For Dockets See 09-3637

United States Court of Appeals, Seventh Circuit.

Grant M. **WALKER**, individually and on behalf of all other similarly situated, et al., Plaintiffs - Appellants,

v.

MONSANTO COMPANY PENSION PLAN, et al., Defendants - Appellees.

Glynn Davis, individually and on behalf of all other similarly situated, et al., Plaintiffs - Appellants,

v.

Solutia Incorporated Employees Pension Plan, Defendant - Appellee.

Fred Donaldson, individually and on behalf of all other similarly situated, et al., Plaintiffs - Appellants,

v.

Pharmacia Cash Balance Pension Plan, et al., Defendants - Appellees.

No. 09-3637.

April 13, 2010.

Appeal from the United States District Court for the Southern District of Illinois, Case No. 3:04-cv00436-JPG-PMF, The Honorable Judge J. Phil Gilbert

Reply Brief of Plaintiffs - Appellants

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The issue before this Court is whether Defendants' cash-balance defined benefit plan ("the Plan") violates ERISA's prohibition against ceasing or reducing the rate of an employee's benefit accrual because of the attainment of any age and causes an impermissive forfeiture.

Plaintiffs explained in their opening brief that Defendants' Plan violates ERISA because (1) the Plan includes an unambiguous provision that on its face ceases a participant's benefit accrual (in the form of Interest Credits to the participant's Prior Plan Account) solely because the participant attains the age of 55; and (2) in determining a participant's accrued benefit, the Plan expressly projects these Interest Credits only through age 55, as opposed to the Plan's normal retirement age of 65.

Defendants have responded to Plaintiffs' arguments and sought to defend the Plan's legality by shifting the Court's focus away from the dispositive terms of the Plan itself and towards the features of the pension plans that existed prior to the Plan (and no longer exist) and other extrinsic evidence of their subjective intent and motivation for adopting the challenged Plan provision - all of which is irrelevant to Plaintiffs' claims. Defendants' proffered defense of the Plan's legality contravenes the plain language of ERISA's relevant statutory text as well as applicable law and regulatory guidance with respect thereto - all of which condemn Defendants' Plan as unlawful.

***2** Defendants also challenge the timeliness of Plaintiffs' claims and ask this Court to radically depart from settled law holding that Plaintiffs' claims were timely filed under the applicable ten-year statute of limitations.

I. Plaintiffs Have Established that Defendants' Plan Violates ERISA as a Matter of Law.

ERISA prohibits the Plan in this case from terminating the Interest Credits to a participant's Prior Plan Account because of the attainment of any age and requires the Plan, when determining the minimum accrued pension benefit mandated by ERISA, to project these Interest Credits to normal retirement age to avoid an impermissive forfeiture. *See* 29 U.S.C. § 1054(b)(1)(H)(i); Revenue Ruling 2008-7. The Plan violates ERISA because the Plan terminates the Interest Credits to the Prior Plan Account when the participant attains age 55 (Plan § 6.2(d) (JA34)) and only projects these Interest Credits to age 55, as opposed to the Plan's Normal Retirement Age of 65, when determining the accrued benefit (Plan §§ 3.2 (JA13), 3.36 (JA23)).

A. Section § 1054(b)(1)(H)(0 Prohibits the Plan from Terminating the Interest Credits to a Participant's Prior Plan Account Because of the Attainment of Any Age.

1. Section 1054(b)(1)(H)G)'s Protective Scope Extends to Any Right, Benefit or Feature Under a Cash Balance Plan that Results in an Increase to a Participant's Stated Account Balance.

Defendants first argue that ERISA's prohibition against ceasing or reducing an employee's benefit accrual because of the attainment of any age does not even apply to the Plan's Interest Credits to a participant's Prior Plan Account (also referred to herein as the "PPA Interest Credits"). *See, e.g.*, Response Brief at 16 ***3** ("ERISA § 204(b)(1)(H)'s prohibition against ceasing 'benefit accruals' because of age does not apply."). If accepted by this Court, Defendants' argument stands for the proposition that the Plan was free to terminate or reduce the PPA Interest Credits "because of . . . age," and that neither the IRS nor Plan participants could legally challenge the Plan's age-based termination or reduction of these Interest Credits under ERISA (or its parallel provision in the Internal Revenue Code). Defendants' suggested interpretation of section 1054(b)(1)(H)(i) leads to an absurd statutory result and reflects an indefensible attempt by Defendants to significantly restrict ERISA's broad protective scope.

Defendants conflate the concepts of accrued benefit and benefit accrual by asserting that this Court in *Cooper* restricted the protective scope of section 1054(b)(1)(H)(i) by interpreting ERISA's undefined phrase "benefit accrual" as limited to only those rights, benefits or features under a plan that increase a participant's accrued benefit or, in Defendants' words, reflect "a new benefit accrual." *See* Response Brief at 20. Plaintiffs disagree that this Court's opinion in *Cooper* or that of any other court (or any regulatory guidance from the Treasury Department) supports limiting ERISA's protective scope in the manner proposed by Defendants.

