

Exhibit G1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JON HOAK, ANTHONY FANO,
ALLAN QUICK, PATRICIA GIERING,
and NANCY PARIN, on behalf of
themselves and all those similarly
situated,

Plaintiffs,

v.

PLAN ADMINISTRATOR OF THE
PLANS OF NCR CORPORATION,

Defendant.

CIVIL ACTION NO.
1:15-cv-3983-AT

ORDER

This is a complex class action involving five retirement plans sponsored by NCR Corporation (“NCR”) and administered by Defendant, the Plan Administrator. These five related retirement plans (“the Plans”) promised each participant the “accrued benefit” of a lifetime annuity — i.e., a specific monthly, fixed payment, *for life*. In 2012, NCR unilaterally terminated all five retirement plans and paid participants lump sum payments based on its calculation of the actuarially equivalent values of the life annuities. NCR further discounted those lump sum payments by 5% based on NCR’s default risk at the time.

The key issues presented here are whether the Plan language allowed NCR to unilaterally convert the beneficiaries’ existing “accrued benefits” (i.e., fixed life annuities) to actuarially equivalent lump sum payments, and, if so, whether the

Plans allowed NCR to select a 5% discount rate for those payments.¹ For the reasons that follow, the Court finds that NCR breached the terms of the Plans when it, without the consent of Plaintiffs or class members, provided them with lump sums instead of the life annuities they bargained for and were owed. Accordingly, NCR's Motion for Summary Judgment [Doc. 136] is **DENIED**, and Plaintiff's Cross-Motion for Summary Judgment [Doc. 151] is **GRANTED**.

I. FACTUAL BACKGROUND²

A. The Plans

This is a class action brought by participants, former participants, and beneficiaries in five “nonqualified” deferred-compensation retirement plans sponsored by NCR. The five Plans involved in this case are: the Senior Executive Retirement Death and Disability Plan (“SERP I”); the Retirement Plan for Officers of NCR (“SERP II”); the Excess Plan; the Mid-Career Plan; and the AT&T Plan (collectively, “the Plans”). (See Plans, Docs. 137-1, 137-2, 137-4, 137-5, 137-6.) Each of these plans was a specific type of retirement plan called a “top hat” plan. A “top hat” plan is any “plan which is unfunded and is maintained by an employer

¹ For context upfront, it is well-settled that, when calculating money to be received in the future, one must discount the benefits to present value “to account for the fact that a dollar amount to be received in the future is generally worth less than the same dollar amount received in the present.” See *Holloman v. Mail-Well Corp.*, 443 F.3d 832, 840 (11th Cir. 2006). A higher discount rate will yield a lower present-value amount. A lower discount rate will yield a higher present-value amount. Here, while the Parties agree that, *if* any permissible payments were made, they would appropriately be subject to *some* discount rate to account for the time value of money, they disagree on whether NCR was allowed to consider its risk of default in selecting a discount rate.

² This statement does not represent actual findings of fact. *In re Celotex Corp.*, 487 F.3d 1320, 1328 (11th Cir. 2007). Instead, the Court has provided the statement simply to place the Court's legal analysis in the context of this particular case.

primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees.” See 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1).

Consistent with this definition, the stated purpose of the SERP I and II Plans was to “provide for the payment of supplemental retirement, death, and disability benefits to senior executives of NCR in order to attract and retain executives of superior ability, industry, and loyalty.” (See, e.g., SERP I, Doc. 137-1 at ECF 3.)³ Thus, these high-level employees were to receive certain retirement benefits in exchange for their years of work for NCR.⁴

The retirement benefits promised under each of the Plans were life annuities. (See e.g., SERP I, Doc. 137-1 at ECF 7) (“Retirement and termination benefits under the Plan *shall be paid for the life of the former Participant.*”) (emphasis added); (See, e.g., AT&T Plan, Doc. 137-6 at ECF 3) (“Each Participant *shall be entitled to a benefit under this Plan expressed as a single life annuity . . .*”) (emphasis added).

The amount of each participant’s life annuity was calculated based on formulas spelled out in the Plans. (See Plans, Docs. 137-1, 137-2, 137-4, 137-5, 137-6.) The formulas calculated a particular participant’s life annuity based on factors

³ The other Plans have a similar stated purpose. (See, e.g., AT&T Plan, Doc. 137-6 at ECF 8, Section 8.7) (stating that the plan is maintained “primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees.”)

⁴ The Plans at issue were all sponsored at various times from the 1970s through early 2000s.

such as years of service, salary, compensation, age, and other aspects of employment. (*Id.*; *see also* Plaintiff's Reply in Support of Statement of Additional Material Facts ("Reply PSAMF"), Doc. 162-1 ¶¶ 209–211.) For instance, the Parties have used the example of an individual whose "accrued benefit" was calculated to be \$10,000 per month, for life.

There were a total of 197 participants covered by the five plans. (*Id.* ¶ 44.) On December 31, 2006, NCR froze all accruals of additional benefits under all five Plans. (*Id.* ¶ 43.) Thus, at the time of the freeze, a given participant's "accrued benefit" was the fixed life annuity benefit amount *already earned by* and *owed to* the participant under the terms of the Plan in exchange for their years of service. (*Id.* ¶ 304.)

The Plans generally provide for the life annuities to be paid beginning on a certain date, e.g., upon the participant reaching a certain age or upon the date of retirement. (*See* Plans, Docs. 137-1, 137-2, 137-4, 137-5, 137-6.) Plaintiffs represent that, by 2013, most participants in the Plans were already receiving their benefits. (Plaintiffs' Brief in Support of Motion for Summary Judgment ("Pls. MSJ"), Doc. 152-1 at 1.)

B. NCR Explores Plan Termination Options

In 2011, NCR became concerned about its overall pension liabilities. (PSAMF, Doc. 162-1 ¶¶ 47, 51.) As a result, it began exploring ways to terminate the Plans. (*Id.*) Each of the Plans includes a provision governing amendments and

terminations. For example, the SERP I and II Plans provide Defendant NCR with certain plan termination rights, as follows:

[Defendant's] Committee shall have the right . . . to amend or modify the Plan . . . or **to terminate or repeal the Plan or any such agreement entirely at any time; provided, however, that (a) no such action shall adversely affect any Participant's, former Participant's, or Eligible Spouse's accrued benefits prior to such action under the Plan . . .** and (b) no amendment may be made to the extent that it would result in a material modification . . .

(SERP I, Doc. 137-1 at ECF 10) (emphases added). The other Plans provide the same or highly similar termination language.

In evaluating the question of how to settle beneficiaries' existing accrued benefits upon Plan termination, leadership at NCR retained various consultants to provide guidance. In October 2012, a consultant from J.P. Morgan made a presentation to NCR's Vice President of Total Rewards, Pat Carroll. This J.P. Morgan presentation assessed methods used by other employers/plan sponsors to calculate discount rates when effectuating lump sum payments to beneficiaries under different circumstances and different plan language. (See JP Morgan Presentation, Doc. 138-50.)

In addition to J.P. Morgan, NCR also sought guidance from the consulting firm Aon Hewitt. In October 2012, actuarial consultants at Aon Hewitt prepared a presentation for NCR to address "NCR SERP Settlement Options." (First Aon Presentation, Doc. 137-91.) This presentation first noted in the background section that "NCR is considering settling the liabilities for the nonqualified SERP," and

that the “[g]oal” was to “[r]emove SERP liability from NCR balance sheet” and “[d]o so in a manner that reduces legal risk and is most cost effective for NCR.” (*Id.* at ECF 3.) This presentation outlined four possible methods/options that NCR could employ to settle participants’ accrued benefits at plan termination. These options ranged from issuing lump sum payments to purchasing replacement annuities, as follows:

- (1) NCR could issue a lump sum settlement on a basis chosen by NCR;
- (2) NCR could purchase participants new annuities with a pre-tax monthly benefit equal to participants SERP benefit (e.g., 10,000/month) but require participants to pay the taxes on the premiums for the new annuities;
- (3) NCR could purchase new annuities for participants, with NCR paying the taxes on the premiums for the new annuities, but resulting in a lower monthly annuity amount for participants;
- (4) NCR could create an irrevocable trust (a “Rabbi trust”), place funds in that trust, and then the trust could purchase equivalent replacement annuities for participants.

(*Id.* at 1-11.) A summary breakdown of the options was provided in Aon Hewitt’s presentation:

Settling SERP Liabilities

- Financial results for NCR and participants will depend upon the following:
 - Lump sum basis used for cash settlement
 - Income tax results for both NCR and participants
 - Annuity pricing

Comparison to Current State		
	Employer Cost	Employee Benefit
Option 1: Lump Sum settlement	Neutral → Lower	Lower "equivalent annuity" unless investment earnings exceed settlement rate after tax
Option 2: Annuity with pre-tax monthly benefit equal to SERP benefit	Higher, depending upon subscription	Increased after-tax annuity after up-front tax cost
Option 3: Annuity with taxes paid from premium first	Higher, depending upon subscription	Lower annual benefit
Option 4: Rabbi trust owned annuities for eligible participants	Higher	Neutral

(*Id.* at 10.)

The next month, on November 30, 2012, representatives from Aon Hewitt met with NCR executives and provided a second PowerPoint presentation, this time outlining the results of Aon Hewitt's *additional* analysis of the options for settling NCR's accrued benefit obligations. (PSAMF, Doc. 162-1 ¶ 74.) This PowerPoint was entitled "Non-Qualified Plan Annuity Analysis" and included the adopted shorthand title for the termination endeavor — "Project Omaha." (Second Aon Presentation, Doc. 136-29.)

