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

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December 5, 2016

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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INTRODUCTION

The Employee Retirement Income Security Act (ERISA) exempts some retirement plans for high-level employees—known as "top-hat plans"—from many of its requirements. But it doesn't free them from basic principles of contract law. Quite the contrary: top-hat plans must "be treated as unilateral contracts and reviewed in accordance with ordinary contract principles." *Craig v. Pillsbury Non-Qualified Pension Plan*, 458 F.3d 748, 752 (8th Cir. 2006).

The district court lost sight of that rule. The two named plaintiffs were both long-time employees at Computer Sciences Corporation, a *Fortune*-500 company. They participated in the company's deferred-compensation top-hat plan. For years—from the day the employees first signed up to the day they retired—the plan offered a particularly stable retirement investment in at least three critical ways:

- it insulated deferred income from short-term market instability by providing an interest rate averaged over ten years;
- it shielded employees' accounts from long-term market downturns by refusing to apply investment losses to account balances; and
- it afforded employees a steady stream of retirement income through approximately "equal distribution payments" every year.

After the employees retired, CSC reaffirmed the guarantee of a stable "annual payment" that would "remain the same."

But CSC broke these promises less than a year later. To save money, CSC embarked on an aggressive "turnaround strategy," hunting for any "cost-cutting measures" it could find. It saw the top-hat plan as a major source for "significantly reducing costs," and, to that end, unilaterally decided to radically amend the plan. The company eliminated virtually all of the features delivering stability:

- it replaced the ten-year rolling interest rate with "volatile" options;
- it dropped the protection against investment losses; and
- it struck the guarantee of equal annual payments.

It then took the unprecedented step of applying these changes retroactively to its retired employees' plan, overruling internal "resistance" to "changing anything for people who were in payout." Doing that triggered losses in the millions for those long-time employees who had relied on CSC's promises through decades of loyal service.

Courts have vigorously rejected just this sort of retroactive bait-and-switch. Under "unilateral contract principles," when an employer offers its employees a top-hat plan, "the plan constitutes an offer that the employee, by participating in the plan, electing a distributive scheme, and serving the employer for the requisite number of years, accepts by performance." *Kemmerer v. ICI Americas Inc.*, 70 F.3d 281, 287 (3d Cir. 1995). When an employee accepts by retiring, the plan "becomes irrevocable, the contract is completed, and the employer is required to comply with

its side of the bargain." *In re New Valley Corp.*, 89 F.3d 143, 150-51 (3d Cir. 1996). Any other result would make the employer's promises wholly illusory—capable of being changed on nothing more than a "whim." *Id.* at 151.

But here, the district court disregarded these principles. It allowed CSC to impose its changes across the board, "regardless whether participants had already retired." JA1726. And in the process, it invented a new rule out of thin air: That, where an employer simply amends a plan instead of terminating it, the standard contract rules do not apply. In the court's view, the "threat" of an "illusory contract" evaporates where an employer does not "terminate benefits altogether." JA1727.

The district court's decision is unsupportable. Settled principles of contract law do not empower companies—via amendment or termination—to silently transform their pension contracts into illusory promises. When CSC's employees retired, their acceptance closed the door on the terms of the plan. The contractual rights contained in the company's pre-amendment plan thus became "irrevocable" and the company was "required" to "comply with its side of the bargain." *New Valley*, 89 F.3d at 15-51. The district court's view to the contrary should be reversed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. On April 26, 2016, the court denied the plaintiffs' motion for class certification and granted CSC's motion for summary judgment on all claims. JA1685-1736. On the same day, the court entered final judgment in favor of the defendants. JA1738. On May 24, 2016 the plaintiffs filed a notice of appeal under Federal Rule of Appellate Procedure 4(a)(1)(A). JA1739. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Propriety of Retroactive Amendment. Did the district court err in concluding that CSC had the authority to freely eliminate or replace key terms of its top-hat plan for those employees who "had already retired" from the company, even though (1) top-hat plans like CSCs must be treated as unilateral contracts governed by ordinary principles of contract law; (2) those circuits to have a considered the issue have all required a company to "clearly indicate" its intent to create an illusory contract by using words to that effect; and (3) CSC's plan contained no "explicit language" either advising employees that the plan's contractual promises were illusory or specifically permitting post-retirement changes?

2. Class Certification. Did the district court abuse its discretion in allowing what it termed a "hypothetical" and "speculative" conflict over the "relief

sought" by the named plaintiffs to defeat class certification on adequacy-of-representation grounds, even though (1) both commonality and typicality requirements were "clearly satisfie[d]" in the case because one "common question" of liability—whether CSC could legally transform its top-hat plan into an illusory contract—united the class, and (2) this Court has explicitly held, in *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 431 n.7 (4th Cir. 2003), that "potential conflicts relating to relief issues . . . will not bar a finding of adequacy"?

STATEMENT OF THE CASE

A. Top-hat plans under ERISA.

When Congress first passed ERISA, it established a highly defined "sub-species" of ERISA plan called the top-hat plan. *New Valley*, 89 F.3d at 148. By definition, ERISA requires this type of plan to be "unfunded" and "maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly trained employees." 29 U.S.C. §§ 1051(2), 1081(a)(3), and 1101(a)(1); *see also* 29 U.S.C. §§ 1002(36), 1003(b).

These elements "make the top hat category a narrow one." *New Valley*, 89 F.3d at 148. From the start, Congress expected that these plans would "cover only high level employees," *id.*, who, "by virtue of their positions or compensation level," were thought to "have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation

plan." Dep't of Labor, Office of Pension & Welfare Benefit Programs, Opinion 90-14A, 1990 WL 123933 at *1 (May 8, 1990); *see Goldstein v. Johnson & Johnson*, 251 F.3d 433, 442 (3d Cir. 2001) (explaining that these "employees are in a strong bargaining position relative to their employers," and "do not require the same substantive protections that are necessary for other employees").

The unique considerations that led Congress to develop top-hat plans also led it, in turn, to "create[] a special regime to cover them." *New Valley*, 89 F.3d at 148. "The dominant characteristic of the special top hat regime is the near complete exemption of top hat plans from ERISA's substantive requirements." *Id.* Unlike welfare-benefit plans, or even most funded pension-benefit plans, a top-hat retirement plan is free from ERISA's minimum participation standards, minimum vesting standards, and even ERISA's robust fiduciary responsibility provisions. *See, e.g.*, 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1).

This regulatory freedom, however, is not unbounded. For one, although top-hat plans fall outside many of ERISA's substantive protections, they are covered "by ERISA's enforcement provisions." *New Valley*, 89 F.3d at 149. An employee who participates in a top-hat plan, therefore, may bring an action "to recover benefits due or otherwise enforce the terms of the plan." *Kemmerer*, 70 F.3d at 286-87; *see also Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 923, 937 (3d Cir. 1985), *overruled on other grounds by Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7

F.3d 1110 (3d Cir. 1993) (Congress "intended to afford [top-hat] participants and beneficiaries a federal forum to enforce the terms of their plans.").

For another, it has also long been understood that "Congress' decision to exempt top hat plans from certain fiduciary standards does not mean that courts may not review their trustees' and sponsors' actions." *Kemmerer*, 70 F.3d at 287. To the contrary, ERISA's top-hat exemption "means only" that a company's decisions "are not held to the strict *fiduciary* standards of loyalty and care otherwise applicable to ERISA fiduciaries." *Id.* (emphasis in original). Instead, these plans are governed by, and a company's plan-related decisions are reviewed under, "the federal common law of contract." *New Valley*, 89 F.3d at 149.

B. Computer Sciences Corporation offers its key executives a deferred compensation plan.

In 1995, CSC began offering some of its key employees the opportunity to participate in a deferred compensation top-hat plan. JA1686. CSC's plan allowed eligible employees to annually defer "portions of their base salary and up to 100% of their incentive compensation." JA1686.

CSC's plan was "unfunded." JA1686; *see* 29 U.S.C. § 1051(2). Although participating employees deferred a portion of their salary each year, CSC did not invest or otherwise segregate that money; instead, the company was free to use the unpaid salary for its own purposes. *See* JA1686-87. CSC, however, accounted for the deferrals by creating "notational accounts"—paper records of each employee's

balance that were used "for accounting purposes." JA1686. Only when a participating employee retired from the company did CSC then pay the deferred benefits out of its "general assets"—either in one lump sum "at the time of retirement or as annual installment payments over five, ten, or fifteen years following retirement." JA1686. This arrangement allowed CSC to treat its employees' deferred compensation as "a loan" while at the same time allowing employees to "defer income taxes" on some of their compensation, offering them the chance to "build up more money for retirement." JA1687.

