

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, )

Plaintiffs, )

vs. )

DUKE ENERGY RETIREMENT CASH )  
BALANCE PLAN and DUKE ENERGY )  
CORPORATION, )

Defendants. )  

---

Case No.: 8:06-CV-00373-RBH

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

**TABLE OF CONTENTS**

	<b>Page</b>
I. INTRODUCTION .....	1
II. ARGUMENT IN REPLY .....	2
A. Duty to Supplement .....	2
1. Duke’s 26.03 Response was Incorrect .....	2
2. Duke’s Objection to Supplementation .....	4
3. Scope of Plaintiffs’ Requests for Production .....	5
B. Rule 30(b)(6) Deposition .....	7
1. Duty to Educate .....	7
2. Conduct in 30(b)(6) .....	9
C. Duty of Candor .....	10
1. Lack of Candor to Court .....	10
2. Lack of Candor to Counsel .....	12
D. Prejudice .....	13
E. Sufficiency of Record .....	13
III. CONCLUSION .....	14

**TABLE OF AUTHORITIES**

<b><u>Cases:</u></b>	<b><u>Page(s)</u></b>
<i>1100 West, LLC v. Red Spot Paint &amp; Varnish Co., Inc.</i> , 2009 U.S. Dist. LEXIS 7320 (S.D. Ind. Jan. 30, 2009) .....	13
<i>Aikens v. Deluxe Fin. Servs.</i> , 217 F.R.D. 533 (D. Kan. 2003) .....	6
<i>Benedict College v. Nat’l Credit Sys.</i> , 2009 U.S. Dist. LEXIS 106742, (D.S.C. Nov. 16, 2009) .....	11
<i>Cross v. Bragg</i> , 329 Fed. Appx. 443, 2009 U.S. App. LEXIS 16392 (4 <sup>th</sup> Cir. July 24, 2009) .....	11
<i>Esden v. Bank of Boston</i> , 229 F.3d 154 (2 <sup>nd</sup> Cir. 2000) .....	11
<i>Franklin v. Missouri</i> , 2004 U.S. Dist. LEXIS 19762 (W.D. Mo. Sept. 24, 2004) .....	6
<i>Great Coastal Express, Inc. v. Int’l Bhd. of Teamsters</i> , 675 F.2d 1349 (4 <sup>th</sup> Cir. 1982) .....	13
<i>Ponca Tribe of Indians v. Cont’l Carbon Co.</i> , 2006 U.S. Dist. LEXIS 74225 (W.D. Okla. Oct. 11, 2006) .....	6
<i>Sonnino v. University of Kansas Hosp. Authority</i> , 221 F.R.D. 661 (D. Kan. 2004) .....	6
<i>United States v. Procter &amp; Gamble Co.</i> , 356 U.S. 677 (1958) .....	14
<i>United States v. Shaffer Equip. Co.</i> , 11 F.3d 450 (4 <sup>th</sup> Cir. 1993) .....	11, 14
<i>Worldwide Network Servs., LLC v. DynCorp Int’l, LLC</i> , 2010 U.S. App. LEXIS 2914 (4 <sup>th</sup> Cir. Feb. 12, 2010) .....	2
 <b><u>Statutes and Rules of Court:</u></b>	
26 U.S.C. § 417(e) .....	1
Rule 26(e) Fed.R.Civ.P. ....	passim
Rule 26(g)(2)(B)(i) Fed. R.Civ.P. ....	4
Rule 30(b)(6) Fed. R.Civ.P. ....	passim

Plaintiffs, individually and as representatives of the whipsaw class and interest rate class certified by the Court on September 4, 2009, submit their Reply to Duke's Response as follows:

**I. INTRODUCTION**

Plaintiffs' Third Count seeks "whipsaw" damages in favor of a class of Duke retirement plan participants who took early retirement between 1997 and 2006. "Whipsaw" is a term unique to cash balance retirement plans. Cash balance plans are defined benefit plans and must state the accrued benefit as the retirement benefit at normal retirement age. Whipsaw comes into play when a participant retires early and the cash balance account has to be converted to the actuarial equivalent of the benefit at normal retirement age. The whipsaw calculation adds interest credits to age 65 and converts the sum to a single life annuity. The annuity is then converted to a lump sum using a discount rate that cannot exceed the rate defined in 26 U.S.C. § 417(e). Ex. A: IRS Notice 96-8. If the interest crediting rate exceeds the discount rate, the accrued benefit as a lump sum is higher than the cash balance account balance and that higher sum must be paid.

