "court accepted Cigna's proposal for the Remedy Determination Date." *See also id.* at 19, 27-31, 45-46. But no matter how many times Cigna repeats this story, it is *not* true. The district court never "held," "adopted" or "accepted" any restrictive methodology for the payment of early retirement benefits.[2] What the district court adopted was Cigna's proposal to provide the Part A early retirement benefits "in the same form, and at the same time" as provided in "§4.3" of the Part A Plan. JA91-92, 98. By restricting the payment of early retirement benefits, Cigna violated

[2] Indeed, the district court expressly rejected Cigna's proposal that the interest rates used to convert lump sums to annuities should be controlled by "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." JA213.

both the mandate and the district court's orders on remand, as well as the Supreme Court's *Heinz* decision.

B. The Interest Rate Credits Allowed to Be Offset From the Relief Were Established by Judge Kravitz's Prior Remedies Decision Which Judge Arterton Adopted and This Court Affirmed.

Because of Cigna's fraud, "Plan participants had a 'reasonable expectation ... that Part B would protect all Part A benefits.'" 775 F.3d at 532. To give the remedy full effect, any interest credits that Cigna is permitted to add to lump sum payments previously made under Part B and then offset from the A+B relief must leave "all Part A benefits" protected by conforming with the instructions on "reasonable" offsets that this Court affirmed. Judge Kravitz ruled in 2008 that for class members who had already been paid lump sums under Part B, "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. Once 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 employee's retirement." 559 F.Supp.2d at 216.

Judge Kravitz ruled that the interest credits to the lump sums previously distributed must be "reasonable" and he provided instructions on what this means. *Id*. at 216-17. Judge Arterton adopted Judge Kravitz's instructions in 2012, 2016,

and 2017. 925 F.Supp. at 249, JA211-213, JA 342 n.2. Judge Arterton ruled that Judge Kravitz's instructions were to use "yearly" interest rates. JA212-13. After Cigna challenged this, Judge Arterton affirmed this ruling again. JA342 n.2 (the interest credits are to be "calculated each year using the 30-year Treasury rate ..., instead of fixing the interest rate at the 30-year rate available ... prior to commencement of benefits").

The "reasonable" interest rates that Judge Kravitz prescribed in 2008, and that Judge Arterton affirmed thus adjust each year with market conditions. The preamble to the interest crediting regulations codified at 1.411(b)(5)-1(d)(1)(iv)(B) cogently explains the risk in "fixing" an interest crediting rate in years in which the current market rate has declined:

> "[B]y definition, fixed rates do not adjust with the market. As a result, the use of any fixed rate will result in an interest crediting rate that is above a then-current market rate of interest during any period in which the current market falls below the fixed rate."

79 Fed.Reg. 56442, 56451 (Sept. 19, 2014).

When the district court modified Judge Kravitz's instructions in July 2017 to allow Cigna to receive higher "fixed" interest credits based on the interest rate in effect in the year the Part B lump sum was provided, the district court clearly erred. With this modification, the district court allowed Cigna to credit itself with rates that were far above market rates and the rates in the "explicit instructions" by Judge

Kravitz that Judge Arterton adopted and this Court affirmed in 2014. The district court found no error in the prior order, but decided Cigna's approach was "more appropriate." SA13-14. The district court even recognized this was a modification of its prior order, which had used "yearly" IRC §417 interest rates. SA1, 4, 13-14.

The district court's modification of the prior rulings was not based on any new financial or other evidence or authority, but on a pitch Cigna's counsel made about how the participants who received lump sums could have protected themselves against declining interest rates by purchasing "30-year Treasury bonds." JA391, 526, 561-62. At trial, Plaintiffs established that Cigna had "told its employees nothing" about the effect of declining interest rates, 563 U.S. at 431, which Cigna tried to excuse by telling Judge Kravitz that it was "entirely unexpected and unpredictable" that interest rates would decline. 534 F.Supp.2d at 347-48. Now, a decade after the trial, Cigna's counsel argued that Cigna's employees should all have seen the declining interest rates coming and bought 30-year Treasury bonds. Of course, no one would need the "insulation" from "interest-rate risk" if interest rate fluctuations were so predictable.

