**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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

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

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**Introduction**

Plaintiff's opening memo quotes *Pigford v. Veneman*, 307 F.Supp.2d 51, 56 (D.D.C. 2004), that "[c]ivil contempt is a remedial device intended to achieve full compliance with a court's order." *See generally* Mem. at 14-16, 44-45 (citing other authorities). Here, Hilton clearly has not used the opportunity to respond to the motion to show cause to offer any evidence of how it has "achieve[d] full compliance," or even to offer evidence disproving the dismal record of unpaid benefits indicated in the Form 5500 reports on annuities and lump sum distributions and by the certified 10-K's financial statements on "Benefits Paid." In the motion for an extension, Defendants represented that the extension would "permit Defendants sufficient time to investigate and respond to the factual assertions made in Plaintiffs' Motion." Dkt. 452 at 2. If that occurred, Hilton's opposition does not reflect the results.[1] There is only one exhibit, which is a survey cover letter that *Plaintiff's counsel* prepared, and no supporting declarations.[2] Hilton's opposition almost exclusively relies on suppositions and conjectures from its outside counsel, which "of course, are not evidence." *United States ex rel. Wood v. Am. Inst. in Taiwan*, 286 F.3d 526, 534 (D.C. Cir. 2002); *accord*, *Grimes v. District of Columbia*, 794 F.3d 83, 91 n.4 (D.C. Cir. 2015) ("counsel's assertions in briefing … are not evidence upon which a court may rely").

Hilton's opposition also barely challenges the case law on civil contempt that Plaintiff's counsel set out in their extensive memorandum. Of 95 cases cited, Hilton distinguishes or follows ten, and only cites five other cases. Hilton does not cite, and thus necessarily does not

[1] The opposition only contains one mention of an investigation. *See id.* at 15.

[2] A declaration to "authenticate" exhibits like Attorney Lacy's is not "testimonial." *See, e.g., United States v. Edwards*, 2012 U.S. Dist. LEXIS 163044, *6 (D.D.C. 11/15/12).

distinguish, the cases cited in Plaintiff's opening memorandum on show cause, equitable accounting, and inferences. Hilton's five other cases do not stand for anything different than in Plaintiff's memo, and some support the class's position, like *Glover v. Johnson,* 934 F.2d 703, 711 (6th Cir. 1991), which found the defendant had *not* used "all reasonable efforts to comply."

In 2015, this Court ended its active supervision of the implementation of the permanent injunction because Hilton had made substantial progress in 2013 and 2014 and Hilton's Vice President Benefits Americas – who no longer has any role with Hilton's Plan – attested to Hilton's commitment to continuing that progress. Dkt. 400 at 24-25, 27. It has been five years since, and the limited data Hilton supplied to Plaintiff's counsel through June 2017, Hilton's certified Form 5500 data for 2015-2018, and its certified 10-K annual reports for 2015-2019 all show that Hilton is barely closer to implementing the permanent injunction to increase "all class members" benefits than it was when this Court concluded its active supervision. The Form 5500s indicate that in the *five years* since this Court stepped away, only 389 annuitants and 292 lump sums have commenced or been paid out of the 8,199 persons whose retirement benefits were unpaid. Mem. at 18, Ex. 3. The survey Plaintiff's counsel conducted at the end of 2019 confirmed that only 10-15% of the unpaid class members have been paid. Ex. 5. One can read Hilton's opposition over and over and still find no contest to the evidentiary showing using the certified 5500 reports that Hilton has just paid 10-15% of the class members who were unpaid in 2015.

In 2012, the D.C. Circuit ruled that "[o]nce the court determined the Plan violated ERISA," Hilton entered the "world of equity." 701 F.3d at 726. Now, at the expense of class members' retirement benefits, Hilton appears to have left the world of equity and again entered the world of not complying with the law. Hilton does not contest that the number of unpaid class members has remained practically the same as it was 5 years ago, but Hilton essentially argues

that if that was good enough for this Court in 2015, it should be good enough now. *See* Opp. at 2, 11-12, 16-17. Although Hilton could turn out to be exceptionally non-compliant, the need to keep up on the implementation of permanent injunctions and consent decrees is not unusual and is a current topic in the law. *See, e.g.*, Judith Resnick, "Reorienting the Process Due," 92 *NYU L. Rev.* 1017, 1060-62 (2017) ("Before approving settlements for structural or monetary relief, courts should require that such agreements include ... regular reporting about implementation... and a method of returning to court, if conflicts arise across sets of claimants"; "aggregate resolutions (for injunctions or money) should be seen as ongoing until all relief is accorded"); *Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1074 (7th Cir. 2018) (if party "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").

## I. The Mandate and Permanent Injunction Require Hilton to Pay "All Class Members" Their Increased Benefits "As Soon As Administratively Feasible."

Hilton's opposition reads the D.C. Circuit's decision as simply a win for Hilton that "rejected" all of "Plaintiff's arguments." Opp. at 1, 7. Hilton does not recognize or respond to the Circuit's mandate that "[t]he [district] 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. Despite this mandate, Hilton attempts a rereading of the transcript of the appellate oral argument as "merely explor[ing] the availability of contempt as a way to enforce a permanent injunction if Hilton refused to comply with obligations for individuals brought to its attention." Opp. at 20 n.8. This is not what the per curiam opinion says, and it does not accurately reflect what Judge Wilkins was discussing on the page of the transcript

that Hilton cites (Judge Wilkins was referring to the "900-some, close to 1,000 people [Plaintiff's counsel] located" in 2017 and brought to Hilton's attention, Ex. 7, Tr. at 27). Moreover, Plaintiff's counsel have given Hilton, and now this Court, many examples of individuals for whom Hilton refuses to comply with its obligations. But after suggesting it hasn't been given any, Hilton tosses those examples aside as "anecdotal." Opp. at 2, 10.[3]

Hilton's opposition not only disregards the full Circuit mandate but ignores the commands of this Court's permanent injunction to "award back payments and commence increased benefits for all class members" "as soon as administratively feasible." There is not one statement in Hilton's opposition concerning how Hilton has complied with the terms of this injunction since 2015 except a single sentence from Hilton's counsel asserting that Hilton has paid benefits "as they become due," Opp. at 14, and an undocumented "summary" by Hilton's other outside law firm. *Id*. at 18.