I.R.S. Notice 96-8 describes a "safe harbor" for plans where there is equivalence between the interest crediting and discount rates. Duke describes this safe harbor as creating "a wash." Dkt. 83-1, p. 8. Duke has paid the cash balance account balance as the lump sum early retirement benefit since it converted to a cash balance plan in 1997. It claims it did not have to perform whipsaw calculations because it was a safe harbor plan.

Plaintiffs have pursued two grounds of whipsaw liability. Duke's 1999 restatement of the Plan contained § 5.04(c) dealing specifically with lump sum distributions:

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. B: 1999 Plan (emphasis added). Plaintiffs seek a recovery based on whipsaw calculations using the 4% rate contained in § 5.04(c). See Dkt 296-1, pp. 15-23, 32-26, also attached as Ex. C. Duke contends that despite the mandatory, all-inclusive language of the “notwithstanding” prefatory clause, it viewed § 5.04(c) as the exception, not the rule, to be applied only “in limited circumstances that have never arisen.” Dkt. 83-1, pp. 14-15.

Plaintiffs also assert a quarterly/annual ground for whipsaw based on the disconnect between the interest crediting rate and the discount rate. The discount rate was often lower than the interest crediting rate and Duke admits that, had it performed whipsaw calculations, many participants would have been paid higher lump sums. Ex. D: Jefferies 30(b)(6) Depo. 172:16 -173:8. Plaintiffs contend a Plan cannot be a safe harbor plan when whipsaw calculations, if done, would result in higher benefits. See Dkt. 296-1, pp. 6-10, 12-15, 28-32, 36-37, also attached as Ex. C.

## II. ARGUMENT IN REPLY

### A. Duty to Supplement.

Rule 26(e) requires parties supplement discovery when new evidence surfaces. *Worldwide Network Servs., LLC v. DynCorp Int’l, LLC*, 2010 U.S. App. LEXIS 2914 (4<sup>th</sup> Cir. Feb. 12, 2010).

#### 1. *Duke’s 26.03 Response was Incorrect.*

On February 12, 2007, Duke filed Local Rule 26.03 responses stating that the “Duke Plans at issue were approved by appropriate governmental agencies.” Dkt. 64, p. 9. Duke says the answer “was true when made and remains true” and “has at all times been accurate.” Dkt. 291, pp. 19-20.

Simply put, the 1999 Plan as written, containing the language at issue before this Court has never been approved.<sup>1</sup> The 2009 determination letter was contingent on extensive changes to §§

---

<sup>1</sup> An IRS reviewer of the identical PanEnergy Plan, stated: “[I]f we do not receive this proposed amendment by September 13, 2008, we will process the technical advice request on the existing record. Therefore we will propose an adverse response based on our assessment that the above referenced plan is not

5.04(c) and Appendix A, and other provisions, to render the Plan facially compliant, in the IRS's view, with provisions of the Internal Revenue Code. Dkt.291-2; see Ex. F: Comparison Chart.

The 1999 Plan, as it must be interpreted and applied by the Court in this case, was not "approved" by the IRS, but rather was condemned for not producing "a definitely determinable rate," not defining the accrued benefit as "a single life annuity payable at normal retirement age or the actuarial equivalent of such annuity," and not defining the accrued benefit "in terms of the cash balance account projected with interest credits to the normal retirement date." Ex. G: IRS Letter. The IRS concluded "the plan's interest crediting rate is not one of the safe harbor rates" and asked that the Plan be amended 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." *Id.*<sup>2</sup>

Section 5.04(c), as it was written in 1999 and as it must be applied by the Court in this case, was not "approved" by the IRS, but was called "illegal" in November 2007 based on Duke's proffered interpretation of the clause.<sup>3</sup> Ex. J: Godofsky Notes. The IRS also told Duke regarding its Appendix A of actuarial assumptions: "New assumptions in item 9 or 9<sup>th</sup> Amendment (to Section

---

qualified without the requested amendment." Ex. E (emphasis added). Clearly, the identical Duke plan was neither approved nor subject to approval as written.

