RICHARD HONAKER
Honaker Law Offices, LC
P.O. Box 366
Rock Springs, WY 82902-0366
Telephone: (307) 362-5800
Facsimile: (307) 362-5890
E-mail: honakerlaw@wyoming.com

STEPHEN R. BRUCE
805 15th St., NW, Suite 210
Washington, D.C. 20005-2271
Telephone: (202) 371-8013
Facsimile: (202) 371-0121
E-mail: stephen.bruce@prodigy.net

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

WADE E. JENSEN and DONALD D. GOFF, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 06CV273
SOLVAY AMERICA, INC., SOLVAY CHEMICALS, INC., and SOLVAY AMERICA COMPANIES PENSION PLAN,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF
MOTION TO ALTER OR AMEND ORDER AND JUDGMENT

Introduction

After three years of litigation leading up to the eve of an August 24, 2009 trial, this Court's August 3, 2009 Order (hereinafter "Order") was unexpected and disheartening to the named Plaintiffs and 919 other current and former Solvay employees who have joined them as party plaintiffs. For the reasons stated below, Plaintiffs respectfully urge the Court to vacate the Order pursuant to FRCP 59(e) and reinstate the case on the trial calendar.

I. Plaintiffs' Motion to Alter or Amend the Order and Judgment Should Be Granted to Correct Manifest Injustice.

Motions to alter, amend or vacate an order and judgment pursuant to Rule 59(e) should be granted when there are "manifest errors of law." *Adams v. Reliance Standard Life Ins. Co.,* 225 F.3d 1179, 1186 (10th Cir. 2000); *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997). Moreover, when an appeal is almost certain to result in reversal, judicial economy dictates that the district court grant the motion rather than force the parties through a lengthy appeal. *Griggs v. Provident Consumer Discount Co*., 459 U.S. 56, 60 (1982); *Russell v. Delco Remy*, 51 F.3d 746, 749 (7th Cir. 1995).

In the Tenth Circuit, reversal is frequently warranted by the failure to properly apply the standards for granting summary judgment. See, e.g., *Avila v. Jostens, Inc.*, 316 Fed Appx 826, 832 (March 19, 2009) (reversing when district court "failed to view the evidence of pretext in its totality and failed to view the evidence in the light most favorable" to plaintiff); *Sanders v. Southwestern Bell Tel.,* 544 F.3d 1101, 1105-6 (10th Cir. 2008) (ADEA).

In determining whether summary judgment can be granted, "[t]he movant bears the initial

burden of making a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law." *Adler v. Wal-Mart Stores, Inc*., 144 F.3d 664, 670-71 (10th Cir. 1998). In this instance, Solvay's statement of 24 numbered facts was devoted mainly to background material that ultimately was not germane to the Court's ruling. The facts related to the Section 204(h) notice and summary of material modification ("SMM") were mainly supported by self-serving characterizations from deposition testimony and affidavits. See Defs. Mot. (dkt.#110) at 6-9. Solvay's statement does not offer any facts related to Plaintiffs' ADEA §§4(a) and 4(i) claims about the periods of wear-away, or the backloading, forfeiture and breach of fiduciary duty claims.

To the extent this Court could nevertheless reasonably determine from Solvay's statement that the material facts related to each claim were clearly set out, "the district court's role is limited to identifying factual issues and not resolving them." *Gardetto v. Mason*, 854 F. Supp. 1520, 1530 (D.Wyo. 1994), vacated and remanded on other grounds by 100 F.3d 803 (10th Cir. 1996). Thus, the district court's "role is simply to determine whether the evidence proffered by plaintiff would be sufficient, if believed by the ultimate fact-finder, to sustain the claim." *Marcus v. McCollum*, 394 F.3d 813, 820 (10th Cir. 2004). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge considering a summary judgment motion." *Stahl v. Bd. of County Comm'rs*, 101 Fed. Appx. 316, 320 (10th Cir. 2004). Under this standard, self-serving assertions, whether in depositions or affidavits, that are "essentially conclusory and lacking in specific facts" are

"inadequate to satisfy the movant's burden." *Maldonado v. Ramirez*, 757 F.2d 48, 51 (3d Cir. 1985). "[I]t is particularly wrong to base a summary judgment on the deposition of an interested party on facts...known only to him–a situation where demeanor evidence might serve as real evidence to persuade a trier of fact to reject his testimony." *National Aviation Underwriters, Inc. v. Altus Flying Service, Inc.*, 555 F.2d 778, 784 (10th Cir. 1977). In *Swenson v. Lincoln County Sch. Dist. No. 2*, 260 F. Supp. 2d 1136 (D.Wyo. 2003), Judge Brimmer specifically held that "[i]n discrimination cases, where intent and credibility issues inhere, summary judgment standards should be applied strenuously." Finally, in determining whether there are genuine issues of material fact, the district court has to "examine the factual record in the light most favorable to the party opposing summary judgment." *Jenkins v. Wood*, 81 F.3d 988, 990 (10th Cir. 1996). "All inferences arising from the record ... must be drawn and indulged in favor of the party opposing summary judgment." *Stinnett v. Safeway*, 337 F.3d 1213, 1216 (10th Cir. 2003).

