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,	)	**Case No.: 8:06-CV-00373-RBH**
Plaintiffs,	)	
vs.	)	
DUKE ENERGY RETIREMENT CASH BALANCE PLAN and DUKE ENERGY CORPORATION,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION
TO MOTION TO DISMISS

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PROCEDURAL HISTORY

The original Complaint was filed on February 6, 2006. [Docket #1]. Defendants, Duke Energy Corporation and Duke Energy Retirement Cash Balance Plan [hereinafter collectively referred to as "Duke," unless otherwise specified] filed a motion for judgment on the pleadings on May 23, 2007. [Docket #83]. Plaintiffs filed a motion to amend the Complaint on October 19, 2007. [Docket #116]. The Court entered an Order resolving the motions for judgment on the pleadings and to amend on June 2, 2008. [Docket #195]. In accordance with the Court's Order, Plaintiffs filed their Amended Complaint on June 18, 2008. [Docket #197]. Duke has now moved to dismiss Count VI of the Amended Complaint, the ERISA breach of fiduciary duty claim.

LEGAL STANDARD

A defendant's motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the pleadings, but does not seek to resolve disputes surrounding the facts. *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). These motions should only be granted "in very limited circumstances." *De Sole v. United States*, 947 F.2d 1169, 1171 (4th Cir. 1991).

Claims brought under ERISA are subject only to the simplified pleading standard of Federal Rule of Civil Procedure 8. *Blackshear v. Reliance Standard Life Ins. Co.*, 509 F.3d 634 (4th Cir. 2007) citing *Swierkiewica v. Sorema N.A.*, 534 U.S. 506 (2002). Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." The United States Supreme Court has clarified this standard as requiring that:

> Specific facts are not necessary; the statement need only "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. ___, ___, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929, 940, 2007 U.S. LEXIS 5901, *21 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. *Bell Atlantic Corp., supra*, at ___ , 127 S. Ct. 1955, 1964, 167 L. Ed. 2d

> 929, 940,(citing *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n. 1, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002); *Neitzke v. Williams,* 490 U.S. 319, 327, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989); *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)).

Erickson v. Pardus, ___ U.S. ___, 127 S.Ct. 2197, 2200 (2007).

The Supreme Court also noted recently that:

> [O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. *See Sanjuan*, 40 F.3d at 251 (once a claim for relief has been stated, a plaintiff "receives the benefit of imagination, so long as the hypotheses are consistent with the complaint"); *accord, Swierkiewicz*, 534 U.S., at 514, 122 S. Ct. 992, 152 L. Ed. 2d 1; *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 256, 114 S. Ct. 798, 127 L. Ed. 2d 99 (1994); *H. J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 249-250, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989); *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984).

Bell Atl. Corp. v. Twombly, ___ U.S. ___, 127 S. Ct. 1955, 1969 (U.S. 2007).

As stated by the Fourth Circuit, a complaint attacked by a Rule 12(b)(6) motion to dismiss "will survive if it contains enough facts to state a claim to relief that is plausible on its face."[1] *Self v. Norfolk S. Corp.*, 264 Fed. Appx. 313 (4th Cir. 2008); *Bosely v. Lemmon (In re Mills)*, 2008WL 2937850, * 6 (4th Cir. July 29, 2008). **Appendix A – Copies of Unpublished Opinions.**

"The purpose of a motion to dismiss is simply to test the sufficiency of the complaint because it 'does not resolve contests surrounding the facts, the merits of a claim or the applicability of defenses; and, in testing the sufficiency of the complaint, the court must draw all reasonable inferences from those facts in favor of the plaintiff." *City of North Myrtle Beach*

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[1] In addition, the United Stated Supreme Court has stated that, on motion to dismiss, "the complaint should . . . be construed generously" and "we may use [the] brief to clarify allegations in [the] complaint whose meaning is unclear." *Pegram v. Herdrich*, 530 U.S. 211, 230 (2000). In this case the Amended Complaint was proffered for filing by Motion to Amend in October 2007. The factual record was developed extensively after that time through tens of thousands of pages of additional document production, ten depositions and pertinent requests for admissions.

v. Hotels.com L.P., 2007 U.S. Dist. LEXIS 85886, *6-7 (D.S.C. Sept. 30, 2007) (citations omitted).

"In considering a defendant's motion to dismiss, it is proper for the Court to take into account any relevant plan documents. Courts may consider ERISA plan documents not attached to a complaint where a plaintiff's claims are 'based on rights under the plans which are controlled by the plans' provisions as described in the plan documents' and where the documents are 'incorporated through reference to the plaintiff's rights under the plans, and they are central to plaintiff's claims.'" *Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997); *see also City of Monroe Employees Retirement Sys. v. Bridgestone Corp.*, 399 F.2d 651, 659 n.6 (6th Cir. 2005) (considering the impact of annual reports referenced in the complaint"). *Blackshear v. Reliance Standard Life Ins. Co.*, 509 F.3d 634 (4th Cir. 2007). The Court may consider documents referenced in the complaint or subject to judicial notice. *In re FAC Realty Sec. Litig.*, 990 F. Supp. 416, 420 (E.D.N.C. 1997); *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47-48 (2nd Cir. 1991); *United States v. Ritchie*, 342 F.3d 903, 908-09 (9th Cir. 2003) (Court may consider documents referenced in the complaint, documents that form the basis of claim, and matters of judicial notice); *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3rd Cir. 1993) (same), *cert. denied*, 510 U.S. 1042 (1994).

ALLEGATIONS OF THE AMENDED COMPLAINT

Count VI of the Amended Complaint alleges that Defendants "breached their fiduciary duties by misleading employees about the effects of the conversion to the Cash Balance Plan and the purpose behind certain amendments to the Plan concerning the calculation of interest

credits."[2] **Am. Compl. ¶ 92**. The Amended Complaint further alleges at Count VI that Duke and/or its designee:

> . . . breached their fiduciary duties by committing numerous errors in the calculation of opening account balances. For instance, Duke Energy and/or its designee set and then arbitrarily changed opening account balances for numerous employees chosen at its discretion in attempts to circumvent the notice requirements of ERISA §204(h). Duke Energy through explicit publications led participants to believe that it was determining opening balances based on a four-step process. In actuality, there was a Step 5, intentionally not communicated to participants, where Duke Energy would arbitrarily make adjustments to selected account balances in hopes of avoiding the notice requirements of ERISA §204(h).

Am. Compl. ¶93.

Plaintiffs allege that the plan conversion "was made without providing adequate notice to participants of the upcoming significant reduction in the rate of future benefit accruals." **Am. Compl. ¶20.** "Duke Energy implemented the conversion in a manner that violated its general fiduciary obligations under ERISA §404 and/or the terms of the Plan. The plaintiffs contend that the implementation of the conversion is so replete with errors that an independent auditor should be appointed to review the administration of the Plan." **Am. Compl. ¶21.**

"In preparing for the Cash Balance Plan conversion in 1996, Duke Energy made misleading statements and misrepresentations to workers to the effect that the new Plan would not impair employee expectations, would not greatly change the old plan, and that employees should not be concerned. Upon information and belief, Duke Energy also misled workers that it was required to convert to a cash balance plan because it was a prime target for a hostile takeover." **Am. Compl. ¶39.**

"The language and provisions of the Plan documents themselves are not readily understandable

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[2] Plaintiffs agree with Duke's assessment that the fiduciary duty claim may not be stated against Duke Energy Retirement Cash Balance Plan. To the extent the Count VI of the Amended Complaint references "the defendants," or "Duke" in the collective sense, Plaintiffs stipulate that the claim is asserted solely against Duke Energy Corporation.

to lay people. In descriptive materials provided to Duke Energy workers, Duke Energy sought to characterize the new Plan as benefitting workers. In 'On Track' newsletters from 1996 in the time period leading up to and contemporaneous with the conversion to the cash balance Plan, Duke Energy misinformed its employees as to the effect that the Plan conversion would have on them." **Am. Compl. ¶40, 53.**

Amended Complaint ¶78 alleges that "[t]he change to a cash balance design means that retirement benefits are now based on each year's compensation rather than on average compensation in a final pay base period. Duke Energy knew, or should have reasonably expected, that as a result of the change in the benefit formula and plan design the rate of future benefit accruals would be significantly reduced under the Cash Balance Plan."

Amended Complaint ¶79 alleges that "[d]espite the significant reduction in the rate of future benefit accruals, Duke Energy intentionally failed to provide notice to participants of the reduction after the adoption of the Plan and at least 15 days prior to its effective date, or at any other time. Upon information and belief, Duke also failed to provide notice to participants of the PanEnergy and Nantahala Plans of a significant reduction in the rate of future benefit accruals after the adoption of the merger of the Plans and at least 15 days prior to the merger's effective date, or at any other time."

The Amended Complaint further alleges that "Duke Energy failed to inform participants that it was arbitrarily revising opening balances for selected participants. Duke Energy also failed to inform participants of the reasons for making such revisions and the criteria for determining which participants would have their opening balances revised. As a result of Duke Energy's discretionary alteration of account balances, participants' benefits under the Cash Balance Plan are not definitely determinable as required under 26 U.S.C. §401(a)(25)." **Am. Compl. ¶94.** The Amended Complaint also asserts violations of ERISA, 29 U.S.C §§1001 *et seq.*, as a general matter.

In addition, the contents of the various versions of Duke's plan documents and other documents referenced in the Amended Complaint are incorporated and also considered a part of the Amended Complaint. *Waters v. Bass*, 304 F.Supp. 2d 802, 807 (D.Va. 2004).

SUMMARY OF ARGUMENT

On December 23, 1996, Duke executed an amendment and restatement of its retirement plan purportedly converting its traditional defined benefit plan to a cash balance plan. The Plan document followed months of communications with employees concerning the impact of the amendment. The amendment was not preceded by any notice to participants pursuant to ERISA §204(h) [29 U.S.C. §1054(h)] that a significant reduction in the rate of benefit accrual would occur, but rather followed assurances that the age-65 benefit would be ***greater*** under the cash balance plan than the old plan. Participants were promised that by age 60 or 64 (depending on age and years of service) they would be better off under the cash balance plan than the prior plan.[3]

Duke is consistent that the effective date of the conversion was January 1, 1997. It has, however, refused to be pinned down on the date of adoption of the cash balance plan conversion. Duke has variously claimed that the cash balance plan was adopted by the July 16, 1997 Plan amendment and restatement **[Ex. A: Ans. to Int. (7/1/07) #11]**; by a "process of review and analysis that began in mid-1995 and continued for over a year" **[Ex. B: Supp. Ans. to Int. (12/12/07) #2]**; and by verbal approval on July 9, 1996 without any written plan document at all. **[Ex. C: Jefferies (30(b)(6))Depo. (2/5/08) at 92:9 – 93:13]**.[4] Duke's Answer to the Amended Complaint restates its

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[3] Duke described the old plan/new plan comparison in terms of "crossover." Crossover meant the age at which benefits under both plans, going forward, would cross and new plan benefits would be greater.

