UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

DENNIS REED BOWEN, KENNETH WALTON GEORGE, CLYDE FREEMAN, GEORGE MOYERS, JIM MATTHEWS, and HENRY MILLER, on their own behalf and on behalf of a class of persons similarly situated,	**C/A No: 8:06-CV-373-RBH**
Plaintiffs,	**PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO AMEND**
vs.	
DUKE ENERGY RETIREMENT CASH BALANCE PLAN and DUKE ENERGY CORPORATION,	
Defendants.	

The Plaintiffs respectfully submit this Memorandum in further support of their Motion to Amend Complaint:

I. Rule 16 Good Cause

This action was filed on February 6, 2006 alleging numerous defects and deficiencies in the Duke Energy Corporation [Duke] conversion from a traditional defined benefit retirement plan to a cash balance retirement plan. The Complaint sought class action treatment under Rule 26(b)(1), (b)(2), and (b)(3) F.R.Civ.P.

The Complaint alleged, among other matters, that Duke did not fully and adequately notify retirement plan participants of the effects of the cash balance conversion. Complaint ¶ 46. The Complaint did not specify the precise provisions of ERISA that required notice and the notice allegation was pled as a part of the factual allegations of the Complaint rather than as a separate cause of action. In February 2006, the allegations in this regard were made based upon

information relating to the six named plaintiffs.

In the Motion to Certify a Class Action filed less than three months after this action was commenced, Plaintiffs further delineated the ERISA notice violation, again based on information regarding the six named Plaintiffs, stating that "Duke failed to notify plan participants of a significant reduction in the rate of future benefit accruals 15 days prior to the January 1, 1997 effective date in violation of ERISA § 204(h), which prohibits such plan amendments without notice of the reduction." Memo in Supp. of Class Certification, p. 3. The class certification memorandum not only identified ERISA § 204(h) as an issue, but also specified additional statutory authority in support of other allegations of the Complaint, including ERISA § 102 and 29 C.F.R. § 2520.102.

On January 8, 2007, the Court issued its Conference and Scheduling Order governing this action. At the Rule 26(f) conference, the parties agreed that the Court's schedule should be altered and agreed upon a proposed Scheduling Order, which was sent to the Court and signed on March 5, 2007. The March 5, 2007 Order, agreed upon by the parties, contemplated a period of discovery prior to the motion to amend cut-off date of June 11, 2007.

Discovery was promptly served by Plaintiffs on March 29, 2007; however, Duke did not begin producing responsive documents until May. **Ex. A – Cover letters for Duke production**. Documents were received by Plaintiffs' counsel on the following dates, with a period of several days required thereafter for additional OCR processing[1] before review could begin:

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[1] The OCR processing accompanying the electronic files served by Duke was insufficient for Plaintiffs' purposes.

May 9, 2007: Documents produced by Duke from Mercer (Duke's actuary) files: M0000001 – M0060404;

May 25, 2007: DE001370 – 060479;[2]

May 31, 2007: DE060480 – 069354;

June 1, 2007: DE069355 – 078145;

July 19, 2007: DE078146 – 081704;

August 7, 2007: DE081705 – 115893;

August 15, 2007: DE115894 – 147503;

September 11, 2007: DE147504 – 153192;

September 14, 2007: DE153193 – 154731;

September 14-19, 2007: DE154732 – 161725;

October 4, 2007: DE161726 – 162067;

October 19, 2007: DE162068 – 165345;

October 27: DE165346 – 170156;

November 2, 2007: DE170157 – 170944;

November 21, 2007: DE171409 – 171564;

December 22, 2007: DE171565 – 176860;

January 2, 2007: DE176861 – 178124.

