Nos. 03-4325, 03-4518, 04-3360

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In Re: SULZER ORTHOPEDICS AND KNEE PROSTHESIS
PRODUCTS LIABILITY LITIGATION

CERTIFIED CLASS,

Plaintiffs,

LINDA MEDIATE,

Plaintiff-Appellant,

V.

SULZER MEDICA et al,

Defendants-Appellees,

SULZER SETTLEMENT TRUST,

Appellee.

On Appeal from the United States District Court
for the Northern District of Ohio

REPLY BRIEF FOR APPELLANT LINDA MEDIATE

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MISCELLANEOUS

Several hundred more class members than the settling parties anticipated filed claims for revision surgeries, thereby increasing Sulzer's and the Trust's obligations under the settlement. Desperate to evade these commitments, appellees grasp at any excuse to reduce the parties' bargained-for obligations to injured class members whose very claims were considered in calculating the settlement fund. Their efforts to evade their obligation to pay appellant Linda Mediate and similarly situated class members are unavailing, and they cannot insulate the Special Master's near-categorical refusal to allow late-filing claimants to receive benefits from review by this Court. Indeed, Sulzer concedes (at 40) that "[w]ere the administrative decision in issue to violate the terms of the CASA, or the parties' rights to Due Process, District Court intervention may be appropriate." Such intervention is long overdue.

ARGUMENT

I. ABSENT CLASS MEMBERS DID NOT WAIVE THEIR RIGHTS TO JUDICIAL REVIEW.[1]

Central to the Claims Administrator's and Sulzer's motions to dismiss was their contention that the Special Master was an arbitrator whose decisions

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[1] Mediate reiterates that Sulzer has waived its right to advance any arguments in this appeal. *See* Mediate's Opposition to Sulzer's Motion to Intervene 1-7. The motions panel of this Court acknowledged that "there very well may be issues of waiver if or when the merits of these appeals are reached." Order 2 (June 7, 2004).

accordingly were not subject to judicial review. Claims Administrator's ("CA") Motion to Dismiss 10-12; Sulzer's Motion to Dismiss 9. Evidently recognizing that arbitral awards are subject to judicial review and that the settlement breathes not a word about arbitration, appellees all but abandon that novel contention. With the outcome in search of a new rationale, Sulzer now contends that because the settlement provides that the Special Master's decision "shall constitute a final and binding determination," CASA § 4.6(g), absent class members waived their right to judicial review.

This sentence effects no waiver of class members' appellate rights. Even if it did, because the settlement agreement provides for administrative appeals to be decided by a *special master,* an adjunct to an Article III court, both Rule 53 and Article III require the district court to review, upon request, at least the Special Master's legal conclusions—*regardless* of any stipulation as to finality. Finally, because class members did not waive judicial review, this appeal presents neither an effort to modify the agreement nor a collateral attack upon it.

A. The Phrase "Final and Binding" Does Not Waive Judicial Review.

The CASA provides that Special Master determinations are "final and binding," but conspicuously absent is the additional critical sentence included in *all* agreements in the decisions cited by Sulzer (at 25-28)—namely, that the parties

"waive their rights to appeal." *See, e.g., In re Lybarger,* 793 F.2d 136, 138 (6th Cir. 1986) ("The decision of the [District] Court shall be final and *the parties waive all rights of appeal and further review of or relief from the Court's order*") (emphasis added); *accord In re Dep't of Energy Stripper Well Exemption Litig.,* 853 F.2d 1579, 1582 (Temp. Emer. Ct. App. 1988); *Brown v. Gillette Co.,* 723 F.2d 192, 192 (1st Cir. 1983); *Goodsell v. Shea,* 651 F.2d 765, 766 (C.C.P.A. 1981).

Sulzer cites no decision in which a court found a waiver of appellate rights absent an express waiver of such rights. Indeed, if parties intend to eliminate judicial review by contract, "their intention to do so must be clear and unequivocal." *Bowen v. Amoco Pipeline Co.,* 254 F.3d 925, 931 (10th Cir. 2001); *accord Utter v. Hiraga,* 845 F.2d 993, 997 (Fed. Cir. 1988); *Aerojet-General Corp. v. American Arb'n Ass'n,* 478 F.2d 248, 251 (9th Cir. 1973).[2]

Sulzer implies that the phrase "final and binding" alone establishes that class

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[2] Even when appellate rights have been waived, courts acknowledge that "compelling circumstances" can justify judicial review, such as when a settlement administrator's decision is "unjust" or there is evidence of "misapplication of controlling law, unfairness, or impropriety." *Stripper Well,* 853 F.2d at 1584. Such "compelling circumstances" are present here because the Special Master has systematically upheld the denial of millions of dollars in benefits to an entire category of class members based on his misinterpretation of governing law. Mediate Br. 14-16, 39-58.

