No. _____

IN THE
Supreme Court of the United States

ELIZABETH A. CLEMONS, DAVID R. KHALIEL, LARRY W. TAYLOR,
on behalf of themselves and all other similarly situated individuals,

Petitioners,

v.

NORTON HEALTHCARE INC. RETIREMENT PLAN,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

William T. Payne
Joel R. Hurt
Feinstein Doyle Payne & Kravec
429 Forbes Ave., 17th Floor
Pittsburgh, PA 15219
(412) 281-8400

Michael D. Grabhorn
Grabhorn Law | Insured Rights™
2525 Nelson Miller Parkway
Suite 107
Louisville, KY 40223
(502) 244-9331

Counsel for Applicants

September 6, 2018

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TO: The Honorable Elena Kagan, Justice of the United States Supreme Court and Circuit Justice, United States Court of Appeals for the Sixth Circuit

Applicants respectfully request an extension until November 15, 2018 within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

The final judgment of the Sixth Circuit of which Applicants seek review was entered on June 18, 2018. A petition for a writ of certiorari is currently due on September 16, 2018. The requested deadline for Applicants' requested extension is within the period set forth in Rule 13.5 of the Rules of the Supreme Court of the United States and 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Copies of the opinions of the court of appeals and the district court are attached to this application. *See* A1-A26.

1. This case involves an important legal question concerning the judicial standard of review as to the interpretation and application of ambiguous contract terms in the context of the Employee Retirement Income Security Act of 1974 (ERISA) and its corresponding statutory requirement that contract (plan) terms be written in clear and unambiguous language.

2. Applicants are retired participants in an ERISA-governed retirement plan, the Norton Healthcare Inc, Retirement Plan, who filed suit to challenge the calculation of their lump-sum retirement benefits. A69-A112. Applicants obtained summary judgment on both the merits of their claims, as well as the applicable corrective damages formula. A42-A68.

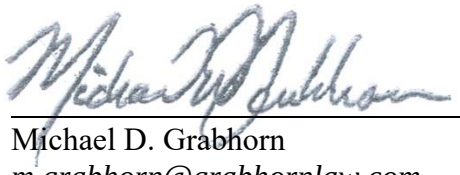
3. Norton appealed. A divided Sixth Circuit panel reversed in part based on the panel's sua sponte determination that the plan terms were ambiguous. A2-A41. Further, the majority concluded that where the plan provides discretion to the claim fiduciary, general rules of contract interpretation (i.e. contra proferentem) are inapplicable. A11-A18. Appellants sought en banc review but the petition was denied. A1.

4. Applicants respectfully request an extension of time within which to file their petition for a writ of certiorari seeking review of the Sixth Circuit's ruling and submit that there is good cause for granting the request. Following the Sixth Circuit's decision, Applicants' counsel have worked diligently to research the applicable law to prepare the petition for certiorari. However, during this same period Counsel have also been addressing multiple prior legal and professional obligations. Thus, additional time is necessary to prepare and complete Applicants' petition and have it printed for submission.

CONCLUSION

For the foregoing reasons, Applicants respectfully request the Court extend the deadline for filing their petition for a writ of certiorari up to and including November 15, 2018.

Respectfully Submitted,



Michael D. Grabhorn
m.grabhorn@grabhornlaw.com
Grabhorn Law | Insured Rights™
2525 Nelson Miller Parkway
Suite 107
Louisville, KY 40223
(502) 244-9331

Counsel for Applicants

Dated: September 6, 2018

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on behalf of themselves and all other similarly situated individuals,

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v.

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for the Sixth Circuit

CERTIFICATE OF SERVICE

I certify that one copy of the Application for an Extension of Time Within Which to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in the above captioned case was served on the following counsel via commercial carrier on September 6, 2018:

Lira A. Johnson
Dinsmore & Shohl LLP
101 South Fifth Street, Suite 2500
Louisville, Kentucky 40202
p: (502) 540-2300

Kenneth Haneline
Keith L. Pryatel
Kastner Westman & Wilkins, LLC
3480 West Market Street, Suite 300
Akron, Ohio 44333
p: (330) 867-9998

Michael D. Grabhorn

Nos. 16-5063/5124

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 18, 2018
DEBORAH S. HUNT, Clerk

ELIZABETH A. CLEMONS, DAVID R. KHALIEL, AND LARRY W. TAYLOR, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED INDIVIDUALS,

Plaintiffs-Appellees/Cross-Appellants,

v.

NORTON HEALTHCARE INC. RETIREMENT PLAN,

Defendant-Appellant/Cross-Appellee.

ORDER

BEFORE: SILER, McKEAGUE, and WHITE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0090p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ELIZABETH A. CLEMONS, DAVID R. KHALIEL, and LARRY W. TAYLOR, on behalf of themselves and all other similarly situated individuals,
Plaintiffs-Appellees/Cross-Appellants,

v.

NORTON HEALTHCARE INC. RETIREMENT PLAN,
Defendant-Appellant/Cross-Appellee.

Nos. 16-5063/5124

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
3:08-cv-0069—Thomas B. Russell, District Judge.

Argued: June 22, 2017

Decided and Filed: May 10, 2018

Before: SILER, McKEAGUE, and WHITE, Circuit Judges.

COUNSEL

ARGUED: Keith L. Pryatel, KASTNER WESTMAN & WILKINS, LLC, Akron, Ohio, for Appellant/Cross-Appellee. Michael D. Grabhorn, GRABHORN LAW OFFICE, PLLC, Louisville, Kentucky, for Appellees/Cross-Appellants. **ON BRIEF:** Keith L. Pryatel, Kenneth M. Haneline, KASTNER WESTMAN & WILKINS, LLC, Akron, Ohio, Lira A. Johnson, Michael P. Abate, DINSMORE & SHOHL LLP, Louisville, Kentucky, for Appellant/Cross-Appellee. Michael D. Grabhorn, Andrew M. Grabhorn, GRABHORN LAW OFFICE, PLLC, Louisville, Kentucky, William T. Payne, Joel R. Hurt, FEINSTEIN DOYLE PAYNE & KRAVEC, Pittsburgh, Pennsylvania, for Appellees/Cross-Appellants.

McKEAGUE, J., delivered the opinion of the court in which SILER, J., joined, and WHITE, J., joined in part. WHITE, J. (pp. 37–40), delivered a separate opinion concurring in part and dissenting from Part III and Part IV. C. 3.

OPINION

McKEAGUE, Circuit Judge. This appeal is the latest installment in an ERISA litigation saga that has spanned almost ten years. At the risk of oversimplifying their case, the Plaintiff–Retirees claim that Defendant Norton Healthcare, Inc. Retirement Plan ("Norton") underpaid them under the terms of the plan. The district court found that the plan was unambiguous in the Retirees' favor. We agree with the district court on most issues. However, because the Plan is ambiguous in one crucial respect and may not comply with ERISA in another, we **VACATE** the district court's summary judgment order and **REMAND** for further examination of those issues. Consequently, we also **VACATE** the district court's damages order, including its certification of a class under Rule 23(b)(1)(A) and (b)(2) during the damages stage. In doing so, we mean no slight to the district judges and their staff, who ought to be praised for their commitment to this case and for their patience with the complex issues it presents.

I

Plaintiffs Elizabeth A. Clemons, David R. Khaliel, and Larry W. Taylor ("the Retirees") were employed by Norton Healthcare. They are covered by a plan ("the Plan") established to benefit former Norton employees. In January 2008, the Retirees brought a putative class action under ERISA, alleging Norton underpaid retirees who elected to take their pension as a lump-sum payment. The district court certified a class in 2011 and eventually granted summary judgment to the Retirees. Damages have not been reduced to a sum certain, but the district court adopted the Retirees' formula for calculating damages, awarded pre-judgment interest at a fixed rate, and entered a final judgment for the Retirees. Collateral proceedings indicate that the total amount at issue is between sixty and seventy million dollars.

Both sides appealed the judgment. Norton (technically, the appellant) disputes the district court's interpretation of the Plan, the standard of review employed by the district court, class certification, and the district court's adoption of the Retirees' proffered damages formula. The Retirees (technically, the cross-appellants), ask us to apply a longer statute of limitations and

quibble with the appropriate rate of prejudgment interest, in addition to disagreeing with Norton's arguments on appeal. After the Retirees filed their cross-appeal, Norton balked, asserting that we lack jurisdiction over the entire case because the district court's last order was not final under 28 U.S.C. § 1291.

A

The facts relevant to this appeal are straightforward and undisputed. In 1991, Norton merged two predecessor plans (the "MEH Plan" and the "NKC Plan") into one Plan, which is the defendant here. The Plan is a single-employer plan governed by ERISA, funded by Norton, and maintained under a written document (the "Plan Document"). Although the initial Plan was established in 1991, the most recent, restated Plan Document became effective January 1, 1997. Since then, it has been amended multiple times.

As of January 1, 1997, the Plan used two basic formulas for pension benefits. First, it included a traditional defined-benefit formula applicable only to members of the predecessor plans from MEH and NKC. It also included a cash-balance formula applicable to all other plans. *See* Norton Plan § 4.03. In 2004, the Plan was amended to tie off the predecessor plans; that is, to end accruals under the defined-benefit formulas and allow further accruals only under the cash-balance benefit formula established in the merged Plan.

In all its iterations, the Plan provides for benefits for "normal" retirement at age 65, late retirement, early retirement, and disability retirement. §§ 4.03–4.07. The Plan allows participants who are at least 55 years old and have at least 10 years of service to retire early. §§ 2.22, 4.05(a). The Plan allows retirees to take their benefit in the "Basic Form" or in one of six alternative forms. § 4.02(a)–(b). One of those alternative forms is a lump-sum payment received on the date of retirement. § 4.02(b)(6).

B

The Retirees here are all former Norton employees who (a) retired after the 2004 amendments became effective and (b) elected the lump-sum benefit. On January 30, 2008, they filed their first Class Action Complaint. The case was assigned to Judge Jennifer B. Coffman.

After two years of motion practice and class-certification discovery, the Retirees filed the operative complaint on May 10, 2010. Explaining the core of their allegations, the Retirees stated:

> On behalf of themselves and others similarly situated, Plaintiffs challenge the calculation of their pension benefits as follows:
>
> > a. the Defendant Plan's failure to include the value of the "increasing monthly income" ("cost-of-living") in the calculation of participant lump sum benefits and in the calculation of participant "cash balance" starting balances;
> >
> > b. the Defendant Plan's failure to include the value of early retirement subsidies in the calculation of participant lump sum benefits and in the calculation of participant "cash balance" starting balances; and/or
> >
> > c. the Defendant Plan's failure to calculate participant lump sum benefits according to the contra[c]tual formula.

1

On May 17, 2010, the Retirees filed a motion for class certification. They sought certification under Rule 23(b)(1)(A), (b)(2), and (b)(3), defining their proposed class as:

> All participants in the Norton Healthcare, Inc. Retirement Plan, its predecessors and successors, whose contractual lump sum pension benefits:
>
> (1) did not include the value of the basic form of benefit – an "increasing monthly retirement income" (annual cost-of-living adjustment) – when election of such basic form would have yielded the highest value for the participant; and/or
>
> (2) did not include the value of the "alternative" lump sum benefit where the basic form of benefit is multiplied by 212, when election of such alternative form would have yielded the highest value for the participant; and/or
>
> (3) did not include the value of the early retirement subsidy.

The district court granted the motion and certified the class under Rule 23(b)(1)(A) and (b)(2), finding Norton's counterarguments to be improperly merits-based. It also appointed Khaliel and Taylor as class representatives, but rejected Clemons, reasoning that the Retirees had not satisfied the typicality requirement as to her. The district court defined the class as requested by

the Retirees. In April 2011, the parties began merits discovery. Meanwhile, Norton petitioned for interlocutory review of the certification order. We denied the petition.

Back in the district court, Norton moved for partial summary judgment. The basis for the motion was that Kentucky's five-year statute of limitations for statutory claims applied, and that all claims related to benefits paid before January 30, 2003 should be dismissed. *See* Ky. Rev. Stat. Ann. § 413.120(2). The Retirees countered that their claims were timely because Kentucky's fifteen-year statute of limitations for claims based on a written contract should apply. *See* Ky. Rev. Stat. Ann. § 413.090(2). The district court denied the motion. The court reasoned that the dispute "centers around the plaintiffs' rights under their contract with [Norton]," and that the Retirees were not seeking to enforce any statutory rights created by ERISA.

2

After we denied interlocutory appeal of the class certification decision, the Supreme Court decided *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). On July 24, 2012, Norton attacked the existing class certification, citing *Dukes* and *West v. AK Steel Corp.*, 484 F.3d 395 (6th Cir. 2007). Norton asked the district court to decertify the class entirely because the highly individualized nature of pension calculations forestalled a finding of commonality. Norton also attacked the merits of Khaliel's and Taylor's individual claims and argued that certification under Rule 23(b)(2) was improper in light of *Dukes* and *West*.

The district court denied the motion. The court found *Dukes* inapplicable, reasoning that the commonality requirement was satisfied because Norton "stipulated that its actuaries used a consistent methodology when they calculated benefits," and "the crux of the Plaintiffs' claims" was whether that methodology was correct. The district court also concluded that even if certification under Rule 23(b)(2) was improper, the class "would remain properly certified under Rule 23(b)(1)(A)."

While Norton's motion to decertify was pending, the parties completed merits discovery and filed cross-motions for summary judgment. Shortly after briefing on these motions was completed, Judge Coffman retired, and the case was reassigned to Judge Thomas B. Russell.

On August 23, 2013, Norton filed a motion asking Judge Russell to reconsider Judge Coffman's ruling on the statute-of-limitations issue. The district court granted the motion, concluding that *Fallin v. Commonwealth Indus., Inc.*, 695 F.3d 512 (6th Cir. 2012), and *Redmon v. Sud–Chemie Inc. Ret. Plan for Union Emps.*, 547 F.3d 531 (6th Cir. 2008), compelled the conclusion that Kentucky's five-year limitations period for statutory claims applied.

C

On October 31, 2013, the district court granted summary judgment to the Retirees. Only the issues germane to this appeal are discussed below.

***First*,** the district court held that, because the Plan gives its administrator discretion to construe the terms of the plan, arbitrary-and-capricious review applies. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). After announcing that conclusion, however, the court engaged in a lengthy discussion of whether the doctrine of *contra proferentum* should also apply. Relying primarily on dicta in *University Hospitals of Cleveland v. Emerson Electric Co.*, 202 F.3d 839 (6th Cir. 2000), the court concluded that there is "no significant reason why this basic and equitable contract principle should not apply in the context of ERISA contracts."

***Second*,** the district court concluded that the Plan documents unambiguously favored the Retirees' position on most issues. This included a finding that the 2004 amendments created an "early retirement subsidy" and that the Plan called for any lump sum to account for an increasing monthly income for sixty months certain. The court supplemented its discussion by stating, "However . . . to the extent that any of the relevant provisions are ambiguous, they would be construed *against* the drafter and in favor of plaintiffs." However, the district court did agree with Norton on a structural issue, applying the last paragraph of a disputed section globally, rather than only to the subparagraph immediately preceding it.

***Third*,** the district court agreed with the Retirees that, regardless of the various formulas set out in the Plan, "ERISA require[s] that a participant's lump sum benefit be the 'actuarial equivalent' of the [Monthly Retirement Income]." 29 U.S.C. § 1054(c)(3).

Fourth, the district court declined to attempt any actual damages calculations, instead leaving them "for the parties to perform, consistent with the Court's instructions." To that end, the court ordered Norton to recalculate the class members' pensions within 45 days, and the Retirees to raise any objections within 14 days thereafter.

D

Translating the district court's rulings into a pension formula proved more difficult and contentious than expected. With the Retirees' agreement, the deadline was extended by 45 days. However, Norton continued to struggle to assemble the necessary records and cull the requisite data. The parties therefore jointly requested an open-ended extension, based on Norton's promise that once its spreadsheet detailing all the data and calculations was completed, Norton would share the spreadsheet with the Retirees and make the underlying hard-copy documents available to the Retirees. The parties also promised to discuss Norton's new formula and attempt to resolve any disagreements. The district court granted the open-ended extension request on January 24, 2014.

This cooperation broke down about a year later. Subsequently, the parties offered competing damages formulas, both supported by expert affidavits. The Retirees also requested pre-judgment interest at a rate of eight percent. Norton argued that the Retirees were not entitled to any pre-judgment interest. Norton also used its damages brief to reargue the certification question.

The district court issued its damages opinion on January 6, 2016 (more than two years after its liability ruling). The court's order addresses a variety of issues, however, and was not limited to damages.

First, the district court ordered that the Retirees' formula be used to recalculate class members' pensions, explaining:

> After extensively reviewing the parties' formulas and their arguments, this Court finds that Norton did not provide a formula that will ensure that the recalculated lump sums are at least actuarially equivalent to the Monthly Retirement Income. Norton goes to great lengths to critique the Class's proposed formula, but it does not adequately explain to this Court how its own formula results in an actuarially

> equivalent lump sum. Norton makes several conclusory statements that its formula results in an actuarial equivalent lump sum, but it does little to explain to the Court how this is so. Alternatively, the Class has gone to great lengths to not only create a formula and demonstrate how it is actuarially equivalent but also to respond to any of Norton's criticisms concerning its formula.

Second, the district court rejected Norton's request to decertify the class entirely. The district court also rejected Norton's request to interpret its liability holding in a way that would narrow the scope of the class.

Third, the district court concluded that the Retirees are entitled to pre-judgment interest. However, the court found that eight percent "would be excessive." Employing the post-judgment interest statute and seeking to avoid "the complexities of compounding interest," the district court instead awarded pre-judgment interest at a flat two percent rate. 28 U.S.C. § 1961.

Finally, the district court concluded its damages opinion with the following:

> To conclude that this matter is complex is probably an understatement. . . . The complexity of comprehending and analyzing lengthy interrelated documents and deciphering the nuisances therein has been time consuming on the part of counsel and the Court. The Court is not inclined to entertain any motion for reconsideration. Frankly, the Court has given this matter its best shot. Too much time has elapsed between the earlier ruling and the current posture of this case. The Court originally thought agreeing on a formula would not be a time consuming process. Obviously, it was time consuming. It is time for another court, if the parties are so inclined, to look at this matter with new eyes.

The district court then entered judgment for the Retirees "in an amount consistent with" its opinion, and stated that its judgment was "final and appealable."

E

Norton filed a notice of appeal on January 20, 2016. The Retirees filed a notice of cross-appeal on February 2, 2016. On May 27, 2016, Norton filed a motion to dismiss the cross-appeal for lack of jurisdiction, arguing the district court has not entered a final order for purposes of 28 U.S.C. § 1291.

II

We have jurisdiction over this appeal. Norton's motion to dismiss is **DENIED**.[1]

The court of appeals has jurisdiction over all "final decisions of the district courts." 28 U.S.C. § 1291. A district court's statement that its judgment is final and appealable does not make it so. *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 742 (1976); *Day v. NLO, Inc.*, 3 F.3d 153, 155 (6th Cir. 1993). Rather, a "final decision is 'one which ends the litigation on the merits and leaves nothing for the [district] court to do but execute the judgment.'" *Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 902 (2015) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). Generally, "[a] judgment is not final for purposes of appeal when the assessment of damages remains," unless the calculation is purely ministerial. *Woosley v. Avco Corp.*, 944 F.2d 313, 316–17 (6th Cir. 1991). Norton contends that the district court's order was not final because it has not reduced damages to a sum certain and because "the complex actuarial calculations required to compute the Plaintiffs' damages" under the formula adopted by the district court "are far more than 'ministerial.'"

We think *Woosley* controls the outcome here. In *Woosley*, we held that a judgment ordering the employer to calculate backpay was final, even though the court had yet to calculate the exact amount owed. 944 F.2d at 317. As the variables necessary to calculate backpay were not known to the court, the judgment ordered the parties to supply stipulations about those variables, which would automatically be incorporated into the judgment. *Id.* at 316. The employer appealed before the stipulations were filed, and the employees subsequently challenged the jurisdiction of this Court on finality grounds, arguing that there were still complex calculations left to be done about which the parties were arguing. *Id.* at 316–17. We denied the motion to dismiss, reasoning that although the calculations required more than simple addition,

[1]The analysis below is included to satisfy our own, independent obligation to ensure that we have jurisdiction. Norton's decision to file a jurisdictional motion to dismiss its own appeal only after its opponents filed a cross-appeal smacks of gamesmanship, sloppiness, or both, and is not well-taken. If Norton thought we lacked jurisdiction over an appeal, it should have considered that issue thoroughly before appealing, not as a tactical afterthought. *See* Fed. R. Civ. P. 11(b)(1)–(2). Nevertheless, mindful that we must "police jurisdiction for ourselves, whether [a party] deserves the inquiry or not," we engage in the analysis anyway. *Exact Software N. Am., Inc. v. DeMoisey*, 718 F.3d 535, 539 (6th Cir. 2013).

they did not affect the finality of the judgment. *See id.* In doing so, we pointed out that "the equities between the parties were resolved," even though someone still had to find a more advanced calculator before writing the check. *Id.* at 317.

The same is true here. The district court answered all the parties' merits questions, and found that Norton had misapplied the terms of the Plan. The district court then told the parties exactly how to recalculate those Retirees' benefits—by using the Retirees' proposed formula. Thus, there are no unanswered legal or equitable questions in this case. Norton also does not contend it lacks the data necessary to perform the calculations, or that the parties dispute the accuracy or authenticity of the relevant records, so there are no unanswered factual questions either. It is undoubtedly true that the calculations required here are complex and time-consuming. But the point made by the *Woosley* panel was that complexity is not a vice in this context. *See id.* The need for an advanced understanding of applied mathematics to obey an order of the court does not make that judgment any less final for our purposes. The motion to dismiss is **DENIED**.

III

The first thing the parties dispute is the standard of review applicable to Norton's interpretation of the plan documents. Ordinarily, a plan administrator's denial-of-benefits decision is reviewed de novo. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). But if the plan "gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan," we review such decisions under the arbitrary-and-capricious standard. *Id.* at 111, 115. Further, if the plan gives the administrator discretion to make factual determinations, arbitrary-and-capricious review extends to those issues as well. *Shaw v. AT&T Umbrella Benefit Plan No. 1*, 795 F.3d 538, 547 (6th Cir. 2015). However, "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a factor in determining whether there is an abuse of discretion." *Firestone*, 489 U.S. at 115 (citation, quotation marks, and brackets omitted).

Under the Plan, the Retirement Committee serves as the Plan administrator, and is granted "the power and discretion . . . to construe all terms, provisions, conditions and limitations of the Plan," and "to determine all questions arising out of or in connection with the provisions of the Plan or its administration in any and all cases . . . ." Norton Plan § 6.06(b)(2)–(3). This language clearly invokes *Firestone* deference.

However, we have also suggested in dicta that the common-law doctrine of *contra proferentum* might apply to ERISA cases. The doctrine is traditionally used to construe ambiguous terms against the drafter of a contract. Our precedent has not been a model of clarity on the issue—in some cases, we have implied that it sweeps broadly; in others, we have expressed confusion about how *contra proferentum* and *Firestone* deference can apply at the same time. *Compare Univ. Hosps. of Cleveland v. Emerson Elec. Co.*, 202 F.3d 839 (6th Cir. 2000), *with Smiljanich v. Gen. Motors Corp.*, 182 F. App'x 480, 486 n.2 (6th Cir. 2006).

The district court recognized this confusion and did its best to obey these cases insofar as it understood them. Although the court ultimately disclaimed any reliance on the rule to decide the case, the doctrine reappears at least five times throughout the court's substantive analysis. Our review of the plan documents and the parties' disputes leads us to conclude that the Plan is ambiguous on an issue of significant importance to the parties—whether the early retirement reducers apply to the Retirees bringing this lawsuit. We think, therefore, that the law's treatment of this ambiguity is necessary to the outcome here, and compels us to examine whether *contra proferentum* can be used in conjunction with *Firestone* deference. We conclude that it cannot.

A

It appears that dicta on this issue first appeared in our cases in 1993. *See Tolley v. Commercial Life Ins. Co.*, 14 F.3d 602 (table) (6th Cir. 1993) (per curiam). That panel declined to reach the question because the insurance policy in dispute was not ambiguous. *Id.*; *see also Schachner v. Blue Cross & Blue Shield of Ohio*, 77 F.3d 889, 895 n.6 (6th Cir. 1996) (same); *Swisher-Sherman v. Provident Life & Accident Ins. Co.*, 37 F.3d 1500 (table) (6th Cir. 1994) (per curiam) (same).

In *Perez v. Aetna Life Insurance Co.*, however, the en banc court issued stronger dicta on the subject. In that case, we stated, without qualification: "The rule of *contra proferentum* provides that ambiguous contract provisions in ERISA-governed insurance contracts should be construed against the drafting party." 150 F.3d 550, 557 n.7 (6th Cir. 1998) (en banc). The dispute in *Perez* was whether a particular plan provision gave the administrator discretion to decide sufficiency-of-the-evidence questions. *Id.* at 556–57. However, the court found that the plan unambiguously did provide for such discretion, and thus did not need to apply *contra proferentum*. *See id.* at 557 n.7.

In *University Hospitals*, a panel went further, but still did not move from dicta to a holding. *University Hosps. of Cleveland v. Emerson Elec. Co.*, 202 F.3d 839 (6th Cir. 2000). In that case, we stated that "to the extent that the [p]lan's language is susceptible of more than one interpretation, we will apply the 'rule of *contra proferentum*' and construe any ambiguities against Defendants/Appellees as the drafting parties." *Id.* at 846–47. However, we ultimately concluded that the defendant's interpretation of the plan was implausible. *Id.* at 850. Since the panel concluded that the plan was unambiguous in the plaintiff's favor, its statements on *contra proferentum* were dicta.

We have since addressed *University Hospitals* and the doctrine of *contra proferentum* at least seven times. Three times, we found no ambiguity and thus did not address any potential conflict between *contra proferentum* and *Firestone*. *See Osborne v. Hartford Life & Accident Ins. Co.*, 465 F.3d 296, 300 (6th Cir. 2006); *Marquette Gen. Hosp. v. Goodman Forest Indus.*, 315 F.3d 629, 632 (6th Cir. 2003); *Ziegler v. HRB Mgmt., Inc.*, 182 F. App'x 405, 408 (6th Cir. 2006). Three other times, we have criticized the doctrine on various grounds. *Mitzel v. Anthem Life Ins. Co.*, 351 F. App'x 74, 82 (6th Cir. 2009) ("Limiting the application of the *contra proferentem* rule to cases in which an administrator's decision is reviewed de novo strikes us as the only sensible approach . . . ."); *Smiljanich v. Gen. Motors Corp.*, 182 F. App'x 480, 486 n.2 (6th Cir. 2006) (concluding that applying *contra proferentum* would be improper where *Firestone* deference applies); *Mitchell v. Dialysis Clinic, Inc.*, 18 F. App'x 349, 353–54 (6th Cir. 2001) (characterizing the statements in *University Hospitals*, *Perez*, and *Schachner* as non-binding dicta).

