

1 consideration of the written memoranda, the arguments of counsel, and the record, the
2 Court grants Defendants' motion as provided herein.

3 **I. PROCEDURAL/FACTUAL BACKGROUND**

4 On September 13, 2011, Plaintiffs filed a complaint against the Secretary of
5 Labor alleging that the elimination of the subsidized early retirement option of their
6 retirement plan violated the Due Process Clause of the Fifth Amendment and that the
7 distinction between early retirees already in “pay status” and those not yet retired
8 amounts to a violation of the equal protection component of the Due Process Clause.
9 The background facts that pertain to Plaintiffs’ original Complaint are recited in the
10 Order Granting Motion to Dismiss entered on March 9, 2014. (ECF No. 16) and will
11 not be repeated here.

12 On March 9, 2012, judgment was entered by this Court in favor of the
13 Secretary of Labor. (ECF No. 18). Plaintiffs appealed that judgment to the Ninth
14 Circuit Court of Appeals. (ECF No. 23). On September 3, 2013, the Ninth Circuit
15 vacated the trial court judgment and instructed the Court to dismiss the case without
16 prejudice. The Ninth Circuit ruled that Plaintiff Arendt lacked standing to bring a
17 claim that the elimination of his early retirement benefits violated the due process and
18 equal protection clauses. (ECF No. 24 at 3). Because the Circuit found it was without
19 jurisdiction to rule, the question of the PPA's¹ constitutionality was not decided. (ECF
20 No. 24 at 4). On October 17, 2013, Plaintiffs filed their First Amended Complaint,
21 substituting the Retirement Fund Trustees (“the Fund”) and the Plan Administrator
22 (“Zenith”) as defendants in place of the Secretary of Labor. (ECF No. 28). Plaintiffs'
23 claims under the First Amended Complaint include: (1) a retroactive taking in
24 violation of the Fifth Amendment; and (2) gross discrimination among certain Fund
25 participants in violation of the equal protection clause of the Fifth Amendment.

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27 ¹Pension Protection Act of 2006 (“PPA”), Pub. L. No. 109-280, 120 Stat.
28 780 (Aug. 17, 2006).

1 According to their First Amended Complaint, Plaintiffs participate in a
2 collectively bargained multiemployer plan that offered an early retirement pension
3 benefit known as the “Rule of 80 Early Retirement” pension (“the Plan”) that allowed
4 participants to retire before age 65 without reducing their basic retirement benefit. In
5 order to be eligible for the “Rule of 80,” participants had to reach a total of 80 when
6 adding (i) their age, and (ii) the number of years in which they participated in the plan
7 and contributed 400 or more working hours. Summary Plan Description and
8 Retirement Plan, as amended January 1, 2001 (“2001 Plan”), ECF No. 11-2 at 12.
9 In August of 2009, the Plan notified Plaintiffs and other Plan participants that due to
10 recent severe investment losses and the decline in the stock market, the Plan was
11 underfunded and in “critical status.” ECF No. 16 at 2. Because of the financial
12 insecurity of the Plan—then less than 65 percent funded and projected to be
13 underfunded for the Plan year beginning July 1, 2013—it was required to take
14 measures in order to continue funding normal benefits to present and future retirees.
15 *Id.* Acting pursuant to the PPA, the Plan’s Board of Trustees decided to eliminate
16 the Plan’s adjustable benefits, including subsidized early retirement. *Id.*

17 **II. DISCUSSION**

18 **A. Fed.R.Civ.P. 12(b)(6) Standard**

19 A Rule 12(b)(6) dismissal is proper only where there is either a "lack of a
20 cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable
21 legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).
22 In reviewing a 12(b)(6) motion, the court must accept as true all material allegations
23 in the complaint, as well as reasonable inferences to be drawn from such allegations.
24 *Mendocino Environmental Center v. Mendocino County*, 14 F.3d 457, 460 (9th Cir.
25 1994); *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The complaint
26 must be construed in the light most favorable to the plaintiff. *Parks School of*
27 *Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). The sole issue
28 raised by a 12(b)(6) motion is whether the facts pleaded, if established, would support

1 a claim for relief; therefore, no matter how improbable those facts alleged are, they
2 must be accepted as true for purposes of the motion. *Neitzke v. Williams*, 490 U.S.
3 319, 326-27, 109 S.Ct. 1827 (1989). The court need not, however, accept as true
4 conclusory allegations or legal characterizations, nor need it accept unreasonable
5 inferences or unwarranted deductions of fact. *In re Stac Electronics Securities*
6 *Litigation*, 89 F.3d 1399, 1403 (9th Cir. 1996).