Cigna's newfound position that class members like Lillian Jones should have protected themselves from "interest-rate risk" by buying 30-year Treasury bonds rested on disclosures Cigna never made and perfect hindsight. Br. at 44. Most

critically, Cigna's new position had already been rejected. Judge Kravitz had explained that reasonable interest credits should conform with the rates used "in the same time period to calculate the lump sum present value of retiring participants' annuities," 559 F.Supp.2d at 216, 221, similar to the interest credits to Cigna's Part B accounts which are "the same for all participants" "[i]n any given year." 534 F.Supp.2d at 302. This was the mandate this Court affirmed and that the district court was to give "full effect."

There was no reason or discretionary basis to modify the mandate to allow Cigna to use one "fixed" rate from the year when the Part B lump sum was distributed. And the only party to gain from this is Cigna. Remarkably, Cigna offers as support for the district court's ruling a quotation where the district court got "interest rate risk" turned around and, at Cigna's urging, said the interest credits should shift this risk "from the Plan to plan participants." Opp. at 34 (quoting SA13-14). This is the opposite of what this Court's mandate was intended to do, and two pages later Cigna says Appellants "misunderstand [the district court's] rationale." *Id*. at 36. Cigna then tries to justify shifting interest-rate risk to the plan participants by sophistry, saying that this "allow[s] class members to select the economic environment in which to take their [Part B] benefits." Opp. at 36. The part about purchasing "30-year Treasury bonds" is replaced by saying participants

should have engaged in a "commercial transaction" to protect themselves against interest rate declines, which even the savviest investors did not foresee or avoid with "commercial transaction[s]." *Id*. at 35.

Cigna asserts that Appellants have "mischaracterize[d]" Judge Kravitz's remedies' decision on the interest to be given on lump sums. Opp. at 52-53. Cigna concedes that Judge Kravitz prescribed interest crediting rates based on IRC §417(e), but it argues that Judge Kravitz did not say that they should be determined in "each year" or on an "annual" basis. *Id*. Cigna argues that Judge Kravitz's "'used in the same time period' language fixe[d] the interest rate at the rate at the time the retroactive lump sum is paid." Opp. at 55 (citing 559 F.Supp. 2d at 221). However, Judge Arterton read Judge Kravitz's "explicit instructions" the same as Appellants, even when she modified the prior rulings.*See* JA211-12; JA342 n.2; SA13.

Cigna asks this Court to rule alternatively that Judge Kravitz' instructions related to the offset were "vacated," Opp. at 54, without recognizing that Judge Arterton and this Court adopted Judge Kravitz's instructions, or seeming to realize that this would mean that Judge Kravitz's ruling allowing the offset, which Cigna quotes in its Statement of the Case (*id*. at 8), would be vacated, too.

Cigna steers away from directly trying to defend the high "fixed" interest rates the district court's modification of its earlier rulings has allowed Cigna to

credit for itself. Instead, Cigna rebrands the high "fixed" interest credits for itself as "Prejudgment Interest" and thereby connects them to something more commonplace and less self-serving than giving high "fixed" credits "to Cigna." Using its new term "Prejudgment Interest Rate," Cigna asks this Court to affirm the interest credits "to Cigna for early payments made under Part B," and even suggests an entitlement by comparing itself to a creditor and the class members to debtors who "owe Cigna interest." Opp. at 35.

Cigna conflates the issue of the interest crediting rates to assume for future years when a class member's retirement age is still in the future, with the issue of the interest crediting rates for each year from the lump sum distribution to the calculation of remedies. Opp. at 38. Appellants' opening brief explained that the latter issue, for example, of the interest credits allowed Cigna for a class member who received a lump sum in 2000 but will not reach the Part A retirement age until 2025, was one that Judge Kravitz did not directly address. Br. at 46. Cigna, and to an extent the district court, SA13-14, conflated the two issues, but the latter issue is an issue that needed to be resolved consistent with the mandate to use "reasonable and appropriate" rates for interest credits on any offset. As *Esden v. Bank of Boston*, 229 F.3d 154, 165-67 (2000), shows, the "projection" of interest is a "necessary" element of accrued benefit calculations, which is commonly resolved

by holding the "current value" constant. 229 F.3d at 165-67. As *Esden* and IRS Notice 96-8 illustrate, no one looks back to a rate from 20 to 30 years earlier and holds that rate constant.

