IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

KENNETH WALTON GEORGE, *et al.*,	)	
	)	
Plaintiffs,	)	**C/A No.: 8:06-CV-373-JMC**
	)	
vs.	)	
	)	
DUKE ENERGY RETIREMENT CASH BALANCE PLAN, *et al.*,	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND OF FEES, COSTS AND EXPENSES

Plaintiff Clyde Freeman, on behalf of himself individually, Plaintiff George Moyers, through his surviving spouse, and Named Class Representative Plaintiffs, Kenneth George, Jim Matthews, Henry Miller and Dennis Bowen,[1] on behalf of the Whipsaw and Interest Rate Classes certified in this case, pursuant to Federal Rule of Civil Procedure 23(e), hereby submit their memorandum of law in support of the Motion for Final Approval of the class action settlement entered into with the Defendants, Duke Energy Corporation ("Duke") and the Duke Energy Retirement Cash Balance Plan (the "Plan"). Plaintiffs additionally request final approval of certain expenses incurred or to be incurred in the settlement administration process, and final approval of their request for attorneys' fees and costs, as discussed below. Plaintiffs are authorized to represent that Defendants do not oppose the Motion.

[1] In the Settlement Agreement, Kenneth George, Jim Matthews, Henry Miller, Dennis Bowen, Mr. Moyers and his surviving spouse Mrs. Moyers are defined as the "Class Representatives" and Mr. Freeman as the "Named Plaintiff." See Settlement Agreement §§ 1.12, 1.31 (Dkt. #366-1).

I. PRELIMINARY STATEMENT.

Pursuant to Fed. R. Civ. P. 23 and the Court's "Order Preliminarily Approving the Parties' Settlement Agreement and Release, Approving the Form and Manner of Notice, and Scheduling a Hearing on the Fairness of the Settlement Agreement Pursuant to Federal Rule 23(e)" ("Preliminary Approval Order") (Dkt. #373) filed February 8, 2011, this Memorandum is filed in support of Plaintiffs' Motion for Final Approval of the Settlement, responds to the two (2) objections that were filed with the Court (Dkt. #377-78) and supplements Plaintiffs' Memorandum in Support of Motion for Approval of Attorney's Fees, Costs and Incentive Awards filed February 18, 2011 (Dkt. #374) ("Fee Submission"). In accordance with all of the above and the Settlement Agreement ¶ 4.4, Plaintiffs request that at the Fairness Hearing on May 16, 2011, the Court enter the Final Order and Judgment, in substantially the form proposed by Exhibit 1[2] hereto:

a. finding that all relevant elements of Rule 23 have been satisfied, including reaffirming the existence of a class pursuant to Rule 23(b)(3);

b. finding that the Parties have complied with the requirements of the Class Action Fairness Act;

c. finding that the Mailed Notice and Publication Notice are adequate notice for purposes of Rule 23 and due process and the best notice practicable;

d. entering final judgment approving the Settlement Agreement as fair, reasonable and adequate to the Classes, and releasing the Releasees from the Released Claims;

e. approving the disbursement of the Settlement Fund in the manner described in the Settlement Agreement and Settlement Plan Amendment;

f. dismissing the Action with prejudice;

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[2] Concurrently with the Settlement Administrator's Affidavit, to be filed on May 9, 2011, Plaintiffs will also submit a proposed Order approving and awarding the attorney fees, costs and incentive awards sought by Class Counsel herein.

g. lifting any remaining restrictions on Duke's communications with employees who are Class Members, including those pursuant to the Court's orders of June 7, 2010 and June 30, 2010;

h. permanently enjoining all Class Members from instituting any action against the Releasees regarding or relating to any of the Released Claims; and

i. providing the Court with continuing jurisdiction to enforce the Final Order and Judgment.

This action involves complex claims related to the Plan, by which Plaintiffs alleged primarily certain violations of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1101, *et seq.* ("ERISA"). After five years of litigation, the Parties agreed to a settlement of $30 million in favor of the two certified classes (collectively the "Class"). The Settlement provides significant direct monetary benefits to the Class, avoids any complex claims process, and allows no reversion of funds to Duke. The Settlement is fair, reasonable and adequate given the litigation risks and all the circumstances of this matter. The Settlement provides timely benefits to the Class, for whom additional years of litigation and appeals would present an unjustified burden. This Settlement was negotiated through an experienced mediator at arms' length after several mediation sessions.

The Court previously granted preliminary approval of the Settlement in its Preliminary Approval Order dated February 8, 2011. Class Counsel thereafter provided notice to 20,103 class members through direct mail, a comprehensive class action website, and newspaper publication. The notice generated hundreds of calls from class members though the Settlement Administrator's call center. Yet only two objections to the Settlement were filed. Those objections are discussed further below. Accordingly, Plaintiffs request that the Court grant final approval of the Settlement.

II. FACTUAL BACKGROUND.

Plaintiffs refer the Court to their "Memorandum of Law in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement" filed January 31, 2011 ("Preliminary Approval Memorandum") (Dkt. #366-2) for a detailed description of the factual and procedural background of this case. See *id.* pp. 6-17. As described at length therein, this action has involved complex claims related to the Plan and primarily raised under ERISA. The litigation has involved voluminous discovery and investigation and exhaustive motions practice extending over approximately five years. In light of the background and history of this hard-fought case, it is clear that no stone was left unturned and the Plaintiffs have been fully informed of the merits and weaknesses of the claims. Thus, settlement is appropriate at this time.

III. LAW GOVERNING FINAL APPROVAL.

Rule 23(e) of the Federal Rules of Civil Procedure governs settlements of class action lawsuits. It provides that a "class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e); *see In re Jiffy Lube Sec. Litig*., 927 F.2d 155, 158 (4th Cir. 1991) (noting Rule 23(e) provides that "a class action shall not be dismissed or compromised without the approval of the court").