[4] Duke's professed confusion concerning the meaning of the term "adoption" is curious given that its retirement plan documents use the "adoption" date as a reference point in critical definitions, including the definition of "accrued benefit," which the Plan requires to be no "less than the actuarial value of [the] retirement benefit as of

position that it did not adopt the cash balance plan on December 23, 1996, but adopted it "earlier." **Ans. to Am. Compl. at 15.** Duke's filings with the Internal Revenue Service are no less confusing. On September 15, 1997, Duke filed its Form 5500, Annual Report of Employee Benefit Plan for the calendar year 1996, and represented that the most recent amendment adopted was October 9, 1995. **Ex. E: 1996 Form 5500, p. 2.** Duke told the IRS in that filing that no amendment was adopted in 1996 that changed the information contained in the latest summary plan description. **Id.** For 1997 Duke filed its form 5500 stating the most recent amendment was July 16, 1997. **Ex. F: 1997 Form 5500, p. 2.** It again stated, however, that no amendment in that plan year changed the information in the latest SPD and stated that no SPD reflecting plan amendments had been furnished to participants.

Under the Duke cash balance plan, as under any cash balance plan, the starting point for determining benefits is the opening account balance. For the vast majority of plan participants, the December 1996 Plan document defined the opening account balance by reference to a "Schedule of Opening Cash Balance Accounts which is herein incorporated in the Plan by this reference." **Ex. G: DE006236 1996 Plan (§3.7(b)(2)).** The December 1996 Plan did ***not*** have a Schedule of Opening Cash Balance Accounts attached or incorporated or even in existence.[5] Nor was any formula or methodology for calculation of the opening balances stated in the Plan document.

Incredibly, Duke never even mentions the 1996 Plan document in the Motion to Dismiss or supporting brief, but repeatedly references the 1997 Plan, with its then incorporated Schedule of

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the ***date of adoption*** of this restated Plan . . . ." **Ex. D: 1996 Plan §1.1(a) at DE006218.** [Emphasis added].

[5] Plaintiffs conducted extensive discovery between November 2007 and February 2008 to establish unequivocally, that there was no Schedule of opening account balances in any form incorporated in the December 1996 Plan, and that no properly adopted Schedule was include with the plan until July 16, 1997.

Opening Cash Balances Accounts.[6] What is clear, as shown below, is that Duke commenced administering a cash balance plan on January 1, 1997, under an incomplete plan that Duke's chief administrative officer calls "***a placeholder.***" **Ex. H: Rolfe Depo. (1/30/08) at 30:15 – 31:17**. [Emphasis added].[7]

Undeterred by the absence of opening balances in the "placeholder" plan, Duke commenced administration of the plan on January 1, 1997 by using"manual calculations" of opening balances and benefits. **Ex. J: Def. Resp. Req. to Admit (1/16/08) ##13, 14.** The Schedule of Opening Cash Balance Accounts referenced in the December 1996 Plan document continued to be developed, but with a secret step that looked to avoiding ERISA §204(h) liability, rather than delivering the promised age 60-64 crossover.

The undisclosed fifth step recalculated Steps 1 through 4 based on January 1, 1997 interest rate data (6.63% interest crediting rate and 6.48% discount rate). **Ex. K: DE044177-9.** This fifth step would show that most participants' cash balance accounts would not reach age the 60/64 crossover, and hundreds of participants would not even reach crossover at age 65. Rather than adjust the opening balances to provide the promised age 60-64 crossover, Duke arbitrarily adjusted only a few hundred account balances upward to achieve equivalence at age 65, not age 64 or earlier. The documents Duke

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[6] This same reluctance to acknowledge the December 1996 Plan has been evident in past filings. For example, in its brief supporting it motion for judgment on the pleadings (Docket #83-2), at 9, Duke represented to the Court: "Most participants in the prior traditional plan received an opening balance that **was set forth in a schedule attached to the Plan.** " This clearly was not true of the 1996 Plan document.

[7] Duke incorrectly states that this "placeholder" plan was necessary because it did not have the year-end salary information to calculate the opening balances when it amended the plan in December 1996. However, when Duke amended the plan in 1999 to bring in PanEnergy and Nantahala participants following a merger, it devoted no less than 4 1/2 pages to describing the calculations, formulae, and steps for establishing the opening balances as of the effective date. **Ex. I: DE000331-335.** The 1999 amendment met all requirements that benefits be definitely determinable and that the PanEnergy and Nantahala participants be able, from the four corners of the plan, to determine the means by which his or her benefits would be calculated as required by the terms of the Plan, IRC §401(a)(25) and ERISA §402(b)(4) [29 U.S.C. §1102(b)(4)], *see supra.*

provided to Plaintiffs in this litigation confirm that "[t]his step was ***not*** communicated to participants." **Ex. L: DE120745.** [Emphasis in original].

Duke did not deliver final opening account balances to plan participants until on or around July 1, 1997. **Ex. M: DE119221.** Then, on July 16, 1997, Duke adopted an amendment and restatement to the retirement Plan which incorporated for the first time the Schedule of Opening Cash Balance Accounts. But, between January and July 1997, plan participants had no means to determine what their benefits were under the new cash balance plan, other than by reference to the written materials preceding the conversion describing an age 60 to 64 crossover arrived at through a 4-step process. These materials included estimated opening balances calculated in September 1996, promising recalculation of the opening balances with year-end data. And, most importantly, between January and July 1997 Duke, as plan administrator, had no means to administer the Plan within the terms and provisions of the Plan instrument, as mandated by ERISA §404(a)(1), 29 U.S.C. §1104(a)(1)(D).

The primary ground for Duke's motion to dismiss is its contention that its actions were all settlor conduct and cannot be redressed by ERISA §502(a)(3). Duke also contends that the plan participants have suffered no "cognizable harm." Duke contends, illogically, that because neither the Plan documents nor the Summary Plan Description (SPD)[8] defined the opening balances other than as a specified number, (ignoring the December 1996 Plan that referenced a Schedule that was to contain a specific number but did not exist) there could be no misrepresentation concerning how the balances were calculated. Finally, irrespective of it conduct, Duke posits that there is no equitable remedy this Court can invoke in favor of the Plaintiffs and its Plan participants.

The determination of fiduciary status is a "fact-intensive inquiry, making the resolution of that

[8] The SPD was not distributed until late September 1997. **Ex. N: HEWDOCS030808; DE000400-415.**

issue inappropriate for a motion to dismiss." *See e.g. Rankin v. Rots,* 278 F. Supp. 2d 853, 879 (E.D. Mich. 2003); *In re Elec. Data Sys. Corp. "ERISA" Litig.,* 305 F. Supp. 2d 658, 665 (E.D. Tex. 2004); *In re CMS Energy ERISA Litig.,* 312 F. Supp. 2d 898, 907-09 (E.D. Mich. 2004); *In Re: Cardinal Health, Inc.*, 424 F. Supp.2d 1002 (S.D. Ohio 2000). Duke's motion should properly have been made as a motion for summary judgment given that fact discovery in this case has been completed.

While an employer or plan sponsor may at times act as settlor and at other times act as a fiduciary, ERISA requires,"that a fiduciary with two hats wear only one at a time, and wear the fiduciary hat when making fiduciary decisions." *Pegram v. Herdrich,* 530 U.S. 211, 224 (2000) (*citing Varity Corp.,* 516 U.S. 489 (1996)). Plaintiffs contend that once the cash balance conversion occurred, activities undertaken by Duke to implement the conversion were fiduciary in nature. These activities had to be carried out in accordance with ERISA's fiduciary provisions. *Systems Council EM-3 v. AT &T Corp.*, 159 F.3d 1376 (D.C. Cir. 1998).

Duke's actions in misrepresenting the plan changes to participants, administering a plan outside its terms, paying benefits based on arbitrary calculations and computations, and in general failing to act in the best interests of the plan participants, support this claim. In addition, the fact that the 1996 plan amendment clearly violates ERISA accords a right to the participants and a class to relief under ERISA §502(a)(3).

ERISA provides broad authority under ERISA §502(a)(3) to fashion an appropriate remedy in this case based on the evidence adduced at trial. The Fourth Circuit has commented on the flexibility given to the federal courts ". . . to appropriately balance the interests of participants and beneficiaries of ERISA plans against the interests and obligations of employers and fiduciaries." *Adams v. Brink's Co.*, 261 Fed. Appx. 583, *597 (4th Cir. Jan. 11, 2008). Reformation and injunctive relief offer remedies that can be tailored to the needs of the class, as may appear following trial on the

merits. See, e.g. *Production and Maintenance Employees Local 504 v. Roadmaster Corporation*, 1992 WL 1058844, *7 (S.D. Ill. Feb. 2, 1989); *Frommert v. Conkright*, 433 F.3d 254, 268 (2nd Cir. 2006) The relief granted by the Court under §502(a)(3), depending on the form it takes, may well give rise to other claims that can only be addressed in a supplemental pleading, following reformation.

FACTS

On December 23, 1996, the Management Committee of the Board of Directors of Duke Power voted unanimously to approve the amended and restated Duke Power Company Retirement Cash Balance Plan. **Ex. O: DE117979.** By virtue of the authority granted at the meeting, Duke's chairman and Chief Executive Officer, W.H. Grigg, on the same date, executed the 1996 Plan document. **Ex. P: DE006210-6282, at 282.** A summary of the minutes of the Board, executed by Board Secretary Phillis Simpson, verified that the Board, on December 23, 1996 ***"adopted"*** the Retirement Cash Balance Plan. **Ex. Q: DE161284-5, at 4.** [Emphasis added].

The December 1996 plan amendment was to go into effect on January 1, 1997. The basic premise of the conversion to a cash balance plan is stated in Duke 1997 Summary Plan Description:

> When you begin participation in the retirement cash balance plan, a "cash balance" account will be created for you. Your cash balance account will grow through various credits made to your account while you work and, in some cases, after your employment with Duke ends. The value of the benefit that will be paid to you when you reach retirement age is determined by the value of your account balance.

Ex. N: 1997 SPD; DE000400-415 at 404.