<sup>2</sup> Duke argues it is inconsistent for Plaintiffs to say that the IRS required the amendment while pointing out that Duke pushed through an amendment it thought beneficial. The IRS did require the amendment, or the plan would have been disapproved as the determination letter states on its face. Ex. H. Given that context, the record is clear that Duke was determined to frame an amendment that facially would not trigger whipsaw. Ex. I.

<sup>3</sup> Plaintiffs have consistently argued that Duke's interpretation of § 5.04(c) must be rejected. It creates an illegality whereas Plaintiffs' interpretation is legal and consistent with the Plan. Dkt. 96, p. 37.

2.05) need to add that to appendix A.” *Id.* (emphasis added).<sup>4</sup> With regard to the definition of accrued benefit as it was written in 1999, the IRS told Duke on May 16, 2008:

[I]n order to satisfy both accrual rules and anti-forfeiture rules, the accrued benefit should be defined as the single life annuity at normal retirement age that is the actuarial equivalent to the participant’s account balance projected to normal retirement age at the rate used to credit interest to the hypothetical account.

Ex. L.

The issuance of the 2009 determination letter on the 1999 Plan was based on a retroactive amendment that doesn’t count in this case. Dkt 291, p. 2, fn. 1. Duke’s statement to the Court that the plans at issue were approved has never been accurate, notwithstanding Duke’s current factually-deficient protestations to the contrary.

2. *Duke’s Objection to Supplementation.*

Contrary to Rule 26(e) F.R.Civ.P. and thereby contrary to Rule 26(g)(2)(B)(i), Duke objected to supplementing its discovery responses. Duke contests Plaintiffs’ recollection that Duke’s stated basis for the objection was the volume of documents that were generated in the ordinary course of plan administration. Plaintiffs stand by this recollection, which is consistent with the wording of the objection itself. Dkt. 291-3, p. 5 (“[A]dministration of the Plan is ongoing, and it would not be feasible to make a continuing production of all the documents that are within the company’s possession that may relate to the Plan.”). Duke’s current interpretation of its objection mandates a conclusion that Duke had no intention of complying with Rule 26(e).

Duke relied on the objection to avoid supplementing its discovery responses when, during discovery, it received responsive IRS communications questioning § 5.04(c), and raising issues of

---

<sup>4</sup> This original Appendix A that applies to this litigation did not contain actuarial assumptions to convert a cash balance account to a lump sum. Ex. B, p. DE-000324; Ex. K: Hearing Tr. (12/19/07), at pp. 68-69, 72-73. This is one factor that deprives the 1999 Plan of safe harbor status and confirms that § 5.04(c) (the original unamended provision) must be used to perform whipsaw calculations.

whipsaw and safe harbor.<sup>5</sup> Duke failed to disclose the active IRS proceeding to the Plaintiffs or the Court, while keeping its litigation counsel fully in the loop because “there were issues in that determination letter [sic] that were directly or indirectly involved in the litigation,” and “part of the litigation dealt with the same plan provisions that the IRS was asking about in part.” Ex. M: Ringel Depo. (1/14/10), 38:2-13 61:2-9; 62:16-63:2.; 81:4-16. A boilerplate objection contained within four full pages of “General Objections” does not allow Duke to disregard its obligations under Rule 26(e). Duke cites no case that allows these duties to be altered by objection.

3. *Scope of Plaintiffs’ Requests for Production.*

Duke now contends that it could not supplement discovery because Plaintiffs’ discovery requests were too broad. Duke cites to the original language of the requests and ignores the parties’ multiple meet and confer sessions for the purpose of narrowing the scope of discovery. In essence, Duke says it located and produced a large volume of the documents it chose to produce and then washed its hands of the matter.

Duke attacks the “related to” and “regarding” language of certain of Plaintiffs’ Requests for Production. However, Duke’s own Requests for Production use exactly the same “related to” and “regarding” language it condemns. Ex. N: Duke First Requests 1-14; Ex. O: Duke Second Requests 1, 3- 4, 6-10; see also, Duke’s definition of “pertaining to” as “relat[ing] to.” Ex. O, p. 2. Duke cites a handful of district court cases that broadly consider such language in the context of motions to compel. These cases are simply not applicable. Here the parties met and conferred, narrowed the scope of discovery by process of exclusion, had an understanding of the scope, and thereby avoided motion practice. Duke cannot now resurrect its objection and claim it did not understand the scope

---

<sup>5</sup> Duke says Plaintiffs were aware of the IRS proceeding because it sent a notice to participants in 2001. Duke implies it was up to participants to keep asking whether the IRS had reactivated the Duke application; however, this is just the type of wheel spinning Rule 26(e) is intended to obviate.

of discovery and did not understand that documents relating to an IRS controversy over the exact same provisions at issue in this case were covered.

