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 SUMMARY JUDGMENT AS TO COUNT THREE OF THE AMENDED COMPLAINT

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The Plaintiffs, Kenneth George and Dennis Bowen, individually and as class representatives of the Whipsaw Class, and Plaintiff, Clyde Freeman, individually, do respectfully move this Honorable Court for Summary Judgment as to Count Three of the Amended Complaint as follows:

I. PERTINENT PROCEDURAL HISTORY

Plaintiffs commenced this action seeking relief including a determination that Duke did not properly perform whipsaw calculations in determining lump sum retirement benefits for participants for the time period January 1, 1997 through August 17, 2006. On September 4, 2009, this Court certified a class action on Count Three. Dkt. 251. The Class is defined as:

> Whipsaw Class - All former employees of Duke who were participants in Duke's Cash Balance Plan, between January 1, 1997 and December 31, 2002, who retired and took lump sum benefits on or before August 17, 2006, prior to age 65, and whose lump sum benefits were calculated during a calendar quarter when the Plaintiffs claim that the applicable interest crediting rate under the relevant Plan documents exceeded the applicable interest rate for discounting to present value under the Plan documents.[1]

Dkt. 251, Order pp. 27-28, as amended by Dkt. 253 – Order dated Sept. 28, 2009, p. 2.

This Court named as class representatives for the whipsaw class the movants herein, Kenneth George and Dennis Bowen. Dkt. 253, p. 2.

II. PERTINENT UNDISPUTED FACTS

A. Background

Plaintiffs' Count Three challenges the legality under ERISA of Duke's methodology for

[1] All of the members of the Whipsaw Class are over age 55. This is because eligibility for early retirement required attainment of this age. This is also the age group of employees most negatively impacted by Duke's conversion from a traditional defined benefit plan to a cash balance plan. See Dkt. 96, pp. 6-7 (describing effect on older employees). While Duke's conversion to a cash balance plan could legally impact participants' anticipated future benefit accruals, the participants may still equitably hold Duke to the letter of the law in administering benefits under the Plan it designed. See Ex. 1: Decl. of Claude Poulin (4/1/10) showing analysis of whipsaw impact.

paying lump sum distributions pursuant to the Duke Energy Retirement Cash Balance Plan.

On January 1, 1997, Duke converted its traditional defined benefit retirement plan to a cash balance plan. A cash balance plan attempts to mimic the attributes of a 401(k) plan – yet it remains a defined benefit plan. In a cash balance plan, an employee's hypothetical account balance is credited with hypothetical allocations and hypothetical earnings determined under a formula selected by the employer. Cash balance plans often specify that hypothetical earnings are determined using a rate of return tied to specified Treasury securities. Ex. 1A: I.R.S. Notice 96-8, 1996-1 C.B. 359.

The hypothetical cash balance account is a bookkeeping entry for record-keeping purposes that tracks benefit accumulations based on periodic pay credits and interest credits. The pay credit is a percentage of the individual's monthly pay. The "interest" credit, under the Duke Plan, is based on 30-year Treasury rates, identified by a "lookback date" and "stability period." See, e.g., Ex. 2: 1997 Plan Excerpts, § 3.9.[2] Once an employee leaves the company, pay credits no longer accumulate. Interest credits, however, continue until the employee begins receiving the pension benefit.

An employee can usually choose whether the retirement benefit is distributed in the form of a single life annuity or a lump sum distribution made at the time of the employee's departure. After an employee vested in the Duke Plan and reached age 55, he or she could elect to receive the lump sum distribution. Ex. 2: 1997 Plan Excerpts, § 4.1. However, the retirement benefit was still to be

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[2] The "lookback date" and "stability period" are mechanisms used to identify the interest rates under the plan. For example, the stability period in a plan may be a month, a quarter, or a year; it simply means duration before reset. The stability period for Duke's interest crediting rate has always been quarterly. Ex. 2: 1997 Plan § 3.9; Ex. 3: 1997 Plan (7/16/97 Amendment) § 3.9; Ex. 4: 1999 Plan § 5.04(b). Between January 1, 1997 and January 1, 1999, Duke twice changed the Plan language setting the interest crediting rate lookback date; however, Duke always used the lookback date for interest credits based on the language of the September 5, 1997 Summary Plan Description ("SPD"). *Id.*; *see also*, Ex. 5: 1997 SPD, at DE-000406.

stated as an "annuity equal to the Actuarial Value of a Participant's Accrued Benefit commencing on the Participant's . . . Distribution Date and continuing for his and/or her lifetime, if applicable." Ex. 2: 1997 Plan § 4.1. This is because under a cash balance plan, as in all defined benefit plans, the employer guarantees the employee an accrued benefit upon retirement. 26 U.S.C. § 411(a)(7).[3]

A departing employee could not be penalized for choosing a lump sum distribution. Thus, the employer had to include the value of all future interest credits as part of a participant's accrued benefit at normal retirement age. Ex. 1A: IRS Notice 96-8, p. 3. The lump sum distribution then had to be calculated as the actuarial equivalent of the accrued benefit at normal retirement age, including the value of future interest credits between termination and age 65. 29 U.S.C. § 1054(d)(3); 26 U.S.C. § 411(c)(3) (requiring "actuarial adjustment").

For those distributions made prior to passage of the Pension Protection Act of 2006, the determination of actuarial equivalence required a two-step calculation, which is commonly known as a "whipsaw calculation."[4] First, the participant's account balance would be projected forward to its value at the participant's normal retirement age "using the rate at which future interest credits would have accrued" had the participant remained in the plan. *West, supra,* 484 F.3d at 400.

---

[3] Section 411(a)(7) provides that the "accrued benefit" be expressed in the form of an annual benefit commencing at normal retirement age.

[4] Pub. L. 109-280, 120 Stat. 780 (Aug. 17, 2006) ("PPA"). The PPA provided that on and after August 18, 2006, cash balance plans were no longer required to perform the whipsaw calculation when determining lump sum distributions. See 29 U.S.C. § 1053(f) (2006); 26 U.S.C. § 411(a)(13) (2006). The PPA does not apply to the Whipsaw Class herein. See *Traylor v. Avnet, Inc.*, 2009 WL 383594, *3 (D.Ariz. Feb. 13, 2009) ("Avnet cannot avoid liability for pre-PPA ERISA violations by relying on a statute that has no retroactive effect. We conclude that the PPA does not bar plaintiffs' whipsaw claims."); *West v. AK Steel Corp. Ret. Accumulation Pension Plan*, 484 F.3d 395, 412 (6th Cir. 2007) (holding that "the PPA is not retroactive in application" and "has no effect" on whether a whipsaw payment should be made to a participant who received a lump sum payment before its enactment).

Second, "that projected amount [would be] discounted back to its present value on the date of the actual lump sum distribution."[5] *Id.*

Federal statutory requirements limit employer discretion in setting actuarial assumptions for lump sum distributions. 26 U.S.C. § 417(e)(3)(A)(i) (stating ". . . the present value shall not be less than the present value calculated by using the applicable table and the applicable interest rate") (emphasis added); *see also* Ex.1: IRS Notice 96-8; 26 C.F.R. § 417(e)-1)(d)(1). Jennifer Yanulavich, the Rule 30(b)(6) deponent for Hewitt Associates, Duke's "enrolled Actuary" for its retirement Plan,[6] described the purpose of § 417(e):

> Q. . . . Tell me about what 417(e) is.
> A. 417(e) is an area of the Internal Revenue Code that defines the minimum requirements when establishing a lump sum payment or a present value of that payment. So pension plans are required when they offer what's called nondecreasing annuities, i.e., increase -- or, I'm sorry, it's when they're offering -- I always get this backwards, the whole -- but 417 is about when you're going to pay a decreasing annuity, for example, lump sum because you get one payment, the requirement to convert the accrued benefit to that form, what minimum assumptions have to be used.

Ex. 6: Yanulavich 30(b)(6) Depo. Excerpts 52:15 – 53:2 (emphasis added).

A plan could select its own actuarial assumptions; however, the discount rate could not exceed the cap set by § 417(e):

> Q. All right. Is it also true that to your knowledge the last bit of that where it talks about how the whipsaw happens when there's a lower interest rate that's required by the Internal Revenue Code. You see -- you see that part of it?
> A. I do.
> Q. Is it also possible that the plan itself may have a provision that requires the lower one?
> . . .

[5] The only exception to the "whipsaw" requirement was for plans that met the very specific safe harbor requirements of IRS Notice 96-8. Ex. 1A, p. 5. See *infra* at pp. 6-11, 28-37.

[6] Ex. 6: Yanulavich Depo. Excerpts 72:6 – 10.

A. It is possible for the plan to define a different interest rate than what the Internal Revenue Code defines.
Q. And you just look to the plan to see?
A. That is correct.
Q. All right. So they're not all the same in that regard?
A. No, they are not.

Ex. 6: Yanulavich Depo. Excerpts 31:21 – 32:14. See also, *Id*. 53:3 – 13.

The projection of the account balances to age 65 at a higher interest rate than the rate used to compute the actuarial present value of the accrued benefit at termination (as capped by § 417(e)) results in a benefit that exceeds the cash balance account. IRS Notice 96-8 requires that the resulting higher lump sum amount be paid. Ex. 1A: Notice 96-8, p. 4.

Duke corporate representatives have admitted that no whipsaw calculations were ever done under the Plan. Ex. 7: Jefferies 30(b)(6) Depo. Excerpts (2/5/08) at 155:5 – 20; 157:10 – 12; 160:12 – 17. Since the Plan came into existence, Duke has instead paid out lump sums in an amount equal to the existing balance of the cash balance account. *Id*. Richard Jefferies, the Rule 30(b)(6) corporate representative for Duke on the issue of whipsaw, testified that he could point to no provision of the Plan that would authorize Duke to avoid performing whipsaw calculations: "I think it really goes more to plan operation as opposed to provision of the plan so I don't know that I can point to a section of the plan that says that." Ex. 7: Jefferies 30(b)(6) Depo. Excerpts (2/5/08) at 158:4 – 7. "I can't point to a section, no." *Id.* at 158:21.

Plaintiffs contend that Duke was required to perform whipsaw calculations because a) the Plan did not meet the safe harbor requirements of IRS Notice 96-8; b) at no time did the rate used by Duke to apply interest credits to participants' account balances match the rate it claims was to be used as the discount rate (referenced below as "reset (quarterly/annual) whipsaw"); and c) application of § 5.04(c) of the 1999 Plan required calculation of lump sum distributions under its

terms (referenced below as "§ 5.04(c) whipsaw").

