

Tax Management

Memorandum

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ERISA “Anti-Cutback” Rule: Recent Appellate Court Application of *Heinz* and Implications for Other Plan Amendments

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INTRODUCTION

In 2004, the U.S. Supreme Court issued its decision in *Central Laborers' Pension Fund v. Heinz* that the “anti-cutback” rule under the Employee Retirement Income Security Act of 1974 (ERISA)¹ prohibited an amendment to a pension plan, made after the accrual

of benefits under the plan, which added conditions that had the effect of suspending the payment of early retirement benefits.²

Since late 2009, federal appellate courts have applied *Heinz* to determine whether the anti-cutback rule prohibited plan amendments in three distinct factual contexts, including where U.S. Treasury Regulations would permit or require the amendment. Three appellate cases, *Tasker*,³ *Battoni*⁴ and *Wetzler*,⁵ and the reasoning behind their decisions, both present interpretive issues regarding both the proper application and scope of *Heinz*, and raise implications regarding other plan amendments made by plan sponsors.

ceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury shall by regulations provide that this paragraph shall not apply to any plan amendment which reduces or eliminates benefits or subsidies which create significant burdens or complexities for the plan and plan participants, unless such amendment adversely affects the rights of any participant in a more than de minimis manner. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph A)).

² *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004).

³ *Battoni v. IBEW Local Union No. 102 Employee Pension Plan*, 594 F.3d 230 (3d Cir. 2010).

⁴ *Tasker v. DHL Retirement Savings Plan*, 2010 U.S. App. LEXIS 20611 (1st Cir. 2010).

⁵ *Wetzler v. Ill. CPA Soc'y & Found. Ret. Income Plan*, 586 F.3d 1053 (7th Cir. 2009).

¹ ERISA §204(g) (29 USC §1054(g)) Decrease of accrued benefits through amendment of plan.

(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 302(d)(2) or 4281.

(2) For purposes of paragraph (1), a plan amendment which has the effect of —

(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(B) eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the pre-

THE SUPREME COURT DECISION IN *HEINZ*

Plan Amendment: Post-Retirement Employment

In *Heinz*, the Supreme Court held that the ERISA anti-cutback rule prohibited an amendment to a multiemployer pension plan, made after the accrual of benefits under the plan, which added conditions to the receipt of an early retirement benefit with respect to post-retirement employment.

The Central Laborers' Pension Fund prohibited participants from certain "disqualifying employment" after they retired, suspending monthly payments until the employment ceased. When Thomas Heinz retired, the Fund defined "disqualifying employment" to include a job as a construction worker but not as a supervisor, the job Mr. Heinz took after his retirement. In 1998, the Fund was amended to expand its definition to include any construction industry job and stopped Mr. Heinz's payments when he did not leave his supervisor's job.⁶

The Supreme Court held that the anti-cutback rule prohibited this plan amendment which expanded the categories of postretirement employment that triggers suspension of the payment of early retirement benefits already accrued.⁷

The Supreme Court's Analysis

The Supreme Court's analysis in *Heinz* provides the source of the interpretive issues regarding both the proper application and scope of *Heinz* by the federal appellate courts in *Tasker*, *Battoni* and *Wetzler*, as well as future court decisions, and implications for other plan amendments made by plan sponsors.

Justice Souter, writing on behalf of the Court, noted that at the heart of ERISA's anti-cutback rule is the question of what is an "accrued benefit," a concept that ERISA "rather circularly defines . . . as 'the individual's accrued benefit determined under the plan. . . .'" §1002(23)(A).⁸ In developing its analysis, the Supreme Court in *Heinz* gave claimants a basis to

rely on their "justified expectations" in seeking benefits when the Court recognized "the centrality of ERISA's object of protecting employees' justified expectations of receiving the benefits their employers promise them."⁹

The *Heinz* Court, citing to "common sense," concluded that "an amendment placing materially greater restrictions on the receipt of the benefit 'reduces' the benefit just as surely as a decrease in the size of the monthly benefit payment."¹⁰ In short, what one circuit court perceives as a material impairment of "individual accrued benefit determined under the plan" may be another circuit court's lack of common sense, and just as what restrictions one circuit court deems to be material may to another circuit court appear trivial.

To support its analysis, the *Heinz* Court reasoned not only that ERISA's anti-cutback rule is duplicative of the Internal Revenue Code's rule, but also that Treasury Regulations construing the Code's anti-cutback rule are applicable to ERISA's rule. Justice Souter noted that the Court's holding was corroborated by Treasury Regulations that had clearly prohibited the application of a subsequent condition in a plan amendment to reduce benefits, even though the Internal Revenue Service had issued contradictory pronouncements in the Internal Revenue Manual and throughout its long-standing practice of approving the qualified status of plans that had been amended to impose conditions subsequent on the receipt of accrued benefits.¹¹

Of significance is that the Supreme Court in *Heinz* did not rely on Treasury Regulations as limiting the scope of the anti-cutback rule based on the statutory and regulatory provisions that the Secretary of the Treasury possesses ultimate authority to issue agency interpretations of IRC §411, which contains both the

vice of the employer] and 'expressed in the form of an annual benefit commencing at normal retirement age,' but it does not describe what a given plan participant's accrued benefit would be. The statute leaves this level of detail to plan drafters who, of course, remain bound by other provisions of ERISA and the Tax Code.' " *Thornton v. Graphic Comm'ns Conf. of the Int'l Bhd. of Teamsters*, 566 F.3d 597, 605 (6th Cir. 2009) (quoting *Board of Trustees of Sheet Metal Workers' Nat'l Pension Fund v. Comr.*, 318 F.3d 599 (4th Cir. 2003)). Because COLA increases the benefits provided by the plan as in effect while the retiree was working, several courts have held that plan amendments eliminating COLA increases not in the plan at the time of retirement do not violate the "anti-cutback" rule. *Id.* Other courts suggest a contrary result. *See, e.g., Williams v. Rohm & Haas Pension Plan*, 497 F.3d 710, 713–14 (7th Cir. 2007) (elimination of COLA increase violates "anti-cutback" rule where COLA increase was provided in plan at time of retirement).

⁹ *Heinz*, 541 U.S.

¹⁰ *Id.* at 744.

¹¹ *Id.* at 747–48.

⁶ *Heinz*, 541 U.S. at 742.

⁷ *Id.* at 741.

⁸ *Id.* at 744. The circular nature of ERISA's definition of "accrued benefit" renders the definition somewhat unhelpful in determining whether a plan amendment has improperly resulted in a cutback in accrued benefits. Regarding the nature of "accrued benefit" in the context of a cost-of-living adjustment (COLA), several courts have held that "when I.R.C. §411(a)(7)(A)(i) refers to 'accrued benefit,' it refers to a benefit created by the accumulation of contributions and limited in its form of payment as 'determined under the plan' [in effect while the employee is in the ser-

definition of “accrued benefit” and the anti-cutback rule.¹² This supporting rationale, which the *Heinz* Supreme Court treated almost as dicta supporting an expansive application of the anti-cutback rule, has taken center stage in the rationale of those appellate courts that have, unlike *Heinz*’s possible expansive construction of the anti-cutback rule through its analysis, limited the rule’s application.¹³

THE *BATTONI* DECISION

Plan Amendment: Indirect Lump Sum Payment Restriction

In *Battoni v. IBEW Local Union No. 102 Employee Pension Plan*, the Third Circuit held that the ERISA anti-cutback rule prohibited an “effective” amendment to a pension plan under which an amendment to a welfare plan that conditioned “receipt of healthcare benefits under a welfare plan on non-receipt of an accrued benefit under a pension plan,” in this case a lump-sum payment under the pension plan, had violated the anti-cutback rule “by constructively amending the pension plan in a manner that decreased an accrued benefit under that plan.”¹⁴

The Third Circuit’s Analysis

The Third Circuit in *Battoni* implicitly relied on the “justified expectations” analysis in *Heinz*, noting that, prior to adoption of the welfare plan amendment, a union employee could elect to receive a lump-sum payment of his or her pension benefit under the pension plan and still receive healthcare benefits, while after the amendment the employee who selected a lump-sum payment of the pension benefit would not be eligible for healthcare benefits.¹⁵

The principal issue posed in *Battoni* was whether the amendment as to healthcare was an amendment of the pension plan.¹⁶ The Third Circuit acknowledged that the amendment formally amended only the wel-

fare plan to which the anti-cutback rule is inapplicable. The Third Circuit concluded without explanation that the anti-cutback rule, however, cannot be employed in such an overly simplistic, robotic fashion.¹⁷ The Third Circuit rejected the union’s contention that it had “lawfully amended a welfare benefit plan” so that the plaintiff had failed to state a claim for violation of ERISA’s anti-cutback rule because the pension plan had not been amended to decrease an accrued benefit.¹⁸

The Third Circuit, effectively adopting the “justified expectations” rationale in *Heinz*, not only noted that “what constitutes an ‘amendment’ to a pension plan has been construed broadly to protect pension recipients,”¹⁹ but reasoned that “the ‘meaning and function’ of the amendment determines whether it modifies a pension plan, a welfare plan, or both.”²⁰ The Third Circuit concluded that the amendment “‘by its express terms or as a result of surrounding circumstances,’ 29 USC §1002(2)(A), amended the . . . Pension Plan.”²¹ The Third Circuit, quoting *Heinz*, concluded that the plan amendment reduced an accrued benefit on the ground that the imposition of a

“reinterpretation of Plan terms — most prominently, the Plan’s definition of ‘compensation’ — constitutes an ‘amendment’ of the Plan within the meaning of ERISA’s anti-cutback provision.” *Redd v. Bhd. of the Maint. of Way Emples. Div. of the Int’l Bhd. of Teamsters*, 48 Employee Benefits Cas. (BNA) 2647 (E.D. Mich. 3/31/10). In reaching this conclusion, Judge Rosen cited *Hunter v. Caliber Systems, Inc.*, 207 F.3d 702, 712 (6th Cir. 2000), which in turn quoted with approval the Third Circuit’s statement that “an erroneous interpretation of a plan provision that results in the improper denial of benefits to a plan participant may be construed as an ‘amendment’ for the purposes of ERISA §204(g).” *Id.* (quoting *Hein v. FDIC*, 88 F.3d 210, 216 (3d Cir. 1996)). Several other courts, however, have held that in the absence of a “formal amendment,” no “anti-cutback” rule violation was stated. *See, e.g., Hollowell v. Cincinnati Ventilating Co.*, 2010 U.S. Dist. LEXIS 42104, 48 Employee Benefits Cas. (BNA) 2841 (E.D. Ky. 4/29/10). This analysis appears to ignore Treas. Regs. §1.411(d)-4, which extends the prohibitions of §204(g) to an “exercise of discretion”: “a plan that permits the employer, either directly or indirectly, through the exercise of discretion, to deny a participant a section 411(d)(6) protected benefit provided under the plan for which the participant is otherwise eligible (but for the employer’s exercise of discretion) violates the requirements of section 411(d)(6).” Treas. Regs. §1.411(d)-4, Q&A-4(a). *See also Thompson v. Ret. Plan for Emples. of S.C. Johnson & Sons, Inc.*, 663 F. Supp.2d 700, 705 (E.D. Wis. 2009).

¹⁷ *Battoni*, 594 F.3d at 233.

¹⁸ 594 F.3d at 233–34.

¹⁹ *Id.* at 234 (citing *Heinz v. FDIC*, 88 F.3d 210, 216 (3d Cir. 1996); *Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 712 (6th Cir. 2000)).

²⁰ *Id.* at 235.

²¹ *Id.*

¹² 29 USC §1202(c). *See also* 29 CFR §2530.200a-2 (regulations prescribed by Treasury under IRC §411 apply to the parallel ERISA provisions).

¹³ The U.S. Treasury Department adopted the suggestion of the Supreme Court in *Heinz* to treat its decision as prospective only with respect to qualification status of plans. Section 411(d)(6) Protected Benefits, 71 Fed. Reg. 45379 (8/9/06).

¹⁴ *Battoni v. IBEW Local Union No. 102 Employee Pension Plan*, 594 F.3d 230, 232 (3d Cir. 2010).

¹⁵ *Id.* at 233. The pension plan’s offering of the benefit in the form of a lump sum is an “accrued benefit.” 29 USC §1002(23).

¹⁶ A different expansive interpretation of “amendment” of a pension plan has recently been adopted by Judge Rosen in the Eastern District of Michigan who held that a plan administrator’s

condition on healthcare benefits rendered the lump-sum optional form of benefit less valuable.²²

Like the Supreme Court in *Heinz*, the Third Circuit relied on Treasury Regulations as corroborating its analysis. The Third Circuit failed to note, however, that the Treasury Regulations do not appear to apply to amendments to welfare plans that “constructively” amend pension plans through an incidental impact on pension benefits if an employee or retiree seeks healthcare benefits. Indeed, the Third Circuit relied on the concept of “justified expectations” in *Heinz* to hold that the amendment of a welfare plan “constructively” amended a pension plan by conditioning participation in the welfare plan on waiver of certain pension benefits.²³

Other Plan Amendment Implications

The *Battoni* decision presents implications for other plan amendments made by plan sponsors insofar as amendments to other plans may result in a violation of the anti-cutback rule for a plan, the exact effect of which on the plan may be difficult to determine given that no direct reduction in benefits under the plan will have occurred, but only a possible indirect reduction under the particular circumstances.²⁴

Further, the *Battoni* decision raises the possibility that the particular circumstances surrounding a *participant's own choices* regarding the timing and form of receipt of benefits under the plan, such as with respect to subsidized early retirement benefits which inherently become less valuable with the delay of commencement, could somehow result in the violation of the anti-cutback rule. Indeed, the employer's other benefit programs may influence the participant's choice by creating incentives to delay commencement of an early retirement benefit, as may result from the availability of particular benefits in an early retirement window program.

