UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JANICE C. AMARA, individually and on behalf of all others similarly situated, *Plaintiffs*, v. CIGNA CORPORATION and CIGNA PENSION PLAN, *Defendants*.	Civil No. 3:01cv2361 (JBA)

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR ATTORNEYS' FEES, INCENTIVE AWARDS, AND EXPENSES AND APPROVAL OF FRCP 23(h)(1) NOTICE TO CLASS

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Summary

The 17.5% fee award that Class counsel are requesting is not unreasonable or excessive, and it is well-supported by the ERISA and non-ERISA decisions cited in the opening memo. With the exception of a misguided challenge to this Court's authority to award expenses "normally charged to fee-paying clients," CIGNA's opposition to the fee motion rests on the contention that the value of the A+B relief is "significantly less than half" of not only the amount Class counsel estimate, but also the amount CIGNA itself estimated in its 10-K's for 2011 and 2012. CIGNA's assertion that the value is over $100 million "less" comes on the heels of its representation to this Court, just two days earlier, that CIGNA was not prepared to take a position on the value but needed "a lot of time" "to figure out how much each person's benefit is without their opening account balance, and then to determine the amount of the offset." Tr. of 5/21/2015 Tel. Conf. at 6-7.

The analysis by Mr. Rugeley in the accompanying supplemental declaration shows that CIGNA's diminution of the $186 million reserve in CIGNA's own 2011 and 2012 10-K's to $80 million is entirely attributable to the use of higher interest rates. As far back as the 2007 bench trial, everyone recognized that "wear-away" would be much less with higher interest rates. 534 F.Supp.2d at 303-4. So it is no surprise that if CIGNA could only use higher interest rates, it could diminish its obligation substantially. The higher interest rates that CIGNA proposes are, however, not only unavailable to class members in the marketplace but they are also not mandated by the Plan's terms and ERISA. The only effect of CIGNA's higher rates would be to diminish the judgment by artificially inflating the offsets to be subtracted from "A+B". Judge Kravitz recognized that interest needs to be

credited when distributions have occurred, but he made clear that those rates must be "reasonable." 559 F.Supp.2d at 269. In this context, "reasonable" means market rates, as limited by applicable Plan terms and ERISA. The Second Circuit expounded on this in *Frommert v. Conkright*, 738 F.3d 522, 530 (2d Cir. 2013), holding that Xerox's proposed offset was "unreasonable" because "no provision in the Xerox Plan defines the offset in accordance with the method the Plan Administrator advocates" and it "produces an absurd and contradictory result" of "mak[ing] the rehired employees worse off under the Plan." Here, as in *Frommert*, CIGNA cannot contrive to diminish the relief due by using higher interest rates to inflate the offset to the "A+B" relief.

If the court has doubts about the value of future payments, the Court can defer resolution of the party's divergent positions until later. *See, e.g.*, *Duahime v. John Hancock Mut. Life Ins.*, 989 F.Supp.2d 375, 379-80 (D. Mass 1997). Thus, if this Court is not ready to rule at this stage on those higher interest rates, this Court can defer a ruling on the value until the FRCP 23(h) notice is issued and the parties' briefing on the "detailed methodology" for providing A+B relief, including "assumptions," is complete.

I. The 23(h) Notice Is Revised In Response to CIGNA's Comments

At this juncture, the most pressing issue is to approve and mail the notice. FRCP 23(h) provides that this Court cannot award fees and nontaxable costs until class members are notified of the fee request and have the opportunity to object. In response to CIGNA's comments and the 5/21/15 conference call with the Court, Class counsel have edited the FRCP 23(h) notice to ensure that it is a notice this Court can approve.