The documents produced made clear that not only were the six named Plaintiffs deprived

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[2] The initial 759 pages of DE documents consisted of certain plan documents and the administrative claims, which were required to be produced by this Court's ERISA Case Management Order of March 29, 2006. The additional DE documents up to DE001369 were produced during the depositions of the class representatives in April 2007.

of proper ERISA § 204(h) notice, but that Duke made a conscious decision to avoid providing the notice to any participant. See, e.g. **Ex. B – M0037195-6, M0050723-5, M0026553**. Until this production there was not a sufficient good faith basis for Plaintiffs to assert a class-wide claim regarding the notice issue.

The documents produced by Duke disclose that during the time period between the December 23, 1996 plan conversion and the July 16, 1997 plan amendment, Duke used a secret fifth step to calculate the initial opening balances for the cash balance plan, contrary to information provided by Duke to plan participants. **Ex. C – DE120741 – 745.** Also, during this time period, Duke was arbitrarily manipulating the assumptions used to calculate opening balances, as well as the dollar amounts of certain opening balances. **Ex. D – M_0037195 – 6; M_0050723 – 5.** This new information significantly impairs Duke's anticipated defense to an ERISA § 204(h) claim, that its communications to plan participants through Summary Plan Descriptions, initial opening cash balance statements, and "On Track" newsletters was sufficient compliance. **Ex. E, Duke's Answers to Plaintiffs' Supplemental Interrogatories of October 16, 2007, ¶ 6, at pp. 5-6.**

Once substantial document production was received from Duke and reviewed, Plaintiffs' counsel were faced with the dilemma that the June 11, 2007 amendment deadline had passed while documents establishing a clear class-wide claim were surfacing. But for a May 2007 United States Supreme Court case, Plaintiffs may well have gone forward with the original Complaint based on the concept of notice pleading and the power of the Court to fashion an appropriate remedy under F.R..Civ.P. 54(c), once the statutory violation was shown. However, on May 21, 2007, *Bell Atlantic Corporation v. Twombly* was decided by the United Stated

Supreme Court. 127 S. Ct. 1955 (2007). The high court "clarified" pleading requirements in terms of specificity in Federal Courts. *Id.* at 1964. Although the Supreme Court declared that its intent was not to alter concepts of federal notice pleading, the opinion certainly served as a warning that parties who relied on minimal pleadings to state a claim did so at their own risk. That the *Twombly* opinion is perceived as plowing new ground is evidenced by the fact that in the months since May 2007, *Twombly* has been cited in more than 3000 cases. **Ex. F – Shepard's citations.**

The language of the *Twombly* case convinced Plaintiffs that a Motion to Amend the Complaint was necessary to protect the right of the putative class of Duke retirement plan beneficiaries who suffered a significant reduction in the rate of their future benefit accrual as a result of Duke's conversion to a cash balance retirement plan. At this point, with the expert designation deadline looming and discovery progressing slowly due to third party recalcitrance and Duke's "rolling" discovery, the parties were already discussing an extension of the Scheduling Order. Duke proposed the extension of virtually all of the Scheduling Order dates, but rejected Plaintiffs' request that the motion to amend date be extended as well. On October 8, 2007, the parties submitted to the Court a proposed consent amended scheduling order that extended most of the initial Scheduling Order dates but noted, at Plaintiffs' insistence, the parties' disagreement concerning the pleading amendment deadline:

> The prior scheduling order set the deadline to move to amend the pleadings as June 11, 2007. Plaintiffs sought consent to include in this amended scheduling order a revised deadline for motions to amend. Defendants objected. Therefore, there is no agreement on that issue.

Ex. G– Email to Judge Harwell and attached proposed Amended Conference and Scheduling Order.

Plaintiffs' Motion to Amend Scheduling Order and Motion for Leave to Amend the Complaint, filed October 19, 2007, ensued.

