UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

KENNETH WALTON GEORGE, DENNIS REED BOWEN, CLYDE FREEMAN, GEORGE MOYERS, JIM MATTHEWS, and HENRY MILLER, on their own behalf and on behalf of a class of persons similarly situated,	**Case No.: 8:06-CV-00373-RBH**
Plaintiffs,	
vs.	
DUKE ENERGY RETIREMENT CASH BALANCE PLAN and DUKE ENERGY CORPORATION,	
Defendants.	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR *IN CAMERA* REVIEW, TO ABROGATE PRIVILEGE, AND TO COMPEL

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The Plaintiffs, individually and as class representatives, move this Honorable Court for an Order abrogating the attorney-client and work-product privileges claimed by Defendants with regard to the categories of documents described below, on the ground that privilege has been vitiated pursuant to the crime/fraud/tort exception to privilege.

I. INTRODUCTION

Throughout the course of this action, Duke has engaged in on-going obstruction of the litigation process. Duke has dissembled, concealed, manipulated, and misrepresented. It has used its lawyers to avoid its discovery obligations and to commit a fraud on this Court. In the latest chapter of litigation misconduct, Duke has brazenly solicited releases of this litigation directly from class members and the named plaintiffs, post-certification, in derogation of class counsel's attorney-client relationship and this Court's authority with regard to the due administration of the class notice process. (Dkt. 267 and 268).

The crime/fraud exception to the attorney-client and work product privileges provides that otherwise privileged communications or work product made for, or in furtherance of, the purpose of committing a crime or fraud will not be privileged or protected. *Chaudhry v. Gallerizzo*, 174 F.3d 394, 403 (4th Cir. 1999); *In re Grand Jury Proceedings*, 33 F.3d 342, 348 (4th Cir. 1994). The crime/fraud exception requires the disclosure of otherwise privileged communications or material obtained in the course of the attorney's duties on the client's behalf which are made or performed in furtherance of a crime, fraud, or other misconduct fundamentally inconsistent with the basic premises of the adversary system. *See, e.g., Clark v. United States*, 289 U.S. 1 (1933); *In re Sealed Case*, 676 F.2d 793, 812 (D.C. Cir. 1982). "A privilege surviv[es] until the relation is abused and vanish[es] when abuse is shown to the satisfaction of the judge . . ." *Clark*, 289 U.S. at 16.

"Whereas confidentiality of communications and work product facilitates the rendering of sound legal advice, advice in furtherance of a fraudulent or unlawful goal cannot be considered 'sound.' Rather advice in furtherance of such goals is socially perverse, and the client's communications seeking such advice are not worthy of protection." *In re Grand Jury Subpoena*, 731 F.2d 1032, 1038 (2nd Cir. 1984). As a District Court in Virginia astutely noted in a recent decision:

> Thus, although referred to as an "exception" to the attorney-client privilege and work product doctrine, the crime/fraud exception is not truly an exception. Rather, it is an exclusion of certain activity from the protective reach of the privileges. *In re Grand Jury Subpoena*, 731 F.2d at 1038. As one noted commentator has put it, the crime/fraud "exception" merely delineates the outer contours of the attorney-client and work product privileges, recognizing the commonsense notion that these privileges "cannot avail to protect the client in concerting with the attorney a crime or other evil enterprise." 8 John Wigmore, *Evidence* § 2298 at 572 (McNaughton rev. 1961); *see also In re St. Johnsbury Trucking Co. v. Bankers Trust Co.*, 184 B.R. 446, 456 (Bankr. D. Vt. 1995) ("The exception is not really an exception, but an exclusion.").

Rambus, Inc. v. Infineon Techs. AG, 222 F.R.D. 280, 287 (E.D. Va. 2004).

In finding that claims of spoliation by a litigant supported the abrogation of privilege, the *Rambus* Court stated:

> The term "crime/fraud exception," however, is "a bit of a misnomer," *Blanchard v. Edgemark Fin. Corp.*, 192 F.R.D. 233, 241 (N.D. I11. 2000), as many courts have applied the exception to situations falling well outside of the definitions of crime or fraud. *E.g.*, *Parrott v. Wilson*, 707 F.2d 1262, 1271 (11th Cir. 1983) (stating that crime/fraud exception applies to work product created as result of lawyer's "unprofessional conduct"); *Cleveland Hair Clinic, Inc. v. Puig*, 968 F. Supp. 1227, 1241 (N.D. Ill. 1996) (holding crime/fraud exception applicable to communications made in furtherance of "***bad faith litigation conduct***"). Although the United States Court of Appeals for the Fourth Circuit has not set forth a precise test for application of the crime/fraud exception in cases of spoliation, it is inconceivable that our Court of Appeals would find that a client's interest in confidential communications and work product respecting destruction of documents in anticipation of litigation would outweigh the societal need to assure the integrity of the process by which litigation is conducted which, of course, is the purpose of prohibiting spoliation of evidence.

Id. at 288 (emphasis added)..

This Motion will focus on Duke's "bad faith litigation conduct" *vis-a-vis* the recently uncovered determination letter process whereby Duke was forced to retroactively re-write major provisions of its cash balance plan in order to secure an Internal Revenue Service (IRS) qualification letter. [1] Although Duke now seeks to convince this Court that the documents it spent two years concealing are helpful to and confirm its positions in this case, the documents, as will be detailed in the up-coming summary judgment briefing, confirm positions Plaintiffs have taken all along, that (1) Duke's interpretation of § 5.04(c) created an illegal cut-back; and (2) the 1999 Plan did not meet the safe harbor requirements of IRS Notice 96-8. [2]

Duke ridiculously postures that Plaintiffs must pass an "acid test" of Duke's creation, and agree to be bound by the new determination letter Duke received from the IRS ***only*** after it retroactively amended its plan to take out the very language of § 5.04(c) that is the foundation for

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[1] From the misdeeds chronicled in Plaintiffs' initial Motion to Compel dated Nov. 8, 2007 (Dkt. 119) – including Duke's early assertion of frivolous claims of privilege in its 468-page non-searchable, illegible 5-point font privilege log – to the present disruption of the class notice/opt-out process, Duke has persistently snubbed its nose at the legal, ethical and fiduciary obligations imposed on it as an ERISA fiduciary and party litigant. Plaintiffs believe a Motion for Sanctions based on the Duke's continuing course of conduct will be warranted once the record on the pending motions is complete.

[2] The best that Duke can say is that it was able, after months of unilateral pressure on and lobbying of its IRS reviewers, to back down the IRS from its position that the requisite amendments had to affirmatively state a whipsaw provision. Instead, the IRS ultimately required only an actuarial equivalence provision that even Duke commented "ha[d] no practical effect in the absence of whipsaw." Ex. 1 The truly interested parties, the plan participants, were kept in the dark rather than afforded the opportunity to advocate to the IRS the alternative and ***legal*** interpretation of Plan provision §5.04(c) espoused in this litigation. The amendment language finally approved by the IRS is not surprising given there was but one voice to be heard in the process and that was Dukes' voice.

a major class claim in this case.[3] Duke throws down this gauntlet after having affirmatively represented to this Court, in writing, that it had no intention of invoking the retroactive amendment in this case (Ex. 2), and also after having made the same commitment on the record in the recent Rule 30(b)(6) deposition of Duke corporate representative, Robert Ringel. Ex. 3: Ringel Depo. (1/1410) at 167:24 – 168:17. Still Duke cannot restrain itself from seeking advantage from the retroactive amendment in some way and this parlor trick is its way of attempting a backdoor gutting of Plaintiffs' claims.

Plaintiffs decline to participate in Duke's "acid test." All parties can make their arguments to this Court on summary judgment and they will either be persuasive or disregarded.

II. DOCUMENTS AT ISSUE

As an initial matter, Plaintiffs request that this Court order an *in camera* review of all communications and documents (including electronic documents) memorializing communications, between and among Duke, its attorneys at Sidley Austin LLP, and Duke's in-house counsel, and any notes or memoranda, from September 15, 2007 through October 2, 2009[4] which discuss, reference, contemplate, or relate in any way to (1) producing or not producing in this litigation documents concerning the IRS determination letter proceedings; (2) producing or not producing in this litigation the retroactive amendments resulting from the IRS determination letter proceedings; (3) supplementation requirements of Rule 26(e) F.R.Civ.P *vis-a-vis* documents generated in the course

[3] Plaintiffs obviously object to application of any retroactive amendment to them as they are entitled to have their benefits determined under the language of the Plan as it existed during the class period.

[4] The date parameters bookend the initial PanEnergy letter from the IRS and the production by Duke of the retroactive amendments to the 1999 Plan, mis-labeled as amendments to the 2009 Duke Energy Retirement Cash Balance Plan.

of the IRS determination letter proceedings; (4) the materiality or relevance of the documents generated in the course of the IRS determination letter proceedings to this litigation; (5) the use of Defendants' objection #11 to avoid supplementation of Responses to Plaintiffs' Requests for Production; (6) educating or not educating Mr. Richard Jefferies, Duke's Rule 30(b)(6) representative, with regard to the complete corporate knowledge concerning the IRS determination letter proceedings as they related to the issues of whipsaw and §5.04(c); (7) advising or not advising the Court in this litigation concerning the IRS determination letter proceedings and the positions taken by the IRS; (8) advising or not advising the IRS that § 5.04(c) to the 1999 Plan was directly at issue in this litigation; (9) advising or not advising the IRS that claims for whipsaw payments under the 1999 Plan were directly at issue in this litigation; (10) supplementing/amending or not supplementing/amending Defendants' Answers to Local Rule 26.03 Interrogatories; (11) producing or not producing the signed retroactive amendment to the 1999 Plan in this litigation; and (12) the timing and form of production of the retroactive amendments resulting from the renewed determination letter process.

