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

PLAINTIFFS-APPELLANTS' OPPOSITION TO MOTION TO DISMISS THE APPEAL

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Table of Contents

Table of Authorities

Cases

Statutes, Regulations and Rules

Miscellaneous

Introduction

Cigna is attempting an end-run around appellate review of the district court's compliance with this Court's mandate. In three places, Cigna's motion cites the Plaintiffs-Appellees' opening brief, which was filed on May 19, 2020, *see* Mot. at 1-2, 13-14, 20, but Cigna leaves out the central point that the appealed district court decisions fail to give "full effect" to this Court's mandate and related law. Cigna audaciously never mentions that the mandate is to provide "the full value" of the A+B relief "including early retirement benefits," and "the insulation from interest-rate risk under the Part A plan" in order to remedy Cigna's "intentionally" and "affirmatively" misleading representations about retirement benefits. 775 F.3d at 516, 518, 527-28, 530-31.

This Court's precedents establish that if a district court's interpretation of a decree does not conform with the mandate, this Court has jurisdiction to review the decision *de novo* to ensure the mandate is "given full effect." *Carroll v. Blinken*, 42 F.3d 122, 126 (2d Cir. 1994). *Accord, Statek Corp. v. Development Specialists*, 809 F.3d 94, 98 (2d Cir. 2015) (district court has "no discretion in carrying out the mandate"); *In re Ivan F. Boesky Sec. Litig.*, 957 F.2d 65, 69 (2d Cir. 1992) ("district court's actions on remand should not be inconsistent with the express terms or the spirit of the mandate"). Equally pertinent is that the "trial

court is 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's motion further ignores centuries-old precedents that equitable orders always "must follow, or in other words, be subordinate to the law," *Magniac v. Thomson*, 56 U.S. 281, 302 (1854); *accord, Rees v. Watertown*, 86 U.S. 107, 122 (1874), and that this Court "retains the authority" to review violations of the law "de novo." *Carroll*, 42 F.3d at 126.

In moving to dismiss the appeal of the district court's August 2019 decisions, Cigna goes so far as to contend that Plaintiffs-Appellants should *never* be allowed to appeal those decisions, without even recognizing the point in the opening brief that those decisions violate the mandate and related law. *See* Pls. Br. at 48-54. In seeking dismissal of Plaintiffs' appeal of the district court's July 2017 decision, Cigna similarly never recognizes the precedents on "interlocutory" orders "merging" into the final order. Instead, Cigna simply proclaims that the denial of reconsideration of the July 2017 decision was the district court's "final" ruling on "the parties' methodological disputes." Mot. at 15-17. Cigna makes this proclamation even though *six* additional orders related to "methodological disputes" followed that denial, including one where Cigna stated that it "changed its methodology to reflect the Order," Dkt. 553 at 2, and two more where the

district court directly ordered the changes. Dkt.560 at 1; SA30.

At the end of its motion, Cigna suggests that Plaintiffs "venture novel arguments about how to implement equitable relief." Mot. at 21. In psychological terms, this is Cigna "projecting" what it is doing onto the Plaintiffs. Plaintiffs make no "novel" arguments, but rely on this Court's decision, the Supreme Court's decision, and the district court's prior decisions from 2008 and 2012 for what is required to give "full effect" to the mandate to provide "the full value" of the "A+B" retirement benefits. Br. at 27-28, 37-39. Plaintiffs are entitled to appellate review of compliance with the mandate "as of right."

The Relevant Background Section in Cigna's Motion Is Riddled With Disinformation.

Cigna's "Relevant Background" section is riddled with disinformation about the district court's orders and other parts of the record. This is not the first time Cigna has done this. Below, Plaintiffs prepared a summary exhibit of Cigna's misquotations and misstatements of the district court's orders, which the district court admitted as "Exhibit 2." *See* JA918-920; Dkt. 578.

In the instant motion, Cigna tries to invent "proceedings" in which Cigna made no "intentionally" or "affirmatively" misleading representations to defraud its employees of retirement benefits and in which this Court never ordered Cigna

to provide "the full value" of the "A+B" benefits, "including early retirement benefits" and the "valuable" "insulation from interest-rate risk under Part A plan" to remedy that fraud. 775 F.3d at 516, 518. Cigna's motion nowhere mentions this mandate, and the background section finds Cigna still arguing over both liability and relief issues on which it lost, and even unfurling a new argument about how Cigna paid "substantial" Part A benefits to people "early, ahead of the schedule that the "A+B" remedy required." Mot. at 3-6.