II. This Court's Order Adopts Defendants' Analysis Verbatim and Fails to Establish that Defendants Should Be Granted Summary Judgment When the Facts Are Viewed Most Favorably to Plaintiffs.

In Exhibit A, attached hereto and incorporated herein, Plaintiffs' counsel have annotated the Order by comparing it with Solvay's briefs and other submissions in support of their motion for summary judgment and in opposition to Plaintiffs' motion for partial summary judgment. Counting the lines, the annotation shows that, outside of summaries of the parties' arguments, 87% of the 62-page Order repeats sentences and whole paragraphs of Defendants' submissions verbatim. Ninety-eight percent of the factual background and 82% of the analysis are verbatim

repetitions. The repetition even extends to typographical errors. For example, the Order adopts this statement from Solvay's Reply en toto: "That participants may experience wear away because of pre-mortality [sic] discounts or other discounts in calculating their opening account balances is irrelevant." Compare *id*. at 34 with Solvay's Reply (dkt.#119) at 15.

Thus, with the exception of one paragraph from Plaintiffs' Proposed Stipulations, the entire factual "background" section of the Order is a verbatim adoption of Solvay's views of the facts. The background section of the Order offers no citations to the portions of the record on which it is based, which would show that Solvay's views are primarily supported by self-serving deposition excerpts from its own witnesses. In this manner, the Court's background section thereby adopts Solvay's assertions about its alleged reliance on November 2003 and October 2004 legal memoranda from the Pillsbury law firm and Solvay's supposed "protection" of benefits earned before December 31, 2004. Most significantly, the background section adopts Solvay's self-serving and conclusory views about the adequacy of its Section 204(h) notice, while disregarding the exhibits, including two expert reports and testimony from five depositions of Solvay executives, the Plan's enrolled actuary, and Solvay's designated actuarial expert that Plaintiffs submitted in support of their motion for partial summary judgment. The background section does not contain any citations to the evidence that leads the Court to conclude that no genuine factual issues exist about Solvay's views despite Plaintiffs' 64 exhibits.[1]

[1] In the summaries of the parties' arguments following the "Background" section, the Order summarizes the arguments of the Defendants and the Plaintiffs, but again offers no citations to the evidence that the Court is accepting or rejecting.

The Analysis sections of the Order are similarly nearly totally devoid of citations to evidence. The only evidentiary citations are to three documents: The Plan document, the purported 204(h) Notice, and the "FutureChoice" brochure. Those citations were all extracted verbatim from Solvay's brief with the sentences and paragraphs to which they were appended. In the entire Order, there is not one citation to Plaintiffs' exhibits, including two expert reports and seven deposition excerpts, filed in support of the Plaintiffs' motion for partial summary judgment and in opposition to Solvay's motion. Instead, the Order adopts Solvay's views of the facts and Solvay's analysis verbatim. In doing this, the Court adopts argumentative and adversarial views of facts that are not only in genuine dispute, but that are unsupported, contradictory, and indefensible. The concluding portion of the Order states that Solvay's pending motions, including its motions to exclude the reports of Plaintiffs' actuarial and statistical experts, were rendered "moot" by the grant of summary judgment. *Id*. at 61-62. In fact, the Court's failure to consider the expert reports in deciding whether any genuine issues of fact exist for trial effectively granted Solvay's motions to exclude. The Order also suggests bias with dismissive references to the Plaintiffs' arguments, e.g., accepting Defendants' assertion that the "gravamen" of the Plaintiffs' Complaint is a claim that "cash balance conversions are inherently age discriminatory," and referring to efforts by the Plaintiffs to "skirt newly developed case law," "ignore controlling law," and "'bootstrap' requirements," with all but one of those statements taken verbatim from Solvay's submissions. *Id.* at 11, 34 and 58. With respect to Plaintiffs' claim under ADEA §4(a), which the Court described in an earlier decision as "age discrimination

stemming from a pension benefit freeze," Dkt.#72 at 2, the Order now dismisses even the need to respond to Plaintiffs' arguments, stating that "Plaintiffs also attempt to save their claim by making other arguments, which the Court need not address." *Id*. at 28.

The Tenth Circuit has addressed the "verbatim adoption" of a prevailing party's proposed findings of fact and conclusions of law in five cases since the Supreme Court's 1985 decision in *Anderson v. City of Bessemer*, 470 U.S. 564: *Everaard v. Hartford Acc. & Indem. Co.*, 842 F.2d 1186, 1193 (10th Cir. 1988); *Dowell by Dowell v. Bd. of Educ. of Okla. City Public Schools*, 8 F.3d 1501, 1509 (10th Cir. 1993); *MacKenzie v. Denver*, 414 F.3d 1266, 1273-74 (10th Cir. 2005); *Flying J Inc. v. Comdata Network, Inc.*, 405 F.3d 821, 829-30 (10th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006); *Avila v. Jostens*, supra, 316 Fed Appx at 831.

