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08-3388(L)

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

BRIEF OF PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

This appeal is from a final judgment entered by the Honorable Mark R. Kravitz, United States District Judge, District of Connecticut, on June 13, 2008. In addition to being in the Appendix, the February 15, 2008 Memorandum of Decision on liability and the June 13, 2008 Memorandum of Decision on relief are reported at 534 F.Supp.2d 288 and 559 F.Supp.2d 192.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over this action under 28 U.S.C. §1331 and Section 502(e)(1), 29 U.S.C. §1132(e)(1), of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

The District Court's Final Judgment disposing of all issues in the litigation was filed on June 13, 2008. The District Court also entered an order on July 22, 2008 requiring CIGNA to post a supersedeas bond. Plaintiffs filed a Notice of Appeal from the Judgment on July 7, 2008, and Defendants filed a Notice of Cross-Appeal on July 14, 2008. This Court has appellate jurisdiction pursuant to 28 U.S.C. §1291, because the appeals are from a final decision of a United States District Court.

ISSUES PRESENTED FOR REVIEW

1. ERISA §204(h) provides that a benefit-cutting amendment is

ineffective unless it is preceded by 15 days' advance notice of the reductions. Can a sponsor circumvent this protection by adopting a nominal freeze on benefits and then claim that the permanent reduction that follows is a benefit increase by comparison?

2. Is no substantive relief available for knowingly misleading representations in an ERISA-required Summary of Material Modification that retirement benefits will be "comparable" to those provided under the Plan's prior provisions because the misleading representations do not correspond with the terms of a prior Plan provision but require the District Court to select a reasonable approach from among several remedial alternatives?

3. Did CIGNA violate ERISA's Section 204(h) and Summary of Material Modification rules when it failed to notify former CIGNA employees of a change to the "Rehire Rule" under which they would be transferred upon rehire to a disadvantageous cash balance formula rather than be reinstated in the traditional defined benefit formula (which continued to be provided to "grandfathered" employees)?

STATEMENT OF CASE

The District Court recognized that "[g]iven how profoundly significant retirement plans and planning are to the great majority of Americans," "[t]he

questions raised in this case are vitally important to both employers and employees (and their families)." [2/15/08SlipOp 2].

Janice Amara who was originally the only named Plaintiff filed this lawsuit on December 19, 2001 against CIGNA Corp. and the CIGNA Corp. Pension Plan following CIGNA's conversion from a traditional defined benefit plan to a cash balance pension formula. [Cmplt]. On December 20, 2002, the District Court certified a class of over 27,000 current and former CIGNA employees. [Dkt. # 61.] The Complaint alleged that CIGNA violated ERISA's anti-backloading, vesting, and age discrimination rules by converting to a cash balance formula in a manner that reduced future rates of retirement benefit accruals and created "wear-away" periods during which employees do not earn any additional pension benefits at all. Plaintiffs also alleged that CIGNA violated ERISA by failing to disclose the benefit reductions, wear-aways and other disadvantages of the amended plan to employees in an ERISA-required Section 204(h) notice, a Summary of Material Modification ("SMM"), or a Summary Plan Description ("SPD"). Plaintiffs also alleged that CIGNA failed to notify former employees who might be rehired by CIGNA that CIGNA had changed its longstanding "Rehire Rule" so they would be moved to the much less favorable cash balance formula rather than be reinstated in the traditional defined benefit formula (which continued to exist for

"grandfathered" employees, including many executives).

A seven-day bench trial was held in September 2006, and January 2007, with over 500 exhibits and sixteen witnesses (only one of whom was called by CIGNA). Following post-trial briefing and oral arguments, Judge Mark Kravitz issued a 122-page decision on February 15, 2008 (the Liability Decision), holding that the cash balance conversion did not violate ERISA's anti-backloading, non-forfeiture, or age discrimination rules. However, the District Court determined that "in effectuating the conversion to the cash balance plan, CIGNA did not give a key notice to employees that is required by ERISA; and CIGNA's summary plan description and other materials were inadequate under ERISA and in some instances, downright misleading." [SlipOp 3]. The District Court concluded that "CIGNA was aware of the significant reduction in the rate of future benefit accrual" but "CIGNA wished to avoid the employee backlash likely to result from a thorough discussion of these aspects of Part B, and that CIGNA sought to negate the risk of backlash by producing affirmatively and materially misleading notices regarding Part B." [*Id.*, 87]. The Court concluded that under *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103 (2d Cir. 2003), participants were "likely prejudiced" or harmed by the defects in disclosure and that CIGNA did not provide any evidence

of harmless error to rebut that presumption. [*Id.*, 104-5].[1]

The District Court declined to find a violation of the ERISA Section 204(h) notice rule from CIGNA's failure to tell former employees who might be rehired that the Plan's "Rehire Rule" had been changed because he ruled that "the valid amendment of Part B was itself sufficient to inform those employees of their rights under the Plan." [SlipOp 109]. However, Judge Kravitz held that the relief for the other disclosure violations would apply to these former employees, too. *Id.*

Following additional briefing and argument, Judge Kravitz issued a separate decision on relief (the Relief Decision) on June 13, 2008. In that decision, the Court followed *Frommert v. Conkright*, 433 F.3d 254 (2d Cir. 2006), in ruling that relief can be provided under ERISA §502(a)(1)(B). [SlipOp 14-20]. To remedy CIGNA's failure to disclose the periods of "wear-away," the Court ordered CIGNA to implement an "A+B" formula under which the cash balance credits must always yield a positive addition to the participant's previously-earned retirement benefits. The Court also ordered CIGNA to "belatedly" notify everyone, including rehires and retirees, about "the true effect on their retirement

[1] The District Court also found that CIGNA violated Treasury regulations on disclosing the "relative value" of benefit options by failing to tell terminating employees when the annuity form of benefits had substantially more value than a lump sum distribution. [SlipOp 118-19]. One of the witnesses lost $80,000 from this. [SlipOp 110 n.47 and Ex7, ¶7].

benefits of the transition to Part B" and directed that comprehensive relief be provided for CIGNA's violations of the "relative value" disclosure rules. [SlipOp 28].

However, despite previously finding that ERISA Section 204(h)'s notice rule was violated not just by silence but by knowingly misleading statements, the Court declined to reinstate participants to the prior plan provisions or provide restitution for past due payments. Because of what the Court described as a "technicality," the Court concluded that substantive relief was an "impossibility." [SlipOp 24, 29]. Because CIGNA placed a "nominal" freeze between the prior plan provisions and the adoption of the permanent cash balance reductions, [2/15/08SlipOp 74], the Court held that the status quo ante had become the nominal freeze. [6/13/08SlipOp 26]. The Court also declined to provide any reparative relief for the misleading representations in CIGNA's Summary of Material Modification that participants would receive "comparable" or "larger" benefits. The Court believed those violations could only be remedied if it were "entirely to rewrite the Plan's provisions, with no clear guidance from the Plan itself or the relevant notices and disclosures." [SlipOp 34].

In determining that the "A+B" relief for CIGNA's failure to disclose the periods of wear-away is a "meaningful, substantial, and appropriate remedy," the

District Court suggested that the "A+B" remedy might do double duty as "alternative relief" to "partly ameliorate" CIGNA's misleading representations about "comparable" benefits. [SlipOp 27, 29 and 33].

The District Court stayed all relief pending appeal *sua sponte*, conditioned on CIGNA posting a bond (later set at $40 million). Both parties appealed. Plaintiffs appeal because incomplete relief was provided. CIGNA appeals on a variety of grounds that would reduce or eliminate the relief ordered.

STATEMENT OF FACTS

Effective January 1, 1998, CIGNA converted its Pension Plan from a traditional defined benefit formula (the "Part A" plan) to a "cash balance" pension formula (the "Part B" plan). [SlipOp 10-11]. Employees who met certain age and service requirements were "grandfathered" under the traditional formula. [Ex501, §1.19]. Under an amendment signed on October 31, 1997, benefits under the Part A plan for all other employees were frozen after December 31, 1997. [Ex2, D00132-33]. The cash balance plan amendments were adopted on December 21, 1998, and made retroactively effective to January 1, 1998. [Ex1, D00264 and 349]; see also *Depenbrock v. CIGNA*, 389 F.3d 78, 82 (3d Cir. 2004).

Under the cash balance plan, employees receive a hypothetical opening account balance based on the participant's Part A accrued benefits as of December

31, 1997. [Ex1, §1.28]. Hypothetical "pay" and "interest" credits are added to the account each quarter. [Ex1, §§4.1-4.2]. When a participant terminates employment, he or she receives the 'greater of' the benefit computed under the new cash balance formula or the frozen retirement benefits to which the participant was eligible on December 31, 1997. [Ex1, §1.1(c)].

The cash balance pension formula produced large reductions in future benefits and commensurate cost savings for CIGNA. Plaintiffs' actuarial expert estimated that the cash balance benefits are approximately 40% lower than the benefits under the prior Plan provisions. [Ex4, ¶10; Ex7, ¶1-6]. The reductions were "masked" from the employees, however, because benefits were expressed in a different mathematical form and CIGNA made misleading representations about the impact of the changes. [Ex8, 5-12]. In a series of communications to Plan participants, including a November 1997 Newsletter (CIGNA's purported Section 204(h) notice), a December 1997 Retirement Information Kit (which CIGNA describes as its Summary of Material Modification), and two nearly-identical Summary Plan Descriptions distributed in 1998 and 1999, CIGNA described the conversion as an "enhancement" that offered "comparable" or "larger" retirement benefits with no "cost savings" for CIGNA. [Ex8, Tab 1, 1; Tab 2, AMARA-00452]. At the time those representations were made, CIGNA knew the changes

were going to provide substantial cost savings to CIGNA by significantly reducing the employees' future retirement benefits and creating periods of "wear-away" in which employees would earn no additional benefits at all. [Ex28, D12287; Ex77; Ex31 at 29113]. CIGNA specifically instructed its communications contractors and key benefits personnel to refuse to provide accurate comparative information in written communications or in response to individual inquiries. [Ex117, SuppD1548].