Cigna cites *Frommert v. Conkright)*, 913 F.3d 101 (2d Cir. 2019), which it numbers as *Frommert II*, and *Doe v. E. Lyme Bd. of Educ.*, 962 F.3d 649 (2d Cir. 2020), for the district court's "discretion" to set prejudgment interest rates. Opp. at 36, 38. The 2019 *Frommert* decision actually follows *Jones v. UNUM Life Ins.*, 223 F.3d 130, 139 (2d Cir. 2000), which holds that the district court's discretion must consider "the need to fully compensate the wronged party," "considerations of fairness," and "the remedial purpose" of the award. Judge Kravitz had also followed *Jones v. UNUM*. *See* 559 F.Supp. at 220.

What Cigna calls *Frommert II* , which was actually *Frommert V,*[3] affirmed a district court order that Xerox employees should be awarded prejudgment interest at a Federal prime rate of 3.5%. It in no way approved high interest credits for the non-prevailing party to subtract from the relief awarded the prevailing employees. Indeed, the 2019 *Frommert* decision separately approved the district court's "new hire" approach, which was taken to avoid Xerox's imputation of "hypothetical

[3] *See Frommert v. Conkright*, 433 F.3d 254 (2d Cir. 2006); *Frommert v. Conkright*, 535 F.3d 111 (2d Cir. 2008), *rev'd and remanded*, 559 U.S. 506 (2010), and *Frommert v. Conkright*, 738 F.3d 522 (2d Cir. 2013).

appreciation of the prior payment." 153 F.Supp. 3d at 599, *aff'd*, 913 F.3d at 107.

C. The Prior Decisions that This Court Affirmed and Treasury Regulations Prescribe the Interest Rates to Calculate the Offset in Annuity Form.

This Court has recognized that the amount of an annuity is determined based on the "then-current interest rate" "when he or she retired." 775 F.3d at 516. The Supreme Court also said that "the price of an annuity" depends on "interest rates at that time" and even gave an example of how lower rates at retirement produce a lower annuity benefit. 563 U.S. at 427. 431. This Court has also specifically recognized that the accrued benefits under Part A provide "valuable" "insulation from interest-rate risk." 775 F.3d at 516.[4]

The record shows that for time periods when 30-year Treasury rates have averaged well below 4%, Cigna has been calculating offsets in annuity form to subtract from the A+B relief by using interest rates of from 5.12% up to 6.15% from the years from 1998 to 2002. JA548, 809. The audaciousness of Cigna's "lookback" to high interest rates to inflate the offset from "the full value" of the reformation warranted by "Cigna's fraud" (775 F.3d at 526; 925 F.Supp.2d at 252)

[4] Cigna says this Court's statement about the Part A accrued benefits' "insulation from interest-rate risk" "has no application here" because it has to do with "wear-away." Opp. at 54. But the A+B remedy was adopted to provide relief from "wear-away." 775 F.3d at 517, 527 n.13; 559 F.Supp.2d at 212.

which was in large part about whether the Part A accrued benefits were protected from declining interest rates, is breathtaking. Originally, Cigna proposed to the district court that it would "*not* perform this calculation until the individual participant reaches his or her earliest retirement age under the terms of Part A, so that the interest rate and mortality assumptions under the Plan *at that time* are used." JA104; JA107 (emph. added).

Cigna provides no explanation of how it flipped around its own position, or how its use of "lookback" interest rates to calculate offsets from the relief can possibly conform with this Court's mandate or the Treasury regulations. Judge Kravitz prescribed, and Judge Arterton adopted, the use of annuitization interest rates that make the lump sum plus interest "as mathematically equivalent as possible" to the annuity payments otherwise due. The interest rates that do that are the rates in effect when the annuity is "otherwise due."Fixed" interest rates from as many as 20 or 30 years earlier are not used by any insurer or regulator to calculate annuities at retirement age.

