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

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR *IN CAMERA* REVIEW, TO ABROGATE PRIVILEGE, AND TO COMPEL

Plaintiffs submit this supplemental brief in support of their Motion for relief regarding improper class communications (Dkt. 267) and pursuant to this Court's minute entry (Dkt. 306) dated April 19, 2010.

I. SUMMARY OF RELIEF REQUESTED.

Plaintiffs seek the following relief based on prior submissions, admissions of Duke on the record, and supplemental case law below:

1. A ruling that Duke's communications with the class members and named Plaintiffs soliciting the release of this litigation was improper;

2. A ruling that Duke's communications with class members regarding the Waiver Release were inaccurate, incomplete, and misleading;

3. An order precluding further communications by Duke or its attorneys with class members relating to this litigation without prior notice to Class Counsel and approval by the Court;

4. A Court-approved corrective notice to Duke-employed class members, at Duke's expense, containing at least the following:

a) A statement that the communications by Duke with class members were without notice to or approval of the Court or Class Counsel and that the Court has found the communications were improper, inaccurate, incomplete and misleading;

b) A statement that the "Important Notice" directed by Duke to class members did not inform them that the law firms listed on the notice had been appointed by the Court as Class Counsel to represent and advise all members of the defined classes;

c) A statement that the "Important Notice" directed by Duke to class members incorrectly stated that the class action "alleges violations of the Age Discrimination in Employment Act," whereas all age discrimination claims have been dismissed;

d) Notice that any class member who believes they were prejudiced by the incomplete, inaccurate, and misleading "Important Notice" should contact Class Counsel for advice concerning potential remedies;

e) Information generally quantifying the value of the interest rate miscalculation claims;

f) A statement that Duke acknowledges that the "non-disparagement" clause contained in the Waiver and Release does not prohibit truthful statements regarding Duke; and

g) Should the Court agree with Plaintiffs' argument below that Duke's Waiver and Release, including the "shortfall" provision, cannot impact the interest rate class members' claims, a notice to that effect.

5. A ruling by this Court that Duke's Waiver and Release, under the totality of the circumstances (including release of vested accrued retirement benefits, lack of consideration,

ambiguity, misleading communication, conflict of interest, and breach of fiduciary duties), does not release class members' interest rate miscalculation claims and that the "shortfall" provision, having the exact same effect, is also invalid;

6. A ruling that Class Representative Henry Miller's acceptance of the VOP does not impair his continued service as Class Representative for the interest rate class;

7. An award of fees and costs, to be determined by subsequent Petition, which may also incorporate any further fee requests arising from Motions yet to be heard by Magistrate Judge Catoe on May 4, 2010; and

8. Such other orders addressing improper class communications as the Court deems proper.

II. DUKE'S POSITION AT HEARING.

Salient points from the April 19, 2010 hearing include:

- ✦ Duke's admission that its Waiver and Release does not impact vested benefits under the retirement plan;
- ✦ Duke's stipulation that the current Waiver and Release is not "materially different" from the prior releases in preserving vested benefits under the retirement plan;
- ✦ Duke's counsel's failure to affirm that the VOP program would have been handled differently had outside counsel been aware of the intended communications;
- ✦ The absence of any explanation for Duke's failure to notify outside counsel, Class Counsel, or the Court of the intended communications with the class; and
- ✦ The absence of any explanation for why Duke timed the VOP window to coincide precisely within the class notice opt-out window.

III. SUPPLEMENTAL ARGUMENT

A. Order Regarding Future Class Communications.

Duke contends that this Court has no authority to find it in contempt because it did not violate any specific court order. At a minimum, Duke violated the spirit if not the letter of this Court's Class Certification and Notice Orders. To ensure Duke is fully apprised in the future of the conduct that is expected of a class litigant and to ensure that the full arsenal of sanctions are available for any future violation, Plaintiffs request an order directly precluding communications of the sort at issue here by Duke or its attorneys with class members and named Plaintiffs.

When limiting a defendant's ability to communicate with class members, the court should take into account the defendant's First Amendment rights. *See Kerce v. West Telemarketing Corp.*, 575 F. Supp. 2d 1354, 1366-1367 (S.D. Ga. 2008). The Supreme Court has held, in a Rule 23 class action, that "an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights for the parties." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 (1981) (emphasis added). Such an order should be drawn to "limit[] speech as little as possible, consistent with the rights of the parties under the circumstances." *Id.* at 102. Here these considerations are less pertinent because the order will involve actual class members rather than potential class members.

