IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

TIMOTHY D. LAURENT, *et al.*, **On behalf of themselves and all others similarly situated,** **Plaintiffs,** **v.** **PRICEWATERHOUSECOOPERS LLP, *et al.*,** **Defendants.**	:	**06 CV 2280 (JPO)(KNF)**

SECOND AMENDED CLASS ACTION COMPLAINT

Plaintiffs, by and through their counsel, allege as follows:

NATURE AND SUMMARY OF THIS ACTION

1. This is an action under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, *et seq.* ("ERISA") challenging the legality of the design of The Retirement Benefit Accumulation Plan for Employees of PricewaterhouseCoopers LLP ("RBAP" or "Plan"). The RBAP is an ERISA-governed "cash balance" defined benefit pension sponsored by Defendant PricewaterhouseCoopers LLP ("PwC") that covers PwC's entire workforce, ranging from partners and principals to rank-and-file employees and support staff.

2. Plaintiffs allege that Defendants failed to comply with the ERISA standard for calculating lump sum benefits payable from a cash balance pension plan. *See, e.g.*, IRS Notice 96-8, 1996-1 C.B. 359-61, 1996 WL 17901 (Feb. 5, 1996), and *Esden v. Bank of Boston*, 229 F.3d 154 (2d Cir. 2000).

3. Plaintiffs further allege that Defendants failed to comply with ERISA's benefit accrual and accrued benefit standards. Specifically, Defendants failed to comply with ERISA's mandate that future "interest credits" accrued under a frontloaded cash balance plan must be taken into account in determining whether a plan complies with ERISA's benefit accrual and accrued benefit requirements. Defendants also failed to comply with ERISA's mandate that the value of a participant's normal retirement benefit under a cash balance pension plan must be preserved.

4. In addition, Plaintiffs allege that Defendants who were and/or are ERISA fiduciaries violated the fiduciary standards set forth in ERISA § 404, 29 U.S.C. § 1104.

5. Plaintiffs bring this action on behalf of themselves and, under Federal Rule of Civil Procedure 23, a proposed class (the "Class") of all persons who were and continue to be adversely affected by these violations (as defined more precisely below), and their beneficiaries and estates (collectively referred to herein as "participants").

JURISDICTION

6. This Court has subject matter jurisdiction over this action by virtue of 28 U.S.C. § 1331 because this is a civil action arising under the laws of the United States and pursuant to ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1), which provides for jurisdiction of actions brought under Title I of ERISA.

7. This Court has personal jurisdiction over the Defendants because they reside in, do business in, or have significant contacts with this District or the United States, and because ERISA provides for nationwide service of process. ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2).

VENUE

8. Venue is proper in this district, under ERISA § 502(e), 29 U.S.C. § 1132(e), because this district is where some of the breaches took place, where the Plan is administered, and where one or more Defendants reside and/or may be found.

EXHAUSTION OF REMEDIES

9. Exhaustion of Plan remedies is not required because this suit raises questions of law or statutory interpretation as to which the exhaustion doctrine does not apply or should not apply. Congress intended that statutory questions of this nature be adjudicated by Article III judges, not employer-appointed plan administrators.

10. In any event, Plaintiffs should be excused from any otherwise applicable requirement to exhaust plan remedies for one or more of the following reasons. First, as noted, Plaintiffs raise no claims as to which it would be appropriate to defer to the Plan's administrator. Second, the Plan does not provide any meaningful claims process for challenges of the type alleged in this suit. Third, any remedy provided under the terms of the Plan for the violations asserted would be inadequate.

11. Finally, any attempt to exhaust would be futile under the circumstances. Futility is confirmed by Defendants' conduct to date, both before and after suit was filed, including by already denying the claim filed by participant and putative Class member Jonathan Lawrence challenging Defendants' method of calculating lump sums calculation.

12. In 2006, after terminating employment with PwC, Mr. Lawrence requested a single lump sum distribution of his benefit from the RBAP. On or about June 2, 2006, without performing any projection of his hypothetical account balance, Defendants paid $90,234.17, the nominal balance of his then-current account. On June 29, 2007, Mr. Lawrence, through counsel,

wrote Defendants, challenging their failure to project his account balance to age 65 before calculating his lump sum entitlement under the Plan, citing this Court's September 5, 2006 Opinion and Order, Doc. 39, reported as *Laurent v. PricewaterhouseCoopers LLP*, 448 F. Supp. 2d 537 (S.D.N.Y. 2006).[1]

13. On August 3, 2007, Defendants denied Mr. Lawrence's claim on the grounds that his lump sum payment "was determined in accordance with the provisions of the RBAP." Defendants' denial showed that Defendants had not projected his account balance before converting it to an annuity and then discounting that annuity to lump sum form. No such projection was performed, Defendants explained, because "[Mr. Lawrence] had already attained normal retirement age," *i.e.,* completed 5 years of vesting service, at the time he requested his benefit.

14. On October 1, 2007, Mr. Lawrence filed a timely appeal from Defendants' August 3, 2007 denial of his claim. On October 16, 2007, Defendants again affirmed the denial of his request, saying:

> Under Section 10.6 of the RBAP, the Plan Administrator decides claims for benefits. However, Section 10.2(a) of the RBAP states that the Plan Administrator "shall have no power to add to, subtract from, or modify any of the terms of the Plan, or to change or add to any benefits provided by the Plan, or to waive or fail to apply any requirements of eligibility for a benefit under the Plan." The Plan Administrator determined the amount of the lump-sum payment of your benefit pursuant to the terms of the RBAP. Your claim seeks to have the payment determined other than pursuant to the terms of the RBAP, specifically in accordance with the decision in *Laurent v. PricewaterhouseCoopers LLP*. The Plan Administrator does not have the power to recalculate the amount of your lump-sum payment, including in accordance with the *Laurent* decision which is still contested.

15. In addition to denying Mr. Lawrence's claim and appeal, Defendants denied and are continuing to improperly deny Mr. Lawrence's December 20, 2007 request in accordance with the Department of Labor claims regulations, 29 C.F.R. § 2560.503-1, for all relevant

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[1] All documents to which this complaint refers are incorporated in full and as if attached in full hereto. *See* Fed. R. Civ. P. 10(c).

documents, records and other information relevant to his claim and his appeal. ERISA § 503(a)(2), 29 U.S.C. § 1133(a)(2), provides "in accordance with regulations of the Secretary, every employee benefit plan shall . . . afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim." A full and fair review of a claim denial is impossible if the claimant is not given the opportunity to review the documents, records and information relevant to his claim and its denial so that he can confirm or challenge the information's accuracy and reliability as well as challenge the basis of the decision denying his claim.

16. On January 24, 2008, Defendants ignored Mr. Lawrence's actual request and the claims regulations and responded by merely listing and offering Mr. Lawrence copies of 6 items that Defendants said were "considered" by the Plan administrator in deciding Mr. Lawrence's claim and appeal.

