FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING

OCT 11 2011

Stephan Harris, Clerk
Cheyenne

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

WADE JENSEN and DONALD D. GOFF, individually and on behalf of all others similarly situated, Plaintiffs, v. SOLVAY CHEMICALS, INC., SOLVAY AMERICA, INC., and SOLVAY AMERICA COMPANIES PENSION PLAN, Defendants.	Case No. 06-CV-273-J

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a class-action case alleging numerous violations of ERISA and the ADEA by Solvay Chemicals, Inc., Solvay America, Inc., and the Solvay America Companies Pension Plain (collectively, Solvay). Plaintiffs Wade E. Jensen and Donald G. Goff (Employees) represent themselves and a class of current and former employees of Solvay. The complaint alleges the violations stemmed from Solvay's conversion of its retirement benefits calculation from a final average pay formula to a cash-balance formula.

After this Court originally granted summary judgment to Solvay on all the claims, the Tenth Circuit affirmed on most of the claims and reversed on this Court's ruling concerning the sufficiency of Solvay's ERISA § 204(h) notice describing the calculation

of early-retirement benefits. The Tenth Circuit held that Solvay's notice concerning those benefits was deficient and remanded to this Court to determine whether the deficiency was an egregious failure under § 204(h). The parties also dispute whether the § 204(h) issue is the only one properly before the Court, or whether the Tenth Circuit also remanded the case on Solvay's ERISA § 102(a) claim. The Court held a non-jury trial from July 11, 2011 through July 18, 2011. Having considered the evidence and arguments of the parties, the Court makes the following findings of fact and conclusions of law:

Findings of Fact

1. Employees presented testimony from the following witnesses:

(a) Plaintiffs Wade E. Jensen (current Solvay Chemicals employee) and Donald Goff (former Solvay Chemicals employee). (Stipulated and Uncontroverted Facts [hereinafter Stip.], Doc. 182, 2-3; Trial Tr. vol. I, 37:9-89:9, 7/11/11; Trial Tr. vol. III, 491:9-553:6.)

(b) Six class member representatives: Debra Godwin (former Solvay Pharmaceuticals employee), Janet Christensen (current Solvay Chemicals employee); James Maxfield (current human resources manager for Solvay Chemicals), Brian Liscomb (current Solvay Chemicals employee), Kari Mulinix (former Solvay Chemicals employee), and Rose Saganich (former Solvay Pharmaceuticals employee). (Trial Tr. vol.

I, 89:20-122:3; Trial Tr. vol. II, 197:18-205:9, 205:17-268:17, 7/12/11; Trial Tr. vol. III, 458:1-476:23, 477:7-490:23; Trial Tr. vol. V, 841:22-861:13.)

(c) Expert witness Claude Poulin, Fellow in the Society of Actuaries, designated as an actuarial expert. (Trial Tr. vol. II, 134:2-186:22.)

(d) Two Solvay management representatives: Carolyn Egbert (former Vice President of Human Resources for Solvay America) and Scott Allen (Vice President and Manager of International Compensation and Benefits for Solvay North America). (Stip. at 4-5; Trial Tr. vol. II, 269:22-337:17; Trial Tr. vol. III, 344:4-457:14; Trial Tr. vol. IV, 564:11-741:12, 7/14/11; Trial Tr. vol. V, 747:7-841:7.)

(e) Three witnesses through deposition testimony: Philip Uhrhan (former Chief Financial Officer of Solvay America), Paul Zeisler, Associate in the Society of Actuaries (previously designated as a rebuttal expert witness for Solvay), and Paul Harding (former Senior Vice President of Human Resources for Solvay North America, LLC, currently Senior Vice President for Solvay Advance Polymers, LLC). (Trial Tr. vol. II, 130:6-131:2 (Uhrhan Dep. 4:17-5:4), 190:6-195:17; Trial Tr. vol. V, 861:14-865:21 (Harding Dep. 5:6-16).)

2. Solvay presented testimony from the following witnesses:

(a) Cindy Schlaefer, attorney and partner at the law firm of Pillsbury

Winthrop Shaw Pittman LLP (Pillsbury), who concentrates her practice in employee benefits, tax, and ERISA and provides legal advice regarding the pension plan. (Stip. at 6; Trial Tr. vol. VI, 1059:5-1060:6.)

(b) Nola Misthos, actuary with Towers Watson, formerly Towers Perrin (Towers), who is the enrolled actuary and the lead actuary consultant for the pension plan. (Stip. at 7; Trial Tr. vol. V, 867:8-903:6; Trial Tr. vol. VI, 907:14-1057:12.)

(c) Philip Uhrhan through deposition testimony (former Chief Financial Officer of Solvay America). (Trial Tr. vol. VI, 1058:2-13.)

(d) Solvay also presented Egbert and Allen as witnesses in their case, although for reasons of efficiency, their testimony was taken during Employees' case in chief. (Trial Tr. vol. II, 269:4-11; Trial Tr. vol. IV, 563:25-564:3.)

3. The Court received into evidence 73 exhibits labeled by the plaintiffs and 138 labeled by the defendants. Many of the parties' exhibits overlapped and some were offered by the opposing party. (Doc. 211.)

The Pension Plan

4. The Solvay America Pension Plan is an employee pension benefit plan. Employees of Solvay Chemicals and other affiliated companies participate in the Solvay America Pension Plan. (Stip. at 2.)

5. Concerning the Solvay Americas Pension Plan, Solvay served as both the plan administrator and sponsor. As such, Solvay had a non-delegable responsibility to distribute a § 204(h) notice to its employees that complied with ERISA § 204(h) and its applicable regulations. (Trial Tr. vol. II, 288:25-289:11; Trial Tr. vol. VI, 632:2-8, 1092:15-24.)

6. Before January 1, 2005, the Solvay America Pension Plan (the old plan) determined the annual retirement benefit for an employee retiring at age 65 under a final average pay formula. That formula multiplies the employee's years of qualified service by 1.1% of the employee's highest average five-year compensation (plus a smaller percentage of the portion of that compensation exceeding the "Covered Compensation" for persons of that age in the current Internal Revenue Service table, *see* Rev. Rul. 2003-124, 2003-2 C.B. 1173 (2004 Covered Compensation Table)). *Jensen v. Solvay*, 625 F.3d 641, 643 (10th Cir. 2010); (Ex. 1 at Solvay 000031–000144.)

7. The old plan defined "early retirement benefit" as "the benefit to which a Participant is entitled upon attainment of his Early Retirement Date while in the service of an Employer as set forth in Section 4.4 herein" and set forth three different early-retirement benefits for which a participant might qualify. The earliest age for retirement under the plan was age 55. (Trial Tr. vol. II, 137:22-138:3; Ex. 1 at Solvay 000042; Stip.

at 2.)

8. The first and most easily attained early-retirement benefit under the old plan covers a plan participant who terminates employment before age 55. At age 55 or later, that participant would be entitled to receive a benefit equal to the benefit payable at the normal retirement age of 65, reduced by 4 percent for each year the retirement preceded age 65. Such a participant's benefit at age 55 would be 40 percent less than the accrued age-65 benefit. For example, if the accrued age-65 benefit were $1,000 per month, the participant's accrued early-retirement benefit would be $600 per month. (Trial Tr. vol. II, 138:15-139:2; Ex. 1 at Solvay 000042; Stip. at 2.)

