No. 22-____

IN THE

Supreme Court of the United States

GARY METZGAR, RICHARD MUELLER, KEVIN REAGAN, RONALD REAGAN, CHARLES PUGLIA, SHERWOOD NOBLE, DALIEL O'CALLAGHAN,

Petitioners,

v.

U.A. PLUMBERS AND STEAMFITTERS LOCAL NO. 22 PENSION FUND, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

CHRISTEN ARCHER PIERROT
3959 N. Buffalo Rd., #33
Orchard Park, NY 14127

ELIZABETH HOPKINS
Counsel of Record
SUSAN METER
KANTOR & KANTOR, LLP
19839 Nordhoff Street
Northridge, CA 92324
(818) 886-2525
ehopkins@kantorlaw.net

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

"With few exceptions, the 'anti-cutback' rule of the Employee Retirement Income Security Act of 1974 (ERISA) prohibits any amendment of a pension plan that would reduce an employee's accrued benefits." *Central Laborers Pension Fund* v. *Heinz*, 541 U.S. 739, 741 (2004) (citing ERISA Section 204(g), 29 U.S.C. 1054(g)). In *Heinz*, this Court held that the anti-cutback "rule prohibits an amendment expanding the categories of postretirement employment that triggers suspension of payment of early retirement benefits already accrued." *Ibid*.

Petitioners are seven participants in a collectively bargained, multi-employer pension plan that covers unionized steamfitters, plumbers, and heating and cooling service workers in western New York. Each applied for early retirement pension benefits after ceasing work in employment covered by the bargaining agreement and each began working in non-disqualifying employment as managers for employers who were parties to the collective bargaining agreement. As had been their uniform practice, the plan administrator and trustees approved these benefits knowing that petitioners were working in managerial positions for covered employers, and the plan paid petitioners these benefits for years thereafter. When the trustees decided that the plan should no longer pay these benefits, they did not first attempt to formally amend the plan; instead, they simply "reinterpreted" the term "retire" in the plan to disallow early retirement benefits for participants such as petitioners who intended to work as managers for covered employers. Only after "reinterpreting" the Plan did the trustees formally amend the plan to reflect the new requirement that plan participants must intend not to return

to work with any covered employer in order to receive early retirement benefits. Not only did the plan then cease payment of benefits to petitioners, but the trustees also demanded that petitioners repay the plan for the pension benefits petitioners had already received, with interest.

The question presented is whether ERISA's anti-cutback rule, 29 U.S.C. 1054(g), prohibits plan trustees and other plan sponsors from eliminating participants' early retirement benefits through a reinterpretation of the plan to disallow previously permitted post-retirement employment, thus accomplishing through a plan interpretation what they could not do through the plan's formal amendment process.

PARTIES TO THE PROCEEDING BELOW

Petitioners are Gary Metzgar, Richard Mueller, Kevin Reagan, Ronald Reagan, Charles Puglia, Sherwood Noble, and Daniel O'Callaghan, the plaintiffs-appellants below.

Respondents are U.A. Plumbers and Steamfitters Local No. 22 Pension Fund, Board of Trustees of U.A. Plumbers and Steamfitters Local No. 22 Pension Fund, and Debra Koropolinski, in her capacity as Plan Administrator, for the U.A. Plumbers & Steamfitters Local 22 Pension Fund, the defendants-appellees below.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page(s)

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES Page(s)

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioners Gary Metzgar, Richard Mueller, Kevin Reagan, Ronald Reagan, Charles Puglia, Sherwood Noble, and Daniel O'Callaghan respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is unreported but is available at 2022 WL 610340. The order of the court of appeals denying the petition for rehearing (App., *infra*, 88a-89a) is unreported. The decision and order of the district court adopting the report and recommendation of the magistrate judge (App., *infra*, 84a-87a) is unreported but is available at 2020 WL 5939202. The magistrate's report and recommendation (App., *infra*, 12a-83a) is also unreported but is available at 2019 WL 1428083.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 2022. A petition for rehearing was denied on June 2, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 1054(g) of Title 29 of the United States Code provides in pertinent part:

> **Decrease of accrued benefits through amendment of plan**
>
> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of a plan, other than an amendment described in section 1082(d)(2) or 1441 of this title.

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

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

(B) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the pre-amendment conditions for the subsidy. The Secretary of the Treasury shall by regulations provide that this paragraph shall not apply to any plan amendment which reduces or eliminates benefits or subsidies which create significant burdens or complexities for the plan and plan participants unless such amendment adversely affects the rights of any participant in more than a de minimis manner. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

* * *

Other pertinent statutory provisions are reproduced in the appendix to this petition. App., *infra*, 90a-93a.

STATEMENT

ERISA is a remedial statute designed to "protect * * * the interests of participants in employee benefit plans and their beneficiaries" by setting forth "standards of conduct, responsibility and obligation for fiduciaries of plans." 29 U.S.C. 1001(b). As this Court recognized in *Heinz*, "[t]here is no doubt about the centrality of ERISA's object of protecting employees' justified expectations of receiving the benefits their employers promise them." 541 U.S. at 743. *See also ibid*. (noting that, in enacting ERISA, Congress "wanted to * * * mak[e] sure that if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions to obtain a vested benefits – he actually will receive it") (internal quotation marks and citations omitted).

"ERISA's anti-cutback rule is crucial to this goal." *Heinz*, 541 U.S. at 744. It provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan." 29 U.S.C. 1054(g)(1). Moreover, it expressly applies to the type of benefits at issue in this case, providing that "a plan amendment which has the effect of * * * eliminating or reducing an early retirement benefit * * * with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits." 29 U.S.C. 1054(g)(2).

1. Petitioners Gary Metzgar, Richard Mueller, Kevin Reagan, Ronald Reagan, Charles Puglia, Sherwood Noble and Daniel O'Callaghan are participants in the U.A. Plumbers & Steamfitters Local 22 Pension Fund (the "Plan" or "Fund"), a defined benefit multi-

employer pension plan with over 1,800 members and approximately $140 million in assets as of 2019. App., *infra*, at 16a-17a. Each petitioner was a member of the U.A. Plumbers & Steamfitters Local 22 union who was employed by an employer that participated in and contributed to the Plan based on the hours worked by their employees in covered employment but did not make contributions on behalf of employees who worked in managerial positions or as project managers or estimators. App., *infra*, at 17a.

These contributions were made pursuant to the terms of the multi-employer collective bargaining agreement governing the Plan, to which the participating employers were parties. App., *infra*, at 17a. The Plan is also governed by a Trust Agreement and Declaration ("Trust") created on April 18, 1999, by the Plan's trustees, a group made up of an equal number of union representatives and employer representatives. App. *infra*, at 16a. The Trust provides for a normal retirement pension for covered employees at age 65, as well as a special early retirement benefit, sometimes referred to as a Rule of 85 pension, which provides full pension benefits for an employee with at least 30 years of employment at age 55. App., *infra*, at 18a.

During the relevant time period, the Trust also provided for a suspension of benefits for any recipient of an early retirement benefit for any month in which the recipient worked for more than 120 hours in "Disqualifying Employment" in an occupation in which that recipient was employed when the pension benefits began and in the same industry and geographic area covered by the Plan. App., *infra*, at 18a. The Trust, however, provided that a recipient's employment "in a managerial position" or as a "project

manager or estimator" for a participating employer was not "Disqualifying Employment" that would subject the recipient to a suspension of early retirement benefits. App., *infra*, at 18a.

Each of the Petitioners applied for and was granted an early retirement benefit between 2002 and 2009. Mr. Metzgar applied for a special early retirement pension in May 2009 at age 55, having performed 30 years of covered service, most recently as a general foreman with a contributing employer, John W. Danforth ("Danforth"). App., *infra*, at 20a. Mr. Metzgar's application for a pension of $4,313 a month was approved and became effective on June 1, 2009. Mr. Metzgar commenced employment on that date as a manager for Danforth training junior foremen. App., *infra*, at 20a.

Mr. Mueller applied for his early retirement pension on April 21, 2004, at age 55, with more than 30 years of service with Danforth, the most recent also being as a foreman. App., *infra*, at 20a. His pension of $4,279 per month was approved and became effective on May 1, 2004, at which time Mr. Mueller commenced employment as a project manager with Danforth. App., *infra*, at 20a-21a.

Petitioner Kevin Reagan applied for his early retirement pension on December 10, 2004, at age 55, with over 30 years of employment with a contributing employer called Mollenberg-Betz ("Mollenberg"), most recently as a foreman. App., *infra*, at 19a. His monthly pension benefit of $3,497 became effective on January 1, 2005. App., *infra*, at 19a. He had already left employment as a foreman with Mollenberg to become a project manager for this employer when his pension benefits commenced, and he continued in this

position after receiving his pension starting January 1, 2005. App., *infra*, at 19a-20a.

Petitioner Ronald Reagan applied for his early retirement benefits on July 8, 2002, at age 55, with more than 30 years of service with Danforth, most recently as a general foreman. App., *infra*, at 19a. His monthly pension of $3,138 was approved and became effective on August 1, 2002, at which time he began work as a project manager with Danforth. App., *infra*, at 19a.

Mr. Puglia applied for his early retirement benefit at age 60, having worked more than 30 years for a contributing employer, MLP Plumbing and Mechanical, Inc. ("MLP"), most recently as a plumber foreman. App., *infra*, at 20a. His monthly pension of $4,037 was approved and became effective as of November 1, 2008. App., *infra*, at 20a. Shortly thereafter, Mr. Puglia began employment with MLP as a warehouse manager. App., *infra*, at 20a.

Mr. Noble applied for his early retirement pension on February 1, 2003, at age 55, with 30 years of service for Danforth. App., *infra*, at 19a. His monthly pension of $3,532 was approved and became effective in February 2003, at which time he began employment as a project manager and estimator for Danforth. App., *infra*, at 19a.

Mr. O'Callaghan applied for his early retirement benefit on January 12, 2007, at age 55, with 30 years of service for Danforth, most recently as a foreman steamfitter. App., *infra*, at 20a. His monthly pension of $3,098 was approved and became effective on March 1, 2007, at which time he began employment as a project manager for Danforth. App., *infra*, at 20a.

All was well until the fall of 2011, when the plan administrator, Respondent Debra Koropolinski, and a plan trustee, Michael McNally, became concerned after attending a conference that the Plan had been improperly paying benefits to employees such as petitioners who continued employment with their former employers, albeit as managers in non-disqualifying employment. App., *infra*, at 21a. They concluded that by paying these benefits, the Plan was violating the Internal Revenue Code and might lose its tax-exempt status. App., *infra*, at 21a. Thereafter, the trustees determined that the pensions awarded to Petitioners and other employees like them violated the terms of the Trust requiring them to operate the Plan in a manner that preserved the Plan's tax-exempt status. App., *infra*, at 21a. Based on this understanding, the trustees adopted a new interpretation of the Plan's term "retire" to mean that a participant "must sever employment [with any employer that contributes to the Plan] with no intent of returning to employment" in order to be eligible for an early retirement pension benefit. App., *infra*, at 22a. They then sent letters to each of the petitioners explaining this new interpretation and informing petitioners that if they did not cease their then-current (non-disqualifying) employment, their pension benefits would be suspended. App., *infra*, at 22a.

In response, Mr. Noble, Kevin Reagan, Mr. Puglia and Mr. O'Callaghan terminated their employment with their former employers and continued to receive their monthly pension benefits. App., *infra*, at 22a. Mr. Metzgar and Mr. Mueller continued their employment with Danforth, and the Plan terminated their monthly pension benefits. App., *infra*, at 22a. Ronald Reagan had by that point reached the age of 65 and had ceased his employment with Danforth. App.,

infra, at 22a. All seven appealed the Plan's determination, but they were unsuccessful in their administrative challenges. App., *infra*, at 25a.

In the meantime, on February 10, 2012, the trustees amended the Plan to add a new provision, requiring that, except for participants who reach the normal retirement age of 65, participants must separate from all service with a contributing employer with the intent that such separation be permanent in order to receive early pension benefits under the Plan. App., *infra*, at 23a. They also filed a submission with the Internal Revenue Service (IRS) under the IRS's voluntary correction program, explaining how they now believed that their former "interpretation and administration of the Plan" was not consistent with the IRS's interpretation of "retirement," which they read as requiring "a separation from employment with all employers contributing to the Plan." App., *infra*, at 23a-24a. The trustees informed the IRS that they did not intend to seek recoupment of any payments made in violation of their new understanding. App., *infra*, at 24a. They received a response from the IRS informing the trustees that the Service would not be revoking tax-favored status and that the compliance statement from the trustees did not affect the rights of any party under Title I of ERISA. App., *infra*, at 24a-25a.

2. Having exhausted their review rights under the Plan, petitioners filed suit on January 25, 2013, against the Plan, its Board of Trustees and Ms. Koropolinski in the United States District Court for the Western District of New York. App., *infra*, at 4a, 25a. Petitioners claimed that the reinterpretation of the Plan to disallow their non-disqualifying employment in managerial positions violated ERISA's anti-cutback provision, led to a wrongful denial of their

benefits, and constituted a breach of fiduciary duty under ERISA. App., *infra*, at 4a.

While the suit was pending, a number of things happened. First, Respondents counterclaimed against petitioners, demanding repayment of the early retirement benefits that the Plan previously paid in total amounts ranging from $138,336 from Mr. Metzgar to $357,774 from Ronald Reagan. App., *infra*, at 25a. Next, as relevant here, the trustees further amended the Plan on August 26, 2016, to add a new provision permitting the trustees to recover "any benefit payment made in error," along with 12% interest and any attorney, paralegal and other fees and expenses incurred in collecting the recoupment of benefits. App., *infra*, at 26a. Pursuant to these draconian new amendments, the trustees demanded even more money from petitioners, ranging from $291,547.18 from Mr. Metzgar to $1,190,598.14 from Ronald Reagan. App., *infra*, at 26a. The letter informed petitioners that if they did not repay these amounts, the Plan would withhold from any future pension payments at the rate of 100% of the first monthly pension payment due to them and 25% of each monthly payment thereafter until the amounts calculated by the trustees had been recouped. App., *infra*, at 26a. The trustees then implemented these offsets starting in January 2017, after the petitioners who were receiving monthly benefits failed to repay these amounts. App., *infra*, at 27a.

The parties cross-moved for summary judgment, and petitioners also filed a motion for preliminary injunction to enjoin the respondents from continuing to withhold a portion of their monthly benefits to recoup the alleged overpayments. App., *infra*, at 85a. The district court granted respondents' motion for summary judgment and denied petitioners' motion for

summary judgment, fully adopting a recommended decision and order from a magistrate judge. App., *infra*, at 86a-87a. In that recommended decision, the magistrate judge concluded, *inter alia*, that the trustees' 2011 reinterpretation of the Plan was not an amendment of the Plan within the meaning of ERISA's anti-cutback provision and therefore respondents did not violate 29 U.S.C. 1054(g) in suspending and eliminating their early retirement benefits pursuant to this reinterpretation. App., *infra*, at 28a-61a. The court also denied respondents' counterclaim for recoupment, App., *infra*, at 68a-70a, as well as petitioners' motion for a preliminary injunction. App., *infra*, at 77a-82a.

3. The court of appeals affirmed the judgment of the district court in all respects in an unpublished summary order. App., *infra*, at 11a. The court reasoned that, because the Plan granted full discretionary authority to the trustees both to determine eligibility and to interpret the terms of the Plan, the court was required to defer to their interpretation of plan terms to the extent that the interpretation was reasonable and not arbitrary and capricious. App., *infra*, at 5a. The court concluded that while the trustees' reinterpretation of the Plan term "retire" to require that participants leave their prior employment with the intent not to return to work before becoming reemployed in non-disqualifying employment may not have been "the only reasonable interpretation," the court "cannot conclude that the interpretation is arbitrary and capricious." App., *infra*, at 6a. The court of appeals found the reasonableness of the trustees' new interpretation bolstered by the fact that the trustees were concerned that the Plan was violating the tax-qualification provisions of the Internal Revenue

Code and suggested that concern was warranted. App., *infra*, at 6a-7a.

The court gave short shrift to petitioners' argument that the trustees had violated ERISA's anti-cutback provision, concluding that the reinterpretation was not an amendment within the meaning of 29 U.S.C. 1054(g) because the trustees determined that the Plan had always required that participants "retire" before receiving benefits, and the Plan had thus never actually permitted the benefits that petitioners received. App., *infra*, at 7a-8a. The court also relied on an earlier Second Circuit decision which had held that "'the word 'amendment' contemplates that the actual terms of the plan changed in some way, * * * or that the plan improperly reserved the discretion to deny benefits,' neither of which occurred here." App., *infra*, at 8a-9a (quoting *Kirkendall* v. *Halliburton, Inc.*, 7070 F.3d 173, 184 (2d Cir. 2013)).

Given the court of appeals' conclusion that the trustees had not acted arbitrarily or capriciously, the court had no trouble affirming the district court's determination that respondents did not wrongfully deny benefits or violate their fiduciary duties. App., *infra*, at 9a-10a. The court also found no abuse of discretion in the district court's denial of a preliminary injunction with respect to the recoupment, concluding that petitioners had failed to show irreparable harm. App., *infra*, at 10a.

REASONS FOR GRANTING THE PETITION

Whether the trustees and administrators of defined benefit pension plans may avoid ERISA's anti-cutback provision and reduce or eliminate an early retirement (or other) pension benefit through a changed interpretation of plan terms is an important question that has arisen frequently. It is likely to arise with increasing frequency in the future as defined benefit pension plans, particularly collectively bargained multiemployer plans, look for ways to improve their funding status.

The courts of appeals that have addressed the question are split, with at least three circuits, including the court of appeals below, holding that a change in interpretation is not an amendment within the meaning of 29 U.S.C. 1054(g), and two circuits holding that a reinterpretation that reduces or eliminates an accrued pension benefit is a prohibited amendment within the meaning of ERISA.

The latter position is correct. It is the most sensible reading of the statutory language as a whole and is the only way to give effect to the anti-cutback provision as interpreted by this Court in *Heinz*.

I. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND WARRANTS REVIEW IN THIS CASE

As this Court has repeatedly recognized, "when Congress enacted ERISA, it 'wanted to * * * mak[e] sure that if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he actually will receive it.'" *Lockheed Corp.* v. *Spink*, 517 U.S. 882 (1996) (quoting *Nachman Corp.* v. *Pension Benefit Guaranty Corporation*, 446

U.S. 359, 377 (1980)). Many of ERISA's key protections and requirements were enacted with this goal in mind. This includes, perhaps first and foremost, ERISA's anti-cutback provision in 29 U.S.C. 1054(g). *See Heinz* 541 U.S. at 744. Likewise, ERISA requires that "every employee benefit plan be established *pursuant to a written instrument*," 29 U.S.C. 1102(a) (emphasis added), "in order that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan." H.R. Rep. No. 93-1280, p. 297 (1974), 1974 U.S.C.C.A.N. 4639, 5077, 5078. Thus, ERISA was designed both "to protect contractually defined benefits," *Massachusetts Mut. Life Ins. Co.* v. *Russell,* 473 U.S. 134, 148 (1985), and to "enable plan beneficiaries to learn their rights and obligations at any time." *Curtiss–Wright Corp.* v. *Schoonejongen,* 514 U.S. 73, 83, 115 (1995).

This was particularly true with regard to defined benefit pension plans, which were the norm at the time of ERISA's enactment and thus the focus of many of ERISA's protections. J. Langbein, S. Stabile, & B. Wolk, *Pension and Employee Benefit Law* 58 (4th ed. 2006). Although this "historic pattern[]" has reversed, and defined contribution plans are now the dominant form of employer-sponsored pension plans, Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 Yale L.J. 451, 471 (2004), there are still over 35 million people with defined benefit plans. U.S. Dept. of Labor, Private Pension Plan Bulletin Historical Tables and Graphs, 1975–2017 (Sept. 2019) (Table E4), *available at* https://www.dol.gov/sites/dolgov/files/EBSA/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf.

Indeed, because of this shift from traditional "defined benefit" pensions to 401(k) and other defined contribution plans, the overall retirement wealth of many employees has been reduced and many Americans are working longer than in the past. *See* Maximiliane E. Szinovacz, et al., *Recession and Expected Retirement Age: Another Look at the Evidence*, 54 The Gerontologist 245, 253 (2013). Increased longevity coupled with rising costs of living, particularly housing, have contributed to this trend, with more people than ever working in retirement. *The State of the Nation's Housing 2019*, 5 Jt. Ctr. for Housing Studies of Harvard University (2019), *available at* http://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_of_the_Nations_Housing_2019.pdf ("According to the Bureau of Labor Statistics, 27 percent of adults aged 65-74 were still working in 2018, as well as 9 percent of those age 75 and over."). For these reasons, it is likely that an increasing number of workers will, by necessity or choice, continue to work even after they have qualified and applied for either early or normal retirement benefits.

It is also likely that defined benefit pension plans, especially multi-employer plans, will look for ways to reduce their pension burdens and increase their funding status, issues that both Congress and the Pension Benefit Guaranty Corporation have repeatedly addressed in light of the long-term demographic and labor trends that have increasingly led to underfunding and threatened the long-term viability of some defined benefit pension plans. For instance, the Pension Funding Equity Act of 2004, Pub. L. No. 108-218, 118 Stat. 596 (2004), and the Pension Protection Act of 2006, Pub. L. No 109-280, 120 Stat. 780 (2006), both attempted to address the effects of economic downturns on the funding status of defined benefit pension plans by altering

the calculations for funding requirements. *The Pension Underfunding Crisis: How Effective Have Reforms Been? Hearing Before the H. Comm. on Education and the Workforce*, 108th Cong. 2 (2003) (statement of Rep. John A. Boehner, Chairman, H. Comm. on Education and the Workforce). In 2012, Congress took another stab at addressing underfunding in the Moving Ahead for Progress in the 21st Century Act (Map-21), Pub. L. No. 112-141, § 40211(b)(1), 126 Stat. 405 (2012), which lowered the minimum funding requirement for single employer plans by allowing a changed methodology for calculating this requirement. *See* U.S. IRS, Map-21: New Funding Rules for Single-Employer Defined Benefit Plans, *available at* https://www.irs.gov/retirement-plans/map-21-new-funding-rules-for-single-employer-defined-benefit-plans (last visited Oct. 26, 2022) (explaining how the Map-21 provides funding relief for defined benefit plans). Most recently, the Pension Benefit Guaranty Corporation issued a final rule implementing the American Rescue Plan's Special Financial Assistance Program, 29 C.F.R. 4262 (2022), which aims "to protect the millions of workers, retirees and their families served by our nation's multiemployer pension plans" through funding designed to stave off "a wave of multiemployer pension plans that were projected to become insolvent and leave millions of America's workers without their full pension benefits." U.S. Dep't of Labor, Statement by United States Secretary of Labor Walsh on the Pension Benefit Guaranty Corporation's Interim Final Rule on Special Financial Assistance (July 9, 2021), *available at* https://www.dol.gov/newsroom/releases/ebsa/ebsa20210709.