Indeed, as Plaintiffs explained in their opening brief, the case law (including aspects of this Court's decision in *Cooper* ignored by Defendants) as well as regulatory guidance from the Treasury Department do not attach section 1054(b)(1)(H)(i) to the protection of the accrued benefit, but rather make clear that ***4** the protective scope of section 1054(b)(1)(H)(i) extends to any right, benefit or feature under a cash balance plan that results in an increase to a participant's stated account balance. *See* Plaintiffs' Opening Brief at 13-15 (*citing Cooper v. IBM Personal Pension Plan*, 457 F.3d 636, 638-39 (7th Cir. 2006) (stating that "benefit accrual" is "a phrase dealing with inputs (either in absolute terms or as a rate of change)" and should be read "as a reference to what the employer puts in" or "imputes to the account"); *id*. at 649 (quoting 67 Fed. Reg. 76123, 76125-26 (Dec. 11, 2002) (explaining that an interpretation of "benefit accrual" as a reference to the employer's contribution to a participant's account has the support of regulations proposed by the Treasury Department, which define the phrase "benefit accrual" as " 'the additions to the participant's hypothetical account for the plan year' "); *Register v. PNC Financial Services Group, Inc.*, 477 F.3d 56, 68-69 (3d Cir. 2007) ("[C]ash balance plans define the benefit in terms of a stated account balance .... Thus, the 'benefit' as used in the phrase 'benefit accrual' refers to the stated account balance as that is how the benefit is defined by cash balance plans. Once this proposition is grasped, it becomes clear that the 'accrual' of 'benefit' in section 1054(b)(1)(H)(i) refers to the credits deposited into the participant's cash balance accounts, *i.e.*, the inputs."); 53 Fed. Reg. 11,876, 11,877 (Apr. 11, 1988) (explaining that a plan violates ERISA "if optional forms of benefits, ancillary benefits or other benefits, rights or features under a plan that are provided with respect to benefits or allocations prior to such age are not provided (on terms that are at least as favorable to employees) with respect to benefits or allocations after such age").

***5** Defendants concede that the PPA Interest Credits at issue in this case are a right, benefit or feature under the Plan that result in an increase to a participant's stated account balance. *See* Response Brief at 20 ("The credits surely add to the yearly account balance . . . ."). Defendants also concede that "[m]easuring benefit accrual by additions to an account [is] the standard way for determining age discrimination when dealing with a typical cash balance plan account . . . ." *See* Response Brief at 24 n.7.

Notwithstanding these dispositive admissions, Defendants still try to advance the notion that they established a pension plan of an undefined and legally unrecognized third type that is neither a traditional defined benefit plan nor a cash balance plan, and that even though the Prior Plan Account is actually an account balance within a cash balance plan, that for some reason ERISA does not apply to it. Defendants' argument that the Prior Plan Account and its Interest Credits are immune from scrutiny under section 1054(b)(1)(H)(i) is not supported by the case law, by the statute itself or by any pronouncement of the Treasury or the Internal Revenue Service through regulation, revenue ruling or otherwise.

The Prior Plan Account is one of the defined Accounts that forms the cash balance plan at issue in this case. (Plan § 3.1 (JA13) (defining "Accounts" as "A Participant's Cash Balance Account and Prior Plan Account.")). It has a stated account balance that increases monthly through employer contributions in the form of Interest Credits (at an annual rate of 8.5%) and Pay Credits (at an annual rate of 4%). These credits are traditional features of any cash balance plan and are ***6** governed by rules generally applicable to any defined benefit, cash balance plan. As such, the Interest Credits to a participant's Prior Plan Account fall within the protective scope of section 1054(b)(1)(H)(i) and cannot be terminated or reduced because of the attainment of any age.

2. Defendants' Remaining Arguments to Remove the PPA Interest Credits from the Protective Scope of Section 1054(b)(1)(H)G) Are Flawed and Misplaced.

Besides being premised on an incorrect interpretation of the protective scope of section 1054(b)(1)(H)(i), Defendants' ancillary arguments are also flawed and misplaced.

a. Defendants' Discussion of the Prior Plan Account and the Function of Its Interest and Pay Credits Is

Inaccurate and Misleading.

First, Defendants' characterization of the PPA Interest Credits as merely restoring an "early retirement discount" finds no support in the Plan itself. The Plan does not include a definition of "early retirement," as one would surely find in the Plan if such a benefit feature was actually part of its terms. The Plan also does not define any "special" pension status for any form of early retirement. The Plan essentially provides for distribution of vested benefits at any age following a participant's separation of employment (*i.e.*, retirement, death or termination of employment). (*See* Plan § 3.47 (JA25), § 7.2 (JA39)). Thus, in terms of pension status, the Plan only delineates between those that are actively employed and those that are not.

***7** Defendants' inability to identify an early retirement benefit feature within the actual Plan is not surprising because the early retirement discount discussed by Defendants only existed in the old traditional defined benefit plans. Once these prior benefit plans were converted to the new cash balance plan on January 1, 1997, the features of the old plans disappeared, including any early retirement benefit feature. What exists after any conversion is a cash balance plan with an opening account balance subject to all of ERISA's requirements. The fact that the Plan labels a participant's opening account balance a "Prior Plan Account" has no bearing on this conclusion. What matters is that the Prior Plan Account is an account balance and, therefore, it must comply with all requirements applicable to any defined benefit, cash balance plan.