Hilton's opposition never recognizes that Hilton has any duty as the enjoined party and as a fiduciary to implement the permanent injunction by acting for the "exclusive purpose" of providing benefits. Hilton does not even admit it has fiduciary duties in implementing the injunction. Instead, Hilton relies on a repeated circumlocution that this Court ordered "*the Plan*" to implement the relief. Opp. at 1-2, 7, 15, 26. ERISA §404's fiduciary duties are not duties of "the Plan." Instead, Hilton and the individual "persons" with "discretionary responsibility in the administration of the plan" are the fiduciaries who have the duty to act for the "exclusive purpose of ... providing benefits to the participants and beneficiaries." ERISA §§3(21)(A), 404(a)(1)(A).

[3] Hilton adds that "some of the individuals [Plaintiff] highlights in his motion were previously brought to the Court's attention." *Id*. at 13 n.6. Hilton neglects to acknowledge that Plaintiff's counsel pointed out that updated information was being provided on some individuals previously brought to the Court's attention, e.g., that the beneficiaries of Ada Rapp and Robert Picotte are still unpaid. *See* Pienta Decl. at ¶¶24-25.

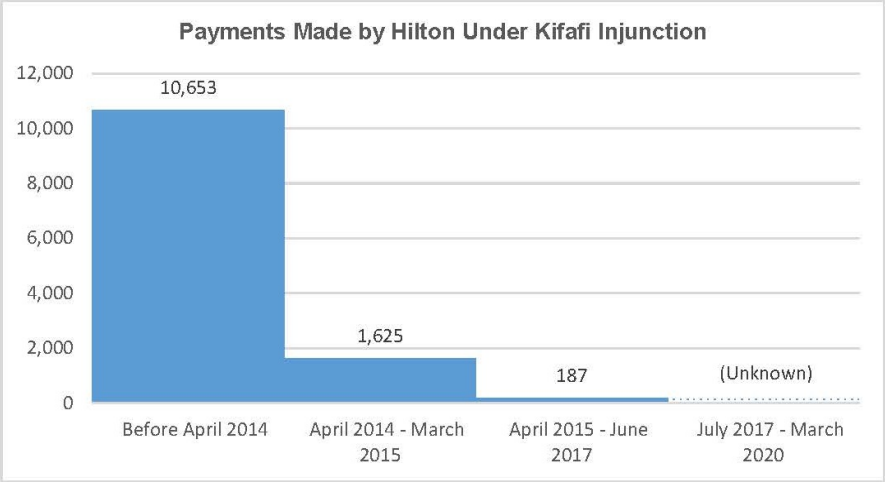
"The Plan" is not such a "person"; it is an "entity" for purposes of suit. ERISA §§3(9), 502(d).

Rather than address why Hilton has not fulfilled its duties as the enjoined party and fiduciary to fully implement the injunction since 2015, Hilton cites *CFTC v. Trade Exch. Network Ltd.*, 117 F.Supp.3d 22, 26 (D.D.C. 2015), for the statement that "a clear and unambiguous order does not leave any reasonable doubt as to what behavior was expected and who was expected to behave in the indicated fashion." Opp. at 12 n.4. The quoted statement suggests that Hilton is now looking to blame the permanent injunction for leaving "reasonable doubt as to what behavior was expected." But if the injunction left "any reasonable doubt," Hilton had an obligation to seek clarification, not to exploit "doubt" in order to leave thousands of class members unpaid. [4]

## II. There Is Sufficient Evidence of Non-Compliance to Order Hilton to "Show Cause."

After Hilton refused to cooperate in any way when Plaintiff's counsel reached out in June 2019, Plaintiff looked to Hilton's certified public records for data on implementation of the relief. Those records from Form 5500 annual reports on the retirement plan and from 10-K reports on Hilton's "Employee Benefit Plans" show that after five more years of putative implementation under the direction to pay all class members "as soon as administrative feasible," Hilton has paid less than 10% of the 8,199 class members who were unpaid when this Court ended its active supervisory jurisdiction in 2015. The graph and tables that Plaintiff prepared to show how payments have fallen after 2015 are reproduced below:

[4] In *TradeExch.*, the defendants did not "substantially comply" with an order to produce responsive documents where they knew of the existence of other documents but failed to produce them and "*never sought any clarification of the order*."117 F.Supp.3d at 26 (emph. added).




**Additional Payments Indicated by Hilton 2015-2018 Form 5500 Data**

| | 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 |

**"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 |

Without offering any different evidence of compliance, Hilton's opposition now treats the motion to "show cause" as a made-up step by a party who lacks "clear and convincing" evidence of contempt. Opp. at 9.[5] As Hilton suggests indirectly with that argument, a "show cause" motion is different from a contempt motion in that it is not required to be conclusive, and it allows the enjoined party an opportunity to show that the unaccounted for amounts or the other evidence of non-compliance do *not* reflect what the defendant has actually achieved. Hilton tries rotely to distinguish a few of the show cause cases in a footnote, Opp. at 10 n.2, but it does not contest this principle, and it never attempts to show it has achieved any more than Plaintiff has found.

[5] Hilton also complains about the burden-shifting that occurs once a show cause motion is granted. Opp. at 9. While the burden does shift to the defendant to provide a full accounting and produce information, the Plaintiff still bears the ultimate burden. *See* Mem. at 38-39.