On December 21, 1998, CIGNA amended the Plan document to modify its previously favorable "Rehire Rule." The old Rule placed rehired employees back under the benefit formula that they previously enjoyed when they were last employed by CIGNA. The amended rule provided for "no resumption of participation" on rehire. [Ex24,16-17]. The effect of the amendment was to provide that all rehired employees would be moved to the cash balance formula where CIGNA knew they could expect to "see no benefit improvement for several years." [Ex140, 4649]. Rehired employees were moved even though other employees with their age and length of service were "grandfathered" because of the disastrous effect of being moved to the cash balance formula.

SUMMARY OF ARGUMENT

The District Court had two ways to afford relief for the serious disclosure

violations it found in its Liability Decision: Provide relief for the Section 204(h) notice violation by reinstating the prior Plan provisions or require CIGNA to keep the promises made in its Summary of Material Modifications of "comparable" or "larger" benefits with no "cost savings" to CIGNA.

The District Court erred in concluding that it lacked the discretion to provide relief for these violations. The District Court found two main stumbling blocks: First, inconsistent with its Liability Decision, the Court determined that a "nominal" freeze insulated CIGNA and its plan from having to provide any relief for the violations of the Section 204(h) notice requirement. The Court determined that the nominal freeze, rather than the prior Plan provisions, became the status quo ante that the Court must reinstate for a Section 204(h) violation. Second, the Court believed that it could not offer any reparative relief for CIGNA's misleading representations that the cash balance benefits were "comparable" with no "cost savings" to CIGNA without "rewriting" the Plan.

As explained below, the first point is incorrect because the District Court already concluded that the freezing of Part A after December 31, 1997 "served essentially as a placeholder, and was intended to disappear once Part B became operative." [SlipOp 23]; accord [2/15/2008SlipOp 74-75]. This is exactly what happened: When CIGNA adopted a restated Plan on December 21, 1998 and made

the Part B (cash balance provisions) operative, the placeholder freeze "disappeared" and was not even mentioned in the restated Plan provisions. Instead, the "prior Plan" is now called the "Part A Plan" and the "Part A Accrued Benefit" is determined "in accordance with the provisions of Part A as in effect" on "the later of December 31, 1997, or the date the participant ceases accruing benefits under Part A." [Ex1, §§1.39-1.40].

As for the second barrier, there are many ERISA and non-ERISA cases enforcing the terms "comparable" or "substantially equivalent" without "rewriting" the relevant contract or statute. Terms like "comparable" have been in use in contracts for at least 100 years and undoubtedly have been used in misleading representations for as long a period. The District Court cannot decline the responsibility to provide relief for CIGNA's misleading representations without harming the very class of employees who were adversely affected. With no relief for these violations, they will suffer a loss of anticipated retirement income for the rest of their lives. Declining this responsibility also allows CIGNA to keep the profits from proven violations of its statutory obligations and encourages other employers to engage in the same conduct.

The District Court also erred in holding that CIGNA had no duty to notify former employees of the change in the Rehire Rule. As shown below, that failure

violated both the Section 204(h) notice requirement and the Summary of Material Modification disclosure rule.

This case should be remanded with instructions for the District Court to provide make-whole relief to the members of the class consistent with the statutory purposes of protecting reasonably expected benefits and disclosing benefit reductions.

ARGUMENT

I. Standard of Review.

Because the lower court decided these issues as matters of law, the standard of review is de novo. *Wilkins v. Mason Tenders Dist. Council Pension Fund*, 445 F.3d 572, 581 (2d Cir. 2006); *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 111 (2d Cir. 2003). It is true that the standard of review for a district court's "chosen remedy of an identified ERISA violation" is ordinarily "for an excess of allowable discretion." *Frommert v. Conkright*, 535 F.3d 111, 117 (2d Cir. 2008). But here the District Court concluded that relief was not available for the identified violations. "Determining what remedies are available under a statute is a question of statutory interpretation that requires de novo review." *Pell v. E.I. DuPont de Nemours & Co.*, 539 F.3d 292, 305 (3d Cir. 2008). Because the District Court made its determinations here as a matter of law based on factors that are

inconsistent with the legal standards for finding violations, the standard of review is de novo.

II. The District Court Has the Authority to Provide Complete Relief for CIGNA's Disclosure Violations.

A. This Circuit's Precedents Show that Complete Relief Can Be Provided Under ERISA §§502(a)(1)(B) or 502(a)(3).

ERISA was "enacted for the purpose of assuring employees that they would not be deprived of their reasonably anticipated pension benefits." *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1409 (2d Cir. 1985). "There is no doubt about the centrality of ERISA's object of protecting employees' justified expectations of receiving the benefits their employers promise them." *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743 (2004).

ERISA §2(b), 29 U.S.C. §1001(b), establishes that "the policy of this Act [is] to protect ... the interests of participants in employee benefit plans and their beneficiaries ... by providing for appropriate remedies, sanctions, and ready access to the Federal courts." The causes of action set out in ERISA §502(a), 29 U.S.C. §1132(a), provide "essential tools for accomplishing the stated purposes of ERISA." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52-53 (1987). Congress "specifically" designed ERISA's enforcement provisions "to provide...participants and beneficiaries with broad remedies for redressing or preventing violations." S.

Rep. 93-127, at 35; 1974 U.S.C.C.A.N. 4838, 4871. "Relief may take the form of accrued benefits due, a declaratory judgment on entitlement to benefits, or an injunction against a plan administrator's improper refusal to pay benefits." *Dedeaux*, supra, 481 U.S. at 53.

One of the "essential tools for accomplishing the stated purposes of ERISA" is the judiciary's authority to order that reasonably anticipated pension and other benefits will be provided to employees and their families to remedy statutory violations. Here, four months after a remarkably incisive and damning 122-page decision finding repeated violations by CIGNA of ERISA's disclosure requirements, the District Court concluded in a separate 50-page opinion that it lacked discretion to remedy the most serious violations that it found. As shown below, the District Court had two alternative ways to accomplish this: Provide relief for the Section 204(h) notice violation by reinstating the prior Plan provisions or else require CIGNA to live up to its promises in the Summary of Material Modification of "comparable" benefits. Instead, the District Court ruled that providing relief for either violation would be an "impossibility on these facts" or would be too "difficult" or too "complex" and lead to "significant problems." [SlipOp 23, 29, 33-34].

This Circuit's decisions in the *Frommert v. Conkright* appeals and in

disclosure cases dating back to the 1985 *Chambless* decision are inconsistent with finding deliberately misleading disclosures but not providing a remedy for them. As the Supreme Court stated in *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996), "We are not aware of any ERISA-related purpose that denial of a remedy would serve. Rather, we believe that granting a remedy is consistent with the literal language of the statute, the Act's purposes, and pre-existing trust law." Dan Dobbs puts it succinctly: The "denial of *all* available remedies is exactly equivalent to saying the plaintiff has no right at all." *Law of Remedies*, §2.4(7) (emph. orig.).

In *Albermarle Paper v. Moody*, 422 U.S. 405, 416-17 (1975), the Supreme Court held that a district court's decisions in fashioning relief, while discretionary, "must [] be measured against the purposes which inform" the statute:

> [T]here may be cases calling for one remedy but not another, and– owing to the structure of the federal judiciary– these choices are, of course, left in the first instance to the district courts. However, such discretionary choices are not left to a court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *United States v. Burr*, 25 F. Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C.J.).... A court must exercise this power "in light of the large objectives of the Act," *Hecht Co. v. Bowles*, 321 U.S. 321, 331 (1944). That the court's discretion is equitable in nature, see *Curtis v. Loether*, 415 U.S. 189, 197 (1974), hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review. In *Mitchell v. DeMario Jewelry*, 361 U.S. 288, 292 (1960), this Court held, in the face of a silent statute, that district courts enjoyed the 'historic power of equity' to award lost wages to workmen unlawfully discriminated against under §17 of the Fair Labor Standards Act of 1938.... The Court simultaneously noted that "the statutory purposes [leave] little room for the exercise of discretion not to order reimbursement." 361 U.S. at

296.

> It is true that "[e]quity eschews mechanical rules… [and] depends on flexibility." *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946). But when Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes and not "equity [which] varies like the Chancellor's foot." *Eldon, L.C., in Gee v. Pritchard*, 36 Eng. Rep. 670, 674 (1818). Important national goals would be frustrated by a regime of discretion that "produce[d] different results for breaches of duty in situations that cannot be differentiated in policy." *Moragne v. States Marine Lines*, 398 U.S. 375, 405 (1970).