members waived their rights to further review, but that claim is demonstrably unfounded. The phrase refers only to a decision that completes a particular phase of litigation and that binds, or obligates, the parties—unless the decision is overturned. "Final and binding" does not purport to address the availability of subsequent judicial review. According to Black's Law Dictionary 662 (8th ed. 2004), "final" means "not requiring any further judicial action by the court that rendered judgment to determine the matter litigated; concluded." Indeed, "[o]nce an order, judgment or decree is final, *it may be appealed on the merits*." *Id.* (emphasis added). Thus, a court of appeals has jurisdiction to review "all *final* decisions of the district courts." 28 U.S.C. § 1291 (emphasis added); *see Bowen,* 254 F.3d at 930-31 (parties' agreement that district court "ruling shall be final" did not foreclose appellate review because language "may be construed as nothing more than a finality clause expressing their intent to have the district court enter judgment"). Likewise, the settlement provision that a Special Master's determination is "final" does not mean that all review has come to an end, but simply that the claims administration process has concluded.

Nor does the addition of the term "binding" signal an intent to deprive class members of further review. When referring to an order, "binding" simply means one "that requires obedience <the temporary injunction was binding on the

parties>." Black's Law Dictionary 178 (8th ed. 2004). Just as a temporary injunction is binding, yet still may be reversed on appeal, so do the Special Master's determinations require obedience unless overturned by a court. As Judge Posner explained in rejecting the contention that a statute deeming appraisals by the Comptroller of the Currency "final and binding" insulated them from judicial review: "The statutory words 'final and binding' have no necessary reference to judicial review; they may just mean that the Comptroller's appraisal is the last appraisal." *Beerly v. Dep't of Treasury,* 768 F.2d 942, 945 (7th Cir. 1985).

This understanding of "final and binding" is confirmed by reams of federal-court rulings reviewing decisions deemed by statute or agreement to be "final and binding." In the ordinary arbitration context, for example, courts of appeals routinely review arbitration decisions expressly made "final and binding," subject to the standard of review applicable to arbitrations. *See Midmichigan Regional Medical Center-Clare v. Professional Employees Div.,* 183 F.3d 497, 501 (6th Cir. 1999); *Anaconda Co. v. District Lodge,* 693 F.2d 35, 36-37 (6th Cir. 1982). The same is true in the international arbitration context, where courts have held "final and binding" arbitrations subject to various defenses reviewable by courts. *E.g., M &C Corp. v. Erwin Behr GmbH & Co.,* 87 F.3d 844, 847 (6th Cir. 1996); *Iran Aircraft Indus. v. Avco Corp.,* 980 F.2d 141, 145-46 (2d Cir. 1992).

So, too, under ERISA, a plan administrator's decision is not inoculated from judicial review even where the plan provides that the administrator's decision is "final and binding." *See Peruzzi v. Summa Medical Plan,* 137 F.3d 431, 433 (6th Cir. 1998); *Mitchell v. Eastman Kodak Co.,* 113 F.3d 433, 438-39 (3d Cir. 1997). Similarly, in federal regulatory challenges, "final and binding" agency actions are subject to judicial review under the Administrative Procedure Act. *E.g., Central & South West Services, Inc. v. EPA,* 220 F.3d 683, 689 n.2 (5th Cir. 2000); *Keeffe v. Citizens & Northern Bank,* 808 F.2d 246, 248-49 (3d Cir. 1986). Indeed, the availability of judicial review often *depends* upon the rendering of a "final and binding" decision. *See United States v. Yousef,* 327 F.3d 56, 165 (2d Cir. 2003) (district court recommendations not "binding" on Bureau of Prisons not appealable as "final decisions" under § 1291); *Millmen Local 550 v. Wells Exterior Trim,* 828 F.2d 1373, 1374 (9th Cir. 1987) (evaluating whether labor arbitrator's decision is "final and binding award reviewable by the courts").

In sum, *without* an explicit waiver of rights to judicial review in the district court and this Court on appeal, the mere pronouncement in the agreement that special master determinations are "final and binding" does not waive class

members' rights to such review.[3]

B. Even if the Agreement were Ambiguous, That Ambiguity Must Be Construed in Favor of Absentees.

The settlement does not waive class members' rights to further judicial review, and that should end the inquiry. But even if the agreement were ambiguous, under the common-law rule of contract interpretation, followed by Delaware, "a court should construe ambiguous language against the interest of the party that drafted it." *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 62 (1995); *accord Bowen,* 254 F.3d at 931; *Corporate Prop. Assocs. v. Hallwood Group, Inc.,* 817 A.2d 777, 778 (Del. 2003). Of course, the settling parties, not absent class members, drafted the "final and binding" clause.