Second, Defendants cannot escape their pre-litigation admission in the form of a sworn statement to the IRS that confirms the Plan contains no early retirement benefit formula. (JA217). Defendants only response is a footnote in their brief asserting that this sworn statement should only be considered a statement that there is no early retirement benefit formula "separate from the basic formula." Response Brief at 27 n.8. But that is not at all what this sworn statement actually says. The IRS asked for the disclosure of any "Benefit formula at early retirement age" and the Plan's response was true to the plain language of the Plan: "NO EARLY RETIREMENT BENEFIT FORMULA." (JA217).[FN1]

FN1. Defendants supplemented the summary judgment record with a compilation of documents that included this sworn statement to the IRS. (*See* Doc. 316; Doc. 322 at 103). At the hearing on the parties' motions in the district court, Plaintiffs directed the court to the Plan's sworn statement and emphasized its significance to the issues before the court. (*See* Doc. 322 at 96; Doc. 318 at 32).

***8** Third, Defendants cannot rely, as the district court erroneously did, upon the very narrow extrinsic ambiguity doctrine to erase the Plan's admission to the IRS or contravene the plain meaning of the Plan's unambiguous terms. Defendants themselves assert that the Plan's terms are unambiguous. *See* Response Brief at 17. Plaintiffs agree. The mere fact that the parties here disagree on the meaning of the Plan's terms does not create an ambiguity or open the door to admission of evidence outside the Plan's four corners. *See* *Green v. UPS Health & Welfare Package for Retired Employees*, 595 F.3d 734, 738-39 (7th Cir. 2010). In addition, the extrinsic ambiguity doctrine does not permit "self-serving testimony of one party to the contract as to what the contract, clear on its face, 'really' means, contrary to what it seems to mean." *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 546 (7th Cir. 2000); *Coffin v. Bowater, Inc.*, 501 F.3d 80, 97-99 (1st Cir. 2007) (relying on cases from the Seventh Circuit in rejecting party's attempt to invoke extrinsic ambiguity doctrine to contravene plain language of a plan).

Moreover, Defendants have never been able to explain how the extrinsic evidence of their intent underlying the challenged Plan provision is relevant to the interpretation of any term in the Plan itself. Defendants' extrinsic evidence, therefore, should not be considered. *See* Plaintiffs' Opening Brief at 16-17.

This Court in *Green* also recently emphasized the narrowness of the extrinsic ambiguity doctrine and limited the use of the doctrine to instances where the objective extrinsic evidence shows that a literal interpretation would lead to an unreasonable or absurd result. *Green*, 595 F.3d at 738-39. While Defendants make ***9** a feeble attempt to satisfy this element presumably in an effort to support their reliance on extrinsic evidence (*see* Response Brief at 34-35), their argument falls far short of the showing necessary for admission of such evidence under the extrinsic ambiguity doctrine. This Court should readily conclude there is nothing unreasonable or absurd about holding a Plan responsible for complying with the dictates of ERISA and ensuring plan participants receive a calculation of their benefits that fully complies with those aspects of plan design that ERISA makes immutable. *See Fry v. Exelon Corp. Cash Balance Pension Plan*, 571 F.3d 644, 646 (7th Cir. 2009) ("Employers are entitled to vary by contract those aspects of pension plans ERISA makes variable, and they may act in their own interest when doing so, just as participants are entitled to the benefit of terms . . . that the law makes immutable.").[FN2]

FN2. Defendants' "unwarranted windfall" defense is no defense at all. While it is certainly true that benefits would be higher for participants if the Plan complies with the law, such additional benefits can in no way be considered a "windfall." Faced with a similar argument to that advanced by Defendants here, this Court responded:

Employers are not required to provide pension benefits, but when they do, their plans must comply with ERISA, and the promises they make can in no way be considered mere gratuities .....

The Plan cannot avoid that which is dictated by the terms of ERISA. While ERISA generally allows each plan to select the monetary amount of benefits provided, it remains a paternalistic statute designed to restrict the freedom of contract.

Williams v. Rohm & Haas Pension Plan, 497 F.3d 710, 714 (7th Cir. 2007).

***10** Fourth, Plaintiffs' claims in this case are based on a challenge to the clear and unambiguous terms set forth in the Plan document itself. The Plan at issue in this case adopted and utilized generally accepted terminology for describing its features, including the Plan's specific use of the term "Interest Credits" to refer to the monthly increase at an annual rate of 8.5% to the Prior Plan Account balance. The rules applicable to cash balance plans, including the requirement that the balance in a cash balance account must be projected with interest credits to normal retirement age to avoid an impermissive forfeiture (*see* Notice 96-8), were presumably known at the time Defendants converted their prior traditional defined benefit plans to the new cash balance plan at issue in this case. To the extent Defendants now claim they adopted a plan design that did not affect their underlying intent, Defendants should be looking to their plan advisors, not this Court, for relief from the liability associated with having adopted an unlawful plan provision. Also, the fact that Defendants can now articulate an alternative plan design that may achieve their stated objective in a legally defensible manner (*see* Response Brief at 30-32) is completely irrelevant to whether Defendants' Plan, as written, complies with ERISA and merely underscores the strength of Defendants' professional malpractice claim against the Plan's architects.[FN3]

FN3. Indeed, Defendants' own proffered ERISA expert has never seen or even heard of a cash balance plan that terminates any type of interest credit in the same manner as this Plan. (*See* Plaintiffs' Opening Brief at 8).

