IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Civil Action No. 3:05-CV-00238-C

WILLIAM L. PENDER,

and

DAVID L. MCCORKLE

On behalf of themselves and on behalf of all others similarly situated

Plaintiffs,

v.

BANK OF AMERICA CORPORATION,

BANK OF AMERICA, N.A.,

THE BANK OF AMERICA CORPORATION CORPORATE BENEFITS COMMITTEE, AND THE CURRENT & FORMER MEMBERS OF SUCH COMMITTEE

PRICEWATERHOUSECOOPERS, LLP,

THE BANK OF AMERICA PENSION PLAN,

and

THE BANK OF AMERICA 401(K) PLAN,

Defendants.

THIRD AMENDED CLASS ACTION COMPLAINT

THIRD AMENDED CLASS ACTION COMPLAINT[1]

Plaintiffs, by and through their counsel, allege as follows:

NATURE OF THE ACTION

1. This is an action challenging the legality of the design and operation under ERISA[2] of two large retirement plans sponsored by Defendant Bank of America Corporation ("Bank of America" or the "Bank") for the Bank's employees. The plans at issue are The Bank of America Pension Plan (the "Pension Plan"), which is a "cash balance" defined benefit pension plan; and The Bank of America 401(k) Plan (the "401(k) Plan"), which is a defined contribution retirement savings plan (collectively, the "Plans").

2. The Pension Plan calculates benefits based on a "Normal Retirement Date" that is defined under the Plan as the 5th anniversary of each employee's date of hire, regardless of age. This results in illegal forfeitures of accrued pension benefits, systematic age discrimination, and excessively "backloaded" benefit accruals.

3. The 401(k) Plan, in a series of transactions implemented over several years, transferred approximately $3 billion from individual participant accounts to the Pension Plan, where the assets were not placed in individual accounts but were commingled with other Pension

[1] Consistent with Judge Howell's Order of September 2, 2005 (Doc. 144), this Third Amended Complaint ("Complaint") reflects Plaintiffs' voluntary dismissal, without prejudice, of certain claims previously asserted in the Second Amended Class Action Complaint. The Complaint voluntarily dismisses Counts Five through Ten of the Second Amended Complaint, and portions of Counts One, Two, Three, Four and Eleven (*e.g.*, to the extent those claims applied to the benefit formula under the BankAmerica Pension Plan and BankAmeraccount Plan). Count Three has been renumbered as Count Four and consolidated with portions of Count Eleven. Count Four has been renumbered as Count Three. The caption of the Complaint also serves notice that former plaintiffs Anita Pothier, Kathy L. Jimenez, Mariela Arias, Ronald R. Wright and James C. Faber, Jr. dismiss without prejudice any and all claims they raised in their individual capacity in the Second Amended Class Action Complaint. These former plaintiffs do not seek to represent any class that has been or may be proposed or certified in this action. However, they reserve all rights as putative or actual class members and as current or former participants of the employee benefit plans that are the subject of the Second and/or Third Amended Class Action Complaints.

[2] The Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, *et seq.*

Plan assets. As the IRS recently concluded after conducting an audit of the Plans, these transfers resulted in unlawful forfeitures of participants' accrued benefits. *See* Bank of America March 2005 SEC 10-K. The transfers also resulted in unlawful use of 401(k) Plan participants' retirement savings by the Pension Plan and the Bank.

4. Plaintiffs bring this action on behalf of themselves and, under Federal Rule of Civil Procedure 23, two proposed classes (the "Classes") of all persons who were and continue to be adversely affected by these violations (as defined more precisely below), and their beneficiaries and estates (collectively referred to herein as "participants"); and on behalf of the 401(k) Plan in connection with the unlawful asset transfers to the Pension Plan.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this action by virtue of 28 U.S.C. § 1331 because this is a civil action arising under the laws of the United States and pursuant to ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1), which provides for jurisdiction of actions brought under Title I of ERISA.

6. This Court has personal jurisdiction over the Defendants because they reside in, do business in, and/or have significant contacts with, this District. ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2).

7. Venue is proper here, under ERISA § 502(e), 29 U.S.C. § 1132(e), because, among other things, this is a District where the Defendants reside or may be found.

EXHAUSTION OF REMEDIES

8. Plaintiffs should be deemed excused from any otherwise applicable requirement to exhaust plan remedies for one or more of the following reasons. First, this suit raises questions of law or statutory interpretation as to which the exhaustion doctrine does not apply or

should not apply. Second, Plaintiffs raise no claim as to which it would be appropriate to defer to the Plan Administrator of either Plan. Third, the Plans do not provide any meaningful claims process as would be required by ERISA § 503, 29 U.S.C. § 1133, for challenges to the legality of Plan designs or the implementation of such designs of the type alleged in this suit. Fourth, Defendants' conduct to date in this suit demonstrates that it would be futile under the circumstances presented or that would necessarily be presented here for Plaintiffs to attempt to seek redress for their grievances through a plan claims process. Defendants have been presented with detailed explications of Plaintiffs' contentions and at no time have stated any willingness to reconsider their view that their Plan designs or implementation was or is unlawful. Fifth, any remedy provided under the terms of the Plans for the violations asserted would be inadequate.

THE PARTIES

9. Plaintiff William L. Pender, a current employee of the Bank of America, is a participant, as defined in ERISA § 3(7), 29 U.S.C. § 1002(7), in The Bank of America Pension Plan and The Bank of America 401(k) Plan.

10. Plaintiff David L. McCorkle, a former employee of NationsBank, was and is a participant, as defined in ERISA § 3(7), 29 U.S.C. § 1002(7), in The NationsBank Cash Balance Plan and The NationsBank 401(k) Plan. Mr. McCorkle remains a participant in the Plans to the extent he is owed additional benefits under the Plans.

11. Bank of America Corporation is a Delaware corporation and bank holding company with principal executive offices in Charlotte, North Carolina. It sells financial services and products through subsidiaries throughout the country, has three-quarters of a trillion dollars in assets, and employs some 133,500 full time employees.

12. On September 30, 1998, the former BankAmerica Corporation merged with and into NationsBank Corporation ("NationsBank"), and the resulting entity was eventually renamed Bank of America Corporation. Unless otherwise stated, reference to "Bank of America" or the "Bank" in this Complaint should be read as Bank of America, in its own right, and as successor to NationsBank.

13. Bank of America is the sponsor of the Plans within the meaning of ERISA § 3(16)(B), 29 U.S.C. § 1002(16)(B), either in its own right or as a successor-in-interest to prior Pension Plan and 401(k) Plan sponsors.

14. The Bank was the Plan Administrator and a "named fiduciary" of the NationsBank Cash Balance Plan within the meaning of ERISA § 402(a)(2), 29 U.S.C. § 1102(a)(2), and is the *de facto* administrator, named fiduciary, and fiduciary of the Bank of America Pension Plan,

15. Defendant Bank of America, N.A, an interstate bank headquartered in Charlotte, North Carolina and a wholly owned subsidiary of Bank of America Corporation, was and is the Trustee of the Pension Plans and the 401(k) Plan within the meaning of ERISA § 403, 29 U.S.C. § 1103, either in its own right or as a successor-in-interest to prior Pension Plan and 401(k) Plan trustees. Unless specifically provided or as clear from the context, references herein to the "Trustee" are intended to also refer to any or all of the trustees of predecessor plans.

