

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT**

DONNA C. RICHARDS, individually, and	:	No. 3:04CV1638 (JCH)
On behalf of others similarly situated,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
FLEETBOSTON FINANCIAL	:	
CORP., FLEETBOSTON	:	
FINANCIAL PENSION PLAN, and	:	
BANK OF AMERICA CORPORATION	:	
	:	
Defendants.	:	December 12, 2006
	:	

---

**SECOND AMENDED COMPLAINT**

1. This Complaint is about the FleetBoston Pension Plan’s cash balance retirement plan. It asserts that in adopting and administering the FleetBoston Pension Plan the defendants violated the Employee Retirement Income Security Act of 1974 (“ERISA”), as amended, 29 U.S.C. §1001, et seq. in one or more of the following ways: (1) when it amended its pension plan to a cash balance approach, FleetBoston’s predecessor bank, Fleet Financial Group Inc. (“Fleet”), failed to notify plan participants that the amendment was significantly reducing their benefits under the plan; (2) FleetBoston, its predecessor, and its successor bank have failed to provide plan participants with an adequate summary plan description that alerts plan participants that their pension benefits have been reduced, that apparently accruing benefits might never actually be paid, that the rate of benefit accruals decreased with age, and that the annuity and lump sum forms of payment under the plan are not equal in value; (3) the company, its predecessor, and its successor have concealed from plan participants the amount of their accrued benefits, the relative values of the annuity lump sum forms of payment, and the application of

“the Rule of 85” to certain Class Members pension calculations; (4) the pension plan reduces the rate of benefit accruals on account of age. Plaintiff seeks appropriate declaratory and injunctive relief to enforce the rights she enjoyed under the plan prior to the cash balance amendment and/or the elimination and/or reformation of unlawful plan provisions.

### **JURISDICTION, VENUE, AND SERVICE OF PROCESS**

2. Plaintiff invokes the jurisdiction of this Court pursuant to the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §1001, et seq.

3. Venue in this Court is proper under ERISA Section 502(e)(2), 29 U.S.C. §1132(e)(2), in that Defendants may be found in this District and the breach took place in this District.

4. Service of process is authorized in any other district where a defendant resides or may be found. ERISA Section 502(e)(2), 29 U.S.C. §1132(e)(2).

### **THE PARTIES**

5. Plaintiff Donna C. Richards (“Richards”) resides in Glastonbury, Connecticut.

6. Richards at all relevant times was a participant in the FleetBoston Plan and the predecessor plan sponsored by Fleet as the term "participant" is defined in ERISA Section 3(7), 29 U.S.C. §1002(7).

7. Defendant FleetBoston Financial Pension Plan (“the Plan” or “FleetBoston Plan”) is an employee benefit plan as defined in Section 3(3) of ERISA, 29 U.S.C. §1002(3), and an “employee pension benefit plan” as defined in Section 3(2)(A), 29 U.S.C. §1002(2)(A). The FleetBoston Plan may be found in Connecticut because participants earn and receive benefits in Connecticut.

8. Defendant FleetBoston Financial Corp. ("FleetBoston") is a business corporation organized and existing under the laws of the State of Delaware. On April 1, 2004, FleetBoston was acquired by Bank of America Corporation. FleetBoston is qualified to do business and does business in Connecticut.

9. At all relevant times, FleetBoston has been an employer within the meaning of 29 U.S.C. §1002(5), a "plan sponsor" as defined in Section 3(16)(B) of ERISA, 29 U.S.C. §1002(16)(B), a "plan administrator" as defined in Section 3(16)(A) of ERISA, 29 U.S.C. §1002(16)(A), and a fiduciary within the meaning of Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A).

10. Defendant Bank of America Corporation is a business corporation organized and existing under the laws of the State of Delaware. On April 1, 2004, Bank of America acquired FleetBoston. Bank of America is qualified to do business and does business in Connecticut.

11. At all relevant times after April 1, 2004, Bank of America has been an employer within the meaning of 29 U.S.C. §1002(5) and a fiduciary within the meaning of Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A).

### **CLASS ACTION ALLEGATIONS**

12. Richards brings this action as a class action in accordance with Federal Rule of Civil Procedure 23 to resolve disputes under the Employee Retirement Income Security Act of 1974. Judicial economy dictates that the issues be resolved in a single action.

13. The proposed class is defined as any and all persons who:

- (a) Are former or current Fleet employees who on December 31, 1996 were not at least age 50 with 15 years of vesting service, and
- (b) Participated in the Fleet Pension Plan before January 1, 1997, and

(c) Have participated in the Fleet Pension Plan at any time since January 1, 1997.

