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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 15, 2022 Decided April 4, 2023

No. 22-8001

IN RE: VALERIE R. WHITE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL., PETITIONERS

On Petition for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(f)
(No. 1:16-cv-00856)

Stephen R. Bruce argued the cause and filed the briefs for petitioners.

Jonathan K. Youngwood argued the cause and filed the brief for respondents.

Before: SRINIVASAN, *Chief Judge*, MILLETT, *Circuit Judge*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* MILLETT.

MILLETT, *Circuit Judge*: Valerie White, Eva Juneau, and Peter Betancourt sought class certification to pursue various claims against the Hilton Hotels Retirement Plan ("Hilton Plan") for what they say are unlawfully denied vested retirement benefits. The district court ultimately denied certification on the ground

that the plaintiffs had proposed an "impermissibly 'fail-safe'" class—that is, a class definition for which membership can only be ascertained through "a determination of the merits of the case," *In re Rodriguez*, 695 F.3d 360, 369–370 (5th Cir. 2012). *See White v. Hilton Hotels Ret. Plan*, No. 16-00856, 2022 WL 1050570, at *4 (D.D.C. March 22, 2022) (hereinafter "*White II*"). For example, a class defined as "those shareholders whom Company X defrauded" would be fail safe. If the named plaintiffs prevail on the merits by showing fraud, then the class is populated by all those with meritorious claims; if the named plaintiffs fail to prove fraud, there will be no class members to be bound by the adverse judgment.

White now seeks permission under Federal Rule of Civil Procedure 23(f) to appeal the district court's decision denying certification of a class. Finding this case an appropriate one for interlocutory review under Rule 23(f), we hold that the district court erred in enforcing an extra-textual limitation on class actions when faithful enforcement of Rule 23's specified terms and criteria for class actions would ensure the proper definition of a class early in the litigation that will be bound by a final judgment in the case.

I

A

Federal Rule of Civil Procedure 23 governs class action litigation in the federal courts. Rule 23(a) sets out four threshold requirements that all proposed

class actions must meet: numerosity, commonality, typicality, and adequacy of representation. *See* FED. R. CIV. P. 23(a); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997).

After passing that threshold, the proponents of a class must also show that the class qualifies as one of the three permitted types of class actions specified in Rule 23(b). *See* FED. R. CIV. P. 23(b)(1)–(3). A class can proceed under Rule 23(b)(1) if "prosecuting separate actions by or against individual class members" would cause confusion or in some way be impracticable. *See* FED. R. CIV. P. 23(b)(1). A Rule 23(b)(2) class is one that seeks declaratory or injunctive relief where "the party opposing the class has acted or refused to act on grounds that apply generally to the class." FED. R. CIV. P. 23(b)(2). Lastly, a Rule 23(b)(3) class is authorized where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3). This case concerns a request for certification under Rule 23(b)(2) as White seeks injunctive relief directing Hilton to vest and to recognize the putative class members' benefits. *See* Am. Compl. at 40–42.

Rule 23(c) provides that the decision to certify a class "must" be resolved "[a]t an early practicable time after a person sues or is sued as a class representative[.]" FED. R. CIV. P. 23(c)(1)(A). The order certifying a class "must define the class," as well as its claims,

issues, or defenses. FED. R. CIV. P. 23(c)(1)(B). The Rule also requires that notice be given to all members of a (b)(3) class and allows the court to direct notice to members of (b)(1) and (b)(2) classes. FED. R. CIV. P. 23(c)(2).

Rule 23(d) and (e) govern the litigation, settlement, and dismissal of a class action. *See* FED. R. CIV. P. 23(d), (e). And Rule 23(f) governs when and how parties can obtain review of "an order granting or denying class-action certification[.]" FED. R. CIV. P. 23(f).

B

Valerie White is a former Hilton employee who alleges that Hilton wrongfully denied her vested retirement benefits. Specifically, White argues that both the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. ch. 18 § 1001 *et seq.*, and court rulings in related litigation required Hilton to apply an "hours of service" standard to her "fractional" (partial) years of service rendered before 1976, which Hilton refused to do. *See* J.A. 41–46. This, White maintains, led Hilton to undercount her years of service with the company so that she fell just below the ten-year work period needed for retirement benefits to vest.

Eva Juneau is a former Hilton employee who spent some of her employment years at what Hilton terms a "non-participating" Hilton property, which is an affiliated business where employment does not count toward a Hilton retirement plan. Juneau only qualifies for vested retirement benefits if Hilton counts

service at its non-participating properties, which Juneau argues Hilton is bound to do by both ERISA and precedent.

Peter Betancourt is the son of Pedro Betancourt, who worked for Hilton for more than 30 years, but died without ever receiving retirement benefits from the company. This is because Hilton only recognized that it owed Pedro Betancourt retirement benefits when it was forced to review its records as part of a separate class action lawsuit against it. By that time, both Pedro and his wife, Peter Betancourt's mother, had passed. Still, when Peter Betancourt pursued a vesting claim on behalf of his late father, Hilton denied it because Peter was neither a beneficiary nor the surviving spouse of a beneficiary. Peter Betancourt asserts that denial violated ERISA.

White, Juneau, and Betancourt (collectively, "White") brought this putative class action under ERISA challenging Hilton's denials of retirement benefits to themselves and others who suffered denials on the same bases.[1]

In September 2018, the district court summarily denied without prejudice White's initial motion to certify a class action pending its disposition of White's motion to amend the complaint because any amendment

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[1] The claims are related to, but legally distinct from, those litigated in a separate class action over which the district court had previously maintained jurisdiction for seventeen years, ending in 2015. *See generally Kifafi v. Hilton Hotels Ret. Plan*, No. 98-1517 (D.D.C.).

could affect the contours of a class certification order. Order at 2–3, *White v. Hilton Hotels Ret. Plan*, No. 16-00856 (D.D.C. Sept. 28, 2018). The district court ultimately denied the motion to amend, but it granted White's request for leave to file a renewed motion for certification.

White then filed a renewed motion for class certification under Federal Rule of Civil Procedure 23(b)(2). White defined the proposed class as:

> [A]ny and all persons who:
>
> (a) Are former or current employees of Hilton Worldwide, Inc. or Hilton Hotels Corp., or the surviving spouses or beneficiaries of former Hilton employees;
>
> (b) Submitted a claim for vested retirement benefits from Hilton under the claim procedures ordered by the District Court and the Court of Appeals in *Kifafi, et al., v. Hilton Hotels Retirement Plan, et al.*, C.A. 98-1517; and
>
> (c) Have vested rights to retirement benefits that have been denied by the Hilton Defendants':
>
> > (1) [u]se of "fractional" years of vesting service under an "elapsed time" method to count periods of employment before 1976 with no resolution of whether the fractions constitute a "year of service" under ERISA;

> (2) [r]efusal to count "non-participating" service for vesting purposes notwithstanding that the service was with the "employer" under ERISA § 3(5), that the Hilton Defendants counted service at the same "Hilton Properties" in *Kifafi* and represented to this Court and the D.C. Circuit in *Kifafi* that Hilton had counted "non-participating" service with Hilton for vesting, and that the "records requested and received from Defendants do not identify any non-participating property that is also not a Related Company"; and
>
> (3) [d]enial of retroactive/back retirement benefit payments to heirs and estates on the sole basis that the claimants are "not the surviving spouse" of deceased vested participants.

Proposed Order on Class Certification, *White v. Hilton Hotels Ret. Plan*, No. 16-00856 (D.D.C. Jan. 31, 2020).

The district court declined to certify that class, but expressly did so without prejudice to a renewed motion to certify. The chief flaw identified by the district court was that the class definition was "impermissibly 'fail-safe[.]'" *White v. Hilton Hotels Ret. Plan*, No. 16-00856, 2020 WL 5946066, at *3 (D.D.C. Oct. 7, 2020) (hereinafter "*White I*"). In particular, the court objected to language that defined the class as those individuals who "have vested rights to retirement benefits that have been denied," given that whether retirement rights had vested was an issue to be resolved in the case. *Id.*

The district court afforded White a "final opportunity to renew [the] motion for class certification" in a manner that would cure the fail-safe problem in the class definition. *White I*, 2020 WL 5946066, at *1. The court also discussed "additional impediments to class certification it [had] identified at [that] stage of the litigation" for White to address, including commonality issues with one subclass and typicality issues with another. *Id.* at *1, *5–8.

White then filed an amended motion to certify. That motion edited the class definition to include individuals who:

> (a) Are former or current employees of Hilton Worldwide, Inc. or Hilton Hotels Corp., or the surviving spouses or beneficiaries of former Hilton employees;
>
> (b) Submitted a claim for vested retirement benefits from Hilton under the claim procedures ordered by the District Court and the Court of Appeals in *Kifafi, et al. v. Hilton Hotels Retirement Plan*, et al., C.A. 98-1517; and
>
> (c) Have **been denied** vested rights to retirement benefits ~~**that have been denied**~~ by the Hilton Defendants':
>
> > (1) [u]se of "fractional" years of vesting service under an "elapsed time" method to count periods of employment before 1976 with no resolution of whether fractions constitute a "year of service" under ERISA;

> (2) [r]efusal to count "non-participating" service for vesting purposes notwithstanding that the service was with ~~**the 'employer' under ERISA § 3(5)**~~ **a hotel property that Hilton operated under a management agreement**, that the Hilton Defendants counted service at the same "Hilton Properties" in *Kifafi* and represented to this Court and the D.C. Circuit in *Kifafi* that Hilton had counted "non-participating" service with Hilton for vesting, and that the "records requested and received from Defendants [do] not identify any non-participating property that is also not a Related Company"; and
>
> (3) [d]enial of retroactive/back retirement benefit payments to heirs and estates on the ~~**sole**~~ basis that the claimants are "not the surviving spouse" of deceased vested participants.

White II, 2022 WL 1050570, at *2–3.

The district court denied White's motion to certify on the ground that the proposed class definition remained impermissibly fail-safe. *White II*, 2022 WL 1050570, at *4. The court added that other Rule 23(a) "problems with the second and third proposed subclasses" identified in the prior order continued to trouble the class definition, but "the Court need not reach them[.]" *Id.* at *6 n.5.

Fourteen days after the denial of class certification, White filed with this court a petition under Rule 23(f) for permission to appeal the denial of class

certification. The district court, with the agreement of the parties, subsequently stayed its proceedings pending resolution of the petition on the ground that the question of "whether a fail-safe class definition is permissible is likely an 'unsettled and fundamental issue of law relating to class actions' for which the Court of Appeals might be more inclined to grant appellate review." Order at 2, *White v. Hilton Hotels Ret. Plan*, No. 16-00856 (D.D.C. April 13, 2022) (quoting *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 99–100 (D.C. Cir. 2002)).

II

The district court had jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1). We have jurisdiction to consider this interlocutory appeal under 28 U.S.C. § 1292(e).

III

At the outset, we must determine whether entertaining this interlocutory appeal is an appropriate exercise of our discretion under Federal Rule of Civil Procedure 23(f). After all, class certification orders are not final judgments. *See* 28 U.S.C. § 1291. Rather, both grants and denials of class certification are interlocutory orders, the likes of which appellate courts do not typically review prior to final judgment in a case. *Cf. id.* § 1292; *id.* § 1292(e). Rule 23(f), however, allows a party to file a petition for permission to appeal a

class-certification order "within 14 days after the order is entered[.]" FED R. CIV. P. 23(f).

Once a timely request for review is filed, the court of appeals may exercise its discretion to hear the appeal "on the basis of any consideration that the court of appeals finds persuasive." FED R. CIV. P. 23(f) & advisory committee's note; *see also* 28 U.S.C. § 1292(e).

This court adopted a framework for analyzing such requests in *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98 (D.C. Cir. 2002). There, we emphasized that "interlocutory appeals are generally disfavored as 'disruptive, time[-]consuming, and expensive' for both the parties and the courts," and expressed concern that an overly generous approach could lead to "micromanagement of complex class actions as they evolve in the district court and inhibition of the district court's willingness to revise the class certification for fear of triggering another round of appellate review." *Id.* at 105 (quoting *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000)).

Given those concerns, this court ruled that Rule 23(f) review will "ordinarily be appropriate" when: (1) "there is a death-knell situation for either the plaintiff or defendant[,]" in that the class-certification decision will effectively end the party's ability to litigate; (2) "the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review;" or (3) "the district court's class certification decision is

manifestly erroneous." *Lorazepam*, 289 F.3d at 105. We stressed, though, that those three categories only provide "guidance" and should not be treated as "a rigid test," since there may be "special circumstances" in future cases that also militate in favor of or against interlocutory review of a Rule 23(f) petition. *Id.* at 105–106.

Because the Rule 23(f) appeal in this case was timely filed, the question raised involves an important and recurring issue of law, the issue will likely evade end-of-case review for all practical purposes, and the circumstances taken as a whole warrant interlocutory intervention, we grant the petition for interlocutory review.

A

White's petition for review was timely. The district court entered its order denying class certification with prejudice on March 22, 2022, and White filed the petition for review on April 5, 2022, squarely within the fourteen-day time limit set by Rule 23(f).

To be sure, the district court had entered two earlier orders denying class certification without prejudice. *See* Order at 3, *White v. Hilton Hotels Ret. Plan*, No. 16-00856 (D.D.C. Sept. 28, 2018); *White I*, 2020 WL 5946066. But the district court was explicit in those orders that it had not yet conclusively resolved the class certification question. The first order simply recognized that a ruling on class certification would put the cart before the horse as the court had not yet ruled on

a pending motion to amend the complaint. Order at 2–3, *White v. Hilton Hotels Ret. Plan*, No. 16-00856 (D.D.C. Sept. 28, 2018).

The second order came as part of an ongoing dialogue between the district court and White over potential problems with the class definition. The district court denied certification without prejudice as part of an express invitation to reformulate the class definition in a way that would address the court's concerns. *White I*, 2020 WL 5946066, at *5.

In both instances, the district court made clear that it was not yet done deciding the class certification question, and that it wished to afford White a fair opportunity to formulate a class definition that could pass Rule 23 muster. Nothing in Rule 23(f)'s time limit suggests it was meant to intrude prematurely on the district court's judgment about how best to manage the progress of the case and to ensure that the Rules are administered "to secure the just, speedy, and inexpensive determination" of the action, FED. R. CIV. P. 1.

Hilton nonetheless argues that the petition was untimely. It reasons that the final March 22 order denying certification left "class action status unchanged from what was determined by [the] prior order" of October 7, 2020, and that "[a] later order that does not change the status quo will not revive the [fourteen]-day time limit." Hilton Br. 17–19 (citing *In re DC Water & Sewer Auth.*, 561 F.3d 494, 496 (D.C. Cir. 2009)); *see generally Strange on Behalf of Strange v. Islamic Republic of Iran, Interest Section*, 964 F.3d

1190, 1196–1197, 1202 (D.C. Cir. 2020) (for a 28 U.S.C. § 1292 interlocutory appeal, district court's rote recertification for appeal, without any substantive change in the order issued, did not restart the statutory deadline for seeking permission to appeal).

But the status quo did change between the October 2020 and March 2022 orders. The district court had not decided in its October order that a class could not be certified or that the problems with White's proposed class definition could not be cured. It ruled in that order only that the definition of the class needed to be adjusted and some other concerns addressed before a class could be certified. In the district court's words, the order afforded White "a final opportunity to renew [the] motion for class certification." *White I*, 2020 WL 5946066, at *1. So no definitive decision on class certification was made until the final order on March 22, 2022. That is a material difference.

Even more to the point, White changed the class definition after the October 2020 order. It was that new class definition that the district court considered and rejected for the first time in the March 2022 order of which White seeks review. And in denying that motion for class certification, the district court significantly changed the litigation status quo by definitively ending the prospect of class action status. In short, what matters is that, prior to the March 2022 order, the district court had not yet made up its mind whether a proper class could be certified in the case. In the March 2022 order, it confronted a new proposed class

definition and, in rejecting it, the court closed the door on class certification.

Nothing in *DC Water* says otherwise. In *DC Water*, there was only one order ruling on class certification. *See* 561 F.3d at 496. The defendant then moved for reconsideration, which the district court denied six months later. About seven months after the denial of the motion for reconsideration, the defendant filed a "Motion to Clarify the Relevant Class Members for Notice Purposes." *Id.* at 495. The district court summarily denied this last motion, and that is the decision for which the defendant sought Rule 23(f) review. We held that the petition—that came seventeen months after class certification was granted and sought review only of a denial of clarification—was out of bounds. The district court's decision did not restart the Rule 23(f) clock for the straightforward reason that it was not "an order granting or denying class action certification[.]" *Id.* at 496. The problem for the *DC Water* petitioner, in other words, was that it sought to use an order other than one granting or denying class certification to reup the Rule 23(f) time period.

