

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GARY BUUS, SIDNEY JOHN FLOR,)
KELLIE PLUMB, THOMAS)
SCHOENLEBER, AUDREY SCHULMAN,)
and MARGARET WEBER individually and on)
behalf of all others similarly situated,)
Plaintiffs,)

No. C07-0903MJP

**AMENDED CLASS ACTION
COMPLAINT FOR VIOLATIONS OF
THE EMPLOYEE RETIREMENT
INCOME SECURITY ACT**

v.)

WAMU PENSION PLAN and THE)
WASHINGTON MUTUAL PENSION PLAN)
ADMINISTRATION COMMITTEE,)
Defendants.)

I. INTRODUCTION

1. Plaintiffs, Gary Buus, Sidney John Flor, Kellie Plumb, Thomas Schoenleber, Audrey Schulman, and Margaret Weber, participants in the WaMu Pension Plan (the “Plan”), bring this action on their behalf and on behalf of all similarly situated participants, their beneficiaries and estates, pursuant to the Employee Retirement Income Security Act of 1974, as Amended (“ERISA”), 29 U.S.C. §§ 1001, *et seq.*

2. Plaintiffs challenge the Plan’s cash balance formula for calculating pension benefits as discriminatory based on age, because it causes a reduced rate of benefit accrual that is

1 correlated with age, and challenge the Plan's failure to comply with ERISA's notice and
2 disclosure provisions.

3 3. Cash balance plans are a type of defined benefit pension plan, and a relatively
4 new corporate phenomenon. The conversion of traditional, or "final average pay," pension plans
5 to cash balance plans is a means for corporations to reduce their future pension obligations to
6 employees, especially older ones. *See, e.g., Depenbrock v. Cigna Corp.*, 389 F.3d 78, 79 (3d Cir.
7 2004) ("[t]his case is a by-product of corporate America's recent effort to curb costs by . . .
8 scaling back the benefits provided under pension plans"); Edward A. Zelinsky, *The Cash*
9 *Balance Controversy*, 19 Va. Tax Rev. 683, 713-14 (2000) (corporations adopt cash balance
10 plans to shore up their corporate bottom lines in a manner that shields the impacts from the older
11 workers who shoulder the burden of the corporate savings).

12
13 4. Though the actuarial component of cash balance plans is complex and far beyond
14 the comprehension of most lay people (which is one of the problems with the plans), the
15 pervasive impacts of the plans are straightforward. Defendants saved money when they
16 converted to a cash balance plan from a final average pay plan, and older workers participating
17 in the plan shouldered the difference. All workers who are subject to cash balance pension plans
18 suffer from reduced rates of benefit accrual as they age. As a result, cash balance plan
19 participants are retiring with dramatically reduced pension benefits based solely on their age.
20
21

22 5. While the proponents of cash balance plans have touted the plans as being
23 beneficial for American employees and retirees, in truth, cash balance plans are nothing more
24 than a scheme for companies to save money by slashing pension obligations to older workers in a
25 way that hides the impacts. *See, e.g., Ellen E. Schultz & Elizabeth McDonald, Retirement*
26 *Wrinkle: Employers Win Big with a Pension Shift*, Wall St. J., Dec. 4, 1998, at A1 (reporting an

1 actuary's admission that "[o]ne feature [of a cash balance plan conversion] which might come in
2 handy is that it is difficult for employees to compare prior pension benefit formulas to the
3 account balance approach"); Ellen E. Schultz, *Actuaries Become Red-Faced Over Recorded*
4 *Pension Talk*, Wall St. J., May 5, 1999 at C1 (quoting actuaries at convention laughing over the
5 following exchange: "It is not until they are ready to retire that they understand how little they
6 are actually getting." "Right, but they're happy while they're employed.").

7
8 6. The cash balance conversion scheme is particularly attractive to corporations like
9 Washington Mutual because, as is well known, under traditional – and *legal* – defined benefit
10 plans, workers with more years of service are more expensive to provide for in retirement. Prior
11 to the advent of the cash balance plan scheme, this pension obligation was considered the *quid*
12 *pro quo* corporations properly gave for an employee's long-term commitment and loyalty.
13 Under a cash balance plan, however, the corporation enjoys pension savings while
14 simultaneously masking workers' reduced benefits and rates of accrual through misleadingly
15 optimistic corporate literature that fails to provide meaningful examples of the negative impacts.

16
17 7. The primary difference between a traditional, "final average pay," pension benefit
18 and a cash balance plan benefit are the factors that affect the accrual of the benefit provided at
19 normal retirement age. Whereas only two factors – the years of service and the amount of pay –
20 generally affect a traditional pension benefit, cash balance plans introduce another benefit
21 component, characterized by Defendants here as the "Assumed Interest Credit" or "Additional
22 Credit," that calculates a portion of the benefit based on the number of years remaining before
23 retirement. The use of this age-dependent component impermissibly causes cash balance plans
24 to reduce the rate of benefit accrual based on an employee's advancing age.
25
26

1 8. While cash balance plan advocates may also claim that these plans offer an
2 “advantage” because benefits may appear to accrue more evenly over an employee’s life-cycle,
3 in fact, it is factually indisputable that benefit accruals under a cash balance plan are highest at
4 the youngest age (because of the greater of number of years until retirement), and smallest at the
5 oldest age (because of the proximity to retirement age). *See Zelinsky, supra*, at 733 (“There is
6 no dispute about the underlying arithmetic of cash balance arrangements: each year, as a cash
7 balance participant ages, the same contribution made for her in the previous year declines in
8 value in annuity terms.”). In short, a cash balance plan formula favors workers early in their
9 career, while a traditional final-pay formula favors workers later in their career.
10

