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FROM: Doug Sprong

DATE: October 15, 2003

RE: **Cooper v. IBM**

PAGES: 14, (including cover page)

MESSAGE: Attached:
The Class's Submission for Entry of Remedial Relief

If you do not receive all pages, please call Kathy at (618) 277-1180.

cc: Robert Hill
William Carr

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

Kathi Cooper, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 99-829 GPM
	)	
The IBM Personal Pension Plan, and IBM Corporation,	)	
	)	
	)	CLASS ACTION
Defendants.	)	

THE CLASS'S SUBMISSION FOR ENTRY OF REMEDIAL RELIEF

COMES NOW the Class, by counsel, and hereby submits its proposed remedial relief for the Court to adopt to correct the illegalities the Court's July 31, 2003 Order identified in the IBM Personal Pension Plan (the "Plan"). In support of this submission, the Class states as follows.

1. On July 31, 2003, the Court entered its Order granting the Class's Motions for Summary Judgment on its claims that 1) the IBM Plan's pension credit formula ("PCF") violates ERISA section 204(b)(1)(G); 2) the PCF and cash balance formula violate ERISA section 204(b)(1)(H) because the rate at which a participant accrues his age 65 annuity decreases on account of age; 3) the manner in which IBM converted to the cash balance formula, and specifically the "wear-away" that conversion caused, violated ERISA section 204(b)(1)(H), because the rate at which a participant accrues any benefit, including the age 65 annuity, decreases on account of age; and 4) the manner in which IBM established participants' opening account balances (the "OABs") for purposes of the cash balance conversion, known as the Always Cash Balance Enhancement ("ACBE"), violated ERISA section 204(b)(1)(H), because the rate at which an older participant accrued a benefit was dramatically less than a similarly

situated younger participant solely on account of age.

2. By the same Order, the Court directed the parties to promptly proceed to develop what relief the Court should order to address the violations. This submission contains the Class' proposals with respect to the relief the Court should order.

3. In broad terms, the Class proposes that the following relief be ordered to correct the violations. First, that the PCF accrued benefits be re-computed so participants accrue benefits at a rate that does not decrease on account of age. This correction involves establishing beginning benefits in the PCF that are age-neutral, establishing a "service cap" that is age neutral (the current 425 point cap in the PCF is age-based) and then providing a rate of annual benefit accrual, measured as a percentage of compensation, that does not decrease on account of age. A subset and extension of this correction involves a pro rata increase of the benefits derived from the increased accrued benefits, most notably the subsidized early retirement annuities provided to eligible PCF participants.

Second, the participants' July 1, 1999 OABs must be re-calculated based on the corrected PCF accrued benefits and the IBM Plan's "comparison formulas," but utilizing factors that eliminate the age discrimination identified by the Court in the comparison formulas. Beginning with the corrected PCF benefits, the OAB correction involves recalculating the OABs using the "applicable interest rate" of Code section 417(e)(3) (here 5.25%) and also recalculating the OABs using an age-neutral ACBE computation, then determining the greatest increase produced by the recalculations in a participant's accrued benefit (i.e., the age 65 annuity) and providing that increase to all older participants. Thus, to the extent the "comparison formulas" produced an increase in the rate of benefit accrual for any participant, older participants in the IBM Plan with the same or more years of service should receive a comparable increase again measured as a percentage of his or her compensation.

Third, once participants' accrued benefits have been increased as of July 1, 1999, accruals under the cash balance formula thereafter must be increased to provide a rate of benefit accrual that does not decrease on account of age. Like the correction to the PCF in its steady state, this correction involves measuring the rate of benefit accrual provided to younger participants in the IBM Plan, measured as a percentage of their compensation, and providing no less than that same rate of accrual to older participants to increase their accrued benefit.

Fourth, because the IBM Plan provided a choice between the (illegally computed) benefits provided under the PCF and the (then illegally computed) benefits provided under the cash balance formula, Plan participants must be given a new choice between the recalculated benefits provided under the PCF and the recalculated benefits provided under the cash balance formula. In the alternative, a participant should receive the greatest benefit provided (determined as of the date payment of the benefit commences) under the PCF or cash balance formula.

Finally, participants who received a distribution of benefits since January 1, 1995 who are entitled to a greater benefit pursuant to the above corrections must receive corrective distributions for the difference between what they received and what they should have received as a result hereof, plus interest.

