UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

LAWRENCE G. RUPPERT,

On behalf of himself and on behalf of
All others similarly situated,

Plaintiff,

3:08-CV-00127-bbc
Judge Barbara B. Crabb
Magistrate Judge Stephen L. Crocker

v.

ALLIANT ENERGY CASH BALANCE
PENSION PLAN,

Defendant.

FIRST AMENDED CLASS ACTION COMPLAINT

Nature of Action

1. This is a proposed class action under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001, *et seq.*, challenging the legality of a defined benefit pension plan's lump sum distribution methodology for the period preceding August 17, 2006. Plaintiff seeks a declaration that the plan's lump sum distribution methodology was illegal under *Berger v. Xerox Corp. Retirement Income Guarantee Plan*, 338 F.3d 755 (7th Cir. 2003) and an order compelling the plan to recalculate his benefit and pay him the amount still due plus appropriate pre- and post-judgment interest.

Subject Matter Jurisdiction

2. This Court has subject matter jurisdiction over this action by virtue of 28 U.S.C. § 1331 because this is a civil action arising under the laws of the United States. Specifically, this action is brought under ERISA § 502, 29 U.S.C. § 1132.

Personal Jurisdiction and Venue

3. This Court has personal jurisdiction over Defendant Plan (defined below) because it transacts business in, and has significant contacts with, this District, and because ERISA provides for nationwide service of process. *See* ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2).

4. Under ERISA § 502(e), 29 U.S.C. § 1132(e), an action "may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found." Venue here is proper on all four bases provided by the statute. First, this is the place where the Plan is administered. Second, this is the District where the alleged breach occurred. Third, the Plan "may be found" in this District in either a general or specific personal jurisdiction sense. Fourth, the Plan "resides" here within the meaning of ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2).

The Parties – Plaintiff's Exhaustion of Plan Remedies – and the Futility of Requiring Further Exhaustion

5. Plaintiff Lawrence G. Ruppert, a resident of Madison, Wisconsin, is a former employee of Alliant Energy Corporation or one or more of its affiliates who participated in the Plan during his period of employment with the Company.

6. Mr. Ruppert remains a participant, as defined in ERISA § 3(7), 29 U.S.C. §1002(7), in the Plan because although he received benefits from it, it owes him additional benefits that it has not yet paid him, as set forth herein.

7. In 2006, after separating from service but before attaining normal retirement age under the Plan (age 65), on forms provided by the Plan, Mr. Ruppert filed a written claim, within the meaning of the Plan, *see* Plan § 11.1 (Doc. 11, Ex. A.), the Plan's Summary Plan Description ("SPD") at 14 (Doc. 11, Ex. B.), and the governing Department of Labor claims regulations, *see* 29 C.F.R. § 2560.503-1 *et seq.*, seeking his Plan benefit in the form of a single-sum (or "lump")

sum distribution, one of the Plan's optional forms of benefit. Plaintiff's request for a distribution for his Plan benefit was without reservation. He was not asked on the forms provided to him to specify the dollar value of the amount he contended the Plan owed him: he asked for his benefit, meaning **all** of it.

8. In response, the Plan's administrator – the "Committee," defined below – partially granted and partially denied Mr. Ruppert's claim, albeit without telling him that it was partially denying his claim, as it was required to do under the claims regulation, under the SPD (p.14) and under Plan § 11.2. Instead, the Committee paid Mr. Ruppert an amount equal to his notional Plan "account balance" but concealed from him that it was denying him his full Plan accrued benefit – *i.e.,* the Committee did not disclose that it had decided to withhold from him the amount in excess of his nominal account balance, which amount, the Seventh Circuit explained in *Berger,* had to be paid in order to ensure actuarial equivalence, or, in the words of Judge Posner, to ensure Plaintiff was not forced "to sell [his] pension entitlement back to the company cheap." *Berger,* 338 F.3d at 762. The Plan and the Committee were well aware that they were denying Mr. Ruppert the entirety of his accrued benefit under the Plan, *accord May Dept. Stores v. Fed. Ins. Co.,* 305 F.3d 597, 602 (7th Cir. 2002) (Posner, J.), yet purposefully chose to keep him in the dark about it precisely to avoid alerting participants that they had a right to benefits they had been denied *sub silentio*.

9. Under the governing Department of Labor claims regulations, in the case of the failure of a plan to follow the claims procedures specified in the regulations as occurred here – which require, among other things, timely notice of an adverse determination, reasons for the adverse determination, a description of the plan's review procedure, a statement of the right to file suit following an adverse determination on review, 29 C.F.R. § 2560.503-1(g)(1) – "**a**

claimant shall be deemed to have exhausted the administrative remedies available under the plan and shall be entitled to pursue any available remedies under [ERISA] section 502(a)." *Id.* § 2560.503-1(l) (emphasis added).

10. Mr. Ruppert thus has made a claim for benefits and it has been denied and he should be deemed to have exhausted his Plan remedies.

11. Any further exhaustion should independently be excused on the grounds of futility. The facts show it is certain that the Committee would hold that the Plan's lump sum distribution methodology for the period preceding August 17, 2006 was lawful and that Mr. Ruppert has already received all that he is due under the Plan as a matter of law.

