No. 15-

IN THE

Supreme Court of the United States

UNITED REFINING COMPANY, UNITED REFINING COMPANY PENSION PLAN FOR SALARIED EMPLOYEES, UNITED REFINING COMPANY RETIREMENT COMMITTEE,

Petitioners,

v.

JOHN COTTILLION, BEVERLY ELDRIDGE, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

One provision of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1054(g), prohibits an employer from adopting an "amendment" to a retirement plan that decreases participants' accrued benefits. A separate ERISA provision, 29 U.S.C. §1132(a)(1)(B), allows a participant to sue when a plan administrator misinterprets the plan in a way that erroneously denies the participant benefits due under the "terms of his plan." In the case at hand, an administrator interpreted an employer's plan one way for several years, but later determined that he had been mistaken and implemented a new interpretation he believed to be correct. The Third Circuit held that his new interpretation was both a prohibited "amendment" under §1054(g) and a misinterpretation for the purposes of §1132(a)(1)(B). The questions presented are:

I. Whether, as the Third Circuit held below and the Sixth Circuit also has ruled, §1054(g)'s prohibition on a plan "amendment" can include an administrator's interpretation of the terms of a legitimate plan provision—or whether, as the D.C., Seventh, and Ninth Circuits have held, a plan "amendment" under §1054(g) refers only to changes an employer makes to plan language.

II. Whether the administrator's new interpretation of the plan was reasonable, subject to deference under *Conkright v. Frommert*, 559 U.S. 506 (2010), and not grounds for a claim under either §1054(g) or §1132(a)(1)(B) that it denied participants benefits due under the terms of the plan.

Parties to the Proceedings

The caption identifies all non-fictitious parties to this proceeding. The plaintiffs initially named certain fictitious parties, John and Mary Does 1-10, as defendants, but the plaintiffs never substituted actual parties for those defendants.

Corporate Disclosure Statement

Petitioners have no parent corporations, and no corporation owns 10% or more of Petitioners' stock.

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Petition for a Writ of Certiorari

Petitioners—United Refining Company, United Refining Company Pension Plan for Salaried Employees, and United Refining Company Retirement Committee (collectively, "United")—respectfully ask this Court to issue a writ of certiorari to the United States Court of Appeals for the Third Circuit in this case.

Opinions Below

The Third Circuit's opinion is reported as *Cottillion v. United Refining Co.*, 781 F.3d 47 (C.A.3 2015), and reproduced at App. 3a-32a. The district court's unpublished opinion granting summary judgment for Respondents is reproduced at App. 73a-107a. The Third Circuit's unpublished order denying panel and *en banc* rehearing is reproduced at App. 1a-2a.

Statement of Jurisdiction

Respondents filed this action in the Western District of Pennsylvania under ERISA, which gives the federal courts subject-matter jurisdiction over these kinds of cases. *See* 29 U.S.C. §1132(e). The district court entered final judgment for Respondents. *See* App. 107a. Petitioners took a timely appeal, and the Third Circuit had jurisdiction under 28 U.S.C. §1292(a)(1). The panel entered final judgment affirming the district court on March 18, 2015. *See* App. 3a-32a. The Third Circuit denied Petitioners' timely application for panel rehearing and rehearing *en banc* on April 13, 2015. *See* App. 1a-2a.

This Court has certiorari jurisdiction under 28 U.S.C. §1254(1). Supreme Court Rule 13 made this petition due on July 13, 2015. United is filing this petition on that date.

Statutory Provisions Involved

Two federal code provisions are key to this case. First, 29 U.S.C. §1054(g) provides in relevant part:

> (g) 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 the 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 . . . eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations) . . . shall be treated as reducing accrued benefits.

29 U.S.C. §1054(g).

Second, 29 U.S.C. §1132(a)(1)(B) provides in relevant part:

> (a) Persons empowered to bring a civil action
> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> . . .
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; . . . .

29 U.S.C. §1132(a)(1)(B).

Introduction

ERISA plays a critical role in the American economy, and this Court repeatedly has granted certiorari to resolve lower-court disputes over what the statute means. This is another one of those cases. At issue is the relationship between two important ERISA provisions. The first, 29 U.S.C. §1054(g), prohibits an employer from adopting an "amendment" to its retirement plan that decreases participants' accrued benefits. The second, 29 U.S.C. §1132(a)(1)(B), creates a remedy when a plan administrator misinterprets a plan and denies a participant benefits owed to him under the "terms of his plan." This case arose when a plan administrator, after discovering that he had been erroneously interpreting a plan for several years, began implementing a second, corrected interpretation. The Third Circuit held that in making the change, the administrator had adopted an "amendment" to the plan in violation of §1054(g). The Third Circuit also held that the second interpretation was unreasonable and thus grounds for a benefits claim under §1132(a)(1)(B).

Those related holdings warrant review. In erroneously finding that the administrator had run afoul of §1054(g), the Third Circuit exacerbated a circuit split over whether an administrator's interpretation of a valid plan provision can amount to a prohibited "amendment" of the plan. And in finding that the administrator had misinterpreted the plan and given rise to a §1132(a)(1)(B) claim, the Third Circuit ignored critical language from the plan and contravened this Court's precedent requiring deference to administrators' good-faith interpretations. *See Conkright v. Frommert*, 559 U.S. 506, 509 (2010). If allowed to stand, the Third Circuit's twin rulings will undermine the uniformity and stability ERISA is designed to bring to the employee-benefit system. This Court should grant certiorari and reverse the Third Circuit on both points.

Statement of the Case

A. Statutory background

ERISA promotes "the interests of employees and their beneficiaries in employee benefit plans." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989) (internal quotation marks omitted). The statute governs retirement and insurance benefits for millions of Americans. *See* Loraine Schmall & Brenda Stephens, *ERISA Preemption: A Move Towards Defederalizing Claims for Patients' Rights*, 42 Brandeis L. Rev. 529, 538 (2004); *see also* 29 U.S.C. §1001. The two provisions at issue here are integral parts of its framework.

1. Section 1054(g)

Section 1054(g), known as the "anti-cutback rule," prohibits an "amendment" to a retirement plan that would decrease "accrued" benefits. *See Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 741 (2004); *Lockheed Corp. v. Spink*, 517 U.S. 882, 891 (1996). Section 1054(g) allows amendments only in limited circumstances that are not relevant for present purposes—namely, when plans need to go below ERISA's standards for minimum funding, or when certain plans terminate their operations. *See* 29 U.S.C. §1054(g) (citing 29 U.S.C. §§1082(d) & 1441).

2. Section 1132(a)(1)(B)

Meanwhile, §1132(a)(1)(B) provides a civil remedy when a plan administrator erroneously interprets a plan, allowing the participant to sue for "benefits due to him under the terms of his plan." 29 U.S.C. §1132(a)(1)(B). When a plan grants an administrator discretion over the interpretation of plan terms, the courts apply a "deferential standard of review" to the administrator's interpretations. *Firestone*, 489 U.S. at 111.

B. Factual background

This case arose because one of the Petitioners, United Refining, sponsors a retirement plan for its salaried employees. The day-to-day administrator of United's plan interpreted its language a particular way for several years, but then learned from plan professionals that he had been wrong and therefore changed his interpretation. Respondents are participants in the plan, and they sued on the theory that his change in interpretation violated §1054(g) and §1132(a)(1)(B).

Respondents represent a class of former United Refining employees who worked for the company long enough to be entitled to benefits, but not long enough to actually start receiving those benefits before their employment ended. App. 4a. Under United's plan, an employee becomes vested in the plan, and thus entitled to benefits, once he has worked for the company for a specified number of years. *See* App. 137a, 146a. But even after the employee has become vested in the plan, he cannot actually start drawing benefits until he reaches either the normal retirement age of 65 or the specified early-retirement age of 59½ or 60. App. 5a. Respondents had worked for United for at least 5 years, but had not yet turned 59½ or 60 when they departed, and thus could not draw their benefits. In ERISA parlance, people like Respondents are known as Terminated Vested Participants, or "TVPs," a term that reflects the fact that although their employment with the company has "[t]erminated," they are "[v]ested" and thus still "[p]articipants" in the plan. App. 4a-5a. Respondents vested in United's plan at different times, so two different versions of the plan governed an individual TVP's benefits: either "the 1987 Plan," or "the 1980 Plan." App. 75a, 79a.

ERISA plans ordinarily address two questions about TVPs. The first is when they can receive their benefits,

and the second is how much those benefits will be. ERISA provides a baseline answer to both questions. As to "when," the statute says if a plan provides for "an early retirement benefit," a TVP can receive his benefits once he reaches the early-retirement age, as defined by his plan. 29 U.S.C. §1056(a). As to "how much," the statute says the TVP can start receiving an amount "not less than the benefit to which he would be entitled at the normal retirement age," but, critically, "actuarially reduced under regulations prescribed by the Secretary of the Treasury." *Id.* So if a TVP leaves his company at age 55 and the plan allows participants to draw early-retirement benefits at age 60, then the TVP can start drawing his benefit once he reaches age 60—even though he may be working for some other company at the time. The benefit he draws will be no less than whatever he would have received once he reached the normal retirement age—which is often 65—reduced by an actuarial formula that compensates for the fact that he otherwise would not have received full benefits until he reached that normal retirement age.

The actuarial-reduction concept is critical to this case. Even though ERISA allows that reduction, United's day-to-day plan administrator, Larry Loughlin, initially interpreted both the 1987 Plan and the 1980 Plan as not providing for it. *See* App. 6a. It would be rare for any plan not to call for the reduction, *see* Doc. 155-2 at 6 ¶8, and Plan actuaries and counsel later informed Loughlin that he was misinterpreting both Plans. *See* App. 6a. So advised, Loughlin reconsidered his interpretation and concluded that both Plans, when properly construed, required the reduction.

Language from the various sections contained within the 1987 and 1980 Plans guides their interpretation, and Section 7.02 of each Plan addresses TVPs.

1. The 1987 Plan

In the 1987 Plan, Section 7.02 makes a distinction between "amount," "form," and "payment" of TVPs' benefits. App. 137a. The "amount," on the one hand, is "determined in accordance" with one provision of the Plan. *Id.* Meanwhile, "form" and "payment" are "determined and made" in accordance with a different part of the document, "as though such terminated Participant had remained in the employment of the Company until reaching his Normal Retirement Date." *Id.*

The provision to which Section 7.02 points regarding the "amount" of TVPs' benefits is Section 5.03. *Id.* That provision addresses early retirees. It states that "[a] participant who retires on an Early Retirement Date will receive his Accrued Retirement Income computed as of his Early Retirement Date commencing at the end of the month in which his Early Retirement Date occurs." App. 118a.

Meanwhile, the part of the document to which Section 7.02 points regarding "form" and "payment" of TVPs' benefits is Article VI. App. 137a. That article contains several sections addressing the "form and payment" of benefits to participants who retire at the normal retirement age of 65. App. 127a-136a. Section 6.04 says, in particular, that unless a participant elects otherwise, "the payment of Retirement Income under the Plan shall not commence later than the first day of the month following the later of," among other things, "his attainment of age 65." App. 131a.

The distinctions Section 7.02 draws between "amount" of benefits on the one hand, and "form and payment" on the other—and the different parts of the Plan referenced with respect to those concepts—are noteworthy. App. 137a. In United's district-court submissions, a benefits-

plan expert stated that while the first sentence could be understood to grant a TVP an aggregate "amount" of benefits commensurate with an early retiree, the second sentence could "reasonably be construed to mean that" the TVP's benefit "would not be payable until" he reached age 65. Doc. 154-14 at 4 ¶16. This inference, in turn, would have supported Loughlin's corrected interpretation, under which the plan needed to make actuarial reductions to TVPs who had vested under the 1987 Plan and accepted benefits before they turned 65. *Id.*

2. The 1980 Plan

Section 7.02 in the 1980 Plan is different from the version found in the 1987 Plan. The 1980 version does not address the "form" and "payment" of TVPs' benefits, and it does not reference Article VI. App. 146a. It instead says that "[t]he amount and time of commencement of" a TVP's income "shall be determined in accordance with the provisions of Section 5.03, based on the Participant's Benefit Service and Average Compensation at the time of employment termination." *Id.*

The 1980 Plan had two versions of Section 5.03, both of which addressed early retirees. The first version provided that a participant "who retires on an Early Retirement Date" could choose between receiving full benefits at age 65 or a reduced amount beginning when he took early retirement. App. 144a. But a later amendment changed Section 5.03's text to the language that also appears in the 1987 Plan, providing that "[a] Participant who retires on an Early Retirement Date will receive his Accrued Retirement Income computed as of his Early Retirement Date commencing at the end of the month in which his Early Retirement Date occurs." App. 152a.

United's witnesses stated below that it was reasonable for Loughlin to read these provisions as requiring actuarial reductions for TVPs who took benefits before turning 65 and who had vested in the 1980 Plan. That was so, one benefits-plan expert stated, because even as amended, "Section 5.03 requires that the participant 'retire' on his 'Early Retirement Date,'" and "this language cannot apply to a" TVP because a TVP "cannot 'retire' on an 'Early Retirement Date.'" Doc. 154-14 at 7 ¶14.

Later versions of United's plan, such as the one that became effective in 2002, expressly stated that TVPs' income would be "actuarially reduced" if they began drawing it at the early-retirement date. Doc. 154-17 at 26-27 ¶5.4(c).

3. United's implementation of the changed interpretation.

After Loughlin determined that the language in the 1987 and 1980 Plans required him to start making the actuarial reduction, United began notifying relevant parties.

United began with the IRS, which has a program through which employers "may notify the Service of proposals to fix mistakes in administering ERISA plans and receive assurance that the IRS will not disqualify a plan from favorable tax treatment." App. 6a. United's outside counsel therefore informed the IRS of the mistake and correction and proposed that the plan be allowed to recoup any overpayments made to TVPs. *Id.* In response, "the IRS issued a 'Compliance Statement.'" App. 7a. This statement "affirmed that the IRS 'will not pursue the sanction of Plan disqualification on account of the qualification failure described in the Submission.'" *Id.* But the IRS cautioned that it did "not express an opinion as to

the accuracy or acceptability of any . . . material submitted with the application" and "should not be construed as affecting the rights of any party under any other law, including" ERISA. *See id.*

United then notified the affected TVPs of the change. *Id.* United informed those who had not yet drawn benefits that the plan would apply an actuarial reduction in the future to any income they collected before they turned 65. *Id.* United also sent a letter to TVPs who already had drawn benefits, stating that the plan "requires that all pension benefits paid to terminated vested participants PRIOR to their Normal Retirement Age of 65 MUST be actuarially reduced to the earlier payment date." App. 8a. The letter advised them of the reduced amount of their future monthly benefit payments and, if applicable, the amount of erroneously paid money the plan was due to recoup from them. *Id.*

C. Proceedings below

Two of the TVPs who received these letters, Beverly Eldridge and John Cottillion, filed this lawsuit. App. 48a-49a. They named the Petitioners—their former employer, the plan itself, and the full committee that administers the plan—as the defendants. App. 73a. They sought to represent a class of all the TVPs whose benefits vested under either the 1987 or 1980 Plan. App. 62a. They asserted, among other claims, one count for an invalid "amendment" under §1054(g) and one count for invalidly withheld benefits under §1132(a)(1)(B). App. 9a.

1. Proceedings in the district court

The district court granted the TVPs summary judgment on their §1054(g) claim, both as to the TVPs who vested under the 1987 Plan and those who vested under the

1980 Plan. *See* App. 106a (Apr. 8, 2013 Order). The court explained that the Third Circuit had "construed broadly" the circumstances that can "constitute[] an 'amendment' to a pension plan" under §1054(g), including both "explicit amendments, such as a formal adoption of a new provision" and "implicit amendments, such as . . . an erroneous interpretation of a plan provision." App. 88a (alterations and internal quotation marks omitted). Applying this rule, the court held that the second interpretation had "clearly been a 'plan amendment' within the meaning of" §1054(g). App. 90a. The court ruled that the second interpretation violated §1054(g) because, in the court's view, the first interpretation of both the 1987 Plan and the 1980 Plan "was correct or, at the very least, was not arbitrary and capricious." App. 97a. The court rejected United's "argument that the Court should apply a deferential standard to" Loughlin's "'re-interpretation' of the Plan Documents." App. 97a n.3. The court reasoned that if the first interpretation was "sufficiently reasonable to produce an accrued benefit, then the anti-cutback rule prevents the subsequent amendment of the Plan Documents to eliminate that benefit." *Id.*

In later orders, the district court entered judgment for United on the TVPs' other claims, including their benefits claim under §1132(a)(1)(B), reasoning that it was duplicative of their claim under §1054(g). App. 69a, 72a. The district court also certified the class. App. 70a; *see also* App. 46a.

2. Proceedings in the Third Circuit

On appeal, the Third Circuit affirmed. App. 32a. Like the district court, the Third Circuit held that Loughlin's second interpretation of both the 1987 Plan and the 1980 Plan amounted to a prohibited "amendment" under

§1054(g). App. 20a. But unlike the district court, the Third Circuit held that Loughlin's second interpretation also had given the TVPs a valid claim under §1132(a)(1)(B). App. 19a. This was so, the Third Circuit held, because in its view the second interpretation was unreasonable, and the TVPs were entitled to unreduced benefits under the terms of both Plans.

Addressing the TVPs' §1132(a)(1)(B) claim, the Third Circuit acknowledged that "[t]he 1980 and 1987 Plans gave the plan administrator discretion in interpreting their terms." App. 13a. But the court ruled that both Plans "[u]nambiguously" afforded TVPs retirement benefits without actuarial reduction. App. 13a. Thus, according to the court, "no amount of deference can rescue Loughlin's second interpretation from its flat contradiction with the terms of the 1980 and 1987 Plans." App. 14a. The court concluded that Loughlin's second interpretation "conflicted with the plain meaning of the terms of the Plans and thus denied the Employees benefits due them in violation of §1132(a)(1)(B)." App. 19a.

The Third Circuit also ruled that Loughlin's second interpretation violated §1054(g). App. 20a. The court acknowledged "the absence of a formal plan amendment," App. 22a, and recognized that "[s]ome Circuits have taken a narrower view of the meaning of 'amendment,'" App. 21a-22a n.2 (citing *Richardson v. Pension Plan of Bethlehem Steel Corp.*, 112 F.3d 982, 987 (C.A.9 1997); *Dooley v. Am. Airlines, Inc.*, 797 F.2d 1447, 1451-53 (C.A.7 1986)). But Third Circuit precedent provides 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).'" App. 21a (quoting *Hein v. FDIC*, 88 F.3d 210, 216 (C.A.3 1996)). In light of that precedent, the court ruled

that Loughlin's second interpretation was a prohibited "amendment." App. 20a.

In concluding that Loughlin's second interpretation was contrary to unambiguous language in both Plans, the Third Circuit made a conspicuous omission regarding the 1987 Plan. The Third Circuit's opinion quoted Section 7.02 of the 1987 Plan as follows:

> 7.02 *Amount and Commencement of Deferred Vested Retirement Income.*
> The amount of a deferred vested Retirement Income to a Participant who satisfies the requirements of Section 7.01 shall be determined in accordance with the provisions of Section 5.03, based on the Participant's Benefit Service and Average Compensation at the time of employment termination. . . .

App. 18a (alteration in original). Based on that quotation—and the ellipsis placed at its end—the Third Circuit stated that "§ 7.02 tells us that a TVP gets retirement income in accord with § 5.03," the provision that addresses early retirees. App. 19a. The Third Circuit did not quote or discuss the sentence the ellipsis omitted. That sentence addresses the "form" and "payment" of a TVP's income, stating that these factors "shall be determined and made in accordance with the provisions of Article VI as though such terminated Participant had remained in the employment of the Company until reaching his Normal Retirement Date." App. 137a.

Based in part on the panel's omission of the 1987 Plan's language regarding "form" and "payment," Petitioners sought panel and *en banc* rehearing. The Third Circuit denied the petition. *See* App. 1a-2a.

Reasons the Court Should Grant Certiorari

On both questions presented, the need for review is paramount. In holding that Loughlin had effected an "amendment" to United's plan even though he had not changed its language—and, indeed, even though he did not, as an administrator, even have *power* to change that language—the Third Circuit entrenched its position on the wrong side of a circuit split over what §1054(g) means. The court doubled down on its error by holding that the TVPs also had a valid claim under §1132(a)(1)(B) because the administrator's interpretation of the plan was unreasonable and not worthy of deference under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and *Conkright v. Frommert*, 559 U.S. 506 (2010). The Third Circuit's rulings will unduly disrupt the system that ERISA protects, and this Court should review both rulings now.

I. This Court should grant certiorari to resolve whether an administrator can violate §1054(g)'s prohibition on a plan "amendment" by interpreting an already-existing, valid plan provision.

The §1054(g) question bears all the critical hallmarks of certiorari. The circuits are split. The question is important. And the Third Circuit's answer is wrong.

A. The circuits are split over this question.

As the Third Circuit admitted, other "Circuits have taken a narrower view of the meaning of 'amendment'" under §1054(g). App. 21a n.2. Under the rule that governs in four circuits, a plan administrator does not violate §1054(g) by interpreting an existing and valid plan provision. Only the Sixth Circuit has joined the Third Circuit on the other side of this split. To preserve the

uniformity of ERISA jurisprudence and the efficient administration of benefit plans throughout the country, it is imperative that this Court resolve this question.

1. *Four circuits do not extend §1054(g) to administrators' interpretations of valid plan provisions.*

Under the rule that governs in the majority of the circuits that have considered the question, the TVPs do not have a claim under §1054(g).

D.C. Circuit. In the seminal case on this issue, a D.C. Circuit panel held that §1054(g) "in its present form, is specifically limited to *actual amendments*, not otherwise approved by ERISA, which would change benefit amounts." *Stewart v. Nat'l Shopmen Pension Fund*, 730 F.2d 1552, 1563 (C.A.D.C. 1984) (MacKinnon, J., joined by Wright and Ginsburg, JJ.) (emphasis in original). The plan administrator in *Stewart* had exercised its authority under the language of a plan to cancel certain credits for plan participants when their employers went out of business. *See id.* at 1555. When the affected participants sued under §1054(g), asserting that the administrator had amended the plan, the D.C. Circuit rejected the argument. The court reasoned that "Congress did *not* state that any change would trigger the two provisions; it stated that any change *by amendment* would do so." *Id.* at 1561 (emphasis in original). The court elaborated that "there was no 'amendment' to the plan in the 'technical' sense—*i.e.*, an actual change in the provisions of the plan." *Id.* The court concluded that "[t]he plaintiffs' construction would stretch the term 'amendment' nearly to the breaking point." *Id.*

Seventh Circuit. The Seventh Circuit followed suit two years later, explaining that it was "unwilling to contort the

plain meaning of 'amendment'" under §1054(g) "so that it includes the valid exercise of a provision which was already firmly ensconced in the pension document." *Dooley v. Am. Airlines, Inc.*, 797 F.2d 1447, 1452 (C.A.7 1986). The plaintiffs there asserted that their plan administrators had violated §1054(g) by changing the actuarial assumptions under which they distributed benefits to the participants. *See id.* at 1451. Citing the D.C. Circuit's opinion in *Stewart*, the Seventh Circuit reasoned that the administrators, in changing the actuarial assumptions, "were merely exercising a provision *which was already in the pension plan*" that allowed them to make the change. *Id.* (emphasis in original). The court agreed with the employer that "there could be no 'plan amendment' because the administrators were merely carrying-out the provisions of the plan as it then stood." *Id.*

Ninth Circuit. In a 1988 case, the Ninth Circuit "adopt[ed] the reasoning" of "the District of Columbia and Seventh Circuits." *Oster v. Barco of Cal. Employees' Retirement Plan*, 869 F.2d 1215, 1220-21 (C.A.9 1988) (citing *Stewart*, 730 F.2d at 1561; *Dooley*, 797 F.2d at 1452). The Ninth Circuit therefore held that an administrator did not enact an "amendment" in violation of §1054(g) when it "merely adopted a policy which applied to a provision which was already part of the Plan." *Id.* at 1221.

The Ninth Circuit again endorsed the rule in *Richardson v. Pension Plan of Bethlehem Steel Corp.*, 112 F.3d 982 (C.A.9 1997). There the court explained that an administrator's adoption of a benefit-distribution policy did not violate §1054(g) because it was "not an amendment of the Plan" but "[r]ather . . . was an interpretation resulting from a negotiated settlement over the application of the Plan's provisions." *Richardson*, 112 F.3d at 987. Once again invoking D.C. and Seventh Circuit case law,

the Ninth Circuit held that "Section 1054(g) applies to *amendments* to a Plan, not to an interpretation of the Plan's terms." *Id.* (emphasis in original) (citing *Oster*, 869 F.2d at 1221; *Stewart*, 730 F.2d at 1552; *Dooley*, 797 F.2d at 1452).

The Ninth Circuit has maintained this rule even while recognizing that the Treasury Department has promulgated a regulation that may prevent employers from adopting plans with terms like those at issue in the D.C. Circuit and Seventh Circuit cases discussed above. *See McDaniel v. Chevron Corp.*, 203 F.3d 1099 (C.A.9 2000). This regulation provides that with certain exceptions, a plan violates section 411(d)(6) of the Internal Revenue Code if it "permits the employer, either directly or indirectly, through the exercise of discretion, to deny" certain protected benefits "for which the participant is otherwise eligible (but for the employer's exercise of discretion)." 26 C.F.R. §1.411(d)–4. The Ninth Circuit has reasoned that because another ERISA provision "expressly provides that regulations prescribed under" §411 "of the IRC shall apply to" 29 U.S.C. §1054, a plan that grants administrators open-ended discretion to terminate certain kinds of benefits will violate §1054. *McDaniel*, 203 F.3d at 1115 (citing 29 U.S.C. §1202(c)). But even under that premise, the court held that this provision does not change the rule that an administrator's mere interpretation of a plan is not an "amendment." As the Ninth Circuit explained, §1054(g) still "applies only to formal plan amendments" and "does not apply to interpretations of ambiguous plan language." *Id.* at 1121.

Second Circuit. More recently, the Second Circuit joined the courts that have adopted a rule under which §1054(g) does not apply when administrators interpret already-existing, valid plan provisions. *See Kirkendall*

v. Halliburton, Inc., 707 F.3d 173 (C.A.2 2013). The court noted that the Treasury regulation flagged by the Ninth Circuit "prohibits plan provisions from building certain broad reservations of discretion into the plan terms," and thus would "appear[] to require a different result from the particular facts at issue in" the D.C. Circuit's decision in *Stewart*. *Id.* at 183. But the court also noted that "[e]ven broadly interpreted, the word 'amendment'" still "contemplates that the actual terms of the plan changed in some way, or that the plan improperly reserved discretion to deny benefits." *Id.* at 184 (citing *Stewart*, 730 F.2d at 1561; 26 C.F.R. § 1.411(d)–4). The court concluded that §1054(g) did not cover the plaintiff's complaint "that an administrator made an incorrect factual determination of the date of a claimant's termination." *Id.*

2. Two circuits have endorsed a rule under which §1054(g) covers administrators' interpretations of already-existing, valid provisions of a plan.

