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. and the FLEETBOSTON :
FINANCIAL PENSION PLAN, :
:
Defendants. :
: FEBRUARY 28, 2005

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

FOR THE PLAINTIFF:
DONNA C. RICHARDS

Thomas G. Moukawsher ct08940
Ian O. Smith ct24135
Moukawsher & Walsh, LLC
21 Oak Street
Hartford, CT 06106
(860) 278-7000
tmoukawsher@mwlawgroup.com

ATTORNEYS FOR PLAINTIFF

TABLE OF CONTENTS

I. Introduction 1

II. ERISA Allows Two Types of Pension Plans 4

1. The Basic ERISA Text 4

2. ERISA's Differing Treatment of the Two Types of Plans 5

3. Characteristics of Conventional Defined Benefit Plans 6

4. Characteristics of Conventional Defined Contribution Plans 7

5. Characteristics of Cash Balance Plans 8

III. Cash Balance Plans and FleetBoston's Plan in Particular Discriminate Based Upon Age. 9

1. Cash Balance Plans Generally 9

2. FleetBoston's Plan 10

IV. Richards' Age Discrimination Claim Should Stand 12

1. The Language of the Age Discrimination Statute 12

2. The Definition of "Rate of Benefit Accrual" 17

V. FleetBoston's Wear Away Problem, the Illegal Conditioning of Benefits and the Anti-Backloading Rules 22

VI. FleetBoston's Duty to Disclose Benefit Reductions: ERISA §204 (h) and the SPD Rules 26

1. Introduction 26

2. The SPD Rules 27

3. Section 204 (h). 30

4. FleetBoston's Claim that Richards Must Allege Prejudice 32

VII. FleetBoston's Claims Concerning Exhaustion 33

VIII. FleetBoston's Claim Concerning Pleading under 502 (a)(1)(B) and 502 (a)(3) 35

IX. FleetBoston's Claim Concerning the Breach of Fiduciary Duty Claim 36

1. Richards has Standing..36

2. FleetBoston is Liable for Material Omissions 38

X. FleetBoston's Claim Concerning Proper Parties under 502 (a)(1)(B)..............................39

XI. Conclusion 40

TABLE OF AUTHORITIES

CASES

Abels v. Titan Int'l, 85 F. Supp.2d 924 (S.D. Iowa 2000)....................30

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981)....................21

Almendarez-Torres v. United States, 523 U.S. 224 (1994)....................15

Anweiler v. American Elec. Power Serv. Corp. , 3 F.3d 986, 17 EB Cases 1090 and 19 EB Cases 2963 (7th Cir. 1993) 38

Amato v. Western Union Int'l, Inc., 773 F.2d 1402 (2d Cir. 1985) 30, 31

Barker v. Ceridian Corp., 122 F.3d 628 (8th Cir. 1997)....................27

Barnett v. IBM Corp., 885 F.Supp. 581 (S.D.N.Y. 1995) 34

Berger v. Xerox, 338 F.3d 755 (7th Cir. 2003)....................4

Blessing v. J.P. Morgan Chase & Co ., 2003 U.S. Dist. LE XIS 2604 (S.D.N.Y. 2003) 34

Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574, 25 EB Cases 1517 (7th Cir. 2000) 28, 39

Brody v. Enhance Reinsurance Co. , 2003 U.S. Dist. LEXIS 3785 (SDNY March 14, 2003) 30

Burke v. Kodak Retirement Income Plan, 336 F.3d 103 (2d Cir. 2003) 28, 32-34

Burstein v. Retirem ent Account Plan for Employees of Allegheny Health Education and Research Foundation, 334 F.3d 365 (3d Cir. 2003)....................27, 29

Campanella v. Mason Tenders' Dist. Council Pension Plan , 299 F. Supp. 2d 274 (S.D.N.Y. 2004)....................34

Chambless v. Masters, Mates & Pilots Pension Plan, 772 F.2d 1032 (2d Cir. 1985) 28

Clark v. Bank of New York, 801 F. Supp. 1182 (S.D.N.Y. 1992) 29

Commissioner v. Keystone Consol. Indus., 508 U.S. 152, ___ (1993) 20

Cooper v. IBM, 274 F. Supp. 2d 1010 (S.D. Ill.2003) 4

Davidson v. Canteen Corporation. 957 F.2d 1404 (7th Cir. 1992)....................30

Depace v. Matsushita Elec. Corp., 257 F. Supp. 2d 543 (E.D. N.Y. 2003)....................34

Devlin v. Empire Blue Cross & Blue Shield, 274 F.3d 76 (2d Cir., 2001) 35

Eardman v. Bethlehem Steel Corp., 607 F. Supp. 196 (1984)....................29

Eaton v. Onan, 117 F.Supp.2d 812 (S.D.Ind. 2000) 12, 14-19

Engers v. AT&T Corp, 2001 U.S. Dist. LEXIS 25889 (D. N.J. 2001) 15, 17

Esden v. Bank of Boston, 229 F.3d 154 (2d Cir. 2000).................... 5, 6, 8, 9, 19, 20, 24-26

Estate of Becker v. Eastman Kodak Co., 120 F.3d 5, 21 EB Cases 1384 (2d Cir. 1997) 38

Farr v. U.S. W est Communications, 151 F.3d 908, 22 EB Cases 1289 (9th Cir. 1998), *as amended,* 179 F.3d 1252 (9th Cir. 1999), *cert. denied*, 528 U.S. 1116, 120 S. Ct. 935, 23 EB Cases 2944 (2000) 39

Firestone Tire & Rubber Co. v. Bruch , 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989)....................37

Flanigan v. General Electric, 93 F. Supp. 2d 236, 269 (D. Conn., 2000)....................34

Frommert v. Conkright, 328 F. Supp. 2d 420 (W.D.N.Y. 2004)....................33

Geller v. County Line Auto Sales, 86 F.3d 18 (2d Cir. 1996) 28

Gilbert v. Burlington Indus., Inc. , 765 F.2d 320 (2d Cir. 1985), aff' d, 477 U.S. 901, 106 S. Ct. 3267, 91 L. Ed. 2d 558 (1986) 29

Gray v. Briggs, 1998 U.S. Dist. LEXIS 10057 (S.D.N.Y. 1998) 34

Greenblatt v. Delta Plumbing & Heating, 68 F.3d 561 (2d Cir. 1995)....................20

Greenhalgh v. Putnam Savings Bank, 140 F.3d 427 (2d Cir. 1998)....................12, 13, 15, 17

Griggs v. E. I. DuPont de Nem ours & Co., 237 F.3d 371, 25 EB Cases 1641 (4th Cir. 2001) 39

Harris Trust & Sav. Bank v. Salomon Smith Barney, 530 U.S. 238 (2000) 21

Harte v. Bethlehem Steel Corp., 214 F.3d 446, 28 EB Cases 1155 (3d Cir. 2000), *cert. denied*, 531 U.S. 1037, 121 S. Ct. 626 (2000) 39

Heidgerd v. Olin Corp., 906 F.2d 903 (2d Cir. 1990)..27

Hillis v. Waukesha Title Co., Inc., 576 F. Supp. 1103 (E.D. Wis. 1983)....................................29

James v. New York City Dist. Council of Carpenters' Benefits Funds, 947 F. Supp. 622, (E.D.N.Y. 1996)..27

Jensen v. SIPCO, Inc., 867 F.Supp. 1384 (N.D. Iowa 1993)..29

Jordan v. Federal Express Corp., 116 F.3d 1005, 21 EB Cases 1209 (3d Cir. 1997)....................38

Koenig v. International Life Corp., 880 F. Supp. 372 (E.D. Pa. 1995) 30

Lawford v. New York Life Ins. Co., 739 F.Supp. 906 (S.D.N.Y. 1990)....................................34

Layou v. Xerox Corp., 238 F.3d 205 (2d Cir. 2001) 28

Leyda v. AlliedSignal, 322 F.3d 199 (2d Cir. 2003) 29

Lyons v. Georgia Pacific Corp. Salaried Employees Retirement Plan, 221 F.3d 1235 (11th Cir. 2000), *cert. denied*, 532 U.S. 967 (2001) 16, 25

McNeese v. Health Plan Mktg., 647 F. Supp. 981, 8 EB Cases 1154 (N.D. Ala . 1986) 39

Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) 20

Moore v. Metropolitan Life Ins. Co., 856 F.2d 488 (2d Cir. 1988)..27

Moriarity v. United Technologies Corp., 947 F. Supp. 43 (D.Conn. 1996) 29

Mullins v. Pfizer, 23 F.3d 663 (2d Cir. 1994) 37

Normann v. Amphenol, 956 F.Supp. 158 (N.D.N.Y. 1997) 31

Novak v. TRW, Inc., 822 F. Supp. 963 (E.D.N.Y., 1993)..34

Pocchia v NYNEX Corp., 81 F.3d 275 (2d Cir. 1996)..39

Pompano v. Michael Schiavone & Sons, Inc., 680 F.2d 911 (2d Cir. 1982)....................................28

Production and Maintenance Employees' Local 504, 954 F.2d 1397 (7th Cir. 1992) 30

Rosen v. Hotel & Restaurant Employees & Bartenders Union of Phila., Bucks, Montgomery, & Delaware Counties, 637 F.2d 592, 2 EB Cases 1054 (3d Cir.) *cert. denied*, 454 U.S. 898, 102 S. Ct. 398 (1981) 38

Stewart v. Thorpe Holding Co. Profit Sharing Plan, 207 F.3d 1143, 24 EB Cases 1754 (9th Cir. 2000), *cert. denied*, 531 U.S. 1074, 121 S. Ct. 768, 25 EB Cases 2280 (2001) 39

