

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ROBERT SESSIONS, LINDA SESSIONS	:	
JOHN ROMAN, PAT KOVAR, JOHN	:	
SAFIAN, and JOE GREEN on behalf of	:	CIVIL ACTION
themselves and on behalf of all others	:	
similarly situated	:	NO. 1:07-cv-1669
Plaintiffs,	:	
	:	AMENDED CLASS
vs.	:	ACTION COMPLAINT
	:	
OWENS-ILLINOIS, INC.,	:	
THE OWENS-ILLINOIS SALARY	:	(ELECTRONICALLY FILED)
RETIREMENT PLAN,	:	
THE OWENS ILLINOIS EMPLOYEE	:	
BENEFITS COMMITTEE FOR	:	
THE OWENS-ILLINOIS SALARY	:	
RETIREMENT PLAN,	:	
ROBERTA BIXHORN, TERRI	:	
FITZPATRICK, DAVID McCORMICK	:	
SHAUN McMACKIN, MIKE	:	
SCHEIDING, ETTA STRONG,	:	
AL BAKER, JOHN CANTELLO,	:	
RENEE ELLIS, TERRI HICKS,	:	
RITA KNOT, DAN PENNYWITT	:	
and JUDY WARNTZ	:	
	:	
Defendants.	:	

**AMENDED COMPLAINT-CLASS ACTION**

Plaintiffs Robert Sessions, Linda Sessions, John Roman, Pat Kovar, John Safian, and Joe Green, by and through their attorneys, bring this action on behalf of themselves individually and on a class wide basis on behalf of others similarly

situated, against Owens-Illinois, Inc., the Owens-Illinois Salary Retirement Plan, the Owens-Illinois Employee Benefits Committee for the Owens-Illinois Salary Retirement Plan and each of the individuals who served on the Benefits Committee for the Owens-Illinois Salary Retirement Plan at any time from 2004 to the present.

### **NATURE OF THE ACTION**

1. This is an action under the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1001, *et seq.* Plaintiffs are former employees of Defendant Owens-Illinois, Inc. (“O-I” or the “Company”) and participants in the Owens-Illinois Salary Retirement Plan. They bring this action, on behalf of themselves and other similarly situated Participants whom they seek to represent in this matter (the “Class”). Plaintiffs bring the action for benefits denied to them under the Owens-Illinois Salary Retirement Plan, interference with protected rights and for breach of fiduciary duties.

2. As of January 1, 2000, the Owens-Illinois Salary Pension Plan included an Enhanced Retirement Benefit (“Enhanced Benefit”) for eligible participants who became Terminated Retirees as a result of a Reduction in Force (“RIF”). The Enhanced Benefit entitled such participants to receive retirement benefits, if they lost their employment with O-I, of between 70% to 100% of their calculated regular retirement benefit (depending upon the combined years of age and service of an employee from 65 years through 80+ combined years). On

October 7, 2004, O-I completed the sale of its plastics packaging business to Graham Packaging Company (“Graham”). Plaintiffs and the Class members were told by O-I that they were not eligible for the Enhanced Benefits despite the fact that they lost their employment with O-I as a result of the Reduction in Force due to O-I’s sale of its business unit to Graham. In fact, pursuant to the Plan terms, Plaintiffs and the Class were entitled to elect retirement pursuant to the Enhanced Benefit provision and related benefits including retiree medical coverage.

### **JURISDICTION AND VENUE**

3. The Owens-Illinois Salary Retirement Plan is and was at all relevant times an “employee pension benefit plan,” an “employee benefit plan,” and a “defined benefit plan” within the meaning of ERISA §§ 3(2)(A), 3(3), and 3(35), 29 U.S.C. §§ 1002(2)(A), 1002(3) and 1002(35).

4. 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. Specifically, this action is brought under ERISA § 502(a), 29 U.S.C. §1132(a). Additionally this Court has subject matter jurisdiction pursuant to ERISA § 502(e)(1), 29 U.S.C. §1132(e)(1).

5. This Court has personal jurisdiction over Defendants because each resides within the United States or is subject to service of process in the United

States pursuant to ERISA § 502(e)(2), 29 U.S.C. §1132(e)(2) which allows for nation wide service of process.