In *Stewart v. O'Neill*, 225 F.Supp.2d 6, 10 (D.D.C. 2002), Judge Lamberth recognized the distinction between a show cause motion and a contempt motion, stating: "In this case, of course, the ultimate question of contempt is not before the Court; plaintiffs seek only an Order that defendant show cause why he should not be held in contempt. At this stage, plaintiffs are not required to show by clear and convincing evidence that the defendant should be held in contempt, but the Court must have some indication that sufficient evidence exists that the Court might find evidence sufficient to hold defendant in contempt." *Accord, Cobell v. Norton*, 195 F.Supp. 2d 1, 3 (D.D.C. 2002) ("Court has considerable latitude in deciding whether to issue an order to show cause" "mindful that civil contempt proceedings are meant to obtain compliance with a court order or to compensate for damage sustained as a result of noncompliance"); *Act Now to Stop War & End Racism Coal. v. District of Columbia*, 2013 U.S. Dist. LEXIS 203571, *5 (D.D.C. 8/23/13) ("Court must have some indication that sufficient evidence exists that the Court might find evidence sufficient to hold defendant in contempt").

Hilton's defense on the merits depends almost exclusively on conclusory dismissals of Plaintiff's evidence. Hilton dismisses what Plaintiff found in the Form 5500s and 10-Ks as "partial" or "misleading" even though the information in the Form 5500s was certified by Hilton's Plan administrator as "true, correct, and complete" and Hilton's CEO and CFO have certified that the financial information in the 10-Ks "fairly present[s] in all material respects, the financial condition and results of operations of the Company." *See* Exs. 3, 4. To justify its characterizations of Plaintiff's evidence as "partial" or "misleading" despite the certifications of Hilton's officers, Hilton's opposition relies on its outside counsel's suppositions and conjectures, which, as stated above, "are not evidence." *United States ex rel. Wood v. Am. Inst. in Taiwan*, 286 F.3d at 534.

Relatedly, Hilton tries to rhetorically downgrade Plaintiff's evidence of non-compliance to "speculation" or a "hunch," saying "Plaintiff speculates on the basis of outdated data, public filings and anecdotal reports," Opp. at 10,[6] and referring to Plaintiff's counsel's "hunch that Defendants are not making sufficient progress in paying class members." *Id.* at 20. It is, of course, not "speculation" or a "hunch" when Plaintiff presents certified 5500 and 10-K data confirmed by survey results, while the enjoined party/fiduciary refuses to produce records related to compliance that are known to exist and are "peculiarly in [its] control."

As this indicates, besides the reliance on assertions by counsel that "are not evidence," the second hallmark of Hilton's opposition is its withholding of records of payments and records like the actuarial valuation reports that are "peculiarly within [its] control," while characterizing Plaintiff's evidence as "incomplete," "partial," or "outdated." Opp. at 2, 7, 10, 12, 14-15. In doing this, Hilton shows no regard for the principle, which Plaintiff's opening memo clearly cites, that in withholding the records "peculiarly within [its] control," an inference should be drawn that Hilton is withholding information that "would be unfavorable" to it. *Czekalski v. Lahood*, 589 F.3d 449, 455-56 (D.C. Cir. 2009); *accord*, *Nat'l Center on Homelessness v. United States VA*, 842 F.Supp.2d 127, 131-32 (D.D.C. 2012) ("unsupported self-assessment of its compliance" is not reliable when there has been a "failure to cooperate on discovery").

Another centerpiece to Hilton's opposition is its criticisms of Plaintiff's 2019 survey, eliding the records in the Form 5500s or the 10-K's. Hilton thus asserts "[t]he sole "new"

[6] Hilton suggests through a parenthetical for *Mass. Union of Public Housing Tenants v. Pierce*, 1983 WL 150, 1983 U.S. Dist. LEXIS 12567 (D.D.C. 10/19/1983), that Plaintiff's evidence is not just speculation, but "mere speculation that there is non-compliance." Opp. at 10. In that case, however, the defendant "filed extensive documentation concerning its compliance" and "counsel for plaintiff conceded that he was satisfied with [defendant's] compliance with the court orders except for two matters." 1983 WL 150, *4-5.

evidence presented in Plaintiff's motion not previously considered by the Court are the partial, unverified results of a survey his counsel sent to class members." Opp. at 14. Given the other evidence of non-compliance, representing that this is "the "sole" new evidence" seems not just farfetched but intentionally misleading.

In another place, Hilton suggests a defense that its plan practices are within the mainstream of the industry and that Plaintiff is reading the injunction to "place[] a higher burden on the Plan than other similarly situated plans." Opp. at 2. What others do or don't do is not a defense, *see, e.g., Meinhard v. Salmon,* 164 N.E. 545, 546 (N.Y. 1928) (Cardozo) ("the level of conduct for fiduciaries [has] been kept at a level higher than that trodden by the crowd" only by adhering to a "duty of loyalty" that is "the highest known to the law"). There is no evidence, moreover, of any "higher burden" being placed on Hilton, but just another bare assertion by Hilton's outside counsel. After recently entering into a $220 million consent decree for violations of the same kinds of duties to locate and pay annuities and lump sum benefits, MetLife, for instance, might be surprised to hear that it could have just had its counsel say it was in the mainstream of industry practices in not paying annuitants. *See* Mem. at 11-12.

Defendants argue further that, "This Court has held that compliance with its judgment will be measured by efforts to locate and pay class members, not payment progress." Opp. at 10. But the Hilton Defendants evidently do not want to be measured by either standard: Hilton's opposition never informs the Court about its "payment progress" since 2015 *or* about Hilton's "efforts to locate and pay class members" over the last five years so this Court could "measure" their compliance in even one of those ways. As the D.C. Circuit stated, this Court did not "hold that Hilton was done satisfying [the injunction's] terms." 752 Fed.Appx. at 9.