To make the proposed notice as close as possible to a consensus notice, we revised it to: (1) remove the personalized data for each class member, and (2) provide notice to the class of CIGNA's contention that the value of the common fund is "significantly less" than $197 million. While CIGNA's representations about the personalized data to be inserted in the notice are misleading, Opp. at 17-18, Class counsel have thus revised the 23(h) notice to remove the personalized data. The attached notice has been further revised to state that CIGNA contends that the value is "significantly less." Because CIGNA represented to this Court two days before that it needed "a lot of time" to arrive at a value and because CIGNA's $80 million value is asserted without any accompanying calculations comparable to those provided by Mr. Rugeley, we have not included the $80 million figure in the notice. We believe the notice should say that CIGNA contends the value of the common fund is "significantly less," although CIGNA's 2012 financial statements estimated the value as $186 million. The notice will illustrate the effect of the 17.5% award in concrete terms, e.g., if the A+B relief provides a $50 per month benefit increase, the benefit increase will be $41.25 per month net of fees.

II. There are No Significant Issues About the Fee Percentage or Expenses

It is important to observe what CIGNA's opposition does not contest–the summary of hours, the hourly rates, the lodestar, the reasonableness of the expenses, and the incentive awards. And most notably, CIGNA "take[s] no position on what percentage of the common fund should be awarded." Opp. at 11. As mentioned, 17.5% is well-justified under the case law. Indeed, on the same day as our motion, Judge Underhill approved a ***35%*** award

on a $140 million ERISA recovery in *Haddock v. Nationwide Financial Services, Inc.*, C.A. 01-cv-1552, Dkt.#601–***twice*** the percentage requested here with no precedent comparable to ***Amara***.

Equally notably, CIGNA's opposition offers no arguments about why any of the five criteria that this Circuit has held must be considered in *Goldberger v. Integrated Resources*, 209 F.3d 43, 50 (2d Cir. 2000), weighs against the requested common fund award. CIGNA cites a few cases where implied multipliers lower than 5 have been used, without seriously distinguishing the cases with multipliers of 5 or more. *Compare* Opp. at 8-10 with Mem. at 29-30. The cases where courts police high multipliers are almost always short-lived securities class actions, *see, e.g.*, *In re Merrill Lynch Sec. Litig.*, 2007 WL 313474, *23 (S.D.N.Y. 2/1/2007), nothing like this epic battle over ERISA remedies. The most important factor making those cases nothing like this one is the level of risk and significance of the case–enormous here, small in those cases.[1]

CIGNA offers a silly argument that this Court should stretch out the payment of fees over the next "seventy years." Opp. at 11-13; Dkt.#420 at 11. *Masters v. Wilhelmina Modeling Agency*, 473 F.3d 423, 437 (2d Cir. 2007), holds that common fund fees are to be paid immediately based on the "entire fund" rather than on claims-made or other discounted basis. CIGNA does not distinguish or cite *Masters* by name. Opp. at 13 n. 10.

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[1] If the value of the common fund were any lower, CIGNA concedes that the multiplier is lower, too, e.g., 17.5% of $155 million is equal to a multiplier of 4 based on a lodestar of $6.8 million. *Cf.* Opp. at 11.

CIGNA's argument against awarding over $880,000 in expenses incurred by the Class' lead counsel for experts is also silly. CIGNA does not contest the reasonableness of the $370,000 in expert fees incurred in this groundbreaking litigation. Nor does CIGNA contest that these are out-of-pocket expenses "normally charged to fee-paying clients." *Reichman v. Bonsignore, Brignati & Mazzotta P.C.*, 818 F.2d 278, 283 (2d Cir. 1987). *Reichman* is directly on point here because CIGNA's entire trial presentation and its entire presentation on remand rested on the testimony of an actuarial expert. If Plaintiffs had not incurred the reasonable expenses of an actuarial expert, Plaintiffs would effectively have been disarmed.

CIGNA's argument that expert expenses are not recoverable under ERISA §502(g) unless they fall within the ambit of "costs" recoverable under 28 U.S.C. §§1821(b) or 1920, *see* Opp. at 14, is misguided. Awards for expert expenses are ***not*** restricted to "costs" under 28 U.S.C. §§1821(b) or 1920 but may be awarded as part of a "reasonable" attorneys' fee award under ERISA §502(g)(1). *Reichman*, which involved both ***ERISA*** and ADEA claims, held that "awards of attorney's fees in civil right suits under fee shifting statutes" "normally include those reasonable out-of-pocket expenses incurred by the attorney and which are normally charged fee-paying clients." 818 F.2d at 283. The rationale "is that attorney's fees include expenses that are 'incidental and necessary' to the representation, provided they are 'reasonable.'" *Id.*; *accord*, *Pappas v. Watson Wyatt*, 2008 WL 45385, *9 (D.Conn. 1/2/2008); *Algie v. RCA Global Communs.*, 891 F.Supp. 875, 898 n. 13 (S.D.N.Y. 1994); *Cefali v. Buffalo Brass Co.*, 748 F.Supp. 1011, 1023 (W.D.N.Y.

