

# Exhibit G2



## I. THE PARTIES

The Plaintiffs are Jon Hoak, Anthony Fano, Allan Quick, Patricia Giering, and Nancy Parin. (*See* Fourth Amended Complaint, Doc. 216). In a September 27, 2017 order, the Court certified a Class and a Subclass. The Class, certified specifically for Count II of Plaintiffs' complaint, was defined as follows:

All participants, former participants, beneficiaries and spouses or eligible spouses, as defined in either (a) the NCR Senior Executive Retirement, Death and Disability Plan, (b) the Retirement Plan for Officers of NCR, (c) the NCR Nonqualified Excess Plan, (d) the NCR Mid-Career Hire Supplemental Pension Plan, or (e) the NCR Supplemental Pension Plan for AT&T Transfers who received or were entitled to receive lump sum payments from NCR as a result of the termination of NCR's nonqualified plans.

(Doc. 83 at 32).<sup>1</sup> The Court refers to the nonqualified plans falling within the Class definition collectively as the "Plans."

The Subclass, certified specifically for Count I of Plaintiffs' complaint, was defined as follows:

All participants, former participants, beneficiaries and spouses or eligible spouses as defined in the NCR Senior Executive Retirement, Death and Disability Plan, and all participants, former participants, beneficiaries and spouses or former spouses as defined in the Retirement Plan for Officers of NCR who were participants in the plan at least one year prior to September 13, 1991 and were participants and active employees at least through January 1, 1995.

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<sup>1</sup> There appear to be 197 members in the Class: the 193 participants/beneficiaries who originally received lump sums upon termination (*see* Doc. 83 at 12), and the four "Eligible Spouse[s]" divorced after commencement of benefits, including Plaintiffs Giering and Parin, who did not originally receive lump sums but should have (*see* Doc. 126 at 27).

*(Id.)*

Because each of them was a participant or beneficiary in one or more of the Plans, Plaintiffs Hoak, Fano, Giering, and Quick were appointed as the representatives for both the Class and Subclass. *(Id.)*

The Defendant is the Plan Administrator of the Plans of NCR Corporation. Technically, NCR Corporation no longer exists in the same form it did at the onset of this case, having been split on October 16, 2023 into two companies: NCR Voyix Corporation and NCR Atleos Corporation.<sup>2</sup> In a Stipulation filed with the Court on October 16, 2023 — signed by Eric Gutierrez, Global Vice President, Total Rewards for NCR Corporation — the Defendant declared under penalty of perjury as follows:

- “The Plan Administrator of the Plans of NCR Corporation will continue to exist after the contemplated spinoff of NCR Atleos, LLC (‘NCR Atleos’) from NCR Corporation on October 16, 2023 (the ‘Spinoff’), in which NCR Corporation will be renamed NCR Voyix Corporation (‘NCR Voyix’).”
- “After the Spinoff, the Plan Administrator of the Plans of NCR Corporation will have the power and authority to pay or cause to be paid from the general assets of NCR Voyix any additional benefits that the Court determines are owed under the terms of [the Plans] to Plaintiffs and the members of the certified class they represent.”

*(See Doc. 227-1 at ECF 2-3).*

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<sup>2</sup> See <https://investor.ncr.com/static-files/410629ba-8801-42f8-8b69-543b11566669> (March 4, 2024 NCR Voyix Corp. 8-K at PDF 6) (describing spinoff).

## II. AVAILABLE RELIEF

On behalf of themselves and the Class, Plaintiffs seek relief under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). (*See* Summary Judgment Order, Doc. 228 at 47; Order on Motion to Dismiss, Doc. 26 at 18 (construing Plaintiffs’ claims as being brought under ERISA § 502(a)(1)(B)). In their operative Fourth Amended Complaint, Plaintiffs seek a series of declarations on the meaning of certain terms in the Plans and that Defendant breached those terms when terminating the Plans, as well as an order requiring Defendant to pay additional benefits under the terms of the Plans consistent with the Court’s declarations. (*See* Doc. 216 at 27-29).

ERISA § 502(a)(1)(B) provides that “a civil action may be brought ... by a participant or beneficiary ... to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.” 29 U.S.C. § 1132(a)(1)(B). “The nature of an action under section 502(a)(1)(B) is for the enforcement of the ERISA plan.” *Blake v. Unionmutual Stock Life Ins. Co. of Am.*, 906 F.2d 1525, 1526 (11th Cir. 1990). “[A]n action ‘to enforce’ means an action to compel someone to do something or not to do something ... that ERISA or the plan requires be done or not done.” *Gulf Life Ins. Co. v. Arnold*, 809 F.2d 1520, 1523 (11th Cir. 1987).

The Eleventh Circuit has held that “the relief provided in an action to recover benefits under ERISA is equitable, not legal,” and that “the relief consists of an order

directing a person or entity having the necessary authority under the benefit plan to pay the participant the benefit that he seeks.” *Hunt v. Hawthorne Assocs., Inc.*, 119 F.3d 888, 907 (11th Cir. 1997). “Given the equitable nature of [a] recovery-of-benefits claim under ERISA, ... an *in personam* order enjoining the payment of benefits under section 502(a)(1)(B) ... must issue against a party capable of providing the relief requested.” *Id.* at 908 (describing appropriate relief under § 502(a)(1)(B) as “an injunctive order to pay benefits”).

In light of Defendant’s Stipulation that it has “the power and authority to pay or cause to be paid ... any additional benefits that the Court determines are owed under the terms of [the Plans] to Plaintiffs and the members of the certified class,” (Doc. 227-1 at ECF 3), the Court may order and enjoin Defendant to pay Plaintiffs and the Class additional benefits consistent with the Court’s findings of law and declarations in the Summary Judgment Order—i.e., to “enforce” their rights under the Plans and allow them “to recover benefits due” under the Plans. 29 U.S.C. § 1132(a)(1)(B).