Suozzo v. Bergreen, 2002 U.S. Dist LEXIS 11726 (S.D.N.Y. 2002) 30

Swierkiewicz v. Sorema, 534 U.S. 506 (2002) 33

Varity Corp. v. Howe, 516 U.S. 489 (1996) 21, 35, 36

Vartanian v. Monsanto, 14 F.3d 697 (1st Cir. 1994) 37

Veilleux v. Atochem North Am. Inc., 929 F.2d 74 (2d Cir. 1991) 29

West Virginia Univ. Hospitals v. Casey, 499 U.S. 83 (1991) 13

CODE & REGULATIONS

29 U.SC. §623 (i)(1)(A) 6

29 U.S.C. §623 (i)(4) 14

29 U.S.C. §631 (a) 14

29 U.S.C. §1022 28

29 U.S.C. §1022 (a) 27

29 U.S.C. §1022 (b) 28, 29

29 U.S.C. §1001 28

ERISA §2 (21) 39

ERISA §3 (19) 5, 24

ERISA §3 (23) 5, 9, 19

ERISA §3 (23) (B) 19

ERISA §3 (34) 4, 20

ERISA §3 (35) 4, 20

ERISA§102 .... 3, 27, 32, 33

ERISA §102 (7) 36

ERISA §104 .... 27, 33

ERISA §203 5

ERISA §203 (a) 5, 24, 26

ERISA §203 (e) 19

ERISA §204 5

ERISA §204 (a)(1) 22

ERISA §204 (b)(1) 19

ERISA §204 (b)(1)(H) 14

ERISA §204 (h) 2, 6, 21, 22, 26, 30-33

ERISA §205 (g) 19

ERISA §502 (a)(1)(B) 3, 21, 35, 26, 38, 39

ERISA §502 (a)(3) 3, 21, 36, 38

ERISA §204 (b)(1)(B) 3, 6, 18, 22, 25

ERISA §204 (b)(1)(g) 18, 19

ERISA §204 (b)(1)(H) 1, 2, 4, 10, 12, 17-19, 21, 22

ERISA §204 (b)(1)(H)(iii) 15

ERISA §204 (c)(3) 5

ERISA §204 (g) 5

ERISA §502 (a)(5) 21

ADEA §4 (i)(1)(A) 10

ADEA § 4 (i)(4) 14

I.R.C. §411 5

I.R.C. §411 (b)(1)....... 19

I.R.C. §411 (a)(7)(A) 19

I.R.C. § 401 (a)(25)....... 19

I.R.C. §411 (b)(1)(H) 6, 10

I.R.C. § 411 (a)(11)(B) 19

I.R.C. § 417 (e) 19

26 C.F.R. §1.411 (a)-4 24

26 C.F.R. §1.411 (b)-2(i)(B)....... 6

29 C.F.R. §2520.102 (b) 27

29 C.F.R. §2520.102-2 (a) 28

29 C.F.R. §2520.102-2 (b)....... 28

29 C.F.R. §2520.102-3 (l) 28

52 F.R. 45360 (Nov. 27, 1987) 13

53 F.R. 11876 (Apr. 11, 1988)....... 13

63 F.R. 68678 (Dec. 14, 1998) 22

67 F.R. 76123 (Dec. 11, 2002) 13

68 F.R. 17277 (Apr. 9, 2003)....... 22

IRS Notice 96-8, 1996-1 C.B. 359....... 24

Treas. Reg. 1.411(b)-1 (b)(2)(iii), Examples (2) and (3) 21

Treas. Reg. 1.411(b)-1 (g)....... 21

RULES

Federal Rule of Civil Procedure 8 2

Rule 12 (b)(6) 1

OTHER AUTHORITIES

131 Cong. Rec. 18868 17

1986 U.S.C.C.A.N. at 4024 16

1986 U.S.C.C.A.N. at 4026-27 15

P.L. 99-509, 100 Stat. 1874, §§ 9201-9204, with S. Amendment 2863, reprinted at 132 Cong. Rec. 25042-44 15

H.R. Conf. Rep. 99-1012, at 382; 1986 U.S.C.C.A.N. 3868, 4027 14

H. Conf. Rep. at 274, 3 ERISA Leg. Hist. 4541 21

Lawrence Sher, "Survey of Cash Balance Conversions" Benefits Quarterly , 1st Quarter 2001 26

Restatement (Second) of Trusts §§170(2) 39

Shea, Francese and Newman, "Age Discrimination in Cash Balance Plans: Another View", 19 Va. Tax Rev. 763 (2000) 12

S.Rep. No.127 (93d Cong.,2d Sess. (1974) 38

Sutherland Statutory Construction (6th ed.), §§46.05 and 46.06 15

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Zelinsky, "The Cash Balance Controversy" 19 Va.Tax Rev. 683 (2000) 4

I. Introduction.

This proposed class action alleges that when FleetBoston converted its traditional defined benefit pension plan to a "cash balance" formula, it violated the federal laws governing pensions in four ways:

(1) FleetBoston's cash balance formula illegally conditions employees' rights to future benefits on their giving up benefits they earned in the past;

(2) FleetBoston's cash balance formula discriminates against older workers in violation of ERISA by decreasing the rate of benefit accrual based upon an employee's age;

(3) FleetBoston failed to adequately disclose that the new cash balance plan significantly reduced the benefits offered before the company amended the plan; and

(4) FleetBoston is breaching its fiduciary duties by telling retiring employees only about the balances in their cash balance accounts without telling them they may still retire with any larger benefit they earned under the pre-cash balance plan formula.

FleetBoston has moved to dismiss under Rule 12(b)(6) raising eight issues:

1. Although ERISA §204(b)(1)(H) expressly prohibits decreases in the rate of employees' benefit accruals because of the employees "attainment of any age," FleetBoston contends that Congress really intended for this to mean "attainment of normal retirement age". Does ERISA §204(b)(1)(H) apply to employees who have not reached the plan's normal retirement age? Yes, the plain language of the statute says so. While earlier drafts in Congress contained a rule that applied after normal retirement age, the conference committee and the final conference report substituted the words "any age". This is the law that Congress enacted. The case law and IRS interpretations further prove that ERISA §204(b)(1)(H) means what it says.

2. Although ERISA §204(b)(1)(H) applies to decreases in "the rate of benefit accrual," FleetBoston says that for cash balance plans the "rate of benefit accrual" should not be interpreted as the change in the "accrued benefit" from year to year, but should be the change in the hypothetical balance of a participant's cash balance account. Is FleetBoston's definition of "the rate of benefit accrual" the right one? No, FleetBoston's cash balance plan is a "defined benefit plan" under ERISA. By statute, the operative benefit under any defined benefit plan, including a cash balance plan, is the annuity at normal retirement age. The "rate of benefit accrual" under a defined benefit plan, including a cash balance plan, is judged by the change in the annuity at normal retirement age. FleetBoston wrongly analogizes to defined contribution plan rules – such as those applicable to 401k plans.

3. FleetBoston next contends that the Court should dismiss Richards' complaint because it does not allege she exhausted her administrative remedies. Should the Court dismiss on this procedural ground? No, Richards can prove she exhausted administrative remedies. Moreover, exhaustion isn't required because this is a case alleging statutory violations. In any case, even where exhaustion must be shown, this Court has held it does not need to be pled.

4. ERISA §204(h) requires plan administrators to notify participants 15 days in advance of a significant reduction in benefit accruals. Should the Court, as FleetBoston suggests, dismiss Richards' Section 204(h) claim because she failed to allege in the complaint that she was prejudiced by the lack of notice? No, a plan participant doesn't need to show prejudice to prove that a plan administrator violated Section 204(h). The statute makes no mention of prejudice and this court should not read that requirement into it. Moreover, FleetBoston's heightened pleading requirement is again not supported by Federal Rule of Civil Procedure 8.

5. ERISA §102 requires plan administrators to give participants updated summary plan descriptions or summaries of material modification explaining how benefits may be lost or reduced as a result of plan changes. Should the Court dismiss Richards' ERISA §102 claim because she didn't allege how she was individually prejudiced by the SPDs' nondisclosures? No, the Second Circuit has ruled that the test is "likely prejudice," not individual prejudice or reliance. Regardless of the standard, no case holds that prejudice needs to be alleged in the complaint.

6. In Count VI, Richards claims FleetBoston breaches its fiduciary duties by telling retiring employees about the balances in their cash balance accounts, but <u>not telling them</u> they can still retire with any larger annuity benefit earned under the pre-cash balance formula. Should the Court dismiss Count VI for lack of standing because Richards did not allege this happened to her? No, Richards has not retired. She is seeking declaratory and injunctive relief to ensure that this does not happen to her and others similarly situated. Under Second Circuit case law Richards has standing so long as she is within the zone of interests ERISA seeks to protect. Richards can seek to enjoin the practice under ERISA §502(a)(3) so she and others don't fall prey to the practice when they retire.

7. The Supreme Court has held that where a plaintiff can obtain relief under ERISA §502(a)(1)(B), the courts need not grant relief under ERISA §502(a)(3). Should Richards' complaint be dismissed because she seeks relief under both sections? No, Richards has merely pled the two sections in the alternative.

8. The Second Circuit has held that only the plan and its fiduciaries are liable for failing to pay benefits due under ERISA or the terms of the plan. The plan sponsor may not be <u>directly</u> liable as such. Should the Court dismiss FleetBoston Financial Corporation from the lawsuit

because it maintains that it is the plan sponsor, but not the plan administrator? No, Richards claims FleetBoston was a plan fiduciary which breached its duties. Whether it was an ERISA fiduciary is a question of fact based on the actual functioning of the plan which is inappropriate for the Court to resolve on a motion to dismiss.

II. ERISA Allows Two Types of Pension Plans.

1. The Basic ERISA Text.

ERISA says pension benefits can have just one of two forms: defined benefit plans that describe a plan in terms of the thing an employee gets out of it and defined contribution plans that focus only on the money an employer puts into it and where what comes out of it depends on how much that money grows by the time the employee retires.[1] Berger v. Xerox, 338 F.3d 755, 757 (7th Cir. 2003); Cooper v. IBM, 274 F.Supp. 2d 1010, 1020-21 (S.D. Ill. 2003); Zelinsky, "The Cash Balance Controversy" 19 Va.Tax Rev. 683, 687-93 (2000). Under ERISA, an "individual account plan" or "defined contribution" plan is defined in pertinent part as:

> a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains, and losses and any forfeitures of accounts of other participants which may be allocated to such participant's account.

ERISA §3 (34). A defined benefit plan, in pertinent part, is described by ERISA more simply as: "a pension plan other than an individual account plan." ERISA §3 (35). Critical to the distinction between the two kinds of benefits and the claims of the class herein, is ERISA's definition of "accrued benefit":

> The term "accrued benefit" means--

[1] A traditional pension, paying a worker a percentage of his former salary every month for life is a classic defined benefit plan. A 401k is a prototypical defined contribution plan.

> (A) ***in the case of a defined benefit plan***, the individual's accrued benefit determined under the plan and except as provided in §204 (c)(3), ***expressed in the form of an annual benefit commencing at normal retirement age.***
> (B) in the case of a plan which is an individual account plan, the balance of the individual's account.

ERISA §3 (23)(emphasis added).[2] Under ERISA, every plan that is not an individual account (defined contribution) plan is a defined benefit plan, and the benefits under every defined benefit plan must be expressed "in the form of an annual benefit commencing at normal retirement age." Id.[3] "In brief, the rules governing distributions from defined benefit plans are framed in terms of the normal retirement benefit – typically a single life annuity payable at normal retirement age." Esden v. Bank of Boston, 229 F.3d 154, 159 (2d Cir. 2000).

2. ERISA's Differing Treatment of the Two Types of Plans.

While the expression of benefits under a defined benefit plan in terms of an annuity commencing at normal retirement is the most important difference for our purposes here, there are other important consequences of the distinction between the two types of plans that matter here too. Some important ERISA rules designed to ensure that plans deliver the benefits they promise and pertinent here, apply to all plans. No pension plan can be amended in ways that reduce participants' accrued benefits. ERISA §204 (g). ERISA also establishes minimum vesting requirements for all plans so that an employee's right to theoretically accumulating pension benefits cannot be taken away. ERISA §203, §204, Code §411. Once the benefits vest, they must be "nonforfeitable". ERISA §203 (a). A "nonforfeitable" right is one defined by ERISA as being "unconditional." ERISA §3 (19). There are several rules in addition to the benefit accrual rules that apply only to defined benefit plans. First, to prevent employers from

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[2] IRC §411(a)(7)(A)(i) also requires that benefits under defined benefit plans be calculated in terms of an annual benefit commencing at normal retirement age.

