UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

KENNETH WALTON GEORGE, DENNIS REED BOWEN, CLYDE FREEMAN, GEORGE MOYERS, JIM MATTHEWS, and HENRY MILLER, on their own behalf and on behalf of a class of persons similarly situated,	)	
Plaintiffs,	)	**Case No.: 8:06-cv-00373-RBH**
vs.	)	
DUKE ENERGY RETIREMENT CASH BALANCE PLAN and DUKE ENERGY CORPORATION,	)	
Defendants.		

DEFENDANTS' OPPOSITION TO PLAINTIFFS'
MOTION FOR RULE TO SHOW CAUSE AND OTHER RELIEF

Defendants Duke Energy Corporation ("Duke") and the Duke Energy Retirement Cash Balance Plan (the "Plan") (collectively, "defendants") respectfully submit this memorandum in opposition to plaintiffs' Motion for Relief Regarding Improper Class Communications and to Show Cause ("Pls.' Motion").

INTRODUCTION

Duke recently announced a Voluntary Opportunity Plan ("VOP"), offering separation benefits to 8,756 employees. The VOP is designed to achieve a significant voluntary reduction in force needed to secure long term, sustainable cost savings and to position Duke as a more efficient organization moving forward. The VOP was offered to approximately forty-five percent of Duke's United States work force. While eligible employees have the opportunity to

volunteer to leave Duke under the VOP, final participation in the VOP will be based upon the rate of employee acceptance and management approval, based on business needs.

To achieve the required cost savings and to encourage participation, Duke offered generous separation benefits for those who volunteered for the VOP. Employees can receive a one-time lump-sum payment based on their years of service, base pay, and short-term incentive target. Employees can also receive six months of continued medical and dental coverage and outplacement assistance. As plaintiff James Matthews stated on his website, the VOP "is almost twice as good as any previous plan offered." "Duke Energy Voluntary Offer Plan", *Duke Employee Advocate*, Jan. 27, 2010, http://www.dukeemployees.com/duke10.shtml#vop (Group Exh. A hereto) *See* Matthews Deposition at 51-52, acknowledging role as author of "Employee Advocate" (Exh. B hereto).

As with virtually any separation agreement, however, employees who wish to participate and receive benefits to which they have no legal entitlement must execute a general release of all claims they have against the company. In the case of employees who are members of the certified " interest rate class" – 5,751 of those who received the offer – the release includes such claims, and the effected employees were unambiguously informed of that in a sample release posted on Duke's employee intranet website. The release expressly encourages all employees to seek legal counsel before signing the release. (Plaintiffs' Memorandum In Support of Relief Regarding… Communications… "Pls.' Memo." Exh. 1, p. 5). The release directs recipients of the offer who are class members to an "Important Notice" which also notes that "**THE COMPANY STRONGLY ADVISES YOU TO CONSULT LEGAL COUNSEL BEFORE SIGNING THE WAIVER AND RELEASE**." *Id*., pp. 5 and 8 (capitalization and bolding in

original). The "Important Notice" provides the names, addresses, and phone numbers of all of the class counsel of record. *Id*. p. 8.

These 5,751 interest rate class members are treated exactly the same as the other recipients of the offer. *All* employees are required to execute a general release of claims against the company. Any employee who believes the offer is inadequate vis-a-vis his or her employment claims, be they discrimination claims, wage disputes, or the ERISA interest rate class claims at issue here, is free to reject the VOP offer.

Plaintiffs claim that the materials distributed to Duke employees describing the VOP are only "purportedly" about a voluntary separation program. Pls.' Memo. at 2. In reality, plaintiffs argue, the VOP materials are communications about this litigation, issued without court approval, and "improperly seeking what amounts to coerced settlements." Pls.' Motion at 1. Duke has offered a generous separation package to almost half its employees, including thousands who are not class members. This is not a covert plan to obtain releases for claims that, collectively, present Duke with a seven figure liability exposure for the class members at issue.[1] Based on the claim that the VOP is really a secret plan to settle this litigation, plaintiffs argue that this Court should exercise its contempt powers to rewrite the terms of the VOP so that members of the interest rate class receive preferential treatment. They claim that Duke should be compelled to offer class members the same separation package as offered all other employees but exempt these class members from the obligation to execute a general release.