### **III. RELIEF ON COUNT II**

#### **A. Findings of Law and Declarations**

In the Summary Judgment Order (Doc. 228), the Court made a number of findings of law on the plain meaning of the terms of the Plans and Defendant’s breach of those terms, including the following:

- “Upon review, the Court finds that a careful reading of the language that is (and is not) in the Plans supports Plaintiffs’ interpretation that Defendants were not permitted to unilaterally convert the promised fixed life annuity benefits to actuarially equivalent lump sum payments upon Plan termination,” *id.* at 29;
- “[T]here is no Plan language indicating that the Parties *ever* contemplated that participants’ accrued benefits would be issued in any form *other than* a life annuity — *even upon Plan termination*,” *id.* at 30;
- “[T]he specific, mandatory ‘shall’ provisions [in the Plans] indicate that the Parties intended the ‘accrued benefit’ take the form of life annuities, and nothing else,” *id.* at 33;
- “Defendant was obligated under the Plans to pay Plaintiffs and class members set monthly payments for life, regardless of how long any particular beneficiary lived,” and “Defendant was not authorized to change the terms of the contract absent a specific provision authorizing it to do so,” *id.* at 27-28;
- “Defendant was only permitted to terminate the Plans provided that ‘no such action shall adversely affect any Participant’s, former Participant’s or Eligible Spouse’s accrued benefits prior to such action under the Plan,’” *id.* at 28;
- “Plan termination could not adversely affect *even one* participant’s established life annuity benefit,” *id.* at 34;
- “Defendant was not permitted to take actions that ‘influenced or changed in a negative or harmful way’ Plaintiffs’ ‘accrued benefits,’” *id.* at 36;
- “[T]he absence of longevity and investment risks were inherent aspects of the ‘accrued benefits’ (the life annuities) bargained for and promised under the Plans,” *id.* at 37;
- “In eliminating those key components of their life annuities, Defendant, in a very real-world way, ‘adversely affected,’ or changed for the worse, Plaintiffs’ ‘accrued benefits,’ *id.*;

- “[A] life annuity is different in kind than a lump sum, and ... the inherent benefits of a life annuity (specifically related to the absence of longevity and investment risk) are reflected in the cost of the replacement annuity options,” *id.* at 40;
- “Defendant was not permitted to unilaterally convert Plaintiffs’ promised life annuities to actuarially equivalent lump sums,” *id.* at 45;
- “Defendant breached the terms of the Plans when it converted Plaintiffs’ life annuities to alleged actuarially equivalent lump sum payments,” *id.* at 46;
- “Defendants could have complied with ... the language of the Plans ... by purchasing replacement annuities with insurance companies or even by providing the Plaintiffs with a sufficient amount of money to purchase equivalent replacement annuities themselves,” *id.* at 44;
- “[E]ven if NCR had been permitted to swap Plaintiffs’ life annuities for lump sums, it was not permitted to settle its contractual obligations by paying less than the value of the life annuities based on its own default risk,” *id.* at 46-47;
- “NCR’s default risk was plainly not an aspect of the fixed, static ‘accrued benefits.’ If it had been, the ‘accrued benefit’ amounts would have fluctuated based on NCR’s credit rating and default risk (which was not the case),” *id.* at 37;
- “Defendant’s use of a 5% discount rate based on its own risk of default violated the Plan terms ...,” *id.* at 47.

These findings of law ultimately resulted in two declarations:

- “[T]he Plans required Defendant to, upon Plan termination, provide Plaintiffs and class members the accrued benefits guaranteed under the Plans, specifically in the form of replacement life annuities or amounts sufficient to purchase such replacement annuities,” *id.* at 47-48;
- “Defendant breached its agreements with the Plaintiffs and class members when it adversely affected their accrued benefits and paid them lump sums that did not deliver to Plaintiffs the accrued benefits to which they were entitled under the Plans,” *id.* at 47.

**B. Appropriate Corresponding Relief**

Plaintiffs do not dispute that Defendant could voluntarily terminate the Plans. (See Summary Judgment Order, Doc. 228 at 28). Accordingly, Plaintiffs do not ask the Court to reverse the termination or to reinstate the Plans. Rather, Plaintiffs ask the Court to order Defendant to deliver the additional benefits they and other Class members were due under a proper termination of the Plans — that is, if NCR’s benefit obligations were settled in a way that did not “adversely affect” any participant’s life annuity “accrued benefit” prior to termination, as the Plans required. (See, e.g., Doc. 152-1 at ECF 49; Doc. 216 at 28, Requests (v) & (vii)).

Through the findings of law and declarations in the Summary Judgment Order, the Court has determined that a proper termination and settlement of the Plans should have delivered to each participant either a replacement life annuity that reproduced his or her existing “accrued benefit” or a sum sufficient to allow the participant to purchase such a replacement life annuity, ignoring tax consequences. (See Summary Judgment Order, Doc. 228 at 41-42 (noting that Plaintiffs do not dispute that tax losses do not fall within the relief available to redress violations of ERISA)).

Purchasing replacement annuities that would have begun periodic payments a decade ago is no longer feasible or even possible.<sup>3</sup> Nor does it make any sense for the Court to Order NCR to reinstate the Plans and annuities (thereby treating them as having never been terminated), as Defendant proposes. Defendant's alternate proposal is based on the incorrect premise that Plaintiffs challenged Defendant's right to terminate the Plans. That is not the breach Plaintiffs asserted in this case. As discussed at length in the Summary Judgment Order, Defendant was fully permitted to terminate the Plans. Plaintiffs do not argue otherwise and have never requested that the Court order Defendant to reinstate the annuities. Instead, as the Court found, to comply with the Plans, Defendant was required to either purchase Plaintiff replacement annuities *or provide Plaintiffs enough money to purchase equivalent annuities themselves*. (Doc. 228 at 48). Therefore, the appropriate way to put Plaintiffs in "as good a position as [they] would have been in had the contract been performed," *see* Restatement (Second) of Contracts § 344, is to provide Plaintiffs with the difference between the lump sums they received and the cost of replacement annuities.<sup>4</sup>

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<sup>3</sup> Moreover, an actual replacement annuity in 2013 and a monetary amount sufficient to purchase such an equivalent replacement annuity are interchangeable in terms of value. The benefits of a lack of longevity and investment risk are baked into the cost of a replacement annuity, as discussed in the Summary Judgment Order.