Duke's position that Plaintiffs had sufficient information to plead a class-wide claim based on ERISA §204(h) ignores the mandates of F.R.Civ.P 11. Plaintiffs' counsel required more than speculation based on information relating only to the six named Plaintiffs to ethically seek what Duke characterizes as "draconian" relief invalidating the cash balance amendment. The notice allegation of the initial complaint was denied by Duke and Plaintiffs did not yet possess documents to prove otherwise. An attorney pleading a claim must base it on more than a mere "belief." The belief must be based on "knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that a claim is well grounded in fact and is warranted by existing law. F.R.Civ.P. 11. In addition, the "reasonable inquiry" must establish "evidentiary support" for the allegations of a pleading. F.R.Civ.P. 11(b)(3). *See, e.g. Givens v. O'Quinn (In re Johnson)*, 186 Fed. Appx. 390, 394 (4th Cir. 2006) (Rule 11 sanction appropriate where allegations were based on perceptions without an inquiry that was reasonable under the circumstances). **Ex. G-1 – Appendix of Unpublished and Out-of-State Opinions, in alphabetical order.**

Finally, it is certainly reasonable that a plaintiff be allowed some opportunity to conduct discovery before a Scheduling Order deadline forever and irrevocably bars amendment to the Complaint. Duke's refusal to extend the amendment deadline while other critical deadlines, such as the discovery deadline and expert designation deadline, were extended forward for months at Duke's behest, altered the basic structure of the initial Scheduling Order to Plaintiffs' detriment. The fact that no discovery was available to Plaintiffs for a year after the Complaint was filed, that

Duke's timing of its initial document production was on the eve of the amendment deadline,[3] and that Duke unreasonably refused to consent to an extension of the amendment deadline while seeking extension of other critical deadlines, is further good cause to allow Plaintiffs' amendment to the Complaint.

In summary, the discovery of significant evidentiary support for class-wide relief based on ERISA § 204(h), together with the implications of the *Twombly* case, and the fact that the other significant Scheduling Order deadlines have all been moved by several months, constitute good cause in support of Plaintiffs' Motion to Amend outside the deadline initially proposed by the parties and set by the Court for Motions to Amend. *See Caplan v. CNA Short Term Disability Plan*, 2007 U.S. Dist. LEXIS 43676, *9-10 (N.D. Cal. June 1, 2007) (finding good cause for motion to amend outside scheduling order deadline based on Rule 11 requirements); *Stewart v. Kroeker*, 2005 U.S. Dist. LEXIS 33625 (D. Wash. 2005) (finding good cause to allow amendment based in part on Rule 11 obligations); *Gen. Fire & Cas. Co. v. Guy Carpenter & Co.*, 2007 U.S. Dist. LEXIS 15093, *5-10 (D. Idaho Mar. 2, 2007) (finding good cause to allow amendment where other deadlines of initial scheduling order has been extended and parties were still in discovery).

II. Rule 15 Standards

Duke asserts various arguments opposing allowance of Plaintiffs' proposed amendment

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[3] Of the 178,124 pages of documents produced from Duke's files to date, only 78,145 had been produced by the motion to amend deadline. The ***first*** significant production, pages DE001370 – 060479, was only received on May 25, 2007. Plaintiffs had also received in May another 60,000 pages from Duke's actuary's files. Clearly, no meaningful review of this voluminous production could be completed, and a motion to amend and proposed amended pleading prepared and filed by June 11, 2007.

purportedly under F.R.Civ.P.15(a) . First, Duke claims that the allowance of the amendment to state a claim for relief under ERISA § 204(h) "will materially alter the nature of the Complaint and the case." Def. Mem at 10. Duke's basis for making this statement is the assumption that the Complaint's notice allegations were all framed in terms of Duke's fiduciary duties. In fact, the primary assertion regarding Duke's notice violation relating to §204(h) is contained in ¶ 46 of the original Complaint in the context of the "wearaway" impact of the cash balance conversion. The relief sought by Plaintiffs for "wearaway" under the Fifth Cause of Action – reformation of the plan and restoration of frozen accruals – is similar to the relief that would be warranted for a notice violation under ERISA §204(h). The actuaries will be conducting similar participant by participant calculations using the interactive spreadsheets containing each plan participant's account information already in the possession of the parties.