[3] Alternative forms of payment such as a lump sum must be the actuarial equivalent of a normal retirement annuity.

excessively postponing the vesting of pension benefits ("backloading"), ERISA regulates the pace at which benefits under a defined benefit plan accrue, requiring that "the value of the benefit accrued in any year...not exceed the value of a benefit accrued in any previous year by more than 33%." Esden, 229 F.3d at 169; ERISA §204 (b)(1)(B); 26 C.F.R. 1.411(b)-2(i)(B)(the so-called "133 1/3 percent" test). Second, age discrimination in defined benefit plans is prohibited by ERISA §204 (b)(1)(H) which provides in pertinent part:

> a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee's benefit accrual is ceased, or ***the rate of an employee's benefit accrual is reduced, because of the attainment of any age.***

Id. (emphasis added). Similarly, the Age Discrimination in Employment Act provides in pertinent part: "It shall be unlawful for an employer... to establish or maintain an employee pension benefit plan which requires or permits–...in the case of a defined benefit plan...the reduction of an employee's benefit accrual, because of age...." 29 U.S.C. §623 (i)(1)(A). The IRS Code further provides:

> ...a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age.

Code §411 (b)(1)(H).

Finally, when defined benefit plans are amended in ways that significantly reduce benefit accruals each participant must receive notice of the reduction 15 days prior to the effective date of the change. ERISA §204 (h).

3. Characteristics of Conventional Defined Benefit Plans.

Conventional defined benefit plans pay workers an annuity based on the retiree's earnings history and her completed years of service. Zelinsky, supra at 687. Typically such plans set the annuity as a percentage of the employee's highest salary years multiplied by the

employee's years of service. Id. Formulas of this type tend to reward the longest serving and presumably the most loyal employees by tying their retirement benefit amount to years of service and to salary, which is usually higher in an employee's last years of service. Under these plans, as an employee gets closer to retirement and enjoys a higher salary, an employer must put away increasingly larger sums of money so that funds are available to pay the promised benefit at retirement. Id. at 688. Employees with less service and more years until retirement correspondingly cost employers less, especially because, given potential investment earnings over time, the longer an employer has before having to pay a dollar, the smaller the amount of money the employer has to put aside to provide the dollar in the future. Id.[4] For this reason, traditional defined benefit plans are described as "backloaded" -- an employee's last years of service under a plan --- close to collecting, with a high salary and many years of service --- tend to be most profitable to the employee and most expensive to the employer. Id.[5] Defined benefit plans benefit workers because they require employers to contribute to pension trusts whatever amount of money is needed to meet the plan's obligation to make fixed payments to retirees, granting employers the risks and rewards of the trust investment experience.[6]

4. Characteristics of Conventional Defined Contribution Plans.

Conventional defined contribution plans, by not promising anything other than the employer's funding commitment, do not focus on what an employee receives at retirement but only on the payments into the employee's account. Id. at 691-2. What happens to the money after that is the employee's risk. The money may provide a generous retirement if the employee's

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[4] Thus, if an employer wants to reduce benefit expenses, reducing older workers pensions yields the highest returns.

[5] The anti-backloading rules, supra are designed to prevent excesses of backloading that would prevent short service employees from realizing any benefits at all.

[6] The more favorable the pension trust's investment experience, the smaller the employer's contributions to the trust can be and vice versa.

investment experience with the contribution is favorable or a less comfortable retirement if the employee's investment experience with the contribution is unfavorable. Id. In any case, the employer's contribution to the fund is typically level (ie- 10% of salary annually) and need not increase as an employee nears retirement in order to fund an annuity that commences at that point. Id. Defined contribution plans benefit employers because they fix employers' obligations to retirement plan accounts and place the risks and the rewards associated with investment experience on employees. See Zelinsky supra at 687-93.

5. Characteristics of Cash Balance Plans.

Cash balance plans are essentially an attempt to seek (principally for employers) the best of both worlds.[7] Cash balance plans, mimicking defined contribution plans, typically feature the creation of hypothetical accounts for each employee to which a percentage of an employee's salary (pay credit) and a minimum rate interest payment (interest credit) are made each year. Id. at 693-4; Esden v. Bank of Boston, 229 F.3d 154, 158 (2d Cir. 2000). The total amount of pay and interest credits in the hypothetical account at any given moment is the employee's cash balance account. Because of the hypothetical accounts, cash balance plans look something like defined contribution plans. Id. However, because the output of the plans consist of the pay credit plus a fixed rate of interest, with the employer accepting the actual risks and rewards of investments, cash balance plans are defined benefit plans. Esden, 229 F.3d at 158, 162 (2d Cir. 2000). Because they are defined benefit plans, they are subject to the rules against age discrimination, against excessive backloading, and requiring advance notice of benefit reductions.

[7] Employers with defined benefit plans face disincentives against simply terminating a defined benefit plan and establishing a defined contribution plan. Termination vests previously forfeitable benefits, loses for employer's the benefit of plan surpluses, and exposes employers to

III. Cash Balance Plans and FleetBoston's Plan in Particular Discriminate Based Upon Age.

1. Cash Balance Plans Generally.

Unlike benefits under conventional defined benefit plans, pension benefits under cash balance plans accrue in relatively (or sometimes absolutely) 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 in conventional defined benefit plans. The net effect of this difference is that younger employees relatively gain under cash balance plans and older employees relatively lose under cash balance plans. Zelinsky, supra at 706. Moreover, because younger employees do not gain as much as older employees' lose, employers yield significant net savings by converting to cash balance plans. Id. Cash balance savings thus come at the expense of older workers.

The age impact of cash balance plans is made especially clear from the impact on benefit accrual rates that occurs as a cash balance plan builds benefits toward an annuity commencing at normal retirement age, the benefit lens through which all defined benefits must be viewed.[8] Thus, at any given date of determination, the rate of benefit accrual is determined by converting the contents of a cash balance account into an annuity at normal retirement-- in short answering the question: what size annuity commencing at normal retirement age could be bought with the benefits earned to date? Under cash balance plans, an older worker with the same rate of pay and years of service, receiving the same dollar amount of contribution to her cash balance

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tax surcharges. Zelinsky, supra at 712-15. It is thus far better for an employer to shed as many of the burdens of defined benefit plans while retaining as many of the benefits as possible.

[8] Esden, supra at 159 ("In brief, the rules governing distributions from defined benefit plans are framed in terms of the normal retirement benefit – typically a single life annuity payable at normal retirement age."); ERISA §3 (23)("accrued benefit" means...the individual's accrued benefit determined under the plan... ***expressed in the form of an annual benefit commencing at normal retirement age.***)(emphasis added).

account, buys an increasingly smaller 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. Zelinsky, supra at 721-22. Thus:

> Consider, for example, a participant who, at ages thirty-five, forty-five, and fifty-five receives in each year a theoretical contribution of $1000 to her hypothetical cash balance account. As of age sixty-five, the earliest contribution will, in annuity terms, represent an annual income of $1094 per year; the $1000 contributed ten years later at age forty-five will constitute at retirement an annuity of $507 per year; and the last $1000 contributed at age fifty-five will, at retirement, represent an annuity of $225 per year. Thus, even though the employee, in defined contribution terms, has been accruing contributions at a steady pace (i.e., $1000 per year), the employee has been earning benefits at a decreasing rate in defined benefit terms. Since later contributions have less time for investment growth, they generate less annuity income at retirement than earlier contributions, which have more time to grow from investment earnings.

Id. at 722-23.

Or as the Court in Cooper v. IBM, 274 F. Supp. 2d 1010 (S.D. Ill.2003), declared in finding age discrimination in IBM's cash balance plan: "At this point in the analysis, the result is inevitable. In terms of age 65 annuity, the interest credits will always be more valuable for a younger employee as opposed to an older employee." Id. at 1021. Structured as they are most cash balance plans accrue benefits that steadily decrease with advancing age in direct contradiction of the ERISA §204 (b)(1)(H), the ADEA §4 (i)(1)(A), and the Code §411 (b)(1)(H) prohibitions against the rate of an employee's defined benefit accrual being reduced because of the attainment of any age.

2. FleetBoston's Plan.

FleetBoston's pension plan is no different. Prior to 1997, FleetBoston pension plan participants received a traditional defined benefit formula consisting of an annuity for life that is a percentage of salary. Exhibit "1" at 2, 7 (FleetBoston SPD)(FleetBoston calls this the

"Traditional Benefit"). Effective January 1, 1997, FleetBoston converted its traditional plan to a cash balance plan. Id. at 2, 21 (FleetBoston calls this the Cash Balance Benefit).

Like most cash balance plans, FleetBoston's Cash Balance Benefit is a combination of pay credits and interest credits. Unlike some plans, FleetBoston's plan partially anticipates the correlation between increasing age and declining benefit accruals by increasing pay credits with age. Id.[9] The FleetBoston Cash Balance Benefit uses the following schedule to calculate pay credits:

POINTS age +service	**CREDIT** Earnings Below Social Security Wage Base	Earnings Above Social Security Wage Base
Under 40	3%	6%
40 to 49	3.5%	7%
50-59	4.5%	9%
60-69	5.5%	11%
70-79	6.5%	13%
80 or more	7.5%	15%

To calculate interest credits (which are paid quarterly on the hypothetical accounts) FleetBoston uses a variable rate set as the average of the constant maturity one-year Treasury Bill for the month preceding the calendar quarter. Interest credits are paid until participants draw their money out. Id. at 25. Richards will present expert testimony that despite FleetBoston's pay credit adjustment, age remains the central factor in determining benefits and, like other cash balance plans, employees' rate of benefit accrual under the FleetBoston's plan declines with age.

[9] When employees' income exceeds the Social Security taxable wage base ($65,400 for 1997) employees get an additional Pay Credit. Id. at 24.

FleetBoston defends against the anti-discrimination charge with a number of the arguments conventionally employed by cash balance advocates.[10]

IV. Richards' Age Discrimination Claim Should Stand.

1. The Language of the Age Discrimination Statute.

FleetBoston relies on the District Court's holdings in Eaton v. Onan, 117 F.Supp.2d 812 (S.D.Ind. 2000). Adapting from Onan, FleetBoston's first claim concerns the prohibition in ERISA §204 (b)(1)(H) against decreases in the rate of employees' benefit accruals because of the employees "attainment of any age". FleetBoston says Congress meant "attainment of any age" to mean "attainment of normal retirement age". The Second Circuit would likely reject this claim. In 1998, the Second Circuit affirmed a decision of this Court (Arterton, J.) in Greenhalgh v. Putnam Savings Bank, 140 F.3d 427, 429 (2d Cir. 1998), that found an "age-based distinction in violation of the amended Act" when compensation between ***ages 60 to 65*** was excluded in computing pension benefits. In Greenhalgh, the Court ruled that Putnam Savings Bank "impermissibly" computed pension benefits under ERISA § 204(b)(1)(H) by excluding compensation in the years before age 65. 140 F.3d at 431. The Second Circuit affirmed the Court's decision and its further ruling that Putnam Savings had modified its practices to comply with the amended Act on its effective date by excluding the last 5 years of compensation for all participants "regardless of the age of the employee." 140 F.3d at 430. Accordingly, the Second Circuit has already recognized that the scope of the "attainment of any age" language reaches ages below 65 (in Greenhalgh ages 60-65).