<sup>4</sup> Besides that Defendant's proposed remedy does not fit the breach that occurred, it is an unworkable proposal. An attempt to recreate a world in which the Plans were

The Court must therefore decide how Defendant should calculate the sum that would have been sufficient to allow each participant to purchase a replacement annuity upon the Plans' termination. Plaintiffs have requested that the Court order Defendant to calculate that sum by reference to the present value of each participant's "accrued benefit" under the Plan at the time of termination using the discount rates prescribed by the Pension Benefit Guaranty Corporation ("PBGC") in terminations of defined benefit plans that provide life annuities. (*See* Doc. 152-1 at ECF 50-51; Doc. 216 at 28, Request (v).)<sup>5</sup>

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never terminated would involve complicated and disputed calculations related to the value of the lump sums Plaintiffs received in 2013 (which were taxed) versus the value of monthly annuity payments as they would have hypothetically occurred. Indeed, the parties' discussion of how to account for interest under this proposal makes the mind spin. The reality is that NCR *did* terminate the Plans (as it was permitted to) and paid out (insufficient) monetary amounts — and Class members likely adjusted their financial plans in response over the past 11 years. Even Defendant's own 2013 meeting notes understood that reinstating the annuities after a lawsuit was not an option. (*See* Project Omaha Meeting Notes, Doc. 138-55) (stating "[i]f NCR terminate[s] the plan, loss [sic] the lawsuit, can NCR [place] them back on payroll (reinstate the annuity)?; No, need to write another check including legal fees," and also noting that relief would be "difference b/w annuity and [lump sum]"). Considering all of these factors, Plaintiffs' requested relief is an appropriate and clear way to measure Plaintiffs' expectation interests and put Plaintiffs in as good of a position as they would have been in had the contracts not been breached.

<sup>5</sup> Defendant argues that Plaintiffs cannot pursue this form of relief because they did not calculate class-wide damages using this method. The Court rejects this argument. ERISA provides for *equitable* relief in the form of enforcing the terms of the Plan. ERISA § 502(a)(1)(B). Under this provision of ERISA, there is no requirement that Plaintiffs provide a class-wide "damages" model.

“When a pension plan is terminated as a result of a distress termination, the liabilities of the plan are assumed by the PBGC.” *In re U.S. Airways Grp., Inc.*, 303 B.R. 784, 787 (Bankr. E.D. Va. 2003). The PBGC’s valuation regulation requires the “plan administrator [to] value all benefits as of the valuation date by— (a) Using the mortality assumptions prescribed by § 4044.53 and the interest assumptions prescribed in appendix B to this part.” 29 C.F.R. § 4044.52.<sup>6</sup>

“The valuation regulation specifies use of the [prescribed mortality assumption], a discount rate which is updated monthly to reflect current annuity pricing, and a table of expected retirement age for plan participants.” *In re U.S. Airways*, 303 B.R. at 788. “The stated goal of the regulation is to generate a value which will ‘accurately approximate the cost of [single-premium] group annuity contracts’ that would pay the benefits promised under the terminated plan.” *Id.* (quoting 58 Fed. Reg. 5128).

The Bankruptcy Court for the Northern District of Georgia has described the PBGC’s methodology for deriving its discount-rate assumptions as follows:

In a nutshell and in general, PBGC obtains a quarterly survey conducted by a third party to determine current prices for single premium annuities charged by various insurance companies. Insurance companies do not publish the interest rates they use to determine such prices. PBGC averages those prices and then, working backward in effect, calculates

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<sup>6</sup> See also 29 C.F.R. § 4044.71 (providing that, for terminations of non-trusted plans, “[t]he value of a benefit which is to be paid as an annuity is the cost of purchasing the annuity on the date of distribution from an insurer”).

the rates for the specified ranges of years that would result in the average prices for such annuities .... ‘The interest rate that comes closest to generating a cost matching the average reported cost from the survey is then adopted as the discount rate.’

*In re Rhodes, Inc.*, 382 B.R. 550, 554 (Bankr. N.D. Ga. 2008) (quoting *In re U.S. Airways*, 303 B.R. at 788-89).

“The price of an annuity is a function both of mortality assumptions and of discount rates. The PBGC’s goal is not to discover the discount rate actually used by the insurers, but rather to arrive at a discount rate that, combined with the mortality assumptions embodied in the [regulation requirements], give the *same price* as the prices currently being quoted by insurance companies.” *In re U.S. Airways*, 303 B.R. at 789.<sup>7</sup>

In short, the PBGC’s valuation methodology provides a ready, reliable, and uniform means for estimating the market price of a replacement annuity for each participant in the Plans as of the Plans’ termination in February 2013. It does so by publishing discount rates derived from contemporaneous insurer surveys that should

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<sup>7</sup> As explained, the PBGC rates are designed to provide the appropriate price of annuities on the market and are not intended to discover the actual discount rate at issue. Further, the rates are intended to be forward looking projections of future interest rates. In contrast, the prejudgment interest rates, discussed in the next section, are intended to be backwards-looking as a measure to compensate individuals for lost use and income on money they should have had in the past. In light of these different measures and purposes, it does not make sense to use the same interest rates to determine the cost of replacement annuities and to determine prejudgment interest, as Defendant requests.

be used in combination with the PBGC's prescribed mortality assumptions to arrive at a present value of the terminated annuity that reflects the average price to purchase a replacement annuity in the private insurance market. *See* 29 C.F.R. § 4044.52. The Court will refer to applying this methodology to derive lump sums representing the price of individual replacement annuities as using the "PBGC Assumptions."