6. Venue is proper here, under ERISA § 502 (e)(2), 29 U.S.C. § 1132 (e)(2) for the following reasons, *inter alia*: the Owens-Illinois Salary Retirement Plan was administered in this District; breaches of the Plan took place in this District; and this is a District where the Defendants reside or may be found.

\*  
**THE PARTIES**

7. Plaintiff Robert Sessions (“Mr. Sessions”) is and has been at all relevant times a “participant” as defined in ERISA § 3(7), 29 U.S.C. § 1002 (7), in the Plan. His date of birth is March 6, 1950. At the time of the sale of the plastics business to Graham on October 7, 2004, he had approximately 30 years of service with O-I. He resides at 205 Thundergust Mill Road, Wellsville, PA 17365. As a result of the sale to Graham, he was required to relocate to York, Pennsylvania, approximately seven and one half (7 ½) hours from where he resided.

8. Plaintiff Linda Sessions (“Ms. Sessions”), is and has been at all relevant times a “participant” as defined in ERISA § 3(7), 29 U.S.C. § 1002 (7), in the Plan. Her date of birth is November 20, 1950. At the time of the sale of the plastics business to Graham on October 7, 2004, she had approximately 34 years of service with O-I. She resides at 205 Thundergust Mill Road, Wellsville, PA 17365. As a result of the sale to Graham, she was required to relocate to York,

Pennsylvania, approximately seven and one half (7 ½) hours from where she resided.

9. Plaintiff John Roman (“Roman”) is and has been at all relevant times a “participant” as defined in ERISA § 3(7), 29 U.S.C. § 1002 (7), in the Plan. His date of birth is January 14, 1951. At the time of the sale of the plastics business to Graham on October 7, 2004, he had approximately 29 years of service with O-I. He resides at 40019 N. Lytham Way, Anthem, AZ 85086. Although forcibly transferred to the employment rolls of Graham on October 7, 2004, he was immediately given notice of his termination from Graham. In order to receive severance pay and health benefit extensions **from O-I**, O-I required him to work **for Graham** through December 31, 2004.

10. Plaintiff Pat Kovar (“Kovar”) is and has been at all relevant times a “participant” as defined in ERISA § 3(7), 29 U.S.C. § 1002 (7), in the Plan. Her date of birth is June 22, 1950. At the time of the sale of the plastics business to Graham on October 7, 2004, she had approximately 31 years of service with O-I. She resides at 233 Country Club Lane, Waterloo, IL 62298. Sixty three days after being forcibly transferred to the employment rolls of Graham, on October 7, 2004, it was announced that the facility at which Ms. Kovar worked was being closed and she was not offered another position with Graham.

11. Plaintiff John Safian (“Safian”) is and has been at all relevant times a “participant” as defined in ERISA §3(7), 29 U.S.C. § 1002(7), in the Plan. His date of birth is June 16, 1950. At the time of the sale of the plastics business to Graham on October 7, 2004, he had approximately 14 years of service with O-I. He resides at 15633 Kruse Road, Wapakoneta, OH 45895. When forcibly transferred to the employment rolls of Graham on October 7, 2004, he was told that he was under consideration for a permanent position at Graham. One month later, in November 2004, he was told he would not receive a position with Graham. In order to receive severance pay and health benefit extensions **from O-I**, O-I required him to work **for Graham** through December 31, 2004.

12. Plaintiff Joe Green (“Green”) is and has been at all relevant times a “participant” as defined in ERISA §3(7), 29 U.S.C. § 1002(7), in the Plan. His date of birth is July 19, 1951. At the time of the sale of the plastics business to Graham on October 7, 2004, he had approximately 31 years of service with O-I. He resides at 521 Flanders Ave, Bowling Green, OH 43402. When forcibly transferred to the employment rolls of Graham on October 7, 2004, he was told that he was under consideration for a permanent position at Graham. On October 15, 2004, Mr. Green was given notice of his termination from Graham. In order to receive severance pay and health benefit extensions **from O-I**, O-I required him to work **for Graham** through December 31, 2004.

13. At all times material hereto Robert Sessions, Linda Sessions, John Roman, Pat Kovar, John Safian, and Joe Green (collectively "Plaintiffs") were Participants in the Owens-Illinois Salary Retirement Plan (the "Plan") and became Terminated Retirees of O-I on October 7, 2004.