The PowerPoint stated that Aon Hewitt's analysis had a "Focus on 409A Grandfathered Retired Participants" — a population of 91 individuals representing "over 75%" of the liability for all "top hat" Plan benefits. (*Id.* at ECF 4, 6.) This PowerPoint included an analysis of the cost to NCR of pursuing the various benefits settlement options for the 91 Grandfathered Participants. (*Id.* at 6.) The

first option was paying the beneficiaries lump sums. Aon Hewitt calculated the cost to NCR of paying the benefits out in lump sums (for the 91 Grandfathered Participants), using various discount rates. For example, paying out benefits via lump sum: (1) using a 5% discount rate would cost NCR \$79,805,044; (2) using the existing Internal Revenue Code 417(e) discount rates (the required discount rates for qualified plans) would cost NCR \$89,252,594; and using a Present Benefit Obligation (“PBO”) discount rate of 3% would cost NCR between \$95,770,943 and \$99,914,021. (*Id.*) The presentation further notes that the PBO “for the entire plan is \$126.7 million.” (*Id.*) The below chart, illustrating these findings, was included in the PowerPoint:

Aon Hewitt Estimate – PBO and Lump Sum

Population: 409A Grandfathered Participants Currently in Payment Status	
Headcount	91
Total Monthly Benefits in Pay	\$677,778
Estimated PBO as of 12/1/2012*	\$95,770,943
Estimated PBO as of 12/1/2012 Reflecting Scale BB*	\$99,914,021
Estimated Lump Sums using 2013 Mortality and Cost of Debt*	\$79,805,044
Estimated Lump Sums using 2013 Qualified Plan Lump Sum Rates*	\$89,252,594
Estimated Lump Sums using 2012 Basis used for Swanson*	\$82,687,172

PBO for the entire plan is \$126.7 million

*Interest Rates used for above liabilities:

PBO = 3.00% as of 10/31/2012

Cost of Debt = 5.00%

2013 Qualified Plan Rates: August 2012 417e segment rates: 1.13% (0-5yrs), 3.71% (5-19), 4.52% (20+)

2012 Swanson Rates: August 2011 417e segment rates: 1.85% (0-5yrs), 4.62% (5-19), 6.02% (20+)

Hewittennisknupp

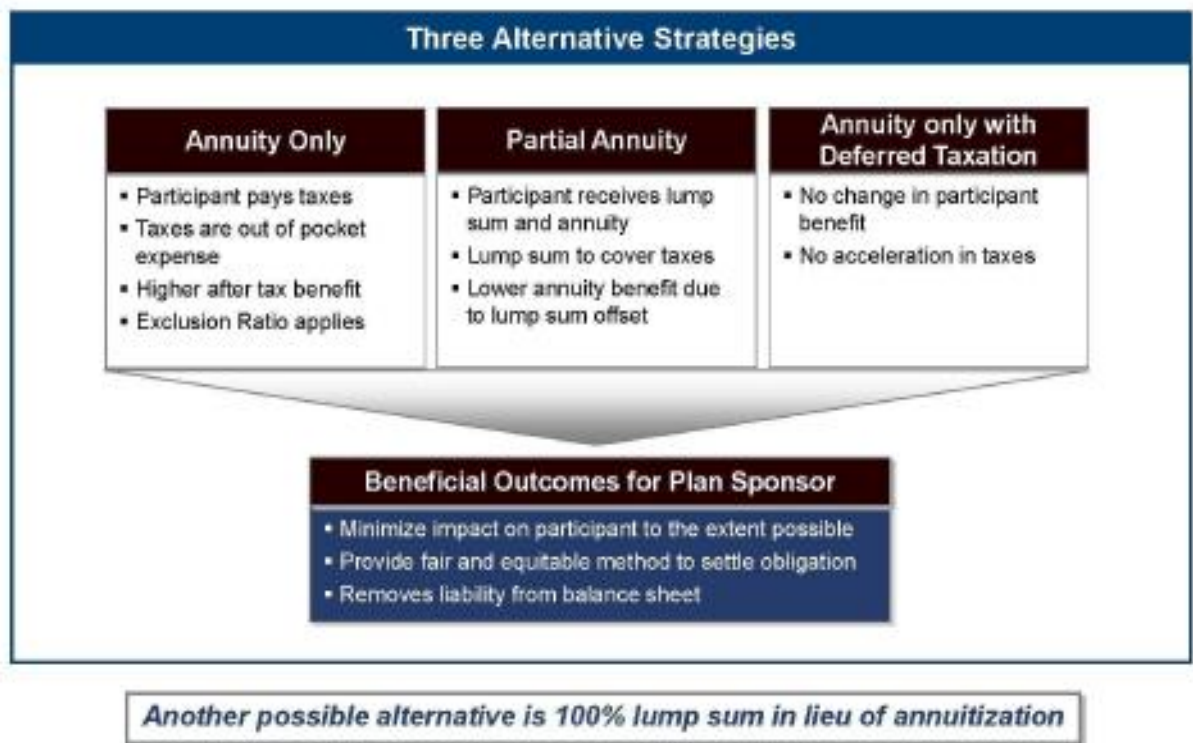
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An Aon Company

(*Id.* at ECF 6.)

The PowerPoint also provided an analysis of options that did not involve NCR making lump sum payments *but instead* would involve NCR purchasing whole or partial replacement life annuities. The PowerPoint noted that these options would “[m]inimize the impact on [the] participant to the extent possible” and would “[p]rovide [a] fair and equitable method to settle obligation.” (*Id.* at ECF 7.) These options were summarized as follows:

Annuity Settlement Options



(*Id.* at ECF 7.) The PowerPoint also included “pros” and “cons” for each replacement annuity option as well as for a lump sum option. (*Id.* at ECF 8–9.) For example, Option 4, the “Settlement with Deferred Taxation” option, noted,

“Greatest transparency for participants.”⁵ (*Id.*) On the other hand, the “Lump Sum Only” option noted “Risk of participant displeasure with basis → cost and energy associated with law suit [sic].” (*Id.*) The PowerPoint also noted that “Participants could also be given an election option,” that is, a choice, “between lump sum and annuity.” (*Id.* at ECF 9.)

Finally, the PowerPoint also outlined estimates for the total cost to NCR of purchasing replacement annuities for beneficiaries based on actual and estimated quotes Aon Hewitt received from various insurance companies. (*Id.* at ECF 10–29.) This analysis was summarized in the following chart:

Settlement Alternatives Benefit Comparison

	Annuity Only	Partial Annuity	Annuity only with Anti Selection	Partial Annuity with Ant Selection	Annuity Only Deferred Taxation
MetLife Prelim	\$117,938,279	\$70,762,967	\$123,835,200	\$74,301,100	\$117,938,279
MetLife estimate	\$108,448,400	\$65,069,000	\$113,870,800	\$68,322,500	\$108,448,400
American General estimate	\$95,739,500	\$57,443,700	\$100,526,500	\$60,315,900	\$95,739,500
Prudential estimate	\$102,852,400	\$61,711,500	\$107,995,100	\$64,797,000	\$102,852,400
Principal Financial estimate	\$111,262,300	\$66,757,400	\$116,825,500	\$70,095,300	\$111,262,300
Lump sum taxes Met prelim	N/A	\$47,175,312	N/A	\$49,534,100	N/A
Lump sum taxes Met est.	N/A	\$43,379,400	N/A	\$45,548,300	N/A
Lump sum taxes – AG est.	N/A	\$38,295,800	N/A	\$40,210,600	N/A
Lump sum taxes – Pru est.	N/A	\$41,140,900	N/A	\$43,198,100	N/A
Lump sum taxes – PF est.	N/A	\$44,504,900	N/A	\$46,730,200	N/A
Total Cost to NCR (MetLife Prem)	\$117,938,279	\$117,938,279	\$123,835,200	\$123,835,200	\$117,938,279
Estimated PBO as of 12/1/2012	\$95,770,943	\$95,770,943	\$95,770,943	\$95,770,943	\$95,770,943
2013 Lump sum in lieu of annuity	\$89,252,594	\$89,252,594	\$89,252,594	\$89,252,594	\$89,252,594

⁵Another slide in the PowerPoint notes that, under the settlement with deferred taxation option, “[n]o change in time or form of benefit” and thus this option “reduces participants’ reasons to view transaction unfavorably.” (*Id.* at ECF 27.)

(*Id.* at ECF 29.)⁶

Ultimately, the PowerPoint provided a summary indicating, among other things, that the option involving NCR purchasing new annuities with deferred taxation “[c]reates a fairly status quo situation” for the beneficiaries. (*Id.* at ECF 30.) Alternatively, the summary stated: “Lump sum option is economically attractive ... Legal Issues need to be vetted to determine viability.” (*Id.* at ECF 30.)

C. Termination of the Plans (“Project Omaha”)

On the same day as Aon Hewitt gave this presentation (November 30, 2012), members of NCR leadership held a follow-up meeting regarding “Project Omaha.” (Project Omaha Meeting Notes, Doc. 138-55.) These meeting notes indicate that the “[f]ocus of this project is 409A grandfathered retired ppt [participants]; 91 pts and 95 million liability.” (*Id.* at ECF 2.) The meeting minutes reflect that one risk “related to the project” included “[l]egal risk? (plan pays legal fee).” (*Id.*) The minutes further note “Board wants LS [lump sum]⁷ regardless [of] risk.” In a section entitled “Taxes and litigation issues,” the meeting minutes note that, “If NCR terminate[s] the plan, loss[sic] the lawsuit, can NCR then [put participants] back on payroll (reinstate the annuity)?” This text is followed by “No, need to write another check including legal fees; what’s the check” and “Pat [Carroll] - \$40

⁶ The PowerPoint also includes discussion of “Anti Selection” option, meaning that NCR could offer beneficiaries the choice between a lump sum and annuity benefit. (*Id.* at ECF 20.) Offering this choice could lead to higher costs to the plan sponsor. (*Id.* at 21.)

