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08-3460 (XAP)

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-Cross-Appellees,

v.

CIGNA CORPORATION and CIGNA PENSION PLAN,

Defendants-Appellees-Cross-Appellants.

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

RESPONSE AND REPLY BRIEF IN SUPPORT OF
PLAINTIFFS-APPELLANTS-CROSS-APPELLEES

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SUMMARY OF ARGUMENT

ERISA's notice and disclosure requirements have "profound importance" for current and former employees as they make decisions about the terms and conditions of their employment or re-employment and their plans for retirement. [SlipOp 4]. Before people can make informed decisions, a company must honestly tell them when a plan amendment has been adopted that will significantly decrease their future pension accruals.

Here, CIGNA hid reductions of future pension benefits by 29% to 44% behind the mask of a new form of benefits based on notional accounts. CIGNA's employees were unable to translate the new lump sum description of benefits back into the traditional fixed-income form of benefits, so they could not tell if their future retirement benefits had been reduced and, if so, by how much. CIGNA made the lack of information worse by falsely promoting the cash balance conversion as a benefit "enhancement" and representing to its employees that their retirement benefits would be "comparable" or "larger" and that "each dollar's worth of credits is a dollar of retirement benefits payable to you." As if this was not enough, CIGNA falsely represented that it was enjoying no "cost savings" from the changes. [SlipOp 22, 24, 26, 29, 80-81, 96]. In its brief here, CIGNA continues the pattern of misstatements, asserting that "personal pension

statements" corrected any "vague and misleading references" and told participants all they needed to know. Br. 18, 21, 24, 28-30, 32, 39, 54, 56-57, 61. In three places, the District Court already correctly and decisively determined that this was not true. [SlipOp 82-83, 102].

The bench trial below was the first and only trial to date about a cash balance pension conversion. In a careful and incisive decision on disclosures, the District Court found violations of all of ERISA's disclosure requirements, concluding that CIGNA's disclosures were "downright misleading." [2/15SlipOp 3]. The employees have filed this appeal because the District Court's decision on relief backed away from affording a full remedy for those violations. As the District Court recognized, the "leverage" to ensure that companies comply with ERISA's requirements for full and timely disclosure of benefit reductions is the "realistic possibility" of "returning" to the prior benefit formula if the notice is inadequate or misleading. [SlipOp 27]. Similarly, the deterrent to SMM/SPD violations is the prospect that the "materially misleading statements" in the "required disclosures" will be enforced by holding that they have become "terms of the plan." [SlipOp 17-18, 31]. If those statutory remedies are not enforced, participants' future retirement benefits will be unprotected and companies will not be deterred from future violations. As Dobbs states in his treatise: "A right with no

effective remedy" is no right at all. *Law of Remedies*, §2.4(7).

Having found that CIGNA's disclosures were "downright misleading" because they led participants to believe that the new benefits were as good or better than the old, the District Court should have ordered the company to fulfill its promises as ERISA requires. Instead, it yielded to concerns about its authority and the cost to CIGNA of continuing its former pension formulas, a concern CIGNA never raised. This Court's decisions, especially *Frommert v. Conkright*, show that the District Court had discretion to reinstate the prior formula or order that "comparable" benefits be provided to remedy CIGNA's misleading representations about the amounts of its employees' future retirement benefits. The failure to do so simply cannot be reconciled with District Court's very strong findings on liability.

CIGNA's brief repeatedly insists that it is a windfall for its employees to receive anything "more than" the annuity equivalent of the current balance that CIGNA "told" them about in "personal pension statements." See Br. 18, 22, 32, 48, 56-57, 61. Yet, from CIGNA's perspective, it is evidently not a "windfall" for CIGNA to retain tens of millions of dollars in cost savings that CIGNA secured with the misleading representations that the District Court extensively documented. CIGNA wants the Court to permit it to profit from its proven

deceptions, while its employees continue to lose the retirement income that they reasonably expected. Neither ERISA nor this Court's precedents require or countenance such unseemly results.

ARGUMENT

I. CIGNA Misstates the Applicable Standard of Review: The District Court Did Not Exercise Discretion In Denying the Relief the Employees Requested; It Ruled that It Lacked Authority to Reinstate the Terms of the Prior Plan or Provide Comparable Benefits; With Respect to Its Cross-Appeal, CIGNA Fails to Recognize that the "Clearly Erroneous" Standard Applies to the District Court's Findings of Fact.

With respect to the employees' appeal, CIGNA asserts that the District Court was only exercising its "equitable powers" when it refused to reinstate the terms of the prior Part A plan as relief for the misleading representations in the Section 204(h) and SMM notices. Br. 49 (citing [SlipOp 26]). Citing *Frommert v. Conkright (II)*, CIGNA says the District Court acted "within its allowable discretion" in denying relief. But *Frommert (II)* actually says that "We review a district court's chosen remedy of an identified ERISA violation for an excess of allowable discretion." 535 F.3d at 117. In this instance, the District Court did not choose a remedy for the Section 204(h) violations or the misleading representations about "comparable" benefits, but determined that it was unable to do so, ultimately concluding that "returning to Part A" was an "impossibility,"

[SlipOp 29], and that making good on CIGNA's promises of "comparable" benefits would require it "entirely to rewrite" the Plan which it was not authorized to do. Because it involves a question of law, deciding that no remedy is available under a statute requires de novo review. See *Pell v. E. I. DuPont de Nemours & Co.*, 539 F.3d 292, 305 (3d Cir. 2008).

The District Court's concern about how it would be "extremely costly" to "extend Part A to as many as ten or twenty thousand additional employees," [SlipOp 25], was, furthermore, not based on statutory considerations and therefore could not be the basis for a proper exercise of its discretion. As the Supreme Court ruled in *Albemarle Paper v. Moody*, 422 U.S. at 416-17, a district court's discretionary decision to fashion relief must "be measured against the purposes which inform" the statute. Under statutes like the FLSA, "the statutory purposes [leave] little room for the exercise of discretion not to order reimbursement." Accord *Frommert*, 535 F.3d at 119 (district court was to select a "reasonable approach" "in light of the ERISA violations we identified in our prior decision"). In this instance, allowing serious violations to go unremedied, leaving thousands of employees with no benefit from this lawsuit, because of costs that are exactly matched by the promised benefits to employees undermines the purpose of the disclosure statutes–deterring undisclosed benefit cuts and arming participants with

information so they can bargain with their employer over the reductions or alter their plans to better protect themselves after their working careers are over.

In support of its cross-appeal of the more limited remedy the District Court ordered for CIGNA's failure to disclose periods of "wear-away," CIGNA miscites *Initial Public Offerings Securities Litig.*, 471 F.3d 24, 40-41 (2d Cir. 2006), for the proposition that "[t]he District Court's legal conclusion that it could award classwide relief ... is reviewed de novo." Br. 21. The *Initial Public Offerings* decision does not discuss the standard of review for "classwide relief" at all. Instead, the decision addresses standards for class certification.

In its cross-appeal, CIGNA also cites but never applies the "clearly erroneous" standard to the factual findings that it is contesting. For instance, CIGNA says repeatedly, in one form or another, that the District Court did not pay enough attention to the "personal pension statements that set forth the precise value of their account balance in the Plan." Br. 18, 21-22, 24, 32. But in three places the District Court expressly rejected the position that anything in those statements "negate[d] the defects in the previously provided notices and disclosures." [SlipOp 82]; see also *id*. at [83, 102].

Indeed, other than recite the "clearly erroneous" standard at the start, CIGNA's brief simply ignores it: First, without any announcement, CIGNA

substitutes a different set of facts in its 13-page "Statement of Facts" than those the District Court found below. The District Court's factual findings are set out at pages 4 to 30 of the Liability Decision ([SlipOp 4-30])and in each section of its decision thereafter. With but two exceptions, CIGNA's Statement of Facts does not rely on the District Court's findings. See Br. 5-17. An appellant or cross-appellant cannot go through a trial and then substitute its own findings for the lower court's on appeal. See *United States v. Certain Land in Newark*, 439 F.2d 670, 674 (3d Cir. 1971) ("statements of 'facts' in briefs are not to be considered as substitutes for evidence or findings made by the fact finder").

In the few places where CIGNA acknowledges that the District Court found something different, CIGNA acts as though any fragment of testimony or part of an exhibit that is, in CIGNA's view, "inconsistent" should lead to a reversal of the District Court's findings. Br. 27. This is a blatant misstatement of the "clearly erroneous" standard. In *Ceraso v. Motiva Enters., LLC*, 326 F.3d 303, 316-17 (2d Cir. 2003), this Circuit held that:

> "[t]he district court's findings of fact after a bench trial are not to be overturned unless they are clearly erroneous. This standard applies whether those findings are based on witness testimony, or on documentary evidence, or on inferences from other facts. In reviewing findings for clear error, we are not allowed to second-guess either the trial court's credibility assessments or its choice between permissible competing inferences....[T]he fact that there may have been evidence to support an inference contrary to

> that drawn by the trial court does not mean that the findings are clearly erroneous"; "where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."