[1] The interest rate class advances claims that slightly different interest crediting rates should have been used in 1997 and 1998. The amounts at issue, per employee, are modest. For example, Mr. Matthews would currently be entitled to $1,283.55 more in his cash balance account if he prevailed on the interest rate claim. Richard Jefferies Declaration, ¶ 4. In contrast, his VOP offer is $123,909.56 plus benefits. Declaration of Jim Matthew, ("Matthews Dec."), Exh. A. (The Matthews Dec. was filed by plaintiffs with their motion.)

The VOP materials are not communications to the class about this action, and absolutely nothing about the VOP process violates this Court's order concerning the dissemination of class notice. The materials are communications to more than 8,750 Duke employees, including some – but by no means all – of the interest rate class members, about a separation package they can voluntarily accept or decline. The litigation was mentioned only to make clear to the employees that a general release will encompass the interest rate claims in this lawsuit: a fact that courts have held weighs *against* any suggestion that the communication is coercive or misleading. As the documents demonstrate on their face and as plaintiffs acknowledge, membership in the interest rate class is wholly irrelevant to the calculation of any employees' VOP offer. Any class member who wants to preserve his or her claim need only decline to participate. There is nothing misleading or coercive in the offer, and there is no legal basis for this Court to rewrite its terms.

FACTS

I. The Voluntary Opportunity Plan.

The VOP is a plan to enable qualified Duke employees to volunteer to leave the company. It was instituted as a part of a larger plan to reposition Duke in the new economic and regulatory environment. Declaration of James O'Connor, ("O'Connor Dec."), ¶ 3. As Chief Executive Officer James Rogers explained, executive management was in the process of performing a detailed review of Duke's cost structure, and options included "consolidating redundant or non-customer facing functions, streamlining business processes, stopping unproductive initiatives earlier and eliminating non-critical work." Duke Energy 2010 VOP Questions/ Answers for Employees, Exh. D to Matthews Dec. Duke announced the possibility

of the VOP to its employees in October of 2009, which was followed by a formal announcement in January of 2010. O'Connor Dec., ¶¶ 5 & 7.

In general, the VOP was offered to regular non-unionized U.S.-based employees with five years or more of service, subject to Duke's business needs. O'Connor Dec., ¶ 10. The VOP was also offered to certain employees with less than five years of service affected by the consolidation of corporate functions into Duke's headquarters in Charlotte, North Carolina. *Id.* Generally, Duke's individual department heads are responsible for determining which groups of employees are eligible for the VOP, but Duke has specified certain criteria that they should and should not use to make those determinations. *Id.*, ¶ 12. Examples of acceptable criteria include, "organizational restructuring," "consolidation of function," and "new technology being implemented." *Id.* Participation in litigation against Duke is *not* an acceptable criterion. *Id.* Of Duke's over 19,000 employees, 8,756 were offered the VOP. *Id.*, ¶ 11. Of those, 5,751 are potential class members of the *George* class action litigation.[2] *Id.*

Participants in the VOP will receive a lump sum cash payment, calculated using base pay and years of service as variables. Exh. D to Matthews Dec. Additional benefits include, among other things, continued health coverage for six months through payment by Duke of COBRA premiums or retiree medical (if applicable) and outplacement assistance. *Id.* As the disclosed formula makes clear, neither the lump sum payment nor the additional benefits are impacted by an eligible employee's status as a class member in this litigation.

[2] Class members are included in greater proportion than their percentage in the workforce because all interest rate class members met the first requirement of five years of service: this class only includes participants in the Plan during 1997 or 1998. The VOP was not offered to all employee class members however, but only to those class members who met all eligibility criteria. And many other members of the interest rate class have already terminated their employment.