<u>Establishing a beginning benefit under the Pension Credit Formula ("PCF").</u>

4. To address the violation in the PCF, the Court should order the IBM Plan to establish a beginning benefit under the PCF that is not discriminatory on the basis of age. The Class proposes that this be done by providing each participant with the greater of their current PCF

benefit or the PCF benefit of any younger participant with the same years of service. For purposes of this relief, the term PCF benefit means a benefit payable as an annual annuity commencing at age 65 and measured as a percentage of the average salary that is used to compute benefits under the PCF.

5. The foregoing remedy is consistent with the Court's July 31, 2003 Order in that it renders an age neutral beginning point for each similarly situated participant to start accruing benefits under the PCF. It is likewise consistent with the Court's Order (and ERISA) in that the beginning point is the same for each participant with the same years of service regardless of his age measured as a percentage of his salary. This correction may be illustrated by an example. Assume a 45 year old participant with 14 years of service at December 31, 1994 had an accrued benefit equal to18.9% of his salary, and the accrued benefit of a 34 year old participant with 14 years of service at December 31, 1994 was also 18.9% of his salary. After the PCF conversion the 34 year old participant has a benefit of 25.83% of his salary, while the 45 year old participant's post-conversion benefit is only 24.37% of his salary. The 45 year old participant's benefit as of January 1, 1995 must be increased by 1.46% (as a percentage of his salary) to correct the violation.

<u>The PCF in a Steady State: Two Alternatives.</u>

6. Addressing the violations the Court identified in the PCF in its steady state can be done in one of two ways: by using a "cumulative approach" or by using an "annual approach."

7. Under the first alternative (which is referred to herein as the "cumulative approach"), the Court would order the IBM Plan to calculate the cumulative annual age-65 benefit that the Plan participant as of January 1, 1995 who was employed by IBM at the youngest age would

have earned under the existing PCF formula as of June 30, 1999 if they would have accumulated years of service ranging from one to the number they would have achieved with continuous employment through age 65. The Plan must then assign that cumulative benefit to all participants with equal years of service, regardless of their age. For this computation the Plan may cap the cumulative benefit after a participant reaches the number of years of service at which a participant as of January 1, 1995 who was employed by IBM at the youngest age would have accumulated 425 points under the existing IBM point formula.

In other words, under the cumulative approach, it is assumed that the internal rates of decline in the rate of benefit accrual that an 18 year old participant experiences are actually service based declines (which would not have run afoul of ERISA section 204(b)(1)(H)). The cumulative approach then provides that same accrual pattern (i.e., the pattern the 18 year old experiences) to each participant in the Plan regardless of his age at the beginning of his participation.

8. Under the second model (which is the Class's preferred alternative and is referred to as the "annual approach"), the Plan must calculate the cumulative benefit that a Plan participant as of January 1, 1995 who was employed by IBM at the youngest age would have accumulated under the existing PCF formula if they had years of service ranging from one through what they would reach at normal retirement age. This cumulative benefit is then assigned to all employees with equal years of service, regardless of age. The Plan must then calculate the highest annual rate of accrual (of an age-65 annual benefit) that the youngest participant in the Plan would earn for an additional year of service and give every participant, regardless of age or years of service an annual accrual at that rate from January 1, 1995 through the date the participant no longer

participates in the Plan.

In other words, under the annual approach, the annual benefit payable as an annuity commencing at age 65 earned by each Plan participant shall be compared to the benefit the participant would have earned under the PCF if his rate of benefit accrual had been the same as the youngest participant in the Plan. For example, if the youngest participant in the Plan is 18 and has an annual rate of benefit accrual of .030635 measured as an annuity commencing at age 65, every participant is entitled to that same annual rate of benefit accrual until he reaches the service cap. For this computation the Plan may cap the cumulative benefit after a participant reaches the number of years of service at which the participant as of January 1, 1995 who was employed by IBM at the youngest age would have accumulated 425 points under the existing IBM point formula.

9. The annual approach is more consistent with the Court's July 31, 2003 Order and the dictates of ERISA than the cumulative approach, because it addresses the internal rate of age-based decline that occurs in the PCF. The cumulative approach only works pursuant to a fiction that the PCF's decreasing accrual pattern is service-based and not age-based.