"The voluntary resolution of litigation through settlement is strongly favored by the courts" and is "particularly appropriate" in class actions. *South Carolina Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1423 (D.S.C. 1990); *see also Lomascolo v. Parsons Brinckerhoff, Inc.*, 2009 WL 3094955, at *10 (E.D. Va. Sept. 28, 2009) (noting judicial policy favoring the resolution of litigation through settlement, particularly in class actions and other complex litigation).[3]

[3] *See also In re Lupron Mktg. and Sales Practices Litig*., 228 F.R.D. 75, 88 (D. Mass. 2005) ("the law favors class action settlements."); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liability Litig*., 55 F.3d 768, 784 (3d Cir. 1995) ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation."); *In re Warner Communications Sec. Litig*., 618 F. Supp. 735, 740 (S.D.N.Y. 1985) ("There is little doubt that

The Manual for Complex Litigation sets forth a two-step procedure for approval of a class action settlement. As the first step, the Court reviews the proposed settlement to determine whether it warrants "preliminary approval" such that notice should be sent to class members and a final approval hearing scheduled. The Court effectuated this step through its Preliminary Approval Order dated February 8, 2011. The second step (now before the Court) is for the Court to hold the final approval hearing and determine whether the settlement should be finally approved, thereby allowing the disbursement of settlement benefits to class members. *See* Fed. R. Civ. P. 23(e); *In re Jiffy Lube Sec. Litig.*, 927 F.2d at 158-59 (4th Cir. 1991); *In re Serzone Prods. Liab. Litig.*, 231 F.R.D. 221, 223 (S.D. W. Va. 2005); *In re Mid-Atl. Toyota Antitrust Litig.*, 605 F. Supp. 440, 442 (D. Md. 1984).

> Federal Rule of Civil Procedure 23(e) mandates that the court approve any proposed settlement or compromise in a class action suit and that notice of the settlement be given to all class members. Although Rule 23(e) does not delineate a procedure for court approval of settlements of class actions, the courts generally have followed a two-step procedure. *See Armstrong v. Board of School Directors*, 616 F.2d 305, 312 (7th Cir. 1980); *In Re Mid-Atlantic Toyota Antitrust Litigation,* 564 F. Supp. 1379, 1384 (D.Md. 1983). First, the court conducts a preliminary approval or pre-notification hearing to determine whether the proposed settlement is "within the range of possible approval" or, in other words, whether there is "probable cause" to notify the class of the proposed settlement. *See Armstrong*, 616 F.2d at 314; *Toyota Antitrust Litigation*, 564 F. Supp. at 1384. Second, assuming that the court grants preliminary approval and notice is sent to the class, the court conducts a "fairness" hearing, at which all interested parties are afforded an opportunity to be heard on the proposed settlement. The ultimate purpose of the fairness hearing is to determine if the proposed settlement is "fair, reasonable, and adequate." *Armstrong*, 616 F.2d at 314; *see also In Re Ames Department Stores, Inc. Debenture Litigation,* 150 F.R.D. 46, 53 (S.D.N.Y. 1993); *Chatelain v. Prudential-Bache Securities, Inc.,* 805 F. Supp. 209, 212 (S.D.N.Y. 1992).

Horton v. Merrill Lynch, Pierce, Fenner & Smith, 855 F. Supp. 825, 827 (E.D.N.C. 1994).

A presumption of fairness attaches to the proposed settlement if it is "reached after

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the law favors settlements, particularly of class action suits.") (citations omitted). Unpublished cases cited herein are attached at Exhibit 2.

meaningful discovery [and] after arm's length negotiation conducted by capable counsel." *M. Berenson Co. v. Faneuil Hall Marketplace, Inc*., 671 F. Supp. 819, 822 (D. Mass. 1987); *Chatelain v. Prudential-Bache Sec., Inc.*, 805 F. Supp. 209, 212 (S.D.N.Y. 1992).[4] The final approval determination, necessarily, is committed to the sound discretion of the district court. *In re MicroStrategy*, *Inc. Sec. Litig*., 148 F. Supp. 2d 654, 663 (E.D. Va. 2001) (class settlements must be evaluated on a case-by-case basis, in light of the relevant circumstances); *see also Jiffy Lube*, 927 F.2d at 158 (reviewing district court's approval of a class action settlement for a clear showing that the district court abused its discretion). Courts will take into account whether the settlement was reached with the assistance of a respected and experienced mediator. *See, e.g., In re Toys "R" Us Antitrust Litig*., 191 F.R.D. 347, 352 (E.D.N.Y. 2000) ("Most significantly, the settlements were reached only after arduous settlement discussions conducted in a good faith, non-collusive manner, over a lengthy period of time, and with the assistance of a highly experienced neutral mediator[.]"). That is what occurred here. Indeed, the parties had three mediations with two experienced mediators.

In considering final approval of the Settlement, the Court is called upon to exercise its "sound discretion … to appraise the reasonableness of [the settlement] … in light of the relevant circumstances." *In re MicroStrategy, Inc. Sec. Litig*., 148 F. Supp. 2d 654, 663 (E.D. Va. 2001). The Court need not, however, "decide the merits of the case or resolve unsettled legal questions." *Carson v. Am. Brands, Inc*., 450 U.S. 79, 88 n.14 (1981). Because the object of settlement is to resolve the determination of contested issues, the approval process should not be converted into a

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[4] This presumption of fairness applies with special force here because the settlement was reached by experienced, fully-informed counsel after protracted arm's-length negotiations. "So long as the integrity of the arm's length negotiation process is preserved …. a strong initial presumption of fairness attaches to the proposed settlement." *In re PaineWebber Ltd. P'ships Litig.,* 171 F.R.D. 104, 125 (S.D.N.Y. 1997). *See also* Manual for Complex Litigation § 21.61, 21.62 (describing process of final approval and legal standard); Newberg on Class Actions § 11.41, 11.43 (same)

trial on the merits. *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988) ("the district court need not undertake the type of detailed investigation that trying the case would involve"). Instead, courts have consistently held that the function of a judge reviewing a settlement is to determine whether the proposed settlement is fundamentally fair, adequate and reasonable. "In exercising its discretion, a trial court may limit its approval hearing to what is necessary to make an informed, just and reasoned decision. Appellate courts have admonished trial courts against turning the hearing into a complete trial on the merits or even resolving unsettled legal issues." *Horton,* 855 F. Supp. at 828 (internal quote marks and citations omitted).