14. Defendant Owens-Illinois, Inc. is an Ohio corporation which has a principal place of business in the Commonwealth of Pennsylvania, is the Plan Sponsor within the meaning of ERISA § 3(16)(B), 29 U.S.C. § 1002 (16)(B) and had fiduciary responsibility over the Plan as detailed below. See Plan § 14.01 (Except as otherwise specified, all references to the "Plan" are to the Eighth Amended and Restated Owens-Illinois Salary Retirement Plan as restated as of January 1, 2000, and subsequently amended as in effect on October 7, 2004, a true and correct copy of which is attached hereto as Exhibit 1).

15. Defendant Owens-Illinois Employee Benefits Committee for the Owens-Illinois Salary Retirement Plan (the "Committee") is the Plan Administrator and a named Fiduciary of the Plan within the meaning of ERISA § 3(16)(A), 402 (a), 29 U.S.C. §§ 1002(16)(A), 1102 (a). See Plan §§ 1.18; 1.67; 1.68; 13.01 and 13.02.

16. Upon information and belief the members of the Committee were all employees, officers or directors of Defendant Owens-Illinois. Each Committee member had responsibility for administering the Plan during some portion of the

relevant time period (July 2004 through the present, “Relevant Times”) and was a Plan fiduciary during the period he/she served as a member of the Committee.

a. Defendant Roberta Bixhorn, at Relevant Times, is the current Chairman of the Owens-Illinois Employee Benefits Committee, and was the Chairman for some portion of the relevant time period.

b. Defendant Terri Fitzpatrick, at Relevant Times, is a Member of the Owens-Illinois Employee Benefits Committee.

c. Defendant David McCormick, at Relevant Times, is a Member of the Owens-Illinois Employee Benefits Committee.

d. Defendant Shaun McMackin, at Relevant Times, is a Member of the Owens-Illinois Employee Benefits Committee.

e. Defendant Mike Scheiding, at Relevant Times, is a Member of the Owens-Illinois Employee Benefits Committee.

f. Defendant Etta Strong, at Relevant Times, is a Member of the Owens-Illinois Employee Benefits Committee.

g. Defendant Al Baker was, at some portion of the Relevant Times, a Member of the Owens-Illinois Employee Benefits Committee.

h. Defendant John Cantello was, at some portion of the Relevant Times, a Member of the Owens-Illinois Employee Benefits Committee.



i. Defendant Renee Ellis was, at some portion of the Relevant Times, a Member of the Owens-Illinois Employee Benefits Committee.

j. Defendant Terri Hicks was, at some portion of the Relevant Times, a Member of the Owens-Illinois Employee Benefits Committee.

k. Defendant Rita Knost was, at some portion of the Relevant Times, a Member of the Owens-Illinois Employee Benefits Committee.

l. Defendant Dan Pennywitt was a Member of the Owens-Illinois Employee Benefits Committee, and Chairman of the Committee for some portion of the Relevant Time period.

m. Defendant Judy Warntz was, at some portion of the Relevant Times, a Member of the Owens-Illinois Employee Benefits Committee.

n. Defendants Bixhorn, Fitzpatrick, McCormick, McMackin, Schelding, Strong, Baker, Cantello, Ellis, Hicks, Knost, Pennywitt and Warntz hereinafter collectively referred to as "Committee Fiduciaries."

17. Defendant Owens-Illinois Salary Retirement Plan is a defined benefit pension plan operated by Owens-Illinois for the benefit of its employees and retirees. The Owens-Illinois Salary Retirement Plan is subject to the provisions of the ERISA, 29 U.S.C. § 1001 et seq.

## CLASS ACTION ALLEGATIONS

18. Plaintiffs bring this action as a class action under Rule 23 (a), (b)(1) and (b)(2) of the Federal Rules of Civil Procedure on behalf of the following Class (the “Class”):

All persons who were Owens-Illinois Salary Retirement Plan Participants employed at Owens-Illinois in its Owens-Brockway Plastic Products Group, and who had a) ten years of credited service; and b) combined age and credited years of service of 65 or more; and c) were terminated from O-I as a result the sale of its Owens-Brockway Plastic Products Group to Graham Packaging Company and who, at the time of their termination, were less than 55 years old.

