

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA  
ANDERSON DIVISION

<b>KENNETH WALTON GEORGE, DENNIS</b>	)	<b>Case No.: 8:06-CV-00373-RBH</b>
<b>REED BOWEN, CLYDE FREEMAN,</b>	)	
<b>GEORGE MOYERS, JIM MATTHEWS,</b>	)	
<b>and HENRY MILLER, on their own behalf and</b>	)	
<b>on behalf of a class of persons similarly situated,</b>	)	
	)	
<b>Plaintiffs,</b>	)	<b>MEMORANDUM IN SUPPORT OF</b>
	)	<b>MOTION FOR RELIEF</b>
<b>vs.</b>	)	<b>REGARDING IMPROPER CLASS</b>
	)	<b>COMMUNICATIONS AND TO</b>
<b>DUKE ENERGY RETIREMENT CASH</b>	)	<b>SHOW CAUSE WHY DUKE</b>
<b>BALANCE PLAN and DUKE ENERGY</b>	)	<b>ENERGY CORPORATION SHOULD</b>
<b>CORPORATION,</b>	)	<b>NOT BE HELD IN CONTEMPT</b>
	)	<b>OF COURT</b>
<b>Defendants.</b>	)	
	)	

---

Plaintiffs submit this Memorandum in Support of their Motion regarding improper class communications, as follows:

**I. FACTS**

On February 6, 2006, Plaintiffs filed this class action asserting various statutory and plan violations relating to Duke’s conversion to and administration of its cash balance retirement plan. On September 4, 2009, this Court certified a class action consisting of a “whipsaw class” and an “interest rate” class. (Dkt. Entry 251). The parties were directed by that Order to meet and confer and submit a proposed Class Notice. By Order dated November 13, 2009, this Court approved both the long and short forms of Class Notice and the joint submission setting forth the plan of dissemination of notice of the class action and of opt-out rights to absent class members. (See Dkt. Entry 259, 259-1, 252-1).

On or about January 6, 2010, Class Counsel commenced distribution of the approved

Class Notice. Pursuant to the terms of the Class Notice absent class members have until March 17, 2010 to opt out of the classes defined in the notice.

Around January 21, 2010, Duke Energy commenced a direct communications campaign with its employees, including named Plaintiffs/Class Representatives Jim Matthews and Henry Miller, purportedly concerning a buy-out program, soliciting early retirement with the offer of severance and other benefits. Declaration of Jim Matthews, ¶ 4.

On or about January 25, 2010, Duke initiated mailings and web portal postings which detailed the buy-out proposal. Declaration of Matthews ¶ 6-7. A part of the offer includes a mandatory “Waiver and Release” document, a sample of which is attached hereto as Exhibit 1.<sup>1</sup>

The “Waiver and Release” contains language which specifically releases rights of the class members in the within litigation. Exhibit 1, ¶ 4(e), states that “the rights and claims waived and released shall include but not be limited to”:

Those arising under the Employee Retirement Income Security Act of 1974 . . . including but not limited to claims relating to the Duke Energy Retirement Cash Balance Plan . . . and further including but not limited to **claims relating to case No. 8:06-cv-00373-RBH pending in the United States District Court for the District of South Carolina and any lawsuit alleging similar claims (the “Cash Balance Litigation”)**. The Cash Balance Litigation seeks additional benefits under the Duke Energy Retirement Cash Balance Plan and other relief. Please see the attached “**Important Notice**” for additional details, including the names and addresses of counsel for the plaintiffs. The Company and the Duke Energy Retirement Cash Balance plan intend to defend themselves vigorously in the Cash Balance Litigation and take the position that no damages should result from the litigation. Employee recognizes and acknowledges that this Agreement completely releases Employee’s rights in the Cash Balance litigation.

(Emphasis added).

---

<sup>1</sup> The “final” Waiver and Release will not be made available to Duke employees until after the offer period expires and they are committed. If they then choose not to sign, they will then be terminated without severance benefits. Declaration of Matthews, Ex. A.

Through this Waiver and Release, Duke even attempts an end run around the foreseeable contingency that this Court would strike down the Release. Duke, thus, builds in alternative set-off language that, for all practical purposes, still amounts to a full release of the claims in this case, if enforced:

In the event that a court in the Cash Balance Litigation should rule that, despite this Agreement, Employee is entitled to some recovery of benefits under the terms of the Duke Energy Retirement Cash Balance Plan, Employee agrees that he or she will receive only the shortfall between the Plan benefit described above in Paragraph 1(a) and what he or she would get under that ruling, if any.

