**UNITED STATES DISTRICT COURT**
**DISTRICT OF SOUTH CAROLINA**
**ANDERSON DIVISION**

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| **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,** | **Case No.: 8:06-CV-00373-RBH** |
| **Plaintiffs,** | |
| **vs.** | |
| **DUKE ENERGY RETIREMENT CASH BALANCE PLAN and DUKE ENERGY CORPORATION,** | |
| **Defendants.** | |

**PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR RELIEF REGARDING IMPROPER CLASS COMMUNICATIONS AND TO SHOW CAUSE**

Plaintiffs submit this Reply in Support of their Motion for Relief Regarding Improper Class Communications, as follows:

## ARGUMENT IN REPLY

### I. Duke's Contentions in General

Duke ignores two basic, irrefutable rules of law in its Response (hereinafter "Duke Br."):

- After a class has been certified, a defendant may not communicate with class members about the class litigation.
- Communications relating to a certified class action are not ordinary course of business communications.

Duke cites to no cases allowing a defendant, unilaterally, to communicate with class members post-certification about class litigation. That is because there are none. Duke cites to no case allowing a defendant to seek releases of class claims directly from class members post-certification. Again, there are none. It is crystal clear that such conduct is improper. [1]

As discussed below, most of the cases Duke relies on are ***pre***-certification cases. These cases should provide no comfort to Duke because they simply do not apply here.

#### A. Duke's Need for Secrecy

Duke contends that it was proper to blind-side class counsel and the Court with its VOP campaign, seeking releases of this litigation from 5751 class members, because the severance program was "highly confidential." [2] This contention is a slap in the face to this Court, which is vested not only with the authority, but the duty, to supervise and control communications with the

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[1] Duke also chooses to ignore the seminal treatises on class action practice and procedure – Newberg § 5.17 (4th ed. 2002) and the Manual for Complex Litigation ("MCL"),§ 30.2 at 234 (3d ed. 1995). It must ignore them because they unequivocally prohibit Duke's conduct. Exhibit A - Unpublished cases and materials.

[2] Duke states: "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." Duke Br. 11.

certified class. [3]

When Duke decided that its "highly confidential business initiatives and strategies" required a reduction in force, the interest rate class had already been certified and the Class Notice approved. At that point, Duke could undertake no action to interfere with the management of the class litigation process, but it certainly had options to accomplish its "initiates and strategies" within the confines of that process. If releases relating to the class litigation were to be involved, Duke had a duty to share its plans not only with class counsel, but with the Court overseeing the class litigation. This is because after certification of the class, Duke was required to treat the class members as being represented by counsel. See *infra* at 8.

There are mechanisms in the Confidentiality Order (Dkt. 86) in this case that would have allowed Duke to make a filing under seal and to seek approval of its proposed communications. Duke is certainly aware that class counsel will contest the legality of mandating a release of vested retirement plan benefits in exchange for a severance package. That issue could have been promptly resolved pre-announcement and the Court's input on and approval of the content and method of any communications to the class obtained (just as plaintiffs obtained approval of the class notice). These issues must now be resolved during the class opt-out period, while the class notice is in the hands of the employed class members alongside the VOP offer and release.

Duke's dogged insistence that it was proper to make direct contact with named plaintiffs and absent class members, and by-pass those parties' attorneys, in order to secure releases of this litigation, is troubling. Duke's elevation of its business interests over class counsel's attorney-client relationship with the named plaintiffs and absent class members, and its total disregard for this

[3] *Gulf Oil v. Bernard*, 452 U.S. 89, 100 (1981) (court in class action has "both the duty and the broad authority ... to enter appropriate orders governing the conduct of counsel and parties"); MCL § 21.33 (4th ed.) ("The judge has ultimate control over communications among the parties, third parties, or their agents and class members on the subject matter of the litigation to ensure the integrity of the proceedings and the protection of the class.").

Court's role in managing class litigation, cannot be countenanced.

Duke made the business decision to take it to the mat on class claims, including the interest rate claim. When this Court concluded that Duke's primary defense to the interest rate claim had no merit, Duke chose to continue the fight. Now, Duke's primary defense seems to be the invalid releases it is wrongfully seeking outside the litigation process.