For most eligible employees, the window for requesting to participate in the VOP opened on February 3, 2010 and will close on February 24, 2010. Exh. B to Matthews Dec. That window will remain open until March 31, 2010 for those employees impacted by the office consolidation. O'Connor Dec., ¶ 14. If too many eligible employees request to participate in the VOP, management will generally use length of service to determine which employees will be allowed to participate in the VOP. *Id.* ¶ 14. Human resources and management will communicate to employees that their requests to participate in the VOP have been approved or denied and to establish individual release dates for approved terminations. *Id.* ¶ 15. Employees who are approved will leave the company between March 31, 2010 and March 31, 2011, based on business needs. *Id.*

II. Communication Of The VOP.

As noted above, Duke's communications regarding the VOP began on October 8, 2009, when Jim Rogers sent an e-mail to Duke employees entitled "Repositioning Duke Energy for the New Business Environment." O'Connor Dec. ¶ 5, Exh. 1. Mr. Rogers told employees to expect an announcement regarding the voluntary opportunity in early 2010. *Id.* During Duke's regularly-held open forum on October 30, 2009, Jim Rogers again addressed the possibility of a voluntary program during the Q&A session. *Id.*, ¶ 6, Exh. 2. As promised, Mr. Rogers sent an e-mail to Duke employees on January 18, 2010 announcing official information about the VOP. *Id.*, ¶ 7, Exh. 3. Mr. Rogers made that announcement simultaneous with the related consolidation plan. *Id.*

After Mr. Rogers's January 18 email, Duke communicated information about the VOP to its employees through face-to-face meetings, held by individual managers and human resources business partners between January 25, 2010 and February 3, 2010. O'Connor Dec., ¶ 8.

Plaintiffs make much of the "mandatory" nature of these meetings. They were mandatory of necessity. Duke was distributing over 8,700 separation agreement packages, including individualized calculations of benefits, to employees. *Id.* This was a major event at the company, and it was imperative that employees fully understood the reasons for the program and its terms. *Id.* Critically, while the meetings were mandatory, participation in the program is voluntary.

At the meetings, the managers discussed the VOP with employees and, where possible, hand delivered employee packages which included a form to request participation in the VOP and instructions for obtaining additional information through the Duke intranet portal. O'Connor Dec., ¶ 9. At these meetings, managers were instructed to emphasize the *voluntary* nature of the VOP. *Id.* Plaintiff Matthews, who attended one of the meetings, does not contend that anyone attempted to coerce him or anyone else to participate in the VOP.

III. The Release.

The VOP documents inform each eligible employee that he or she will need to execute a general release in favor of Duke to secure the benefits. Exh. B to Matthews Dec. Employees are directed to a sample Release at the Duke employee website.[3] *Id.*

A release has been used by Duke for many years in connection with severance agreements, and Duke's standard release has expressly included the claims asserted in the cash balance litigation since 2006, as plaintiffs know and as Mr. Matthews noted at his website. "Positive Layoff Echoes," *Duke Employee Advocate*, February 24, 2006. Group Exh. A. The inclusion of a release in a separation agreement is standard. A non-disparagement agreement was also required of every person who accepted the offer. Pls.' Memo., Exh. 1, p. 4. Absolutely

[3] A sample release is offered in lieu of a copy of the actual release to avoid accidental, premature execution of a release. Duke does not intend to make any changes to the sample release available on the website.

nothing in the non-disparagement clause precludes any named plaintiff or witness from testifying truthfully in this action. In addition to the release, Duke provided employees with an Important Notice (the "Notice"). Pls.' Memo., Exh. 1, p. 8. The Notice specifically addressed the litigation and referenced the class definitions for both certified classes. *Id.* The Notice also instructed class members, in bold, upper-case font: **"THE COMPANY STRONGLY ADVISES YOU TO CONSULT LEGAL COUNSEL BEFORE SIGNING THE WAIVER AND RELEASE."** Duke provided the names, addresses, and telephone numbers (including a toll-free number) for class counsel.[4] *Id.*

ARGUMENT

I. Duke Is Not In Contempt Of Court.

Duke has done nothing to warrant a contempt ruling here. To establish civil contempt, a movant must show each of the following elements by clear and convincing evidence:

> (1) the existence of a valid decree of which the alleged contemnor had actual or constructive knowledge; (2) ... that the decree was in the movant's "favor"; (3) ... that the alleged contemnor by its conduct violated the terms of the decree, and had knowledge (at least constructive) of such violations; and (4) ... that [the] movant suffered harm as a result.