For the vast majority of plan participants, the December 1996 Plan document, signed by Mr. Grigg, provided that "the Participant's opening account balance shall be determined as follows:"

> §3.7(b)(2) Opening Balances – For an Employee who is not eligible for an immediate pension benefit under the terms of the Prior Plan, or who is eligible for an immediate pension benefit under the Prior Plan but has not yet reached Attached Age 60, the opening balance identified for the Participant in the Duke Power Company Retirement

> Cash Balance Plan ***Schedule of Opening Balance Accounts which is herein incorporated in the Plan by this reference***.

Ex. G: DE006236. [Emphasis added].

There was, however, no Schedule of Opening Balance Accounts attached, or incorporated in or, in fact, in existence as of December 23, 1996, or as of January 1, 1997, the effective date. Mr. Grigg's authority, as stated in the minutes of the Board meeting of December 23, 1996, extended only to execution of the plan "substantially in the form presented to the Committee." **[Ex. O: DE117979],** which, of course, did not include a Schedule because the Schedule did not exist.

In a draft audit report preceding the "adoption" of the Plan, Duke's internal auditors documented concerns regarding the calculation of initial estimated opening balances:

> Sufficient documentation was not available regarding how the initial cash balance calculation worked, what the assumptions were, or how the assumptions were applied. Many of the decisions regarding these matters were through verbal conversations with William. M. Mercer, Inc. Although there appears to be no miscommunication in this case, we recommend in the future that information relevant to how an outside company should perform work for Duke Power be documented and signed by an authorized representative to avoid the risk of miscommunication.

Ex. R: DE044679 – 82 at 79 – Internal Audit Report (12/15/96).

As of January 1, 1997, Duke commenced administering the plan as a cash balance plan. Between January 1, 1997 and July 16, 1997, when the Plan was amended to finally incorporate an existing Schedule of Opening Cash Balance Accounts, dozens of Duke employees retired and received benefits purportedly under the December 1996 Retirement Cash Balance Plan. **Ex. S: DE014176-181.** During that time frame, Duke was operating a cash balance plan under a plan document from which the plan benefit could not be calculated from the four corners of the plan for most of the plan

participants. [9]

Duke, in its first responses to Interrogatories in this case, answered the question, "[s]et forth the cash balance benefit formula," as follows:

> Under the cash balance plan formula, participants receive monthly pay credits and interest credits. The pay and interest credit formulae are identified in numerous documents, including the summary plan descriptions, which are incorporated herein pursuant to Rule 33(d). Further answering, the basic formula is ***Opening Balance*** + Pay Credits + Interest Credits = Cash Balance. In addition, participants are entitled to certain minimum benefits that are described in the Plan and in communications to participants.

Ex. U: Def. Ans. to Int. (6/1/07) #10. [Emphasis added].

An employee's accrued benefit under the Duke plan signed on December 23, 1996 could not be determined because Duke's "basic" cash balance formula required the opening balance and the December 1996 Plan amendment contained no formula or other means of calculating the opening account balances for the vast majority of participants under §3.7(b)(2), other than by reference to the non-existent Schedule. **Ex. J; Def. Resp. to Requ. to Admit (1/16/08) #5.**

No actuary, armed with the Duke retirement plan document of December 1996 (and complete age, salary, and service information, and benefit information from Duke's prior traditional plan) could calculate a benefit for any plan participant described under § 3.7(b)(2). **Ex. G: DE006235-36; Ex. V: Beideman Depo. (2/21/08) at 31:11 – 25; Ex. W: Rowe Depo. (2/21/08) at 47:11 – 50:19.**

Section 401(a)(25) of the Internal Revenue Code provides that:

> [a] Defined benefit plan shall not be treated as providing definitely

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[9] Most critically, however, Duke ceased the accrual of additional of protected benefits to its participants under the prior plan. As Plaintiffs have noted previously in this litigation, Duke contributed more than $54 million each year in 1995 and 1996 to fund the prior plan. In 1997 through 2002 Duke made no contribution to the Plan. **Ans. to Am.Compl. §§ 45-46, at p. 12-13.** As acknowledged by Duke's 30(b)(6) witness, Richard Jefferies, in agreeing that cost was a factor in the conversion: "I'd say for most decisions a company makes cost is a major factor." **Ex. T: Jefferies (30(b)(6)) Depo. (2/5/08) at 20:20 – 21:15.**

> determinable benefits unless, whenever the amount of any benefit is to be determined on the basis of actuarial assumptions, such assumptions are specified in the plan in a way which precludes employer discretion.

Even though Duke disparages the implications of IRC §401(a)(25), stating this Internal Revenue Code section relating to definitely determinable benefits, creates no substantive rights in favor of the plan participants, it chooses to ignore the substantive rights created by the plain language of the December 1996 Plan ***mandating*** compliance of the Plan with IRC provisions, including §401(a)(25). In the Preamble to the December 23, 1996 Plan, Duke recites: "The Plan, as restated, is intended to continue the Plan as a retirement plan qualified ***under [Internal Revenue] Code Section 401(a)*** and the separate Trust Agreement is intended to continue the Trust as tax-exempt under Code Section 501(a)." **Ex. X: DE006217.** [Emphasis added]. Also, " [t]he Company intends this Plan, in conjunction with the Trust Agreement, to meet all the requirements of ERISA and ***the [Internal Revenue] Code*** and the terms of this Plan shall be interpreted to comply with ERISA and ***the Code*** and all final regulations and formal rulings issued under ERISA and ***the Code***." **Id.** [Emphasis added]. The December 1996 Duke Plan, at §3.6, relating to opening account balances, also required: "Notwithstanding the foregoing or any other provision of the Plan, any benefit computed in the manner set forth under this Section is contingent upon the express or implicit ***approval of the Internal Revenue Service*** of such benefit as having satisfied ***the requirements of the Code*** for plan years beginning on or after the effective date." **Ex. G: DE006235.** These Plan provisions incorporated into the Plan requirements of the Internal Revenue Code, including the requirement that benefits be definitely determinable.

In addition, ERISA §402(b)(4) mandates that every ERISA plan shall specify the basis on which payments are to be made to and from the plan. 29 U.S.C. §1102(b)(4). Courts have held that

this requirement is "intended to ensure that each plan participant knows where he or she 'stands with respect to the plan.' *Czyz v. General Pension Board*, 578 F. Supp. 126, 129 (W.D. Pa. 1983). Any right to a particular method of payment must therefore be found in the agreement itself. *Id.*" *Kaszuk v. Bakery and Confectionery Union and Indus. Int'l Pension Fund*, No. 83-C-1177, 1985 WL 2183, *1 (N.D. Ill. July 15, 1985). Thus, ERISA §402(b)(4) parallels the IRC "definitely determinable" requirement.

Plaintiffs and plan participants could not, under the December Plan document, determine a benefit because the basic cash balance plan formula started with an opening balance and there was not one. Under the four corners of that document any participant's cash balance benefit could have ranged from zero to millions of dollars or more. This cannot be allowed under IRC §401(a)(25) and ERISA §402(b)(4). Duke trumpets the fact that it "assigned plaintiffs opening account balances pursuant to a schedule that was incorporated by reference into the Plan itself and listed amounts for various participants." **Duke Br. at 5.** Duke is silent on the fact that this was not done until the July 16, 1997 amendment, and that the December 1996 plan had no schedule.

The newsletters and account statements provided to Plaintiffs and other employees prior to January 1, 1997, were the only written documents available from which plan participants could attempt to put a value on their cash balance account.

Prior to January 1, 1997, Plaintiffs and plan participants had been told by Duke in ***mandatory*** terms that opening balances under the new cash balance plan would be calculated to create a crossover in the benefits under the old plan and the cash balance plan between ages 60 and 64:

- Your opening account balance ***will be*** set to generate benefits that are roughly equivalent to benefits you would earn under the current plan between the ages of 60 and 64. If you are close to eligibility for early retirement, your new benefit ***will be*** comparable to your current benefit

closer to the age of 60. If you are younger and have shorter service, your benefit ***will be*** comparable closer to the age of 64. **Ex. Y: MOYER000365-378, at 372 – September 1996 Personalized Statement**. [Emphasis added].

- The opening balance of your account ***will be*** set to generate benefits that are roughly equivalent to current plan benefits between the ages of 60 and 64. If you are close to eligibility for early retirement, your new benefit ***will be*** comparable to your current benefit closer to the age of 60. If you are young and have shorter service, your benefit ***will be*** comparable closer to age 64. **Ex. Z: MOYER000347-354, at 350 – On Track Newsletter August 1996.** [Emphasis added].

- With the new plan, however, there is no strong bias against leaving the company before retirement and no large incentive to retire early. For the employee who decides to work until normal retirement age (age 65), the new plan ***provides*** additional benefits. **Ex. AA: DE048108-117, at 109 – On Track Newsletter September 1996**. [Emphasis added].

- Although the formula for calculating opening cash balances is complex, the basic goal is to provide you with an opening balance that ***will*** make your benefit from the new plan roughly equivalent to the benefit you would have received from the current plan if you retire in your early 60's. (This assumes that interest credits are about 7% per year and that your salary increases over time.) If you are presently close to retirement, your opening cash balance ***will be*** large enough so that your benefits under the current and new plans ***should be*** roughly equivalent if you retire about age 60.

  If you are further from retirement, your opening cash balance ***will be*** large enough so that your benefits under the current and new plans ***should be*** roughly equal if you retire closer to age 64. **Ex. AA: DE048108-117, at 110 – On Track Newsletter September 1996.** [Emphasis added].

In disseminating estimated opening balances in September 1996, Duke stated:

- We have *estimated* your opening account balance as of January 1, 1997 based on your salary as of December 31, 1995 and projected age and service as of December 31, 1996. Your actual opening account balance will be calculated ***based on data as of December 31, 1996***. You will be given your actual opening account balance in mid 1997. **Ex. Y: MOYER000365-378, at 373 – September 1996 Personalized**

Statement. [Emphasis added].

- Your opening cash balance will be calculated so that the benefit you receive under the new plan ***will be*** roughly equivalent to the benefit you would have received under the current plan if you retire in your early 60's (the opening balance is calculated assuming interest credits will be about 7% per year and your salary will grow at a typical rate with age). To give you an idea of an opening cash balance amount, here are estimates for 7 sample employees of different ages, service and salaries. Keep in mind that these are very rough approximations and are meant only to give you a general sense of the transition.

  Of course, your actual opening cash balance account will be based on your own age, service and salary history. The personalized statement you will receive in October will give you a more precise estimate of your own opening balance. ***Your actual opening cash balance will be calculated after January 1, 1997 with data as of December 31, 1996*** and will be available to you in mid 1997. **Ex. AA:DE048108-117, at 111 – On Track Newsletter September 1996.** [Emphasis added].