Duke does not get a free pass to conduct itself however its chooses when its interests conflict with its responsibilities to this Court and to the due administration of justice

**B. Matthews Website**

Duke mischaracterizes plaintiff Jim Matthews's website, Duke Employee Advocate, http://www.dukeemployees.com,[4] as endorsing the terms of the VOP. Duke Br. 2. This is not the case. Mr. Matthews very clearly does not endorse the "waiver and release" feature of the VOP offer but notes: "The money is the bait; the waiver is the hook. There will always be a hook." Dkt 275-1: Ex. A to Duke Br.[5]

**C. The Communications Relate to the Litigation**

Duke, with a straight face, contends: "The VOP materials are not communications to the class about this action." Duke Br. 4. It then chronicles multiple notices, descriptions, and instructions in the VOP materials that are about the class action.

Duke also contends that the VOP is not " driven by the litigation." But Duke then goes on

[4] Mr. Matthews's website dates back long before this lawsuit to 1999, and has always been maintained by Mr. Matthews without attorney involvement. Dkt. 275-2 – Matthews Depo., at 52.

[5] Duke tries to contrast the defense-calculated value of Mr. Matthews's interest rate claim [which Plaintiffs do not agree is accurate] with his severance offer. Duke Br., n. 1, n. 9. The two figures have nothing to do with each other. Duke, in an incredible display of arrogance, appears to be implying that the "modest" interest rate claims are not worthy of the concern of Duke or the concern of this Court. Duke is most assuredly achieving huge cost savings through the VOP, but also wants to wipe out millions of dollars of vested, accrued benefits for as many interest rate class members as possible, on zero additional consideration. The significance of a thousand or a few thousand dollars in vested, retirement benefits to loyal Duke employees is something Duke is not qualified to comment on.

to state the obvious, that it will seek to use any release secured during the VOP election period as a complete defense to the interest rate class claim. Duke Br. 9.

**D. Duke Interfered with the Attorney-Client Relationship**

Duke acknowledges mandatory, in-person meetings with the named plaintiffs and class members concerning the VOP and the releases. As to those meetings, Duke simply says they were "necessary." Duke Br. 7. Duke then contends it has not interfered with the attorney-client relationship through those meetings or through its written communications because it encouraged class members to call and ask class counsel for legal advice. [6]

Duke cannot expect that 5751 employed class members will call class counsel for one-on-one legal advice. The class action is a vehicle which is supposed to minimize the need for individualized interaction in favor of issues being addressed in a more global fashion. That is why issues impacting the class should not be addressed directly to individual class members and particularly by side-stepping class counsel.

The only means to achieve a class-wide response to questions the class might have concerning Duke's VOP and the release is through another mass mailing which, contrary to Duke's practice, will not occur without Court approval. Even if such a mailing were possible in the time constraints of the VOP window, which expires in around two weeks, class counsel do not even have a segregated list of the 5751 individuals involved. Teasing out those names from the class list, even if data is available, cannot be accomplished before the VOP program expires. Thus, the vast majority of the employed interest rate class members are being left with the unilateral communications from the adversary in this case, Duke. And in those communications, Duke tells its employees that it expects

[6] Duke's materials omit the critical fact that the attorneys listed have been appointed by the Court to represent all class members. Duke's "Important Notice" calls them: "the attorneys who filed the class action." Ex. B, p. 8.

to pay nothing as a result of the class litigation. Ex. B, p. 3.

**E. Not a General Release**

Duke repeatedly refers to the release as a "general release." Duke Br. 2, 3, 4, 5, 7, 11, 12, 17. It is not. What Duke disseminated is in part a general release, but it goes on to specifically release and waive all claims in the within class litigation by name and docket number, also referencing an attached Duke-prepared "IMPORTANT NOTICE."

Duke is dissembling when it tells this Court that the release is what an employee would have to sign in conjunction with "virtually any separation agreement." Duke Br. 2. Duke says "inclusion of a release in a separation agreement is standard" and "a release has been used by Duke for many years in conjunction with severance agreements." Duke Br. 7. What is untrue about these statements is that the current release is dissimilar to Duke's ***own*** releases used both ***before and after*** this class action was filed.

