IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-55599

DAVID HURLIC, SUSANNA H. SELESKY, INDIVIDUALLY AND ON BEHALF OF A CLASS OF ALL OTHER PERSONS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

SOUTHERN CALIFORNIA GAS COMPANY; THE SOUTHERN CALIFORNIA GAS COMPANY PENSION PLAN,

Defendants-Appellees.

Appeal from the United States District Court for the
Central District of California
Case No. 2:05-cv-05027-R-MAN

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CORPORATE DISCLOSURE STATEMENT

Southern California Gas Company is a wholly-owned subsidiary of Sempra Energy, which is a public company. Appellees are not aware of any public company that directly or indirectly holds 10% or more of the stock of Sempra Energy. Appellees are not aware of any other publicly held company which has a financial interest in the outcome of this proceeding.

TABLE OF CONTENTS

TABLES OF AUTHORITIES

CASES

STATUTES AND RULES

LEGISLATIVE HISTORY

FEDERAL REGISTER

CODE OF FEDERAL REGULATIONS

REVENUE RULINGS

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

Appellees Southern California Gas Company ("SoCalGas") and Southern California Gas Company Pension Plan ("the Plan") agree with the Appellants' Jurisdictional Statement.

COUNTERSTATEMENT OF THE ISSUES FOR REVIEW

1. Whether the district court erred in dismissing plaintiffs' claim that SoCalGas' cash balance formula, by crediting interest at the same rate regardless of a participant's age, discriminates against older workers in violation of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), § 204(b)(1)(H).

2. Whether the district court erred in dismissing plaintiffs' claim that defendants violated the backloading provisions of ERISA § 204(b)(1)(B) by providing that eligible employees received the greater of their cash balance benefit or the benefit resulting from the pre-amendment formula.

3. Whether the district court erred in dismissing plaintiffs' claim of inadequate notice under ERISA § 204(h) when plaintiffs had three chances to allege that they suffered harm resulting from the supposedly inadequate notice but failed to do so.

4. Whether the district court erred in dismissing plaintiffs' claim under the California Fair Employment and Housing Act ("FEHA"), which is preempted by ERISA.

COUNTERSTATEMENT OF THE CASE

Overview of Pension Plans Under ERISA

ERISA defines a pension plan as any plan established or maintained by an employer to provide "retirement income to employees." 29 U.S.C. § 1002(2)(A)(i). ERISA, however, does not require that an employer provide any particular benefits, or even any benefits at all. *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 91 (1983). In addition, employers "are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate" welfare and pension plans. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890-91 (1996). Congress recognized that providing employers with "flexibility in the design and operation" of pension plans was "vital" to the willingness of employers to provide such plans. H.R. Rep. No. 93-533 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4647. Thus, Congress did not impose mandatory pension levels but created a set of "outer bounds" on permissible pension practices. *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 512 (1981).

ERISA provides for two types of pension plans, defined contribution plans and defined benefit plans. A defined contribution plan provides "for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses …" 29 U.S.C. § 1002(34). Thus, each participant in a defined contribution plan has an individual account, and a participant reaps the benefits of any gains and bears the risk of any losses in that account. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439-440 (1999).

A defined benefit plan is any pension plan that is not a defined contribution plan. 29 U.S.C. § 1002(35); *Cooper v. IBM Pers. Pension Plan,* 457 F.3d 637, 641 (7th Cir. 2006). Typically, a defined benefit plan provides participants a fixed annuity benefit commencing upon their retirement and determined pursuant to the formula specified in the plan. *See, e.g., Hughes Aircraft Co.,* 525 U.S. at 439-440. A defined benefit plan "consists of a general pool of assets rather than individual dedicated accounts." *Id.* at 439.

Cash Balance Plans

A cash balance plan is a type of defined benefit plan in which each participant has a bookkeeping account to which the employer allocates contributions in the form of pay credits and interest credits. *See Cooper*, 457 F.3d at 637. For example, under a cash balance plan that provides a pay credit of 5%

and an interest credit of 3%, a participant who earns $100,000 per year would be allocated a pay credit of $5,000 (.05 x $100,000) at the end of Year 1. In Year 2, the participant's account would be allocated a pay credit of $5,000 plus an interest credit of $150, representing the interest on the account balance from Year 1. Because the employee's account grows with pay credits and interest credits, cash balance plans are in many respects "functionally identical" to defined contribution plans. *Cooper,* 457 F.3d at 641. In contrast to other types of defined benefit plans, which usually provide benefits only in the form of an annuity commencing at normal retirement age, cash balance plans typically allow participants to receive their benefits upon termination of employment in a lump-sum payment as well.

Cash balance plans provide significant benefits to both employees and employers. The court in *Register v. PNC Fin. Servs. Group, Inc.,* No. 04-CV-6097, 2005 WL 3120268, *1 (E.D. Pa. Nov. 21, 2005), discussed some of those benefits:

> Th[e] movement from traditional defined benefit plans to cash balance plans reflects the changing labor market. From an employee's perspective, cash balance plans are better suited to increased job-mobility and contemporary labor markets because they accrue evenly over an employee's career, allow greater portability, and are easier to understand because they resemble 401ks. From an employer's perspective, cash balance plans are more advantageous because employees have a greater appreciation for the value of their pension benefit under a cash balance plan. In addition, the employer retains the

> funding/tax benefits associated with a defined benefit plan.

(Citation omitted.) Thus, in contrast to traditional defined benefit plans that pay a specified annuity benefit at normal retirement age, cash balance plans provide more even benefit accruals throughout an employee's career, express benefits in a more understandable account format, and allow employees in today's mobile job market to take their benefits with them when they change jobs. *Id.* Although defined contribution plans such as 401(k) plans have many of these advantages, 401(k) plans lack certain distinct advantages of cash balance plans. Cash balance plans such as the SoCalGas Plan are entirely funded by the employer and are available to all eligible participants. In contrast, 401(k) plans typically are funded by employee contributions (sometimes matched in whole or in part by employer contributions) and, because participation is voluntary, employees who elect not to participate are deprived of a valuable tax-deferred retirement savings opportunity. In addition, in a defined contribution plan, participants bear the risk that their retirement benefits may lose value as a result of market fluctuations, but in a cash balance plan the employer must cover any underfunding resulting from such market fluctuations. *See Hughes,* 525 U.S. at 439.

Cash balance plans have been in existence since the 1980s, and by 2003, there were hundreds of cash balance plans across the country. *See* Pension Benefit Guaranty Corp., *Pension Insurance Data Book 2004*, at 59 (2005), available at www.pbgc.gov/docs.2004databook.pdf. Indeed, Federal Reserve Board data indicate that almost half of defined benefit plan assets are now in cash balance plans. *See* Barry Kozak, *The Cash Balance Plan: An Integral Component of the Defined Benefit Plan Renaissance*, 37 J. Marshall L. Rev. 753, 804 (Spr. 2004). If plaintiffs' age discrimination argument were to prevail, all of those cash balance plans would violate ERISA. *See Eaton v. Onan Corp.*, 117 F. Supp. 2d 812, 814 (S.D. Ind. 2000).

ERISA's Age Discrimination Provision.

ERISA § 204(b)(1)(H) provides that

> [a] defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age.

29 U.S.C. § 1054(b)(1)(H)(i). As originally enacted, ERISA did not require that a pension plan allow employees who worked beyond normal retirement age to continue earning benefits. H.R. Conf. Rep. No. 99-1012, 2d Sess. at 378 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3868, 4023 ("Conference Report"). There was disagreement as to whether the Age Discrimination in Employment Act ("ADEA") prohibited plans from denying additional pension accruals to such employees, as the Department of Labor and the Equal Employment Opportunity Commission had taken inconsistent positions on that issue. *Id.* The 1986 Omnibus Budget

Reconciliation Act, 99 P.L. 509; 100 Stat. 1874 ("OBRA 1986"), resolved that disagreement by adding parallel age discrimination provisions to ERISA at § 204(b)(1)(H), ADEA at 29 U.S.C. § 623(i), and the Internal Revenue Code ("IRC") at 26 U.S.C. § 411(b)(1)(H).[1] The Conference Report explained that the OBRA provisions ended the ongoing uncertainty by requiring that "benefit accruals or continued allocations to an employee's account under either a defined benefit plan or a defined contribution plan may not be reduced or discontinued on account of the attainment of a specified age." *Id.*

The Conference Report also states that these new provisions (including § 204(b)(1)(H)) do not apply to employees who have not reached normal retirement age:

> Under the conference agreement, the rules preventing the reduction or cessation of benefit accruals on account of the attainment of age *are not intended to apply* in cases in which a plan satisfies the normal benefit accrual requirements *for employees who have not attained normal retirement age.*

Id. (Emphasis added.) The sponsoring legislators confirmed that interpretation of the statute. Senator Grassley introduced the bill that was enacted as OBRA 1986 with the following remarks: "I am introducing legislation today that would amend the [ADEA] and [ERISA] to require continued pension benefit accruals *for*

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[1] Congress made clear that these three provisions should be interpreted to have identical meaning. *See* Conference Report at 378-79; *see also Eaton*, 117 F. Supp. 2d at 822-23 (same).

workers who work past the normal retirement age of 65." 131 Cong. Rec. S9429 (daily ed. July 11, 1985) (emphasis added). Then-Representative Jeffords later explained:

> It is important for this body to understand what this "Older Americans Pension Benefits" provision does and does not do. What it does is prevent a covered employee pension benefit plan from eliminating or reducing an employee's pension benefit accruals, because of the attainment of any age, *for a period of employment after the employee attains the normal retirement age under his or her plan.*

132 Cong. Rec. H11437 (daily ed. Oct. 17, 1986) (emphasis added). Indeed, the heading of Section 9202 of OBRA 1986 is entitled "Benefit Accrual *Beyond Normal Retirement Age.*" Pub. L. No. 99-509, 100 Stat. 1874, at 1975 (1986) (emphasis added). Thus, the legislative history of § 204(b)(1)(H) demonstrates that Congress sought to protect the pension benefits of workers who worked beyond normal retirement age.[2]

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[2] ERISA § 204 was subsequently amended in the Pension Protection Act of 2006, Public Law No. 109-280, signed into law by the President on August 17, 2006. The Act confirms that cash balance plans comply with § 204(b)(1)(H) and do not violate that section merely because they credit hypothetical accounts with interest credits. ERISA §§ 204(b)(5)(A); (b)(5)(E). The Act provides that the amendments made therein apply to periods beginning on or after June 29, 2005, *see id.* § 701(e), and the Act expressly disclaims any implication that cash balance plans were age discriminatory under pre-existing law. *Id.* § 701(d)(1).

