UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMAL J. KIFAFI, individually, and on behalf of all others similarly situated, Plaintiff, v. HILTON HOTELS RETIREMENT PLAN, *et al.*, Defendants.	)	**Case No. 98-1517 (CKK)**

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO "SHOW CAUSE" WHY DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT AND FOR EQUITABLE ACCOUNTING

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Introduction

When implementation of a classwide injunction "breaks down," "class members retain the enforcement rights of a party to a permanent injunction." 755 Fed. Appx. 8, 9 (2019). Those enforcement rights include an "equitable accounting" and a "show cause" motion for civil contempt. This Court ordered the Hilton Defendants to provide "increased benefits" to a nationwide class of current and former employees "to remedy the minimum accrual rate and vesting violations previously found by the Court." 736 F.Supp.2d 64, 69 (D.D.C. 2010). A permanent injunction was issued in 2011 ordering Hilton to "award back payments and commence increased benefits" under a specified formula to 20,692 class members "as soon as administratively feasible." Dkt.#258 at 9. On remand from the D.C. Circuit's December 14, 2012 affirmance, this Court reissued that permanent injunction. Dkt.#366 at 5-6.

Almost seven years later, and five years after the last status report from the Hilton Defendants, all indications are that close to 35% of the class members and 35% of the increased retirement benefits remain *unpaid*. From April 2015 to date, Hilton has made no significant efforts to fully implement the injunction, despite this Court reiterating that the termination of active supervision "does not modify Defendants' obligations to class members or beneficiaries that have already been identified or who will be identified in the future." Dkt.#434 at 7; Dkt.#447 at 3. When Class counsel have asked for updates, Hilton refuses to provide any information. While Hilton refuses to provide updates, Hilton's publicly-available Form 5500 annual reports and 10-K's show that Hilton's implementation of the permanent injunction has, indeed, "broken down" – leaving as ***unpaid*** approximately 34 to 35% of the increased benefits with a current value of close to $80 million.

To ensure that unpaid class members receive the increased retirement benefits they are

due, the named Plaintiff moves this Court to order the Hilton Defendants to provide a full "equitable accounting" of Hilton's implementation of the judgment and "show cause" why they are not in civil contempt.

Background

On 8/31/2011, this Court ruled that since ERISA became effective in 1976 Hilton had violated the benefit accrual rules in ERISA §204, 29 U.S.C. §1054. The Order required that Defendants "provide Plaintiff's counsel with revised calculations of benefits and vesting service for the class members according to this Court's rulings." Dkt.#258 at 8. The Court ordered that "Hilton shall amend the Plan to provide benefits in accordance with the terms ordered" and "[a]s soon as administratively feasible, and by no later than January 1, 2012, Hilton shall award back payments and commence increased benefits for all class members." *Id*. at 7, 9. A later Order summarized that "[o]n August 31, 2011, the Court issued its final remedial Order requiring Defendants to:

(1) amend the Plan's benefit accrual formula to remedy the backloading violation;

(2) administer a claim procedure for crediting participants' years of union service for vesting purposes;

(3) award back payments for increased benefits that should have been paid in the past; and

(4) commence increased benefits for all class members by no later than January 1, 2012."

Dkt.#400 (2/4/2015 Order) at 3. Pursuant to the 8/31/2011 Order, Hilton filed a spreadsheet on November 14, 2011 with the individual "true up" benefits determined by applying the remedial formulas. Dkt.#273. Based on that spreadsheet, 20,692 class members were due increased

benefits that averaged $35 per month.[1] The Court determined that the total value of the relief was $146.75 million in 2011 dollars. Dkt.#374 at 2.

Defendants appealed the 2011 Order on the ground, *inter alia*, that "requiring the Plan to comply with the 133 1/3% rule in particular, rather than the anti-backloading rule generally, was an abuse of discretion." 701 F.3d 718, 726 (D.C. Cir. 2012). The Circuit affirmed the relief, holding that "[o]nce the court determined the Plan violated ERISA, it entered the world of equity," and that in ordering the relief, "the district court exercised a discretion informed by much more than just the ERISA violation." *Id.* at 726-27.

On remand, this Court's 10/11/2013 Order rejected the Hilton Defendants' proposal that they "be permitted an open-ended period of time in which to implement the final Plan Amendment" and ruled that "[c]onsistent with its prior Orders, the Court shall specify an end date by which the Defendants must award back payments and commence increased benefits." Dkt.#366 at 3. Accordingly, the Hilton Defendants were ordered to implement the terms of the Hilton Plan's "Appendix E," as adopted pursuant to this Court's 8/31/2011 Order, which requires Hilton to "award back payments and commence increased benefits for all class members" "as soon as administratively feasible," or by no later than 120 days from the date of the order. Dkt.#258 at 9; *see also* Dkt.#366 at 7.

In April 2014, Hilton moved to release its supersedeas bond under FRCP 62(d) on the ground that it had paid $33 million in benefit increases to 11,000 class members and mailed

[1] The 20,692 total includes 19,972 individuals identified in Hilton's November 2011 spreadsheet, plus 513 class members who were only due benefit increases from the 1999-1 Amendment that Hilton adopted to "moot" *Kifafi*'s benefit accrual complaint, and an additional 207 "newly vested" class members. Pienta Decl. ¶2.

notices of increased benefits to another 5,600 class members. *See* Dkt.#382-1 at 5; Dkt.#386 at 8. Plaintiff's opposition showed that this only represented 55% of the 20,000 total class members due benefit increases and only about 50% of what Hilton's own actuaries had expected to be paid in 2014 *alone*. *See* Dkt.#385 at 23-25. On February 4, 2015, the District Court granted Hilton's motion, ruling that "[i]n certain circumstances" "courts will release the supersedeas bond even though the judgment award has not yet been fully paid." Dkt.#400 at 8. Although Hilton had only paid "approximately $33.3 million in increased benefits," the Court did "not measure Defendants' compliance for discharge of the supersedeas bond based on how close Defendants have come to paying out $75.8 or $87 million" of the expected payout "in its first year of implementing the judgment." *Id.* at 10. The Court instead "consider[ed] the efforts Hilton has made to reach and pay all class members and the number of class members Hilton has paid or for whom Hilton has otherwise satisfied the judgment." *Id*. at 11. The Court also concluded it was "satisfied that there are no systemic problems or failures in Defendants' implementation of the judgment, only a few refinements to Defendants' forms and procedures." *Id*. at 27.

Plaintiff moved to reconsider, which this Court granted in part on June 4, 2015, by modifying Defendant's search procedures for class members with unconfirmed addresses. The District Court held Plaintiff's motion in abeyance in part to "evaluate Defendants' certification of compliance with the Court-ordered address location process." Dkt.#414 at 21-22. After Defendants filed a certificate of compliance with the Court's address location process in June 2015, Dkt.#415, Plaintiff continued to submit status reports to the Court in August and September of 2015 concerning Hilton's failure to mail notices and pay class members whose addresses had been individually confirmed by Plaintiff's counsel. Dkt.#419, 426.

In a December 7, 2015 decision to rule on the "remaining issues," the District Court ruled that after "review[ing] all of the other materials the parties have submitted regarding the ongoing address location efforts," "Defendants have adequately complied with the search requirements – notwithstanding certain logistical challenges inherent in identifying Plan members and their beneficiaries." Dkt.#434 at 6. The Court stated that it "is not convinced that Plaintiffs have identified any gap in coverage or any deficiency in Defendants' actions in implementing the Court's remedial orders." *Id*. But the Court stated that it would order searches every two months until June 2016, followed by an additional search in December 2016, and a final search in December 2017. *Id*. at 7. The District Court refused to order reporting about those searches, but stated "the termination of this specific search requirement does not modify Defendants' obligations to class members or beneficiaries that have already been identified or who will be identified in the future." *Id*.

Plaintiff noticed an appeal of the District Court's termination of its active supervision without an accounting or other remedial provisions to ensure compliance with its orders. In an October 10, 2017 decision on a notice Plaintiff filed advising that Hilton had ***not*** mailed to the confirmed addresses Class counsel had supplied for 985 class members, this Court rejected Plaintiff's request to "order Hilton to prepare a status report on its compliance with this Court's Orders or authorize Plaintiff to conduct post-judgment discovery" "because the Court's jurisdiction over the issues raised has concluded." Dkt.#447 at 1-2.

On February 15, 2019, the D.C. Circuit ruled that "[t]he district court did not abuse its discretion by choosing to end its active supervision of the permanent injunction." 752 Fed. Appx. 8, 9. But the Court recognized that "Hilton has ongoing obligations to class members or

beneficiaries that have already been identified or who will be identified by other means in the future," and that "Hilton, too, confirmed to us that it has continuing obligations under the decree to find and pay beneficiaries." *Id*. "The court's relinquishment of jurisdiction did not terminate the underlying injunction, nor did the court hold that Hilton was done satisfying its terms. Should the implementation break down, class members retain the enforcement rights of a party to a permanent injunction." *Id*.

I. The D.C. Circuit's Per Curiam Judgment Recognizes that Relinquishing Active Supervision "Did Not Terminate the Underlying Injunction" and that "Class Members Retain the Enforcement Rights of a Party to a Permanent Injunction."

"[O]nce a court issues an injunction, those persons subject to it must obey the terms of the Order as long as the injunction remains in effect." *Armstrong v. Executive Office of the President*, 821 F. Supp. 761, 764 (D.D.C. 1993), *rev'd on other grounds*, 1 F.3d 1274 (D.C. Cir. 1993). There is "no question that courts have inherent power to enforce compliance with their lawful orders." *Shillitani v. United States*, 384 U.S. 364, 370 (1966); *Young v. United States*, 481 U.S. 787, 794 (1987) (this authority is "essential to the administration of justice"); *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1289 (D.C. Cir. 1993). Thus, "district courts clearly have the authority to enforce the terms of their mandates," *Fund for Animals v. Norton*, 390 F.Supp.2d 12, 15 (D.D.C. 2005), and "to take broad remedial action to effectuate compliance with [their] orders." *Dixon v. Barry*, 967 F.Supp. 535, 550 (D.D.C. 1997).