The only contrary case appears to be *Copeland Oaks v. Haupt*, 209 F.3d 811 (6th Cir. 2000). The *Copeland Oaks* court never used the term *contra proferentum*. But in holding the plan administrator had abused her discretion, the court stated that *Firestone* deference should not be understood to allow a plan to "avoid a default rule of insurance law applicable in the ERISA context merely by giving itself discretion to interpret the plan." *Id.* at 813. The court went on to state that "even an arbitrary and capricious standard of review can be tempered by considering conflicts of interest such as those implicit in any self-funded plan, and by construing ambiguities against a plan drafter." *Id.*

This last statement went beyond the holding in *Copeland Oaks*. That case dealt solely with the issue of whether *Firestone* discretion allowed the plan to avoid a default rule of federal insurance law (the "make-whole" rule). *Id.* We concluded that the plan could not avoid default obligations that *we* have imposed on all ERISA plans simply by interpreting the plan to its advantage. *Id.* Instead, we required a clear statement before we would conclude that the parties had chosen to abandon the make-whole rule. *Id.* at 813–14. This result is not obtained by "tempering" arbitrary and capricious review, but instead is mandated by a cardinal principle of administrative law: that ambiguity does not give administrators license to ignore fundamental policy judgments made by the governments that supervise them. *Cf. Util. Air Regulatory Grp. v. Envt'l Protection Agency*, 134 S. Ct. 2427, 2444 (2014); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125–26, 132–33 (2000).

Contra proferentum has nothing to do with this logic. It applies as a sort of equitable estoppel between parties to a contract, not as a way for parties to escape the strictures of public policy. *See, e.g.*, *Merrimack Valley Nat'l Bank v. Baird*, 363 N.E.2d 688, 690–91 (Mass. 1977) ("The author of the ambiguous term is held to any reasonable interpretation attributed to that term which is relied on by the other party."). Thus, suggestions in a case dealing with the latter issue are not necessarily helpful in the former cases.

B

Faced solely with a mountain of dicta, we move from law to reason. And we think that *contra proferentum* is inherently incompatible with *Firestone* deference. Thus, we hold that

when *Firestone* applies, a court may not invoke *contra proferentum* to "temper" arbitrary-and-capricious review. However, when it is not clear whether the administrator has, in fact, been given *Firestone* deference on a particular issue, we think the doctrine still has legitimate force.

1

In *Firestone*, the Court rejected the Plan's position that arbitrary-and-capricious review should be the norm in denial-of-benefits cases. Before ERISA, a denial-of-benefits lawsuit was governed by ordinary contract law, *unless* the plan itself "g[a]ve the employer or administrator discretionary or final authority to construe uncertain terms." *Firestone*, 489 U.S. at 112–13. When it enacted ERISA, Congress relied heavily on concepts of trust law, including the fundamental rule that the courts would construe trust terms "without deferring to either party's interpretation." *Id.* at 112. The Court was therefore skeptical that Congress meant to give employees less protection under ERISA than they possessed under pre-ERISA contract law.

But even though de novo review was the default rule, the Court recognized a significant exception. It observed that "when trustees are in existence, and capable of acting, a court of equity will not interfere to control them in the exercise of a *discretion vested in them by the instrument* under which they act." *Id.* at 111 (quoting *Nichols v. Eaton*, 91 U.S. 716, 724–25 (1875)) (emphasis supplied by the *Firestone* Court). In other words, parties to a trust may, by contract, remove certain decisions from the de novo supervision of an equity court. *Id.* A trustee therefore cannot violate the terms of the trust he or she was vested with authority over, but *could* violate the vesting clause itself through an abuse of discretion. *Id.* at 114–15.

The *contra proferentum* doctrine is, at its core, a rule of equity. *See* RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt. *a* (noting that the principle's "operation depends on the positions of the parties as they appear in litigation, and sometimes the result is hard to distinguish from a denial of effect to an unconscionable clause").[2] It compels a drafting party to be honest

[2]*See also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62–63 (1995) ("The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result."); *Merrimack Nat'l Bank*, 363 N.E.2d at 690–91 ("The author of the ambiguous term is held to any reasonable interpretation attributed to that term which is relied on by the other party."); *Westfield Ins. Co. v. Galatis*, 797 N.E.2d 1256, 1262 (Ohio

about its offer up front, by threatening to construe terms "against the offeror" if he attempts to hoodwink the other party. *Id.*; *Contra Proferentem*, BLACK'S LAW DICTIONARY (10th ed. 2014). The rule's equitable nature and its stated goals suggest that it does not make a good roommate for *Firestone*, but that it might make a good neighbor.

2

As a practical matter, we do not think a court can apply *Firestone* deference and *contra proferentum* to the same case without contradiction.

First, the *Firestone* Court labeled the discretion-vesting clauses as a turning point in the character of an ERISA plan. By conferring discretion on the administrator of a plan, ordinary rules of equity no longer operate to control the administrator–trustee absent an abuse of discretion that violates the vesting clause itself. *See Firestone*, 489 U.S. at 111. It follows that *contra proferentum*, as an equitable rule, should not be injected to micromanage this discretion or tip the scales in close cases. Whatever the precise contours of *Firestone* deference, it must include the ability to choose between two reasonable interpretations of the Plan, and that is precisely the situation in which the traditional *contra proferentum* rule operates against the drafter.

Indeed, the very point of vesting discretion in someone is to trust his or her judgment when you are lost at sea or when you need to solve a Gordian knot. It makes little sense to revoke that discretion when it is needed most—in difficult cases where there is no clear answer. In effect, applying *contra proferentum* when language is ambiguous generates a paradox where the administrator can only exercise his discretion when it is not needed, i.e., when the plan language is clear. We are certain that this is not what the Supreme Court had in mind when it decided *Firestone*.

Second, we doubt that plan-construction and denial-of-benefits decisions will be influenced by a *contra proferentum* rule. Courts construe ambiguities against a drafter to remind

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2003) (applying the rule only when the parties have unequal bargaining power); *In re Riconda*, 688 N.E.2d 248, 253 (N.Y. 1997) (invoking the rule when the drafting party had a lawyer and the other party did not).

the *next* drafter to state his terms clearly when he comes to the negotiating table. It is a prophylactic rule, not a remedial device. *See* RESTATEMENT (SECOND) OF CONTRACTS § 206 (noting that the primary aim of the rule is to discourage drafters from being "deliberately obscure"). But the kind of benefits and plan-construction decisions contemplated by ERISA are far removed from contract negotiations, where parties cannot reasonably be expected to foresee every possible negative consequence of the language they use. Indeed, it is this very uncertainty that often compels parties to vest discretion in the administrator, rather than risk de novo review under *Firestone*. The presence of an obvious vesting clause makes it hard to believe that beneficiaries will be duped by a "deliberately obscure" clause in the plan, since they have already agreed to trust the administrator's judgment in those obscure cases. And it is equally hard to believe that the administrator would deliberately write obscure benefits provisions, since that can easily develop into a headache later on (or perhaps a ten-year-long, class-action lawsuit). Thus, we do not see how *contra proferentum* has any worth as a prophylactic in these cases.

3

Neither do we think that *contra proferentum* can be "weighed" in the final analysis "in determining whether there is an abuse of discretion." *Firestone*, 489 U.S. at 115 (citation omitted) (quotation marks and brackets removed); *Copeland Oaks*, 209 F.3d at 813 (suggesting this approach). An administrator's conflict of interest is properly considered in this analysis, because fiduciaries are absolutely forbidden from acting with ulterior motives. *Firestone*, 489 U.S. at 115–16; RESTATEMENT (THIRD) OF TRUSTS § 78, cmt. *b*. Depending on the severity of the conflict, discretion exercised under these circumstances can easily be capricious, in the sense that the action is done without regard for the best interests of the beneficiary. *See id.*

Plan ambiguities do not work this way. If the administrator *deliberately* makes the Plan ambiguous so that it can invoke deference to serve its own interests, we might consider that fact under *Firestone*. But we would do so under the conflicts-of-interest rubric and the breach-of-trust doctrine, not because the plan was ambiguous. In other words, the equitable impulse to construe the Plan against the drafter comes from the administrator's malfeasance, not from the Plan's language. To the extent that we would "temper" arbitrary-and-capricious review by

construing language against the administrator, we would do so only to take account for this kind of misbehavior.

4

This does not mean that we abandon *contra proferentum* entirely. The *Firestone* Court made it clear that modifying the presumption of de novo review is a *contractual* decision. 489 U.S. at 115. And unlike denial-of-benefits and plan-construction decisions, defer-or-not decisions *are* at the forefront of ERISA plan negotiations, because that is where *Firestone* puts them. Indeed, the parties' agreement on the *Firestone* procedural rules may often be more important than the substance of the plan itself. In the immortal words of Rep. John Dingell: "I'll let you write the substance . . . you let me write the procedure. I'll screw you every time." Hearing on H.R. 2327, 98 Cong. 312 (1983).

Thus, we see the wisdom of applying *contra proferentum* to the threshold question of whether *Firestone* deference exists. The administrator has an obvious desire to operate under *Firestone* and an equally obvious motivation to obtain that result in a deliberately obscure manner. We do not think it was an accident that our first unequivocal statement on this subject occurred in an en banc case where the defer-or-not question was at issue. *Perez v. Aetna Life Ins. Co.*, 150 F.3d 550, 557 n.7 (6th Cir. 1998) (en banc). And if beneficiaries are to give the administrator the kind of trust inherent in *Firestone* deference, they ought to do so on purpose, not as the result of ambiguity.[3] But since no one disputes that the Norton plan gives the administrator *Firestone* deference here, this issue can be resolved at a later time.

In sum, we hold that if the Plan clearly gives the administrator *Firestone* deference, then *contra proferentum* has no place in reviewing the administrator's decisions. The arbitrary-and-capricious standard stays intact.

[3]We leave for another day whether *contra proferentum* applies to construe a plan where *Firestone* does not apply, as we suggested in *Mitzel v. Anthem Life Ins. Co.*, 351 F. App'x 74, 82 (6th Cir. 2009).

IV

We now move to the core of our task: construing the Plan. Mindful that we are judges—not actuaries or the "fairness police"—we ask one question, and one question only: Is the Plan language clear? If it is, we must enforce it, no matter how unfair or bizarre it might seem to Norton or to the Retirees. *Perez*, 150 F.3d at 556–57. It is simply not our job to rescue parties from the unintended consequences of complexity, sloppy drafting, or bad negotiating. *Id.* at 557. The time to close loopholes is in the offices of transactional lawyers, not in the courts fourteen years later.

To the extent that the Plan is *truly* ambiguous, *Firestone* requires the district court to defer to Norton's reasonable interpretation. The Plan is ambiguous if it is susceptible to multiple reasonable interpretations, not just because clever lawyers can disagree over the meaning of terms. *Id.* at 557 n.7. The district court held that the Plan was unambiguous on all fronts, and for the most part, we agree. However, we think that the Plan gives ambiguous instructions on one of the core disputes between the parties—whether or not the early retirement reducers apply to these plaintiffs. We therefore must vacate the district court's holding on that issue and remand for a *Firestone* analysis of Norton's proposed interpretation.

Although many different variables and formulas are involved, calculating an individual's retirement benefit under the Plan involves three steps. First, identify the applicable rules. Second, use those rules to determine the individual's Monthly Retirement Income (MRI), which is, essentially, the individual's accumulated pension entitlement expressed as an amount per month. Third, convert the MRI to the form of benefit selected by the individual, one of several different annuities or a lump sum. Both parties raise a host of arguments about interpreting discrete sections of the Plan. However, no one in this litigation has ever explained how the *whole* plan works, i.e., how to calculate benefits from start to finish. This omission makes their more nuanced arguments almost impossible to follow. We think such a roadmap is the only logical starting point, and so we draw one for ourselves, addressing the parties' disputes as they arise.

A. Step 1: Identify the Appropriate MRI Rules

The Plan divides Retirees into four categories: Normal, Early, Late, and Disability. Norton Plan § 4.03–4.06. Each category has its own rules and restrictions for calculating MRI. Thus, before we can start analyzing the benefits question, we must first identify the governing rules.

The class members in this case all retired early, and are therefore governed by § 4.05. That section gives us two tracks from which we can choose: subsection (b), which applies "[e]ffective prior to January 1, 2004," and subsection (d), which is "[e]ffective only for a Member who terminates employment on or after January 1, 2004." § 405(b), (d) (as amended). The choice is obvious. Subsection (d) governs the class. That subsection states:

> Effective only for a member who terminates employment on or after January 1, 2004, upon such Member's retirement on the Member's Early Retirement Date, the Member shall be entitled to a Monthly Retirement Income equal to the benefit described under Subsection 4.03(b), determined as of the Member's Early Retirement Date . . . provided, in no case shall such Monthly Retirement Income be less than the Member's Accrued Benefit as of December 31, 2003.

§ 405(d). It is here that we find the first piece of tension dividing the parties. Generally, a person who retires early receives less money than someone who retires on time. *See* § 4.05(a), (b). However, the Retirees point out, correctly, that the cross-reference to "Subsection 4.03(b)" refers to the rules for a person retiring on their *Normal Retirement Date*. *See* § 4.03(b).

We see tension here, but no ambiguity. Subsection 4.05(d) uses terms of equivalence, not incorporation. In other words, § 4.05(d) does not import § 4.03(b) wholesale—it simply tethers one value to another. Thus, the reader is instructed to follow the rules in § 4.03(b), except that we are to use the person's early retirement date *as if* it was a normal retirement date. Tempering the rules in § 4.03(b) with early retirement calculations at the MRI stage, as Norton suggests, would violate the mandate that the early Retirees' payment be "equal to the benefit described under Subsection 4.03(b)." § 4.05(d) (as amended). Although this distinction seems trivial, it becomes important later on in the analysis. Committed to our step-by-step process, we table its implications until that time.

B. Step 2: Calculate MRI

Section 4.03(b) contains instructions for calculating MRI. The original plan did not contain a § 4.03(b); instead, it was added by the same amendments that created § 4.05(d). These amendments split "Normal" MRI calculations into two subsections: 4.03(a), which outlines the defined-benefit scheme applicable before 2004, and 4.03(b), the new cash-balance scheme created in 2004. Section 4.03(b) instructs the reader that this benefit "shall be determined" by a two-step process. The two-step process is as follows:

> (1) First, the Member's Monthly Retirement Income determined under Paragraphs 4.03(a)(1), (2), and (3) as of December 31, 2003 . . .
>
> (2) Second, the Member's Monthly Retirement Income as determined under Paragraph 4.03(b)(1), increased monthly as follows:
>
> (A) beginning January 1, 2004 and each January 1 thereafter with respect to the Monthly Retirement Income accrued for the prior Plan Year, by a factor which, when compounded on a simple basis for twelve (12) months, would produce the Index for the applicable Plan Year, and
>
> (B) commencing January 1, 2004, by an increasing monthly income accrued at the rate of one two hundred twelfth of a percentage of the Member's Compensation for any Plan Year in which the Member completes one thousand (1000) Hours of Service based on the following schedule [omitted].

§ 4.03(b)(1)–(2).[4]

Thus, § 4.03(b) tells us to add two numbers together to find the MRI. The base number is the amount accrued under the old defined-benefit system. § 4.03(b)(1). That number is then "increased" by the benefit accrued under the cash-balance system established in 2004. § 4.03(b)(2). There does not appear to be much dispute over how the (b)(2) number is calculated. Thus, we stick to resolving the dispute under (b)(1).

Subsection (b)(1) concerns the MRI accumulated under the defined-benefit scheme "as of December 31, 2003." § 4.03(b)(1). This number is static—it is determined at the close of 2003,

[4]Section 4.03(b) also includes a third step based on '"set aside' hours as of December 31, 1991," which is inapplicable here.

and remains unchanged whether the employee retired on January 1, 2004, or January 1, 2014. *Id.* In other words, *everyone* covered by the defined-benefit plan "retired" en masse from that plan on December 31, 2003. Any post-2003 benefits are accounted for in the cash-balance calculation created by § 4.03(b)(2). This is important because the 2004 amendments are not retroactive beyond January 1, 2004. Therefore, other than the instruction that we are to use December 31, 2003 as the cutoff or "retirement" date for benefits, we must ignore the 2004 amendments until we resurface from the defined-benefit calculation.

Jump in the time machine. The old plan only had a defined-benefit system, governed by § 4.03(a). That section states:

> When a Member lives to his Normal Retirement Date, he shall be entitled to retire and to receive a Monthly Retirement Income in an amount certified to the Trustee by the Retirement Committee. The amount of the Member's Monthly Retirement Income under the basic form described in Section 4.02(a) and payable at his Normal Retirement Date shall be equal to the largest of the amounts provided under the applicable provisions of paragraphs (1), (2) or (3) hereof . . . .

Id. § 4.03(a). The parties agree that paragraph (3) is the winner, at least for Khaliel, who is the class representative. The relevant language states:

> (3) For a Member with an NKC Accrued Benefit, the greater of (A) or (B):
>
> (A) one and two-thirds percent (1-2/3%) of the Member's Average Monthly Earnings, such amount multiplied by the Member's years of Credited Service, minus the lesser of [two actuarial calculations].
>
> (B) The NKC accrued benefit.
>
> Such monthly amount shall be converted to a single sum on the basis of the interest rate or rates . . . for 30-year Treasury securities for the second month prior to the beginning of the applicable Plan Year and the mortality table prescribed by the Secretary of the Treasury and the resulting amount divided by 212.

§ 4.03(a)(3). Subparagraph (A) refers to a Traditionally Accrued (or "TRAC") benefit. Subparagraph (B) refers to the Accrued Benefit under the pre-merger plan. The parties seem to agree that Subparagraph (A) is the winner, again, for Khalil. But that is where the agreement ends.

The final paragraph quoted above is at the center of the parties' dispute. Under the calculations prescribed in that paragraph, a nonincreasing monthly benefit is converted into an increasing benefit—one that begins smaller, but increases over time to account for inflation. The Retirees, apparently, believe that the subparagraph (A) benefit is *already* an increasing benefit, while the subparagraph (B) benefit is not. Thus, they argue, it makes no sense to apply the translation formula to subparagraph (A) again. Norton takes the opposite position, arguing that both benefits are nonincreasing, and therefore that the translation is necessary for both.

We need not get tied up in deciding who has the better argument on how the subparagraphs operate in isolation. That is a question to be answered by the district court in the first instance after hearing expert testimony from the parties.[5] More importantly, however, the minutiae of benefits calculations cannot control the answer given by the structure of § 4.03(a)(3). Such analysis puts the cart before the horse: our first question is not what makes *sense* in the context of the plan calculations; we ask, instead, what the plan *says*. Here, the final paragraph lacks an introductory number or letter. However, it is aligned at the left margin with the introductory language of § 4.03(a)(3) and with the subsection designations (A) and (B). We can think of no reason that a drafter would do this other than to make the final paragraph applicable to all of subsection 4.03(a)(3). Indeed, if the final paragraph was only supposed to apply to subparagraph (B), then we would expect it to either be appended to (B) without separation or be indented to the same extent that sub-subparagraphs (A)(i) and (ii), applicable only to (A), are indented. It's not. The inferences drawn by the Retirees—from § 4.03 or elsewhere—do not

[5]The district court refused to consider expert testimony at all during the liability stage. We think this was error. As the district court recognized, expert testimony is admissible to clarify or define trade usage and terms of art. The district court's October 30, 2013 order striking Parks's testimony states that "[t]here is no indication that any of the terms" of the Plan "are of special/technical usage or trade usage." However, the district court's summary judgment order, issued the very next day, stated that (1) interpreting the Plan had been "challenging," and "easier said than done," and (2) the court had struggled to understand the effect of the Plan's various amendments, and that trying to do so was "like traversing a matrix," because "the complexity of documents" and their "piecemeal nature" made the task "daunting for all concerned." The district court also acknowledged that its opinion represented "an *attempt* to interpret the plain meaning of the text *where available*." In light of this admirable honesty and our own review of the Plan, it is clear that expert testimony would be exceedingly helpful. *See* Fed. R. Evid. 702. To the extent that further interpretation is required on remand, we think the district court would be well-advised to accept reasonable proffers of expert testimony from the parties.

overcome the unambiguous structure of the section.[6] The extent to which our holding here influences the district court's resolution of the increasing-or-nonincreasing debate is up to the district court's sound evaluation of the expert testimony.

In sum, we hold that the such-monthly-amount paragraph applies to all of § 4.03(a)(3), not just to subparagraph (B). We therefore affirm the district court's judgment on this issue.

C. Step 3: Convert MRI into the appropriate lump-sum benefit

To reiterate: a person's MRI under the Plan is the appropriate amount from § 4.03(a) plus the amount accrued under § 4.03(b)(2). Once we go back up through the decision tree to § 4.05(d), we are ready to convert the MRI into the form elected by the Plan Member.

The run-of-the-mill Plan Member will receive monthly payments from the Plan under the "Basic Form." The Basic Form is an "increasing monthly income commencing on the Member's Disability, Early, Normal or Late Retirement Date . . . and continuing for sixty (60) months certain and for his lifetime thereafter." § 4.02(a). However, if a Member follows the proper steps, he can "elect . . . to receive his Monthly Retirement Income in one of the alternative forms listed below." § 4.02(b). One of those forms is a lump sum, which is at issue here.

The lump sum rules are in § 4.02(b)(6). That section states:

> [An] alternative form[] include[s] [a] lump sum payment payable at the Member's Disability, Early, Normal or Late Retirement Date . . . calculated by multiplying the increasing Monthly Retirement Income determined under the applicable Section by 212 and, if the Monthly Retirement Income is due to Early Retirement or Disability Retirement, dividing by one (1) minus the appropriate reduction factor under Section 4.05(b)(5), Section 4.06(a)(5) or Section 5.01(c)(5), as applicable.

§ 4.02(b)(6). The "applicable Section" here is clearly § 4.05(d), and by extension, § 4.03(b). Thus, the lump sum is simply the MRI derived under § 4.03(a) and § 4.03(b)(2), multiplied by

[6]The Retirees argue that the 2008 version of the Plan demonstrates that the final paragraph of § 4.03(a)(3) in the 2004 version was not meant to be part of the MRI calculation. True, the disputed paragraph does not appear in the 2008 Plan's § 4.03(b)(3) (the analogue of § 4.03(a)(3) in the 1997 Plan). The parallel provision in the 1997 Plan's § 4.03(a)(2) is also gone from its 2008 analogue, § 4.03(b)(2). However, as Norton correctly points out, the relevant language has simply been placed in a new § 4.03(c), which applies to both §§ 4.03(b)(2) and (3). The Retirees' argument is therefore without merit.

212 and divided by one minus the reduction factor, as appropriate. The parties, however, present us with two quarrels about this math. First, the Retirees claim that the value of this lump sum must include the value of an increasing monthly income for sixty months certain, which basic-form beneficiaries get under § 4.02(a). Second, the Retirees claim that the early retirement reducers referenced in § 4.02(b)(6) were impliedly repealed by the 2004 amendments and do not apply to them. The district court agreed with the Retirees.

1

The Retirees contend that any lump sum must include the actuarial value of an increasing monthly income, guaranteed for sixty months certain. They reach this conclusion by arguing that the MRI under § 4.03(b) is identical to the Basic Form identified in § 4.02(a), and the Basic Form *does* require an increasing income for sixty months certain.

The Retirees' argument is based on two observations. First, they point out that § 4.03(b) states that "the amount of the Member's Monthly Retirement Income under the basic form described in Section 4.02(a)" shall be determined by certain calculations. Therefore, they reason, the MRI is equivalent to the basic form and must abide by the same rules. Second, § 4.02(a) states that "[t]he basic form of Retirement Benefit (to which the formula indicated in Section 4.03 applies) shall be an increasing monthly income . . . continuing for sixty (60) months certain and for [the retiree's] lifetime thereafter." The Retirees claim that since the basic form "shall be determined" per § 4.03(b) *and* "shall be an increasing monthly income" for sixty months certain per § 4.02(a), the MRI determined under § 4.03(b) is identical to the sixty-months-certain, increasing monthly income described under § 4.02(a). We disagree.

The district court reasoned that "4.03(b) . . . explicitly states the MRI shall be in 'the basic form described in Section 4.02(a).'" This is only a half-truth. Section 4.03(b) states that "the amount of the Member's [MRI] under the basic form described in Section 4.02(a) . . . *shall be determined as set forth in paragraphs (1) and (2) hereof* . . . ." § 4.03(b) (emphasis added). The emphasized language reveals that the district court was paddling against the current—it put the words "shall be" in the wrong spot. Under § 4.03(b), MRI is determined by reference to the two subparagraphs, *not* by reference to the basic-form rules. The words "under the basic form

described in Section 4.02(a)" simply direct the reader on how to apply the output of the MRI calculation. § 4.03(b). In other words, the basic-form rules lie *downstream* from § 4.03(b), while the MRI calculation lies *upstream*. The beneficiary's election of an alternative form merely diverts the MRI output through a separate fork in the river.

This is confirmed by the lump-sum rules. Those rules instruct the reader to use the MRI "determined under the applicable Section," not the MRI as expressed by the basic-form rules. § 4.02(b)(6). The basic-form rules do not determine MRI, or provide any instructions for doing so, and therefore cannot be the "applicable Section." The basic-form section is, by its terms, a discussion of *form*, not substance. In contrast, § 4.03(b) provides detailed, substantive instructions on how to calculate MRI, and is therefore the "applicable Section" for § 4.02(b)(6) purposes.

However, this does not mean that the Retirees receive a nonincreasing benefit. The lump-sum rules themselves declare that the Plan must use an "increasing Monthly Retirement Income determined under the applicable Section." § 4.02(b)(6). Thus, regardless of what any other Part of the plan says, § 4.02(b)(6) itself requires that the input be an increasing MRI. Indeed, the expert testimony in the record, discussed above, suggests the MRI will always be increasing at this stage in the math, but the district court is free to examine this issue in more detail. However, because this section is silent about the sixty-months-certain issue, we hold that the Plan itself does not require the lump sum to account for that variance.

2

This is not the end of the matter. ERISA requires that any lump-sum alternative be the "actuarial equivalent" of the basic-form benefit. 29 U.S.C. § 1054(c)(3). Because the district court did not address actuarial equivalence, a remand is necessary to answer this question.

ERISA mandates that "lump-sum payments . . . must be the actuarial equivalent of the normal accrued pension benefit." *West v. AK Steel Corp.*, 484 F.3d 395, 400 (6th Cir. 2007). The Retirees seize upon this doctrine to argue that a lump-sum benefit must include the actuarial value of an increasing monthly income for sixty months certain, since the basic-form benefit provides for those features. Norton counters that the lump sum benefit is *already* based on an

increasing monthly income. This is true. However, § 4.02(b)(6) does not appear to include the sixty-months-certain feature of the basic-form benefit. ERISA requires Norton to account for that feature.