⁷ The Court understands LS to mean “lump sum” as used throughout these minute notes.

million is ceiling, **difference b/w annuity and [lump sum].**” (emphasis added). This note is reproduced below:

- If NCR terminate the plan, loss the lawsuit, can NCR them back on payroll (reinstate the annuity)? ; No, need to write another check including legal fees; what's the check?
- Pat - \$40 million is ceiling, difference b/w annuity and LS

(*Id.* at ECF 4.) This section also notes “Lawyers will argue that they should still get the same annuity in the market” and “[p]assing longevity risk from NCR to individual – no case on this[.]” (*Id.*)

Ultimately, NCR’s executive leadership team, led by NCR’s CEO, decided that the accrued benefits would be settled via the lump sum option. (PSAMF, Doc. 162-1 ¶ 112; Carroll Dep., Doc. 152-3 p. 156:3-9.) At a February 18, 2013 meeting of the Plan Administrator, NCR’s outside legal counsel advised that “*deleting the annuity benefit payment and replacing it with a lump sum payment* is reasonably construed as providing the full benefit entitlement under the Plans provided the lump sum payment is the actuarial equivalent of the annuity benefit.” (PSAMF, Doc. 162-1 ¶ 113) (emphasis added).

Two days later, on February 20, 2013, the NCR Compensation and Human Resources Committee (“the Committee”) stated in a unanimous vote that the Committee’s “resolution to terminate the Plans by settling all benefits as a lump sum payment would not ‘adversely affect’ any accrued benefit if the lump sum is actuarially equivalent to the annuity benefit, using reasonable actuarial assumptions.” (Meeting Minutes from Feb. 20, 2013, Doc. 137-43 at ECF 3.) After voting to pay out the benefits as lump sum payments, the Committee agreed, again

unanimously, “that a reasonable interest rate to compensate for the delayed payment is 5%.” (*Id.* at ECF 6.)

Five days later, on February 25, 2013, the Committee officially approved the termination of the Plans because it “determined that it is in the best interest of NCR Corporation to terminate the Plans.” (Committee Resolution, Doc. 137-42 at ECF 2.) The resolution further provided that NCR would settle the retirement benefits owed under the Plans by providing to each participant a lump sum payment that was the “actuarial equivalent” of the accrued benefit calculated by applying a discount rate of 5% and using certain mortality tables. (*Id.* at ECF 2.)

D. NCR Terminates the Trust Protecting Participants of the SERP I and II Plans

At the same time NCR was considering how to settle participants’ accrued benefits upon Plan termination, it also terminated the Trust associated with the SERP I and II Plans.

In 1990, NCR’s Board of Directors established a Trust to protect the benefits of the participants in the SERP I and II Plans. (PSAMF, Doc. 162-1 ¶ 135.) The Trust Agreement provided the Trustee with the power to negotiate with NCR on behalf of beneficiaries, and, if negotiation failed, maintain legal proceedings against NCR to recover on beneficiaries’ claims. (*Id.* ¶ 143.) The Trustee was to discharge its duties under the Trust Agreement “solely in the interest of the Participants in the Plans” and “for the exclusive purpose of providing benefits to such Participants.” (*Id.* ¶ 144.)

Besides outlining the duties of the Trustee, the Trust Agreement outlined a claims procedure for participants pursuing benefits claims. Under the claims procedure, participants could appeal a denial-of-benefits decision to the Trustee. (*Id.* ¶ 152.) On appeal, the Trustee was to conduct a *de novo* review of the decision, and the burden of proof was on NCR to establish the basis for the denial (*Id.*) The Trustee’s ultimate decision was to be “final, conclusive, and binding” on NCR. (*Id.*)

The Trust Agreement also, among other things, created a claims expense account that was to be used to pay expenses incurred in connection with settlement or litigation of the claims of beneficiaries of the SERP I and II Plans. (*Id.* ¶ 138.) The Trust Agreement further stated that the assets of the Trust “shall never inure to the benefit of the Company and shall be held for the exclusive purpose of providing benefits to Participants” and “defraying reasonable expenses of administering the Plans or performing any of the Trustee’s duties” under the Agreement. (*Id.* ¶ 148.)

Per its terms, the Trust Agreement could not be amended or terminated “during a Threatened Change in Control Period or after a Change in Control,” with the following caveats. (Trust Agreement, Doc. 137-13 at ECF 47.) Specifically, the Trustee, “after a Change in Control, upon written advice of counsel, may amend the provisions of this Trust Agreement to the extent required by applicable law.” (*Id.*) (emphasis added). And, “[a]fter a Change in Control, the Trustee may amend or terminate the provisions of th[e] Trust Agreement *with the consent of the Committee and a majority in interest of the Participants.*” (*Id.*) (emphases added).

In October of 2012, the Committee, voted to amend the SERP I and II Plans. (PSAMF, Doc. 162-1 ¶ 155.) These amendments eliminated the Trustee's *de novo* review of appeals benefit denials, eliminated NCR's burden of proof on appeal, and modified provisions related to the payment of legal fees for participants pursuing benefit claims. (*Id.* ¶ 156.) NCR did not seek approval from the participants of the SERP I and II Plans for these amendments. (*Id.* ¶ 157.)

In April 2013, the Committee and Plan Administrator agreed to send two letters to the Trustee: the first letter would inform it of the broader termination of the SERP I and II Plans; the second/later letter would request that the Trustee wind up the Trust since all benefits would have been paid at that point (in NCR's view). (*Id.* ¶ 167.) In July 2013, NCR's Assistant Treasurer provided the Trustee with notice that the Trust "had terminated," and provided instructions for winding up the Trust. (*Id.* ¶ 168.) Ultimately, the Trustee of the Trust (J.P. Morgan) followed these instructions and ultimately transferred more than \$4 million of Trust assets to NCR. (*Id.* ¶¶ 175, 176.)

II. RELEVANT PROCEDURAL BACKGROUND

The procedural history of this case is long and winding. Here, the Court recounts the litigation events necessary to provide context for the present dispute.

Plaintiffs originally filed this suit in November of 2015, naming four Defendants: NCR Corporation; the Compensation and Human Resources Committee; Andrea Ledford (the Senior VP and Chief HR Officer of NCR Corporation); and the Plan Administrator. (*See generally* Doc. 1.) This original

complaint alleged three claims, based on: NCR's alleged improper removal of the Trustee over the SERP I and II Plans (Count I); NCR's alleged breach of its agreement with the Plaintiffs by paying lump sums discounted at 5% (Count II); and NCR's alleged improper interpretation of the term "eligible spouse," which deprived participants' spouses of their accrued benefits (Count III). (*Id.*) Plaintiffs sought declaratory relief and requested that the Court order NCR to pay participants' and their spouses amounts to which they were allegedly entitled under the Plans. (*Id.*)

Defendants moved to dismiss the original complaint. (Doc. 12.) In granting in part and denying in part Defendants' motion, the Court determined that the Plan Administrator was the only proper Defendant and so dismissed without prejudice Defendants NCR Corp., the Committee, and Ms. Ledford. (Doc. 26 at 40–41.) The Court also dismissed without prejudice Count III (the spousal claim) for failure to allege standing. (*Id.*) The Court denied the motion to dismiss Counts I and II. (*Id.*)

Plaintiffs then amended their complaint in December of 2016, adding a new Plaintiff to pursue the spousal claim (Count III), which was alleged anew in the amended complaint. (Doc. 34.) Defendant moved to dismiss this freshly alleged spousal claim. (Doc. 37.) The Court denied this motion to dismiss. (Doc. 70.)

Next, in September 2017, the Court granted in part and denied in part Plaintiffs' motion for class certification. (Doc. 83.) The Court certified a class for Count II, defined as follows:

All participants, former participants, beneficiaries and spouses or eligible spouses, as defined in either (a) the NCR Senior Executive Retirement, Death and Disability Plan, (b) the Retirement Plan for Officers of NCR [SERP II], (c) the NCR Nonqualified Excess Plan, (d) the NCR Mid-Career Hire Supplemental Pension Plan, or (e) the NCR Supplemental Pension Plan for AT&T Transfers who received or were entitled to receive lump sum payments from NCR as a result of the termination of NCR's nonqualified plans.

(*Id.* at 32.) The Court also certified a subclass to adjudicate the claim in Count I related to the improper removal of the Trustee for the SERP I and II Plans. This subclass was defined as follows:

All participants, former participants, beneficiaries and spouses or eligible spouses as defined in the NCR Senior Executive Retirement, Death and Disability Plan, and all participants, former participants, beneficiaries and spouses or former spouses as defined in the Retirement Plan for Officers of NCR who were participants in the plan at least one year prior to September 13, 1991 and were participants and active employees at least through January 1, 1995.

(*Id.*) The Court did not certify a class as to Count III but allowed Plaintiffs to either (1) amend their complaint to allow another former spouse to join the lawsuit and, along with the existing spousal Plaintiff, pursue claims individually, or alternatively (2) conduct additional limited discovery to determine whether Plaintiffs could establish a class of eligible spouses sufficient to satisfy the requirements of Rule 23. (*Id.* at 33.) Plaintiffs elected the first option and, shortly thereafter, filed a second amended complaint adding a second spousal Plaintiff for purposes of Count III (Doc. 86).

The Parties then filed and briefed cross summary judgment motions on Count III only, the spousal claims. (Docs. 87, 93.) After reviewing the briefing, the

Court granted Plaintiffs' motion for partial summary judgment on Count III and denied Defendant's cross-motion, having found that the two spousal Plaintiffs were "eligible spouses" entitled to benefits under the Plans. (Doc. 126.)

Around the same time that the Court ruled on Count III, the Parties filed cross summary judgment motions on Count II, the claim alleging that NCR breached the Plan terms. (Docs. 136, 151.) After reviewing the initial briefs, the Court noted that Plaintiffs' theory of the case had, after years of class discovery, somewhat "morphed." (Doc. 184 at 4.) In particular, in their summary judgment briefing, Plaintiffs presented a new theory of liability, and argued that they were entitled to replacement annuities or cash sufficient to purchase an equivalent replacement annuity. (*Id.* at 6.) Defendant contended that Plaintiffs had not asserted this theory in their complaint. (*Id.* at 7.) In light of this dispute, the Court ordered the Parties to submit supplemental briefs to address whether the Court could properly consider Plaintiffs' new theory of liability on summary judgment. (*Id.* at 7–8.)