Courts in the Fourth Circuit have adopted a two-step analysis for determining whether a settlement is both "fair" and "adequate" and, therefore, appropriate for final approval. *Whitaker v. Navy Fed. Credit Union*, 2010 U.S. Dist. LEXIS 106094, *5 (D. Md. Oct. 4, 2010) ("The United States Court of Appeals for the Fourth Circuit has held that a class action settlement should be approved if it is both 'fair' and 'adequate.'"). Each of the steps includes factors for the Court to consider. In assessing the "fairness" of a settlement, the Court considers: (a) the posture of the case at the time the settlement was proposed; (b) the extent of discovery that had been conducted; (c) the circumstances surrounding the settlement negotiations; and (d) the experience of counsel in the area of class action litigation. *Horton,* 855 F. Supp. at 828; *In re Serzone Prods. Liability Litig*., 231 F.R.D. 221, 243-46 (S.D.W. Va. 2005); *Whitaker*, 2010 U.S. Dist. LEXIS 106094, *5-6.

In determining the "adequacy" of the settlement, the Court considers (a) the relative strength of the plaintiffs' case on the merits; (b) the existence of additional litigation; (c) the anticipated duration and expense of additional litigation; (d) the solvency of the defendants and the likelihood of recovery on the litigated judgment; and (e) the degree of opposition to the

settlement. *Whitaker*, 2010 U.S. Dist. LEXIS 106094, *5-6.

All of the fairness and adequacy factors weigh heavily in favor of this Settlement. Accordingly, the Plaintiffs respectfully request that the Court approve this class action Settlement as "fair, reasonable, and adequate" and, after the final approval hearing, enter a Final Judgment dismissing this action.

IV. SETTLEMENT TERMS.

Plaintiffs refer the Court to the extensive discussion of the Settlement terms found in their Preliminary Approval Memorandum at pp. 17-25. (Dkt. #366). To recapitulate, under the Settlement Defendants are creating a settlement fund to be funded by a combined gross amount ("Total Settlement Amount") of $30 million. This Total Settlement Amount will be allocated to provide net benefits to the Class Members in both the Interest Rate and Whipsaw Classes, to reimburse the parties for various settlement administration related expenses, and to pay attorneys' fees, litigation costs and Named Plaintiff incentive awards, in amounts to be approved by the Court. The net settlement amount is in excess of $20 million after all requested attorneys' fees, litigation costs, and Named Plaintiff incentive awards are deducted. This fund will be applied to pay to the Class Members their allocated shares of the settlement, as well as to defray the settlement administration costs.

Under the Settlement Agreement, the individual net settlement benefits to be paid to each Class Member are based upon a calculation methodology which has five basic steps. See Plan of Allocation, discussed in Settlement Agreement Section 3, and described in detail in Exhibits C and D thereto.

First, attorneys' fees, litigation costs, Named Plaintiff incentive awards, costs associated with the implementation and administration of the settlement, and any other amounts allowed by

the Settlement Agreement and approved by the Court, will be deducted from the Total Settlement Fund.

Second, the settlement funds, net of those deductions, will be allocated across the group of Class Members who are in the Interest Rate Class for whom individualized actuarial calculations demonstrate damages sustained under Plaintiffs' theory of the claim. This allocation will be calculated to pay to each affected Class Member approximately 100% of their total actual damages under this claim. Plaintiffs have established this 100% recoupment rate, because of their estimation of the relative strength of this claim and because the Total Settlement Amount achieved through the efforts of Class Counsel allows this relief. Thus, 100% of the potential damages under this claim will be determined and allocated to each of the estimated relevantly affected 17,782 members of the Interest Class.

Third, the settlement funds, net of deductions and prior allocations to the Interest Rate Class, will be allocated across the group of Whipsaw Class Members who have an "Interest Reset Whipsaw" claim, and for whom individualized actuarial calculations demonstrate damages sustained under Plaintiffs' theory of the claim. This allocation likewise will be calculated to pay to each affected Class Member approximately 100% of their total actual damages under this claim. Again, this percentage is chosen because Plaintiffs attribute high relative strength to the claim. Thus, 100% of the potential damages under this claim will be allocated to each of the impacted members of the Whipsaw Class who have "Interest Reset Whipsaw" damages.

Fourth, from the remaining funds, any participant for whom individualized damage calculations show damage allocations less than $100 will be paid or credited with a minimum allocation amount to ensure that every Class Member receives a minimum settlement of $100. There are estimated to be 7,927 Interest Rate Class members whose potential damages are less

than $100. Likewise there are approximately 1,104 Whipsaw Class members whose potential damages are estimated to be less than $100. This minimum $100 award ensures that each Class Member at least receives a minimum amount to justify the costs of administering each Settlement Award.

Fifth, the funds remaining after the above four steps are performed, will go toward paying an enhancement to the settlement award for each Whipsaw Class Member who also has a Section 5.04(c) Whipsaw claim. Plaintiffs' Section 5.04(c) claim sought to hold Duke to an interpretation of a 1999 Plan provision that would have mandated a much lower than typical discount rate. While this claim was in theory a high-dollar claim, the relative strength of the claim was low in comparison to the other claims, notwithstanding Plaintiffs' diligent efforts to vigorously advocate for their clients on the claim in prior briefing. Thus Plaintiffs have allocated the remaining funds after the first four steps above are undertaken, to enhance the whipsaw class allocation for relevant Class Members in a meaningful amount.