Also, in condemning Plaintiffs' requests, Duke ignores Request #19 that asks for "all draft versions and any amendments to the Duke Retirement Cash Balance Plan." Dkt 291-3, pp. 11-12. There is no overbreadth objection stated in response to this Request. Nevertheless, Duke did not supplement the response as new draft versions of § 5.04(c) and other provisions of the 1999 Plan were prepared and submitted to the IRS from November 2007 to March 2009. Ex. P.

In addition, objecting to discovery requests as overbroad or vague "does not automatically relieve Defendant of its obligation to provide responses. . . ." *Aikens v. Deluxe Fin. Servs.*, 217 F.R.D. 533, 538-39 (D. Kan. 2003) (cited by Duke at Dkt 291, pp. 6, 17). "[T]he responding party still has a duty to respond to the extent the request is not objectionable." *Id.* This duty extends to the supplementation requirements of Rule 26(e). See *Sonnino v. University of Kansas Hosp. Authority*, 221 F.R.D. 661, 672 n.39 (D. Kan. 2004); *Franklin v. Missouri*, 2004 U.S. Dist. LEXIS 19762, \*8-9 (W.D. Mo. Sept. 24, 2004).

Duke contends it had no duty "to undertake a continuous search for responsive documents." Dkt 291, p. 17 citing *Ponca Tribe of Indians v. Cont'l Carbon Co.*, 2006 U.S. Dist. LEXIS 74225, \*10-11 (W.D. Okla. Oct. 11, 2006). However, this is not a situation where Duke's counsel claims ignorance or where Duke did not know the documents at issue were relevant. Duke has now supplemented its privilege log to add more than 250 entries for communications, mostly during 2007 and 2008, involving the determination letter process, claiming the communications related to "pending litigation." It was no mystery to Duke that the IRS communications were relevant to this litigation.

Duke cannot have it both ways. It defends its failure to supplement by claiming that

Plaintiffs' Requests for Production were too broad. Yet, as discussed in more detail below, it defends its failure to prepare and educate its Rule 30(b)(6) witness about the IRS positions on whipsaw and § 5.04(c) because the topics did not include "the determination letter process." Thus, according to Duke, the Requests were too broad, the 30(b)(6) topics were too narrow, and Plaintiffs were not going to learn of the IRS positions during discovery.

**B. Rule 30(b)(6) Deposition.**

*1. Duty to Educate.*

Plaintiffs forwarded to Duke on November 6, 2007 a draft 30(b)(6) notice and served the final notice on January 10, 2008. Ex. Q. The notice called for a Duke witness on:

7. Whipsaw calculations involving the Duke Cash Balance Plan . . . .
8. Formulation, implementation and interpretation of Section 5.04(c) language contained in the 1999 amendment to the Duke retirement plan.

On February 5, 2008 Duke presented Richard Jefferies to testify on multiple topics, including whipsaw and § 5.04(c). During the course of that deposition, Plaintiffs asked Mr. Jefferies whether he remembered "any discussions or drafts of the plan where anybody talked about 5.04(c)." Ex. D: Jefferies 30(b)(6) Depo. 167:6-9. This question was the best chance for Plaintiffs to uncover the active IRS proceeding, given that Duke had not supplemented discovery with any of the documents showing the IRS/Duke discussions concerning § 5.04(c) or the new drafts of § 5.04(c) submitted to the IRS. Mr. Jefferies, despite his direct involvement in that IRS proceeding in the months prior to his deposition, responded, "No, not that I'm aware of." *Id.*; see Dkt. 283-16 and 283-17.