Plaintiffs believe the Class, as defined herein, includes in excess of 85 persons.

19. With regard to all of Plaintiffs’ claims, the Class is so numerous that joinder of all members is impracticable.

20. There are questions of law and fact common to the Class, *inter alia*:

(a) Whether Plaintiffs and the Class are entitled to the Enhanced Benefit provisions of the Plan following the sale of the O-I unit to Graham Packaging;

(b) Whether Defendants breached a fiduciary duty by failing to provide benefits to Plaintiffs and the Class;

(c) Whether Defendants breached a fiduciary duty by publishing a summary plan description which misrepresented material terms of the Plan to the Plaintiffs and the Class; and

(d) Whether Defendant O-I purposefully changed and mischaracterized the employment status of Plaintiffs and the Class in connection with the sale to Graham with the intent to deprive Plaintiffs and the Class of the Enhanced Retirement and related benefits to which they were entitled.

21. Plaintiffs' claims are typical of the claims of the Class, all of whom sustained damages from Defendants' wrongful conduct in violation of ERISA.

22. Plaintiffs will fairly and adequately protect the interests of the Class, in that they have the capacity to lead this action; they are represented by competent counsel; and they have no conflict of interest with the members of the Class.

23. The prosecution of separate actions by or against individual members of the Class would create a risk of: (a) inconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for the party opposing the Class or (b) adjudications with respect to individual members of the Class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

24. The Defendants have acted, or refused to act, on grounds generally applicable to the Class. Final injunctive relief or corresponding declaratory relief is appropriate with respect to the Class as a whole.

25. Alternatively, if necessary, Fed. R. Civ. P. 23(b)(3) allows for class certification. Common issues of law and fact predominate over any individual issues, and because joinder of all putative class members is impracticable, a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

26. This action may properly be maintained under Fed. R. Civ. P. 23(b)(1), (b)(2), or, in the alternative if necessary, under (b)(3).

### **FACTS GIVING RISE TO THIS ACTION**

#### **I. The Owens-Illinois Salary Retirement Plan**

27. Plaintiff Robert Sessions worked at O-I, in Perrysburg, OH in the Owens-Brockway Plastic Products Group. At the time that he was terminated by O-I, on October 7, 2004, Mr. Sessions was 54 years and 7 months old and employed with O-I for 30 years. He had a Combined Age and Service of 84 years.

28. Plaintiff Linda Sessions worked at O-I, in Perrysburg, OH in the Owens-Brockway Plastic Products Group. At the time that she was terminated by O-I, on October 7, 2004, Ms. Sessions was 53 years and 11 months old and employed with O-I for 34 years. She had a Combined Age and Service of 87 years.

29. Plaintiff John Roman worked at O-I, in LaMirada, CA in the Owens-Brockway Plastic Products Group. At the time that was terminated by O-I, on

October 7, 2004, Mr. Roman was 53 years and 9 months old and employed with O-I for 29 years years. He had a Combined Age and Service of 82 years.

30. Plaintiff Pat Kovar worked at O-I, in St. Louis MO in the Owens-Brockway Plastic Products Group. At the time that she was terminated by O-I, on October 7, 2004, Ms. Kovar was 54 years and 4 months old and employed with O-I for 31 years. She had a Combined Age and Service of 85 years.

31. Plaintiff John Safian worked at O-I, in Perrysburg, OH in the Owens-Brockway Plastic Products Group. At the time that he was terminated by O-I, on October 7, 2004, Mr. Safian was 54 years and 4 months old and employed with O-I for 14 years. He had a Combined Age and Service of 68 years.

32. Plaintiff Joe Green worked at O-I, in Perrysburg, OH in the Owens-Brockway Plastic Products Group. At the time that he was terminated by O-I, on October 7, 2004, Mr. Green was 53 years and 3 months old and employed with O-I for 31 years. He had a Combined Age and Service of 84 years.

