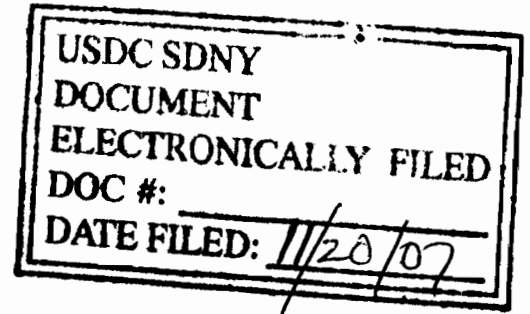


**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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**In re CITIGROUP PENSION PLAN** :  
**ERISA LITIGATION** :

**THIS DOCUMENT RELATES TO:** :  
**ALL ACTIONS** :

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**SHIRA A. SCHEINDLIN, U.S.D.J.:**



**OPINION AND ORDER**

MASTER FILE: 05 Civ. 5296  
(SAS)

**I. INTRODUCTION**

Michael Lonecke, Raymond Duffy, Anne Nelson, Robert S. Fash, and Craig A. Harris, on behalf of themselves and a class of similarly situated individuals (“plaintiffs”), filed consolidated actions against Citigroup Inc. and its Plans Administration Committee (“defendants”) alleging that the Citibuilder Cash Balance Plan (the “Plan”) violates the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), 29 U.S.C. § 1001 *et seq.* This ruling assumes familiarity with the Court’s previous ruling on the parties’ cross-motions for summary judgment.<sup>1</sup> By Opinion and Order, the Court granted summary judgment in plaintiffs’ favor on Counts I, III, V, and VII of their Consolidated

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<sup>1</sup> See *In re Citigroup Pension Plan ERISA Litig.*, 470 F. Supp. 2d 323 (S.D.N.Y. 2006) (“*Citigroup I*”).

Class Action Amended Complaint (“Complaint”), denied defendants’ motion for summary judgment, and directed defendants to reform the Plan to comply with ERISA. This Court also granted plaintiffs’ motion for class certification.<sup>2</sup> On April 4, 2007, this Court denied defendants leave for an interlocutory appeal and clarified certain aspects of its summary judgment ruling.<sup>3</sup> Now pending before the Court is plaintiffs’ application requiring defendants to undertake certain remedial remedies.

## II. BACKGROUND

Plaintiffs claim that the Plan fails to comply with ERISA’s minimum accrual requirements. Article 4.1(e) of the Plan provides that if a payout fails to comply with ERISA’s accrual requirements, an additional amount sufficient to satisfy ERISA’s “fractional test” would be paid.<sup>4</sup> Participants in the Plan were notified in December 1999 (the “December 1999 § 204 Notice”) that there would be changes in the Plan, but the mechanism underlying Article 4.1(e) was not explained. A subsequent notice was sent in December 2000 (the “December 2000

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<sup>2</sup> See *In re Citigroup Pension Plan ERISA Litig.*, 241 F.R.D. 172 (S.D.N.Y. 2006).

<sup>3</sup> *In re Citigroup Pension Plan ERISA Litig.*, No. 05 Civ. 5296, 2007 WL 1074912 (S.D.N.Y. Apr. 4, 2007) (“*Citigroup II*”).

<sup>4</sup> See Plan Article 4.1(e), Ex. 1 to Joint Stips.

§ 204 Notice,” and collectively, the “Notices”), but this notice also failed to explain Article 4.1(e).

Plaintiffs allege in Counts I and II, respectively, that the Plan is impermissibly backloaded due to insufficient interest credits and that even if this backloading is cured, the Plan will produce an illegal accrual phenomenon known as a “whipsaw.” In Count III, plaintiffs allege that the Plan’s “fractional test” method of computing accrued benefits is precluded under ERISA and, in the alternative, the test is being wrongfully applied. In Counts IV and V, plaintiffs allege that the Plan discriminates based on age. Count VI has been withdrawn. In Count VII, Plaintiffs allege that defendants failed to provide Plan participants proper notice that the 2000 and 2002 cash balance amendments (“CBAs”) would reduce the rate of future benefit accrual.