As if there was a magnetic field, Defendants' arguments also gravitate to asserting

impossibility, saying that "full payment to over 20,000 class members ... is unrealistic," Opp. at 2, that it is "not feasible to locate and pay every class member owed an increased benefit," *id.* at 11, and that "[p]erfect implementation of the remedial order is neither possible nor required," *id.* at 17. Plaintiff's opening memo cites cases, none of which is distinguished by Hilton, holding that enjoined parties asserting "impossibility" must be specific and bear a heavy burden, and that conclusory declarations are insufficient. Mem. at 39-40. Here, Hilton does not even offer a conclusory declaration from someone with personal knowledge.

Hilton cites one case, the Sixth Circuit's 1991 decision in *Glover v. Johnson*, *supra*, 934 F.2d at 708, for the principle that a defendant is not in contempt when it "took all reasonable steps within its power to comply with the court's order." Opp. at 11 n.3. But Hilton neglects to note that in *Glover*, the defendants "simply did not convince the court that they took all reasonable steps to comply, and they do not convince us [the appeals court]." *Id*. at 708. While defendants claimed they could not do more, defendants failed to take action "under their direct control" and failed to "explore[] or attempt[] any alternative solutions." *Id.; accord*, *United States v. Two GE Aircraft Engines*, 2016 U.S. Dist. LEXIS 151704, *7 (D.D.C. 11/2/16) (defendant "has not met its burden to demonstrate that it made all reasonable efforts to comply"; a 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. Here, Evans' refusal to put forward such evidence dooms its argument ... just as surely as it doomed its argument of impossibility").

## III. An Accounting Is Appropriate Based on the Evidence of Non-Compliance.

With respect to the request for an equitable accounting, Hilton does not distinguish or refute any of the cases in this Circuit on equitable accounting, including *Cobell v. Salazar,* 573 F.3d 808, 810-13 (D.C. Cir. 2009), where the Interior Dept breached its fiduciary duties by

mismanaging the Individual Indian Money Trust, and Eloise Cobell obtained an injunction requiring defendants to provide plaintiffs an "accounting" with "sufficient information for the beneficiary readily to ascertain whether the trust has been faithfully carried out." Sections 82 and 83 of the *Restatement (3d) of Trusts*, the D.C. Code on the accounting remedy (§19-1310.0), and the case law on accountings dating back nearly two centuries, *see, e.g.*, *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 456-457 (1932), all show that accountings are *not* extraordinary but the norm when there is a fiduciary relationship, in recognition that the fiduciary has information which is "unknowable" to the beneficiaries to whom duties are owed. Gordon Smith, Andrew Gold, eds., *Research Handbook on Fiduciary Law*, at 167 (2018).

Relying on *Bates v. Nw. Human Services*, 466 F.Supp.2d 69, 103 (D.D.C. 2006), which Plaintiff's opening memo cited, Defendants still argue that "[a]n accounting is an extraordinary remedy." Opp. at 19. But again, an accounting is *not* extraordinary when there is a fiduciary relationship. *See, e.g.*, *Cafritz v. Corporation Audit Co.*, 60 F.Supp. 627, 631 (D.D.C. 1945). In *Bates*, the defendant was not an enjoined party, and ultimately *Bates* did *not* "dismiss the plaintiffs' request for an accounting" because the 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 discovery and judicial intervention." 466 F.Supp.2d at 104.

Hilton next argues, relying on *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 556-57 (6th Cir. 2012), that it should not have to account because Hilton never breached ERISA. Opp. at 20. In case someone has forgotten, the permanent injunction this Court issued provides "appropriate and equitable" relief as a remedy after Hilton "had violated ERISA's anti-backloading provision, 29 U.S.C. § 1054(b)(1), and had violated the Plan's vesting provisions" for over two decades.

Dkt. 258 at 1-2.[7]

Hilton complains that Plaintiff's request for an accounting is "repackaged post-judgment discovery," Opp. at 9, and that Plaintiff is trying an "end-run around" the requirement for post-judgment discovery. *Id.* at 20. There are similarities between an accounting and post-judgment discovery. But the major difference is that an accounting is based on a fiduciary relationship in which the fiduciary is in possession of records and other information that is otherwise "unknowable" to the beneficiaries. After asserting that Plaintiff is trying an "end-run around" the post-judgment discovery rules, Hilton never distinguishes the post-judgment discovery cases cited in Plaintiff's opening memo, which show the standards for post-judgment discovery are nearly as "broad" as for an accounting. *See* Mem. at 43-44. Under those cases, Plaintiff has made a more than sufficient showing for post-judgment discovery of records related to Hilton's compliance. *See, e.g.*, *Convertino v. U.S. Dept. of Justice*, 684 F.3d 93, 100 (D.C. Cir. 2012) ("more than enough facts" showed the opposing party "has the information" that can be obtained "through discovery"); *Palmer v. Rice*, 231 F.R.D. 21, 25 (D.D.C. 2005) ("without further discovery, plaintiffs will not be able to determine whether the government has complied with the court's injunctions").[8]

As another alternative, Defendants act as though "detail[ing] the current payment status

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[7] *Cataldo* recognized a claim for "equitable accounting," but ruled that since breach of fiduciary duty claims had been dismissed, plaintiffs "are not entitled to any equitable relief." 676 F.3d at 556-57. Here, the Plaintiff class was "entitled to" and awarded "equitable relief."