Class representatives George and Bowen signed "general releases" in conjunction with a reduction in force in 2003-04, before this case was filed. Not only did the releases ***not*** release the types of claims stated by the interest rate class, they specifically ***preserved*** such claims:

> I understand that by signing this Waiver and Release, I ***do not waive and release*** any rights and claims to ***any benefits under the terms of any employee retirement benefit plan*** in which I am a participant and in which I have ***vested***. I further understand and acknowledge that any distributions to which I might be entitled ***by virtue of being vested*** in any employee retirement benefit plan in which I am a participant shall be made ***in accordance with the terms of the respective plan***.

Ex. C, ¶ 6, Ex. D, ¶ 6 (emphasis added).

Likewise a release signed by plaintiff, Freeman, in 2004, contained the same provision preserving vested benefits and acknowledging entitlement to benefits to be paid in accordance with the Plan. Ex. E, ¶ 6.

In its Response to Class Certification, Duke acknowledged the impact of these ***pre***-class

litigation releases:

> By signing such waivers and releases, these named plaintiffs forfeited their rights to challenge the terms of the Plan (distinct from their ***rights to challenge benefits due*** under the terms of the Plan).

Dkt. 79: Duke Resp. to Class Cert., at 29 (emphasis added).

Duke's current "release" deletes the language protecting vested benefits accrued in the employee benefit plans, and the "right to challenge benefits due under the terms of the Plan." The release instead seeks to extinguish those claims.[7] This newly formulated release only protects claims for benefits under the plan arising in the future. Ex. B; pp. 3-4, ¶ 5. As shown above, this is a dramatic departure from prior releases. A release used by Duke in 2007 also preserved as non-waived claims, employees' vested rights under the retirement Plans:

> Vested Benefit Plans: Employee further ***does not waive and release*** any rights and claims to any benefits under the terms of any employee retirement benefit plan in which Employee is a participant and in which Employee has vested. Any such distributions from benefit plans shall be made in accordance with the terms of the respective plans.

Ex. F (emphasis added).

In short, Duke's posturing that the releases now being sought are not litigation driven is feigned. The newly evolved language of the releases establishes this beyond doubt.

Duke states that nothing in ERISA "precludes employers from conditioning separation offers on a waiver of claims such as those asserted in this litigation." Duke Br. 18. In fact, as discussed below, Duke's attempt to secure a forfeiture of vested ERISA benefits is illegal and the illegality

[7] Duke tries to characterize the release in conjunction with the VOP as an ordinary course of business communications despite the specific release of rights in the pending and certified class action. Duke Br. 11: "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." This position is untenable and is completely refuted by the fact that the ***pre***-litigation releases ***preserved*** the pertinent claims under the benefits causes of action. Only post-certification did Duke alter its course, deleting the protective language, and specifically attempting to eliminate such rights.

makes Duke's conduct even more egregious.

### F. The Class Does not Seek Preferential Treatment

In an amazing display of illogic, Duke seeks to turn the tables by concluding that failing to require interest rate class members to release their claims would be preferential treatment over other employees. Duke Br. 3, 18. However, the interest rate class claim relates solely to the ***amount*** of vested, accrued benefits that should be reflected by the class members' account balances, based on the interest rates designated in the Plan documents. This is not a tort claim. It is a claim whereby participants seek exactly what every other Duke participant has – vested, accrued benefits calculated in accordance with the Plan. No other Duke employees are being forced to forfeit money that should already have accrued to their retirement accounts based on what this Court has already characterized as "practically admitted miscalculations." Dkt. 195: Order, p. 36.

It is unclear what Duke's defense to the interest rate claim is now, other than the assertion of as many releases as it can secure. Duke's release as to claims to determine the amount of already accrued vested benefits due under the Plan is illegal.

## II. Duke's Communications with the Named Plaintiffs and the Class were Improper and Appropriate Relief is Required

Duke argues it did not violate this Court's orders. Duke Br. 9. In fact, Duke violated the orders certifying the class, approving the class notice, and setting forth the notice procedure. Among other things the certification order appointed the undersigned as class counsel to represent the class members. Dkt 251, Order p. 28. Upon certification, Duke was obligated to treat the class members as represented by class counsel.[8] Instead, Duke side-stepped the order and solicited releases directly

[8] MCL § 21.33 (4th ed.) ("Once a class has been certified, the rules governing communications apply as though each class member is a client of the class counsel…. Defendants' attorneys, and defendants acting in collaboration with their attorneys, may only communicate through class counsel with class members on matters regarding the litigation."); *Impervious Paint Indust., Inc. v. Ashland Oil*, 508 F.Supp. 720, 723 (W.D.Ky.1981) ("defendants' counsel must treat

from named plaintiffs and class members.