In February 2013, the PBGC's published discount rates were 2.67% for the first 20 years of payments and 3.01% thereafter.<sup>8</sup> The PBGC's discount rates are consistent with the implied discount rates derived from annuity prices that NCR's actuary, Aon, reported to Defendant in November 2012 based on its own survey data — which ranged from 2.43% to 2.73% for immediate annuities, and from 3.02% to 3.4% for deferred annuities. (*See* Doc. 136-29 at ECF 35). Defendant's actuarial expert in this case, Dr. Ethan Kra, produced a report sworn under oath in another case where he similarly asserted that, as of January 2013, "insurance company group annuity pricing was generally between 2 ½% and 3%." (Doc. 150-9 at ECF 17; Doc. 150-6 at ECF 169). Further, "application of [PBGC] rates results in a lower cost for

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<sup>8</sup> *See* <https://www.pbgc.gov/prac/interest/ida> (noting that the "select and ultimate interest rates are issued for the specific purpose of determining the present value of annuities in involuntary and distress terminations of single-employer plans, as discussed in 29 CFR 4044").

the replacement annuities than the quotes obtained by Defendant at the time of Plan termination.” (Summary Judgment Order, Doc. 228 at 48).<sup>9</sup>

The Court therefore finds that requiring Defendant to use the PBGC Assumptions is a fair and reasonable way to calculate the sum that would have been sufficient to allow each participant to purchase a replacement annuity at the time the Plans were terminated, and thus to serve as the basis for calculating the additional benefits Defendant must pay to Plaintiffs and Class members under the terms of the Plans.

In *Holloman v. Mail-Well Corp.*, 443 F.3d 832 (11th Cir. 2006), the Eleventh Circuit suggested that plaintiffs bringing ERISA § 502(a)(1)(B) claims could present “affirmative evidence—such as market annuity prices, or evidence of life expectancy estimates and discount rates used in the private market—to establish the true present value of the future payments or otherwise show that value of the lump-sum payment fell short of the value of” their terminated annuities. *Id.* at 840; *see also Hoefel v. Atlas Tack Corp.*, 581 F.2d 1, 7 (1st Cir. 1978) (holding, in a breach of contract action for wrongfully terminated life annuities, that “the cost of an individual annuity, competitively priced, is a fair and reasonable measure of

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<sup>9</sup> (See generally Doc. 136-31, including at ECF 6, 10-29) (showing that MetLife’s actual quote for the 91 Grandfathered participants was more than \$117 million, and three other estimates ranged from \$102 million to \$111 million, whereas the present value of the participants’ annuities using a 3% discount rate was less than \$96 million).

damages”). Plaintiffs have followed the Eleventh Circuit’s guidance here by proposing the PBGC Assumptions, as well as by presenting for comparison other contemporaneous data about the cost of replacement annuities around the time the Plans were terminated.

Accordingly, the Court **ORDERS** Defendant to calculate the benefits due to Plaintiffs and Class members upon the Plans’ termination using the PBGC Assumptions in effect as of the February 25, 2013 termination date.<sup>10</sup> Defendant should do so using the same participant and beneficiary data that it used in 2013 to calculate Plaintiffs’ and Class members’ original lump sums,<sup>11</sup> but substituting the PBGC Assumptions in place of the discount-rate and mortality assumptions Defendant used originally.<sup>12</sup> The Court further **ORDERS** Defendant to complete this calculation no later than **60 days** following the entry of this Order, and to demonstrate its compliance by filing a declaration from an appropriate representative

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<sup>10</sup> The PBGC-prescribed discount rates are found at <https://www.pbgc.gov/prac/interest/ida>. The PBGC-prescribed mortality tables are found at <https://www.pbgc.gov/prac/mortality-retirement-and-pv-max-guarantee/erisa-mortality-tables/erisa-section-4044-mortality-table-for-2013-valuation-dates>.

<sup>11</sup> Defendant already has spreadsheets reflecting relevant participant and beneficiary data and assumptions that it used to make the original lump sum calculations. (*See, e.g.*, Docs. 138-39, 138-40.)

<sup>12</sup> Those assumptions are described in the February 25, 2013 termination resolution (*see* Doc. 137-42 at ECF 2) and the “Plan Administrator Assumptions and Decisions Regarding Calculation of Lump Sums (4/15/2013)” (*see* Doc. 136-28 at ECF 2).

with knowledge attesting to completion and attaching (under seal) a schedule indicating for each participant and beneficiary the recalculated sum next to the originally calculated lump sum.

In addition, the Court **ORDERS** Defendant to distribute to Plaintiffs and Class members the additional benefits they were entitled to receive upon Plan termination, calculated by subtracting the original lump sum paid to each participant and beneficiary from the sum due pursuant to the preceding paragraph using the PBGC Assumptions in effect as of February 25, 2013. The Court further **ORDERS** Defendant to complete this distribution no later than **120 days** following the entry of this Order,<sup>13</sup> and to demonstrate its compliance by filing a declaration from an appropriate representative with knowledge attesting to completion and attaching (under seal) a schedule indicating each participant and beneficiary to whom the additional sums have been paid, along with the amount paid to each.

### **1. Prejudgment Interest**

Plaintiffs have requested that the Court award prejudgment interest on any additional benefits that Defendant is ordered to deliver to Plaintiffs and Class members. (*See* Doc. 216 at 28).