Because this is no ordinary contract, but a class action settlement agreement, it is incumbent upon the Court to consider the reasonable expectations of absent class members before finding that they waived judicial review. As the Third Circuit held in an analogous context, opt-out language in the class notice and settlement agreement "must, in order to avoid due process concerns, be strictly

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[3] Claims Administrator Procedure ("CAP") 30, ¶ 8, adopted in March 2003, attempts to compensate for the missing waiver language by providing that "the Special Master's Decision is final and may not be further contested or appealed." The parties cannot fundamentally alter the terms of the settlement after-the-fact, however, by slipping in waiver language to which absentees have not assented.

construed against those who seek to restrict class members from pursuing individual claims." *In re Diet Drugs Prods. Liab. Litig.,* 369 F.3d 293, 308 (3d Cir. 2004). Here, absentees' reasonable expectation that the settlement effected no waiver of judicial review is reinforced by other provisions in the agreement that promised meaningful oversight by the district court. For example, the court retained jurisdiction "to assure that all disbursements are properly made in accordance with the terms of the Settlement Agreement, and to interpret and enforce the terms, conditions and obligations of the Settlement Agreement." CASA § 9.1; *id.* § 13.3(a)(i)(6). No absent class member would have understood from this language, especially given the absence of a provision waiving judicial review, that she had no right to seek relief from the district court if the Special Master arbitrarily or unlawfully upheld benefits denials. Class members' expectation that review would be available was further buttressed, as discussed in Part I.C., *infra,* by the agreement's express designation of a "special master" to hear administrative appeals.

Equally important is what absent class members were *told* in the class notice. Absentees "can hardly knowingly waive some of their tort rights without clear notice of what they are waiving. They may be entirely dependent on the class notice for this information." *Diet Drugs,* 369 F.3d at 308; *see also In re Nissan*

Motor Corp. Antitrust Litig., 552 F.2d 1088, 1104 (5th Cir. 1977) (class notice will be absentees' "primary, if not exclusive, source of information for deciding how to exercise their rights under rule 23"). Thus, in *Diet Drugs,* the Third Circuit paid "careful attention to the language of the class notice" in determining the scope of the settlement's preclusive provisions. 369 F.3d at 308; *see also In re Prudential Ins. Co. of America Sales Practice Litig.,* 261 F.3d 355, 366-67 (3d Cir. 2001); *National Super Spuds, Inc. v. New York Mercantile Exchange,* 660 F.2d 9, 16 (2d Cir. 1981).

Here, the class notice not only failed to inform class members that they (supposedly) were waiving their rights to judicial review, but affirmatively led them to believe just the *opposite* by assuring them that "[t]he Settlement Agreement permits Class Members to *appeal* the Final Determination of the Claims Administrator." (R. 243 at 9 n.12) (emphasis added). Whatever class counsel and Sulzer may have thought when they drafted the settlement agreement—and neither Sulzer nor the district court cites evidence of the parties' intentions outside the agreement itself—absent class members are not mind readers and had no reason to believe that the district court would subsequently construe the settlement to preclude all judicial review.

C. The Settlement's "Special Master" Provision Entitles Class Members to Judicial Review.

By its use of the term-of-art "special master," the settlement further guarantees class members the right to review by an Article III judge at least as to the master's legal conclusions. Apparently conceding that Rule 53 guarantees judicial review, Sulzer argues that *this* Special Master is not bound by Rule 53, positing one universe in which Article III and Rule 53 apply and an alternative universe in which they do not. Sulzer Br. 41-47. (How absent class members would know which universe they occupied, Sulzer does not say). However, there is only one universe. When parties provide by agreement for a special master, they contract for Rule 53 procedures and judicial review. Sulzer's efforts (at 41-44) to evade these strictures are fully rebutted in Mediate's Opposition to Sulzer's Motion to Dismiss 8-11 & n.6. It is irrelevant that the settlement does not specifically cite Rule 53. As a comprehensive Federal Judicial Center study found, appointments of special masters commonly cite no authority. Mediate Br. 28-29. Sulzer attempts to distinguish *Turner v. Orr,* 722 F.2d 661 (11th Cir. 1984), but *Turner* rightly held "that in cases of doubt about the clear meaning of . . . an agreement, *and particularly when the agreement uses the term 'special master,'* the courts should construe the judgment to provide for the kind of appeal allowed by Rule

53." *Id.* at 666 (emphasis added).

Sulzer asserts, without citation, that the "battery of cases" Mediate cites to demonstrate that federal courts insist on reviewing a special master's resolution of legal questions does not apply where "the parties have agreed to waive their right to resolution by an Article III court, and instead proceed in a non-judicial forum." Sulzer Br. 45-46. Sulzer's argument is circular: It contends that class members have waived judicial review because the agreement provides for a special master to make "final and binding" determinations and that the master's determinations are "final and binding" because class members waived their rights to judicial review. Moreover, the Special Master appeal process has *not* been conducted in a nonjudicial forum, but has played out on the district court's own docket, under the auspices of the court. Mediate Br. 34-35.

