IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONNA C. RICHARDS, Plaintiff, v. FLEETBOSTON FINANCIAL CORP. and the FLEETBOSTON FINANCIAL PENSION PLAN, Defendants.	)))))))))))	CASE NO.: 3:04-CV-1638 (JCH) MARCH 28, 2005

REPLY BRIEF OF DEFENDANTS FLEETBOSTON FINANCIAL CORPORATION AND FLEETBOSTON FINANCIAL PENSION PLAN IN SUPPORT OF THEIR MOTION TO DISMISS

TABLE OF CONTENTS

I. COUNT I FAILS TO STATE A CLAIM UNDER ERISA § 204(b)(1)(H)........................3

A. Plaintiff Has Presented No Basis To Reject The Overwhelming Case Law And Legislative History Holding That ERISA § 204(b)(1)(H) Does Not Apply Before Normal Retirement Age. 3

B. Plaintiff's Reliance On Other ERISA Provisions And Abandoned Regulations Is Misplaced. 8

II. COUNT I FAILS TO STATE A CLAIM FOR THE ADDITIONAL REASON THAT THE FLEETBOSTON PLAN'S CASH BALANCE BENEFIT FORMULA DOES NOT DISCRIMINATE ON THE BASIS OF AGE. 9

A. Esden Does Not Support Plaintiff's Position. 9

B. This Court Should Reject The Cooper Decision And Follow The Well-Reasoned Decisions Of The Courts In Eaton And Tootle. 10

C. Plaintiff's Position Makes No Sense When Applied To The Rate Of Benefit Accrual For Plan Participants Beyond Normal Retirement Age. 12

D. The Other ERISA Provisions Plaintiff Cites Do Not Support Her Position. 13

III. COUNTS II THROUGH VI FAIL TO STATE A CLAIM. 14

A. Counts II Through VI Must Be Dismissed Because Plaintiff Has Failed To Allege Exhaustion Of Her Administrative Remedies. 16

B. Counts IV-V Fail To Plead Prejudice or Likely Harm And Should be Dismissed. 17

C. Count VI Should Be Dismissed Because Plaintiff Lacks Standing To Sue On Behalf Of Retired Employees And Has Not Alleged Detrimental Reliance. 18

D. Plaintiff's ERISA § 502(a)(3) Claims For Equitable Relief In Counts II, IV-V Fail. 19

IV. PLAINTIFF'S ERISA § 502(a)(1)(B) CLAIMS FOR BENEFITS MAY NOT BE BROUGHT AGAINST THE CORPORATE EMPLOYER. 19

TABLE OF AUTHORITIES

CASES **Page Nos.**

Beharry v. Ashcroft, 329 F.3d 51 (2d Cir. 2003) 17

Brody v. Enhance Reinsurance Co.,
No. 00 Civ. 9660, 2003 U.S. Dist. LEXIS 3785 (S.D.N.Y. March 17, 2003) 15

Buckley v. Valeo, 424 U.S. 1 (1976) 7

Burke v. Kodak Retirement Income Plan, 336 F.3d 103 (2d Cir. 2003) 17

Cooper v. IBM Personal Pension Plan, 274 F. Supp. 2d 1010 (S.D. Ill. 2003) 2, 10-11

Corcoran v. Bell Atlantic, No. Civ. A 97-510, 1997 WL 602859 (E.D. Pa. Sept. 23, 1997),
aff'd, 159 F.3d 1350 (3d Cir. 1998) 15

Crocco v. Xerox Corp., 137 F.3d 105 (2d Cir. 1998) 20

DeVito v. Local 553 Pension Fund,
No. 02 Civ. 4686, 2005 WL 167590 (S.D.N.Y. Jan. 26, 2005) 17

Devlin v. Empire Blue Cross and Blue Shield, 274 F.3d 76 (2d Cir. 2001) 19

Disabled in Action of Metropolitan New York v. Hammons,
202 F. 3d 110 (2d Cir. 2000) 7

Eaton v. Onan Corp., 117 F. Supp. 2d 812 (S.D. Ind. 2000) 1-4, 7, 9-13

Engers v. AT&T Corp.,
No. 98-3660, 2001 U.S. Dist. LEXIS 25889 (D.N.J. June 6, 2001) 1, 3-4, 8

Esden v. Bank of Boston, 229 F. 3d 154 (2d Cir. 2000) 2, 9-10, 15

Flanigan v. General Electric Co., 93 F. Supp. 2d 236 (D. Conn. 2000) 17

Gerosa v. Savasta & Co., 329 F.3d 317 (2d Cir. 2003) 19

Glaxo Operations v. Quigg, 894 F.2d 392 (Fed. Cir. 1990) 7

Greenhalgh v. Putnam Savings Bank, 140 F. 3d 427 (2d Cir. 1998) 2-4

Greifenberger v. Hartford Life Ins. Co.,
No. 03 Civ. 3238, 2003 WL 22990093 (S.D.N.Y. Dec. 18, 2003) 16

Guiles v. Sea-Land Servs., 820 F. Supp. 744 (S.D.N.Y. 1993) 7

Hoffman v. Empire Blue Cross and Blue Shield,
No. 96 Civ. 5448, 1999 WL 782518 (S.D.N.Y. Sept. 30, 1999) 16-17

In re The Caldor Corp., 303 F.3d 161 (2d Cir. 2002) 7

Kennedy v. Empire Blue Cross and Blue Shield, 989 F.2d 588 (2d Cir. 1993) 17

Kross v. Western Electric Co., Inc., 701 F.2d 1238 (7th Cir. 1983) 17

Leonelli v. Pennwalt Corp., 887 F.2d 1195 (2d Cir. 1989) 16

Levin v. Raynor, No. 03 Civ. 4697, 2004 WL 2937825 (S.D.N.Y. Dec. 17, 2004) 18

Lyons v. Georgia Pacific Corp., 221 F.3d 1235 (11th Cir. 2000) 15

Mason v. Continental Group, Inc., 763 F.2d 1219 (11th Cir. 1985) 17

Mullins v. Pfizer, Inc., 23 F.3d 663 (2d. Cir. 1994) 18

Panaras v. Liquid Carbonic Indus. Corp., 74 F.3d 786 (7th Cir. 1996) 18

Railway Labor Executives Ass'n v. Interstate Commerce Comm'n,
735 F. 2d 691 (2d Cir. 1984) 7