For Cigna, the district court's 122-page decision about Cigna's violations of ERISA contains no instructions, but can be reduced to one sentence: "Yet while the transition was lawful, the court found that Cigna's descriptions of the transition misled participants." Mot. at 4. There is nothing about the Supreme Court's 2011 decision, which went over the district court's 2008 liability and relief determinations in detail, 563 U.S. at 428-30, or the 2012 district court decision on remand ordering "reformation" of Cigna's retirement plan which adopted the analysis in the 50-page 2008 relief decision. 925 F.Supp.2d at 265.

Most consequentially, Cigna's Background leaves out this Court's 2014 decision, written by Judge Livingston and joined by Judges Jacobs and Lynch. That decision unanimously affirmed the reformation over Cigna's appeal and explained the "intentional misrepresentations" the "A+B" relief is to remedy. 775

F.3d at 525, 527. Cigna's motion cites this decision perfunctorily once, Mot. at 5, and then cites it in a footnote as somehow supporting a proposal *made by Cigna* that the district court rejected. *Id*. at 9 n.1. As Plaintiffs-Appellants' opening brief shows, the decision of this Court, along with the district court's prior decisions, lays out a roadmap for the district court on remand. This Circuit's decision affirmed the relief that the district court ordered in 2008 and re-ordered in 2012, ruling that "class members will receive (1) the full value of their accrued benefits under Part A, including early retirement benefits, in annuity form; and (2) their accrued benefits under Part B, in annuity or lump sum form." 775 F.3d at 518. This Court also affirmed that Cigna had "intentionally" failed to disclose that the "risk" of "fluctuating interest rates" was being "shifted" to participants "under the new Part B plan" and that "the insulation from interest-rate risk under the Part A plan was *valuable*." *Id*. at 516 (emph. added).

After leaving *all* of this out, Cigna manages to squeeze in a two-paragraph discussion of the "setoff" Cigna is to be allowed. Mot. at 6-7. But that discussion forgets all of the "explicit instructions" related to that setoff that the district court adopted, *see, e.g.* JA211-212, only remembering that Cigna is "to receive full credit." *Id.* Cigna never recognizes the late Judge Mark Kravitz's 2008 rulings on the interest rates and mortality factors to be used for this setoff, 559 F.Supp.2d at

216-17, 221, which were adopted in the 2012 district court decision, 925 F.Supp.2d at 265, and are part of the mandate. There is also nothing about Cigna "bear[ing] the risk" of any "overpayment" after this setoff, which both district judges ordered. 559 F.Supp.2d at 217; JA201. In Cigna's world, the district court was writing on a clean slate on remand, except to give Cigna "full credit."

Cigna's Background even rewrites the district court's decisions after the remand. Cigna never acknowledges that Judge Arterton's July 2017 decision granted Cigna's request to "modify its [prior] order." SA1.[1] Instead, Cigna asserts that Judge Arterton "clarified" the prior decision when the ruling unmistakably "reconsidered" it. *Compare* SA1, 13-14 *with* Mot. at 9-10. To reinforce this deception, Cigna refers to this decision in *nine* places as the "Clarification Ruling." Mot. at 9-11, 13-16, 18.

To further reframe the proceedings on remand, Cigna has divided the district court's decisions into three distinct categories of "proceedings" within three time periods: "Methodology Proceedings (2015-2017)," "Attorney's Fees Proceedings (2017-2018)," and "Enforcement Proceedings (2019-2020)." These

[1] The July 2017 decision also admits it is "shifting interest rate risk from the Plan to plan participants." SA14. This is in direct conflict with the mandate to provide participants with the "insulation from interest-rate risk under the Part A plan." 775 F.3d at 516.

three categories do *not* accurately reflect anything the district court said or did during these periods, and they conspicuously fail to account for the *six* additional orders the district court issued related to "the parties' methodological disputes" *after* the November 2017 denial of reconsideration, including:

- Rulings during a July 25, 2018 hearing about "the common fund" "dispute" and Plaintiffs' complaints about Cigna's "interpretations" of the Court's methodology rulings that "They [Cigna] haven't done anything. There's nothing to enforce because they haven't implemented it yet. That's the point at which I think your [Plaintiffs'] complaints, of which they are well on notice, come into play." JA656. In recognition of those disputes, the court ordered that the individual relief notices for the class must explain that "Cigna's going to pay X, but class counsel calculates it should be X+." JA647, 676.