7 As it is not necessary for the court to review materials outside of the pleadings
8 in order to make its determination in this matter, Defendants' motion is not converted
9 to a summary judgment motion under Fed. R. Civ. P. 56 and reliance on the 12(b)(6)
10 standard is appropriate.

11 **B. Defendants' and Intervenor's Arguments**

12 **1. The Fund and Zenith are not government or state actors.**

13 Defendants and Intervenor (collectively "Defendants") argue that Plaintiffs'
14 claims for violations of the 5th Amendment of the U.S. Constitution must be dismissed
15 because the Fund and Zenith are private entities, not government or state actors.
16 Citing *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 936-937 (1982), Defendants
17 conclude that because state action is required for Plaintiffs' Equal Protection and
18 takings claims, *Sutton*² should apply to and preclude the bringing of their
19 constitutional claims.

20 In accordance with the PPA, the Plan sponsor (the Plan's Board of Trustees)
21 agreed that one of the ways they would rehabilitate the Plan was by eliminating all
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23 ²In *Sutton v. Providence St. Joseph Medical Ctr.*, 192 F.3d 826, 839 (9th
24 Cir. 1999), the Ninth Circuit addressed "whether governmental compulsion in the
25 form of a general statute, without more, is sufficient to deem a private defendant a
26 governmental actor," and concluded that a "plaintiff must establish some other
27 nexus sufficient to make it fair to attribute liability to the private entity." *Id.* at
28 841.

1 of the adjustable benefits offered by the Plan, including subsidized early retirement.³
2 The Plan did not reduce accrued benefits payable at normal retirement age and did not
3 cut any benefits of participants who retired and entered “pay status” (as defined in
4 ERISA § 305(I)(6), 29 U.S.C. §1085(I)(6)) before they were notified that the Plan
5 was in critical status. Defendants conclude that there is no state action sufficient to
6 support a constitutional argument in this matter, especially when coupled with this
7 Court’s previous finding that Plaintiffs’ loss of early retirement benefits pursuant to
8 a Rehabilitation Plan adopted by their private pension plan, was not an impermissible
9 taking, regulatory or otherwise, by the Government.

10 **2. The PPA is rationally based legislation and not unconstitutional.**

11 In August of 2009, the Retirement Plan, a collectively bargained multiemployer
12 plan, notified its participants that it had suffered severe investment losses in the stock
13 market decline of 2008 and early 2009, and was underfunded and in "critical status."
14 The notice explained that the Plan was less than 65 percent funded and that the Plan
15 was projected to have an accumulated funding deficiency for the plan year beginning
16 July 1, 2013. As a result, the Retirement Plan was required under the PPA, to take
17 steps to resolve its funding crisis so that it could continue to fund normal benefits for
18 current and future retirees. ERISA § 302, 29 U.S.C. §1082. Although the PPA gives
19 the plan sponsor (subject to collective bargaining) the ability to make such decisions,
20 it protects participants' ability to receive normal retirement benefits. ERISA
21 §305(e)(8)(B), 29 U.S.C. §1085(e)(8)(B).

22 The PPA's express authorization of the reduction or elimination of adjustable
23 benefits (including early retirement benefits), through rehabilitation plans of those
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25 ³“Rule of 80 Early Retirement Pension,” (“Rule of 80”), was funded at
26 Section 3.08 of the Plan by an allocation of “20% of all negotiated Employer
27 Contributions” via an additional and dedicated payroll contributions from Active
28 Participants.