11 9. However, for pension plans under ERISA, it is unlawful to reduce rates of
12 pension benefit accrual as workers age. The only undisputed “advantage” of cash balance
13 formulas is to the plan sponsor’s bottom line, because the conversion results in significant
14 savings for the plan sponsor – a savings, however, borne on the backs of older workers.
15

16 10. Plaintiffs also challenge Defendants’ violations of ERISA’s notice and disclosure
17 requirements. In particular, Defendants failed to issue proper advance notice to the participants
18 that their rates of future benefit accrual were going to be reduced, and failed to comply with
19 ERISA’s other substantive notice requirements about Plan changes through the issuance of
20 timely and adequate Summary Plan Descriptions (“SPDs”) and Summaries of Material
21 Modifications (“SMMs”).
22

23 11. Plaintiffs ask the Court: 1) to declare that the cash balance formula used by the
24 WaMu Pension Plan and its merged predecessor plans, as defined herein (collectively, the
25 “Plan”), violate ERISA’s minimum accrual standards; 2) to enjoin Defendants from enforcing
26 those unlawful formulas; 3) to order Defendants to reform the terms of the Plan to bring them

1 into compliance with ERISA's requirements; 4) to recalculate the accrued benefits of all
 2 participants under the terms of the reformed Plan; and 5) to pay pensioners, their beneficiaries
 3 and Estates the difference between the benefits paid to them heretofore, and the benefits due
 4 under the terms of the reformed Plan.

5
 6 12. Plaintiffs further ask the Court to 1) declare that the WaMu Pension Plan was
 7 never properly amended upon conversion to a cash balance plan because the Plan failed to meet
 8 the disclosure requirements of such plan amendments as mandated by ERISA; and 2) order the
 9 Plan to issue benefits to participants utilizing an appropriate pre-amendment calculation to
 10 determine their benefits.

11 **II. JURISDICTION AND VENUE**

12 13. Jurisdiction over this action is based on ERISA Section 502(e)(1), 29 U.S.C.
 13 § 1132(e)(1), and 28 U.S.C. § 1331, because this action arises under the laws of the United
 14 States, namely ERISA.

15
 16 14. Venue in this District is proper pursuant to ERISA § 502(e)(2), 29 U.S.C.
 17 § 1132(e)(2), because the Plan is administered and Defendants can be found in this District.

18 15. Declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202,
 19 respectively, by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by ERISA
 20 Sections 502(a)(1)(B) and 502(a)(3), 29 U.S.C. §§1132(a)(1)(B) and (a)(3).

21 **III. PARTIES**

22
 23 16. Plaintiff Gary Buus is a "participant" of the Plan within the meaning of ERISA
 24 Section 3(7), 29 U.S.C. § 1002(7) and is subject to the Plan's cash balance formula. He resides
 25 in Seal Beach, California. Plaintiff Buus began working for Great Western Bank, a wholly-
 26 owned subsidiary of Great Western Financial Corporation, in 1991, and was still employed by

1 Great Western at the time of its 1997 merger with Washington Mutual, Inc. Mr. Buus continued
2 to work for Washington Mutual, Inc. until 2001.

3 17. Plaintiff Sidney John Flor is a “participant” of the Plan within the meaning of
4 ERISA Section 3(7), 29 U.S.C. § 1002(7) and is subject to the Plan’s cash balance formula. He
5 resides in Mercer Island, Washington. Plaintiff Flor began working for Washington Mutual in
6 1959 and worked for Washington Mutual through his retirement in 2000.

7
8 18. Plaintiff Kellie Plumb is a “participant” of the Plan within the meaning of ERISA
9 Section 3(7), 29 U.S.C. § 1002(7) and is subject to the Plan’s cash balance formula. She resides
10 in University Park, Washington. Plaintiff Plumb began working for Pacific First Federal Savings
11 Bank in 1987, and was still employed by Pacific First Federal Savings Bank at the time of its
12 1993 merger with Washington Mutual, Inc. Ms. Plumb continued to work for Washington
13 Mutual, Inc. until 2006.

14
15 18.1 Plaintiff Thomas Schoenleber is a “participant” of the Plan within the meaning of
16 ERISA Section 3(7), 29 U.S.C. § 1002(7) and is subject to the Plan’s cash balance formula. He
17 resides in Gig Harbor, Washington. Plaintiff Schoenleber began working for Washington
18 Mutual in 1977, and worked for Washington Mutual through his retirement in 2006.

19
20 19. Plaintiff Audrey Schulman is a “participant” of the Plan within the meaning of
21 ERISA Section 3(7), 29 U.S.C. § 1002(7) and is subject to the Plan’s cash balance formula. She
22 resides in Hillsboro Beach, Florida. Plaintiff Schulman began working for Great Western Bank,
23 a wholly-owned subsidiary of Great Western Financial Corporation, in 1996, and was still
24 employed by Great Western at the time of its 1997 merger with Washington Mutual, Inc. Ms.
25 Schulman continued to work for Washington Mutual, Inc. until 2006.