12. *First*, the Committee is not only a plan fiduciary but it has amendment powers *and duties* under the Plan to make sure that the Plan remains compliant with *the law*. Plan § 12.1 (Committee to amend the Plan to "conform to any requirements of ERISA"). The Committee has exercised these powers in the past but never to bring the Plan's lump sum methodology into compliant with ERISA even after the Seventh Circuit decided *Berger* in 2003 in a case involving a factually indistinguishable plan. For example, twice in 2005, when it came time to amend the Alliant Plan, the Committee, though charged with the duty of enacting amendments necessary for keeping the Plan compliant with the law, did not then alter the Plan's illegal lump sum methodology. *See, e.g.*, Doc. 11-2 at 90-93 (March and September 2005 Committee Resolutions amending the Plan). That is because the Committee long ago made its mind up: it believes that the Plan's lump sum methodology is acceptable. Exhaustion would be futile.

13. *Second*, wholly apart from its failure to exercise its amending authorities and duties to right the Plan's wrongs, the Committee as fiduciary can hardly contend it has not separately made the fiduciary determination that the Plan's lump sum methodology was lawful:

a fiduciary's obligation to ensure that the plan is run lawfully under ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), does not arise when a participant makes a benefit claim**.** That obligation arises at the outset of the fiduciary relationship and is a continuous one. After *Berger* was handed down in 2003, as Plan administrator the Committee must have concluded that the Alliant Plan's lump sum methodology was *not* unlawful. Indeed, if it did not thoroughly review that question *sua sponte* in the wake of *Berger* – which found illegal a lump sum methodology indistinguishable from the Alliant Plan's – it was in gross dereliction of its fiduciary duties under ERISA § 404(a)(1)(D). Either way, exhaustion at this point would be an act of futility.

14. *Third*, the suggestion that exhaustion is required for the purpose of calculating damages, *see* Doc. 11 at 4, 10-11 ("Plaintiff [sh]ould be forced to say to the Committee precisely what amount of additional Plan benefits he now seeks"), misses the point and in any event is based on a misstatement of facts. The key, threshold issue is not damages but liability: it is certain that the Committee will never voluntarily conclude the Plan's lump sum methodology is illegal because it has on a continuous basis as well as on specific occasions come to the conclusion that it is not unlawful. But to the extent damages are relevant, as a matter of fact the Committee knows exactly how to calculate damages and already has in hand the damages calculations the Company and the Plan's actuaries performed in the wake of *Berger* when the Company (and the Committee) again refused to bring the Plan into compliance with the law but wanted to know what the Plan's and the Company's potential exposure would be in the event a participant like Mr. Ruppert figured out he had been illegally underpaid.

15. The "Plan" or the "Alliant Plan" is Defendant Alliant Energy Cash Balance Pension Plan (EIN: 39-1914946 - Plan No.: 001). The Plan is and was at all relevant times an "employee pension benefit plan," and more specifically a "defined benefit plan," within the

meaning of ERISA §§ 3(2)(A) and 3(35), 29 U.S.C. §§ 1002(2)(A) and 1002(35). The Plan sponsor is Alliant Energy Corporate Services, Inc. ("Alliant" or the "Company"). The Company also acts *de facto* as the Plan's administrator. The Company, the Plan and the Plan's nominal administrator, the Committee (defined below), are alter egos or factually indistinguishable from one another, notwithstanding formal legal distinctions, for purposes of deciding whether to require Plaintiff to exhaust or further exhaust his contention that the Plan's lump sum methodology was illegal.

16. Prior to and at times since adopting the Plan's current cash balance format in 1998, the Company carefully considered but rejected the notion that the Company is or may be prevented by law from defining a participant's pre-age 65 lump sum as equal to the balance of his notional account balance: the Company has always believed that it can define the Plan's lump sum distribution methodology any way it likes and that adherence to ERISA's nonforfeiture and actuarial equivalence requirements as explained in IRS Notice 96-8, 1996-1 CB 359, 1996 WL 17901 (Feb. 5, 1996), is optional, not legally required, no matter what the IRS, the Treasury, or the courts have said. The Company's view is clearly stated in the Plan's preamble. Plan, Article I, §1.1, entitled "The Plan," states: "This restated Plan also incorporates cash balance features, including *an intent to pay benefits in a single lump sum equal to a Participant's Cash Balance Account.*" Plan §1.1 (emphasis added).

17. To ensure that this "intent" be carried out, ever since the Plan adopted the cash balance format, the Company has exercised tight control over the Plan's nominal administrator, the Alliant Energy Corporation Employee Total Compensation Committee (the "Committee"). The Company, which wrote the Plan document, took care to specify that the Committee has the authority to "control and manage the operation of the Plan as the named fiduciary" but only "*as*

authorized by the Company." Plan § 1.2(c) (emphasis added). This limitation on the Committee's independence is underscored in Article 10, entitled "Administration of the Plan," where the Plan specifies that the Committee "shall act as Administrator of the Plan," but only "as established *and authorized by the Company*." Plan § 10.1.

18. The Committee consists entirely of Company employees, appointed by the Company and who serve at the pleasure of the Company which may remove them at any time for any reason. *Id.* In selecting Committee members, the Company was careful to select those who understood that their job was ministerial and would not distinguish between what is in the best interests of the Company as plan sponsor and what is in the best interest of participants.

19. To help ensure that the Committee did not and does not stray from the terms of the Plan even if ERISA requires the Committee to depart from the Plan terms, the Company wrote into the Plan document the following misstatement of law: "The Administrator shall administer the Plan in accordance with Plan terms." Plan § 10.2. What the law actually says is that a fiduciary shall act "in accordance with the documents and instruments governing the plan *insofar as such documents and instruments are consistent with the provisions of [ERISA Title I, "Protection of Employee Benefit Rights"]*." ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (emphasis added). In any event, the Committee does not believe and never has believed that it is authorized by the Plan document or otherwise to depart from the express terms of the Plan in any regard and in practice it never has.