In these decisions, the Tenth Circuit expressly disapproves of a district court's verbatim adoption of large portions of a prevailing party's submissions because it calls into question whether the district court has exercised independent judgment and conducted a thorough and independent review of the record, including the evidentiary basis for the often "argumentative [and] adversarial" assertions put forward by prevailing parties. It is true that the Tenth Circuit has thus far not reversed solely on the basis of verbatim adoption. But the Tenth Circuit is almost certain to reverse if Plaintiffs show that a verbatim adoption of the prevailing party's facts and analysis has substituted for a rigorous and independent application of the standards for a grant of summary judgment. As Plaintiffs demonstrate below, when this Court adopted large portions of Solvay's briefs verbatim, it essentially adopted a defective work-product. The sentences and

paragraphs drawn verbatim from Solvay's briefs not only fail to analyze the facts–and inferences drawn from the facts–in the light most favorable to the Plaintiffs, but they contain contradictory and indefensible misinformation about both the law and the facts.

In *Everaard v. Hartford Accident and Indemnity Co.*, supra, 842 F.2d at 1188, the district court "adopt[ed] verbatim proposed findings of fact and conclusions of law submitted by the plaintiff" following a bench trial. The Tenth Circuit observed:

> "The trial transcript contains conflicting testimony of several insurance experts, Messrs. Roberts and Travis, and Hartford's representative, Mr. Donaldson, who testified on the issue of whether Hartford's actions amount to bad faith. Nonetheless, the court's ultimate findings of fact and conclusions of law simply fail to articulate which of those specific actions the court believed amounted to bad faith .... Instead, the findings of fact are argumentative, adversarial, and emotional, and of no aid to our review."

Id. at 1193. Verbatim adoption has not only occurred after bench trials, but (as here) in grants of summary judgment. In *Avila v. Jostens*, supra, the Tenth Circuit found that on a motion for summary judgment:

> "the district court adopted Jostens' proposed findings of fact almost verbatim, deleting only the record citations provided by Jostens. The Supreme Court has criticized such verbatim adoption of one parties' proposed findings of fact, and this court has noted that it provides little aid on appellate review."

Id. at 831. In *Avila*, the appellant did not even raise the issue of verbatim adoption, but the Tenth Circuit raised it on its own. Concluding that verbatim adoption "does not alter [the de novo] standard of review" that applies to a grant of summary judgment, the Tenth Circuit focused on whether the district court's verbatim findings were resolving material issues of fact in favor of the defendant. The Tenth Circuit concluded that "there is evidence in the record from which a

reasonable jury could conclude that Jostens' proffered reasons for discharging Mr. Avila were pretextual." "[T]he district court failed to view the evidence of pretext in its totality and failed to view the evidence in the light most favorable to Mr. Avila." *Id*. at 831-32.

In this case, we are confronted not just with verbatim adoption of factual findings, but with the wholesale adoption of 85% of the "analysis" word-for-word from Solvay's briefs. The closest case on this point is *Bright v. Westmoreland County*, 380 F.3d 729 (3d Cir. 2004). In *Bright*, the Third Circuit reversed the dismissal of plaintiff's complaint where the district court requested that the defendants prepare a proposed opinion and order in lieu of a reply brief and essentially copied it verbatim as the district court's opinion. While the Third Circuit recognized that verbatim adoption of proposed findings of fact and conclusions of law are not "in and of itself reason for reversal":

> "Here...we are not dealing with findings of fact. Instead, we are confronted with a District Court opinion that is essentially a verbatim copy of the appellees' proposed opinion...."
>
> "Judicial opinions are the core work-product of judges. They are much more than findings of fact and conclusions of law; they constitute the logical and analytical explanations of why a judge arrived at a specific decision. They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic. When a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions."
>
> "... In this case, there is no record evidence which would allow us to conclude that the District Court conducted its own independent review, or that the opinion is the product of its own judgment."

Id. at 732.

In this case, neither the analysis nor the background section identifies the material facts

about which there are no genuine issues. Nor does the Order ever display the independent application of the standard that the material facts must not be subject to genuine issue when viewed in the light most favorable to the Plaintiffs. To the contrary, after summarizing Plaintiffs' arguments (with no references to the evidence on which Plaintiffs are relying), the Court repeatedly adopts Solvay's analysis, built upon Solvay's view of the facts, with no discussion of Plaintiffs' evidence or any independent evaluation of whether the facts expressed or subsumed in Solvay's arguments are subject to genuine dispute.

Thus, rather than showing that this Court "actively wrestled" with the facts presented by both parties and found no genuine issues of material fact, the Order demonstrates a wholesale adoption of Solvay's version of the facts, while ignoring Plaintiffs' showing of facts that are in genuine dispute. Accordingly, the Order does not provide the Tenth Circuit with a basis "to conclude that the District Court conducted its own independent review, or that the opinion is the product of its own judgment." There is also no evidence that the Court entered the Order "after searching the record and independently determining whether or not genuine issues of fact exist" as stated in the Court's July 27, 2009 Order. Dkt. # 131 at 2.

With no basis in the opinion to find an independent and meaningful judicial consideration of the Plaintiffs' evidence and arguments, the Tenth Circuit cannot infer that the Court properly applied the summary judgment standards. The Court's recitation of the standard requiring that the evidence be viewed "in the light most favorable to the party opposing summary judgment" (Order at 11-12) cannot be accepted when no part of the analysis shows that this

occurred. Moreover, the Order fails to either recite or apply the portion of the Tenth Circuit's standard that requires that all inferences arising from the record be drawn and indulged in favor of the non-moving party. *Stinnett v. Safeway*, supra, 337 F.3d at 1216.

