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' SUPPLEMENTAL MEMORANDUM
REGARDING THE 2010 VOLUNTARY OPPORTUNITY PLAN

Defendants Duke Energy Corporation ("Duke") and Duke Energy Retirement Cash Balance Plan (collectively "defendants") file this supplemental memorandum in response to "Plaintiffs' Motion for Relief Regarding Improper Class Communications."

I. DUKE WILL ALLOW EMPLOYEES TO REVERSE THEIR DECISION TO DECLINE PARTICIPATION IN THE VOP IF THIS COURT REQUESTS.

This Court articulated its view that Duke's 2010 Voluntary Opportunity Plan ("VOP") communications should not have been distributed to members of the interest rate class without first being vetted with class counsel and the Court. Duke will not use the opportunity afforded by this Court to file a supplemental memorandum to reargue that issue: the Court's duty is to protect the integrity of the class process and Duke accepts the Court's decision. Duke assures

this Court that its intent was never to avoid the jurisdiction of this Court with respect to these matters, and apologizes to the Court for communicating in a manner that concerned the Court.[1]

Duke writes to address the question posed by this Court at oral argument. Assuming *arguendo* that the communications were infirm, what can or should be done? In addressing that question Duke will not stand on legalities. Indeed, if this Court desires and believes it appropriate, Duke is willing to undertake a course of action that, although burdensome to it, would cure any potential harm to class members from its employee communication regarding the VOP offering.

The one issue raised at argument where some remedial or curative action could arguably be appropriate involved employees who chose not to request to participate in the VOP. Specifically, plaintiffs argued that they would have requested that the VOP materials inform members of the interest rate class of the approximate value of those class claims so that the members could make a fully informed decision as to whether the severance offer was adequate to support the release of those claims. Plaintiffs expressed the concern that a class member might have overvalued those claims and thereby rejected an offer that he or she would otherwise have accepted.

Duke never intended to deter participation in the VOP. But if this Court concurs in the concern expressed by plaintiffs, Duke is prepared to permit the class members who declined to participate in the VOP a second opportunity to participate, and to provide them with a description of the claims to be released that is approved by the Court. That description could

[1] As outlined in Duke's filings in response to plaintiffs' pleadings, Duke did not believe the VOP materials constituted a communication about the class action, but was a communication made in the ordinary course of business to almost half its work force, including many who are not class members. Duke recognizes this Court's contrary view, and will be guided by it going forward.

also inform the class members that plaintiffs dispute the validity of that release, again provided that such disclosure is desired and approved.

However, any process to permit class members to reconsider their decision to decline the VOP offer must be initiated in short order, for reasons described in the attached Declaration of James O'Connor. The VOP was established to address Duke's business needs. The timing of employment terminations pursuant to the VOP has been planned so that they will not interrupt Duke's business operations and will insure the continued reliability of its electric service. (O'Connor Dec., ¶¶ 5-7). If Duke is to permit employees to reconsider their decision to decline the VOP offer, Duke must do so quickly so that it can plan for additional employment terminations that were not contemplated. So that Duke's business is not adversely effected, and to assure continued reliability of service, Duke imposed a deadline for requesting participation so that it could evaluate the potential loss of resources and engage in the requisite succession planning. (*Id.*, ¶ 6). Duke is not setting an outside limit on its offer to allow class members a second opportunity to participate because it wants to make every effort to address this issue to the satisfaction of the Court. But the process must be commenced soon, and agreement on the communications should be reached promptly. (*See also id.*, ¶¶ 6, 7).

If this Court deems this path appropriate, Duke will promptly provide class counsel and the Court with a proposed form of communication to the effected employees. Duke believes that any provision in the communication describing the approximate value of the interest rate claims should be initially drafted by class counsel, but Duke will otherwise assume responsibility for preparation of the first draft of the notice. The notice could also inform class members that plaintiffs assert that the release is unenforceable as against the interest rate claims, if class counsel wishes such a disclosure.

Whether offering a second opportunity to participate in the VOP is necessary to address any issue arising from the original communications is an issue Duke leaves to this Court's determination. Duke notes that there are reasons to believe that an evaluation of the class claims ascribing excessive value to those claims was not a material factor in employees' decisions not to participate. First, interest rate class members accepted at a rate virtually identical to the rate of non-interest class members who received the VOP offer. Duke has identified 572 acceptances of interest class members out of a total acceptance pool of 904. (*Id.*, ¶ 4). And the VOP was offered to 8,756 employees, of whom 5,751 were in the class. (*Id.*, ¶ 3). Thus the class comprises 65% of the recipients and 63% of the acceptances.

Second, nothing in the VOP materials would lead an employee to overvalue the interest rate claims. Indeed, in briefing on this motion, plaintiffs argued that "in the Waiver and Release [Duke] misleadingly impugns the claim, stating that no damages should result from the litigation." (Opening Memo., p. 6, n.2). Although Duke does not agree that it impugned the claims, it believes that nothing in the VOP materials would have led a class member to believe the claims were potentially lucrative.