17. On March 6, 2008, Mr. Lawrence challenged Defendants' refusal to honor his request for all documents relevant to the consideration of his claim and appeal, writing:

> I am advised that the law would say that "considered" and "relevant" are not the same thing. I am asking for you to clarify this for me. For example, you don't list the Laurent decision as being considered in deciding my claim and appeal. But don't you agree that it was at least relevant to my claim and appeal? Please, as I previously asked, disclose all documents, records and other information relevant to my claim and appeal.

18. On March 14, 2008, Defendants responded by again refusing to produce all documents relevant to the consideration of his claim and appeal. This time, Defendants attempted to sidestep Mr. Lawrence's request and the ERISA claims regulation in a different way, arguing that because "[t]he determination of your claim and appeal was based upon the terms of the RBAP, from which the plan administrator has no authority to depart as was stated in

the October 16, 2007 decision on your appeal," "[t]he documents, records and information identified in our letter of January 24th fully reflect the scope of your claim and appeal."

19. But ERISA entitles Mr. Lawrence to all documents, records and information "relevant" to his claim and appeal as expansively defined by the regulations. *See* 29 C.F.R. § 52560.503-1(m)(8) (relevant even if it was merely "generated in the course of making the benefit determination, without regard to whether such document, record, or other information was relied upon in making the benefit determination"). Defendants' refusal to produce all relevant documents deprived Mr. Lawrence of administrative due process and further underscores that it would have been futile for the named Plaintiffs to use the Plan's internal claims process before filing this lawsuit.

THE PARTIES

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

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

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

23. Defendant The Retirement Benefit Accumulation Plan for Employees of PricewaterhouseCoopers LLP ("RBAP" or the "Plan") is a "cash balance" pension plan covering PwC partners and principals ("partners"), directors, and employees.[2] The RBAP is an "employee pension benefit plan" within the meaning of ERISA § 3(2)(A) and more precisely a "defined benefit plan," *see* RBAP at 1-2, within the meaning of ERISA § 3(35) and Internal Revenue Code ("IRC" or "Tax Code") § 414(j), and a "pension plan" within the meaning of IRC § 401(a) and Treasury Regulation ("Treas. Reg.") § 1.401-1(b)(1)(i).[3] The Plan is overseen and administered in significant part by individuals who work and/or reside in this District. For example, many of the Plan's Trustees and members of the Plan's Administrative Committee work and/or reside in the District; the Plan's IRS determination letters were addressed to PwC's

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

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

offices in this District; and the Plan's lead actuaries during all or most of the years at issue in this lawsuit work and/or reside in the District.

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

BACKGROUND

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

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

26. On July 1, 1998, Price Waterhouse LLP and Coopers & Lybrand LLP merged to create PwC. On that same date, Coopers & Lybrand LLP's traditional defined benefit plan, the Coopers & Lybrand Retirement Plan, was amended to provide for a cash balance formula under which participants' hypothetical accounts were credited with compensation credits and interest credits at rate based on Treasury securities. Normal retirement age under the Coopers & Lybrand Retirement Plan was defined as age 65. The RBAP merged into the Coopers & Lybrand Retirement Plan one year later, on July 1, 1999, and the merged plan was amended and restated as the amended and restated RBAP. (Accordingly, all references to the RBAP herein

should be read to include the Coopers & Lybrand Retirement Plan from July 1, 1998 until July 1, 1999).

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

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

29. Account balances are adjusted each business day by hypothetical "investment credits" (or debits), which are the RBAP's version of the more typical cash balance "interest credits." RBAP participants choose from among a PwC-selected menu of "investment experience choices" (essentially, investment options) in which their accounts are deemed to be invested (or, if no choice is made, they are defaulted into the money market fund). The Plan thus credits participant accounts with hypothetical interest (investment credits) based on real market rates of return: the investment credits reflect the results of each participant's hypothetical investment performance. Moreover, participants may reallocate their deemed investment mix on a daily basis.

30. Under the terms of the RBAP, most participants have the right to leave their account balances in the Plan even after terminating employment or retiring and to continue receiving investment credits. RBAP § 2.13(b). More specifically, a participant with an account balance in excess of $5,000 at the time of his termination of employment is permitted to leave his

or her benefits in the RBAP through April 1 of the year following the later of retirement or the date the participant attains age 70½. RBAP §§ 5.1, 5.6.

31. A participant's right to receive future investment credits on his account balance through normal retirement age accrues at the same time as the corresponding pay credits to which the investment credits relate – that is, the right to receive future investment credits through normal retirement age is not conditioned on the performance of additional services for PwC. Accordingly, the RBAP's investment credits are "frontloaded" within the meaning of IRS Notice 96-8. (If the Plan was not a frontloaded plan, it would violate ERISA's anti-backloading standards.) As a result, the future investment credits payable on existing account balances through the date each participant attains his or her normal retirement age are part of each RBAP participant's current "accrued benefit" within the meaning of ERISA. *Id.*; Treas. Reg. § 1.417(e)-1(d).

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

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

34. Plaintiffs Laurent and Sharon received a single lump sum payment from the Plan on or about May 20, 2002 (Mr. Laurent) and April 30, 2002 (Ms. Sharon). The payment made to

Mr. Laurent was $24,432.65, an amount equal to the sum of (1) the nominal balance of his hypothetical cash balance account and (2) the Plan-calculated present value of his accrued benefit under the Coopers & Lybrand Retirement Plan as of June 30, 1998. The payment made to Ms. Sharon was $9,527.02, an amount equal to the nominal balance in her cash balance account.

II. Violations Arising Out of Defendants' Refusal to Abide by the IRS's Interpretation of the Statutory Definition of "Accrued Benefit."

35. "ERISA was enacted to restrict employers' and employees' freedom of contract when bargaining over pensions. Employers do not have to provide pension plans, but when they do, those plans must comply with Title I of ERISA." *Esden*, 229 F.3d at 172. Further, if a plan seeks the tax benefits afforded a qualified pension plan, as the RBAP does, it must comply with the requirements imposed by the Tax Code. *Id*. at 173.

36. ERISA (including ERISA's Tax Code provisions) imposes minimum standards that apply by reference to a participant's "accrued benefit" as that term is defined under the statute.

37. For example, ERISA governs the rate at which each participant's statutory "accrued benefit" must accrue over the course of his participation in a plan. Under ERISA's benefit accrual standards, benefits generally must accrue at a relatively even rate for each year of employment. ERISA § 204(b); IRC § 411(b).

38. ERISA also governs the amount that must be paid to a participant who requests payment of his or her "accrued benefit" in a single sum instead of as a retirement annuity. ERISA §§ 204, 205(g); IRC §§ 411, 417(e). "A defined benefit pension plan, including one adopting a cash balance format [such as the RBAP], need not offer a lump-sum distribution as an optional form of benefit, but when it does so provide, that distribution must be the actuarial

equivalent of the accrued benefit valued according to the statutory methodology." *Esden*, 229 F.3d at 172.