Each individual net settlement benefit paid to a Whipsaw or Interest Rate Class Member will be paid to Class Members by the Plan to the greatest extent possible as a tax-qualified benefit. For Class Members who are current participants in the Plan, the settlement amount will simply be credited to their notional cash balance account. Where it is possible under the Plan, Class Members will be able to elect to have their settlement amount "rolled over" into individual "IRA" retirement accounts. In the event that some or all of a Class Member's individual net settlement benefit cannot be paid as a tax-qualified benefit, the parties will cooperate to make the appropriate arrangements to have the amount paid as a non-tax-qualified benefit. See Exhibit D to the Settlement Agreement.

Over the course of the class notice process, Class Counsel have worked diligently with

Defense Counsel and all Parties' actuarial consultants to prepare the estimated settlement amounts for each Class Member pursuant to the Plan of Allocation. See Settlement Agreement (Dkt. #366-1), at Section 3, and Exhibits C and D thereto. In this regard, the Parties are preparing, with the assistance of the actuaries, their calculations of the final Settlement Awards prior to distribution. The calculation of the final amounts of the Settlement Awards for the Class Members is described in the Plan of Allocation and will be based on each Class Member's allocable share of the Net Settlement Fund, which will be determined after the Court rules on the proposed attorney's fees, costs, incentive awards, and expenses incurred in the settlement administration process. Since the Class Notice was mailed, the parties have addressed, and continue to address, specific inquiries by Class Members regarding various data items and calculations, and have continued the process of completing their due diligence in this regard.

Plaintiffs do not anticipate that the final Settlement Awards will differ significantly from the estimated Settlement Awards that were previously calculated. A detailed description of the Plan of Allocation can be found in Plaintiffs' Preliminary Approval Memorandum at pp. 20-24. The allocated Settlement Awards will be distributed pursuant to the terms of an Amendment to the Plan to be filed in due course by Defendants.[5]

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[5] The currently anticipated timing and mechanism for distributions under the Settlement Plan Amendment, assuming that the Settlement is approved on or around May 16, 2011 and no appeal taken, is as follows: The Settlement Awards for each Current Plan Participant who is employed by Duke or who has terminated employment with Duke but has not yet commenced a Plan distribution will be posted to a Settlement Subaccount within his Cash Balance Account on a date in August, 2011 to be determined by AonHewitt, and the Settlement Subaccount thereafter will be credited with interest at the Plan's interest crediting rate until the account is distributed in a lump sum or until the distribution of the account has commenced in another form of benefit then available under the Plan.

Settlement Awards of $1,000 or less but more than $200 that are payable to former Plan Participants pursuant to the Participant's direction to AonHewitt either will be paid directly to such former Plan Participant or rolled over to an eligible retirement plan. Such a Settlement Award will not earn interest and will be paid or rolled over to an eligible retirement account pursuant to AonHewitt's procedures as soon as administrably practicable, no earlier than October, 2011. Settlement Awards of

In addition to the attorneys' fees and litigation costs addressed in Plaintiffs' Fee Submission filed on February 18, 2011, Plaintiffs seek Court approval of the costs generated in the course of settlement administration. The Parties' good faith estimate of the costs incurred and to be incurred for settlement administration at the time of the filing of Plaintiffs' Preliminary Approval Motion was $791,000, subject to change based upon actual costs.[6] The actual costs and expenses related to settlement administration for which Plaintiffs seek Court approval total $804,706.92. This amount is only $13,706.92 greater than the parties' and relevant vendors' previous good faith estimate of $791,000. See Declaration of John Hughes, Esq. regarding settlement administration costs and expenses submitted herewith as Exhibit 3 ("Hughes Dec.").

With regard to the costs and expenses incurred in this action for settlement administration, the Settlement Administrator's records reflect expenses incurred in a) staffing the call center and responding to voluminous inquiries from the class members; b) designing and implementing the class action settlement website; c) securing address searches to locate class

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$200 or less will be paid directly, without interest, according to AonHewitt's procedures as soon as administrably practicable, no earlier than October, 2011.

Settlement Awards to either former Plan Participants or to Plan Participants who are receiving annuity payments will be paid to them in a lump sum or annuity distribution, as elected by such a former Plan Participant or Plan Participant, as soon as administrably practicable, no earlier than October, 2011, without any adjustment for interest. A new Cash Balance Settlement Account will be established as soon as administrably practicable, on a date in August, 2011 for any such Participant who does not elect a lump sum or annuity distribution, and such account will be credited with interest at the Plan's interest crediting rate thereafter until such account is distributed in a lump sum or until the distribution of such account has commenced in another form of benefit then available under the Plan.

Settlement Awards payable to Surviving Spouses, Beneficiaries and Alternate Payees will be similarly treated. All estimated dates will change if the Effective Date of the Settlement is pushed beyond mid-June, 2011.

[6] The past and future costs of administering the settlement, including expert actuarial assistance, third party vendors, implementation of changes to the Plan, mailing and publishing class notice, and distribution of the settlement funds were estimated through invoices, vendor quotes and internal estimates.

members; d) processing change of address / address update requests from class members; e) vendor payments for printing and mailing notice; and f) vendor payments for newspaper publication. (Hughes Dec. ¶ 2). There are 20,103 class members in the settlement. To date, the Settlement Administrator has taken approximately 1,550 phone calls from class members, and has had 178,049 hits, as well as 10,167 visits on the Duke settlement website. Approximately 15,000 settlement amounts have been checked, as well as 1,164 address updates performed, using the website. The Settlement Administrator has directly incurred at least $76,568.92 in costs and expenses related to settlement administration including: (a) $7.67 -- costs of settlement website; (b) $35,430.00 -- costs of call center and inquiry response; (c) $25,228.86 -- costs of newspaper publication of notice; (d) $15,831.57 -- costs of printing and mailing notice; and (e) $70.82 -- costs of address searches on Westlaw/Lexis. (Hughes Dec. ¶¶ 3-5).

