No. 16-1606

In the United States Court of Appeals for the Fourth Circuit

JEFFREY PLOTNICK and JAMES C. KENNEDY,
on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

v.

COMPUTER SCIENCES CORPORATION DEFERRED COMPENSATION PLAN FOR KEY EXECUTIVES and COMPUTER SCIENCES CORPORATION,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

For more than two decades, CSC offered its high-level employees a deal: forego present-day compensation in exchange for a stable and predictable source of retirement income down the road. Hundreds of employees accepted CSC's offer, not by signing their name to a contract but through performance, by loyally remaining at the company for years. This sort of retirement plan carried substantial risk for the employees; at any time before retirement, CSC remained free to alter the terms of the deal. But when these employees retired, they had fulfilled their end of the bargain and locked in place the company's offer.

According to CSC, though, this entire arrangement is a mirage. Although CSC's retiring employees relied on the company's explicit assurances that their retirement income would be provided consistent with the settled terms of the plan in place at the time they retired, the company now asserts that those assurances were worthless. In its view, the retirement plan can forever be changed on a whim, and without the consent of its retired employees. As CSC's brief now makes clear, nothing would prevent the company from wielding its nearly limitless amendment power to impose a prospective flat annual crediting rate of *negative* 10 percent, so long as the change didn't decrease the amount of any retiree's account "as of the effective date of such amendment."

In our opening brief, we explained that CSC's view about its obligations is wrong. Once performance is complete, a company is required to fulfill its end of the bargain by making payments consistent with its employees' respective elections. Acceptance by performance, in other words, "closes the door" on the terms of the contract. That rule has only one exception: A company that desires to change the terms of the deal after performance (i.e., after an employee retires) can clearly indicate that intent by using words to that effect—adding something like "including after retirement" to its amendment authority. But, because there is no question that CSC's plan fails to do this—even the district court acknowledged that CSC's plan did not "clearly and specifically permit post-retirement amendments"—its attempt to renege on concrete promises it made to retirees is ineffective.

In response, CSC relies on a lone unreported district court opinion—*Cram v. PepsiCo Executive Income Deferral Compensation Program,* 2010 WL 4877275 (S.D.N.Y. Aug. 9, 2010)—and a few scattered cases involving welfare-benefit plans to argue that it should not have to comply with the settled unilateral-contract principles that courts have long held govern top-hat plans under ERISA. But even *Cram* cuts against CSC's position here, and, as courts have repeatedly explained, the rules that apply to welfare-benefit plans are different.

Ultimately, this case is not about a company that wants the freedom to make small, marginal tweaks to its retirement plan. It is, instead, about a company that has sought to eliminate the core guarantees that induced its key employees to remain at the company for many years. Allowing CSC to avoid its obligations—without fair notice before the employee completes performance—would rob retired employees who devoted their careers to the company of the very thing that they were promised: a safe and predictable source of retirement income. The district court's decision should be reversed.

ARGUMENT

I. The Court should reject CSC's attempt to free itself from the standard contract-law principles that govern top-hat plans.

A. Unilateral-contract principles apply to top-hat plans.

CSC stakes its case on a simple theory: that "unilateral contract principles should not apply to top-hat plan[s]." CSC Br. 25. That is wrong. As we explained at length in our opening brief (at 37–42), a top-hat plan "is a unilateral contract which creates a vested right in those employees who accept the offer it contains by continuing in employment for the requisite number of years." *Kemmerer v. ICI Americas Inc.*, 70 F.3d 281, 287 (3d Cir. 1995) (internal quotations omitted). These plans must therefore "be interpreted in keeping with the principles that govern unilateral contracts." *Id.*

1. In support of its effort to escape this settled rule, CSC points to other types of ERISA plans. Because some ERISA plans need not adhere to unilateral-contract principles, CSC says, top-hat plans should likewise be freely amendable (without clear notice) even after retirement. *See* CSC Br. 25–26. CSC offers the example of welfare-benefit plans—like the one at issue in *Gable v. Sweetheart Cup Co.*, 35 F.3d 851 (4th Cir. 1994)—as proof that unilateral-contract principles are inapplicable here. Because the plan in *Gable* was "exempt" from some of ERISA's statutory requirements but nonetheless open to amendment even "after retirement, without the consent of retiree-participants," *Gable*'s "reasoning" is, in CSC's view, "equally applicable to top-hat plans." CSC Br. 26–27 (claiming that it "makes no sense" to apply different rules to the different types of plans).