Duke contends that Mr. Jefferies' answer, based on "context," was limited to the 1998-99 time frame. Ex. R; Dkt 291 at pp. 7, 22, 24. However, the series of questions leading up to that final, open-ended, not date-restricted question, dealt not only with the drafting of the provision in

1998, but also with what the clause meant and how Duke applied it. Ex. D: Jefferies 30(b)(6) Depo.151:8-152:16; 154:8-155:15; 156:7-157:12; 158:11-160:18; 163:21-165:1. In fact, there was far less discussion in the preceding pages concerning the drafting of § 5.04(c) than the application of it by Duke. *Id.*

Duke's "context" excuse must be viewed through the prism of its preparation of Mr. Jefferies for the 30(b)(6) topics. This is because Mr. Jefferies states he was prepared to testify on § 5.04(c) solely with regard to the 1998-99 time frame. Ex. S: Jefferies (1/14/10) Depo. 23:23-24:18; 30:17-32:9; 53:9-54:10; 54:17-55:15; 55:22-56:1; 56:14-58:2; 69:9-70:3. Whether Mr. Jefferies' answer was limited to 1998-99 because he was counseled to talk only about that time frame, or because he had not been educated and was not fully aware of the ongoing IRS discussions concerning § 5.04(c), or whether he was fully aware of the IRS communications and intended to deceive Plaintiffs' counsel, cannot be determined on the record. But what is clear is that Duke's counsel, experienced ERISA attorneys from one of the largest law firms in the country, intentionally carved out from the portion of the topic requiring testimony on "interpretation of Section 5.04(c) language" the IRS's interpretation that § 5.04(c) was "illegal" and that Duke had to "get rid of it."

Duke did not educate or prepare Mr. Jefferies with any information at all concerning the whipsaw, safe harbor or § 5.04(c) issues raised by the IRS in a proceeding that was ongoing at the time and highly pertinent to the issues in this case. Ex. S: Jefferies (1/14/10) Depo. 18:8-19:24; 22:20-23:17; 24:19-25:3; 26:21-25; 30:3-14; 38:3-19; 40:4-41:7; 44:24-46:7; 46:9-21; 47:12-24; 48:11-50:20; 52:18-53:1; 58:15-59:3; 65:9-66:2; 74:20-75:7. He was not shown the critical September 24, 2007 IRS letter condemning the 1999 Plan or the notes documenting the IRS's characterization of § 5.04(c) as illegal. Although Duke argues Plaintiffs' counsel did not ask enough questions, did not ask the right questions, or did not ask the right questions in the right context

(about documents they did not know existed, on subject matter they were not aware of), Duke's witness now says further questions would have done no good:

I'm not sure I would say I was providing a limited answer in terms of what I was completely aware of at the time. Again I can't dispute being on emails, but I don't know that I would have been able to tell you much more at the time anyway.

Ex. S: Jefferies (1/14/10) Depo. 58:1-14.

Duke's counsel offers no excuse for failing to educate Mr. Jefferies on the IRS positions on whipsaw and § 5.04(c), other than to posture that there was no topic covering the determination letter process. Rule 30(b)(6) notices cover topics, not processes. The determination letter process revolved almost exclusively around the Rule 30(b)(6) topics. Duke's view, given its awareness that the IRS interpretations at that time were not helpful to it, is simply gamesmanship.

2. *Conduct in 30(b)(6) Deposition.*

During the Rule 30(b)(6) deposition of Mr. Jefferies, when Plaintiffs' counsel began questioning the witness on the initial 1997 determination letter application, Duke's counsel interposed the following objections:

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

Well it's problematic because we have an obligation to prepare a witness for what you tell us you are going to be asking him about. And when you go off topic, he--he hasn't been prepared for that. . . .

. . . [B]ut now you are asking questions of Duke and I certainly have not prepared him to be a Duke witness on an IRS determination letter because it wasn't one of the categories identified.

Ex. D: Jefferies Depo Excerpts (2/5/08), 185: 6-9; 185:12-18; 185:24-186:2.

These objections were framed in terms of determination letters, even though Duke's counsel was aware that the then-current determination letter process revolved around whipsaw and the §

5.04(c) language. The objection was, on its face, obstructionist. It pre-empted any questions Plaintiffs' counsel might have posed concerning the 1999 determination letter.

Duke points out that its counsel directed Plaintiffs to ask determination letter questions during the witness's personal deposition and states that Plaintiffs' counsel refrained from doing so. This is not true. Ex. T: Jefferies (personal) Depo. 2/5/08. As Duke clearly assumed would happen, at 4 p.m. following 7 hours of testimony, Plaintiffs asked Mr. Jefferies the question concerning the 1997 determination letter Duke had objected to, asked several follow-up questions, and ended the deposition. *Id.* Even if Plaintiffs' counsel had been clairvoyant and asked about the 1999 Plan determination letter proceeding, Mr. Jefferies, as noted above, contends he had no answers.