B. IRS Notice 96-8 Safe Harbor

1. Pertinent Provisions of the Notice

For pre-PPA distributions, a cash balance plan could avoid the requirement that each lump sum distribution paid to retiring participants be supported by a § 417(e)-compliant whipsaw calculation, but only by meeting explicit safe harbor requirements. In Notice 96-8, the IRS stated:

> [A]ssuming that the annuity conversion factor **under the plan** is not less than the annuity conversion factor determined using the applicable interest rate and mortality table under section 417(e)(3), the employee's hypothetical account balance will equal or exceed the present value of the employee's accrued benefit determined in accordance with section 417(e). Thus, a single sum distribution equal to the employee's hypothetical account balance under such a plan will satisfy sections 411(a) and 417(e).
>
> In other cases, a single sum distribution equal to an employee's hypothetical account balance will satisfy sections 417(e) and 411(a) if (a) the annuity conversion factor is **not less than** the annuity conversion factor determined using the applicable interest rate and mortality table under section 417(e)(3), (b) under the method for reflecting future interest credits in the calculation of an employee's accrued benefit, the future interest credits are projected using a rate that is no greater than the applicable interest rate under section 417(e)(3), and (c) this projection does not result in a forfeiture in violation of section 411(a).

Ex. 1A: IRS Notice 96-8, Sec. III.B.3., pp. 3-4 (emphasis added).

Thus, Notice 96-8 provides that to be a safe harbor plan the "annuity conversion factor under the plan" must be "not less than the annuity conversion factor determined using the applicable [417(e)] interest rate and mortality table under section 417(e)." *Id.*. at p. 4. Duke has previously described the Notice 96-8 safe harbor this way:

> "Whipsaw" liability, however, does not arise where a plan provides interest credits at a rate that is the same as, or lower than, the § 417(e) discount rate. If the interest and discount rates are the same, calculating how much interest an account balance will earn over the number of years it takes the employee to reach age 65, then discounting this amount by the same interest rate over the same number of years,

> **results in a wash**. Thus, where a plan provides interest at a rate that is the same as, or lower than, the § 417(e) discount rate, it need not perform a whipsaw calculation, and can simply pay the amount of the account balance.

Dkt. 83-2, p. 8 (boldface and underline emphasis added).

In order to demonstrate a safe harbor result, the plan must state the discount rate – whether the § 417(e) rate or a lesser rate – and the plan must define the stability period (duration) and lookback date (reset date)[7] so that it is clear on the face of the plan that the result, as described by Duke, is "a wash." As discussed in the next section, Duke's plan did not meet these conditions for safe harbor.

2. Pertinent Provisions of the Plan

From 1997 to 1998, the provisions of the Plan pertinent to the issue of whipsaw are the sections relating to interest crediting rate and actuarial value. Section 3.9 of both 1997 Plans provides for an interest crediting rate that resets quarterly. Section 1.4 defined the actuarial value of the participant's benefit as:

> **Actuarial Value** shall mean a benefit of equivalent value, as certified by the Actuary, of a Participant's benefit provided under the Plan, computed on and after January, 1997, on the basis of the following assumptions:
>
> > Mortality - the table described in Section 417(e) of the Code, which for 1997 is the blended (50/50) 1983 Group Annuity Mortality Table.
> >
> > Interest - the annual yield on 30-year Treasury securities determined as the average for the month of November prior to the beginning of the Plan Year during which the Annuity Starting date begins, determined in accordance with Section 417(e) of the Code.

Ex. 2: 1997 Plan § 1.4; Ex. 3: 1997 Plan (7/16/97 Amendment) § 1.4 (emphasis in original).

The 1999 Plan described the interest crediting rate in § 5.04(b). Ex. 4. While the 1999 Plan

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[7] Treas. Reg. § 1.417(e)-1(d)(4)(ii) and (iii).

included an "Appendix A" of actuarial assumptions, the Appendix omitted assumptions for conversion of a cash balance account under the 1999 Plan to a lump sum:

> For conversion of the Cash Balance Account to a single life annuity and to convert the Duke Power Prior Plan accrued benefit to a lump sum:
>
> > Mortality - 1983 Group Annuity Mortality Table weighted 50% male and 50% female.
> >
> > Interest - Annual yield on 30-year United States Treasury securities determined as the average for the month of November prior to the beginning of the Plan Year during which the Annuity Starting date falls.

Ex. 4: 1999 Plan, Appendix A, DE-000324 (underline emphasis added).[8]

Duke states that the Plan did not need to state actuarial assumptions for conversion of the cash balance plan to a lump sum because Duke never made that calculation. Duke's 30(b)(6) deponent, Richard Jefferies, stated:

> Q. All right. Now if you would, show me the provision in Appendix A that would apply to converting the cash balance plan to a lump sum.
> A. Cash balance plan wasn't required to be converted to a lump sum. It's already expressed in lump sum form.

Ex. 7: Jefferies 30(b)(6) Depo. Excerpts, 149:11 – 16.

Duke's other 30(b)(6) deponent, Robert Ringel, stated:

> Q. Under Duke's interpretation there was no discount rate provided in the plan for lump-sum conversions, correct?
> . . .
> A. Well, we weren't discounting. You know, we -- there was no project forward and discount back because the plan term said if you elect a lump sum then

[8] Duke acknowledged the omission in 2002 as an amendment to Appendix A, effective January 1, 2003. It expanded the actuarial assumptions to show conversion of the cash balance account to a lump sum. Ex. 8: Amendment 9 to 1999 Plan, pp. 7-8. The amendment, however, could only apply to participants vesting after the effective date because, to the extent Amendment 9 prescribes a less favorable discount rate, it is considered an unlawful cut-back of accrued benefits. ERISA § 204(g), 29 U.S.C. § 1054(g); IRC § 411(d)(6), and Treas. Reg. §§ 1.411(d)-4, Q&A-I(a)(2)&(3) and 1.411(d)-3(g)(6)(i).

what you get is the account balance.

Ex. 9: Ringel 30(b)(6) Depo. Excerpts, 98:15 – 23.[9]

Yet during the design phase for the cash balance plan Duke was told by its consultant that a cash balance plan could not simply pay the cash balance account as a lump sum:

> **The rule**
>
> The lump sum cannot be less than the present value of the normal retirement benefit calculated using applicable GATT[10] rates.
>
> **What it means for cash balance plans**
>
> Cash balance plans can't simply pay out the current cash balance account if an employee elects a lump-sum distribution. Instead, [sic] must project the normal retirement benefit as an annuity benefit. Then, convert to a lump sum using interest rates no higher than applicable GATT rates. This can result in a lump sum that may exceed cash balance account. If future interest credits exceed GATT rate, then project forward at higher rate and discount back at lower rate.

Ex. 11: Mercer Powerpoint (August 1995) at M_00026882 (emphasis added).

> **The rule**
>
> An employee's accrued benefit is defined by the Code as "the employee's accrued benefit determined under the plan . . . expressed in the form of any annual benefit commencing at normal retirement age." [§ 411(a)(7)]
>
> **What it means for cash balance plans**
>
> ✦ IRS says accrued benefit cannot be defined simply as the current account balance. Define accrued benefit as the deferred annuity payable at normal retirement age. . . .

Ex. 11: Mercer Powerpoint (August 1995) at M_00026877.

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[9] Duke also has taken the position that in the absence of appropriate assumptions in the Plan, the IRS § 417(e) rate is a default rate. Ex. 10: Hearing Transcript (12/19/07) at pp. 72-3.

[10] The "GATT rate" (General Agreement on Tariffs and Trades) represents the interest rate of 30-year Treasury Bonds and prescribes interest and mortality assumptions used under § 417(e) of the Internal Revenue Code to establish a ceiling for determining amounts of lump sum benefits.

Duke further admits through its Rule 30(b)(6) witness, Richard Jefferies, that a whipsaw calculation using the Plan interest crediting rate and the discount rate it contends should be used, would not produce "a wash," but would produce added benefits for participants:

> A. . . . In -- in terms of this report, this report was look -- was done to look at where there had been variations between the GATT rate which I sometimes term the conversion rate, and the interest crediting rate and in particular it was highlighting where the interest crediting rate because of timing difference of when the rate set was higher than the GATT rate, okay? And so [sic] doesn't change the company's belief or my belief that because we're using 30-year Treasury rate no whipsaw calculation was required, but it does kind of set the tone for those quarters where if a calculation had been done, the product of the calculation would have been a higher value than the cash balance account.

Ex. 7: Jefferies 30(b)(6) Depo. Excerpts 172:16 – 173:8 (emphasis added).

3. Duke-IRS Communications

Plaintiffs have always contended that the Duke Plan was not a safe harbor plan and that it was required to perform whipsaw calculations. Plaintiffs now know that the IRS denied Duke safe harbor status for the 1999 Plan. Although Duke contended early in this case that "the plans at issue" were approved by the IRS, only the 1997 version of the Plan had received a favorable determination letter until recently. The legal impact of the 1997 and 2009 determination letters on this litigation is nil;[11] however, the points made by the IRS during 2007 and 2008 are instructive. Laura

[11] "Notably such IRS proceedings are *ex parte*, predicated only on the submissions of the ERISA plan seeking relief. The IRS determination thus only resolves issues between the IRS and the ERISA plan - it is not a formal adjudication and it does not impact on the relationship between an ERISA plan and its beneficiaries. Even though the IRS may decide whether to tax an ERISA plan, it is not entitled to alter the contractual rights of the plan beneficiary. Although we accord great deference to the IRS with respect to tax policy and regulation, the judiciary retains its dominion in ERISA civil actions. Thus, despite the Defendant's argument to the contrary, the IRS ruling relied on by the Defendant is not entitled to deference in this proceeding." *Cross v. Bragg*, 329 Fed. Appx. 443, 2009 U.S. App. LEXIS 16392, *27-28 (4th Cir. July 24, 2009) (emphasis added). *See also Esden v. Bank of Boston,* 229 F.3d 154, 177 (2nd Cir. 2000) (The "adjudication of [an employee's] rights is for the Federal courts, not the field offices of the IRS").

Warshawsky, an IRS field reviewer, stated:

> 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. 12: Warshawsky letter (boldface and underline emphasis added).

The IRS, initially and in subsequent communications, focused on the language of § 5.04(c) of the 1999 Plan 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. Notes of a conversation between Duke attorneys and Laura Warshawsky of the IRS are unequivocal: "We need to get rid of 5.04(c) because it is illegal."[12] Ex. 13 (emphasis added).

The IRS ultimately required Duke to delete the provisions of § 5.04(c) that are the focus of the § 5.04(c) whipsaw issue in this litigation and to make the Appendix A actuarial assumptions (originally effective 1/1/03) retroactive to January 1, 1997, to provide for conversion of the cash balance account to a lump sum. The IRS also insisted that Duke include in its definition of accrued benefit a provision that equated the accrued benefit with "an annuity in the Normal Form of Retirement Income commencing on the Normal Retirement Date that is the Actuarial Equivalent of the Participant's Cash Balance Account with Interest Credits projected to the Normal Retirement Date." Ex. 14: 3/30/09 Plan Amendment. The amendment also verified the proper method for calculating future interest credits: "In computing the Accrued Benefit at any time, the assumed future Interest Credits shall be determined using an interest rate equal to the Interest Factor in effect on the date the determination is being made." *Id.*; see also Ex.15. The reviewers, thus, wavered on whether to require specific whipsaw language in the amendment that they required to tax qualify the plan; but they never wavered on the fact that the 1999 Plan document did not produce a safe harbor plan.

