IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JANICE C. AMARA, GISELA R. BRODERICK, ANNETTE S. GLANZ individually, and on behalf of others similarly situated, Plaintiffs	*	3:01 CV 2361 (MRK)
v.	*	
CIGNA CORP. AND CIGNA PENSION PLAN, Defendants	*	

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE

M. PATRICIA SMITH
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor

NATHANIEL I. SPILLER
Counsel for Appellate and Special Litigation

EDWARD D. SIEGER
Senior Attorney
United States Department of Labor
200 Constitution Ave., N.W., Rm. S-2007
Washington, DC 20210
Sieger.edward@dol.gov
Phone: (202) 693-5771

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INTRODUCTION

In 2008, this Court found that CIGNA Corp. violated the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq. by making material misrepresentations in summary plan descriptions (SPDs) and summaries of material modifications (SMMs). The Court ordered a monetary remedy under section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), which the Second Circuit affirmed. Neither court found it necessary to rely on section 502(a)(3) of ERISA, id.. § 1132(a)(3), a section authorizing "other appropriate equitable relief" to redress ERISA violations.

On May 16, 2011, the Supreme Court vacated and remanded the Second Circuit's decision. The Supreme Court concluded that section 502(a)(1)(B) did not authorize the remedy but that "the types of remedies [this Court] entered here fall within the scope of the term 'appropriate equitable relief' in § 502(a)(3) [29 U.S.C. § 1132(a)(3)]." CIGNA Corp. v.

Amara, 131 S. Ct. 1866, 1880 (2011). The Supreme Court remanded for this Court or the Second Circuit to determine in the first instance whether those remedies are appropriate in this case, and the Second Circuit subsequently vacated this Court's judgment and remanded the case for further proceedings. Dkt. 311.

The Secretary participated as amicus curiae in the Supreme Court and frequently participates in ERISA cases raising important issues because of her responsibilities for interpreting and enforcing Title I of ERISA. See Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) (en banc) (Secretary's interests include promoting uniformity of law, protecting beneficiaries, enforcing fiduciary standards, and ensuring the financial stability of employee benefit plan assets). The Secretary submits this amicus brief to argue that the "A plus B" remedy that this Court ordered under section 502(a)(1)(B) of ERISA is "appropriate equitable relief" under section 502(a)(3) of ERISA. The Court's remedy is appropriate because it meets the well-established equitable standards for reformation and surcharge – remedies that the Supreme Court has already determined to be categories of equitable relief that "closely resemble" the relief already fashioned by this Court. Amara., 131 S. Ct. at 1879. Now that the Supreme Court has instructed this Court to remedy CIGNA's violation under section 502(a)(3) consistent with the guidance its decision provides on equitable remedies. the Court should, accordingly, reinstate its "A plus B" remedy as "appropriate equitable relief" under that section, as the Court "strongly implied" that it would do if it were to reach the section 502(a)(3) cause of action. Id. at 1878.

STATEMENT OF THE CASE

A. CIGNA's Conversion to a Cash Balance Plan

Before 1998, CIGNA provided a traditional defined benefit plan to its employees. Under that plan, an employee's pension benefit was expressed as an annuity calculated on the employee's pre-retirement salary and years of service. In 1998, CIGNA converted this plan to a cash balance plan. Under a cash balance plan, each employee's benefit is generally expressed as a balance in a hypothetical account. The account balance increases over time with hypothetical contributions and interest, and each employee is entitled to the balance in his or her account on retirement. Because many employees had already accrued benefits under the traditional plan, and ERISA prohibited CIGNA from reducing those benefits, 29 U.S.C. § 1054(g), CIGNA had to ensure that the new cash balance plan preserved benefits employees had accrued under the traditional defined benefit plan. See generally Amara v. CIGNA Corp., 534 F. Supp. 2d 288, 296-99 (D. Conn. 2008), aff'd, 348 Fed. Appx. 627 (2d Cir. 2009), vacated, 131 S. Ct. 1866 (2011).

CIGNA could have adopted what this Court called the "A plus B" approach of giving employees the benefits they had accrued under the traditional defined benefit plan (Part A) and additional benefits going forward under the cash balance plan (Part B). See Amara, 534 F. Supp. 2d at 298. For conversions of traditional defined benefit plans to cash balance plans after June 29, 2005, ERISA requires post-conversion benefits to be at least equal to benefits provided by the "A plus B" approach. Pension Protection Act of 2006, Pub. L. No. 109-280, § 701(a), 120 Stat. 981 (29 U.S.C. § 1054(b)(5)(B)(iii)). CIGNA did not adopt the "A plus B" approach, however. Instead, CIGNA used the "greater of A or B" approach, meaning that employees would get either the benefits accrued under the traditional defined benefit plan or the benefits accrued under the cash balance plan but not both. 534 F. Supp. 2d at 298, 304.

The practical result of CIGNA's use of the "greater of A or B" approach was that the pre-conversion defined benefit plan set the ceiling on accrued benefits for however long it took for accrued benefits under the cash balance plan to "wear away" and surpass the pre-conversion benefits. Employees who continued to work for CIGNA received benefit credits to their accounts in the cash balance plan, but the actual retirement benefits they could expect under the plan did not augment what they were already entitled to receive under the traditional defined benefit plan until their accounts in the cash balance plan (B) grew to be greater than the amount they had already earned under the traditional defined benefit plan (A). Amara, 534 F. Supp. 2d at 303-04. In some cases, employees worked for years without receiving any additional benefits toward retirement. Id. at 304. Some employees accrued no additional benefits at all from the implementation date of the cash balance plan until their retirement. Id. at 349.