The SoCalGas Plan's Cash Balance Amendment

On June 30, 1998, the SoCalGas Plan ("the Plan") was amended to provide a cash balance benefit for non-union employees. The initial balance of each participant's cash balance account was at least equal to the actuarial equivalent of the participant's accrued benefit under the Plan before the cash balance amendment. Excerpt of Record ("ER") 245 (Second Amended Complaint ("SAC"), ¶ 17). Thereafter, monthly pay credits ("retirement credits"), amounting on an annual basis to 7.5% of the participant's annual earnings (ER 245, ¶ 18), and monthly interest credits based on the 30-year United States Treasury Bond rate have been allocated to each participant's account. ER 245-46, ¶ 19.

The Plan also provided a five-year "grandfather" period, under which eligible participants continued to accrue benefits under the pre-amendment plan formula (with certain enhancements) for up to five years until June 30, 2003, at which time their pre-amendment plan benefit was frozen. A participant who begins to receive benefits receives the *greater of* (1) the actuarial equivalent of his or her cash balance account expressed in the form of an annuity or (2) an annuity under the prior plan formula. ER 246-47, ¶¶ 21-24.

SUMMARY OF ARGUMENT

Plaintiffs, dissatisfied with their pension benefits under SoCalGas' cash balance formula, but facing the reality that ERISA permits a plan sponsor to amend a plan at any time for any reason, have tried to conjure up ways to challenge the cash balance formula under ERISA or state law. None of those claims – that the cash balance formula is age discriminatory under ERISA or under FEHA, that it is improperly "backloaded," or that plaintiffs did not receive adequate notice of the cash balance amendment – is viable.

First Claim. Plaintiffs' contention that the SoCalGas Plan violates ERISA § 204(b)(1)(H)'s prohibition against age discrimination effectively requests a finding that cash balance plans are *per se* illegal. Plaintiffs' claim is based on the fact that younger workers have more years to work before reaching normal retirement age than older workers, and therefore younger workers have more years to earn interest on their retirement Plan accounts. According to plaintiffs, when Congress used the term "rate of … benefit accrual" in § 204(b)(1)(H), it intended that "benefit accrual" be read as the equivalent of "accrued benefit," which is the anticipated annuity payable to the employee at age 65, including the future value of guaranteed interest credits. Because plaintiffs claim that, other factors being equal, an "accrued benefit" will be larger for a worker who has more years to accumulate interest credits, plaintiffs assert that cash balance plans discriminate against older workers.

Not surprisingly, that contention has been decisively rejected by numerous federal courts. Most prominently, the Seventh Circuit rejected plaintiffs' theory, reversing the district court that had invalidated a cash balance plan on the same age discrimination theory plaintiffs advance here. *See Cooper*. Virtually every other district court throughout the country to consider the issue has also rejected plaintiffs' theory.

Those courts have correctly construed § 204(b)(1)(H). As the Seventh Circuit held, the statutory phrase "rate of benefit accrual" refers to the pace at which benefits are earned by a participant as the participant works additional years. *Cooper,* 457 F.3d at 639. Plaintiffs' construction, which equates "benefit accrual" with the term "accrued benefit" is untenable. "Accrued benefit" is a defined term under ERISA; "rate of benefit accrual" is not. As numerous courts have held, Congress easily could have used the defined term "accrued benefit" if it intended that term to apply to the age discrimination provision, but it used a different, undefined term.

Moreover, plaintiffs cannot dispute that the accrual of benefits in defined contribution plans, in which benefits accrue in a functionally identical way to cash balance accruals, complies with the defined contribution age discrimination provision. As the Seventh Circuit held, there is no reason why Congress would intend that the equivalent accrual of benefits under a cash balance plan would be age discriminatory just because such a plan is a defined benefit plan. *Cooper*, 457 F.3d at 638-39.

Plaintiffs' age discrimination claim also suffers from an independent fatal flaw: it confuses age discrimination with the time value of money. Two SoCalGas employees of different ages who earn the same pay and have the same years of service will always have equal cash balance accounts on any given date. Because they reach age 65 at different times, the younger employee will have accrued more in interest credits than the older employee, but also will have waited longer to receive those benefits. Waiting longer for a benefit that is increased directly in proportion to the waiting time is not discrimination; it is merely accounting for the time value of money. Plaintiffs' position thus violates the principle, repeatedly applied by the Supreme Court, that characteristics that are merely correlated with age are not thereby discriminatory. On this basis, the Seventh Circuit and virtually all district courts to consider the issue have concluded that allocating interest credits to an age-neutral cash balance plan is not age discrimination

Finally, plaintiffs' claim of reduced benefit accruals is not causally linked to the "attainment" of normal retirement age, or any other age, designated "under the plan." For this independent reason as well, as numerous district courts have held, plaintiffs' theory of age discrimination fails to state a claim under § 204(b)(1)(H).

Second Claim. Plaintiffs allege that the Plan "backloads" the accrual of benefits in violation of the "133-1/3 Percent Rule" contained in ERISA § 204(b)(1)(B). Under the Plan's "greater of" formula, participants receive the greater of their frozen benefits under the pre-amendment formula or their cash balance benefits. Plaintiffs assert that whether a plan is backloaded should be determined by taking into account the effect of the frozen benefit on the cash balance benefit. That claim, however, is foreclosed by ERISA's plan amendment provision, which specifically provides that backloading should not be measured on that basis, and by a uniform line of authority including this Court's decision in *Williams v. Caterpillar, Inc.*, 944 F.2d 658 (9th Cir. 1991).

Third Claim. Plaintiffs' claim of inadequate notice under ERISA § 204(h) is deficient because as a matter of law plaintiffs failed to allege, and cannot allege, that they suffered harm as a result of the allegedly inadequate notice. *See Siles v. ILGWU Nat'l Retirement Fund*, 783 F.2d 923, 930 (9th Cir. 1986).

Fourth Claim. Plaintiffs' claim of discrimination under California's FEHA is preempted by ERISA. Plaintiffs argue that their claim falls within an exception to preemption, because dismissal would impair the enforcement of the ADEA. Preempting plaintiffs' claim does not impair federal law, however, because plaintiffs' FEHA claim conflicts with both ADEA and ERISA, and because any ADEA claim would be time-barred.

I. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' CLAIM FOR AGE DISCRIMINATION UNDER ERISA § 204(b)(1)(H)

Section 204(b)(1)(H) bars only those defined benefit plans where, "under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age." 29 U.S.C. § 1054(b)(1)(H)(i). The natural meaning of the words Congress used is plain. To pass muster under this provision, a defined benefit plan may not use a formula under which an employee either stops accumulating pension benefits, or accumulates them at a reduced rate, because the employee has attained any age. If the employer adds to the employee's pension benefit at the same rate each year regardless of the employee's age, then by definition there is no violation of this provision.

The SoCalGas Plan is lawful under § 204(b)(1)(H) for three reasons. First, the Plan does not reduce the "rate of benefit accrual"; rather, it adds benefits at a uniform rate to each participant's account each year, regardless of age. In addition, for two independent reasons the alleged reduction that plaintiffs complain about is not caused by the "attainment of any age." This is true because the interest adjustments that plaintiffs receive reflect only the time value of money, not discrimination, and because the Plan does not cease or reduce paying benefits upon reaching any specified retirement age.

A. <u>The SoCalGas Plan Does Not Reduce The Rate Of Benefit Accrual</u>

Section 204(b)(1)(H) prohibits defined benefit plans only from ceasing or reducing the "rate of benefit accrual" because of the attainment of any age. This statutory phrase is undefined in ERISA, and in their natural meaning these words plainly refer to the pace at which benefits are earned. This is precisely the holding of the Seventh Circuit in *Cooper.* Reading the provision as it is written, the Court defined "benefit accrual" as referring to "what the employer puts in (either in absolute terms or as a rate of change)," and to "the annual addition to the pot, not to the final payment." *Cooper,* 457 F.3d at 639, 641. Numerous district courts agree. *See, e.g., Eaton,* at 832-33 (for cash balance plan, "the rate of benefit accrual should be defined as the change in the employee's cash balance account from one year to the next.").[3] Under this provision, therefore, "the employer can't stop making allocations (or accruals) to the plan or change their rate on account of age." *Cooper,* 457 F.3d at 638. A plan that does "neither of these things ... complies with the statute." *Id.*

The Seventh Circuit had no difficulty applying the plain meaning of "accrued benefit" to IBM's cash balance plan. Under that plan, "[e]very covered employee receive[d] the same 5% pay credit and the same interest credit per

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[3] *See also Laurent v. PricewaterhouseCoopers LLP,* No. 06 Civ. 2280 (MBM), 2006 WL 2546805, at *13 (S.D.N.Y., Sept. 5, 2006); *Drutis v. Quebecor World,* No. 04-269-KSF, slip op. at 11 (E.D. Ky., Sept. 25, 2006).

annum." *Id.* The IBM plan was thus "age-neutral." *Id.* The same is true here. All participants in the SoCalGas Plan with the same years of service receive the same annual pay credit as a percentage of annual salary and the same interest on their account, regardless of their age. ER 245 (SAC ¶ 18); *see* Appellants' Br. 8, and n.1. For this reason alone, the SoCalGas Plan does not violate § 204(b)(1)(H).