14. The proposed class covers all participants who have been harmed by the ERISA breaches set forth below.

15. On information and belief the proposed class covers well over 1,000 individuals. The class is so numerous that joinder of all members is impracticable.

16. There are common questions of law and fact affecting the rights of the members of the class. The claims of the named class representative are typical of the claims of the class. The named representative will fairly and adequately protect the interests of the class.

17. This action is maintainable as a class action under Rule 23 (b)(1) because the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

18. This action is maintainable as a class action under Rule 23(b)(2) because Defendant has acted and/or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and other equitable relief in favor of the class.

#### **STATEMENT OF FACTS**

19. Richards was born on May 15, 1948.

20. Richards was hired by Hartford National Bank on February 5, 1973.

21. Following a series of mergers she became a participant in the Shawmut Retirement Plan.

22. When Fleet Financial Group acquired Shawmut National Corporation in 1995, it acquired Richards as an employee and merged the Shawmut Retirement Plan into the Fleet Pension Plan, which following a merger between Fleet and Bank Boston became, known as the defendant, FleetBoston Financial Pension Plan (the "Plan" or the "FleetBoston Plan"). On April 1, 2004 Bank of America acquired FleetBoston and Richards is now an employee of Bank of America.

23. Richards's present job title is Senior Vice President in Bank of America's Private Clients Group.

24. Prior to January 1, 1997, FleetBoston's predecessor Fleet had provided its employees with a defined pension plan under which retiring employees received a percentage of their final average pay for life (the "Traditional Plan Terms").

25. Under the Traditional Plan Terms, as employees got older, the rate of their benefit accruals increased. The Traditional Plan Terms rewarded Fleet's longest serving and presumably most loyal employees by tying their retirement benefit amount to years of service and to salary, numbers which are higher in an employee's last years of service. Under the Traditional Plan Terms, as a Fleet employee got closer to retirement and enjoyed a higher salary, Fleet was obliged to put away increasingly larger sums of money so that funds were available to pay the promised benefit at retirement. Employees with less service and more years until retirement correspondingly cost Fleet less, especially because, given potential investment earnings over time, the longer Fleet had before having to pay a dollar, the smaller the amount of money Fleet had to put aside to provide the dollar in the future. For this reason, the Traditional Plan Terms were "backloaded" -- an employee's last years of service under a plan --- close to collecting,

with a high salary and many years of service --- were the most profitable to a Fleet employee and most expensive to Fleet.

26. Effective January 1, 1997, Fleet amended the Fleet Pension Plan to convert the Traditional Plan Terms to: (1) for new employees a "cash balance" benefit; (2) for employees over age 50 with 10 years of service, a benefit computed based on a percentage of their final average pay, and (3) for employees under 50 or age 50 with less than 10 years of service, the greater of benefits accrued under the Traditional Plan Terms through December 31, 1996 and benefits earned under the new cash balance formula.

27. The cash balance retirement benefit provided under the FleetBoston Plan is calculated based upon an annual payment to a hypothetical account of a percentage of an employee's pay (the "pay credit") together with a payment of interest on the annual hypothetical account (the "interest credit").

**Benefit Accrual Rates Decreasing with Age.**

28. As with many cash balance benefits, pay credits under the FleetBoston Plan cash balance benefit are determined by "points" equal to the sum of an employee's age and vesting service. Subject to adjustment for social security integration, the pay credits are as follows:

<b>POINTS</b>	<b>CREDIT</b>
age +service	
Under 40	3%
40 to 49	3.5%
50-59	4.5%
60-69	5.5%
70-79	6.5%

80 or more

7.5%

29. Interest credits under the FleetBoston Plan cash balance benefit are based on the average annual yield of one-year U.S. Treasury constant maturities for the month preceding the calendar quarter in which the pay period begins.

30. If a Plan participant's employment terminates before age 65, the Plan ceases to make hypothetical pay credit payments but continues through age 65 to make hypothetical interest credits.

31. To determine on any given day the age-65 value of a participant's cash balance benefit, interest credit payments on the cash balance are projected each year from the date of determination through the participant's 65th birthday. That balance (and the annuity that can be created from it) is the cash balance benefit provided under the cash balance terms of the FleetBoston Plan.