Further, Norton has complied with ERISA only if *all* its actuarial assumptions are valid, taken together. In other words, the calculation in § 4.02(b)(6)—multiplying the § 4.03(b) MRI by 212 and then dividing by one minus any applicable reduction factor—must produce a lump sum that is actuarially equivalent to the increasing, sixty-months-certain lifetime annuity provided under the basic-form rules. *See West*, 484 F.3d at 400. All of the Plan's other actuarial conversions, such as calculations from § 4.03(a)(3), must also be valid. According to Norton's experts, they are. The district court, however, struck the experts' reports and did not address this issue in its liability order.[7]

This made granting summary judgment for the Retirees inappropriate. Whether the actuarial-equivalence requirement is satisfied is a factual dispute. And because the court granted the *Retirees'* motion, it was obligated to consider the evidence in the light most favorable to Norton. *Cockrel v. Shelby Cty. Sch. Dist.*, 270 F.3d 1036, 1056 (6th Cir. 2001). We think this would naturally include Norton's experts' explanation of how the actuarial conversions work. The court need not ultimately *accept* those explanations as the factfinder, but it must do so on the Retirees' motion for summary judgment. *Id.* Because there is a genuine issue of material fact, and because we have altered the district court's interpretation of the plan, neither party is entitled to summary judgment on this question. We therefore vacate the district court's grant of summary judgment and remand for further examination of the actuarial-equivalence issue.

[7]The district court did consider expert opinions at the damages stage and found Plaintiffs' expert's opinion on actuarial equivalence more persuasive. But at that point, the experts' opinions had accounted for the consequences of the district court's merits rulings. It is unclear whether or to what extent their competing formulas would have been different had the district court correctly interpreted the Plan. It is also unclear whether this might have changed the district court's conclusions about the experts' persuasiveness. Thus, remand is appropriate to allow both the parties and the district court to address the actuarial equivalence issue for the first time under our interpretation of the Plan.

3

At long last, we reach the final plan-interpretation issue. And it is here that we find the ambiguity mandating *Firestone* deference. Section 4.02(b)(6) states that "if the Monthly Retirement Income is due to Early Retirement . . . [the lump sum shall be calculated by] dividing [the MRI] by one (1) minus the appropriate reduction factor under Section 4.05(b)(5), Section 4.06(a)(5) or Section 5.01(c)(5), as applicable." These sections have the effect of reducing a lump-sum benefit in proportion to the "earliness" of a person's retirement. Section 4.05(b)(5) is the governing rule for early retirees.[8] Subparagraph (b)(5) comes on the heels of four other paragraphs explaining how to calculate MRI for a Member who retires before January 1, 2004. Section 4.05(b) (as amended) states:

> Effective prior to January 1, 2004, upon the Member's retirement on his Early Retirement Date, he shall be entitled to a Monthly Retirement Income equal to the largest of the amounts provided under the applicable provisions of paragraphs (1), (2) or (3) below . . . .
>
> (1) The sum of [§ 4.03(a)(1), reduced by certain fractional amounts, and (a)(1)(B)];
>
> (2) For a Member with a Methodist Accrued Benefit, a reduced Monthly Retirement Income equal to his Accrued Benefit determined under Sections 2.01(a)(2) and 4.03(a)(2) as of his Early Retirement Date, [reduced by the subparagraph (1) fractions]
>
> (3) For a Member with an NKC Accrued Benefit, [do the same calculation as in (2), but use § 4.03(a)(3), instead of § 4.03(a)(2)].
>
> (4) [omitted as immaterial].
>
> (5) Anything herein to the contrary notwithstanding, the Monthly Retirement Income described in paragraphs (1), (2), (3) and (4) above [sic] be reduced or further reduced by one three hundredths (1/300) for each month by which the Member's Early Retirement Date precedes his Normal Retirement Date.

This is where the confusion sets in. "[P]aragraphs (1), (2), (3) and (4)" all refer to MRI calculations that were expressly made "effective prior to January 1, 2004." § 4.05(b)(5); Plan Amendments, § 6 (Jan. 2004). The amendments did not modify the cross-reference in

[8]Sections 4.06(a)(5) and 5.01(c)(5) apply to disability retirement and severance pay, respectively.

§ 4.02(b)(6); neither did they create a parallel reduction scheme for post-2004 early retirees. The Retirees claim that the amendments thereby "subsidized" early retirement by eliminating the reducers. Norton claims that it never intended to create such a subsidy, and that the lump-sum rules obviously contemplate that *all* early retirees will have their benefits reduced. We think that the Plan is ambiguous on this point. Under *Firestone*, therefore, the district court was obligated to determine whether Norton's interpretation was a reasonable way to resolve the ambiguity.

The Retirees' argument is plausible as a matter of the plain text of the Plan. At no point in our calculation of MRI do we encounter the rules in § 4.05(b). The first time they come up in the decision tree is during the lump-sum conversion. This appears to be intentional. A post-2004 early retiree is expressly governed by § 4.05(d), *not* § 4.05(b). That section, in turn, refers us to the normal-retirement rules in § 4.03(b). Thus, on the front end, the text of the plan strongly suggests that the Retirees *do* get the benefit of the normal-retirement rules, sans reductions. The lump-sum rules seem to dictate this outcome as well. Section 4.05(b)(5) is expressly limited in its operation to "the Monthly Retirement Income described in paragraphs (1), (2), (3) and (4) above." Since the Retirees' MRI was not calculated by way of those paragraphs, it is hard to see how subsection (b)(5) would apply, either.

However, Norton presents a plausible counter-point. The lump-sum rules do command that the MRI shall be reduced "if the [MRI] is due to Early Retirement," and that the reduction shall be accomplished by the rules in one of three sections, "as applicable." § 4.02(b)(6). The district court's view, essentially, was that the phrase "as applicable" in § 4.02(b)(6) means the cross-reference to the reducers only operates if § 4.05(b)(5) is applicable on its own terms; that is, only if the retiree's MRI has been calculated under § 4.05(b)(1)–(4). Norton correctly points out, however, that § 4.02(b)(6) says "as applicable," not "if applicable." We presume that this change in wording has real meaning, since the Plan drafters used the words "if applicable" many other times in the Plan documents, including in the 2004 Amendments. *See, e.g.*, Plan Amendments § 4 (Jan. 2004); Norton Plan § 2.01(a).

In sum, for post-2004 early Retirees, the Plan commands us to apply a section that, by its terms, does not apply. This is a classic example of a patent ambiguity.[9] We suspect that during the amendment process, someone either failed to account for this particular fact pattern or neglected to include language clarifying that the reducers applied to post-2004 early retirees. But since we cannot discern the contours of the parties' intent from the text of the document, *Firestone* requires the courts to defer to Norton's interpretation unless it is arbitrary and capricious. However, this is a question that the district court should decide in the first instance. The district court refused to consider expert testimony on Norton's interpretation of the Plan at the liability stage, and as we have said, we believe such testimony is necessary to fully understand whether Norton's position is arbitrary and capricious. Since the record lacks a complete explanation for Norton's position, we think a remand is the best course of action. We therefore vacate the district court's holding that the Plan unambiguously favored the Retirees on this point, and we remand with instructions to apply *Firestone* deference.

V

The district court concluded that Kentucky's five-year limitations period for statutory claims applies in this case, rather than the fifteen-year limitations period for claims on written contracts. It also refused to decertify the class. Both issues are contested on appeal, and we address each in turn.

---

[9]Judge White contends that the only ambiguity here is whether or not the MRI should be *increased* by dividing by a § 4.02(b)(6) fraction (which yields a larger number). This reading would essentially generate a "buyout" incentive for employees to retire early, since the MRI reductions are no longer taken upstream because of § 4.05(d). Judge White thinks the ambiguity ends there; in other words, she believes the only reasonable choice is between a lump-sum that is the *same* as a normal retiree (obtained by ignoring the plain text of the plan) or that is *greater* than a normal retiree (obtained by applying the reversal even though no reduction was taken). We disagree. Norton presents a third plausible option. As Judge White observes, the § 4.02(b)(6) fraction existed in the old Plan solely to reverse a reduction taken during the MRI process. The new Plan shifts the MRI calculation away from the front-end reducers, but still retained the reversal on the back end. We think a third plausible option is that the reversal must be viewed in light of the reduction that traditionally precedes it. By retaining the reversal, Norton argues, the Plan implicitly contemplates some sort of earlier reduction. Otherwise, the text of the Plan would create an elephantine buyout hidden in an unlikely mousehole—as we stated above, § 4.02 is about form, not substance. We think that this nudges the tension identified in Part IV.A into a full-fledged ambiguity and requires a remand for a *Firestone* analysis.

Judge White also concludes that adopting this third interpretation would be arbitrary and capricious. In our view, the record is insufficient to support this position as a matter of law, since the district judge held that the Plan was unambiguous. A remand is therefore necessary to fully examine the issue.

A

The Retirees contend that the district court should have applied a longer limitations period to their underpayment claims. *See* 29 U.S.C. § 1132(a)(1)(B). We agree. "ERISA does not explicitly provide a limitations period for § 1132(a)(1)(B) claims," so "courts fill the statutory gap using federal common law," and we look to the most analogous state statute of limitations to answer that question. *Patterson v. Chrysler Grp., LLC*, 845 F.3d 756, 762 (6th Cir. 2017). We have held that "when a plaintiff seeks benefits under the plan and those claims depend on alleged violations of ERISA's statutory protections, Kentucky's five-year limitations period applies." *Fallin v. Commonwealth Indus., Inc.*, 695 F.3d 512, 515 (6th Cir. 2012) (internal quotation marks omitted). In contrast, when a claim is based on the contract alone, then Kentucky's longer statute of limitations for contract claims applies. *Redmon v. Sud–Chemie Inc. Ret. Plan*, 547 F.3d 531, 537 (6th Cir. 2008).

To the extent that the Retirees' claims are based solely on the improper interpretation of the Plan terms, the contract limitations period must apply. As we explained in *Redmon*:

> The plaintiffs in *Fallin* alleged that certain amendments to their employee retirement benefit plan violated the protections afforded them by ERISA. Although plaintiffs in *Fallin* also sought benefits under the plan, the benefits claim depended on the alleged violations of ERISA's statutory protections. Here, Redmon does not dispute that she signed the DFBP waiver. Rather, she argues that the plan administrator obtained her signature in violation of ERISA. She alleges that her waiver of survivor benefits was therefore invalid under ERISA and that she is entitled to the benefits she would have received if she had not signed the waiver. Redmon's claim for benefits therefore depends on a finding that her signature was invalidly obtained in violation of ERISA. Thus, her claim for benefits can be said to arise more specifically from ERISA's statutory protections than from an independent contract between the Redmons and Sud–Chemie. The result might be different if, for example, Redmon contested the authenticity of the signature on the DFBP. Such a claim might present an issue of contract law.

Id. This is such a case. At least as to their underpayment claims, the retirees argue that Norton misconstrued the Plan terms and failed to pay them what the Plan required. Absent some indication that this cause of action depends on "ERISA's statutory protections" rather than on the

interpretation of the contract, the most analogous limitations period here would be that which Kentucky applies to contract claims. *Id.*

Thus, we hold that to the extent the retirees' claims are based on alleged misinterpretations of the Plan, they are governed by Kentucky's contractual limitations period. The retirees' actuarial-equivalence claims remain governed by the statutory limitations period.

B

Norton also challenges the district court's certification of the class at both the liability and damages stages. We will not reverse a certification decision in the absence of "a strong showing that the district court's decision amounted to a clear abuse of discretion." *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 850 (6th Cir. 2013). "An abuse of discretion occurs if the district court relies on clearly erroneous findings of fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment." *Id.* Any class certification must satisfy Rule 23(a)'s requirement of numerosity, commonality, typicality, and adequate representation. Further, a class action must fit under at least one of the categories identified in Rule 23(b). The district court must conduct "a 'rigorous analysis' . . . as to all the requirements of Rule 23." *Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich.*, 654 F.3d 618, 630 (6th Cir. 2011).

1

In 2011, the district court certified the class under Rules 23(b)(1)(A) and (b)(2). It defined the class as:

> All participants in the Norton Healthcare, Inc. Retirement Plan, its predecessors and successors, whose contractual lump sum pension benefits:
>
> (1) Did not include the value of the basic form of benefit – an "increasing monthly retirement income" (annual cost-of-living adjustment) – when election of such basic form would have yielded the highest value for the participant; and/or

(2) Did not include the value of the "alternative" lump sum benefit where the basic form of benefit is multiplied by 212, when election of such alternative form would have yielded the highest value for the participant; and/or

(3) Did not include the value of the early retirement subsidy.

We assess the (b)(2) certification first. Rule 23(b)(2) applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Any analysis of a (b)(2) certification must start with the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes.* In *Dukes*, the Court unanimously held that Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." 564 U.S. 338, 360–61 (2011). Instead, the Court stated that "individualized monetary claims belong in Rule 23(b)(3)," noting the due-process issues raised by binding a (b)(2) class without notice and an opportunity to opt out. *Id.* at 361–63. Further, the Court stated:

> The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them. In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class.

Id. at 360 (internal citations and quotation marks omitted). The Court held open the possibility, however, that (b)(2) certification might be appropriate when monetary relief is "incidental to . . . injunctive or declaratory relief." *Id.* (internal quotation marks omitted).

Our precedent speaks to this residual question. In *Gooch v. Life Investors Insurance Co. of America*, the ultimate issue was "the difference between the charges for which [each class member] was billed and the amount that [the defendant] paid." 672 F.3d 402, 409, 428 n.15 (6th Cir. 2012). We held that those issues required (b)(3) certification. *Id.* at 428 n.15. However, we also stated that "Rule 23(b)(2) certification remains available . . . when the plaintiffs seek a declaration about the meaning of a contract," even "when the declaratory relief serves as a predicate for later monetary relief." *Id.* at 427, 429.

Importantly, *Gooch* approved the practice of bifurcated certification: subrule (b)(2) certification for contract interpretation, and subrule (b)(3) certification of classes and subclasses for determining damages. *Id.* at 427–28. Although we have yet to extend this approach to post-*Dukes* ERISA cases, the Seventh Circuit has done so. *Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 371 (7th Cir. 2012) ("[A]ll that the class is seeking . . . at least initially, is a reformation of the Meriter pension plan—a declaration of the rights that the plan confers and an injunction ordering Meriter to conform the text of the plan to the declaration."). We think *Gooch* is equally applicable to ERISA plans, as demonstrated by the logic in *Johnson*. Therefore, the district court did not abuse its discretion by certifying the class under Rule 23(b)(2) for plan-interpretation purposes. Since the plan must mean the same thing regardless of the person to whom it applies, "uniform declaratory relief is appropriate." *Gooch*, 672 F.3d at 428; *Johnson*, 702 F.3d at 371.

The fact that the district court also certified the class under Rule 23(b)(1)(A) does not change that conclusion. Rule 23(b)(1)(A) permits certification when separate actions "would create a risk of . . . inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." As the Supreme Court has explained,

> Rule 23(b)(1)(A) takes in cases where the party is obliged by law to treat the members of the class alike (a utility acting toward customers; a government imposing a tax), or where the party must treat all alike as a matter of practical necessity (a riparian owner using water as against downriver owners).

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997) (internal quotation marks omitted).

The district court did not abuse its discretion by certifying a Rule 23(b)(1)(A) class at the liability stage. At that point in the case, the issue before the district court was the interpretation of the Plan. ERISA administrators may not discriminate between similarly situated beneficiaries. *Varity Corp. v. Howe*, 516 U.S. 489, 514 (1996); *Alday v. Raytheon Co.*, 619 F. Supp. 2d 726, 736 (D. Ariz. 2008) ("ERISA requires plan administrators to treat all similarly situated participants in a consistent manner."); *Adams v. Anheuser–Busch Cos.*, No. 2:10-CV-826, 2012 WL 1058961, at *10 (S.D. Ohio, Mar. 28, 2012). Here, individual actions by multiple retirees

would clearly have created a risk of "inconsistent or varying adjudications" that "would establish incompatible standards of conduct" for Norton. Fed. R. Civ. P. 23(b)(1)(A). We therefore affirm the district court's certification, but only as it relates to the liability and plan-interpretation aspects of the case.

2

Throughout its hearings on damages, the district court refined its definition of the class. It held that the class includes all retirees who took lump-sum distributions after January 30, 2003, regardless of whether their benefit was ultimately determined on a cash-balance or defined-benefit basis, but not disability retirees or those receiving mandatory lump-sum payments. On appeal, Norton argues that certification under Rules 23(b)(1)(A) and (b)(2) was inappropriate; that retirees whose lump-sum distribution was determined on a cash-balance basis should not have been included in the class; and that, as ultimately defined, the class contains members with antagonistic interests, at least some of whom cannot be adequately represented by Khaliel. We hold that the district court abused its discretion by failing to engage in a meaningful analysis under *Dukes* when certifying a damages class. We therefore vacate the district court's decision on this point and remand for a more thorough analysis.

We address the (b)(2) problem first. *Dukes* was clear that when a case involves individualized damages awards, a damages class cannot be certified under subrule (b)(2). *Dukes*, 564 U.S. at 360–62. And it is clear from the record that the amount of any individual class member's award may vary wildly depending on their circumstances. This reality should have prompted the district court to consider the due-process concerns highlighted by the Supreme Court in *Dukes*. *See id.* at 362–63; *Randleman v. Fid. Nat'l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011) (stating that district courts have a "continuing obligation to ensure that the class certification requirements are met"). The district court, however, said only: "This Court has previously considered and denied Norton's motion to alter or amend the class certification order. . . . Having considered Norton's renewed arguments against class certification, this Court finds that its previous certification will stand." But this order contains no substantive discussion of certifying a *damages* class under Rule 23(b)(2).

This does not satisfy the "rigorous analysis" requirement. *Pipefitters*, 654 F.3d at 629–30. In *Pipefitters*, the district court issued an order certifying a class "for the reasons stated on the record." *Id.* at 628. At the relevant hearing, the district court had done little more than recite the applicable rule and state that its requirements were satisfied. *Id.* We reversed, holding that the district court had not addressed "the basic facts" underlying its decision. *Id.* at 629. Here, the district court did even less than the district court in *Pipefitters*. Indeed, the district court has never addressed the due-process issues raised by *Dukes* at all, much less analyzed them in light of the facts of this case. On remand, the district court must address this issue prior to certifying a damages class under subrule (b)(2).

The district court's (b)(1)(A) certification is also suspect on these grounds. Only Rule 23(b)(2) was at issue in *Dukes*, and the Court did not address whether its holding applied to Rule 23(b)(1) classes. 564 U.S. at 346 n.2. But the due process concerns that led the Court to conclude that "individualized monetary claims belong in Rule 23(b)(3)" are similar for (b)(1) classes. *Id.* at 361–62; *see* WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:13 (5th ed. 2017). Thus, for the same reasons discussed above, the district court abused its discretion by failing to address these issues in a meaningful way. Although the district court may be within its authority to certify a damages class under (b)(1)(A), it must address these issues first.

In sum, to the extent that the district court certified the class for plan-interpretation purposes, that decision is affirmed. To the extent that its certification extended to damages calculations, we vacate the certification and remand for further proceedings consistent with this opinion. We do not reach the remainder of the parties' class-certification arguments. The parties also raise arguments about the damages formula adopted by the court and the appropriate rate of prejudgment interest. Because our resolution of the merits of this case requires us to vacate the award of damages, these issues are no longer ripe.

VI

This is not an easy case. We hope that our opinion today lends some finality to the major legal issues presented by the parties. To the extent that uncertainties remain, we reiterate the importance of the judicial role under *Firestone*: Ask only if the plan is ambiguous. If it is,

Norton's decisions—factual and interpretive—must stand unless they are arbitrary and capricious.

Except as stated below, we **AFFIRM** the judgment of the district court. The district court's order dismissing certain contract claims as barred by the statute of limitations is **REVERSED**. Further, the district court's order granting summary judgment to Plaintiffs is **VACATED IN PART** insofar as it (a) held that the plan unambiguously subsidized early retirement; (b) held that the plan required Norton to pay a lump sum including the value of sixty-months-certain benefits; and (c) disposed of the actuarial-equivalence issue. Consequently, the district court's damages order is **VACATED**—including as it relates to class certification at the damages stage—and the case is **REMANDED** for proceedings not inconsistent with this opinion.

CONCURRING IN PART AND DISSENTING IN PART

HELENE N. WHITE, Circuit Judge, concurring in part and dissenting in part. I concur in the majority opinion except for Part IV. C. 3., addressing the early-retirement/lump sum issue, and Part III., addressing the applicability of the doctrine of *contra proferentum*.

The majority concludes that the Plan is ambiguous regarding reductions for early retirement, and remands for further consideration and application of *Firestone* deference. I would affirm the grant of summary judgment to the Retirees on this issue based on the unambiguous provisions of the Plan. As the majority opinion explains, 4.05(b), which contains all the early-retirement reductions, including the 4.05(b)(5) reduction at issue here, applies to Members who retired before January 1, 2004. (Maj. Op. at 23.) For Members retiring after that date, 4.05(b) was replaced with 4.05(d), which adopts 4.03(b)(3) as the applicable formula. Section 4.03(b)(3) has no reductions for early retirement. The majority and I agree that the old 4.05(b) reductions do not apply based on the express language of section 4.05. (*Id.* at 35.)

The majority concludes, however, that ambiguity is introduced by 4.02(b)(6), which continues to refer to 4.05(b)(5), and other reducers, notwithstanding that they no longer apply. (*Id.* at 34-36.) Section 4.02(b)(6) states:

> A lump sum payment payable at the Member's Disability, Early, Normal or Late Retirement Date or the date specified in Section 5.01, and calculated by multiplying the increasing Monthly Retirement Income determined under the applicable Section by 212 and, if the Monthly Retirement Income is due to Early Retirement or Disability Retirement, dividing by one (1) minus the appropriate reduction factor under Section 4.05(b)(5), Section 4.06(a)(5) or Section 5.01(c)(5), as applicable.

In response to the Retirees' analysis of the Plan language, the majority states that "Norton presents a plausible counter-point. The lump-sum rules do command that the MRI shall be reduced 'if the [MRI] is due to Early Retirement,' and that the reduction shall be accomplished by the rules in one of three sections, 'as applicable.'" (*Id.* at 35.) It is here that I part ways with the majority. The lump-sum rules do *not* command that the MRI be reduced if the MRI is due to

early retirement. Nowhere are the words "the MRI shall be reduced if due to early retirement," or similar words, found in the section. Instead, the section sets forth a formula for converting the MRI into a lump sum. This formula instructs that the lump-sum payment be calculated by multiplying the MRI by 212, and "if the Monthly Retirement Income is due to Early Retirement," "dividing by one (1) minus the appropriate reduction factor under Section 4.05(b)(5), . . . as applicable." Applying this second step does not reduce the MRI; it *increases* it. Mathematically, it cannot be disputed that if after multiplying the MRI by 212 as instructed, one goes on to divide that product by 1 minus the appropriate reduction factor under 4.05(b)(5), the lump-sum payment goes up, not down; dividing a number by a number that is less than 1 increases the number. This is not a drafting mistake. The Form of Benefit section makes an adjustment for early-retirement reductions that were at one time taken upstream of the 4.02(b) calculations. All of the 4.02(b) alternatives intentionally restore the early-retirement MRIs to their values before the early-retirement reduction by dividing by one minus the applicable reduction. And Norton's proposed calculations do so as well. (*See infra* note 2.)

Thus, reading section 4.05 on Early Retirement and section 4.02(b)(6) on lump-sum payments together does, indeed, reveal an ambiguity, because 4.02(b)(6) continues to refer to 4.05(b)(5) and the other reducers, and reverses early-retirement reductions that are no longer applicable. But that ambiguity is not whether the 4.05(b)(5) reduction should be taken; it is whether the 4.02(b)(6) formula (which increases the payment) should still apply in light of the elimination of 4.05(b)(5)'s upstream reductions. The majority observes that "for the post-2004 early Retirees, the Plan commands us to apply a section that, by its terms, does not apply. This is a classic example of a patent ambiguity. . . . But since we cannot discern the contours of the parties' intent from the text of the document, *Firestone* requires the courts to defer to Norton's interpretation unless it is arbitrary and capricious." (Maj. Op. at 36.) I agree. But this does not lead to the conclusion the majority reaches.

Any reading of the Plan that fails to recognize that 4.05(d) rendered all the provisions of 4.05(b), including 4.05(b)(5), inapplicable would be arbitrary and capricious. As explained, the ambiguity introduced by 4.02(b)(6) is not whether to apply the reduction found in 4.05(b)(5) itself, because it clearly no longer applies; the ambiguity is whether 4.02(b)(6) should be applied

in accordance with its explicit terms, or whether the final adjustment (dividing by 1 minus the reduction factor) should be ignored because the reduction was never taken. This is the issue regarding which Norton is entitled to *Firestone* deference. But because the Retirees do not argue that they are entitled to have their MRIs increased under 4.02(b)(6), and argue only that Norton wrongly decreased their benefits under 4.05(b)(5), we do not have to address the real ambiguity.[1] Because Norton's contention that 4.02(b)(6) somehow entitles it to reduce benefits under 4.05(b)(5) is entirely unsupported and contrary to the plain language of the Plan, it is arbitrary and capricious.[2] I would therefore affirm the district court's ultimate conclusion that 4.05(b)(5) cannot be used to reduce the MRI based on the unambiguous language of the Plan, and would not remand for further consideration of the issue.[3]

This leads me to the *contra proferentum* issue. I would accept the district court's statement that it did not apply the doctrine, and find no need to address it because, as in our prior

[1]If this were the issue before us, I would conclude on this record that a decision by the fiduciary that there is no early-retirement increase under 4.02(b)(6) is reasonably supported by the Plan and not arbitrary and capricious.

