IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD 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, v. Duke Energy Retirement Cash Balance Plan, Duke Energy Corporation, Defendants.	Civil Action No.: 8:06-cv-00373-RBH **ORDER**

This matter is before the court with Plaintiffs' [Docket Entry 267] Motion Regarding Class Communications and Expedited Hearing filed on January 29, 2010. Defendants ("Duke") filed their [Docket Entry 275] Response in Opposition on February 5, 2010, to which Plaintiffs timely replied on February 8, 2010, [Docket Entry 278]. On April 19, 2010, the court held a hearing on Plaintiffs' motion.

Background

This case is a class action asserting various statutory and plan violations relating to Duke's cash balance retirement plan. On September 4, 2009, the court certified a class action consisting of a "whipsaw class" and an "interest rate class." *See* Order [Docket Entry 251] at 27. That order also instructed the parties to submit a proposed Class Notice regarding the two certified classes. *Id.* On November 13, 2009, the court approved the class notices and the plan of dissemination of notice of the class action and opt-out rights to the absent class members. Order [Docket Entry 259] at 1-3. In January 2010, Class Counsel commenced distribution of the

approved Class Notice, and pursuant to the Notice's terms, the absent class members had until March 17, 2010 to opt-out of the class action.

Also in January 2010, Duke announced a Voluntary Opportunity Plan ("VOP"), offering separation benefits to current employees, both inside and outside this class action. Generally, the VOP offered a one-time lump-sum payment to those employees that volunteered for the program, and the payment was calculated based on their years of service and base pay, among other things. Duke informed employees of the VOP through mailings, web portals, and in-person meetings. The information distributed to the employees contained a "Waiver and Release," that employees were required to sign if they wished to volunteer for the VOP, and an "Important Notice" relating to the "Waiver and Release." Both the "Waiver and Release" and "Important Notice" specifically referenced this lawsuit by its civil action number and caption, and the "Important Notice" contained information regarding this lawsuit. Duke drafted and distributed the "Waiver and Release" and "Important Notice" without notifying the court or opposing counsel. According to Class Counsel, after class members received the VOP information, Class Counsel received approximately 600 phone calls from class members with questions regarding the VOP as it relates to this class action. Class Counsel also indicated they had between 200 and 300 individual meetings with class members to discuss the VOP and this class action.

Based on the class members' response after Duke distributed the VOP information, Class Counsel filed this current motion regarding improper communications. The motion concerns only the "interest rate class" because the "whipsaw class" is composed of only former employees of Duke, and therefore none of those individuals received the VOP information. The court had a

hearing on the motion on April 19, 2010. The court also gave both parties an opportunity to file supplemental briefs regarding the issues raised at the hearing, and both parties subsequently filed supplemental briefs on April 21, 2010.

Discussion

As an initial matter, the court finds that a rule to show cause hearing is not appropriate because Duke's actions did not rise to the level of civil contempt.

> To establish civil contempt, a movant must show each of the following elements by clear and convincing evidence:
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> (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) (quoting *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 301 (4th Cir. 2000)). "Civil contempt is an appropriate sanction if [the court] can point to an order . . . which sets forth in specific detail an unequivocal command which a party has violated." *In re Gen. Motors Corp.*, 61 F.3d 256, 258 (4th Cir. 1995) (internal quotations and citations omitted). Duke argues that there is no question about the court's supervisory authority under Rule 23, but that there has been no showing of clear and convincing evidence to establish civil contempt, which requires a violation of a clear court order. While very troublesome, Duke's alleged actions do not support a finding of civil contempt. Plaintiffs have failed to point to an explicit order or command of the court that Duke violated. Plaintiffs argue that Duke's actions violated the letter and the spirit of "the orders certifying class, approving the class notice, and setting forth the notice procedure." Reply [Docket Entry 278] at 8. However, none of those orders included an explicit and unequivocal bar on

communications of the type now in question. Therefore, because Plaintiffs cannot show that Duke's actions violated or contradicted any explicit orders or commands of the court, the actions cannot sustain a finding of civil contempt. Accordingly, a rule to show cause hearing is unnecessary as to this matter.

Nevertheless, while not reaching the level of civil contempt, the court does find that Duke did in fact improperly communicate with the "interest rate class" members in this action.

