APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2019

(Submitted: October 23, 2019
Decided: December 23, 2019)

Docket No. 18-487-cv

TIMOTHY D. LAURENT AND SMEETA SHARON, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

PRICEWATERHOUSECOOPERS LLP,
THE RETIREMENT BENEFIT ACCUMULATION PLAN FOR EMPLOYEES OF PRICEWATERHOUSECOOPERS LLP,
THE ADMINISTRATIVE COMMITTEE TO THE RETIREMENT BENEFIT ACCUMULATION PLAN FOR EMPLOYEES OF PRICEWATERHOUSECOOPERS LLP,

Defendants-Appellees.[*]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[*] The Clerk of the Court is respectfully directed to amend the official caption to conform to the above.

Before:

KATZMANN, *Chief Judge*, and CHIN and DRONEY, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the Southern District of New York (Oetken, J.) dismissing plaintiffs-appellants' claims alleging that the terms of their employee retirement benefits plan violated the Employment Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* In a prior appeal, we affirmed the district court's holding that the plan violated the statute, and we remanded for the district court to consider the appropriate relief. On remand, however, defendants-appellees moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), contending that the relief requested by plaintiffs-appellants -- reformation of the plan and the recalculation of benefits in accordance with the reformed plan -- was unavailable as a matter of law. The district court agreed.

VACATED AND REMANDED.

JULIA PENNY CLARK, Bredhoff & Kaiser, PLLC, Washington, DC (Eli Gottesdiener, Gottesdiener Law Firm, PLLC, Brooklyn, New York, *on the brief*), *for Plaintiffs-Appellants*.

DANIEL J. THOMASCH (Richard W. Mark, Amer S. Ahmed, and Alejandro A. Herrera, *on the brief*), Gibson, Dunn & Crutcher LLP, New York, New York, *for Defendants-Appellees.*

BRENDAN BALLARD, Trial Attorney (Kate O'Scannlain, Solicitor of Labor, G. William Scott, Assistant Solicitor for Plan Benefits Security, and Thomas Tso, Counsel for Appellate and Special Litigation, *on the brief*), U.S. Department of Labor, Washington, D.C., *for Amicus Curiae U.S. Secretary of Labor*.

Brian T. Burgess, William M. Jay, Jaime A. Santos, James O. Fleckner, and Alison V. Douglass, Goodwin Procter LLP, Washington, D.C. and Boston, Massachusetts, *and* Steven P. Lehotsky, U.S. Chamber Litigation Center, Washington, D.C., *for Amicus Curiae Chamber of Commerce of the United States of America, the American Benefits Council, the Business Roundtable, and the ERISA Industry Committee*.

CHIN, *Circuit Judge*:

Plaintiffs-appellants Timothy D. Laurent and Smeeta Sharon ("Plaintiffs"), on behalf of themselves and similarly situated former employees of defendant-appellee PricewaterhouseCoopers LLP ("PwC"), brought this action in 2006 alleging that their retirement plan -- the "Retirement Benefit Accumulation Plan for Employees of PricewaterhouseCoopers LLP" (the "Plan") -- violated the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq*. In a series of decisions, three different district judges (Mukasey, Daniels, and Oetken, *JJ.*) held that the Plan violated ERISA. *See Laurent v. PricewaterhouseCoopers LLP*, 794 F.3d 272, 278 (2d Cir. 2015) ("*Laurent V*"). In 2015, on PwC's interlocutory appeal, we agreed, holding that "the [P]lan's definition of 'normal retirement age' as five years of service violates

[ERISA] . . . because it bears no plausible relation to 'normal retirement.'" *Id.* at 273. Because the district court had not addressed "the appropriate relief" we remanded for "the district court to consider that question in the first instance." *Id.* at 289.

On remand, however, PwC moved for judgment on the pleadings, arguing that ERISA did not authorize the relief sought by Plaintiffs -- reformation of the Plan to bring it into compliance with ERISA and the recalculation of benefits in accordance with the reformed Plan. The district court agreed, holding that ERISA did not authorize the recalculation of benefits in the circumstances here, and dismissed the Second Amended Complaint (the "SAC") with prejudice on that basis, notwithstanding the violation of ERISA.

Plaintiffs appeal, contending that the district court erred in granting PwC's motion because ERISA does in fact authorize the relief they sought. We agree, and for the reasons detailed below, we VACATE the judgment and REMAND for further proceedings consistent with this Opinion.[1]

BACKGROUND

I. *The Plan*

The Plan is a cash balance plan subject to regulation under both ERISA and the Internal Revenue Code. In 1996, the Internal Revenue Service announced its position that where a cash balance plan

---

[1] Plaintiffs also argue on appeal that the district court exceeded the scope of this Court's mandate in reaching PwC's argument that no relief was available under ERISA. Because we hold that Plaintiffs prevail on the merits, we do not reach the issue of the scope of the mandate.

permits participants to take benefits before normal retirement age ("NRA") in the form of a lump-sum and promises future credits, the plan must: (1) project the participant's account balance out to the participant's NRA and add an amount reflecting the value of the future interest credits that would have accrued had the account balance remained in the plan until that future date; and (2) discount that projected total back to the distribution date using the plan's discount rate, as limited by a statutory maximum. I.R.S. Notice 96-8, 1996-1 C.B. 359. This calculation is known as the whipsaw calculation. *See Esden v. Bank of Bos.*, 229 F.3d 154, 159 (2d Cir. 2000); *see also Laurent v. PricewaterhouseCoopers LLP*, 448 F. Supp. 2d 537, 544 (S.D.N.Y. 2006) ("*Laurent I*") ("It is the forward projecting and discounting back that accounts for the whipsaw terminology.").[2] "'[W]hipsaw payments' . . . guarantee that plan participants who take distributions in the form of a lump sum when they terminate employment will receive the actuarial equivalent of the value of their accounts at retirement." *Laurent V*, 794 F.3d at 273.

The Plan provides that when a vested employee leaves employment, she has the option of receiving (1) an annuity commencing at NRA or (2) an immediate lump-sum payment. *Id.* at 275. The present value of the lump-sum payment must be worth at least as

---

[2] ERISA was amended in 2006 by the Pension Protection Act of 2006, Pub. L. No. 109-280, § 701(a)(2), 120 Stat. 780 (2006) (the "PPA"), which eliminated the whipsaw calculation requirement for participants in cash balance benefit plans who elect lump-sum distributions. The parties agree, however, that the PPA does not apply to this case because the conduct at issue predates the PPA.

much as the value of the stream of income from the annuity commencing at normal retirement age. *Id.*; *see Esden*, 229 F.3d at 163. In other words, if a plan offers participants a lump-sum distribution, it "cannot deprive the participants of the value that would accrue if the participants waited and took their distributions as an annuity at normal retirement age." *Laurent V*, 794 F.3d at 275. The whipsaw calculation is used to determine the difference between the "value of a cash balance plan account at any given time and the value of the account as an annuity payable at [NRA]." *Id*.

Here, as the district court and this Court have held, the Plan violates ERISA in at least one respect. It defines "Normal Retirement Age" as "[t]he *earlier* of the date a Participant attains age 65 or *completes five (5) Years of Service*." J. App'x at 1028 (emphasis added). As we concluded in *Laurent V*, ERISA does not give an employer "boundless discretion" to set any period of time as the NRA; rather, a plan's NRA "must have some reasonable relationship to the age at which participants would normally retire." 794 F.3d at 281. We held that five years of service was not a "normal retirement age." *Id*. at 289.

Moreover, as PwC does not dispute for the purposes of this appeal, the Plan's use of the 30-year Treasury rate as the projection rate is improper because it understates future interest credits. *See Laurent v. PricewaterhouseCoopers LLP,* No. 06-CV-2280 (JPO), 2017 WL 3142067, at *4 & n.5 (S.D.N.Y. July 24, 2017) ("*Laurent VI*"); ERISA § 204(c)(3). Indeed, the Internal Revenue Service concluded that the Plan "credits the accounts using one interest rate structure" -- based on equity rates of return -- "and projects

them to Normal Retirement Age using another" -- the 30-year Treasury rate. J. App'x at 1195.

II. ***Procedural History***

This case has a long procedural history dating back to 2006. Relevant here is that in 2013, PwC moved to dismiss the SAC, arguing, *inter alia*, that the Plan's "five years of service" NRA was valid as a matter of law. In a decision issued August 8, 2013, the district court rejected PwC's argument and held that the Plan's NRA violated ERISA because "five years of service" is not an "age" under ERISA. *See Laurent v. PriceWaterhouseCoopers LLP,* 963 F. Supp. 2d 310, 321 (S.D.N.Y. 2013) ("*Laurent IV*").

Following *Laurent IV*, PwC petitioned for interlocutory appeal and plaintiffs moved to certify the class. On January 22, 2014, the district court certified *Laurent IV* for interlocutory appeal and on April 22, 2014, this Court granted the petition. On June 26, 2014, while the interlocutory appeal was pending, the district court granted Plaintiffs' motion for class certification on the counts asserting "whipsaw" claims seeking lump-sum distributions equal to the annuity payable at NRA.

In an opinion issued on July 23, 2015, this Court affirmed the district court's order denying PwC's motion to dismiss. *See Laurent V*, 794 F.3d at 273. Although we disagreed with the district court's reasoning, we agreed that the Plan's method of calculating the NRA was unlawful because it "bears no plausible relation to 'normal retirement,' and is therefore inconsistent with the plain meaning of the statute," *id.*, and affirmed on that ground alone. We then remanded for

the district court to determine the proper remedy. *Id.* at 289. In a footnote, we also noted:

> Since ERISA grants a private cause of action to enforce, *inter alia*, the terms of the plan, 29 U.S.C. § 1132(a)(3), PwC may be compelled to 'act in accordance with the documents and instruments governing the plan insofar as they accord with the statute.'

Id. at 289 n.19 (quoting *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 100 (2013)).

On remand, following seven months of additional discovery, PwC moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), arguing that Plaintiffs were not entitled to relief for their ERISA claims. Plaintiffs opposed the motion as untimely and a violation of the mandate rule, *see, e.g., United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001), and cross-moved for summary judgment pursuant to Rule 56.

The district court granted PwC's motion and denied Plaintiffs' motion. *Laurent VI*, 2017 WL 3142067 at *1. The district court held that PwC's motion was not untimely and that its arguments had not been waived, and it held further that the Supreme Court's holding in *CIGNA Corp. v. Amara*, 563 U.S. 421, 436 (2011) ("*Amara III*"), precluded it from reforming the Plan under ERISA § 502(a)(1)(B). *Laurent VI*, 2017 WL 3142067 at *4-7. The district court also rejected Plaintiffs' argument that they could obtain an equitable remedy under § 502(a)(3). *Laurent VI*, 2017 WL 3142067 at *7-9.

First, the district court concluded that there was no breach of fiduciary duty because the Plan administrator was not acting in his fiduciary capacity when he distributed benefits in accordance with the Plan. *Id.* at *8. Second, the district court held that equitable reformation of the Plan was not available here because there was no allegation of fraud or mutual mistake. Finally, the district court found unpersuasive Plaintiffs' "attempt to restyle" the requested relief as seeking "an accounting for profit, surcharge, or unjust enrichment, or a constructive trust." *Id.* at *8-9. Because Plaintiffs' requested remedy, in its view, was "at bottom . . . a legal claim for money damages," *id.* at *9, the district court concluded that it was precluded under *Mertens v. Hewitt Assocs.,* 508 U.S. 248, 256 (2002).

Plaintiffs subsequently moved for reconsideration, and then for clarification of the district court's order pursuant to Federal Rules of Civil Procedure 60(a) and (b). The district court denied both motions.

This appeal followed.

DISCUSSION

Plaintiffs argue on appeal that the following two-step procedure is a remedy authorized by ERISA:

> 1. An order . . . compelling Defendants to bring the terms and administration of the Plan into compliance with ERISA . . . ;
>
> 2. An order requiring Defendants to re-calculate the benefits accrued and/or due under the terms of the Plan in accordance with the requirements of ERISA, and for the Plan to pay these amounts, plus interest, to or on behalf of all Class . . . members who received less

> in benefits or benefit accruals than the amount to which they are entitled.

Appellant's Br. at 9 (quoting Compl., Prayer for Relief ¶¶ E & F). Plaintiffs and the Secretary of Labor (the "Secretary"), as *amicus curiae*, contend that both Steps 1 and 2 are authorized by § 502(a)(1)(B) of ERISA. In the alternative, they contend that Step 1 is authorized under § 502(a)(3) and that Step 2 is authorized under § 502(a)(1)(B).[3]

I. *Standard of Review*

"We review a judgment under Federal Rule of Civil Procedure 12(c) *de novo*," accepting as true the allegations of the nonmovant and drawing all reasonable inferences in its favor. *Graziano v. Pataki*, 689 F.3d 110, 114 (2d Cir. 2012). Where a judgment is premised on a question of statutory interpretation, we similarly review that interpretation *de novo*. *City of Syracuse v. Onondaga Cty.*, 464 F.3d 297, 310 (2d Cir. 2006).

---

[3] PwC also contends that Plaintiffs forfeited this "two-step" argument by failing to raise it below. But Plaintiffs did ask for their two-step remedy, albeit in their reply in support of their motion for summary judgment. The district court never reached the argument not because it deemed it forfeited -- indeed it had discretion to consider it, *see Ruggiero v. Warner-Lambert Co.*, 424 F.3d 249, 252 (2d Cir. 2005) -- but because it determined PwC was entitled to judgment on the pleadings and consequently did not reach Plaintiffs' request on the merits. In any event, we are "not limited to the particular legal theories advanced by the parties but rather retain[] the independent power to identify and apply the proper construction of governing law." *McDonald v. Pension Plan of NYSA-ILA Pension Tr. Fund*, 320 F.3d 151, 160 (2d Cir. 2003) (quoting *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99 (1991)).

II. *ERISA's Remedial Provisions*

The civil enforcement provision of ERISA at issue in this case provides, in relevant part:

> (a) Persons empowered to bring a civil action
>
> A civil action may be brought--
>
> (1) by a participant or beneficiary--
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> *(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan*;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
>
> *(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan* [] . . . .

29 U.S.C. § 1132(a) (emphasis added).

A. *Section 502(a)(1)(B)*

The Supreme Court considered the limits of ERISA § 502(a)(1)(B) in *Amara III*. *Amara III* involved a pension plan for CIGNA employees that, although compliant with ERISA, differed from the summary plan description previously provided to the

plan's participants. 563 U.S. at 428. After holding that the discrepancy violated ERISA's notice requirements, the district court, relying on § 502(a)(1)(B), reformed CIGNA's existing pension plan to match the terms stated in the summary plan description. *Id.* at 434. CIGNA appealed and the Supreme Court vacated, holding that § 502(a)(1)(B) did not authorize plan reformation in this context. *Id.* at 435-36. In reaching its holding, the Supreme Court observed:

> Where does § 502(a)(1)(B) grant a court the power to change the terms of the plan as they previously existed? The statutory language speaks of 'enforc[ing]' the 'terms of the plan,' not of changing them. The provision allows a court to look outside the plan's written language in deciding what those terms are, *i.e.*, what the language means. But we have found nothing suggesting that the provision authorizes a court to alter those terms, at least not in present circumstances, where that change, akin to the reform of a contract, seems less like the simple enforcement of a contract as written and more like an equitable remedy.

Id. (citations and emphases omitted). Because modifying the CIGNA plan's terms to match the summary plan description went beyond "simple enforcement," the Court held it was not authorized by § 502(a)(1)(B). *Id.* at 436.

Following *Amara III*, courts of appeals have construed § 502(a)(1)(B) as limited to authorizing the enforcement of pension plans as written. *See Soehnlen v. Fleet Owners Ins. Fund*, 844 F.3d 576, 583 n.2 (6th Cir. 2016); *Singletary v. United Parcel Serv., Inc.*, 828

F.3d 342, 349 (5th Cir. 2016); *Pender v. Bank of America Corp.*, 788 F.3d 354, 362 (4th Cir. 2015). This Court has done so as well in a non-precedential summary order. *See Gill v. Bausch & Lomb Supplemental Ret. Income Plan I*, 594 F. App'x 696, 699 (2d Cir. 2014) (summary order) ("*Amara* [*III*] instructs a district court to limit itself to 'the simple enforcement of a contract as written.'").

The Seventh Circuit, by contrast, has affirmed two awards of whipsaw benefits under § 502(a) following *Amara III*. *See Ruppert v. Alliant Energy Cash Balance Pension Plan*, 2010 WL 5464196 (W.D. Wis. Dec. 29, 2010), *aff'd*, 726 F.3d 936 (7th Cir. 2013); *Thompson v. Ret. Plan for Emps. of S.C. Johnson & Sons, Inc.*, 716 F. Supp. 2d 752 (E.D. Wis. 2010), *aff'd in relevant part*, 651 F.3d 600 (7th Cir. 2011). Neither affirmance, however, cites to *Amara III* and in both cases, judgment had been entered in the plaintiffs' favor in the district court before issuance of the *Amara III* decision.

B. *Section 502(a)(3)*

ERISA § 502(a)(3) allows plan participants, beneficiaries, or fiduciaries to bring civil actions to enjoin any act or practice that violates ERISA or to obtain other "appropriate equitable relief" to redress the violation. 29 U.S.C. § 1132(a)(3); *see Mertens*, 508 U.S. at 255. The Supreme Court has interpreted the term "appropriate equitable relief" as referring to "categories of relief that, traditionally speaking (*i.e.*, prior to the merger of law and equity) were *typically* available in equity." *Amara III*, 563 U.S. at 439 (internal quotation marks omitted). Because "[a] claim for money due and owing under a contract is quintessentially an

action at law," *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002) (internal quotation marks omitted), money damage awards are not available under § 502(a)(3). *See id.*; *Mertens*, 508 U.S. at 255.