The “Waiver and Release” also contains a gag provision which prohibits employees from making any “disparaging” or “derogatory” statements about Duke Energy. Exhibit 1, ¶ 9. Breach of this provision would result in forfeiture of the severance benefits paid to an employee under the Agreement, but would allow the Waiver and Release to continue to bind the employee to bar claims in this action. Attached to the Waiver is a document called “Important Notice” which also specifically relates to this class action. Exhibit 1, p. 8.

Beginning on January 25, 2010, Duke began a series of mandatory in-person meetings with Duke employees. Declaration of Matthews, ¶ 5-7. At these in-person meetings, Duke representatives discussed the buy-out offers, answered questions and informed those present that the Waiver and Release was mandatory in order to receive the severance package. Declaration of Matthews, ¶ 6. Named Plaintiff Jim Matthews was at one such mandatory meeting. Declaration of Jim Matthews, ¶ 6-9.

Also, at the in-person meetings, Duke employees, including Plaintiff Jim Matthews, were handed packets containing individual offers of severance, conditioned on execution of the

mandatory Waiver and Release of claims in this litigation. Declaration of Jim Matthews, ¶¶ 9-10. Jim Matthews, as a named Plaintiff and class representative, would be required to terminate all of his claims in the within litigation and step down as class representative in order to participate. Declaration of Jim Matthews, ¶ 15.

The communications to Plaintiffs and absent class members by Duke state that the opportunity to participate in the buy-out program will only be offered from February 3, 2010 through February 24, 2010. Declaration of Jim Matthews, Ex. D. Duke employees and impacted members of the Plaintiff class are, thus, being required to respond to a unilateral, non-Court sanctioned settlement offer directly within the opt-out period in this litigation.

On January 28, 2010, Class Counsel brought the matter to the attention of local counsel for Defendants, Robert O. King. Mr. King stated that he was not aware of the facet of the VOP offer that mandated a release of this litigation. Mr. King was tasked with determining whether litigation counsel at Sidley Austin were aware of the improper contact with Plaintiffs and class members and improper solicitation of releases; however, the answer to that inquiry has not been forthcoming.

## **II. AUTHORITY**

The seminal authority on class action litigation states:

Once a class has been certified and during the pendency of the litigation, prospective members are constructively represented by class counsel until such time as they formally opt out or are otherwise excluded from the class. The ban on communications is intended to prevent infringement of the constructive attorney-client relationship and abusive tactics by the party opposing the class.

2 NEWBERG ON CLASS ACTIONS § 5.17 (4<sup>th</sup> ed. 2002).

At a minimum, class counsel represents all class members as soon as a class is certified,

*Van Gemert v. Boeing Co.*, 590 F.2d 433, 440 n. 15 (2<sup>nd</sup> Cir. 1978), *aff'd*, 444 U.S. 472 (1980).  
*See, also, Roper v. Conserve, Inc.*, 578 F.2d 1106, 1110 (5<sup>th</sup> Cir. 1978), *aff'd sub nom. Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980).

After class certification “the [ethical] rules governing communications apply as though each class member is a client of class counsel. Under accepted ethical principles, defendants and their attorneys may communicate on matters regarding the litigation with class members who have not opted out, **but only through class counsel.**” MANUAL FOR COMPLEX LITIGATION, § 30.2 at 234 (3d ed. 1995) (emphasis added); *See, also, Kleiner v. First Nat. Bank of Atlanta*, 102 F.R.D. 754 (N.D. Ga. 1983), *judgment aff'd in part, vacated in part on other grounds*, 751 F.2d 1193 (11<sup>th</sup> Cir. 1985); *Blanchard v. Edgemark Fin. Corp.*, No. 94-1890, 1998 U.S. Dist. LEXIS 15420, \*19 (N.D. Ill. Sept. 11, 1998). Unreported Cases are attached at Exhibit 2.