C. Reset (Quarterly/Annual) Whipsaw

Duke's Plan did not meet its own description of safe harbor as "a wash" or meet the requirements of Notice 96-8. During the whipsaw class period, the interest rate that would be used to "calculat[e] how much interest an account balance will earn over the number of years it takes the

[12] Duke seeks to soften the impact of the notation through hearsay comments of Duke outside counsel David Godofsky, who has never been named a witness in this case nor provided testimony. 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.

employee to reach age 65" was not the same as the discount rate Duke contends was applicable. This is because Duke used a quarterly reset for interest crediting rates and either an annual reset for the discount rate or stated no discount rate at all. See Ex. 16 (table of rates showing the quarterly interest crediting rates called for by the Plan documents compared with the annual discount rates described in the 1997 Plan at §1.4 and Appendix A to the 1999 Plan).[13] There was never a time period for the Duke Plan when the interest crediting and discount rates were the same. Duke employee Christopher Rolfe described the phenomenon:

> A. Actually, it was the -- a potential issue with whipsaw was brought to my attention, and I can't recall the exact time and it had to do with the issue of -- that in the plan interest crediting rates I believe were determined quarterly based upon market conditions.
> Q. Right.
> A. The discount rate was set annually and there was the possibility that those could become disconnected even though for a short period of time. And I believe we made an amendment to the plan, and I cannot recall the exact year, to eliminate that possibility and to make the discount rate and the interest crediting rate reset annually. That is whipsaw that I'm aware of, the potential.

Ex. 17: Rolfe Depo. Excerpts 33:24 – 34:14 (emphasis added).

As Mr. Rolfe notes, using the discount rate Duke says was applicable meant there was never equivalence with the interest crediting rate. Furthermore, contrary to what Mr. Rolfe thought, Duke never did a thing to correct the issue.

Duke's corporate representative, Richard Jefferies, also admits that a whipsaw calculation, under the terms of the Plan, would not have resulted in "a wash" because if a calculation had been done, the product of the calculation would have been a higher value than the cash balance account."

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[13] While Appendix A, prior to January 1, 2003, did not set forth a discount rate for conversion of a cash balance account to a lump sum (see fn. 8, above), Duke argues it can be looked to anyway, rather than § 5.04(c) as Plaintiffs contend. Even if the Court accepts Duke's position, whipsaw results. Thus, for purposes of the reset rate whipsaw, Plaintiffs have listed the Appendix A annual discount rates to demonstrate the rate discrepancy throughout the class period. Ex. 16.

Ex. 7: Jefferies 30(b)(6) Depo. Excerpts 172:16 – 173:8 (underline emphasis added).

Duke is bound by the corporate representative's admission that for the quarters when the interest crediting rate under the Plan exceeded the GATT rate, a properly performed whipsaw calculation would have resulted in a higher lump sum to participants, not a wash. This scenario is the antithesis of the safe harbor Duke described early on in this case. Compare Dkt. 83-2, p. 8.

In fact, long before Plaintiffs filed claims and commenced administrative proceedings, Duke recognized and began quantifying the potential liability of the Plan based on its failure to perform whipsaw calculations. Ex. 18: Whipsaw Lump Sum Report; Ex. 19: Email of Jennifer Yanulavich; Ex. 6: Yanulavich Depo. Excerpts 48:20 – 49:9. Jennifer Yanulavich, Rule 30(b)(6) deponent for Hewitt Associates, Duke's "enrolled actuary" for the Plan, described what she was asked to do with regard to calculating potential whipsaw liability:

> A. Going back to the documents we looked at before between 2003 and 2004, we were asked to look at the impact on participants' cash balance accounts who had retired during a period of time in which the interest crediting rate was greater than the 417(e) interest rate.

Ex. 6: Yanulavich Depo. Excerpts 70:15 – 71:2 (emphasis added); see Id. 72:6 – 10. Ms. Yanulavich also testified:

> Q. All right. When you say that the liability as of December 31, 2004 was 13.3 Million at a 5 percent interest rate, is this liability the amount of money that's totaled by picking -- by doing a whipsaw calculation instead of simply paying someone whatever their cash balance is? Is it the difference between those two?
>
> A. It would be a difference, yes.

Id. 49:14 – 21.[14]

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[14] The liability figures were calculated by Ms. Yanulavich herself. *Id.* 51:14 – 16. She described that the calculations were to show what the difference would have been had Duke actually done the whipsaw calculations. *Id.* 53:19 – 54:10. (The damage figures both parties will present are lower than the totals Ms. Yanulavich noted because her figures did not account for participants who

D. Section 5.04(c) Whipsaw

"Notwithstanding anything herein to the contrary ..." – this phrase ushers in § 5.04(c) of the 1999 Plan, to apply "if a Participant elects to receive a lump sum distribution prior to his Normal Retirement Date." The provision reads in full:

> Notwithstanding anything herein to the contrary, if a Participant 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 shall be the lesser of 4% or the "applicable interest rate" specified in Code Section 417(e) and Treasury Regulation 1.417(e)-1T.

Ex. 4: 1999 Plan (emphasis added). Despite this mandatory, all-inclusive language, Duke viewed § 5.04(c) as the exception, not the rule. Duke disregarded the provisions of § 5.04(c) throughout the course of its administration of benefits under the 1999 Plan, stating it was only to be applied "in limited circumstances that have never arisen." Dkt. 83-2, pp. 14-15.

Duke says § 5.04(c) is irrelevant to lump sum distributions despite the "notwithstanding" language because lump sum distributions were paid out as the cash balance account balance pursuant to § 7.02(a) of the Plan. According to Duke, the Plan Administrator never even gets to the language of § 5.04(c). Duke is wrong because, even without analyzing the impact of the "notwithstanding" clause, which Plaintiffs address below at pp. 32-33, the explicit terms of the Plan all lead back to § 5.04 of the Plan, to include § 5.04(c).

1. Relevant Terms of the Plan

To derive a Participant's ultimate payout under the Plan, the Plan terms follow a two-fold approach that first requires determining the amount of the benefit and then following the provisions governing the form of the benefit to be paid. Calculation of a Participant's early retirement benefit

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retired and collected the prior plan frozen benefit when that benefit exceeded the cash balance account).

amount starts with § 6.02(c) of the 1999 Plan which provides:

> Amount. A Participant's early retirement benefit shall be equal to his **Accrued Benefit**, payable in the **form of payment elected**....

Ex. 4: 1999 Plan § 6.02 (boldface emphasis added, underline in original).

Plan § 2.03 defines "Accrued Benefit" for purposes relevant to the whipsaw issue as "the Participant's **Cash Balance Account**." See Ex. 4: 1999 Plan § 2.03 (emphasis added). Plan § 2.14 then defines "Cash Balance Account" as "the Participant's Accrued Benefit as **calculated pursuant to Section 5.01**." See Ex. 4: 1999 Plan § 2.14 (emphasis added). Plan § 5.01 defines the Participant's Cash Balance Account as "the Opening Balance (if any) plus Pay Credits credited in accordance with Section 5.03 plus **Interest Credits credited in accordance with Section 5.04**." See Ex. 4: 1999 Plan § 5.01 (emphasis added).

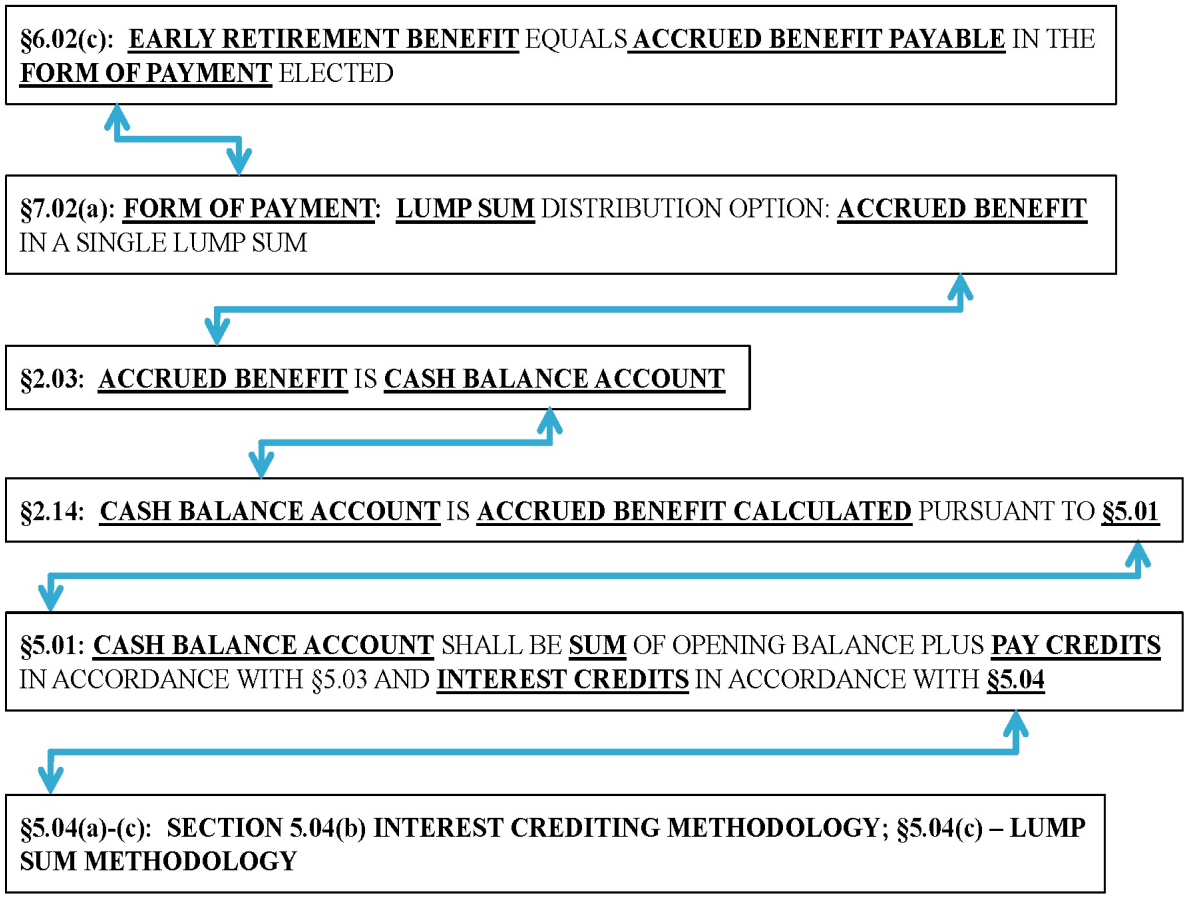
Plan §5.04(a) describes the Participants entitled to interest credits. Section 5.04(b) establishes the manner in which interest credits accrue to each eligible Participant's account through an Interest Factor that is converted to a Monthly Interest Rate. See Ex. 4: 1999 Plan Excerpts, §§ 5.04(b), 2.38 and 2.39. Plan §5.04(c) then sets forth the manner in which the lump sum calculation must be performed, "notwithstanding anything [in the Plan] to the contrary," a calculation that requires calculation of discounted interest credits.

