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Case No. 7705-

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LESLEY C. RUPP, Plaintiff, v. JAMES E. ROGERS, WILLIAM BARNET, III, G. ALEX BERNHARDT, SR., MICHAEL G. BROWNING, DANIEL R. DiMICCO, JOHN H. FORSGREN, ANN MAYNARD GRAY, JAMES H. HANCE, JR., E. JAMES REINSCH, JAMES T. RHODES, and PHILIP R. SHARP, Defendants, and DUKE ENERGY CORPORATION, Nominal Defendant.	C. A. No. ____________

DERIVATIVE COMPLAINT

Plaintiff Lesley C. Rupp, by her attorneys, derivatively on behalf of Duke Energy Corporation ("DUKE"), a Delaware Corporation, alleges the following upon personal knowledge as to Paragraph 11 and upon information and belief with respect to all other allegations of this Complaint:

INTRODUCTION AND OVERVIEW OF ACTION

1. Nature of Action. This suit challenges the breach of fiduciary duties of loyalty and care by eleven members of the DUKE Board of Directors.

2. Planned Merger Announced Subject to Various Approvals. On January 10, 2011, DUKE and Progress Energy, Inc. ("PROGRESS"), two large utilities companies, announced plans to merge, with DUKE to be the surviving

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entity. The plan and agreement of merger, approved by the Boards of Directors of both corporations, was subject to approval by shareholders of both companies and approval of certain regulatory authorities, including the Federal Energy Regulatory Commission ("FERC"), the North Carolina Utilities Commission ("NCUC"), and utilities regulatory agencies of several other states.

3. Johnson to Be CEO Post-Merger. All declarations of both companies -- press releases, applications to NCUC and other utilities regulators to approve the merger, testimony to NCUC, Securities & Exchange Commission ("SEC") filings, proxies soliciting shareholder approval, as well as the merger agreement itself, represented that, upon completion of the merger, William D. Johnson ("Johnson"), the pre-merger Chief Executive Officer ("CEO") of PROGRESS, would become the CEO of DUKE, and James E. Rogers ("Rogers"), the pre-merger CEO of DUKE, would become its executive chairman.

4. Delays. Based on delays in regulatory approvals, the merger did not close until July 2, 2012, at 4:02 p.m., 18 months after the original announcement.

5. The Conspiracy. Some weeks before closing, the pre-merger directors of DUKE decided that, upon completion of the merger, they would cause DUKE to fire Johnson, and re-install Rogers as CEO of the combined entities. They kept this planned breach of the merger agreement secret from all their constituencies -- NCUC (which holds life-and-death power over DUKE'), other utilities regulators, the shareholders of both companies, PROGRESS, and its Board.

6. Eleventh Hour Huggermugger. After they decided to fire Johnson upon the completion of the merger, but before such completion, the directors of DUKE (a) signed Johnson up to a new employment agreement on June 27, 2012, including his severance deal and (b) asked NCUC to hurry its final approval of the merger but without telling NCUC of the planned CEO switch; NCUC complied.

7. The One-Minute Manager. Instantaneously upon closing, the Board of the combined entity (comprised of the entire pre-closing Board of DUKE plus six members of the pre-closing Board of PROGRESS) held its first meeting, fired Johnson, and re-installed Rogers as CEO. The vote to fire Johnson as CEO and reinstall Rogers was 10-5, with all pre-merger DUKE Board members except Rogers in the majority and all pre-merger PROGRESS Board members voting "no." Rogers and Johnson did not participate. Though this firing was planned in advance, neither NCUC, nor other regulatory bodies, nor the SEC, nor the shareholders of either company who had approved the merger, was given any notice.

8. The Nuclear Hailstorm. The regulatory and public reaction was fast, fierce, and furious. NCUC, whose commissioners stated that they had been misled by this obvious act of bad faith, called public hearings, which are ongoing. The former lead PROGRESS Board member stated, in a widely publicized letter to the Wall Street Journal ("WSJ") that "I do not believe that a single director of PROGRESS would have voted for this transaction as structured with the knowledge that the CEO of Duke, Jim Rogers, would remain as CEO of the combined company." The Standard & Poors Bond Rating Service ("S&P") immediately put its

rating for DUKE on "watch for a possible downgrade" because of the "sudden shift in management" and changed its outlook on a possible upgrade of PROGRESS's existing debt that DUKE assumed in the merger from "positive" to "developing."