The notice order, based on joint submission and agreement, sets forth the class notice procedures approved by the Court. Any reasonable reading of the order, in conjunction with Rule 23, requires the conclusion that mass communications with the class about this litigation, other than as stated therein, are precluded.

The cases Duke cites regarding class communications are distinguishable or actually support plaintiffs. Duke cites *Kleiner, supra.,* n. 7 for the proposition that it has not violated the Court's orders. Duke Br. 9. In fact, the case stands for the opposite proposition as that court expressly noted that "class counsel represents all class members as soon as a class is certified…" 751 F.2d at 1207 n. 28. In *Kleiner*, the Court also noted that "[a] unilateral communications scheme . . . is rife with potential for coercion." *Id*. at 102. See, Decl. of Class Representative Henry Miller filed herewith.

Likewise, the *Rochlin* case cited by Duke (Duke Br. 10) did not involve a purported release of claims in a certified class action. *Rochlin v. Cincinnati Ins. Co.*, 2003 WL 21852341,*20-21 (S.D. Ind. July 8, 2003) (company merely sent work duties questionnaires to workers). In *Rochlin*, the Court commented:

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plaintiff class members as represented by counsel" after certification and during opt-out period); *Van Gemert v. Boeing Co.*, 590 F.2d 433, 440 n. 15 (2nd Cir. 1978) ("A certification under Rule 23(c) makes the Class the attorney's client for all practical purposes…"), *aff'd*, 444 U.S. 472 (1980); *Parks v. Eastwood Ins. Serv., Inc.*, 235 F.Supp.2d 1082, 1083 (C.D. Cal. 2002) ("In a class action certified under Rule 23, Federal Rules of Civil Procedure, absent class members are considered represented by class counsel unless they choose to 'opt out.'"); *Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1207 n. 28 (11th Cir.1985) ("At a minimum, class counsel represents all class members as soon as a class is certified…"); *Daniels v. The City of New York*, 199 F.R.D. 513, 514-15 (S.D.N.Y. 2001) ("As it stands, the entire class is counsel's client for all practical purposes."); *Tedesco v. Mishkin*, 629 F.Supp. 1474, 1483 (S.D.N.Y.1986) ("By communicating with the class members after this court had orally certified the class, Mishkin also violated DR 7-104(A)…"); *Jacobs v. CSAA Inter-Insurance*, 2009 WL 1201996, *2 (N.D. Cal. May 1, 2009) ("After a court has certified a class, communication with class members regarding the subject of representation must be through counsel for the class."); *In re Federal Skywalk Cases*, 97 F.R.D. 370, 377 (W.D.Mo.1983) (same, noting that "[i]f this Court permits the defendants to make an end-run around its supervisory authority, the principle that will be established for future class actions is unconscionable"); *Bower v. Bunker Hill Company*, 689 F.Supp. 1032, 1033 (E.D.Wash.1985) ("[O]nce the court enters an order certifying a class, an attorney-client relationship arises between all members of the class and class counsel.").

> An attorney may not communicate on the subject matter of the representation with a party that he knows is represented by counsel. Ind. Rule Prof. Conduct 4.2. Furthermore, class members who have not opted out are deemed to be represented by class counsel. See, e.g. *Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193, 1207-08 (11th Cir. 1985) ("defense counsel had an ethical duty to refrain from discussing the litigation with members of the class as of the date of class certification").

*Id.* at *20.

Other cases cited at Duke Br. 13-14, have no bearing because they only deal with ***pre***-certification communications. *Alaniz v. Sam Kane Beef Processors, Inc.*, 2007 WL 4290659 (S.D. Tex. 2007); *Keystone Tobacco Co., Inc. v. U.S. Tobacco Co.*, 238 F. Supp. 2d 151 (D.D.C. 2002); *Longcrier v. HL-A Co., Inc.*, 595 F. Supp. 2d 1218 (S.D. Ala. 2008); *Ralph Oldsmobile v. GE*, 2001 WL 1035132 (S.D.N,.Y. Sept. 7, 2001); *Jenifer v. Delaware Solid Waste Auth.*, 1999 WL 117762 (D. Del. Feb. 25, 1999).