This analogy fails. For starters, every court that has considered this argument has rejected it. *See, e.g.*, *In re New Valley Corp.*, 89 F.3d 143, 153 (3d Cir. 1996) (explaining that the rules that govern "different type[s] of ERISA plan[s]," like welfare-benefit plans, do not "control the uniquely narrow category of top hat benefit plans" and distinguishing *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litig.*, 58 F.3d 896 (3d Cir. 1995), a case involving a retiree medical plan); *Kemmerer*, 70 F.3d at 287 (same); *Carr v. First Nationwide Bank*, 816 F. Supp. 1476, 1489 (N.D. Cal. 1993) (holding that "the line of cases regarding the free amendability of 'welfare benefit' plans under ERISA" does not "preclude application of unilateral contract rules in the enforcement of Top Hat plans under ERISA"). And there is a "straight-forward" reason why top-hat plans are treated differently. *New Valley*, 89 F.3d at 153. Although welfare-benefit plans are exempt from ERISA's vesting requirements, *Gable,* 35 F.3d at 855, they are *not* exempt from ERISA's "strict fiduciary standards of loyalty and care," *Kemmerer*, 70 F.3d at 287.

That "important difference" matters. *New Valley*, 89 F.3d at 153. As the Third Circuit has explained (in rejecting a company's identical effort to free its top-hat plan from unilateral contract principles), "the exemption of top hat plans from ERISA's fiduciary provisions" places these plans on different footing "in terms of the remedy available." *New Valley*, 89 F.3d at 153. "Top hat employees have rights only under the contract." *Id.* As a result, "[w]here a contract action fails, they have no recourse." *Id.* Welfare-benefit plan participants, on the other hand, "enjoy an action for breach of fiduciary duty," even when an employer's "general right to terminate or amend" the plan is "fatal to the participants' contractual claim." *Id.* Because top-hat employees "have no such alternative remedy," the rules governing welfare-benefit plans "do[] not apply." *Id.* at 153–54.[1]

What's more, unlike welfare-benefit plans, top-hat plans are also exempt from ERISA's writing requirement, 29 U.S.C. § 1102(a)(1). Because "[t]he writing

[1] That is why CSC is wrong to suggest that *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015) establishes that top-hat plans "are subject to the same interpretative rules as other ERISA plans." CSC Br. 26–27. *Tackett* says *nothing* about top-hat plans, so CSC concedes that its argument here requires an "implicit" step. CSC Br. 27. But even so, the Court in *Tackett* drew an *explicit* distinction between "plans that offer medical benefits as welfare plans" and those that "result in a deferral of income by employees as pension plans." 135 S. Ct. at 936. And it *reversed* the Sixth Circuit for relying on the premise that the same rules apply equally to both. *See id.*

requirement does not apply," *New Valley*, 89 F.3d at 153, an employer's extra-contractual "undertakings"—like a representation that retirees' "annual payments will remain the same until [the] last payment," *see, e.g.*, JA1459—will inform any interpretation of its plan.

Even so, taking *Gable* on its face highlights why it does nothing for CSC. In *Gable*, the plan gave employees far more notice of the potential for post-retirement changes than CSC did here. For instance, at the time of retirement, the company provided its employees with documents that explicitly stated that benefits could change based on "policy in effect at any specific time in the future." *Gable*, 35 F.3d at 854. And a later update—sent specifically to retirees—set forth the company's reservation of its "right to modify, change or terminate the medical coverage *for retirees* at any time in the future, just as it does for active employees." *Id.* (emphasis added). CSC did nothing similar.

2. Nor is it "anomalous" to apply unilateral-contract principles to top-hat plans. CSC Br. 28. To the contrary, unlike a welfare-benefit plan, a top-hat plan *is*, by definition, a unilateral contract—it is a pension plan that "creates a vested right in those employees who accept the offer it contains by continuing in employment for the requisite number of years." *Pratt v. Petroleum Prod. Mgmt. Inc. Employee Sav.*

Plan & Trust, 920 F.2d 651, 661 (10th Cir. 1990).[2] In other words, the plan terms constitute an offer that an employee accepts only by performance—by "serving the employer for the requisite number of years" and "electing a distributive scheme" at retirement. *Kemmerer*, 70 F.3d at 287. As a result, "unless an explicit right to terminate or amend after the participants' performance is reserved," acceptance by performance "closes th[e] door" on the offer promised by the plan then in effect. *Id.* at 287–88. Welfare-benefit plans, by contrast, make "ongoing medical benefits available" to workers throughout their "working years" and often "continuing on into retirement." *New Valley*, 89 F.3d at 154. Those benefits, in other words, are "payable as compensation while the employees worked and then continued on into retirement." *Id.*