The decisions cited in Mediate Br. 31-32 rebut Sulzer's purported "baffl[ement]" about why complete abdication of decisionmaking authority should be of "concern" to this Court. *See* Sulzer Br. 46. All involved stipulations that the special master's decision be final, and yet each held that neither the district court nor the parties had the right to circumvent the personal and structural guarantees that an Article III judge will always, upon request, review a special master's legal conclusions. Not only does Sulzer fail to cite a single decision to the contrary, but

the treatise it (mis)cites strongly reaffirms this basic proposition. The quote from 9 Moore's Federal Practice § 53.10[1][a] (3d ed. 2004) (cited as § 53.03[3] in Sulzer's Brief at 46) refers only to the types of duties that a special master may perform. The treatise emphasizes repeatedly that "Article III requires that district judges decide all dispositive issues of fact and law." *Id.* § 53.03[1][a]; *accord id.* § 53.03[3] ("The standard of review applicable to a master's conclusions of law is always de novo."); *id.* § 53.10[3][c][ii][E] (same). Indeed, the treatise underscores that "[t]he trial court must, *in all cases,* review the master's conclusions of law de novo. . . . The trial court may not, *even though the parties unanimously agree to a lesser standard of review,* depart from the de novo standard for legal conclusions." *Id.* § 53.42[2] (emphasis added).

D. Mediate's Appeal is Neither an Impermissible Collateral Attack Upon the Settlement Nor Barred by Res Judicata.

Sulzer is wrong to maintain that this appeal seeks modification of the agreement or constitutes an impermissible collateral attack upon it. Sulzer Br. 21-25, 36-38, 47-50. As the Third Circuit recognized in overseeing the class settlement in *In re Orthopedic Bone Screw Products Liability Litigation,* 350 F.3d 360 (3d Cir. 2003): Although "challenges to the legality of the settlement agreement itself . . . are no longer timely," to the extent class members "challenge

not the provision itself, but the interpretation and application of it to [a particular] case, . . . the finality of the agreement does not prevent review." *Id.* at 363. Mediate likewise does not challenge the settlement itself, but rather its interpretation and application to her case.

Sulzer argues that Mediate should have objected to the "final and binding" language during the settlement approval process. Sulzer Br. 44-45. Aside from the fact that there was no conceivable reason for Mediate to have objected to this language, as it did not bar judicial review, she would have had no standing to have pressed an objection or appeal any sooner. Mediate's hypothetical pre-settlement approval objection, which would have been made more than six months before her filing deadline—that she *might* suffer future injury *if* she were to file a claim denied by the Claims Administrator, *if* that denial were later erroneously sustained by the Special Master, and then, *if* the district court were to find that she was entitled to no judicial review—would have been unripe and speculative. *See Binker v. Pennsylvania,* 977 F.2d 738, 753 (3d Cir. 1992) (class members' challenge to settlement properly rejected as premature, for "[u]ntil the predicted injustice becomes a real and substantial threat, [their] predicament is not justiciable"); *cf. In re General Motors Corp. Engine Interchange Litig.,* 594 F.2d 1106, 1121 (7th Cir. 1979) (absentees did not waive appellate review because,

given the class notice, they "could reasonably rely on class counsel to protect their interests by prosecuting an appeal" if necessary). *See* Mediate's Opposition to CA Motion to Dismiss 6-9.

The doctrine of res judicata is equally inapposite. The cases cited by Sulzer (at 23-24) involved suits against defendants on the same claims resolved by judgments entered in previous class actions against them. As this Court noted, for a prior judgment to bar an action on the basis of res judicata, "there must be a final judgment on the merits and both cases must involve the same cause of action." *King v. South Central Bell Tel. & Tel. Co.,* 790 F.2d 524, 528 (6th Cir. 1986) (citation omitted). Here, there is no identity of cause of action. If Mediate filed a lawsuit against Sulzer today seeking compensation, that suit would be barred by res judicata and the settlement's release. But Mediate's injury here arose from the district court's refusal to review the Special Master's determination upholding the denial of her claim as untimely. Her cause of action is separate and distinct from the causes of action against Sulzer underlying the original class action itself.

If appellees are right, and class settlements render all subsequent disputes regarding their *implementation* moot, barred, or otherwise nonjusticiable, then no class member could *ever* appeal rulings that post-date settlement approval. Yet such appeals, including by late-filing class members, are routine, especially where,

as here, the settlement involves a complex claims process. *See* Mediate's Opposition to Sulzer's Motion to Dismiss 3-5; Mediate's Opposition to CA Motion to Dismiss 7-9.

Sulzer maintains that if this Court recognizes a right to judicial review, the floodgates will open, and the "finality and efficiency" sought by the parties "will be lost in endless appeals." Sulzer Br. 51. With respect, whether absentees have waived their fundamental rights to have an Article III judge evaluate whether the Special Master's categorical denial of their claims was arbitrary and unlawful does not turn on whether it is *efficient* for them to retain those rights. Regardless, Sulzer's parade of horribles is exaggerated. The Special Master's factual findings are accepted unless clearly erroneous, while only his legal conclusions are reviewed de novo. *See* Fed. R. Civ. P. 53(e); Mediate's Opposition to CA Motion to Dismiss 19-20. The notion that a significant number of class members denied benefits will seek judicial review is farfetched. The Special Master's determinations of eligibility for benefits here are intrinsically fact-bound. Thus, the overwhelming majority of claimants seeking judicial review in this case have been late filers excluded entirely from the settlement, not class members denied benefits on the merits. The same legal issues are common to most, if not all, these late-filing appeals and may be addressed efficiently in a single opinion by this

Court that will provide important guidance for the district court and Special Master on remand. *See, e.g., In re Orthopedic Bone Screw Prods. Liab. Litig. ("Sambolin"),* 246 F.3d 315 (3d Cir. 2001).