39. ERISA provides that "[f]or purposes of applying [these standards], the term 'accrued benefit' means . . . the employee's accrued benefit determined under the plan . . . expressed in the form of an annual benefit commencing at normal retirement age." IRC § 411(a)(7).

40. This statutory definition of "accrued benefit" (the "statutory accrued benefit") requires that the "accrued benefit determined under the plan" (the "plan-defined accrued benefit") be *translated* it into a standardized form, namely, "the form of an annual benefit commencing at normal retirement age." The statute requires this translation (or rendering) of the plan-defined accrued benefit into its statutory "accrued benefit" form (*i.e.,* "expressed [as] an annual benefit commencing at normal retirement age") so that any plan, regardless of how its benefit formula may be contractually defined, can be tested to determine if it satisfies ERISA's minimum standards. The statute provides for no exceptions to this statutory "accrued benefit" translation requirement.

41. Years before Defendants designed and implemented the RBAP, the IRS made clear to cash balance plan sponsors that it interpreted the applicable statutes and regulations as providing for no exceptions to the statutory "accrued benefit" translation requirement. For example, in preamble to regulations published in 1991, the IRS indicated that it was this requirement that prevented the Service from providing an exemption to cash balance plan sponsors seeking "special relief" from the statute's minimum lump sum calculation requirements. *See, e.g.,* "Nondiscrimination Requirements for Qualified Plans," 56 Fed. Reg.

47524, 47528 (Sept. 19, 1991). In early 1996, the IRS reiterated its determination that the statutory "accrued benefit" translation requirement applies to cash balance plans in Notice 96-8.

42. In 1993-1994, as they were designing and adopting the RBAP, and since July 1994, while they were implementing the Plan's lump sum calculation methodology, Defendants were aware of, but disagreed with, the IRS's instruction to cash balance plan sponsors and their plans that ERISA's statutory "accrued benefit" translation requirement applied to cash balance plans.

43. In 1999, after articles appeared in the pension press questioning techniques used by PwC on behalf of itself and at least one of its clients to evade this requirement,[4] Defendants, through PwC Partner Ira Cohen, who was a member of Defendant Committee, aired Defendant's view that the translation requirement made no sense in the context of cash balance plans because "a cash balance plan provides a benefit in the form of an account" and "the fundamental benefit [in such a plan] is an account balance." *See* Ex. 1, Letter from Ira Cohen, PricewaterhouseCoopers LLP, to IRS Commissioner Charles O. Rossotti and Deputy Assistant Secretary for Tax Policy Jonathan Talisman, dated Sept. 30, 1999, *reprinted in* Tax Notes Today, Nov. 18, 1999 ("PwC Letter to IRS").

44. Mr. Cohen contrasted cash balance plans with other defined benefit plans and declared that in his view that "these plans -- unlike traditional defined benefit plans – should [be able to pay benefits equal to the account balance.]" *Id.* Acknowledging that the IRS disagreed

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[4] *See*, *e.g.,* "Cash Balance: Trouble for Bank Plans? IRS Scrutinizes Shortened Retirement Ages," *Pensions & Investments,* May 31, 1999 ("The five-year normal retirement age looks like a contrivance to get around rules"; "Such shortened retirement ages short-circuit various pension rules pegged to the more conventional retirement ages of 60 and 65"; "A short retirement age 'guts' the Employee Retirement Income Security Act."); "Pension Downsizing, Continued," *Tax Notes,* May 24, 1999 ("Retire in Five Years? [NationsBank's] new plan takes a hyper-technical approach to the question of what constitutes a normal retirement age . . . . PricewaterhouseCoopers, which designed the NationsBank plan, put the same retirement age provision in its own plan.").

with his view, Mr. Cohen noted that "that elegant equation -- the account equals the account -- is not in the IRS's current mathematical repertoire." *Id.*

45. Rather than petitioning the IRS (and/or Congress) to change its interpretation, and in the mean time complying with the law, Defendants took a different tack: they attempted to contract around the IRS interpretation. In their unsuccessful attempt to contract around the statute's minimum standards as interpreted authoritatively by the IRS, Defendants violated ERISA.[5]

III. <u>A Participant's "Accrued Benefit" Under The RBAP.</u>

46. It was a design goal of Defendants that the RBAP would not make lump sum payments to participants in excess of the account balance. Stated another way, one of PwC's design objectives was to see that the RBAP made lump sum payments equal to participants' account balances.

47. That is in part why the RBAP defines a participant's accrued benefit under the Plan in the way it does. The RBAP defines a participant's accrued benefit under the Plan as of any date as "the Participant's Deemed Account Balance credited to that date" – *i.e.*, his or her current account balance. RBAP § 2.1.

48. Because this "accrued benefit determined under the plan" (the "plan-defined accrued benefit") is not "expressed in the form of an annual benefit commencing at normal retirement age," it must be translated into that form. According to the IRS's "authoritative" interpretation of ERISA, *Esden*, 229 F.3d at 171, the translation is achieved by projecting the

[5] The IRS has primary jurisdiction and rulemaking authority over ERISA's benefit accrual and accrued benefit calculation standards. *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 747 (2004) (*citing* Reorg. Plan No. 4 of 1978, § 101, 43 Fed. Reg. 47713 (Oct. 17, 1978)); ERISA§ 3002(c), 29 U.S.C. § 1202(c).

account balance to normal retirement age at the plan's interest crediting rate and determining the participant's deferred annuity entitlement at that age.

49. This means that an RBAP participant's statutory accrued benefit "as of any date before attainment of normal retirement age ["NRA"] is based on the employee's hypothetical account balance as of normal retirement age, ***including future interest credits to that age***." IRS Notice 96-8 (emphasis added). In other words:

Accrued Benefit = Current Account Balance + [Stream of future interest credits through NRA]

with the resulting sum converted into an annuity commencing at normal retirement age. *Id.*

IV. ERISA Minimum Standards that Apply by Reference to the Statutory Accrued Benefit.

50. The rule that a cash balance plan participant's statutory accrued benefit includes not just his current account balance but also "future interest credits" though normal retirement age has at least the following three implications.