CSC also mischaracterizes what applying standard contract principles means. It repeatedly insists that doing so would "creat[e] a special 'presumption of vesting' for top-hat plans that does not apply elsewhere." CSC Br. 29. Wrong again. Courts have repeatedly stressed that, for top-hat plans, rights and obligations

[2] CSC contends that, because top-hat plans are unfunded, the rules governing *funded* pension plans—which include unilateral contract principles—should not apply here. *See* CSC Br. 34 n.10 (attempting to distinguish *Pratt*). But that argument has been firmly rejected. Although "the cases applying unilateral contract principles generally involved funded rather than unfunded plans," the distinction is irrelevant because the issue in both contexts turns not on ERISA's funding requirements but on "principles of contract law." *Kemmerer*, 70 F.3d at 288 (following *Pratt*).

"vest" only if, at the time the contract is accepted (at retirement), the terms of the plan itself "provide a basis for contractual vesting or accrual of the claimed benefits." *Carr*, 816 F. Supp. at 1489 (explaining that "[w]hile ERISA does not require vesting," a plan itself "may imply a vested benefit"); *Cf. Hooven v. Exxon Mobile Corp.*, 465 F.3d 566, 575 (3d Cir. 2006) ("Where the plan provides that an employee is irrevocably entitled to a certain benefit, and where all of the conditions precedent to the employee's receipt of that benefit have been satisfied, 'that benefit is said to have accrued (or 'vested' or 'ripened') and cannot be taken away by plan amendment or termination.'"). For example, a top-hat plan that provides that amounts deferred "shall be paid" in accordance with an employee's distribution elections unless the employee "files a written notice . . . requesting a different form of distribution," has created a right that vests when an employee "complie[s] with all the prerequisites" and "accept[s] the [company's] offer." *Kemmerer*, 70 F.3d at 287. It is, therefore, the plan language—not any presumption—that may establish a "binding and irrevocable" right that must "be complied with" after performance is complete. *Id.* at 289.

3. CSC offers barely any defense of the district court's effort to distinguish the key top-hat plan cases. It doesn't even *cite* several of them, including one of the most thoroughly reasoned—*Carr v. First Nationwide Bank*. Instead, CSC just block quotes the district court's explanation for disregarding *New Valley* and calls it "correct[]"; and it offers a single sentence to distinguish *Kemmerer*, arguing that the Third Circuit found that the plan there "vested participants in their distribution choices upon separation from service." CSC Br. 31–33. But that is *exactly* what CSC's plan did here: It specifically promised that any payout election "*shall be paid* . . . as specified in any election made." JA412 (emphasis added); *see Kemmerer*, 70 F.3d at 287 (relying on the plan's promise that benefits "shall be paid" according to the employee's election). That guarantee unmistakably—"in no uncertain terms"—provides that an employee's "election of a particular method of payment is binding and irrevocable, and that it shall be complied with." *Kemmerer*, 70 F.3d at 289.

CSC's explanation for its disregard of this binding commitment is remarkable. The company simply says that it was "no longer administratively feasible"—given the decision to replace the stable crediting rate with a set of volatile valuation finds—to comply with the "fixed rate of return" that the plan had guaranteed and that retired employees had elected. CSC Br. 39 (conceding that complying with the plaintiffs' distribution elections is impossible "due to fluctuations in the valuation funds"). That is no excuse. Expediency doesn't allow a company to "unilaterally" change a distribution arrangement "rather than comply[] with its retired executives' elections." *Kemmerer*, 70 F.3d at 285. "To conclude in the face of such language that [the company] had unfettered discretion to disregard" a retired worker's chosen election "would violate the plain meaning rule of contract interpretation." *Id.* at 289.

And the company's suggestion that any challenge to its distribution changes is "little more than a re-packaged attack against the changes to the crediting rate" fares no better. CSC Br. 40. When CSC eliminated its guarantee of equal annual payments, it robbed its retirees—independent of any change in crediting rates—of a core promise that induced workers to accept the plan in the first place: a "stable reliable source of income," JA929–30, that would be paid out in a "steady stream . . . for [their] entire retirement," JA1135. Unless its plans says so expressly, a company may not reserve to itself "unfettered discretion to decide . . . not [to] honor any of the specific promises in the Plan regarding how payment 'shall' be made." *Carr*, 816 F. Supp. at 1494.