> Class counsel represents the interests of all class members, including the named plaintiffs and absent class members.
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> . . . .
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> In representing a client, attorneys may not communicate about the subject of representation with persons known to be represented by another lawyer in the matter, *without the consent of the court and/or opposing counsel*. Once a class has been certified and during the pendency of the litigation, prospective members are constructively represented by class counsel. . . . The ban on communications is intended to prevent infringement of the constructive attorney-client relationship and abusive tactics by the party opposing the class.

2 ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS §§ 5:16-5:17 (4th ed. 2002) (emphasis added). "It is essential that class members' decisions to participate or to withdraw be made on the basis of independent analysis of their own self interest . . . ." *Georgine v. Amchem Prods., Inc.*, 460 F.R.D. 478, 490 (E.D. Pa. 1995) (citing *Impervious Paint Indus., Inc. v. Ashland Oil*, 508 F. Supp. 720, 723 (E.D. Ky. 1981)). "A unilateral communications scheme . . . is rife with potential for coercion," and "[u]nsupervised, unilateral communications with the plaintiff class sabotage the goal of informed consent . . . ." *Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1202, 1203 (11th Cir. 1985). Finally, "misleading communications to class members concerning litigation pose a serious threat to the fairness of the litigation process, the adequacy of representation and the administration of justice generally." *Georgine*, 460 F.R.D. at

490. In the case at bar, it is clear that Duke communicated with the "interest rate class" members, including Named Plaintiffs Matthews and Miller, regarding the subject matter of this litigation without even notifying the court or opposing counsel, or gaining the consent of either. At the hearing, Defense Counsel indicated that Duke apparently did not even notify its own defense counsel of its intention to unilaterally communicate with the class members. It is important to note that both the VOP's "Waiver and Release" and "Important Notice" contained specific references to this lawsuit. *See, e.g.*, Important Notice [Docket Entry 267-2] at 8 ("[Y]ou should be aware that a class action is pending in federal district court in South Carolina. . . . The case is entitled *George et al. v. Duke Energy Cash Balance Retirement Plain and Duke Energy Corporation*, Case No. 806-cv-373-RBH . . . ."). Moreover, these unilateral communications contained inaccurate, and possibly misleading, information[1] and occurred during the relevant opt-out period as specified by the court in its November 13, 2009 Order. Finally, after the hearing on this matter, it is clear to the court that, at the very least, the unilateral communications created unnecessary confusion among the class members during an important stage of the class action process. Plaintiffs' counsel asserted at the hearing that they received over 600 hundred phone calls regarding the VOP, and actually had to have 200 to 300 individual meetings with class members to discuss the effects of the VOP. Because Duke, without even notifying its own outside counsel or notifying and gaining the consent of the court and/or opposing counsel,

[1] The "Important Notice" referenced that an Age Discrimination in Employment Act claim was pending before this court. However, all ADEA claims in this lawsuit have been dismissed. Additionally, while the "Important Notice" identified the names, addresses, and contact information for Class Counsel in this action, the Notice failed to alert the class members that the listed attorneys were actually Class Counsel. Rather, the Notice merely stated that the attorneys listed were "[t]he lawyers who had filed the class action." Important Notice at 8.

unilaterally communicated with class members regarding the subject matter of this litigation, the court finds that such communications were improper and should not have occurred.

Moreover, because Duke improperly communicated with the class members in this action, the court finds that certain relief and sanctions are warranted. District Courts have "both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (stating that courts have the inherent power to prevent litigation abuse and "to achieve the orderly and expeditious disposition of cases"); *Romano v. SLS Residential Inc.*, 253 F.R.D. 292, 296-97 (S.D.N.Y. 2008) (citing *Gulf Oil* and *Chambers* in support of its decision to restrict communications in a class action and impose sanctions on an offending party for "[a]busive practices in litigation"). At the hearing, Duke recognized and did not dispute this inherent supervisory power of the court under Rule 23. Accordingly, the court will discuss the appropriate relief and sanctions in turn as set out in the remainder of this Order as a result of Duke's improper communications to class members.

