IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WALID JAMMAL and DANA LARICHE, et al., on behalf of themselves and all others similarly situated,	)	CASE NO. 1:13-CV-00437
Plaintiffs,	)	JUDGE DONALD C. NUGENT
vs.	)	
AMERICAN FAMILY INSURANCE GROUP, et al.,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

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2. Whether plaintiffs' alleged right to employee benefits (Counts 5 and 6) should be dismissed because plaintiffs admit they were not eligible for benefits under the terms of the plans and the Internal Revenue Code cannot expand the benefits owed under ERISA.

3. Whether Counts 5 and 6 should also be dismissed because plaintiffs admit they failed to exhaust their administrative remedies under the plans and cannot show futility.

4. Whether plaintiffs' breach of fiduciary duty claims (Counts 4 and 6) are barred by the applicable three-year statute of limitations.

5. Whether plaintiffs' claims for unpaid benefits (Counts 3 and 5), with the exception of plaintiff Durachinsky's claims, are barred by the applicable six-year statute of limitations.

6. Whether plaintiffs' claims for declaratory judgment and injunctive relief (Counts 1 and 2) are derived from their substantive claims and should be dismissed for the same reasons as their substantive claims.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs are all current or former insurance agents who worked under independent contractor agreements. Plaintiffs allege that despite their agreements, they were actually common-law employees and, therefore, are entitled to various benefits under the Employee Retirement Income Security Act of 1974 ("ERISA").

Plaintiffs' claims essentially relate to two sets of issues: (1) whether the termination benefits portion of their commission agreements constitute a pension plan under ERISA; and (2) whether plaintiffs were eligible as "employees" under the Company's employee benefit programs generally. Plaintiffs have asserted six separate claims, two of which are simply prayers for relief:

Count 1. A prayer for declaratory relief under ERISA. (Am. Compl. ¶¶ 102-03);

Count 2. A prayer for injunctive relief under ERISA. (Am. Compl. ¶¶ 104-07);

Count 3. "Pension" benefits under the commission agreements, brought under 29 U.S.C. § 1132 (a)(1)(B). (Am. Compl. ¶¶ 108-20);

Count 4. Alleged breach of fiduciary duties under 29 U.S.C. § 1132(a)(3) for not treating the commission agreement as if it were a pension plan (Am. Compl. ¶¶ 121-30);

Count 5. Claim for benefits pursuant to "ERISA § 503(a)(1)B" [sic] under various American Family employee benefit plans apparently based upon the participation requirements of the Internal Revenue Code (Am. Compl. ¶¶ 131-43); and

Count 6. Claim for other relief under "ERISA § 503(a)(3)" [sic] with respect to those same plans. (Am. Compl. ¶¶ 144-51).

As explained more fully below, plaintiffs' claims should be dismissed for numerous reasons:

- All plaintiffs' claims should be dismissed because the plaintiffs are independent contractors as a matter of settled law and, therefore, are not entitled to benefits under ERISA;

- Plaintiffs' alleged right to employee benefits (Counts 5 and 6) should be dismissed because plaintiffs admit they were not eligible under the terms of the plans and the Internal Revenue Code cannot expand the benefits owed under ERISA;

- Counts 5 and 6 should also be dismissed because plaintiffs admit they failed to exhaust their administrative remedies under the plans and cannot show futility;
- Plaintiffs' breach of fiduciary duty claims (Counts 4 and 6) are barred by the applicable three-year statute of limitations;
- Plaintiffs' claims for unpaid benefits (Counts 3 and 5), with the exception of plaintiff Durachinsky's claims, are barred by the applicable six-year statute of limitations; and
- Plaintiffs' claims for declaratory judgment and injunctive relief (Counts 1 and 2) are derived from and should be dismissed for the same reasons as their substantive claims.

II. SUMMARY OF RELEVANT FACTUAL ALLEGATIONS

Taking the factual allegations of the Amended Complaint as true, all plaintiffs worked as insurance agents for American Family[1] under American Family Insurance Agreements. (Amended Complaint ("Am. Compl.") ¶¶ 17-28, 47). Copies of the Agreements signed by plaintiffs Jammal and LaRiche are attached to the Amended Complaint as Exhibits A and B, respectively. The Agent Agreements for the other employees are the same in all material respects. (*Id.* at ¶ 48).

The Agent Agreements expressly state that "[i]t is the intent of the parties hereto that you are not an employee of the Company for any purposes, but are an independent contractor for all purposes, including federal taxation with full control of your activities and the right to exercise independent judgment as to time, place and manner of soliciting insurance, servicing policyholders and otherwise carrying out the provisions of this agreement. As an independent contractor you are responsible for your self-employment taxes and are not eligible for various employee benefits such as Workers and Unemployment Compensation." (*Id.* at ¶ 49, Ex. A, Sec. 6).

The Agent Agreements also set forth commission schedules that provide, among other things, that after at least 10 years of service, agents become eligible for certain extended

[1] Plaintiffs collectively refer to defendants as "American Family" in their Amended Complaint. (Am. Compl. ¶ 2). Plaintiffs, however, have named a panoply of plans including ones that do not even exist. For ease of reference only, this memorandum will also refer to defendants collectively.

earnings/termination benefits. (*Id.* at ¶¶ 8, 64, Ex. A, Sec. 6(m), Page ID# 906-08). In 1993, the Agent Agreements were amended to provide greater "Termination Benefits" to agents who worked for at least 10 years under the Agent Agreement. (*Id.* at ¶¶ 73-75, Ex. A, Page ID# 915).

American Family provides benefits to current employees through various ERISA plans, including a retirement plan, a 401(k) plan, a group health plan, a group dental plan, a group life plan, and a long term disability plan. (*Id.* at ¶ 86). Because American Family designated plaintiffs as independent contractors, they were excluded from the definition of "employee" under these plans, meaning they were not eligible for benefits under these plans. (*Id.* at ¶¶ 86 – 89). Plaintiffs did not attempt to pursue any available administrative remedies under these plans and allege such efforts would have been futile. (*Id.* at ¶¶ 91-93). Plaintiffs do not allege they ever made a claim for benefits under these plans or that they ever received benefits from these plans. (See Am. Compl.).

While plaintiffs concede that their agreements provided they were independent contractors (Am. Compl. ¶¶ 4, 49), they contend that certain policies rendered them employees. These polices include matters such as requirements that they staff their offices during normal business hours, refrain from illegal or discriminatory conduct, and establish minimal standards (such as an absence of felony convictions and compliance with state licensing laws) for their office staff. (Am. Compl. ¶¶ 6, 53-57, Exhs. C to F). These policies are discussed more fully below.