Duke claims that its communications were proper because they purportedly were regular business communications with its employees. The case law does not support Duke on this. Communications about the class litigation are off-limits.

Duke cites *Cobell v. Norton*, 212 F.R.D. 14 (D.D.C. 2002) [9] to support its claim that it was appropriately engaging in "regular sorts of business communications with class members." Duke Br. 10. The very next sentence in the opinion belies Duke's assertions:

> The Court's order will be tailored to protect the rights of defendants. The order will not be a blanket prohibition on communications with class members. Defendants will be permitted to continue engaging in the regular sorts of business communications with class members that occur in the ordinary course of business. The Court does not find such communications objectionable ***because they do not purport to extinguish the rights of the class members in this litigation***.

212 F.R.D. at 20 (emphasis added). Duke's VOP, by contrast, expressly says it will extinguish those

[9] The Court in *Cobell* not only entered a Rule 23(d) order prohibiting future communications with class members concerning the litigation, it also referred defendants' attorneys to the Committee on Grievances of the U.S. District Court for the District of Columbia for potential violation of the ethical rules. *Id.* at 24.

rights. Further, the court in *Cobell* stated "[w]hat this Court considers improper is sending notices to individual class members that have the effect of extinguishing the rights of those class members without first seeking the approval of this Court." *Id.* at 19.

Newberg has defined the scope of ordinary course of business communications as those that "do not relate to the claims involved in the litigation ...." 3 Newberg § 15.18 (3d ed. 1992). See, also, *Montgomery v. Aetna Plywood, Inc.* 1996 WL 189347, *4 (N.D. Ill. July 2, 1996) (allowing communications necessary to conduct the daily business of the employer, but prohibiting communications about the litigation). Duke simply cannot credibly claim that communications by which it asks class members to forfeit their rights to a recovery in the class litigation are ordinary day-to-day business communications.

Finally, Duke attempts to re-frame the issues to impose a burden on plaintiffs to demonstrate that Duke's communications were misleading. As plaintiffs note in their opening brief, pp. 5-6, Duke's relationship with the class members is inherently coercive and its direct communications with the class *per se* wrongful.[10] Duke conceded that soliciting opt-outs would be a violation of the orders (Duke Br. 9), but somehow believes that soliciting full releases of the litigation is not. Duke's direct post-certification communications with the class, face to face and by writings, without notice to the Court or counsel representing the class, seeking to extinguish the rights of class members, is more than sufficient to merit the relief requested.

## III. Duke's Conduct is Even More Egregious Because the Waiver and Release is Illegal

[10] The communications were, in fact, misleading. Duke's "Important Notice" misrepresents the status of the case by stating that the ADEA claim remains pending. It lists the undersigned attorneys as "the attorneys who filed the class action, "not as class counsel appointed to represent all class members. The release indicates Duke's position that it will not be required to pay money in the class litigation. The release describes the litigation as seeking "additional benefits" under the plan when, in fact, the litigation simply seeks the benefits required by the plan. Also, Duke acknowledges the materials do not mention the opt-out procedure, leaving class members to wonder if execution of the release requires an opt-out request.

ERISA was passed by Congress as a federal regulatory scheme to govern employee benefit plans by providing standards for the establishment, operation and administration of the plans so as to ensure their financial soundness for employees. 29 U.S.C. § 1001(a). ERISA prohibits the alienation or assignment of benefits because the statute was designed with the main purpose of protecting the interests of plan participants and their beneficiaries by minimizing the dissipation of pension funds. 29 U.S.C. § 1001.

The anti-alienation provision states that each pension plan "shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056. "The anti-alienation provision can be seen to bespeak a pension law protective policy of special intensity: Retirement funds shall remain inviolate until retirement." *Boggs v. Boggs*, 520 U.S. 833, 851 (1997) (citations omitted); *see, also, Patterson v. Shumate*, 504 U.S. 753, 760 (1992) (noting that the Court "vigorously has enforced ERISA's prohibition on the assignment or alienation of pension benefits, declining to recognize any implied exceptions to the broad statutory bar").

In *Lynn v. CSX Transp., Inc.*, 84 F.3d 970 (7th Cir. 1996), the court reversed and remanded a lower court decision that a waiver precluded an employee from pursuing a claim that a pension plan's terms entitled him to credits for the time he was in the military. The employee had accepted an early retirement package that enhanced his retirement plan benefits in exchange for a form agreement not to assert any claims from his employment.