Finally, Sulzer makes the last-ditch argument that if this Court were to "superimpose additional review procedures onto those agreed by the parties," class members' victory would have "profound repercussions for future plaintiffs and defendants in class action litigation." Sulzer Br. 53-54. Because Mediate and similarly situated absentees seek nothing more than enforcement of the settlement as written, a victory for them will not undercut the public policy favoring settlements. The Claims Administrator similarly threatens that "[t]he extraordinary and tortuous litigation surrounding these two appeals is precisely the outcome that awaits" if this Court recognizes Mediate's right to judicial review. CA Br. 55. But it is Sulzer and the Claims Administrator, not Mediate, that launched a battery of baseless motions in this Court to block review. The Third Circuit answered a similar argument well: "As appealing as the efficiencies of a nationwide mass tort class settlement may be . . . , the Supreme Court has repeatedly cautioned that they cannot override fundamental principles of due process or faithful application of controlling law." *Diet Drugs,* 369 F.3d at 297.

E. Mediate Retains Her Right to Judicial Review of Her Due Process Claim.

At a minimum, regardless of whether Mediate waived her right to seek review of the Special Master's determination, she has the right to judicial review of her claim that the Claims Administrator denied her due process when he failed to provide her reasonable and timely notice that her claim arrived with a two-day-late postmark. Mediate Br. 32 n.10, 58-62; *see also* Part II.D, *infra*. Indeed, Sulzer concedes that judicial "intervention may be appropriate" when an administrative decision violates due process. Sulzer Br. 40.

II. THE SPECIAL MASTER ARBITRARILY AND UNLAWFULLY EXCLUDED MEDIATE FROM OBTAINING SETTLEMENT BENEFITS.

Appellees' arguments regarding excusable neglect read as if the settlement agreement absolutely prohibited paying late-filing class members. It does not. Quite the contrary: The CASA establishes a flexible filing scheme where deadlines vary depending on type of implant and date of surgery and where class members are given up to a year to cure claim deficiencies. Mediate Br. 7-8, 43-46. More importantly, CAP 29 makes clear what is implicit in the agreement itself—that extensions of time for submission of claims are permitted. It is undisputed that CAP 29, which, as the Claims Administrator concedes,

incorporates federal law on excusable neglect, is valid and governs the inquiry whether particular filing delays should be excused. CA Br. 26-27; Sulzer Br. 22 ("the terms of the CASA—including the Claims Administrat[or] Procedures" are binding).

Thus, the relevant inquiry is not whether filing deadlines under the settlement are absolute. Clearly, they are not. Instead, the question is whether the Special Master committed legal error or abused his discretion in determining that even an allegedly *two-day-late* submission must be rejected because "[t]he Agreement does not give the Appellee discretion to disregard the plain and unambiguous terms of the Agreement" and because forgiving the late filing "would be unfair" to other class members. (R. 922). The Master's denial of Mediate's appeal is emblematic of his broader view, reiterated in denial after denial, that federal law precludes finding excusable neglect when the reason for untimeliness was within counsel's control or the result of attorney error. Mediate Br. 14-16, 39-42.

In addressing whether the Special Master erred, the Claims Administrator all but ignores Mediate's opening brief regarding the four-step excusable-neglect test of *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership,* 507 U.S. 380 (1993). Thus, Mediate will highlight simply the most problematic

aspects of the Administrator's analysis.

A. Mediate Does Not Rely on Advice of Counsel.

According to the Claims Administrator, Mediate maintains that her claim should be deemed valid because she was relying on "the advice and conduct of counsel." CA Br. 28-29. That is incorrect. To the extent Mediate's counsel erred in submitting her claim two days late—a contention impossible to verify given the more than four-month delay in notifying counsel of the late postmark—that error is Mediate's error. She argues simply that the error should have been excused. The Claims Administrator's contention that if Mediate prevails, she will receive more favorable treatment than would a similarly situated pro se claimant is bizarre. *Id.* 47. Mediate's showing of excusable neglect would have been no different had she been unrepresented and mailed the claim two days late.

B. *Pioneer* Factors

1. Prejudice

Both the Claims Administrator and Sulzer place the greatest emphasis on the prejudice Sulzer and the remainder of the class allegedly would suffer if this Court rules in favor of Mediate. Both argue that, by definition, Sulzer and the class would be prejudiced if the Claims Administrator were forced to pay some late filers because Sulzer would spend more money and class members might recover

less. CA Br. 19-20, 32-35, 38-40; Sulzer Br. 35. But that ignores Mediate's analysis in her opening brief as to why there is no prejudice.