III. The Application of the Legal Standards to Each One of the Plaintiffs' Claims Shows that Summary Judgment Should Not Have Been Granted on This Record.

The application of the standards for summary judgment to each of Plaintiffs' claims further shows that summary judgment should not have been granted to Solvay after an independent review of the record and application of the standards for determining whether genuine issues of fact exist.

A. The Fourth Claim for Age Discriminatory Wear-Aways of Age 65 Benefits.

Plaintiffs' opposition clearly stated that the ERISA §204(b)(1)(H) and ADEA §4(i) claims are based on the facts and circumstances related to the wear-aways produced by Solvay's transition design, as the Court recounts in its summary of the Plaintiffs' arguments. Order at 16. The Order also finds that the credits to a participant's cash balance account are supposed to represent "a promise to pay a real benefit." *Id.* at 19-20. However, the Order then fails to consider the fact-based reports from Plaintiffs' actuarial and statistical experts showing that Solvay's cash balance pay credits are fictitious "inputs" when participants are under the periods of "wear-away." Pls. Exs. 1 and 2. The Order also fails to consider the fact that Solvay's consultants told Solvay repeatedly that this "opening account balance approach" adversely affected employees "age 45 and older" and raised "compliance issues" all of which could be solved by using an "A+B" approach. Pls. Stmnt. (dkt.#108) ¶¶11-12, 45.

Instead of addressing this evidence, the Court adopts Solvay's characterization that Plaintiffs' claim is really that cash balance formulas all "inherently" discriminate based on age, whether or not they have wear-aways. Order at 20. The Order relies on the Seventh Circuit's decision in *Cooper v. IBM*, 457 F.3d 636 (2006), and other cases in which periods of wear-away were not at issue and concludes that "This line of cases holds that cash balance plans, such as the one at the heart of the case before this Court, do not violate ERISA's age discrimination provision because they do not discriminate against older workers." Order at 21. To link wear-aways to the *Cooper* line of cases, whether or not they address the phenomenon of wear-away, the Order asserts that "'[w]ear away' is a phenomenon unique to cash balance conversions." *Id*. at 23. But even Solvay does not go this far: Solvay says that wear-away is "often associated" with cash balance conversions. Mot. at 18. In other words, wear-away is often not associated with cash balance conversions, and hence, is not "inherently" a part of such conversions.

In its analysis of ADEA §4(i), the Court similarly fails to consider the evidence that Plaintiffs are offering to support their "allegations involving 'wear-away' periods." But contradictorily, in the discussion of ADEA §4(a), the Order states that "Plaintiffs' ADEA §4(a) allegations fall squarely within §4(i)" and relies on *Hurlic v. So. Cal. Gas*, 539 F.3d 1024 (9th Cir. 2008), for the proposition that "allegations involving 'wear-away' periods due to conversion to a CB formula 'must be brought under ADEA §4(i)." *Id*. at 29 (also quoting *Hurlic* that "the wear-away provision need satisfy only the requirements of ADEA §4(i)"). Thus, the allegations that cannot be addressed under ADEA §4(i) "falls squarely within" that Section six pages later.

B. The First Claim for Age Discriminatory Wear-aways of Early Retirement Benefits.

This Court's Order recognizes that ADEA §4(a)(2) "provides the basis for Plaintiffs' disparate impact claim." *Id*. at 28. The Order also recognizes that "ADEA §4(i) disallows disparate treatment of employees by employers because of age." *Id*. at 23. Nevertheless, the Court goes on to conclude that Congress intended for the disparate impact claim under §4(a)(2) to be "precluded" by the disparate treatment claim under §4(i). *Id*. at 28.

The Order also never addresses Plaintiffs' argument that ADEA §4(i) cannot "preclude" an age discrimination claim under ADEA §4(a) because §4(i), as enacted in 1986, expressly places the "subsidized portion of any early retirement benefit" outside of its scope, whereas Congress amended the ADEA in 1990 in response to a Supreme Court decision about early retirement benefits available on disability[2] to clarify that §4(a) prohibits discrimination in "all forms of employee benefits." There is manifest error in the logic that "compliance with the requirements of this subsection ... shall constitute compliance with the requirements of this section" means that what is "not covered" by §4(i) is exempt from the protection against age discrimination in §4(a)(1) and (2). The Court's analysis does not discuss the cases holding that §4(i) is not intended to do this: *Engers v. AT&T*, 2007 WL 958472 *4 (D.N.J. 2007); *George v. Duke Power*, 560 F.Supp.2d 444, 462-63 (D.S.C. 2008); and *Vaughn v. Air Line Pilots Ass'n*, 395 B.R. 520, 542 n. 14 (E.D.N.Y. 2008). The Order also does not address the legislative history that "[i]n circumstances in which the provisions of section 4(i) are inapplicable, claims of

[2] *Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989).

discriminatory accruals or pension credits in defined benefit and defined contribution pension plans shall continue to be resolved under section 4(f)(2) as modified by these amendments." H.R. Rep. 664, 101st Cong., 2d Sess., at 35-36, 1990 WL 200383; S. Rep. 263, 101st Cong., 2d Sess., 1990 U.S.C.C.A.N. 1509, 1525.