As Cigna acknowledges, Judge Kravitz's instruction was "that the lump sum plus interest and the annuity payments otherwise due to date would be made as 'mathematically equivalent as possible.'" Opp. at 53. But Cigna implausibly asserts that this "said nothing about the use of Part A date rates." *Id*.. Judge Kravitz,

however, expressly prescribed the use of "the rate used in the same time period by the CIGNA Plan to calculate the lump-sum present value of retiring participants' annuities," which is the IRC §417(e) rate. 559 F.Supp.2d at 221; JA793 (Plan definition of "Applicable Interest Rate"). Judge Arterton also recognized that the interest rate "the Plan uses to translate back and forth from annuities to their present value ... varies from year to year as market conditions change." JA344.

Cigna tries to brush off the prohibition in Treas. Reg. 1.417(e)-1(d) against using "lookback" interest rates by saying those "provisions do not apply to the calculation of [an] offset as part of an equitable remedy fashioned by the district court." Opp. at 42. But the Supreme Court ruled in *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327-28 (2015), that "[c]ourts of equity can no more disregard statutory ... requirements and provisions than can courts of law."

Searching to defend the rates it is using, Cigna misreads the Part A Plan's reference to the "benefit commencement date" to mean the date when a participant took their Part B lump sum. Opp. at 10, 35. But the Cigna Part A Plan does *not* provide the Part B lump sum. so it also does not provide a commencement date for it. Instead, the Part A Plan defines the "Benefit Commencement Date" to mean "the first period for which an amount is paid as an annuity or in any other form." JA792.

Cigna also argues that a more "consistent approach" would be to apply the

same annuitization interest rate if two participants receive lump sums in the same year but reach retirement age in different years. Opp. at 42. Cigna's position is no defense to the mandate or the Treasury regulations, and it is economic nonsense. No market for annuities looks back to interest rates from 20 or 30 years ago to determine the price of an annuity (much less looks back to the interest rate in 1998 for one person reaching retirement age in 2018, while looking back to the interest rate in 2010 for another, as Cigna's "fixed" rates do).

Disrespectfully, Cigna casts aspersions on Judge Kravitz by asserting that "Judge Arterton even acknowledged in the Methodology Rulings that Judge Kravitz was not aware of ... the need to calculate the offset for the Part A benefits paid as part of Part B lump sums." JA202; JA351 n.2. Judge Kravitz was, of course, acutely aware of this, that's why he gave "explicit instructions" on how to calculate the offset and, contrary to Cigna's assertion, Judge Arterton never "acknowledged" anything else and referenced, as did this Court, Judge Kravitz's "careful calibration of the interests at stake." 925 F.Supp.2d at 265; 775 F.3d at 532.

As support that the district court had "discretion" to "interpret[] its own orders" to allow Cigna to use higher interest rates for its offset, Cigna miscites *PACA Tr. Creditors of Lenny Perry's Produce, Inc. v. Genesco*, 913 F.3d 268 (2d

Cir. 2019). In that case, the defendants were *not* entitled to the offset they seek," not because of the district court's discretion in interpreting its orders, but because, analogous to this case, the offset "would be inconsistent with Congress's intent ... to 'broaden the protections afforded to produce suppliers.'" *Accord, Statek/Coudert*, *supra*, 809 F.3d at 98 (district court discretion is "cabined by the mandate"); *Garcia v. Yonkers Sch. Dist.*, 561 F.3d 97, 103 (2d Cir. 2009) ("district court's interpretation of its own order is generally reviewed for abuse of discretion" but "we review de novo the legal question of whether the district court issued a preliminary injunction or restraining order in satisfaction" of the law).

Without saying so directly, Cigna is admitting that the district court was merely "interpreting its own orders" and not interpreting the prior decisions that were part of the mandate, or the Treasury regulations on "lookback" interest rates. Because there have been record low interest rates for more than a decade, it was clearly at odds with this Court's mandate to allow Cigna to use high "fixed" interest rates from the late 1990's and early 2000's rates to inflate offsets from the A+B reformation. After misleading its employees on the effects of declining interest rates on their retirement annuities, it was unconscionable and a breach of fiduciary duty for Cigna to seek to undermine the mandate by taking offsets from the relief that continue to "shift interest-rate risk from the Plan to plan

participants."