The September 1996 "On Track" brochure includes at page 2 a graph under the heading "Impact of the Change," which is labeled "GRAPH: BENEFIT GROWTH" and compares benefits under the old and the new plan. The graph signifies for younger employees that, at or before age 64, the employee's benefit under the new plan would be substantially greater than the benefit under the old plan. The text accompanying the graph states that "[f]or the employee who decides to work until normal retirement age (age 65), the new [cash balance] plan provides ***additional*** benefits." **Ex. AA: DE048108-117, at 109: September 1996 On Track Newsletter.** [Emphasis added]. The third page of the same brochure provides four more graphs purporting to compare the two plans for employees using different ages and other starting conditions. In each of these graphs, the new plan is represented as providing a greater benefit at or before age 64.[10] The accompanying text describes how opening cash balances would be set so that "your benefit from the new plan [will be] roughly equivalent to the

[10] The graphs depict the earlier – age 60 – crossover for the older, age 55 employees with longer years of service. **Ex.. AA: DE048108-117, at 110.**

benefit you would have received from the current plan if you retire in your early 60s." **Ex. AA: DE048108-117, at 110 – September 1996 On Track Newsletter.**

Documents provided by Duke to Plaintiffs and other employees months after the purported effective date of the cash balance conversion, in July 1997, describe how opening account balances were calculated by Duke using "four steps." Thus, the document provided to Plaintiff Dennis Bowen states:

> **Part II. Steps to Determine Your Opening Account Balance**
>
> Your Retirement Cash Balance Plan opening account balance was determined in four steps as shown below. While all steps might not yield adjustments, these steps were designed to provide a fair transition for all employees.
>
> Step 1: Your initial opening account balance was set so that with future company contribution and interest credits your projected benefit at age 64 under the new Retirement Cash Balance Plan ***would be equal to your projected benefit at age 64*** under the old Retirement Plan. This is the minimum opening balance that you could receive as a current employee.
>
> Step 2: Your protected age 55 benefit from the old Retirement Plan was compared with your projected cash balance benefit at age 55. If your age 55 protected benefit is at least 85% of your projected cash balance account at age 55, your crossover age was changed. In your case, ***your crossover age was changed from age 64 to age 60 .*** Your opening balance was increased accordingly, as shown.
>
> Step 3: Your projected combined benefits at age 55 from both the new Retirement Cash Balance Plan and the new Retirement Savings Plan were compared with the projected combined benefits you would have received at age 55 under the old Retirement Plan and the Stock Purchase-Savings Program. If your new projected combined benefits at age 55 were less than a minimum of 80% of your old projected combined benefits, a credit was added to your account to bring your new benefits up to the minimum.
>
> Step 4: Your opening account balance, determined by combining Steps 1-3, was compared with the present value of the protected benefit you earned under the old Retirement Plan If that balance was less than a minimum of 85% of the present value of your protected benefit, a

> credit was added to your account to bring your new benefits up to the minimum.

Ex. BB: BOWEN-000160-162 – "Your Personalized Statement." [Emphasis added]. Similar documents were provided to other Plaintiffs and to the entire participant group. **See, e.g., Ex. CC: MOYER-000015-18.**

The documents Duke provided to Plaintiffs and plan participants are contradicted by Duke's internal documents which reflect a "step 5" and further confirm that "[t]his step was ***not*** communicated to participants." **Ex. L: DE120745.** [Emphasis in original]. A February, 1997, letter from Duke's actuary to Richard Jefferies of Duke, verified that opening balances were being adjusted "such that [the participant's] ***age 65 projected benefits*** under the Cash Balance Plan and the prior plan would be ***equal*** . . ." **Ex. DD: M_0037195-200.** In another letter to Mr. Jefferies on May 7, 1997, the actuary documented adjustments to 332 accounts to make benefits under the new plan equal to those under the old plan ***by age 65***. **Ex. K: DE044177-79.**

The discrepancy giving rise to "step 5," and to the tacit alteration of the crossover from between age 60/64 to age 65, arose because interest rates were falling. Step 5 actually required Steps 1 through 4 to be recalculated using the more current January 1997 interest crediting and discount rates, and allowed for additions to opening balances to achieve an ***age 65*** equivalency. ***Id.*** Duke's concerns had shifted from providing its participants with the promised age 60 to 64 crossover, to avoiding ERISA §204(h) liability for failing to disseminate the requisite notice of impending significant reduction in rate of benefit accrual.

ARGUMENT

I. Duke Breached Fiduciary Duties Administering the Plan Under the December 1996 Plan

Duke's overarching position regarding Count VI is that fiduciary duties are not implicated because its conduct regarding opening balances was as a "settlor," engaging in plan design and amendment, rather than as a fiduciary, engaging in plan administration.

As a preliminary matter, this issue should have been raised by Duke on Motion for Summary Judgment. The determination of fiduciary status is a "fact-intensive inquiry." *See In re AEP ERISA Litig., 327 F.Supp. 2d* 812, 827 (S.D.Ohio 2004); *Rankin v. Rots,* 278 F. Supp. 2d 853, 879 (E.D. Mich. 2003). Fact discovery has been completed and the Court, most appropriately, should resolve this issue on the merits shown by the facts developed in discovery.

It is axiomic that Duke either had a cash balance plan between January and July 1997, and was administering it, or it did not. An employer or plan sponsor may at times act as settlor and at other times act as a fiduciary; however, ERISA requires, "that a fiduciary with two hats wear only one at a time, and wear the fiduciary hat when making fiduciary decisions." *Pegram v. Herdrich,* 530 U.S. 211, 224 (*citing Varity Corp.,* 516 U.S. at 489). Once the Duke cash balance conversion occurred, through amendment of the plan, activities undertaken to implement the conversion were fiduciary in nature.

Duke has taken the position (at times) that the cash balance conversion occurred through the December 23, 1996 Plan amendment, effective January 1, 1997. Duke was then charged with carrying out its functions in administering that plan amendment in accordance with ERISA's fiduciary provisions. *Systems Council EM-3 v. AT &T Corp.*, 159 F.3d 1376 (D.C. Cir. 1998). [11] ERISA

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[11] Duke was charged under the Plan, § 17.1, with "discharging [its] duties under this Plan . . .solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable administration expenses." **Ex. EE: DE006274.** Duke also was required to "discharge [its] duties hereunder with

broadly defines a fiduciary as one who "exercises any discretionary authority or discretionary control respecting management of [the] plan" or "has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. §1002(21); *Griggs v. E. I. DuPont de Nemours & Co.*, 237 F.3d 371, 379-80 (4th Cir. 2001). Anyone "who exercises authority over an employee benefit plan can properly be held an ERISA fiduciary because that term was intended to be interpreted broadly by Congress. . . ." *See In re AEP ERISA Litig.,* 327 F.Supp. 2d at 826. The duties charged to an ERISA fiduciary have been characterized as the "highest known to law." *Tatum v. R.J. Reynolds Tobacco Co.*, 2007 WL 1612580, *5 (M.D.N.C. May 31, 2007); *Defilice v. U.S. Airways, Inc.*, 235 F.R.D. 70, 76 (D.Va. 2006); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc.*, 793 F.2d 1456, 1468 (5th Cir. 1986)(quoting *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2nd Cir. 1982)); *ITPE Pension Fund v. Hall*, 334 F.3d 1011, 1013 (11th Cir. 2003); *Kuper v. Iovenko*, 66 F.3d 1447, 1453 (6th Cir. 1995).

The Federal Courts consistently enumerate the duties of a fiduciary under ERISA:

> Through ERISA, Congress wanted to ensure that if an employee was promised a benefit, he would receive it. *Lockheed Corp. v. Spink,* 517 U.S. 882, 887, 116 S. Ct. 1783, 135 L. Ed. 2d 153 (1996). Thus, ERISA "protect[s] . . . the interest of participants in employee benefit plans and their beneficiaries . . ., by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and access to the federal courts." *Id.* (citing 29 U.S.C. §1001(b)). ERISA accomplishes this goal by mandating that private pension plan assets are to be held in trust for the exclusive benefit of plan participants and beneficiaries. *Id.* (citing 29 U.S.C. §1003(a)). ERISA requires such plans to name fiduciaries who shall have the authority to control and manage the operation and administration of the plan. *Id.* (citing 29 U.S.C. §1002(a)(2)). These fiduciaries need not be independent parties; the employer or plan sponsor may appoint its own "officer, employee, agent, or other representative" to serve in a fiduciary capacity. *Id.* (citing 29 U.S.C. §1108(c)(3)).

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the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of a like enterprise and with like aims." **Id.**

In Re Cardinal Health, Inc. ERISA Litig., 424 F.Supp. 2d 1002, 1016 (S.D.Ohio 2006).

> The duty of loyalty embodies the "obligation to deal fairly and honestly with all plan members." *Shea v. Esensten*, 107 F.3d 625, 628 (8th Cir.), *cert. denied* 522 U.S. 914, 118 S.Ct. 297, 139 L. Ed. 2d 229 (1997). The duty is breached when a plan administrator participates "knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiary's expense." *Varity Corp. v. Howe,* 516 U.S. 489, 506, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996); *see, Wilson, 55 F.3d at 405.*

Christensen v. The Qwest Pension Plan, 462 F.3d 913, 917 (8th Cir. 2006).

Duke's fiduciary functions as plan administrator had to be performed pursuant to the documents and instruments governing of the Plan. 29 U.S.C. §1104(a)(1)(D). However, even if Duke's acts of setting the opening balances were settlor conduct, there was no valid amendment of the Plan until July 16, 1997 to incorporate these balances. Duke's administration of the cash balance plan between January and July 1997 included paying out benefits based on "manual calculations" of opening balances by its actuary, William M. Mercer, Inc., under a Plan document that did not provide for dollar amounts of opening balances, nor a means for arriving at benefits amounts. **Ex. J: Def. Resp. Req. to Admit (d. 1/16/08) ##13, 14.**

Duke violated its fiduciary duties by paying benefits based on *ad hoc* calculations of balances which, at best, amounted to informal amendments. *See Pizlo v. Bethlehem Steel Corp.,* 884 F.2d 116,120 (4th Cir. 1989) (stating that "informal" modification of pension plans is "impermissible" under ERISA); *Chao v. Malkani*, 452 F.3d 290, 294 (4th Cir. 2006); *Cherepinsky v. Sears Roebuck & Co.*, 487 F. Supp. 2d 632, 642 (D.S.C. 2006) (refusing to dismiss ERISA §502(a)(3) claims for other equitable relief based on the plan administrator's failure to follow plan documents and finding that a failure to act "in accordance with the documents and instruments governing the plan" generally constitutes a breach of fiduciary duty). The Fourth Circuit in *Chao* stated:

> While a mistaken interpretation of plan terms hardly proves a fiduciary breach, *see Morgan v. Indep. Drivers Ass'n Pension Plan*, 975 F.2d 1467, 1470 (10th Cir. 1992), ***defendants' bizarre reading – violative of both the Plan and ERISA*** – surely supports the overall conclusion that they were not acting prudently in managing the Plan, see 29 U.S.C. §1104(a)(1)(B).