B. <u>Plaintiffs' Construction of "Benefit Accrual" Is Untenable.</u>

Plaintiffs' claim of age discrimination depends entirely on their insistence – squarely rejected in *Cooper* – that § 204(b)(1)(H)(i) "must be" read to incorporate a defined statutory term that the provision conspicuously does not use. Appellants' Br. 11-12. Specifically, plaintiffs claim that the phrase "'rate of benefit accrual'" in fact "can refer to nothing other than the change in 'accrued benefit' payable at normal retirement age." *Id.* at 12 (quoting § 204(b)(1)(H)(i) and ERISA § 3(23)A, 29 U.S.C. § 1002(23)(A)). This proposition is counterintuitive, contrary to basic principles of statutory construction, and would have extraordinarily disruptive consequences that Congress plainly did not intend.

1. The Use Of "Accrued Benefit" Elsewhere In § 204 <u>Undermines, Rather Than Supports, Plaintiffs' Claim.</u>

Plaintiffs argue that § 204(b)(1)(H) is "part of a larger statutory scheme" that is "replete with references to 'accrued benefit.'" Appellants Br. 30. They note that the term "accrued benefit" appears elsewhere in ERISA, including in the numerous subsections of § 204(b)(1), such as §§ 204(b)(1)(A), (B), (C), (D), (F), and (G). *Id.* at 29-31. But far from making plaintiffs' point, these citations undermine it.

It is a basic principle of statutory construction that:

> where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. . . . We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.

Russello v. United States, 464 U.S. 16, 23 (1983); *see Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 496-97 (1992); 2A Norman J. Singer, *Statutes and Statutory Construction* § 46.06, p. 194 (6th ed. 2000) ("The use of different terms within related statutes generally implies that different meanings were intended").

This principle is especially applicable here. The term that plaintiffs want to import is not simply one that Congress used in numerous other places, but one that Congress took the trouble to define in ERISA itself. If Congress meant § 204(b)(1)(H) to measure reductions in a participant's "accrued benefit," it easily could and would have said so.[4] As the Seventh Circuit aptly observed in *Cooper*, it

[4] Moreover, the legislative history to § 204(b)(1)(H) describes as *not* age-discriminatory a type of plan that would be unlawful under plaintiffs' approach. The OBRA 1986 Conference Report describes a plan that allows a participant to continue to accrue an additional annuity of $10 per month for every year the participant works after age 65. Conference Report at 4026. If the "rate of benefit accrual" must refer to an annuity at age 65, then the additional $10 benefit would

was in equating "benefit accrual" with "accrued benefit" that the lower court in that case "went off the rails." 457 F.3d at 639.[5] *See Hirt v. Equitable Ret. Plan for Employees, Managers & Agents*, No. 01 Civ. 7920 (AKH), 2006 WL 2023545, *34 (S.D.N.Y. July 20, 2006) ("If Congress had intended the term "accrued benefit" – and its statutory meaning of post-retirement annuities under section 3(23)(A) – to apply to section 204(b)(1)(H)(i), it would have included such language in section 204(b)(1)(H)(i)."); *Laurent*, 2006 WL 2546805, at *14 ("If the term "benefit accrual" and "accrued benefit" are to be read as equivalents then the same term would have been used in both statutory sections.").[6]

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have to be recast as an annuity at age 65, and would *decline* in value each year after age 65 because the benefit would have to be discounted *back* to age 65. *See* Newman, *Age Discrimination in Cash Balance Plans: Another View*, 19 VA. TAX REV. 763, 768-773 (2000); *Eaton,* 117 F. Supp. 2d at 830 ("[p]laintiff's interpretation would transform that example of compliance into an example of a violation.") Given Congress' focus on protecting pension benefits of employees who continued to work after normal retirement age, Congress cannot possibly have intended that result.

[5] Plaintiffs' construction of the statute also makes no sense because § 204 – the very section upon which plaintiffs rely – mandates the use of the same type of interest credits that plaintiffs claim violates § 204(b)(1)(H). Plaintiffs' theory would invalidate § 204(c)(2)(B), which provides that a participant's annuity benefit for employee contributions is computed in the same way that such benefits are calculated for cash balance plans. *See Eaton,* 117 F. Supp. 2d at 831; *Curtiss-Wright Corp.*, 514 U.S. at 81 (court should not adopt statutory interpretation that would lead to "improbable results").

[6] *See also Eaton*, 117 F. Supp. 2d at 832-33; *Register*, 2005 WL 3120268, at *6-7; *Drutis,* slip op. at 15; *In re Gulf Pension Litig.*, 764 F. Supp. 1149, 1176-77 (S.D. Tex. 1991).

2. **The Parallel Provision For Defined Contribution Plans Further Undermines Plaintiffs' Position**

Trying to turn this principle of statutory construction to their advantage, plaintiffs point to the parallel anti-discrimination provision for defined contribution plans also contained in § 204. Under that provision, ERISA § 204(b)(2)(A), a defined contribution plan is lawful if "allocations to the employee's account are not ceased, and the rate at which amounts are allocated to the employee's account is not reduced, because of the attainment of any age." 29 U.S.C. § 1054(b)(2)(A). Plaintiffs concede, as they must, that under the language of this provision, the SoCalGas Plan would not be discriminatory. But they argue that because § 204(b)(1)(H) "does not refer to an account," and because ERISA has a "binary" structure that separately regulates defined contribution plans and defined benefit plans, a formula that is expressly lawful in the world of defined contribution plans must be deemed unlawful if used in a defined benefit plan. Appellants' Br. 36-41, *citing Richards v. FleetBoston Fin. Corp.,* 427 F. Supp. 2d 150, 167 (D. Conn. 2006); *see also* Appellants' Br. 36 (the "explicit reference to account balances in § 204(b)(2) demonstrates that Congress could have chosen the same language in § 204(b)(1)(H)(i) had it intended to prohibit only differential hypothetical additions to hypothetical account balances in defined benefit plans.")

Although plaintiffs are correct that § 204(b)(1)(H) does not refer to an "account," they draw the wrong conclusion. The fact that Congress referred to an "account" only in § 204(b)(2)(A) is unsurprising, because defined contribution plans, by definition, involve contributions to an account. Congress appropriately omitted the term "account" in § 204(b)(1)(H) to ensure that the provision could be applied, as it must be, to all types of pension benefit plans, many of which do not involve the creation of "hypothetical" accounts.[7] Indeed, defined benefit plans without cash balance accounts were far more prevalent than cash balance plans in 1986 when § 204(b)(1)(H) was added to ERISA. Thus, Congress appropriately used the phrase "rate of benefit accrual," rather than allocations to an "account," in § 204(b)(1)(H).[8]

There is no reason, however, to think that by using this broader language, Congress meant to prohibit defined benefit plans from using a formula for increasing pension benefits that is functionally equivalent to what Congress expressly approved for use in defined contribution plans. That is the essential

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[7] Plaintiffs' brief uses the word "hypothetical" 32 times when describing cash balance accounts or the pay and interest credits allocated to those accounts. In doing so, plaintiffs disingenuously suggest that "rate of benefit accrual" should not be interpreted to refer to the change in an employee's cash balance account from year to year because the cash balance account is "hypothetical." A participant's cash balance account is hypothetical *only* in the sense that it is a bookkeeping account, and plan assets are maintained and invested by the plan on behalf of all participants. *See Cooper,* 457 F.3d at 637, 641. Clearly, there is nothing hypothetical about the benefits accrued under cash balance plans, just as there is nothing hypothetical about the benefit accruals under any defined benefit plan.

[8] In contrast, Congress clearly could have used the term "accrued benefit" in § 204(b)(1)(H) if it meant that concept to apply for age discrimination purposes to all defined benefit plans.

holding of *Cooper*. The Seventh Circuit rejected the notion that the fact that "there is a 'fundamental' distinction between defined-contribution and defined-benefit plans," dictates that the two types of plans *must* be treated differently for age discrimination purposes. *Id.* at 641. The Court could discern no reason why a formula that "is non-discriminatory when used in a defined-contribution plan" should "become unlawful because the account balances are book entries rather than cash[.]" *Id.* at 638.

On the contrary, the court found compelling reasons to treat the two types of plans similarly for purposes of age discrimination: "Interest is not treated as age discrimination for a defined-contribution plan, and the fact that these subsections are so close in both function and expression implies that it should not be treated as discriminatory for a defined-benefit plan either." *Id.* at 638-39. Instead, "benefit accrual" for defined benefit plans and "allocation" to an "account" for defined contribution plans "both refer to the employer's contribution rather than the time value of money between contribution and retirement." *Id.* at 639. Thus, the Court concluded that "§ 204(b)(1)(H)(i) does not whimsically require a court to find age discrimination for a defined-benefit plan when materially identical statutory language allows functionally identical defined-contribution plans to operate without any taint of discrimination." *Id.* at 641.

Plaintiffs have offered no reason why Congress would have wanted to prohibit such equal treatment in the context of cash balance plans. *See Eaton,* 117 F. Supp. 2d at 831. Certainly nothing in ERISA states or even implies that benefits in a defined benefit plan cannot be earned in the form of account credits.

The appellate cases plaintiffs cite are inapposite. None construes the term "rate of … benefit accrual" in § 204(b)(1)(H). Contrary to plaintiffs' assertions, *Miller v. Xerox Corp. Ret. Income Guarantee Plan*, 447 F.3d 728 (9th Cir. 2006), *amended,* 2006 U.S. App. LEXIS 23289 (9th Cir., Sept. 13, 2006), *Berger v. Xerox Corp. Ret. Income Guar. Plan*, 338 F.3d 755 (7th Cir. 2003), and *Esden v. Bank of Boston,* 229 F.3d 154 (2d Cir. 2000), establish only the unremarkable proposition (which neither defendants nor any of the numerous courts rejecting plaintiffs' theory dispute) that cash balance plans are governed by the ERISA provisions relating to defined benefit plans. They do not hold that § 204(b)(1)(H) *must* be interpreted differently than its defined-contribution counterpart. Moreover, *Miller, Berger*, and *Esden* dealt with ERISA provisions that specifically use the term "accrued benefit." None dealt with age discrimination, § 204(b)(1)(H), or the "rate of benefit accrual." In *Miller*, this Court, recognizing that the fact that a participant in a defined contribution plan bears the risk of declining future interest rates distinguishes such plans from defined benefit plans, 457 F.3d at 735, held only that the provisions of a defined benefit plan must be evaluated under the rules applying to such plans. *Id.* As the *Cooper* court noted,

> As the class reads [*Esden* and *Miller*], these opinions stand for two important propositions. First, that an "accrued benefit" in a cash-balance plan is an annuity at normal retirement age. Second, that there is a "fundamental" distinction between defined-contribution and defined-benefit plans. Both of these propositions are correct, and both of them are irrelevant.