The Order also fails to address Plaintiffs' point that in the *Hurlic* decision on which the Court principally relies, the allegations about wear-away did not involve wear-aways of the subsidized portion of early retirement benefits, but involved wear-aways in the age 65 annuity benefit which might have been addressed under §4(i) had the *Hurlic* plaintiffs alleged that. See *Hurlic*, 539 F.3d at 1027 (the "wear-away provision" at issue "provides that a participant's accrued benefit is an age 65 single-life annuity..."). The Order does not consider whether there is any genuine issue of fact about whether the wear-away provision at issue here is the same as in *Hurlic*. Instead, the Court's discussion of Plaintiffs' arguments conclusorily states that "Plaintiffs' claim ... must be brought under ADEA §4(i), not ADEA §4(a)" and adopts Solvay's position that "Plaintiffs' claims fail under §4(i)," Order at 30, again with no examination of the evidence presented by Plaintiffs' experts that the periods of wear-away produced by Solvay's opening account balance approach are disproportionately suffered by older employees (e.g., 97% of the employees with wear-aways of four or more years are age 40 or older, Pls. Ex. 2 at 9).

C. The Second Claim for Backloading of Age 65 Benefits.

In discussing Defendants' arguments about ADEA §4(a), the Court recognizes that Defendants have admitted that under Solvay's opening account balance approach, participants

whose "opening account balance ... is set at an amount less than their accrued age 65 annuity benefit under the prior formula ... will accrue no increasing age 65 annuity benefits for a period of time while their accrued benefit under the CB formula 'catches up' with their accrued benefit." *Id*. at 26 (also recognizing that Defendants concede "wear away's effect on the age 65 annuity accrued benefit (the output)").

In analyzing the backloading claim, the Order distinguishes these admissions by finding that "once there is an amendment to the prior plan, only the new plan is relevant for a backloading analysis." Order at 33. However, the Order never addresses Plaintiffs' point that the "pre-retirement mortality" discount that causes the age 65 benefits to be backloaded is part of the "opening account balance" approach adopted in the Sixth Amendment to the Plan which Solvay's CEO executed on December 28, 2004. Indeed, Solvay conceded in its memorandum in support of summary judgment that the pre-retirement mortality discount was not authorized by the prior plan, but is authorized by Section 12.2(b) of the Sixth Amendment. Dkt.#110 at 5.

The Court next adopts Solvay's conclusory statement verbatim, "That participants may experience wear away because of pre-mortality [sic] discounts or other discounts in calculating their opening account balances is irrelevant." Order at 34 (and compare Defendants' Reply at 15 which has the same typo). There is no analysis in the Order about why a period with no accruals in the age 65 annuity benefit does not raise a genuine issue of material fact about Solvay's compliance with the 133-1/3% accrual rule.

Tracking Solvay's reply brief verbatim, the Order also dismisses the relevance of the

Treasury Department's Revenue Ruling 2008-7, by stating that Plaintiffs "fail to establish why IRS Revenue Ruling 2008-7 is relevant for the Court's consideration of ERISA anti-backloading rules, where this argument [sic] has been squarely rejected in other cash balance decisions." Order at 34-35 (citing *Hurlic* and a district court decision in *Tomlinson v. El Paso*, 2007 WL 891378 (D. Colo. 2007)). [3] In fact, *Hurlic* and *Tomlinson* involved a particular part of Revenue Ruling 2008-7 that deals with delayed transition rules in which opening account balances are established at the start of one plan year but the prior plan's formula continues to operate for several more years. See 539 F.3d at 1027, 1034 and 2008 WL 762456 *1, 5. Solvay's transition did not include such a feature. Whether or not those decisions were correct (the Treasury Department has stated that the *Tomlinson* decision is not, 73 Fed. Reg. 34665, 34667 (June 18, 2008)), deference is owed to all other parts of the Treasury Department's analysis of backloading under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843-45 (1984). Consistent with the Treasury Department's 1977 regulations on benefit accruals, Revenue Ruling 2008-7 shows that a "period of a zero annual rate of accrual followed by a period of positive annual rates of accrual" will violate the 133-1/3% rule unless the "special rule of §411(b)(1)(B)(i)" applies. *Id*. at 10. As stated above, that "special rule" does not apply here.

Solvay's reply brief also represents to this Court that despite Revenue Ruling 2008-7, it recently secured a favorable determination letter on all pending tax-qualification issues, including compliance with the benefit accrual rules. Reply at 15. However, Solvay omits two key facts:

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[3] Solvay's citation to 2007 WL 891378 , which this Court adopted, is to a decision in *Tomlinson v. El Paso* that predates the issuance of Revenue Ruling 2008-7.

First, in its January 18, 2008 Application for Determination, Solvay falsely represented, under penalty of perjury, that there were no pending issues related to this Plan before "any court." Exhibit B. Second, when the IRS nevertheless requested information about the Plan's compliance with the benefit accrual rules, Solvay's representatives submitted exhibits showing compliance with the 133-1/3% rule premised on the assumption that there was no "pre-retirement mortality" discount. Exhibit C at 3023-25 ("Preretirement Mortality: None"). In this case, Solvay concedes the existence of pre-retirement mortality discounts, but represents to this Court, in part based on the determination letter it secured from the IRS by making the opposite representation, that periods with zero accruals are "irrelevant." The Court cannot accept such contradictory representations and find no genuine issues of fact about compliance with the accrual rules.