D. Cigna's Use of "Outdated" Mortality Tables for Offsets Conflicts with the Prior Decisions and Treasury Regulations.

No annuity provider or regulator uses "outdated" mortality tables to perform annuity calculations, and the district court erred in allowing Cigna do so. Cigna suggests Plaintiffs coined the term "outdated." Opp. at 43. But this is the term the Treasury Department uses for what the district court allowed Cigna to do. The Treasury Department says that the use of "outdated mortality tables" causes a "permanent loss of retirement assets," 82 Fed. Reg. 46389, 46393 (Oct. 5, 2017), and that the "applicable mortality table" is the table "on the date when the present value is determined." Treas. Reg. 1.417(e)-1(d)(2).

As Plaintiffs showed below, this is not just a legal requirement. The provisions in Cigna's Pension Plan on the "Applicable Mortality Table" provide for use of the "any successor table prescribed by the Commissioner of Internal Revenue," JA793, as Cigna's opposition indirectly concedes. Opp. at 43. The Supreme Court has also recognized that the "price of an annuity" at retirement age "depends upon ... mortality assumptions at that time." 563 U.S. at 427. And this Court has also recognized that the reformation was in part required because Cigna took a mortality "haircut" in calculating the value of the Part A benefits. 775 F.3d at 515-16. The district court did not explain why it was permitting Cigna to use

"outdated' mortality tables, other than to say it went along with allowing Cigna to use "fixed" interest rates. SA27, 32. No one can equitably or legally justify using "outdated" mortality tables from the year of lump sum distributions to calculate retirement age annuities, or annuitized offsets, 10, 20 or 30 years later.

Cigna tries to confuse its use of "outdated" mortality tables with Appellants' position on whether to use the "successor" mortality table in effect when the relief calculations were made or the mortality tables in effect at the Part A retirement dates when those dates were before 2018. Cigna is correct that Plaintiffs originally said the mortality table in effect at the Part A retirement age should be used, but Plaintiffs refined this because the Treasury regulations and the Plan's definition of the Applicable Mortality Table use "any successor table prescribed by the Commissioner" as of the determination date. JA793. Plaintiffs' refinement of their position did not give Cigna a "Get Out of Jail Free" card to go back to mortality tables from decades ago in order to serve its financial interests.

II. Plaintiffs-Appellants Have Not "Waived" their Motion to Enforce and Order Cigna to "Show Cause" on Contempt.

It is difficult to understand Cigna's reasoning on how Appellants did not appeal the denial of contempt and have thereby "waived" such rights. *See* Opp. at 20. Plaintiffs appealed the Court's decision denying the motion to enforce and for sanctions (and the denial of reconsideration of that decision). The district court did

not reach Plaintiffs' request to order Cigna to "show cause" why it is not in contempt because the district court denied the motion to enforce. If the denial of the motion to enforce is reversed, the district court will need to reach the "show cause" motion.

Because the district court previously agreed with Cigna on the issues on appeal, it may be less likely the district court will grant the motion to show cause on remand. While Appellants appreciate that, their responsibility is to enforce this Court's mandate on behalf of the unpaid and underpaid class, and address the show cause order on remand. Cigna's securities disclosures have already revealed that, since March of 2016, Cigna has been identifying "aspects" of the district court orders that Cigna considered "open to interpretation" and applying "the Company's interpretation" to them. Br. at 9-10, JA323.

Conclusion

For the foregoing reasons and the reasons given in the opening brief, Plaintiffs-Appellants pray that the appealed decisions be reversed and the mandate of this Court, including the prior decisions on which it is based, be given full effect.

Respectfully submitted,

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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 of Fed. R. App. P. 32(a)(7)(B)(ii) and (e) and Circuit Rule 32.1(a)(4)(B) because this brief contains 6,994 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: December 14, 2020

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