The path Duke is offering to take is a significant undertaking, and Duke asks that this Court consider these facts before deciding whether this is an approach that needs to be adopted. If Duke permits employees to reconsider their prior decision, Duke would incur significant costs – both monetary costs as well as the diversion of resources and attendant disruption of business caused by any changes to the program. But Duke heard and understood the concerns expressed by the Court at oral argument and is fully prepared to follow this approach.

Plaintiffs do not challenge the election by 572 class members to request participation in the VOP. As to this group, the only "relief" requested by plaintiffs is that this Court void their

release of the interest crediting rate claims. As shown *infra*, that release is valid and enforceable. In any event, no additional communication to those 572 class members regarding the release is necessary. A class member who accepted the VOP notwithstanding the need to provide a release of class claims would have accepted the same VOP offer stripped of that requirement. Nonetheless, if the Court deems it prudent, Duke would agree to send, or support class counsel's distribution of, an approved letter to the 572 class members who took the VOP notifying them of plaintiffs' position on the waiver.

II. THE OTHER COMMUNICATIONS ISSUES RAISED BY PLAINTIFFS DO NOT REQUIRE FURTHER ACTION.

In briefing on this motion, plaintiffs raised concerns about a possible interference with aspects of the class action opt out process. These issues need not be remedied, as the alleged potential problems did not arise.

A. The VOP Did Not Interfere With The Opt Out Process.

Plaintiffs' briefs noted that the decision to participate in the VOP coincided with the period to opt out of the class. The VOP materials said nothing about the opt out process. Plaintiffs, however, voiced concern that this silence might leave "class members to wonder if execution of the release requires an opt out request." (Plaintiffs' Reply Memo [Doc. 27] at 10, n.10).

Of the 572 class members who accepted the offer, only one opted out of the class. (O'Connor Dec., ¶ 4). Defendants made no attempt to solicit opt outs, and nothing in the VOP led persons to incorrectly believe that they needed to opt out of the class in order to participate. There is no need for any curative action here, as there is nothing to cure.[2]

[2] The single opt out could be voided if it was executed because of an erroneous concern about any connection between the exclusion process and the VOP.

B. Class Counsel's Status Has Been Communicated.

The sample release provided to employees receiving the VOP contained an "Important Notice" describing the class action, identifying the classes that were certified, and providing the names and addresses of plaintiffs' attorneys. Plaintiffs note that the Important Notice identifies them as "[t]he lawyers who filed the class action" rather than "the lawyers certified by the Court as class counsel."

Assuming that the latter wording would have been preferable, no confusion arose from the Notice as drafted. First, the description provided by Duke is in no way inconsistent or contradictory with the description preferred by plaintiffs. The Important Notice says a certification order was entered and identifies the lawyers as the ones "who filed the class action." This clearly leads to the conclusion that they are class counsel. That is, moreover, what the class understood, as class counsel stated at the argument that approximately 600 employees contacted them about the VOP. In addition, the class notice, also received by those employees, states "[t]he Court has approved lawyers to represent you and other Class Members." (Affidavit of John Hughes, Tab A) (Doc. No. 305-1). Thus, there is no need for a corrective notice, as class members have been clearly informed of the identity of class counsel.

III. DISPUTED BENEFIT CLAIMS CAN BE RELEASED.

Finally, defendants address a legal issue that plaintiffs raised in their reply brief. Plaintiffs claim that it is "illegal" to request a release of the interest rate claims and that the release of those claims included in the VOP materials should be voided. (Reply Memo. at 10). This issue need not be resolved at this time, as it involves the affirmative defense of release and

plaintiffs have preserved their claim that the release is invalid.[3] Nevertheless, defendants address the issue so as not to waive any arguments.

According to plaintiffs, any dispute as to the proper calculation of the pension benefits of Duke's employees is a claim for vested benefits that can never be released. (Reply Memo. at 12-13). Were this true, benefit claims could never be settled or compromised; the only path available would be litigation to final judgment. That is not what the law requires. *See Lumpkin v. Envirodyne Industries, Inc.*, 933 F.2d 449, 455 (7th Cir. 1991); *see also Leavitt v. Northwestern Bell Telephone Co.*, 921 F.2d 160, 162 (8th Cir. 1990).

Benefits provided under the cash balance plan cannot be "assigned or alienated." 29 U.S.C. § 1056(d). Thus, as Duke stated in the notice of eligibility for the VOP, Duke cannot request that plaintiffs waive or release the undisputed value of their cash balance account in connection with any severance package. (*See* Matthews Dec., Ex. B, p. 1) (Doc. No. 268-2). Duke has not made any such request. But the interest rate claims are disputed: Duke says that it properly calculated interest crediting rates in 1997 and 1998 and plaintiffs disagree. Claims regarding benefit disputes under ERISA plans are routinely settled, and just as routinely those settlements include releases. *See, e.g., Finz v. Schlesinger*, 957 F.2d 78, 82-83 (2d Cir. 1992); *Leavitt*, 921 F.2d at 162; *Fair v. Int'l Flavors & Fragrances, Inc.*, 905 F.2d 1114, 1116-17 (7th Cir. 1990).