On August 25, 2006, the parties filed cross-motions for summary judgment on all counts. On December 11, 2006, this Court held that the Plan violated the requirements of section 204(b)(1) of ERISA and therefore granted plaintiffs’ motion with regard to Counts I and III. This Court also held that the Notices failed to satisfy ERISA’s notice requirements in that they did not describe the non-traditional method of complying with ERISA’s accrual requirements contained in Article 4.1(e), and therefore granted plaintiffs’ motion with regard to

Count VII. Finally, this Court held that the Plan was age discriminatory and therefore granted plaintiffs' motion with regard to Count V.

### **III. APPLICABLE LAW**

#### **A. Standard of Review**

Section 502(a)(3) of ERISA permits any participant, beneficiary, or fiduciary to bring a civil action “(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . . .”<sup>5</sup> This section “does not require district courts to grant particular relief; rather, it affords district courts the discretion to fashion appropriate equitable relief . . . .”<sup>6</sup>

#### **B. Violations of the 133 1/3% Rule (Counts I, III)**

As discussed in *Citigroup I*, the Plan is a cash balance plan, which is classified in this circuit as a defined benefit plan for ERISA purposes.<sup>7</sup> ERISA requires defined benefit plans to accrue benefits at a certain rate, and while it

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<sup>5</sup> 29 U.S.C. § 1132(a)(1)(3).

<sup>6</sup> *McDonald v. Pension Plan of NYSA-ILA Pension Trust Fund*, 320 F.3d 151, 161 (2d Cir. 2003).

<sup>7</sup> *See Citigroup I*, 470 F. Supp. 2d at 332.

provides three tests for determining whether benefit accrual is permissible, only one of those tests, the 133 1/3% Rule, is applicable to the Plan.<sup>8</sup> Under the 133 1/3% Rule, a plan generally must provide that in no year may the participant accrue benefits that exceed 133 1/3% of the benefits accrued in any previous year.<sup>9</sup>

### C. Whipsaws

ERISA requires that a participant's accrued benefits under a cash balance plan not fall below the actuarial equivalent of the participant's account.<sup>10</sup> Thus, a participant's accrued benefits are valued in terms of the annuity that those benefits would yield at retirement age. If a participant receives that benefit earlier or in another form, the received benefit must be at least as valuable as that annuity.<sup>11</sup> ERISA provides that the actuarial equivalent is determined by projecting the participant's account balance forward using the plan's stated "projection interest rate" and then discounting that number back to its present value using a statutory interest rate.<sup>12</sup>

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<sup>8</sup> See *id.* at 337; 29 U.S.C. § 1054(b)(1)(B).

<sup>9</sup> ERISA § 204(b)(1)(B); 29 U.S.C. § 1054(b)(1)(B).

<sup>10</sup> See *Citigroup I*, 470 F. Supp. 2d at 334-35.

<sup>11</sup> See *Esdén*, 229 F.3d at 163-64.

<sup>12</sup> See *id.* at 159. This provision ensures that where a plan offers an interest rate higher than the statutory rate, a participant who exits the plan before

Therefore, because the interest rate at which the account is projected forward is not necessarily the same as the rate used to discount the future sum back to its present value, the present value of an accrued benefit is not necessarily the same as the nominal dollar value of the benefit. If the projection interest rate exceeds the statutory interest rate, the actual value of an accrued benefit will exceed its nominal value. If such a plan awards participants the nominal value instead of the actual value, it violates ERISA.<sup>13</sup>

**D. Age Discrimination (Count V)**

ERISA requires that a defined benefit plan not reduce the “rate of an employee’s benefit accrual . . . because of the attainment of any age.”<sup>14</sup> In *Citigroup I*, this Court found that cash benefit plans violate this rule.<sup>15</sup> Under a

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retirement benefits from that higher rate.