CIGNA was aware that its use of the "greater of A or B" approach could result in employees working without accruing additional benefits but, because it did not inform employees that it was going to calculate benefits in that manner, the employees were not aware of this result. Amara, 534 F. Supp. 2d at 305, 346. Instead, CIGNA distributed materials indicating that employees would receive benefits in addition to the benefits they had already earned, i.e., that CIGNA would calculate benefits using an "A plus B" approach. In a November 1997 newsletter, for example, CIGNA told employees that the opening balance of an employee's account in the cash balance plan would equal the value of the benefit the employee had already accrued under the traditional defined benefit plan and that the account would thereafter grow as CIGNA credited a percentage of an employee's earnings, and interest, to the account. Id. at 306-07. Those statements were false because the opening balances in the cash balance plan for many employees did not represent the full value of benefits accrued under the traditional defined benefit plan, and, as a consequence, the account balances of many employees did not continue to grow for many years, if at all. Id. at 303.

Similarly, in a December 1997 retirement kit, CIGNA stated that "[e]ach dollar's worth of credits [to an employee's cash balance account] is a dollar of retirement benefits payable to [the employee] after he is vested," and that employees "will see the growth in your total retirement benefits from CIGNA every year." Amara, 534 F. Supp. 2d at 309. In October 1998 and September 1999, CIGNA issued summary plan descriptions (SPDs) stating that an employee's opening balance in the cash balance plan "was equal to the lump sum value of the pension benefit [the employee] earned" under the traditional defined benefit plan. Trial Ex 505 at 3; Trial Ex. 506 at J-2. The SPDs further stated that "[e]ach dollar's worth of credit is a dollar of retirement benefits payable to [employees] after [they] are vested," id., and reported that an employee's account would "continue to grow every year [the employee was] with CIGNA." Trial Ex. 505 at 1; Trial Ex. 506 at J-1. Like earlier materials, the SPDs thus falsely informed employees that CIGNA was following an "A plus B," rather than "greater of A or B," approach that CIGNA had actually chosen.

CIGNA was also aware that employees lacked full information about provisions in the formal plan instruments, Amara, 534 F. Supp. 2d at 342-43, which CIGNA did not even finalize until December 1998, id. at 300, and that 92% of employees responding to a December 1997 survey had stated that they "thoroughly read the retirement communications

[they] received" – i.e., the December 1997 retirement communications that falsely represented the new plan to have adopted an "A plus B" approach. Trial Ex. 133. CIGNA chose not to inform employees of the true effects of the change to a cash balance plan and instead informed its benefits department and the consulting company that helped CIGNA prepare the 1997 newsletter and 1998 retirement kit not to compare benefits under the two plans. 534 F. Supp. 2d at 343. CIGNA did so to avoid employee opposition to the conversion, which had caused other employers to abandon or scale back similar changes to a cash balance plan. Id. "CIGNA's strategy proved successful at avoiding a similar revolt within the company." Id.

B. This Court's Decisions on Liability and Remedies

1. After an extensive bench trial, this Court issued the first of two decisions. On February 15, 2008, it decided the liability issues, holding that CIGNA violated ERISA provisions governing SPDs and SMMs, 29 U.S.C. §§ 1022, 1024; 29 C.F.R. § 2520.102-2(b), and also violated the requirements in section 204(h) of ERISA, 29 U.S.C. § 1054(h) (2000), to inform participants of pension plan amendments that significantly reduce the rate of future benefit accrual . Amara, 534 F. Supp. 2d at 329-54. In particular, the Court concluded that the November 1997 newsletter, which CIGNA identified as its section 204(h) notice, id. at 335, violated section 204(h) because it included "material misrepresentations suggesting benefit increases" and indicated that "reductions in the rate of future benefit accrual were not a component or a possible result" of CIGNA's conversion to a cash balance plan. Id. at 339, 340. For similar reasons, the Court determined that CIGNA's SPDs and the December 1997 retirement kit that CIGNA identified as its SMM, id. at 335, violated ERISA's requirements that SPDs and SMMs be "sufficiently accurate and comprehensive to reasonably apprise

[employees] . . . of their rights and obligations under the plan," 29 U.S.C. § 1022(a), inform employees of "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits," id. § 1022(b), "be written in a manner calculated to be understood by the average plan participant," id. § 1022(a), and "not have the effect [of] misleading, misinforming or failing to inform [employees]." 29 C.F.R. § 2520.102-2(b); see 29 U.S.C. § 1024(b). The SPDs and SMM did not tell employees about the possibility of their having to work without earning additional retirement benefits even though CIGNA knew that numerous employees were likely to have to do so, the Court stated. Amara, 534 F. Supp. 2d at 346-49. Instead, the Court found that the SPDs and SMM contained "materially misleading statements" that led employees to believe that they would steadily earn additional benefits under the cash balance plan. Id. at 350-51. The Court further found that the SPDs and SMM contained misrepresentations that led participants to believe that all benefits previously accrued under the defined benefit plan would be included in the opening balances under the cash balance plan. Id.

The Court rejected CIGNA's argument that it was not the plan administrator responsible for complying with section 204(h) and ERISA's SPD and SMM provisions. Amara, 534 F. Supp. 2d at 329-34. CIGNA was the de facto administrator, the Court found, because it had exclusive responsibility for producing and distributing the section 204(h) notice, the SPDs, and the SMM. Id. at 331. The Court further concluded that although the CIGNA plan could be liable for benefits under section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), CIGNA as administrator could be liable only for appropriate equitable relief under section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3). 534 F. Supp. 2d at 333-34. Applying the Second Circuit's "likely harm" test, the Court found that the plaintiffs had established that they were likely harmed by CIGNA's violations. Id. at 352 (citing Burke v. Kodak Retirement Income Plan, 336 F.3d 103, 113 (2d Cir.2003)). And it rejected CIGNA's arguments that the violations were harmless, because CIGNA's successful efforts to conceal the full effects of the transition to a cash balance plan deprived employees of the opportunity to take timely action in response to the transition either by protesting when the change was implemented, leaving CIGNA for another employer, or filing a lawsuit. Id. at 352-54.