The Third Circuit has entrenched its position on the other side of the split, and the Sixth Circuit has gone that way as well.

Third Circuit. The Third Circuit first adopted its rule in *Hein v. FDIC*, 88 F.3d 210 (C.A.3 1996). The court in that case reasoned that even when there was "no evidence in the record that the actual text of the Plan was amended or modified in any way," the plan administrator could be deemed to make an "amendment" prohibited by §1054(g) via "[a]n erroneous interpretation of a plan provision that results in the improper denial of benefits to a plan participant." *Id.* at 216. That statement was *dictum* because the Third Circuit ultimately concluded that the administrator's "interpretation of the Plan provisions" was "accurate" and thus could not, even under the court's

novel rule, "be considered an amendment of the Plan." *Id.* at 219.

The Third Circuit elevated that *dictum* to a binding holding in the case at hand. The Court reiterated 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).'" App. 21a (quoting *Hein,* 88 F.3d at 216). That principle controlled the outcome of the case this time around, for the Third Circuit held that Loughlin's second interpretation was an "amendment." App. 20a. The court acknowledged that "[s]ome Circuits have taken a narrower view of the meaning of 'amendment.'" App. 21a n.2 (citing *Richardson*, 112 F.3d at 987; *Dooley*, 797 F.2d at 1451-53). But the Third Circuit claimed that the Treasury regulation addressed by the Second and Ninth Circuits "supports [its] view and is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)." *Id.* (citing *Kirkendall*, 707 F.3d at 183).

Sixth Circuit. The Sixth Circuit also has endorsed the Third Circuit's rule 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 [the anti-cutback rule].'" *Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 712 (C.A.6 2000) (quoting *Hein*, 88 F.3d at 216). On that basis, the Sixth Circuit held that an amendment that did not substantively "change" the plan but solely "interpreted" it still constituted an "amendment" under §1054(g). *Id.*

This circuit split thus is longstanding and entrenched. And as the Second Circuit's decision in *Kirkendall* suggests, the Treasury Department's promulgation of 26 C.F.R. §1.411(d)–4 will not close the gap between the

Third Circuit and the other courts of appeals. Contrary to the Third Circuit's suggestion in this case, this regulation does not support the view that an administrator's interpretation of a valid plan provision can amount to a prohibited amendment of it. The regulation operates on the employers who sponsor plans, not the administrators who operate them. It precludes these employers from working an end-run around the amendment process by giving administrators unbridled discretion to cancel benefits, and it invalidates *plan provisions* that purport to grant administrators that discretion. The regulation does not prohibit administrators from interpreting valid plan provisions, and could not possibly do so. Instead, as the Second Circuit has held, even after the regulation, "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." *Kirkendall*, 707 F.3d at 184 (citing *Stewart*, 730 F.2d at 1561; 26 C.F.R. § 1.411(d)–4). The split thus persists, and it will continue to do so until this Court intervenes.

B. The split is important.

This Court's immediate intervention is needed because the split creates significant difficulties for plan administrators. As this Court has explained, Congress enacted ERISA because it recognized that "[a]n employer with employees in many States might find that the most efficient way to provide benefits to those employees is through a single employee benefit plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 105 n.25 (1983). One of the statute's "principal goals" was "to enable employers" with national operations "to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits"

throughout the country. *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001) (internal quotation marks omitted). "Uniformity is impossible" when "plans are subject to different legal obligations in different States." *Id.* Yet that is the situation in which administrators now find themselves regarding §1054(g). When they need to implement new plan interpretations, their ability to do so depends on whether the employers who sponsor their plans have operations in the Third and Sixth Circuits.

The facts this Court encountered in *Conkright v. Frommert*, 559 U.S. 506 (2010), underscore the frequency of the problem and the need for a uniform national rule. Like Loughlin here, the administrator in that case initially had implemented a plan under a mistaken interpretation of its terms. Following an adverse court ruling, the administrator sought to implement a new interpretation. *See id.* at 510-11. This Court held that the administrator's second interpretation was entitled to deference, despite the earlier mistake. *Conkright*'s facts show that administrators sometimes "make mistakes" and need to adopt new interpretations of their plans. *Id.* at 509. When they do, they need to know which of the two prevailing approaches regarding §1054(g) they need to follow.

The split also raises other important practical concerns. As the Chief Justice and Justice Kennedy noted in discussing the distinction between claims brought under §1132(a)(1)(B) for plan misinterpretation and claims brought for breach of fiduciary duty under §1132(a)(2), "[t]he significance of the distinction" between §1132(a)(1)(B) and other ERISA provisions is "not merely a matter of picking the right provision to cite in the complaint." *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 258 (2008) (Roberts, C.J., joined by Kennedy, J., concurring in

part and concurring in the judgment). When participants claim that an administrator has misinterpreted a plan and wrongly denied them benefits under §1132(a)(1)(B), they must "exhaust the administrative remedies" associated with the plan before "filing suit." *Id.* at 259. Likewise, for the purposes of a §1132(a)(1)(B) suit, "ERISA plans may grant administrators and fiduciaries discretion in determining benefit eligibility and the meaning of plan terms, decisions that courts may review only for an abuse of discretion." *Id.* "[T]hese safeguards encourage employers and others to undertake the voluntary step of providing medical and retirement benefits to plan participants." *Id.* "Allowing what is really a claim for benefits under a plan to be brought as" another kind of claim "may result in circumventing such plan terms." *Id.* Much thus turns on the proper resolution of the split, and this Court should provide that resolution now.

C. The Third Circuit's answer to this question is wrong.

It would be particularly appropriate to resolve this issue in this case because the Third Circuit is on the wrong side of the split. The other circuits have explained why. As the D.C. Circuit has put it, "Congress did *not* state that any change would trigger the two provisions; it stated that any change *by amendment* would do so." *Stewart*, 730 F.2d at 1561 (emphasis in original). The Ninth Circuit rightly has stated that "Section 1054(g) applies to *amendments* to a Plan, not to an interpretation of the Plan's terms." *Richardson*, 112 F.3d at 987 (emphasis in original). To suggest otherwise, as the Seventh Circuit has observed, would "contort the plain meaning of 'amendment.'" *Dooley*, 797 F.2d at 1452. That is so because, as the D.C. Circuit has noted, the common understanding of the term

"amendment" connotes "an actual change in the provisions of the plan." *Stewart*, 730 F.2d at 1561.

The Third Circuit's contrary interpretation does not make sense in light of the structure of the statute. Section 1054(g) does not prohibit every "amendment" that reduces accrued benefits. The statute allows certain amendments when plans have terminated or need variances from minimum-funding requirements. *See* 29 U.S.C. § 1054(g) (citing 29 U.S.C. §§1082(d) & 1441). Those sorts of amendments involve changes to the actual *language* of plans that employers make. They are not actions undertaken by plan *administrators* to implement *interpretations* of existing plan language.

This Court's decision in *Conkright* confirms the point. This Court recognized that interpretive "mistakes" by plan administrators should come as "no surprise" in this area, given that ERISA "is 'an enormously complex and detailed statute,' and the plans that administrators must construe can be lengthy and complicated." 559 U.S. at 509 (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993)). Quite sensibly, while the Court held in that case that an administrator's corrected interpretation of a plan was worthy of deference, no Justice suggested that every time a plan administrator fixes one of those mistakes, it effects an "amendment" that violates §1054(g). Nor did any Justice come close to suggesting, as the Third Circuit's rationale does when taken to its logical conclusion, that an administrator's initial imprudent interpretation of a plan forever binds that plan to that result, no matter how much damage it does to the long-term interests of the employer and its former employees.

The Third Circuit's rule also disregards the distinction this Court has rightly drawn between the employers who act as the sponsors of a plan and the administrators who

act as the participants' fiduciaries. The very reason this Court has held that "employers or other plan sponsors" can "modify" or even "terminate" plan provisions is that when they "undertake those actions, they *do not act as fiduciaries*" toward the beneficiaries. *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) (emphasis added) (citing *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995)). Thus, the Court has observed, "it may be true that amending or terminating a plan . . . cannot be an act of plan 'management' or 'administration.'" *Varity Corp. v. Howe*, 516 U.S. 489, 505 (1996). Under the Third Circuit's holding, an administrator, who is by his very nature a fiduciary, can take actions that are non-fiduciary. The disconnect between the Third Circuit's rule and the basic premises of this Court's ERISA jurisprudence cements the case for certiorari.

II. The Court should grant certiorari to resolve whether the Third Circuit should have deferred to the administrator's corrected interpretation.

This Court also should review the second justification the Third Circuit gave for its decision—its holding that the plaintiffs had established a claim under §1132(a)(1)(B) because the 1987 and 1980 Plans unambiguously forbade actuarial reductions for payments made to the TVPs. Particularly as to the 1987 Plan, the Third Circuit's reasoning was egregiously wrong, contravening this Court's precedents requiring courts to defer to administrators' reasonable interpretations. And the Third Circuit's analysis of both plans is sufficiently connected to the first issue that the Court should consider both questions at once.

A. The Third Circuit's answer to this question is patently wrong.

The Third Circuit's treatment of Loughlin's second interpretation was transparently erroneous. The Third Circuit did not deny that because the plans at issue gave the administrator discretion to interpret their terms, this Court's precedents required the court to defer to the second interpretation so long as it was reasonable. *See Firestone*, 489 U.S. at 111; *Conkright*, 559 U.S. at 512. But the Third Circuit held that Loughlin's second interpretation was not reasonable. App. 19a. That analysis was flawed as to both Plans, but its application to the TVPs who vested under the 1987 Plan bears special attention. Without offering any explanation for doing so, the Third Circuit's opinion simply deleted, from its quotation of a critical provision of the 1987 Plan, language that firmly supports the corrected interpretation Loughlin reached after plan actuaries and counsel informed him that the first interpretation was wrong.

1. The Third Circuit's analysis of the 1987 Plan deleted critical language from its quotation of the plan terms.

The Third Circuit's analysis of the 1987 Plan rightly focused on Section 7.02, but its quotation of that provision was not accurate. The Third Circuit claimed that Section 7.02 reads as follows:

> 7.02 *Amount and Commencement of Deferred Vested Retirement Income.*
> The amount of a deferred vested Retirement Income to a Participant who satisfies the requirements of Section 7.01 shall be determined in accordance with the provisions of Section

> 5.03, based on the Participant's Benefit Service and Average Compensation at the time of employment termination. . . .

App. 18a (alteration in original). Based on that quotation, terminated with an ellipsis placed there by the court, the Third Circuit reasoned that "§ 7.02 tells us that a TVP gets retirement income in accord with § 5.03." App. 19a. Because Section 5.03 provides that early retirees can receive their income without an actuarial reduction when they turn 60, the Third Circuit concluded that "Loughlin's second interpretation conflicted with the plain meaning of the terms of the Plans and thus denied the Employees benefits due them in violation of §1132(a)(1)(B)." *Id.*

But the Third Circuit left a sentence out of its discussion. The full quotation of this provision is as follows:

> 7.02 *Amount and Commencement of Deferred Vested Retirement Income.*
> The amount of a deferred vested Retirement Income to a Participant who satisfies the requirements of Section 7.01 shall be determined in accordance with the provisions of Section 5.03, based on the Participant's Benefit Service and Average Compensation at the time of employment termination. *The form and payment of a Participant's deferred vested retirement income shall be determined and made in accordance with the provisions of Article VI as though such terminated Participant had remained in the employment of the Company until reaching his Normal Retirement Date.*

App. 137a (emphasis added).

That last sentence devastates the Third Circuit's theory about the TVPs who vested under the 1987 Plan. The court was simply wrong when it said, as a blanket matter, that "§ 7.02 tells us that a TVP gets retirement income in accord with § 5.03." App. 19a. As the deleted sentence shows, Section 7.02 of the 1987 Plan tells us that only the "amount" of TVPs' income—the *total* they receive—will be "determined" in accordance with Section 5.03. App. 137a. Meanwhile, as the sentence the Third Circuit deleted shows, the "form" and "payment" of their income would be "determined" and "made" "in accordance with the provisions of Article VI." *Id.* That Article addresses participants who end their employment at the normal age of 65. App. 127a-136a. And critically, the deleted sentence says that this "form" and "payment" is "determined" and "made" "*as though such terminated Participant had remained in the employment of the Company until reaching his Normal Retirement Date.*" App. 137a (emphasis added). This language gave Loughlin a reasonable basis, to say the least, to actuarially reduce any payments made to TVPs before they reached age 65. The reduction made the "payment" reflect the reality that, according to Section 7.02's terms, TVPs were not entitled to benefits before they reached the "Normal Retirement Date." *Id.*

The Third Circuit did not try to reconcile its analysis with the deleted sentence, and when United brought the omission to the court's attention, the Third Circuit denied rehearing without explanation. *See* United Reh'g Pet. 4; App. 1a-2a. The Third Circuit's failure to address this concern would, if it stood alone, be a sufficient basis to summarily reverse with respect to the TVPs who vested under the 1987 Plan. At the very least, this Court should address this issue when it resolves the first question presented.

2. The Third Circuit's analysis of the 1980 Plan also was flawed.

The Third Circuit's treatment of TVPs who vested under the 1980 Plan likewise deserves review. To be sure, unlike its counterpart in the 1987 Plan, the 1980 version of Section 7.02 does not mention the "form" and "payment" of a TVP's income. But the Third Circuit contravened this Court's precedents requiring deference to plan administrators when it concluded that the 1980 Plan unambiguously *forbade* actuarial reductions for payments made to TVPs.

That is particularly so in light of the record United created below. This Court has noted that courts defer to ERISA administrators because, among other things, their interpretations reflect expert familiarity with principles that animate ERISA plans. *See Conkright*, 559 U.S. at 520 (discussing the time value of money). United presented evidence below that it would be rare for a plan to extend the same sort of benefits to TVPs that it does to early retirees. Employers tend to view early retirees as "warranting special consideration," and TVPs as not. Doc. 155-2 at 6 ¶¶7-8; Doc. 154-14 at 6 ¶8. There are numerous reasons why a plan administrator versed in these realities would conclude that the 1980 Plan did not call for TVPs to receive the same sort of benefits as early retirees. While the 1980 Plan's version of Section 7.02 states that the "amount" and "time of commencement" of a TVP's income is determined in accordance with Section 5.03, the provision governing early retirees, it does not say that the "form" or "payment" of the income would *not* be subject to an actuarial adjustment. Likewise, the amended version of Section 5.03 in the 1980 Plan provides for unreduced income payments for a participant who "retires" on the early-retirement date. App. 152a. That provision does not

say that a participant who does not retire on that date, such as a TVP, will receive the same deal. And courts have held that TVPs who have left a company cannot be said to have "retire[d]" for purposes of early-retirement provisions in plan documents. *See Apponi v. Sunshine Biscuits, Inc.*, 809 F.2d 1210, 1219 (C.A.6 1987).

The Third Circuit's second-guessing of Loughlin's judgment is contrary to the deferential approach for which this Court's decisions in *Firestone* and *Conkright* call. After plan professionals informed him that his previous interpretation was wrong, Loughlin reached a sensible interpretation of the Plans that, through both their text and history, were "lengthy and complicated." *Conkright*, 559 U.S. at 509. In contrast, the Third Circuit's reading of those Plans requires benefits to TVPs that go above and beyond the baseline established by ERISA, and in so doing the lower court has imposed unforeseen costs on the employer who has sponsored the plan. A result like this one shows why this Court has been right to emphasize that courts should lean on "the expertise of the plan administrator," rather than engaging in the sort of "unexpected and inaccurate plan interpretations that might result from *de novo* judicial review." *Id.* at 517.

B. The relationship between the first and second questions necessitates review of both.

Even though the second question presented does not implicate a circuit split, its relationship with the first question presented cements the case for reviewing both. The Third Circuit tied its resolution of these two questions closely together, reasoning that Loughlin had effected a §1054(g) "amendment" not simply because he had adopted a new interpretation, but because the court believed that interpretation was "erroneous"—a finding that led the

Third Circuit to hold that United also had violated §1132(a)(1)(B). App. 19a, 21a. As Justice Scalia elaborated earlier this year, when the Court "grant[s] certiorari on a question for which there is a 'compelling reason' for our review," such as the circuit split over the first question presented, the Court "often also grant[s] certiorari on attendant questions that are not independently 'certworthy,' but that are sufficiently connected to the ultimate disposition of the case that the efficient administration of justice supports their consideration." *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1779 (2015) (Scalia, J., dissenting). That is the path this Court should take here.

Conclusion

This Court should grant certiorari and reverse the judgment of the Third Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — DENIAL OF PETITION FOR REHEARING FILED BY UNITED REFINING COMPANY, UNITED REFINING COMPANY PENSION PLAN FOR SALARIED EMPLOYEES, AND UNITED REFINING COMPANY RETIREMENT COMMITTEE IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, DATED APRIL 13, 2015

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 13-4633 & 13-4743

JOHN COTTILLION; BEVERLY ELDRIGE, on behalf of themselves and all others similarly situated,

Appellants in 13-4743,

v.

UNITED REFINING COMPANY; UNITED REFINING COMPANY PENSION PLAN FOR SALARIED EMPLOYEES; UNITED REFINING COMPANY RETIREMENT COMMITTEE; JOHN AND MARY DOES 1 TO 10

United Refining Company; United Refining Company Pension Plan for Salaried Employees; United Refining Company Retirement Committee,

Appellants in 13-4633.

Appendix A

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 1-09-cv-00140)
District Judge: Honorable
Cathy Bissoon

Before: McKEE, *Chief Judge*, RENDELL, AMBRO,
FUENTES, SMITH, FISHER, CHAGARES,
JORDAN, HARDIMAN, GREENAWAY, Jr.,
VANASKIE, SHWARTZ, and KRAUSE,
Circuit Judges.

SUR PETITION FOR REHEARING

The petition for rehearing filed by Appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court *en banc*, is denied.

By the Court,

s/ Thomas L. Ambro
Circuit Judge

Dated: April 13, 2015

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED MARCH 18, 2015

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 13-4633 & 13-4743

JOHN COTTILLION; BEVERLY ELDRIGE, on behalf of themselves and all others similarly situated,

Cross-Appellants in No. 13-4743,

v.

UNITED REFINING COMPANY; UNITED REFINING COMPANY PENSION PLAN FOR SALARIED EMPLOYEES; UNITED REFINING COMPANY RETIREMENT COMMITTEE; JOHN AND MARY DOES 1 TO 10

United Refining Company; United Refining Company Pension Plan for Salaried Employees; United Refining Company Retirement Committee,

Appellants in No. 13-4633.

October 1, 2014, Argued
March 18, 2015, Filed

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 1-09-cv-00140)
District Judge: Honorable Cathy Bissoon

Before: AMBRO, CHAGARES,
and VANASKIE, *Circuit Judges*

OPINION

AMBRO, *Circuit Judge*

The Employee Retirement Income Security Act of 1974 ("ERISA"), a law meant to guarantee that employees will receive the retirement benefits they are promised, governs pension plans. We determine whether the calculation of retirement benefits that the United Refining Company and co-defendants (who appeal and are collectively referred to throughout this opinion as "United") provided in a pension plan to a specific class of former employees (collectively, "Employees") varied, as United argues, depending on how old they were when they elected to receive the benefits. Because United's reading finds no support in the text of the plans, we affirm the rulings of the District Court.

I. Factual Background and Procedural History

John Cottillion worked at United for 29 years, from 1960 until 1989. He was 54 years old when he quit, and his benefits had vested under "the 1980 Plan," which is the version of United's Pension Plan for Salaried Employees that applies to people whose benefits vested (*i.e.*, became non-forfeitable under ERISA) after 1980 but before 1987. Because his employment at United was long enough to vest benefits and he was too young on leaving United to receive those benefits, Cottillion belongs to the subset of former United employees involved in this lawsuit: "terminated

vested participants" or "TVPs" in United's pension plan. TVPs are distinct from Early Retirees, who are not a part of this litigation; the latter are people who retired directly from United at an age older than 59 1/2 or 60 (depending on the applicable Plan) but younger than 65.

When Cotillion left the company, United wrote a letter informing him that "[a]s a terminated Pension Plan participant with a vested interest, you are eligible for a deferred retirement benefit from the United Refining Company Pension Plan for Salary [*sic*] Employees." The letter further stated that he "may elect to have [his] monthly retirement benefit begin at anytime [*sic*] after October, 1995," the month in which Cottillion would turn 60, and that his "monthly retirement benefit will be $573.70 at age 60." The letter did not state that the amount of Cottillion's benefit depended on whether he elected to receive it at age 60 or later. TVPs under the 1987 Plan were likewise informed of their pension amounts and told they could receive them the month following their "59 1/2 birthday . . . without any reduction for early retirement." *E.g.*, Beverly Eldridge, Application for Commencement of Deferred Vested Benefits, Terminated Vested Participants (Jan. 9, 1997).

On January 30, 2002, United amended and restated the plan, backdated to January 1, 1995 (the "1995 Plan"), to comply with then-recent amendments to ERISA. The Internal Revenue Service informed United that certain changes needed to be made to the Plan before it could issue a letter confirming that the 1995 Plan would receive favorable tax treatment; in response, United amended the

1995 Plan, effective January 1, 2002 (the "2002 Plan"). Both the 1995 and 2002 Plans included a § 5.04(c), absent from the 1980 and 1987 Plans, stating that the benefits of TVPs who receive pensions before age 65 would be "actuarially reduced to reflect the earlier starting date thereof." Neither the 1995 Plan nor the 2002 Plan applies to any employee-plaintiff in this case, but they are relevant because of what happened next.

In 2005, plan actuaries (professionals who perform a variety of services relating to implementing and maintaining ERISA plans) at the firm Towers Perrin informed Lawrence A. Loughlin, the plan administrator, that United had erroneously paid to TVPs vested under the 1980 and 1987 Plans pensions that were not "actuarially reduced," *i.e.*, calculated in light of the TVP's age. (The younger a beneficiary is, the longer she will receive benefits, and thus retirement plans often lower benefits for people who take them early so that the benefits are worth the same regardless when they begin to be paid.) Because operational deviations from the terms of ERISA-governed plans can jeopardize their favorable tax treatment, John Owsen, United's (now deceased) longtime outside counsel for benefits matters, sent a letter to the IRS in November 2005 proposing to recoup the excess funds paid. Owsen's letter followed the IRS's voluntary correction program through which employers may notify the Service of proposals to fix mistakes in administering ERISA plans and receive assurance that the IRS will not disqualify a plan from favorable tax treatment. The letter cited and attached the 2002 version of § 5.04(c), but it did not call attention to the absence of this language in

the 1980 and 1987 Plans. In March 2006 the IRS issued a "Compliance Statement," which affirmed that the IRS "will not pursue the sanction of Plan disqualification on account of the qualification failure described in the Submission," but cautioned that it "does not express an opinion as to the accuracy or acceptability of any . . . material submitted with the application" and "should not be construed as affecting the rights of any party under any other law, including" ERISA.

In July and August 2005, after notification from Towers Perrin but before the IRS correspondence, United sent letters to TVPs who had not yet begun to receive benefits "to clarify when you can receive your pension from United Refining Company and under what terms." This letter stated that if a TVP elected to receive retirement benefits before turning 65, the benefit would be reduced to reflect the early election date in accord with the following table:

Age	Factor
64	89%
63	80%
62	72%
61	65
60	59%
59 1/2	56%

About a year later, United sent letters to TVPs who were already receiving pensions. These letters stated,

"The Plan document requires that all pension benefits paid to terminated vested participants PRIOR to their Normal Retirement Age of 65 years MUST be actuarially reduced to the earlier payment date" (emphasis in original). Indeed, some retirees were told that in two weeks from the date of the letter their monthly pension would be lowered "until the excess payments have been recovered, after which you will begin receiving the amount that should have been provided to you based on the correct calculation." Others were told that in two weeks "your monthly pension benefit payment will stop and you will not receive any future payments. Additionally, in order to recover excess payments, you should repay the Plan" the amount of money already paid that exceeded the actuarially reduced benefit. In Cottillion's case, his pension of $506.58 per month was eliminated, and he was told he should pay the Plan $14,475. The letters represented that the reductions were necessary for the Plan to retain its favorable tax treatment under the Internal Revenue Code and that the statements in the letter were "based on the [IRS]'s published revenue procedures and Compliance Statement which the Plan Retirement Committee must follow."

After receiving this letter, the Employees represent that Cottillion had a telephone conversation with Loughlin, the plan administrator and author of the letter, during which Cottillion complained about the reduction in pension benefits. Loughlin told him that the reduction corrected a mistake that had resulted in excessive payments. Several other aggrieved TVPs wrote to Loughlin, who replied by letter that the plan documents required the correction to maintain the plan's favorable tax treatment. Some, but not

all, who complained were informed that they could file a written appeal of Loughlin's decision.

The Employees sued in the Western District of Pennsylvania alleging, as relevant here, that United's actions deprived them of a benefit to which they were entitled under the Plan, in violation of 29 U.S.C. § 1132(a)(1)(B), and that they violated ERISA's "anti-cutback" rule, 29 U.S.C. § 1054(g), which prohibits employers from amending a plan in a way that reduces benefits accrued under a defined benefit plan (such as the Plans at issue here). Judge Sean McLaughlin denied United's Motion to Dismiss and later granted the Employees' Motion for Summary Judgment in part and denied United's Motion for Summary Judgment, holding that United's actions violated the anti-cutback rule. When Judge McLaughlin resigned to enter the business world, the case was assigned to Judge Cathy Bissoon. She granted the Employees' Motion for Class Certification, granted in part their Motion for Final Remedy (enjoining United from actuarially reducing Employees' benefits and awarding damages to make whole those who had been receiving too little, but declining to order United to pay anything to TVPs who had not yet elected to receive benefits), and granted United's Motion for Judgment on the Pleadings, dismissing with prejudice the Employees' remaining counts because any relief would be duplicative.

United appeals then-Judge McLaughlin's summary judgment decision and Judge Bissoon's order on remedies. The Employees cross-appeal the latter order and the award of judgment on the pleadings.