In *Leyda v. AlliedSignal*, 322 F.3d 199, 208-9 (2d Cir. 2003), an ERISA case like this one, AlliedSignal represented that the district court made certain erroneous findings but this Circuit determined that there were "no such findings in the Trial Decision" and found that "there was evidence at trial" to support the district court's conclusions. Accord *Healey v. Chelsea Resources Ltd.*, 947 F.2d 611, 619 (2d Cir. 1991) ("The fact that there was evidence in the record to support Healey's view of the events, however, did not and does not require judgment in his favor." "The decision as to whose testimony to credit and as to which of competing inferences to draw was within the province of the district court as trier of fact").

These are important matters. As indicated, the District Court rejected CIGNA's factual assertions about the information conveyed in its "personal pension statements" in three places. [SlipOp 82-83, 102]. And the District Court never adopted the bullet-point synopses of testimony and exhibits that CIGNA reoffers here. Compare Br. 28-29 with Dkt.#251 at 52-54, 59-61. To illustrate, in one bullet point, CIGNA asserts that named Plaintiff "Gisela Broderick testified that based on her Part B annual account statement, she understood that she would not be entitled to the 'A + B' formula." Br. 28 (citing Tr. 84-85, 140-41). Not only

is the purported fact wrong, but CIGNA's citations are to unrelated parts of her testimony. CIGNA's counsel questioned Ms. Broderick along a related line in cross-examination, but he framed the inquiry quite differently, asking if Ms. Broderick believed she was entitled to both her Part A "accrued benefit" and her cash balance "closing balance." Tr. 133-134. Ms. Broderick testified she did not believe that, but that "part of my plan was to receive additional pension benefits from CIGNA, which in fact I did not." Tr. 139. She testified to the same thing on direct: She thought the cash balance benefits were "going to be added to my pension benefits." Tr. 104.

The named Plaintiffs and the employee class could continue to catalog the factual assertions in CIGNA's brief that are inconsistent with the District Court's findings and unsupported by the exhibits or transcript references. But the District Court already provided the parties a seven-day bench trial, a 122-page decision on liability, and a 50-page decision on relief. CIGNA had the same opportunity as the Plaintiffs to establish the relevant facts at trial. Unless CIGNA can show that a factual finding is "clearly erroneous," CIGNA should be relying on the District Court's findings instead of attempting to circumvent or subvert them. It is especially incongruous for CIGNA to try to substitute its own findings for the District Court's when CIGNA "limited its discovery to requesting documents from

and deposing the eight class members chosen by Plaintiffs, and decided not to call any class members at all as witnesses at trial." [6/13SlipOp 5].[1]

II. The District Court Has Full Authority to Remedy the Disclosure Violations.

The District Court recognized that "Plaintiffs request a declaration that Part B [the cash balance amendment] is void and an injunction ordering a return to Part A, or, failing that, an injunction remedying the misrepresentations identified by the Court in its Liability Decision (for example, by establishing A+B and 'comparable' benefits." [SlipOp 14-15]. However, the District Court did not grant either request. As shown in the employees' opening brief, the policy of the Act, the statutory language and the case law all show that the District Court had the power to provide this relief. CIGNA's brief does not defend the District Court's relief decision on any of the grounds given in that decision. CIGNA's brief offers no defense to the District Court's conclusion that relief for the Section 204(h) violation is an "impossibility" or that relief for the SMM violation would require the Court "entirely to rewrite" CIGNA's Plan.

Many cases about relief for ERISA violations concern the distinction

[1] At the argument on relief, the District Court said, "I expected [CIGNA] to have some witnesses who testified that they knew full well, but we actually had a trial and I didn't hear that from anybody." 4/30/2008 Tr. 94-95.

between actions under ERISA §§502(a)(1)(B) and 502(a)(3) and the Supreme Court's pronouncements in *Great-West v. Knudson*, 534 U.S. 204 (2002), and *Sereboff v. Mid-Atlantic Medical Services*, 547 U.S. 356 (2006), about the "equitable relief" available under ERISA §502(a)(3). CIGNA does not argue that any of those cases apply here, nor does it once mention ERISA §§502(a)(1)(B) or 502(a)(3). Thus, CIGNA is not contending on appeal that there is any structural bar to relief. Indeed, CIGNA's argument that the District Court's decision not to provide any relief for the Section 204(h) violation was "within its allowable discretion," Br. 49, presupposes that the District Court had the discretion to provide the full relief requested.

CIGNA also does not offer any response to this Circuit's holdings in *Frommert (I)* and *(II)* that undisclosed and non-compliant terms are "ineffective," 433 F.3d at 268, and that to remedy such violations the district court should "design a remedy to provide" participants "with the proper level of pension benefits in light of" the Section 204(h) violation by selecting "one reasonable approach among several alternatives" even if a different approach would cost the company less money. 535 F.3d at 119. There is also no distinction by CIGNA of *Varity Corp. v. Howe*, 516 U.S. 489, 493-94 and 505-6 (1996), where the Supreme Court affirmed full relief for employees, including reinstatement into a prior plan, based

on the Varity Corporation's remarkably parallel misstatements to "persuade the employees...to accept the change" and "avoid the undesirable fallout that could have accompanied" forthright disclosures. [2]

Rather than address these points, CIGNA places its cards on two arguments: First, CIGNA contends that ERISA Section 204(h) only required CIGNA to provide its employees with notice of the "freeze" that it used to transition to cash balance, Br. 50-53, even though the District Court found that freeze to be a "placeholder" that literally "disappeared" once the benefit reductions took effect. [6/13SlipOp 23]. Second, CIGNA argues that providing the employees with anything more than CIGNA wants to give them is a "windfall" for the employees, no matter how often CIGNA promised "comparable" or "larger" retirement benefits with no "cost savings" to CIGNA. See Br. 27, 53-57, 61.

CIGNA's first argument is essentially a call to reverse the District Court's conclusion that CIGNA violated Section 204(h), even though the District Court found a violation based on CIGNA's "downright misleading" representations, [2/15SlipOp 3], and ordered CIGNA to provide "a §204(h) notice regarding the

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[2] CIGNA also makes no effort to distinguish this Circuit's decisions on "unjust enrichment" in ERISA cases. See *Dunnigan v. Metropolitan Life*, 277 F.3d 223, 229 (2002) (restitution can be provided when "plan has realized an unjust enrichment"), and *Pereira v. Farace*, 413 F.3d 330, 340 (2005) ("defendant's unjust gain" can be recovered).

transition to Part B" that discloses "the true effect on [employees'] retirement benefits of the transition to Part B." [6/13SlipOp 28]. The Court did this because it determined that "the transition to Part B worked a significant reduction in the rate of future benefit accrual, meaning that a §204(h) notice was due." [6/13SlipOp 20]. The vacuousness of CIGNA's second argument resides in the premise that despite its disclosure violations, employees would receive a "windfall" if "ineffective" plan terms do not continue to limit what CIGNA provides. *Frommert* establishes that this is simply not true. Under the district court order which this Circuit affirmed in *Frommert II*, Paul Frommert and 103 other plaintiffs are receiving more than if the undisclosed and now "ineffective" phantom offset applied to determine their benefits. CIGNA would call this a "windfall" when all it does is give employees what the company promised and what the statute's notice rules require.

A. The District Court Has the Authority to Remedy the Section 204(h) Notice Violation By Reinstating the Terms of the Prior Benefit Formulas; Here, the Prior Benefit Formulas Are the "Part A" Formulas in Effect Before January 1, 1998.

The District Court's Liability Decision and its Relief Decision both found that CIGNA's cash balance conversion significantly reduced future retirement benefits. [2/15SlipOp 76-77, 6/13SlipOp 20]. The District Court found that CIGNA "affirmatively misled" the employees with representations of "enhancements" and

"comparable" or "larger" benefits. [2/15SlipOp 80-81; 6/13SlipOp 20]. The District Court determined that CIGNA was aware of the benefit reductions and "sought to negate the risk of backlash by producing affirmatively and materially misleading notices regarding Part B." [SlipOp 87]. The Court found that "CIGNA offered statements that misled plan participants into believing that significant reductions in the rate of future benefit accrual were not a component or a possible result of Part B." [SlipOp 80]. Rather than contest those findings, CIGNA ignores them and contradictorily asserts that "cash balance formulas are easier to understand." Br. 29.

The Relief Decision held that "plan participants at least deserve to know, albeit belatedly, the true effect on their retirement benefits of the transition to Part B." [SlipOp 28]. Accordingly, "CIGNA is ... ordered to supply accurate 204(h) notices to all members of the Class, including rehires.... [T]hese notices must satisfy current regulations to the extent relevant, and must be provided within a reasonable period." [SlipOp 48].

This appeal arises because at the same time that the District Court issued this Order, it held that it was powerless to reinstate the Part A benefit formula as relief for the Section 204(h) violation. In support of that conclusion, the District Court essentially said that it was boxed in. Without explaining why no alternative was

within its authority, the District Court concluded that "the apparently exclusive remedy of invalidation" would require "a return not to a viable benefit plan, but to a freeze" and that this "would harm, rather than benefit, Plaintiffs." [SlipOp 26-27] ("plan participants would return to a frozen Part A, rather than Part A itself .... As a result, plan participants would gain nothing, and CIGNA would face a minor inconvenience, but little else").

Plaintiffs-Appellants respectfully submit that the District Court's failure to find that it could reinstate the prior Part A provisions was not an "exercise of discretion" because the Court determined that it was unable to do so, ultimately concluding that "returning to Part A" was an "impossibility." [SlipOp 29]. While the exercise of a district court's discretion may be a matter for deferential review, concluding that the district court has no discretion is a conclusion of law.