**C. Duty of Candor.**

*1. Lack of Candor to Court.*

During the hearing on December 19, 2007, Duke argued that the 1999 Plan was a safe harbor plan under IRS Notice 96-8, even though it had already been told by the IRS on September 24, 2007, that the Plan was not a safe harbor plan and did not comply with Notice 96-8. Duke argued its preferred meaning for § 5.04(c) without disclosing to the Court that the IRS had already told Duke that Duke's proffered interpretation rendered § 5.04(c) illegal, that Duke needed to get rid of § 5.04(c), and that a whipsaw provision was needed in the Plan. At the same hearing, Duke argued that "Appendix A is quite clear and Section 2.05 is quite clear that for purposes of actuarial equivalence, you have to look to Appendix A." Ex. K, p. 59. In fact, Duke was quoting to the Court provisions of Appendix A as amended in 2003, rather than the Appendix applicable to the Class. Ex. K, pp. 59, 68-70, 72-73. Duke had already been told by the IRS in November 2007: "New assumptions in item 9 or 9<sup>th</sup> Amendment (to Section 2.05) need to add that to Appendix A." Ex. J. Duke did not raise the IRS proceeding at all during the hearing.

Duke now states that its arguments in December 2007 regarding the 1999 Plan were proper because Duke had received determination letters prior to and after that Court hearing.<sup>6</sup> Dkt. 291, p. 27. However, the “prior” determination letter, dated April 2008 (Ex. U), was not even applicable to the 1999 Plan, and Duke was still 14 months and 1 retroactive amendment away from the 2009 letter.

The Fourth Circuit Court of Appeals, in *United States v. Shaffer Equip. Co.*, reaffirmed the importance of a litigant’s duty of candor: “It is appropriate to remind counsel that they have a ‘continuing duty to inform the Court of any development which may conceivably affect the outcome’ of the litigation.” 11 F.3d 450, 458 (4<sup>th</sup> Cir. 1993), *quoting Tiverton Board of License Commissioners v. Pastore*, 469 U.S. 238, 240 (1985).

A District Court in South Carolina also recently noted:

The court does not view favorably any attempt “to play fast and loose” with our judicial system. Too often a lawyer loses sight of his primary responsibility as an officer of the court. Zealous advocacy can lead to obstruction where it impedes the court’s search for truth. Counsel has a basic ethical obligation to be “scrupulously candid and truthful” in his representations to the court. . . . This court concurs with the proposition that the judicial system can provide “no harbor for clever devices to divert the search, mislead opposing counsel or the court, or cover up that which is necessary for justice in the end.

*Benedict College v. Nat’l Credit Sys.*, 2009 U.S. Dist. LEXIS 106742, \*17-18 (D.S.C. Nov. 16,

---

<sup>6</sup> Duke’s claim that the March 2009 amendment “reaffirmed that no whipsaw payment was ever necessary” is simply untrue. The role of the IRS in mandating those amendments was to tax qualify the plan under the Internal Revenue Code. Dkt. 291-2. If Duke’s Plan were compliant, the IRS would not have insisted the language of the Plan be changed. “The IRS determination . . . 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 (4<sup>th</sup> Cir. July 24, 2009) (emphasis added). *See also Esden v. Bank of Boston*, 229 F.3d 154, 177 (2<sup>nd</sup> Cir. 2000) (The “adjudication of [an employee’s] rights is for the Federal courts, not the field offices of the IRS”).

2009) (citations omitted).