As stated, the Circuit's Per Curiam Judgment recognizes that in this case a "permanent injunction" is in place and that "[t]he court's relinquishment of jurisdiction did not terminate the underlying injunction, nor did the court hold that Hilton was done satisfying its terms. Should the implementation break down, class members retain the enforcement rights of a party to a

permanent injunction." 752 Fed. Appx. at 9. Under the "mandate rule," the "letter and spirit" of this mandate must be carried out. *Cleveland v. Federal Power Comm'n*, 561 F.2d 344, 346 (D.C. Cir. 1977). "The mandate rule embodies the simple principle that an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *United States v. Hiachor Kpodi*, 888 F.3d 486, 491 (D.C. Cir. 2018). *Taylor v. FDIC*, 132 F.3d 753, 761 (D.C. Cir. 1997), also holds that an "unpublished" decision like this one is "law of the case, preclusive for all matters decided expressly or by necessary implication." *Accord*, *National Classification Committee v. United States*, 765 F.2d 164, 170 (D.C. Cir. 1985).

As the Per Curiam Judgment recognizes, this case continues to be in "the enforcement phase, in which sanctions are imposed for noncompliance with the previously promulgated rule of conduct." Owen M. Fiss, *The Civil Rights Injunction* (1978), at 9. Consistent with this, the Per Curiam Judgment rules that "[t]he court's relinquishment of jurisdiction did not terminate the underlying injunction" or "the enforcement rights of a party to a permanent injunction." 752 Fed. Appx. at 9. Accordingly, "[t]he beneficiary of a mandatory order has the right to return to [that] court to ask for enforcement of the rights the party obtained in the prior litigation." *Dowell v. Board of Ed.*, 795 F.2d 1516, 1521 (10th Cir. 1986). *Accord*, *Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1074 (7th Cir. 2018) (if party "refuses or fails to comply with the federal court's injunction or complies only partially, the federal court's involvement would certainly continue as it oversees the implementation of its order"); *United States v. District of Columbia*, 768 F. Supp. 365, 368 (D.D.C. 1991) (notwithstanding "termination" of jurisdiction, the court had jurisdiction to enforce consent decree because this Court always "possesses jurisdiction to enforce its own order"); *Central of G. R. Co. v. United States*, 410 F. Supp. 354, 357-358 (D.D.C. 1976) ("no

doubt that federal courts have continuing jurisdiction to protect and enforce their judgments"); Lloyd Anderson, "Release and Resumption of Jurisdiction Over Consent Decrees in Structural Reform Litigation," 42 *U. Miami L. Rev.* at 413-16 (courts always have authority to reopen and "resume jurisdiction to enforce the decree"); *Joy v. St. Louis*, 138 U.S. 1, 47 (1891) ("it is not unusual for a court of equity to take supplemental proceedings to carry out its decree and make it effective under altered circumstances"). Indeed, the beneficiary of a mandatory order cannot go anywhere else to enforce the injunction. Instead, "[c]ontempt proceedings must be brought in the court that was allegedly defied by a contumacious act." 1993 Adv. Comm. Notes to FRCP 4.1.

II. Hilton and Its Officers Have a Duty to Implement the Injunction "As Soon As Administratively Feasible."

An enjoined party's obligation to implement an injunctive decree is like a "fiduciary relation." *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 456-457 (1932). The enjoined party's obligation to comply extends to the officers and agents of the defendant and everyone else "legally identified with the defendant," even when they are not named as defendants. *Chase Nat'l Bank v. City of Norwalk*, 291 U.S. 431, 436-37 (1934).

Hilton and its officers have not only the obligation of an enjoined party to implement the decree "as soon as administratively feasible," but Hilton is the "plan administrator" under ERISA. *See* ERISA §3(16)(A), 29 U.S.C. §1002(16)(A), and Defs. Answer (Dkt.#6) at ¶¶7-8 (admission of allegation in complaint). As plan administrator, Hilton and the other Defendants are "fiduciaries." ERISA §3(21)(A), 29 U.S.C. §1002(21)(A) (defining "fiduciary" as exercising "any discretionary authority or discretionary responsibility in the administration of [the] plan").

As an enjoined party and fiduciary, Hilton has an obligation to discharge its duties with respect to the plan "for the exclusive purpose of providing benefits to participants and their

beneficiaries" in accordance with the terms of the Plan "insofar as such [terms]... are consistent with the provisions of this title." ERISA §404(a)(1), 29 U.S.C. §1104(a)(1); *accord*, *Res. (3d) of Trusts*, §76(2)(d) and cmt. ("duty to comply with the terms of the trust and applicable law providing for the distribution"). The undivided duty of loyalty that fiduciaries owe participants and beneficiaries to act for their exclusive benefit is rooted in the Biblical admonition that "no man can serve two masters," which the Supreme Court recognized over 170 years ago. *See Michaud v. Girod*, 45 U.S. 503, 553-58 (1846); *Wardell v. R.R. Co.*, 103 U.S. 651, 657-58 (1880); *Pepper v. Litton*, 308 U.S. 295, 297-307 (1939).[2] Hilton's obligations are doubly clear because this Court reinforced its order by requiring Hilton to adopt parallel plan terms to the permanent injunction requiring all benefit increases to be paid or commence "as soon as administratively feasible." Dkt.#258 at 9.

A fiduciary's failure to carry out its obligations under an injunction is a breach of fiduciary duty. *See, e.g., Crawford v. La Boucherie Bernard, Ltd.*, 815 F.2d 117, 119 (D.C. Cir.), *cert. denied*, 484 U.S. 943 (1987) (after judgment for violations of ERISA was entered, court properly ordered further equitable relief when trustees paid nothing on the judgment). To adhere to the strict duty of loyalty, a fiduciary like Hilton must account for its actions and explain how exercises of discretion that deny a "critical resource" to a beneficiary are consistent with the duty of loyalty, in contrast to the fiduciary's self-interest or the interests of another non-beneficiary. D. Gordon Smith, "The Critical Resource Theory of Fiduciary Duty," 55 *Vanderbilt L. Rev.* 1399, 1406-11 (2002).

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[2] This rule is "especially pertinent if one of the masters happens to be economic self-interest." *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 549 (1961); *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 196-97 (1963); *Leman, supra,* 284 U.S. at 456.

A. The Fiduciary Duties of "Prudence" and "Loyalty" Require "Reasonable Efforts" to Find Missing Participants and Process Them to Payment.

Estate executors have always been charged with wide-ranging duties to find and pay "a missing beneficiary." *See, e.g.,* Nicholas D. Ward, Michelle L Evans*, Wills, Trusts, and Estates for the D.C. Area Practitioner* (2019), §12.08(2)(f) (estate representative must detail efforts "undertaken to locate the beneficiary, even when the distribution is less than $1,000"). In the era of electronic records and sophisticated systems for mailing and tracking responses, a vast array of actions are available to anyone charged with implementing an injunction "as soon as administratively feasible" and with a fiduciary duty to act for the "exclusive purpose of providing benefits to participants and their beneficiaries." ERISA §404(a)(1), 29 U.S.C. §1104(a)(1).

Guidance issued by the Labor Department in 2014 establishes that "[c]onsistent with their obligations of prudence and loyalty, [ERISA] plan fiduciaries must make reasonable efforts to locate missing participants or beneficiaries, so that they can implement directions on plan distributions from the participants or beneficiaries." Field Assistance Bulletin No. 2014-01.[3] In the same year, the Labor Department initiated a "Terminated Vested Participant Project" to enforce the duty to locate missing and unpaid retirees.[4] By 2019, securing payments for unpaid "terminated vested" participants and beneficiaries, also described as "missing participants," had become the most significant enforcement activity of the Labor Department's Employee Benefit

[3] Available at https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2014-01

[4] *See* https://www.law360.com/articles/1222671/ebsa-says-it-recovered-2-6b-for-benefit-plans-in-2019

Security Administration (EBSA) *Id*.

A January 2018 GAO report (GAO 18-19) on "Workplace Retirement Accounts" describes how the "pilot investigation [by the Labor Department] found that some ongoing plans send notices that were returned undeliverable but then fail to follow-up with any search process .... [And] in some circumstances plan sponsors may be considering a participant to have been "notified," even when the mail used to notify them was returned undeliverable." GAO 18-19, at 21.[5] "DOL audit findings also show[ed] that ongoing plans have challenges staying in touch with missing participants and paying them their benefits when due.... [In a] DOL pilot investigation of 50 large DB plans, they found tens of thousands of separated participants who were entitled to benefits but were not receiving them." *Id*. at 22.[6]

In December 2017, MetLife's failures to pay "missing and unlocated" annuitants exploded in the business press after an 8-K filing disclosed that MetLife had not paid about 5% of the pension liabilities it had assumed in "pension risk transfer" transactions. MetLife's "pension bungle" involved approximately 30,000 individuals, most of whom were due less than $150 per month." *Wall Street Journal*, "MetLife Discloses Pension Bungle" (Dec. 16, 2017). As examples of what MetLife was doing, and not doing, MetLife was found to "presume annuitants had died or otherwise would never be found if they did not respond to only two mailing attempts made approximately five and half years apart."[7] MetLife CEO Steven Kandarian, who had formerly been Executive Director of the PBGC, admitted that "sometimes we had addresses that

[5] Available at https://www.gao.gov/products/gao-18-19

[6] The GAO report further observed that merely mailing a letter "to the participant address [a plan sponsor] has on file" did not constitute satisfactory efforts. *Id*. at 22-23.

[7] https://www.sec.gov/news/press-release/2019-269

were quite old, out of date, etc." "MetLife CEO on Missing Annuitants: I Can't Believe We're the Only One," *Best's Insurance News* (2/15/18).[8] He recognized this "is an area where ... the entire industry has to find ways to do a better job and find these people and pay the benefits to these people that they're owed." *Id*. Investigations of MetLife by the insurance commissioners of Massachusetts and New York ultimately resulted in a $220 million consent decree, including $19.75 million fine. *See Law360*, "MetLife's $220M Deal Shows Risk In Losing Track Of Retirees" (Jan. 29, 2019).

B. Enjoined Parties Have an "Obligation to Cooperate" in Providing Information About Implementation and Fiduciaries Have a Duty to "Account."

As enjoined parties, the Hilton Defendants have a duty not only to fully implement the permanent injunction, but to cooperate by responding to reasonable inquiries about compliance. Counsel's "obligation to cooperate" with each other in complying with the Court's orders "extends throughout the course of the litigation." *Ford v. Washington Metro. Area Transit Auth*., 131 F.R.D. 12, 14 (D.D.C. 1990); *accord, Gulf & W. Indus. v. United States*, 615 F.2d 527, 533 (D.C. Cir. 1979) (lawyer should "accede to reasonable requests for cooperation"); *United States DOJ v. Daniel Chapter One*, 89 F.Supp.3d 132, 144-45 (D.D.C. 2015) (ordering defendants to "produce information to the Commission upon request about their compliance"); *Nat'l Law Ctr. on Homelessness & Poverty v. United States VA*, 842 F.Supp.2d 127, 131-32 (D.D.C. 2012) (refusing to rely on defendants' "unsupported self-assessment of its compliance" with permanent injunction after defendants' "failure to cooperate on discovery").