The form of the benefit to be paid is set out primarily in Article VII. Plan § 7.01 provides that the Normal Form of Retirement Income shall be either a Joint and Survivor Annuity for married participants or a Single Life Annuity for unmarried Participants. *See* Ex. 4: 1999 Plan § 7.01. Plan § 7.02 sets forth other forms of benefit payments. That section provides in part:

> Lump Sum Distribution Options. A married or unmarried Participant may elect payment of the Participant's **Accrued Benefit** in a single lump sum . . . .

Ex. 4: 1999 Plan Excerpts, § 7.02 (boldface emphasis added).

In short, both § 7.02 and § 6.02 reference "Accrued Benefit," which in turn is described as the "Cash Balance Account," which in turn is described in § 5.01 to mean an amount **calculated** under § 5.04. The Plan terms thus lead inevitably to the provision Plaintiffs have always contended is applicable here – § 5.04(c). The interrelationship of these critical plan provisions may be shown graphically as follows:



Thus: §6.02(c) → §7.02(a) → §2.03 → §2.14 → §5.01 → §5.04(a) – (c).

Plan§ 5.04(c) cannot simply be thrown out by looking to § 7.02 as Duke urges.

2. What § 5.04(c) Does not Say

Duke, through its Rule 30(b)(6) representative, testified that: " We – we never went to 5.04(c) of the plan. When someone elected a lump-sum distribution, what we would do instead is just pay their account balance." Ex. 9: Ringel 30(b)(6) Depo. 91:20 – 23. According to Mr. Ringel, notwithstanding the "notwithstanding" language of § 5.04(c):

> Q. You can't ignore what the plan says just because you want to, can you?
> A. We would not ignore, you know, a provision that applied to a particular circumstance, but this 5.04(c) just didn't apply when someone asked for a lump sum.

Ex. 9: Ringel 30(b)(6) Depo. Excerpts 159:13 – 18.

Duke says that § 5.04(c) is triggered only if the 417(e) rate fell below 4%:

> A. Okay. Just to specifically address the section, I think what the – what the section you're referring to says is that at – at any point if the interest rate dropped below 4 percent, which 4 percent was the minimum interest crediting rate associated with the interest credit side of the plan, if it dropped below that point, then what would be used if anyone wanted to come back and use that as a reason why we would need to project forward and back, then this section would say that it's not the 4 percent rate you would use for that purpose; it's -- it's the 417(e) rate which would mean you were projecting forward and back at the same rate.

Ex. 7: Jefferies 30(b)(6) Depo. (2/5/08) 159:13 – 160:1; see also *id.* at 222:9 – 25. Mr. Ringel agreed with this erroneous view of § 5.04(c):

> A. 5.04(c) -- we've never applied it. And when someone elects a lump sum we pay the account balance in their, you know, cash balance account. The point of 5.04(c), since we have this 4 percent minimum interest crediting rate, if someone was to say that we had to do a projection forward to normal retirement age and discount back, then what we wanted to make sure of when we put this in there is in that case, which never happened, so hypothetical if we had to do this whipsaw calculation we wanted the interest rate for projecting up to the normal retirement age to be the lesser of 4 percent or the 30-year Treasuries, and that' – that's what that means in 5.04(c).

Ex. 9: Ringel 30(b)(6) Depo. Excerpts 154:14 – 155:2.

Nowhere in § 5.04(c), or anywhere in the 1999 Plan, is there a limitation that § 5.04(c) would be triggered only if the 417(e) rate fell below 4%. This restriction is neither stated nor implied. In fact, the "lesser of" language of § 5.04(c), which explicitly calls for a choice between the two alternatives, is rendered absurd by Duke's view of the provision. The plain reading of § 5.04(c) is that 4% is to be used when the 417(e) applicable rate is **not** below 4%.

Further, if § 5.04(c) is interpreted as setting an interest crediting rate for lump sum calculations, as urged by Duke, the literal language of the provision calls for a **monthly** rate of 4% or the 417(e) rate. This equates to an annual interest crediting rate exceeding 48% with compounding. While Plaintiffs would not turn down a whipsaw calculation performed using an interest crediting rate of 4% per month, the sheer magnitude of the number that results admittedly renders such an interpretation an absurdity – but one that logically follows from Duke's view. Duke's argument that § 5.04 (c) must be considered an interest crediting rate means that Duke must either a) live with a monthly crediting rate of 4% (in which case safe harbor goes out the window and Plaintiffs must recover a huge windfall); b) ask this Court to cast aside § 5.04(c) in its entirety; or c) have this Court reform the provision so that it reads:

> ~~Notwithstanding anything herein to the contrary,~~If and only if a Participant elects to receive a lump sum distribution prior to his Normal Retirement Date and as of that date the "applicable interest rate" specified in Code Section 417(e) and Treasury Regulation 1.417(e)-1T is below 4%, the ~~Monthly~~ Interest ~~Rate~~Factor applied for purposes of determining the lump sum distribution shall be the lesser of 4% or the "applicable interest rate" ~~specified in Code Section 417(e) and Treasury Regulation 1.417(e)-1T.~~ and the discount rate to be applied to the calculation shall also be the "applicable interest rate."

Such a reformation not only is improper,[15] but transforms a contract clause that can be read

[15] Duke has not sought equitable reformation. *Blackshear v. Reliance Standard Life Ins. Co.*, 509 F.3d 634, 643 (4th Cir. 2007) (stating that doctrine of equitable reformation does not apply in the context of an administrator's interpretation of an ERISA plan; the administrator cannot simply

in a manner that harmonizes with the remainder of the Plan to render it illegal. Duke's "operational" reformation of § 5.04(c) not only creates the potential for negative whipsaw, but leads to a forfeiture of vested benefits. See § 417(e) and ERISA § 205(g); § 411(a)(2) and ERISA § 203(a)(2).[16] This is the illegal effect that Plaintiffs, since the commencement of this litigation, have argued forecloses the spin Duke seeks to put on the provision. This is also the interpretation that caused a Duke attorney on November 12, 2007 to note, based on a conversation with IRS reviewer Laura Warshawsky: "We need to get rid of 5.04(c) because its illegal." Ex. 13: Godofsky Notes.

3. What § 5.04(c) Does Say

Plaintiffs urge a plain meaning basis for implementing § 5.04(c). Reiterating the language of the provision, § 5.04(c) says:

> Notwithstanding anything herein to the contrary, if a Participant 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 shall be the lesser of 4% or the "applicable interest rate" specified in Code Section 417(e) and Treasury Regulation 1.417(e)-1T.

Ex. 4: 1999 Plan § 5.04(c) (emphasis added). Obviously, to give effect to the initial clause of § 5.04(c) is to recognize that such "notwithstanding" language must trump any contrary language in the Plan. *See infra.* at pp. 32-33. Thus, to give effect to the plain language of the section is to recognize that it must apply to all instances where "a Participant elects to receive a lump sum

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'reform' a plan to correct what it unilaterally perceives to be a mistake or error contained in the plan's written terms; rather reformation, like other forms of equitable relief, must be requested by the party seeking to reform the contract and granted by a court."). Absent actually seeking and establishing entitlement to reformation, Duke is stuck with the language of the Plan it wrote.

[16] Vested benefits cannot be forfeited, as explained in prior whipsaw cases. See *Berger v. Xerox Retirement Income Guar. Plan*, 231 F.Supp.2d 804 (S.D.Ill. 2002), *aff'd*, 338 F.3d 755 (7th Cir. 2003) (whipsaw claim); *Esden v. Bank of Boston*, 229 F.3d 154 (2nd Cir. 2000) (whipsaw claim); *West v. AK Steel Corp. Ret. Accumulation Pension Plan*, 484 F.3d 395 (6th Cir. 2007) (same).

distribution prior to his Normal Retirement Date." Accordingly, the clear language of § 5.04(c) must supercede any argument that the Plan simply calls for payment of the cash balance account balance. Application of § 5.04(c) is mandatory, by its clear terms, to the determination of any Duke Plan participant's "lump sum distribution prior to his Normal Retirement Date."

Plan § 5.04(c) mandates a "lesser of" analysis between 4% and the "applicable interest rate specified in Code Section 417(e) and Treasury Regulation 1.417(e)-1T." The words "lesser of" are clear and there is no reasonable interpretation of the plain words of the Plan provision other than that an objective "lesser of" determination be made and applied to the determination of lump sum distributions. Because the 417(e) "applicable rate" never dropped below 4% between January 1, 1999 and August 17, 2006 (the end of the class period), the winning rate must be 4%.

The final issue is application of the 4% to determination of a lump sum amount. As discussed above, Duke contends that § 5.04(c) establishes an interest crediting rate for determination of participants' lump sum distributions. However, viewing the rate as an interest crediting rate means that the explicit language of the provision creates a monthly rate of 4%. This equates to an astronomical figure, but any other reading requires either a strikeout of the phrase "monthly interest rate" or a reformation of that phrase to read "Interest Factor." See Ex. 4: 1999 Plan § 2.38. To construe the provision as Duke reads it violates the most basic rules of contract construction and the mandates of ERISA and produces a result which allows for an interest crediting rate that violates ERISA. *See* e.g. p. 20 above. Duke's construction also requires one to ignore the fact that the interest crediting rate for the calculation of lump sum distributions must be determined by looking to the Plan § 5.04(b) crediting rate as of the date of distribution.

The sole legitimate interpretation of § 5.04(c) that gives effect to the plain language of the

provision and all of it, is that the 4% is to be used as a discount rate in determining the lump sum distribution. This is appropriate for 3 reasons.

First, as conceded by Duke, until January 1, 2003, the Plan did not otherwise state any assumptions to calculate actuarial equivalence in converting a cash balance account to a lump sum. Thus, without 4% as a conversion factor, the Plan Document lacked the assumptions required by Treas. Reg. § 1.417(e) -1 and IRS Notice 96-8. Ex. 1A, p. 4.

Second, the "lesser of" language in § 5.04(c) is entirely consistent with the type of methodology required under Treas. Reg. §1. 417(e)-1(d)(5) for a plan that states a discount rate other than the 417(e) rate, i.e. comparing the rates and using the rate which results in the greater benefit. This conclusion is made even stronger by the fact that § 5.04(c) uses the phrase "applicable interest rate specified in Code Section 417(e) and Treasury Regulation 1.417(e)-1T." The "applicable interest rate" specified in 417(e) and the Treasury Regulation is a discount rate, not an interest crediting rate. The fact that the sentence at issue requires a comparison between a specific numeric rate and a statutory discount rate is certainly strong evidence that the topic of the clause is the discount rate.