- The October 17, 2018 "Ruling on Methodology for Calculating Attorneys' Fees" in which the district court recognized: "The parties dispute the proper calculation of the present value of the common fund recovery," which ... must be ruled on in order for remedy payments to begin issuing to class members." JA704. The court found "both parties agree that at least two of the methodological disputes at issue affect not only the present value of the common fund recovery but also the actual remedy amounts paid to class members." The court deferred ruling on those disputes but addressed the "two remaining methodological disputes" "[i]n light of the possibility that the dispute ... would not be captured going forward by any future ... contempt motion." JA704-705. In a subsequent response, Cigna acknowledged that it "changed its methodology [on early retirement benefits] to reflect the Order." Dkt.553 at 2.

- The November 29, 2018 decision awarding attorneys' fees, where the district court again recognized the outstanding disputes over the "remedy rulings" and decided that "[i]n order to avoid further delay in remedy payments to class members," the court would make the fee

award based on the common fund amount "as valued by Defendants" and "[i]n the event that Plaintiffs file and prevail on a motion to enforce their interpretation of the requirements on Cigna and the Court's previous rulings, resulting in additional benefits to be paid to class members, Cigna will be required to pay appropriate attorney's fees on any such additional remedy amounts found to be due." JA722-724.

"[T]he parties were [ordered] to exchange their individual results for each class member [with 30 days of this ruling] for inclusion in Plaintiffs' website benefit statement and in Cigna's mailed notices." Cigna was ordered to "mail these notices within 60 days of this ruling, and then pay any past due lump sums and back benefits no later than 30 days thereafter." JA728.

- The December 12, 2018 decision on *Cigna's* motion for clarification, which ordered Cigna to pay "small benefit cashouts" "regardless of any ... Part B cash balance benefits to which the class member also is entitled (or has received)." Dkt.560 at 1.

- The August 16, 2019 ruling granting Plaintiffs' motion to require Cigna to pay small benefit cashouts "without waiting for their Part B amounts to be paid," but denying the rest of Plaintiffs' motion to enforce, but SA30.

- The January 10, 2020 ruling denying Plaintiffs' motion to reconsider the aspects in which the motion to enforce had been denied. SA32.

Cigna selectively quotes the district court's statements at the July 25, 2018 hearing, but edits out all of the directions to Plaintiffs to file a "motion to enforce" if Cigna carried through with its "interpretations" of the methodology rulings. *Compare* Mot. at 12, 17 *with* Pls. Br. at 32-33. The district court placed "Defendant [Cigna] ... on full notice ... that it will be held to its fiduciary

obligations to ... prepare the notices of amounts due and pay the amounts," and "CIGNA implements [the relief] at its peril, and we are here in the event that they have violated the terms of the plan as reformed." JA656, 685.

Cigna's motion gives only a passing nod to the district court's "declin[ing] to entertain" Cigna's violation of the mandate to provide "the full value" of "early retirement benefits." *See* Mot. at 2, 20. Cigna never mentions that the district court relied on an inaccurate representation by Cigna in a footnote that it had repeatedly "advised" Plaintiffs of its position via emails from its counsel. *See* Pls. Br. at 33-36. Instead of defending the accuracy of its footnote, Cigna's Background invents two district court orders in its favor on early retirement benefits, *see* Mot. at 8, 9, ignoring the district court's adoption of Cigna's proposal to comply with the "§4.3" Part A plan provisions on "Early Retirement Benefits" and provide the "same benefits in the same form, and at the same time" as for all participants "under Part A." JA91-92; Pls. Br. at 30-31.

Cigna's Background also simply ignores the part of the August 2019 decision that allows Cigna to use "outdated" mortality tables, which conforms with no prior order or plan provision and clearly violates the law. *See* ERISA §205(g)(3)(B) and Treas. Reg. 1.417(e)-1(d)(2).