Given these funding pressures, there is a high likelihood that plan sponsors and trustees will be on the lookout for ways to reduce plan liabilities, including by reducing pension benefits offered through

defined benefit pension plans. Consequently, there can be little doubt that courts will continue to grapple with determining when such attempts constitute illegal cutbacks. *See, e.g.*, *Baleja* v. *Northrop Grumman Mission Sys. Corp. Salaried Pension Plan*, No. EDCV 17-235, 2022 WL 8176156, at *11-*12 (C.D. Ca. Oct. 13, 2022) (interpretation of defined benefit plan to exclude years of service for an acquired subsidiary prior to the acquisition did not violate the anti-cutback provision because the plan had always provided for the exclusion of the prior services and because "only formal amendments" are cut-backs in the Ninth Circuit); *Cooper* v. *Willis Towers Watson Pension Plan for U.S. Emps.*, 562 F. Supp. 3d 890 (C.D. Ca. 2022) (plan amendment requiring employee to begin receiving pension benefits not later than the attainment of age 62 constituted an illegal cutback of accrued benefits under ERISA); *Smith* v. *Rockwell Automation, Inc.*, 438 F. Supp. 3d 912 (E.D. Wis. 2020) (defendants' interpretation of "actuarial equivalence" violated anti-cutback rule). The Second Circuit's ruling in this case offers a path for trustees of multi-employer defined benefit plans to effectuate cutbacks despite the prohibition in 29 U.S.C. 1054(b), by allowing them to reduce or eliminate accrued benefits through a new interpretation of the plan terms even when they could not do so through a more formal plan amendment. Whether they may do so is a question of exceptional importance given the congressional intent to ensure that plan participants know where they stand with respect to their pension benefits and that they receive the benefits they have been promised and have earned through their service.

II. THE COURTS OF APPEALS ARE SPLIT ON WHETHER A CHANGE IN INTERPRETATION THAT RESULTS IN THE REDUCTION OR ELIMINATION OF AN ACCRUED PENSION BENEFIT IS PROHIBITED BY 29 U.S.C. 1054(g)

The decision below is hardly the first to deal with the question of whether the prohibition in 29 U.S.C. 1054(g) prohibits a changed interpretation of plan terms that results in the reduction or elimination of an accrued defined benefit. To the contrary, there is a deep and abiding split in the circuits on this issue. *See Hein* v. *F.D.I.C.*, 88 F.3d 210, 216 (3d Cir. 1996) ("There is a circuit split on what constitutes an 'amendment' under ERISA § 204(g)'s anti-cutback provision."); *Johnson* v. *Dow Employees' Pension Plan*, 703 F. App'x 397, 407 (6th Cir. 2017) (same).

On one side of the split are the Third and Sixth Circuits, which have held that "[a]n erroneous interpretation of a plan provision that results in the improper denial of benefits to a plan participant may be construed as an 'amendment' for the purposes of § 1054(g)." *Cottillion* v. *United Refining Co.*, 781 F.3d 47, 58 (3d Cir. 2015) (quoting *Hein*, 88 F.3d at 216). *Accord Hunter* v. *Caliber Sys., Inc.*, 220 F.3d 702, 712 (6th Cir. 2000) (quoting *Cottillion* with approval); *Johnson*, 703 F. App'x at 407.

For instance, in *Hein*, the Third Circuit held that a change in a plan interpretation with respect to an unreduced early retirement benefit was an improper amendment within the meaning of Section 204(g) if, before the change, the participant satisfied the requirements for the benefit. 88 F.3d at 217. Although the court in *Hein* concluded that the participant had not been entitled to the early retirement benefit before the

change, *id.* at 218, the court's critical determination that a change in "interpretation," even "in the absence of a formal plan amendment," can constitute an amendment remains the law in that circuit. *See Cottillion*, 781 F.3d at 58. Thus, the Third Circuit in *Cottillion* concluded that the plan administrator's new "interpretation of the Plan" to require a reduction in benefits based on the employee's age at retirement "improperly denied accrued benefits" to the plaintiffs in the form of unreduced early retirement benefits in violation of Section 204(g), even though the administrator "had reinterpreted" the plan to require "actuarial adjustments to the amounts paid to" early retirees in an attempt to comply with new statutory requirements. *Ibid.*

Similarly, the Sixth Circuit has adopted the Third Circuit's broader view of the term "amendment" in Section 204(g) as encompassing changed interpretations of plan terms. *Johnson*, 703 F. App'x at 407. As one district court in that circuit has held, a participant establishes a violation of ERISA's anti-cutback provision by showing a reinterpretation of plan terms that resulted in the decrease of the participant's accrued benefits. *Deschamps* v. *Bridgestone Americas, Inc. Salaried Employees Retirement Plan*, 169 F. Supp. 3d 735, 750 (M.D. Tenn. 2015). In that case, the court concluded that the Bridgestone violated Section 204(g) by reinterpreting plan terms to exclude pension service credit for the years that the participant worked for Bridgestone at a location outside of the United States, when the company had previously interpreted the plan to count such service. *Id.* at 750-52.

On the other side of the spilt are the Second, District of Columbia, and Ninth Circuits, which read Section 204(g) more strictly. *See* App., *infra*, at ___; *Stewart* v.

National Shopmen Pension Fund, 730 F.2d 1552, 1561, 1563 (D.C. Cir. 1984) (Section 204(g) applies only to "actual change[s] in the provisions of the plan" and forbids only "actual amendments * * * which would change benefit amounts"); *Richardson* v. *Pension Plan of Bethlehem Steel Corp.*, 112 F.3d 982, 987 (9th Cir. 1997) (adopting the D.C. Circuit's reasoning that "the word 'amendment' is used as a word of limitation" in Section 204(g), and that only a "change by amendment" would trigger the provision); *Oster* v. *Barco of California Employees' Retirement Plan*, 869 F.2d 1215, 1221 (9th Cir. 1988) (applying same reason to conclude that modification of plan's lump sum distribution policy was not an amendment).

In these circuits, plan sponsors or trustees generally must invoke their plan's amendment procedures and formally amend the plan to reduce or eliminate accrued benefits in order to come within the scope of the anti-cutback provision. For instance, in *Stewart*, the trustees of a multi-employer pension plan had a longstanding practice to grant pension credits to employees of Anchor Post Products, Inc. ("Anchor") for their pre-enrollment and indeed pre-ERISA service at the Anchor plant in Baltimore Maryland. 730 F. 2d at 1154. When the Anchor plant closed and the company stopped making pension contributions, the trustees invoked a provision of the plan that allowed it to cancel pre-contributory service credit in cases where an employer dumped unfunded liability on the plan. The employees cried foul and sued, asserting, among other things, a violation of Section 204(g). *Id.* at 1554-55. The District of Columbia Circuit rejected this assertion, reasoning "that there was no 'amendment' to the plan in the 'technical' sense—*i.e.,* an actual change in the provisions of the plan" and that only such an

"actual amendment" would trigger Section 204(g). *Id.* at 1561, 1563.

The Ninth Circuit has relied on the reasoning in *Stewart* in more typical circumstances to conclude that changes in plan practice or interpretation were not plan amendments and thus did not come within the scope of Section 204(g). Thus, in *Richardson*, the Ninth Circuit concluded that a memorandum of settlement reached between an employer and its employees when the employer shut down one of its steel plants that failed to preserve the rights of plan participants to certain shutdown benefits was not a plan amendment under the anti-cutback provision. 112 F.3d at 987. And in *Oster*, a case even more analogous to this one, the Ninth Circuit held that an about-face with respect to the rights of employees to receive lump-sum pension distributions, which the plan had previously routinely granted, was not an amendment within the meaning of Section 204(g), and thus was not an illegal cut-back. 869 F.2d at 1221.

The Seventh Circuit has addressed these issues in a case that does not fall neatly on one side or the other of this divide but certainly illuminates the importance and complexity of the issue presented here. *Dooley* v. *Am. Airlines, Inc.*, 797 F.2d 1447, 1451-52 (7th Cir. 1986). *Dooley* did not involve a change in plan interpretation, but instead involved a change in the actuarial assumptions used by a defined benefit plan to compute lump sum pension distributions, which lowered the amount of those distributions. However, this change was made pursuant to a plan provision expressly allowing changes to the actuarial assumptions. *Ibid*. In that context, the Seventh Circuit was "unwilling to contort the plain meaning of 'amendment' so that it includes the valid exercise of a

provision which was already firmly ensconced in the pension document," and thus the court rejected the plaintiff' contention that the change violated ERISA Section 204(g). *Id.* at 1452.

The Second Circuit has recognized one other situation besides a formal plan amendment that might violate Section 204(g). In *Kirkendall*, a plan participant claimed that her loss of an early retirement subsidy after a corporate merger and spin-off was an illegal cutback under Section 204(g). 707 F.3d at 176-78. The court rejected this claim, holding that "[e]ven broadly interpreted, the word 'amendment' contemplates that the actual terms of the plan changed in some way, * * * or that the plan improperly reserved the discretion to deny benefits * * * not that an administrator made an incorrect factual determination on the date of a claimant's termination." *Id.* at 184. In the decision at issue in this case, the Second Circuit quoted this language from *Kirkendall*, but held that no improper reserve of discretion occurred because "under Defendants' reinterpretation of the Plan, [petitioners] were never entitled to the accrued benefits they claimed to have lost." App. *infra*, at 8a-9a.

For the proposition that an improper reserve of discretion might be the basis for a cutback claim under ERISA Section 204(g), the Second Circuit relied on a Treasury regulation pertaining to the parallel anti-cutback provision found in Section 411(d)(6) of the Internal Revenue Code ("IRC"), 26 U.S.C. 411(d)(6). *Kirkendall*, 707 F.3d at 183. *See also Heinz*, 541 U.S. at 747 (discussing 26 U.S.C. 411(d)(6) and explaining how the IRS was given interpretive rulemaking authority for the anti-cutback provisions in both the Code and ERISA); *Williams* v. *Cordis Corp.,* 30 F.3d 1429, 1431 n. 2 (11th Cir.1994) (holding that rules

promulgated under IRC Section 411 apply with equal force to corresponding provisions of ERISA); *Gillis* v. *Hoechst Celanese Corp.,* 4 F.3d 1137, 1145 (3d Cir. 1993) (same). This regulation explains that, with one exception not applicable here, "a plan that permits the employer, either directly or indirectly, through the exercise of discretion, to deny a participant a section 411(d)(6) protected benefit provided under the plan for which the participant is otherwise eligible (but for the employer's exercise of discretion) violates the requirements of section 411(d)(6)." 26 C.F.R. 1.411(d)-4, Q & A 4. Although the Second Circuit noted that "[o]n its face, the Regulation appears to require a different result from the particular facts at issue in *Stewart*," the court concluded no reinterpretation of plan terms had occurred in that case. *Kirkendall*, 707 F.3d at 183. The Ninth Circuit has also addressed the effect of this to regulation, concluding that the regulation was a response cases like *Stewart*, *Dooley* and *Oster*, but that it does not forbid reinterpretations based on "simple ambiguities in the text of a covered plan." *McDaniel* v. *Chevron Corp.*, 203 F.3d 1099, 1118-19 (9th Cir. 2000).

Thus, the Second, Ninth and District of Columbia Circuits allow trustees to simply employ a new interpretation of plan terms to accomplish a reduction or elimination of benefits. As this case demonstrates, even if this new interpretation is followed by plan amendment formalizing and extending the dire consequences of that reinterpretation, these courts do not consider this to be a prohibited cutback within the meaning of Section 204(g).

III. THE COURT OF APPEALS' DECISION IS INCORRECT

The Second Circuit's approach is incorrect. There is no dispute here that all parties, including the respondents, formerly understood the Plan language to allow participants who met the age and years of service requirements to receive early retirement benefits after leaving their covered employment as rank-and-file workers in the plumbing, heating and cooling trades, even if they immediately began working in non-disqualifying employment in management positions. *See* App., *infra*, at 19a, 30a.

Moreover, a plan amendment that reduces or eliminates "an optional form of benefit" such as an early retirement benefit is considered as reducing accrued benefits. *See* 29 U.S.C. 1054(g)(2). Thus, there also can be no reasonable dispute that, as this Court held in *Heinz*, the right to return to work under specified circumstances is a cognizable "accrued benefit" within the meaning of Section 204(g). 541 U.S. at 739-40. *See also Bellas* v. *CBS, Inc.,* 221 F.3d 517, 524 (3d Cir. 2000) (there is "'no question but that a standard early retirement benefit, provided exclusively upon the satisfaction of certain age and/or service requirements, is an accrued benefit'"); *Cottillion*, 781 F.3d at 57 (same, quoting *Bellas*).

Indeed, the facts of *Heinz* are strikingly similar to this case. There, as here, participants in a multiemployer pension plan for construction trade workers were able to collect early retirement pensions even if they returned to certain categories of jobs. 541 U.S. at 741-42. The trustees, expressing tax concerns, amended the plan to eliminate some of these categories of previously permitted post-retirement work. *Id.* at 742. In those circumstances, this Court "could not

see how, in any practical sense, this change of terms could not be viewed as shrinking the value of Heinz's pension rights and reducing his promised benefits." *Id.* at 745.

The same is true here. The Plan allowed covered employees to collect early retirement benefits upon meeting the age and service requirements of the Plan, so long as they did not engage in disqualifying employment. *See* App., *infra*, at 18a-19a. Petitioners met those existing requirements and received early retirement benefits for many years until the trustees imposed a new condition on receiving benefits. *See* App., *infra*, at 19a-21a. The only difference is that here, unlike in *Heinz*, the change of Plan terms to add a new disqualifying event – post-retirement work in a non-disqualifying management position that is not preceded by the intent to permanently leave employment with a covered employer – occurred through the guise of interpretive discretion, followed closely by a formal plan amendment. App., *infra*, at 21a, 23a. In "any practical sense," however, the result is the same: a "shrinking [in] the value of [Petitioners'] pension rights and [a reduction in their] promised benefits." *See Heinz*, 541 U.S. at 745.

Nor do the potential tax consequences that the trustees cite as the reason for their reduction or elimination of petitioners' early retirement benefits provide cover for their improper cutback. First, nothing in IRC Section 401(a), or the regulations and IRS Revenue Rulings and Private Letter Rulings giving effect to that Code section, requires that plan participants in multiemployer defined benefit pension plans retire from all employment, including non-disqualifying employment, in order to be entitled to an early retirement benefit. To the contrary, Department

of Labor regulations make repeated reference to "service" as meaning "covered service" under which benefits accrue for purposes of ERISA Section 204, 29 C.F.R. 2530.210(a)(2), (c)(2), making it clear enough that only separation from covered employment is contemplated under the IRS rules in order for a Plan to pay an early retirement benefit. Second, although the IRS provisions "condition the eligibility of pension plans for preferential tax treatment on compliance with many" of the substantive requirements in Title I of ERISA, *Heinz*, 541 U.S. at 746, the converse is not true. Thus, even if a plan is not tax-qualified for purposes of Title II of ERISA, that does not excuse it from complying with its obligations to its participants and beneficiaries under ERISA, as the IRS cautioned in its letter to respondents in this case accepting its voluntary compliance program submission, App., *infra*, at 24a-25a, and as the Third Circuit correctly recognized in *Bellas*, 221 F.3d at 539.

Allowing plan administrators and trustees, through a new interpretation of plan terms, to reduce or eliminate the very accrued pension benefits that they could not cut back through a plan amendment is neither logical nor consistent with ERISA. That Congress did not intend to do so is underscored by two Treasury regulations applicable to the parallel anti-cutback provisions in both the tax code and ERISA. First, is the regulation cited in *Heinz* that provides that "[t]he addition of * * * objective conditions with respect to a section 411(d)(6) protected benefit that has already accrued violates section 411(d)(6). Also, the addition of conditions (whether or not objective) or any change to existing conditions with respect to section 411(d)(6) protected benefits that results in any further restriction violates section 411(d)(6)." 26 U.S.C. 1.411(d)–4, A–7. "So far as the IRS regulations

are concerned, then, the anti-cutback provision flatly prohibits plans from attaching new conditions to benefits that an employee has already earned." *Heinz*, 541 U.S. at 747.

Second, is the Treasury regulation previously discussed, *supra*, at 21-22, which flatly rejects the notion that Congress only prohibited direct benefit cutbacks that are accomplished through formal amendments while allowing plan administrators or trustees to do indirectly what they could not do through a plan amendment. 26 C.F.R. 1.411(d)-4, Q & A 4. This anti-cutback regulation broadly prohibits a plan from permitting an "employer, either directly or *indirectly*, *through the exercise of discretion*, to deny a participant a section 411(d)(6) protected benefit provided under the plan for which the participant is otherwise eligible (*but for the employer's exercise of discretion*)." *Ibid* (emphasis added). It is not plausible that this regulation's repeated reference to the "exercise of discretion" does not extend to the exercise of discretion in reinterpreting plan terms as they relate to the conditions that a participant must satisfy with respect to the protected accrued benefit. To the contrary, the regulation is clearly aimed at prohibiting cutbacks of accrued benefits through indirect plan amendments accomplished through the exercise of interpretive discretion, as occurred here.

If allowed to stand, the Second Circuit's reading of ERISA Section 204(g) renders *Heinz* toothless. It allows an easy work-around to ERISA's anti-cutback protections and means that, regardless of what employees have been promised and for how long with regard to the requirements for obtaining an early retirement benefit, trustees can change the rules of the game

through a new interpretation, and they will be accorded great deference in doing so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CHRISTEN ARCHER PIERROT
3959 N. Buffalo Rd., #33
Orchard Park, NY 14127

ELIZABETH HOPKINS
Counsel of Record
SUSAN METER
KANTOR & KANTOR, LLP
19839 Nordhoff Street
Northridge, CA 92324
(818) 886-2525
ehopkins@kantorlaw.net

Counsel for Petitioners

October 2022

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

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 2nd day of March, two thousand twenty-two.

20-3791

PRESENT:

MICHAEL H. PARK,
BETH ROBINSON,
Circuit Judges,

JED S. RAKOFF,[*]
District Judge.

---

[*] Judge Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.

GARY METZGAR, RICHARD MUELLER, KEVIN REAGAN, RONALD REAGAN, CHARLES PUGLIA, SHERWOOD NOBLE, DANIEL O'CALLAGHAN,

Plaintiffs-Counter-Defendants-Appellants,

v.

U.A. PLUMBERS AND STEAMFITTERS LOCAL NO. 22 PENSION FUND, BOARD OF TRUSTEES OF U.A. PLUMBERS AND STEAMFITTERS LOCAL NO. 22 PENSION FUND, DEBRA KORPOLINKSI, IN HER CAPACITY AS PLAN ADMINISTRATOR, FOR THE U.A. PLUMBERS & STEAMFITTERS LOCAL 22 PENSION FUND,

Defendants-Counter-Claimants-Appellees.

FOR PLAINTIFFS-COUNTER-DEFENDANTS-APPELLANTS:

CHRISTEN ARCHER PIERROT, Orchard Park, NY.

FOR DEFENDANTS-COUNTER-CLAIMANTS-APPELLEES:

JULES L. SMITH (Daniel R. Brice, *on the brief*), Blitman & King LLP, Rochester, NY.

Appeal from a Judgment of the United States District Court for the Western District of New York (Sinatra, *J.*; Foschio, *M.J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

Plaintiffs are participants in the U.A. Plumbers & Steamfitters Local 22 Pension Fund (the "Fund"), a defined benefit multi-employer pension plan governed by an Agreement and Declaration of Trust (the "Trust"). Pension benefits are provided to participants according to a Restated Plan of Benefits (the "Plan"), which is subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001–1461. Under the Trust, the Trustees have "full and exclusive discretionary authority to determine all questions of coverage and eligibility" and "full discretionary power to interpret the provisions of this Trust Agreement and the Plan of Benefits, and the terms used in these documents." App'x at 192–93.

At all times relevant to this appeal, the Plan set the normal retirement age at 65, but it also offered "Special Early Retirement" to "[a]ny Employee who retires . . . after his fifty-fifth (55th) birthday and whose combined age and Years of Special Service shall equal eighty-five (85) or more." App'x at 248. The Plan also provided that a participant's monthly benefit would be suspended for any month in which they worked in disqualifying employment, which included "any occupation covered by the Plan," but excluded non-disqualifying employment, such as in "a managerial position [or as a] project manager or estimator." *Id*. at 251. Until the fall of 2011, the Plan was administered with the understanding that participants did not have to completely stop working for a covered employer in order to receive special early retirement pension payments—instead, they could continue working while receiving pension benefits as long as they switched from disqualifying employment to non-disqualifying employment. Plaintiffs here switched from disqualifying to non-disqualifying employment upon receiving approval for special early retirement, thus both earn-

ing a salary from their non-disqualifying employment and receiving pension benefits through the Plan.

In the fall of 2011, the Plan Trustees concluded that the Plan could not be interpreted to allow special early retirement pension payments to participants who had not "retired" under the terms of the Plan. Relying on their understanding of the Internal Revenue Code requirements applicable to the Plan, the Trustees interpreted the term "retire" to mean that a participant "must sever employment [with all employers that contribute to the Plan] with no intent of returning to employment." App'x at 494. They sent a letter to Plaintiffs, which stated that Plaintiffs had to cease their then-current (non-disqualifying) employment in order to continue receiving their pensions; failure to do so would result in suspension of pension payments. Some Plaintiffs stopped working for their employers altogether and the Fund continued their pension payments; others continued working in non-disqualifying positions and the Fund discontinued their pension payments.

On January 25, 2013, Plaintiffs sued the Fund, its Board of Trustees, and Debra Korpolinski in her capacity as Plan Administrator for the Fund (collectively, "Defendants"), in the United States District Court in the Western District of New York. Plaintiffs claimed that Defendants' reinterpretation of the Plan and the subsequent choice they forced Plaintiffs to make between keeping their pensions or their jobs was (1) a violation of ERISA's anti-cutback rule, 29 U.S.C. § 1054(g); (2) a wrongful denial of benefits, *id*. § 1132(a)(1)(B); and (3) a breach of Defendants' fiduciary duty to Plaintiffs, *id*. § 1104(a)(1). Both parties moved for summary judgment, and Plaintiffs also filed a motion for a preliminary injunction to

enjoin Defendants from withholding 25% of Plaintiffs' monthly pension payments, which Defendants started doing in January 2017 to recoup prior payments to Plaintiffs that Defendants concluded were made in violation of the Internal Revenue Code. The district court granted Defendants' motion for summary judgment and denied Plaintiffs' motions for summary judgment and a preliminary injunction. Plaintiffs timely appealed. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

"We review the district court's decision to grant summary judgment *de novo*, construing the evidence in the light most favorable to the party against which summary judgment was granted and drawing all reasonable inferences in its favor." *Halo v. Yale Health Plan, Dir. of Benefits & Recs. Yale Univ.*, 819 F.3d 42, 47 (2d Cir. 2016) (citation omitted). "[W]here the written plan documents confer upon a plan administrator the discretionary authority to determine eligibility, we will not disturb the administrator's ultimate conclusion unless it is 'arbitrary and capricious.'" *Pagan v. NYNEX Pension Plan*, 52 F.3d 438, 441 (2d Cir. 1995). A plan administrator's decision is arbitrary and capricious if it is "without reason, unsupported by substantial evidence or erroneous as a matter of law." *Id.* at 442 (citation omitted).