[8] This Court's 2/4/15 decision (Dkt. 400 at 25) cited the "prima facie" standard for post-judgment discovery in *800 Adept v. Murex Sec. Ltd.*, 2007 U.S. Dist. LEXIS 70861, *7 (M.D. Fl. 9/25/07), and Hilton now cites this unreported decision, too. Opp. at 9. In this case, Hilton's Form 5500s and 10-Ks and Plaintiff's 2019 survey confirm that Hilton ended significant efforts to pay the remaining unpaid members of the class once the Court ended its active supervision in 2015. This is more than sufficient for an accounting or for post-judgment discovery under *800 Adept,* as well as the precedents in this jurisdiction.

of each and every [unpaid] class member" is exceptionally burdensome. Opp. at 12. There is no mention that, in response to Judge Pillard's question at oral argument about whether Hilton has "been keeping track of every effort that's been made" since this Court ended its active supervision in 2015, Hilton's counsel responded that "[t]here are spreadsheets that we've given before." Ex. 7, Tr. at 38.

Hilton's bottom-line defense to an accounting seems simply to be "it's none of your business," e.g., what payments Hilton has made since 2015 under the injunction, any payments in process or stuck in process, any denials of payments, and what Hilton is doing to locate and process payments to missing participants and beneficiaries. Based on this "it's none of your business" defense, Hilton is refusing to produce any records at all. This is not a defense to an accounting recognized anywhere in the law.

## IV. Hilton's Opposition Does Not Change Any of the Evidence.

To guide this reply through the evidence, we have taken the evidentiary headings from Plaintiff's opening memo (Sections IV.A - F) and have gone through Hilton's Opposition to identify the responses, if any, and then to reply to those responses:

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

Hilton's Opposition does not contest that there were 8,199 unpaid class members when this Court ended its active supervisory jurisdiction, sometimes suggesting an even higher number, and never suggesting a lower one. Hilton says that Plaintiff's "assertions of noncompliance" are based on an "assertion that as of 2015, 8,419 class members … remained unpaid," Opp. at 12, rather than the "8,199" in Plaintiff's motion. In another place, Hilton says "over 8,000," *id.* at 13, and in the section on accounting they quote the "8,199" from Plaintiff's, *id.* at 19. The 8,419 count, which is 220 more than 8,199, appears to be because Hilton is

including individuals whose vesting claims were denied (and are class members in *White*). Plaintiff's counsel did *not* include those individuals in the count of 8,199 unpaid class members.

Hilton asserts that the "unpaid figures reflected reasonable reasons [sic] that payment had not been made as of 2015, including that Defendants still needed information from payee [sic] to process the claim or were otherwise reviewing the claim." Opp. at 13. But participants who had one of those "statuses," like participants who had responded to notices but had not been processed through to payment and class members with unconfirmed addresses, *see* Mem. at 18, were not supposed to stay in the same status for the next five years. Under the injunction, Hilton was obligated to pay benefits to class members "as soon as administratively feasible." Thus, Hilton was obligated to complete the processing of class members who had responded, to locate missing class members whose addresses were unconfirmed, and to notify class members with deferred benefits as they aged into eligibility for retirement benefits at ages 55 and older.

### 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.

Hilton offers no response to the cases on cooperation or to the duty to locate missing and unpaid participants as established by the 2014 DOL Field Assistance guidance and illustrated by MetLife's $220 million consent decree for failing to locate and pay individuals who are due annuities. *See* Mem. at 10-13.

Hilton offers no evidence about how it is complying with the standards in the DOL Field Assistance guidance. And Hilton now admits there is an "ongoing audit" by DOL which they call "sensitive" (Opp. at 2) and which appears to concern some of the same duties as here, since Plaintiff's counsel are the ones who reported the violations. Being under investigation by a government agency is not an exception to an accounting or post-judgment discovery, or to the

duty of an enjoined party to cooperate. Being under investigation thus does not allow a party to turn down requests for information by asserting it is "sensitive." *See, e.g., Noble v. City of Fresno*, 2017 U.S. Dist. LEXIS 194489, *18 (E.D. Cal. 11/27/17) (documents containing "objective factual information" "simply do not implicate the sensitive investigative interests necessary to protect an ongoing investigation"). Because the investigation is not confidential, an inference may be drawn from Hilton's refusal to cooperate that Hilton is withholding information about the DOL investigation that "would be unfavorable" to its position on this motion. *Czekalski*, 589 F.3d at 455-56. (If Hilton will not cooperate, this Court can always ask DOL to explain its investigation, as courts often do for purposes of judicial economy and efficiency.)

Hilton offers an extended legal argument about not being "required" to produce the actuarial valuation reports (AVRs) under ERISA. Opp. at 21. Hilton does not dispute that it provided the AVRs to Plaintiff through 2014, usually within days of a request, and now will not. The 2014 AVR specifically broke out data on the *Kifafi* implementation, including accrued benefits "prior to" and "post Kifafi litigation," Ex. 9 at 39-41, which makes production of these AVRs more compelling than typically, and which also makes the withholding of these AVRs subject to the inference that the information being withheld "would be unfavorable to [the opposing] party." *Czekalski*, 589 F.3d at 455-56.

Hilton incredibly asserts that "provision" of the AVRs somehow "is outside the scope of the *Kifafi* litigation and "not properly before the Court." Opp. at 21. Hilton never explains the basis for that position since it produced the AVRs before, and Plaintiff even cited the 2013 and 2014 AVRs in the opening memo. Mem. at 22-23, 27. These are relevant records that are known to exist and are "peculiarly in [Hilton's] control."