In addition, the Settlement Administrator has received invoices for the following amounts regarding other tasks associated with the past and ongoing settlement administration in this matter totaling $728,138, as follows:

a. $57,500 – Andrew French/Pension Portal LLC: reflecting work done and to be done by the Plaintiffs' retained actuary in designing the plan of allocation, determining estimated and final amounts of Settlement Awards, and assisting with answering questions of class members. See Hughes Dec. Appendix A.

b. $88,108 – Towers Watson/Frank Reagan: reflecting work done by the Defendants' retained actuary, assisting the Parties and working with Plaintiffs' actuary in this matter. See Hughes Dec. Appendix B.

c. $511,898 – AonHewitt: reflecting work done and to be done by the Defendants' retained third party pension plan administrator, AonHewitt, with regard to implementing the Settlement, facilitating the actual payment and crediting of individual Settlement Awards to Class Members, and other related activities. The items charged involve work that AonHewitt would not have performed but for the Settlement. See Hughes Dec. Appendix C.

d. $70,632 – Northern Trust: reflecting work to be done by the Defendants' retained vendor, Northern Trust, with regard to the printing and distribution of Settlement

Awards and related materials. See Hughes Dec. Appendix D.

The settlement administration related costs and expenses for which the parties request Court approval for payment out of the settlement fund total $804,706.92. These costs and expenses are in line with administrative costs in other class actions and help to ensure that this complex settlement is administered correctly under the mandates of ERISA. Accordingly, Plaintiffs respectfully request approval of the settlement administration costs to be paid from the net settlement amount described, in the amount of $804,706.92.

V. THE SETTLEMENT SHOULD BE FINALLY APPROVED.

The Settlement herein is fair, reasonable and adequate under the circumstances and is greatly to the benefit of Class Members. As noted, the case has been fiercely and thoroughly litigated, there has been ample discovery on pertinent issues, the settlement negotiations occurred at arm's length over a protracted period of time, and the Class has been represented by experienced and capable Class Counsel.

The parties have reached an agreement after years of hard-fought litigation under which all claims will be dismissed in exchange for a Total Settlement Amount of $30 million. This Settlement represents an exceptional recovery for Class Members and should be approved.

The Agreement provides substantial benefits to both Classes and removes the risk of non-recovery or a lesser recovery and the delay that the Classes would face were this action to continue. The merits have yet to be decided on the relevant claims and, accordingly, Plaintiffs and the Class by this Settlement avoid the risk of loss on one or more of the following issues: (1) liability; (2) the availability of damages or monetary relief in the event liability is established; (3) the amount of damages; (4) whether any of the claims asserted are timely; (5) whether other affirmative defenses should overcome any recovery; and (6) whether any of Defendants' other

contentions with regard to Plaintiffs' case should prevail, all as evidenced in the voluminous filings in this case.

The net results for Class Members are substantial. Assuming the maximum award of attorney's fees under the Settlement Agreement of $9 million (30% of the Total Settlement Amount), the requested litigation cost reimbursement of $447,033.28, the requested cost reimbursement for settlement administration of $804,706.92 and the maximum requested named plaintiff incentive awards (payments totaling $115,000), Class Members will receive individual allocations from a net remaining fund of $19,633,259.80 that will be allocated based upon the Plan of Allocation. Furthermore, the Settlement Awards are being structured in a manner so as to obtain a tax-favored basis to the maximum extent possible.

The achievement of a Settlement for a gross amount of $30,000,000 represents an exceptional result. As noted in Plaintiffs' prior submissions, the Court previously dismissed, in line with other district court and appellate decisions, Plaintiffs' primary claim which would have been by far the largest claim monetarily -- that the Plan conversion was age discriminatory and unlawful *per se*. Defendants had pending before the Court summary judgment motions which, if granted, would have resulted in the dismissal of all the remaining claims in this action. Particularly in light of this posture of the litigation, the negotiated Settlement clearly is an exceptional result for the Class.

The proposed Settlement satisfies each of the criteria applied by the Fourth Circuit for reviewing a proposed class action settlement, as discussed below.

a. The Posture of the Case and the Extent of Discovery.

The Court considers the posture of the case at the time the settlement was proposed and the extent of discovery that has been conducted as a means of determining whether the parties

have sufficiently developed the case to appreciate its merits and drawbacks. *Serzone,* 231 F.R.D. at 244. There is, however, no minimum or definitive amount of discovery that must be undertaken to satisfy this fairness consideration. *Jiffy Lube,* 927 F.2d at 159. Indeed, discovery may not be necessary for the parties to fully evaluate the merits of the plaintiffs' claims. *See Jiffy Lube*, 927 F.2d at 159 (lack of formal discovery did not preclude approval class action settlement); *Horton*, 855 F. Supp. at 829 (settlement approved in which plaintiffs had received fewer than 4,000 pages of documents and two "confirmatory" depositions).

Here, there was voluminous discovery and a lengthy course of litigation prior to the Settlement. The Settlement was reached after five years of hard fought litigation that had proceeded beyond the completion of discovery and a reopened discovery period. Merits briefing on cross-motions for summary judgment had been completed comprising more than 300 pages of briefing alone, not counting exhibits. The Motion for Preliminary Approval sets forth a detailed chronology of the extensive motions practice and discovery undertaken in this case that led to settlement at the third attempt at mediation. Class Counsel conducted an extensive investigation, numerous depositions were taken, tens of thousands of documents were reviewed, and there was vigorous and repeated motion practice. The 378-entry docket for this action exemplifies the extraordinary effort that culminated in the resolution of the complex ERISA claims that were certified by the Court. Accordingly, it is clear that "plaintiffs have conducted sufficient … discovery and investigation to … evaluate the merits of Defendants' positions during settlement negotiations.'" *MicroStrategy*, 148 F. Supp. 2d at 664-65 (citation omitted).

b. Circumstances Surrounding Negotiations, Experience of Class Counsel.

Given the complexity of this litigation and the significant risks that the parties would face if the action were to proceed, the Settlement represents an excellent result for the Class. As

previously noted, the Settlement was achieved through negotiations that continued after the third attempt at mediation. An experienced and well-qualified mediator, Thomas Wills, worked tirelessly with the parties late into the night of that mediation and continued facilitating discussions in the week that followed to bring the parties together.