III. <u>ARGUMENT</u>

PLAINTIFFS' CLAIMS SHOULD BE DISMISSED

A. <u>Motion To Dismiss Standard</u>

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In considering a motion to dismiss, a court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the

plaintiff." *Bassett v. NCAA*, 528 F.3d 426, 430 (6th Cir. 2008) (quoting *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007)). But a complaint cannot survive a motion to dismiss if, as in this case, a plaintiff has not alleged "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570.

"Determining whether a complaint states a plausible claim for relief" is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Indeed, this "plausibility" standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 668 (citing *Twombly*, 550 U.S. at 557). Thus, it is not enough for a plaintiff to plead facts that could conceivably support a finding of liability. Rather, a complaint must include allegations sufficient to "nudge[ ]" the plaintiff's "claims across the line" from the conceivable to the plausible. *Twombly*, 550 U.S. at 547; *see also Iqbal*, 556 U.S. at 668.

Moreover, while the Court must accept all well-pleaded factual allegations as true, it need not "accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Neither formulaic recitations of legal elements nor naked assertions devoid of factual enhancement will satisfy this standard. *Iqbal*, 556 U.S. 662, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555). The complaint must "give the defendant fair notice of what the claim is and the grounds upon which it rests," *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (internal quotations omitted) (quoting *Twombly*, 550 U.S. at 555), and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal* 556 U.S. at 678 ("Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."). Documents attached to a complaint are properly considered in determining whether to grant a motion to dismiss. *Shaughnessy v. Interpublic Grp. of Cos.*, 2012 U.S. App. LEXIS 24198 at *19 (6th Cir. Nov. 2, 2012).

B. All Of Plaintiffs' Claims Fail Because They Were Not Employees As A Matter Of Law

All of plaintiffs' claims fail as a matter of law because they have not (and cannot) adequately plead that they were "employees" under ERISA. Rather, plaintiffs' Amended Complaint and settled law conclusively demonstrate that they were independent contractors.

The Court "'must undergo a two-prong analysis to determine whether or not an employee is entitled to benefits under ERISA." *Jaeger v. Matrix Essentials, Inc.*, 236 F. Supp. 2d 815, 821-22 (N.D. Ohio 2003) (citing *Wolf v. Coca-Cola Co.*, 200 F.3d 1337 (11th Cir. 2000)). "The first prong requires that the plaintiff be an 'employee.' The second prong requires that the plaintiff be eligible to receive benefits according to the terms of the plan." *Id.*; *Bellefleur v. The Hayman Co.*, 2013 U.S. Dist. LEXIS 4949 at *12-16 (E.D. Mich. Jan. 14, 2013) (same).

Plaintiffs have brought their action under 29 U.S.C. § 1132(a), which enables a benefit "participant" or "beneficiary" to enforce the provisions of ERISA. The Act "defines 'participant' as 'any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan . . .'" *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 320-21 (1992) (quoting 29 U.S.C. § 1002(7)). Thus, plaintiffs' ERISA claims can succeed only if they were American Family's "employee," a term that ERISA defines as "any individual employed by an employer." *Id.* Because the Supreme Court found ERISA's definition of an employee to be "circular" and "explain nothing," it adopted a "common law test for determining who qualifies as an employee under ERISA." *Id.* This is a general common law test, rather than the law of any particular state. *Id.* The crux of the test is "the hiring party's right to control the manner and means by which the product is accomplished." *Id.* at 323. The *Darden* Court set forth the following factors as relevant to this inquiry, none of which are dispositive:

> the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired

> party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. *Id.* at 589-90.

Since *Darden*, numerous courts have considered whether insurance agents such as plaintiffs are "employees" for purposes of ERISA coverage. The Ninth Circuit recently provided a summary of this case law: "We, along with virtually every other Circuit to consider similar issues, have held that insurance agents are independent contractors and not employees for purposes of various federal employment statutes, including [ERISA], the Age Discrimination in Employment Act ("ADA"), and Title VII." *Murray v. Principal Financial Group, Inc.*, 613 F.3d 943 (9th Cir. 2010) (citing *Weary v. Cochran*, 277 F.3d 522 (6th Cir. 2004); *Wortham v. Am. Family Ins. Group*, 385 F.3d 1139 (8th Cir. 2004)). This Court has likewise recognized that "the Sixth Circuit has repeatedly held that insurance agents are independent contractors, rather than employees, in the ERISA and many other contexts." *Averill v. Gleaner Life Ins. Society*, 2008 U.S. Dist. LEXIS 10073 at *17 (N.D. Ohio Jan. 29, 2008) (citing, among others, *Ware v. United States*, 67 F.3d 574 (6th Cir. 1995); *Wolcott v. Nationwide Mut. Ins. Co.*, 884 F.3d 245 (6th Cir. 1989); and *Plazzo v. Nationwide Mut. Ins. Co.*, 892 F.2d 79 (6th Cir. 1989)).

American Family Agents in particular have been held to be independent contractors. In *Wortham v. Am. Family Ins. Group*, 385 F.3d 1139 (8th Cir. 2004), the Eighth Circuit affirmed that an American Family insurance agent was an independent contractor and not an employee for purposes of the ADEA. Relying on the *Darden* factors, the court concluded that, as a matter of law, the plaintiff was an independent contractor because:

> 1) the plaintiff was an insurance professional; (2) the American Family Agent Agreement identified her as an independent contractor; (3) American Family did not supervise her day-to-day activities; (4) the plaintiff worked out of an independent office, hired her assistants, and paid all office-related expenses, including assistants' salaries, rent, utilities, furniture, and supplies; (5) the plaintiff herself was not subjected to any formal hour or leave policies; (6) the plaintiff was paid exclusively by commission, did not receive employee benefits, and was responsible

> for paying self-employment taxes; and (7) the plaintiff was free to terminate her contract with American Family at will. *Id.* at 1140-41.

Likewise, the Sixth Circuit has applied the *Darden* factors to find insurance agents to be independent contractors and not employees as a matter of law. In *Weary*, 377 F.3d at 525-29, the Sixth Circuit held the plaintiff insurance agent was an independent contractor under the ADEA where, among other things: the plaintiff signed an agreement designating him as an independent contractor, the plaintiff was an insurance professional required to be licensed by the state, the plaintiff used his own tools and instrumentalities, the plaintiff worked from either his home office or his own office space, the defendant did not have authority regarding how long the plaintiff worked, except to require him to attend certain meetings, the plaintiff was paid solely on commissions, and the plaintiff employed his own staff at his own expense and discretion.