In this case, by contrast, the March 2022 order was indisputably a denial of class certification within the plain meaning of Rule 23(f). So it started the fourteen-day clock for filing a Rule 23(f) petition. And White filed her petition with this court before the buzzer went off.

Reading Rule 23 as Hilton proposes—to require an interlocutory appeal before the district court is even

done wrestling with an issue—would make little sense. The disruption occasioned by interlocutory appeals would increase tenfold were parties obligated to petition for review from every non-prejudicial and expressly non-conclusive ruling on class certification issued by the district court, out of fear of losing the chance to appeal later the one ruling that actually resolves the matter. Hilton nowhere explains how requiring White to have sought review of both the October 2020 order and the final order of March 2022 would promote the district court's sensible management of litigation or this court's efficient handling of interlocutory appeals.

Think about it: Had White appealed after the first order denying certification, there would have been no reasoning by the district court for us to review and any ruling would have been hopelessly premature. Had White appealed after the second certification order, the district court's constructive efforts to work through the difficult class-certification questions and to fully consider the possible class definitions would have been derailed. Neither the text of Rule 23 nor logic supports requiring the filing of petitions for review before the district court finishes its class-certification decisionmaking.

B

Timeliness is necessary for White to be eligible for interlocutory review, but it is not sufficient. This circuit also requires those seeking interlocutory review to

demonstrate a "persuasive" reason for appellate intervention at this early juncture. *Lorazepam*, 289 F.3d at 102 (quoting FED R. CIV. P. 23(f) advisory committee's note). White has done so.

Turning to *Lorazepam*'s traditional factors, White's petition falls squarely within the second category of generally appropriate interlocutory petitions: Whether the district court properly adopted a rule against fail-safe classes is an unsettled, recurring, and "fundamental issue of law relating to class actions, important both to the specific litigation and generally, and one that is likely to evade end-of-the-case review." *Lorazepam*, 289 F.3d at 105.

To start, the question whether Rule 23 prohibits fail-safe classes is a fundamental issue of law relating to class actions. In this case, the district court relied solely on the fail-safe character of the class definition to deny the motion to certify. *See White II*, 2022 WL 1050570, at *4 ("[T]he Court concludes that Plaintiffs' proposed class remains impermissibly 'fail-safe,' as presently defined. This precludes certification."). So unquestionably, the existence of a fail-safe rule is important to the fate of *this* "specific litigation," *Lorazepam*, 289 F.3d at 105.

And no less so to class action litigation in general. While this court has not yet considered the question, nine other federal courts of appeals have issued varying opinions about such class definitions, demonstrating that the relevance of a class's fail-safe character is an important, recurring, and unsettled question of

class action law. *See*, *e.g.*, *In re Nexium Antitrust Litig.*, 777 F.3d 9, 22 (1st Cir. 2015) (endorsing a rule against fail-safe classes); *Byrd v. Aaron's Inc.*, 784 F.3d 154, 167 (3d Cir. 2015) (same); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 360 n.9 (4th Cir. 2014) (instructing district court to consider possibility of anti-fail-safe rule on remand); *Rodriguez*, 695 F.3d at 369–370 (rejecting rule against fail-safe classes); *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012) (endorsing rule against fail-safe classes, but rejecting defendant's proposed application); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012) (recognizing fail-safe problem, but noting it can and often should be resolved by refining class definition, not denying certification); *Orduno v. Pietrzak*, 932 F.3d 710, 716–717 (8th Cir. 2019) (endorsing rule against fail-safe classes as independent bar to class certification); *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1138 n.7 (9th Cir. 2016) (recognizing fail-safe problem as other side of coin to over-inclusiveness in class definition); *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1277 (11th Cir. 2019) (same).

Our district courts appear to be divided on the issue as well. *Compare White II*, 2022 WL 1050570, at *4, *with Ramirez v. United States Immigr. & Customs Enf't*, 338 F. Supp. 3d 1, 49 (D.D.C. 2018) ("[I]t is not clear why Defendants might be harmed or at all disadvantaged by Plaintiffs' reliance on a fail-safe class definition[.]"), *and Afghan & Iraqi Allies Under Serious Threat Because of Their Faithful Service to the United States v. Pompeo*, 334 F.R.D. 449, 464 (D.D.C. 2020)

(rejecting defendant's fail-safe argument as strain of implied ascertainability requirement that this circuit has never addressed). Perhaps that is why the district court in this case expressed the view that the fail-safe issue is the kind of fundamental question of class action law that it would be appropriate and helpful for this court to address. *See* Order at 3, *White v. Hilton Hotels Ret. Plan*, No. 16-00856 (D.D.C. April 13, 2022).

In addition, the fail-safe question is likely to evade end-of-the-case review.

To start, if the case is required to go forward as an individual action and the named plaintiffs prevail, they will have little incentive to bear the risk and expense of appealing the class certification denial. Especially since—even if they win on the merits and even if they also then win an appeal of the class certification decision—they would face the risk that the district court would find that their already-resolved claims are not typical of the other putative class members' or that they can no longer fairly and adequately represent the class given their different procedural posture. *See* FED. R. CIV. P. 23(a)(3) and (4). After all, neither party here has argued that the merits litigation would leave some distinct category of class claims unresolved, nor does the complaint suggest such a distinction. *Cf. Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 529 (D.C. Cir. 2006) (settlement agreement preserved "Plaintiff's class claim" distinct from its resolution of her "individual claims").

To be sure, we have held that a would-be class plaintiff who settles claims retains an interest in appealing a denial of class certification if an interest in spreading the costs of litigation remains. *Richards*, 453 F.3d at 529; *see United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 404–407, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980). But that interest in shared expenses is a different consideration from whether the already-successful plaintiff's legal interests in the merits of the case remain typical of the putative class members' unresolved legal claims to satisfy Federal Rule of Civil Procedure 23(a)(3) and (4). *See Geraghty*, 445 U.S. at 407 ("We need not decide here whether Geraghty is a proper representative for the purpose of representing the class on the merits.").

Of course, it is not *inconceivable* that a hearty plaintiff would assume the risk and successfully hurdle all of those obstacles. But the question under *Lorazepam* is not whether end-of-case review is impossible, only whether it is not "likely[.]" 289 F.3d at 105.[2]

For similar reasons, if the named plaintiffs lost their claims on the merits in individual litigation, they would have to possess the resources to continue litigating and also win the merits question on appeal to have any prospect of having the class certification question also reviewed. Otherwise, a merits loss on appeal will make consideration of the class-certification

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[2] The defendant that has opposed class certification here surely will not appeal the denial of class action certification either.

question academic. Nor could they viably choose to appeal just the important and fundamental class-certification question because, with the adverse merits ruling unchallenged, then the law of the case or principles similar to collateral estoppel could (again) make the typicality and adequacy-of-representation factors daunting hurdles to their class action going forward, *see* FED. R. CIV. P. 23(a)(3) and (4). *Cf. Zenith Labs., Inc. v. Carter-Wallace, Inc.*, 530 F.2d 508, 512 (3d Cir. 1976) (named plaintiff could not adequately represent class because prior litigation could be used as defense against named plaintiff's claims in way not true of class as a whole).

Nor, even assuming a defendant could challenge the class certification on appeal if liability is found, could we hold that an issue is subject to meaningful end-of-case review when only the defendant, and not the plaintiff, will be able to seek that review later. To be sure, it might be possible for unnamed class members to intervene and appeal the class-certification question. *See In re Brewer*, 863 F.3d 861, 868 (D.C. Cir. 2017). But Hilton has made no argument that intervention by absent class members is viable in this case. And even if there were reason to think intervention might occur, the nature of the fail-safe legal question at issue here is likely to evade meaningful end-of-case review anyhow.

The very character of the fail-safe legal question exists most critically at the early class-certification stage of a case. The crux of the fail-safe critique is that a proposed class definition impermissibly depends on

a determination on the merits of the case, so that class membership cannot be effectively identified and represented until the litigation ends. For example, a class defined to include "all those discriminated against *illegally*" relies critically on a merits determination to set the contours of class membership. But at the class certification stage, a determination on the merits is far down the road, while the need to identify the class for procedural and substantive purposes is immediate. *See*, *e.g.*, FED. R. CIV. P. 23(c)(1)(B) and (2). In other words, the fail-safe concern is that the class definition is hopelessly indeterminate at the time the district court is required to resolve class action status and to define class membership—"a[s] early [as] practicable" after the proposed class action commences. FED. R. CIV. P. 23(c)(1)(A).

But should a fail-safe class proceed to final judgment, the merits will have been resolved. So the fail-safe concern—however cogent at the class certification stage—becomes muddied, or, at minimum, substantially diluted. If the problem with fail-safe classes is that they rely on merits determinations that are wholly unknown at class-certification time, that problem abates by final judgment. At the very least, it would be a different inquiry on appeal for this court to determine whether the class definition "all those defrauded illegally" is impermissibly fail-safe once a trial court has said whether fraud occurred or not. The question will have shifted. We would be in a strange posture indeed if forced to conclude a class definition

was hopelessly indeterminate at time *a* however legible it has become at time *b*.

That presumably is why eight of the nine other circuits to have addressed the fail-safe issue—including the two circuits whose approach to Rule 23(f) review we endorsed in *Lorazepam*, 289 F.3d at 104–105—have done so on interlocutory appeals from grants or denials of class certification. *See Nexium*, 777 F.3d at 14; *Byrd*, 784 F.3d at 161; *Rodriguez*, 695 F.3d at 364; *Young*, 693 F.3d at 536; *Messner*, 669 F.3d at 808; *Ruiz Torres*, 835 F.3d at 1132; *Cordoba*, 942 F.3d at 1264; *cf. EQT*, 764 F.3d at 356–357 (granting 23(f) petition on basis that district court decision was manifestly erroneous); *but see Orduno*, 932 F.3d at 716–717 (court *sua sponte* raised potential fail-safe issue as reason plaintiff's predominance problems could not be solved when reviewing class certification denial after trial on the merits).

Finally, we note that the *Lorazepam* scenarios are neither rigid categories nor exhaustive of the situations for which Rule 23(f) review can be appropriate. *See Lorazepam*, 289 F.3d at 105; *cf. In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869*, 725 F.3d 244, 250 (D.C. Cir. 2013) ("The [*Lorazepam*] categories are mutually reinforcing, not exclusive. * * * [T]he confluence of multiple rationales may fortify our decision—the sort of 'special circumstances' contemplated by our case law."); *In re Veneman*, 309 F.3d 789, 795 (D.C. Cir. 2002) (noting that a fundamental issue of law unlikely to evade end-of-case review could nonetheless be appropriate for 23(f) review in "special

circumstances"). Given the purely legal question presented for review, its high likelihood of recurrence within the courts of this circuit, its dispositive role in foreclosing a class action in this case, its importance as a matter of class action law for this circuit going forward, the severe and one-sided practical prohibitions on end-of-case review, the shape-shifting that the legal question would undergo by the conclusion of litigation, and the lack of prejudice to the district court proceedings given the district court's decision—with the parties' agreement—to stay the case pending our review, we conclude that granting the petition is warranted in the circumstances of this case.[3]

IV

We review class certification decisions for an abuse of discretion. *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979); *Garcia v. Johanns*, 444 F.3d 625, 631 (D.C. Cir. 2006). A material error of law is always an abuse of discretion. *Koon v. United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law.").

We hold that the court abused its discretion by denying the amended class certification motion based on a stand-alone and extra-textual rule against "fail-safe" classes, rather than applying the factors

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[3] Given our decision, we need not address White's additional arguments that the denial of class certification here also qualifies for interlocutory review under the *Lorazepam* manifestly erroneous and death-knell criteria. *See* 289 F.3d at 105.

prescribed by Federal Rule of Civil Procedure 23(a). Rule 23 provides strong protection against circular or indeterminate class definitions, which the district court understandably sought to avoid.

A

Rule 23(a) of the Federal Rules of Civil Procedure sets out the indispensable "prerequisites" for class certification. FED. R. CIV. P. 23(a). They are (1) numerosity, meaning that the "class is so numerous that joinder of all members is impracticable[,]" (2) commonality in that the "questions of law or fact" at issue in the case are "common to the class[,]" (3) typicality, which requires that the "claims or defenses of the representative parties [be] typical of the claims or defenses of the class[,]" and (4) adequacy in that the named representative parties "will fairly and adequately protect the interests of the class[.]" FED. R. CIV. P. 23(a). Even after the Rule 23(a) requirements for certification are met, putative class members must still show that their action is maintainable under one of the class-action types identified in Rule 23(b). And Rule 23 expressly directs that the definition of a class be determined and that its members be identified or identifiable early in the litigation, not at its end. *See* FED. R. CIV. P. 23(c)(1)(A).

B

Courts have identified two main problems with certifying a so-called "fail-safe" class, the membership

of which depends on the merits. First, if membership in a class depends on a final resolution of the merits, it is administratively difficult to determine class membership early on. *See Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 492–497 (7th Cir. 2012). Second, if the only members of fail-safe classes are those who have viable claims on the merits, then class members either win or, by virtue of losing, are defined out of the class, escaping the bars of *res judicata* and collateral estoppel. *See Young*, 693 F.3d at 538. Heads they win; tails the defendant lose—at least, that is the concern.

To illustrate, for a class definition that encompasses "all those whom Company X defrauded," the "defrauded" addendum makes the definition circular. That is, whether or not certain actions constitute fraud, a tortious activity for which Company X would be subject to liability, is just what the litigation is meant to find out. As for *res judicata* effect, if a defendant is found not to have defrauded anyone, then there would be no class members at all. Every erstwhile class member would, after the merits determination, become a stranger to the case who would not be bound by that litigation loss.

Those concerns are understandable. In practice, though, a fail-safe class definition is only truly troubling to the extent it hides some concrete defect with the class. Rule 23 is a carefully structured rule that, properly applied, already addresses relevant defects in the class definition. And enforcing the Rule's written requirements is greatly preferred to deploying a textually untethered and potentially disuniform criterion,

the contours of which can vary from case to case. *Cf. Jones v. Bock*, 549 U.S. 199, 212–216 (2007) ("[C]ourts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns[,]" *id.* at 212.). Instead, courts should stick to Rule 23's specified requirements when making class certification decisions and, in doing so, will likely find any "fail-safe" concerns assuaged.

Start with Rule 23(a)'s prerequisites. The putative class prosecuting the action—that is the class as defined at the beginning of the case, FED. R. CIV. P. 23(c)(1)(A)—must be too numerous for individualized litigation to be practicable. FED. R. CIV. P. 23(a)(1). That numerosity must exist throughout the litigation. Yet a class that could be defined to have zero members if the plaintiffs lose is not numerous at all.

Similarly, a circular class definition could reveal the lack of a genuinely common issue of law or fact. *See* FED. R. CIV. P. 23(a)(2). Plaintiffs may define a class as all those discriminated against illegally because they are at a loss for a more specific thread to tie claims together. But Rule 23 does not allow for such a 30,000 foot view of commonality. *See DL v. District of Columbia*, 713 F.3d 120, 126 (D.C. Cir. 2013) (Proposed class definition spoke "too broadly" because it "constitute[d] only an allegation that the class members 'ha[d] all suffered a violation of the same provision of law[.]'" (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011))).

Typicality too should be a hard hill to climb if the named plaintiffs might not be members of the class come final judgment. *See* FED. R. CIV. P. 23(a)(3); *see also Amchem Prods., Inc.*, 521 U.S. at 626 n.20 (the same applies to the adequacy prerequisite—noting that the adequacy-of-representation requirement tends to merge with the commonality and typicality criteria of Rule 23(a)). So too for Rule 23(b)(3)'s superiority requirement, since a class action would fail to be a superior device for resolving a dispute if the class would collapse should the plaintiffs lose on the merits. *See* FED. R. CIV. P. 23(b)(3). Even more fatal to an indeterminate class definition can be the requirement in Rule 23(c) that the district court ensure up front the "binding effect of a class judgment on members[.]" FED. R. CIV. P. 23(c)(2)(B)(vii).[4]

All that is to say that the protocol for determining if a class definition is proper is to apply the terms of Rule 23 as written. Doing so should eliminate most, if not all, genuinely fail-safe class definitions.

For those rare cases (if any) in which a truly "fail-safe" class hurdles all of Rule 23's requirements, then the problem will in all likelihood be one of wording, not substance. After all, a class of human beings cannot itself be circular. Only a class definition attempting to describe them can. For example, assume a class defined as "all workers of Company X employed in its

[4] The inability of a court to satisfy Rule 23(c)'s notice provisions could also alert the court to a Rule-based problem with a class definition.