[2]I note that Norton's expert's submission shows that Norton not only wrongly applied the section 4.05(b)(5) reduction, but also the 4.05(b)(3) reductions in computing benefits. (R. 117-3, PID 1626.) For instance, in the expert's calculations for Khaliel, benefits are first computed under 4.03(a)(3) as $2849.13. The reduction required by the "212" calculation using the Pension Benefit Guaranty Corporation rate and the proper mortality rate is then applied and reduces the MRI to $2288.78. Correct so far. But the calculation then goes on to apply two reductions from old section 4.05(b): 4.05(b)(3) and 4.05(b)(5), which clearly no longer apply. Tellingly, the calculation then goes on to reverse the reduction based on 4.05(b)(5), thus increasing the payment. (*Id.*)

[3]I am baffled by the majority's parenthetical assertion in footnote 9 that my reading of the Plan as providing a lump-sum payment for early retirees that is the same as for normal retirees is "obtained by ignoring the plain text of the plan"; the majority acknowledges that the plain text provides that the reducers no longer apply. (Maj. Op., at 35.) The only textual remnant of the reducer is found in the reversal of the reduction. Further, it is significant that if an early retiree chooses the basic form, there is no early-retirement reduction under the plain terms of the Plan. And, even if the majority's third option provides an interpretation that is not arbitrary and capricious and the 4.05(b)(5) reducer is applied in direct conflict with 4.05(d), the reduction would still be reversed by 4.02(b)(6). Although not necessary to decide the case because the language rendering the reductions inapplicable is unambiguous, I observe that once the accumulations were tied off, and the computation of the second part of the pension was tied to the date of actual retirement, the reductions for early retirement became unnecessary. The employees simply receive what they accumulate to the date of retirement, and early or late retirement simply explains when the employee retires. The computations are the same either way; the Member accumulates increases to his or her MRI based on interest, 4.03(b)(2)(A), and service, 4.03(b)(2)(B), until the date of retirement, at which point the benefits are payable. An employee who retires early receives the benefits earlier, but ceases to accumulate added benefit for time worked and added value on the benefits already earned; the employee who takes a late retirement continues to accumulate value. The bottom line is that when the Plan was modified to tie off the old benefit and tie benefits to the date of retirement, the early retirement penalties became irrelevant.

decisions,[4] the language at issue is unambiguous. I acknowledge that the majority reaches the *contra proferentum* issue because it finds the early-retirement provisions ambiguous. However, given our many references to the doctrine in prior cases, we should refrain from foreclosing application of *contra proferentum* in conjunction with *Firestone* deference in all cases until presented with a case in which that doctrine is actually applied. To be sure, the two approaches are in inherent tension, and in light of *Firestone*, there can be no binding "rule of interpretation that would completely contradict the deference paid to an administrator's decision" in an ERISA case. *Mitchell v. Dialysis Clinic, Inc.*, 18 F. App'x 349, 353 (6th Cir. 2001). However, we have said that "even an arbitrary and capricious standard of review can be tempered by . . . construing ambiguities against a plan drafter." *Copeland Oaks v. Haupt*, 209 F.3d 811, 813 (6th Cir. 2000) (citing *University Hosps. of Cleveland v. Emerson Elec. Co.*, 202 F.3d 839, 846–47 (6th Cir. 2000)). What that application might look like is an open question. However, acknowledging the tension between *contra proferentum* and *Firestone* deference, I find the analogy to the conflict-of-interest situation apt. Just as we are instructed in appropriate cases to temper the arbitrary and capricious standard by taking into account the fiduciary's conflict of interest, *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 117 (2008), there may be situations in the gray area between arbitrary and capricious and *Firestone* deference where the *contra proferentum* doctrine may have a role. Because we have not been presented with such a case, we have not been required to resolve the issue. And because the district court did not apply the doctrine, I would not do so now.

I join in the majority opinion in all other respects.

[4]*See, e.g.*, *University Hosps. of Cleveland v. Emerson Elec. Co.*, 202 F.3d 839, 846–47 (6th Cir. 2000); *Perez v. Aetna Life Insurance Co.*, 150 F.3d 550, 557 n.7 (6th Cir. 1998) (en banc).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:08-CV-00069-TBR

ELIZABETH A. CLEMONS, *et al.* Plaintiffs

v.

NORTON HEALTHCARE, INC. RETIREMENT PLAN Defendant

MEMORANDUM OPINION

On March 18, 2015, this Court ordered Defendant Norton Healthcare, Inc. Retirement Plan ("Norton") to provide its opening brief concerning the damages formula it believes should be applied to the Plaintiffs, a class of early retirees who elected to receive lump sum distributions ("the Class"). (Docket No. 244 at 1.) The Court also ordered the Class to submit a Response and Norton to Reply to the Class's Response. (Docket No. 244 at 1.) Lastly, the Court ordered both parties to submit briefing to the Court regarding the provision of data by Norton to the Class. (Docket No. 244 at 2.) The parties submitted all required briefing to the Court. (*See* Docket Nos. 245, 246, 247, 248, 249, 250, 251.)

Subsequently, the Class filed a Motion to Strike Norton's Reply concerning the damages formula. (Docket No. 252 at 1.) In the alternative, the Class requested leave to file a surreply. (Docket No. 252.) The Defendant Norton has responded, (Docket No. 253.), and the Class has replied, (Docket No. 254.) Fully briefed, this matter is ripe for adjudication. The Court has considered the Class's Surreply in forming this opinion. Therefore, the Court with DENY the Class's Motion to Strike and GRANT its request to file a surreply.

Background

The Court has discussed the general facts of this case in prior opinions but will repeat them as necessary to resolve the current controversy. (*See* Docket No. 217) This case involves an Employee Retirement Income Security Act ("ERISA") pension dispute brought by a class of early retirees who elected to draw lump sum distributions.[1] The pension plan at issue is a defined benefit pension plan sponsored by Norton with the express purpose of providing retirement benefits to employees. By its terms, the Plan provides for an early retirement to any employee who accrues ten years of service and attains age 55. The Class's members are participants in the Norton's Plan (and its predecessors and successors) who claim that Norton underpaid their retirement benefits. The Court previously certified Plaintiffs' claims as a class action. (Docket No. 66.) The Court defined the class as follows:

> All participants in Norton Healthcare, Inc. Retirement Plan, its predecessors and successors, whose contractual lump-sum pension benefits:
>
> (a) Did not include the value of the basic form of benefit – an "increasing monthly retirement income" (annual cost-of-living adjustment) – when election of such basic form would have yielded the highest value for the participant; and/or
>
> (b) Did not include the value of the "alternative" lump-sum benefit where the basic form of benefit is multiplied by 212, when election of such alternative benefit would have yielded the highest value for the participant; and/or
>
> (c) Did not include the value of the early retirement subsidy.

(Docket No. 66 at 12-13.)

On October 31, 2013, this Court granted in part the Class's Motion for Summary Judgment and denied Norton's Motion for Summary Judgment. (Docket No. 217 at 44.) The Court found that the Class Members' Monthly Retirement Income ("MRI") is an increasing

[1] Employee Retirement Income Security Act, 29 U.S.C. §1001-1461.

monthly income for sixty (60) months certain. (Docket No. 217 at 33.) Additionally, the Court concluded that application of the Plan's Section 4.02(b)(6) for the determination of the Class members' lump sums does not result in a reduction of benefits for Early Retirement. (Docket No. 217 at 36-37.) As a result of the Court's aforementioned findings, the Court ordered Norton to "recalculate Plaintiffs' Monthly Retirement Income and corresponding lump sums" and to "ensure the recalculated lump sums are at least actuarially equivalent to the Monthly Retirement Income, appropriately accounting for the increasing monthly income (cost of living adjustment) and sixty (60) months certain of the Monthly Retirement Income." (Docket No. 217 at 44.)

Following the Court's Order, the parties were unable to agree as to (I) the formula used to calculate the Class's Monthly Retirement Income and corresponding lump sum, (II) who among the Plan's participants qualifies as a member of the class, (III) whether or not the Class members are entitled to pre-judgment interest, and (IV) what data Norton must provide to the Class. The Court will address each of the aforementioned issues below.

Discussion

I. Calculation of Class Members' Monthly Retirement Income and Corresponding Lump Sum

The Court will address (A) Norton's proposed formula and (B) the Class's proposed formula. Following an analysis of the parties' proposed formulas and their disagreements with each respective formula, the Court will provide its conclusion.

A. Norton's Proposed Formula

In its Damages Memorandum, Norton proposes the following formula:

Full Years of Credited Service to Separation =	A
Credited Service at Normal Retirement Date =	B
Average Monthly Earnings =	C

Final Average Earnings =	D
Covered Compensation =	E
Monthly Retirement Income @ Normal Retirement Date (TRAC) ((C* 0.0167*B)-(0.00625*(lesser of D or E)*(lesser of B or 30)))*(A/B) =	F
The annuity value at current age based on PBGC interest (taken from January 1 of the plan year of the annuity starting date) and UP84(-3) mortality table =	G
MRI after application of bottom paragraph of §4.03(a)(3) 2nd ¶: F*G/212 =	H
Lump Sum using 212 Factor: H*212 =	I

(Docket No. 245 at 5-6 (footnotes omitted).) Norton states that application of the aforementioned formula "to randomly sampled Class members results in substantial enhancements to lump sum distributions." (Docket No. 245 at 6.)

Additionally, Norton discusses the Internal Revenue Code's requirement that "[i]n order to be a 'qualified' tax-exempt pension plan, . . . a defined benefit pension plan must allow for minimum interest rates and minimum mortality tables when converting an Accrued Benefit to a distribution in the form of a lump sum." (Docket No. 245 at 4-5 (citing 26 U.S.C. § 417(e)(3)(A).) According to Norton, the 30-year Treasury securities rate is the applicable interest rate and the 1994 GAR table is the applicable mortality table. (Docket No. 245 at 5 (citing 26 C.F.R. § 1.417(e)-(1)(d)(1)-(4); Rev. Rul. 2001-62).) Norton states that "[t]he present value of the accrued benefit (i.e. a lump sum distribution) then becomes the greater of the benefit calculation using the § 1.417(e)-(1) IRS adjustment factors or the plan's stated interest rate and mortality table." (Docket No. 245 at 5 (citing 26 C.F.R. § 1.417(e)-(1)(d)(1).) Norton declares that "[t]hese applied calculations afford pension plan participants with *a guaranteed actuarial equivalent* of their Accrued Benefit when taken in the form of a lump sum distribution." (Docket No. 245 at 5 (emphasis added); *see also* Docket No. 251 at 9.) Norton's actuary Mr. Parks states that Norton's formula results in a lump sum that is actuarially equivalent to the increasing and sixty months

certain guaranteed MRI because it "begins by selecting an annuity factor based on 60-month certain payments." (Docket No. 251-1 at 2.)

In its Response, the Class argues that Norton's formula does not calculate the actuarial equivalent lump sum. (Docket No. 250 at 9.) The Class contends that Norton's formula merely "recalculates a participant's '212 minimum lump sum' under Section 4.02(b)(6) of the Plan document." (Docket No. 250 at 9.) The "212 minimum lump sum" refers to the lump sum that results from the multiplication of the increasing MRI by a factor of 212. (*See* Docket No. 143-5 at 44; 245 at 6; 250 at 10.) In his Declaration, the Class's actuary Mr. Libman states that "[t]he 212 factor is based on an assumed zero percent (0%) effective interest rate, meaning the discount interest rate and the Index rate are assumed to be the same." (Docket Nos. 250 at 10; 250-1 at 5.) He also contends that the 212 factor is based on "an assumed retirement age of 65" and, therefore, it is "a minimum assumption . . . [that] does not accurately reflect the actuarial equivalent value." (Docket Nos. 250 at 10; 250-1 at 5.) Mr. Libman argues that the "[t]he actuarial equivalent [must] use[] the actual effective interest and the actual retirement age." (Docket No. 250-1 at 6.) Mr. Libman concludes that "the lump sum factor would be greater for a participant retiring prior to age 65 and/or where the index rate exceeds the discount interest rate." (Docket No. 252-3 at 3.)[2]

B. The Class's Proposed Formula

Before addressing the substance of the Class's formula, the Court must address Norton's argument that the Class's reliance on and inclusion of a Declaration by its actuary Mr. Libman in

[2] In its Response to the Class's Motion to Strike, Norton argues that the Class has conceded that Norton correctly calculated the MRI for all class members and then concludes the Class's formula seeks to "double dip." (Docket No. 253 at 3.) The Class disagrees with Norton's characterization. (Docket No. 254 at 5-6.) This Court concludes that the Class did not concede that Norton correctly calculated the Class member's MRI. The Class's actuary Mr. Libman merely stated that "[t]he Plan's proposed damages formula *appears* to properly calculate the amount of the 212 minimum lump sum in Section 4.02(b)(6). The Plan has taken the corresponding MRI and multiplied by 212. This application is correct. Absent the respective data points, *I cannot confirm whether the underlying MRI is correct*." (Docket No. 250-1 at 5 (emphasis added).) Mr. Libman's statement in no way concedes that Norton correctly calculated class member's MRI. Therefore, Norton's argument regarding the Class's agreement with its calculation of the MRI and subsequently the Class's formula attempting to "double dip" is without merit.

its damages brief was improper. (Docket No. 253 at 7-9.) Mr. Libman has worked as an actuary and consultant since 1975. (Docket Nos. 250-1 at 1; 250-2 at 1.) Norton argues that Mr. Libman's Declaration is inappropriate because (1) the Court previously granted Norton's Motion to Strike Mr. Libman's expert report and (2) Mr. Libman's declaration violates Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure. (Docket No. 253 at 7-9.)

First, Norton is correct that this Court previously struck Mr. Libman's expert report. (Docket No. 213.) However, the Court stated that Mr. Libman's report was "not admissible *at this time*." (Docket No. 213 at 3 (emphasis added).) This Court found that Mr. Libman's report was inadmissible as it engaged in contract interpretation of the Plan document, and contract interpretation is a question of law to be decided by the Court. (Docket No. 213 at 2.) Additionally, the Court stated that it would "not be performing any of the calculations required by [the Plan's] provisions . . . [as] those calculations are left for the parties to perform, consistent with the Court's instructions." (Docket No. 213 at 3.) At this juncture, the Court must perform the calculations required by the Plan's provisions because the parties have been unable to agree as to the correct formula. Consequently, the Court finds that Mr. Libman is qualified and uses reliable and relevant testing and principles to support his opinion that Norton's formula does not provide an actuarially equivalent lump sum. *See Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579 (1993).[3]

Second, Norton argues that Mr. Libman's Declaration violates Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure. (Docket No. 253 at 9.) Norton contends that Mr. Libman's Declaration "was never previously disclosed to Defendant or its counsel[], nor does Libman's re-packaged affidavit meet the 'must' disclose requirements of Rule 26." (Docket No. 253 at 9.) In response, the Class argues that it previously advocated for the parties to submit new expert

[3] The Court is satisfied with the Class's explanation concerning the discrepancy in Mr. Libman's calculations of Plaintiff David Khaliel's actuarial equivalent lump sum. (Docket No. 254 at 4-5.)

reports that would comply with Rule 26(a)(2)(B). (Docket No. 254 at 4.) The Class further contends that Norton opposed the production of new expert reports and expert depositions that would comply with Rule 26(a)(2)(B). (Docket No. 254 at 4.) The Class is correct that Norton opposed the submission of new expert reports and stated that "[i]f either party believes that their previously identified experts are necessary to explain or expound on their proposed damages formula, they can secure and file affidavits from such experts along with their briefs." (Docket No. 236 at 2-3.) As Norton previously advocated against the submission of new expert reports in compliance with Rule 26(a)(2)(B) and suggested the parties could "file affidavits from [their] experts along with their briefs," it is estopped from contesting the Class's inclusion of Mr. Libman's Declaration in its brief. The Court will now address the substance of the Class's formula.

The Class provides an alternative formula that it argues calculates the actuarial equivalent lump sum. The Class describes its formula in the following manner:

> Class members are entitled to the greater of the minimum "212 minimum lump sum" and the "actuarial equivalent" lump sum. Calculating the 212 lump sum is a mechanical calculation whereby the MRI payable under Section 4.02(a) is multiplied by 212. Calculating the actuarial equivalent lump sum is also a mechanical calculation applied in the same way to each Class member, whereby the MRI payable under Section 4.02 is multiplied by a lump sum factor. This lump sum factor is determined based on three components: (1) a discount interest rate; (2) an index rate; and (3) a mortality table.
>
> The Plan document provides for two lump sum factors with a participant entitled to use the factor that produces the greatest benefit. The first lump sum factor is based on the discount interest rate "which would be used as of the first day of the Plan Year in which the benefit determination occurs by the Pension Benefit Guaranty Corporation" and the "1984 Unisex Pension Mortality Table set back three (3) years for age." Id. The second lump sum factor is based on the discount interest rate "for 30-year Treasury securities for the second month prior to the beginning of the applicable Plan Year" and the mortality table prescribed "by the Secretary of Treasury as set forth in IRS Revenue Ruling 2001-26."
>
> In calculating the respective lump sum factors, an adjustment is required to account for the Plan's "increasing monthly income" and

> "sixty (60) months certain" features. The Plan increases a participant's monthly income each year by an "Index." The Index is equal to "the rate being paid on 3-year Treasury Notes as of the first day of December preceding the Plan Year for which such Index is being credited, as published in the Federal Reserve Statistical Release, plus one-half of one-percent (0.5%)." To account for the value of the "increasing monthly income," the discount interest rate utilized in calculating the lump sum factor must be adjusted to account for the future increased benefits in order to determine the effective interest rate. This effective interest rate is then used as the discount rate for the applicable mortality table in order to determine the actuarial equivalent lump sum factor.
>
> To account for the value of the "sixty (60) months certain" feature, the actuarial equivalent lump sum factor is multiplied by 1.015. This 1.5% adjustment reasonably reflects the value of the Plan's guaranteed payment of benefits for 60 months (removing the mortality expense).

(Docket No. 250 at 10-12.)

Norton contends that the Class's proposed formula is "fraught with rather obvious actuarial errors." (Docket No. 251 at 9.) In particular, Norton disagrees with (1) the Class's use of the Plan's "index rate," (2) the Class's proposed "corresponding effective rate," and (3) the Class's use of the factor 1.015. (Docket No. 251 at 9.)

1. The Index Rate

In its formula, the Class uses the Index rate in effect at the time of a plan participant's retirement. (Docket No. 250 at 11.) Norton argues that instead of using the Index rate in effect on a particular date, the rate should be based upon a historical average of Treasury bond yields after removing the effects of inflation. (Docket No. 251-1 at 3-4.)

Norton states that the Class's use of the "Plan's 'index rate' – which is used to establish the cash balance interest credit to participant's 401(k)-like account – to value the annually increasing annuity benefit in the form of a lump sum distribution . . . is pulled from thin air and is . . . not compelled by either the law or the Plan text." (Docket No. 251 at 10.) Norton's actuary Mr. Parks reasons that "any one year's 'index' is not appropriate to be used over a much longer lifetime calculation since such an annual index does not consider the impact of wide interest rate

fluctuations over a long period of time." (Docket No. 251-1 at 4.) Furthermore, Norton argues that only two variables are used to define "actuarial equivalent" under the Plan and, therefore, the Class's "index rate" is an "altogether new, non-Plan metric [being used] to derive one's 'actuarial equivalent.'" (Docket No. 253 at 4.)

In response, the Class argues that its use of the "Index" rate is rooted in the Plan itself and is appropriate for the calculation of a plan participant's lump sum. The Class's actuary Mr. Libman states that Norton's proposed historical average "is by definition inaccurate." (Docket Nos. 252-2 at 15; 252-3 at 4.) To support its position, the Class points to Section 4.02(a) in which the Plan states that the participant's monthly income "shall be increased, on each January 1 following the date the Member's Monthly Retirement Income commences, by *the Index determined for the Plan Year*." (Docket No. 143-5 at 39 (emphasis added); *see also* Docket No. 252-2 at 12.) Section 2.30 of the Plan defines "Index" as "the rate being paid on 3-year Treasury Notes as of the first day of December preceding the Plan Year for which such Index is being credited." (Docket No. 143-5 at 26.) Following the January 1, 2004 amendments, the "Index" definition was increased by "one-half of one-percent (.5%)." (Docket No. 143-10 at 2.) The Class argues that as the Index rate is defined as "the rate by which a Class member's annuity benefit increases each year, and [the Plan] . . . requires the rate be 'determined for the Plan Year," the Index rate in effect at the time of retirement is the most appropriate rate to use in determining the effective interest rate." (Docket No. 252-2 at 12.) Mr. Libman reasons that "[j]ust as the discount rate is measured at a point in time, so too is the Index rate. By tying the Index rate and the discount rate together, the same assumptions are applied to the lump sum calculation." (Docket No. 252-3 at 4.) Mr. Libman contends that since the enactment of ERISA, the IRS has required interest rates to be determined as of a fixed date. (Docket Nos. 252-2 at 13; 252-3 at 5.) According to the Mr. Libman, "[i]f the discount rate is determined as of a specific date, the Index rate which is a function of similar bond yields should logically be determined as of the same fixed date." (Docket Nos. 252-2 at 13; 252-3 at 5.)

The Class also disagrees with Norton's argument made in its Response to the Class's Motion to Strike that there are only two variable used to define the actuarial equivalent: (1) "the 30-year Treasury securities rate for the second month prior to the beginning of the applicable Plan Year" (the discount rate) and (2) "the mortality table published by the Secretary of the Treasury." (Docket No. 253 at 4.) Norton argues that the Index rate is an additional variable that should not be used to calculate the actuarial equivalent. (Docket No. 253 at 4.) Norton's position is puzzling as Norton has itself stated that in order to calculate the present value of the increasing 60-month certain annuity, "three different factors need to be determined . . . "the mortality table, the [discount] interest rate, and the COLA (cost of living adjustment) rate." (Docket No. 145-1 at 27.) Having reviewed the relevant sections of the Plan, namely Sections 2.02 (the definition of actuarial equivalent), 4.02 (form of benefit), and 4.03 (normal retirement benefit), this Court does not find merit in Norton's argument. The Court does not believe that Section 2.02 forecloses the use of a third factor. Furthermore, it in fact appears that the parties have been in agreement until now that there are three factors that make up the actuarial equivalent lump sum. The Court agrees with the Class that "the parties' dispute to date with regard to the calculation of the 'actuarial equivalent' lump sum has [largely] concerned . . . what COLA rate should be used when calculating a lump sum." (Docket No. 254 at 9.) While the Class has advocated for the use of the Index rate, Norton has argued that the use of a historical average of Treasury bond yields is more appropriate for the COLA rate. Therefore, the Court finds that the "actuarial equivalent" lump sum has three components

Additionally, Norton argues that the "lower the utilized Index Rate, the greater the lump sum distribution." (Docket No. 251 at 9-10 (citing *CIGNA Corp. v. Amara*, 563 U.S. 421, 430 (2011)).) In its Surreply, the Class disagrees with Norton's statement and argues that "the lower the Index [rate], the lower the present value lump sum [because] [t]he future annuity does not increase as quickly, and therefore, the lump sum needed today is reduced." (Docket No. 252-2 at 13.) Additionally, the Class distinguishes the case cited by Norton because the Supreme Court in

Amara was "analogizing the discount rate, not a cost of living (COLA) rate such as the Index." (Docket No. 252-2 at 13.) The Class states that the discount rate provides the present value of future annuity payments. (Docket No. 252-2 at 13.) Therefore, according to the Class, the lower the discount rate, the greater the lump sum. (Docket No. 252-2 at 13.)

2. The Effective Interest Rate

Norton argues that the Class uses a negative effective interest rate "to artificially inflate potential recoverable damages." (Docket No. 251 at 10.) Alternatively, Norton uses an interest rate of 3 percent that is based upon a historical average of Treasury bond yields. (Docket Nos. 251 at 10; 251-1 at 3.) Norton's actuary Mr. Parks states that "for valuing interest over a long period of time[,] . . . the best measure is a smoothed average of historical rates over a long period of time, corrected for inflation." (Docket No. 251-1 at 4.) In its Surreply, the Class responds that its effective interest rate is based upon the following formula:

Effective Interest Rate = [1+Discount Rate) / (1 + Index Rate)] – 1

(Docket No. 252-2 at 11.) The Class's actuary Mr. Libman states that its effective interest rate calculation "reflects the impact of future inflation on the discount interest rate." (Docket No. 252-2 at 11.) Additionally, Mr. Libman contends that the Class's effective interest rate formula "is regularly utilized in calculating pension obligations." (Docket No. 252-2 at 11.)

3. The Class's use of the factor 1.015 (1.5%)

Lastly, Norton disagrees with the Class's use of the factor 1.015 (1.5%). The Class's formula utilizes a two-step process to determine the actuarial equivalent of the increasing, sixty months certain benefit instead of beginning with an annuity factor based on a sixty month certain benefit as Norton does in its formula. (Docket Nos. 251 at 10; 251-1 at 3.) First, the Class's formula "select[s] a 'life only' (no guaranteed) annuity factor; and then convert[s] the 'life only' factor to guaranteed 60-months payment by applying the constant multiplier 1.015." (Docket No. 251 at 10.) Norton argues that the Class's application of the factor 1.015 to account for the sixty months certain provided under the plan, "is unsupported by the law, by the Plan, and by common

sense since it presumes every person in the Class is the same age as Named-Plaintiff David Khaliel." (Docket No. 251 at 10.) Norton's actuary Mr. Parks states that "[t]he more precise actuarial calculation begins with an annuity factor based on 60-month certain payments for the particular class member, based upon his/her age at distribution." (Docket No. 251-1 at 3.)

Norton's disagreement with the Class's use of the factor 1.015 is significant, as it does not appear that it has previously made its concerns known. In a prior Opinion in this case, this Court noted that:

> Plaintiffs allege the Defendant incorrectly determined their lump sum benefit by failing to adjust for the value of a sixty (60) months certain benefit. Plaintiffs allege this adjustment is done by multiplying the [MRI] by 1.015. It appears *Defendant has admitted this is the proper way to make such an adjustment*.

(Docket No. 217 at 28 (emphasis added) (citing Docket No. 143-7, NOR 485; 143-15, No. 47).)

In its Surreply, the Class disagrees with Norton's characterization of its use of the factor 1.015. (Docket No. 252-2 at 16-17.) The Class states that in its formula, "the actuarial equivalent lump sum factor is multiplied by 1.015 (1.5%) to account for the value of the 60-month certain feature of the Class member's annuity benefit, and then multipl[ied] by the MRI." (Docket No. 252-2 at 16-17.) The Class argues that its use of 1.015 is supported by the Plan and is consistent with the law. (Docket No. 252-2 at 17.) Furthermore, the Class asserts that Norton's actuaries "have consistently used the 1.015 . . . factor." (Docket No. 252-2 at 17.) Within the Plan document, the Class points to Section 4.02(b)(2) of the 1997 Plan where "there is a table containing the various minimum factors to use for converting the 60 month certain annuity." (Docket No. 252-3 at 3; *see also* 143-5 at 42.) The table contains the factor used to convert a 60-month certain annuity to a life annuity (with zero payments guaranteed). (Docket Nos. 143-5 at 42; 252-2 at 18.) With zero payments guaranteed, the life annuity is 101.5% (a factor of 1.015) of the 60-month certain annuity. (Docket No. 252-2 at 18.) In addition to finding support for its use of 1.015 in the Plan document, the Class also argues that its use of the factor 1.015 is supported

by the law. The Class cites to Revenue Ruling 71-446 in which the IRS "provided guidance that a 60 months certain annuity was to be valued at 97% of the life-only annuity." (Docket No. 252-2 at 19.) The Class and its actuary Mr. Libman reason that based on the IRS's guidance in the aforementioned Revenue Ruling, "the 1.015 factor in the Plan, also written as 98.5% of the life-only annuity, is both reasonable and actuarially sound." (Docket No. 252-2 at 19.) Lastly, the Class contends that in practice Norton has "consistently used the 1.015 factor to convert a participant's 60-months certain annuity benefit to a life-only annuity benefit." (Docket No. 252-2 at 18.) Mr. Libman states that Norton has used the 1.015 factor in practice and referred to it as the "historic factor." (Docket No. 252-3 at 3.) The Class argues that Norton has not only used the factor 1.015 in the past but it has done so regardless of the plan participant's age. (Docket No. 252-2 at 18 (providing examples of Norton's use of the 1.015 factor in converting a 60-month certain annuity to life annuity for two participants of different ages at retirement).)