THE TASKER DECISION

Plan Amendment: Discretionary Plan Benefit Transfers

In *Tasker v. DHL Retirement Savings Plan*, the First Circuit held that the ERISA anti-cutback rule did not

prohibit discretionary amendments on the part of an employer to a defined benefit pension plan and savings plan to eliminate the right of participants to transfer benefits between defined benefit and defined contribution plans, as specifically allowed by Treasury Regulations.²⁵

The First Circuit's Analysis

The First Circuit in *Tasker*, purporting to construe *Heinz* and relying on Treasury Regulations, held that there was no violation of the anti-cutback rule effected by amendments that expressly altered the benefits provided by a pension plan. The First Circuit applied an analysis similar in form to that applied by the Third Circuit in *Battoni*, concluding that amendments of pension plans did not violate ERISA's anti-cutback rule, even though the benefit received was reduced by one amendment and an optional form of benefit for certain participants was eliminated by the other.

In *Tasker*, the First Circuit declined to apply a broad application of the anti-cutback rule where the plaintiff alleged that coordinated amendments of a defined benefit pension plan and savings plan to eliminate the right of participants to transfer benefits between the defined benefit and defined contribution plans, “even when the elimination may have the incidental effect of reducing benefits,” was authorized by a Treasury Regulation that provides:

Q-2. To what extent may section 411(d)(6) protected benefits under a plan be reduced or eliminated?

...

A-2. (b)(2)(viii) Provisions for transfer of benefits between and among defined contribution plans and defined benefit plans. A plan may be amended to eliminate provisions permitting the transfer of benefits between and among defined contribution plans and defined benefit plans.²⁶

Because the amendments of the Savings Plan and Retirement Plan in *Tasker* were designed “to eliminate provisions permitting the transfer of benefits from one plan to the other,” the First Circuit noted that “[a]t first blush, then, resolving this case seemingly requires only that we travel the path that the Secretary already has beaten [because] [t]he question posed here directly tracks Q-2 of the regulation” so that, facially at least, “the regulation insulates the

²² *Id.* at 235–37.

²³ In reaching this conclusion, the Third Circuit appears to ignore the distinction between “accrued benefits” and ancillary benefits. *Hickey v. Chicago Truck Drivers, Helpers & Warehouse Workers Union*, 980 F.2d 465, 468, 470 (7th Cir. 1992).

²⁴ As an example, an amendment of a severance welfare plan to provide an offset based on eligibility for pension benefits would appear to violate the anti-cutback rule under the *Battoni* analysis, even though courts generally have reached a contrary conclusion. *See, e.g., Campbell v. BankBoston, N.A.*, 327 F.3d 1 (1st Cir. 2003).

²⁵ *Tasker v. DHL Retirement Savings Plan*, 2010 U.S. App. LEXIS 20611 (1st Cir. 2010).

²⁶ Treas. Regs. §1.411(d)-4, Q&A-2(b)(2)(viii).

challenged plan amendments from the anti-cutback rule.”²⁷

The First Circuit, however, noted that (even though Mr. Tasker arguably had waived the issue by failing to present it in the district court),²⁸ the relevant Treasury Regulation authorizing the elimination of transfer of benefit provisions was claimed by Mr. Tasker on appeal to be limited by another regulation that provides in pertinent part:

In general. The Commissioner may, consistent with the provisions of this section, provide for the elimination or reduction of section 411(d)(6) protected benefits that have already accrued only to the extent that such elimination or reduction does **not result in the loss to plan participants of either a valuable right or an employer-subsidized optional form of benefit** where a similar optional form of benefit with a comparable subsidy is not provided or to the extent such elimination or reduction is necessary to permit compliance with other requirements of section 401(a). . . .²⁹

Mr. Tasker contended that the qualification in the bolded language precluded the First Circuit, like the plans’ administrator, from construing the Treasury Regulation’s benefit transfer option exception to ERISA’s anti-cutback rule that permits the reduction

²⁷ 2010 U.S. App. LEXIS 20611 (1st Cir. 2010).

²⁸ The claimant’s failure to present the “anti-cutback” rule issue to the district court renders the First Circuit’s analysis somewhat difficult to evaluate because the applicable standard of review is the deferential one of “plan error” applicable to claims that are “forfeited,” rather than the *de novo* standard traditionally applied to claims of legal error. In discussing the standard of review, the First Circuit stated: “We review forfeited claims for plain error — a hard-to-meet standard that is ‘not appellant-friendly.’ *Dávila v. Corporación de P.R. Para La Difusión Pública*, 498 F.3d 9, 14 (1st Cir. 2007). ‘[W]e will resuscitate a forfeited argument only if the appellant demonstrates that “(1) an error occurred (2) which was clear or obvious and which not only (3) affected the [appellant’s] substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of the judicial proceedings.’ ” *Id.* at 14–15 (quoting *U.S. v. Duarte*, 246 F.3d 56, 60 (1st Cir. 2001)). On a properly presented record, the First Circuit might have relied, as did the Third Circuit in *Battoni*, on the policy arguments underlying *Heinz*, and protected Mr. Tasker’s justified expectation in a larger annuity.

²⁹ Treas. Regs. §1.411(d)-4, Q&A-2(b)(1) (emphasis added). The *Tasker* court, like other courts, reasoned that Treasury’s interpretation of whether a change in benefits undermined the plan’s qualification status was equally applicable to the entitlement of a participant to benefits under ERISA. See 29 USC §1202(c); 29 CFR §2530.200a-2. Of some note is that the Supreme Court in *Heinz* treated the Treasury Regulations as instructive only and not controlling as to the ERISA entitlement of the claimant to additional benefits.

of a pension benefit or valuable right. The First Circuit rejected this argument by noting both that the exception to the anti-cutback rule would be eliminated if the provision were given general application. As a corollary, the First Circuit rejected application of this broader provision on the ground that “[i]t is a conventional canon of legal interpretation that specific provisions trump more general ones.”³⁰

The facts in *Tasker* compel sympathy for Mr. Tasker, who worked for more than 30 years for Airborne, which was acquired in 2003 by DHL. After Mr. Tasker retired in 2004, but before he began receiving benefits in 2008, when he turned 62, Airborne’s plans were merged into their DHL counterparts, *viz.*, the DHL Savings Plan and the DHL Retirement Plan. At the time of Mr. Tasker’s 2004 retirement, the pension plan benefit was reduced by the participant’s Savings Plan annuity benefit. The Savings Plan annuity benefit was calculated to be the actuarial equivalent of the participant’s nonforfeitable interest in the participant’s Savings Plan account balance, expressed as a monthly single life annuity (SLA), payable at the participant’s normal retirement age. Because the monthly SLA from the Savings Plan was computed with reference to a participant’s account balance, which could be taken as either a lump sum or an annuity, the participant’s ability, prior to his election to begin receiving benefits, to transfer the account balance from the Savings Plan into the Retirement Plan enabled a participant to reduce the participant’s Savings Plan account balance to zero so as to avoid any offset of the Retirement Plan annuity. At the time of retirement, DHL provided an estimate (and not a final guarantee) of \$4,163.92 per month as Mr. Tasker’s total pension and Savings Plan annuity if he exercised the Savings Plan’s benefit transfer option to transfer all of his Savings Plan account balance to the Retirement Plan. DHL also estimated that, if Mr. Tasker did not transfer his Savings Plan account balance to the Retirement Plan, his annuity from the Retirement Plan following the setoff calculation would be only \$187.90.

Although the Savings Plan benefit transfer option was in effect when Mr. Tasker retired in March 2004 at age 57, so that Mr. Tasker claimed a “justified expectation” that he could avoid any offset, the benefit transfer option was eliminated, effective December 31, 2004. At that time, DHL amended the Retirement Plan to eliminate the benefit transfer option and simultaneously amended the Savings Plan to eliminate a participant’s right to transfer the Savings Plan account balance to the Retirement Plan. Mr. Tasker did not transfer the Savings Plan account balance to the Retirement Plan prior to the effective date of the amendments of the Savings and Retirement Plans.

³⁰ *Tasker* (quoting *Harry C. Crooker & Sons, Inc. v. OSHRC*, 537 F.3d 79, 84 (1st Cir. 2008)).

In 2008, when Mr. Tasker sought to exercise the benefit transfer option and begin the distribution of his unreduced Retirement Plan benefit, the plan administrator determined that DHL's December 2004 amendments of the Savings and Retirement Plans foreclosed his use of the benefit transfer option. Letters from the plan explained that Mr. Tasker could expect either a combined annuity of \$2,200 per month from the Savings and Retirement Plans or an annuity of \$187 per month from the Retirement Plan, while retaining the Savings Plan, which had grown to \$513,754.58. As the First Circuit acknowledged, "[e]ither of the available alternatives was a far cry from the annuity benefit projected" in 2004.

The First Circuit, noting general notions of fairness, concluded that "the plaintiff deserves better," presumably because the "real value of that benefit" had not been maintained,³¹ but held that the Treasury Regulation's authorization of plan amendments that eliminate benefit transfer options without violating ERISA's anti-cutback rule dictated judgment for the defendants. The *Tasker* analysis dictates the conclusion that if a sponsor can invoke a provision in a Treasury Regulation that facially appears to have been excepted from the scope of the anti-cutback rule, no anti-cutback claim can be maintained even if the sponsor does not identify a justification for the regulation's exception from the scope of the anti-cutback rule.

Other Plan Amendment Implications

The *Tasker* decision fortunately affirms that a plan amendment made pursuant to a Treasury Regulation that expressly permits the elimination of a benefit under a plan will not be overturned in court based on the *Heinz* decision. This affirmation would extend to other regulatory, statutory and Congressional exceptions to the anti-cutback rule, such as, for example, the elimination of disability benefits under Treasury Regulations.³²

Similarly, a plan amendment to a cash balance plan which eliminated so-called "whipsaw" for lump-sum payments could not be challenged using the *Heinz* decision, based on Congress's exception in the Pension Protection Act of 2006 (the "PPA") which would allow the elimination without violation of the anti-

cutback rule, if certain requirements were met.³³ The PPA thereby allowed a cash balance plan to pay reduced benefits by plan amendment to change the accrued benefit of the plan to become exclusively the account balance under the plan and, consistent therewith, pay a participant only the current account balance under the plan, without regard to a higher lump-sum value of the cash balance account as calculated using the actuarial equivalent value of the cash balance account at normal retirement age.

THE WETZLER DECISION

Plan Amendment: Highly Compensated Lump-Sum Payment Restriction

In *Wetzler v. Ill. CPA Soc'y & Found. Ret. Income Plan*,³⁴ the Seventh Circuit held that the ERISA anti-cutback rule did not prohibit a plan amendment which eliminated the right of the top 25 highly compensated employees ("HCEs") to a lump-sum payment from a pension plan, as required by law under applicable Treasury Regulations.

The Seventh Circuit's Analysis

In *Wetzler*, the Seventh Circuit held that a plan amendment eliminating the right of an HCE to a lump-sum payment from a pension plan was not a violation of the anti-cutback rule because "even if the right to receive lump-sum distributions had been an 'optional form of benefit' that was 'attributable to service' prior to Amendment One, Amendment One brought the Plan into compliance with the Internal Revenue Code and accompanying Treasury Regulations, *see* I.R.C. §401(a); 26 CFR [§]1.401(a)(4)-5(b)(3), bringing it outside the ambit of ERISA's anti-cutback statute."³⁵

In reaching this conclusion, the Seventh Circuit relied on 29 USC §1054(g)(2), which provides that the Secretary of the Treasury may by regulation provide that the Code's anti-cutback provision, as well as ERISA's anti-cutback rule, is inapplicable to a plan amendment eliminating an optional form of benefit

³¹ *Williams v. Rohm & Haas Pension Plan*, 497 F.3d 710, 713 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 1657, 170 L. Ed. 2d 386 (2008).

³² Treas. Regs. §1.411(d)-3(b)(3)(i), (g)(2)(ii) (ancillary benefits, which includes certain disability benefits, do not have anti-cutback protection under the Treasury Regulations).

³³ ERISA §203(f)(1), 29 USC §1053(f)(1), as enacted by the PPA, P.L. 109-280. Pursuant to Section 1107(a)(2) of the PPA, a plan amendment which eliminated so-called "whipsaw" could be made no later than the last day of the plan year beginning on or after Jan. 1, 2009 without violating the ERISA anti-cutback rule, provided that the participants were provided a notice of any reduction of benefits as a result of the plan amendment.

³⁴ 586 F.3d 1053 (7th Cir. 2009).