III. FACTS

In September 2007, pursuant to the lifting of the moratorium on cash balance plan determination letters, the IRS wrote to Duke concerning its applications for determination letters on the 1999 Duke Energy Retirement Cash Balance Plan and its short-lived, but substantially identical, PanEnergy Retirement Cash Balance Plan.[5] Pertinent comments by the IRS reviewers concerning the Duke plans included:

- With respect to Section 2.02, please provide a proposed amendment which

[5] The PanEnergy Plan was a transitional plan during the merger of PanEnergy with Duke.

revises the definition of "accrued benefit" to reflect that a participant's accrued benefit as of any valuation date on or prior to the participant's normal retirement date shall be equal to a single life annuity which is the actuarial equivalent of the projected value of such participant's hypothetical account balance as of such valuation date, and that the projected value is determined using the current interest crediting rate and projecting to normal retirement date.

- For crediting interest, section 2.36 provides an interest factor of 9% (as adjusted by section 2.37) in certain situations, while Section 5.04(c) provides for an interest rate of 4% or less for purposes of determining a lump sum distribution. Thus, the interest rate used to project the accrued benefit to normal retirement age when calculating a lump sum appears to be lower than the rate used for crediting interest to the hypothetical account and, if so, there may be an impermissible forfeiture of accrued interest. Please explain and provide a proposed amendment if necessary.

Ex. 4 (regarding the PanEnergy Plan).

- Section 2.38 defines the Interest Factor based on the average yield on 30-year United States Treasury Bonds as published in the United States Federal Reserve Statistical Relief H.15 for the end of the third full business week of the month prior to the beginning of the calendar quarter in which such month occurs. This language does not take into account the fact that there were years when 30-year Treasury Bonds were not available. The benefits based on rates for those years are not definitely determinable.

- Section 5.04(c) of the Plan provides that for a participant who elects to receive a lump sum distribution prior to his normal retirement date, the monthly interest rate applied for purposes of determining the lump sum distribution is the lesser of 4% or the "applicable interest rate" specified in Code Section 417(e) and the regulations thereunder. Please explain what this provision does. Why is the Monthly Interest Rate defined differently here than in Section 2.39 of the Plan? Also the reference to the "Applicable Interest Rate" does not produce a definitely determinable rate without specifying the month for which the rate applies.

- Section 411(a)(7) of the Internal Revenue Code (the "Code") and the regulations thereunder generally provide that for a defined benefit plan, the accrued benefit must be defined as a single life annuity payable at normal retirement age or the actuarial equivalent of such annuity. For a cash balance plan, the single life annuity for this purpose generally is calculated by (1) projecting interest on the hypothetical account balance at the interest crediting rate through the participant's normal retirement date and then (2)

converting that projected balance to an annuity using reasonable actuarial assumptions specified in the plan.

- Section 2.03 of the plan provides that a participant's accrued benefit is generally the participant's cash balance account .... please amend the plan to define the accrued benefit in terms of the cash balance account projected with interest credits to the normal retirement date. Section 6.01 of the plan provides that the normal form of retirement income is equal to the participant's accrued benefit and section 2.03 of the plan defines the accrued benefit as the cash balance account. This appears to result in the lump sum being equal to the hypothetical account balance. Notice 96-8, 1996 C.B. 359 permitted a plan to pay a participant's hypothetical account balance without violating Code Section 417(e)(3) provided interest was credited using one of several specified variable "safe harbor" rates. Since the plan contains a minimum interest rate and a maximum interest rate, the plan's interest crediting rate is not one of the safe harbor rates.

- Please amend the plan to provide that the lump sum is the greater of the participant's cash balance account or the actuarial present value of the participant's accrued benefit determined ... by projecting interest on the cash balance account through the participant's normal retirement date.

Ex. 5 (regarding the Duke Plan)

The IRS, initially and in subsequent communications, focused on the language of § 5.04(c) and Duke's failure to perform whipsaw calculations to arrive at a lump sum payout that was the actuarial equivalent of the accrued benefit taken out to normal retirement age as required by ERISA.[6] Notes of a conversation between Duke attorneys and Laura Warshawsky of the IRS

[6] Robert Ringel, Duke's most recent Rule 30(b)(6) witness on the issue of Duke's communications with the IRS since September 2007 regarding the determination letter applications, agreed:

Q: ...would it be fair to say that the determination letter process from September of '07 forward revolve-revolved primarily around whipsaw accrued benefit and Section 5.04(c) of the plan?

A: I think-I mean I think those are the-there were a lot of issues-more issues than that, but I think we probably spent the most time talking about those issues.

are unequivocal: "We need to get rid of 5.04(c) because it is illegal." [7] Ex. 6.

These facts would have helped the Plaintiffs in this case if they had known about them. One of the Plaintiffs' claims is that Duke's interpretation of § 5.04(c) is unlawful, that Plaintiffs' interpretation of § 5.04(c) is lawful and that under principles of construction, an interpretation which renders a contract lawful is preferred to one which render it unlawful.[8]

This pivotal development occurred in the middle of the discovery period in this case, which concluded at the end of February 2008. Yet Duke did not turn over to Plaintiffs the September 2007 IRS letters nor produce the hundreds of pages of subsequent correspondence and emails between and among Duke, the IRS, Duke's outside counsel and its litigation attorneys. Duke, in its Opposition to Plaintiffs' Motion to Compel filed on February 2, 2010, seems to state that it did not produce documents because Plaintiffs' discovery requests were "vague" and did not specifically mention the determination letter application. Continuing its now well-established habit of dissembling, Duke describes in its footnote 7 Plaintiffs' "vague and non-specific" Requests for Production ##3, 4, 12, and 13, but completely ignores the other discovery requests mentioned in Plaintiffs' Motion to Compel: Interrogatory #4 (asking Duke to identify . . . correspondence/emails

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Ex. 3: Ringel Depo. (1/14/10) at 145:3 – 11.

[7] Duke seeks to soften the impact of the notation through hearsay comments of Duke outside counsel David Godofsky, who has not provided testimony in this case and has never been named as a witness. Through references to what Mr. Ringel says Mr. Godofsky says Ms. Warshawsky said, Duke has introduced the new concept of a "*de facto*" safe harbor plan. (Dkt. 271, at p. 7).

[8] Williston on Contracts § 32:11 (4th ed.) ("Consonant with the principle that all parts of a contract be given effect where possible, an interpretation which renders a contract lawful is preferred to those which render it unlawful."); 17A Am. Jur. 2d Contracts § 340 ("Generally, where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former will be adopted.").

that relate in any way to the Plan); Request for Production #1 (documents identified in your interrogatory answers), and Request for Production #15 (correspondence with nonparties that relates in any way to issues). (Dkt. 271, p.10).

All the while Duke was resting on its answer to Local Rule 26.03 Interrogatories that represented the 1999 Plan as meeting the safe harbor requirements of IRS Notice 96-8, even though the IRS was now telling Duke it did not. It did not amend its answer to Local Rule 26.03 Interrogatories whereby Duke represented to the Court that the Plans "were approved by appropriate governmental administrative agencies" even though such agencies were, in fact, telling Duke the Plans, as written, were illegal.

In the months following the September 2007 IRS letters, Duke was in constant communication with litigation counsel at Sidley Austin regarding the IRS determination letter proceeding.[9] In the recent Rule 30(b)(6) deposition of Duke's corporate representative, taken on January 14, 2010, Robert Ringel affirmed that Duke understood the importance of keeping litigation counsel at Sidley Austin in the loop regarding the determination letter proceedings:

> Q: So Duke was basically keeping the defense litigation team at Sidley in the loop on these IRS issues that primarily started with the IRS letter dated September 24, 2007 to Duke, correct?
>
> A: David Godofsky reported to me. He was working with the IRS. I wanted to make sure I was coordinating because the issues that David[Godofsky] was working with the IRS on-***there were a lot of issues but some of them were involved in the litigation***. I just wanted to keep Sidley in the loop, not on everything, I mean, I had to use my judgment and I didn't want to pay two lawyers to do everything but I felt like if there was some issue that related to both I wanted to make sure Sidley &

[9] Hundreds of privilege log entries reference communications involving Sidley Austin attorneys David Johnson, Erin Kelly, Joseph Guerra, and Patricia Ryan concerning the determination letter process and "pending litigation." See, generally, Ex. 7: Supp. Priv. Logs; Ex. 8: Listing of privilege log entries which include Sidley Austin attorneys.

Austin was in the loop.

Ex. 3: Ringel Depo. (1/14/10) at 32:7-22 (emphasis added).

Mr. Ringel also testified:

Q: Okay. All right. So it would be fair to say that Duke was keeping the defense litigation team fully in the loop with regard to those two letters, correct?

MR. JOHNSON: Object to the form.