The Parties submitted the requested supplemental briefs. Upon review, the Court found that Plaintiffs' "shift in their theory of liability" was "explored through both the fact and expert stages of discovery" and that "Defendant claims no material surprise and has articulated no actual prejudice" by having Plaintiffs' revised theory considered on the merits on summary judgment. (Doc. 193 at 4.) Even so, the Court required Plaintiffs to file an amended complaint expressly alleging the full basis on which they claimed the Plans had been breached as well

as their request for relief. (*Id.*) Plaintiffs then filed their Third Amended Complaint. (Doc. 194.)

Since that time, the Parties have fully resolved the dispute addressed in the spousal claim (Count III), and therefore filed a fresh Fourth Amended Complaint which includes only Counts I and II. (Fourth Amended Complaint, Doc. 216.) Also in the intervening time, the Court has held two oral arguments on the issues presented by the Parties' cross summary judgment motions. At this juncture, these motions are therefore ripe for consideration. Both Parties seek summary judgment in their favor as to Count II, the claim alleging that NCR breached the Plan terms.⁸

III. SUMMARY JUDGMENT STANDARD

Summary judgment may only be granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law.” FED. R. CIV. P. 56(c). A dispute of material fact “is ‘genuine’ . . . [only] if the evidence is such that a

⁸ Neither side moved for summary judgment on Count I. Defendant contends that, because it is entitled to summary judgment on a *de novo* review of Count II, Count I is moot. (Def. MSJ, Doc. 136-1 at 25.) Plaintiffs state in their cross-motion for summary judgment that they “do not pursue relief” on the sub-class certified under Count I different from the relief for the class certified under Count II and thus do not address Count I in their motion. (Pls. MSJ, Doc. 150-1 at 16 n.3.) At the 8/30/23 hearing, Plaintiffs' counsel argued that the allegations in Count I — that NCR unlawfully disposed of the fiduciary Trustee and thus the Trustee's *de novo* review over denial-of-benefits decisions — support the Court's application of a *de novo* standard in its review of Count II. (*See* 8/30/23 Hearing Tr., Doc. 224 at ECF 25–28.) As articulated in Section IV.A. of this Order, the Parties essentially agree that the Court should conduct a *de novo* review of Count II. Because no party seeks summary judgment on Count I, the Court does not address it further in this Order.

reasonable jury could return a verdict for the non-moving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When ruling on the motion, the Court must view all the evidence in the record in the light most favorable to the non-moving party and resolve all factual disputes in the non-moving party’s favor. *Welch v. Celotex Corp.*, 951 F.2d 1235, 1237 (11th Cir. 1992). The Court must avoid weighing conflicting evidence. *Anderson*, 477 U.S. at 255. Where a reasonable fact finder may “draw more than one inference from the facts, and that inference creates a genuine issue of material fact, then the court should refuse to grant summary judgment.” *Barfield v. Brierton*, 883 F.2d 923, 933–34 (11th Cir. 1989). The essential question is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson*, 477 U.S. at 251–52.

The standard of review for cross-motions for summary judgment does not differ from the standard applied when only one party files a motion, but simply requires a determination of whether either of the parties deserves judgment as a matter of law on the facts that are not disputed. *Am. Bankers Ins. Group v. United States*, 408 F.3d 1328, 1331 (11th Cir. 2005); *United States v. Oakley*, 744 F.2d 1553, 1555 (11th Cir. 1984) (“Cross-motions for summary judgment will not, in themselves, warrant the court in granting summary judgment unless one of the parties is entitled to judgment as a matter of law on facts that are not genuinely disputed.”). The Court must consider each motion on its own merits, resolving all reasonable inferences against the party whose motion is under consideration. *Id.*

Cross-motions may, however, be probative of the absence of a factual dispute where they reflect general agreement by the parties as to the controlling legal theories and material facts. *Id.* at 1555–56.

IV. ANALYSIS

A. Governing Legal Principles Under ERISA

The Plans at issue in this case are a particular subset of retirement plans called “top hat” plans – plans that provide deferred compensation to high-earning employees.⁹ While “top hat” plans are not subject to all of ERISA’s regulatory requirements, “ERISA’s enforcement provision clearly permits participants in top hat plans . . . to bring civil actions ‘to enforce the substantive provisions of the Act or **to recover benefits due or otherwise enforce the terms of the plan.**’”

Kemmerer v. ICI Americas Inc., 70 F.3d 281, 286 (3d Cir. 1995) (quoting 29 U.S.C. § 1132(a)(1)(B)) (emphasis added); *see also Blake v. Unionmutual Stock Life Insurance Co. of America*, 906 F.2d 1525, 1526 (11th Cir. 1990) (explaining that

⁹ As noted above, a “top hat” plan is “a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees.” 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1). “Top hat plans are subject to ERISA, 29 U.S.C. § 1003(a), but . . . are excluded from many individual ERISA provisions on the basic assumption that high-level employees are in a “strong bargaining position relative to their employers and thus do not require the same substantive protections that are necessary for other employees.” *Holloman v. Mail-Well Corp.*, 443 F.3d 832, 837 (11th Cir. 2006) (quoting *Goldstein v. Johnson & Johnson*, 251 F.3d 433, 442 (3d Cir. 2001)). “Top hat” plans are exempt from ERISA’s participation and vesting provisions, 29 U.S.C. §§ 1051-1061, funding provisions, 29 U.S.C. §§ 1081-1086, and fiduciary responsibility provisions, 29 U.S.C. §§ 1101-1114. See 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1). However, “top hat” plans are subject to ERISA’s reporting and disclosure provisions, 29 U.S.C. §§ 1021-1031, and administration and enforcement provisions, 29 U.S.C. §§ 1131-45. *Maynard v. Merrill Lynch & Co., Inc.*, 2008 WL 4790670, at *11 (M.D. Fla. Oct. 28, 2008).

the nature of a federal ERISA action is to equitably enforce the plan terms). In suing to enforce the terms of the plan, an ERISA plaintiff has the burden of proving entitlement to the contractual benefits in question. *Horton v. Reliance Std. Life Ins. Co.*, 141 F.3d 1038, 1040 (11th Cir. 1998).

In the context of ERISA suits seeking enforcement of plan terms, “it is well established that federal courts have the authority to develop a body of federal common law to govern the interpretation and enforcement of benefit plans.” *Alexandra H. v. Oxford Health Ins. Inc. Freedom Access Plan*, 833 F.3d 1299, 1306–07 (11th Cir. 2016) (internal quotations omitted). In crafting this federal common law, courts have borrowed from state contract law and so developed “rules of contract interpretation for construing ERISA plans.” *Id.* at 1307 (citations omitted). *See also Kemmerer*, 70 F.3d at 287 (explaining that claims seeking enforcement of the terms of an ERISA top hat plan are based on breaches of contract and “in such instances, breach of contract principles, applied as a matter of federal common law, govern disputes arising out of the plan documents”); *Carr v. First Nationwide Bank*, 816 F. Supp. 1476, 1487 (N.D. Cal. 1993) (“[I]t is clear that plaintiffs may enforce the terms of the [top hat plan] under 29 U.S.C. § 1132 and that federal common law of contract principles govern.”); *Maynard v. Merrill Lynch & Co., Inc.*, 2008 WL 4790670, at *12 (M.D. Fla. Oct. 28, 2008) (same).

By this logic, federal courts have treated such “top hat” retirement plans as unilateral contracts which employees accept through the performance of working for the employer. *See Kemmerer*, 70 F.3d at 297 (“[T]he plan constitutes an offer

that the employee, by participating in the plan . . . and serving the employer for the requisite number of years, accepts by performance.”). Put another way, “[u]nder unilateral contract principles, once the employee performs, the offer becomes irrevocable, the contract is completed, and the employer is required to comply with its side of the bargain.” *Id.* See also *Maynard*, 2008 WL 4790670, at *12 (same); *Carr*, 816 F. Supp. at 1488 (same). Further, once the employee performs, “[s]ubsequent unilateral adoption of an amendment which is then used to defeat or diminish the [employee’s] fully vested rights under the governing plan document is . . . ineffective.” See *Kemmerer*, 70 F.3d at 297. Thus, after employees’ rights are vested, the employer cannot change the terms of the contract in the absence of a specific provision authorizing it to do so. *Id.*

In interpreting an ERISA plan through the lens of breach of contract principles, courts “first look to the plain and ordinary meaning of the [plan] terms.” *Alexandra H.*, 833 F.3d at 1307; see also *Billings v. UNUM Life Ins. Co. of Am.*, 459 F.3d 1088, 1094–95 (11th Cir. 2006). “When plan documents unambiguously address the substantive rights of the parties at issue, the plan language controls.” *Meadows ex rel. Meadows v. Cagle’s, Inc.*, 954 F.2d 686, 691 (11th Cir. 1992); *Holloman v. Mail-Well Corp.*, 443 F.3d 832, 839 (11th Cir. 2006).¹⁰ In reviewing plan language, “the specific language of each provision should be interpreted in the context of the whole.” *Carr*, 816 F. Supp. at 1493. Plans should be construed so as

¹⁰ While ERISA plans are interpreted under federal common law, courts may use principles of state common law to guide their analyses. See *Wheeler v. Dynamic Engineering, Inc.*, 62 F.3d 634, 638 (4th Cir. 1995).

to render no provisions “nugatory and to avoid illusory promises.” *Id.* (collecting cases) (“[A]n interpretation which gives reasonable, lawful and effective meaning to all the terms is preferred to one which leaves any part unreasonable or of no effect.”).