Third, the phrase "Monthly Interest Rate" can only be harmonized with a rate as large as 4% if it is a discount rate. That is because the mechanism used for discounting applies an annual rate against successive monthly payments and then totals the monthly discounted amounts to determine a lump sum. Jennifer Yanulavich of Hewitt and Associates describes this process:

> To determine the lump sum, each expected monthly payment is multiplied by a discount factor to represent the time value of money between the lump sum payment date and the future monthly payment date. Beginning with the date monthly payments are to begin, the first monthly payment is multiplied by a discount factor for the time period between the date of the first monthly payment and the lump sum payment date. Then the second monthly payment is multiplied by a discount factor

> for the time period between the date of the second monthly payment and the lump payment date. This process is done for every possible future monthly payment and the present value of all of the monthly payments are summed to determine the present value of the monthly stream of benefit payments. In summary, the lump sum determination does reflect the timing of each monthly payment and does not assume that future payments will be made on an annual basis when discounting the payments for interest.[17]

Ex. 20: Yanulavich Letter, DE-000474-75, at DE-000475. The process described is an annual rate applied to a monthly period and is the only scenario in which the language or § 5.04(c) does not create an absurdity.

Duke has tried to create an inference in its favor from the subheading for 1999 Plan § 5.04, entitled "Interest Credits." Dkt. 103, p. 15. Duke makes the argument that § 5.04(c) must describe an interest crediting rate because of this subheading, despite the explicit language of § 13.03: "The headings and subheadings in this Plan have been inserted for convenience of reference only and are to be ignored in any construction of the Plan." Ex. 4: 1999 Plan Excerpts. In any event, as discussed herein, the "Interest Credits" for purposes of lump sum distributions must be <u>discounted</u> interest credits. Thus, there is no disharmony with the subheading of Plan § 5.04.

III. STANDARD GOVERNING MOTION FOR SUMMARY JUDGMENT

For the standard of review of summary judgment, the Plaintiff directs the Court to Plaintiffs' Memorandum in Support of Motion for Summary Judgment as to Count Four, pp. 2-3, which is incorporated herein by reference.

IV. ARGUMENT

A. The Appropriate Scope of Review is *De Novo*

In reviewing this Motion for Summary Judgment, this Court must first determine the

[17] The process is described with regard to the present value calculation for a prior plan benefit, however, the present value discounting process is always the same.

applicable scope of review of Plaintiffs' claims. In cases in which a court reviews an ERISA plan administrator's decision to deny benefits, a reviewing court must initially decide *de novo* whether the plan's language grants the administrator discretion to determine the claimant's eligibility for benefits, and if so, whether the administrator acted within the scope of that discretion. *See Haley v. Paul Revere Life Ins. Co.*, 77 F. 3d 84, 89 (4th Cir. 1996). In the usual case, if the court determined the language of the plan conferred such discretion, then the court would review the decision to deny benefits for abuse of discretion. *Cedar v. Paul Revere Life Ins. Co.*, 228 F.3d 518, 522 (4th Cir. 2000) (citing *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989)). This deferential standard of review allows a court to uphold a reasonable decision even if the court would have reached a different conclusion.

The Duke plan contains language conferring on the Benefits Committee or its designee authority to interpret the Plan provisions and designating the committee as one of the named fiduciaries. Ex. 4: 1999 Plan §10.08. This language generally would qualify under *Firestone* as conferring discretionary authority to determine eligibility for benefits or to construe the terms of the plan. However, the abuse of discretion scope of review <u>only</u> applies where the court determines upon *de novo* review that a contested provision of the plan is ambiguous.

> Because Ericsson reserved full discretion to interpret the terms of this plan and to adjudicate benefit claims, we would generally review its denial of benefits for an abuse of discretion. Under this standard, a plan administrator's decision will not be disturbed if it is reasonable even if [the] court would have come to a different conclusion independently. <u>However, in the context of an interpretation of a plan's language, we afford this deference only if the language at issue is ambiguous. Where, in contrast, the plan's language is clear and unambiguous, a plan administrator must construe the language as written and we owe no deference to contrary constructions</u>.

Ahuja v. Ericsson, Inc., 277 Fed. Appx. 300, 302 2008 WL 2018449, *2 (4th Cir. 2008) (emphasis

added, citations and internal quote marks omitted); *see also, Lockhart v. United Mine Workers of America 1973 Pension Trust*, 5 F.3d 74, 78 (4th Cir. 1993) (accord); *Davis v. Burlington Indus., Inc.,* 966 F.2d 890, 895 (4th Cir. 1992) ("If the plan language is unambiguous, however, we would not defer to a contrary interpretation by the trustees"); *Colucci v. A.G.F.A. Corp. Severance Pay Plan*, 431 F.3d 170, 176 (4th Cir. 2005) ("Yet, even as an ERISA plan confers discretion on its administrator to interpret the plan, the administrator is not free to alter the terms of the plan or to construe unambiguous terms other than as written"), *abrogated in part on other grounds, Champion v. Black & Decker (U.S.) Inc.*, 550 F.3d 353 (4th Cir. 2008). An ERISA plan must be enforced "as written unless we can find a provision of ERISA that contains a contrary directive." *Berger v. Nazametz,* 157 F. Supp.2d 998, 1009 (S.D. Ill. 2001) (quoting *Dade v. North American Phillips Corp.*, 68 F.3d 1558, 1652 (3rd Cir. 1995)).

Whether a contract is ambiguous is a question of law for the court to decide. *Denzler v. Questech, Inc.*, 80 F.3d 97, 101 (4th Cir. 1996) (ERISA case, stating that "[t]he question of whether a contract is ambiguous is one of law…"). Further, "[i]n interpreting ERISA plans, we turn to principles of the federal common law of contracts. We also turn to principles of state common law for guidance." *Id*. (citations omitted).

In contract construction, a "mere lack of clarity on casual reading is not the standard for determining whether a contract is afflicted with ambiguity." *Campbell, Givens and Moody v. Moise*, 288 S.C. 210, 341 S.E.2d 147, 150 (Ct. App. 1986); *Jacobs v. Service Merchandise Co.,* 297 S.C. 123, 375 S.E.2d 1 (Ct. App. 1988). In this case, the fact that Plaintiffs urge an interpretation of § 5.04(c) that is at odds with the interpretation of Duke, does not mandate a conclusion that the provision of the retirement plan is ambiguous. An ambiguity in a contract does not exist merely

because the parties dispute the meaning of the contract. "[A]mbiguity does not exist simply because the parties urge different interpretations." *Hugo Boss Fashions v. Federal Ins. Co.*, 252 F.3d 608, 616 (2nd Cir. 2001) (internal quote marks omitted). In order to find an ambiguity in a plan's terms, the language must give rise to at least two different but reasonable interpretations. *Colucci*, *supra*, 431 F.3d at 176. In this case there is no such ambiguity. That is because Duke's interpretation of § 5.04(c), creating an illegality, is *per se* unreasonable while Plaintiffs posit a reasonable, legal and logical application of § 5.04(c) that accords meaning to every term and resolves what Duke contends is a gap in the Plan – the lack of actuarial assumptions for lump sum conversion.

If a contract can be given a clear and certain meaning, it will not be held ambiguous. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tx. 1983). An interpretation of a contract "which gives a reasonable, lawful and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect." Restatement (2nd) of Contracts § 203, Cmt. A. (1981). *See also* 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."). The Duke Plan incorporates this principle of law. Section 13.70 of the 1999 Plan states "the company, through the plan administrator, shall interpret and administer the plan in such manner that the plan and trust shall remain in compliance with the Code, ERISA and other applicable laws, regulations and rulings." (Emphasis added).

This Court in a previous opinion has concluded that the terms of an ERISA plan are to be interpreted "under ordinary principles of contract law, enforcing the plan's plain language in its

ordinary sense." *Johnson v. Michelin N. Am.*, 658 F.Supp.2d 732, 742 (D.S.C. 2009) (citing *Wheeler v. Dynamic Engineering, Inc.*, 62 F.3d 634, 638 (4th Cir. 1995)). This Court also ruled:

> The plain language of an ERISA plan must be enforced in accordance with its literal and natural meaning. *Kress v. Food Employers Labor Relations Association*, 391 F.3d 563, 568 (4th Cir. 2004) (internal quotation marks omitted). "The award of benefits under any ERISA plan is governed ... by the language of the plan itself." *Lockhart v. United Mine Workers of America 1974 Pension Trust*, 5 F.3d 74, 78 (4th Cir. 1993).

Carden v. Aetna Life Ins. Co., 2007U.S. Dist. LEXIS 81678 (D.S.C. Nov. 2, 2007) (internal quotation marks and citations omitted).

Another basis for *de novo* adjudication of the issues raised in Count Three is that the questions are questions of law. The Fourth Circuit Court of Appeals has concluded that "legal questions are appropriate terrain for the courts, not plan administrators, and when eligibility determinations turn on questions of law we have not hesitated to apply *de novo* standard of review." *Johannssen v. Vist. No. 1-Pac. Coast Dist.*, 292 F.3d 159, 169 (4th Cir. 2002). (citing *Gauer v. Connors*, 953 F.2d 97, 99 (4th Cir. 1991)), *abrogated on other grounds as recognized by Spry v. Eaton Corp. Long Term Disability Plan*, 326 Fed.Appx. 674 (4th Cir. 2009). The Fourth Circuit further held that:

> [E]ven if we did accept that Hart was nominally engaged in interpreting the terms of the pension plan, we would still not accept the plan's claim for deferential review in this context. This Circuit has stated that the deferential standard reflects our recognition of the greater institutional competence plan administrators possess relative to our own within their area of expertise. The standard exists to insure that administrative responsibility rests with those whose experience is daily and continual not with Judges whose exposure is episodic and occasional. A plan administrator's area of competence is in <u>the application of plan terms to the factual circumstances of particular claims</u> and the day to day administration of the plan.

Johannssen, 292 F.3d at 169 (emphasis added) (internal quote marks and citations omitted).

Despite Duke's anticipated argument for an abuse of discretion standard and that deference be accorded to the plan administrator regarding each and every issue presented by the Plaintiffs'

Third Count, the analysis of the Court in *Johannssen* is equally applicable here. The Court in *Johannssen* found that none of the policies providing justification for granting deference applied in that case and explained that "[e]mployee protection is furthered by more, rather than less scrutiny of conflicts in which both sides have mixed and partisan motives." 292 F.3d at 169. Under the circumstances of this case, however, the result should be the same whether this Court reviews the issues *de novo* or for an abuse of discretion. *See* pp. 37-44, *infra.*

B. The Duke Plan Did Not Provide for a Discount Rate That Was Equal to the Applicable 417(e) Rate and Thus Was Not a Safe Harbor Plan

Duke designed its cash balance plan to define the accrued benefit as the balance in the cash balance account. It did this despite the guidance provided by its consultant, Mercer, that to do so violated "the rules" for cash balance plans. Ex. 11: Mercer Powerpoint at M_00026877, M_00026882. In doing so it ignored the language of 26 U.S.C. §411(a)(7)(A):

> (A) In general, for the purposes of this Section, the term "accrued benefit" means –
>
> > (i) in the case of a defined benefit plan, the employee's accrued benefit determined under the plan and, except as provided in subsection (c)(3),[18] expressed in the form of an annual benefit commencing at normal retirement age, or
> >
> > (ii) in the case of a <u>plan which is not a defined benefit plan</u>, the balance of the employee's account.