When enjoined parties have fiduciary duties, there is an additional duty to "respond to the

[8] https://www.winkintel.com/2018/02/metlife-ceo-missing-annuitants-cant-believe-one/

request of any beneficiary for information concerning the trust and its administration," and "at reasonable intervals on request, to provide beneficiaries with reports or accountings." *Res. (3d) of Trusts* (2007), §82(2) and 83 and cmt. a. This duty to provide accountings provides trust beneficiaries with access to the records that fiduciaries have kept that are otherwise "unknowable" to them. As Elias Merwin wrote in 1895, "The right to such discovery exists where the account from its nature is particularly within the knowledge of the defendant, or where, from privity of contract or otherwise, it was the duty of the defendant to keep the account." Merwin, *Principles of Equity and Equity Pleading*, §584. An equitable accounting is especially appropriate where, as here, the information sought is relatively "complicated." *See, e.g., Kirby v. Lake Shore & M.S.R. Co.*, 120 U.S. 130, 134 (1887) ("complicated nature of the accounts between the parties constitutes a sufficient grounds for going into equity"); *Bates v. Nw. Human Servs.*, 466 F.Supp.2d 69, 103 (D.D.C. 2006) (accounts were "complicated, and all records relating to them have been in the [d]efendants' exclusive control, making it impossible for the [p]laintiffs to determine what funds were received, spent and remain" without an equitable accounting).

In this Circuit, the best known case on "equitable accounting" is *Cobell v. Salazar*, 573 F.3d 808, 810-13 (D.C. Cir. 2009), which was cited in the D.C. Circuit's December 2012 decision in this case as a prime example of the "remedial options" that this Court possesses. *Kifafi*, 701 F.3d at 727. In *Cobell*, an "equitable accounting" of "all money in the IIM [Individual Indian Money] trust held in trust for the benefit of plaintiffs" was performed in a $1 billion class action. This Circuit recognized that "under traditional equitable principles, the trustee's report must contain sufficient information for the beneficiary readily to ascertain whether the trust has

been faithfully carried out." 573 F.3d at 812. *See also Cobell v. Norton*, 428 F.3d 1070, 1077-78 (D.C. Cir. 2005) ("proper accounting" includes "supporting documentation that is adequate to demonstrate that each listed transaction actually took place").

III. Civil Contempt Is a Remedial Device Intended to Achieve Full Compliance With an Injunction.

If a permanent injunction could be set aside or avoided by an enjoined party's "own act of disobedience," it would make a "mockery" of justice. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911). "Civil contempt is a remedial device intended to achieve full compliance with a court's order." *Pigford v. Veneman*, 307 F. Supp. 2d 51, 56 (D.D.C. 2004). In *Taggart v. Lorenzen*, 139 S.Ct. 1795 (2019), Justice Breyer wrote for a unanimous Court that:

> Th[e] "old soil" that has long governed how courts enforce injunctions ... includes the "potent weapon" of civil contempt. *International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*., 389 U.S. 64, 76 (1967). Under traditional principles of equity practice, courts have long imposed civil contempt sanctions to "coerce the defendant into compliance" with an injunction or "compensate the complainant for losses" stemming from the defendant's noncompliance with an injunction. *United States v. Mine Workers*, 330 U.S. 258, 303-304 (1947); *see D. Dobbs & C. Roberts, Law of Remedies* §2.8, p. 132 (3d ed. 2018); J. High, *Law of Injunctions* §1449, p. 940 (2d ed. 1880).

Id. at 1801-2. Civil contempt is not a discretionary matter. If an injunction is being violated, the court must make the injured parties whole. *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979) (contrasting this with the "wide discretion in fashioning the remedy").

"In seeking civil contempt sanctions, a plaintiff need only show, by clear and convincing evidence, (1) the existence of a reasonably clear and unambiguous court order and (2) a violation of that order by the defendant." *Walker v. Center for Food Safety*, 667 F.Supp.2d 133, 136 (D.D.C. 2009); *accord*, *Armstrong*, 1 F.3d at 1289; *National Organization of Women v. Operation Rescue*, 37 F.3d 646, 662 (D.C. Cir. 1994). This "clear and convincing" standard is

satisfied by "a firm belief" or "reasonable certainty." *Lewis v. Estate of Lewis*, 193 A.3d 139, 144 (D.C. 2018) ("firm belief"); *SEC v. Bilzerian*, 729 F. Supp. 2d 1, 4 (D.D.C. 2010) ("clear and convincing standard requires a quantum of proof adequate to demonstrate a reasonable certainty that a violation occurred"). This is not "beyond a reasonable doubt," although it is more than a "preponderance." Thus, in *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1183 (D.C. Cir. 1981), a magistrate's finding of no contempt was reversed when it required the NLRB to "prove its case beyond a reasonable doubt" and provide proof of "a wilful and deliberate disregard of a court decree." "[T]he NLRB should not have been required to do more than produce clear and convincing evidence in support of its allegations." *Id*. If this "less rigorous standard of proof had been applied, [the magistrate's] conclusion might have changed" because of the "substantial body of evidence" in support of the NLRB's position. *Id. See also NLRB v. Blevins Popcorn Co.* 1982 WL 31212, *4 (D.D.C. 10/5/1982) (finding on remand "clear and convincing evidence" that the company "made highly disadvantageous proposals, compromised only on minor issues, and provided inadequate justification for its position"); *SEIU Nat'l Indus. Pension Fund v. Artharee*, 48 F. Supp. 3d 25, 29-30 (D.D.C. 2014) (plaintiffs provided "clear and convincing evidence" of noncompliance, and defendant provided no response justifying noncompliance).

Consistent with *McComb v. Jacksonville Paper Co.*, 336 U. S. 187 (1949), the *Taggart* decision further explains how "a party's "record of continuing and persistent violations" justifie[s] placing "the burden of any uncertainty in the decree ... on [the] shoulders" of the party who violated the court order." *Id*. ed). "[A] finding of bad faith on the part of the contemnor is not required. Indeed, the law is clear in this circuit that the contemnor's failure to comply with the court decree need not be intentional." *Food Lion v. United Food & Commer. Workers Int'l*

Union, 103 F.3d 1007, 1016 (D.C. Cir. 1997). "The intent of the recalcitrant party is irrelevant in a civil contempt proceeding because, unlike a criminal contempt proceeding, a civil contempt action is a remedial sanction used to obtain compliance with a court order or to compensate for damage sustained as a result of noncompliance." *Id*.; *accord*, *Blevins Popcorn*, *supra,* 659 F.2d at 1183 ("failure to comply with the court decree need not be intentional"; "the intent of the recalcitrant party is irrelevant").

In this District, there are many examples of civil contempt determinations. *See, e.g., SEIU Nat'l Indus. Pension Fund v. Artharee*, 48 F. Supp. 3d 25, 28-29 (D.D.C. 2014) (Kollar-Kotelly) (defendant failed to submit past-due remittance reports and account for all past due contributions); *In re Fannie Mae Secs. Litig*., 552 F.3d 814, 822 (D.C. Cir. 2009) (affirming contempt where defendant failed to process search terms or comply with deadlines); *Food Lion,* 103 F.3d at 1016 (contempt where defendant "failed to search and produce documents from the off-site boxes during the ten-day period specified in the district court's order"); *Twelve John Does v. District of Columbia*, 855 F.2d 874, 877-78 (D.C. Cir. 1988) (contempt for violating prison population restriction in consent order); *LaShawn A. v. Fenty*, 701 F.Supp.2d 84, 93-94 (D.D.C. 2010) (contempt for failing to provide adequate annual proposal for implementation and consult with plaintiffs on new agency director); *Cobell v. Norton*, 226 F.Supp.2d 1, 127 (D.D.C. 2002) (contempt for filing "false and misleading status reports" that "prevent[ed] the plaintiffs from learning the truth about the administration of their trust accounts").

IV. Based on the Record, the Hilton Defendants Should "Show Cause" Why They Are Not in Contempt of the Injunction to "Commence Increased Benefits for All Class Members" "As Soon As Administratively Feasible."

This Circuit's per curiam judgment recognizes that this Court's August 2011 "permanent

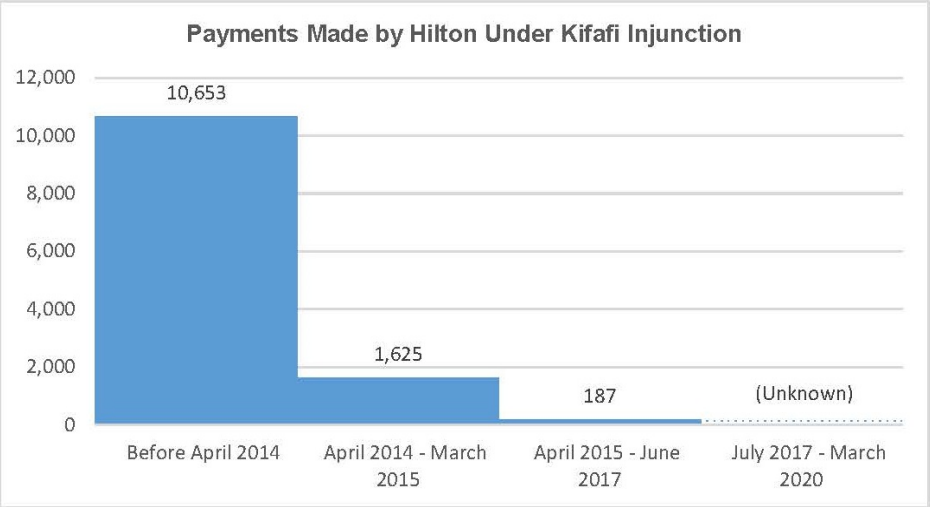
injunction" "required Hilton to amend the Plan's benefit-accrual formula; award back payments for increased benefits that should have been paid in the past; commence increased benefits for all class members ....." 752 Fed. Appx. at 8. While Hilton's counsel professed to the Circuit that "Hilton will always have an obligation under the law to do its best to find beneficiaries [and that] [i]t has a continuing obligation to try and find anyone who came into benefits by virtue of this Court's and the District Court's prior orders," Ex. 7 (1/30/19 Tr.) at 35, Hilton has not been forthcoming with evidence of that and has repeatedly refused to provide any records of payments. As the sections below set out, "clear and convincing" evidence in the form of certified, publicly-available records and other information show that there have not been significant additional payments by Hilton in the nearly four and one-half years since this Court ended its supervisory jurisdiction in December 2015.