³⁵ *Id.* at 1060.

other than a plan amendment having the effect of eliminating or reducing an early retirement benefit or a retirement-type subsidy.³⁶

In reaching its conclusion in *Wetzler*, however, the Seventh Circuit did not identify any Treasury Regulation that specifically excepted an amendment eliminating an HCE lump sum from invalidity because a plan might become unqualified due to inadequate funding. Instead, the Seventh Circuit held that because the “plan is intended to have a tax-qualified status” and such status would be jeopardized under IRC §401 and Treas. Regs. §1.401(a)(4)-5(b)(3)(i)(A), 29 USC §1054(g)(2) excepted the plan’s amendment from the anti-cutback rule.

No less significantly, the Seventh Circuit in *Wetzler* did not address whether a plan sponsor could effectively eliminate (or delay) a lump-sum payment option to an HCE by not taking steps to fully fund a plan on a fast enough basis, in order to avoid or delay making lump-sum payments. In reasoning as it did, the Seventh Circuit in *Wetzler* therefore may have provided an incentive for plan sponsors to not fund plans on a faster basis, based on plan qualification requirements which effectively eliminate the lump-sum payment option, and in so doing not violate the anti-cutback rule.

Other Plan Amendment Implications

The *Wetzler* decision confirms that the *Heinz* decision cannot be used to challenge plan amendments which are legally required, arguably even if alternatives may exist to the plan sponsor regarding the payment of benefits associated with the plan amendment or the mitigation of the effect of the plan amendment, such as improving the funded status of the plan with increased employer contributions.

The foregoing conclusion also would extend in the same manner to the legally-required restrictions for

lump-sum payments under ERISA and IRC §436 which generally restricts lump-sum payments based on the funded status of the plan.³⁷

CONCLUSION

In the view of the authors, the *Tasker* decision in particular is well-reasoned and would appropriately preclude a challenge that a plan amendment which is made pursuant to an express exception to the ERISA anti-cutback rule, even if the amendment is discretionary on the part of the plan sponsor, cannot be considered to violate the anti-cutback rule, including based on the *Heinz* decision.

The *Battoni* decision, which applied the *Heinz* decision and reasoning to find a violation of the ERISA anti-cutback rule from an amendment to another plan, presents difficult interpretive issues regarding the proper application and scope of the *Heinz* decision and the anti-cutback rule itself to those situations where the plan itself has not been amended but a reduction in benefits arguably has occurred. Only by invocation of the legal fiction of a “constructive” amendment of a plan can *Battoni* bring the amendment within the application of the anti-cutback rule, which makes application of the rule problematic from the outset of any analysis of the particular reduction in benefits.

The *Wetzler* decision appropriately holds that any plan amendment to preserve a plan’s qualified status is excepted from the ERISA anti-cutback rule, regardless of alternatives available to a plan sponsor.

Based on the foregoing, *Tasker* and *Wetzler* decisions most appropriately construe the ERISA anti-cutback rule, and the *Tasker* decision in particular is truly consistent with the anti-cutback rule, the *Heinz* decision and Treasury Regulations.

³⁶ *Id.*

³⁷ ERISA §206(g)(3), 29 USC §1056(g)(3), IRC §436(c)(3), as enacted by the PPA, P.L. 109-280.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Plaintiff,

v.

[REDACTED]

Defendant.

CASE NO. 3:10-cv-02575

ANSWER AND COUNTERCLAIM

[REDACTED] ([REDACTED]), through undersigned counsel, respectfully responds to the Complaint of Plaintiff Trustees of the [REDACTED] Pension Fund Pension Plan ("Trustees"), as follows:

FIRST DEFENSE

1. [REDACTED] denies the averments contained in the unnumbered paragraph in the Section titled "Jurisdiction and Venue" in the Complaint.

2. [REDACTED] admits that Trustees are fiduciaries, admit that there is an [REDACTED] Pension Fund (the "Plan") that owes to and, through December 2009, paid qualified joint and survivor pension benefits to [REDACTED] and denies the remaining averments in the first two sentences of ¶ 1 in the Section titled

"Parties and Background" in the Complaint and all averments contained in the last sentence of ¶ 1 in the Section titled "Parties and Background" in the Complaint.

3. [REDACTED] admits the averments contained in ¶ 2 of the Section titled "Parties and Background" in the Complaint.

4. [REDACTED] admits that the Plan's provisions are contained in those plan documents that comprise the Plan Document, states that the 1998 amendments to the Plan that Trustees have ignored in the Complaint are part of the documents comprising the "Plan Document", states that the documents comprising the "Plan Document" have not been provided to this Court as an exhibit to the Complaint, states that the averment is incapable of response other than to be denied as a meaningless legal assertion to the effect that the terms of a plan are set forth in the applicable plan documents that Trustees failed to provide to the Court and [REDACTED], and deny the remaining averments contained in ¶ 3 of the Section titled "Parties and Background" in the Complaint.

5. As her response to the averments in ¶ 1 of Count I in the Complaint, [REDACTED] incorporates her foregoing responses and objections as if fully restated herein.

6. [REDACTED] denies the averments contained in ¶ 2 of Count I in the Complaint.

7. [REDACTED] denies for lack of knowledge, information and belief whether the employees and representatives selected by the Trustees have committed errors and deny the remaining averments contained in ¶ 3 of Count I in the Complaint.

8. [REDACTED] denies the averments contained in ¶ 4 of Count I in the Complaint.

9. [REDACTED] denies the averments contained in ¶ 5 of Count I in the Complaint, except to admit that Trustees, having breached their fiduciary duties, wrongfully caused the Plan to cease paying pension benefits due [REDACTED] from January 2010 through the present.

10. [REDACTED] denies the averments contained in ¶ 6 of Count I in the Complaint.
11. [REDACTED] denies the averments contained in ¶ 7 of Count I in the Complaint.
12. [REDACTED] denies each and every averment contained in the Complaint not expressly admitted herein as true.

SECOND DEFENSE

13. The Complaint fails to allege facts on the basis of which a cause of action against [REDACTED] can be maintained.

THIRD DEFENSE

14. No cause of action exists under the Labor Management Relations Act ("LMRA") against [REDACTED] because [REDACTED] is not alleged to have breached any collectively bargained agreement so that [REDACTED] could not be liable under LMRA § 301, *codified at* 29 U.S.C. § 185.

FOURTH DEFENSE

15. The Complaint fails to allege any factual grounds that would support the Trustees' allegations of personal jurisdiction and venue in this District and this Court.

FIFTH DEFENSE

16. Inasmuch as Trustees purport to be asserting a claim for monetary damages under Employee Retirement Income Security Act ("ERISA") § 502(a)(3), *codified at* 29 U.S.C. § 1132(a)(3) in "demand[ing] judgment against [Mrs.] [REDACTED]," Trustee's claims are barred inasmuch as monetary damages are impermissible under controlling precedent such as *Ramsey v. Formica Corp.*, 398 F.3d 421 (6th Cir. 2005), *aff'g*, 33 EBC 1095 (S.D. Ohio 2004), *cert. denied*, 126 S. Ct. 340 (2005), *on remand*, 2006 U.S. Dist. LEXIS 966 (S.D. Ohio 2006).

SIXTH DEFENSE

17. Trustees ignored the terms of the applicable Plan documents, such as the 1998 Plan amendment increasing pension benefits by \$50 per month, so that Trustees have breached their fiduciary duties under ERISA § 404, *codified at* 29 U.S.C. § 1104, in failing to adhere to and apply the terms of the Plan documents. As a result of the breaches of their fiduciary duties, Trustees have unclean hands and are not entitled to equitable relief under ERISA § 502(a)(3), *codified at* 29 U.S.C. § 1132(a)(3).

SEVENTH DEFENSE

18. Trustees are barred from pursuing equitable relief in the Complaint by the equitable doctrine of *in pari delicto* inasmuch as *inter alia* Trustees have alleged in the Complaint that any error in the payment was made by the Trustees or “the former Administrative Manager of the Plan” whom the Trustees, in the exercise of their fiduciary duties, appointed, had a fiduciary duty to monitor, and for whom the Trustees are responsible.

EIGHTH DEFENSE

19. Trustees are barred from pursuing equitable relief in the Complaint by the equitable doctrines of waiver, estoppel and laches inasmuch as Trustees have alleged in the Complaint that Trustee’s putative errors in pension payments, for which the Trustees are responsible, began in February 1995. *See, e.g., Wells v. United States Steel & Carnegie Pension Fund*, 950 F.2d 1244, 1251 (6th Cir. 1991); *Hart v. Equitable Life Assurance Society*, 2003 U.S. App. LEXIS 19397, 31 E.B.C. (BNA) 1242 (2d Cir. Sept. 18, 2003), *aff’g*, 2002 U.S. Dist. LEXIS 22928 (S.D.N.Y. Nov. 26, 2002).

NINTH DEFENSE

20. Trustees’ denial of pension benefits, which was a denial of a claim for pension benefits that had been previously recognized, violated federal law that required the Trustees to

adhere to fair and reasonable claims procedures as mandated in ERISA § 503, *codified at* 29 U.S.C. § 1133, and by the claims regulations promulgated by the United States Department of Labor that are codified at 29 C.F.R. § 2560.503-1. In particular, Trustees failed to advise Mrs. [REDACTED] of her rights: (1) to appeal administratively the denial of her claim for pension benefits, (2) to submit documentation and information for consideration on appeal, and (3) to obtain upon request and without cost all material documents relating to the denial of her pension benefits, including communications between Trustees and their counsel which are not protected by the attorney-client privilege as a result of the “fiduciary exception” to the attorney-client privilege applicable in ERISA litigations. A denial letter was due within sixty days of the denial and required to be in writing so that the Trustees’ failure to provide this denial in a timely fashion bars Trustees’ claims.

TENTH DEFENSE

21. No controlling case law, statute or regulation mandates the recoupment from Mrs. [REDACTED] in these circumstances, particularly where there is no allegation in the Complaint that “the plan [has sought to] recover[] the full amount of the erroneous payments from the administrator, whose alleged negligence caused the overpayments to be made, [so that] the plan need not, of course, consider recoupment of the overpayments from the plan participants and beneficiaries who received them.” DOL Advisory Opinion No. 77-8. As a result, Trustees’ are barred by their own breaches of equitable and legal duties in pursuing equitable relief from Mrs. [REDACTED]

ELEVENTH DEFENSE

22. To the extent that Trustees seek compensatory, exemplary or punitive damages from Mrs. [REDACTED], no claim is available under the terms of the Plan and ERISA. Indeed,

Trustees' imposition of excessive interest, without authorization of law, is sanctionable and bars Trustees' pursuit of equitable relief from Mrs. Pompei.

TWELFTH DEFENSE

23. The Plan Documents do not impose a constructive trust on any alleged overpayments from the Plan to Mrs. [REDACTED] so that, in light of controlling case law since *Great-West*, no claim for equitable relief is permissible under ERISA § 502(a)(3), *codified at* 29 U.S.C. § 1132(a)(3).

THIRTEENTH DEFENSE

24. ERISA § 413, *codified at* 29 U.S.C. § 1113, establishes a three-year statute of limitations for recovery of overpayments under ERISA § 502(a)(3), *codified at* 29 U.S.C. § 1132(a)(3), so that Trustees have already recovered all claimed overpayments and their Complaint is barred by the affirmative defenses of statute of limitations, payment and satisfaction.

FOURTEENTH DEFENSE

25. Even if ERISA § 413, *codified at* 29 U.S.C. § 1113, were inapplicable and ERISA were to "borrow" a state statute of limitations, such as the Ohio limitations period for unjust enrichment, which is six years, Trustees' claims are barred.

FIFTEENTH DEFENSE

26. Trustees' use of a 7% pre-judgment interest rate to calculate damages is extraordinary, in excess of that recognized by 28 U.S.C. § 1961 for post-judgment rates, impermissible under law and at equity. Trustees' use of a 7% pre-judgment interest rate to calculate damages is impermissible under law and at equity so that its use must be enjoined and deprives Trustees of any right to equitable relief.

SIXTEENTH DEFENSE

27. Trustees' calculations of claimed damages and overpayments not only are incomprehensible, but appear to assume entitlement to a post-judgment rate of interest in excess of that authorized by 28 U.S.C. § 1961.

SEVENTEENTH DEFENSE

28. Trustees' Complaint, which ignores both the 1990 Restatement of the Pension Plan and the 1998 amendment of the Pension Plan, was filed in violation of 28 U.S.C. § 1927 and Federal Rule of Civil Procedure 11.

EIGHTEENTH DEFENSE

29. Mrs. [REDACTED] is entitled to an award of her attorney fees, expenses and costs incurred in the defense of Trustees' Complaint and the pursuit of her Counterclaim pursuant to 29 U.S.C. § 1132(g).

NINETEENTH DEFENSE

30. Trustees' Complaint fails to name all necessary parties, including the beneficiary of the qualified joint and survivorship benefit under the terms of the Plan.

TWENTIETH DEFENSE

31. Trustees' action to terminate Mrs. [REDACTED]'s benefits and to seek recoupment by reinterpreting plan documents fifteen years after benefits had begun violates the anti-cutback rule of ERISA § 204(g), *codified at* 29 USC §1054(g).

WHEREFORE, Defendant [REDACTED], through undersigned counsel, respectfully prays this Court to dismiss the Complaint with prejudice as to it, to award to [REDACTED] her attorney fees and costs incurred herein, and to award such other and further relief that may be due, just and proper.