The Ravenswood Group v. Fairmont Assoc., 736 F. Supp. 1285 (S.D.N.Y. 1990) 9

Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) 18

Tedori v. United States, 211 F. 3d 488 (9th Cir. 2000) 9

Tootle v. ARINC, Inc., 222 F.R.D. 88 (D. Md. 2004) 1-4, 8-13

STATUTES & REGLATIONS

ERISA § 204(b)(1)(A)-(C), 29 U.S.C. § 1054(b)(1)(A)-(C) 5, 11, 13, 15

ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H) .... passim

ERISA § 204(h), 29 U.S.C. § 1054(h) 13, 17

ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) 16, 19-20

ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) 17, 19

Pub. L. No. 99-272, 100 Stat. 82 (1986) 16

Pub. L. No. 107-16, 115 Stat. 38 (2001) 16

26 C.F.R. § 1.401(a)(4)-8(c) 12

26 C.F.R. § 1.401(a)(4)-13(c) 15

26 C.F.R. § 1.401(a)(17)-1(e)(5), *Example 1* 15

26 C.F.R. § 1.411(d)-6T, Q&A-10, Q&A-5 16

52 Fed. Reg. 45,360 (Nov. 27, 1987) 9

56 Fed. Reg. 47,524 (Sept. 19, 1991) 14

68 Fed. Reg. 17,277 (Q&A 6(b) and 8) (Apr. 9, 2003) (codified at 26 C.F.R. § 54.4980F-1) ... 14

Treas. Reg. §§ 1.411(b)-1 5

H.R. Conf. Rep. No. 99-1012 (1986), reprinted in 1986 U.S.C.C.A.N. 3868 .... 5-7, 12

S. Rep. No. 98-575 (1984), reprinted in 1984 U.S.C.C.A.N. 2547 15

132 Cong. Rec. H 11437 (daily ed. Oct. 17, 1986) 5, 7

Rev. Rul. 81-12, 1981-1 C.B. 228 15

IRS Announcement 2003-22, I.R.B. 2003-17 (Apr. 7, 2003) 9

IRS Announcement 2004-57, I.R.B. 2004-27 (June 15, 2004) 9

OTHER CITATIONS

Proposed Treas. Reg. §1.411(b)-2(b)(iii), 67 Fed. Reg. 76,123 (Dec. 11, 2002) 11

Shea, Francese, & Newman, Age Discrimination in Cash Balance Plans: Another View,
19 VA. TAX REV. 763, 768-773 (2000) 12

Plaintiff's contention that the FleetBoston Plan's cash balance benefit formula violates ERISA § 204(b)(1)(H)'s prohibition against age discrimination does not state a claim for two independent reasons. First, § 204(b)(1)(H) protects only participants who work beyond normal retirement age. The legislative history makes clear that § 204(b)(1)(H) applies only to such participants and that younger participants are already protected by ERISA's existing benefit accrual rules. Three courts have also so concluded. See Eaton v. Onan Corp., 117 F. Supp. 2d 812, 832-33 (S.D. Ind. 2000); Tootle v. ARINC, Inc., 222 F.R.D. 88, 94 (D. Md. 2004); Engers v. AT&T Corp., No. 98-3660, 2001 U.S. Dist. LEXIS 25889, at *10 (D.N.J. June 6, 2001).

Second, even if § 204(b)(1)(H) did apply to participants who had not reached normal retirement age, the FleetBoston Plan's cash balance benefit formula is not age discriminatory as a matter of law. Ms. Richards does not dispute that the Plan actually increases the pay credits to an employee's cash balance account based on additional years of age and service (Cmplt. ¶ 25), and that the rate at which interest is credited to cash balance accounts is the same for all participants, regardless of age. Ms. Richards nevertheless claims that because an amount credited to a younger worker has more years to earn interest before the worker's retirement than an amount credited to an older worker due to the time value of money, the Plan discriminates against the older worker. Both the Tootle and Eaton courts, however, rejected that theory regarding the interpretation of the phrase "rate of benefit accrual" in § 204(b)(1)(H).

Instead of addressing that case law and compelling legislative history, Ms. Richards attempts to deflect attention from it. She devotes substantial portions of her brief ("Pl. Br.") to mischaracterizing the FleetBoston Plan and cash balance plans generally, as well as the reasons that companies adopt such plans. For example, she ignores the fact that the FleetBoston Plan favors older employees by increasing their pay credits. Ms. Richards also impugns employers' motives in adopting cash balance plans, ignoring the many benefits to participants that contributed to FleetBoston's and other employers' decisions to adopt such plans.

Even Ms. Richards' attempts to address the substance of Defendants' arguments are simply distractions. Because she cannot refute the authority that holds that § 204(b)(1)(H) applies only to participants who have reached normal retirement age, she misstates the holding of Greenhalgh v. Putnam Savings Bank, 140 F. 3d 427 (2d Cir. 1998), to create the false impression that the Second Circuit would support her position. The Second Circuit, however, has not addressed the application of § 204(b)(1)(H) to participants under normal retirement age, and Ms. Richard's prediction as to how the Second Circuit might in the future rule on that issue is simply unfounded speculation. Ms. Richards also attempts to dismiss the clear expressions of legislative intent as a "vestige," even though the Conference Report, issued four days before the statute was enacted, clearly supports Defendants' position. Ms. Richards' other arguments, such as her reliance on dormant, proposed regulations, cannot save her age discrimination claim.

In addition, the Tootle and Eaton courts provided numerous reasons why, even if § 204(b)(1)(H) were to apply prior to normal retirement age, Ms. Richards' "time value of money" age discrimination theory does not state a claim. Rather than respond, Ms. Richards again distorts Second Circuit authority. Esden v. Bank of Boston, 229 F. 3d 154 (2d Cir. 2000), does not address § 204(b)(1)(H) and thus in no way indicates, as she argues, that the Second Circuit would reject the later-decided Tootle and Eaton decisions. Because the only decision that supports Ms. Richard's position, Cooper v. IBM Personal Pension Plan, 274 F. Supp. 2d 1010 (S.D. Ill. 2003), was incorrectly decided and is contrary to the reasoning of Eaton and Tootle, this Court should follow those cases and reject the holding in Cooper.

Finally, Ms. Richards attempts to obscure the fatal pleading defects in her complaint by arguing the merits of Counts II through VI, even though the merits of those claims are beyond the scope of Defendants' motion. Not only are Ms. Richards' assertions regarding those claims demonstrably wrong, they cannot obscure the fact that she has not pleaded exhaustion of her administrative remedies, she has not pleaded she was harmed by the form of notice she received,

and she is not entitled to equitable relief. The complaint should be dismissed in its entirety.