In a "recap" on pages 16-17 of its motion, Cigna introduces three more

misstatements about the proceedings below, the prime example of which is the assertion that Cigna responded to a motion by Plaintiffs by voluntarily "describing its methodological approach," when the district court actually *ordered* Cigna to "file a detailed methodology for providing the A+B relief ordered by the Court." JA79.

I. This Court Has Jurisdiction to Review the August 2019 and December 2019 Final Remedial Orders.

"Ensuring compliance with a prior order is an equitable goal which a court is empowered to pursue even absent a finding of contempt." *Berger v. Heckler*, 771 F.2d 1556, 1569 (2d Cir. 1985); *accord*, *Dulce v. Dulce*, 233 F.3d 143, 146 (2d Cir. 2000). "[W]here, as in this case, "civil contempt proceedings are instituted after the conclusion of the principal action ... the order disposing of the contempt proceedings is [also] appealable" as a final decision of a district court under 28 U.S.C. § 1291." *Latino Officers Ass'n City of N.Y., Inc. v. City of New York*, 558 F.3d 159, 163 (2d Cir. 2009) ("This rule encompasses appeals from orders both granting and denying post-judgment civil contempt sanctions").

With no recognition of this Circuit's precedents, Cigna argues that, unless this Court finds "contempt," there should be no appellate review – *at any time* – of the district court's August 2019 orders on Plaintiffs' motion to enforce. Mot. at 19.

The orders that Cigna asks this Court to *refuse* to review caused class members to lose nearly $100 million in relief by allowing Cigna to increase the relief setoff through the use of old "lookback" interest rates and "outdated" mortality tables. JA607-609.[2] That value is, moreover, *not* taken away evenly across the class; instead, thousands of class members have been left with none of the mandated "A+B" relief as a result of Cigna's positions. JA-777.

As the basis for nullifying Plaintiffs' right to appeal, Cigna relies on a miscitation and misreading of *In re Tronox*, 855 F.3d 84 (2d Cir. 2017), to give the district court wide, unreviewable discretion, not just to interpret its orders but to decide for this Court what does "nothing more than interpret and enforce a final injunction." *See* Mot. at 2, 19-20. The quotation on which Cigna relies is actually *not* what *Tronox* holds, but is what the appellee "argues." 855 F.3d at 95. *Tronox* instead recognized that whether a district court's decision is "merely interpretive" is for this Court to decide. *Id*. at 98 (following *Wilder v. Bernstein*, 49 F.3d 69, 72 (2d Cir. 1995) (interpretation of application of foster care consent decree to "kinship placements")). *Tronox* further recognizes that this Court will not engage in a "merits inquiry at the jurisdictional stage" and that interpretations involving

[2] "Lookback" interest rates are interest rates from an earlier time period, e.g., using a 6.15% interest rate applicable in the year 2000 for a benefit calculation in 2020. *See, e.g.,* Treas. Reg. 1.417(e)-1(d)(4).

matters of law are always reviewed *de novo*. *Id*. at 98-99.

In addition to misciting *Tronox,* Cigna misstates what the district court's August 2019 rulings said. The district court determined that, "in context," its prior order directing use of the "plan provisions in place when the lump sum was received" to calculate annuities at retirement age meant to use the interest rates and mortality tables "in effect at the time the lump sum was received." SA27. This cannot be "merely interpretive" because no "plan provisions in place" at any time even arguably provided for the use of "lookback" interest rates or "outdated" mortality tables to calculate annuities at retirement age. *See* Pls. Br. at 48-54.

In denying reconsideration, the district court added that the August 2019 ruling "*necessarily* considered and adhered to" its "ruling on reformation" and "the Second Circuit's opinion affirming that ruling." SA36 (emph. added). But the district court never explained how allowing Cigna to use "lookback" interest rates and "outdated" mortality factors to increase the setoff adheres to the "explicit instructions" in Judge Kravitz's prior decision that this Court had affirmed or the Treasury regulations on interest rates and mortality tables. *See* Pls. Br. at 48-54. Ultimately, Cigna is left with only its own proclamation, misquoting *Tronox* again, that the August 2019 rulings were "nothing more than" an interpretation of an injunction. Mot. at 20.