At the hearing, the parties advised the court that 572 members of the "interest rate class" accepted the VOP offer, but only one (1) of those 572 persons opted-out of this class action. As to those 571 class members that accepted the VOP but did not opt-out, no additional notice is necessary because they are still a part of this class action and Duke acknowledges that the validity of the VOP's "Waiver and Release" is properly before the court and should be, and can be, dealt with at a final hearing. Because these class members did not opt-out of the class action and all relevant opt-out periods have concluded, their status in this lawsuit remains unchanged

and therefore they have not been prejudiced by these communications. In their Sur-Reply filed after the hearing, Plaintiffs also request that a corrective notice be sent to all class members currently employed by Duke. However, the court declines to require any such corrective notice as to the class as a whole based on the same reasoning that it declines to require a corrective notice as to the 571 class members that accepted the VOP. Additionally, it was also brought up at the hearing and the court notes that Henry Miller, a named plaintiff, is still an adequate class representative for the 571 members that accepted the VOP, because he also accepted the VOP and remained in this lawsuit challenging the validity of the VOP's "Waiver and Release."

However, the court does find that additional notice is necessary as to the one (1) class member that accepted the VOP and opted-out of this class action. "It is essential that class members' decisions to participate or to withdraw be made on the basis of independent analysis of their own self-interest, and the vehicle for accomplishing this is the class notice." *Georgine*, 160 F.R.D. at 490. Because the court has determined that this one (1) class member was exposed to improper and confusing communications and therefore possibly did not make an independent, unfettered decision to withdraw from the class action, and pursuant to this court's inherent authority to control the litigation and its duty to manage the notice to the class under Rule 23, the court therefore restores this individual as a class member and will give him a new opportunity to make an independent decision to opt-out of the class. *Id.* at 502 (citing Fed. R. Civ. P. 23; *Kleiner*, 751 F.2d at 1201). Duke will not be unfairly prejudiced by such a ruling, because "if [this] class member[] did, in fact, make a free and unfettered decision in choosing to withdraw, then [he] will do so again." *Impervious Paint Indus., Inc.*, 508 F. Supp. at 724. Accordingly, the parties are instructed to consult with each other and jointly submit to the court a proposed

additional notice to be mailed to this one (1) member generally informing him that he has been restored to this class action, the reasons surrounding his restoration, and granting him a new, unfettered opportunity to once again opt-out of this action.

The court also notes that Plaintiffs assert a variety of defenses regarding the validity of the VOP's "Waiver and Release," including lack of consideration, ERISA's anti-alienation provision, and IRS and Treasury regulations that they allege prevent an employer from requiring an employee to "give up vested pension benefits to secure a severance package." Reply at 13. Although Plaintiffs requested at the hearing that the court go ahead and rule on the validity of the VOP's "Waiver and Release," the court declines to do so. At the hearing, Duke repeatedly conceded that the issue is properly before the court, and can and should be ruled upon at a final hearing assuming that summary judgment is not granted in either parties' favor. As the issue of the validity of the waiver is an affirmative defense, it is not necessary to rule on the matter at this stage of the litigation. Plaintiffs additionally requested that the court order Duke to reopen the VOP severance program as to those class members that initially turned down the VOP benefits. However, as Duke correctly argued at the hearing, the court does not have the authority to enter such an order.[2] Neither of the classes in this action were certified regarding the VOP or its

[2] The court does note that in Duke's [Docket Entry 307] Response filed after the hearing, Duke states that it 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." [Docket Entry 307] at 2. However, as discussed above, the court does not have the authority to order Duke to undertake any actions relating to the VOP. Therefore, the court cannot and will not pass any judgment as to Duke's alleged willingness to re-open or extend the VOP severance program. That is a decision that Duke will have to make independently of this action and without any direction from the court. However, if Duke does independently decide to re-open or extend the VOP severance program, any notice or communications to be mailed to class members that touches upon the subject matter of this class action must be approved by the court and with consultation of class counsel.

benefits, and therefore the court cannot by judicial fiat extend or re-open the VOP severance program.

Additionally, as a result of Duke's improper communications to class members, the court finds that Plaintiffs are entitled to an award of reasonable attorneys' fees and costs. *See Romano*, 253 F.R.D. at 297 ("Abusive practices in litigation may also lead to the imposition of sanctions, monetary or otherwise, against the offending party.") (citing *Chambers*, 501 U.S. 32). Duke improperly communicated with class members and frustrated the purpose of Rule 23, which led to Plaintiffs filing this current motion. Plaintiffs' attorneys have had to expend time over and above that which is normally required in class actions due to Duke's improper communications. For example, Plaintiffs' attorneys advised the court at the hearing that they had received over 600 phone calls from class members regarding the VOP information, and actually had met with 200 to 300 of those individuals. Plaintiffs' attorneys have also spent additional time preparing, handling, and prosecuting this current motion. Accordingly, the court will award Plaintiffs their reasonable attorneys' fees and costs incurred in relation to this current motion and for time spent regarding the hundreds of calls and consultations regarding the VOP. Plaintiffs' attorneys are hereby directed to submit to the court a reasonable estimate of their time spent and fees incurred relating to this motion, including but not limited to their time spent filing this motion and handling the hundreds of phone calls and meetings with class members regarding the VOP's "Waiver and Release."