I. COUNT I FAILS TO STATE A CLAIM UNDER ERISA § 204(b)(1)(H).

A. Plaintiff Has Presented No Basis To Reject The Overwhelming Case Law And Legislative History Holding That ERISA § 204(b)(1)(H) Does Not Apply Before Normal Retirement Age.

Three courts have already held that § 204(b)(1)(H) does not apply before normal retirement age. Tootle, 222 F.R.D. at 93; Engers, 2001 U.S. Dist. LEXIS 25889, at *10; Eaton, 117 F. Supp. 2d at 826-29. Ms. Richards does not even attempt to refute the compelling reasoning of these courts that have ruled directly on the issue. Instead, Ms. Richards relies on Greenhalgh, supra, even though the Second Circuit never ruled in that case whether § 204(b)(1)(H) applies before normal retirement age. In Greenhalgh, the defendant retroactively amended its plan to adopt a new benefit formula. Plaintiffs challenged the use of the new formula to calculate their benefits. The statute set forth a "remedial amendment period" and the "single question" presented for review was whether the amended plan was in "operational compliance," such that the new benefit formula could be used to calculate plaintiffs' benefits. 140 F.3d at 428. The district court and Second Circuit both ruled for defendants. Id. at 432-33.

Ignoring the limited scope of the holding in Greenhalgh, Ms. Richards focuses on the benefit formula prior to the retroactive amendment, which excluded compensation earned between age 60-65 and argues that this prior formula shows that § 204(b)(1)(H) applies before normal retirement age. However, neither the Second Circuit nor the district court held that ERISA § 204(b)(1)(H) applies before normal retirement age. Because defendants had properly amended the benefit formula, and because the parties did not dispute that the new formula fully complied with § 204(b)(1)(H), the courts never needed to address whether the old formula violated § 204(b)(1)(H). Ms. Richards wholly distorts Greenhalgh when she states that the district court and Second Circuit "found an 'age-based distinction in violation of the Amended

Act.'" Pl. Br. at 12 (emphasis added). Neither court made any such finding.[1] The only ruling either court made was on whether the retroactive amendment could be applied in calculating plaintiffs' benefits, and both courts held that it could.

Thus, Ms. Richards has no basis to argue that Greenhalgh shows that the Second Circuit "would likely reject" the Eaton, Tootle and Engers decisions. Pl. Br. at 12. The Second Circuit in Greenhalgh did not address any of the compelling reasons that support these decisions. In addition, because Greenhalgh was decided years before Eaton, Tootle and Engers, the Second Circuit did not have the benefit of these courts' careful review of the legislative history supporting their holding that § 204(b)(1)(H) does not apply before normal retirement age. In short, Greenhalgh never assessed the meaning or reach of the "rate of benefit accrual" under § 204(b)(1)(H), and Ms. Richard's suggestion that the Second Circuit would reject Eaton, Tootle and Engers is unsupported speculation.

Next, Ms. Richards raises a false alarm by contending that, were this Court to agree with Eaton and the other courts, participants who have not reached normal retirement age would be unprotected from age discrimination. As Eaton properly noted, however, "this interpretation [that § 204(b)(1)(H) protections begin at normal retirement age] does not leave employees between the ages of 40 and 65 unprotected from age discrimination. The more general terms of the ADEA continue to bar intentional age discrimination, and all the other complex benefit accrual rules for defined benefit plans continue to apply." 117 F. Supp. 2d at 829.

As the Eaton court recognized, prior to the enactment of § 204(b)(1)(H), ERISA already had comprehensive requirements that protect the benefit accrual of participants before normal

---

[1] Ms. Richards misreads these decisions when she quotes excerpts out of context. The district court merely suggested that the prior benefit formula "could" have been construed as a violation. 140 F.3d at 429. The Second Circuit did not agree or disagree with the district court on that point, but merely noted that the parties did not dispute this. Id.

retirement age. For example, the "anti-backloading" rules of ERISA § 204(b)(1)(A)-(C) set forth strict rules on how participants accrue benefits up to normal retirement age, but do not apply to benefit accruals at or after normal retirement age. See Treas. Reg. §§ 1.411(b)-1(b)(1)(i), (b)(2)(i), (b)(3)(ii)(A) (1977). When Congress enacted § 204(b)(1)(H) and its companion ADEA amendment (§ 4(i)), it carefully considered this statutory framework and recognized that participants were already adequately protected before normal retirement age and thus did not need the new protections of § 204(b)(1)(H):

> Under the conference agreement, the rules preventing the reduction or cessation of benefit accruals on account of attainment of any age are not intended to apply in cases in which a plan satisfies the normal benefit accrual requirements for employees who have not attained normal retirement age. Under the benefit accrual rules, the rate of benefit accrual for an employee may vary depending on the number of years of service an employee may complete between date of hire and the attainment of normal retirement age.

H.R. Conf. Rep. No. 99-1012, at 379 (1986), reprinted in 1986 U.S.C.C.A.N. 3868, 4024 (emphasis added). Congress then gave an example to demonstrate this very point: 45- and 55-year old participants are not covered by ERISA § 204(b)(1)(H), and need not be covered because one of the anti-backloading rules (the so-called "fractional benefit accrual rule") provides adequate protections to such participants. Id.[2] The statements of Representatives only four days before the enactment of ERISA § 204(b)(1)(H) further confirm this interpretation:

> The Conference Report on H.R. 5300 and the Statement of Managers makes it clear that, with respect to benefit accruals under normal retirement age, pension plans which conform with the existing benefit accrual rules under ERISA and the Internal Revenue Code are considered to meet the new requirements. This framework provides a safe harbor for pre-normal retirement age accruals for all covered pension plans . . . .

132 Cong. Rec. H 11437 (daily ed. Oct. 17, 1986).[3] In short, Congress concluded that existing

---

[2] Ms. Richards completely misinterprets this example and incorrectly argues that it somehow shows that Congress intended that § 204(b)(1)(H) apply before normal retirement age. Pl. Br. at 16-17. In fact, the context in which the example was offered by the Conference legislators clearly demonstrates that Congress intended that the new provision apply only when participants reach normal retirement age.

[3] The legislative history cited herein and not attached to Defendants' opening brief, including the relevant portions of the Congressional Record and Senate Report No. 98-575 (see p. 15, infra), is included in the accompanying document entitled "Attachment – Additional Legislative History".

benefit accrual laws adequately protected participants before normal retirement age and it enacted § 204(b)(1)(H) solely to protect participants once they attained normal retirement age.