The Trust gives Defendants full discretionary authority to determine eligibility and to interpret the terms of the Plan. We thus defer to their interpretation of the Plan and conclude that all of Plaintiffs' claims fail because Defendants' interpretation was reasonable and not arbitrary and capricious. *See Jordan v. Ret. Comm. of Rensselaer Polytechnic Inst.*, 46 F.3d 1264, 1271 (2d Cir. 1995) ("The court may not upset a rea-

sonable interpretation by the [plan] administrator."). Specifically, Defendants reasonably interpreted the Plan to require participants to separate from all employment with a contributing employer prior to receiving pension benefits.

The text of the Plan states: "Any Employee who *retires*" and who fulfills other requirements is entitled to a special early retirement pension. App'x at 248 (emphasis added). "In common parlance, retire means to leave employment after a period of service." *Meredith v. Allsteel, Inc.*, 11 F.3d 1354, 1358 (7th Cir. 1993), *overruled on other grounds by Ahng v. Allsteel, Inc.*, 96 F.3d 1033 (7th Cir. 1996). The Trustees concluded that to "retire" under the Plan required separation from "employment with all employers that contribute to the Plan." App'x at 494. Contrary to Plaintiffs' argument, such a definition would not "render meaningless" the Plan provision allowing post-retirement employment in "non-disqualifying employment"—it would simply require participants actually to retire first and to separate completely from their prior employment before becoming reemployed in non-disqualifying employment. Appellant's Br. 42. We do not suggest that the Trustees' interpretation of the meaning of "retire" is the only reasonable interpretation; but we cannot conclude that the interpretation is arbitrary and capricious.

In addition, this *reinterpretation* of the Plan was not arbitrary and capricious because Defendants reasonably understood that it was necessary to avoid violating § 401(a) of the Internal Revenue Code, 26 U.S.C. § 401(a), thereby jeopardizing the Fund's tax-exempt

status.[1] Section 401(a)(36)(A) implies that if a plan allowed for distribution to a participant under age 591/2 who has not separated from employment, the plan would violate § 401(a). *See id.* § 401(a)(36)(A) ("A trust forming part of a pension plan shall not be treated as failing to constitute a qualified trust under this section solely because the plan provides that a distribution may be made from such trust to an employee who has attained age 591/2 and who is not *separated from employment* at the time of such distribution." (emphasis added)). Several federal district courts have upheld trustee interpretations of pension plans based on similar concerns about violating § 401(a). *See Meakin v. Cal. Field Ironworkers Pension Trust*, No. 5:16-cv-07195, 2018 WL 405009, at *6 (N.D. Cal. Jan. 12, 2018), *aff'd*, 774 Fed. App'x 1036 (9th Cir. 2019) ("[I]t was reasonable for the Trustees to conclude that, in order to maintain a tax-exempt status under § 401(a), a plan could not allow pension payments to individuals who had not had a severance from their employment."); *Maltese v. Nat'l Roofing Indus. Pension Plan*, No. 5:16-cv-11, 2016 WL 7191798, at *4 (N.D. W. Va. Dec. 12, 2016) ("Based on the applicable regulations and the IRS's application of § 401(a), the Trustees' interpretation . . . is reasonably calculated to ensure that beneficiaries intend to actually separate from employment before early retirement benefits are distributed, thus, retaining the Plan's tax-exempted status.").

In light of this, Plaintiffs' challenges to Defendants' reinterpretation of the Plan terms are unavailing.

---

[1] We express no opinion on whether distributing pension benefits to participants who have terminated their disqualifying employment but have not separated from all employment for a contributing employer would *actually* violate § 401(a).

First, Defendants did not violate ERISA's anti-cutback rule, which states that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan." 29 U.S.C. § 1054(g)(1). Plaintiffs argue that Defendants' reinterpretation of the Plan was an amendment and that the accrued benefit they lost was the ability to receive their special early retirement pensions upon terminating their covered employment and commencing non-disqualifying employment with a contributing employer. The Plan has always required that to be entitled to special early retirement a participant must (1) retire (2) on or after reaching the age of fifty-five and (3) have a combined age and years of special service of eighty-five or more. Notably, the Plan did not purport to define "retire" prior to a February 2012 amendment. Although in practice Defendants previously permitted special early retirement distributions when a participant left disqualifying employment for non-disqualifying employment, the implication of their reasonable interpretation of the Plan is that it never actually allowed for such distributions. In the circumstances of this case, this reinterpretation is not arbitrary and capricious. *See Wetzler v. Ill. CPA Soc'y & Found. Ret. Income Plan*, 586 F.3d 1053, 1057 (7th Cir. 2009) (holding that a plan administrator's current determination that a certain benefit was not available before the alleged amendment is evaluated under the arbitrary and capricious standard).

Nor was Defendants' reinterpretation an "amendment" because "[e]ven broadly interpreted, the word 'amendment' contemplates that the actual terms of the plan changed in some way, . . . or that the plan improperly reserved discretion to deny benefits," neither of which

occurred here.[2] *Kirkendall v. Halliburton, Inc.*, 707 F.3d 173, 184 (2d Cir. 2013). We thus conclude that Plaintiffs' anti-cutback claim fails because, under Defendants' reinterpretation of the Plan, they were never entitled to the accrued benefit they claim to have lost, and Defendants' reinterpretation was not an "amendment."

Second, Defendants did not wrongfully deny Plaintiffs benefits in violation of 29 U.S.C. § 1132(a)(1)(B) by requiring them to choose between continuing to receive pension benefits and continuing to work in non-disqualifying employment for a contributing employer. "[W]here . . . the relevant plan vests its administrator with discretionary authority over benefits decisions . . . the administrator's decisions may be overturned only if they are arbitrary and capricious." *Roganti v. Metro. Life Ins. Co.*, 786 F.3d 201, 210 (2d Cir. 2015). As explained above, Defendants' decision to require Plaintiffs either to stop working or to stop receiving pension benefits was not arbitrary and capricious because it was based on a reasonable interpretation of the Plan. We thus affirm the district court's conclusion that Defendants did not wrongfully deny benefits to Plaintiffs.

Third, Plaintiffs fail to show that Defendants breached their fiduciary duty under ERISA by failing to act "with the care, skill, prudence, and diligence under the circumstances then prevailing" that a "prudent" person would exercise. 29 U.S.C. § 1104(a)(1). Specifically, Plaintiffs do not show how Defendants' decision in late 2011 to correct what they reasonably

---

[2] Although Defendants made a formal amendment to the Plan in February 2012 reflecting their reinterpretation, Defendants' 2011 reinterpretation is the basis for Plaintiffs' anti-cutback claim.

thought was an erroneous interpretation of the Plan in order to protect its tax-exempt status demonstrated a failure to exercise "care, skill, prudence, and diligence."[3] *Id.*

Finally, we discern no abuse of discretion in the district court's decision to deny Plaintiffs' motion for a preliminary injunction. Plaintiffs have failed to demonstrate that they would suffer irreparable harm absent an injunction—the loss of monetary pension benefits alone does not constitute irreparable harm because it can be remedied by money damages.[4] *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir. 1995) ("To establish irreparable harm, the movant must demonstrate an injury . . . that cannot be remedied by an award of money damages." (cleaned up)); *see also Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("[T]he temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury.").

---

[3] Plaintiffs also argue that if Defendants' initial interpretation was truly erroneous, then questions of fact exist as to whether that initial approval of Plaintiffs' early retirement benefits was a breach of fiduciary duty. Plaintiffs did not include this claim in their complaint and failed to raise it either in their motion for summary judgment or in opposition to Defendants' motion for summary judgment. It was alluded to only briefly in Plaintiffs' objection to the magistrate judge's report and recommendation, and the district court never addressed it. The issue was thus not "properly raised below" and we decline to consider it. *Caiola v. Citibank, N.A.*, 295 F.3d 312, 328 (2d Cir. 2002).

[4] Plaintiffs also argue that they do not need to show irreparable harm to be entitled to a preliminary injunction. We do not reach this argument because it was raised for the first time on appeal. *See United States v. Wasylyshyn*, 979 F.3d 165, 172 (2d Cir. 2020) ("As a general rule, we will not consider arguments first raised on appeal to this court.").

We have considered the remainder of Plaintiffs' arguments and find them to be without merit. Accordingly, we affirm the judgment of the district court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court
[SEAL Catherine O'Hagan, Clerk of Court]

APPENDIX B

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

13-CV-85V(F)

GARY METZGAR, RICHARD MUELLER, KEVIN REAGAN, RONALD REAGAN, CHARLES PUGLIA, SHERWOOD NOBLE, DANIEL O'CALLAGHAN,

Plaintiffs,

v.

U.A. PLUMBERS AND STEAMFITTERS LOCAL NO. 22 PENSION FUND, BOARD OF TRUSTEES OF U.A. PLUMBERS AND STEAMFITTERS LOCAL NO. 22 PENSION FUND, AND DEBRA KORPOLINSKI, IN HER CAPACITY AS PLAN ADMINISTRATOR, FOR THE U.A. PLUMBERS AND STEAMFITTERS LOCAL 22 PENSION FUND,

Defendants.

DECISION and ORDER[1]

REPORT and RECOMMENDATION

---

[1] Motions pursuant to Rule 15(d) are non-dispositive. *See McKenzie v. Obertean*, 2019 WL 441593, at *1 n. 1 (W.D.N.Y. Feb. 5, 2019) (citing *Fielding v. Tollaksen*, 510 F.3d 175, 178 (2d Cir. 2007); (Second Circuit found magistrate judge decision to deny plaintiff's motion to amend based on futility not "an abuse of discretion."); *Palmer v. Monroe Cty. Sheriff*, 378 F.Supp.2d 284, 289 (W.D.N.Y. 2005) (internal citation omitted); *but see Crenshaw v. Hamilton*, 2012 WL 1565696, at *1 n. 1 (W.D.N.Y. Mar. 30, 2012) (citing *Velez v. Hartke*, 2011 WL 2489987, at *1 n. 2 (W.D.N.Y. May 13, 2011)). Accordingly, as Plaintiffs' motion for leave to serve a supplemental complaint is closely related to the parties' opposing motions for summary judgment the court considers such motions in this combined Decision and Order and Report and Recommendation.

APPEARANCES:

CHRISTEN ARCHER PIERROT, ESQ.
Attorney for Plaintiffs
3959 N. Buffalo Road
Orchard Park, New York 14052

COLLIGAN LAW LLP
Attorneys for Plaintiffs
A. NICHOLAS FALKIDES,
MATTHEW K. PELKEY, of Counsel
12 Fountain Plaza, Suite 600
Buffalo, New York 14202

BLITMAN & KING
Attorneys for Defendants
DANIEL R. BRICE,
JULES L. SMITH, of Counsel
The Powers Building
16 West Main Street, Suite 207
Rochester, New York 14614

JURISDICTION

This case was referred to the undersigned by Hon. Richard J. Arcara for all pretrial matters on October 29, 2014 (Dkt. 40). It is presently before the court on Defendants' motion for summary judgment, filed February 1, 2018) (Dkt. 98), Plaintiffs' motion for summary judgment (Dkt. 101), Plaintiffs' motion for leave to file a supplemental complaint filed February 1, 2018 (Dkt. 110), and Plaintiffs' motion for a preliminary injunction also filed February 1, 2018 (Dkt. 111).

BACKGROUND

In this ERISA, 29 U.S.C. § 1001, *et seq*., action Plaintiffs allege unlawful reductions and/or elimination of Plaintiffs' accrued pension benefits in violation of 29 U.S.C. §§ 1054(g), denial of Plaintiffs' pension

benefits in violation of § 1132(a)(1)(B), breach of fiduciary duty in violation of § 1104(a)(1), and declaratory relief. On February 1, 2018, Defendants moved for summary judgment (Dkt. 98) along with the Affirmation of Jules L. Smith in Support of Defendants' Motion For Summary Judgment (Dkt. 98-3) and an Affidavit In Support Of Defendants' Motion For Summary Judgment (Dkt. 99) attaching Exhibits A – Q (Dkt. 99-1-17) ("Defendants' motion"). An (Amended) Memorandum Of Law In Support Of Defendants' Motion For Summary Judgment was filed February 1, 2018 (Dkt. 100).

Plaintiffs filed their Notice Of Motion For Summary Judgment also on February 1, 2018 (Dkt. 101) attaching Plaintiffs' Memorandum Of Law In Support Of Motion For Summary Judgment (Dkt. 101-1), Plaintiffs' Rule 56.1 Statement Of Undisputed Facts (Dkt. 101-2), Attorney Affirmation of A. Nicholas Falkides, Esq. (Dkt. 101-3) with Exhibits A-T (Dkts. 101-4-23), the Affidavit of Ronald Reagan in Support of Motion for Summary Judgment (Dkt. 102), Affidavits in Support of Plaintiffs' Motion for Summary Judgment of Kevin Regan (Dkt. 103), Ronald Reagan (Dkt. 104), Gary Metzgar (Dkt. 105), Richard Muller (Dkt. 106), Daniel O'Callaghan (Dkt. 107), Charles Puglia (Dkt. 108), and Sherwood Noble (Dkt. 109). ("Plaintiffs' motion")

Defendants' Response To Plaintiffs' Local Rule 56.1 Statement (Dkt. 115) and Memorandum Of Law In Further Support Of Defendants' Motion For Summary Judgment And In Opposition To Plaintiffs' Motion For Summary Judgment (Dkt. 116) was filed March 5, 2018.[2] Plaintiffs' Counter-Statement of Facts (Dkt.

[2] Defendants' Memorandum included Defendants' request to withdraw Defendants' counterclaims, Dkt. 116 at 18, which the

118), Memorandum Of Law In Opposition To Defendants' Motion For Summary Judgment (Dkt. 118-1) and the Attorney Affirmation of A. Nicholas Falkides (Dkt. 118-2) were filed March 5, 2018. Exhibits A – I for Plaintiff's Opposition (Dkt. 118) were filed in a separate filing on March 5, 2018 (Dkt. 119). Defendants' Memorandum Of Law In Reply To Plaintiffs' Opposition And In Further Support Of Defendants' Motion for Summary Judgment (Dkt. 120) and Plaintiffs' Reply Memorandum Of Law In Support Of Motion For Summary Judgment (Dkt. 121) were filed March 19, 2018.

Plaintiffs also moved on February 1, 2018, for Leave to File Supplemental Complaint (Dkt. 110) along with the Attorney Affirmation of Matthew K. Pelkey (Dkt. 110-1) attaching Exhibits A-H (Dkts.110-2-9) ("Plaintiffs' Motion To File A Supplemental Complaint"). Defendants opposed the motion by filing on March 5, 2018, Defendants' Memorandum Of Law In Opposition To Plaintiffs' Motion For Leave To File A Supplemental Complaint (Dkt. 114). Plaintiffs' reply, Attorney Affirmation of Matthew K. Pelkey, was filed March 19, 2018 (Dkt. 122) with the continuation of exhibits filed as (Dkt. 124).

By papers filed February 1, 2018, Plaintiffs moved for a Preliminary Injunction (Dkt. 111) along with Plaintiffs' Memorandum Of Law In Support Of Motion For Preliminary Injunction and the Attorney Affirmation of Matthew K. Pelkey, Esq. (Dkt. 111-2) attached Exhibits A-F (Dkt. 111-3-18) ("Plaintiffs' Motion for Preliminary Injunction"). Defendants' Memorandum Of Law In Opposition To Plaintiffs' Motion For Pre-

---

court treats as a motion to dismiss counterclaim pursuant to Fed.R.Civ.P. 41(a)(2). *See* Discussion, *infra*, at 52-54.

liminary Injunction was filed March 5, 2018 (Dkt. 117) and Plaintiffs' Reply Memorandum Of Law In Further Support Of Their Motion For Preliminary Injunction was filed March 19, 2018 (Dkt. 123).

Oral argument was deemed unnecessary. Based on the following Defendants' motion should be GRANTED; Plaintiffs' motion should be DENIED; Plaintiffs' motion to file a supplemental complaint should be DENIED; Plaintiffs' motion for preliminary injunction should be DENIED.

FACTS[3]

Plaintiffs are retired members of U.A. Plumbers & Steamfitters Local 22 ("the Union") who, based on their prior active Union membership, were entitled to participate in the Defendant U.A. Plumbers & Steamfitters Local No. 22 Pension Fund ("the Fund"). The Fund is a defined benefit multi-employer pension plan under a Trust Agreement and Declaration created April 18, 1999 by the Fund's Trustees made up of representatives of the Union and an association of plumbing, heating and cooling service contractors doing business in Western New York ("the Trust"). The Fund's pension benefits to eligible Union member participants are provided through the U.A. Plumbers and Steamfitters Local No. 22 Pension Fund Restated Plan of Benefits adopted by the Fund's Trustees effective May 1999 ("the Plan"). The Fund has eight trustees on the Board of Trustees – four representatives of the contractors and four from the Union. Defendant Korpolinski is the Administrator of the Fund, a position she had held since 2005; prior thereto the position was held by Janice L. Maslen. The Fund is financed by contributions of participating employers,

[3] Taken from the pleadings and papers filed in this action.

plumbing, heating and cooling contractors, of Union members based on the number of hours worked by Union members who were employed by contractors participating in the Fund as required by a multi-employer Union Collective Bargaining Agreement ("CBA"). Plaintiffs are among 1,868 participants and beneficiaries of the Fund as of March 2012 which then had assets of approximately $140 million. An Employee is eligible for benefits under the Plan upon performing 800 hours of covered employment, *i.e.*, as a plumber or steamfitter, employment which is subject to the CBA ("covered service or employment") and is vested as an accrued pension benefit under the Plan after five years of covered service. Contributing employers make contributions to the Fund to support employee pensions based on an employee's hours of work in covered employment, but not on behalf of employees who serve in managerial positions or as project managers or estimators.

Article V Section 3 of the Trust grants to the Trustees the "full and exclusive discretionary authority to determine all questions of coverage and eligibility, method of providing benefits and all related matters . . . [and that the Trustees have] full discretionary authority to interpret the provisions of this Trust Agreement and the Plan of Benefits . . . ." Dkt. 99-1 at 12-13. The Trust also requires the Trustees comply with ERISA and the Internal Revenue Code so that "the Trust and Plan of Benefits . . . will be structured and operated to qualify for approval by the Internal Revenue Service ("I.R.S.") as a tax-exempt Trust and Plan to ensure that the Employer contributions to the Fund are proper deductions for income tax purposes" and states [i]t is the intention of the Trustees to fully comply with all requirements of the Internal Revenue Code." (Art. VII Sec. 4). Dkt. 99-1 at 29.

The Plan in Art. V Sec. 1(a) provides for a "Normal Retirement" pension available to employees at age 65, Dkt. 99-2 at 15, an "Early Retirement" pension Art. V Sec. 1(c) at a reduced monthly payment, Dkt. 99-2 at 18, and as provided in Art. V Sec. 1(d) a "Special Early Retirement" pension ("Special Early Retirement" or "pension") available to an employee with at least 30 years of covered service at age 55 under a so-called Rule of 85, Dkt. 99-2 at 18, in the amount of the employee's Accrued Benefit. *Id.* Beginning in 2002, each Plaintiff, then eligible under the Rule of 85, applied for and received the Fund's approval of a Special Early Retirement pension (Dkt. 101-2 ¶¶ 35–37). The Plan also provided for a suspension of pension benefits for any recipient who received a Normal Retirement pension from the Fund and who worked for over 40 hours per month in a disqualifying employment or an industry covered by the Plan (steamfitting or plumbing). Similarly, a recipient of an early retirement pension benefit, such as Plaintiffs' Special Early Retirement pensions, was subject to a suspension of pension benefits for any month in which the recipient worked in an occupation in which an employee was employed when pension benefits began, in the same industry and geographic area covered by the Plan, for more than 120 hours per month. Art. V Sec. 3(a)(i)) (Dkt. 99-2 at 21-22) ("Disqualifying Employment"). Employment in "a managerial position" or as a "project manager or estimator" for a participating employer by a participant receiving a Special Early Retirement pension was not Disqualifying

Employment subjecting the recipient to a suspension of benefits under Art. 5 Sec. 3 of the Plan ("Art. V Sec. 3"). Dkt. 99-2 at 21. Former employees who continued in non-Disqualifying Employment were also not subject to any limits as to total monthly working

hours which also did not apply after a recipient reached age 701/2. Art. V Sec. 3(a)(1). When Plaintiffs applied for their Special Early Retirement pensions the Plan did not contain any definition of the term "to retire" or "retirement," and the Plan was administered with the understanding that applicants for Special Early Retirement pensions could receive, without incurring a suspension of benefits, both their monthly Special Early Retirement pension as well as earnings from employment with a participating employer for whom the employee had previously worked provided the employees were to be employed in non-Disqualifying Employment, *i.e.*, a managerial position or an a project manager or estimator, at the time the employees' Special Early Retirement pensions commenced, as defined in Art. V Sec. 3; Dkt. 101-4 at 93-94; 110-11.

Plaintiff Ronald Reagan applied for his Special Early Retirement pension on July 8, 2002, at age 55 after more than 30 years of service with John W. Danforth ("Danforth") most recently as a general foreman. His pension, with a monthly benefit of $3,138, was approved August 1, 2002, effective August 1, 2002 at which time he commenced work as a project manager with Danforth. Plaintiff Noble applied for his pension on February 1, 2003, effective the same date, with a monthly benefit of $3,532 at age 55 after 30 years of service with Danforth. On the same date, Noble also commenced employment with Danforth as a project management/estimator. Plaintiff Kevin Reagan applied for his Special Early Retirement pension on December 10, 2004, at the age of 55 with over 30 years of service with Mollenberg-Betz ("Mollenberg"), a contributing employer, most recently as a foreman. His pension with a monthly benefit of $3,497 was approved and became effective on January 1, 2005. Reagan had previously, in 2001, become eligible upon attaining age

55 for an Early Retirement pension and left covered employment with Mollenberg to become a project manager in which position he continued to work upon receiving his pension starting January 1, 2005.

Plaintiff O'Callaghan applied for his Special Early Retirement pension on January 12, 2007, at age 55 after 30 years of service with Danforth most recently as a foreman steamfitter. His pension was approved on February 1, 2007, effective March 1, 2007, at which time he continued employment with Danforth as a project manager while receiving monthly pension benefits of $3,098. Plaintiff Puglia applied for his Special Early Retirement pension on September 30, 2008, at age 60 after more than 30 years of service with MLP Plumbing and Mechanical, Inc. ("MLP"), a contributing employer, most recently as a plumber foreman. His pension was approved and became effective as of November 1, 2008, with a monthly benefit of $4,037. Shortly thereafter, Puglia commenced employment with MLP as a warehouse manager, a non-Union managerial position newly created by MLP. Plaintiff Metzgar applied for his Special Early Retirement pension at age 55 from the Plan in May 2009, with a monthly pension benefit of $4,313 having 30 years of covered service, most recently as a general foreman, with his employer Danforth, a participating employer in the Fund, which application was approved and became effective on June 1, 2009. On this date, Metzgar commenced employment with Danforth as a "rover," a new managerial position in which Metzgar mentored junior foremen for Danforth. Plaintiff Mueller applied for his pension on April 21, 2004, at age 55 with a monthly benefit of $4,279 having more than 30 years of service with Danforth most recently as a foreman. Mueller's pension was approved and became

effective on May 1, 2004, at which time Mueller continued employment with Danforth as a project manager.