In *Wolcott*, 844 F.2d at 251, the Sixth Circuit found that the plaintiff insurance agent was an independent contractor and not an employee for purposes of ERISA where: he hired his own employees, exercised managerial skill in the operation of his business, maintained and owned his office, was responsible for most of his expenses, was responsible for maintaining a license to sell insurance, was paid on commission, was responsible for reporting his own self-employed income, was not eligible for regular employee benefits, including sick pay and vacation, and signed an agreement acknowledging he was an independent contractor and not employee.

Here, plaintiffs' own Amended Complaint demonstrates that they, as is the case with virtually every other insurance agent, were independent contractors and not employees for purposes of ERISA under the required *Darden* and *Wortham* analysis. Indeed, plaintiffs' allegations and their contracts establish <u>each</u> of the *Wortham* factors.

1. <u>Plaintiffs were insurance professionals</u>

Plaintiffs concede they were insurance agents responsible for selling insurance and were paid commissions based on insurance policies sold. (*See, e.g.*, Am. Compl., Agent Compensation

Schedule, Page ID# 916-27). They were also required to be licensed as insurance agents. (*Id.* at Ex. A, Sec. 2, Page ID# 903).

2. Plaintiffs signed the Agent Agreements in which they expressly acknowledged that they were independent contractors

"Each Agreement contains statements purporting to classify Plaintiffs and Class Members as independent contractors." (Am. Compl.¶ 49; Ex. A, Sec. 6(a), Page ID# 905 ("It is the intent of the parties hereto that you are not an employee of the Company for any purpose, but are an independent contractor for all purposes . . .")). *See also Weary*, 377 F.3d at 525 ("This evidence, while not dispositive of the issue, is certainly relevant to the inquiry.").

3. Plaintiffs have not sufficiently pled that defendants supervised their day-to-day activities

The focus of the "day-to-day" supervision factor is whether the defendants controlled the manner and means in which the contractor sold the defendant's insurance products. *Weary*, 377 F.3d at 526-26; *Murray*, 613 F.3d at 946. Plaintiffs have not sufficiently alleged that American Family controlled the manner and means in which they sold American Family products. Rather, plaintiffs allege that American Family required them to, among other things, follow a code of conduct and business ethics, use American Family computer hardware and software when selling its products or services, follow a document retention policy, reserved the right to terminate the Agent Agreement if plaintiffs engaged in inappropriate behavior in the office, approved Agent advertising, required them to attend district meetings, and monitored their computer use. (*See* Am. Compl. ¶¶ 54-57).

The Sixth Circuit has addressed nearly identical facts in finding that a plaintiff insurance agent was an independent contractor under the *Darden* factors. In *Weary*, the plaintiff insurance agent alleged that the defendant Company controlled the manner and means in which he performed his job because he was required to comply with various legal and ethical rules and certain administrative guidelines. *Weary*, 377 F.3d at 526. The Sixth Circuit found this did not establish an

employer/employee relationship and noted that insurance agents have been found to be independent contractors even when they are required to obtain permission prior to advertising the defendant's products, comply with various guidelines set by the insurance company, and perform work on the insurance company's forms and pursuant to its standards. *Id.*; *see also Averill*, 2008 U.S. Dist. LEXIS 10073 at *20-21 (insurance company did not control the agent's work where "there is nothing in the record that demonstrates [the Company] exercised any control or 'penalized' him because of the methods he used to sell its products."); *Maune v. Bankers Life and Casualty Co.*, 2012 U.S. Dist. LEXIS 144828 at *11 (D. Idaho Oct. 5, 2012) (insurance agent's allegation that she was required to attend regular mandatory meetings was "mere minutiae" and did not change the fact that she was an independent contractor and not an employee).

While plaintiffs pled that American Family "retains a right to exercise control over the manner and means by which the Agent-employees conduct every material aspect of their business," this conclusory statement does not satisfy federal pleading standards. *See Iqbal*, 129 S. Ct. at 1949.

4. Plaintiffs worked out of an independent office, hired their assistants, and paid all office-related expenses, including assistants' salaries, rent, utilities, furniture, and supplies

"The expense of any office, including rental, furniture and equipment, signs, supplies not furnished by the Company, salaries of your employees, telephone, postage, advertising and all other charges and expenses incurred by you in the performance of this agreement shall be at your discretion and paid by you." (*See* Am. Compl. Ex. A, Sec. 4(k), Page ID #904). Plaintiffs do not dispute this, but rather allege that American Family required that certain members of plaintiffs' office have valid insurance licenses and certain minimum qualifications, such as a high school diploma and no felony convictions (as required under federal law). (Am. Compl., ¶ 57(D) and Exs. D and E). Such common-sense hiring requirements are another example of "mere minutiae" and are not evidence that plaintiffs were common-law employees. *See Maune*, 2012 U.S. Dist. LEXIS at

*11 (fact that the Company "discouraged [the plaintiff] from hiring personnel or support staff, and permitted her to do so only were 'such staff met very specific and arduous requirements'" was insignificant and "mere minutiae"); *Murray*, 613 F.3d at 946 (plaintiff insurance agent was an independent contract despite alleging a lack of autonomy to select and retain her assistant).

5. Plaintiffs were not subjected to any formal hour or leave policies.

The Agent Agreements made clear plaintiffs "control the number of hours you work and the scheduling of those hours" and that they would have "full control" as to the "time, place and manner of soliciting insurance." (Am. Compl. Ex. A, Page ID# 902, 905, Sec. 6(a)). Plaintiffs do not contest this. Instead, their only allegation as to American Family's alleged hours policy is that they were required to staff their offices during normal business hours. (*Id.* at ¶ 57(G)). Nowhere do plaintiffs suggest that they themselves were subjected to such a policy, making this allegation irrelevant. *See Weary*, 377 F.3d at 527 (requirement that an insurance agent was required to hire and maintain a secretary for twenty hours per week was "insignificant" to the *Darden* inquiry).

6. Plaintiffs were paid by commission, did not receive employee benefits, and were responsible for paying self-employment taxes.