II. The District Court Properly Excused the Employees from Exhausting Plan Remedies.

United argues that it was entitled to summary judgment because the named plaintiffs failed to exhaust the remedies available to them under the Plan. *See, e.g., Harrow v. Prudential Ins. Co. of Am.*, 279 F.3d 244, 249 (3d Cir. 2002). The Employees do not dispute that ordinarily the named plaintiff in an ERISA class action must exhaust plan remedies before bringing suit and that Cottillion and Beverly Eldridge did not, but they argue that: (1) they were not required to exhaust remedies because of the nature of their claim; (2) exhaustion is an affirmative defense and United has not met its burden of persuasion on the issue; and (3) there is undisputed record evidence that exhaustion would have been futile.

While we review *de novo* the legal standard that a district court applies in determining whether an employee must exhaust plan remedies before coming to federal court, the court's ultimate decision whether to require a plaintiff to exhaust is committed to its sound discretion. *Harrow*, 279 F.3d at 248; *see also D'Amico v. CBS Corp.*, 297 F.3d 287, 290 (3d Cir. 2002); *Dishman v. UNUM Life Ins. Co. of Am.*, 269 F.3d 974, 984 (9th Cir. 2001); *Stevens v. Employer-Teamsters Joint Council No. 84 Pension Fund*, 979 F.2d 444, 459 (6th Cir. 1992); *Springer v. Wal—Mart*, 908 F.2d 897, 899 (11th Cir.1990); *Janowski v. Int'l Bhd. of Teamsters Local No. 710 Pension Fund*, 673 F.2d 931, 935 (7th Cir. 1982), *judgment vacated on other grounds*, 463 U.S. 1222, 103 S. Ct. 3565, 77 L. Ed. 2d 1406 (1983).

The Employees argue that the exhaustion requirement does not apply to their anti-cutback claim based on 29 U.S.C. § 1054(g), as there is "a distinction . . . between claims based on pension rights created by contract, which must be [exhausted if the plan provides for remedies], and claims based on purely statutory rights created by ERISA, which may be asserted in federal court directly." *Delgrosso v. Spang & Co.*, 769 F.2d 928, 932 (3d Cir. 1985). We need not resolve whether in general the exhaustion requirement applies to an anti-cutback claim or whether this particular suit states "a simple contract claim artfully dressed in statutory clothing." *Drinkwater v. Metro. Life Ins. Co.*, 846 F.2d 821, 826 (1st Cir. 1988). As discussed below, the District Court did not abuse its discretion in holding that exhaustion would prove futile.

The Employees misconstrue the futility exception to the exhaustion requirement when they argue that, because exhaustion is an affirmative defense, United bears the burden of proving that it would not be futile. True, "[t]he exhaustion requirement is a nonjurisdictional affirmative defense" for United. *Metro. Life Ins. Co. v. Price*, 501 F.3d 271, 280 (3d Cir. 2007). Yet futility is an exception to the exhaustion requirement, and "[a] party invoking this exception must provide a clear and positive showing of futility before the District Court." *D'Amico*, 297 F.3d at 293; *accord Harrow*, 279 F.3d at 249. Therefore, this argument against dismissal for failure to exhaust also fails.

In any event, the District Court held that the Employees had shown exhaustion of their Plan remedies would have been futile. As we wrote in *Harrow*:

> Whether to excuse exhaustion on futility grounds rests upon weighing several factors, including: (1) whether plaintiff diligently pursued administrative relief; (2) whether plaintiff acted reasonably in seeking immediate judicial review under the circumstances; (3) existence of a fixed policy denying benefits; (4) failure of the [defendant] to comply with its own internal administrative procedures; and (5) testimony of plan administrators that any administrative appeal was futile. Of course, all factors may not weigh equally.

279 F.3d at 250.

The District Court excused the Employees from the exhaustion requirement because they showed that United had a fixed policy of denying benefits. *Cottillion v. United Ref. Co.*, No. 1:09-cv-140, 2013 U.S. Dist. LEXIS 49913, 2013 WL 1419705, at *14–*15 (W.D. Pa. Apr. 8, 2013). The Employees made this showing by supplying the District Court with extensive correspondence between Loughlin and aggrieved TVPs. Loughlin sent form letters out to all TVPs apprising them of the reduction in their benefits. When anyone wrote back to him to complain, Loughlin would reply that the change in benefits was mandated by the IRS. Many of the letters failed to inform recipients of the possibility of an appeal. There is no evidence in the record that any TVP got anywhere by seeking further review from Loughlin, and that United continues to adhere to the position that TVPs are only entitled to actuarially reduced benefits further supports the inference that

exhaustion was futile. At least one TVP (Frederick Hane) followed the instructions in Loughlin's letter and the 1987 Plan's appeals procedures. But rather than demonstrate that the issues raised in Hane's letter were considered an appeal of an earlier determination, Loughlin (on behalf of the retirement committee) treated Hane's objections as "questions" and offered him no relief or opportunity for further review.

The failure of Hane's appeal, the existence of a fixed policy denying benefits as evidenced by the correspondence between Loughlin and the many TVPs with letters in the record, and the absence of any evidence before us to suggest that an appeal from Loughlin's letter was anything other than time wasted, lead us to conclude that the District Court did not abuse its discretion in applying the futility exception to the exhaustion requirement. Thus we continue.

III. The Plans Unambiguously Afforded TVPs Retirement Benefits Without Actuarial Reduction.

The 1980 and 1987 Plans gave the plan administrator discretion in interpreting their terms. Thus, in evaluating the Employees' benefits-due claim, we review Loughlin's interpretation under a deferential standard and will uphold it unless it is arbitrary and capricious. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989); *Fleisher v. Standard Ins. Co.*, 679 F.3d 116, 120—21 & n.2 (3d Cir. 2012). However, the parties dispute the standard of review for the Employees' claim that Loughlin's interpretation of the

Plan adopted in his letters to TVPs (that the Plan provided only actuarially adjusted benefits, contrary to United's earlier representations) violated the anti-cutback rule. The Employees urge that the District Court correctly deferred to Loughlin's first interpretation of the Plans—that they provided benefits in the same dollar amount to TVPs who elected to receive them before age 65 as to those who began receiving them at age 65 or later—and correctly did not defer to the second one as the "reinterpretation" was really a *sub rosa* plan amendment to reduce accrued benefits in violation of the anti-cutback rule. United argues that under *Conkright v. Frommert*, 559 U.S. 506, 130 S. Ct. 1640, 176 L. Ed. 2d 469 (2010), Loughlin's final interpretation—the one allowing reduction of benefits—is entitled to deference.

We need not determine who has the better of this argument. As we shall see, no amount of deference can rescue Loughlin's second interpretation from its flat contradiction with the terms of the 1980 and 1987 Plans. We therefore assume without deciding that the deferential arbitrary and capricious standard applies, under which a "court may overturn a decision of the Plan administrator only if it is without reason, unsupported by the evidence or erroneous as a matter of law." *Mitchell v. Eastman Kodak Co.*, 113 F.3d 433, 439 (3d Cir. 1997) (internal quotation marks omitted) (quoting *Abnathya v. Hoffmann—LaRoche, Inc.*, 2 F.3d 40, 45 (3d Cir.1993)), *abrogated on other grounds by Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 128 S. Ct. 2343, 171 L. Ed. 2d 299 (2008). Even under that standard, an administrator's "interpretation may not controvert the plain language of the document." *Dewitt v. Penn-Del Directory Corp.*, 106 F.3d 514, 520 (3d Cir. 1997).

A. The Plans' Texts Support the Employees' Position.

To determine whether Loughlin's second interpretation contradicts the actual words of the 1980 and 1987 Plans, we quote the relevant provisions.

Article VII of the 1980 Plan reads:

> 7.01 Required Service for Vesting
>
> If a Participant's employment shall terminate prior to his Normal Retirement Date [age 65, § 4.01] or an Early Retirement Date [age 60, § 4.02], for any reason other than death, he shall be entitled to a deferred vested Retirement Income if he is credited with at least ten . . . years of Vesting Service at the time of his employment termination. . . .
>
> 7.02 Amount and Commencement of Deferred Vested Retirement Income
>
> The amount and time of commencement of a deferred vested Retirement Income to a Participant who satisfies the requirements of Section 7.01 shall be determined in accordance with the provisions of Section 5.03, based on the Participant's Benefit Service and Average Compensation at the time of employment termination. . . .

Appendix B

Section 5.03 provides:

> A Participant who retires on an Early Retirement Date may elect to receive one of the following:
>
> (a) His Accrued Retirement Income computed as of his Early Retirement Date commencing at the end of the month in which his Normal Retirement Date would have occurred.
>
> (b) A reduced amount of Retirement Income to begin at the end of the month in which his Early Retirement Date occurs, computed so as to be a percentage of the benefit provided for him under paragraph (a) of this Section 5.03, in accordance with the following table:

Number of Years Prior to Normal Retirement Date (Interpolate if not a Whole Number)	Percentage
0	100.0%
1	100.0%
2	100.0%
3	100.0%
4	93.3%
5	86.7%

On October 27, 1988, United put in place "Amendment 5" to the 1980 Plan, effective July 1, 1987. Amendment 5, which applies to all class members covered by the 1980 Plan, in relevant part rewrites § 5.03 of the 1980 Plan to read in its entirety:

> A Participant who retires on an Early Retirement Date will receive his Accrued Retirement Income computed as of his Early Retirement Date commencing at the end of the month in which his Early Retirement Date occurs.

"Accrued Retirement Income . . . as of any particular date" is defined under § 5.02 as an amount to be computed in accordance with § 5.01, which lays out the method of calculation for the "annual rate of Retirement Income." Section 5.01 describes the method of calculation as (roughly speaking) a percentage of average compensation multiplied by time of service with United, with qualifications and complications not at issue in this appeal.

To summarize, per § 7.02 a TVP gets retirement income in accordance with § 5.03, which states that a participant who retires is entitled to "Accrued Retirement Income," which is calculated under § 5.01 with respect to a participant's average compensation and length of service with the company.

The 1987 Plan is quite similar as it concerns this appeal. Article VII provides:

7.01 Required Service for Vesting.

If a Participant's employment shall terminate prior to his Normal Retirement Date for any reason other than death, he shall be entitled to a deferred vested Retirement Income if he is credited with at least five . . . years of Vesting Service at the time of his employment termination. . . .

7.02 Amount and Commencement of Deferred Vested Retirement Income.

The amount of a deferred vested Retirement Income to a Participant who satisfies the requirements of Section 7.01 shall be determined in accordance with the provisions of Section 5.03, based on the Participant's Benefit Service and Average Compensation at the time of employment termination. . . .

Section 5.03 provides:

Early Retirement Annual Accrued Retirement Income.

A Participant who retires on an Early Retirement Date will receive his Accrued Retirement Income computed as of his Early Retirement Date commencing at the end of the month in which his Early Retirement Date occurs.

"Accrued Retirement Income" is the amount specified in § 5.02, which, as in the 1980 Plan, is the "amount computed in accordance with Section 5.01," which in turn provides a formula roughly based on a percentage of average compensation multiplied by the employee's tenure at United.

The Early Retirement Date under the 1987 Plan initially occurred the month after an employee turned 60, but it was lowered effective February 1, 1996, to age 59 1/2.

A straightforward reading of the 1980 and 1987 Plans, consistent with United's early interpretations of these Plans, leads to the conclusion that TVPs were entitled to pensions in an amount that did not include an actuarial adjustment for the number of years younger than 65 that they were when they retired. Under both plans, § 7.02 tells us that a TVP gets retirement income in accord with § 5.03, which states that a retiree is entitled to "Accrued Retirement Income," which is calculated under § 5.01 with respect to a participant's average compensation and length of service with the company. Not one of these provisions treats TVPs differently from people who retire directly from United, and no provision requires actuarial adjustment (read reduction) for taking retirement benefits early. Loughlin's second interpretation conflicted with the plain meaning of the terms of the Plans and thus denied the Employees benefits due them in violation of § 1132(a)(1)(B), notwithstanding the Plans' conferral on him of discretion to interpret Plan provisions. *Epright v. Envtl. Res. Mgmt., Inc. Health & Welfare Plan*, 81 F.3d 335, 342—43 (3d Cir. 1996) ("By imposing a requirement

which is extrinsic to the Plan[s], [Defendants have] acted arbitrarily and capriciously.").

The second interpretation also violated the anti-cutback rule, which occurs when an "accrued benefit" is eliminated or reduced by a "plan amendment." 29 U.S.C. § 1054(g)(1). "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 that is protected by" § 1054(g).[1] *Bellas v. CBS, Inc.*, 221 F.3d 517, 524 (3d Cir. 2000). Sections 7.01 and 7.02 of both Plans provide precisely the early retirement benefits described in *Bellas* and are thus "accrued benefits."

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1. The statute reads:

> (g) 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 the plan, other than an amendment described in section 1082(d)(2) or 1441 of this title [neither of which applies in our case].
> >
> > (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 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. 29 U.S.C. § 1054.

United argues, however, that the early retirement benefits are not "accrued benefits" because § 5.01 of both Plans provide calculations for "[t]he annual rate of Retirement Income payable to a Participant who retires on or after his *Normal* Retirement Date." (emphasis added). Thus, according to United, anyone who retires before his normal retirement date has no accrued retirement benefits. What this argument ignores is the combined effect of §§ 7.01, 5.03, 5.02, and 5.01. Section 7.01 vests retirement income in TVPs; § 5.03 directs the administrator to calculate TVPs' Accrued Retirement Income as of the date of early retirement, while § 5.02 states that the amount of Accrued Retirement Income is computed "in accordance with Section 5.01." In other words, §§ 5.01, 5.02, and 5.03 provide the method for computing TVPs' benefits, while § 7.01 actually confers the benefits, making them "accrued" within the meaning of ERISA.

Our Court's "view of what constitutes an 'amendment' to a pension plan has been construed broadly to protect pension recipients." *Battoni v. IBEW Local Union No. 102 Employee Pension Plan*, 594 F.3d 230, 234 (3d Cir. 2010). "An 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). *Hein v. F.D.I.C.*, 88 F.3d 210, 216 (3d Cir. 1996).[2]

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2. Some Circuits have taken a narrower view of the meaning of "amendment" than *Hein—see Richardson v. Pension Plan of Bethlehem Steel Corp.*, 112 F.3d 982, 987 (9th Cir. 1997); *Dooley v. Am. Airlines, Inc.*, 797 F.2d 1447, 1451—53 (7th Cir. 1986)—

The critical question in this case, in light of the absence of a formal plan amendment, is whether Loughlin's "interpretation of the Plan improperly denied accrued benefits to" the Employees. *Id*. at 216—17. The answer is yes. In 1988, United's understanding of the Plans accorded with the plain reading of the Plans that we have discussed above. By 2005, United had reinterpreted the Plans and decided that they required actuarial adjustments to the amounts paid to TVPs who took early retirement. This incorrect interpretation resulted in the improper denial of TVPs' accrued early retirement benefits and thus violated ERISA's anti-cutback rule.

B. United's Counterarguments Fail to Persuade.

United makes several arguments to the contrary, none convincing. Its arguments can be grouped into four categories: (1) internal textual arguments (the text of the 1980 and 1987 Plans supports United); (2) external textual arguments (the text of documents other than the Plans supports United); (3) structural (the Plans address Early Retirees and TVPs in separate sections, and thus they treat differently these different kinds of participants);

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but, as the Second Circuit has noted, a Treasury Regulation interpreting the provision of the Internal Revenue Code that implements 29 U.S.C. § 1054(g) supports our Court's view and is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). *Kirkendall v. Halliburton, Inc*., 707 F.3d 173, 183 (2d Cir. 2013) (discussing Limitations on Availability of Benefits, 53 Fed. Reg. 26,050-01, 26,064 (July 11, 1988) (*codified at* 26 C.F.R. § 1.411(d)—4)).

and (4) statutory (because ERISA sets a floor for benefits, we should interpret the Plans to provide only that floor absent a clear and express plan provision to the contrary). We address each in turn.

1. The Internal Textual Argument

United's argument from the Plans' text is that § 5.03 entitles only "[a] Participant *who retires* on an Early Retirement Date" to benefits (emphasis added). They argue that "retire" means "retire from United," because "'Retirement Date' expressly required 'actual retirement' from the Company with an immediate right to draw down a pension benefit." Opening Br. at 14. (Recall that by definition all TVPs left United before they were old enough to retire from the company at age 59 1/2 or 60.) But no definition in any plan defines "retire" or "Retirement Date" with reference to separation from United. Instead, both the 1980 and 1987 Plans (at § 1.31) define "Retirement Date" as the date of "actual retirement," but *not* actual retirement from United.

For support, United cites pages 1645 ¶ 18 and 1684 ¶ 27 of the Joint Appendix. Both citations lead to United's statement of material facts in support of its motion for summary judgment, and that document in turn cites an expert report by Nancy Keppelman (an ERISA lawyer) interpreting the Plans. Setting aside the problem of considering expert testimony on the interpretation of a pension plan, which is a purely legal question and not properly the subject of expert testimony, *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 99 (1st Cir. 1997)

(collecting circuit cases); *Haberern v. Kaupp Vascular Surgeons Ltd. Defined Ben. Plan & Trust Agreement*, 812 F. Supp. 1376, 1378 (E.D. Pa. 1992), the expert does not even support United's interpretation of the meaning of "retire." Keppelman writes, "The cross-reference [from § 7.02 to § 5.03] did not confer early retirement benefits on [TVP]s." Keppelman Report 7, Jan. 24, 2012, ECF No. 154-14. It may be that "the cross reference" does not confer early retirement benefits, but § 7.01 explicitly does, and § 7.02 clarifies that the amount of the benefits conferred by § 7.01 "*shall* be determined *in accordance* with" § 5.03 (emphases added). By drafting an actuarial adjustment into the Plan, United is requiring the benefits to be calculated *not* in accordance with § 5.03, the exact opposite of the Plan's requirements.

2. The External Textual Argument

The extrinsic documents on which United relies further undermine its position. It posits that § 5.04(c) of the 1995 and 2002 Plans made explicit what had been true all along: TVPs who took their pensions before turning 65 would be entitled only to actuarially adjusted pensions. But even if it were permissible to look to the 1995 and 2002 Plans for guidance in interpreting the 1980 and 1987 Plans, the addition of § 5.04(c) more strongly supports the Employees' position that, without the new language explicitly imposing an actuarial adjustment, there was no such adjustment before.

United also points to certain summary plan descriptions ("SPDs") to argue they clarify that actuarial adjustments

are required under the Plans. The 1987 and 1995 SPDs (which describe the 1980 and 1987 Plans, respectively) state that employees who took vested retirement benefits earlier than their normal retirement date would only be entitled to actuarially reduced benefits.

United's reliance on the SPDs poses two principal problems. First, the SPDs state that "[i]f the terms of the Plan document and the Trust agreement and of this summary are inconsistent, the terms of the Plan document and the Trust agreement will control." United Refining Company, Pension Plan for Salaried Employees, Summary Plan Description 20 (Jan. 1 1987); United Refining Company, Pension Plan for Salaried Employees, Summary Plan Description 20 (Jan. 1 1995). When the SPD contains this sort of a disclaimer and the Plan is more favorable to beneficiaries than the SPD, the Plan controls. *Sturges v. Hy-Vee Employee Ben. Plan & Trust*, 991 F.2d 479, 480—81 (8th Cir. 1993) (*per curiam*); *Glocker v. W.R. Grace & Co.*, 974 F.2d 540, 542—43 (4th Cir. 1992); *McGee v. Equicor-Equitable HCA Corp.*, 953 F.2d 1192, 1201 (10th Cir. 1992). As discussed, the SPDs conflict with the Plans, as the Plans clearly do not contemplate actuarial adjustment.

Second, United published employee handbooks in 1985, 1991, 1994, and 1998 that are wildly inconsistent on whether benefits are calculated with actuarial adjustment, and the Employees not implausibly characterize the handbooks as, by their own terms, SPDs. *See, e.g.*, United Refining Company, Salaried Employee Handbook 110 (Apr. 1, 1994) ("The handbook contains Summary Plan

Descriptions of the plans . . . ."). The 1985 handbook (published before Amendment 5 to the 1980 Plan removed its actuarial adjustment table) stated that pension benefits both for Early Retirees (people who retired directly from United after age 59 1/2 or 60 and before age 65) and TVPs who took benefits before their Normal Retirement Date would be actuarially reduced. The 1991 handbook contained no mention of actuarial adjustments for early receipt of benefits. The 1994 handbook stated of TVPs, "You can begin receiving benefits as early as age 60 with no reduction." *Id.* at 84. The 1998 handbook is less quotable, but it includes a sample calculation for a person who retires (not necessarily a TVP) at age 59 1/2 and does not include an actuarial adjustment for the participant's age. Indeed, nowhere in the 1998 handbook is there any indication that anyone's benefits might be actuarially reduced. These handbooks' differences with each other and with the SPDs strengthen our conviction that the plain meaning of the Plans should control.

3. The Structural Argument

United's structural argument is stronger, but not strong enough. It relies on expert reports from an actuary (Ian Altman) and an ERISA lawyer (Keppelman), who point out that Article 5 of the Plans addresses benefits for Early Retirees—those who retire from United directly before turning 65—while Article 7 addresses benefits for TVPs. If the plans intended to treat the two categories of participants similarly, why devote a separate section to each group? The question, though provocative, does not overcome the indisputable facts that the TVP section

explicitly informs readers that TVPs' benefits are to be calculated "in accordance with" Article 5 and that *nothing* in either the 1980 Plan or the 1987 Plan refers to actuarial adjustments for people who elect to receive their pensions early. The structure and language of the plan could be read to suggest that without Article 7 TVPs would be entitled to nothing more than ERISA's statutory floor, but with Article 7 they are entitled to what Article 7 provides, which is benefits calculated in accordance with Article 5.

4. The Statutory Argument

United's statutory argument fares no better. ERISA § 206(a) does provide that TVPs are entitled to "no less than" an actuarially reduced benefit. 29 U.S.C. § 1056(a). But for the reasons stated above, these Plans expressly provided TVPs with more than the statutory floor. Imposing a requirement that a plan be even clearer than the one in this litigation would be unreasonable. The case United relies on—*McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184 (2d Cir. 2007)—only exposes its argument's weakness. In *McCarthy*, when a TVP took payment early, the

> benefit was actuarially reduced from the amount that would have been paid at age 65 in two respects. First, to reflect the time value of money, the Master Retirement Plan reduced the benefit by a 6.75 percent discount rate for each year prior to the age of 65 that payments began. Second, the benefit was reduced by a mortality factor to adjust actuarially for the

> possibility that a participant might not live to the age of 65.

Id. at 189. These explicit provisions are the opposite of what we find in United's Plans; far from a reference to actuarial adjustment or silence that could arguably be understood only to provide the minimum pension allowed under ERISA, the 1980 and 1987 Plans set out a detailed scheme for calculating TVPs' benefits, one that expressly omits any actuarial adjustment.

IV. United Forfeited Any Objection to the District Court's Interest Rate.

United next argues that, even if we hold that it owes the Employees benefits without actuarial adjustment (as we do), the District Court erred in its final order on remedies when it ordered United to pay interest at 7.5% on the Employees' damages. The Court ordered this amount of interest based on the 2002 Plan, which set 7.5% as the rate of interest for actuarial calculations and on the basis of United's IRS submission, which laid out the company's plan to recoup excess payments to TVPs at 7.5% interest. *Cottillion v. United Ref. Co.*, No. 1:09-cv-140, 2013 U.S. Dist. LEXIS 158077, 2013 WL 5936368, at *9 (W.D. Pa. Nov. 5, 2013). United asserts that because certain sections of the Plan that entitle participants to lump sum payments state that the interest rate in those contexts is the 30-year Treasury rate, the interest here should be 3.7%.

We need not rule on this objection because it is raised for the first time in United's reply brief and hence is waived.

Kirschbaum v. WRGSB Assocs., 243 F.3d 145, 151 & n.1 (3d Cir. 2001). Moreover, although reasonable objections could be made to the District Court's choice of an interest rate, United's proposed rate has no better grounding in the Plan documents (the sections that specify the 30-year Treasury rate apply only to lump sum payments in the event the Plan is terminated or in the case of employees with very small pension entitlements). And because there is some evidence that the Plan provided 7.5% as a default rate, the District Court's order was not clearly erroneous.

V. The Employees Are Not Entitled to More Relief Than the District Court Ordered.

When the District Court entered its final order on remedies, it concluded that class members who had not yet elected to receive their benefits were entitled only to an option to start receiving properly computed benefits at the appropriate age under the Plan (or immediately if they were older than 59 1/2 or 60, depending on the Plan). If they were older than 59 1/2 or 60, they were *not* entitled to receive damages in the amount of benefits they would have received had they elected to receive (properly computed) benefits as early as possible plus interest. According to the District Court, that relief would be "entirely speculative." *Cottillion*, 2013 U.S. Dist. LEXIS 158077, 2013 WL 5936368 at *8.

The Employees claim that "there is no economic incentive for a [TVP] to delay commencing an unreduced monthly benefit past his Early Retirement Date." Employees' Response and Cross-Appeal at 62. They are

mistaken. In fact, they do not dispute that entitlement to benefits requires "actual retirement." 1980 Plan § 1.31; 1987 Plan § 1.31. Because retirement benefits are generally less than salary, there is an incentive to keep working and to continue to be paid for full-time work instead of electing to receive pension benefits conditioned on retirement.

The Employees advance three other theories to argue that that the District Court's injunction should be modified to allow TVPs to receive the payments to which they would have been entitled absent the reinterpretation—namely, unjust enrichment, surcharge, and restitution. All of these rationales suffer from the same flaw: the Employees failed to prove in the District Court that class members would have taken unreduced pension benefits early.

The Employees do not seek remand to prove on an individual basis that those eligible for unreduced early retirement benefits who have not yet elected to take them (or who only took them after turning 65) would have taken them earlier but for United's new interpretation of the Plan. In a footnote, the Employees suggest that "the court could order retroactive benefits using a utilization factor based on an assumption that individual class members would have delayed commencing an unreduced benefit by the average of such delays prior to the cutback, as proposed by [their] expert." Employees' Response Br. and Cross-Appeal at 65 n.20. However this suggestion would play out, the injured class members suffered individualized damages, and this sort of aggregate proceeding violates the ordinary rule that "a class action cannot be certified in

a way that . . . masks individual issues." *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013); *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561, 180 L. Ed. 2d 374 (2011) (rejecting as "abridging a substantive right" the extrapolation of class-based damages from a sample of the class).

The Employees' final argument readily fails. They contend that the District Court should not have dismissed the remaining counts of their complaint as duplicative of the anti-cutback claim because it failed to award them full relief on the anti-cutback count. In other words, they claim that the order granting judgment on the pleadings to United should be reversed for the same reasons that they contend the damages awarded were inadequate. But because the Employees have received the full remedy to which they are entitled, anything more would indeed be duplicative. Thus, the District Court's decision was proper.