16. The Bank is sued in all of the capacities just described, and as a co-fiduciary and a non-fiduciary that knowingly participated in the fiduciary breaches of others.

17. Defendant The Bank of America Corporate Benefits Committee (the "Benefits Committee"), in its own right and as a successor-in-interest of, for example, the NationsBank Corporation Corporate Benefits Committee, was and is the Administrator and a "named

fiduciary" of the Pension Plan and 401(k) Plan, as was and is each of its members, Defendants John and Jane Does ## 51-100. Each member of the Benefits Committee was and is a fiduciary of the Plans under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) like the Benefits Committee itself was and is. The Benefits Committee members included or include the following additional individually named Defendants: J. Steele Alphin; Amy Woods Brinkley; Edward J. Brown III; Charles J. Cooley; Richard M. DeMartini; Barbara J. Desoer; James H. Hance; Kenneth D. Lewis; Jr, Liam E. McGee; Eugene M. McQuade; Alvaro G. de Molina; Michael E. O'Neill; Owen G. Shell, Jr; R. Eugene Taylor; F. William Vandiver, Jr; and Bradford H. Warner.

18. PricewaterhouseCoopers, LLP and/or its predecessors, affiliates, subsidiaries, partners, and/or employees ("PwC"), at all relevant times was and is the accountant for and auditor of the Bank and the accountant, auditor and/or contract administrator for the Pension Plans and 401(k) Plan. PwC also serves and served at all relevant times as a consultant to the Bank with respect to its employee benefit plans, earning tens of millions of dollars in fees. For example, in 2001 alone, the Bank reported that it paid PwC $19 million in fees for "benefit plan administration." PwC had actual or constructive knowledge of the violations alleged in this Complaint.

19. Defendant The Bank of America Pension Plan is a cash balance "defined benefit plan" within the meaning of ERISA § 3(35), 29 U.S.C. § 1002(35). The Pension Plan is the successor to The NationsBank Cash Balance Plan, which was converted into a "cash balance" defined benefit plan as of July 1, 1998. Unless specifically provided or as clear from the context, references herein to the Pension Plan are intended to also refer to The NationsBank Cash Balance Plan.

20. Defendant The Bank of America 401(k) Plan is a "defined contribution plan" within the meaning of ERISA § 3(34), 29 U.S.C. § 1002(34). The 401(k) Plan is the direct or indirect successor to The NationsBank 401(k) Plan, the Barnett Bank 401(k) Plan, the NationsBanc Montgomery 401(k) Plan, the Oxford 401(k) Plan, and certain other 401(k) plans. Unless specifically provided or as clear from the context, references herein to the 401(k) Plan are intended to also refer to any or all of these predecessor 401(k) plans, and any other 401(k) plan from which assets were transferred to the Pension Plan in a transaction of the type that is the subject of Count Four.

ADDITIONAL ALLEGATIONS

21. Effective as of July 1, 1998, NationsBank amended its existing traditional defined benefit pension plan to convert the plan into The NationsBank Cash Balance Plan, a "cash balance" defined benefit plan. On December 31, 1998, following the merger of NationsBank into Bank of America, the BankAmerica Pension Plan merged into the NationsBank Cash Balance Plan. However, participants from the former BankAmerica Pension Plan were continued on the original BankAmerica Pension Plan formula before they were switched, on July 1, 2000, to the "NationsBank cash balance formula," which is the formula Plaintiffs challenge in this action. As of July 1, 2000, The NationsBank Cash Balance Pension Plan also was renamed The Bank of America Pension Plan. (For ease of reference, the Complaint generally refers to the benefit formula under The Bank of America Pension Plan, which is the existing cash balance plan. However, descriptions of and references to "The Bank of America Pension Plan" or the "Pension Plan" and the benefit formula under such Plan are intended to refer also to the NationsBank Cash Balance Plan and the cash balance formula under that plan originally adopted as of July 1, 1998.)

22. As a "cash balance" defined benefit plan, the Bank of America Pension Plan maintains a hypothetical account in each participant's name. These accounts are credited with Compensation Credits after the end of each pay period in an amount equal to 2-8 % of each participant's pay. For participants who have worked for the Bank for at least five years, the pay credits are weighted based on the sum of each employee's age and years of employment, based on the following chart, the first two rows of which are drawn from Section 5.2 of the Pension Plan:[3]

AGE + SERVICE	COMPENSATION CREDIT	EQUIV. AGE-65 ACCRUED BENEFIT[4]
less than 30	2 % of pay	7.87 % of pay
30 to 39	3 % of pay	5.07 % of pay
40 to 49	4 % of pay	2.65 % of pay
50 to 59	5 % of pay	1.29 % of pay
60 to 69	6 % of pay	0.61 % of pay
70 to 79	7 % of pay	0.59 % of pay
more than 79	8 % of pay	0.67 % of pay

[3] The crediting rates were slightly different under the NationsBank Cash Balance Plan, but the accrual pattern was similar.

[4] Accrued benefit equivalents in column three are calculated by Plaintiffs. Calculation assumes (1) a participant who is in his 6th year of service and an age that puts him at the upper end of the age + service range in each row (except age is assumed to be age 75 in the last row), (2) an annual return of 9.835% (.785% monthly), based on cumulative blended rate of return from 1926 to 2000 on a portfolio invested 70% in stocks and 30% in bonds, and (2) for purposes of calculating the relevant annuity factor, the GAR94 mortality table and 4.9% interest, as required under Exhibit A of the Pension Plan document. The assumed asset mix is based on (1) the average investment mix used by the Plan over the period 2002-2004, as reported in the Bank's most recent SEC 10-K filings, n.16, and (2) the mix recommended by Goldman Sach's Abbey Joseph Cohen in 2001(70% equities, 27% bonds, 3% commodities). Return data is derived from Ibbotson Associates: http://gbr.pepperdine.edu/023/assets.html

23. For participants who have not yet worked for five years, pay credits are based on the 5-year *average* of the credits each participant would have received each year under the chart based on his or her age and years of service.

24. Each participant account also is adjusted at the end of each business day by Investment Credits (or debits) that reflect the return on the investments in which each account is *hypothetically* invested.[5] The Pension Plan requires participants to direct the hypothetical investment of their account balance in a limited number of "Investment Measures" offered under the Plan, which generally mirrored the actual investments available under the 401(k) Plan.

25. On the surface, this "participant-directed" investment structure appears similar to the structure of many 401(k) plans. However, unlike under a 401(k) plan, the participant "investments" under the Pension Plan are only *hypothetical*: participants in the Pension Plan do not have the authority to instruct the Trustee of the Pension Plan how the Trustee must actually invest assets of the Plan, and in fact, the Trustee (or other Plan fiduciaries) are obligated to make their own independent judgment as to how to best invest Plan assets. The hypothetical investments are merely the method by which the amount of Investment Credits made to each participant's account is determined.