Whether a party is prejudiced depends on whether its bargained-for expectations have been disappointed. Mediate Br. 47-52. Here, paying a two-day-late, but otherwise valid, claim cannot possibly prejudice either Sulzer or the class. In no legal setting does prejudice mean merely the loss of an advantage. Allowance of the creditor's late claim in *Pioneer* meant that other timely creditors risked having their share of bankruptcy proceeds reduced, yet the Court found no prejudice. 507 U.S. at 398; *accord In re Eagle-Picher Indus., Inc.,* 285 F.3d 522, 530 (6th Cir. 2002) (rejecting claim of prejudice on ground that allowing tardy claim would expand number sharing in bankruptcy proceeds as merely "loss of a windfall"); *Sambolin,* 246 F.3d at 324 (if late class members were excluded, "timely registrants would receive what is essentially a 'windfall,' comprised of some portion of the recovery that would be owed to the otherwise deserving late registrants").

Appellees do not dispute that the settling parties funded the settlement on the express expectation that *100%* of class members undergoing revision surgeries "would show up and make claims." Mediate Br. 50 (quoting Fairness Hearing Tr. 76 (R. 349)). The problem is that the parties seriously underestimated the number

of revision surgeries. They projected that 3,605 class members would undergo revision surgeries by the cut-off dates, including 2,788 hip revisions (such as Mediate's) conducted by April 2002. Fairness Hearing Tr. 74-76 (R. 349); Mediate Br. 46-47.[4] But 4,300 eligible claimants sought benefits from the Affected Product Revision Surgery ("APRS") Fund. (R. 1944). If Sulzer pays more and the class receives less than originally expected, it is because more class members qualified for benefits than the parties predicted—not because a small percentage of eligible class members filed their claims late. The parties did not bargain for a reduction in settlement funding or disbursements in anticipation of exclusions of late-filed claims. Even the class's right to a pro rata distribution of the Trust residue, if any, is qualified; the class is entitled to such a distribution only "upon the satisfaction in full of all obligations to pay Class Members and Plaintiffs' Counsel pursuant to this Settlement Agreement." CASA § 15.6.

The Claims Administrator maintains that the late claims' value is not "marginal" or "minuscule" because their projected value of $22-$34 million

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[4] Not only did the parties factor in Mediate's claim in calculating the size of the settlement fund, but the Claims Administrator was also aware of Mediate's existence before the filing deadline, despite his protestations to the contrary. CA Br. 25, 43-44. Because Mediate received advances from Sulzer, the Administrator learned of her identity, by virtue of CAP 7, ¶ 2, by early August 2002. Mediate Br. 9, 46-47.

constitutes 13-20% of the Trust's remaining assets. CA Br. 44, 57. This argument is frivolous. If the Administrator continues to postpone payment to late filers, while making payments to others, the percentage these late claims represent of the *remaining* settlement fund will approach 100%. But to have any meaning, the significance of the late claims must be measured against the total settlement. As the Third Circuit recognized in *Sambolin,* 100 late claimants represented "only a minuscule fraction *of the total settlement class*" of 4,412 bone screw recipients. 246 F.3d at 324 (emphasis added). Here, $22-$34 million is truly minuscule, representing only 2% to 3% of the $1.045 billion total settlement value. Mediate Br. 51-52 & nn.15-16.

2. Claims Administration

Ignoring that the effect of a filing delay must be judged in "absolute terms" and not based on intervening circumstances, Mediate Br. 42, appellees maintain that the claims administration process itself will be impaired if Mediate and similarly situated class members are paid. Sulzer Br. 51-53; CA Br. 44-46. Neither appellee explains how an alleged two-day filing delay could possibly have prejudiced the claims administration process, especially since claims due on November 4, 2002 could be perfected over the following year. Both also ignore the overwhelming authority holding that a delay of two days is trivial as a matter of

law, Mediate Br. 42-43, and that misdirected mail, regardless of fault, is the quintessential instance of excusable neglect. *Id.* 54-55.

Instead, appellees argue that the Claims Administrator's decision to delay payment of some Extraordinary Injury Fund ("EIF") benefits, *see* CAP 32, demonstrates that late-filed claims are interfering with claims administration. Sulzer Br. 52-53; CA Br. 45-46. But the Claims Administrator chose to delay these payments because he deemed the consequences of allowing judicial review uncertain, not because he was unable to project the number and value of late claims. *See* Claims Administrator's Supplemental Representation to Motion to Dismiss 2 (Mar. 10, 2004); Sulzer Br. 53.[5] Indeed, he has projected the value of late claims to be $22-$34 million. Appellees cannot bootstrap their concern over the effect of judicial review, addressed above, into an argument that the claims administration process will be hindered by late-filed claims. Furthermore, the uncertainty about whether Mediate and others have a right to judicial review will

[5] The Claims Administrator's previous doomsday prediction that the prospect of judicial review of late-filed claims left him to "speculate about the number of valid, and potentially valid, APRS claims," rendering it "literally impossible for the Claims Administrator to issue any Claimant their second installment of benefits for many, many years," CA Motion to Dismiss 14, has already proved unfounded. In March 2004, the Administrator estimated that fewer than 4,300 valid APRS claims for benefits would be made and then paid that second installment. *See* Order (R. 1944).

end shortly when this Court decides this case.