9. The second early-retirement benefit under the old plan covers a plan participant who retires at or after age 55, but before age 65. In that case the participant would be entitled to receive a benefit equal to the benefit payable at the normal retirement age of 65, reduced by 3 percent for each year the retirement preceded age 65. Such a participant's age-55 benefit would be 30 percent less than the accrued age-65 benefit. For example, if the accrued age-65 benefit were $1,000 per month, the participant's accrued early-retirement benefit would be $700 per month. (Trial Tr. vol. II, 139:3-12; Ex. 1 at Solvay 000042; Stip. at 2.)

10. The third early-retirement benefit under the old plan is referred to as the "Rule

of 85." This covers a participant who has attained age 55, and whose years of service plus age add up to 85 points or more. In that case, the participant is entitled to receive the entire accrued age-65 benefit without any reduction. For example, if the accrued age-65 benefit were $1,000 per month, the participant's accrued early-retirement benefit would be $1,000 per month. (Trial Tr. vol. II, 139:13-21; Ex. 1 at Solvay 000042; Stip. at 2.)

11. Solvay's summary plan description (SPD) advised plan participants that they could retire anytime after reaching age 55, and provided them with the following "formula for calculating" early-retirement benefits, (Ex. 2 at 9), which the parties have stipulated is controlling (Trial Tr. vol. II, 284:20-25):

> If you terminate employment with the company at age 55 or above and the sum of the number of your years of benefit service and your age at the date of termination is equal to or greater than 85, the early retirement benefit will equal the normal retirement benefit you have earned at retirement based on your Benefit Service, Highest Average Compensation and Covered Compensation, with no reduction for early commencement.
>
> If you terminate employment with the company at age 55 or above and the sum of the number of your years of benefit service and your age at the date of termination is less than 85, the early retirement benefit will equal the normal retirement benefit you have earned at retirement based on your Benefit Service, Highest Average Compensation and Covered Compensation, but reduced 3% for each year you receive benefits early.
>
> For any participant who terminates employment with the company prior to age 55, the early retirement benefit will equal the normal retirement benefit you have earned at retirement based on your Benefit Service, Highest Average

> Compensation and Covered Compensation, but reduced 4% for each year you receive benefits early.

12. Pension plan participants as well as human resource representatives had access to this SPD from the time it was issued in January 2003 through the conversion effective January 1, 2005, and until it was updated and replaced in 2005. (Trial Tr. vol. 5, 774:21-775:20.)

13. The old plan was converted into a cash-balance pension plan (the new plan) by the adoption of the "Sixth Amendment" to the Plan, effective January 1, 2005. (Ex. 1, Solvay 000145-000155; Ex. N7.) The Sixth Amendment was drafted by Solvay's outside ERISA counsel, Cindy Schlaefer, (Trial Tr. vol. IV, 1065:6-7, 1065:15-19), and was executed by Solvay's then-President and CEO, David Birney, on December 28, 2004. (Stip. at 4; Ex. 1 at Solvay 000155.)

14. The new plan offered individual accounts similar to savings accounts except that these accounts are hypothetical. An employee's opening account balance is established based on the employee's accrued benefits under the old plan. Pay credits (which increase from 2.5% of pay with less than 40 age and service points to a maximum of 5% of pay with 80 or more age and service points) and interest credits (based on 30-year Treasury bond yields) are assigned to this account on a quarterly basis. (Ex. 1 at

Solvay 000147-000148.) The annuity benefit at age 65 is determined by projecting the cash-balance account with interest to age 65 and converting it to an annuity by applying the interest rate and mortality table specified in the plan. (Trial Tr. vol. II, 139:22-141:19.)

15. Under the new plan, early-retirement benefits are "subject to [an] actuarial reduction" from the accrued benefit payable at age 65. (Ex. 1 at Solvay 000145-000146, 000150; Trial Tr. vol. II, 139:22-142:11.) An actuarial reduction is equivalent to a reduction of approximately 5.3% for each year by which retirement precedes age 65. (Trial Tr. vol. II, 141:8-142:1.) This leaves an early-retirement benefit of only 47% of the age 65 accrued benefit for a retirement at age 55. (Trial Tr. vol. II, 141:20-142:11.) Both parties' actuaries agreed that an actuarial reduction provides between 45 and 50% of the accrued benefit for a retirement at age 55. (Trial Tr. vol. VI, 927:23-928:7.) For example, under the new plan, if the accrued benefit at age 65 were $1,000 per month, the age-55 early-retirement benefit would be $470 per month. (Trial Tr. vol. II, 139:22-142:11, 172:9-14; Trial Tr. vol. VI, 931:17-18.)

16. The Sixth Amendment provided that employees who were over age 50 and had more than 10 years of benefit service were offered the opportunity to elect to stay under the old plan (be grandfathered). (Ex. 1 at Solvay 000145.)

17. For those employees not grandfathered, the reductions in early-retirement benefits caused by the conversion to the new plan were significant. For employees who might have been eligible for the Rule of 85, a $1,000 per month benefit could be reduced down to approximately $470 per month. (Trial Tr. vol. II, 141:20-142:11.) For employees who reached age 55 but were not eligible for the Rule of 85, early-retirement benefits could fall from $700 per month down to approximately $470 per month. (Trial Tr. vol. II, 173: 11-20.)

18. Even under the new plan, a participant continues to have a legally-protected interest in the early-retirement benefit that he or she accrued under the old plan. That legal protection is established by ERISA §204(g)(1) and (2) and is also set forth in Section 10.2(b)(ii) of the plan document which provides that "no amendment shall be permitted that would have the effect of eliminating or reducing an early retirement benefit or a retirement-type subsidy . . . with respect to a Participant's Accrued Benefit." (Ex. 1 at Solvay 000100.) As a result of this protection, if a participant retires under the new plan, the participant is still entitled to the early-retirement benefit actually accrued under the old plan before the conversion if that benefit is higher than what the participant is entitled to under the new plan. (Trial Tr. vol. II, 142:14-143:1;) § 204(g)(2)(A).

19. These protected benefits also contain within them a right to "grow into"

eligibility if the participant is not eligible for early retirement at the time of the conversion. For example, if a participant was age 50 at the time of the plan conversion and is now age 55 and still working for Solvay, the participant could retire and receive the age-65 benefit, reduced by 3% for each year between ages 55 and 65. (Trial Tr. vol. II, 143:3-19.) This is called the "protected" benefit or the "protected minimum" benefit. If the protected benefit exceeds the retirement benefit available under the new plan, the participant is entitled to receive the higher amount. (Trial Tr. vol. II, 142:12-143:19.) Solvay understood the nature of this protected benefit. (Trial Tr. vol. IV, 582:12-24; Trial Tr. vol. V, 789:18-21.)