[5] The Pension Plan guarantees that the nominal amount of the participants' hypothetical opening account balance plus the value of certain pay credits and asset transfers is not subject to reduction. However, the Plan does not provide any guarantee that the value of the account balance will not erode as a result of inflation. Nor does the Plan guarantee that a participant's "accrued benefit" under the Plan, as defined under ERISA, will not be reduced.

Allegations Related to the Pension Plan's Unlawful Normal Retirement Date

26. ERISA and the Internal Revenue Code (the "Code") define **"**normal retirement age**"** identically as the earlier of –

(A) the time a plan participant attains normal retirement age under the plan, or

(B) the ***later of*** (i) the time a plan participant attains age 65, or (ii) the 5th anniversary of the time a plan participant commenced participation in the plan.

ERISA § 3(24), 29 U.S.C. § 1002(24); 26 U.S.C. ("Code") § 411(a)(8) (emphasis added).

27. The Pension Plan defines the "Normal Retirement Date" under the Plan as "the ***earlier of*** (i) the date the Participant attains age sixty-five (65) or (ii) the date the participant completes sixty (60) months of Vesting Service." Pension Plan § 2.1(c)(35) (emphasis added). Under this definition, all Plan participants are deemed to reach their "normal retirement date" after completing 5 years of service with the Bank, regardless of their age, with the relatively rare exception of the person who starts work for the Bank after age 60. No other large cash balance plan or pension plan of any type – other than the plan sponsored by the Bank's pension consultant, PwC, for its own employees – purports to define the normal retirement date or age in this manner.

28. The Bank adopted this definition for the sole purpose of trying to evade ERISA standards that apply to benefits accruals under a defined benefit pension plans. ERISA defines an employee's "accrued benefit" under a defined benefit plan as "the individual's accrued benefit determined under the plan and, except as provided in [ERISA] § 204(c)(3), *expressed in the form of an annual benefit commencing at <u>normal retirement age</u>*" (emphasis added). ERISA § 3(23), 29 U.S.C. § 1002(23); IRC § 411(a)(7) (emphasis added).

29. The Bank did not want to have to comply with the requirement that benefits under the Plan be expressed as an annuity at retirement age. The Bank's goal was for the Pension Plan to have the look and "feel" to participants of a defined contribution plan, similar to a 401(k) plan, while at the same time maintaining all of the favorable aspects to the Bank of sponsoring a defined benefit pension plan. The requirement that benefits under the Plan be expressed as a projected benefit commencing at normal retirement age, rather than as an account balance, was seen as an impediment to this goal.

30. By adopting a Normal Retirement Date that was the 5th anniversary of each employee's date of hire – which coincided with the first date participants would become vested under the Plan – the Bank believed it could avoid the projection requirement. The Bank believed the fictitious date would let it express the benefits accrued under the Pension Plan in terms of each employee's current "account balance" – because any participant who had earned a vested benefit under the Plan would, by definition, have reached his Normal Retirement Date. As a result, there would be need to express benefits as a *projected* benefit at the participant's Normal Retirement Date: the "projected" "retirement" benefit was the current benefit – the participant's account balance.

31. However, the Bank's effort to avoid application of ERISA standards in this manner is ineffective, because the "normal retirement age" under the Pension Plan, within the meaning of ERISA § 3(24), 29 U.S.C. § 1002(24), and Code § 411(a)(8), is not and cannot be defined as the 5th anniversary of each employee's date of hire. Bank employees do not normally "retire" after five years of employment with the Bank. In fact, the Plan has consistently reported on its annual IRS Form 5500 information return submitted to the Internal Revenue Service and

the Department of Labor that, for actuarial and financial accounting purposes, the assumed retirement age of employees who participate in the Plan is age 61.

32. The Bank cannot maintain that it defined the Normal Retirement Date under the Plan the way it did in an effort to encourage employees to retire after 5 years, or for some other valid human resources or business purpose. Neither the Plan nor the Bank informs participants that they have reached their "normal retirement age" when they complete 5 years of service. Similarly, participants do not receive a "suspension of benefits notice" informing them that by continuing to work past 5 years, the economic value of their "normal retirement benefit" may erode.

33. Furthermore, the Plan's summary plan descriptions ("SPDs") since the Plan's adoption in 1998 have not and do not describe the Plan's normal retirement age (or "date") as the 5th anniversary of each employee's date of hire. If anything, the SPDs imply that the normal retirement age under the Plan is age 65. If the Bank had a legitimate HR or other business purpose for defining Normal Retirement Age as it did, the Bank would have advertised the 5-year definition, not hid it. (The Bank also affirmatively misled the IRS at the time of the submission of its original determination letter request, stating and/or implying that the Plan was governed by a normal retirement age of 65.)

34. The Bank's actual motives are clear. After the Bank's 5-year retirement rule was exposed in the pension press as a fiction meant to allow the Plan to evade the law,[6] the Pension

[6] *See*, *e.g.*, "Cash Balance: Trouble for Bank Plans? IRS Scrutinizes Shortened Retirement Ages," *Pensions & Investments,* May 31, 1999 ("Officials from the Treasury Department and IRS have been scrutinizing plans like NationsBank's that have defined 'normal' retirement as occurring . . . after 5 years' tenure. . . . Such shortened retirement ages short-circuit various pension rules pegged to the more conventional retirement ages of 60 and 65," including the rule against anti-backloading; "A short retirement age 'guts' the Employee Retirement Income Security Act, said a cash balance plan expert who declined to be identified. 'Twenty-eight is not a normal retirement age.'"; "What's more, an inordinately short retirement age also renders ERISA's anti-backloading rules

Plan's designer, PwC, tried to defend the Plan's design. In September 1999, with the Bank's knowledge, consent and encouragement, PwC sent a letter to the U.S. Treasury Department and the IRS signed by PwC partner Ira Cohen, the principal designer of the NationsBank Cash Balance Plan. *See* Ex. 1, Letter from Ira Cohen, PricewaterhouseCoopers LLP, to IRS Commissioner Charles O. Rossotti and Deputy Assistant Secretary for Tax Policy Jonathan Talisman, dated Sept. 30, 1999, *reprinted in* Tax Notes Today, Nov. 18, 1999.

35. In the letter, PwC concedes that the 5-year normal retirement age was specifically designed to "foil[]" rules "created by the IRS." *Id.* at 6. PwC contends in the letter that while "the IRS was absolutely correct" that Treasury regulations require "all type of defined benefit plans" to comply with ERISA defined benefit standards, the IRS should not enforce the regulations as applied to *cash balance* type defined benefit plans because the regulations are "inconsistent with their basic design [and] rational pension policy." *Id.* at 4-5. The letter says that "until such time as the IRS" accepts this obvious truth and takes action to exempt cash balance plans from the regulations, the only "logical reaction" by cash balance sponsors is to resort to self-help via use of the low normal retirement age. *Id.* at 4-6.