C. The plaintiffs—like many of CSC's key employees—decide to participate in the plan.

The two named plaintiffs, Jeffrey Plotnick and James Kennedy, were both long-time executive-level employees at CSC. JA921; JA928. Mr. Plotnick first started working at CSC in 1984 and, twelve years in, was offered the chance to participate in CSC's Plan. JA921. Mr. Kennedy first started work at CSC in 1992 and, after seven years of service, earned the chance to participate in the plan. JA928.

For more than a decade, the employees deferred significant portions of their annual compensation under the terms of the plan. JA921; JA928. The plan included a number of features that made it a particularly attractive retirement investment. Over the years, the plan promised that employees' deferred income would grow according to a pre-established crediting rate. *See* JA411. At first, the

plan used a 120-month rolling average of yield to maturity on ten-year U.S. Treasury Notes. JA411. Beginning in March 2003, the plan switched to a new crediting rate: the 120-month average yield to maturity of a Merrill Lynch corporate bond index. JA411. The plan promised that, each year, "earnings shall be credited" according to the current value of these rates, with the value in the account "compounded annually." JA411, JA432.

The plan's use of these smoothed-over rates offered a significant advantage to participating employees: stable, above-market yields that, because of their ten-year averaging, came with little volatility or down-year risk. *See* JA1703. One bad year, in other words, would not dramatically alter the interest rate applied to employees' balances. That stability was reinforced by another significant feature of the plan: it only applied gains, not losses, to account balances. JA411. Under this protection, even if interest rates declined, employees' accounts would not be charged with losses. *See* JA1181. As a result, employees' benefits were shielded from significant market downturns.

The plan's terms also guaranteed a steady stream of income upon an employee's retirement. The plan's payout formula was determined by applying the

current Merrill Lynch crediting rate to the balance in the account, calculating the "total . . . worth or the value of the account to be paid over the installment period," and then dividing that total into the set number of annual payments that the employee had elected to receive. JA980-82. In this way, the plan's payout formula promised employees that they would receive annual installments in approximately "equal amounts." JA966.

In 2012, both Mr. Plotnick and Mr. Kennedy announced their retirement from CSC, fully completing their performance under the plan. *See* JA407, JA412. Shortly after their retirements, each received letters from the company providing the current "status of [their] account[s]" and laying out the schedule of their post-retirement annual payments. JA1459, JA1462. At the time of Mr. Plotnick's retirement, in 2012, the balance of his deferral account had already grown to nearly $3.5 million. JA921. Consistent with the terms of the plan, the company stated that Mr. Plotnick's "annual payments will remain the same." JA1459. Applying the governing Merrill Lynch crediting rate—6.30%—CSC told Mr. Plotnick that his "annual payment" over the course of his 15-year term would be $363,420 for every year until the final year of payout, totaling approximately $5.45 million. JA1459. On October 4, 2012, along with this letter, the company enclosed Mr. Plotnick's first annual payment. JA1459.

Mr. Kennedy's experience was much the same. The value of his deferred income had grown to more than $4 million by the time he retired in 2012. Shortly thereafter, he was told that he would receive equal annual payouts of $541,600 over the next ten years—bringing the estimated total value of his account to $5.4 million. JA928; JA1462. On March 13, 2012, the company (as it did with Mr. Plotnick) sent Mr. Kennedy a letter guaranteeing that his "annual payments will remain the same," and enclosing his first annual payment. JA1462.

D. After the plaintiffs retire, CSC unilaterally amends the plan to eliminate key stability features—and decides to retroactively apply the changes to those retired employees in payout.

After the plaintiffs retired and "were in payout," the company substantially amended the terms of the plan. JA985-86. This amendment was the product of a "turnaround strategy," in which CSC began exploring major "cost-cutting measures," including in employee-compensation strategy. JA1158, JA1159. The company commissioned a consulting firm, Aon Hewitt, to "review" its deferred-compensation plan "design," make changes, and "outsource" administration, JA964—all with an eye towards "simplify[ing]" the Plan and "reduc[ing] costs and risk," JA1160.

, leading CSC to impose a set of fundamental cost-cutting changes to the plan. These changes became

"effective" on January 1, 2013, after the plaintiffs had retired. JA1687. In three key ways, the amendment radically transformed how benefits would be calculated and paid out to account holders—exchanging stability for volatility.

First, it eliminated the established ten-year rolling average crediting rate. *See* JA204. In its place, CSC imposed a new rate with four valuation funds. *See* JA1687. Across the board, all of these new options were far more volatile than the 120-month-average rolling crediting rate used under the existing plan. JA1179-80.

Second, the company dropped the plan's preexisting protection from market downturns. The amendment eliminated this protection, exposing employees' accounts to market losses by translating any drop in interest rates into losses in participants' accounts. *Compare* JA411 ("earnings shall be credited") *with* JA204 ("earnings shall be credited to or charged against").

Third, the amendment also altered the plan's post-retirement payout structure. Instead of paying out "the same" annual payments over the course of the election period, *e.g.*, JA1462, the newly restructured plan divided a participant's remaining balance by the number of payments left, and then applied interest rates

as determined by the actual current performance of a chosen combination of the four valuation funds, JA966. As a result, payment amounts were no longer guaranteed—as the plan had previously promised—to be of roughly "equal annual installments"; they "start lower and end higher." JA966-67.

[redacted]. Internally, some voiced "resistance . . . to changing anything for people who were in payout" JA985. But the Board opted for a different approach. Instead of limiting the amendment's changes to apply prospectively, the company's leaders decided that they "would apply to the entire plan," even to the accounts of retirees who had already started receiving payouts. JA984.

There was good reason for some to be skeptical of this effort. As an initial matter, the company had (with one technical exception) never before applied amendments to the plan—including changes to crediting rates—to employees who had already retired from the company. JA1220-21. Doing that here, then, would break from longstanding past corporate practice on which loyal employees had relied for decades. And the one past technical amendment that had been retroactively applied to the accounts of retired employees was made "in order to comply with Internal Revenue code requirements." JA1221; *see also* JA1306-07.

In addition, the plan's language did not give CSC the right to amend the preexisting plan terms for retired employees. The plan contained both a general amendment clause, allowing the Board to amend the plan "from time to time," and a provision stating that the rate used for "crediting of earnings" was "subject to amendment by the board." JA411, JA422, JA432, JA448. But the plan also specifically stated that "[r]etroactive amendments" could be made only if "necessary to conform to the provisions of ERISA or the [Internal Revenue] Code." JA423. And, the Board's amendment authority also made clear that "[n]o amendment" to the plan could be made if it "decrease[d] the amount of any [account] as of the effective date of such amendment." JA422. In full, the plan's amendment authority provided:

> The Plan may be wholly or partially amended by the Board from time to time, in its sole and absolute discretion, including prospective amendments which apply to amounts held in [an account] as of the effective date of such amendment and including retroactive amendments necessary to conform to the provisions and requirements of ERISA or the Code; provided, however, that no amendment shall decrease the amount of any [participant's account] as of the effective date of such amendment.

JA422-23. And, finally, the plan guaranteed that each participant's "interest in his or her . . . Account shall be 100% vested and non-forfeitable at all times." JA411.

The employees, too, believed that any amendments made after retirement would not apply retroactively—in other words, that, upon their retirement, the terms of their plan would be locked in place. As Mr. Plotnick understood it, CSC's

amendment authority only "allow[ed] the company to amend up until the point that a person retires because it's a contract." JA1125. Once retired, though, it would then be "up to CSC to pay" according to the terms "in effect at the time." JA1125.

Nevertheless, the company pressed forward with its strategy.

E. The company's amendment triggers benefit losses in the millions for retirees.

In late December 2012, CSC sent a notification to retirees informing them that the cost-cutting changes contained in the amendment would apply to their accounts. JA184-85. The document asked retirees to review their four new rate options and select how their payouts would be calculated. Mr. Plotnick reviewed the options "very carefully," but was concerned about the volatility of all of the funds. JA1130-31. The new "mercurial" options were, in his view, "lousy alternatives" to the Merrill Lynch Fund, which "filter[ed] out . . . the quick ups and downs." JA1131. At "65- and 66-years old," he didn't "want to take that risk anymore." JA1125. But he found himself "locked in." JA1125. And even if he *were* willing to take the risk, he calculated that even the high-risk-high-reward fund options left him "short of what [he] would have gotten had they . . . given [him] what they promised[.]" JA1130, JA1132, JA1135. Lacking any other choices, he

eventually settled on a money market fund, which seemed the least risky. JA1131. Mr. Kennedy similarly looked for a "conservative investment" for this major source of retirement income, and found that all the options "would either provide lower returns or greater risk than the Merrill Lynch account." JA1108, JA1109. He elected to tie 80% to the bond fund and 20% to the S&P 500. *See* JA1689.