Id. (emphasis added). 26 U.S.C. § 411, pre-PPA, did not allow a cash balance plan, or any other defined benefit plan, to define the accrued benefit as an account balance. Looking to Notice 96-8, the result is the same. Notice 96-8, even with regard to safe harbor, relates to <u>distribution</u> of the

[18] Section 411(c)(3) provides: "**<u>Actuarial Adjustment</u>**. For the purposes of this section, if an employee's accrued benefit **is to be determined** as an amount other than an annual benefit commencing at normal retirement age, or . . . **is to be determined** with respect to a benefit other than an annual benefit in the form of a single life annuity . . . commencing at normal retirement age, the employee's accrued benefit . . . shall be the **actuarial equivalent** of such benefit or amount determined under paragraph (1) or (2)." (Boldface emphasis added, underline in original).

accrued benefit, not how it is defined. Section 411(a)(7) defines the accrued benefit in terms of benefits payable at normal retirement age." The Notice explicitly states that "the requirements referred to in this notice apply even in the case of a cash balance plan that defines an employee's accrued benefit as an amount equal to the employee's hypothetical account balance. Ex. 1A, at p. 4 (emphasis added). IRS Notice 96-8 thus clearly affirms that § 411(a)(7) trumps any such plan definition.

What IRS Notice 96-8 allowed for plans meeting its safe harbor provision, was a lump sum "distribution equal to the employee's hypothetical cash balance account without violating sections 411(a) or 417(a), provided that the plan **provides** the appropriate annuity conversion factors." Ex. 1A, p. 5 (emphasis added).

Duke, in essence, uses circular logic to defend its safe harbor claim. It contends that it could define the lump sum distribution as the accrued benefit, and define accrued benefit as the cash balance account because its Plan purportedly met the safe harbor requirements of 417(e). Then it contends that its 1999 Plan did not have to state a discount rate for the conversion of the cash balance account to a lump sum (as safe harbor requires) because it defined the lump sum distribution as the balance in the cash balance account. Duke posits that the 417(e) rate can be assumed. What Duke is saying is that because it assumes a 417(e) rate it is a safe harbor plan and because it is a safe harbor plan it need not state a discount rate. Plainly, this is not what IRS Notice 96-8 says.

A plain reading of 96-8 requires that a plan demonstrate safe harbor requirements, not assume them. In order to take advantage of the safe harbor Notice 96-8 described, and make a distribution of the account balance as the lump sum, Duke had to "provide[] the appropriate annuity conversion

factors."[19] Ex. 1A, p. 5 (emphasis added). Notice 96-8 allowed safe harbor only "assuming that the annuity conversion factor **under the plan** is not less than the annuity conversion factor determined using the applicable interest rate and mortality table under section § 417 (e) (3). . . ." Ex. 1A: IRS Notice 96-8 Sec. III.B.3., pp. 3-4 (boldface and underline emphasis added). This assumption cannot be made for the 1999 Plan which, according to Duke, did not provide any stated conversion factor for the lump sum calculation.

Also, Notice 96-8 explains that "[i]n order to comply with section 401(a)(25) [definitely determinable rule], the method [for calculating an employee's accrued benefit], including actuarial assumptions, if applicable, must preclude employer discretion." IRS Notice 96-8, p. 3. Duke's interpretation fails this requirement. In response to Plaintiffs' administrative claim, Duke stated that "all actuarial calculations required under the Plan are performed in accordance with Appendix A, or, if not specified in Appendix A, in accordance with reasonable assumptions determined in consultation with the Plan's actuaries." Ex. 21, Braden Letter at DE-000571. By allowing actuaries to make such assumptions, including interest rates, Duke retained employer discretion that is in direct violation of IRC § 401(a)(25) and Notice 96-8.

In addition, Duke's position that the 417(e) rate is the "assumed" rate or the "default" rate ignores the language of 26 U.S.C. § 417(e)(3)(A)(i), Treas. Reg. § 1.417(e) and 1.417(e)-1, and Notice 96-8 that the Plan must pay an amount not less than the accrued benefit calculated using the 417(e) rate. Section 417(e) sets a ceiling, but not a floor, and allows Plans to adopt discount rates anywhere between 0% and the 417(e) rate. As Duke's enrolled actuary noted, you look to the Plan

[19] The "appropriate annuity conversion factors" include, as required by Treas. Reg.§ 1.417(e)-1, that the lookback month and stability period also be specified in the plan. § 1.417(e)-1(d)(4)(ii) and (iii).

to determine the rate. Ex. 6: Yanulavich Depo. Excerpts 31:21 – 32:14; 53:3 – 13.

Also, as described above, another facet of the Duke Plan that did not pass muster with the IRS was the fact that the Plan established a ceiling and a floor for the interest crediting rate. If the 417(e) rate fell below the floor or exceeded the ceiling of the plan, the Plan rate and the 417(e) rate would necessarily diverge. In the view of these reviewers, this design parameter alone made the Duke Plan fail the safe harbor of IRS Notice 96-8. Ex.12: Warshawsky Letter. Duke claims that despite the defective design of the Plan it operated as a safe harbor plan. It did not. As illustrated herein, at no time did the interest crediting rate and discount rate run parallel so as to cancel each other out. Accordingly, the Duke Plan was not a safe harbor plan

It is clear from the record of the IRS determination proceeding that Duke was well aware that to perform a whipsaw calculation for lump sums distributed since the inception of the cash balance plan would often result in a greater accrued benefit than paid out by Duke as the cash balance account balance. Applying the whipsaw calculation would result in a higher payout to participants for all distributions taking place in calendar quarters where the quarterly interest crediting rate exceeded the discount rate. This phenomenon was recognized by Duke for many years. It is for this reason that in the IRS determination letter proceeding, Duke adamantly opposed any language in the retroactive plan amendment that called for retroactive whipsaw. Duke was aware of the manner in which the calculations would be performed and that the calculations would result in millions of dollars of additional benefits to its participants who had already retired. Ex. 23: Alston & Bird billing record.[20] This perhaps explains why Duke concealed the IRS proceeding for two years during

[20] During the time period when the IRS was insisting that a whipsaw provision be put into the Plan amendment, Duke's attorneys were calculating the dollar cost of such a requirement, in documents that Duke has withheld on a privilege claim. Ex. 22: Alston & Bird Billing Record; Ex. 23, Privilege Log (Entry 5210D).

this litigation, while it lobbied *ex parte* for the language most beneficial to it, as employer, versus language that served the interests of plan participants.

The entire theory of safe harbor is that an interest crediting rate is matched with an equivalent discount rate such that the performance of the calculation is rendered moot because the projection would be taken forward at the exact rate it would be discounted back, resulting in the identical beginning and ending amount. The purpose of safe harbor is rendered meaningless by Duke's theory that a plan can be a safe harbor plan even when a whipsaw calculation would result in additional benefits to its participants. Such a position is directly contrary to the meaning and intent of IRS Notice 96-8, cases such as *Esden* and *Berger*, and the remedial framework of ERISA.

Safe harbor exemptions under ERISA have historically been strictly construed. *Lee v. Liberty National Life Ins. Co.*, 2009 U.S. Dist. LEXIS 95948 (S.D. Ga, Oct. 14, 2009); *Moorman v. Unum Providence Corp.*, 464 F.3d 1260, 1267 (11th Cir. 2006); *Dam v. Life Ins. Co. of North America*, 206 Fed. Appx. 626 (8th Cir. Nov. 30, 2006). Accordingly, Duke cannot have a "*de facto*" safe harbor plan with"appropriate actuarial assumptions" simply assumed and the calculations circumvented through a definition of "accrued benefit" that ignores 26 U.S.C. § 411(a)(7).

C. Enforcement of the Plain Meaning of § 5.04(c) of the 1999 Plan Produces Whipsaw in Favor of the Participants

It is clear that the prefatory language of § 5.04(c), "notwithstanding anything herein to the contrary," must be enforced and cannot be ignored. "When the contract evidences care in its preparation, it will be presumed that its words were employed deliberately and with intention." *Flair Broad. Corp. v. Powers*, 733 F.Supp. 179, 185 (S.D.N.Y. 1990) (quoting *Hellams v. Harnist*, 284

S.C. 256, 325 S.E.2d 569, 571 (Ct. App. 1985)).[21] The United States Supreme Court noted with regard to such "notwithstanding" clauses:

> As we have noted previously in construing statutes, the use of such a "notwithstanding" clause clearly signals the drafter's intention that the provisions of the "notwithstanding" section override conflicting provisions of any other section. See *Shomberg v. United States*, 348 U.S. 540, 547-548, 99 L.Ed. 624, 75 S.Ct. 509 (1955). Likewise, the Courts of Appeals generally have "interpreted similar 'notwithstanding' language . . . to supercede all other laws, stating that "'[a] clearer statement is difficult to imagine.'" *Liberty Maritime Corp. v. United States*, 289 U.S. App. D.C. 1, 4, 928 F.2d 413, 416 (1991) (*quoting Crowly Caribbean Transport, Inc. v. United States*, 275 U.S.App. D.C. 182, 184, 865 F.2d 1281, 1283 (1989) (in turn *quoting Illinois National Guard v. FLRA*, 272 U.S.App. D.C. 187, 194, 854 F.2d 1396, 1403 (1988))); *see also Bank of New England Old Colony, N.A. v. Clark*, 986 F.2d 600, 604 (VA1 1993); *Dean v. Veterans Admin. Regional Office*, 943 F.2d 667, 670 (CA6 1991), *vacated and remanded on other grounds*, 503 U.S. ----, 112 S.Ct. 1255, 117 L.Ed.2d 486 (1992); *In re FCX, Inc.* 853 F.2d 1149, 1154 (CA4 1988) cert. denied sub nom. *Universal Cooperatives, Inc. v. FCX, Inc.*, 489 U.S. 1011, 103 L. Ed. 2d 181, 109 S. Ct. 1118 (1989); *MultiState Communications, Inc. v. FCC*, 234 U.S. App. D.C. 285, 291, 728 F.2d 1519, 1525, cert. denied, 469 U.S. 1017, 93 L. Ed. 2d 358, 105 S. Ct. 431 (1984); *New Jersey Air National Guard v. FLRA*, 677 F.2d 276, 283 CA3) cert. denied sub nom. *Government Employees v. New Jersey Air National Guard*, 459 U.S. 988, 103 S. Ct. 343, 74 L. Ed 2d 384 (1982).