Washington, D.C. and New York City offices between 2021 and 2023 who were unlawfully denied promotion to clerical supervisor due to enforcement of the Company X Skills Test." The one word in that definition that makes it fail safe is "unlawfully." By deleting that, the definition loses any fail-safe character and might otherwise pass all of Rule 23's requirements.

Or consider the class "all associates employed by Law Firm Y from 2021 to 2023 who were denied their contractual bonus because Law Firm Y refused to credit pro bono hours." While the parties may litigate on the merits whether the associates had any contractual right to a bonus, any fail-safe issues at the certification stage could be addressed by simply rephrasing as a counterfactual—that is, "who would have received their contractual bonus if Law Firm Y credited pro bono hours."

The solution for cases like these is for the district court either to work with counsel to eliminate the problem or for the district court to simply define the class itself. Rule 23 charges district courts ultimately with "defin[ing] the class." FED. R. CIV. P. 23(c)(1)(B). Using that tool, the "problem [of fail-safe classes] can and often should be solved by refining the class definition rather than by flatly denying class certification on that basis." *Messner*, 669 F.3d at 825. So rather than reject a proposed class definition for a readily curable defect based on an unwritten criterion, a district court should either define the class itself or, perhaps most productively, simply suggest an alternate class definition and allow the parties to object or revise as needed.

In summary, the textual requirements of Rule 23 are fully capable of guarding against unwise uses of the class action mechanism. So we reject a rule against "fail-safe" classes as a freestanding bar to class certification ungrounded in Rule 23's prescribed criteria. Instead, district courts should rely on the carefully calibrated requirements in Rule 23 to guide their class certification decisions and the authority the Rule gives them to deal with curable misarticulations of a proposed class definition.

V

The district court in this case bypassed Rule 23's requirements and based its denial of class certification entirely on the class's "fail-safe" character. For the foregoing reasons, we reverse and remand for further proceedings consistent with this opinion.

So ordered.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-8001 **September Term, 2022**
FILED ON: APRIL 4, 2023

IN RE: VALERIE R. WHITE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.,

PETITIONERS

On Petition for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(f)
(No. 1:16-cv-00856)

Before: SRINIVASAN, *Chief Judge*, MILLETT, *Circuit Judge*, and EDWARDS, *Senior Circuit Judge*

JUDGMENT

This cause came to be heard on a petition for leave to file an interlocutory appeal pursuant to Fed. R. Civ. P. 23(f), and the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED that interlocutory review under Rule 23(f) be granted. It is

FURTHER ORDERED and **ADJUDGED** that the District Court's class certification decision appealed from in this cause be reversed and the case be

remanded for further proceedings, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy
Deputy Clerk

Date: April 4, 2023

Opinion for the court filed by Circuit Judge Millett.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-8001 **September Term, 2021**

1:16-cv-00856-CKK

Filed On: June 29, 2022

In re: Valerie R. White, individually and on behalf of all others similarly situated, et al.,

Petitioners

BEFORE: Henderson, Wilkins, and Katsas, Circuit Judges

ORDER

Upon consideration of the petition for leave to appeal pursuant to Federal Rule of Civil Procedure 23(f), the response thereto, and the reply, it is

ORDERED that the petition for leave to appeal be referred to the merits panel to which this appeal is assigned. The parties are directed to address in their briefs the issues presented in the petition rather than incorporate those arguments by reference. In addition to addressing whether the petition should be granted, the parties are also directed to address in their briefs whether the district court properly denied the plaintiffs' motion for class certification under Fed. R. Civ. P. 23.

The Clerk is directed to transmit a certified copy of this order to the district court.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VALERIE R. WHITE, *et al.*, Plaintiffs, v. HILTON HOTELS RETIREMENT PLAN, *et al.*, Defendants.	Civil Action No. 16-856 (CKK)

ORDER
(April 13, 2022)

This matter is before the Court on the parties' [91] Joint Status Report. Therein, the parties jointly request that the Court stay the case pending Plaintiffs' interlocutory appeal of the Court's March 22, 2022 [87] Order denying Plaintiffs' [83] Second Renewed Motion for Class Certification. Pursuant to Federal Rule of Civil Procedure 23(f), "[a]n appeal [of a class certification order] does not stay proceedings in the district court unless the district judge or the court of appeals orders." In evaluating such a motion, the court looks to: "(1) whether there is a substantial likelihood that the movant will succeed on the merits of the claims/appeal; (2) whether the movant will suffer irreparable injury if an injunction/stay does not issue; (3) whether others will suffer harm if an injunction/stay is granted; and (4) whether the public interest will be furthered by injunction/stay." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 286 F.R.D. 88, 91 (D.D.C. 2012). As the

parties jointly request a stay, the Court assumes that Defendants at least concede the latter two considerations.

As to the first consideration, the Court asks whether it is likely that the Court of Appeals will grant *both* review *and* relief. *Id.* at 92. The Court of Appeals has explained that it is more likely to grant review:

> (1) When there is a death-knell situation for either plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable, taking into account the district court's discretion over class certification;
>
> (2) When the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; and
>
> (3) When the district court's class certification is manifestly erroneous.

In re Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 99-100 (D.C. Cir. 2002). As the Court has most recently explained in its last Memorandum Opinion on the subject, the D.C. Circuit has yet to examine the rule against fail-safe class definitions and there remains an unsettled circuit split on the issue. *White v. Hilton Hotels Retirement Plan*, 2022 WL 1050570 at *5. Accordingly, whether a fail-safe class definition is permissible is likely an "unsettled and fundamental issue of

law relating to class actions" for which the Court of Appeals might be more inclined to grant appellate review.

As such, as at least two, if not three, of the *In re Rail Freight* factors weigh in favor of a stay pending appeal, and in light of the parties' consent, the Court will exercise its discretion to grant such a stay. Therefore, it is hereby

ORDERED, that this matter is **STAYED** until further order of the Court. It is further

ORDERED, that the parties shall file a joint status report informing the Court as how they intend to proceed in this matter no fewer than seven days after the D.C. Circuit Court of Appeals' resolution of Plaintiffs' [89-1] Petition by Plaintiffs-Petitioners for Leave to Appeal Pursuant to FRCP 23(f).

SO ORDERED.

Date: April 13, 2022

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VALERIE R. WHITE, *et al.*, Plaintiffs, v. HILTON HOTELS RETIREMENT PLAN, *et al.*, Defendants.	Civil Action No. 16-856 (CKK)

MEMORANDUM OPINION
(March 22, 2022)

This putative class action comes before the Court on Plaintiff's [83] Second Renewed Motion for Class Certification. The Court has now offered Plaintiffs three opportunities to craft an appropriate class definition, yet Plaintiffs' proposed class definition remains improperly "fail-safe." This threshold defect renders certification of the proposed class impermissible. This fatal flaw bars Plaintiffs from converting this case into a class action. Accordingly, upon consideration of the briefing,[1] the relevant legal authorities, and the record

[1] The Court's consideration has focused on the following documents:

- Second Am. Class Action Compl. ("Second Am. Compl."), ECF No. 50;
- Plaintiffs' Memorandum of Law in Support of Second Renewed Motion for Class Certification ("Mot."), ECF No. 83-1;

as a whole, the Court shall **DENY** Plaintiffs' [83] Second Renewed Motion for Class Certification.

I. BACKGROUND

The Court shall briefly summarize the factual background already addressed in the Court's prior two orders denying without prejudice Plaintiffs' motions for class certification. Plaintiffs Valerie R. White, Eva Juneau, and Peter Betancourt ("Plaintiffs") bring this putative class action under the Employee Retirement Income Security Act of 1974 ("ERISA") with respect to certain vesting determinations made by the Hilton Hotels Retirement Plan (the "Plan"). This matter was noticed as related to *Kifafi v. Hilton Hotels Retirement Plan*, No. 98–cv–1517 (CKK) (D.D.C.) ("*Kifafi*"), an action over which the Court concluded its jurisdiction in December 2015, after more than 17 years of litigation. *See Kifafi*, 752 F. App'x 8, 9 (D.C. Cir. Feb. 15, 2019) (Mem.) (per curiam). In this action, Plaintiffs, who are former Hilton employees and putative beneficiaries of the Plan, seek to address grievances that did not fall within the narrow classes certified in the *Kifafi* litigation. Now, after the Court denied their first two

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- Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Second Renewed Motion for Class Certification ("Opp."), ECF No. 84; and
- Plaintiffs' Reply in Support of Second Renewed Motion for Class Certification., ("Repl."), ECF No. 85.

In an exercise of its discretion, the Court finds that holding oral argument in this action would not be of assistance in rendering a decision. *See* LCvR 7(f).

motions for certification without prejudice, ECF Nos. 62, 80, Plaintiffs have filed their third motion for class certification, which is presently pending before the Court. Plaintiffs ground this motion in the allegations within their Second Amended Complaint. Mot. at 2.

Specifically, Plaintiffs seek to represent three separate subclasses of claimants. First, Plaintiff Valerie R. White alleges that Hilton unlawfully applied a so-called "elapsed time method" to employee service rendered before 1976, resulting in an improper calculation of her years of vesting credit under the Plan. *See* Second Am. Compl. ¶¶ 41–44. Plaintiff Eva Juneau alleges that Hilton improperly denied vesting credit to employees, like her, for service rendered at certain "non-participating" locations. *See* Second Am. Compl. ¶¶ 57–58. Additionally, Plaintiffs allege that Hilton failed to keep proper documentation for services rendered by certain employees, like Ms. Juneau, and that Hilton should have, but failed to, credit appropriate time "equivalencies" to these employees, in the absence of that proper documentation. *See* Second Am. Compl. ¶¶ 68–73. Finally, Plaintiff Peter Betancourt alleges that Hilton also improperly denied claims made by surviving beneficiaries "solely on the grounds that the claimant is 'not the surviving spouse' " of the original Plan participant. *Id.* ¶ 75. According to Plaintiffs, this is not a valid "basis for a denial of a claim to retroactive benefits." *Id.*

In their second motion for class certification, Plaintiff sought to certify a class that comprises three distinct subclasses corresponding to the Plaintiffs'

distinctive claims outlined above. In full, Plaintiffs sought to certify a class of "any and all persons who:

(a) Are former or current employees of Hilton Worldwide, Inc. or Hilton Hotels Corp., or the surviving spouses or beneficiaries of former Hilton employees;

(b) Submitted a claim for vested retirement benefits from Hilton under the claim procedures ordered by the District Court and the Court of Appeals in *Kifafi, et al., v. Hilton Hotels Retirement Plan, et al.*, C.A. 98-1517; and

(c) Have vested rights to retirement benefits that have been denied by the Hilton Defendants':

(1) Use of "fractional" years of vesting service under an "elapsed time" method to count periods of employment before 1976 with no resolution of whether the fractions constitute a "year of service" under ERISA;

(2) Refusal to count "non-participating" service for vesting purposes notwithstanding that the service was with the "employer" under ERISA §3(5), that the Hilton Defendants counted service at the same "Hilton Properties" in *Kifafi* and represented to this Court and the D.C. Circuit in *Kifafi* that Hilton had counted "non-participating" service with Hilton for vesting, and that the "records requested and received from Defendants do not identify any non-participating property that is also not a Related Company"; and

> (3) Denial of retroactive/back retirement benefit payments to heirs and estates on the sole basis that the claimants are "not the surviving spouse" of deceased vested participants."

Pls.' Proposed Order on Class Cert., ECF No. 74-1. Plaintiffs allege that this class comprises at least 220 distinct individuals throughout the United States. *See* Second Am. Compl. ¶ 12. On October 7, 2020, the Court rejected this definition, holding, among other things, that the term "have vested rights to retirement benefits that have been denied" is concomitant with the merits of the case.

Plaintiffs' third proposed class definition is now:

A class consisting of any and all persons who:

(a) Are former or current employees of Hilton Worldwide, Inc. or Hilton Hotels Corp., or the surviving spouses or beneficiaries of former Hilton employees,

(b) Submitted a claim for vested retirement benefits from Hilton under the claims procedures ordered by the District Court and the Court of Appeals in *Kifafi, et al. v. Hilton Hotels Retirement Plan, et al.*, C.A. 98-1517; and

(c) Have **been denied** vested rights to retirement benefits ~~**that have been denied**~~ by the Hilton Defendants:'

> (1) Use of 'fractional' years of vesting service under an 'elapsed time' method to count periods of employment before 1976 with

no resolution of whether fractions constitute a 'year of service' under ERISA;

(2) Refusal to count 'non-participating' service for vesting purposes notwithstanding that the service was with ~~**the 'employer' under ERISA §3(5)**~~ **a hotel property that Hilton operated under a management agreement**, that the Hilton Defendants counted service at the same "Hilton Properties" in *Kifafi* and represented to this Court and the D.C. Circuit in *Kifafi* that Hilton had counted "non-participating service with Hilton for vesting, and that 'records requested and received from Defendants who not identify any non-participating property that is also not a Related Company; and

(3) Denial of retroactive/back retirement benefit payments to heirs and estates on the ~~**sole**~~ basis that the claimants are 'not the surviving spouse' of deceased vested participants.

Compare White v. Hilton Hotels Ret. Plan, 2020 WL 5946066 at *2 (D.D.C. Oct. 7, 2020) *with* ECF 83-2. Defendants oppose Plaintiffs' revised definition.

II. LEGAL STANDARD

In deciding whether to certify a class, a court must consider whether the proposed class meets the requirements of Federal Rule of Civil Procedure 23. *Kottaras v. Whole Foods Mkt., Inc.*, 281 F.R.D. 16, 20 (D.D.C.

2012). The party seeking class certification must "affirmatively demonstrate" that the requirements of Rule 23 have, in fact, been satisfied. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). "Certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied," and that "actual, not presumed, conformance with Rule 23(a) remains indispensable." *Id.* at. 350–51 (cleaned up). At the certification stage, "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013).

The Rule 23 analysis proceeds in two parts. First, the putative "class plaintiff has the burden of showing that the requirements of Rule 23(a)" are met. *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 529 (D.C. Cir. 2006). Under Rule 23(a), a member of a class may sue on behalf of the class if "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Next, the putative class plaintiff must also demonstrate "that the class is maintainable pursuant to one of Rule 23(b)'s subdivisions." *Richards*, 453 F.3d at 529. Here, Plaintiffs request certification under Rule 23(b)(2) or, alternatively, Rule 23(b)(3). *See* Pls.' Mot. at

31–33. Certification under Rule 23(b)(2) is proper where "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Certification under Rule 23(b)(3) is appropriate where common questions within the proposed class predominate over non-common questions, and where class resolution is superior to other methods of adjudication. Fed. R. Civ. P. 23(b)(3); *see also Cohen v. Warner Chilcott Public Ltd. Co.*, 522 F. Supp. 2d 105, 116–17 (D.D.C. 2007).

Finally, in addition to the strictures of Rule 23, courts also consider the "implied requirement" of "definiteness" before certifying a class. *Thorpe v. District of Columbia*, 303 F.R.D. 120, 139 (D.D.C. 2014). Traditionally, the "definiteness" requirement is not excessively stringent. *Id.* Nonetheless, it does demand that plaintiffs are "able to establish that the general outlines of the membership of the class are determinable at the outset of the litigation." *Id.* (quotation omitted). "Accordingly, a class may be certified only when 'an individual would be able to determine, simply by reading the [class] definition, whether he or she [is] a member of the proposed class.'" *Campbell v. Nat'l R.R. Passenger Corp.*, 311 F. Supp. 3d 281, 313 (D.D.C. 2018) (quoting *Artis v. Yellen*, 307 F.R.D. 13, 23 (D.D.C. 2014)).

III. DISCUSSION

For the reasons set forth herein, the Court concludes that Plaintiffs' proposed class remains

impermissibly "fail-safe," as presently defined. This precludes certification.

As the Court explained when confronting Plaintiffs' last proposed class definition, a fail-safe class exists where the class definition "depend[s] on the merits of the underlying claim." *Id.* Put otherwise, a fail-safe class arises where the class "is defined so that whether a person qualifies as a member depends on whether the person has a valid claim." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012). For example, the class definition: "*All Black CBA employees who have been discriminated against because of their race or color in regard to competitive promotion selections*," is impermissibly "fail-safe" because it "makes membership in the class contingent on individualized merits determinations as to whether the individual suffered discrimination because of his race." *Campbell*, 311 F. Supp. 3d at 314. "Such a class definition is improper because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Messner*, 669 F.3d at 825. "Moreover, by using a future decision on the merits to specify the scope of the class, a fail-safe class definition makes it impossible to determine who [is] in the class until the case ends." *Campbell*, 311 F. Supp. 3d at 314 (cleaned up).