With respect to the employees' appeal of the District Court's decision on the available remedies, one would expect CIGNA to discuss remedies for §204(h) violations, particularly because CIGNA is not appealing the District Court's Order finding a §204(h) violation or ordering CIGNA to provide notice to employees of the "true effect on their retirement benefits of the transition to Part B." Instead, without recognizing these findings or conclusions, CIGNA isolates some of the District Court's statements concerning the "freeze" and tries to persuade this

Circuit that all CIGNA ever needed to disclose was that "freeze" and as a result "a proper 204(h) notice was provided." Br. 51.

CIGNA blithely ignores the District Court's findings that the "freeze" that went into effect after December 31, 1997 was a "nominal" or "placeholder" freeze that "disappeared" once the 29 to 44% reductions in the employees' retirement benefits became effective on January 1, 1998. Compare [2/15SlipOp 74; 6/13SlipOp 23] with Br. 50-53. With the sleight of hand of a three-card Monty dealer, CIGNA takes isolated statements from the District Court's Relief Decision about the "freeze" and fashions the astounding argument that the cash balance formula actually "was an *increase*–not a reduction." Br. 52.

Obviously, the District Court disagreed with CIGNA's mathematical gyrations because it found a Section 204(h) violation from the transition to cash balance and ordered CIGNA to provide a 204(h) notice to current and former employees disclosing "the true effect on their retirement benefits" of the transition to cash balance. [6/13SlipOp 28, 48]. [3] By hewing to the line that "a proper 204(h) notice was provided," Br. 51, CIGNA lends no support to the District Court's position that while a very serious violation of the notice requirements occurred, the

[3] CIGNA twice asserts that Plaintiffs' expert agreed with it. Br. 6, 53. But the transcript to which CIGNA cites, Tr. 387-88, concerns a radically-different hypothetical.

remedy of reinstating the terms of the prior plan is not available.

Although CIGNA does not mention it, the District Court's Liability Decision is filled with findings that the "freeze" on which CIGNA bases its defense was "nominal at best" because "CIGNA made clear from the outset that its intent was to shift directly from Part A to Part B, with the freeze only as an interim stopgap." [SlipOp 74]. The Court held that "Permitting employers to avoid these important obligations simply by exploiting the technicality of 'freezing' old benefits before retroactively instituting new ones runs diametrically opposite" to the purpose of Section 204(h), "namely to protect employees' interests and their reasonable expectations." [SlipOp 75]; see also 8/23/07Tr. 99 (referring to the freeze as "a temporary condition to allow the pieces of paper to be drafted and put into place").

The Relief Decision also found that "the freeze served essentially as a placeholder, and was intended to disappear once Part B became operative." [6/13SlipOp 23] Moreover, the Court said that it "sees a risk here ... of CIGNA exploiting a technicality (a freeze that was intended to 'disappear' when no longer needed) to frustrate employees entitlement to notice under §204(h)." *Id*. at [SlipOp 24]. Although the Court ultimately concluded that the remedy of reinstatement was unavailable, it conceded that "by upholding the validity of the freeze amendment, and consequently not ordering the invalidation of Part B, the Court has permitted

CIGNA effectively to eviscerate the notice requirements of §204(h)...Such an outcome is particularly troublesome because, as the Court found in its Liability Opinion, CIGNA never intended the freeze to be permanent." [6/13SlipOp 27].

These were obviously very thoughtful and strong statements from the District Court. But with great respect, the District Court erred in concluding that reinstatement of the prior benefit formula is not an available remedy for the Section 204(h) violation. The Treasury Department's Section 204(h) regulations require notice to be provided if the amount of future benefits under an amendment is "reasonably expected" to be reduced in comparison with "the terms of the plan prior to amendment." Treas. Reg. 1.411(d)-6, Q&A 5 and 7 ([AD-7 to 9]). Under the Treasury regulations, "the terms of the plan prior to amendment" are CIGNA's "Part A" benefit formulas, and not the freeze that was "never intended ... to be permanent." In fact, CIGNA's Plan document expressly provides that the terms of the Plan "prior to January 1, 1998" are the "Part A" plan terms. [Ex1, §§1.39-1.40]. Indeed, those Part A provisions continued to be effective until March 31, 2008 for thousands of "grand-fathered" employees. [6/13SlipOp 25]. Because the amendment freezing Part A and the amendment implementing Part B were deliberately designed by CIGNA and "reasonably expected" to operate together to reduce the cash balance participants' future retirement benefits, the terms of the

plan prior to amendment were the Part A provisions, and not the nominal freeze that CIGNA "never intended ... to be permanent." This is the comparison that both CIGNA and the employees "reasonably expected" (as shown by the misleading comparisons in CIGNA's own disclosures) and it is the comparison that the District Court relied on in finding 29 to 44% reductions in retirement benefits and a concomitant violation of Section 204(h).

In line with the Treasury regulations, the case law shows that when Section 204(h) notice is not provided, the benefit-reducing amendment is "ineffective" and the terms of the prior plan must be reinstated. See *Frommert*, 433 F.3d at 268; *Production & Maintenance Employees' Local 504 v. Roadmaster*, 954 F.2d 1397, 1404 (7th Cir. 1992); *McNeil v. Abiseid*, 2008 WL 4809095 *7 (E.D. Ark. Oct. 30, 2008); *Buus v. WaMu Pension Plan*, 2007 WL 4510311 *4 (W.D.Wa. 2007); *Koenig v. Int'l Life Corp*., 880 F.Supp. 372, 376 (E.D.Pa. 1995). There are no cases allowing companies to avoid §204(h) notice and defeat reasonable expectations based on contrived positions that 29 to 44% "reductions" are really "increases."

CIGNA argues that the "anti-cutback" rules at Treas. Reg. 1.411(d)-4 do not permit two or more amendments which have the effect of reducing benefits to be considered together if they have different "adoption dates." Br. 53. But CIGNA overlooks the "multiple amendment" rule in the same set of regulations (cited in

Plaintiffs-Appellants' Brief, at 32 n. 7) which collapses a "series of plan amendments which, when taken together, have the effect of reducing" benefits. Without mentioning this rule, the District Court said the rule on which CIGNA relies is inapplicable because it "expands on [the anti-cutback protection in ERISA] §204(g)" and "seeks to close a loophole employers might use in order to reduce employees' benefits." [6/13SlipOp 24]. The employees' point is not that the "multiple amendments" rule is directly applicable here, but that the Treasury regulations on Section 204(h) provide that "reasonable expectations" control in determining whether a significant reduction in future benefits has occurred. As Judge Kravitz found the purpose of Section 204(h) is to protect employees' "reasonable expectations." [SlipOp 75]. Here, the "reasonable expectations" of the employees were that they would go from the Part A provisions to "comparable" or better Part B cash balance provisions. CIGNA described that transition as being an "enhancement" with no "cost savings" to CIGNA. If CIGNA's notice of the significant reductions under the cash balance provisions was "misleading," as the District Court found, the employees should go back to the Part A provisions. As Judge Kravitz suggested, "reasonable expectations" are what keeps a company from "exploiting a technicality (a freeze that was intended to 'disappear' when no longer needed) to frustrate employees' entitlement to notice under §204(h)."

[SlipOp 24].

This result is fully consistent with how other important notice statutes work, including COBRA and the WARN Act. Notice requirements such as Section 204(h), COBRA and the WARN Act cannot deter misconduct effectively, unless they can undo the wrongs committed. See, e.g., *Smith v. Rogers Galvanizing Co.*, 128 F.3d 1380, 1383-85 (10th Cir. 1997) (affirming award of retroactive insurance coverage when COBRA "notice was inadequate"); 29 U.S.C. §2104(a)(1) (WARN Act provision for backpay and lost benefits for the period of deficient notice).

In this instance, reparative relief should not be foreclosed on a ground that the District Court expressly rejected in its Liability Decision and continued to reject in the Relief Decision. The District Court recognized that the "leverage" to ensure that companies comply with Section 204(h) is the "realistic possibility" of "returning" to the prior benefit formula if the notice is deficient. [6/13SlipOp 27]. In finding liability, it also recognized that "[p]ermitting employers to avoid these important obligations simply by exploiting the technicality of 'freezing' old benefits before retroactively instituting new ones runs diametrically opposite" to the statutory purpose of "protect[ing] employees' interests and their reasonable expectations." [SlipOp75] (emph. added). It is a fundamental tenet of remedies and "the law of the case" that the District Court cannot refuse to exercise its discretion

based on criteria that are "diametrically opposite" to its own findings and the statutory objectives. See Dobbs, supra, §2.4(1) and 2.4(7) (discretion "should not be permitted to limit a remedy provided by statute"; "Judges and juries are not permitted to say that the plaintiff was injured as a proximate result of the defendant's negligence but that, as a matter of discretion, all money damages will be denied").

CIGNA's brief offers no support for the District Court's concern with the financial burden on CIGNA from providing a full remedy for its conduct. CIGNA does not point to any evidence that it would be unduly burdensome for CIGNA to provide the Section 204(h) remedy or to provide "comparable" benefits. Nor does CIGNA's brief respond to the rule that the cost to the defendant is generally not a consideration when each dollar of costs is matched by a dollar of benefits. See Dobbs, supra, §2.4(5) (defendant's costs are "best considered" when they are "not an inseparable part of the plaintiff's right" or when the cost "far exceeds the benefit to which the plaintiff is entitled").