Immediately, both retirees saw major shifts in the projected payouts for their accounts. In June 2013, Mr. Kennedy received a statement showing that his account had lost nearly $60,000 in just one quarter. JA1111-12. Since the amendment went into effect, actual annual payments to the two plaintiffs have dropped by more than $100,000, compared to the estimates they were sent shortly after retirement. JA1404-06. Overall, in the three-year period between the time the amendment came into effect and January 29, 2016, payouts made to those employees who had retired before the changes were $4.1 million less than they would have been. JA169. And even for many retirees who chose a valuation fund with the potential for higher returns, payouts have been both lower *and* less stable than what was promised under the preexisting plan. Mr. Kennedy, for example, has seen his payouts fluctuate by more than $40,000 over the course of the last three years. JA1405-06.

These changes have forced the plaintiffs to reimagine their retirements. The drop in payouts compelled Mr. Kennedy "to work again after retiring—which [he]

had not planned to do"—in order to keep up with his mortgage payments and retain "a stable reliable source of income in [his] retirement." JA929. Before he retired, Mr. Kennedy thought the plan guaranteed just that. "[W]hen I put the money in, I expected that rate to be applied for the life of it." JA1106. "If I expected them to change the [crediting rate]," he reflects, "I would not have invested any money in [the plan]." JA1106. As Mr. Plotnick puts it, "[t]he reason why I signed up for this Plan is because I wanted a steady stream of reliable low-risk income for my entire retirement." JA1135. That "was taken away by this amendment." JA1135. Had he known that, even after retirement, the "risk [could be] all turned over to the employee who took the risk all of those years, irrevocably deferring that salary," he "wouldn't have done it." JA1123.

F. After CSC denies the retired plaintiffs' benefits claims, the plaintiffs bring suit.

In May 2013, Mr. Plotnick and Mr. Kennedy separately sent letters to CSC, claiming benefits under the plan and challenging the applicability of the 2012 amendment to their accounts. JA811, JA821. Two months later, CSC denied their claims. JA828, JA830. The company told the retirees that, because "CSC retains the absolute discretion to amend the Plan from time to time pursuant to Sections 8.6 and 16.6 of the Plan document," the plaintiffs' request was "contrary to the stated terms of the Plan." *Id.*

Half a year later, Mr. Plotnick filed this suit, seeking to represent a class of similarly situated retired employees "who had elected to receive distributions of deferred income during retirement in installments, and for whom the amount or manner of their benefit payment was altered by the 2012 Amendment." JA1691, JA21-58. The complaint challenged the validity of the company's view that it could transform its plan into an illusory contract by altering the terms of the plan that the employees had accepted when they retired.

The lawsuit pressed two alternative ERISA claims relevant to this appeal: (1) a claim under 29 U.S.C. § 1132(a)(1)(B) for recalculation and distribution of benefits under the pre-amendment terms of the plan; and (2) a claim seeking a declaration, under 29 U.S.C. § 1132(a)(3), that the plan amendment is invalid and an order that benefits be recalculated. JA1691, JA46-56. After preliminary motions practice, the company filed a global motion for summary judgment and sought denial of the plaintiffs' class-certification motion.

G. The district court grants summary judgment to CSC and denies class certification.

The district court granted summary judgment to CSC on all claims and denied the employees' motion for class certification. In the court's view, the "dispositive principle" governing the case was "simple"—"[w]here the terms of the plan authorize the administrator to amend the plan," the administrator "may do so" without limitation. JA1710.

1. The standard of review. In reaching this conclusion, the court first addressed the "threshold issue" of the "appropriate standard of review." JA1718. Where a plan "vests the administrator" with discretionary authority to make benefits decisions or interpret the terms of the plan, under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989), "review of the plan administrator's decision is solely for abuse of . . . discretion." JA1718. But, "because top-hat plans do not entail fiduciary obligations for plan administrators," the trust principles that led the Supreme Court to embrace abuse-of-discretion review for most ERISA plans are absent. JA1718-19 (discussing *Craig*, 458 F.3d at 752 and *Goldstein*, 251 F.3d at 443). As a result, the court observed, the circuits "are split as to whether the logic of *Firestone* applies to top-hat plans" or whether *de novo* review is more appropriate. JA1719.

Although the Fourth Circuit had yet to weigh in, because the plan in this case contained a discretionary-review clause, the district court characterized the two standards—*Firestone* deference and *de novo* review—as a "distinction without a difference" because the "fundamental question presented here is the same regardless: Was the administrator's determination to deny plaintiffs' claims for benefits on the ground that the 2012 Amendment is valid a reasonable interpretation of the Plan?" JA1720.

2. The propriety of retroactive amendment. Turning to that question, the district court held that there was "no doubt" that CSC had the authority to retroactively alter the terms of the retirees' plan. JA1724. At the time of the amendment, the plan stated that it could be "wholly or partially amended by the Board from time to time, in its sole and absolute discretion." JA1688. In the court's view, this authority—which included the power to make "prospective amendments"—authorized the company to adopt changes that applied even to retirees.

In reaching this conclusion, the court recognized that numerous courts had held that, under standard "unilateral contract principles," "general plan language permitting amendment 'at any time' or 'from time to time' is insufficient to permit post-retirement amendments" to ERISA top-hat plans. JA1725 (citing *New Valley*, 89 F.3d at 151 and *Carr v. First Nationwide Bank*, 816 F. Supp. 1476, 1493-94 (N.D. Cal. 1993)). Applying ordinary contract principles, these courts held that when the employee "leaves the employ of the company," the "plan then in effect" becomes irrevocable. JA1727. Because permitting a company to use amendment authority to alter material terms for already-retired employees would transform the plan from a unilateral contract into an "illusory" one, these courts have ruled that retroactive amendments will not be permitted absent "explicit language" allowing them. *See* JA1725.

The district court refused to apply these principles to CSC's plan because it saw this case as different in "two significant respects." JA1726. First, the plan here contained "more specific" language allowing amendments "to the crediting rate." JA1726. Although this language (like the earlier "from time to time" clause) included no explicit statement that the crediting rate could be altered *after* an employee had retired, the court reasoned that, because "nothing in the Plan distinguished retired employees from active employees for purposes of CSC's amendment power," the Plan "clearly and unambiguously provided for the Board's specific authority to change the crediting rate applicable to participant accounts, regardless whether the participants had already retired." JA1725-26.

Second, the court held that unilateral contract principles only come into play when a company passes an amendment designed "to *terminate* benefits" for retirees. JA1726 (emphasis in original) (holding that "unilateral contract principles" do "not apply here"). In the district court's eyes, unilateral contract principles are only necessary to address the "threat" that a company could terminate a plan altogether even after an employee had retired—otherwise, in its view, there was no "illusory contract problem." JA1727. Here, because "CSC lacked the power to terminate benefits altogether," the concern was absent. JA1727. As a result, it saw "no basis . . . to insist . . . that the Plan must clearly and specifically permit post-retirement

amendments in order for such amendments to be valid." JA1727 (concluding that imposing such a requirement "would be to impose a rule without a reason").

3. Class certification. The district court also denied the employees' request to certify a class of similarly situated former CSC employees who were all retired when the company imposed its new amendment. *See* JA1691-1709. The court first determined that "the common legal question" in the case was the same for every retiree, namely "whether the 2012 Amendment is valid," and therefore held that Rule 23's commonality and typicality requirements were "clearly satisfie[d]." JA1693.

But it ruled that the proposed class failed to meet Rule 23's adequacy standard. The court reasoned that the case involved a disqualifying conflict: "a divergence of economic interests between the named plaintiffs and absent class members." JA1699. On the one hand, there was no doubt that the named plaintiffs suffered substantial losses under the amendment. But the court speculated that some retirees would be "better off" under the new changes. JA1698. That tension meant that the proposed class could not be certified because "the relief sought, *i.e.,* a return to the pre-amendment Plan, could well harm their pecuniary interests." JA1698.

In reaching this conclusion, the court acknowledged that the potential conflict was both "hypothetical" and "speculative." JA1702. That was so, the court

explained, because the "market volatility" of the "volatile valuation funds" used in the amendment's crediting rates would make it "impossible to know" whether "any given participant comes out ahead or behind . . . as compared to how their accounts would have performed under the pre-amendment Plan." JA1698, 1701. But it nonetheless found the possibility that some class members might "prefer" the status quo sufficient to defeat certification. JA1703.