457 F.3d at 641.

Only one court, *Richards*, has accepted plaintiffs' reasoning. But *Richards* principally relied on the mistaken notion, now thoroughly discredited by *Cooper*, that because ERISA separately regulates defined benefit and defined contribution plans, "what is lawful for one must be forbidden to the other." *Cooper*, 457 F.3d at 641. *Richards* is contrary to every other decision addressing the issue, including two other district courts in the same circuit, one of which expressly rejected *Richards* as "at odds not only with all other applicable case law but also the logic of ERISA ..." *Laurent*, 2006 WL 2546805, at *12; *see also Hirt; Drutis,* slip op. at 12-15. *Richards* thus stands alone in misconstruing the implications of ERISA's "binary" structure for the purpose of evaluating age discrimination claims.

3. Treasury Department Regulations Support the District Court's Ruling.

Finally, plaintiffs argue that a Treasury regulation promulgated pursuant to a *different* ERISA provision, § 204(h), supports their construction of § 204(b)(1)(H). Section 204(h) requires notice of reductions in the "rate of *future* benefit accrual." ERISA § 204(h), 29 U.S.C. § 1054(h) (emphasis added); *see* Appellants' Br. 28-29. The regulation that plaintiffs cite construes § 204(h) to require notice of a plan amendment "only if it is reasonably expected that the amendment will reduce the amount of the *future* annual benefit commencing at normal retirement age (or at actual retirement age, if later) for benefits accruing for a year." 68 Fed. Reg. 17,277, 17,282 (April 9, 2003) (emphasis added). This regulation does not salvage plaintiffs' claim, for three reasons.

First, this regulation construes a materially different provision of ERISA, one that is concerned with providing plan participants with advance notice of a *future* reduction in their rate of benefit accrual. The word "future" must be construed to give some meaning to § 204(h) beyond the meaning of the phrase "rate of benefit accrual," or else "future" would become mere surplusage. The Treasury regulation thus reasonably directs the inquiry for § 204(h) to the future – to reductions in the annual benefit at normal retirement age. Plaintiffs ignore the word "future," but under basic rules of statutory construction, a court may not do so.[9]

Second, the Treasury Department has stated that its interpretation of the § 204(h) notice provision "does not indicate any possible outcome" on its interpretation of § 204(b)(1)(H). 68 Fed. Reg. 17,277, 17,278. The Treasury Department has construed the phrase "rate of benefit accrual" in § 204(b)(1)(H)(i), and its interpretations support the ruling in *Cooper* and all but one of the district courts. As the Seventh Circuit noted, proposed Treasury regulations define "rate of benefit accrual" as "the additions to the participant's hypothetical account balance for the plan year." 67 Fed. Reg. 76,123, 76,126 (Dec. 11, 2002).[10] *See Cooper,* 457 F.3d at 639-40 ("the Treasury's view, like our independent reading, looks at the rate of contribution (what goes into the account) rather than the annual rate of withdrawal at retirement").

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[9] Moreover, the term "future benefit accrual" in § 204(h) cannot be interchangeable with "accrued benefit," because benefits that are not part of a participant's "accrued benefit" are subject to the notice requirement. *See* 29 U.S.C. § 1054(h)(9) (early retirement subsidies). For this reason as well, a regulatory construction of § 204(h) provides no guidance as to the proper interpretation of § 204(b)(1)(H).

[10] The court noted that "[a]ppropriations riders have prevented the Treasury from taking final action on the draft regulations, but they still help to inform our understanding of the statute." *Cooper*, 457 F.3d at 639.

The Treasury Department also effectively rejected plaintiffs' theory of age discrimination in the 1991 preamble to final regulations under § 401(a) of the Internal Revenue Code:

> The fact that interest adjustments through normal retirement age are accrued in the year of the related hypothetical allocation will not cause a cash balance plan to fail to satisfy the requirements of section 411(b)(1)(H) [the parallel provision to ERISA § 204(b)(1)(H)], relating to age-based reductions in the rate at which benefits accrue under a plan.

56 Fed. Reg. 47,524, 47,528 (Sept. 19, 1991).[11] Further, the regulations issued with this preamble contained a safe harbor design that required, among other things, uniform interest credits using any one of several specified bases until normal retirement age. 26 C.F.R. § 1.401(a)(4)-8(c)(3). Plaintiffs' theory, however, would invalidate as age discriminatory the very interest crediting feature that the Treasury Department authorized under final regulations. It is illogical to conclude that what Treasury determined is a "safe harbor" in one context is a violation of ERISA's age discrimination provision in another.[12]

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[11] The Treasury Department holds exclusive administrative jurisdiction over the interpretation of ERISA § 204(b)(1)(H). *See* Reorganization Plan No. 4, 43 Fed. Reg. 47,713 (Sept. 20, 1978). Hence, its pronouncements are entitled to great deference. *See Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 158 n.13 (1982) (preamble represents "the administrative construction of the regulation, to which 'deference is clearly ... in order.' *Udall v. Tallman*, 380 U.S. 1, 16 (1965)").

[12] Plaintiffs argued below that section 401(a) of the Internal Revenue Code is not the age discrimination provision of the Code, but the preamble specifically refers

In sum, the language, structure, legislative history, and regulatory interpretations of ERISA generally, and the phrase "benefit accrual" in § 204(b)(1)(H) in particular, all reinforce the conclusion of *Cooper* and the district courts that cash balance plans should be evaluated by "what the employer imputes to the account" each year rather than by the rate of change of the accrued benefit. Because the SoCalGas Plan is age-neutral by the proper statutory measure, it does not violate § 204(b)(1)(H).

C. Plaintiffs Fail To State A Claim Of Discrimination "Because Of The Attainment Of Any Age"

Even if plaintiffs were correct in construing "benefit accrual" to mean "accrued benefit," their complaint still would not state a claim. Their complaint fails to show that the reduction in benefit accrual is "because of the attainment of any age" for two independent reasons.

1. Plaintiffs Cannot Base an Age Discrimination Claim on the Time Value of Money.

The reduction in the benefit accrual to which plaintiffs object is not linked to the "attainment of any age," as it must be to state a claim under § 204(b)(1)(H), but rather to the Plan's straightforward accounting for the time

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to § 411(b)(1)(H) of the Code, *the parallel provision to ERISA § 204(b)(1)(H),* and thus provides powerful guidance, as it deals directly with the age discrimination provision at issue here. Plaintiffs also argued that the IRS eliminated the preamble when it amended its regulation. That misses the point that the regulations to which the preamble relates were enacted as final regulations and permit the very interest crediting feature that plaintiffs claim is age discriminatory.

value of money. Such accounting is an ordinary financial adjustment and is beneficial for the employee; it is not age discrimination.

Here, as in *Cooper*, plaintiffs' theory of age discrimination is that an older worker's age 65 annuity will be worth less than a younger worker's simply because the younger worker has to wait more years to accumulate interest credits, and those interest credits will be included in a calculation of the amount of the annuity. Plaintiffs claim that the pay credit given to a younger participant has a greater dollar value when projected to her 65th birthday than the same pay credit given to an older participant when projected to her 65th birthday, because the younger participant's pay credit will generate more years of interest. Appellants' Br. 42; *see* ER 250 (SAC ¶ 35).

Plaintiffs, however, ignore that at any *one* moment in time, given the same years of service and compensation, any two participants' account balances will be identical, no matter what their ages may be. A 45-year old participant will have 10 more years to earn interest on his pay credits under the Plan than the 55-year old participant, but the 45-year old will also have to wait those extra 10 years to receive those benefits. That phenomenon merely reflects the "power of compound interest." *Cooper*, 457 F.3d at 640. Moreover, plaintiffs ignore that if the younger worker elects to receive benefits before reaching age 65, the value of future guaranteed interest credits to be received up to age 65 would be discounted to present value. *See id.* (plaintiffs characterize future guaranteed interest credits as "extra interest for the young," but they ignore the discounting to present value).

Thus, plaintiffs' position contradicts the principle that changes in benefits that merely correlate with age, but are not *caused* by age, cannot be deemed unlawful age discrimination. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612-13 (1993); *Eaton*, 117 F. Supp. 2d at 832 (§ 204(b)(1)(H) does not prohibit reductions in benefits based upon years of service "despite the one-to-one correlation of age and years of service"); *Coleman v. The Quaker Oats Co.,* 232 F.3d 1271, 1285 (9th Cir. 2000).[13] Plaintiffs assert that the accrual rate under the cash balance formula will be lower for older employees than for younger employees because they have fewer years before retirement, and so "age is 'perfectly correlated' with the reduction in the rate of the employees' benefit accruals." Appellants' Br. 42. The Seventh Circuit disagreed that such a correlation equals age discrimination: "[I]t is essential to separate age *discrimination* from other characteristics that may be correlated with age. That

[13] This Court's decision in *Arnett v. California Public Employees Retirement System*, 179 F.3d 690 (9th Cir. 1999), is inapposite. In *Arnett*, if an older and younger worker with the same pay and years of service began receiving disability benefits on the same day, the older worker would receive a smaller disability. In contrast here, if a younger and older SoCalGas employee with the same pay and years of service began receiving benefits on the same day, the older worker would never receive a smaller benefit than the younger worker.

was the Supreme Court's point in *Hazen Paper*..." *Cooper*, 457 F.3d at 642 (emphasis in original).

In *Hazen,* the Supreme Court addressed the situation in which "wages rise with seniority (and thus with age) at many employers, but distinctions based on wage levels (in order to reduce a payroll) do not 'discriminate' by age." *Cooper,* 457 F.2d at 642. The Seventh Circuit analogized plaintiffs' age discrimination theory to *Hazen,* and noted, after citing as additional authority *Achor v. Riverside Golf Club*, 117 F.3d 339 (7th Cir. 1997) and *Sheehan v. Daily Racing Form, Inc.,* 104 F.3d 940 (7th Cir. 1997):

> While those decisions involved different statutory regimes, the objective is general: a plaintiff alleging age discrimination must demonstrate that the complained-of effect is *actually* on account of age. One need only look at IBM's formula to rule out a violation. It is age-neutral.