Given that unilateral and improper communications have already occurred in violation of established rules of class action practice, it is appropriate to order that neither Duke nor its lawyers may unilaterally communicate with class members regarding the subject matter of this litigation. Such a ruling does not circumscribe Duke's ability to communicate with its employees in the ordinary course of business. Communications regarding the subject matter of the class action litigation, post-certification, *per se* are not communications in the ordinary

course of business. 3 Newberg § 15.18 (3d ed. 1992) (defining the scope of ordinary course of business communications as those that "do not relate to the claims involved in the litigation ...."); *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)[1]; *Cobell v. Norton*, 212 F.R.D. 14 (D.D.C. 2002) ("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."); *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").

B. Corrective Notice.

Duke's counsel insisted at hearing that this Court could not interfere with Duke's business plan by reopening the VOP acceptance period for non-accepting class members. This position underscores the dilemma Duke has created for the Court in fashioning a remedy for what clearly was improper contact involving a communication that was incomplete, inaccurate and misleading.

Duke's defense of "no harm, no foul" is untenable. Hundreds of class members sought out Class Counsel expressing confusion and concern regarding the release and the "Important Notice." Some were confused about the claims that remain pending in this case and others had

[1] Unpublished cases are attached as Exhibit A.

no idea of the value of the pending claims versus the severance package offered. Given that Duke's unilaterally-prepared "Important Notice" is undeniably inaccurate, the impact on and potential prejudice to the thousands of class members who did not contact Class Counsel cannot be ignored.[2]

Class Counsel have no desire to interfere with or "blow up" Duke's VOP. Business decisions are undeniably within the province of Duke's corporate management. But supervision of this class action and protection of the sanctity and fairness of the process are exclusively the province of this Court. Whether pursuant to Rule 23 or its inherent powers, this Court has the authority to fashion a remedy that addresses the specific misconduct that has occurred. "The judge can . . . require notice to correct misinformation or misrepresentations made by one of the parties or by parties' attorneys .... Those who made the misstatements should bear the cost of a notice to correct misstatements." Manual for Complex Litigation (Fourth), ("MCL") §21.313. "The judge has ultimate control over communications among the parties, third parties, 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." MCL § 21.33. The Supreme Court has recognized the broad powers inherent in the District Court that are not dependent on specific rules of court or statutes:

> It has long been understood that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution," powers "which cannot be dispensed

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[2] Duke's counsel implied at hearing that Class Counsel, Wallace & Graham, helped draft Duke's release and notice. This simply is not true. The reference was to Wallace & Graham's insistence years ago, that Duke could not require the release of workers' compensation/occupational disease claims. The 2010 VOP communications, the Waiver and Release, the inaccurate and misleading "Important Notice," the lack of notice to or input from Class Counsel and the Court, may all be laid directly at Duke's doorstep.

> with in a Court because they are necessary to the exercise of all others." For this reason, "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, decorum, in their presence, and submission to their lawful mandates." These powers are "governed not by rule or statute but by the control necessarily vested to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."

Chambers v. Nasco, Inc., 501 U.S. 32, 43 (1991) (internal citations omitted).

Duke seeks to pigeonhole the potential prejudice to class members solely as an opt-out issue based on Plaintiffs' early briefing on the issue. Plaintiffs identified the opt-out issue based on the timing of Duke's unilateral communications directly within the opt-out period. However, the potential to confuse and mislead is not so circumscribed, as the hundreds of contacts from confused class members has shown.

Duke opposes the non-accepting class members being offered another chance at the VOP. At a minimum, however, this Court can ensure that those class members receive accurate information and an opportunity to be advised of other potential remedies. Thus, a corrective notice to serve that purpose should set forth the inaccuracies in the prior notice, include corrective information, and direct class members to Class Counsel for more information and advise on potential remedies.[3]

This Court is authorized to order corrective notices. *See Relig. Tech. Ctr. v. Henson*, 2000 U.S. App. LEXIS 15396 (9th Cir. 2000); see also Manual for Complex Litigation § 30.24, p. 273 (curative notice issued at the expense of the party at fault may be appropriate where the party at fault provided class members with inappropriate communications); *Haffer v. Temple*

[3] Duke was acting as a fiduciary, with concomitant fiduciary duties, in seeking from the participants a waiver and release of ERISA claims. *Auslander v. Helfand*, 988 F.Supp. 576, 581 (D.Md. 1997). Duke's conduct certainly fell far short of exhibiting the required lack of conflict and the required absence of fraud, undue influence and overreaching. *Id.*