2. On June 13, 2008, this Court issued its decision on remedies, ordering the CIGNA plan to provide benefits under the "A plus B" approach. Amara v. CIGNA Corp., 559 F. Supp. 2d 192, 210-14 (D. Conn. 2008), aff'd, 348 Fed. Appx. 627 (2d Cir. 2009), vacated, 131 S. Ct. 1866 (2011). The Court reasoned that this remedy was straightforward and resolved the problems created by CIGNA's misrepresentations. Id. at 211-12. The Court declined to order further relief for the section 204(h) violation, other than to require CIGNA to issue new notices complying with that section, in part because the remedy for the SPD and SMM violations provided substantial relief. Id. at 209-10.

The Court relied on section 502(a)(1)(B) as authority for awarding the "A plus B" remedy. Amara, 559 F. Supp. 2d at 203-06. The Court explained that under Second Circuit precedent, CIGNA's misrepresentations in the SPDs and SMM became terms of the CIGNA plan. Id. at 203. Because plaintiffs could therefore bring an action under section 502(a)(1)(B) to recover benefits based on the misrepresentations, the Court ordered CIGNA to reform its records to provide benefits under the "A plus B" approach. Id. at 203, 222. The Court did not rely on section 502(a)(3) as authority for awarding the "A plus B" remedy for two reasons: First, relief was not "appropriate" under section 502(a)(3) when it was available under section 502(a)(1)(B), and, second, it believed that Supreme Court decisions such as Mertens v. Hewitt Associates, 508 U.S. 248 (1993), had severely curtailed the kinds of relief available under section 502(a)(3). Amara, 559 F. Supp. 2d at 205.

The Court rejected CIGNA's request for a further opportunity to show that individual employees were not harmed by CIGNA's misrepresentations. Amara, 559 F. Supp. 2d at 196-200. The Court determined that CIGNA had stipulated that the Court could determine that no individual issues remained concerning likely prejudice or harmless error, and the Court did so. Id. at 196-97. The Court further concluded that even if individual issues remained open, CIGNA should not get another opportunity to raise them because CIGNA had declined to engage in relevant discovery and had failed to call any employees as witnesses at trial. Id. at 197-98.

3. CIGNA appealed, arguing only that this Court erred by awarding plaintiffs more benefits than they were told they would receive under the pension plan. See Amara v. CIGNA Corp, 348 Fed. Appx. 627 (2009). The Second Circuit, in a summary opinion, rejected that argument and arguments in the plaintiffs' cross-appeal "for substantially the reasons stated in [this Court's] two well-reasoned and scholarly opinions." Id. CIGNA then filed a certiorari petition asking the Supreme Court to decide whether a showing of "likely harm" is sufficient to entitle participants to recover benefits based on an inconsistency between the explanation of benefits in the SPD or similar disclosure document and the terms of the plan itself. See Amara, 131 S. Ct. at 1871. The Amara plaintiffs also filed a certiorari petition, seeking further relief. Amara v. CIGNA Corp., No. 09-784, 2010 WL 17042 (U.S.).

C. The Supreme Court's Decision

The Supreme Court granted CIGNA's petition and issued a decision vacating the Second Circuit's judgment and remanding for further proceedings. CIGNA Corp. v. Amara, 131 S. Ct. 1866 (2011). After issuing that decision, the Court granted the Amara plaintiffs' petition and remanded without issuing a decision. Amara v. CIGNA Corp., 131 S. Ct. 2900 (2011). In resolving CIGNA's petition, the Supreme Court did not disturb any of this Court's factual findings about CIGNA's violations of ERISA. Id. at 1882 ("We are not asked to reassess the evidence."). Instead, the Supreme Court established three principles concerning claims based on an inconsistency between the explanation of benefits in the SPD or similar disclosure document and the terms of the plan itself.

First, the Supreme Court addressed whether section 502(a)(1)(B) authorizes the relief this Court awarded. Amara, 131 S. Ct. at 1876. The Supreme Court concluded that section 502(a)(1)(B) does not authorize this Court's order reforming the plans because that section is limited to recovering (or declaring rights to) benefits as written in the terms of formal plan instruments, and cannot be use to enforce promises made only in SPDs or similar documents summarizing the plan. Id. at 1876-78.

Second, the Supreme Court considered the possibility of providing similar relief under section 502(a)(3) "given the likelihood that, on remand, the District Court will turn to and rely upon this alternative subsection." Amara, 131 S. Ct. at 1878. It concluded that "the types of remedies [this Court] entered here fall within the scope of the term 'appropriate equitable relief' in § 502(a)(3)." Id. at 1880. The Supreme Court explained that "appropriate equitable relief" refers to those categories of relief that were typically available in equity before the merger of law and equity. Id. at 1878. A suit by an ERISA beneficiary against a plan fiduciary about the terms of a plan is the kind of lawsuit that, before the merger of law and equity, could only be brought in a court of equity, and the remedies available to those courts were traditionally considered equitable remedies, the Court explained. Id. at 1879.

The remedies adopted by this Court fit within the scope of the term "appropriate equitable relief," the Supreme Court determined, because they "closely resemble[]" three traditional equitable remedies: "reformation of the terms of the plan, in order to remedy the false or misleading information CIGNA provided," id. at 1879, equitable estoppel to hold CIGNA to what it had promised, id. at 1880, and a "surcharge" or make-whole remedy to provide relief "in the form of monetary 'compensation' for a loss resulting from a breach of fiduciary duty, or to prevent a trustee's unjust enrichment." Id.