In another misinterpretation of the legislative history, Ms. Richards isolates the words "entire extent" from the following language in the OBRA 1986 Conference Report:

> Age Discrimination in Employment Act. It is the intention of the conferees, in adopting amendments to the ADEA (new sec. 4(i)), that the requirements contained in section 4(i) related to an employee's rights to benefit accruals with respect to an employee benefit plan (as defined in sec. 3(2) of ERISA) shall constitute the entire extent to which ADEA affects such benefit accrual and contribution matters with respect to such plans on or after the effective date of such provisions (as described in the provision).

H.R. Conf. Rep. No. 99-1012, at 382 (1986), reprinted in 1986 U.S.C.C.A.N. 3868, 4027 (emphasis added). Ms. Richards' assertion that this language extended OBRA 1986's protections to participants as early as age 40, when the ADEA's other protections against age discrimination generally begin to apply, is clearly wrong. Instead, the excerpt on its face clearly provides that the new Section 4(i) in the ADEA "shall constitute the entire extent" to which the ADEA affects benefit accrual. Because the "rate of benefit accrual" protections of ERISA § 204(b)(1)(H) and ADEA § 4(i) are intended to begin only at normal retirement age, the above excerpt clarifies that Congress did not intend to extend the ADEA's general protections that begin at age 40 to benefit accruals under ERISA-covered plans. This conclusion is entirely consistent with the Eaton, Tootle and Engers holdings that OBRA 1986 applies only when participants reach normal retirement age – even though the ADEA generally applies beginning at age 40. Indeed, Ms. Richards' position that "attainment of any age" means any age whatsoever would essentially mandate a finding that participants are protected by § 204(b)(1)(H) long before they reach age 40, even as early as in their twenties. This, of course, would go way beyond the "entire extent" to which the ADEA protects against age discrimination in any context.

Ms. Richards also falsely labels the legislative history a mere "vestige" of an earlier intent that Congress supposedly abandoned. Pl. Br. at 15. However, the Conference Report, as

well as the statements of the legislators clearly indicating Congress' intent that the provision apply once a participant reaches normal retirement age, were issued on October 17, 1986, only four days before OBRA 1986 was enacted. H.R. Conf. Rep. No. 99-1012, at 374-382 (1986), reprinted in 1986 U.S.C.C.A.N 3868, 4019-4027; 132 Cong. Rec. H 11437 (daily ed. Oct. 17, 1986); see also Eaton, 117 F. Supp. 2d at 829 (discussing legislative history). Given their contemporaneous timing, it is no surprise that the Second Circuit considers conference reports a reliable means of understanding congressional intent in enacting legislation. Disabled in Action of Metropolitan New York v. Hammons, 202 F. 3d 110, 124 (2d Cir. 2000) (quoting Railway Labor Executives Ass'n v. Interstate Commerce Comm'n, 735 F. 2d 691, 701 (2d Cir. 1984)). In light of this contemporaneous legislative history, the fact that Congress expressly titled the legislation "Benefit Accrual Beyond Normal Retirement Age" in the ERISA section and "Continued Accrual Beyond Normal Retirement Age" in the Internal Revenue Code section cannot be deemed, as Ms. Richards portrays it, a mere "vestige."

Ms. Richards is wrong when she asserts that this Court should ignore the overwhelming weight of the legislative history documenting that ERISA § 204(b)(1)(H) does not apply before normal retirement age. As the United States Supreme Court noted in Buckley v. Valeo, 424 U.S. 1, 51 n.57 (1976), a court should not adopt an interpretation of a statute where the conference report "expressly provides for a contrary interpretation." Thus, courts regularly look to legislative history to interpret statutory language that might appear unambiguous on its face. See, e.g., In re The Caldor Corp., 303 F.3d 161, 171 (2d Cir. 2002) (although finding the text of the statute clear on its face, court analyzed legislative history to assure that there was no "tension" between the statute and its legislative history); Guiles v. Sea-Land Servs., 820 F. Supp. 744, 751 (S.D.N.Y. 1993) (court looked to legislative history to determine if there was a legislative intent contrary to clear statutory language); Glaxo Operations v. Quigg, 894 F.2d 392, 395 (Fed. Cir. 1990). In this case, reading "any age" in § 204(b)(1)(H) as any age at and after

normal retirement age, as did the Eaton, Tootle and Engers courts, gives full recognition to Congress's intent that participants who work past normal retirement age, no matter how long, continue to accrue benefits. That reading of the statute is both a reasonable application of the statutory language and fully consistent with and supported by the legislative history.

B. Plaintiff's Reliance On Other ERISA Provisions And Abandoned Regulations Is Misplaced.

Ms. Richards also erroneously interprets ERISA § 204(b)(1)(H)(iii) and (v) and cites proposed regulations that have been rescinded. Section 204(b)(1)(H)(iii) does not support Ms. Richards' position that § 204(b)(1)(H) applies before normal retirement age. Pl. Br. at 14-15. Rather, it simply provides that if a participant does not retire in the year he or she attains normal retirement age, the benefit must be increased to reflect the delay in payment. Subparagraph (iii) does not state or even suggest that § 204(b)(1)(H) applies before normal retirement age.

Likewise, Ms. Richards incorrectly asserts that the reference in § 204(b)(1)(H)(v) to "early retirement benefits" necessarily means that § 204(b)(1)(H) applies before normal retirement age. Pl. Br. at 14. However, subsection (v) is necessary to address the conflict that would exist if early retirement benefits were counted in measuring the rate of benefit accrual at and beyond normal retirement age. Defined benefit plans often provide an enhanced benefit to individuals who retire before normal retirement age. This enhanced benefit (or "subsidy") is eliminated once the participant reaches normal retirement age. Viewed in terms of "rate of benefit accrual," as § 204(b)(1)(H) requires, a participant's benefit accrual will decrease at and after normal retirement age due to the loss of the subsidy that had been in place before normal retirement age. Subparagraph (v) provides that this reduction in benefit accrual at normal retirement age (the age that § 204(b)(1)(H)'s protections begin) does not violate § 204(b)(1)(H).