The district court's decision to "decline[] to entertain" the issue of whether Cigna is restricting early retirement benefits in violation of the mandate, the Part A plan's terms, and the "anti-cutback" rule in ERISA §204(g), 29 U.S.C. 1054(g), amounts to a refusal to adjudicate the merits, which this Court must be able to review. As Plaintiffs' opening brief sets out, *see* Br. at 27-28, this Court's mandate requires Cigna to provide "the full value" of the Part A plan's "valuable right to retire early." 775 F.3d at 515. This Court ruled that this reformation is appropriate because participants "believed that under the new plan all of their benefits accrued under Part A would be protected" and that cash balance benefits were adding to their Part A benefits. *Id*. at 532.

Initially, Cigna correctly proposed on remand to apply the early retirement requirements in "§4.3" of the Part A plan to provide the "same benefits in the same form, and at the same time" as for all participants "under Part A." JA88-89, 92. This is the proposal the district court adopted. JA215. However, Cigna changed its position later to impose a new requirement limiting the commencement of early retirement benefits until after "their actual [Part B] payment date." This is contrary to this Court's mandate, "§4.3" of the Part A plan, and ERISA's "anti-cutback" rule. Cigna only disclosed its intent to impose this new restriction to the district court in December 2017, JA577, and Cigna never made any motion for approval of

it as required by *CBS Broadcasting v. FilmOn*, 814 F.3d 91, 99-100 (2d Cir. 2016).

When Plaintiffs challenged Cigna's new restriction in February 2018, the district court stated that Cigna must be "put[] ... to the test of doing it right, and then, upon the actual not doing of it right ... then there are remedies." JA654. But when Plaintiffs moved to enforce, as the district court had instructed, the court "decline[d] to entertain" the motion on the basis of the purported "failure" of Plaintiffs to "fully pursue the issue" "in the motions related to methodology." SA28. Plaintiffs have set out the flaws in that decision's reliance on an inaccurate footnote from Cigna in the opening brief. Br. at 33-36. Without going over each of those flaws, it is clear that the decision to "decline[] to entertain" Plaintiffs' motion is not "merely interpretive" of any prior order and must be reviewed by this Court.

For these reasons, Plaintiffs are entitled to appellate review of the district court's August 2019 and January 2020 rulings allowing Cigna to use old "lookback" interest rates and "outdated" mortality tables and to restrict early retirement benefits in violation of this Court's mandate and the law.

II. This Court Has Jurisdiction to Review the Interlocutory July 2017 and November 2017 Decisions.

The district court's November 7, 2017 denial of reconsideration of its July 14, 2017 ruling was not a "final" order under 28 U.S.C. §1291 that Plaintiffs were

required to immediately appeal. A "final decision is one that conclusively determines the pending claims of all the parties to the litigation, leaving nothing for the court to do but execute its decision." *Mead v. Reliastar Life Ins. Co*., 768 F.3d 102, 109 (2d Cir. 2014). Finality also requires "some manifestation by the district court that it intends the decision to be its final act in the case." *See, e.g., Nelson v. Unum Life Ins. Co.*, 468 F.3d 117, 119 (2d Cir. 2006) (per curiam).

"When a district court enters a final judgment in a case," it is well established that "interlocutory orders rendered in the case typically merge with the judgment for purposes of appellate review." *Shannon v. GE*, 186 F.3d 186, 192 (2d Cir. 1999). "[T]hese rules advance the historic federal policy against piecemeal appeals, while preserving the right to appeal adverse rulings." *Id.*; *accord, Anobile v. Pelligrino*, 303 F.3d 107, 115 (2d Cir. 2001). "The fact that the challenged orders are part of post-judgment litigation warrants no different conclusion." *Vera v. Republic of Cuba*, 802 F.3d 242, 247 (2d Cir. 2015).