20. A plan participant could not only grow into eligibility for the 3% per year reduction by working until age 55, but could also grow into the Rule of 85. If the participant was not age 55 at the time of the conversion, but continued to work for Solvay and later turned 55 and had 30 years of service, he could retire and receive the full, unreduced age-65 pension benefit that was available under the old plan. To the extent that the Rule of 85 was an accrued benefit under the old plan, it continued to exist under the new plan. (Trial Tr. vol. II, 148:10-24, 149:19-150:3.)

21. Plaintiff Goff's situation illustrates the concept of a growing into a protected benefit. Goff's employment with Solvay terminated in 2005 at age 49, and he is now age

55. Under the old plan, Goff's accrued age-55 benefit was $1,029 per month, which equaled his age-65 benefit of $1,715 multiplied by 60 percent (4 percent per year reduction between ages 55 and 65). (Trial Tr. vol. II, 143:20-25; 144:9-145:2; Ex. G-2.) Employees' actuary calculated that Goff's protected benefit under the old plan is superior in value to his benefit under the new plan for a period of some 11 years after the conversion. (Ex. G-2.)

22. Shortly after Goff's termination, he received an application for benefits from Solvay, indicating that he was entitled to a lump sum under the new plan or a single life annuity of only $573.47 under the new plan. The application did not advise Goff of the existence of the protected benefit that he could grow into, i.e., that he was entitled to a monthly annuity of $1,029 if he were to wait until age 55 to commence benefits. The application, did however, explain to Goff that he may be eligible for additional payment options, and he should call for more information. (Trial Tr. vol. II, 147:8-148:9, 148:21-24, 178:9-180:17; Trial Tr. vol. III, 526:8-16; Trial. Tr. vol. IV, 672:23-673:1, 673:18-20, 674:2-21; Ex. 61.)

Leading Up to the Conversion

23. In the early 2000s, funding for the pension plan was volatile and unpredictable. (Trial Tr. vol. IV, 681:9-23, 683:9-684:6.) During this time, the equities markets were

down and interest rates were low. (Trial Tr. vol. III, 356:18-357:3; Trial Tr. vol. IV, 683:23-684:6.) Egbert testified that these economic conditions caused volatility in pension plan funding as the company could not adequately predict how much it would have to contribute to the Pension Plan to maintain proper funding. (Trial Tr. vol. III, 356:18-357:23.) As the company was responsible for 100% of Pension Plan funding, the volatility was unacceptable as it required unexpected monetary contributions that were not originally budgeted to funding the Pension Plan. (Trial Tr. vol. III, 357:4-358:12; Trial Tr. vol. IV, 681:9-23.) With the magnitude of funding volatility, it was determined that the old plan was not sustainable. (Trial Tr. vol. IV, 683:23-684:21.)

24. While Solvay's figures disclose a problem with funding volatility, they also disclose that Solvay undercontributed to the plan by nearly $40 million from 1992 through 2002, contributing only $48.3 million while paying out benefits totaling $88 million. (Ex. 14 at 6-7; Ex. U-1 at 12-13.) During the time Solvay was considering a pension plan conversion, the plan's assets were $99 million less than its liabilities. (Ex. I1; Trial Tr. vol. III, 380:19-381:11, 448:1-14.)

25. In early 2003, Egbert received the directive to reduce the funding volatility of the pension plan. (Trial Tr. vol. III, 372:8-14; Trial Tr. vol. IV, 656:19-22.)

26. To analyze the company's various alternatives, on or about May 2003, Egbert

and Allen engaged Towers to analyze Solvay's current retirement benefits as well as the benefits of other companies within the chemicals and pharmaceuticals market and to present various alternatives for reducing funding volatility. (Trial Tr. vol. III, 354:22-359:14; Trial Tr. vol. IV, 684:22-685:1, 686:10-18; Trial Tr. vol. V, 872:6-21; Ex. C1.) The primary Towers actuaries working on the project were John Markson, who was the pension plan lead actuary at that time, and Misthos, who later became the pension plan lead actuary. (Trial Tr. vol. IV, 685:6-10; Trial Tr. vol. V, 871:1-10, 872:22-873:16; Ex. C1.)

27. In August 2003, Markson and Misthos presented Egbert and Allen with the analysis of Solvay's current benefits and their competitiveness in the market. (Trial Tr. vol. III, 369:11-375:17; Trial Tr. vol. IV, 686:10-688:17; Ex. F1.) Specifically, Towers's presentation advised Egbert and Allen that the values of their existing benefits were 33% higher than the average chemical industry program and 19% higher than the average pharmaceutical industry program. (Ex. F1 at ESOLVAY00124849.) Towers's presentation also advised Egbert and Allen that Solvay's pension plan benefits were currently equal to the chemical industry average and 21% above the pharmaceutical industry average, while Solvay's savings plan benefits were 20% above the chemical industry average and more generous than the pharmaceutical industry average. (*Id.*; Trial

Tr. vol. VI, 686:22-687:7.)

28. The August 2003 presentation by Markson and Misthos also provided Egbert and Allen with various alternatives to the old plan. (Trial Tr. vol. III, 369:11-375:17; Trial Tr. vol. IV, 686:10-688:17; Ex. F1.) Egbert testified that the alternatives ranged from terminating the old plan to converting to a cash-balance formula while enhancing features of the savings plan. (Trial Tr. vol. III, 372:22-373:10; Ex. F1.) Allen testified that Towers advised him and Egbert that "there was a distinct movement within the chemical industry towards what [he] would call hybrid plans, like cash balance plans . . . ." (Trial Tr. vol. IV, 687:8-14.) Misthos also testified that "Solvay's peer companies were showing a trend of either starting to provide savings plan only benefits to employees or to, you know, change their traditional final average pay plans over to like a cash balance plan." (Trial Tr. vol. V, 882:9-13.)

29. In light of the cash-balance alternative, as well as certain court decisions and surrounding legislative uncertainty regarding cash-balance plans, in late 2003, Egbert retained Schlaefer and Pillsbury to provide legal advice regarding the state of cash-balance formula conversions. (Trial Tr. vol. III, 349:2-23; Trial Tr. vol. VI, 1061:3-1064:19; Ex. 4; Ex. 34.) In November 2003, Schlaefer provided Egbert with a memorandum discussing recent developments regarding cash-balance plans. (Ex. 4; Trial

Tr. vol. VI, 1061:20-1062:19.) Specifically, Schlaefer's memorandum advised Egbert that Pillsbury believed that cash-balance plan designs do not inherently violate age discrimination laws and that the recent court decisions holding the opposite are misguided. (Ex. 4.) Schlaefer's memorandum also advised Egbert that if the old plan was converted to a cash-balance formula, Solvay could minimize the risk of litigation if full disclosure regarding the change was made to participants. (*Id.*) Schlaefer later updated the memorandum in October 2004 with new developments in the cash-balance landscape, but adhered to Pillsbury's opinion that cash-balance plans are not inherently age discriminatory. (Trial Tr. vol. VI, 1062:25-1064:19; Ex. 34.) Schlaefer's 2004 memorandum also advised that Solvay could minimize the risk of litigation by providing full disclosure to participants regarding the conversion. (Ex. 34.)