Strom v. Goldman, Sachs, 202 F.3d 138, 247 (2d Cir. 1999), held that in ERISA cases "the objective is to eliminate the direct economic effect of an alleged violation of the statute" and thereby "serve Congress' purpose of affording meaningful relief to benefit plan beneficiaries." In *Jones v. UNUM Life Ins. Co.*, 223 F.3d 130, 139 (2d Cir. 2000), and *Henry v. Champlain Enterprises*, 445 F.3d 610, 624 (2d Cir. 2006), this Circuit reiterated that "[t]he aim of ERISA is to make the plaintiffs whole, but not to give them a windfall." This Circuit's *Frommert* decisions in 2006 and 2008 have reaffirmed that aim. In the instant case, Plaintiffs respectfully ask that this Circuit clarify that the District Court possesses full authority to provide relief for the violations that it found and direct the Court to exercise that authority in conformity with the aim of making the plaintiffs whole.

1. Relief Under §502(a)(1)(B).

In *Frommert v. Conkright*, this Circuit has twice applied the make-whole

aim to provide relief for a violation of Section 204(h)'s notice requirement under ERISA §502(a)(1)(B). *Frommert* involved Xerox's failure to disclose the adoption of a benefit-reducing "phantom offset" in violation of Section 204(h). *Frommert (I)* held that "without such proper notice to Plan participants, the amendment was ineffective as to them." 433 F.3d at 268. After vacating the District Court's determination that 204(h) notice was timely provided, this Circuit remanded to the District Court to "employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy." 433 F.3d at 268.

Under that mandate, Judge Larimer chose a remedy that "most clearly reflect[ed] what a reasonable employee would have anticipated based on the not-very-clear language in the Plan and SPD," guided by the principle that "if there is some doubt or ambiguity as to th[e] formula," "it must be resolved in favor of the employee" while "adequately preventing employees from receiving a windfall." 472 F.Supp.2d 452, 458-59 (W.D.N.Y. 2007). Following those principles, Judge Larimer selected an alternative that offset prior distributions based on their "nominal value" (i.e., with no interest)--even though Xerox advocated approaches with hypothetical interest or investment gains through which Xerox would achieve something closer to its original "phantom offset." 535 F.3d at 117 and 119 and

472 F.Supp.2d at 458. The Xerox Defendants appealed, and in *Frommert (II),* 535 F.3d 111, 119 (2d Cir. 2008), this Circuit affirmed, holding that:

> "The District Court had discretion to design a remedy to provide Plaintiffs-Appellees with the proper level of pension benefits in light of the ERISA violations we identified in our prior decision. As Defendants-Appellants wrote a pension plan that addresses the situation of a discharged-and-then-rehired employee with what can only be described as an ambiguity, contradiction or silence, we see no problem with the District Court's selection of one reasonable approach among several alternatives."

2. Relief Under §502(a)(3), If Relief Is Unavailable Under §502(a)(1)(B).

Frommert (I) held that under the facts of that case the remedies for Xerox's Section 204(h) violation could "be fully provided under [ERISA] §502(a)(1)(B)." "Because adequate relief is available under [§502(a)(1)(B)], there is no need on the facts of this case to also allow equitable relief under §502(a)(3)." 433 F.3d at 269-70. When full relief is unavailable under §502(a)(1)(B), *Varity Corp. v. Howe*, 516 U.S. 489 (1996), holds that relief can be provided under ERISA §502(a)(3). *Varity* recognizes that §502(a)(3) is a "catchall" provision enacted "as a safety net, offering appropriate equitable relief for injuries caused by violations that §502 does not elsewhere adequately remedy." 516 U.S. at 512.

It is well-established that where the "equitable jurisdiction" of the court is "properly invoked," the court has "the power to decide all relevant matters in dispute and to award complete relief." *Porter v. Warner Holding Co.*, 328 U.S.

395, 398-99 (1946); accord, *Mitchell v. De Mario Jewelry*, supra, 361 U.S. at 291-92 (recognizing "historic power of equity to provide complete relief in light of the statutory purposes").

In *Varity*, as here, the Supreme Court addressed "misleading" assurances to participants "that they would continue to receive similar benefits in practice," 516 U.S. at 501–even though the company "knew ... the reality was very different" and was "aware of the importance of the matter" to the employees. 516 U.S. at 494 and 503. Nearly identically to what Judge Kravitz found here, Varity Corp. provided its employees with "materially misleading" assurances "to persuade the employees ... to accept the change," "to avoid the undesirable fallout that could have accompanied" forthright disclosures, and "to save the employer money at the beneficiaries' expense." *Id.* at 493-94 and 505-6.[2]

In *Varity*, the Supreme Court affirmed the Eighth Circuit's award of equitable relief. The Eighth Circuit had ruled that the plaintiffs were "entitled to an injunction reinstating them as members of the M-F Welfare Benefits Plan" from which they had been "induced" to move with knowingly misleading promises. The

[2] Here, Judge Kravitz found that "CIGNA chose not to inform its employees about [the true] effects in order to ease the transition to a less favorable retirement program," avoid "an adverse employee reaction" and "avoid the employee backlash likely to result." [SlipOp 85-87]; and *id*., 104 ("CIGNA's successful efforts to conceal the full effects of the transition to Part B deprived plaintiffs of the opportunity to take timely action in response to the purported amendment").

Eighth Circuit further directed the district court to make "an award in the nature of restitution to compensate them for benefits of which ... they had been deprived." 36 F.3d 746, 756; and 41 F.3d 1263 (clarifying remand). The Supreme Court recognized that the participants in *Varity* sought "an order that, in essence, would reinstate each of them as a participant in the employer's ERISA plan," 516 U.S. at 492, and provide "the benefits they would have been owed under their old, Massey-Ferguson plan, had they not transferred to Massey Combines." *Id.* at 494-95. The Supreme Court affirmed the Eighth Circuit's judgment, ruling that under ERISA §502(a)'s "broad" authority to provide relief for statutory violations, including breaches of fiduciary duty in "conveying information about the likely future of plan benefits," participants are entitled to the kind of relief the lower courts ordered. *Id*. at 502 and 510. The Court stated that "Given [ERISA's] objectives, it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy." *Id*. at 513.

A recent Third Circuit decision, *Pell v. E.I. DuPont de Nemours & Co.*, supra, 539 F.3d 292, further shows how equitable relief can be provided under ERISA §502(a)(3) if relief for misleading representations is unavailable under §502(a)(1)(B). *Pell* shows that relief for misleading representations does not

constitute "rewriting" of the Plan but represents an application of estoppel, injunctive relief, and restitution. In that case, DuPont assured Pell orally and in writing that his adjusted service date would be 1971, but later said that the Plan document required otherwise. The district court held that DuPont was equitably estopped from using a later date and enjoined DuPont to pay the "higher pension amount." 539 F.3d at 308.

The Third Circuit affirmed the injunction–even though DuPont argued that the district court was "rewriting" or "informally amending" the plan: "[T]he injunction left the plan intact while acknowledging that equity requires DuPont to pay Pell a higher pension amount" and thus did not "rewrit[e]" the plan. 539 F.3d at 308. Although the district court had declined to provide past due benefits on the ground that restitution was unavailable, the Third Circuit reversed and ordered that relief to be provided, too. The Third Circuit held that "the restitution Pell seeks for his unduly low past payments is clearly traceable to the plan trust funds in DuPont's possession." *Id*. at 310.[3] Without as much explanation, *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 57 F.3d 1255, 1264 (3d Cir. 1997), followed the same model of providing injunctive relief to remedy material

[3] *Pell*'s ruling on restitution is consistent with this Circuit's decisions in *Pereira v. Farace*, 413 F.3d 330, 340 (2d Cir. 2005), *Dunnigan v. Metropolitan Life Ins. Co.*, 277 F.3d 223, 229 (2d Cir. 2002), and *FTC v. Verity Int'l*, 443 F.3d 48, 68 (2d Cir. 2006) (non-ERISA).

misrepresentations with "restitutionary reimbursement for back benefits." [4]

B. When a Plan Amendment Reduces Benefits in Violation of ERISA's Standards, *Frommert* Provides for a Declaration that the Amendment Is "Ineffective" Followed by Appropriate Relief.

The immediate consequence of a plan amendment that reduces benefits without complying with ERISA's advance notice requirement should be a declaratory order that the amendment is "ineffective." The Court's injunctive and restitutionary authority are then used to fashion appropriate relief for the violation as if the plan had not been amended. See *Frommert (I)*, 433 F.3d at 268 ("without such proper notice to Plan participants, the amendment was ineffective as to them"); *Frommert (II)*, 535 F.3d at 116 ("we concluded ... that Defendants-Appellants had impermissibly amended the ERISA plan to include [a phantom offset] mechanism in violation of 29 U.S.C. 1054(h)" and "remanded to the District Court to fashion a remedy for these violations"). Other courts have reached the same conclusion. See *Production and Maintenance Employees' Local*

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[4] See also *Mathews v. Chevron Corp.*, 362 F.3d 1172, 1184-5 (9th Cir. 2004) (ordering reinstatement to plan as modified by law because employees were "actively misinformed" about availability of future retirement benefits); *Griggs v. E.I. DuPont de Nemours & Co.*, 237 F.3d 371, 385-86 (4th Cir. 2001) (reinstatement for misleading statements "is "within the range of redress permitted by the phrase 'other appropriate equitable relief'"; reversing decision that reinstatement "was not a viable alternative" while "leav[ing] it to the sound discretion of the district court to consider the subtleties that will surely arise" in fashioning a remedy).