Finally, it is Defendants, not Plaintiffs, that are mischaracterizing the Prior Plan Account and distorting the function of the PPA's Interest and Pay Credits. Defendants' repeated characterization of the Prior Plan Account as merely ***11** preserving the age-65 benefits that employees had already earned under the prior benefit plans at the time of the conversion is inaccurate and contrary to the Plan's terms. The Prior Plan Account is not a frozen accrued benefit. For example, the Pay Credits to the Prior Plan Account (at an annual rate of 4%) are conditioned on continued employment and, therefore, cannot be part of a participant's accrued benefit calculated as of the January 1, 1997 conversion date. Any discounting used to calculate the supposed accrued benefit as of January 1, 1997 simply does not apply to these Pay Credits. The Pay Credits are an additional benefit earned for each subsequent month of employment after January 1, 1997, and represent, using Defendants' terminology, a "new benefit accrual." *See Eaton v. Onan Corp.*, 117 F. Supp. 2d 812, 832 (S.D. Ind. 2000) (explaining that a credit to a cash balance plan that is conditioned on continued employment accrues year by year as the participant continues to work).

Moreover, the Interest Credits to the Prior Plan Account (at an annual rate of 8.5%) apply to the total balance of the Prior Plan Account on the first day of each month, plus the Pay Credit for that month. The portion of the Interest Credit attributable to the Pay Credit earned each month, like the Pay Credit itself, constitutes a new benefit accrual as it also accrues month to month as the participant continues to work. *See Eaton*, 117 F. Supp. 2d at 832.

***12** For illustration purposes, consider a plan participant (like Defendants' Mary Doe example) who was age 50 at the time of conversion on January 1, 1997, with a Prior Plan Account opening balance of $83,131 (or the equivalent of a $125,000 "accrued benefit," at least according to the Plan's conversion methodology)[FN4] discounted by 8.5% for five years from age 55 to the participant's age of 50 at the time of conversion. Assuming this participant works from age 50 to age 55, the Pay Credits (including the Interest Credits on the Pay Credits) will increase the balance of the participant's Prior Plan Account by almost $26,900. The $26,900 in "new benefit accrual" attributed to the Pay Credits consists of $22,800 from the actual Pay Credits and $4,100 from the Interest Credits on the Pay Credits.

FN4. Contrary to Defendants' assertion, Plaintiffs have never conceded that the Plan's calculation of the "accrued benefit" at the time of conversion properly preserved the value of each participant's accrued benefit under the prior plans. (Doc. 294-2 at 16-19). The 125 factor used by the Plan to convert existing accrued benefits on January 1, 1997 is based on an interest rate of 8.5%, a very high rate at that time. The IRC 417(e) lump sum rate (*i.e.*, the 30-year Treasury Rate) available at the time of conversion was only 6.81% (October, 1996).

As explained in Plaintiffs' opening brief (and not disputed by Defendants), if this Plan participant continued to work after age 55, Pay Credits would continue to accrue and be added each month to the participant's Prior Plan Account, but solely because the participant attains age 55, the Interest Credits on the Pay Credits cease.

As the above discussion and illustration establish, it is inaccurate under the Plan's plain terms for Defendants to assert that the Prior Plan Account merely represents a frozen accrued benefit or that the PPA Interest Credits do nothing more than reverse an early retirement discount (even assuming the Plan actually ***13** includes an early retirement discount - which it does not). The Pay Credits, and Interest Credits on the Pay Credits, reflect the fiction of Defendants' Mary Doe example (*see* Response Brief at 21) and present further reason why Defendants cannot wriggle free of the plain language of the Plan by parsing the Prior Plan Account.

b. The Eighth Circuit's Decision in *Atkins* Does Not Preclude Scrutiny of the Plan's PPA Interest Credits.

Contrary to Defendants' assertion, the Eighth Circuit's decision in *Atkins v. Northwest Airlines, Inc.*, 967 F.2d 1197 (8th Cir. 1992), does not preclude scrutiny of the Prior Plan Account's Interest Credits for compliance with ERISA's requirement that a plan not cease or reduce an employee's benefit accrual because of the attainment of any age. In fact, *Atkins* says nothing about whether an interest credit that increases an account balance within a cash balance plan is a "benefit accrual" within the meaning of section 1054(b)(1)(H)(i). *Atkins* also does not address the effect of the Plan's ongoing accrual of Pay Credits during a participant's continued employment and the Interest Credits on those Pay Credits, which cease under the Plan's terms solely because the participant attains age 55.