SUMMARY OF ARGUMENT

I. Retroactive amendment. The district court's grant of summary judgment to CSC must be reversed because the district court failed to apply the correct standards governing top-hat plans under ERISA. 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*, 70 F.3d at 287. When an employee accepts, the offer "becomes irrevocable, the contract is completed, and the employer is required to comply with its side of the bargain." *New Valley*, 89 F.3d at 150-51. A company cannot renege on its obligations by changing the terms of the plan after an employee has retired, unless its plan document contains an "explicit right" to terminate or amend the plan "even after retirement." *Id.*

The district court nonetheless freed CSC from this rule. It reasoned that the common law's clear statement "requirement" does not apply where a company

amends the plan (as opposed to eliminates it) because, in that circumstance, there is no "threat" of an illusory contract. JA1727. But what "render[s] the contract" illusory is that a "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). That can certainly occur when an employer opts to terminate its plan, but it can also happen, as it did here, through amendment or modification. A later amendment that defeats an employee's rights under the governing plan in existence when he left the company "is not only ineffective, but also arbitrary and capricious." *Pratt v. Petroleum Prod. Mgmt. Inc. Employee Sav. Plan & Trust*, 920 F.2d 651, 661 (10th Cir. 1990).

II. Class certification. The district court's belief that the named plaintiffs could not adequately represent the class because their interests were *potentially* antagonistic to unnamed class members must also be reversed. "[P]otential conflicts relating to relief issues which would arise only if the plaintiffs succeed on common claims of liability on behalf of the class will not bar a finding of adequacy." *Gunnells*, 348 F.3d at 431 n.7 (internal quotations omitted). Here, as the district court recognized, one common question of liability—"whether the 2012 Amendment is valid"—united the class. JA1693. As a result, because the conflict identified by the district court would arise only if the plaintiffs could succeed on this

claim, it may not "support denial of initial class certification." *Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir. 2003).

Rule 23's adequacy requirement, moreover, does not contemplate that speculative-relief conflicts can serve as a basis for defeating class certification. The crucial question concerning a court's assessment of the adequacy of named plaintiffs is whether, "at the beginning of the case," the class "appear[s] united in interest against an outsider." 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1768 (3d ed. 2005). If so, "a potential conflict" between the representatives and some class members at a later stage "should not preclude the use of the class-action device." *Id.*

Even setting aside the district court's flawed focus on conflicts involving downstream relief, the court's concession that the purported conflict here was both "speculative" and "hypothetical" in itself warrants reversal. *See Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010) (denial of class certification is improper where purported "conflict rests on the uncertain prediction" that a lawsuit will cause economic harm that will "adversely affect some members of the class"). Other protective mechanisms allow courts to police real conflicts when they arise while at the same time avoiding "class certification denial for conflicts that are merely conjectural." *Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l, Ltd.*, 247 F.R.D.

253, 268-69 (D. Mass. 2008) (*quoting* 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 3.30 (4th ed. 2002)).

STANDARD OF REVIEW

"Because ERISA does not specify the appropriate standard of judicial review," courts have "develop[ed] a federal common law" to review claims arising under the statute. *Booth v. Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan*, 201 F.3d 335, 340 (4th Cir. 2000). "[A]s a general proposition, ERISA plans, as contractual documents, are interpreted *de novo* by the courts, which conduct their review 'without deferring to either party's interpretation.'" *Id.* (internal citations omitted).

The appropriate standard of review governing benefit decisions for top-hat plans (including interpretations of the plan) is unsettled. The district court applied a "deferential abuse of discretion framework," JA1720, but that was wrong. Because "a top hat administrator has no fiduciary responsibilities under ERISA," the "policy considerations" that "trigger abuse-of-discretion review (i.e., 'the Supreme Court's analogy to trust law, and particularly the fiduciary responsibilities possessed by administrators with discretionary authority') are simply not present in the case of a top hat plan." *Craig*, 458 F.3d at 752. As a result, *de novo* review should apply to top-hat plans "even when they give their administrators interpretive discretion." *Id.* (agreeing with *Goldstein*, 251 F.3d at 443).

Nevertheless, for purposes of this case, the "touchstone" question under either standard is one of "reasonableness." *Compare* JA1720-24 *with Craig*, 458 F.3d at 752 (noting that *de novo* review of a plan that contains a discretionary clause does not "alter [the] analysis as much as it might appear" because the core question is "whether the Plan's decision was reasonable"). This Court reviews *de novo* a district court's review of a coverage decision by an ERISA plan administrator, "applying the same standard of review as the district court applied." *Helton v. AT&T Inc.*, 709 F.3d 343, 351 (4th Cir. 2013).

This Court also reviews a district court's grant of summary judgment on a contract *de novo*. *Wilkins v. Montgomery*, 751 F.3d 214, 220 (4th Cir. 2014). For contracts, "[o]nly an unambiguous writing justifies summary judgment without resort to extrinsic evidence, and no writing is unambiguous if susceptible to two reasonable interpretations." *Washington Metro. Area Transit Auth. v. Potomac Invest. Props., Inc.*, 476 F.3d 231, 235 (4th Cir. 2007) (quoting *Goodman v. R.T.C.*, 7 F.3d 1123, 1126 (4th Cir. 1993)). Where a contract is ambiguous, this Court has explained, summary judgment is only "appropriate" when "an ambiguity can be definitively resolved by reference to extrinsic evidence." *Id.* "If, however, resort to extrinsic evidence in the summary judgment materials leaves genuine issues of fact respecting the contract's proper interpretation, summary judgment must of course be refused and interpretation left to the trier of fact." *Id.*

This Court reviews an order denying class certification for abuse of discretion. *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001). Although district courts are afforded "broad discretion in deciding whether to certify a class," that "discretion must be exercised within the framework of Rule 23." *Id.*

ARGUMENT

I. The district court erred in determining that CSC could avoid its contractual promises by retroactively changing the terms of its already-retired employees' plan.

CSC argued below, and the district court agreed, that its plan "unambiguously" allowed it to change key features and apply those changes to employees who were already retired and in payout, effectively transforming the plan into an illusory promise. That approach cannot be reconciled with the rules of contract law that govern top-hat plans and the text of CSC's plan itself. Under settled federal common law, when an employer intends to create a top-hat plan that allows the company to change the terms of its contract even after an employee has fully performed—an illusory plan, in other words—it must explicitly make that atypical intention clear. Because CSC's plan contains no such explicit grant of authority, the company's effort to enforce its post-acceptance modification here is "ineffective." *Kemmerer*, 70 F.3d at 287.

A. Unilateral contract principles bar CSC from changing the terms of the plan as applied to retirees.

CSC's effort to apply the amendment's cost-cutting changes to its already-retired employees' plan fails because it cannot be reconciled with the common-law rules that govern all top-hat plans under ERISA. "Under unilateral contract principles," when an employer offers its employees a top-hat pension plan, "the plan constitutes an offer that the employee, by participating in the plan, electing a distributive scheme, and serving the employer for the requisite number of years, accepts by performance." *Kemmerer*, 70 F.3d at 287; *see, e.g.*, *Carr*, 816 F. Supp. at 1488 (holding that a top-hat plan's terms "constitute an offer for a unilateral contract and a participant's performance under the plan's terms create[s] a binding contract.").

When an employee accepts—which occurs "by continuing in the company's employment until retirement"—the offer "becomes irrevocable, the contract is completed, and the employer is required to comply with its side of the bargain." *New Valley*, 89 F.3d at 150-51. At that point the terms of the pension plan are locked in place: "the trustee is required to determine benefits in accordance with the plan then in effect." *Kemmerer*, 70 F.3d at 287 (internal quotations omitted); *see also Pratt*, 920 F.2d at 661 (same).

CSC disregarded these principles. When the two named plaintiffs retired, the plan in effect guaranteed a credit rate "equal to the 120-month rolling average

yield to maturity of the [Merrill Lynch] index." JA411 (stating that this rate "shall be credited" to each participant's earnings). And it promised the employees (1) that their "annual payments will remain the same until [the] last payment," *see, e.g.*, JA1459, and (2) that their accounts would be shielded from any market losses, JA411, JA1181. After the employees retired, however, the company reneged: It eliminated the ten-year rolling crediting rate and replaced it with a set of "volatile valuation funds," JA1702, dropped the protection against losses that it previously had guaranteed participants, and effectively overturned the right of participants to receive equal annual payments. *See* JA1181-82, JA1686-90.

The federal common law of contracts does not allow this. The employees' retirement—which established their acceptance under the terms of CSC's plan, *see* JA407, JA412—"completed" the contract and made the promises then in effect "irrevocable." *New Valley*, 89 F.3d at 150. CSC was therefore "required" to "determine benefits in accordance with the plan then in effect," *id.*, and "comply with its side of the bargain." *Kemmerer*, 70 F.3d at 287. When it did not, the company's actions became "not only ineffective, but also arbitrary and capricious." *Pratt*, 920 F.2d at 661 (refusing to permit "subsequent unilateral adoption of an amendment which is then used to defeat or diminish the [employee's] fully vested rights under the governing plan document").