504 v. Roadmaster Corp., 954 F.2d 1397, 1404 (7th Cir. 1992) (because amendment that violated Section 204(h) is "ineffective," "the plan continued in force as if it had not been amended"); *Buus v. WaMu Pension Plan*, 2007 WL 4510311, *4 (W.D.Wa. 2007) ("the appropriate remedy under 29 U.S.C. §1054(h)" is that the amendment "that reduced Plaintiffs' rate of benefit accrual should be disregarded"); *Koenig v. Int'l Life Corp.*, 880 F.Supp. 372, 376 (E.D.Pa. 1995) (to remedy §204(h) violation, plan "shall calculate plaintiffs' retirement benefits under the IIP Plan that was in effect before the attempted 1990 amendment"); *Pickering v. USX Corp.*, 809 F.Supp. 1501, 1564-65 (D.Ut. 1992) (because of §204(h) violation, the prior plans "continue[] in force as if no amendment had occurred").

The same types of remedies are provided for plan amendments that violate ERISA §204(g)'s protection of accrued benefits (which is called the "anti-cutback" rule): The unlawful amendment is declared ineffective and injunctive and restitutionary relief are used to restore participants to the rightful position. In *Central Laborers' Pension Fund v. Heinz*, the Supreme Court ruled unanimously that an amendment that expanded the categories of postretirement employment triggering a suspension in monthly retirement payments constitutes a reduction in accrued benefits prohibited by ERISA §204(g). 541 U.S. at 743 (finding ERISA

§204(g) crucial to "ERISA's object of protecting employees' justified expectations"). In *Swede v. Rochester Carpenters Pension Fund,* 467 F.3d 216, 219 and 221-22 (2d Cir. 2006), this Circuit applied *Heinz* and affirmed the provision of "full retroactive benefits" for the amendment adopted in violation of ERISA §204(g). [5]

Plan amendments adopted in violation of the requirement in ERISA that amendments must be in writing and in conformity with the plan's procedures for amendments are likewise treated as invalid or ineffective. In *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 84 (1985), the Supreme Court ruled that if an unfavorable plan amendment is not properly adopted, it is "invalid." In *Aramony v. United Way Replacement Benefit Plan*, 191 F.3d 140, 148-50 (2d Cir. 1999), this Circuit affirmed a district court's refusal to enforce a forfeiture provision that was only approved by an Executive Committee in draft form. The provision was not "binding" because "the relevant details" remained "to be worked out." In *Depenbrock v. CIGNA*, 389 F.3d 78, 82 (3d Cir. 2004), the Third Circuit

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[5] Accord *Counts v. Kissack Water & Oil Service*, 986 F.2d 1322, 1325 (10th Cir. 1993) (amendment that violates ERISA §204(g) is "ineffective"); *Collins v. Seafarers Pension Trust*, 846 F.2d 936, 938-41 (4th Cir. 1988) (amendment "ineffective"); *Shaver v. Siemens*, 2008 WL 859251, *2 (W.D. Pa. 2008) (§204(g) violation remedied by "restoring" the preexisting arrangement, thereby "undoing the statutory violation" and requiring "a return to the true status quo mandated by ERISA").

addressed CIGNA's adoption of the same Rehire Rule that is at issue here. The Third Circuit held that the unfavorable change to the Rehire Rule could not be retroactively applied before the December 21, 1998 date on which CIGNA's CEO adopted it. Citing the decisions of five other circuits and its own precedent, the Third Circuit held that an "amendment is ineffective if it is inconsistent with the governing instruments."[6]

This Circuit has offered the same type of relief for violations of the disclosure requirements for SPDs and SMMs. In *Chambless v. Masters, Mates & Pilots Pension Plan*, 772 F.2d 1032, 1040 (2d Cir. 1985), cert. denied, 475 U.S. 1012 (1986), a multiemployer plan was amended to address how employees' benefits would be affected if they accepted employment with companies that do not contribute to the plan. Chambless accepted employment with a non-contributing company, causing his benefits to be reduced from approximately $920 per month at age 55 to about $470 per month beginning at age 65. 772 F.2d at 1036. This Circuit held that the notice of the amendment "was insufficient to satisfy the requirements of ERISA [§102]" because it did not explain the "full import of the interaction" between the amendment and the existing plan

[6] See also *Winterrowd v. American General Annuity Ins. Co.*, 321 F.3d 933, 937-38 (9th Cir. 2003); *Allison v. Bank One-Denver*, 289 F.3d 1223, 1235-36 and 1238 (10th Cir. 2002).

provisions. The case was remanded for the district court to determine Chambless' benefits without the amendment. *Id*. at 1040.

In *Layaou v. Xerox*, 238 F.3d 205, 211 (2d Cir. 2001), this Circuit applied *Chambless* to Xerox's SPD and held that it "did not describe the 'full import' of the effect of receiving a prior lump-sum distribution on the calculation of future retirement benefits upon rehire, and therefore, did not meet the requirements" of ERISA. On remand, the District Court refused to apply the amendment that Xerox had not adequately explained and held that "it is the SPD, not the Plan itself, that controls here." "[S]ince the SPD did not mention the phantom account offset" the plan was "directed to recalculate the plaintiffs retirement benefit" "without using any 'phantom account' at all." 330 F.Supp.2d 297, 304-5 (W.D.N.Y. 2004).

In this case, the Plaintiffs-Appellants ask that this Court direct the District Court to follow *Frommert (I)* and *(II)* and *Swede* in providing full relief for the Section 204(h) violations and, if full relief cannot be provided for that violation, to follow *Chambless* and *Layaou* in providing full relief for the SMM/SPD violation. Contrary to the June 13th Relief Decision, relief is not an "impossibility" on either claim. No new precedents on declaratory relief, injunctions, or restitution need to be established. The District Court simply needs to offer full relief for the violations of ERISA that it so capably found in line with the guidance given in

Frommert: Select a "reasonable approach" that most clearly reflects what a reasonable employee would have anticipated based on the not-very-clear language in the Plan and SPD, guided by the principle that doubt or ambiguity should be resolved in favor of the employees while adequately preventing a windfall. 535 F.3d at 119. As in *Frommert (II)*, the fact that the District Court must select "one reasonable approach among several alternatives" to provide make-whole relief cannot be an excuse for failing to provide the employees with any reparative remedy or allowing CIGNA to walk away with the profits it secured by misleading its employees about their retirement benefits.

III. ERISA Section 204(h) Requires That Prior Benefit Provisions Be Reinstated Until Notice of Reductions Is Provided.

A. Reinstating Prior Benefit Provisions Cannot be Avoided by Arguing that a Nominal Freeze Is the Prior Benefit Provision.

Frommert (I) holds that Section 204(h) requires that the notice of an amendment creating a significant reduction in future benefits explain that "benefits [will] be reduced" so employees can "make a meaningful decision regarding whether they [will] accept the terms." 433 F.3d at 262. Absent such notice, "the amendment was ineffective." *Id*. at 268. In *Hurlic v. Southern California Gas*, 539 F.3d 1024, 1038 (9th Cir. 2008), the Ninth Circuit likewise held that Section 204(h) requires "a summary of the amendments 'written in a

manner calculated to be understood by the average plan participant'." "Even without an individualized explanation of how the provision would affect their benefits," employees were "entitled to receive notice" because it could "induce[] Plaintiffs to increase savings in other retirement vehicles or to consider other employment." *Id.*

In the Liability Decision, the District Court rejected CIGNA's argument that by adopting "Amendment No. 4," which froze the old Part A benefits for active employees meeting certain criteria after December 31, 1997, "the resumption of benefit accrual" under the cash balance formula must be considered an increase in comparison to the interim freeze, rendering Section 204(h) notice unnecessary. [SlipOp 74]. The District Court held that this freeze 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." *Id*. "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 the 204(h) notice requirement, "namely to protect employees' interests and their reasonable expectations." [*Id*., 75].

The Liability Decision approvingly cites *Brody v. Enhance Reinsurance Co. Pension Plan*, 2003 WL 1213084, *11 (S.D.N.Y. 2003), in which Judge Preska

addressed a similar argument that a reduction in benefits following a temporary freeze could be reframed as having "effected an increase" in the rate of accruals compared with the temporary freeze. Judge Preska held that "[i]t is not so obvious to this Court that when there is a freeze in benefits, along with the promise of retroactive benefit accruals once the new Plan is adopted,...any additional benefit accruals at all constitute an overall increase because the baseline is zero. It is possible, for example, that pre-freeze benefits accrued a X rate, and post-freeze benefits made retroactive accrued at a rate less than X and that such a change falls within §204(h)." *Id.*, *11.

The District Court's Liability Decision and *Brody* both indicate that for Section 204(h) purposes courts should disregard a freeze in benefits where there is a promise of retroactive benefit accruals once the new plan is adopted. Both courts believed that any other ruling would allow plan sponsors to do something with two amendments that would be illegal with one–namely, amend the plan to reduce future benefits without advance notice of the reduction.

This appeal was necessary, however, because the District Court's Relief Decision justified the denial of relief under Section 204(h) on an abandonment of its previous approach to expressly-related *seriatim* amendments. The Relief Decision treated CIGNA's nominal freeze as though it was not a placeholder for

the permanent reductions. It concluded that if the permanent reduction amendment was ineffective, "the result would be a return not to a viable benefit plan, but to a freeze." [SlipOp 26].