51. First: "In order for a defined benefit plan to satisfy [IRC] section 417(e), any single sum distribution payable to an employee from the plan must not be less than the nonforfeitable portion of the present value of the employee's *accrued benefit under [IRC] section 411(a)(7)*," *i.e.*, his statutory accrued benefit. IRS Notice 96-8 (emphasis added). This means a lump sum distribution from the RBAP can never lawfully be less than the present value of the employee's projected benefit at normal retirement age, including future interest through that date. This requirement applies "even in the case of a cash balance plan [such as the RBAP] that defines an employee's accrued benefit as an amount equal to the employee's hypothetical

account balance [because] [s]ection 411(a)(7) defines the accrued benefit in terms of benefits payable under the plan at normal retirement age." *Id.*

52. Second: "benefits attributable to interest credits are in the nature of accrued benefits within the meaning of [Treas. Reg.] section 1.411(a)-7(a), rather than ancillary benefits, and thus, once accrued, must become nonforfeitable in accordance with a vesting schedule that satisfies section 411(a). * * * If benefits attributable to future interest credits [that] have accrued . . . are disregarded when benefits commence before normal retirement age, the plan has effectively conditioned entitlement to the benefits attributable to those future interest credits on the employee not taking a distribution prior to normal retirement age. Pursuant to section 1.411(a)-4T, a right that is conditioned under the plan on a subsequent forbearance is a forfeitable right. Accordingly, conditioning entitlement to benefits on the employee not taking a distribution violates the nonforfeitability requirements of section 411(a)." *Id.*

53. Third: The statutory accrued benefit is the benefit that must accrue at a rate that complies with ERISA's benefit accrual standards. *Id.* ("benefits attributable to interest credits must be taken into account in determining whether the accrual of the retirement benefits under a cash balance plan satisfies one of the rules in [IRC] section 411(b)(1)(A), (B) or (C)"). *Accord* IRS Notice 2007-69, 2007-35 I.R.B. 468.

V. Defendants' Two-Tiered Strategy to Circumvent the Accrued Benefit Translation Requirement.

54. Defendants knew by the time the RBAP was adopted that the IRS interpreted ERISA as applying to cash balance plans in the manner described above. But rather than comply with that interpretation, Defendants decided to try to make the RBAP-defined accrued benefit trump the statutory accrued benefit. To accomplish this, Defendants pursued a two-tiered strategy.

55. The first strategy was to adopt and implement an innovative definition of "normal retirement age." Under PwC's pension plan in effect before the adoption of the RBAP in 1994, normal retirement age was defined as age 65 for all employees. By contrast, under the RBAP, normal retirement age was defined as age 65 only during each employee's first 5 years of service with PwC, before most employees became vested in their pension benefits. Once an employee completed 5 or more years of service with PwC, their normal retirement age changed to a typically-much-earlier date: the date the employee completed the 5 years of service. This was the same date most employees became vested in their pension benefits. Plan § 2.32 defines the Normal Retirement Age under the Plan as: "The earlier of the date a Participant attains age 65 or completes five (5) Years of Service." Plan § 6.1 sets forth the Plan's vesting schedule.

56. The RBAP's definition of normal retirement age ("RBAP-defined NRA") meant that an employee hired at age 22 typically would have attained "normal retirement age" at age 27. Plaintiff Laurent attained normal retirement age under the RBAP-defined NRA at age 30.

57. By defining the normal retirement age under the Plan in this manner, Defendants believed they could argue that they "complied" with the statutory accrued benefit translation requirement by effectively circumventing it.

58. Plugging the RBAP-defined NRA into the statutory "accrued benefit" definition yields the following. For employees in their first 5 years of service, their statutory accrued benefit was:

Accrued Benefit = Current Account Balance + [Stream of future interest credits through *age 65*]

59. But once an employee had completed 5 years of service (and become vested in his pension benefits), his statutory accrued benefit changed to:

Accrued Benefit	=	Current Account Balance	+	Stream of "future" interest credits through *the present*

which simplifies to:

Accrued Benefit	=	Current Account Balance

60. Defendants thought they could argue this solved the "problem" posed by the statutory accrued benefit translation requirement – at least for employees who had completed 5 years of service and accordingly had gained a vested right to receive a lump sum pension distribution upon termination of employment. Defendants believed they could argue that the problem "disappears once a participant reaches his or her normal retirement age (because there is no longer a need to project into the future – the minimum lump sum rules require projection only until normal retirement age)." PwC Letter to IRS.

61. Defendants' purported solution was not complete, however, because even Defendants realized it left the translation requirement still applicable to employees during their first 5 years of service. (Defendants determined it was not cost-effective to define NRA as each employee's date of hire because that would have required the RBAP to vest every employee in their accrued benefit immediately instead of after 5 years of service, a milestone many PwC employees never reached).

62. The accrued benefit translation requirement applied to employees during their first 5 years of service, even if the RBAP-defined NRA was accepted as lawful, because during a PwC employee's first 5 years of service, his or her normal retirement age was age 65, the only one of the two alternative dates in the Plan's NRA definition that the employee could have reached were he to terminate employment during his first 5 years and perform no further service

for PwC. Defendants knew this by the time the RBAP was adopted. IRS Notice 2007-69 confirms that the IRS has long considered a plan that defines NRA based on completion of a stated number of years of service to be a plan under which a participant's NRA changes to an earlier date upon completion of the stated number of years.

63. To try to avoid having to comply with ERISA's lump sum calculation and benefit accrual standards for employees who had not yet completed 5 years of service, Defendants adopted another technique.

64. As described above, ERISA defines the statutory accrued benefit under a cash balance plan as a participant's hypothetical account balance plus future interest credits under the plan's interest or investment crediting formula through NRA. This statutory accrued benefit must then be used to calculate lump sums and to demonstrate compliance with ERISA's benefit accrual standards. In the case of a plan like the RBAP that specifies a variable rate of return for use in determining the amount of investment credits, the precise dollar amount of an employee's hypothetical account balance as of normal retirement age (including future investment credits to NRA), and thus the precise dollar amount of the employee's accrued benefit as of any date before NRA, cannot be calculated prior to NRA. But a participant who requests a lump-sum cash-out before NRA is entitled to payment – thus a plan with this design "must prescribe the method for reflecting future interest credits in the calculation of an employee's accrued benefit" before NRA. Notice 96-8, Section III.B.1

65. The plan's projection method also had to preclude employer discretion and "reflect[]" the "value" of future interest credits without "reduc[ing] the interest rate or rate of return used for projecting future interest credits" and without "understat[ing] the value of those credits." *Id.* This meant that PwC, as plan sponsor, was required to select a projection method

that, after a review of alternative methods, appeared to best reflect the value of anticipated future interest credits.

66. Defendants knew these projection method requirements by the time they adopted and implemented the RBAP. In their 1999 letter to the IRS, Defendants said: "the IRS required cash balance plans develop a normal retirement age annuity benefit by projecting the account balance to normal retirement age using an interest rate **reflective of** the investment adjustments (the 'Projection Rate'), then converting that amount to an annuity." PwC Letter to IRS (emphasis added).

67. However, Defendants realized that if these projection method requirements were applied in the case of the RBAP, it would not be able to pay lump sums equal to a participant's hypothetical account balance. Generally speaking, a cash balance plan with a projection rate greater than the statutory discount rate making distributions to vested participants who had not yet attained normal retirement age under the plan would (during the period covered by this lawsuit) have had to make lump sums payments to them in excess of their account balances. In the case of the RBAP, any *bona fide* projection of the Plan's market-rates-of-return crediting formula would have resulted in a projection rate greater than the discount rate.