9. Damages. Damages to DUKE proximately caused by defendants' bad faith and breach of fiduciary duty are enormous and are pled herein. Plaintiff seeks redress for and on behalf of DUKE from the defendants named herein.

PARTIES

10. DUKE. Nominal Defendant DUKE is a Delaware corporation with its principal place of business at 550 South Tryon Street, Charlotte, North Carolina 28202. Its common shares are publicly traded on the New York Stock Exchange ("NYSE") under the symbol "DUK." DUKE's core business is generating, transmitting, distributing and selling electrical power, both through nuclear and coal-fired plants, and selling the power primarily for commercial and residential consumption in DUKE's regulated service areas. Since the merger on July 2, 2012, it includes PROGRESS, which is now a wholly owned subsidiary of DUKE. Most of DUKE's business is heavily regulated, at both the federal and state level.

(a) DUKE Pre-Merger. Pre-merger, DUKE's primary service areas were, in order of volume and revenue, central and western North Carolina, western South Carolina, and central and southern Indiana, and northern Kentucky, covering 50,000 square miles, four million customers, and 12 million people. In 2011, DUKE achieved operating revenues of $14.6 billion and net income of $1.7 billion.

(b) PROGRESS Pre-Merger. Pre-merger, PROGRESS was a North Carolina corporation headquartered in Raleigh, NC. PROGRESS's service areas were, in order of volume and revenue, portions of North Carolina, portions of South Carolina, and portions of Florida, covering three million retail customers. In 2011, PROGRESS achieved operating revenues of $8.9 billion and net income of $582 million.

(c) DUKE Post Merger. DUKE is now the largest utilities company in the United States both in revenues and power generation capacity. Most of its business is heavily regulated both at the federal and state level. For example, state utilities commissions' rate setting proceedings are crucial to DUKE's economic well being, as they were to both DUKE and PROGRESS pre-merger. Of these, NCUC is by far the most important state utilities commission, as 45% of DUKE's rate-regulated revenues are from customers in North Carolina.

11. Plaintiff. Plaintiff Lesley C. Rupp is a shareholder of DUKE and has been continuously since 2009. Ms. Rupp resides in Alabama. Before her marriage about two years ago, Ms. Rupp's name was Lesley C. Dicaire.

12. Rogers. Defendant James E. Rogers ("Rogers") is a director of DUKE and has been continuously since its merger with Cinergy Corp. in 2006 and Chairman of the Board of Directors since 2007. Rogers was CEO of DUKE continuously from 2006 to date, except for a few minutes on July 2, 2012, as pled throughout this Complaint. Between 1994 and 2006, Rogers served as CEO of Cynergy Corp., an energy firm.

13. Non-Executive Director Defendants. The following served on DUKE's Board of Directors before and up to the time of the merger and continue to serve on DUKE's Board of Directors:

(a) Defendant William Barnet, III ("Barnet") is a director of DUKE and has been since 2005. He is President and CEO of Barnet Development Corporation, a real estate development firm, and until 2011 was Chairman and CEO of Barnet Company, Inc., an investment firm.

(b) Defendant G. Alex Bernhardt, Sr. ("Bernhardt") is a director of DUKE and has been since 1991. He is Chairman and past CEO of Bernhardt Furniture Co.

(c) Defendant Michael G. Browning ("Browning") is a director of DUKE and has been since 1990. He is Chairman and President of Browning Investments, a real estate development company.

(d) Defendant Daniel R. DiMicco ("DiMicco") is a director of DUKE and has been since 2007. DiMicco is Chairman and CEO of Nucor Corporation, a major firm that manufactures steel and steel products.

(e) Defendant John H. Forsgren ("Forsgren") is a director of DUKE and has been since 2009. Until his retirement in 2004, Forsgren was Executive Vice President and Chief Financial Officer ("CFO") of Northeast Utilities, a large utilities and electrical power company operating in the New England states.

(f) Defendant Ann Maynard Gray ("Gray") is a director of DUKE and has been since 1994. Gray has served as DUKE's "Lead Director" since 2004. Gray is past President, Diversified Publishing Group, a business unit of ABC, Inc.

(g) Defendant James H. Hance, Jr. ("Hance") is a director of DUKE and has been since 2006. He is the retired former CFO of Bank of America Corp.