36. As PwC explained it, "Sir Isaac Newton's third law of motion states that for every action there is an opposite and equal reaction." *Id.* at 5. The Bank's opposite and "equal" reaction to Treasury's unreasonable rulemaking was to define a normal retirement age "well

meaningless"); "Pension Downsizing, Continued," *Tax Notes*, May 24, 1999 ("now something has come along that even the slightly embarrassed Treasury may not be able to ignore. Pension advisers, emboldened by a decade of improvidently granted determination letters and reliance on a reassuring sentence in a preamble to an otherwise irrelevant regulation, have begun playing fast and loose with retirement ages in cash balance plans. . . . Retire in Five Years? . . . .[NationsBank's] new plan takes a hyper-technical approach to the question of what constitutes a normal retirement age . . . PricewaterhouseCoopers, which designed the NationsBank plan, put the same retirement age provision in its own plan"; "[t]he backloading rules of section 411(b), which cause complications for cash balance plans, are also believed to be avoided by the NationsBank definition of normal retirement age" because after normal retirement age the sponsor can "backload as much as it wants").

below the actual typical retirement age" to counter the effect of the government's rules, rendering them harmless. "It is only through the strength and wisdom of our hero in this saga (the low normal retirement age) that the pension policy dragon . . . created by the IRS has been foiled." *Id.* at 6.

Allegations Related to the Transfer of Assets from the 401(k) Plan to the Pension Plan

37. As described above, participant-directed "investments" under the Pension Plan are only hypothetical and serve merely as the method by which the amount of Investment Credits to participant accounts is determined. The Trustee of the Pension Plan (or other Plan fiduciaries) is obligated to make their own independent judgment as to how to best invest Plan assets. In fact, to the extent the actual investment return on Plan assets exceeds the return on the Investment Measures selected by participants, the Pension Plan benefits from the difference as an arbitrage gain. Arbitrage gains are used to offset contributions the Bank would otherwise be required to make to the Plan to fund benefit payments. The gains thereby reduce the Bank's pension costs, and in some cases resulted in pension income that was reflected in the Bank's financial statements.

38. To maximize their client's arbitrage opportunity in this regard, the Bank's pension consultant, accountant and outside auditor, PwC, advocated a radical strategy. PwC convinced the Bank that it could remove assets from individual accounts in the 401(k) Plan and deposit them into the Pension Plan Trust, where the assets would be commingled with other Pension Plan assets. This transaction would strip individual employees of the authority to direct the actual investment of their retirement savings and transfer that authority to the Pension Plan's

professional investment advisors.[7] The idea was that the Pension Plan's investment experts would be able to achieve a higher return on participants' retirement savings – which, according to PwC, the Pension Plan could retain as arbitrage profits (rather than passing any additional returns through to participants).[8] With the assurances provided by its outside (and purportedly independent) auditor, PwC, that the arbitrage profits could be reflected on the Bank's financial statements – assurances PwC provided even though it knew that the asset transfers were potentially subject to challenge by the IRS and participants as inconsistent with IRS regulations – the Bank agreed to proceed with this unprecedented strategy, which no other company has attempted before or since.

39. The transaction was completed on or about July 1, 1998, when the Bank and other Defendants, with PwC's assistance, caused the Trustee to transfer approximately $1.4 billion in 401(k) account assets from the NationsBank 401(k) Plan to the NationsBank Cash Balance Plan.

40. The Bank, again with PwC's assistance, would soon repeat the same moves using the 401(k) plans of four new acquisitions. On July 1, 1999, following the merger of Barnett Bank into NationsBank, the Bank and other Defendants caused the Trustee of the Barnett Employee Savings and Thrift Plan (the "Barnett 401(k) Plan"), other Barnett Bank 401(k) Plan

[7] Participants could still direct the hypothetical investment of their benefits, which the Bank assumed would largely remain in relatively low-yield money market or similar funds. In fact, following the transfer, the default investment fund in the Pension Plan for participants who did not make an affirmative "investment" election in the cash balance plan was the low-return stable value fund. This is further evidence that the Bank's and PwC's pension strategy was driven by the single-minded goal of gathering assets in the Pension Plan so that the Bank could enjoy increased pension arbitrage profits.

[8] As the Pension Plan's actuary, Tower Perrin, remarked in a contemporaneous memorandum that analyzed the asset transfer proposal: "From the employer's perspective, the motive for this arrangement is financial. If the assets of the cash balance plan can actually be invested in a manner that outperforms the crediting rates for cash balance accounts, this will produce gains for the cash balance plan. The extent of this *arbitrage opportunity* probably depends on employees' cash balance investment elections." The memorandum continues: "Given that a primary motive of an employer to engage in a transfer of this type is because of an expectation that the pension fund will out-earn the returns promised to participants, *does this constitute a breach of fiduciary duty*?" *See Pensions & Investments*, "Bank Plan Blurs Line Between DB, DC," September 21, 1998 (emphasis added).

fiduciaries and the Barnett Bank 401(k) Plan participants to remove or consent to the removal of participant accounts (in whole or in part), and caused them to transfer or consent to the transfer of $214 million into the NationsBank Cash Balance Plan on similar terms as the NationsBank 401(k) account removal-and-asset transfer that occurred one year earlier.

41. On August 4, 2000, following the July 1, 2000 merger of the BankAmerica 401(k) Investment Plan into the Bank of America 401(k) Plan, the Bank and other Defendants, with PwC's assistance, caused the 401(k) Plan and the 401(k) Plan participants to transfer $1.3 billion into the Bank of America Pension Plan on similar terms as the earlier 401(k)-to-cash balance plan transfers.

42. Much the same occurred in connection with the transfer of participants' assets from their accounts in the NationsBanc Montgomery Securities 401(k) Deferred Compensation Plan ("NationsBanc Montgomery 401(k) Plan") on or about July 1, 1999; from the Oxford Resources 401(k) Profit Sharing Plan ("Oxford 401(k) Plan") on or about January 1, 2001; and from other 401(k) plans on other dates.

43. In order to accomplish each of these transfers, the Bank, PwC and other Defendants misled the Trustee, other Plan fiduciaries and the participants themselves about the nature and character of the proposed transactions. Notwithstanding these Defendants' material misrepresentations and/or omissions, the Trustee and the other Defendants knew or should have known that the asset transfer and failure to maintain separate accounts would violate Title I of ERISA and the Internal Revenue Code, and were duty-bound to refuse, and should have refused, to participate or to allow the transfers (as structured) to occur. Among other failures, the Trustee and other Defendants fiduciaries failed to obtain their own independent counsel, or failed to

obtain competent independent counsel or advice, regarding the lawfulness of the 401(k) Plan asset transfers, instead relying on the Bank's advisors.