The Settlement resulted from arm's-length negotiations conducted by counsel with the "experience and ability … necessary to [effectuate] representation of the class's interests." *MicroStrategy,* 148 F. Supp. 2d at 665 (quoting *Wienberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982)); *see also Horton*, 855 F.Supp. at 831 (noting that "the evidence before the court demonstrates that the proposed settlement was the product of arms'-length, good-faith bargaining"). As the prior Motion and the attorney declarations previously filed demonstrate, the attorneys on both side of the table were highly experienced counsel in complex ERISA and class action matters who were able to realistically assess positions and risk, move beyond rhetoric, and craft a resolution that is in the best interest of the class. Collusion between the counsel for plaintiffs and defendants is patently unimaginable as shown by even a cursory review of the procedural history of this case.

The fact that the parties engaged in arduous settlement negotiations over many months, involving two mediators, reflects the diligence behind the Settlement. In addition, as reflected in prior filings with regard to class certification and preliminary approval, Class Counsel herein are well-qualified and experienced. *Compare Horton*, 855 F. Supp. at 831 ("No one contests class counsel's experience in class action suits in general and securities litigation in particular, as set forth in their affidavits in support of preliminary approval of the proposed settlement."). As the Court previously found in appointing the undersigned as Class Counsel, the attorneys for the Plaintiffs herein have long and extensive experience. They have successfully prosecuted

numerous class and/or complex litigation actions in state and federal courts, including other cases involving ERISA. Plaintiffs' Counsel were in a strong position to evaluate the strengths and weaknesses of their case. Based upon their experience and knowledge, Plaintiffs' Counsel believe that the Settlement achieved here is fair, reasonable, adequate and in the best interests of the Class. *Compare MicroStrategy*, 148 F. Supp. 2d at 665 (quoting *S.C. Nat'l Bank v. Stone*, 139 F.R.D. 335, 339 (D.S.C. 1991)) (court concluded that in similar circumstances, it was "appropriate for the court to give significant weight to the judgment of class counsel that the proposed settlement is in the interest of their clients and the class as a whole"); *Flinn v. FMC Corp*., 528 F.2d 1169, 1173 (4th Cir. 1975) ("While the opinion and recommendation of experienced counsel is not to be blindly followed by the trial court, such opinion should be given weight in evaluating the proposed settlement").

c. The Relative Strength of The Plaintiffs' Case on the Merits.

In evaluating the adequacy of a class action settlement the Court may consider the relative strength of Plaintiffs' case and the existence of any defenses or difficulties of proof. *Horton*, 855 F. Supp. at 831; *Flinn*, 528 F.2d at 1172; *Serzone*, 231 F.R.D. at 244; *MicroStrategy*, 148 F. Supp. 2d at 665; *S.C. Nat'l Bank*, 139 F.R.D. at 340. Here, Plaintiffs presented a strong case on the interest crediting rate claim and the interest reset component of the whipsaw claim, but even those claims were not airtight.

Defendants moved for summary judgment on the interest crediting rate claim asserting that the interpretation of the Plan Administrator was grounded in the language of the Plan, and that the interpretation advanced the purposes and goals of the Plan. Defendants contended that the court could not "impose a contrary construction -- even if reasonable -- because the administrator was properly charged to resolve any ambiguity." (Dkt. #295-1, p. 29). Had the

Court determined that the claim was one where deference to the interpretation of the Plan Administrator was required, Defendants potentially would have prevailed. Also, even if Plaintiffs prevailed, Defendants argued that the damages were lower than Plaintiffs calculated because under Plaintiffs' interpretation interest credits would actually have been lower for one quarter.[7]

With regard to the interest reset whipsaw claim, Duke moved for summary judgment relying heavily on what it argued was IRS approval of its position that the interest reset discrepancy did not mandate a whipsaw calculation, even when the calculation would not be a wash. Had the Court given significant credence to this argument, Defendants could have secured summary judgment on liability.

The defenses presented by Defendants could well have resulted in substantially less than the settlement obtains or even a zero award. The outcome would likely have turned on esoteric actuarial concepts, or the interpretation and application of ambiguously worded Treasury Regulations and guidance.

A loss on the high-risk section 5.04(c) component of the whipsaw class claim would have meant a maximum potential award on the stronger interest rate and reset whipsaw claims of $12 million using Plaintiffs' damage methodology or as little as $10 million under Defendants' methodology (and this gross recovery could have been reduced by attorneys' fees and costs). This Settlement allows full payment to class members of 100% of their gross, not net, damages under the higher damage methodology on these stronger claims, with additional minimum payments that would not have been possible through a verdict on the merits.

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[7] Because the Plan and the Summary Plan Description differed on how the interest crediting rate was determined each quarter, Plaintiffs contended that the Plan participants should be entitled to the most beneficial rate each quarter until the discrepancy was corrected, a methodology that resulted in a damage amount about $2 million greater than calculated by Defendants.

In addition, the section 5.04(c) claimants will receive a significant award forestalling the potential for a complete loss and zero award given the unique nature of the claim. This clearly represents an excellent result in obtaining settlement value on a very difficult claim. Defendants in summary judgment briefing contended that the plain language of the Plan required a conclusion that the 4% rate specified in section 5.04(c) was an interest crediting rate and not a discount rate. Plaintiffs had virtually no chance of prevailing on the section 5.04(c) whipsaw claim unless the Court found that the plain language of the Plan confirmed that the 4% rate was a discount rate and not an interest crediting rate. Plaintiffs also faced the steep hurdle of defeating the deference that may have been accorded the Plan Administrator's interpretation of the provision. While Plaintiffs presented a unique theory that they fought very hard to sustain, it is impossible to characterize this claim, based on everything that is known, as anything but high-risk.