COUNTERCLAIM

As her Counterclaim against Plaintiff Trustees of the

Pension Fund ("Trustees"), Mrs. ("Mrs."), through undersigned counsel, avers as follows:

1. Mrs. incorporates by reference her averments in her Answer, *supra*.
2. Jurisdiction and venue exist in this District for Mrs.'s Counterclaim under ERISA § 502(e)(1) & (2), *codified at* 29 U.S.C. § 1132(e)(1) & (2), inasmuch as the Pension Fund (the "Plan"), of which Trustees are the fiduciaries, is administered in Avon, Ohio, which is within this District.
3. Trustees are fiduciaries of the Plan. Indeed, Trustees are named fiduciaries in Plan documents, including the 1990 Restatement of the Plan,. Trustees function as the Plan Administrator of the Plan, even though Trustees delegate certain ministerial functions to third-party administrators and service providers.
4. Mrs. is a participant in the Plan.
5. Mrs. retired in 1995 and from early 1995 through December 2009 received pension benefits from the Plan.
6. Mrs.'s spouse is a beneficiary of the Plan.
7. The Pension Plan was restated as of 1990.
8. The Restatement of the Pension Plan in 1990 was undertaken in response to amendments to ERISA that prohibited the use of graded vesting of more than seven years, which appears to be the vesting schedule employed by Trustees in their recalculation of Mrs.'s pension benefits.

9. The Pension Plan document under which Mrs. [REDACTED] retired (the "Plan Document") is attached as Exhibit 1 (with certain handwriting that is extrinsic).

10. Mrs. [REDACTED] had at least eight years of credited service under the Plan.

11. In a December 18, 2009 letter, Trustees informed Mrs. [REDACTED] that she had "8 years of credited service."

12. A true and accurate copy of the December 18, 2009 letter is attached as Exhibit 2.

13. Under the terms of Section IV.C of the Plan Document, a participant with 7 or more years of credited service had vested benefits that were to be calculated at 100% of the "accrued benefits."

14. Under the terms of Section IV.B of the Plan Document, a participant was entitled to service benefits at 3.25%

15. Under the terms of Section IV. A of the Plan Document, a plan participant, such as Mrs. [REDACTED] is entitled to full benefits upon achieving "Normal Retirement Date", which under the terms of the Plan Document "means the date [the participant] reach[es] age 60. . . ."

16. Mrs. [REDACTED] selected a qualified joint and survivor benefit as her pension benefit under the terms of the Pension Plan.

17. Mrs. [REDACTED]'s qualified joint and survivor benefit in 1995, when she retired, was \$181.27 per month.

18. As reflected in an August 1, 1998 notice from the Trustees to pension recipients, such as Mrs. [REDACTED] monthly pension benefits increased by \$50 per month. The notice informed each of the pension recipients, including Mrs. [REDACTED], "that at their last meeting, the Board of Trustees of the [REDACTED] Pension Fund unanimously approved a \$50.00 per month increase for all participants receiving benefits prior to December 31, 1997. Therefore, the Board

is pleased to inform you that your August, 1998 and all checks thereafter will contain this \$50.00 increase." A true and accurate copy of the August 1, 1998 notice from the Trustees to Mrs. Pompei is attached as Exhibit 3.

19. Beginning in August 1998, Mrs. [REDACTED] received \$231.27 as the monthly pension benefit from the Plan.

20. Since August 1998, Mrs. [REDACTED] has been entitled to receive \$231.27 as the monthly pension benefit from the Plan under the terms of the Pension Plan documents.

21. On or about December 18, 2009, the Trustees, per Lou Grasso, wrote a letter to Mrs. [REDACTED] informing her that Trustees had directed the Plan attorneys who filed the Complaint to pursue recovery of a sum that the Trustees and their actuaries had miscalculated based on their misinterpretation or willful disregard of the 1990 Restatement of the Pension Plan in place at the time that Mrs. [REDACTED] retired (and when her benefits were deemed accrued). A true and accurate copy of this letter is attached as Exhibit 2.

22. The Plan has failed to pay Mrs. [REDACTED] her monthly pension benefits of [REDACTED] since January 2010.

23. The Plan is liable to Mrs. [REDACTED] for past benefits and interest in an amount to be calculated and awarded by the Court.

24. On or about November 10, 2010, the Trustees initiated this lawsuit against Mrs. [REDACTED], imposing on Mrs. [REDACTED] the burden of attorney fees, costs and expenses.

25. Under ERISA, the Plan and the Trustees who represent the Plan are liable for the attorney fees, costs and expenses incurred in the defense of the litigation initiated by the Trustees and the Counterclaim necessitated by the Trustees' causing the Plan to terminate payment of Mrs. [REDACTED]'s benefits.

26. Upon information and belief, the Trustees have reconsidered and terminated benefits for other participants and beneficiaries of the Plan.

First Count

27. Mrs. [REDACTED] incorporates by reference her foregoing averments, as if fully restated herein.

28. ERISA § 502(a)(1)(B), *codified at* 29 U.S.C. § 1132(a)(1)(B), authorizes a plan participant or beneficiary, such as Mrs. Pompei, to pursue a federal action for recovery of benefits due under the terms of the Plan document and ERISA.

29. In the First Count, Mrs. [REDACTED] seeks to recover pension benefits due her under the terms of the Plan that the Plan has failed to pay since January 2010 and benefits on a going forward basis.

30. Under the terms of the Plan, as restated in 1990, four years prior to her retirement, Mrs. [REDACTED] is entitled to vested pension benefits calculated at 100%, in the monthly amount of \$181.27.

31. Under the terms of the Plan, as amended in 1998, three years after her 1995 retirement, Mrs. [REDACTED] is entitled to pension benefits that she had received prior to August 1, 1998 plus \$50, *i.e.*, a monthly amount of \$231.27.

32. Any judicially imposed obligation to exhaust administrative remedies that might otherwise exist for Mrs. [REDACTED] claim for benefits has been voided on two grounds.

33. First, although exhaustion of administrative remedies ordinarily would be necessary for the filing of a claim for benefits under ERISA § 502(a)(1)(B), *codified at* 29 U.S.C. § 1132(a)(1)(B), exhaustion is not required where, as here, litigation has already been initiated

by the Plan so that Mrs. [REDACTED]'s pursuit of administrative remedies would be futile. On this ground, exhaustion is not required.

34. Second, although exhaustion of administrative remedies ordinarily would be necessary for the filing of a claim for benefits under ERISA § 502(a)(1)(B), *codified at* 29 U.S.C. § 1132(a)(1)(B), exhaustion is not required in this case because the December 18, 2009 letter from the Plan's representative denied benefits to Mrs. [REDACTED] without satisfying the express requirements of the Department of Labor's Claims Regulations for benefits claims as initially authorized in 29 U.S.C. § 1133, and codified at 29 C.F.R. § 2560.503-1. In particular, no identification is provided as to the right to bring suit, the right to appeal, the right to provide additional documentation or information, or the right to obtain documentation upon written request.

35. Under ERISA, Mrs. [REDACTED] is entitled to past pension payments not paid plus interest and future pension payments.

36. Under ERISA § 502(a)(1)(B), *codified at* 29 U.S.C. § 1132(a)(1)(B), Mrs. [REDACTED] is entitled to an award of past pension payments not paid plus interest and issuance of an injunction directing the Plan and the Trustees to make future pension payments due to Mrs. Pompei under the terms of the Plan documents.

Second Count

37. Mrs. [REDACTED] incorporates by reference her foregoing averments, as if fully restated herein.

38. In 1995, Mrs. [REDACTED]'s benefits "accrued" upon her retirement and initiation of pension benefits under the terms of the Plan.

39. In 2009, the Trustees determined to reconsider their analysis of and reinterpretation of plan documents fifteen years after Mrs. [REDACTED]'s benefits had begun.

40. Trustee's reconsiderations and reinterpretation of Plan documents not only is wrong, but violates the anti-cutback rule of ERISA § 204(g), *codified at* 29 USC §1054(g).

41. Trustees' action to terminate Mrs. [REDACTED]'s benefits and to seek recoupment by reinterpreting plan documents fifteen years after benefits had begun violates the anti-cutback rule of ERISA § 204(g), *codified at* 29 USC §1054(g).

42. Accordingly, under ERISA § 502(a)(1)(B), *codified at* 29 U.S.C. § 1132(a)(1)(B), Mrs. [REDACTED] is entitled to an award of past pension payments not paid plus interest and issuance of an injunction directing the Plan and the Trustees to make future pension payments due to Mrs. [REDACTED] under the terms of the Plan documents.

Third Count

43. Mrs. [REDACTED] incorporates by reference her foregoing averments, as if fully restated herein.

44. Trustees' action to terminate Mrs. [REDACTED]'s benefits and to seek recoupment by reinterpreting plan documents fifteen years after benefits had begun violates the anti-cutback rule of ERISA § 204(g), *codified at* 29 USC §1054(g).

45. Accordingly, under ERISA § 502(a)(3), *codified at* 29 U.S.C. § 1132(a)(3), Mrs. [REDACTED] is entitled to an injunction barring Trustees from refusing to make past pension payments not paid plus interest and issuance of an injunction directing the Plan and the Trustees to make future pension payments due to Mrs. [REDACTED] under the terms of the Plan documents.

Fourth Count

46. Mrs. [REDACTED] incorporates by reference her foregoing averments, as if fully restated herein.

47. Under ERISA § 502(a)(3), *codified at 29 U.S.C. § 1132(a)(3)*, Mrs. [REDACTED] is entitled to an injunction barring Trustees from refusing to make past pension payments and directing Trustees to make future pension payments due to other participants and benefits under the terms of the Plan documents and in compliance with ERISA's anti-cutback rule, ERISA § 204(g), *codified at 29 USC §1054(g)*.

Fifth Count

48. Mrs. [REDACTED] incorporates by reference her foregoing averments, as if fully restated herein.

49. Under ERISA § 502(a)(3), *codified at 29 U.S.C. § 1132(a)(3)*, Mrs. [REDACTED] is entitled to a declaratory judgment that she is entitled on a going forward basis to monthly benefits in the amount of \$231.27 per month.

WHEREFORE, Mrs. [REDACTED] respectfully pray for and demand the following relief:

1. That a declaration be issued that Mrs. [REDACTED] is entitled to monthly benefits in the amount of \$231.27 per month;
2. That Mrs. [REDACTED] be awarded monthly benefits in the amount of \$231.27 per month plus interest that have not been paid since December 2009;
3. That Trustees and the Plan be ordered to pay Mrs. [REDACTED] future monthly benefits in the amount of \$231.27 per month;
4. That Trustees and the Plan be enjoined from changing the benefits of other retirees based on the Trustees' reinterpretation of the Plan documents;

5. That Mrs. [REDACTED] be awarded her attorney fees, costs and expenses incurred herein in an amount to be determined by the Court; and,
6. That Mrs. [REDACTED] be awarded such other and further relief as may be due, just and proper.

Respectfully submitted,

s/Jack F. Fuchs/s

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Certificate of Service

I hereby certify that I served a copy of the foregoing by ECF filing, which effected the filing of this answer and counterclaim on all parties, this 10th day of December, 2010.

s/Jack F. Fuchs/s

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[REDACTED]

Plaintiffs,

-VS-

[REDACTED]

Defendant.

CASE NO. [REDACTED]

JUDGE

COMPLAINT

[REDACTED]

[REDACTED]

Attorneys for Plaintiffs

Now come Plaintiffs who for their Complaint allege and aver as follows:

JURISDICTION AND VENUE

Plaintiffs bring this action under the provisions of Section 301 of the Labor Management Relations Act of 1947, as amended (codified at 29 U.S.C. §185) and Section 502(a)(3), (e) and (f) of the Employee Retirement Income Security Act of 1974, as amended (codified at 29 U.S.C. §1132(a)(3). Venue is conferred upon this Court by 28 U.S.C. Sections 1391(b) and (c) and 29 U.S.C. 1132(e)(2).

PARTIES AND BACKGROUND

1. Plaintiffs, Trustees of the [REDACTED] Local Union [REDACTED] Pension Plan (hereinafter "Plan"), are fiduciaries of a multiemployer pension plan created and maintained pursuant to collective bargaining agreements and addenda to the collective bargaining agreements and trust agreements entered into with various employers. Plaintiffs provide pension benefits to participants meeting the requirements set forth in the [REDACTED]

[REDACTED] Pension Plan Document and benefits are calculated pursuant to the provisions set forth in the Plan Document. Plaintiffs may sue as an entity under Section 502(d)(1) of ERISA.

2. Defendant, [REDACTED] is an individual who resides in [REDACTED] Florida, [REDACTED].

3. The Plan Document sets forth the Plan's vesting requirements as well as how benefits shall be calculated under the Plan.

COUNT I

1. Plaintiffs incorporate paragraphs 1 through 3 above as if fully rewritten herein.

2. Under the terms of the Plan, Defendant was entitled to an 80% vested benefit with a benefit multiplier of 2.7%. As a result, Defendant was entitled to a monthly payment of [REDACTED] under the terms of the Plan

3. Because of an error on the part of the former Administrative Manager of the Plan, Defendant's benefit was calculated at 100% vested instead of at 80% vested and with a benefit multiplier of 3.25% instead of 2.7%.