32. Unlike the benefits under the Traditional Plan Terms, the FleetBoston Plan's cash balance benefits accrue in relatively stable percentages throughout an employee's career. The benefits do not start out accruing in small amounts and then significantly balloon in the final years like benefits do under the Traditional Plan Terms. The net effect of this difference is that younger employees' pensions relatively gain under the FleetBoston Plan's cash balance benefit and older employees' pensions relatively lose. Under the FleetBoston Plan's cash balance benefit, an older worker with the same rate of pay and years of service as a younger worker, receiving the same dollar amount of contribution to her cash balance account, buys an increasingly smaller age-65 pension annuity with that money because the closer the older worker gets to retirement age the less time the money contributed has to earn annual interest credits under the plan. The rate of benefit accrual thus decreases as a direct result of increases in the

employee's age. As the employee gets one year older, the amount of the interest credits to be earned through age-65 is reduced. Therefore, the FleetBoston cash balance benefit accrues benefits that steadily decrease with advancing age, with the effects partially mitigated, but not eliminated, by the Plan's "points" approach to pay credits.

**The Wear-Away Effect.**

33. Like many cash balance plans the FleetBoston Plan's cash balance benefit terms converted the benefits employees earned under the Traditional Plan Terms into a hypothetical opening cash balance account.

34. When Plan administrators calculated the opening account, however, they ignored Plan participants' valuable rights to subsidized early retirement benefits and instead the opening account balance was derived by computing the benefit under the Traditional Plan Terms as a single life annuity commencing at age 65. They also applied a pre-retirement mortality discount (providing for the possibility of death prior to normal retirement) but provided no mechanism for crediting this discount back as participants grow older and the risk of pre-retirement mortality steadily shrinks. They also used a 7% interest rate but provided no mechanism to adjust the balance when, as they have over the last five years, interest rates have fallen below the 7% rate used in the conversion.

35. The combination of these factors yielded an opening account balance for Richards that was substantially less than the value of the benefits she had accrued under the Traditional Plan Terms on December 31, 1996.

36. This difference has significant consequences under the FleetBoston Plan's new cash balance benefit terms because Richards's accrued benefit under the FleetBoston plan is a



“greater of benefit,” creating a critical role for the previously accrued benefits in calculating the new benefit accruals under the Amended Plan:

**“Accrued Benefit”** means, as of any determination date,

- (a) for a Cash Balance Participant for whom an Opening Account Balance is calculated based on his accrued benefit under the Plan and/or a predecessor plan, **the greater of** (1) the monthly benefit, payable in the form of a Single Life Annuity, commencing on the Participant’s Normal Retirement Date, or, as applicable, any later determination date, which is the Actuarial Equivalent of the Participant’s Cash Balance Account, and (2) the Participant’s accrued benefit under the Plan and/or, if applicable, under a predecessor plan, as of the date the Participant’s Opening Account was determined.

Richards cannot receive her previously accrued benefits and simply add the new cash balance benefits to them. Instead the Fleet Plan promises her the greater of the two benefits.

37. Because the difference between Richards’s opening account balance and her frozen benefit is substantial, Richards hasn’t earned any new retirement benefits in the nine years she has worked under the cash balance benefit terms. This phenomenon is known as the “wear-away effect”.

**Fleet's Failure to Explain Benefit Cuts and Continuing Misrepresentations.**

38. Because benefit accruals decline with age under the FleetBoston Plan and because of the wear-away effect, the amendment of the FleetBoston Plan that added the cash balance terms, significantly reduced the rate of future benefit accruals for many plan participants, including Richards.

39. Despite this impact, prior to the effective date of the change, Fleet gave no notice to plan participants, explaining to them the existence and the extent of a significant reduction of their benefits.

40. Despite this impact, Fleet did not explain the full import of the cash balance plan terms in a summary plan description distributed to plan participants, including but not limited to

an explanation of the wear-away effect and a disclosure that benefit accruals under the plan are reduced by advancing age.

41. Instead, despite the totally hypothetical character of the cash balance accounts and the wear-away effect's elimination of years of benefit accruals, Fleet falsely promised plan participants "your cash balance benefit builds steadily throughout the time you work at Fleet. Each quarter Fleet makes pay credits and interest credits into an account in your name."

42. Despite the plan's significant reduction in plan benefits, Fleet answered a hypothetical employee question: "Can my pension benefit decrease under the new Fleet Pension Plan?", with the answer "No.", by disingenuously observing: "Whether you participate in the cash balance benefit or the traditional benefit, you will never receive less than the benefit you earned as of December 31, 1996", omitting to mention that the amendment caused many plan participants to lose substantial plan benefits to the wear-away effect and the benefit accruals that decline with age. Instead, Fleet explained that a key reason it was adopting the cash balance benefit was because, "The New Plan makes good sense for our employees".