The Greenhalgh Court's application of the "attainment of any age" language proceeds obviously from the plain language of the statute. An example shows the difference between the

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[10] See e.g. Shea, Francese and Newman, "Age Discrimination in Cash Balance Plans: Another View", 19 Va. Tax Rev. 763 (2000).

statutory rule and the construction that FleetBoston now proposes. If the prohibition against decreases in rates of accrual were limited to decreases in rates "after age 65," a company sponsoring a pension plan could decrease an employee's rate of accruals at age 50, 55, 60, or even 64 from a benefit equal to 2% of pay to .1% of pay. As FleetBoston would construe it, the company would only violate ERISA (and the ADEA for that matter) if the reduction occurred after age 65. FleetBoston's construction would make a mockery of the age discrimination laws. But, as the Supreme Court has said in West Virginia Univ. Hospitals v. Casey, 499 U.S. 83, 101 (1991), "It is our role to make sense rather than nonsense out of the corpus juris."

The federal agencies with interpretive responsibility for this statute have also ***rejected*** FleetBoston's construction. In proposed regulations issued by the IRS in 1988 and by the EEOC in 1987, the statutory reference to "any age" has been interpreted to mean what it says. 53 F.R. 11876 (Apr. 11, 1988) and 52 F.R. 45360 (Nov. 27, 1987). Although the IRS did not make its proposed regulations final, it authorized taxpayers to rely on the regulations for guidance pending issuance of final regulations. 53 F.R. at 11878; accord Greenhalgh v. Putnam Savings Bank, 140 F.3d at 430 n.4. On December 11, 2002, the IRS issued a new set of proposed regulations. 67 F.R. 76123. In those regulations, which contain several controversial new proposals for cash balance pension plans discussed infra, the IRS reiterated:

> Under these sections, attainment of any age means a participant's growing older. Accordingly, these regulations, like the 1988 proposed regulations, would apply regardless of whether the participant is older than, younger than, or at normal retirement age.
>
> Some commentators have suggested that only cessations or reductions after attainment of normal retirement age are prohibited by these sections. This interpretation is not consistent with the language of the statute, which does not specify any minimum age at which the rule applies.

67 F.R. at 76124 (emphasis added).

Moreover, contrary to the conclusion of the Onan Court, Congress' intention to address discrimination in rates of benefit accruals at "any age" is evident in both the 1986 Conference Report and Section 4(i)(4) of the ADEA, 29 U.S.C. § 623(i)(4). The Conference Report states that: "It is the intention of the conferees, in adopting amendments to ADEA . . . that the requirements contained in section 4(i) related to an employee's right to benefit accruals . . . shall constitute the entire extent to which ADEA affects such benefit accrual and contribution matters with respect to such plans on or after the effective date of such provisions." H.R. Conf. Rep. 99-1012, at 382; 1986 U.S.C.C.A.N. 3868, 4027 (emphasis added). Section 4(i)(4) codifies this by providing that compliance with the prohibition on decreasing the rate of accruals at any age constitutes compliance with the ADEA's prohibition on age discrimination insofar as it relates to benefit accruals. As this Court knows, the age discrimination rules apply to workers "who are at least 40 years of age." 29 U.S.C. § 631(a). Under FleetBoston's construction, the requirements contained in section 4(i) would be limited to individuals who are ***past age 65***, but they would nevertheless constitute the "entire extent" to which ADEA affects rates of benefit accrual for individuals past age 40. This would make the statutory scheme nonsensical.

If this were not sufficient, Richards would also draw the Court's attention to two related subsections in the same act: First, a subsequent subsection provides that an employee's rate of benefit accruals is not considered decreased "solely because the subsidized portion of any ***early retirement*** benefits is disregarded." ERISA § 204(b)(1)(H)(v), 29 U.S.C. § 1054(b)(1)(H)(v)(emphasis added). This exception concerning ***early*** retirement would not be necessary if the general rule only applied to employees who are past age 65 and were eligible for normal retirement.[11] In addition, there are two references in a subsequent subsection to

[11] The Conference Report also discusses the exception for "subsidized early retirement benefits" and the agencies' authority to make additional exceptions to the general rule for "other types of

employees who have "attained normal retirement age" in circumstances where Congress intended the rules to be limited in this manner. ERISA § 204(b)(1)(H)(iii). In addition to Onan, FleetBoston's argument on this point relies on a ruling by Judge Nicholas Politan in Engers v. AT&T Corp, 2001 U.S. Dist. LEXIS 25889 (D. N.J. 2001)(Exhibit "2"). The Engers decision was designated "not for publication." Judge Politan's decision was a *sua sponte* dismissal in reliance solely on the decision in Onan.[12] Judge Politan, who retired at the start of 2002, did not ask for briefs on this matter from the plaintiffs and his ruling has not been reviewed because it is interlocutory. Like the Onan decision, the Court in Engers never addressed the IRS's interpretation of the statutory language and neither controls here in light of Greenhalgh.

Ultimately much of the effort to judicially rewrite "any age" to " age 65" rests on a vestigial heading. In the Internal Revenue Code, but not in ERISA or the ADEA, the statutory rules are preceded by a heading that reads "Continued accrual beyond normal retirement age." This heading originated with earlier versions of the bill which had less comprehensive objectives. Compare S. Amendment 2863, reprinted at 132 Cong. Rec. 25042-44. In conference, the legislation was expanded to comprehensively provide that the rate of benefit accruals may not cease or be decreased because of the attainment of "any age."[13]

It is a black letter rule of statutory construction that a statute's effect is not limited to earlier objectives. Instead, each word in the statute is given its plain meaning. See, e.g., Sutherland Statutory Construction §§ 46.05 and 46.06. Statutory headings can provide some indication of the meaning of doubtful terms. Almendarez-Torres v. United States, 523 U.S. 224,

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benefits, such as disability benefits or social security supplements, which are payable before normal retirement age." 1986 U.S.C.C.A.N. at 4026-27 (emph. added).

[12] See Engers at *7-*13 (Exhibit "2").

[13] Along with the conferees' expansion of the general rule, several exceptions were added. Compare P.L. 99-509, 100 Stat. 1874, §§ 9201-9204, with S. Amendment 2863, reprinted at 132 Cong. Rec. 25042-44.

234 (1994). But headings are not strait jackets. As the Eleventh Circuit found in another ERISA case, "Congressional inaction regarding an existing title" that originated with an earlier bill "is far too thin a reed to support a statutory construction that would effectively write out of the statute the very changes that Congress amended the provision to include." Lyons v. Georgia Pacific Corp. Salaried Employees Retirement Plan, 221 F.3d 1235, 1246 (11th Cir. 2000), *cert. denied*, 532 U.S. 967 (2001). Here, the heading is not inaccurate; it is simply an incomplete description of the final legislation. Forcing the final legislation to fit within a heading "would effectively write out of the statute the very changes" that the conferees adopted to comprehensively address age discrimination in pension benefit accruals.

The Onan Court's brief review of the Conference Report as adopted here by FleetBoston skips over an example that shows how the "rules preventing the reduction of benefit accruals on account of the attainment of age" apply to "employees who have not attained normal retirement age." 1986 U.S.C.C.A.N. at 4024. The example compares the rates of accrual before normal retirement age for two employees hired at ages 45 and 55. The Report states that the "general rule that benefit accruals cannot be reduced or ceased on account of the attainment of age" is not violated by application of ERISA's "fractional" rule "merely because a younger employee has a lower accrued benefit than an older employee with the same number of years of service." Id.

(emph. added). The example cuts out any remaining fabric from the argument that the statute is intended to apply only to workers who are past age 65.[14]

In summary, the IRS has expressly concluded that FleetBoston's "interpretation is not consistent with the language of the statute, which does not specify any minimum age at which the rule applies." 67 F.R. at 76124. The unequivocal statutory language, the Conference Report, and the Greenhalgh decision all show that Congress intended to stop age discrimination in rates of accruals at "any age."

2. The Definition of "Rate of Benefit Accrual."

FleetBoston says that because the benefit *formula* does not change with the attainment of any age (except to go up), no violation can exist and no further analysis is needed. It also says that the words "rate of benefit accrual" in ERISA §204 (b)(1)(H) should be interpreted as it is in defined contribution plans instead of with the obvious reference to the definition of "accrued benefit" that governs defined benefit plans. According to FleetBoston and other cash balance advocates, because ERISA doesn't explicitly define "rate of benefit accrual", the courts are free to interpret it in a way convenient to cash balance advocates: by measuring only the growth in a cash balance participant's account each year -- the measure used for a defined contribution plan, not the measure for a defined benefit plan. FleetBoston also argues that the difference between

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[14] The Onan Court's reliance on a floor statement by Senator Charles Grassley, who was one of 17 sponsors for the final Senate amendment, rests on an anachronism. In a prepared statement on July 11, 1985, Senator Grassley said his initial bill on this subject (S. 1427) would require "continued pension accruals for workers who work past the normal retirement age of 65." Slip op. at 9 -10 (quoting 131 Cong. Rec. 18868). The legislation with the prohibition against decreasing rates of benefit accrual at "any age" was not adopted until over a year later. The Engers Court also quoted three statements from members of the House of Representatives who were conferees but not sponsors of the bill. Slip op. at 10. The special typeface in the Congressional Record shows that none of these statements were spoken on the floor of the House when the Conference agreement was approved. Moreover, read in full, two of those statements refer to the bill's impact on employees who have not reached age 65. See 132 Cong. Rec. 32963-64 (then-Cong. Jeffords) and 32974-75 (Cong. Roukema).

older and younger workers under the plans reflects nothing more than the time value of money: younger workers have to wait longer for their benefits. FleetBoston points out that the court in Eaton v Onan, supra largely adopted the arguments of cash balance plans proponents on these points.

FleetBoston's reasoning, as adopted by the Onan Court is flawed. This reasoning may suggest a way without legislation for cash balance plan advocates to get what they want, but it turns the ERISA statute on its head in the process. FleetBoston's arguments depend on treating a defined benefit plan for rate of benefit accrual purposes as though it were a defined contribution plan. FleetBoston cannot deny that measured like every other defined benefit plan, the rate of benefit accrual of its cash balance plan shows declining accruals with age. FleetBoston's arguments depend upon ignoring the definition of "accrued benefit" central to the distinction between defined benefit plans and defined contribution plans when making the obviously related calculation of "rate of benefit accrual" used in the statute in close conjunction with its uses of the words "accrued benefit".[15] Understanding that "benefit accrual" should be calculated using the definition of "accrued benefits" is not among the many difficult jobs parsing the texts of ERISA and the Code. It obviously should apply. Zelinsky, supra at 741.

Its application was obvious to the Court in the most widely noted cash balance decision as well. In Cooper v. IBM, 274 F. Supp. 2d 1010 (S.D. Ill. 2003), the Court, addressed the argument that "'benefit accrual' means something different than the term 'accrued benefit'" by focusing on simple grammatical construction of the words:

> Defendants question why Congress would use different language in succeeding subparagraphs (accrued benefit and benefit accrual) unless it intended the subparagraphs to cover different types of benefits. The answer is simple. Congress chose to be grammatically correct. The term accrued benefit in §204

[15] See e.g. §204 (b)(1)(g) and §204(b)(1)(H).