In regard to what ERISA §104(b)(4) requires, even absent the duty to cooperate and to

account, Hilton calls the case Plaintiff cited, *Bartling v. Fruehauf Corp.*, 29 F.3d 1062, 1070 (6th Cir. 1995), "an early ruling whose reasoning has been rejected by every other Circuit to consider the scope of ERISA Section 104(b)(4)." Opp. 22 n.9. In fact, *only two* circuits have considered requests for AVRs, one of which was *Bartling* and the other of which was *CWA/ITU Pension Plan v. Weinstein*, 107 F.3d 139 (2d Cir. 1997). As Plaintiff's counsel advised Hilton in an August 29, 2019 letter, *Weinstein* was effectively overruled by a 2006 amendment to ERISA which required disclosure of AVRs prepared for multiemployer plans. Ex. 11 and *see* ERISA §101(k)(1)(G). That leaves *Bartling*, whose ruling that AVRs are "indispensable" in how of defined benefit plans are "operated" was persuasive when *Bartling* was decided in 1995, and is even more persuasive since the 2006 Pension Protection Act amendments to ERISA codified more of the functions of actuarial valuations in how defined benefit pension plans are "operated." *See, e.g.,* ERISA §§101(j), 206(e) and (g), 303(j). Plaintiff's counsel went over *Bartling* and the effect of the 2006 PPA amendments in both the August 29, 2019 correspondence with Hilton and the opening memo. *Mem.* at 21, Ex. 11. Hilton contests none of these points.

As stated in Plaintiff's opening memo and above, this Circuit's decision in *Czekalski*, 589 F.3d at 455-56, holds that an inference should be drawn when records "peculiarly in the opposing party's control" are not produced that those records "would have been unfavorable to that party." Here, Hilton is refusing to produce records related to compliance, including the AVRs, that Hilton's counsel told Judge Pillard exist (Ex. 7, Tr. at 38) and that are "peculiarly in the opposing party's control." Hilton does not contest the applicability of *Czekalski* or otherwise distinguish it.[9]

As a general defense against producing records related to compliance that are "peculiarly

[9] Hilton says ERISA §104(b)(4) only requires production of the "latest" AVR, not "historical" ones. Opp. at 22 n.9. Unlawfully refusing to produce a document cannot become its own excuse, and this Court's authority to order an accounting is not limited in any such way.

in [its] control," Hilton falsely asserts that "Plaintiff's counsel has ... repeatedly asked Hilton to provide the same information this Court and the Circuit Court have held he is not entitled to." Opp. at 23. The Circuit Court did not make any rulings about what Plaintiff's counsel "is not entitled to," nor has this Court made any rulings related to requests for information from Hilton since December 2015. Obviously, the rulings this Court issued were not about "the same information" since the records did not exist then.

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

Hilton asserts that Plaintiff "misrepresents or misinterprets Hilton's public filings." Opp. at 13. Hilton does not, however, contest any specific statements or explain how Plaintiff either "misinterprets" or "misrepresents" in a manner to which Plaintiff can respond. Hilton never mentions anything specific that was misinterpreted in the Form 5500 data which indicates fewer than 800 new annuitants and lump sum distributions since 2015. Mem. at 18, Ex. 3.

With respect to the 10-K's, Hilton first says, "This same argument [about the data on "Benefits Paid" in the 10-K annual reports] was presented last year to the Circuit Court, which nonetheless affirmed the Court's decision not to continue active supervision of Defendants' compliance." Opp. at 13. But the Circuit did not pass on any events after 2015; it decided this Court's decision was reasonable "[a]fter carefully assessing the evidence before it" at that time. 752 Fed. Appx. at 9.

With respect to the "Benefits Paid" in the 10-K's, Hilton adds that, "Regardless, total benefit payment levels have consistently remained above 2012 (pre-judgment implementation) levels." *Id*. at 14. This is unresponsive to Plaintiff's well-documented point that the 2013-2014 AVRs show that the 2013-2014 payments increased the future "Benefits Paid" by $1.2 million,

which means the "Benefits Paid" in every year after that average only $1 million. *See* Mem. at 23. This simply isn't enough to make a significant dent in $80 million in unpaid obligations.

Hilton's counsel asserts, "Since then [2013-14], Hilton has paid increased benefits (or first time benefits) as they become due, rather than significant lump back payments." Opp. at 14. Hilton's assertion again comes from its counsel, which is "not evidence." If "as they become due" was given its broad meaning, there should be *thousands* more payments than the 800 new annuitants and lump sum recipients indicated by the certified Form 5500 records. The requested accounting will provide "sufficient information for the beneficiary readily to ascertain whether the trust has been faithfully carried out." *Cobell v. Salazar,* 573 F.3d at 810-13.

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

Plaintiff's survey at the end of 2019 confirmed what is shown in the Form 5500 reports on the retirement plan and the 10-K reports on Hilton's financial operations. Hilton asserts these are "partial, unverified [survey] results" "which Plaintiff fails to support with any documentation" and that this is not "evidence that Defendants are in contempt of the Court's orders." Opp. at 14.

Hilton seems thereby to ask the Court for a ruling excluding Plaintiff's survey results because they are based on a declaration about the survey that includes examples, but not all the raw data. But under FRE 1006, a party "may use a summary, chart, or calculation to prove the content of voluminous writings ... that cannot be conveniently examined in court." "The proponent must make the originals or duplicates available for examination or copying, or both, by other parties," or "the court may order the proponent to produce them in court." *See United States v. Hemphill*, 514 F.3d 1350, 1359 (D.C. Cir. 2008) ("the point of Rule 1006 is to avoid introducing all the documents. As long as a party has laid a foundation for the underlying

documents, a chart summarizing them can itself be evidence under Rule 1006"). "Regarding survey results in particular, technical and methodological deficiencies in a survey go to the weight of the evidence, not the admissibility." *United States v. H&R Block*, 831 F.Supp.2d 27, 32 (D.D.C. 2011).