VI. United's Pending Motions

There remain two motions pending: United's Motion for Stay of District Court Judgment and its Motion to Strike Part H of the Employees' Brief. The Motion to Stay is denied as moot in light of our disposition of the appeal.

Part H of the Employees' Fourth Step Brief responds to arguments that, they say, were improperly raised in United's Second Step Brief. United is correct that the Employees should not have responded to these arguments by way of a reply brief, but should have either moved for leave to file a sur-reply or moved to strike United's

arguments. *See* Fed. R. App. P. 28.1(c)(4); *USX Corp. v. Liberty Mut. Ins. Co.*, 444 F.3d 192, 201—02 (3d Cir. 2006). The Motion is granted insofar as it attacks all but the last paragraph of Part H, which responds to a letter by United informing us of a non-precedential opinion that the Employees (rightly) argue is irrelevant (like all the other cases brought to our attention by United's six 28(j) letters). For these reasons, all but the last paragraph of Part H is stricken as an impermissible sur-reply filed without leave.

* * * * *

United provided detailed pension plans that clearly explained how to calculate payments owed to those who, like the Employees here, earned accrued benefits and left United before they were eligible to receive them. The Plans' method of calculation did not include an actuarial adjustment for participants who took benefits before turning 65, and ERISA forbids United from drafting those reductions into the Plans whether by amendment, "interpretation," or otherwise. United must pay the Employees what it promised, and thus the careful and thorough judgments of the District Court are affirmed.

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA, DATED MARCH 24, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 09-140 Erie

JOHN COTTILLION, *et al.*, on behalf of themselves
and all others similarly situated,

Plaintiffs,

v.

UNITED REFINING COMPANY, *et al.*,

Defendants.

March 24, 2014, Decided
March 24, 2014, Filed

Judge: Cathy Bissoon, United States District Judge.

Appendix C

MEMORANDUM AND ORDER

I. MEMORANDUM

This matter is before the Court upon the parties' submission of a joint report (Doc. 247) identifying the final composition of the certified class, the payment amounts owed to each member of that class, and any disputes remaining as to either of the foregoing. In addition, the following motions are pending: Plaintiffs' Motion to Clarify the Memorandum and Order Dated November 5, 2013 (Doc. 251); Plaintiffs' Motion to Strike (Doc. 252); Defendants' Cross-Motion for Attorneys' Fees (Doc. 254); and Defendants' Cross-Motion to Substitute Declaration (Doc. 260). For the reasons that follow, each of these motions will be denied. A final class certification order will be issued consistent with this memorandum opinion.

A. BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs John Cottillion ("Cottillion") and Beverly Eldridge ("Eldridge") (collectively, "Plaintiffs") initiated this action on June 12, 2009, alleging, *inter alia*, that Defendants had violated ERISA's anti-cutback provision, § 204(g), 29 U.S.C. § 1054(g)(2). (Doc. 1). On April 8, 2013, Judge Sean J. McLaughlin issued a memorandum opinion and order granting summary judgment in favor of Plaintiffs on their anti-cutback claim. *Cottillion v. United Refining Co.,* 2013 U.S. Dist. LEXIS 49913, 2013 WL 1419705, *1 (W.D. Pa. Apr. 8, 2013). On November 5, 2013, this Court granted Plaintiffs' motion for class certification and certified the following class:

> All terminated vested participants of the United Refining Company Pension Plan for Salaried Employees ("Plan"), who were employed by United Refining Company and vested under either the 1980 or 1987 version of the Plan at any time between January 1, 1987 and March 18, 2003, and their beneficiaries under the Plan.

Cottillion v. United Refining Co., 2013 U.S. Dist. LEXIS 158077, 2013 WL 5936368, *10 (W.D. Pa. Nov. 5, 2013). The Court directed the parties to "meet and confer to determine the final composition of the certified class" and to identify any disputes "as to the composition of the class or the amount of restitution owed to any individual class member." 2013 U.S. Dist. LEXIS 158077, [WL] at *11.

On January 14, 2014, the parties' submitted a joint report outlining their stipulations and disputes concerning final class composition and restitution. (Doc. 247). Specifically, the parties indicated that they had agreed to the following stipulations:

a. The parties stipulate that the 193 individuals listed in Joint Exhibit 1 (and their beneficiaries under the Plan) are members of the certified class; and

b. The parties stipulate to the payment amounts due under the Remedies Order as of December 31, 2013, for the 25 class members that are listed in Joint Exhibit 2.

(Doc. 247 at p. 1). However, the parties could not agree as to whether the following five individuals qualified as members of the certified class: Lisa Feeny, Charles Fields, Raymond Gutshall, Gayle Munson, and Stuart Upton. *Id.* at 2. The parties also disagreed as to the proper restitution amounts for the following five individual class members: Gary Berti, Janice Moore, Home Morrison III, Dennis Tuttle, and Stephen Widmer. *Id.*

B. ANALYSIS

1. Motion for Clarification

"Although no Federal Rule of Civil Procedure specifically governs 'motions for clarification,' these motions are generally recognized and allowed by federal courts." *Barnes v. District of Columbia,* 289 F.R.D. 1, 13 (D.D.C 2012). "The general purpose of a motion for clarification is to explain or clarify something ambiguous or vague, not to alter or amend." *Resolution Trust Corp. v. KPMG Peat Marwick,* 1993 U.S. Dist. LEXIS 16546, 1993 WL 211555, at *2 (E.D. Pa. June 8, 1993).

Here, Plaintiffs seek to "clarify" the Court's November 5, 2013 memorandum and order with respect to the relief awarded to class members who have reached their Early Retirement Date but who have not yet commenced receiving a benefit. The pertinent language in the memorandum stated that Defendants must "provide each class member who has reached their early retirement date with the opportunity to immediately commence receiving an unreduced benefit if they choose to do so." *Cottillion,*

2013 U.S. Dist. LEXIS 158077, 2013 WL 5936368 at *8. The accompanying order similarly provided that, "[w]ith respect to those class members who have reached their early retirement date but have not yet commenced receiving benefits, it is hereby ORDERED that Defendants must provide each class member so situated with the opportunity to immediately elect to commence receiving an unreduced benefit if they choose to do so." 2013 U.S. Dist. LEXIS 158077, [WL] at *11. Plaintiffs urge the Court to interpret this language to require Defendants to provide such class members with an opportunity to immediately commence an *actuarially adjusted* benefit — that is, a benefit that includes an adjustment for the past payments that such class members could have received had they elected to commence receiving benefits at their early retirement date — rather than receiving only prospective relief.

Contrary to Plaintiffs' assertions, there is nothing ambiguous or vague about the Court's order. It simply requires Defendants to provide the class members at issue with the opportunity to begin receiving benefits immediately, even if they had previously elected to wait until a later date. Although Plaintiffs urge the Court to interpret this language to require an adjustment for past benefits that those participants elected not to receive, the Court has already determined that restitution for such class members "would be entirely speculative." *Cottillion,* 2013 U.S. Dist. LEXIS 158077, 2013 WL 5936368 at *8. Consequently, there is nothing to clarify. *See, e.g., Wallace v. Powell,* 2012 U.S. Dist. LEXIS 78688, 2012 WL 2007294, at *1-2 (M.D. Pa. June 5, 2012) (concluding

that clarification of the court's previous order was "unwarranted" where the order stated its determination "clearly and unambiguously"). Plaintiffs' motion is denied.[1]

2. Motion to Strike/Motion to Substitute

Plaintiffs' Motion to Strike addresses the fifth paragraph of a declaration submitted by Robert Kaemmerer, the Plan Administrator, concerning the dates on which the 1987 Plan was amended. (Doc. 252). The original paragraph in Kaemmerer's declaration stated as follows:

> Based upon company records, the 1987 Plan was amended effective January 1, 1995 (the "1995 Plan") and January 1, 2002 (the "2002 Plan"). A corporate resolution adopted both plans in 1995 and 2002. The company applied for tax qualification of both Plans and the Internal Revenue Service issued tax qualification letters. I attach hereto as Exhibits "C," "D," "E," "F," "G," and "H" true and correct copies of the 1995 Plan, the 2002 Plan, the corporate resolution adopting the 1995 Plan, the corporate resolution

1. Defendants request an award of the attorneys' fees that they incurred in responding to Plaintiffs' Motion to Clarify, contending that Plaintiffs' motion was the product of "willful bad faith." (Doc. 254 at p. 13). Although Plaintiffs' motion lacks merit, the Court does not find that it was designed to "multipl[y] the proceedings . . . unreasonably and vexaciously" or that it was the product of bad faith. *See* 28 U.S.C. § 1927. Consequently, Defendants' motion for a fee award is denied.

> adopting the 2002 Plan, and the tax two [sic] qualification letters for both plans respectively.

(Doc. 248 at ¶ 5). Plaintiffs suggest that this portion of Kaemmerer's declaration contains errors and contradicts factual findings already made by the Court. Defendants, in response, have offered (by way of their motion to substitute) to withdraw the offending paragraph and substitute a corrected version. (Doc. 260).

Courts have "considerable discretion in disposing of a motion to strike under Rule 12(f)." *Dela Cruz v. Piccari Press,* 521 F.Supp.2d 424, 428 (E.D. Pa. 2007). In the instant case, the assertions set forth in each version of Kaemmerer's declaration are immaterial to matters now pending before the Court. Each of the documents referenced in Kaemmerer's declaration is already part of the record in this case, and the Court is well aware of the import of those documents and its own previous factual findings. The Court simply has no reason, at this stage in the proceedings, to utilize or rely upon any representation contained in that portion of Kaemmerer's declaration. Consequently, both the motion to strike and the motion to substitute will be denied.

3. Class Composition Disputes

As noted above, the parties disagree as to whether the following five specific individuals should be included as members of the certified class. These individuals will be discussed in turn.

a. Lisa Feeny, Charles Fields, Raymond Gutshall and Stuart Upton

To qualify as a member of the certified class in the instant case, an individual must have vested under either the 1980 or 1987 version of the Plan. *Cottillion*, 2013 U.S. Dist. LEXIS 158077, 2013 WL 5936368 at *10. In order to vest, an individual must have been credited with at least five years of vesting service at the time his or her employment terminated. 2013 U.S. Dist. LEXIS 158077, [WL] at *3. With respect to the four individuals discussed in this subsection, the lone issue in dispute is whether they vested under the 1987 Plan (in which case they would be members of the certified class) or the 2002 Plan (in which case they would not).

By way of background, Feeny, Fields, Gutshall and Upton were hired between May 19, 1997, and December 8, 1997, at which time the 1987 Plan was still in effect. (Doc. 250-1). However, at the beginning of 2002 — around the time that those four individuals were approaching five years of vested service — the company was in the process of amending and restating the Plan. The 2002 Plan was eventually adopted with an effective date of January 1, 2002. (Doc 248-4). As of that date, Feeny, Fields, Gutshall and Upton had not yet accumulated five years of vested service.

In order to maintain the Plan's tax qualified status in light of several new legislative requirements (collectively referred to as "GUST"), Defendants submitted the amended Plan to the IRS seeking a determination that the

Plan was GUST-compliant. (Doc. 143-10). Following the adoption of a handful of mandatory amendments, the Plan received a favorable determination letter from the IRS on March 4, 2003. (Doc. 145-4). A restated Plan with the required amendments was signed on March 18, 2003. *Id.*

During the time between the effective date of the new Plan (January 1, 2002) and the adoption of the final GUST-required amendments (March 18, 2003), Feeny, Fields, Gutshall and Upton each attained five years of vested service. Consequently, in an attempt to bring those individuals within the scope of the certified class, Plaintiffs contend that the 1987 Plan Document remained in effect until March 18, 2003. In support of this position, Plaintiffs cite *Depenbrock v. Cigna Corp.*, 389 F.3d 78 (3rd Cir. 2004), wherein the plaintiff, a pension plan beneficiary, attacked a plan amendment that had been adopted in a manner contrary to the plan's written procedures at the time of its purported effective date. *Id.* at 79. During the interval between the deficient attempt to adopt the amendment and the proper adoption of that amendment a year later, the plaintiff purportedly accrued rights under the older version of the plan. *Id.* at 80. The issue before the Court was whether the company's initial attempt to amend the plan was effective and, if not, whether the subsequent, proper adoption of the amendment had retroactive effect. *Id.* at 81. On review, the Court of Appeals for the Third Circuit resolved each of these issues in favor of the plaintiff, concluding that he was entitled to the benefit that he had accrued between the effective date of the amendment and the formal adoption of that amendment. Plaintiffs here contend that this holding supports the

broader proposition that an amendment to prospectively eliminated or reduce benefits not yet accrued does not take effect until the *later of* the amendment's adoption date or effective date. (Doc. 247 at p. 3) (emphasis in original).

Plaintiffs' argument is misplaced. Unlike *Depenbrock*, Defendants were not attempting to correct a deficiency in the amendment process during the interval between January 1, 2002, and March 18, 2003. Rather, in accordance with well-established IRS procedures, Defendants submitted the amended Plan documents to the IRS for a determination as to the tax-qualified status of the Plan. Under the Internal Revenue Code, this procedure, and any subsequent amendments enacted in order to satisfy IRS requirements, explicitly relate back to the effective date of the original amendment. *See* 26 U.S.C. § 401(b) ("A stock bonus, pension, profit-sharing, or annuity plan shall be considered as satisfying [certain IRS] requirements . . . for the period beginning with the date on which it was put into effect . . ."); 26 C.F.R. § 1.401(b)-1 (providing a remedial period following the adoption of a plan amendment in which the plan may correct provisions that would otherwise affect the plan's tax-qualified status, and providing that those amendments relate back to the original effective date of the original amendment); Rev. Proc. 2002-73 (allowing plans until September 30, 2003 to enact amendments to pre-approved plans in order to comply with GUST). There is no case law to support Plaintiffs' proposition that a plan amendment is not effective until the plan receives an IRS tax qualification letter certifying that the amended plan documents have been approved. *See Faircloth v. Lundy Packing Co.,* 91 F.3d 648, 652-54 (4th Cir. 1996) (concluding that an IRS

determination letter "does nothing to set up or manage" a plan); *Murphy v. Verizon Comms., Inc.*, 2010 U.S. Dist. LEXIS 111122, 2010 WL 4248845, *8 (N.D. Tex. Oct. 18, 2010) (concluding that a "determination letter from the IRS . . . does not establish or manage the plan" or "set out the parties' rights or obligations"). Consequently, the Court concludes that Feeny, Fields, Gutshall and Upton each vested under the 2002 Plan, rather than the 1987 Plan, and are not members of the certified class.

b. Gayle Munson

In order to qualify for a benefit under the 1987 Plan, a beneficiary must be credited with five years of service with a minimum of 1,000 hours of service each year. With respect to Munson, Defendants have supplied a declaration from Kaemmerer, the Plan Administrator, indicating that Munson only reached the 1,000 hour minimum threshold in four of the years that she worked for United Refining. (Doc. 248). Defendants support Kaemmerer's determination with a worksheet indicating that the only years in which Munson worked at least 1,000 hours were 1985, 1986, 1987 and 1988. (Doc. 248-2). In light of this unrebutted evidence, the Court concludes that Munson did not vest under the 1987 Plan and does not meet the requirements of the certified class.

4. Restitution Disputes

Plaintiffs challenge the restitution calculations performed by Defendants with respect to Gary Berti, Janice Moore, Dennis Tuttle, Homer Morrison and

Stephen Widmer. The source of this dispute primarily concerns an annuity contract that the Plan purchased from TransAmerica in 1984. For Plan participants who were employed at United Refining prior to October 1, 1984, a portion of their benefit under the Plan is funded from the TransAmerica annuity, while the remainder is funded from the general assets of the Plan. Plaintiffs speculate that Defendants have miscalculated the restitution amount owed to these individuals by failing to properly account for the portion of the benefit funded by the TransAmerica annuity, resulting in an artificially low unreduced benefit calculation. Specifically, Plaintiffs conjecture that Defendants "appear to have calculated the amount of unreduced benefit payments a class member should have received by dividing the benefit amount actually paid by the reduction factor (based on the class member's age at commencement) that was used to calculate that benefit." (Doc. 247 at p. 9). Plaintiffs supply sample calculations demonstrating that this formula would not result in an accurate unreduced benefits calculation if the value of the TransAmerica annuity is not properly accounted for. *Id.* at 9-10.

Defendants, in response, have supplied a declaration from Thomas DeFilippo, a principal of Towers Watson, the entity that currently serves as the enrolled actuary for the Plan. (Doc. 249). In his declaration, DeFilippo indicates that Plaintiffs' speculation as to the manner in which the TransAmerica annuity is accounted for in the Plan's benefits calculations is unfounded and incorrect. *Id.* at 2. To the contrary, DeFilippo explicitly states

that Defendants' administrative practice has always been to offset the gross benefit amount by the amount of the TransAmerica annuity before calculating the value of the unreduced monthly benefit. *Id.* As such, Defendants are accurately capturing the value of that annuity and reflecting that value in their calculation of the unreduced benefit amount. *Id.* at 3-4. In light of DeFillipo's explanation and his inherent familiarity with the calculation methods commonly utilized by the Plan to determine benefit amounts, the Court will adopt Defendants' calculations with respect to Berti, Moore, Tuttle, Morrison and Widmer.[2]

II. ORDER

Upon consideration of Plaintiffs' Motion for Clarification (Doc. 251), Defendants' Motion for Attorneys' Fees (Doc. 254), Plaintiffs' Motion to Strike (Doc. 252), Defendants' Cross-Motion to Substitute Declaration (Doc. 260) and the parties' Joint Report concerning remedies (Doc. 247), the Court hereby ORDERS the following:

1. Plaintiffs' Motion for Clarification is DENIED.

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2. Plaintiffs additionally contend that Widmer is entitled to a large lump-sum back payment because he chose initially to commence receiving benefits at his early retirement age, only to change his mind upon being informed that his benefit would be actuarially reduced. However, this Court has already held that it would not award monetary relief for participants who elected not to commence receiving benefits. *Cottillion,* 2013 U.S. Dist. LEXIS 158077, 2013 WL 5936368 at *8.

2. Defendants' Motion for Attorneys' Fees is DENIED.

3. Plaintiffs' Motion to Strike is DENIED.

4. Defendants' Motion to Substitute is DENIED.

5. The certified class shall consist of the 193 individuals listed in Joint Exhibit 1 (and their beneficiaries under the Plan).

6. Judgment hereby is entered in favor of each of the individual certified class members listed in Joint Exhibit 2 in the amounts indicated.

7. Judgment hereby is entered in favor of Gary Berti, Janice Moore, Dennis Tuttle, Homer Morrison, and Stephen Widmer in the amounts set forth in the calculations provided by Defendants.

IT IS SO ORDERED.

March 24, 2014

/s/ Cathy Bissoon
Cathy Bissoon
United States District Judge

APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA, FILED NOVEMBER 5, 2013

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 09-140E

JOHN COTTILLION, *et al.*, on behalf of themselves
and all others similarly situated,

Plaintiffs,

v.

UNITED REFINING COMPANY, *et al.*,

Defendants.

November 5, 2013, Decided
November 5, 2013, Filed

Judge Cathy Bissoon

MEMORANDUM AND ORDER

I. MEMORANDUM

For the reasons that follow, Plaintiffs' Motion for Class Certification (Doc. 192) will be granted, Defendants' Motion for Judgment on the Pleadings (Doc. 194) will be

granted, and Plaintiffs' Motion Proposing Final Remedy (Doc. 203) will be granted in part and denied in part.

BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs John Cottillion ("Cottillion") and Beverly Eldridge ("Eldridge") (collectively, "Plaintiffs") are former employees of the United Refining Company ("United Refining") who participate and have vested interests in the United Refining Pension Plan for Salaried Employees ("the Plan"). *See Cottillion v. United Refining Co.,* 2013 U.S. Dist. LEXIS 49913, 2013 WL 1419705, *1 (W.D. Pa. Apr. 8, 2013). Cottillion and Eldridge are referred to by the Plan as "terminated vested participants" because their employment with United Refining ended after they had satisfied the Plan's vesting requirement, but prior to the "Early Retirement Date." *Id.*

Prior to 2005, the Plan administrator consistently interpreted the relevant Plan documents as providing unreduced early retirement benefits for terminated vested participants such as Cottillion and Eldridge. 2013 U.S. Dist. LEXIS 49913, [WL] at *2-4. In 2005, however, the Plan administrator began issuing letters to terminated vested participants informing them that their prior benefits calculations had been incorrect and that their monthly pension amounts should, in fact, have been actuarially reduced. 2013 U.S. Dist. LEXIS 49913, [WL] at *4-6. Consistent with this new interpretation of the Plan, the Plan administrator petitioned the Internal Revenue Service ("IRS") to allow the Plan to recoup the purported overpayments to members of the class. *Id.* Cottillion and

Eldridge responded by filing the instant action asserting: a claim for benefits pursuant to ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B); a claim for declaratory relief under §§502(a)(1)(B), 502(a)(3), 29 U.S.C. §§ 1132(a)(1)(B), 1132(a)(3); a breach of fiduciary duty claim pursuant to § 404, 29 U.S.C. § 1104; and a claim alleging a violation of ERISA's anti-cutback provision, § 204(g), 29 U.S.C. §1054(g)(2).

On April 8, 2013, District Judge Sean J. McLaughlin issued a Memorandum Opinion and Order granting summary judgment in favor of Plaintiffs on their anti-cutback claims and dismissing the remaining claims without prejudice. 2013 U.S. Dist. LEXIS 49913, [WL] at *15. In that Opinion, the Court concluded that the Plan administrator's prior interpretation of the Plan as providing unreduced early retirement benefits had produced an "accrued benefit" within the meaning of ERISA Section 204(g)(2). 2013 U.S. Dist. LEXIS 49913, [WL] at *12 (citing 29 U.S.C. § 1054(g)(2)). Consequently, according to Judge McLaughlin, the Plan administrator's reinterpretation of the Plan in 2005 and 2006 to eliminate that benefit ran afoul of ERISA's anti-cutback rules. *Id.*

Plaintiffs now seek to certify a class consisting of all terminated vested participants who, like Cottillion and Eldridge, vested under either the 1980 or 1987 Plan Documents and accrued a right to unreduced early retirement benefits. The putative class consists of approximately 30 individuals who, like Cottillion, already have begun receiving unreduced monthly benefits, and approximately 150 individuals who, like Eldridge, have

not yet elected to commence receiving benefits payments. *See* Libman Report (Doc. 203-1). Plaintiffs also seek to clarify and reduce to final judgment those remedies appropriately flowing from Judge McLaughlin's summary judgment ruling. For their part, Defendants oppose each of the instant Motions and further request that the Court dismiss with prejudice the three counts of the Amended Complaint that Judge McLaughlin declined to reach.

ANALYSIS

A. Motion for Class Certification

Pursuant to Federal Rule of Civil Procedure 23, Plaintiffs have moved to certify the following settlement class:

> All terminated vested participants in the United Refining Company Pension Plan for Salaried Employees ("Plan"), who were employed by United Refining Company at any time between January 1, 1987 and March 18, 2003, and their beneficiaries under the Plan.

See Plaintiffs' Motion for Class Certification (Doc. 192).

In order to warrant certification, a class action proponent must satisfy the threshold requirements of Fed. R. Civ. P. 23(a) and demonstrate that the action is maintainable under one of the subsections of Rule 23(b). Rule 23(a) provides that:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). These four threshold requirements commonly are referred to as numerosity, commonality, typicality and adequacy of representation. *See, e.g., Bernhard v. TD Bank,* 2009 U.S. Dist. LEXIS 92308, 2009 WL 3233541, *3 (D. N.J. 2009).

1. Numerosity

The first element, numerosity, requires that "the class be so numerous that joinder of all class members is impracticable." Rule 23(a)(1). While there is no talismanic number required to satisfy numerosity, courts typically have held that classes of around 40 or more members are sufficient. *See Stewart v. Abraham,* 275 F.3d 220, 226-27 (3d Cir. 2001) ("Generally, if the named plaintiff demonstrates that the potential number of plaintiffs exceed 40, the first prong of Rule 23(a) has been met."); *see also* Moore's Federal Practice ¶ 23.05[1], at 23-150 (1982) ("[W]hile there are exceptions, numbers in excess of forty, particularly those exceeding one hundred or one thousand have sustained the [numerosity] requirement."). Here,

the class proposed by Plaintiffs includes approximately 178 proposed members, a number sufficient to meet the requirements of numerosity.

2. Commonality

The element of commonality is satisfied if "the class members have suffered the same injury and . . . the claim depends upon a common contention that is capable of class-wide resolution." *See Savani v. Washington Safety Mgmt. Solutions, LLC,* 2012 U.S. Dist. LEXIS 121687, 2012 WL 3757239, *3 (D. S.C. Aug. 28, 2012) (*citing Wal-Mart Stores, Inc. v. Dukes,* -- U.S. --, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)). In *Wal-Mart*, the United States Supreme Court addressed the commonality requirement in the context of a sex discrimination suit alleging that 1.5 million current and former female employees of Wal-Mart stores had been systematically disfavored for promotions and pay as compared to male co-employees. *Id.* at 2547. The Court held that the commonality requirement had not been satisfied because, although each female employee generally alleged that she had not been promoted because of her gender, the plaintiffs had failed to demonstrate that the allegedly discriminatory employment decisions were "glued" together by "[s]ignificant proof that [the] employer operated under a general policy of discrimination." *Id.* at 2553 (*quoting Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 159 n.15, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)). The Court emphasized that "[w]hat matters to class certification . . . is not the raising of common 'questions' — even in droves — but, rather the capacity of a classwide proceeding to generate common answers apt to drive the

resolution of the litigation." *Id.* at 2551 (*quoting* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. Rev. 97, 132 (2009)). In other words, the common contention shared by the putative class must be such that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

In the instant case, the Court concludes that a single common policy — the "cutback" — binds each of the putative class members' claims together. Prior to 2005, each member of the putative class was uniformly instructed that they would receive unreduced early retirement benefits upon reaching their early retirement date if they elected to enter into pay status at that time. When the Plan altered its position and announced that early retirement benefits should have been actuarially reduced, that decision also was universally applied to each putative class member in precisely the same fashion. Although the particular harm suffered by each Plaintiff as a result of that decision varies, the source of that harm — the legal determination by the Plan that the provision of unreduced benefits had been in error — is the same for each Plaintiff. Unlike in *Dukes*, there is no suggestion in the record that individual departments, units, managers or plan administrators determined, on an individualized basis, whether or not a particular plaintiff was entitled to unreduced benefits. Rather, this lawsuit targeted a single decision that was universally applied and affected each putative class member in the same fashion.