> (b)(1)(G) means an employee's age 65 *accumulated benefit*. If Congress has used the term accumulated benefit in §204 (b)(1)(G), instead of the term accrued benefit, it would not have used the clumsy phrase "rate of accumulated benefit" in §204 (b)(1)(H). Presumably, Congress would have opted for standard English and used the phrase "rate of benefit accumulation," even though it intended to cover the same type of benefit in both subparagraphs.n.2.
>
> n.2. For a simpler example consider the word popcorn. Popcorn is the word used to describe the product created by exposing corn kernels to extreme heat. If asked to draft a phrase related to the speed of this process, one would not say "rate of popcorn." Rather, to be grammatically correct, one would say "the rate corn pops".Id. at 1016.

Using the correct definition and facing the indisputable mathematics, the Cooper Court quickly concluded the IBM cash balance plan violated ERISA §204 (b)(1)(H) by reducing a participant's rate of benefit accrual with increasing age. Id. at 1017.

In light of its reasoning in Esden v. Bank of Boston, it is hard to believe that the Second Circuit would follow the view of FleetBoston and the Onan Court, rather than that of Richards, the plain meaning of the statute and the Cooper Court. Esden, like the present case, turned on recognition of the fact that, try as they might to carve out a different status between defined contribution plans and defined benefit plans, cash balance plans are defined benefit plans and the regulatory consequences of that can't be ignored:

> However, notwithstanding that cash balance plans are designed to imitate some features of defined contribution plans, they are nonetheless defined benefit plans under ERISA. n 6. The regulatory consequences of this classification are wide-reaching. First, ERISA § 3(23) provides different definitions of "accrued benefit" for defined benefit and defined contribution plans. Only for a defined contribution plan is "accrued benefit" defined as simply "the balance of the individual's account." ERISA § 3(23)(B); I.R.C. § 411(a)(7)(A). Second, defined benefit plans are subject to a series of parallel statutory constraints-- under ERISA and I.R.C.-- from which defined contribution plans are exempted. Those relevant to this case include: limitations on "backloading" of accruals, see ERISA § 204(b)(1); I.R.C. § 411(b)(1); the valuation rules of I.R.C. § 417(e) as made applicable by I.R.C. § 411(a)(11)(B), see also ERISA §§ 203(e), 205(g); and the definitely determinable benefits requirement of I.R.C. § 401(a)(25).
> n 6. Under ERISA the terms "defined contribution plan" and "individual account plan" are synonymous and are both defined as "a pension plan which provides for

> an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses . . . ." ERISA § 3(34) (emphasis added). A "defined benefit plan" is defined as any plan "other than an individual account plan." ERISA § 3(35). However "hybrid" in design a cash balance plan may be, it remains subject to a regulatory framework that is in many regards rigidly binary. Because the individual accounts, and the employer contributions and the interest credits to those accounts, are all hypothetical under a cash balance plan, it is classified as a defined benefit plan. The Plan does not (and cannot) dispute this definition. Rather it resists--and has tried to draft around--its consequences.

229 F.3d at 158.

Essential to the Esden decision and this decision are the consequences of measuring accrued benefits under a cash balance plan in terms of an annuity at normal retirement age. "In brief, the rules governing distributions from defined benefit plans are framed in terms of the normal retirement benefit--typically, a single-life annuity payable at normal retirement age." Id at 159. It is a highly dubious proposition to suggest that having recognized employers' desire to escape the consequences of defined benefit plan regulation of cash balance plans and having refused to submit to them in the face of the defined benefit statutory scheme, the Second Circuit would now succumb to them in a circumstance that is a natural extension of the ruling made in Esden. Richards believes the Second Circuit would rule that benefit accrual rates must be judged as are "accrued benefits", through the lens of an age 65 annuity.

Finally, FleetBoston's argument overlooks the "presumption that similar language in two labor law statutes has a similar meaning." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 61 (1987); accord Sutherland Statutory Construction (6th ed.), §47.28 ("when common terms are used, they should be given their common meaning"); Commissioner v. Keystone Consol. Indus., 508 U.S. 152, ___ (1993) ("identical words used in different parts of the same act are intended to have the same meaning"; Congress was "presumptively aware" of the "settled meaning" of "sale or exchange" when it used the same phrase in ERISA). Accord Greenblatt v. Delta Plumbing &

Heating, 68 F.3d 561, 576 (2d Cir. 1995) (argument that company was an "employer" for purposes of one section of ERISA but not another discarded because the "statute makes no such distinction"). The presumption is particularly strong when provisions are part of the same statutory section. See Harris Trust & Sav. Bank v. Salomon Smith Barney, 530 U.S. 238, 244-46 (2000) (holding that nonfiduciaries may be sued under ERISA § 502(a)(3) because it is similarly worded to §502(a)(5)); Varity Corp. v. Howe, 516 U.S. 489 (1996) (ERISA §502(a)(3) authorizes individual relief for a breach of fiduciary duty because identical language in §502(a)(5) authorizes such relief).

In this instance, three subsections within the same section of ERISA – ERISA §§ 204(b)(1)(B), (b)(1)(H) and (h) – refer to benefit "accruals." The same words cannot have a different meaning in each subsection, particularly when the entire Section is titled "Benefit Accrual Requirements." If Congress had to continually reiterate that the common term possesses the same meaning in each subsection, even the most careful draftsman would be hard-pressed to enact effective legislation.

The meaning of the "accrual rate" in ERISA §§ 204(b)(1)(B) and 204(h) is settled and entirely consistent with Richards' claim about what it means in §204(b)(1)(H). ERISA §204(b)(1)(B) refers to the "accrual rate" in describing the 133 1/3% test for accrued benefits (the parallel Internal Revenue Code Section even names the test the "133 1/3% accrual rule"). The ERISA Conference Report also describes how the 133 1/3% rule tests the "rate of accrual" or "accrual rate" in different years. H. Conf. Rep. at 274, 3 ERISA Leg. Hist. 4541. The Treasury Department's regulations on the 1331/3% rule, issued in 1977, compare the "rate of benefit accrual" or the "rate of accrual" in earlier and later years. Treas. Reg. 1.411(b)-1 (b)(2)(iii), Examples (2) and (3) and 1.411(b)-1(g). Accord Alessi v. Raybestos-Manhattan, Inc., 451 U.S.

504, 514 (1981) (under ERISA's 133 1/3% rule "the accrual rate for a given year of service does not vary beyond a specified percentage from the accrual rate of any other year under the plan").

Similarly, ERISA Section 204(h) requires a plan administrator to notify employees of a reduction in the "rate of future benefit accrual." In promulgating regulations under this rule, the Treasury Department stated: "The statutory phrase "rate of future benefit accrual" implies, on its face, that section 204(h) is limited to changes in the accrued benefits." 63 F.R. 68678, 68680 (December 14, 1998). In April 2003, the Treasury Department issued a set of regulations to implement amendments to section 204(h). Those regulations again provide that the "rate of future benefit accrual," including under a cash balance plan, is the "benefit accruing for a year" in the form of a single life annuity commencing at normal retirement age. 68 F.R. 17277, 17282-83, Q&A-6(b) and Q&A-8(b) (April 9, 2003).

FleetBoston essentially claims that the term "benefit accrual" does not really have to refer to the change in the employee's "accrued benefit" – at least when that term is used under §204(b)(1)(H). It is clear that Congress intended for its "accrued benefit" definition to apply to §204(b)(1)(H) because this subsection is part of the broader rules in ERISA §§ 204(a)(1) and (b)(1) which establish the "accrued benefit" requirements for defined benefit plans. Furthermore, as discussed above, the regulations implementing ERISA §§ 204(b)(1)(B) and 204(h) establish that "benefit accrual" means "the change in the accrued benefit."

V. FleetBoston's Wear Away Problem, the Illegal Conditioning of Benefits and the Anti-Backloading Rules.

Although FleetBoston asks the Court to dismiss Counts Two and Three on technical grounds discussed below, the Court should understand the underlying cause of action when it considers those challenges. Richards explains them here.

In addition to her losses from age discrimination, Richards suffers another major loss of benefits by virtue of the terms and conditions under which her Traditional Benefits were converted into a new cash balance account. Like many cash balance plans FleetBoston's converts the benefits of employees with existing pension benefits into opening cash balance accounts. When FleetBoston converted the original benefits to a cash balance account it ignored plan participants' valuable rights to subsidized early retirement benefits and instead the benefit was expressed as a single life annuity commencing at age 65. Exhibit "1" at 22 (SPD). The plan then says that the employee's accrued benefit is the greater of her benefit under the original benefit plan, frozen as of the commencement date of the cash balance plan, and the value of the cash balance account. Id. Therefore, under FleetBoston's Cash Balance Benefits, employees' pension entitlements don't grow until their hypothetical account balance under the cash balance plan equals ("wears away") and is greater than the value of the frozen original benefit. Id. See, Zelinsky, supra at 702. Richards can show that in many cases the "wear away" effect makes participating in the FleetBoston cash balance plan completely illusory because the cash balance account never exceeds the value of the frozen account. She will also show that even participants who accrue benefits under the cash balance plan lose benefits because when FleetBoston converted the original benefits to cash balance benefits it applied a pre-retirement mortality discount (providing for the possibility of death prior to normal retirement) but provides no mechanism for crediting this discount back as participants grow older and the risk of pre-retirement mortality steadily shrinks. Such participants also lose benefits when, as they have over the last five years, interest rates fall below the 7% rate FleetBoston used in calculating the conversion. Exhibit "1" at 22 (SPD)(showing 7% rate). Under those circumstances, participants can purchase even less of the annuity than they had previously earned. The smaller a

participant's cash balance account is, the longer the wear away on the participant's benefits. The longer the wear away, the more years a participant must wait before accruing any new benefits under the plan.

The wear away effect has important legal implications. First, it illegally conditions participants' right to collect benefits provided under its plans, causing prohibited benefit forfeitures. Second, the wear-away effect, which leaves employees with many years of no benefits followed by the sudden appearance of benefits violates the anti-backloading prohibition on benefits increasing faster then 33.3% each year.

To prevent benefit promises from proving illusory, ERISA §203 (a) says that benefit accruals must be "nonforfeitable" once a participant has the years of service required to be vested. ERISA §3 (19) defines a non-forfeitable right as a right that is "unconditional". "A right which, at a particular time, is conditioned under the plan upon a subsequent event, subsequent performance, or subsequent forbearance which will cause loss of such right is a forfeitable right at that time." 26 C.F.R. 1.411(a)-4. IRS Notice 96-8, 1996-1 C.B. 359, further explains:

> If benefits . . . have accrued [but] those benefits are disregarded when benefits commence before normal retirement age, the plan has effectively conditioned entitlement to the benefits . . . on the employee not taking a distribution prior to retirement age.

See also Esden v. Bank of Boston, 229 F.3d 154, 168 (2d Cir. 2000) ("by making part of [Lynn Esden's] benefit conditional on the form of payment chosen, the Plan made that benefit forfeitable, in violation of ERISA").