30. Egbert and Allen continued to work with Markson and Misthos through 2003 and 2004 to finalize the proposed terms of the conversion. (Trial Tr. vol. III, 378:23-379:12, 380:2-381:1; Ex. K1.) During this time, Egbert presented the various alternatives to the Executive Committee, the Solvay America Board of Directors, and the Solvay America Pension Plan Investment Committee. (Trial Tr. vol. III, 375:25-378:18, 383:11-24; Trial Tr. vol. IV, 687:23-688:3; Ex. J1; Ex. R1; Ex. S1.)

31. In early 2004, the Solvay Investment Committee decided to move forward with

the cash-balance alternative. (Trial Tr. vol. III, 350:14-355:3, 372:8-14, 385:6-17; Trial Tr. vol. IV, 687:15-688:17; Ex. S1.) After this, Egbert and Allen presented the cash-balance alternative to the Executive Committee, the Solvay America Board of Directors, the Solvay America Pension Plan Investment Committee, and various senior human resources managers. (Trial Tr. vol. III, 383:11-387:23, 389:18-390:23; Trial Tr. vol. IV, 701:18-702:2; Ex. J1; Ex. R1; Ex. S1; Ex. U1; Ex. B2; Ex. G2.)

32. In June of 2004, the Executive Committee approved the proposed changes to the Pension and Savings Plans. (Trial Tr. vol. III, 391:2-392:3; Ex. I2.)

33. Misthos and Allen testified that the conversion was designed to be cost neutral over the lifetime of the plans. (Trial Tr. vol. IV, 592:6-593:9; Trial Tr. vol. V, 877:20-879:13.) In other words, the conversion was designed such that over time there would not be any large cost increase or decrease, even with the transition between formulas. (Trial Tr. vol. VI, 877:20-879:13.)

34. Specifically, before the conversion, Solvay understood the old plan's average annual cost was approximately 5.3% of pay for the average employee. (Trial Tr. vol. IV, 690:20-696:3, 701:10-16; Ex. X9; Trial Tr. vol. VI, 882:15-884:19; Ex. 3.) In converting to the new plan, the overall cost was reduced by 40%, bringing the average annual cost of the Pension Plan down to approximately 3.3% of average employee annual pay (from the

previous 5.3%). (Ex. 3; Ex. 5.)

35. Misthos, however, testified that the 5.3% was not an actual percentage based on Solvay's particular payroll, but instead was a score using Towers's BENVAL analysis. (Trial Tr. vol. VI, 1014:20-1015:11.) Regardless, Solvay understood the change in percentage from 5.3% to 3.3% to be the reason it needed to shift more money to the Savings Plan to keep the employees' beneefits value nuetral. (Trial Tr. vol. IV, 688:10-17.)

36. To achieve cost neutrality, the 2% cost differential was shifted from the Pension Plan to the Savings Plan, such that participants would be eligible for an additional 2% matching (from up to 7% to up to 9%). (Trial Tr. vol. IV, 690:20-692:19, 701:10-16; Ex. X9; Trial Tr. vol. VI, 1012:16-23; Ex. 3; Ex. 5.) In addition, an annual 1.25% transition contribution was provided to participants who were converted to the new plan. (Trial Tr. vol. IV, 692:20-693:16, 701:10-16; Ex. X9; Trial Tr. vol. VI, 1012:16-23; Ex. 3.)

Preparing the § 204(h) Notice

37. After the Executive Committee approved the decision to convert to the new plan, Allen and his team started the preliminary preparations on the communications materials concerning the conversion. (Trial Tr. vol. IV, 701:18-702:13; Trial Tr. vol. V,

831:24-832:2.) Allen testified that on July 26, 2004, he sent Markson an email that noted that "[w]e had a meeting this afternoon with our communications consultant and discussed the 204h disclosure as related to our pension plan redesign." (Trial Tr. Vol. IV, 708:1-21; Ex. 9.) Allen then went on to ask Markson in the email, "Would you be able to provide us with a document that outlines the specific disclosure requirements prescribed under the statutes?" (Ex. 9; Trial Tr. vol. IV, 708:1-21.) In this email, Allen copied Schlaefer because she was ERISA counsel, and copied Robyn Schaub, the communications consultant from PartnerComm who was assisting with the preparation of certain conversion communications materials, including the FutureChoice Brochure and Decision Guide. (Ex. 9; Trial Tr. vol. IV, 703:15-24, 708:1-21.)

38. Allen testified that he also received an email from Schaub on July 27, 2004, which included a sample 204(h) notice that PartnerComm had prepared for a different client, which included the term "subsidized early retirement." (Trial Tr. vol. IV, 710:18-712:11; Ex. T2). Allen testified that he forwarded that email to Markson and Schlaefer. (Trial Tr. vol. IV, 710:18-21; Ex. T2.)

39. On July 27, 2004, Allen also received an email from Markson with an attached memorandum from Towers that summarized the 204(h) notice regulations along with the regulations themselves. (Trial Tr. vol. IV, 708:22-709:6; Ex. 10.) Allen testified that after

reading through the documents, it became clear that the regulations contained a lot of information, and that he did not have the ability to interpret what they meant. (Trial Tr. vol. IV, 709:12-19). Allen and Egbert testified that they believed it was prudent to retain Towers and Pillsbury to draft and edit the § 204(h) notice. (Trial Tr. vol. II, 288:16-20, 310:1-9, 332:9-14; Trial Tr. vol. III, 353:23-354:6; Trial Tr. vol. V, 795:20-21, 799:10-12, 800:3-4, 801:3-5.)

40. Because Towers was already familiar with the pension plan and was already assisting with the terms of the conversion, and based on their expertise and knowledge on the § 204(h) regulations, as demonstrated through their memorandum on the subject, as well as their expertise in actuarial and communications matters, Egbert and Allen believed that Towers would be highly qualified to provide advice on the § 204(h) notice. (Trial Tr. vol. II, 275:8-19, 294:1-10; Trial Tr. vol. III, 354:22-355:3; Trial Tr. vol. IV, 709:20-710:1; Ex. C1.)

41. Therefore, Allen and Egbert retained Towers to draft and provide advice about the § 204(h) notice. (Trial Tr. vol. IV, 714:12-715:5; Ex. N3; Trial Tr. vol. V, 896:8-11; Trial Tr. vol. VI, 1065:4-7.) Towers was responsible for preparing the initial draft of the § 204(h) notice under Misthos's direction. (Trial Tr. Vol. IV, 641:20-22; Trial Tr. Vol. V, 896:19-21.) Misthos had prior experience drafting § 204(h) notices and she was familiar

with the § 204(h) notice requirements.(Trial Tr. vol. V, 896:12-18.) Misthos testified that under her direction, several persons at Towers worked on preparing the § 204(h) notice, including: a communications consultant, Jennifer Ngo, who prepared the initial internal draft of the Notice; actuary Markson, who worked with Ngo to update several internal drafts of the Notice; actuaries, Rosalind Preiss and David Fee, who provided the numerical examples; an editor, Faye Dixon, who reviewed and made comments on the drafts; and a newly hired associate. (Trial Tr. vol. V, 872:22-873:4, 896:8-899:21; Trial Tr. vol. VI, 945:9-21.) In addition, Misthos coordinated the notice preparation and conducted the final review before sending to the client "to make sure that [she] thought it was compliant with the 204(h) regulations." (Trial Tr. vol. V, 899:14-21.)