A: Keeping the Sidley team fully--

Q: In the loop.

A: -in the loop-I think I had to use my judgment but where ***there were issues raised by the IRS that I thought were involved in the litigation***, I wanted to make sure Sidley was in the loop and --.

Ex. 3: Ringel Depo. (1/14/10) at 38:2 – 13 (emphasis added). [10]

* * *

Q: My question is, why-Sidley is the litigation counsel correct?

A: Correct.

Q: Sidley is not involved with getting a determination letter from the IRS are they?

A: No. In this case David [Godofsky] was taking a lead to get a determination letter from the IRS, but because ***there were issues in that determination letter that were directly or indirectly involved in the litigation***, I wanted Sidley to be involved as well.

Q: Okay. So-so any edits that Sidley made or suggested would have been litigation related correct?

A: My purpose for involving them is to keep them in the loop because ***the litigation involved issues that the IRS was raising or you know similar provisions to the plan***.

[10] The standard of relevance for discovery is broad and Duke had no basis to withhold for example the letters it received from the IRS which are not privileged or confidential, which are plainly relevant to the whipsaw claim since they cite § 5.04(c) and Notice 96-8 right in them. The IRS letters definitely raise issues directly involved in the litigation and yet they were not produced.

> I don't know if Sidley read a whole amendment and saw a typo or saw something that could be improved. They might have commented on that as well but the reason I had them involved was the litigation.

Ex. 3: Ringel Depo. (1/14/10) at 60:24 – 61:20 (emphasis added).

Duke's litigation counsel at Sidley Austin were not just sitting on their hands observing the determination letter process; they were players. Litigation counsel, Patricia Ryan,[11] was actually participating in revising the proposed amendments Duke was submitting to the IRS. Ex. 7 – privilege logs entries 5322D, 5353, 5361F, 5369D, 5403C, 5404C, 5405E, 5416C, 5418D, 5431B, 5438, 5439, 5440B, 5446B, 5447, 5451, 5452, 5462B, 5463, 5464B, 5465, 5469B, 5499B, 5531B. See, also, Ex. 9.

Mr. Ringel, who was also Duke's in-house point man on the determination letter proceedings, was aware that a hearing before this Court was approaching and that some of the issues to be heard involved the same Plan provisions under review by the IRS:

> Q: Prior-prior to the date of that hearing, which I'll get it right here in a minute was December 19, 2007, did you prior to that date or on that date have any discussions with Mr. Johnson, Mr. Guerra of his firm or anyone else in his firm or anyone with Duke or Mr. Godofsky or anyone at Alston & Bird about the issues or anything that might come up at that hearing?
>
> A: I was generally aware that there was going to be a hearing done and I would have been aware from having discussions with those people.
>
> Q: Okay. All right. We have established that you were aware that there was a hearing. Now, my question was did you have any discussion with them about any issues that might arise at that hearing.
>
> A: I don't remember anything specific but I think it's likely I talked with somebody about something to do with that hearing where they were calling and saying we need a document or we need something.

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[11] Ms. Ryan has never appeared of record in this case; however, Duke confirmed her role as litigation counsel. Ex.3: Ringel Depo. (1/14/10) at 27:14 –28:12; 80:4 – 16.

Ex. 3: Ringel Depo. (1/14/10) at 23:7 – 24:3.

* * *

Q: ...was there any discussion that you had or you were in on or that you saw an email on, memo or letter or whatever, with any of these other people I've talked to-talked about such as Mr. Godofky, Mr. Guerra, Mr. Johnson or anybody with Sidley in this time frame prior to December 19, 2007, dealing with Section 5.04(c) of the plan or whipsaw?

A: So the question is was there any discussion with any of those people about 5.04(c) or whipsaw?

Q: Correct.

A: Yes.

Ex. 3: Ringel Depo. (1/14/10) at 25:21 – 26:8.

* * *

Q: Were there-were there emails back and forth during this time frame in December of '07 in addition to the conversations?

A: Emails back and forth during this time frame about what?

Q: About-about the issues that might come up at this hearing.

A: I don't remember specifics, but I wasn't--I wasn't a big you know part of preparing for this hearing. I--I don't remember.

Q: Well you said you weren't part of preparing for the hearing but you were--

A: I said I wasn't a big part of preparing for the hearing.

Q: Did you understand at that point in time that a part of the hearing would be about whipsaw and Section 5.04(c) of the plan?

MR. JOHNSON: Objection – foundation.

A: I knew those were things that were part of the claims-of the case.

Ex. 3: Ringel Depo. (1/14/10) at 28:21 – 29:16.

* * *

Q: Well we've discussed the fact that the Court held a hearing on December 19, which was two days-it was on a Wednesday morning, December 19, 2007, Florence, South Carolina, where there was a lot of talk about Section 5.04(c); are you aware of that?

MR. JOHNSON: Objection, foundation.

A: Well like I said before I wasn't at that hearing-I don't know exactly what was-I still don't know exactly what happened at that hearing, but if it was a hearing to talk about all the different claims, then yeah I would know that they were talking about 5.04(c) because I knew that was one of the claims.

Ex. 3: Ringel Depo. (1/14/10) at 120:24 – 121:12.

In the days leading up to the December 19, 2007 hearing, between December 10-18, 2007, there was a flurry of communications involving Sidley Austin attorneys regarding the IRS proceeding.[12] However, Duke's attorneys conducted themselves at the hearing as though the determination letter moratorium had not been lifted.

Duke's attorney, Joseph Guerra,[13] argued to the Court without qualification on December 19, 2007, that the 1999 Plan was a safe harbor plan. Ex. 10: Hearing Transcript (12/19/07) at 51-60.[14] He did not invoke Duke's newly-minted concept of "*de facto*" safe harbor; he did not mention

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[12] Ex. 7: see supplemental privilege log entries, 5330C, 5330D, 5346A, 5346B, 5346C, 5347B, 5347C, 5346D, 5365A 5368D, 5369A, 5369B, 5370B, 5370C, 5371A, 5371B, 5371C, 5372B, 5401A, 5402C, 5402D, 5403A, 5403B, 5403C, 5404A, 5404B, 5404C, 5405A, 5405E, 5431A, 5431B, 5433A, 5433B, 5433F, 5434A, 5434B, 5434C, 5434D, 5434E, 5435A, 5436A, 5436B, 5437, 5440A, 5440B, 5451, 5464B, 5466, 5466B, 5466C, 5468C, 5468D, 5471B, 5472B, 5471C, 5472A, 5472C, 5517A, 5517B, 5521B, 5521C, 5521H, 5521I, 5523D. All entries list subject matter relating to the "pending litigation."

[13] Duke's argument that Mr. Guerra is no longer with Sidley Austin and was appointed Principal Deputy Associate Attorney General in the United States Department of Justice, is irrelevant. (Dkt. 271, at p. 13). Duke, through its attorneys including Mr. Guerra, was less than candid with the Court and Mr. Guerra's present employment does not alter that fact.

[14] Compare Mr. Guerra's statement that the Plan was a safe harbor plan, to the initial IRS letter regarding the Duke Plan saying it was not: "Notice 96-8, 1996 C.B. 359 permitted a plan to pay a participant's hypothetical account balance without violating Code Section 417(e)(3) provided interest was credited using one of several specified variable 'safe harbor' rates. Since the plan

the position of the IRS at that time that Duke was, in fact, required to perform whipsaw calculations; and most importantly he urged this Court to dismiss the whipsaw claim before any additional discovery could be done. Ex. 10, at 69.

Following the December 2007 hearing, discovery continued and Plaintiffs deposed a number of Duke employees and consultants. Most critical was the Rule 30(b)(6) deposition of Duke corporate representative, Richard Jefferies. The 30(b)(6) deposition was set for February 5, 2008 and included the following topics:

> 6. Whipsaw calculations involving the Duke Cash Balance Plan including, but not limited to, calculations such as those found in the "Duke Energy 'Whipsaw Lump Sum Report (total lump sum count/amount by quarter)'" found at Duke document number DE080322-23;
>
> 7. Formulation, implementation and interpretation of Section 5.04(c) language contained in 1999 Amendment to the Duke Cash Balance Plan.

Ex. 10A.

Despite extensive questioning of Mr. Jefferies at the deposition on these topics, the matter of the on-going IRS determination letter proceeding and the positions of the IRS on whipsaw and §5.04(c), was never mentioned. When asked the direct question, "do you remember any discussions or drafts of the plan where anybody talked about 5.04(c)," Mr. Jefferies replied: "No, not that I'm aware of." Ex. 11: Jefferies 30(b)(6) Depo. (2/5/08) at 167:6 – 9.[15] In answers to Interrogatories

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contains a minimum interest rate and a maximum interest rate, the plan's interest crediting rate is not one of the safe harbor rates." Ex. 5.

[15] Despite Duke's contention that Mr. Jefferies was only privy to a "handful of email strings" concerning the IRS proceedings before his February 5, 2008 deposition, Plaintiffs stand by their statement that he was sender or recipient on dozens of such emails. See Ex.13: Listing of emails by date and time (if available) that include Richard Jefferies as sender, recipient or "cc." This list does not include the many additional email entries within the emails strings on which he was not a listed recipient. See, also, Ex. 14: Listing of all privilege log entries from 9/15/07 through 2/5/08

concerning that response and in prior briefing to the Court (Dkt. 271 at 12), Duke has taken the position deponent Jefferies answered the question as he did because he interpreted the "context" of the line of questioning to be limited to the 1998-99 time frame when the Plan provision was originally drafted. Ex. 12.