1 plans in critical status, is an exception to ERISA's general "anti-cutback rule."

2 ERISA § 204(g), 29 U.S.C. § 1054(g).⁴

3 Defendants suggest that Plaintiffs' interest in employer-subsidized early
4 retirement benefits was never absolute, but always was subject to elimination in the
5 event of plan termination under ERISA Section 4041A, 29 U.S.C. § 1341a.
6 Moreover, not only is the Government not taking any of the Plan's (or Plaintiffs')
7 assets away through the PPA, but that legislation is directed to ensuring that plans
8 facing dire financial circumstances can continue to pay normal retirement benefits
9 without defaulting.

10 **C. Plaintiffs' Argument**

11 In opposing Defendant's Motion to Dismiss, Plaintiffs seek a ruling that the
12 PPA as applied to Plaintiffs creates (1) an unconstitutional taking under the Takings
13 Clause of the Fifth Amendment, and (2) a denial of Equal Protection under the Fifth
14 Amendment.

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18 ⁴ERISA's anti-cutback rule provides, with certain exceptions not relevant
19 here, that "[t]he accrued benefit of a participant under a plan may not be decreased
20 by an amendment of the plan." 29 U.S.C. § 1054(g)(1). The rule applies to the
21 participant's basic accrued benefit, as well as to accrued early retirement benefits,
22 retirement-type subsidies, and optional forms of benefits. 29 U.S.C. § 1054(g)(2).
23 Such benefits may only be eliminated or reduced by amendment on a prospective
24 basis, i.e., with respect to benefits that have not yet accrued. *Allen v. Honeywell*
25 *Retirement Earnings Plan*, 382 F.Supp.2d 1139, 1149-50 (2005) citing *Campbell*
26 *v. BankBoston*, 327 F.3d 1, 8-9 (1st Cir.2003) (holding that elimination of a future
27 expected benefit that has not yet accrued does not constitute an ERISA violation).
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1 Plaintiffs assert, citing *Eastern Enterprises*,⁵ that the Defendants' rehabilitation
2 plan is mandated by the PPA pursuant to 29 U.S.C. §1085(a)(2)(A) and allegedly
3 results in a retroactive elimination of previously "earned" and promised benefits.
4 Therefore, Plaintiffs reason, this presents an "economic regulation" that can "effect
5 a taking," in violation of the "Takings Clause of the Fifth Amendment." Plaintiffs
6 claim that Defendants' rehabilitation plan was mandated by the PPA. Plaintiffs
7 appear to argue, citing snippets of the lengthy *Eastern Enterprises* opinion, that the
8 "mandated" rehabilitation plan reneged on a promise under contract because such a
9 rehabilitation plan trumps the protection of ERISA's "anti-cutback" rule and uses "
10 . . . a shorter cut than the constitutional way of paying for the change." *Eastern*
11 *Enterprises*, 524 U.S. 498 at 528, 522- 523 (1998), quoting *Pennsylvania Coal Co.*
12 *v. Mahon*, 260 U.S. 393, 416 (1922).

13 Plaintiffs further argue that they have a fundamental right to subsidized early
14 retirement benefits and that their constitutional challenge to § 202 of the PPA is
15 subject to higher scrutiny because its application in this case violates Plaintiffs'
16 fundamental rights by allowing a retroactive taking of their early retirement benefits.
17 Plaintiffs conclude that the PPA provision fails such strict scrutiny.

18 **D. Analysis**

19 The Court previously found that Plaintiffs failed to demonstrate any state
20 action, which is a necessary predicate to a suit alleging due process and equal
21 protection claims. Similarly, the Court again finds that Plaintiffs' Equal Protection
22 and takings claims in the Amended Complaint fail to demonstrate any government
23 action involving these Defendants who are private actors, and whom Plaintiffs allege
24 were "compelled" to act by the government. The mere existence of the provisions in
25 the PPA allowing the elimination of adjustable benefits does not amount to state
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27 ⁵*Eastern Enterprises v. Apfel*, 524 U.S. 498, 522-39 (1998).
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1 action. Unlike the statute that is at issue in the *Eastern Enterprises* case, the PPA
2 does not mandate a specific course of action but permits discretion to be exercised,
3 provided that pension plans in critical financial status are addressed in a rational
4 manner. Although Plaintiffs assert that the notice sent out to participants affected by
5 the rehabilitation plan has language referencing the mandatory nature of the action
6 being taken, this does not change the fact that no specific course of action was
7 mandated by the PPA.