The district court held that the claim was barred by the release. Reversing on appeal, the Seventh Circuit distinguished prior decisions regarding releases of claims under ERISA, noting that in those cases the plaintiffs were bringing suit to enforce the release terms. The *Lynn* court drew a "critical distinction" between "[p]ension entitlements" and "[c]ontested pension claims." *Id*. at 975:

> Pension entitlements are, ***without exception***, subject to the anti-alienation provision of ERISA. . . . The distinction between these two categories is a critical one, and, if

> the decision of the district court is any indication, one that has not yet been drawn with sufficient clarity. A pension entitlement arises under the terms of the pension plan itself. A contested pension claim, by contrast, arises under a settlement agreement. [11] ***A release . . . may not bar claims based on pension entitlements.***

*Lynn v. CSX Transportation, Inc.*, 84 F.3d at 975 (emphasis added and citations omitted). Other courts have reached the same conclusions. [12]

In *Boeckman v. A.G. Edwards, Inc.*, 461 F.Supp.2d 801, 814 (S.D.Ill. 2006), the district court, citing to *Lynn*, found "that the benefits at issue in this case are 'vested benefits' and thus outside the scope of the terms of the release[.]" The court also noted that the facts before it were "quite close to a simple claim that benefits were miscalculated." *Id*. at 810. That is, of course, the essence of the interest rate claim in the instant case.

IRS and Treasury regulations likewise state that Duke may not require its employees to give up vested pension benefits to secure a severance package.[13] There are rights and benefits under ERISA that may not be eliminated or reduced. These rights include the accrued benefits under the plan. 29 U.S.C. § 1054(g)(2); 26 U.S.C. § 411(d)(6).

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[11] ERISA's anti-alienation provision only allows settlement agreements in which pension claims are knowingly and intentionally resolved by employees "pursuant to a bona fide settlement of such a controversy." 60A Am. Jur. 2d *Pensions* § 328. Duke states that no consideration is offered for release of the interest rate claim and that it is not a "settlement." Duke Br. 12.

[12] *Malloy v. Ameritech*, 2000 WL 35525477, *15 (S.D.Ill. Feb. 7, 2000) (district court agreed with the class's contention that "the relevant release provisions violate the anti-alienation provision contained in ERISA and are, therefore, unenforceable because the claims asserted by Mr. Perotti and the AMPP subclass are pension entitlement claims"); *Laurenzano v. Blue Cross & Blue Shield of Mass. Ret. Income Trust*, 191 F. Supp. 2d 223, 233 (D. Mass. 2002) ("The dispute in this case does not turn on the meaning of any settlement agreement, but rather on the meaning of the Plan and the law …. A release may prevent a plan participant from asserting claims based on a settlement agreement, but may not bar claims based on pension entitlements."); *Shaver v. Siemens Corp.*, 2007 WL 1006681, *12 (W.D.Pa. March 30, 2007) (stating "claims for accrued pension benefits that rely solely on the straightforward terms of the ERISA plan in question and do not involve any outside transaction or instrument present a claim based on 'incontestable pension rights,' which are not subject to waiver").

[13] *See Boeckman*, 461 F.Supp.2d at 813, n. 7 ("Because one of the purposes of ERISA is to encourage employers to establish pension plans, and correspondingly favorable tax treatment is furnished for pension plans that comply with ERISA, many sections of ERISA have counterparts in the Internal Revenue Code ('IRS')."; *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1144-45 (3rd Cir. 1993).

Treasury regulations state, "[i]n general ... a participant may not elect to waive section 411(d)(6) protected benefits." 26 C.F.R. § 1.411(d)-4; Treas. Reg. § 411(d)-4 Q&A 3(a)(3). The vested accrued interest rate benefits hereunder are section 411(d)(6) protected benefits. *See, also, Gallade v. Commissioner*, 106 T.C. 355 (1996) (finding that purported waiver of "accrued fully vested benefit" violated ERISA's anti-alienation provisions). [14]

Likewise in *Esden v. Bank of Boston*, 229 F.3d 154, 173 (2nd Cir. 2000), the court stated that "[a] participant may not elect a forfeiture [of vested pension benefits]." *Id.* at 173. The court explained:

> The anti-forfeiture provisions of ERISA are drafted as mandatory terms. See, e.g., ERISA § 203(a) ("Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable...."); I.R.C. § 411(a) (same). The statutes nowhere provide for an exception allowing a plan to offer an employee the voluntary choice of a partial forfeiture in exchange for a particular form of payment. See Treas. Reg. § 1.411(a)-4(a) (conditional rights are forfeitable rights and not within the definition of "the term 'nonforfeitable' for the purposes of [section 411(a)'s] requirements") Such restrictions on the employee's freedom of contract permeate ERISA. Cf., e.g., ERISA § 206(d)(1) ("Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.").