D. The Third Claim that Lump Sum Distributions Are Forfeiting Part of the Value of Forfeiture of Previously-Earned Benefits.

After using Plaintiffs' words to describe the forfeiture claim, the Court prefaces the next sentence with the words "More concisely" and adopts a totally different characterization of the claim drawn verbatim from Solvay's Proposed Conclusions. Order at 37. The Court next accepts a series of factually and legally incorrect and nearly impenetrably-worded assertions from Solvay's reply brief verbatim,[4] without once returning to Plaintiffs' argument or evidence about the benefit losses that participants have incurred and are incurring with lump sum distributions.

[4] For instance, that "participants do not forfeit any CB benefits while those benefits are less than the participant's minimum FAP benefits," Order at 38, and that "[p]articipants are always entitled to at least the annuity benefit equal to their December 31, 2004 FAP benefits because of the Pension Plan's 'greater of' provision." *Id*. at 39.

Plaintiffs have shown that there are genuine issues for trial because participants are unknowingly losing part of the value of their retirement benefits by accepting lump sum distributions. Solvay's Enrolled Actuary goes so far as to assume that 100% of the participants accept lump sum distributions on termination of employment even if the value of their protected monthly retirement benefit is higher. Pls. Ex. 47 (Misthos Dep.) at 78; Pls. Ex. 26 at 123886.

E. The Fifth Claim for Violation of the Section 204(h) Notice Requirements for Reductions in Early Retirement Benefits, Wear-Aways and Reductions in Future Benefits.

The Order's reading of the Treasury regulations on Section 204(h) is manifestly in error insofar as it pertains to disclosures of: (1) early retirement reduction factors, (2) wear-aways, and (3) reductions in future benefits. First, the Order states that Solvay's "Notice ... adequately describes ... how the early retirement benefit is calculated after the amendment by noting the lack of early retirement subsidies." Order at 49. However, the Treasury regulations expressly provide that "the notice must state the change and specify the factors that apply in calculating the actuarial reduction (for example, a 5% per year reduction applies for early retirement before age 60)." Treas. Reg. 54.4980F-1, Q&A-11(a)(3)(ii). See also Q&A-11(b), Example 5.

Second, the Order adopts Solvay's assertion that there is a "list" or "listing" of required items in the Treasury Department's Section 204(h) regulations, but "no specific disclosure requirements for 'wear-away.'" *Id.* at 45 and 50. In fact, there is no "list" or "listings" of the items identified on page 45 of the Order, and the regulations expressly require disclosures of the "approximate magnitude" of "a period of time during which there are no accruals (or minimal

accruals) with regard to normal retirement benefits or an early retirement subsidy (a wear-away period)" and the "general classes" of employees who are subject to such periods. Q&A-11(a)(4)(i)(B) and (ii)(A). The regulations also expressly require that illustrative examples "must bound the range of reductions" where "an amendment results in reductions that vary (...over time as to any individual participant, as would occur for an amendment that results in a wear-away period)." Q&A-11(a)(4)(ii)(B). The regulations even set forth the interest assumption that is to be used in "the determination of whether an amendment is reasonably expected to result in a wear-away period." Q&A-11(a)(4)(ii)(C).

Third, the Order accurately states that the Treasury regulations require disclosure of "sufficient information for each applicable individual to determine the approximate magnitude of the expected reduction [of benefits] for that individual." Order at 46. But the Order accepts Solvay's assertion that disclosures of total benefits satisfy that obligation. As Plaintiffs' actuarial expert opined, Solvay's Tables A and B mix the benefits that participants have already earned with the "future benefits" they may earn under the cash balance formula in a manner that does not allow a participant to distinguish between the two or compare how much their future benefits are being reduced in dollar or percentage terms. Ex. 1 (Poulin Rpt.) at ¶47. In adopting Solvay's position, the Order neglects that the basic test in the Treasury regulations is whether the rate of "future benefit accrual" is significantly reduced as measured by "the amount of the future annual benefit." Q&A-6(b) and 8(b). The regulations repeatedly say that the required disclosure is the estimated reduction in the "future annual benefit," "future accruals" or "future benefits." *Id.*;

Q&A-11(a)(4)(ii)(D). Example 4 in the regulations even distinguishes between a disclosure of "the sum of the monthly annuity accrued before the conversion...plus" the monthly annuity accrued thereafter and a disclosure of the "estimated future accruals under the new formula in terms that can be readily compared with the old formula." Q&A-11(b), Example 4.