4. As a result of the error described above, Defendant was mistakenly paid a monthly pension benefit in the amount of [REDACTED] from February 1995 through December 2009, for an overpayment of \$[REDACTED]. After applying appropriate interest at the rate used by the

Plan to determine actuarial equivalence (in this case 7.0%) Defendant has received a total overpayment in the amount of \$26,771.34.

5. Defendant's future benefits have been offset to recover a portion of the overpayment previously paid and as such, Defendant has not received a payment since December 2009 and will not be paid benefits in the future.

6. However, the offset of the amount of Defendant's future benefits does not fully account for the overpayment paid by the Plan because Defendant has been overpaid more than the amount of future benefits she is owed under the Plan.

7. Consequently, Defendant has been overpaid in the remaining amount of \$14,694.20 (calculated with appropriate interest).

WHEREFORE, Plaintiffs demand judgment against Defendant [REDACTED] in a total known amount of \$14,694.20 to reimburse the Plan for the overpayment and any other equitable relief deemed appropriate by this Court.

Respectfully submitted,

[REDACTED]
[REDACTED]
[REDACTED] (6667661)
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Attorneys for Plaintiffs

Slip Copy, 2010 WL 1286653 (E.D.Mich.), 48 Employee Benefits Cas. 2647
(Cite as: 2010 WL 1286653 (E.D.Mich.))

H

[Motions, Pleadings and Filings](#)

[Judges and Attorneys](#)

Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.

Amy **REDD**, as Personal Representative of the Estate
of Susan L. Creswell, Mac A. Fleming, Gail A.
Meisel, John M. Pesta, and Ernest L. Torske, Plain-
tiffs,

v.

BROTHERHOOD OF the MAINTENANCE OF
WAY EMPLOYEES DIVISION OF the INTERNA-
TIONAL BROTHERHOOD OF **TEAMSTERS**, and
Brotherhood of the Maintenance of Way Employees
Division Pension Plan, Defendants.

No. 08-11457.
March 31, 2010.

OPINION AND ORDER REGARDING CROSS- MOTIONS FOR SUMMARY JUDGMENT

[GERALD E. ROSEN](#), Chief Judge.

I. INTRODUCTION

*1 Plaintiffs Mac A. Fleming, Gail A. Meisel, John M. Pesta, and Ernest L. Torske are retired former employees of the Defendant Brotherhood of the Maintenance of Way (the “Brotherhood”) who receive pension benefits under the Defendant Brotherhood of the Maintenance of Way Employees Division Pension Plan (the “Plan”).^{[FN1](#)} In June of 2007—after each of the Plaintiffs had retired and was drawing pension benefits from the Defendant Plan—the Defendant Brotherhood, as plan administrator, adopted a new interpretation of certain Plan terms and applied this new construction retroactively to recalculate Plaintiffs’ pension benefits, resulting in reduced monthly payments to Plaintiffs going forward. What is more, the Defendant Brotherhood began to withhold additional amounts from Plaintiffs’ monthly benefit payments, in order to recoup alleged overpayments made to Plaintiffs prior to June of 2007. In response, Plaintiffs brought the present suit in April

of 2008, asserting two claims arising under the Employee Retirement Income Security Act of 1974 (“ERISA”), [29 U.S.C. § 1001 et seq.](#): (i) a claim under § 502(a)(1)(B) of ERISA, [29 U.S.C. § 1132\(a\)\(1\)\(B\)](#), to recover benefits allegedly owed under the terms of the Plan, and (ii) a claim that the Defendant Brotherhood allegedly breached various fiduciary duties owed to the Plaintiff plan participants under § 404(a)(1) of ERISA, [29 U.S.C. § 1104\(a\)\(1\)](#).^{[FN2](#)}

[FN1](#). A fifth Plaintiff, Susan L. Creswell, was named in the initial complaint, but her claims have been resolved. Ms. Creswell passed away after the commencement of this suit, and her claims were then pursued on behalf of her estate by personal representative Amy Redd.

[FN2](#). The complaint also includes two other counts, but Plaintiffs have voluntarily withdrawn these claims.

Presently pending before the Court are cross-motions filed by Plaintiffs and Defendants, in which each side seeks an award of summary judgment in its favor on Counts I and II of the complaint. In support of their motion, Plaintiffs argue (i) that the plan administrator’s recent reinterpretation of Plan terms is arbitrary and capricious, particularly in light of the construction the plan administrator previously gave to these terms when initially calculating Plaintiffs’ pension benefits; and (ii) that the Defendant Brotherhood, as plan administrator, breached a fiduciary duty owed to Plaintiffs by reducing Plaintiffs’ accrued pension benefits in violation of ERISA’s “anti-cutback” provision, [29 U.S.C. § 1054\(g\)](#). For their part, Defendants argue that the plan administrator’s reinterpretation of Plan terms was reasonable and faithful to the language of the Plan, and that the Brotherhood acted in accordance with ERISA and the terms of the Plan in applying this reinterpretation to recalculate Plaintiffs’ pension benefits and seek recoupment of past overpayments.

These cross-motions have been fully briefed by the parties. Having reviewed the parties’ motions, briefs, and accompanying exhibits, as well as the

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(Cite as: 2010 WL 1286653 (E.D.Mich.))

administrative record submitted separately by the parties, the Court finds that the relevant allegations, facts, and legal arguments are adequately presented in these written submissions, and that oral argument would not aid the decisional process. Accordingly, the Court will decide the parties' cross-motions "on the briefs." See Local Rule 7.1(e)(2), U.S. District Court, Eastern District of Michigan. This opinion and order sets forth the Court's rulings on these motions.

II. FACTUAL BACKGROUND

*2 Plaintiffs Mac Fleming, Gail Meisel, John Pesta and Ernest Torske are all retired former employees of the Defendant Brotherhood,^{FN3} with retirement dates spanning from November of 2001 to October of 2006. Since their retirement, Plaintiffs have received pension benefits under the Defendant Plan. The Defendant Brotherhood is the plan administrator of the Plan.

^{FN3}. As noted earlier, the claims of a fifth Plaintiff, Susan Creswell, have been resolved.

A. The Relevant Terms of the Plan

The claims in this case arise from the Defendant Brotherhood's decision in June of 2007 to reinterpret certain terms of the Plan, resulting in the reduction of Plaintiffs' monthly pension benefits and the withholding of additional amounts from these payments in order to recoup alleged overpayments made in reliance on the prior, purportedly mistaken construction of the Plan. Accordingly, the Court turns first to the Plan provisions that bear upon the calculation of Plaintiffs' pension benefits.

The Plan defines a number of terms that factor into the computation of pension benefits. First, it defines an "Accrued Benefit" as "the amount determined in accordance with Section 5.1" of the Plan. (Defendants' Motion, Ex. A, Plan at § 1. 1.) Next, "Compensation" is defined as "the Employee's basic earnings, paid by the Employer for a Plan Year which is exclusive of overtime, bonuses, and other extraordinary compensation." (*Id.* at § 1.9.) The Plan further defines "Final Average Monthly Compensation" as "the average monthly rate of pay determined by dividing by thirty-six (36) the sum of the Employee's Compensation during the thirty-six (36) highest paid consecutive calendar months during the ten (10) year period preceding his termination." (*Id.* at § 1.15.)

Finally, a "Plan Year" is defined as "[t]he twelve (12) month period commencing on January 1 of each year and ending the following December 31." (*Id.* at § 1.29.)

As noted, the Plan's definition of an "Accrued Benefit" references § 5.1 of the Plan, and this section, in turn, states that an "Accrued Benefit means the Normal Retirement Pension payable at Normal Retirement Date determined pursuant to Section 6.2." (*Id.* at § 5. 1.) This latter section provides that "the monthly amount of the Normal Retirement Pension shall be equal to ... [o]ne-twelfth (1/12th) of one and one-half percent (1-1/2%) of Final Average Monthly Compensation times Months of Benefit Service (computed to the nearest penny)." (*Id.* at § 6.2.)

One of the four Plaintiffs, Gail Meisel, elected early retirement, and the calculation of early retirement benefits is governed by Section 7 of the Plan. First, this portion of the Plan provides that "[t]he monthly amount of the Early Retirement Pension shall be equal to the Accrued Benefit" that applies to normal retirees. (*Id.* at § 7.2.) Next, following a July 1, 2002 amendment to the Plan's early retirement provisions, the Plan provides:

Payment of Benefits. Payment of an Early Retirement Pension shall commence as of the Participant's Normal Retirement Date. However, if a Participant who qualifies for Early Retirement terminates his employment with the Employer after July 1, 2002 and requests the Committee to authorize the commencement of his Early Retirement Pension as of the first day of the month coincident with or next following his early retirement, or as of the first day of any subsequent month which precedes his Normal Retirement Date, his pension shall commence as of the beginning of the month so requested ("Requested Early Retirement Date"), but the amount thereof shall be reduced to provide the greater of: (a) his Accrued Benefit actuarially reduced using the actuarial assumptions specified in Appendix A; or (b) reduced by three per cent (3%) for each complete Plan Year between the Participant's Normal Retirement Date and his Requested Early Retirement Date.

*3 (Defendants' Motion, Ex. B, 7/1/2002 Early Retirement Amendments at 1-2 (amending § 7.3 of the Plan).)

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Finally, the Plan includes some more general provisions that are relevant to the claims in this case. First, the Plan prohibits the Defendant Brotherhood from “amend[ing] this Plan [to] reduc[e] any Participant’s Accrued Benefit,” unless such an amendment is permitted under a separate provision triggered by the Brotherhood’s “substantial financial hardship.” (Defendants’ Motion, Ex. A, Plan at § 5.2(a), 9.5.) Similarly, another Plan provision states that “[n]o amendment to the Plan (including a change in the actuarial basis for determining optional or early retirement benefits) shall be effective to the extent that it has the effect of decreasing a Participant’s Accrued Benefit.” (*Id.* at § 13. 1.)

B. The Initial Calculation of Plaintiffs’ Pension Benefits Under the Plan

As noted, the four remaining Plaintiffs in this case retired between November of 2001 and October of 2006. In each case, their pension benefits were calculated under the above-quoted terms of the Plan. The principal point of dispute in this case is whether the so-called “final vacation pay” received by these four individuals upon their retirement should be considered part of their “compensation” within the meaning of the Plan, such that their pension benefits should be calculated based on an increased level of “compensation” that includes this lump-sum payment for vacation time that these individuals had accrued but not used at the time of their retirement.

As explained in the affidavit of Plaintiff Gail Meisel, employees of the Defendant Brotherhood earn paid vacation in one year that they may then use during the following year. (*See* Plaintiffs’ Motion, Ex. 10, Meisel Aff. at ¶ 8.) ^{FN4} Upon retirement, then, an employee may have two categories of earned but unused vacation: (i) vacation earned the previous year but not used prior to the employee’s retirement date, and (ii) vacation earned in the current year that would have been available for use the following year, but for the employee’s retirement. (*See id.* at ¶ 8.) Meisel states without contradiction in her affidavit that “[t]he Brotherhood’s longstanding practice has been to pay the retiring employee for all of [his or her] unused earned vacation in the employee’s final paycheck.” (*Id.* at ¶ 8.) The question becomes, then, whether this lump-sum amount of “final vacation pay” in an employee’s final paycheck should be deemed part of his or her “compensation” within the

meaning of the Plan, such that the calculation of the employee’s pension benefits should incorporate this additional amount—resulting, of course, in increased pension benefits.

^{FN4} The Brotherhood has adopted a “use it or lose it” scheme of vacation accrual, under which vacation time may no longer be used after the year in which it becomes available for use. (*See id.* at ¶ 7.) For example, if an employee worked in 2005 to earn paid vacation time in 2006, he or she had to use this paid vacation time by the end of 2006, and any unused vacation days were not carried over to 2007.

When each of the four Plaintiffs retired and his or her pension benefits were initially computed, the answer to this question was “yes”—that is, the determination of Plaintiffs’ “compensation” under the Plan (and, in turn, the calculation of their pension benefits) included the final vacation pay reflected in their final paychecks. The Brotherhood’s secretary-treasurer until 2003, Bill LaRue,^{FN5} explained that an employee’s final vacation pay was considered “earned” income, such that it was viewed by those with plan administration responsibilities as regular rather than “extraordinary” compensation under the Plan’s definition of “compensation.” (*See* Plaintiffs’ Motion, Ex. 9, LaRue Dep. at 14, 16-17.) LaRue further testified that he consulted with the Plan’s attorney, Kalman Goren, in determining that the term “compensation” as used in the Plan should be construed as encompassing an employee’s final vacation pay. (*See id.* at 14-17.) In addition, Plaintiffs point out that the Plan calls for a three-percent “[p]articipant [] contribution[]” to be withheld from each employee’s “monthly compensation,” (*see* Defendant’s Motion, Ex. A, Plan at § 12.2(a)), and Defendants concede that in the case of each Plaintiff, this three-percent Plan contribution was withheld from the entirety of his or her final paycheck, including the portion attributable to final vacation pay. (*See* Plaintiffs’ Motion, Ex. 8, Geller Dep. at 40-41.)

^{FN5} Under the express terms of the Plan, both the president and the secretary-treasurer of the Brotherhood were deemed to be “plan administrators.” (*See* Defendant’s Motion, Ex. A, Plan at § 1.27.) Thus, LaRue was a plan administrator during the period

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he served as the Brotherhood's secretary-treasurer.