33. All full time salaried employees of O-I were eligible to participate in the Owens-Illinois Salary Retirement Plan.

34. At all times material hereto, the Plan in effect was The Eighth Amended and Restated Owens-Illinois Salary Retirement Plan, effective since January 1, 2000, and subsequently amended as in effect on October 7, 2004. (See Exhibit 1) The Plan provided that Terminated Retirees of O-I receive an Enhanced

Retirement Benefit (“Enhanced Benefit”) (See § 8.05 of the Plan at Exhibit 1).

The Plan also provided a lump sum retirement option; early retirement benefit option at age 55; and retiree health benefits to Participants of the Plan who were eligible and elected to retire.

35. Participants of the Plan were eligible to retire from O-I at age 55 as long that they had 10 or more years of Credited Service. However, a Plan Participant who elects Early Retirement receives a substantially reduced monthly benefit.

36. In the event a Participant with ten years or more of Credited Service is terminated by O-I for a reason other than Cause or Resignation, the Participant becomes a Terminated Employee if their combined age and years of credited service equals 65 or greater. A Terminated Retiree is eligible for an Enhanced Retirement Benefit.

37. Because Plaintiffs and the Class were under age 55 at the time of their termination the only retirement benefit for which they were eligible was the Enhanced Retirement Benefit.

38. A Participant who is eligible for an Enhanced Retirement Benefit will receive 100% of his or her accrued benefit (either as a monthly benefit or in a lump sum) if his or her combined age and years of Credited Service is 80 or greater. The

amount of the benefit is reduced from the full amount in accordance with a schedule. Specifically, § 8.05 (b) of the Plan provides:

- (b) Enhanced Benefit. Notwithstanding any other provision of the Plan, a Terminated Retiree shall be eligible for an Enhanced Retirement Benefit equal to the Terminated Retiree's Accrued Benefit subject to the following table by reason of the early commencement of such benefit:

<u>Combined Age and Service Benefit</u>	<u>Percentage of Accrued Benefit</u>
65	70%
66	72
67	74
68	76
69	78
70	80
71	82
72	84
73	86
74	88
75	90
76	92
77	94
78	96
79	98
80+	100

Also pursuant to Section 8.05(b), there is a very modest additional reduction based on age calculated on a sliding scale from age 43 to 55.

39. As a result of being denied their accrued Enhanced Benefits, Plaintiffs and the Class are not entitled to commence an unreduced accrued benefit until age 65. If they elect to commence their benefit from the Plan after reaching age 55 but

prior to reaching age 65, their benefit from the Plan will be substantially reduced and they will not receive a retiree medical benefit.

## **II. The Graham Sale:**

40. On July 28, 2004, O-I announced that it entered into a definitive agreement with Graham to sell its Owens-Brockway Plastic Products Group. This divestiture was completed on October 7, 2004, when O-I announced that it “had completed the sale of its blow-molded plastic container operations in North America, South America and Europe, to Graham Packaging Company, a portfolio company of the Blackstone Group.” The divestiture affected O-I Plastic Container Plants in twenty-four locations throughout the United States, including locations in this District.

41. Upon information and belief, in the course of negotiation of the sale to Graham, O-I negotiated a Transition Agreement which related the terms of the employment of the Owens Brockway Packaging Products Group employees. That Transition Agreement was finalized prior to October 7, 2004. In that Transition Agreement, O-I required that its Owens Brockway Packaging Products Group employees be transferred to Graham effective on the date of the sale even though Graham did not commit to actually retain any of those individuals as employees for any period of time and had not yet decided to which employees it would offer positions. The Transition Agreement with Graham was purposefully structured by



O-I for the purpose of cutting off the Class' entitlement to Enhanced Benefits under the Plan.

42. The Enhanced Benefit was a benefit to which all Class Members were entitled by virtue of their age and service credit for work that they had performed for Owens-Illinois prior to October 7, 2004.

43. In order to deceive Participants of the Plan and purposely manipulate the employment status of those individuals affected by the Graham sale for the purpose of depriving the Participants of the Enhanced Benefit, Defendant O-I, on September 13, 2004, provided a "written communication" to all employees affected by the Graham sale, titled "Plastic Container Employee Frequently Asked Questions." The deceptive communication included, *inter alia*:

10. *What is my employment status as of the closing date?*

A. All active employees of Owens-Brockway Plastic Products Inc. ...automatically become employees of Graham Packaging at the closing. If you choose to retire from O-I after the closing, you will still become an employee of Graham at closing.