A. The Last Records Hilton Produced Show as *Unpaid* 8,199 Class Members, Which Is Approximately 40% of the Class.

The last records that Hilton produced to the Court or Class counsel showed that 12,496 class members, or about 60% of the class members, had been paid, and that 8,199, or close to 40% of the class members, remained *unpaid*. Pienta Decl. ¶3. The retirement benefit increases due the class members who remained unpaid were $38 per month on average, which has a total current present value of approximately $88 million. *Id*.

The spreadsheets Hilton provided in April 2014 when it moved to release the supersedeas bond showed that Hilton had paid over 10,650 class members. In March 2015, Hilton produced a spreadsheet showing it had paid another 1,625 class members. Hilton did not provide any additional records until June 2017. *See* Dkt.#440-2. Those records, which lacked the detail of the previous spreadsheets, simply stated that slightly fewer than 190 class members had been "paid"

during all of that two-year period. Since that time, Hilton has refused to provide any records of payments.



The last records provided by Defendants and their service providers show that Hilton was placing the 8,199 unpaid individuals in four different categories[9]:

Categories of Unpaid Class Members Reported by Hilton Before March 2015

Last Status	# Class Members
Notice of deferred benefit sent but no payment	5,184
Payments due beneficiaries of deceased participants	1,492
Participants and beneficiaries with unconfirmed addresses	937
Other reasons	586
	8,199

Of the approximately 5,200 class members due benefits in the future, 4,130 are currently at ages where they are eligible to *immediately* commence benefits. Pienta Decl. ¶6. Of the nearly 1,500 beneficiaries of deceased class members, at least 805 had already responded to notices from Hilton as of that last report, but had not been paid. *Id*. The class members with unconfirmed

[9] The "Other reasons" category included class members categorized as having "No Benefit Increase Due" (*but see* Section E.1 below), "newly vested" individuals, and class members who were due a benefit increase under the 1999-1 Amendment. *See* n. 1 above.

addresses included about 1,000 whose addresses Class counsel had individually confirmed and who either had responded to Hilton's notices but had not been paid, or had not responded to Hilton's notices after responding to Class counsel's address confirmation requests. *Id.*

B. Despite the "Obligation to Cooperate" and "Account" and ERISA's Reporting Duties, Hilton Refuses to Update Implementation Spreadsheets or Provide Actuarial Valuation Reports for 2015-2019.

A fundamental part of trust law predating ERISA by centuries is the fiduciary duty to provide instruments under which the trust is operated to beneficiaries. *See, e.g.*, Henry E. Smith, "Why Fiduciary Law Is Equitable," in Andrew S. Gold, Paul B. Miller, eds., *Philosophical Foundations of Fiduciary Law* (2014), at 263. This duty is in the *Restatement of Trusts*, which describes the duty to "respond to the request of any beneficiary for information concerning the trust and its administration," and "at reasonable intervals on request, to provide beneficiaries with reports or accountings." *Res. (3d) of Trusts* (2007), §§82(2) and 83. ERISA §104(b)(4) codifies part of that duty by requiring plan administrators to produce "instruments under which the plan is ... operated."

The records that Hilton produced through March 2015 and the 2014 Actuarial Valuation Report that Hilton provided to Plaintiff's counsel showed that the Plan's fiduciaries and service-providers have been keeping records of the *Kifafi* payments. Indeed, the 2014 Actuarial Valuation Report breaks out the increased benefits from *Kifafi* to show accrued benefits "prior to" and "post Kifafi litigation." Ex. 9 at 39-41. At the oral argument on appeal, Judge Pillard asked Hilton's counsel if Hilton has "been keeping track of every effort that's been made" since this Court ended its active supervision in 2015. Ex. 7 (1/30/19 Tr.) at 38. Hilton's counsel responded that "[t]here are spreadsheets that we've given before." *Id*.

After the Per Curiam Judgment, Class counsel asked Hilton to cooperate by providing updated spreadsheets on payments to *Kifafi* class members, but Hilton refused to provide them. *See* Ex. 10 (6/7/19 and 7/23/19 letters).[10] In an April 30, 2019 email and letters dated July 23, 2019 and August 29, 2019, Class counsel further asked Hilton and its Plan administrator, the Global Benefits Administrative Committee (GBAC), for the Actuarial Valuation Reports (AVRs). Ex. 11. But Hilton and the GBAC refused to produce the AVRs. Exs. 10-11 (5/16/19 email; 6/19/19 and 1/8/20 letters). Hilton did this despite its duty to "cooperate" as an enjoined party, the duty to "account" as a fiduciary, and its duties under ERISA §104(b)(4), 29 U.S.C. §1024(b)(4), to "furnish a copy" of the "instruments under which the plan is established or operated" upon request of a participant or beneficiary.

Initially, Hilton's outside counsel, Simpson Thacher refused to produce the AVRs on the sole ground that the appeal had been "resolved." Ex. 11 (5/16/19 email). On October 14, 2019, another of Hilton's outside counsel, Alston & Bird, sent a letter stating they, and not Simpson Thacher, actually represented the GBAC and that the "GBAC will consider your August 29, 2019 letter and the request for actuarial valuation reports at an upcoming regularly scheduled meeting." Ex. 11. Nearly three months later, however, another letter from Alston & Bird stated that the GBAC was denying the requests because actuarial valuation reports are "primarily used for funding purposes, and not for determining payments to participants." Ex. 11 (1/8/20 letter).

The denial is uncooperative and legally incorrect because Hilton previously cooperated by providing such reports with no court order requiring it, and because actuarial valuation

[10] From May to June 2017 and again in the period from June to August 2018, Class counsel also made multiple requests for updated spreadsheets on payments. Pienta Decl. ¶8.

reports are "instruments under which the plan is ... operated," which ERISA §104(b)(4) requires to be provided on request. As *Bartling v. Fruehauf Co.*, 29 F.3d 1062, 1070 (6th Cir. 1994), held over 25 years ago, actuarial valuation reports are "instruments under which the plan is ... operated" because they are "required" by ERISA §103(d) and "are indispensable to the operation of the plan." ERISA §402(b)(1), 29 U.S.C. §1102(b)(1), indeed, requires "[e]very employee benefit plan" to "provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter," and ERISA §402(a) requires the plan's named fiduciaries to "maintain" the plan pursuant to the procedures in that "funding policy and method." Since 2006, ERISA has set out additional requirements for annual plan "valuations" to establish minimum funding requirements and funding targets, all of which are set out in the AVRs. *See, e.g.,* ERISA §§101(j), 206(e) and (g), 303(j). In line with this, Hilton's plan document now contains provisions related to "minimum funding" and "funding limitations" based on such "valuation[s]." Ex. 6 (Sections 8.2(c)-(e)).

Consistent with these statutory requirements and the related plan provisions, ERISA §104(b)(4) requires actuarial valuation reports to be produced on request as "instruments under which the plan is ... operated." When records should be produced that are "peculiarly in the opposing party's control," an inference should be drawn when such records are not produced that they "would have been unfavorable to that party." *Czekalski v. Lahood*, 589 F.3d 449, 455-56 (D.C. Cir. 2009); *United States v. West*, 393 F.3d 1302, 1309 (D.C. Cir. 2005).

C. Based on Hilton's Publicly-Available Form 5500 and 10K Annual Reports, Less Than 10% of the Unpaid Class Members Were Paid From 2016 to 2019.

With no cooperation from Hilton in producing records of implementation or the AVRs, Class counsel turned to two publicly-available sources, the Form 5500 Annual Returns that

ERISA requires and the 10-K Reports required by the securities laws, to see the extent to which the unpaid class members have been paid. These two sets of certified records indicate that since 2015, a substantial percentage of class members in the unpaid category has *not* been paid.

Hilton's certified Form 5500's for the years from 2015 to 2018 (Ex. 3) show no significant increases in the number benefit payments in Lines 6b and e of the "Basic Plan Information" and in the lump sum information in "Schedule R" in the same Form 5500s:

Additional Payments Indicated by Hilton 2015-2018 Form 5500 Data [11]

	2015	2016	2017	2018
Line 6b Annuitants	234	137	126	100
Line 6e Beneficiaries	83	23	2	1
Sch R Lump Sums	1581	276	4	12

Totaling the numbers in each column after 2015, approximately 680 additional class members appear to have been paid. If additional payments are assumed for 2019 at the same rate as 2018, the total is less than 800 for 2016-2019, or less than 10% of the unpaid class. Pienta Decl. ¶9.[12]

Hilton's 10-K Annual Reports from 2013 through 2019, which Hilton's CEO and CFO have certified to as "fairly presenting, in all material respects, the financial condition and results of operations of the Company," also indicate no significant increases in benefit payments after 2014 in compliance with the permanent injunction. There are only two years, 2013 and 2014, in

[11] The numbers in the Line 6b and 6e rows subtract the earlier year's figure from the later year's to find the addition. For annuitants, Class counsel *added* 100 per year to account for the annuitants in the earlier years who died with no annuity for a surviving spouse. Hilton's 2013 and 2014 AVRs show 129 and 162 deceased annuitants in 2013 and 2014, respectively, and state that only 40% leave a survivor's annuity. *See* Ex. 8 at 42, 51; Ex. 9 at 43, 46.

[12] Hilton already has the 2019 records, but is not required to file a Form 5500 until 10/15/20, and has refused to provide any information. The 2019 estimate is consistent with the 2018 additions and also with the "Benefits Paid" in the 2019 10-K.

which the 10-K's show significant upticks in payments above the 2012 baseline of $22 million (which Hilton calls the "pre-implementation" level, *see* Appellee Br. (Doc. #1759941 in Case No. 16-7002, at 40).[13] In 2013, $45 million was paid, which was $23 million above the 2012 level, and in 2014, $42 million was paid, which is $20 million above the baseline. Ex. 4. In no year since has there been any similar significant uptick in the certified "Benefits Paid." In 2015 and 2016, the "Benefits paid" totaled $25 million, or only $1.8 million above the adjusted 2014 baseline of $23.2 million.[14] In 2017-2019, the "Benefits paid" in the 10-Ks were even less: only $24 million in 2017, $23 million in 2018, and $24 million in 2019, which are, respectively, only $0.8 million, $0.0 million, and $0.8 million above the adjusted 2014 baseline.