26 20. Plaintiff Margaret Weber is a “participant” of the Plan within the meaning of

1 ERISA Section 3(7), 29 U.S.C. § 1002(7) and is subject to the Plan's cash balance formula. She
2 resides in Hauppauge, New York. Plaintiff Weber began working for Dime Bancorp Inc. in
3 1999, and was still employed by Dime Bancorp at the time of its January 1, 2002 merger with
4 Washington Mutual, Inc. Ms. Weber continued to work for Washington Mutual Inc until
5 September 30, 2002.
6

7 21. Defendant WaMu Pension Plan, together with its merged predecessor plans, is an
8 "employee pension benefit plan" within the meaning of ERISA § 3(2)(A), 29 U.S.C.
9 § 1002(2)(A), and a "defined benefit plan" within the meaning of ERISA § 3(35), 29 U.S.C.
10 § 1002(35). The Plan is administered in this District. The Plan covers employees of Washington
11 Mutual, Inc. which is the successor-in-interest to other companies, including but not limited to
12 Great Western Financial Corporation, Dime Bancorp, Inc., H.F. Ahmanson & Company, and
13 Pacific First Federal Savings Bank (collectively, the "WaMu Predecessor Companies"), whose
14 former employees participate in the Plan and/or whose prior retirement plans have been merged
15 into the Plan. On information and belief, Defendant WaMu Pension Plan assumed all assets and
16 liabilities of the retirement plans of the WaMu Predecessor Companies as of the date of their
17 respective plan mergers, and is the successor in interest to the Dime Bancorp Pension Plan, Great
18 Western Financial Pension Plan, H.F Ahmanson Plan and Pacific First Federal Savings Plan.
19 See Exhibit 1 attached hereto (depicting WaMu Pension Plan Family).
20
21

22 22. Washington Mutual's Plan Administration Committee is the Plan Administrator
23 within the meaning of ERISA § 3(16)(A)(i), 29 U.S.C. § 1002(16)(A)(i), and a Plan fiduciary
24 within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). The Plan Administration
25 Committee's offices are located in this District.
26

IV. FACTS

23. The Plan applies “cash balance” formulas to calculate the pension benefits of eligible employees and former employees of Washington Mutual, including Plaintiffs.

24. Pursuant to its applicable cash balance formula, the Plan defines the accrued pension benefit earned by participants with reference to the balance in a hypothetical individual account (the “Account”) that serves only as a record-keeping device. The “balance” in a participant’s Account is periodically increased through: 1) the addition of credits based on a designated percentage of a participant’s compensation during a given period (the “Compensation Credit”); and 2) credits based on a designated percentage of the existing Account balance during a designated period (the “Additional Credit”). Compensation Credits are only available to participants during the period they are earning compensation as defined in the Plan, but Additional Credits are guaranteed through a participant’s Normal Retirement Age regardless of future service.

25. Although the Plan refers to an individual Account for each participant, the Plan is not a “defined contribution plan,” as that term is defined at ERISA Section 3(34), 29 U.S.C. § 1002(34). Instead, it is a “defined benefit plan,” which is defined at ERISA Section 3(35), 29 U.S.C. § 1002(35), as “a pension plan other than an individual account plan.”

26. When a participant elects to withdraw his or her benefit, the Account with Compensation Credits and Additional Credits accumulated through the date that benefits are to commence is converted to either an annuity benefit, or some other form of qualified benefit, including a lump sum benefit, pursuant to actuarial assumptions specified in the Plan.

27. Normal Retirement Age under the Plan is age 65.

28. Generally, employees not covered by a collective bargaining agreement become

1 eligible to participate in the Plan on the first day of the calendar quarter after completing one
2 year of service.

3 29. Generally, under the terms of the Plan, participants become 100 percent vested in
4 their accrued benefits upon the earlier of five years of service or reaching Normal Retirement
5 Age. Prior to 2006, some Plan participants became partially vested in their accrued benefits after
6 two or more years of service.
7

8 30. The Plan year is based upon the calendar year, commencing January 1 and ending
9 December 31.

10 31. Plaintiffs have not filed a claim for benefits under the Plan's claims procedure
11 because they seek relief from violations of ERISA statutory provisions, as opposed to seeking a
12 declaration of rights and duties under the pension plan. Exhaustion of administrative remedies is
13 not required for an action, where, as here, the issue is whether violations of the ERISA statute
14 have occurred. Exhaustion of administrative remedies would be futile, in any event, because
15 resort to administrative remedies would provide no adequate remedy. This is not a case where
16 the court would benefit from prior fully considered actions by pension plan trustees interpreting
17 their plans and perhaps also further refining and defining the problem in given cases. Rather
18 plaintiffs seek relief from the Court for the Plan's violations of ERISA law through judicial
19 interpretation of ERISA.

20 **Great Western Retirement Plan ("GW Plan")**

21 32. Prior to January 1, 1997, the Great Western Retirement Plan ("GW Plan") was a
22 traditional pension plan.

23 33. Prior to January 1, 1997, the GW Plan incorporated final average earnings and
24 credited service in its benefit formula, offset by a participant's estimated Social Security benefit.
25

26 34. Effective January 1, 1987, the GW Plan vesting schedule called for 100 % vesting

1 upon 5 or more years of service.

2 35. Effective January 1, 1997, the GW Plan was converted from a traditional pension
3 plan to a cash balance plan.

4 36. On July 1, 1997, Great Western Financial Corporation merged with Washington
5 Mutual, Inc.

6 37. By resolution of the Washington Mutual, Inc. Board of Directors at a meeting on
7 October 21, 1997, Washington Mutual, Inc. assumed the assets, liabilities, trust, or other funding
8 arrangements of the GW Plan and became its plan sponsor. The WaMu Pension Plan is the
9 successor in interest to the GW Plan. Certification of the Meeting of the WaMu Board of
10 Directors, Oct. 21, 1997, attached hereto as Exhibit 2.