....

17. *I'm a salaried employee or a non-Union hourly employee. What is my employment status? What about compensation?*

A. As stated above, you will continue to be an employee of the O-I Plastic Container business until the sale closes. At that time, you will be an employee of Graham. As part of the transaction, Graham has agreed to provide salaried employees and non-Union hourly employees a cash compensation package that is no less favorable than the package in effect at the closing.

....

*25. If I am offered continued employment with Graham and do not accept, will I receive severance?*

A. If Graham offers you a job that has the same or better cash compensation and you choose not to accept the offer for whatever reason, you are not entitled to severance compensation.

....

*27. What is my RIF (Reduction in Force) benefit as a result of the sale?*

A. The O-I RIF benefit is currently available to eligible O-I employees of record that are terminated by O-I for lack of work. It is not available to non O-I employees who are terminated by third parties, nor is it available to employees who are terminated after the sale of a business. Due to the fact that you will be a Graham employee at closing, you will not be eligible for O-I RIF payments. Please note that the elimination of RIF payments is currently under review for all active O-I employees.

....

*37. If I am not eligible to retire as of the closing, will the O-I retiree medical plan be available to me later when I reach retirement age?*

A. No, you must be retirement eligible as of the closing date to be an eligible participant in the O-I salary retiree medical plan.

(See the Employee Frequently asked Questions document attached as Exhibit 2).

44. When forcibly transferred to the employment rolls of Graham on October 7, 2004, Plaintiffs and Class members were told that they were under consideration for permanent positions at Graham. In order to receive severance pay and health benefit extensions **from O-I**, O-I required Plaintiffs and the Class to work **for Graham** through December 31, 2004.

45. As a result of said divestiture, Plaintiffs and members of the Class all became Terminated Retirees of O-I, and entitled to the Enhanced Retirement Benefit, despite being told that they were not.

46. In accordance with Paragraph 1.91 of the Plan, Terminated Employees were Participants with ten years or more of Credited Service and terminated by O-I for a reason other than Cause or Resignation, and whose combined age and years of credited service equal 65 or greater.

47. Resignation is a defined Plan term, set forth in Paragraph 1.79 of the Plan as follows:

“The term Resignation means a Severance from Service initiated by, and voluntary on the part of an Employee. An Employee whose position is eliminated because of a Reduction in Force and who refuses an offer of alternative employment in a salaried position at any domestic location of the Employer, at a bases salary equivalent to or greater than the Employee’ current base salary, will be deemed separated as a Resignation. **An Employee who is employed at an Employment Unit which ceases to be owned or operated by the Employer, and who upon Severance from Service from the Employer receives a comparable offer of employment from the successor employer which assumes control of the Employment Unit, will be deemed separated as a Resignation.**” (Emphasis added)

48. The O-I Salary Retirement Plan Summary Plan Description ( “SPD”) states, *inter alia*:

If you have 10 or more years of credited service and your employment is terminated as a result of a reduction in personnel, declining business, discontinuance of operations, location closing, or for reasons other than cause or resignation, and if your combined age and years of

credited service equals or exceeds the number 65, you will be entitled to Enhanced Retirement Benefits as a terminated employee.

This benefit is not available to a participant who is terminated by an operation subsequent to the sale or partial sale of that operation; **nor is it available if you are employed (or decline an offer of employment) by a successor employer that assumes control of the location where you work (even if the employment or offer is at another location.)** In other words, if the Company's operation or location where you work is sold or otherwise transferred to another employer and you either continue to work there as an employee of the new owner/employer or decline an offer to do so (or to work elsewhere as an employee for the new employer), you will not be eligible for this Enhanced Retirement Benefit when the new employer takes over, and you cannot become eligible for it later.

49. The SPD is false and misleading because it entirely omits the fact that under the terms of the Plan, in order to be deemed separated from the company by resignation in the context of the sale of an employment unit, an offer of employment from a successor employer which assumes control of the employment unit must be a comparable offer of employment. Further, the SPD is false and misleading in that it affirmatively states that the Enhanced Retirement Benefit is not available if the Participant is offered employment by a successor company at another location, which is false because such offer would not be comparable.