The Supreme Court also discussed § 502(a)(3) in *Amara III*. After concluding that the relevant pension plan could not be reformed under § 502(a)(1)(B), the Supreme Court considered whether a remedy for the *Amara* plaintiffs could instead be found in § 502(a)(3). 563 U.S. at 438. There, the plaintiffs had argued that reformation was available as an equitable remedy for fraud. The issue was whether this remedy required a showing of detrimental reliance. In holding it did not, the Court hinted that courts should construe remedies in equity available under § 502(a)(3) broadly, stating:

> we conclude that the standard of prejudice must be borrowed from equitable principles, *as modified by the obligations and injuries identified by ERISA itself*. Information-related circumstances, violations, and injuries are potentially too various in nature to insist that harm must always meet that more vigorous "detrimental harm" standard when equity imposed no such strict requirement.

Id. at 444-45 (emphasis added).

C. *Application*

Although we have previously affirmed the entry of a two-step reformation and enforcement remedy under ERISA, *see Amara v. CIGNA Corp.*, 775 F.3d 510, 532 (2d Cir. 2014) ("*Amara V*"), we have not yet had occasion to consider the availability of reformation to plaintiffs in circumstances such as these, where the

written terms of a pension plan indisputably violate ERISA, but there is no allegation that the violation stems from traditional fraud, mistake, or otherwise inequitable conduct. We nonetheless conclude that reformation of the Plan was available here under ERISA § 502(a)(3), and that, consistent with our precedent, the district court was then authorized to enforce the reformed Plan as a second step under § 502(a)(1)(B).

1. *Reformation under § 502(a)(3)*

ERISA authorizes reformation of the Plan because, by its plain language, § 502(a)(3) authorizes participants and beneficiaries to "obtain . . . equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3). Here, because reformation is an equitable remedy and the Plan violated a "provision[] of [the] subchapter" -- specifically, ERISA § 3(24) -- we conclude that § 502(a)(3) authorizes the district court to reform the Plan. *Id.*

The district court reached a contrary conclusion because it interpreted *Mertens* and its progeny as limiting the availability of equitable remedies under § 502(a)(3) to the specific circumstances under which those remedies were typically available in equity courts. *Laurent VI*, 2017 WL 3142067, at *8 ("Plaintiffs do not allege mistake, fraud, or inequitable conduct here. . . . Plaintiffs are therefore not entitled to relief in the form of judicial reformation under ERISA

§ 502(a)(3).").[4] But neither the statute nor *Mertens* imposes this added requirement. Instead, § 502(a)(3) tells us that equitable remedies are available to "redress violations of" or "to enforce any provisions of" ERISA subchapter I. And *Mertens* holds only that remedies under § 502(a)(3) are limited to "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." 508 U.S. at 256. Reformation is indisputably a typical and traditional form of equitable relief, *see Simmons Creek Coal Co. v. Doran*, 142 U.S. 417, 435 (1892); *see also Amara III*, 563 U.S. at 440 ("The power to reform contracts . . . is a traditional power of an equity court"), and is thus categorically available to a participant or beneficiary to enforce violated provisions of ERISA.

Even were we to find ambiguity in the statute, our holding finds further support in the body of law that has developed around ERISA in this context. The Supreme Court has instructed that when construing a remedy in equity under ERISA § 502(a)(3), courts are to be guided by "equitable principles, as modified by the obligations and injuries identified by ERISA itself." *Amara III*, 563 U.S. at 445. Admittedly, the *Amara III* Court's discussion of § 502(a)(3) is arguably dicta, *see id.* at 442 (noting that the Court "need not

---

[4] In finding that violations of subchapter I of ERISA themselves form the basis for a district court to enter equitable remedies under § 502(a)(3), we do not hold that the violation here could not, in itself, be construed as a form of fraud or mistake sufficient to warrant reformation. Moreover, while we do not need to reach the issue, here PwC arguably engaged in inequitable conduct -- deciding to use an unreasonable definition of NRA and applying two different interest rates in an unfair manner.

decide which remedies [were] appropriate . . . to resolve the parties' dispute"). But our own precedent too has identified "fraud, mutual mistake, or *terms violative of ERISA*" as independent bases that justify the equitable remedy of reformation under § 502(a)(3). *Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 103 (2d Cir. 2005) (emphasis added).

Moreover, the outcome advocated by PwC (and the Chamber of Commerce and other *amici curiae*) -- that even where employees prove an ERISA violation, they have no remedy -- is inconsistent with the "maxim of equity . . . that '[e]quity suffers not a right to be without a remedy.'" *Amara III*, 563 U.S. at 440 (quoting R. Francis, Maxims of Equity 29 (1st Am. ed. 1823)). And the Supreme Court has expressly identified § 502(a)(3) as occupying a special "catchall" remedial role in ERISA's statutory scheme, *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996), particularly in instances where other remedies for violations of the statute may be unavailable. *See id.* at 515 ("[Plaintiffs] must rely on the *third* subsection or they have no remedy at all. We are not aware of any ERISA-related purpose that denial of a remedy would serve. Rather, we believe that granting a remedy is consistent with the literal language of the statute, the Act's purposes, and pre-existing trust law.").

We hold that § 502(a)(3) authorizes district courts to grant equitable relief -- including reformation -- to remedy violations of subsection I of ERISA, even in the absence of mistake, fraud, or other conduct traditionally considered to be inequitable.

2. *Enforcement under § 502(a)(1)(B)*

After concluding that reformation of the Plan is available to Plaintiffs under § 502(a)(3), we have little trouble holding that the district court's authority to grant Step 2 of Plaintiffs' proposed remedy -- enforcement of the reformed Plan under § 502(a)(1)(B) -- follows. As the Supreme Court noted in *Amara III*, "equity often considered reformation a 'preparatory step' that 'establishes the real contract.'" 563 U.S. at 441 (quoting 4 Pomery, Equity Jurisprudence § 1375, at 999). And indeed, we have already expressly affirmed a two-step remedy of reformation-and-enforcement in the post-*Amara III*, ERISA context. *See Amara V,* 775 F.3d at 532.

PwC does not quarrel with our view that § 502(a)(3) is the proper vehicle for enforcing violations of ERISA subsection I, or that enforcement of a pension plan is authorized by § 502(a)(1)(B).[5] But PwC does dispute our authority under ERISA to enter Plaintiffs' two-step remedy more generally, arguing that at least one circuit has rejected this approach. *See Eichorn v. AT&T Corp.*, 484 F.3d 644, 654-57 (3d Cir. 2007). To the extent that it is so, however, *Eichorn* pre-dates *Amara III* and contradicts our own precedent. And while PwC points to controlling cases that limit the remedies available under both

---

[5] To the contrary, PwC has explicitly pointed to § 502(a)(3) as the provision upon which current Plan participants may properly rely to sue for violations of the statute. *See* Appellee's Br. at 26; *see also* Tr. Oral Arg., J. App'x at 613 ("Can you sue to seek an injunction or reform it if you were in the plan and you said I don't like the way this plan is set up, I don't think it's legal. I want to go in. [Section] 502(a)(3) gives you a vehicle to do that.").

§ 502(a)(3) and § 502(a)(1)(B) independently, it is notable that none of those cases considers the two provisions simultaneously. *See, e.g.*, *Mertens*, 508 U.S. at 256-58; *Great-West*, 534 U.S. at 209-19. In the absence of controlling authority otherwise, we are inclined to follow the Supreme Court's express preference that violations of ERISA should be remedied. *See Varity Corp.*, 516 U.S. at 515; *accord Esden*, 229 F.3d at 177 ("Under ERISA, to correct this lack of safeguards, Congress created substantive rights for pension plan participants and expressly created private causes of action in federal court to vindicate those rights.").

As we have concluded that ERISA authorizes, in the circumstances here, the two-step remedy of reformation under § 502(a)(3) and enforcement under § 502(a)(1)(B), we do not address Plaintiffs' alternative arguments for relief. Nor do we address the nature of any reformation and consequent relief to which Plaintiffs may be entitled, whether on their motion for summary judgment or otherwise, leaving those questions to be resolved by the district court in the first instance.

CONCLUSION

For the reasons set forth above, the judgment of the district court is VACATED and the case is REMANDED for further proceedings consistent with this Opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIMOTHY LAURENT, *et al.*, Plaintiffs, -v- PRICEWATERHOUSECOOPERS LLP, *et al.*, Defendants.	06-CV-2280 (JPO) OPINION AND ORDER

J. PAUL OETKEN, District Judge:

This action is brought by Plaintiffs Timothy Laurent and Smeeta Sharon, on behalf of themselves and all others similarly situated, against Defendants PricewaterhouseCoopers LLP, the Retirement Benefit Accumulation Plan for Employees of PricewaterhouseCoopers LLP, and the Administrative Committee to the Retirement Benefit Accumulation Plan for Employees of PricewaterhouseCoopers LLP (collectively, "PwC") under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et. seq*. PwC moves for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), asking the Court to dismiss Plaintiffs' claims with prejudice. (Dkt. No. 209.) Plaintiffs move for summary judgment pursuant to Federal Rule of Civil Procedure 56. (Dkt. No. 216.) The Court held oral argument on May 23, 2017. (Dkt. No. 233.) For the reasons that follow, PwC's motion is granted and Plaintiffs' motion is denied.

I. Motion for Judgment on the Pleadings

A. Background[1]

The following facts are taken from the SAC and documents incorporated therein.[2] (Dkt. No. 133 ("SAC").)

At issue in this action are terms of the Retirement Benefit Accumulation Plan for Employees of PwC. (Dkt. No. 210-3 to -10 ("RBAP" or "Plan"); *see* SAC ¶ 23 n.2 (incorporating the Plan by reference).) Plaintiffs are former employees of PricewaterhouseCoopers LLP who elected a distribution of the fully vested benefits under the RBAP's lump-sum option. (SAC ¶¶ 20-21, 32, 34.) The RBAP provides a lump-sum distribution option for departing participants who have attained the Plans' "Normal Retirement Age."[3] (RBAP

---

[1] The Court provides a brief overview of certain background information relevant to the current motions. Additional background is provided in the prior opinions in this case. *See Laurent v. PriceWaterhouseCoopers LLP*, 963 F. Supp. 2d 310 (S.D.N.Y. 2013), *aff'd*, 794 F.3d 272 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 981 (2016); *Laurent v. PricewaterhouseCoopers LLP*, 448 F. Supp. 2d 537 (S.D.N.Y. 2006) (Mukasey, J.).

[2] "In considering a Rule 12(c) motion, 'a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint.'" *Biro v. Conde Nast*, No. 11 Civ. 4442, 2014 WL 4851901, at *1 n.1 (S.D.N.Y. Sept. 30, 2014) (quoting *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010)).

[3] The Plan's definition of "Normal Retirement Age" was the subject of previous rulings by this Court and the Second Circuit. The RBAP defines "Normal Retirement Age" as "[t]he earlier of the date a Participant attains age 65 or completes five (5) Years of Service." (RBAP § 2.32.) This Court held that the "five (5)

§ 5.4(a).) Under the RBAP, "[t]he amount of any lump sum payment . . . shall not be less than the Actuarial Equivalent of the Participant's Normal Retirement Benefit." (*Id.* § 5.4(b).) The "Normal Retirement Benefit" is "calculated by projecting the Deemed Account Balance to Normal Retirement Age using the Deemed Plan Interest Rate." (*Id.* § 5.1.) The "Deemed Plan Interest Rate" is the annual rate of interest equal to the interest rate on 30-year Treasury securities, as specified by the IRS for the month of February (or before July 1, 2001, the month of May) immediately preceding the "Plan Year" in which the calculation is made. (*Id.* § 2.16; *see id.* § 2.37 (defining "Plan Year" as "[t]he twelve (12) consecutive month period commencing each July 1 and ending the immediately following June 30").)

Plaintiffs allege that the 30-year Treasury rate "was not an appropriate predictor of future investment crediting rates under the RBAP." (SAC ¶ 90.) The problem with using the 30-year Treasury rate, according to Plaintiffs, is that it "undervalued" the "future interest credits" promised by the Plan, which unlawfully forced participants who opted to receive their benefits in the form of a lump sum to forfeit a portion of their return. (*Id.* ¶¶ 97-98.)

On June 26, 2014, this Court granted Plaintiffs' motion for class certification as to Count One and Count Five of the SAC. (Dkt. No. 175.) Both counts assert so-called "whipsaw" claims seeking lump-sum

---

Years of Service" component of this definition was invalid under ERISA. *See Laurent*, 963 F. Supp. 2d at 319-22. The Second Circuit affirmed, albeit on somewhat different grounds. *See Laurent*, 794 F.3d at 285.

distributions equal to the annuity payable at normal retirement age.[4] (SAC ¶¶ 113-118, 129-133.) *See Laurent*, 794 F.3d at 275 (describing the "whipsaw" calculation at issue). Count One, in relevant part, alleges that PwC's "lump sum calculation methodology," which used the 30-year Treasury rate specified in the Plan, "result[ed] in an unlawful forfeiture of accrued benefits" in violation of ERISA and the Internal Revenue Code. (SAC ¶ 117.) Plaintiffs have acknowledged that Count Five is pleaded in the alternative and seeks similar relief—albeit under a slightly different theory. (Dkt. No. 162 at 8.)

Here, Plaintiffs seek relief under both Counts One and Five in the form of three declarations from the Court:

> 1. A declaration that the lawful "normal retirement age" under the RBAP for purposes of calculating lump sum benefits is not "5 years of service" but age 65.

---

[4] Until 2006, under ERISA, plans that offered participants lump-sum distributions could not "deprive the participants of the value that would accrue if the participants waited and took their distributions as an annuity at normal retirement age." *Laurent*, 794 F.3d at 275. In other words, plans were required to take the employee's account balance, increase it "by the plan's interest rate multiplied by the time to normal retirement age," and then discount that total "back to present value at a set rate." *Id.* This is known as the "whipsaw calculation." *Id.* These mandatory payments were eliminated in 2006—after this case was filed and after the distributions at issue were made—when Congress passed the Pension Protection Act of 2006, 120 Stat. 780 (2006); the parties agree that the Pension Protection Act does not apply to this case. *Laurent*, 794 F.3d at 276.

2. "[A] declaration that [the RBAP's] method of computing the lump sums to which withdrawing employees are entitled is unlawful," *Berger v. Xerox*, 338 F.3d 755, 763 (7th Cir. 2003).

3. A declaration that members of the Class remain entitled to benefits under the Plan attributable to the investment credits that would have been credited between the date of their lump sum distributions and age 65, using the rate that the Court determines would have been "the most reasonable projection rate" to estimate the amount of those future credits at the time of the lump sum payments, Ruppert v. Alliant Energy Cash Balance Pension Plan, [726 F.3d 936, 939 (7th Cir. 2013).]

(Dkt. No. 162 at 2-3 (alterations in original) (citing SAC ¶¶ 115-118, 133, 144, Prayer for Relief ¶ F).)

In their motion for judgment on the pleadings, Defendants argue that Plaintiffs do not have an avenue for relief under ERISA. (*See* Dkt. No. 209.) Specifically, Defendants argue that nothing in ERISA enables this Court to issue a declaration that invalidates the Plan's projection rate and replaces it with a new projection rate that complies with ERISA's valuation requirements. (Dkt. No. 210 at 2.)

B. Legal Standard

Under Rule 12(c), "a party is entitled to judgment on the pleadings 'only if it has established that no material issue of fact remains to be resolved and that [it]

is entitled to judgment as a matter of law.'" *Zurich Ins. Co. v. Crowley Latin Am. Servs., LLC*, No. 16 Civ. 1861, 2016 WL 7377047, at *2 (S.D.N.Y. Dec. 20, 2016) (alteration in original) (quoting *Bailey v. Pataki*, No. 08 Civ. 8563, 2010 WL 234995, at *1 (S.D.N.Y. Jan. 19, 2010)). "The standard for granting a Rule 12(c) motion for judgment on the pleadings is identical to that of a Rule 12(b)(6) motion for failure to state a claim." *Citibank, N.A. v. Tormar Assocs. LLC*, No. 15 Civ. 1932, 2015 WL 7288652, at *3 (S.D.N.Y. Nov. 17, 2015) (quoting *Gioconda Law Grp. PLLC v. Kenzie*, 941 F. Supp. 2d 424, 427 (S.D.N.Y. 2013)) (internal quotation marks omitted). "In both postures, the district court must accept all allegations in the non-movant's pleadings as true and draw all inferences in [that party's] favor." *Id.* (alteration in original) (quoting *Gioconda Law Grp. PLLC*, 941 F. Supp. 2d at 427) (internal quotation marks omitted).

C. Discussion

In order to maintain an action under ERISA, "a plaintiff must both 'assert a constitutionally sufficient injury arising from the breach of a statutorily imposed duty' *and* 'identify a statutory endorsement of the action.'" *Am. Psychiatric Ass'n v. Anthem Health Plans, Inc.*, 821 F.3d 352, 359 (2d Cir. 2016) (quoting *Kendall v. Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112, 118 (2d Cir. 2009)). Because "ERISA is a 'comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system,'" *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (quoting *Mertens v. Hewitt Associates*, 508 U.S. 248, 251 (1993)) (internal quotation marks omitted), courts are "especially 'reluctant to tamper with [the] enforcement scheme'

embodied in the statute by extending remedies not specifically authorized by its text," *id.* (alteration in original) (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985)). "ERISA's 'carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Id.* (quoting *Mertens*, 508 U.S. at 251).

In the SAC, Plaintiffs point generally to ERISA § 502(a) as the provision under which all relief may be granted. (SAC at 41.) In Plaintiffs' motion for class certification, they specifically identified ERISA § 502(a)(1)(B) as the particular provision under which they move for relief. (Dkt. No. 162 at 2.) Now, in their opposition to PwC's motion for judgment on the pleadings, Plaintiffs also propose ERISA § 502(a)(3) as an alternative ground for relief. (*See* Dkt. No. 212 at 18-20.)

The Court addresses (1) whether PwC's motion is untimely or procedurally improper; (2) whether controlling authority permits Plaintiffs' claims under ERISA § 502(a)(1)(B); and (3) whether ERISA § 502(a)(3) provides an alternative path to relief.