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<sup>13</sup> Defendant completed the original lump sum distribution in fewer than 120 days following termination on February 25, 2013. The original settlement date was June 1, 2013, and the original payment date for “grandfathered” participants was June 7, 2013. (*See* Doc. 136-28 at ECF 2).

“The award of prejudgment interest [in an ERISA claim] is a matter committed to the sound discretion of the trial court.” *Sosebee v. Life Ins. Co. of N. Am.*, 2021 WL 9721327, at \*1 (N.D. Ga. July 7, 2021) (citing *Moon v. Am. Home Assurance Co.*, 888 F.2d 86, 89-90 (11th Cir. 1989)); *see also Cheal v. Life Ins. Co. of N. Am.*, 330 F. Supp. 2d 1347, 1351-52 (N.D. Ga. 2004). “But in any event a trial court does not have unbridled discretion to deny the award.” *Zorn v. Principal Life Ins. Co.*, 2012 WL 662854, at \*2 (S.D. Ga. Feb. 28, 2012) (citation and quotations omitted). “[T]he decision as to whether to award pre-judgment interest should be grounded in the question of whether such an award would succeed in making the wronged party whole.” *Lyons v. Ga.-Pacific Corp. Salaried Emps. Ret. Plan*, 196 F. Supp. 2d 1260, 1271 (N.D. Ga. 2002). “[G]ood faith is not a defense to the assessment of prejudgment interest.” *Zorn*, 2012 WL 662854, at \*1 (citation and quotations omitted).

Here, the Court finds that it is appropriate to award prejudgment interest on the additional benefits that Defendant must pay to Plaintiffs and the Class. Class members, most of them retirees, have been wrongfully deprived of a portion of the retirement benefits due to them under the Plans for over a decade. Prejudgment interest would succeed in making Class members whole by compensating for the loss of use of their benefits and loss of potential investment opportunities caused by the delay.

The court “must next determine the rate of prejudgment interest.” *Kinser v. Plans Admin. Comm. of Citigroup, Inc.*, 2008 WL 762200, at \*1 (M.D. Ga. Mar. 18, 2008). “Because there currently exists no statutory provision that provides the rate of prejudgment interest, the Eleventh Circuit has endorsed the practice of looking to analogous state law provisions.” *Id.* (citing *Florence Nightingale Nursing Serv., Inc. v. Blue Cross/Blue Shield of Ala.*, 41 F.3d 1476, 1484 (11th Cir. 1995)). Courts in this district have looked “to Georgia’s statutorily mandated post-judgment interest rate for guidance.” *Id.* (citation omitted). O.C.G.A. § 7-4-12(a) provides that “[a]ll judgments in [Georgia] shall bear annual interest upon the principal amount recovered at a rate equal to the prime rate as published by the Board of Governors of the Federal Reserve System, as published in statistical release H. 15 or any publication that may supersede it, on the day the judgment is entered plus 3 percent.”

Courts in this district and other courts in the Eleventh Circuit have often applied the rate prescribed in O.C.G.A. § 7-4-12 when determining the amount of prejudgment interest to award in ERISA cases. *See, e.g., Zorn*, 2012 WL 662854, at \*2; *Kinser*, 2008 WL 762200, at \*1; *Waschak v. Acuity Brands, Inc. Senior Mgmt. Benefit Plan*, 2009 WL 2461038, at \*5 (N.D. Ga. Aug. 6, 2009), *reversed on other grounds Waschak v. Acuity Brands, Inc. Senior Mgmt. Benefit Plan*, 384 F. App’x. 919 (11th Cir. 2010); *Hamall-Desai v. Fortis Benefits Ins. Co.*, 2005 WL 8157396, at \*2 (N.D. Ga. Mar. 17, 2005). The Eleventh Circuit has affirmed a district court’s

use of the rate in O.C.G.A. § 7-4-12 as the prejudgment interest rate in an ERISA case. *See Smith v. Am. Int'l Life Assur. Co. of New York*, 50 F.3d 956, 958 (11th Cir. 1995).

Here, if the Court were to apply O.C.G.A. § 7-4-12(a) *without modification*, the prejudgment interest rate would be the current prime rate (8.5%) plus 3%, for a total of 11.5%.<sup>14</sup> Yet, such a mechanical application of O.C.G.A. § 7-4-12(a) is not appropriate upon consideration of the unique circumstances of this case alongside the purposes underlying a prejudgment interest award. Unlike many cases cited by the parties, this case involves a prejudgment interest period that spans over a decade, from 2013 to the present. In that time, the federal prime rate has fluctuated from 3.25% in 2013 to 8.5% at present.<sup>15</sup> For much of the relevant time, the prime rate was significantly lower than the current rate, and thus the current higher rate is not truly reflective of the overall period.

The purpose of prejudgment interest is to compensate Class members for the lost use and income on money they should have received in the past (here, starting in 2013). *See Ins. Co. of N. Am. V. M/V Ocean Lynx*, 901 F.2d 934, 942 (11th Cir. 1990) (noting that “[p]re-judgment interest is not a penalty, but compensation to the plaintiff for the use of funds that were rightfully his.”). And because an award of

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<sup>14</sup> *See* <https://www.federalreserve.gov/releases/h15/>.

<sup>15</sup> *See* [https://fedprimerate.com/wall\\_street\\_journal\\_prime\\_rate\\_history.htm](https://fedprimerate.com/wall_street_journal_prime_rate_history.htm).

prejudgment interest should be “compensatory rather than punitive, the award must be tempered by an assessment of the equities.” *Osterneck v. E.T. Barwick Indus., Inc.*, 825 F.2d 1521, 1536 (11th Cir. 1987) (internal quotations omitted), *aff’d sub nom. Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989).