In doing so, the District Court ignored the express relationship between the freeze amendment ("Amendment No. 4") and the Plan provisions that follow. Amendment No. 4 expressly provided that the freeze was adopted to allow the cash balance formula to "provide for benefit accruals under terms and conditions different from the Plan provisions in effect before 1998." [Ex.2, D00132]. CIGNA already knew that it could not get the formal provisions together until sometime "[p]rior to April 1998." [Ex8, Tab 1, 5]. The purpose of Amendment No. 4 was to avoid an ERISA §204(g) violation from retroactively applying reduced "terms and conditions" to the period between the effective date of the cash balance formula and the later adoption of the formal provisions. Plaintiffs-Appellants have not contested that CIGNA was allowed to do this to shield itself from potential liability under ERISA §204(g). But ERISA does not allow CIGNA to turn that shield into a sword against the Section 204(h) notice requirement. Section 204(h) requires notice to plan participants if the "terms and conditions <u>different from</u> the Plan provisions in effect before 1998" cause a significant reduction in future benefits compared with the prior provisions.

The Treasury Regulations on Section 204(h) provide that "[f]or a defined benefit plan," determining whether an amendment results in a significant reduction in the rate of benefit accrual is done "by comparing the amount of the annual benefit commencing at normal retirement age as determined under Q&A-5(a)(1) under the terms of the plan as amended, with the amount of the annual benefit commencing at normal retirement age as determined under Q&A-5(a)(1) under the terms of the plan prior to amendment." Treas. Reg. 1.411(d)-6, Q&A-7. As shown by CIGNA's restated Plan, the terms of the plan "prior to January 1, 1998" are the "Part A" terms. [Ex1, §§1.39-1.40; Ex501, §1.38]. Treating the nominal freeze as if it were "the terms of the plan prior to amendment" would lead to an absurd result. All of the active participants' prior benefits would be computed as zero no matter what the actual amounts.

The Treasury Department's regulations reinforce the basic test by explicitly providing that "[a]ll plan provisions that may affect the rate of future accrual ... must be taken into account" and that the determination of whether an amendment provides for a significant reduction in future benefits shall be made "based on reasonable expectations taking into account the relevant facts and circumstances at the time the amendment is adopted." Treas. Reg. 1.411(d)-6, Q&A-6 and 7; 63

F.R. 68678, 68681 (1998).[7]

In this instance, as far as reasonable expectations are concerned, the relevant plan provisions at the time the amendment was adopted were the Part A provisions in effect through December 31, 1997 and the cash balance/Part B provisions in effect beginning on January 1, 1998. The employees who were moved to cash balance provisions never knew about an "Amendment No. 4." What they knew was that Part A provisions were followed by Part B, which CIGNA assured them was going to provide "comparable" or even "larger" benefits. The comparative references in the Newsletter and Retirement Kit are all to the "current Pension Plan," i.e., Part A: For example, the Retirement Kit assures participants: "Generally speaking, the new Retirement Plan, in comparison with the current Pension Plan, tends to provide larger benefits for shorter-service employees and comparable benefits for longer-service employees." [SlipOp 26] and [Ex8, Tab 2, 729]. There were no comparative references in any CIGNA communication to the benefits earned during a nominal freeze.

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[7] Other Treasury regulations reinforce the point about "reasonable expectations." Treasury Regulation 1.411(d)-3(a)(2)(iii) and Treasury Regulation 1.411(d)-4 both contain a "multiple amendment" rule which collapses a "series of plan amendments which, when taken together, have the effect of reducing or eliminating a section 411(d)(6) protected benefit in a manner that would be prohibited by section 411(d)(6) if accomplished through a single amendment." 1.411(d)-4, Q&A 2(c)(1).

As a result, the analysis in the District Court's Relief Decision is flawed and inconsistent with the analysis in the Liability Decision. As hundreds of thousands of employees know, a pension freeze is a real period of time with a zero accrual rate. See generally GAO, *Defined Benefit Pensions: Plan Freezes Affect Millions of Participants and May Pose Retirement Income Challenges* (GAO-08-817 July 2008); accord *In re Gulf Pension Litigation*, 764 F.Supp. 1149, 1202 (S.D. Tex. 1991). Here, a freeze in benefits in this sense was not in effect for even a month. As the District Court found, Amendment No. 4 served as a "placeholder" on the continuing effect of the prior plan provisions until the next set of provisions could be adopted. Once those provisions were adopted, the placeholder disappeared and the prior Plan provisions continued to be those in effect through December 31, 1997.

The syllogism that the District Court drew concerning Amendment No. 4 and the "Amendment 5" also does not hold up for rehired employees. First, although the Relief Decision refers to "Amendment 5" five times, [SlipOp 22-25], there was actually no such amendment, but a "restatement" of the Plan to include the Part B provisions along with the prior Part A provisions. See [Exs1 and 501]. Second, by its terms, Amendment No. 4 only applied to active employees who satisfied certain criteria. [Ex2, D132].Thus, even if the analysis in the District

Court's Relief Decision was adopted, it would not work for rehired employees because they were not active employees. The status quo ante for the rehired employees was always the prior Part A plan provisions. In the Relief Decision, the District Court avoids that determination by concluding that "no §204(h) notice was due to rehires." [6/13/08SlipOp 22]. The Relief Decision never explains why CIGNA was not required to provide a §204(h) notice about the reductions and the change in the Rehire Rule to former employees who might return to CIGNA.

B. The Relief Decision Offers Stronger Reasons Against Its Conclusion Than in Its Favor.

The Relief Decision concludes that "returning to Part A as a remedy for CIGNA's defective 204(h) notice" is an "impossibility." [SlipOp 29]. As the Relief Decision candidly recognizes, this result allows an employer to "eviscerate" the statute by placing a nominal, less than one millisecond freeze between the prior Plan provisions and the provisions that effect the permanent reductions. *Id*.

In reaching the conclusion that doing anything more is an "impossibility," the Relief Decision is at odds with itself, describing reasons in favor of relief in most places and only occasionally arguing against it. On pages 23 and 24, the Relief Decision refers to the freeze as a "technicality" and "placeholder" that was "intended to disappear"–as it in fact did in the restated Plan. [SlipOp 23-24]. Page 24 also affirms that the Liability Opinion "ignore[s] the effect of the freeze in

determining whether a significant reduction ... had occurred." [SlipOp 24]. And on page 27, the Relief Decision finds that the outcome reached on the preceding page is "particularly troublesome" because "CIGNA never intended the freeze to be permanent." [SlipOp 27]. The same page very incisively recognizes that:

> The statute was designed to create "leverage" for employees "to encourage CIGNA to reconsider Part B" by holding out "the possibility of returning to Part A" if the notice is defective.
>
> "[T]he statute and the Second Circuit" intend for a "defective" notice to result in "a return to the more favorable plan provisions pre-dating the amendment."

The District Court then acknowledges that it "has permitted CIGNA effectively to eviscerate the notice requirements of 204(h)." *Id*. On the next page, the Court also recognizes that its decision may send the wrong message to other plan sponsors about a potential for profitable violations and is thereby inconsistent with the aim of deterring unlawful conduct. [SlipOp 28].

The support for the conclusion that the Relief Decision ultimately reached is by comparison lukewarm and conclusory. On page 25, the Decision distinguishes the Liability Decision on the ground that "there is a difference between ignoring the effect of a freeze for the purpose of determining whether a 204(h) notice is due and voiding the amendment underlying the freeze." [SlipOp 25]. The Relief Decision also states that there is "no justification or support for the proposition

that the defective 204(h) notice regarding Amendment 5 should somehow also implicate properly noticed Amendment 4." *Id*.

As indicated above, there actually was no "Amendment 5," but a "restatement" of the entire Plan to include the Part B provisions alongside the prior Part A provisions. See [Ex1 and Ex501]. In the restated Plan, the "prior" Plan is defined as the prior Part A provisions. [Ex1 §§1.39-1.40; Ex501 §1.38]. As the District Court correctly found, Amendment No. 4 was a "placeholder" with no continuing effect.

The Relief Decision also suggests that a higher standard of "bad faith" is needed to obtain relief for the Section 204(h) violation. See [SlipOp 28]. The Decision talks about how CIGNA did not "intentionally" adopt the freeze "to shield itself from the possibility of a return to Part A." *Id*. To the extent this suggests an "extraordinary circumstances" requirement, neither *Frommert (I)* nor *(II)* offers any support for imposing this on top of the existing requirement of "likely prejudice." Morever, if "extraordinary circumstances" is required, Plaintiffs-Appellants have satisfied that standard by showing that CIGNA achieved cost savings by deliberately misleading its employees with assurances of comparable or larger benefits with no cost savings for CIGNA. See *Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90, 101 (2d Cir. 2001) (extraordinary

circumstances where employer decreased overall expenses by reducing benefits provided under early retirement incentive program after employees retired); *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 79 (2d Cir. 1996) (employer avoided expenses by refusing to recognize severance plan announced by company president).

C. The District Court's Suggestion that Relief for the Section 204(h) Violation Is Inappropriate Because It Would Be "Extremely Costly" for CIGNA Is Unsupported by the Record and Is Inconsistent With the Finding of Liability, the Statutory Purpose and Fundamental Remedial Principles.

Although the Relief Decision concludes that relief in the form of additional benefits under the prior Plan provisions is an "impossibility," it suggests in other places that relief was available but not appropriate because it would be "extremely costly" for CIGNA. The Relief Decision distinguishes *Frommert (I)* on the basis that it "involved a much narrower amendment" that "had little effect on the overall functioning of Xerox's benefit plan." [SlipOp 25]. Here, "the effect on CIGNA's retirement program would be immense" and "a widespread return to Part A would also be extremely costly." *Id*. The Decision later refers to "the draconian results of a return to Part A" for CIGNA. [SlipOp 30 n.6].