In its last Memorandum Opinion on the subject, the Court agreed that the term "*have vested rights to retirement benefits that have been denied*[,]" ECF No. 74-1, at ¶ 2(c), was a "fail-safe" provision. *White*, 5946066 at *5. On its face, this class requirement may

have appeared objective, but, in fact, the question of whose rights have vested is central to the merits of this action. Consider Ms. Valerie White, for example, who possesses "a total of 9.52957 years of vesting service," leaving her a fraction short of the ten years of credit needed for her rights to vest. Second Am. Compl. ¶ 44. Therefore, Ms. White will "have vested rights" and become a member of the proposed class, only if the Court agrees with her merits assertion that fractional years of service must be "rounded up." *See* Second. Am. Compl. ¶ 44. But of course, this is the very question at the heart of Plaintiffs' claim in Count I of the Second Amended Complaint. *See id.* ¶¶ 40–5 1.

Plaintiffs have proposed to remedy this issue by changing "have vested rights to benefits that have been denied" to "[h]ave been denied vested rights to retirement benefits." The problem remains the same. In order to determine who qualifies as a member of the class, the Court must first make legal determinations on the propriety of the alleged actions as to each of the three subclasses. As explained, "[s]uch a class definition is improper because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Messner*, 669 F.3d at 825. Nevertheless, as the Court shall definitively settle class certification in this Memorandum Opinion and the accompanying Order, it shall restate its broader discussion of the state of the law on "fail-safe" class definitions.

As the Court has previously explained, the rule against such classes is not entirely settled. In this

jurisdiction, at least one district court has adopted the rule and denied certification thereunder, *see Campbell*, 311 F. Supp. 3d at 313–15, while two other district courts have considered the rule against fail-safe classes, without concluding that it is definitively established as a criteria for class certification, *see Ramirez v. United States Immigration & Customs Enf't*, 338 F. Supp. 3d 1, 49 (D.D.C. 2018); *Afghan & Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the United States v. Pompeo*, 334 F.R.D. 449, 464 (D.D.C. 2020). The D.C. Circuit has not opined directly on this matter. Yet, the absence of a clear directive from the D.C. Circuit does not negate the rule against fail-safe classes, but rather leaves open the question of the rule's applicability.

And here, the Court finds multiple factors weighing strongly in favor of an operative rule against fail-safe classes. First, of the nine circuits to consider the matter, eight circuits have either adopted a categorical rule against fail-safe classes[2] or discussed such a rule

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with approval.[3] Only the Fifth Circuit has rejected the applicability of the rule against fail-safe classes. *See In re Rodriguez*, 695 F.3d 360, 370 (5th Cir. 2012). This Fifth Circuit precedent, however, stands as an outlier amongst the circuits and is post-dated by more recent circuit precedent adopting the rule against fail-safe classes. Moreover, numerous district courts throughout the country have applied the rule against fail-safe classes in denying class certification.[4] And even where

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class that cannot be defined until the case is resolved on its merits.").

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[4] *See*, *e.g.*, *Day v. Humana Ins. Co.*, 335 F.R.D. 181, 200 (N.D. Ill. 2020) (denying certification of an ERISA class where "the class Plaintiff [] attempted to define [wa]s 'fail-safe'—that is, defined so that whether a person qualifies as a member depends on whether the person has a valid claim") (quotation omitted); *Bais Yaakov of Spring Valley v. ACT, INC.*, 328 F.R.D. 6, 14 (D. Mass. 2018) (denying class certification where "the class fit[] squarely within the definition of a 'fail-safe class' because class membership [wa]s

debate exists regarding the contours of a broader "ascertainability" requirement for class certification, the narrow rule against fail-safe classes has persisted. *See Mullins*, 795 F.3d at 660 (rejecting an expanded "ascertainability" requirement while applying the rule against "fail-safe" classes as "well-settled").

Furthermore, beyond the weight of this precedent, the gravamen of the rule itself is rooted in compelling principles of fairness and common-sense. As a practical matter, putative members of a fail-safe class are not identifiable after class certification, because the definition of a class member turns on the final result of the litigation itself. This creates tangible administrative problems for the courts, including difficulty in providing proper notice to class members. *See Orduno*, 932 F.3d at 716–17. Fail-safe classes are also inherently unfair to the defendant, who "is forced to defend against the class, but if a plaintiff loses, she drops out and can subject the defendant to another round of litigation." *Mullins*, 795 F.3d at 660. In this way, fail-safe classes also contravene the notions of efficiency critical to Rule 23 and the class action mechanism. A merits ruling against a fail-safe class does not resolve a class-wide dispute, but instead hollows out the fail-safe class at issue, leaving further litigation for a later date.

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defined by whether or not members have a valid claim"); *Quevedo v. Macy's, Inc.*, No. CV091522GAFMANX, 2011 WL 13124445, at *5 (C.D. Cal. Mar. 9, 2011) ("For the independent reason that Plaintiff's proposed sub-classes constitute such impermissible 'fail-safe' classes against which no adverse judgment could be entered, the Court denies certification.").

In view of the foregoing, the Court will apply the rule against fail-safe classes in this case. Indeed, it would be improvident to certify a fail-safe class like Plaintiffs' where the D.C. Circuit has not approved of such classes and where numerous circuit courts, and at least one district court in this jurisdiction, have applied a common-sense rule against them. Having offered Plaintiffs three opportunities to remedy this problem, each to no avail, the Court shall deny class certification.[5]

IV. CONCLUSION

For the reasons set forth in this Memorandum Opinion, the Court **DENIES** Plaintiffs' [83] Second Renewed Motion for Class Certification.

An appropriate order accompanies this Memorandum Opinion.

Date: March 22, 2022

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

[5] Although the problems with the second and third proposed subclasses as explained in the Court's [82] Memorandum Opinion remain, *id.* at 10-16, the Court need not reach them here, having concluded that the broader class definition is an impermissible "fail-safe."

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VALERIE R. WHITE, *et al.*, Plaintiffs, v. HILTON HOTELS RETIREMENT PLAN, *et al.*, Defendants.	Civil Action No. 16-856 (CKK)

ORDER
(March 22, 2022)

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED, that Plaintiffs' [83] Second Renewed Motion for Class Certification is **DENIED**. It is further

ORDERED, that, on or before April 12, 2022, the parties shall file a joint status report identifying how they propose to proceed in this matter and a schedule for such proceedings.

SO ORDERED.

Date: March 22, 2022

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VALERIE R. WHITE, *et al.*, Plaintiffs, v. HILTON HOTELS RETIREMENT PLAN, *et al.*, Defendants.	Civil Action No. 16-856 (CKK)

Memorandum Opinion
(October 7, 2020)

Presently pending before the Court is Plaintiffs' [74] Renewed Motion for Class Certification. As explained in detail herein, Plaintiffs' proposed class definition is impermissibly "fail-safe." This threshold defect renders certification of the proposed class improper. Yet, because this deficiency may be susceptible to remedy, the Court will permit Plaintiffs a final opportunity to renew their motion for class certification. The Court will also discuss additional impediments to class certification it has identified at this stage of the litigation. Accordingly, upon consideration of the briefing,[1] the relevant legal authorities, and the record as a

[1] The Court's consideration has focused on the following documents:

- Second Am. Class Action Compl. ("Second Am. Compl."), ECF No. 50;
- Mem. in Supp. of Pls.' Renewed Mot. for Class Cert. ("Pls.' Mot."), ECF No. 74-2;

whole, the Court shall **DENY** Plaintiffs' [74] Renewed Motion for Class Certification **WITHOUT PREJUDICE**.

I. BACKGROUND

Plaintiffs Valerie R. White, Eva Juneau, and Peter Betancourt ("Plaintiffs") bring this putative class action under the Employee Retirement Income Security Act of 1974 ("ERISA") with respect to certain vesting determinations made by the Hilton Hotels Retirement Plan (the "Plan"). This matter was noticed as related to *Kifafi v. Hilton Hotels Retirement Plan*, No. 98–cv–1517 (CKK) (D.D.C.) ("*Kifafi*"), an action over which the Court concluded its jurisdiction in December 2015, after more than 17 years of litigation. *See Kifafi*, 752 F. App'x 8, 9 (D.C. Cir. Feb. 15, 2019) (Mem.) (per curiam). In this action, Plaintiffs, who are former Hilton employees and putative beneficiaries of the Plan, seek to address grievances that did not fall within the narrow classes certified in the *Kifafi* litigation. Now, after the Court denied their initial motion for certification without prejudice, *see* Order, ECF No. 62, at 1, Plaintiffs have renewed their motion for class certification, which is presently pending before the Court, *see* Pls.' Mot., ECF No. 74. Plaintiffs ground this motion in the

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- Mem. of P. & A. in Opp'n to Pls.' Renewed Mot. for Class Cert., ("Defs.' Opp'n"), ECF No. 79; and
- Pls.' Reply in Supp. of Mot. for Class Cert., ("Pls.' Reply"), ECF No. 76.

allegations within their Second Amended Complaint. *See id.* at 2.

Specifically, Plaintiffs seek to represent three separate subclasses of claimants. First, Plaintiff Valerie R. White alleges that Hilton unlawfully applied a so-called "elapsed time method" to employee service rendered before 1976, resulting in an improper calculation of her years of vesting credit under the Plan. *See* Second Am. Compl. ¶¶ 41–44; Pls.' Mot., Ex. 1 (White Service Sheet). Plaintiff Eva Juneau alleges that Hilton improperly denied vesting credit to employees, like her, for service rendered at certain "non-participating" locations. *See* Second Am. Compl. ¶¶ 57–58; Pls.' Mot, Ex. 2 (Juneau Service Sheet). Additionally, Plaintiffs allege that Hilton failed to keep proper documentation for services rendered by certain employees, like Ms. Juneau, and that Hilton should have, but failed to, credit appropriate time "equivalencies" to these employees, in the absence of that proper documentation. *See* Second Am. Compl. ¶¶ 68–73. Finally, Plaintiff Peter Betancourt alleges that Hilton also improperly denied claims made by surviving beneficiaries "solely on the grounds that the claimant is 'not the surviving spouse' " of the original Plan participant. *Id.* ¶ 75. According to Plaintiffs, this is not a valid "basis for a denial of a claim to retroactive benefits." *Id.*

Now, in their renewed motion for class certification, Plaintiff seek to certify a class that comprises three distinct subclasses corresponding to the Plaintiffs' distinctive claims outlined above. In full, Plaintiffs seek to certify a class of "any and all persons who:

(a) Are former or current employees of Hilton Worldwide, Inc. or Hilton Hotels Corp., or the surviving spouses or beneficiaries of former Hilton employees;

(b) Submitted a claim for vested retirement benefits from Hilton under the claim procedures ordered by the District Court and the Court of Appeals in *Kifafi, et al., v. Hilton Hotels Retirement Plan, et al.*, C.A. 98-1517; and

(c) Have vested rights to retirement benefits that have been denied by the Hilton Defendants':

(1) Use of "fractional" years of vesting service under an "elapsed time" method to count periods of employment before 1976 with no resolution of whether the fractions constitute a "year of service" under ERISA;

(2) Refusal to count "non-participating" service for vesting purposes notwithstanding that the service was with the "employer" under ERISA §3(5), that the Hilton Defendants counted service at the same "Hilton Properties" in *Kifafi* and represented to this Court and the D.C. Circuit in *Kifafi* that Hilton had counted "non-participating" service with Hilton for vesting, and that the "records requested and received from Defendants do not identify any non-participating property that is also not a Related Company"; and

(3) Denial of retroactive/back retirement benefit payments to heirs and estates on the sole basis that the claimants are "not the

> surviving spouse" of deceased vested participants."

Pls.' Proposed Order on Class Cert., ECF No. 74-1; *see also* Pls.' Mot. at 2. Plaintiffs allege that this class comprises at least 220 distinct individuals throughout the United States. *See* Second Am. Compl. ¶ 12; Pls.' Mot. at 12. Defendants, however, have once again opposed the certification of this class for myriad reasons. *See generally* Defs.' Opp'n, ECF No. 79. In turn, Plaintiffs have submitted their reply brief, and, accordingly, Plaintiffs' renewed motion for class certification is ripe for this Court's review.

II. LEGAL STANDARD

In deciding whether to certify a class, a court must consider whether the proposed class meets the requirements of Federal Rule of Civil Procedure 23. *Kottaras v. Whole Foods Mkt., Inc.*, 281 F.R.D. 16, 20 (D.D.C. 2012). The party seeking class certification must "affirmatively demonstrate" that the requirements of Rule 23 have, in fact, been satisfied. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). "Certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied," and that "actual, not presumed, conformance with Rule 23(a) remains indispensable." *Id.* at. 350–51 (cleaned up). At the certification stage, "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class

certification are satisfied." *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013).

The Rule 23 analysis proceeds in two parts. First, the putative "class plaintiff has the burden of showing that the requirements of Rule 23(a)" are met. *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 529 (D.C. Cir. 2006). Under Rule 23(a), a member of a class may sue on behalf of the class if "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Next, the putative class plaintiff must also demonstrate "that the class is maintainable pursuant to one of Rule 23(b)'s subdivisions." *Richards*, 453 F.3d at 529. Here, Plaintiffs request certification under Rule 23(b)(2) or, alternatively, Rule 23(b)(3). *See* Pls.' Mot. at 31–33. Certification under Rule 23(b)(2) is proper where "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Certification under Rule 23(b)(3) is appropriate where common questions within the proposed class predominate over non-common questions, and where class resolution is superior to other methods of adjudication. Fed. R. Civ. P. 23(b)(3); *see also Cohen v. Warner Chilcott Public Ltd. Co.*, 522 F. Supp. 2d 105, 116–17 (D.D.C. 2007).

Finally, in addition to the strictures of Rule 23, courts also consider the "implied requirement" of

"definiteness" before certifying a class. *Thorpe v. District of Columbia*, 303 F.R.D. 120, 139 (D.D.C. 2014). Traditionally, the "definiteness" requirement is not excessively stringent. *Id.* Nonetheless, it does demand that plaintiffs are "able to establish that the general outlines of the membership of the class are determinable at the outset of the litigation." *Id.* (quotation omitted). "Accordingly, a class may be certified only when 'an individual would be able to determine, simply by reading the [class] definition, whether he or she [is] a member of the proposed class.'" *Campbell v. Nat'l R.R. Passenger Corp.*, 311 F. Supp. 3d 281, 313 (D.D.C. 2018) (quoting *Artis v. Yellen*, 307 F.R.D. 13, 23 (D.D.C. 2014)).

III. DISCUSSION

For the reasons set forth herein, the Court concludes that Plaintiffs' proposed class is impermissibly "fail-safe," as presently defined. This precludes certification. Additionally, Plaintiffs' individual subclasses also suffer from unique deficiencies under Fed. R. Civ. P. 23, as set forth below. The Court will address these issues in turn.

A. Plaintiffs' Proposed Class Is Impermissibly "Fail Safe"

Defendants argue, in part, that class certification is improper because Plaintiffs' proposed class is fail-safe. *See* Defs.' Mot. at 33–34. A so-called "fail-safe" class does not satisfy the definiteness requirement for

class certification. *Campbell*, 311 F. Supp. 3d at 313. A fail-safe class exists where the class definition "depend[s] on the merits of the underlying claim." *Id.* Put otherwise, a fail-safe class arises where the class "is defined so that whether a person qualifies as a member depends on whether the person has a valid claim." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012). For example, the class definition: "*All Black CBA employees who have been discriminated against because of their race or color in regard to competitive promotion selections*," is impermissibly "fail-safe" because it "makes membership in the class contingent on individualized merits determinations as to whether the individual suffered discrimination because of his race." *Campbell*, 311 F. Supp. 3d at 314. "Such a class definition is improper because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Messner*, 669 F.3d at 825. "Moreover, by using a future decision on the merits to specify the scope of the class, a fail-safe class definition makes it impossible to determine who [is] in the class until the case ends." *Campbell*, 311 F. Supp. 3d at 314 (quotation omitted and cleaned up).

The Court agrees with Defendants that Plaintiffs' proposed class is impermissibly fail-safe. *See* Defs.' Mot. at 33–34. Here, the fail-safe arises because Plaintiffs' class includes only those persons who "*have vested rights to retirement benefits that have been denied . . .* " Pls.' Proposed Order on Class Cert., ECF No. 74-1, at ¶ 2(c). On its face, this class requirement may appear

objective, but, in fact, the question of whose rights have vested is central to the merits of this action. Consider each of Plaintiffs' proposed class representatives. Ms. Valerie White, for example, possesses "a total of 9.52957 years of vesting service," leaving her a fraction short of the ten years of credit needed for her rights to vest. Second Am. Compl. ¶ 44; *see also* Pls.' Mot. at 14–17. Therefore, Ms. White will "have vested rights" and become a member of the proposed class, only if the Court agrees with her merits assertion that fractional years of service must be "rounded up." *See* Second. Am. Compl. ¶ 44. But of course, this is the very question at the heart of Plaintiffs' claim in Count I of the Second Amended Complaint. *See id.* ¶¶ 40–51. As such, Ms. White, and putative class members like her, would not know whether they were class members until after the Court made a determination on the merits of her claim.