<u>Subsidized Early Retirement Annuities Derived from the PCF.</u>

10. Pursuant to ERISA section 204(b)(1)(H), the subsidized portion of a participant's immediate annuity is not part of the accrued benefit, i.e., the benefit payable in the form of a level annuity at age 65. However, pursuant to ERISA section 204(g), the subsidized portion of the immediate annuity is a protected benefit and cannot be cut-back. Under the PCF, a participant's subsidized immediate annuity is derived from the age 65 benefit otherwise payable. This is so because the Plan formula for computing the immediate annuity is a function of the

participant's accrued benefit divided by a subsidized early retirement factor. Thus, an increase in the accrued benefit results in an increase in the amount of the subsidized early annuity.

11. ERISA section 204(g) prohibits a reduction in accrued benefits. Section 204(g) includes within its protection subsidized early retirement benefits. For example, a defined benefit plan that provided an annual 3% actuarial reduction in a participant's accrued benefit from age 65 to age 55 is said to be partially subsidized in that annual reductions of much higher percentages are authorized. Under section 204(g), a defined benefit plan could not reduce the subsidy by imposing a higher percentage reduction for benefits already accrued in prior years of service.

12. In the case at bar, if eligible PCF participants[1] are not provided with increases in their subsidized early retirement annuities commensurate with the increases in their accrued benefits, a reduction in the amount of the subsidy will occur because the percentage subsidy (that is, the percentage of the accrued benefit that is not actuarially reduced) will be reduced. Accordingly, the Plan's early retirement annuities should be recalculated by applying the early retirement factors to the revised, increased age 65 annuity benefits.

Wear-away.

13. The simplest and most effective way to address the section 204(b)(1)(H) violation occasioned by the wear-away is to recalculate the present value of the participants' PCF accrued benefit utilizing the ERISA section 205(g)(3) interest rates so that no wear-away occurs. Thus, with reference to the accrued benefit attributable to the PCF, the Plan must compare the actual

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[1]The subsidy is only available to participants with a specified number of years of service and age.

OAB of each Participant to the OAB he would have had if the OAB had been computed using the "applicable interest rate" as defined in Internal Revenue Code section and the terms of the Plan at June 30, 1999. For 1999, the 205(g)(3) rate for the IBM Plan was 5.25%. As a practical matter, this correction does not increase any participants' accrued benefit as of July 1, 1999; however, the correction prevents any participant from failing to accrue a benefit under the cash balance formula on a forward going basis so that no participant experiences a decrease in his or her rate of benefit accrual as a result of age. The additional benefits are the accruals the participant otherwise did not realize during the wear-away period.

Always Cash Balance Enhancement: Two Alternatives.

14. The Court should order the Plan to provide, as of July 1, 1999, each participant with an increase in his age 65 annuity benefit equal to the greatest increase in the rate that the age 65 annuity benefit of any younger participant with the same or fewer years of service received as a result of the ACBE. For purposes of this remedy, the ACBE is determined by multiplying 5% times years of service times average pay times 1.055^(65-x), where x = the Participant's age at June 30, 1999, less the Participant's OAB determined under the wear-away calculations set forth above.

15. The foregoing calculation has several steps, the first of which was done in 1999 by IBM when it converted to the cash balance formula. First, the Plan must determine the OAB to which each participant would have been entitled under the ACBE and calculate the increase in the age-65 benefit, if any, that this OAB produced by projecting the OAB to age 65 at 5.5% (the Plan's interest crediting rate for 1999) and converting that balance to an annuity using the annuity

factors set forth in the Plan.[2] Next, the Plan must determine at what age/years of service point a participant would have received the largest percentage increase in his age-65 benefit as a result of the ACBE. Next, for participants who continued under the PCF, the Plan must provide every participant who was older than this age, and had equal or greater years of service, the same increase, measured as a percentage of their salary, in their age-65 benefit. Finally, for participants who continued in the cash balance formula, the Plan must determine what increase would be needed in such participants' OAB's to provide that increased age-65 benefit.[3]

The correction occasioned by the foregoing is best explained by an example. According to documents admitted into evidence by the Class with its summary judgment pleadings, certain Plan participants' age 65 annuity benefits increased by as much as 11.6% of final pay as a result of the ACBE. An older participant with the same or more years of service as the participant who received the 11.6% accrual must also receive a benefit accrual of no less than the same 11.6% of pay. Thus, an older participant earning $60,000 is entitled to receive a one-time increase in his accrued benefit of $6,960 (11.6% times $60,000) to remedy the age discrimination in the ACBE.