As discussed in Plaintiffs' Preliminary Approval Memorandum, the Court previously dismissed what Plaintiffs had viewed as the "largest" of their claims, sounding in age discrimination and attacking the Plan as a whole. With regard to the remaining claims, Class Counsel frankly evaluated the strengths and weaknesses of each of the claims in determining the Plan of Allocation. The Plan of Allocation reflects a reasonable assessment of the strengths and weaknesses of the claims herein and compares very favorably to results in other class actions.[8]

In short, as to the claim of the "Interest Rate Class," the affected group of Class Members who are in the Interest Rate Class and had damages will receive approximately 100% of their

[8] "The typical recovery in most class actions generally is three-to-six cents on the dollar." *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 804 (S.D. Tex. 2008). *See also In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (approving settlement comprising 16.6% of plaintiffs' potential recovery).

total actual damages under this claim. This allocation reflects the Plaintiffs' belief that the claim was very strong. Likewise, as to the group of Class Members who are in the Whipsaw Class, and who have an "Interest Reset Whipsaw" claim and who have damages, the allocation will ensure each affected Class Member receives approximately 100% of his or her total actual damages under this claim. Again, this percentage is chosen because Plaintiffs and Class Counsel attribute high relative strength to the claim. Class Members for whom individualized damage calculations show damages less than $100 will be paid or credited with a minimum allocation amount to ensure that every class member receives a minimum settlement of $100.

Finally, all of the net settlement funds remaining after the above allocations (as well as payment for costs and expenses, fees, etc.) will go toward paying an enhancement to the settlement award for each Whipsaw Class Member who has a Section 5.04(c) Whipsaw Claim. As discussed in the Preliminary Approval Brief, this claim was a unique claim that Duke contested vigorously and a finding for Duke was quite possible. In fact, the Court itself previously noted that "Duke makes some strong arguments for dismissal of this claim." (Dkt. #195, p. 33). Nonetheless, because the Plaintiffs were able to obtain such a significant overall settlement, they have been able through the Plan of Allocation to ensure that even as to this weakest claim, the affected Class Members will receive a significant settlement amount.

In summary, the recommended Plan of Allocation is designed to ensure that Class Members with relatively stronger claims recover proportionately higher settlement benefits. All claims faced various obstacles to recovery and all claims could have been dismissed had Defendants been successful under one or more of their defenses; however, the probability of success with regard to the interest crediting rate claim (the claim held by all members of the Interest Rate Class) and the interest reset whipsaw component of the Whipsaw Class was much

greater than with regard to the whipsaw claim based on Section 5.04(c) of the 1999 Plan.[9] In summary, Plaintiffs' case on the merits was strong in some respects, weaker in others, and the settlement represents excellent value in light of these certified claims.

d. The Existence of Additional Litigation; Anticipated Expense of Further Litigation Herein.

To Class Counsel's knowledge, the Settlement will bring to a close all pending litigation against Defendants with respect to the claims alleged herein and encompassed in the scope of the release and accordingly this Settlement helps to bring closure to these pension plan issues for the company. As a result, the Settlement is the kind of resolution favored by public policy. *See Fiberglass Insulators, Inc. v. Dupuy*, 856 F.2d 652, 654 (4th Cir. 1988).

Further, there is no doubt but that absent a settlement this case would have proceeded for further years of litigation. The Court is well aware of the fact that ERISA litigation of the type presented here is a complicated, evolving and demanding area of the law. New precedents are issued frequently and can have a dramatic impact on pending cases (as indeed, was the case herein with regard to the age discrimination claims). This type of case requires the devotion of significant resources. Absent a settlement, the Defendants clearly would have continued their vigorous defense of this case up through trial. An appeal by the losing side was a certainty. The Settlement prevents the years of additional delay Class Members would have faced as well as eliminating the risk of no recovery. Thus, this factor also speaks strongly in favor of final approval. *See Horton*, 855 F. Supp. at 833 (noting additional delay and expense absent a settlement); *MicroStrategy*, 148 F. Supp. 2d at 667 ("there is little doubt that a jury verdict for

[9] Assessment of a plan of allocation under Rule 23 is governed by the same standards of review applicable to the settlement as a whole – the plan must be fair and reasonable. *E.g., Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1284, 1292 (9th Cir. 1992). The proposed allocation plan herein was explained in the Mailed Notices and meets this standard and should be approved.

either side would only have ushered in a new round of litigation in the Fourth Circuit and beyond, thus extending the duration of the case and significantly delaying any relief for plaintiffs").[10]

In the absence of settlement there is no question but that whichever party did not prevail on the merits in this case would have pursued all available appeals and additional years of litigation and appeals would have been unavoidable. As shown by Plaintiffs' Fee Submission (Dkt. #374-1, p. 29) Plaintiffs had already incurred more than $447,033 in costs when the case settled. Of this amount $241,318 had accrued in expert costs alone, even though the damage phase of the case had not yet begun and experts had not yet been deposed. (Dkt. 374-5, Appendix B; 374-6, Appendix B; 374-7, Appendix B). Clearly, continuing the case through trial and appeal would not only have greatly delayed any possible recovery to the class, but also would have dramatically increased the costs of litigation and thereby reduced any net recovery of the class.

e. The Solvency of the Defendants.

Plaintiffs had no reason to believe that Defendants could not have satisfied a large judgment, and the Settlement does not reflect any concern about collection.

f. The Degree of Opposition to the Settlement.

Class members received the best notice practicable under the circumstances, with notices being sent by direct mail to tens of thousands of identified Class Members. In addition, notice was published in appropriate regional newspapers, and a user-friendly class notice website was

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[10] Litigation over ERISA benefits can be expensive and protracted. For example, a class action brought by retirees against GM over retiree medical benefits was litigated for nine years before GM prevailed. *See Sprague v. Gen. Motors Corp*., 133 F.3d 388 (6th Cir. 1998) (*en banc*). Litigation has been similarly drawn out in other benefit cases. *See, e.g., UAW v. Yard-Man, Inc.,* 716 F.2d 1476, 1478 (6th Cir. 1983) (seven years).

established and maintained. The Settlement Administrator received numerous calls and inquiries from Class Members thereby reflecting that the class notice was reaching the Class Members. (See Exhibit 3, reflecting work done by Settlement Administrator). After this diligent notice process and after an extended, 45-day notice and objection period was afforded, there were only two filed objections to the Settlement. Neither militates against approval of the Settlement.