8 The Defendants exercised complete, autonomous discretion in creating a
9 rehabilitation plan for the Fund. The PPA directed that the Fund's Board adopt and
10 implement a rehabilitation plan to ensure normal benefits were paid, as the Fund
11 was less than 65 percent funded and was projected to have an accumulated funding
12 deficiency as early as July 2013. (ECF No. 11 at Exhibit 1). The collective
13 bargaining parties to the Fund also agreed with the decision to eliminate the Rule of
14 80 benefits. No governmental actor coerced, directed, suggested, or even reviewed
15 Defendants' actions in creating and dictating the contents of a rehabilitation plan.
16 Simply put, Defendants (the Fund and Zenith) followed the law as private actors.

17 The Court also previously rejected an earlier argument by Plaintiffs relating to
18 a “takings” claim that did not rely on the Fifth Amendment Takings Clause. Plaintiffs
19 now specifically allege a takings claim under the Takings Clause. Plaintiffs
20 essentially seek a determination of whether Defendants violated ERISA's anti-cutback
21 statute,⁶ in eliminating early retirement to those participants that are not in “pay
22 status.” While it is well established as a matter of law that government regulation
23 can effect a Fifth Amendment taking,⁷ not every economic change required by law
24 constitutes a “taking” in violation of the Fifth Amendment. *Deltona Corp. v. U. S.*,

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26 ⁶Section 204(g), 29 U.S.C. § 1054(g) (2010).

27 ⁷*Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123, 98 S.Ct.
28 2646, 2658, 57 L.Ed.2d 631 (1978),

1 657 F.2d 1184, 1191 (1981).

2 Plaintiffs appear to argue that the early retirement benefit established in §
3 Section 3.08 of the Plan at issue is protected by the anti-cutback statute, § 204(g), 29
4 U.S.C. § 1054(g), which Plaintiffs suggest “extends to all participants the right to
5 ‘grow into’ a benefit subsidy by satisfying the plan's pre-amendment eligibility
6 requirements.” *See Bellas v. CBS, Inc.*, 221 F.3d 517, 527 (3d Cir.2000). In other
7 words, Plaintiffs would prefer that if a plan is amended to eliminate a subsidized early
8 retirement benefit for employees who have completed or nearly completed the
9 pre-amendment eligibility requirements but are not in “pay status,” an employee
10 should be given the right to “grow into” early retirement benefits as long as an
11 employee satisfies, or will be able to satisfy, the eligibility requirements prior to the
12 amendment or after an amendment to the plan takes effect.

13 Plaintiffs would be eligible for early retirement benefits (retire before age 65
14 without reducing their basic retirement benefit) provided in the Summary Plan
15 Description and Retirement Plan at issue, if they had met the Plan eligibility
16 requirements—primarily attaining a total of 80 when adding (i) their age, and (ii) the
17 number of years in which they participated in the plan and contributed 400 or more
18 working hours pre-amendment or before the critical date of August of 2009.

19 The PPA exempted the Defendants’ continued payment of early retirement
20 benefits already in “pay status” as of a date certain but not thereafter. 29 U.S.C.
21 §1085(e)(8)(A)(ii) (“exception for retirees”) and §1085 (i)(6) (“pay status”
22 definition). For example, a proper application approved and placed in pay status for
23 a “Rule of 80” pension prior to August, 2009, continues to be paid by Defendants.
24 That same application made in September, 2009, would be denied because the
25 benefit, although “earned by service,” was extinguished, as in Plaintiffs’ cases,
26 pursuant to the rehabilitation plan mandated by the PPA.