Sometime in the fall of 2011, Korpolinski and Fund Trustee Michael McNally attended an employee benefits conference in New Orleans at which a presenter stated that it was unlawful for the Fund, as a tax-exempt pension trust fund, to pay early retirement pensions without the pension applicant having fully retired by completely separating from any employment with the prior employer. Dkt. 99 ¶ 31. This representation may have been based on an I.R.S. Private Letter Ruling No. 201147038, issued April 20, 2010 (Dkt. 100), 2011 WL 5893533 (Nov. 25, 2011) ("the PLR"), in which the I.R.S. stated that to retain its tax-exempt status, a qualified pension plan must require that a participant who elects to receive an early retirement pension upon becoming eligible, *i.e.*, prior to age 62, as permitted by Section 401(a)(36) of the Internal Revenue Code, must terminate all prior employment. Upon their subsequent review of the Plan, based on this new information Defendant Trustees determined that numerous Plan participants, including Plaintiffs, who had continued employment with their respective former participating employers upon receiving Special Early Retirement pensions, had been erroneously awarded such pensions in violation of the Internal Revenue Code, specifically § 401(a) of the Code ("§ 401(a)"), by Defendants which Defendants' characterized as "an operational error/ mistake." Dkt. 99 ¶ 33. Based on the terms of the Trust requiring the Trustees to operate the Fund in a manner that preserved the Fund's tax-exempt status, the Trustees also determined that the pensions awarded to employees, including Plaintiffs, pursuant to the Rule of 85 under Art. V Sec. 3 also violated the terms of the Trust and Plan. *Id.* ¶ 33. Following the

Trustees' determination the Plan, on November 29, 2011, sent letters to all affected Special Early Retirement pension beneficiaries including Plaintiffs advising of the Trustees' conclusion that if the beneficiary had remained employed by his former employer, the beneficiary was not entitled under the Plan to the Special Early Retirement pension he had been receiving, and should contact the Plan's office. Dkt. 99 ¶ 34. A second letter, dated December 27, 2011, was sent by Defendant Korpolinski as Plan administrator to Plaintiffs informing Plaintiffs that based on the I.R.S.'s required definition of retirement under § 401(a), Plaintiffs must cease their current employment in order to continue to receive their pensions after February 1, 2012, failing which their pensions would be suspended. Dkt. 99-14. Because the recent I.R.S. Private Letter Ruling was limited to early retirement benefits received at age 55 but not at age 62 or a later age, no letter was sent to Plaintiff Ronald Reagan as he had then stopped all employment with Danforth and had reached age 65 at that time and thus was not subject to a suspension of his pension benefits under the Plan for having engaged in employment with his previous employer at age 65. Plaintiffs were also advised to file a claim with the Fund if they wished to dispute Defendants' determination. In response, Plaintiffs Metzgar, Mueller, and O'Callaghan continued working for Danforth and their respective pensions were therefore terminated by the Plan as of February 1, 2012; as requested by the Fund, Plaintiffs Noble, Kevin Reagan, and Puglia withdrew from employment with their respective employers, Danforth, Mollenberg and MLP, and the Fund continued their pension payments. Plaintiff O'Callaghan later terminated his employment with Danforth and his pension payments were resumed.

On February 10, 2012, the Trustees amended the Plan by adding a new Section 5.5(a) which, in substance, Dkt. 99-3 at 80, states that retirement under the Plan requires a participant to separate from all service, *i.e.*, employment, with a contributing employer with the intent that such separation be permanent except for participants who attain the Normal Retirement Age (65) ("the February 2012 Amendments"). The February 2012 Amendments also amended Plan Section 5.3 to include any managerial position, project manager, and estimator as Disqualifying Employment for recipients of a Special Early Retirement pension except for participants who have attained age 65. Dkt. 99-3 at 80-81. Following adoption of these amendments Plaintiffs allege certain Plaintiffs were required to re-retire under the amended Plan as a condition to continued payments of their pension, *see* Dkt. 110-1 ¶ 1(h), an assertion which Defendants deny. Dkt. 110-2 ¶ 1(h).

On March 2, 2012, Defendants filed a Voluntary Correction Plan submission with the I.R.S., a procedure[4] by which tax exempt pension plans like the Fund could request I.R.S. approval of corrective actions taken by a plan necessary to preserve the tax-exempt status of the plan following self-reported non-compliance, *i.e.*, "failure" to comply with applicable I.R.S. requirements ("the VCP" or "the VCP submission"). Dkt. 99-16 at 2-24. In the VCP, Defendants explained that the Plan had been previously administered so as to permit participants, like Plaintiffs, eligible for an Special Early Retirement pension, to receive such a pension without terminating all further employment with a participating employer provided that the employees'

[4] *See* Rev. Proc. 2006-27, 2006-22 I.R.B. 945 (May 30, 2006).

further employment was as a manager, project manager, or estimator as Art. V Sec. 3 had provided. Defendants also represented to the I.R.S. that at the time of the VCP submission Defendants now understood "their [past][5] interpretation and administration of the Plan was not consistent with the I.R.S.'s interpretation of a 'retirement' under Treasury Regulations §§ 1.401(a)-1(b)(1)(i) and 1.401(b)(1)(i) which [interpretation] requires a separation from employment with all employers contributing to the Plan (*see, e.g.*, PLR 201147038)[.]" Dkt. 99-16 at 21. Defendants' VCP submission also stated that 30 participants in the Plan, including Plaintiffs, had received Special Early Retirement pensions in violation of this requirement and that Defendants had stopped payment of pension benefits to these individuals to obtain their compliance with Defendants' requests to terminate the non-Disqualifying Employment in which such participants had been engaged. *Id.* The Fund also advised the I.R.S. it did not intend at that time to seek recoupment of any pension payments made in violation of the Defendant Trustees' present understanding of applicable I.R.S. requirements and that any potential loss to the Fund as a result of the Trustees' error in distributing such payments had been accounted for in "the funding liabilities of the Plan." Dkt. 99-16 at 22, 23. In its response to the VCP, dated August 16, 2012, Dkt. 99-17, the I.R.S. stated that based on Defendants' VCP submission, the I.R.S. would "not pursue the sanction of revoking the tax-favored status of the plan" based on the compliance failures and corrective actions described by Defendants in the VCP submission. Dkt. 99-17 at 8. The I.R.S. also stated in its acceptance of Defendants' VCP submission, that the "compliance

[5] Unless otherwise indicated bracketed material added.

statement" did not affect the rights of any party under ERISA Title I. Dkt. 99-17 at 8.

On March 2, 2012, Plaintiffs, through counsel, filed an administrative appeal to Defendants of the Fund's 2011 determination ("Defendants 2011 Determination") requiring Plaintiffs to terminate their employment or suffer a suspension of their pension benefits. In their appeal, Plaintiffs contended, *inter alia*, that the I.R.S. definition of retirement for purposes of § 401(a) was not relevant to Plaintiffs' continued entitlement to their Early Retirement pensions as protected by ERISA § 204(g) ("the anti-cutback rule") and was only relevant to the Fund's tax-exempt status. Dkt. 101-9 at 3. Plaintiffs also contended that applicable I.R.S. regulations only prohibit continued in-service or covered employment under the CBA after retirement which does not extend to post-retirement non-covered employment like the Plaintiffs' non-Disqualifying Employment in managerial positions or as project managers and estimators, in which occupations Plaintiffs had engaged as allowed in Art. V Sec. 3. On July 23, 2012, the Fund rejected each of Plaintiffs' appeals. This action followed on January 25, 2013 ("*Metzgar* I").

In Defendants' Answer, filed May 16, 2014, Dkt. 30, pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), Defendants counterclaimed against each Plaintiff for the amount of the Special Early Retirement pensions paid erroneously by the Fund which Plaintiffs had not repaid as Defendants had requested as follows: Metzgar - $138,336.00; Mueller-$397,971.18; Noble-$381,489.48; O'Callaghan-$182,787.31; Puglia-$158,838.81; Kevin Reagan-$282,423.55; Ronald Reagan-$357,774.18.

Defendants' motion to dismiss for failure to state a claim (Dkt. 11) was denied by Decision and Order by Hon. Richard J. Arcara on May 2, 2014 (Dkt. 29), 2014

WL 1767715 (W.D.N.Y. May 2, 2014) *adopting Report and Recommendation*, Dkt. 20, 2014 WL 1757715, at *4 (W.D.N.Y. Feb. 14, 2014) (Schroeder, M.J.).

On August 26, 2016, Defendant Trustees further amended the Plan by deleting Section 10.4 relating to disclosures of pension information for participant beneficiaries to the Social Security Administration and I.R.S. (Dkt. 99-3 at 54), replacing it with a new provision (Dkt. 101-12 at 1-2) authorizing the Trustees to recover wrongfully paid benefit payments "as well as any benefit payment made in error," with 12% interest ("the August 2016 Amendment"). The amendment also permits Defendants to recover wrongfully paid benefits by reducing by 25% future pension benefit payments to a participant, or by legal action. *Id.* The August 2016 Amendment also requires a participant reimburse the Fund for attorneys and paralegal fees and other expenses incurred in collecting overpayments or mistaken payments of benefits. *Id.* By letters to each Plaintiff dated December 6, 2016 (Dkt. 101-13), the Fund demanded repayment of the alleged mistakenly paid Early Retirement pensions together with 12% interest as follows: Metzgar-$291,547.18; Mueller-$1,172,140.72; Noble-$1,225,562.28; O'Callaghan-$445,086.06; Puglia-$347,331.08; Kevin Reagan-$794,741.86; Ronald Reagan-$1,190,598.14. In this letter, the Fund advised Plaintiffs that if at the time Plaintiff legitimately, at age 65 or after terminating employment, were then receiving their pension payments from the Plan, Plaintiffs had not fully reimbursed the Fund for the payments mistakenly paid to Plaintiffs, the Fund would commence to withhold 100% of the first monthly pension payment due Plaintiffs and 25% of each monthly payment thereafter until the full amount of the pension overpayments plus interest were recovered by Defendants. Dkt. 101-13. Thereafter, the Trustees, not

having received reimbursement from any Plaintiff as Defendants had requested, commencing with the Plaintiffs' January 2017 pension payment, withheld 100% of such payment and reduced by 25% each Plaintiff's subsequent monthly pension payment to which Plaintiffs, all attaining age 65, were then entitled to receive. Plaintiffs appealed these adverse determinations on February 3, 2017. Defendants denied Plaintiffs' appeals by letter dated June 23, 2017. Dkt. 101-15. Plaintiffs commenced, on August 1, 2017, 17-CV-726V(F) ("*Metzgar* II"), another action against Defendants, former Trustees and a Plan administrator alleging violations of ERISA §§ 204(g), 502(a)(1)(B), 502(a)(3), 510 and 409(a), requesting declaratory and injunctive relief against further set-offs by Defendants' reducing Plaintiffs' monthly pension payments which set-offs continue.

DISCUSSION

I. Summary Judgment.

"Where 'parties file cross-motions for summary judgment, . . . each party's motion must be examined on its own merits, and in each case, all reasonable inferences must be drawn against the party whose motion is under consideration." *Fireman's Fund Insurance Company v. Great American Insurance Company of New York*, 822 F.3d 620, 631 n. 12 (2d Cir. 2016) (quoting *Morales v. Quintel Entertainment, Inc.*, 249 F.3d 115, 121 (2d Cir. 2001) (brackets omitted)). In this case, as the parties do not request trial, the matter may be resolved on the parties' summary judgment motions.

A. Plaintiffs' First Claim.

1. Defendants' 2011 Determination Was Not An Amendment To The Plan for Purposes of § 204(g).

Plaintiffs' First Claim alleges that Defendants' suspension of Plaintiffs' Early Retirement Pensions unless Plaintiffs terminate further employment with Plaintiffs' employers violated the anti-cutback rule embodied in ERISA Section 204(g), 29 U.S.C. § 1054(g) ("§ 204(g)__" or "§ 1054(g)__"). Section 204(g)(1) provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment to the plan . . . ." § 1054(g)(1).[6] This protection applies to Plaintiffs' Special Early Retirement pensions under § 1054(g)(2). Specifically, Plaintiffs assert that Defendants' determination, communicated to Plaintiffs in Defendants' November 29 and December 27, 2011 correspondence to Plaintiffs (collectively "Defendants' 2011 Determination"), that unless Plaintiffs terminated Plaintiffs' current employment with their employers, all of which were participating employers, Plaintiffs' pensions would be suspended, constituted an amendment to the Plan which reduced Plaintiffs' pension benefits, including the possibility of Plaintiffs' post-retirement employment as a related benefit, prior to Defendants' 2011 Determination, subject to protection under § 204(g). *See Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 744-45 (2004) (plan amendment adopted by plaintiff's pension fund extending plan's prohibition on post-retirement employment to include plaintiff's supervisory position within the construction industry covered by plan after plaintiff's retirement

[6] A similar protection exists in the Internal Revenue Code. *See* 26 U.S.C. § 411(d)(6)(A); *see also* 26 C.F.R. § 1.411(d)-4, A-7.

as a carpenter curtailed value of plaintiff's pension benefit, including plaintiff's right to engage in post-retirement supervisory employment as had been permitted by the plan, accrued at time of plaintiff's retirement, and thus violated the anti-cutback rule). Plaintiffs therefore contend that Defendants' demand, that Plaintiffs forgo Plaintiffs' post-retirement employment or suffer suspension of Plaintiffs' Special Early Retirement pension benefits, issued administratively by Defendants in Defendants' December 2011 letter to Plaintiffs based on Defendants' determination that Plaintiffs had not retired, constituted a plan amendment that improperly reduced Plaintiffs' monthly pension payments as well as the additional income Plaintiffs had been receiving from their respective post-retirement employments which, Plaintiffs assert, had accrued when Plaintiffs retired, upon approval of Plaintiffs pension applications, from Plaintiffs' covered employment under the Plan. Thus, the court first addresses whether Defendants' 2011 Determination that Defendants were required, under a correct interpretation and application of Art. V Sec. 1(d) of Plan (Dkt. 99-2 at 19) that Plaintiffs had not retired, to suspend Plaintiffs' pensions pursuant to Art. V Sec. 3(a)(i) (Dkt. 99-2 at 21-22) until Plaintiffs ceased their post-retirement employment, until reaching age 65, constituted an amendment in violation of § 204(g), ERISA's anti-cutback rule, as the basis for Plaintiffs' First Claim.

As noted, prior to February 2012, the Plan provided for a Special Early Retirement pension under Art. V Sec. 1(d) which requires a participant attain age 55 with at least 30 years of credited service to be eligible for such pension. The Special Early Retirement pension was also subject to suspension where the recipient returned to work as a steamfitter or plumber in the

Western New York steamfitter and plumbing industry covered by the CBA if the recipient worked 120 hours in any month. Art. V Sec. 3(a)(i), Dkt. 99-2 at 21. However, under this provision employment after retirement in a managerial position or as a project manager or estimator did not subject a Special Early Retirement pension recipient to possible suspension of his monthly pension payment. *Id*. ("Sec. 3(a)(i)") ("non-Disqualifying Employment"). At the time Plaintiffs' pensions were approved by the Plan, the Plan Administrator understood recipients could under Sec. 3(a)(i) receive both a Special Early Retirement pension as well as engage in any of the three types of non-Disqualifying Employment immediately following approval of their pensions, without any actual temporal break in their employment with Plaintiffs' then participating employers, without being subject to a suspension of benefits as required by Sec. 3(a)(i). Dkt. 101-8 (referencing Plaintiffs' Statement of Facts, Dkt. 101-2 ¶¶ 49-62). However, the fact that the Plan Administrator correctly understood that Plaintiffs would not be subject to any loss of benefits for having engaged in disqualifying employment after their retirements did not address whether the Plan's then criteria for the Special Early Retirement pension required Plaintiffs not continue any actual employment in order for the Fund to maintain its eligibility to operate as a tax-exempt ERISA pension fund under § 401(a), the applicable provision of the Internal Revenue Code for such tax benefit. However, upon learning that Defendants' approvals of Plaintiffs' pensions were in apparent non-compliance with the requirement of § 401(a), as construed by the I.R.S., that to remain qualified for tax-exempt status under § 401(a) a pension trust like the Fund in this case could not approve an early retirement pension, *i.e.*, one received before an

employee reached 65, unless the recipient of the early pension from a tax-exempt pension trust completely and permanently terminated all employment, including any non-Disqualifying Employment, which may be permitted by a plan, with the employee's participating employer Defendants acted to immediately bring the Plan into compliance by demanding Plaintiffs and other employees who, like Plaintiffs, had been awarded Special Early Retirement pensions and whom Defendants were aware had continued employment with their employers, cease their post-retirement employment or incur a suspension of their pensions. To insure the Plan's future full compliance with this corrected understanding of § 401(a) as applied to Plaintiffs' pensions, the sole basis for Defendants' 2011 Determination, Defendants formally amended the Plan on February 10, 2012 to require future applicants for Special Early Retirement pensions cease any further employment. Plaintiffs therefore contend that the Defendants' 2011 Determination as stated in the December 27, 2011 Letter to Plaintiffs constitutes a "De Facto Plan Amendment" prohibited by § 204(g), which "determination" Plaintiffs allege is the basis for Plaintiffs' alleged anti-cutback violations. Dkt. 101-1 at 11; Dkt. 118-1 at 25 ("There can be no dispute that Defendants, in late 2011, applied conditions to Plaintiffs' receipt of benefits that were neither set forth in the terms of the Plan nor applied in the first [when approving Plaintiffs' pensions] instance."); Complaint Dkt 111-3 ¶ 31 ("The monthly early retirement benefits received by Plaintiffs prior to Defendants' December 2011 and subsequent determinations that Plaintiffs did not actually retire . . . constitute accrued benefits [protected by § 204(g)]."); ¶ 32 ("Defendants' determination that each of the Plaintiffs did not actually retire because each of the Plaintiffs continued working in

Non-Disqualifying Non-Plan employment subsequent to his retirement constitutes a Plan amendment."); ¶ 41 ("All of the Plaintiffs will continue to be harmed until and unless the Defendants are estopped from refusing to recognize Plaintiffs' original dates of retirement pre-December 2011."). Thus, regardless of the fact that the terms of the alleged "De Facto" amendment to the Plan are based on the administrative "determination" made by Defendants in December 2011, the substance of which Plaintiffs also allege was then added to the Plan as a formal amendment in February 2012, Defendants' November and December 2011 interpretations of the requirements of the Plan under Art. V Sec. 1(d) for Plaintiffs' pensions are the basis for Plaintiffs' anti-cutback claim pursuant to § 204(g). Accordingly, at the threshold, the court considers whether Defendants' 2011 Determination constitutes a plan "amendment" as that term appears in § 204(g).

In support of Defendants' contention that Defendants are entitled to summary judgment on Plaintiffs' claim under § 204(g), Defendants rely on *Kirkendall v. Halliburton, Inc.*, 2011 WL 2360058, at *10 (W.D.N.Y. June 9, 2011) (Curtin, J.), *vacated in part, and affirmed in part*, 707 F.3d 173 (2d Cir. 2013), *cert. denied*, 571 U.S. 882 (2013) ("*Kirkendall*"). *See* Dkt. 100 at 27-28. In *Kirkendall*, the court held that the term "amendment of the plan" as stated in § 204(g) refers only to "actual amendments to the terms of the plan, not to a plan administrator's interpretation of plan provisions which results in a reduction of benefits." *Kirkendall*, 2011 WL 2360058, at *10.

Plaintiffs do not respond directly to this contention. *See* Dkt. 118-1 at 23-24 (citing caselaw holding that administrator's interpretation of plan reducing employee

pension benefits are *de facto* amendments subject to § 204(g)). In reaching this conclusion, Judge Curtin surveyed applicable circuit caselaw holding that § 204(g)'s "protections . . . apply only to actual amendments to the terms of a Plan, not to an interpretation of terms [by a plan administrator] which amounts to a constructive amendment of the Plan." *Kirkendall*, 2011 WL 2360058, at *8 (citing caselaw). In *Kirkendall*, Judge Curtin particularly relied on the reasoning of the opinion in *Stewart v. Nat'l Shopmen Pension Fund*, 730 F.2d 1552 (D.C.Cir.), *cert. denied*, 469 U.S. 834 (1984), in which the court stated that as it appears in § 204(g), "[T]he word 'amendment' is used as a word of limitation. Congress did *not* state that any change would trigger the . . . provision[ ]; it stated that any change by *amendment* would do so . . . ." *Stewart*, 730 F.2d at 1561 (italics in original). In *Stewart*, as quoted by Judge Curtin, the D.C. Court of Appeals further stated that

> The plaintiffs' construction would stretch the term "amendment" nearly to the breaking point. Under their construction, reducing *any* benefits, authorized by the plan, of persons whose rights are vested, would constitute an "amendment." While speculation regarding why Congress chooses specific language is not always fruitful, it should be noted that had Congress *meant* [Section 204(g)] to apply to "any *reduction* in benefits to vested participants," it could easily have said so.

Kirkendall, 2011 WL 2360058, at *9 (quoting *Stewart*, 730 F.2d at 1561) (italics in original and citing *Dooley v. American Airlines, Inc.*, 797 F.2d 1447, 1451-52 (7th Cir. 1986)) (applying *Stewart's* "common sensical rule of law" to find plan fiduciaries' "valid exercise of a

provision which was already firmly ensconced in the pension document" did not amount to amendment of the plan in violation of Section 204(g) and citing caselaw)).

Here, the provisions of the Plan upon which Plaintiffs rely for their First Claim are found in Art. V Sec. 1(d) (Dkt. 99-2 at 19-20) ("Any employee who retires on or after June 1, 1998 . . . .")[7] under which Plaintiffs qualified under the Rule of 85 (age 55 plus 30 years of service) for a Special Early Retirement pension which was also subject to later suspension under Art. V Sec. 3(a) in the event of any subsequent employment by the retiree "(A) in an industry covered by the Plan . . ., (B) in the geographic area covered by the Plan . . ., and (C) in any occupation in which the Participant worked under the Plan . . . ." Dkt. 99-2 at 22 (defined as "Disqualifying Employment"). Such restrictions on post-retirement Disqualifying Employment were included in the Plan, originally adopted May 1, 1999, and restated on March 28, 2002, effective as of May 1, 2002 to include subsequent amendments. Dkt. 99-2 at 3, 54. The Plan was subsequently restated, on December 16, 2009, effective May 1, 2009, Dkt. 99-3 at 2, 65, incorporating amendments adopted since the 2003 Restatement and adopting a different section decimal-based number system, but retaining the same language authorizing Special Early Retirement pensions of Art. V Sec. 1(d).[8] Thus, as with the provision in

---

[7] Unless otherwise indicated all underlining is added.