50. None of the Plaintiffs and members of the Class received an offer of comparable employment for the following reasons, which include but are not limited to:

- a) No offers of employment were made by Graham or received by the O-I employees;
- b) Some O-I employees were provided sham positions with Graham which were immediately eliminated;
- c) O-I employees who chose to stay with Graham were forced to uproot and relocate their families to job sites over 7 hours from where they lived;
- d) Graham did not give former O-I employees service credit in the Graham pension plan based on O-I employment;
- e) Graham's Pension Plan, eliminated in 2006, provided no Enhanced Retirement Benefits;
- f) Pursuant to the Graham Pension Plan, a participant cannot take early retirement until age 62.
- g) Graham's Pension Plan provides no right to withdraw the pension as a lump sum; and
- h) Graham's Pension Plan contains no retiree health benefits.

51. Plaintiffs and the Class are Terminated Retirees in accordance with the terms of the Plan and therefore are entitled to their accrued Enhanced Retirement Benefits as set forth in Section 8.05 of the Plan.

## EXHAUSTION OF ADMINISTRATIVE REMEDY

52. On February 14, 2005, Plaintiff Pat Kovar submitted an appeal for enhanced retirement benefits to Defendant Pennywitt ("Pennywitt"), Chairman of the Owens-Illinois Employment Benefits Committee, stating, in pertinent part:

I am an employee of the now Graham Packaging Plastics Plant in St. Louis, Mo. I was employed with Owens-Illinois from 10/73 through the date of the sale of the Plastics Division on 10/7/04. My birthdate is 6/22/50. At the time of the sale I had 31 years of service with Owens-Illinois and was 54 years 4 months old. Based on my lack of age – 8 months – I was not offered the opportunity to draw my retirement benefits, as were those individuals who were 55 on the date of the sale. Within 2 months of the finalization of the sale, as you know, Graham announced the closure of the St. Louis Plant. By virtue of the fact that I am now considered deferred vested, I have lost the ability to draw my retirement at age 55, without a reduction of 60% (6% per year for every year under the age of 65), lost the option for taking a level income option or lump sum payment option, and more importantly, lost my retirement insurance – all for 8 months of age.

....

I feel I deserve consideration for the payment of my retirement benefits, based on my years of service.

(Exhibit 3, for letter from Kovar to Pennywitt dated February 14, 2005).

53. On February 18, 2005, the Defendant Pennywitt responded to Plaintiff Pat Kovar's appeal for enhanced retirement benefits, denying her appeal, and stating, in pertinent part:

At its regularly scheduled meeting on February 16, 2005, the

Owens-Illinois benefits Committee reviewed your appeal to the Committee in which you asked the Committee to determine whether you were eligible to receive a retirement benefit (as opposed to a term-vested benefit) from the Owens-Illinois Salary Retirement Plan.

You appear to clearly understand your situation and the corresponding plan provisions that apply to you in this matter. That being, **at the time Owens-Brockway Plastics Products, Inc. was sold to Graham Packaging, Inc. you had not attained age 55 and accordingly you were not eligible for a retirement benefit from the Owens-Illinois Salary Retirement Plan.**

I believe you realize that the Owens-Illinois Employee Benefits Committee in its role of Plan Administration can not pick and choose who gets retirement benefits, as opposed to term-vested benefits from the Owens-Illinois Salary Retirement Plan. In your situation you are eligible for a term-vested benefit from the Owens-Illinois Salary Retirement Plan as if you terminated employment from Owens-Brockway Plastic Products, Inc. on October 7, 2004, age 54 and 4 months with 31 years of Owens-Illinois service.

(Exhibit 4, for letter from Pennywitt to Kovar dated February 18, 2005).

54. On October 14, 2004, 7 days after the sale to Graham closed, in response to emails from Plaintiff Roman to Defendant Kost, Manager, Retirement Plans, Ms. Kost denied Roman's Enhanced Benefits, which she referred to alternatively as the O-I RIF (reduction in force) benefit or Enhanced Retirement provision:

John, under the terms of the sale, all active employees of Owens-Brockway, Inc. automatically became employees of Graham Packaging at the closing. As an employee of Graham, you are not eligible for the O-I RIF (reduction in force) benefit. Your benefit due from the O-I retirement Plan is determined by your age and service as of the closing when your credited service with

O-I ceased. As noted in my earlier e-mail, you are a Deferred Vested Employee.