C. The Court's Conclusion

In its October 31, 2013 Opinion, this Court ordered Norton to "recalculate [the Class's] Monthly Retirement Income and corresponding lump sums . . . [and to] ensure the recalculated lump sums are at least *actuarially equivalent* to the Monthly Retirement Income, appropriately accounting for the increasing monthly income (cost of living adjustment) and sixty (60) months certain of the Monthly Retirement Income. (Docket No. 217 at 44 (emphasis added).) After extensively reviewing the parties' formulas and their arguments, this Court finds that Norton did not provide a formula that will ensure that the recalculated lump sums are at least actuarially equivalent to the Monthly Retirement Income. Norton goes to great lengths to critique the Class's proposed formula, but it does not adequately explain to this Court how its own formula results in an actuarially equivalent lump sum. Norton makes several conclusory statements that its formula results in an actuarial equivalent lump sum, but it does little to explain to the Court how this is so. (Docket Nos. 245 at 5; 251 at 8-9; 253 at 3.) Alternatively, the Class has gone to great lengths to not only create a formula and demonstrate how it is actuarially equivalent but also to respond to

any of Norton's criticisms concerning its formula. Consequently, the Court will ORDER Norton to utilize the Class's formula to recalculate the Class Members' Monthly Retirement Income and corresponding lump sums.

II. Members of the Class

The parties continue to disagree as to whether or not the Court's certification of the Class was proper, and if indeed there is a class, who belongs within the class. Concerning the certification of the class, this Court has previously considered and denied Norton's motion to alter or amend the class certification order. (*See* Docket No. 158.) Having considered Norton's renewed arguments against class certification, this Court finds that its previous certification will stand.

With regards to who belongs within the certified class, the parties disagree on the following two matters: (A) whether plan participants whose MRI was calculated solely under Section 4.03(a)(1) (the cash balance benefit) of the plan are members of the class and, therefore, entitled to the recalculation of their lump sum to include the value of the increasing monthly income and the sixty (60) months certain income and (B) whether plan participants who received lump sum benefits between January 30, 2003 and December 31, 2003 are members of the class as their receipt of their lumps sums was prior to the 2004 amendments to the Plan.

A. Plan Participants Whose MRI was Calculated Solely under Section 4.03(a)(1)

The parties have been unable to agree as to whether or not plan participants whose MRI was based upon a cash balance benefit are members of the class and entitled to the recalculation of their lump sum to include the value of the increasing and sixty (60) months certain income.

Norton contends that there were two claims in the Class's Seconded Amended Complaint that the Class abandoned in the process of seeking class certification. (Docket No. 245 at 8.) The one currently at issue is the Class's claim that "the separate cash balance component of the

'greater of' calculations shorted participants when their cash balance accounts were first established in 1991." (Docket No. 245 at 8.) Norton argues that the cash balance benefit and the defined benefit are two separate benefit calculations and, therefore, the Court's liability finding only applies to those plan participants who received a defined benefit.

To support its argument, Norton cites to the Court's earlier Memorandum and Opinion, the Class's expert Michael Libman's deposition, and a statement made by the Class's counsel during a previous hearing. (Docket No. 251 at 5.) With regards to Mr. Libman's testimony, Norton claims that he "agreed that the [defined] benefit was altogether distinct and separate from one's plan cash balance benefit and that there were no mathematical errors of any sort with respect to Named Plaintiff Khaliel's Plan calculated cash balance potential, alternative distribution" (Docket No. 251 at 4-5.) The Class counters that its expert Mr. Libman "did not offer any such agreement." (Docket No. 252-2 at 6.) After reviewing Mr. Libman's testimony, it appears that he did agree, though perhaps not as equivocally as suggested by Norton, that Named Plaintiff Khaliel's cash balance account was correctly calculated in 1991 and correctly re-set in 2004. (Docket No. 252-11 at 3-4, 6.) However, it does not appear from the cited portions of the deposition that he agreed that the defined benefit and the cash balance benefit are all together separate and distinct. (*See* Docket No. 252-11 at 1-10.)

As for Class counsel's statement at a previous hearing, Class counsel does not dispute the statement but rather states that it was a misstatement and points to other statements made during the hearing that support the Class's position. (Docket No. 252-2 at 6-7.) During the hearing at issue on December 13, 2012, the following exchanged occurred:

> The Court: Well, that was my next question. Do you believe the class definition should be modified?
>
> Mr. Grabhorn: No. I think the one right now satisfies it because the Court has already actually addressed the statute of limitations, and so now it comes down to most of these are material calculations. If someone, by way of example, retired

> before January 1 of '04, we don't even have to do the calculation under (c) of the definition.
>
> *If they don't have a TRAC [defined] benefit, we don't have to do (a) or (b).* This starts narrowing the field down. There's not 9,000 out there. I haven't produced 9,000 participants with lump sums. And it really helps to narrow it down.

(Docket No. 165 at 36-37 (emphasis added).) The italicized sentence is significant because Class counsel's statement refers to parts (a) and (b) of the Class definition. Class counsel essentially stated that unless a plan participant received a defined benefit, he or she is not entitled to a recalculation of his or her lump sum to include the value of the increasing and sixty (60) months certain income. The Class argues that Norton's "selective citation omits the balance of the dialogue" during the hearing between the parties and the Court. (Docket No. 252-2 at 6.) After reviewing the portions of the hearing transcript cited by the parties, the Court agrees that Class counsel's statement was a mere "slip of the tongue," and it was inconsistent with the Class's overall argument. The Court will not prejudice the Class for a mere misstatement by its counsel.

The Class argues that its "claims concerning the calculation of lump sum benefits apply equally to all class members regardless of which part of Section 4.03 provided the largest MRI benefit, whether the cash balance or the grandfathered (defined) benefit." (Docket No. 250 at 6.) The Class contends that it "did not abandon [its] contractual claim that the Plan must provide the actuarial equivalent lump sum for all participants, whether a cash balance or a grandfathered (defined) MEH/ NKC benefit." (Docket No. 250 at 6 n.2.) The Class is adamant that whether plan participant's MRI was calculated under Section 4.03(a)(1), (2), (3) is irrelevant to whether or not the participant is a member of the class. (Docket No. 252-2 at 5.) The Class reasons that "[w]hile [Norton] is correct that the MRI is calculated under different formulas for subsection (1), (2), and (3), this distinction is without significance and conflates the issue . . . [because] each participant is entitled to the greater of the resulting MRI calculations." (Docket No. 252-2 at 5.) The Class contends that "the issue is the lump sum calculation based on the MRI, regardless of the source"

and, therefore, "all participants are entitled to an MRI paid under Section 4.02(a)." (Docket No. 252-2 at 5.)

The Court addressed this subject in its earlier Memorandum and Opinion concerning the parties' motions for summary judgment. (Docket No. 217 at 27.) This Court stated that:

> While [Norton] appears to argue there is a difference in treatment regarding calculation of a lump sum depending on which type of benefit is being used (Defined Benefit or Cash Balance), the Court has found the Plan document does not textually support this assertion. The actual calculation of the lump sum is the same regardless of which type of benefit (Defined or Cash) one uses for determination of the MRI for a retiree . . .

(Docket No. 217 at 27.) With regards to the calculation of a plan participant's lump sum, this Court has already addressed this dispute among the parties and is not persuaded by Norton's further argument to change its previous findings. The calculation of a plan participant's lump sum is the same whether the cash balance benefit or the defined benefit is used to calculate the participant's MRI under either the 1997 plan prior to the amendments or under the amended plan. Therefore, this Court finds that plan participants whose MRI was based upon a cash balance benefit are members of the class and entitled to the recalculation of their lump sum to include the value of the increasing and sixty (60) months certain income.

B. Plan Participants Who Received A Lump Sum Between January 30, 2003 and December 31, 2003

The parties do not agree as to whether or not those plan participants who elected to receive a lump sum prior to the January 1, 2004 amendments to the plan are members of the class. In its Damage's brief, Norton argues that the Plan's "defined 'Accrued Benefit' was not altered to be reflective of one's Monthly Retirement Income (MRI) until January 1, 2004" and, therefore, Norton's damages formula should apply only to those Plan participants who received an early retirement lump sum distribution on or after January 1, 2004. (Docket No. 245 at 13-14.) The Class counters that this Court's decision was rooted in the Plan's language in Sections 4.05(d)

and 4.03(b) and, therefore, plan participants who received a lump sum prior to the January 1, 2004 amendments are members of the Class. (Docket No. 250 at 7.) Both of the Plan's sections cited by the Class state that "in no case shall [a member's] monthly retirement be less than the Member's Accrued Benefit *as of December 31, 2003*." (Docket Nos. 143-10 at 2, 4; 217 at 30-32.)

With regard to Norton's argument, the Court certainly relied upon the definition of Accrued Benefit from the 1997 Plan document in making its determination that "the MRI (the accrued benefit as of December 31, 2003) is increasing and for sixty months certain." (Docket No. 217 at 32.) One need only read Section 2.01 to determine that the 1997 Plan's definition of Accrued Benefit reflects a participant's MRI. The 1997 Plan's definition of Accrued Benefit that this Court relied on in its previous Memorandum Opinion is as follows:

> 2.01 Accrued Benefit
>
> (a)Effective prior to January 1, 2004, the term "Accrued Benefit" as of any date of determination shall mean the greater of the amount in paragraph (1) or (2) as applicable, plus the amount in paragraph (3), if applicable:
>
> (1) The Member's Monthly Retirement Income earned to the date of determination under Section 4.03(a)(1) or
>
> (2) The greater of the amount in paragraph (A) or (B):
>
> (A) The Member's projected Monthly Retirement Income at his Normal Retirement Date under Section 4.03(a)(2)(A) or (3)(A), as applicable, multiplied by a fraction, . . .
> (B) The Member's Monthly Retirement Income under Section 4.03(a)(2)(B) or (3)(B).

(Docket Nos. 143-5 at 10-11; 217 at 31.) Therefore, the Court finds little merit in Norton's argument that "the Plan's defined 'Accrued Benefit' was not altered to be reflective of one's [MRI] until January 1, 2004" and thus only those early retirees who took a lump distribution on or after January 1, 2004 are members of the Class. The 1997 Plan's definition of Accrued Benefit was pivotal to the Court's ruling, and it is reflective of one's MRI.

However, the Class also does not present a compelling argument as Sections 4.05(d) and 4.03(b) were added to the Plan as part of the January 2004 amendments. While the Class is correct that the Court reached the ultimate conclusion that the MRI is "an increasing monthly income and is for sixty (60) months certain," the Court did so by starting its analysis with the newly added Sections 4.05(d) and 4.03(b). (Docket No. 217 at 30.) To determine the inclusion of those who took a lump sum between January 30, 2003 and December 31, 2003 in the class, this Court must look solely at the 1997 Plan before the 2004 amendments. After careful consideration, the Court holds that the MRI is an increasing monthly income and is for sixty (60) months certain under the 1997 Plan and, therefore, those plan participants who received a lump sum prior to the January 1, 2004 Plan amendments are members of the class. The Court will note the relevant provisions below that result in the inclusion of these participants in the class.

The starting point for this analysis is Section 4.05(b) Early Retirement Benefit, which reads:

> Upon the Member's retirement on his Early Retirement Date, he shall be entitled to a **Monthly Retirement Income equal to the largest of the amounts provided under the applicable provisions** of paragraphs (1), (2), or (3) below, plus the amount provided under paragraph (4) below, if applicable.
>
> (1) The Sum of:
> a. **The benefit described in Section 4.03(a)(1)(A)** . . .
> b. **The benefit described in Section 4.03(a)(1)(B)**, determined as of the Member's Early Retirement Date
> (2) For a Member with a Methodist Accrued Benefit, a reduced **Monthly Retirement Income equal to his Accrued Benefit determined under Sections 2.01(a)(2) and 4.03(a)(2)** as of his Early Retirement Date . . .
> (3) For a Member with an NKC Accrued Benefit, a reduced Monthly Retirement Income equal to his **Accrued Benefit determined under Sections 2.01(a)(2) and 4.03(a)(3)**.

Section 4.05(b) requires the Court to move to Section 4.03(a) Normal Retirement Benefit and Section 2.01 Accrued Benefit.

> 4.03(a) When a Member lives to his Normal Retirement Date, he shall be entitled to retire and to receive a Monthly Retirement Income in an amount certified to the Trustee by the Retirement Committee. **The amount of the Member's Monthly Retirement income under the basic form described in Section 4.02(a)** and payable, at his Normal Retirement Date shall be equal to the largest of the amounts provided under the applicable provisions of paragraphs (1), (2) or (3), plus the amount provided under paragraph (4) hereof, if applicable.
>
> (1) The sum of:
> (A) the Member's Methodist Accrued Benefit or NKC Accrued Benefit, if and as applicable, converted to a single sum . . .
> (B) an increasing monthly income accrued commencing January 1, 1991
> (2) For a Member with a Methodist Accrued Benefit, the greater of (A) or (B) (which have been omitted here) . . . .
> (3) For a Member with an NKC Accrued Benefit, the greater of (A) or (B) (which have been omitted here) . . . .
>
> 2.01(a) The term "Accrued Benefit" as of any date of determination shall mean the greater of the amount in paragraph (1) or (2) as applicable, plus the amount in paragraph (3), if applicable:
>
> (1) The Member's Monthly Retirement Income earned to the date of determination under Section 4.03(a)(1) or
>
> (2) The greater of the amount in paragraph (A) or (B):
>
> (A) The Member's **projected Monthly Retirement Income at his Normal Retirement Date** under Section 4.03(a)(2)(A) or (3)(A), as applicable, multiplied by a fraction, . . .
> (B) The Member's Monthly Retirement Income under Section 4.03(a)(2)(B) or (3)(B).

The basic form referred to in 4.03(a) is described under Section 4.02(a) Form of Benefit as follows:

> The basic form of Retirement Benefit (to which the formula indicated in Section 4.03 applies) shall be an **increasing monthly income commencing on the Member's** Disability, **Early**, Normal or Late Retirement Date or on the date specified in Section 5.01 and **continuing for sixty (60) months certain and for his lifetime thereafter**.

While these provisions do not run seamlessly together and they are not entirely clear, they do appear to lead to the conclusion that the MRI is an increasing monthly income and is for

sixty (60) months certain under the 1997 plan. Most importantly for this Court's analysis, Section 4.02(a) explicitly states that the basic form of retirement benefit is increasing and continues for sixty (60) months certain. (Docket No. 143-5 at 39.) Furthermore, Section 4.02(a) specifically references Early Retirement. (Docket No. 143-5 at 39.) Lastly, Section 4.02(a) of the Plan explicitly provides that the formula in Section 4.03 applies to the basic form of Retirement Benefit described under 4.02(a). (Docket No. 143-5 at 39.) Section 4.05(b) with which this Court began its analysis incorporates Section 4.03(a) and Section 2.01(a). (Docket No. 143-5 at 49.) Section 4.03(a), which 2.01 uses for the actual determination of a member's Accrued Benefit, states the amount of a member's MRI is "under the basic form described in Section 4.02(a)." (Docket No. 143-5 at 46.) There is no indication in sections 4.05(b) (which concerns a member's early retirement), 4.03(a) (the provision governing the determination of the amount of a member's MRI), 2.01(a) (the definition of Accrued Benefit), or 4.02(a) that the basic form described under 4.02(a) is not the proper form to use when a member retired early under the 1997 plan prior to the 2004 amendments. Therefore, this Court finds that those plan participants who retired early and received a lump sum between January 30, 2003 and December 31, 2003 are members of the class, and they are entitled to have their benefits re-calculated with an MRI that is both increasing and for sixty (60) months certain.

III. Prejudgment Interest

Additionally, the Class has asked this Court to award it pre-judgment interest. In their Response to Norton's Damages Brief, the Class asks the Court to award it "interest on the past due benefits (measured as the difference between the recalculated lump sum and the lump sum previously paid to each Class member)." (Docket No. 250 at 13.) Norton responds that the "statutory enforcement section that is the ERISA predicate for this suit (29 U.S.C. § 1132(a)(1)(B)) does not afford a prevailing party pre-judgment interest."

It is well established in the Sixth Circuit that even though ERISA does not require the award of pre-judgment interest, "the district court may [award pre-judgment interest] at its discretion in accordance with general equitable principles." *Schumacher v. AK Steel Corp. Ret. Accumulation Pension Plan*, 711 F.3d 675, 685-86 (6th Cir. 2013) (citing *Rybarczyk v. TRW, Inc.*, 235 F.3d 975, 985 (6th Cir. 2000)). However, "[i]nterest awards should not be punitive, but should simply compensate a beneficiary for the lost interest value of money wrongly withheld from him or her." *Rybarczyk*, 235 F.3d at 985 (citing *Ford v. Uniroyal*, 154 F.3d 613, 618 (6th Cir. 1998). An award of excessive pre-judgment interest that results in the overcompensation of an ERISA plaintiff is punitive and contravenes "ERISA's remedial goal of simply placing the plaintiff in the position he or she would have occupied but for the defendant's wrongdoing." *Ford*, 154 F.3d at 618 (citing *Hizer v. General Motors Corp., Allison Gas Turbine Div.*, 888 F. Supp. 1453, 1463 (S.D. Ind. 1995). "Similarly, an exceedingly low prejudgment interest rate fails to make the plaintiff whole by inadequately compensating him or her for the lost use of money." *Id.* The Sixth Circuit Court of Appeals has found that "to allow [a Defendant plan] to retain the interest it earned on funds wrongfully withheld would be to approve of unjust enrichment." *Rybarczyk*, 235 F.3d at 986 (quoting *Sweet v. Consolidated Aluminum Corp.*, 913 F.2d 268, 270 (6th Cir. 1990)). Consequently, "[a] proper determination of pre-judgment interest involves a consideration of various case-specific factors and competing interests to achieve a just result." *Schumacher*, 711 F.3d at 686. The factors include but are not limited to the following: "the remedial goal to place the plaintiff in the position that he or she would have occupied prior to the wrongdoing; the prevention of unjust enrichment on behalf of the wrongdoer; the lost interest value of money wrongly withheld; and the rate of inflation." *Id.* at 687.

The Sixth Circuit Court of Appeals does not provide a specific formula that district courts are to use in the calculation of pre-judgment interest. It has approved of district courts' awards of pre-judgment interest calculated according to 28 U.S.C. § 1961. *Rybarczyk*, 235 F.3d at 986; *see*

also Ford, 154 F.3d at 619. However, it has also overturned a "mechanical application" of that rate. *Schumacher*, 711 F.3d at 685 (reversing a district court's use of 28 U.S.C. § 1961 when the rate was at an all-time low of 0.12%). In addition to the use of 28 U.S.C. § 1961, the Sixth Circuit Court of Appeals has approved awards of pre-judgment interest that "were tied to prevailing market rates, thus reflecting what the defendants would have had to pay in order to borrow the money at issue." *Rybarczyk*, 235 F.3d at 986.

Here, the Class suggests a pre-judgment interest rate of 8%. (Docket No. 250 at 13.) The Class bases this number on the "Plan's assumed interest rate of 8% as stated in the Plan's annual reports on Forms 5500 for the same time period." (Docket No. 250 at 13.) The Class contends that "[t]his interest rate reflects the Plan's own assumptions as to valuation liability as represented to the Internal Revenue Service in its annual Form 5500 filings." (Docket No. 250 at 13.) Lastly, the Class argues that the 8% interest rate will make the class members whole and, therefore, is neither excessive nor insufficient. (Docket No.250 at 14.) In its Reply, Norton does not suggest a rate and instead focuses solely on the fact that ERISA does not mandate the award of pre-judgment interest. (*See* Docket Nos. 251 at 11-12; 253.) Norton urges this Court to view Congress's silence on the subject as intentional and, therefore, this Court does not have discretion to grant pre-judgment interest. (Docket No. 251 at 11-12.) However, as explained above, it is well established in the Sixth Circuit that it is within a district court's discretion to award pre-judgment interest in "accordance with general equitable principles" in an ERISA action. *Rybarczyk*, 235 F.3d at 985.

This Court finds that an award of pre-judgment interest at a rate of 8% to the Class would be excessive and therefore punitive. The Court believes that an interest rate based upon 28 U.S.C. § 1961 would be more appropriate to make the Class whole and avoid an excessive punitive award. The rate established under 28 U.S.C § 1961 is tied to the average 52-week United States Treasury bill rate. *Rybarczyk*, 235 F.3d at 985. 28 U.S.C. § 1961(a) mandates that interest is to be

calculated "at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of judgment." Instead of using the weekly average 1-year constant maturity treasury yield for the calendar week preceding the date of this opinion, the Court has calculated the mean interest rate under the rate prescribed by 28 U.S.C. § 1961 for January 30, 2003 onward. The Court believes this will provide "a closer approximation of the likely return on [the Class's] unpaid benefits." *Rybarczyk*, 235 F.3d at 986 (citing *Algie v. RCA Global Communications, Inc.*, 60 F.3d 956, 960 (2d Cir.1995). The mean of the weekly average 1-year treasury constant maturity from the week of January 30, 2003 to the date of this Court's order January 6, 2016 is 1.51%. Alternatively, the mean of the annual average 1-year treasury constant maturity from the year 2003 to the year 2015 is 1.52%. Like the lower court in *Ford*, this Court will select a flat rate of 2% per annum "to avoid the complexities of compounding interest." 154 F.3d at 619. Thus the slight discrepancy between the two averages is irrelevant. The Court believes this interest rate serves to make the Class members whole and is not punitive for Norton. Therefore, the Court will GRANT in part and DENY in part the Class's request for pre-judgment interest.

IV. Provision of Data

The parties have been unable to agree on the data that Norton must provide to the Class for the recalculation of class members' benefits. Norton provided Class counsel with an excel spreadsheet containing data necessary for the recalculation of class members' benefits on June 19, 2014. (Docket No. 246 at 2.) Subsequently, on July 21, 2014 and August 26, 2014, Norton sent Class counsel updated versions of the excel spreadsheet. (Docket No. 246 at 2.) According to Norton, the spreadsheet contains information regarding "601 'grandfathered' (NKC or MEH) participants." (Docket No. 239 at 2.) These "grandfathered" participants "belonged to predecessor plans, became participants of the defendant Plan, and had a traditional defined 'accrued benefit' as of December 31, 2003." (Docket No. 246 at 3.) For each of the 601 identified participants,

Norton provided the following: name, social security number, birthdate, date of hire, payment form, total lump sum distribution issued, date of retirement or lump sum payment, amount of vested accrued benefit at normal retirement date, set aside amount (if any), age at benefit commencement date, early retirement factor, cash balance amount, source of the demographic and distribution information, and source of the accrued benefit information. (Docket No. 246 at 3-4.)

The Class argues that the information provided is insufficient as the class is much larger than the 601 "grandfathered" participants identified by Norton. (Docket No. 247 at 5-6.) The Class contends "Norton excluded every Class member whose lump sum was based on their cash balance benefit and every class member who was not entitled to a subsidized early retirement." (Docket No. 247 at 6.) The Class argues that "[u]nder the Court's summary judgment ruling all class members are entitled to receive a lump sum that is actuarially equivalent to their unreduced [MRI] amount, including the cost-of-living adjustment and the 60-month certain feature." (Docket No. 247 at 6.) The Class "seeks the identity of each participant who received a lump sum benefit on or after January 30, 2003 [and] [f]or each such participant, the Class seeks the corresponding data points necessary to re-calculate their respective lump sum benefits . . . ." (Docket No 249 at 2.)

In response, Norton argues that those plan participants who received a cash balance benefit instead of a defined benefit are not members of the class and, therefore, Norton did not include these individuals in the data provided to the Class.[4] (*See* Docket No. 248 at 3-8.) As the Court has found that the calculation of a plan participant's lump sum is the same whether the cash balance benefit or the defined benefit is used to calculate the participant's MRI, the Court will

[4] Norton also argues that it should not have to provide data regarding plan participants who received a "minimum lump sum distribution" or for those plan participants that received a lump sum disability retirement benefit as neither of these lump sums were at issue in this case. (Docket No. 248 at 8-9.) As the parties and the Court's opinion concerning liability did not address these two forms of lump sums available under the plan, Norton need not provide data concerning plan participants who received one of them because these lump sums are not at issue in this case.

ORDER that Norton provide data for all early retirees who received a lump sum regardless of whether the cash balance benefit or the defined benefit was used to calculate their MRI. Additionally, Norton must provide data for all of those who meet this criteria and retired on or after January 30, 2003.

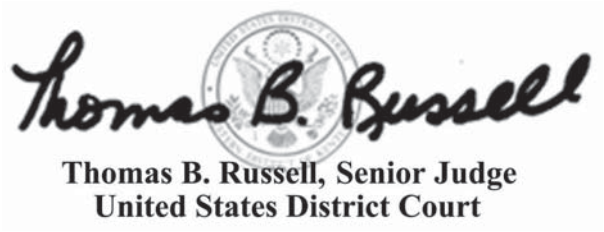
CONCLUSION

To conclude that this matter is complex is probably an understatement. There have been hard fought disputes on class certification, discovery, and the production of data. There has been more than considerable briefing on the many issues involved in this controversy. The Court further understands that there has been delay by the Court in issuing several of its rulings. The complexity of comprehending and analyzing lengthy interrelated documents and deciphering the nuisances therein has been time consuming on the part of counsel and the Court. The Court is not inclined to entertain any motion for reconsideration. Frankly, the Court has given this matter its best shot. Too much time has elapsed between the earlier ruling and the current posture of this case. The Court originally thought agreeing on a formula would not be a time consuming process. Obviously, it was time consuming. It is time for another court, if the parties are so inclined, to look at this matter with new eyes.

For the reasons enumerated above, and consistent with the Court's conclusions above, this Court will ORDER:

1. The Plaintiffs' Motion to Strike is DENIED and their request to file a surreply is GRANTED.
2. The Defendant must utilize the Plaintiffs' formula to recalculate the Class Members' Monthly Retirement Income and corresponding lump sums.

3. Plan participants whose MRI was based upon a cash balance benefit are members of the class and entitled to the recalculation of their lump sum to include the value of the increasing and sixty (60) months certain income.
4. Those plan participants who retired early and received a lump sum between January 30, 2003 and December 31, 2003 are members of the class, and they are entitled to have their benefits re-calculated with an MRI that is both increasing and for sixty (60) months certain.
5. The Court will GRANT in part and DENY in part Plaintiffs' request for pre-judgment interest.
6. Defendant must provide data for all early retirees who received a lump sum regardless of whether the cash balance benefit or the defined benefit was used to calculate their MRI. Additionally, Norton must provide data for all of those who meet this criteria and retired on or after January 30, 2003.