Univ., 115 F.R.D. 506, 514 (E.D. Pa. 1987); *Bullock v. Auto. Club of S. Calif.*, 2002 U.S. Dist. LEXIS 7692, 13-14 (C.D. Cal. Jan. 28, 2002). "One of the policies of Rule 23's notice provision is to protect class members from misleading communications from the parties or their counsel. Thus, it is within the court's discretion to order a corrective notice to be issued to correct [an] arguably misleading statement." *In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d 1249, 1266 (D. Kan. 2006) (citations omitted); *In re Lupron(R) Mktg. & Sales Practices Litig.*, 2005 U.S. Dist. LEXIS 4039 (D. Mass. Mar. 16, 2005) (noting imposition of sanctions for sending unauthorized and misleading communications to class members, and order for corrective notice); *Belt v. Emcare Inc.*, 299 F. Supp. 2d 664, 670 (E.D. Tex. 2003) (ordering corrective notice, at expense of defendants, as well as costs, attorneys' fees and costs in bringing the motion and in connection with the corrective notice).

C. Duke's Waiver and Release as to Interest Rate Claim Should Be Negated

Duke opposes Plaintiffs' request that the Court invalidate Duke's "Waiver and Release" insofar as Duke seeks to impact the class claims for vested, accrued benefits due under the Duke retirement benefit plan.[4] Although Plaintiffs requested this relief in the initial Motion filed on January 29, 2010, Duke claims the issue was first raised in Plaintiffs' Reply brief and that the parties have not had full opportunity to brief it. The Court has now given the parties this opportunity to submit additional briefing on the issues before the Court. Thus, the release issue is properly before the Court, is ripe for adjudication, and the circumstances of Duke's improper contact with the class add urgency to resolution of the issue at this juncture.

[4] Duke also asserts that because this Motion does not address the release *vis-a-vis* named Plaintiffs' individual breach of fiduciary duty claims, Plaintiffs agree it is valid. This is of course not true. The issue simply falls outside the purview of the current Motion.

Duke has the burden of proving the validity of the release. *Shaver v. Siemens Corp.*, 2007 U.S. Dist. LEXIS 23578 (W.D. Pa. Mar. 29, 2007) ("As previously noted, it is generally recognized that the proponent of a release seeking to assert it as a defense to a cause of action bears the burden of proving the effectiveness of the release."). "The validity of a waiver of pension benefits under ERISA is subject to closer scrutiny than a waiver of general contract claims." *Davis v. Bowman Apple Prods. Co.*, 2002 U.S. Dist. LEXIS 6204, *27 (W.D. Va. Mar. 29, 2002). This is because "individuals waiving pension benefits claims are relinquishing rights that ERISA indicates a strong congressional purpose of preserving." *Linder v. BYK-Chemie USA, Inc.*, 2006 WL 648206, at *6 (D.Conn. Mar. 10, 2006) (alteration omitted) (quoting *Finz v. Schlesinger*, 957 F.2d 78, 81 (2d Cir.1992)); *see also Rivera-Flores v. Bristol-Myers Squibb Caribbean*, 112 F.3d 9, 10 (1st Cir. P.R. 1997) (noting "heightened scrutiny"); *Sharkey v. Ultramar Energy*, 70 F.3d 226, 231 (2d Cir. N.Y. 1995) (describing "closer scrutiny than a waiver of general contract claims"); *Moody v. Skaliy*, 2007 U.S. Dist. LEXIS 22307, *15 (N.D. Ga. Mar. 27, 2007) (purported waivers are "closely scrutinized to ensure that there has been a 'knowing and voluntary relinquishment of an ERISA-protected benefit.'"); *Boeckman v. A.G. Edwards, Inc.*, 461 F. Supp. 2d 801, 809 (S.D. Ill. 2006) (waiver subjected to "closer scrutiny than a waiver of general contract claims."). The Supreme Court has noted:

> The principal object of the statute [ERISA] is to protect plan participants and beneficiaries. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90, 77 L. Ed. 2d 490, 103 S. Ct. 2890 (1983) ("ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans"). Section 1001(b) states that the policy of ERISA is "to protect . . . the interests of participants in employee benefit plans and their beneficiaries." Section 1001(c) explains that ERISA contains certain safeguards and protections which help guarantee the equitable character and the soundness of [private pension] plans" in order to protect "the interests of participants in

private pension plans and their beneficiaries."

Boggs v. Boggs, 520 U.S. 833, 845 (1997).