Similar problems apply to Ms. Eva Juneau, Mr. Peter Betancourt, and the subclasses they represent. Ms. Juneau, for example, asserts that Hilton improperly denied her vesting credit for service rendered at the Reno Hilton, while the location was designated as a "non-participating" property. *Id.* ¶ 58. Plaintiffs allege that employees like Ms. Juneau *should* have vested rights, because Hilton's denial of such vesting credit for service at "non-participating" properties is unlawful under ERISA. *Id.* ¶¶ 53–54. Therefore, a merits decision from the Court on the "nonparticipating" service claim, would be necessary to determine whether employees like Ms. Juneau ultimately will receive the credit needed for their retirement rights to vest. And

the same problem applies to Mr. Betancourt. For Mr. Betancourt, and the subclass he purports to represent, the vesting of their rights hinges on a decision from this Court regarding whether Hilton may properly deny retirement benefits to a beneficiary, "solely on the grounds that the claimant is 'not the surviving spouse.'" *Id.* ¶ 75. In sum, membership for each proposed subclass manifests only upon an affirmative merits ruling from the Court. As explained, "[s]uch a class definition is improper because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Messner*, 669 F.3d at 825. For these reasons, Plaintiffs' proposed class is fail-safe.

Despite the presence of this fail-safe class, however, the Court notes that the rule against such classes is not entirely settled. In this jurisdiction, at least one district court has adopted the rule and denied certification thereunder, *see Campbell*, 311 F. Supp. 3d at 313–15, while two other district courts have considered the rule against fail-safe classes, without concluding that it is definitively established as a criteria for class certification, *see Ramirez v. United States Immigration & Customs Enf't*, 338 F. Supp. 3d 1, 49 (D.D.C. 2018); *Afghan & Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the United States v. Pompeo*, 334 F.R.D. 449, 464 (D.D.C. 2020). The D.C. Circuit has not opined directly on this matter. Yet, the absence of a clear directive from the D.C. Circuit does not negate the rule against fail-safe classes, but rather leaves open the question of the rule's applicability.

And here, the Court finds multiple factors weighing strongly in favor of an operative rule against fail-safe classes. First, of the nine circuits to consider the matter, eight circuits have either adopted a categorical rule against fail-safe classes[2] or discussed such a rule with approval.[3] Only the Fifth Circuit has rejected the

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[3] *See*, *e.g.*, *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1276–77 (11th Cir. 2019) ("We do not hold today that a court is required to ensure that the class definition does not include any individuals who do not have standing before certifying a class. Such a rule would run the risk of promoting so-called 'fail-safe' classes, whose membership can only be determined after the entire case has been litigated and the court can determine who actually suffered an injury."); *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1138 n.7 (9th Cir. 2016) ("[D]efining the class to include only those individuals who were 'injured' by non-disclosure threatens to create a 'fail safe' class."); *Byrd v. Aaron's Inc.*, 784 F.3d 154, 167 (3d Cir. 2015) ("[R]equiring such specificity may be unworkable in some cases and approaches requiring a fail-safe class."); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 360 n.9 (4th Cir. 2014) ("Although the issue was briefed and argued below, the district court did not address whether it is possible to define the classes without creating

applicability of the rule against fail-safe classes. *See In re Rodriguez*, 695 F.3d 360, 370 (5th Cir. 2012). This Fifth Circuit precedent, however, stands as an outlier amongst the circuits and is post-dated by more recent circuit precedent adopting the rule against fail-safe classes. *See supra* at Note 2. Moreover, numerous district courts throughout the country have applied the rule against fail-safe classes in denying class certification.[4] And even where debate exists regarding the contours of a broader "ascertainability" requirement for class certification, the narrow rule against fail-safe classes has persisted. *See Mullins*, 795 F.3d at 660 (rejecting an expanded "ascertainability" requirement while applying the rule against "fail-safe" classes as "well-settled").

Furthermore, beyond the weight of this precedent, the gravamen of the rule itself is rooted in compelling principles of fairness and common-sense. As a practical

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a fail-safe class. . . . On remand, the district court should consider this issue as part of its class-definition analysis.").

[4] *See*, *e.g.*, *Day v. Humana Ins. Co.*, 335 F.R.D. 181, 200 (N.D. Ill. 2020) (denying certification of an ERISA class where "the class Plaintiff [] attempted to define [wa]s 'fail-safe'—that is, defined so that whether a person qualifies as a member depends on whether the person has a valid claim") (quotation omitted); *Bais Yaakov of Spring Valley v. ACT, INC.*, 328 F.R.D. 6, 14 (D. Mass. 2018) (denying class certification where "the class fit[] squarely within the definition of a 'fail-safe class' because class membership [wa]s defined by whether or not members have a valid claim"); *Quevedo v. Macy's, Inc.*, No. CV091522GAFMANX, 2011 WL 13124445, at *5 (C.D. Cal. Mar. 9, 2011) ("For the independent reason that Plaintiff's proposed sub-classes constitute such impermissible 'fail-safe' classes against which no adverse judgment could be entered, the Court denies certification.").

matter, putative members of a fail-safe class are not identifiable after class certification, because the definition of a class member turns on the final result of the litigation itself. This creates tangible administrative problems for the courts, including difficulty in providing proper notice to class members. *See Orduno*, 932 F.3d at 716–17. Fail-safe classes are also inherently unfair to the defendant, who "is forced to defend against the class, but if a plaintiff loses, she drops out and can subject the defendant to another round of litigation." *Mullins*, 795 F.3d at 660. In this way, fail-safe classes also contravene the notions of efficiency critical to Rule 23 and the class action mechanism. A merits ruling against a fail-safe class does not resolve a class-wide dispute, but instead hollows out the fail-safe class at issue, leaving further litigation for a later date.

In view of the foregoing, the Court will apply the rule against fail-safe classes in this case. Indeed, it would be improvident to certify a fail-safe class like Plaintiffs' where the D.C. Circuit has not approved of such classes and where numerous circuit courts, and at least one district court in this jurisdiction, have applied a common-sense rule against them. Nonetheless, "the fail-safe problem is more of an art than a science," which "can and often should be solved by refining the class definition rather than by flatly denying class certification on that basis." *Messner*, 669 F.3d at 825. Accordingly, the Court finds that it is most appropriate to **DENY** Plaintiffs' Renewed Motion for Class Certification **WITHOUT PREJUDICE**, and to permit

Plaintiffs a final opportunity to amend their class definition in accordance with this Memorandum Opinion.

B. Additional Barriers To Class Certification

Because the Court will permit Plaintiffs a final opportunity to cure the fail-safe deficiency in their proposed class definition, the Court, in the interest of judicial economy, will also note additional defects in Plaintiffs' proposed subclasses. *See Campbell*, 311 F. Supp. 3d at 315. At this juncture, two such defects are readily apparent: (1) Plaintiffs' "non-participating service" subclass lacks commonality, and (2) Mr. Betancourt's claim is not "typical" of the subclass he purports to represent.

1. Non-Participating Service Subclass

Plaintiffs' cumbersome "non-participating service" subclass presents multiple problems at the certification stage of this litigation. Foremost among these deficiencies is the lack of commonality within the subclass. Here, Rule 23(a)(2) demands that "there are questions of law or fact common to the class" proposed. The Supreme Court has stated that a "common" question is one that is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). "The touchstone of the commonality inquiry is 'the capacity of a classwide proceeding to

generate common *answers* apt to drive the resolution of the litigation.'" *Coleman ex rel. Bunn v. District of Columbia*, 306 F.R.D. 68, 82 (D.D.C. 2015) (quoting *Wal-Mart*, 564 U.S. at 350).

The Court is not persuaded that a classwide proceeding would generate such common answers for the non-participating service subclass at issue here. As a threshold matter, the Court notes that Plaintiffs' present class certification order functionally amends the definition of its nonparticipating service subclass offered in the Second Amended Complaint. Specifically, in the Second Amended Complaint, this subclass covered:

> Refusal to count "non-participating" service for vesting by not recognizing Hilton properties as "Related Companies" whether or not they participate in the Plan, or failing to apply the proper equivalencies for non-participating service

Second Am. Compl. ¶ 11(c)(2). Plaintiffs, however, have changed the definition of this subclass in the proposed class certification order, accompanying their present motion, to:

> Refusal to count "non-participating" service for vesting purposes notwithstanding that the service was with the "employer" under ERISA §3(5), that the Hilton Defendants counted service at the same "Hilton Properties" in *Kifafi* and represented to this Court and the D.C. Circuit in *Kifafi* that Hilton had counted "non-participating" service with Hilton for vesting, and that the "records requested and received from Defendants do not identify any

> nonparticipating property that is also not a Related Company"

Pls.' Proposed Order on Class Cert., ECF No. 74-1, at ¶ 2(c)(2). Tellingly, this de facto amendment comes after the Court's express decision to deny Plaintiffs' leave to amend their Second Amended Complaint. *See* Mem. Op., ECF No. 64, at 12. And this alteration was no doubt motivated by the merits implications of the Court's conclusion that "*Kifafi* specifically refrained from adjudicating a right to claim credit for non-participating service," and that "Plaintiffs cannot purport to enforce something established in *Kifafi* when their basis for saying that it was established in *Kifafi* is wrong." *Id.* at 9–10.

Nonetheless, this change does not rectify the non-participating service subclass Plaintiffs seek to advance. First, the question of whether a class member's "non-participating service" was rendered while Hilton was "the 'employer' under ERISA § 3(5)" is not susceptible to common resolution amongst the proposed subclass. Indeed, the recognition of an "employer" under ERISA § 3(5) is a distinct legal inquiry, which requires an individualized assessment of the management relationship in effect with each of the individualized non-participating properties at issue. *See* 29 U.S.C. § 1002(5). And, as Defendants note, the Second Amended Complaint references at least twelve of these non-participating properties to be considered within this subclass. Second Am. Compl. ¶ 65.

For example, Ms. Juneau rendered service at the Reno Hilton while it "was a nonparticipating property prior to August 1, 1992." *Id.* ¶ 5 8; *see also* Pls.' Mot., Ex. 2 (Juneau Service Sheet). But an assessment of whether that particular service was rendered while Hilton was Ms. Juneau's "employer" does not readily supply an answer common to the claims of employees who rendered service at a different non-participating property, *see* Second Am. Compl. ¶ 65, such as the alleged 20 employees also within this proposed subclass who were denied credit for nonparticipating service at the Atlanta Hilton, *id.* ¶ 66. Indeed, whether Hilton was an "employer" under ERISA § 3(5) will turn on its specific contractual relationship with each of the various nonparticipating properties, not a uniform policy. *See* Pls.' Mot., Ex. 12 (Management Agreements). In response, Plaintiffs argue that they will "show that all of the 'managed property' agreements that Hilton enters into give Hilton the power to hire, fire, promote, and supervise performance"—"in other words, managed property agreements give Hilton the power to function as the 'employer.'" Pls.' Mot. at 18–19. But this assertion only *supports* the conclusion that an individualized assessment of the various non-participating properties, including their operative management agreements, is needed to resolve the various class members' claims embedded within Plaintiffs' non-participating service subclass. The presence of such disparate questions in this subclass impedes the Court's ability to "resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350.

Plaintiffs' proposed non-participating service subclass also suffers from a second "commonality" problem: it seeks to collapse distinct legal issues under ERISA into a single subclass. *See* Defs.' Opp'n at 14–16; *DL v. Dist. Of Columbia*, 713 F.3d 120, 128 (D.C. Cir. 2013). Specifically, this subclass includes at least 29 claimants, for whom Hilton has allegedly kept inadequate records and has failed to apply the proper time "equivalencies" for those undocumented periods of employment. *See* Second Am. Compl. ¶ 68. Notably, Plaintiffs' original subclass definition expressly carved out a position for these distinct claimants whose claims were denied because Hilton "fail[ed] to apply the proper equivalencies for non-participating service." *Id.* ¶ 1 1 (c)(2). And while Plaintiffs' revised subclass definition omits such language, *see* Pls.' Proposed Order on Class Cert., ECF No. 74-1, at ¶ 2(c), their present motion makes clear that these unique claimants remain part of the non-participating service subclass, *see* Pls.' Mot. at 18, n.6 (citing Second Am. Compl. ¶¶ 67–73)). Yet, as Defendants note, the application of "proper equivalencies" folds a unique ERISA issue into the non-participating service subclass, distinct from the question of whether an employee's non-participating service was rendered to Hilton as an "employer." *See* Defs.' Opp'n at 15. Packing "multiple, disparate failures to comply" with ERISA into a single subclass further vitiates the existence of commonality under Rule 23 here. *DL v. Dist. Of Columbia*, 713 F.3d at 128 (quotation omitted); *see also Kifafi v. Hilton Hotels Ret. Plan*, 189 F.R.D. 174, 179–80 (D.D.C. 1999) (denying

certification of class that "encompasse[d] a variety of alleged ERISA violations").

Finally, beyond these issues of commonality with the proposed non-participating service subclass, one additional problem merits discussion. As noted, Plaintiffs have defined this subclass to cover claimants who provided service to Hilton, as an "employer" under ERISA § 3(5). Pls.' Proposed Order on Class Cert., ECF No. 74-1, at ¶ 2(c). But the question of whether any nonparticipating service was rendered for Hilton as an "employer" as defined in the statute is, itself, another "contested issue in this case" and, therefore, "not a proper way to determine the class." *Alexander v. F.B.I.*, 971 F. Supp. 603, 612 (D.D.C. 1997). In fact, Plaintiffs motion states plainly that they "*will* show that . . . managed property agreements give Hilton the power to function as the 'employer.' " Pls.' Mot. at 18–19 (emphasis added). Implicit in this assertion is the fact that they have not yet done so, and, in this way, Plaintiffs leave membership in their proposed nonparticipating service subclass open to a disputed matter of statutory interpretation. *See* 29 U.S.C. § 1002(5). Consequently, Plaintiffs have created yet another fail-safe class here, as no putative class member can presently determine whether he or she rendered service to Hilton as an "employer" under ERISA § 3(5), until the Court considers the merits of that legal issue. *See Campbell*, 311 F. Supp. 3d at 313. This flaw, in conjunction with the defects outlined above, makes certification of the nonparticipating service subclass improper, as presently defined. *See* Fed. R. Civ. P. 23(a).

2. Mr. Betancourt's "Surviving Beneficiary" Claim

In addition to the aforementioned problems with Plaintiffs' "non-participating service" subclass, a distinct defect is also apparent with regards to the "surviving beneficiary" subclass Plaintiffs seek to certify. Namely, Mr. Betancourt, the proposed class representative, possesses a claim that is not "typical" of the subclass he purports to represent. Generally speaking, "[t]ypicality is . . . satisfied when the plaintiff's claims arise from the same course of conduct, series of events, or legal theories as the claims of other class members." *In re XM Satellite Radio Holdings Secs. Litig.*, 237 F.R.D. 13, 18 (D.D.C. 2006). Inherent in this standard, however, is "the requirement that the class representatives be members of the class" they represent and fit that proposed class definition. *Gatore v. United States Dep't of Homeland Sec.*, 327 F. Supp. 3d 76, 103 (D.D.C. 2018) (quotation omitted); *see also Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982) ("We have repeatedly held that a class representative must be part of the class and possess the same interest and suffer the same injury as the class members.").

Mr. Betancourt's claim is atypical on its face. Here, Mr. Betancourt purports to represent a subclass of individuals who have been denied "retroactive/back retirement benefit payments . . . *on the sole basis* that the claimants are 'not the surviving spouse' of deceased vested participants." Pls.' Proposed Order on Class Cert., ECF No. 74-1, at ¶ 2(c)(3) (emphasis added). In their reply brief, for example, Plaintiffs explain that

"Hilton uniformly denied at least 28 beneficiaries like Mr. Betancourt back payment using the same form language:

> Your claim is denied because you are not the surviving spouse of [Participant]. Under the Plan, a surviving spouse benefit is payable in certain situations. *See* Hilton Hotels Retirement Plan §4.7. However, the applicable Plan document does not provide for a death benefit to anyone other than the surviving spouse. Because you are not the surviving spouse, you are not entitled to a death benefit under the Plan."