(h) Defendant E. James Reinsch ("Reinsch") is a director of DUKE and has been since 2009. He is a past Senior Vice President and Partner of Bechtel Group and past President of Bechtel Nuclear.

(i) Defendant Dr. James T. Rhodes ("Rhodes") is a director of DUKE and has been since 2001. Until his retirement in 2001, he was Chairman and CEO of the Institute for Nuclear Power, and previously served as CEO of Virginia Electric and Power Company.

(j) Defendant Dr. Philip R. Sharp ("Sharp") is a director of DUKE and has been since 2007. He was a Congressman from Indiana for 20 years. Sharp is currently President of Resources for the Future, a non-profit organization that conducts research into energy, environmental issues, and resource economics.

14. Continuing DUKE Directors. Barnet, Bernhardt, Browning, DiMicco, Forsgren, Gray, Hance, Reinsch, Rhodes, and Sharp are hereinafter sometimes collectively referred to as the "Outside Director Defendants." The Outside Director Defendants plus Rogers are hereinafter sometimes collectively referred to as the "Director Defendants."

DESCRIPTION OF SOME NON-PARTIES MENTIONED IN COMPLAINT

15. Johnson. Johnson was President of PROGRESS from 2005 until his promotion to Chairman and CEO of PROGRESS in 2007 and served in those

positions until July 2, 2012. Johnson served as CEO and a member of the Board of Directors of DUKE for a few minutes on July 2, 2012.

16. Mullin. John H. Mullin III was member of the Board of PROGRESS from 1999 until July 2, 2012 and served as PROGRESS's lead director at all relevant times until completion of the merger. He was not one of the PROGRESS directors that served on the DUKE Board upon completion of the merger.

17. PROGRESS Board Members Who Moved to Duke Board. Per the merger agreement, DUKE had the right to nominate 11 directors to the post-merger DUKE Board and PROGRESS had the right to nominate seven. DUKE nominated all eleven of its existing directors, listed above as the Director Defendants, and all eleven continue to serve. PROGRESS nominated Johnson, who resigned from the Board on the late afternoon or evening of July 2, 2012, and further nominated the following, who served on the PROGRESS Board up until closing of the merger and now serve and since July 2, 2012 have served on the DUKE Board:

(a) John D. Baker II ("Baker"), who served on the PROGRESS Board since 2009;

(b) Harris E. DeLoach, Jr. ("DeLoach"), who served on the PROGRESS Board since 2006;

(c) James B. Hyler ("Hyler"), who served on the PROGRESS Board since 2008;

(d) E. Marie McKee ("McKee"), who served on the PROGRESS Board since 1999;

(e) Carlos A. Saladrigas ("Saladrigas"), who served on the PROGRESS Board since 2001; and

(f) Theresa M. Stone ("Stone"), who served on the PROGRESS Board since 2005.

18. New Directors of DUKE. Baker, DeLoach, Hyler, McKee, Saladrigas, and Stone are collectively referred to as the "PROGRESS-DUKE Directors."

CURRENT COMPOSITION OF THE DUKE BOARD

19. DUKE Board Composition. As of the date of this complaint, the board of Directors of DUKE consists of 17 members, being the 11 Director Defendants and the seven New DUKE Directors. All of the Director Defendants have served on the DUKE Board for more than three years, at all relevant times.

FACTS

A. Distribution of Customers by State

20. The four million retail utilities customers that DUKE served before the merger and continues to serve break down by state as follows:

1.9 million are in North Carolina (47.5%);

540,000 are in South Carolina (13.5%);

690,000 are in Ohio (17.25%);

790,000 are in Indiana (19.75%); and

140,000 are in Kentucky (3.5%).

The source is DUKE's website at http://www.duke-energy.com/pdfs/de-factsheet.pdf.

21. Following the merger, the DUKE combined entity served 7.1 million retail utilities customers, and the distribution of customers by state is as follows:

3.2 million are in North Carolina (45%);

715,000 are in South Carolina (10%);

690,000 are in Ohio (9.7%);

790,000 are in Indiana (11.1%);

140,000 are in Kentucky (1.97%); and

1.6 million are in Florida (22.5%).

The source is DUKE's website at http://www.duke-energy.com/pdfs/de-factsheet.pdf.