16. An alternative approach to the foregoing mimics the fictional concept behind the "cumulative approach" to the PCF correction (and, for the same reasons, is not favored by the Class). Under this alternative approach, the Plan must determine the maximum accrued benefit that any participant received as a result of the ACBE and determine what percentage of his

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[2]These calculations were done in connection with the 1999 conversion to the cash balance formula.

[3]The PCF relief will increase the July 1, 1999 accrued benefit of older employees and therefore increase that employee's OAB under the present value formula, resulting in a reduction of the correction required for the ACBE.

compensation this represents. Then, all participants with the same or more years of service who are the same or older in age must receive an increase in their accrued benefit sufficient to provide them with the same accrued benefit measured as a percentage of their compensation. For example, if the maximum accrued benefit provided by the ACBE was provided to a 36 year old employee with 18 years of service and this benefit amounted to 43% of the participant's compensation, all other participants with at least 18 years of service and who are at least 36 years of age must have their benefits increased (by whatever amount necessary) to produce an accrued benefit that is no less than 43% of their compensation. Thus, if the older participant's accrued benefit as of June 30, 1999 was 39% of his compensation, his benefit would be increased by 4% to equal the 43% ACBE benefit provided to the younger participant.

17. The alternative approach ignores the actual increase in the younger participant's accrued benefit (for instance, 11.6%) and instead refers only to the total accrued benefit produced by the ACBE. It is premised on a fiction that the ACBE contained a percentage of pay cap, measured as the actual pay cap of the most favored participant. As such, the alternative approach does not completely address the age discrimination inherent in the ACBE.

Cash Balance in its Steady State: Two Alternatives.

18. The Court should order the Plan to determine the annual benefit payable as an annuity commencing at age 65 earned by each Plan Participant and compare it to the benefit the participant would have earned under the Cash Balance formula if his rate of benefit accrual had been the same as the youngest participant in the Plan. For example, if the youngest Plan participant commenced participation at age18 and has an annual rate of benefit accrual of .04 for his first year of participation, then every older participant is entitled to no less than that same

annual rate of benefit accrual. This can also be referred to as an "annual approach."

Alternatively, the Plan could be ordered to provide each participant with a "cumulative approach" benefit, which, as noted in the PCF section above, compares the cumulative rate of benefit accrual that an 18 year old Participant experiences (under the assumption that the declines in the rate of benefit accrual are actually service based declines). The cumulative approach then provides that same accrual pattern (i.e., the pattern the 18 year old experiences) to each older participant in the Plan regardless of his age at the beginning of his participation. As noted, the cumulative approach is based on a fiction that the decreases in the internal accrual pattern in the cash balance formula are service based and not age-based. For that reason, the Class does not believe it is an appropriate remedy to address the age discrimination inherent in the cash balance formula.

Election of Benefits.

19. Because an order providing the relief requested herein will alter the amount of benefits available to IBM Plan participants, the Court should also order IBM, the Plan sponsor, to provide all Plan persons who were participants on July 1, 1999 with a choice between the revised cash balance benefits and the revised PCF benefits. A similar choice was provided to certain Plan participants (based on their age and service) in 1999. However, because the benefit amounts upon which those choices were made will be revised, those elections were not based on accurate information and are not effective.

Corrective Payments.

20. As many as 50,000 employees have terminated employment with IBM since January 1, 1995. Because the Plan benefits provided to these terminated participants were determined

utilizing illegal Plan formulas, the payments they have received or are receiving are, in most cases, under-valued. To the extent the Court grants all or some of the relief requested herein, the Plan must make corrective distributions to the terminated participants based on the recalculated benefits owed to them, plus prejudgment interest at the prime rate. The Class requests that any Order include a directive that corrective distributions be made to the Class members who have terminated participation in the Plan and have received a distribution from the Plan on or after January 1, 1995.

WHEREFORE, the Class prays as aforesaid.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On October 15, 2003, service of the foregoing pleading was made by facsimile and by placing a copy of same in the U.S. mail, postage prepaid, addressed as follows:

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