January 6, 2016

cc: Counsel

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:08-CV-00069-TBR

ELIZABETH A. CLEMONS, DAVID R. KHALIEL, and LARRY W. TAYLOR, on behalf of themselves and all other similarly situated individuals. — Plaintiffs

v.

NORTON HEALTHCARE, INC. RETIREMENT PLAN. — Defendant

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon Plaintiffs' Motion for Summary Judgment. (Docket No. 143.) Defendant has responded, (Docket No. 148), and Plaintiffs have replied. (Docket No. 167). This matter is now fully briefed and ripe for adjudication. For the following reasons, the Court will **GRANT in part** and **DENY in part** (to the extent it is inconsistent with this opinion) Plaintiffs' Motion for Summary Judgment. (Docket No. 143.) The Court **ORDERS** Defendant to recalculate Plaintiffs' Monthly Retirement Income and corresponding lump sums, consistent with the below holdings. Furthermore, the Court **ORDERS** Defendant to ensure the recalculated lump sums are at least actuarially equivalent to the Monthly Retirement Income, appropriately accounting for the increasing monthly income (cost of living adjustment) and sixty (60) months certain of the Monthly Retirement Income. The recalculations should be done within 45 days and submitted to the Court for approval. If Plaintiffs have any objections with these recalculations, they must respond within 14 days.

Defendant has also moved for Summary Judgment and for Oral Argument. (Docket No. 145.) Plaintiffs have responded, (Docket No. 154), and Defendant has replied. (Docket No. 164.) For the following reasons, the Court will **DENY** Defendant's Motion for Summary Judgment to the extent it is inconsistent with this opinion. The Court will also **DENY** their request for oral argument. Plaintiffs' complaint is not dismissed.

BACKGROUND

This is an Employee Retirement Income Security Act ("ERISA") pension dispute brought by a class of early retirees who elected to draw lump sum distributions.[1] The pension plan at issue is a defined benefit pension plan sponsored by Norton Healthcare, Inc. Retirement Plan ("Defendant") with the express purpose of providing retirement benefits to employees. The Plan was established in 1991 when the Company merged two predecessor plans: the Methodist Evangelical Hospital Plan (the "MEH Plan") and the NKC Hospitals, Inc. Plan (the "NKC Plan"). It is funded exclusively by contributions from the Company and maintained in accordance with a written plan document, beginning with the first plan document effective January 1, 1991. (Docket No. 143-3.)

Subsequent to the 1991 plan, the Plan document has been amended. These subsequent amendments were reflected in restated Plan documents. Each restatement of the Plan document incorporates all intervening amendments since the last Plan document. One such restated Plan document was effective January 1, 1997. (Docket No. 143-5, 1997 Plan Document.) There are several amendments that occurred in both

[1] Employee Retirement Income Security Act, 29 U.S.C. §1001-1461.

January and May of 2004, which predated Plaintiffs retirement. (Docket No. 143-11; 143-12.)

By its terms, the Plan provides for an early retirement to any employee who accrues ten years of service and attains age 55:

> 2.22(a) The term "Early Retirement Date" shall mean, in the case of each Member who has been credited with at least (10) years of Service and whose Attained Age is at least fifty-five (55), the later of:
>
> (1) the date such Member shall leave the employ of the Employer in accordance with Section 4.05 hereof, or
>
> (2) the date the Member directs in writing shall be his Early Retirement Date.
>
> * * *
>
> 4.05(a) Upon written application, a Member whose Attained Age is at least fifty-five (55) and who has been credited with ten (10) or more years of Service may retire as of an Early Retirement Date.

(Docket No. 143-5.)

Plaintiffs are participants in the Defendant Plan (and its predecessors and successors) who claim that Defendant underpaid their retirement benefits. The Court previously certified Plaintiffs' claims as a class action. (Docket No. 66.) The Court defined the class as follows:

> All participants in Norton Health, Inc. Retirement Plan, its predecessors and successors, whose contractual lump-sum pension benefits:
>
> (a) Did not include the value of the basic form of benefit – an "increasing monthly retirement income" (annual cost-of-living adjustment) – when election of such basic form would have yielded the highest value for the participant; and/or
>
> (b) Did not include the value of the "alternative" lump-sum benefit where the basic form of benefit is multiplied by 212, when election of such alternative benefit would have yielded the highest value for the participant; and/or

(c) Did not include the value of the early retirement subsidy.

(Docket No. 66, Page 12-13.)

In their Second Amended Complaint, Plaintiffs' challenge the calculation of their benefits on three separate bases:

> First, they allege Defendant failed to include the value of the **"increasing monthly income" ("cost-of-living")** in the calculation of participant lump sum benefits and in the calculation of participant "cash balance" starting balances.
>
> Second, they allege Defendant failed to include the **value of early retirement subsidies** in the calculation of participant lump sum benefits and in the calculation of participant "cash balance" starting balances.
>
> Third, they allege Defendant failed to calculate participant **lump sum benefits according to the contractual formula**.

(Docket No. 42, Second Amended Complaint.) Specifically, Plaintiffs allege the following deficiencies by the Defendant with respect to these steps.

> (1) The Plan failed to accurately determine the form of benefit payable to Class members by incorrectly characterizing their accrued benefit as a non-increasing benefit. Plaintiffs contend this characterization is directly contrary to the express terms of the plan.
>
> (2) The Plan further compounded the error of characterization of the accrued benefit by failing to include the value of the five-year certain benefit (60 months), as well as the "increasing" benefit when calculating the Actuarial Equivalent lump sum benefit.
>
> (3) The Plan failed to provide the 212 Lump Sum minimum benefit, whereby the step two benefit is multiplied by 212 to arrive at the lump sum minimum benefit.
>
> (4) For early retirees on or after January, 1, 2004, the Plan improperly reduced their lump sum benefit for early commencement contrary to the amended plan document.

The Plaintiffs request the Court to enter summary judgment in their favor as to the following:

> (1) The accrued benefit is an increasing monthly income and continuing for sixty months certain. The accrued benefit for Mr. David Khaliel is $2,849.13. The accrued benefit is the Basic Form of benefit.
>
> (2) The Early Retirement Benefit is fully subsidized. For Class members terminating on or after January 1, 2004, their benefits are not to be reduced for early commencement. Their lump sum benefits are to be calculated based upon their Basic Form of benefit. For Mr. Khaliel, his Early Retirement Benefit would be calculated based upon his accrued Basic Form of benefit ($2,849.13).
>
> (3) The lump sum benefit, based on the Basic Form of benefit, shall be the greater of:
>
> > (a) an amount equal to the Actuarial Equivalent of the Basic Form, inclusive of the increasing and five-year certain benefit; or
> >
> > (b) an amount equal to the Basic Form times 212, said amount then divided by one minus the appropriate reduction factor.

The Plaintiffs also request that the Court order the Defendant to perform the requisite recalculation of Class member's benefits in accordance with the findings within 45 days, so the Class can verify the amounts. Defendants contest all these assertions and request the opposite be ordered, essentially affirming their determination of Name Plaintiffs' lump sums.

Name Plaintiff David R. Khaliel was employed by the Defendant from November 18, 1974, to January 9, 2005. When he retired effective March 1, 2005, he elected to receive his accrued plan benefit in lump sum. Mr. Khaliel received a lump sum and submitted a claim by letter July 11, 2007, challenging Defendant's benefit calculations. The Defendant never responded to this claim for benefits. This lawsuit was filed on January 30, 2008. (Docket No. 1, Complaint.)

STANDARD

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

"[N]ot every issue of fact or conflicting inference presents a genuine issue of material fact." *Street v. J. C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989). The test is whether the party bearing the burden of proof has presented a jury question as to each element in the case. *Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir. 1996). The plaintiff must present more than a mere scintilla of evidence in support of his position; the plaintiff must present evidence on which the trier of fact could reasonably find for the plaintiff. *See id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). The plaintiff may accomplish this by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence . . . of a genuine dispute . . . ." Fed. R. Civ. P. 56(c)(1). Mere speculation will not suffice to defeat a motion for summary judgment; "the mere existence of a colorable factual dispute will not defeat a properly supported motion for summary judgment. A genuine dispute between the parties on an issue of material fact must exist to render summary judgment inappropriate." *Moinette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1177 (6th Cir. 1996).

DISCUSSION

STANDARD OF REVIEW FOR DEFENDANT'S BENEFIT DECISIONS

As an initial matter, it is necessary to determine the standard of review that will be applied to Defendant's decision(s) to deny Plaintiffs benefits they claim are due under the plan. Name Plaintiff Khaliel received a lump sum payment and subsequently, by letter dated July 11, 2007, submitted a claim challenging the Plan's benefit calculations. The Defendant never responded to Mr. Khaliel's letter, prompting the filing of this lawsuit.[2] The Court has already ruled on the exhaustion issue and again agrees with Plaintiffs that the exhaustion requirements under ERISA were excused because further exhaustion would be futile.[3]

We review the plan administrator's denial of benefits *de novo,* unless the benefit plan specifically gives the plan administrator discretionary authority to determine eligibility for benefits or to construe the terms of the plan. *Morrison v. Marsh & McLennan Companies, Inc.,* 439 F.3d 295, 300 (6th Cir. 2006). In this case, the benefit Plan specifically gives the plan administrator discretionary authority to determine eligibility for benefits or construe the terms of the plan. Notably, the Plaintiffs' do not dispute that the Plan affords this discretion.[4] 6.06 of the plan provides for this discretion:

> 6.06 Powers and Authority
>
> (a) Each Committee shall have all powers and discretion necessary or helpful for carrying out its responsibilities, and the decisions or

[2] The Court is assuming that Plaintiffs are correct in stating Defendant failed to respond to Mr. Kahliel's letter because the Court was not directed to, nor did it find on its own, any contention by the Defendant that it did respond to the letter.
[3] The Court has already ruled on this matter previously, so further discussion is not required.
[4] "Whereas the plan documents appear to have language providing discretion to the plan administrator, the Class asserts that the applicable standard of review should be *de novo*." (Docket No. 143-1, Page 14.)

> actions of such Committee in good faith in respect of any matter hereunder shall be conclusive and binding upon all parties concerned.
>
> (b) Without limiting the generality of the foregoing, the Retirement Committee shall be the Plan Administrator and shall have the power and discretion:
>
> (1) to make rules and regulations for the administration of the Plan which are not inconsistent with the terms and provisions of the Plan.
>
> (2) to construe all terms, provisions, conditions and limitations of the Plan.
>
> (3) to determine all questions arising out of or in connection with the provisions of the Plan or its administration in any and all cases in which the Retirement Committee deems such a determination advisable.

(Docket No. 143-5, Page 57-58.)

Where an ERISA plan gives the plan administrator such discretionary authority, as is the case here, we review under an "arbitrary and capricious" standard. *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 111 (1989). Review under the arbitrary and capricious standard is the least demanding form of judicial review of an administrative action; it requires only an explanation based on substantial evidence that results from a deliberate and principled reasoning process. *See Killian v. Healthsource Provident Adm'rs Inc.,* 152 F.3d 514, 520 (6th Cir. 1998). The Court must accept a plan administrator's rational interpretation of a plan even in the face of an equally rational interpretation offered by the participants. *Morgan v. SKF USA, Inc.*, 385 F.3d 989, 992 (6th Cir. 2004) (citation omitted).[5] Thus, if an interpretation of the plan provisions is "reasonable," it must be upheld. *Morrison*, 439 F.3d at 300; *Firestone,* 489 U.S. at 111.

[5] However, relatedly, the Court notes that if the Plan's language is susceptible of more than one interpretation the "rule of *contra proferentum*" applies and any ambiguities are construed against the drafting parties. *Univ. Hospitals of Cleveland v. Emerson Elec. Co.*, 202 F.3d 839, 846-47 (6th Cir. 2000).

The issue of reasonableness is a question of law. *Waxman v. Luna,* 881 F.2d 237, 240 (6th Cir. 1989).

However, there is arguably a principle of contract interpretation that would temper the deference given to the administrator: "to the extent the Plan's language is susceptible of more than one interpretation, we will apply the 'rule of *contra proferentum*' and construe any ambiguities against . . . the 'drafting parties."' *Univ. Hospitals of Cleveland v. Emerson Elec. Co.*, 202 F.3d 839, 846-47 (6th Cir. 2000) (noting arbitrary and capricious deferential review is tempered by the principle of "*contra profentum*" which construes any ambiguities against the drafting parties) (emphasis added). At first glance, these two principles seem to be at odds with one another. However, they can be reconciled by noting that arbitrary and capricious review isn't as deferential when it comes to ambiguities in plan language asserted against a drafting party, such as Defendant here. Of course, plan administrators still are afforded the normal deferential arbitrary and capricious review when it comes to determinations apart from plan language, such as whether an employee is disabled or not.[6] But as to construing plan provisions themselves, ambiguities are construed *against* the drafting party.[7]

The Court notes that the principle of *contra profenentum* in the context of a Plan administrator's decision is not a well established principle:

[6] Often times these determinations could be referred to as "fact determinations" (such as determining whether an employee is disabled or not). While it technically does involve interpreting "plan language," it also involves making factual determinations separate from the plan language. The Court recognizes it is a fine line, but it is a line nonetheless.

[7] The Court notes that this was a tough question which the applicable precedent, as discussed below, appears to be inconsistent on. The Court believes this is the best way to reconcile this difficult issue created by arguably inconsistent precedent. However, as will be discussed, the resolution of this issue had no bearing on the Court's ultimate conclusion in this case.

First, they point to cases from this Circuit that they claim have reduced the deference given to an administrator's decision through the use of state principles of contract interpretation. "[T]o the extent that the Plan's language is susceptible of more than one interpretation, we will apply the 'rule of contra proferentum' and construe any ambiguities against" the drafting party. *University Hospitals of Cleveland v. Emerson Elec. Co.,* 202 F.3d 839, 846-47 (6th Cir. 2000) (quoting *Perez v.. Aetna Life Ins. Co.,* 150 F.3d 550, 557 n. 7 (6th Cir. 1998) (en banc)); *see also Copeland Oaks v. Haupt,* 209 F.3d 811, 813 (6th Cir. 2000). We do not believe that through these statements this Circuit has established a rule of interpretation that would completely contradict the deference paid to an administrator's decision.

As the parenthetical notes, the court in *University Hospitals* attributes the application of the rule of interpretation to the *Perez* court. When we examine *Perez,* we see that the court was not talking about applying the principal to "temper" the arbitrary and capricious standard. Rather, the *Perez* court was interpreting the provision that was alleged to grant that discretion-the principal issue in the case. *See Perez v. Aetna Life Ins. Co.,* 150 F.3d 550, 557 & n. 7 (6th Cir. 1998) (en banc). It was in that context that the court said it was *possible* to apply the state rule of interpretation. *See id.* ("Because the only reasonable interpretation of the Plan concludes that *it vests discretion* in Aetna to make benefit determinations, Perez's *contra proferentum* argument lacks merit.") (emphasis added).

The *Perez* court cites a footnote in an earlier case, *Schachner v. Blue Cross & Blue Shield of Ohio,* 77 F.3d 889, 895 n. 6 (6th Cir. 1996), when describing how "[t]he rule of *contra proferentum* provides that ambiguous contract provisions in ERISA-governed insurance contracts should be construed against the drafting party." *Perez,* 150 F.3d at 557 n. 7. But that language does not hold that the *Perez* court was suggesting that the rule of interpretation is to be used in ERISA cases when the standard of review is arbitrary and capricious. And indeed when one reads *Schachner* one realizes that the *Perez* court was likely just citing it for descriptive purposes rather than suggesting that it was the rule in this Circuit. For *Schachner* does nothing more than state in a footnote that the court need not address the issue of whether the rule of interpretation applies in ERISA cases. "Since we hold that the phrase [in the Plan] is not ambiguous, however, we need not consider" the arguments regarding the applicability of *contra proferentum. Schachner,* 77 F.3d at 895 n. 6. Indeed, the court does not even purport to be reviewing the administrator's decision; rather, it makes clear it is

applying a de novo standard of review to the contract. *See id.* at 893.

University Hospitals, while it states (citing *Perez* (*Id.* at 846)) it will construe any ambiguities against the drafter when applying the "arbitrary and capricious" standard, makes no further reference to that principle in its analysis and holding that the Plan administrator's construction of the Plan was arbitrary and capricious and that the only reasonable construction of the Plan was that asserted by the plaintiff.

Copeland Oaks was a suit by a benefit Plan to require the employee and his daughter who had suffered injuries to sign a subrogation agreement before it, the Plan, paid any of the daughter's medical expenses. Plaintiff's daughter's claim against a third party had been settled for $100,000 plus $5,000 medical expenses for the parents. This Circuit had adopted the so-called "make whole" rule of federal common law. That requires an insured to be made whole before an insurer can enforce its rights to subrogation. *Copeland Oaks* attempted to rely on the language of the Plan and the arbitrary and capricious standard for its conclusion that the Plan had opted out of the default make-whole rule. The court held, however, that it was arbitrary and capricious in the absence of language rejecting the make-whole rule with clarity and specificity as ultimately determined by the reviewing court not to apply the default since the language of the Plan failed to establish its priority over any partial recovery.

Thus, none of the cases cited indicate how the arbitrary and capricious standard is affected by applying the state law rule that contracts are construed against the drafter. We note that this Circuit, in *McMahan v. New England Mutual Life Ins. Co.,* 888 F.2d 426 (6th Cir. 1989), held that the plaintiff's state law claim for breach of contract-and, therefore, Kentucky's rule of interpreting ambiguous provisions against the drafter-was preempted by ERISA. 'We think it clear that subjecting an ERISA fiduciary to the vagaries of state contract law regarding its benefits decisions would create the very real prospect that the fiduciary's administrative scheme would be subject to conflicting requirements in various states.... Accordingly, we reject plaintiffs' first argument and hold that the state law claim in this case was within reach of the pre-emption clause.' *Id.* at 429.

However, since there are two bases on which the Plan administrator relied in denying coverage and there is no ambiguity as to one, we need not decide the effect to give to the dicta in the cited cases.

Mitchell v. Dialysis Clinic, Inc., 18 F. App'x 349, 353-54 (6th Cir. 2001); *see also Smiljanich v. Gen. Motors Corp.*, 182 F. App'x 480, 486 n. 2 (6th Cir. 2006); *see generally Mitzel v. Anthem Life Ins. Co.*, 351 F. App'x 74, 82 (6th Cir. 2009) (stating in dicta that the application of *contra proferentum* should be limited to cases in which an administrator's decision is reviewed de novo).

Although the principle in *University Hospitals* was arguably dicta and at least two unpublished Sixth Circuit cases have, in dicta, renounced the principle, the Court finds the principle is sound and there is a slightly more precedent in favor of adopting it.[8] First, *University Hospitals* is a published Sixth Circuit case, while all the cases arguing against the principle are unpublished cases. Second, the Court believes the principle is a sound one. Admittedly, the unpublished cases make sound points on why the Sixth Circuit might have read their previous cases too broadly in establishing the principle and why there are legitimate concerns with applying all state contract law to ERISA governed contracts. However, the substantive arguments against the *application* of the principle itself (as opposed to the *establishment* of the principle through prior precedent), in this Court's opinion, are overbroad and do not outweigh the merit of applying the principle and following published Sixth Circuit precedent. Applying

[8] The Court notes that the Sixth Circuit has provided some continued support for the principle of *contra proferentum* in this context in published cases:

> Osborne contends that the policy language should be construed against its drafter Hartford. *See University Hosps. v. Emerson Elec. Co.,* 202 F.3d 839, 846-47 (6th Cir. 2000) (applying *contra proferentum* to ERISA contract). We apply the doctrine of *contra proferentum,* however, only if the contract term is ambiguous. *See Perez v. Aetna Life Ins.,* 150 F.3d 550, 557 n. 7 (6th Cir. 1998) (en banc).
>
> This case does not involve the interpretation of ambiguous contractual language that should be construed against the drafter of the contract. The dispute before us is not over the meaning of "own occupation," which defines the term "Total Disability," but over the methodology Hartford used to determine Osborne's occupation. Even if the doctrine of *contra proferentum* applies in interpreting ERISA plans, the doctrine does not apply here.

Osborne v. Hartford Life & Acc. Ins. Co., 465 F.3d 296, 300 (6th Cir. 2006).

contra proferentum doesn't necessarily mean that, as a result, all state contract law will be applicable. Therefore, its individual application wouldn't necessarily subject an "ERISA fiduciary to the vagaries of state contract law" or "create the very real prospect that the fiduciary's administrative scheme would be subject to conflicting requirements in various states."[9] *Mitchell v. Dialysis Clinic, Inc.*, 18 F. App'x 349, 354 (6th Cir. 2001).

As to the merit of the application of the principle itself, the principle of *contra proferentum* is sound. To the extent drafters do make ambiguous contracts, they should have those contracts construed against them. The Court can think of no significant reason why this basic and equitable contract principle should not apply in the context of ERISA contracts.

In any event, whether or not this Court finds the principle of *contra profentum* applies won't actually impact the Court's analysis because the below holdings are not based on construing any ambiguities against the Defendant, but rather, it is based on a plain reading of the document (the Court did not find any ambiguities). Despite Defendant's initial qualification for deferential arbitrary and capricious review (based on the Plan documents affording Defendant discretion), Plaintiffs make several arguments for why deferential review is not applicable or, at the very least, should be tempered. The Court will deal with each in turn.

[9] Hypothetically, even if the some states applied the principle of *contra proferentum* while others did not, the Court seriously doubts that drafters of plans in those states which did not apply the principle would, as a result, go out and intentionally create ambiguous plan documents. It seems to the Court that creating unambiguous contracts is a general principle that should be followed regardless of state law on the issue. While in some contexts the application of state law to ERISA governed contracts may necessarily subject an "ERISA fiduciary to the vagaries of state contract law," the Court doesn't believe the application of the principle of *contra profentum* would do that given that drafters wouldn't prefer to create ambiguous contracts in the first place (in fact they presumably would prefer to create unambiguous ones). *Mitchell v. Dialysis Clinic, Inc.*, 18 F. App'x 349, 354 (6th Cir. 2001).

I. Deferential review is not without limitations and/or does not apply to a plan administrator's decision that is contrary to the plan terms

Plaintiffs' assert that under the arbitrary and capricious standard the administrator's decision must be rational in light of the plan's provisions. Essentially, the decision must be reasonable and the Court cannot simply "rubber stamp" the plan administrator's decision. *Schwalm v. Guardian Life Ins. Co. of Am.*, 626 F.3d 299, 308 (6th Cir. 2010). The Court agrees, and, if review under the arbitrary and capricious standard is applied, must determine if the decision is rationale.

The Employee Retirement Income Security Act ("ERISA") requires a plan administrator to discharge his duties with respect to the plan "in accordance with the documents and instruments governing the plan." ERISA §404(a)(1)(D); 29 U.S.C. §1104(a)(1)(D). "In interpreting the provisions of a plan, a plan administrator must adhere to the plain meaning of its language, as it would be construed by an ordinary person." *Shelby Cnty. Health Care Corp. v. S. Council of Indus. Workers Health & Welfare Trust Fund*, 203 F.3d 926, 934 (6th Cir. 2000). Where no ambiguity exists as to the meaning of plan provisions, the plan administrator must apply the plan provisions as written. *Univ. Hospitals*, 202 F.3d at 850. Therefore, the Court agrees with Plaintiffs that if the Defendant's interpretation of the plan is contrary to the plain meaning of the language, as it would be construed by an ordinary person, then the typical deferential review is not applicable.

II. Plaintiffs' Assertion of an Inherent Conflict of Interest Tempering Any Deference

Plaintiffs assert that review of a benefit denial is tempered when the plan administrator has a conflict of interest. *Univ. Hospitals*, 202 F.3d at 846. Defendant

funds the Plan and its Board of Directors appoints the members of the Retirement Committee to administer the Plan. The Court acknowledges that this is "one factor" a Court must consider when evaluating a Defendant's decision to deny benefits under ERISA. *Schwalm*, 626 F.3d at 311. Such a conflict is a "red flag" that may trigger a somewhat more searching review, but the arbitrary and capricious standard remains in place. *Id.*

However, it is unclear whether the conflict of interest factor is applicable to this particular situation, and, if it is, it is less of a "red flag" than is typically seen. The Supreme Court's commentary on this factor is helpful:

> The conflict of interest at issue here, for example, should prove more important (perhaps of great importance) where circumstances suggest a higher likelihood that it affected the benefits decision, including, but not limited to, cases where an insurance company administrator has a history of biased claims administration. It should prove less important (perhaps to the vanishing point) where the administrator has taken active steps to reduce potential bias and to promote accuracy, for example, by walling off claims administrators from those interested in firm finances, or by imposing management checks that penalize inaccurate decisionmaking irrespective of whom the inaccuracy benefits.

Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 117 (2008). The Defendant points out that the initial (and what turned out to be the "final") benefit calculations were performed by an independent organization, Mercer.[10] Plaintiffs did not suggest there were any circumstances suggesting a higher likelihood the "conflict" affected the benefits decision (including a history of biased claims administration). Therefore, if a conflict of interest does exist, it is a less significant conflict than is typical because Mercer acts as an independent "intermediary" making an initial determination before the Defendant

[10] There appears to have been separate independent organizations for each Name Plaintiff (Khaliel and Taylor). However, there is no indication there were any meaningful differences between these two entities, so there is no need to distinguish between the two of them.

makes the final determination.[11] However, because the Defendant still continues to make a final determination/actually administers the plan, the situation is not completely devoid of any conflict of interest. *See generally Shvartsman v. Johnson & Johnson*, 2012 U.S. Dist. LEXIS 80328, 24-25 (D.N.J. June 11, 2012) ("However, a conflict of interest is not present if an employer funds a benefit plan, but an independent third party is paid to administer the plan.").[12] As such, if the Court performs review under the arbitrary and capricious standard, it will take into account that a minimal conflict of interest exists.

III. Plaintiffs' Argument that Defendant has Waived Any Deference By Failing to Exercise Any Discretion

Deferential review can be waived where a plan administrator does not make a benefits decision, as there is nothing for a court to defer. *See Shelby Cnty. Health Care Corp. v. Majestic Star Casino*, 581 F.3d 355, 365 (6th Cir. 2009). While not clear from the briefs, the Court interprets Plaintiffs' argument as two separate arguments for why Defendant failed to exercise discretion.

First, Plaintiffs argue that since Defendant never responded to Mr. Khaliel's letter inquiring as to why his lump sum wasn't more, they failed to exercise their discretion. However, as to this first argument, Plaintiffs misapply the general principle that deferential review can be waived when a plan administrator does not make a benefits decision. While Plaintiffs are correct in stating that Defendant failed to respond to Mr. Khaliel's letters inquiring as to why his lump sum was not more, they are incorrect in concluding the mere lack of response was a failure by Defendant to

[11] The Court notes that in this instance Mercer's initial determination was "adopted" by the Defendant. If the Defendant had departed from Mercer's initial determination, the conflict of interest factor may have weighed more in favor of a heightened review.