11 38. The GW Plan became part of the WaMu Pension Plan on January 1, 1998.

12 39. On information and belief, the WaMu Plan assumed all assets and liabilities of the
13 GW Plan as of their merger on January 1, 1998.

14 **H.F. Ahmanson & Company Retirement Plan ("Ahmanson Plan")**

15 40. Prior to July 1, 1999, the H.F. Ahmanson & Company Retirement Plan
16 ("Ahmanson Plan") was a traditional pension plan.

17 41. Prior to July 1, 1999, the Ahmanson Plan incorporated final average earnings and
18 credited service in its benefit formula, offset by a participant's estimated Social Security benefit.

19 42. On October 1, 1998, H.F. Ahmanson & Company merged with Washington
20 Mutual, Inc.

21 43. The Ahmanson Plan became part of the WaMu Pension Plan on July 1, 1999.

22 44. As of June 30, 1999, active participants of the Ahmanson Plan ceased benefit
23 accruals under the Ahmanson Plan. As of July 1, 1999, active participants of the Ahmanson Plan

1 commenced benefit accruals under the Plan's cash balance formula. Washington Mutual, Inc.
2 Cash Balance Plan Amended and Restated Effective Oct. 1, 1998 ("WaMu 1998 Plan"), Apx. 1,
3 § 2.2, attached hereto as Exhibit 3.

4 45. As of July 1, 1999, assets from the Ahmanson Plan trust were transferred to the
5 Plan's trust, and the Plan assumed liability for all benefits accrued through June 30, 1999 under
6 the Ahmanson Plan. *Id.*, WaMu 1998 Plan, Apx.1, § 2.2. The WaMu Pension Plan is the
7 successor in interest to the Ahmanson Plan.
8

9 **Retirement Plan of Dime Bancorp, Inc. ("Dime Plan")**

10 46. On information and belief, prior to April 1, 2002, the Retirement Plan of Dime
11 Bancorp, Inc. ("Dime Plan") was a traditional pension plan.

12 47. On information and belief, prior to April 1, 2002, the Dime Plan incorporated
13 final average earnings and credit service in its benefit formula.
14

15 48. On January 4, 2002, Dime Savings Bank of New York, FSB merged with
16 Washington Mutual, Inc.

17 49. The Dime Plan became part of the WaMu Pension Plan on April 1, 2002.

18 50. On information and belief, participants in the Dime Plan as of March 31, 2002
19 had their retirement benefits converted to a cash balance plan upon the merger of the Dime Plan
20 with the WaMu Pension Plan on April 1, 2002.
21

22 51. As of July 1, 2002, assets from the Dime Plan trust were transferred to the WaMu
23 Plan's trust, and the WaMu Pension Plan assumed liability for all benefits accrued through
24 March 31, 2002 under the Dime Plan. WaMu 1998 Plan, Apx. 3, ¶ 2.2, Exhibit 4.

25 **Retirement Plan for Employees of Pacific First Federal Savings Bank ("PFB Plan")**

26 52. Prior to April 1, 1994, the Pension Plan for Employees of Pacific First Bank

1 (“PFB Plan”) was a traditional pension plan.

2 53. Prior to April 1, 1994, the PFB Plan incorporated final average earnings and
3 credited service in its benefit formula.

4 54. On April 9, 1993, Pacific First Bank merged with Washington Mutual, Inc.

5 55. The PFB Plan became part of the WaMu Pension Plan on April 1, 1994.

6 56. On information and belief, participants in the PFB Plan as of March 31, 1994 had
7 their retirement benefits converted to a cash balance plan upon the merger of the PFB Plan with
8 the WaMu Pension Plan on April 1, 1994.

9 57. On information and belief, the WaMu Pension Plan assumed all assets and
10 liabilities of the PFB Plan as of their merger on April 1, 1994. The WaMu Pension Plan is the
11 successor in interest to the PFB Plan.
12

13 **Elements of the Plan**

14 58. Any reference herein to “the Plan” includes the Plan’s predecessor plans,
15 (“Predecessor Plans”) which are explicitly incorporated throughout this Complaint in the
16 collective reference to “the Plan.”
17

18 59. According to the July 1, 2005 WaMu Plan Summary Plan Description (the “2005
19 SPD”), attached hereto as Exhibit 5, the percentage used to calculate a participant’s
20 Compensation Credit, which is equal to a percentage of an employee’s eligible compensation, is
21 based on that employee’s years of service. Compensation Credits are allocated to participants’
22 accounts each pay period, and range from four percent to eight percent of eligible compensation,
23 as follows:
24
25
26

Years of Service	Percentage of Eligible Compensation ("Compensation Credit")
1, but less than 5	4%
5, but less than 10	5%
10, but less than 15	6%
15, but less than 20	7%
20 or more	8%

60. Additional Credits under the Plan are allocated daily, based upon the average annual rate of interest on 30-year Treasury Constant Maturities for business days in November of the previous calendar year. The annual rate is reported on the home page of WaMuPension.net.