[8] Plaintiffs state that inasmuch as all Plaintiffs, except Metzgar who "retired" under the 2009 Restated Plan, "retired" under the 2002 Restated Plan with "virtually identical language," with the 2001 Restated Plan for ease of reference, reference should be to the 2002 Restated Plan. Dkt. 118-1 at 10 n. 8. Accordingly, the court's references are to the 2002 Restated Plan.

question in *Stewart*, these provisions were equally well-ensconced, *see Dooley*, 797 F.2d at 1451-52, in the Plan document when Plaintiffs applied for their Special Early Retirement pensions commencing in 2002 with Plaintiff Ronald Reagan.

As noted, Facts, *supra*, at 6, an exception in the Plan to the prohibition on continued employment with a contributing employer following the Plan's approval of Plaintiffs' retirement pensions provided that "employment in a managerial position, project manager, or estimator for an Employer shall not be deemed 'Disqualifying Employment.'" Significantly, nothing in the text of Art. V Sec. 1(d) ("Any employee who retires . . . .") indicates that the term "retires" includes any expectation the employee intends to continue employment with a contributing employer in any form of employment whether such future employment is subject to suspension of pension benefits under Art. V Sec. 3(a) or not. As stated in Defendants' 2011 Determination, *see, e.g.*, Dkt. 99-13 at 3, Dkt. 99-14 at 2, because Plaintiffs, upon commencing their Special Early Retirement pensions, continued to work for a participating employer, albeit in non-Disqualifying Employment that did not require suspension of a pension under the terms of the Plan, Defendants' action to suspend Plaintiffs' pensions in order to assure the Plan's compliance with § 401(a) and preserve the Plan's tax-exempt status, was an administrative interpretation of existing Plan language, specifically, the phrase "[a]ny employee who retires . . . ." Art. V Sec. 1(d) ("Any employee who retires . . . .") to include § 401(a)'s required permanent severance of any form of employment service after retirement to support distribution of an early retirement benefit, and is therefore not an amendment to the Plan necessary to support an action pursuant to § 204(g). Significantly,

as the terms "retire" or "retirement" were not defined by the Plan, Dkt. 101-2 ¶ 30 ("The Plan does not define the term 'retire'") and a perusal of the Plan yields no definition of the term "retirement;" *see also* Dkt. 118-1 (Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment) at 10 ("[T]he terms of the Plan in effect at the time that each Plaintiff qualified for early retirement do not explicitly define 'retirement'"). Defendants' 2011 Determination therefore did not alter an existing term of the Plan nor did it add any provision to the Plan; rather, it construed and applied the relevant terms so as to comply with previously existing and applicable Internal Revenue Code requirements, specifically § 401(a). In sum, Defendants' prior understanding of the term "retires" and "retirement" as used in the Plan to allow for continued employment by an employee upon receiving an early retirement pension was legally erroneous, and its correction in Defendants' December 2011 Determination did not effect an amendment to an existing term of the Plan within the scope of § 204(g).

As noted, the Second Circuit's decision affirmed the District Court's dismissal of plaintiff's § 204(g) claim in *Kirkendall*, *see Kirkendall*, 707 F.3d at 184, although recognizing the existence of other judicial interpretations of the term "amendment" as used in § 204(g) to include "an erroneous interpretation of a plan provision that results in the improper denial of benefits to a plan participant may be construed as a 'amendment' for purposes of ERISA § 204(g)," *Kirkendall*, 707 F.3d at 182-83 (quoting *Hein v. FDIC*, 88 F.3d 210, 216 (3d Cir. 1996) and Treas. Reg. § 1.411(d)-4, A-7 (stating that a plan allowing an employer to deny a protected benefit by the exercise of administrative discretion violates Internal Revenue Code § 411(d)(6) a provision similar to § 204(g)); *see*

also Hunter v. Caliber System, Inc., 220 F.3d 702, 712 (6th Cir. 2000) ("'erroneous interpretation of a plan provision that results in the improper denial of benefits to a plan participant may be construed as an 'amendment' for purposes of ERISA § 204(g)'") (underlining added) (quoting *Hein*, 88 F.3d at 216)). *See also Cottillion v. United Refining Co.*, 2013 WL 1419705, at *9 (W.D.Pa. Apr. 8, 2013) (erroneous reinterpretation to correct calculation of monthly pension payment using actuarial method for early retirement pensions previously awarded without such actuarial computation with a resultant reduction in the amount of the monthly pension payment constituted an "implicit" plan amendment for § 204(g) purposes), *aff'd*, 781 F.3d 47, 58 (3d Cir. 2015) (citing *Hein*, 88 F.3d at 216). Nevertheless, despite such conflicting views concerning the meaning and scope of the term "amendment" as used in § 204(g), the Second Circuit in *Kirkendall* found no need to resolve such conflicting opinions on this threshold issue because the court found plaintiff's claim in that case was based on an alleged miscalculation of benefits, not an administrative reinterpretation of any terms of the plan itself potentially constituting an informal amendment of the plan as Plaintiffs assert here. *See Kirkendall,* 707 F.3d at 184. In *Kirkendall* the court therefore stated it would "leave for another day the question of whether a constructive amendment [as found in *Hein*] can trigger the requirements of § 204(g)." *Id.* Based on the undersigned's research, that day has not arrived and this court accordingly finds that Judge Curtin's holding in *Kirkendall* that 'constructive' amendments based on alleged erroneous administrative determinations under a plan as found by the Third Circuit in *Hein, supra,* and the Sixth Circuit in *Hunter, supra*, to be sufficient to support a § 204(g) claim, and are not plan amendments subject

to relief under § 204(g), represents controlling law on the issue in this Circuit. Significantly, Plaintiffs cite to no Second Circuit or district court decisions within the Second Circuit reaching a contrary result. As such, Defendants' 2011 Determination suspending Plaintiffs' pensions unless Plaintiffs forgo continued employment with their former employers before reaching age 65, is not an amendment to the Plan subject to review under § 204(g), and Defendants' motion for summary judgment on Plaintiffs' First Claim (Dkt. 98) should therefore be GRANTED and Plaintiffs' motion on this claim (Dkt 101) should be DENIED.

2. Defendants' 2011 Determination Resulting in a Suspension of Plaintiffs' Pensions and Loss of Plaintiffs' Employment Income Was Not a De Facto Plan Amendment Subject to § 204(g).

Plaintiffs' contend that while Defendants suspended Plaintiffs' pensions based on Defendants' 2011 Determination prior to the formal amendments to the Plan adopted in February 2012, Defendants' administrative action nevertheless constituted a *de facto* plan amendment reducing Plaintiffs' accrued benefits and, as such, is actionable under § 204(g). Dkt. 118-1 at 24-25 (citing *Deschamps v. Bridgestone Americas, Inc. Salaried Employees Ret. Plan*, 169 F.Supp.3d 735, 751 (M.D.Tenn. 2015), *aff'd*, 840 F.3d 267 (6th Cir. 2016); *DiCioccio v. Duquesne Light Co.*, 911 F.Supp. 880, 899 (W.D.Pa. 1995); *Hein v. F.D.I.C.*, 88 F.3d 210, 216 (3d Cir. 1996) and *Hadden v. Consol. Edison Co. of N.Y., Inc.*, 312 N.E.2d 445, 448 (N.Y. 1974)). In these cases, an administrator's "reinterpretation of plan language," *Deschamps,* 169 F.Supp.3d at 751, to exclude plaintiff's occupation of maintenance manager from coverage in defendants' pension plan, despite evidence that

defendants had considered plaintiff's job title as one within the plan for 16 years prior to defendants' later attempt to exclude plaintiff's job, which earlier inclusion defendants claimed was a "clerical mistake," *id.,* was held to be an "amendment" within the meaning of § 204(g). In affirming the district court's finding defendants' reinterpretation of the plan to exclude plaintiff's job title from plan coverage to correct an alleged clerical error was a *de facto* amendment for § 204(g) purposes, the Sixth Circuit Court of Appeals held that such later administrator's interpretation constituted a plan amendment for purposes of § 204(g) where the original interpretation including plaintiff's position within the coverage of plan was not "untenable" based on the actual language of the plan describing the specific job classification, supervisor, under which plaintiff had been considered to be a covered employee. *Deschamps*, 840 F.3d 267, 280 (6th Cir. 2016). Likewise, in *DiCioccio*, the court found defendant's attempt to exclude employee income realized from the employees' exercise of stock options, which the employer had granted on a one-time basis, from employees' compensation upon which employees' pensions were to be calculated under the plan, to constitute a *de facto* amendment despite defendants' position that defendants' plan sponsor never intended such extra incentive income to be considered within the plan's definition of compensation for pension plan purposes when granting the stock options as a one-time boost to employees' compensation to enhance employee morale, and that including the income represented "a mistake in practice which had inadvertently 'developed'" which the administrator's discretionary interpretation, although after the fact, was intended to correct. *DiCioccio*, 911 F.Supp.3d at 895. In reaching its conclusion, the court relied on the past practice

of several of the employer's senior human resource and employee benefits managers who had previously considered the stock option income to be within the plan's definition of compensation. *Id.* at 899. In *Hein*, the court stated that "[a]n erroneous interpretation of a plan provision that results in the improper denial of benefits to a plan participant may be construed as "an amendment" for the purposes of ERISA § 204(g)." 88 F.3d at 216. In *Hein*, the court reversed the district court's award of early retirement benefits for plaintiff under § 204(g) despite the fact that plaintiff had not attained age 55 as required by the plan prior to his termination from his original employer, a bank, which had resulted from his employer's take-over by defendant, the F.D.I.C., and subsequent asset sale to an unrelated bank. In *Hadden*, the court held that defendant's post-retirement interpretation of defendant's pension plan to cancel retroactively plaintiff's pension based on plaintiff's pre-retirement criminal misconduct was without support in any existing provision of the plan at the time of plaintiff's retirement and constituted an unauthorized amendment.[9] Thus, whether a subsequent administrative interpretation of a plan intended to overcome an alleged prior mistaken or erroneous interpretation by the plan administrator resulting in an approval of pension benefits constitutes a *de facto* plan amendment for § 204(g) purposes depends on whether the initial interpretation or practice which approved the benefit to which the subsequent corrective interpretation is directed, was reasonable or tenable based on the

[9] *Hadden*, decided May 1, 1974, is of limited authority as it is a state court decision issued based on state contract law, now pre-empted by ERISA, *see* 29 U.S.C. § 1144(a), following its enactment effective September 2, 1974.

existing provisions of the plan when the benefits at issue were approved. *See Deschamps*, 840 F.3d at 280 (finding that defendant's determination that plaintiff's position was included in definition of a pension eligible occupation was not "untenable . . . under the language of the Plan.") (citing *Redd v. Bhd. of Maint. Way Emps. Div. of Int'l Bhd. of Teamsters*, 2010 WL 1286653, at *8 (E.D. Mich. Mar. 31, 2010). As the court of appeals in *Deschamps* stated, *"Redd* further concluded that to succeed on a [§ 204(g)] claim, plaintiffs must establish that the benefits they received prior to the alleged amendment were based on a 'tenable' or 'permissible reading of the terms of the Plan.'" *Deschamps*, 840 F.3d at 280 (quoting *Redd*, 2010 WL 1286653, at **9-10). *See also Cottillion*, 781 F.3d at 57-58 (plan administrator's later attempt to interpret plan to require actuarial computation of plaintiff's early retirement pension as allegedly required by federal tax law constituted an informal plan amendment actionable under § 204(g) when plan language at time of plaintiff's retirement provided no indication that actuarial-based reduction in early retirement pension was required).

Whether the plan administrator's award of benefits was based on such a "tenable" or "permissible" reading of the plan will be reviewed under an arbitrary or capricious standard. *Redd*, 2010 WL 128665, at *10. Where, as here, the Trust grants discretionary authority to the Defendant Trustees, a plan's fiduciary's decision such as in this case made by Defendants, may be judicially voided as arbitrary or capricious or contrary to law, "only if it was 'without reason, unsupported by substantial evidence or erroneous as a matter of law.'" *Pagan v. NYNEX Pension Plan,* 52 F.3d 438, 442 (2d Cir. 1995) (quoting *Abnathya v. Hoffman-La Roche, Inc.*, 2 F.3d 40, 45 (2d Cir. 1993),

abrogated on other grds by *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008)). "This standard is highly 'differential,' and 'the scope of judicial review is narrow.'" *Roganti v. Metropolitan Life Ins. Co.*, 786 F.3d 201, 210-11 (2d Cir. 2015) (quoting *Celardo v. GNY Auto. Dealers Health & Welfare Trust*, 318 F.3d 142, 146 (2d Cir. 2003)). In this case, Defendants' prior practice of approving Special Early Retirement pensions where recipient employees intended to continue employment was based on a fundamental misunderstanding of Internal Revenue Code requirements applicable to tax-exempt pension trusts, for such early retirement pensions and therefore was not "tenable" or "permissible" under the relevant provisions of the Plan at the time of such approvals such that Defendants' misunderstanding resulted in an improper distribution of pension benefits thereby jeopardizing the tax-exempt status of the Fund. Thus, Defendants' reinterpretation or corrective interpretation of the Plan by Defendants' 2011 Determination to require the suspension of Plaintiffs' Special Early Retirement pensions or termination of Plaintiffs' non-Disqualifying Employment in order to fully comply with § 401(a) was not the result of an arbitrary or capricious decision, and Defendants' subsequent interpretation of the relevant provisions of the Plan requiring Plaintiffs forgo such continued employment or suffer suspension of Plaintiffs' pension payments therefore did not constitute a *de facto* amendment of the Plan.

First, as trustees, Defendants are required by the explicit terms of the Trust to comply with ERISA and the Internal Revenue Code so that "the Trust and Plan of Benefits . . . will be structured and operated to qualify for approval by the Internal Revenue Service as a tax-exempt Trust and Plan to ensure that the Employer contributions to the Fund are proper

deductions for income tax purposes . . . . It is the intention of the Trustees to fully comply with all requirements of the Internal Revenue Code." Trust Art. VII, Section 4 (Dkt. 99-1 at 29). Under ERISA, ERISA pension funds like the Fund in this case are to be administered under "the common law of trusts to define the general scope of their authority and responsibility." *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985). ERISA requires a plan fiduciary to "discharge [their] duties with respect to a plan solely in the interest of the participants and beneficiaries . . . for the sole purpose of providing benefits to participants . . . . ." 28 U.S.C. § 1105(a)(1)(A). It is basic that the duty of a trustee is "to administer the trust, diligently and in good faith, in accordance with the terms of the trust and applicable law." Restatement (Third) Trusts § 76(A) (2007). Moreover, a fiduciary plan administrator "is [not] precluded from reconsidering an award of benefits to correct its own error, so long as the plan administrator specifically justifies the change as the correction of an earlier mistake and the record supports that decision." *Serbanic v. Harleysville Life Ins. Co.,* 325 Fed.Appx. 86, 91 (3d Cir. Apr. 30, 2009); *see also Oster v. Barco of California Employees' Retirement Plan,* 869 F.2d 1215, 1219 (9th Cir. 1988) (no abuse of discretion where "[t]he Committee's decision to modify its policy appears to be reasonable").

In this case, Plaintiffs applied for Special Early Retirement pensions under Art. V Sec. 1(d) of the Plan which states in relevant part that "any employee who retires . . . after his fifty-fifth (55th) birthday and whose combined age and years of Special Service shall equal eighty-five (85) or more, shall be entitled to a monthly pension equal to his Accrued Benefit on the date he makes application for Special Early Retirement."

Dkt. 99-2 at 19. The Accrued Benefit under the Plan is the monthly benefit payable to the employee at age 65 calculated in accordance with Art. V Sec. 1(a). Dkt. 99-2 at 15; Art. 1 Sec. 1 (Dkt. 99-2 at 4). Art. V Sec. 1(a) refers to the vested participants who may "retire" on or after age 65. Dkt. 99-2 at 16. This provision also provides that "retirements" at age 65 which occur after May 1, 2000, receive "a monthly pension payable over his [the employee's] lifetime" calculated in accordance with that section. Dkt. 99-2 at 16. As noted, the terms "retire" and "retirement" are not defined by the Plan. *See* Discussion, *supra*, at 7, 22. It is also undisputed that Plaintiffs intended to continue to be employed with their respective employers albeit in occupations that would not subject Plaintiffs to a suspension of pension benefits under Art. V Sec. 3 (Dkt. 99-2 at 22) for Disqualifying Employment. Further, nothing in Art. V Sec. 1(d) defines an employee's eligibility for the Special Early Retirement pension with reference to whether the employee intends to engage in non-Disqualifying Employment such as those occupations in which Plaintiffs intended to be employed when Plaintiffs applied for the Special Early Retirement pensions and in fact were employed upon receiving their pensions. In approving Plaintiffs' pensions without regard to whether Plaintiffs continued to be employed in non-Disqualifying Employment, Defendants acted in the mistaken belief that such distributions were permissible under § 401(a) and would not impair the tax-exempt status of the Plan as non-compliant distributions.[10] As such, if Defendants' prior

[10] There are several adverse consequences of significance to employees and employers in the event a pension plan's tax-exempt status is revoked including the disallowance of deductions for the employer's contributions until the amount of its contributions are included in employees' income, and payment of

interpretation of the Plan and past practice in approving Plaintiffs' pensions in relation to the requirements of § 401(a), knowing Plaintiffs intended to engage in continuing employment with a participating employer, thereby placed the Fund in violation of the Internal Revenue Code jeopardizing the Fund's tax-exempt status in violation of the specific provisions of the Trust requiring Defendants to operate the Fund and Plan so as to assure such compliance and the Fund's future tax-exempt status was not "tenable" or "permissible," *Deschamps*, 840 F.3d at 280, Defendants' subsequent interpretation in 2011 represented by Defendants' 2011 Determination to bring the Plan into compliance with § 401(a), if reasonable, does not constitute a *de facto* amendment to the Plan subject to § 204(g). A brief overview of the requirements of § 401(a), applicable I.R.S. regulations, rulings, and relevant caselaw demonstrates Defendants' prior misunderstanding of § 401(a)'s requirements as applied to Defendants' administration of the Special Early Retirement pension benefit and approval of Plaintiffs' pensions under the Plan was not reasonable or tenable, and that Defendants' 2011 reinterpretation and corrective actions were not arbitrary or capricious.

26 U.S.C. § 401(a) ("§ 401(a)"), enacted as part of the Internal Revenue Code of 1954, authorizes and states the requirements for tax-exempt trusts created for the exclusive purpose of providing pension and other benefits for retired employees. 26 C.F.R. § 1.401-1(a)(2)(i) ("§ 1.401-1(_)") states that § 401(a) "prescribes the requirements which must be met for qualification [as

---

taxes on a trust's earning. *See* Dkt. 100 at 40 including I.R.S., TAX CONSEQUENCES OF PLAN DISQUALIFICATION (2018), http://www.irs.gov/retirement-plans/tax-consequences-of-plan-disqualification, *last visited* March 28, 2019.

a tax-exempt entity] of a trust forming part of a pension . . . plan." As relevant, Treasury Regulation § 1.401-1(b)(1)(i) further states that

> "A pension plan within the meaning of Section 401(a) is a plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to his employees over a period of years, usually for life, after retirement.

26 C.F.R. § 1-401-1(b).

Section 401(a) therefore further requires a distribution of pension benefits to employees to begin not later than at age 70 1/2 or the calendar year when the employee "retires." § 401(a)(9)(A)(i); § 401(a)(9)(C)(i)(II).

Additionally, 26 C.F.R. § 1.410(a)-7(b)(2) provides that the term "severance from service" is the date "on which the employee quits, retires, is discharged or dies," or "remains absent from service." 26 C.F.R. § 1.410(a)-7(b)(6) provides that an employee's "period of service" is the "period of service commencing on the employee's employment . . ." "ending on the severance from service date." 26 C.F.R. 1.409A1(h)(1)(i) states in relevant part "[a]n employee separates from service with the employer if the employee . . . retires, or otherwise has a termination of employment with the employer." Section 1.409A-1(h)(1)(ii) provides as relevant

> whether a termination of employment has occurred is determined based on whether the facts and circumstances indicate that the employer and employee reasonably anticipated that no further services would be performed after a certain date . . . .

Thus, I.R.S. regulations which define the requirements for administration of a tax-exempt trust under § 401(a) make clear that a qualified pension trust shall begin pension payments upon an employee's retirement and that such retirement occurs when the employee terminates his or her employment with an employer with the expectation that no further services will be performed by the employee for the employer.

I.R.S. rulings also make clear that a pension trust established under § 401(a) may not distribute benefits and retain its tax-exempt status if pension benefits are distributed to employees prior to severance of employment. *See* Rev. Ruling 74-254, 1974-1 C.B.91 (qualified pension plan under § 401(a) may not permit distributions "prior to termination of employment"); Rev. Ruling 71-437, 1971-2 C.B.185 ("A pension plan does not qualify [for tax-exempt status] under § 401(a) if it permits distributions of the employer's contributions or increments therein prior to severance of employment . . . ."); *see also* I.R.S. Notice 07-69, 2007-35 C.B. 468 ("[A]n early retirement benefit is generally only permitted to commence with an annuity starting date that is after severance from employment (except to the extent permitted under § 401(a)(36) . . .), 2007 WL 2285348, at *6. Moreover, in the case of early retirement, *i.e.*, in this case prior to age 65, § 401(a)(36), enacted in 2006, permits an employee to receive an early retirement pension from a tax-exempt pension trust at age 62 where the employee intends to continue working if the trust elects to grant such an early retirement pension. Thus, by necessary implication, § 401(a)(36) recognizes that early retirements such as those received by Plaintiffs where the employee intends to engage in employment after retiring are permissible only at age 62 and not, as here, at age 55. In this case, the Plan has not adopted § 401(a)(36) and established

age 65 as the Normal Retirement Date. Plan Art. I(23) (Dkt. 99-2 at 10); Art. I(34) (Dkt. 99-2). As noted, Facts, *supra*, at 7-9, it is undisputed that each Plaintiff, at the time such Plaintiff applied for his Special Early Retirement pension, had an understanding with Plaintiff's then current employer that Plaintiff would continue employment after the date of Plaintiff's retirement albeit in a job title that would not be subject to a suspension of Plaintiff's pension under Art. V Sec. 3(a), *i.e.*, in non-Disqualifying Employment. As is evident from the applicable I.R.S. regulations, rulings, and notice such an intention is contrary to the requirements for a valid retirement compliant with § 401(a). The prerequisite to a valid retirement under § 401(a) that the employee intends to sever all further employment also furthers congressional policy of assuring that distributions from tax-exempt pension trusts be for the purpose of supporting retirement and not other purposes such as estate or income enhancements. "The Code [§ 401(a)] attempts to ensure that those funds that have been accumulated with the aid of the loss of tax revenue associated with tax deferral are in fact actually used for retirement purposes and not for estate or other purposes." Pamela D. Perdue, Esq., *The Ins and Outs of Retirement Plan Distributions,* TAXES – THE TAX MAGAZINE, Feb. 2009 at 63.