2. *Lack of Candor to Counsel*

When Duke produced the retroactive amendment on October 2, 2009, its litigation counsel had had the signed amendment in hand for six months. Dkt. 283-19. The document was finally produced as an attachment to a transmittal email that read: “Counsel – attached please find amendments to the Duke Energy cash balance plan, as amended and restated effective January 1, 2009.” Dkt. 283-20 (emphasis added). Duke admits the “effective January 1, 2009” description was intentional but claims the reference used “proper nomenclature.” Dkt. 291, p. 27. However, the amendment is titled: “Amendment to the Duke Energy Retirement Cash Balance Plan, as amended and restated effective January 1, 1999.” Ex. V. The amendment recites that it is an “[a]mendment to the Duke Energy Retirement Cash Balance Plan, as amended and restated effective January 1, 1999 (the “Plan”)” *Id.* Duke makes the claim that it used “proper nomenclature” even though at no time since January 1, 2009 has any party referenced the 1999 Plan or amendments thereto using Duke’s new nomenclature. In Duke’s recent filing for summary judgment, Duke referred to the 1999 amendment as “the ‘1999 Plan’” and cited to “the 1999 Plan” no less than 20 times. Dkt. 295-1. Even Duke’s Response to the Motion herein consistently references “the 1999 Plan.” Dkt. 291, pp. 1, 2, 15, 19, 26.

When Plaintiffs’ counsel questioned the 6-month delay in serving the March 2009 retroactive amendment, Duke explained: “After the court ruled on the class certification motion, [September 4, 2009], we investigated whether there was any need to supplement our document production. We identified the two plan amendments and produced them.” Dkt. 283-25. However, Duke’s counsel knew about the amendment all along, participated in the process of reviewing and drafting it, and had the signed amendment in hand by April 3, 2009. There was

nothing to “investigate” or “identify.” In truth, Duke offers no explanation at all for holding the signed March 30, 2009 retroactive amendment for six months.

**D. Prejudice**

Duke argues that Plaintiffs have suffered no prejudice from the misconduct asserted by their Motion. Prejudice is clear:

- ◆ Plaintiffs were kept ignorant of the determination letter process through the full discovery period while they took 10 depositions, including 30(b)(6) depositions of Duke, Duke’s consultant Mercer Inc., and Duke’s consultant Hewitt Associates;
- ◆ Plaintiffs could have sought additional depositions, including depositions of the IRS reviewers and Duke ERISA attorney David Godofsky, who was the person lobbying the IRS for a “zero cost” amendment;
- ◆ The IRS proceeding was concluded without input from the participants, and with no indication the reviewers had any inkling of the issues being adjudicated in this Court or of Plaintiffs’ positions on § 5.04(c), whipsaw, and safe harbor;
- ◆ This Court was kept in the dark concerning the IRS proceeding, which was moving along a parallel track concerning the same Plan provisions; and
- ◆ The integrity of the judicial process in this case has been undermined, causing Plaintiffs to expend hundreds of attorney hours seeking out the truth.

**E. Sufficiency of Record**

The record establishes a *prima facie* case warranting application of the crime/fraud exception to order *in camera* review of the narrowly focused categories of documents described in Plaintiffs’ Motion. Duke simply cannot distinguish the line of cases exemplified by *1100 West, LLC v. Red Spot Paint & Varnish Co., Inc.*, 2009 U.S. Dist. LEXIS 7320 (S.D. Ind. Jan. 30, 2009) wherein strikingly similar misconduct was deemed sufficient to abrogate the privilege of the wrongdoer. Duke cites cases indicating that “fraud on the court” is only implicated in cases involving bribery or improper influence but does not disclose that the cases it cites are limited to the Rule 60(b)(3) context. *See Great Coastal Express, Inc. v. Int’l Bhd. of Teamsters*, 675 F.2d

1349, 1356 (4<sup>th</sup> Cir. 1982). The view of the Fourth Circuit in other contexts is far broader. In characterizing misconduct sufficient to warrant dismissal of an action, the Court stated:

While we have not published on the subject, the inherent power to dismiss a case for the misconduct of counsel is undoubtedly clear. In *Hazel-Atlas Co.*, the Supreme Court observed that the court of appeals could have dismissed that case where it was discovered that counsel had suppressed the truth about the authorship of an important article offered into evidence. 322 U.S. at 250. . . . *Halaco Engineering Co. v. Costle*, 843 F.2d 376, 380 (9<sup>th</sup> Cir. 1988) (recognizing the inherent power to dismiss EPA case for discovery abuses, but reversing dismissal order as excessive in the circumstances) . . . .

*Shaffer*, 11 F.3d at 462. The Court has eloquently described the reason parties must be held to high standards of conduct and candor:

Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions – all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition. Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process. As soon as the process falters in that respect, the people are then justified in abandoning support for the system in favor of one where honesty is preeminent.