The SPD is the Summary Plan Description for the O-I Salary Retirement Plan. Refer to pages 2-5 for a complete summary of the Enhanced Retirement provision and an explanation of your vested benefit. The following is from the section regarding Enhanced Retirement – Reduction in Force or Termination of Employment.

“This benefit is not available to a participant who is terminated by an operation subsequent to the sale or partial sale of that operation; nor is it available if you are employed by a successor employer that assumes control of the location where you work.”

Please also refer to the Plastic Container Sale – Employee Frequently Asked Questions document on the O-I Home page (click on “What’s New” on the far right, select – Plastics Sale Q&A List). In particular note the answer to question #10...

(Exhibit 5, email of October 14, 2004 from Knost)(emphasis added).

55. The referenced SPD falsely misstated the critical relevant terms of the Plan relating to eligibility for the Enhanced Benefit.

56. The following day, 8 days after the sale to Graham closed, Plaintiff Roman was notified of his termination by Graham.

57. On July 23, 2005, Plaintiff Roman sent a letter to the O-I Benefits Committee again requesting the Enhanced Benefit, and referencing the previous denial. (See Exhibit 6 for Mr. Roman’s letter of July 23, 2005).



58. On August 24, 2005, Defendant Bixhorn (“Bixhorn”), Chairman of the Owens-Illinois Employee Benefits Committee, Administrator of the Plan, responded to Plaintiff Roman’s appeal denying his appeal:

At its regularly scheduled meeting on August 17, 2005, the Owens-Illinois Employee Benefits Committee reviewed your appeal to the Committee in which you requested that if you commence your pension benefit from the Owens-Illinois Salary Retirement Plan prior to your 65<sup>th</sup> birthday, your pension benefit should be calculated without any actuarial reductions.

As you know, **at the time your employment with Owens-Brockway Plastics Products, Inc. was terminated you had not attained age 55.** Accordingly you are entitled to a “terminated vested benefit” from the Owens-Illinois Salary Retirement Plan. This means that when you attain your age 65 normal retirement age, you are eligible to commence an unreduced vested benefit from the Owens-Illinois Salary Retirement Plan and if you commence your benefit after you attain age 55, but prior to attaining age 65, your benefit from the Owens-Illinois Salary Retirement Plan will be actuarially reduced.

These provisions are plan provisions. Accordingly your appeal to the Committee is “denied”.

(Exhibit 7, letter of August 24, 2005 from Bixhorn to Roman)(emphasis added).

59. Thus, Plaintiff Roman’s request for the Enhanced Benefit and his appeal, and Plaintiff Kovar’s request for the Enhanced Benefit and her appeal were both denied on grounds that are equally applicable to all participants who lost their jobs with O-I as a result of the sale to Graham and consistent with the written

communications from the defendants at the time the sale was announced (See paragraph 43).

60. Therefore, it would be futile for the other Plaintiffs or Class members to engage in the administrative process.

**FIRST CAUSE OF ACTION  
AGAINST ALL DEFENDANTS FOR FAILURE TO PROVIDE ERISA  
BENEFITS  
IN VIOLATION OF § 502(a)(1)(B) OF ERISA, 29 U.S.C. § 1132(a)(1)(B)**

61. Plaintiffs incorporate all of the above paragraphs as through the same were fully set forth.

62. Plaintiffs and the Class were or are each participants as defined by ERISA and the Plan, in the Plan.

63. Defendant Committee is the administrator and Fiduciary of the Plan, as defined by 29 U.S. C. § 1002 (16)(A)(I). The Committee Fiduciaries are co-administrators and co-fiduciaries of the Plan. Defendant Company is the Plan sponsor, a Plan fiduciary and, upon information and belief, participates in the administration of the Plan through its officers and/or directors who serve on the Committee.

64. Plaintiffs and members of the Class they seek to represent are entitled to the Benefits as provided in the Plan document.

65. Defendants' refusal to recognize the entitlement of Plaintiffs and the Class to the Enhanced Retirement Benefit and other benefits of the Plan arising