61. Though Washington Mutual converted its pension plan to a cash balance formula effective January 1, 1987, the Plan delayed its notice for nine months before informing participants of their opening account balance under the new Cash Balance Pension Plan. In an October 1, 1987 letter to participants in the Cash Balance Pension Plan, attached hereto as Exhibit 6, Lynn Ryder writes, "We apologize for the delay in providing this information to you." Furthermore, in corporate literature dated December 8, 1986, entitled "Questions and Answers about the New Washington Mutual Financial Group Retirement Program" ("1986 FAQ"), attached hereto as Exhibit 7, Defendants pose the question, "I was planning to retire next year. Should I retire now instead to make sure I get everything that's coming to me?" In response, Defendants wrote, "There's no reason to retire now if you don't want to. Through the conversion process that has been established, no current participant in any retirement plan with a Financial Group company will lose any of the valuable benefits they've earned to date." This statement is misleading because it falsely assured participants that current expectations regarding

1 retirement benefits would continue after the conversion date.

2 62. In the same 1986 FAQ comparing the old plan with the new cash balance plan,
3 the literature is misleading because it paints the picture that a hypothetical employee, “Carol
4 Smith,” is better off under the new plan because her rate of accrual of benefits do not cap out
5 under the new plan after 30 years, as they did under the old plan. However, the example is
6 misleading because it assumes that Carol Smith would earn the same amount, with no pay
7 increases, for 30 years. If Carol Smith had received pay increases in 30 years, her retirement
8 benefit would have been greater under the old plan because, under the old plan, the benefit was
9 based on a final average pay formula.
10

11 V. CLASS ACTION ALLEGATIONS

12 63. Plaintiffs bring this action on their own behalf and, pursuant to the provisions of
13 the Federal Rules of Civil Procedure, on behalf of a class of all others similarly situated, defined
14 as all Plan participants, whether active, inactive or retired, their beneficiaries and Estates, whose
15 accrued benefits or pension benefits are based in whole or in part on the Plan’s and Predecessor
16 Plans’ cash balance formulas, from January 1, 1987 to the present for Counts II, III, and IV and
17 from January 1, 1987 through June 29, 2005 for Count I, including but not limited to the cash
18 balance formulas of the WaMu Predecessor Plans – the GW Plan, the Dime Plan, the Ahmanson
19 Plan, and the PFB Plan. Plaintiffs limit the time period of the proposed class with respect to
20 Count I because June 29, 2005 is the effective date of the Pension Protection Act of 2006 which,
21 among other things, clarified the legality (as against age discrimination claims) of cash balance
22 plans on a prospective basis.
23

24 64. If, during the course of discovery, it becomes apparent that the identification of
25 one or more subclasses would facilitate the more orderly prosecution of this action, Plaintiffs
26

1 reserve the right to request that the Court certify subclasses pursuant to Federal Rule of Civil
2 Procedure 23(c)(1)(4).

3 65. The requirements for maintaining this action as a class action under Rule 23(b)(1)
4 and (b)(2), Federal Rules of Civil Procedure, are satisfied in that:

5 (a) The members of the class are so numerous that joinder of all members is
6 impracticable;

7 (b) The class is large in number; the exact number and identities of all class members are
8 currently unknown to Plaintiff, but are known to Defendants. The number of class
9 members is believed to be in the tens of thousands;

10 (c) There are questions of law common to all members of the class, such as whether the
11 Plan's cash balance formulas comply with ERISA and, if not, how to reform them to
12 bring them into compliance with the statute;

13 (d) There are also questions of law common to all members of the class in that the Plan
14 and its Predecessor Plans uniformly failed to disclose the effects of the plan
15 amendments, including providing the required advance warning that the participants'
16 rate of future benefit accrual would decrease by adoption of the cash balance plan
17 formula;

18 (e) Plaintiffs are members of the class as defined above; their claims are typical of the
19 claims of the members of the class and they will fairly and adequately protect the
20 interests of the class. Plaintiffs' interests are coincident with, and not antagonistic to,
21 those of the remainder of the class, and Plaintiffs are represented by experienced
22 ERISA class action counsel;

23 (f) The prosecution of separate actions by individual members of the class would create
24
25
26

1 the risk of inconsistent or varying adjudications establishing incompatible standards
2 of conduct for Defendants and a risk of adjudications which as a practical matter
3 would be dispositive of the interests of other members of the class who were not
4 parties; and

5 (g) Defendants have acted or refused to act and are likely to act or refuse to act on
6 grounds generally applicable to the class, thereby making appropriate final injunctive
7 and other relief with respect to the class as a whole.
8

9 VI. CLAIMS FOR RELIEF

10 FIRST CLAIM FOR RELIEF

11 Rate of Benefit Accrual Reduced on Account of Age

12 (For Violation of ERISA Section 204(b)(1)(H)(i), 29 U.S.C. § 1054(b)(1)(H)(i))

13 66. Plaintiffs repeat and reallege each and every allegation above.
14

15 67. Because the value of the Plan's Additional Credits is valued as of Normal
16 Retirement Age by projecting it forward to that age, the younger the participant, the greater the
17 value of his Additional Credit component, which is compounded daily. The value of the Plan's
18 Additional Credits decrease each year that a participant ages, therefore the rate of accrual
19 diminishes with age.

20 68. ERISA Section 204(b)(1)(H)(i), 29 U.S.C. § 1054(b)(1)(H)(i), as applied in this
21 case until June 29, 2005, provides that a plan's rate of accrual must not reduce the rate of accrual
22 based on the attainment of any age:
23

24 Notwithstanding the preceding subparagraphs [i.e., ERISA's three
25 minimum accrual schedules], **a defined benefit plan shall be treated as
26 not satisfying the requirements of this paragraph if, under the plan,
an employee's benefit accrual is ceased, or the rate of an employee's
benefit accrual is reduced, because of the attainment of any age.**

1 (emphasis added).