1. Timeliness and Propriety

Plaintiffs contend that PwC's motion for judgment on the pleadings (1) "is untimely in the extreme"; (2) was previously rejected by this Court in its decision on the motion for class certification (*see* Dkt. No. 175); and (3) conflicts with the Second Circuit's decision in *Laurent*, 794 F.3d at 289. (*See* Dkt. No. 212 at 2-3.)

Rule 12(c) provides the standard for determining whether a motion for judgment on the pleadings is timely. It states that "[a]fter the pleadings are

closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). It is true that this case is over a decade old, and PwC could have raised this argument years earlier than it did. Instead it chose to focus on a different set of arguments at the motion-to-dismiss stage. But there was no waiver or forfeiture by PwC. Rule 12(c) focuses on "delay [of] trial." Where, as here, the pleadings are closed but the parties have not started expert discovery and no trial date has been set, PwC's motion is not untimely. *See Vail v. City of N.Y.*, 68 F. Supp. 3d 412, 422-23 (S.D.N.Y. 2014) (collecting cases).

Second, PwC made a similar argument to that advanced here in opposition to Plaintiffs' Motion for Class Certification. (*See* Dkt. No. 168 at 4.) However, in deciding that motion, the Court nowhere addressed whether ERISA endorses the relief sought by Plaintiffs, which is addressed here for the first time. (*See* Dkt. No. 175 at 3 ("Plaintiffs and Defendants continue to dispute whether RBAP's NRA is valid under ERISA and, if it is not, how to remedy the problem. But the scope of their dispute with respect to class certification is considerably narrower.").) Accordingly, this Court has not previously rejected PwC's arguments.

Finally, the Second Circuit's prior opinion in this case concerned the legality of the Plan's five-years-of-service "normal retirement age" provision. *See Laurent*, 794 F.3d at 289. The Second Circuit expressly left "to the district court" the task of considering the "appropriate relief," which is the subject of the instant dispute. *Id.* And even if the Second Circuit's decision could be read as assuming that *some* relief would be appropriate, it made no such holding.

The Court thus concludes that Defendants' motion for judgment on the pleadings is timely and properly made.

2. ERISA § 502(a)(1)(B)

Under ERISA § 502(a)(1)(B), "[a] civil action may be brought by a participant or a beneficiary . . . to recover benefits due to him *under the terms of his plan*, to *enforce* his rights *under the terms of the plan*, or to *clarify* his rights to future benefits *under the terms of the plan*." ERISA § 502(a)(1)(B) (emphases added). Plaintiffs argue that ERISA § 502(a)(1)(B) is the proper section under which to assert their whipsaw claims. (*See* Dkt. No. 212 at 8-18.)

The Supreme Court has made clear that courts may invoke ERISA § 502(a)(1)(B) only to enforce the terms of the Plan, "as written." *CIGNA Corp. v. Amara*, 563 U.S. 421, 436 (2011). In *Amara*, the Court considered both ERISA § 502(a)(1)(B) and ERISA § 502(a)(3). *See id.* at 425. *Amara* was not a whipsaw case; rather, it involved allegations that an ERISA plan administrator provided inaccurate "summary plan descriptions," which misled plan participants. *Id.* at 428-31. Finding authority in ERISA § 502(a)(1)(B), the district court had ordered the terms of the plan reformed and enforced, in order to remedy the false or misleading information provided by the plan administrator. *Id.* at 425, 433-34; *see also Amara v. CIGNA Corp.*, 348 F. App'x 627 (2d Cir. 2009) (affirming the district court's judgment).

On review, the Supreme Court held that reformation of plan terms is not a remedy available under ERISA § 502(a)(1)(B). *Amara*, 563 U.S. at 436 ("The statutory language speaks of '*enforc[ing]*' the 'terms of

the plan,' not of *changing* them." (alteration in original) (quoting 29 U.S.C. § 1132(a)(1)(B))). While ERISA § 502(a)(1)(B) "allows a court to look outside the plan's written language in deciding what [a] term[] [is], *i.e.*, what the language means," it does not "authorize[] a court to alter [that] term[]." *Id.*

Plaintiffs in this case, invoking ERISA § 502(a)(1)(B), ask the Court to strike the Plan's projection rate—the 30-year Treasury rate—and replace it with the "rate that the Court determines would have been 'the most reasonable projection rate' to estimate" future investment credits under the Plan. (Dkt. No. 162 at 3 (quoting *Ruppert*, 726 F.3d at 939).) The crux of the disagreement between the parties here is whether, after the Supreme Court's 2011 decision in *Amara*, this Court is permitted to afford the relief sought by Plaintiffs

PwC does not dispute, for the purposes of this motion, that the 30-year Treasury rate is improper.[5] (*See*

---

[5] Plaintiffs argue that the 30-year Treasury projection rate contained in the Plan is illegal in light of a 2014 IRS Technical Advice Memorandum ("IRS TAM"), which explains that "the balance in the cash balance account must be projected with interest credits to [Normal Retirement Age]," and this projection must use "*the same interest rate used to provide interest credits to the cash balance account*." (Dkt. No. 212 at 12.) In other words, Plaintiffs argue that it is illegal to credit accounts using one rate structure while Participants are working, but to project the estimated future value of the accounts at retirement age when an early lump sum is taken using a different (and lower) rate structure—here, the 30-year Treasury rate. This is the essence of an ERISA "whipsaw" claim. *See Laurent*, 794 F.3d at 275–76; *Ruppert*, 726 F.3d at 939.

Dkt. No. 211 at 19; Transcript of Oral Argument, May 23, 2017 at 21.)

However, PwC *does* dispute Plaintiffs' request for a replacement rate. According to Plaintiffs, RBAP § 2.14 defines the correct interest-crediting rate, which is determined by "an algorithm that defines a variable rate based on the performance of the funds offered under the Plan's hypothetical investment menu." (Dkt. No. 212 at 12.) Plaintiffs argue that the correct projection rate is equal to the average actual interest credit over a number of prior periods and ask to the Court to supply this rate to replace the 30-year Treasury rate. (*Id.* at 12-13 (citing *Esden v. Bank of Boston*, 229 F.3d 154, 166 n.17, 177 (2d Cir. 2000)).) PwC, however, argues that such relief would amount to reformation rather than interpretation of the Plan, which, they argue, is not authorized under ERISA § 502(a)(1)(B), as clarified by the Supreme Court in *Amara*.

Plaintiffs rely primarily on pre-*Amara* cases to support their contention that, under ERISA § 502(a)(1)(B), this Court can strike the Treasury rate from the Plan and replace it with a new rate. (*See* Dkt. No. 212 at 9-13 (citing *West v. AK Steel Corp.*, 484 F.3d 395 (6th Cir. 2007); *Berger*, 338 F.3d 755; *Esden*, 229 F.3d 154.) Plaintiffs chiefly rely on *May Department Stores Co. v. Federal Insurance Co.*, 305 F.3d 597 (7th Cir. 2002), and *UNUM Life Insurance Co. of America v. Ward*, 526 U.S. 358 (1999), two cases discussing the scope of permissible interpretation under ERISA § 502(a)(1)(B). (*See* Dkt. No. 212 at 7-8, 15-16.) In *May Department Stores*, decided almost a decade before *Amara*, the Seventh Circuit held that, "like many other contracts, pension plans governed by

ERISA contain provisions implied by law." 305 F.3d at 601. Relying on *May Department Stores*, Plaintiffs argue that, if they are correct that the 30-year Treasury rate violates ERISA, then "fleshing out the specifics of the RBAP's implied-by-law projection rate is not 'changing' the Plan's terms: it is resolving an ambiguity" by interpreting it to reflect a provision implied by law. (Dkt. No. 212 at 14.)

Plaintiffs also rely heavily on *UNUM*, pointing particularly to the Supreme Court's citation of *UNUM* in *Amara*. (*Id.* at 15-16.) *UNUM* involved a suit brought under ERISA § 502(a)(1)(B) to recover disability benefits under an ERISA-governed insurance policy in California, which an insurance company had denied as untimely under the terms of the plan at issue. *UNUM*, 526 U.S. at 364-65, 377. However, under California's "notice-prejudice" rule, an insurer denying a claim as untimely must also "prove that it suffered substantial prejudice" before denying a claim. *Id.* at 366-67 (quoting *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 15 Cal. Rptr. 2d 815, 845 (1st Dist. 1993)). ERISA preempted the state's notice-prejudice rule as a state law that "relate[s] to" an employee benefit plan, ERISA § 514(a); unless, as disputed by the parties, the rule "regulat[ed] insurance" and thus escaped preemption under the saving clause, ERISA § 514(b)(2)(A). *Id.* at 367. The Supreme Court held that California's notice-prejudice rule applied as it regulated insurance and was, therefore, *not* preempted by ERISA. *Id.* at 379.

The effect of the Court's decision in *UNUM*, then, was to incorporate California's notice-prejudice rule into the terms of the plan. In *Amara*, the Court again confirmed that § 502(a)(1)(B), "allows a court to look

outside the plan's written language in deciding what those terms are, *i.e.*, what the language means." *Amara*, 563 U.S. at 436. In support of this proposition, the *Amara* Court relied on *UNUM* and described *UNUM* (parenthetically) as "permitting the insurance terms of an ERISA-governed plan to be *interpreted* in light of state insurance rules." *Id.* (emphasis added).

Plaintiffs here rely on the *Amara* Court's discussion of *UNUM* to argue "that § 502(a)(1)(B) remains the proper path for enforcement of claims like the one here that are more 'like the simple enforcement of a contract as written.'" (Dkt. No. 212 at 16 (quoting *Amara*, 563 U.S. at 436).) Plaintiffs thus argue that this Court should conceptualize the striking and replacing of the 30-year Treasury rate with a rate determined by an algorithm as a "straightforward contract interpretative exercise." (Dkt. No. 212 at 12.)

Thus, this Court must determine whether the relief sought by Plaintiffs amounts to "interpret[ation]" of plan terms, as in *UNUM* (as described in *Amara*) — which is allowed under ERISA § 502(a)(1)(B)—or reformation—which, the *Amara* Court held, is not. *See Amara*, 563 U.S. at 436.

A "request for reformation is . . . a request that the court alter the words of the document. [A] party who seeks interpretation asks the court not to change the actual words of the document but to determine the meaning of those words." 5 Corbin on Contracts § 24.18. Here, Plaintiffs' requested relief—the striking out of the 30-year Treasury rate and its replacement with a different rate—amounts to a "change[] akin to the reform of a contract" rather than "the simple enforcement of a contract as written." *Amara*, 563

U.S. at 436. This relief goes further than the reading of a state-law notice requirement into a plan, as in *UNUM*, and would require the Court to fully replace a term of the plan. Plaintiffs would require the Court to *reform* the plan by changing its actual words, rather than determining the meaning of those words.

After *Amara*, courts have consistently refused to allow similar relief under ERISA § 502(a)(1)(B), at least when the issue is presented. In *Pender v. Bank of America Corp.*, 788 F.3d 354 (4th Cir. 2015), for example, the Fourth Circuit applied *Amara* to reject an ERISA § 502(a)(1)(B) claim where "the plaintiffs sought to enforce the plan not as written, but as it should properly be enforced under ERISA." *Id.* at 362. The plaintiffs in *Pender* argued that a bank violated ERISA when it "misapplied [a] formula" by failing to modify that formula with ERISA-mandated terms. *Id.* at 361 (citation omitted) (internal quotation marks omitted). The Fourth Circuit held that *Amara* "explicitly precludes" plaintiffs from using § 502(a)(1)(B) because the remedy required more than enforcement of plan terms—it required the court to reform the terms of the plan. *Id.* at 362-63. Though the Second Circuit has not addressed the issue, several other Courts of Appeals have reached conclusions similar to that reached by the Fourth Circuit in *Pender*. *See Soehnlen v. Fleet Owners Ins. Fund*, 844 F.3d 576, 583 n.2 (6th Cir. 2016) ("By arguing that the terms of the Plan do not comply with the law, Plaintiffs tacitly concede that the relief they seek exists outside the scope of their plan. And an action attempting to re-write the terms of a plan is unavailable under § [502](a)(1)(B)."); *Singletary v. United Parcel Serv., Inc.*, 828 F.3d 342, 349 (5th Cir. 2016) (applying the

Eighth Circuit's distinction between claims for benefits under a plan as written and claims for equitable relief, where only the latter authorizes a plaintiff to "seek[] to reform the Plan by obtaining a declaration that the purported [Plan provisions] are void") (second alteration in original) (quoting *Ross v. Rail Car Am. Grp. Disability Income Plan*, 285 F.3d 735, 740 (8th Cir. 2002)).

To be sure, the Seventh Circuit has affirmed an award of relief under § 502(a)(1)(B), post-*Amara*, in a whipsaw case, thus effectively allowing exactly the type of reliefs sought by Plaintiffs here. *Ruppert*, 726 F.3d 936. However, the issue of whether *Amara* allows such relief under that provision was not raised in the case, and the court did not address it. It therefore does not serve as precedent for Plaintiffs' position on the issue.

Plaintiffs also argue, with some force, that the Supreme Court's decision in *Amara* should not be viewed as having so easily discarded a long line of cases, including whipsaw cases, that authorized claims for reformation-type relief under § 502(a)(1)(B). This is akin to the argument in the context of statutory interpretation that Congress "does not . . . hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)—the point being that such a major change should not be lightly inferred without evidence of a concomitant awareness of its gravity on the part of the Congress (or, here, the Court). It is not at all clear, however, that the elephants-in-mouseholes principle should apply at all to opinions of the Supreme Court, which elucidate the meaning of the law through their own language. In any event, this argument does not carry the day here for two reasons.

First, the Supreme Court's holding in *Amara* was not offhand dicta; it was a carefully reasoned, unequivocal holding in the case. And second, its holding was based on statutory language that the Court concluded was itself clear and unambiguous.

Finally, at oral argument, Plaintiffs argued that, under *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013), the Court should view the illegal plan term as void and look outside the Plan to fill the resulting gap. However, while the words of a plan may leave gaps, they also "may speak clearly." *Id.* at 1549. The Supreme Court in *McCutchen* endorsed "'look[ing] outside the plan's written language' to decide what an agreement means" so as not to "frustrate the parties' intent and produce perverse consequences." *Id.* (quoting *Amara*, 563 U.S. at 436). Here, the intent of the parties is not in question and the terms of the Plan speak clearly. The relief requested by Plaintiffs is reformation—not interpretation and not gap-filling—and requires more than the simple enforcement of the terms of the Plan as written.

Accordingly, Section 502(a)(1)(B) provides no avenue for relief.

3. ERISA § 502(a)(3)

Plaintiffs contend that ERISA § 502(a)(3) provides an alternative path to the relief they seek. (Dkt. No. 212 at 18-20.) ERISA § 502(a)(3) provides that "[a] civil action may be brought . . . by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce

any provisions of this title or the terms of the plan." 29 U.S.C. § 1132(a)(3).

ERISA § 502(a)(3) is a "'catchall' provision[] [that] act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996). However, "[t]he provision authorizes solely *equitable* relief, and under the Supreme Court's decision in *Great-West*, [534 U.S. 204 (2002)], this means that money awards are available in suits brought under § 502(a)(3) 'only in very limited circumstances.'" *Wilkins v. Mason Tenders Dist. Council Pension Fund*, 445 F.3d 572, 578-79 (2d Cir. 2006) (quoting *Gerosa v. Savasta & Co.*, 329 F.3d 317, 321 (2d Cir. 2003)); *see also Coan v. Kaufman*, 457 F.3d 250, 262 (2d Cir. 2006) ("Unlike section 502(a)(2), section 502(a)(3) permits ERISA plan participants to bring suit for individual remedies; but relief under section 502(a)(3) must be 'equitable.'" (quoting 29 U.S.C. § 1132(a)(3))).

PwC initially argues that it would be improper to allow Plaintiffs to invoke ERISA § 502(a)(3) because Plaintiffs have based their claims for class relief on ERISA § 502(a)(1)(B). (Dkt. No. 211 at 20–21 (citing *Singletary*, 828 F.3d at 349).) However, the Court is persuaded that Plaintiffs may rely on § 502(a)(3) in the alternative, for two reasons. First, in the SAC, Plaintiffs broadly invoke ERISA § 502(a) as the provision under which all relief may be granted. (SAC at 41.) Second, courts have not been overly strict about allowing an alternative theory of relief under ERISA § 502(a)(3). *See Amara*, 563 U.S. at 438–43.

Plaintiffs first argue that the Court may provide equitable relief where a plan administrator has breached its fiduciary duty—and that failure to calculate benefits in accordance with ERISA amounts to breach of fiduciary duty. (Dkt. No. 212 at 18-19.) *See Varity*, 516 U.S. at 511 ("[A] plan administrator engages in a fiduciary act when making a discretionary determination about whether a claimant is entitled to benefits under the terms of the plan documents."). But as PwC points out, it was not making a discretionary determination about whether class members are entitled to benefits—it was merely adhering to the terms of the Plan and distributing benefits "calculated ministerially according to the Plan's terms." (Dkt. No. 213 at 9.) Moreover, PwC correctly observes that, when designing the complained-of plan term, PwC was acting in its settlor capacity, not as a fiduciary. (Dkt. No. 211 at 21; Dkt. No. 213 at 9.) Where "plan sponsors acts to adopt, modify, or terminate an ERISA plan, they act as settlors of a trust and do not fall into the category of fiduciaries." *In re Am. Express. Co. ERISA Litig.*, 762 F. Supp. 2d 614, 625 (S.D.N.Y. 2010) (citing *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996)).