The decision in *Atkins* deals with the "because of . . . age" element of the factually distinguishable claim at issue in that case and has no application here. *See* Plaintiffs' Opening Brief at 27-29. Ultimately, the Eighth Circuit's unremarkable decision in *Atkins* turned on that case's traditional defined benefit plan's twenty-five year service cap and an undisputed and express early retirement subsidy that ceased at the plan's normal retirement age, both of which federal law ***14** permits and neither of which is present in the cash balance plan at issue in the case before this Court.

This Court should reject Defendants' attempt to shield the PPA Interest Credits from scrutiny and proceed to declare the Plan unlawful for explicitly ceasing these Interest Credits solely because a participant attains the age of 55.

B. The PPA Interest Credits Cease Under the Plan's Plain Terms Solely Because a Participant Attains the Age of 55.

Once this Court concludes that the Interest Credits to a participant's Prior Plan Account must be scrutinized for compliance with section 1054(b)(1)(H)(i), the Plan's illegality is conclusively demonstrated by the facial nature of the Plan's exclusive use of the attainment of a specified age (*i.e.*, because "the Participant attains age 55") to terminate the PPA Interest Credits. Because the Plan on its face defines a participant's eligibility for PPA Interest Credits solely in terms of the participant's attainment of a specified age, the discrimination is facial and Defendants' reasons for adopting the challenged Plan provision are irrelevant to the Plan's legality. *See* Plaintiffs' Opening Brief at 20-24.

Notwithstanding the Plan's plain language, Defendants argue that the Plan actually terminates the PPA Interest Credits because of "pension status," not age. Defendants' argument fails under scrutiny.

First, Defendants' so-called "pension status" argument finds no support in the Plan itself. Essentially, the only pension status under the Plan is one based on whether or not there has been a separation of employment (regardless of age). If a separation of employment occurs at any age (whether by retirement, death or ***15** termination), a participant is entitled to a distribution of his or her vested benefits. (*See* Plan § 3.47 (JA25), § 7.2 (JA39)). There is no "special" pension status under the Plan for "early retirement" because the Plan does not actually include an early retirement benefit feature. Thus, Defendants' attempt to define a "pension status" based on a non-existent early retirement benefit feature fails as a matter of law.

Accordingly, there is no "pension status" under the Plan that correlates with any age to which Defendants can point in their effort to bring this case within the Supreme Court's *Kentucky Retirement* exception or the analysis employed by the Eighth Circuit in *Atkins*. This case remains governed by the well-established traditional rule that declares unlawful any policy or provision that on its face discriminates on the basis of age (or other protected trait) and finds the employer's reasons for adopting the challenged policy or provision to be irrelevant to its legality. *See* Plaintiffs' Opening Brief at 23-24.

Second, even if Defendants were permitted to maintain their "pension status" argument through extrinsic evidence - which they should not for the reasons outlined above - Defendants remain unable to defend the aspect of the Prior Plan Account's operation that ceases the accrual of Interest Credits on the Pay Credits solely because "the Participant attains age 55." The portion of the Interest Credit attributable to the Pay Credit earned each month, like the Pay Credit itself, constitutes a new benefit accrual as it also accrues month to month as the participant continues to work. *See Eaton*, 117 F. Supp. 2d at 832. There is no pension status or other basis to which Defendants can point to defend the ***16** termination of this benefit accrual solely because "the Participant attains age 55." Thus, at a minimum, this aspect of the Prior Plan Account's operation is unlawful under ERISA.

C. Section 1054(b)(1)(H)(v) Does Not Foreclose Plaintiffs' Claims Because There Is No Early Retirement Subsidy to Disregard.

Defendants' reliance on subsection (v) of section 1054(b)(1)(H) is also misplaced. Subsection (v), much like the Eighth Circuit's decision in *Atkins*, unremarkably confirms that ERISA does not require an accrued benefit to include the value of early retirement subsidies. Defendants eliminated any early retirement subsidy as of January 1, 1997 (the effective date of the conversion of their prior traditional defined benefit plans to the cash balance plan at issue in this case). Thus, there is no early retirement subsidy to disregard under subsection (v) that would impact the analysis of whether the Plan unlawfully terminates the PPA Interest Credits because of the attainment of any age in violation of section 1054(b)(1)(H)(i).

Also fatal to Defendants' subsection (v) argument is Defendants' inability to establish through any supporting record citation the validity of the underlying discount rate assumption for the supposed "illustration" upon which Defendants' argument rests. Defendants bury in a footnote the dispositive admission that their subsection (v) argument is based on an undisclosed statutory discount rate from February, 2009. There is no basis in the Plan or elsewhere in the record to validate Defendants' arbitrarily selected and self-serving use of apparently one of multiple February, 2009 IRC § 417(e) segment discount rates to determine the actuarial ***17** equivalence of Mary Doe's or any actual participant's normal retirement benefit at any given age.

Defendants also have not established as a matter of undisputed fact that their subsection (v) illustration and corresponding argument is even representative of the participants that comprise the certified classes. Indeed, Defendants' subsection (v) illustration fails to reflect the increase in a participant's accrued benefit from the accrual of Pay Credits and Interest Credits on those Pay Credits for those participants that continued to be employed after January 1, 1997.