2 69. Because the Plan is a defined benefit plan under ERISA, the definition of the
3 phrase “rate of an employee’s benefit accrual” in § 204(b)(1)(H)(i) refers to what the employee
4 receives from the hypothetical account in the form of a retirement benefit, or the actuarial
5 equivalent of the employer’s contributions to the account (output) and not the employer’s
6 contributions to the plan (input).

7
8 70. In order to avoid a violation of ERISA § 204(b)(1)(H)(i), the Plan must ensure
9 that the rate at which a plan participant accumulates their retirement benefit does not decrease as
10 the participant ages.

11 71. The Plan’s cash balance formulas creates an adverse correlation between the rate
12 of retirement benefit accrual and the increase in a participant’s age. Under the Plan, the rate at
13 which a plan participant accumulates their retirement benefit *decreases* as the participant ages.

14
15 72. For example, a chart attached to this Complaint as Exhibit 8 shows that under the
16 1987 WaMu Plan, the Plan’s overall rate of accrual for a participant who was 45 at the time of
17 conversion diminishes from a high of 1.15 percent in the first year, to a low of 0.27 percent at
18 age 65.

19 73. The Plan’s reduction in the rate of benefit accrual on account of age violates
20 ERISA Section 204(b)(1)(H)(i), 29 U.S.C. § 1054(b)(1)(H)(i).

21
22 74. Because June 29, 2005 is the effective date of the Pension Protection Act of 2006
23 which, among other things, clarified the legality (as against age discrimination claims) of cash
24 balance plans on a prospective basis, the allegations pled in this Count I extend from the
25 beginning of the class period, January 1, 1987 until June 29, 2005.

SECOND CLAIM FOR RELIEF

Failure to Provide Notice of Reduction in Rate of Benefit Accrual

(For Violation of ERISA Section 204(h), 29 U.S.C. § 1054(h))

75. Plaintiffs repeat and reallege each and every allegation above.

76. At all times relevant to this action, ERISA Section 204(h), 29 U.S.C. § 1054(h), required advance notice to participants in a defined benefit pension plan of any amendment whose effect is to “provide for a significant reduction in the rate of future benefit accrual.” 29 U.S.C. § 1054(h)(1).

77. At all times relevant to this action, ERISA § 204(h) generally required that Plan participants receive warning from the Plan administrator of a significant reduction in their future rate of benefit accrual *after* a plan amendment had been adopted, but *before* the amendment’s purported effective date.

78. Upon information and belief, amendments to the Plan and amendments to its Predecessor Plans during the Class Period caused “a significant reduction in the rate of future benefit accrual” by converting the Plan from a final average pay plan to a cash balance plan, and by reducing participants’ rates of benefit accrual by these conversions.

79. Over time, the impact of the 1987 WaMu Plan’s reduction in the rate of benefit accrual as a worker ages causes a substantial drop in a participant’s final benefit when compared with the prior formula. For example, a chart attached to this Complaint as Exhibit 9 shows that pursuant to the 1987 WaMu Plan, a 45-year old worker with 10 years of service at the time of the 1987 cash balance conversion would be entitled to a cash balance plan benefit at age 65 with a present value of **\$252,324**. Under the formula in effect prior to the 1987 cash balance conversion, this same worker would have been entitled to receive a benefit with a present value

1 of **\$558,074**. Thus, for this one example, the implementation of the 1987 cash balance plan,
2 without further reductions or revisions, represents a **45 percent** reduction compared to the
3 benefit under the prior formula.

4 80. At a minimum, as of the following dates, the WaMu Pension Plan affected a
5 significant reduction in plan participants' rates of future benefit accrual: January 1, 1987 (upon
6 the WaMu Plan's conversion from final average pay to cash balance); April 1, 1994 (upon
7 conversion of the PFB Plan from final average pay to cash balance); January 1, 1997 (upon
8 conversion of the GW Plan from final average pay to cash balance); July 1, 1999 (upon
9 conversion of the Ahmanson Plan from final average pay to cash balance); and April 1, 2002
10 (upon conversion of the Dime Plan from final average pay to a cash balance plan). *See* Exhibit 1
11 attached hereto (reflecting cash balance conversion dates and Plan merger dates for the WaMu
12 Plan and its Predecessor Plans).

13
14
15 81. At no time during the class period, upon information and belief, did Plan
16 participants receive advance notice of the reductions in the rate of future benefit accruals due to
17 the Plan's conversions to a cash balance formula, as is required under 29 U.S.C. § 1054(h).

18 82. At no time during the class period, upon information and belief, did Plan
19 participants receive advance notice that the reductions in their rate of future benefit accruals were
20 correlated with the attainment or advancement of age, as is required under 29 U.S.C. § 1054(h).

21 83. In addition to the foregoing, at no time during the Class Period, upon information
22 and belief, did Plan participants receive timely, accurate, or sufficiently comprehensive notice of
23 reductions in the Plan's rate of future benefit accruals, as is required under 29 U.S.C. § 1054(h).

24 84. Defendants' failures to comply with the timing, content and method of
25 distribution requirements of the notice and disclosure laws violated ERISA Section 204(h), 29
26

1 U.S.C. § 1054(h), and all applicable regulations.

2 85. As a consequence of these violations of ERISA Section 204(h), 29 U.S.C.
3 § 1054(h), and all applicable regulations, the Plan amendments that purported to adopt cash
4 balance formulas or otherwise effect a significant reduction in the rate of participants' future
5 benefit accrual never became effective.