44. PwC was well compensated for its efforts on the Bank's behalf. For the years 1998 to 2002, PwC as "contract administrator" or auditor was paid $15.6 million from various iterations of the Pension Plan, and from the 401(k) Plan took over $20.6 million, for a total of more than $36.2 million. A significant portion of these fees is directly traceable to PwC's work in connection with the 401(k) asset transfers. PwC and/or its individual partners remain in possession of these fees and earnings on such fees.

45. Following each of the transfers, the assets that had been held in individual accounts for each participant in the 401(k) Plan were no longer held in individual accounts within the Pension Plan. Instead, the assets were commingled with other Pension Plan assets. Before the transfers, each account in the 401(k) Plan by law was required to be, and was, fully funded – *i.e.*, the assets in each participant's account was precisely equal to the participant's accrued benefit under the 401(k) Plan. Following the transfers, there was and is no requirement that the Pension Plan be fully funded – *i.e.*, Pension Plan assets may be less than the aggregate accrued benefit liabilities under the Pension Plan, so that if it were to terminate, benefits might not be fully funded. As a result, participants' benefits became less secure following the transfers.

46. Before the transfers, net income earned on the assets in each participant's account within the 401(k) Plan was used to increase the participant's benefit under the 401(k) Plan – *i.e.*, account income "belonged" to the account. Any extraordinary income or gains accrued to the benefit of participants. Following the transfers, investment income on those same assets was used by the Pension Plan to defray the Plan's expenses and reduce the Bank's funding obligation

– *i.e.*, investment income "belonged" to the Pension Plan. Any extraordinary income or gains accrued to the benefit of the Pension Plan and by extension the Bank.

47. For these and other reasons, the Internal Revenue Service informed the Bank on December 10, 2004, that the IRS had reached the tentative but formal conclusion that the 401(k) plan transfers described above resulted in illegal cutbacks in participants' accrued retirement benefits. *See* Bank of America March 2005 SEC 10-K filing. In reaching this conclusion, the IRS applied the same statutory provisions cited by Plaintiffs in their original Complaint dated June 30, 2004, as well as in this Third Amended Complaint.

COUNTS ONE THROUGH FOUR

COUNT ONE

UNLAWFUL LUMP SUM BENEFIT CALCULATION

48. Plaintiffs repeat and re-allege the allegations contained in the foregoing paragraphs of this Complaint as if fully set forth herein.

49. Plaintiffs bring this claim on behalf of themselves himself and members of the proposed Cash Balance Formula Class, as defined below.

50. ERISA § 203(a)(2), 29 U.S.C. § 1053(a)(2), and Code § 411(a)(2) provide that a participant who has satisfied a plan's vesting requirements has a nonforfeitable right to 100% of the employee's "accrued benefit" derived from employer contributions. The Pension Plan provides that a participant is fully vested upon the completion of five (5) years of service with the Bank or a related employer.

51. A participant's "accrued benefit" under a defined benefit plan is the benefit defined under the terms of the plan and, except as provided in ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3), expressed in the form of a life annuity beginning at "normal retirement age."

ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A). Thus, regardless of the manner in which a plan by its terms calculates or expresses the benefit payable thereunder, the "accrued benefit" for purposes of determining whether the plan complies with ERISA's benefit standards is the plan-defined benefit expressed in the form of an annual payment beginning at normal retirement age.

52. In the case of a cash balance plan, a participant's "accrued benefit" is calculated by projecting the participant's hypothetical account balance to normal retirement age using the plan's interest or investment crediting rate, then converting the projected account balance to a life annuity using reasonable actuarial factors expressed under the terms of the plan.

53. Under ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3) and Code § 411(c)(3), if a plan provides for benefits in a form other than an annual payment beginning at normal retirement age – for example, as an early retirement benefit or lump sum payment – the plan can only provide these alternative forms (or "optional forms of benefit") on the condition that the alternative form be no less valuable than (*i.e.*, the "actuarial equivalent of") the accrued benefit expressed in the normal form of a life annuity beginning at normal retirement age. ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3), and Code § 411(c)(3).

54. If the optional form of benefit is paid as a lump sum, ERISA § 205(g), 29 U.S.C. § 1055(g), and Code § 417(e), as implemented by Treasury Regulation § 1.417(e)-1(d), specify the precise actuarial assumptions that must be used to prove compliance with this requirement.

55. If the optional form of benefit is paid as a non-decreasing life annuity, ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3), Code § 411(c)(3), and the regulations thereunder give a plan more latitude, requiring only that the actuarial assumptions used to prove compliance with the equivalent value requirement be reasonable and be specified in the plan in a manner that precludes employer discretion. *See* Code § 401(a)(25). However, the actuarial assumptions the

Pension Plan uses for this purpose are the same factors used for purposes of proving compliance with ERISA § 204(c)(3) when benefits are paid in the form of a lump sum. Pension Plan § 2.1(c)(4)(B).

56. Plaintiff McCorkle was employed by the Bank and was fully vested participants in the Pension Plan by the time he terminated employment and received a single sum distribution from the Pension Plan under the NationsBank Cash Balance Plan formula.

57. As required by ERISA § 205(c), 29 U.S.C. § 1055(c), Code § 417, the regulations thereunder, and the terms of the Pension Plan, Mr. McCorkle was provided with an explanation of the alternative forms of benefit available to him under the Plan and their relative values. But Mr. McCorkle was given an explanation that presented him with inaccurate benefit calculations, depriving him of the opportunity to which he was entitled to make a fully informed election based on complete and accurate information provided by the Plan.

58. Mr. McCorkle elected from among the available forms to receive his benefit in the form of a single sum distribution. Mr. McCorkle received a lump sum payment based on his August 1, 1999 account balance. The payment was $ 68,702, an amount equal to the nominal balance in his cash balance account but less than his accrued benefit under the Plan.

59. The "normal retirement age" under the Pension Plan within the meaning of ERISA is in fact age 65, not the Plan's Normal Retirement Date.

60. In determining the amount of the alternative forms of benefit available to Plaintiff McCorkle, in violation of law, the Pension Plan did not (a) calculate Plaintiff's "accrued benefit" by projecting his hypothetical account balance to age 65 using the Plan's investment crediting rate and expressing this projected balance in the form of a life annuity, and then (b) determine the alternative distribution forms available to Plaintiff based on this accrued benefit, using the

legally required factors to determine actuarial equivalence. The Plan's failure to conduct these required calculations and pay benefits accordingly caused Plaintiff McCorkle to forfeit a significant portion of his vested, accrued benefits.[9] *See, e.g., Berger v. Xerox Corporation Retirement Income Guarantee Plan*, 338 F.3d 755 (7th Cir. 2003).

61. Defendants caused an additional forfeiture of Plaintiff McCorkle's vested, accrued benefits – whatever the effect of the Plan document's definition of "Normal Retirement Date" – by failing to calculate and pay Plaintiff benefits taking into account the value of his right to leave his account balance in the Plan even after attaining normal retirement age and continue to receive investment credits indefinitely. Under the terms of the Pension Plan, a participant with an account balance in excess of $5,000 is permitted to leave his or her benefits in the Plan even after normal retirement age, through at least age 70½. Under ERISA, this right to continue to receive investment credits is recognized as part of a participant's "accrued benefit" and the value of the right must be factored into any benefit distribution. This is the case even though the continued interest credits are purportedly conditioned on a participant leaving his benefits in the plan. *See, e.g.,* ERISA §§ 3(23)(A) and 203(a), 29 U.S.C. §§ 1002(23)(A) and 1053(a); Treas. Reg. § 1.411(a)-4T(a).