Therefore, in addition to being premised on a non-existent early retirement subsidy, which alone is fatal, Defendants' subsection (v) argument rests on an unsupported rate assumption and otherwise fails to establish as a matter of undisputed fact a valid defense to the claim of any actual plan participant within the certified classes.

Moreover, even if Defendants' subsection (v) argument had some merit - which it does not - this argument has no application to Plaintiffs' challenge to that aspect of the Prior Plan Account's operation that ceases the ongoing accrual of Interest Credits on the Pay Credits during a participant's continued employment solely because "the Participant attains age 55." This aspect of the Plan's operation has nothing to do with any alleged "early retirement subsidy," which renders subsection (v) irrelevant to that aspect of Plaintiffs' claims.

***18 D. The Plan's Failure to Project the PPA Interest Credits to Normal Retirement Age Also Results in an Impermissive Forfeiture.**

Defendants assert that the impermissive forfeiture aspect of Plaintiffs' claims lacks sufficient explanation. Defendants (and this Court) need to look no further than the operation of the Plan's Cash Balance Account for an ideal illustration of how the Plan's Prior Plan Account runs afoul of ERISA's requirements.

Under the Plan's express terms, Interest Credits on a participant's Cash Balance Account continue each month prior to a participant's Annuity Starting Date and are projected through Normal Retirement Age (which the Plan defines as age 65) when calculating a participant's Accrued Benefit. (*See* Plan §§ 6.3(d) (JA37), 3.2 (JA13)). The operation of the Plan's Cash Balance Account thus complies with ERISA's requirements that (1) a benefit accrual not cease because of the attainment of any age; and (2) in determining the accrued benefit of a participant under a cash balance plan at any time prior to normal retirement age, the balance in the cash balance plan must be projected with interest credits to normal retirement age to avoid an impermissive forfeiture.

In stark contrast, Interest Credits on a participant's Prior Plan Account cease when a participant attains age 55 and are only projected through age 55 (as opposed to the Plan's normal retirement age of 65) when calculating a participant's Accrued Benefit. (*See* Plan §§ 6.2(d) (JA34), 3.2 (JA13)).

To comply with ERISA's requirements, the Prior Plan Account's age 55 cut-off must be eliminated and the Plan reformed to provide that the PPA Interest Credits continue each month prior to a participant's Annuity Starting Date and are ***19** projected to Normal Retirement Age (*i.e.*, age 65) when calculating a participant's Accrued Benefit to avoid an impermissive forfeiture. Class members would then be entitled to a recalculation of their benefits based on the lawful operation of the Prior Plan Account.

II. Plaintiffs Timely Filed Their Claims Within the Applicable Ten-Year Statute of Limitations.

There is no merit to Defendants' statute of limitations argument. Even assuming Defendants' analysis regarding when the claims accrued is correct, Plaintiffs' claims were timely filed within the applicable ten-year statute of limitations provided under Missouri law for all actions upon written contracts for the payment of money. Mo. Rev. Stat. § 516.110(1) ("Within ten years: (1) An action upon any writing . . . for the payment of money or property").

Notwithstanding the clear applicability of this ten-year limitations period (as confirmed by a decision of the en banc panel of the Eighth Circuit, which Defendants fail to even mention), Defendants ask this Court to radically depart from settled law in this area and apply the shorter two-year limitations period from the Missouri Human Rights Act or Missouri's alternative five-year limitations period applicable to those limited contract actions not otherwise governed by Missouri's ten-year limitations period. Defendants do not cite a single case in which any court has ever applied in an ERISA action either of the shorter limitations periods that Defendants urge upon this Court.

***20 A. Plaintiffs' Claims Are Governed by Missouri's Ten-Year Limitations Period Applicable to All Actions for Breach of a Written Contract for the Payment of Money.**

As set forth in Plaintiffs' Consolidated Class Action Complaint and admitted by Defendants in their Answers, Plaintiffs' claims at issue on this appeal were brought pursuant to 29 U.S.C. § 1132(a)(3) and 29 U.S.C. § 1132(a)(1)(B). (*See* Doc. 139 at ¶¶ 21-24, 69-94; Doc. 243, Doc. 244, Doc. 151 at H 21-24). The essence of Plaintiffs' claims is a suit for additional pension benefits (*i.e.*, the payment of money) arising from a contract action that challenges whether the written Plan complies with the "plan requirements" enumerated in ERISA, 29 U.S.C. § 1054(b), including the requirement that a participant's benefit accrual not cease or be reduced under the Plan because of the attainment of any age, 29 U.S.C. § 1054(b)(1)(H)(i). In terms of the relief requested, Plaintiffs allege they are entitled to: (1) additional pension benefits that mathematically flow from reformation of the Plan to comply with ERISA's plan requirements; and/or (2) a judgment clarifying and recalculating the benefits that participants should have been paid had the Plan complied with ERISA. (*See* Doc. 139 at ¶¶ 21-24, 69-94 & pp. 36-38).