Chao, 452 F.3d at 295. [Emphasis added].

Duke's reading of the December 1996 Plan amendment as a "placeholder" that would allow the freezing of accrued benefits under the prior plan, and a half year of administration of the new cash balance plan with no governance from a written plan document in terms of benefits amounts, until a later plan amendment filled in the gaps, certainly qualifies as bizarre. Duke's actuary agreed that it would be "unusual" to have a plan with 17,000 participants "hanging out there for six and a half months with no way to compute their benefits." **Ex. FF: Beideman Depo. (2/21/08) at 28:2 – 11.**

The District Court of Connecticut recently addressed the impact of a similar cash balance conversion. *Amara v. CIGNA*, ___ F.Supp. 2d ___, 2008 WL2403772 (D.Conn. June 13, 2008). In *Amara* the conversion was a two-step process with two amendments. CIGNA initially adopted an amendment that froze benefit accruals under its traditional defined benefit plan. That amendment was properly preceded by an ERISA §204(h) notice of a significant reduction in the rate of benefit accrual. CIGNA then adopted a later amendment retroactively putting in place the cash balance plan. The District Court, in scathing language, condemned the cash balance conversion [apparently the brainchild of the same actuary used by Duke for its conversion], but was left with the dilemma that invalidating the second amendment would result in employees going back to a plan with frozen benefits because the first amendment was valid:

> The Court does, however, wish to emphasize CIGNA's use of a freeze here and its implications for §204(h). For by upholding the validity of the freeze amendment, and consequently not ordering the invalidation of Part B [cash balance plan], the Court has permitted CIGNA effectively to eviscerate the notice requirement of §204(h). CIGNA's failure to provide a valid §204(h) notice meant that CIGNA was able to

> introduce Part B without the potentially significant controversy that might have resulted had CIGNA been open with its employees about the cuts in benefits CIGNA proposed. Yet a return to the freeze, or the maintenance of Part B shields CIGNA from the consequences for a defective §204(h) notice intended by the statute and by the Second Circuit: a return to the more favorable plan provisions predating the amendment. And because the plan participants would return to a frozen Part A [prior pension plan] rather than to Part A itself, CIGNA would be free to reimplement Part B, preceded by a proper §204(h) notice without having been required to return to the original, more favorable plan term in the meantime. As a result, plan participants would gain nothing and CIGNA would face a minor inconvenience, but little else.

Amara v. CIGNA, at *15.[12]

Duke appears to have attempted a similar result in this case, but by using an incomplete, placeholder plan instead of a valid "freeze" amendment accompanied by the proper §204(h) notice.

Duke clearly had knowledge that the setting of opening balances was not undertaken in accordance with the amendment procedures mandated in Plan documents, was not in accordance with the communications made to participants by it as fiduciary,[13] did not provide for the age 60-64 crossover, and was accomplished through arbitrary adjustments to the accounts of groups of individual participants.[14] As a fiduciary, Duke was required to administer the Plan in the sole interests of

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[12] The quagmire created by the valid first amendment left the district court so uncertain as to remedies that the Court certified the case for an immediate appeal to the Second Circuit. In this case, Duke's original 1996 plan amendment was not preceded by a 204(h) notice and could not effectively freeze benefit accruals.

[13] Duke did not set the initial opening balances to comport with the only information participants had before and after the conversion on how their benefits were to be calculated – that calculations would be performed based on January 1997 data and ***would*** produce a crossover between age 60 and 64. The opening balances that were set would not, using the 6.63%/6.48% prevailing rates as of January 1, 1997, produce the promised crossover points. These current data were, however, used in the secret step 5, which demonstrated a significant number of initial opening balances would result in a reduction in benefits even as of age 65. **Ex. K: DE044177-79.** Duke stuck with a 7% interest assumption in the step 1 crossover analysis even though the secret step 5 was run on all participants using the current and accurate interest rate data as of January 1, 1997, which clearly demonstrated that crossover projections were not met. Rather than increase the opening balances so that the crossovers would be met, Duke increased balances only for the 332 participants who would not cross over by age 65, so as to avoid incurring employer liability under ERISA §204(h).

[14] Duke did not set the initial opening balances to comport with the only information participants had before and after the conversion on how their benefits were to be calculated – that calculations would be performed based on January 1997 data and ***would*** produce a crossover between age 60 and 64. The opening balances that were

participants and beneficiaries, and for the exclusive purpose of providing benefits. ERISA §404(a)(1), 29 U.S.C. §1104(a)(1)). It was required to speak honestly and forthrightly with participants, to provide accurate and truthful information to participants, and to discharge its duties with the care, skill, prudence and diligence that a prudent person acting in like capacity and familiar with the operation of a defined benefit would exercise. *Varity*, 515 U.S. at 505. It was also required to act to correct problems that would jeopardize the interests of participants.

A plan fiduciary may not conceal a plan amendment after it is adopted nor fail to accurately inform participants and beneficiaries about their rights and obligations under a given plan. *See Lettrich v. J.C. Penney Company, Inc.*, 213 F.3d 765, 772 (3rd Cir. 2000); *Bixler v. Central Pa. Teamsters Health &Welfare Fund*, 12 F.3d 1292, 1300 (3rd Cir. 1993). Duke certainly did not advise participants that (1) the December 1996 plan was a "placeholder; (2) opening balances were being set on an *ad hoc* basis; (3) opening balances were being set that would not produce the promised age 60–64 crossover; (4) opening balances were being adjusted for some participants and not others; and (5) that different interest rates were being used in an employer liability calculation than were used in the employee opening balance calculation.[15]

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set would not, using the 6.63%/6.48% prevailing rates as of January 1, 1997, produce the promised crossover points. These current data were, however, used in the secret step 5, which demonstrated a significant number of initial opening balances would result in a reduction in benefits even as of age 65. **Ex. ___: DE044377–390.** Duke stuck with a 7% interest assumption in the step 1 crossover analysis even though the secret step 5 was run on all participants using the current and accurate interest rate data as of January 1, 1997, which clearly demonstrated that crossover projections were not met. Rather than increase the opening balances so that the crossovers would be met, Duke increased balances only for the 332 participants who would not cross over by age 65, so as to avoid incurring employer liability under ERISA §204(h).

[15] Duke's decision to employ different interest rates for crossover calculations and § 204(h) calculations violated the mandate contained in the §16.1 of the December 1996 Plan, that the actuary use the same actuarial tables in making calculations during a particular time period:

> In making all calculations hereunder, the actuary shall use such actuarial tables as he deems appropriate but he shall use the same tables in making all his calculations during a specified period. **Ex. GG: DE006273.**

Either Duke converted to a cash balance plan by virtue of the December 1996 Plan documents, and was thereafter administering the plan in its fiduciary role as plan administrator, or the December Plan document did not accomplish the conversion. Duke could not continue forward designing the plan under an incomplete conversion, and administering the plan under an incomplete plan document. Duke simply cannot have it both ways, irrespective of its view that it can operate under a "placeholder" plan and thereby cease protected benefit accruals under the prior plan.

Duke seems to argue that the cash balance plan could be administered piecemeal, on a *ad hoc* basis, over a six month period after its supposed adoption, as "design" decisions were made by it as settlor, to complete its "placeholder" plan. Yet, §402(a)(1) of ERISA requires that "every employee benefit plan shall be established and maintained pursuant to a written instrument." 29 U.S.C. §1102(a)(1). Relying primarily on this provision, the Fourth Circuit in *HealthSouth Rehab. Hosp. v. Am. Nat'l Red Cross*, 101 F.3d 1005 (4th Cir. 1996) held that "informal amendments to established ERISA plans are completely incapable of altering the specified terms of the plan's written coverage." *Id.,* at 1009. The Court also stated, "based on that clear statutory directive we have concluded that in order to be effective, 'any modification to a plan must be implemented in conformity with the formal amendment procedures and must be in writing.'" *Id.* at 1009. *See also, Pizlo v. Bethlehem Steel Corp.,* 884 F.2d 116,120 (4th Cir. 1989) (stating that "informal" modification of pension plans is "impermissible" under ERISA); *Degan v. Ford Motor Co.,* 869 F.2d 889, 895 (5th Cir. 1989) ("ERISA mandates that [a] plan itself and any changes made to it [are] to be in writing."); *Musto v. American General Corp.,* 861 F.2d 897, 910 (6th Cir. 1988) ("[A] written employee benefit plan may not be modified or superceded by oral undertakings on the part of the employer."), *cert denied,* 490 U.S.

1020, 109 S. Ct. 1745, 104 L. Ed. 2d 182 (1989); *Moore v. Metropolitan Life Insurance Co.,* 856 F.2d 488, 492 (2nd Cir. 1988) ("An ERISA welfare plan is not subject to amendment as a result of informal communications between the employer and plan beneficiaries.").

Duke ignores the fact that ERISA §402(a)(1) was designed to ensure that "every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan." H.Rep. No. 1280, 93rd Cong., 2d Sess. 297, *reprinted* in 1974 U.S. Code Cong. & Admin. News 5038, 507778. Employees, who are entitled to rely on the terms of a written benefit plan, "should not have their benefits eroded by oral modifications to the . . . plan." *Cefalu v. B.F. Goodrich Co.,* 871 F.2d 1290, 1296 (5th Cir. 1989). "Congress, in passing ERISA, did not intend that participants in employee benefit plans should be left to the uncertainties of oral communications in finding out precisely what rights they were given under their plan." *Musto,* 861 F.2d at 909-10; *see, also Biggers v. Wittek, Industries, Inc.,* 4 F.3d 291 (4th Cir. 1993) (holding that "[a] written plan is critical to ERISA's goal that employees be informed about the benefits to which they are entitled. Oral or informal amendments are inadequate to alter written terms of a plan as this practice would undermine certainty.").