Defendants heavily contest the commonality and typicality elements, noting the existence of several distinctions which, in their view, counsel against class certification. For example, they note that there are two versions of plan documents at issue (1980 and 1987), that one group of Plaintiffs (represented by Cottillion) has entered into pay status while another (represented by Eldridge) has not, and that various Plaintiffs might be subject to unique defenses (such as exhaustion). Each of these is insufficient to render the class unviable. As an initial matter, with respect to exhaustion, Judge McLaughlin already held that each Plaintiff was excused from exhausting their claims because it would be futile to do so. *Cottillion*, 2013 U.S. Dist. LEXIS 49913, 2013 WL 1419705 at *14-15. Moreover, Judge McLaughlin granted summary judgment in favor of *both* named Plaintiffs despite the fact that Cottillion had vested under the 1980 Plan and had already entered pay status, while Estridge had vested under the 1987 Plan and had not yet begun to receive benefits payments. This holding provided the "common answer" required by *Dukes* to "drive the resolution of the litigation" by binding Plaintiffs together in a single class. *See id.* at 2551. In light of the common legal and factual issues between proposed class members, the element of commonality is satisfied here.

Recent caselaw concerning ERISA's anti-cutback provision supports this conclusion. In *Savani*, for example, the district court addressed the commonality requirement in the context of an anti-cutback claim as follows:

> Rule 23(a)(2) requires that the resolution of common questions affect all or a substantial number of the class members. *See Brown v. Nucor Corp.*, 576 F.3d 149, 153 (4th Cir. 2009). As the Supreme Court recently clarified, in order to satisfy the commonality requirement, the plaintiff must demonstrate that the class members have suffered the same injury and that the claim depends upon a common contention that is capable of class-wide resolution. *See Wal—Mart Stores, Inc. v. Dukes*, -- U.S. --, 131 S. Ct. 2541, 180 L.Ed.2d 374 (2011).
>
> All of the claims of the [c]lass members arose from the same acts and conduct of [the d]efendants, namely [their] elimination of § 4.12(a) early retirement supplemental benefits. The theory of liability of each member is identical, *i.e.* [the d]efendants violated the . . . ERISA anti-cut back rule. 29 U.S.C. § 1054(g). The parties do not dispute that [the p]laintiffs' claim fulfills the commonality requirement. The court finds that the issue of whether there was a denial of supplemental benefits in violation of the anti-cut back rule is a common question of law applicable equally to [the p]laintiffs and all members of the [c]lass and [s]ubclass.

Savani, 2012 U.S. Dist. LEXIS 121687, 2012 WL 3757239, *3. Similarly, in *Mezyk v. U.S. Bank*, 2011 U.S. Dist. LEXIS 13857, 2011 WL 601653 (S.D. Ill. Feb. 11, 2011), the district court reached the same conclusion:

> There is clearly a common nucleus of operative facts and law at issue with respect to the putative classes. The [p]lan has engaged in a standardized course of conduct toward all members of the proposed classes by calculating the opening cash balance of each putative class member's account using the methodology set forth in the [p]lan. With respect to each calculation made under the same methodology, the legal issue is whether using this methodology complied with the anti-cutback and anti-discrimination provisions of ERISA.

Mezyk, 2011 U.S. Dist. LEXIS 13857, 2011 WL 601653 at *6; *see also Barnes v. AT&T Pension Benefit Plan,* 273 F.R.D. 562, 569-70 (N.D. Cal. 2011) (allowing plaintiffs to amend the class definition in an anti-cutback case to include deferred annuitants in a class composed of lump-sum benefit recipients because defendant's construction of the plan documents was identical with respect to each group); *Titus v. Burns & McDonnell, Inc. Employee Stock Ownership Plan,* 2010 U.S. Dist. LEXIS 94840, 2010 WL 3713666, *3 (W.D. Mo. Sept. 13, 2010) (certifying a class in an anti-cutback case because "[a]ll potential class members were ESOP participants whose ESOP accounts were affected by the [alleged cutback]"); *Pender v. Bank of America Corp.,* 269 F.R.D. 589, 597 (W.D. N.C. Aug. 25, 2010) (finding commonality in an anti-cutback case based on the prevalence of issues common to the entire class).

3. Typicality

Somewhat overlapping the commonality requirement, the typicality element assesses whether "the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented." *Baby Neal v. Casey,* 43 F.3d 48, 56 (3d Cir. 1994). Typicality requires an inquiry into whether "the named plaintiff's individual circumstances are markedly different or . . . the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based." *Id.* at 57 (*quoting Hassine v. Jeffes,* 846 F.2d 169, 177 (3d Cir. 1988)). Although they are distinct factors under Rule 23(a), courts have noted that "[t]he concepts of commonality and typicality are broadly defined and tend to merge." *Id.* at 56. Thus, as with commonality, "even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories." *Id.* at 57 (citing *De La Fuente v. Stokely-Van Camp, Inc.,* 713 F.2d 225, 232 (7th Cir. 1983)). As discussed above, the legal theories shared between Plaintiffs and the prospective class members are identical, and there is nothing to indicate that the named Plaintiffs' interests are inconsistent with those of the prospective class. Thus, the typicality requirement is satisfied.

4. Adequacy of Representation

The final Rule 23(a) element, adequacy of representation, encompasses "two distinct inquiries designed to protect the interests of absentee class members." *In re Prudential*

Ins. Co. America Sales Practice Litigation Agent Actions, 148 F.3d 283, 312 (3d Cir. 1998). Specifically, the adequacy of representation inquiry "tests the qualifications of the counsel to represent the class" and "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Id.* (*quoting In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.,* 55 F3d 768, 800 (3d Cir. 1995) *and Amchem Prods. v. Windsor,* 521 U.S. 591, 594, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)). Based upon the qualifications set forth in Exhibit 1 to Plaintiffs' Motion for Class Certification (*see* Doc. 191-1), the Court concludes that class counsel is sufficiently qualified and experienced to represent the proposed class throughout this litigation.[1] Moreover, as discussed above, Cottillion and Eldridge share an identical interest with the proposed class members in correcting the anti-cutback violation that resulted from Defendants' decision to actuarially reduce their accrued early retirement benefits. *See, e.g., Mezyk,* 2011 U.S. Dist. LEXIS 13857, 2011 WL 601653, *7 (concluding that plaintiffs were adequate class representatives because they "possess[ed] the same interest and suffer[ed] the same injury as the class members") (*quoting East Tex. Motor Freight Sys., Inc. v. Rodriguez,* 431 U.S. 395, 403, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977)). As such, the Court concludes that Plaintiffs are adequate class representatives.

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1. Defendants do not contest the adequacy of class counsel's qualifications. *See* Defendants' Memorandum in Opposition to Plaintiffs' Motion for Class Certification (Doc. 210) at 9.

5. Rule 23(b) Requirements

In addition to satisfying numerosity, commonality, typicality and adequacy of representation, a proposed class action suit also must satisfy one of the three Rule 23(b) subsections. Rule 23(b) provides:

(b) A class action may be maintained if Rule 23(a) is satisfied and if:

> (1) prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the class members predominate over any questions affecting only individual

> members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Fed. R. Civ. P. 23(b). Here, Plaintiffs primarily seek certification of a mandatory class under sub-parts (b)(1) and/or (b)(2). *See* Fed. R. Civ. P. 23(c)(2).

Rule 23(b)(1) is satisfied where separate actions by or against individual class members would risk establishing incompatible standards of conduct for party opposing the class or where individual adjudication would prejudice the class members themselves. *See* Fed. R. Civ. P. 23(b)(1); *Savani,* 2012 U.S. Dist. LEXIS 121687, 2012 WL 3757239, *4 (*citing Zimmerman v. Bell,* 800 F.2d 386, 389 (4th Cir. 1986)). Application of this sub-section is most appropriate where the defendant is obligated to treat all members of the class alike as a matter of law or other necessity. *See Amchem,* 521 U.S. at 614. As such, certification pursuant to Rule 23(b)(1) is "especially helpful in ERISA cases where a defendant provides unitary treatment to all members of a putative class and where litigation of some class members' rights could be implicated in suits brought by other class members." *Mezyk,* 2011 U.S. Dist. LEXIS 13857, 2011 WL 601653, *9 (*citing Thomas v. SmithKline Beecham Corp.,* 201 F.R.D. 386, 396-97 (E.D. Pa. 2001)); *Savani,* 2012 U.S. Dist. LEXIS 121687, 2012 WL 3757239, *4 (noting that "ERISA cases where plaintiffs challenge the computation of benefits are often certified under Rule 23(b)(1)(A)"); *Pender,* 269 F.R.D. at 598 (same).

In the instant case, it is clear that inconsistent adjudications with respect to different class members would establish incompatible standards of conduct for the Plan. For example, if relief were granted in favor of some terminated vested participants and not others, the Plan would be faced with the impossible task of distributing benefits to similarly situated plan participants pursuant to two conflicting standards. In order to avoid this impracticality and establish a single standard of conduct, consistent with the underlying goals of ERISA, class certification pursuant to Rule 23(b)(1) is appropriate. *See, e.g.*, *Thomas,* 201 F.R.D. 386, 396-97 (noting that ERISA obligates plan administrators to provide uniform treatment to similarly situated plan participants); *Mezyk,* 2011 U.S. Dist. LEXIS 13857, 2011 WL 601653, *9 (same).

Certification similarly is warranted pursuant to Rule 23(b)(2) because "defendant's conduct . . . was generally applicable to the class and . . . final injunctive or declaratory relief with respect to the entire class [is] the appropriate remedy." *Mezyk,* 2011 U.S. Dist. LEXIS 13857, 2011 WL 601653, *9 (*citing Retired Chicago Police Ass'n v. City of Chicago,* 7 F.3d 584, 596 (7th Cir. 1993)). Courts routinely have certified classes pursuant to this sub-section where, as in the instant case, an ERISA plan administrator makes a uniform decision about administering the Plan as it applies to the putative class members. 2011 U.S. Dist. LEXIS 13857, [WL] at *9-10; *see also Pender,* 269 F.R.D. at 599 (certifying a class pursuant to Rule 23(b)(2) where the plan administrator imposed an improper method of calculating benefits upon the entire class and where the appropriate remedy consisted primarily of declaratory relief).

In sum, Plaintiffs have satisfied all four provisions of Rule 23(a) and two provisions of Rule 23(b). Consequently, the Court concludes that certification of a mandatory class pursuant to Rule 23 is appropriate. However, in order to more accurately reflect the scope of Judge McLaughlin's prior summary judgment motion, the class definition should be amended to include:

> All terminated vested participants in the United Refining Company Pension Plan for Salaried Employees ("Plan"), who were employed by United Refining Company [and vested under either the 1980 or 1987 version of the Plan] at any time between January 1, 1987 and March 18, 2003, and their beneficiaries under the Plan.

See Plaintiffs' Motion for Class Certification (Doc. 192).

B. Remedy

Having determined that class certification is warranted, the Court now turns to the issue of remedy. In their Motion Proposing Final Remedy, Plaintiffs essentially seek three types of relief. First, they seek a declaratory judgment stating that all class members have accrued an unreduced early retirement benefit under the 1980 or 1987 Plan Document and that Defendants' attempt to actuarially reduce this benefit violated ERISA. Similarly, they request that Defendants be enjoined from applying the improper actuarial reduction to any future payments of their early retirement benefits. Finally, for those class members who already have reached their early

retirement date, they seek monetary reimbursement in the form of equitable restitution and/or surcharge in order to restore the pension benefits that Defendants wrongfully withheld.

ERISA § 502(a)(3) authorizes a plan participant to bring a civil action "to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan" and to obtain other appropriate equitable relief . . . to redress such violations or [] to enforce . . . the terms of the plan." 29 U.S.C. § 1132(a)(3). It is well-established that § 502(a)(3)'s reference to "equitable relief" refers to "those categories of relief that were typically available in equity." *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 209-10, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2002). Such remedies include injunction, mandamus, restitution, surcharge, reformation and equitable estoppel. *Mertens v. Hewitt Assoc.,* 508 U.S. 248, 257, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993); *CIGNA Corp. v. Amara,* -- U.S. --, 131 S. Ct. 1866, 1878, 179 L. Ed. 2d 843 (2011).

As an initial matter, Plaintiffs' request for declaratory and injunctive relief is readily granted. Such relief is well within the scope of available remedies under ERISA § 502(a)(3) and clearly is supported by the summary judgment ruling previously issued by Judge McLaughlin. *See, e.g., Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 53, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987) (stating that available relief under ERISA § 502(a)(3) includes "a declaratory judgment on entitlement to benefits" and "an injunction against a plan administrator's improper refusal to pay benefits"); *Cottillion,* 2013 U.S. Dist. LEXIS 49913,

2013 WL 1419705, *12-14 (concluding that Plaintiffs had established an accrued right to unreduced early retirement benefits and that Defendants' attempt to reduce that accrued right amounted to an anti-cutback violation); *see also Pell v. E.I. Dupont De Nemours & Co. Inc.*, 539 F.3d 292, 305-08 (3d Cir. 2008) (affirming an injunction that required defendant to use a specific service date to re-calculate and pay pension benefits going forward); *In re Unisys Corp., Retiree Medical Benefit "ERISA" Litig.*, 57 F.3d 1255, 1269 (3d Cir. 1995) (upholding an injunction restoring future benefits under an ERISA plan).

With respect to monetary relief, Plaintiffs seek reimbursement for employees who fall into several different groups. First, for those employees, such as Cottillion, who reached early retirement age and began receiving early retirement benefits prior to the cutback, all parties agree that equitable restitution and/or surcharge is appropriate in the amount of the difference between the unreduced benefits they should have been paid and the amount of the benefits payments they actually received, plus interest.[2]

For employees such as Eldridge, who have reached their early retirement age but have not yet applied for benefits, Plaintiffs seek monetary relief based upon their contention that each of these class members would have elected to commence receiving benefits upon reaching age 591/2 had the Plan not improperly informed them that

2. The Court's determination as to the appropriate interest rate is set forth below.

those benefits would be actuarially reduced. *See* Libman Report ¶¶ 10-11. According to Plaintiffs, "there is no economic incentive for a terminated vested participant to delay commencing an unreduced monthly benefit past his or her Early Retirement Date." *See* Plaintiff's Brief in Support of Motion Proposing Final Remedy (Doc. 203) at 12; Libman Report ¶ 11. Consequently, Plaintiffs contend that this group of individuals is entitled to compensation for the benefits that were wrongfully withheld from them, despite that they each elected not to commence receiving any benefits at that time. In the alternative, Plaintiffs request that Defendants be ordered to send an election form to each of these class members giving them the option to "immediately commence a benefit that is actuarially equivalent to the unreduced benefit they should have been eligible to receive at their Early Retirement Date, or . . . wait and receive the same benefit amount at age 65." *See* Plaintiff's Reply Brief (Doc. 219) at 10.

On balance, the Court concludes that an award of monetary relief for this group of participants would be entirely speculative. As noted by Defendants, Plaintiffs have failed to supply any evidence indicating that any or all of those class members elected not to commence receiving benefits on the basis of the cutback. Plaintiffs' position further is undermined by the fact that several of the plan participants within this group failed to apply for benefits even upon reaching age 65, at which time they would have been entitled to non-actuarially reduced benefits under any interpretation of the Plan. Rather than award restitution based upon the supposition of Plaintiffs' expert, the Court will adopt Plaintiffs' alternative request and

order Defendants to provide each class member who has reached their early retirement date with the opportunity to immediately commence receiving an unreduced benefit if they choose to do so.

Finally, with respect to those employees who vested under the 1980 or 1987 version of the Plan but have not yet reached their early retirement date, the declaratory and injunctive relief awarded herein is sufficient. There is no need for the Court to direct specific payment amounts for such members when the Plan is perfectly capable of calculating their early retirement benefits, consistent with the language of the declaratory judgment order, at the time that those class members become eligible to commence receiving benefits.

One final issue pertaining to remedy concerns the appropriate rate of interest. It is well-settled that "interest is presumptively appropriate when ERISA benefits have been delayed." *Fotta v. Trustees of the UMWA Health & Retirement Fund,* 165 F.3d 209, 214 (3d Cir. 1998). Apropos to the instant dispute, Section 1.2 of the governing Plan Document provides that, when comparing two or more benefits under the Plan, "the assumed interest rate shall be seven and one-half percent (7-1/2%), compounded annually." *See* Defs.' Ex. D (Doc. 215-04) at § 1.2. The Plan administrator utilized this 7.5% interest rate in the Plan's 2006 submission to the IRS to calculate the amount that the Plan intended to recoup from those terminated vested participants who allegedly had been overpaid prior to the cutback. *See* Libman Report ¶¶ 6-7. Plaintiffs suggest that the same rate should be utilized

when returning those improperly recouped benefits to the affected Plan participants.

Defendants respond that the appropriate interest rate is the lesser one set forth in Section 1.2(c)(i) of the governing Plan Document. That section provides that, in situations where "single-sum cash settlements" are made pursuant to "Sections 6.6 and 11.6" of the Plan, the "annual rate of interest on 30-year Treasury securities as specified by the Internal Revenue Service . . . for the second month preceding the Plan Year in which the distribution is made" should be utilized. *See* Defs.' Ex. D (Doc. 215-04) at § 1.2(c)(i). Application of subsection 1.2(c)(i) would result in an interest rate of approximately 3.7%. *See* Altman Decl. (Doc. 212) ¶ 11.

After reviewing each of the pertinent subsections, the Court concludes that a rate of 7.5% is appropriate. Although the plain language of Section 1.2 would appear, by its own terms, to apply only when determining whether "two or more benefits" are of "equivalent value as determined actuarially," Defendants, in their corrective submission to the IRS, explained that "Plan Section 1.2 provides that a rate of 7.5% will be used when no other rate is specified." *See* Ex. C to IRS Submission (Doc. 203-4) at 3. Neither of the sections cross-referenced in Section 1.2(c)(i) concern the calculation of restorative payments to correct an improper benefit reduction; rather, section 6.6 addresses lump sum payments to participants who hold very small retirement accounts, and Section 11.6 addresses lump sum payments to participants in the event that the Plan is terminated. *See* Defs.' Ex. D (Doc. 215-04)

at §§ 6.6, 11.6. Consequently, the 7.5% default rate that applies "when no other rate is specified" is the appropriate rate here. *See* Ex. C to IRS Submission (Doc. 203-4) at 3. Indeed, as noted by Plaintiffs, it would be inequitable for Defendants to apply the 7.5% rate when attempting to recoup perceived overpayments to beneficiaries, but apply a much smaller rate when forced to restore those wrongfully recovered amounts.

C. Motion for Judgment on the Pleadings

In Judge McLaughlin's summary judgment Order, the Court held that "Plaintiffs' anti-cutback claim provides a full and complete remedy for the violations alleged in the Amended Complaint." *Cottillion,* 2013 U.S. Dist. LEXIS 49913, 2013 WL 1419705, *15. As such, the Court found it "unnecessary to address the alternate theories of recovery advanced in the Amended Complaint" and dismissed each of those remaining claims without prejudice. *Id.* Defendants now seek judgment on the pleadings and dismissal with prejudice as to each of those unaddressed claims.

By way of background, Count I of the Amended Complaint asserted a claim for benefits under ERISA Section 502(a)(1)(B). Count II asserted a claim for declaratory relief pursuant to ERISA Sections 502(a)(1)(B) and 502(a)(3). Count III asserted a claim for breach of fiduciary duty pursuant to ERISA Section 502(a)(3). With respect to each, Plaintiffs sought the same relief that they are entitled to receive pursuant to their anti-cutback claim, namely, a declaratory judgment and injunction

establishing their right to unreduced early retirement benefits, and monetary relief in the form of restitution and/or surcharge.

It is well-settled that an ERISA plaintiff may not receive duplicative relief under both Section 502(a)(3) and Section 502(a)(1)(B). *See, e.g., Varity Corp. v. Howe,* 516 U.S. 489, 515, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996); *Mondry v. Am. Family Mut. Ins. Co.,* 557 F.3d 781, 805 (7th Cir. 2009) (noting that "a majority of the circuits" have interpreted *Varity* as holding that "if relief is available to a plan participant under subsection (a)(1)(B), then that relief is unavailable under subsection (a)(3)"); *Twomey v. Delta Airlines Pilots Pension Plan,* 328 F.3d 27, 32 (1st Cir. 2003); *Frommert v. Conkright,* 433 F.3d 254, 269 (2d Cir. 2006) (same), *rev'd on other grounds*, 559 U.S. 506, 130 S. Ct. 1640, 176 L. Ed. 2d 469 (2010). Pursuant to this Memorandum and Order, Plaintiffs will receive full and complete relief for the violations alleged in the Amended Complaint. Consequently, any relief that could be awarded pursuant to Counts I-III would be entirely redundant and duplicative. Those claims, therefore, will be dismissed with prejudice.

Consistent with the foregoing, the Court enters the following:

II. ORDER

It is hereby ORDERED that:

A. Plaintiffs' Motion for Class Certification (**Doc. 192**) is **GRANTED**. The following litigation class is certified pursuant to Federal Rule of Civil Procedure 23(a) and 23(b)(1) and (b)(2):

> All terminated vested participants in the United Refining Company Pension Plan for Salaried Employees ("Plan"), who were employed by United Refining Company and vested under either the 1980 or 1987 version of the Plan at any time between January 1, 1987 and March 18, 2003, and their beneficiaries under the Plan.

B. The Court hereby approves Plaintiffs John Cottillion and Beverly Eldridge as representative plaintiffs of the class pursuant to Rule 23(a)(3) and (a)(4).

C. The Court hereby appoints Tybe A. Brett, Ellen M. Doyle, Joel R. Hurt, and Feinstein Doyle Payne & Kravec, LLC as class counsel pursuant to Rule 23(g).

D. Plaintiffs' Motion Proposing Final Remedy (**Doc. 203**) is **GRANTED IN PART AND DENIED IN PART**, as set forth below.

E. Consistent with the Memorandum Opinion and Order issued by Judge Sean J. McLaughlin on April 8, 2013 (Doc.186), it is hereby declared that all members of the certified class had accrued an unreduced early retirement benefit under the 1980 and/or 1987 Plan Document and that Defendants' reinterpretation of the 1980 and 1987 Plan Documents in 2005 and 2006 as providing an actuarially reduced early retirement benefit violated the anti-cutback rules contained in ERISA § 204(g), 29 U.S.C. § 1054(g).

F. Defendants are enjoined from applying any actuarial reduction for early commencement to the unreduced early retirement benefits that class members accrued under the 1980 and/or 1987 Plan Documents.

G. With respect to those class members who have reached their early retirement date and have commenced receiving their benefits, judgment is entered for the difference between the amount of the unreduced benefit payments they should have been paid and the amount of the benefit payments they actually received, plus interest at 7.5 percent. The parties are directed to meet and confer to agree upon payment amounts for each of these class members and submit those amounts to the Court by ***December 6, 2013***.

H. With respect to those class members who have reached their early retirement date but have not yet commenced receiving benefits, it is hereby **ORDERED** that Defendants must provide each class member so situated with the opportunity to immediately elect to commence receiving an unreduced benefit if they so choose.

I. The parties are ordered to meet and confer to determine the final composition of the certified class. The parties shall file a joint stipulation to the Court, by ***December 6, 2013***, identifying the final composition of the class. Any disputes as to the composition of the class or the amount of restitution owed to any individual class member shall be submitted, in a joint report to the Court, by ***December 6, 2013***.

J. Defendants' Motion for Judgment on the Pleadings (**Doc. 194**) is **GRANTED**, and Counts I, II and III of the Amended Complaint are **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

November 5, 2013

/s/ Cathy Bissoon
Cathy Bissoon
United States District Judge

APPENDIX E — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA, FILED APRIL 8, 2013

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN COTTILLION, *et al.*, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

UNITED REFINING COMPANY, *et al.*,

Defendants.

C.A. No. 09-140 Erie
District Judge McLaughlin

MEMORANDUM OPINION

McLAUGHLIN, SEAN J., J.

On June 12, 2009, Plaintiffs John Cottillion and Beverly Eldridge filed this putative class action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, against United Refining Company, the United Refining Company Salaried Employees Pension Plan, and the Retirement Committee responsible for administering the Plan. On October 26,

2009, Plaintiffs filed an amended complaint wherein they assert (1) a claim for benefits pursuant to ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), (2) a claim for declaratory relief pursuant to ERISA §§502(a)(1)(B), 502(a)(3), 29 U.S.C. §§ 1132(a)(1)(B), 1132(a)(3), (3) breach of fiduciary duty pursuant to ERISA § 404, 29 U.S.C. § 1104, and (4) a violation of ERISA's anti-cutback provision, §204(g), 29 U.S.C. §1054(g)(2). Now pending before the Court are Plaintiffs' Motion for Summary Judgment on Counts I, II and IV [Dkt. 138], Defendants' Motion for Summary Judgment [Dkt. 153], and Plaintiffs' Motion to Strike Expert Reports and Testimony [Dkt. 167]. Each of these motions is fully briefed and ripe for review.

I. BACKGROUND

The following facts are undisputed, unless otherwise noted. Plaintiff John Cottillion ("Cottillion") was employed by the United Refining Company ("United Refining") from December 27, 1960 to April 21, 1989. (Pl. Ex. 1, Answer, ¶ 32; Pl. Ex. 2, Kaemmerer Decl., ¶ 4).[1] Plaintiff Beverly Eldridge was employed by United Refining from July 20, 1987 to December 6, 1996. (Pl. Ex. 1, Answer, ¶ 51; Pl. Ex. 2, Kaemmerer Decl., ¶ 3; Defendant's Response to Concise Statement, ¶ 3). Both Cottillion and Eldridge participated in the United Refining Pension Plan for Salaried Employees ("the Plan"), a pension plan sponsored and funded exclusively by United Refining for its employees. (Pl. Ex. 1, Answer, ¶¶ 1, 32). Because

1. Citations to "Pl. Ex." refer to the exhibits contained in Plaintiffs' Appendix in Support of Summary Judgment. Defendant's exhibits are cited herein as "Def. Ex."

Cottillion and Eldridge each ended their employment with United Refining after satisfying the Plan's vesting requirement, but prior to the "Early Retirement Date" specified by the Plan, they fall into a category referred to as "terminated vested participants."

The "Named Fiduciary" and "Administrator" of the Plan is the United Refining Company Retirement Committee ("Retirement Committee"). (Pl. Ex. 4, 1980 Plan Document § 13.01; Pl. Ex. 6, 1987 Plan Document § 14.01; Pl. Ex. 7, 1995 Plan Document § 7.1; Pl. Ex. 8, 2002 Plan Document § 7.1). From May 3, 1988 to January 1, 2009, the Retirement Committee consisted of Lawrence Loughlin, Myron Turfitt, and John Catsimatidis, with Loughlin, the Secretary of the Retirement Committee, serving as the Plan's day-to-day administrator. (Pl. Ex. 9; Pl. Ex. 10, Loughlin Decl., ¶ 2; Pl. Ex. 4, 1980 Plan § 13.01; Pl. Ex. 6, 1987 Plan, § 14.01; Pl. Ex. 7, 1995 Plan § 7.1).