42. In addition to hiring Towers for its expertise, Egbert and Allen retained Schlaefer, an attorney with Pillsbury, who had expertise in ERISA, benefits, and tax law, to review the § 204(h) notice and provide edits to ensure legal compliance. (Trial Tr. vol. II, 276:1-16; Trial Tr. vol. VI, 1065:3-7.)

43. Solvay's choice to engage Towers and Pillsbury for help with its § 204(h) notice is consistent with the testimony Claude Poulin, Employees' actuarial expert, who admitted on cross-examination that an average person who is not a lawyer or actuary would have difficulty understanding the § 204(h) regulations. (Trial Tr. vol. II, 156:4-10.)

Solvay's choice to seek advice from both expert lawyers and actuaries is evidence of its intent to comply with the § 204(h) requirements.

44. As part of the § 204(h) notice preparation process, Allen and his team, Towers, and Pillsbury formulated several drafts of the § 204(h) notice. (See Trial Tr. vol. IV, 715:6-741:10; Trial Tr. vol. V, 747:15-754:18.)

45. On September 2, 2004, Misthos forwarded the initial draft of the § 204(h) notice to Allen, who managed the day-to-day responsibilities regarding the preparation of the § 204(h) notice. (Trial Tr. vol. V, 901:15-17, 908:22-23; Ex. S3.) Misthos testified that Solvay communicated to her that its intent with regard to the § 204(h) notice was to "fully comply with the rules." (Trial Tr. vol. VI, 924:24-925:1.) Misthos further testified that she reviewed it for compliance, knowing that counsel would conduct a legal review. (Trial Tr. vol. V, 896:4-11, 899:14-21.)

46. After receiving the draft notice, Allen forwarded it to Schlaefer for "legal review." (Trial Tr. vol. VI, 1066:8-13; Ex. T3.)

47. Schlaefer, who has reviewed a number of draft § 204(h) notices in her career, actively referenced the ERISA statute and the applicable regulations' requirements for § 204(h) notices during her review of the initial draft notice. (Trial Tr. vol. VI, 1065:8-10, 1094:15-21.) Schlaefer proposed several edits within a redline version of the draft notice

based on compliance with the § 204(h) regulations, including several additions regarding early retirement "subsidies." (Trial Tr. vol. VI, 1069:4-1072:21, 1097:23-1098:7; Ex. 19.)[1]

48. Schlaefer testified that her comments to the notice were intended to make it "compliant with the regulation" and the intent behind all "the changes [was] to comply with the requirements of the 204(h) notice." (Trial Tr. vol. VII, 1135:4-7, 1172:23-1173:1; *see also* Ex. B4 (noting that edits were "based on compliance with 204(h) regulations").) Schlaefer also testified that she knew that the "204(h) notice requires that you draft it in a way that is calculated to be understood by the average plan participant, so I had that in mind when I provided comments and tried to spot issues." (Trial Tr. vol. VII, 1151:14-19.) She also testified that "I think both the actuaries and the lawyers focus on that, on the requirement of the regulations to make it clearly understandable." (Trial Tr.

[1] Employees adduced countless pieces of testimony concerning Solvay's use of the words subsidy and subsidies. (*E.g.* Trial Tr. vol. II, 311:2-312:3; Trial Tr. vol. IV, 621:16-23; Trial Tr. vol. VI, 1111:23-1114:5, 1123:2-1124:14; Trial Tr. vol. VII, 1148:3-1151-7.) However, that testimony is not relevant to Solvay's intent concerning its failure to describe how to calculate early-retirement benefits. While numerous employees, including the CFO could not clearly define their meaning in the context of the § 204(h) notice, Employees provided no evidence that Solvay intentionally included that language in order to confuse or mislead the participants about how to calculate their benefits.

vol. VI, 1091:6-8.)[2]

49. Allen and his team accepted each of Schlaefer's recommendations, including the recommendations regarding the early retirement subsidy information. (Trial Tr. vol. IV, 722:20-723:20; Trial Tr. vol. V, 750:24-751:4; Ex. 21.)

50. Towers and Pillsbury continued to review and edit the draft § 204(h) notice and both approved the final § 204(h) notice. (Trial Tr. Vol. VI, 924:5-12, 997:8-12, 1074:10-1075:9, 1076:4-7; Trial Tr. Vol. VII, 1175:2-25; Ex. 23.) Towers and Pillsbury also reviewed several other communication documents including the "Future Choice Brochure," which in combination with the § 204(h) notice, acted as the SMM. (Trial Tr. vol. V, 891:24-892:3; Trial Tr. vol. VII, 1181:9-19, 1182:17-19.)

51. At no time did Solvay reject any recommendation from Pillsbury or Towers regarding early-retirement benefits information in the § 204(h) notice. (Trial Tr. vol. III, 397:7-15; Trial Tr. Vol. IV, 723:17-20; Trial Tr. vol. V, 750:24-751:4.) Both Allen and Egbert testified that throughout the drafting process they did not intentionally omit any information regarding early-retirement benefits from the § 204(h) notice and that they believed at the time of distribution that the notice complied with the law. (Trial Tr. vol. II,

[2] The Court uses the testimony to determine only Solvay's intent, not whether a violation occurred. The Tenth Circuit ruled that the § 204(h) notice did not, in fact, comply with the regulations. *Jensen*, 625 F.3d at 654-55.

333:6-15, 336:11-23; Trial Tr. vol. III, 397:21-23, 406:24-408:3, 457:9-11; Trial Tr. vol. IV, 618:14-16, 620:17-19; Trial Tr. vol. V, 755:3-9.)

52. Likewise, Misthos testified that she did not intentionally omit any information from the § 204(h) notice regarding early-retirement benefits, and that no one instructed her to omit any such information. (Trial Tr. Vol. VI, 923:18-924:12.) Schlaefer also testified that no one instructed her to omit or delete any information related to early-retirement subsidies. (Trial Tr. vol. VI, 1076:8-11.) Employees have failed to adduce any evidence that contradicts this testimony.

53. The Court notes that none of the testimony adduced by Employees provides any evidence of Solvay's intent with respect to the § 204(h) notice, with the single exception of testimony of Maxfield. Maxfield admitted on cross-examination, "It is my opinion that none of those people [referring to Egbert, Allen, and Harding] would intentionally do anything to not comply with the law." (Trial Tr. vol. II, 268:5-12.) Because Maxfield was an adverse witness to Solvay as his future pension benefits were reduced as a result of the conversion, the Court finds Maxfield's testimony credible. Moreover, Maxfield's testimony is consistent with the other evidence. Solvay did not intentionally fail to describe how early-retirement benefits were calculated before and after the conversion.

54. Therefore, based on the credible testimony of Allen, Egbert, Misthos, Schlaefer, and Maxfield, the Court finds that Solvay's intent was to provide a compliant § 204(h) notice to participants. The Court further finds that Solvay did not intentionally omit information regarding how to calculate early-retirement benefits from the § 204(h) notice.