20. Moreover, even if he or she wanted to do so, a Committee member as a practical matter would not hold that the Plan's lump sum methodology is unlawful. Committee members' jobs and prospects for raises and promotions would be adversely affected, and/or are seen by them to be adversely affected, by a decision contrary to the Company's interest, especially one

that could immediately call into question the validity of the millions of dollars of pension benefits the Plan has paid participants over the years and the millions of dollars of tax deductions the Company has claimed on its tax returns.

21. The Committee has never acted in a manner that has been inconsistent with the Company's desires and wishes as plan sponsor. Nor has the Committee defied the Company or acted independently of the Company in a manner relating to the administration of the Plan. The Committee has never paid benefits from the Plan that the Company has not agreed the Plan should pay. The Committee relies entirely on Company counsel and Company advisors for legal and fiduciary advice and has never sought or obtained advice from third-parties that differed or may have differed from advice offered in the best interest of the Company.

22. When it received a copy of the original Complaint filed in this action, the Committee met with Company officials and Company counsel and devised a strategy to defeat Plaintiff's claim. The Committee, like the Company, rejects and has always rejected the notion that the Company is prevented by law from defining the Plan's lump sum distribution methodology any way it likes and that it must adhere to ERISA's nonforfeiture and actuarial equivalence requirements as explained in IRS Notice 96-8. The Committee therefore never even considered the possibility of obtaining separate counsel and did not do so. Rather, in consultation with Company counsel, it has resolved to attempt to get this matter remanded to it by disingenuously contending that it is open-minded to considering the claim solely so it can deny it and then insist to this Court that that denial is one to which this Court should in some regard defer.

23. All references to "Defendant," "Defendants," "Plan," "Company," and/or "Committee" should be interpreted to include, as applicable, the Plan, the Company, the

Committee, individual Committee members, Plan fiduciaries, the Company's current or former directors, officers, employees, attorneys, auditors, actuaries, service providers or agents, whether or not such persons or entities are specifically named as a defendant in this action at this time.

Additional Allegations

24. During the period of Plaintiff's employment with Alliant, he accrued pension benefits under the Plan. The Plan is a defined benefit pension plan of the "cash balance" variety, in which a hypothetical account is established for each participant.

25. The Plan was converted to a cash balance format effective January 1, 1998. Participants in the Plan (or a prior plan related to the Plan) as of July 31, 1998 are entitled to the greater of their cash balance benefit or a "grandparent benefit" calculated under a pre-existing formula, generally based on the number of years of service and the highest three years of salary). (The grandparenting is dynamic for the 10-year period August 1, 1998-August 1, 2008. Thereafter, the grandparented benefit is frozen.)

26. As regards the cash balance benefit, under the terms of the Plan, Plaintiff and members of the proposed Class accrued a "benefit credit" (or "pay credit") equal to 5% of "pension pay" (defined as base pay and overtime, plus selected incentives and bonuses paid during the year), together with the right to an interest credit (or "interest crediting rate") to be applied to their notional account balances each December 31 equal to the greater of: (i) 4%, or (ii) 75% of the rate of return generated by the Plan's Trust for that calendar year. Plan § 3.5(a).

27. Under the Plan, participants accrue the right to receive future interest credits on their account balances through normal retirement age (age 65) at the same time as the corresponding pay credits to which the interest credits relate. The Plan was and is, as a result, a "frontloaded" interest crediting plan. In a frontloaded cash balance plan, future interest credits

are not conditioned upon future service. This means that the benefits attributable to such future interest credits with respect to a hypothetical allocation "accrue at the same time that the benefits attributable to the hypothetical allocation accrue." IRS Notice 96-8. As a result, "if an employee terminates employment and defers distribution to a later date, interest credits will continue to be credited to that employee's hypothetical account." *Id.*

28. The Plan's interest crediting rate is an unusually valuable, above-market equity-based crediting rate that does not exist outside of the Plan and cannot be obtained in the market. Each year, a participant is guaranteed never less than 4% annually, but has the potential for enormous upside because, if greater, he gets three-quarters of the Plan's returns on its own investments. As a large institutional investor the Plan enjoys expert advice and low investment management fees. The combination of (i) the 75% of the upside of investing in the stock market but with none of the downside, and (ii) the annual guaranteed minimum of 4% makes the crediting rate extremely valuable. It is a crediting rate so good that, in the view of the Department of Treasury, it is illegal under the Pension Protection Act of 2006, ERISA § 204(b)(5)(B)(i)(I), IRC § 411(b)(5)(B)(i)(I) (forbidding above market rates of return). *See* "Hybrid Retirement Plans," 72 Fed. Reg. 73680, 73688, 2007 WL 4555189, *17 (Dec. 28, 2007) (if "plan were to provide interest credits based on the greater of a fixed rate (<u>including a fixed rate of 0 percent</u>) and the rate of return on plan assets or the value of an equity-based index, determined on an annual basis, then the effective interest crediting rate would typically be in excess of a market interest rate") (emphasis added).