*4 This interpretation of the Plan was applied to compute the pension benefits of each of the four Plaintiffs. Indeed, even after the retirement of Bill LaRue as the Brotherhood's secretary-treasurer and Plaintiff Mac Fleming as the Brotherhood's president, the current president, Freddie Simpson, and secretary-treasurer, Perry Geller, approved the calculation of Plaintiff Fleming's and Plaintiff Meisel's pension benefits using this interpretation of the Plan.^{FN6} In addition, each of the Plaintiffs was credited with an additional "month of service" in light of his or her unused vacation, (see Plaintiffs' Motion, Ex. 10, Meisel Aff. at ¶ 8), which in turn resulted in increased pension benefits.

^{FN6}. As noted earlier, Simpson and Geller became plan administrators upon assuming the offices of president and secretary-treasurer of the Brotherhood.

Apart from this question of what constitutes "compensation" under the Plan, another issue of Plan interpretation factored into the calculation of Plaintiff Gail Meisel's pension benefits. Meisel retired in October of 2006, ten months before her normal retirement date, and her pension benefits therefore were computed by resort to the Plan's early retirement provisions. In particular, under § 7.3 of the Plan as amended effective July 1, 2002, if an early retiree elects to receive his or her pension benefits immediately upon retirement, rather than deferring the payment of benefits until the employee's normal retirement date, the benefits are to be "reduced by three per cent (3%) for *each complete Plan Year* between the Participant's Normal Retirement Date and his Requested Early Retirement Date." (Defendants' Motion, Ex. B, 7/1/2002 Early Retirement Amendments at 1-2 (emphasis added).) In the initial calculation of Meisel's pension benefits, it was determined that her benefits were not subject to reduction under § 7.3 of the Plan, because there was no "complete Plan Year" between her early retirement date in October of 2006 and her normal retirement date ten months later (*i.e.*, in mid-2007). Rather, because the Plan defines a "Plan Year" as an ordinary calendar year from January 1 to December 31, (see Defendants' Motion, Ex. A, Plan at § 1.29), it was determined that no "complete" calendar year elapsed between Meisel's early

and normal retirement dates.^{FN7}

^{FN7}. This same construction of § 7.3 of the Plan evidently was applied to compute the early retirement benefits of former Plaintiff Susan Creswell.

C. The Recalculation and Reduction of Plaintiffs' Pension Benefits

From their retirement dates until mid-2007, Plaintiffs received monthly pension benefits in accordance with the initial calculations of their benefits, together with annual cost-of-living increases. On June 20, 2007, however, they received letters from the current plan administrators, Brotherhood president Freddie Simpson and secretary-treasurer Perry Geller, stating that errors had been made in the calculation of their pension benefits, and that the Plan was required under federal law to recoup any past overpayments of benefits as a result of these errors. (See Admin. Record at 618-20, 625-27, 724-26, 738-40.) Specifically, these letters asserted that Plaintiffs' final vacation pay had been erroneously included as part of their compensation, despite the purported fact that "the Plan has always excluded Vacation Pay from the defined term 'Compensation' as a type of extraordinary remuneration." (*Id.* at 618.)^{FN8} In addition, the letter to Plaintiff Meisel stated that her "early retirement should have been adjusted to take into account [her] retirement before [her] otherwise 'Normal Retirement Date.'" (*Id.* at 625.) Accordingly, Plaintiffs were advised that their monthly pension payments were being reduced to reflect the purportedly correct calculation of their benefits under the Plan, and that additional amounts were being withheld from their monthly payments to recoup the alleged overpayments they had received in the past.^{FN9}

^{FN8}. The letters noted that three percent employee contributions had been withheld from Plaintiffs' final paychecks, including the portions of these paychecks attributable to their final vacation pay. The letters acknowledged that this withholding was inconsistent with the exclusion of vacation pay from an employee's "compensation" under the Plan, and stated that this three percent withholding was being refunded to Plaintiffs with interest. (*Id.*)

^{FN9}. Between the reduced monthly benefits

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and the amounts withheld to recoup alleged overpayments, Plaintiffs' monthly benefit payments decreased by between \$155.64 (for Plaintiff Fleming) and \$283.71 (for Plaintiff Pesta).

*5 Plaintiffs promptly pursued administrative appeals of the Plan's decision to retroactively recalculate and reduce their pension benefits, but to no avail. This suit followed, with Plaintiffs seeking to overturn the Defendant Brotherhood's adverse benefit determinations, and also claiming that the Brotherhood breached various fiduciary duties owed under ERISA to the Plaintiff plan participants.

III. ANALYSIS

A. The Standards Governing the Parties' Cross-Motions

Through the present motions, each party seeks summary judgment in its favor on each of Plaintiffs' two pending claims.^{FN10} Under the pertinent Federal Rule, summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." [Fed.R.Civ.P. 56\(c\)](#). As the Supreme Court has explained, "the plain language of [Rule 56\(c\)](#) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." [Celotex Corp. v. Catrett](#), 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). In addition, where a moving party—here, Plaintiffs—seeks an award of summary judgment in its favor on an issue as to which it bears the burden of proof, this party's "showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." [Calderone v. United States](#), 799 F.2d 254, 259 (6th Cir.1986) (internal quotation marks, citation, and emphasis omitted).

^{FN10} Plaintiffs' claims for benefits under Count I of their complaint presumably are not amenable to resolution under summary judgment principles, but instead must be addressed under the guidelines set forth by the Sixth Circuit in [Wilkins v. Baptist Healthcare System, Inc.](#), 150 F.3d 609, 619

(6th Cir.1998). As explained below, however, the Court has determined that Plaintiffs' claims for benefits have been rendered moot, in light of the Court's resolution of Plaintiffs' claims arising under ERISA's "anti-cutback" provision, [29 U.S.C. § 1054\(g\)](#). Accordingly, the *Wilkins* guidelines need not be applied here.

In deciding a motion brought under [Rule 56](#), the Court must view the evidence in a light most favorable to the nonmoving party. [Pack v. Damon Corp.](#), 434 F.3d 810, 813 (6th Cir.2006). Yet, the nonmoving party "may not rely merely on allegations or denials in its own pleading," but "must—by affidavits or as otherwise provided in [\[Rule 56\]](#)—set out specific facts showing a genuine issue for trial." [Fed.R.Civ.P. 56\(e\)\(2\)](#). Moreover, any supporting or opposing affidavits "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." [Fed.R.Civ.P. 56\(e\)\(1\)](#). Finally, "the mere existence of a scintilla of evidence that supports the nonmoving party's claims is insufficient to defeat summary judgment." [Pack](#), 434 F.3d at 814 (alteration, internal quotation marks, and citation omitted).

B. The Defendant Brotherhood Breached a Fiduciary Duty Owed to the Plaintiff Plan Participants by Effectively Amending the Plan to Decrease Plaintiffs' Accrued Pension Benefits.

In Count II of their complaint, Plaintiffs allege that the Defendant Brotherhood, as administrator of the Plan, breached fiduciary duties owed to Plaintiffs as Plan participants by, *inter alia*, reducing their pension benefits in violation of ERISA's so-called "anti-cutback" provision, [29 U.S.C. § 1054\(g\)](#).^{FN11} Under this provision, "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan," with certain exceptions that do not apply here. [29 U.S.C. § 1054\(g\)](#) (1).^{FN12} In seeking summary judgment in their favor on this aspect of their breach of fiduciary duty claim, Plaintiffs contend that each of the requisite elements of an anti-cutback violation has been established as a matter of law: (i) their pension benefits qualify as "accrued benefits," (ii) these benefits have been decreased, and (iii) the Defendant Brotherhood's reinterpretation of Plan terms—most prominently, the Plan's definition of "compensation"—constitutes an "amendment" of the Plan within the meaning of ERISA's anti-cutback

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provision. The Court agrees.

FN11. To be accurate, Plaintiffs' complaint cites a parallel anti-cutback provision in the Internal Revenue Code, [26 U.S.C. § 411\(d\)\(6\)](#), which “mirrors” the ERISA provision. See [Hunter v. Caliber System, Inc.](#), 220 F.3d 702, 712 (6th Cir.2000).

FN12. This prohibition also extends to the reduction of early retirement benefits, insofar as the benefits in question are “attributable to service before the amendment” that resulted in the reduction. [29 U.S.C. § 1054\(g\)\(2\)](#); see also [Cattin v. General Motors Corp.](#), 955 F.2d 416, 422 (6th Cir.1992) (discussing the 1984 amendment to [§ 1054\(g\)](#) to encompass early retirement benefits that meet certain statutory conditions).

***6** If the Court were to confine its analysis of Plaintiffs' anti-cutback claim solely to the arguments and authorities presented in Defendants' submissions, Plaintiffs would surely and readily prevail. The sum total of Defendants' challenge to Plaintiffs' anti-cutback claim is a citation to, and very brief discussion of, a handful of cases and an Internal Revenue procedure that (at best) stand for the proposition that a plan administrator may, under the appropriate circumstances, seek to recoup overpaid plan benefits. (See Defendants' Motion, Br. in Support at 22-24.) Yet, two of the cited cases involved the recoupment of overpaid *disability* benefits, as opposed to pension benefits, see [Vick v. Metropolitan Life Insurance Co.](#), 417 F.Supp.2d 868, 881-82 (E.D.Mich.2006); [Peitrowski v. ACIA](#), 65 F.Supp.2d 614, 620 (E.D.Mich.1999), and such welfare benefits do not qualify as accrued benefits within the ambit of ERISA's anti-cutback provision, see [29 U.S.C. 1051\(1\)](#) (providing that employee welfare benefit plans are not subject to the portion of the ERISA statutory scheme that contains the anti-cutback provision); see also [Battoni v. IBEW Local Union No. 102 Employee Pension Plan](#), 594 F.3d 230, 234 (3d Cir.2010) (confirming that “welfare benefits are exempt from coverage under the Anti-Cutback rule”). Another case cited by Defendants, [Wells v. United States Steel & Carnegie Pension Fund, Inc.](#), 950 F.2d 1244, 1250-51 (6th Cir.1991), did involve the attempted recoupment of overpaid pension benefits, but this attempt was opposed on the equitable grounds of laches and

estoppel, without any discussion or mention whatsoever of ERISA's anti-cutback provision.

Likewise, Defendants' appeal to an Internal Revenue procedure, [Rev. Proc.2006-27](#), (see Defendants' Motion, Ex. E)-as well as an unpublished decision that briefly discusses a predecessor Internal Revenue procedure, [Rev. Proc.2003-44](#), without ruling on its applicability to the case before the court, see [Ramsey v. Formica Corp.](#), No. 1:04-CV-149, 2006 WL 38995, at *4 (S.D. Ohio Jan.5, 2006)-fails to shed any light whatsoever on the viability of Plaintiffs' anti-cutback claim in this case. This procedure, generally speaking, establishes a scheme under which plan sponsors may make corrections to certain types of retirement plans that would otherwise run afoul of the Internal Revenue Code provisions governing such plans. Yet, there is no evidence that the Defendant Brotherhood has ever invoked this mechanism to correct any alleged Plan defects of the sort addressed in the Internal Revenue procedure. Nor, indeed, have Defendants even *identified* any such Plan defect that would trigger the applicability of this Internal Revenue procedure. In any event, the procedure itself expressly states that such a defect may be corrected through a plan amendment only if “the amendment complies with the requirements of” a variety of Internal Revenue Code provisions, including the Code's counterpart to ERISA's anti-cutback provision, [26 U.S.C. § 411\(d\)\(6\)](#). (See Defendants' Motion, Ex. E, [Rev. Proc.2006-27](#) at § 4.05.) Far from supplanting the anti-cutback provision, then, this Internal Revenue procedure explicitly incorporates it as a limit on a plan sponsor's ability to correct a plan defect through an amendment.

***7** In short, the authorities cited by Defendants utterly beg the question presented here-namely, whether the Defendant Brotherhood ran afoul of ERISA's anti-cutback provision by recalculating and reducing Plaintiffs' pension benefits based on a reinterpretation of certain Plan provisions.^{[FN13](#)} Plaintiffs, in contrast, point to a case that is directly on point, both factually and legally. In [DiCioccio v. Duquesne Light Co.](#), 911 F.Supp. 880, 884-85 (W.D.Pa.1995), the plaintiff class of retirees of the defendant company challenged the reinterpretation of the term “compensation” in the company's retirement plans to exclude income from the plaintiffs' exercise of stock options. Until June of 1990, such income was included in the calculation of the plaintiffs' benefits under

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the retirement plans, but the plan administrator then issued a memorandum opining that this income did not qualify as “compensation” under the plans, and directing the company’s benefits manager to exclude it from any future benefit calculations. See *DiCioccio*, 911 F.Supp. at 887, 890-91. As one of their claims in the case, the plaintiffs alleged that the plan administrator’s decision to exclude their stock option income from the calculation of their pension benefits was “a *de facto* amendment” to the defendant company’s retirement plans that reduced their accrued benefits in violation of ERISA’s anti-cutback provision. *DiCioccio*, 911 F.Supp. at 894. The defendants, however, contended that the plan administrator’s memorandum “constituted an exercise of appropriate discretionary authority under the Plans and simply was intended to correct a mistake in practice which had inadvertently developed.” 911 F.Supp. at 895.