The only support for the assertion that "a widespread return to Part A" would be "extremely costly" or "draconian" is the "noticeably higher benefit

accrual rate under Part A." [SlipOp 25]. Plaintiffs proved the "noticeably higher benefit accrual rate" at trial to establish the violation of Section 204(h). CIGNA never even admitted the prior accrual rate was higher. Nor did CIGNA ever present any evidence at trial or in the relief stage about how "extremely costly" it would be to reinstate participants under Part A. The closest CIGNA came to this subject was in its submission on the appeal bond, but there, CIGNA argued that a bond should not be required to be posted because this case represents such a small portion of CIGNA's annual income of $1.115 billion that CIGNA can easily afford it. [Dkt. #293 at 3.]

Denying relief even in part based on the cost to CIGNA is wrong for another reason: It leaves the main statutory consideration–the harm to participants from the disclosure violations–unaddressed. Consideration of CIGNA's financial interests is especially undeserved when the key part of the misleading representations that the District Court found were the representations by CIGNA that the accrual rates were "comparable" and that "one advantage the company *will not* get from the retirement program changes is cost savings." [SlipOp 80 (emph. orig.)].

Apart from there being no evidence of an extreme financial burden on CIGNA, Dobbs observes that it is improper to consider the costs of a remedy when

those costs are matched dollar-for-dollar by the benefits conferred. The 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." *Law of Remedies*, §2.4(5); accord Douglas Laycock, *Modern American Remedies*, at 405-410, 445. Similarly, in *Frommert*, 472 F.Supp.2d at 457, the District Court held that: "What is 'best' from a financial or actuarial point of view is not what the Court has been charged with determining."

In providing no retrospective relief for the §204(h) violation while ordering CIGNA to provide notice, "belatedly," to let everyone know "the true effect on their retirement benefits of the transition to Part B," [SlipOp 28], the District Court wound up providing relief prospectively (over a decade after-the-fact) while refusing to offer any reparative retrospective relief. The Supreme Court has ruled, however, that a controlling interpretation of Federal law should be given "full retroactive relief ... as to all events, regardless of whether such events predate or postdate" the decision. *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993). To do otherwise treats "similarly situated litigants differently" by denying relief to those who were harmed in the past while offering some measure of relief to those for whom the harm is continuing. In *Swede*, 467 F.3d at 220, this Circuit already rejected another ERISA defendant's efforts to avoid retroactive relief on

the basis that a decision should not be applied retrospectively.

IV. To Redress the Violations of ERISA's Summary of Material Modification Rules, CIGNA Must Provide "Comparable" Benefits Until Notice of the Reductions Is Provided.

Since 1974, ERISA has required any material modification to an employee benefit plan (positive or negative) to be understandably and accurately disclosed in a Summary of Material Modification or an updated Summary Plan Description. ERISA §§102 and 104, 29 U.S.C. §§1022 and 1024. Following *Frommert*, relief for violations of these requirements may be sought under ERISA §502(a)(1)(B), and if relief is unavailable thereunder, injunctive and other appropriate equitable relief may be sought under ERISA §502(a)(3).

Here, the District Court found that CIGNA misled participants into believing that CIGNA was designing the cash balance provisions to ensure that retirement benefits would be "comparable" to what they enjoyed before. The Relief Decision recognizes that CIGNA made four "offending statements" about benefit reductions:

(1) "Generally speaking, the new Retirement Plan, in comparison with the current Pension Plan [i.e., Part A], tends to provide larger benefits for shorter-service employees and comparable benefits for longer-service employees."

(2) "Other employees and all new hires will be able to earn comparable benefits as career employees under the CIGNA Retirement Plan [i.e., Part B]."

(3) "Our analysis showed that, in comparison to people with a higher age and service combination, you have plenty of time to take full advantage of the many attractive features of the Retirement Plan."

(4) "CIGNA is not reducing the overall amount it contributes for retirement benefits, nor has the new program been designed to save money."

[SlipOp 34]. The Liability Decision further recognizes that CIGNA's "efforts to conceal the full effects of the transition to Part B" were "successful" and that they "deprived [plaintiffs] of the opportunity to take timely action." [2/15/2008SlipOp 104].

Initially, the District Court held that it "need not, and does not, decide whether Plaintiffs could obtain relief under 502(a)(3)" because "Plaintiffs may obtain full relief under 502(a)(1)(B)." [SlipOp 20]. The Decision also specifically recognized that benefits can be ordered under ERISA §502(a)(1)(B) "as a result of materially misleading statements in CIGNA's notices and disclosures." [*Id*., 18]; and [id., 17] (benefits may be derived "from the misleading statements in CIGNA's required disclosures"). In the end, however, the District Court decided that it could not provide full relief to the Plaintiffs under §502(a)(1)(B). [*Id*., 33-34]. If full relief is not available under §502(a)(1)(B), Plaintiffs-Appellants respectfully submit that the District Court's authority under §502(a)(3) has to be reached. However, the District Court never reached that issue.

A. The Term "Comparable" Has Never Been Held to be "Not Definite Enough" to Enforce.

Without specifying whether it is referring to Section 502(a)(1)(B) or 502(a)(3), the District Court said that it believed it could not provide any substantive relief for CIGNA's misleading representations in its SMM because "there are no concrete means of remedying" the misleading representations about "comparable benefits." [SlipOp 34]. The Court held that it "would be required entirely to rewrite the Plan's provisions" "[i]n order to make these statements 'true'" but it had no "authority" to do so. *Id*.[8]

As indicated earlier, the term "comparable" has been interpreted in a variety of contexts to mean substantially equal or equivalent. While the term obviously confers some leeway on whomever is charged with applying it, the term "comparable" is not too indefinite to enforce. For instance, in *Fruin v. Colonnade One at Old Greenwich Ltd. P'ship*, 662 A.2d 129 (Conn. App. 1995), a contract set a $255,000 purchase price for a condominium but included a provision that would match the lower sale price of a unit with "comparable" footage. The Plaintiff sought to rescind the sales agreement because the term "comparable" was "not definite enough" and "makes it impossible to calculate the purchase price."

[8] At the April 30, 2008 oral argument on relief, Dkt.#278, Judge Kravitz stated, "I don't know that it is within even my equitable power to say...comparable [] means 90 percent of Part A." [Tr. 59].

Id. at 133. The court affirmed the trial court's decision that the contract was not void because the price of the unit could be "ascertained with reasonable certainty." *Id*. at 134.

In the context of employment cases, the term "comparable" is also frequently used and enforced. In *Adams v. Wyoming*, 975 P.2d 17, 19-20 (Sup.Ct.Wyo. 1999), a worker's compensation case, the issue was whether a post-injury wage which was 89% of the pre-injury wage was a "comparable or higher wage," a term that was undefined under the statute. The court looked to the dictionary meaning of comparable, how it was defined in other legislation, and the purpose of the statute and concluded that "comparable means substantially equal or equivalent" and "wages are only comparable if the difference between them is insignificant." A post-injury wage that was 89% of the pre-injury wage was <u>not</u> comparable. Accord, *Carpenter v. Arkansas Best Corp.*, 810 P.2d 1221, 1222 (Sup.Ct.NM 1991) ("comparable means 'substantially equal' or 'equivalent' in light of what we think the statute is trying to accomplish"; 84% was <u>not</u> a "comparable wage"); *USF Distribution Services v. Industrial Claim Appeals Office of Colorado*, 111 P.3d 529 (Ct.App.Colo. 2004) (benefit policy was not comparable because it "contained caps on the rate of TTD, wage loss, and medical benefits that were lower than those imposed under the Act").

In the ERISA context, corporate merger and acquisition agreements often require "comparable" benefits. Again, no one suggests that such terms are unenforceable because they require "rewriting" of the Plan. See, e.g., *Halliburton Co. Benefits Committee v. Graves*, 463 F.3d 360, 365 and 378 (5th Cir. 2006) (under merger agreement surviving company had to maintain "substantially comparable" benefits to similarly situated active employees); *Elmore v. Cone Mills Corp.*, 6 F.3d 1028, 1031 n.3 (4th Cir. 1993) (in buyout negotiations, employer promised retirement benefits "at least comparable" to current plans); *Belland v. PBGC*, 726 F.2d 839, 841 (D.C. Cir. 1984) (employees would receive benefits "comparable" to former plan under collective bargaining agreement); *Livernois v. Warner-Lambert Co.*, 723 F.2d 1148,1151 n.3 (4th Cir. 1983) (in contract to provide "comparable benefits," "'comparable' means 'at least equal'"); *Kosswig v. Timken Co.*, 2007 WL 2320537, *3 n.5 (D. Conn. 2007) (purchase agreement provided for "comparable benefit plans").