Next, Plaintiffs argue that reformation is appropriate under ERISA § 502(a)(3). Cases in the Second Circuit and other circuits have held that the equitable remedy of reformation is available in cases of fraud and mutual mistake—neither of which is at issue here. Plaintiffs note that the Second Circuit has suggested that reformation is available where there is "fraud, mutual mistake or *terms violative of ERISA*." *Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 103 (2d Cir. 2005) (emphasis added) (Cudahy, J.) (citing

DeVito v. Pension Plan of Local 819 I.B.T. Pension Fund, 975 F. Supp. 258, 267 (S.D.N.Y. 1997)). But this reference to ERISA-violative plan terms as an alternative basis for reformation (in the absence of fraud or mistake) is dicta. Plaintiffs cite no other cases that endorse this approach, and the court in *Nechis* did not itself provide relief under ERISA § 502(a)(3) based on a finding that the plan terms violated ERISA. *See id.* (denying both injunctive relief and restitution under ERISA § 502(a)(3) where the claims were legal and not equitable in nature). Indeed, while *DeVito*, the case cited by the *Nechis* court, indicates that a court may order a *defendant* to reform its plan if it is found in violation of ERISA, 975 F. Supp. at 267, the court did "not[] reach the issue of whether *it* has the authority to reform a pension plan under ERISA." 975 F. Supp. at 267 n.13 (emphasis added).

Moreover, the Second Circuit has more recently explained (on remand from the Supreme Court in the *Amara* case) that, under federal common law, "[a] contract may be reformed due to the mutual mistake of both parties, or where one party is mistaken and the other commits fraud or engages in inequitable conduct," where "such fraud reasonably cause[s] [a] plaintiff[] to be mistaken about the terms of [a] pension plan." *Amara v. CIGNA Corp.*, 775 F.3d 510, 525-26 (2d Cir. 2014); *see also Amara,* 563 U.S. at 440 ("The power to reform contracts (as contrasted with the power to enforce contracts as written) is a traditional power of an equity court, not a court of law, and was used to prevent fraud."); Restatement (Second) of Contracts § 166 (1981) (justifying reformation of a con-

tract in light of a "party's fraudulent misrepresentation"). The Second Circuit did not mention other circumstances under which reformation might be justified. And Plaintiffs do not allege mistake, fraud, or inequitable conduct here. *See Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 955 (9th Cir. 2014) ("The power to reform contracts is available only in the event of mistake or fraud."). Plaintiffs are therefore not entitled to relief in the form of judicial reformation under ERISA § 502(a)(3).

Moreover, PwC emphasizes that Plaintiffs seek legal, not equitable, relief. (Dkt. No. 211 at 22-24.) The Supreme Court has held that ERISA § 502(a)(3) authorizes only "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Mertens*, 508 U.S. at 256. PwC argues that the relief sought by Plaintiffs in pursuing their whipsaw claims—money damages for the Plan's implementation of the 30-year Treasury rate—is a legal remedy that does not align with any of the forms of equitable relief available under ERISA § 502(a)(3). (Dkt. No. 211 at 22-24.)

Indeed, judicial reformation under ERISA § 502(a)(3) is not available where a plaintiff seeks "to impose personal liability on respondents for a contractual obligation to pay money—relief that was not typically available in equity." *Great-West*, 534 U.S. at 210. "Almost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of

legal duty." *Id.* (alteration in original) (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 918-19 (1988) (Scalia, J., dissenting)). Here, the requested declarations, if granted, will result in the award of money damages for benefits that were allegedly underpaid by PwC.

Plaintiffs attempt to restyle their requested relief as equitable—characterizing it as an accounting for profit, surcharge, unjust enrichment, or a constructive trust. (Dkt. No. 212 at 18-20.) But, at bottom, they are pursuing a legal claim for money damages. Of course, "[e]quity courts possessed the power to provide relief in the form of monetary 'compensation' for a loss resulting from a trustee's *breach of duty*, or to prevent the trustee's *unjust enrichment*." *Amara*, 563 U.S. at 441-42 (emphasis added) (quoting Restatement (Third) of Trusts § 95 & cmt. a (Tent. Draft No. 5, Mar. 2, 2009)). But Plaintiffs fail to demonstrate the breach of any duty and have not shown any unjust enrichment. As the Second Circuit did in *Nechis*, the Court here "decline[s] this invitation to perceive equitable clothing where the requested relief is nakedly contractual." *Nechis*, 421 F.3d at 104.

Finally, Plaintiffs argue that it would be "nonsensical" to find that the plan term at issue is in violation of ERISA and yet preclude Plaintiffs from recovering. (Dkt. No. 212 at 8.) They argue that supplying a remedy serves the purposes of ERISA as understood through its preamble, which calls for the protection of "the interests of participants in employee benefit plans" by "providing for appropriate remedies." ERISA § 2(b). However, the Second Circuit has required close adherence to ERISA's text over reliance on its broadly stated purposes. In *Central States*, the

Second Circuit asserted that "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text." *Central States*, 771 F.3d at 159 (quoting *Great-West*, 534 U.S. at 220). The court expressly recognized that, "although [plaintiff] might well be left without an appropriate remedy as a result of this decision . . . the claims raised by [plaintiff] are legal, not equitable, and therefore may not be brought under § 502(a)(3)." *Id.* at 159-60.

Accordingly, the Court concludes that Plaintiffs are not entitled to relief pursuant to ERISA § 502(a)(3).

II. Motion for Summary Judgment

Plaintiffs seek summary judgment as to liability and relief under Counts One and Five of the SAC. (Dkt. No. 216.) For the reasons stated above, Plaintiffs' fail to establish they are entitled to relief under ERISA for their whipsaw claims. Plaintiffs' motion for summary judgment is therefore denied.

III. Conclusion

For the foregoing reasons, Defendants' motion for judgment on the pleadings is GRANTED and Plaintiffs' motion for summary judgment is DENIED.

The Clerk of Court is directed to close the motions at Docket Numbers 209 and 216.

The parties are directed to provide a status update or proposed judgment to the Court by August 14, 2017.

SO ORDERED.

Dated: July 24, 2017
New York, New York

/s/ J. Paul Oetken

J. PAUL OETKEN
United States District
Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIMOTHY LAURENT, *et al.*, Plaintiffs, -v- PRICEWATERHOUSECOOPERS LLP, *et al.*, Defendants.	06-CV-2280 (JPO) <u>OPINION AND ORDER</u>

J. PAUL OETKEN, District Judge:

Plaintiffs Timothy Laurent and Smeeta Sharon brought this action, on behalf of themselves and all others similarly situated, against Defendants PricewaterhouseCoopers LLP, the Retirement Benefit Accumulation Plan for Employees of Pricewaterhouse Coopers LLP, and the Administrative Committee to the Retirement Benefit Accumulation Plan for Employees of Pricewaterhouse Coopers LLP (collectively, "PwC"). Plaintiffs allege that PwC violated the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*

In an Opinion and Order dated July 24, 2017, this Court granted PwC's motion for judgment on the pleadings and denied Plaintiffs' motion for summary judgment. *See Laurent v. PricewaterhouseCoopers LLP*, No. 06 Civ. 2280, 2017 WL 3142067 (S.D.N.Y. July 24, 2017). Familiarity with the facts, as set out

in that prior Opinion and Order, is presumed. Plaintiffs move for reconsideration. (Dkt. No. 240.) For the reasons that follow, the motion is denied.

I. Legal Standard

"A motion for reconsideration is 'an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources. . . .'" *Drapkin v. Mafco Consol. Grp., Inc.*, 818 F. Supp. 2d 678, 695 (S.D.N.Y. 2011) (quoting *In re Initial Public Offering Sec. Litig.*, 399 F. Supp. 2d 298, 300 (S.D.N.Y. 2005)). To prevail, the movant must demonstrate either "(1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error or prevent manifest injustice." *Jacob v. Duane Reade, Inc.*, 293 F.R.D. 578, 580–81 (S.D.N.Y. 2013) (quoting *Drapkin*, 818 F. Supp. 2d at 696 (S.D.N.Y. 2011)); *see also Cioce v. County of Westchester*, 128 Fed. App'x 181, 185 (2d Cir. 2005) ("Generally, motions for reconsideration are not granted unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." (quoting *In re BDC 56 LLC*, 330 F.3d 111, 123 (2d Cir. 2003)).

II. Discussion

Having reviewed the record and the parties' briefs, the Court concludes that it overlooked neither a controlling issue of law nor a crucial fact in the record. Thus, none of Plaintiffs' arguments warrants reconsideration.

First, Plaintiffs contend that the Second Circuit's mandate in *Laurent v. PricewaterhouseCoopers LLP*,

794 F.3d 272 (2d Cir. 2015), foreclosed this Court's conclusion that this suit was not authorized by ERISA § 502(a)(3). (Dkt. No. 241 at 3, 5.) Relatedly, Plaintiffs argue that PwC waived any argument that § 502(a)(3) does not authorize their action by failing to present that argument to the Second Circuit. (*Id.* at 10.) This Court already considered and rejected these two procedural arguments. (*See* Dkt. No. 238 at 30; Dkt. No. 212 at 2–3.) Reconsideration is not warranted because Plaintiffs identify neither an intervening change in controlling law, any new evidence, nor the need to correct clear error or prevent manifest injustice. *See Jacob*, 293 F.R.D. at 580–81.

Having rejected Plaintiffs' procedural arguments, the Court now turns to their substantive arguments. First, Plaintiffs argue that the Court's decision is contrary to *Esden v. Bank of Boston*, in which the Second Circuit explained that ERISA "permits plan participants whose rights are violated by the terms of a plan (or a plan amendment) to recover benefits." 229 F.3d 154, 176 (2d Cir. 2000) (quoting Hearings on Hybrid Pension Plans Before the Senate Comm. on Health, Education, Labor and Pensions, 106 Cong. (1999) (prepared testimony of Stuart Brown, Chief Counsel, IRS)). *Esden*, however, is wholly consistent with this Court's opinion: ERISA "created substantive rights for pension plan participants and expressly created private causes of action in federal court to vindicate those rights." *Id.* at 177 (citing ERISA § 502(a), which sets out private rights of action under the statute). In order to vindicate a substantive right under ERISA, a plaintiff's action must be authorized by § 502(a), as *Esden* clearly recognized. Here, the Court simply con-

cluded that § 502(a) does not authorize the form of relief that Plaintiffs seek. "Although [Plaintiffs] might well be left without an appropriate remedy as a result of this decision," the Court remains convinced that their claims are "legal, not equitable, and therefore may not be brought under § 502(a)(3)." *See Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Gerber Life Ins. Co.*, 771 F.3d 150, 159–60 (2d Cir. 2014).[1]

Second, Plaintiffs contend that the "structure" of ERISA "compel[s] the conclusion" that § 502(a)(3) authorizes them to bring an action to enforce its substantive vesting requirements. (Dkt. No. 241 at 19.) *Central States* confirms, however, that Plaintiffs' structural and purposive arguments, like their *Esden* argument, ultimately lack merit (even if there is some intuitive appeal to the idea that ERISA should not be interpreted to leave beneficiaries without remedies for statutory violations). In *Central States*, the Second Circuit rejected the idea that "the underlying purposes of ERISA and of equitable relief generally would permit a court to fashion an appropriate remedy." 771 F.3d at 159 (2d Cir. 2014); *see also id.* at 158 (recognizing that "[c]ommentators have repeatedly noted that as a result of this case law ERISA plans and beneficiaries are, in some circumstances, deprived of remedies").

Finally, Plaintiffs request reconsideration of the Court's conclusion that the relief they seek does not qualify as "appropriate equitable relief" under ERISA

---

[1] Plaintiffs do not challenge the Court's determination that they do not have a cognizable claim under ERISA § 502(a)(1)(B) for benefits. (Dkt. No. 241 at 1.)

§502(a)(3). Plaintiffs identify two varieties of equitable relief, which they claim they are authorized to pursue under § 502(a)(3): (1) an "injunction" requiring the plan administrator to "deviate from the plan's unlawful terms"; and (2) "equitable surcharge." (Dkt. No. 243 at 6–7.)

As to Plaintiffs' request for "injunctive relief," they identify no precedent or authority authorizing a federal court to enjoin a plan administrator to "comply with the [ERISA] statute." (Dkt. No. 241 at 18.) Contrary to their argument, the Supreme Court's *Great-West* decision does not stand for the proposition that § 502(a)(3) authorizes an injunction to enforce a federal statute: that case merely noted, in the course of holding that § 502(a)(3) does *not* authorize specific performance of a contract, that the "*Administrative Procedure Act* . . . does not bar a State from seeking specific relief to obtain money to which it claims entitlement under the *federal Medicaid statute*." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002) (emphasis added) (citing *Bowen v. Massachusetts*, 487 U.S. 879 (1988)). Neither *Great-West* nor *Bowen* has any bearing on whether a plaintiff may enjoin compliance with *ERISA* under § 502(a)(3).

Plaintiffs' overly broad conception of the injunctive relief available under § 502(a)(3) is also difficult to square with the Supreme Court's warning that "appropriate equitable relief" cannot be interpreted to mean "all relief available for breach of trust" in the common-law courts of equity. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 257–58 (1993) ("Since *all* relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief obtainable under § 502(a)(3) to 'equitable relief' in the sense of

'whatever relief a common-law court of equity could provide in such a case' would limit the relief *not at all*," rendering the modifier "appropriate" superfluous.) This inconsistency between Supreme Court precedent and Plaintiffs' argument is especially clear insofar as they claim that trust law principles permit the Court to enjoin the Plan Administrator, as a trustee, to "deviate from" the "terms of the trust." (Dkt. No. 243 at 6). The mere fact that Plaintiffs seek relief against a trustee does not, by itself, transmogrify legal relief into appropriate equitable relief under ERISA.

Regarding the final, alternative equitable remedy sought by Plaintiffs, § 502(a)(3) does authorize actions for "equitable surcharge." *See, e.g.*, *CIGNA Corp. v. Amara*, 563 U.S. 421, 442 (2011); *Osberg v. Foot Locker, Inc.*, 555 F. App'x 77, 80 (2d Cir. 2014). Nonetheless, Plaintiffs fail to meet their "initial burden" to establish the elements of a claim for that equitable remedy, namely: (1) a breach of fiduciary duty that (2) caused them to "suffer[] a 'related loss.'" *Amara v. CIGNA Corp.*, 925 F. Supp. 2d 242, 258 (D. Conn. 2012), *aff'd*, 775 F.3d 510 (2d Cir. 2014).

As the Court explained in its original opinion, Plaintiffs have failed to identify any breach of fiduciary duty by PwC, and this failure precludes them from seeking an equitable surcharge. *See Laurent*, 2017 WL 3142067, at *8. Plaintiffs claim that the Court overlooked *New York State Psychiatric Ass'n, Inc. v. UnitedHealth Group.*, 798 F.3d 125 (2d Cir. 2015), which cited *Kendall v. Employees Retirement Plan of Avon Products*, 561 F.3d 112, 120 (2d Cir. 2009), for the proposition that "[t]he statute . . . impose[s] a general fiduciary duty to comply with ERISA." *New York*

State Psychiatric Ass'n, 798 F.3d at 131 (second alteration added). Plaintiffs argue that PWC breached this "general fiduciary duty" to comply with ERISA, and that this breach entitles them to the remedy of equitable surcharge. (Dkt. No. 241 at 21.)

The Court disagrees with the notion that ERISA imposes a general fiduciary duty on a plan administrator to comply with each and every provision in the statute. First, the *Kendall* quote is taken out of context. *Kendall* is about Article III standing, not the proper interpretation of § 502(a)(3). In the course of concluding that the plaintiff lacked standing to bring certain ERISA claims, the Second Circuit explained that "[t]he statute does impose a general fiduciary duty to comply with ERISA, but it does not confer a right to every plan participant to sue the plan fiduciary for alleged ERISA violations without a showing that they were injured by the alleged breach of the duty." *Kendall*, 561 F.3d at 120. The Court does not read *Kendall* to hold that a plan administrator breaches his fiduciary duty whenever he fails to depart from a term of the plan—such as the whipsaw projection rate and nonretirement-age terms at issue here—which conflict with an ERISA provision.

Instead, the Court agrees with Judge Garaufis's conclusion that "[t]rustees do not breach their fiduciary duties under ERISA simply by presiding over a plan which fails in some respect to conform to one of ERISA's myriad provisions." *Cement & Concrete Workers Dist. Council Pension Fund v. Ulico Cas. Co.*, 387 F. Supp. 2d 175, 184 (E.D.N.Y. 2005), *aff'd*, 199 F. App'x 29 (2d Cir. 2006). Consistent with this Court's previous opinion, "a trustee breaches an ERISA fiduciary duty only where, when acting as a fiduciary

within the meaning of ERISA § 3(21)(A) . . . , the trustee fails to discharge one or more of the duties described in 29 U.S.C. § 1104." *Id.* at 184. Here, Plaintiffs have failed to adequately allege such a breach. Therefore, their claim for equitable surcharge under § 502(a)(3) fails.

III. Conclusion

For the foregoing reasons, Plaintiffs' motion for reconsideration (Dkt. No. 240) is DENIED.

As counsel for Plaintiffs acknowledged during oral argument, the conclusion reached by the Court resolves all remaining claims asserted in this action.[2] Accordingly, the Second Amended Complaint is dismissed with prejudice.

The Clerk of Court is directed to close this case.

SO ORDERED.

Dated: January 19, 2018
New York, New York

/s/ J. Paul Oetken

J. PAUL OETKEN
United States District Judge

[2] *See* Dkt. No. 238 at 52 ("Effectively, your Honor, that would be – I agree with my colleague – that would be the end of the case. We're not saying that they committed fraud in connection with the projection. . . . So that would be the end.").