Distribution of the § 204(h) Notice

55. The § 204(h) notice, along with additional communications, were mailed to participants on September 17, 2004. (Stip. at 3; Ex. 27.) The communication materials distributed to non-grandfather eligible participants included: (1) the § 204(h) notice; (2) a FutureChoice Brochure; and (3) a Personalized Statement of Estimated Opening Account Balances. (Stip. at 3-4; Ex. 28; Ex. 27; Ex. C5.) Grandfather eligible participants who needed to make a decision about which formula to choose received a slightly different communications packet that contained more information about their options, including: (1) the 204(h) notice; (2) a FutureChoice Brochure; (3) a Personalized Statement of Projected Retirement Benefits (with information under "Option 85," as applicable); (4) the FutureChoice Decision Guide (which included information about "Option 85"); and (5) a Pension Plan Election Form. (Trial Tr. vol. IV, 740:8-23; Trial Tr. vol. V, 747:15-748:16; Ex. 27; Ex. 28; Ex. Y4; Ex. A5 at ESOLVAY000226; Ex. Z4.)

56. After the distribution of the § 204(h) notice and other communication materials, in September and October 2004, Allen and other Solvay representatives presented the Pension Plan and Savings Plan changes to participants in live, on-site meetings using a PowerPoint presentation. (Trial Tr. vol. IV, 605:15-606:11; Trial Tr. vol. V, 766:3-11; Ex. 29; Ex. 30.)

57. While the PowerPoint presentation included a statement that the "Rule of 85/early retirement features remain in the [old] pension plan," that statement was made only on the slide explaining grandfathering. Nowhere else does the presentation state that early-retirement benefits are protected. (Ex. 29.)

58. One of the employee meetings Allen conducted was recorded and portions from the recorded meeting were played at trial. (Trial Tr. vol. IV, 576:12-15, 660:7-11.) The Court finds credible Allen's statement that while each meeting utilized the same PowerPoint presentation as a guide, the content of each meeting varied with the audience. (Trial Tr. vol. IV, 612:6-10, 615:9-11.) During the presentation, Allen encouraged employees to ask questions about the conversion. (Ex. 40 at 3:16-4:4.)

59. Jensen and Maxfield testified that throughout this communication process surrounding the conversion, Maxfield and Sherrie Frolic, the human resources representatives at Solvay Chemicals in Green River, made themselves available and

maintained an open-door policy in which employees could ask questions and seek clarification. (Trial Tr. vol. I, 72:19-73:16; Trial Tr. vol. II, 251:17-254:8, 265:8-266:5.) Specifically, Maxfield testified that he answered questions to the best of his ability and instructed his team members "to help each and every employee the best that they could every day, to not give answers that they didn't know to be accurate, and to take Solvay America up on the invitation to call and refer questions to them and that they would help us through this process." (Trial Tr. vol. II, 251:17-252:1.)

60. Further, there was evidence presented that Egbert asked that the various presidents and senior human resources representatives encourage their employees "to attend the meetings to ensure that they fully understand [the conversion]." (Ex. H5.)

61. The Court finds that Solvay's communication efforts in the on-site meetings and through their human resources representatives undercut Employees' allegations that Solvay intended to not disclose information regarding the changes associated with the conversion.

62. Further, the testimony at trial established that participants understood the impact of the conversion. Specifically, Jensen, Godwin, Liscomb, and Goff, understood and were upset about the elimination of early retirement subsidies, and in particular the elimination of the Rule of 85 from the new plan. (Trial Tr. vol. I, 58:8-11, 69:1-11,

72:11-15; 109:15-16; Trial Tr. vol. III, 475:8-13, 518:22-24, 537:2-4; Trial Tr. vol. V, 857:12-15.) Additionally, Jensen and Goff testified that they understood that they would be losing a substantial amount of money as a result of the conversion. (Trial Tr. vol. I, 71:14-72:18, 76:9-25; Trial Tr. vol. III, 547:24-548:15.)

63. Moreover, even Employees' witnesses that do not remember reading the § 204(h) notice understood the effect of the conversion. Christensen and Mulinix both testified that they did not remember reading the § 204(h) notice. (Trial Tr. vol. II, 203:8-9; Trial Tr. vol. III, 489:4-14.) Yet, Christensen testified that she knew that her benefits under the new plan would not come close to the benefits she would have had under the old plan. (Trial Tr. vol. II, 204:1-15.) Likewise, Mulinix testified that she understood that she was losing money as a result of the conversion. (Trial Tr. vol. III, 487:11-14.)

64. Employees failed to introduce evidence sufficient to establish why Solvay would communicate the loss of the Rule of 85 and the significant loss of pension plan benefits, yet intentionally omit information from the § 204(h) notice regarding how to calculate early-retirement subsidies. Similarly, Employees failed to establish that Solvay intentionally failed to disclose to participants that they could "grow into" Rule of 85 benefits.

65. Jensen and Goff further testified that because of the changes to the pension plan, the loss of the Rule of 85, and the other reductions to benefits, employees at the Green River location organized a union campaign. (Trial Tr. vol. I, 73:17-74:5; Trial Tr. vol. III, 544:6-23.) The Court finds that this testimony establishes that the § 204(h) notice (while legally deficient in the one aspect held by the Tenth Circuit) and Solvay's various other communications actually informed the participants of the changes to the pension plan. That Solvay communicated this information also establishes that Solvay had no intent to mislead or conceal information from the participants.

66. Moreover, whether or not Employees claim to have understood the notice at the time, the testimony of Employees and other class members establishes that they were able to utilize the tables in the § 204(h) notice and could determine their individual loss of benefits. For example, when questioned, Goff was able to utilize the tables found in the § 204(h) notice to closely align his age and years of service and determine his early-retirement benefits before and after the conversion. (Trial Tr. vol. III, 538:7-540:21.) Jensen was also able to determine his early-retirement benefits before and after the conversion by simply looking at the § 204(h) notice's Table B. (Trial Tr. vol. I, 71:1-22.) Similarly, Employees' witness Saganich was able to refer to Table B in the § 204(h) notice at trial and determine that at age 55 she would have been entitled to approximately

$3,700 under the old plan and $1,100 under the new plan. (Trial Tr. vol. V, 856:9-858:15.) Saganich testified that the disparity demonstrates that she was losing approximately two-thirds of the value of her early-retirement benefits. (Trial Tr. vol. V, 856:9-858:15.) This information is the same as the calculation Saganich performed in 2004 when she emailed Harding asking for consideration for increased benefits. (Ex. 35; Trial Tr. vol. V, 849:14-850:22, 856:9-857:6, 858:4-9.)

67. Because the employees understood the impact of the conversion on their benefits, the Court finds that Solvay did not, in fact, mislead participants. Based on all the evidence, the Court finds that Solvay intended to fully communicate the benefit changes. The Court therefore finds that Solvay did not intentionally omit any required information from the § 204(h) notice.

Feedback After § 204(h) Notice

68. After Solvay communicated the conversion to employees, Egbert, Allen, and others received emails from participants expressing their displeasure with the changes. Both Saganich and Godwin testified that they were upset about the reduction of their anticipated benefits. (Trial Tr. vol. I, 97:9-15; Trial Tr. vol. V, 851:1-11, 858:10-14.) Saganich and Godwin each sent emails to Harding expressing their dissatisfaction with the conversion. (Ex. 35; Ex. 53.) Saganich's email noted that she would be receiving

about two-thirds less under the new plan. (Ex. 35.) In Godwin's email, she stated that, as a result of the conversion, she estimated that she was going to lose between $650,000-$800,000. (Ex. 53.)