6
7 86. Defendants' acts and/or omissions prejudiced or likely prejudiced Plaintiffs and
8 the Plan participants because the failure to receive adequate notice precluded their full
9 understanding of the impact of these plan amendments and/or prevented them from further
10 supplementing their retirement savings.

11 87. Defendants' acts and/or omissions render the cash balance formulas
12 unenforceable.

13 **THIRD CLAIM FOR RELIEF**

14 **Failure to Provide Adequate Summary Plan Descriptions**

15 **(For Violation of ERISA Sections 102, 104(b)(1), 29 U.S.C. §§ 1022, 1024(b)(1), and**
16 **29 C.F.R. § 2520.102-2)**

17 88. Plaintiffs repeat and reallege each and every allegation above.

18 89. ERISA Section 102(a), 29 U.S.C. § 1022(a), requires the Plan administrator to
19 provide all participants and beneficiaries with a summary plan description ("SPD"):

20
21 The summary plan description shall include the information described in
22 subsection (b) of this section, shall be written in a manner calculated to be
23 understood by the average plan participant, and shall be sufficiently
24 accurate and comprehensive to reasonably apprise such participants and
25 beneficiaries of their rights and obligations under the plan.

26 90. In turn, ERISA Section 102(b), 29 U.S.C. § 1022(b), provides in pertinent part:

The summary plan description shall contain the following information: . . .
the plan's requirements respecting eligibility for . . . benefits; . . .

circumstances which may result in disqualification, ineligibility, or denial or loss of benefits

91. Similarly, 29 C.F.R. § 2520.102-2 provides in pertinent part:

(a) *Method of presentation.* The summary plan description shall be written in a manner calculated to be understood by the average plan participant and shall be sufficiently comprehensive to apprise the plan's participants and beneficiaries of their rights and obligations under the plan Consideration of these factors will usually require . . . the use of clarifying examples and illustrations, the use of clear cross-references and a table of contents. (b) *General format.* The format of the summary plan description must not have the effect [of] misleading, misinforming or failing to inform participants and beneficiaries. Any description of exceptions, limitations, reductions, and other restrictions of plan benefits shall not be minimized, rendered obscure or otherwise made to appear unimportant. Such exceptions, limitations, reductions, or restrictions of plan benefits shall be described or summarized in a manner not less prominent than the style, captions, printing type, and prominence used to describe or summarize plan benefits. The advantages and disadvantages of the plan shall be presented without either exaggerating the benefits or minimizing the limitations. The description or summary of restrictive plan provisions need not be disclosed in the summary plan description in close conjunction with the description or summary of benefits, provided that adjacent to the benefit description the page on which the restrictions are described is noted.

92. ERISA § 104(b)(1) imposes timing requirements for issuance of the SPD. In general, a plan administrator must furnish an SPD to each participant within 90 days of becoming a participant. A plan administrator must furnish subsequent SPDs integrating all intervening plan amendments to each participant every fifth year. 29 U.S.C. § 1024(b)(1).

93. Upon information and belief, none of the SPDs issued by Defendants regarding the Plan or the Predecessor Plans summarize their cash balance formulas in compliance with ERISA.

94. For example, the 1995 Washington Mutual SPD, which is attached to this Complaint as Exhibit 10, describes the benefits under the plan as a combination of a "Benefit Credit" (referred to herein as Compensation Credit) and an "Interest Credit" (referred to herein

1 as Additional Credit) (Ex. 10 at pp. 2-3). While the SPD provides a Glossary to define the terms
2 “Benefit Credit” and “Interest Credit,” nowhere in the SPD, including the Glossary section, does
3 it explain that the Interest Credit correlates to a participant’s age, and that the value of the
4 Interest Credit decreases as a participant ages.

5
6 95. Furthermore, the 1995 Washington Mutual SPD states that “if you participated in
7 a plan of a former employer that is merged into this Plan, your accrued benefits under that plan
8 are converted to a beginning Account balance that is the actuarial equivalent of your benefits
9 under the former plan. In all events, your accrued benefits under the former plan are fully
10 protected and cannot be reduced under this Plan.” (at 3). This statement fails to indicate that
11 participants merged into the Plan would experience a reduction in their rate of benefit accrual
12 upon the conversion of a final average pay plan to a cash balance plan. This statement had the
13 effect of “misleading, misinforming [and] failing to inform participants” of the reduced rate of
14 benefit accrual, and “minimized, rendered obscure, or otherwise made to appear unimportant”
15 the “description of exceptions, limitations, reductions, and other restrictions of plan benefits.”
16

17 96. By describing the cash balance formula in a misleading manner, without full
18 disclosure, the SPD had the effect of “misleading, misinforming [and] failing to inform
19 participants” as to the rate of accrual, and “minimized, rendered obscure, or otherwise made to
20 appear unimportant” the “description of exceptions, limitations, reductions, and other restrictions
21 of plan benefits.”
22

23 97. In short, upon information and belief, the SPDs did not explain, inter alia, (a) that
24 the rate of accrual under the Plan diminished based on age for all Plan participants as a matter of
25 simple arithmetic; and (b) that the rate of future benefit accrual would be reduced for all Plan
26 participants under the cash balance plan.

1 98. On information and belief, omissions of the type detailed with respect to the 1995
2 Washington Mutual SPD were pervasive throughout the Class Period with respect to all
3 Summary Plan Descriptions issued for the Plan and the Predecessor Plans.