Where, as here, the essence of the action is a suit for benefits under ERISA, the Eighth Circuit has held that the suit should be characterized as a contract action and governed by Missouri's ten-year statute of limitations applicable to all actions for breach of a written contract for the payment of money. *Harris v. The Epoch Group, LC*, 357 F.3d 822, 825 (8th Cir. 2004) (holding that "the en banc court has already done our work" in "deciding the ten-year period under ***21**Mo. Rev. Stat. 516.110(1) is the most analogous statute of limitations under Missouri law for a claim for ERISA benefits," citing *Johnson v. State Mut. Life Assur. Co.*, 942 F.2d 1260, 1263-66 (8th Cir. 1991) (en banc) (holding that a suit for benefits under ERISA, 29 U.S.C. § 1132(a)(1)(B) should be characterized as a contract action and governed by Missouri's ten-year statue of limitations)).

The Eighth Circuit's characterization of a claim for benefits under ERISA as a contract action governed by Missouri's ten-year limitations period is consistent with this Circuit's characterization of these types of ERISA claims for purposes of selecting the limitations period applicable under Illinois law. *See, e.g.*, *Daill v. Sheet Metal Workers' Local 73 Pension Fund*, 100 F.3d 62, 65 (7th Cir. 1996) (holding that for cases filed under 29 U.S.C. § 1132(a)(1)(B), "the court applies the most analogous state statute of limitations. . . . Both parties are correct that the most analogous Illinois statute limitation is the 10-year limitations period for suits pertaining to written contracts.").

This Court should follow the settled law in this area and conclude that Plaintiffs' claims for benefits under ERISA are governed by Missouri's ten-year limitations period applicable to all actions upon written contracts for the payment of money.

B. Defendants Cannot Avoid Application of Missouri's Ten-Year Limitations Period to Plaintiffs' Claims.

This Court should reject Defendants' invitation to displace settled law in this area and apply the shorter two-year limitations period from the Missouri Human Rights Act or Missouri's alternative five-year limitations period applicable to those ***22** limited contract actions not otherwise governed by Missouri's ten-year limitations period. The two-year and five-year limitations periods identified by Defendants have no application to Plaintiffs' claims.

Defendants' argument that the Missouri Human Rights Act's two-year limitations period should apply to Plaintiffs' claims is directly at odds with established law from the Eighth Circuit and elsewhere. In fact, a recent district court decision from Connecticut aptly illustrates the flawed nature of Defendants' argument. In *Amara v. CIGNA Corp.*, 534 F. Supp. 2d 288 (D. Conn. 2008), the plaintiffs' claims focused on whether "CIGNA's cash balance plan discriminates against workers on the basis of age." *Id*. at 312. Just like Defendants here, the defendant in *Amara* seized upon the word "age" and asked the court to apply Connecticut's 180-day statute of limitations for age discrimination. *Id*. The court rejected the defendant's arguments, stating: "Indeed, colleagues in this District have expressly rejected both Connecticut's 180-day statute of limitations for age discrimination claims and its two-year statute of limitations for actions to collect on unpaid wages in favor of the six-year limit for written contracts." *Id*. at 312. Despite canvassing decisions from across the country, the court found no support for the defendants' contention that Connecticut's age discrimination limitation period should apply to the plaintiffs' claims. *Id*. at 313. Ultimately, the court refused to "depart from the considerable weight of authority which holds that ERISA actions to recover unpaid employee welfare benefits should be governed by state statutes of limitations governing contract actions." *Id*. at 312. This Court should follow ***23** established law in this area and reject Defendants' effort to apply a limitations period from the Missouri Human Rights Act to Plaintiffs' claims.

Defendants' argument that Missouri's five-year limitation period applicable to those limited contract actions not otherwise governed by Missouri's ten-year limitations period is also misguided.[FN5] Once again, Defendants' argument is directly at odds with *Harris* and *Johnson*, which provide that Missouri's ten-year limitations period governs a plaintiff's claims for ERISA benefits. Tellingly, Defendants do not even mention (let alone try to distinguish) the Eighth Circuit's settled resolution of this question. Moreover, Defendants have not identified a single case that has ever characterized an ERISA claim for benefits as an action upon a contract implied by law subject to Missouri's five-year limitations period.

> FN5. *Compare* Mo. Rev. Stat. § 516.110(1) ("Within ten years: (1) An action upon any writing, whether sealed or unsealed, for the payment of money or property . . . ."), *with* Mo. Rev. Stat. § 516.120(1) ("Within five years: (1) All actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 516.110, and except upon judgments or decrees of a court of record, and except where a different time is herein limited . . . .").

Defendants' citation to this Court's decision in *May Department Stores Co. v. Federal Ins. Co.*, 305 F.3d 597 (7th Cir. 2002) does nothing to improve their argument. In fact, the reasoning employed by this Court in *May* supports Plaintiffs' characterization of their claims as seeking benefits under the Plan subject to Missouri's ten-year limitations period applicable to all actions upon written contracts for the payment of money.