At the time of Cottillion's retirement, the Plan was governed by a document styled "United Refining Company Pension Plan for Salaried Employees as Amended and Restated Effective June 30, 1980 (the "1980 Plan Document"). (Pl. Ex. 4, 1980 Plan Document). Section 4.01 of the 1980 Plan Document defined a participant's "Normal Retirement Date" as "the first day of the month coincident with, or next following his 65th birthday." Section 4.02 defined a participant's "Early Retirement Date" as "the first day of the month coincident with or following his 60th birthday and his completion of 10 years of Vesting Service, provided that he informs the Committee at least three months prior to such Early Retirement Date of his intention to retire early."

Article VII of the 1980 Plan Document addressed termination from employment. Specifically, Section 7.01 provided that "[i]f a participant's employment shall terminate prior to his Normal Retirement Date or an Early Retirement Date, for any reason other than death, he shall be entitled to a deferred vested Retirement Income if he is credited with at least ten (10) years of Vesting Service at the time of his employment termination." (Pl. Ex. 4, 1980 Plan Document, § 7.01). Section 7.02 provided that "[t]he amount and time of commencement of a deferred vested Retirement Income to a participant who satisfies the requirements of Section 7.01 shall be determined in accordance with the provisions of Section 5.03, based on the Participant's Benefit Service and Average Compensation at the time of employment termination." The cross-referenced section, Section 5.03, stated:

> A Participant who retires on an Early Retirement Date may elect to receive one of the following:
>
> > (a) His Accrued Retirement Income computed as of his Early Retirement Date commencing at the end of the month in which his Normal Retirement Date would have occurred.
> >
> > (b) A reduced amount of Retirement Income to begin at the end of the month in which his Early Retirement Date occurs, computed so as to be a percentage of the benefit provided

> for him under paragraph (a) of this Section 5.03, in accordance with the following table. . .

(Section 5.03). The table accompanying Section 5.03 specified a "100.0%" benefit for retirees who started collecting benefits zero, one, two or three years prior to their Normal Retirement Date, a "93.3%" benefit for participants four years prior to Normal Retirement Date, and an "86.7%" benefit for participants five years prior to Normal Retirement Date. (*Id.*) Consistent with this language, letters sent from United Refining to terminated vested participants during this time period informed them that any reduction in expected benefits prior to the participant's Normal Retirement Date "appl[y] to ages 60 and 61 only."

Effective July 1, 1987, United Refining adopted "Amendment No. 5" which amended the 1980 Plan Document by, *inter alia*, reducing the Vesting Service requirement for a terminated vested participant to five years and amended Section 5.03 to read: "A participant who retires on an Early Retirement Date will receive his Accrued Retirement Income computed as of his Early Retirement Date commencing at the end of the month in which his Early Retirement Date occurs." (Pl. Ex. 5, Amendment No. 5 to 1980 Plan Document, ¶ 4). Following the adoption of Amendment No. 5, United Refining communicated with terminated vested participants to inform them that they could elect to have their full retirement benefit begin without reduction at any time after their Early Retirement Date. (Pl. Ex. 24, 5/13/88

Letter to Frederick Hane). Consequently, when Cottillion terminated his employment with United Refining in 1989, the company sent him a letter informing him that he could elect to receive his full retirement benefit - $573.70 -- following his Early Retirement Date in October, 1995, "at age 60." (Pl. Ex. 25, 8/7/89 Letter to Cottillion; Pl. Ex. 26, Cottillion Application for Benefits). From November, 1995 through June, 2006, Cottillion received his full monthly benefit each month without any actuarial reduction for early retirement. (Pl. Ex. 14, Cottillion Depo., pp. 117-118; Pl. Ex. 46, 6/15/06 Letter to Cottillion).

On December 28, 1994, United Refining adopted a restated plan document, effective January 1, 1987, entitled "United Refining Company Pension Plan for Salaried Employees as Amended and Restated Effective January 1, 1987" (the "1987 Plan Document"). (Pl. Ex. 6, 1987 Plan Document). The 1987 Plan Document provided that, "[i]f a Participant's employment shall terminate prior to his Normal Retirement Date for any reason other than death, he shall be entitled to a deferred vested Retirement Income if he is credited with at least five (5) years of Vesting Service at the time of his employment termination." (Pl. Ex. 6, 1987 Plan Document, § 7.01). Section 7.02 of the 1987 Plan Document stated:

> The amount of a deferred vested Retirement Income to a Participant who satisfies the requirements of Section 7.01 shall be determined in accordance with Section 5.03, based on the Participant's Benefit Service and Average Compensation at the time of employment

> termination. The form and payment of a Participant's deferred vested retirement income shall be determined and made in accordance with the provisions of Article VI as though such terminated Participant had remained in the employment of the Company until reaching his Normal Retirement Date.

(Pl. Ex. 6, 1987 Plan Document, § 7.02). Section 5.03 of the 1987 Plan Document continued to provide that "A Participant who retires on an Early Retirement Date will receive his Accrued Retirement Income computed as of his Early Retirement Date commencing at the end of the month in which his Early Retirement Date occurs." Consequently, when Eldridge terminated her employment with United Refining on December 6, 1996, she was informed that she could elect to have her "vested benefits . . . paid monthly commencing on the first of the month following [her] 59 1/2 birthday December 2009, without any reduction for early retirement." (Pl. Ex. 37, Eldridge Application for Benefits; Pl. Ex. 38, 1/8/97 Letter to Eldridge).[2]

On January 30, 2002, United Refining resolved to amend and restate the Plan in order to comply with the requirements of various recent legislative enactments. (Pl. Ex. 39, Consent of Directors). An amended and restated plan document, referred to as the "1995 Plan Document," was executed on January 30, 2002. (Pl. Ex. 7, 1995 Plan

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2. Amendment No. 2 to the 1987 Plan, adopted in 1996, lowered the Plan's Early Retirement Date from age 60 to age 59 1/2. (Pl. Ex. 6, 1987 Plan Document, Amendment No. 2).

Document). Following notification from the IRS that several amendments to the Plan Document were required before a favorable determination letter could be issued, another amended and restated plan document, the "2002 Plan Document," was adopted on March 18, 2003. (Pl. Ex. 8, 2002 Plan Document; Pl. Ex. 20, IRS Submission).

Both the 1995 and 2002 Plan Documents added the following language in Section 5.4(c) requiring benefits that commence prior to a Normal Retirement Date to be actuarially reduced:

> The Retirement Income of a terminated Participant determined pursuant to this Section shall be payable commencing as of his Normal Retirement Date, as set forth in Article VI of the Plan, in an amount equal to the nonforfeitable percentage of his Accrued Benefit. A terminated Participant may elect, by giving at least 120 days' prior written notice to the Committee, to have his Retirement Income commence prior to his Normal Retirement Date on the first day of any month coincident with or following his age fifty-nine and one-half birthday. In that event he shall be entitled to receive a Retirement Income for life in an amount equal to his Retirement Income on his Normal Retirement Date, actuarially reduced to reflect the earlier starting date thereof.

(Pl. Ex. 7, 1995 Plan Document, § 5.4(c); Pl. Ex. 8, 2002 Plan Document, § 5.4(c)). However, the 1995 Plan

Document explicitly stated that "[e]mployees who retire on a Retirement Date or who terminated employment with the Company prior to January 1, 1995 shall have all of their benefits determined in accordance with the applicable provisions of the Prior Plan . . ." (Pl. Ex. 7, 1995 Plan Document). Similarly, the 1987 Plan Document provided that "[i]n the event an amendment, including any change in actuarial assumptions, causes a Participant's Accrued Benefit to decrease, either directly or indirectly, then such Participant's Accrued Benefit shall be computed without consideration of the amendment or changed actuarial assumption." (Pl. Ex. 6, 1987 Plan Document). From 2002 through 2005, United Refining continued to pay unreduced benefits to terminated vested participants. (Pl. Ex. 20, IRS Submission; Pl. Ex. 21, IRS Submission).

On August 17, 2005, United Refining sent a letter to Eldridge purporting to "clarify when you can receive your pension from United Refining Company and under what terms . . .". (Pl. Ex. 43, 8/17/05 Eldridge Letter). That letter informed her that: "If you elect to receive your pension benefit before age 65, the amount you receive will be adjusted to reflect the earlier starting date." (Pl. Ex. 43, 8/17/05 Eldridge Letter). Substantively identical letters were sent to other terminated vested participants who, like Eldridge, had accrued a vested benefit but had not yet commenced benefit payments. (Pl. Ex. 44). The letters each contained a chart outlining the actuarial factors by which each terminated vested participants' benefits would be reduced. (*Id.*) Attached to each letter was a copy of Section 5.4 from the 2002 Plan Document. (*Id.*)

Shortly thereafter, on November 28, 2005, United Refining applied for a compliance statement under the IRS's Voluntary Correction Program ("VCP"). (Pl. Ex. 20, IRS Submission). In its application, United Refining represented that it was voluntarily entering the VCP "for the purpose of correcting plan operational failures that have been discovered as a result of a review of the operation of the Plan." (*Id.*) United Refining described the purported operational failure to the IRS as follows:

> Under the terms of the Plan, a Participant is entitled to a pension benefit beginning at his or her Normal Retirement Date at age sixty-five years (see Plan sections 1.15 and 5.1). A Participant who terminates his or her employment for any reason other than death, prior to reaching his or her Normal Retirement Date or Early Retirement Date (at age 59-1/2 years) and who has five (5) or more Years of Service shall be entitled to a deferred vested pension benefit beginning at his or her Normal Retirement Date (see Plan section 5.4). If the Participant elects to begin payment of his or her pension benefit on or after attaining age 59-1/2 years but prior to the Normal Retirement Date, then the pension benefit will be actuarially reduced for the earlier payment date (see Plan Section 5.4(c), last sentence).
>
> Beginning with Plan Year 1995 (one participant) and continuing to the current year 2005, 16 Participants who elected to receive their

> deferred vested benefit prior to attaining their Normal Retirement Date were overpaid a monthly pension benefit that should have been actuarially reduced (as required by the Plan document) to reflect the earlier payment date.
>
> As a result, "excess amounts" were paid to terminated vested participants. This error was discovered in the current year by the Plan's actuaries, Towers Perrin.

(Pl. Ex. 20, IRS Submission). In support of its application, United Refining referenced and attached sections of the 2002 Plan Document, including Section 5.4(c), which did not appear in previous Plan Documents. (Pl. Ex. 20, IRS Submission). Based on these submissions, the IRS issued a compliance statement on March 16, 2006, which authorized United Refining to recoup past payments from, and reduce or halt future payments to, the sixteen plan participants identified in the IRS submission, including Cottillion. (Pl. Ex. 21, IRS Submission, Ex. C; Pl. Ex. 45, Compliance Statement).

After receiving the March 16, 2006 Compliance Statement from the IRS, United Refining sent a letter to those terminated vested participants who were then receiving benefits payments from the Plan informing them that their pensions had been incorrectly calculated. (Pl. Ex. 46, 6/15/06 Letter to Cottillion; Pl. Ex. 48, Letters to Participants). Specifically, the letters advised participants that "the Retirement Committee of the Plan [recently] discovered that the calculation of your monthly pension

benefit was incorrect and was in excess of the amount permitted under the terms of the Plan." (Pl. Ex. 46, 6/15/06 Letter to Cottillion; Pl. Ex. 48, Letters to Participants). The letters further stated that:

> The Plan document requires that all pension benefits paid to terminated vested participants PRIOR to their Normal Retirement Age of 65 years MUST be actuarially reduced to the earlier payment date. As your monthly pension benefit began before your 65th birthday, your monthly pension benefit should have been reduced to reflect the earlier payment date.
>
> The Employee Retirement Income Security Act ("ERISA") requires the Retirement Committee to strictly follow the terms of the Plan document in order for the Plan to maintain its favorable qualification issued by the Internal Revenue Service. As your current monthly pension benefit would be reduced under the requirements of the Plan document, the Plan Retirement Committee requested that the Internal Revenue Service review your retirement benefit payments and issue a Compliance Statement permitting correction to your future monthly pension payments.
>
> On March 16, 2006, the Internal Revenue Service issued their Compliance Statement that will permit the Plan to maintain its favorable Plan qualification provided the Retirement

> Committee corrects your monthly pension benefit payments (see Attached Internal Revenue Service Compliance Statement and Submission).

(Pl. Ex. 46, 6/15/06 Letter to Cottillion; Pl. Ex. 48, Letters to Participants). Each letter further advised the participant as to the new amount of his or her future monthly benefits payments. Cottillion's letter, for example, stated that:

> Beginning on July 31, 2006 your monthly pension benefit payment will stop and you will not receive any future payments. Additionally, in order to recover excess payments, you should repay the Plan $14,475.55. This amount will fully satisfy the amount owed to the Plan for past overpayments and has been reduced to account for any future payments you would have received if excess payments were not paid to you.

(Pl. Ex. 46, 6/15/06 Letter to Cottillion). Each letter concluded by cautioning that "[t]his determination is based on the Internal Revenue Service's published revenue procedures and Compliance Statement which the Plan Retirement Committee must follow." (Pl. Ex. 46, 6/15/06 Letter to Cottillion; Pl. Ex. 48, Letters to Participants).

II. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c)(2) provides that summary judgment shall be granted if the "pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Rule 56(e) further provides that when a motion for summary judgment is made and supported, "an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must -- by affidavits or as otherwise provided in this rule -- set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party."

A material fact is a fact whose resolution will affect the outcome of the case under applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The moving party has the initial burden of proving to the district court the absence of evidence supporting the non-moving party's claims. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Country Floors, Inc. v. Partnership Composed of Gepner and Ford,* 930 F.2d 1056, 1061 (3rd Cir. 1990). Further, "[R]ule 56 enables a party contending that there is no genuine dispute as to a specific, essential fact 'to demand at least one sworn averment of that fact before the lengthy process of litigation continues.'" *Schoch v. First Fidelity Bancorporation,* 912 F.2d 654, 657 (3rd Cir. 1990) (quoting *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)). The

burden then shifts to the non-movant to come forward with specific facts showing a genuine issue for trial. *Matsushita Elec. Indus. Company v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *Williams v. Borough of West Chester, Pa.*, 891 F.2d 458, 460-461 (3rd Cir. 1989) (the non-movant must present affirmative evidence — more than a scintilla but less than a preponderance — which supports each element of his claim to defeat a properly presented motion for summary judgment).

III. ANALYSIS

Although Plaintiffs raise multiple claims for relief in their Amended Complaint, the heart of this action is Plaintiffs' contention that United Refining violated ERISA's anti-cutback provisions by attempting to retroactively reduce the amount of accrued early retirement benefits earned and/or paid to plan participants under the 1980 and 1987 Plan Documents. Defendants contend that the payment of unreduced benefits from 1988 through 2006 was the result of a mistake made by the plan administrator which has now been properly corrected.

Although ERISA "neither mandates the creation of pension plans nor in general dictates the benefits a plan must afford," *Bellas v. CBS, Inc.*, 221 F.3d 517, 522 (3rd Cir. 2000), ERISA does "seek to ensure that employees will not be left emptyhanded once employers have guaranteed them certain benefits." *Lockheed Corp. v. Spink,* 517 U.S. 882, 887, 116 S. Ct. 1783, 135 L. Ed. 2d 153 (1996) (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.,* 446

U.S. 359, 375, 100 S. Ct. 1723, 64 L. Ed. 2d 354 (1980)). Indeed, "[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." *Central Laborers' Pension Fund v. Heinz,* 541 U.S. 739, 743, 124 S. Ct. 2230, 159 L. Ed. 2d 46 (2004). A "crucial" component of this objective is ERISA's anti-cutback rule, which provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan . . .". *Heinz,* 541 U.S. at 743-44 (quoting ERISA § 204(g), 29 U.S.C. § 1054(g)(1)). ERISA Section 204(g)(2) adds 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). Thus, in order to state a claim for a violation of ERISA's anti-cutback rule, a plaintiff must show "(1) that a plan was amended and (2) that the amendment decreased an accrued benefit." *Battoni v. IBEW Local Union No. 102 Employee Pension Plan*, 594 F.3d 230, 233 (3rd Cir. 2010).

In the Third Circuit, "what constitutes an 'amendment' to a pension plan has been construed broadly to protect pension benefits." *Battoni*, 594 F.3d at 234 (citing *Hein v. FDIC,* 88 F.3d 210, 216) (3rd Cir. 1996). This construction extends both to explicit amendments, such as a formal adoption of a new provision, and to implicit amendments, such as when "[a]n erroneous interpretation of a plan provision . . . results in the improper denial of benefits to a plan participant." *Hein*, 88 F.3d at 216. Thus, a pension committee's reinterpretation of a plan

term to deny previously accrued benefits represents an "amendment" of the plan to the same extent as a formal amendment. *Id.* at 216-17 ("[I]f McNeil improperly denied Hein unreduced early retirement benefits, McNeil's action could be construed as a Plan amendment, and ERISA § 204(g) would apply."); *Hammond v. Alcoa, Inc.,* 2008 U.S. Dist. LEXIS 98455, 2008 WL 5135671, *8 (W.D. Pa. 2008) ("[A]n amendment can take the form of a change in the actual text of the plan itself, or an erroneous interpretation of a plan provision, resulting in the improper denial of benefits."); *Zebrowski v. Evonik Degussa Corp. Admin. Committee,* 2012 U.S. Dist. LEXIS 128953, 2012 WL 3962670, *12 (E.D. Pa. 2012) (holding that a "Committee's interpretation had the same effect as a formal amendment" for purposes of an anti-cutback claim); *Pieseski v. Northrop Grumman Corp.,* 2002 U.S. Dist. LEXIS 11891, 2002 WL 97749, *6-7 (citing *Hein* and holding that the defendants' misinterpretation of a plan provision was "sufficient to constitute an 'amendment' of the Northrop Plan for purposes of a Section 204(g) violation of ERISA . . ."); *Hunter v. Caliber System, Inc.*, 220 F.3d 702, 712 (6th Cir. 2000) (accord).

As previously noted, Cottillion's employment terminated in 1989 under the 1980 Plan Document, and Eldridge's employment terminated in 1996, under the 1987 Plan Document. Plaintiffs' anti-cutback claim is premised on the contention that United Refining retroactively applied Section 5.4(c) of the 1995 and 2002 Plan Documents to reduce Plaintiffs' vested benefits which accrued under the 1980 and 1987 Plan Documents. Defendants counter that Section 5.4(c) did not alter or change the benefits

provided under the 1980 and 1987 Plan Documents, but merely stated in explicit terms what already should have been clear under each of the previous documents, to wit, that Plaintiffs' early retirement benefits must be actuarially reduced. Consequently, the company contends that the Retirement Committee's decision to retroactively reduce pension benefits which had previously been paid at unreduced amounts was not occasioned by the addition of Section 5.4(c), but rather, was an overdue correction of a longstanding mistake. *See, e.g.,* Defendants' Memorandum in Support of Summary Judgment, pp. 13-15.

We first observe, consistent with *Hein*, *Hammond*, *Zebrowski* and *Pieseski*, discussed above, that whether by virtue of the addition of Section 5.4(c) to the 2002 Plan Document or in light of the Retirement Committee's reinterpretation of the 1980 and 1987 Plan Documents to preclude unreduced early retirement benefits, there has clearly been a "plan amendment" within the meaning of the anti-cutback rule. Having reached that conclusion, our inquiry shifts to whether the benefit claimed by the plan participants and reduced by the amendment was an "accrued benefit."

This analysis is governed by several well-established principles. First, ERISA defines an "accrued benefit" as "the individual's accrued benefit determined under the plan . . .". 29 U.S.C. § 1002(23)(A). In other words, a determination as to an entitlement to benefits must be "based on a permissible reading of the terms of the Plan" before it can be considered an "accrued benefit" within the meaning of ERISA. *Redd v. Brotherhood of*

the Maintenance of Way Employees Division Pension Plan, 2010 U.S. Dist. LEXIS 31671, 2010 WL 1286653, *9 (E.D. Mich. 2010) ("It surely is not enough . . . to merely claim that a pension benefit was 'determined under the plan' . . . without any effort to show that this benefit determination rested upon some tenable reading of the controlling plan documents."); *Hein*, 88 F.3d 210, 217 (observing that "ERISA § 204(g) can protect an entitlement to benefits, but it cannot create an entitlement to benefits when no entitlement exists under the terms of the Plan.").

Secondly, it is well-settled that "the proper standard of review" of a plan administrator's interpretation of plan language "depends on the language of the instrument." *Conkright v. Frommert,* 559 U.S. 506, 130 S.Ct. 1640, 1646, 176 L. Ed. 2d 469 (2010) (citing *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 111-12, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989)). If the plan documents "give the trustee 'power to construe disputed or doubtful terms, . . . the trustee's interpretation will not be disturbed if reasonable.'" *Id.* at 1646 (quoting *Firestone,* 489 U.S. at 111). Consequently, a plan administrator's interpretation of a plan "is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan" in which case it is subject to "arbitrary and capricious" review. *Id.* (quoting *Firestone*, 489 U.S. at 115); *see also Hunter,* 220 F.3d at 709-12.

Finally, the parties agree that the calculation and payment of monthly benefits by a plan administrator

represents an interpretation of the relevant Plan language. *See* Transcript, Oral Hearing, 11/16/12, p.9; *Morales v. Reliance Standard Ins. Co.*, 2006 U.S. Dist. LEXIS 67360, 2006 WL 2709376, *3 (E.D. Pa. 2006) ("When Reliance calculated the long term disability monthly benefit it was interpreting relevant portions of the plan.").

Here, each of the Plan Documents at issue explicitly invested the Retirement Committee with the power to "[c]onstrue and interpret the Plan, decide all questions of eligibility and determine the amount, time and manner of payment of any benefits hereunder . . .". *See, e.g.*, Pl. Ex. 4, 1980 Plan Document, § 13.10(a)(4). From approximately 1995 through 2002, the Retirement Committee and the plan administrator consistently interpreted the relevant language of the 1980 and 1987 Plan Documents to provide unreduced early retirement benefits to terminated vested participants. In resolving the question as to whether the provision of unreduced early retirement benefits to terminated vested participants represented an "accrued benefit" for purposes of Plaintiffs' anti-cutback claim, we find the analytical approach utilized by the court in *Redd* to be persuasive and sound.

In *Redd*, the defendant pension plan had previously included "final vacation pay" in calculating the pension benefits of plan participants. From 2001 through roughly 2007, the company paid benefits to plan participants in accordance with this interpretation of the Plan. On June 20, 2007, however, participants began receiving letters informing them that "errors had been made in the calculation of their pension benefits, and that the

Plan was required under federal law to recoup any past overpayments as a result of these errors." 2010 U.S. Dist. LEXIS 31671, [WL] at *4. Consequently, the Plan advised participants that "their monthly pension payments were being reduced to reflect the purportedly correct calculation of their benefits under the Plan, and that additional amounts were being withheld from their monthly payments to recoup the alleged overpayments they had received in the past." *Id.* The participants filed suit alleging that this "correction" violated ERISA's anti-cutback rules. *Id.*

The court began its analysis as to whether the benefits at issue were "accrued benefits" by observing:

> It surely is not enough, after all, to merely claim that pension benefit was "determined under the plan," 29 U.S.C. § 1002(23)(A), without any effort to show that this benefit determination rested upon some tenable reading of the controlling plan documents. . . . [A] wholly mistaken benefit determination presumably would not produce an "accrued benefit determined under the plan," 29 U.S.C. § 1002(23)(A), and thus might not be entitled to protection under ERISA's anti-cutback provision. [Courts have] recognized precisely this principle, rejecting anti-cutback claims where the plaintiff plan participants could not establish an entitlement to benefits under the pertinent pre-retirement plan provisions to a level or type of pension benefits that subsequently was reduced or eliminated.

Id. at *9 (collecting cases). The court further explained:

> Consequently, to secure an award of summary judgment in their favor on their anti-cutback claim, Plaintiffs must establish that the benefit amounts they were receiving prior to the Defendant Brotherhood's June 2007 recalculation and reduction of those benefits were based on a permissible reading of the terms of the Plan. Under the Sixth Circuit's decision in *Hunter,* 220 F.3d at 709-12, the Brotherhood's interpretation of the Plan at the time of Plaintiffs' retirement (from 2001 until 2006) is subject to "arbitrary and capricious" review, provided that the Plan confers upon the Brotherhood the discretion to construe its terms. The Plan clearly does so[.] . . .
>
> In order to determine, then, whether Plaintiffs' initial retirement benefits, before their recalculation and reduction, were "accrued benefits" that were permissibly "determined under the plan," 29 U.S.C. § 1002(23)(A), the Court must consider whether the interpretation of the Plan that generated these initial benefit awards passes muster under the "arbitrary and capricious" standard of review. This is the "least demanding form of judicial review," under which this Court must uphold a denial of benefits if it is "rational in light of the plan's provisions." "When it is possible to offer a reasoned explanation, based on the evidence,

> for a particular outcome, that outcome is not arbitrary or capricious."

Id. at *10 (internal citations omitted).

Applying the aforementioned principles, the court rejected the defendant's contention that their prior, long-standing interpretation of the plan to include final vacation pay as "compensation" was based on a "loophole" that was never "the intent of the Plan." *Id.* Rather, after reviewing the plain language of the plan and "the Brotherhood's construction of other Plan terms at the time", the court concluded that the prior interpretation of the plan "readily passe[d] muster under the 'arbitrary and capricious' standard of review." 2010 U.S. Dist. LEXIS 31671, [WL] at **11-12. Consequently, the court awarded summary judgment in favor of the plaintiffs on their anti-cutback claim. 2010 U.S. Dist. LEXIS 31671, [WL] at *12.