Sometimes, though, a plan provision may be ambiguous. A plan term is ambiguous if it is susceptible to two or more reasonable interpretations that can be fairly made. *Alexandra H.*, 833 F.3d at 1307; *Novak v. Irwin Yacht & Marine Corp.*, 986 F.2d 468, 472 (11th Cir. 1993). If a plan term is ambiguous, the court applies the federal common law rule of *contra proferentem* — which requires that any ambiguity in an ERISA plan be construed against the drafter. *Alexandra H.*, 833 F.3d at 1307; *Billings*, 459 F.3d at 1095; *Jones v. Am. Gen. Life and Acc. Ins. Co.*, 370 F.3d 1065, 1070 (11th Cir. 2004). Thus, if both the plaintiff and the administrator propose reasonable interpretations of the plan language, which result in an ambiguity, then, pursuant to the doctrine of *contra proferentem*, the plan will be construed against the administrator and the administrator’s interpretation will be deemed to be *de novo* wrong. *See Lee*, 10 F.3d at 1551; *Florence Nightingale Nursing Serv., Inc.*, 41 F.3d at 1481; *Epolito v. Prudential Ins. Co. of Am.*, 737 F. Supp. 2d 1364, 1373 (M.D. Fla. 2010).

Here, the Court conducts its review *de novo*. As the Eleventh Circuit has recognized, “[t]here is some uncertainty about what standard of review a district court should apply when reviewing decisions made by the administrator of a top hat plan.” *Holloman v. Mail-Well Corp.*, 443 F.3d 832, 837 (11th Cir. 2006)

(discussing the district court’s decision to review a plan administrator’s decision *de novo* rather than by applying the “more deferential arbitrary-and-capricious standard of review”). In *Holloman*, the Eleventh Circuit reviewed the defendant’s decision to accelerate payments owed to beneficiaries under a “top hat” plan. In addressing the appropriate standard of review, the *Holloman* Court found that it need not determine which standard of review was appropriate because the result — which turned on an interpretation of the contractual plan language — would be the same regardless. Specifically, the *Holloman* Court said:

We find it unnecessary to decide whether the district court should have applied a deferential standard of review or *de novo* review. Because all the questions in this case turn on interpretation of what the plain terms of the plans permit and require, the results would be precisely the same under either standard of review.

Id. at 837.

The same logic applies here. The questions raised by the Parties all concern contractual interpretation of the language included in the five Plans and assessment of “what the plain terms of the plans permit and require.” Therefore, as in *Holloman*, the “results would be precisely the same under either standard of review.” *Id.*¹¹ *Hoak v. Plan Administrator of Plans of NCR Corp.*, 389 F. Supp. 3d 1234, 1273-74 (N.D. Ga. 2019) (“*Hoak II*”).

¹¹ The Parties generally agree that the Court should initially interpret the Plans *de novo*. Although Defendant states in briefing that, if it loses on a *de novo* review, the Court should then conduct a second review for abuse of discretion, defense counsel acknowledged at the second oral argument that this issue should ultimately be decided as a matter of law applying a *de novo* standard. (8/30/23 Hearing Tr., Doc. 224 at ECF 53–54) (“[B]oth parties agree this should actually [be] resolved on a *de novo* basis. The parties just have different interpretation of what the language means.”)

With this framing in mind, the Court turns to the Plans at issue and assesses the disputes concerning the Plan language, consistent with breach of contract principles, applied as a matter of federal common law.

B. Whether Defendant Breached the Terms of the Plans

At issue here is whether NCR breached the unilateral contracts when, upon Plan termination, it issued beneficiaries actuarially calculated lump sum payments using a 5% discount rate.

Plaintiffs' primary argument is that Defendant breached the Plans because the beneficiaries were not given the "accrued benefits" they bargained for and were owed under the terms of the Plans — life annuities, or an amount sufficient to purchase equivalent life annuities — and were instead provided something worse. To clarify from the start, Plaintiffs argue that the Plans prohibited Defendant from settling its benefit obligations by paying "lump sums," i.e., sums calculated by using a set of actuarial assumptions such that the lump sums were, in theory, actuarially equivalent to the present value of the life annuities. Plaintiffs **do not** argue that the Plans prohibited Defendant from paying beneficiaries a single sum of money that would have been sufficient to purchase an equivalent life annuity at the time of the Plan termination.¹² Plaintiffs' secondary argument is that, even if the Plans permitted Defendant to convert Plaintiffs' life annuities to actuarial

¹² In this way, Plaintiffs distinguish between the term "lump sum" in the context of a defined benefit plan under ERISA versus a "lump sum" in ordinary parlance. (See 8/30/23 Hearing Tr., Doc. 224 at ECF 6.)

equivalent lump sums, the Plans did not permit Defendants to discount those lump sums based on NCR's default risk on the market (the measure NCR unilaterally selected). Countering, Defendant contends that the Plan language allowed it to convert Plaintiffs' life annuities to lump sum payments that were actuarially equivalent to their life annuities, discounted by 5% based on the NCR's market default risk. The Parties agree that the issues presented should be decided as matters of law, and that there are no material disputes of fact. (*See* 8/30/23 Hearing Tr., Doc. 224 at ECF 32; 7/27/21 Hearing Tr., Doc. 211 at ECF 24.)

1. The Plan Language

As with any contract dispute, the Court begins with the language of the Plans. To start, the Plans are crystal clear on what Defendant explicitly promised to Plaintiffs — life annuities (of fixed amounts) in exchange for their years of service. (*See e.g.*, SERP I, Doc. 137-1 at ECF 7) (“Retirement and termination benefits under the Plan *shall be paid for the life of the former Participant.*”) (emphasis added); (*See, e.g.*, AT&T Plan, Doc. 137-6) (“Each Participant *shall be entitled to a benefit under this Plan expressed as a single life annuity . . .*”) (emphasis added).

Considering this language, the Parties agree that the “accrued benefits” promised by the Plans were life annuities. Defendant does not dispute that each beneficiary’s “accrued benefit” was set and locked-in at a particular amount at the time Defendant terminated the Plans: for example, \$10,000 a month, for life. As such, Defendant was obligated under the Plans to pay Plaintiffs and class members

set monthly payments for life, regardless of how long any particular beneficiary lived. Consistent with unilateral contract principles, because Plaintiffs had already performed their end of the bargain (through their years of service to NCR), Defendant was not authorized to change the terms of the contract absent a specific provision authorizing it to do so. *See Kemmerer*, 70 F.3d at 297; *Maynard*, 2008 WL 4790670, at *12.

The Plans, however, did provide Defendant with the right *to terminate* the plans “entirely at any time.” (*See, e.g., SERP I*, Doc. 137-1 at ECF 10.) But, Defendant was only permitted to terminate the Plans provided that “no such action shall adversely affect any Participant’s, former Participant’s or Eligible Spouse’s accrued benefits prior to such action under the Plan.” (*Id.*) The relevant portion of this provision (“the Termination Provision”) is reproduced below:

[Defendant’s] Committee shall have the right . . . to amend or modify the Plan . . . or **to terminate or repeal the Plan or any such agreement entirely at any time; provided, however, that (a) no such action shall adversely affect any Participant’s, former Participant’s, or Eligible Spouse’s accrued benefits prior to such action under the Plan.**

(*SERP I*, Doc. 137-1 at ECF 10) (emphases added). In light of this language, Defendant was clearly permitted to terminate the Plans. Plaintiffs do not argue otherwise.

However, because no Plan language directly authorized Defendant’s actions, Plaintiffs argue that the unilateral contract did not provide Defendant the right to substitute lump sum payments in lieu of the life annuities that Plaintiffs were

explicitly promised and owed. On the other hand, Defendant asserts that the Termination Provision's right to terminate necessarily provides an implied right to convert the life annuities to lump sum payments as long as this action did not "adversely affect" Plaintiffs' "accrued benefits." (See Def. MSJ, Doc. 157 at 15) ("While the Plans did not set forth specific rates, they supplied a standard by stating that Plan termination could not 'adversely affect' accrued benefits. That language required the Plan Administrator to use assumptions that would result in lump sums that were actuarially equivalent to the participants' accrued benefits under the Plans.").

Upon review, the Court finds that a careful reading of the language that is (and is not) in the Plans supports Plaintiffs' interpretation that Defendants were not permitted to unilaterally convert the promised fixed life annuity benefits to actuarially equivalent lump sum payments upon Plan termination.

First, the Court begins with what language *is not* in the Plans. Beyond allowing Defendant to terminate the Plans, the Plans include no language stating that Defendant may convert the promised life annuities to lump sums or otherwise accelerate the payment of benefits, as in some cases. *See, e.g., Hollomon*, 443 F.3d at 838 (explaining that the plan language in that case stated that the board "reserves the right in its sole discretion *to accelerate the payment of any benefits payable under the Plan*") (emphasis added). For purposes of the present dispute,

the Plans do not mention lump sums at all.¹³ Since the Plans do not mention lump sum payments, they also (obviously) do not provide any requirements for calculating hypothetical lump sums or accelerated payments. Thus, there is no relevant mention of an “actuarial equivalence” standard — the measure Defendant now contends it was permitted, or even required, to apply.

In the absence of any such language (related to lump sums, the acceleration of benefits, actuarial equivalence, actuarial assumptions, or the like), there is no Plan language indicating that the Parties *ever* contemplated that participants’ accrued benefits would be issued in any form *other than* a life annuity — *even upon Plan termination*. Put another way, there are no explicit provisions in the Plans stating that Defendant may convert the promised accrued benefits (life annuities of fixed amounts) to fundamentally different instruments (actuarially equivalent lump sum payments).

As a practical matter, the record evidence demonstrates that Defendant considered multiple options of how to settle participants’ “accrued benefits” upon Plan termination. One of those options was issuing lump sum payments. But Defendant *also* considered purchasing replacement life annuities on the market (with various tax treatment options). (*See* First Aon Presentation, Doc. 137-91; Second Aon Presentation, Doc. 136-29.) This undisputed evidence shows that the

¹³ A discretionary lump sum provision was added to the Plans in 2008. The Parties agree that these discretionary lump sum provisions “don’t have any application to this case.” (8/30/23 Hearing Tr., Doc. 224 at ECF 39–40.)

issuance of lump sum payments was by no means a necessary consequence of Plan termination. There were other options.