[12] The Court notes that in this case, as opposed to *Shvartsman*, an independent third party does not "administer" the plan, but instead makes an initial determination. The Defendant still has the "final call."

exercise his discretion.[13] To the contrary, at that point Defendant had already exercised its discretion by awarding a lump sum it believed complied with plan terms. Implicit in that award is the fact that Defendant believed, in its discretion, that the lump sum was the correct amount based on its interpretation of the plan.

Plaintiffs' second argument is a closer call. Plaintiffs argue that since Mercer was the one making the initial determination and calculation, as opposed to Defendant, that is essentially a failure to exercise discretion by the Defendant. There is support for Plaintiffs' second argument in an unpublished Sixth Circuit Case:

> In fact, the parties do not dispute the fact that the LTD Plan grants discretionary authority. Instead, plaintiff argues that despite this grant of authority, the arbitrary and capricious standard cannot apply because the plan administrators did not exercise their discretion with regard to plaintiff's claim. Defendants never offered plaintiff an interpretation of the plan explaining their denial of his claim for benefits. The Third Circuit has held that, "[t]he deferential standard of review of a plan interpretation 'is appropriate only when the trust instrument allows the trustee to interpret the instrument *and where the trustee has in fact interpreted the instrument.*" *Moench v. Robertson,* 62 F.3d 553, 567 (3d Cir. 1995) (citing *Trustees of Central States, Southeast and Southwest Areas Health and Welfare Fund v. State Farm Mut. Auto Ins. Co.,* 17 F.3d 1081, 1083 (7th Cir. 1994)). In *Moench,* the court held that despite language in the plan granting discretionary authority, the arbitrary and capricious standard did not apply because there was no evidence that the Plan administrative committee construed the plan at all-rather, the evidence showed that a distinct entity, not granted authority in the plan language, offered the Plan interpretation in question. *Id.* Plaintiff analogizes to the present case, arguing that defendants did not render an interpretation of Plan language but instead simply told plaintiff that his time to appeal had expired.
>
> The district court rejected plaintiff's argument, emphasizing that *Moench* is distinguishable from the present case. The district court explained that "[p]laintiff mischaracterizes the holding in *Moench.*

[13] The Court is assuming that Plaintiffs are correct in stating Defendant failed to respond to Mr. Khaliel's letter because the Court was not directed to, nor did it find on its own, any contention by the Defendant that it did respond to Plaintiffs' letter.

> That court refused to apply a deferential standard of review because entities *other than the trustee* had interpreted the plan, not because of complete lack of interpretation."
>
> Despite the district court's conclusion, plaintiff's argument has merit. If in fact a plan administrator never offers an interpretation of plan language, then there is nothing to which the court can defer. Although the LTD Plan document clearly grants discretionary authority to defendants, defendants never provided an interpretation of the Plan to plaintiff in response to his claim that he continued to be enrolled in the Plan. As a result, we cannot apply a deferential standard of review. We will review defendants denial of plaintiff's claim for benefits de novo. As this case is before us on a motion for summary judgment, we must determine if there is any genuine issue of material fact whether defendants' decision to deny benefits was improper.

Thompson v. J.C. Penney Co., Inc., 00-3504, 2001 WL 1301751 (6th Cir. Aug. 7, 2001). However, *Thompson* is distinguishable from the present case.[14] In *Thompson*, Plaintiff filed an application for disability benefits with the LTD Plan. *Id.* at 2. The "Defendants never provided a formal acceptance or denial of plaintiff's application for disability benefits." *Id.* It is in that sense that the defendant never offered an "interpretation" of the Plan—it never provided a formal acceptance or denial.

In this case, the formal denial of benefits was the award of a lump sum, a lump sum that was less than the amount Plaintiffs claim they are entitled. This lump sum award provided an "interpretation" of the plan sufficient to satisfy *Thompson*. If, on the other hand, Defendant had completely failed to respond to or acknowledge Mr. Khaliel, for example by not awarding a lump sum at all and not communicating its rejection, then *Thompson* would be applicable to provide for review of Plaintiffs' claims for benefits *de novo*.

[14] Because this is a close call, the Court notes that *Thompson* was an unpublished Sixth Circuit case. Therefore, it is not binding on the Court. In any event, there is more recent and published Sixth Circuit precedent available to guide the Court, as discussed below.

Furthermore, Plaintiffs' second argument is at odds with a more recent, *published* Sixth Circuit case:

> But this contention, even if it were properly before us, lacks any support in the caselaw. Zurich's retention of outside counsel to assist it in its claim determination would in fact seem to demonstrate that it took the process seriously and attempted to ensure that its decision had a strong legal basis. The Kovaches have not demonstrated that Zurich's retention of Maguire amounted to the sort of improper delegation of authority that would require us to apply a de novo standard of review to Zurich's decision. We will thus proceed to examine Zurich's denial of the Kovaches' claim under the arbitrary-and-capricious standard.

Kovach v. Zurich Am. Ins. Co., 587 F.3d 323, 329 (6th Cir. 2009). There is no indication that Defendant's retention of an independent organization to make benefits calculations amount to the sort of improper delegation of authority mentioned in *Zurich* as requiring application of a *de novo* standard of review. *Id.* As discussed above, Mercer only made the "initial" determination, and Defendant made the "final" determination. (Docket No. 148, Page 7.) Therefore, Defendant still exercised its discretion and did not waive the right to deferential review.

Consistent with the above holdings, the Court will review Defendant's denial of benefits under an arbitrary and capricious standard, taking into account the minimal conflict of interest that exists because Defendant still administers the plan and makes the "final" determination (although in this case it adopted the independent organization's "initial" calculation).

SUBSTANTIVE ARGUMENTS CONCERNING PLAN PROVISIONS

I. Introduction

As an initial matter, the Court is applying the 1997 Plan Document and the 2004 amendments (from both January and May).[15] (Docket No. 143-5; 143-10; 143-11.) This was the Plan Document in effect when the Name Plaintiffs retired.[16] The 2008 Plan Document was not in effect at that time. Both parties appear to agree there are no substantive differences in the 2008 Plan Document, but for clarity and consistency all references will be to the 1997 Plan Document with the 2004 amendments.[17]

In responding to the parties' motions for summary judgment, the Court will only be deciding the proper way to interpret the Plan document. Essentially, the Court will be specifying exactly what provisions apply and resolving any disagreements between the parties on interpretations of those provisions. However, the Court will not be performing any of the calculations required by these provisions. Those calculations are left for the parties to perform, consistent with the Court's instructions.

[15] The Court notes that both parties referenced different plan documents. This made it extremely difficult for the Court to decipher the parties' arguments. For any filings going forward, the Court requests the parties reference the proper plan document: the 1997 plan document with the 2004 amendments.

[16] Defendant has consistently argued that Plaintiff should not be permitted to rely on the 2008 Plan Document because the 1997 Plan Document was originally pled. The Court has already ruled on this matter, but notes that it only considered the 1997 Plan Document and the 2004 Amendments. However, to the extent the Defendant would also argue against reliance on the 2004 Amendments (the Court assumes it would for the same reasons it argued against the 2008 Plan Document), the Court feels the Defendant is being disingenuous. The 2004 Amendments were part of the record and produced during discovery. Furthermore, it is clear they were in effect when Name Plaintiff Khaliel retired. Plaintiffs (who filed their motion for summary judgment first) indicated their arguments were based in large part on these amendments and also indicated the theory of their case through their expert, who also relied on these amendments.

[17] The Court notes there is at least one area where there *could* be a substantive difference between the Plan with the 2004 Amendments and the 2008 Plan (this area deals with how the Plan would be interpreted based on the incorporation of provisions done for purposes of determining Accrued Benefits). From 2004 to 2008 the bottom paragraph in 4.03(a)(3) was moved to its own separate section of 4.03(c). If provisions incorporating specifically 4.03(a)(3) were not updated to reflect this change, then an argument could be made that the paragraph in 4.03(c) would no longer be applicable. However, the Court need not decide this issue because it is not before it and the parties did not raise it.

II. Determination of Monthly Retirement Income

Plaintiffs argue that on January 1, 2004, the early retirement benefit became fully subsidized (retirees no longer had their benefits reduced for early retirement). Essentially, they argue that a participant's early retirement benefit would no longer be reduced for early commencement, while Defendant disagrees.[18] The Court will address both parties' positions by examining the contractual provisions they reference in support of their respective arguments.[19]

Prior to January 1, 2004, a Member's Monthly Retirement Income ("MRI") on his Early Retirement Date was subject to the provisions of 4.05(b).[20] In 4.05(b), there was (and still is) a reduction formula based on the number of months a retiree retired early: "reduced by one one hundred and eightieth (1/180) for each of the first sixty (60) months and one three hundred and sixtieth (1/360) for each of the next sixty (60) months by which the Member's Early Retirement Date precedes his Normal Retirement Date." 4.05(b)(1), (2), and (3).

However, in January 2004, the Plan was amended and the phrase "Effective prior to January 1, 2004," was inserted at the beginning of 4.05(b). (Docket No. 143-10.) Accordingly, 4.05(b) by its own terms no longer applied after January 1, 2004, for

[18] Defendants assert that there are two "parallel" benefit options available for determination of the Monthly Retirement Income: a Cash Balance Benefit (created in 2004) and a Defined Benefit (which was frozen in 2004, but retirees retained the possibility of receiving if it was greater than the Cash Balance benefit). Defendant appears to argue that distributions from the Cash Balance Account were exempted from Early Retirement reducers, while distributions from the former Defined Benefit were not. While a logical assertion on its face, the Court struggles to see how a plain reading of the Plain document permits this interpretation. As will be discussed below, a plain reading of the Plan document provides for the opposite: the Defined Benefit is also exempt from the Early Retirement reducers (at least after the 2004 amendments). Furthermore, to the extent the plan document ambiguous, it is construed *against* the drafter. *Univ. Hospitals of Cleveland v. Emerson Elec. Co.*, 202 F.3d 839, 846-47 (6th Cir. 2000).

[19] The Court notes that Defendant has argued that 4.05 operates to reduce for early retirement. (Docket No. 145-2, Page 7-8.) However, this reference to 4.05 is the pre-2004 version of 4.05. Additionally, as will be discussed below, any argument that 4.05 continues to reduce for early retirement as to the Defined Benefit is incorrect based on a plain reading of the Plan provisions.

[20] The Court notes that Section 4.05, which includes both 4.05(b) and 4.05(d), is labeled "Early Retirement."

determining an early retiree's MRI. By the same and additional amendments in 2004, 4.05(d) was created and was "Effective only for a Member who terminates employment on or after January 1, 2004, . . ." (Docket No. 143-10, 143-11.) 4.05(d) provided for the determination of Monthly Retirement Income for a Member who opted to retire early *on or after* January 1, 2004.[21] Unlike 4.05(b),[22] 4.05(d) does not have any reference to a reduction for Early Retirement. Name Plaintiff Khaliel terminated his employment with Defendant on January 9, 2005, and commenced his benefits under the plan effective March 1, 2005. (Docket No. 143, Page 7.)

It should be noted that all the provisions applying prior to January 1, 2004, didn't suddenly become obsolete/superfluous because of these amendments.[23] Throughout the Plan there are references to a retiree's "Accrued Benefit" as of December 31, 2003. These references ultimately will require a retiree to receive the "greater of" two benefit calculations:

> 4.05(d) Effective only for a Member who terminates employment on or after January 1, 2004, upon such Member's retirement, the Member shall be entitled to a **Monthly Retirement Income** equal to the benefit described under Subsection 4.03(b), determined as of the Member's Early Retirement Date, subject to Subsections (a) and (c) above; provided **in no case shall such Monthly Retirement Income be less than the Member's Accrued Benefit as of December 31, 2003**.
>
> * * *

[21] The Court notes this is logical. The 2004 Amendments made 4.05(b) only apply prior to January 1, 2004, while at the same time creating 4.05(d) which applied on or after January 1, 2004.

[22] The Court reiterates that by amendment 4.05(b) no longer applied on or after January 1, 2004.

[23] Admittedly, as will be shown, the provisions reducing distributions prior to January 1, 2004, for Early Retirement do become obsolete/superfluous (in that since it is after January 1, 2004, these provisions will likely never apply to a retiree absent some unusual circumstances). While this is a seemingly odd result (and accordingly one the Court was hesitant to make), it is what is demanded by a plain reading of the plan document. Presumably, at least standing here today, Defendant would argue it was their intention for the Early Retirement Reducers of 4.05(b) to continue to apply to the Defined Benefit for retirees on or after January 1, 2004. However, the Plan's language does not in any way warrant that interpretation. Furthermore, to the extent the plan document ambiguous, it is construed *against* the drafter. *Univ. Hospitals of Cleveland v. Emerson Elec. Co.*, 202 F.3d 839, 846-47 (6th Cir. 2000).

> 4.03(b) Effective January 1, 2004, the amount of the Member's **Monthly Retirement Income** under the **basic form** described in Section **4.02(a)** and payable at the Members' Normal Retirement Date shall be determined as set forth in paragraphs (1) and (2) hereof, if applicable; provided, **in no case shall such monthly retirement be less than the Member's Accrued Benefit as of December 31, 2003**.
>
> * * *
>
> 2.01 Accrued Benefit
> (a) Effective prior to January 1, 2004, the term **"Accrued Benefit"** as of any date of determination shall mean the greater of the amount in paragraph (1) or (2) as applicable, plus the amount in paragraph (3), if applicable:
>
> (1) The Member's Monthly Retirement Income earned to the date of determination under Section 4.03(a)(1) or
>
> (2) The greater of the amount in paragraph (A) or (B):
>
> (A) The Member's **projected Monthly Retirement Income at his Normal Retirement Date** under Section 4.03(a)(2)(A) or (3)(A), as applicable, multiplied by a fraction, . . .
>
> (B) The **Member's Monthly Retirement Income** under Section 4.03(a)(2)(B) or (3)(B). (emphasis added.)

The parties' references to a "Traditional/Defined Benefit"[24] (for benefits accrued as of December 31, 2003, and were "frozen" at that point) and "Cash Balance"[25] (benefits accrued based on the formula used on or after January 1, 2004) reflect these two distinct benefit calculations/values. These provisions establish the accrued traditional/defined benefit for each participant who had one as of December 31, 2003, as a *minimum* benefit for each respective participant.[26] The parties appear to agree that the Defined Benefit (the Accrued Benefit as of December 31, 2003) produced the largest

[24] Plaintiffs appears to refer to this as the "TRAC Benefit" (although Plaintiff neglects to account for the bottom paragraph of 4.03(a)(3) in making this reference as discussed below). The language itself is not important. What is important is to recognize that there are two, separate benefit calculations.
[25] Plaintiffs appeared to allege that Name Plaintiff Khaliel's Cash Balance Benefit would be $1,811.17 per month. (Docket No. 146-16, Page 13, Number 45.)
[26] The Defendant has stated that the benefit available under the Cash Balance is less than that for the Defined Benefit. (*See* Docket 145-1, Number 15.) Plaintiffs appear to agree.

benefit.[27] Therefore, the Court's discussion of Plan provisions will be in the context of determining Plaintiff's Monthly Retirement Income under the "Traditional/Defined Benefit" formula.

a. Amount of Defined Benefit (Monthly Retirement Income)

Before resolving the parties' areas of disagreement as to the *treatment* of the Defined Benefit (the Accrued Benefit as of December 31, 2003), the Court will resolve disagreement concerning the correct *amount* for the Defined Benefit. Although the parties aren't entirely clear on their disagreement concerning this issue, the Court has deciphered there is disagreement as to the calculation of the *amount* of the Defined Benefit.[28] The Court need not replicate this calculation to tell the parties' the proper amount (nor would it be capable of doing so). Since this disagreement hinges on whether or not the bottom paragraph in 4.03(a)(3) is applicable (beginning with "[s]uch monthly amount shall be converted to. . ."), the Court need only instruct whether or not that bottom paragraph is applicable. For the reasons below, the Court will hold that this paragraph **is applicable** to the determination of the Plaintiffs' MRI under 4.03(a)(3).

> 4.03(a)(3) For a member with an NKC Accrued Benefit, the greater of (A) or (B)
>
> > (A) one and two-thirds percent (1-2/3%) of the Member's Average Monthly Earnings, such amount multiplied by the Member's years of Credited Service, minus the lesser of (i) and (ii):
> >
> > > (i) six hundred twenty five thousandths percent (0.625%) of the Member's three year average of Monthly Earnings (not to exceed the taxable wage base) up to his Covered

[27] The Court believes the parties are in agreement that, even with application of 4.03(a)(3)'s bottom paragraph, the Defined Benefit produces a larger amount than the Cash Balance Benefit.

[28] *See* Docket No. 148-5, Exhibit C, Page 21 (appearing to assert application of 4.03(a)(3) results in an MRI of 2,288.78 rather than 2,849.13); Docket No. 165, Page 27 (asserting the same). On the other hand, Plaintiffs appear to assert the amount of the Defined Benefit MRI is $2,849.13.

> Compensation, multiplied by the Member's years of Credited Service to a maximum of thirty (30);
>
> (ii) eight hundred thirty-three thousandths percent (0.833%) of the lesser of the Member's Average Monthly Earnings, three (3) year average of Monthly Earnings (not to exceed the taxable wage base) or Covered Compensation, multiplied by the Member's years of Credited Service to a maximum of thirty (30).
>
> (B) the NKC Accrued Benefit.
>
> Such monthly amount shall be **converted to a single sum** on the basis of the interest rate or rates which would be used as of the first day of the Plan Year in which the benefit determination occurs by the Pension Benefit Guaranty Corporation for determining the present value of a Member's lump sum distribution on plan termination [in no event, however, will a Pension Benefit Guaranty Corporation immediate rate in excess of nine percent (9%), and the deferred rates related thereto, be used] and the 1984 Unisex Pension Mortality Table set back (3) years of age, and the **resulting amount divided by 212**; provided, effective January 1, 2000, the amount resulting from such conversion shall be no less than the amount which results from a conversion based upon the interest rate for 30-year Treasury securities for the second month prior to the beginning of the applicable Plan Year and the mortality table prescribed by the Secretary of the Treasury and **resulting amount divided by 212**. (emphasis added.)

§4.05(d) directs a reader to §4.03(b) for determination of MRI (with the Accrued Benefit minimum requirement). §4.03(b) also has an Accrued Benefit (Defined Benefit) minimum requirement. § 2.01, the provision applicable for determination of the Accrued Benefit, ultimately directs the Court to § 4.03(a)(3)(A). Because it results in a greater MRI than the Cash Balance Benefit, § 4.03(a)(3) continues to provide the Court with the formula to define Named Plaintiff Khaliel's MRI, even after the applicable 2004 Plan Amendments. § 4.03(a)(3)'s bottom paragraph contain

instructions for converting a monthly amount into a "single sum" (as opposed to a lump sum), ultimately resulting in division by 212.

It is important to recognize, in interpreting 4.03(a)(3), that "single sum" is distinct from "lump sum." The term "lump sum" is used throughout the plan to refer to the actual conversion to a lump sum. The fact that the Plan specifically uses "single sum" makes it obvious it is distinct from a "lump sum." Keeping this distinction in mind, the Court finds the "single sum" reference is merely part of a lengthy calculation for ultimately determining Plaintiffs' MRI.[29] It is also important to recognize this bottom paragraph is not indented. This precludes any argument that it applies only to 4.03(a)(3)(B) and not (a)(3)(A) because the fact that the paragraph is not indented indicates it was intended to apply to *both* (A) and (B). As a result, the Court holds that the bottom paragraph of 4.03(a)(3) applies in determining Plaintiffs' Monthly Retirement Income (in the Defined Benefit calculation).

Accordingly, the Court **ORDERS** 4.03(a)(3)'s bottom paragraph (beginning with "[s]uch monthly amount shall be . . .") is applicable in determining Plaintiffs' Monthly Retirement Income.[30]

b. Resolving Disagreement on Treatment of the Defined Benefit With Respect to Early Retirement

The parties appear to agree that the Defined Benefit (the Accrued Benefit as of December 31, 2003) produced the largest benefit.[31] However, the parties disagree on

[29] This is important because had this been instructions to convert to a lump sum, the Court would find it inapplicable because the incorporation of 4.03(a)(3) is *only* for purposes of determining the MRI in this context.

[30] It appears the same result would occur under 4.03(a)(2).

[31] The Court believes the parties are in agreement that, even with application of 4.03(a)(3)'s bottom paragraph, the Defined Benefit produces a larger amount than the Cash Balance Benefit.

(1) whether this number (either as a monthly amount or upon conversion to a lump sum) should be reduced for early retirement; (2) whether this number represents an *increasing* monthly income (as opposed to non-increasing, which would have to be reduced to reflect an increasing monthly income); and (3) whether the lump sum conversion was done correctly (specifically whether it took into account the 60 months certain aspect of the MRI and whether, if applicable, it was adjusted for the increasing monthly income).

While Defendant appears to argue there is a difference in treatment regarding calculation of a lump sum depending on which type of benefit is being used (Defined Benefit or Cash Balance), the Court has found the Plan document does not textually support this assertion. The actual calculation of the *lump sum* is the same regardless of which type of benefit (Defined or Cash) one uses for determination of the MRI for a retiree *on or after January 1, 2004*. Similarly, the operation of § 4.05 (labeled Early Retirement) is the same for retirees *on or after January 1, 2004*, regardless of which type of benefit is used for the determination of the MRI—there is no reduction for Early Retirement as a result of 4.05.[32]

In order to demonstrate why the calculation of the MRI and/or resulting lump need not be reduced for Early Retirement, the Court will note some of the provisions required for the calculation of the Defined Benefit to provide context important to interpreting the Plan document. The primary takeaway from this demonstration is that, despite Defendant's contentions otherwise, a reading of the Plan document does not result in a reduction for Early Retirement.

As already mentioned, the starting point is 4.05(d):

[32] The Court reiterates that for a retiree on or after January 1, 2004, 4.05(d) applies.

> 4.05(d) **Effective only for a Member who terminates employment on or after January 1, 2004**, upon such Member's retirement on the Member's Early Retirement Date, the Member shall be entitled to a Monthly Retirement Income equal to the benefit described under Subsection 4.03(b), determined as of the Member's Early Retirement Date, subject to Subsections (a) and (c) above; provided **in no case shall such Monthly Retirement Income be less than the Member's Accrued Benefit as of December 31, 2003**. (emphasis added)

Keeping in mind that 4.05(d) references a "Member's Accrued Benefit as of December 31, 2003" for the minimum amount required for a Member's *Monthly Retirement Income*, 2.01(a) prescribes exactly what *calculation* is required to determine this precise minimum, Accrued Benefit (the accrued benefit as of December 31, 2003):

> 2.01 Accrued Benefit
> (a) Effective prior to January 1, 2004, the term **"Accrued Benefit"** as of any date of determination shall mean the greater of the amount in paragraph (1) or (2) as applicable, plus the amount in paragraph (3), if applicable:
>
> (1) The Member's Monthly Retirement Income earned to the date of determination under Section 4.03(a)(1) or
>
> (2) The greater of the amount in paragraph (A) or (B):
>
> (A) The Member's **projected Monthly Retirement Income at his *Normal* Retirement Date** under Section 4.03(a)(2)(A) or (3)(A), as applicable, multiplied by a fraction, . . .
>
> (B) The Member's Monthly Retirement Income under Section 4.03(a)(2)(B) or (3)(B). (emphasis added.)

As should be apparent from a reading of 2.01 and 4.05(d), the reference to the Accrued Benefit (as of December 31, 2003) is a reference *only* for purposes of determining a Member's *Monthly Retirement Income*. There is no indication that this should impact the determination of their *lump sum*. Although 2.01 ultimately directs a determination of a Member's *Monthly Retirement Income* to be done under 4.03(a), the

determination of a Member's *lump sum* is still a separate calculation. Essentially, the reference and operation of 4.03(a) in this context is *only* for the purposes of determining a Member's Monthly Retirement Income. Understanding that the "incorporation" of 4.03(a) in this context is *solely* for determination of the MRI is the key for understanding why Defendant's argument that the MRI continues to be reduced for Early Retirement is unavailing.

There are two reasons that the reference and operation of 4.03 (by way of 2.01) is only for purposes of determining a Member's Monthly Retirement Income ("MRI") is significant. First, there is no indication the MRI determination requires an application of the Early Retirement reductions in 4.05(b) that applied prior to January 1, 2004. The "incorporation" of 4.03(a) through 4.05 and 2.01 is *only* for the purpose of determining a Member's *Monthly Retirement Income*, not for applying the pre-2004 Early Retirement reducers in 4.05(b).[33] If the actual intention of the Defendant was to continue to apply to Early Retirement reducers in 4.05(b) on or after January 1, 2004, to the Accrued Benefit as of December 31, 2003 (the Defined Benefit), that intention is not made apparent from a reading of the Plan.[34] On the contrary, there is no reference to 4.05(b), or even 4.05 in general, in Section 2.01 which establishes exactly what the Accrued Benefit "mean[s]."[35] 2.01(a). While it may have been logical to reduce the

[33] The Court further notes that 4.03(a)(3)(A), which the parties appear to agree is the applicable provision, is stated under 2.01(a)(2)(A) to be used for purposes of determining a Member's projected MRI at his **Normal** Retirement Date, which provides more evidence that the pre-2004 Early Retirement reducers under 4.05(b) should not apply to a determination of the MRI.

[34] Furthermore, as already mentioned, to the extent the Plan's language is susceptible of more than one interpretation, we will apply the "'rule of *contra proferentum*' and construe any ambiguities against . . . the 'drafting parties.'" *Univ. Hospitals of Cleveland v. Emerson Elec. Co.*, 202 F.3d 839, 846-47 (6th Cir. 2000)

[35] Defendant is correct that standing alone 4.05(b)(3) would operate to reduce Plaintiffs' Monthly Retirement Income under the Plan for Early Retirement. However, the amendments made 4.05(b) no longer applicable to retirees on or after January 1, 2004.

MRI for Early Retirement, that intention is not made apparent from a plain reading of the Plan.