Cooper, 457 F.3d at 642. The same is true of the SoCalGas Plan. *See also Laurent,* 2006 WL 2546805 at *14 ("the rate of benefit accrual under such plans is not age dependent.") (citations omitted); *Hirt*, 2006 WL 2023545 at *34 ("The plan merely preserves the time value of money, and thus treats all participants equally."); *Tootle v. Arinc, Inc.*, 222 F.R.D. 88, 93-94 (D. Md. 2004); *Register*, 2005 WL 3120268, at *6-7; *Eaton*, 117 F. Supp. 2d at 825-33. Thus, as the Seventh Circuit and numerous other courts have observed, "[t]reating the time value of money as a form of discrimination is not sensible." *Cooper,* 457 F.3d at 639.

Plaintiffs point to no policy that would support the result they seek. On the contrary, plaintiffs' theory faults employers for providing interest credits that protect a participant's pay credit from the brunt of inflation before the participant is eligible to take a distribution. *See Cooper*, 457 F.3d at 638 ('[u]nder the district court's analysis, compound interest becomes a scourge."); *Eaton,* 117 F. Supp. 2d at 832 (plaintiff's interpretation "would … give employers a perverse incentive *not* to guarantee at least some level of growth in the value of a pension over time.") (emphasis in original). *See also Hirt*, 2006 WL 2023545, at *34 (compounding is an essential feature of preserving value). Moreover, plaintiffs' theory would require enormous windfalls to older employees. A participant who is allocated a pay credit at age 21 and waits until age 65 to receive benefits will receive the benefit of 44 years of compound interest on that credit. Under plaintiffs' theory, the plan would have to provide that same 44 years of compound interest to the 64-year old participant who has only to wait one year to receive it. Finally, plaintiffs' age discrimination argument would invalidate not only SoCalGas' plan but virtually all other cash balance plans as well – and would do so only because the plan provides commonplace protection to participants from the erosion of the value of their benefits over time. There is no reason to construe § 204(b)(1)(H)(i) to require that extraordinary and harmful result.

2. Plaintiffs' Claim of Reduced Benefit Accrual Is Not Linked to the Attainment of "Normal Retirement Age" Or Any Other Age Designated Under The Plan.

There is a second fundamental reason why plaintiffs cannot show a reduction in benefit accrual "because of the attainment of any age." Congress' purpose in enacting § 204(b)(1)(H) was to ensure that employees who continued to work *after normal retirement age* would continue to accrue pension benefits. *See* p. 6-8, *supra*. Congress did not intend to create new rights for participants, such as plaintiffs here, who cannot link any reduction in benefits to the attainment of a designated retirement age. Numerous courts have recognized and enforced this limitation on the scope of relief under § 204(b)(1)(H).

Plaintiffs argue that this Court should ignore the caselaw and disregard the legislative history because the statute is unambiguous. (Appellants' Br. 23-24.) Reading the words "any age" in § 204(b)(1)(H) in isolation, plaintiffs argue that whenever an individual attains an age, no matter what age that may be, if that person can point to someone younger who will earn a larger accrued benefit, then that person can bring a claim under § 204(b)(1)(H). Thus, under plaintiffs' illogical approach, a 19-year old employee would have a claim for age discrimination because he has fewer years to accrue benefits than an 18-year old co-worker. Plaintiffs' reading thus creates unprecedented and outlandish types of age discrimination claims.

It is far more reasonable to conclude that the words "attainment of any age" mean that a plan cannot designate any particular age after which the rate of benefit accrual would be cut off or reduced simply because the participant reached that age. The legislative history unequivocally demonstrates that Congress intended that § 204(b)(1)(H) and the parallel provisions in the ADEA and the IRC do not apply to participants who have not reached normal retirement age. *See* pp. 6-8, *supra*. The Conference Report clarified that the statute was "not intended to apply" to "employees who have not attained normal retirement age."[14] Conference Report at 379. Sponsoring legislators said that the legislation would require "continued pension benefit accruals for workers who work past the normal retirement age of 65." *See* 131 Cong. Rec. S 9429; *Eaton*, 117 F. Supp. 2d at 827. The statutory heading reads "Benefit Accrual Beyond Normal Retirement Age."[15]

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[14] Next to the statute itself a conference report "is the most persuasive evidence of congressional intent." *Dep't of Health and Welfare, State of Idaho v. Block*, 784 F.2d 895, 901 (9th Cir. 1986); *see also Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 835 (9th Cir. 1996); *Eaton*, 117 F. Supp. 2d at 827; *Buckley v. Valeo*, 424 U.S. 1, 51 n.57 (1976) (court should not adopt an interpretation of a statute where the conference report "expressly provides for a contrary interpretation").

[15] Statutory headings can provide insight into a statute's meaning. *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998). *See Laurent,* 2006 WL 2546805, at *13 ("It is particularly persuasive that the statutory headings in the

Pub. L. No. 99-509, 100 Stat. 1874 at 1975. The legislative history is clear and uncontroverted.[16]

Numerous courts have considered that legislative history and have reached the same conclusion. In *Laurent,* 2006 WL 2546805, at *13, the court held:

> Based on my reading of the statutory text, particularly the statutory headings of IRC § 411(b)(1)(H), and considering also the nature of the legislative history, I agree with the majority view that ERISA's anti-discrimination provision does not apply to employees who have not reached normal retirement age.

Eaton, 117 F. Supp. 2d at 826-29 (same); *Tootle*, 222 F.R.D. at 93 (same); *Engers v. AT&T Corp.*, No. 98-3660, 2001 U.S. Dist. LEXIS 25889, at *10 (D.N.J. June 6, 2001) (same); *Drutis*, slip op. at 8 (same); *see also Campbell v. BankBoston, N.A.*, 327 F.3d 1, 10 (1st Cir. 2003) (citing *Eaton* and reasoning that "the ERISA age discrimination provision may not even apply to workers younger than the age of

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parallel provision in the I.R.C. refer to the accrual of benefits 'beyond normal retirement age' as being the subject of the anti-discrimination provision.")

[16] Plaintiffs claim that the legislative history "does not 'conclusively' establish that Congress was only concerned with discrimination after age 65." Appellants' Br. 25, n.4. Plaintiffs' *only* support for that half-hearted position, however, is a statement from the Conference Report dealing with the elimination of a provision in the then-current law that "permitt[ed] an employer to exclude from participation under certain plans employees hired within five years of normal retirement age." Conference Report at 379. The quoted passage, however, does not address benefit accruals, or the rate of benefit accrual, or the specific reach of § 204(b)(1)(H). Rather, it deals with a provision requiring employers to give older workers, i.e., those within five years of normal retirement age, the opportunity to earn benefits.

normal retirement."); *Lunn v. Montgomery Ward & Co.*, 166 F.3d 880, 883 (7th Cir. 1999) (recognizing that under § 204(b)(1)(H), an employer "could not say to [its employee], if you insist on working after you reach the age of 65, we're going to cut down your normal retirement benefits"). Because plaintiffs' claim for age discrimination is not causally linked to a reduction in benefits triggered by the "attainment of any age" designated "under the plan," plaintiffs fail to state a claim under § 204(b)(1)(H).

II. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' BACKLOADING CLAIM

Plaintiffs' next claim is that the Plan violates § 204's prohibition against the "backloading" of pension benefits. As the House Report on ERISA explained, the "primary purpose" of ERISA's backloading rules is to prevent plans from "providing inordinately low rates of accrual in the employee's early years of service when he is most likely to leave the firm and ... concentrating the accrual of benefits in the employee's later years of service when he is most likely to remain with the firm until retirement." H.R.Rep. No. 93-807 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4688. There are three backloading rules, and a plan need comply with only one.

Plaintiffs allege that the SoCalGas plan violates the 133-1/3 Percent Rule, which is set forth in ERISA § 204(b)(1)(B), 29 U.S.C. § 1054(b)(1)(B).[17] This Rule provides that benefits accrued in any one year may not exceed 133-1/3 percent of the benefit accrued in any prior year. *Id.* Plaintiffs do not allege that the Plan's cash balance benefit formula, standing alone, fails this standard. They could not reasonably do so. Their cash balance accounts are credited with monthly retirement and interest credits (ER 245-46 (SAC ¶¶ 18-19); Appellants' Br. 7-8) pursuant to a formula that will produce accruals well within the statutory range.

Instead, plaintiffs focus their backloading claim on the Plan's "grandfather" provisions. Appellants' Br. 9. Under those provisions, plaintiffs were entitled to continue to accrue benefits under the pre-amendment formula until June 30, 2003, when those benefits were "frozen." *Id.* Upon retirement, plaintiffs are then entitled to receive the "greater of" the benefits earned under the pre-amendment formula or the cash balance formula.

Plaintiffs' backloading claim thus arises solely from the interplay between the old and new formulas. Plaintiffs allege that their frozen benefits under

[17] Plaintiffs wrongly assert that cash balance plans cannot satisfy the other two backloading tests. Although some courts have so stated, they have done so without analyzing the language of the statute, and their statements conflict with the statutory language. The Court need not address this issue because the SoCalGas plan plainly complies with § 204(b)(1)(B). But the Court also should not endorse plaintiffs' mistaken assumption about the other two tests.

the pre-amendment formula are currently significantly greater than the benefits in their cash balance account, and they are currently experiencing and will continue to experience "zero benefit accrual." When that "wearaway" period ends, plaintiffs argue, *any* accruals to their cash balance accounts will by definition exceed zero, and thus violate the 133-1/3 Percent Rule.

Plaintiffs' backloading claim is foreclosed by the plan amendment exception to the 133-1/3 Percent Rule. It is equally and independently foreclosed by a uniform line of authority, including this Court's decision in *Williams*, that bars challenges to accruals under one formula based on the impact of benefits accrued and frozen under another formula.