The Third Circuit's decision in *Kemmerer* illustrates the point: Employers do not have "carte blanche to amend" top-hat plans simply because "fiduciary standards are inapplicable." 70 F.3d at 288. To the contrary, when employees retire, their rights become "vested" because "they completed performance." *Id.* at 287. A company may not, therefore, later alter or abridge those rights "in the absence of a specific provision in the plan authorizing it to do so." *Id.* Put another way: once "performance is complete," a company is "required . . . to fulfill its end of the bargain by making payments consistent with [the employees'] respective elections." *Id.* at 287-88. Allowing a company to thwart its preexisting commitments, the court warned, "has no basis in contract law" and would be "more than minimally unfair." *Id.* at 287.

B. CSC's top-hat plan does not authorize post-retirement changes.

Applying these settled principles here should have led the district court to reject CSC's effort to abandon its preexisting commitments to its long-serving employees. But instead of blocking CSC's attempt to break promises it made to its employees when they retired, the district court held that CSC had unfettered autonomy to amend the terms of its plan and apply those changes retroactively to retirees. That was wrong.

1. In the district court's view, the text of the CSC's amendment authority handed CSC the power to freely change both "the crediting rate applicable to

participant accounts," JA1726, and "how annual benefit payments are distributed," JA1688, "regardless whether the participants had already retired." JA1726. "[M]ake no mistake," the district court ruled, the language contained in the amendment clause—which allowed that the plan "may be wholly or partially amended by the Board from time to time, in its sole and absolute discretion," including certain "prospective amendments"—was "enough" to authorize the company to make post-retirement modifications. JA1724.

That conclusion, though, disregards decades of settled law. A "general reserved power of amendment" does not confer "unfettered power" to "amend or modify the Plan in a manner that infringes [a participant's] rights with regard to interest and repayment." *Carr*, 816 F. Supp. at 1492. On this point, "the caselaw evinces an emergent common-law rule to this effect." *McGrath v. R.I. Ret. Bd.*, 88 F.3d 12, 18 (1st Cir. 1996). After an employee "fulfills the service requirement entitling him" to benefits under a plan, he "acquires a contractual right to those benefits, and the employer cannot abridge that right despite its aboriginal reservation of a power to effect unilateral amendments or to terminate the plan outright." *Id.* at 18-19. "Any other interpretation," would "render[] the promises embodied [within the plan] completely illusory." *Kemmerer*, 70 F.3d at 288.

CSC's amendment authority is easily controlled by this rule. The clause allows the company to amend or modify the plan "from time to time" and "in its

sole and absolute discretion." But this language is nothing new. Nearly every court that has considered similar amendment language has held that it does not (in the district court's words) "unambiguously" authorize an employer to change the terms of a retired employee's plan. Quite the opposite: As the Third Circuit has explained, general amendment language authorizing a company to "amend or terminate" a plan "at any time" or "for any reason" is, "[a]s a matter of plain language," "ambiguous." *New Valley*, 89 F.3d at 150-52.

To see why, consider *New Valley*. There, an employer's top-hat plan contained an amendment clause providing that the employer "may amend or terminate the Plan at any time for any reason." *Id.* at 147. After a number of employees had accepted the terms of the plan and retired, the employer sought to eliminate the retirees' benefits, arguing that its amendment authority was "unambiguous" and allowed it "to terminate even after retirement." *Id.* at 151.

The Third Circuit rejected this argument. "[T]he words 'at any time'" are "ambiguous," the court held, and do not clearly establish the company's power to alter a retired employee's plan. *Id.* Contrary to the company's claim, the court explained that most employees "would not expect" that the phrase "at any time" would allow a company to change contract terms "post-performance." *Id.* That arrangement "would make th[e] 'contract' largely illusory" by allowing the employer to modify or terminate "retirement benefits at its whim." *Id.* Although

not forbidden under ERISA, it would be "unlikel[y]" that the parties would agree to that arrangement "when significant benefits are at stake," and, without more, such a result could not be inferred from the amendment clause. *Id.*

Other courts have likewise reached the same conclusion based on similarly generic grants of amendment authority—including clauses that contain phrases like "from time to time" and "in its discretion." *See Bahr v. Technical Consumer Prods., Inc.*, 601 Fed. App'x 359, 368-69 (6th Cir. 2015) (reversing district court's decision to allow "post-acceptance modification" where a plan's amendment authority gave a company the "right to amend, change, or cancel [the plan] *at its discretion*") (emphasis added); *McGrath*, 88 F.3d at 18 (endorsing common-law rule that "the presence of a clause in a pension plan reserving to the employer 'the right to change, suspend or discontinue the Plan *at any time*'" is insufficient to permit post-retirement changes in a unilateral contract) (emphasis added); *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1, 5 (1st Cir. 1978) (amendment clause reserving "the right to change, suspend or discontinue the plan at any time" cannot allow post-retirement modifications); *Carr*, 816 F. Supp. at 1493-94 ("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" does not authorize unilateral post-retirement amendments in top-hat plans) (emphasis added); *but see Hollomon v. Mail-Well Corp.*, 443 F.3d 832 (11th Cir. 2006) (permitting a post-retirement modification where plan included a

general "at any time" amendment clause, but basing its decision on separate plan term that specifically authorized the post-retirement change). The district court offered no persuasive justification for its refusal to follow the rule adopted by these courts here.

2. The point of this rule is no different from similar requirements in other ERISA contexts. As this Court has explained, a "grant" of authority under ERISA "must be clear" if it is to meaningfully serve "the notice function of plan language." *Cosey v. Prudential Life Ins. Co. of Am.*, 735 F.3d 161, 165, 167 (4th Cir. 2013). "Neither the parties nor the courts should have to divine" whether the plan has clearly delegated authority to take some action. *Id.* at 165 (quoting *Sandy v. Reliance Standard Life Ins. Co.*, 222 F.3d 1202, 1207 (9th Cir. 2000)); *see also Kinstler v. First Reliance Standard Life Ins. Co.*, 181 F.3d 243, 252 (2d Cir. 1999) (criticizing a plan's "needless ambiguity in the wording of the policy"). The "concern[]" motivating this requirement is that employees will not be "given sufficient notice" whether or not their company has "broad, unchanneled discretion." *Cosey*, 736 F.3d at 167. That is unacceptable: It is "critical that employees understand the broad range of a plan administrator's authority because of the impact that this information can have on employees' own decisions." *Id.*

This fair notice concern is particularly heightened in the top-hat context. Unlike with other benefit plans, top-hat participants have only one remedy

available—a contract action. *See New Valley*, 89 F.3d at 153. "Where a contract action fails, they have no recourse" or "alternative remedy." *Id.* Welfare-benefit-plan participants, by contrast, "enjoy an action for breach of fiduciary duty." *Id.* That "important difference" means that the contractual provisions here "must therefore be enforced with care." *Id.* at 153-54.

The record here offers a case in point. The plaintiffs signed up for CSC's plan because they believed it would offer "a stable reliable source of income in [their] retirement." JA929-30. They were drawn to it precisely because it "filter[ed] out . . . the quick ups and downs," JA1131, thus offering a "conservative investment" for the major source of their retirement income, JA1108. At "65- and 66-years old," they wanted to limit—not expand—the "risk" of their retirement accounts, and relied on the plan's promises to do just that. JA1125. Had they known that the plan's promises were illusory—that the "risk [could be] all turned over to the employee who took the risk all of those years, irrevocably deferring that salary"—they "wouldn't have done it." JA1123.

If a company truly intends to create an illusory pension plan for its employees—*i.e.*, one that is capable of being freely changed even after an employee fully completes performance (retires)—it is free to do so. But it may not do that through a bait-and-switch tactic under cover of night. Instead, it must clearly tell its employees—at the outset—that this is the offer (however unappealing such an offer

might be), by including a "specific provision" reserving "an explicit right to terminate or amend after the participants' performance." *Kemmerer*, 70 F.3d at 287-88 (explaining this important "corollary").

C. The district court was wrong to hold that settled unilateral-contract principles do not apply when an employer amends a plan instead of terminates it.