“The court may allow the defendant to communicate with absent class members in the ordinary course of business, **as long as** the communications do not relate to the claims involved in the litigation.” *Cobell v. Norton*, 212 F.R.D. 14, 17 (D.D.C. 2002) (emphasis added); *see, also, Resnick v. American Dental Ass’n*, 95 F.R.D. 372, 377 (N.D.Ill.1982). However, “where the absent class member and the defendant are involved in an ongoing business relationship, such as employer-employee, any communications are more likely to be coercive.” *Belt v. Emcare, Inc.*, 299 F. Supp. 2d 664, 668 (E.D. Tex. 2003); *Kleiner*, 751 F.2d at 1202 (“If the class and the class opponent are involved in an ongoing business relationship, communications from the class opponent to the class may be coercive.”); *Ojieda-Sanchez v. Bland Farms*, 600 F. Supp. 2d 1373, 1380 (S.D.Ga. 2009); *Sorrentino v. ASN Roosevelt Ctr., LLC*, 584 F.Supp. 2d 529, 533

(E.D.N.Y.2008); *In re Currency Conversion Fee Antitrust Litig.*, 361 F.Supp. 2d 237, 253 (S.D.N.Y. 2005); *Jones v. Jeld-Wen, Inc.*, 250 F.R.D. 554, 561 (S.D.Fla. 2008); *Mevorah v. Wells Fargo Home Mortg., Inc.*, No. 05-1175, 2005 U.S. Dist. LEXIS 28615, \*13 (N.D.Cal. 2005).

In addition, Duke is adding to the inherent coercive atmosphere of the employer-employee relationship by the following acknowledgment in the “Request Form” handed out in the in-person meetings:

I understand that I must also execute and not revoke the Waiver and Release provided by the Company in order to receive any Plan benefits and that if I fail to execute the Waiver and Release in the required time frame or if I revoke it, **I will not receive the Plan benefits and my employment will be terminated on or about the Separation Date.**

Declaration of Matthews, ¶ 9, Ex. A (emphasis added).

This threat was also accompanied by a Q & A document that alluded to future involuntary departures, if enough people did not accept the VOP as well as the threat that any future severance benefits offered to employees would likely be less lucrative. Declaration of Matthews, ¶ 13.

By this severance program, Duke appears to be offering class members exactly what they are offering non-class members, but demanding a waiver and release of claims to accrued retirement benefits based on interest miscalculations that this Court has characterized as “practically admitted violations.”<sup>2</sup> See, Declaration of Matthews, ¶ 17; see, also, Dkt. 195, p. 36. The package appears to contain zero additional consideration for the class members to give up their claims.

Duke sought similar releases very shortly after the within litigation was filed, long before

---

<sup>2</sup> Despite the Court’s conclusion, Duke Energy, in the Waiver and Release, misleadingly impugns the claim, stating that “no damages should result from the litigation.”

class certification and is well aware that Plaintiffs contest the validity of the releases, given the coercion, lack of consideration and the inherent discrimination in offering the same benefits to class members and non-class members. *See, e.g. Allen v. Suntrust Banks, Inc.* 549 F. Supp.2d 1379 (N.D.Ga. 2008).

Duke also is demanding a gag provision against “derogatory” statements, subject to forfeiture of the buy-out benefits. Exhibit 1, ¶ 9. This provision will create a chilling effect on testimony in this case.

Class counsel have been inundated with inquiries from absent class members regarding Duke’s “offer” and the impact of the Waiver and Release language. Absent class members are seeking information quantifying the claims they would potentially be releasing at a time when Duke is well aware that individual damage calculations have not yet been done, but only very rough damage ranges performed. Class counsel are placed in the untenable position of having to address this issue, during the course of the opt-out period in this case, without prior notice and without approval by the Court of Duke’s communication.

It is well established that “[d]istrict courts have ‘both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and the parties.’” *Alaniz v. Sam Kane Beef Processors, Inc.*, No. 07-335, 2007 U.S. Dist. LEXIS 89161 at \*2 (S.D.Tx. Dec. 4, 2007); *In re Currency Conversion Fee Antitrust Litigation*, 361 F.Supp.2d 237, 252-53 (S.D.N.Y. 2005) (“Indeed, a district court’s authority under Rule 23(d) is not limited to communications that actually mislead or otherwise threaten to create confusion, but extends to communications that interfere with the proper administration of a class action or those that abuse the rights of members of the class.”).

Duke Energy has held mandatory, in-person meetings with Plaintiffs and absent class members and has already disseminated its solicitation for releases mandating responses by Plaintiffs and absent class members between February 3 and February 24, 2009 which falls within the time period within which class members are supposed to be making a decision on opt-out based solely on the Court-approved class notice.