As the District Court recognized, by "not ordering the invalidation of Part B, the Court has permitted CIGNA effectively to eviscerate the notice requirements." [6/13SlipOp27]. Because the District Court did not recognize the breadth of its authority and erroneously concluded that reinstatement of Part A was not available,

the decision to deny full relief for the Section 204(h) violation should be reversed and remanded with instructions to consider that approach in light of the employees' reasonable expectations, the statutory purpose and the Treasury regulations.

B. Alternatively the District Court Has the Authority to Remedy CIGNA's Misleading Representations that the Cash Balance Benefits Would Be "Comparable" or "Larger" Because Where the Disclosures in an SMM or SPD Conflict with the Terms of the Plan, the SMM or SPD Controls.

CIGNA's only defense of its representations to its employees in official Summaries of Material Modification ("SMMs") that their retirement benefits would be "comparable" or "larger" with no "cost savings" to CIGNA is to trivialize the misleading representations. Br. 54 (describing its representations as "general statements" and stating that "Plaintiffs focus on the word 'comparable' and claim based on this word..."). CIGNA's brief offers nothing to support the two reasons that the District Court gave for denying relief for CIGNA's violation of the disclosure requirements. CIGNA does not support the District Court's distinction between the gravity of misleading representations in an SMM and an SPD. See [6/13SlipOp 33]. As the District Court otherwise acknowledged ([2/15SlipOp 89]), the Department of Labor regulations, which are applicable to both SPDs and SMMs, provide that "Any description of exceptions, limitations, reductions, and other restrictions of plan benefits shall not be minimized, rendered obscure or

otherwise made to appear unimportant." 29 C.F.R. 2520.102-2(b). Instead of supporting the District Court's position that misleading representations in SMMs are less grave than misleading representations in SPDs, CIGNA stakes out a more extreme position. It argues that *Burke v. Kodak*, 336 F.3d 103 (2d Cir. 2003), should be overturned and that this Circuit should hold that inadequate or misleading SPDs should not control over conflicting plan terms. Br. 43-48.

In addition to this Circuit's decision in *Chambless v. Masters, Mates & Pilots Pension Plan*, 772 F.2d at 1040, and the Labor Department's regulations, neither of which draws a distinction between the gravity of misleading communications in SMMs and SPDs, this Circuit's decision in *Bouboulis v. Transp. Workers*, 442 F.3d 55, 61-62 (2d Cir. 2006), shows that the District Court's reluctance to place misleading representations in SMMs on the same plane as SPDs is misplaced. *Bouboulis* said that "we look to the SPD and any alleged amendments to the SPD ... as the relevant Plan documents." The reference to "amendments to the SPD" is to the "statutorily required notice of a material modification" or SMM. 442 F.3d at 62. *Bouboulis* found that a letter distributed to all Plan members on official stationery could be an SMM. However, the panel found "no language" in that letter "that affirmatively operate[d] to create a promise" to retirees. By contrast here, as in *Chambless*, there is no dispute that CIGNA's summary of material

modification was "embodied in the December 1997 Retirement Information Kit" ([SlipOp 29]) and that it contained affirmative misleading representations about receiving "comparable" benefits with no "costs savings" to CIGNA. [6/13SlipOp 20 (citing SlipOp 78-79), 34]. *Chambless* afforded a remedy for an SMM violation that was less egregious than CIGNA's intentionally misleading representations about future benefits. See 772 F.2d at 1040.

The District Court's second reason for denying relief was that enforcing the misleading representations that benefits will be "comparable" or "larger" would require the Court "entirely to rewrite" the Plan. [SlipOp 34]. CIGNA does not support this in any way, nor does it challenge the employees' point, documented with 18 employment cases, that "comparable" is a term that is enforced everyday to mean "at least equal" or "substantially equivalent." See, e.g., *Livernois v. Warner-Lambert Co.*, 723 F.2d 1148, 1151 n.3 (4th Cir. 1983) ("'comparable' means 'at least equal'"). Both CIGNA and the District Court have recognized that Plaintiffs propose that the Court reasonably interpret "comparable" to mean "approximately ninety percent of the benefits that would have been provided under Part A." Br. 54; [SlipOp 15].[4] Providing 90% of the additional benefits under a long-standing

[4] In the oral argument on relief, the District Court questioned whether "it is within even my equitable power to say ... comparable [] means 90 percent of Part A." 4/30/2008 Tr. 59.

benefit formula for which there are detailed plan provisions, business requirements, and computer software clearly does not require the Court "entirely to rewrite" the Plan or to "create a new benefit formula from whole cloth." Br. 54.

Rather than support the reasons that the District Court gave, CIGNA espouses a third reason for denying relief. CIGNA contends that no matter how misleading the representations in its SMM were about "comparable" or "larger" pension benefits with no "cost savings" to CIGNA, any remedy for those violations would deliver more than the amount that CIGNA promised in its "personal pension statements" and "the SPD." Br. 54, 57, 61. The suggestion that "the SPD" promises any specific dollar amount at all is patently false. See [Ex. 8, Tab 3]. The personal pension statements only contain dollar amounts of notional or hypothetical credits and account balances. See Br. 25-26. They never express benefits in the fixed income annuity form that is ERISA's and the Plan's basic benefit, nor do they anywhere "correct" the misleading representations that the resulting retirement benefits will be "comparable" or "larger" to the monthly benefits that employees had been earning under Part A. The District Court found that the personal statements did not "negate the defects in the previously provided notices and disclosures" and "could not counteract the more favorable impression made by CIGNA's other statements about the positive features of the new plan and how

employees' benefits would grow under Part B." [SlipOp 82-83]. As a result, the District Court determined "the additional materials provided by CIGNA" were not "adequate either to cure the defects in the notices or to transform any possible prejudice into harmless error." [SlipOp 102].

Apart from the point that the District Court's findings are not "clearly erroneous," CIGNA leaps over the obvious fact that a correction must be something that a reader can see as modifying an earlier statement to make it accurate. See *Res. (2d) Torts*, §551(2)(c); *Griggs v. E.I. Dupont de Nemours & Co.*, 237 F.3d 371, 382 (4th Cir. 2001) ("once DuPont actually learned that there was a problem that threatened to cut substantially into the benefits Griggs thought he would receive, the particular language on the back of the application form did nothing to correct Grigg's obvious misunderstanding"); *In re Unisys Corp. Retiree Medical Benefits ERISA Litig.*, 2006 WL 2822261, *52 (E.D.Pa. 2006) ("the presence of [reservations of rights] provisions in other benefits documentation simply does not clarify any confusion created by the conflicting information the Trial Plaintiffs received in the form of oral and written affirmative misrepresentations about the retirement benefits under the Burroughs Plan").[5]

[5] Accord *Cummings v. Pennsylvania R. Co.*, 45 F.2d 142, 143 (2d Cir. 1930) (subsequent charge to jury was "given not as an express correction and with no attempt to point out ... the difference between it and what had previously been

III. Notice of the Change in the "Rehire Rule" Was Required by *Frommert*, the Treasury Regulations on Section 204(h), and the Department of Labor Regulations on Summaries of Material Modification.

No one can seriously contend that re-employment rules and adverse changes to such rules are insignificant matters. See, e.g., *Frommert*, 433 F.3d at 260-61 ("rehire" rule changed to include "phantom" offset of distributions made at the conclusion of the prior period of employment); *EEOC v. Allstate*, 528 F.3d 1042, 1045 (8th Cir. 2008) (examining disparate impact of "rehire" policy that restricted rehiring of former employee-agents for a specified period); *Eichorn v. AT&T* , 248 F.3d 131, 136-37 (3d Cir. 2001) (rehire policy restricted hire of certain employees following sale of company). Here, CIGNA's old "Rehire Rule" unambiguously returned rehired employees to the Part A benefit formula that they previously enjoyed. The modified Rehire Rule eliminated that benefit entirely.

Although the District Court recognized that CIGNA's modification to its "Rehire Rule" meant that some rehired former employees "face the possibility that...they would accrue no further benefits during their remaining time with CIGNA," [SlipOp 105], the District Court concluded that rehired employees were not entitled to notice of the change in the Rehire Rule because they were not "plan

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said"; this "would, in all probability, have been treated only as a restatement of what had gone before").

participants" and because the Part B amendment "was itself sufficient" to inform rehires of their rights under the Plan. [SlipOp 109].

CIGNA again does not support those determinations, but resorts to reasons that the District Court did not use. First, CIGNA says that rehired employees were sufficiently notified of the cash balance changes because "these individuals received a copy of the SPD" sometime after they were rehired. Br. 57. The SPD on which CIGNA relies does indirectly disclose the change in the Rehire Rule. See [Ex. 8, Tab 3, 8]. But learning about a change in the Rehire Rule after-the-fact, i.e., after one has chosen to return to CIGNA, obviously comes too late to serve as "timely" notice. For example, named Plaintiff Gisela Broderick was working for Aetna and earning additional pension benefits, but she gave that job up because she thought that returning to the CIGNA Pension Plan would be better for her retirement. Tr. 82-85. Receiving notice of a change before-the-fact that adversely alters the status quo is what Section 204(h) was enacted to assure.