62. If Plaintiff McCorkle's benefit had been calculated in the manner required under the Plan, ERISA and the Code, Plaintiff would have received a far larger lump sum distribution than the amount paid to him. Additionally, Plaintiff would have been presented with an election

[9] Defendants have no argument that the Plan would have paid the same lump sum amount even if Plaintiff's normal retirement age is age 65 on the basis that the terms of the Plan call for the Plan to project a participant's current account balance to normal retirement age based on the "Guaranteed Rate." Plan § 2.1(c)(2)(B). It would have been unlawful to use the Guaranteed Rate to project Plaintiff's account balance to age 65. ERISA requires such projections to be based on the Plan's investment crediting rate, not another rate defined solely for purposes of making the required projection. *See, e.g.,* ERISA §§ 3(23)(A) and 203(a), 29 U.S.C. §§ 1002(23)(A) and 1053(a); Treas. Reg. § 1.411(a)-4T(a).

to take his benefit in the form of a life annuity that was far larger than the annuity in fact made available to him.[10]

63. Plaintiff Pender asserts similar claims with respect to his rights to an accurate calculation of his accrued benefits to date, and to an accurate calculation and payment of his accrued benefit under the Pension Plan.

64. As a result of the violations described in this Count, Plaintiffs and other members of the proposed Cash Balance Formula Class became (or will become) entitled to benefits under the terms of the Pension Plan that are less than the benefits they would have accrued had the Plan complied with ERISA and Code accrued benefit calculation standards.

COUNT TWO

AGE DISCRIMINATION

65. Plaintiffs repeat and re-allege the allegations contained in the foregoing paragraphs of this Complaint as if fully set forth herein.

66. Plaintiffs bring this claim on behalf of themselves and members of the proposed Cash Balance Formula Class, as defined below.

67. The benefit formula used or to be used to compute each participant's accrued benefit under the Pension Plan violates the benefit accrual rules set forth in ERISA § 204(b), 29 U.S.C. § 1054(b), and IRC § 411(b), and the regulations thereunder.

68. First, the benefit formula used to compute participants' accrued benefits under the Pension Plan violates the age discrimination rules contained in ERISA § 204(b)(1)(G), 29 U.S.C.

[10] Other participants received annuities or other forms of payment that were smaller than the benefit that should have been paid to them. These participants also were presented with the option to elect a single lump sum payment that was less than the lump sum that should have been made available.

§ 1054(b)(1)(G), and Code § 411(b)(1)(G), because participants' accrued benefits are unlawfully reduced on account of increases in their age.

69. This result follows inescapably when the benefit under the Pension Plan is expressed in terms of a life annuity commencing at normal retirement age, which is the basis on which ERISA and the Code require a defined benefit plan participant's "accrued benefit" to be tested for compliance with ERISA and Code accrued benefit standards.[11] ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A), and Code § 411(a)(7)(A)(i).

70. Because of the nature of the projection calculation, in any period during which a participant's account balance remains unchanged from one year to the next (because his account experiences a zero net rate of return), the participant's projected age-65 accrued benefit necessarily is reduced during the period – this is mathematically irrefutable.[12] The same is true of any period during which a participant's account balance *drops* because of hypothetical investment losses, as well as over any period during which his account balance increases by an

[11] To illustrate numerically, assume a participant with a current account balance of $100 is 30 years old, the investment crediting rate assumption for the plan is 5%, and normal retirement age is age 65. On these facts, the participant's projected account balance at normal retirement age would be $\$100 \times (1.05)^{35}$ = **$551.60**. The participant's "accrued benefit" is this projected balance, converted into a life annuity that begins at age 65. If an annuity factor of 10 is assumed, the annual payment would be $55.16/yr for life (*i.e.*, $551.60 ÷10 = $55.61), plus the present value of the continued right under the Plan to continue to receive investment credits. *See, e.g.,* IRS Notice 96-8.

[12] To continue the example above, if the participant's account balance remains unchanged after a year (*e.g.*, he no longer is an active employee with Bank and experiences a net zero rate of return on his deemed investments for the year), his projected account balance at age 65 would now be $\$100 \times (1.05)^{34}$ = **$525.33**. This is because the participant is now age 31, so the exponent in the projection formula (which reflects the number of years from the participant's current age to age 65) is reduced from 35 to 34.

amount too small to offset the reduction in the projected age-65 benefit that occurs because the participant moves one year closer to age 65.[13]

71. Second, the benefit formula used to compute participants' accrued benefits under the Pension Plan violated and violates the age discrimination rules contained in ERISA § 204(b)(1)(H) 29 U.S.C. § 1054(b)(1)(H), and Code § 411(b)(1)(H), because Pension Plan benefits accrue at a rate that is reduced because of age or the attainment of any age.

72. Again, this result follows inescapably when the benefit under the Pension Plan is expressed in terms of a life annuity commencing at normal retirement age, which is the basis on which ERISA and the Code require a defined benefit plan participant's "rate of benefit accrual" to be tested for compliance with ERISA and Code accrued benefit standards. ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A), and Code § 411(a)(7)(A)(i).

73. The *rate* at which an employee's benefit accrues under the Pension Plan – the "rate of the employee's benefit accrual" – is the rate at which his projected benefit accrues over time. The problem for the Pension Plan is that this rate decreases as employees grow older, in direct contradiction of ERISA § 204(b)(1)(H). This is because "stapled" to each pay credit provided to a participant in the Plan is a promise by the Plan that that pay credit will be supplemented (or reduced) by "investment credits" for as long as the pay credit remains in the Plan. When these pay credits and the associated promises of future investment credits are *expressed together in terms of an annuity payable at normal retirement age* (as required under ERISA) – here, age 65 – a troublesome accrual pattern becomes evident: the rate of benefit

[13] If the participant's account balance drops to \$95, his projected account balance at age 65 would, at age 31, be \$95 x $(1.05)^{34}$ = **\$499.07**. If the account balance increases to \$103, the participant's projected account balance at age 65 would now be \$103 x $(1.05)^{34}$ = **\$541.09**, still less than his accrued benefit was at age 30.

accrual varies inversely with age.[14] The variation results solely because of increased age – age and age alone is the factor that explains the reduction.

74. The Pension Plan violated the ERISA age discrimination standards regardless of the actual "normal retirement age" under the Plan, for the same reason that the Plan failed to properly calculate Plaintiff McCorkle's benefit regardless of the Plan's normal retirement age. *See* Count One, ¶ 61.

75. As a result of the violations described in this Count, Plaintiffs and other members of the proposed Cash Balance Formula Class became (or will become) entitled to benefits under the terms of the Pension Plan that are less than the benefits they would have accrued had the Plan complied with ERISA and Code age discrimination standards.