29. Since the Plan's conversion to a cash balance format in 1998, the crediting rate has returned double-digit or very high single digit returns:

Year	Earnings Credit
1998	8.100%
1999	7.125%
2000	4.000%
2001	4.000%
2002	4.000%
2003	16.950%
2004	4.000%
2005	4.000%
2006	9.600%

30. Precisely because participants enjoy a positive 4.0% return regardless of how the market performs, the earnings credit has yielded participants a high annualized rate of return, well above not just the 4.0% minimum but also well above the applicable discount rate:

Year	Earnings Credit
1998	8.10%
1999	7.61%
2000	6.39%
2001	5.79%
2002	5.43%
2003	7.27%
2004	6.79%
2005	6.44%
2006	6.79%

31. For all years, the then-current rate, the average annualized rate, or any five year average consistently exceeded the applicable discount rate, namely, the 30-year Treasury, Plan § 1.2(b)(1). Nevertheless, rejecting the claim that the law required otherwise, the Committee decided benefit claims and caused the Plan to pay lump sum benefits in an amount equal to the participant's account balance, in Plaintiff's case and in all cases.

32. In 1996, two years before the Company adopted the current cash balance format and the lump sum distribution methodology challenged here, the IRS issued Notice 96-8, referenced above, that explicitly instructed cash balance plans that they must use what has been called a "whipsaw" calculation in issuing lump sum distributions to participants departing a plan prior to normal retirement age (typically and here, age 65), first determining the annuity payable at age 65 to which the participant is entitled under the plan, and then calculating the actuarial equivalent of that annuity in current dollars:

> [I]n order to comply with [IRC] sections 411(a) and 417(e) in calculating the amount of a single sum distribution under a cash balance plan, the balance of the employee's hypothetical account must be projected to normal retirement age and then the employee must be paid at least the present value, determined in accordance with section 417(e), of that projected hypothetical account balance.

Notice 96-8, Sec.II.A.

33. Notice 96-8 made clear that because it is a defined benefit plan and not a defined contribution plan (like a 401(k) plan), the "accrued benefit" under a cash balance plan is never the account balance as such, but rather the annuity commencing at age 65 to which the participant is entitled under the plan, and that consequently a whipsaw calculation is required to ensure actuarial equivalence and protect participants' contractually defined benefits.

34. Under a whipsaw calculation, when the projection rate is greater than the statutorily-prescribed discount rate, the actuarial equivalent of the normal retirement benefit, *i.e.*, what the participant is actually owed, will be more than the notational account balance. Notice 96-8 explained that unless this higher amount is paid out, an impermissible forfeiture has occurred in violation of ERISA § 203(a), 29 U.S.C. § 1053(a). Failure to pay the higher lump sum results in a violation of the requirement that lump sums be no less than the actuarial equivalent of the normal retirement annuity, under ERISA § 205(g), 29 U.S.C. § 1055(g).

35. Notice 96-8 provided specific instructions about how the projection calculation must be performed where a plan uses a variable earnings or interest rate like the one adopted by the Alliant Plan, where the interest crediting rate is the greater of 4% or 75% of the return on the Plan's assets. In such case, the IRS explained, the plan is required to set forth the methodology for determining what rate is to be used to project the value of a participant's benefit at age 65 – a fair estimate of the value of the future interest credits participants would have received all the way out to age 65 had they left their benefit in the plan until that time:

> [I]f a . . . plan specifies a variable outside index for use in determining the amount of interest credits, the precise dollar amount of an employee's hypothetical account balance as of normal retirement age (including future interest credits to normal retirement age) . . . cannot be calculated prior to normal retirement age. [Such a plan must nevertheless] prescribe the method for reflecting future interest credits in the calculation of an employee's accrued benefit . . . [and] **a forfeiture**, within the meaning of [Treasury Regulation] section 1.411(a)-4T, **will result if the value of future interest credits is projected using a rate that understates the value of those credits or if the plan by its terms reduces the interest rate or rate of return used for projecting future interest credits**. A forfeiture in violation of [IRC] section 411(a) also will occur if, in determining the amount of an employee's accrued benefit, **future interest credits are not taken into account** (i.e., there is no projection of future interest credits) and this has the same effect as using a rate that understates the value of future interest credits.

Id. (emphasis added).

36. However, the Company willfully ignored this requirement and attempted to contract around ERISA and evade the whipsaw rule by using plan terms to ensure that participants requesting pre-normal retirement age (age 65 under the Plans) distributions of their benefits are never paid more than the current balance of the participant's notional account balance. The Company did not put into the Plan, a projection methodology specifying how the Plan would estimate the amount of investment credits a departing participant would have earned had he or she left her money in the Plan until age 65. Instead, the Plan specified that the required "projection" would be performed using the exact same 30-year Treasury bond rate that they were

required to use to discount the projected age-65 benefit back to present value. Plan § 1.2.

37. This is not a methodology for attempting in good-faith to calculate and pay lump sums equal to the present value of a participant's projected retirement benefit. **It is a ruse**: although the Plan sets forth a projection-and-discount methodology that in *form* resembles the present value "whipsaw" methodology described in IRS Notice 96-8, the Plan's use of the same interest rate assumptions in both steps of the calculation renders the projection-and-discount calculation a nullity, always resulting in merely a participant's current account balance – with the result that in *substance* the Plan by its terms does not include a whipsaw methodology. Rather than comply with the projection rate requirement, the Plan mocks it. Instead of using a projection rate intended to estimate future interest credits, the Committee engaged in a meaningless mathematical exercise intended to make it *appear* as though it was complying with the projection requirement. The Plan's up-and-back charade using the 30-year Treasury rate both to project a participant's benefit and discount it back is precisely what the plan in *Berger*, engaged in – and precisely why the Seventh Circuit found it to violate ERISA.