Duke Energy's unilateral communications have impacted the sanctity of the on-going notice and opt-out process sanctioned by this Court. Duke Energy has attempted an end-run around this Court's jurisdiction over the class and class notice procedures. It has thereby undermined this Court's supervisory authority over this class action and infringed upon the attorney-client relationship of Class Counsel with the named plaintiffs as well as the absent class members. Irreparable harm will result without this Court's intervention.

### **III. RELIEF SOUGHT**

In this case an injunction or restraining order will not remedy the damage that has been done. That ship has sailed and is out on the water. Plaintiffs, individually and as class representatives, ask this Court to:

- (a) conduct an expedited, evidentiary hearing;
- (b) order Defendant Duke Energy Corporation to appear and show cause why it should not be held in contempt of Court for violation of this Court's order approving the substance and form of Class Notice and setting forth the mechanism for a orderly notice and opt-out procedure protecting the rights of the Plaintiffs and absent class members;
- (c) strike down and rule invalid the language of the "Waiver and Release" that purports to impact the rights and remedies of class members in this class action and terminate

rights to retirement benefits accrued under ERISA;

(d) strike down and rule invalid the language of the “Waiver and Release” that purports to preclude class members from making any derogatory or disparaging statement about Duke Energy, to the extent such provision may be used to preclude full participation in this class action and submission of truthful affidavits or testimony, irrespective of whether such participation casts Duke Energy in a negative light;

(e) order dissemination of a joint, court-approved communication to all class members, at Defendant Duke Energy’s expense, advising that class members are not required to opt out of or release rights in the class litigation in order to participate in the VOP offer; and

(g) order other such other relief or sanctions as the Court may deem appropriate.

Respectfully submitted this 29th day of January, 2010.

/s/Cheryl F. Perkins

Charles W. Whetstone, Jr. (Fed. I.D. #4604)  
Thad Lee Myers (Fed. I.D. #6260)  
Cheryl F Perkins (Fed. I.D. #4969)  
WHETSTONE MYERS PERKINS & YOUNG LLC  
601 Devine Street  
P. O. Box 8086 (29202)  
Columbia, S.C. 29201  
803-799-9400  
803-799-2017 (fax)  
[cwhetstone@attorneysc.com](mailto:cwhetstone@attorneysc.com)  
[tmyers@attorneysc.com](mailto:tmyers@attorneysc.com)  
[cperkins@attorneysc.com](mailto:cperkins@attorneysc.com)

James Robinson Gilreath (Fed. I.D. #2101)  
William Mitchell Hogan (Fed. I.D. #6141)  
THE GILREATH LAW FIRM  
P.O. Box 2147  
Greenville, S.C. 29602  
864-242-4727  
864-232-4395 (fax)

[jim@gilreathlaw.com](mailto:jim@gilreathlaw.com)  
[bhogan@gilreathlaw.com](mailto:bhogan@gilreathlaw.com)

Mona Lisa Wallace, Esq. (Fed. I.D.#7216)  
WALLACE & GRAHAM, P.A.  
525 North Main Street  
Salisbury, N.C. 28144  
(800) 849-5291 (phone)  
(704) 633-9424 (fax)  
[mwallace@wallacegraham.com](mailto:mwallace@wallacegraham.com)

Terry Edward Richardson, Jr. (Fed. I.D. #3457)  
Andrew Hoyt Rowell, III (Fed. I.D.#3665)  
Thomas Christopher Tuck (Fed. I.D. #9135)  
RICHARDSON PATRICK WESTBROOK & BRICKMAN  
P.O. Box 1368  
Barnwell, S.C. 29812  
803-541-7850  
803-541-9625 (fax)  
[trichardson@rpwb.com](mailto:trichardson@rpwb.com)  
[hrowell@rpwb.com](mailto:hrowell@rpwb.com)  
[ctuck@rpwb.com](mailto:ctuck@rpwb.com)

Wallace K. Lightsey (Fed. I.D. #1037)  
Carl Frederick Muller (Fed. I.D. #3602)  
WYCHE BURGESS FREEMAN & PARHAM  
P.O. Box 728  
Greenville, S.C. 29602  
864-242-8200  
864-242-8324 (fax)  
[wlightsey@wyche.com](mailto:wlightsey@wyche.com)  
[cmuller@wyche.com](mailto:cmuller@wyche.com)

ATTORNEYS FOR PLAINTIFFS