Accordingly, to find that Defendant had the right to unilaterally swap out the benefits bargained for (life annuities) for fundamentally different instruments (lump sums), the Court would have to read into the Plans both (1) a right to convert the accrued benefit and (2) an “actuarial equivalence” standard — neither of which exist in the Plan language. Reading in unwritten rights cuts against well-settled contract principles. *See Baldwin v. University of Pittsburgh Med. Center*, 636 F.3d 69, 75–76 (3d Cir. 2011) (explaining that, under federal common law contract principles, “[t]he strongest objective manifestation of [the parties’] intent is the language of the contract,” and further emphasizing “the firmly settled principle that the intent of the parties to a written contract is contained *in the writing itself*”) (citing *Am. Eagle Outfitters v. Lyle & Scott Ltd.*, 584 F.3d 575, 587 (3d Cir. 2009)(internal quotations omitted) (emphasis added)).

In addition to the language *absent* from the Plans, the language *present* in the Plans further cuts against Defendant’s argument that the Termination Provision broadly allowed it to provide Plaintiffs with different benefits than the ones promised. In particular, Defendant’s broad interpretation of the Termination Provision conflicts with other *specific, mandatory* provisions included in the Plans: namely, the provisions stating that the retirement benefits “*shall* be paid for the life of the participant” or that each participant “*shall* be entitled to a benefit under this Plan expressed as a single life annuity.” (*See e.g.*, SERP I, Doc. 137-1 at

ECF 7; AT&T Plan, Doc. 137-6 at ECF 5) (emphases added). Nothing in the Plans indicates that these mandatory “shall” provisions are entitled to less force upon Plan termination.

In addressing whether a defendant-employer may take actions not explicitly provided for by “top hat” plan language, courts have relied on the well-established contract principle that “specific, mandatory clauses take precedence over general ones.” *See Carr v. First Nationwide Bank*, 816 F. Supp. 1476, 1492–95 (N.D. Cal. 1993) (finding that plan sponsor did not have an implied right to change the form and timing of payment that participants had elected pursuant to the plan where the plan language did not explicitly provide the sponsor with this right). Indeed, in *Carr*, the Court explained that, where (like here) the plaintiffs’ rights had already vested, the defendant-employer’s “power to amend, modify *or terminate* the Plan does not entitle [it] to avoid its express contractual obligations. . . . Any other interpretation of the Plan’s amendment clause would make the Plan’s several specific and mandatory provisions ineffective, rendering the promises embodied therein completely illusory.” *Id.* (emphasis added). In so finding, the *Carr* Court relied on the contract principle that a plan should be construed as a whole and that “an interpretation that gives a reasonable meaning to all the terms is preferred to one which leaves any part unreasonable or of no effect.”¹⁴

¹⁴ In *Carr*, the Court said “[n]otwithstanding the [employer’s] reserved power to amend, the court further finds that under the terms of the 1979, 1983 and 1986 Plans, the [employer] is not entitled to amend or modify the Plan in a manner that infringes plaintiffs’ rights with regard to interest and repayment.” *Id.* at 1492 (emphasis added).

Based on the same principles, the Third Circuit, in *Kemmerer v. ICI Americas Inc.*, similarly rejected an employer's argument that it had an implied right that was not included in the plans. 70 F.3d 281, 287 (3d Cir. 1995) (finding that defendant did not have the right to terminate the plan where such right was not explicitly reserved in the plan document and was inconsistent with other language in the plan).¹⁵

In this case, as in *Carr* and *Kemmerer*, a *general* power reserved in the contract (here, to *voluntarily* terminate the Plans at any time) cannot not be read in a manner that infringes on the Plaintiffs' rights as set out in the *specific, mandatory* "shall" provisions (here, that participants "shall" receive life annuities). To find as much would render NCR's promise to provide life annuities illusory and would deprive the "shall" provisions of their meaning. Accordingly, the specific, mandatory "shall" provisions indicate that the Parties intended the "accrued benefit" take the form of life annuities, and nothing else.¹⁶

¹⁵ *Kemmerer* also involved a "top hat" plan. The plan was different in that the benefits were not life annuities. Instead, upon retirement, a beneficiary elected how he would like to be paid his accumulated balance. *Id.* at 284–85. If no election was made, payments were made in five percentage installments. *Id.* at 285. The plaintiffs in the case made specific elections for fixed amounts of distributions. *Id.* The defendant initially honored those elections but then unilaterally terminated the Plan and – rather than comply with the elections – made 3 final payments (annually) of all accumulated balances. *Id.*

¹⁶ Defendant argues that these "shall" provisions are irrelevant after Plan termination. In support, Defendant cites a different "shall" provision in the Plans that cannot be harmonized with the overall Plan Termination provision. (Def. Reply, Doc. 157 at 12) (citing SERP I language stating that each grandfathered participant "shall continue to receive his benefits under the Plan in accordance with the terms of the Plan . . . as in effect on October 3, 2004"). Obviously, a participant cannot "continue to receive" benefits "under the Plan" when the Plan has been terminated. But, the provision that the benefits "shall be paid for the life of the participant" *can* be harmonized with the Termination

Besides the “shall” provisions promising the beneficiaries life annuities, other Plan language also supports Plaintiffs’ interpretation that Defendant was not permitted to unilaterally convert the life annuities to lump sum payments. Indeed, a closer reading of the Termination Provision itself supports Plaintiffs’ position, specifically with respect to the terms “any” and “adversely affect.”

The Court first addresses the meaning of the term “any.” The Termination Provision allowed Defendant to terminate the Plans provided that “no such action shall adversely affect *any* Participant’s” established life annuity benefit. (SERP I, Doc. 137-1 at ECF 10) (emphasis added). The plan and ordinary meaning of “any” is “some or even the smallest amount or number of.” *Any*, Cambridge Dictionary, available at: <https://dictionary.cambridge.org/us/dictionary/english/any>. As such, Plan termination could not adversely affect *even one* participant’s established life annuity benefit.

In converting beneficiaries’ life annuity benefits to lump sum payments, Defendant necessarily relied on mortality tables and similar actuarial calculations. Inevitably, though, some beneficiaries will live longer than anticipated by the mortality tables. As such, those beneficiaries will have received less money than they would have received by way of the promised life annuity. These individuals’

Provision (and its requirement that termination not adversely affect participants’ existing accrued benefits). Without question, Defendant could have purchased replacement life annuities — in which case, the Plaintiffs’ benefits would “be paid for the life of the participant,” as demanded by these “shall” provisions of the Plans. Thus, Plaintiffs’ interpretation of the specific, mandatory provisions outlining that the accrued benefits shall be life annuities can be harmonized with the more general Termination Provision.

“accrued benefits” were therefore “adversely affected.”¹⁷ The Termination Provision’s requirement that termination not adversely affect “any” participant’s “accrued benefit” cannot be harmonized with Defendant’s decision to issue beneficiaries lump sum payments based on mortality tables and actuarial calculations as it did. Indeed, this issue speaks to the inherent differences between the two instruments – a life annuity and an actuarially equivalent lump sum payment – and highlights why the two instruments are not interchangeable.

The Court next turns to the Termination Provision’s requirement that Defendant’s actions not “adversely affect” any participant’s “accrued benefit.” “Adversely affect” is not defined in the Plans and is thus given its “plain and ordinary” meaning. *Alexandra H.*, 833 F.3d at 1307. The Cambridge Dictionary definition of “adversely affected” is “influenced or changed in a negative or harmful way.” *Adversely Affected*, Cambridge Dictionary, available at: <https://dictionary.cambridge.org/us/dictionary/english/adversely-affected>.¹⁸

¹⁷ For an easy and highly simplified example, take a beneficiary whose life annuity was \$10,000 a month for the rest of her life, or \$120,000 a year. At the time of Plan termination, mortality tables expected she had exactly 5 years left to live. So, she received a lump sum of \$600,000 (\$120,000 x 5), without factoring in a discount rate. However, she ends up living for 10 years after Plan termination. With a life annuity, this beneficiary would have received 1.2 million dollars (without accounting for a discount rate). Thus, what she received with the time-limited 5-year lump sum was less than what she would have received had she retained her life annuity.

¹⁸ The Merriam-Webster definition of “adverse” is “acting against or in a contrary direction,” “opposed to one’s interests” or “causing harm.” *Adverse*, Merriam-Webster Dictionary, available at: <https://www.merriam-webster.com/dictionary/adverse#:~:text=%3A%20acting%20against%20or%20in%20a,%3A%20opposed%20to%20one%27s%20interests>. The Cambridge Dictionary definition of “adverse” is “having a negative or harmful effect on something.” *Adverse*, Cambridge Dictionary, available at: <https://dictionary.cambridge.org/us/dictionary/english/adverse>.

Thus, Defendant was not permitted to take actions that “influenced or changed in a negative or harmful way” Plaintiffs’ “accrued benefits.”

In arguing that the conversion of their life annuities to lump sums “adversely affected” their “accrued benefits,” Plaintiffs emphasize two core features of fixed life annuities that render these annuities such potent financial instruments. These two core features are that fixed life annuities: (1) provide fixed income *for life*, mitigating the risk that participants will outlive their assets; and (2) provide a fixed return regardless of market conditions, mitigating the risk that participants will fail to earn a sufficient investment return to fund retirement. (Pls. MSJ, Doc. 150-1 at 31.) These concepts are known as “longevity risk” and “investment risk.” “Longevity risk” is the risk that an individual will outlive his retirement or his savings. *See Hoak*, 2021 WL 9772287, at *5 (N.D. Ga. July 26, 2021); *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 662 (4th Cir. 1996) (Michael, J., concurring). “Investment risk” is the risk that one’s investments will do poorly. *Id.* Thus, one key feature of each Plaintiff’s fixed life annuity benefit (which he or she bargained for) was the absence of longevity or investment risk. Indeed, these risks were borne by NCR as the plan sponsor. *See Faircloth*, 91 F.3d at 662 (noting that with a defined-benefit plan, “the employer bears the investment and longevity risks”).