A similar argument was addressed in *DiCioccio v. Duquesne Light Co.*, 911 F.Supp. 880 (W.D. Pa. 1995). Under the facts in *DiCioccio*, prior to 1990, the defendant company had consistently included income from the plaintiffs' exercise of stock options when calculating plaintiffs' benefits under the company's retirement plan. In June of 1990, however, the plan administrator for the company's retirement plan issued a memorandum opining that this income did not qualify as "compensation" under the plan and would no longer be used in future benefits calculations. *Id.* at 887, 890-91. Plaintiffs argued that this reinterpretation of the plan reduced their accrued benefits in violation of ERISA's anti-cutback rule, with Defendants

countering that the plan administrator's decision "constituted an exercise of appropriate discretionary authority under the Plans and simply was intended to correct a mistake in practice which had inadvertently developed." *Id.* at 895. The district court framed its analysis by noting:

> ERISA defines an accrued benefit in the case of a defined benefit plan as "the individual's accrued benefit determined under the plan, and, except as provided in section 1054(c)(3) of this Title, expressed in the form of an annual benefit commencing at normal retirement age...." 29 U.S.C. § 1002(23)(A). ERISA further provides that "the accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this Title." 29 U.S.C. § 1054(g)(1). It follows *a fortiorari* that an accrued benefit may not be retroactively decreased through the purported exercise of an administrator's discretion.

Id. at 897. After reviewing the plan documents, the court determined that the plan administrator's prior interpretation of the plan to include proceeds from the exercise of stock options as "income" was based on a reasonable construction of the plan and, as such, had produced an accrued benefit. *Id.* at 897. Accordingly, the court concluded that the plan administrator's attempt to reinterpret the plan to exclude that income ran afoul of the anti-cutback rule and awarded summary judgment in favor of the plaintiffs. *Id.*

Based on *Redd* and *DiCioccio*, we conclude that it is the Plaintiffs' burden to establish that the interpretation of the Plan Documents which had resulted in the provision of unreduced early retirement benefits for terminated vested participants was tenable and rational such that it passes muster under the arbitrary and capricious standard.[3] Here, Plaintiffs contend that the Plan Administrator's interpretation of the 1980 and 1987 Plan Documents was correct or, at the very least, was not arbitrary and capricious. In support of their contention, Plaintiffs primarily rely upon the cross-reference to Section 5.03 contained in Section 7.02 of each of the applicable Plan Documents. As noted above, Section 7.02 of the 1980 Plan Document provided that "[t]he amount and time of commencement of a deferred vested Retirement Income to a participant who satisfies the requirements of Section 7.01 shall be determined in accordance with the provisions of Section 5.03, based on the Participant's Benefit Service and Average Compensation at the time of employment termination." (Pl. Ex. 4, 1980 Plan Document, § 7.02). Section 7.02 of the 1987 Plan Document similarly stated

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3. Contrary to Defendants' assertions, the focus of our inquiry in the anti-cutback context is not whether the amendment itself was an appropriate exercise of discretion, but whether the amendment has the effect of reducing or eliminating an accrued benefit. Consequently, Defendants' argument that the Court should apply a deferential standard to the Plan Administrator's "re-interpretation" of the Plan Documents is simply inapposite. If the prior, long-standing interpretation by the Plan Administrator was sufficiently reasonable to produce an accrued benefit, then the anti-cutback rule prevents the subsequent amendment of the Plan Documents to eliminate that benefit.

that "[t]he amount of a deferred vested Retirement Income to a Participant who satisfies the requirements of Section 7.01 shall be determined in accordance with Section 5.03, based on the Participant's Benefit Service and Average Compensation at the time of employment termination . . . as though such terminated Participant had remained in the employment of the Company until reaching his Normal Retirement Date." (Pl. Ex. 6, 1987 Plan Document, § 7.02). Following the adoption of Amendment No. 5 to the 1980 Plan Document, Section 5.03 of both the 1980 and 1987 Plan Documents stated that "A Participant who retires on an Early Retirement Date will receive his Accrued Retirement Income computed as of his Early Retirement Date commencing at the end of the month in which his Early Retirement Date occurs." Plaintiffs contend that the Plan Administrator reasonably interpreted this language to mean that the amount of a terminated vested participant's deferred vested retirement income would be the unreduced amount specified in Section 5.03, precisely as the plain language of those provisions would seem to suggest.

Defendants' respond that the Plan Administrator's original interpretation of the 1980 and 1987 Plan Documents was the result of a mistake and its decision to rectify it must be accorded deference. Consequently, Defendants contend, for purposes of Plaintiffs' anti-cutback claim, that Plaintiffs' entitlement to unreduced early retirement benefits never accrued. Defendants dismiss Section 7.02's explicit cross-reference to Section 5.03 as "a vestigial reference" that "makes no sense," *see* Transcript, Oral Hearing, 11/16/12, at 42, and offer

the following interpretation of the Plan Documents as pertaining to the calculation of benefits for terminated vested participants:

> Section 7.02's cross-reference to § 5.03, which referred to the computation of "Accrued Retirement Income" as of the date at the end of the first month in which a participant could commence pay status, confined payment of a full DVT benefit to age 65. The term "Accrued Retirement Income" used in Section 5.03 also appeared in Section 5.02 of the Plan, which directed that the amount of a Participant's "Accrued Retirement Income" would be computed, "as of any particular date," in accordance with the formula for Normal Retirement in Section 5.01 and "based upon his Benefit Service and Average Compensation determined on that date." Reading the three sections together with Section 7.02, the Accrued Retirement Income of a DVT was to be computed under Section 5.01 only at the normal retirement age of 65 as of the last day of the first month in which a DVT could commence pay status by means of the formula in Section 5.01.

(Defendants' Memorandum in Support of Summary Judgment, p. 11).

We find that the Defendants' construction of the Plan Documents unreasonably minimizes the explicit reference to Section 5.03 contained in Section 7.02 in favor of a

series of implicit cross-references, the cumulative effect of which would render Section 7.02 meaningless. Moreover, to the extent that the language of the Plan Documents is ambiguous or susceptible to multiple interpretations,[4] including that offered by the Defendants, the Plan Administrator's long-standing interpretation of those provisions (which provided for unreduced benefits) is entitled to deference, as previously discussed. *Redd*, 2010 U.S. Dist. LEXIS 31671, 2010 WL 1286653, *10; *Hunter*, 220 F.3d at 709-12.

In sum, after carefully reviewing the language of the 1980 and 1987 Plan Documents, we conclude that the construction urged by the Plaintiffs is, at a minimum, tenable and rational so as to withstand scrutiny under the arbitrary and capricious standard. Consequently, Defendants' attempt to reduce Plaintiffs' accrued retirement benefits runs afoul of ERISA's anti-cutback rules.

Before summary judgment can be entered in favor of Plaintiffs on their anti-cutback claim, however, two additional hurdles must be cleared. Specifically, Defendants contend that Plaintiffs' claims are barred because they failed to exhaust their administrative remedies and because their claims are untimely. Each of these arguments will be addressed in turn.

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4. At oral argument, defense counsel conceded that the 1980 and 1987 Plan Documents "were not models of clarity." (Transcript, Oral Hearing, 11/16/12, p. 11).

As an initial matter, we conclude that Plaintiffs' anti-cutback claim is timely. The parties agree that the appropriate limitations period for an anti-cutback claim is Pennsylvania's six-year "catch-all" limitations period as set forth in 42 Pa.C.S.A. § 5527. *See, e.g., Romero v. Allstate Corp.*, 404 F.3d 212, 220 (3rd Cir. 2005). Such a claim accrues at "such time as the employee knew or should have known that the amendment has brought about a clear repudiation of certain rights that the employee believed he or she had under the plan." *Id.* at 223.

Defendants contend that Plaintiffs' anti-cutback claim accrued, at the latest, on January 30, 2002, when United Refining adopted the 1995 Plan Document which first contained Section 5.4(c). Defendants suggest that Plaintiffs should have known as of that date that their benefits were going to be actuarially reduced. However, in *Romero*, the Third Circuit rejected a rule which would necessarily "tie the date of accrual to the date of amendment." *Romero*, 404 F.3d at 223. As explained by the Court:

> A rule that unwaveringly ties the date of accrual to the date of amendment would have the undesirable effect of requiring plan participants and beneficiaries "likely unfamiliar with the intricacies of pension plan formulas and the technical requirements of ERISA, to become watchdogs over potential [p]lan errors and abuses." It would also tend to preclude claims by those who commenced employment after the limitations period applicable to the particular ERISA claim has elapsed. Additionally, it

> would impose an unfair duty of clairvoyance on employees, such as those in this case, who allege that an amendment's detrimental effect on them was triggered not at the time of its adoption, but rather at some later time by a subsequent event. We eschew such a rule in light of the underlying purposes of ERISA and its disclosure requirements.

Id. at 224 (citing *DeVito v. Pension Plan of Local 819 I.B.T. Pension Fund,* 975 F.Supp. 258, 265 (S.D.N.Y. 1997); *In re Unisys Corp. Retiree Med. Ben. ERISA Litigation*, 58 F.3d 896, 901 (3rd Cir.1995)).

In the instant case, no "clear repudiation" of Plaintiffs' accrued right to benefits occurred until Plaintiffs received letters from Loughlin informing them that their vested benefits would be actuarially reduced from that point forward. For Eldridge, that date was August 17, 2005; for Cottillion, June 15, 2006. In light of the communications that Cottillion and Eldridge had previously received from United Refining consistently informing them of their eligibility for an unreduced early retirement benefit (and, in the case of Cottillion, the unreduced payments that he had been receiving for several years), it would likewise impose "an unfair duty of clairvoyance" on Plaintiffs to require them to have predicted that Defendants would someday attempt to retroactively apply Section 5.4(c) to reduce those benefits. *See Romero*, 404 F.3d at 223-24. Consequently, Plaintiffs' anti-cutback claim, filed on June 12, 2009, is timely.

Finally, with respect to exhaustion, it is undisputed that neither Eldridge nor Cottillion invoked or exhausted Plan appellate procedures following their reductions in benefits. Plaintiffs nonetheless contend that the exhaustion requirement should be excused in this case on the grounds of futility. "A plaintiff is excused from exhausting administrative procedures under ERISA if it would be futile to do so." *See Harrow*, 279 F.3d at 250 (citing *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 916 (3rd Cir. 1990)). In determining whether to excuse exhaustion on futility grounds, courts consider several factors including: "(1) whether plaintiff diligently pursued administrative relief; (2) whether plaintiff acted reasonably in seeking immediate judicial review under the circumstances; (3) existence of a fixed policy denying benefits; (4) failure of the insurance company to comply with its own internal administrative procedures; and (5) testimony of plan administrators that any administrative appeal was futile." *Harrow*, 279 F.3d at 250.

Here, Plaintiffs primarily rely upon the third factor, contending that United Refining responded to each inquiry from a terminated vested participant concerning the reduction in benefits by informing them that the matter was out of their hands and that nothing could be done. For example, the notification letters sent by Loughlin indicated that the proposed reduction in benefits was required by a third party, the IRS, to whom no appeal or administrative exhaustion was available. *See* Pl. Ex. 46, 6/15/06 Letter to Cottillion; Pl. Ex. 48, Letters to Participants ("[T]he Internal Revenue Service . . . will permit the Plan to maintain its favorable Plan

qualification provided the Retirement Committee corrects your monthly pension benefit payments."). Letters sent in response to prompt inquiries from numerous affected plan participants similarly indicated that Defendants had reached a fixed and intractable position with respect to the benefits in question. *See, e.g.,* Pl. Ex. 62, 11/14/06 Letter from Loughlin ("The error and correction was submitted to the IRS to remove any decision authority from the Plan Administrator and the Company."); Pl. Ex. 67, 9/13/06 Letter from Loughlin ("This correction was mandated by the Internal Revenue Service and not by the Plan Administrator or the Company."). By portraying the reduction in benefits as a *fait accompli* driven by the IRS, Defendants represented that their own hands were tied and that no grounds for reconsideration were available. *See, e.g.*, *Berger*, 911 F.2d at 916-17 (excusing exhaustion where evidence showed "that the company had adopted a policy of denying all applications" for benefits); *Falcone v. Teamsters Health and Welfare Fund*, 489 F.Supp.2d 490, 496 (E.D. Pa. 2007) (excusing exhaustion where evidence indicated that the defendant had taken a "clear and unwavering" stance with regards to the denial of benefits); *Olay v. Motion Control Indus.*, 2007 U.S. Dist. LEXIS 36913, 2007 WL 1520094, *12-13 (W.D. Pa. 2007) (excusing exhaustion as the result of a fixed policy).

For the reasons set forth above, we conclude that Plaintiff has demonstrated a "clear and positive showing of futility." *Harrow*, 279 F.3d at 249 (quoting *Brown v. Cont'l Baking Co.,* 891 F.Supp. 238, 241 (E.D. Pa. 1995)).

In conclusion, we find that summary judgment in favor of Plaintiff on the anti-cutback claim presented in Count IV of the Amended Complaint is appropriate. At oral argument, Plaintiffs' counsel acknowledged that Plaintiffs' anti-cutback claim provides a full and complete remedy for the violations alleged in the Amended Complaint:

> The Court: Isn't this really an anti-cutback case?
>
> Ms. Brett: Yes.
>
> The Court: Don't you get, if you're right, I'm not suggesting you are, but just to try to get the underbrush cleared out here, you get everything that you want under an anti-cutback theory, don't you?
>
> Ms. Brett: Yes.

(Transcript, Oral Hearing, 11/16/12, p. 55). Consequently, it is unnecessary to address the alternate theories of recovery advanced in the Amended Complaint at this time.[5] *See, e.g.*, *Redd*, 2010 U.S. Dist. LEXIS 31671, 2010 WL 1286653, *14 ("[I]n light of the Court's conclusion that Plaintiffs are entitled to summary judgment in their favor on their anti-cutback claim, the Court need not address the other theories of recovery advanced in Plaintiff's complaint.").

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5. Similarly, in light of their successful advancement of their anti-cutback claim, Plaintiffs' Motion to Strike Expert Reports and Testimony is denied as moot.

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

JOHN COTTILLION, *et al.*, on behalf of themselves
and all others similarly situated,

Plaintiffs,

v.

UNITED REFINING COMPANY, *et al.*,

Defendants.

C.A. No. 09-140 Erie
District Judge McLaughlin

ORDER

AND NOW, this 8th day of April, 2013, for the reasons set forth in the accompanying MEMORANDOM OPINION,

IT IS HEREBY ORDERED that Plaintiffs' Motion for Summary Judgment is GRANTED IN PART with respect to the anti-cutback claim set forth in Count IV of the Second Amended Complaint, and is otherwise DENIED WITHOUT PREJUDICE. Defendants' Motion for Summary Judgment is DENIED WITH PREJUDICE as to Count IV and is otherwise DENIED WITHOUT PREJUDICE.

JUDGMENT is accordingly entered in favor of Plaintiffs as to Count IV of the Second Amended Complaint.

/s/ Sean J. McLaughlin
United States District Judge

APPENDIX F — EXCERPTS FROM UNITED REFINING COMPANY PENSION PLAN FOR SALARIED EMPLOYEES, DATED JANUARY 1, 1987

UNITED REFINING COMPANY

PENSION PLAN
FOR
SALARIED EMPLOYEES

AS AMENDED AND RESTATED
EFFECTIVE JANUARY 1, 1987

* * *

ARTICLE I

DEFINITIONS

* * *

1.01A "Accrued Benefit" means Accrued Retirement Income, as defined in section 1.02 of Article I.

1.02 "Accrued Retirement Income" means the amount of Retirement Income accrued by a Participant in accordance with Section 5.02 of Article V.

1.02A "Actuarial Equivalent" means, unless otherwise defined in the Plan, a benefit of equivalent value to the benefit which would otherwise have been provided, determined on the basis of the reduction, mortality and interest rate assumptions set forth below, which

assumptions shall be uniformly used and consistently applied by the Plan's Actuary. Unless otherwise specified in the Plan, the mortality rates used shall be those of the 1983 Group Annuity Mortality Table for males, using an interest rate ot 7-1/2%.

* * *

1.12 "Compensation" means a Participant's earned income, wages, salaries, fees for professional services and other amounts received for personal services actually rendered in the course of employment with the Company (including, but not limited to, commissions paid salesman, compensation for services on the basis of a percentage of profits, comissions on insurance premiums, tips and bonuses), and excluding the following:

> (a) Company contributions to a plan of deferred compensation which are not included in the Employee's gross income for the taxable year in which contributed, or employer contributions under a simplified employee pension plan to the extent such contributions are deductible by the Employee, or any distributions from a plan of deferred compensation;
>
> (b) Amounts realized from the exercise of a non-qualified stock option, or when restricted stock (or property) held by the Employee either becomes freely transferable or is no longer subject to a substantial risk of forfeiture;

(c) Amounts realized from the sale, exchange or other disposition of stock acquired under a qualified stock option; and

(d) Other amounts which received special tax benefits, or contributions made by the employer (whether or not under a salary reduction agreement) towards the purchase of an annuity described in Section 403(b) of the Internal Revenue Code (whether or not the amounts are actually excludable from the gross income of the Employer).

For Plan Years beginning after December 31, 1988, the annual Compensation of each Participant taken into account under the Plan for any Plan Year shall not exceed $200,000, as adjusted by the Treasury Secretary at the same time and in the same manner as under Code section 415(d), except that the dollar limit in effect on January 1 of any calendar year is effective for Plan Years beginning in such calendar year and the first adjustment to the $200,000 limitation is effected on January 1, 1990. If the Plan determines Compensation on a period of time that contains fewer than 12 calendar months, then the annual Compensation limit is an amount equal to the annual Compensation limit for the calendar year in which the Compensation period begins multiplied by the ratio obtained by dividing the number of full months in the period by 12.

In determining the Compensation of a Participant for purposes of this limit, the rules of Code section 414(g)(6) shall apply, except in applying these rules, "family"

will include only the Participant's spouse and any lineal descendants of the Participant who have not attained age 19 before the close of the Plan Year. If, as a result of the application of these rules the adjusted $200,000 limit is exceeded, then (except for determining the portion of Compensation up to the integration level if this plan provides for permitted disparity), the limit will be prorated among the affected individual's Compensation determined under this section before this limit is applied.

If compensation for any prior Plan Year is taken into account in determining an employee's contributions or benefits for the current year, the Compensation for such prior year is subject to the applicable annual Compensation limit in effect for the prior year. For this purpose, for Plan Years beginning before January 1, 1990, the applicable annual Compensation limit is $200,000.

For purposes of determining a Participant's Accrued Retirement Income, Compensation does not included Compensation received from an Affiliated Company that is not participating in this Plan.

1.13 "Deferred Retirement Date" means the Retirement Date of a Participant who retires in accordance with the provisions of Section 4.03 of Article IV.

1.14 "Early Retirement Date" means the Retirement Date of a Participant who retires in accordance with the provisions of Section 4.02 of Article IV.

1.15 “Effective Date” means January 1, 1987, the date as of which the provisions of this amended and restated Plan become effective, except the effective date of the Accrued Retirement Income determination under Section 1.02, the Actually Equivalent in section 1.02A, Eligibility Conditions in Section 2.01, the normal Retirement Pension formula in Section 5.01, and the Vesting Schedule in Section 7.01 is January 1, 1989.

1.16 “Employee” means any person employed by the Company, in an executive, administrative or office and clerical capacity and, effective as of September 30, 1984, those nonunion hourly paid persons employed by the Company in a manufacturing or maintenance capacity; excluding those persons employed by the Company at a plant, location, division or other organizational entity of the Company which has been excluded from coverage under the Plan by action of the Board of Directors. Any such exclusion of coverage shall be indicated in Appendix A attached to this Plan. Notwithstanding the foregoing, if leased employees constitute less than 20% of the Company’s non-highly compensated work force within the meaning of Section 414(n)(5)(C)(ii) of the Code, the term “Employee” shall not include those leased employees covered by a plan described in Section 414(n)(5) of the Code unless otherwise provided by the terms of the Plan.

* * *

1.22 “Named Fiduciary” means the Committee.

* * *

1.23 “Normal Retirement Date” means the Retirement Date of a Participant who retires in accordance with the provisions of Section 4.01 of Article IV.

* * *

1.25 “Participant” means an Employee who becomes a participant pursuant to Article II or who is a Transferred Hourly Plan Participant.

* * *

1.27 “Plan” means the amended and restated United Refining Company Pension Plan for Salaried Employees effective January 1, 1987, as herein set forth and as it may be amended from time to time.

* * *

1.30 “Prior Plans” means the United Refining Company Pension Plan for Salaried Employees initially effective as of April 1, 1953, and restated on June 30, 1980, as amended from time to time and as in effect on December 31, 1986.

1.31 “Retirement Date” means the date of actual retirement of a Participant, which may be his Normal, Early or Deferred Retirement Date, whichever is applicable to him pursuant to Article IV.

1.32 “Retirement Income” means the benefits payable to a Participant or his spouse in accordance with Articles V and VII.

* * *

1.39 "Vesting Service" means service as defined in Section 3.01 of Article III for purposes of determining the vested status of a Participant under the Plan.

* * *

1.41 Age. Unless otherwise expressly provided, all references in this instrument to an individual's age shall be construed as meaning his age at his last birthday.

* * *

1.43 "Hourly Plan" means the United Refining Company Pension Plan for Hourly Employees.

1.44 "Transferred Hourly Plan Participant" means a nonunion employee or former employee who, as of September 30, 1984, was a Participant in the Hourly Plan.

ARTICLE IV

RETIREMENT DATE

4.01 Normal Retirement Date.

A Participant's Normal Retirement Date shall be the first day of the month coincident with, or next following his 65th birthday. Subject to the following Sections of this Article, each Participant shall retire on his Normal Retirement Date.

4.02 Early Retirement Date.

A Participant may retire on an Early Retirement Date which may be the month coincident with or following his 60th birthday and his completion of five (5) years of Vesting Service, provided that he informs the Committee at least three (3) months prior to such Early Retirement Date of his intention to retire early.

4.03 Deferred Retirement Date.

Subject to the provisions of Section 15.01 of Article XV, a Participant may continue in the employ of the Company beyond his Normal Retirement Date. The first day of the month coincident with or next following the Participant's termination of employment after his Normal Retirement Date shall be known as his Deferred Retirement Date.

Appendix F

ARTICLE V

AMOUNT OF RETIREMENT INCOME

5.01 Accrued Retirement Income Formula.

The annual rate of Retirement Income payable to a Participant who retires on or after his Normal Retirement Date shall be equal to the greater of:

(a) (1)(A) For Participants who retire prior to February 1, 1993, 0.95% of his Average Compensation up to his Social Security Compensation Base multiplied by the number of years (and fractions thereof) of Benefit Service, or

(B) For Participants who retire on or after February 1, 1993, 1.00% of his Average Compensation up to his Social Security Compensation Base multiplied by the number of years (and fractions thereof) of Benefit Service, plus

(2) 1-1/4% of his Average Compensation in excess of his Social Security Compensation Base multiplied by such number of years of Benefit Service.

i. For the purpose of this Paragraph (a) above, Average Compensation, Benefit Service and Social Security Compensation Base shall be determined as of the Deferred Retirement Date for a Participant who retires on a Deferred Retirement Date.

(b) Notwithstanding the provisions of Paragraph 5.01(a), in no event shall a Participant's Retirement income, for Participants who retire after December 31, 1993, be less than the sum of:

i. the Participant's Retirement income benefit determined as of December 31, 1993, plus

ii. the Participant's Retirement income benefit determined under Paragraph 5.01(a) on the Benefit Service earned after December 31, 1993.

(c) For a Participant who was a Participant under the Prior Plan as of May 31, 1975, the amount of Retirement Income accrued under the Prior Plan as of May 31, 1975, based upon his service and compensation for benefit determination purposes as of such date.

(d) The annual rate of Retirement Income payable to a Transferred Hourly Plan Participant shall not be less than the Retirement Income payable to such Participant or his spouse under the terms of the Hourly Plan as in effect on September 30, 1984.

(e) In no event shall the Retirement Income payable to a Participant who retires on his Normal Retirement Date be less than the amount of Retirement Income to which he would have been entitled had he retired on an Early Retirement Date.

5.02 Annual Accrued Retirement Income.

The annual Accrued Retirement Income of a Participant as of any particular date shall be an amount computed in accordance with Section 5.01 hereof, based upon his Benefit Service and Average Compensation determined on such date.

5.03 Early Retirement Annual Accrued Retirement Income.

A Participant who retires on an Early Retirement Date will receive his Accrued Retirement Income computed as of his Early Retirement Date commencing at the end of the month in which his Early Retirement Date occurs.

5.04 Elective Deferral.

In lieu of the commencement date that would otherwise apply under Sections 5.01, 5.02, or 5.03 hereof, and subject to the limitations set forth in Section 6.04, a Participant who terminates his employment with the Company on or before a Retirement Date may elect, prior to his Retirement Date, to defer commencement of his Retirement Income payments to a date (his Deferred Commencement Date) subsequent to, but no more than five years after, his Normal Retirement Date. Such election shall be made by written instrument delivered to the Committee. A Participant who elects to defer commencement of his Retirement Income pursuant to this Section shall be entitled to a Retirement Income for life payable as provided in Article VI of the Plan commencing on his Deferred Commencement Date, in an amount determined under Section 5.01 or 5.02 of the Plan,

whichever is applicable, actuarially increased to reflect the later starting date thereof.

5.05 Suspension of Benefits.

(a) If a Participant receives Retirement Income payments under the Plan following a termination of his employment with the Company prior to his Normal Retirement Date and later resumes his employment with the company prior to his Normal Retirement Date, no Retirement Income payments shall be paid during such later period of employment and up to his Normal Retirement Date. Any benefits payable under the Plan to or on behalf of the Participant at the time of his subsequent date of termination of employment shall be reduced by the Actuarial Equivalent of any benefits paid to him after his earlier termination and prior to his Normal Retirement Date unless the Participant repays such benefits in full to the Trust within two years after his date of reemployment.

(b) If (i) a Participant whose employment terminates is reemployed by the Company after his Normal Retirement Date, or is reemployed by the Company prior to his Normal Retirement Date and continues in employment beyond his Normal Retirement Date, or (ii) a Participant continues in employment with the Company after his Normal Retirement Date without a prior termination, the following provisions of this Section 5.05 shall become applicable to him as of his Normal Retirement Date or, if later, his date of reemployment.

(c) For purposes of this Section, the following definitions shall apply:

(i) “Postretirement Date Service” means each calendar month of employment of a Participant after his Normal Retirement Date and subsequent to the time that:

(A) payment of Retirement Income commenced to the Participant if he returned to employment with the Company, or

(B) payment of Retirement Income would have commenced to him if he had not remained in employment with the Company,

if in either case the Participant completes forty (40) or more Hours of Service in such calendar month. The determination of the Committee with respect to whether an Employee is performing Postretirement Date Service shall be based on a reasonable and good faith evaluation of the facts, and shall be conclusive and binding.

(ii) “Suspendable Amount” means:

(A) in the case of Retirement Income payable periodically on a monthly basis for as long as a life (or lives) continues, the monthly Retirement Income otherwise payable in a calendar month in which the Participant is engaged in Postretirement Date Service;

(B) in the case of Retirement Income payable other than in the form described in clause (A)

above, the lesser of (1) the amount of Retirement Income that would have been payable to the Participant if he had been receiving monthly benefits under the Plan since actual retirement based on a single life annuity commencing at his actual retirement date; or (2) the actual amount paid or scheduled to be paid to the Participant for such month. Payments that are scheduled to be paid less frequently than monthly may be converted to monthly payments for purposes of clause (2).