Additionally, in a Private Letter Ruling issued Nov. 25, 2011, I.R.S. Priv. Ltr. Rul. 201147033, 2011 WL 5893533 (Nov. 25, 2011) ("the PLR") (Dkt. 100 at 32), in applying the applicable regulations and judicial definitions of the term "retirement" as it is used in § 401(a), the I.R.S. stated unequivocally that "if both the employer and employee know at the time of 'retirement' that the employee, with reasonable certainty, continues to perform services for the employer, a termination of employment has not occurred upon

'retirement' and the employee has not legitimately retired [for purposes of § 401(a)]." Dkt. 100 at 36 (citing *Meredith v. Allsteel, Inc.*, 11 F.3d 1354, 58 (7th Cir. 1993) ("In common parlance, retire means to leave employment after a period of service." (citing Webster's Ninth New Collegiate Dictionary 1007 (1986) (to retire is "to withdraw from one's position or occupation: to conclude one's working or professional career."))). In the PLR the I.R.S. concluded that where, as here, employees applying for early retirement pension benefits "would not actually separate from service and cease performing services for the employer when they 'retire' these 'retirements' would not constitute a legitimate basis to allow participants to qualify for early retirement benefits" and "will violate section 401(a) of the [Internal Revenue] Code and will result in disqualification of the Plan under section 401(a) of the Code." Dkt. 100 at 37 (underlining and bracketing added). Thus, as originally drafted and administered, the Plan permitted Special Early Retirement pensions to be awarded to employees including Plaintiffs who intended to and in fact engaged in continued employment after receiving such pensions as Fund distributions without having fully retired in violation of § 401(a) thereby placing the tax-exempt status of the Fund in jeopardy contrary to the terms of the Trust and requirements of applicable tax and trust law. Such a remarkable misunderstanding of § 401(a)'s requirement resulting in an erroneous interpretation of the term "to retire" or "retirement" as used in Art. V Sec. 3 and improper distribution of Plaintiffs' pensions can hardly qualify as a "tenable" or "reasonable" interpretation of the Plan.

Plaintiffs contend that to the extent § 401(a) and I.R.S. regulations construing § 401(a) refer to an employee's required retirement from employment,

such employment is limited to "covered employment" under the Plan, *i.e.*, employment in the plumbing and steamfitters trade for which employer contributions to the Plan are required, (citing Art. 1 Sec. 7) (Dkt. 99-2 at 6) (The term "Covered Employment" shall mean employment of an Employee by a Contributing Employer") and does not extend to non-Disqualifying

Employment for which contributions to the Fund are not required thus, according to Plaintiffs' theory, Plaintiffs did retire consistent with § 401(a). Dkt. 118-1 at 15-16. Plaintiffs point to ERISA, 29 U.S.C. § 1002(2)(A) ("§ 1002(2)(A)") which defines a tax qualified pension plan as one providing "(i) retirement income to employees or (ii) results in deferral of income by employees for periods extending to the termination of covered employment or beyond." *Id.* However, the conclusion Plaintiffs draw from this, *viz.* that "'retirement' in the context of a tax qualified pension plan does not mean that a participant . . . must terminate all employment before receiving his pension, but, instead, that he must simply terminate 'covered employment,' to wit, the work [through covered employment] that accrues benefits under the plan," *id.,* does not follow. First, § 1002(2)(A), the purpose of which is to guide whether a give employment related benefit is one protected by ERISA, *see, e.g.*, *Pasternack v. Shrader*, 863 F.3d 162, 168-69 (2d Cir. 2017) (under § 1002(2)(A) Stock Rights Plan not an "employee pension benefit plan" subject to ERISA) does not carry the relevant legal effect as does § 401(a) as the latter is the provision of the tax code which controls the availability of a tax exemption for a pension trust, not § 1002(2)(A). Further, nothing in the text of § 401(a) recognizes that the term "retirement" refers exclusively to a withdrawal from work in covered employment as its prerequisite for a valid distribution of early

retirement pension payments. In fact, in submitting the VCP, Defendants included in its description of Defendants' error that in approving Plaintiffs' Special Early Retirement pensions Defendants erroneously believed that a withdrawal "from Covered Employment" by a participant with an expectation that the employee would continue working in non-covered employment was satisfactory compliance with applicable regulations, specifically § 401(a)-(1)(b)(i) and § 1.410-1(i) "which require[ ] a separation from employment with all employers contributing to the Plan." Dkt. 99-16 at 21. Significantly, a careful reading of the I.R.S.'s acceptance of the VCP ("Compliance Statement" Dkt. 99-17 at 3, 8) indicates the I.R.S. found Defendants' statements of tax code requirements applicable to Defendants' approval of Plaintiffs' Special Early Retirement pensions to represent a misunderstanding by Defendants of such requirements. *See* Dkt. 99-17 (*passim*). Nor did the I.R.S. in its approval of the VCP's statement of Defendants' "failures" and corrective action, *i.e.*, requiring Plaintiffs desist in engaging in Plaintiffs' non-covered employment or suffer suspension of their pensions, to be based on an erroneous understanding by Defendants of the basis for Defendants' statement of failures, *i.e.*, non-compliance with § 401(a), and Defendants' need for corrective action to avoid any loss of the Fund's tax-exempt status. Nor does the I.R.S.'s discussion of the issue in the PLR indicate that whether an employee's early retirement pension violates § 401(a) turns on whether the employee terminates covered as opposed to non-covered employment under a plan, as Plaintiffs assert, while at the same time receiving a distribution of early retirement pension benefits.

A similar argument was raised by plaintiff in *Meakin v. California Field Ironworkers Pension Trust*,

2018 WL 405009, at *7 (N.D.Cal. Jan. 12, 2018) to support a finding that plaintiff, who had received early retirement benefits while engaging in continuing employment with a participating employer, had legitimately retired by moving from covered to non-covered employment such that the plan was compliant with § 401(a). *See Meakin*, 2018 WL 405009, at *7. The court in *Meakin* rejected this contention noting that given defendants' fiduciary obligation to construe the plan so as to preserve its tax-exempt status it was reasonable for defendants to conclude I.R.S. requirements under § 401(a) could not be met based on such a distinction. *Id.* Significantly, here, in accepting Defendants' interpretation of § 401(a) as elaborated in the PLR, the I.R.S. had no objection to Defendants' interpretation and corrective action as constituting a violation of 26 U.S.C. § 411(d)(6), a provision "substantially identical" to § 204(g).

Plaintiffs' reliance on *Heinz* (Dkt. 118-1 at 14), is misplaced. In *Heinz*, unlike in this case, defendants had amended the plan after plaintiffs retired and continued work in an occupation not previously included in disqualifying employment, to include such employment as disqualifying and subjecting Plaintiffs' early retirement pensions to suspension, a new restriction on plaintiff's accrued pension benefit the Supreme Court held violated the anti-cut back rule. *Heinz*, 541 U.S. at 744-45. Here, unlike what defendants did in *Heinz,* Defendants did not broaden the scope of non-disqualifying employment to include that in which Plaintiffs were engaged. Rather, Defendants determined that by Plaintiffs' continued employment upon Plaintiffs' putative early retirements, Plaintiffs' pensions, as approved by Defendants, violated § 401(a) and therefore could not qualify as having legitimately accrued precluding suspension of Plaintiffs' pensions

or termination of Plaintiffs' post-retirement employment, an issue not presented in *Heinz*. *See* Dkt. 118-1 at 14 n. 11 (noting that in *Heinz* neither party nor I.R.S. asserted plaintiffs "never actually retired because [they] did not have a permanent intention to never perform any kind of work for a contributing employer again"). Specifically, in *Heinz*, the question present on *certiorari* was "whether a pension plan amendment that is authorized by ERISA Section 203(a)(3)(B) is nonetheless prohibited by Section 204(g) to the extent that it applies to previously accrued benefits." 2004 WL 110581 (2004). Plaintiffs' contention that approval of early retirement pensions, such as those approved for Plaintiffs in the circumstances presented in this case, are permitted under § 401(a) provided the employees continue to work in non-covered employment as defined in the Plan is therefore without merit.

Two recent cases, addressing similar questions regarding a plan's determination that its early retirement pensions were improperly approved in violation of § 401(a), also support this conclusion. In *Meakin,* 2018 WL 405009, at * 1 the plan permitted early retirement pensions similar to that provided by the Plan in this case notwithstanding that the employees continued to work in non-disqualifying occupations as permitted by the Plan. Specifically, unlike the present case, the plan defined "retirement" to require the employee's complete severance from employment in the covered industry but exempted employment in occupations, like the instant case, that were not covered by the collective bargaining agreement. *Meakin*, 2018 WL 405009, at *2. However, like Defendants in this case, in approximately 2011, the plan discovered that by approving early retirement pensions where eligibility was based on the Rule of 85 and where the employee nevertheless continued

employment in the industry covered by the plan, the plan was in violation of § 401(a). In *Meakin,* as in the instant case, the plan thereafter filed a VCP with the I.R.S. disclosing the circumstances of this violation based on the plan's erroneous interpretation of § 401(a)'s requirements that early retirees cease any further employment with employers in their industry which resulted in improper pension distributions to 290 retirees including plaintiff since 1990. The I.R.S. subsequently accepted the defendant's VCP which proposed suspension of early retirement pensions for 58 of the retired employees received after 2007 including plaintiff's whose pension was suspended in 2014. In rejecting plaintiff's action brought pursuant to 28 U.S.C. § 1132(a)(1)(B) for benefit denial (plaintiff did not assert a claim pursuant to § 204(g)), the court found defendants did not engage in an abuse of discretion in their reinterpretation of the plan, as governed by § 401(a), that early retirement must include a severance of any further employment including in a non-disqualifying occupation as had been allowed under the plan. *Meakin*, 2018 WL 405009, at **5-6. In support of its conclusion, the court noted defendant trustees had a duty as fiduciaries to interpret and act to ensure the plan complied with the Internal Revenue Code to protect the plan's continued tax-exemption under § 401(a). *Id.* Notably, the court in *Meakin* also cited the PLR, relied upon by Defendants in this case, as evidence that the defendant's determination that by allowing payment of early pension benefits to employees who had continued to work in their industry, albeit in non-disqualified occupations, defendants' prior administration of the plan was in violation of applicable tax law, was reasonable. *Meakin*, 2018 WL 405009, at *6. Specifically, the court held that defendants were required to interpret the

plan in a manner compliant with applicable law, specifically § 401(a) and related I.R.S. regulations, so as to preserve the economic viability of the plan for future beneficiaries rather than continue to pay illegal benefits to a few beneficiaries including plaintiff thereby jeopardizing the tax-exempt status of the plan, and that such belated corrective action was therefore reasonable providing no basis for a claim under § 1132(a)(1)(B) seeking to recover wrongfully denied benefits.

Similarly, in *Maltese v. National Roofing Industry Pension Plan,* 2016 WL 7191798, at *1 (N.D.W.Va Dec. 12, 2016) plaintiff applied for and received early retirement benefits after defendant's approval on May 1, 2012, at which time plaintiff commenced work as an estimator for his former employer. Subsequently, defendant, in 2015, suspended plaintiff's pension because by engaging in continued employment plaintiff had not retired and that plaintiff's receipt of early pension payments was in violation of § 401(a) requiring defendant to take corrective action by suspending plaintiff's pension payments in order to bring the plan into compliance with § 401(a) thereby preserving the plan's tax-exempt status. *Maltese*, 2016 WL 7191798, at *4. The court therefore granted summary judgment to defendant on plaintiff's ERISA claim[11] alleging a wrongful denial of benefits based on its finding that defendant's interpretation of the plan which had excluded plaintiff's continued employment from the plan's exemption from a suspension of early pension benefits for work by "a Pensioner" was "reasonable and consistent with the goal of maintaining the Plan's tax-exempt status under § 401(a)." *Id.* In reaching its

[11] The court's decision does not specify the basis of plaintiff's ERISA claim.

conclusion, the court in *Maltese* also relied, despite its non-binding effect, upon the PLR in this case which, as discussed, Discussion, *supra*, at 34, concluded that no valid retirement for § 401(a) purposes occurs where an employee otherwise eligible for early retirement benefits after receiving approval of an application for such benefits "will immediately return to service with the employer." *Id.* Thus, both *Meakin* and *Maltese* support the court's conclusion in this case that the tax implications of Defendants' prior interpretation of the Plan, particularly Art V. Sec. 1(d) regarding Plaintiffs' eligibility under the Plan for Special Early Retirement pensions, strongly support the reasonableness of such interpretation and, as such, in this case, that Defendants' corrective action through Defendants' later interpretation as stated in Defendants' 2011 Determination and suspension of Plaintiffs' benefits in order to preserve the tax-exempt status of the Fund was not arbitrary or capricious.

Plaintiffs' assertion that by adopting the 2012 Amendments to the Plan to include Defendants' later reinterpretation demonstrates Defendants' 2011 Determination is not an "interpretation of the terms of the Plan," Dkt. 118-1 at 4 n. 1, in that "*Defendants actually changed them*" is incorrect. As the relevant terms "to retire" and "retirement" had no previous definition in the Plan, Defendants' action in both Defendants' 2011 Determination and the February 2012 Amendments to conform Defendants' prior interpretation and practice to the requirements of § 401(a) effected no change in any previously existing term of the Plan under which Plaintiffs had sought to retire. Accordingly, Defendants' actions as challenged by Plaintiffs did not constitute a *de facto* amendment of the Plan subject to § 204(g).

Defendants contend that by requiring Plaintiffs terminate all employment to qualify for a Special Early Retirement pension Defendants did not impose a new Plan condition. *See* Dkt. 116 at 11 (citing to Plan Art. V Sec. 2(c) which states that benefits shall commence no later than the 60th day after the "Employee terminates service with all of the participating Employers."). However, as Plaintiffs point out, Dkt. 118-1 at 12, this section is directed to protecting an employee's right to eventually receive benefits to which the employee is entitled under a plan and replicates the requirements stated in ERISA, 29 U.S.C. § 1056(a)(1)-(3) ("§ 1056(a)(1)-(3)"), that unless an employee elects otherwise benefits shall not begin later than the sixtieth (60th) day after the "last of the following occurs:

> (a) The Employee attains Normal Retirement Date;
>
> (b) The occurrence of the tenth (10th) anniversary of the Plan Year in which the employee commenced participation in the Plan; or
>
> (c) The Employee terminates service with all of the participating Employers.

Thus, this provision cannot be fairly read to require an employee who otherwise was eligible for a Special Early Retirement to also terminate all further employment with participating employers. Section 1056(a)(1)-(3) simply "protects a participant's right to receive benefits by establishing . . . the latest possible trigger for payment" under a plan. *Morales v. Plaxall, Inc.*, 541 F.Supp 1387, 1390 (E.D.N.Y. 1982). Indeed, nothing in the record remotely suggests that such was ever Defendants' understanding of this provision, and, significantly, Plan Art. V Sec. 1(d), Dkt. 99-2 at 19-20,

which defines eligibility for a Special Early Retirement pension makes no reference to it. Accordingly, Art. V Sec. 2(c) does not, contrary to Defendants' assertion, establish that Plaintiffs were always required by the terms of the Plan to terminate all employment to receive a Special Early Retirement pension without Defendants' reliance on a more correct application of the requirement of § 401(a) that an early retirement, one prior to age 65, except for plans subject to § 401(a)(36) allowing for early retirement at age 62 with continued service, retirement requires a complete severance of an employee's further employment with a participating employer. *See Smith v. United States,* 508 U.S. 223, 233 (1993) ("[j]ust as a single word cannot be read in isolation, nor can a single provision of a statute [or plan].")

Plaintiffs contend that Defendants' rationale for Defendants' reinterpretation is based on an error by Defendants on a question of law, *i.e.*, Defendants' understanding of the requirements of § 401(a), and therefore is to be reviewed *de novo* and not under the deferential arbitrary and capricious standard applicable to discretionary determinations by ERISA plan fiduciaries. Dkt. 118-1 at 3-7 (citing caselaw and referencing Defendants' characterization of Defendants' approval of Plaintiffs' Special Early Retirement pensions where Defendants were aware of Plaintiffs' intent to nevertheless continue employment in non-Disqualifying Employment as "contrary to the law," Dkt. 118-1 at 4, and that Defendants' approvals were based on a "mistake of law" (referencing Defendants' VCP application, Dkt. 101-6 at 21)). *See Montesano v. Xerox Corp. Retirement Income Guarantee Plan*, 117 F.Supp.2d 147, 158 (D.Conn. 2000) (where plan "administrator's decision turned on a legal interpretation [of a statute or regulation] . . . *de novo* review required)

(citing caselaw), *aff'd in relevant part*, 256 F.3d 86 (2d Cir. 2001). However, other than asserting Defendants' reliance on the PLR was not permitted under 26 U.S.C. § 6710(k)(3), and attempting to distinguish Rev. Rulings 71-437 and 74-255, Dkt. 118-1 at 17 n. 14, as not involving an issue of retirement, Plaintiffs also rely on ERISA-based regulations which are not controlling on whether under § 401(a) Plaintiffs' pensions were improperly approved. Plaintiffs cite no caselaw indicating otherwise and the court's research reveals no such contrary authority. Further, Plaintiffs point to no judicial decisions which plausibly support that Defendants' rationale for Defendants' 2011 Determination and subsequent corrective actions as detailed in the VCP were legally erroneous and thus unnecessary because Defendants' approvals of Plaintiffs' pensions were, contrary to Defendants' stated failures in the VCP as approved by the I.R.S., compliant with § 401(a) and thus not based on a "mistake of law" or other actions prohibited by § 401(a) as Defendants contend. Because neither I.R.S. revenue rulings nor private letter rulings are regulations promulgated after public notice and comment, and sometimes are self-serving when issued by the I.R.S. in preparation to litigate so as to bolster its position in the ensuing litigation, such pronouncements are not entitled to *Chevron*[12] deference by the courts but, rather, are "'entitled to respect' only to the extent it has 'the power to persuade,'" *Laurent v. PricewaterhouseCoopers LLP*, 794 F.3d 272, 287 (2d Cir. 2015) (quoting *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000)), and provided such interpretation is not "inconsistent with the statute's plain meaning. . . ." *Id*. (citing *Gen. Dynamics*

[12] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

Land Sys. v. Cline, 540 U.S. 581, 600 (2004) ("[D]eference to [an agency's] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent.")). *See also Taproot Administrative Services, Inc. v. Comm'r*, 133 T.C. 202, 209, n. 16 (2009) (noting various types of I.R.S. pronouncements are entitled to differing levels of deference, but that *Skidmore*[13] deference, the lowest level, has continued viability and applies to I.R.S. pronouncements other than regulations). Given that the purpose of § 401(a) is to assure that tax-exempt pension trusts shall function for the sole purpose of providing retirement income and not for other financial purposes such as income enhancements and estate creation, *see* Discussion, *supra*, at 34 (quoting Pamela D. Perdue, Esq., *The Ins and Outs of Retirement Plan Distributions,* TAXES – THE TAX MAGAZINE, Feb. 2009 at 63) the relevant I.R.S. regulations, rulings and the PLR requiring an early retirement applicant to forgo continued employment with a participating employer cannot be said to be inconsistent with § 401(a) and Plaintiffs offer no reason to find otherwise. Significantly, other decisions which have addressed this issue, *Meakin* and *Maltese*, have also concluded the I.R.S.'s regulations, rulings as well as the PLR represent a legally correct analysis of the question. The court therefore finds such regulations, rulings and the PLR are entitled to persuasive effect and that Defendants committed no legal error in seeking to conform Plaintiffs' pensions to § 401(a)'s requirements. *See Maltese*, 2016 WL7191798, at *4 ("while non-binding, the I.R.S.'s analysis and interpretation of § 401(a) [in the PLR] and its relevant regulations is persuasive"). Thus,

[13] *Skidmore v. Swift*, 323 U.S. 134, 140 (1944).

even under the *de novo* standard of review Plaintiffs fail to demonstrate Defendants committed an error of law and wrongfully suspended Plaintiffs' pensions and conditioned any restoration of Plaintiffs' pension payments upon Plaintiffs' termination of their employment as did Plaintiffs Puglia and Noble (Plaintiff O'Callaghan initially continued with his employment but later stopped working and had his pension payments restored).

3. Plaintiffs' Special Early Retirement Pensions Were Not An Accrued Benefit Under The Plan.

For purposes of a claim pursuant to § 204(g) whether an early retirement beneficiary suffered a reduction in an "accrued benefit" is "determined under the Plan." *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 744 (2004) (quoting 29 U.S.C. § 1002(23)(A)). Here, Art. I Sec. 1 of the Plan defines "Accrued Benefit" as the monthly benefit payable at Normal Retirement Date that the Employee has earned under Article V . . . ." As noted, Facts, Discussion, *supra*, at 6, Article V of the Plan grants the Special Early Retirement pensions to employees like Plaintiffs who reach age 55 with 30 years of credited service in the same monthly amount as a retiree at age 65 would receive under the Plan. Article V of the Plan grants the Special Early Retirement pension to "[a]ny employee who retires." Dkt. 99-2 at 19. In this case, as discussed, Discussion, *supra*, at 24-45, because Plaintiffs continued to be employed by their former respective employers, when Plaintiffs applied for their pensions between 2001-2009, Plaintiffs did not "retire" under any definition of that term in the Plan as required by § 401(a), and Defendants reasonably determined that Defendants' approval of Plaintiffs' pensions was erroneous requiring Defendants suspend Plaintiffs' pensions in order to

bring the Plan into compliance with § 401(a) unless Plaintiffs ceased further employment with their employers before reaching age 65. Thus, as Plaintiffs' Special Early Retirement pensions were improperly approved by Defendants in violation of § 401(a), such pensions did not constitute a benefit that had accrued to Plaintiffs when Plaintiffs' pensions were approved by Defendants. An ERISA plan benefit resulting from an administrator's misconstruction of the plan does not accrue to support a claim pursuant to § 204(g). *See Sims v. American Postal Workers Acc. Ben. Association*, 2013 WL 4677723, at *6 (D.N.H. Aug. 30, 2013) (mistake by an administrator's prior construction of plan to allow use of employee's "annualized" versus employee's last year's actual annual compensation to determine plaintiff's three highest years of compensation for purposes of calculating plaintiff's pension did not result in accrual of a pension benefit under § 204(g) where plan had not been properly amended to authorize such "annualized" final year compensation and existing plan language was inconsistent with such annualized calculation), *aff'd,* No. 13-2246 (1st Cir. Aug. 6, 2014) (unpublished). *See also Wetzler v. Ill. CPA Soc. & Foundation Retirement Income Plan*, 586 F.3d 1053, 1058 (7th Cir. 2009) (where plan amendment eliminated lump sum distribution as optional form of pension benefit and administrator reasonably determined such option would violate § 401(a) resulting in potential loss of plan's tax-exempt status, preexisting option lump sum payment to plaintiff did not constitute an accrued benefit for purposes of § 204(g)); *Hunter v. Caliber Systems, Inc.*, 220 F.3d 702, 713-14 (6th Cir. 2000) (where plan reasonably determines plaintiffs not entitled to lump sum distribution as a pension benefit would violate applicable I.R.S. regulations plan did not reduce an accrued

benefit actionable under § 204(g)). As explained, Discussion, *supra*, at 29, as fiduciaries, Defendants were authorized to reconsider a prior award of benefits as improperly approved (citing *Serbanic*, 325 Fed.Appx. at 91; *Oster*, 869 F.2d at 1219). Accordingly, because Plaintiffs' Special Early Retirement pensions were improperly approved, based on Defendants' misunderstanding of § 401(a)'s requirement no such benefit accrued to Plaintiffs and Plaintiffs did not suffer a reduction of "an accrued benefit" by virtue of Defendants' suspension of Plaintiffs' pension or termination of Plaintiffs' continued employment within the scope of protection under § 204(g). Defendants' motion for summary judgment (Dkt. 98) should therefore be GRANTED on this ground; Plaintiffs' motion (Dkt. 101) should be DENIED.