The term "comparable" is also frequently included in severance pay plans. Many severance plans deny severance benefits to employees who are offered "comparable" positions by an acquiring company. Some of these plans leave the term "comparable" undefined; others define it. In all cases, the term is enforced. See, e.g., *Campbell v. BankBoston*, 327 F.3d 1 , 3 (1st Cir. 2003) ("comparable

employment" defined as "one with a base salary within 10% of the current job"); *Adams v. Thiokol Corp.*, 231 F.3d 837, 841 and 845 (1st Cir. 2000) ("comparable job" was "one that is within 10% of your current pay or one that is more than your current pay"); *Easterly v. Philips Elecs. N. Am. Corp.*, 37 Fed. Appx. 166, 170 (6th Cir. 2002) ("Comparable employment is defined as any position that allows the employee to retain their current salary"); *Awbrey v. Pennzoil Co.*, 961 F.2d 928, 931 (10th Cir. 1992) (plaintiffs obtained "comparable" jobs where they retained same positions and salaries with only "minor" differences in benefits); *Yochum v. Barnett Banks Inc.*, 234 F.3d 541, 546 (11th Cir. 2000) (reversing determination that executive was offered "comparable employment" when term was defined to mean "equivalent compensation and benefits"); *Kolkowski v. Goodrich Corp*., 448 F.3d 843, 852-53 (6th Cir. 2006) (employee entitled to severance benefits when he was not offered "at least comparable" benefits).[9]

Congress also uses the term "comparable" in employment-related statutes. For instance, under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301, et seq., and 20 C.F.R. 1002, et seq,

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[9] Under Title VII, employees have a duty to mitigate damages by locating "comparable" employment. "Comparable" is defined as "virtually identical" in this context, too. See *Palasota v. Haggar Clothing Co.*, 499 F.3d 474, 486 (5th Cir. 2007); *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 624 (6th Cir. 1983); *Hutchison v. Amateur Elec. Supply*, 42 F.3d 1037, 1044 (7th Cir. 1994).

individuals who leave civilian employment to undertake military service are entitled to be reemployed in their civilian job or a "comparable" or "similar" position. 20 C.F.R. 1002.192. They are also required to receive the same non-seniority rights and benefits as the employer provides for "comparable" non-military leave. 20 C.F.R.1002.150. Accord *U.S. v. Clark*, 454 U.S. 555, 556 (1982) (under "prevailing wage" system for Federal blue-collar employees, rate of pay is based on prevailing wage rate for "comparable work" in local areas).[10]

The District Court should not have thrown up its hands on the ground that CIGNA's representations of "comparable" benefits with no "cost savings" were misleading but impossible to enforce without "rewriting" the Plan. As courts have done in other cases, the District Court could seek ways to simplify or avoid difficult dividing lines, for example, by using the prior Part A plan provisions and requiring CIGNA to provide 90% of the future benefits under the prior provisions–as Plaintiffs in fact suggested below. [Dkt.#275 at 36.]

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[10] One area where the term "comparable" has encountered resistance is "comparable worth" under the Equal Pay Act. "In adopting the "equal pay for equal work" formula," Chief Justice Rehnquist wrote in dissent that "Congress carefully considered and ultimately rejected" a "comparable worth" standard because of the "tremendous latitude" this term gives "to whoever is to be arbitrator." *County of Washington v. Gunther*, 452 U.S. 161, 184 and 186 (1981).

B. ERISA Does not Distinguish Between the Gravity of Misleading Representations in an SMM or an SPD.

The Liability Decision found that CIGNA's notices led participants to believe that the accrual rates "were at least roughly equivalent to those under Part A." [2/15/08SlipOp 104]. But the Court ultimately refused to provide any relief, reasoning that because the representations about "comparable" benefits with no "cost savings" to CIGNA were included in an SMM, and not in CIGNA's SPDs, it was "reluctant to treat a misleading SMM as a misleading SPD–that is, to reform the terms of the plan in conformity with the SMM." [6/13/2008 SlipOp 33].

The proposed distinction between the gravity of misleading statements in an SMM and an SPD in the Relief Decision is unsupported. *In Schoonejongen*, supra, 514 U.S. at 83-84, the Supreme Court found that "Under ERISA, both Summary Plan Descriptions and all plan amendment summaries 'shall be written in a manner calculated to be understood by the average participant." As the Supreme Court further held in *Varity*, 516 U.S. at 502, "Conveying information about the likely future of plan benefits" is a fiduciary function. Whether the information about the "likely future of plan benefits" is in an SPD or an SMM is immaterial if the information conveyed is misleading.

While there are not as many decisions about SMMs as SPDs, no one has drawn a distinction like the Relief Decision's, including in this Court's *Chambless*

decision. *Chambless* addresses ERISA's requirement that "plans must furnish to participants clear, timely explanations of circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." 772 F.2d at 1040 (citing ERISA §102(a) and (b) and §104(b)(1)). Far from downgrading the importance of SMMs, *Chambless* holds that a "notice was insufficient to satisfy the requirements of ERISA" because it did not explain the "full import of the interaction of the wage-related provision and the Amendment for someone in Chambless' position." *Id*.

In contrast to the Relief Decision, the District Court's Liability Decision found no meaningful distinction between the SMMs and SPDs, recognizing, as the Supreme Court did in *Schoonejongen*, that "the regulations regarding the content of the SMMs and SPDs is virtually identical." [SlipOp 87 n33]; and see 29 C.F.R. 2520.102-2(a) (SPD) and 2520.104b-3(a) (SMM). See also 29 C.F.R. 2520.104b-3(b) (providing that an updated SPD will substitute for an SMM). As the District Court's Liability Decision correctly found, "the only material difference between the two relates to timing." [SlipOp 87 n33].

The relationship between disclosures in an SMM and an SPD is further reinforced by the "duty to correct." *Griggs v. E.I. DuPont de Nemours & Co.*, 237 F.3d 371, 381 (4th Cir. 2001), holds that an "ERISA fiduciary that knows or should

have known that a beneficiary labors under a material misunderstanding of plan benefits that will inure to his detriment cannot remain silent–especially when that misunderstanding was fostered by fiduciary's own material representations or omissions." In *Hooven v. Exxon Mobil Corp.*, 465 F.3d 566, 578 n.7 (3d Cir. 2006), the Third Circuit likewise recognized that the "statute's SPD provisions implicitly require employers and plan administrators to correct misleading or incomplete SPDs," citing *McAuley v. IBM*, 165 F.3d 1038, 1046 (6th Cir. 1999). Because of the "duty to correct," misleading representations in an SMM that benefits will be "comparable" or "larger" with no "cost savings" for the plan sponsor inevitably leads to a "duty to correct" those statements in the SPD. Because of the duty to correct, a distinction between the gravity of misleading representations in an SMM and an SPD is not viable.

The District Court's distinction is also not tenable because of the fiduciary duty to carry out ERISA's statutory obligations. ERISA §404(a)(1)(D), 29 U.S.C. 1104(a)(1)(D), provides that fiduciaries are required to follow the Plan document "insofar as the provisions are consistent with the provisions of this title." The "provisions of this title" include the statutory obligation to understandably and accurately disclose material modifications. Consistent with ERISA §404(a)(1)(D), CIGNA's Plan document expressly authorizes the Plan administrator to take "such

actions as necessary to 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." [Ex1, D329].

Although the District Court eventually declined to exercise this authority, the Relief Decision simultaneously recognized that it has the authority to "reform" the Plan to correspond with CIGNA's representations.[11] Indeed, the most significant relief that the Court granted was a reform of the Plan: The Court ordered CIGNA to implement an "A+B" remedy to redress the failure to disclose the periods of wear-away. [SlipOp 35-41].

Under this Circuit's precedents on both SMMs and SPDs, there was thus ample authority for the District Court to provide full relief for CIGNA's misleading representations by reforming the Plan to include the term "comparable" in order to make CIGNA's representations "not misleading" and "in full and timely compliance" with the law. If reinstatement to the prior plan provisions cannot be provided for the Section 204(h) violation, Plaintiffs-Appellants thus

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[11] See [SlipOp 11] ("the primary relief sought by Plaintiffs is a declaration that Part B is invalid and an injunction requiring the plan administrator to reform his records to provide employees with benefits under Part A"); 35 ("A reformation of the benefit election notices to take account of the Court's A+B remedy would also address these two defects"); 48 ("the Court orders and enjoins the CIGNA Plan to reform its records to reflect that all class members must now receive 'A+B' benefits").

request a mandate similar to *Frommert*. *Frommert* recognized the "difficulty" in fashioning a remedy "because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated" and suggested that the district court "employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy." 433 F.3d at 268. On remand, Judge Larimer observed that the "SPD provide[d] even less guidance than the Plan" and ordered a remedy that "most clearly reflects what a reasonable employee would have anticipated based on the not-very-clear language in the Plan and SPD." 472 F.Supp.2d at 458.

Finally, the Relief Decision justifies the failure to provide relief for the misleading representations in the SMM by suggesting that the "A+B" remedy that the Court otherwise ordered to redress the periods of wear-away will "partly ameliorate" the benefit reductions. [SlipOp 27, 29]. However, at the relief stage, Plaintiffs presented an estimate, which CIGNA did not contest, that the "A+B" remedy will leave approximately 6,000 class members with no relief at all. [Dkt#279, 9]. Plaintiffs also submitted a Declaration from an expert in retirement plan administration illustrating that even for those who receive something, the A+B remedy will offer widely-varying recoveries when measured as a percentage of the amount by which their retirement benefits have been reduced, and on

average will recover only 21-25% of the losses. [Dkt#279-3].

The authorities on relief advise against omitting remedies for "major claims or types of relief" because some relief has been secured on other claims. "Particular segments of the class" should not be treated "differently than others" nor should "significant components of the class" be offered "illusory benefits." See *Manual for Complex Litig.* §21.62 (courts examine whether "particular segments of the class are treated differently than others" and whether "major claims or types of relief sought in the complaint have been omitted"); *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 783-85 (7th Cir. 2004) (rejecting settlement providing no relief to entire subclass with "colorable legal claims"); *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 388 (C.D. Cal. 2007) ("The Court is aware of no case in which a settlement was allowed that partitioned a class so as to provide relief to one segment and to deny it completely to another").