JTH Tax, Inc. v. H & R Block E. Tax Servs., Inc., 359 F.3d 699, 705 (4th Cir. 2004) (citing *Ashcroft v. Conoco, Inc.*, 218 F.3d 288, 301 (4th Cir. 2000)). Legal contempt is appropriate only when a party violates an explicit command from the court. *Id.; see also, Erhardt v. Prudential Group, Inc.*, 629 F.2d 843, 845 (2d Cir. 1980) (holding that the prerequisites for civil contempt were not present where no explicit command in the Judge's order of notice was violated).

[4] The reference to class counsel has clearly been effective, as class counsel have been "inundated with inquiries from absent class members regarding Duke's 'offer.'" (Pls.' Memo. at 7). Class counsel take exception to being requested for advice from their clients because they have not yet calculated damages. *Id.* But Duke does not have the luxury of withholding the VOP until class counsel can quantify to the penny the interest rate claims of each person to whom the VOP is extended. The parties to this action have a general understanding of the magnitude of those claims.

Plaintiffs do not, and cannot, show the requisite elements of contempt. The only "valid decree" that plaintiffs claim Duke violated is this court's order approving the Class Notice (the "Notice Order") (Doc. 259). Pls.' Mot. at 2. However, plaintiffs point to no portion of the Notice Order that is violated by Duke's VOP communications. Indeed, the Notice Order is silent as to Duke's ability to communicate with class members, many of whom are also current employees of Duke. Nor does any other court decree prohibit Duke's VOP-related communications. Courts have declined to find implicit bars on communication where no explicit bar exists. *Erhardt*, 629 F.2d at 846-47.

Duke has not otherwise violated the Notice Order, such as by soliciting opt outs. *See Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1203 (11th Cir. 1985) (defendant acted in derogation of Rule 23 by establishing call center to secretly contact 3000 class members and solicit opt out requests). The VOP materials do not even mention the opt out process, and employees need not exclude themselves from the class to participate in the VOP. Duke will assert the release as an affirmative defense to the claims of any class member who participates in the VOP, and has no reason to seek to induce such employees to opt out of the class. Moreover, employees with any questions about the class action are referred to class counsel.

Additionally, plaintiffs do not show that any class member has suffered harm as a result of any purported violation. Class members are offered a *choice* to request participation in the VOP. To the extent that any employee class member views participation in the VOP as a "harm," that employee need only *choose not to participate*.[5]

[5] Mr. Matthews suggests that he has been harmed by being forced to choose between accepting the offer and continuing as class representative. Matthews Dec., ¶ 15. The choice is his. The class has five representatives, each found to be adequate by this Court, and the claims will be prosecuted regardless of Mr. Matthews' decision.

Plaintiffs' motion goes well beyond a request for contempt for violating the Notice Order, and argues that the communication of the VOP offer to the class violates established procedures governing class actions, even if it did not violate any provision of the Notice Order itself. This Court need not decide whether any such violations could support a contempt finding because, as shown below, these arguments fail.

A. The VOP Communications Were Made In The Ordinary Course Of Business And Were Not An Improper Communication To The Class.

Plaintiffs argue that the VOP documents and meetings constitute improper communications with the class about the subject of this litigation. But they do not. It is well established that defendants in employment class actions are permitted to communicate with class members where those communications occur in the ordinary course of business. *See, Cobell v. Norton,* 212 F.R.D. 14, 20 (D.D.C. 2002) (allowing defendants "to continue engaging in the regular sorts of business communications with class members that occur in the ordinary course of business"); *see also Rochlin v. Cincinnati Ins. Co.*, No. IP00-1898-CH/K, 2003 WL 21852341**20-21 (S.D. Ind. July 8, 2003) (denying motion to show cause for circumvention of ethical rules where subject communications were "internal communications related to the normal course of business") (unpublished options are found in Exhibit C attached hereto). *Cobell v. Norton*, the case plaintiffs cite as authority for their position, classifies communications as occurring in the "ordinary course of business" where "defendants possess an independent reason to send out such statements….[and the] statements would be distributed anyway, regardless of the instant litigation." 212 F.R.D. at 20. Duke's communications regarding the VOP are ordinary course business communications to its employees, many of whom are not class

members, about a voluntary separation program. The VOP offer would have been made in the absence of this litigation.[6] Accordingly, the VOP communications were permissible.