Third, the Supreme Court concluded that "any requirement of harm must come from the law of equity," "as modified by the obligation and injuries identified by ERISA itself." Amara, 131 S. Ct. at 1881, 1882. Applying this principle, the Supreme Court rejected CIGNA's argument that a participant must always show detrimental reliance before a court can provide a remedy. Id. In particular, the Supreme Court determined that, while detrimental reliance is required under an estoppel theory, id. at 1881, a court could reform a contract to reflect the mutual understanding of the contracting parties, without a showing of detrimental reliance, "where 'fraudulent suppressions, omissions, or insertions'" materially affected the substance of the contract. Id. (citation omitted). A court could likewise provide a surcharge or make-whole remedy "only upon a showing of actual harm," the Supreme Court reasoned, but the actual harm did not have to be detrimental reliance (although actual harm may sometimes consist of detrimental reliance). The Court explained:

> [The actual harm] might also come from the loss of a right protected by ERISA or its trust-law antecedents. In the present case, it is not difficult to imagine how the failure to provide proper summary information, in violation of the statute, injured employees even if they did not themselves act in reliance on summary documents -- which they might not themselves have seen -- for they may have thought fellow employees, or informal workplace discussion, would have let them know if, say, plan changes would likely prove harmful. We doubt that Congress would have wanted to bar those employees from relief.

Id.

Based on this analysis, this Supreme Court remanded for this Court (or the Second Circuit) to determine in the first instance whether these principles are properly applicable in this case. Id. at 1882.[1] On July 27, 2011, the Second Circuit vacated this Court's judgment and remanded the case for further proceedings consistent with the Supreme Court's decision. Dkt. 311.

ARGUMENT

THIS COURT MAY APPROPRIATELY AWARD THE SAME RELIEF UNDER SECTION 502(a)(3) OF ERISA THAT THE COURT AWARDED UNDER SECTION 502(a)(1)(B) OF ERISA

A. The Supreme Court Held that the Types of Remedies This Court Awarded Under Section 502(a)(1)(B) Fall Within the Scope of the Term "Appropriate Equitable Relief" under Section 502(a)(3)

As discussed above, the Supreme Court stated that "the types of remedies [this Court] entered here fall within the scope of the term 'appropriate equitable relief' in § 502(a)(3)" of ERISA. Amara, 131 S. Ct. at 1880. The Supreme Court identified the "affirmative and negative injunctions" and "other relief" ordered by this Court as being typically equitable in nature, and especially singled out reformation, surcharge and estoppel for further commentary because they resembled both the remedy this Court had fashioned and "resemble[d] forms of traditional equitable relief." Id. at 1879. And it further explained that such relief could be appropriately considered on remand because reformation of plan terms may be suitable "to remedy the false or misleading information CIGNA provided,"

[1] Justice Sotomayor took no part in the consideration or decision of the case. Justices Scalia and Thomas concurred in the judgment, as rendered in the decision by Justice Breyer, but disagreed with the majority's addressing Section 502(a)(3) once the Court decided that Section 502(a)(1)(B) does not apply.

surcharge may be suitable to provide monetary compensation to retirees for losses caused by CIGNA's breach of its fiduciary duties or to prevent CIGNA's unjust enrichment, and equitable estoppel may be suitable to hold CIGNA to its promise "that the new plan would not take from its employees benefits they had already accrued." See id. at 1880-81.[2]

The Supreme Court's conclusion that these remedies fall within the scope of "appropriate equitable relief" under section 502(a)(3) is a holding because the conclusion was a necessary part of the Supreme Court's decision. See Black's Law Dictionary 800 (9th ed. 2009) (defining "holding" as "[a] court's determination of a matter of law pivotal to its decision; a principle drawn from such a decision"). The Supreme Court granted review "to decide whether the District Court applied the correct legal standard, namely, a 'likely harm' standard, in determining that CIGNA's notice violations caused its employees sufficient injury to warrant legal relief." Amara, 131 S. Ct. at 1871. After certiorari was granted, CIGNA argued on the merits of its petition that this Court improperly used a "likely harm" standard because (1) plaintiffs cannot recover benefits based on an inconsistency between an SPD and the plan under section 502(a)(1)(B), and (2) in appropriate cases, plaintiffs can recover benefits based on such inconsistency by proving detrimental reliance under section 502(a)(3). Brief for Petitioners, p. iii (filed Aug. 27, 2010). In response to the first argument, the Supreme Court held that section 502(a)(1)(B) did not authorize plaintiffs' suit. In response to the second argument, the Supreme Court agreed with CIGNA that section

[2] Because the Court's "A plus B" award is appropriate equitable relief under either reformation or surcharge, this brief does not separately address estoppel or stand-alone injunctive relief. This brief also expresses no view on whether the Court should award broader relief than the "A plus B" remedy that it previously issued, including whether it should reconsider its denial of additional relief for the section 204(h) violation that it found CIGNA had committed.

502(a)(3) provides an avenue for relief, but disagreed that a showing of detrimental reliance was always required. Id. at 1876-80. The Court thus resolved the question on which it had granted certiorari – "the applicable legal standard in determining whether members of the relevant employee class were injured," 131 S. Ct. at 1880 – by holding that, for example, "although a fiduciary can be surcharged under § 502(a)(3) only upon a showing of actual harm," (id. at 1881), "it is not always necessary to meet the more rigorous standard implicit in the words 'detrimental reliance.'" Id. at 1881-82. The Court was "asked about the standard of prejudice" and "conclude[d] that the standard of prejudice must be borrowed from equitable principles, as modified by the obligations and injuries identified by ERISA itself." Id. at 1882. The Supreme Court's analysis of the remedies available under section 502(a)(3) was therefore necessary for the Court to decide the question it had granted certiorari to decide.

For these reasons, this Court cannot disregard the Supreme Court's discussion of remedies under section 502(a)(3) as dicta. See, e.g., Brooklyn Legal Services Corp. v. Legal Services Corp., 462 F.3d 219, 235 (2d Cir. 2006) (reversing district court for characterizing as dicta reasoning that was essential to a Supreme Court decision). Justices Scalia and Thomas incorrectly characterized the majority's discussion of section 502(a)(3) as dicta by focusing only on the first part of CIGNA's argument. Amara, 131 S. Ct. at 1882-83 (Scalia & Thomas, JJ., concurring). The Supreme Court's remand, however, leaves no room for further fact-finding and its analysis of equitable remedies under section 502(a)(3) in the very context of this case must provide substantial guidance to this Court in carrying out the instruction "to revisit" its remedy determination "consistent with this opinion." Amara, 131 S. Ct. at 1882.