That holds true for other binding promises that CSC tried to eliminate. As our opening brief explained (at 45), the plan's promise of a stable retirement vehicle was embodied in its explicit guarantee that participant accounts would be shielded from losses. CSC claims that this protection was eliminated merely as a byproduct of the extreme risk that the new valuation options carried *See* CSC Br. 38. Not so. The company *specifically* altered the language addressing this protection by writing into the plan a new liability—that any losses would be "charged against" a participant's account. JA204. The provision now reads: "earnings shall be credited to *or charged against*" an account balance. *Compare* JA411 *with* JA204 (emphasis added). Focusing on this change is not, as CSC put it (at 38), "myopic[]"; it is another example of how CSC fundamentally deprived its workers of the promises they accepted (and to which the company bound itself) when they retired.

And CSC's attempt to alter its crediting rate is no different—a point the court in *Carr* made clear. There, a company offered its employees a top-hat plan that promised a specific "interest rate" for deferred compensation. *Carr*, 816 F. Supp. at 1482–83. The company (a bank) later amended the plan to "eliminate[]" the preexisting rate and "replace[]" it with a new "interest rate formula" that led to lower future returns. *Id.* (noting that the "overall effect" of the interest rate amendment "result[s] in a net reduction in *future* interest payments"). The bank then sought to apply the new amended interest rate (along with a newly amended payout arrangement) to the deferrals of those employees who had already retired.

The court rejected the company's bid to apply these amendments to already-retired employees. Although "no contracts are actually formed until participants have accepted the offer posed by the Plan," once they accept (by retiring), the company "becomes contractually obligated to repay" the participants' "deferred compensation in accordance with the interest and repayment terms of the Plan in effect at the time of [acceptance]." *Id.* at 1494. For top-hat plans, a company cannot, in other words, "change the interest rate and payout schedules set forth" in the version of the Plan that governed when the employees "completed the required performance under the terms of the Plan." *Id.* at 1492. CSC opts not to confront this analysis at all—not even citing *Carr* once in its brief.

These changes (if allowed to stand) make CSC's plan illusory. *See* Opening Br. 31–37. CSC disagrees, of course, arguing (at 34) that, because its amendment power "was not unlimited," the plan is not "an illusory contract." In support of that view, CSC quotes a section of the Restatement explaining that "[a] contract is not illusory [] when there are limits on the promisor, 'even though a conditional power of choice is left to the promisor.'" *Id.* (citing Restatement (Second) of Contracts § 77 cmt. c (1981)). But that is only true for contracts in which one party entering a contract is given the "right to chose one of *several stated performances*." Restatement (Second) of Contracts § 77 cmt. c (1981) (emphasis added). CSC does not suggest (how could it?) that the plan in place at the time the plaintiffs retired triggered this rule.

And CSC's effort to label its plan only "partly illusory" and therefore "by definition not illusory" is a nonstarter. What "render[s] the contract" illusory is that *some* "binding obligation" is "changeable, *i.e.*, non-binding." *Elmore v. Cone Mills Corp.*, 23 F.3d 855, 870 (4th Cir. 1994) (en banc) (Murnaghan, J., concurring); *see also* 1 *Williston on Contracts* § 1:2 (4th ed. 2015) (explaining that a contract becomes illusory because it contains an "apparent promise which makes performance entirely optional with the promisor" and therefore "is in fact no promise" at all.) CSC's employees fulfilled the service requirements entitling them to the full promise of the plan's "specific and mandatory provisions." *Kemmerer*, 70 F.3d at 288. Allowing CSC to later abridge *any* of those contractually vested rights dwould "render[] the promises embodied [within the plan] completely illusory." *Id.* The illusory-promises doctrine "instructs courts to avoid constructions of contracts that would render promises illusory." *Tackett*, 135 S. Ct. at 936. Adopting CSC's position would flout this instruction.

B. CSC's plan contains no clear grant of authority allowing post-retirement changes.

Falling back, CSC suggests that the district court applied the proper principles but simply determined that the plan "was sufficiently specific to allow post-retirement amendments." CSC Br. 29. But the district court was quite clear: It saw no reason "why unilateral contract principles would apply here." JA1726. To be sure, the district court reached this conclusion by construing CSC's plan to "clearly and unambiguously" permit wholesale changes to be applied to already-retired employees. JA1725–26. But it did so by opting out of the governing rules—not by faithfully applying them.