Hilton alternatively offers a critical observation that "crediting [Plaintiff's] one line summary of responses ... over 24% of these recipients [sic] never received the intended mailing, which was returned as undeliverable. This calls Plaintiff's own address list ... into serious question." Opp. at 15. But the count of 424 individuals whose mail was returned is out of the total mailings to 4,156 individuals. This is a 10% returned mail rate which is not surprising for addresses confirmed five years ago. Currently and historically, the U.S. Census Bureau finds that each year, not just every five years, about 10% of adult Americans move.[10]

Hilton also says its "investigation of the letters sent to this population [of deferred vested class members] ... indicated that *at least some* of the recipients told they were currently owed benefits were, in fact, not yet eligible." Hilton says "*current* employees who received [Plaintiff's] survey are not eligible for early retirement benefits unless they do, in fact, retire," and as a result, "[i]f they are still employed with Hilton, they cannot receive benefits "now.""Opp. at 15 n. 7. Hilton provides no details about how many "at least some" is: 10, 20, 50? An inference may be drawn from Hilton's withholding of information "peculiarly in the opposing party's control" and instead relying on an assertion from counsel the carefully-phrased "at least some" means minimal.

Finally, Hilton makes irresponsible assertions that some of the survey respondents may be from the *White v. Hilton Hotels* litigation: "Some of the survey respondents referenced in

[10] *See* Table, Annual Geographic Mobility Rates, 1948-2019, available at https://www.census.gov/data/tables/time-series/demo/geographic-mobility/historic.html

Plaintiff's motion may, in fact, be putative class members in *White*" and "the extent to which heirs of Plan participants are entitled to death benefits is one of three issues currently pending" in *White*. Opp. at 17. In *White*, the class definition for the "heirs and estates" subclass includes only those individuals who "... [s]ubmitted a claim for vested retirement benefits from Hilton under the claim procedures ordered by the District Court and the Court of Appeals in *Kifafi, et al., v. Hilton Hotels Retirement Plan, et al.*, ... and ... [h]ave vested rights to retirement benefits that have been denied by the Hilton Defendants … on the sole basis that the claimants are "not the surviving spouse" of deceased vested participants." Dkt. 74-2 in C.A. 16-856, at 2. This subclass only consists of about 28 people, *id*. at 24, none of whom was included in the survey mailing to 4,156 unpaid class members from *Kifafi*.

Furthermore, whereas this Court has left the door slightly ajar in *White*, there is no issue about the extent to which the heirs and estates of deceased plan participants are entitled to back benefits in *Kifafi*. Your Honor has specifically ruled that "[b]ack payments for deceased participants shall be made in a manner that is consistent with §4.13(e)(6) of the 2007 Plan, which provides that any additional benefits payable to the participant shall be payable to the surviving beneficiary or beneficiaries, if any, under the optional form of benefit, if any, elected by the participant, or, if there is no such surviving beneficiary, to the participant's surviving spouse or, if there is no surviving beneficiary or surviving spouse, to the participant's estate." Dkt. 258 at 10.

### 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.

The only mention of the elimination of "true up" increases is where Hilton says that "In February 2015, the Court considered and rejected arguments that Defendants were not in

compliance with respect to various class members who had not yet been paid, including challenges to class members listed as "No Benefit Increase Due" ...." Opp. at 13 n.5. The Court did not "reject" Plaintiff's argument about this. What this Court said was "[t]o the extent Plaintiff's counsel identifies individuals in this category who believe they are owed a benefit payment, Hilton's claims appeals process is the most proper forum for Plaintiff's counsel to address that complaint." Dkt. 400 at 15. At that time, Plaintiff's counsel had "before and after" amounts of the benefit increases, although Hilton supplied no explanations when it eliminated or restricted a benefit. Dkt. 385-1 at 11-12; Dkt. 388-1 at 2-3. Now Plaintiff's counsel don't even have before-and-after amounts, so there is no way otherwise unrepresented participants could know that Hilton has eliminated or decreased their benefit increase in order to challenge that.

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

The only mention of restricting eligibility to retire before age 65 is where Hilton cites Plaintiff's memorandum and says in a parenthetical that Plaintiff is "erroneously arguing" Hilton "has restricted eligibility to commence retirement benefits before at 65." Opp. at 15 n.7. The basis for Plaintiff's statement is that Hilton's counsel at Simpson Thacher told us in a December 16, 2019 letter that Hilton was requiring at least *ten* Years of Vesting Service for early retirement even though Hilton's Amendment 2003-2 had expressly changed this to five years. There is no support for saying we are "erroneously arguing" this because that is what the December 16, 2019 letter says. *See* Ex. 12. Hilton's opposition never responds to the point, which Plaintiff's opening memo goes over in great detail, that requiring ten years for early retirement eligibility is contrary to Amendment 2003-2 and Hilton's prior representations to this Court. *See* Mem. at 28-30; Dkt. 160 at KIF10387 (Amendment 2003-2).

Plaintiff's counsel did misdescribe one aspect of the Alston & Bird's January 8, 2020 "summary" by saying in the opening brief that it advised that "Hilton's administrative service providers were not notifying anyone of the availability of the original and increased benefits before age 65." Mem. at 28. The January 8, 2020 letter actually says Hilton sends a one-time "Early Retirement Date Reminder" to one group of early retirees 90 days before age 55. Ex. 11. The group to which Alston & Bird says this one-time notice is sent consists of those eligible under the 1995 Plan's definition of "Early Retirement Date." That definition says a participant has to reach age 55 *while employed* and have at least 10 years of vesting service. Dkt. 219-5 at KIF00252-53. Section 4.2 of the Plan separately provides for actuarially-equivalent early retirement benefits for all terminated vested employees. *Id*. at KIF00284. While the reduction factors for the group covered by the "Early Retirement Date" definition are more valuable, the latter group of terminated vested employees, for whom not even a one-time notice is purported to be sent, is much larger. Plaintiff does not have data on exactly how many are in the "Early Retirement Date" group, but this Court can infer from Hilton's failure to produce records and from the small numbers of new annuitants in 2016-2018 that the number is not large and that one-time noticing with no follow-up is generally ineffective.