68. Defendants admitted as much in their 1999 letter to the IRS where they complained that the so-called "whipsaw" requirement was a particular problem for plans like the RBAP (though the RBAP was not specially mentioned) because the calculation "severely punish[es] employers who credit true market related investment adjustments" – *i.e.*, investment credits of the type provided under the RBAP. PwC Letter to IRS at 4 (emphasis added). What Defendants meant by "severely punish" here was: make payments to participants in excess of their account balances.

69. Defendants also admitted elsewhere in the 1999 letter that plans like the RBAP that credit market related investment adjustments were liable for making payments to participants in excess of their account balances, when it asked (rhetorically): "What kind of policy precludes market rates of return from being applied to cash balance accounts . . . ?" *Id.* What Defendants meant by "preclude[] market rates of return" here was: deter sponsors from adopting such crediting rates in the first place by not allowing them to limit lump sums to the balance of the participant's hypothetical account.

70. Defendants' solution to this problem was to calculate lump sums by reference to a benefit that included interest credits through NRA, but not the interest credits required by ERISA. The statute requires lump sums to include the value of projected interest *under the plan's investment crediting formula*. *See, e.g.*, Notice 96-8. Lump sums under the RBAP were based on a self-styled "Normal Retirement Benefit" that included projected interest *at the 30-year Treasury bond rate*.

71. Specifically, Plan § 5.4(b) provides that: "The amount of any lump sum payment to a Participant or Beneficiary shall not be less than the Actuarial Equivalent of the Participant's Normal Retirement Benefit." This would be lawful if the Plan defined a participant's Normal Retirement Benefit as his current account balance projected to NRA using a rate that actually estimated future hypothetical account returns under the RBAP's menu of investment options without undervaluing them – *i.e.*, if the "Normal Retirement Benefit" was the participant's statutory accrued benefit. But the Plan did not define Normal Retirement Benefit that way.

72. The Plan defined Normal Retirement Benefit as a participant's current account balance projected to NRA using the "Deemed Plan Interest Rate." Specifically, Plan § 5.1 states: "A Participant's Normal Retirement Benefit shall be an amount equal to the Actuarial Equivalent

(calculated by projecting the Deemed Account Balance to Normal Retirement Age using the Deemed Plan Interest Rate) of his or her Deemed Account Balance." Plan § 2.16, in turn, defines the Deemed Plan Interest Rate as the annual rate of interest equal to the interest rate on 30-year Treasury securities, as specified by the IRS for the month of February (or before July 1, 2001, the month of May) immediately preceding the plan year in which the calculation is made.

73. As its name implies, this "deemed" interest rate was not an estimate by Defendants of the actual future participant investment returns under the RBAP's menu of investment options Defendants expected participants would have received had they left their accounts in the Plan, but a means to an end – *i.e.,* lump sums equal to the hypothetical account balance. The deemed interest rate was and is consequently *per se* invalid under Notice 96-8 and ERISA.

74. Because the Plan defines a participant's Normal Retirement Benefit as his current account balance projected to NRA at the 30-year Treasury rate instead of a rate that reasonably estimated future hypothetical account returns under the RBAP's menu of investment options, the "Normal Retirement Benefit" is not the participant's statutory accrued benefit.

* * *

75. Defendants' use of the RBAP-defined NRA and Deemed Plan Interest Rate to apply ERISA minimum standards, including ERISA's vesting, benefit calculation, and benefit accrual standards, caused Defendants to violate ERISA in several ways.

VI. Violation of ERISA Benefit Accrual Standards.

76. Under the RBAP-defined NRA definition in effect before May 22, 2007, each participant's normal retirement age initially was age 65 but then changed to an earlier date once the participant completed five years of service, if ever.[6]

77. The only anti-backloading standard that the RBAP conceivably could hope to satisfy is the 133-1/3 standard under ERISA § 204(b)(1)(B).

78. Because normal retirement age is one of the bases on which a Plan participant's retirement benefits are calculated, the change in a participant's normal retirement age upon the completion of five years of service changed the basis on which benefits were calculated under the Plan solely by reason of an increase in the number of years of participation in the Plan. This violated ERISA's benefit accrual standards. *See* Treas. Reg. § 1.411(b)-1(b)(2)(ii)(F); Treas. Reg. § 1.411(b)-1(d)(3); IRS Notice 2007-69.

79. The RBAP-defined NRA also violated ERISA § 203(a) and IRC § 411(a) because it defines normal retirement age by reference to the completion of a specified number of years of service. *See, e.g., Duchow v. New York State Teamsters Conference Pension & Retirement Fund,* 691 F.2d 74 (2d Cir. 1982); IRS Notice 2007-69.

80. The result is that the RBAP-defined NRA does not define a "normal retirement age" that is lawful under ERISA. The Court of Appeals for the Tenth Circuit has explained that "[h]aving defined 'normal retirement age,' the statute then goes on to set forth certain requirements that must be met by a plan for employees reaching normal retirement age as defined by the statute. *If those requirements are met* by the plan, then there has been no

[6] The Plan was amended effective May 22, 2007 to change the definition of Normal Retirement Age to age 62 for all participants. *See* Plan as Amended and Restated Effective July 1, 2008, § 2.29. Accordingly, for participants whose annuity starting date is on or after May 22, 2007, the RBAP's NRA is age 62.

violation of the statute" as a result of the plan's NRA definition. *Lindsay v. Thiokol Corp*., 112 F.3d 1068, 1070 (10th Cir.1997) (emphasis added). A plan-defined NRA that causes a plan to violate ERISA's substantive minimum standards is invalid as a matter of law. *See, e.g.,* Notice 2007-69, Sec. V.

81. By statutory and regulatory default, as well as under the terms of the Plan itself, once the unlawful "five years of service" clause in the RBAP-defined NRA definition is excised, the normal retirement that must be used to apply and measure compliance with ERISA's minimum standards (the "statutory NRA" defined in IRC § 411(a)(8)) is age 65.

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

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

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

84. As described above, the RBAP is a "frontloaded" cash balance plan that calculates interest credits by reference to investment measures that are variable. According to the IRS's authoritative interpretation of the law: "A frontloaded interest credit plan that specifies a variable outside index for use in determining the amount of interest credits must [1] prescribe the method *for reflecting future interest credits* in the calculation of an employee's accrued

benefit. In order to comply with [Tax Code] section 401(a)(25), the method, including actuarial assumptions, if applicable, must preclude employer discretion. [2] Further, in determining the amount of an employee's accrued benefit, a forfeiture, within the meaning of [Treasury Regulation] section 1.411(a)-4T, will result if the value of future interest credits is projected using a rate that understates the value of those credits or *if the plan by its terms reduces the interest rate or rate of return used for projecting future interest credits*. [3] A forfeiture in violation of [Tax Code] section 411(a) [and ERISA § 203] also will occur if, in determining the amount of an employee's accrued benefit, *future interest credits are not taken into account (i.e., there is no projection of future interest credits*) and this has the same effect as using a rate that understates the value of future interest credits." IRS Notice 96-8 (emphasis added).