38. The Committee knew all this but chose to look the other way. It was well aware from the outset (as any responsible fiduciary would be) that the 30-year Treasury rate was not selected by the Company in attempted good-faith compliance with Notice 96-8 and that its use is insupportable for that purpose. Use of the 30-year Treasury rate as an unbiased estimator of future interest credits under the Plan is risible. There is no relationship between, on the one hand, the greater of 4% or the 75% of the return on the Plan's assets, and the 30-year Treasury bond on the other. No economic theory and no empirical evidence support the Committee's use of the 30-year Treasury bond as an estimator of future interest credits. To the contrary, as the Committee has always known, its use was and is utterly unreasonable and entirely arbitrary – but

for the fact that the Company was and is dead-set against ever possibly having to pay whipsaw benefits, as it states in the Plan preamble, an intent the Committee has, misguidedly, felt duty-bound to respect. Any responsible fiduciary would have known that independent of the distribution of future returns, the mathematical expectation of future return is an unknown constant and that no matter what one's assumed theoretical distribution of returns is (consistent with explained variability), the chance that this unbiased estimate equals exactly the 30 year Treasury rate has a probability very close to zero.

39. The Committee has also always known that according to the Plan's own actuaries, it is not reasonable to estimate the future return under the Plan's crediting rate as equal to the 30-year Treasury bond: the Plan's actuaries have always said that the Plan's crediting rate will significantly **exceed** the return on the 30-year Treasury bill. *See* Plan IRS Form 5500 filings.

40. The Committee knew and knows that the only time a cash balance plan is effectively excused from including a whipsaw projection is where the plan's interest crediting rate is the 30-year Treasury rate (or such other functional equivalent "safe harbor" rate listed in Notice 96-8). The interest crediting rate used by the Alliant Plan undisputedly is **not** the 30-year Treasury rate – which means that a *bona fide* whipsaw calculation was required. The Committee knew that, as an above-market equity rate of return crediting mechanism, the Plan's interest crediting rate cannot be remotely likened to the return on 30-year Treasuries. But because the Committee believed the Company should be able to define lump sums any way it liked, it turned its back on the law and did things the way the Company wanted.

41. The fact that the Committee has already made up its mind to deny Plaintiff's contention that its lump sum methodology is illegal is further demonstrated by the fact that it has repeatedly ignored rulings making clear that in deciding benefit claims and making benefit

payments it needed to adhere to Notice 96-8 instead of the Plan's terms to comply with ERISA.

42. For example, in 2000, the Eleventh Circuit decided *Lyons v. Georgia-Pacific Corp.*, 221 F.3d 1235, 1237-38 (11th Cir. 2000) and the Second Circuit decided *Esden v. Bank of Boston*, 229 F.3d 154, 164-173 (2d Cir. 2000). *Esden* and *Lyons* both concluded IRS Notice 96-8 accurately reflects how lump-sum cash-outs must be calculated. *Esden* and *Lyons* both involved plans employing variable outside index crediting rates like the Alliant Plan. In both cases, the plans were held to have violated ERISA because, like the Alliant Plan, they failed to pay the present value of participants' account balances projected to normal retirement age at a rate reflecting the value of the future interest credits participants would have received had they left their benefit in the plan until retirement age. In response, the Committee continued its up-and-back charade.

43. In 2001, the District Court in *Berger v. Nazametz*, 157 F.Supp.2d 998 (S.D. Ill. 2001) – relying on *Lyons* and *Esden* – also found that IRS Notice 96-8 accurately reflects how lump-sum cash-outs must be calculated. *Berger* also involved a plan employing a variable outside index crediting rate like the Alliant Plan. The Xerox plan as well failed to pay the present value of participants' account balances projected to normal retirement age at a rate reflecting the value of the future interest credits participants would have received had they left their benefit in the plan until retirement age. In response, to the District Court's careful, well-reasoned opinion in *Berger*, the Committee continued calculating lump sums via sham projections to normal retirement age.

44. In March 2002, following a random audit of some 60 cash balance plans, the Inspector General of the United States Department of Labor ("DOL") issued a report, calling for increased enforcement actions by DOL, having found that a significant percentage of the plans it

investigated were computing lump sums in violation of the law's requirements. In explaining how one plan which employed a variable outside index crediting rate like the Alliant Plan, was unlawfully calculating lump sums, the report said:

> In another plan, the sponsor allowed participants to select hypothetical investments and then set each participant's interest credit rate at the rate of return of the hypothetical investments. The interest credit rate for the participants in our sample varied from 9.01 percent to 16.5 percent. This interest credit rate is not one of the "safe harbor" rates of [IRS] Notice 96-8 and, thus, would require a projection and discount to arrive at a present value of the accrued benefit. The plan would not be able to pay the cash balance account as the lump sum benefit. The plan administrator told us that the plan used the ERISA § 205 rate [the 30-year Treasury rate] for projection purposes and this made the account balance the actuarial equivalent of the normal retirement benefit. **However, Notice 96-8 specifically states this would violate ERISA**.
>
> Notice 96-8 states:
>
> ... in determining the amount of an employee's accrued benefit, a forfeiture .... will result if the value of future interest credits is projected using a rate that understates the value of those credits or if the plan by its terms reduces the interest rate or rate of return used for projecting future interest credits.
>
> In discussing plans when the interest credit rate is higher than the ERISA § 205 rate, Notice 96-8 states:
>
> If such a plan provided that the rate used for projecting the amount of future interest credit rates were no greater than the interest rate under 417(e)(3), the projection would result in forfeiture.
>
> This is exactly what this plan accomplished. **While actually accruing benefits at higher rates, the administrator reduced the projection of future interest credits to no greater than the 417(e) rate and paid the account balance as the benefit**. **The administrator's reasoning was that the plan stated the balance represented the accrued benefit and this allowed the payment as full benefit.** The plan also stated that it had a qualification letter from the IRS, which provided IRS approval of the payment method.
>
> We do not agree with either argument. A plan provision that violates ERISA is invalid, as legal requirements take precedence over plan provisions. Also, the courts have held that an IRS qualification letter does not protect a plan as to participant benefits. In one case, *Esden v. Bank of Boston,* the plan sponsor raised this defense and the court concluded that the qualification letter protects the plan from tax disqualification, but does not protect the plan as to participant benefits that may be improperly paid.

DOL IG Report at 12-13 (emphasis added).

45. As with prior developments, the Committee took careful note of the Inspector General's conclusions but continued to believe that the Alliant Plan's lump sum methodology need not be altered because the Company did not **want** it altered.

46. Then, on August 1, 2003, the Seventh Circuit ruled that a lump sum methodology in all material regards identical to the Alliant Plan's methodology is illegal. Writing for the Seventh Circuit, Judge Posner not only explained that Notice 96-8 "is an authoritative interpretation of the applicable statutes and regulations" and that cash balance plans are required to comply with the "whipsaw" calculation methodology set forth therein, *Berger*, 338 F.3d at 762, but he further explained that the projection to age 65 must reflect the interest crediting rate promised under the plan – that it is not enough to "go through the motions of first projecting future credits at the [statutory discount] rate and then discounting them at the same rate to present value," since that would be no different than saying "that the employee's entitlement is just to whatever his hypothetical cash balance is when he takes his retirement benefits." *Id.* at 761 (emphasis added). Unlike in *Berger*, where the 1 year Treasury bill + 1% crediting rate was at least similar in kind to statutorily-required discounting mechanism in place at the time (*i.e.*, the applicable PBGC interest rates), there can be no serious argument that the 30-year Treasury can be considered an unbiased estimator of the value of the Alliant Plan's above-market interest crediting rate.

47. Notwithstanding *Berger* and the fact that the Plan is administered within the Seventh Circuit, the Committee continued to do the Company's bidding and calculate lump sums as before.

48. The Committee has already specifically determined in Plaintiff's case that he is

not entitled to a whipsaw calculation performed other than via the sham projection rate written into the Plan. In *Berger*, the Court identified two permissible methods for estimating the value of future interest credits. *Berger*, 338 F.3d at 760 (current one year or five year average). Under either method, Plaintiff would have received an additional payment beyond the nominal value of his then-current account "balance."

49. In response to Plaintiff's claim for benefits, made in conformance with the terms of the Plan, SPD and governing Department of Labor regulations, the Plan decided to adhere to the Plan terms rather than pay Plaintiff's claim for benefits in its entirety. The Committee thus caused the Plan to pay Plaintiff the amount equal to his notional account balance but omitting the present value of the credits his account would have continued to receive had he left his benefit in the Plan. In other words, the Committee granted his claim for benefits to the extent of paying him an amount equal to his account balance but denied it to the extent that payment should have included the amount required to ensure actuarial equivalence and avoid a forfeiture of accrued benefits. The Committee has clearly determined that Plaintiff has already received all of the benefits to which he is due under the Plan. Yet, as part of its effort to conceal the Plan's systematic underpayment of benefits, the Committee did not inform Plaintiff that the payment represented a partial grant and a partial denial of his claim for Plan benefits. As noted above, under the governing Department of Labor claims regulations, Mr. Ruppert should be deemed to have exhausted his plan remedies.

50. Indeed, further exhaustion would also be futile because the same Plan fiduciaries who would decide any such internal appeals actively aided and abetted the Plan's ERISA violations throughout the relevant time by knowingly participating in hundreds of illegal calculations. The Committee is not about to find itself guilty of violating the law all these years.

Indeed, that would entail effectively conceding that the Committee intentionally concealed from participants including Plaintiff the Plan's sham projection rate and evasion of the whipsaw rule. None of the Plan's communications with participants disclose or explain the Plan's supposedly legitimate projection rate but instead present the Plans as legitimately omitting future interest credits from the calculation of the lump sum distributions without reference the projection which the Plans acknowledge in form albeit in substance they, like all defined benefit plans (at least prior to August 17, 2006) must go through in calculating pre-retirement age lump sums. The Committee did not disclose the sham projection rate to avoid alerting to current and former participants to the fact that the Plans were effectively confiscating the value of future interest credits so they would either not file suit or not file suit in timely fashion.

51. These same fiduciaries, through the Plan's SPDs, website communications, periodic account statements and all other communications, consistently made false and/or misleading statements and/or omissions intended to cause participants to believe that the value of the future interest credits to age 65 they have already accrued the right to receive whether they leave their benefit in the Plans or not following separation from service before retirement age is not a portion of their ERISA-protected accrued benefit when it is. Indeed, the Plan's Summary Plan Descriptions violated the statutory and regulatory minimum standards for these vital documents because they fail to inform participants that the Plan (purports to) forfeit participants' rights to a portion of their accrued benefit whenever a participant requests a lump sum distribution of a portion of their Plan benefit before retirement age.