Plaintiffs' more recent deposition of Richard Jefferies uncovered the actual reason he imposed time parameters on his responses regarding §5.04(c), which were neither contained in the questions posed nor the 30(b)(6) topics. Mr. Jefferies testified that prior to his 30(b)(6) deposition he was "prepared" to answer questions regarding §5.04(c) based on the 1998-99 time frame of drafting the 1999 Plan, despite the lack of time parameters in the topic listed in the notice. It is abundantly clear that Duke and its litigation counsel at Sidley Austin intentionally kept Mr. Jefferies as much in the dark as possible with regard to the IRS proceeding and intentionally directed Mr. Jefferies's attention solely to the 1998-99 time frame in preparing him for his testimony on §5.04(c):

> Q. And was it your role in February of 2008 to provide complete corporate knowledge of Duke Energy concerning the topic of 5.04(c)?
>
> MR. JOHNSON: Objection, calls for a legal opinion.
>
> A. My -- what I believe my role to be was to -- to talk about 5.04(c) in the context of the drafting of the 1999 plan document.
>
> Q. Did you not believe that it was your obligation to find out everything that -- as a representative of Duke Energy that Duke Energy knew about 5.04(c)? Did -- did you not understand that?
>
> MR. JOHNSON: Objection, calls for a legal opinion.
>
> A. Again, my -- what I thought my role was to look at the addition of 5.04(c) in the plan document when it was drafted in 1999.

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involving Richard Jefferies, some of which are labeling certain entries as duplicates.

Q. And who told you that?

A. I mean, that's -- that's essentially the preparation I had relative to the deposition.

Q. That's not what the notice says, though, is it? Read me what the notice says.

A. Okay. Formulation, implementation and interpretation of Section 5.04(c) language contained in 1999 amendment to the Duke retirement plan.

Q. So it talks about formulation, implementation, interpretation. Now, are you – and you're telling me that as the representative of Duke Energy you did not review this September 24th document, the letter from the IRS?

A. Again, from my memory, no, I did not.

Ex. 15: Jefferies Depo. (1/14/10) at 23:18 – 24:24.

* * *

Q. Would you agree with me that those communications in those e-mails I just showed you deal with the interpretation of the Internal Revenue Service and Duke of Section 5.04(c) of the plan?

MR. JOHNSON: Objection, compound.

A. It appears to at least reference 5.04(c) with respect to some discussion around whipsaw.

Q. But you did not review those documents in preparation for that deposition, did you?

A. No.

Ex. 15: Jefferies Depo. (1/14/10) at 30:3 – 30:14.

* * *

Q. But did you read letters from the Internal Revenue Service and Duke's response to them in preparation for your 30(b)(6) deposition?

A. Not that I remember, no.

Q. Let -- let me ask you to look in that black notebook there at Tab 11. And you will see a letter; do you see it?

A. Yes. From David Godofsky?

Q. To David Godofsky from the Department of the Treasury Internal Revenue Service dated September 24th, 2007; do you see that?

A. Yes, I do.

Q. And if you look at Tab 13, there is a letter back from Mr. Godofsky to Laura Warshawsky dated November the 12th.

A. Okay.

Q. Now, did you review or read those letters in response -- in preparation for your 30(b)(6) deposition?

A. Not that I remember, no.

Q. Were you at the time I took your deposition aware of those letters?

A. Aware of the specific letters? I'm – I'm not sure that I was.

Q. Do you believe that -- or do you know whether you would have received e-mails that had copies of those letters with them?

A. I -- I don't know whether there would have been copies of these letters attached to the e-mails, no.

Q. Do those letters involve interpretations of Section 5.04(c)?

A. Yes, the first letter has a reference to 5.04(c) on the first page and the second letter also references 5.04(c) as well.

Ex. 15: Jefferies Depo. (1/14/10) at 18:1 – 19:24.

* * *

Q. All right. Well, let me ask you this: In preparation for your deposition as Mr. 5.04(c) and Mr. Whipsaw for Duke Energy, did your lawyers or whoever prepared you, did they bring to your attention or have any discussions with you about this letter, September 24th IRS letter?

A. I don't recall that they did, no.

Ex. 15: Jefferies Depo. (1/14/10) at 58:15 – 21.

* * *

Q: Were you-were you aware at the time I took your deposition that the IRS was very interested in Section 5.04(c)?

MR. JOHNSON: Object to the form.

A: I'm-I don't believe I was.

Ex. 15: Jefferies Depo. (1/14/10) at 26:21 – 25.

* * *

Q. Can you explain to me the reason why you didn't prepare yourself to testify regarding the IRS's position on whipsaw in 5.04(c)?

A. Again, my -- my preparation was related to the inclusion of 5.04(c) in the document that was drafted in '98.

Q. That's not what the notice says, is it?

MR. JOHNSON: You're just arguing with him now. He's given you his understanding of the notice, and you have a different one.

A. Yeah, I mean, it talks about form --formulation, implementation which clearly to me would have related to when 5.04(c) was put in and then it talks about contained in the 1999 amendment. So, again, my focus was on what happened in '98 leading to the '99 restated plans.

Q. Didn't you skip a word in there, interpretation? Doesn't it talk about interpretation?

A. It does say interpretation as well. It does.

Ex. 15: Jefferies Depo. (1/14/10) at 30:17 – 31:12.

Richard Jefferies agreed that §5.04(c) and whipsaw issues were an integral part of the determination letter process during 2007-08, but testified that he was not prepared to testify in any respect about the issues raised by the IRS or Duke's response:

Q. And you got an e-mail there in front of you at Number 22 where it's talking about 5.04(c) and it's talking about whipsaw, and this is all under a subject discussion with the IRS re: 5300 for Duke Energy.

A. Yeah, I mean, I would say based on these e-mails that 5.04(c) was a subject in

discussions with the IRS about the determination letter that had been filed, you know, I guess eight years previously.

Ex. 15: Jefferies Depo. (1/14/10) at 49:5 – 14.

* * *

Q. On the formulation, implementation and interpretation Section 5.04(c), when you were tendered as the witness on that subject, you were aware that there were extensive discussions of 5.04(c) in the months leading up to your deposition, correct?

MR. JOHNSON: Asked and answered.

A. Again, I guess I obviously was copied on e-mails.

Ex. 15: Jefferies Depo. (1/14/10) at 52:18 – 53:1.

* * *

Q. And do you recall that Mr. Johnson objected to me asking you anything about the determination letter process at your deposition; do you remember --

A. As part of the interrogatory I saw that referenced again that, you know, established I wasn't prepared to speak to determination letter process.

Q. And even if it involved 5.04(c) you weren't prepared?

A. I wasn't prepared at all for -- you know, to discuss the determination letter process, no.

Q. But you were prepared to discuss 5.04(c), weren't you?

MR. JOHNSON: Asked and answered.

BY MR. GILREATH:

Q. You were supposed to be; do you agree with me on that, right?

A. I was supposed to be based on what --

Q. But if 5.04(c) had something to do with the determination letter process, I wasn't going to find out about it that day, was I, not -- not from Duke Energy anyway?

MR. JOHNSON: Objection, speculative.

A. Yeah, I --

Q. Would you agree with that?

A. I mean, again, I -- I did not testify related to anything concerning 5.04(c) with respect to the determination letter process. I guess that's what you're asking.

Ex. 15: Jefferies Depo. (1/14/10) at 49:15 – 50:20.

* * *

Q. Were you aware before you took the deposition that Duke would take the position that the determination letter process was not within the scope of your 30(b)(6) testimony?

A. I mean, I knew determination letter wasn't a part of, you know, what I had been provided as what I was the 30(b)(6) witness on. I didn't know -- I didn't have any view of what was going to happen at my deposition.

Ex. 15: Jefferies Depo. (1/14/10) at 69:9 – 17.

In addition to abdicating its duties, through its litigation counsel at Sidley Austin, to prepare its 30(b)(6) witness fully to testify concerning whipsaw and §5.04(c) and imposing unstated time parameters on the topic, Duke sealed the deal on its information embargo by interposing an affirmative objection during the first 30(b)(6) deposition in 2008 to questions concerning determination letters.

MR. JOHNSON: Before we go on, is there a 30(b)(6) topic on IRS determination letters because I wasn't aware of one? [16]

MR. GILREATH: I don't know whether there is or not, but I'm going to ask him some questions anyway.

MR. JOHNSON: Well, it's problematic because we have an obligation to prepare a witness for what you tell us you're going to be asking him about. And when you go off topic, he --

MR. GILREATH: I -- I thought it was --

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[16] While the question posed had to do with the determination letter application to the 1997 Plan, Mr. Johnson's objection was more global, referencing "***determination letters***."

MR. JOHNSON: -- he hasn't been prepared for that.

Ex. 11: Jefferies 30(b)(6) Depo. (2/5/08) at 185:6 –18).