That the VOP waiver specifically mentioned the cash balance litigation does not mean that the communications are not in the "ordinary course of business." Defendants mentioned the cash balance litigation in order to make as full a disclosure of the scope of the release as possible. The materials are still an offer made in the ordinary course of Duke's business that would have been made – and would have required the execution of a general release – regardless of whether the litigation had been brought.

Plaintiffs' argument that the VOP had to be communicated to class members through class counsel (Pls.' Memo at 5) shows just how untenable plaintiffs' position is. The VOP arose out of highly confidential business initiatives and strategies, and it would have been inappropriate to discuss those strategies with class counsel in advance of the company's announcement. Nor could Duke use the procedures available for class notice to disseminate the VOP materials to any of Duke's employees in the class. The class notice process is designed to protect the due process rights of absent class members, and its machinery cannot be used to implement the business operations of a major employer announcing a voluntary reduction in force to half its employees. Plaintiffs do not even hint at how a process of communicating the VOP conducted "***only through class counsel***" would work. *Id*. (emphasis in original). Duke properly made a job-related offer directly to its employees through normal human resource channels and through standard uniform

[6] Class counsel attach significance to the question of whether Duke's counsel, both at Ogletree Deakins and Sidley Austin, had knowledge of the VOP offer prior to its dissemination. Pls. Memo at 4. Attorneys from both firms had no knowledge of any release being sought by Duke in connection with the VOP prior to January 28, 2010 and, in fact, knew nothing more about the program than had been reported in the press on January 19, 2010. On January 28 counsel for plaintiffs emailed to Robert King copies of the sample Release and it was then seen by counsel at these firms for the first time. Clearly, Duke did not view the VOP as being driven by the litigation.

communications. Class counsel have no right to interject themselves into that process and attempt to rewrite the VOP.

B. The VOP Is Not An Offer To Partially Settle The Interest Rate Claim In This Litigation.

Plaintiffs also argue that the VOP is an improper attempt to settle class claims. Pls.' Motion at 1. This is demonstrably not the case. The VOP is not a "settlement" offer as to anyone. Duke provided employees a "Q. and A." that describes in detail how the dollar amount of each employee's offer was calculated. Exh. D to Matthews Dec. Nothing in that calculation ascribes any value to pending litigation. *Id*. The separation benefits provide adequate consideration for the general release, but they were not calculated as a negotiated resolution of employment claims held by any employee to whom the offer was extended.

Undercutting their claim that the VOP is an improper offer to settle the class claims, plaintiffs complain that Duke failed to include an *additional* sum in the VOP for the interest rate class claim. Pls.' Memo at 6. But including an additional sum for the litigation arguably would have constituted a "settlement" offer, which is precisely what plaintiffs claim is impermissible. Regardless, no additional sum is offered because the VOP separation payments are not advanced as a settlement offer for the interest rate claims. A class member who would rather maintain his or her interest claim than accept the VOP offer can do so, just as any other employee with a claim against Duke can refuse the VOP if the benefits offered are outweighed by the perceived value of the claim.

C. The VOP Materials Were Not Misleading or Coercive and Do Not Interfere With This Action.

Because the imposition of limits on speech implicate constitutional concerns, there is no *per se* prohibition on communications between class members and parties to the litigation. *Gulf*

Oil Co. v. Bernard, 452 U.S. 89, 102-03 (1981). Rather, courts prohibit communications that are "misleading, coercive or an improper attempt to undermine Rule 23." *Alaniz v. Sam Kane Beef Processors, Inc.*, No. CC-07-335, 2007 WL 4290659 *1 (S.D. Tex. 2007); *Belt v. Emcare Inc.*, 299 F. Supp. 2d 664, 668 (E.D. Tex. 2003). The VOP materials fit none of the prohibited categories.