FN13. Perhaps Defendants and their counsel are to be congratulated for filing a brief in support of their summary judgment motion that at least purports to cite *some* authority on this question, no matter how inapposite it might be. This stands in contrast to their response to Plaintiffs’ summary judgment motion, which cites *no authority whatsoever* on any issue even remotely touching upon Plaintiffs’ anti-cutback claim. Indeed, the only authorities cited *at all* in Defendants’ response brief are a few cases addressing the general rules for ERISA plan interpretation. (See Defendants’ Response Br. at 3.) As Plaintiffs aptly observe in their reply brief, Defendants’ “ ‘mediation-style’ response brief ... largely ignores most of Plaintiffs’ arguments” in support of their request for summary judgment. (Plaintiffs’ Reply Br. at 1.)

The district court granted summary judgment to the plaintiffs on their anti-cutback claim, finding that the plan administrator’s reinterpretation of the plans to exclude stock option income from the calculation of an employee’s pension benefits could not be applied retroactively to recalculate and reduce the benefits that had accrued prior to this new interpretation of the plans. 911 F.Supp. at 897. The court explained:

ERISA defines an accrued benefit in the case of a defined benefit plan as “the individual’s accrued

benefit determined under the plan and, except as provided in [section 1054\(c\)\(3\)](#) of this title, expressed in the form of an annual benefit commencing at normal retirement age. ...” 29 U.S.C. § 1002(23)(A). ERISA further provides that “the accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082[(d)(2)] or 1441 of this [title].” 29 U.S.C. § 1054(g)(1). It follows *a fortiori* that an accrued benefit may not be retroactively decreased through the purported exercise of an administrator’s discretion.

In the instant matter, the administrator did not attempt to exercise any purported discretion to exclude the ... income generated from the stock option and appreciation rights prior to June 5, 1990. Because the language contained in the Plans defining compensation was inclusive rather than exclusive and specifically encompassed the type of income recognized upon the [stock option] exercises, it follows that those employees which exercised their stock option and appreciation rights in 1989 and had income reported on their W-2’s for the calendar year of 1989 acquired an accrued benefit. Accordingly, plaintiffs are entitled to partial summary judgment on this aspect of the claim set forth in Count II.

*8 911 F.Supp. at 897 (footnote omitted).

The reasoning of *DiCioccio*, if applied here, plainly would warrant an award of summary judgment in Plaintiffs’ favor on their anti-cutback claim. Indeed, Plaintiffs’ claim in the present suit is stronger in one respect than the similar claim asserted in *DiCioccio*, because it appears that not all members of the plaintiff class in that case had retired and begun drawing pension benefits at the time the plan administrator reinterpreted the term “compensation” in the plans and applied this reinterpretation to recalculate the plaintiffs’ benefits. Arguably, then, any calculation of benefits prior to an employee’s retirement was only tentative and did not give rise to an “accrued benefit,” as necessary to trigger ERISA’s anti-cutback provision. **FN14** Here, in contrast, each of the four Plaintiffs had already retired, and was being paid pension benefits in accordance with the Plan as it was construed at the time of his or her retirement, when the Defendant Brotherhood announced a new inter-

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pretation of the Plan in June of 2007 and applied it retroactively to reduce the benefits Plaintiffs had been receiving to that point. Surely, then, it would behoove Defendants to identify some ground for distinguishing the ruling in *DiCioccio*, or at least to suggest why the Court should not follow this decision. Yet, remarkably, Defendants do not so much as even acknowledge this adverse ruling.

FN14. The Court does not (and need not) express any view as to the merits of this argument.

The Court is reluctant to fashion and address arguments in support of Defendants' position that they and their counsel have failed to advance on their own behalf. Nonetheless, certain aspects of the analysis in *DiCioccio* are rather abbreviated and warrant more extensive consideration. First, ERISA's anti-cutback provision is triggered only by an "amendment of the plan" that reduces an accrued benefit. [29 U.S.C. § 1054\(g\)\(1\)](#). In finding this condition satisfied, the *DiCioccio* court seemingly relied on the commonsense notion that a plan administrator should not be able to accomplish through a discretionary "reinterpretation" of the plan what ERISA's anti-cutback provision prohibits through a traditional plan amendment. See *DiCioccio*, 911 F.Supp. at 897. Yet, the Court must adhere to the statute's express language, rather than a commonsense gloss upon this language, and so it must confirm that the Defendant Brotherhood's reinterpretation of the Plan truly constituted an "amendment" within the meaning of [§ 1054\(g\)](#).

As it happens, the Sixth Circuit has addressed this question, holding that a plan administrator's statement of the proper interpretation of a plan qualifies as an "amendment" under ERISA's anti-cutback provision. See *Hunter*, 220 F.3d at 712. In that case, the defendant plan sponsor adopted written amendments in order to clarify the intended operation of a retirement plan. The plaintiffs argued that these amendments could not be considered both amendments (for purposes of an ERISA anti-cutback claim) **and** interpretations of the plan (for purposes of triggering the deferential "arbitrary and capricious" standard of review) "because an amendment, by definition, *changes* rather than interprets." *Hunter*, 220 F.3d at 712. The court disagreed, stating that it saw "no reason why an amendment that interprets a plan

may not ... be considered an 'amendment' for purposes of" ERISA's anti-cutback provision. [220 F.3d at 712](#). In so ruling, the court cited with approval a Third Circuit decision, *Hein v. F.D.I. C.*, 88 F.3d 210, 216 (3d Cir.1996), holding that a plan had been amended within the meaning of [§ 1054\(g\)](#) even though "the actual text of the Plan was [not] amended or modified in any way." The Third Circuit explained that "[a]n erroneous interpretation of a plan provision that results in the improper denial of benefits to a plan participant may be construed as an 'amendment' for the purposes of" ERISA's anti-cutback provision. *Hein*, 88 F.3d at 216. Consistent with these authorities, this Court concludes that the Defendant Brotherhood's reinterpretation of the Plan in its June 20, 2007 letters to Plaintiffs constituted an "amendment" to the Plan within the meaning of [§ 1054\(g\)](#).

***9** Next, *DiCioccio* only briefly addresses the language in ERISA's anti-cutback provision limiting its reach to "accrued benefit[s]." [29 U.S.C. § 1054\(g\)\(1\)](#). At first glance, this requirement appears to be easily satisfied in this case. For a defined benefit plan like the one at issue here, ERISA defines an "accrued benefit" as "the individual's accrued benefit determined under the plan and ... expressed in the form of an annual benefit commencing at normal retirement age." [29 U.S.C. § 1002\(23\)\(A\)](#). The Sixth Circuit has noted the "surface ambiguity created by" this definition's "circular reference" to an individual's "accrued benefit," but has nonetheless construed this provision as "mak[ing] plain that the terms of [the] pension plan document(s) in effect while a participant worked for a covered employer dictate his or her 'accrued benefits.'" *Thornton v. Graphic Communications Conference of International Brotherhood of Teamsters Supplemental Retirement & Disability Fund*, 566 F.3d 597, 605-06 (6th Cir.2009). Because Plaintiffs' initial pension benefit payments upon their retirement were determined under the terms of the Plan as it was then construed by the Defendant Brotherhood and its individual plan administrators—most notably, with the understanding that final vacation pay was to be counted as part of an employee's "compensation" under the Plan—and because there were no more conditions or prerequisites that were yet to be satisfied before these benefits could be paid to the Plaintiff retirees, there seemingly can be no question that Plaintiffs' benefits had "accrued" upon their retirement within the meaning of [§ 1054\(g\)](#) (1). Likewise, the language of the Plan itself bolsters this conclusion, as the Plan defines an "Accrued Benefit"

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as “the Normal Retirement Pension payable at Normal Retirement Date determined pursuant to” a formula set forth elsewhere in the Plan, (Plan at § 5. 1), and there is no dispute that, upon their retirement, Plaintiffs began to draw pension benefits calculated in accordance with this formula as it was then understood to operate.

Yet, as Plaintiffs implicitly recognize in the brief in support of their motion, something more is required to fully satisfy ERISA's definition of an “accrued benefit.” It surely is not enough, after all, to merely claim that a pension benefit was “determined under the plan,” [29 U.S.C. § 1002\(23\)\(A\)](#), without any effort to show that this benefit determination rested upon some tenable reading of the controlling plan documents. As Defendants argue-albeit, true to form, without citation to authority-a wholly mistaken benefit determination presumably would not produce an “accrued benefit determined under the plan,” [§ 1002\(23\)\(A\)](#), and thus might not be entitled to protection under ERISA's anti-cutback provision. And, in fact, the courts have recognized precisely this principle, rejecting anti-cutback claims where the plaintiff plan participants could not establish an entitlement under the pertinent pre-retirement plan provisions to a level or type of pension benefits that subsequently was reduced or eliminated. *See, e.g., Thornton*, 597 F.3d at 609, 616 (holding that a post-retirement increase in benefits was not an “accrued benefit” under ERISA, and therefore could be eliminated without running afoul of ERISA's anti-cutback provision); [Hunter](#), 220 F.3d at 712-17 (holding that the plaintiffs were not entitled to a lump-sum distribution of their benefit plan account balances under the pre-amendment versions of the plans, and thus could not claim that the plan amendments violated ERISA's anti-cutback provision); [Cattin v. General Motors Corp.](#), 955 F.2d 416, 423-24 (6th Cir.1992) (finding that an anti-cutback claim failed because the plaintiffs “did not meet the prerequisites of the plan before the amendment”); [Hein](#), 88 F.3d at 217 (observing that [§ 1054\(g\)](#) “can protect an entitlement to benefits, but it cannot create an entitlement to benefits when no entitlement exists under the terms of the Plan”).

***10** Consequently, to secure an award of summary judgment in their favor on their anti-cutback claim, Plaintiffs must establish that the benefit amounts they were receiving prior to the Defendant Brotherhood's June 2007 recalculation and reduction

of those benefits were based on a permissible reading of the terms of the Plan. Under the Sixth Circuit's decision in [Hunter](#), 220 F.3d at 709-12, the Brotherhood's interpretation of the Plan at the time of Plaintiffs' retirement (from 2001 until 2006) is subject to “arbitrary and capricious” review, provided that the Plan confers upon the Brotherhood the discretion to construe its terms. The Plan clearly does so, (*see* Defendants' Motion, Ex. A, Plan at § 16.5 (“The Plan Administrator shall have power to construe this Agreement, to make all benefit determinations and to make factual findings, [and] any such construction by the Plan Administrator made in good faith [shall] be final and conclusive.”)), and both sides agree that the “arbitrary and capricious” standard applies here, (*see* Defendants' Motion, Br. in Support at 13, 16; Plaintiffs' Motion, Br. in Support at 11-12).

In order to determine, then, whether Plaintiffs' initial retirement benefits, before their recalculation and reduction, were “accrued benefits” that were permissibly “determined under the plan,” [29 U.S.C. § 1002\(23\)\(A\)](#), the Court must consider whether the interpretation of the Plan that generated these initial benefit awards passes muster under the “arbitrary and capricious” standard of review. This is the “least demanding form of judicial review,” under which this Court must uphold a denial of benefits if it is “rational in light of the plan's provisions.” [Monks v. Keystone Powdered Metal Co.](#), 78 F.Supp.2d 647, 657 (E.D.Mich.2000) (internal quotation marks and citations omitted), *aff'd*, 2001 WL 493367 (6th Cir. May 3, 2001). “When it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary or capricious.” [Davis v. Kentucky Finance Cos. Retirement Plan](#), 887 F.2d 689, 693 (6th Cir.1989) (internal quotations and citations omitted), *cert. denied*, 495 U.S. 905, 110 S.Ct. 1924, 109 L.Ed.2d 288 (1990).

The parties differ as to two aspects of the initial calculation of Plaintiffs' pension benefits at the time of their retirement. First and foremost, they disagree as to the interpretation given to the Plan term “Compensation” in calculating these benefits. As noted earlier, the Plan defines “Compensation” as “the Employee's basic earnings, paid by the Employer for a Plan Year which is exclusive of overtime, bonuses, and other extraordinary compensation.” (Defendants' Motion, Ex. A, Plan at § 1.9) At the time of Plaintiffs' retirement, the Defendant Brotherhood and the indi-

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viduals charged with plan administration construed this term as encompassing an employee's "final vacation pay"-that is, the lump-sum payment included in an employee's final paycheck that reflects the employee's earned but unused vacation. In recalculating and reducing Plaintiffs' benefits in June of 2007, however, the Brotherhood determined that final vacation pay was "extraordinary" remuneration that should be excluded from the Plan's definition of "compensation."

***11** The Court finds that the Brotherhood's initial interpretation of "compensation" as including an employee's final vacation pay was not arbitrary and capricious. As noted by Plaintiffs, each of them "earned" his or her vacation in the ordinary course of his or her employment, and each received his or her ordinary salary for any vacation days taken. Pay for unused vacation, then, would arguably satisfy the Plan's definition of "compensation" as "basic earnings," as opposed to "extraordinary compensation." Certainly, it is reasonable to view an employee's earned vacation, and the pay received in lieu of unused vacation, as more akin to routine "earnings" than to bonuses and other outof-the-ordinary remuneration that the Plan references as "extraordinary" compensation.