"Benefits Paid" Shown in 2014-2019 Hilton 10-Ks Above Baselines

	2013	2014	2015	2016	2017	2018	2019
"Benefits Paid"	$23 M	$20 M	$1.8 M	$1.8 M	$0.8 M	$0.0 M	$0.8 M

The total "Benefits Paid" for 2016-2019 above the adjusted baseline is $3.4 million. Even if $0.8 million of this represents additional ongoing annuity payments, with a value of approximately $10 million, this does not make a very large a dent in the unpaid obligations of approximately

[13] As Plaintiff has done here, Hilton's brief on appeal relied on the "Benefits Paid" in the 10-Ks above "pre-implementation levels." Hilton's brief stated that the "Benefits Paid" of "$28 million" in the 2017 10-K "demonstrated that the amount of Hilton's benefit payments have consistently remained above 2012 (pre-implementation) levels." Resp. in 16-7002 at 40. The problem with that statement was not in its analytical method, but that the amount in the 2017 10-K was actually $24 million. A 12/7/18 Notice of Errata called the $28 million figure a "typographical error." Doc. 1763406 (in 16-7002) at 1.

[14] Because Hilton's 2014 AVR shows that the 2013-2014 payments added $1.2 million in *ongoing* annuity payments, Ex. 9 at 41, the 2014 baseline was increased by $1.2 million to $23.2 million.

$88 million, Pienta Decl. ¶10 ($10 million + $1 million in lump sums / $88 = 13%).[15]

D. A Survey Conducted at the End of 2019 Indicates That Hilton Has Paid No More Than 16% of the Unpaid Class Members.

At the appellate oral argument, Judge Wilkins twice suggested that Class counsel could conduct a survey of unpaid class members to "find out what Hilton has done with respect to contacting them and what they have." Ex. 7 (1/30/19 Tr.) at 27-28. In the last quarter of 2019, Class counsel did that. Pienta Decl. ¶11. This survey provides further evidence of Hilton's non-compliance with the injunction to pay "all" class members "as soon as administrative feasible." The survey responses are admissible in a contempt proceeding without regard to the general rule against hearsay. *See, e.g., FTC v. Kuykendall*, 371 F.3d 745, 757-58, 767 (10th Cir. 2004) (en banc) (in contempt proceeding for violation of injunction, letters of complaint from consumers were admissible under FRE 807 residual exception).

To conduct the mailing and collect survey responses, Class counsel retained the class action administration firm of Kurtzman Carson Consultants in El Segundo, California. The first mailing for this survey went to 937 class members (including beneficiaries) whose addresses had been individually confirmed by Class counsel in 2015-2017. Pienta Decl. ¶11. The second mailing went to 3,219 deferred vested class members who are entitled to receive benefits immediately and whose addresses had also been confirmed by Class counsel.[16] The results of this

[15] In contrast with the indications in the 10-K and Form 5500 records of no substantial payments from 2016-19, the "Service Provider Information" in Hilton's Form 5500s consistently shows substantial payments to the outside law firms and benefit administrators in each year. The total for 2016-2018 is $10.0 million in legal and administrative fees. Ex. 3.

[16] After Hilton's counsel threatened Class counsel and the contractor who was conducting the survey, Class counsel did not complete the mailing to all of the unpaid class members. Pienta Decl. ¶11.

survey show that of 1,775 responses, only 16% of the unpaid class members have been paid their benefits. *Id*. This is consistent with the approximately 10% shown in the Form 5500 data. Because 40% of the class was unpaid, paying 10 to 16% of 40% translates to payment of 4 to 6% of the entire class, reducing the unpaid percentage from 40% to 34-35%.

Survey of Unpaid Class Members in 2019

Questionnaires Received or Returned as Undeliverable	Never Received Letter AND Have NOT Been Paid	Received Letter BUT Have NOT Been Paid	Received a Letter AND Have Been Paid	No Checkbox Selected	Mail Returned as Undeliverable
1,775	756 (42%)	223 (13%)	289 (16%)	83 (5%)	424 (24%)

In comments on the survey forms, a number of class members added information about how they had not heard from Hilton or about problems obtaining benefit payments. For example, class member Mohammed Mustafa stated, "I used to move a lot.... So I don't know if they mail me anything. But so far this is the first letter I receive about my retirement." Pienta Decl. ¶14. Another class member, Sut Fong, age 59, stated, "Please tell me how to receive the forms needed to start my retirement benefits as I've never received such letter or forms from Hilton Hotels which pertains to my retirement." *Id*. Donald Harris checked that he received a letter from Hilton about the increased benefit, but had not been paid. His comments stated, "Yes, I am at the age of 66 years as of August 27, 2019 and I'm ready to start receiving all to me when possible." *Id*.

As indicated, although Judge Wilkins had suggested the survey, Hilton's counsel threatened Class counsel and their contractors for conducting one. In a December 16, 2019 letter, 110 days after they had been told of the survey (*see* Ex. 10, 8/28/19 letter), Hilton's outside counsel asserted that the survey was "a violation of the D.C. ethics rules" and that use of class member information to do the mailing was a "violation of the protective order entered in *Kifafi*." Ex. 12. Hilton's counsel "demand[ed] that [Class counsel] cease further communications with

Kifafi class members, and direct KCC [Class counsel's mailing contractor] and any and all parties to do the same." *Id*. The next day, Hilton's counsel sent a threatening letter to KCC, without copying Plaintiff's counsel, repeating the demand that KCC "no longer direct communications to *Kifafi* class members" and asserting that KCC was using "confidential information" in "violation of the protective order entered in the litigation," to which KCC was not even a party. Ex. 12.

Hilton's threats support an inference that Hilton knew what the survey results were showing and sought to prevent its completion for that reason. *See*, *e.g.*, *Potts v. Postal Trucking Co.*, 2018 WL 794550, *2 (E.D.N.Y. 2018) ("intimidation in connection with a lawsuit may call for the exercise of the Court's inherent powers" including "drawing adverse evidentiary inferences"); *McCormick's Handbook on the Law of Evidence,* §273 ("Wrongdoing ... amounting to an obstruction of justice, is also commonly regarded as an admission by conduct. By resorting to wrongful devices, the party is said to provide a basis for believing he or she thinks the case is weak and not to be won by fair means").

E. Rather Than Pay "All" Unpaid Participants and Beneficiaries, Hilton Has Restricted and Eliminated Benefits Due Under the Injunction.

1. Hilton Has Eliminated "True Up" Increases Due Under Its Own Spreadsheet for Implementing the Injunction.

Rather than pay all unpaid participants and beneficiaries, the spreadsheets Hilton produced in April 2014 revealed that the Hilton Defendants had eliminated the increased benefits due over 660 class members by reclassifying them as "No Benefit Increase Due." Dkt.#385 at 26. On appeal, Hilton told the Circuit that its "calculations of benefits owed under the judgment" are in "constant flux." 11/14/18 Br. in No. 16-7002 (Doc. 1759941), at 41.

The "true up" benefit amounts due participants were calculated pursuant to this Court's 8/31/2011 Order which required that Defendants "shall provide Plaintiff's counsel with revised calculations of benefits ... for the class members according to this Court's rulings." Dkt.#258 at 8. In accordance with that Order, Hilton filed a spreadsheet with the Court under seal on Nov. 14, 2011 which lists the "true up" benefits due each class member. Dkt.#273. As Hilton's 2013 AVR stated, "The effect of the proposed plan amendment implementing the Court's judgment on individual participants was documented in the True-Up List previously provided to the Court and Plaintiff." Ex. 8 at 61. The 2014 AVR also stated, "The effect of the plan amendment on individual participants was documented in a true-up list approved by the Court." Ex. 9 at 59.

Even though the November 2011 spreadsheet that Hilton filed under seal with this Court showed benefit increases, Hilton's April 2014 data showed that Hilton had modified the amounts of "true up" benefits for over 660 class members and recategorized them as "No Benefit Increase Due." *See* Dkt.#385 at 33. No data was provided by Hilton to either Class counsel or these class members under which they could review the elimination of the benefit increases calculated for them under the spreadsheet that Hilton had filed under seal. Dkt.#388-1 at 3. In February 2015, this Court nevertheless ruled that "Hilton's claims appeals process is the most proper forum for Plaintiff's counsel to address th[is] complaint." Dkt.#400 at 15.

On appeal, Hilton's only justification for changing benefit amounts was that "Hilton's own calculations of benefits owed under the judgment are in constant flux, as relevant circumstances change." 11/14/18 Br. in 16-7002 at 41. Hilton offered no explanation of what "relevant circumstances" continue to "change" or be in "constant flux," nor did Hilton produce any records showing how it is justifiable to eliminate the increased benefits due under the

permanent injunctions, or, according to the appeal, continue to revise the "benefits owed under the judgment" as "relevant circumstances change." Simply put, a permanent injunction to pay increased benefits cannot be fully implemented if the enjoined party is free to revise its obligations with no review.

2. Hilton Has Restricted Eligibility to Retire Before Age 65, Despite Contrary Representations to This Court on Three Occasions.

Hilton has also restricted eligibility to commence retirement benefits before age 65 despite contrary representations to this Court on three occasions. A December 16, 2019 letter from one of Hilton's outside counsel criticizes Plaintiff's survey letters for stating that deferred vested benefits are due "now" on the basis that the Plan's "conditions for early retirement ... include ... 10 Years of Vesting Service." Ex. 12. A January 8, 2020 letter from Hilton's other outside counsel showed that the December 16, 2019 letter was no mistake by advising Plaintiff's counsel that Hilton's administrative service providers were not notifying anyone of the availability of the original and increased benefits before age 65. Ex. 11. Thus, the Hilton Defendants have reversed course and returned to a requirement of at least 10 Years of Vesting Service for early retirement which Hilton's Amendment 2003-2 eliminated over 17 years ago, as Hilton has on three separate occasions advised this Court.