27 While both Plaintiffs had accrued significant points potentially leading to the
28 right to retire at age 55 without reduction of benefits, neither Plaintiff was in “pay

1 status” before changes to the pension plan were made. “Adjustable benefits” are
2 defined in the PPA to include “benefits, right, and features under the plan, including
3 ... early retirement benefits not yet in pay status.”⁸ Plaintiffs, therefore, had an
4 expectancy that they would receive the supplemental benefit but not an absolute right
5 to collect under all circumstances and the timing of the rehabilitation plan. Although
6 Plaintiffs will suffer no economic loss with respect to their normal retirement
7 benefits, the elimination of early retirement benefits could reasonably be seen as
8 upsetting their expectation that they would be able to retire early with full benefits.
9 However, as the Court noted in *Concrete Pipe*, “. . . pension plans had long been
10 subject to federal regulation, and those who do business in the regulated field cannot
11 object if the legislative scheme is buttressed by subsequent amendments to achieve
12 the legislative end.” *Concrete Pipe and Products of California, Inc. v. Construction*
13 *Laborers Pension Trust*, 508 U.S. 602, 645-46 (1993) (internal quotations omitted),
14 *citing Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1,15-16 (1976) (“legislation
15 readjusting rights and burdens is not unlawful solely because it upsets otherwise
16 settled expectations.”).

17 As for Plaintiffs’ claim that the PPA impinges on their fundamental right
18 to early retirement benefits under their Rule of 80 Plan, the Court finds early
19 retirement is not recognized as a “fundamental right” as the great weight of authority
20 suggests that even public employment is not a fundamental right, at least for purposes
21 of substantive due process. *Massachusetts Board of Retirement v. Murgia*, 427 U.S.
22 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976). The Court also finds that a challenge to
23 Section 202 of the PPA under the Equal Protection component of the Fifth
24 Amendment is subject to rational basis review, not a strict scrutiny review. *Pension*
25 *Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984); *U.S. Railroad Ret.*
26 *Bd. v. Fritz*, 449 U.S. 166, 177 (1980). Because Section 202 of the PPA plainly
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28 ⁸ERISA § 305(e)(8)(A)(iv), 29 U.S.C. § 1085(e)(8)(A)(iv).

1 serves legitimate government purposes through means that are rationally related to
2 those purposes, Plaintiffs cannot meet the “extremely high” burden applicable to
3 rational basis review. *Richardson v. City and County of Honolulu*, 124 F.3d 1150,
4 1162 (9th Cir. 1997). It would appear that Congress acted rationally, in theory and
5 in fact, to protect and preserve Plaintiffs’ and others’ normal retirement benefits, and
6 to avoid the cost to the Pension Benefit Guaranty Corporation⁹ that would occur from
7 a defaulting pension plan.

8 **III. CONCLUSION**

9 The Court believes the result it has reached is proper for the reasons set forth
10 above and that it is consistent with the legislative goals of ERISA and the PPA,
11 statutes which are to be construed liberally to achieve those goals. *FHA v. The*
12 *Darlington, Inc.*, 358 U.S. 84, 91 (1958) (“Those who do business in the regulated
13 field cannot object if the legislative scheme is buttressed by subsequent amendment
14 to achieve the legislative end.”). The PPA, which ensures the long-term financial
15 stability of pension plans, required the Defendants to modify the Plan which was done
16 in accordance with the PPA. Under the terms of the amended Plan, Plaintiffs were
17 not entitled to early retirement benefits (an adjustable benefit) because they were not
18 in pay status.

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22 ⁹The Pension Benefit Guaranty Corporation (“PBGC”) is a federal
23 corporation created under Title IV of ERISA whose purpose is to encourage the
24 continuation and maintenance of certain private pension plans and to provide for
25 payment of pension benefits under those plans. ERISA § 4002(a), 29 U.S.C. §
26 1302(a). At insolvency, the PBGC will provide financial assistance to the plan so
27 it can provide benefits at the guarantee level. ERISA § 4261(a), 29 U.S.C. §
28 1431(a).