(d) Payment shall be permanently withheld of a portion of a Participant's Retirement Income, not in excess of the Suspendable Amount, for each calendar month during which the Participant is employed in Postretirement Date Service.

(e) If payments have been suspended pursuant to paragraph (d) next above, such payments shall resume no later than the first day of the third calendar month after the calendar month in which the Participant ceases to be employed in Postretirement Date Service; provided, however, that no payments shall resume until the Participant has complied with the requirements set forth in paragraph (i) below. The initial payment upon resumption shall include the payment scheduled to occur in the calendar month when payments resume and any amounts withheld during the period between the cessation of Postretirement Date Service and the resumption of payment, less any amounts that are subject to offset pursuant to paragraph (f) below.

(f) Retirement Income payments made subsequent to Postretirement Date Service shall be reduced (i) by the Actuarial Equivalent of any benefits paid to the Participant prior to the time he is reemployed by the Company after his Normal Retirement Date (such reduction will occur only if such benefits are not repaid in full to the Trust within two years after his date of reemployment); and (ii) by the amount of any payments previously made during those calendar months in which the Participant was engaged in Postretirement Date Service; provided, however, that such reduction under (ii) shall not exceed, in any one month, twenty-five percent of that month's total Retirement Income payment (excluding amounts described in paragraph (d) above) that would have been due but for the offset.

(g) Any Participant whose payments of Retirement Income are suspended pursuant to paragraph (d) of this Section, shall be notified (by personal delivery or certified or registered mail) during the first calendar month in which payments are withheld, that his Retirement Income is suspended. Such notification shall include:

> (i) a description of the specific reasons for the suspension of payments;
>
> (ii) a general description of the Plan provisions relating to the suspension;
>
> (iii) a copy of the provisions;

(iv) a statement to the effect that applicable Department of Labor regulations may be found at Section 2530.203-3 of Title 29 of the Code of Federal Regulations;

(v) the procedure for appealing the suspension, which procedure shall be governed by Section 14.12; and

(vi) the procedure for filing a benefits resumption notification pursuant to paragraph (i) below.

If payments subsequent to the suspension are to be reduced by an offset pursuant to paragraph (f) above, the notification shall specifically identify the periods of employment with the Company for which the amounts to be offset were paid, the Suspendable Amounts subject to offset, and the manner in which the Plan intends to offset such Suspendable Amounts.

(h) If the Summary Plan Description ("SPD") for the Plan contains information that is substantially the same as information required pursuant to paragraph (g), the notification required by paragraph (g) may refer the Participant to the relevant pages of the SPD. If the notification refers to the SPD, the notification shall also inform the Participant how to obtain a copy of the SPD, or relevant pages thereof, and any request for the referenced information shall be honored within thirty (30) days of the receipt by the Committee of such request.

(i) Payments shall not resume as set forth in paragraph (e) above until a Participant performing Postretirement Date Service notifies the Committee in writing of the cession of such Service and supplies the Committee with such proof of the cessation as the Committee may reasonable require.

(j) A Participant may request, pursuant to the procedure contained in Section 14.12, a determination whether specific contemplated employment will constitute Postretirement Date Service.

5.06 Accrued Retirement Income Transition Rule.

Notwithstanding any other contrary provision of the Plan, in calculating the Accrued Retirement Income (including the right to any optional benefit provided under the Plan) of any Participant, such Participant shall accrue no additional benefit under the Plan on or after May 31, 1989 to the extent that such additional benefit accrual exceeds the benefit which would otherwise accrue in accordance with the terms of the Plan as subsequently amended to comply with those qualification requirements described in Income Tax Regulations Section 1.401(b)-l(b)(2)(ii) [Tax Reform Act of 1986].

This provision shall be effective until the last day of the first Plan Year beginning after December 31, 1990 and shall be effective for such period if and only if the subsequent Tax Reform Act of 1986 amendment is made on or before the last day of the first Plan Year beginning after December 31, 1990.

In addition, the benefit accrued by any Participant during the 1989, 1990, and 1991 Plan Years shall in no event exceed the benefit accrual provided during the 1989, 1990, and 1991 Plan Years with respect to such Participant under the terms of the Plan as subsequently amended to comply with the Tax Reform Act of 1986. However, such Participant's Accrued Retirement Income shall not be less than what the Participant had accrued as of the last day of the last Plan Year beginning before January 1, 1989.

5.07 Accrued Retirement Income Transition Rule for Highly Compensated Employees.

Notwithstanding any other contrary provision of the plan, in calculating the accrued benefit (including the right to any optional benefit provided under the plan) of any plan Participant who is highly compensated employee within the meaning of Section 414(q) of the Internal Revenue Code, such highly compensated employee shall accrue no additional benefit under the plan on or after May 31, 1989, to the extent that such additional benefit accrual exceeds the benefit which would otherwise accrue in accordance with the terms of the plan as subsequently amended to comply with those qualification requirements described in Income Tax Regulations Section 1.401(b)-1(b)(2)(ii) [Tax Reform Act of 1986).

This provision shall be effective until the last day by which the plan may be amended retroactively to comply with the Tax Reform Act of 1986 for its first plan year beginning in 1989 in order to remain qualified under the Code and shall be effective for such period if and only if

the subsequent plan amendment to comply with the Tax Reform Act of 1986 is made on or before the last day by which the plan may be amended retroactively to comply with the Tax Reform Act of 1986 for its first plan year commencing in 1989 in order to remain qualified under the Code.

In addition, the benefit accrued by any highly compensated employee, within the meaning of Section 414(q) of the Code shall in no event exceed the benefit accrual provided during the 1989, 1990, and 1991 Plan Years with respect to such Participant under the terms of the plan as subsequently amended to comply with the terms of the Tax Reform Act of 1986. However, such highly compensated employee's benefit shall not be less than what that Participant had accrued as of the last day of the last Plan Year beginning before January 1, 1989.

ARTICLE VI

FORM AND PAYMENT OF RETIREMENT INCOME

6.01 Standard Method of Retirement Income Payment.

(a) The form of payment of Retirement Income under the Plan to a Participant who is unmarried or who has not been married throughout the one year period ending on his Retirement Date shall be a monthly single life annuity commencing at the end of the month in which his Retirement Date occurs and terminating with the last monthly payment due prior to his death. The amount of the single life annuity payable to a Participant described in the preceding sentence shall be determined in accordance with the provisions of Section 5.01.

(b) The form of payment of Retirement Income under the Plan to a Participant who is married on his Retirement Date and who has not made an election described in Section 6.02 shall be a monthly qualified joint and survivor annuity. The qualified joint and survivor annuity provides for a reduced monthly annuity payable during the life of the Participant with a survivor annuity for the life of his spouse which is equal to 50% of the amount of the annuity payable during the lifetime of the Participant. The qualified joint and survivor annuity shall be the actuarial equivalent of the single life annuity described in Section 6.01(a) and the amount of the joint and survivor annuity payment to the Participant shall be determined in accordance with the provisions of Section 6.03.

(c) The monthly payments to the Participant under the qualified joint and survivor annuity shall commence at the end of the month in which his Retirement Date occurs and terminate with the last monthly payment due prior to his death. The monthly payments to the Participant's spouse shall commence at the end of the month following the date of the Participant's death, if the spouse is then living, and terminate with the last monthly payment due prior to the spouse's death. If the Participant's spouse dies before the Participant and after commencement of the reduced monthly Retirement Income payments to the Participant, the Retirement Income payments to the Participant will continue unchanged and terminate with the last monthly payment due prior to his death.

(d) The Committee shall obtain satisfactory proof of age of the spouse of a Participant whose Retirement Income is to be paid in the form of a joint and survivor annuity.

(e) If the lump sum Actuarial Equivalent of the monthly Retirement Income or joint and Survivor Annuity payable under the Plan to any Participant, or to the Spouse of a deceased Participant is less than $3,500, the Company shall direct that the Actuarial Equivalent of that monthly Retirement Income otherwise payable, be paid in a lump sum in full satisfaction of all rights of the Participant and his Spouse to receive any benefits under the Plan. Such lump sum payment shall be paid on or before the date of the first annuity payment provided under Section 6.01(a) or (b) within sixty days after the end of the Plan Year in which the Participant incurs a Break in Service

or dies, whichever is applicable. No distribution may be made under this Section after payment of a Participant's Retirement Income has commenced unless the Participant and his Spouse, if any (or where the Participant has died, his Spouse), consent in writing to the distribution.

6.02 Optional Method of Retirement Income Payment For Married Participants.

At any time within the 90-day period proceeding the date his Retirement Income is to commence, a married Participant, by written notice to the Committee, may elect, subject to the following sentence, to convert the joint and survivor annuity provided under Section 6.01 into an actuarially equivalent single life annuity in an amount determined in accordance with Section 5.01 or 5.03. Any election to waive the qualified joint and survivor annuity shall not take effect unless the spouse of the Participant consents to such election in a writing that (i) designates a beneficiary which may not be changed without spousal consent, (ii) acknowledges the effect of such election, and (iii) is witnessed by a notary public. The requirements of this paragraph may be waived if it is established to the satisfaction of the Committee that the consent may not be obtained because there is no spouse or because the spouse cannot be located or because of such other circumstances as may be prescribed by regulation, in which case a waiver will be deemed a qualified election. Any consent necessary under this provision will be valid only with respect to the spouse who signs the consent, or in the event of a deemed qualified election, the designated Spouse.

Any election made under this Section may be revoked by the Participant during the specified election period. Such revocation shall be effected by written notification to the Committee. Following such revocation, another election under this Section may be made at any time during the specified election period. A revocation of a prior waiver may be made at any time by a Participant without the consent of the spouse before the commencement of benefits.

6.03 Joint and Survivor Annuity Actuarial Equivalent Factors.

The reduced amount of Retirement Income payable to a Participant in the form of a joint and survivor annuity shall be determined by multiplying the amount of Retirement Income which would be payable in the form of a single life annuity by a factor determined as follows, based upon the age nearest birthday of the Participant and his spouse:

(a) .945, plus

(b) .006 multiplied by the number of years by which the Participant's age is less than 65 at the time his Retirement Income commences or minus .006 multiplied by the number of years by which the Participant's age is greater than 65 at that time, plus

(c) .005 multiplied by the number of years by which the spouse's age is greater than the Participant's

age or minus .005 multiplied by the number of years by which the spouse's age is less than the Participant's age.

6.04 Commencement of Retirement Income Payments.

Unless a Participant elects otherwise, the payment of Retirement Income under the Plan shall not commence later than the first day of the month following the later of:

(a) his attainment of age 65, or

(b) his termination of employment for any reason, or

(c) the occurrence of a One-Year Break in Service;

provided, however, that effective January 1, 1985, a Participant (or the Beneficiary of a deceased Participant) may elect to defer such distribution until the later of

(x) April 1 of the calendar year following the calendar year in which the Participant attains (or would have attained, in the case of a deceased Participant) the age of seventy and one-half (70 1/2) or

(y) except as provided in the succeeding sentence, until April 1 of the calendar year following the calendar year in which the Participant retires.

Clause (y) shall not apply if the Participant is a “five percent (5%) owner” (as such term is defined in Section 416 of the Code) with respect to the Plan Year in which the Participant attains age seventy and one-half (70 1/2).

6.05 Installment Payments and Payments After Death.

(a) If distribution of a Participant’s Retirement Income is made in installments, then

> (A) if the Participant’s spouse is not the Beneficiary, at least 50 percent of the present value of the amount available for distribution shall be paid within the life expectancy of the Participant, and
>
> (B) the amount to be distributed each year must be an amount at least equal to the quotient obtained by dividing the Participant’s entire interest by the life expectancy of the Participant or joint life expectancy of the Participant and Beneficiary.

For purposes of the preceding sentence, (x) life expectancy and joint life expectancy shall be computed by the use of the return multiplies contained in Treas. Reg. section 1.72-9, and (y) the life expectancy of a Participant and a Participant’s spouse may be redetermined, but no more frequently than annually.

(b) If a Participant dies after distribution of his Retirement Income has commenced, the remaining portion of such amount shall continue to be distributed at

least as rapidly as under the method of distribution being used prior to the Participant's death. If a Participant dies before distribution of his Retirement Income commences, all of such amount shall then be distributed no later than five (5) years after the Participant's death; provided, however, that

> (A) if any portion of the Participant's Retirement Income is payable to a Beneficiary, the Trustees may direct that distribution of such portion be made in substantially equal installments over a period not extending beyond the life expectancy of the Beneficiary, commencing no later than one (1) year after the Participant's death; and
>
> (B) if the Beneficiary is the Participant's surviving spouse,
>
> > (1) the Trustees may direct that distributions be made in accordance with clause (i) above, except that such spouse may, with the approval of the Trustees, defer the commencement date to the date on which the Participant would have attained the age of 70-1/2, and
> >
> > (2) if the spouse dies before payments begin, subsequent distributions shall be made as if the spouse had been the Participant.

For purposes of the preceding sentence,

(x) payments shall be calculated by use of the return multiples specified in Treas. Reg. section 1.72-9;

(y) in the case of a surviving spouse, life expectancy may be recalculated annually; and

(z) in the case of any other Beneficiary, life expectancy shall be calculated at the time payment first commences and payments for any 12-consecutive month period shall be based on such life expectancy minus the number of whole years passed since distribution first commenced.

For purposes of this Section 6.05, any amount paid to a child of the Participant shall be treated as if it had been paid to the surviving spouse if the amount becomes payable to the surviving spouse when the child reaches the age of majority.

6.06 Eligible Rollover Distributions.

(a) This Section 6.06 applies to distributions made on or after January 1, 1993. Notwithstanding any provision of the plan to the contrary that would otherwise limit a distributee's election under this Section, a distributee may elect, at the time and in the manner prescribed by the plan administrator, to have any portion of an eligible rollover distribution paid directly to an eligible retirement plan specified by the distributee in a direct rollover.

(b) Definitions.

(i) Eligible rollover distribution: An eligible rollover distribution is any distribution of all or any portion of the balance to the credit of the distributee, except that an eligible rollover distribution does not include: any distribution that is one of a series of substantially equal periodic payments (not less frequently than annually) made for the life (or life expectancy) of the distributee or the joint lives (or joint life expectancies) of the distributee and the distributee's designated beneficiary, or for a specified period of ten years or more; any distribution to the extent such distribution is required under section 401(a)(9) of the Code; and the portion of any distribution that is not includible in gross income (determined without regard to the exclusion for net unrealized appreciation with respect to employer securities).

(ii) Eligible retirement plan: An eligible retirement plan is an individual retirement account described in section 408(a) of the Code, an individual retirement annuity described in section 408(b) of the Code, an annuity plan described in section 403(a) of the Code, or a qualified trust described in section 401(a) of the Code, that accepts the distributee's eligible rollover distribution. However, in the case of an eligible rollover distribution to the surviving spouse, an eligible retirement plan is an individual retirement account or individual retirement annuity.

(iii) Distributee: A distributee includes an employee or former employee. In addition, the employee's or former employee's surviving spouse and the employee's or former employee's spouse or former spouse who is the alternate payee under a qualified domestic relations order, as defined in section 414(p) of the Code, are distributees with regard to the interest of the spouse or former spouse.

(iv) Direct rollover: A direct rollover is a payment by the plan to the eligible retirement plan specified by the distributee.

ARTICLE VII

TERMINATION OF SERVICE

7.01 Required Service for Vesting.

If a Participant's employment shall terminate prior to his Normal Retirement Date for any reason other than death, he shall be entitled to a deferred vested Retirement Income if he is credited with at least five (5) years of Vesting Service at the time of his employment termination. A Participant whose employment terminates prior to his being credited with at least five (5) years of Vesting Service and prior to his Normal Retirement Date shall not be entitled to any benefits under the Plan.

7.02 Amount and Commencement of Deferred Vested Retirement Income.

The amount of a deferred vested Retirement Income to a Participant who satisfies the requirements of Section 7.01 shall be determined in accordance with the provisions of Section 5.03, based on the Participant's Benefit Service and Average Compensation at the time of employment termination. The form and payment of a Participant's deferred vested retirement income shall be determined and made in accordance with the provisions of Article VI as though such terminated Participant had remained in the employment of the Company until reaching his Normal Retirement Date.

7.03 Re-employment.

A Participant who does not meet the requirements of section 7.01 as of his date of employment termination and incurs a One-Year Break in Service shall lose all rights to his Accrued Retirement Income as of such date and upon re-employment shall be considered a new Employee, subject however to the provisions of Section 3.04.

7.04 Full vesting upon attainment of normal retirement age.

Notwithstanding the vesting schedule in section 7.01, above, or any applicable top-heavy vesting schedule, an Employee's right to his Normal Retirement Income will be nonforfeitable upon the attainment of Normal Retirement Age.

APPENDIX G — EXCERPTS FROM UNITED REFINING COMPANY PENSION PLAN FOR SALARIED EMPLOYEES, DATED JUNE 30, 1980

UNITED REFINING COMPANY
PENSION PLAN FOR
SALARIED EMPLOYEES
AS AMENDED AND RESTATED
EFFECTIVE JUNE 30, 1980

* * *

ARTICLE I

DEFINITIONS

* * *

1.02 "Accrued Retirement Income" means the amount of Retirement Income accrued by a Participant in Accordance with Section 5.02 of Article V, commencing at the end of the month in which his Normal Retirement Date occurs and based upon his benefit Service as of the date of termination of employment.

1.03 "Actuary" means an actuary appointed by the Committee in accordance with Section 13.08(b) of Article XIII.

1.04 "Administrator" means the Committee.

* * *

1.07 "Benefit Service" means service as defined in Section 3.02 of Article III for purposes of determining the amount of a Participant's Accrued Retirement Income under the plan.

* * *

1.12 "Compensation" means the regular basic salary and/or wages paid to an Employee by the Company, including regularly scheduled bonus payments to all Employees, and overtime payments, but excluding incentive commissions.

1.13 "Deferred Retirement Date" means the Retirement Date of a Participant who retires in accordance with the provisions of Section 4.03 of Article IV.

1.14 "Early Retirement Date" means the Retirement Date of a Participant who retires in accordance with the provisions of Section 4.02 of Article IV.

1.15 "Effective Date" means June 1, 1975, the date as of which the provisions of this amended and restated Plan become effective. Unless otherwise expressly provided, this amended and restated Plan shall apply only to individuals in the employment of the Company on or after June 1, 1975, and it has no effect on the rights under the Plan of previous employees or their beneficiaries whose benefits continue to be determined under the terms and conditions of the plan as it existed at the time of their termination of employment.

Appendix G

* * *

1.22 "Named Fiduciary" means the Committee.

1.23 "Normal Retirement Date" means the Retirement Date of a Participant who retires in accordance with the provisions of Section 4.01 of Article IV.

* * *

1.30 "Prior Plan" means the United Refining Company Pension Plan for Salaried Employees initially effective as of April l, 1953 as amended from time to time and as in effect on May 31, 1975.

1.31 "Retirement Date" means the date of actual retirement of a Participant, which may be his Normal, Early or Deferred Retirement Date, whichever is applicable to him pursuant to Article IV.

1.32 "Retirement Income" means the benefits payable to a Participant or his spouse in accordance with Articles V and VII.

* * *

1.41 Unless otherwise expressly provided, all references in this instrument to an individual's age shall be construed as meaning his age at his last birthday.

* * *

Appendix G

ARTICLE IV

RETIREMENT DATE

4.01 A Participant's Normal Retirement Date shall be the first day of the month coincident with, or next following his 65th birthday. Subject to the following Sections of this Article, each Participant shall retire on his Normal Retirement Date.

4.02 A Participant may retire on an Early Retirement Date which may be the first day of the month coincident with or following his 60th birthday and his completion of 10 years of Vesting Service, provided that he informs the Committee at least three months prior to such Early Retirement Date of his intention to retire early.

4.03 Subject to the provisions of Section 14.01 of Article XIV, a Participant may continue in the employ of the Company beyond his Normal Retirement Date, provided, however, that a Participant may continue his employment beyond age seventy (70) only with the approval of the Company. The first day of the month coincident with or next following the Participant's termination of employment after his Normal Retirement Date shall be known as his deferred Retirement Date.

ARTICLE V

AMOUNT OF RETIREMENT INCOME

5.01 The annual rate of Retirement Income payable to a Participant who retires on or after his Normal Retirement Date shall be equal to the greater of (a) or (b) below:

(a) (1) 3/4% of his Average Compensation up to his Social Security Compensation Base multiplied by the number of years (and fractions thereof) of Benefit Service, plus (2) 1-1/4% of his Average Compensation in excess of his Social Security Compensation Base multiplied by such number of years of Benefit Service. The average Compensation, Benefit Service and Social Security Compensation Base shall be determined as of Normal Retirement Date for a Participant who retires on a Deferred Retirement Date.

(b) For a Participant who was a Participant under the Prior Plan, the amount of Retirement Income accrued under the Prior Plan as of May 31, 1975, based upon his service and compensation for benefit determination purposes as of such date.

(c) In no event shall the Retirement Income payable to a Participant who retires on his Normal Retirement Date be less than the

amount of Retirement Income to which he would have been entitled had he retired on an Early Retirement Date.

5.02 The annual Accrued Retirement Income of a Participant as of any particular date shall be an amount computed in accordance with section 5.01 hereof, based upon his Benefit Service and Average Compensation determined on such date.

5.03 A Participant who retires on an Early Retirement Date may elect to receive one of the following:

(a) His Accrued Retirement Income computed as of his Early Retirement Date commencing at the end of the month in which his Normal Retirement Date would have occurred.

(b) A reduced amount of Retirement Income to begin at the end of the month in which his Early Retirement Date occurs, computed so as to be a percentage of the benefit provided for him under paragraph (a) of this Section 5.03, in accordance with the following table:

Number of Years Prior to Normal Retirement Date (Interpolate If Not A Whole Number)	Percentage
0	100.0%
1	100.0%
2	100.0%

3	100.0%
4	93.3%
5	86.7%

* * *

ARTICLE VII

TERMINATION OF SERVICE

7.01 Required Service for Vesting

If a Participant's employment shall terminate prior to his Normal Retirement Date or an Early Retirement Date, for any reason other than death, he shall be entitled to a deferred vested Retirement Income if he is credited with at least ten (10) years of Vesting Service at the time of his employment termination. A Participant whose employment terminates prior to his being credited with at least ten (10) years of Vesting Service and prior to his Normal Retirement Date shall not be entitled to any benefits under the Plan.

7.02 Amount and Commencement of Deferred Vested Retirement Income

The amount and time of commencement of a deferred vested Retirement Income to a Participant who satisfies the requirements of Section 7.01 shall be determined in accordance with the provisions of Section 5.03, based on the Participant's Benefit Service and Average Compensation at the time of employment termination.

7.03 Re-employment

A Participant who does not meet the requirements of Section 7.01 as of his date of employment termination and incurs a One-Year Break in Service shall lose all rights to his Accrued Retirement Income as of such date and upon re-employment shall be considered a new Employee, subject however to the provisions of Section 3.03.

APPENDIX H — AMENDMENT 5 TO 1980 PLAN

UNITED REFINING COMPANY

Consent of Sole Director in Lieu of Meeting

The undersigned, being the sole director of United Refining Company (the "Corporation"), a Pennsylvania corporation, and acting by written consent in lieu of a special meeting pursuant to Section 1402 of the Pennsylvania Business Corporation Law, hereby adopts the following resolutions and takes the actions set forth herein:

> WHEREAS, the Corporation maintains the United Refining Company Pension Plan for Hourly Employees (the "Hourly Plan") and the United Refining Company Pension Plan for Salaried Employees (the "Salaried Plan");
>
> WHEREAS, Section 13.02(d) of the Hourly Plan and the Salaried Plan, respectively, reserves to the Corporation the right of selection and removal of all members of the Retirement Committee which administers the Hourly Plan and the Salaried Plan (the "Committee") as constituted under Section 13.01 of the Hourly Plan and the Salaried Plan; and
>
> WHEREAS, the Corporation is authorized to amend the Hourly Plan and the Salaried Plan pursuant to Section 14.1 of the Hourly Plan and the Salaried Plan, respectively;

NOW THEREFORE, it is hereby

RESOLVED, that J. Nelson Happy is hereby removed from the Committee; and it is further

RESOLVED, that, effective May 3, 1988, Lawrence A. Loughlin is hereby selected to serve as a member of the Committee, to serve as such, along with John A. Catsimatidis and Myron L. Turfitt, at the pleasure of this Board of Directors; and it is further

RESOLVED, that, effective July 1, 1987, Amendment No. 4 to the Hourly Plan is hereby adopted in the form attached hereto as Exhibit A, and Amendment No. 5 to the Salaried Plan is hereby adopted in the form attached hereto as Exhibit B; and it is further

RESOLVED, that the proper officers of the Corporation are hereby authorized and directed to take all such steps and to execute and deliver all such documents and instruments, including (without limitation) the making of such amendments to the Hourly Plan and the Salaried Plan and the filing of such submissions with such governmental agencies as any of the officers may, with the advice of counsel, deem necessary to carry out the foregoing resolutions.

IN WITNESS WHEREOF, the undersigned has executed this instrument as of this 27th day of October, 1988 and directs that it be filed with the minutes of the meetings of the Board of Directors of the Corporation.

/s/________________________
John A. Catsimatidis

Appendix H

AMENDMENT NO. 5

United Refining Company
Pension Plan for Salaried Employees

1. Section 1.02 of the Plan is amended in its entirety to provide the following:

"Accrued Retirement Income" means the amount of Retirement Income accrued by a Participant in accordance with Section 5.02 of Article V, commencing at the end of the month in which his Retirement Date occurs and based upon his Benefit Service as of the date of termination of employment."

2. Section 4.02 of the Plan is amended in its entirety to provide the following:

"A Participant may retire on an Early Retirement Date which may be the month coincident with or following his 60th birthday and his completion of five (5) years of Vesting Service, provided that he informs the Committee at least three months prior to such Early Retirement Date of his intention to retire early."

3. Section 5.01 subsection (1) of the Plan is amended to provide the following:

"(1) .9% of his Average Compensation up to his social Security Compensation Base multiplied by the number of years (and fractions thereof) of Benefit Service, plus"

4. Section 5.03 of the Plan is amended in its entirety to provide the following:

"A Participant who retires on an Early Retirement Date will receive his Accrued Retirement Income computed as of his Early Retirement Date commencing at the end of the month in which his Early Retirement Date occurs."