In response to Class counsel's requests for information, Hilton has continued to provide no evidence of notices or payments to class members who were already eligible for early retirement or who are now eligible. There is also no indication in Hilton's Form 5500 records that any significant number of these class members have become annuitants. Ex. 3. As Class counsel informed this Court previously, Hilton has also failed to provide notices of the increased deferred vested benefits to the Social Security Administration as mandated by 26 U.S.C. §6057(a) so SSA

could provide notice of the increased private pension obligations when class members claim for social security benefits as early as age 62. Dkt.#394 at 4-5.[17]

Instead of notifying this large group of unpaid class members of their right to commence increased benefits before age 65, Hilton has, according to these two letters from its outside counsel, modified its position on the rules on eligibility for early retirement benefits to require ten years of vesting service. Hilton has done this despite three contrary representations to this Court: First, in September 2003, the Hilton Defendants informed this Court in its summary judgment briefing that Hilton had adopted "Amendment 2003-2" which "reduced the number of years of vesting service required to become eligible to receive an early retirement benefit from ten years to five years for all otherwise eligible participants who either (a) were employed on November 1, 2003, or (b) had terminated employment with a deferred vested benefit prior to that date." Dkt.#180-2 at 9. Defendants further explained that "[s]ince five years is also the number of years required to become vested in a retirement benefit, the practical effect of Amendment 2003-2 is to make vested former employees who had not commenced benefits prior to November 1, 2003 eligible for an early retirement benefit at age 55." *Id*.

This issue arose a second time in the July 2011 hearing on unresolved remedial issues. At that hearing, Hilton's counsel, Jonathan Youngwood, initially advised this Court that early retirement eligibility under the Plan required "10 years." Dkt.#264 (7/29/11 Tr.) at 9. After

[17] This Court recognized that "[t]hese notices are required by statute," but assumed Hilton would "follow the statute." Dkt.#400 at 23. When Hilton did not, Class counsel reported to DOL's Employee Benefits Security Administration in April 2016 that thousands of terminated vested participants in *Kifafi* had not been provided the deferred vested notices required by 26 U.S.C. § 6057(a). Pienta Decl. ¶15. In April 2019, Class counsel recontacted the DOL and were informed by EBSA's Washington office that the investigation is "still an ongoing matter." *Id*.

Plaintiff's counsel challenged this, Your Honor told him he could "talk to whoever is in the courtroom" to be sure of the client's position. *Id.* Hilton's other counsel, Thomas Rice, then stepped forward and agreed that "effective November 1, 2003, the references to 10-years vesting service are replaced by 5-years vesting service. So that as of that date, that's when the eligibility becomes five years." *Id*. at 13. On the third occasion, in May 2014, Hilton represented to this Court that all deferred vested participants "who are over age 55 or older, were sent a form to allow them to begin their benefit." Dkt.#386 (5/19/14 Reply) at 8.[18]

In 2014, slightly less than 2,075 unpaid class members were eligible to receive the increased retirement benefits before age 65. With the aging of the class, that number has grown to 2,612. Pienta Decl. ¶16. The effect of Hilton's reversal and its failure to notify persons who are eligible for early retirement of their rights is to improperly restrict the commencement of the benefits due under the injunction to over 2,600 unpaid class members now over age 55. *Id*.

3. Hilton Has Lost Hundreds of Records Submitted by Heirs and Estates.

Based on Hilton's 2014 spreadsheets, 1,973 of over 3,100 surviving spouses and beneficiaries, or over 63%, responded to Hilton's notices. Pienta Decl. ¶17. But fewer than 14% of the surviving spouses and beneficiaries had been processed through to payment. Pienta 5/15/14 Decl. (Dkt. #385-1) at 13-17. Hilton has never provided any evidence of what happened to the benefit payments due the beneficiaries of the remaining 1,500 deceased class members, many of whom had already responded to notices from Hilton. In 2015 and 2017, Class counsel reported that surviving spouses and beneficiaries were having difficulties in obtaining payments due under

[18] Hilton's Form 5500's and its 2013 and 2014 Actuarial Valuation Reports also defined "Early retirement" as "Retirement before NRD [Normal Retirement Date] and on or after both attaining age 55 and completing five years of vesting service." Ex. 3, Ex. 8 at 58; Ex. 9 at 56.

the judgment. Dkt.#401-1 at 13-14; Dkt.#426 at 4-6; Dkt.#437 at 5-6.

At the end of the third quarter of 2017, Hilton changed administrative service providers from Aon (the administrator who provided the declarations on which this Court relied) to Mercer. Pienta Decl. at ¶18. With that change, all of the related phone numbers and mailing addresses were changed. *Id*. But the unpaid members of the class received no notification of those changes. Class counsel and their staff have fielded numerous calls from class members or beneficiaries who could not contact the Pension Center because the old phone number was disconnected and they did not have the new number after the transition to Mercer. *Id.*. Class counsel have also heard from class members whose records were lost in the transition from Aon to Mercer. For example, Margaret Simon, daughter of deceased participant Essie Cole, received letters from Hilton/Aon in July 2017, and provided Aon with beneficiary forms and her mother's death certificate. In April 2018, she called the Hilton Pension Center and was told that the paperwork and records of her calls did not "transfer," and she would have to "start over" and provide the documents again. Ms. Simon responded to Class counsel's survey indicating she supplied the documents again but has still not been paid. Pienta Decl. at ¶18; *see also id.* ¶22 (Kwan and Willis examples).

Beneficiaries of deceased class members also continue to report difficulties in obtaining payment even after receiving notices. For example, Marylily Ramirez and her two siblings submitted their paperwork to Hilton over two years ago for their deceased aunt, Mary Palomares, who worked for Hilton Palacio del Rio in San Antonio for almost 30 years and passed away in 2013. Hilton classified Ms. Ramirez's claim as "Need Information from Payee to Process Payment" in April 2014. When Ms. Ramirez last spoke to the Pension Center in October 2019, 5-

1/2 years later, she was told "the attorney" had their paperwork and the Pension Center could not provide her any more information. Pienta Decl. at ¶19; *see also id.* at ¶¶20, 24-25.

Judith Berg is the daughter of Lily Halpern who worked at the Denver Hilton for over 20 years and died in 2002. Ms. Berg had to retain her own personal counsel to obtain payment. Ms. Berg confirmed her address in 2017, and Class counsel provided the confirmed address to Hilton/PBI on 12/29/17. But Ms. Berg did not receive a notice or forms from Hilton after that. When she called the Pension Center, she was unable to get past pre-recorded questions to speak to a live representative. After reaching out to Class counsel in July 2019, she again called the Pension Center and was told they would send her forms in the mail – nearly two years after her confirmed address was provided to Hilton. Ms. Berg finally retained a personal attorney to assist her in putting together the information needed for Hilton's forms. It was only after her personal attorney threatened Hilton with contempt that Ms. Berg and her sister received a check at the end of February 2020. Pienta Decl. at ¶21; Ex. 14 (letter from attorney John Berman to the Court).

4. Hilton's Outside Counsel Admit Hilton Is Making Only Limited Efforts to Notify and Pay.

This Court ordered the Hilton Defendants to pay "all" class members "as soon as administratively feasible." In addition to locating class members and sending them notices with necessary forms to obtain payments, Hilton has a duty to follow up and process unpaid class members through to payment "as soon as administratively feasible." As the DOL's guidance, the GAO report, and Class counsel's own experience show, the duty to do everything "administratively feasible" to pay class members and to act for the exclusive purpose" of providing them benefits requires reasonable follow-up efforts, just as an executor or a fiduciary charged with paying a beneficiary under an individual trust cannot fulfill his or her duties with pro

forma or limited efforts. *See* Field Assistance Bulletin 2014-01; GAO 18-19 at 22-23.

But as one of Hilton's outside counsel admitted, Hilton is only making the level of efforts that MetLife's CEO recognized as unacceptable for a fiduciary acting for the exclusive purpose of providing benefits, and far less than what is "administratively feasible." Based on Class counsel's experience locating class members and following up on processing in five nationwide class actions involving over 200,000 class members, Hilton's service providers have never come near to what a fiduciary with the duties of prudence and loyalty can and should do to ensure class members are paid "as soon as administratively feasible." Pienta Decl. ¶13.

According to Hilton's outside counsel, Hilton has limited its efforts to only mailing vested participants "a Normal Retirement Date reminder approximately 90 days before they turn age 65," with a "reminder" sent "once per year" after that. Ex. 11 (1/8/20 letter). There is no notification of rights to early retirement before age 65 – whether the class member has five or ten years. Hilton is carrying out no follow-ups to determine why there is no response from a participant. As the DOL's 2014 Field Assistance Bulletin, the GAO Report on missing participants, and MetLife's "pension bungle" in 2017, and Class counsel's experiences all show, these are "systemic" violations of the duty to act for the "exclusive purpose" of providing benefits, and violations of the injunction to do everything "administratively feasible" to pay class members.

As of the Court's 12/7/2015 Order, there were approximately 1,500 class members with unconfirmed addresses who were due increased benefits worth $30 million. Dkt.#437 (Pl's 5/12/17 Notice) at 3-4. Through the work of a project manager and private investigator, Class counsel compiled individually verified addresses for 985 of those class members and transmitted those addresses to PBI and Hilton in 2016 and 2017. *Id*. at 4. A number of class members reported to

Class counsel that they nonetheless had ***not*** received anything from Hilton. Dkt.#437 at 5-6. Ultimately, Hilton admitted that it did not instruct Aon to mail notices to any of those 985 addresses until after Class counsel told Hilton's counsel that Plaintiff would be filing a notice with this Court if evidence of the mailings was not produced. Dkt.#442-2; *see also* Dkt.#440-2 at ¶9 (Aon is only now "in the process of complying" with Hilton's instruction to send notices to 298 addresses Class counsel provided in March 2016). For another 129 individuals, the addresses in Hilton's mailing did not match the confirmed addresses Class counsel had supplied, but Hilton would not instruct Aon to mail to those addresses. Dkt.#442 at 5.

Class counsel have still never received anything from Hilton on payments to the people whose addresses Class counsel confirmed at considerable expense. The numbers of individuals paid and the "Benefits Paid" as shown in Hilton's Form 5500 Annual Returns and 10-K Annual Reports also show no significant increases, despite Hilton's purported mailings in 2017 to the 985 individuals with confirmed addresses whose benefits due totaled over $14 million.

Gloria Felix, for example, had been categorized by Hilton as "Notice of Increased Benefit Sent" in 2014, even though Hilton's counsel said the address for Ms. Felix was a "bad address." *See* Dkt.#385-1 at 28. Class counsel provided a confirmed address for Ms. Felix to Hilton in October 2016 as part of their 985 confirmations. Hilton recategorized her as "notice mailed" in June 2017, with no indication of whether retirement forms had been sent to her, even though Ms. Felix was already 69 years old at the time. *See* Dkt.#442 at 4.