The district court refused to hold CSC's plan to these settled principles. Instead, it fashioned a new exception: In its view, "unilateral contract principles," including the requirement that a plan include "*explicit* language" advising participants that changes could be made even after retirement, were only applicable where a company used its amendment authority "to *terminate* benefits." JA1726-27 (emphases in original) (concluding that, to "import such a requirement" for post-retirement *amendments*, "would be to impose a rule without a reason"). In the absence of termination, the court insisted, there was no "illusory contract problem" and so no need to insist on additional clarity. JA1727. But no court has ever embraced this newfangled amendment/termination distinction, and the district court certainly cited none. And for good reason—the distinction doesn't hold up.

1. A contract becomes "illusory" not because an employer may terminate the agreement after performance; it 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. 1 *Williston on Contracts* § 1:2 (4th ed. 2015); *see Mohamed v. Uber Techs., Inc.,* 836 F.3d 1102, 1111 (9th Cir. 2016) (quoting 2 *Corbin on Contracts* 142 (rev. ed. 1995) (explaining that an illusory promise is one containing words "in promissory form that promise nothing" and that "do not purport to put any limitation on the freedom of the alleged promisor"). Termination, in other words, is largely beside the point. Instead, as the late Judge Murnaghan explained, what "render[s] the contract" illusory is that a "binding obligation" is "changeable, *i.e.*, non-binding." *Elmore*, 23 F.3d at 870 (Murnaghan, J., concurring); *see also In re Worker's Comp. Refund*, 46 F.3d 813, 819 (8th Cir. 1995) (holding that a contract is "illusory" if it can "always be changed *or* obliterated," even after performance.). That can certainly occur when an employer opts to terminate its plan, but it can also happen through amendment or modification. Either way, though, an employer must clearly tell its employees that it reserves the right to unilaterally abridge promises even after retirement.

That it why the Third Circuit used a "common example" of a post-acceptance "wage scenario" modification (not a termination) to highlight how a contract can become illusory:

> Suppose an employer and employee enter into a contract stating that employee will work forty hours per week for $500, payable at the end of the week. The contract further states that employment is at will and employer can change employee's wages "at any time." After working a week, employee goes to pick up her pay check. Employer informs

> employee that it has exercised its right to change her wages "at any time," and will be paying her $300 for that week's work.

New Valley, 89 F.3d at 151. For both scenarios—one in which the promise is later modified and one in which the contract is terminated entirely—the rationale for requiring "explicit language" is the same: Without it, an employee "would not expect" that changes to the contract could "take place post-performance." *Id.*

Numerous courts have enforced this rule against employers attempting to modify the terms of already-accepted plans. In *Pratt*, for instance, a company sought to amend—not terminate—the terms of its pension plan by changing the "valuation date" to "reduce" its employees' accrued benefits under the plan. *Pratt*, 920 F.2d at 660. Although the amendment was made "some eight weeks after" one employee had left, the company nonetheless sought to apply it to the no-longer-employed participant—relying on nothing more than a general amendment authority. *Id.* at 653. The Tenth Circuit rejected this attempt. Without an explicit grant of authority to later change the terms of an already-accepted plan, the court held, the employer is "required to determine benefits in accordance with the plan . . . in effect" at retirement. *Id.* at 661. A later amendment designed to "defeat" a participant's rights under the governing plan in existence when he left the company "is not only ineffective, but also arbitrary and capricious." *Id.*

So too in *Carr*. There, relying on its generic amendment clause, an employer sought to "replace[]" a promised interest-rate calculation with "a new formula"

and "altere[d] the payout schedules specified by plaintiffs in their deferral notices under the terms of the prior plans." 816 F. Supp. at 1482. It made no effort to terminate the plan. Yet the court understood that the changes, if allowed, would "operate to make the[] promises" contained in the preexisting plan "illusory." *Id.* at 1490. In the absence of an explicit statement telling employees that the terms could be modified even after retirement, the court rejected the company's reliance on its "reserved power to amend, modify or terminate the Plan" to "avoid its express contractual obligations." *Id.* at 1494.

The upshot: CSC's inability "to terminate benefits altogether," does not eliminate the "threat that the [Plan] was an illusory promise," as the district court incorrectly thought. JA1727. As a result, the court's bottom-line conclusion, that CSC's plan need not have complied with the "requirement" that it "clearly and specifically permit post-retirement amendments in order for such amendments to be valid," cannot stand. JA1727.

2. Instead of holding CSC to these requirements, the district court went digging in unrelated plan provisions in search of the clarity that CSC's amendment clause lacked. *See* JA1726-27 (pointing to the plan's "specific" authority to amend the crediting rate and its unlimited definition of participants to support its conclusion). But this extraneous plan language does nothing to clarify CSC's amendment authority.

For instance, that the plan "expressly authorized amendments to the crediting rate," JA1726, says nothing about whether that authority extends beyond an employee's retirement—the point at which 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]." *Carr*, 816 F. Supp. at 1494; *see also Pratt*, 920 F.3d at 662 (holding that, "[w]here the plan document unambiguously addresses the valuation procedure," the plan "is contractually bound to honor that procedure as it existed when the plaintiff separated"). This language, in other words, is no clearer than the plan's general amendment authority, which "expressly authorizes" *any* amendment to the plan. Both fail, under settled unilateral-contract principles, to validly permit post-retirement changes because they do not clearly express that atypical intention.[1]

And anyway, this particular provision—focused as it is on changes to the crediting rate—affords no support for the other crucial changes that CSC made to

[1] The district court was also mistaken about the significance of the clause's authorization of "prospective amendments." Contrary to the district court's understanding, a "prospective amendment does not affect settled plans or arrangements." *In re Worker's Compensation Refund*, 46 F.3d at 819. Indeed, not even CSC thought these provisions added anything to its authority. When it denied the employees' benefit claims it pointed only to its general amendment provision as the basis of its authority, arguing that the power contained within that clause gave it "absolute discretion" to amend the Plan at any point, including after retirement. See JA827, JA829.

the retirees' completed contract. The district court glossed over the problem, but the plan contains no similar "specific" or "express" authority for CSC's decision to alter the promise of equal post-retirement payments or loss protection. By the district court's own logic, then, those changes were unauthorized.

Ultimately, the district court's approach here only illustrates the problem. "[G]iven the ease in drafting clear language," this court has counseled against "search[ing] in semantic swamps" for arguable grants of authority. *Cosey* 735 F.3d at 168 (quoting *Kinstler*, 181 F.3d at 252). Heeding this counsel here should have meant rejecting CSC's bid to avoid its preexisting contractual obligations.

D. The district court's conclusion that CSC's interpretation of its amendment authority and denial-of-benefits decision were reasonable should be reversed.

The district court's incorrect conclusion that the plain language of CSC's plan "unambiguously" afforded the company power to revoke its preexisting promises led the court to hold, in turn, that CSC's denial of the plaintiffs' benefits was "valid" and "reasonable." *See* JA1721-24. In so ruling, the district court followed the eight-factor "deferential" "abuse of discretion framework" first set forth in *Booth*, 201 F.3d at 342-43, ultimately concluding that "CSC correctly interpreted the Plan as permitting the 2012 Amendment," and that its "denial of plaintiffs' claims for benefits was therefore appropriate." JA1724. But because the premise was wrong, so is that conclusion. Where plan language does not clearly

authorize a "unilateral . . . amendment" that abridges retirees' preexisting rights, the amendment is "ineffective," and any related effort to deny benefits is "arbitrary and capricious." *Pratt*, 920 F.2d at 661; *see also* JA1717 (acknowledging that, if CSC had no authority to retroactively change the plan, then it "likewise erred in denying plaintiffs' claims for benefits").

What makes the district court's effort to bless CSC's conduct here even more suspect is that it cuts against a host of other indicators signaling just how unreasonable CSC's conduct was. *See* JA1721 (explaining that the *Booth* factors "cut to the heart of reasonableness"). One factor in particular—whether CSC's "interpretation was consistent with other provisions in the plan and with earlier interpretations of the plan"—seriously undermines the reasonableness of CSC's position. *Helton*, 709 F.3d at 353. CSC's plan contains "numerous specific and mandatory provisions" that would be rendered superfluous if CSC's position wins out. *New Valley*, 89 F.3d at 151-52. That is unreasonable: These provisions "point to a binding contractual agreement," *id.*, that, once accepted, cannot be "defeat[ed] or diminish[ed]" through "unilateral . . . amendment." *Pratt*, 920 F.2d at 661.

For starters, CSC's plan "contains explicit provisions regarding how participants in the plan 'may' defer compensation and 'shall' be paid such deferred compensation." *Carr*, 816 F. Supp. at 1493. When the employees retired, the plan

made clear that any payout election—including the option of receiving payment in "approximately equal annual installments"—"*shall be paid* . . . as specified in any election made." J433-34, JA412 (emphasis added).