The section of the Order summarizing the Plaintiffs' arguments about Section 204(h) Notice describes some of Plaintiffs' points about Solvay's non-compliance with the foregoing requirements, but fails to describe any of the factual particulars, including the findings in the expert report of Plaintiffs' actuarial expert, Claude Poulin, about the contents of Solvay's notice, or the striking deposition testimony of Defendants' actuarial expert, who agreed with Mr. Poulin point-by-point that the contents of Solvay's Notice do not conform with the contents specified in the Treasury Department's 204(h) regulations. Pls. Ex. 44 (Zeisler Dep.) at 174, 223-231. The Order also fails to address the deposition testimony of Solvay's former and current Senior VPs for Human Resources, Carolyn Egbert and Paul Harding, both of whom testified that, even with legal backgrounds and inside knowledge that far exceeds those of ordinary Solvay employees, they did not understand what an early retirement "subsidy" was and erroneously believed that a 3% per year reduction for early retirement was not "subsidized." Pls. Ex. 41 at 59-60; Pls. Ex. 40 at 56. At his deposition, Solvay's Director of Compensation and Benefits also admitted that the references to "subsidies" are jargon that he would not expect employees to understand. Pls. Ex. 48 at 142-143. Despite this evidence, the Order does not address whether there is any genuine issue of fact about how an average plan participant could have understood the references to

"subsidies." There is also no discussion by the Court about how any participant could know whether the reference to "some participants" whose monthly benefits "may not increase" includes them when Plaintiffs' actuarial expert reported and testified at his deposition that there was no information provided from which a participant would notice that or could figure it out, and Defendants' actuarial expert essentially agreed. Pls. Ex. 44 (Zeisler Dep.) at 174, 223-231. And, finally, there is no discussion in the Order of the regulatory requirement that the reduction in "future benefits" as opposed to "total benefits" be disclosed, and no discussion of the fact that in the tens of thousands of pages of documents produced in discovery there were many participants who were confused and asking questions about the extent of the benefit reductions, but not a single participant who understood Tables A and B in the manner that Solvay suggests. Defendants' actuarial expert recalculated the figures in Tables A and B to reveal the reductions in future benefits, showing that an employee age 60 would only earn $22 per month in future benefits in the next five years under cash balance compared with $322 per month under the old plan formula–a 93% reduction in future benefits, compared with a 27% reduction if total benefits were used. Pls. Ex. 25 at 69. Testimony at trial would further show that some employees, including Messrs. Jensen and Goff, did not understand Tables A and B in the manner that Solvay suggests at all: They understood that they would receive the "bucket" of money (the lump sum) and the annuity. Ex. 31 at 128332. The employees could gather that something bad was happening to the them, but they were confused about the magnitude of the reductions, and Solvay calculatingly decided to leave them in that state. By contrast, the 204(h) regulations are designed

to provide employees with "sufficient information ... to determine the approximate magnitude of the expected reduction [in future benefits] for that individual," not to leave them in a confused and uninformed state about it.

Whether the employees were confused by Solvay's 204(h) notice or understood the magnitude of the reductions is a genuine issue of material fact. On summary judgment, the Court is not authorized to resolve genuine issues about the disclosure of early retirement reductions with assertions like "The 204(h) Notice also adequately describes ... how the early retirement benefit is calculated after the amendment by noting the lack of early retirement subsidies," Order at 49, particularly when there is no evidence to support the position that any participant understood the reference to "subsidies" and much evidence, including from Solvay's Senior VPs for Human Resources, that they did not. The Court also cannot reasonably accept Solvay's assertion that wear-aways were disclosed "in layman's terms," Order at 7 and 51, when even the employees who asked questions about how much their benefits were being cut displayed no understanding of the wear-away "phenomenon." Pls. Stmnt. ¶¶48-59. The Court also cannot resolve genuine issues of fact by concluding that "a participant may notice" wear-aways, *id*. at 51, when Plaintiffs' actuarial expert found no means by which a participant could possibly notice this. Ex. 1 (Poulin Rpt.) at ¶46.

F. The Sixth Claim for Violation of the Summary of Material Modification Requirements and Breaches of the Fiduciary Duty to Disclose.

Solvay's FutureChoice brochure is a glossy pamphlet that specifically states that it "is not intended as...a summary of material modifications." Ex. 27, last page. So the Court can put that

brochure out of the way in determining whether Solvay satisfies the SMM requirements. This leaves the issue of whether Solvay's purported 204(h) notice performed double-duty as an SMM. The Court's Order states that the 204(h) Notice/SMM "satisfied ERISA's requirements because it disclosed the conversion to the CB formula and described the changes to the Pension Plan." *Id.* at 57. An SMM must, however, go beyond generalities and update the disclosures in the SPD by "clearly identifying [changes in the] circumstances which may result in...denial, loss, forfeiture, suspension, offset, reduction,...of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits..." 29 C.F.R. 2520.102-3(l); 2520.104b-3(a) (plan administrator must "furnish a summary description of any material modification to the plan and any change in the information required by...§ 2520.102-3 of these regulations").[5]

The Order also adopts the statement from Solvay's reply that "the cases cited by Plaintiffs in support of their arguments relate only to the SPD requirements, and not SMMs." *Id*. at 58. But this is simply incorrect: Both *Chambless* and *Amara* are about inadequate disclosures in SMMs. See 772 F.2d at 1040 ("the notice was insufficient to satisfy the requirements of ERISA, 29 U.S.C. §1022(a) and (b) and §1024(b)(1)"); 534 F. Supp. 2d at 344. Tracking Solvay's language further, the Order twice suggests that the only remedies for an inadequate SMM or SPD are "fines" or "penalties." Order at 58-59. This statement cannot be reconciled with *Chiles v. Ceridian*, 95 F.3d 1505, 1518 (10th Cir. 1996), *Horn v. Cendant*, 69 Fed.Appx. 421 (10th Cir.