The Agent Agreements state that: "As an independent contractor, you are responsible for your self-employment taxes and are not eligible for various employee benefits such as Workers and Unemployment Compensation." (Am. Compl. ¶ 49). The plaintiffs were also paid by commissions (or advanced commissions) and, as alleged in the Amended Complaint, were not eligible for American Family employee benefits. (Am. Compl. ¶¶ 138, 146; Compensation Schedules, Page ID# 916-27); s*ee also Wolcott*, 884 F.2d at 251 (plaintiff insurance agent was an independent contractor where he reported his own self-employed income to the IRS and was not eligible for regular employment benefits).

7. Plaintiffs were free to terminate their contracts with American Family at will.

Plaintiffs acknowledge in their Amended Complaint that "both American Family and its Agent-employees had the right to terminate the . . . relationship." (Am. Compl. at ¶ 59). This is consistent with the terms of plaintiffs' Agent Agreements: "this agreement may be terminated by either party with or without cause." (*Id.* at Ex. A, Sec. 6(h)(1), Page ID# 905).

Thus, plaintiffs' own Amended Complaint establishes each of the *Darden/Wortham* factors demonstrating that no employee relationship existed. Because plaintiffs were not employees, all of their claims should be dismissed.

C. Counts 5 and 6 Should Be Dismissed Because Plaintiffs Admit They Were Not Eligible For Benefits Under The Terms Of The Applicable Plans

Even if plaintiffs were common-law employees as they claim, Counts 5 and 6 should still be dismissed on the grounds that plaintiffs admit they were not eligible for benefits under the terms of the American Family employee benefit plans.

"It is well settled that ERISA does not prohibit an employer from distinguishing between groups or categories of employees, providing benefits for some but not others." *Bronk v. Mountain States Telephone & Telegraph, Inc.*, 140 F.3d 1335, 1338 (10th Cir. 1998). "[Plaintiffs] must both be [] "common law employee[s]" under the *Darden* factors and be eligible to receive the benefits [they are] seeking under the terms of [the American Family] ERISA plans. If [they] fail on either prong, [they] lack standing to bring a claim for benefits under [American Family's] ERISA plans. *Jaeger*, 236 F. Supp. 2d at 825. "A plaintiff may have a plausible argument that he was a common law employee . . . , but it is the language of the Plan, not common law status, that controls." *Edes v. Verizon Communications, Inc.*, 417 F.3d 133, 137-38 (1st Cir. 2005) (dismissing ERISA claims where employees were not eligible for benefits under the terms of the at-issue plan). "In fact, the only limitation ERISA places on employers is in forbidding them to 'deny participation in an ERISA plan to an

employee on the basis of age or length of service if he is at least twenty-one years of age and has completed at least one year of service.'" *Jaeger*, 236 F. Supp. 3d at 825.

Thus, ERISA benefit claims are properly dismissed where the at-issue benefit plans exclude the plaintiff from coverage (assuming that the exclusion is not on the basis of age or length of service). For example, in *Jaeger*, the plaintiff's ERISA benefit claims were dismissed in part because the defendant company designated her as a leased employee, and leased employees were expressly excluded from the at-issue benefit plans irrespective of whether they were common law employees. *See also Edes*, 417 F.3d at 137-38 (affirming dismissal of the plaintiffs' ERISA claims where the plaintiffs acknowledged in their Complaint that they were excluded from coverage under the at-issue ERISA plans and finding the fact that they claimed to be common-law employees irrelevant).

In this case, plaintiffs' claims for benefits under the American Family employee benefit plans as stated in Counts 5 and 6 fail because plaintiffs concede they were excluded from the definition of covered employees under the express terms of the plans. (Am. Compl. ¶¶ 138, 146-48). Thus, regardless of whether plaintiffs are common-law employees, they have not and cannot assert a viable claim for benefits under the American Family employee benefit plans. *See, e.g., Edes*, 417 F.3d at 137-38; *Jaeger*, 236 F. Supp. 2d at 825.

Seemingly aware of this fatal flaw, plaintiffs allege that American Family's refusal to treat them as "employees" eligible for inclusion in the ERISA benefit plans violates the Internal Revenue Code's minimum coverage requirements, specifically 26 U.S.C. § 410(b) and § 105(h). (Am. Compl. ¶¶ 136-41, 147-50). Plaintiffs seem to allege that by not treating them as "employees" under the benefit plans, American Family did not adhere to the Internal Revenue Code's requirement that a tax-qualified retirement plan benefit a certain percentage of an employer's non-highly-compensated employees in relation to the percentage of highly-compensated employees who participate in the plan. Plaintiffs' theory fails for several reasons.

First, as plaintiffs indirectly acknowledge (Am. Compl. ¶ 136), neither 26 U.S.C. § 410(b) or § 105(h) is incorporated into ERISA. *See* 29 U.S.C. § 1202(c) (expressly incorporating Treasury regulations promulgated under 26 U.S.C. §§ 410(a), 411, & 412); *Edes*, 417 F.3d at 143-44; *Bronk*, 140 F.3d at 1339; *Bellah v. American Airlines, Inc.*, 656 F. Supp. 2d 1207, 1214 (E.D. Cal. 2009). "Hence a violation of this regulation cannot be a violation of ERISA through incorporation." *Edes*, 417 F.3d at 143-44; *Abraham*, 85 F.3d at 1131 ("It is true that ERISA does incorporate portions of the Internal Revenue Code and Treasury regulations, in some instances, but on those occasions it does so explicitly."); *Bellah*, 656 at 1214 (same).

Second, the Revenue Code and regulations cannot expand the substantive rights under ERISA and do not afford the authority to rewrite ERISA plans: "Failure to meet the requirements of [the Treasury] regulations results in the loss of a beneficial tax status; it does not permit a court to rewrite the plan to include additional employees." *Abraham*, 85 F.3d at 1131; *see also Edes*, 417 F.3d at 143-44 ("[n]or does [the Treasury regulations] confer substantive rights on ERISA plan participants or would-be participants independent of ERISA's statutory provisions."); *Bellah*, 656 F. Supp. 2d at 1215 ("even if defendants' exclusion of plaintiff violated the Internal Revenue Code, plaintiff failed to submit any authority that would permit the court to rewrite the plan.").

Finally, individuals who do not meet a plan's prescribed eligibility requirements are disregarded as employees under 26 U.S.C. § 410(b)(4). As the Tenth Circuit noted in *Bronk*, 140 F.3d at 1339, "[t]hat section would be pointless if [] *all* employees who satisfy ERISA's minimum participation requirements and meet the definition of common law employees must be included within the plan. No employees could ever be excluded under that section." Such a reading would also contradict the Supreme Court's pronouncement that "ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits." *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983).