Accordingly, consistent with the above holdings, the Court **ORDERS** the Defendant to not reduce the Plaintiffs' Monthly Retirement Income for Early Retirement in recalculating the benefits due under the Plan. [36]

c. Resolving Disagreement on Treatment of Defined Benefit as to Increasing Monthly Income (Cost of Living Adjustment) and Sixty Months Certain Assertions

As stated above, the parties disagree (1) whether this MRI represents an *increasing* monthly income (as opposed to non-increasing, which would have to be reduced to reflect an increasing monthly income); (2) whether the MRI is for sixty (60) months certain; and (3) whether the lump sum conversion was done correctly (specifically whether it took into account the 60 months certain aspect of the MRI and whether, if applicable, it was adjusted for the increasing monthly income). For the foregoing reasons, the Court holds the MRI is an *increasing* monthly income and is for sixty (60) months certain, which should be reflected in the conversion to a lump sum.[37] Reading the previously discussed 4.05(b), 4.03(b), 2.01, and 4.02(a) in conjunction with 4.02(b)(6) requires this result:

> 4.05(d) Effective only for a Member who terminates employment on or after January 1, 2004, upon such Member's retirement on the Member's Early Retirement Date, the Member shall be entitled to a Monthly Retirement Income **equal to the benefit described**

[36] The Court notes, as discussed below, that Defendant's argument that in the alternative/additionally 4.05(b)(5) reduces Plaintiffs' MRI for Early Retirement is also wrong because of the 2004 Amendments. 4.05(b)(5) applies only to "the Monthly Retirement Income described in paragraphs (1), (2), (3) and (4) above . . .". Those paragraphs no longer apply after the 2004 Amendments because 4.05(b) begins with the qualifier "[e]ffective prior to January 1, 2004, . . ." Therefore, 4.05(b)(5) is not applicable. The Court will further expand on why 4.05(b)(5) is inapplicable below in III. Conversion to a Lump Sum and Early Retirement Impact.

[37] As will be discussed below, the Court finds unavailing Defendant's arguments that this MRI was a non-increasing annuity and needed to be "reduced" in order to represent an increasing annuity.

under Subsection 4.03(b), determined as of the Member's Early Retirement Date, subject to Subsections (a) and (c) above; provided in no case shall such Monthly Retirement Income be less than the Member's Accrued Benefit as of December 31, 2003.

* * *

4.03(b) Effective January 1, 2004, the amount of the Member's Monthly Retirement Income **under the basic form described in Section 4.02(a)** and payable at the Members' Normal Retirement Date shall be determined as set forth in paragraphs (1) and (2) hereof, if applicable; provided, in no case shall such monthly retirement be less than the Member's Accrued Benefit as of December 31, 2003.

* * *

2.01 Accrued Benefit

(a) Effective prior to January 1, 2004, the term **"Accrued Benefit"** as of any date of determination shall mean the greater of the amount in paragraph (1) or (2) as applicable, plus the amount in paragraph (3), if applicable:

(1) The Member's Monthly Retirement Income earned to the date of determination under Section 4.03(a)(1) or

(2) The greater of the amount in paragraph (A) or (B):

(A) The Member's **projected Monthly Retirement Income at his Normal Retirement Date** under Section 4.03(a)(2)(A) or (3)(A), as applicable, multiplied by a fraction, . . .

(B) The Member's Monthly Retirement Income under Section 4.03(a)(2)(B) or (3)(B).

* * *

4.03(a) Effective prior to January 1, 2004, when a Member lives to his Normal Retirement Date, he shall be entitled to retire and to receive a Monthly Retirement Income in an amount certified to the Trustee by the Retirement Committee. The amount of the Member's Monthly Retirement Income **under the basic form described in 4.02(a)** and payable at his Normal Retirement Date shall be equal to the largest of the amounts provided . . .

* * *

4.02(a) Basic Form: The basic form of Retirement Benefit (to which the formula indicated in **Section 4.03 applies**) shall be an **increasing monthly income** commencing on the Member's Disability, **Early**, Normal, or Late Retirement Date or on the date specified in Section 5.01 and **continuing for sixty (60) months**

> **certain** and for his lifetime thereafter. The monthly income shall be increased, on each January 1 following the date the . . .
>
> * * *
>
> 4.02(b)(6) A lump sum payment payable at the Member's Disability, Early, Normal, or Late Retirement Date or the date specified in Section 5.01, and calculated by multiplying the **increasing** Monthly Retirement Income determined under the applicable Section by 212, and, **if the Monthly Retirement Income is due to Early Retirement or Disability Retirement, dividing by one (1) minus the appropriate reduction factor under Section 4.05(b)(5),** Section 4.06(a)(5) or Section 5.01(c)(5), **as applicable.** (emphasis added.)

While not a model of clarity, there are several indications in these provisions that lead to the conclusion that the MRI (the accrued benefit as of December 31, 2003) is increasing and for sixty months certain. First, the basic form of retirement benefit in 4.02(a) is stated to be "increasing" and for "sixty (60) months certain." There is no indication in 4.05(d) (which deals with a Member's Early Retirement on or after January 1, 2004), 4.03(b) (applicable provision for determining the amount of the MRI), 2.01(a) (Accrued Benefit as of December 31, 2003), 4.03(a) (provision sent to by 2.01 for actual determination of the Accrued Benefit), or 4.02(a) that the basic form is not the proper form in the situation where a Member retires early on or after January 1, 2004, and is availing himself of the Accrued Benefit as of December 31, 2003. In fact, there are indications that it is indeed the proper form in all of these provisions.

4.02(a) explicitly indicates that the basic form is the benefit to which the formula indicated in 4.03 applies (which it does in this context both for determination of the amount of the MRI, 4.03(b), and, by incorporation through 2.01, 4.03(a)). 4.03(b), which is applicable for the determination of the amount of the MRI, explicitly states the MRI shall be in "the basic form described in Section 4.02(a)." 4.02(a) also specifically

references Early Retirement. 2.01(a)(2)(A) states "projected Monthly Retirement Income at his **Normal** Retirement Date," which indicates that, regardless of whether or not the Member has retired early, he or she is entitled to the MRI that would be available at his Normal Retirement Date. 4.03(a), which 2.01 uses for the actual determination of the Accrued Benefit, states the amount of the MRI is "under the basic form described in 4.02(a)."

Furthermore, 4.02(b)(6) references "increasing Monthly Retirement income" with respect to the lump sum. Defendant argues that the accrued benefit is a non-increasing benefit that must be first "converted" (reduced) into an increasing annuity. The Court finds no support for this assertion in the Plan language. To the contrary, as shown above, the Court finds a plain reading of the Plan terms requires that this benefit be increasing as specified in 4.02(a).

Accordingly, the Court **ORDERS** that Defendant treat the Plaintiffs' Monthly Retirement Income as an increasing monthly income for sixty (60) months certain in recalculating the Plaintiffs' benefits due under the Plan. Having determined the Monthly Retirement Income is both increasing and for sixty months certain, the Court will now address the parties' arguments concerning the conversion of this Monthly Retirement Income to a lump sum. As will become clear below, Defendant's argument that the conversion to a lump sum resulted in a reduction for Early Retirement is unavailing.[38]

[38] Nor would it be logically consistent with the rest of the Plan taking into account the Court's above holdings because, as the Court held above, the Monthly Retirement Income individually is to not be reduced for Early Retirement.

III. Conversion to a Lump Sum and Early Retirement Impact

Both parties appear to agree that 4.02(b)(6) is applicable to convert the "increasing Monthly Retirement Income" to a lump sum.[39] The parties' disagreement concerns whether 4.02(b)(6) operates to reduce this lump sum for Early Retirement.

> 4.02(b)(6) A lump sum payment payable at the Member's Disability, Early, Normal, or Late Retirement Date or the date specified in Section 5.01, and calculated by multiplying the increasing Monthly Retirement Income determined under the applicable Section by 212, and, **if the Monthly Retirement Income is due to Early Retirement or Disability Retirement, dividing by one (1) minus the appropriate reduction factor under Section 4.05(b)(5), Section 4.06(a)(5) or Section 5.01(c)(5), as applicable.**
>
> * * *
>
> 4.05(b)(5) **Anything herein to the contrary notwithstanding**, the **Monthly Retirement Income** described in paragraphs (1), (2), (3) and (4) above be reduced or further reduced by one three hundredths (1/300) for each month by which the Member's Early Retirement Date precedes his Normal Retirement Date (emphasis added).

4.02(b)(6) essentially instructs a reader to multiply the determined, increasing MRI by 212 and then, if the MRI is due to Early Retirement, to divide by one (1) minus the appropriate reduction factor under 4.05(b)(5) **as applicable**. Defendant has consistently argued that application of 4.02(b)(6) results in a reduction for Early Retirement, but has never actually expanded on or explained how their interpretation of that provision results in such a reduction. In fact, upon reviewing Defendant's briefing, the Court believes it has argued for different, inconsistent interpretations of 4.02(b)(6), one which

[39] Plaintiffs have alleged the multiplication by 212 is the "minimum lump sum" benefit. (*See, e.g.,* Docket No. 143, Page 25-26.) Implicit in this statement is that Plaintiffs believe the other option for determining the lump sum (the Actuarial Equivalent of the MRI) can be, at least in some instances, greater than the lump sum derived from the multiplication by 212. The Court merely notes that, as will be discussed below, to the extent the application of 4.02(b)(6) is less than what the Actuarial Equivalent of the MRI would be, then Plaintiffs would be entitled to an Actuarial Equivalent lump sum.

would actually *increase* the Plaintiffs' lump sum for Early Retirement.[40] Because Defendant was not entirely clear on how exactly it interpreted 4.02(b)(6) and 4.05(b)(5) to result in a reduced lump sum because of Early Retirement, the Court will analyze some of the arguments for a reduction for Early Retirement which Defendant has made with respect to these provisions.

Despite Defendant's contentions otherwise, application of 4.02(b)(6) does not result, through its reference to 4.05(b)(5), in a literal application of Section 4.05(b)(5) in its entirety in this context. That would be illogical and not consistent with the plain reading of the text. A division by one (1) always results in getting the same number with which one started.[41] So that language, specifically placed in the plan document, would be rendered superfluous. If that odd reading is what the drafters intended, then they presumably would have separated off the division by one from the "minus the appropriate reduction factor."[42] Furthermore, as will be discussed below, language in both 4.02(b)(6) ("as applicable") and 4.05(b)(5) precludes application of 4.05(b)(5) for retirees on or after January 1, 2004.

To the extent Defendant is arguing for application of 4.05(b)(5) on its own right (aside from any incorporation through 4.02(b)(6)), the Court notes that such application would not be appropriate. The first line of 4.05(b)(5) states its application only applies to "the Monthly Retirement Income described in paragraphs (1), (2), (3), and (4)." As

[40] *See* Docket No. 145-1, Number 64: "212 / (1-(32/300)) = 237.313." Admittedly, this appears to be in the context of having already applied 4.05(b)(5), which the Court will hold is not applicable in this situation. That change—that 4.05(b)(5) is no longer applicable—would presumably cause the Defendant to argue that this interpretation would no longer be appropriate.

[41] For example, 1000 / 1 = 1000. It would make very little sense for this to be the reading of 4.02(b)(6), as the division by one (1) would essentially be superfluous/meaningless.

[42] Even a period or comma would potentially have made this interpretation more reasonable, although the Court still doubts it would be determinative.

discussed, due to the 2004 Amendments, 4.05(b)(1)-(4) does not determine a retiree's (on or after January 1, 2004) Monthly Retirement Income. Therefore, 4.05(b)(5) standing alone would not apply to a determination of Plaintiffs' benefits.

Plaintiffs' assert that application of 4.02(b)(6) and 4.05(b)(5) only results in a multiplication of 212, arguing that the ending "as applicable" language in 4.02(b)(6) and "the Monthly Retirement Income described in paragraphs (1), (2), (3), and (4)" language in 4.05(b)(5) precludes any possible reduction of benefits due to Early Retirement on the basis of 4.05(b)(5).[43] (*See* Docket No. 154, Plaintiffs' Response to Defendant's Motion for Summary Judgment, Page 25 n. 25.) There is merit to Plaintiffs' argument since a reduction under 4.05(b)(5) would not be "applicable" since: (1) Plaintiffs' Monthly Retirement Income was not determined under 4.05(b)(1)-(4); and (2) all indications are a reduction for Early Retirement is not appropriate given the language in 4.05(b)(5) and that the determination of a retiree's MRI (before conversion to a lump sum) did not result in a reduction Early Retirement.[44]

Therefore, the Court agrees with Plaintiff that application of 4.02(b)(6) for a conversion to a lump sum will not result in a reduction of benefits for Early Retirement.[45] Furthermore, as already mentioned, to the extent the Plan's language is

[43] Plaintiffs also argue the language in 4.05(d) making the determination subject to (a) and (c), but not (b), precludes the application of 4.05(b)(5). This argument has merit as to the application of 4.05(b)(5) on its own right. However, as to application of 4.05(b)(5) through incorporation by 4.02(b)(6), this argument is without merit. This language is all with respect to the "Monthly Retirement Income" determination. It does not have anything to do with the lump sum determination. Choosing to take a lump sum is what "exposes" a retiree to 4.02(b)(6), which subsequently incorporates 4.05(b)(5). In any event, as discussed below, the Court holds that 4.05(b)(5) is not made applicable through 4.02(b)(6).

[44] While not determinative, the Court notes that it would be an odd result for the Plan to be read in a way that doesn't reduce a retiree's MRI for Early Retirement, but does reduce their lump sums for Early Retirement.

[45] The Court notes that Plaintiffs have merely asked the Court to find that 4.02(b)(6) does not result in a reduction of benefits for Early Retirement (essentially asking the Court to find it only results in a

susceptible of more than one interpretation, we will apply the "rule of *contra proferentum* and construe any ambiguities against . . . the drafting parties." *Univ. Hospitals of Cleveland v. Emerson Elec. Co.*, 202 F.3d 839, 846-47 (6th Cir. 2000). Accordingly, the Court **ORDERS** that application of 4.02(b)(6) for determination of Plaintiffs' lump sums does not result in a reduction for Early Retirement.

IV. Actuarial Equivalent Lump Sum

It appears Plaintiffs believe 4.02(b)(6)'s application only results in a "minimum" lump sum and that the actuarial equivalent lump sum will actually be a larger amount (and therefore is the lump sum they will wish to take).[46] The Plan and ERISA require that a participant's lump sum benefit be the "actuarial equivalent" of the MRI. *See* 5.01(e).[47] 5.01(e) states "a terminated Member may elect to receive his benefits in Actuarially Equivalent alternate form." A lump sum is an alternate form. Had Defendant intended the actuarially equivalent calculation to be based on a non-increasing annuity (or any form other than the basic form), 5.01(e) would have been the section that it would have been logical to place that qualifier. 2.02 doesn't eliminate the assumption of actuarial equivalency based on an increasing monthly income and sixty (60) months certain. Therefore, an "actuarial equivalent" lump sum will need to account for an increasing monthly benefit for sixty (60) months certain.

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multiplication by 212). Plaintiffs have not asked for any other interpretations of this provision and have only refuted Defendant's contentions that it results in a reduction for Early Retirement.

[46] If Plaintiffs' contention is true, then it would appear the Court's holding as to 4.02(b)(6) would not impact the lump sum Plaintiffs ultimately receive (as they will always take the actuarial equivalent amount).

[47] The Court notes that 5.01(e) is actually qualified by "subject to the provisions of Section 4.02," but ERISA actually requires that the lump sum be actuarially equivalent, so that possible qualification does not matter. In any event, there is nothing within 4.02 that could be interpreted as completely negating any presumption from the rest of the plan provisions that a lump sum should be the actuarially equivalent of the increasing and sixty (60) months certain monthly retirement income.

Plaintiffs allege the Defendant incorrectly determined their lump sum benefit by failing to adjust for the value of a sixty (60) months certain benefit. Plaintiffs allege this adjustment is done by multiplying the Monthly Retirement Income ("MRI") by 1.015. (Docket No. 143, Page 11.) It appears Defendant has admitted this is the proper way to make such an adjustment. (Docket No. 143-7, NOR 485; 143-15, No. 47.) Plaintiffs also allege that Defendant failed to take into account the increasing nature of the MRI when determining the lump sum. Defendant appears to allege that multiplying by 212 is the appropriate way of reflecting for the increasing benefit, as well as accounting for the five year certain aspect. (Docket No. 145, Page 14-15; Docket No. 154, Page 27.)

Plaintiffs appear to disagree that the 212 factor is the appropriate way to determine the actuarial equivalent lump sum. (Docket No. 154, Page 26-28.) Specifically, Plaintiffs allege "the Plan must still calculate the actuarial equivalent by using the interest rates in effect as of the calculation date and by using the participant's actual age at retirement." In essence, Plaintiffs argue that the 212 lump sum is the *minimum* benefit provided by the Plan--even if 4.02(b)(6) (the provision of the plan applicable for determination of the lump sum) is properly applied, they are still entitled to the "actuarial equivalent" of the MRI, which includes proper adjustment for the sixty months certain benefit and increasing nature of the MRI.

The Court holds that Plaintiff is entitled to a lump sum that at least is actuarially equivalent to the increasing and sixty (60) months certain Monthly Retirement Income. To the extent application of 4.02(b)(6) does not provide an actuarially equivalent lump sum, then Defendant will need to provide them with an alternative lump sum that is the

actuarial equivalent of the MRI. The Court **ORDERS** Defendant to provide the actuarial equivalent lump sum, if necessary, when performing the recalculation. As part of that calculation, Defendant should be prepared to demonstrate why the lump sum is at least actuarially equivalent to an increasing monthly income and sixty months (60) certain.[48]

V. Note on Standard

The Court believes all of its holdings are based on a plain reading of the Plan document. However, as held above, to the extent any of the relevant provisions are ambiguous, they would be construed *against* the drafter and in favor of the Plaintiffs. *Univ. Hospitals of Cleveland v. Emerson Elec. Co.*, 202 F.3d 839, 846-47 (6th Cir. 2000) (noting arbitrary and capricious deferential review is tempered by the principle of "*contra profentum*" which construes any ambiguities against the drafting parties). Accordingly, to the extent any of the Plan provisions turned out to be ambiguous, they would in any event be construed against the Defendant. *Id.*

MISCELLANEOUS ARGUMENTS

I. Plaintiffs' Summary Plan Description Argument Concerning Early Retirement Reductions

The Court finds Plaintiffs' argument that the Summary Plan Description ("SPD") eliminated reduction for Early Retirement without a legal basis. Plaintiffs request the Court to look at the SPD from January 2004:

[48] The Court is aware some of the parties' experts arguably have given their opinion on whether the lump sum is actuarially equivalent. However, those opinions were made prior to the Court's holdings regarding the impact of Early Retirement on the MRI and conversion to lump sum, the increasing nature of the MRI, and the sixty (60) months certain nature of the MRI.

> **Early Retirement**
> For plan members who terminate employment on or after January 1, 2004, if you terminate employment prior to normal retirement age (age 65), your benefit will consist of the vested portion of **your retirement account**, with no reduction for early termination (emphasis added).

(Docket No. 143-8, Page 5.) Defendant disagrees with Plaintiffs' contention that Early Retirement reducers were altogether eliminated from lump sum distribution calculations by the Plan. In support, Defendant also points to the 2004 SPD, specifically some of the bolded descriptions:

> **Retirement Account** – You have a retirement account in your name. Benefit credits are added to your account each year, and your account is credited with interest based on competitive rates.
>
> **Benefit Credits** – At the end of each year, Norton Healthcare credits your account with a benefit account for that year. This benefit credit equals a percentage of your total cash compensation for each calendar year in which you completed 1,000 or more hours of service. The benefit credit percentage that applies to you will vary from year to year, depending on the number of years you have been employed at Norton Healthcare.
>
> **Interest** – Your account not only grows through annual benefit credits, it receives a competitive rate of interest, too.

(Docket No. 143-8, Page 1.) Based on this language, Defendant argues that the SPD language identified by Plaintiffs only eliminates the Early Retirement reductions for Cash Balance distributions: relying on the "your retirement account" language. (Docket No. 148, Page 11.) Defendant argues this language is unique pension verbiage for reference to Cash Balance benefit distributions.

The Court is inclined to agree with Defendant's interpretation that the "retirement account" definition in the 2004 Summary Plan Description only purports to eliminate Early Retirement reductions for Cash Balance distributions. However, the

Court does not need to decide this issue definitively because SPD language is not legally binding:

> [h]owever, we cannot agree that the terms of statutorily required plan summaries (or summaries of plan modifications) necessarily may be enforced (under § 502(a)(1)(B)) as the terms of the plan itself . . . information *about* the plan provided by those disclosures is not itself *part of* the plan.
>
> Finally, we find it difficult to reconcile the Solicitor General's interpretation with the basic summary plan description objective: clear, simple communication. See §§ 2(a), 102(a), 29 U.S.C. § 1001(a), 1022(a) (2006 ed.). To make the language of a plan summary legally binding could well lead plan administrators to sacrifice simplicity and comprehensibility in order to describe plan terms in the language of lawyers.
>
> For these reasons taken together we conclude that the summary documents, important as they are, provide communication with beneficiaries *about* the plan, but that their statements do not themselves constitute the *terms* of the plan for purposes of § 502(a)(1)(B). We also conclude that the District Court could not find authority in that section to reform CIGNA's plan as written.

CIGNA Corp. v. Amara, 131 S. Ct. 1866, 1877-78 (2011).[49] Since *Amara*, the Sixth Circuit has observed that Summary Plan Descriptions are not "legally binding, nor parts of the benefit plans themselves." *Engleson v. Unum Life Ins. Co. of Am.*, 723 F.3d 611, 620 (6th Cir. 2013). Therefore, regardless of how the Court would interpret the SPD,

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[49] The Supreme Court has recently reaffirmed this precedent, but in what the Court can best describe as a "unique" situation departed from it:

> We have made clear that the statements in a summary plan description 'communicat[e] with beneficiaries *about* the plan, but ... do not themselves constitute the *terms* of the plan.' *CIGNA Corp. v. Amara,* 131 S.Ct. 1866, 1878 (2011). Nonetheless, the parties litigated this case, and both lower courts decided it, based solely on the language quoted above. See 663 F.3d 671, 673 (C.A.3 2011); App. to Pet. for Cert. 26a. Only in this Court, in response to a request from the Solicitor General, did the plan itself come to light. See Letter from Matthew W.H. Wessler to William K. Suter, Clerk of Court (Nov. 19, 2012) (available in Clerk of Court's case file). That is too late to affect what happens here: Because everyone in this case has treated the language from the summary description as though it came from the plan, we do so as well.

US Airways, Inc. v. McCutchen, 133 S. Ct. 1537, 1543, n. 1 (2013).

its provisions would not be legally binding in the face of contrary plan provisions. The actual plan provisions, not the SPD, are what controls for the determination of whether there is a reduction for early retirement.

II. Larry Taylor Dilemma

Defendant argues that Plaintiffs have "abandoned" Name Plaintiff Larry Taylor. (Docket No. 145, Page 14; 148, Page 11-12.) Plaintiffs' appear to accept that Taylor may not be entitled to an early retirement benefit, but reassert that his lump sum failed to include the value of a 5-year certain and life annuity. Given the seemingly unique circumstances surrounding Taylor,[50] and the parties' notable lack of pleading on this issue, the Court is unable to make a definitive holding on this issue. However, to the extent the plan language applicable to Taylor is substantively the same as the 1997 Plan and 2004 amendments, the Court's holdings are applicable to any benefit determination.

III. 2008 Plan Document

Plaintiffs point out the 2008 Plan governs the claims of those members of the Class who terminated their employment with the Company after September 12, 2008. (Docket No. 154, Page 29.) Plaintiffs allege the 2008 Plan is substantively the same as the 1997 Plan with the 2004 Amendments (the Plan that was briefed and before the Court). It is unclear whether Defendants disagree. To the extent the Plan provisions are

[50] It appears that "Mr. Taylor left employment in 1988," but took his lump sum distribution in 2006. (Docket No. 154, Page 33.) Plaintiffs reference the "1985 Plan" in a citation, but the Court has been unable to locate it. *Id.* Therefore, the Court is unable to make a definitive judgment one way or another as to Mr. Taylor. However, as the Court holds above, to the extent the plan language is substantively the same with respect to the 1997 Plan with the 2004 amendments, the Court's holdings are applicable.

substantively the same, the Court's holdings also apply to Class members who terminated their employment with the Company after September 12, 2008.[51]

IV. Form 5500

The Defendant emphasized that there was no reported increase in liability on their 2004 Form 5500. To the extent the Court's above reading of the plan document does result in a more "subsidized" early retirement, the Court admits this is an odd situation.[52] However, just as there was no legal significance to the Summary Plan Description, there is no legal significance to the Form 5500. The Court is interpreting the Plan document, not the Form 5500. While the Defendant may not have necessarily meant to subsidize early retirement, a plain reading of the Plan document results in that outcome. The Court is bound to interpret the Plan document, not decipher what Defendant's actual intentions were or were not.

CONCLUSION

The Court has found the review of this matter challenging. The Court has attempted to apply the applicable standards of review and apply the plain meaning of the Plan as applicable. Needless to say this was easier said than done. The Court was faced with merging of two plans into one document, which were subsequently amended on numerous occasions, but included prior provisions. At times it was like traversing a matrix. The parties attempted to be helpful, but the complexity of documents and

[51] The Court notes there is at least one area where there *could* be a substantive difference between the Plan with the 2004 Amendments and the 2008 Plan (this area deals with how the Plan would be interpreted based on the incorporation of provisions for purposes of determining Accrued Benefits). From 2004 to 2008 the bottom paragraph in 4.03(a)(3) was moved to its own separate section of 4.03(c). If provisions incorporating specifically 4.03(a)(3) were not updated to reflect this change, then an argument could be made that the paragraph in 4.03(c) would no longer be applicable. However, the Court need not decide this issue because it is not before it and the parties did not raise it.

[52] Even if it is an "odd" situation, however, it would not be unheard of for a Defendant to (1) wrongfully interpret their plan document; and/or (2) to have misstated their liabilities.

piecemeal nature of those documents made the task daunting for all concerned. Nevertheless, after several drafts this opinion represents an attempt to interpret the plain meaning of the text where available and reach a reasoned conclusion.

For these reasons, and consistent with the Court's conclusions above,

IT IS HEREBY ORDERED as follows:

(1) **IT IS HEREBY ORDERED** that Plaintiff's Motion for Summary Judgment, (Docket No. 143), is **GRANTED in part** and **DENIED in part** (to the extent it is inconsistent with this opinion).

(2) **IT IS HEREBY ORDERED** that Defendant's motion for summary judgment, (Docket No. 145), is **DENIED** to the extent it is inconsistent with this opinion. Plaintiffs' complaint will not be dismissed.

(3) **IT IS HEREBY ORDERED**, consistent with the above holdings, that Defendant **RECALCULATE** Plaintiffs' Monthly Retirement Income and corresponding lump sums. Furthermore, Defendant should ensure the recalculated lump sums are at least actuarially equivalent to the Monthly Retirement Income, appropriately accounting for the increasing monthly income (cost of living adjustment) and sixty (60) months certain of the Monthly Retirement Income.

(4) **IT IS HEREBY ORDERED** the recalculations should be done within 45 days and submitted to the Court for approval. If Plaintiffs have any objections with these recalculations, they must respond within 14 days.

IT IS SO ORDERED.

Date: January 6, 2016

cc: Counsel

Thomas B. Russell

Thomas B. Russell, Senior Judge
United States District Court