The use of "shall" here is unmistakable, yet CSC's amendment unquestionably makes it impossible for the company to fulfill these contractual guarantees. As the district court itself freely acknowledged, "[a]pproximately equal payments are not feasible under the 2012 Amendment due to the volatility of the valuation funds." JA1729. CSC's position would thus abridge this guaranteed right for those retired employees who elected and were guaranteed equal payments.

To avoid this difficulty, CSC argued (and the district court accepted) that it only promised that distribution payments would "be as close to equal as is reasonably administratively feasible"—allowing them to freely change the payout schedule as circumstances required. JA1729 (noting that CSC "now" interprets its plan this way). That is wrong. The plan told retired employees that their elections were "irrevocable," and made clear that company "shall" honor a choice to receive equal payouts over the course of the schedule. When they retired, in other words, the plan language "in no uncertain terms provide[d]" that these elections "shall be complied with." *Kemmerer*, 70 F.3d at 289. "To conclude in the face of such language," as the district court did here, that CSC "had unfettered discretion to disregard a participant's election would violate the plain meaning rule of contract

interpretation." *Id.*; *see also Carr*, 816 F. Supp. at 1494 ("This is a result which basic principles of ERISA federal contract law will not allow.").

A similar problem infects the amendment's new crediting-rate options, which exposed retirees' accounts to the risk of market downturns for the first time. This shift directly contradicted language in the preexisting plan, which promised that only "earnings shall be credited" according to a set rate. JA411, JA432. As CSC has acknowledged, that term meant that, "prior to 2013, no account would be charged losses." JA1181. But that changed with the amendment. Under the amendment, CSC explicitly altered the plan language to eliminate the preexisting loss protection, providing that "earnings shall be credited to *or charged against*" deferred compensation accounts. JA204 (emphasis added); *see also* JA226, JA251. Permitting that change to be applied retroactively to already-retired employees eliminates a clear contractual guarantee—a shield from losses—that was in place at the time they retired.

The substantial "extrinsic evidence" in the record also contradicts CSC's bid to apply its amendment to the retirees. *See Helton*, 709 F.3d at 354 (extrinsic evidence should be used as a check against the reasonableness of a company's benefit decision). The plaintiffs had good reason to believe that they would receive the steady payouts promised to them by the plan in place at the time of their retirements. Shortly after they left the company, each received a notice outlining

what that their retirement payouts would be over the coming decade, calculated according to the terms in place at the time. JA1459; JA1462. The letters confirmed that they would receive annual payments calculated according to "the rate of return" for "the most recent fiscal year"—the Merrill Lynch crediting rate—and guaranteed that their "annual payments [would] remain the same until [the] last payment." *Id*. The retired employees thus believed these schedules would be locked in, subject to no further amendment. Evidence of the employees' "reasonable understanding" is "directly relevant to this issue." *New Valley*, 89 F.3d at 152.

So too is the company's past amendment history—which reinforces the unreasonableness of CSC's position. Apart from a small change made to comply with IRS standards, no previous plan amendment—not even earlier changes in the crediting rate—had been applied "retroactively" to "affect the accounts of persons who at the time the amendment was effective had already retired." JA1220. CSC's choice here thus broke from longstanding company practice—another red flag that its decision was an invalid. *See Helton*, 709 F.3d at 354 (holding that courts are "require[d] . . . to consider whether the coverage determination at issue is consistent with earlier interpretations of the plan.").

In short, beyond the plain language, "numerous indicia," *New Valley*, 89 F.3d at 152, confirm what settled contract principles hold: CSC's claim that it acted reasonably in "avoid[ing] its express contractual obligations" cannot be endorsed,

Carr, 816 F. Supp. at 1494. Absent a specific provision granting the employer an "explicit right" to terminate or amend the plan "even after retirement," a company cannot renege on its obligations by changing the terms of the plan after an employee has retired. *New Valley*, 89 F.3d at 151. CSC's effort to do that here should be rejected.

II. The district court improperly refused to certify the class.

When it came time to address class certification, the district court made several more crucial analytical errors. Initially, the court agreed that the proposed class in this case "clearly satisfie[d]" both Rule 23's commonality and typicality requirements. After all, the case turned on a single "common question" that "applies" to the entire class of retired employees: "whether the 2012 Amendment is valid." JA1693. But, in the course of its Rule 23 analysis, the district court developed a core theory for why denial of the class was required: a "hypothetical" and "speculative" conflict existed between the named plaintiffs and some retirees. JA1701. Because some retired employees' accounts had (at least temporarily) performed better under the high-risk interest rates than they otherwise might have, the court speculated that these retirees "might prefer" to maintain the new status quo. JA1703. As a result, the court ruled that the named plaintiffs were not adequate representatives for the class. JA1709. But this theory does not hold up,

and the district court abused its discretion in relying on it to defeat class certification.

A. The district court's analysis does not comport with the standards governing Rule 23's adequacy requirement.

The district court speculated that this litigation would lead to a "winners and losers" scenario within the class. *See Laumann v. Nat'l Hockey League*, 105 F. Supp. 3d 384, 399-408 (S.D.N.Y. 2015) (discussing the theory). On the one hand, the district court reasoned, those retired employees whose accounts outperformed the Merrill Lynch Index might want to retain the "economic benefit" of the illegal amendment. JA1702. On the other, those class members whose accounts suffered (including the named plaintiffs) would want to invalidate the amendment and restore the safer terms in effect when they retired. In the district court's view, because the relief sought by the named plaintiffs—"a return to the Merrill Lynch Index crediting rate"—could very well end up "working a harm" on those absent class members whose accounts grew, the two groups' interests were fatally antagonistic. JA1703 (internal quotations omitted). This reasoning is flawed.

To begin, the district court's rationale here—that the "the relief" sought triggered a disabling conflict—disregards the controlling rule in this circuit that "[p]otential conflicts relating to *relief issues* which would arise only if the plaintiffs succeed on common claims of liability on behalf of the class will not bar a finding of adequacy." *Gunnells*, 348 F.3d at 431 n.7 (internal quotations omitted) (emphasis

added); *see also Int'l Woodworkers of America v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1269 (4th Cir. 1981) ("Mere speculation as to conflicts that might develop at the remedy stage is insufficient to support denial of initial class certification.").

That rule deals a fatal blow to the district court's ruling. There is no way to conceive of the district court's identified conflict here as anything but one "relating to relief issues." *Id.* In the district court's own words, the conflict was "among the putative class members with respect to whether the relief plaintiffs seek here will be a benefit or a harm to these members." JA1699. And, there is also no question that the potential conflict would "arise only if" the named plaintiffs here "succeed on common claims of liability on behalf of the class." *Gunnells*, 348 F.3d at 431 n.7. Given this, the district court's reliance on the conflict to defeat Rule 23's adequacy requirement is, standing alone, reversible error. *See Brown v. Nucor Corp.*, 576 F.3d 149, 159 (4th Cir. 2009) (reversing district court's class certification denial because potential conflict among class members over possible relief "should not defeat class certification").

It is, of course, true that a "fundamental" conflict can serve as the basis for denying certification. *See Gunnells*, 348 F.3d at 430. For instance, when a class includes members whose *claims* are for a different type of relief than the claims of the putative class representatives, "it is possible that the differences create a conflict of interest disabling the representative from adequately representing the entire

class." 1 William B. Rubenstein, *Newberg on Class Actions* § 3:59 (5th ed. 2016)). That type of conflict is considered fundamental because the proposed representative "would have an incentive to maximize" his own recovery at the risk of "sacrificing the strength" of a separate claim held by an absent class member. *Id.*

But courts have routinely drawn a distinction between such fundamental conflicts (which can defeat certification) and those that involve similar class-wide claims just with potential differences in relief (which cannot). "[C]onflicts that may develop at the remedy stage," the Ninth Circuit has explained, are "insufficient to support denial of initial class certification." *Cummings*, 316 F.3d at 896. The Third Circuit, too, has declined to accept this relief-based argument as a basis for denying class certification. *See In re K-Dur Antitrust Litig.*, 686 F.3d 197, 223-24 (3d Cir. 2012), *vacated on other grounds sub nom.*, *Upsher–Smith Labs., Inc. v. Louisiana Wholesale Drug Co.*, —— U.S. ——, 133 S. Ct. 2849 (2013) (mem.), *reinstated sub nom.*, *In re K–Dur Antitrust Litig.*, 2013 WL 5180857 (3d Cir. Sept. 9, 2013). Defendants often "contend that the interests of class members" diverge when it comes to relief, but "such potential conflicts" do not "afford a valid reason," at the class certification stage, "for refusing to certify the class." *Blackie v. Barrack*, 524 F.2d 891, 908, 910 (9th Cir. 1975) (observing that "[c]ourts faced with the same situation have repeatedly, either explicitly or implicitly, rejected defendants' position, for the potential conflict is present in most prolonged classes").