In this case, the "final" remedial order was the district court's January 10, 2020 denial of reconsideration of Plaintiffs' August 2019 motion to enforce. There was no manifestation by the district court of finality before that. When the district court considered its 2012 order of reformation to be "final" for purposes of appeal, the Order clearly stated, "The Clerk is directed to enter final judgment." 925

F.Supp.2d at 266. There was no such manifestation of finality in the 2017 rulings. Instead, the district court's intent was to issue *all* of the rulings related to "implementing the remedy" on remedial methodology, noticing, and payment before any further appeal. Those remedial rulings, including on "methodological disputes," extended well beyond the November 2017 date to which Cigna would now pin FRAP 4's 30-day appeal period. Indeed, three of those subsequent rulings ordered Cigna to *change* its remedial methodology. *See supra* at 7-8. If the district court had adopted the position Cigna is now advocating, it obviously would have led to "piecemeal" appeals irreconcilable with the district court's intent to have no "further delay" until Cigna "begins implementing the remedy." JA681-82, 722. Especially considering that it has been nearly a decade since liability was determined, Plaintiffs and the district court wanted to avoid the "further delay" in implementing relief that could result from piecemeal appeals. *See, e.g.,* Mot. at 5 ("the district court had stayed its 2008 and 2012 judgments pending both appeals").

Cigna relies on *United States v. Yalincak,* 853 F.3d 629 (2d Cir. 2017), which involved a narrow ruling under the Mandatory Victims Restitution Act. Mot. at 15-17. With respect, the issue here is not analogous to vacating an interlocutory order *sua sponte* eight years after-the-fact under the district court's inherent authority "to grant relief from erroneous interlocutory orders." 853 F.3d at 632. "The dispositive

question on appeal" in *Yalincak* was whether the district court's original order on "restitution credits" was "final or interlocutory," with the principal consideration being "as a practical matter whether the district court's grant of [such credits] could ever be challenged" if "appeal had to wait until Yalincak discharged his restitution obligations entirely." *Id*. at 638. Here, Cigna never recognizes that "dispositive question" at all, much less the principal consideration used to resolve it. *See* Mot. at 16-17.

The other case on which Cigna relies is *In re Am. Preferred Prescription, Inc.*, 255 F.3d 87, 93 (2d Cir. 2001), which involved an appeal of the appointment of a bankruptcy trustee after a bankruptcy plan was finalized. Cigna cites *American Preferred* as holding that in cases with a "protracted remedial phase," substantive post-judgment orders "have readily been deemed appealable." Mot. at 16. As with Cigna's misquoting of *Tronox*, *American Preferred* establishes no such rule. Instead, it looks at factors "that favor and oppose preclusion" for "the particular type of order at issue." Most noticeably, Cigna edits out entirely this Circuit's consideration of:

> "the risk of precipitating extra appeals. If some post-confirmation orders are given preclusive effect against parties who could have but did not appeal them, even though the orders had no immediate effect on the rights of such parties, some parties will feel obliged to appeal some orders only to protect their position in the event that the order is

subsequently applied to affect their rights."

255 F.3d at 94. In *City of Bridgeport v. Bridgeport Guardians*, 2007 WL 4376109, *2 (2d Cir. 2007), this Court declined to accept jurisdiction of a "post-judgment order issued in a case involving a protracted remedial phrase," ruling that an "order to submit a plan" was non-final because "it does not conclusively determine the rights of the parties." *Accord*, *Henrietta D. v. Giuliani*, 246 F.3d 176, 180-81 (2d Cir. 2001) (order for declaratory relief was not final notwithstanding "directive to close the case" when "other remedial issues remain unresolved"); *Mead*, *supra*, 768 F.3d at 110-11 (order remanding to ERISA plan administrator with instructions on calculating benefits was not "final" because "district court left unresolved the amount of relief" and there were "continuing disputes regarding the total amount of the award").

In this case, the district court never manifested the intent that the July 2017 ruling was the "final act" on remand, and it issued six additional rulings related to "methodological disputes" after that, including *three* that ordered Cigna to "change[] its methodology." *See supra* at 7-8. Indeed, the district court clearly states in its November 2018 ruling on fees that although "the parties dispute each other's common fund valuation ... pursuant to the Court's remedy rulings," the court wants "to avoid further delay in remedy payments to class members" to ensure that Cigna

"begin[s] implementing the remedy as quickly as possible." JA722, 728.[3]

An additional factor against preclusion of an appeal of this interlocutory order is "sufficient overlap in the factors relevant to the appealable and nonappealable issues." *McCullough v. Wyandanch Union Free Sch. Dist.*, 187 F.3d 272, 277 (2d Cir. 1999). As the opening brief explains, the issues concerning the interest rates the district court allowed Cigna to use in the July 2017 modification and in the August 2019 denial of the motion to enforce share the same legal errors about shifting "interest-rate risk" to the plan participants and not following Judge Kravitz's "explicit instructions" on the interest rates to use for the setoff. Br. at 42-43, 51-52. Further showing the "overlap," the August 2019 ruling expressly relied on the reasoning in the July 2017 decision. *See* SA27.