Cisneros v. Alpine Ridge Group, 508 U.S. 10, 18 (1993) (emphasis added).[22]

There has been much discussion in this case over the interpretation of § 5.04(c).[23] Merely

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[21] The 1999 Plan and § 5.04(c) were drafted by specialized ERISA lawyers within Duke, as well as Duke's outside ERISA counsel. Ex. 7: Jefferies 30(b)(6) Depo. 165:2 – 166:9.

[22] *See also L & B 57th Street, Inc. v. Blanchard*, 143 F.3d 88, 93 (2nd Cir. 1998) (noting "notwithstanding" clause "trump[ed]" other contrary clause in contract); *Conyers v. Merit Systems Protection Board*, 388 F.3d 1380, 1382 (Fed. Cir. 2004); *Liberty Maritime Corp. v. United States*, 928 F.2d 413, 416 (D.C. Cir. 1991) (interpreting "notwithstanding" language to supersede all other provisions); *New Jersey Air National Guard v. FLRA*, 677 F.2d 276, 283 (3rd Cir. 1982) (interpreting statute stating "[n]otwithstanding any other provision of law," court found that "[a] clearer statement is difficult to imagine" and section "must be read to override any conflicting provision of law in existence….").

[23] Duke admits, however, that for purposes of administration of the Plan, it never interpreted § 5.04(c). Ex. 9: Ringel Depo. Excerpts 95:9 – 21.

because one party disagrees with a construction that will be disadvantageous to it, does not mean that a provision is ambiguous. In order for contract language to be ambiguous, it must be susceptible of more than one reasonable meaning. *Colucci, supra*, 431 F.3d at 176. In this case, there is but one reasonable interpretation of § 5.04(c) that takes into account the plain and ordinary meaning of all its words, as well as the statutory and regulatory framework of ERISA and the Internal Revenue Code.

As described above, Plaintiffs' interpretation of § 5.04(c) takes each and every word of the provision, gives it a plain and ordinary meaning, and harmonizes the meaning with the balance of the Plan. Part of the harmonization is that viewing the "lesser of 4% or the 'applicable interest rate specified in Code Section 417(e) and Treasury Regulation 1.417(e)-1T'" as a discount rate allows the Plan to be viewed as a complete document. The Third Circuit, in *Stepnowski v. Comm'r.,* 456 F.3d 320, 327-328 (3rd Cir. 2006), held that "the interest rate provision [for discounting] is 'integral' to the present value provision." The Court also noted that "integral is something that is 'essential to completeness' or is 'serving to form a whole.' *Webster's New International Dictionary* 1173 (Phillip Babcock Gov. Ed., 1971)." *Id.*

As detailed above, the terms of an ERISA plan must be interpreted "under the ordinary principles of contract law, enforcing the plan's plain language in its ordinary sense." *Wheeler v. Dynamic Engineering, Inc.*, 62 F.3d 634, 638 (4th Cir. 1995). Further, "ERISA plan coverage is intended to be liberally construed in order to protect the interests of beneficiaries." *Murch v. Prudential Welfare Benefit Plan*, 2006 U.S. Dist. LEXIS 32613, *10 (W.D. Wash. May 23, 2006)("coverage [is intended to] . . . be construed liberally to provide the maximum degree of protection to working men and women covered by private retirement programs"). ERISA is a

"remedial statute" that must be broadly construed to favor Plan participants. *See, e.g.*, *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 123 (4th Cir. 1991); *Brink v. DaLesio*, 667 F.2d 420, 427 (4th Cir. 1981).

In this case, every marker points to § 5.04(c) as creating a discount rate. To construe the provision otherwise not only requires adoption of a meaning that violates ERISA and the Code, but also requires rejection of every black letter rule of contract construction. This Court can only get to where Duke wants it to go by:

- ✦ Ignoring the mandate of § 13.07 of the Plan which requires that the Plan be interpreted and administered in a manner in compliance with the Code (IRC), ERISA, and other applicable laws, regulations and rulings;
- ✦ Re-writing a legal provision in a manner which renders it illegal under ERISA, § 417(e); IRS Notice 96-8, *Esden, Berger, AK Steel,* and additional case law thereunder;
- ✦ Overlooking the "negative whipsaw" implications of Duke's interpretation;
- ✦ Overlooking the violation of "nonforfeiture" provisions of ERISA created by Duke's interpretation;
- ✦ Ignoring the "notwithstanding" clause in § 5.04(c);
- ✦ Substituting the words "Interest Factor" for the words "Monthly Interest Rate" in § 5.04(c);
- ✦ Ignoring the "lesser of" language of § 5.04(c);
- ✦ Ignoring the literal 48% annual rate called for by Duke's interpretation in favor of the 4% or less construction Duke creates out of whole cloth;
- ✦ Accepting that the 1999 Plan is simply silent on discount rate and/or annuity conversion assumptions needed for lump sum calculations, in violation of § 417(e) and Notice 96-8;
- ✦ Concluding that the § 417(e) "applicable interest rate" can be assumed, even though the possible, legal range of discount rates was 0% to the ceiling 417(e) rate;

- ✦ Concluding that § 5.04(c) allowed Duke discretion to determine actuarial assumptions for calculating lump sum distributions, in contravention of the definitely determinable rule of IRC § 401(a)(25);

- ✦ Assuming a lookback month and assuming a stability period for the assumed 417(e) rate, in violation of Treas. Reg. § 1.417(e)-1(d)(4)(ii) and (iii) which required statement of such in the Plan;

- ✦ Ignoring Duke's non-safe harbor status created by the interest crediting rate ceiling and floor condemned by the IRS; and

- ✦ Allowing Duke to sidestep the clear meaning and intent of ERISA's actuarial equivalence requirements and pay the cash balance account balance in clear violation of ERISA.

Stated another way, Duke's unlawful interpretation simply does not hold water reading the plain and literal language of § 5.04(c).[24] Duke wrote the provision and Duke must live by what it says.

D. Where Whipsaw Is Not a Wash the Plan Is Not Safe Harbor

At no time during Duke's operation of the Plan did it use the same interest crediting and discount rate. It was not set up to produce "a wash," if whipsaw was calculated. As recognized by Duke's own corporate representative, in testimony that is binding on the company, performing whipsaw calculations would often have produced higher lump sum payments to participants. Ex. 7: Jefferies 30(b)(6) Depo. Excerpts 172:16 – 173:8; Ex. 18: Whipsaw Lump Sum Report; Ex. 19 – email. Without safe harbor status, ERISA, Notice 96-8 and the case law thereunder required Duke to perform whipsaw.

Duke was fully aware during the IRS determination letter proceeding that if the IRS required any provision in the Plan that on its face called for whipsaw, the calculations would produce millions

[24] The 1997 Plan contained a "severability" clause allowing an illegal or invalid clause to be disregarded. Ex. 2: 1997 Plan § 20.5. The 1999 Plan contains no such provision.

of dollars in payouts to participants. This is why Duke fought so hard in the IRS proceeding, where the participants had no voice, for an amendment that limited whipsaw to the never-realized scenario where the 417(e) 5ate fell below 4%.

Requiring Duke to go back and do the whipsaw calculations is required on multiple bases:

- ✦ The 1997 Plan was not a safe harbor plan because the crediting rate and the discount rate were never the same and did not offset;
- ✦ The 1999 Plan was not a safe harbor plan under Duke's construction because it did not state a discount rate at all and a 417(e)-compliant rate cannot be assumed so as to create a safe harbor after the fact;
- ✦ The 1999 Plan was not a safe harbor plan, even if the Appendix A actuarial assumptions were assumed, because the interest crediting rate and the discount rate were never the same and did not offset;
- ✦ The 1999 Plan was not a safe harbor plan for the reasons cited by the IRS.

As noted above, safe harbor exemptions under ERISA have historically been strictly construed. There is no basis for extending the protection of safe harbor to Duke under the terms of the 1997 and 1999 iterations of the Plan. The reset whipsaw was an effect long recognized by Duke as a potential liability and one that Duke hoped to keep swept under the rug. Duke's admissions concerning the higher participant benefits that a whipsaw calculation would bring demonstrate, irrefutably, that Plaintiffs should prevail on Count Three and proceed to the damages phase.

E. Under an Abuse of Discretion Standard of Review Plaintiffs Prevail

Under the abuse of discretion standard, the Plan administrator's decision "will not be disturbed if it is reasonable," even if the Court "would have come to a different conclusion independently." *Vaughan v. Celanese Ams. Corp.,* 338 Fed. Appx. 320, 322, 2009 U.S.App. LEXIS 16854 (D.S>C. July 30, 2009). For the decision to be reasonable it must be "the result of a

deliberate principled reasoning process" and be "supported by substantial evidence." *Brogan v. Holland*, 105 F.3d 158, 161 (4th Cir. 1997) (internal quotation marks omitted).

This reasonableness inquiry is guided by eight non-exclusive factors: (1) the language of the plan; (2) the purposes and goals of the plan; (3) the adequacy of the materials considered to make the decision and the degree to which they support it; (4) whether the fiduciary's interpretation was consistent with other provisions in the plan and with earlier interpretations of the plan; (5) whether the decision-making process was reasoned and principled; (6) whether the decision was consistent with the procedural and substantive requirements of ERISA; (7) any external standard relevant to the exercise of discretion; and (8) the fiduciary's motives and any conflict of interest it may have. *Booth v. Wal-Mart Stores, Inc.*, 201 F.3d 335, 342-43 (4th Cir. 2000). The *Booth* factors may be viewed as "more particularized statements of the elements that constitute a deliberate, principled reasoning process and substantial evidence and of the reasons for applying a modified abuse of discretion standard of review." *Richardson v. Triad Hosp., Inc.*, 2010 U.S. Dist. LEXIS 10792, *46-47 (D.S.C. Feb. 8, 2010) (quoting *Donnell v. Metro Life Ins. Co.*, 165 Fed. Appx. 288, 294, n. 6 (4th Cir. 2006). "The more incentive for the administrator . . . to benefit itself by a certain interpretation of benefit eligibility or other plan terms, the more objectively reasonable the administrator['s] . . . decision must be and the more substantial the evidence must be to support it." *Ellis v. Metro. Life Ins. Co.*, 126 F.3d 228, 233 (4th Cir. 1997). In this case, all of the *Booth* factors demonstrate an abuse of discretion by Duke in denying the Plaintiffs' claims that whipsaw calculations were required, when the calculations would have resulted in higher lump sum payments to the participants.

1. Language of the Plan

Administrators are bound by the language of the Plan. *Johnson v. Metro. Life Ins. Co.*, 2008

U.S. Dist. LEXIS 110009 (W.D.N.C. Aug. 26, 2008), citing *Coleman v. Nationwide Ins. Co.*, 969 F.2d 54, 56 (4th Cir. 1992). The Plaintiffs have demonstrated above that Duke rejected the clear language of the Plan, particularly with regard to § 5.04(c).[25] The Preamble to the 1997 Plan and Section 13.07 of the 1999 Plan all required Duke to administer the Plan in compliance with ERISA and to interpret the terms of the Plan in order to "comply with ERISA and the Code and all regulations and formal rulings issued under ERISA and the Code." Ex. 3: DE-000087, Ex. 4: DE-000313. Duke did not do so.