Finally, the Claims Administrator invokes the slippery-slope argument that the claims of Mediate and other late filers must be denied because otherwise all deadlines in the settlement agreement will be rendered meaningless. CA Br. 25, 37-42, 45. This argument proves far too much. The adoption of CAP 29 shows that the parties recognized that late-filed claims can (and would) be accommodated without bringing down the entire settlement. Allowing late-filers to receive settlement benefits will not upend the claims administration process here any more than it has in other cases addressing this same problem. *See* Mediate Br. 36-55 (citing cases).

Contrary to the Claims Administrator's assertion, Mediate does *not* contend that the settlement's deadlines should be disregarded so long as a claim is submitted by 2007. Instead, because the settlement permits a class member up to one year to cure deficiencies before the Claims Administrator makes a final determination, CASA § 4.6(b)-(e), Mediate submits that a claim (of whatever type) by an eligible class member that is filed late, *but within the period for curing deficiencies,* does not affect claims administration any more than one that is timely, but incomplete. Mediate Br. 44-46. By contrast, a pre-approval APRS claim due November 4, 2002 and submitted one year late presumptively would affect claims

administration adversely because the time would have elapsed for the Claims Administrator to have projected the number of, and attached a value to, that type of claim. This adverse impact on claims administration could outweigh most excuses for claims submitted past the cure period, except in extraordinary circumstances.

3. Reason for the Delay and Good Faith

Instead of focusing on the fact that Mediate's counsel directed his staff to mail the claim the day it was due and that, at worst, it was posted two days late, the Claims Administrator instead labels the filing "attorney malpractice," which, he contends, is not a basis for extending a deadline. CA Br. 48-51. His analysis is entirely off-base and, if accepted, would eviscerate the excusable-neglect doctrine.

The Rule 60(b) cases cited by the Claims Administrator are irrelevant because each involved outright legal error by counsel leading to a judgment against the client, from which the lawyer then sought relief under Rule 60(b). In *McCurry v. Adventist Health System,* 298 F.3d 586 (6th Cir. 2002), counsel's legal error led to the wrong plaintiff filing a wrongful death action, and the district court dismissed the suit. This Court noted that relief under Rule 60(b) was circumscribed by the public policy favoring finality of judgments and that counsel's misinterpretation of law was not sufficient reason to relieve plaintiffs of the error's consequences. *Id.* at 592-95. That decision and others cited at CA Br.

50-51 are inapposite. Here, Mediate's counsel did not misinterpret the governing law; he directed his staff to mail the claim on November 4, 2002, and for some reason, whether an office mix-up or postal-service error, the claim arrived with a postmark two days late.[6] Nor was any judgment entered from which Mediate sought relief. As soon as her counsel learned of the delayed postmark in March 2003, he immediately requested an extension, Notice of Appeal Exhs. 25-46 (R. 653), *before* either the Claims Administrator or the Special Master issued determinations in her case. As this Court has recognized, "'out-of-time' filings" are treated far more generously under *Pioneer* than Rule 60(b) motions seeking to reopen merits judgments to consider new legal issues after-the-fact. *Jinks v. AlliedSignal, Inc.,* 250 F.3d 381, 386 (6th Cir. 2001).

Finally, the Claims Administrator brazenly continues to intimate that Mediate's inability to account for the two-day-late postmark evinces a lack of good faith. Yet her inability to explain exactly what happened to the claim is attributable to the Claims Administrator's own conduct in failing to notify her within a reasonable time that her form was postmarked late.

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[6] Although it is not necessary for Mediate to establish that the two-day-late postmark was not her counsel's fault, it is worth noting that postal-service error is not "high[ly] improbab[le]." CA Br. 55. Mediate's counsel mailed another claim that same day that arrived with no postmark at all. Mediate Br. 12-13, 59.

C. Delaware Law

The Claims Administrator contends that Delaware law is inapplicable to whether Mediate's late filing should be excused, but liberally cites Delaware cases concerning contract interpretation when it suits him. CA Br. 24, 25, 39. This Court need not engage in a complicated choice-of-law analysis: Delaware law on the doctrine of substantial compliance and the significance of omitting a "time is of the essence" clause, Mediate Br. 56-58, is in accord with federal law on excusable neglect. Moreover, there is no statute of limitations at issue here. *Compare* CA Br. 59-60. The question, instead, is what effect Mediate's allegedly late filing should have under Delaware law on the parties' obligations to pay her under the settlement.

The Claims Administrator's only effort to address this body of law, which reflects the principle that substantial compliance is sufficient even when the plaintiff has not met a contractual deadline, Mediate Br. 56-58, is to try to distinguish *Mendich v. Hunt International Resources, Inc.,* 1981 WL 7629, 7 Del. J. Corp. L. 200 (Del. Ch. 1981), on the ground that there, unspent settlement proceeds would revert to the defendant. CA Br. 61-62. Yet the *Mendich* court's willingness to forgive late filings did not depend on the settlement being reversionary. Rather, it turned on the fact that paying the late filers comported

with the parties' expectations. *See* 1981 WL 7629, at *2 ("When the defendants agreed to settle with the plaintiff they must have assumed that the entire settlement fund would be paid out and their failure to pay all claimants would amount to a windfall to them."). The same can be said here with respect to Sulzer and the class.