A. ERISA's Plan Amendment Provision Bars Plaintiffs' Backloading Claim.

The 133-1/3 Percent Rule includes a plan amendment provision, which states that "any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years." *See* ERISA § 204(b)(1)(B)(i). Under this provision, when a plan is amended to adopt a new benefit formula, the 133-1/3 Percent Rule is applied to the new formula on a stand-alone basis, as if it had been effect "for all other plan years," without considering the pre-amendment formula. This provision preserves the flexibility of plan sponsors to amend benefit formulas on a prospective basis without risking a violation of the backloading rules. *See Langman v. Laub*, 328 F.3d 68, 71-72 (2d Cir. 2003); *Allen v.*

Honeywell Retirement Earnings Plan, 382 F. Supp. 2d 1139, 1160 (D. Ariz. 2005); *Campanella v. Mason Tenders' Dist. Council Pension Plan*, 299 F. Supp. 2d 274, 285 (S.D.N.Y. 2004).

As a result, every court to apply the plan amendment provision to backloading claims has concluded that benefits accrued under a pre-amendment formula are not considered in determining whether an amended formula complies with the backloading rule. *Langman*, 328 F.3d at 71-72 (benefits accrued under a prior, pre-amendment plan formula not taken into account); *Allen*, 382 F. Supp. 2d at 1160 ("backloading question must be answered by considering the new formula on a stand-alone basis"); *Campanella*, 299 F. Supp. 2d at 285 (rejecting backloading claim because "all current employees under the Plan are accruing the same benefit rate").

Two courts have applied the plan amendment provision specifically to cash balance conversions. Each has held that the pre-amendment benefit formula must be disregarded for backloading purposes. *Register*, 2005 WL 3120268, at *11-12 ("the protected prior benefits under the old plan are disregarded" for purposes of testing compliance with the 133-1/3 Percent Rule); *Richards*, 427 F. Supp. 2d at 170-71 and *Richards v. FleetBoston Financial Corp,* No. 04-CV-1638, 2006 U.S. Dist. LEXIS 55809, at *7-10 (D. Conn. July 21, 2006) (dismissing amended complaint) (plan amendment provision applies to cash balance conversion where, as here, pre-amendment formula is also part of the post-amendment's "greater of" formula).[18] If the cash balance formula here had always been in effect, plaintiffs would have started accruing benefits under the cash balance formula from the start of their employment and never would have accrued any benefits under the prior formula; thus, there could be no period of "zero benefit accrual." *See Richards*, 2006 U.S. Dist. LEXIS 55809, at *8-9.

The plan amendment exception to the 133-1/3 Percent Rule is appropriate, because Congress separately protected participants from the loss of any accrued benefits from a plan amendment. ERISA § 204(g) expressly prohibits an employer from reducing an accrued benefit when it amends a plan. *See Campbell v. BankBoston, N.A.*, 327 F.3d 1, 8 (1st Cir. 2003). As a result, participants will always be entitled at least to the benefits they accrued before a plan amendment. Under plaintiffs' approach, however, *any* plan that would give participants the greater of their frozen pre-amendment benefit or their amended plan benefit could violate the 133-1/3 Percent Rule. This would create an obstacle to plan amendments that Congress plainly wished to avoid.

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[18] Plaintiffs cite *Eaton*, 117 F. Supp. 2d at 843-45, which denied defendant's motion for summary judgment on a backloading claim. That opinion, however, does not address the application of the plan amendment provision and therefore is inapposite.

Indeed, this case aptly illustrates the valuable role that the plan amendment exception plays. Under ERISA § 204(g), the SoCalGas plan did not need to provide *any* "grandfather" provisions in which participants accrued benefits under the pre-amendment formula; it would have been sufficient under ERISA simply to preserve each participant's "accrued benefit under the Pre-Conversion Formula as of June 30, 1998," as plaintiffs admit was done here. ER 245 (SAC ¶ 17); *see* ERISA § 204(g). The SoCalGas plan thus went beyond the minimum that ERISA permits to provide grandfathering provisions that plaintiffs admit substantially increased the value of their benefits. To hold now that these provisions violate the backloading requirements "would be a strange rule" indeed. *Langman*, 328 F.3d at 71-72. It would discourage employers from including beneficial provisions in plan amendments, and illustrate in yet another context how it is possible "for litigation about pension plans to make everyone worse off." *Cooper*, 457 F.3d at 642.

Plaintiffs rely solely on one Treasury regulation and an excerpt from an informal guidance document. Neither is applicable here, because neither addresses the impact of a plan amendment upon the 133-1/3 Percent Rule.

The Treasury regulation cited by plaintiffs provides:

> A defined benefit plan may provide that the accrued benefits for participants are determined *under more than one plan formula*. In such a case, the *accrued benefits under all such formulas must be aggregated* in order to

> determine whether or not the accrued benefits under the plan for participants satisfy one of the alternative methods.

Treas. Reg. § 1.411(b)-1(a), 26 C.F.R. § 1.411(b)-1(a) (emphasis added). The regulation, by its terms, does not address a plan amendment. Instead, it addresses the situation in which a participant is entitled to receive multiple benefits under different formulas, and states that all of the benefits earned must be "aggregated" for purposes of applying the backloading rules. Benefits thus must be aggregated in assessing backloading when a participant is entitled to the *sum of* the benefits (commonly referred to as an "A+B" benefit formula).[19] Where, as here, a plan is amended to provide a participant a single benefit that is the greater of two alternative benefits (a "greater of A or B" formula), this regulation is inapplicable. Indeed, it makes no sense to aggregate the benefits under two alternative formulas where a participant is entitled to the benefit provided by only one of those formulas.

Plaintiffs' only other proffered support is an IRS publication that accompanies a "Worksheet," used by IRS examiners, regarding minimum vesting standards. *See* Appellants' Br. 48 (citing "Explanation No. 2A: Minimum Vesting Standards – Defined Benefit Plans" ("Explanation 2A")). Far from helping

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[19] For an example of such a formula, *see* IRS P.L.R. 84-13-066 (Dec. 29, 1983) (plan provided benefits equal to sum of (a) 1.5% of compensation up to social security wage base, and (b) 2.25% of compensation in excess of social security wage base).

plaintiffs, this document expressly confirms that the "plan amendment … exception" applies to satisfy the 133-1/3 Percent Rule, and even offers an example of how it does so. (A 115) Notably, plaintiffs ignore the plan amendment example, and point instead to an illustration of backloading under the "top-heavy rules" (A 116), which obviously are not at issue here.[20]

B. Plaintiffs' Cash Balance Benefit Accruals Must Be Tested For Backloading Without Regard To Their Frozen Benefits.

The plan amendment provision independently disposes of plaintiffs' backloading claim. But even apart from that provision, plaintiffs' backloading claim still would fail. Under the settled law of this Court, when a plan provides a participant with the greater of two benefits under two formulas, one of which is frozen, the frozen benefit is not taken into account in applying the backloading rules. Rather, the benefit that is not frozen is evaluated on a stand-alone basis. *See Williams,* 944 F.2d at 662; *cf.* Rev. Rul. 76-259, 1976-2 C.B. 111.

In *Williams,* this Court addressed, *outside* the context of a plan amendment, precisely the issue of a plan that awarded benefits according to the "greater of" two formulas. In that case, plaintiffs were initially covered under a

[20] For the top-heavy rules to apply to a plan of a company such as SoCalGas, more than 60% of the present value of the plan's accrued benefits must be earned by company officers with an annual compensation of at least $140,000 annually. *See* 26 U.S.C. §§ 416(g)(1), (i)(1). Given the number of SoCalGas employees and the broad eligibility provisions of the Plan, such a concentration of benefits at the top clearly could not occur.

defined benefit formula applicable to union employees. They were then promoted and covered under a different defined benefit formula applicable to managers; thereafter, they were demoted to union positions and once again covered under the union formula. *Id.* Upon retirement, plaintiffs received benefits pursuant to a "single, integrated system" which gave them the greater of their benefits under the union formula or the management formula. *Id.* at 662-63. Their benefits under the management formula (which were effectively frozen because they did not increase after plaintiffs returned to the union formula) were higher than under the union formula, and so the plaintiffs in *Williams* "actually received no additional, incremental benefit allocable to" their final years of service under the union plan. *Id.* In other words, the plaintiffs in *Williams* experienced the same "zero benefit accrual" alleged by plaintiffs in this case.

The *Williams* plaintiffs alleged violations of numerous ERISA provisions, including ERISA's minimum participation, vesting, and accrual standards. This Court held that the plaintiffs had "not identified or demonstrated a substantive ERISA violation in the calculation of their benefits." *Id.* at 664. In so holding, the Court expressly rejected the methodology that plaintiffs advance here that benefit accrual must be measured for purposes of ERISA § 204 by considering the effect of the frozen benefit on the other formula. *Id.* Although the *amounts payable* to plaintiffs were calculated by determining whether their union benefit or frozen management benefit was greater, the *minimum accrual rules* of § 204, which include the 133-1/3 Percent Rule, were applied without taking the frozen benefit into account:

> Appellants, in short, have incorrectly attempted to apply the minimum accrual rules *after* the offset was made [i.e. considering the effect of the frozen benefit on the active accruing benefit], rather than before. *See* 29 U.S.C. § 1054 [ERISA § 204] (setting forth minimum accrual requirements).

944 F.2d at 663.

Before the district court, plaintiffs attempted to distinguish *Williams* as involving the interaction of two distinct plans with two distinct benefit formulas, rather than a single plan. Rather than treating the plans at issue in *Williams* as separate, however, this Court emphasized that the frozen management benefit was "'*itself part of the formula* for determining the amount of [plaintiffs'] pension payments'" under the union plan, *id.* at 664 (emphasis added); *see id.* at 663-64 (plan may account for offsetting benefits from whatever source, public or private). Thus, *Williams* leaves no doubt that a frozen benefit is simply not considered in measuring benefit accrual under § 204.