B. Plaintiffs' Second Claim.

Plaintiffs' Second Claim alleges, pursuant to ERISA 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), a denial of benefits under an ERISA plan, specifically Defendants wrongful refusal to continue Plaintiffs' Special Early Retirement pensions following Defendants' 2011 Determination to suspend such benefits in order to bring the Plan into compliance with § 401(a) and avoid a likely loss of the Fund's tax-exempt status. ERISA § 502(a)(1)(B) authorizes a civil action by a plan participant or beneficiary to "recover benefits due him under the terms of his plan . . . ." 29 U.S.C. § 1132(a)(1)(B). "To prevail under § 502(a)(1)(B), a plaintiff must show that: (1) the plan is covered by ERISA; (2) the plaintiff is a participant or beneficiary of the plan; and (3) the plaintiff was wrongfully denied a benefit owed under the plan." *Guerrero v. FJC Security Services Inc.*, 423 Fed.Appx. 14, 16 (2d Cir. 2011) (citing *Giordano v. Thomson,* 564 F.3d 163, 168 (2d Cir. 2009)). Under a

plan, as in this case, which grants to its fiduciaries discretionary decision-making authority with respect to questions of interpretation which lead to an alleged denial of benefits such denials are reviewable for abuse of discretion or more specifically whether the challenged decision was arbitrary and capricious. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 114-15 (1989). A plan administrator's decision is arbitrary and capricious or contrary to law "only if it was 'without reason, unsupported by substantial evidence or erroneous as a matter of law.'" *Pagan*, 52 F.3d at 442 (quoting *Abnathya*, 2 F.3d at 45) (*abrogated on other grds*, *Metro Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008)).

Here, the parties do not dispute the Plan is one covered under ERISA nor that Plaintiffs were, prior to their putative retirements at issue, participants, and since their pensions were approved are also beneficiaries of the Plan. Thus, for purposes of Plaintiffs' and Defendants' motions for summary judgment whether Defendants wrongfully denied Plaintiffs' pension benefits turns on whether the record demonstrates Defendants' determination to suspend Plaintiffs' pension benefits was based on an unreasonable, *i.e.*, an arbitrary and capricious interpretation of the requirements of the Plan for approval of Plaintiffs' pensions, or one contrary to law, in the context of the Defendants' legal and fiduciary obligation to administer the Plan in accordance with the terms of the Trust, the Plan and applicable law. As discussed, Discussion, *supra*, at 24-45, far from one fairly characterized as unreasonable, Defendants' reinterpretation of the Plan in 2011 to require Plaintiffs' to completely terminate further employment as a legally required precondition to continued eligibility for Plaintiffs' early retirement pension benefits in order to comply with the requirement of

§ 401(a) as construed by the I.R.S., and in order to preserve the Fund's tax-exempt status, was a corrective interpretation entirely reasonable under the undisputed facts and applicable law and not inconsistent with any terms of the Plan at that time. Also, as discussed, a plan trustee's action in distributing a benefit which violates applicable law is subject to reconsideration and rectification as erroneous. Discussion, *supra*, at 29. Accordingly, Defendants' suspension of Plaintiffs' pensions or requiring Plaintiffs forgo continued employment with Plaintiffs' former employers was not arbitrary, capricious or illegal. To the contrary, it was on based on a reasonable interpretation of applicable Treasury regulations, I.R.S. rulings and the PLR required to preserve the Fund's tax-exemption. Plaintiffs' Second Claim is therefore without merit and Defendants' motion (Dkt. 98) directed to Plaintiffs' Second Claim should be GRANTED; Plaintiffs' motion (Dkt. 101) should be DENIED.

C. Plaintiffs' Third Claim.

Plaintiffs' Third claim alleges Defendants are liable to Plaintiffs for the value of Plaintiffs lost pension benefits, income from lost employment with Plaintiffs' former employers and related medical benefits as a result of Defendants' breach of fiduciary duty owed Plaintiffs in violation of ERISA § 404(a)(1); 29 U.S.C. § 1104(a)(1) ("§ 1104(a)(1)"). Such violations are actionable pursuant to ERISA § 502(a)(3); 29 U.S.C. § 1132(a)(3) ("§ 1132(a)(3)"). As relevant, Section 1104(a)(1) requires a fiduciary to act in the interest of participants and beneficiaries for the exclusive purpose of providing benefits to participants and their beneficiaries, and defraying expenses of plan administration, with "the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent" person "would

use in the conduct of an enterprise of a like character and with like aims . . ..” In order to state a claim for breach of fiduciary duty under ERISA, plaintiff must show “(1) defendant was performing a fiduciary function when it engaged in the conduct at issue in the complaint; (2) the defendant breached a fiduciary duty; and (3) the plaintiff is entitled to equitable relief.” *In re DeRogatis*, 904 F.3d 174, 190 (2d Cir. 2018). Here, the parties do not dispute Defendants were fiduciaries of the Plan when Defendants suspended Plaintiffs’ pension benefits or required Plaintiffs terminate their respective employment. However, as discussed, Discussion, *supra*, at 24-45, because Plaintiffs did not retire in accordance with the requirements of § 401(a) when Plaintiffs’ Special Early Retirement pensions were approved by Defendants such that Plaintiffs’ pensions were approved in violation of § 401(a), Defendants did not breach any fiduciary duty with respect to the award of any pension benefit under the Plan. As discussed, Discussion, *supra*, at 24-45, in suspending Plaintiffs’ pensions, Defendants acted reasonably to correct Defendants’ erroneous approval of Plaintiffs’ pensions in order to retain the tax-exempt status of the Fund, a specific fiduciary duty imposed by the terms of the Trust itself, and necessary to provide for its future economic viability in order to benefit all present and future retirees as beneficiaries under the Plan who receive pensions from the Fund. *See* Dkt. 99 ¶ 34 (continued employment by Plaintiffs following early retirement pension approvals “contrary to law” and “threaten the continued existence of the Pension Plan”) (Affidavit of Debra Korpolinski, Plan Administrator, quoting from Defendants’ November 29, 2011 letter to Plaintiffs). It therefore would have been unreasonable for Defendants as fiduciaries to act other than in compliance with their obligation under

the Trust and applicable tax law as interpreted by the I.R.S. to assure such tax-exempt status where the failure to do so would thereby jeopardize the future viability of the Fund to the economic detriment of all beneficiaries. As such, Defendants acted in a reasonably prudent manner as would a prudent person in administering the Fund under the same circumstances in accordance with § 1104(a)(i) in the best interests of the Plan's beneficiaries and, on this record, as a matter of law, there was no breach by Defendants of any fiduciary duty to Plaintiffs imposed by ERISA.

Defendants argue alternatively that Plaintiffs' Third Claim is also subject to dismissal as duplicative. Dkt. 100 at 19 n. 16 (citing *Del Greco v. CVS Corp.*, 337 F.Supp.2d 475, 486-88 (S.D.N.Y. 2004). In *Del Greco* the court held that a claim pursuant to § 1132(a)(3) should proceed only if equitable relief, as Plaintiffs have requested in this case, is sought. *Del Greco*, 337 F.Supp.2d at 487 ("Thus, Plaintiff may bring a claim under both 29 U.S.C. § 1132(a)(1)(B) and 29 U.S.C. § 1132(a)(3) only as long as she seeks equitable relief on her 29 U.S.C. § 1132(a)(3) claim.") (citing *Devlin v. Empire Blue Cross and Blue Shield*, 274 F.3d 76, 89-90 (2d Cir. 2001)). Although in *Del Greco* plaintiff's claims for breach of fiduciary duty was permitted to proceed the court later found that the relief sought by plaintiff for that claim was the same as requested on plaintiff's denial of benefits claim, plaintiff's claim pursuant to § 1132(a)(3) was deemed redundant and dismissed. *Id.* at 488-89. Here, the relief Plaintiffs seek under Plaintiffs' Third Claim is the same as requested under Plaintiffs' First and Third Claims and, as such, should, alternatively, also be dismissed based on redundancy. Accordingly, Defendants' motion (Dkt. 98) directed to Plaintiffs' Third Claim should be

GRANTED; Plaintiffs' motion (Dkt. 101) directed to this claim should be DENIED.

D. Defendants' Counterclaim for Recoupment.

In Plaintiffs' cross-motion for summary judgment (Dkt. 101 at 27-28), Plaintiffs request that Defendants' counterclaims, Dkt. 30, seeking recoupment of the approximately $1.9 million erroneously paid to Plaintiffs from 2002 to the current date as improperly approved Special Early Retirement pensions be withdrawn for failure to designate a fund exclusively holding such payments in order to support equitable relief available under ERISA as required by *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213-14 (2002) (fiduciary's claim for restitution of medical treatment payments from proceeds of settlement of beneficiary's tort action not then in actual possession of beneficiary was legal remedy not available pursuant to § 1132(a)(3) which provides for equitable relief directed to an identifiable fund under beneficiary's control only). In Defendants' Answer, Defendants, pursuant to ERISA § 502(a)(3) (29 U.S.C. § 1132(a)(3) and (e)), asserted counterclaims against each Plaintiff to recover the amounts of Special Early Retirement pensions erroneously paid to each Plaintiff as of February 1, 2012 ("the Counterclaims"). *See, e.g.*, Dkt. 30 at 9-11 (Plaintiff Metzgar). In Plaintiffs' Reply (Dkt. 57), Plaintiffs deny Defendants' assertions that Plaintiffs were ineligible for Special Early Retirement pensions under the terms of the Plan and that the pension payments received by each Plaintiff were in violation of the Plan permitting Defendants to seek recovery of the pension payments paid to each Plaintiff. *See, e.g.,* Dkt. 57, ¶¶ 16, 18 (Plaintiff Metzgar). Plaintiffs also contend the Counterclaims are outside both a three-year and six-year statute of limitation period. *Id.* at 17-18. Alternatively,

Plaintiffs asserted a (six-year) statute of limitation defense for Plaintiffs Mueller, Noble, K. Reagan, and R. Reagan. In Defendants' Memorandum of Law In Further Support of Defendants' Motion For Summary Judgment And In Opposition To Plaintiffs' Motion For Summary Judgment, filed March 5, 2018 (Dkt. 116), Defendants request permission to withdraw the Counterclaims for the reason, consistent with Plaintiffs' primary defense, that Defendants have been unable to establish the existence of the pension funds paid to Plaintiffs to support enforcement of the equitable lien or constructive trust Defendants seek to impose upon such funds as required by *Montanile v. Bd. of Trustees of the Nat'l Elevator Health Benefit Plan*, ___ U.S. ___, 136 S.Ct. 651, 659-60 (2016) (fiduciary's action pursuant to § 1132(a)(3) for equitable relief must be directed to an identifiable fund held by pension plan beneficiary who had agreed plan was entitled to restitution of value of medical treatment benefits received from plaintiff benefit plan).[14] Plaintiffs have not responded to Defendants' request for dismissal of the Defendants' Counterclaims. *See* Dkt. 121 (Plaintiffs' Reply Memorandum of Law in Support of Motion for Summary Judgment) (*passim*)).

Fed.R.Civ.P. 41 ("Rule 41__"), which applies to counterclaims as well as a plaintiff's claim, *see* Rule 41(c), provides for voluntary dismissal of a counterclaim where, as here, plaintiff has filed a reply as a responsive pleading either by (1) a stipulation of dismissal signed by all parties pursuant to Rule 41(a)(1)(ii),

---

[14] Defendants' request, which requires an order of the court, should have been made by motion in accordance with Fed.R.Civ.P. 7(b)(1). Accordingly, for purposes of this Report and Recommendation, the court treats Defendants' request as a motion to dismiss the Counterclaims pursuant to Rule 41(a)(2) as a dispositive motion.

or (2) pursuant to Rule 41(a)(2) by court order upon "such terms that the court considers proper." Because Plaintiffs have served a reply, a voluntary dismissal by Defendants of the Counterclaims is not available pursuant to Rule 41(d) ("A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made: (1) before a responsive pleading is served . . . . Accordingly, in the absence, to date, of a stipulation filed pursuant to Rule 41(a)(1)(ii) and, in the absence of any opposition by Plaintiffs to Defendants' request, the court finds Defendants' concession that Defendants are unable to establish the existence of a fund to which Defendants' equitable relief request can attach, and request to withdraw the Counterclaims, should be considered under Rule 41(a)(2) and, as such, because Defendants do not request such dismissal should be without prejudice, Defendants' motion to dismiss the Counterclaims should be GRANTED with prejudice.

II. Plaintiffs' Motion For Leave to File Supplemental Complaint.

By papers filed February 1, 2018, Plaintiffs moved for leave to file a supplemental complaint pursuant to Fed.R.Civ.P. 15(d) ("Rule 15(d)") (Dkt. 110) and attaching such Proposed First Supplemental Complaint (Dkt. 110-2). In the Proposed Supplemental Complaint, Plaintiffs seeks to allege "new facts [which] supplement and provide additional particularization for each cause of action in the original Complaint." Dkt. 110-2 ¶ 20. Specifically, Plaintiffs seek to add allegations that Defendants amended the Plan in August 2016 ("the August 2016 Amendment") to authorize Defendants to recover the asserted overpayments Defendants made to Plaintiffs as Special Early Retirement pensions erroneously approved by Defendants in specified amounts paid to each Plaintiff with 12% interest. Dkt.

110-2 ¶¶ 23-24(a)-(g). Plaintiffs also propose to allege that in exercising the newly enacted authority granted to Defendants by the August 2016 Amendment to seek recovery of the overpayments, Defendants withheld the entire January 2017 pension payment due Plaintiffs Mueller, Noble, O'Callaghan, Puglia, K. Reagan and R. Reagan, and have further reduced each Plaintiff's monthly pension payment thereafter by 25%. Plaintiffs propose to further allege that as to Plaintiff Metzgar, who has not discontinued his non-Disqualifying Employment under the Plan and had not reached age 65,[15] Defendants have refused to pay Metzgar any pension payments Plaintiffs claim are due him since January 2012 when he refused to terminate his employment with Danforth in compliance with Defendants' demand. Dkt. 110-2 ¶ 25.

Plaintiffs also propose new allegations describing that a substantial number of other retirees under the Plan who, like Plaintiffs, continued working with participating employers in non-Disqualifying Employment following approval of their Special Early Retirement pensions by Defendants and thus, according to Defendants, also owe Defendants large sums for improperly approved pensions to such early retirees, were offered settlements of Defendants' threatened claims, like those asserted by Defendants against Plaintiffs, against such other early retirees, but not Plaintiffs, for "pennies on the dollar" which were accepted and paid by these other retirees with the result that these retirees' alleged overpayments were in effect reduced to approximately 5% of the face amount of Defendants' respective claims for the pension overpayments. Dkt. 110-2 ¶¶ 26-29. Additionally, accord-

[15] Metzgar will turn 65 on April 10, 2019 (Dkt. 105 ¶ 8).

ing to Plaintiffs' proposed supplemental complaint, Defendants refused to settle, on the same terms as described above, with Plaintiffs R. Regan, Puglia, K. Reagan and Noble, who were not interested in such a favorable settlement, unless Plaintiffs Metzgar, Mueller and O'Callaghan, who apparently refused to settle on these terms, also settled with Defendants. Dkt. 110-2 ¶ 30-31. Plaintiffs further state that in the absence of a settlement with Plaintiffs as described above, Defendants issued a 2017 denial of Plaintiffs' administrative appeal of Defendants' self-help initiative upholding Defendants' original 2011 Determination and continued to pay Plaintiffs reduced pensions as described. Dkt. 110-2 ¶ 32. Additionally, Plaintiffs assert a claim pursuant to 29 U.S.C. § 1132(a)(1)(B) for wrongful denial of pension benefits based on the fact that when Plaintiffs retired the Plan did not include the August 2016 Amendment authorizing Defendants to recover the alleged pension overpayments by the set-offs against Plaintiffs' pension payment commencing in January 2017, a form of self-help prohibited by ERISA. Dkt. 110-2 ¶¶ 40-43. Plaintiffs contend that Plaintiffs' motion should be granted in the absence of undue delay, bad faith, dilatory tactics, undue prejudice to Defendants as the party to be served, or futility. Dkt. 110-1 at 6 (citing caselaw). Plaintiffs further assert that Plaintiffs could not earlier seek the Proposed Supplemental Complaint as an Amended Complaint addressing Defendants' December 2016 determination to initiate set-off for repayment of Defendants' restitution or recoupment claims as Defendants' recovery actions occurred after the cut-off of November 4, 2016 for motions to file amended pleadings established by the Scheduling Order (Dkt. 56) and Plaintiffs were required to exhaust administrative remedies by appealing Defendants'

determination to obtain repayment which Defendants eventually denied in May 2017. Dkt. 110-1 %% 26-27. Plaintiffs therefore request permission to supplement the Complaint by asserting additional claims pursuant to § 204(g) based on Plaintiffs' assertion that Defendants attempt to recover the pension overpayments by set-off is a Plan amendment in violation of the anti-cutback rule, and Defendants' refusal to pay Plaintiffs the full amount of Plaintiffs' Special Early Retirement pensions due all Plaintiffs since January 2017 (except Metzgar who does not at present receive a pension payment) is a denial of benefits in violation of § 1132(a)(1)(B) and § 1132(a)(3). Dkt. 110-2 %% 36-48. In the Proposed Supplemental Complaint Plaintiffs also request a permanent injunction based on these newly stated facts, Dkt. 110-2 % 44-48, and a preliminary injunction, %% 49-54, based on an irreparable loss of enjoyment of Plaintiffs' retirement years given Plaintiffs' advancing ages and the expected time necessary to complete this litigation. Dkt. 110-2 %% 49-54. Defendants oppose Plaintiffs' motion (Dkt. 114) (Defendants' Memorandum of Law in Opposition to Plaintiffs Motion for Leave to File a Supplemental Complaint filed March 5, 2018) asserting Plaintiffs' undue delay in requesting permission to file the Proposed Supplemental Complaint and futility based on a short contractual 180-day limitation period as established by the Plan. Plaintiffs' Reply Memorandum of Law (Dkt. 122-1) was filed March 19, 2018.

In general, Fed.R.Civ.P. 15(d) ("Rule 15(d)") permits the court to allow a supplemental complaint to add "any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Supplemental pleadings are typically permitted absent undue delay, bad faith, dilatory tactics, undue prejudice or futility. *See Quaratino v. Tiffany & Co.*, 71 F.3d

58, 66 (2d Cir. 1995). Plaintiffs assert, *see* Discussion, *supra*, at 57, their request for the Proposed Supplemental Complaint is not based on any undue delay by Plaintiffs. In support, Plaintiffs also point to the court's "suggestion" that Defendants' set-off actions could be the subject of a Supplemental Complaint as stated in the court's Decision and Order (Dkt. 13), filed August 29, 2017, ("the D&O") denying Plaintiffs' request to consolidate a new complaint (17-CV-726V(F) ("*Metzgar II*")) filed on August 1, 2017 by Plaintiffs against Defendants and former trustees of the Fund asserting anti-cutback, denial of benefits, breach of fiduciary duty and discrimination claims in violation of ERISA Sections 204(g), 502(a)(1)(B), 502(a)(3), 510 and 409(a). In *Metzgar* II, Plaintiffs also requested declaratory and injunctive relief. In *Metzgar* II, Plaintiffs asserted these new claims were based on Defendants' August 2016 Amendment to the Plan authorizing Defendants to seek restitution or engage in other recovery actions such as the set-off challenged by Plaintiffs of the Special Early Retirement pensions Plaintiffs had been erroneously paid to Plaintiffs by Defendants in violation of Section 401(a) of the Internal Revenue Code and Defendants' December 2016 determination reducing Plaintiffs' future pension payments by 25% to recoup such overpayments. In the D&O, the court determined that consolidation of *Metzgar* I, the instant action, and *Metzgar* II, would delay resolution of the controlling threshold questions, *viz.*, whether Defendants' 2011 Determination to suspend Plaintiffs' early retirement pensions violated ERISA § 204(g) or § 502(a)(3). Thus, Plaintiffs' proposed Supplemental Complaint which seeks to include the same claims asserted in *Metzgar* II would, if allowed, effectively nullify the determination of the D&O that litigating such claims at the present time in conjunction with

Metzgar I could unduly delay resolution of this key threshold issue.

It is correct, as Plaintiffs point out, Dkt. 110-1 ¶ 29, that the court, in the D&O did observe that Plaintiffs could seek to include the facts relating to Defendants' August 2016 plan amendment and Defendants' subsequent decision in December 2016 to recover by set-off, beginning in January 2017, the overpayment of Plaintiffs' early pension benefits from pension payments to which Plaintiffs (except as to Metzgar) were then entitled having reached age 65, but, contrary to Plaintiffs' contention, the court's "suggestion," Dkt. 110-1 ¶ 29; Dkt. 122-1 at 13, was limited to Plaintiffs' request for injunctive relief in *Metzgar I*. As the D&O stated in this regard "Plaintiffs may, if Plaintiffs deem it necessary, also request permission to add the Defendants' December 2016 set-off decision to the Complaint in *Metzgar* I pursuant to Fed.R.Civ.P. 15(d), as a supplemental pleading regarding such decision and its adverse effect on Plaintiffs as additional particularization to support Plaintiffs' injunctive request." Decision and Order, Dkt. 13 at 11.