ERISA's requirement of a writing dovetails with ERISA §402(b)(4), as well as IRC §401(a)(25) mandating that benefits under a plan be definitely determinable. Duke's 1996 Plan document specifically and repeatedly recites that the Plan is to continue as a qualified plan under IRC § 401(a). **Ex. HH: DE006217; DE006235; DE006263.** The deficiencies in the Plan could not be cured, after the fact, by ***settlor*** conduct – the *ad hoc* addition of opening balances to the plan between January and July 1997, if viewed as settlor conduct, would be invalid informal amendments.[16] Even

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[16] *See Esden v. Bank of Boston*, 229 F.3d 154 (2nd Cir. 2000) (noting that a plan is not free to use an *ad hoc* methodology to determine cash balance benefits):

then, it is only "as long as an amendment does not violate a specific provision of ERISA" that "the act of amending a pension plan does not trigger ERISA's fiduciary provisions.'" *Bennett v. CONRAIL Matched Sav. Plan Admin. Comm.*, 168 F.3d 671, 679 (3d Cir.) (quoting *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999)), *cert. denied*, 528 U.S. 871 (1999). Thus, even if the creation of opening balances is viewed as an amendment to the plan, Duke is not insulated in its conduct because the "amendments" violated ERISA. The creation of the opening balances was accomplished on an *ad hoc* basis, not in a writing to be provided to plan participants on request, and also violated the provisions of ERISA §402(b)(4) and the IRC "definitely determinable" rule incorporated into the Plan .

Duke signed the plan document in December 1996 purportedly effectuating a cash balance plan conversion as of January 1, 1997 but, according to its argument, it did not complete the design features of that plan until more than six months later. Duke would have this Court conclude that it could cease protected benefit accruals under its prior traditional plan, but retain complete employer discretion concerning the calculation of benefits under the "new" plan for more than half a year. Duke's contention that its interim conduct is protected by its never having removed its settlor hat is outrageous.

Duke cannot have a plan and not have a plan. The implications of its argument that it was

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For the purposes of this rule, the regulations do not leave a plan free to choose its own methodology for determining the actuarial equivalent of the accrued benefit expressed as an annuity payable at normal retirement age. If plans were free to determine their own assumptions and methodology, they could effectively eviscerate the protections provided by ERISA's requirement of "actuarial equivalence." See, e.g., H.R. Rep. No. 103-632, pt. 2, at 57 (1994) ("If plans could use high [discount] rates, plans could lower the single sum paid to participants."). To comply with ERISA, as well as to be considered a qualified plan under the Code, a plan must comply with specified valuation rules and certain consent rules. See Treas. Reg. § 1.411(a)-11(a)(1); see also Treas. Reg. § 1.417(e)-1(a).

acting as settlor in establishing opening balances are profound, casting serious doubt on the December 1996 amendment. If the December 1996 Plan document was ineffective to accomplish the conversion to a cash balance plan, a conclusion begged by Duke's argument, then Duke could not freeze participants' protected benefits under the prior traditional plan on December 31, 1996, as it did. Such a freeze, preceding by six months the July 16, 1997 amendment, would clearly be an unlawful cut-back in accrued benefits barred by ERISA §204(g). 29 U.S.C. §1054(g); *see, e.g., Depenbrock v. Cigna,* 389 F.2d 78 (3rd Cir. 2004). If the December 1996 Plan document was ineffective to accomplish the conversion to a cash balance plan, the issue of §204(h) notice compliance regarding the July 1997 amendment arises.

Based on Duke's assertions that it adopted the cash balance plan "earlier" than December 1996, with an effective date of January 1, 1997, this Court must find that Duke then put on its fiduciary hat and was required to administer the Plan pursuant to the December 1996 Plan document, which as a practical matter it could not do. Plaintiffs respectfully contend that the morass created by Duke's disastrous conversion procedure can only be corrected through the equitable powers this Court may exercise under ERISA §502(a)(3). This case is just the type of case where "other equitable relief" provides the means for this Court to fashion equitable relief that is in the best interests of both the Plan and the participants.

II. Plaintiffs Can Show "Cognizable Harm" arising from Duke's Breaches of Fiduciary Duties

A. Misleading Statements on Calculation of Opening Balances

Duke concedes that Plaintiffs' allegations concerning its misleading communications about the effects of the conversion may implicate fiduciary conduct. It contends, however, that the conduct *vis-a-vis* the December 1996 plan and the opening balances caused no "cognizable harm."

This Court has already held that Plaintiffs have sufficiently pled prejudice arising from Duke's breaches of fiduciary duty. *George v. Duke Energy Corporation, et al*, 2008 WL 2307485 *25 (D.S.C. June 2, 2008) (citing to ¶52 of the Complaint, which appears as ¶50 in the Amended Complaint). This Court's conclusion should apply with equal force to the opening balance allegations.

In the "On Track Newsletters" referenced in the Amended Complaint ¶53, Duke participants were promised in mandatory terms opening cash balances that would ultimately outgrow benefits under the prior plan. It promised benefits that, at age 60 for some and 64 for others, would exceed benefits under the prior plan. Duke then proceeded to set balances tacitly using an age 65 crossover rather than the earlier age crossover. [17]

By not accurately communicating to Plaintiffs the actual method it was using to calculate benefits, Duke misrepresented the new plan as providing more benefits and being more advantageous than it was. And, because the Plan document had no information from which to determine benefits, the misrepresented information was all participants had. Despite its duty under ERISA to produce the Plan to participants on request [ERISA §104(b)(4), 29 U.S.C. §1024(b)(4)], all Duke would have been able to produce from January 1, 1997 through July 16, 1997, was a Plan that purported to set forth opening balances as a "set amount," but had no set amounts associated with it. **Ex. JJ: Jefferies (30(b)(6)) Depo. (2/5/08) at 52:18 – 53:8.** Once opening balances were finally determined, they were made a part of the plan only under a new amendment adopted July 16, 1997 and were not set in amounts that would produce the promised crossover points. Accordingly, cognizable harm is clearly shown for the same reasons stated in this Court's order of June 2, 2008.

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[17] This made a difference in the opening balances of the named Plaintiffs ranging from $1,145 to $16,851, which calculated to the end of the third quarter 2008 ranges from $2,086 to $30,708. **Ex. II: Poulin Chart.**

B. Plan Administration Under December 1996 Plan

Duke seizes upon the fact that the undisclosed and arbitrary opening account adjustments, made to some participants' accounts to create age 65 equivalency, increased those balances. Duke contends plan participants were, thus, not harmed. The adjustments demonstrate, however, Duke's bad faith in abandoning its promises to its participants and continuing a pattern of misrepresentation.

Also, Duke adopted the December Plan and then operated it for more than six months on nothing but promises. Far from being "settled," "fixed," and "determined," and "simply set forth in the Plan," as claimed by Duke, [Duke Br. At 8-9] the account balances were unknown and unknowable during this time frame and subject to whatever arbitrary manipulations Duke chose to perform. Duke concedes the complete "absence of any provision in the Plan that can be used to determine . . . the opening balance assigned to any plaintiff." **Duke Br. at 5.** The account balances, which were the "accrued benefit" defined in the Plan, did not exist as a number or a reference point. Duke force its plan participants' benefits under the prior traditional plan, pursuant to a Plan amendment which did not provide for a means to continue benefit accruals and for benefits to be administered pursuant to the Plan document. It commenced administering a Plan that could not be administered on it face and was subject to complete employer discretion and "adjustment" of accrued benefits at will.

Far from creating a plan in furtherance of "ERISA's goal that employees be informed about the benefits to which they are entitled," (*Biggers v. Wittek, Industries, Inc.,* 4 F.3d 291, 295 (4th Cir. 1993)). Duke kept its employees in the dark and kept its own options open. It evaded "[t]he fundamental requirement that plan participants have sufficient notice of their rights under an ERISA plan . . . ." *Blackshear v. Reliance Standard Life Ins. Co.*, 509 F.3d 634, 643 (4th Cir. 2007). This circumstance incontrovertibly demonstrates "cognizable harm."

III. Duke's Misleading Communications Support a Fiduciary Duty Claim

Duke contends that Plan participants cannot state a claim for breach of fiduciary duty based on misrepresentations to participants concerning how their opening balances would be calculated under the cash balance plan.

Duke states that it has no fiduciary duties regarding its representations concerning calculation of opening balances because, "[t]hose descriptions . . . are not part of the Plan itself, nor are they set forth in any Summary Plan Description." **Duke Br. at 6.** Also, "plaintiffs do not and cannot identify any language in the Plan that entitles any plaintiff to an opening account balance different from the one assigned to him in the Opening Balance Schedule." **Id.** Duke ignores the fact, however, that neither the opening cash balances nor an Opening Balance Schedule was a part of the December 1996 Plan amendment.

The courts are clear that misrepresentations in writings outside the formal plan and SPD, not to mention oral misrepresentations, can give rise to a breach of fiduciary duty claim. *See In re Unisys Corp. Retiree Medical Benefit*, 242 F.3d 497, 505 (3rd Cir. 2001) (holding fact issues remained as to whether administrator actively assured prospective retirees that retiree health benefits were guaranteed for their lifetime, despite plan clause advising there were no guarantees).

Further, where statements to employees are misleading, courts have held this may support a claim for breach of fiduciary duty even where those statements were contradicted by formal plan documents that would have advised employees otherwise. *In re Unisys Corp., supra* at 497(fact issues remained as to whether administrator actively assured prospective retirees that retiree health benefits were guaranteed for their lifetimes, despite plan clause advising there were no guarantees). Here, however, there were no contradictory information in the plan documents, because Duke ensured that there would be a complete dearth of information.

Duke's intention in the conversion process is clear. By leaving off any formula or language in the December Plan amendment concerning calculation of opening balances, other than a "schedule" which did not exist (and which Duke felt it could create at any time and in any way), Duke wanted to promote the plan to participants without any transparency at all. Duke's argument implies that it could have made any representation at all to its employees, with complete impunity, just so long as the Plan document only contained a schedule of dollar amounts (albeit a missing one) and no formula. Duke's position is ludicrous.

This Court noted in its Order dated June 2, 2008:

> ERISA's fiduciary responsibility provisions, 29 U.S.C. §§1101-1114, are derived from certain principles of the common law of trusts. *See Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). Under ERISA, fiduciaries may not make material misrepresentations to beneficiaries, or provide incomplete, inconsistent, or contradictory disclosures that misinform beneficiaries. *Griggs v. E.I. Dupont de Nemours & Co*., 237 F.3d 371, 380 (4th Cir. 2001). Additionally, a fiduciary is obligated to affirmatively provide "material facts affecting the interest of the beneficiary which [the fiduciary] knows the beneficiary does not know and which the beneficiary needs to know for his protection. *Griggs*, 237 F.3d at 380. "In sum, the duty to inform 'entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful.'" Id. (citing *Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993)).