Of course, when Duke's attorney made his objection on February 5, 2008, he knew what Plaintiffs' counsel did not, that the determination letter proceeding was on-going at that time and was predominantly focused on whipsaw issues and § 5.04(c), topics that ***were*** specifically within the scope of the Rule 30(b)(6) deposition. His objection to scope slammed the door on any slim chance that Plaintiffs' counsel, operating in ignorance of the IRS proceeding, would stumble down the path that would lead to full disclosure. A clearer example of gamesmanship is difficult to imagine.

The attorneys responsible for preparing – or not preparing – Mr. Jefferies for his 30(b)(6) deposition were the litigation team at Sidley Austin. Ex. 15: Jefferies (1/14/10) at 31 – 32. Richard Jefferies and the Sidley Austin attorneys clearly knew that Plaintiffs expected and was entitled to a knowledgeable, fully educated corporate representative to testify to the issues stated in the Rule 30(b)(6) notice:

Q: Is there any question in your mind today and was there any that you were the person tendered on behalf of Duke Energy to talk about whipsaw?

A: No, I don't think so.

Q: And was there any question in your mind when you were tendered on February 5, 2008 that you were, to use my terminology, Mr. Whipsaw?

A: No.

Ex. 15: Jefferies (1/14/10) at 21:21 - 25.

Duke cannot credibly claim that its corporate representative should not have been educated to testify to the ongoing dispute between Duke and the IRS regarding the meaning of §5.04(c), the

IRS's rejection of Duke's safe harbor claim, and the IRS's position at that time that Duke was required to perform whipsaw calculations under the 1999 Plan. It wanted to keep the IRS matter separate from the litigation and Duke took the following steps to ensure it would succeed:

- Failing to supplement responses to Plaintiffs' discovery requests with critical documents when the failure to supplement clearly rendered the prior responses materially incomplete;[17]

- Failing to supplement and revise its Rule 26(a) disclosures and 26.03 answers to Local Rule Interrogatories;

- Representing at the hearing on December 19, 2007 that the 1999 Plan was a safe harbor plan when the IRS by then had sent its first letter saying it was not.

- Choosing not to educate Richard Jefferies, as the Duke 30(b)(6) representative, with regard to Issue #6, whipsaw calculations, with information concerning the IRS determination letter process;

- Choosing not to educate Richard Jefferies, as the Duke 30(b)(6) representative, with regard to Issue # 7 concerning §5.04(c), *vis-a-vis* the determination letter process;

- Engaging in a preemptive strike in the 30(b)(6) deposition to stop questions about the determination letter process by objecting that determination letters were not an issue in the 30(b)(6) notice, all the while aware that Issues 6 and 7, (whipsaw and §5.04(c)), brought the determination letter process within the scope of those topics;

- Counseling Mr. Jefferies, as the Duke 30(b)(6) representative, to limit his testimony with regard to §5.04(c) to the 1998-99 time frame when the Rule 30(b)(6) deposition notice, Issue #7, contained no time parameters.

- Failing to timely produce the determination letter dated February 23, 2009 and the signed retroactive amendment to the 1999 Plan (which re-wrote §5.04(c)) when the documents were in the hands of litigation counsel at Sidley Austin by April 3, 2009. Ex. 16.

- Producing the retroactive amendment on October 2, 2009 by an email misdescribing

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[17] The materiality of the on-going IRS proceeding is clearly demonstrated by Duke's insistence that its litigation counsel at Sidley Austin be kept fully "in the loop" concerning all aspects of the determination letter process, because "the litigation involved issues that the IRS was raising. . . ." Ex. 3, Ringel Depo. (1/14/10) at 61:2 – 20.

it as an amendment to the 2009 restated plan effective January 1, 2009. Ex. 17.

IV. ARGUMENT

A. Duty to Supplement

As a preliminary matter, Duke has ***no*** viable argument that it could legitimately withhold the IRS documents regarding the determination letter proceeding, while acknowledging at the same time that it was critical for its own litigation counsel Sidley Austin to be kept "in the loop." Rule 26(e) F.R.Civ.P.[18] mandates that:

> (1) *In General*. A party who has made a disclosure under Rule 26(a)--or who has responded to an interrogatory, request for production, or request for admission--must supplement or correct its disclosure or response:
>
> > (A) in a timely manner if the party learns that ***in some material respect*** the disclosure or response ***is incomplete*** or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or
> >
> > (B) as ordered by the court.

(Emphasis added).

The plain language of Rule 26(e) thus mandates supplementation by a litigant when additional responsive and ***material*** documents come to light. Thus it has been held that the standard is "if there is an objectively reasonable likelihood that the additional or corrective information could substantially affect or alter the opposing party's discovery plan or trial preparation." *Sender v. Man*, 225 F.R.D. 645, 654 (D. Colo. 2004). It is abundantly clear that had Plaintiffs been afforded access

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[18] Duke sought to attach some significance to the fact that Plaintiffs' prior filing did not argue the mandates of Rule 26(e). (Dkt. 271, p. 11). In fact, it is crystal clear and expressly stated in the prior Memorandum that the purpose for the "Procedural History" was to provide this Court with the context of the Motion to Compel coming as it did almost two years after discovery had been completed. (Dkt. 263-1at p. 1, 9; Dkt. 262, ¶3). That pleading and the governing scheduling order provided for a separate filing to address the legal ramifications of Duke's misconduct.

to the documents relating to the determination letter process, in-depth discovery would have been taken on that matter, depositions would have been handled differently, and additional depositions would have ensued.

It is quite apparent that had Duke shared its highly pertinent communications from the IRS, the course of that proceeding would have been altered by the intervention of impacted plan participants. As it was, the IRS, while aware that Duke was in litigation concerning the cash balance plan, apparently did not know that it was tinkering with plan provisions, retroactively, that were already under review by a Federal Judge. Ex. 3: Ringel Depo. (1/14/10) 122:5 – 22; 128:5 – 17. The ability of Duke, behind Plaintiffs' collective backs, to ultimately secure language in the required amendment it considered favorable to this litigation is clearly the reason its litigation counsel Sidley Austin was so heavily involved in the process and "in the loop" in revising and approving iterations of the draft amendments submitted to the IRS. Ex. 18; see also, Ex. 8 listing with regard to litigation counsel commenting and redlining amendments.

Duke takes the position that the canned objection in its discovery response (general objection #11) obviates the scope of supplementation mandated by Rule 26(e) F.R.Civ.P. See Dkt. 271-14, pp. 4-5. The discovery rules are what they are and the parties cannot alter them unilaterally. *AVX Corp. v. Cabot Corp.*, 252 F.R.D. 70, 77 (D.Mass. 2008) ("[T]he duty to supplement is a continuing duty and a party may not free itself of the burden to fully comply by placing a heretofore unrecognized duty of repeated requests for information on its adversary," internal quote marks omitted); *Arthur v. Atkinson Freight Lines Corporation*, 164 F.R.D. 19, 20-21 (S.D.N.Y.1995) ("The disclosure provisions in the Federal Rules of Civil Procedure do not permit a party to trim his duty of disclosure to suit his own view of what might be relevant to his adversary."); *Bartlett v. Mutual*

Pharmaceutical Co., Inc., 2009 WL 3614987, *4 (D.N.H. Nov. 2, 2009) ("[T]he duty to supplement under Rule 26(e) does not depend upon repeated requests by an adversary for updated or complete information.").

In addition, it is clear that Duke's focus in its objection #11 related to routine Plan administration documents. That interpretation is verified by the discussions of counsel in subsequent meet and confer conference calls. See Declaration of Cheryl Perkins filed herewith. Defendants' concerns with regard to ongoing, routine plan administration documents did not absolve it from complying with the supplementation requirements set forth in Rule 26(e) with regard to documents clearly ***material*** to the issues before this Court.

Duke also takes the position that it did not have to supplement its production because the documents generated during the determination letter process during 2007, 2008 and 2009, did not render its prior responses incomplete or incorrect. In support of this bizarre contention, that its discovery responses remained ***correct*** and ***complete*** despite the withheld documents, Duke states that the position it was articulating to the IRS mirrored what Duke was saying in the context of this litigation. The contention is nonsensical. What Duke chooses to ignore is that the ***IRS's position*** was that the 1999 Duke Plan did not meet the safe harbor provisions of IRS Notice 96-8, while Duke had affirmatively stated in Rule 26 disclosures that the plan was a safe harbor plan, had received government approvals,[19] and that plan participants had been afforded an opportunity to participate regarding the approvals. Of course, plan participants were ***not*** afforded an opportunity to participate in the post-moratorium determination letter process because the process was kept secret.

[19] In fact, this statement was never correct because no determination letter was issued on the 1999 Plan until 2009.

The bottom line is the Plan was deemed ***not*** a safe harbor plan; and the IRS ***did not*** approve the Plan until significant retroactive amendments were made to the language. The Plan language before the Court was ***not approved.***

Now that the IRS position is known, Duke argues that the Plan was a "*de facto*" safe harbor plan. Nonetheless, the IRS never wavered in its position that the Plan, as interpreted by Duke, could not be a qualified plan as drafted. Otherwise, the determination letter that was ultimately issued to Duke would not have stated that issuance of the letter was strictly subject to the described retroactive amendments. Ex. 16 – see attached determination letter at p. 1.