The issue in *May* was whether there was insurance coverage for the benefits May agreed to pay in settlement of two ERISA class actions brought on behalf of ***24** plan participants. *Id*. at 598. The policy at issue excluded coverage for any liability that "constitutes benefits due or to become due under the terms of [May's pension plan]." *Id*. at 600. May argued that the policy's exclusion did not apply because the legal basis of the class action claims against May was not language in the plan itself but provisions of ERISA. *Id*. at 600-01. This Court rejected May's attempt to separate the plan's terms from the requirements of ERISA in characterizing the class action claims upon which liability was based. *Id*. at 601. Just like it did in *May*, this Court should reject Defendants' attempt here to separate the Plan's terms from the requirements of ERISA in characterizing Plaintiffs' claims for benefits.

C. Plaintiffs' Claims Were Timely Filed.

This Court should follow settled law in this area and hold that Plaintiffs' claims for ERISA benefits are governed by Missouri's ten-year statute of limitations for all actions upon written contracts for the payment of money. Once the ten-year limitations period is held to govern, there is no dispute that Plaintiffs' claims were timely filed. Defendants concede that the earliest possible accrual of Plaintiffs' claims occurred sometime in "mid-1996" or January 1, 1997. *See* Response Brief at 11, 47. Therefore, by Defendants' own calculation, Plaintiffs had until at least mid-2006 (or January 1, 2007) to file their claims under Missouri's ten-year limitations period. As Defendants' acknowledge, Plaintiffs' complaint was filed on June 23, 2004 against Monsanto, on October 12, 2005 against Solutia, and on January 3, 2006 against Pharmacia. *See* Response Brief at 4. Thus, even assuming Defendants' accrual analysis is correct, Plaintiffs' claims were timely filed under the ***25** applicable ten-year limitations period.

Contrary to Defendants' unsupported claim (see Response Brief at 47), Plaintiffs have never conceded that Defendants' analysis regarding when the claims accrued is correct. Rather, Plaintiffs have argued that Defendants' own accrual analysis confirms the timeliness of Plaintiffs' claims under the applicable ten-year limitations period. In any event, Plaintiffs do assert (just as Plaintiffs did in the district court, see Doc. 322 at 87-88) that Defendants' accrual analysis (which focuses on the date on which Defendants began providing notice to employees in "mid-1996" concerning the plan conversion effective January 1, 1997) is incorrect.

For instance, the Monsanto Defendants argued in the district court that Plaintiffs' claims were not ripe when filed because Plaintiffs had not exhausted their administrative remedies available under the Plan. (Doc. 11; Doc. 58). Pursuant to an agreement of the parties and upon order of the district court (Doc. 81; Doc. 82), Plaintiffs then pursued the Plan's administrative remedies, which did not result in a final determination by the Plan until November 8, 2005. (Doc. 290-19 at 324; Doc. 290-19 at 301-10). Thus, Plaintiffs' claims against the Monsanto Defendants did not accrue until November 8, 2005, and are timely under any limitations period identified by the parties. *See, e.g., Daill,* 100 F.3d at 66 (holding that claim did not accrue until final denial of administrative appeal); *Laurenzano v. Blue Cross & Blue Shield,* 134 F. Supp. 2d 189, 208-11 (D. Mass. 2001) ("In summary, under federal law, a cause of action under ERISA § 502(a)(3) [29 U.S.C. § 1132(a)(3)] to recalculate benefits accrues upon distribution of the benefits, unless ***26** the participant chooses to seek internal remedies, in which case the cause of action accrues upon exhaustion of the internal remedies.").

With respect to the claims against the Pharmacia and Solutia Defendants (which did not involve the exhaustion of administrative remedies), Plaintiffs' claims did not accrue until, at the earliest, the date of each participant's distribution of benefits (or denial of benefits). *See Jenkins v. Local 705,* 713 F.2d 247, 254 (7th Cir. 1983) ("A cause of action under Section 502 of ERISA, 29 U.S.C. § 1132, arose when the trustees of the pension plan denied applicant's benefit application."); *Laurenzano, supra*. Defendants have no evidence in this record of any benefit distribution dates (or denial dates) sufficient to establish a viable statute of limitations defense under this accrual analysis for any individual class member.

Ultimately, it is not necessary for this Court to resolve the parties' competing views on the accrual of Plaintiffs' claims because, as noted above, even under Defendants' accrual analysis, all of Plaintiffs' claims were timely filed within the applicable ten-year limitations period.

CONCLUSION

Plaintiffs respectfully urge this Court to rule that the district court erred in granting summary judgment to Defendants and in denying summary judgment to Plaintiffs. Accordingly, the district court's judgment in favor of Defendants on Plaintiffs' Age 55 Cut-Off claims (Counts I, II and III of the Consolidated Class Action Complaint) should be reversed, and judgment entered in favor of Plaintiffs on those claims.

Grant M. WALKER, individually and on behalf of all other similarly situated, et al., Plaintiffs - Appellants, v. MONSANTO COMPANY PENSION PLAN, et al., Defendants - Appellees. Glynn Davis, individually and on behalf of all other similarly situated, et al., Plaintiffs - Appellants, v. Solutia Incorporated Employees Pension Plan, Defendant - Appellee. Fred Donaldson, individually and on behalf of all other similarly situated, et al., Plaintiffs - Appellants,
2010 WL 1789186 (C.A.7) (Appellate Brief)

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