In addition, Plaintiffs point out that this interpretation is readily harmonized with the Brotherhood's construction of other Plan terms at the time, as evidenced by its contemporaneous practices. As noted earlier, the Plan is funded in part by three-percent "Participant[] Contributions" that are withheld from each participant's "monthly *compensation*." (Plan at § 12.2(a) (emphasis added).) It is undisputed that this three-percent contribution was withheld from the entirety of each Plaintiff's final paycheck, including the portion attributable to final vacation pay. If Plaintiffs' final vacation pay was treated as "monthly compensation" for purposes of this withholding provision, it stands to reason that it was properly treated as "compensation" for purposes of calculating Plaintiffs' pension benefits. Moreover, Plaintiffs have provided the final paycheck stubs of Plaintiff Pesta showing that his final vacation payments were designated as "regular" earnings. (See Plaintiffs' Motion, Ex. 16.)

Against these points, Defendants rely principally on a one-paragraph passage in the brief in support of their summary judgment motion, in which they main-

tain that Plaintiffs seek to exploit a "loophole" that "was never the stated intention of the Plan." (Defendants' Motion, Br. in Support at 18-19.) The Court is puzzled, however, as to how it might go about discerning the "stated intention of the Plan," other than by resort to the language of the Plan itself. As Defendants acknowledge, the Plan is silent as to whether vacation pay should or should not be included as "compensation." (See *id.* at 20.) It follows that the question must be resolved by resort to surrounding language, as well as other sources that might illustrate the reasonableness (or lack thereof) of treating vacation pay as compensation. Defendants have nothing to offer on this score, beyond their sweeping and utterly unfounded claim that Plaintiffs' proposed interpretation would read a Plan provision- § 6.2, the provision specifying the formula for pension benefit calculation-"out of the plan document." (Defendants' Response Br. at 3.) In fact, this provision remains firmly in place and fully operative under either side's preferred construction of "compensation"-the only difference is what is *included* in the "compensation" that is plugged into the § 6.2 formula. Thus, even accepting Defendants' characterization of Plaintiffs' proposed construction as a "loophole," it was not arbitrary and capricious to calculate Plaintiffs' pension benefits by resort to a "loophole" that rested upon a rational and reasoned interpretation of the language of the Plan itself.

***12** Next, the parties have advanced two different interpretations of § 7.3 of the Plan, which determines the amount by which early retirement benefits are to be reduced in the event that an early retiree elects to receive his or her benefits immediately rather than at the normal retirement date. Specifically, this provision calls for such early retirement benefits to be "reduced by three per cent (3%) for each complete Plan Year between the Participant's Normal Retirement Date and his Requested Early Retirement Date." (Defendants' Motion, Ex. B, 7/1/2002 Early Retirement Amendments.) The Plan, in turn, defines a "Plan Year" as an ordinary calendar year from January 1 to December 31. (See Defendants' Motion, Ex. A, Plan at § 1.29.) In computing Plaintiff Gail Meisel's pension benefits, it was determined that no reduction was warranted, because no "complete Plan Year" elapsed between her early retirement date in October of 2006 and her normal retirement date ten months later, in mid-2007.

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This interpretation of the Plan was not arbitrary and capricious, and Defendants do not seriously contend otherwise. Plainly, no complete calendar year elapsed between Plaintiff Meisel's early retirement and normal retirement dates. Nonetheless, Defendants assert that the early retirement amendment in question was not "intended to apply to any individual who served as a 'core' employee," such as Plaintiff Meisel. (Defendants' Motion, Br. in Support at 21.) Yet, Defendants fail to point to any Plan language that might evidence such an intent, and the language of § 7.3 itself includes no such limitation to "non-core" employees (or any other subset of employees).^{FN15} Neither does this provision provide any support for Defendants' contention that the annual three-percent reduction should be pro-rated for partial plan years, where the provision itself addresses only "complete" plan years. Thus, the reading of § 7.3 used to determine Plaintiff Meisel's early retirement benefits readily passes muster under the "arbitrary and capricious" standard of review.^{FN16}

^{FN15}. In any event, as Plaintiffs point out, Defendants' argument would seem to call into question Plaintiff Meisel's eligibility to take early retirement *at all*, and not merely the amount by which her retirement benefits should have been reduced. Yet, the individuals currently responsible for plan administration approved this early retirement, and no effort has been made to withdraw this approval.

^{FN16}. In their complaint and summary judgment motion, Plaintiffs also take issue with Defendants' determination in June of 2007 that they were improperly credited with one extra "month of service" in the initial calculation of their pension benefits. Yet, in their cross-motion for summary judgment, Defendants state that only "two facets" of the Plan are at issue: the inclusion of vacation pay in "compensation," and the application of the early retirement reduction provision. (See Defendants' Motion, Br. in Support at 8.) Likewise, Defendants have failed to address the "months in service" issue in their response to Plaintiffs' motion. Accordingly, the Court finds that Defendants have forfeited their opportunity to challenge Plaintiffs' contention, supported by ev-

idence, (see Plaintiffs' Motion, Br. in Support at 24), that the "months of service" determinations made at the time of their initial benefit calculations were not arbitrary or capricious.

In sum, Plaintiffs have established each element of their anti-cutback claim as a matter of law. Their pension benefits as calculated upon their retirement qualify as "accrued benefits" under ERISA's anti-cutback provision, because these benefits were determined under an interpretation of the Plan that was not arbitrary or capricious. These accrued benefits were later decreased as a result of a reinterpretation of the Plan by the Defendant Brotherhood and the individuals who currently serve as plan administrators. Finally, this reinterpretation of the Plan constituted an "amendment" of the Plan under § 1054(g) and the case law construing this provision. It follows that the reduction in Plaintiffs' pension benefits violated ERISA's anti-cutback provision.

There remains only the question of the appropriate remedy for this violation of § 1054(g). As noted earlier, Plaintiffs asserted their anti-cutback claim in Count II of their complaint, citing this violation as one of the ways in which the Defendant Brotherhood breached the fiduciary duties owed to the Plaintiff Plan participants. This breach of fiduciary duty claim, in turn, has presumably been brought under the ERISA provision that authorizes suit "by a participant ... (A) to enjoin any act or practice which violates any provision of this subchapter ..., or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3); see also *Varity Corp. v. Howe*, 516 U.S. 489, 515, 116 S.Ct. 1065, 1079, 134 L.Ed.2d 130 (1996) (recognizing that this provision authorizes breach of fiduciary duty claims brought by plan participants and seeking individual relief). It follows that Plaintiffs would be limited under this breach of fiduciary duty claim to injunctive and equitable relief.

*13 Much of the relief sought in Plaintiffs' complaint fits comfortably within this remedial scheme. In particular, they seek (i) a declaration reversing the June 2007 decision to recalculate and reduce their pension benefits and restoring these benefits to the amounts determined at the time of their retirement, together with any cost of living increases to which

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they are entitled, and (ii) an order enjoining Defendants from applying the Brotherhood's June 2007 reinterpretation of "compensation" and the early retirement provision at § 7.3 of the Plan to recompute or reduce their benefits. Yet, one item of damages is potentially problematic: Plaintiffs seek an order compelling Defendants to return to them the full amount of any benefit reductions made in violation of ERISA's anti-cutback provision, as well as all amounts withheld in an effort to recoup alleged overpayments made prior to June of 2007. The Supreme Court has recognized that such claims for restitution may be equitable or legal in nature, depending on the basis for the claim and the nature of the relief sought. See Great-West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204, 212-13, 122 S.Ct. 708, 714, 151 L.Ed.2d 635 (2002).

In this case, the Court finds that Plaintiffs' plea for restitution falls on the equitable side of this divide, and thus is an available remedy under Count II of their complaint. As the Supreme Court has explained, "for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." Great-West Life, 534 U.S. at 214, 122 S.Ct. at 714-15 (footnote omitted). The funds that Plaintiffs seek to recover were withheld from their monthly benefit payments and presumably remain in the Defendant Plan, where they may be identified and restored to Plaintiffs. Thus, it would appear that the restitution sought by Plaintiffs may be awarded in a breach of fiduciary duty claim brought under § 1132(a)(3).

This conclusion is not free from doubt, however. In Thornton, 566 F.3d at 616-17, the Sixth Circuit appeared to conclude that relief analogous to the restitution sought by Plaintiffs here was properly recoverable in a claim for benefits under 29 U.S.C. § 1132(a)(1)(B), as opposed to a claim under § 1132(a)(3). The Second Circuit has reached a similar conclusion, holding that an anti-cutback claim was properly analyzed as brought under § 1132(a)(1)(B), rather than § 1132(a)(3). See Frommert v. Konkright, 433 F.3d 254, 269-70 (2d Cir.2006). Finally, in Hunter, 220 F.3d at 711-12, the Sixth Circuit seemingly did not decide whether an anti-cutback claim should be analyzed as a claim for benefits under § 1132(a)(1)(B) or a breach of fiduciary duty claim. Accordingly, the Court finds in the alternative that

Plaintiffs may proceed with their anti-cutback claim under § 1132(a)(1)(B), see Hunter, 220 F.3d at 711; Frommert, 433 F.3d at 269-70, and it is clear that the restitution they seek may be awarded as a "recover[y][of] benefits" under this ERISA provision, see Frommert, 433 F.3d at 270. ^{FN17}

^{FN17} This raises the question whether Plaintiffs' anti-cutback claim should have been analyzed under the standards of Wilkins, 150 F.3d at 619, rather than summary judgment standards. Yet, in both Thornton, 566 F.3d at 601, and Hunter, 220 F.3d at 709, the Sixth Circuit reviewed anti-cutback claims that had been resolved by the lower courts on summary judgment motions, without suggesting that the district courts should have analyzed these claims under the procedures announced in Wilkins.

*14 Finally, in light of the Court's conclusion that Plaintiffs are entitled to summary judgment in their favor on their anti-cutback claim, the Court need not address the other theories of recovery advanced in Plaintiffs' complaint. In particular, the Court need not (and does not) decide whether the Defendant Brotherhood's June 2007 reinterpretation of the Plan's definition of "compensation" and its early retirement provision would survive scrutiny under "arbitrary and capricious" review. This issue, if reached and decided by the Court, would not affect the rights of the Plaintiffs actually before the Court—who, by virtue of the Court's rulings, have secured all of the relief sought in their complaint—but would matter only to those employees who retired *after* the Brotherhood's reinterpretation of the Plan. This latter class of employees cannot claim that their retirement benefits were recalculated and reduced as the result of a retroactively applied Plan amendment, and it follows that they, unlike Plaintiffs, presumably cannot claim the protection of ERISA's anti-cutback provision. Consequently, the Court declines to issue what would be, in effect, an advisory opinion as to the rights of Plan participants who are not parties to this case. ^{FN18}

^{FN18} One final matter remains to be resolved in this case—namely, the precise substance of the judgment to be entered in Plaintiffs' favor as a result of the Court's award of summary judgment on their anti-cutback claim. The record presently before

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this Court does not establish the precise amount of restitution owed to each Plaintiff, and the Court also is unsure whether factual issues remain as to these amounts. Accordingly, Plaintiffs will be directed to submit a proposed judgment to the Court, and Defendants will be given an opportunity to raise objections to this proposed judgment in the event that Plaintiffs are unable to secure their concurrence as to the form and substance of the judgment to be entered. In addition, the Court directs Plaintiffs to file a proposed stipulated order of dismissal reflecting the resolution of the claims brought by Plaintiff Susan Creswell.

IV. CONCLUSION

For the reasons set forth above,

NOW, THEREFORE, IT IS HEREBY ORDERED that Plaintiffs' July 8, 2009 motion for summary judgment (docket # 47) is GRANTED IN PART, with respect to Plaintiffs' claim under ERISA's anti-cutback provision, [29 U.S.C. § 1054\(g\)](#), and is otherwise DENIED WITHOUT PREJUDICE. IT IS FURTHER ORDERED that Defendants' May 26, 2009 motion for summary judgment (docket # 39) is DENIED.

Next, IT IS FURTHER ORDERED that, within **fourteen (14) days** of the date of this opinion and order, Plaintiffs shall file and serve a proposed judgment reflecting the relief to be awarded in light of the Court's award of summary judgment in Plaintiffs' favor on their anti-cutback claim. In the event that Plaintiffs are unable to secure Defendants' concurrence as to the form and substance of this proposed judgment, Defendants shall file and serve any objections to Plaintiffs' proposed judgment within **seven (7) days** after service of Plaintiffs' proposed judgment. The Court will then resolve any objections and enter an appropriate judgment.

Finally, IT IS FURTHER ORDERED that, within **seven (7) days** of the date of this opinion and order, Plaintiffs shall submit to the Court a proposed stipulated order of dismissal reflecting the resolution of the claims of Plaintiff Susan Creswell (now being pursued on behalf of her estate by personal representative Amy Redd).

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- [2009 WL 3832140](#) (Trial Motion, Memorandum or Affidavit) Defendants' Answer to Plaintiffs' Motion Seeking Judgment on Count I and Summary Judgment on Count II of Plaintiffs' Complaint (Jul. 29, 2009) Original Image of this Document (PDF)
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[Judges](#)

Judges

• **Rosen, Hon. Gerald E.**

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