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIMOTHY LAURENT, *et al.*, Plaintiffs, -v- PRICEWATERHOUSECOOPERS LLP, *et al.*, Defendants.	06-CV-2280 (JPO) OPINION AND ORDER

J. PAUL OETKEN, District Judge:

Plaintiffs Timothy Laurent and Smeeta Sharon brought this action, on behalf of themselves and all others similarly situated, against Defendants PricewaterhouseCoopers LLP, the Retirement Benefit Accumulation Plan for Employees of PricewaterhouseCoopers LLP, and the Administrative Committee to the Retirement Benefit Accumulation Plan for Employees of PricewaterhouseCoopers LLP (collectively, "PwC"). Plaintiffs allege that PwC violated the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*

In an Opinion and Order dated July 24, 2017, this Court granted PwC's motion for judgment on the pleadings and denied Plaintiffs' motion for summary judgment. *See Laurent v. PricewaterhouseCoopers LLP* ("*Laurent II*"), No. 06 Civ. 2280, 2017 WL 3142067 (S.D.N.Y. July 24, 2017). Plaintiffs moved for reconsideration, and that motion was denied on

January 19, 2018 (*see* Dkt. No. 244.). The Clerk of Court subsequently entered judgment against Plaintiffs (*see* Dkt. No. 245). On February 5, 2018, Plaintiffs moved, pursuant to Federal Rules of Civil Procedure 60(a) and 60(b), for clarification or modification of the Court's order denying reconsideration. (*See* Dkt. No. 246.) For the reasons that follow, the motion is denied.

I. Legal Standard

"Rule 60(a) allows for the correction of clerical mistakes, oversights, and omissions in order to 'implement the result intended by the court at the time [an] order was entered.'" *Weiming Chen v. Ying-Jeou Ma*, 595 F. App'x 79, 80 (2d Cir. 2015) (alteration in original) (quoting *Rezzonico v. H & R Block, Inc.,* 182 F.3d 144, 150 (2d Cir. 1999)). "However, a court acting pursuant to Rule 60(a) may not make 'changes that alter the original meaning [of an order] to correct a legal or factual error.'" *Id.* (alteration in original) (quoting *Rezzonico*, 182 F.3d at 151).

"Rule 60(b) is 'a mechanism for extraordinary judicial relief invoked only if the moving party demonstrates exceptional circumstances.'" *Id.* (quoting *Ruotolo v. City of New York,* 514 F.3d 184, 191 (2d Cir. 2008)). Rule 60(b) relief is available for, *inter alia*, the following reasons: "(1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason that justifies relief." Fed. R. Civ. P. 60(b). Such relief is not available, however, "where the moving party seeks solely to relitigate an issue already decided." *Weiming Chen*, 595 F. App'x at 80 (quoting *Shrader v. CSX Transp., Inc.,* 70 F.3d 255, 257 (2d Cir. 1995)); *see also United Airlines, Inc. v. Brien*, 588 F.3d 158,

176 (2d Cir. 2009) ("[A] Rule 60 motion 'may not be used as a substitute for appeal' and . . . a claim based on legal error alone is 'inadequate.'" (quoting *Matarese v. LeFevre*, 801 F.2d 98, 107 (2d Cir. 1986))).

II. Discussion

Having reviewed the record and the parties' briefs, the Court concludes that Plaintiffs are not entitled to relief under either subsection of Rule 60.

First, to the extent that Plaintiffs rely on Rule 60(a), their failure to identify any clerical error in the Court's prior decisions is fatal to their motion. *See Weiming Chen*, 595 F. App'x at 80.

Second, Plaintiffs have not identified any "mistake, inadvertence, surprise, or excusable neglect; . . . or . . . any other reason that justifies relief" under Rule 60(b). Instead, Plaintiffs' motion amounts to a claim of legal error, which is not cognizable on a Rule 60(b) motion.

Like their brief in support of reconsideration (*see* Dkt. No. 241 at 3), Plaintiffs' Rule 60(b) argument centers on the meaning of footnote 19 of the Second Circuit's opinion in *Laurent v. PricewaterhouseCoopers LLP* ("*Laurent I*"), which states:

> 65 is not only (part of) the statutory default normal retirement age, but it is also the default normal retirement age under the plan. Since ERISA grants a private cause of action to enforce, *inter alia,* "the terms of the plan," PwC may be compelled to "act 'in accordance with the documents and instruments governing the plan' insofar as they accord with the statute."

794 F.3d 272, 289 n.19 (2d Cir. 2015) (internal citations omitted) (first quoting 29 U.S.C. § 1132(a)(3), then quoting *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 101 (2013)).

Based on this footnote, Plaintiffs' motion for reconsideration contended that the Court's conclusion that ERISA § 502(a)(3) does not authorize the relief Plaintiffs seek was inconsistent with the Second Circuit's mandate in *Laurent I*. The Court has now twice rejected Plaintiffs' argument that the Second Circuit already decided that a remedy was available under ERISA § 502(a)(3). (*See Laurent II*, 2017 WL 3142067, at *4; Dkt. No. 244 at 2.) In their Rule 60(b) motion, Plaintiffs' claim about the proper interpretation of footnote 19 is slightly weaker: Instead of arguing that the footnote *mandated* that the Court allow their suit to proceed under ERISA § 502(a)(3), they now argue that footnote 19 *permitted* this Court to "order Defendants to comply with the *lawful* terms of the Plan" under § 502(a)(3). (Dkt. No. 246 at 2 (alterations omitted)).

As the Court has previously explained, "[t]he Second Circuit expressly left 'to the district court'" the question of what, if any, remedy is available to Plaintiffs. (*Laurent II*, 2017 WL 3142067, at *4 (quoting *Laurent I*, 794 F.3d at 289).) The fact that footnote 19 contemplated that § 502(a)(3) might afford Plaintiffs a remedy, however, does not justify relief under Rule 60(b), because the Court has already answered the question left open by the Second Circuit: Section 502(a)(3) of ERISA does not authorize the relief Plaintiffs seek—i.e., the recalculation of benefits. The Court cannot order recalculation of benefits under

§ 502(a)(3), regardless of whether such relief would require the Court to *replace* illegal Plan terms or, as Plaintiffs now argue, to determine whether the 30-year Treasury projection rate violated ERISA and then "*remand* to PwC . . . 'to act in accordance with the documents and instruments governing the plan insofar as they accord with the statute.'" (Dkt. No. 246 at 2 (emphasis added) (quoting *Laurent I*, 794 F.3d at 289 n.19).) As Defendants rightly point out, "the Plan does not contain any projection rate that Plaintiffs accept as 'lawful.'" (Dkt. No. 247 at 5.)

In short, the Court has twice concluded that § 502(a)(3) does not authorize Plaintiffs to pursue equitable relief in the form of recalculated benefits. At this point, the proper vehicle for challenging this conclusion is an appeal, rather than a motion under Rule 60.

III. Conclusion

For the foregoing reasons, Plaintiffs' motion for clarification or modification is DENIED.

The Clerk of Court is directed to close the motion at Docket Number 246.

SO ORDERED.

Dated: April 24, 2018
New York, New York

/s/ J. Paul Oetken

J. PAUL OETKEN
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of February, two thousand twenty.

Timothy D. Laurent and Smeeta Sharon, on behalf of themselves and all others similarly situated, Plaintiffs - Appellants, v. PricewaterhouseCoopers LLP, The Retirement Benefit Accumulation Plan for Employees of PricewaterhouseCoopers LLP, The Adminstrative Committee to the Retirement Benefit Accumulation Plan for Employees of PricewaterhouseCoopers LLP, Defendants - Appellees.	**ORDER** Docket No: 18-487

Appellees, PricewaterhouseCoopers LLP, The Adminstrative Committee to the Retirement Benefit Accumulation Plan for Employees of PricewaterhouseCoopers LLP and The Retirement Benefit Accumulation Plan for Employees of PricewaterhouseCoopers LLP, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

APPENDIX F

EXCERPTS FROM DEFERRED JOINT APPENDIX

C.A. Dkts. 105–112,
No. 18-487 (2d Cir. Nov. 29, 2018)

TABLE OF CONTENTS

Second Amended Class Action Complaint (Dist. Ct. Dkt. 133 dated Aug. 22, 2012) (*excerpts*)
Joint Appendix pp. 124–129........................60a
Joint Appendix pp. 142–148........................66a
Joint Appendix pp. 153–154........................74a

Retirement Benefit Accumulation Plan for Employees of PricewaterhouseCoopers LLP, Summary Plan Description (Dist. Ct. Dkt. 24-5 dated July 1, 1999) (*excerpt*)
Joint Appendix pp. 977–980........................76a

IRS Determination Letter for Retirement Benefit Accumulation Plan for Employees of PricewaterhouseCoopers LLP (Dist. Ct. Dkt. 24-6 dated Feb. 9, 1996)
Joint Appendix pp. 991–992........................83a

IRS Determination Letter for Retirement Benefit Accumulation Plan for Employees of PricewaterhouseCoopers LLP (Dist. Ct. Dkt. 24-6 dated Mar. 22, 2004)
Joint Appendix pp. 993–994........................86a

Retirement Benefit Accumulation Plan for Employees of PricewaterhouseCoopers LLP (Part 2) (Dist. Ct. Dkt. 210-4 dated July 1, 1995) (*excerpt*) Joint Appendix pp. 1040–1048....................89a

IRS Technical Advice Memorandum, 2014-E-PWC-L005037-45 (Dist. Ct. Dkt. 221-1 dated May 28, 2014) Joint Appendix pp. 1189–1197....................99a

THE PARTIES

20. Plaintiff Timothy D. Laurent of Inverness, Illinois, a former PwC employee, was and remains a participant, as defined in ERISA § 3(7) in the RBAP. In 2002, after terminating employment with PwC, he requested a single lump sum distribution of his benefit from the RBAP. On or about May 20, 2002, Mr. Laurent was paid a lump sum equal to the sum of (1) the nominal balance of his hypothetical cash balance account and (2) the Plan-calculated present value of his accrued benefit under the Coopers & Lybrand Retirement Plan as of June 30, 1998. The lump sum payment was less than the value of his accrued benefit.

21. Plaintiff Smeeta Sharon of New York, New York, a former PwC employee, was and remains a participant, as defined in ERISA § 3(7) in the RBAP. In 2002, after terminating employment with PwC, she requested a single lump sum distribution of her benefit from the RBAP. On or about April 30, 2002, Ms. Sharon was paid the nominal balance of her hypothetical cash balance account, an amount less than the value of her accrued benefit.

22. Defendant PricewaterhouseCoopers LLP is a Delaware limited liability partnership organized and existing pursuant to the PwC Partners and Principals Agreement (incorporated herein by reference). PwC is the sponsor of the RBAP. PwC also was and/or is the RBAP's administrator within the meaning of ERISA § 3(16)(A). PwC's headquarters are located at 300 Madison Avenue, New York, New York 10017-6204. All references to "PwC" include its predecessors, including Price Waterhouse LLP and Coopers & Lybrand LLP.

23. Defendant The Retirement Benefit Accumulation Plan for Employees of PricewaterhouseCoopers LLP ("RBAP" or the "Plan") is a "cash balance" pension plan covering PwC partners and principals ("partners"), directors, and employees.[142] The RBAP is an "employee pension benefit plan" within the meaning of ERISA § 3(2)(A) and more precisely a "defined benefit plan," *see* RBAP at 1-2, within the meaning of ERISA § 3(35) and IRC § 414(j), and a "pension plan" within the meaning of IRC § 401(a) and Treasury Regulation ("Treas. Reg.") § 1.401-1(b)(1)(i).[3] The Plan is overseen and administered in significant part by individuals who work and/or reside in this District.

---

[2] "RBAP" refers, as the case may be, to the RBAP in its entirety or the document commonly referred to as the "RBAP plan document." The RBAP plan document is an "Agreement" between, among others, PwC and "the Trustees" amended and restated effective July 1, 1995. References to the RBAP plan document are to that Agreement together with all amendments, exhibits, appendices, supplements, and agreements or side letters or special annual memoranda to partners, all of which, as updated to the present, are incorporated herein by reference. References to the "RBAP" include the RBAP plan document and other related documents such as the Summary Plan Description(s) ("SPD"), all of which are also incorporated herein by reference.

[3] ERISA consists of four titles. Citations to specific sections of ERISA refer to sections in Title I. However, any reference to a particular provision of Title I should be interpreted as including a reference to the parallel provision in Title II, which is codified in the Internal Revenue Code. Similarly, any reference to a particular provision of the Internal Revenue Code should be interpreted as including a reference to the parallel provision in Title I. More generally, references to ERISA should be interpreted to include a reference to the Internal Revenue Code.

For example, many of the Plan's Trustees and members of the Plan's Administrative Committee work and/or reside in the District; the Plan's IRS determination letters were addressed to PwC's offices in this District; and the Plan's lead actuaries during all or most of the years at issue in this lawsuit work and/or reside in the District.

24. Defendant The Administrative Committee to the Retirement Benefit Accumulation Plan for Employees of PricewaterhouseCoopers LLP (the "Administrative Committee" or "Committee") was and/or is the RBAP's Administrator within the meaning of ERISA § 3(16)(A). The Committee and its current and former members were and/or are named fiduciaries with respect to the RBAP within the meaning of ERISA § 402(a). A number of Committee members work and/or reside in this District.

BACKGROUND

I. Basic Description of the RBAP and Plaintiffs' Benefits Thereunder.

25. Prior to July 1, 1994, the RBAP's effective date, Price Waterhouse LLP, a predecessor of PwC, maintained for its employees a traditional defined benefit plan, known as the Retirement Plan for Employees of Price Waterhouse LLP. Effective June 30, 1994, Price Waterhouse LLP froze benefit accruals under that plan, effectively replacing it with the RBAP, which became effective July 1, 1994.

26. On July 1, 1998, Price Waterhouse LLP and Coopers & Lybrand LLP merged to create PwC. On that same date, Coopers & Lybrand LLP's traditional defined benefit plan, the Coopers & Lybrand Retirement Plan, was amended to provide for a cash balance

formula under which participants' hypothetical accounts were credited with compensation credits and interest credits at rate based on Treasury securities. Normal retirement age under the Coopers & Lybrand Retirement Plan was defined as age 65. The RBAP merged into the Coopers & Lybrand Retirement Plan one year later, on July 1, 1999, and the merged plan was amended and restated as the amended and restated RBAP. (Accordingly, all references to the RBAP herein should be read to include the Coopers & Lybrand Retirement Plan from July 1, 1998 until July 1, 1999).

27. The RBAP includes a benefit formula that is commonly-referred to as a "cash balance" pension formula. The benefits payable under the Plan are calculated in part based on the value of the hypothetical "account" established under the Plan for each participant.

28. Similar to other plans that include cash balance formulas ("cash balance plans"), participants in the RBAP receive hypothetical periodic "pay credits" to their hypothetical accounts each month. Non-partner employees receive credits equal to 5-8% of the employee's monthly compensation. Partners generally receive pay credits over a 10 year period equal to approximately 10% of the maximum contribution permitted under ERISA.

29. Account balances are adjusted each business day by hypothetical "investment credits" (or debits), which are the RBAP's version of the more typical cash balance "interest credits." RBAP participants choose from among a PwC-selected menu of "investment experience choices" (essentially, investment options) in

which their accounts are deemed to be invested (or, if no choice is made, they are defaulted into the money market fund). The Plan thus credits participant accounts with hypothetical interest (investment credits) based on real market rates of return: the investment credits reflect the results of each participant's hypothetical investment performance. Moreover, participants may reallocate their deemed investment mix on a daily basis.

30. Under the terms of the RBAP, most participants have the right to leave their account balances in the Plan even after terminating employment or retiring and to continue receiving investment credits. RBAP § 2.13(b). More specifically, a participant with an account balance in excess of $5,000 at the time of his termination of employment is permitted to leave his or her benefits in the RBAP through April 1 of the year following the later of retirement or the date the participant attains age 70½. RBAP §§ 5.1, 5.6.

31. A participant's right to receive future investment credits on his account balance through normal retirement age accrues at the same time as the corresponding pay credits to which the investment credits relate – that is, the right to receive future investment credits through normal retirement age is not conditioned on the performance of additional services for PwC. Accordingly, the RBAP's investment credits are "frontloaded" within the meaning of IRS Notice 96-8. (If the Plan was not a frontloaded plan, it would violate ERISA's anti-backloading standards.) As a result, the future investment credits payable on existing account balances through the date each participant attains his or her normal retirement age are part of each RBAP participant's current "accrued benefit"

within the meaning of ERISA. Id.; Treas. Reg. § 1.417(e)-1(d).

32. The RBAP provides that a participant is fully vested upon the completion of five (5) years of service with PwC or a related employer. Plaintiffs were fully vested under this provision by the time they terminated employment with PwC. Plaintiffs' RBAP account balances exceeded $5,000 at the time of their termination of employment.

33. As a result, at the time of their termination of employment, each Plaintiff had a vested accrued benefit within the meaning of ERISA equal to (1) the nominal balance in their hypothetical cash balance account, plus (2) the stream of future investment credits payable on such account balance through normal retirement age; together expressed as a life annuity commencing at normal retirement age.

34. Plaintiffs Laurent and Sharon received a single lump sum payment from the Plan on or about May 20, 2002 (Mr. Laurent) and April 30, 2002 (Ms. Sharon). The payment made to Mr. Laurent was $24,432.65, an amount equal to the sum of (1) the nominal balance of his hypothetical cash balance account and (2) the Plan-calculated present value of his accrued benefit under the Coopers & Lybrand Retirement Plan as of June 30, 1998. The payment made to Ms. Sharon was $9,527.02, an amount equal to the nominal balance in her cash balance account.

* * *

VII. <u>Violations of ERISA Lump Sum and Vesting Standards.</u>

82. Defendants' use of the RBAP-defined NRA and Deemed Plan Interest Rate also caused Defendants to violate ERISA's provisions governing the calculation and payment of benefits in the form of a lump sum.

83. Had Defendant calculated and paid lump sums using age 65 as the statutory NRA, as required, participants would have received the full amount of accrued benefits to which they were legally entitled under the terms of the Plan and ERISA. As it was, Plaintiffs and members of the Class unwittingly forfeited a significant portion of their accrued benefits solely because they elected to receive benefits in the form of a single sum following termination of employment rather than as an annuity commencing at age 65. This occurred as follows.