1. **The communications are not misleading.**

Plaintiffs advance no argument that the VOP materials are misleading. Plaintiffs do not dispute that the VOP communications accurately describe the terms of the offer, including the scope of the release, and direct class members with issues or questions to class counsel. *See Keystone Tobacco Co., Inc. v. U.S. Tobacco Co.*, 238 F. Supp. 2d 151-157 (D.D.C. 2002) (finding communication not misleading where "[t]he correspondence itself does not appear to contain any incorrect assertions of fact regarding the current class action" and it "advised customers to consult with their own lawyers"). Plaintiffs' only challenge to the representations in the release is that they accurately describe its scope by referencing this litigation. As courts have held, however, referencing class litigation is entirely appropriate: it is the failure to do so that can lead to a misrepresentation claim. *See, e.g., Longcrier v. HL-A Co., Inc.*, 595 F. Supp. 2d 1218, 1228 (S.D. Ala. 2008) ("Of critical importance, HL-A's lawyers neither informed the declarants that a class action lawsuit … was pending, nor that those declarants were themselves potential class members."); *Ralph Oldsmobile v. GE*, No. 99 Civ. 4567, 2001 WL 1035132 *4 (S.D.N.Y. Sept. 7, 2001) (holding that because "the release does not mention this [class] action…[t]here is thus the risk that dealers may sign the release without knowing what they are releasing."). The accurate disclosure that the release encompasses the interest rate claims is not misleading.

2. **The communications are not coercive.**

Plaintiffs do argue – in a cursory fashion – that the VOP materials create a "coercive atmosphere." Pls.' Memo at 5-6. Coercion "occurs in this context when 'the conduct somehow overpowers the free will or business judgment of the potential class members.'" *Keystone Tobacco*, 238 F. Supp. 2d at 158 (citing *Jenifer v. Delaware Solid Waste Auth.*, No. Civ. A. 98-270 MMS, 1999 WL 117762 **9-10 (D. Del. Feb. 25, 1999)). However, there is nothing coercive about the offer: it is indisputably voluntary. Eligible employees are provided with all of the relevant information, as well as time to make inquiries, and then each makes a decision based on his or her best interests. *See, Jenifer*, 1999 WL 117762 at *10 (court did not find coercion because the communications "relate[d] to a business proposition which potential class members are free to reject if they decide the costs outweigh the benefits."); *see also Keystone*, 238 F. Supp. 2d. at 159 (same).

Although plaintiffs say the employer/employee relationship can lead to a coercive environment, courts have held that the mere existence of a potentially coercive relationship is *insufficient* to bar communication. *Keystone*, 238 F. Supp. 2d at 158-59 (citing *Jenifer*, 1999 WL 117762 at *4). And beyond their platitude about the inherent coercion of the relationship, plaintiffs are unclear about just what action is allegedly coerced by the VOP.

Plaintiffs' main complaint about the VOP materials is that the release expressly encompasses the litigation. Not only is that legally permissible, but the release alerts class members that they will be forfeiting the right to any recovery in this action if they participate in the VOP. The release further directs class members to the Notice, which provides a fully accurate description of the litigation, again alerting employees that they will be releasing the class claims, and directs them to class counsel. Plaintiffs do not suggest that these documents would coerce an employee into participation in the VOP. Rather, the documents recommend that

employees seek the advice of counsel and fully consider the consequences of their choice. As opposed to "coercing" them into acceptance, the release helps assure that acceptance is knowing and voluntary.

Plaintiffs next point to Duke's statement that if employees do not sign the release after accepting the VOP offer, they will not receive the VOP benefits, despite having voluntarily severed employment. Pls.' Memo at 6. But that merely repeats the terms of the offer. Any employee who does not want to execute the release should reject the offer. Informing employees of the requirements for obtaining a payment is entirely appropriate, not "coercive." Moreover, warning them in advance that the terms of the VOP will be strictly enforced heightens the employees' consideration of the implications of acceptance. This does not "coerce" them into signing.