Thus, plaintiffs' misplaced reliance on inapplicable Tax Codes and regulations does not change the fact that they have not adequately pled claims for ERISA benefits under Counts 5 and 6. These Counts therefore should be dismissed.

D. All Of Plaintiffs' Claims Are Barred By The Statute Of Limitations

1. Plaintiffs' Breach of Fiduciary Duty Claims (Counts 4 and 6) Are Barred By The Applicable Three-Year Statute Of Limitations

Plaintiffs assert claims under ERISA § 502(a)(3) alleging that defendants breached their fiduciary duty owed under 29 U.S.C. § 1104(a)(1)(B) by refusing to recognize the Termination Benefit Plan benefits as vested and non-forfeitable as required by ERISA (Count 4) and improperly excluding them from the definition of an "employee" under the American Family employee benefit plans (Count 6). These counts are barred by the applicable three-year statute of limitations.[2]

ERISA provides a three-year and a six-year time period for when a plaintiff may bring a suit for breach of fiduciary duty. 29 U.S.C. § 1113. The three-year period applies where the alleged victim had "actual knowledge of the breach or violation." *Brown v. Owens Corning Investment Review Committee*, 622 F.3d 564, 570-71 (6th Cir. 2010). "An ERISA plaintiff has actual knowledge when he or she has 'knowledge of all the relevant facts, not that the facts establish a cognizable legal claim under ERISA.'" *Id.* Moreover, "actual knowledge" does not require proof that the plaintiffs actually saw or read the documents that disclosed the allegedly unlawful provisions – it is enough that they were provided with the documents or that they were made available. *Id.* at 571. For instance, in *Edes v. Verizon Communications, Inc.*, 417 F.3d 133, 137-38 (1st Cir. 2005), plaintiffs alleged that the defendants breached their fiduciary duties under 29 U.S.C. § 1104 by misclassifying them as off-payroll employees ineligible to participate in the defendant's ERISA plans. In granting the

[2] Plaintiffs' fiduciary duty claims are also barred because they have also asserted a Section 502(a)(1)(B) claim for benefits. *Tackett v. M&G Polymers, USA, LLC,* 561 F.3d 478, 492 (6th Cir. 2009).

defendant's 12(b)(6) motion, in part based on statute of limitations grounds, the First Circuit found that ERISA's three-year limitations period applied to bar the plaintiffs' fiduciary duty claims:

> As the facts alleged in their complaint establish, Plaintiffs knew in April 1994 that they were not classified as employees on GTE's direct payroll. At the same time, Plaintiffs received no ERISA benefits from GTE. These facts establish that Plaintiffs had actual knowledge that if Defendants had a fiduciary duty to classify them as eligible for ERISA plan participation and/or to design their plans accordingly, they had breached that duty. *Id.* at 142.

Here, plaintiffs' fiduciary duty claims are time-barred because they had knowledge of all the relevant facts upon which their claims are based by virtue of their Agent Agreement more than three-years prior to the filing of this lawsuit. Count 4 alleges that defendants refused to pay "vested and non-forfeitable Termination Benefits," which is alleged to be a breach of ERISA and defendants' fiduciary duties. (Am. Compl. ¶¶ 124-29). Plaintiffs allege that "benefits under the Termination Benefits Plan at a minimum do not vest until 10 years of employment, and often 12 or 13 years based on an Agent-employee's participation in the Advanced Compensation Program, instead of vesting at 3 or 5 years as ERISA requires." (*Id.* at ¶ 82). This allegedly unlawful rate was expressly set forth as part of the American Family Agent Agreements that plaintiffs signed. (Doc. 21-2, PageID# 907, 913, 915). Thus, plaintiffs were on notice of this allegedly impermissible accrual/vesting schedule no later than when they signed their Agreements, and their claims began to accrue at this time. *See Brown*, 622 F.3d at 570-71. Because all plaintiffs signed their Agent Agreements more than three years prior to the filing of this lawsuit, Count 4 is time-barred.[3]

[3] Plaintiffs signed their American Family Agent Agreements on July 1, 2003, January 16, 2007, on or about December 1999, on or about 1995, on or about October 2008 and on or about September 1999, respectively, which was more than three years prior to the filing of their February 28, 2013 lawsuit. (Am. Compl. ¶¶ 17-28, 47-48) ("Each American Family Agent-employee must sign the American Family Agent Agreement as a mandatory condition of employment . . . The terms of the Agreement between each member of the Class and American Family are the same in all material respects."). Notably, even if the six-year limitations period applied, all the plaintiffs' fiduciary claims with the exception of plaintiff Durachinsky would still be time-barred.

Count 6 is time-barred for the same reasons. As with the plaintiffs in *Edes*, plaintiffs had actual knowledge that they were excluded from the various employee benefit plans no later than when they signed the Agreements stating they were independent contractors and not employees. As set forth above, Section 6(a) of the Agreements, titled "Independent Contractor Relationship," left no doubt that plaintiffs were independent contractors and not employees. (Am. Compl. ¶ 49). Because the Agent Agreement made clear plaintiffs were not being classified as employees and were not eligible for employee benefits, they had "actual knowledge" sufficient to start the limitations period no later than when they signed their Agreements. *See Brown*, 622 F.3d at 571; *Edes*, 417 F.3d 133 at 141. Since this occurred more than three-years prior to filing this lawsuit, Count 6 is also time-barred.

2. Plaintiffs' Claims For Benefits (Counts 3 and 5), With The Exception of Plaintiff Durachinsky's Claims, Are Barred By The Applicable Six-Year Statute of Limitations

Counts 3 and 5 of plaintiffs' Amended Complaint assert claims under ERISA § 502(a)(1)(B) alleging that they were not provided benefits required under ERISA. These claims, with the exception of Durachinsky's claims, are barred by the applicable six-year statute of limitations.

a. The applicable limitations period is six-years

"Congress did not provide a statute of limitations for claims under § 502 of ERISA . . . , requiring courts to borrow the time limit from the forum state's most analogous cause of action." *Winnett v. Caterpillar, Inc.*, 609 F.3d 404, 408 (6th Cir. 2010). Alleged violations of specific ERISA requirements – as opposed to ERISA claims alleging defendants breached the terms of an ERISA plan - are governed by the forum state's statute of limitations for statutory penalties. *See Redmon v. Sud-Chemie Inc. Retirement Plan for Union Employees*, 547 F.3d 531, 534-35 (6th Cir. 2008); *see also Gelesky v. AK Steel Corp.*, 828 F. Supp. 2d 935, 939-43 (S.D. Ohio 2011) (applying Ohio's six year statute of limitations under Ohio Rev. Code 2305.07 for ERISA claims based on statutory liability).