<sup>13</sup> For example, assuming a 10% projection rate, a 8% statutory interest rate, and annual compounding, a \$1000 nominal benefit has a present value of \$1096.09 if the participant is sixty years old. This discrepancy arises because the \$1000 is projected forward at a 10% rate for five years, to \$1610.51, and then discounted at an 8% rate for five years, to \$1096.09. If the participant exits the plan and receives only the nominal benefit, the participant has been illegally deprived of \$96.09. This phenomenon is known as a “whipsaw.” Of course, if the projection rate were the same as the statutory interest rate, the present value would be \$1000.

<sup>14</sup> ERISA § 204(b)(1)(H)(I), 29 U.S.C. § 1054(b)(1)(H)(i).

<sup>15</sup> *Citigroup I*, 470 F. Supp. 2d at 340-45.

cash benefit plan, a participant's account is credited with a certain sum each year. The account also benefits from interest that accrues at a certain rate each year. Because a younger worker benefits from more time to earn interest than an older worker, an annual contribution is worth more to the younger worker than the equivalent contribution made to the older worker.

#### **E. Ineffective Notice (Count VII)**

A plan cannot be amended "in a way that reduces future benefit accruals without notice to plan participants."<sup>16</sup> The Second Circuit has explained that amendments to an ERISA plan become effective "at the moment when employees are properly informed" of the amendment.<sup>17</sup> In *Citigroup I*, this Court ruled that the Notices "never took legal effect" to the extent that they failed to disclose Article 4.1(e), which was an atypical and unanticipated method for addressing ERISA's minimum accrual rules.<sup>18</sup>

### **IV. DISCUSSION**

#### **A. Remedy for Minimum Accrual Violations**

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<sup>16</sup> *Frommert v. Conkright*, 433 F.3d 254, 263 (2d Cir. 2006). *See also* ERISA § 204(h), 29 U.S.C. § 1054(h).

<sup>17</sup> *Frommert*, 433 F.3d at 262-63.

<sup>18</sup> *Citigroup I*, 470 F. Supp. 2d at 340.

As discussed in *Citigroup I*, the Plan violates the 133 1/3% Rule.<sup>19</sup> Plaintiffs and defendants agree that the proper remedy for the Plan's violation of the 133 1/3% Rule is the increase of payment credits as necessary to bring the Plan in compliance with the rule.<sup>20</sup> This proposal best ensures that participants in the Plan receive the benefits to which they are entitled. As a result, this Court orders defendants to increase pay credits as required.<sup>21</sup> To avoid further violation of ERISA, the Plan must make additional payments as required to avoid whipsaws.

Article 4.1(e) of the Plan provides that if a participant exits the Plan and the accrual would otherwise violate ERISA's accrual restrictions, the participant is entitled to an additional amount sufficient to bring the payment into compliance with ERISA's fractional rule.<sup>22</sup> Plaintiffs argue that the Court should award additional amounts to those participants who would have received them under Article 4.1(e) had the Court not ordered reformation of the plan.<sup>23</sup> However, by its terms, Article 4.1(e) only operates when a participant would otherwise

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<sup>19</sup> *Id.* at 337-38.

<sup>20</sup> *See* Plaintiffs' Submission Regarding Remedies ("Pl. Sub."), at 2; Defendants' Memorandum Concerning Appropriate Equitable Remedies, at 13.

<sup>21</sup> *See* Table Regarding Increases in Benefit Accrual, Ex. B to Pl. Sub.

<sup>22</sup> *See* Plan Article 4.1(e), Ex. 1 to Joint Stipulations.

<sup>23</sup> *See* Pl. Sub. at 4.

receive a sum insufficient to satisfy ERISA's minimum accrual requirements.<sup>24</sup>

Because the Court now orders that the Plan be reformed such that it complies with those requirements, all participants will now receive payments that satisfy ERISA.

As a result, Article 4.1(e) is now irrelevant.<sup>25</sup> Any further award would be a punitive measure that would violate both the intention and the language of that Article.