Pls.' Reply at 11. Indeed, Plaintiffs further elaborate that because "there is no factual variation among these denials," the "defining characteristic" of Mr. Betancourt's subclass is "the fact that the claim was denied 'on the sole basis' that the individual who submitted the claim is not a surviving spouse of a Plan participant." *Id.*; *see also* Second Am. Compl., ¶¶ 75–76.

The record, however, does not bear this out. To the contrary, the denial letter Plaintiffs cite contains *additional* bases for the denial of Mr. Betancourt's benefits claim under the Plan. *See* Defs.' Opp'n, Ex. I (June 2015 Letter), at 1–2. In addition to the fact that Mr. Betancourt was not a "surviving spouse" of the Plan participant (his father), Hilton also denied Mr. Betancourt's claim because it was untimely and, relatedly, because his father (a Hilton employee) died after the age of 70.5, without commencing his retirement benefits. *See id.*; *see also* Pls.' Mot., Ex. 10 (Appeals

Analysis Spreadsheet), at 2. As such, Mr. Betancourt's claim was not denied "*solely on the basis*" that he was not a "surviving spouse," but also for multiple, additional reasons stated plainly in his denial letter. And importantly, these additional grounds for Mr. Betancourt's denial are not simply ancillary litigation defenses that could "skew the focus of the litigation." *Meijer, Inc. v. Warner Chilcott Holdings Co. III*, 246 F.R.D. 293, 302 (D.D.C. 2007); *see also* Pls.' Reply at 13, 17–20. Instead, they are fundamental components of Mr. Betancourt's claim placing him outside the definition of the very subclass he purports to represent. *See Gatore*, 327 F. Supp. 3d at 103 (denying class certification where proposed representatives did not fit the class definition). This defect precludes the certification of the surviving beneficiary subclass. *See* Fed. R. Civ. P. 23(a)

IV. CONCLUSION

For the reasons set forth in this Memorandum Opinion, the Court **DENIES** Plaintiffs' [74] Renewed Motion for Class Certification **WITHOUT PREJUDICE**. By **NOVEMBER 6, 2020**, the parties shall file a Joint Status Report identifying how they propose to proceed and a schedule for such proceedings.

An appropriate order accompanies this Memorandum Opinion.

Date: October 7, 2020

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VALERIE R. WHITE, *et al.*, Plaintiffs, v. HILTON HOTELS RETIREMENT PLAN, *et al.*, Defendants.	Civil Action No. 16-856 (CKK)

ORDER
(October 7, 2020)

For the reasons set forth in the accompanying Memorandum Opinion, the Court **DENIES** Plaintiffs' [74] Renewed Motion for Class Certification **WITHOUT PREJUDICE**. By **NOVEMBER 6, 2020**, the parties shall file a Joint Status Report identifying how they propose to proceed and a schedule for such proceedings.

SO ORDERED.

Date: October 7, 2020

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VALERIE R. WHITE, *et al.*, Plaintiffs, v. HILTON HOTELS RETIREMENT PLAN, *et al.*, Defendants.	Civil Action No. 16-856 (CKK)

MEMORANDUM OPINION
(December 17, 2019)

Plaintiffs seek reconsideration of this Court's denial, *see* March 31, 2019 Order, ECF No. 63, of their Motion for Leave to Amend Complaint to Add Additional Named Representative, ECF No. 58. The Court previously discussed the relevant background of this case in its March 31, 2019 Memorandum Opinion, ECF No. 64, to which it refers the reader. Upon consideration of the briefing,[1] the relevant legal authorities, and

[1] The Court's consideration has focused on the following:

- Pls.' Mot. to Reconsider March 31, 2019 Decision Denying Mot. to Add Add'l Named Representative ("Pls.' Mot. for Recons."), ECF No. 66;
- Defs.' Mem. of P. & A. in Opp'n to Pls.' Mot. to Reconsider March 31, 2019 Decision Denying Mot. to Add Add'l Named Representative ("Defs.' Opp'n to Mot. for Recons."), ECF No. 67; and
- Pls.' Reply in Supp. of Mot. to Reconsider March 31, 2019 Decision Denying Mot. to Add Add'l Named

the record as a whole, the Court **DENIES** Plaintiffs' Motion to Reconsider March 31, 2019 Decision Denying Motion to Add Additional Named Representative, ECF No. 66.

I. LEGAL STANDARD

Under Rule 54(b) of the Federal Rules of Civil Procedure, the district court may revise its own interlocutory orders "at any time before the entry of judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b).

While Rule 54(b) affords a procedural mechanism for courts to reconsider prior interlocutory orders, its actual text provides little guidance as to when reconsideration may be appropriate. *Wultz v. Islamic Republic of Iran*, 762 F. Supp. 2d 18, 23 (D.D.C. Jan. 28, 2011). To fill this gap, the United States Court of Appeals for

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Representative ("Pls.' Reply in Supp. of Mot. for Recons."), ECF No. 68.

In addition, the Court has reviewed, as appropriate, the original briefing relating to Plaintiffs' Motion for Leave to Amend:

- Pls.' Mot. for Leave to Amend Compl. to Add Add'l Named Representative ("Pls.' Mot. to Amend"), ECF No. 58;
- Mem. of P. & A. in Opp'n to Pls.' Mot. for Leave to Amend Compl. to Add Add'l Named Representative ("Defs.' Opp'n to Pls.' Mot. to Amend"), ECF No. 60; and
- Pls.' Reply in Supp. of Mot. to Add Add'l Named Representative ("Pls.' Reply in Supp. of Mot. to Amend"), ECF No. 61.

In an exercise of its discretion, the Court finds that holding oral argument would not be of assistance in rendering a decision. *See* LCvR 7(f).

the District of Columbia has provided that relief under Rule 54(b) is available "as justice requires." *Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc.*, 630 F.3d 217, 227 (D.C. Cir. 2011). In general, "a court will grant a motion for reconsideration of an interlocutory order only when the movant demonstrates: (1) an intervening change in the law; (2) the discovery of new evidence not previously available; or (3) a clear error in the first order." *Stewart v. Panetta*, 826 F. Supp. 2d 176, 177 (D.D.C. 2011) (quoting *Johnson-Parks v. D.C. Chartered Health Plan*, 806 F. Supp. 2d 267, 269 (D.D.C. 2011)). In the final analysis, the district court must ask whether relief upon reconsideration is "necessary under the relevant circumstances." *Lewis v. District of Columbia*, 736 F. Supp. 2d 98, 102 (D.D.C. 2010) (internal quotation marks omitted) (quoting *Cobell v. Norton*, 224 F.R.D. 266, 272 (D.D.C. 2004)). In this regard, the district court's discretion is broad. *Id.*

The party moving the court to reconsider its decision carries the burden of proving that some harm would accompany a denial of the motion to reconsider: "In order for justice to require reconsideration, logically, it must be the case that, some sort of 'injustice' will result if reconsideration is refused." *Cobell v. Norton*, 355 F. Supp. 2d 531, 540 (D.D.C. 2005). In other words, "the movant must demonstrate that some harm, legal or at least tangible, would flow from a denial of reconsideration." *Id.* But "to promote finality, predictability and economy of judicial resources, as a rule a court should be loathe to revisit its own prior decisions in the absence of extraordinary

circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice." *Pueschel v. Nat'l Air Traffic Controllers' Ass'n*, 606 F. Supp. 2d 82, 85 (D.D.C. 2009) (internal quotation marks and alterations omitted) (quoting *Lederman v. United States*, 539 F. Supp. 2d 1, 2 (D.D.C. 2008)).

II. DISCUSSION

Plaintiffs do not move for reconsideration on the basis that there is new law or evidence. Instead, they contend that four errors in the Court's March 31, 2019 Order and Memorandum Opinion renders reconsideration necessary. Defendants claim that there were no such errors, that any errors do not result in injustice, and that the Court had alternative bases on which to deny Plaintiffs' Motion for Leave to Amend the Complaint, ECF No. 58. Despite Plaintiffs' assertions that the grounds for denying Plaintiffs' Motion were not sufficiently addressed in the prior briefing, the parties previously addressed many of these issues at length. *See*, *e.g.*, Defs.' Opp'n to Pls.' Mot. to Amend at 9–14 (arguing futility as ground for denial); Pls.' Reply in Supp. of Mot. to Amend at 5–8 (responding to Defendants' futility arguments). Regardless, the Court will briefly consider each of Plaintiffs' arguments here.

First, Plaintiffs contend that the March 31, 2019 decision "does not conform with the 'law of the case' doctrine based on a 'reason' that the parties never 'squarely addressed.'" Pls.' Mot. for Recons. at 2. As the Court noted above, Plaintiffs did indeed respond to the

general argument that amendment would be futile in the original briefing. *See* Pls.' Reply in Supp. of Mot. to Amend at 5–8. So too did this Court consider Plaintiffs' law of the case doctrine argument. *See* March 31, 2019 Mem. Op. at 11–12. Now, Plaintiffs argue that the Court is bound by the law of the case established by this Court's August 18, 2017 decision finding that Plaintiffs had sufficiently plead a plausible claim under Rule 12(b)(6) as to non-participating services. *See* Pls.' Mot. for Recons. at 2–3. Plaintiffs' arguments do not convince this Court that it erred on this issue.

"The law-of-the-case doctrine generally provides that 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *Musacchio v. United States*, 136 S. Ct. 709, 716 (2016) (quoting *Pepper v. United States*, 562 U.S. 476, 506 (2011)). It rests on the premise that "the *same* issue presented a second time in the *same* case in the *same court* should lead to the *same result*." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc). The "law-of-the-case doctrine is a prudential creation of the courts." *Id.* at 1395.

As Plaintiffs contend that this Court is bound by its prior August 18, 2017 Order on Defendants' Rule 12(b)(6) motion, some discussion of that decision is warranted. In ruling on that motion, the Court considered Defendants' arguments that this Court's decisions in *Kifafi* were inapposite to Ms. Eva Juneau's claim. August 18, 2017 Mem. Op., ECF No. 21, at 4. The Court explained that "the fact that the Court did not

address this claim in *Kifafi* does not render it inactionable within the confines of this matter." *Id.* Moreover, the Court concluded that, specifically as to Ms. Juneau, "Plaintiffs ha[d] pleaded sufficient factual matter to stake out a plausible claim under Rule 12(b)(6)." *Id.* In short, the Court found that the complaint sufficiently pled this claim, but it did not examine *Kifafi*'s relevance to this claim. *See id.* at 1, 4.

The issues discussed related to the August 18, 2017 decision and those discussed regarding the Court's March 31, 2019 decision do not present "the same issue." *LaShawn A.*, 87 F.3d at 1393. To begin with, the Court's discussion in the August 18, 2017 Memorandum Opinion and Order focused on the specific facts pleaded as to Ms. Juneau. *See* August 18, 2017 Mem. Op. at 4 (discussing specific allegations regarding property at which Ms. Juneau worked); *see also* March 31, 2019 Mem. Op. at 2 ("[T]he Court touched on *Kifafi* but focused on the viability of Plaintiffs' individual claims, rather than those of the subclasses they proposed to represent."). The Court therefore did not contemplate whether Mr. Hemphill, who did not work at the same property, could state a claim. More importantly, the Court did not specifically consider "what if any effect its prior rulings in *Kifafi* may have" on the claims alleged in the complaint. August 18, 2017 Mem. Op. at 1.

For these reasons, the earlier decision did not create any binding law of the case on the specific issue of whether *Kifafi* "decide[d] the right that Plaintiffs now purport to enforce based on *Kifafi*." March 31, 2019

Mem. Op. at 11. To the extent that it could be construed as doing so, the Court notes that this prudential doctrine is not a limit on this Court's power; courts may depart from prior rulings, especially when the prior motion was an interlocutory order such as a motion to dismiss. *See Langevine v. District of Columbia*, 106 F.3d 1018, 1023 (D.C. Cir. 1997) ("Interlocutory orders are not subject to the law of the case doctrine and may always be reconsidered prior to final judgment."); *Int'l Union, United Gov't Sec. Officers of Am. v. Clark*, 706 F. Supp. 2d 59, 64 (D.D.C. 2010) ("The Supreme Court has made clear that denial of a motion to dismiss is an interlocutory order."), *aff'd sub nom. Barkley v. U.S. Marshals Serv. ex rel. Hylton*, 766 F.3d 25 (D.C. Cir. 2014). Plaintiffs' argument on this basis therefore fails.

Second and third, Plaintiffs argue that this Court erred in assuming that issue preclusion only precludes the ultimate issue, rather than distinct issues of law and fact. Pls.' Mot. for Recons. at 3–5. Plaintiffs also argue that the Court erred because it assumed "that if this Court were to determine that there were *no* rulings in *Kifafi*" that qualify for issue preclusion, it would be futile to add Mr. Hemphill. *See id.* at 5–7.

In their Motion, Plaintiffs identify several distinct issues from *Kifafi* that they contend qualify for issue preclusion in this case. *See id.* at 3–7. Plaintiffs previously raised some of these same issues in their prior briefing. *See*, *e.g.*, Pls.' Reply in Supp. of Mot. to Amend at 10–11 (discussing issues related to Defendants' record-keeping with respect to non-participating services); *id.* at 11–12 (discussing representations by

Defendants' in *Kifafi* about consistency of crediting vesting service); Pls.' Mot. to Amend at 5 (relying upon language from May 15, 2009 summary judgment decision in *Kifafi* on distinct matter). The Court has already rejected many of Plaintiffs' arguments. *See* March 31, 2019 Mem. Op. at 10–12. Moreover, the issues raised by Plaintiffs are irrelevant to this Court's determination that "*Kifafi* did not adjudicate whether service at a non-participating Hilton Property that is not a Related Company must be counted toward vesting." *Id.* at 12; *see also id.* at 11 (explaining that language from *Kifafi* quoted by Plaintiffs was not relevant because it was decided in different context). Indeed, this Court refused to expand the vesting claims to all "non-participating service" in *Kifafi*. *Kifafi v. Hilton Hotels Ret. Plan*, 616 F. Supp. 2d 7, 30 (D.D.C. 2009) ("Kifafi seeks to expand this claim beyond union service to include all 'non-participating service.' *See* Pl.'s Reply at 38–43. Kifafi never moved to expand the scope of this sub-class and the Court never certified a 'non-participating service' class. The Court declines to revisit the scope of this sub-class at this late date."), *aff'd*, 701 F.3d 718, 732 (D.C. Cir. 2012) (specifically finding reasonable this Court's decision to limit the subclass in this way); *Kifafi v. Hilton Hotels Ret. Plan*, 736 F. Supp. 2d 64, 74 (D.D.C. 2010) ("The Court previously ruled that it would not expand Plaintiff's union service claim to include all 'nonparticipating' service because Kifafi never moved to expand the scope of the subclass and the Court never certified a 'non-participating service' subclass."), *aff'd*, 701 F.3d 718, 732 (D.C. Cir. 2012) (specifically finding reasonable this

denial). Even if these issues qualify for issue preclusion—and it is far from clear that they do—this would not change the fact that the specific issue underlying the claim at issue was not decided in *Kifafi*. This argument therefore provides no basis for reconsideration.

Fourth, Plaintiffs argue that the decision should be reconsidered because it contains errors regarding two decisions in *Kifafi*: the class certification decision in May 1999 and the August 2000 clarification of that decision. Like with the other alleged issues Plaintiffs have identified, however, even if these were errors, they would not impact the Court's ultimate decision. For example, Plaintiffs focus on the Court's statement that "[t]he Court's review of *Kifafi* strongly suggests that the 'Related Company' definition was never at issue in that litigation." March 31, 2019 Mem. Op. at 9. Plaintiffs explain that this was in error because the 'Related Company' definition was at issue based on briefing in *Kifafi*, copies of which Plaintiffs have provided. *See* Pls.' Mot. for Recons. at 7–8. While this sheds light on what was considered in *Kifafi*, that it may have been at issue does not impact this Court's ultimate finding that *Kifafi* did not decide whether service at a nonparticipating Hilton Property that is also not a Related Company is counted toward vesting. *See* March 31, 2019 Mem. Op. at 12. At bottom, Plaintiffs have failed to identify any error that would necessitate this Court reconsidering its prior denial.

Even if Plaintiff had done so, the Court also discussed alternative bases on which Plaintiffs' Motion could have been denied. As this Court noted in its prior

Memorandum Opinion, Plaintiffs untimely filed their Motion without explanation, even though they had knowledge of the potential defects in their Second Amended Complaint. *See* March 31, 2019 Mem. Op. at 5. The delayed filing of this Motion also posed substantial prejudice to Defendants, especially as it came years into the litigation. *See id.* at 5–6. These factors, which the Court must also weigh when considering whether to grant a motion for leave to amend a complaint, weighed heavily against granting Plaintiffs' Motion. Accordingly, justice does not require reconsideration in this case.