Finally, Ms. Richards' attempt to rely on various proposed regulations that were never adopted or were rescinded should be rejected. Pl. Br. at 13. Courts do not afford any weight to

proposed regulations. Tedori v. United States, 211 F. 3d 488, 492 (9th Cir. 2000) ("proposed regulations carry no more weight than a position advanced on a brief"); The Ravenswood Group v. Fairmont Assoc., 736 F. Supp. 1285, 1288 (S.D.N.Y. 1990) (affording no credence to proposed regulations because they are "prospective only and are subject to change in the rule-making process"). The proposed regulations published by the EEOC in 1987 and the IRS in 1988 that Ms. Richards cites have never been finalized, but instead have sat dormant for over 17 years. Furthermore, the 2002 proposed IRS regulations she cites have been rescinded. See IRS Announcement 2003-22, I.R.B. 2003-17 (Apr. 7, 2003) and IRS Announcement 2004-57, I.R.B. 2004-27 (June 15, 2004). None of those proposed and then abandoned regulations provides any authority for Ms. Richards' position here.[4]

II. COUNT I FAILS TO STATE A CLAIM FOR THE ADDITIONAL REASON THAT THE FLEETBOSTON PLAN'S CASH BALANCE BENEFIT FORMULA DOES NOT DISCRIMINATE ON THE BASIS OF AGE.

Even if ERISA § 204(b)(1)(H) were applied before normal retirement age, Ms. Richards' theory of age discrimination fails on the merits. Ms. Richards does not even attempt to refute the numerous compelling rationales that the Eaton and Tootle courts set forth in rejecting the contention that an annuity commencing at normal retirement age is the only proper measure of "rate of benefit accrual" under § 204(b)(1)(H). Nor does Ms. Richards address the additional reasons that reinforce the Eaton and Tootle holdings. See Defendants' opening brief ("Def. Memo.") at 21-25. Instead, she offers a series of unsupported arguments.

A. Esden Does Not Support Plaintiff's Position.

Ms. Richards' assertion that the holding in Esden, 229 F.3d 154, shows that the Second

[4] Even were these regulations to be given weight, Ms. Richards can hardly claim that they show that the EEOC and IRS support her position. For example, in its 1987 proposed regulations, the EEOC stated "OBRA added section 4(i)(1)(A) to the ADEA [the section comparable to ERISA § 204(b)(1)(H)] to provide rules for continued accruals under defined benefit plans beyond normal retirement age. . . ." 52 Fed. Reg. 45,360, 45,361 (Nov. 27, 1987) (emphasis added).

Circuit will reject Eaton and Tootle and adopt her position stretches Esden far beyond its holding and logic. In Esden, the Second Circuit dealt with a particular issue involving how the cash balance plan in that case calculated the dollar amount paid to a participant who elected to take a lump-sum distribution before normal retirement age. Ms. Richards does not and cannot claim that the FleetBoston Plan has that same issue. Moreover, the Second Circuit did not address § 204(b)(1)(H) in Esden, nor did it address the concept of "rate of benefit accrual" at all. The most that the Second Circuit said that is applicable here is not in controversy – cash balance plans are defined benefit plans that must comply with the applicable ERISA provisions. 229 F.3d at 158. Defendants do not dispute that the FleetBoston Plan must comply with § 204(b)(1)(H). But that ignores the question at issue, which is how to measure "rate of benefit accrual." Not only did the Second Circuit provide no guidance on that issue in Esden, it certainly did not call into question the compelling rationales set forth in Eaton and Tootle supporting Defendants' position.

B. This Court Should Reject The Cooper Decision And Follow The Well-Reasoned Decisions Of The Courts In Eaton And Tootle.

The only decision that supports Ms. Richards' position is Cooper, 274 F. Supp. 2d 1010. That decision is distinguishable from this case and its holding and rationale should not be followed. Def. Memo. at 25-27. The Cooper court did not even address the detailed reasoning of the court in Eaton. Nor is there any evidence that Congress intended that "rate of benefit accrual" be measured only in terms of an annuity payable at normal retirement age. Rather, the Cooper court's decision to equate the term "rate of benefit accrual" with the defined term "accrued benefit" was based solely on the court's analysis of proper grammar and the erroneous conclusion that there is no grammatically correct way to refer to the rate of change in a participant's accrued benefit other than by using the term "rate of benefit accrual." However, as Defendants demonstrated (and Ms. Richards does not dispute), if Congress had actually intended to refer to a participant's accrued benefit, Congress easily could have used the term "accrued

benefit" in ERISA § 204(b)(1)(H) without running afoul of proper grammar. See, e.g., Def. Memo. at 27. Rather than merely to avoid "clumsy" grammar, Cooper, 274 F. Supp. 2d at 1016, Congress did not use the term "accrued benefit" in § 204(b)(1)(H) because it did not intend to refer to a participant's accrued benefit. In other statutory provisions where Congress did intend to refer to a participant's accrued benefit, it expressly did so. See, e.g., ERISA § 204(b)(1)(B).

Indeed, there are strong reasons supporting Congress' decision not to equate "rate of benefit accrual" under § 204(b)(1)(H) solely with the fixed and static concept of "accrued benefit." No matter how benefits actually accrue under a defined benefit plan, the Cooper decision dictates that the courts look at the rate of accrual in only one way – as an annuity at normal retirement age. However, the plain meaning of "rate of benefit accrual" refers to the pace at which benefits are accrued, or earned, by a participant as the participant works additional years. The rate at which benefits accrue is determined by the plan's benefit formula, which can vary from plan to plan. Thus, Congress could not define "rate of benefit accrual" because that rate is specific to each plan.

As the Eaton and Tootle courts observed, under cash balance plans such as the FleetBoston Plan, benefits are earned in the form of pay credits and interest credits. The rate at which those benefits are earned, i.e., the rate of benefit accrual, is the pace at which those credits are allocated to participants' accounts.[5] The mere fact that this rate of benefit accrual is similar in certain respects to the rate of benefit accrual under a defined contribution plan does not "[turn] the ERISA statute on its head" as Ms. Richards asserts. Pl. Br. at 18. Nothing in ERISA states or even implies that benefits in a defined benefit plan cannot be earned in the form of account credits. Indeed, the Treasury Department has recognized that defined benefit plans can be

[5] In the 2002 proposed IRS regulations upon which Ms. Richards relies, Pl. Br. at 13, the IRS agreed with the Eaton and Tootle courts that "a participant's rate of benefit accrual for a plan year is permitted to be determined as the addition to the participant's hypothetical account for the plan year." Prop. Treas. Reg. §1.411(b)-2(b)(iii), 67 Fed. Reg. 76,123, 76,126 (Dec. 11, 2002).

measured for certain purposes like defined contribution plans. See 26 C.F.R. § 1.401(a)(4)-8(c) (2001) (plan may be tested in terms of annual allocations as if it were a defined contribution plan). Because benefits accrue to cash balance participants under the FleetBoston Plan as pay credits and interest credits, the proper measure of the "rate of benefit accrual" is how credits are allocated to participants' accounts. Eaton and Tootle so held, and this Court should as well.