COUNT THREE

VIOLATION OF ANTI-BACKLOADING RULES

76. All Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs of this Complaint as if fully set forth herein.

77. Plaintiffs bring this claim on behalf of themselves and members of the proposed Cash Balance Formula Class, as defined below.

78. ERISA requires that benefits that accrue under a pension plan become partially vested after no more than 5 years, and fully vested after no more than 7 years. ERISA § 203(a),

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[14] Assume the participant in the example above was hired at age 29 and received his first pay credit of $100 when he was age 30. As discussed in the example above, his "accrued benefit" at age 30 is $\$100 \times (1.05)^{35} = \$551.60$. This represents an increase of $551.60 over his account balance in the previous year, which was zero. Thus, the participant's *rate of benefit accrual* for the year was **$551.60/yr.** Assume a different participant who was hired at age 49 and who also received a $100 pay credit, but at age 50 instead of at age 30. His accrued benefit at age 50 is $\$100 \times (1.05)^{15} = \$207.89$. This represents an increase of $207.89 over his account balance in the previous year, which was zero. Thus, this second participant's *rate of benefit accrual* for the year was **$207.89/yr.** This rate is obviously lower than the rate of accrual enjoyed by the 30-year-old participant, and age is the *only* factor that explains the vastly different accrual rates for the two participants.

29 U.S.C. § 1053(a) and IRC § 411(a). Congress wrote this into the law to ensure that employees with many years of employment would not lose anticipated retirement benefits merely because they did not work until full retirement age.

79. ERISA's vesting rules generally addressed this problem. But Congress realized there was a potential loophole. As PwC explained in its 1999 letter to the IRS:

> Under the minimum vesting standards, a person's vested benefit is the product of (1) the benefit earned under the plan (the "accrued benefit") and (2) the vesting percentage. If an employer did not want to provide early vesting, the employer could provide negligible accruals until the point that employer desires to provide vesting; after all vesting 100% vesting [sic] in an accrued benefit of zero is not different from not vesting at all. The fundamental problem was accruing large amounts in later years relative to small amounts in earlier years ("Backloading"). Therefore, Congress provided a floor of protection by enacting the Anti-Backloading Rules. . . . These rules are designed to prevent plans from providing for the accrual of most of a participant's benefits later in his or her career, thereby circumventing the minimum, vesting rules.[15]

80. The ERISA anti-backloading rules, codified at ERISA § 204(b)(1)(A)-(C), 29 U.S.C. § 1054(b)(1)(A)-(C), and IRC § 411(b)(1)(A)-(C), apply to benefits that accrue under a defined benefit plan through normal retirement age. The rules require that benefits accrue roughly pro rata over the course of an employee's career, rather than being heavily back weighted. As alleged above, the normal retirement age under the Pension Plan is age 65, notwithstanding the provision of the Plan that provides a different "Normal Retirement Date."

81. The pattern of benefit accruals under the Pension Plan does not satisfy any of the three anti-backloading standards. *See* Hubert V. Forcier, Guide to Cash Balance Plans, 11-2, 11-3 (Aspen 2003 & 2004 Supp.) (showing with graphs and data that if the anti-backloading rules

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[15] PwC 1999 IRS letter, Ex 1. "As an example, a requirement that benefits be vested after 5 years of service (one of the Code's standards) would be meaningless if a participant might accrue a benefit of only $1 per year for 19 years, and a benefit of $30,000 in the 20th year." Prepared Testimony of Chief Counsel for the Internal Revenue Service Stuart L. Brown Before the United States Senate Committee on Health, Education, Labor and Pensions, Hearing on Hybrid Pension Plans, September 21, 1999.

"applied to [the Bank of America Pension Plan] formula on the assumption that normal retirement age was age 65, the rule would be failed").

82. As a result of the violations described in this Count, Plaintiffs and other members of the proposed Cash Balance Formula Class became (or will become) entitled to benefits under the terms of the Plan that are less than the benefits they would have accrued had the Plan complied with ERISA and Code benefit accrual standards.

COUNT FOUR

ELIMINATION OF PROTECTED BENEFIT

83. Plaintiffs repeat and re-allege the allegations contained in the foregoing paragraphs of this Complaint as if fully set forth herein.

84. Plaintiffs bring this claim on behalf of themselves, members of the proposed Cutback Class, as defined below, and derivatively on behalf of the 401(k) Plan from which assets were transferred as described herein.

85. ERISA § 204(g)(1), 29 U.S.C. § 1054(g)(1), and IRC § 411(d)(6)(A) provide that the accrued benefit of a participant in a plan may not be decreased by an amendment of the plan except as otherwise specifically provided in ERISA or regulations.

86. Treasury Regulation § 1.411(d)-4, Q&A-3(a)(2), which implements ERISA § 204(g)(1), 29 U.S.C. § 1054(g)(1), and IRC § 411(d)(6)(1), provides that the separate account feature of an employee's benefit under a defined contribution plan such as the above-referenced 401(k) plans is a protected benefit that may not be eliminated except as provided under Code § 411(d)(6). IRC § 411(d)(6) or the regulations do not provide an exception that allows the separate account feature to be eliminated and no other exception to ERISA § 204(g), 29 U.S.C. § 1054(g) is applicable here.

87. Pursuant to plan amendment(s) and the implementation of the amendment(s), the Bank and/or Bank fiduciaries eliminated or decreased the separate account of every 401(k) Plan participant whose individual account assets were removed in whole or in part from one or more of the above-referenced 401(k) plans and deposited into the Pension Plan's commingled trust fund. Either when participants' accounts were removed in whole or in part and/or when their account assets were deposited in the Pension Plan trust and commingled with other Pension Plan general account assets, the separate account feature was eliminated or decreased, in violation of ERISA § 204(g)(1), 29 U.S.C. § 1054(g)(1), IRC § 411(d)(6)(1), and Treas. Reg. § 1.411(d)-4, Q&A-3(a)(2).

88. The Plans' fiduciaries also breached their fiduciary duties, and engaged in prohibited transactions, in connection with the transactions described in this Count in violation of ERISA §§ 404(a)(1)(A), (a)(1)(B) and (a)(1)(D), 29 U.S.C. §§ 1104(a)(1)(A), (a)(1)(B) and (a)(1)(D); ERISA §§ 405(a)(1)-(3), 29 U.S.C. § 1105(a)(1)-(3); ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D); and ERISA §§ 406(b)(1)-(3), 29 U.S.C. §§ 1106(b)(1)-(3). Although the asset transfers were implemented by means of one or more Plan amendments, the Plans' fiduciaries had a duty to ignore the terms of the amendments to the extent the amendments were inconsistent with ERISA. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). The Plans' fiduciaries also had a duty to communicate with the Trustee and other Defendant fiduciaries honestly, and to otherwise act with the best interests of participants in mind, which they failed to do.