In any case, CSC is wrong that its plan contains a "straightforward" grant of authority to amend terms post-retirement. CSC Br. 22 (pointing to the plan's "from time to time" general amendment clause). As we explained in our opening brief (at 32–34), courts have determined that "[a] short general provision" stating that a plan "may be modified or amended in whole or in part at any time or from time to time by the Board" is not sufficient to authorize unilateral post-retirement amendments in top-hat plans.[3]

That rule is not undermined by CSC's resort to an extraneous clause in the plan defining "Participant." The company reasons that, because "nothing in the text of the Plan distinguishes between active employees and retirees with respect to plan amendments," the Board therefore had the authority to apply amendments to employees who had already completed their obligations to the company. CSC Br. 23, 30–32. But even CSC's best case—the unreported decision in *Cram*—doesn't support its argument. There, the court held that a company's top-hat plan provided "sufficiently clear authorization for retroactive application" of an amendment *only* because (1) the plan defined participants broadly *and* (2) the amendment clause contained an "explicit" statement making clear that "All

[3] CSC is wrong to suggest that *Hollomon v. Mail-Well Corp.*, 443 F.3d 832 (11th Cir. 2006) is inconsistent with this rule. *See* CSC Br. 28. There, the court allowed a company to enforce a post-retirement amendment not because the plan had a generic amendment clause (which it did), but because the plan contained a *specific* reservation of amendment authority to make *post-retirement* changes to the distribution schedule. *See Hollomon*, 443 F.3d at 838 (approving company decision to accelerate benefits payments because the plan contained a specific grant of authority to "accelerate the payment of any benefits payable under the Plan").

Participants shall be bound by [any] amendment." 2010 WL 4877275, at *8. CSC's plan contains no similar statement.[4]

II. By focusing on "speculative" conflicts, the district court abused its discretion in denying class certification.

In our opening brief (at 47–57), we explained that, in denying class certification, the district court lost sight of the fundamental principle that Rule 23's adequacy analysis is driven by the question of whether a common injury unites the class and *not* by "the distinct question of whether all class members agree about how best to *respond* to the injury." *Laumann v. Nat'l Hockey League*, 105 F. Supp. 3d 384, 400 (S.D.N.Y. 2015). By recasting "the balance of economic effects as an issue of adequacy under Rule 23(a), rather than a merits issue," the district court misconstrued the goal of class certification. *Id.* at 403. In defense of the district court's decision, CSC simply doubles down on this flawed approach.

A. CSC defends the district court's decision, first and foremost, by claiming that it "did not rely upon 'speculative,' 'potential,' or 'hypothetical' conflicts in

[4] CSC suggests that its decision to apply its cost-cutting amendments retroactively was not unprecedented. It cites nothing in the record to support this claim. *See* CSC Br. 42 (offering nothing more than a cite to the district court's opinion). Instead, as we pointed out in our opening brief, the only record evidence on this issue comes from one of the company's own former employees—who could not recall that any similar previous amendment had been applied to those who had already retired from the company at the time the amendment became effective. *See* JA1220–21. In any event, the existence of a factual dispute over the company's past amendment history just confirms that summary judgment was premature here. *See* *New Valley*, 89 F.3d at 152.

denying class certification." CSC Br. 45. Those are, however, exactly the words the court used (many times over) to describe the conflict. As the district court saw it, the named representatives' "pecuniary interests" might not necessarily end up aligned with absent class members because "whether the 2012 Amendment confers an economic benefit or causes an economic harm to a specific Plan participant (i) is speculative today, (ii) was speculative when the experts were drafting their reports, and (iii) will be speculative on the date of judgment." JA1701–02; *see also id.* (explaining that the only way to resolve the conflict would be to compare "actual distributions" with "hypothetical distributions"). On this point, the district court could hardly have been clearer: "Whether a participant wins or loses" can only be determined upon "final distribution" because it is then (and only then) that the actual distributions under the post-amendment regime could be "accurately compared to hypothetical distributions under the Merrill Lynch Index." JA1702 (concluding that the conflict will "cease to be speculative only when" distributions are complete).