III. CONCLUSION

For the foregoing reasons, the Court **DENIES** Plaintiffs' Motion to Reconsider March 31, 2019 Decision Denying Motion to Add Additional Named Representative, ECF No. 66. An appropriate Order accompanies this Memorandum Opinion.

Date: December 17, 2019

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VALERIE R. WHITE, *et al.*, Plaintiffs, v. HILTON HOTELS RETIREMENT PLAN, *et al.*, Defendants.	Civil Action No. 16-856 (CKK)

ORDER
(December 17, 2019)

For the reasons set forth in the accompanying Memorandum Opinion, the Court shall **DENY** Plaintiffs' Motion to Reconsider March 31, 2019 Decision Denying Motion to Add Additional Named Representative, ECF No. 66. By **JANUARY 7, 2020**, the parties shall file a Joint Status Report identifying how they propose to proceed and a schedule for such proceedings.

SO ORDERED.

Date: December 17, 2019

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VALERIE R. WHITE, *et al.*, Plaintiffs, v. HILTON HOTELS RETIREMENT PLAN, *et al.*, Defendants.	Civil Action No. 16-856 (CKK)

MEMORANDUM OPINION
(March 31, 2019)

Plaintiffs Valerie R. White, Eva Juneau, and Peter Betancourt seek leave to amend their operative complaint yet again. This time Plaintiffs propose adding a further plaintiff, Darryl Hemphill, to remedy a potential defect in their proposed representation of a putative subclass. *See* Pls.' Mot. for Leave to Amend Compl. to Add Additional Named Representative, ECF No. 58, at 1-3 & n.2. Yet, an examination of one factor for the Court's consideration—the amendment's futility—indicates that Plaintiffs are unable to prevail, though for a reason not squarely addressed by Plaintiffs or Defendant Hilton entities and executives.[1] The Court need not reach Plaintiffs' request, in the alternative,

[1] Defendants listed in the Second Amended Complaint consist of Hilton Hotels Retirement Plan, Hilton Worldwide, Inc., Global Benefits Administrative Committee, Mary Nell Billings, S. Ted Nelson, Casey Young, and Unnamed Members of the Global Benefits Administrative Committee.

for Mr. Hemphill's intervention. Upon consideration of the briefing,[2] the relevant legal authorities, and the record as a whole, the Court shall, in an exercise of its discretion, **DENY** Plaintiffs' [58] Motion for Leave to Amend Complaint to Add Additional Named Representative.

I. BACKGROUND

Plaintiffs bring this putative class action under the Employee Income Security Act of 1974 ("ERISA") with respect to certain vesting determinations made by the Hilton Hotels Retirement Plan (the "Plan"). This matter was noticed as related to *Kifafi v. Hilton Hotels Retirement Plan*, No. 98–cv–1517 (CKK) (D.D.C.) ("*Kifafi*"), an action over which the Court concluded its jurisdiction in December 2015, after more than 17 years of litigation. *See Kifafi*, 752 F. App'x 8, 9 (D.C. Cir. Feb. 15, 2019) (Mem.) (per curiam); Order at ECF p. 3, *Kifafi*, ECF No. 447.[3] In *Kifafi*, the Court

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[2] The Court's consideration has focused on the following documents:

- Pls.' Mot. for Leave to Amend Compl. to Add Additional Named Representative, ECF No. 58 ("Pls.' Mot.");
- Mem. of P&A in Opp'n to Pls.' Mot. for Leave to Amend Compl. to Add Additional Named Representative, ECF No. 60 ("Defs.' Opp'n"); and
- Pls.' Reply in Supp. of Mot. to Add Additional Named Representative, ECF No. 61 ("Pls.' Reply").

[3] In this decision, all references to docket numbers in *Kifafi* pertain to the litigation in district court. The only references to Circuit proceedings include the citation to the respective Federal Reporter.

certified a benefit-accrual class and certain vesting subclasses. *See Kifafi*, 701 F.3d 718, 723-24 (D.C. Cir. 2012); *Kifafi*, 616 F. Supp. 2d 7, 10 (D.D.C. 2009).

The Second Amended Complaint, ECF No. 50, is replete with allegations that the legal issues underlying this new putative class action have already been decided by the Court in *Kifafi*, and that such determinations are binding under the doctrines of res judicata and offensive collateral estoppel.

The Court addressed those legal issues in varying degrees when it granted-in-part and denied-in-part Defendants' motion to dismiss the (First) Amended Complaint, and granted Plaintiffs' motion for leave to file the Second Amended Complaint. *See* Mem. Op. and Order, *White v. Hilton Hotels Retirement Plan*, 263 F. Supp. 3d 8 (D.D.C. 2017), ECF No. 21; Mem. Op., ECF No. 49. In the former instance, the Court touched on *Kifafi* but focused on the viability of Plaintiffs' individual claims, rather than those of the subclasses they proposed to represent. *See White*, 263 F. Supp. 3d at 9, 11-12. When it later considered the motion to amend, the Court expressly refrained from diving into the *Kifafi* depths:

> Defendants effectively ask this Court to decide these and other disputes [related in part to *Kifafi*] in determining whether to grant the Motion to Amend. But they cannot argue that the Court is *required* to resolve such issues at this stage. In an exercise of this Court's discretion under Federal Rule of Civil Procedure 15(a)(2), the Court finds that the Motion to

> Amend is not the proper posture to resolve these disputes. Plaintiffs have reasonably attempted to address the reasons for which this Court initially dismissed Claim Three [associated with a putative subclass other than the proposed "non-participating service" subclass], and accordingly the litigation shall proceed on the basis of their Second Amended Complaint.

Mem. Op., ECF No. 49, at 2-3. Despite the fact that the presently pending motion also seeks leave to amend, or in the alternative to intervene, the Court now finds that attention to *Kifafi* is crucial. And because of the intersection between the latest proposed amendment and one of the proposed subclasses, the Court denied the motion for class certification without prejudice pending the Court's decision as to this motion. Order, ECF No. 62.

II. LEGAL STANDARD

In cases where plaintiffs have already amended their Complaint, Federal Rule of Civil Procedure 15(a)(2) provides that "a party may amend its pleading only with the opposing party's written consent or the court's leave," which should be "freely give[n] . . . when justice so requires." Fed. R. Civ. P. 15(a)(2); *see Willoughby v. Potomac Elec. Power Co.*, 100 F.3d 999, 1003 (D.C. Cir. 1996) (finding that leave to amend a complaint is within the court's discretion and "should be freely given unless there is a good reason . . . to the contrary"); *Firestone v. Firestone*, 76 F.3d 1205, 1208

(D.C. Cir. 1996) (noting that "it is an abuse of discretion to deny leave to amend unless there is sufficient reason").

"When evaluating whether to grant leave to amend, the Court must consider (1) undue delay; (2) prejudice to the opposing party; (3) futility of the amendment; (4) bad faith; and (5) whether the plaintiff has previously amended the complaint." *Howell v. Gray*, 843 F. Supp. 2d 49, 54 (D.D.C. 2012) (citing *Atchinson v. District of Columbia*, 73 F.3d 418 (D.C. Cir. 1996) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

"Courts that have found an undue delay in filing [a proposed amended complaint] have generally confronted cases in which the movants failed to promptly allege a claim for which they already possessed evidence." *United States ex rel. Westrick v. Second Chance Body Armor, Inc.*, 301 F.R.D. 5, 9 (D.D.C. 2013). An amendment would be unduly prejudicial if it "substantially changes the theory on which the case has been proceeding and is proposed late enough so that the opponent would be required to engage in significant new preparation"; it would "put [the opponent] to added expense and the burden of a more complicated and lengthy trial"; or it raises "issues . . . [that] are remote from the other issues in the case." *Djourabchi v. Self*, 240 F.R.D. 5, 13 (D.D.C. 2006) (quoting 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1487 (2d ed. 1990)) (internal quotation marks omitted). With respect to the futility of an amendment, a district court may properly deny a

motion to amend if "the amended pleading would not survive a motion to dismiss." *In re Interbank Funding Corp. Sec. Litig.*, 629 F.3d 213, 218 (D.C. Cir. 2010) (citing, e.g., *Foman*, 371 U.S. at 182). "With respect to bad faith, courts generally consider the length of the delay between the latest pleading and the amendment sought. However, delay alone is an insufficient ground to deny the motion unless it prejudices the opposing party." *Djourabchi*, 240 F.R.D. at 13 (citing Wright, Miller & Kane, *supra*, § 1488).

"Because amendments are to be liberally granted, the non-movant bears the burden of showing why an amendment should not be allowed." *Abdullah v. Washington*, 530 F. Supp. 2d 112, 115 (D.D.C. 2008).

III. DISCUSSION

A. Undue Delay, Prejudice, and Previous Amendment[4]

Defendants rightly observe that Plaintiffs' latest request to amend their operative complaint is dilatory in various respects, several of which the Court shall highlight.[5] First, Plaintiffs filed this motion long past

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[4] Defendants also refer to the "bad faith" factor when they recite the relevant standard for leave to amend, but they do not specifically explain how Plaintiffs' motion runs afoul of this factor. *See* Defs.' Opp'n at 9, 14-15.

[5] Although Defendants address Plaintiffs' delay in part through the lens of Rule 16(b)(4)—governing modification of a scheduling order—the Court shall instead deal with this issue in the context of Rule 15(a)(2), as the present posture is a motion for leave to amend the operative complaint. *See* Defs.' Opp'n at 5-9,

their proposed deadline—which the Court adopted—for motions to amend. *See* Order, ECF No. 62, at 1-2. They do not explain why the motion that they did timely file did not address this issue. *See generally* Mem. Op., ECF No. 49 (dealing with other grounds for leave to amend their (First) Amended Complaint). Plaintiffs do not dispute Defendants' contention that they have represented Mr. Hemphill before, including through Defendants' internal appeals process. *See* Defs.' Opp'n at 7 (citing Pls.' Mot. at 5); Pls.' Reply at 2. Nor do Plaintiffs dispute that they were aware—before their motion for leave to amend their (First) Amended Complaint, and before their class certification motion—of the potential defect in Plaintiff Juneau's ability to represent the putative "non-participating service" subclass. *See* Defs.' Opp'n at 7; Order, ECF No. 62, at 1-2 (discussing Plaintiffs' comments, in class certification memorandum and reply, about this issue). Plaintiffs now try to explain the delay simply by saying that Defendants had not yet opposed their class certification motion. Pls.' Reply at 2-3. But that does not justify Plaintiffs' failure to act sooner upon their awareness.

Defendants furthermore argue that they have been prejudiced by, *inter alia*, briefing multiple rounds of motions to amend, as well as the motion for class certification. *See* Defs.' Opp'n at 8. Because of the pending second motion to amend, the Court denied the

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14-15. However, the Court's treatment of this issue shall not be construed as suggesting that Rule 16(b)(4) is never an appropriate means of addressing delay in similar circumstances.

motion for class certification without prejudice, which may result in re-briefing. *See* Order, ECF No. 62.

Notwithstanding these factors weighing against amendment, the Court ultimately shall deny the proposed amendment on different grounds.

B. Futility of Amendment

Defendants also argue the futility of Plaintiffs' motion to the extent that Plaintiffs try to correct a perceived deficiency in their Second Amended Complaint. In deciding whether to grant leave to amend, the Court has considered whether Mr. Hemphill would be an appropriate representative of the proposed "non-participating service" subclass, as that is Plaintiffs' motive for requesting this amendment. The Court has reviewed that proposed subclass and ultimately decides not to grant leave to amend, but on grounds *other than* Mr. Hemphill's relative ability to represent that subclass.

The reason for Plaintiffs' difficulty goes back to the foundations of this case. As discussed above, Plaintiffs designated this case as related to *Kifafi*. *See* ECF Nos. 2, 30. The operative Second Amended Complaint in this case, like the proposed Third Amended Complaint, specifically styles this case as an "enforcement" of rulings in *Kifafi*. *See*, *e.g.*, 2d Am. Class Action Compl., ECF No. 50 ("SAC"), at 1 ("The named Plaintiffs . . . *seek to enforce* their rights, and the rights of others similarly situated, to receive vested retirement benefits in accordance with the District Court's decisions in a related case, *Kifafi* . . . , and the standards set forth

in ERISA and the Hilton Hotels Retirement Plan." (emphasis added)).

But briefing of the pending motion has elucidated problems with this premise as it applies to the proposed "non-participating service" subclass: it is not clear that the *Kifafi* litigation established the right that Plaintiff Juneau, and proposed Plaintiff Hemphill, seek to vindicate.

In theory, that's fine: This is a new lawsuit, and Plaintiffs can pursue as-yet-unlitigated claims. Earlier in this case, the Court indeed found that Plaintiffs had stated a claim with respect to the proposed "non-participating service" subclass. *White*, 263 F. Supp. 3d at 11-12. A closer examination now casts doubt on that conclusion. The flawed premise is that Plaintiff Juneau, and would-be Plaintiff Hemphill, want to enforce a right generated by *Kifafi*—without giving a valid basis in the operative complaint, or proposed amendment, for believing that the right was in fact established in *Kifafi*, as the Court's review of the history of that case has revealed.

In a May 11, 1999, decision in *Kifafi*, this Court provisionally certified a "benefit-accrual class" limited to "all former and current employees of Hilton Hotels Corporation" meeting certain additional criteria. *Kifafi*, 189 F.R.D. 174, 176, 180 (D.D.C. 1999). The Court's ruling does not refer to former and current employees of a "Hilton Property," the relevance of which the Court shall address shortly.

An August 11, 2000, decision revisited that benefit-accrual class definition to consider certain proposed clarifications or modifications at the parties' request. Mem. Order, *Kifafi*, Civil Action No. 98-1517 (CKK) (D.D.C. Aug. 11, 2000), ECF No. 88. That Memorandum Order cites the Court's May 11, 1999, ruling discussed above for the definition of the benefit-accrual class. However, inexplicably, the definition differs in a way material to the present decision: it includes "[a]ll former or current employees of Hilton Hotels Corporation *or a Hilton Property*." *Id.* at 1. At this time, the Court has not discerned how the "Hilton Property" aspect was included in a definition that supposedly did not differ from what the Court provisionally certified on May 11, 1999. In any case, the August 11, 2000, Memorandum Order proceeds to recognize that "Hilton Property" is defined by the Hilton Hotels Retirement Plan to consist of "each business entity . . . in which the [Hilton Hotels Corporation], directly or indirectly has an interest or with which it has a contractual relationship for hotel management." *Id.* at 4 (alteration in original); Pls.' Reply, Ex. 1, ECF No. 61-1 (Hilton Hotels Retirement Plan, as amended and restated effective January 1, 1987 ("1987 Plan"), at 17).[6]

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[6] Because the August 11, 2000, decision in *Kifafi* predates electronic docketing, the plaintiff's exhibit from which the Court quoted is not readily retrievable. Accordingly, it is not clear which version of the Plan is referenced. However, the Court finds the same definition of "Hilton Property" in the 1987 version of the Plan, which is the operative version for these purposes. *See* 1987 Plan at 2 (indicating that 1987 version is applicable to "Employees who retire or otherwise terminate employment on or after

In the presently operative and proposed complaints, Plaintiffs are correct to observe that the August 11, 2000, decision found the definition of "Hilton Property" to include entities under contract for management. *E.g.*, SAC ¶ 55. But Plaintiffs do not identify any support in that decision for their contention that "this Court ruled in *Kifafi* that the Plan's definition of 'Related Companies' encompasses any 'Hilton Property.' " Pl.'s Mot. at 6 n.5 (citing Mem. Order at 4, *Kifafi*, Civil Action No. 98-1517 (CKK) (D.D.C. Aug. 11, 2000), ECF No. 88). The Court's August 11, 2000, ruling does not refer at all to "Related Companies." In fact, the Court's decision even omitted that part of the "Hilton Property" definition; after all, the 1987 Plan defined "Hilton Property" to "mean each [designated] business entity (including a Related Company of [Hilton Hotels Corporation])," that met the other criteria—such as being under contract for management—that the Court did quote in its August 11, 2000, ruling. *See* 1987 Plan at 17. Nor do Plaintiffs articulate how that August 11, 2000, ruling establishes any relationship between the Related Company definition and the Hilton Property definition without referring at all to a Related Company. The Court's review of *Kifafi* strongly suggests

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January 1, 1987"); Defs.' Opp'n, ECF No. 60-3 (Decl. of Andrew M. Lacy, Ex. A (Hilton Hotels Retirement Plan, as amended and restated effective Jan. 1, 2012, at 2 (providing that prior versions of Plan are applicable to "Employees who retire or otherwise terminate employment prior to January 1, 2012")). Mr. Hemphill allegedly left a Hilton entity for the second time in 1991, when it appears that he would have been subject to the 1987 Plan. [Proposed] 3d Am. Class Action Compl., ECF No. 58-2, ¶ 4A; *see also* Pls.' Reply at 6-7 (citing 1987 Plan).

that the "Related Company" definition was never at issue in that litigation.