Duke also contends that Plaintiffs' discovery requests were vague and non-specific, implying that it could not tell that documents relating to the determination letter process were responsive. As noted above this simply is not the case. In addition, the course of dealing between the parties during the litigation makes it crystal clear that Duke was well aware that Plaintiffs were seeking communications regarding the determination letter process. Ex. 19.[20]

Duke states in a footnote in its Opposition to Plaintiffs' prior Motion to Compel that it was not required to supplement or correct its Local Rule 26.03 interrogatories. (Dkt. 271, p. 13, n. 12)

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[20] Plaintiffs' April 8, 2008 letter is one of dozens of communications over many months, even after the discovery period closed, documenting Plaintiffs' efforts to secure from Duke documents wrongfully withheld based on privilege claims. The Attachment A-4 to the letter deals exclusively with Plaintiffs' effort to secure communications regarding IRS filings and communications relating to the determination letter application (forms 5300 and 5310), listed on Duke's privilege log from 1999 through 2002. Duke cannot, with a straight face, contend that it did not realize Plaintiffs would consider current documents related to the determination process, from the 2007/2008 time frame, responsive and relevant. Duke's contention that "Plaintiffs did not pursue any discovery regarding the determination letter process until they received the Plan amendment that Duke executed in March of 2009" is yet another falsehood. (Dkt 271 at p. 11). It is also noteworthy that Duke chose to ignore Plaintiffs' April 2008 correspondence for more than two months and then assert that Plaintiffs' complaints were not timely. Ex. 20.

The footnote simply misses the point. The 26.03 interrogatory answer specifically stated that the Defendants' Plans ***"were approved*** by appropriate governmental agencies" and that the Plaintiffs had "every opportunity to intervene and to participate." (Dkt. 64, p. 9). Given the discovery that has now been unearthed and the Defendants' conduct in hiding the ongoing IRS proceeding from the Plaintiffs and their counsel, nothing could be further from the truth than the statement contained in the 26.03 answer. Plaintiffs and their counsel had no opportunity to participate from September 2007 until subsequent to the issuance of the determination letter by the IRS and the reason was that the Defendants did not supplement discovery in this case as mandated by Rule 26(e) of the Federal Rules of Civil Procedure.

Had Plaintiffs been apprised of the IRS proceeding and been given the opportunity to participate, a very different outcome may have ensued. Given the IRS's clear inclination for months in the proceedings to argue that whipsaw paymant ***was*** required of Duke,[21] it is not any stretch to postulate that the IRS would not have knuckled under to compromise language that even Duke has characterized as making little sense, if the impacted parties – the Plan participants – had been able to present their views and interpretations to the agency. This is particularly so when the Plaintiffs' interpretation of the Plan would eliminate the IRS's concern over unlawfulness and secure greater benefits for the participants.

B. Duty to Educate

Duke's conduct in presenting Mr. Jefferies for deposition not only without educating him with regard to the whipsaw and §5.04(c) aspects of the IRS determination letter proceeding, but in affirmatively steering him away from that issue by counseling him to limit testimony to the 1998-99

[21] Ex. 21.

time frame, is appalling. This litigation misconduct is even more aggravated because Duke's counsel used a patently frivolous objection to lock down the scope of the deposition and ensure that the witness steered clear of the subject matter Duke obviously did not want unearthed.

The seminal case interpreting Rule 30(b)(6) F.R.Civ.P., is *United States of America v. Taylor*, 166 F.R.D. 356 (M.D.N.C. 1996). *Taylor* states:

> The Court agrees with plaintiff that [defendant] must prepare deponents by having them review prior fact witness deposition testimony, as well as documents and deposition exhibits. In this manner, [defendant] can state its corporate position at the Rule 30(b)(6) deposition with regard to the prior deposition testimony. Rule 30(b)(6) explicitly requires [defendant] to have persons testify on its behalf as ***to all matters known or reasonably available to it*** and, therefore, implicitly requires such persons to review all matters known or reasonably available to it in preparation for the Rule 30(b)(6) deposition.

166 F.R.D. at 362 (emphasis added).[22]

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[22] The *Taylor* case has been recognized as authoritative by dozens of federal courts. *See, e.g., Lockheed Martin Corp. v. L-3 Communs. Corp.*, 2007 U.S. Dist. LEXIS 52658, at *7 (M.D. Fla., July 22, 2007) ("[p]roblems of individual limitations, including memory and involvement with the matters in question, 'do not relieve a corporation from preparing its Rule 30(b)(6) designee to the extent matters are reasonably available, whether from documents, past employees, or other sources.'"); *Otero v. Vito*, 2006 U.S. Dist. LEXIS 88464, at *8 (M.D. Ga., Dec. 7, 2006) ("[u]pon notification of a 30(b)(6) deposition, a corporation 'cannot take a *laissez faire* approach to the inquiry."); *Cont'l Cas. Co. v. Compass Bank*, 2006 U.S. Dist. LEXIS 12288, at *60 (S.D. Ala., Mar. 3, 2006) ("[c]ounsel for the entity should prepare the designated witness to be able to provide meaningful information about any designated area(s) of inquiry."); *Azur v. Chase Bank USA, N.A.*, 2007 U.S. Dist. LEXIS 74973, at *4 (W.D. Pa., Oct. 9, 2007) (reminding Defendant of its duty to ensure that the witness is properly educated regarding the areas of inquiry); *Heron Interact, Inc. v. Guidelines, Inc.*, 244 F.R.D. 75, 76 (D. Mass. 2007) (requiring review of all matters known or reasonably available to an entity in preparation for the 30(b)(6) deposition); *Lutz v. St. Paul Fire & Marine Ins. Co.*, 2005 U.S. Dist. LEXIS 12568, at *7 (S.D. Ohio, May 26, 2005) (representative must review all matters known or reasonably available in preparation for the Rule 30(b)(6) deposition); *United Techs. Motor Sys., Inc. v. Borg-Warner Auto., Inc.*, 1998 U.S. Dist. LEXIS 21837, at *4-5 (E.D. Mich., Sept. 4, 1998) (litigant must prepare its Rule 30(b)(6) designee to the extent matters are reasonably available from documents, past employees, or other sources); *PPM Fin., Inc. v. Norandal USA, Inc.*, 297 F. Supp. 2d 1072, 1086 (N.D. Ill. 2004) ("the corporation is obliged to prepare the designees so that they may give knowledgeable and binding answers for the corporation."); *United States v. Magnesium Corp. of Am.*, 2006 U.S. Dist. LEXIS 87734, at *16 (D.

Duke, in failing to properly educate Richard Jefferies ***at all*** on those aspects of the IRS proceeding encompassing whipsaw and §5.04(c), ignored this immense body of case law mandating that the Rule 30(b)(6) corporate designee must be prepared to testify concerning the corporate entity's complete knowledge of the issues called for by the notice. Duke's attempts to unilaterally delineate the parameters of Plaintiffs' 30(b)(6) deposition runs afoul of Rule 30(b)(6).

A similar situation was presented in *Calzaturficio S.C.A.R.P.A., s.p.a. v. Fabiano Shoe Co., Inc.*, 201 F.R.D. 33, 36 (D. Mass. 2001). In that case the entity took the position that the deponent "'has the knowledge he has,' that he has 'absolutely no obligation whatsoever to go out and educate himself,' and that he has 'no obligation to sit there and read through all the [documents] in preparation for a deposition.'" *Id.* The court held that the deponent's counsel was "quite simply wrong in his assertion that the [designees] did not have a duty to educate themselves about 30(b)(6) topics. Indeed, the law is well established that a 30(b)(6) deponent does have an affirmative obligation to educate himself as to the matters regarding the corporation." *Id*. The court also found in *Calzaturficio* that any argument that the deponents could do no more to prepare themselves was "disingenuous at best," noting:

Utah, Nov. 27, 2006) (requiring "a good faith effort [by] the designate to find out the relevant facts – to collect information, review documents, and interview employees with personal knowledge."); *Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 75 (D. Neb. 1995) (stating that "[i]f the rule is to promote effective discovery regarding corporations, the spokesman must be informed."); *Brunet v. Quizno's Franchise Co. LLC*, 2008 U.S. Dist. LEXIS 105603, at *8 (D. Colo., Dec. 23, 2008) ("the Rule 30(b)(6) deponent must be woodshedded with information that was never known to the witness prior to deposition preparation.").

> Even if the documents are voluminous and the review of these documents would be burdensome, the deponents are still required to review them in order to prepare themselves to be deposed. *See Prokosch, supra.*, 193 F.R.D. at 638 ("the burden upon the responding party, to prepare a knowledgeable Rule 30(b)(6) witness, may be an onerous one, but we are not aware of any less onerous means of assuring that the position of a corporation that is involved in litigation, can be fully and fairly explored"). Such preparation is necessary because the individuals so deposed are required to testify to the knowledge of the corporation***, not*** the individual." *Poole, supra.*, 192 F.R.D. at 504.