This Circuit held in *Frommert* that an amendment adopting a phantom offset was "ineffective" because notice of the change was not provided to rehires before they returned to work for Xerox. 433 F.3d at 266-67. Even though Xerox subsequently distributed a "tardy" Benefits Update, the Update was not "timely" enough to satisfy Section 204(h) because participants "were deprived of the

opportunity to take timely action." *Id*. at 266 and 268.

CIGNA again stretches for the outlandish, taking the position that the future benefits of its former employees cannot have been "reduced" because they were earning "zero" benefits during the time they were separated from employment. Br. 57-58. CIGNA goes so far as to opine that "Part B had *no impact* on any of these former CIGNA employees," *Id*. 58 (emph. orig.)–even though they clearly ended up under Part B after the Rehire Rule was modified. CIGNA's position does not account for the fact that the terms of the Plan providing for the "Resumption of Participation Upon Re-employment" under the Part A benefit formulas were expressly changed, without any notice to former employees, to provide for "No Resumption of Participation Upon Re-employment." CIGNA's position also does not account for *Frommert*, which holds that former employees are entitled to advance notice of a change in an offset rule that applied if and only if they were rehired. 433 F.3d at 268.

Furthermore, CIGNA does not respond to the point that CIGNA did not make any determination "contemporaneously" that notice was not required to be given to former employees. The District Court clearly ruled that the Treasury regulations require any determination of whether Section 204(h) notice is due to be made "contemporaneously." [6/13SlipOp 8-9] ("CIGNA should have determined,

as it planned the dissemination of its notices, whether there were any employees or classes of employees who did not need to receive a §204(h) notice"). There is no question that CIGNA did not do this and, as the District Court found, one cannot "recreate, a decade later" an assessment of relevant facts and circumstances.

With respect to the District Court's conclusion about who is to receive notice of the change, the statutory language requires a Section 204(h) notice to be provided to "each participant in the plan" at least 15 days in advance of the effective date. [AD-3]. The Treasury Department's regulations reinforce this by providing that the statute "generally requires the notice to be provided to plan participants." Treas. Reg. 1.411(d)-6, Q&A-1, [AD-7]. In relevant part, ERISA §3(7) defines the term "participant" clearly and unambiguously as "any ... former employee ... who is or may become eligible to receive a benefit from an employee benefit plan." Again, and most decisively, *Frommert* establishes that "timely notice" of a change in a rehire rule is required to be provided to former employees. Because notice was not provided, the amendment was "ineffective" and the former employees who had been subjected to the phantom offset after they were rehired were entitled to relief. 433 F.3d at 266-68.

CIGNA also offers no response to the point that the SMM rules establish a separate requirement of notice to former employees unless an amendment "in no

way affects ... vested separated participants' rights under the plan." 29 C.F.R. 2520.104b-4(c). Like the SPD, the Retirement Kit for the grand-fathered employees contains some language about the Rehire Rule which could (at least in hindsight) be read to disclose that there has been a change. [Ex. 228, 3]. But CIGNA admits that neither the SPD, this Retirement Kit, nor any other notice was distributed to vested separated employees who might be deciding whether to return to work with CIGNA. Br. 57 n.13. As indicated in the opening brief, CIGNA conceded before trial that if disclosure was required, the prospective rehires were "likely prejudiced" by the non-disclosure. See Dkt. #182 at 72-75.

IV. CIGNA's Cross-Appeal Lacks Merit.

"What wear away means in practice is that even though an employee is continuing each year to receive pay and interest credits under Part B, and the employee's account balance may even be growing, it nonetheless remains less than the minimum benefit [the employee had already] earned as of December 31, 1997." [2/15SlipOp 17]. The Court found that CIGNA "nowhere informed its employees that they might not be accruing benefits under Part B, despite [it's own expert's] testimony that [such wear-aways] would have been predictable and known to CIGNA." [SlipOp. 90]. "As CIGNA's counsel admitted to the Court, he could point to no statement in the notices that told employees they were actually not earning

retirement benefits." *Id*. at 97. In the briefing related to relief, CIGNA acknowledged, moreover, that "wearaway may not have been sufficiently disclosed." Dkt.#280 at 6. Even in the current brief, CIGNA concedes to "deficient disclosures" and "vague and misleading references." Br. 19, 21 and 24.

To correct the misleading representations that no periods of "wear-away" existed, the District Court acted within its discretion in ordering an "A+B" remedy in which the cash balance credits will always have to be a positive addition to the participants' previously-earned retirement benefits. [SlipOp 29-35]. On appeal, CIGNA does not contest the District Court's authority to order the "A+B" remedy. Instead, it continues to contest the Court's determination that it is liable for misleading employees about the wear-aways.

CIGNA first contests whether the participants suffered any "likely prejudice" from its inadequate disclosures and, if anyone did, whether likely prejudice must be established individual-by-individual in 27,000 hearings before relief is provided. Alternatively, CIGNA contends that its violations of the disclosure rules are "harmless error" and if they are not harmless error for every participant, that harmless error must be established in 27,000 proceedings before relief can be provided. Br. 37-41. As a fallback, CIGNA contends that this Circuit incorrectly decided *Burke v. Kodak* to the extent it holds that the terms of an employee benefit

plan can be modified by an inadequate SMM or SPD. Br. 44-46. Finally, CIGNA asserts that it has some releases that may bar relief.

A. CIGNA Has Shown No Basis for Reversing the District Court's Finding of "Likely Prejudice" to the Employees from CIGNA's Misleading Disclosures.

The District Court found that "CIGNA issued the same misleading notices and disclosures to the Class as a whole, and thus all class members were affected equally and in a similar manner by those publications." [6/13SlipOp 4-5]. The District Court found three key misrepresentations in both the SMM and the SPD about wear-away: CIGNA represented that the old benefits, including early retirement benefits, were "fully protected," that "each dollar's worth of credits is a dollar of retirement benefits payable to you," and that the benefits would "grow steadily throughout your career." [2/15SlipOp 81, 96, 98]. The District Court found "likely prejudice" from the inadequate and misleading disclosures because "the notices provided by CIGNA likely, and quite reasonably, led plan participants to believe that wear away was not a likely result of the transition to Part B, that the full value of the accrued benefits under Part A, including early retirement benefits, would be included in the opening account balances ...." [SlipOp. 104]. The Court concluded that the plan participants were "deprived of the opportunity to take timely action in response to the purported amendment, whether that action was

protesting at the time Part B was implemented, leaving CIGNA for another employer with a more favorable pension plan, or filing a lawsuit like this one." *Id*. In the briefing on relief below, CIGNA admitted that "certain uniform written communications were insufficient to defeat a claim of likely prejudice, or demonstrate harmless error, on a classwide basis." Dkt.#276 at 3.

Now, however, although CIGNA never contests the District Court's finding that there were periods of wear-away after the cash balance conversion that it did not disclose, and in fact, affirmatively hid, CIGNA challenges "likely prejudice" from those non-disclosures. As the District Court found, the critical thing that employees lose when benefit reductions are not disclosed on a timely basis is the ability to complain. Rather than comply with the law and respond to such complaints, "CIGNA sought to negate the risk of [employee] backlash by producing affirmatively and materially misleading notices regarding Part B." [SlipOp 87]. The District Court found that CIGNA was "successful" in its "efforts to conceal the full effects of the transition to Part B" and that this "deprived plaintiffs of the opportunity to take timely action in response to the purported amendment." [SlipOp 104]. The District Court held that "Plaintiffs have met their burden of showing likely harm and prejudice." [SlipOp 104]. Defendants did not rebut this either by showing that prejudice was unlikely or that the inadequate

disclosures were harmless error. At trial, CIGNA did not call even a single fact witness in support of its position.

Without challenging the District Court's findings, CIGNA offers a confusing argument that the likely prejudice standard in *Burke* "merely" establishes a 'burden-shifting" rule for evidentiary purposes. Compare Br. 33-34. CIGNA then asserts that "By definition, this (or any) burden shifting only matters where the evidence weighs equally in favor of both parties." Br. 34. Hidden behind the deflective phrase "[b]y definition," CIGNA seems to be confusing the "burden of proof" with "burden-shifting." The case on which CIGNA relies, *Medina v. California*, 505 U.S. 437, 449 (1992), addresses whether a criminal defendant has the "burden of proof" on the issue of incompetency.

CIGNA also subtly seeks to append an additional substantive requirement of "actual prejudice" to the "likely prejudice" requirement that *Burke* established and thereby shift the burden back to the Plaintiffs-Appellants with a requirement that each class member establish this "before a remedy will attach." In a heading, CIGNA asserts that "*Burke* Did Not Alter The Substantive Requirement That A Participant Be Actually Prejudiced Before A Remedy Will Attach" and on the same page says that the lower court "erred" in finding likely harm "without considering each class member's own actual knowledge and factual circumstances." Br. 33.