The importance of that lacuna is that Plaintiffs' presently operative and proposed complaints propose a subclass definition that seeks to rely on something that purportedly was established in *Kifafi*, but was not. That subclass would seek to hold Defendants liable for, in pertinent part, their alleged "refusal to count 'non-participating' service for vesting by not recognizing Hilton properties as 'Related Companies' whether or not they participate in the Plan." SAC ¶ 11(C)(2).[7] But, as described above, Plaintiffs have not established their contention that "Related Company" is a category that includes "Hilton Property." The Plan establishes instead the opposite relationship: "Hilton Property" is a category that includes, but appears to be not limited to, a "Related Company." Accordingly, Plaintiffs cannot purport to enforce something established in *Kifafi* when their basis for saying that it was established in *Kifafi* is wrong.

This brings the Court to an associated issue: Whether the Court ever recognized a subclass in *Kifafi*

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[7] The Court notes that Plaintiffs' proposed subclass definition does not specifically invoke the term "Hilton Property," which uses the capital letter "P" and is defined in the Plan, but the present litigation concerns the use of that defined term. Also, and separately, Plaintiffs' motion appears not to concern the aspect of the proposed "non-participating service" subclass that would seek a remedy for "failing to apply the proper equivalencies for non-participating service." SAC ¶ 11(c)(2). Accordingly, the Court does not express a view on whether that aspect of the subclass is enforceable based on *Kifafi*.

regarding service at a non-participating entity. The answer to that question is a qualified "no." The qualification is that the Court did certify a subclass regarding union service, which can include service at a non-participating entity, but the Court expressly rejected the plaintiff's belated argument that the remedy for failure to credit union service should include all non-participating service. *Kifafi*, 736 F. Supp. 2d 64, 73-74 (D.D.C. 2010) (citing *Kifafi*, 616 F. Supp. 2d at 30 n.18) (recognizing that "the Court never certified a 'non-participating service' subclass");[8] *see also id.* at 79 (rejecting another of plaintiff's proposals that would result in credit for non-participating service). The Circuit affirmed that this Court had not abused its discretion in rejecting the plaintiff's attempt to expand the class or the remedy beyond union service to include all nonparticipating service. *See Kifafi*, 701 F.3d at 731-32 ("Even if it would have been reasonable to certify a broader nonparticipating service class, the district court's actual certification decision was no less reasonable. The same is true of its later refusals to expand the certified subclass."); *Kifafi*, 752 F. App'x at 10 (recognizing Circuit's prior affirmance of this Court's decision not to reach non-union, non-participating service). In short, *Kifafi* specifically refrained from adjudicating a right to claim credit for non-participating service. As

[8] The Court also indicated that "[a]lternatively, if Defendants prefer to avoid the costs of searching corporate records and establishing a claims procedure, they may agree to Plaintiff's proposal to credit all non-participating service." *Kifafi*, 736 F. Supp. 2d at 76. But, in its review of the *Kifafi* docket, the Court has not found that the *Kifafi* defendants ever opted for the latter option.

a result, the *Kifafi* claims process would not be expected to recognize that right.

Nevertheless, in an effort to establish that service at a non-participating Hilton Property that is not a Related Company can count towards vesting, Plaintiffs rely on, *inter alia*, the Court's finding in *Kifafi* that "ERISA requires employers to count all of an employee's years of service for calculating his or her years toward vesting, even if they occur prior to participation in the retirement plan." *Kifafi*, 826 F. Supp. 2d 25, 28-29 (D.D.C. 2011) (citing 29 U.S.C. § 1053(b)(1); *Kifafi*, 616 F. Supp. 2d at 12); Pls.' Mot. at 5 (citing *Kifafi*, 616 F. Supp. 2d at 12; *Holt v. Winpisinger*, 811 F.2d 1532, 1537 (D.C. Cir. 1987)). Yet, that proposition is not directly at issue. The Court made the observation about counting all years in the separate context of assessing *Kifafi* defendants' compliance with their "1,000 hours standard for calculating employees' vesting credit." *Kifafi*, 616 F. Supp. 2d at 12, 29. Here, instead, Plaintiffs are not trying to enforce an hours-based standard for calculating the amount of service, but rather to establish that service at a non-participating Hilton Property that is not a Related Company can count towards vesting. The latter right was not adjudicated in *Kifafi*.

* * *

Although *Kifafi* spawned a veritable hydra, one head that hydra evidently lacks is a subclass regarding service at non-participating Hilton Properties that are

not Related Companies.[9] Plaintiffs must establish afresh their entitlement to credit for that service, rather than try to claim a mythological trophy attributable to *Kifafi*.

Granting leave to amend the Second Amended Complaint to add Mr. Hemphill as a putative representative of this proposed subclass would not cure the deficiencies discussed in this decision. The Court has pointed out a flaw in that subclass insofar as *Kifafi* did not specifically decide the right that Plaintiffs now purport to enforce based on *Kifafi*. It would be futile to add a new person to represent that subclass when the subclass is not actually enforcing a right determined by *Kifafi*.

The Court is not persuaded otherwise by any of Plaintiffs' remaining arguments, including their brief invocation of the "law of the case" doctrine to defend the Court's denial of Defendants' motion to dismiss Plaintiff Juneau's claim in the (First) Amended Complaint. *See* Pls.' Mot. at 6 (citing *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc)). Briefing of the present motion has required analysis of *Kifafi* to an extent that the Court has not previously performed in this case; that analysis supports a denial of the pending motion on grounds of futility, albeit different such grounds than Defendants have specifically contemplated. Separately, Plaintiffs also refer to various

[9] The Court need not delve into the parties' dispute about whether Defendants have ever created and, if so, produced, a list of non-participating Hilton Properties that are not Related Companies. *See*, *e.g.*, Defs.' Opp'n at 11 n.6; Pls.' Reply at 10-11 & n.3.

instances in Defendants' *Kifafi* briefing that purportedly suggest that the Plan counts service at non-participating properties towards vesting. *See* Pls.' Reply at 11-12. But, even if that is true, that would not change the Court's finding that *Kifafi* did not adjudicate whether service at a non-participating Hilton Property that is not a Related Company must be counted towards vesting.

Because adding Mr. Hemphill would not solve the problems identified in this decision, the Court need not reach Plaintiffs' arguments for intervention—whether by right or permission.

IV. CONCLUSION

For the foregoing reasons, and in an exercise of its discretion, the Court shall **DENY** Plaintiffs' [58] Motion for Leave to Amend Complaint to Add Additional Named Representative. *Kifafi* never made a determination as to a "non-participating service" subclass as Plaintiffs define it; therefore, there are no rights to be vindicated as to any such subclass pursuant to *Kifafi*. In light of the delay and prejudice that their actions in this litigation already have entailed, Plaintiffs are prohibited from seeking further leave to amend their Second Amended Complaint, unless Plaintiffs decide to forego this claim in this lawsuit.

By **APRIL 15, 2019**, the parties shall file a Joint Status Report identifying how they propose to proceed and a schedule for such proceedings.

A separate Order accompanies this Memorandum Opinion.

Dated: March 31, 2019

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VALERIE R. WHITE, *et al.*, Plaintiffs, v. HILTON HOTELS RETIREMENT PLAN, *et al.*, Defendants.	Civil Action No. 16-856 (CKK)

ORDER
(March 31, 2019)

For the reasons set forth in the accompanying Memorandum Opinion, and in an exercise of its discretion, the Court shall **DENY** Plaintiffs' [58] Motion for Leave to Amend Complaint to Add Additional Named Representative. *Kifafi* never made a determination as to a "nonparticipating service" subclass as Plaintiffs define it; therefore, there are no rights to be vindicated as to any such subclass pursuant to *Kifafi*. In light of the delay and prejudice that their actions in this litigation already have entailed, Plaintiffs are prohibited from seeking further leave to amend their Second Amended Complaint, unless Plaintiffs decide to forego this claim in this lawsuit.

By **APRIL 15, 2019**, the parties shall file a Joint Status Report identifying how they propose to proceed and a schedule for such proceedings.

SO ORDERED.

Dated: March 31, 2019

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VALERIE R. WHITE, *et al.*, Plaintiffs, v. HILTON HOTELS RETIREMENT PLAN, *et al.*, Defendants.	Civil Action No. 16-856 (CKK)

ORDER
(September 28, 2018)

Presently pending before the Court are Plaintiffs' [44] Motion for Class Certification and their [58] Motion for Leave to Amend Complaint to Add Additional Named Representative. Upon consideration of the pleadings,[1] the relevant legal authorities, and the

[1] The Court's consideration has focused on the following pleadings:

- Pls.' Mem. in Supp. of Mot. for Class Certification, ECF No. 44-1 ("Pls.' Class Cert. Mem.");
- Mem. of P&A in Opp'n to Pls.' Mot. for Class Certification, ECF No. 56 ("Defs.' Class Cert. Opp'n");
- Pls.' Reply in Supp. of Mot. for Class Certification, ECF No. 57 ("Pls.' Class Cert. Reply");
- Pls.' Mot. for Leave to Amend Compl. to Add Additional Named Representative, ECF No. 58 ("Pls.' 2d Mot. to Amend");
- Mem. of P&A in Opp'n to Pls.' Mot. for Leave to Amend Compl. to Add Additional Named Representative, ECF No. 60 ("Defs.' Opp'n to 2d Mot. to Amend"); and

record as a whole, in an exercise of its discretion the Court shall **DENY WITHOUT PREJUDICE** Plaintiffs' [44] Motion for Class Certification. The Court shall decide separately Plaintiffs' [58] Motion for Leave to Amend Complaint to Add Additional Named Representative ("Second Motion to Amend"). A brief summary of relevant procedural developments shall furnish the basis for the Court's present decision.

On November 2, 2017, the Court entered a [29] Scheduling and Procedures Order that set forth a number of deadlines to which the parties had agreed in the Court's Initial Scheduling Conference on November 1, 2017. One of those deadlines pertained to "Motions to amend pleadings or to join additional parties," which were due no later than November 8, 2017. Plaintiffs had requested the opportunity to amend, and had proposed that deadline to do so, in order to rectify deficiencies in Claim Three, which the Court had dismissed without prejudice. *See* Joint Rule 16.3 Report, ECF No. 27, at 3; Tr. of Initial Scheduling Conference at 10:3-13, ECF No. 32. Plaintiff Peter Betancourt's participation in this lawsuit, and the participation of putative class members that he would represent, depended on the reinstatement of that claim. Another of the deadlines provided in the Court's Scheduling and Procedures Order was for a Motion for Class Certification, due by January 15, 2018.

- Pls.' Reply in Supp. of Mot. to Add Additional Named Representative, ECF No. 61 ("Pls.' Reply in Supp. of 2d Mot. to Amend").

In keeping with the Court's Scheduling and Procedures Order, Plaintiffs timely filed their [33] Motion for Leave to Amend Pursuant to FRCP 15(a)(2), which the Court granted on January 24, 2018. Order, ECF No. 48; Mem. Op., ECF No. 49; *see also* 2d Am. Class Action Compl., ECF No. 50. The Court found that "Plaintiffs [had] reasonably attempted to address the reasons for which this Court initially dismissed Claim Three, and accordingly the litigation shall now proceed on the basis of their Second Amended Complaint." Mem. Op., ECF No. 49, at 3. Now that Peter Betancourt's claim was reinstated, the litigation would proceed with all three named Plaintiffs: Valerie R. White, Eva Juneau, and Mr. Betancourt.

Shortly before the Court granted leave to amend, Plaintiffs timely filed their [44] Motion for Class Certification.[2] Consistent with the Court's decision soon after filing, Plaintiffs' [44] Motion assumed that the Second Amended Complaint would apply, and they accordingly focused their memorandum on all three named Plaintiffs who would be implicated thereby. *See* Pls.' Class Cert. Mem. at 1 n. 1. Nevertheless, in a footnote, they identified a potential deficiency in the efforts to certify a class as to Claim Two, where Ms. Juneau's claim might not be considered typical of the entire class. *See id.* at 18 n.4. Plaintiffs proposed that, "[i]f the Court required, Plaintiffs could add another person in addition to Ms. Juneau" to rectify the perceived potential deficiency. *Id.* Plaintiffs expressly contemplated

[2] As January 15, 2018, was a federal holiday, Plaintiffs' filing on January 16, 2018, was timely.

that the mechanism for doing so would be the Court's decision to conditionally certify a class and instruct Plaintiffs to try to find a suitable representative of the remainder of Claim Two. *See id.* (citing Manual for Complex Litigation (Fourth) § 21.26 (2004)). Defendants objected that such a method would be futile, for it purportedly would not correct the underlying deficiency. *See* Defs.' Class Cert. Opp'n at 18-19. Evidently emboldened, Plaintiffs indicated in response that they intended to move for leave to amend, once again, this time to add a fourth named plaintiff to rectify the perceived deficiency. Pls.' Class Cert. Reply at 9.

While Plaintiffs' Motion for Class Certification was ripe and under advisement, Plaintiffs proceeded—without the Court's authorization—to file their [58] Motion for Leave to Amend Complaint to Add Additional Named Representative. Plaintiffs argued that this further attempt to amend, or alternatively for intervention of right or by permission, would address the perceived deficiency in typicality discussed in the parties' class certification briefing. *See*, *e.g.*, Pls.' 2d Mot. to Amend at 2. The Court observed that this second motion to amend was untimely, under the terms of the Court's [29] Scheduling and Procedures Order, but that the Court would permit briefing, in part due to the intervention arguments. Min. Order of Apr. 18, 2018. Defendants opposed Plaintiff's Second Motion to Amend based on, among other grounds, untimeliness and futility. *See* Defs.' Opp'n to 2d Mot. to Amend. That motion is now fully briefed.

In the Court's view, a decision as to Plaintiffs' Second Motion to Amend will affect the disposition of Plaintiffs' Motion for Class Certification. Denial of the Second Motion to Amend would require the Court to determine whether Ms. Juneau's claim is typical of all putative class members seeking to recover under Claim Two, and in turn whether she meets the other criteria for a proper representative under Federal Rule of Civil Procedure 23. Granting the Second Motion to Amend, or recognizing intervention of right or by permission, would seem to obviate that inquiry as to a certain subset of putative class members seeking to recover under Claim Two. The Court would instead evaluate whether a separate putative class representative—the fourth named plaintiff—meets the typicality and other Rule 23 criteria. Deciding the Second Motion to Amend first would facilitate that inquiry, in part because the Court would assess futility in light of the potential for class certification. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) (citing futility among factors in assessing whether leave to amend is warranted). Further briefing of a renewed Motion for Class Certification also would assist the Court's review. That briefing likely would not differ drastically from that associated with the present Motion for Class Certification, but it would differ enough to guide the Court's assessment—to the limited extent necessary at the class certification stage—of the employee benefits issue that lies at the intersection of the presently pending Motion for Class Certification and the Second Motion to Amend.

In an exercise of the Court's discretion to manage this case, the Court **DENIES WITHOUT PREJUDICE** Plaintiffs' [44] Motion for Class Certification. The Court shall set a schedule for a renewed motion upon deciding Plaintiffs' [58] Motion for Leave to Amend Complaint to Add Additional Named Representative.

SO ORDERED.

Dated: September 28, 2018

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-8001 **September Term, 2022**
1:16-CV-00856-CKK
Filed On: May 19, 2023

In re: Valerie R. White, individually and on behalf of all others similarly situated, et al.,

Petitioners

BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs, Pan, and Garcia*, Circuit Judges; and Edwards, Senior Circuit Judge

ORDER

Upon consideration of the petition for rehearing en banc filed by respondent/appellees, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

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* Circuit Judge Garcia did not participate in this matter.

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 23(a)-(c) and (f) provide:

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

> **(1)** the class is so numerous that joinder of all members is impracticable;
>
> **(2)** there are questions of law or fact common to the class;
>
> **(3)** the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> **(4)** the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

> **(1)** prosecuting separate actions by or against individual class members would create a risk of:
>
> > **(A)** inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
> >
> > **(B)** adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) *Certification Order.*

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by

order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice.*

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes*. For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment.* Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues.* When appropriate, an action may be maintained as a class action with respect to particular issues.

(5) *Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Federal Rule of Appellate Procedure 26(b) provides:

(b) Extending Time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:

(1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or

(2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.