Williams is fully consistent, moreover, with a host of decisions and rulings by the Treasury Department, the IRS, and other courts, all of which recognize, in various contexts that plans providing the "greater" benefit as between two or more formulas, are lawful. *See, e.g.,* 26 C.F.R. § 1.401(a)(4)-13(c)(4)(ii) (allowing plans to use formula that calculated participants' benefits as the greater of a frozen benefit and an active accruing benefit (explicitly referred to in the regulation as a "wearaway formula")); 26 C.F.R. § 1.401(a)(17)-1(e)(5), *Example 1*; S. Rep. No. 98-575, at 28-29 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2574-75; *Brody v. Enhance Reinsurance Co.*, No. 00 Civ. 9660, 2003 U.S. Dist. LEXIS 3785, at *26-27, 37-38 (S.D.N.Y. March 14, 2003) (citing Rev. Rul. 81-12, 1981-1 C.B. 228)); *Corcoran v. Bell Atlantic Corp.*, No. Civ. A 97-510, 1997 WL 602859, at *3-4 (E.D. Pa. Sept. 23, 1997), *aff'd*, 159 F.3d 1350 (3d Cir. 1998).

Floor-offset arrangements, for example, inherently involve the potential for precisely the same "wearaway" to which plaintiffs object. In one such arrangement, a participant's accrued benefit under a defined benefit plan is offset by the benefit provided by a defined contribution plan. *See* Rev. Rul. 76-259, 1976-2 C.B. 111. In that situation, a participant might receive no benefit under a defined benefit plan in one particular year because it is offset by a greater benefit under a defined contribution plan, while the following year the participant might receive a benefit under the defined benefit plan. Under plaintiffs' theory, this period of "zero benefit accrual" under the defined benefit plan, followed by a positive accrual, would be a *per se* violation of the 133-1/3 Percent Rule. The IRS has ruled, however, that the benefit from the other plan is ignored and the plan complies with the 133-1/3 Percent Rule as long as the defined benefit formula *itself* satisfies the backloading rules. Rev. Rul. 76-259, 1976-2 C.B. 111; *see White v. Sundstrand Corp.*, 256 F.3d 580 (7th Cir. 2001) (approving floor-offset plan).

Applying the same principle underlying the floor-offset ruling here, the Plan's cash balance formula should be tested on a stand-alone basis and is not backloaded. As discussed above, the one Treasury regulation plaintiffs cite addresses the aggregation of benefits from multiple benefit formulas (A+B); it does not address a situation, such as that discussed in the revenue ruling above, where a participant receives the "greater of" two alternative calculations.[21] It certainly provides no reason to reject all of the other rulings that specifically endorse "greater of" benefit formulas.[22]

[21] The other document plaintiffs cite, the IRS worksheet, is merely internal agency guidance that, unlike the authority cited above, lacks the force of law and is not entitled to deference. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("interpretations contained in policy statements, agency manuals, and enforcement guidelines ... lack the force of law – [and] do not warrant *Chevron*-style deference.") (internal citations omitted). Explanation 2A, the example to which plaintiffs cite, moreover, is devoid of reasoning and lacks citation to authority (*see* A-116); it therefore does not warrant even *Skidmore* respect. *See Skidmore v. Swift & Co.,* 323 U.S. 134 (1944); *Padash v. INS*, 358 F.3d 1161, 1168 n.6 (9th Cir. 2004). Indeed, the document does not purport to bind even agency personnel. *See* Internal Revenue Manual § 7.11.1.6(2) ("Alert Guidelines" are merely "tools *available to assist* the [IRS] specialist in analyzing plans" which may, but are not required to, be used "[i]n addition to the specialist's knowledge, training, and experience.") (emphasis added).

[22] Plaintiffs argued below that defendants "could have adopted" a different plan that gave participants the sum of their pre-amendment and cash balance benefits. That is irrelevant to whether the "greater of" formula that the Plan did adopt is legal.

At bottom, plaintiffs' argument here is no different in its essentials than the one in *Williams*. Each claims that it is "unfair that an employee would not receive an additional increment of [benefit] compensation for every year of additional service." *Williams*, 944 F.2d at 663. As this Court noted, the failure to receive additional annual benefits under one formula is merely the result of having already received more generous benefits under a different formula. "[U]nfair or not," the Plan's "greater of" formula does not violate ERISA's benefit accrual rules. *Id.*

III. DESPITE THREE ATTEMPTS, PLAINTIFFS DID NOT STATE A CLAIM UNDER ERISA § 204(h).

The district court gave plaintiffs three opportunities to attempt to state a claim for inadequate notice under ERISA § 204(h). Plaintiffs failed every time. They have not pleaded that they were harmed by the purported lack of notice, and they cannot plead such harm. They were not entitled, under the regulations applicable at the time of amendment, to receive notice of the possibility of wearaway, and in any event they were indisputably on notice from the Plan's Summary Plan Description ("SPD") of the possibility of wearaway almost three years before it could have occurred.

A. Plaintiffs Are Required to Allege Harm From Any Lack of Notice.

This Court has held that a plaintiff seeking to recover for an alleged failure to comply with ERISA's notice requirements must show harm from the failure to receive such notice. *Siles,* 783 F.2d at 930. Courts within this Circuit have routinely recognized that this requirement applies to § 204(h). *See Finch v. Bob's Distrib. Co., Inc., Defined Benefit Plan*, No. CV-95-00365, slip op. at 25 (D. Alaska Dec. 22, 1997) (tentative order), *final order directing entry of judgment*, slip op. at 2 (D. Alaska Jan. 23, 1998), *aff'd*, 1999 U.S. App. LEXIS 22189 (9th Cir. 1999) (unpublished), *cert. denied*, 528 U.S. 1157 (2000); *Allred v. First Nationwide Fin. Corp.*, No. C-92-4000, 1994 U.S. Dist. LEXIS 21538, *16-19 (N.D. Cal. May 2, 1994) ("*Allred I*"), 1994 U.S. Dist. LEXIS 20245, *8 (N.D. Cal. Aug. 2, 1994) ("*Allred II*") (employee must show substantive damage from alleged lack of § 204(h) notice); *Young v. St. Frances Xavier Cabrini Hosp. of Seattle*, No. C87-973Z, 1989 U.S. Dist. LEXIS 18376, *11 (W.D. Wash. April 12, 1989) (employees could not recover under § 204(h) because they were not prejudiced by lack of notice), *rev'd on other grounds, Johnson v. St. Frances Xavier Cabrini Hosp. of Seattle*, 910 F.2d 594 (9th Cir. 1990).

Plaintiffs argue that it is sufficient, under the language of the statute, merely to allege failure to provide notice. (Appellants' Br. 50-51). That argument ignores the Ninth Circuit law cited above, which clearly requires a showing of harm, and misreads ERISA as well.

First, the regulations require that notice be given only to participants who are expected to experience a significant reduction in their rate of future benefit accrual. 60 Fed. Reg. 64,320, 64,323, § 1.411(d)-6T, Q&A-9(a) ("A plan administrator need not provide section 204(h) notice to any participant whose rate of future benefit accrual is reasonably expected not to be reduced by the amendment"). Implicit in this limitation on who must receive notice is a requirement of harm. Participants who could not possibly be harmed by a lack of notice (because they will not experience a significant reduction in the first place) need not be provided with notice.

Second, the requirement that a plaintiff show harm is rooted in the equitable nature of the remedy for a violation of the notice requirement. Plaintiffs seek to use § 204(h) to impose a draconian remedy of voiding the amendment converting the plan to a cash balance formula as to *all* participants in the Plan, regardless of whether those participants received or were required to receive notice, and regardless of whether the cash balance formula provided those participants with a larger benefit. ER 241 (SAC ¶ 5). In *Allred*, the court recognized that the extreme relief sought by plaintiffs – invalidation of the plan amendment – would result in adverse consequences for other plan participants.

Allred I, 1994 U.S. Dist. LEXIS 21538 at *16-17. Because violations of ERISA's notice provisions must be remedied equitably, the court rejected plaintiffs' invitation to ignore Ninth Circuit authority requiring a showing of harm. *Id.* at *15-17.

Plaintiffs rely entirely on cases from outside this Circuit in suggesting that they do not need to allege harm. Appellants' Br. 51-53 (citing *Prod. and Maint. Employees' Local 504 v. Roadmaster Corp.*, 954 F.2d 1397 (7th Cir. 1992); *Koenig v. Intercontinental Life Corp.*, 880 F. Supp. 372, 373 (E.D. Pa. 1995); *Abels v. Titan Int'l, Inc.*, 85 F. Supp. 2d 924, 937 (S.D. Iowa 2000)). None of these cases, however, considers the Ninth Circuit's precedent and supporting rationale, and so none provides a reason to abandon the harm requirement.

B. Plaintiffs Cannot Allege Harm.

In the Second Amended Complaint, plaintiffs attempted to plead harm in two ways. Neither is, or could be made, sufficient.

To begin with, plaintiffs allege that the lack of notice deprived them of the opportunity of "seeking an injunction preventing SoCalGas from implementing" the amendment. ER 258 (SAC ¶ 69). Because plaintiffs have failed to state any viable claim that the Plan was unlawful *independent of the notice requirement*, however, there was no violation of law to enjoin. No harm can flow from this lost opportunity.

Other than that, plaintiffs allege only that they lost "the opportunity … to purs[ue] other alternatives such as increasing the amount of their retirement savings." *Id.* This conclusory allegation also fails as a matter of law, for two reasons.

First, the only causal link between this alleged lost opportunity and notice under § 204(h) is plaintiffs' allegation that they should have been notified of the "Wear-Away Provision, and those terms that resulted in the future freezing of plaintiffs' benefits accrued under the Pre-Conversion Formula." *Id.*; *see also* ER 250-51 (SAC ¶¶ 36-40, 64-66)). But under the regulation that governed the content of notices at the time of the amendment, plaintiffs were not entitled to receive notice of the fact or potential impact of wearaway. As the court held in *Register,* Treasury regulations in force prior to 2002 expressly provided that a § 204(h) notice summary *"need not explain* how the individual benefit of each participant … will be affected by the [plan] amendment." Treas. Reg. 1.411(d)-6, Q&A(10) (1998). *See Register,* 2005 WL 3120268 at *8 n.19. For that reason, the *Register* court dismissed a similar notice claim:

> Defendants did not notify participants that their benefit accrual rates would be "significantly reduced" in the future, but, quite simply they did not need to. As a result, this claim is dismissed.