Duke also asserts that the proposed amendment "would prejudice some putative class members." Def. Mem at 12. Duke warns, without any supporting evidence, that "[i]f this Court were to find a violation of § 204(h) and deem the amendment instituting the cash balance plan ineffective over a decade after the amendment took effect, thousands of workers who are better off under the cash balance plan would be severely prejudiced." Def. Mem. at 12.

Duke's "conflict" theory is one which should be presented in the context of the class certification motion. However, to the extent the issue bears upon the Motion to Amend, Duke's position is without merit.

Duke premises its argument on the contention that the sole remedy this Court could invoke were it to conclude that Duke violated ERISA § 204(h) is to strike down the amendment adopting the cash balance plan, and let the chips fall where they may for all plan participants.

Duke ignores abundant case law confirming the Court's power to fashion a remedy for violation of §204(h) based on the individual circumstances of the case before it.

1. The Court May Order "Greater of" Relief

Plaintiffs' proposed Amended Complaint seeks relief for the ERISA § 204(h) violation as stated in the current version of 29 U.S.C. §1054(h), which allows plan participants to seek "greater of" relief. The basis for this form of relief for a § 204(h) violation occurring prior to the 2001 amendment to ERISA §204(h), is stated in *Hirt v. The Equitable Retirement Plan for Employees, Managers and Agents*, 441 F. Supp. 2d 516, 539 (S.D.N.Y. 2006):

> The insufficiency of Equitable's 1990 notice - under the terms of the statute in effect at the time it was given, December 4, 1990, and the Court's interpretation of the statutory requirements - vitiates the amendment itself. The statute makes a sufficient notice a precondition to the effectiveness of the plan amendment. Thus, the statute, as it read in 1990, provides that a "plan may not be amended . . . unless . . . the plan administrator provides a written notice." COBRA §11006(a), 100 Stat. at 243. The statute as amended in 2001, providing explicitly that which was implicit in the earlier iteration, provided for the ineffectiveness of an amendment made without adequate notice, and whereby
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> > in the case of any egregious failure to meet any requirement . . . the provisions of the . . . plan shall be applied as if such plan amendment entitled all applicable individuals to the greater of -- (I) the benefits to which they would have been entitled without regard to such amendment, or (ii) the benefits under the plan with regard to such amendment.
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> EGTRRA §659(b), 115 Stat. at 140 (codified as amended at 29 U.S.C. § 1054(h)(6)(A)).

441 F. Supp. 2d at 539.

Also, the District Court in *In Re Citigroup Pension Plan ERISA Litigation*, 241 F.R.D. 172, 181 (S.D.N.Y. 2006), granted class certification in an action involving allegations of pre-2001 ERISA § 204(h) violations, where the class sought "restitutionary relief" in the form of "the

greater of the benefit calculated under the pre-cash balance formula or the cash balance formula." Notably, the Court rejected out-of-hand Citigroup's argument that the plaintiffs were not adequate class representatives because of a purported conflict based on seeking ERISA§ 204(h) relief. 241 F.R.D. at 179.

2. The Court May Fashion its Own Equitable Remedy for a §204(h) Violation

Numerous courts have confirmed the flexibility inherent in determining the appropriate remedy for an ERISA § 204(h) notice violation. For example, in *Production and Maintenance Employees Local 504 v. Roadmaster Corporation*, 1989 U.S. Dist. LEXIS 8282, *19 (S.D. Ill. February 3, 1989) (emphasis added), the District Court stated:

> In order to remedy an employer's violation of ERISA, a court has the authority to rescind an amendment to a Plan document, to order that a defendant grant the participants their improperly denied benefit accruals, and to order the defendant to contribute to a Plan such amounts, plus prejudgment interest, as would have been contributed to the Plan but for the improper amendment. *See, Collins v. Seafarers Pension Trust*, 846 F.2d 936, 939-40 (4th Cir. 1988) (failure to provide proper notice of any pension plan amendment decreasing accrued benefits justifies vitiation of that amendment); *see also Lowen v. Tower Asset Mgt., Inc.*, 653 F. Supp. 1542, 1556 (S.D.N.Y.), *aff'd*, 829 F.2d 1209 (2nd Cir. 1987) (court has broad discretion in ***fashioning equitable remedy including recision of unlawful transactions***); *accord Gilliam v. Edwards*, 492 F. Supp. 1255, 1266-67 (D.N.J. 1980).

In *Frommert v. Conkright*, 433 F.3d 254, 268 (2nd Cir. 2006), the Second Circuit Court of Appeals also confirmed the appropriateness of employing equitable principles to fashion a remedy for violation of ERISA § 204(h) notice requirements:

> On remand, the remedy crafted by the district court for those employees rehired prior to 1998 should utilize an appropriate pre-amendment calculation to determine their benefits. We recognize the difficulty that this task poses because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated. As guidance for the district court, we

> suggest that ***it may wish to employ equitable principles*** when determining the appropriate calculation and fashioning the appropriate remedy.

The court in *Frommert* also stated: "On remand, it will be necessary for the district court to determine which of the plaintiffs were rehired by Xerox after the Plan was amended to include the phantom account and thus can be bound by its terms." 433 F.3d at 269. The impact of the *Frommert* court's ruling was to vitiate the amendment as to some participants, but not others.

In *Davidson v. Canteen Corporation,* 957 F.2d 1404 (7th Cir. 1992), the Seventh Circuit Court of Appeals awarded limited relief to two individual plaintiffs based on an employer's violation of ERISA § 204(h). The court specifically recognized that an ERISA § 204(h) violation could occur even when a plan amendment adversely impacted only a "few participants." 957 F.2d at 1407. The court stated:

> The amendment of a retirement plan to deprive ***some*** of the plan's participants of a benefit they were promised, when advance notice of that amendment would have allowed them to prevent injury from the amendment, is exactly what § 204(h) clearly outlaws. The burden such notice requirement places on a plan sponsor is a burden Congress must have weighed, and decided to ignore (or to counter balance with the word "significant"), in drafting and passing §204(h).

957 F.2d at 1409 (emphasis added).

The *Davidson* Court, by awarding relief to the two named plaintiffs, rather than invaliding the plan amendment *in toto*, implicitly recognized the court's power to fashion a remedy that compensates plan participants ***aggrieved*** by a § 204(h) violation through relief short of invalidating the amendment, *vis-a-vis* all participants irrespective of harm. *See also, Pickering v. USX Corporation*, 809 F. Supp 1501, 1565 (D. Utah 1992) (awarding limited relief based on ERISA § 204(h) violation to certain adversely impacted participants).

In *Allred v. First Nationwide Financial Corp.*, 1994 U.S. Dist. LEXIS 21538, *16 (N.D.

Cal. May 2, 1994) (citations omitted), the District Court, in looking at cases from the Ninth Circuit, held:

> While these cases do not specifically consider § 204(h), as modified by IRS requirements, they create an atmosphere in which these ERISA notice violations should be remedied equitably. Therefore, given the general equitable nature of ERISA, the Court will take equitable considerations into account in determining what sort of remedy is appropriate for plaintiffs.