52. The purpose of these misleading communications was to ensure that participants remained ignorant of their rights and not seek to compel the Plan's compliance or that they be delayed in doing such until such time as the Plan has the ability to interpose purported statute of

limitations defenses.

53. The Plan, the Company, the Committee and the agents of some or all of them intentionally and/or negligently concealed from Plaintiff and the proposed Class the foregoing violations and facts underlying them in an effort to avoid liability and possible threatened plan disqualification by the IRS. They did so through misleading statements and omissions made to participants in a variety of contexts including in the Plan's Summary Plan Descriptions; in periodic account statements; on the website dedicated to the Plan; and in connection Plaintiff's application or claim for benefits.

54. The Committee intentionally and systematically concealed from participants including Plaintiff, through false and/or misleading statements and/or omissions, the fact that there is an alternative, indeed required, method for calculating lump sums that would or could lead participants to receive higher lump sum distributions than the Company wishes to pay.

55. Because the Committee has scrupulously avoided making forthright disclosure to participants about the nature and operation of, or regulatory regime governing, the Plan, it has not disclosed that there is an alternative methodology for calculating pre-retirement age lump sums which the Committee has determined it need not follow. As a result, the Committee has not repudiated or explicitly communicated to Plaintiff or any other participant that it has denied any portion of any Plaintiff's or proposed Class member's application for benefits seeking payment of the legally required payments at issue here such as might arguably trigger the running of the statute of limitations.

56. As a result of the Committee's failures to disclose, and misleading statements and omissions, Plaintiff only recently learned that he has not received the benefits to which he is lawfully entitled sought here.

57. On information and belief, *see, e.g.*, Doc. 11 at 8 n.3, a participant or participants whose identity or identities are not now known to Plaintiff filed a claim for benefits with the Plan within the meaning of the Plan, the SPD and/or the governing claims regulation that included a claim for an additional "whipsaw" payment which the Committee denied. Whether or not Plaintiff can or should serve as a class representative, *see* Doc. 11 at 8 n.3, he should be permitted to proceed with his claim here. Futility is demonstrated without more.

58. Further proof exhaustion would be futile can be found in the fact that the Company and Committee have rejected the IRS's request that the Company retroactively amend the Plan and/or see to it that the Committee retroactively alters its administration of the Plan to provide for projections to retirement age at a rate or rates higher than the applicable 30 year Treasury rate. This, indeed, is one reason why the Plan is operating without a current IRS determination letter: the Plan's 1999 application for a determination letter has not been granted because the IRS believes the Plan is illegal in all the ways set forth in this Complaint. The Company and the Committee, which have had ample time to consider the IRS's contentions, disagree. If the Company and the Committee will not listen to the IRS, there is no reason to suppose it will listen to a mere former employee like Mr. Ruppert.

59. Because Plaintiff is currently without access to specific proof to substantiate certain aspects of his exhaustion contentions, should the Court not find the facts and allegations sufficient to deny a motion or renewed motion to dismiss for failure to exhaust, it should permit Plaintiff limited discovery before rendering a decision on a motion which Plaintiff submits is designed solely to block Plaintiff access to the federal courts and a remedy as opposed to truly consider the merits of Plaintiff's claim with an eye toward granting it. The Committee would have done so on its own long ago *sua sponte* if its current protestations to even-handedness and

open-mindedness are to be believed.

Claims

60. ERISA §§ 203(e) and 205(g), 29 U.S.C. §§ 1053(e) and 1055(g), and Internal Revenue Code § 417(e), as implemented by Treasury Regulation § 1.417(e)-l(d), requires any optional form of benefit paid from a defined benefit plan, including a lump sum distribution, to be no less than the present value of the participant's accrued benefit expressed as an annuity commencing at normal retirement age (under the Plan, age 65).

61. The Plan, through the Committee, knowingly paid Plaintiff and members of the proposed Class lump sum benefits that were less than the present value of their respective accrued benefits in violation of ERISA §§ 203(e) and 205(g), and IRC § 417(e), as implemented by Treasury Regulation § 1.417(e)-l(d).

62. The Plan, through the Committee, knowingly failed to project the account balances of Plaintiff and members of the proposed Class to normal retirement age at the Plan's crediting rate or a rate that did not understate the value of the interest credits they had the right to receive through that age. The Plan, through the Committee, thus calculated and paid these participants a benefit according to the terms of the Plan knowing it was not the actuarial equivalent of the amounts they would have received had they left their benefit in the Plans until age 65.

63. Despite the fact that the Alliant Plan states an above-market variable interest crediting rate far outside the "safe harbor" rates of IRS Notice 96-8, the Company, abetted by the Committee, failed to "prescribe the method for reflecting future interest credits in the calculation of an employee's accrued benefit . . . .[in a way that] preclude[s] employer discretion . . . . [and ensures that "the value of future interest credits is projected using a rate that [does not]

understate[] the value of those credits." Notice 96-8, Section III A. Flouting the law, the Committee simply paid participants like Plaintiff and the members of the proposed Class the balance of their hypothetical accounts or in the case of grandparented participants, paid or pays them their grandparent benefit when in fact the value of their cash balance benefit is higher.