This is, in fact, made clear by the authorities cited by plaintiffs. As noted in *Lynn v. CSX Transp., Inc.*, 84 F.3d 970, 975 (7th Cir. 1996):

[3] At oral argument, plaintiffs suggested that this issue needs to be resolved before any new offer of the VOP. Duke reiterates, however, that it needs to move forward immediately if employees are permitted to reconsider their decision to decline the VOP offer. As already noted, if this Court believes it is necessary, the communications can include a reference to plaintiffs' assertion that the release is invalid. Should plaintiffs' prevail and void the release as to the class claims, employees accepting the VOP will receive the full benefits of that offer and participate in any recovery in this action. If this Court decides to void the release as to the claims in this class action, defendants agree that the set-off provision contained within the release will likewise be unenforceable.

> Pension entitlements are, without exception, subject to the anti-alienation provision of ERISA. *Patterson v. Shumate*, 504 U.S. 753, 760 (1992). Contested pension claims, on the other hand, are "simply outside the realm of the provision." (quoting *Lumpkin v. Envirodyne Ind., Inc.*, 933 F.2d 449, 456 (7th Cir. 1991).

Moreover, the release at issue in *Lynn* did not release a contested benefits claim but, rather, fully preserved all claims under the applicable pension plan. *Id.* at 976. Likewise, in another case cited by plaintiffs, the court observed that "[i]f ERISA's anti-alienation provision is read to apply to waivers and settlements, it creates a tension with the body of federal common law that allows waivers." *Laurenzano v. Blue Cross and Blue Shield of Mass., Inc. Retirement Income Trust*, 191 F. Supp. 2d 223, 228 (D. Mass. 2002); *see also Shaver v. Siemens Corp.*, 2007 WL 1006681 at *9 (W.D. Pa. Mar. 29, 2007) (releases that do not waive accrued benefits are not prohibited by ERISA's anti-alienation provision); *Howell v. Motorola, Inc.*, 2005 WL 2420410 at *4 (N.D. Ill. Sept. 30, 2005) (release involving fiduciary breach claims under ERISA was not invalid where the "claims were contested claims at the time the release was signed, and still are contested"); *Martino-Catt v. E.I. duPont Nemours & Co.*, 317 F. Supp. 2d 914 (S.D. Iowa 2004) (release contained in severance plan was enforceable).

As a fallback position, plaintiffs argue that the VOP release provides no consideration for the disputed interest rate claim because no portion of the severance payment is designated for this claim. (Plaintiffs' Reply at 12, n.11). Duke's employees were offered a severance package, comprised of cash, health benefits and outplacement services. In return, the employees who accepted the VOP offer provided a release of claims. Some employees may believe that they had claims against Duke, others may not. Each employee needed to weigh the value of any potential claims against the aggregate value of the package. Duke was not required to calculate the value of its offer to correspond to claims that had been or could be asserted by any particular employee. *See Myricks v. Federal Reserve Bank of Atlanta*, 480 F.3d 1036, 1042 (11th Cir.

2007) (holding that "employers have no obligation to vary the compensation offered for a release based on the potential strength of an employee's claim"). The program is voluntary, and employees are entitled to make individual determinations regarding whether to participate based upon their own circumstances. The payments under the VOP are legally sufficient consideration for a release.[4] *See Brock v. Entre Computer Centers, Inc.*, 933 F.2d 1253 (4th Cir. 1991) (consideration sufficient where employer provides benefits that it is not otherwise obligated to provide in exchange for release); *Rivera-Flores v. Bristol-Meyers Squibb Caribbean*, 112 F.3d 9, 11 (1st Cir. 1997) (same); *Carroll v. Primerica Fin. Servs. Ins. Marketing*, 811 F. Supp. 1558, 1565 (N.D. Ga. 1992) (same).

CONCLUSION

Defendants respect this Court's view that the VOP communications should not have been distributed as written without first being presented to class counsel and the Court. No end-run around this Court was intended, and defendants commit that there will be no recurrence. Moreover, if this Court believes it appropriate, Duke will agree to provide a second opportunity to participate in the VOP for those class members who declined the offer. Duke stands ready to work with class counsel and the Court to achieve that result. Duke otherwise denies that plaintiffs are entitled to the relief that they seek.

[4] Nor does the non-disparagement provision in the release effect its validity. Duke has already addressed plaintiffs' concerns about that provision by agreeing that nothing in the provision precludes any named plaintiff or witness from testifying truthfully in this action. This is so regardless of whether such truthful testimony is detrimental to Duke's litigation position, and Duke reaffirms that understanding.

Dated: April 21, 2010

Respectfully submitted,

/s/ Robert O. King

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