In *Normann v. Amphenol Corporation*, 956 F. Supp. 158, 163-64 (N.D.N.Y. 1997), the District Court in the Southern District of New York held that ERISA § 204(h) contemplated relief beyond that specifically enumerated in the statute and the Treasury Regulations interpreting it, holding that a "significant reduction" in the rate of future benefit accrual arising from an amendment impairing early retirement benefits required a § 204(h) notice, stating:[4]

> Few courts have addressed the precise coverage of §1054(h). Those courts that have looked at §1054(h), albeit in other contexts, appear to have concluded that §1054(h) is to be read broadly.
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> * * *
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> These decisions are not surprising in light of the remedial nature of ERISA. As the Second Circuit has stated:
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> > There can be no doubt that ERISA was enacted for the purpose of assuring employees that they would not be deprived of their reasonably-anticipated pension benefits; an employer was to be prevented from "pulling the rug out from under" promised retirement benefits upon which his employees had relied during their long years of service . . . . "The provisions of S. 4 are addressed to the issue of whether American working men and women shall receive private pension plan benefits which they have been led to believe would be theirs upon retirement from working lives. It responds by mandating protective measures and prescribing minimum standards for promised benefits." *Amato v. Western Union International, Inc.*, 773 F.2d 1402, 1409 (2nd Cir. 1985) (quoting *S. Rep. No.* 127, 93rd Congress, lst Session, reprinted in, 1974 U.S. Code Cong. & Ad. News 4639, 4838).

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[4] The New York court exhibited some degree of clairvoyance in that § 204(h) was amended in 2001 to specifically cover reductions in early retirement benefits.

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> A finding that § 1054(h)'s notice requirements apply to early retirement benefits would comport with one of the central precepts of ERISA: disclosure. . . . In light of ERISA's remedial nature, ERISA's reliance on disclosure, that early retirement benefits are not expressed or expressly excluded from Section 1054(h), and the fact that early retirement benefits are considered accrued benefits subject to §1054(g)'s protection, the Court holds that a significant reduction in early retirement benefits triggers the notice requirements of 1054(h).

In *Richards v. FleetBoston*, 235 F.R.D. 165 (D. Conn. 2006), the District Court in Connecticut granted class certification over objections virtually identical to those raised by Duke in this case.[5] The well-reasoned conclusions of the *FleetBoston* Court were:

> The defendants argue that Richards has interests antagonistic to those of some putative class members. . . . They argue that some members of the proposed class are better off under the Amended Plan than they would be under the Traditional Plan and that it would be improper to bind them to a non-opt-out class. . . . The court finds that Richards can adequately represent the interests of the class as she has proposed it. . . . For the reasons discussed in Part IV.E. of this court's ruling on the defendants' motion to dismiss, the defects in disclosure themselves are significant enough to establish a presumption of likely prejudice, common to all members of the class, and this presumption has not been rebutted.
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> For these reasons, the members of the proposed class share Richard's claims. Even if the court were to accept the defendants' allegation that some class members would prefer to receive the greater benefits afforded them by the Amended Plan, with its alleged violations of ERISA, than to receive benefits that they would have received had Fleet kept the Traditional Plan in place, does not mean that the court should exclude those individuals from a class that is created to vindicate their ERISA-created rights.

235 F.R.D. at 170 (citations omitted).

The Court in *FleetBoston* relied upon substantial case law and other authority: "*J. John Jacobi v. Bache & Co., Inc.*, 16 Fed. R. Serv. 2d 71 (S.D.N.Y. Feb. 8, 1972) (Callahan) (holding, in denying a challenge to certification of a Rule 23(b)(1) class, that 'the object of an anti-trust

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[5] Duke's Chicago lawyers represented FleetBoston in making these same arguments.

action is the restoration of competition to the injury involved: the fact that some members of the class may differ as to the desirability of a particular remedy for the anti-trust violation, or even desire the maintenance of the status quo, does not preclude their being included within the class bringing the action'), cited in Alba Conte & Herbert B. Newberg, 1 Newberg on Class Actions § 3:30 (4th ed. 2005); *see also, Norwalk Core v. Norwalk Redevelopment Agency*, 395 F.2d 920, 937 (2d Cir. 1968) (holding that, where a complaint alleged discrimination against particular races by city housing relocation program and questions of fact common to all members, the 'fact that some members of the class were personally satisfied with the defendants' relocation efforts is irrelevant.'), cited in 1 Newberg on Class Actions § 3:30; *Groover v. Michelin N. Am., Inc.*, 192 F.R.D. 305, 306, 307 n. 1 (M.D.Ala. 2000) (holding that 'the fact that some class members may be satisfied with the welfare benefits they are currently receiving, notwithstanding any alleged contractual violation, and would prefer to maintain the status quo and leave violations of their rights, if violations exist, unremedied is not dispositive under Rule 23(a),' but not reaching merits of defendant's argument that some class members' benefits actually increased under the 'current system')" *Id.* at 171.