84. As described above, the RBAP is a "front-loaded" cash balance plan that calculates interest credits by reference to investment measures that are variable. According to the IRS's authoritative interpretation of the law: "A frontloaded interest credit plan that specifies a variable outside index for use in determining the amount of interest credits must [1] prescribe the method *for reflecting future interest credits* in the calculation of an employee's accrued benefit. In order to comply with [Tax Code] section 401(a)(25), the method, including actuarial assumptions, if applicable, must preclude employer discretion. [2] Further, in determining the amount of an employee's accrued benefit, a forfeiture, within the meaning of [Treasury Regulation] section 1.411(a)-4T,

will result if the value of future interest credits is projected using a rate that understates the value of those credits or *if the plan by its terms reduces the interest rate or rate of return used for projecting future interest credits*. [3] A forfeiture in violation of [Tax Code] section 411(a) [and ERISA § 203] also will occur if, in determining the amount of an employee's accrued benefit, *future interest credits are not taken into account (i.e., there is no projection of future interest credits*) and this has the same effect as using a rate that understates the value of future interest credits." IRS Notice 96-8 (emphasis added).

85. The methodology used by Defendants to calculate lump sums under the RBAP did not comply with any of these three standards. Defendants' failure to comply with each constituted independent violations of ERISA.

86. *First*, for the reasons described above, the statutory NRA under the Plan necessarily is age 65 for all participants regardless of their years of service with PwC. Therefore, when calculating lump sums Defendants were required to project a participant's current account balance at the Plan's investment crediting rate through age 65. But, except in the case of lump sums paid to the beneficiary of a participant who died before completing 5 years of service, Defendants did not do this. (Lump sums paid to beneficiaries of participants who died before completing 5 years of service were calculated by projecting the deceased participant's account balance at the Deemed Plan Interest Rate to the date he or she would have attained age 65, and calculating the present value of the resulting projected age-65 account balance using required

ERISA discount rate and mortality factors. *See* Plan §§ 5.7 and 5.4(b).)

87. Plan § 5.1 only purported to project interest through the RBAP-defined NRA, which for participants who had completed 5 years of service was the date the participant reached that 5-year milestone, not age 65. Defendants did not disregard the terms of the Plan and project interest to age 65 for these participants. The result is that the vast majority of participants who received lump sum distributions had completed 5 years of service by the time of the distribution so for these participants (whose RBAP-defined NRA was a date in the past), there was no projection at all: lump sums were defined as an amount equal to the participant's current account balance. *See* Plan §§ 5.4(b) and 5.1. Because lump sums paid to participants in this category, which includes Plaintiffs Laurent and Sharon along with most other members of the proposed Lump Sum Class, did not take future interest credits into account at all – "*i.e.,* there is no projection of future interest credits," Notice 96-8 – the lump sums necessarily resulted in unlawful forfeitures of accrued benefits in violation of IRC § 411(a) and ERISA § 203(a). *See* Notice 96-8 requirement [3] above.

88. *Second*, even ignoring the absence of a projection to age 65, the lump sums were nevertheless calculated unlawfully because, as alleged above, the calculation was performed using a projection rate that was not Defendants' actual estimate of future interest credits. As described above, RBAP § 5.4 provides that lump sums shall be no less than the present value of a participant's "Normal Retirement Benefit." A participant's Normal Retirement Benefit is defined as the

participant's current account balance projected to normal retirement age at the 30-year Treasury rate. So the rule under the RBAP was that lump sums would be based on a participant's current account balance "projected" to "Normal Retirement Age."

89. But while the RBAP's lump sum calculation formula does include a "projection" of a participant's account balance to normal retirement age, it was not the product of any *bona fide* attempt to reflect the value of future interest credits in the calculation of the participant's accrued benefit. Thus, for example, Defendants' selection of the 30-year Treasury rate was not based on any studies or analyses conducted or relied upon by Defendants to establish an estimate of the investment returns a participant would receive were he to defer his pension until age 65 (or for that matter, any date in the future). Defendants could not then and cannot today provide any contemporaneously-available support, empirical or otherwise, for their selection of the 30-year Treasury rate. It was and is a projection rate in name only.

90. Indeed, all of the information available to Defendants, based in part on their projections of market-based investment returns for other purposes, showed or should have showed Defendants that 30-year Treasury rate (and in particular, the annual rate of interest equal to the interest rate on 30-year Treasury securities, as specified by the IRS for the month of February (or before July 1, 2001, the month of May) immediately preceding the plan year in which the calculation is made) was not an appropriate predictor of future investment crediting rates under the RBAP.

91. PwC's and the Plan's own estimates of future rates of return on participant accounts exceeded Defendants' estimates of the future rate of return on 30-year Treasury bonds.

92. Defendants told Plan participants that, with an appropriately diversified portfolio, they could expect to earn rates of return that would significantly exceed the expected return on Treasury bonds and other "risk-free" investments. For example, in the July 1, 1994, RBAP Highlights Guide (PwC-L000857) distributed to participants, each of the five "Model Portfolios" presented by Defendants were shown to have historical average returns over the 20-year period ended June 30, 1994 ranging between 10.7% (Preservation of Capital model portfolio) and 14.4% (Very Aggressive Growth model portfolio). The Guide explained that the average annual rate of return on Treasury bills (1926-1993) had been 3.7% and implied that Treasury bills would be a poor investment for most participants because "Treasury Bills have historically provided almost no real return and in some instances have actually lost ground to inflation. Thus, while Treasury Bills offer apparent safety and predictability in the short-run, they pose a potentially very serious risk of purchasing power loss over longer periods of time. This result is just the opposite of the case described above with stocks, which exhibit short-term volatility risk but offer greater long-term security." *Id.* at PwC-L00910-00911.

93. The Highlights Guide advised participants that "[a] key component in selecting the appropriate asset allocation strategy for your portfolio should be based on your investment time horizon, so it's important that you carefully consider what your specific

time horizon might be. * * * Over a twenty-year period, there is plenty of time for stock market ups and downs to average out to a more consistent and attractive long-term average annual return. In fact, stocks have outperformed bonds and Treasury Bills in virtually all periods of 20 years or longer. Thus, the risk associated with unpredictable short-term stock market fluctuations is virtually eliminated for long-term investors. * * * For the reasons cited above, investors with 15 to 20 or more years to invest should generally consider placing most of their portfolios in stocks to achieve the highest returns." *Id.* at PwC-L00909-00910.

94. The Highlights Guide suggested that most if not all participants should consider themselves to have investment time horizons of at least 15 to 20 years, explaining: "If you are currently 35 years old, you'll likely not tap into your account for at least 25 years. Even if you're within two years of retirement, you most likely will spend your dollars gradually over the remainder of your life." *Id*. at PwC-L00909.

95. Defendants re-issued the Guide in substantially identical form in subsequent years. Defendants provided similar information and investment advice on the Plan website, in other summary plan descriptions ("SPDs") and elsewhere, *e.g.*, in financial planning advice distributed to principles and partners.

96. Defendants believed that RBAP participants were intelligent individuals who could understand the information and advice provided in the Highlights Guide, on the Plan website, and elsewhere, which advice was set forth in plain English at a level appropri-

ate to the educational level of an average Plan participant receiving the information. Defendants also believed RBAP participants would accept the accuracy of the information provided in the Guide and that many participants would follow the advice given. Defendants did not believe that every participant would invest 100% of their hypothetical account balances in funds that would track or approximate the return on 30-year Treasury securities.

97. *Third,* even assuming the "deemed" projection rate was the result of a *bona fide* attempt to estimate the value of future interest credits, the RBAP's lump sum calculation methodology still violated ERISA because use of the 30-year Treasury bond rate undervalued future interest credits. Treasury securities are considered "riskless" assets with a correspondingly low expected rate of return. Interest credits under the Plan are based on the rate of return of the portfolio of mutual funds selected by each participant. *See* Plan § 2.14. As the investment expert used by Defendants to support their motion for summary judgment explained: "Since a portfolio of stocks and bonds has by definition more market risk than a riskless asset, investors demand a risk premium and hence a higher expected rate of return for holding it." Sharpe Decl. (Doc. 66) ¶ 20. *See also* Def. Rule 56.1 Stmt. (Doc. 67) ¶ 17. The Highlight Guides described above reflect that Defendants knew this when the RBAP was adopted.

98. Accordingly, it would have been unlawful for Defendants to use the 30-year Treasury rate to calculate lump sums because that would have meant that participants who elected to receive benefits in the form of a lump sum would have been forced to forfeit

the portion of the return they would have been expected to receive had they left their accounts in the Plan and taken a pension at age 65. This would have violated ERISA because it "conditions an employee's right to future interest credits on the *form* of the distribution he elects to take (pension at age 65 or lump sum now), which is precisely what the law forbids." *Berger v. Xerox Corp. Ret. Income Guar. Plan,* 338 F.3d 755, 762 (7th Cir. 2003). *See, e.g.,* ERISA § 203(a)(2), IRC § 411(a)(2), and Treas. Reg. § 1.411(a)-4.

99. On information and belief, Defendants explicitly recognized that the IRS would not or would not likely accept such a projection rate if PwC were to adopt it and the agent assigned to review the Plan's determination letter application noticed and/or understood the significance of its usage in the context of this Plan.

100. For each of these reasons, Defendants violated ERISA when they calculated and paid lump sums that were less than the ERISA-defined present value of a participant's statutory accrued benefit, including future investment credits through normal retirement age.

* * *

CLAIMS FOR RELIEF

COUNT ONE

UNLAWFUL LUMP SUM CALCULATION

113. Plaintiffs repeat and re-allege the allegations contained in the foregoing paragraphs of this Complaint as if fully set forth herein.

114. Plaintiffs bring this claim on behalf of themselves and the proposed Class.

115. For the reasons described above, the RBAP-defined NRA cannot be used as the Plan's statutory NRA within the meaning of ERISA § 3(24) and IRC § 411(a)(8) to apply ERISA's vesting and lump sum benefit calculation standards. Thus, ERISA and the terms of the Plan (*e.g.,* Plan §§ 2.32 and 16.6(b)) require that age 65 be used as the statutory normal retirement age.

116. Using age 65 as the statutory NRA, the manner in which Defendants calculated and paid lump sum benefits to Plaintiffs and other RBAP participants violated ERISA §§ 204(c)(3) and 204(g), IRC §§ 411(c)(3) and 417(e), and Treas. Reg. §§ 1.411(a)-7(a)(1) and 1.411(c)-1(e).

117. Lump sums paid to Plaintiffs and other participants were smaller than the ERISA-defined actuarial present value of the statutory accrued benefit to which each participant was lawfully entitled under the term of the Plan and ERISA, resulting in an unlawful forfeiture of accrued benefits in violation of IRC § 411(a) and ERISA § 203(a). Defendants' lump sum calculation methodology unlawfully conditioned a participant's receipt of a portion of his or her statutory accrued benefit on the *form* of the distribution he or

she elected to take (pension at age 65 or immediate lump sum. Treas. Reg. § 1.411(a)-4.

118. If Defendants had calculated and paid lump sum benefits in the manner required under ERISA and the Tax Code, Plaintiffs and other members of the proposed Class would not have unwittingly forfeited a portion of their statutory accrued benefits and accordingly would have received larger distributions than the amounts in fact paid to them.

* * *

WHEN BENEFITS ARE PAYABLE

Benefits are payable upon termination of employment if you are vested. A transfer of employment from one PricewaterhouseCoopers office worldwide to another PricewaterhouseCoopers office worldwide is not a termination of employment for which benefits are payable. Additionally, prior to termination of employment, "non-highly compensated" client-service staff members who are vested may receive all or any portion of amounts credited to their accounts in any of the Plan payment methods (for legacy KL and C&L non-highly compensated client-service staff, amounts credited after June 30, 1999 are available for distribution). This option is also available to such staff members who have terminated employment.

PLAN PAYMENT METHODS UPON TERMINATION OF EMPLOYMENT OR RETIREMENT

One of the advantages of the plan is its flexibility in offering various methods of benefit payment. The value of your account will be determined on the last business day of the month in which you request a distribution from the plan. However, if you request a distribution during the month that you terminate employment, your account will be valued on the last business day of the next month. If on the day of valuation, shares are not traded on national stock exchanges, your benefit will be determined on the preceding day on which shares are traded. Your distribution will be made as soon thereafter as practicable.

You may choose the method of benefit payment that best suits your needs. Payment methods under the plan are as follows:

Mandatory Lump Sum Payment

Regardless of the payment methods described below, if the value of your vested account does not exceed $5,000, a lump sum payment will be made to you. Your account will be valued on the last day of the second month following the month during which your termination of employment is reported to the plan. Your distribution will be made as soon thereafter as practicable.

Normal Payment Method for Single Participants

The plan's normal form of payment for a single participant is a single life annuity that is the actuarial equivalent of your account balance. If you are single at the time your plan benefits are to begin under this payment method, your benefit will be paid to you in equal monthly installments for your life. The last retirement plan payment will be for the month in which your death occurs.

Normal Payment Method for Married Participants

If you are married at the time your plan benefits are to begin, the normal form of payment is a 50% joint and survivor annuity that is the actuarial equivalent of your account balance. Under this form of payment, your monthly benefit is reduced from what you would have received under a single life annuity because after your death, 50% of the benefit that you received continues to be paid to your surviving spouse -- for the rest of his or her life. Benefit payments are continued to your surviving spouse only if you were married to that spouse at the time retirement payments began.

The reduction from a single life annuity is based on the ages of you and your spouse and reflects the fact that benefits are payable during both your lifetimes. If your spouse should die after plan benefit payments have begun, reduced income will continue to be paid for your lifetime. If you remarry after the date retirement benefits begin, your new spouse will not be eligible to receive a survivor annuity.

Optional Payment Methods

Regardless of whether you are single or married at the time plan payments are scheduled to begin, you can choose one of the following optional payment methods by filing the appropriate forms with National Benefits Administration, Tampa-NAC, within the 90-day period before plan benefits begin. If you are single, you must waive a life annuity in writing. If you are married, both you and your spouse must waive a joint and survivor annuity in writing. Your spouse's signature must be notarized. Elections may be revoked or changed at any time before benefits begin. Once benefits have begun, you cannot choose a different form of benefit payment and any election you have made may not be revoked or changed.

Single Life Annuity –- This payment method is the same as the normal form of payment for single participants -- i.e., your retirement benefit will be paid in monthly installments throughout your lifetime but no benefits are paid to your spouse after your death.

Lump Sum Payment – Under this payment option, you may receive a lump sum cash payment. The amount of the lump sum payment shall be equal to your vested account balance. If you are a legacy C&L

employee and you elect a lump sum payment, the portion of the lump sum that is based on the C&L career average formula will be equal to the actuarially computed present value of the career average benefit payable at age 65 as a single life annuity. Present value for this purpose, shall be calculated using the mortality rates specified in the plan and an interest rate based on the annual rate for 30-year Treasury securities in effect for the month of May preceding the plan year in which a distribution occurs.

If the value of your benefit is more than $5,000 and you are less than age 70%, you can elect to defer distribution. If the value of your benefit is $5,000 or less or if you are age 70%, no deferral election is permitted.

Direct Rollovers

If you elect a lump sum distribution (with your spouse's consent, if applicable), you may instruct the Plan Administrator to make your plan distribution payable directly to another eligible retirement plan. Payment may be made to another employer's retirement plan or an Individual Retirement Account (IRA). Please see the *Special Tax Notice Regarding Plan Payments* at the end of this section for more information regarding the tax consequences of your benefit distribution.

For legacy C&L employees who have attained age 53 by their termination of employment, besides the payment options described above, the following payment options that were available under the C&L Retirement Plan will continue to be available if you were covered by that plan.

> *100%,* 75%, *70%, 66* 2/3% *and 50% Joint & Survivor Annuity* — This form of payment provides you

with a monthly benefit for your life and after your death, your designated beneficiary receives the applicable percentage of your benefit for the rest of his or her life. Your monthly benefit is reduced from what you would have received under a single life annuity. Your beneficiary need not be your spouse. If your beneficiary should die after your payments have started, your monthly payment will not increase.

Five, Ten or Fifteen Year Period Certain and Life Annuity — This form of payment provides you with a monthly benefit for your life and guarantees plan payments for a certain period of time. If you die before receiving 60, 120, or 180 monthly payments, your designated beneficiary will receive the remaining payments for that period. Your monthly benefit is reduced from what you would have received under a single life annuity. Your beneficiary need not be your spouse. You can select the 180 payments only if such period does not exceed your life expectancy at the time payments begin.

Level Income Annuity — If you retire early and elect to have your plan payments begin before age 62, you can choose the level income annuity option. Under this payment method, your monthly payments are increased before your Social Security benefits begin upon age 62 and decreased (or possibly reduced to zero) after that. Your combined retirement income from the plan and Social Security benefits remain nearly level throughout your retirement.

If you terminate employment with the firm after age 53 and elect one of the annuity payment options, you will receive the portion of an annuity payable at age 65 for your C&L career average retirement benefit, as shown in the table below. The reduction is based on your age and service at the time payments begin to take into account the fact payments will be made over a longer period of time.

Your Age When Income Starts	**If You Have Five But Less Than 30 Years of Service**	**If You Have 30 or More Years of Service**
53	42%	54%
54	46	58
55	50	62
56	54	66
57	58	70
58	62	76
59	66	82
60	70	88
61	76	94
62	82	100
63	88	100
64	94	100
65	100	100

For legacy C&L employees who terminate employment prior to attaining age 53, benefits can be paid as a qualified joint and survivor annuity, a single life annuity or a lump sum as described above. If paid in annuity form, the portion of the benefit based on the

C&L career average formula will be reduced based on a 6% per annum interest rate and the mortality rates specified in the plan.

*   *   *

INTERNAL REVENUE SERVICE
DISTRICT DIRECTOR
G.P.O. BOX 1680
BROOKLYN, NY 11202

Date: FEB 9 1996

PRICE WATERHOUSE LLP
C/O ROBERT A NACRON
C/O PRICE WATERHOUSE LLP
1177 AVENUE OF THE AMERICAS RH 303
NEW YORK, MY 10036

Employer Identification Number: 13-5326270

File Folder Number: 133007316

Person to Contact: JOSEPH SCHIANO

Contact Telephone Number: (203) 840-4100

Plan Name:
RETIREMENT BENE ACCUMULATION PLAN
FOR EMPLYS OF PRICE WATERHOUSE LLP

Plan Number: 195

Dear Applicant:

We have made a favorable determination on your plan, identified above, based on the information supplied. Please keep this letter in your permanent records.