Here, plaintiffs' claims for ERISA benefits under Section 502(a)(1)(B) (Counts 3 and 5) are subject to Ohio's six year statute of limitations for claims based on statutory liability under Ohio Rev. Code 2305.07. Plaintiffs' claims pertaining to the Termination Benefits Plans are premised entirely on the allegation that the Plans themselves violate ERISA because they allegedly do not satisfy various ERISA vesting and accrual requirements. (*See, e.g.,* Am. Compl. at ¶¶ 11, 82, 112-17, 125-27). Likewise, plaintiffs allege that the American Family employee benefit plans do not comply with 26 U.S.C. § 410(b) and § 105(h) because they are excluded from the definition of "employee" under these plans. (*Id.* at ¶¶ 136-38). Thus, plaintiffs' ERISA claims are based on defendants' alleged failure to adhere to the requirements of ERISA and are therefore subject to a six-year statute of limitations.[4] *See Redmon*, 547 F.3d at 536.

b. Count 3 is time-barred

While the statute of limitations period for denial of benefits claims under ERISA is based on state law, "[a]ccrual of an ERISA claim is a matter of federal common law." *Gelesky*, 828 F. Supp. 2d 935 (S.D. Ohio 2011). Similar to the accrual of ERISA fiduciary duty claims, an ERISA denial of benefits claim cause of action accrues "when a fiduciary gives a claimant clear and unequivocal repudiation of benefits." *Redmon* at 538 (quoting *Morrison v. Marsh & McLennan Cos.*, 439 F.3d 295, 302 (6th Cir. 2006)). "Under the 'clear repudiation rule,' the fiduciary's repudiation need not be formal. Rather, the repudiation alone provides notice to the claimant." (*Id.*). "Under federal law, as under most laws, the limitations clock starts ticking 'when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation.'" *Winnett*,

[4] The Termination Benefits Plans have a Wisconsin choice of law provision. (*See* Am. Compl. Page ID #909, Sec. 7(d)). However, even if Wisconsin law were to apply, the applicable statute of limitations would still be six years. *See Doe v. Blue Cross & Blue Shield United of Wisconsin*, 112 F.3d 869, 873 (7th Cir. 1997) (assuming that Wisconsin's six-year statute of limitations period for breach of contract applies to ERISA § 502(a)(1)(B) claim); *see also Chesemore v. Alliance Holdings, Inc.*, 284 F.R.D. 416, 420 (W.D. Wis. 2012) (Wis. Stat. § 893.93 provides a six-year statute of limitations for an action upon a liability created by statute when a different limitation is not prescribed by law).

609 F.3d at 408 (in regards to ERISA § 502 and LMRA claims). "The asserted actual knowledge of plaintiffs is not determinative if they did not act as reasonable person and, in effect, closed their eyes to evident and objective facts concerning the accrual of their right to sue." *Id.*

In *Winnett*, a group of retiree plaintiffs filed a lawsuit on March 28, 2006 alleging that they were wrongfully denied free, unalterable, lifetime healthcare benefits under a 1988 collective bargaining agreement (CBA). The Sixth Circuit first found that if the plaintiffs "discovered or reasonably should have discovered Caterpillar no longer was willing to provide free, unalterable, lifetime healthcare benefits under the 1988 CBA at least six years earlier, namely before March 28, 2000, the claim must be dismissed as time-barred." *Id.* at 409. In finding the claims time-barred, the court concluded that "the company's notices put the stakes clearly on the table in 1998 and 1999, properly forcing the retirees either to accept the bitter with the sweet and forgo litigation or to challenge the changes to the 1988 benefits package within six years of the 1998 CBA." *Id.* at 414-15.

In *Bilello v. JPMorgan Chase Retirement Plan*, 607 F. Supp. 2d 586 (S.D.N.Y. 2009), the plaintiffs were former employees who brought several ERISA claims based on various allegations pertaining to their former employer's conversation from a traditional defined benefit plan to a cash balance plan. This included a claim (Count 1) that the cash balance formulas used in the at-issue benefit plan created the risk of "backloading" in violation of ERISA's 133 1/3 percent rule. *Id.* at 595. The plaintiffs also alleged the benefit plan did not use the projections required by ERISA Section 203(a), 29 U.S.C. § 1053(a), which created a forfeiture of benefits. *Id.* at 596.

Using the same "clear repudiation" analysis employed by the Sixth Circuit, the court found these claims were time-barred. As to Count 1, the court found that a 1999 summary plan description provided an interest rate that clearly did not include language regarding a minimum rate as allegedly required by ERISA. "Plaintiff was therefore on notice that no such minimum rate existed, and his claim, wholly predicated on the absence of a minimum interest rate, began to accrue

by 1999." *Id.* at 595-96. The court also found "Counts 3 and 4 [] barred for those plans enacted between 1989 and 1997, since the plaintiff was on clear notice through SPDs and other notices issued prior to 2001 of the omissions identified by these counts." *Id.* at 596; *see also Durand v. The Hanover Ins. Group, Inc.*, 2011 U.S. Dist. LEXIS 35531 at *18 (W.D. Ky. Mar. 31, 2011) (the plaintiffs' ERISA claims accrued when the SPD was issued because the SPD clearly contained the alleged plan inadequacies and omissions upon which the plaintiffs' claims were based).

Here, plaintiffs allege that that the "Termination Benefit Plan accrues 0% for 10 years, 50% in year 11, 10% per year for years 11-20, and 5% per year for year 20 onward. Accordingly, the Termination Benefit Plan fails to satisfy any of the three [ERISA] rules designed to prevent anti-backloading of benefit accrual rates and violates 29 U.S.C. § 1054." (Am. Compl. ¶¶ 116-17). Plaintiffs' Amended Complaint also contains numerous quotations from the Agent Agreements which state that benefits under the Termination Benefits Plan "do not vest until 10 years of employment, and often 12 or 13 years based on an Agent-employee's participation in the Advanced Compensation Program, instead of vesting at 3 or 5 years as ERISA requires." (Am. Compl. ¶¶ 70-75, 82-85, Ex. A, Page ID# 907, 913, 915). As stated in the Amended Complaint, a copy of the Termination Benefits Plan with the vesting language that is the entire basis of Count 3 was part of the American Family Agent Agreement that all plaintiffs signed. (*Id.* at ¶¶ 47-48).