Finally, plaintiffs take issue with Duke's statements that (1) "while we are hopeful that the VOP offering and other ongoing efforts will allow us to minimize the possibility of future involuntary departures, we can never rule out that possibility, especially in this challenging economic climate," and (2) "while we will always work hard to provide impacted employees with options, and we will continue to do so, it is likely that any severance benefits available to employees after the VOP will be less lucrative tha[n] those benefits being offered under the VOP." Pls.' Memo at 6; Exh. D to Matthews Dec, p. 2. But plaintiffs do not, and cannot, claim these statements are untrue. This is information an employee facing the decision to accept or reject the VOP should want to have. Moreover, these statements were directed to all eligible participants; it was not a message tailored to class members. Class members, along with any other recipient of the offer, may decide for themselves if they wish to accept the VOP offer based

upon their individual circumstances. Accordingly, there is no basis for plaintiffs' claims that the VOP is "coercive."

3. **The communications do not interfere with management of this action.**

The final consideration under which communications to class members have been successfully challenged is where they interfere with the management of the class action. Plaintiffs claim the communications have such effect. They do not.

Plaintiffs argue that the prohibition on disparagement that is part of the release "will create a chilling effect on testimony in this case." Pls.' Memo. at 7. But the provision only prohibits "untrue, disparaging, defamatory or derogatory statements." There is nothing in the provision that would preclude truthful testimony in this action**.** Indeed, even were the release capable of such a construction, which it is not, it would still be enforceable even though it could not prohibit such honest testimony. *See, Cooper Tire & Rubber Co. v. Farese,* 423 F.3d 446, 456-458, (5th Cir.2005) (holding that the mere fact that a non-disparagement clause *could* conceivably be misused did not render it void as illegal or contrary to public policy).

Plaintiffs also complain that the VOP election period falls during the class opt out period. Pls.' Memo. at 8. But these events are unrelated. The VOP expressly describes all conditions to the offer and nowhere suggests that an employee must opt out of the class to participate.

Finally, plaintiffs argue that Duke has "infringed upon the attorney-client relationship of Class Counsel with the named plaintiffs as well as the absent class members." Pls.' Memo. at 8. The VOP does nothing of the sort. Quite the contrary, it encourages all employees to consult with counsel and it expressly directs class members to class counsel, in language that is bolded and in all capital letters. Pls. Memo., Exh 1, p. 8. The only "fact" on this score recited by plaintiffs is that "[c]lass counsel have been inundated with inquiries from absent class members."

Pls.' Memo. at 7. As opposed to demonstrating any so-called infringement, this allegation shows that employees are contacting class counsel for advice because of Duke's communications.

II. The "Remedies" Proposed By Plaintiff Are Inappropriate In Any Event.

Based upon their erroneous assertions about the nature of the VOP offer, plaintiffs argue that this Court should declare that class members, unlike all other Duke employees, may both accept the offer *and* continue to prosecute claims against Duke.[7] But class certification does not bestow substantive legal privileges on absent class members; certification is a procedural device. The interest rate class members are not freed from terms and conditions of employment, or severance, that every other employee must accept. In the case of the VOP, those terms require execution of a general release. Duke has treated class members identically to non-class members. It need do nothing more.

The cases cited by plaintiffs where any form of sanction was adopted for communications to a class are patently distinguishable, and each involve deception or misconduct directed against the class by the defendant. For example, in *Kleiner*, the defendant secretly called 3,000 potential class members, all of whom were bank customers, to encourage them to opt out of the class. 751 F.2d 1193. There is nothing secret about the VOP, and the VOP materials say nothing about opting out. Rather, they direct class members to class counsel. In *Cobell*, 212 F.R.D. at 14, the defendants sent historical statements of account to class members purporting to be a final accounting of the amounts allegedly due them, and providing that a failure to contest the amount would prohibit any appeal to the Board of Indian Appeals. *Id.* at 16. The statement did not tell the class members about the litigation, even though its sole purpose was to extinguish their

[7] This claimed right apparently encompasses only the certified interest crediting rate claim, as no objection has been raised regarding waiver of the named plaintiffs' individual claims for breach of fiduciary duty.

claims in the class action. *Id.* In contrast, Duke expressly informed employees that they were waiving class claims. In *Belt v. Emcare,* defendants sent a letter only to putative class members mischaracterizing the suit and suggesting that continuation of the action threatened their employment. 299 F. Supp. 2d at 668. Here Duke is implementing a voluntary reduction in force through a program that treats all eligible employees equally.