22. It is a very bad business practice, through false statements or material omissions, to deceive or mislead or antagonize the regulatory agency that has control over the economics of one's business. Such actions can never gain protection of the Business Judgment Rule. It is a an even worse business practice for DUKE's fiduciaries to intentionally mislead and antagonize NCUC, and to publicly embarrass NCUC, the agency that controls 45% of DUKE's business, amounting to several billions of dollars in revenues and several hundreds of millions of dollars in net income each year. Yet, as pled herein, that is exactly what the Director Defendants did. And furthermore, it the Director Defendants misled NCUC's counterpart agencies in other states that were asked to, and did, approve the merger on the representation that Johnson would become the CEO of the combined entity.

B. History Leading Up to Merger Agreement

23. In late June 2010, the DUKE Board, in a two-day strategic retreat, considered a possible business combination of DUKE with PROGRESS, and the DUKE Board explicitly authorized DUKE management to explore with PROGRESS such a business combination.

24. On July 6, 2010, Rogers phoned Johnson and proposed a meeting to explore a business combination between DUKE and PROGRESS. The two CEOs discussed the strategic rationale for such a combination.

25. On July 8, 2010, the chief legal officers of the two companies began work on a confidential disclosure agreement ("CDA") so that information looking toward a possible merger might be exchanged.

26. On July 14, 2010, the Board of PROGRESS weighed a potential combination with DUKE against a proposed combination with another utility company ("Utility A"). The PROGRESS Board decided that a combination with DUKE was preferable to one with Utility A, and authorized Johnson to explore strategic rationale for the deal with DUKE.

27. On July 18, 2012, Rogers and Johnson held a personal meeting and discussed strategic aspects of a proposed merger. At that meeting, Rogers told Johnson that DUKE could be receptive to the greater emphasis on the regulated utilities business that the combination would bring to DUKE, and the two CEOs discussed regulatory matters and efficiencies related to the two companies' interconnected North Carolina and South Carolina utilities. At that meeting,

Rogers told Johnson that Rogers would be receptive to Johnson becoming CEO of the combined companies, with Rogers becoming executive chairman. Following the July 18, 2010, meeting, Mullin, PROGRESS's lead director, authorized Johnson to meet with the DUKE Board to further discussions but not to negotiate deal terms.

28. Based on the progress of the discussions between DUKE and PROGRESS, on July 19, 2010, Johnson phoned the CEO of Utility A and told him that the PROGRESS Board at that time was no longer interested in pursuing a combination with Utility A but would revisit the question in September 2010. In mid to late September 2010, Johnson confirmed to the CEO of Utility A that PROGRESS had made a final decision not to proceed further to explore a combination with Utility A.

29. On July 29, 2010, DUKE and PROGRESS entered into a mutual CDA with an 18 month standstill provision.

30. On July 29 and August 2, 2010, Johnson met separately with groups of members of the DUKE board. According to the registration statement on SEC Form S-4, Amendment 5, filed on July 7, 2011 jointly by both DUKE and PROGRESS ("the S-4"), "[F]or members of the Duke Energy Board of Directors, ***these meetings provided an opportunity for the directors to get to know Mr. Johnson*** . . . " [emphasis supplied], but there was no discussion of deal terms. Thus, the Director Defendants' process of "getting to know Mr. Johnson" began two years before the boardroom coup, the last minute nature of which caused so much damage

to DUKE. The S-4 is the document that solicited approval of the merger of the shareholders of both companies.

31. In early August, 2010, the two companies began exchanging financial information.

32. The S-4, at p. 49-50, states the following:

> Members of the Progress Energy board of directors noted that they viewed the strategic emphasis on the regulated utility business as critical to the value of the potential transaction, that the corporate governance and organizational structure of the combined company created by the combination of Duke Energy and Progress Energy would have to support that strategy, and that they viewed having Mr. Johnson as the chief executive officer of the combined company as an important element in ensuring implementation of that strategy.

Thus, it was clear that to PROGRESS, Johnson becoming CEO was a material term of the merger agreement, and the presence of the above quoted passage in the S-4, dated a year before the boardroom coup, and signed by each and every one of the Director Defendants, establishes that the Director Defendants knew this. It was also clear from the above quoted passage that PROGRESS regarded Johnson as adept at directing the combined entity's crucial regulatory affairs, a trait that Rogers has lately manifestly lacked.