As of the December 2015 Order, there were also 740 class members who had been sent notices to confirmed addresses, but who had not responded. Pienta Decl. at ¶7. There were also 832 class members who responded to Hilton's notices but who Hilton had not paid. Most of those

responses were from the beneficiaries of deceased class members. *Id*. To the best of Class counsel's knowledge after making repeated inquiries, Hilton has never engaged in follow-up efforts to complete the payment process for either of these groups of class members. *Id*.

Besides the inadequate follow up efforts, there have even been indications that when inquiries are made Hilton may be advising people it is too late, and suggesting limitations barriers like those interposed in the related Valerie White class action where Hilton contends that some of the vested benefit obligations due beneficiaries of deceased class members in *Kifafi* are barred by statutes of limitations. *See White v. Hilton Hotels Ret. Plan*, 263 F.Supp.3d 8, 11 (D.D.C. 2017); Dkt.#75 in C.A. 16-856 (Hilton 2/14/20 Opp. to Motion for Class Cert.) at 21-22, 27-28.[19]

F. Hilton's Threats of "Rule 11" Sanctions and "Serious" Ethical Charges for Filing a "Show Cause" Motion Provide Further Evidence of Contempt.

Subsequent to the Circuit's per curiam decision, Hilton threatened Plaintiff's counsel with "attorney's fees, costs, and all other appropriate sanctions under Rule 11" "[s]hould you bring a frivolous contempt proceeding." Ex. 10 (6/19/19 letter). Thus, rather than cooperate by providing information about the additional class members who Hilton has paid, Hilton through counsel threatened Plaintiff's counsel "to seek attorney's fees, costs, and all other appropriate sanctions under Rule 11" and also to pursue "all rights available under federal and/or D.C. law to remedy your violations of the D.C. Rules of Professional Conduct." Ex. 10 (6/19/19 and 7/30/19 letters).[20]

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[19] For example, Elia Mendoza was an annuitant who died in 2012 at age 88. Her daughter, Alicia Castaneda, does not recall anything from Hilton about paying the back benefits due her mother. After receiving the survey, Ms. Castaneda contacted Hilton's Pension Center in and was told they have no record of her mother because it was "too long" ago. Pienta Decl. ¶23.

[20] Hilton's counsel threatened to bring charges for an "ethical breach" because Plaintiff's counsel asked Hilton's CEO and GC to cooperate rather than going to Simpson Thacher. Ex. 10 (6/19/19 letter). Plaintiff's counsel did this after *twice* asking Simpson Thacher whether it

Five months later, Hilton's counsel transmitted another letter to Plaintiff's counsel "demand[ing] that you cease further communications with *Kifafi* class members, and direct KCC [Class counsel's administrative consultant] and any and all third parties to do the same." Ex. 12. The next day, with no cc to Plaintiff's counsel, Hilton's counsel sent a letter to Plaintiff's consultants, Kurtzman Carson Consultants, threatening KCC as well that unless "you no longer direct communications to *Kifafi* class members" and stop "your use of confidential information of class members – including their names, addresses, and benefit amounts" KCC will be in "violation of the protective order entered in the litigation." Ex. 12.

Contrary to Hilton's letters, the addresses and benefit amounts used in the survey were not subject to any "protective order" preventing their use for this survey. Ex. 12 (12/23/19 letter). The addresses are from Class counsel's address confirmations (which were done between 2014 and 2017), as well as NCOA and Lexis-Nexis public records searches. And the benefit amounts in the letters attached to the survey are from the Court-ordered individual benefit calculations in 2011 to remedy the benefit accrual violations. Those amounts have previously been used in notices sent by *both* Class counsel and the Hilton Defendants to those individuals. *See, e.g.*, Dkt.#358 at 4-7 (Court-approved Rule 23(h)(1) notice); Dkt.#385-7 and 385-8 (letters to class members from Hilton). Providing trust beneficiaries with the information related to them is by no stretch of the

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continued to represent Hilton after the appeal. Exs. 10-11 (5/8/19 email; 6/7/19 letter). When Simpson Thacher finally responded, it said the appeal was "resolved" with no representation that its representation was continuing. Ex. 10 (6/19/19 letter). ABA Comm. of Ethics & Professional Responsibility, Formal Op. 95-396 provides that "[i]n the event that such a termination has occurred, the communicating lawyer is free to communicate with, and to respond to communications from, the former represented person." Comment 5 to Rule 4.2 of the D.C. Rules of Professional Conduct also provides that "consent of the organization's [outside] lawyer is not required where a lawyer seeks to communicate with in-house counsel of an organization." *Accord,* D.C. Ethics Opinion 331 (2005).

imagination a confidentiality violation.

As this Court knows, "Rule 11 motions should not be made or threatened … to intimidate an adversary into withdrawing contentions that are fairly debatable." 1993 Adv. Comm. Notes. Under Rule 8.4(g) of the D.C. Rules of Professional Conduct, "It is professional misconduct for a lawyer to: … Seek or threaten to seek ... disciplinary charges solely to obtain an advantage in a civil matter." The case law against using Rule 11 to threaten and intimidate an adversary from pursuing valid claims is equally strong. *Naegele v. Albers*, 355 F. Supp. 2d 129, 144 (D.D.C. 2005) ("a frivolous Rule 11 sanction motion may itself be a violation of Rule 11"); *accord*, *Dove v. Wash. Metro. Area Transit Auth.*, 2005 U.S. Dist. LEXIS 17955, *9 (D.D.C. 8/18/2005) (court has authority to impose sanctions *sua sponte* "[i]f the court determines that the motive and intent of the offending party is to harass the other party"); *Simu v. Carvalho*, 598 B.R. 356, 364 (D.D.C. 3/27/19) ("Rule 11 motion for sanctions or any other motion should not be presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation"); *Blum, Frank & Kamins Cos. v. Marzullo*, 1989 U.S. Dist. LEXIS 9700, *9 n.7 (D.D.C. 8/11/89) (Rule 11 motions can "result in sua sponte imposition of Rule 11 sanctions if the Court concludes that such motions are being interposed for an improper purpose").

Hilton's effort to interfere with KCC's performance of its contractual obligations by threatening KCC into "no longer direct[ing] communications to *Kifafi* class members" is also very serious. "One who intentionally and improperly interferes with the performance of a contract ... between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract." *Res. (2d) of Torts*, §766. *Accord,*

Klayman v. Judicial Watch, 267 F. Supp. 3d 81, 86 (D.D.C. 2017); *Bowhead Info. Tech. Servs v. Catapult Tech..,* 377 F. Supp. 2d 166, 175-76 (D.D.C. 2005).

Hilton's threats to Plaintiff's counsel and their contractor provide further support that Hilton should be required to "show cause" why it should not be held in contempt. *See*, *e.g.*, *Potts*, 2018 WL 794550 at *2; *McCormick's Handbook on the Law of Evidence,* §273.

V. After Nearly Seven Years, the "Burden" Has Shifted to Hilton to "Show Cause" Why It Has Not Fully Complied With the Injunction.

As described in Section III, "[o]nce the plaintiffs establish that the defendant has not complied with the order, the burden shifts to the defendant to justify its noncompliance." *Int'l Painters & Allied Trades Indus. Pension Fund v. Zak Architectural Metal and Glass*, 736 F.Supp.2d 35, 40 (D.D.C. 2010). The primary way to defend against contempt is to show that the judgment has been "satisfied" in full. FRCP 60(b)(5); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R. Co.,* 380 F.2d 570, 581 (D.C. Cir. 1967) ("compliance ... is a defense in coercive contempt proceedings").

If the court determines the alleged contempt "states a case for the employer's noncompliance, the judge will order the defendant to show cause and schedule a contempt hearing – a process significantly shorter than the typical litigation states of a motion to dismiss, motion for summary judgment, and merits hearing." Jordan Laris Cohen, "Democratizing the FLSA Injunction," 127 *Yale L. Journal* 706, 747 (2018). The term "show cause" emanates from the fact that "[o]nce the plaintiffs establish that the defendant has not complied with the order, the burden shifts to the defendant to justify its noncompliance." *Int'l Painters & Allied Trades Indus. Pension Fund*, 736 F.Supp.2d at 40; *SEC v. Bilzerian,* 112 F. Supp. 2d 12, 16 (D.D.C. 2000) ("burden shifts to Bilzerian to produce evidence justifying his noncompliance").

At the contempt hearing, "the plaintiff bears the burden of demonstrating by clear and convincing evidence that the defendant violated the injunction.... After the plaintiff makes out this prima facie case for contempt, the burden shifts to the employer to disprove liability or establish a defense such as financial inability to comply." Cohen, 127 *Yale L. Journal* at 747; *accord*, *LABMD, Inc. v. FTC*, 894 F.3d 1221, 1234-35 (11th Cir. 2018) ("if at the show cause hearing the Commission establishes by clear and convincing proof that the defendant engaged in the forbidden conduct and that the defendant had the ability to comply with the injunctive provision at issue, the court may adjudicate the defendant in civil contempt and impose appropriate sanctions"); *United States v. Daniel Chapter One*, 896 F. Supp. 2d 1, 16 (D.D.C. 2012) ("At the contempt hearing, the Court concluded that there was clear and convincing evidence that Defendants had violated Part II of the Modified Final Order"); *Cobell v. Babbit*, 37 F.Supp.2d 6, 8-9 (D.D.C. 1999) (after show cause order, court held contempt hearing and ruled that defendants were in contempt "[u]pon consideration of the evidence presented and representations made at the contempt trial and contained in both parties' briefs").

Conclusory declarations or affidavits are insufficient to establish a defendant's compliance, or that it "has done all within its powers to comply." In *SEC v. Kenton Capital, Ltd.*, 983 F. Supp. 13, 15 (D.D.C. 1997), this Court rejected a defendant's "bald and conclusory statements in his affidavit" to support his contentions that he had repaid several loans and was unable to satisfy an order of disgorgement. "The Court is unwilling to accept [defendant's] word without more support." *Id.*; *accord SEC v. Bankers Alliance Corp.*, 881 F.Supp. 673, 683 (D.D.C. 1995) (statements in declaration that funds were in possession of unidentified entities, without producing "credible evidence" in support, were not a "categorical, detailed showing of the impossibility of

complying with the Preliminary Injunction").