Not only would plaintiffs' proposed amendment to the VOP constitute inappropriate preferential treatment of class members, it is a remedy entirely without precedent. This Court does not have the authority to "redact portions of the agreement, or substitute terms more to the court's liking." *Sorrentino v. ASN Roosevelt Ctr.*, 584 F. Supp. 2d 529, 534 (E.D.N.Y. 2008). The sole authority cited by plaintiffs that addressed a right to void a provision in the release is *Allen* v. *Suntrust Banks, Inc.*, 549 F. Supp. 2d 1379 (N.D.Ga. 2008). But the *Allen* court found that the release at issue violated a statutory protection against broadly defined "retaliation" afforded employees who filed Fair Labor Standards Act claims. Id. at 1382. Because claims under labor statutes protect interests beyond those of the claimant employee, such laws prohibit conduct that "well might have dissuaded a reasonable worker from making or supporting a charge." *Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 68 (2006).[8] There is nothing in the civil remedies provisions of ERISA that precludes employers from conditioning separation offers on a waiver of claims such as those asserted in this litigation, and the interest rate claims will be prosecuted to judgment regardless of whether some of the class members accept the VOP.

[8] Even in the case of employment rights against retaliation, employers can lawfully condition severance on a waiver of the employee's right to recover individual damages, although the right to participate in EEOC proceedings cannot be forfeited. *Lockett v. Marsh USA, Inc.*, No. 08-3413, 2009 WL 4412326 *6 (6th Cir. Dec. 3, 2009) (upholding finding for employer where "[t]he clear and unambiguous terms of the Plan provide that only Plan participants who signed and did not revoke a Waiver and Release Agreement … would be eligible to receive enhanced severance pay [and] [t]he Plan did not give the administrator discretion to authorize enhanced severance pay to Plan Participants who did not sign the Waiver").

Even where courts have found communications to the class to be misleading, which is clearly not the case here, those courts have only required the offending party to send out corrective notice *informing the class members of the instant litigation* – something Duke has done from the very beginning. *See Ralph Oldsmobile, Inc.*, 2001 WL 1035132 at *6 (mandating that notice of the class action be sent but finding that plaintiffs request to forbid GM from entering settlements because "Courts cannot simply interpose themselves in the business relationship between a franchisor and its franchisees each time a franchisee files a putative class action."). Plaintiffs identify no need for a corrective notice. The only "corrections" they seek is a notice informing class members they can accept the VOP but ignore the release and that they need not opt out to participate in the VOP. Pls.' Memo. at 9. As shown above, plaintiffs cannot rewrite the release, and this Court has no authority to order that result. There can be no need for correction on this score. With regard to opt outs, the VOP does not even suggest that an employee need opt out of this class to participate. Again, there is nothing to "correct."

III. There Is No Need For An Evidentiary Hearing.

The facts relevant to this matter are straightforward. Moreover, there is no genuine factual dispute. The only "dispute" involves plaintiffs' claim that the VOP materials are only "purportedly" about a reduction in force but, in reality, are a scheme to secure a settlement from some portion of the interest rate class. No neutral observer could credit this claim.[9] The VOP is an offer made by Duke in the ordinary course of its business. Its terms – and the challenged communications – are before this Court. No further evidence is needed.

CONCLUSION

[9] Indeed, were this the true purpose, there would be no reason for complaint. Mr. Matthews was offered nearly $124,000 plus benefits, and his interest rate claim is worth less than $1,300.

For the reasons stated above, defendants respectfully request that this Court deny plaintiffs' motion to show cause and for other relief.

Respectfully submitted,

/s/ Robert O. King

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CERTIFICATE OF SERVICE

Robert O. King, an attorney, certifies that he caused copies of the foregoing **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO SHOW CAUSE AND OTHER RELIEF** to be served on all counsel through the court's ECF System on this 5th day of February, 2010.

__/s/ Robert O. King__