FleetBoston employees who have higher frozen benefits than cash balance benefits can certainly get cash balance benefits. However, because FleetBoston does not permit them to get both, participants have to give up their higher frozen benefits as a condition of their collecting the lower cash balance benefits. The opposite is also true. FleetBoston employees can take their

frozen benefits on condition that they give up their cash balance benefits. Moreover, even if someday participants' cash balance accounts finally exceeds their frozen benefits, the cash balance benefits accrued will still be less then they ought to be because the cash balance benefits at conversion were set artificially low by virtue of its exclusion of early retirement benefits as well as the mortality assumptions and interest rate used.

Richards' claim for relief for the conditional benefits violations is built on the Second Circuit's September 2000 decision in Esden v. Bank of Boston and the authorities cited therein: Namely, ERISA's "133 1/3%" accrual rule, ERISA's anti-forfeiture rule, and the Treasury Department regulations on forfeitures. The Esden decision is one of only two circuit court decisions that have addressed accruals and vesting under cash balance pension plans; the other decision, Lyons v. Georgia Pacific, 221 F.3d 1235 (11th Cir. 2000), is discussed in Esden.

In Esden, Bank of Boston converted to a cash balance plan in 1989. In accordance with ERISA, Bank of Boston protected the benefits that Lynn Esden had earned with her 16 years of service before the change and offered her additional accruals for her service after the change. However, Bank of Boston next offered Ms. Esden an option under which it would actually only pay part of the value of the benefits she was to have accrued after the change. The Second Circuit held that the "only test that [a cash balance pension plan like the Bank of Boston's] might satisfy is the so-called 133 1/3 percent test under ERISA section 204(b)(l)(B)." Id. at 167. This accrual test requires that the plan offer annual rates of benefit accrual which do not escalate by more than 33%. Id. According to the Court, a plan sponsor "tries to have it both ways" if it claims compliance with ERISA's benefit accrual rules, but then conditions the actual right to payment. Id. at 167 n.8 and 168. The Court relied on the Treasury Department's nonforfeitability regulation which prohibits conditions on entitlement to accrued benefits based upon subsequent

events or forbearance. The Court concluded that "part of [Lynn Esden's] pension benefit was made conditional on the distribution option chosen, in violation of the anti-forfeiture provisions of ERISA § 203(a)." Id. at 158 and 168. The Second Circuit also held that ERISA prohibits "allowing a plan to offer an employee" the "choice of a partial forfeiture in exchange for a particular form of payment." Id. at 173.

VI. FleetBoston's Duty to Disclose Benefit Reductions: ERISA §204 (h) and the SPD Rules.

1. Introduction.

Whatever arguments FleetBoston may make about whether the substance of its cash balance plan complies with the applicable federal laws, FleetBoston must admit that by amending the FleetBoston pension plan to create a cash balance plan, it significantly reduced employee benefits in comparison with those provided under FleetBoston's prior plan. A principal purpose of cash balance plans is to cut defined benefit costs. A survey article found that among those adopting cash balance plans "benefit reductions of 20% or more were expected to arise for some employees at certain retirement ages in 59% of the cases responding to this question." Lawrence Sher, "Survey of Cash Balance Conversions" Benefits Quarterly, 1st Quarter 2001. The question whether FleetBoston reduced benefits here is, of course, a question of fact the Court can't decide on a motion to dismiss.

If a company significantly reduces employee benefit accruals, ERISA at least wants to see that, apart from any other question, the company tells employees about it truthfully, completely, and in plain language. ERISA requires this in two principal ways: (1) Through ERISA §204 (h) which prohibits pension plan amendments providing for a significant rate of future benefit accrual unless each participant is notified of the decreasing benefit accrual at least 15 days prior to the effective date of the change, and (2) through a summary plan description

governed by ERISA §§102 and 104 which provides complete plan information in terms calculated to be understood by the average plan participant.

2. The SPD Rules.

Adequate disclosure to employees is the sole purpose of SPD's and one of the major purposes of the ERISA statute as a whole. Burstein v. Ret. Account Plan for Emples. of Allegheny Health Educ. & Research Found., 334 F.3d 365, 378 (3d Cir. Pa. 2003)(citing Barker v. Ceridian Corp., 122 F.3d 628, 633 (8th Cir. 1997) ("Summary plan descriptions are considered part of ERISA plan documents. . . . Adequate disclosure to employees is one of ERISA's major purposes. . . . Because of the importance of disclosure, in the event of a conflict between formal plan provisions and summary plan provisions, the summary plan description provisions prevail.")). "The primary method by which an employer communicates to its employees with respect to an ERISA welfare plan is through a summary plan description, Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988), which 'must not have the effect of misleading, misinforming or failing to inform participants and beneficiaries' with respect to a plan's provisions. 29 C.F.R. § 2520.102(b)." James v. New York City Dist. Council of Carpenters' Benefits Funds, 947 F. Supp. 622, 628 (E.D.N.Y. 1996). The centrality of the SPD to the ERISA statutory scheme and the care with which an SPD must be crafted has been thoroughly explained by the Second Circuit:

> ERISA requires that the participants and beneficiaries of any employee benefit plan be provided with a summary plan description ("SPD"), a thorough and easy to understand summary of the benefit plan. 29 U.S.C. § 1022(a). The SPD must be "written in a manner calculated to be understood by the average plan participant" and must "be sufficiently accurate and comprehensive to apprise such participants and beneficiaries of their rights and obligations under the plan." Id. ERISA "contemplates that the summary [plan description] will be an employee's primary source of information regarding employment benefits, and employees are entitled to rely on the descriptions contained in the summary." Heidgerd v. Olin Corp., 906 F.2d 903, 907-08 (2d Cir. 1990).

Generally, for a SPD to meet the disclosure requirements of 29 U.S.C. § 1022, "the limitation or elimination of technical jargon and of long, complex sentences [and] the use of clarifying examples" is required. 29 C.F.R. § 2520.102-2(a). The SPD must include, among other things, a description of the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." 29 U.S.C. § 1022(b); *see also* 29 C.F.R. § 2520.102-3(l) (an SPD must contain "a statement *clearly identifying* circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture or suspension of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits") (emphasis added). Regulations promulgated under ERISA prescribe the format of a SPD. The format of the summary plan description must not have the effect [of] misleading, misinforming or failing to inform participants and beneficiaries. Any description of exceptions, limitations, reductions, [or] restrictions of plan benefits shall not be minimized, rendered obscure or otherwise made to appear unimportant . . . [and] shall be described or summarized in a manner not less prominent than the style, captions, printing type, and prominence used to describe or summarize plan benefits. 29 C.F.R. § 2520.102-2(b); see also Chambless v. Masters, Mates & Pilots Pension Plan, 772 F.2d 1032, 1040 (2d Cir. 1985) (requiring SPD to explain "full import" of provisions affecting employee); Pompano v. Michael Schiavone & Sons, Inc., 680 F.2d 911, 914 (2d Cir. 1982) (stating that the plan at issue "was written up in summary form in simple and unmistakable language easy enough for the average plan participant to be reasonably appraised of his rights and obligations under the Plan."). In analyzing Layaou's claim, we are mindful that Congress intended that ERISA function as a comprehensive remedial statute designed to safeguard pension benefits. See Geller v. County Line Auto Sales, 86 F.3d 18, 22 (2d Cir. 1996) (citing 29 U.S.C. § 1001) (statement of Congressional purpose).Layou v. Xerox Corp., 238 F.3d 205, 209-10 (2d Cir. 2001).

SPD language that "obscures" or tends to "minimize" benefit limitations is prohibited by ERISA. Burke v. Kodak Retirement Income Plan, 336 F.3d 103, 110 (2d Cir. 2003). The "full import" of benefit-related consequences must be set forth or an SPD will be deemed out of compliance with ERISA. Chambless v. Masters, Mates & Pilots Pension Plan, 772 F.2d 1032, 1040 (2d Cir. 1985); Layou v. Xerox Corp., 238 F.3d at 211 (citing also, Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574, 587 (7th Cir. 2000) (holding that because "the explanations provided in the SPD . . . did not provide the critical information needed by employees in [plaintiff's] circumstances[,] . . . the [ ] SPD lacked the clarity and completeness required by § 1022")).

Benefit reductions not adequately disclosed in a SPD cannot be enforced. In Burke v. Kodak Retirement Income Plan, 336 F.3d 103, 110 (2d Cir. 2003) the Second Circuit considered pension plan SPD language related to survivor benefits for domestic partners. The District Court held that Kodak's reference to the required filing of domestic partner affidavits for other benefits, its inclusion of the requirement at issue in the plan document and its inclusion of the requirement in a company newsletter permitted the company to enforce the requirement against the

plaintiff, depriving her of survivor benefits. Id.105-7. Reversing and directing judgment for the plaintiff, the Second Circuit ruled that ERISA prohibited enforcement of the affidavit requirement because only a SPD disclosure can satisfy the statute, and while contained in other sections of the SPD, the affidavit requirement was omitted from the section governing survivor benefits and failed, in the alternative, to refer the reader to the other SPD sections where the requirement was set forth. Id. at 110-11. Providing the missing information, the Court observed, would have required minimal diligence and effort from the plan administrator and would have eliminated guesswork by participants. Id. at 111. Settling a long standing question, the Court also ruled that plan participants can prevail in cases challenging flawed SPDs without proving reliance upon the flawed document. Id. at 112-14.[16] See also Burstein v. Retirement Account Plan for Employees of Allegheny Health Education and Research Foundation, 334 F.3d 365, 380 (3d Cir. 2003). In Leyda v. AlliedSignal, 322 F.3d 199 (2d Cir. 2003) the Court of Appeals considered a District of Connecticut decision (Hall, J.) related to a plan's failure to disclose a reduction in life insurance coverage. Id. at 201-3. The Court of Appeals upheld the District Court's decision awarding a plan participant's widow the larger amount of benefits she thought she would receive based upon prior disclosures and refusing to enforce the new summary plan description containing the reduction because the company made inadequate efforts to distribute the SPD to plan participants. Id. at 201. Other Courts have routinely refused to enforce benefit reductions and limitations where they have not been adequately disclosed in the applicable SPD. "The SPD does not inform employees of the 'circumstances which may result in disqualification, ineligibility, or loss of benefits,' 29 U.S.C. §1022(b) -- one of the primary concerns sought to be remedied by ERISA's disclosure requirements. Accordingly, the SPD is inaccurate and inconsistent with the language of the Plan, and Defendant is estopped to rely on the Plan in denying Plaintiff benefits." Moriarity v. United Technologies Corp., 947 F. Supp. 43, 52 (D.Conn. 1996)("It is the employer, not the employee, who must bear the cost of a poorly drafted SPD"); Jensen v. SIPCO, Inc., 867 F.Supp. 1384, 1391 (N.D. Iowa 1993)("If the SPD does not contain a benefit forfeiture clause, then such a forfeiture will not be enforced against a participant."(Citing Hillis v. Waukesha Title Co., Inc., 576 F. Supp. 1103, 1109 (E.D. Wis. 1983); Eardman v. Bethlehem Steel Corp., 607 F. Supp. 196, 209-214 (1984)). See also Veilleux v. Atochem North Am. Inc., 929 F.2d 74, 76 (2d Cir. 1991) (per curiam) (quoting Gilbert v. Burlington Indus., Inc., 765 F.2d 320, 328-29 (2d Cir. 1985), aff'd, 477 U.S. 901, 106 S. Ct. 3267, 91 L. Ed. 2d 558 (1986)); Clark v. Bank of New York, 801 F. Supp. 1182, 1195-1196 (S.D.N.Y. 1992)(inadequate disclosures make benefit denials arbitrary and capricious).