229 F.3d at 173.

ERISA embodies a policy of protecting employees. *Pilot Lfe Ins. Co. v. Dedeaux*, 107 S.Ct. 1549 (1987) ("In ERISA, Congress set out to protect . . .participants in employee benefit plans and their beneficiaries") (internal quotes omitted). Because Congress's express policy in enacting ERISA is to protect participants in employee benefit plans and their beneficiaries, the release of rights under ERISA is strictly construed against the employer and limited to particular circumstances where, above all, the release or waiver in no way infringes on workers' vested pension rights, their accrued

[14] Scholarly commentators agree: "[R]eleases of claims to accrued pension plan benefits are void *ab initio*."Albert Feuer, "When are Releases of Claims for ERISA Plan Benefits Effective?," John Marshall Law Review, Vol. 38, 773, 812 (Spring 2005).

pension benefits, and the anti-alienation provisions. Here, Duke has infringed on the class's rights in each of these areas, as well as this Court's authority, under Rule 23, to supervise and control the administration of a certified class action. This Court should find and declare the waiver as to the interest rate class invalid. [15]

## IV. Evidentiary Hearing

Duke is opposed to an evidentiary hearing. In fact, Duke is opposed to a hearing of any sort and requests this matter be resolved on the papers.

Courts are vested with broad authority to manage collective actions and to govern the conduct of counsel and parties in such cases. *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989). This Court's class notice process had been interfered with and class counsel's attorney-client relationship with the named plaintiffs and class members has been infringed upon. This is a very serious matter and implicates not only the provisions of Rule 23 F.R.Civ.P. but South Carolina Appellate Court Rule 407, Section 4.2. [16]

Duke's litigation counsel have confirmed that they had no advance notice of the VOP. It is clear, however, that Duke attorneys at some level were involved with the preparation and dissemination of VOP materials, including the Waiver and Release, given its sophistication as

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[15] Plaintiffs also contend Duke's release is ineffective on other grounds and as to other claims, including the individual plaintiffs' claims. Given that Duke's outrageous conduct in overstepping the bounds of class counsel's attorney-client relationship with the class and disrupting the class notice process necessitated this request for expedited relief, those issues must wait for another day.

[16] *See Weiss v. Winner's Circle*, 1995 U.S. Dist. LEXIS 18919, *23 (N.D. Ill. Dec. 15, 1995) (Magistrate's recommendation of sanctions and default: "Notwithstanding the appointment of plaintiffs' counsel to represent the class members and the dictates of Rule 4.2, Bailey and Associates' corporate counsel, without permission from class counsel and in direct contravention of Rule 4.2, repeatedly communicated with members of the class about their rights in this action, and sought to negotiate settlements and releases with them. This conduct, violative of Judge Holderman's Order of August 17, 1993, was amplified and exacerbated by violation of the Rules of Professional Conduct. Serious acts are made more egregious when violations of court orders are coupled with violations of Rules of Professional Conduct."

compared to past releases as discussed above and its obvious timing.

Under the circumstances presented here the case law demands "a clear record and specific findings" and an evidentiary hearing is necessary. See, *Gulf Oil*, 452 U.S. at 101. Plaintiffs request that this Court set an evidentiary hearing on an expedited basis and order that Duke appear and produce the witnesses most knowledgeable concerning the preparation and dissemination of the VOP materials, and the scope of the in-person meetings. Duke should further be ordered to produce at the hearing the attorneys involved in the waiver and release aspect of the Duke 2010 VOP.

**CONCLUSION**

In conclusion, Plaintiffs respectfully request that this Court inquire into the matters raised herein, order an evidentiary hearing, and grant the relief requested by their Motion and such other relief as may appear appropriate.

Respectfully submitted,

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February 8, 2010