If the defendant cannot show full compliance, it can "provide adequate detailed proof justifying noncompliance." *SEIU Nat'l Indus. Pension Fund v. Artharee*, 48 F. Supp. 3d 25, 28-29 (D.D.C. 2014) (Kollar-Kotelly); *accord*, *Int'l Painters & Allied Trades Indus. Pension Fund*, 736 F. Supp. 2d at 38. But again, that proof cannot be conclusory but "must demonstrate an inability to comply categorically and in detail." *Walker,* 667 F.Supp.2d at 137. Any contention that it is "impossible" to comply with an injunctive order carries a heavy burden. *Huber v. Marine Midland Bank*, 51 F.3d 5, 10 (2d Cir. 1995). To defend against contempt when the defendant cannot show full satisfaction, "[the contemnor is required to show that it has done all within its power to comply with the court's order." *Int'l Painters & Allied Trades Indus. Pension Fund*, 736 F.Supp.2d at 40; *Pigford*, 307 F. Supp. 2d at 58 (when court determines "contemnor has not done all within its power to comply with the court's orders, contempt may be appropriate even where compliance is difficult"); *Twelve John Does v. District of Columbia*, 855 F.2d 874, 878 (D.C. Cir. 1988) (affirming district court's finding of non-compliance where defendant "had not done all it could to comply"); *United States v. Latney's Funeral Home*, 41 F.Supp.3d 24, 35-36 (D.D.C. 2014) ("positive steps" and "good faith alone," "[w]ithout more facts," were "insufficient to satisfy [defendants'] burden of showing that they took all reasonable steps within their power to comply); *United States v. Two GE Aircraft Engines*, 2016 U.S. Dist. LEXIS 151704, *7 (D.D.C. 11/2/2016) (contemnor is required "to bring forward evidence of her ability to comply, so that the court may evaluate the efforts she has actually made against those she had the capability to make"; "refusal to put forward such evidence dooms its argument that it is making good faith efforts, just as surely as it doomed its argument of impossibility").

In this case, it is clear that Hilton, for all practical purposes, ended any substantial efforts to pay the remaining 35-40% of the class once the Court ended its active supervision. This is shown by the certified, publicly-available Form 5500 and 10K reports indicating no significant additional payments after 2015, and by Hilton's refusal to cooperate even in providing the actuarial valuation reports required to be provided on request under ERISA. Hilton has not shown that it has done "all it could do to comply" with the Court's permanent injunction. With respect to the remaining 8,199 unpaid class members, Hilton has refused to update the payment or noticing for these individuals since it last provided records in 2015. Hilton has provided no evidence of noticing or payments to the class members who were already eligible for early retirement in 2015, or to the total of over 4,100 class members who are now eligible (including individuals over age 65 and those eligible for early retirement). Hilton has also provided no evidence of what happened to the processing of the approximately 1,500 class members whose addresses were individually confirmed by Class counsel, or the approximately 1,000 who had already responded to Hilton's notices but who have not been paid, many of whom are the beneficiaries of deceased class members.

VI. An "Equitable Accounting" Must Be Required as Part of the Show Cause Order.

Supreme Court decisions on "equitable accountings" go back nearly two centuries. In *Fowl v. Lawrason*, 30 U.S. 495, 503 (1831), Chief Justice Marshall ruled that "the jurisdiction of a court of equity is undoubted" in "an action of account" where "some discovery [is] required." *Root v. Railway Co.*, 105 U.S. 189, 214 (1881), required an accounting as "applies in cases of trustees who have committed breaches of trust by an unlawful use of the trust property for their own advantage." Perhaps most closely on point, *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. at 456-457, the ruled that if a "proceeding is a part of the main cause in equity and is for the enforcement of the

decree," a remedial "accounting" proceeding is available under "equitable principles" as for "an actual fiduciary relation."

With the advent of modern discovery, including post-judgment discovery, and the fusion of law and equity, there are fewer references to this equitable remedy. But under FRCP 53(a) and (c), special masters are empowered "to perform an accounting" and to otherwise "compel, take, and record evidence." State trust laws also continue to provide for the remedy of an accounting. *See, e.g.*, D.C. Code §19-1310.0 ("Remedies for breach of trust" include "[o]rder a trustee to account").

Under ERISA, courts unanimously hold that the accounting remedy "fall[s] within the scope of the term "appropriate equitable relief" in [ERISA] §502(a)(3)." *Schmitt v. Nationwide Life Ins.*, 2018 U.S. Dist. LEXIS 144362, *8 (S.D. Ohio 8/24/18); *accord, Pender v. Bank of Am.*, 788 F.3d 354, 364-67 (4th Cir. 2015); *Edmonson v. Lincoln Nat'l Life Ins.*, 725 F.3d 406, 419-20 (3d Cir. 2013); *Parke v. First Reliance Std. Life Ins.*, 368 F.3d 999, 1008 (8th Cir. 2004).

In the District of Columbia, the case law on "equitable accountings" goes back well before the *Cobell* line of cases described before. In *Cafritz v. Corporation Audit Co.*, 60 F.Supp. 627, 631 (D.D.C. 1945), the court found that the defendant, as a "fiduciary," had the "burden ... to prove that he had disposed properly of the amount for which he is accountable, and to show what that amount is." *See also Rosenak v. Poller*, 290 F.2d 748, 750 (D.C. Cir. 1961) ("once facts giving rise to a duty to account have been alleged and admitted," the burden "must shift to defendant"); *Donovan v. USPS*, 530 F.Supp. 894, 901 (D.D.C. 1981) (case involving hundreds of thousands of postal workers was "precisely the type of litigation" where "full accounting" is mandated "by a court of equity"). *Accord, Trudel v. SunTrust*, 288 F.Supp.3d 239, 246-47 (D.D.C. 2018).

In contempt cases, district courts often require the defendant to provide an accounting

preparatory to the "show cause" hearing to prove that the defendant has taken all reasonable steps in its power to comply. *See, e.g.*, *Bilzerian,* 112 F. Supp. 2d at 15 (show cause order required "Bilzerian to file a sworn accounting identifying all assets in which he had any direct or indirect beneficial interest" before the hearing); *Wilde v. Wilde*, 576 F.Supp.2d 595, 608 (S.D.N.Y. 2008) ("upon a showing that an [equitable] accounting is warranted, an interlocutory decree is issued requiring the fiduciary to make an accounting. Once the accounting is made, a second hearing is held to establish the final amounts owed to the principal").

"When the accounting remedy is granted" by showing a fiduciary relationship entitling the plaintiff to an accounting, "[t]he plaintiff must [also] establish some substantive basis for an accounting," e.g., by showing "all gross amounts claimed from the defendant." Joel Eichengrun, "Remedying the Remedy of Accounting," 60 *Ind. L. J*. 463, 469-70 (1985) (citing *Cafritz v. Corporation Audit Co.*, 60 F.Supp. 627, 631 (D.D.C. 1945)). Here, Plaintiff has clearly done that by showing the unpaid amounts as of April 2015 and the Form 5500 and 10-K records for the years since then showing no significant payments.

As indicated, the court's "inherent power to authorize post-judgment discovery when information concerning compliance is not forthcoming on a cooperative basis" also supports requiring the Hilton Defendants to produce records for an accounting on compliance. *Smith v. Mallick*, 2005 U.S. Dist. LEXIS 36216, *3 (D.D.C. 12/29/2005) (allowing plaintiff "to seek [post-judgment] discovery from defendant in the form of a deposition or request for production of documents" about defendants' ability to satisfy judgment); *Palmer v. Rice*, 231 F.R.D. 21, 25 (D.D.C. 2005) (granting discovery on enforcement of 10-year old permanent injunction; "without further discovery, plaintiffs will not be able to determine whether the government has complied

with the court's injunctions"); *Mass. Union of Public Housing Tenants*, 1983 U.S. Dist. LEXIS 12567, *4 (D.D.C. 10/19/1983) (granting discovery to "ensur[e] proper compliance with the May 20th court order, and in order to bring to light the present status of meter conversions affected by the order"); *Fed. Mktg. Co. v. Va. Impression Prods.*, 823 A.2d 513, 520 (D.C. App. 2003) ("court granted the co-special masters ample authority to obtain and verify information from the parties themselves and ... directed FMC and VIP to cooperate fully with the investigation"). The denial of such discovery can be an abuse of discretion. *Cruz v. McAleenan*, 931 F.3d 1186, 1193 (D.C. Cir. 2019); *Convertino v. U.S. Dep't of Justice*, 684 F.3d 93, 100 (D.C. Cir. 2012) ("more than enough facts" showed opposing party "has the information" that can be obtained "through discovery").

VII. If Hilton "Has Not Fully Complied With the Court's Earlier Orders," This Court Has "Broad" Powers to Issue Additional Orders, Including Sanctions.

This Court not only has the inherent power to find contempt, it has statutory "power to punish by fine or imprisonment ... contempts of its authority" including disobedience. 18 U.S.C. §401. The "court's powers to enforce its own injunction by issuing additional orders is [thus] broad, particularly where the enjoined party has not fully complied with the court's earlier orders." *Nat'l Law Ctr. on Homelessness & Poverty v. United States VA*, 98 F.Supp.2d 25, 26-27 (D.D.C. 2000); *accord, Broderick v. Donaldson*, 437 F.3d 1226, 1234 (D.C. Cir. 2006) ("power to punish for contempts is inherent in all courts; its existence is essential to ... the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice"); *Latney's Funeral Home, Inc*., 41 F. Supp. 3d at 37 ("Courts have wide discretion in fashioning remedial sanctions for civil contempt"). Any person subject to an injunction may, moreover, be punished for contempt if he or she disobeys the order. As stated, this includes the "officers, agents, servants, employees, and attorneys" of a party. FRCP 65(d)(2).

The sanctions this Court can impose include compensatory sanctions and fines. *See, e.g.*, *Walters v. P.R.C.*, 72 F.Supp.3d 8, 11 (D.D.C. 2014) (civil contempt "is designed to ... compensate a complainant for losses sustained"); *SEIU Nat'l Indus. Pension Fund*, 48 F.Supp.2d at 31 (awarding unpaid contributions and interest for period during which defendant failed to file reports); *FTC v. BlueHippo Funding, LLC*, 762 F.3d 238, 243 (2d Cir. 2014) ("civil contempt sanctions" serve "to remedy any harm caused by noncompliance"). For fines, warning must be provided so the defendant has "the opportunity to bring himself into compliance before the sanctions are imposed." *In re Magwood*, 785 F.2d 1077, 1082 (D.C. Cir. 1986).

Conclusion

For the foregoing reasons, this Court should order the Hilton Defendants to provide a full "equitable accounting" of Hilton's implementation of the ordered relief since April 2015 and to "show cause" why they are not in civil contempt of the permanent injunction.

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Respectfully submitted,

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