Sulzer contends that the doctrine of substantial compliance excuses only "minor departures" from technical requirements, but does not allow courts to significantly modify a plan. Sulzer Br. 32-33. Yet, as discussed in Mediate's opening brief, the district court, not the parties, chose the actual filing deadline by virtue of its approval date. Furthermore, the agreement says nothing about a class member forfeiting all rights to payment upon missing the 180-day filing deadline. Mediate Br. 43-44.[7] Significantly, the district court confused the issue of paying benefits to individuals who underwent revision surgery *after* the settlement cut-off dates, with paying a class member, such as Mediate, who underwent a covered revision surgery *within* the period covered by the settlement, but then allegedly mailed her claim late. The only discussion of deadlines in the record during the lead-up to settlement approval concerned deadlines governing injury accrual, not

[7] The Claims Administrator cites CASA § 4.6(a), which gives him discretion to set and notify class members of deadlines *in addition* to those set forth in Article 4 and to disallow claims received after such deadlines. CA Br. 46-47. No such additional deadlines are at issue here.

filing deadlines. Mediate Br. 48-49. That the filing deadlines are not absolute is again confirmed by CAP 29.

D. Due Process

Mediate contends that the Claims Administrator violated both the settlement and her right to due process when he failed to notify her until more than four months later that her claim arrived with a November 6, 2002 postmark. As the Claims Administrator observes, the communications with his office attached to Mediate's Notice of Appeal indeed "evidence the nearly daily contact Appellant's counsel had with the Office of the Claims Administrator *during the month of April*," CA Br. 63 (emphasis added)—five months after Mediate submitted her claim.[8]

The Claims Administrator does not attempt to excuse this delay, but instead argues that the settlement's provision for giving notice of a deficiency refers only to "curable" omissions. CA Br. 65. But the settlement's notification provision,

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[8] The Claims Administrator seeks the right to develop additional evidence regarding Mediate's notice. CA Br. 63 n.7. He has waived the right to do so. Mediate protested in correspondence with the Administrator, submitted with her appeal to the Special Master (R. 653), that his office informed her for the first time in March 2003 that her claim was postmarked late and thereby denied her reasonable notice and an opportunity to cure the defect. Mediate Br. 11-13. Although he filed an opposition to her appeal (R. 712), the Administrator did not rebut Mediate's factual submissions.

CASA § 4.6(b), contains no such qualification. More importantly, it is undisputed that Mediate's counsel was permitted to cure a postmark defect in the case of his other client, Audra Cano, by submitting an affidavit swearing to the timely mailing. Mediate Br. 12-13, 59. With timely notice, Mediate's counsel might well have been able to procure a similar affidavit from a staff member attesting to the timely mailing. The Claims Administrator denied her that right and violated due process.

III. THIS COURT SHOULD ADDRESS EXCUSABLE NEGLECT AND DELAWARE LAW RATHER THAN REMAND TO THE DISTRICT COURT.

Sulzer argues that if this Court concludes that Mediate has a right to judicial review, it should remand to the district court to review the Special Master's determination in the first instance. Sulzer Br. 55-56.

There is no reason for this Court not to reach the excusable-neglect and Delaware-law issues, all of which present legal questions on a paper record. Because the parties have "fully briefed and [will have] orally argued the merits" of this case, the Court has "all the information necessary to render a decision." *UHI, Inc. v. Thompson,* 250 F.3d 993, 996 (6th Cir. 2001). Importantly, the resolution of these issues "will materially advance the progress of this already protracted litigation" and will help avoid yet another appeal to this Court after remand. *Katt*

v. Dykhouse, 983 F.2d 690, 695 (6th Cir. 1992). An opinion from this Court allowing judicial review and participation in settlement benefits by Mediate and other late filers may also have the salutary effect of encouraging a global resolution of the problem of late-filed claims—precisely the outcome after the Third Circuit issued its decision in *Sambolin*. Mediate's Opposition to Sulzer's Motion to Dismiss 19-20 & n.12.

CONCLUSION

The district court's orders of September 18, 2003 and February 23, 2004 should be reversed.

Date: July 30, 2004

Respectfully submitted,

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RULE 32(a)(7)(C) CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply Brief for Appellant Linda Mediate complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief is composed in a 14-point proportional typeface, Times New Roman. As calculated by my word processing software (WordPerfect), the Brief (exclusive of those parts permitted to be excluded under the Federal Rules of Appellate Procedure and Sixth Circuit Rules) contains 7,000 words.

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 30th day of July, 2004, she caused to be served by U.S. mail, first-class postage prepaid, two copies each of the foregoing Reply Brief for Appellant Linda Mediate on the following:

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