33. Intensive negotiations and due diligence ensued in August and September 2010. These included, among other things, board meetings of both entities, exploration of regulatory issues, exploration of management issues, and telephonic and personal meetings between Rogers and Johnson, and initial discussion of a possible exchange ratio in a stock-for-stock merger.

34. On October 2, 2010, Rogers and Johnson met and discussed DUKE's proposed deal outline, including (a) the exchange ratio, (b) that Johnson would serve as CEO and Rogers executive chairman of the combined companies, (c) that the headquarters would be in Charlotte, NC, not Raleigh, NC, but that there would continue to be "a significant presence in Raleigh."

35. Throughout October and into mid-November 2010, negotiations and due diligence continued as to all financial, management, and regulatory aspects of the transaction. On November 15, 2010, the two CEOs and the two lead directors -- Rogers, Johnson, Gray, and Mullen -- held a meeting to discuss strategy and management design of the combined company.

36. On November 19, 2010, the DUKE board met and discussed many aspects of the proposed deal, including the proposed management roles of Rogers and Johnson. Following the meeting, the Director Defendants met with Johnson. On November 20, Johnson met with key members of DUKE management in Charlotte and Rogers met with key members of PROGRESS management in Raleigh.

37. Detailed negotiations continued throughout the remainder of November and into December 2010. On December 18, Rogers and Johnson met again to discuss a revised term sheet, including a compromise in the exchange ratio, the relative roles of Rogers and Johnson, and a proposal as to the composition of the Board of the combined entity, which was to include 11 DUKE designees (including Rogers) and seven PROGRESS designees (including Johnson), and other material

terms. Numerous conversations between Rogers and Johnson continued throughout December and into January 2011.

38. Following extensive deliberations and input from numerous outside advisors, and after various news outlets got wind of and prematurely reported a possible merger agreement, the Board of DUKE by unanimous vote approved the merger agreement on January 8, 2011, and the Board of PROGRESS by unanimous vote approved it later that day. The merger agreement was executed following the two meetings, and the two companies issued a joint press release announcing the merger agreement on January 10, 2011.

C. Certain Material Provisions of Merger Agreement

39. Under the merger agreement, each share of PROGRESS was effectively converted into a right to receive 2.6125 shares of DUKE common stock before giving effect to a one-for-three reverse stock split of DUKE common stock. This heavily negotiated exchange ratio represented a premium of approximately 7.1% over the closing price of PROGRESS common stock on January 5, 2011, the last trading day before various news outlets reported on a possible deal. The value of the consideration given to PROGRESS shareholders, measured at the market price at the time of the merger agreement, was approximately $13 billion.

40. Under the merger agreement, the merger could not be completed without the approval of the shareholders of both DUKE and PROGRESS.

41. Under the merger agreement, Johnson was to become CEO of the combined entity and Rogers was to become its executive chairman.

42. Under the merger agreement, corporate headquarters were to be in Charlotte, NC, but the corporation was to maintain a "significant presence in Raleigh, North Carolina."

43. Under the merger agreement, the obligation to complete the merger was conditioned upon receiving approval of, among others, the Federal Energy Regulatory Commission ("FERC"), the Nuclear Regulatory Commission, NCUC, the South Carolina Public Service Commission ("SCPSC"), the Kentucky Public Service Commission.

D. Events Following Execution of Merger Agreement

44. On August 2, 2011, the Kentucky Public Service Commission approved the merger based on all the representations in the merger agreement.

45. Based on such representations made in the S-4, the shareholders of DUKE approved the merger at a special meeting on August 23, 2011, and the shareholders of PROGRESS approved the merger on the same day.

46. In a later Order, dated July 6, 2012, initiating an investigation of the events that are the subject of this Complaint (the "Investigation"), NCUC accurately stated:

> On May 20, 2011, James Rogers and William Johnson filed joint written testimony with the Commission [NCUC] in the Merger Dockets in support of the proposed merger between Duke and Progress. In that testimony, Rogers stated that he would be the Executive Chairman of the Board of the combined company, and Johnson stated that he would be the Chief Executive Officer of the combined company.
>
> On September 20, 21, and 22, 2011, and on June 25, 2012, the Commission held hearings to receive testimony in the Merger

> Dockets. During the hearing on September 20, 2011, Rogers and Johnson testified jointly under oath. As part of their testimony, Rogers and Johnson reaffirmed the accuracy of the testimony they filed with the Commission on May 20, 2011.