C. Plaintiff's Position Makes No Sense When Applied To The Rate Of Benefit Accrual For Plan Participants Beyond Normal Retirement Age.

If § 204(b)(1)(H) protects participants before normal retirement age, as Ms. Richards contends, it surely also protects participants at and after normal retirement age. This fact further reveals the fallacy of her contention that "rate of benefit accrual" can only be measured in terms of an annuity commencing at normal retirement age. In the legislative history, Congress provided an example of a plan that complies with § 204(b)(1)(H) because it allows a participant to continue to accrue an additional annuity of $10 per month for every year the participant works after age 65. 1986 U.S.C.C.A.N. at 4026. However, if the court applied Ms. Richards' theory that "rate of benefit accrual" must refer to an annuity at age 65, the additional $10 benefit in the Congressional example, recast as an annuity at age 65, would decline in value each year after age 65 for the simple reason that the benefit would have to be discounted back to age 65.[6]

Under Ms. Richards' theory, the very plan that Congress set forth as compliant would result in a reduction in the rate of benefit accrual on account of age, and thus become non-compliant, when applied to participants working past normal retirement age – the very participants who were

---

[6] For example, applying the same "time value of money" concept that Ms. Richards uses to project benefits forward to age 65, a $10 benefit received at age 66 would be valued at $8.90 when projected back to age 65, and an additional $10 benefit received at age 67 would be valued at the lesser amount of $7.90 when projected back to age 65 (using an assumed discount rate of 8.75%). The article that Ms. Richards cites in her brief (Pl . Br. at 12 n.10) explains in mathematical detail how this occurs. Shea, Francese, and Newman, Age Discrimination in Cash Balance Plans: Another View, 19 VA. TAX REV. 763, 768-773 (2000). This decrease in the rate of benefit accrual after normal retirement age would occur under Ms. Richards' theory regardless of what discount rate (8.75% as above or otherwise) were applied.

OBRA 1986's intended beneficiaries. The Eaton court recognized this nonsensical result when it rejected the position Ms. Richards takes here. 117 F. Supp. 2d at 830.

Measuring rate of benefit accrual for purposes of a cash balance plan in terms of the amounts credited to cash balance accounts, as the Eaton and Tootle courts did, would not yield this absurd result. This Court should follow the decisions in Eaton and Tootle and hold that, because pay credits under the FleetBoston Plan increase as participants get older and interest credits are allocated at the same rate to all accounts regardless of age, the FleetBoston Plan's cash balance formula does not violate ERISA § 204(b)(1)(H).

D. The Other ERISA Provisions Plaintiff Cites Do Not Support Her Position.

Ms. Richards apparently contends that because ERISA §§ 204(b)(1)(B) and 204(h) refer to benefit "accruals," and an annuity commencing at normal retirement age is how "accruals" under those provisions have been measured, then ERISA § 204(b)(1)(H)'s "rate of benefit accrual" must be measured in the same way. This reasoning is flawed on a number of levels.

First, § 204(b)(1)(B) is one of ERISA's anti-backloading provisions. Compliance with that provision is measured looking at an annuity commencing at normal retirement age for the simple reason that the provision specifically states that compliance must be measured in terms of an "accrued benefit payable at normal retirement age." In stark contrast, § 204(b)(1)(H) nowhere uses the term "accrued benefit," let alone sets forth any required method of measuring the rate of benefit accrual. This difference reinforces Defendants' position: Congress did not intend that "rate of benefit accrual" be measured as an annuity commencing at normal retirement age because, where Congress did so intend, as in ERISA § 204(b)(1)(B), it expressly said so.

Similarly, the fact that the rate of accrual for purposes of an ERISA § 204(h) notice is measured under Treasury Department regulations in terms of an annuity commencing at normal retirement age says nothing about how to measure rate of accrual under § 204(b)(1)(H). The Treasury Department made clear that the regulation Ms. Richards cites only applies to ERISA §

204(h). See 68 Fed. Reg. 17,277, 17,282-83 (Q&A 6(b) and 8) (Apr. 9, 2003) (codified at 26 C.F.R. § 54.4980F-1). The Treasury Department has never stated that "rate of benefit accrual" for § 204(b)(1)(H) purposes must be measured in the same way. Indeed, as explained in Def. Memo. at 23-24, the Treasury Department has expressly stated the contrary:

> The fact that interest adjustments through normal retirement age are accrued in the year of the related hypothetical allocation will not cause a cash balance plan to fail to satisfy the requirements of section 411(b)(1)(H) [the IRC equivalent of ERISA § 204(b)(1)(H)], relating to age-based reductions in the rate at which benefits accrue under a plan.

56 Fed. Reg. 47,524, 47,528 (Sept. 19, 1991). The Treasury Department's rejection of Ms. Richards' position further establishes that the FleetBoston Plan is not age discriminatory.

III. COUNTS II THROUGH VI FAIL TO STATE A CLAIM.

In order to distract this Court from the pleading defects in Counts II-VI, Ms. Richards argues the merits of those claims. These arguments are not only beyond the scope of the Motion to Dismiss, they also misstate the facts and law. For example, Ms. Richards speculates that the FleetBoston Plan can result in "prohibited benefit forfeitures" if participants "have to give up" their higher frozen traditional benefits as a "condition" to receiving lower cash balance benefits. Pl. Br. at 24. However, the Plan does not require an "either-or" choice between alternative benefits. Instead, participants who accrued a benefit prior to the conversion to a cash balance formula receive one benefit which is always the greater of (1) their cash balance account benefit and (2) their benefit accrued under the traditional plan as of December 31, 1996. Def. Memo. Ex. A at 3, Ex. B at 22, Ex. C at 1. Under this "greater-of" formula, participants always receive at least their full accrued benefit under the traditional plan. And, because the only benefit that participants are entitled to under the cash balance formula is the greater of their benefit under the

old plan or under the cash balance formula, there is never a "forfeiture" of any accrued benefit.[7]