[16] Instead the Court merely requires a showing of prejudice, meaning "likely harm". Id. at 113.

3. Section 204 (h).

Disclosures concerning plan amendments are also governed by ERISA §204 (h). No plan amendment significantly decreasing benefit accruals can be enforced unless the reduction of benefit accruals is explained in lay terms in an advance notice. ERISA §204 (h) says:

> that a plan ...may not be amended so as to provide for a significant reduction in the rate of future benefit accrual, unless after adoption of the plan amendment and not less than 15 days before the effective date of the plan amendment, the plan administrator provides a written notice, setting forth the plan and its effective date to ...each participant in the plan.

Id.; Davidson v. Canteen Corporation. 957 F.2d 1404 (7th Cir. 1992). Where a plan amendment reduces future benefit accruals but has not been preceded by a Section 204 (h) notice, courts have not hesitated to declare the amendments ineffective and the prior plans as continuing in force. Production and Maintenance Employees' Local 504, 954 F.2d 1397, 1404 (7th Cir. 1992)(generalized notice insufficient); Koenig v. Intercontinental Life Corp., (E.D.Pa. 1995)(plan merger declared ineffective); Suozzo v. Bergreen, 2002 U.S. Dist LEXIS 11726 (S.D.N.Y. 2002)(absent notice provisions of the amendment are ineffective)(Exhibit "3"); Abels v. Titan Int'l, 85 F. Supp.2d 924 (S.D. Iowa 2000) (rejecting argument that employer complied with "spirit" of the notice rule by giving notice of employer's intent in collective bargaining); Koenig v. International Life Corp., 880 F. Supp. 372 (E.D. Pa. 1995)(change which resulted in a substantial decline in rate of benefit accrual was amendment subject to 204(h); 1989 benefit formula had to be continued in absence of required notice); Brody v. Enhance Reinsurance Co., 2003 U.S. Dist. LEXIS 3785, at * 34-36 (SDNY March 14, 2003)(Section 204(h) notice cannot be avoided by announcing a short freeze and not telling participants that a benefit reduction follows the freeze)(Exhibit "4"). Section 204 (h) applies to reductions in all accrued benefits. Early retirement benefits are accrued benefits. Amato v. Western Union Int'l, Inc., 773 F.2d

1402, 1410 (2d Cir. 1985). Accordingly, Section 204 (h) applies to reductions in early retirement benefits. Normann v. Amphenol, 956 F.Supp. 158 (N.D.N.Y. 1997).

Faced with a mandate to tell employees that their Cash Balance Benefits would be less than their Traditional Benefits, FleetBoston responded in most cases with nothing more than a description of how the new plan operates, and, where it said more, Richards will show that the change was nothing but good news.

With all that plan participants lost by the conversion to a cash balance plan, it is hard to conceive of a way to find FleetBoston complied with its paramount duty to tell plan participants the truth about company plans. It isn't the case, as FleetBoston suggests that Richards didn't know that the plan had been amended, the issue is that the SPD plainly does not warn participants of the circumstances, through wear away, etc., in which benefits can be lost. It contains no disclosures of: (1) Loss of early retirement subsidies; (2) Reductions in benefit rates compared to old plan; (3) Lower rates with age; (4) The age 65 benefit was used as the basis for the Opening Account Balance (OAB), not the age 55 benefit; (5) the application of a pre-retirement mortality discount in computing the OAB; (6) and that pay and interest credits are conditional because of wear away. The company has never explained the relative value of the optional forms of benefit, i.e. the difference between taking the frozen Traditional Benefit or accepting Cash Balance Benefits: indeed, Richards will show that sometimes the company never even tells retiring employees about their right to the higher benefits frozen under the traditional formula of the prior company plan. Moreover, none of the reductions described above were contained in a §204 (h) notice, a fact which FleetBoston must admit. Nor can FleetBoston succeed with its alternative argument that a §204 (h) notice need not disclose benefit reductions so long as it describes the terms of the new plan. This would, of course, directly contradict the

language of the statute which calls not merely for a disclosure of the new plan terms but "sufficient information...to allow applicable individuals to understand ***the effect*** of the plan amendment." ERISA §204 (h). If a description of the effect of the plan amendment were the same thing as a description of the plan amendment, the requirement to explain "the effect" of the plan amendment would be mere surplusage. Moreover, this view is consistent with the implementing regulations for §204 (h) which require the ***magnitude*** of the reductions to be described. 68 F.R. 17277 (April 9, 2003). While the regulations are not retroactive, the regulating authority's view of the words should be persuasive at least and, at best, is the only rational way to interpret a statute requiring "notice of significant reduction in benefit accruals."

4. FleetBoston's Claim that Richards Must Allege Prejudice.

FleetBoston says the Court should dismiss Richards' ERISA §204 (h) and ERISA §102 because Richards hasn't claimed that she was prejudiced by FleetBoston's failure to disclose. FleetBoston misinterprets the Second Circuit's decision in Burke v. Eastman Kodak, 336 F.3d 103 (2d Cir. 2003). Burke only addresses ERISA §102; it says nothing about imposing a prejudice requirement on cases brought under ERISA §204 (h). Also, the District Court in Burke granted the defendant summary judgment because the plaintiff didn't *prove* reliance on the faulty disclosure; it didn't dismiss the case because the plaintiff failed to *plead* anything. 336 F.3d at 106. What's more, the Second Circuit not only rejected the reliance standard the District Court imposed, it didn't adopt the "actual prejudice" standard FleetBoston suggests it did. Instead, as the Court explained, a disclosure violation can be proved if harm to plan participants was "likely". 336 F.3d 113-14. The question of "likely" harm in contrast to "actual" harm need not have anything to do with what actually happened to the plaintiff. Requiring Richards to plead she was prejudice thus isn't required by Fed.R.Civ. P. 8. As the Supreme Court reaffirmed in 2002

in Swierkiewicz v. Sorema, 534 U.S. 506, 513-14 (2002), under Rule 8(a)'s simplified notice pleading standard a party doesn't have to engage in "technical forms of pleading" or plead each factual or legal element of a claim in order to give "fair notice" of a claim. Under the standard Burke set, Richards has given FleetBoston ample notice of her claims under ERISA §204 (h) and ERISA §102.

Frommert v. Conkright, 328 F. Supp. 2d 420 (W.D.N.Y. 2004) requires no different result. At best, Frommert suggests that the "likely harm" standard adopted in Burke should apply to §204 (h) cases. Id. at 436. It says nothing about requiring likely harm to be pled. Moreover, while it mentions that under the facts of that case applying §204(h) wouldn't advance the statute's purpose of giving notice in advance so participants can act before the change's effective date, it didn't say that giving *advance* notice was §204 (h)'s only purpose. Clearly the principal purpose of §204(h) is giving employees notice of significant decreases in benefits without regard to whether the notice is given in advance or on the effective date of the change. Frommert doesn't suggest §204(h) can't apply to the facts of this case, nor does it say anything about what has to be pled to give fair notice of a §204(h) claim. Accordingly, the Court should let Richards continue her claims against FleetBoston under ERISA §204 (h), ERISA §102 and ERISA §104.

VII. FleetBoston's Claims Concerning Exhaustion.

FleetBoston says this entire case should be dismissed because Richards didn't allege she exhausted her administrative remedies. FleetBoston is wrong to do so, however, because plan participants suing for statutory violations don't have to exhaust administrative remedies. Even where they do have to exhaust administrative remedies they don't need to plead exhaustion, even though Richards could plead it because she did exhaust her administrative remedies.

Although the Second Circuit hasn't specifically addressed this issue, ERISA doesn't require plan participants to exhaust administrative remedies before to going to court in statutory violation cases. ERISA requires participants to demand relief from plan administrators only when they claim benefits due under the plan terms. See e.g. Burke v. Kodak Ret. Income Plan, 336 F.3d 103, 107 (2d Cir. 2003)("We require the exhaustion of administrative remedies for the denial of ERISA benefits."). Those are the only cases ERISA says administrators must set up administrative claims procedures for under ERISA §503: that is, in the language of the statute, claims procedures have to be set up for any participant "whose ***claim for benefits under the plan*** has been denied." ERISA doesn't require this step in statutory violation cases because statutory interpretation and enforcement is exclusively the judiciary's job. The Third, Fourth, Fifth, Sixth, Ninth and Tenth Circuits all agree, and have held plan participants need not make demand before filing suit in statutory violation cases. See Depace v. Matsushita Elec. Corp., 257 F. Supp. 2d 543, 557 (E.D. N.Y. 2003)(collecting cases). So have at least seven district courts in this circuit. Campanella v. Mason Tenders' Dist. Council Pension Plan, 299 F. Supp. 2d 274, 281 (S.D.N.Y. 2004); Depace v. Matsushita Elec. Corp., 257 F. Supp. 2d 543, 557 (E.D. N.Y. 2003); Blessing v. J.P. Morgan Chase & Co., 2003 U.S. Dist. LEXIS 2604 *5-*6 (S.D.N.Y. 2003)(Exhibit "5"); Gray v. Briggs, 1998 U.S. Dist. LEXIS 10057 *19-20 (S.D.N.Y. 1998)(Exhibit "6"); Barnett v. IBM Corp., 885 F.Supp. 581, 592 (S.D.N.Y. 1995); Novak v. TRW, Inc., 822 F. Supp. 963, 969 (E.D.N.Y., 1993); Lawford v. New York Life Ins. Co., 739 F.Supp. 906, 912 (S.D.N.Y. 1990). Accordingly, because ERISA doesn't require Richards to exhaust FleetBoston's administrative remedies, FleetBoston's motion should be denied. In any case, this Court has already held that even where plaintiffs must exhaust administrative remedies, they need not allege they did so, even where as here Richards could prove she did. Flanigan v. General Electric, 93 F. Supp. 2d

236, 269 (D. Conn., 2000)("while a showing of exhaustion or futility is needed, it is not a technical pleadings requirement, but implicates fact-dependent issues.")