1990); *Tourangeau v. Uniroyal*, 1987 WL 54374, *26 (D. Conn. 3/3/1987).

In *Evans v. Books-A-Million*, 762 F.3d 1288, 1298 (11th Cir. 2014), the Eleventh Circuit recently followed *Reichman*, holding that ERISA §502(g) "should be interpreted consistently with similar language in other fee-shifting statutes," including 42 U.S.C. §1988. The Eleventh Circuit held that "under 42 U.S.C. § 1988– which, like §1132(g)(1), allows for a 'reasonable attorney's fee'–a party may recover all reasonable expenses incurred in case preparation, during the course of litigation, or as an aspect of settlement of the case." Therefore, "the definition of costs under §1920 is not controlling and ... Evans' expenses ... may be awarded as attorneys' fees if the district court determines they were reasonably incurred in the course of case preparation, settlement, or litigation." *Id*. at 1299. *Evans* thus follows *Reichman* in holding that "reasonable litigation expenses" "may be recovered under §1132(g)(1) if it is the prevailing practice in the legal community to bill fee-paying clients separately for those expenses."

Even if the expert expenses were recoverable under ERISA §502(g), the expenses would be recoverable as part of the Court's equitable authority to surcharge to redress fiduciary breaches. The Supreme Court held in *Amara* that surcharge provides relief "for a loss resulting from a trustee's breach of duty." 131 S.Ct. at 1880. Surcharge requires a breaching fiduciary to restore "the amount necessary to compensate fully for the consequences of the breach." *Res. 2d of Trusts*, §205 & cmt. a. Bogert recognizes that "legal fees of a beneficiary or cotrustee incurred in successfully asserting a claim against the trustee for breach may, in the court's discretion, be charged against the trustee,

personally." *Trusts and Trustees* (3d ed.), § 970, at 304-5. *Accord*, Note: "Embracing Equity: A New Remedy for Wrongful Health Insurance Denials," 90 *Minn L. Rev.* 1447, 1466 (May 2006); *F.J. Hanshaw Enters. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1142-43 (9th Cir. 2001); *Public Service Co. v. Chase Manhattan Bank,* 577 F. Supp. 92, 110 (S.D.N.Y. 1983); *Parker v. Rogerson*, 350 N.Y.S.2d 950 (Sup. Ct. N.Y. 1973).

It is also within this Court's equitable discretion to award the expected costs of notice and monitoring. CIGNA does not distinguish the cases we cited on the costs of noticing and monitoring (4/10 Mem. at 35 citing *West v. Manon and In re WorldCom, Inc. ERISA Litig.*), or cite any cases to the contrary. CIGNA also offers no rationale for why the members of the class should have to shoulder the costs of noticing or monitoring from the common fund.[2] The disingenuous efforts to duck the obligations to provide retirement benefits that have been seen throughout this lawsuit are CIGNA's choices, the costs of which should not be borne by class members from their recovery. Significantly, CIGNA has left entirely intact the paragraph in the proposed FRCP 23(h) notice about expenses, indicating that CIGNA does not expect this Court to adopt its position.