The starting point for analysis of this issue is what Duke stated at the hearing. Duke acknowledged that it cannot require its employees to release vested ERISA benefits. Duke also agrees that the current release, despite the alteration of language from prior releases, does not require release of vested ERISA benefits. Duke also stated on the record that the current release is not different in any "material respect" from the 2007 release at Dkt 278-9 (Exhibit F to Plaintiffs' Reply).

The 2007 Release stated:

> 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 shall from benefit plans shall be made in accordance with the terms of the respective plan**. [Dkt. 278-9, p. 3 of 6].

The current 2010 release, which Duke contends is not materially different, provides:

> Claims not waived. Notwithstanding the provisions of Paragraph 4 above, **. . . with the exception of claims related to the Cash Balance litigation, this Agreement does not waive claims that may arise after the date of execution of this Agreement, including, but not limited to, claims arising under an employee benefit plan** or program maintained by the Company. [Dkt. 278-5, p. 3-4 of 8].

Taking Duke's representation at face value,[5] the meaning and intent of the releases are at best ambiguous. Duke participants who are vested in the Duke retirement Plan are entitled to

[5] In fact, it is difficult to reconcile the plain language of the new Waiver and Release with Duke's counsel's comment that there is no material change. The language on its face appears not only to cut off for the *George v. Duke* class members prior vested benefits but future claims to benefits as well. Thus, Duke sought to either preserve vested, accrued benefits under the Plan as it states on the record, or it made the conscious decision to alter course from prior releases, just for the *George* class members.

accrued benefits calculated according to the terms of the Plan. Those benefits – properly calculated – are vested, accrued benefits. It is exactly those benefits that are sought by Plaintiffs' interest miscalculation claim. The claim seeks no more and no less than vested benefits under the Plan. However, according to Duke, should this Court rule that interest credits were not properly credited to 1997 and 1998 participants' cash balance accounts in accordance with the Plan documents, the relief this Court will grant – the distribution of benefits "in accordance with the terms of the []plan," – will not be available to the employees who accepted the VOP.

Duke's release purports to preserve vested benefits, but take away the right to enforce a calculation of those vested benefits under the terms of the Plan. Duke cannot have it both ways. Consistent with the protective approach to ERISA waivers, courts have not looked with favor on the use of ambiguous waivers to bar employee benefit claims. *See, e.g. Amara v. CIGNA Corp.*, 534 F. Supp. 2d 288, 315 (D.Conn. 2008). Duke's release is unenforceable on its face.

In addition, as argued by Plaintiffs in the prior briefing, Plaintiffs' claims are the type of claims that cannot be disposed of by what Duke calls a "general release" by virtue of ERISA's anti-alienation and anti-forfeiture provisions. Dkt. 278, pp. 10-14. Duke's counter-point to this position is its view that litigation settlements relating to such benefits would also be precluded. However, just as occurs in FLSA[6] cases where releases are banned, litigating parties may always ask the court to approve a stipulated settlement. *See* Albert Feuer, "When are Releases of Claims for ERISA Plan Benefits Effective?" 38 J. Marshall L. Rev. 773, 841-42 (Spring, 2005).

[6] Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*; *see also Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704 (1945).

Exhibit B.

The Feuer law review article is a comprehensive analysis of ERISA release case law. The author noted that most courts addressing ERISA releases were not asked to address the impact of the anti-alienation and anti-forfeiture provisions of ERISA and ruled based on the issues put before them.[7] He concluded "releases in severance agreement may never deprive participants and beneficiaries of their accrued pension benefit entitlements." *Id*. at 866. Mr. Feuer observed:

> One of the key components of ERISA's protection of employee benefits is the provision of ready access to the federal courts by ERISA participants and beneficiaries who wish to challenge alleged deprivations of these benefits. In particular, release of claims for ERISA beneficiaries are void *ab initio* unless they satisfy stringent conditions. On the other hand, voiding a release does not entitle an individual to any ERISA benefits, but only to an opportunity to have a full and fair judicial determination of the claims to an entitlement to ERISA plan benefits.

Id. at 865.

In addition, Duke concedes that the Waiver and Release is not a settlement and does not include <u>any</u> consideration for release of the interest rate claims. Dkt. 275, p. 12 ("no additional sum is offered because the VOP separation payments are not advanced as a settlement offer for the interest rate class.").