VIII. FleetBoston's Claim Concerning Pleading under 502 (a)(1)(B) and 502 (a)(3).

FleetBoston says that the Court should dismiss Richards' claims under ERISA §502 (a)(3) in Counts II, IV, and V because she also claims alternative remedies under both ERISA §502 (a)(3) and ERISA §502 (a)(1)(B). FleetBoston claims that ERISA §502 (a)(3) only applies where there is no remedy under ERISA §502 (a)(1)(B), so with Richards claiming there is a remedy under ERISA §502 (a)(1)(B), she can't simultaneously claim under ERISA §502 (a)(3). The Second Circuit considered and rejected this claim in Devlin v. Empire Blue Cross & Blue Shield, 274 F.3d 76, 89-90 (2d Cir., 2001):

> Finally, we disagree with Empire's contention that "there is no private action for breach of fiduciary duty under ERISA when another remedy is available under 29 U.S.C. § 1132. Appellee's Br. at 41. Plaintiffs' cause of action for their breach of fiduciary duty claims arises from ERISA §502(a)(3), which allows plan participants, beneficiaries or fiduciaries to bring a civil action "to enjoin any act or practice which violates any provision of this subchapter or terms of the plan, or . . . obtain other appropriate equitable relief." 29 U.S.C. § 1132 (a)(3). In Varity Corp., the Supreme Court held that such claims alleging breach of fiduciary duty could be brought by individual plaintiffs because ERISA § 502(a)(3) "acts as a safety net, offering appropriate equitable relief for injuries caused by [ERISA] violations that § 502 does not elsewhere adequately remedy." Varity Corp., 516 U.S. at 512. The Supreme Court further noted that, given ERISA's requirement that fiduciaries act "solely in the interest of the participants and beneficiaries," 29 U.S.C. § 1104 (a)(1), "it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy." Id. at 513. We note that should plaintiffs' claim under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132 (a)(1)(B), to enforce their rights under the plan fail, plaintiffs' breach of fiduciary duty claim is their only remaining remedy. Varity Corp. clearly provides that, where a plan participant has no remedy under another section of ERISA, she can assert a claim for breach of fiduciary duty under § 502(a)(3). Id. at 515 (noting that ERISA's purposes would be furthered by granting a remedy where no other remedy is available); see also Strom, 202 F.3d at 149 ("[Varity Corp.] evidences a clear intention to avoid construing ERISA in a manner that would leave beneficiaries . . . without any remedy at all.").

> Varity Corp. further explained, however, that "where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be 'appropriate.'" Varity Corp., 516 U.S. at 515 (emphasis added). The Supreme Court in Varity Corp. did not eliminate the possibility of a plaintiff successfully asserting a claim under both § 502(a)(1)(B), to enforce the terms of a plan, and § 502 (a)(3) for breach of fiduciary duty; instead, the Court indicated that equitable relief under § 502(a)(3) would "normally" not be appropriate. Ultimately, we believe that the determination of "appropriate equitable relief" rests with the district court should plaintiffs succeed on both claims. This determination must be based on ERISA policy and the "special nature and purpose of employee benefit plans." Id. (internal quotation marks omitted). We therefore hold that Varity Corp. did not eliminate a private cause of action for breach of fiduciary duty when another potential remedy is available; instead, the district court's remedy is limited to such equitable relief as is considered appropriate. If the plaintiffs ultimately prevail on this claim upon remand, the district court must then fashion appropriate relief.

Accordingly, FleetBoston's challenge to Richards' alternative pleading under ERISA §502 (a)(3) and ERISA §502 (a)(1)(B) must fail.

IX. FleetBoston's Claim Concerning the Breach of Fiduciary Duty Claim.

1. Richards has Standing.

Richards brings this action under ERISA §502 (a)(1)(B) and §502 (a)(3) which authorizes a civil action to be brought by:

> (1) by a participant or beneficiary—(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> …
>
> (3) by a participant, beneficiary or fiduciary…(A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

Id. Under ERISA §102 (7) the term "participant" means:

> *any employee* or former employee of an employer…*who is or may become eligible to receive a benefit* of any type form an employee benefit plan which covers employee of such employer…

Id. (emphasis added).

On the definition of "participant" The Supreme Court has ruled:

> an employee may demonstrate that she "may become eligible" for benefits by showing a "colorable claim that(1) he or she will prevail in a suit for benefits, or that *(2) eligibility requirements will be fulfilled in the future."*

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 117-18, 109 S.Ct. 948, 958, 103 L.Ed.2d 80 (1989). In Mullins v. Pfizer, 23 F.3d 663 (2d Cir. 1994) the Second Circuit took a broad view of Firestone at odds with FleetBoston's motion. Mullins was a former Pfizer employee who missed his chance to participate in a voluntary separation benefit because plan fiduciaries misled him into retiring shortly before its adoption. Id. at 665. The District of Connecticut (Nevas, J.) granted Pfizer summary judgment ruling, inter alia, that as a former employee Mullins lacked "participant" standing. Id. On appeal the Second Circuit reversed, noting that "Congress intended the statutory scheme, in conjunction with state law, to afford broad protection". Id. On the narrow issue of Mullins' standing the Court held Mullins was a participant because he was a former employee of defendant and had a colorable claim to plan benefits under a plan concerning which he would have been a participant, but for Pfizer's wrongdoing. Id. at 667-8. On the basic standing question under ERISA, the Court adopted the broadest possible view, holding that: "the basic standing issue is whether the plaintiff is '*within the zone of interest ERISA was intended to protect*'" Id. at 668 (quoting Vartanian v. Monsanto, 14 F.3d 697, 701 (1st Cir. 1994). Explaining the Second Circuit's view, the Mullins Court cited a reminder from the legislative history that ERISA was supposed to remove obstacles to claims, not create them:

> The intent of the [Senate Labor and Public Welfare] Committee is to provide the full range of legal and equitable remedies available in both state and federal

> courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants.
>
> S.Rep. No.127 (93d Cong.,2d Sess. (1974).

23 F.3d at 668.

At a minimum, Richards is in the zone of interests ERISA protects because she and others like her will retire someday, and without relief they may face the same problem – FleetBoston may not tell them about the larger frozen benefits they may take. At a minimum, Richards may seek to clarify her rights under the terms of the plan under ERISA §502 (a)(1)(B) or enjoin a violation of ERISA under ERISA §502 (a)(3). Either way she is putting a stop to something that otherwise would harm people like her. Accordingly, even though she has suffered no harm yet, she can bring this action to see that she doesn't.

2. FleetBoston is Liable for Material Omissions.

FleetBoston also says that to succeed on this claim Richards must allege and prove misrepresentations as opposed to nondisclosure. That is not so. Avoiding misrepresentations is not the limit of fiduciary duty under ERISA. With respect to current plan terms, fiduciaries have a duty to voluntarily disclose information they have that they know plan participants need to protect their financial interests. The Second Circuit and many other courts agree. [17]

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[17] Estate of Becker v. Eastman Kodak Co., 120 F.3d 5, 9–10, 21 EB Cases 1384 (2d Cir. 1997)(ambiguous and incomplete summary plan description may alone create duty to inform); Jordan v. Federal Express Corp., 116 F.3d 1005, 1015–16, 21 EB Cases 1209 (3d Cir. 1997)(when fiduciary knows silence would be harmful, there is affirmative duty to inform participant of material information that participant must know for his or her own protection); Anweiler v. American Elec. Power Serv. Corp., 3 F.3d 986, 991, 17 EB Cases 1090 and 19 EB Cases 2963 (7th Cir. 1993)("Fiduciaries must also communicate material facts affecting the interests of the beneficiaries . . . . This duty exists when a beneficiary asks fiduciaries for information, and even when he or she does not."); Rosen v. Hotel & Restaurant Employees & Bartenders Union of Phila., Bucks, Montgomery, & Delaware Counties, 637 F.2d 592, 599–600, 2 EB Cases 1054 (3d Cir.)(failure to warn participant that employer had not made required

Accordingly, Richards need not allege a misrepresentation to succeed with her breach of fiduciary duty claim.

X. FleetBoston's Claim Concerning Proper Parties under 502 (a)(1)(B).

FleetBoston also claims FleetBoston Financial Corporation shouldn't be a party because benefit claims can only be brought against the benefit plan, not its corporate sponsor and because Richards wrongly claims FleetBoston Financial Corporation is the plan administrator. The Court can easily dispense with this claim. The Complaint alleges that FleetBoston Financial Corporation is a fiduciary of the Plan and that it breached its fiduciary duties concerning plan administration when it and its agents failed to tell plan participants that their frozen benefits were greater than their largely illusory cash balance benefits. Complaint ¶¶9, 52, 53. ERISA §2(21) defines "fiduciary" functionally; any person who exercises discretion or control over the plan is a

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contributions to fund, which resulted in loss of benefits, constituted breach), *cert. denied*, 454 U.S. 898, 102 S. Ct. 398 (1981); McNeese v. Health Plan Mktg., 647 F. Supp. 981, 985–86, 8 EB Cases 1154 (N.D. Ala. 1986) (plan administrator breached duties by failing to notify employees of financial problems with plan); RESTATEMENT (SECOND) OF TRUSTS §§170(2), 173, cmt. d;; Farr v. U.S. West Communications, 151 F.3d 908, 915, 22 EB Cases 1289 (9th Cir. 1998), *as amended,* 179 F.3d 1252 (9th Cir. 1999), *cert. denied*, 528 U.S. 1116, 120 S. Ct. 935, 23 EB Cases 2944 (2000)(liability for inadequate written disclosures regarding tax consequences of lump sum distributions). Harte v. Bethlehem Steel Corp., 214 F.3d 446, 448, 453, 28 EB Cases 1155 (3d Cir. 2000), *cert. denied*, 531 U.S. 1037, 121 S. Ct. 626 (2000)(fiduciary had a duty to clarify ambiguous plan language where a beneficiary had relied on an incorrect interpretation of the language to his detriment); Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574, 590–91, 25 EB Cases 1517 (7th Cir. 2000)(employer's failure to clarify incomplete and inadequate information in an SPD regarding preexisting condition provisions in a medical plan constituted a fiduciary breach); Stewart v. Thorpe Holding Co. Profit Sharing Plan, 207 F.3d 1143, 1146, 1157, 24 EB Cases 1754 (9th Cir. 2000) (failure to inform beneficiary about written procedures for determining whether marital dissolution order was a QDRO would constitute a breach of fiduciary duty), *cert. denied*, 531 U.S. 1074, 121 S. Ct. 768, 25 EB Cases 2280 (2001); Griggs v. E. I. DuPont de Nemours & Co., 237 F.3d 371, 379–84, 25 EB Cases 1641 (4th Cir. 2001)(employer breached its fiduciary duty by failing to alert a participant in a timely manner to the tax consequences of a rollover). But note: the Second Circuit and other courts have held that plan fiduciaries do not have to volunteer information about future benefit changes being considered by plan sponsors. See e.g. Pocchia v NYNEX Corp., 81 F.3d 275, 279 (2d Cir. 1996)(NYNEX "...did not have a duty to disclose proposed changes in the absence of inquiry....").

fiduciary. Richards alleges FleetBoston Financial Corporation exercises discretion or control over the plan, so regardless of its status in claims for benefits under the terms of the plan and even if its agent not it is the plan administrator, FleetBoston Financial Corporation belongs in the case because Richards claims it's a fiduciary that breached its duty. Accordingly, this challenge to Richards' complaint must also fail.

XI. Conclusion.

For all the reasons given above, the Court should not dismiss any part of Richards' Complaint.

Respectfully submitted,

By /s/ Thomas G. Moukawsher
Thomas G. Moukawsher ct08940
Ian O. Smith ct24135
Moukawsher & Walsh, LLC
21 Oak Street
Hartford, CT 06106
(860) 278-7000
tmoukawsher@mwlawgroup.com

ATTORNEYS FOR PLAINTIFF