The consideration of "each class member's own actual knowledge" that CIGNA seeks is inconsistent with the concepts of "likely prejudice" and "harmless error" that *Burke* establishes. "Likely prejudice" is not based on the "actual knowledge" or "actual prejudice" of each participant. Instead, under *Burke*, proof of "actual knowledge" or a lack of harm is the responsibility of the defendant. In *Burke*, this Circuit thereby concluded that a "likely prejudice" standard "is more consistent with ERISA's objective to protect the employee against inadequate SPDs" because "[a] rule requiring detrimental reliance imposes an insurmountable hardship on many plaintiffs," and "such a rule hardly advances the Congressional purpose of protecting the beneficiaries of ERISA plans by insuring that employees are fully and accurately apprised of their rights under the plan." 336 F.3d at 112. The District Court recognized this here, too, stating that this Circuit "has emphasized the broad nature of 'likely harm'" "in order to avoid the imposition of 'harsh common law principles to defeat employees' claims based on a federal law designed for their protection'." [SlipOp 100] (quoting *Burke*, 336 F.3d at 113). The District Court also recognized that by seeking to make individualized proof of actual knowledge into the Plaintiffs' burden, CIGNA was "seeking impermissibly to shift its burden of proof onto the Class" and held that CIGNA "may not do" this. [SlipOp 8] (citing *Burke*, 336 F.3d at 113).

CIGNA also neglects to address the fact that *Frommert* was a multiple plaintiff action on behalf of 104 individuals in which "likely prejudice" was found without any "individualized showings by each plaintiff." [6/13SlipOp 4]. In *Frommert*, this Circuit held that "likely prejudice" was established because participants were "deprived of the opportunity to take timely action," including "seeking injunctive relief, altering their retirement investment strategies, or perhaps considering other employment." 433 F.3d at 266. Here, the District Court expressly found that the "likely prejudice" standard is not an individualized inquiry, as shown by the fact that *Frommert* "did not require individualized showings by each plaintiff." [SlipOp 4]. *Central States Teamsters Welfare Fund v. Merck-Medco*, 433 F.3d 181, 199-200 (2d Cir. 2005), further shows that proof of individual harm is not a requirement to obtain injunctive relief for violations of ERISA's disclosure requirements: "Courts have ... recognized that a plan participant may have Article III standing to obtain injunctive relief related to ERISA's disclosure and fiduciary duty requirements without a showing of individual harm to the participant."

CIGNA nevertheless cites *Wilkins v. Mason Tenders Dist. Council Pension Fund*, 445 F.3d 572 (2d Cir. 2006), as "the clearest example of the individualized nature of the likely harm/harmless error inquiry." Br. 35. In *Wilkins*, which was not a class action, an SPD did not disclose that participants must produce proof for

work performed to receive credit for additional benefits. *Id*. at 584. *Wilkins* held that whether the plaintiff was likely prejudiced "require[d] further development of the factual record" and remanded the case for the plaintiff to provide sufficient evidence to show he would have taken "effective measures" had he received adequate notice. *Id*. at 585.

Wilkins was an appeal from a grant of summary judgment in favor of defendants; it was not an appeal from a bench trial in which the district court made any finding on likely prejudice. As a result, unless the panel was to develop the record itself, a remand was necessary. In this case, the District Court candidly observed that "[c]ertain language" in the *Wilkins* opinion "could be read as reintroducing a detrimental reliance requirement. However, the court did not explicitly restrict *Burke* or *Frommert*, and the Court will not presume *Wilkins* intended to do so implicitly." [SlipOp 103n.44]. As mentioned, the District Court expressly found that "likely prejudice" is not an individualized inquiry, as shown by the fact that *Frommert* "did not require individualized showings" by the 104 plaintiffs. [6/13SlipOp 4].

CIGNA further analogizes this case to *Sheehan v. Metro. Life Ins. Co.*, 368 F.Supp.2d 228 (S.D.N.Y. 2005), *Exarhaki*s *v. Visiting Nurse Serv.*, 2006 WL 335420 (E.D.N.Y. 2006), and *Tocker v. Philip Morris*, 470 F.3d 481 (2d Cir.

2006), where the plaintiffs could not have done anything differently with adequate disclosures. CIGNA asserts that here, as in those cases, its employees were not deprived of any benefit to which they were entitled. Br. 31. However, as the District Court said below, "Courts have ... rejected the idea that a plaintiff has failed to show likely harm if he cannot prove that he would have received a larger benefit were the notices accurate." [SlipOp 103]. In *Layaou v. Xerox,* Xerox advanced a nearly identical argument to CIGNA's that "Layaou cannot show any prejudice because, even if the SPD had adequately explained the 'phantom account' offset, there is nothing that he could have done differently that would have resulted in his receiving a higher retirement benefit." 330 F.Supp.2d at 302. The district court rejected this: "To adopt defendants' analysis, though, would effectively be to require plaintiff to show 'detrimental reliance' on the faulty SPD, a standard that the *Burke* court rejected." *Id*.[6]

B. CIGNA Has Also Shown No Basis for Reversing the Determination that "CIGNA Bears the Burden of Demonstrating Harmless Error" But "Offered Only Unsupported Speculation."

With respect to the affirmative defense of "harmless error" that *Burke* establishes, see 336 F.3d at 113, the District Court held that "CIGNA bears the

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[6] *Exarhakis* also distinguished itself from *Burke*: "This is not a case where the plaintiff claims that she based her actions (or lack of actions) upon a deficient or misleading SPD." 2006 WL 335420 *13.

burden of demonstrating harmless error, ... and has instead offered only unsupported speculation about what thousands of depositions might reveal." [6/13SlipOp 6]. "CIGNA has not provided the Court with any evidence that even a single employee had actual knowledge from CIGNA of the undisclosed information regarding the transition to Part B." *Id*.

CIGNA cites *Weinreb v. Hosp. for Joint Diseases Orthopaedic Inst.*, 404 F.3d 167 (2d Cir. 2005), *Pastore v. Witco*, 388 F.Supp.2d 212 (S.D.N.Y. 2005), and *Park v. Trustees of 1199 SEIU Health Care Employees Pension Fund*, 418 F.Supp.2d 343 (S.D.N.Y. 2003), for the proposition that this case is like ones where relief for inadequate disclosures was denied because the participant suffered no harm. Br. 22-23. However, the District Court distinguished "each of the cases CIGNA cites" because in each, "the employer provided information regarding the missing provisions by means of an additional, official notice or through authorized conversations between an employee and a representative of the company." [6/13SlipOp 6]. "Moreover, the harmless error cases that CIGNA relies on all involved requirements to qualify for benefits under the plan, rather than material misrepresentations in official company notices and disclosures about the plan, making those cases of questionable relevance here." [*Id*. at 6 n.2].

CIGNA incorrectly asserts that the District Court made an erroneous

"classwide" holding on "harmless error." Br. 33; and *id*. at 37-38 ("District Court concluded...that CIGNA would be unable to establish harmless error for any class member") and 42 (asserting that District Court made a "classwide determination of ... no harmless error"). The District Court actually determined that CIGNA had not carried its burden under *Burke* of showing harmless error either on a classwide basis or with respect to any individual. [6/13SlipOp 5-6]. The District Court observed that the parties had entered into a Stipulation that specifically covered discovery and the presentation of evidence on this subject at trial. [SlipOp 3-4] and dkt. #167. The Stipulation provided that CIGNA could take discovery from 26 members of its litigation control group as well as 8 class members selected by the Plaintiffs and 8 class members selected by CIGNA. As the District Court found,"CIGNA failed to avail itself of the scope of discovery permitted under the parties' Stipulation. Rather, CIGNA limited its discovery to requesting documents from and deposing the eight class members chosen by Plaintiffs, and decided not to call any class members at all as witnesses at trial." [SlipOp 5]. CIGNA offers no response to the Court's conclusion that it failed to carry its burden.

1. CIGNA's "Personal Pension Statements" Cannot Establish Harmless Error Because the District Court Found that They Do Not Correct Any of the Misleading Representations.

CIGNA again argues that its "personal pension statements" establish that

participants did not suffer "actual harm" from "the vague and misleading references that troubled the District Court." Br. 24. But CIGNA's personal pension statements do not reflect the monthly or annual retirement benefits that participants will receive nor do they correct any of the prior misrepresentations. This is what led the District Court to find that "the additional materials provided by CIGNA" were not "adequate either to cure the defects in the notices or to transform any possible prejudice into harmless error." [SlipOp 102]; see also *id*. at [82-83]. Again, CIGNA never shows how those findings are "clearly erroneous." Instead, CIGNA's brief simply asserts that the personal pension statements told participants all they need to know and "corrected" any earlier "vague and misleading references." Br. 24-28.

Rather than explain how the District Court's findings were "clearly erroneous," CIGNA's brief contains new representations about the contents of the personal pension statements that were not made below and that are simply concocted. CIGNA's brief asserts these personal statements tell employees "exactly how much they would receive in pension benefits under Part B if they were to retire" and "exactly how much he/she earned in additional benefits each year." Br. 21-22, 56. [7] CIGNA asserts that the statements "correct[]" "the vague and

[7] In support of this, CIGNA miscites the District Court as "finding" that the "personal pension statements ...accurately described exactly how much they would receive in pension benefits under Part B if they were to retire." Br. 21-22 (citing

misleading references that troubled the District Court." Br. 18-19, 24. But any review of these statements (two of which are reprinted at pages 25-26 of CIGNA's brief) shows that they do not indicate "exactly how much" participants "would receive in pension benefits under Part B if they were to retire." There is no projection of the notional account balances to retirement age and no translation of projected balances into a monthly or annual retirement benefits. Moreover, as the District Court expressly found, when the periods of "wear-away" apply, "even though the employee continues to work for CIGNA and continues to receive benefit credits, the employee's expected retirement benefits have not grown beyond what the employee was entitled to under Part A as of December 31, 1997." [2/15SlipOp 18]. To illustrate how far off track CIGNA has gone, CIGNA asserts that the personal statements "explicitly" and "unambiguously told" Annette Glanz that she earned a benefit of $3,095.98 in 1998. Br. 56. However, the District Court found that Ms. Glanz was under a "wear-away" and was not actually earning those benefit credits. [2/15SlipOp 18]. Hence, these statements perpetuate rather than

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534 F.Supp.2d at 354). In fact, the District Court made no such "finding" (the cited page from F.Supp.2d says nothing about these statements). CIGNA also twice asserts that the District Court agreed that the personal benefit statements were "admittedly accurate." Br. 27, 30. But CIGNA pulls this quote out of context: The District Court was only referring to "the information regarding the opening account balances." [SlipOp 83].