43. Even though the cash balance terms say Richards is entitled to receive the greater of her cash balance account or her frozen benefits, Fleet plan administrators and their successors have routinely concealed the amount of their frozen benefits from Richards and other similarly situated plan participants when providing them with statements of their accrued benefits. Quarterly, Fleet and its successors have given Richards and every similarly situated cash-balance plan participant a statement of benefits earned under the FleetBoston Plan that is materially misleading because, while it lists the balance in participants' hypothetical cash balance accounts, it conceals the amount of their frozen benefits even when these benefits are greater than the cash balance benefits. Furthermore, upon information and belief, when plan participants have asked

administrators for statements of the retirement benefits they have earned, the administrators give them materially misleading documents that list the balance in participants' hypothetical accounts as their "accrued benefits" while concealing their frozen benefits even when these benefits are greater than the cash balance benefits. Richards received such a statement dated July 2, 2004 showing her "accrued benefit" as \$161,177.49 but concealing that the frozen benefit that was her actual accrued benefit on that date was \$232,244. Richards and other similarly situated plan participants receiving these materially misleading statements and documents were likely harmed by the false information in them because the false information likely caused them to believe that their retirement benefits were substantially less than they actually were, thus adversely affecting their retirement planning, their understanding of the terms and conditions under which they continue employment, and their knowledge at retirement of whether they are receiving the right amount of benefits.

44. Fleet and its successors have failed to supply Richards and other plan participants receiving benefit estimates and benefit election forms with accurate benefit calculations reflecting the "Rule of 85" which limits benefit reductions for early retirement for most employees converted to the cash balance formula whose age and years of service added together equal at least 85. December 24-28, 2004 emails between Fleet officials and their third party administrators at Fidelity shows that plan administrators were not properly applying the Rule of 85 to Richards and other plan participants.

45. In violation of C.F.R. 1.401(a)-20, Q&A 36 which implements ERISA §205 (g), Fleet and its successors have also failed to supply Richards and other plan participants receiving benefit estimates and benefit election forms with an explanation of the relative value of the optional forms of benefits available under the plan even though the lump sum and annuity forms

of payment are not equally valuable. Richards received a July 2, 2004 estimate without the required information.

46. Prior to April 1, 2004, the plan administrators who prepared and distributed the misleading statements and documents set forth were agents and employees of Fleet or FleetBoston. After April 1, 2004 the plan administrators who prepared and distributed the misleading statements and documents set forth were agents and employees of Bank of America.

**COUNT ONE: Violation of ERISA §204(b)(1)(H): Decreasing Benefit Accrual Rates with Advancing Age.**

47. The cash balance terms of the Fleet Plan violate the prohibition in ERISA Section 204(b)(1)(H) against an employer establishing or maintaining plan rules that reduce “the rate of an employee’s benefit accrual . . . because of the attainment of any age.”

48. Accordingly, Richards is entitled to appropriate equitable relief under ERISA §502 (a)(3) and/or additional benefits under ERISA §502 (a)(1)(B).

**COUNT TWO: Violation of ERISA §204 (h): Failure to Supply Advance Notice of a Significant Benefit Decrease.**

49. Fleet’s failure to notify Richards and other plan participants of a significant reduction in the rate of future benefit accrual 15 days prior to the January 1, 1997 effective date violated the ERISA §204 (h) prohibition on such plan amendments in the absence of such notice.

50. Accordingly, Richards is entitled to appropriate equitable relief under ERISA §502 (a)(3) and/or additional benefits under ERISA §502 (a)(1)(B).

**COUNT THREE: Violation of ERISA §102: Failure to Provide an Adequate Summary Plan Description (SPD).**

51. Fleet and its successors’ failure to explain the full import of the cash balance plan terms in a summary plan description distributed to plan participants, including but not limited to

a complete explanation of the wear-away effect violates the minimal requirements for SPDs set forth in ERISA §102 and its implementing regulations found in 29 C.F.R. 2520.102.

52. Fleet and its successors' failure to explain the relative value of the optional forms of benefit available under the plan violates the minimal requirements for SPDs set forth in ERISA §102 and its implementing regulations found in 29 C.F.R. 2520.102.

53. Accordingly, Richards is entitled to appropriate equitable relief under ERISA §502 (a)(3) and/or additional benefits under ERISA §502 (a)(1)(B).