Applying an 11.5% interest rate to the entire lengthy prejudgment interest period would overcompensate Plaintiffs (considering the outlier 8.5% current prime rate) and would allow the prejudgment interest award to cross the line from appropriate compensatory relief into an inequitable zone. At least some other courts have adjusted prejudgment interest awards because the current go-to rate was historically high or low, and thus not an appropriate measure. *See, e.g., Maryland Cas. Co. v. Mid-Continent Cas. Co.*, 2016 WL 10518592, at \*3 (D. Utah Sept. 21, 2016) (finding that a 10% award under the state statute would unfairly compensate the plaintiff “considering prejudgment interest in this case accrued during a period of historically low interest rates” and instead awarding prejudgment interest at the lower U.S. prime rate) *aff’d*, 725 F. App’x 699 (10th Cir. 2018); *Compulife Software, Inc. v. Rutstein*, 2021 WL 5830554, at \*1 (S.D. Fla. Oct. 20, 2021) (finding that the federal interest rate was at a historic low and would not fully compensate plaintiff so instead applying a higher rate based on the median of Florida interest rates during the relevant period).

Instead of applying an 11.5% rate as Plaintiffs request, the Court — exercising its wide discretion in this area — finds it appropriate to award an interest rate of **8.9%** over the relevant prejudgment interest period. This rate reflects a midpoint of 5.9% in the range of prime rates during the relevant time<sup>16</sup>, plus 3% consistent with O.C.G.A. § 7-4-12(a).

Accordingly, the Court **ORDERS** Defendant to add prejudgment interest at a rate of 8.9%, to all additional benefits due to Plaintiffs and Class members as a result of using the PBGC Assumptions in effect as of February 25, 2013.<sup>17</sup>

As to the timeframe during which prejudgment interest should accrue, Plaintiffs argue that: “[f]or each participant or beneficiary, prejudgment interest should accrue from the date the original lump sum was paid until the day final judgment is entered in this case,” which amounts to approximately 11 years. (Proposed Order, Doc. 231). Defendant argues that approximately 5.25 years should be deducted because Plaintiffs’ changed litigation theory caused significant delay.

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<sup>16</sup> See [https://fedprimerate.com/wall\\_street\\_journal\\_prime\\_rate\\_history.htm](https://fedprimerate.com/wall_street_journal_prime_rate_history.htm).

<sup>17</sup> Plaintiffs requested that the Court compound the rate annually to reflect the fact that the Class members could have received compound interest by investing their unpaid benefits. The Court declines to compound the rate annually, as doing so would also render the award more punitive than compensatory. See *Osterneck v. E.T. Barwick Indus., Inc.*, 825 F.2d 1521, 1536 (11th Cir. 1987), *aff’d sub nom. Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989) (declining to compound interest annually).

Upon review, the Court finds that Plaintiffs’ “morphed” theory caused some delay — but much less than Defendant’s suggest. The only concrete period of delay caused by Plaintiffs’ theory shift was approximately 315 days.<sup>18</sup> Besides this 315-day delay attributable to Plaintiffs, this case also experienced “delays inherent in the federal judicial system.” *See Osterneck*, 825 F.2d at 1536. The Eleventh Circuit has affirmed a district court’s consideration of such delays in reducing the period of time during which prejudgment interest should accrue. *Id.* Here, the parties’ briefs on the cross-summary judgment motions were submitted, and the Court heard oral argument, by July 27, 2021. (Doc. 209). However, due to overall COVID case backlog in the Court and the complexity of this case, the Court was unable to issue its summary judgment opinion until February 6, 2024. The Court therefore finds it appropriate to exclude 681 days from March 27, 2022 (eight months after the first

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<sup>18</sup> This is the number of days between when Plaintiffs filed their cross-summary judgment motion (Doc. 150) — asserting their adjusted theory — and the time Plaintiffs filed their Third Amended Complaint (Doc. 194), which the Court deemed necessary to align Plaintiffs’ theory with the operative complaint. The time it took for the Court to review and assess Plaintiffs’ changed theory and determine whether to allow Plaintiffs to proceed on that basis is delay attributable to Plaintiffs’ shift. On the other hand, and contrary to Defendant’s contentions, Plaintiffs’ adjusted theory did not cause any actual delay before the filing of Plaintiffs’ cross-summary judgment motion. And, as Plaintiffs correctly point out, they raised this ultimate theory as early as the administrative proceedings in 2013. (Doc. 138-15 at ECF 7-8).

summary judgment hearing<sup>19</sup>) through the date the summary judgment order was issued (February 6, 2024) from the relevant timeframe. The Court therefore excludes 996 days (315 + 681) for delay attributable to Plaintiffs' delay and "delays inherent in the federal judicial system." *See Osterneck*, 825 F.2d at 1536. Consequently, the timeframe during which prejudgment interest should accrue, for each participant or beneficiary, is from the date the original lump sum was paid until the date final judgment is entered in this case, minus 996 days.

The Court further **ORDERS** Defendant to distribute to Plaintiffs and Class members the additional sums they were entitled to receive upon Plan termination along with all accrued prejudgment interest on those additional sums, within the **120 days** allowed to complete such distributions pursuant to the Court's instructions above.

## 2. Post-Judgment Interest

Plaintiffs have also requested that the Court award post-judgment interest. (*See* Doc. 216 at 28).

Post-judgment interest serves a different purpose than prejudgment interest, in that it "serves to reimburse the claimant for not having received the money in hand on that day." *Bryant Motors, Inc. v. Blue Bird Body Co.*, 2009 WL 1796001, at \*3

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<sup>19</sup> Considering the complexity of this case, the parties could have expected to receive a ruling on the cross-summary judgment motions within 8 months of the summary judgment hearing.

(M.D. Ga. June 22, 2009) (citation and quotations omitted); *see also Camacho v. Nationwide Mut. Ins. Co.*, 188 F. Supp. 3d 1331, 1364 (N.D. Ga. 2016) (“[T]he purpose of post-judgment interest is to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant.”) (citation and quotations omitted).