"correct" the misleading statements that "each dollar's worth of credits is a dollar of retirement benefits payable to you."

CIGNA never tries to explain how the hypothetical benefit credits in these personal statements could be accurate for the majority of employees who were suffering under the Plan's "wear-away" design and were not actually earning any additional retirement benefits. As the District Court found, CIGNA "nowhere informed its employees that they might not be accruing benefits under Part B, despite [it's own expert's] testimony that [such wear-aways] would have been predictable and known to CIGNA." [SlipOp. 90].

In *Layaou v. Xerox*, 238 F.3d 205, 210 (2d Cir. 2001), this Court found that "[t]he confusion caused by the lack of notice as to how benefits would be calculated for employees who were rehired after receiving lump-sum benefits distributions was compounded by the individualized yearly calculation of estimated benefits Xerox sent to its employees." Although "Layaou's 1994 yearly benefits statement informed him that Xerox calculated his CBRA and TRA benefits to be lump-sums of $18,403 and $9,244 respectively," "[t]his estimation of benefits, like the SPD, makes no mention of the 'phantom account' offset or the fact that the benefits of rehired employees would be offset by an appreciated amount of prior distributions." 238 F.3d at 210. *Frommert* likewise found that a Benefit Update

issued by Xerox contained "insufficient accurate" information to overcome its disclosure violations. 433 F.3d at 268.

Although CIGNA tries to distinguish its benefit statement from Xerox's, Br. 30, CIGNA's benefit statements are no different. They contain no statement that benefits are being substantially reduced, contrary to the prior misleading representations of "comparable" or "larger" benefits. Nor do the personal pension statements express benefits in a fixed-income form that an individual could use to compare with his or her previously-earned benefits. See Br. 25-26; [Exs. 519-520]. The trial testimony and exhibits showed that the only communication in which cash balance benefits were expressed in annuity form, the Total Compensation Reports, used unrealistic interest rates to inflate the projected annual benefits. Tr. 275-280; [Ex. 85, P-1789, 1816, 1842]. Accordingly, as the District Court found, CIGNA's pension plan statements cannot provide a defense to its disclosure violations.

2. CIGNA's Assertion That There Was "Evidence That a Number of Class Members Fully Understood What Their Benefits Would Be" Is Completely At Odds with the District Court's Finding that CIGNA Did Not Show that "a Single Employee Had Actual Knowledge From CIGNA of the Undisclosed Information."

CIGNA asserts that there was "evidence that a number of class members fully understood what their benefits would be." Br. 19. This is completely at odds

with the trial record and with the District Court's finding that CIGNA did not show that "a single employee had actual knowledge from CIGNA of the undisclosed information." [6/13SlipOp 6]. As support for its assertion to the contrary, CIGNA seeks to revive factual findings that it previously proposed below. Without reference to the "clearly erroneous" standard, CIGNA repeats its proposed bullet point findings about each witness and contends that the Court's findings were "inconsistent" with the testimony. Compare Br. 27-29 with Dkt.#251 at 52-54, 59-61. The problems with CIGNA's factual synopses were illustrated above with the testimony of Ms. Broderick.

The closest that CIGNA comes to supporting its assertion that even a single participant had "actual knowledge" of the reductions is in its synopsis of the testimony of Robert Upton, one of the witnesses at trial for the employees who was also an in-house lawyer for CIGNA. CIGNA asserts that Mr. Upton "requested and received a statement comparing his benefits under Part A and Part B" and "fully understood" from it that "he was receiving less under Part B than he had under Part A." Br. 39. CIGNA suggests that such comparisons were commonplace, representing that "this was consistent with the testimony of other class members." Br. 39. However, Mr. Upton testified that it took him three years to obtain this comparison and one of his co-workers was denied the same information after he

told her that he had secured it. Tr. 651-662, 664-65; [Ex. 120, 20529, 20531]. Discovery showed that CIGNA had a firm written policy of "NOT providing" any such comparisons and that Mr. Upton was the one and only employee to secure one. [SlipOp 85-86; Ex. 119, 11708]. At trial, Mr. Upton testified that he was threatened with adverse job action after he finally obtained this comparison and complained about what it was showing. Tr. 665-66. Thus, the information that Mr. Upton obtained was not received on a "timely" basis nor was it distributed to other employees so that they could have joined with him or otherwise taken actions to redress the reductions.

CIGNA's brief still does not seem to appreciate the effect the bench trial had. Judge Kravitz did not just read affidavits from Mr. Upton, Ms. Broderick, or others attached to motions for summary judgment. He listened to their testimony, including under cross-examination, and he rejected or did not adopt CIGNA's proposed findings. See [SlipOp 77, 104-5]. CIGNA has not come anywhere close to showing that any of the District Court's findings were "clearly erroneous."

C. The District Court Firmly Rejected CIGNA's Argument that It Is Entitled to 27,000+ Post-Trial Hearings.

CIGNA contends that even if its uniform written communications "likely harmed" the named Plaintiffs and testifying witnesses, "it does not follow that the

entire class was likely or actually prejudiced" and that whether each class member was likely or actually harmed must be determined in 27,000+ hearings after additional post-trial discovery. Br. 33, 37. The District Court recognized that CIGNA was speculating that at least some employees might have had actual knowledge of the reductions, but found that "CIGNA does not explain on what basis it expects to find that certain employees, despite having received the same disclosures" "would have actual knowledge of the undisclosed information." [6/13SlipOp 5]. The District Court firmly rejected the CIGNA's argument that post-trial discovery and up to 27,000 hearings on "harmless error" were appropriate based this record, stating that "Given that CIGNA bears the burden of demonstrating harmless error, and has instead offered only unsupported speculation about what thousands of depositions might reveal, the Court would in any event decline to order the wide-ranging, time-consuming and almost certainly fruitless additional discovery CIGNA requests." [6/13SlipOp 6].

Without acknowledging the District Court's findings, CIGNA contends that the District Court should be reversed because as a matter of law the likely prejudice/harmless error analysis that *Burke* established must be an "individualized inquiry not appropriate for treatment on a classwide basis." Br. 42. As support, CIGNA quotes *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 223 (2d Cir. 2008),

for the proposition that "individualized proof is needed to overcome the possibility that a member of the purported class" acted on some basis other than the belief that the misrepresentation likely fostered. However, *McLaughlin* is not an ERISA case but an action for fraud under RICO, which specifically requires a showing of detrimental reliance. Before the District Court, CIGNA relied on a different non-ERISA decision also involving fraud. See Dkt. #280 at 10. In response, Judge Kravitz explained that the detrimental reliance requirement for fraud is "unlike the statutory violations asserted in this case" for which likely prejudice is required. [6/13SlipOp 7]. As indicated above, CIGNA also fails to come to grips with the facts that: (1) *Frommert* was a multiple plaintiff action on behalf of 104 individuals in which "likely prejudice" was found without "individualized showings by each plaintiff," and (2) "harmless error" is an issue on which CIGNA, rather than the plaintiffs, bears the burden of going forward and persuasion. [6/13SlipOp 4, 6].

As another fallback, CIGNA contends that the District Court's March 12, 2007 Rule 23(c)(1)(B) Order committed the District Court to providing CIGNA with individual post-trial hearings regardless of whether CIGNA presented any evidence on harmless error during the trial. Br. 43 ("In that Order, the District Court specifically stated that likely harm/harmless errors were individualized issues not to be decided on a classwide basis"). However, the Rule 23(c) Order on which

CIGNA relies specifically says:

> "The recitation below generally sets forth the claims of the parties as they have chosen to describe them, with such specificity as is required to understand the claim. The Court expresses no opinion on the merits of the claims or defenses of the parties, and therefore the parties should attach no significance to the particular phraseology chosen to describe any claim or defense."

Dkt. #241 at 3. The District Court's Relief Decision states that "both the parties' Stipulation and the Court's Rule 23(c)(1)(B) Order contemplated the possibility that once the trial was complete, the Court would determine that no individual issues regarding likely prejudice/harmless error remained. And in fact that is exactly what the court did...." [SlipOp 4].

The employee class does not dispute that under *Burke* "harmless error" can be shown individually, but CIGNA had the burden of going forward and proving that the error is harmless in one or more cases. As mentioned, the District Court gave CIGNA opportunities to conduct discovery and present any such proof on an individual or classwide basis, but CIGNA never did so. During the oral argument on relief, CIGNA's counsel represented that some executives may have had inside information about the benefit reductions. Upon hearing that, Judge Kravitz invited CIGNA to identify them. See 4/30/2008 Tr. at 84-86. However, CIGNA refused to do so and in a subsequent submission said that "[t]he executives responsible are no

longer employed by CIGNA." Dkt. #280 at 11. Now, CIGNA's brief reverts to the same argument that some of the executives who "participated in the design of ... Part B" must have "awareness" of the reductions and "should not be allowed to recover for deficient disclosures." Br. 40. No remand is warranted to give CIGNA an opportunity to do that which it was invited and declined to do before.