Ms. Richards' "wear-away" complaint in Counts II and III is merely that benefits under the new cash balance formula do not increase as quickly as she would like. Pl. Br. at 23. However, Congress, the Treasury Department, the IRS and the courts have all recognized that wear-away is lawful and have upheld plans like FleetBoston's that pay a "greater-of" benefit. See, e.g., 26 C.F.R. § 1.401(a)(4)-13(c)(4)(ii) (allowing plans to use a "[f]ormula with wear-away"); 26 C.F.R. § 1.401(a)(17)-1(e)(5), *Example 1*; S. Rep. No. 98-575, at 28-29 (1984), reprinted in 1984 U.S.C.C.A.N. 2547, 2574-75 (noting the legality of a plan with a "greater-of" formula even though "the participant's accrued benefit . . . will not be increased by subsequent service or pay raises until the subsequent increase brings the participant's accrued benefit to a level in excess of the accrued benefit as of [the amendment date]"); Brody v. Enhance Reinsurance Co., No. 00 Civ. 9660, 2003 U.S. Dist. LEXIS 3785, at ** 26-27, 37-38 (S.D.N.Y. March 17, 2003) (plan's use of "greater-of" formula did not violate ERISA § 204(g); "the greater-of method . . . has been consistently approved by the IRS" (citing Rev. Rul. 81-12, 1981-1 C.B. 228)); Corcoran v. Bell Atlantic, No. Civ. A 97-510, 1997 WL 602859, at *3-4 (E.D. Pa. Sept. 23, 1997), aff'd, 159 F.3d 1350 (3d Cir. 1998) ("greater-of" formula used in transition from traditional defined benefit to cash balance formula did not violate § 204(g)).[8]

Likewise, Ms. Richards' claim in Count IV that the notice participants received prior to the 1997 Plan amendment did not satisfy ERISA § 204(h) is clearly incorrect. Pl. Br. at 32. At that time, § 204(h) merely required a plan administrator to provide written notice "setting forth

[7] Because the FleetBoston Plan does not offer participants a choice between their cash balance benefit and their frozen traditional benefit, Esden 229 F.3d 154, and Lyons v. Georgia Pacific Corp., 221 F.3d 1235 (11th Cir. 2000), in which participants were required to choose between certain benefits, are inapplicable.

[8] Nor does FleetBoston's Plan violate ERISA's anti-backloading rule. Ms. Richards improperly compares the accrual rate under the prior traditional formula to the cash balance formula. Pl. Br. at 25. However, as set forth in ERISA § 204(b)(1)(B)(i), compliance is to be determined as if the cash balance formula were in effect for prior plan years, not by comparing it to the old formula.

the plan amendment and its effective date." Pub. L. No. 99-272, 100 Stat. 82 (1986); see also Pub. L. No. 107-16, 115 Stat. 38 (2001). The regulations then in effect provided that a summary or the text of the amendment itself constituted sufficient notice, and FleetBoston indisputably complied with this requirement. See Exhibit D (attached). Ms. Richards' assertions that FleetBoston's notice failed to disclose the "effect" or "magnitude" of any reductions in benefit accruals or early retirement benefits (Pl. Br. at 30-31) are undermined by the regulations, which at the time specifically provided that a plan administrator need not explain "how the individual benefit of each participant . . . will be affected by the amendment" and that "the rate of future benefit accrual is determined without regard to early retirement benefits . . . or retirement-type subsidies." 26 C.F.R. § 1.411(d)-6T, Q&A-10, Q&A-5. In fact, Ms. Richards' arguments are based on a later version of the statute and regulations that were not in effect when FleetBoston amended its plan. Pl. Br. at 31-32. Ms. Richards' attempt to hold FleetBoston to notice standards that were not in effect until years later fails as a matter of law.

A. Counts II Through VI Must Be Dismissed Because Plaintiff Has Failed To Allege Exhaustion Of Her Administrative Remedies.

Ms. Richards concedes that she must exhaust her administrative remedies under the Plan before she can bring a claim in federal court for benefits under ERISA § 502(a)(1)(B). Pl. Br. at 34; see also Leonelli v. Pennwalt Corp., 887 F.2d 1195, 1199 (2d Cir. 1989). The well-established exhaustion requirement and the policy it serves would be gutted if plaintiffs were not required to plead exhaustion before obtaining discovery. For this reason, district courts in this Circuit have consistently dismissed claims for benefits when plaintiffs fail to plead exhaustion. See, e.g., Greifenberger v. Hartford Life Ins. Co., No. 03 Civ. 3238, 2003 WL 22990093, at *4 (S.D.N.Y. Dec. 18, 2003) ("If [an ERISA] plaintiff fails to allege that he or she has exhausted administrative remedies, the claim must be dismissed") (emphasis added); Hoffman v. Empire Blue Cross and Blue Shield, No. 96 Civ. 5448, 1999 WL 782518, at *13 (S.D.N.Y. Sept. 30,

1999) (imposing same pleading requirement); DeVito v. Local 553 Pension Fund, No. 02 Civ. 4686, 2005 WL 167590, at *7 (S.D.N.Y. Jan. 26, 2005) (same). Ms. Richards' position that she should not have to plead exhaustion is nothing more than a tacit admission that she failed to exhaust her remedies relating to Counts II through VI. These counts should be dismissed.[9]

These principles apply with equal force to Ms. Richards' claims under ERISA § 502(a)(3). Ms. Richards acknowledges that the Second Circuit has not ruled on this issue, but offers no reason why this Court should not follow the Seventh and Eleventh Circuits that require plaintiffs to exhaust administrative remedies before seeking equitable relief under ERISA § 502(a)(3). Kross v. Western Electric Co., Inc., 701 F.2d 1238, 1245 (7th Cir. 1983); Mason v. Continental Group, Inc., 763 F.2d 1219, 1227 (11th Cir. 1985). There are compelling reasons to require exhaustion of administrative remedies under § 502(a)(3), Def. Memo. at 30-31, many of which Second Circuit has recognized under ERISA and in other contexts. See Kennedy v. Empire Blue Cross and Blue Shield, 989 F.2d 588, 594 (2d Cir. 1993) (ERISA claim); see also Beharry v. Ashcroft, 329 F.3d 51, 56 (2d Cir. 2003) (Immigration and Naturalization Act claim). Ms. Richards' § 502(a)(3) claims in Counts II-VI should be dismissed.

B. Counts IV-V Fail To Plead Prejudice or Likely Harm And Should be Dismissed.

Ms. Richards concedes that she must at a minimum establish "likely harm" to prevail on her claims in Counts IV-V regarding an allegedly inadequate § 204(h) notice and deficient SPD.[10] Pl. Br. at 32. Her refusal to plead this essential element of her claim is just another

---

[9] Ms. Richards incorrectly claims that the Court in Flanigan v. General Electric Co., 93 F. Supp. 2d 236 (D. Conn. 2000), held that a plaintiff need not plead exhaustion of administrative remedies. Rather, the Court referenced a prior order in which the Court "did not consider the exhaustion issue as grounds for dismissal." Id. at 269. The Court in Flanigan did not identify the grounds on which the defendant had sought dismissal. Flanigan is not inconsistent with the decisions cited above requiring plaintiffs to plead exhaustion of administrative remedies.