The *FleetBoston* court also concluded:

> Another court in this district confronted a case factually similar to the present case in *Amara v. CIGNA Corp. No. 3:01CV2361 (DJS)*, 2002 U.S. Dist. LEXIS 25947, at *6-*7 (D. Conn. Dec. 20, 2002). While recognizing that "providing the relief requested in the complaint on a class-wide basis may actually harm some members of the class," he concluded that "this problem can be addressed when the court determines what remedy should be provided if plaintiff prevails on the merits of her claims." Id.
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> This court reaches the same conclusion as a result of its adequacy analysis. The question of remedies is not appropriate for resolution at this stage in the litigation,

> and the court is not required to impose the particular remedy requested by Richards even if she prevails on the merits of her claims.

Id. at 172.

In another class action alleging ERISA § 204(h) violations, the District Court in Arizona, seeing no impediment to a class-wide ERISA § 204(h) claim, concluded "not only have Plaintiffs stated a claim [under ERISA 204(h)], summary judgment in favor of Plaintiffs is warranted." *Allen v. Honeywell Ret. Earnings Plan*, 382 F. Supp. 2d 1139, 1167 (D.Ariz. 2005)

Based on the foregoing cases, it is clear that this Court has the power to certify a class benefitting those Duke plan participants who suffered a significant reduction in the rate of future benefit accruals as a result of the plan amendment converting Duke's traditional defined benefit plan to a cash balance plan and to grant relief in their favor based on the equitable principles espoused above.

The filing of the Plaintiffs' Motion to Amend after the June 11, 2007 deadline has not prejudiced Duke by its timing. Two other motions - Plaintiffs' Motion for Class Certification and Duke's Motion for Judgment on the Pleading - were filed well before June 11, 2007 (on April 27, 2006 and May 23, 2007 respectively), yet they were not heard until December 19, 2007. There is nothing to indicate that had the motion been filed before the Scheduling Order deadline it would have been heard any earlier than December 19. Further, Duke's present opposition to the Motion to Amend, including their opposition based on the more liberal amendment standards of Rule 15, indicates Duke would not have consented to the motion.

Duke's remaining primary opposition to Plaintiffs' Motion to Amend is purported futility. Duke summarily concludes that South Carolina's three-year statute of limitations applies to this

action. Def. Mem. At 14-15. [6] While Duke cites to New York and Second Circuit cases in support of its theory, it is not at all clear at this juncture which South Carolina statute of limitations would apply to this action. There is a split of authority on the characterization of ERISA claims as contract claims, statutory claims, or claims which are neither and must fall within a state's "catch-all" statutes of limitations. *See, e.g., White v. Sun Life Assur. Co. of Canada*, 488 F.3d 240, *251 n. 4 (4th Cir. 2007) (borrowing North Carolina's breach of contract statute of limitations in ERISA action); *Jones v. Wal-Mart Stores, Inc.* 2007 U.S. Dist. LEXIS 71575, * 4 (N.D. Miss. Sept. 25, 2007) (borrowing Mississippi's "catch-all" statute of limitations); *Flickinger v. E.I. du Pont de Nemours & Co.*, 466 F. Supp. 2d 701, 708 (W. D. Va. 2006) (applying Virginia's "catch-all" statute of limitations provision). Plaintiffs will assert that this action should fall under South Carolina's catch-all statute of limitation which provides a ten-year limitations period. § 15-3-600 *S.C. Code Ann.*. If, however the action is looked upon as one sounding in contract, as the Fourth Circuit Court of Appeals found in *White* ,the statutory period still would not fall under § 15-3-530(1), because the pension plan at issue is a sealed instrument. **Ex. H – December 23, 1996 Plan cover page and signature page.** The South Carolina statute of limitations for actions upon sealed instruments is contained in § 15-3-520 and provides for a limitations period of twenty (20) years. *See, also, Treadway v. Smith,* 325 S.C. 367, 479 S.E.2d 849 (Ct. App. 1996); *SCDSS v. Winyah*, 282 S.C. 556, 320 S.E.2d 464 (Ct. App. 1984).