Continued qualification, of the plan under its present form will depend on its effect in operation. (See section 1.101-1(b)(3) of the Income Tax Regulations.) We will review the status of the plan in operation periodically.

The enclosed document explains the significance of this favorable determination letter, points out some

features that may affect the qualified status of your employee retirement plan, and provides information on the reporting requirements for your plan. It also describes some events that automatically nullify it. It is very important that you read the publication.

This letter relates only to the status of your plan under the Internal Revenue Code. It is not a determination regarding the effect of other federal or focal statutes.

This determination letter is applicable for the plan adopted on June 23, 1995.

This plan has been mandatorily disaggregated, permissively aggregated, or restructured to satisfy the nondiscrimination requirements.

This plan satisfies the nondiscrimination in amount requirement of section 1.401(a)(4)-1(b)(2) of the regulations on the basis of a general test described in the regulations.

This letter is issued under Rev. Proc. 93-39 and considers the amendments required by the Tax Reform Act of 1986 except as otherwise specified in this letter.

This plan satisfies the nondiscriminatory current availability requirements of section 1.401(a)(4)-9(b) of the regulations with respect to those benefits, rights, and features that are currently available to all employees in the plan's coverage group. For this purpose, the plan's coverage Group Consists of those employees treated as currently benefiting for purposes of demonstrating that the plan satisfies the minimum coverage requirements of Section 410(b) of the Code.

This plan also satisfies the requirements of section 1.401(a)(4)-9(b) of ‘the regulations with respect to the specific benefits, rights, or features for which you have provided information.

This letter may not be relied upon with respect to whether the plan satisfies the qualification requirements as. amended by the Uruguay Round Agreements Acts Pub. L. 103-465.

We have sent a copy of this letter to your representative as indicated in the power of attorney.

If you have questions concerning this matters please contact the person whose name and telephone number are shown above.

Sincerely yours,

/s/ Herbert J. Huff

Herbert J. Huff
District Director

Enclosures:
Publication 794

INTERNAL REVENUE SERVICE
P. O. BOX 2508
CINCINNATI, OH 45201

Date: MAR 22 2004

PRICEWATERHOUSECOOPERS LLP
1301 AVENUE OF THE AMERICAS
NEW YORK, NY 10019-6013

Employer Identification Number: 13-4008324

DLN: 17007178010032

Person to Contact: JUANITA M PRERICH

Contact Telephone Number: (877) 829-5500

Plan Name:
RETIREMENT BENEFIT ACCUMULATION PLAN FOR PWC LLP

Plan Number: 002

Dear Applicant:

We have made a favorable determination on the plan identified above based on the information you have supplied. Please keep this letter, the application forms submitted to request this letter and all correspondence, with the Internal Revenue Service regarding your application for a determination letter in your permanent records. You must retain this information to preserve your reliance on this letter.

Continued qualification of the plan under its present form will depend' on its effect in operation. See section 1.401-1(b)(3) of the Income Tax Regulations. We will review the status of the plan in operation periodically.

The enclosed Publication 794 explains the significance and the scope of this favorable determination letter based on the determination requests selected on your application forms. Publication 794 describes the information that must be retained to have reliance on this favorable determination letter. The publication also provide examples of the effect of a plan's operation on . its qualified status and *discusses* the reporting requirements for qualified plans. Please read Publication 794.

This letter relates only to the status of your plan under the Internal Revenue Code. It is not a determination regarding the effect of other federal or local statutes.

This determination is subject to your adoption of the proposed amendments submitted in your letter dated February 27, 2004. The proposed amendments should be adopted on or before the date prescribed by the regulations under :ode section 401(b).

This determination letter is applicable for the amendment(s) executed al May 21, 2002.

Issues arising from the amendment of a defined benefit plan's benefit formula to convert that formula into a cash balance type benefit formula are under study, and this determination letter does not express an opinion on any of these issues. A cash balance type formula generally defines a benefit for each employee by reference to a single-sum amount, such as 10 percent of final average pay times years of service, or the amount of the employee's hypothetical account balance.

This letter considers the changes in qualification requirements made by the Uruguay Round Agreements Act, Pub. L. 103-465; the Small Business Job Protection Act of 1996, Pub. L. 104-188, the Uniformed *Services* Employment and Reemployment Rights Act of 1994, Pub. L. 103-353, the Taxpayer Relief Act of 1997, Pub. L. 105-34, the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, and the Community Renewal Tax Relief Act of 2000, Pub. L. 106-554.

This letter may not be relied on with respect to whether the plan satisfies the requirements of section 491(a) of the Code, as amended by the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107-16.

The requirement for employee benefits plans to file summary plan descriptions (SPD), with the U.S. Department of Labor was eliminated effective August 5, 1997. For more details, call 1-808-998-7542 for a free copy of the SPD card.

If you have questions concerning this matter, please contact the person whose name and telephone number are shown above.

Sincerely yours,

/s/ Paul T. Shultz

Paul T. Shultz
Director,
Employee Plans Rulings & Agreements

Enclosures:
Publication 794

ARTICLE 5

RETIREMENT BENEFITS

5.1 Normal Retirement Benefit. A Participant's Normal Retirement Benefit shall be an amount equal to the Actuarial Equivalent (calculated by projecting the Deemed Account Balance to Normal Retirement Age using the Deemed Plan Interest Rate) of his or her Deemed Account Balance.

(a) Eligibility for Normal Retirement Benefit. A Participant shall be eligible for Normal Retirement Benefit upon termination of employment from the Employer, or in the case of a Participant who is a Partner, Principal, Limited Equity Partner or Limited Equity Principal when he ceases to be active, with a nonforfeitable right to his or her Accrued Benefit, as determined under Article 6 of the Plan. For purposes of this Plan, a Participant who is a Partner, Principal, Limited Equity Partner or Limited Equity Principal ceases to be active when he ceases to perform significant services for the Employer as a Partner, Principal, Limited Equity Partner or Limited Equity Principal under the Agreement or Restated Agreement described in Section 2.21 of the Plan (without regard to such individual's status under the income tax laws).

Effective for Participants who attain age 70½ after December 31, 1998, the Normal Retirement Benefit that is paid upon a Participant's termination of employment, or in the case of a Participant who is a Partner, Principal, Limited Equity Partner or Limited Equity Principal after he ceases to be active, after the Participant attains age 70 ½ shall be the Actuarial Equivalent of the Normal Retirement Benefit that would have been paid to the Participant at age 70½

had he then terminated employment ceased to be active. For purposes of this Section, an Actuarial Equivalent shall be the product of (1) the Normal Retirement Benefit at age 70½, (2) Deemed Investment Experience, and (3) a fraction, the numerator of which is the value of a life annuity of $1 commencing on April 1 following the calendar year in which the Participant attains age 70½, and the denominator of which is the value of such a life commencing on the Valuation Date for the Participant's request for a distribution upon his termination of employment.

On or after July 1, 1997 and prior to July 1, 1998, a transfer, leave of absence, appointment, secundment, or any other arrangement with the same result, from any PWF Firm to another PW Firm shall not be considered a termination of employment from the Employer, or in the case of a Partner or Principal or Limited Equity Partner or Limited Equity Principal ceasing to be active. Effective July 1, 1998, a transfer, leave of absence, appointment, secundment, or any other arrangement with the same result, from any Member Firm, Network Firm or Relevant Entity of the PricewaterhouseCoopers Global Network to another Member Firm, Network Firm or Relevant Entity of the PricewaterhouseCoopers Global Network shall neither be considered a termination of employment from the Employer, not be considered ceasing to be active.

(b) Payment of Normal Retirement Benefit. Subject to Section 5.3, a Participant's Normal Retirement Benefit shall be paid in monthly payment equal to one twelfth (1/12th) of the annual Normal Retirement Benefit. Effective for Participants who attain

age 70 ½ after December 31, 1998 and prior to January 1, 2002, a Participant's Normal Retirement Benefit shall commence to be paid not later than the first day of April of the calendar year following the later of the calendar year during which the Participant attains age 70½ or the Participant terminated employment or in the case of a Participant who is a Partner, Principal, Limited Equity Partner or Limited Equity Principal he ceases to be active. For Participants who attain age 70½ after December 31, 2001, the Participant's Normal Retirement Benefit must be distributed, or distribution must commence, no later than April 1 of the calendar year following the calendar year in which the Participant attains age 70½ even though the Participant may still be employed by the Employer or not ceased to be active, and such distribution shall be increased each following December 31 to take into account the Participant's Accrued Benefit not distributed as of such December 31.

5.2 Payment of Benefits. Prior to July 1, 1999, for purposes of a distribution under the Plan, the value of a Participant's Benefit shall be its value as of the Valuation Date occurring on the 20th day of the second following calendar month after the calendar month during which a Participant provides the Plan Administrator with a request for a distribution of his or her Benefit (or in the case where a Participant's Benefit does not exceed $5,000 ($3,500 prior to July 1, 1998) during which termination of a Participant's employment occurs, or a Participant who is a Partner, Principal, Limited Equity Partner or Limited Equity Principal ceases to be active), unless the 20th day of the second following calendar month is a day on which shares are not traded on a national stock exchange, in

which case it shall be the Valuation Date occurring on the first day before the 20th day on which shares are traded on a national stock exchange. Effective on and after July 1, 1999, for purposes of a distribution under the Plan of: (1) a Benefit in value as of the Valuation Date occurring on the last business day of the Calendar month during which the Participant provides the Plan Administrator with a request for a distribution of his or her Benefit if the request us received by the Plan Administrator by the twentieth (20th) day of such month; provided, however, that a request for a distribution which is provided to the Plan Administrator during the same calendar month in which a Participant's termination of employment occurs (or in which a Partner, Principal, Limited Equity Partner, or Limited Equity Principal ceases to be active) shall result in such Participant's Benefit being valued on the Valuation Date occurring on the last business day of the next calendar month if the request is received by the Plan Administrator by the twentieth (20th) day of the month in which the Participant's termination of employment occurs (or in which a Partner, Principal, Limited Equity Partner, or Limited Equity Principal ceases to be active); and (2) a Benefit that is $5,000 or less, the value of a Participant's Benefit shall be its value as of the Valuation Date occurring on the last business day of the second calendar month following the calendar month in which a Participant's termination of employment occurs (or in which a Partner, Principal, Limited Equity Partner, or Limited Equity Principal ceases to be active). If the last business day of any calendar month is a day on which shares are not traded on a national stock exchange, the Valuation Date shall be the first day on which shares are traded on a national stock exchange before the last

business day. A Participant's Benefit shall be paid as soon as practicable following its Valuation Date. Any Deemed Payroll Period Allocation made to the Participant's Deemed Account Balance subsequent to the initial distribution, shall be distributed as soon as practicable following the date of such Deemed Payroll Allocation. All distributions hereunder shall be made in a consistent and uniform manner with regard to timeliness of distribution. Notwithstanding any other provision of the Plant to the contrary, a Participant's request for a distribution will be valued as of the Valuation Date occurring on the next business day following receipt of the request for the distribution when such request is made to comply with an independence standard imposed by any international, federal or state regulatory agency or professional association.

5.3 Qualified Joint and Survivor Annuity.

(a) A married Participant's Benefit shall be paid in the form of a Qualified Joint and Survivor Annuity unless the Participant elects an optional form of Benefit pursuant to a Qualified Election, as defined in Subsection (b), not earlier than ninety (90) days or less than thirty (30) days before the date that Benefit payments would commence.

(b) A Qualified Election is an election of an optional form of Benefit by a married Participant to which his or her Spouse consents in a writing witnessed by a Plan representative or a notary public. A Qualified Election constitutes a waiver of the Qualified Joint and Survivor Annuity. A Participant may make a Qualified Election not to have his or her Benefit paid in the form of a Qualified Joint and Survivor Annuity and may elect an alternative form of payment

not earlier than ninety (90) days or less than thirty (30) days before the date on which Benefits are scheduled to commence. The Benefit commencement date for a distribution in a form other than a Qualified Joint and Survivor Annuity may be less than thirty (30) days after receipt of the written explanation described in Section 5.3(c) provided: (a) the Participant has been provided With information that clearly indicates that the Participant has at least thirty (30) days to consider whether to waive the Qualified Joint and Survivor Annuity and to elect (with Spousal Consent) a form of distribution other than a Qualified Joint and Survivor Annuity; (b) the Participant is permitted to revoke any affirmative distribution election at least until the Benefit commencement date or, if later, at any time prior to the expiration of the seven day period that begins the day after the explanation of the Qualified Joint and Survivor Annuity is provided to the Participant; and (c) the Benefit commencement date is a date after the date that the written explanation was provided to the Participant. In order to be effective, any such election to have Benefits paid in a form other than a Qualified Joint and Survivor Annuity shall be consented to by the Spouse (or the Spouse's legal guardian if the Spouse is legally incompetent) in writing whereby the Spouse:

(1) consents not to receive the Qualified Joint and Survivor Annuity; and

(2) consents to the specific optional form elected by the Participant.

The instrument shall contain the signed acknowledgment by such Spouse of the effect of such election.

Spousal consent to such election shall not be required if the Participant establishes to the satisfaction of a Plan representative that such written consent may not be obtained because: there is no Spouse;

(1) there is no Spouse;

(2) the Spouse cannot be located;

(3) the Participant furnishes a court order to the Administrative Committee establishing that the Participant is legally separated or has been abandoned (within the meaning of local law), unless a qualified domestic relations order pertaining to such Participant provides that the Spouse's consent must be Obtained; and

(4) there exist such other circumstances as the Secretary of the Treasury may by regulations prescribe.

Any consent necessary under this provision shall be valid only With respect to the Spouse who signed such consent (or the designated Spouse in the event that it is established that the consent of the Spouse may not be obtained) and such consent shall be irrevocable. A Participant may revoke any prior election without the consent of his or her Spouse at any time prior to the commencement of benefits, in which case benefits shall be paid in the form of a Qualified Joint and Survivor Annuity, unless an alternative election is duly made with the appropriate Spousal consent.

(c) The Administrative Committee shall provide to each Participant within a reasonable period prior to the commencement of benefits a written explanation of:

(1) the terms and conditions of the Qualified Joint and Survivor Annuity;

(2) the Participant's right to make, and the effect of, an election to waive the Qualified Joint and Survivor Annuity form of benefit;

(3) the rights of a Participant's Spouse; and

(4) the right to make, and the effect of, a revocation of a previous election to waive the Qualified Joint and Survivor annuity.

5.4 Optional Forms. In lieu of the form of Benefit set forth in Sections 5.1 or 5.3, the Participant may elect, subject to the rules of Subsection 5.3(b), if applicable, one of the following forms of Benefit.

(a) Specified Distribution. Upon attainment of Normal Retirement Age, a Participant who is (i) a Partner or Principal, or (ii) a Non-Highly Compensated client-service Employee may receive a distribution of all or any portion of his or her Accrued Benefit in any form available under the Plan. This form of distribution shall not be available to a Highly Compensated client-service Employee or any practice-support Employee. This form of distribution shall not be available to any Participant who was a participant in the Coopers & Lybrand Retirement Plan or the Kwasha Lipton Retirement Plan prior to July 1, 1999.

(b) Lump Sum Payment. A single lump sum cash payment to the Participant upon his or her termination of employment, or in the case of a Participant who is a Partner, Principal, Limited Equity Partner or Limited Equity Principal when he ceases to be active, or upon the Participant's death to his or her

Beneficiary. This is the only form of distribution available to a Beneficiary who is not the Participant's Spouse. The amount of any lump sum payment to a Participant or Beneficiary shall not be less than the Actuarial Equivalent of the Participant's Normal Retirement Benefit. A Participant who is required to cease receiving his Benefit in any form permitted under the Plan in order to comply with an independence standard imposed by any international, federal or state regulatory agency or professional association may receive a single lump sum payment that is not less than the Actuarial Equivalent of the undistributed portion of the Participant's Normal Retirement Benefit.

(c) Single Life Annuity. An annuity with equal monthly installments payable to the Participant for his or her lifetime. This is the automatic form of Benefit for a single Participant, unless such Participant elects another form. The amount of the annuity is the Actuarial Equivalent of the Participant's Deemed Account Balance.

5.5 Method of Payment of Benefit. The Administrative Committee, in its sole discretion, may provide for the payment of Benefits under this Article by the Trustee, through the purchase of annuity contracts from an insurer, or through direct cash payments from the Trust to the Participant or Beneficiary. Any annuity contract purchased from an insurer which is distributed to a Participant or Beneficiary must be nontransferable in the hands of the Participant or Beneficiary. Neither the Administrative Committee, Employer or the Trustee, nor their successors, shall be responsible for the failure on the part of the insurer

to make payments provided by any such annuity contract, which is distributed to a Participant or Beneficiary.

* * *

INTERNAL REVENUE SERVICE
EMPLOYEE PLANS
TECHNICAL ADVICE MEMORANDUM

Taxpayer's Name:	PricewaterhouseCoopers LLP
Taxpayer's Name:	PricewaterhouseCoopers LLP
Taxpayer's Address:	3109 W. Dr. Martin Luther King Jr. Blvd. Tampa, FL 33607
Plan:	Retirement Benefit Accumulation Plan for Employees of PricewaterhouseCoopers LLP
Taxpayer's EIN:	13-4008324
Years Involved:	PYE June 30, 2003 forward
Date of Conference:	September 11, 2012

Issues:

1. Whether the Plan's definition of the Accrued Benefit causes the Plan to fail any of the requirements of sections 411 and 417(e)(3) of the Internal Revenue Code (the "Code").
2. If the Plan fails to satisfy one or more of the above requirements, whether the retroactive disqualification of the Plan should be limited by the application of section 7805(b) of the Code.