III. CIGNA's Suggestion that the Common Fund Is $100 Million "Less" Is Based on High Interest Rates Inconsistent With the Judgment and ERISA

Although this Reply is limited to 10 pages, and we will have the opportunity to

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[2] CIGNA contends that monitoring is "additional relief" prohibited by the "final judgment" rule. Opp. at 16. But a "court that invokes equity's power to remedy" "has the continuing duty and responsibility to assess the efficacy and consequences of its order." *Brown v. Plata*, 131 S.Ct. 1910, 1946 (2011).

respond to the "detailed methodology" that CIGNA is scheduled to file on July 13th, we want to point out here that, after cutting through the obscure terminology, the only difference between CIGNA's approach and the Class' (and the estimates in CIGNA's 2011 and 2012 10-Ks) is that CIGNA is proposing to use much higher interest rates than 4.5% at three steps in the process of calculating the relief. CIGNA thus proposes to use:

(1) 5.5% to bring cash distributions forward, Henderson Supp. Decl. ¶14,

(2) 5.24% to 5.69% to convert the artificially accumulated cash amounts to annuities, *id.* at ¶13, and

(3) Interest rates of up to 6.81%, with an "effective interest rate" of 6.13%, to convert the net relief in annuity form back to a present value, *id.* at ¶10.

As Mr. Rugeley's supplemental declaration shows, CIGNA should not be able to use higher interest rates to diminish the relief that the members of the class cannot themselves enjoy without substantial risk of loss. As this Court already found, "by Defendants' own estimate to the SEC, the *Amara* litigation creates liability of $186 million." Dkt.#407 at 3. Those estimates by CIGNA were based on 3.5% to 4.5% interest rates, which CIGNA's management continues to use to discount "pension benefit obligations." The higher interest rates CIGNA proposes to implement this judgment are not only inconsistent with those rates, but they are also not mandated by the Plan or ERISA. The effect of their use would be to unreasonably and artificially inflate the offsets to be applied against "A+B," thereby undermining the judgment in favor of the Class.

CIGNA tries to cloak its efforts to diminish relief by characterizing the higher interest rates as "required" by ERISA or "ERISA prescribed." Opp. at 2-7, 11-12;

Henderson Supp. Decl. ¶¶15-16, 19. But this is simply untrue. In one place, CIGNA's actuary admits he is using a 5.5% rate of interest to accumulate account balances because "**CIGNA has directed [its] use**," ¶14–even though the Plan specifically provides for a 4.5% rate of interest, as he acknowledges four paragraphs later. In a second place, he proposes on behalf of CIGNA to use 5.24% to 5.69% interest rates in effect in November 2008 (just as the recession was hitting) to convert the amounts artificially accumulated with the CIGNA-directed 5.5% interest rate to an annuity form in 2015, Henderson ¶13 and Ex. 2 to Rugeley Supp. Decl.–even though ERISA §205(g)/ IRC §417(e) specifically provide that "the present value shall not be less than the present value calculated by using" the applicable interest rates, which currently are no higher than ***1.35% to 4.47%***. IRS Notice 2015-24. In a third place, CIGNA contrives to use still higher interest rates from the minimum funding rules of up to 6.81% to discount the annuities computed with these aforementioned interest rates back to a present value, Henderson ¶10, even though ERISA §205(g)/IRC §417(e) again specifically prescribes interest rates of no more than 4.47% for the purpose of calculating the "present value" of accrued benefits and CIGNA itself currently uses 3.75% to discount "pension benefit obligations." CIGNA's reliance on 29 U.S.C. §1083(h) and IRC §430 (*see* Opp. at 2-3, 6; Henderson Supp. Decl. ¶¶9-10, 15-16) is totally misguided and disingenuous. *See, e.g.*, IRS Notice 2012-61 (the "MAP-21 segment rates" "based on the 25-year average" "provide funding relief for DB plans" and "should not be used for...calculating the minimum present value requirement for distributions subject to § 417(e)(3)").

Conclusion

For the foregoing reasons, Plaintiffs request that the FRCP 23(h) notice to the class be approved and that their motion be granted.

Dated: June 9, 2015

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CERTIFICATE OF SERVICE

I certify that on this 9th day of June, 2015, the foregoing Plaintiffs' Reply in Support of Motion for Attorneys' Fees, Expenses, Incentive Awards and Expenses and Approval of FRCP 23(h)(1) Notice to Class, the Supplemental Report/Declaration of Malcolm Rugeley, and the revised Proposed FRCP 23(h)(1) Notice were filed electronically through the CM/ECF system. Notice of this filing will be sent by e-mail to all counsel listed below by operation of that system:

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