Thus, because the Agent Agreements unquestionably provided notice that the Termination Benefits did not "vest" in the manner plaintiffs allege was required by ERISA, this constituted a "clear repudiation" and the limitations clock started no later than when they signed the Agent Agreements. *See Winnett*, 609 F.3d at 408 ("the limitations clock starts ticking 'when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation.'"). Indeed, plaintiffs' claims are almost identical to the plaintiffs' time-barred claims in *Bilello*, in which the court found that the statute of limitations accrued upon dissemination

of the SPDs that made it clear the benefit plan contained the alleged inadequacies upon which the plaintiffs' claims were based. Because plaintiffs, with the exception of Durachinsky, signed their Agreements more than six years prior to the filing of their lawsuit, Count 3 is time-barred. *See Redmon*, 547 F.3d at 536; *Bilello*, 607 F. Supp. 2d at 595-96; *Durand*, 2011 U.S. Dist. LEXIS at *15-16.

3. Count 5 is time-barred

Count 5 is time-barred because plaintiffs knew, or should have known, American Family was not providing them with employee benefits no later than when they signed their Agent Agreements.

In *Brennan v. Metropolitan Life Ins. Co.*, 275 F.Supp.2d 406 (S.D.N.Y. 2003), the plaintiffs were independent insurance agents and consultants who were not permitted to participate in the employer's employee benefits programs, and were expressly excluded from participating in such per their written independent contractor agreements. They brought ERISA claims under Section 502(a)(1)(B). Applying the "clear repudiation" analysis, the court dismissed the claims as time-barred and found that "all of the district courts that have considered claims made by the individuals who were classified or treated as independent contractors have held that **the statute of limitations begins to run when the beneficiary first learns that she is considered an independent contractor and is therefore not entitled to benefits, regardless of whether she later files a formal claim for benefits**." *Id.* at 410 (collecting cases) (emphasis added).

In *Kienle v. Hunter Eng'g Co.*, 24 F. Supp. 2d 1004 (E.D. Mo. 1998), the plaintiff brought a proposed class action based on an ERISA claim, alleging he and other class members were denied employee benefits due to the fact they were designated as independent contractors. In granting the defendant's motion to dismiss on statute of limitations grounds, the court held: "plaintiff's claims under § 1132(a)(1) and (3) accrued on July 1, 1988, when he signed the agreement clearly informing him that he would be considered an independent contractor and not an employee." *Id.* at 1006-07; *see also Muller v. Am. Mgmt. Ass'n Int'l*, 368 F. Supp. 2d 1166 (D. Kan. 2004) (dismissing independent

contractor's ERISA claims as time-barred and finding that "the statute of limitations began to run at the time plaintiffs signed their independent contractor agreements."); *Kryzer v. BMC Profit Sharing Plan*, 2001 U.S. Dist. LEXIS 18300 (D. Minn. Nov. 1, 2001) (same); *Scruggs v. ExxonMobil Pension Plan*, 2008 U.S. Dist. LEXIS 49597, 10-17 (W.D. Okla. June 30, 2008) (independent contractor's limitation period began to run "when plaintiff either actually knew or should have known that she was classified not as an employee of ExxonMobil but, rather, as an independent contractor not entitled to benefits."); *Walker v. Pharm. Research & Mfrs. of Am.*, 439 F. Supp. 2d 103, 106-08 (D.D.C. 2006) (allegedly misclassified independent contractors' ERISA denial of benefit claims dismissed as time-barred upon finding that the plaintiffs' claims accrued from when they signed their independent contractor agreements); *Keen v. Lockheed Martin Corp.*, 486 F. Supp. 2d 481 (E.D. Penn. 2007) (same).

As in the cases cited above, plaintiffs' claims that they were improperly excluded from defendants' various employee benefit plans accrued no later than the date on which they signed their Agent Agreements which stated they were independent contractors and not employees. In addition, the Agent Agreements made clear that plaintiffs were not eligible for the various American Family employee benefits and that the Agreement specified all the compensation to which they were entitled. (Amend. Compl., Ex. A, Secs. 5(a) and 6(a)). Thus, plaintiffs knew, or should have known, that they were being excluded from participating in defendants' benefit plans based on their status as independent contractors no later than when they signed their Agreements. The six-year statute of limitations period therefore began running at that time. *See Winnett*, 609 F.3d at 408; *Brennan*, 275 F.Supp.2d at 410. Because all plaintiffs (except for Durachinsky) signed their Agent Agreements more than six years prior to the filing of their lawsuit, Counts 5 is also time-barred.

E. Counts 5 and 6 Should Also Be Dismissed Because Plaintiffs Failed To Exhaust Their Administrative Remedies

Plaintiffs' claims concerning their alleged entitlement to benefits under American Family's employee benefit plans (Counts 5 and 6) should also be dismissed because plaintiffs failed to exhaust their administrative remedies under these plans.

A plan participant or beneficiary may not file suit under ERISA until he or she has exhausted all available administrative remedies: "[the] administrative scheme of ERISA requires a participant to exhaust his or her administrative remedies prior to commencing suit." *Id.* at 986. The exhaustion requirement "enables Plaintiff fiduciaries to 'officially manage their funds; correct their errors; interpret plan provision; and assemble a factual record which will assist the court in reviewing the fiduciary's actions.'" *Baxter v. C.A. Muer Corp.*, 941 F.2d 451, 454 (6th Cir. 1991) (per curium). If a party pleads that resorting to the plan's appeals procedure would be futile, the burden is on that party to show by a "clear and positive indication that her claim will be denied on appeal." *Brigolin v. Blue Cross Blue Shield of Michigan*, 2013 U.S. App. LEXIS 4679 at *20 (6th Cir. Mar. 4, 2013).

In *Reid v. Supershuttle Int'l, Inc.*, 2010 U.S. Dist. LEXIS 26831 (E.D.N.Y. Mar. 22, 2010), the plaintiffs signed agreements stating that they would work for defendants as independent contractors. The plaintiffs filed suit alleging that defendants exercised extensive control over their day-to-day operations, which rendered them employees of defendants. *Id.* at *2-3. The plaintiffs brought a number of claims, including that they were entitled to participate in the defendants' ERISA employee benefit plans. (*Id.* at *3). The defendants filed a 12(b)(6) motion to dismiss, in part on the grounds that the plaintiffs failed to exhaust their administrative remedies under the benefit plans. The court noted that in their complaint, the plaintiffs alleged that they:

> have either attempted to exhaust administrative remedies but were prevented by Defendant from exhausting such remedies, or exhaustion would be futile wherein Defendant has adjudged Plaintiffs and the Class Members to be independent contractors rather than employees. *Id.* at *21.