Facts:

Price Waterhouse LLP ("PW") and Coopers & Lybrand LLP ("C&L") combined, effective July 1, 1998, to form PricewaterhouseCoopers LLP ("PwC").

Prior to the formation of PwC, C&L maintained the Coopers & Lybrand Retirement Plan ("C&L Plan"), a career average pay plan, originally effective June 1, 1954. On April 15, 1996, the Service issued C&L a favorable determination letter that considered the amendments made to the C&L Plan as required by the Tax Reform Act of 1986 and related legislation.

Prior to the formation of PwC, PW maintained the Retirement Benefit Accumulation Plan for Employees of Price Waterhouse, LLP ("PW Plan"), a cash balance plan, which was originally effective July 1, 1994. On February 9, 1996, the IRS issued PW a favorable determination letter that considered the amendments made to the PW Plan as required by the Tax Reform Act of 1986 and related legislation. The 1996 determination letter covered the PW Plan's cash balance provisions.

Both the C&L Plan and the PW Plan were assumed, effective July 1, 1998, by PwC, and the PW Plan was renamed the Plan. Effective July 1, 1998, the C&L Plan was converted into a cash balance plan.[1] Effective July 1, 1999, the Plan was merged into the C&L Plan and the C&L Plan was renamed the Plan.

On March 22, 2004, the IRS issued PwC a favorable determination letter that considered the amendments

---

[1] This TAM does not consider the cash balance provisions of the C&L Plan, which are found in Appendix B of the Plan.

made to the Plan as required by the Uruguay Round Agreements Act and related legislation ("GUST"). The determination letter contained a caveat relating to issues arising from the Plan's conversion into a cash balance plan.

The Service commenced an examination of the Plan beginning with Plan year ending June 30, 2003. On May 19, 2009, EP Examinations requested technical advice on Issues (1) and (2) above.

This TAM considers only whether the Plan's definition of the Accrued Benefit causes the Plan to fail to satisfy 411 and 417(e) as discussed below. This TAM does not consider the provisions applicable to C&L Participants as provided in Appendix B of the Plan, the amendments made to the Plan effective May 22, 2007, or any other issues not specifically addressed in this TAM.

<u>Plan Provisions:</u>

Section 2.1 of the Plan defines the Accrued Benefit as of any date to mean the Participant's Deemed Account Balance credited to that date.

Section 2.2 of the Plan defines Actuarial Equivalent as a benefit having the same present value as the benefit which it replaces using the Deemed Plan Interest Rate that is applicable for the plan year with respect to which such determination is made and the mortality table under section 417(e) of the Code.

Section 2.13 of the Plan defines the Deemed Account Balance as the Participant's Deemed Payroll Period Allocations to date, as increased or decreased to reflect his or her Deemed Investment Experience.

Section 2.14 of the Plan defines Deemed Investment Experience as an increase or decrease in a Participant's Deemed Account Balance in accordance with his or her investment experience election from among the choices prescribed by the Administrative Committee. This section further provides that each Participant's Deemed Account Balance shall be adjusted to reflect his or her Deemed Investment Experience in the same manner as if the Deemed Account Balance were actually invested pursuant to the Participant's investment experience election and as if each Deemed Payroll Period Allocation were actually an allocation made to an account for the Participant.

Section 2.15 of the Plan provides a Deemed Payroll Period Allocation that is defined as an annual, flat pay credit equal to the "Share Ratio," the "Unadjusted Allocation," or 5, 7, or 10 percent of compensation, depending on the Participant's classification (e.g., Director, Partner, Principal, or other Employee).

Section 2.16 of the Plan defines Deemed Plan Interest Rate as the annual rate of interest for an annuity commencement date in a plan year equal to the interest rate on 30-year Treasury securities for the month of May immediately preceding such plan year. Section 2.16 provides that effective July 1, 2001, and plan years thereafter, the annual rate of interest for an annuity commencement date in a plan year is equal to the interest rate on 30-year Treasury Securities for the month of February immediately preceding such plan year. However, only for the plan year commencing July 1, 2001, the *Deemed* Plan Interest Rate shall be equal to the rate specified for February 2001 or May 2001, whichever produces the largest benefit.

Section 2.32 of the Plan defines Normal Retirement Age as the earlier of the date a Participant attains age 65 or completes five (5) Years of Service.

Section 2.33 of the Plan defines the Normal Retirement Benefit to mean a single life annuity payable at the later of the participant's attained age or Normal Retirement Age, as set forth in Article 5 of the Plan.

Section 5.1 of the Plan defines the Normal Retirement Benefit as an amount equal to the Actuarial Equivalent (calculated by projecting the Deemed Account Balance to Normal Retirement Age using the Deemed Plan Interest Rate) of his or her Deemed Account Balance.

Section 5.4(b) of the Plan provides that a lump sum payment is a cash payment payable on termination of employment and that the amount of any lump sum payment shall not be less than the Actuarial Equivalent of the Normal Retirement Benefit.

Section 5.4(c) of the Plan provides that the automatic form of benefit for a single participant is a monthly annuity that is an amount equal to the Actuarial Equivalent of the Participant's Deemed Account Balance.

Section 6.1 of the Plan provides that a Participant who is employed on attainment of Normal Retirement Age or death shall be fully vested in his or her Accrued Benefit. This section further provides that if a Participant terminates employment, the Participant is vested after completing 5 years of service.

In 2008, the Plan was amended as follows:

- To freeze accruals under the Plan effective July 1, 2008;

- To provide the cessation of Deemed Payroll Period Allocations after June 30, 2008;
- To define Normal Retirement Age as age 62, effective May 22, 2007;[2] and
- To provide that, for distributions after August 17, 2006, the amount of a lump sum payment is equal to the amount of the Deemed Account Balance. The language for distributions prior to this date was retained. See Section 5.4(b) of the Plan.

PW Plan Provisions/Original Plan Document:

The PW Plan's provisions are the same as those set forth above, except that Section 5.1 of the PW Plan states that a Participant's Normal Retirement Benefit shall be an amount equal to the Actuarial Equivalent of his or her Deemed Account Balance.

---

[2] Section 2.29 of the 2008 Plan Restatement defines Normal Retirement Age for periods after May 21, 2007, to mean age 62 subject to the following stipulations: that age 62 is Normal Retirement Age under the Plan only for the purpose of falling within the safe harbor of the regulations; it should not be construed as reasonably representative of the typical retirement age in the industry; it shall become null and void *ab initio* and confer no right, benefit or privilege on any participant or beneficiary if Congress or any agency or court determines that it is inconsistent with or unnecessary to comply with the Code or ERISA; and it does not apply to C&L participants under Appendix B of the Plan. As indicated above, this TAM accepts age 62 as the Normal Retirement Age and defers issues relating to the above stipulations to the pending determination letter process.

Law and Analysis:

Issue (1) — Accrued Benefit and Lump Sum Distributions

Section 411(a) of the Code states that a qualified plan must provide that an employee's right to his normal retirement benefit is nonforfeitable upon attainment of normal retirement age and that an employee's right to his accrued benefit is nonforfeitable upon completion of the specified number of years of service under one of the vesting schedules set forth in section 411(a)(2).

Section 411(a)(7)(A)(i) of the Code defines a participant's accrued benefit under a defined benefit plan to mean the employee's accrued benefit determined under the plan, expressed in the form of an annual benefit commencing at normal retirement age.

Section 411(c)(3) of the Code states that if the accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, then the accrued benefit shall be the actuarial equivalent of such benefit.

Section 1.411(a)-7(a)(1)(i) of the federal Income Tax Regulations ("Regulations") defines the accrued benefit under a defined benefit plan for purposes of section 411 of the Code as an annual benefit commencing at normal retirement age, if the plan provides an accrued benefit in that form. Section 1.411(a)-7(a)(1)(ii) states that if a plan does not provide an accrued benefit in that form, the accrued benefit is an annual benefit commencing at normal retirement age which is the actuarial equivalent of the plan's accrued benefit.

Section 411(b)(1) of the Code provides that a defined benefit plan must satisfy either the 3% method, the 133 1/3% method, or the fractional method with respect to benefits accruing under the plan. A cash balance plan generally cannot satisfy either the 3% rule or the fractional rule, and so it must satisfy the 133 1/3% rule. Section 411(b)(1)(B) provides that a defined benefit plan satisfies the requirements of the 133 1/3% rule for a particular plan year if, under the plan, the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit, and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than 133 1/3 % of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year.

Section 417(e)(3) of the Code provides that a lump sum payment under a qualified plan may not be less than the present value of the participant's accrued benefit calculated using the applicable mortality table and the applicable interest rate. For this purpose, prior to the enactment of the Pension Protection Act of 2006 ("PPA"), the applicable interest rate is the annual rate of interest on 30-year Treasury securities for the month before the date of distribution or such other time as the Secretary may prescribe. Section 1.417(e)-1(d)(4) of the Regulations requires a plan to designate the lookback month that is used for determining the applicable interest rate.

Effective for lump sum distributions with initial annuity starting dates on or after August 17, 2006, the effective date of the PPA, permits certain cash balance

plans to provide that the present value of the accrued benefit is equal to the account balance regardless of the interest crediting rate (thus, allowing lump sum payments to be equal to the account balance if the only benefit is the cash balance benefit).

Notice 96-8, 1996-1 C.B. 359 ("Notice 96-8"), stated that benefits attributable to interest credits under a cash balance the plan are in the nature of accrued benefits within the meaning of section 1.411(a)-7(a) of the Regulations, and thus, once accrued, must become nonforfeitable in accordance with a vesting schedule that satisfies section 411(a) of the Code. Notice 96-8 further stated that in order for a plan's interest credits to satisfy the accrual rules of section 411(b)(1), the interest must be frontloaded. In order for interest to be frontloaded, the benefits attributable to future interest credits with respect to a hypothetical allocation must accrue at the same time as the benefits attributable to the hypothetical allocation. Thus, in determining the accrued benefit of a participant under a cash balance plan any time prior to NRA, the balance in the cash balance account must be projected with interest credits to NRA.

Notice 96-8 further provides that in order for a defined benefit plan to satisfy section 417(e) of the Code, any single sum distribution must not be less than the nonforfeitable portion of the present value of the employee's accrued benefit under section 411(a)(7), determined using the applicable interest rate and mortality table under section 417(e). Part IV of Notice 96-8 explains that a plan that credits accounts at one of the variable interest rates described therein would be permitted to distribute a lump sum equal to the current account balance because those rates are deemed to be

no greater than the applicable interest rate of section 417(e)(3).

Accrued Benefit

In general, for purposes of section 411 of the Code, the accrued benefit must be determined as an annual benefit commencing at normal retirement age. In order to satisfy the accrual rules of section 411(b)(1)(A)-(C), the interest credits must be frontloaded within the meaning of Notice 96-8. Furthermore, even if the interest credits are frontloaded, the determination of the accrued benefit under the plan can result in either a forfeiture, which is not permitted under section 411(a), or a failure to satisfy the accrual rules of section 411(b)(1)(A)-(C), unless the projected interest crediting rate used to determine the accrued benefit is the same interest rate used to provide interest credits to the cash balance account.

In this case, the Plan provided flat pay credits that would satisfy the 133 1/3 percent accrual rule. However, the Plan fails to define the Accrued Benefit to mean, as of any date, a life annuity payable at Normal Retirement Age that is equal to the Actuarial Equivalent of the Deemed Account Balance projected to Normal Retirement Age using the interest crediting rate, which is the Deemed Investment Experience. Rather, Sections 2.1 and 5.1 of the Plan define the Accrued Benefit and Normal Retirement Benefit, respectively, in a manner that credits the accounts using one interest rate structure and projects them to Normal Retirement Age using another. This discrepancy in the rates for crediting and projecting the accounts can result in failure to satisfy the anti-forfeiture require-

ments of section 411(a) of the Code or the 133 1/3 percent accrual rule under section 411(b)(1)(B), depending on whether the interest crediting rate is higher or lower than the rate for projecting the accounts.

Lump Sum Payments

Notice 96-8 provides that in order for a defined benefit plan to satisfy section 417(e) of the Code, a distribution must not be less than the present value of the accrued benefit, determined in a manner that satisfies sections 411(a)(7) and 417(e). Section 5.4(b) of the Plan provides for a lump sum distribution that is equal to an amount "no less than" the Actuarial Equivalent of the Participant's Normal Retirement Benefit. As discussed above, the Plan's definition of the Accrued Benefit fails to satisfy section 411. Although the lump sum distribution provision satisfies section 417(e) in form, given the flawed definition of the Accrued Benefit, the Plan fails to satisfy section 417(e) requirements in operation with respect to lump sum distributions with initial annuity starting dates prior to August 17, 2006. Effective August 17, 2006, the Plan was amended to provide a lump sum distribution equal to the Deemed Account Balance, as permitted under PPA.

To address the above failures in prior years, the Taxpayer has requested 7805(b) relief, which is discussed below.

<u>Issue (2) — Relief Under Section 7805(b):</u>

Section 7805(b)(8) of the Code provides that the Secretary may prescribe the extent, if any, to which any ruling (including any judicial decision or any admin-

istrative determination other than by regulation) relating to the internal revenue laws shall be applied without retroactive effect.

Section 18 of Revenue Procedure 2014-5, 2014-1 I.R.B. 169, provides that, except when stated otherwise, a holding in a technical advice memorandum ("TAM") is applied retroactively, unless the Commissioner, Tax Exempt and Government Entities Division exercises discretionary authority under section 7805(b) of the Code to limit the retroactive effect of the holding. Generally, a TAM that modifies or revokes a letter ruling or another TAM or a determination letter is not applied retroactively either to the taxpayer to whom or for whom the letter ruling or TAM or determination letter was originally issued, or to a taxpayer whose tax liability was directly involved in such letter ruling or TAM or determination letter if: (1) there has been no misstatement or omission of material facts; (2) the facts at the time of the transaction are not materially different from the facts on which the letter ruling or TAM or determination letter was based; (3) there has been no change in the applicable law; (4) in the case of a letter ruling or determination letter, it was originally issued on a prospective or proposed transaction; and (5) the taxpayer directly involved in the letter ruling or TAM or determination letter acted in good faith in relying on the letter ruling or TAM or determination letter, and the retroactive modification or revocation would be to the taxpayer's detriment.

The Taxpayer has a favorable determination letter dated February 9, 1996, which covers the predecessor provisions of the PW Plan. The Accrued Benefit under the PW Plan was defined to mean the Account Balance, and the Normal Retirement Benefit to mean the

Actuarial Equivalent of the Account Balance. The PW Plan credited interest at the Deemed Investment Experience, the equity rates of return, and the Deemed Plan Interest Rate, the 30-year Treasury rate was embedded in the definition of Actuarial Equivalence. Thus, the PW Plan contained provisions resulting in a mismatch between the interest crediting rate and the interest rate used to project the accounts to normal retirement age.

The Plan continued the PW Plan's provisions by defining the Accrued Benefit to mean the Account Balance and defining the Normal Retirement Benefit to mean the Account Balance projected to normal retirement age using the 30-year Treasury rate. This Plan language is consistent with, although more explicit than, the language in the PW Plan, which was covered by the February 9, 1996, favorable determination letter. The lump sum distribution provision in the PW Plan was also covered by the 1996 determination letter, and this provision was continued under the Plan. The Plan received a favorable determination letter on March 22, 2004, which contained a caveat for issues pertaining to the cash balance conversion. Given that the Plan had already converted to a cash balance plan on July 1, 1994, and such conversion was covered by the prior favorable determination letter, the caveat in the March 22, 2004, determination letter does not invalidate the prior letter.

On May 22, 2007, the final normal retirement age regulations were issued and the Taxpayer amended the Plan to define Normal Retirement Age as age 62. The Service had previously approved the methodology for determining the Accrued Benefit, which methodology applied regardless of the Plan's definition of Normal

Retirement Age. Thus, there was no change in the applicable law relating to the cash balance terms of the Plan. Retroactive application of the conclusions reached in this memorandum would be detrimental to the Plan, the Plan sponsor and the Plan Participants.

For these reasons, with respect to the failures under section 411 of the Code, the Taxpayer is entitled to relief under section 7805(b) beginning with PYE June 30, 2003, through 30 days after the issuance of this TAM. After 30 days from the date this TAM is issued, the Plan's continued qualification will depend on the Taxpayer amending the Plan to define the Accrued Benefit, and the Normal Retirement Benefit, for all purposes other than calculating the amount of a lump sum distribution or testing the Plan's benefit formula for age discrimination, to mean, as of any date on or before age 62 (i.e., Normal Retirement Age, exclusive of any caveats as currently provided in the Plan), a single life annuity commencing at age 62 in an amount equal to the Actuarial Equivalent of the Participant's Deemed Account Balance as of such date projected to age 62 using the interest crediting rate (i.e., each Participant's current Deemed Investment Experience) as of such date.

With respect to the failure under section 417(e) of the Code, the Taxpayer is entitled to relief under section 7805(b) beginning with PYE June 30, 2003, through August 17, 2006, the effective date of the PPA. The Plan's lump sum provision satisfies section 417(e) requirements after such date.

Conclusions:

Issue (1):

For the reasons discussed above, the Plan's definition of the Accrued Benefit causes the Plan to fail to satisfy the requirements of sections 411 and 417(e) of the Code.

Issue (2):

With respect to the above failures under section 411 of the Code, relief under section 7805(b) is granted beginning with PYE June 30, 2003, through 30 days after the issuance of this TAM.[3] Qualification beyond the date that is 30 days after issuance of this TAM is dependent on the Taxpayer adopting on a timely basis Plan amendments that are described under Issue (2) above and conform to the requirements discussed in this TAM.[4] With respect to the failure under section 417(e) of the Code, relief under section 7805(b) is granted beginning with PYE June 30, 2003, through August 17, 2006, the effective date of the PPA.

---

[3] However, the relief provided under Code section 7805(b) does not apply for purposes of Title I of ERISA.

[4] Qualification beyond the date that is 30 days after issuance of this TAM is dependent on the Taxpayer adopting timely and acceptable amendments.