. . . The system can provide no harbor for clever devices to divert the search, mislead opposing counsel or the court, or cover up that which is necessary for justice in the end. It is without note, therefore, that we recognize that the lawyer's duties to maintain the confidences of a client and advocate vigorously are trumped ultimately by a duty to guard against the corruption that justice will be dispensed on an act of deceit.

*Shaffer*, 11 F.3d at 457-58; *see also United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) (“Modern instruments of discovery serve a useful purpose . . . They together with pretrial procedures make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.”).

### III. CONCLUSION

Duke and its attorneys ignored their duties under Rule 26(e) to supplement discovery and to correct misstatements in filings with the Court; they failed to educate Duke's 30(b)(6) witness with information that was clearly responsive to listed topics, interposed objections to divert questioning from relevant topics, and then sat on their hands while the deponent applied unstated context; they appeared in court arguing positions contrary to agency findings and kept the Court and the Plaintiffs in the dark concerning the IRS proceeding; they sat on the retroactive amendment for six months before attempting to slip it by Plaintiffs' counsel by referring to a 2009 time period not relevant to the class; and they then misrepresented that they only identified the amendment post-class certification in September 2009. Duke's conduct from the beginning of this litigation has, in fact, been a game of "blind man's bluff" and the Motion should be granted.<sup>7</sup>

/s/Cheryl F. Perkins

Charles W. Whetstone, Jr. (Fed. I.D. #4604)

Thad Lee Myers (Fed. I.D. #6260)

Cheryl F Perkins (Fed. I.D. #4969)

WHETSTONE MYERS PERKINS & YOUNG LLC

601 Devine Street

P. O. Box 8086 (29202)

Columbia, S.C. 29201

803-799-9400

803-799-2017 (fax)

[cwhetstone@attorneyssc.com](mailto:cwhetstone@attorneyssc.com)

[tmyers@attorneyssc.com](mailto:tmyers@attorneyssc.com)

[cperkins@attorneyssc.com](mailto:cperkins@attorneyssc.com)

James Robinson Gilreath (Fed. I.D. #2101)

William Mitchell Hogan (Fed. I.D. #6141)

THE GILREATH LAW FIRM

P.O. Box 2147

---

<sup>7</sup> Plaintiffs believe the history of this litigation warrants compelling the "CEO affidavit," originated by the Honorable G. Ross Anderson, from the CEO of Duke Energy and the managing partner of Sidley Austin, LLP affirming, based on a diligent search, that all documents this Court may order produced for *in camera* review are located and submitted to the Court. See Ex. W, sample attached.

Greenville, S.C. 29602  
864-242-4727  
864-232-4395 (fax)  
[jim@gilreathlaw.com](mailto:jim@gilreathlaw.com)  
[bhogan@gilreathlaw.com](mailto:bhogan@gilreathlaw.com)

Mona Lisa Wallace, Esq. (Fed. I.D.#7216)  
WALLACE & GRAHAM, P.A.  
525 North Main Street  
Salisbury, N.C. 28144  
(800) 849-5291 (phone)  
(704) 633-9424 (fax)  
[mwallace@wallacegraham.com](mailto:mwallace@wallacegraham.com)

Terry Edward Richardson, Jr. (Fed. I.D. #3457)  
Andrew Hoyt Rowell, III (Fed. I.D.#3665)  
Thomas Christopher Tuck (Fed. I.D. #9135)  
RICHARDSON PATRICK WESTBROOK & BRICKMAN  
P.O. Box 1368  
Barnwell, S.C. 29812  
803-541-7850  
803-541-9625 (fax)  
[trichardson@rpwb.com](mailto:trichardson@rpwb.com)  
[hrowell@rpwb.com](mailto:hrowell@rpwb.com)  
[ctuck@rpwb.com](mailto:ctuck@rpwb.com)

Wallace K. Lightsey (Fed. I.D. #1037)  
Carl Frederick Muller (Fed. I.D. #3602)  
WYCHE BURGESS FREEMAN & PARHAM  
P.O. Box 728  
Greenville, S.C. 29602  
864-242-8200  
864-242-8324 (fax)  
[wlightsey@wyche.com](mailto:wlightsey@wyche.com)  
[cmuller@wyche.com](mailto:cmuller@wyche.com)  
ATTORNEYS FOR PLAINTIFFS