George, at *24.

Indeed, the case law is replete with cases finding that employers may be liable for breach of fiduciary duty under ERISA where the employer makes "incomplete, inconsistent or contradictory" disclosures of relevant information to plan participants. *See Griggs v. E.I. Dupont de Nemours & Co.*, 237 F.3d 371, 380 (4th Cir. 2001) (employer liable if it makes incomplete disclosure); *Colin v. Marconi*, 335 F. Supp. 2d 590, 609-10 (M.D.N.C. 2004)) (employer may be liable for incomplete disclosures); *Curcio v. John Hancock Mutual Life Ins. Co*., 33 F.3d 226 (3rd Cir. 1994) (employer's misrepresentations regarding existence of supplemental insurance established breach of fiduciary

claim); *Smith v. Hartford Ins. Group*, 6 F.3d 131 (3rd Cir. 1993) (employer's erroneous representations regarding coverage under new plan gave rise to breach of fiduciary duty claim); *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988) (same); *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 669 (2nd Cir. 1994) (plan administrator's misrepresentations about proposed future changes to an ERISA-governed plan are actionable as a breach of fiduciary duty); *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300-01 (3rd Cir. 1993) (ERISA fiduciary's duty to provide "complete and accurate information" to its beneficiaries "entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful"), *Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992) ("Misleading communications to plan participants regarding plan administration (for example, eligibility under a plan, the extent of benefits under a plan) will support a claim for a breach of fiduciary duty."); *Larsen v. NMU Pension Plan Trust of the NMU Pension & Welfare Plan*, 767 F.Supp. 554, 558 (S.D.N.Y. 1991) ("defendants are also liable for breach of fiduciary duty if they provided materially misleading information to [a beneficiary] or if the information supplied was insufficient to enable him to make an informed decision").

In *Varity Corp. v. Howe, supra,* the Supreme Court proclaimed, "To participate knowingly and significantly in deceiving plan beneficiaries in order to save the employer money at the beneficiaries' expense is not to act 'solely in the interest of the participants and beneficiaries.' As other courts have held, 'lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA.'" *Id.* at 506. *See also Martinez v. Schlumberger, Ltd.*, 338 F.3d 407, 425 ("When an ERISA plan administrator speaks in its fiduciary capacity concerning a material aspect of the plan, it must speak truthfully"); *McCall v. Burlington Northern/Santa Fe,* 237 F.3d 505, 510-11; *Mullins v. Pfizer, Inc.*, 23 F.3d at 668 (2nd Cir. 1994) ("when a plan administrator speaks, it must speak

truthfully").

Duke consistently made disclosures to plan participants stating that it was calculating their opening account balances to produce an age 60 to 64 crossover, that the final balances would be calculated using December 31, 1996 data, and that the calculations were based on a four step procedure. Duke intentionally decided to add the fifth step, did not communicate the step to plan participants, and then the ignored the results of the step, which demonstrated the promised crossover would not be met. The Supreme Court, in *Varity Corp.*, has held that where a company knew there was a significant risk that its original representations were wrong, the company had a duty to correct those representations. *Varity*, 516 U.S. 489 (employer encouraged employees to continue their employment through a reorganization when the employer knew there was a significant risk the reorganization would fail leaving workers with no benefits); *See, also, Griggs*, 237 F.3d at 380 (4th Cir. 2001) (employer liable when it said statement it later found out to be wrong and did not inform employee); *Drennan v. Gen. Motors Corp.*, 977 F.2d at 251 (6th Cir.1992) (management liable where it was privately considering change to plan and left employee believing there would be no change); *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 122, 126 (2nd Cir. 1997) (employer told employees that plan would not change after retirement, then did change plan; claim stated).

One of the principal purposes of ERISA is "to protect . . . the interests of participants . . . and . . . beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries . . . and . . . providing for appropriate remedies . . .and ready access to the Federal Courts." ERISA §2(b), 29 U.S.C. §1001(b), quoted in *Varity Corp.,* 516 U.S. at 513. It is impossible to see how Duke's deliberate choice to misrepresent the steps used to calculate pension benefits to participants complied with those standards of conduct and responsibility.

In summary, Duke knowingly sent written disclosures to plan participants that were false. It

affirmatively represented to plan participants that under the new plan their benefits would exceed those under the old plan prior to age 65, and disseminated charts and graphs to that effect. It knowingly encouraged the participants to believe that only four steps were applied when in fact a secret fifth step was applied that demonstrated that benefits would not grow as promised. Then, once Duke realized that the new plan benefits would not exceed old plan benefits for numerous participants, it did not tell them so. Rather, Duke used its stopgap "step five," but only to purportedly make age-65 benefits equal under the new plan – not greater, as affirmatively proclaimed.

Duke contends that it cannot be held liable for breach of fiduciary duty based on statements to participants that the plan conversion was needed to prevent a takeover. **Duke Br. at 11-12.** Plaintiffs do not seek relief based on these allegations but provide them as context.

IV. The Relief Plaintiffs Seek Is Available Under ERISA §502(a)(3).

A. Meaning of "Injunctive or Other Appropriate Equitable Relief."

If a fiduciary breaches the duties set forth in ERISA §404(a), then §502(a)(3) authorizes an action by an individual participant or beneficiary (1) to enjoin the act or practice that violates these duties, or (2) to obtain other appropriate equitable relief to redress the violation or to enforce the duties. 29 U.S.C. §1132(a)(3); *see Varity*, 516 U.S. at 512, 116 S. Ct. at 1077-78. The Supreme Court has denominated §1132(a)(3) as ERISA's "catchall" provision, meant to "act as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." *Id*. This section gives force to ERISA's objective of protecting the interests of plan participants and beneficiaries, because "it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy." *Id*. at 513.

The Supreme Court as well as the Fourth Circuit have expressly recognized the development

of a federal common law of rights and obligations under ERISA plans. *Adams v. Brink's Co.*, 261 Fed.Appx. 583 (4th Cir. 2008). In *Varity v. Howe,* 517 U.S. at 515, the Supreme Court held that courts should keep in mind the special nature and purpose of ERISA benefit plans in fashioning appropriate equitable relief. However, the Supreme Court has limited the "other equitable relief" available under §502(a)(3) to forms of relief that were "typically available in equity" in the time of the divided bench. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993). The Supreme Court subsequently explained that in determining whether relief sought is equitable, courts must focus not on "the substance of the relief requested," but on "the conditions that equity attached to its provisions," which can be determined by reference to "standard current works" on remedies. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 216-17 (2002)

It is very clear under the law of the Fourth Circuit Court of Appeals that this Court has broad authority under ERISA §502(a)(3) to fashion an appropriate remedy in this case based on the evidence adduced at trial, to exercise the flexibility given to the federal courts ". . . to appropriately balance the interests of participants and beneficiaries of ERISA plans against the interests and obligations of employers and fiduciaries." *Adams v. Brink's Co.*, 261 Fed. Appx. at 597 (4th Cir. Jan. 11, 2008).

Here the Plaintiffs seek reformation, restitution, appointment of an auditor to perform an accounting, and such other equitable remedies as the Court deems proper. **Am. Compl., p. 24.** Each of the remedies sought by Plaintiffs was typically available in equity.

B. Reformation Is Appropriate Equitable Relief Under § 502(a)(3).

Duke cannot dispute that this Court has the authority to order reformation of the Plan if it violates any provision of ERISA. Such an equitable remedy is consistent with the remedial purposes of ERISA. *See Ross v. Rail Car Am. Group Disability Income Plan*, 285 F.3d 735, 740 (8th Cir. 2002), *cert. denied*, 537 U.S. 885, 123 S. Ct. 118 (2002) (holding §502(a)(3) authorized suit for declaration

that plan amendments were not validly adopted; if participant succeeded, invalidation of amendments would create claim for benefits). *Mahoney v. Northwest Airlines Pension Plan*, 2004 WL 114946, *6, 32 Empl. Ben. Cas. 1151 (D.Minn. Jan. 8, 2004) (holding "to the extent that Plaintiffs are seeking injunctive relief under 502(a)(3) . . . or to reform a system-wide error in enforcement of the plan provisions, . . . their claims survive.").

ERISA §502(a)(3) allows plan participants to bring civil actions:

> (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (I) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

29 U.S.C. §1132(a)(3). A reformation may be ordered "appropriate equitable relief" under ERISA §502(a)(3)(I) or (ii). The practical effect of an injunction under §502(a)(3)(A), retroactively enjoining administration of an invalid plan amendment, would have an effect similar to reformation, and such relief is not subject to the limitations of *Mertens, Great Western* and their progeny concerning "other appropriate equitable relief." Courts have specifically sanctioned the use of injunction in these circumstances. *See In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, No. 03-3924, 2007 WL 2071876 at *10, *14 (E.D. Pa. July 16, 2007) (stating that an "injunction ordering specific performance of the assurances Unisys made" to the retirees is permissible under ERISA §502(a)(3)). The District Court of South Carolina, in *Cherepinsky v. Sears, Roebuck & Co.*, held:

> The language of section 502(a)(3) allows a beneficiary to bring suit to enjoin an act or practice violating the terms of a plan or to obtain other appropriate equitable relief to redress violations of the plan's terms. Plaintiffs allege that Defendants have failed to follow Plan documents and have engaged in self-dealing. A failure to act "in accordance with the documents and instruments governing the plan" generally constitutes a breach of fiduciary duty.

478 F. Supp. 2d 632, 642 (D.S.C. 2006) (internal citations omitted).

Duke acknowledges the availability of reformation as a remedy under the authority of *In re Unisys*. Duke also cites to *Shaver v. Siemens*, No. 2:02cv1424, 2008 WL 859251 (W.D. Mar. 28, Pa.

2008) and says:

> the court concluded that, where a plan amendment "eliminate[d] accrued benefits from a plan in violation of" ERISA's anti-cutback provision, § 204(g), the appropriate "make-whole"remedy included restoration of the benefits "defendants should have been paying." *Id.* at *2. "Relief for back due benefits in such a setting," the court explained, "has long been recognized as a form of restitutionary reimbursement that is appropriate as part of the equitable decree and a return to the true status quo mandated by ERISA." *Id.*

Duke Br. At 17-18.