B. The "A Plus B" Remedy that This Court Awarded Under Section 502(a)(1)(B) is Appropriate on the Facts of This Case

Although the Supreme Court established that the types of remedies this Court awarded under section 502(a)(1)(B) fall within the scope of the term "appropriate equitable relief" under section 502(a)(3), the Supreme Court directed this Court (or the Second Circuit) to decide in the first instance whether those remedies were appropriate under the facts of this case. Amara, 131 S. Ct. at 1882. The Supreme Court read this Court's decision as "strongly impl[ying]" that it would base its relief on section 502(a)(3) were it not for this Court's conclusion that (1) section 502(a)(1)(B) provided sufficient authority, and (2) Supreme Court decisions such as Mertens had narrowed the availability of relief under section 502(a)(3). Id. at 1878; see Amara, 559 F. Supp. 2d at 205. Now that the Supreme Court has concluded that section 502(a)(1)(B) does not provide sufficient authority and that Mertens is not an obstacle to relief under section 502(a)(3), this Court should base its relief on section 502(a)(3). This relief is appropriately directed at CIGNA, Amara, 534 F. Supp. 2d at 331 (finding CIGNA was the de facto plan administrator), and may be awarded either as a matter of equitable reformation or pursuant to an injunction surcharging CIGNA for the difference between what it misleadingly promised the employees and what it knew the Plan actually provided.

1. The Court May Appropriately Reform CIGNA's Plan to Provide the "A Plus B" Relief

Amara affirms that the term "appropriate equitable relief" in section 502(a)(3) refers to "'those categories of relief' that, traditionally speaking (*i.e.*, prior to the merger of law and equity) 'were typically available in equity.'" Amara, 131 S. Ct. at 1878 (Court's emphasis; citation omitted). It is well established that equity courts had jurisdiction, under a clear and convincing evidence standard "to reform written instruments, where there is a mutual mistake, or mistake on one side and fraud or inequitable conduct on the other." Simmons Creek Coal Co. v. Doran, 142 U.S. 417, 435 (1892); see, e.g., Columbian Nat'l Life Ins. Co. v. Black, 35 F.2d 571, 573 (10th Cir. 1929). "Fraud" in equity had no precise definition or elements, but generally consisted in "obtaining an undue advantage by means of some intentional act or omission that was unconscientious or a violation of good faith." 3 John N. Pomeroy, A Treatise on Equity Jurisprudence § 873 at 421 (5th ed. 1941). Inequitable conduct included, among other things, actions that caused another party to an agreement to form a mistaken view of what the agreement covered. See, e.g., Tokio Marine & Fire Ins. Co. v. National Union Fire Ins. Co., 91 F.2d 964, 966-67 (2d Cir. 1937). "Mistake" meant "an erroneous mental condition, conception, or conviction, induced by ignorance, misapprehension, or misunderstanding of the truth, but without negligence, and resulting in some act or omission done or suffered erroneously by one or both the parties to a transaction, but without its erroneous character being intended or known at the time." 3 Pomeroy, supra, § 839, at 284-85.

Courts applied these principles in reforming documents that were contrary to an understanding expressed in other documents. For example, in Tokio Marine, two insurance companies had reached an agreement on a policy of reinsurance and a binder was issued to that effect. 91 F.2d at 965. An agent for one of the companies intentionally changed a term from the binder and the other company accepted a policy of reinsurance with the changed term. Id. at 966. The Second Circuit upheld a district court decision reforming the policy to reflect the terms in the binder, reasoning that although no intent to deceive or actual fraud was claimed, it was inequitable for the insurance company that had made the change to gain an advantage from the mistake of the other company in failing to understand the effect of the change. Id. at 966-67.

In Columbian Nat'l Life Ins. Co., the Tenth Circuit went further and reversed a district court for failing to reform a life insurance policy to reflect coverage the parties had agreed to. The policy did not reflect this agreement because the insurance company had inadvertently combined parts of an endowment policy, which provided a higher payout, with the intended personal policy. The insured claimed not to know about the mistake, but paid the lower premium owing on a personal policy. The Tenth Circuit held that equity required reformation, stating that if the insured did not notice the error, the mistake was mutual, and if he did notice it and said nothing "he was guilty of such inequitable conduct as to amount to fraud." 35 F.2d at 574; see also Korrick v. Tuller, 27 P.2d 529, 531 (Ariz. 1933) (reformation proper where a defendant had discovered an error in a deed through which the plaintiff transferred property to the defendant and "[h]is silence was an indication of a disposition to profit at plaintiff's expense because of the latter's ignorance of a fact well known to defendant. . . . His conduct, we believe, may with propriety and justice be characterized as inequitable").

Courts have similarly reformed ERISA plans to remedy inequitable or illegal conduct. In DelGrosso v. Spang & Co., 769 F.2d 928, 930 (3d Cir. 1985), a collective bargaining agreement prohibited an employer from obtaining a reversion of excess plan assets on plan termination. The employer amended the plan to permit a reversion. Id. at 931, 934. The Third Circuit concluded that the employer, in its role as administrator, breached its fiduciary duty to follow a governing plan document (the collective bargaining agreement) and ordered reformation of the plan to bar a reversion. Id. at 938. In McDonald v. Pension Plan of the

NYSA-ILA Pension Trust Fund, 450 F.3d 91, 95-96 (2d Cir. 2006), the Second Circuit affirmed an order reforming a pension plan to provide benefits required by ERISA. See also Nechis v. Oxford Health Plans, Inc., 421 F.3d 96, 103 (2d Cir. 2005) (recognizing bases for reformation "such as fraud, mutual mistake or terms violative of ERISA"). In Mathews v. Chevron Corp., 362 F.3d 1172, 1185-86 (9th Cir. 2004), the Ninth Circuit affirmed an order requiring an employer to modify plan records to make employees eligible for retirement benefits as a remedy for misleading statements that induced employees to retire before a retirement program was adopted.