V. The Liability Ruling that CIGNA Did Not Need to Disclose the Amendment to the "Rehire Rule" to Former CIGNA Employees Is Clearly Wrong.

Before December 21, 1998, CIGNA's Plan document contained a favorable "Rehire Rule" entitled "Resumption of Participation Upon Re-Employment" which returned any rehired employee to the benefit formula that he or she enjoyed when they were last employed by CIGNA. [Ex2, D00025]. A December 21, 1998

amendment adopted by CIGNA's CEO modified this rule to one that provided for "No Resumption of Participation Upon Re-Employment." [Ex24, 16-17]. The effect of this amendment was to provide that all rehired employees would be moved to the cash balance formula. It is undisputed that no notice was given to the rehired employees of this change. [Ex29 (AnswerNo2inSecondSet)]. For individuals considering offers to be rehired such as named Plaintiff Gisela Broderick, it was not apparent that the prior Part A Plan had disappeared because it continued to exist for grandfathered employees.

In *Frommert*, the Second Circuit found likely prejudice from Xerox's undisclosed adoption of a new "rehire" rule because rehired employees were deprived of the opportunity to seek injunctive relief, alter retirement investment strategies, or consider other employment. 433 F.3d at 266. Here, as in *Frommert*, the change to CIGNA's Rehire Rule had disastrous consequences for the future pension benefits of rehired employees. Moving the rehired CIGNA employees to the cash balance plan caused older employees to "see no benefit improvement" for the remainder of their careers with CIGNA. [Ex140, 4649; Ex33; Ex230; Ex231]. CIGNA acknowledged that for older employees there was "not enough time before retirement to recover from this disruption." [Ex8, Tab 2, AMARA-00448]. The likely prejudice to the rehires from not providing notice was so strong that CIGNA

conceded it below. [Dkt.#182, 72-75.]

A. Even Though Hundreds of Former Employees Were Likely to Be Affected by the Change to the "Rehire Rule," Section 204(h) Notice Was Not Provided.

ERISA Section 204(h) provides that the notice of significant reduction in future benefit accruals must be provided to "each participant in the plan." Treasury regulations provide, however, that a Section 204(h) notice need not be provided "to any participant whose rate of future benefit accrual is reasonably expected not to be reduced by the amendment." Treas. Reg. 1.411(d)-6, Q&A-9(a). Whether former employees satisfy this criteria requires a determination based on "all relevant facts and circumstances at the time the amendment is adopted." Treas. Reg. 1.411(d)-6, Q&A-9; 63 F.R. 68678, 68682 (1998). Thus, if CIGNA wanted to withhold notice of the change in its Rehire Rule to former employees who might be rehired, CIGNA needed to make a contemporaneous determination based on all the facts and circumstances "at the time" that the future benefits of former employees were reasonably expected "not to be" affected by the change.

The District Court recognized that CIGNA's amended Rehire Rule "meant that certain employees who were close to retirement age when they were rehired by CIGNA faced the possibility that, as a result of wear-away and the method by which opening account balances were established, they would accrue no further

pension benefits during their remaining time with CIGNA." [2/15/08SlipOp 105]. Nevertheless, the Court held that rehired employees were not entitled to Section 204(h) notice because it found that the employees rehired after the amendment date were not "plan participants" for whom a 204(h) notice or SMM/SPD disclosures are required and because "the valid amendment of Part B was itself sufficient to inform these employees of their rights under the Plan." [SlipOp 109].

This part of the Liability Decision is simply wrong because the Treasury regulations show that former employees are "plan participants" to whom 204(h) notice is owed unless a contemporaneous consideration of the "relevant facts and circumstances" determines that they are not likely to be affected by the change. See [SlipOp 107]. The statement that "the valid amendment of Part B was itself sufficient to inform these employees" is without foundation because it was uncontested that these employees never received the cash balance amendment or any notice of the change in the Rehire Rule in advance of its application to them. [Ex29 (AnswerNo2inSecondSet)].

With respect to the facts and circumstances related to Section 204(h) notice, the evidence unquestionably shows that:

(1) CIGNA's amendment to the "Rehire Rule" was directed at rehired employees as in *Frommert*; indeed, the amendment could affect no one else;

(2) the amendment to the Rehire Rule was reasonably expected to affect at least hundreds of former employees; "CIGNA rehired 2,600 former employees in 1998-1999," hundreds of whom had already been rehired before CIGNA adopted the amendment, [Ex140, 4649] [12];

(3) CIGNA knew that placing employees with "higher age and service combinations" under the cash balance formula was going to have a disastrous impact on their future retirement benefits; a Retirement Kit that CIGNA prepared for other employees stated that there is "not enough time [for older employees] before retirement to recover from this disruption." [Ex8, Tab 2, AMARA-00448]; as stated, the likely prejudice to the rehires from not providing notice was so strong that CIGNA conceded it below. [Dkt.#182, 72-75]; and

(4) For employees considering job offers to be rehired, there was no inherent notice that the Rehire Rule would not continue to apply since the Part A Plan continued to exist for grandfathered employees.

With respect to any contention that a significant impact on the retirement benefits of at least several hundred people is insufficient to justify a notice, *Frommert* required Section 204(h) notice for an amendment to a "rehire rule" that affected 104 Xerox employees. 472 F.Supp.2d at 459-60. In *Davidson v. Canteen Corp.*, 957 F.2d 1404, 1407-8 (7th Cir. 1992), notice was required when only two executives were affected by an amendment related to compensation from the exercise of stock options.

Without linking the two, the June 13th Relief Decision also clearly shows

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[12] The *Depenbrock v. CIGNA* litigation established that "approximately 178" participants had already been rehired between January 1, 1998 and the December 21, 1998 date when the amendment was actually adopted. 2005 WL 636701 *4 (E.D. Pa. 2005).

how the Liability Decision on the Rehire Rule errs. In rejecting a separate argument by CIGNA that it should be able to retroactively identify people who do not warrant Section 204(h) notice, the Relief Decision decisively concludes that ERISA requires a "contemporaneous" assessment of the facts and circumstances: "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." [SlipOp 8-9]. The District Court found that CIGNA should not "be permitted to escape responsibility for misleading statements by attempting to determine ten years after the fact that certain employees were never entitled to receive the misleading notices CIGNA sent them." [*Id*., 9].

Plaintiffs-Appellants submit that the District Court erred when it did not apply this same reasoning to notice of the change in the Rehire Rule. The change to the Rehire Rule was disastrous for those who were affected by it and hundreds of participants were expected to be affected. CIGNA should not be "permitted to escape responsibility" to provide notice to these participants when it is undisputed that it made no contemporaneous determination "whether there were any employees or classes of employees who did not need to receive a §204(h) notice." All of the facts and circumstances suggest that if CIGNA had made a contemporaneous determination in good faith, it would have concluded that it was

required to provide notice of the change in the Rehire Rule.

B. No Summary of Material Modification Was Distributed to Former Employees Either.

Department of Labor regulations on the obligation to distribute an SMM describing an unfavorable amendment are even less susceptible to avoidance. The regulations provide that an SMM need not be distributed only if the amendment "in no way affects ... vested separated participant's rights under the plan." "[A] modification in benefits under the plan to which such ... vested separated participant ... had not at any time been entitled (and would not in the future be entitled) would not affect his or her rights and hence need not be furnished." 29 C.F.R. 2520.104b-4(c).

It is impossible to come up with a way to conclude that CIGNA's reversal of its Rehire Rule "in no way affects" the rights of terminated vested employees. Before the change, they had the right to be reinstated under a reasonably generous pension benefit formula if they were rehired. After the change, they did not have that right. In fact, after the change many of them would earn no additional benefits at all. Under ERISA's disclosure rules, CIGNA clearly had a duty to tell them that the Rehire Rule had changed.

The Relief Decision stated that "rehires remain eligible for relief regarding the misrepresentations in the Summary of Material Modifications and Summary

Plan Descriptions." [SlipOp 22]. However, the District Court never returned to the SMM in either the Liability Decision or the Relief Decision to determine whether CIGNA was obliged to tell vested former employees that the Rehire Rule had been effectively eliminated. Under the regulations, an SMM was undoubtedly required. CIGNA has conceded, moreover, that if the disclosure was required, the rehired employees were "likely prejudiced" by the failure to provide notice for the reasons identified in the *Frommert* decision.

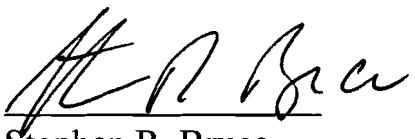
CONCLUSION

The District Court's Liability Decision constituted a formidable undertaking that reached very forceful conclusions about CIGNA's conduct with respect to its employees' retirement plan. The Relief Decision provides participants with a measure of relief for at least two of CIGNA's disclosure violations (the failure to disclose "wear-aways" and the "relative value" of benefit options). However, the District Court's failure to provide any reparative relief for the serious violations of the Section 204(h) and SMM requirements was in error, as was its holding that CIGNA was not required to provide notice of the change in the Rehire Rule. This case should be remanded with instructions for the District Court to provide complete relief to the members of the class consistent with the violations that the District Court found and the statutory purposes of providing advance notice of

benefit reductions and protecting employees' reasonable expectations of retirement security.

Dated: October 2, 2008

Respectfully submitted,



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