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

86. *First*, for the reasons described above, the statutory NRA under the Plan necessarily is age 65 for all participants regardless of their years of service with PwC. Therefore, when calculating lump sums Defendants were required to project a participant's current account balance at the Plan's investment crediting rate through age 65. But, except in the case of lump sums paid to the beneficiary of a participant who died before completing 5 years of service, Defendants did not do this. (Lump sums paid to beneficiaries of participants who died before completing 5 years of service were calculated by projecting the deceased participant's account balance at the Deemed Plan Interest Rate to the date he or she would have attained age 65, and calculating the present value of the resulting projected age-65 account balance using required ERISA discount rate and mortality factors. *See* Plan §§ 5.7 and 5.4(b).)

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

88. *Second*, even ignoring the absence of a projection to age 65, the lump sums were nevertheless calculated unlawfully because, as alleged above, the calculation was performed using a projection rate that was not Defendants' actual estimate of future interest credits. As described above, RBAP § 5.4 provides that lump sums shall be no less than the present value of a participant's "Normal Retirement Benefit." A participant's Normal Retirement Benefit is defined as the participant's current account balance projected to normal retirement age at the 30-year Treasury rate. So the rule under the RBAP was that lump sums would be based on a participant's current account balance "projected" to "Normal Retirement Age."

89. But while the RBAP's lump sum calculation formula does include a "projection" of a participant's account balance to normal retirement age, it was not the product of any *bona*

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

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

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

92. Defendants told Plan participants that, with an appropriately diversified portfolio, they could expect to earn rates of return that would significantly exceed the expected return on Treasury bonds and other "risk-free" investments. For example, in the July 1, 1994, RBAP Highlights Guide (PwC-L000857) distributed to participants, each of the five "Model Portfolios" presented by Defendants were shown to have historical average returns over the 20-year period ended June 30, 1994 ranging between 10.7% (Preservation of Capital model portfolio) and 14.4% (Very Aggressive Growth model portfolio). The Guide explained that the average annual

rate of return on Treasury bills (1926-1993) had been 3.7% and implied that Treasury bills would be a poor investment for most participants because "Treasury Bills have historically provided almost no real return and in some instances have actually lost ground to inflation. Thus, while Treasury Bills offer apparent safety and predictability in the short-run, they pose a potentially very serious risk of purchasing power loss over longer periods of time. This result is just the opposite of the case described above with stocks, which exhibit short-term volatility risk but offer greater long-term security." *Id.* at PwC-L00910-00911.

93. The Highlights Guide advised participants that "[a] key component in selecting the appropriate asset allocation strategy for your portfolio should be based on your investment time horizon, so it's important that you carefully consider what your specific time horizon might be. * * * Over a twenty-year period, there is plenty of time for stock market ups and downs to average out to a more consistent and attractive long-term average annual return. In fact, stocks have outperformed bonds and Treasury Bills in virtually all periods of 20 years or longer. Thus, the risk associated with unpredictable short-term stock market fluctuations is virtually eliminated for long-term investors. * * * For the reasons cited above, investors with 15 to 20 or more years to invest should generally consider placing most of their portfolios in stocks to achieve the highest returns." *Id.* at PwC-L00909-00910.

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

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

96. Defendants believed that RBAP participants were intelligent individuals who could understand the information and advice provided in the Highlights Guide, on the Plan website, and elsewhere, which advice was set forth in plain English at a level appropriate to the educational level of an average Plan participant receiving the information. Defendants also believed RBAP participants would accept the accuracy of the information provided in the Guide and that many participants would follow the advice given. Defendants did not believe that every participant would invest 100% of their hypothetical account balances in funds that would track or approximate the return on 30-year Treasury securities.

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

98. Accordingly, it would have been unlawful for Defendants to use the 30-year Treasury rate to calculate lump sums because that would have meant that participants who elected to receive benefits in the form of a lump sum would have been forced to forfeit the portion of the return they would have been expected to receive had they left their accounts in the Plan and taken a pension at age 65. This would have violated ERISA because it "conditions an employee's right to future interest credits on the *form* of the distribution he elects to take (pension at age 65 or lump sum now), which is precisely what the law forbids." *Berger v. Xerox Corp. Ret. Income Guar. Plan,* 338 F.3d 755, 762 (7th Cir. 2003). *See, e.g.,* ERISA § 203(a)(2), IRC § 411(a)(2), and Treas. Reg. § 1.411(a)-4.

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

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

VIII. <u>Violation of ERISA Participant Disclosure Standards.</u>

101. Defendants made false and misleading material misstatements and omissions concerning the Plan's normal retirement age to prevent or delay participants from objecting to the definition (to PwC management, with a government agency, or by filing suit). These misstatements and omissions were intentional and fraudulent, have been consistent and continuous since 1994, were and are self-concealing, and were and continue to be part of Defendants' attempt to fraudulently conceal their benefit forfeiture scheme. They were and are

not isolated incidents but part of a pattern of fraud and fraudulent concealment found in all or most participant communications, designed to avoid or delay exposure of the benefit forfeiture scheme and the need for Defendants to ever have to answer for it.

102. Defendants purposefully misled participants as to the Plan's 5-years-of-service NRA and deprived them of the information the statute required Defendants to disclose so that participants would not know or have any reason to reasonably suspect there was anything to challenge regarding Defendants' benefit calculation methodology and to deprive participants of the opportunity to timely react to, internally challenge and/or externally contest Defendants' forfeiture of their benefits.

103. Defendants knew that if they clearly disclosed to participants that they had defined "normal retirement age" to be the earlier of age 65 and the date each participant completed 5 years of service, they risked the unraveling of their benefit forfeiture scheme. The Plan's definition of Normal Retirement Age meant that RBAP participants, regardless of their age, are deemed to reach their "normal retirement age" after completing 5 years of service with PwC, with the relatively rare exception of the person who starts work for PwC after age 60. Plaintiff Laurent himself reached his "normal" retirement age at age 30, for example. Defendants knew if they told employees the truth about their unusual definition of "retirement," it would have raised red flags and led to the discovery by employees that Defendants were using an artificially low NRA for the purpose of avoiding ERISA minimum standards and depressing benefit levels.

104. Defendants feared that this discovery would cause wide-spread employee discontent and protests that would pressure Defendants to make the RBAP-defined accrued benefit match the Plan's statutory accrued benefit and otherwise calculate benefits in the manner

sought via this action. They also knew that if they had made proper disclosure of the Plan's 5-years-of-service NRA, there was a good chance one or more employees or former employees would have immediately filed suit to seek the relief sought via this action. Defendants knew that by concealing the Plan's 5-years-of-service NRA they were concealing their benefit forfeiture scheme and that the longer the concealment the better their chances were of having some or all of a lawsuit seeking recovery of their benefits dismissed on statute of limitations or laches grounds.