D. CIGNA's Argument that the Supreme Court's 1995 *Schoonejongen* Decision Overrides the Second Circuit's 2003 Decision in *Burke v. Kodak* Is Extremely Tenuous and Anachronistic.

As a last ditch argument against the relief for the wear-aways that the District Court ordered, CIGNA's brief focuses on an extremely tenuous argument that the Second Circuit's 2003 decision in *Burke* that "the SPD controls" "where the terms of a plan and the SPD conflict" is "inconsistent" with the Supreme Court's decision eight years earlier in *Curtiss-Wright v. Schoonejongen*, 514 U.S. 73 (1995). Br. 43-48. CIGNA asserts that reconciling *Burke* with *Schoonejongen* "is appropriate for consideration by the panel, or alternatively, for consideration by the Second Circuit en banc." Br. 45 n.11. CIGNA overlooks the fact that this Circuit has reached this conclusion not only in *Burke*, but in six other decisions: *American Federation of Grain Millers v. Int'l Multifoods Corp.*, 116 F.3d 976, 983 (1997); *Joyce v. Curtiss-Wright Corp*., 171 F.3d 130, 135-36 (1999); *Layaou*, 238

F.3d at 211 (2001); *Frommert I*, 433 F.3d at 265 (2006); *Bouboulis*, 442 F.3d at 61 (2006); *Tocker*, 470 F.3d at 487-88 (2006).

It is true that "[a]lthough a panel of this court cannot ordinarily overrule the decision of a prior panel, that rule does not apply where an intervening Supreme Court decision casts doubt on the prior ruling." *Rich v. Maranville*, 369 F.3d 83, 91 n.7 (2d Cir. 2004). Here, however, the Supreme Court's 1995 decision in *Schoonejongen* is clearly not an "intervening" event; it preceded the first of these decisions by 2 years and the last of them by 13 years.

There was, moreover, no suggestion in *Schoonejongen* that the Supreme Court intended for that decision to limit relief for violations of ERISA's disclosure rules. The issue in *Schoonejongen* was whether the amendment "procedure" required by ERISA §402(b)(3) is satisfied by a Plan document that says that the plan may be amended by the company without specifying anything more. 514 U.S. at 81-85. CIGNA argues that *Schoonejongen* could nevertheless be read to suggest that an inadequate or misleading SPD or SMM cannot change "the terms of the plan" unless the Plan's amendment procedure provides for such changes. This was, however, clearly not the issue before the Supreme Court so *Schoonejongen* cannot possibly be a controlling precedent on this issue.

CIGNA alternatively contends that holding that an inadequate or misleading

SPD changes the terms of the Plan could be considered to violate the "two hat" construct that is used in some ERISA cases, relying on a different Supreme Court decision, *Pegram v. Herdrich*, 530 U.S. 211 (2000). Br. 47-48. Although *Pegram* has even less to do with ERISA's SPD and SMM rules than *Schoonejongen*, CIGNA says that because ERISA's disclosure requirements are directed to the Plan administrator, it would be inconsistent with this "two hat" construct to conform the Plan, which is a separate legal entity for purposes of suit, based on misleading statements in an SPD or SMM.

In the Relief Decision, the District Court already addressed CIGNA's argument that the relief available from the Plan must be distinguished from the relief available from the Plan administrator. Following *Frommert*, the District Court held that "benefits under the terms of the plan" "mean[s] exactly that, regardless of whether those benefits derive from the literal terms of the plan or from the misleading statements in CIGNA's required disclosures." [SlipOp 17]. Relying on *Frommert* and Judge Posner's decision in *May Dep't Stores Co. v. Fed. Ins. Co.*, 305 F.3d 597, 601 (7th Cir. 2002), the District Court determined that, in the words of *Frommert*, relief for disclosure violations "falls comfortably within the scope of §502(a)(1)(B)" and accordingly the Plan can be liable under ERISA

§502(a)(1)(B) for disclosure violations. [SlipOp 15].[8]

E. The District Court Correctly Concluded that CIGNA "Failed to Demonstrate ... that the Waivers Signed by CIGNA Employees Intentionally Relinquished or Abandoned the Claims Plaintiffs Assert Here."

Finally, CIGNA contends that the form releases that some employees executed in order to receive severance pay could bar relief if they were examined on a "totality of the circumstances" basis, following *Finz v. Schlesinger*, 957 F.2d 78, 82 (2d Cir. 1992). Br. 41-42. *Finz* sets forth "six factors that may be examined to determine whether a plaintiff who waives benefits covered under ERISA acted knowingly and voluntarily.

In this case, however, the District Court found an express exception in CIGNA's release that exempts "any claims for benefits under any retirement,

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[8] The Solicitor General has taken the same position in a brief submitted by invitation in *AK Steel Ret. Accumulation Pension Plan v. West*, 07-663, online at http://www.usdoj.gov/osg/briefs/2008/2pet/6invit/2007-0663.pet.ami.inv.pdf. The Solicitor General states that "[a] claim that a plan administrator failed to provide benefits in compliance with the terms of the plan and the provisions of ERISA is a claim for benefits due under the terms of the plan cognizable under Section 502(a)(1)(B)." Br. 10.

CIGNA's distinction between the Plan and the Plan administrator also overlooks Section 13.2(g) of the Plan document which authorizes the Plan administrator "[t]o take such actions as are necessary to establish and maintain the Plan as a retirement program which is at all times in full and timely compliance with any law or regulation having pertinence to this Plan." [Ex. 1, 60].

savings, or other employee benefit programs." The District Court determined that this exception covered the claims in this case and found no evidence to support CIGNA's argument "that the exception covers only claims for benefits under the terms of the Plan, and not claims under ERISA itself." [2/15SlipOp 34, 38]. CIGNA has not appealed from that determination.

In its brief, CIGNA argues that the District Court did not cover all the bases because it did not address "one later form of release." Br. 41-42. Although CIGNA represents that this revision made the exception "a much more narrow exclusion that unambiguously barred the claims asserted in this case," CIGNA does not quote the language or even direct the Court to the revision itself. The revision to which CIGNA refers occurred in the middle of 2004, after the class had already been certified. It is anything but clear that the revised release is "much more narrow" or that it "unambiguously bar[s] the claims asserted in this case." Instead, it continues to exempt "any claims for benefit payments to which the Plan administrator determines you are entitled under the terms of any retirement, savings, or other employee benefit programs in which the Company participates." [Ex. 214, 4-5].

Although CIGNA's brief asserts that the District Court did not review the revised release, Br. 41, this is not true. In the Relief Decision, the District Court expressly states that "the Court did not limit its holding to the pre-2004 waivers;

rather, it stated, 'the Court concludes that CIGNA, which has the burden of proof on this issue, has failed to demonstrate under any standard, much less the 'closer scrutiny' applicable in the ERISA context, that the waivers signed by CIGNA employees intentionally relinquished or abandoned the claims Plaintiffs assert here." [SlipOp 9-10].

Because the District Court resolved the issue on this ground, it did not need to reach the Plaintiffs' alternative position that under FRCP 23(e), the claims asserted in this case cannot be released after a class has been certified without court approval. Dkt.#254 at 93-94. Indeed, under the rules about communicating with adverse parties, CIGNA should not have been communicating with class members at all about the subject matter of the lawsuit once the class was certified, much less soliciting revised or unrevised releases from individual class members of certified claims. See *Manual of Complex Litig. (Fourth)* §21.33 ("Once a class has been certified, the rules governing communications apply as though each class member is a client of the class counsel"). This case was certified as a class action in December 2002, long before the revised waivers to which CIGNA refers. See 2002 WL 31993224 (D. Conn. Dec. 20, 2002).

CONCLUSION

The notices to current and former employees of reductions in future benefits required by ERISA §204(h) and the disclosures in Summaries of Material Modifications and Summary Plan Descriptions required by ERISA §102 are essential protections in ERISA's statutory framework. The strictness of these disclosure rules reflects the profound importance of company-sponsored retirement benefits to employees' well-being once their working careers have ended. When a company flaunts the disclosure rules, hides significant benefit reductions and affirmatively misleads participants to believe that their future retirement benefits will be "comparable" or "larger" to those which they have been earning, the rules against misleading disclosures must be vigorously enforced.

For all of the reasons given above, this Circuit should reverse and remand to the District Court with instructions, as in *Frommert*, to choose a reasonable approach among available alternatives to completely remedy the Section 204(h) and SMM violations by declaring the amended plan terms ineffective and reinstating the traditional benefit formula or awarding future benefits at least "comparable" to those that participants received under CIGNA's traditional defined benefit formulas. The District Court's determination on notice of the "Rehire Rule" should also be reversed because "timely" notice of this change was required to be

given to former employees before they decided to return to work with CIGNA.

CIGNA's cross-appeal should be denied because CIGNA has nowhere shown any of the District Court's detailed findings related to likely prejudice and harmless error are "clearly erroneous." CIGNA has also not shown that the District Court abused its discretion or erred on any matter of law.

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Respectfully submitted,

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