Finally, "Rule 23 specifically empowers district courts to issue orders to prevent abuse of the class action process." *In re Sch. Asbestos Litig.*, 842 F.2d 671, 680 (3rd Cir. 1988); *see also Gulf Oil Co.*, 452 U.S. at 100 (recognizing district court's "duty" and "broad authority" to

exercise control over class actions)). "Abusive practices that have been considered sufficient to warrant a protective order include communications that coerce prospective class members into excluding themselves from the litigation; communications that contain false, misleading or confusing statements; and communications that undermine cooperation with or confidence in class counsel." *The Kay Co. v. Equitable Prod. Co.*, 246 F.R.D. 260, 263 (S.D.W. Va. 2007) (quoting *Cox Nuclear Med. v. Gold Cup Coffee Servs., Inc.*, 214 F.R.D. 696, 698 (S.D. Ala. 2003)). "Before entry of such a[] [protective] order, there must be a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." *Great Rivers Coop. v. Farmland Indus., Inc.*, 59 F.3d 764, 766 (8th Cir. 1995). However, "[t]he plaintiffs do not have to show that actual harm has occurred, but there must be some basis on which the court can rely to limit the communication." *The Kay Co.*, 246 F.R.D. at 263. In the case at bar, the court finds that an order limiting communications between Duke and the class members on the subject matter of this litigation is warranted for all the same reasons discussed throughout this Order. Duke improperly and unilaterally communicated with the class members regarding the subject matter of this action, and that communication caused confusion among a significant number of class members during the action's opt-out period. Therefore, now that the opt-out period has closed and the members of the class are certain, the court hereby bans any future communications between Duke and the class members regarding the subject matter of this litigation, unless Duke first gets approval from the court. If Duke wishes to communicate with the class members about this litigation in the future, court approval is required without exception.

Conclusion

The court has thoroughly reviewed the motion, memoranda, and applicable law. Based on the foregoing, Plaintiff's Motion is **GRANTED** in part and **DENIED** in part. It is therefore **ORDERED** that:

(1) Duke's actions do not support a finding of civil contempt and therefore a rule to show cause hearing is not appropriate;

(2) Duke improperly communicated with class members when it unilaterally communicated with the class members regarding the subject matter of this litigation, and such communications contained inaccurate information regarding Class Counsel and the claims pending in this action;

(3) No additional or corrective notice shall be required as to any of the remaining class members;

(4) The one (1) class member that accepted the VOP and opted-out of this class action is restored as a class member. Additional and/or corrective notice is necessary as to this one (1) class member, and the parties are instructed to consult and jointly submit to the court a proposed additional notice to be mailed to this one (1) member generally informing him that he has been restored to this class action, the reasons surrounding his restoration, and granting him a new, unfettered opportunity to once again opt-out of this action;

(5) The issue of the validity of the VOP's "Waiver and Release" is an affirmative defense and the court does not need to pass judgment on the issue at this stage of the litigation;

(6) Plaintiffs are entitled to an award of reasonable attorneys' fees and costs. Plaintiffs' attorneys are hereby directed to submit to the court, within fifteen (15) days of the date of this

Order, a reasonable estimate of attorneys' fees and costs[3] incurred relating to this motion, including but not limited to their time spent filing this motion and handling the hundreds of phone calls and meetings with class members regarding the VOP's "Waiver and Release;"

(7) Any future communications between Duke and the class members regarding the subject matter of this litigation are barred, unless Duke first gets approval from the court. If Duke wishes to communicate with the class members about this litigation in the future, court approval is required, along with consultation with Class Counsel, without exception.

IT IS SO ORDERED.

s/R. Bryan Harwell
R. Bryan Harwell
United States District Judge

June 7, 2010
Florence, South Carolina

[3] In their Petition for attorneys' fees and costs, Counsel should comply with the local rules and Fourth Circuit law regarding any requested amount. Defendant shall file any response to the requested amount within fifteen (15) days from Plaintiffs' filed Petition.