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

Hilton does not contest the evidence that hundreds of records submitted by heirs and estates have been lost. Hilton simply does not mention it. There is not even a mention of the 2017 change in administrative service providers from Aon to Mercer and with that, changes in contact information that the *Kifafi* class members were never informed about.

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

Hilton offers no contest to what Plaintiff's opening memorandum said about Hilton's limited efforts to find, process, and pay and their fiduciary duties under the DOL Field Assistance guidance. *See* Mem. at 10-12, 32-35. Hilton's opposition offers only the following self-serving quote from its other outside counsel at Alston & Bird, describing this as a "voluntarily provided ... summary of the Plan's "proactive and robust post-2015 efforts to locate and pay class members":

> [V]ested participants eligible for early retirement are sent an Early Retirement Date Reminder approximately 90 days before they turn age 55 and vested participants are sent a Normal Retirement Date reminder approximately 90 days before they turn age 65. These notices provide specific instructions regarding the commencement process to receive benefits under the Plan. Vested participants over age 65 are also sent reminders regarding their Plan benefit at least once per year. At the beginning of each year, vested participants who reached age 70 ½ by December 31 of the prior year are sent an RMD Pension Benefit Commencement Election Package. Even those participants over age 70 ½ who do not return the election kit are forced to commence their retirement benefits effective April 1.

Opp. at 18-19 and Ex. 11. The description of this by counsel as "proactive and robust" is ridiculous. There is nothing in this paragraph about "efforts to locate and pay class members." This kind of limited and rote noticing is exactly what DOL's Field Assistance guidance and the GAO report say is ineffective and what MetLife's CEO finally admitted was deficient after it was disclosed that thousands of persons due annuities from MetLife had never been paid. *See* Mem. at 10-12 (statement by MetLife CEO that "the entire industry has to find ways to do a better job and find these people and pay the benefit to these people that they're owed").

Hilton separately asserts, "Locating, validating, and paying heirs [of deceased Plan participants] takes time, and the provision of benefits to surviving spouses and beneficiaries is a highly individualized and fact-bound process." Opp. at 16-17. Hilton also complains that "benefit

class members include retirees who reached age 65 in or before 1976, and former class members who died more than thirty years ago." *Id.* at 11. Once again, these are counsel's statements which "are not evidence." Processing some class members through to payment may be more difficult than for others, but there is no employee benefit review process that takes five years. *See* 29 C.F.R. 2560.503-1(f) - (j). Hilton's counsel's implicit complaints about how difficult it is to process benefit payments for the most elderly class members also rests on exaggeration. Within the 8,199 class members who remain unpaid, there are less than 1% who "reached age 65 in or before 1976," most of whom are likely to be deceased so that the search is for beneficiaries. Plaintiff's counsel still cannot fathom what relevance dying "more than thirty years ago," *i.e.,* before 1990, has to the rights of the surviving spouses and beneficiaries.

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

Defendants say their counsel's "correspondence ... speaks for itself" as to whether its counsel have made any threats and that its counsel "appropriately instructed Plaintiff's counsel to abide by their ethical obligations, including [1] the no-contact rule, and [2] to refrain from sending class-wide mailings that are inaccurate and unauthorized by this Court." Opp. at 22.

The principal threat in Hilton's counsel's correspondence was actually "sanctions under Rule 11" for filing this show cause motion. Ex. 10 (6/19/19 letter). Plaintiff's opening memo went over the authorities against using Rule 11 as a threat, Mem. at 37, to which Hilton does not respond. After that, there was Hilton's counsel's threat to sue not just Plaintiff's counsel but Kurtzman Carson Consultants, the contractor for Plaintiff's counsel, for violating the 1999 protective order, even commanding KCC to "stop" any mailings or be sued. Ex. 12 (12/17/19 letter). That threat was dropped (but never retracted) after Plaintiff's counsel pointed out that the

addresses and benefit amounts had all been used in prior notices and updated through Plaintiff's counsel's address confirmation efforts. Ex. 12 (12/23/19 letter).

Next came threats of professional ethics charges against Plaintiff's lead counsel for contacting Hilton's general counsel and CEO and CFO in order to ask for their cooperation and offer Plaintiff's after Simpson Thacher announced the appeal was "resolved" and refused to confirm any ongoing representation of Hilton. Plaintiff's counsel already responded to the argument about contacting Hilton's general counsel and the CEO and CFO in correspondence dated July 23, 2019 (Ex. 10) and in the opening memo. *See* Mem. at 35 n.20 (citing authorities). While finally acknowledging Plaintiff's "disagreement that these communications were improper," Hilton still asserts its counsel's threats were "appropriate," Opp. at 22, based on how Hilton's outside counsel "stated that it interpreted ethical rules," *id*. at 23-24. Even if a communication about professional ethics was "appropriate" in this narrow sense, it is clearly inappropriate to leverage potential ethics charges to keep Plaintiff's counsel from filing a motion to "show cause" on behalf of unpaid class members. As with the inference from withholding records "peculiarly in [its] control," an inference in favor of a show cause order may be drawn from all of these threats. *See* Mem. at 38.[11]

**Conclusion**

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

[11] Hilton's fourth retaliatory action, the baseless "cross-motion" for a "prior restraint" on communications with the unpaid class members, which was filed without regard to controlling Supreme Court precedent, is addressed in Plaintiff's June 16, 2020 opposition.

Dated: June 23, 2020

Respectfully submitted,

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**Certificate of Service**

I hereby certify that on June 23, 2020, a true and correct copy of Plaintiff's Reply in Support of Motion to "Show Cause" Why Defendants Should Not Be Held in Contempt and for Equitable Accounting was sent via CM/ECF electronic filing, addressed to the following attorneys for Defendants:

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