201 F.R.D. at 37 (emphasis in original).

Ultimately, the court in *Calzaturficio* ruled that: "Because the Fabiano sons flouted the obligations imposed by Rule 30(b)(6), Fabiano will have to bear the ultimate responsibility. Producing an unprepared witness is tantamount to a failure to appear at a deposition." *Id.* at 39. Most courts considering the issue have determined that failure to present a knowledgeable witness in response to a Rule 30(b)(6) deposition notice is the equivalent of a failure of the party to appear. [23] Duke's conduct with respect to the Rule 30(b)(6) deposition was simply egregious and, as noted by the case law, tantamount to a failure to appear with regard to this highly significant aspect of the case. What is worse, Duke's flouting of Rule 30(b)(6) was clearly part of a larger strategy to keep

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[23] *See e.g., Starlight Int'l, Inc. v. Herlihy*, 186 F.R.D. 626, 639 (D. Kan. 1999); *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 303 (3rd Cir. 2000); *United States of America v. Taylor*, 166 F.R.D. 356, 363 (M.D.N.C. 1996); *Resolution Trust Corp. v. Southern Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993); *Ideal Aerosmith, Inc. v. Acutronic USA, Inc.*, 2008 U.S. Dist. LEXIS 85619, at *7-8 (W.D. Pa., Oct. 23, 2008); *Pandora Jewelry, LLC v. Chamilia, LLC*, 2008 U.S. Dist. LEXIS 79232, at * 22-23 (D. Md., Sept. 30, 2008); *Payless ShoeSource Worldwide, Inc. v. Target Corp.*, 2008 U.S. Dist. LEXIS 28878, at *27 (D. Kan., April 8, 2008); *Fox v. Morris Jupiter Assocs.*, 2007 U.S. Dist. LEXIS 70880, at *5-6 (S.D. Fla., Sept. 25, 2007); *Coleman v. Blockbuster, Inc.*, 238 F.R.D. 167, 170 (E.D. Pa., Oct. 11, 2006); *Swangain v. AON Corp.*, 2006 U.S. Dist. LEXIS 63964, at *2 (S.D. Miss., Sept. 6, 2006); *Expert Choice, Inc. v. Gartner, Inc.*, 2006 U.S. Dist. LEXIS 41466, at *11 (D. Conn., June 21, 2006); *Goodyear Tire & Rubber Co. v. Great Southwest Expr.*, 2006 U.S. Dist. LEXIS 12485, at *5 (N.D. Ga., Mar. 10, 2006); *Cont'l Cas. Co. v. Compass Bank*, 2006 U.S. Dist. LEXIS 12288, at *4 (S.D. Ala., Mar. 3, 2006); *Lutz v. St. Paul Fire & Marine Ins. Co.*, 2005 U.S. Dist. LEXIS 12568, at *7-8 (S.D. Ohio, May 26, 2005); *Cox Communs. of La. v. I.C. Fiber of La., L.L.C.*, 2003 U.S. Dist. LEXIS 17939, at *3 (E.D. La., Oct. 7, 2003).

Plaintiffs in the dark concerning its dealings with the IRS on whipsaw and §5.04(c) for as long as possible.

C. Duty of Candor

Duke, through its litigation counsel at Sidley Austin, had a legal and ethical duty to exercise candor in its dealings with the Court and Plaintiffs. The Fourth Circuit takes a very serious approach to the attorney's duty of candor, going so far as to consider a sanction of dismissal appropriate for violation under certain circumstances:

> When a party deceives a court or abuses the process at a level that is utterly inconsistent with the orderly administration of justice or undermines the integrity of the process, the court has the inherent power to dismiss the action.

United States v. Shaffer Equipment Co., 11 F.3d 450, 462 (4th Cir. 1993).

The Fourth Circuit has stated in this context:

> Due to the very nature of the court as an institution, it must and does have an inherent power to impose order, respect, decorum, silence, and compliance with lawful mandates. This power is organic, without need of a statute or rule for its definition, and it is necessary to the exercise of all other powers….Under the inherent power, a court may issue orders, punish for contempt, vacate judgments obtained by fraud, conduct investigations as necessary to exercise the power, bar persons from the courtroom, assess attorneys' fees, and dismiss actions.

Richardson v. Cabarrus County Bd. of Educ., 1998 U.S. App. LEXIS 12106, *10-12 (4th Cir. June 9, 1998) quoting *Shaffer Equipment*, 11 F.3d at 461-62.

Duke's conduct throughout this litigation has fallen short of the duties expected of litigants practicing within this Circuit. In the final analysis, the course of conduct cannot be chalked up to just the result of inadvertence, misunderstandings based on "context," a narrow reading of scope, mistaken beliefs, or typographical errors. A review of the issues raised in Plaintiffs' initial Motion to Compel (Dkt. 119-2) reveals that Duke withheld on a claim of privilege communications with

third parties including the IRS, the Wall Street Journal, American Benefits Council, First Union Bank, Georgia Pacific, etc. (which Duke says were inadvertently logged as privileged); listed non-attorneys as attorneys on its privilege log (again through "inadvertence"); claimed all communications on its privilege log where the sender or recipient did not have an email address identified were communications with Duke employees (which was false and a "mistake"); withheld documents that were transmitted to an attorney for review on the frivolous theory that non-privileged documents could acquire privileged status by funneling them through an attorney; claimed that correspondence on its privilege log were drafts when they were not (and then withdrew them as non-responsive), and now implies, but never states, that the Sidley Austin email forwarding the final retroactive amendment to the 1999 Plan to Plaintiffs counsel which described it as an amendment to the "2009 Duke Energy Retirement Cash Balance Plan, as amended and restated effective January 1, 2009," was yet another inadvertent error. Given Duke's history and the years of withholding documents on the IRS proceeding, the claim of inadvertence has worn out its welcome.

D. A Limited Abrogation of Privilege is Warranted

The Fourth Circuit has expressly held "that an adverse party's failure, either inadvertent or intentional, to produce . . . obviously pertinent requested discovery material in its possession is misconduct under the meaning of Rule 60(b)(3)." *Schultz v. Butcher*, 24 F.3d 626, 630 (4th Cir. 1994). *Accord, Anderson v. Cryovac, Inc.*, 862 F.2d 910, 922-33 (1st Cir. 1988); *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1341-42 (5th Cir. 1978) (statement that no report existed, when one did, constituted misrepresentation). Plaintiffs submit that misconduct sufficient to set aside a judgment qualifies as misconduct sufficient to invoke the "wrongful conduct" exception to the attorney-client privilege.

As the court in *Anderson* recognized, there are varying levels of culpability in the withholding of evidence. 862 F.2d at 925. Arguably, the most serious is a misrepresentation by an officer of the court such as an attorney. This is a fraud on the court, a subclass of the broader category of "fraud" which subverts the integrity of the court. *In Re Tri-Cran, Inc.*, 98 B.R. 609, 615-17 (D.Mass. 1989). It can also occur when a party uses counsel to perpetrate the fraud. *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118-19 (1st Cir. 1989).

An egregious example of fraud on the court occurred in *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128 (9th Cir. 1995). There, the Vice-President and general counsel of a company engaged in numerous acts of deception in the course of a product liability suit, including failing to disclose the existence of a harmful videotape, giving false answers to interrogatories, and failing to correct false testimony which he observed.

There can be no doubt that fraud in connection with litigation – whether rising to the level of "fraud on the court" or not – suffices to terminate the attorney-client privilege. In *In Re Sealed Case*, 754 F.2d 395 (D.C.Cir. 1985), the court held the exception applicable based on a showing that the privilege holder engaged in a scheme to destroy or alter evidence; concealed the destruction through false testimony; and submitted false representations to the court through counsel, all of which constituted fraud on the court. *See also Cunningham v. Connecticut Mut. Life Ins.*, 845 F.Supp. 1403 (S.D.Cal. 1994) (exception applies when letters of counsel contain misrepresentations of fact – applying California law).

Duke had a clear duty to disclose the pending IRS proceeding and the documents underlying that proceeding in supplemental responses to plaintiffs' discovery requests, in supplemental Local Rule 26.03 disclosures, during the course of the Rule 30(b)(6) deposition taken by Plaintiffs and in

Court hearings revolving around those same issues. It not only failed to do so but concealed the matter by failing to educate its Rule 30(b)(6) witness, providing false "context" to the 30(b)(6) topics in preparing the deponent, interposing a frivolous objection to scope at the deposition, and finally serving the plan amendment as a mis-described enclosure and then posturing that the amendment had been served six months after the fact because that was when it was "identified" by counsel. Ex. 22.

When Plaintiff discovered the new retroactive amendment and then sought the documents that should have been produced by supplementation, Duke responded that it "did not want to incur the added cost of additional discovery." Ex. 24. If, however, the IRS materials were the holy grail as Duke makes out in its most recent filing, it is impossible to explain why the documents were not touted in prior Duke filings and arguments and why Duke, even now would resist production. And not only did Duke resist the production but sought to deter Plaintiffs by conveying the veiled threat that it would retreat from its commitment not to defend the case based on the retroactive amendment: "We will not agree that 'the amendments have no effect on any certified claim' if discovery on them proceeds. In short, as is always the case, discovery is not a one-way street. Once the plaintiffs open the door, both sides will be free to pass through." *Id.*

Duke's misconduct has involved counsel at every level, other than locally. There is no indication that Mr. King had any knowledge at all concerning the ongoing IRS proceeding. [24] Duke demonstrably used counsel (and the privilege) to effectuate a concealment of facts it was legally

[24] Duke litigation counsel at Sidley Austin were not standing alone when these misdeeds occurred. Duke in-house counsel, Pat Smith, was present every step of the way, seated in the Rule 30(b)(6) deposition of Richard Jefferies and in the courtroom during the December 19, 2007 hearing. Ms. Smith was also fully "in the loop" concerning the IRS determination letter proceeding. Ex. 23 listing privilege log entries of communications involving attorney Smith on this issue.

obligated to disclose. Like the attorney in *Pumphrey, supra*, Duke's litigation and in-house counsel were seated and present at Mr. Jefferies' deposition when he gave testimony which these attorneys knew to be inaccurate or, at a minimum, materially incomplete. As an officer of the court, the attorneys had the obligation to correct the record. Instead of doing so, counsel made matters worse by his objectiona. As was the case in *Pumphrey*, this was a fraud on the court and the parties.