Duke characterizes the ruling in *Shaver* as limited to settlor conduct. *Id.* at 17. *Shaver* clearly states, however:

> Restoration of plaintiffs' accrued PJS pension benefits is for work previously performed under the defendants; pension plans, which are subject to reformation due to defendants' statutory violation in creating and ***administering*** those plans. Like the situation in *Varity Corp. v. Howe*, 516 U.S. 489, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996), the court's decree in such a situation properly is understood as "a matter of restoring the plaintiffs' benefits enrollment to the preexisting arrangement," which arrangement existed while the work was performed. *Eichorn*, 484 F.3d at 656 (distinguishing between a decree restoring a plaintiff to benefits that were available and earned during the employee's work but for the employer's statutory violation and the situation in Eichorn where the benefits were never earned because of the employer's unlawful interference). Furthermore, plaintiffs are entitled to relief as a class and the relief they seek properly can be measured against defendants' gain. A "make-whole" remedy for defendants' statutory violation necessarily has as components a restoration to the benefits defendants should have been paying since plaintiffs' separation from employment and a recognition of their entitlement to those restored benefits into the future.

Shaver v. Siemens Corp., 2008 WL 859251, *2 (W.D. Pa. Mar. 28, 2008) [Emphasis added]. *Shaver* clearly references not only settlor conduct, but fiduciary conduct in "administering" the plan.

Duke goes on to argue that, in any event, the holding in *Shaver* and other similar cases are not applicable because no ERISA violation remains at issue, In fact, however, the December 1996 Plan fails in numerous regards. ERISA §402(a) mandates that every employee benefit plan must be established and maintained pursuant to a written instrument. 29 U.S.C. §1102(a). Between January

1997 and July 1997 the Duke retirement plan did not establish by written instrument adopted in accordance with the mandatory amendment procedure contained the prior iterations of the Plan, the most critical foundational element for determination of benefits, the Opening balance, or a means to determine the opening balance. **Ex. KK: 1995 Plan, DE000070.** *See Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 58-59 (4th Cir.1992) ("[A]ny modification to a plan must be implemented in conformity with the formal amendment procedures."), *cert. denied,* 506 U.S. 1081, 113 S.Ct. 1051, 122 L.Ed.2d 359 (1993). Also, ERISA §402(b)(4) mandates that a plan "specify the basis on which payments are made to and from the plan." 29 U.S.C. §1102(b)(4). The December 1996 Plan did not specific the basis for benefits to be paid because it had no schedule of opening balances. The Plan Administrator's administration of benefit between January 1997 and July 1997 was in direct violation of this provision, relying as it did on what was at best informal amendments setting *ad hoc* opening balances.

Accordingly, if the Court finds that the Plan Administrator acted in violation of the terms of the plan or any provision of ERISA in administering the plan with opening balances not provided for in the plan document and not for provided by proper amendment, or if Duke provided misleading and inaccurate communications to the participants concerning the opening balances, then this Court may explore reformation as a means of doing equity to the Plan and the participants.[18] Indeed, this Court had already ruled that plaintiffs may seek "an injunction reforming the plan" as a remedy under the breach of fiduciary duty claim. *George*, at *29.

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[18] The Court may, for example, reform the December 1996 amendment to comport with the intent of the parties so as to provide for an age 60 or 64 crossover; it may reform the December 1996 to mandate inclusion of a schedule of opening balances calculated for all participants using the four step process and using the same actuarial assumptions used to avoid §204(h) notice; it may reform the Plan by striking the December 1996 amendment as invalid and balance the equities to fashion a remedy.

Duke cites to several Circuit Court cases purportedly precluding a two-step theory to recover benefits . **Duke Br. 19-21.** In fact, only *Todisco v. Verizon Communications, Inc.*, 497 F.3d 95 (1st Cir. 2007) mentions a two-step theory. In the *Todisco*, the Court held that:

> Todisco's alternative theory tries to recast her claim as one for benefits under section 502(a)(1)(B). This theory entails two steps. First, she asks us to invoke equitable estoppel based on Verizon 's misrepresentations to her husband. As she envisions it, this would bar Verizon from asserting that a statement of health form was required during an open enrollment period. Second, Mrs. Todisco asks us to allow her to claim, under a reformulated plan, the benefits that were promised to her husband. With Verizon barred from invoking the actual language of its plan, she believes that this claim will be successful.
>
> This approach is not permitted by ERISA's text. Section 502(a)(1)(B) allows a plaintiff to sue only for benefits "due to him under the terms of his plan." 29 U.S.C. §1132(a)(1)(B) (emphasis added). Here, the plan unambiguously stated that Mr. Todisco was ineligible to add supplemental life insurance without submitting a statement of health form. Since it is undisputed that he never submitted this form, Mrs. Todisco's claim for benefits is plainly not a suit for benefits under the terms of the plan. Instead, she expressly seeks benefits not authorized by the plan's terms.

Todisco, 497 F.3d at 101(footnote omitted). *Todisco*, as well as the two additional cases cited by Duke,[19] focus on assertions of equitable estoppel, not a defective plan amendment preceded by material misrepresentations to the entire participant group.

The line of cases cited by Duke actually demonstrates that the appropriate relief in this case falls under ERISA §502(a)(3). As stated in these cases, Plaintiffs' claims cannot fall under ERISA §502(a)(1) because they do not claim benefits "under the terms of the plan." In this case Plaintiffs seek formal reformation of the Plan. What remedies would arise at that point, following reformation, can only be addressed at that point through supplemental pleading. Anticipating the form reformation

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[19] *Slice v. Sons of Nor.,* 34 F.3d 630, 631-32 & n.5 (8th Cir. 1994); *Watkins v. Westinghouse Hanford Co.,* 12 F.3d 1517, 1527-28 (9th Cir. 1993).

might take and predicted appropriate relief is simply speculative at this juncture. [20]

Finally, the arguments made by Duke concerning absence of mutual mistake or fraud to warrant a reformation do not fully address the grounds for reformation. A number of courts note the availability of reformation not only based on mutual mistake or fraud but also, on illegality. See, *Kawski v. Johnson & Johnson*, 2005 WL 3555517, *7 (W.D.N.Y. Dec. 19, 2005) (ERISA plan may be reformed where there is "fraud, mutual mistake or terms violative of ERISA,"citing to *Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 103 (2nd Cir. 2005)); *Bariteau v. PNC Fin. Servs. Group, Inc.*, 2006 U.S. Dist. LEXIS 79564 *10 (W.D.Ky. Oct. 30, 2006) (contract may be reformed "on the grounds of fraud or mutual mistake, or [if] the contract is illegal.").

In *Hozier v. Midwest Fasteners, Inc.*, the Third Circuit held:

> Regardless of whether fiduciary duties do or do not attach to an employer's amendment decision, the particular amendment at issue in *Delgrasso* was invalid under the terms of the unamended plan's governing documents. Because ERISA grants participants the right to seek equitable relief from acts that violate the terms of their plan, see ERISA §502(a)(3), 29 U.S.C. §1132(a)(3) (quoted in *Delgrasso*, 769 F.2f at 937), that invalidity alone was sufficient for the *Delgrasso* plaintiffs to obtain the remedy they sought – reformation of the plan to strike the purported amended – regardless of whether any fiducairy act was breached.

908 F.2d 1155, 1162 (3rd Cir. 1990).

The Amended Complaint, which includes the documents referenced therein, including the Plan documents, the On Track Newsletters, and the Personalized Account statements, are sufficient to demonstrate ERISA violations and plan violations. There is, thus, no basis for Duke to argue that reformation is not a remedy available for the claims relating to the opening balances, either arising from misrepresentations or other fiduciary breaches.

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[20] One remedy might include that protected benefits under the old plan would accrue for an additional six and one-half months. Remedies based on the Invalidation of the December 1996 amendment and the consequences to the

C. Restitution Is Appropriate Equitable Relief Under § 502(a)(3).

This Court has ruled that restitution is not available for the breach of fiduciary duty claim based on the misrepresentation claim previously pled. *George*, *29. With regard to the allegations concern the opening balances, the Court held open the question of restitution.

Various courts have recognized a make-whole remedy in circumstances similar those presented here. In *Shaver v. Siemens Corp.*, the District Court in Pennsylvania held:

> A "make-whole" remedy for defendants' statutory violation necessarily has as components a restoration to the benefits defendants should have been paying since plaintiffs' separation from employment and a recognition of their entitlement to those restored benefits into the future.

Shaver v. Siemens Corp., 2008 WL 859201, *2 (W.D. Pa. Mar. 28, 2008).

Restitution is equitable when it recovers the "defendant's unjust gain." *Pereira v. Farace*, 413 F.3d 330, 340 (2nd Cir. 2005); *Dunnigan v. Metropolitan Life Ins. Co.*, 277 F.3d 223, 229 (2nd Cir. 2002) ("When benefits are paid only after the date on which the beneficiary was entitled to receive them under the terms of the plan, the beneficiary has not received the full value of what was promised and to the same degree, the plan has realized an unjust enrichment (assuming the lateness was unjustified"); *FTC v. Verity Int'l.*,443 F.3d 48, 68 (2nd Cir. 2006) (although "it is incorrect to generalize" "in many cases" "the defendant's gain will be equal to the consumer's loss"); Dobbs, *Law of Remedies,* §4.1(2) ("The fundamental substantive basis for restitution is that the defendant has been unjustly enriched by receiving something, tangible or intangible, that properly belongs to the plaintiff Restitution rectifies unjust enrichment by forcing restoration to the plaintiff"). Here Duke avoided accruing benefits under the prior plan for a period of more than half a year while ignoring failing interest rates in setting opening balances. It unquestionably profited significantly by this conduct. *See Parke v. First Reliance Standard Life Ins. Co.*, 368 F.3d 999, 1008 (8th Cir. 2004); *Dunnigan v. Metro.*

Life Ins. Co., 214 F.R.D. 125, 134 (S.D.N.Y. 2003). Plaintiffs are not required to seek imposition of a constructive trust on the profits rather than restitution. "[T]he availability of an accounting for profits is not limited to situations in which a constructive trust is imposed over specifically identifiable property." *Parke*, 368 F.3d at 1008.

D. Appointment of an Auditor

Duke opposed appointment of an auditor essentially on merits grounds. It is premature to exclude any form of equitable remedy at this stage. As noted above the Court has broad powers to fashion equitable remedies and these powers should not be curtailed at the Motion to Dismiss stage.

E. The Court May Apply Equitable Principals to Fashion a Remedy in the best interest of the Plan Participants

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*, 1992 WL 108844, *7 (S.D. Ill. Feb. 2, 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 relief including recision of unlawful transaction***s); *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:

> 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.

CONCLUSION

In conclusion, Plaintiffs respectfully assert that the Motion to Dismiss of Duke is without merit and should be denied.

Respectfully submitted,

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