Determination of date of accrual as well as the appropriate limitations period to apply will involve a complex analysis on which full briefing will be necessary for this Court. This is

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[6] Plaintiffs incorporate by reference their argument regarding accrual set forth in Plaintiffs' Reply Memorandum dated December 5, 2007.

certainly not an issue upon which a claim of "futility" based on the face of the pleadings should preclude amendment of the pleadings as requested by Plaintiffs.

III. CONCLUSION

In conclusion, the District Court is granted broad discretion in determining whether to grant or deny a motion to amend pleadings. In this case, the circumstances weight heavily in support of allowance of the amendment. *See, Sweetheart Plastics, Inc. v. Detroit Forming, Inc.*, 743 F.2d 1039 (4th Cir.1984). Plaintiffs respectfully request that this Honorable Court grant the relief requested in the Motion to Amend Scheduling Order and Motion for Leave to Amend the Complaint, filed October 19, 2007.

S/James R. Gilreath
James R. Gilreath (Fed. I.D. No. 2101)
William M. Hogan (Fed. I.D. No. 6141)
THE GILREATH LAW FIRM, P.A.
110 Lavinia Avenue (29601)
Post Office Box 2147
Greenville, South Carolina 29602
(864) 242-4727 Telephone
(864) 232-4395 Facsimile
jim@gilreatlaw.com
bhogan@gilreathlaw.com

Charles W. Whetstone, Jr. (Fed. I.D. No. 4604)
Cheryl F. Perkins (Fed. I.D. No. 4969)
Thad Myers (Fed. I.D. No. 6260)
WHETSTONE MYERS PERKINS & YOUNG LLC
601 Devine Street (29201)
Post Office Box 8086
Columbia, South Carolina 29202
(803) 799-9400 Telephone
(803) 799-2017 Facsimile
cwhetstone@attorneyssc.com
cperkins@attorneyssc.com

Mona Lisa Wallace (Fed. I.D. No. 7216)
WALLACE & GRAHAM, P.A.
525 North Main Street
Salisbury, North Carolina 28144
(704) 633-5244 Telephone
(704) 633-9434 Facsimile
mwallace@wallacegraham.com

Carl Frederick Muller (Fed. I.D. No. 3602)
Andrew B. Coburn
Wallace K. Lightsey (Fed. I.D. No. 1037)
WYCHE BURGESS FREEMAN & PARHAM
Post Office Box 728
Greenville, South Carolina 29602
(864) 242-8200 Telephone
(864) 242-8324 Facsimile
cmuller@wyche.com
acoburn@wyche.com
wlightsey@wyche.com

A. Hoyt Rowell, III (Fed. I.D. No. 3665)
T. Christopher Tuck (Fed. I.D. No. 9135)
Robert S. Wood (Fed. I.D. No. 7965)
Richardson Patrick Westbrook & Brickman
Post Office Box 1007
Mt. Pleasant, South Carolina 29465
(843) 727-6500 Telephone
(843) 216-6509 Facsimile
hrowell@rpwb.com
ctuck@rpwb.com
bwood@rpwb.com

ATTORNEYS FOR PLAINTIFFS

Greenville, South Carolina

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