Under 28 U.S.C. § 1961(a), “[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court.” The statute sets post-judgment interest “at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding[] the date of the judgment.” 28 U.S.C. § 1961(a). Such post-judgment interest “shall be compounded annually.” 28 U.S.C. § 1961(b).

The award of post-judgment interest is mandatory, not discretionary. *See, e.g., Caffey v. Unum Life Ins. Co.*, 302 F.3d 576, 586 (6th Cir. 2002) (“Under 28 U.S.C. § 1961, district courts are required to award post-judgment interest. ... The statute mandates the imposition of post-judgment interest, thus removing the award of such interest from the discretion of the District Court.”) (citation and quotations omitted); *Ford v. Alfaro*, 785 F.2d 835, 842 (9th Cir. 1986) (“Therefore, we construe the language of section 1961 to be mandatory in cases awarding post-judgment interest.”); *Genworth Life & Health Ins. Co. v. Beverly*, 547 F. Supp. 2d 186, 190 (N.D.N.Y. 2008) (“In contrast to pre-judgment interest, a prevailing party is entitled

to post-judgment interest as a matter of right. ... District courts have virtually no discretion to modify this rate.”) (citations omitted).

The Court therefore finds that Plaintiffs and Class members are entitled to post-judgment interest at the rate prescribed by 28 U.S.C. § 1961(a), which must be compounded annually. The 1-year constant maturity Treasury yield is published daily and can be found at <https://www.federalreserve.gov/releases/h15/>. The “weekly average” of that rate “for the calendar week preceding[] the date of the judgment” can be calculated, once the date of judgment is known, by reference to this published data. The weekly average rate applicable to the final judgment in this case will be referred to as the “Applicable Post-Judgment Rate.”

Accordingly, the Court **ORDERS** Defendant to add post-judgment interest at the “Applicable Post-Judgment Rate,” compounded annually, to all additional sums it has been ordered to pay—i.e., the additional benefits due under the Plans and prejudgment interest awarded thereon.<sup>20</sup> For each participant or beneficiary, post-

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<sup>20</sup> “[Plaintiff] is entitled to postjudgment interest under 28 U.S.C. § 1961(a) on the entire judgment entered in this case, including any interest that forms part of the judgment.” *Inns v. Anira Hotels, Inc.*, 2017 WL 406983, at \*6 (N.D. Ga. Jan. 31, 2017) (citing *Ins. Co. of N. Am. v. Lexow*, 937 F.2d 569, 572 n.4 (11th Cir. 1991) (finding that post-judgment interest should be awarded on the entire amount of the judgment, including award of prejudgment interest)); *see also Camacho v. Nationwide Mut. Ins. Co.*, 188 F. Supp. 3d 1331, 1364 (N.D. Ga. 2016) (“Plaintiffs are entitled to post-judgment interest under section 1961(a) on the entire judgment entered in this case, including interest given as an element of damages.”) (citations omitted).

judgment interest should accrue from the date the final judgment is entered in this case to the date that payment is made. The Court further **ORDERS** Defendant to distribute to Plaintiffs and Class members the additional sums attributable to post-judgment interest within the **120 days** allowed to complete all other distributions pursuant to the Court's instructions above.

#### **IV. ABSENCE OF ADDITIONAL RELIEF ON COUNT I**

In their operative Fourth Amended Complaint, Plaintiffs also assert “Count I: Improper Removal of the Trustee and Elimination of the Trusts.” (Doc. 216 at 25). The Court addressed the factual bases and evidence related to Count I in its Summary Judgment Order. (*See* Doc. 228 at 13-15). However, as the Court noted, neither party moved for summary judgment on Count I. (*Id.* at 19 n.8).

Aside from seeking a declaration that NCR breached the terms of two of the Plans when it terminated the Trusts and eliminated the Trustee, Plaintiffs do not seek any independent or additional relief arising from that declaration beyond payment of additional benefits owed under the terms of the Plans. (*See* Doc. 216 at 27-29). In their summary judgment briefing and at oral argument, Plaintiffs and their counsel stated that the resolution of Count I implicates the standard of review that should be applied under the terms of the Trusts — namely, *de novo* review with Defendant bearing the burden of proof. (*See* Summary Judgment Order, Doc. 228 at 19 n.8).

As the Court applied a *de novo* standard of review based on the plain meaning of the Plans' terms, the resolution of Count I has no bearing on the Court's Summary Judgment Order or the relief granted by this Order. Count I ultimately seeks the same relief as Count II — an order requiring payment of additional benefits — which the Court has granted. Since Count II provides Plaintiffs with an adequate remedy under ERISA § 502(a)(1)(B), Count I is duplicative of Count II. *See Jones v. Am. Gen. Life & Acc. Ins. Co.*, 370 F.3d 1065, 1073-74 (11th Cir. 2004) (explaining that, where § 502(a)(1)(B) provides adequate remedy, there is no separate claim under § 502(a)(3)).

Accordingly, the Court **DECERTIFIES** the Count I Subclass certified on September 27, 2017 (Doc. 82 at 32) and **DISMISSES** Count I without prejudice. To the extent the standard of review again becomes relevant, the Court may consider the allegations supporting Count I, as well as the terms of the Trusts, without treating Count I as a separate claim for relief.