**COUNT FOUR: Violation of ERISA §404: Breach of Fiduciary Duty.**

54. By intentionally, recklessly or negligently making the materially false statements described in paragraphs 41-45, above, and by failing to comply with ERISA §102 and ERISA §204 (h) Fleet, FleetBoston Financial Corp., and/or Bank of America have breached the fiduciary duties they owe to Plan participants under ERISA §404.

55. Accordingly, Richards is entitled to additional benefits under ERISA §502 (a)(1)(B) and/or appropriate equitable relief under ERISA §502 (a)(3).

**COUNT FIVE: Violation of ERISA §204(c)(3): Failure to Provide an Actuarially Equivalent Lump Sum.**

56. When Fleet and its successors apply the pre-retirement mortality discounts described in paragraph 34 to lump sums paid prior to age 65, they violate ERISA §204 (c)(3) because they are discounting the participants' accrued benefits for the probability of dying before normal retirement age even though the plan would pay the same lump sum to the beneficiaries of any participants who die before age 65. This affects Richards because she is likely to retire with a lump sum before age 65.

57. Accordingly, Richards is entitled to additional benefits under ERISA §502 (a)(1)(B) and/or appropriate equitable relief under ERISA §502 (a)(3).

**Prayer for Relief.**

WHEREFORE, the Plaintiff prays that this Court for:

1. A declaration that the cash balance amendment to the Fleet Pension Plan which purportedly took effect on January 1, 1997 was ineffective for, and that the plan in place prior thereto is still in force and effect for, any participants who suffered a reduction of future benefit accruals because of the amendment;

2. A declaration that a participant's rate of benefit accrual under the FleetBoston Plan and its predecessor plan must be measured at all times in terms of the increase in a participant's annual benefit commencing at normal retirement age;

3. An injunction prohibiting the application of the FleetBoston Plan and its predecessor plan's reductions in the rate of benefit accruals because of age;

4. An order for appropriate equitable relief, including but not limited to, an accounting to determine plan participant losses caused by Fleet and its successors' violations of ERISA as alleged in this Second Amended Complaint and requiring the payment of additional benefits as appropriate under the Court's ruling;

5. An injunction ordering the FleetBoston Plan and Bank of America to cease publishing misleading information concerning benefits under the FleetBoston Plan and ordering the FleetBoston Plan and/or Bank of America to distribute to plan participants an accurate summary plan description, an accurate statement of FleetBoston Plan participants' accrued benefits and ordering the FleetBoston Plan and/or Bank of America to take such other steps as the Court may deem just to ensure that FleetBoston Plan participants receive truthful, accurate and complete descriptions of the benefits due to them under the FleetBoston Plan.

6. Attorney's fees pursuant to ERISA §502 (g);

7. Interest;
8. Costs;
9. An order for appropriate equitable and remedial relief to ensure that relief granted hereunder is implemented on a class-wide basis,
10. Such other equitable and remedial relief as the Court deems appropriate.

THE PLAINTIFF: DONNA C. RICHARDS

By /s/ Thomas G. Moukawsher  
Thomas G. Moukawsher ct08940  
Ian O. Smith ct24135  
Moukawsher & Walsh, LLC  
21 Oak Street, Suite 209  
Hartford, CT 06106  
T: (860) 278-7000  
F: (860) 548-1740  
E: tmoukawsher@mwlawgroup.com  
E: ismith@mwlawgroup.com

ATTORNEYS FOR PLAINTIFF

## CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2006, the foregoing SECOND AMENDED COMPLAINT was filed electronically with the Court and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's system.

William F. Conlon  
wconlon@sidley.com  
Scott E. Gross  
sgross@sidley.com  
Brian P. Guarraci  
bguarrac@sidley.com  
Julie A. Koca  
jkoca@sidley.com  
Anne E. Rea  
area@sidley.com  
Sidley Austin Brown & Wood  
10 S. Dearborn St.  
Chicago, IL 60603

George J. Kelly, Jr.  
Siegel, O'Connor, Zangari, O'Donnell &  
Beck  
150 Trumbull St.  
Hartford, CT 06103  
gkelly@siegelconnor.com

Keith P. Carroll  
Mintz, Levin, Cohn, Ferris, Glovsky &  
Popeo, P.C.  
One Financial Center  
Boston, MA 02111  
617-542-6000  
617-542-2241 (fax)  
kpcarroll@mintz.com

/s/ Thomas G. Moukawsher  
Thomas G. Moukawsher ct08940  
Moukawsher & Walsh, L.L.C.  
21 Oak Street, Suite 209  
Hartford, CT 06106  
T: 860-278-7000  
F: 860-548-1740  
E: tmoukawsher@mwlawgroup.com