These authorities support the Court's remedy of plan reformation. CIGNA promised its employees in the November 1997 newsletter, December 1997 retirement kit, and 1998 and 1999 SPDs that they would receive the full value of their accrued benefits under the traditional plan in the opening balances to the new cash balance plan and that each dollar credited to the cash balance plan was an additional dollar toward their retirement. This Court found that these documents "likely, and quite reasonably, led plan participants to believe 'that [working without accruing additional benefits toward retirement] was not a likely result of the transition'" to the new plan. Amara, 534 F. Supp. 2d at 354 (citation omitted). The Court's finding supports the conclusion that employees were mistaken about an important part of their compensation. See, e.g., S. Rep. No. 127, 93d Cong., 1st Sess. 3 (1973) (pensions are part of the compensation offered by employers for employees' services).

CIGNA, on the other hand, engaged in fraud or inequitable conduct. Like the insurer in Tokio Marine whose actions led to the other party's mistake in that case, CIGNA's deficient notices led to the employees' mistake here. Like the parties who acted inequitably in Tokio Marine, Columbian Nat'l Life Ins. Co., and Korrick, CIGNA did not take steps to correct the other party's mistaken understanding of the relevant document. Instead, CIGNA acted more inequitably by affirmatively misleading employees and taking affirmative steps to prevent employees from obtaining information that CIGNA knew employees lacked. See Amara, 534 F. Supp. 2d at 343 (CIGNA informed its benefits department and the consulting company that helped CIGNA prepare the 1997 newsletter and 1998 retirement kit not to compare benefits under the old and new plans). CIGNA also sought to obtain and did obtain an advantage from its inequitable conduct. See id. (CIGNA sought to avoid adverse employee reactions, which had caused other employers to abandon or scale back similar changes to a cash balance plan, and was successful at avoiding a similar revolt); cf. DelGrosso, 769 F.2d at 938 (reforming plan after employer obtained right to reversion of plan assets by amending plan contrary to collective bargaining agreement).

These facts support reformation of CIGNA's plan "to remedy the false or misleading information CIGNA provided." Amara, 131 S. Ct. at 1879. The facts show "mistake on one side and fraud or inequitable conduct on the other," Simmons Creek, 142 U.S. at 435, and there is thus good reason to use reformation as a remedy, especially given the Supreme Court's recognition of such a remedy under section 502(a)(3) of ERISA. See also Young v. Verizon's Bell Atlantic Cash Balance Plan, 615 F.3d 808, 820 (7th Cir. 2010) (rejecting argument that ERISA's requirement for plans to be established and maintained pursuant to a written instrument, 29 U.S.C. § 1102(a)(1), prevents reformation of plan terms), cert. denied, 131 S. Ct. 2924 (2011).[3]

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[3] There is no basis for the concurring Justices' concern that reformation may not be appropriate because "here, the Court would be employing the doctrine to alter the terms of a contract in response to a third party's misrepresentations--not those of a party to the contract." Amara, 131 S. Ct. at 1884 (Scalia & Thomas, JJ., concurring). There is no third party here

2. <u>Alternatively, this Court May Also Use Surcharge to Award the Class-Wide "A Plus B" Relief</u>

The Supreme Court's decision in this case also recognizes that surcharge, which could support this Court's injunctions "requir[ing] the plan administrator to pay to already retired beneficiaries money owed them under the plan as reformed," is an available remedy under section 502(a)(3). Amara, 131 S. Ct. at 1880. This case corresponds to a suit in equity by a beneficiary against a plan trustee about the terms of a trust, which "is the kind of lawsuit that, before the merger of law and equity, [the plaintiffs here] could have brought only in a court of equity, not a court of law." <u>Id.</u> at 1879; <u>cf.</u> <u>id.</u> (noting that ERISA typically treats a plan fiduciary as a trustee). In such a suit, "[e]quity courts possessed the power to provide relief in the form of monetary 'compensation' for a loss resulting from a trustee's breach of duty, or to prevent a trustee's unjust enrichment." <u>Id.</u> at 1880. This remedy, sometimes called a "surcharge," "extended to a breach of trust committed by a fiduciary encompassing any violation of a duty imposed upon that fiduciary." <u>Id.</u> "Surcharge" is therefore "appropriate equitable relief" in a suit under section 502(a)(3), even though <u>Mertens</u> limits the monetary relief available against a non-fiduciary. <u>Id.</u>

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because CIGNA, acting as both plan sponsor and administrator, made the misrepresentations and was also a party to the plan "contract." The concurring Justices also incorrectly suggested that CIGNA's role as plan sponsor in drafting the terms of the plan somehow limits CIGNA's responsibility for the misleading information it provided as a plan fiduciary. <u>Id.</u> As the Third Circuit explained in rejecting an argument that an injunction prohibiting a plan amendment impermissibly regulates settlor activity, "[t]he injunction is designed to remedy [the employer's] violation of its fiduciary duty to the plaintiffs for actions it took in its fiduciary capacity, and the specific equitable relief provision of ERISA [Section 502(a)(3)], which applies in this case, trumps the application of the general principle that ERISA does not regulate settlor activity." <u>In re Unisys Corp. Retiree Medical Benefits ERISA Litigation</u>, 579 F.3d 220, 237 (3d Cir. 2009)

a. As the Supreme Court recognized, surcharge is an equitable monetary remedy developed under equity's exclusive jurisdiction over trusts. Equity courts traditionally had responsibility for regulating fiduciary conduct in their role as "universal trustee," with ultimate supervisory authority over trusts and trustees. See, e.g., Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 676 (1819) (charitable trusts are "subject to the general superintending power of the court of chancery . . . possessing a general jurisdiction, in all cases of an abuse of trust, to redress grievances and suppress frauds"); Frye v. Community Chest of Birmingham and Jefferson County, 4 So. 2d 140, 148 (Ala. 1941) ("The court of equity has inherent power under the law of trusts to make such orders touching properties within its jurisdiction as will protect all interests."). In this role, equity courts provided a variety of remedies, including make-whole monetary relief, which served the goals of equity to restore the status quo ante, i.e., the position the beneficiary was or would have been in if the breach had not occurred, and to do justice, e.g., by depriving the breaching trustee of ill-gotten profits. Restatement (Second) of Trusts § 197, at 433 (1959); id. § 198, at 434; id. § 205, at 458; 1 John N. Pomeroy, supra, § 151, at 184; Duvall v. Craig, 15 U.S. (2 Wheat.) 45, 56 (1817); Manhattan Bank v. Walker, 130 U.S. 267, 271 (1889).