### **B. Remedy for Notice Violations**

This Court held that the 2000 and 2002 CBAs "never took legal effect" to the extent that they included the atypical benefit accrual system described in Article 4.1(e).<sup>26</sup> Because participants did not receive fair notice of the unorthodox (and illegal) approach taken by that article and by the Plan, they had

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<sup>24</sup> Plan Article 4.1(e).

<sup>25</sup> In *Citigroup I*, I held that Article 4.1(e) never took effect because participants did not receive adequate notice of its addition to the plan. *Citigroup I*, 470 F. Supp. 2d at 339-40. However, ERISA provides that in the case of an "egregious failure" to provide adequate notice of an amendment, participants are entitled to receive the greater of what they would have received with and without the amendment. See ERISA § 204(h)(6), 29 U.S.C. § 1054(h)(6). This provision became effective on June 7, 2001, but plaintiffs argue that it was "implicit" before that date. See Pl. Sub. at 11 n.8. Because I find that plan participants are not entitled to any additional amounts under Article 4.1(e) even if it were effective, I need not determine whether plaintiffs' construction of the pre-June 7, 2001 statute is correct.

<sup>26</sup> *Citigroup I*, 470 F. Supp. 2d at 340.

no reason to expect that their benefits would not accrue in accordance with ERISA's requirements. Plan participants rightfully expected that their benefits would accrue in accordance with the 133 1/3% Rule, and the Notices did not inform them otherwise.

As discussed above, the Court now orders that the Plan retroactively reform the accrual system to comply with the 133 1/3% Rule. Therefore, because of the required reform, no further remedy is required.

### **C. Remedy for Age Discrimination Violations**

This Court found that cash benefit plans such as the Plan discriminate based on age in violation of ERISA.<sup>27</sup> Defendants argue that retroactive relief on this count is inappropriate because it would impose a severe burden on the Plan, it is unnecessary to ensure future compliance with ERISA, and its action appeared reasonable at the time.

I note that several courts have disagreed with this Court's holding that cash benefit plans discriminate based on age in violation of ERISA.<sup>28</sup> Indeed,

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<sup>27</sup> *Id.* at 343-44.

<sup>28</sup> *See Register v. PNC Fin. Servs. Group, Inc.*, 477 F.3d 56 (3d Cir. 2007); *Drutis v. Rand McNally & Co.*, No. 06 Civ. 6380, 2007 WL 2409762 (6th Cir. Aug. 27, 2007); *In re J.P. Morgan Chase Cash Balance Litig.*, No. 06 Civ. 732, 2006 WL 3063424 (S.D.N.Y. Oct. 30, 2006); *Richards v. FleetBoston*, 427 F. Supp. 2d 150 (D. Conn. 2006).

this issue is currently on appeal before the Second Circuit.<sup>29</sup> In light of this pending appeal, and in the interests of judicial economy, I reserve my rulings on the proper remedy (if any) for the Plan's violation of ERISA's ban on age discrimination.


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<sup>29</sup> See *Hirt v. Equitable Retirement Plan for Employees, Managers and Agents*, 441 F. Supp. 2d 516 (S.D.N.Y. 2006), *appeal docketed*, No. 06 Civ. 4757 (2d Cir. 2006).

## V. CONCLUSION

Defendants are hereby directed to reform the Plan in accordance with this Court's rulings. The parties shall confer to determine how best to notify class members of this ruling and the pending ruling regarding plaintiffs' age discrimination claim, the expense of which shall be borne by defendants.<sup>30</sup> The parties shall determine whether different notices are appropriate for current and former Plan participants. Communications from defendants to members of the plaintiff class that concern this lawsuit shall be submitted to this Court for approval, on notice to plaintiffs' counsel. This Court will direct further relief when and if appropriate. A conference is scheduled for Friday, December 7, 2007, at 4:30pm.

SO ORDERED:

  
Shira A. Scheindlin  
U.S.D.J.

Dated: New York, New York  
November 20, 2007

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<sup>30</sup> Plaintiffs' counsel has suggested that a paycheck insert might be an appropriate method of notification.

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