But most courts confronting this type of scenario have firmly rejected the argument that the sort of hypothetical conflicts identified by the district court may defeat class certification. *See, e.g.*, *In re Miller Indus., Inc. Sec. Litig.*, 186 F.R.D. 680, 687 (N.D. Ga. 1999) (holding that a conflict that was "largely theoretical" at the certification-stage because it was "primarily" focused on a "damages issue[]"could not defeat class certification, and noting that the "weight of authority" was decidedly against denying certification); *In re Intelligent Elec., Inc. Sec. Litig.*, 1996 WL 67622, at *4–5 (E.D. Pa. Feb. 13, 1996) (explaining that theoretical conflicts will exist in any large securities-fraud case and do not warrant denial of class certification); *Hispanics United of DuPage County v. Village of Addison, Ill.*, 160 F.R.D. 681, 689 (N.D. Ill. 1995) (explaining that, although a class is "not fairly and adequately represented if class members have antagonistic or conflicting *claims*," a "potential conflict" involving the possible effects of relief is "too remote and speculative to defeat class certification") (emphasis added); *see also Blackie v. Barrack*, 524 F.2d 891, 909 (9th Cir. 1975) ("[C]ourts have generally declined to consider conflicts, particularly as they regard damages, sufficient to defeat class action status at the outset unless the conflict is apparent, imminent, and on an issue at the very heart of the suit."). The district court was wrong to rely on its freewheeling speculation about absent members' downstream economic interests to defeat certification.

B. CSC nevertheless contends that the district court rooted its decision in "existing conflicts" because some putative class members "were *already* better off under the 2012 Amendment and, therefore did not share Plaintiff's interests in establishing CSC's liability." CSC Br. 46–47 (discussing its analysis that some retirees earned higher rates of return under the new crediting rate). But not only is that wrong—any retiree who ultimately ends up better off is not, by definition, part of the class, *see* JA1691—it also misses the point.

The injury suffered by all retired employees—the one global injury that united the class—has nothing to do with the speculative increases or decreases (even those in the present) in annual distribution payouts under the new regime. Instead, the "common question" that "applies" to the entire class of retired employees is "whether the 2012 Amendment is valid." JA1693. CSC suggests (at 55) that this question implicates no "actual injury," but that is wrong. Regardless of its economic effects, every class member has suffered an injury because every class member, as a continuing participant in the plan, "has been deprived" of their right to the irrevocable terms of the plan they agreed to upon retirement. *Laumann*, 105 F. Supp. 3d. at 401. Put simply, that injury "unites the class" and is "universal." *Id.* at 402.[5]

And it does not matter that some within the class, like the named plaintiffs, may have also suffered additional pecuniary injuries that others have not (or, at least, have not yet). If CSC's amendment is "being unlawfully applied," then "the

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[5] CSC argues that, because the plan restricts it from "enacting any amendment that would reduce participants' existing balances," "anyone who outgained the Merrill Lynch Index still stands on better footing today." CSC Br. 56. But the terms that CSC amended (and could amend again) have nothing to do with retirees' existing balances; they instead have to do with the fundamental stability of the retirement plan and the balance of risk borne by the retirees and the company.

fact that this would purportedly alter the 'economic fundamentals' . . . is irrelevant." *Vaccarino v. Midland Nat'l Life Ins. Co.*, 2013 WL 3200500, at *9 (C.D. Cal. June 17, 2013). Here, beyond those who had already received all their benefits under the plan (and who were not included within the class), all retired employees—even those who (1) hold accounts that increased under the new crediting rate, and (2) may not mind the elimination of equal annual distributions or that their accounts are no longer insulated from market losses—are now subject to a fundamentally different (and always amendable) set of terms than those that they agreed to when they retired. That is all that Rule 23 requires when it comes to adequacy.

C. Finally, though CSC insists that other mechanisms for safeguarding the interests of absent class members "would not remedy" any potential conflicts, it fails to explain why. CSC Br. 57. Instead, it offers a dodge, arguing that opt-out classes are "adventuresome" and unwarranted where the claims are valuable. CSC Br. 57. But that view runs counter to this Court's own guidance that, when "a class action will provide the most fair and efficient adjudication of a case, such an action may be superior even though class members have sufficient means or incentive to proceed individually." *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 432 (4th Cir. 2003) (quoting 5 *Moore's Federal Practice* § 23.48[2][a] (1997)). Because opting out is an option here, the "hypothetical conflict provides no basis" for refusing to certify the class. *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 43 (1st Cir. 2003). "[S]ophisticated" plaintiffs, as the district court called the retired employees here, can determine for themselves whether a fundamental conflict exists within the class and adequately protect their interests in the event such a conflict arises.

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

<u>/s/ Matthew W.H. Wessler</u>

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 4,891 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Baskerville font.

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January 31, 2017

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fourth Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

/s/ Matthew W.H. Wessler
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