Typically, therefore, equity allowed the beneficiary to "surcharge the trustee for the amount necessary to compensate fully for the consequences of the breach," by, for example, "restor[ing] the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered." Restatement (Third) of Trusts - Prudent Investor Rule § 205 & cmt. a at 223 (1992). See generally Restatement (Second) of Trusts, supra, § 205, at 458; 3 Austin W. Scott & William F. Fratcher, The Law of Trusts § 205, at 238-39 (4th ed. 1987); George G. Bogert & George T. Bogert, The Law of Trusts and

Trustees § 862, at 36 (rev. 2d ed. 1995); 4 Austin W. Scott, William F. Fratcher, Mark, L. Ascher, Scott and Ascher on Trusts § 24.9, at 1685-87 (5th ed. 2007). A surcharge remedy measured by the beneficiary's loss provides compensation only for economic injury, however, not for non-pecuniary harm. See Restatement (Third) of Trusts - Prudent Investor Rule, § 205, at 223 (describing extent of trustee's liability and making no mention of liability for non-economic injury); 4 Scott and Ascher on Trusts, supra, § 24.9, at 1685-95 (same); 3 The Law of Trusts, supra, § 205 at 237-50 (same).

This Court's "A plus B" remedy is an appropriate form of surcharge because it achieves the primary goal of surcharge by requiring CIGNA to restore the amount necessary to compensate fully for the consequences of CIGNA's breach of fiduciary duty but does not compensate for non-pecuniary harm. As the plan administrator, CIGNA is "a trustee-like fiduciary," who, among other things, "provides participants with the summary documents that describe the plan." Amara, 131 S. Ct. at 1877; see also Varity Corp. v. Howe, 516 U.S. 489, 502-03 (1996) (holding that employer/administrator acts as fiduciary in providing information to employees about plan benefits). As the plan administrator, it had the same duty as a trustee not to intentionally misrepresent material information to beneficiaries. Varity, 516 U.S. at 506; Bell v. Pfizer, Inc., 626 F.3d 66, 74 (2d Cir. 2010). It had a further duty "to provide information when it knows that its failure to do so might cause harm." Devlin v. Empire Blue Cross & Blue Shield, 274 F.3d 76, 88 (2d Cir. 2001) (citation omitted).

This Court found that CIGNA violated its disclosure obligations under ERISA by making material misrepresentations and failing to provide information about the true effects of the conversion to a cash balance plan. Amara, 534 F. Supp. 2d at 342-43. The Court also effectively found that CIGNA's violations caused at least two kinds of the "actual harm" required by the Supreme Court. Amara, 131 S. Ct. at 1881 ("a fiduciary can be surcharged under § 502(a)(3) only upon a showing of actual harm -- proved (under the default rule for civil cases) by a preponderance of the evidence"). First, all employees were harmed because CIGNA's violations prevented the kinds of protests and organized opposition by employees that had led other companies to scale back or revoke similar conversions to cash balance plans. See Amara 534 F. Supp. 2d at 352-54. Second, individual employees were deprived of individual opportunities to protest, negotiate for higher pay, seek other employment, change retirement savings, or file a lawsuit. See id. at 354 (discussing testimony of Ms. Amara). As the Supreme Court stated, these harms extended to employees who may not have read the misleading materials CIGNA submitted:

> In the present case, it is not difficult to imagine how the failure to provide proper summary information, in violation of the statute, injured employees even if they did not themselves act in reliance on summary documents -- which they might not themselves have seen -- for they may have thought fellow employees, or informal workplace discussion, would have let them know if, say, plan changes would likely prove harmful.

Amara, 131 S. Ct. at 1880. The Supreme Court's "doubt that Congress would have wanted to bar those employees from relief," id., was thus well founded.

It makes no difference that this Court made its findings, which were not disturbed by the Supreme Court or the Second Circuit, under the "likely harm" standard rather than an actual harm standard. Under trust law, it is well established that once a beneficiary shows that a trustee's breach of duty caused some loss, uncertainties over the extent of the loss are resolved against the trustee. See George G. Bogert & George T. Bogert, supra, § 871, at 156-57; Restatement (Second) of Trusts, supra, § 205 cmt. f at 460; id. § 212(4) & cmt. e at 484, 486. Courts applied that rule in pension cases arising under pre-ERISA law. See Nedd v.

United Mine Workers, 556 F.2d 190, 211 (3d Cir. 1977); Branch v. White, 239 A.2d 665, 674 (N.J. Super. Ct. App. Div. 1968). The same rule applies in ERISA cases. See, e.g., Donovan v. Bierwirth, 754 F.2d 1049, 1056 (2d Cir. 1985) ("once a breach of trust is established, uncertainties in fixing damages will be resolved against the wrongdoer"). Here, individuals who testified established that CIGNA's breach caused harm because of lost opportunities to take action in response to the breach. See In re Unisys Corp. Retiree Medical Benefits ERISA Litigation, 579 F.3d 220, 229 (3d Cir. 2009) ("decisions to decline other employment opportunities, to forego the opportunity to purchase supplemental health insurance, or other important financial decisions pertaining to retirement" qualify as harm and as detrimental reliance). CIGNA chose not to engage in discovery or to call other witnesses, possibly because CIGNA suspected that other employees were likewise harmed. See Trial Ex. 133 (CIGNA knew from its own survey that 92% of employees said they thoroughly read the retirement communications they received); Amara, 534 F. Supp. 2d at 342-43 (CIGNA knew employees lacked full information and chose not to provide it). Under these circumstances, the plaintiffs have collectively established "actual harm" from CIGNA's disclosures, and uncertainties as to the extent of the harm should be resolved against CIGNA. See Amara, 559 F. Supp. 2d at 196-200 (rejecting CIGNA's request for a further opportunity to raise individual issues on harm to employees); Branch, 239 A.2d at 309 (distinguishing a case alleging inadequate disclosure by trustees, which affects all members of a class in the same way, from a case where misrepresentations to each individual and reliance thereon had to be proved).