69. Godwin's email also requested an exception so that she be allowed to grandfather into the old plan and requested an individualized projection of benefits under both plan at age 59½. (Trial Tr. vol. I, 105:13-23, 106:18-107:3, 109:3-20; Ex. 53.) Similarly, employee Duncan Del-Toro sent Egbert an email to see if anything could be done because his anticipated pension benefits under the new plan would be substantially lower than those under the old plan. (Ex. 37.) Another employee, Kenneth Neugebauer, also sent an email to Allen asking for a projection of benefits forecasting his future annuity under the old plan as if it would continue to accrue after the conversion and his future annuity under the new plan. (Ex. 37.)

70. Although these participants expressed their personal dissatisfaction with the reduction of their anticipated benefits and the eligibility cut-off criteria for grandfathering, and requested side-by-side, individualized projections of benefits under both plans, none of their communications alleged the § 204(h) notice was deficient. (Ex. 35; Ex. 37; Ex. 53.) There is no evidence that any employee challenged the adequacy of the § 204(h) notice until the administrative claim was filed.

71. The evidence reflects only one employee communication that mentions the § 204(h) notice. (Ex. 52.) That communication was sent from attorney Nancy Wasch on behalf of an employee, Darrin Meyer. (*Id.*; Trial Tr. vol. V, 767:20-768:16.) While Wasch's email originally challenged the adequacy of the notice, (Ex. E7), Solvay pointed out the information was located on the § 204(h) notice and FutureChoice brochure. Based on that response, Wasch was able to determine that "Mr. Meyer's monthly annuity, approximately $849 for life beginning at age 65, is preserved." (Ex. G7.) After Solvay responded to Wasch's email, there were no further questions that even mentioned the § 204(h) notice that would have put Solvay on notice of its failure.

72. Even so, after receiving the communications from participants, Egbert and Allen consulted Schlaefer for advice. (Ex. 37.) Schlaefer advised Solvay that despite the participants' requests, Solvay was not legally required to provide participants with individualized projections. (Trial Tr. vol. VII, 1184:13-23.) At no time, before or after the employee communications, did Schlaefer or Pillsbury advise Solvay that the § 204(h) notice was deficient in any respect. (Trial Tr. vol. VI, 1076:12-14.)

73. No evidence in the record indicates that Solvay ever discovered its unintentional failure to describe how to calculate early-retirement benefits in its § 204(h) notice. The evidence instead suggests that when confronted with the possibility that its §

204(h) notice was deficient, Solvay sought the advice of its ERISA counsel to ensure it remained compliant.

Conclusions of Law

74. Employees allege that Solvay's failure to describe in the § 204(h) how the early-retirement benefits were calculated under the old plan and the new plan was an egregious failure under 29 U.S.C. § 1054(h)(6)(B). The Court finds no egregious failure. Employees further allege Solvay violated 29 U.S.C. § 1022(a) by failing to follow ERISA's SMM requirements. This Court does not agree the SMM claim is properly before it. If the SMM claim is proper, Employees still failed to carry their burden on that claim. Therefore, Solvay is entitled to judgment in its favor.

75. ERISA § 204(h) defines an egregious failure to meet the notice requirements as follows:

> [T]here is an egregious failure to meet the requirements of this subsection if such failure is within the control of the plan sponsor and is
>
> (i) an intentional failure (including any failure to promptly provide the required notice or information after the plan administrator discovers an unintentional failure to meet the requirements of this subsection),
>
> (ii) a failure to provide most of the individuals with most of the information they are entitled to receive under this subsection, or
>
> (iii) a failure which is determined to be egregious under regulations

prescribed by the Secretary of the Treasury.

29 U.S.C. § 1054(h)(6)(B).

76. The Court granted summary judgment to Solvay on subsection (ii), as there was no genuine issue of material fact that Solvay provided most of the information to most of the participants. (Doc. 165 at 5-6.) The Court also recognized that no argument exists on subsection (iii), as the regulations provide nothing more that the statute itself. (*Id.* at 5.) Therefore, the issue for trial was whether Solvay's failure was intentional or whether Solvay failed to promptly correct an unintentional failure after discovering the failure. (*Id.* at 12.)

Intentional Failure

77. Neither the statute nor the regulations define "intentional failure." *See* § 204(h); 26 C.F.R. § 54.4980F-l. While the term is undefined, this Court holds that proof of an intentional failure does not require proof of hostile or malicious intent. Courts have utilized the phrase in defining other terms. *E.g. Smith v. Wade*, 461 U.S. 30, 39 n.8 (1983) (willful neglect); *M.E.N. Co. v. Control Fludics, Inc.*, 834 F.2d 869,872-73 (10th Cir. 1987) (willful failure); *Brantner v. Poole*, 487 F.2d 1326,1328 (10th Cir. 1973) (willful misconduct); *NMP Corp. v. Parametric Tech. Corp.*, 958 F. Supp. 1536, 1546 (N.D. Okla. 1997) (gross negligence).

78. In defining "willful failure," the Tenth Circuit has on numerous occasions explained, "intentional failure [is] distinguished from involuntary noncompliance. No wrongful intent need be shown." *M.E.N.*, 834 F.2d at 872-73 (*quoting In re Standard Metals Corp.*, 817 F.2d 625,628-29 (10th Cir. 1987)). This Court finds the Tenth Circuit definition to be in accordance with the plain meaning of the term. *See United States v. Floyd*, 88 F.3d 1517, 1523 (10th Cir. 1996) (applying ordinary meaning found in dictionary when Congress does not statutorily define a term). Black's Law Dictionary defines "intentional" as being "done with the aim of carrying out the act." (9th ed. 2009). Therefore, the meaning of intentional does not require maliciousness.

79. In civil and criminal cases alike, intent can be (and most often is) proved by circumstantial, rather than direct, evidence. *See United States v. King*, 632 F.3d 646,646 (10th Cir. 2011) ("The intent to possess the weapon to further the drug trafficking crime is generally proven through circumstantial evidence.") (*quoting United States v. Rogers*, 556 F.3d 1130, 1140 (10th Cir. 2009)); *United States v. Cardinas Garcia*, 596 F.3d 788, 798 (10th Cir. 2010) ("More often than not, intent is proved by circumstantial evidence."); *Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187, 1197 (10th Cir. 2008) ("Though [a plaintiff] lacks direct evidence of discriminatory intent, he still may carry his statutory burden by presenting circumstantial evidence . . . ."); *United States v. Johnson*,

971 F.2d 562, 566 (10th Cir. 1992) ("Direct evidence of a defendant's intent is seldom available. Intent can be proven, however, from surrounding circumstances."); *SEC v. Curshen*, 2010 WL 1444910, *9 (10th Cir. Apr. 13,2010) ("[The defendant's] failure to disclose his self-interest is strong circumstantial evidence of intentional conduct.").