64. The Plan's conduct, carried out by the Committee, as described above also resulted in an impermissible forfeiture of benefits prohibited by ERISA § 203(a) and Internal Revenue Code § 411(a), as implemented by Treasury Regulation § 1.411(a)-4 and 4T, in that the Plan conditioned the right to receive future interest credits on these participants not taking a distribution prior to normal retirement age.

Class Allegations

65. Plaintiff brings suit on behalf of himself and on behalf of all other participants and beneficiaries similarly situated under the provisions of Rule 23 of the Federal Rules of Civil Procedure with respect to violations alleged herein. Plaintiff proposes a Class defined as follows:

> All persons who, since January 1, 1998, accrued under the terms of the Alliant Energy Cash Balance Pension Plan (the "Plan"), a vested or partially vested interest in a notional account balance established in their name by the Plan, including but not limited to all persons who, at any time between January 1, 1998 and August 17, 2006, either (a) received a lump sum distribution of his or her cash balance formula benefit and/or (b) received any form of distribution calculated under the Plan's (or a related, prior plan's) prior formula after that benefit was determined to be more valuable than their benefit calculated under the Plan's cash balance formula all persons who received a lump sum distribution; and the beneficiaries and estates of such persons and alternate payees under a Qualified Domestic Relations Order.

66. The requirements for maintaining this action as a class action under Fed. R. Civ. P. 23(a)(1) are satisfied in that there are too many Class members for joinder of all of them to be practicable. There are at least hundreds of members of the proposed Class dispersed among many states.

67. The claims of the Class members raise numerous common questions of fact and law, thereby satisfying the requirements of Fed. R. Civ. P. 23(a)(2).

68. All issues concerning liability are common to all Class members because such issues concern their entitlement to benefits calculated in a manner other than that calculated thus far and their entitlement to relief from harm caused by the violations of law, rather than any action taken by Plaintiffs or any Class member. In addition, all issues concerning relief are also common to the Class. The computation of a participant's lump sum distribution is standardized in that the amount of the lump sum distribution for each member of the Class was calculated in the same manner as described above. Thus, there exist common questions of fact as to each member of the Class in question. Each Class member's rights will be determined by reference to the same Plan documents and the same provisions of ERISA. Thus, there exist common questions of law as to each Class member, *i.e.*, whether the method of calculating of lump sum distributions or account balances violated the law.

69. Plaintiff's claims are typical of the claims of Class members, and therefore satisfy the requirements of Fed. R. Civ. P. 23(a)(3). He does not assert any claims relating to the Plans in addition to or different than those of the Class. Plaintiff's claims are typical of the claims of the Class members in that his lump sum distributions was calculated in the same fashion as the rest of the Class, and his rights, as well as those of the Class as a whole, are similarly provided for under the plan documents and applicable provisions of ERISA.

70. Plaintiff is an adequate representative of the proposed Class, and therefore satisfies the requirements of Fed. R. Civ. P. 23(a)(4). Plaintiff's interests are identical to those of the proposed Class. Defendants have no unique defenses against him that would interfere with his representation of the Class. Plaintiff has engaged competent counsel with both ERISA and

class action litigation experience.

71. Additionally, all of the requirements of Fed. R. Civ. P. 23(b)(1) are satisfied in that the prosecution of separate actions by individual members of the proposed Class would create a risk of inconsistent or varying adjudications establishing incompatible standards of conduct for Defendants and individual adjudications present a risk of adjudications which, as a practical matter, would be dispositive of the interests of other members who are not parties.

72. All of the requirements of Fed. R. Civ. P. 23(b)(2) also are satisfied in that the Plan's actions affected all Class members in the same manner making appropriate final declaratory and injunctive relief with respect to the Class as a whole.

Prayer for Relief

WHEREFORE, Plaintiff prays that judgment be entered against Defendants and that the Court award the following relief:

A. Certification of this action as a class action for all purposes of liability and relief and appointment of undersigned counsel as class counsel pursuant to Fed. R. Civ. P. 23.

B. Judgment for Plaintiff and the Class against the Plan on all claims expressly asserted and/or within the ambit of this Complaint.

C. An order awarding, declaring or otherwise providing Plaintiff and the Class all other such relief to which Plaintiff and the Class are or may be entitled whether or not specified herein.

D. An order awarding pre- and post-judgment interest.

E. An order awarding attorney's fees on the basis of the common fund doctrine (and/or other applicable law, at Plaintiff's election), along with the reimbursement of the expenses incurred in connection with this action.

F. An order awarding, declaring or otherwise providing Plaintiff all relief under ERISA § 502(a), 29 U.S.C. § 1132(a), or any other applicable law, that Plaintiff may subsequently specify and/or that the Court may deem appropriate.

Dated: April 28, 2008 By

/s *Eli Gottesdiener*
Eli Gottesdiener (#4045464)
Gottesdiener Law Firm, PLLC
498 7th Street
Brooklyn, New York 11215
Email: eli@gottesdienerlaw.com
Telephone: (718) 788-1500
Telecopier: (718) 788-1650

Counsel for Plaintiff and the proposed Class

CERTIFICATE OF SERVICE

I, Eli Gottesdiener, an attorney, do hereby certify that on April 28, 2008, I electronically submitted the foregoing Plaintiff's First Amended Complaint to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Mark Casciari
Amanda A. Sonneborn
Seyfarth Shaw LLP
131 South Dearborn Street Suite 2400
Chicago, IL 60603-5577
mcasciari@seyfarth.com
asonneborn@seyfarth.com

/s/Eli Gottesdiener