4 99. The failure of the Plan's Summary Plan Descriptions to timely and fully disclose
5 Plan provisions that negatively impacted the benefits participants reasonably expected to receive
6 violates ERISA Sections 102, 104(b)(1), 29 U.S.C. §§ 1022, 1024(b)(1) and 29 C.F.R.
7 § 2520.102-2. These acts and/or omissions prejudiced or likely prejudiced Plaintiffs and the Plan
8 participants by precluding their understanding of the impact of the cash balance formula and/or
9 preventing them from further supplementing their retirement savings.
10

11 100. Defendants' acts and/or omissions render the cash balance formulas
12 unenforceable.
13

14 **FOURTH CLAIM FOR RELIEF**

15 **Failure to Provide Summaries of Material Modifications ("SMMs")**

16 **(For Violation of ERISA Sections 102(a), 104(b)(1), 29 U.S.C. §§ 1022(a), 1024(b)(1), and** 17 **29 C.F.R. 2520.104b-3)**

18 101. Plaintiff repeats and realleges each and every allegation above.

19 102. ERISA Section 102(a), 29 U.S.C. § 1022(a), also provides:

20 A summary of any material modification in the terms of the plan and any
21 change in the information required under subsection (b) of this section
22 shall be written in a manner calculated to be understood by the average
23 plan participant and shall be furnished in accordance with section
24 [104(b)(1), 29 U.S.C. §] 1024(b)(1) of this title.

25 103. ERISA Section 104(b)(1), 29 U.S.C. § 1024(b)(1), generally provides that a plan
26 administrator must provide to each participant, and to each beneficiary who is receiving benefits
under the plan, a summary of material modifications ("SMM") not later than 210 days after the
end of the plan year in which the change is adopted.

104. 29 C.F.R. § 2520.104b-3 governs in greater detail the timing and content of the required SMMs.

105. Upon information and belief, Defendants did not provide to participants timely and sufficient SMMs as required by ERISA Sections 102, 104(b)(1), 29 U.S.C. §§ 1022(a), 1024(b)(1), and 29 C.F.R. § 2520.104b-3, thereby violating those provisions.

106. The failure of the Plan's SMMs to timely and fully disclose revised Plan provisions that negatively impacted the benefits participants reasonably expected to receive violates ERISA Sections 102, 104(b)(1), 29 U.S.C. §§ 1022, 1024(b)(1) and 29 C.F.R. § 2520.104b-3. These acts and/or omissions prejudiced or likely prejudiced Plaintiff and the Plan participants by precluding their understanding of the impact of the cash balance formula and/or preventing them from further supplementing their retirement savings.

107. Defendants' acts and/or omissions render the cash balance formulas unenforceable.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court enter judgment as follows:

A. Certifying this action as a class action;

B. Declaring:

1. That the Plan's cash balance formulas reduce the rate of accrual based on the attainment of any age, in violation of ERISA Section 204(b)(1)(H)(i), 29 U.S.C. § 1054(b)(1)(H)(i) (First Claim for Relief);

2. That the advance notice of a significant reduction in the rate of future benefit accruals required by the adoption of the cash balance formulas or other amendments to the Plan did not comply with ERISA Section 204(h), 29 U.S.C. §

1 1054(h), as to timing, content and method of distribution, so that the cash balance
2 formulas or other amendments reducing the rate of future benefit accrual did not
3 become effective (Second Claim for Relief);

4 3. That the Summary Plan Descriptions summarizing the new cash balance formulas
5 violated ERISA Sections 102, 104(b)(1), 29 U.S.C. § 1022, 1024(b)(1), and 29
6 C.F.R. § 2520.102-2 (Third Claim for Relief); and

7
8 4. That the Plan Administrators did not provide the summaries of material
9 modifications of the cash balance formulas required by ERISA Sections 102(a),
10 104(b)(1), 29 U.S.C. §§ 1022(a), 1024(b)(1), and 29 C.F.R. § 2520.104b-3,
11 thereby violating those provisions (Fourth Claim for Relief); and

12 C. Enjoining Defendants from enforcing the Plan's unlawful provisions or provisions that
13 never became effective due to insufficient notice or other disclosure;

14 D. Ordering Defendants to reform the Plan to cure all ERISA violations;

15 E. Ordering Defendants to recalculate the accrued benefits of all Class members based on
16 the greater of the benefit formula sought to be amended in violation of ERISA Section
17 204(h), or the pre-amendment formula, after both or either are reformed to cure all
18 ERISA violations;

19 F. Ordering Defendants to pay all pensioners, their beneficiaries and Estates the difference
20 between the amount of pension paid to them heretofore, and the benefit that should have
21 been paid based on the Plan as reformed to cure all heretofore-listed ERISA violations,
22 with interest at the highest allowable rate compounded monthly;
23
24
25
26

1 G. Awarding Plaintiffs

2 1. their costs, disbursements and expenses herein pursuant to ERISA Section 502(g),
3 29 U.S.C. § 1132(g), or as otherwise authorized by law;

4
5 2. reasonable attorneys' fees pursuant to ERISA Section 502(g), 29 U.S.C. §
6 1132(g) and the common fund doctrine, or as otherwise authorized by law; and

7 H. Awarding the Class such other and further relief as the Court may deem just, proper and
8 equitable.

9 DATED this 16th day of April, 2008.

10 KELLER ROHRBACK L.L.P.

11
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20 *Attorneys for Plaintiffs*

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all known counsel of record, listed below:

Ladd B. Leavens, Anne E. Rea, Danielle J. Carter, and Rachel Blum Niewoehner.

DATED this 16th day of April, 2008.

s/ Karin B. Swope
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