[10] Contrary to Ms. Richards' claim, the Second Circuit adopted a "prejudice standard" in Burke v. Kodak Retirement Inc. Plan as "more consistent with ERISA's objective to protect the employee against inadequate SPDs." 336 F.3d 103, 112 (2d. Cir. 2003).

attempt to mask the fact that she cannot do so. Contrary to Ms. Richards' assertions, courts that have addressed pleading requirements under ERISA's notice provisions have required plaintiffs to plead prejudice or likely harm. See, e.g., Levin v. Raynor, No. 03 Civ. 4697, 2004 WL 2937825, at *10 (S.D.N.Y. Dec. 17, 2004) (dismissing claim under analogous notice provision, ERISA § 104(b)(1), in part because plaintiffs did not sufficiently allege prejudice). Indeed, a plaintiff must plead more than a conclusory allegation; she must plead specific facts describing the prejudice or harm. See, e.g., Panaras v. Liquid Carbonic Indus. Corp., 74 F.3d 786, 792-94 (7th Cir. 1996) (affirming dismissal of inadequate SPD claim and rejecting plaintiff's conclusory allegation of prejudice which failed to identify in the complaint the "harm *[plaintiff] specifically* . . . suffered as a result of [defendant's] ERISA violations") (italics in original).[11]

C. Count VI Should Be Dismissed Because Plaintiff Lacks Standing To Sue On Behalf Of Retired Employees And Has Not Alleged Detrimental Reliance.

Ms. Richards' argument that she has standing under Count VI as a "participant" in the FleetBoston Plan is a red herring. First, Defendants did not challenge Ms. Richards' status as a participant, but rather her failure to allege an injury-in-fact. Def. Memo. at 33-34. Second, Mullins v. Pfizer, Inc., 23 F.3d 663 (2d. Cir. 1994), Pl. Br. at 37, provides no basis to find that Ms. Richards suffered an injury-in-fact because the plaintiff in Mullins alleged that he was misled. The Second Circuit limited its discussion to a separate and distinct standing issue not in dispute here – whether plaintiff retained plan "participant" status under ERISA. Id. at 666-69.

Ms. Richards argues herself out of her claim when she admits that "she has suffered no harm yet" and that "she . . . will retire someday, and without relief [she] may face the same problem – FleetBoston may not tell [her] about the larger frozen benefit she may take." Pl. Br. at 38 (emphasis added). These allegations – that she may someday have a greater frozen benefit

[11] Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508 (2002), cited in Pl. Br. at 33, only addressed pleading requirements in employment discrimination cases which have a unique burden-shifting framework. Nowhere did the Court address a plaintiff's pleading obligations under ERISA.

under the traditional plan when she retires and that she may someday then be misled about the existence of that benefit – utterly fail to demonstrate a concrete, actual injury-in-fact.

Even assuming Ms. Richards has standing, detrimental reliance is an essential element of her claim for breach of fiduciary duty, see Def. Memo. at 34, and her failure to allege it requires dismissal. Defendants do not contend, as Ms. Richards argues, that she must show a material misrepresentation as opposed to an omission. Pl. Br. at 38. Rather, she has not alleged that she detrimentally relied on a misrepresentation or an omission. Count VI should be dismissed.

D. Plaintiff's ERISA § 502(a)(3) Claims For Equitable Relief In Counts II, IV-V Fail.

To support her claim that Counts II, IV, and V can proceed under both ERISA § 502(a)(1)(B) and § 502(a)(3), Ms. Richards cites Devlin v. Empire Blue Cross and Blue Shield, 274 F.3d 76 (2d Cir. 2001). However, Devlin solely involved a breach of fiduciary duty claim. Defendants are not challenging Ms. Richards' attempt to bring her breach of fiduciary duty claim (Count VI) under both ERISA sections. Rather, Ms. Richards' non-fiduciary claims under § 502(a)(3) in Counts II, IV, and V must be dismissed because she seeks benefits, not equitable relief. Def. Memo. at 35-38. Ms. Richards' admissions further compel this result:

- Count II – "Richards suffers another major loss of benefits by virtue of [the conversion of her Traditional Benefits] into a new cash balance account." Pl. Br. at 23; and
- Count IV – "No plan amendment significantly decreasing benefit accruals can be enforced unless the reduction of benefit accruals is explained . . . in an advance notice." Id. at 30.

See also Gerosa v. Savasta & Co., 329 F.3d 317, 321 (2d Cir. 2003) (when "determining the propriety of a remedy, [courts] must look to the real nature of the relief sought, not its label").

IV. PLAINTIFF'S ERISA § 502(a)(1)(B) CLAIMS FOR BENEFITS MAY NOT BE BROUGHT AGAINST THE CORPORATE EMPLOYER.

Ms. Richards' argument that FleetBoston is liable under Counts II, IV, and V because it acted in a fiduciary capacity in failing to disclose information (which itself is relevant only to Count VI) (Pl. Br. at 39-40) is contrary to Second Circuit law. The Second Circuit does not simply permit benefit claims to be brought against any entity that acted in a fiduciary capacity.

Rather, in claims for benefits, the only entities that may be held liable are the plan, its trustees and administrators. See Crocco v. Xerox Corp., 137 F.3d 105, 107-08 (2d Cir. 1998); see also Def. Memo. at 38. The plan sponsor may not be held liable, even to the extent it acts in a fiduciary capacity or as a "*de facto* co-administrator." Crocco, 137 F.3d at 107-08. Ms. Richards may not bring a claim for benefits under § 502(a)(1)(B) against FleetBoston.

Respectfully submitted,

DEFENDANTS FLEETBOSTON FINANCIAL CORP. AND FLEETBOSTON FINANCIAL PENSION PLAN

By: /s/ Scott E. Gross
One of their Attorneys

George J. Kelly, Jr. ct06888
SIEGEL, O'CONNOR,
O'DONNELL & BECK
150 Trumbull St.
Hartford, CT 06103
gkelly@siegeloconnor.com

William F. Conlon, ct26510
Anne E. Rea, ct26513
Scott E. Gross, ct26514
Erin E. Kelly, phv0041
Julie A. Koca, ct26511
Brian P. Guarraci, ct26512
SIDLEY AUSTIN BROWN & WOOD LLP
Bank One Plaza, 10 S. Dearborn Street
Chicago, IL 60603
(312) 853-7000
Email: sgross@sidley.com