[5] ERISA §102 also requires a summary of any change in the "circumstances which may result in ...denial or loss of benefits."

2003), or this Court's decision in *White v. Keychoice*,827 F.Supp. 690, 694-95 (D. Wy. 1993).

Again adopting Solvay's language, the Order states that "Plaintiffs have adduced no competent evidence that the SMM did not comply with the requirements of ERISA." *Id*. at 58. But Plaintiffs have adduced evidence that Solvay's purported 204(h) notice/SMM does not disclose: (1) the reduction factors for early retirement under the cash balance formula, (2) the legally-required protection of early retirement benefits offered under the old plan and the loss or forfeiture of part of the value of those benefits if employees accept lump sum distributions, and (3) the general classes of employees subject to wear-away and the expected duration of those wear-aways.

The analysis of Solvay's purported Summary of Material Modification contains no discussion about whether there are genuine issues of fact about Solvay's failure to disclose these features. The Order instead adopts Solvay's unsupported and erroneous statements from Solvay, e.g., that Solvay's SMM "disclosed ... that the opening account balances accounted for 'pre-retirement mortality'." *Id*. at 58. Solvay offers no support for that statement and never made any such disclosure–even Solvay's outside counsel had to ask the Plan's actuary to find out whether a pre-retirement mortality discount had been applied. Defs. Ex. 26 (dkt.#110) at SOLVAY 18.

The Order also finds that "Defendants worked with their experts at Towers and Pillsbury throughout the Conversion process to ensure the SMM was adequate." Order at 57. But Plaintiffs have offered emails, memos, and deposition extracts, showing that there are genuine issues about that, including no compliance with Towers' 19-page memorandum about the 204(h)

requirements, an unanswered question from Pillsbury about the maximum duration of wear-aways, and no sign-off by Pillsbury on the final Notice, which included a last-minute change to an example so it only illustrated a grand-fathered employee. Pls. Reply (dkt.#118) at 23-24.

With respect to the fiduciary duty to disclose, *Varity Corp. v. Howe*, 516 U.S. 489 (1996), recognizes that "the primary function of the fiduciary duty is to constrain the exercise of discretionary powers which are controlled by no other specific duty imposed by ... the legal regime. If the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose." *Id*. at 504-505. In *Horn v. Cendant*, supra, 69 Fed.Appx. at 427, the Tenth Circuit followed *Varity* and the *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3d Cir.1993), line of cases on the duty to disclose material facts which the participant needs to know for his or her own protection. The Order does not discuss *Horn* and it distinguishes *Varity*, with a statement repeated verbatim from Solvay's brief that *Varity* does not support the "proposition that SMMs must include information other than what is required under the specific disclosure requirements of ERISA." *Id*. at 59-60. Solvay's distinction is a non-sequitur because the fiduciary duty that *Varity* recognizes is an overarching duty, not confined to a specific communication. Continuing to follow Solvay's brief word-for-word, the Order relies on the *Ehlmann* and *Sprague* decisions from the Fifth and Sixth Circuits. *Id*. at 59. In addition to not being precedential in the Tenth Circuit, those decisions are unpersuasive to the extent they depart from *Varity* and *Horn v. Cendant*.[6] Most critically in terms

[6] *Sprague* distinguished the facts before it from those in *Varity*. 133 F.3d at 405. *Ehlmann* failed to mention *Varity* at all. See 198 F.3d 522.

of genuine issues of material fact, the Order never addresses or even alludes to the deposition testimony of Solvay's Senior VP for Human Resources and its Director of Compensation and Benefits that they expressly agreed on and carried out a policy of refusing to answer employees' questions about how the benefits under the new formula compared with the old because they knew honest comparisons would make the employees "angry." In adopting and carrying out this policy, there obviously is a genuine issue of fact about whether Solvay placed its financial self-interest ahead of its fiduciary duty to provide participants with honest information that they could use to make informed decisions about their employment and retirement.

Conclusion

The Court's decision to dismiss this action based on verbatim adoption of Solvay's views and arguments should be vacated because it rests on manifest errors of law and disregards the standards for summary judgment by resolving genuine issues of material fact in favor of Solvay without a trial. For these reasons, Plaintiffs respectfully request that the Order be vacated and that the action be reinstated on the trial calendar.

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/s/
Richard Honaker
P.O. Box 366
Rock Springs, WY 82902-0366
Telephone: (307) 362-5800
Fax: (307) 362-5890
Email: honakerlaw@wyoming.com

/s/
Stephen R. Bruce
Allison C. Pienta
805 15th St., NW, Suite 210
Washington, DC 20005
Telephone: (202) 371-8013
Fax: (202) 371-0121
Email: stephen.bruce@prodigy.net

Attorneys for Plaintiffs

Exhibits

Ex. A August 3rd Order annotated to show verbatim adoption.

Ex. B Application for Determination to the Internal Revenue Service dated Jan. 22, 2008, with statement from Solvay's VP of Human Resources under penalty of perjury that no issues related to this Plan are currently pending before any court.

Ex. C 6/5/2009 letter to Dept. of Treasury from Pillsbury Winthrop on behalf of Solvay with exhibits prepared by the Plan's actuaries demonstrating how the Plan meets the accrual rules, based on assumption of no pre-retirement mortality discounts.