The prevailing law in the Fourth Circuit is that "in order to establish the applicability of the attorney-client privilege, the proponent must show, *inter alia*, that the communication was not made "for the purpose of committing a crime or tort." *Hawkins v. Stables*, 148 F.3d 379, 383 (4th Cir. 1998). That showing cannot be made by Duke in this case with respect to the categories of document listed *supra* at Heading II: "Documents at Issue."

District Courts within the Fourth Circuit have applied the crime/fraud exception in varying circumstances. *See, e.g., United States v. Ruhbayan*, 201 F. Supp. 2d 682, 686 (E.D. Va. 2002) (applying crime/fraud exception upon *prima facie* showing of obstruction of justice); *Parkway Gallery Furniture, Inc. v. Kittinger/Pa. House Group, Inc.*, 116 F.R.D. 46, 53 (M.D.N.C. 1987) (discussing crime/fraud exception in context of violations of antitrust law); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D. S.C. 1975) (assuming applicability of crime/fraud exception to violations of antitrust law). *Chesapeake & Ohio Ry. Co. v. Kirwan*, 120 F.R.D. 660, 665 (S.D.W.Va. 1988) (plaintiff railroad had established prima facie case of fraud sufficient to invoke crime-fraud exception to attorney-client privilege; case involved claim that employees took money).

Other courts, when confronted with a variety of wrongful conduct, have concluded that the exception is not confined to proof of a crime or a fraud. The crime/fraud exception may apply to communications made in furtherance of a crime, fraud, "or other type of misconduct fundamentally

inconsistent with the basic premises of the adversary system." *In re Sealed Case,* 676 F.2d 793, 812 (D.C. Cir. 1982). After examining the decisional law of the United States Court of Appeals for the Second Circuit, the district court, in *In re St. Johnsbury Trucking Co. v. Bankers Trust Co.*, 184 B.R. 446, 456 (Bankr. D. Vt. 1995), held that the crime/fraud exception should apply to communications or work product created "in furtherance of some sufficiently malignant purpose." Similarly, after examining the decisional law of the United States Court of Appeals for the Fifth Circuit, a district court in Florida held that the crime/fraud exception applies "not only where fraud or crime is involved, but also where there are other substantial abuses of the attorney-client relationship." *International Tel. & Tel. Corp. v. United Tel. Co. of Fla.*, 60 F.R.D. 177, 180 (M.D. Fla. 1973); *see also Sound Video Unlimited, Inc. v. Video Shack, Inc.*, 661 F. Supp. 1482, 1486 (N.D. I11. 1987) ("The attorney-client privilege does not apply when the person consults an attorney to further a continuing or future crime, fraud or other misconduct."). In *Moody v. Internal Revenue Service*, 654 F.2d 795 (D.C. Cir. 1981) the Court held that "at least in some circumstances, a lawyer's unprofessional behavior may vitiate the work product privilege." *Id*. at 800.

An attorney who counsels a client to withhold evidence and violate applicable rules of civil procedure is not advancing the observance of the law, but rather counseling misconduct. Thus, there is no logical reason to extend the protection of the attorney-client privilege to communications undertaken in order to further litigation misconduct and abuse. *See Madanes v. Madanes*, 199 F.R.D. 135, 149 (S.D.N.Y. 2001) ("At a minimum, then, the attorney-client privilege does not protect communications … that undermine[] the adversary system itself."). Fundamental fairness requires that the attorney-client privilege give way to Plaintiffs' legitimate need to uncover the truth as to Defendants' misconduct. *Lawson v. Sun Microsystems, Inc.*, 2009 U.S. Dist. LEXIS 15131

(S.D. Ind. Feb. 26, 2009) citing *Garcia v. Zenith Elecs. Corp.*, 58 F.3d 1171, 1175 n.1 (7th Cir. 1995). *See also 1100 West, LLC v. Red Spot Paint & Varnish Co., Inc.*, 2009 U.S. Dist. LEXIS 7320 (S.D. Ind. Jan. 30, 2009) ("Red Spot has committed a fraud upon the Court. As such, it has waived any attorney-client privilege with respect to the non-disclosure of the Newly Discovered Relevant Documents").

In the Fourth Circuit, the attorney-client and work product privileges are to be "strictly confined within the narrowest possible limits consistent with the logic of [their] principle[s]." *In re Grand Jury Proceedings*, 727 F.2d 1352, 1355 (4th Cir. 1984) (internal citations and quotations omitted). Applying the attorney-client privilege to communications between lawyer and client with regard to withholding of documents and evidence is fundamentally inconsistent with the principles behind recognition of the attorney-client privilege, namely, "observance of law" and the "administration of justice." *Commodity Futures Trading Com v. Weintraub*, 471 U.S. 343, 348 (1985). By intentionally withholding evidence from litigation, such misconduct directly undermines the administration of justice. *See Craig v. A.H. Robins Co.*, 790 F.2d 1, 3-4 (1st Cir. 1986) (allowing introduction of evidence that would otherwise have been protected by attorney-client privilege because communications pertained to intentional destruction of evidence, a subject contrary to administration of justice).

Similarly, attorney-client or work product materials that relate to the withhholding of evidence do not "work for the advancement of justice" nor further the "rightful interests" of an attorney's client. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). Declining to afford such materials protection cannot have a "demoralizing" effect on the profession nor would it fail to accord attorneys, as officers of courts, their rightful sphere of protection. *Id*. at 511. To the contrary, by

removing the ability of lawyers and clients to hide behind claims of privilege, the courts will assure that the work of lawyers is confined to the rightful interests of clients, rather than interests that frustrate the administration of justice and cast the legal system (as well as the legal profession) in an unsavory light.

For the foregoing reasons, the crime/fraud exception should extend in this case to materials or communications created in planning, or in furtherance of withholding evidence in this case concerning the IRS proceeding as described above.

E. In Camera Review

The United State Supreme Court in the seminal case, *United States v. Zolin*, 491 U.S. 554 (1989), addressed the question of whether a court may examine allegedly privileged documents to determine whether the crime-fraud exception vitiates an asserted privilege. The party asserting the privilege in *Zolin* contended that the party invoking the crime-fraud exception had to establish the existence of the crime or fraud through the use of independent evidence. The Supreme Court rejected that argument, and held that the documents themselves could be examined to make the necessary determination. The Fourth Circuit has commented upon the impact of *Zolin*:

> *Zolin* also held that the party invoking the crime-fraud exception must make a threshold showing that *in camera* review is appropriate before a court may examine, *in camera*, the allegedly privileged documents that could potentially demonstrate the existence of the crime or fraud. Before engaging in *in camera* review [of allegedly privileged documents] to determine the applicability of the crime-fraud exception, "the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person," . . . that *in camera* review of the materials [at issue] may reveal evidence to establish the claim that the crime-fraud exception applies. *Id*. at 572.

United States v. Under Seal (In re Grand Jury Proceedings), 33 F.3d 342, 349 (4th Cir. 1994).

Plaintiffs do not have the burden to establish even by a preponderance of the evidence, the

prima facie case necessary to warrant an order by this Court that Duke produce for *in camera* review of the documents above, although they have more than done so:

> The party asserting the crime-fraud exception, the Government in our case, must make a *prima facie* showing that the privileged communications fall within the exception. *Chaudhry v. Gallerizzo*, 174 F.3d 394, 403 (4th Cir. 1999). In satisfying this *prima facie* standard, proof either by a preponderance or beyond a reasonable doubt of the crime or fraud is not required. *See Union Camp Corp. v. Lewis*, 385 F.2d 143, 145 (4th Cir. 1967) ("[The Government] was not at this [*prima facie*] stage of the proceedings required to prove the crime or fraud in order to secure the evidence."). Rather, the proof "must be such as to subject the opposing party to the risk of non-persuasion if the evidence as to the disputed fact is left unrebutted." n2 *Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215, 1220 (4th Cir. 1976) (citations omitted). Further, "while such a showing may justify a finding in favor of the offering party, it does not necessarily compel such a finding." *Id*.

United States v. Under Seal (In re Grand Jury Proceedings #5), 401 F.3d 247, 251 (4th Cir. 2005). *See, also, U.S. v. Regan*, 281 F.Supp.2d 795, 804-07 (E.D.Va. 2002) (finding government showed probable cause to warrant in camera review by Magistrate under crime-fraud exception to privilege).

V. CONCLUSION

In conclusion, Plaintiffs respectfully move that this Honorable Court order production of the documents and materials described in Section II above, conduct an *in camera* review and, following review, abrogate Duke's privilege claims, and order production to Plaintiffs.

Respectfully submitted this the 24 day of February, 2010 by:

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