In reliance on the court's observation Plaintiffs, in the proposed Supplemental Complaint, sought to add allegations regarding Defendants' August 2016 Plan amendment authorizing Defendants to obtain restitution of Defendants' pension overpayments to Plaintiffs and the December 2016 implementation of substantial (100% of Plaintiffs' January 2017 pension payment and 25% of each following payment) set-offs as a form of self-help in accordance with the 2016 Plan Amendment authorization to do so which Plaintiffs assert constitute additional violations of § 204(g) and § 502(a)(3). In support of Plaintiffs' motion for leave to file the Proposed Supplemental Complaint, Plaintiffs

assert the court's "suggestion" induced Plaintiffs to "file a supplemental complaint for additional particularization of their claims . . . ." Dkt. 122-1 at 8. However, as a fair reading of the actual text of the relevant portion of the D&O demonstrates, the court's comment was limited to Plaintiffs' providing additional support for Plaintiffs' probable request for preliminary injunctive relief in *Metzgar* I by explaining the additional economic harm incurred by Plaintiffs stemming from the underlying Defendant's 2011 Determination that Plaintiffs' Special Early Retirement pensions were erroneously approved and needed to be suspended as additional evidence that a balance of hardships, *see* D&O at 10-11, favored Plaintiffs. Plaintiffs acknowledge "[Defendants'] recoupment action [counterclaims] is based entirely on the same facts as the 2011 Determination." Dkt. 122-1 at 10. Accordingly, allowing the Proposed Supplemental Complaint to proceed at this point in the case would circumvent the court's denial of consolidation of *Metzgar* I and *Metzgar* II and is predicated on Plaintiffs' misreading of the intent of the court's observation. Additionally, as the undersigned has recommended Defendants' summary judgment motion on the merits of the threshold issue in this case be granted, Discussion, *supra*, at 24-45, and, that Plaintiffs' motion for preliminary injunctive be denied, *see* Discussion, *infra*, at 61-65, for lack of a showing of irreparable harm, a prerequisite to such relief, any use of Plaintiffs' proposed supplemental allegations to support Plaintiffs' request for injunctive relief is moot. As Defendants have requested dismissal of the Counterclaims, which the court also recommends be granted, the need for any supplemental pleading of facts relating to such Counterclaims in *Metzgar* I has been substantially diminished if not eliminated. Further, all of Plaintiffs' claims in *Metzgar* II

attacking Defendants' set-offs remain unaffected and regardless of the disposition of the motions for summary judgment directed to Plaintiffs' claims in the instant action, Plaintiffs may, upon vacating the stay of *Metzgar* II yet proceed based on the allegations in *Metzgar* II and the Proposed Supplemental Complaint, including that the August 2016 Amendment may not be enforced against Plaintiffs' pensions as post-dating Plaintiffs' retirements, should Plaintiffs seek to vacate the stay and leave to file such Supplemental Complaint (*see* Dkt. 110-2 ¶¶ 42) in connection with *Metzgar* II.

Based on these factors the court finds Plaintiffs' motion to file the Proposed Supplemental complaint by injecting additional claims into the instant case at this point in the litigation could unduly delay resolution of the threshold merits of this case thereby prejudicing Defendants and interfering with the early resolution of the instant litigation. *See Krumme v. WestPoint Stevens, Inc.*, 143 F.3d 71, 88 (2d Cir. 1998) (prejudice arising from delay in disposing of case because of proposed additional claims warrants denial of motion for leave to amend). Finally, based on the foregoing, it is not necessary to address Defendants' alternative contention in opposition to Plaintiffs' motion contending Plaintiffs' proposed supplemental allegations are futile as outside the Plan's contractual 180-period for asserting claims directed to Defendants' August 2016 Amendment. Accordingly, Plaintiffs' motion for leave to file the Proposed Supplemental Complaint (Dkt. 110) should be DENIED.

III. Preliminary Injunction.

As noted, Background, *supra*, at 4, Plaintiffs also move, by papers filed February 1, 2018, pursuant to Fed.R.Civ.P. 65(a) ("Rule 65(a)") for a preliminary injunction enjoining Defendants from any reduction of

Plaintiffs' Special Early Retirement monthly pension benefits ("Plaintiffs' Motion for Preliminary Injunction" or "Plaintiffs' motion"). The basis for Plaintiffs' motion is that beginning in January 2017 Defendants have reduced Plaintiffs' monthly pension payments by 100% of the January 2017 payments and thereafter by 25% (except for Plaintiff Metzgar who has continued employment with his former employer since January 2012 when Defendants suspended Plaintiffs' Special Early Retirement pensions but who will also become eligible for such pension payments upon attaining age 65) until Plaintiffs terminated their continued employment or reached age 65 which pensions Defendants had determined in December 2011 were approved in violation of § 401(a). Also, as noted, Facts, *supra*, at 12-13, Defendants' 2011 Determination is the subject of Plaintiffs' and Defendants' motions for summary judgment addressing whether Defendants' 2011 Determination constitutes a violation of Plaintiffs' rights under ERISA § 204(g) (anti-cutback rule), ERISA § 502(a)(1)(B) (authorizing beneficiary recovery of benefits wrongfully denied) and ERISA § 1104(a)(1) (breach of fiduciary duty). Thus, whether Defendants' subsequent decision to recoup, commencing in January 2017, the pensions erroneously paid to Plaintiffs up to January 2012 by partially reducing Plaintiffs' pension payments, as Defendants maintain, was lawful under ERISA thereby supporting Plaintiffs' request for preliminary injunction, turns on whether Defendants' underlying decision in December 2011 to suspend such pension payments to bring the Plan into compliance with § 401(a) was lawful. As discussed, Discussion, *supra*, at 54-61, although Plaintiffs' motion for leave to serve a supplemental pleading pursuant to Rule 15(d) has been denied, the court finds Plaintiffs' claims as alleged in this action, *Metzgar* I, provides a

sufficient basis to support Plaintiffs' motion for preliminary injunctive relief if the other prerequisites for Plaintiffs' motion have been satisfied. Specifically, if Defendants' suspensions of Plaintiffs' pensions in 2012, as illegally approved by Defendants, were improper under § 204(g), then Plaintiffs would have been entitled to continue to receive their pensions without set-off to the present time and Defendants would have no legal basis for recouping beginning in 2017 the amount of Plaintiffs' pensions received by Plaintiffs to January 2012. Thus, the threshold issue of the basic validity of Defendants' actions against Plaintiffs as challenged in this case provide a sufficient basis upon which Plaintiffs may seek preliminary injunctive relief to attempt further to avoid adverse consequences, *i.e.*, reduced pension payments.

The criteria for granting a temporary restraining order pursuant to Fed.R.Civ.P. 65(b) ("Rule 65(b)") or a preliminary injunction pursuant to Fed.R.Civ.P. 65(a) ("Rule 65(a)") are the same. *Neopost USA, Inc. v. McCabe*, 2011 WL 4368447, *3 (D.Conn. Sep=t 19, 2011) (quoting *Citigroup Global Markets, Inc. v. VCG Opportunities Master Fund Limited*, 598 F.3d 30, 35 (2d Cir. 2010). A party seeking either form of preliminary equitable relief must "show '(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.'" *Citigroup Global Markets, Inc.*, 598 F.3d at 35 (quoting *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979)). The injunctive relief requested must also be shown to be "'in the public interest.'" *Carlson v. Medco Health Solutions, Inc.*, 2011 WL 3800017, *4 (W.D.N.Y. Aug. 29, 2011) (Arcara, J.) (quoting *Winter*

v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)). It is "well-settled" that a showing of irreparable harm is a prerequisite for relief pursuant to both Rule 65(a) and 65(b). *Neopost USA, Inc.*, 2011 WL 4368447, *3. To qualify as irreparable, the requisite harm must be "actual and imminent, not remote and speculative, and not adequately compensable by money damages." *Id.* (citing cases). The party seeking injunctive relief carries the burden of establishing each of these factors by a preponderance of the evidence. *Carlson,* 2011 WL 3800017, *4 (citing *Procter & Gamble Co. v. Ultreo, Inc.*, 574 F.Supp.2d 339, 344 (S.D.N.Y. 2008)). "The irreparable harm requirement is the most important factor in determining whether preliminary injunct[ive] [relief] should issue." *Chapman v. South Buffalo Railway Company*, 43 F.Supp.2d 312, 318 (W.D.N.Y. 1999) (Arcara, J.). Moreover, absent "a showing of irreparable harm, it is not necessary to examine the second prong of the preliminary injunction requirements," *i.e.*, likelihood of success or the presence of serious questions together with a balance of hardship in movant's favor. *Id.* at 318 (citing *Shady v. Tyson*, 5 F.Supp.2d 102, 109 (E.D.N.Y. 1998)).

As noted, it is established Second Circuit law that "[a] showing of irreparable harm is essential to the issuance of preliminary injunction." *See Sperry Int'l Trade, Inc. v. Government of Israel*, 670 F.2d 8, 11-12 (2d Cir. 1982). To establish irreparable harm, the movant must demonstrate 'an injury that is neither remote nor speculative but actual and imminent' and that cannot be remedied by an award of monetary damages." *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir. 1995) (quoting *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2nd Cir. 1989)). *See also Wright v. New York State Dep't. of Corrections*, 568 Fed.Appx. 53 (2d Cir. 2014) (quoting

Shapiro, 51 F.3d at 332); Wright Miller Kamer Marcus Spencer Steinman, FED. PROC. & PRAC. § 2348.1 (3d ed.) ("[A] preliminary injunction usually will be denied if it appears that the applicant has an adequate alternate remedy in the form of money damages or other relief.") (citing cases). An exception to this general rule arises where there is a risk that the movant will become insolvent prior collection of a judgment in the movant's favor. *Id.* (citing *Brenntag Intern'l Chemicals, Inc. v. Bank of India*, 175 F.3d 245, 249-50 (2d Cir. 1999). Here, however, none of the Plaintiffs aver that in the absence of a preliminary injunction to prevent Defendants from any further reduction of Plaintiffs pension payments, Plaintiffs will suffer insolvency. At most, Plaintiffs Metzgar, Mueller, Noble, O'Callaghan, K. Reagan, and Puglia, *see* Affirmation of Matthew K. Pelkey, Esq., Dkt. 111-2 ¶ 20, (referencing Affidavits of Plaintiffs Metzgar, Mueller, Noble, O'Callaghan, Kevin Regan, and Puglia, filed in support of Plaintiffs motion for a preliminary injunction), state that Defendants' actions have resulted in a "significant financial hardship." *See* Metzgar Affidavit (Dkt. 111-18 ¶ 34); Mueller Affidavit (Dkt. 111-9 ¶ 29); Noble Affidavit (Dkt. 111-10 ¶ 28); O'Callaghan Affidavit (Dkt. 111-11 ¶ 30); K. Reagan Affidavit (Dkt. 111-12 ¶ 27); Puglia Affidavit (Dkt. 111-14 ¶ 28).[16] Each Plaintiff also asserted that based their respective ages, 63-71, and further expected lengthy proceedings to obtain complete financial relief in this case, he "may suffer harm that cannot be compensated by money

[16] Plaintiff Metzgar also avers that the loss of his pension in January 2012 and the anticipated reduction by Defendants in his pension payments when his pension resumes at age 65, in April 2019, has and will result in "significant financial hardship." Dkt. 111-18 ¶ 28.

damages." *See, e.g.,* Dkt. 111-18 ¶ 34 (Metzgar Affidavit dated January 25, 2018). Thus, Plaintiffs do not demonstrate that absent preliminary injunctive relief Plaintiffs will suffer insolvency and that such a result is "actual and imminent." *Neopost USA, Inc.*, 2011 WL 4368447 at *3. Accordingly, Plaintiffs fail to satisfy the threshold prerequisite of irreparable harm, and Plaintiffs' motion, Dkt. 111, should therefore be DENIED.

CONCLUSION

Based on the foregoing, Defendants' motion for summary judgment (Dkt. 98) should be GRANTED; Plaintiffs' motion for summary judgment (Dkt. 101) should be DENIED; Plaintiffs' motion for leave to file a Supplemental Complaint (Dkt. 110) is DENIED; Defendants' motion to dismiss the Counterclaims (Dkt. 116) should be GRANTED; Plaintiffs' motion for preliminary injunction (Dkt. 111) should be DENIED. The Clerk of Court should be directed to close the file.

Respectfully submitted,

/s/ *Leslie G. Foschio*
LESLIE G. FOSCHIO
UNITED STATES MAGISTRATE JUDGE

As to Plaintiffs' Motion for Leave to File a Supplemental Complaint (Dkt. 110), Plaintiffs motion is DENIED.

SO ORDERED.

/s/ *Leslie G. Foschio*
LESLIE G. FOSCHIO
UNITED STATES MAGISTRATE JUDGE

Dated: March 28, 2019
Buffalo, New York

ORDERED that this Report and Recommendation be filed with the Clerk of the Court.

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of the Court within fourteen (14) days of service of this Report and Recommendation in accordance with the above statute, Rules 72(b), 6(a) and 6(d) of the Federal Rules of Civil Procedure and Local Rule 72.3.

Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Court's Order. *Thomas v. Arn*, 474 U.S. 140 (1985); *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir. 1989); *Wesolek v. Canadair Limited*, 838 F.2d 55 (2d Cir. 1988).

Let the Clerk send a copy of this Report and Recommendation to the attorneys for the Plaintiffs and the Defendants.

SO ORDERED.

/s/ *Leslie G. Foschio*
LESLIE G. FOSCHIO
UNITED STATES MAGISTRATE JUDGE

Dated: March 28, 2019
Buffalo, New York

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

13-cv-85 (JLS) (LGF)

GARY METZGAR, *et al.*,

Plaintiffs.

v.

U.A. PLUMBERS AND STEAMFITTERS LOCAL NO. 22 PENSION FUND, *et al.*,

Defendants.

DECISION AND ORDER

Plaintiffs commenced this action on January 25, 2013, alleging that Defendants violated ERISA when they required Plaintiffs to choose between ceasing certain post-retirement employment and foregoing special early retirement benefits. *See generally* Dkt. 1. Specifically, Plaintiffs claim that Defendants (1) violated ERISA's anti-cutback rule, (2) wrongfully denied Plaintiffs benefits under ERISA, and (3) breached their fiduciary duty to Plaintiffs under ERISA when—after Defendants determined that their prior interpretation of the pension plan, which allowed certain post-retirement employment and simultaneous receipt of special early retirement benefits, was incorrect—they reinterpreted the plan to require Plaintiffs to choose between that post-retirement employment and those

special early retirement benefits.[1] *See* Dkt. 1, at 6-14. Plaintiffs alternatively seek declaratory judgment based on the same facts. *See* Dkt. 1, at 14.

After several years of discovery and motion practice, both Defendants and Plaintiffs moved for summary judgment on February 1, 2018. Dkts. 98-109. Plaintiffs also moved for leave to file an supplemental complaint (Dkt. 110) and for a preliminary injunction (Dkt. 111) the same day. Each party opposed the other's motion for summary judgment. Dkts. 115, 116, 118, 119. Defendants also opposed Plaintiffs' motion for leave to file a supplemental complaint (Dkt 114) and motion for preliminary injunction (Dkt. 117). Each party filed a reply in further support of its motion for summary judgment (Dkts. 120, 121), and Plaintiffs replied in further support of their motions for leave to file a supplemental complaint (Dkt. 122) and for a preliminary injunction (Dkt. 123).

United States Magistrate Judge Leslie G. Foschio—to whom the case was referred for all proceedings under 28 U.S.0 §§ 636(b)(1)(A), (B), and (C)[2]—issued a combined Report and Recommendation (R&R) and Decision and Order on March 28. 2019. Dkt. 139. The Decision and Order, which is not at issue here, denied Plaintiffs leave to file a supplemental complaint. *See*

---

[1] In their objections, Plaintiffs suggest an alternate theory for their breach-of-fiduciary duty claim: that Defendants breached their fiduciary duty by "advising Plaintiffs of their right to retire." *See* Dkt. 142, at 40. Plaintiffs appear to raise this theory for the first time in their objections.

[2] Hon. Richard J. Arcara, who originally was assigned to this case, issued this diapositive referral order. Dkt. 40. The case then was reassigned—first to Hon. Lawrence J. Vilardo on December 4, 2015, and then to the undersigned on February 18, 2020. Dkts. 42, 148.

Dkt 139, at 55-61. The R&R recommended that this Court: (1) grant Defendants summary judgment; (2) deny Plaintiffs summary judgment; (3) deny Plaintiffs a preliminary injunction; and (4) grant Defendants' request to withdraw their counterclaim.[3] *Id.* at 66.

Plaintiffs objected to the R&R on May 10, 2019. Dkt. 142. They object to the recommendations that the Court deny them summary judgment and grant Defendants summary judgment—and object to the "[e]ntire" R&R with respect to those motions. *See id.* at 3. *See also* Dkt. 147, at 1 ("Plaintiffs challenge[] almost every conclusion made in the [R&R] . . . ."). Plaintiffs did not object to the recommendation that the Court deny their motion for preliminary injunction. *See generally* Dkt. 142. Defendants responded in opposition to Plaintiffs' objections on June 3, 2019, and Plaintiffs replied on June 17, 2019. Dkts. 145, 147.

A district court may accept, reject, or modify the findings or recommendations of a magistrate judge. 28 U.S.C. § 636(b)(1): Fed. R. Civ. P. 72(b)(3). A district court must conduct a *de* novo review of those portions of a magistrate judge's recommendation to which objection is made. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3).

This Court conducted an extensive and careful review of the R&R, the briefing on objections. and the relevant record. Based on that *de novo* review, the Court accepts and adopts Judge Foschio's recommendation to grant Defendants' motion for summary judgment, deny Plaintiffs' motion for summary judgment,

---

[3] Because Plaintiffs neither responded to nor opposed Defendants' request to withdraw their counterclaim, the R&R recommends dismissing the counterclaim under Federal Rule of Civil Procedure 41(a)(2). *See id.* at 52-54.

deny Plaintiffs' motion for preliminary injunction, and grant Defendants' request to withdraw their counterclaim.[4]

For the reasons stated above and in the R&R, the Court:

1. GRANTS Defendants' motion for summary judgment (Dkt. 98);
2. DENIES Plaintiffs' motion for summary judgment (Dkt. 101):
3. DENIES Plaintiffs' motion for preliminary injunction (Dkt. 111); and
4. GRANTS Defendants' request to withdraw their counterclaim. Plaintiffs' claims and Defendants' counterclaim are dismissed, with prejudice. The Clerk of Court shall close this case.

SO ORDERED.

Dated: October 7, 2020
Buffalo, New York

/s/ John L. Sinatra, Jr.
JOHN L. SINATRA, JR.
UNITED STATES DISTRICT JUDGE

[4] Although not required to do so here—where neither party objected to the recommendation regarding Plaintiffs' motion for preliminary injunction or Defendants' request to withdraw their counterclaim—the Court nevertheless reviewed those portions of the R&R as well. *See Thomas v. Arn,* 474 U.S. 140, 149-50 (1985).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 20-3791

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 2nd day of June, two thousand twenty-two.

GARY METZGAR, RICHARD MUELLER, KEVIN REAGAN, RONALD REAGAN, CHARLES PUGLIA, SHERWOOD NOBLE, DANIEL O'CALLAGHAN,

Plaintiffs-Counter-Defendants-Appellants,

v.

U.A. PLUMBERS AND STEAMFITTERS LOCAL NO. 22 PENSION FUND, BOARD OF TRUSTEES OF U.A. PLUMBERS AND STEAMFITTERS LOCAL NO. 22 PENSION FUND, DEBRA KOROPOLINSKI, IN HER CAPACITY AS PLAN ADMINISTRATOR, FOR THE U.A. PLUMBERS & STEAMFITTERS LOCAL 22 PENSION FUND,

Defendants-Counter-Claimants-Appellees.

ORDER

Appellants, Gary Metzgar, Richard Mueller, Sherwood Noble, Daniel O'Callaghan, Charles Puglia, Kevin Reagan and Ronald Reagan, 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

[SEAL Catherine O'Hagan Wolfe, Clerk]

APPENDIX E

26 U.S.C. 411(c)(6):

(6) Accrued benefit not to be decreased by amendment.–

(A) In general.–A plan shall be treated as not satisfying the requirements of this section if the accrued benefit of a participant is decreased by an amendment of the plan, other than an amendment described in section 412(d)(2), or section 4281 of the Employee Retirement Income Security Act of 1974.

(B) Treatment of certain plan amendments.–For purposes of subparagraph (A), a plan amendment which has the effect of–

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

(ii) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary shall by regulations provide that this subparagraph shall not apply to any plan amendment which reduces or eliminates benefits or subsidies which create significant burdens or complexities for the plan and plan participants, unless such amendment adversely affects the rights of any participant in a more than de minimis manner. The Secretary may by regulations provide that this subparagraph shall not apply to a plan amendment described in clause (ii) (other than a

plan amendment having an effect described in clause (i)).

26 C.F.R. 1.411(d)–4, Q & A 7:

Q–7: May a plan be amended to add employer discretion or conditions restricting the availability of a section 411(d)(6) protected benefit?

A–7: No. The addition of employer discretion or objective conditions with respect to a section 411(d)(6) protected benefit that has already accrued violates section 411(d)(6). Also, the addition of conditions (whether or not objective) or any change to existing conditions with respect to section 411(d)(6) protected benefits that results in any further restriction violates section 411(d)(6). However, the addition of objective conditions to a section 411(d)(6) protected benefit may be made with respect to benefits accrued after the later of the adoption or effective date of the amendment. In addition, objective conditions may be imposed on section 411(d)(6) protected benefits accrued as of the date of an amendment where permitted under the transitional rules of § 1.401(a)–4 Q&A–5 and Q&A–8 of this section. Finally, objective conditions may be imposed on section 411(d)(6) protected benefits to the extent permitted by the permissible benefit cutback provisions of Q&A–2 of this section.

26 C.F.R. 1.411(d)-4, Q & A 4:

Q–4: May a plan provide that the employer may, through the exercise of discretion, deny a participant a section 411(d)(6) protected benefit for which the participant is otherwise eligible?

A–4: (a) In general. Except as provided in paragraph (d) of Q&A–2 of this section with respect to certain employee stock ownership plans, a plan that permits

the employer, either directly or indirectly, through the exercise of discretion, to deny a participant a section 411(d)(6) protected benefit provided under the plan for which the participant is otherwise eligible (but for the employer's exercise of discretion) violates the requirements of section 411(d)(6). A plan provision that makes a section 411(d)(6) protected benefit available only to those employees as the employer may designate is within the scope of this prohibition. Thus, for example, a plan provision under which only employees who are designated by the employer are eligible to receive a subsidized early retirement benefit constitutes an impermissible provision under section 411(d)(6). In addition, a pension plan that permits employer discretion to deny the availability of a section 411(d)(6) protected benefit violates the definitely determinable requirement of section 401(a), including section 401(a)(25). See § 1.401–1(b)(1)(i). This is the result even if the plan specifically limits the employer's discretion to choosing among section 411(d)(6) protected benefits, including optional forms of benefit, that are actuarially equivalent. In addition, the provisions of sections 411(a)(11) and 417(e) that allow a plan to make involuntary distributions of certain amounts are not excepted from this limitation on employer discretion. Thus, for example, a plan may not permit employer discretion with respect to whether benefits will be distributed involuntarily in the event that the present value of the employee's benefit is not more than the cash-out limit in effect under § 1.411(a)–11(c)(3)(ii) within the meaning of sections 411(a)(11) and 417(e). (An exception is provided for such provisions with respect to the nondiscrimination requirements of section 401(a)(4). See § 1.401(a)(4)–4(b)(2)(ii)(C).)

(b) Exception for administrative discretion. A plan may permit limited discretion with respect to the ministerial or mechanical administration of the plan, including the application of objective plan criteria specifically set forth in the plan. Such plan provisions do not violate the requirements of section 411(d)(6) or the definitely determinable requirement of section 401(a), including section 401(a)(25). For example, these requirements are not violated by the following provisions that permit limited administrative discretion:

(1) Commencement of benefit payments as soon as administratively feasible after a stated date or event;

(2) Employer authority to determine whether objective criteria specified in the plan (e.g., objective criteria designed to identify those employees with a heavy and immediate financial need or objective criteria designed to determine whether an employee has a permanent and total disability) have been satisfied; and

(3) Employer authority to determine, pursuant to specific guidelines set forth in the plan, whether the participant or spouse is dead or cannot be located.