89. PwC and the Company (to the extent it was not at some relevant point in time acting in a fiduciary capacity) knowingly participated in all the violations described above. Accordingly, pursuant to § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), both of these

Defendants are liable to, among other things, disgorge any benefit they enjoyed which resulted from such violations.

90. As a result of the violations described in this Count, Plaintiffs and other members of the proposed Cutback Class became (or will become) entitled to benefits under the terms of the Plans that are less than the benefits they would have accrued had the Plans complied with ERISA and Internal Revenue Code standards. Defendants, including but not limited to the Bank, the Pension Plan, and PwC, also were unjustly enriched.

CLASS ACTION ALLEGATIONS

91. Plaintiffs bring suit on behalf of themselves and on behalf of all other participants and beneficiaries of the Plans under the provisions of Rule 23 of the Federal Rules of Civil Procedure with respect to violations alleged herein.

92. There are two proposed overlapping Classes, defined as follows:

> Cash Balance Formula Class: All persons who accrued benefits under The NationsBank Cash Balance Plan cash balance formula, all persons who accrued and/or are currently accruing benefits under The Bank of America Pension Plan, and the beneficiaries and estates of any of such persons.
>
> Cutback Class: All persons who had one or more accounts under of the 401(k) plans from which assets were withdrawn and transferred to The NationsBank Cash Balance Plan or The Bank of America Pension Plan in one or more of the transactions that occurred on or about July 1, 1998 (involving the NationsBank 401(k) Plan), July 1, 1999 (involving the Barnett Bank 401(k) Plan and NationsBanc Montgomery 401(k) Plan), August 4, 2000 (involving the Bank of America 401(k) Plan), January 1, 2001 (involving the Oxford 401(k) Plan), or any other date on which similar transactions occurred; and the beneficiaries and estates of any of such persons.

93. The requirements for maintaining this action as a class action under Fed. R. Civ. P. 23(a) are satisfied in that there are too many Class members for joinder of all of them to be practicable. There are tens of thousands of members of the proposed Class dispersed among many states. (References to the “Class” herein refer to each of the overlapping Classes defined

above, separately and combined. Each of the Classes separately satisfies the requirements of Fed. R. Civ. P. 23(a) and/or Fed. R. Civ. P. 23(b).)

94. The claims of the Class members raise numerous common questions of fact and law, thereby satisfying the requirements of Fed. R. Civ. P. 23(a)(2). Every or most issues concerning liability are common to all Class members because all such issues concern their entitlement to benefits calculated in a manner other than that calculated thus far and their or their Plans' entitlement to relief from harm caused by fiduciary breaches and related alleged misconduct, rather than any action taken by the Plaintiffs or any Class member. Virtually every issue concerning relief is common to the Class for the same reason. The Complaint raises several common questions including the legality of the cash balance formulas used by the Pension Plans and the permissibility of Defendants' removal of Plaintiffs' accounts from the 401(k) Plan and transfer of 401(k) Plan assets into the NationsBank Cash Balance Plan or Bank of America Pension Plan.

95. Plaintiffs' claims are typical of the claims of the Class members, and therefore satisfy the requirements of Fed. R. Civ. P. 23(a)(3). They do not assert any claims relating to the Plan in addition to or different than those of the Class.

96. Plaintiffs are adequate representatives of the Class, and therefore satisfy the requirements of Fed. R. Civ. P. 23(a)(4). The interests of Plaintiffs are identical to those of the Class. Defendants have no unique defenses against them that would interfere with their representation of the Class. Plaintiffs have engaged counsel with considerable ERISA class action litigation experience.

97. Additionally, all of the requirements of Fed. R. Civ. P. 23(b)(1) are satisfied in that the prosecution of separate actions by individual members of the Class would create a risk of

inconsistent or varying adjudications establishing incompatible standards of conduct for Defendants and individual adjudications present a risk of adjudications which, as a practical matter, would be dispositive of the interests of other members who are not parties.

98. Alternatively, all of the requirements of Fed. R. Civ. P. 23(b)(2) also are satisfied in that Defendants' actions affected all Class members in the same manner making appropriate final declaratory and injunctive relief with respect to the Class as a whole. If necessary, Class certification also would be appropriate under Fed. R. Civ. P. 23(b)(3) in that a class action is superior to other available methods for the fair and efficient adjudication of this controversy, since joinder of all members is impracticable. The expense and burden of individual litigation makes it impractical for the members of the Class to pursue individual litigation to vindicate their rights. Plaintiffs are not aware of any problems that would militate against the maintenance of this action as a class action.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that judgment be entered against Defendants and that the Court award the following relief:

A. A certification that this action is a class action pursuant to Fed. R. Civ. P. 23;

B. Judgment for Plaintiffs, the 401(k) Plan and the Class against Defendants on all claims expressly asserted and/or within the ambit of this Complaint;

C. An order awarding, declaring or otherwise providing Plaintiff, the 401(k) Plan and the Class all other such relief to which Plaintiff, the 401(k) Plan and the Class are or may be entitled whether or not specified herein.[16]

[16] Plaintiffs and putative class counsel reserve the right to withdraw or reduce the scope of the specific requests for relief sought herein or otherwise limit the scope of the Complaint's overall request for relief.

The relief Plaintiffs seek includes but is not limited to:

D. An order declaring that:

(1) Defendants violated and are violating ERISA's accrued benefit standards in the specific manners alleged in Counts One through Four;

(2) Defendants have breached their fiduciary and co-fiduciary duties in connection with the transfers of 401(k) Plan assets to the Pension Plan, as alleged in Count Four and otherwise; and

(3) PwC and the Bank, to the extent not acting in their fiduciary capacities, knowingly participated in all the violations alleged herein.

E. An order enjoining Defendants from continuing to violate the law and the terms of the Plans in the manner alleged or referenced in this Complaint, reforming the Plans, and compelling Defendants to bring the terms and administration of the Plans into compliance with ERISA or the lawful provisions of the Plans *nunc pro tunc*;

F. An order requiring Defendants to re-calculate the benefit amounts due under the terms of the Plans in accordance with the requirements of ERISA, and for the Plans to pay the difference, plus interest, to or on behalf of all Class members who received less in benefits or benefit accruals than the amount to which they are entitled;

G. An order compelling the non-Plan Defendants to make the Plans whole for all losses or lost investment return or opportunity resulting from the violations alleged herein, and disgorgement of any benefit they received as a result of such violations, restitution, and such other equitable or remedial or other relief as the Court may deem appropriate, whether under ERISA § 409(a), 29 U.S.C. § 1109(a), ERISA § 502(a), 29 U.S.C. § 1132(a), or otherwise.

H. An order awarding pre- and post-judgment interest.

I. An order awarding attorney's fees on the basis of the common fund doctrine (and/or other applicable law, at Plaintiffs' election), along with the reimbursement of the expenses incurred in connection with this action.

J. An order awarding, declaring or otherwise providing Plaintiffs all relief under ERISA § 502(a), 29 U.S.C. § 1132(a), or any other applicable law, that Plaintiffs may subsequently specify and/or that the Court may deem appropriate.

By:

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