## **V. ATTORNEYS' FEES AND COSTS**

In their operative Fourth Amended Complaint, Plaintiffs also request that the Court order Defendant to pay attorneys' fees and costs. (*See* Doc. 216 at 29). The parties stipulated and jointly moved the Court to postpone consideration and adjudication of any requests for attorneys' fees and costs until after the final judgment is entered or, in the event of an appeal, after the Eleventh Circuit issues its

mandate. (*See* Doc. 229.) On February 21, 2024, the Court adopted the parties' proposal and issued an order providing as follows:

- “If NCR does not appeal the Court’s Order and forthcoming final judgment, Plaintiffs’ motion for attorneys’ fees and costs shall be due 60 days after the Court enters final judgment. On the same date, Plaintiffs shall submit their proposal concerning notice to the certified classes. NCR’s response shall be due 30 days after Plaintiffs’ submissions.”
- “If NCR appeals the Court’s Order and forthcoming final judgment, the Parties’ joint or competing proposals for briefing all remaining issues, including Plaintiffs’ motion for attorneys’ fees and costs, shall be due 14 days after the Eleventh Circuit’s mandate is issued.”
- “Irrespective of which of the foregoing deadlines for remaining issues will ultimately apply, Plaintiffs are in the interim relieved of any deadlines for seeking attorneys’ fees and costs that may otherwise apply under Fed. R. Civ. P. 54(d), Local Rule 54, and Fed. R. Civ. P. 23(h).”

(Doc. 230 at 1-2.)

In light of the parties’ agreement and the Court’s order to defer consideration and resolution of issues related to Plaintiffs’ request for attorneys’ fees and costs, the Court “determines that there is no just reason for delay,” Fed. R. Civ. P. 54(b), and nothing prevents the entry of final judgment in this case.

## **VI. SUMMARY OF RELIEF AND DIRECTION TO ENTER FINAL JUDGMENT**

In light of the findings of law and declarations reflected in the Summary Judgment Order, the Court hereby grants Plaintiffs and the Class further relief as follows:

1. The Court **ORDERS** Defendant to calculate the benefits due to Plaintiffs and Class members upon the Plans' termination using the PBGC Assumptions in effect as of February 25, 2013. Defendant should do so using the same participant and beneficiary data that it used in 2013 to calculate Plaintiffs' and Class members' original lump sums, but substituting the PBGC Assumptions in place of the discount-rate and mortality assumptions Defendant used originally.

2. The Court **ORDERS** Defendant to calculate and add prejudgment interest at a rate of 8.9% to all additional benefits due to Plaintiffs and Class members as a result of using the PBGC Assumptions in effect as of February 25, 2013. For each participant or beneficiary, the interest should accrue from the date the original lump sum was paid until the day final judgment is entered in this case, with 996 days subtracted, as discussed in Section III.B.1 of this Order.

3. The Court **ORDERS** Defendant to complete the calculations of additional benefits due, along with prejudgment interest thereon, no later than **60 days** following the entry of this Order, and to demonstrate its compliance by filing a declaration from an appropriate party with knowledge attesting to completion and attaching (under seal) a schedule indicating for each participant and beneficiary the additional sum due according to Defendant's calculations, along with prejudgment interest consistent with this Order, next to the original lump sum paid.

4. The Court **ORDERS** Defendant to calculate and add post-judgment interest at the “Applicable Post-Judgment Rate,” compounded annually, to all additional sums it has been ordered to pay — i.e., the additional benefits due under the Plans and prejudgment interest awarded thereon. For each participant or beneficiary, post-judgment interest should accrue from the date the final judgment is entered in this case to the date that payment is made.

5. The Court **ORDERS** Defendant to distribute to Plaintiffs and Class members (1) the additional benefits due upon Plan termination, calculated by subtracting the original lump sums paid to each participant and beneficiary from the sums due using the PBGC Assumptions in effect as of February 25, 2013; (2) prejudgment interest on the additional benefits due upon Plan termination, calculated at a rate of 8.9%, from the date of original lump sum payment until the date of final judgment, minus 996 days; and (3) post-judgment interest on the sum of (1) and (2), calculated using the “Applicable Post-Judgment Rate,” compounded annually, from the date the final judgment is entered in this case to the date that payment is made to each participant or beneficiary.<sup>21</sup>


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<sup>21</sup> With respect to Class members Keith Taylor, Raymond Fitzsimmons, Sandra Black, and Mohsen Stephan, Defendant has presented some evidence that three of these individuals separately resolved their claims with NCR, and, in doing so, released their claims. Defendant also contends that Mr. Taylor’s claim is barred by *res judicata* based on the district court’s ruling in *Taylor v. NCR Corp.*, 2015 WL 5603040 (N.D. Ga. 2015). Defendant has therefore presented some evidence that it may have a valid defense to payment for these four Class members (*See* Doc. 232 at

6. The Court **ORDERS** Defendant to complete this distribution no later than **120 days** following the entry of this Order, and to demonstrate its compliance by filing a declaration from an appropriate representative with knowledge attesting to completion and attaching (under seal) a schedule indicating each participant and beneficiary to whom the additional sums have been paid, along with the amount paid to each.

All of Plaintiffs' claims having been finally resolved, the Court hereby **DIRECTS** the Clerk of Court to **ENTER FINAL JUDGMENT** against Defendant, the Plan Administrator of the Plans of NCR Corporation.<sup>22</sup>

**IT IS SO ORDERED** this 10th day of June, 2024.

  
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**Honorable Amy Totenberg**  
**United States District Judge**

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ECF 28-30; Docs. 233, 233-1, and 233-2). Accordingly, Defendant is specifically relieved of any obligation under this Order to automatically distribute additional benefits to these four individuals. Instead, **within 45 days from the date of this Order**, Defendant is **DIRECTED** deliver to Taylor, Fitzsimmons, Black, and Stephan correspondence (1) informing them of the Court's Summary Judgment Order and this Order; (2) attaching copies of both Orders; (3) informing them of Defendant's position on why they are prohibited by contract or law from recovering additional benefits under this Order; and (4) advising them to consult their own legal counsel to assess Defendant's position and decide whether to take any action to contest Defendant's position.

<sup>22</sup> To the extent necessary to render this judgment final, the Court "determines that there is no just reason for delay." Fed. R. Civ. P. 54(b).