105. ERISA § 404(a) required the fiduciary Defendants to communicate honestly and expertly with plan participant regarding their plan benefits, not to mislead them, to disclose information necessary for the protection of their retirement benefits and to correct mistaken understandings it reasonably knows participants are laboring under. More specifically, ERISA § 102 required the fiduciary Defendants to furnish participants with a summary plan description that was sufficiently accurate and comprehensive to apprise participants and beneficiaries of their rights and obligations under the plan, which required the inclusion of "a statement describing the plan's normal retirement age, as that term is defined in section 3(24) of the Act." 29 C.F.R. § 2520.102-3(j)(1).

106. In violation of these requirements, Defendants concealed from participants the RBAP's definition of Normal Retirement Age, knowingly caused participants to believe it was age 65 and on numerous occasions falsely stated that it was age 65. For example, the RBAP SPDs for 1999-2005 state that "normal retirement age" under the RBAP is age 65. *See* RBAP 1999 SPD at 14; 2001 SPD at 21; 2003 SPD at 24; 2004 SPD at 24; 2005 SPD at 23.[7] Moreover,

[7] Some SPDs before 1999 appear to have disclosed that the Plan used a earlier-of-65-or-5-years-of-service normal retirement age "for plan purposes," but the 1998 SPD, for example, also tells participants that "[t]he amount of the lump sum payment will be equal to the actuarially equivalent present value of your retirement benefit at the time that payment is made." 1998 SPD at 110-11. Furthermore, until 2005, the

when the former Coopers & Lybrand Pension Plan was amended to incorporate RBAP's five-year normal retirement age, Defendants ensured that the relevant SPD did not disclose this change or that the RBAP-defined NRA was defined as the earlier of age 65 or the completion of 5 years of service, as opposed to age 65 under the old Coopers & Lybrand plan.

107. Defendants went so far as falsely state in public filings made shortly after the Plan's adoption that the normal retirement age under the Plan was the *later* of age 65 or the completion of five years of service. *See, e.g*., 1994 Form 5500. (In other submissions to the IRS before the benefit forfeiture scheme was exposed, Defendants concealed and/or obscured the Plan's normal retirement age definition.)

108. Defendants also purposefully crafted other Plan communications – for example, annual benefit statements and the benefit election packages and benefit calculations provided to participants at the time they requested and received a distribution of benefits – to keep participants from discovering that the RBAP-defined NRA Defendants used to calculate benefits was the date a participant had completed 5 years of service.

109. Defendants also made other false or misleading statement or omissions to further ensure participants did not discover the Plan's 5-years-of-service NRA. For example, the SPDs and other communications participants were furnished concealed that many of them were entitled to request in-service distributions because they had attained "normal retirement age" under the Plan. Indeed, Defendants affirmatively misstated to rank-and-file employees that they could not request in-service distributions but could only receive distributions after they terminated employment which in many cases was simply false.

"Glossary" on the RBAP's website for Plan participants defined "Normal Retirement Age (NRA)" as: "The age, as established by the plan, at which retirement normally occurs."

110. Defendants did not issue participants a "suspension of benefits notice" when they completed 5 years of service informing them that they had reached normal retirement age and that by continuing to work past normal retirement age, the economic value of their "normal retirement benefit" may erode. Such a notice is required at normal retirement age unless a plan provides for an appropriate actuarial adjustment of the normal retirement benefit, *see* 29 C.F.R. § 2530.203-3(b)(4), which the RBAP does not do. But Defendants realized that if, for example, they sent 30-year-old participants notices informing them that they had reached normal retirement age, their benefit forfeiture scheme would be exposed, challenged and stopped.

111. The participant challenges that Defendants sought to avoid by misleading employees were not ones in which every employee would necessarily protest or react, but one in which enough employees would complain (to Defendants and/or the IRS and/or Department of Labor) or file suit to make a difference. To avoid that, Defendants visited harm on all members of the proposed Class, not just those likely to protest, react or file suit.

112. Plaintiffs and other Plan participants did not independently discover that the Plan document defined the RBAP-defined NRA as the earlier of 5 years of service or age 65. Defendants kept the formal Plan document closely held and did not distribute it to Plaintiffs or virtually any other participant outside a small group charged with drafting and administering the Plan. The only time Defendants provided a participant not involved with Plan administration access to or a copy of the formal plan document was if a participant made a formal request in writing for a copy of or for the right to inspect the formal plan document. But Defendants' communications did not give ordinary participants any reason to believe they might need to inspect the formal plan document to protect themselves. Consequently, from 1994 to 2006, only

a small handful of participants not involved with Plan administration ever asked for a copy of or for the right to inspect the formal plan document.

CLAIMS FOR RELIEF

COUNT ONE

UNLAWFUL LUMP SUM CALCULATION

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

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

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

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

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

statutory accrued benefit on the *form* of the distribution he or she elected to take (pension at age 65 or immediate lump sum. Treas. Reg. § 1.411(a)-4.

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

COUNT TWO

UNLAWFUL CONDITIONING OF ACCRUED BENEFITS

119. [Plaintiffs will not appeal the dismissal of their claim that lump sums must include the value of future interest credits between age 65 and April 1 of the year following attainment of age 70½.]

COUNT THREE

AGE DISCRIMINATION UNDER ERISA § 204(b)(1)(H)

120. [Plaintiffs will not appeal the dismissal of their claim that RBAP violated the age discrimination rules contained in ERISA § 204(b)(1)(H) and IRC § 411(b)(1)(H)].

COUNT FOUR[8]

FAILURE TO PRESERVE ACTUARIAL VALUE OF NORMAL RETIREMENT BENEFITS

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

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

123. A participant's "normal retirement benefit" under a cash balance or other defined benefit pension plan generally is his accrued benefit under the plan commencing as of normal

[8] Claim Four was dismissed by the District Court and is set forth in this Second Amended Complaint solely for purposes of preserving the claim for appeal.

retirement age. ERISA § 3(22), 29 U.S.C. § 1002(22), and IRC § 411(a)(9). Under ERISA, any benefit paid *after* normal retirement age must have an actuarial value that is at least as large as the value of this normal retirement benefit and any larger benefit accrued as of any date after normal retirement age. In other words, the actuarial value of a participant's largest accrued benefit payable on or after his normal retirement age must be "locked in" as a minimum benefit – no benefit paid after the normal retirement age can have an actuarial value of less than this benefit, absent an applicable exception. *See* ERISA §§ 203 and 204(c)(3), IRC §§ 411(a) and 411(c)(3), and Proposed Treasury Regulations §§ 1.411(b)-2 and 1.411(c)-1.

124. The RBAP failed and fails on its face, and in actual administration, to satisfy this requirement because it did not and does not actuarially increase a participant's benefit after normal retirement age. This is the case regardless of whether the normal retirement age under the RBAP is the date a participant completes 5 years of service, as the RBAP Plan document purportedly defines it, or age 65, as Plaintiffs assert, or some other age.