Cigna places considerable emphasis on a statement by Plaintiffs in the "Notice of Value of Common Fund Recovery" that "the Court has completed its orders on the methodology for computing individual relief under the A+B reformation," quoting this five times in its motion. Mot. at 1-2, 11, 14, 17. The simple response is that "completed" is not the same as "final" for purposes of

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[3] *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-203 (1988), which Cigna cites at 17 n.3, is not relevant because the attorneys' fee ruling here recognized that the common fund recovery remained subject to "disputes" about the "remedy rulings." JA722-723.

appeal. Nothing in the July 2017 decision or the November 2017 denial of reconsideration manifest that the district court intended for that to be the "final act" on remedies so as to force an immediate appeal. Moreover, Plaintiffs quickly learned from Cigna's December 2017 response to this Notice that the methodology orders were not "completed" because Cigna was applying "Company interpretations" to the rulings to impose new requirements on early retirement benefits and to apply old interest rates and "outdated" mortality tables to increase the setoff and take away nearly $100 million in relief. JA607-609.

Cigna's motion indirectly suggests that Plaintiffs might have been able to take an interlocutory appeal from the July 2017 decision as "modifying" the "injunction" under 28 U.S.C. §1292(a)(1). *See* Mot. at 20-21. Even if the district court had acknowledged that it was "modifying" the affirmed "injunction," as opposed to its "prior order," neither the district court nor Plaintiffs wanted "piecemeal appeals." "The fact that appeal might have been taken from various intermediate orders under an interlocutory appeal statute or an expanded version of the final judgment rule should not preclude reconsideration by the trial court or review on appeal from a traditional final judgment. The opportunity for an earlier appeal is intended to protect the appellant, not to forfeit the right to later review." *Algonquin Power Income Fund v. Christine Falls of NY*, 362 Fed. Appx. 151, 156

(2d Cir. 2010) (quoting Wright & Miller, *Federal Practice and Procedure,* §4433); *accord*, *Arthur v. Nyquist*, 547 F.2d 7, 9 (2d Cir. 1976) (interlocutory appeals under §1292(a)(1) "are not mandatory and an interlocutory order from which no appeal has been taken merges into the final decree"); *In re Agent Orange Products Liability Litig.*, 818 F.2d 179, 181 (2d Cir. 1987).

Cigna's proclamation that the 2017 decisions "conclusively resolved the parties methodological disagreements" and that "[n]o further proceedings about the appropriate A+B methodology were pending or contemplated" after the November 2017 denial of reconsideration, Mot. at 17, is totally unsustainable. As set out above, Cigna's trifurcation of the "proceedings" on remand into three categories in three distinct time periods, with all remedy orders concluding in 2017, Mot. at 7-14, is an artifice that fails to reflect the district court's *six* additional rulings related to "methodological disputes" after the November 2017 ruling (including *three* where Cigna was ordered to make changes). In a January 14, 2020 motion to discharge the supersedeas bond, filed only 4 days after the district court denied reconsideration of the motion to enforce, Cigna also recognized that the district court's "series of remedy orders" had just ended with the August 2019 "Motion for Reconsideration, which this Court also denied." Dkt.589-1 at 3. Plaintiffs are entitled to appeal the July 2017 decision as part of that "series of remedy orders."

Conclusion

For the foregoing reasons, Plaintiffs-Appellants respectfully request that this Court deny Cigna's motion to dismiss the appeal.

Dated: June 15, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

1. This response complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 5,160 words, excluding the parts exempted by Fed. R. App. P. 28(a)(2) and 32(f).

2. This response complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(5), and 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 the text and footnotes.

Dated: June 15, 2020

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