Nevertheless, the district court analogized this case to several decisions in which "a divergence of economic interests between the named plaintiff and absent class members" was held to create a disabling conflict. *See* JA1698 (citing *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1190 (11th Cir. 2003), *Bieneman v. City of Chicago*, 864 F.2d 463, 465 (7th Cir. 1988), and *Phillips v. Klassen*, 502 F.2d 362, 366 (D.C. Cir. 1974)). But the district court was wrong to rely on these cases. As an initial matter, they cannot overcome this circuit's own contrary rule—a point other circuits (and district courts) have themselves made forcefully. *See K-Dur*, 686 F.3d at 223 ("reject[ing] the *Valley Drug* decision" because it conflicts with controlling case law and the weight of authority); *In re Skelaxin (metaxalone) Antitrust Litig.*, 292 F.R.D. 544, 553 (E.D. Tenn. 2013) (noting that "the *Valley Drug* decision has not been widely embraced" and refusing to follow either it or *Phillips*).

More pertinently, these cases provide no support for the district court's denial of class certification. Unlike the *Valley Drug* line of cases, *all* the class members in this case suffered injury. *See Laumann*, 105 F. Supp. 3d at 401 (explaining that what "sets the[*Valley Drug* cases] apart" is "the presence of class members who, in the actual world, suffered no injury"). The district court, of course, disagreed, stressing that it could see no injury for those who might prefer the "four-option system" with which CSC replaced its "virtually risk-free" Merrill Lynch Index.

But one global injury unquestionably affects the entire class—CSC's decision to impermissibly transform its top-hat plan into an illusory contract. Regardless of its economic effects, that "general injury" touches "every class member" because, if the plan is illusory, all retirees are at risk: CSC is free to impose any future amendments on them without limitation. *See Laumann*, 105 F. Supp. 3d at 401; *see also* JA1693 (agreeing that the this issue "applies" to all participants). And, although some within the class, like the named plaintiffs, may have also suffered "*additional* injuries," that others (even arguably) did not is "irrelevant" for Rule 23 purposes. *Laumann*, 105 F. Supp. 3d at 401, 406. "Put simply," CSC's effort to turn its top-hat plan into an illusory contract "is universal," and it is the "common injury" that "unites the class" and takes this case out of *Valley Drug's* (dubious) wake. *Id.* at 400-01. By focusing on the existence of other "additional" injuries, the district court lost the forest for the trees.

Contrary to the district court's view, then, the crucial question concerning adequacy, for Rule 23 purposes, is whether, "at the beginning of the case," the class "appear[s] united in interest against an outsider." 7A Wright, Miller & Kane, *Federal Practice and Procedure* § 1768. If so, "a potential conflict" between the representatives and some class members at a later stage "should not preclude the use of the class-action device." *Id.*

There is good reason for this rule. The premise of the district court's conflict theory was that some retirees would "stand to benefit" from CSC's improper attempt to apply the crediting rate change to retired employees' account. In the district court's view, these class members "might prefer" the new regime even if it was delivered illegally. JA1702 (speculating about what class members might think of the new crediting rate). But that is not a legitimate basis for denying class certification. "[I]t will almost always be the case" that some class members might prefer "the status quo for some reasons." 1 *Newberg on Class Actions* § 3:64. Yet this "form of conflict should not preclude a finding of adequacy on merely speculative terms." *Id.* Were it otherwise, absent class members insisting on the "continuation of an allegedly unlawful practice" could always thwart class certification. *Ruggles v. WellPoint, Inc.*, 272 F.R.D. 320, 338 (N.D.N.Y. 2011) (holding that adequacy is "not undermined" by this possibility); *see also Srail v. Village of Lisle*, 249 F.R.D. 544, 552 (N.D. Ill. 2008) ("[A] judge may not refuse to certify a class simply because some class members may prefer to leave the violation of their rights unremedied.") (internal quotation marks omitted)

In short, the district court's approach "confuses the question of whether a common injury unites the class with the distinct question of whether all class members agree about how best to *respond* to the injury." *Laumann*, 105 F. Supp. 3d at 400. "It is the former, not the latter, that drives the Rule 23 analysis." *Id*. By

focusing on the downstream economic interests of class members, the district court mistakenly recast "the balance of economic effects as an issue of adequacy under Rule 23(a), rather than a merits issue" and therefore contravened Rule 23's requirements. *Id.* at 403 (the claim that certain plaintiffs may "benefit from the defendants' practices," is "not properly addressed to the adequacy of the named plaintiffs to represent the class") (alterations omitted).

B. The "speculative" conflict identified by the district court cannot defeat class certification.

Despite overlooking this governing framework, the district court nevertheless ran straight into the reason for its existence: To prevent class certification decisions based on speculation and conjecture. Analyzing the potential conflict here, the court candidly acknowledged that any comparison between winners and losers would necessarily be "hypothetical" and "speculative." JA1702. Why? Because "[w]hether a participant wins or loses" can only be determined upon "final distribution"—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). In the court's eyes, this uncertainty proved the legitimacy of the conflict. That is wrong.

As this Court has explained, "a conflict will not defeat the adequacy requirement if it is 'merely speculative or hypothetical.'" *Ward*, 595 F.3d at 180

(quoting *Gunnells*, 348 F.3d at 430); *see* 1 *Newberg on Class Actions* § 3:58 ("Conflicts that are merely speculative or hypothetical will not affect the adequacy inquiry."). To the contrary, a conflict "must be manifest at the time of certification rather than dependent on some future event or turn in the litigation that might never occur." 1 *Newberg on Class Actions* § 3:58; *see also Ward*, 595 F.3d at 180 (denial of class certification improper where "conflict rests on the uncertain prediction" that a lawsuit will cause economic harm that will "adversely affect some members of the class"); *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 680 (7th Cir. 2009).

The district court's own speculative discussion illustrates the point. In support of its decision to deny class certification, the district court offered a grab bag of potential ways—all untethered from the record—in which class members might "prefer" the new (even if illegal) crediting rate options. For instance, it suggested that some retired employees "might subjectively value the flexibility under the 2012 Amendment for its own sake." JA1703. "[S]till other[s]," it insisted, "might prefer the potential under the 2012 Amendment to make investment decisions that outperform the Merrill Lynch Index." JA1703. And, finally, "for some putative class members[,] the possibility of a higher reward might justify the acceptance of a higher risk." JA1703.

These inferences, though, only show why the district court's reliance on the "conflict" was misguided. Embracing a rule (as the district court did here) that, at

the certification stage, a plaintiff must affirmatively prove that no absent class members oppose the relief would make certification of virtually *any* class impossible. Without knowing whether any class members actually embrace these views, denying certification was premature.

C. Other mechanisms are available to protect absent class members where necessary.

Should any fundamental conflict arise down the road, valid mechanisms exist to protect both the court and absent class members. The district court found these mechanisms "of little use at this point," but that just reinforces how premature its decision really was. JA1709.

For instance, the opt-out provision in Rule 23(c)(2)(B) "is an important method for determining whether alleged conflicts are real or speculative. It avoids class certification denial for conflicts that are merely conjectural and, if conflicts do exist, resolves them by allowing dissident class members to exclude themselves from the action." *Natchitoches*, 247 F.R.D. at 268-69 (quoting 1 *Newberg on Class Actions* § 3.30 (4th ed. 2002); *see Gunnells*, 348 F.3d at 420 (explaining that the rule "permits members of a class" to "opt out of the class, providing an option" for those class members who require a "more individualized inquiry"). And, in the event of a settlement, a court can offer a new opportunity for class members to request exclusion pursuant to Fed. R. Civ. P. 23(e)(4).

Other means for protecting the class are also readily available. A court, for example, has the right to require subclassing if fundamental conflicts do in fact arise. *See* Fed. R. Civ. P. 23(c)(5). And subclasses can even be created after an initial grant of class certification. See Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment"). What's more, a conflict that is "too speculative" at the certification stage can always be "reconsider[ed]" later, if the conflict becomes clearer. *Cummings*, 316 F.3d at 896.

Given the "common question" at the heart of this case, the district court's belief that no class would serve the interests of the retirees cannot be right. At a minimum, "[i]f there are any doubts about adequate representation or potential conflicts," courts should "resolve them in favor of upholding the class, subject to later possible reconsideration." 1 *Newberg on Class Actions* § 3:55. Reversing the district court here would allow it to adequately police any concrete conflicts if they arise in the future.

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

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December 5, 2016

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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 13,395 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). 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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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2016, I electronically filed the foregoing redacted 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.

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