125. The RBAP does continue to provide investment credits after normal retirement age. But the RBAP's *investment* credits are not a substitute or an adequate substitute for the actuarial adjustment required under ERISA §§ 203 and 204(c)(3) and IRC §§ 411(c)(3) and 401(a)(25) because they do not maintain the actuarial value of a participant's normal retirement benefit or any larger benefit accrued as of a date after normal retirement age.

126. As a result of this flaw in the RBAP, Plaintiffs' and other participants' vested normal retirement benefits under the RBAP were unlawfully reduced during periods over which investment returns actually credited (or debited) to their accounts were less than the actuarial adjustment required to maintain the value of their normal retirement benefits.

127. Neither the Plaintiffs nor any other affected participant received a "suspension of benefits" notice within the meaning of ERISA § 203(a)(3)(B) and the regulations thereunder. Therefore, no exception applies that would excuse such forfeitures. *Id.*; IRC § 411(a)(3)(B).

128. As a result of the violations described in this Claim, Plaintiffs and other members of the proposed Class accrued benefits under the Plan that were less than the benefits they would have accrued had the Plan complied with ERISA and Tax Code standards.

COUNT FIVE

FAILURE TO SATISFY BENEFIT ACCRUAL AND VESTING STANDARDS UNDER IRC § 411

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

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

131. Defendants' use of the RBAP-defined NRA to calculate and pay benefits caused the Plan to violate ERISA's benefit accrual standards under ERISA § 204 and IRC § 411(b) because the RBAP-defined NRA purports to define a normal retirement age that is "conditioned (directly or indirectly) on the completion of a stated number of years of service." Notice 2007-69, Part V. *See, e.g.,* Treas. Reg. § 1.411(b)-1(b)(2)(ii)(F); Treas. Reg. § 1.411(b)-1(d)(3).

132. The RBAP-defined NRA also violated ERISA § 203(a) and IRC § 411(a) because it defined normal retirement age by reference to the completion of a specified number of years of service. *See, e.g., Duchow v. New York State Teamsters Conference Pension & Retirement Fund,* 691 F.2d 74 (2d Cir. 1982); IRS Notice 2007-69.

133. As a result of these violations, Plaintiffs and other members of the proposed Class were forced unwittingly to forfeit a portion of their statutory accrued benefits under the Plan in violation of ERISA.

COUNT SIX

BREACH OF ERISA PARTICIPANT DISCLOSURE STANDARDS AND FIDUCIARY DUTY

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

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

136. The fiduciary Defendants violated ERISA's disclosure requirements and their fiduciary and co-fiduciary duties in making the material false and misleading statement and omissions regarding the Plan's normal retirement age definition identified or referenced above and as will be revealed in discovery. Plaintiffs and the proposed Class were harmed by these violations and breaches including in the manners identified or referenced above. For example, Defendants' disclosure violations delayed the discovery of their benefit forfeiture scheme until 2004 when Mr. Laurent learned of it only through counsel who independently discovered and informed Plaintiff of it.

CLASS ACTION ALLEGATIONS

137. Plaintiffs brings suit on behalf of themselves and on behalf of all other participants and beneficiaries similarly situated under the provisions of Rule 23 of the Federal Rules of Civil Procedure with respect to violations alleged herein.

138. The proposed Class is defined as:

> All persons who participated in the Retirement Benefit Accumulation Plan for Employees of PricewaterhouseCoopers LLP at any time after June 30, 1994, and the beneficiaries and estates of such persons, who at any point before August 17, 2006 received a lump sum distribution of all or any portion of their accrued benefit under the Plan.[9]

[9] The Class definition is limited to individuals who received lump sums before August 17, 2006, because it is anticipated that (1) final Treasury Regulations will permit Defendants to amend the RBAP to bring its lump sum calculation methodology into compliance with ERISA as of August 17, 2006, and (2) Defendants will amend the Plan and take any other actions necessary to qualify for such retroactive relief.

139. The requirements for maintaining this action as a class action under Fed. R. Civ. P. 23(a) are satisfied in that there are too many Class members for joinder of all of them to be practicable. There are tens of thousands of members of the proposed Class dispersed among many states.

140. The claims of the Class members raise numerous common questions of fact and law, thereby satisfying the requirements of Fed. R. Civ. P. 23(a)(2). Every issue concerning liability is common to all Class members because all such issues concern their entitlement to benefits calculated in a manner other than that calculated thus far and their entitlement to relief from harm caused by the violations of law, rather than any action taken by Plaintiffs or any Class member. In addition, every issue concerning relief is also common to the Class for the same reason.

141. Plaintiffs' claims are typical of the claims of the Class members, and therefore satisfy the requirements of Fed. R. Civ. P. 23(a)(3). They do not assert any claims in addition to or different than those of the Class.

142. Plaintiffs are adequate representatives of the Class, and therefore satisfy the requirements of Fed. R. Civ. P. 23(a)(4). The interests of Plaintiffs are identical to those of the Class. Defendants have no unique defenses against them that would interfere with their representation of the Class. Plaintiffs have engaged counsel with considerable ERISA class action litigation experience.

143. Additionally, all of the requirements of Fed. R. Civ. P. 23(b)(1) are satisfied in that the prosecution of separate actions by individual members of the Class would create a risk of

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If final regulations do not provide this relief and/or if Defendants do not take the steps necessary to qualify for such relief, Plaintiffs will seek certification of a broader class. Similarly, Plaintiffs would seek to broaden the class definition if Claim Four is reinstated on appeal.

inconsistent or varying adjudications establishing incompatible standards of conduct for Defendants and individual adjudications present a risk of adjudications which, as a practical matter, would be dispositive of the interests of other members who are not parties.

144. Alternatively, all of the requirements of Fed. R. Civ. P. 23(b)(2) also are satisfied in that Defendants' actions affected all Class members in the same manner making appropriate final declaratory and injunctive relief with respect to the Class as a whole.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that judgment be entered against Defendants and that the Court award the following relief:

A. An order certifying this action as a class action and appointing undersigned counsel as class counsel pursuant to Fed. R. Civ. P. 23;

B. Judgment against Defendants and on behalf of Plaintiffs and the Class on all claims expressly asserted and/or within the ambit of this Complaint;

C. An order awarding, declaring or otherwise providing Plaintiffs and the Class all other such relief to which Plaintiffs and the Class are or may be entitled whether or not specified herein;

D. An order awarding pre- and post-judgment interest;

E. An order awarding attorney's fees on the basis of the common fund doctrine (and/or other applicable law, at Plaintiffs' election), along with the reimbursement of the expenses incurred in connection with this action;

F. An order awarding, declaring or otherwise providing Plaintiffs all relief under ERISA § 502(a), 29 U.S.C. § 1132(a), or any other applicable law that Plaintiffs may subsequently specify and/or that the Court may deem appropriate.

By:

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Dated: August 22, 2012