"The general rule that consideration given cannot be inadequate applies to releases, and thus in order to be considered valuable the consideration must be adequate." 66 Am. Jur. 2d

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[7] The lone Fourth Circuit case allows for a "knowing and voluntary" waiver of ERISA benefits but addresses waiver in the context of the right to participate in the future in a health plan, rather than prior vested accrued benefits. *See Dist. 29, United Mine Workers v. New River Co.*, 842 F.2d 734 (4th Cir. 1988). In any event, it is inconceivable that a waiver and release procured by a party from another represented party, behind the back of counsel, presenting a direct conflict of interest and a violation of fiduciary duties owed by the Plan and the Employer, could ever be adjudged knowing and voluntary.

Release § 14. In *Sparveri v. Town of Rocky Hill*, 656 F. Supp. 2d 297, 314 (D. Conn. 2009) the Court voided a release of non-ERISA pension benefits on a finding that included lack of consideration ("there is simply nothing to indicate that Plaintiff was given anything in consideration for allegedly waiving her nonforfeitable rights under the Pension Plan.").

Here the issue of adequacy of consideration must be viewed through the prism of the relief sought by the interest rate claim. The claim seeks the benefits calculated under the terms of the Plan for all Participants during 1997 and 1998. This Court has already ruled that Duke may not assert that its calculations were compliant with the summary plan description (SPD), the defense presented by Duke on Motion for Judgment on the Pleadings. Duke is now left with an argument of semantics, stating an untenable position that the words "prior to" mean counting forward not backward. Dkt. 295-1, pp. 5-6.

A ruling by this Court in Plaintiffs' favor will confirm that employed class members' cash balance accounts understate their vested accrued benefits under the Plan. Those balances will then require adjustment. However, under Duke's argument, the Waiver and Release language precludes VOP recipients from having their vested benefits properly calculated to reflect the terms of the Plan. They will forfeit their vested benefits under the Plan and be treated differently than non-VOP recipients whose vested pension benefits will be properly calculated under the Plan. The disparity in treatment is supported by zero consideration as Duke admits. As one Court noted:

> Courts need to ensure that federally protected rights are not "undermined by private agreements born of circumstances in which employees confront extreme economic pressures or lack information regarding their legal alternatives."

Pierce v. Atchison, Topeka & Santa Fe Ry. Co., 110 F.3d 431, 437 (7th Cir. 1997).

This Waiver and Release was drafted by Duke, for its own business purposes. It is unclear even from Duke's statements what it really means. Under the elevated scrutiny of releases under ERISA, the waiver is ambiguous, it lacks consideration, and it was presented to class members under circumstances outside the control and supervision of this Court and through improper, inaccurate, misleading communications, in violation of Duke's fiduciary duties to its retirement plan participants. Duke has not carried its burden of showing the releases were knowing, voluntary, legal and thereby enforceable. Accordingly, this Court should find that the provisions of the release (including under the "shortfall" provision[8]) purporting to waive the interest rate claim to ERISA pension benefit entitlements under the Plan are invalid. In addition, the releases should be stricken pursuant to this Court's inherent authority and in light of Duke's violation of that authority and the tenets of Rule 23.

E. Attorney Fees

Plaintiffs' counsel have been forced to divert their attention from the merits of the case to address the class communications issue and the issues regarding recent late disclosure of the IRS determination letter proceeding, currently the subject of a Motion to be heard before Magistrate Judge Catoe. Plaintiffs' counsel have expended hundred of hours in attorney and staff time, including researching and briefing issues and communicating with class members. Plaintiffs respectfully request the opportunity to present a consolidated fee and cost petition following the conclusion of the pending Motions to Compel and the Motion herein.

F. Other Relief

[8] The provision at § 4 e. of the Waiver is a new attempt by Duke to make an end-run around a ruling by this Court invalidating the release language. It purports to allow no recovery unless the interest rate class recovery exceeds the severance pay, when Dukes knows it never will.

Courts possess the inherent power to protect the orderly administration of justice and to preserve the dignity of the tribunal. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-65 (1980). "Abusive practices in litigation may also lead to the imposition of sanctions, monetary or otherwise, against the offending party. It is understood that Courts are vested with certain inherent powers necessary to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Romano v. SLS Residential, Inc.*, 253 F.R.D. 292, 297 (S.D.N.Y. 2008) (internal citations and quote marks omitted). This Court is fully empowered to address the conduct of Duke and take such actions as its deems appropriately preserve the sanctity of the class action process and deter future violations.

III. CONCLUSION

Plaintiffs respectfully request that this Court issue its order in accordance herewith and for such other relief as the Court deem proper.

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