80. While Employees agree that intent can be proved by circumstantial evidence, they argue that all they need to prove for an intentional failure is: (1) knowledge of statute's requirement, and (2) a failure to satisfy that requirement. Indeed, if intentional failure only required proof of those two elements, Employees would have carried their burden.

81. However, this Court holds as a matter of law that while those two facts are probative of an intentional failure, they are not determinative. Employees point to no law to support their proposition. Instead, this Court will follow the law stated above and consider those facts as circumstantial evidence of intent.

82. Employees argue that sufficient circumstantial evidence exists in the record for the Court to find Solvay committed an intentional failure. While that evidence was enough for this Court to find a genuine issue of material fact for trial, it was not enough to carry their burden at trial. At trial, Employees pointed to no other evidence that Solvay intentionally failed to provide the calculations of early-retirement benefits. To the

contrary, the evidence showed that Solvay did its best to comply with the regulations—the entire set of applicable regulations. What was proven at trial is that Solvay consulted multiple experts on the complex issue of their plan conversion, all of whom testified their goal (and Solvay's goal) was to comply with the law. Moreover, one class member who had a working relationship with those employees making the ERISA decisions stated that none of those employees "would intentionally do anything to not comply with the law." (Trial Tr. vol. II, 268:11-12.)

83. Therefore, this Court holds that Employees failed to satisfy their burden of proof; Solvay did not intentionally fail to disclose in the § 204(h) notice how to calculate early-retirement benefits.

Failure to Promptly Notice After Discovery

84. Subsection (i) includes in its definition of an intentional failure "any failure to promptly provide the required notice or information after the plan administrator discovers an unintentional failure to meet the requirements of this subsection." § 1054(h)(6)(B)(i).

85. On summary judgment, this Court held a genuine issue of material fact existed as to whether Solvay discovered its failure to describe how to calculate early-retirement benefits in its § 204(h) notice. The Court recognized the genuine issue based on the record indicating numerous employees requested side-by-side comparisons of the two

plans. Moreover, the Court noted that one email to Solvay included an employee's attorney referencing some information that was not provided in the § 204(h) notice.

86. In the single case on point, *Brady v. Dow Chemical Co.*, the Fourth Circuit held employees' emails indicating confusion over a certain issue was sufficient to find that administrators had discovered a § 204(h) failure. 2009 WL 394322, *6 (4th Cir. Feb. 18, 2009). In *Brady*, the Fourth Circuit granted summary judgment for the plaintiff, as emails clearly indicated multiple employees were confused over the specific deficiency of the notice. Moreover, in that case emails also showed the plaintiff discussed with administrators specifically how the § 204(h) notice was misleading concerning the same failure the court held violated ERISA.

87. This case is distinguishable from *Brady.* The single email referencing a deficiency of the § 204(h) notice was answered by Solvay by directing the attorney making the inquiry to the first page of the § 204(h) notice. The attorney responded, recognizing that the § 204(h) notice explained her client's accrued benefit was protected, even referencing his annuity value. Therefore, that email does not suffice to put Solvay on notice of its deficiency.

88. Moreover, the queries from the other employees similarly did not lead to a discovery by Solvay of its failure. The majority of the inquiries discussed at trial

concerned the grandfather cutoff, and the employees most upset about the conversion knew they were losing significant benefits by the conversion. Nothing at trial indicated that any employees did not understand their benefits under the old plan, or that they would be losing the premier early-retirement benefits of the old plan. They were indeed most upset about losing those benefits.

89. The evidence at trial suggests the earliest time Solvay discovered its failure was after the filing of this case. This Court will not consider those facts.

90. Therefore, this Court holds that Employees failed to satisfy their burden of proof; Solvay did not discover its unintentional failure to disclose in the § 204(h) notice how to calculate early-retirement benefits.

Claim Regarding SMM

91. This Court entered its *Order on Mandate* (Doc. 149 at 1), stating:

> On September 7, 2010, the Tenth Circuit Court of Appeals entered Judgment **affirming** the judgment of the district court with respect to Plaintiffs' ADEA claim and with respect to all of their ERISA claims and **reversing and remanding** as to the claim based on the failure of the § 204(h) notice to describe the calculation of early-retirement benefits. The mandate for the case issued October 26, 2010. Accordingly for the foregoing reasons, it is hereby
>
> **ORDERED** that this matter be restored to the docket . . . .

92. Employees' argument that the remand includes more than the single issue

listed in the Court's *Order on Mandate* stems from a statement made by the Tenth Circuit:

> In sum, we hold that Solvay's SMM was not deficient, except for the possibility that § 1022(a) required disclosure of the old plan's method of calculating early-retirement benefits. We need not address that possible violation, however, because we have held that the failure to disclose violates [§ 204(h)], so remand is required in any event.

(Doc. 148 at 38.)

93. However, prior to that statement, the Tenth Circuit also stated:

> We are not convinced that the SMM was defective. With respect to Plaintiffs' first contention, aside from the failure to disclose how early-retirement benefits were calculated under the old plan, the SMM adequately described how the new plan differed from the old. And we need not decide whether that failure constituted an independent violation of [§ 102(a)], because we have already held that the failure violated [§ 204(h)]; and Plaintiffs have not suggested that any additional remedy would be available for a violation of [§ 102(a)].

(Doc. 148 at 35.)

94. Finally, this Court notes the Tenth Circuit's wording concerning Solvay's failure:

> We therefore conclude that Solvay's notice failed to comply with the requirements for disclosure of early-retirement calculations. Whether Plaintiffs are entitled to relief, however, depends on whether there was an "egregious failure" in compliance. [§ 204(h)(6)(A)]. We remand to the district court to resolve that issue (although it may also consider any defense not addressed in this opinion that Solvay may have to this claim).

(Doc. 148 at 31.)

95. This Court is not persuaded by Employees' argument that the Tenth Circuit's single choice of words indicating a possible § 102(a) violation overcomes the remainder of the Tenth Circuit's opinion mandating this Court only consider the single claim for the § 204(h) violation and whether relief is proper (whether the failure was egregious).

96. Even if the Tenth Circuit had remanded this case to this Court to consider more than the single issue of the § 204(h) violation, Employees would still not be entitled to equitable relief under § 502(a)(3) by simply proving a violation of § 102(a). *Ackerman v. Warnaco, Inc.*, 55 F.3d 117, 124–25 (3d Cir. 1995) ("[T]he plaintiff [must] demonstrate the presence of 'extraordinary circumstances.' Such circumstances include situations where the employer has acted in bad faith, or has actively concealed a change in the benefit plan, and the covered employees have been substantively harmed by virtue of the employer's actions.") (*quoted in Engers v. AT&T, Inc.*, 2011 WL 2507089, *4 (3d Cir. June 22, 2011)).

97. Employees presented no evidence at trial of such "extraordinary circumstances." The record shows that Solvay's failure to disclose the calculations for early-retirement benefits was not in bad faith, that Employees knew they were losing the benefits with the plan conversion, and they were not substantively harmed by Solvay's

failure to properly disclose. Therefore relief under § 502(a)(3) for a § 102(a) would not be proper in this case.

Dated this 10th day of ~~September~~ October, 2011.

Alan B. Johnson
United States District Judge