Mr. Byrum filed objections on March 7, 2011. His primary complaints involve perceived mistreatment by Duke in connection with his belief that he was "forced into retirement" with an inadequate severance "buy-out check." These issues are beyond the scope of the claims being litigated. This class action does not include a wrongful termination claim, nor does it challenge the computation of severance awards. Mr. Byrum's expressed dissatisfaction with his $100 settlement award does not appear to relate to the merits of the Class Claims, but instead relates back to his concerns about the manner in which his career at Duke terminated. In any event, Mr. Byrum received $100 because his prior protected plan benefit under the pre-1997 Duke pension plan exceeded any accruals under the post-1997 cash balance plan. That means Mr. Byrum had no damages derived from miscalculations or ERISA violations relating to the cash balance plan, which was the sole subject of this class action under the certified claims in this lawsuit. Accordingly, while Class Counsel are sympathetic to Mr. Byrum's circumstances, the settlement is actually generous because Mr. Byrum has incurred $0 in actual damages under the certified claims. Thus, his objection should be denied.

The second objection, received from Mr. Payseur, was filed March 21, 2011. It is a complaint about the total compensation received in the Settlement. Mr. Payseur says that the "settlement is 'cheaper' than the cost of guilt." Mr. Payseur goes on to say that "the defendants in this subject action are guilty of premeditated and purposeful deception and manipulation of

accounting for the sole purpose of financial gain for the corporation…" He provides no facts in support of his bald assertion. Accordingly, with all due respect, Mr. Payseur's complaints are simply off point. Finally, Mr. Payseur states that Duke should be "punished" by a "fine" of "Two Hundred Million Dollar[s]." Again however, there are no claims for punitive damages or fines herein, nor does Mr. Payseur provide any factual basis or support for his assertion that the settlement should be for two hundred million dollars. Accordingly, this objection as well should be denied. *See, e.g. Horton,* 855 F. Supp. 825, 833 (E.D.N.C. 1994) (class settlement approved, rejecting arguments of 15 objectors); *Rexam v. United Steel Workers of Am.*, 2007 WL 2746595, at *5, 7 (D. Minn. 2007) (approving class action settlement where four percent of class members objected); *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118-19 (3d Cir. 1990) (objections by only 10% of the class rejected); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1152 (8th Cir. 1999) (approving settlement, rejecting arguments of objectors representing fewer than 4% of the class).

Neither of the two objections states any ascertainable legal theory that would call into question the fairness of the settlement amount or the Plan of Allocation. There is no discussion of the legal merits of the certified claims, analysis of any theory by which proceeding forward on the merits would result in a better outcome for the class, or description of any defect in the Plan of Allocation. Neither objector questioned the basis or amounts of attorneys' fees sought or costs itemized for reimbursement. The objectors clearly have personal grievances against Duke that do not reflect upon the fairness and adequacy of the settlement herein.

The low number of objections supports final approval. *Compare Horton, supra; Rexam, supra*; *Stoetzner, supra*; *Petrovic, supra*; *Robinson v. Ford Motor Co.*, 2005 WL 5253339, at *5 (S.D. Ohio June 15, 2005) (holding that "a relatively small number of class members who object is an indication of a settlement's fairness"); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508,

527 (E.D. Mich. 2003) ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.").

In this case the combined number of class members exceeded 20,000. The two objections represent 0.01% of the class. Such a low objection rate is phenomenal and clearly demonstrates that the Settlement is adequate, appropriate and fair.

VI. THE ATTORNEYS' FEES AND LITIGATION COSTS REQUEST SHOULD BE FINALLY APPROVED.

As discussed in Plaintiffs' Fee Submission filed February 18, 2011 (Dkt. #374), Plaintiffs have requested that this Court enter an Order for an award of attorneys' fees of $9 million and litigation expenses in the amount of $447,033.28 from this class action settlement. Plaintiffs have further requested incentive awards for the Plaintiff Class Representatives in the amount of $20,000 each and for the Plaintiff non-Class Representative in the amount of $15,000.

In further support of the Fee Submission, Plaintiffs submit that this Court should accord great weight to the fact that none of the 20,000-plus class members, including the objectors, filed any complaints or questions regarding the basis of or amount of the attorneys' fees sought or costs itemized for reimbursement herein. This is an outstanding response affirming the reasonableness of the fees and costs sought, in clear recognition of the tremendous amount of time and effort Class Counsel devoted to obtaining a phenomenal settlement in a very complex and difficult case.

The low rate of objections is particularly significant. During the Notice period, Class members were shown their estimated benefit and told that it assumed a thirty (30%) attorneys' fee award and the requested litigation costs. The lack of objection to the requested fees and costs, from a class so sizeable, is almost unheard of and indicates the class's willingness to see Class Counsel compensated for their efforts in bringing this matter to a conclusion.

At the time of the February 18, 2011 Fee Submission, Class Counsel had documented 13,858 hours in attorney time, resulting in a lodestar ranging from $6,173,847.00 to $8,240,562.50. Depending on the hourly rate this Court deems appropriate, the lodestar multiplier still is less than 2, at 1.1 or 1.45. This nominal multiplier is further diluted by additional attorney time of more than 350 hours incurred since the February 18, 2011 filing. See Counsel Declarations attached as Exhibit 4. Accordingly, the "lodestar multiplier" described in Plaintiffs' Fee Submission, which was already low and favorable compared to other class action settlements as discussed therein, has now become even lower and more favorable.

Based upon the foregoing, as well as Plaintiffs' February 18, 2011 Fee Submission, Plaintiffs respectfully request that the Court grant their motion for attorneys' fees and costs.

CONCLUSION

Wherefore, Plaintiffs respectfully ask that their motion be granted and that the Court issue orders finally approving the proposed settlement and approving and awarding attorneys' fees and costs and settlement administration costs and expenses as discussed herein.

This the 25th day of April, 2011.

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