The "A plus B" remedy appropriately resolves uncertainties about the extent of actual harm against CIGNA in favor of plan participants. It comes closest to putting participants in the position that CIGNA, through its violations, had represented they would be in, and also conforms to the current statutory requirement that plans provide at least the "A plus B" benefits in a transition to a cash balance plan. See 559 F. Supp. 2d at 211-12 & n.6. It is therefore the kind of surcharge that equity courts could award and "appropriate equitable relief" under section 502(a)(3) of ERISA.

b. In recasting the "A plus B" remedy as an appropriate surcharge remedy under section 502(a)(3), this Court should take cognizance of the sea change the Amara decision has wrought in the field of ERISA remedies. In particular, the Supreme Court's holding that detrimental reliance is not required in cases where courts ordered "surcharge," 131 S. Ct. at 1881, effectively overrules court of appeals decisions requiring detrimental reliance as an element of a fiduciary breach claim based on a material misrepresentation or omission. See, e.g., Bell, 626 F.3d at 75. Such a requirement is not in the text of ERISA and not required by courts of equity in cases by beneficiaries against trustees. Accordingly, there is no sound basis for this Court to require a showing of detrimental reliance before ordering a surcharge remedy.

More fundamentally, the Supreme Court's recognition of a surcharge remedy has overruled court of appeals decisions holding that section 502(a)(3) does not authorize make-whole compensation for monetary losses caused by a fiduciary breach. See, e.g., Amschwand v. Spherion Corp., 505 F.3d 342, 346-48 (5th Cir. 2007); Coan v. Kaufman, 457 F.3d 250, 263-64 (2d Cir. 2006). Those decisions construed Mertens and Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002), to prohibit such relief in cases against fiduciaries, even though Mertens and Great-West involved actions against non-fiduciaries. The Supreme Court has now corrected this misinterpretation of its decisions, holding that courts have power to provide make-whole compensation that CIGNA's status as a fiduciary makes a critical difference insofar as make-whole relief is concerned, and that this Court's concern with limited remedies allowed under Mertens and Great-West was misplaced. Amara, 131 S. Ct. at 1878, 1880.

Accordingly, the availability of make-whole relief against a fiduciary under section 502(a)(3) makes it unnecessary for this Court to decide whether monetary relief in this case could be authorized under one of the theories applied before the Supreme Court's decision in this case, such as a constructive trust theory, see Pell v. E.I. DuPont de Nemours & Co. Inc, 539 F.3d 292, 306-07 (3d Cir. 2008), or equitable restitution. See Howe v. Varity Corp., 36 F.3d 746, 754-57 (8th Cir. 1994), aff'd on other grounds, 516 U.S. 489 (1996). A surcharge remedy thereby avoids what courts and commentators had long criticized as unjust results when the facts of a case do not easily fit into such theories, leaving wronged beneficiaries with no remedy. See, e.g., Amschwand, 505 F.3d at 348-49 (Benavides, J., concurring specially) (facts "scream out for a remedy"); Cicio v. Does 1-8, 321 F.3d 83, 106 (2d Cir. 2003) (Calabresi, J., dissenting in part) ("the injury that the courts have done to ERISA will not be healed until the Supreme Court reconsiders the existence of consequential damages under that statute"), vacated, 542 U.S. 933 (2004); John H. Langbein, What ERISA Means by "Equitable": The Supreme Court's Trail of Errors in Russell, Mertens, and Great-West, 103 Colum. L. Rev. 1317, 1353-62 (2003). The Supreme Court's unqualified recognition of surcharge as a remedy under section 502(a)(3) restores ERISA to its original promise as a statute protecting the participants and beneficiaries of employee benefit plans by affording them a remedy sufficient to recompense for the economic harms suffered as a result of a fiduciary breach. See Amara, 131 S. Ct. at 1879 (relying on maxim of equity stating that "[e]quity suffers not a right to be without a remedy.") (citation omitted).

CONCLUSION

For the reasons stated above, the Court may reform CIGNA's plan or, alternatively, surcharge CIGNA to award the "A plus B" remedy as appropriate equitable relief under section 502(a)(3) of ERISA.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor for Plan
Benefits Security

NATHANIEL I. SPILLER
Counsel for Appellate and
Special Litigation

__/s Edward D. Sieger_______________
EDWARD D. SIEGER
Senior Attorney
Office of the Solicitor
U.S. Department of Labor
200 Constitution Ave., N.W.
Rm. S-2007
Washington, D.C. 20210
Sieger.edward@dol.gov
(202) 693-5771

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CERTIFICATE OF SERVICE

The undersigned certifies that copies of the foregoing Brief for the Secretary of Labor as Amicus Curiae have been served this 22nd day of September, 2011, by express mail upon the following:

Joseph J. Costello
Jeremy P. Blumenfeld
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103

Robinson & Cole
James A. Wade
280 Trumbull St.
Hartford, CT 06103

Stephen R. Bruce
Allison C. Pienta
805 15th Street, N.W., Suite 210
Washington, D.C. 20005
stephen.bruce@prodigy.net

Thomas G. Moukawsher
Moukawsher & Walsh
21 Oak Street
Hartford, Ct 06106

__/s Edward D. Sieger___
EDWARD D. SIEGER
Senior Attorney