Id. The same is true here. Because plaintiffs were not entitled to receive notice of wearaway and future frozen benefits, they cannot claim harm from any lost opportunity that such notice would have given them.

Second, plaintiffs cannot allege any harm because SoCalGas distributed to participants a summary plan description ("SPD")[23] that identified the potential for wearaway and "frozen benefits" almost *three years* before they stopped accruing grandfather benefits under the old formula in 2003.[24] They therefore had ample opportunity to react to the Plan amendment. Plaintiffs did not dispute below either that the SPD was distributed to participants in September 2000 or that it notified participants of the potential for wearaway and frozen

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[23] When a plaintiff bases a claim on the terms of a plan, a court may consider the plan documents, even those not mentioned in the complaint, on a motion to dismiss. *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998). All of plaintiffs' claims are based on the Plan and the SPD is an essential plan document. *See Bergt v. Ret. Plan for Pilots Employed by Mark Air, Inc.*, 293 F.3d 1139, 1143 (9th Cir. 2002).

[24] For example, the SPD includes a table under the heading "Special Features for Employees Transitioning to the Cash Balance Plan." The last row of that table is entitled "Frozen Benefit" and states: "If you were a participant in the plan on July 1, 1998, your benefit will always be the greater of your Cash Balance Plan account or the present value of your June 30, 2003 benefit under the prior plan." Appellees' Supplemental Excerpts of Record ("SER") 07 (Exhibit A to Defendants' Memorandum in Support of Motion to Dismiss Second Amended Complaint, at 7)). That statement disclosed to participants that they would be entitled to the pre-amendment benefit if it was greater than their cash balance benefit, but the pre-amendment benefit would be frozen on June 30, 2003. Thus, if the cash balance benefit subsequent to that date was less than the frozen plan benefit, plaintiffs would experience what they call "wearaway."

benefits. They claimed only that distribution of the SPD after the Plan amendment does not satisfy § 204(h). But SoCalGas relies on the SPD only to show that plaintiffs cannot state a claim for *harm* from lack of notice of wearaway and frozen benefits in 1998, because plaintiffs received such notice in 2000 – three years before any wearaway period could have commenced. Three years is far more advance notice of a potential loss in benefits than plaintiffs would have received under § 204(h), which requires 15 days notice, if, as explained above, the plan had omitted the grandfather provisions and immediately converted them to the cash balance formula.

To be sure, plaintiffs might still claim that they were deprived of the opportunity to take action between 1998 and 2000. But they conceded below that participants cannot be harmed or prejudiced when they are issued a notice explaining the effects of a plan amendment "well before" their benefit calculation takes place. SER 09 (Plaintiffs' Opposition to Motion to Dismiss Complaint, at 22). Here, moreover, they have failed even remotely to allege any lost opportunity unique to that time period. In these circumstances, their vague claims of harm are precisely the sort that courts have rejected as insufficient. *See Allred I,* 1994 U.S. Dist. LEXIS 21538, at *18 (rejecting claim of "harm" that plaintiffs "would have altered their retirement savings plans if they had known that their pension benefits had ceased to accrue" because "these claims cover a vague period from 1989 to

1991 without specifying exactly how plaintiffs were injured between June 30, 1991 [the date of the plan amendment] and November of that year when they received complete notification of their benefit accruals"); *Devine v. American Benefit Corp.*, 27 F. Supp. 2d 669, 676 (S.D. W.Va. 1998) (plaintiff was not prejudiced by defendant's failure to comply with ERISA's disclosure requirements where she waited three years to take any action).

IV. <u>THE FOURTH CLAIM FOR RELIEF IS PREEMPTED BY ERISA.</u>

Finally, plaintiffs' state law discrimination claim is preempted. Section 514(a) states that ERISA:

> shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a). Section 514(a) broadly preempts state laws relating to employee benefit plans, including state anti-discrimination laws that prohibit conduct that is permissible under ERISA. *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 95-106 (1983) (ERISA preempts state law claim of gender discrimination); *see generally New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 650-51 (1995); *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 127 (1992); *Nachman Corp. v. Pension Ben. Guaranty Corp.*, 446 U.S. 359, 361 (1980). This Court has repeatedly held that ERISA preempts state law age discrimination claims such as plaintiffs' FEHA claim here.

See Stone v. Travelers Corporation, 58 F.3d 434 (9th Cir. 1995) (ERISA preempted FEHA claim regarding pension plan); *Champion Int'l Corp. v. Brown*, 731 F.2d 1406, 1408-09 (9th Cir. 1984) (ERISA preempted Montana state law age discrimination claim regarding pension plan); *see also* Order Granting in Part Defendants' Motion to Dismiss in *Godinez v. CBS Corp.,* Case No. SA CV 01-28-GLT (Anx), at *5 (May 22, 2001) (dismissing virtually identical FEHA claim asserting age discrimination claim against a cash balance plan), *aff'd*, 81 Fed. Appx. 949 (9th Cir. 2003) (unpublished); *Martinez v. Maxim Property Management*, No. C-97-01944 si, 1997 WL 564070, at *4 (N.D. Cal. Aug. 28, 1997) (FEHA claim preempted).

Plaintiffs concede that their FEHA claim "relates to" an ERISA plan and thus falls within the scope of § 514(a). Appellants' Br. 55. They defend their FEHA claim solely on the theory that one "narrow" statutory exception to preemption applies here. *Shaw*, 463 U.S. at 102. Plaintiffs claim that it would "impair" a "law of the United States" – namely, the ADEA – to preempt their FEHA claim. ERISA § 514(d); 29 U.S.C. § 1144(d). They assert that FEHA's provisions "track the age discrimination protections of ADEA," and that "joint state/federal enforcement" of age discrimination law is important to the federal scheme. Appellants' Br. 57-58. Plaintiffs therefore assert that their FEHA claim "does not extend, but merely parallels, federal law." *Id.* at 56.

Plaintiffs are incorrect, for three reasons. First, plaintiffs have no valid claim of age discrimination. *See* Part I, *supra*. Because the Plan complies with ERISA's proscription against age discrimination, it also complies with the parallel provision of the ADEA and as discussed above is based on nothing more than the time value of money. *See* pp. 14-34, *supra*. The Plan therefore does not discriminate on the basis of age as a matter of federal law. This alone requires preemption of the FEHA claim. *Cf. Shaw*, 463 U.S. at 103 ("[i]nsofar as state laws prohibit employment practices that are lawful under Title VII, … , pre-emption would not impair Title VII within the meaning of [ERISA] § 514(d)").

Second, plaintiffs' FEHA claim affirmatively conflicts with both the ADEA and ERISA. Plaintiffs seek remedies, such as punitive damages and recovery for emotional distress, that are not permitted under ADEA or ERISA. (ER 262 (SAC, p. 23 ¶¶ D, E)).[25] Such claims are preempted. See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52-54 (1987) (holding that ERISA preempts a state law claim seeking punitive and emotional distress damages, and noting that ERISA "would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA");

[25] *Commissioner v. Schleier*, 515 U.S. 323, 325-26 (1995) (ADEA does not allow compensatory damages for pain and suffering and emotional distress); *Bruno v. Western Elec. Co.*, 829 F.2d 957, 966-67 (10th Cir. 1987) (ADEA does not permit punitive damages).

see also Hoops v. Elk Run Coal Co., 57 F. Supp. 2d 357, 359-60 (S.D. W. Va. 1999); *Paradise v. Benefit Plans Committee*, Civ. A. No. 93-40113-NMG, 1995 WL 708659 at *2 (D. Mass. Nov. 29, 1995).

Finally, and in all events, plaintiffs failed to exhaust their administrative remedies. Thus, even if plaintiffs once had a viable ADEA claim, it was time-barred when they filed their first complaint. *See Albano v. Schering-Plough Corp.*, 912 F.2d 384, 387 (9th Cir. 1990) (failure to exhaust administrative remedies is a condition precedent to filing suit); 29 U.S.C. §§ 626(d)(2), 633(b) (requiring that plaintiffs file an administrative charge within 300 days of the alleged discriminatory conduct); ER 252 (SAC ¶¶ 44-45) (conceding that plaintiffs filed their administrative complaints more than 300 days after discriminatory conduct occurred).

The narrow exception of § 514(d) thus cannot apply here. Enforcement of the ADEA "in no way depends on" state law enforcement of a time-barred federal claim, regardless of its purported merit. *Shaw*, 463 U.S. at 103. "[T]o allow plaintiffs' [FEHA] claim to survive preemption would be to permit plaintiffs to exercise rights to which they would not be entitled under federal law." *Alston v. Atlantic Elec. Co.*, 962 F. Supp. 616, 625 (D.N.J. 1997). Preemption thus "in no way impairs federal law" here. *Id.* (preempting state law age discrimination claim because ADEA claim was time-barred); *Management Employees of AT&T v.*

AT&T Corp., No. 98-3660 (NHP), 1999 U.S. Dist. LEXIS 6260 at **5-6 (D.N.J. 1999) (same); *Warren v. Oil, Chemical & Atomic Workers*, 729 F. Supp. 563, 567 (E.D. Mich. 1989) (same). Plaintiffs' FEHA claim therefore is preempted by § 514(a).

CONCLUSION

For the foregoing reasons, the Orders of the district court should be affirmed.

Respectfully submitted,

Dated: October 4, 2006

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Defendants-Appellees state that there are no known cases in this Court that would be deemed related.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more and contains 13,992 words.

Dated: October 4, 2006

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PROOF OF SERVICE

I, Jeffrey R. Tone, declare that on October 4, 2006, I served the BRIEF OF APPELLEES and APPELLEES' SUPPLEMENTAL EXCERPTS OF RECORD on the persons listed below by sending true and complete copies thereof via Federal Express for overnight delivery, addressed as follows:

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I further declare that on October 4, 2006, the original and fifteen (15) copies of BRIEF OF APPELLEES and five (5) copies of APPELLEES' SUPPLEMENTAL EXCERPTS OF RECORD were filed with the Court by depositing same with Federal Express for overnight delivery to:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on October 4, 2006 at Chicago, Illinois.

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