The court found that these allegations "implicitly admit that plaintiffs failed to exhaust whatever administrative remedies were available to them. Accordingly, the elements of the defendants' affirmative defense of exhaustion are on the face of the complaint." *Id.* at *21. The plaintiffs alleged that exhaustion would be futile and that the question was a legal one – whether they were misclassified as independent – and, therefore, their ERISA claim was not appropriate for administrative review. *Id.* at *21-22. The court noted that in *Davenport v. Abrams*, 249 F.3d 130, 133 (2d Cir. 2001), the Second Circuit "held that an independent contractor could not demonstrate futility when she made no attempt to file a formal claim for benefits or request a summary plan description." The court therefore granted the defendants' motion to dismiss the ERISA claims finding that "[t]he plaintiffs in this case, also independent contractors, did not make any attempt to file a claim for benefits and, thus, cannot demonstrate futility." *Id.* at *22.

As with the plaintiffs in *Reid*, plaintiffs also implicitly admit that they failed to exhaust whatever administrative remedies were available to them under the American Family benefit plans:

> American Family has for decades maintained that its agents, Plaintiffs and the Class, were independent contractors even when agents challenged the designation. . . . Accordingly, to the extent Plaintiffs' claim are construed to be directed to the interpretation of the plans and not their legality, and to the extent any administrative remedies were available, it would have been futile for Plaintiffs and the Class to pursue them." (Am. Compl., ¶¶ 91-93).

Indeed, as in *Reid*, plaintiffs do not allege that they made **any** attempt to file a claim for benefits under the American Family employee benefit plans. (*See* Am. Compl.). Moreover, as reflected in the terms of the plans that plaintiffs specifically reference in their Amended Complaint, such as the American Family Retirement Plan, all claims regarding eligibility for benefits under the plan must go through a mandatory claims procedure that is ultimately decided by the Plan Administrator. (Ex. 1, American Family Retirement Plan SPD, Sec. 11.4 and 11.5).

Thus, plaintiffs cannot demonstrate futility and Counts 5 and 6 should be dismissed for plaintiffs' failure to exhaust their administrative remedies. *See Reid*, 2010 U.S. Dist. LEXIS 26831 at

*21-22; *Jaeger*, 236 F. Sup. 2d at 823. (ERISA claim for failure to exhaust dismissed where the plaintiff "failed to request or apply for any of the benefits to which she now claims she was entitled.").[5]

F. Plaintiffs' Claims For Injunctive and Declaratory Relief (Counts 1 and 2) Should Be Dismissed To The Same Extent As Their Substantive Claims Upon Which These Counts Are Based

Plaintiffs' claims for declaratory relief under ERISA (Count 1) and injunctive relief (Count 2) should also be dismissed to the same extent as their substantive claims. Neither claim asserts an independent basis for relief. (*See* Am. Compl. ¶¶ 102-07).[6] Count 1 seeks certain declaratory relief under Section 502(a)(3) of ERISA and the Declaratory Judgments Act, seemingly on the basis of the arguments articulated in Counts 3 through 6. (*Id.*). The Sixth Circuit has held that "[a] request for declaratory relief is barred to the same extent that the claim for substantive relief on which it is based would be barred." *Int'l Assoc. of Machinists and Aerospace Workers v. Tennessee Valley Authority*, 108 F.3d 658, 668 (6th Cir. 1997); *see also Reid*, 2010 U.S. Dist. LEXIS at *27-28 (same). Thus, plaintiffs' claim for declaratory relief fails for the same reason as their substantive claims. Likewise, plaintiffs' claim for injunctive relief does not assert an independent basis for the relief sought, but rather seeks

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[5] Defendants note that in *Fredebaugh v. Rockwell Automation/Reliance Electric Tech.*, 2010 U.S. Dist. LEXIS 114840 (N.D. Ohio Oct. 28, 2010), this Court relied on Second Circuit authority and denied summary judgment on exhaustion of remedies grounds on an ERISA denial of benefits claim brought by allegedly misclassified independent contractors. However, this Court made its ruling while noting that "[n]either side has provided any case law addressing the issue of whether an 'unacknowledged' employee (or wrongfully designated employee) is relieved of the duty to attempt administrative remedies under the futility exemption." As discussed above, both *Davenport v. Abrams*, 249 F.3d 130, 133 (2d Cir. 2001), and *Reid v. Supershuttle Int'l, Inc.*, 2010 U.S. Dist. LEXIS 26831 (E.D.N.Y. Mar. 22, 2010), addressed this exact issue, and both found that allegedly wrongfully designated employees are required to exhaust their administrative remedies prior to bringing a lawsuit under ERISA. Further, unlike in *Fredebaugh*, the terms of the American Family summary plan descriptions excludes independent contractors such as plaintiffs from being "Covered Employees" entitled to retirement benefits under the plan and requires that all claims regarding eligibility for benefits be submitted through a mandatory claims procedure that is ultimately decided by the Plan Administrator. (Ex. 1 at Secs. 2.1(m)(q) and (bb), 5.1, 11.4 and 11.5).

[6] It should also be noted that plaintiffs' apparent request for the Court to rewrite the alleged ERISA plans is improper. While the Supreme Court indicated that reformation might be available under § 502(a)(3), it only exists to "reform contracts to reflect the mutual understanding of the contracting parties where 'fraudulent suppression[s], omission[s], or insertion[s], material[ly] . . . affect[e]d' the substance of the contract." *CIGNA v. Amara*, 131 S. Ct. 1866, 1881 (2011). Plaintiffs have not (and could not have) pled such facts which would permit the reformation of the alleged ERISA plans.

an injunction to remedy the alleged ERISA violations. (Amended Complaint ¶¶ 104-107). This claim therefore also fails to the same extent as plaintiffs' substantive claims.

IV. CONCLUSION

Plaintiffs have not and cannot adequately allege that they were American Family employees entitled to benefits under ERISA. All their claims therefore should be dismissed with prejudice. Plaintiffs' claims should also be dismissed for a plethora of other reasons, including their admitted failure to exhaust administrative remedies, statute of limitations, and their admitted ineligibility for the benefits sought under the terms of the applicable plans.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on May 13, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Gregory V. Mersol
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