Where (as here) a plan sponsor bears those risks, a beneficiary is afforded a sense of security that he will be provided with a set amount of money for the entirety of his life, no matter how long he lives and despite external market factors. But here, by unilaterally converting the fixed lifetime benefits to single lump sum

payments, Defendant shifted those risks to Plaintiffs, *without their consent or approval*.¹⁹ The stability, security, and peace of mind provided by a lifetime of scheduled, fixed payments were inherent features of the “accrued benefits” that Plaintiffs bargained for when they agreed to work for NCR. In converting the life annuities to lump sums, Defendant wiped out those valuable components of Plaintiffs’ “accrued benefits.” In eliminating those key components of their life annuities, Defendant, in a very real-world way, “adversely affected,” or changed for the worse, Plaintiffs’ “accrued benefits.”

As shown herein, the absence of longevity and investment risks were inherent aspects of the “accrued benefits” (the life annuities) bargained for and promised under the Plans. The absence of these risks speaks to the value of those “accrued benefits.” The same is not true of NCR’s default risk on the market. NCR’s default risk was plainly not an aspect of the fixed, static “accrued benefits.” If it had been, the “accrued benefit” amounts would have fluctuated based on NCR’s credit rating and default risk (which was not the case). Thus, in assessing whether Defendant’s actions “adversely affected” the “accrued benefits,” it is appropriate

¹⁹ As a brief aside, the Court notes that, in the context of the termination of a *qualified* plan that provides for life annuities, if a plan sponsor wants to provide lump sums instead of the life annuities promised, it *must* provide participants with an option to receive a replacement life annuity or alternatively accept a lump sum. If a participant chooses the replacement life annuity, the plan sponsor must provide that replacement annuity. Under such circumstances, the plan sponsor cannot force a lump sum on any participant. *See* 26 C.F.R. § 1.417(e)-1(b)(1)-(2). As this regulation applies to qualified plans, it is not applicable to the non-qualified Plans at issue here. Even so, courts evaluating nonqualified plans have recognized that ERISA regulations governing qualified plans may provide at least some helpful context for the interpretation of terms in nonqualified plans. *See, e.g., Maynard*, 2008 WL 4790670, at *13; *Hoak II*, 389 F. Supp. 3d at 1279–80.

for the Court to consider the relative longevity and investment risks, but not NCR's default risk — a risk not encompassed within the “accrued benefits,” and one NCR *voluntarily and unilaterally* chose to eliminate when it terminated the Plans and paid Plaintiffs lump sums. Indeed, as discussed later in Section IV.C., when NCR discounted these lump sum payments to account for its risk of default, NCR only *further* “adversely affected” Plaintiffs’ accrued benefits (beyond the adverse effects associated with paying Plaintiffs lump sums instead of the life annuities they were promised).

The above discussion demonstrates the ways in which a life annuity and a lump sum payment are fundamentally different instruments, rather than interchangeable ones. These fundamental differences are further illustrated by the record evidence relating to the value of replacement life annuities in this case. Here, Plaintiffs have presented undisputed record evidence that, upon Plan termination, Defendant explored alternatives to converting the life annuities to lump sum payments. (*See* Second Aon Presentation Doc. 136-29 at ECF 12–29.) Specifically, NCR explored options involving purchasing replacement annuities on the market. (*Id.*) These replacement annuities would have provided Plaintiffs and class members with the *exact same benefits* to which they were entitled under the Plans (e.g., \$10,000 a month, for life). Through its consultant, Defendant received actual and estimated quotes for the cost of replacement life annuities, at least for the 91 Grandfathered Participants in the Plans. (*Id.*; *see, e.g., id.* at ECF 15.)

At the 8/30/23 hearing, Plaintiffs’ counsel discussed an example — specifically that of one of the Plaintiffs (who the Court will refer to as “Plaintiff X”). (8/30/23 Hearing Tr., Doc. 224 at ECF 22–24.) At the time of Plan termination, Plaintiff X was 71.69 years old. (*Id.*) His (and his spouse’s) “accrued benefit” was a joint and survivor life annuity benefit of \$8,594 per month, or \$103,131 per year, under the Plan. (*Id.*) That was the benefit that he bargained for and to which he and his spouse were entitled based on his years of service to NCR. At the time of Plan termination, Defendant received a quote from MetLife to replace Plaintiff X’s *specific* joint and survivor life annuity for the amount of \$1.817 million. (*Id.*) Besides the actual quote provided by MetLife, Plaintiffs’ counsel also proposed an alternative measure to determine the cost of a replacement joint and survivor life annuity for Plaintiff X and his wife — specifically by using standard rates set by the Pension Benefit Guaranty Corporation (“PBGC”) at the time.²⁰ Using such PBGC rates, the cost of a replacement annuity for Plaintiff X and his wife in 2013 would have been \$1.588 million. (*Id.* at ECF 24.) Thus, the value of an instrument that provided Plaintiff X with the same benefit as his existing “accrued benefit” was between \$1.588 and \$1.817 million. At the time of Plan termination, NCR paid Plaintiff X and his wife a lump sum settlement of \$1.273 million (before taxes).

²⁰ The PBGC is a federal agency, created via ERISA, that “protect[s] pension benefits in both single-employer and multiemployer private sector pension plans.” If a plan is terminated “without sufficient money to pay all benefits, PBGC’s insurance programs will pay for the benefit provided by” the pension plan, up to the limits set by law. *See* <https://www.pbgc.gov/about/faq/pg/general-faqs-about-pbgc>.

(*Id.*) The monetary value of Plaintiff X’s lump sum was therefore significantly lower than the purchase price for a replacement annuity that would have provided identical benefits to the ones Plaintiff X was owed. If Plaintiff X had wanted to take the lump sum provided by NCR and purchase a new life annuity (because, for example, he valued the security of fixed payments for life — a benefit he bargained for), he could not have purchased one that would have provided the same benefits, given the lower cash amount of the lump sum payment. In this way, Defendant’s decision to unilaterally substitute an actuarially equivalent lump sum for the life annuity benefit he bargained for “adversely affected” Plaintiff X’s “accrued benefit.” The Court provides this example, not to indicate that any particular monetary amount was the correct value of Plaintiff X’s life annuity, but to illustrate that a life annuity is different in kind than a lump sum, and that the inherent benefits of a life annuity (specifically related to the absence of longevity and investment risk) are reflected in the cost of the replacement annuity options.

In sum, the Court finds that the Plan language, viewed as a whole, supports Plaintiffs’ reading that Defendant was not permitted to unilaterally swap out the life annuities to which they were entitled for actuarially equivalent lump sum payments. In particular, the Court bases its conclusion on (1) the absence of Plan language allowing Defendant to convert Plaintiffs’ accrued benefits to a different financial instrument of lesser value; (2) the specific, mandatory “shall” provisions in the Plans promising life annuities; and (3) the Plans’ plain textual requirement that Plan termination not “adversely affect” “any” Plaintiffs’ accrued benefit.

Defendant's arguments to the contrary are ultimately unpersuasive. As noted above, Defendant argues that the Termination Provision broadly allowed it to convert the Plaintiffs' accrued benefits to actuarially equivalent lump sums as long as its actions did not "adversely affect" any Participant's accrued benefits. (*See* Def. MSJ, Doc. 157 at 15.) Defendant argues that its actions did not "adversely affect" Plaintiffs' accrued benefits because the lump sums were "actuarially equivalent" to the value of the life annuities. (*Id.*) But as discussed herein, nothing in the Plans supports Defendant's reading. This is because the Plans do not define "adversely affect" in the manner Defendant suggests; the Plans do not mention "lump sums" (as relevant here); and the Plans do not mention "actuarial equivalence" or the use of "actuarial assumptions." Under the circumstances, Defendant's request that the Court read in an "actuarial equivalence" standard asks the Court to, in effect, conjure Plan language from thin air. Doing so would impose a contract term on each Plaintiff and class member that was not agreed upon and which transforms the life annuity benefit's financial value to Plaintiffs' detriment.

Defendant further argues that its broad interpretation of the Termination Provision is supported by the case law. In particular, Defendant cites to *Taylor v. NCR Corp.*, a case that also involved one of NCR's "top hat" plans. *See* 2015 WL 5603040 (N.D. Ga. Sept. 23, 2015). The plaintiff in that case primarily argued that NCR's termination of the plan adversely affected his benefit because, when NCR paid him a lump sum, it resulted in a significant taxable event that reduced the value of his benefit. *Id.* at *6. The *Taylor* Court explained, citing a line of well-

settled authority (that Plaintiffs here do not dispute), that “tax losses do not fall within the relief available to redress violations of ERISA.” *Id.* at 7.²¹ In a passing footnote, the *Taylor* Court also stated — without supporting legal authority or further elaboration — that the power to terminate a retirement plan necessarily implies the power to pay out the benefit in the form of a lump sum, as follows:

Taylor’s allegation that the Plain “specifically precluded the distribution of a participant’s vested account balance in the form of a lump sum benefit,” (FAC ¶ 16), has no basis in the Plan documents. There is express language in the Plan authorizing NCR to unilaterally terminate the Plan at any time. (Mot. to Dismiss at 13, Ex. B). **The power to terminate a plan necessarily implies the power to pay out the benefit in a lump sum upon termination.**

Id. at n.6 (emphasis added).

Upon review, the Court does not find the conclusory *Taylor* footnote persuasive. The plaintiffs in *Taylor* did not present this issue to the district court in the manner fully discussed and argued in the instant case. The *Taylor* Court’s footnote provides no legal authority or supportive reasoning for its conclusory finding. Conversely, here, Plaintiffs have presented evidence that Defendant had a number of alternative options upon termination *besides* converting the life annuities to lump sums, such as purchasing replacement annuities. (See Second Aon Presentation, Doc. 136-29.) As such, actuarially equivalent lump sum payments were *not* necessarily attendant to Plan termination and cannot be logically deemed an automatic element of Plan termination. Moreover, standard

²¹ The *Taylor* Court further found that the plaintiff failed to allege that the 5% discount rate was miscalculated or improperly applied. *Id.*

tools of contract interpretation, applicable case law (in particular, *Carr* and *Kemmerer*), and other Plan language demands a contrary conclusion — that the Plans did not provide Defendant with an implied right to convert the life annuities to lump sums. For these reasons, Defendant’s reliance on the *Taylor* footnote is misplaced.