2. Purposes and Goals of the Plan

Duke also ignored the "purposes and goals of the Plan" in avoiding the mandatory whipsaw calculations. A plan fiduciary is required to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1); see *Vanegas v. Bd. of the Trs. of the Health & Welfare Fund for the Int'l Union of Operating Eng'rs, Local 99 and 99A*, 2007 U.S. Dist. LEXIS 86206, *27-28 (D. Md. Nov. 20, 2007).

Duke was not free to ignore IRS Notice 96-8 which mandated whipsaw calculations and then pay out the cash balance account balances when it knew that participants, by its own calculations, were being deprived of millions of dollars in accrued benefits. Ex. 18: Whipsaw Report; Ex. 19: email.

3. Adequacy of Materials Considered to Make the Decision and the Degree to Which They Support it

There is no indication from the administrative record that Duke gave any credence at all to Plaintiffs' whipsaw claims. It simply rubber-stamped the practice of paying out account balances

[25] In fact, Duke's 30(b)(6) witness Robert Ringel said: "I don't know if we really had an interpretation. We never applied 5.04(c). So we didn't have a chance to interpret it." Ex. 9: Ringel Depo. Excerpts 95:15 – 21.

that it had settled upon without the advice or approval of its enrolled actuary, Hewitt Associates. Ex. 6: Yanulavich depo. 71:17 – 24 (confirming that Hewitt was never asked to opine whether the Plan required whipsaw). Nor did it consider the Plan's plain language.

4. Whether the Fiduciary's Interpretation Was Consistent with Other Provisions and Earlier Interpretations

Duke's interpretation of the Plan to not require whipsaw was not consistent with other provisions of the Plan. *See* flow-chart at p. 17, *supra.* While Duke has operated the Plan consistently without whipsaw calculations, its Rule (30)(b)(6) witness, Richard Jefferies, conceded that there was nothing in the Plan he could point to that allowed Duke to avoid this ERISA mandate. See Ex. 7: Jefferies 30(b)(6) Depo. Excerpts (2/5/08) at 158:4 – 7; 158:21. Duke's interpretation of the Plan, by ignoring § 5.04(c), "runs afoul of the well-established doctrine that a contract should be read to give effect to all its language." *Carolina Care Plan, Inc. v. McKenzie*, 467 F.3d 383, 388 (4th Cir. 2006).

5. Whether Decision-making Process Was Reasoned and Principled

It is abundantly clear that the outcome of the Plaintiffs' claims process was a foregone conclusion. Duke was aware years before the Plaintiffs' claims were made that there was a whipsaw problem under the Plan. It took the step of quantifying the potential liability based on the reset (quarterly/annual) whipsaw, but did not secure an opinion from the enrolled actuary regarding whipsaw. In short, Duke "failed to elaborate on, or outright ignored, evidence favorable to the claimant." *White v. Eaton Corp. Short Term Disability Plan*, 308 Fed. Appx. 713, 717 (4th Cir. 2009). To arrive at its interpretation of § 5.04(c), Duke had to completely ignore the "notwithstanding anything herein to the contrary" language. Even when an ERISA plan confers discretion on its administrator to interpret the plan, "the administrator is not free to alter the terms

of the plan or to construe unambiguous terms other than as written." *Dawkins v. Owens Corning Hourly Employees' Ret. Plan*, 2007 U.S. Dist. LEXIS 73409, 31-37 (D.S.C. Sept. 30, 2007) (quoting *Colucci*, 431 F3d at 176). A denial of benefits that makes plain language of a plan meaningless is *per se* unreasonable. *Buchanan v. Consol. Coal Co. Benefit Plan for UMWA Represented Employees*, 1998 U.S.App. LEXIS 31577 (4th Cir. Dec. 17, 1998). Here, the administrative record demonstrates a disregard for the language of the Plan.[26]

6. Whether the decision was consistent with procedural and substantive requirements of ERISA

Duke went through the procedural motions to conduct a "review" of Plaintiffs' whipsaw claims. Duke's current spin on § 5.04(c) tortures the plain language of the provision and renders it illegal under ERISA and the Code. IRC §417(e) and ERISA §205(g); I.R.S. Code § 411(a)(2) and ERISA § 203(a)(2); *Berger, supra, Esden, supra*. The outcome clearly contravened the substantive requirements of ERISA for the reasons stated above.

7. Any External Standard Relevant to Exercise of Discretion

Plaintiffs have not identified any external standards relevant to Duke's decision in this case other than as noted below under conflict of interest.

8. Fiduciary's Motives and Conflict of Interest

The Supreme Court recently decided *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343, 171 L. Ed. 2d 299 (2008), which clarified when a conflict of interest exists and how a conflict is to be taken into account. In *Glenn*, the court held that when the plan administrator serves in the dual role of evaluating claims for benefits and paying the claims, the dual role itself creates a conflict. 128 S. Ct. at 2346 – 2348. The Court found in the case before it that because an insurance company

[26] Administrative Record is attached at Ex. 24.

served as both administrator and insurer of the plan (as administrator it had discretionary authority to determine claims and as insurer it paid the claims) the company had a conflict of interest. *Id*. at 2346. The same conflict is created when an employer serves in a similarly dual role. *Id*. at 2348. The Court held that when reviewing a plan administrator's discretionary determination, a court must take the conflict into account only as "one factor among many" that is relevant in deciding whether the administrator abused its discretion. *Id*. As the Court said:

> In such instances, any one factor will act as a tiebreaker when the other factors are closely balanced, the degree of closeness necessary depending upon the tiebreaking factor's inherent or case-specific importance. The conflict of interest at issue here, for example, should prove more important (perhaps of great importance) where circumstances suggest a higher likelihood that it affected the benefits decision, including, but not limited to, cases where an insurance company administrator has a history of biased claims administration.

Id. at 2351. Also, such a conflict is "more important (perhaps of great importance) where circumstances suggest a higher likelihood that it affected the benefits decision." *Id*.

In this case, the *per se* conflict described in *Glenn* exists. Duke is the employer and funds the pension benefits at issue. The Plaintiffs represent a class of claimants with claims totaling millions of dollars. *Young v. Verizon's Bell Atlantic Cash Balance Plan*, 575 F.Supp.2d 892, 907 (N.D.Ill. 2008) (stating that the "fact that Plaintiff represents a class with claims totaling billions of dollars in damages causes the Court to place greater importance on this conflict of interest in its analysis than it might otherwise do in the typical individual action"). In this case, the strong motive for Duke to deny Plaintiffs' claims cannot be denied. Before Plaintiffs even filed an administrative claim, Duke was exploring the issue of "potential whipsaw liability." Ex. 18. Ex. 19. Duke knew that if it ever recognized any obligation to perform whipsaw, the calculations would result in

millions of dollars of additional benefits being owed to participants.[27] The fact that Duke was aware of the whipsaw problem is also demonstrated by its reaction to the IRS determination letter proceeding. Duke's goal, ultimately accomplished in the *ex parte* IRS proceeding it kept under wraps, was a "zero cost" whipsaw amendment. Ex. 26: Email. Duke kept the class in the dark during the course of that proceeding, when a different outcome may have resulted had the IRS been privy to the participants' interpretations of the Plan. Accordingly, this final *Booth/Glenn* factor weighs heavily against Duke.

In conclusion, application of the *Booth* factors, although an exercise that is not necessary in this case for the reasons stated above, cannot provide Duke with absolution from whipsaw. The regulations promulgated under ERISA prescribe that decisions must be made in accordance with plan documents. *Vaughan v. Celanese Ams. Corp.*, 339 Fed. Appx. at 322-323. "Even when a plan confers discretion on the plan administrator to construe the meaning of the plan's terms, the plan administrator is 'not free to alter the terms of the plan or to construe unambiguous terms other than as written.'" *Adams v. Louisiana-Pacific Corp.*, 177 F. Appx. 335, 339 (4th Cir. N.C. 2006); *see also Buchanan, supra.* at *7 (concluding that a denial of benefits was an abuse of discretion in part because "the denial of benefits also makes the plain language of the plan meaningless"). Thus, even if Duke had discretion in this case, it could not deny whipsaw:

> To the extent the administrator enjoys discretion to interpret the terms of a plan in the course of making a benefits-eligibility determination, such interpretive discretion applies <u>only to ambiguities</u> in the plan. *See id.* (Interpretive discretion only allows an administrator to resolve ambiguity.'); *Crest v. Food Employers Labor Relations Ass'n.*, 391 F.3d 563, 567 (4th Cir. 2004) (explaining that "discretionary authority is not implicated" where "the terms of the plan itself are clear"). An administrator's

[27] While Duke's Actuary calculated the potential whipsaw liability, it was not allowed to include that liability when reviewing the Plan "to ensure that we're reflecting all the plan provisions when measuring liability." Ex. 6: Yanulavich Depo. Excerpts 72:6 – 21.

> discretion never includes the authority "to read out unambiguous provisions" contained in an ERISA plan, and to do so constitutes an abuse of discretion. *Colucci*, 431 F.3d at 176.

Blackshear, 509 F.3d at 639 (emphasis added).

The Fourth Circuit summed up the abuse of discretion standard in *Evans v. Eaton Corp Long Term Disability Plan,* 514 F.3d 315 (4th Cir. 2008):

> The ERISA context permits a still more particularized conception of the abuse of discretion standard. First, in ERISA cases, the standard equates to reasonableness: we will not disturb an ERISA administrator's discretionary decision if it is reasonable, and will reverse or remand if it is not. Second, the abuse of discretion standard is less deferential to administrators than an arbitrary and capricious standard would be; to be unreasonable is not so extreme as to be irrational. Third, an administrator's decision is reasonable if it is the result of a deliberate, principled reasoning process and if it is supported by substantial evidence. Fourth, <u>the decision must reflect careful attention to the language of the plan, as well as the requirements of ERISA itself</u>.

514 F.3d at 322-23 (emphasis added) (internal cites and quote marks omitted).

In this case Duke did not pay "careful attention to the 'language of the plan'" or "the requirements of ERISA itself." *Id.* The Fourth Circuit requires that the "administrator's decisions to adhere both to the text of ERISA and the plan to which they have contracted; to rest on good evidence and sound reasoning; and to result from a fair and searching process." *Evans v. Eaton Corp Long Term Disability Plan,* 514 F.3d at 322-23. Duke's determination that its Plan could avoid whipsaw calculations and deprive participants of increased benefits was simply unreasonable and must be overturned.

V. CONCLUSION

The whipsaw calculations must be made. The Court should grant summary judgment to the Plaintiffs on this issue.

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