Besides *Taylor*, Defendant also relies on *Holloman v. Mail-Well Corp.*, 443 F.3d 832, 837 (11th. Cir. 2006) (affirming summary judgment where defendant terminated a “top hat” plan and converted a promised life annuity to a lump sum payment). *Holloman*, however, is distinguishable. There, the plan at issue included an *explicit provision* allowing defendant to accelerate benefits and pay those benefits out via lump sum. *Id.* 443 F.3d at 838 (explaining that the plan language stated that the Board “reserves the right in its sole discretion *to accelerate the payment of any benefits* payable under the Plan . . . but the Board shall make no reductions in the benefits other than those provided in the Plan, based on the applicable Actuarial Assumptions.”) (emphasis added).²² The Plans in the instant case contain no similar provision granting Defendant the right to accelerate the payment of any benefits. For these reasons, *Holloman* does not provide authority to support Defendant’s argument that the Court may read in an implied right to

²² In *Holloman*, the Eleventh Circuit also found that the plaintiffs failed to present any affirmative evidence to show that the lump sum payment was not equivalent in value to the stream of future benefit payments the plaintiffs were due. *Id.* at 839–40. By contrast, Plaintiffs here present ample evidence that the lump sum payments were not equivalent in value to the life annuities, or specifically the cost of equivalent replacement life annuities.

convert the promised benefits (life annuities) to something different (actuarially equivalent lump sums) where the Plans do not so provide.

Besides relying on *Taylor* and *Holloman*, Defendant argues that treasury regulation 26 C.F.R. § 1.409A-3(j)(4)(ix)(C)(4) supports its position. This regulation relates to “plan terminations and liquidations” for nonqualified plans. *Id.* It states that “[a] plan *may provide* for the acceleration of the time and form of payment, or a payment under such plan may be made, where the acceleration of the payment is made pursuant to a termination and liquidation of the plan . . .,” provided that, among other things, all “payments are made within 24 months of the date” that the plan sponsor terminates the plan. *Id.* (emphasis added).

Defendant therefore argues that this regulation supports its position that a right to terminate a plan necessarily includes an implied right to pay benefit obligations via lump sums. (Def. Reply, Doc. 157 at 8) (“cash[ing] out the benefit upon termination . . . ***is what plan termination is.***”) (emphasis in original). But, as Plaintiffs point out in response, all this regulation means is that Defendant could not fail to settle its benefit obligations after 24 months. Defendants could have complied with this requirement (and the language of the Plans) by purchasing replacement annuities with insurance companies or even by providing the Plaintiffs with a sufficient amount of money to purchase equivalent replacement annuities themselves. (Pl. Reply, Doc. 161 at 5; *see also* 8/30/23 Hearing Tr., Doc. 224 at ECF 68–69 (noting that the regulation was of no moment “because NCR could have paid the premium to an insurance company and been done with it right

away”)). Plaintiffs also point out that this regulation was enacted in 2005 and therefore does not apply to the vast majority of the class members, who stopped accruing benefits before the regulation was added. (8/30/23 Hearing Tr., Doc. 224 at ECF 68–69.)

Upon review, the Court finds that this 24-month payment requirement — which appears to apply only to a small number of class members, and which Defendant could have complied with by purchasing replacement annuities — does not support Defendant’s much broader assertion that actuarial equivalent lump sum payments are *always* attendant to plan termination, regardless of the specific Plan language to the contrary. This is especially so where courts are directed to consider such “top hat” plans as individual contracts in their own right subject to recognized rules of contract interpretation. *Kemmerer*, 70 F.3d at 287; *Alexandra H.*, 833 F.3d at 1307.

Consequently, after a full review of all the relevant words and provisions in the Plans — and consideration of provisions or language omitted from the Plans — the Court concludes that Defendant was not permitted to unilaterally convert Plaintiffs’ promised life annuities to actuarially equivalent lump sums. In particular, the Court finds the following contract language dispositive: the “shall” promise of life annuities, the prohibition on “adversely affect[ing]” “any” participant’s life annuity, and the absence of any provision allowing Defendants to substitute the promised benefits. Considering these Plan terms, Defendant’s

argument — which asks the Court to read in a right to convert the accrued benefits that does not exist in the Plan language — must fail. The Court thus concludes that Defendant breached the terms of the Plans when it converted Plaintiffs’ life annuities to alleged actuarially equivalent lump sum payments.

C. Whether the Plans Permitted NCR to Consider its Default Risk in Setting a Discount Rate

Putting aside the above discussion, even if the Plans permitted Defendant to convert the promised life annuities to lump sum payments, the Plans did not permit Defendant to discount those payments by 5% based on NCR’s risk of default. No Plan language mentions this discount rate or provides NCR the right to consider its default risk in accelerating payments. Indeed, as discussed earlier, the Plans do not mention acceleration of payments at all.

As Plaintiffs repeatedly point out in their borrower-lender loan analogy, a borrower who owes an amount (e.g., \$100,000, pursuant to a loan contract) cannot *voluntarily* decide to prepay the loan and then pay less than the full amount owed because his credit score has decreased since he obtained the loan and thus the market value of the loan is less. (*See* Pls. Reply, Doc. 161 at 14) (“If the borrower voluntarily chooses to prepay, the only way to fully settle his contractual obligations is to pay everything that he owes under the contract, discounted—at most—by the time value of money. The borrower cannot force the lender to settle for less due to changes in his default risk.”). The same principle applies here: even if NCR had been permitted to swap Plaintiffs’ life annuities for lump sums, it was not permitted to settle its contractual obligations by paying less than the value of

the life annuities based on its own default risk. Defendant's use of a 5% discount rate based on its own risk of default violated the Plan terms because (1) nothing in the Plans permitted Defendant to reduce Plaintiffs' benefits based on NCR's default risk and (2) Defendant's use of a 5% discount rate undoubtedly "adversely affected" Plaintiffs' and class members' "accrued benefits" by providing them a benefit of lesser value than the benefits to which they bargained for and were entitled.

D. Appropriate Relief

Having found that Defendant breached the Plan terms by converting the benefits Plaintiffs bargained for (fixed life annuity payments) to something different (lump sum payments), the Court now considers the appropriate relief.

Plaintiffs seek declaratory relief and also request an order requiring Defendant to comply with the Plan terms and pay Plaintiffs and class members the remainder of what they are due under the Plans. *See* 29 U.S.C. § 1132(a)(1)(B) (permitting a beneficiary to recover benefits due to him under the terms of his plan or to enforce his rights under the terms of the plan).

For the reasons articulated herein, the Court **DECLARES** that Defendant breached its agreements with the Plaintiffs and class members when it adversely affected their accrued benefits and paid them lump sums that did not deliver to Plaintiffs the accrued benefits to which they were entitled under the Plans. The Court further **DECLARES** that the Plans required Defendant to, upon Plan termination, provide Plaintiffs and class members the accrued benefits guaranteed

under the Plans, specifically in the form of replacement life annuities or amounts sufficient to purchase such replacement annuities.

As to the appropriate relief, Plaintiffs request that the Court order Defendant to comply with the terms of the Plans by providing Plaintiffs and the Class Members with amounts reflecting the difference between the lump sums they received and the cost of the replacement life annuities to which they were entitled. Plaintiffs propose that Defendant be ordered to calculate the cost of Plaintiffs' and class members' replacement life annuities using the discount rates implied in commercial annuity prices as reported by the Pension Benefit Guaranty Corporation ("PBGC") at the time of Plan termination. Plaintiffs have represented that these rates are routinely used to estimate the cost of replacement annuities. (8/30/23 Hearing Tr., Doc. 224 at ECF 30.) The Court notes that application of these rates results in a lower cost for the replacement annuities than the quotes obtained by Defendant at the time of Plan termination.

In light of the above, the Court **ORDERS** Plaintiffs to submit a proposed order that addresses the above-requested relief, as well as Plaintiffs' request for pre- and post-judgment interest. Plaintiffs' proposed order should be supported by relevant legal authority, evidence, and documentation. In addition, Plaintiffs appear to seek attorneys' fees and costs. As such, Plaintiffs may file a separate motion for attorneys' fees, supported by relevant legal authority, time records, attorney affidavits, and other relevant documentation. Defendant may file a response to the proposed relief order in the event it disagrees with use of the PBGC

rates or other aspects of the proposed relief order. Defendant may file its response to any motion for attorneys' fees consistent with the below schedule.

V. CONCLUSION

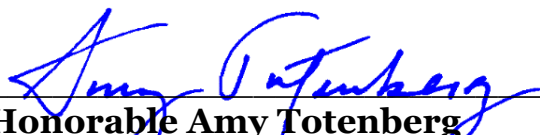
For the reasons articulated above, Defendant's Motion for Summary Judgment [Doc. 136] is **DENIED**. Plaintiffs' Motion for Summary Judgment [Doc. 151] is **GRANTED**.

Plaintiffs' proposed relief order shall be due **25 days** from the date of this Order. Defendant's response shall be due **25 days** thereafter. Any motion for attorneys' fees shall be due within **35 days** of the date of this Order. Defendant's response to this motion shall be due **14 days** after the fee motion is filed.²³ The Parties are further **DIRECTED** to advise the Court as to their positions as to any remaining issues that require resolution, including the disposition of Count I. The Parties are encouraged to consider engaging in mediation to bring this long-litigated matter to conclusion. If the Parties agree to pursue mediation, they are **DIRECTED** to promptly advise the Court of such agreement, the name of the mediator selected, and the date of the mediation.²⁴ If the Parties do not intend to pursue mediation, they should similarly advise the Court of this decision.

²³ Alternatively, the Parties may propose a different briefing schedule to address these issues. Any joint proposed briefing schedule should be filed within 14 days of the entry of this Order.

²⁴ If the Parties wish to proceed to mediation, the Court will administratively close the case given the potential complexities of that process.

IT IS SO ORDERED this 6th day of February, 2024.



Honorable Amy Totenberg
United States District Judge