47. NUNC effectively delayed approval of the proposed merger until FERC finally approved it. FERC imposed certain conditions on their approval of the merger, which delayed NUNC's approval. Then FERC conditionally approved the merger on June 8, 2012, subject to a joint compliance filing; DUKE and PROGRESS made the joint compliance filing on June 25, 2012, effectively completing and securing FERC's approval.

48. On June 25, 2012, DUKE and PROGRESS represented to NCUC (a) that NCUC approval was now an emergency because if the merger did not close by July 8. 2012, under the terms of the Merger Agreement, either party could walk away, and (b) that the parties wished to close on July 1, 2012. Based on this representation, NCUC reopened the hearings on June 25, 2012. As NCUC Chairman Edward S. Finley, Jr. later correctly stated at the outset of the hearing commencing the Investigation on July 10, 2012:

> The Commission reopened the hearings in the dockets on a limited basis on June 25, 2012.
>
> The Commission understood that the parties wished to close the business combination by July 1, 2012, and pursuant to the agreement between them that if the closing did not occur by July 8, 2012, either party was free to walk away from the transaction without financial penalty.
>
> In an effort to comply with the applicants' conveyed wishes, the Commission issued its Order approving the business combination, with conditions and code of conduct on June 29, 2012.

> At that time the Commission had not been made aware of any discussions or decisions concerning change in the representations with respect to the individual that would hold the position of president and CEO of The New Duke and issued its Order on the understanding, based on the sworn testimony it had received, that that individual would be William D. Johnson.

In fact, according to NCUC Commissioner Brown-Bland, DUKE then assured the Commission "there were no changes justifying reopening the hearings."

49. Each and every one of the Director Defendants knew by June 25, 2012, of the planned CEO switch, and each and every one of the Director Defendants knew that neither NCUC, nor any other regulatory agency, had been made aware of it. *A fortiori,* each and every one of the Director Defendants knew by June 29, 2012, of the planned CEO switch, and each and every one of the Director Defendants knew that neither NCUC, nor any other regulatory agency, had been made aware of it. This represents intentional wrongdoing and deceit which has brought DUKE into disrepute. Furthermore, it is a violation of criminal laws.

50. On the morning of July 2, 2012, following the lead of NCUC, the SCPSC approved the proposed merger.

51. On July 2, 2012, at 4:02 p.m. EDT, the merger was completed.

E. DUKE Board Decides to Dump Johnson Upon Close of Merger

52. Based on all of the facts pled herein, there is a reasonable inference, and we allege, that several weeks before the merger, and not later than mid May 2012, the Director Defendants made the decision to fire Johnson as CEO shortly after the merger. They agreed to do so without even seeking the input of their soon-to-be fellow directors at PROGRESS who knew most about Johnson's effectiveness.

53. The Director Defendants knew that they had represented to the SEC, to NCUC, to SCPSC, to several other regulatory bodies, as well as to their own shareholders, that upon completion of the merger, Johnson would become CEO and Rogers executive chairman of the combined entity.

54. The Director Defendants knew that by omitting to advise the SEC, NCUC, SCPSC, and numerous other regulatory bodies, as well as to their own shareholders, that they had changed their mind about top management appointments, they were materially misleading these bodies.

55. In mid-May, 2012, the DUKE Board in executive session, with Rogers excluded from the meeting, considered not allowing Johnson to serve as CEO following the completion of the merger.

56. Rogers has testified before NUNC that on June 23, 2012, and again on June 24, 2012, Director Defendants Gray (on June 23) and Browning (with Gray on June 24) advised Rogers that the DUKE Board had concluded that Johnson was not the best person to lead the combined company. They asked him if he would accept the position of CEO if they acted on that "preliminary view." Rogers replied that he would be willing to do so.

57. Rogers testified on July 10, 2012, that the Board had accumulating concerns about Johnson, primarily as to (a) style, saying he is too autocratic, (b) culture, saying he was not the best person to lead the blending of the cultures of the two companies, and (c) a PROGRESS plant at Crystal River, that had been closed at the time the merger agreement was executed and was still closed. As to Crystal

River, from Rogers testimony it appears that the difference was that Rogers and the other Director Defendants wanted to retire the plant and Johnson was working to repair it to get it back into productive use. Yet, the DUKE Board did not meet with Johnson in 2012 to tell him about their misgivings or what they had in mind. This manifests bad faith by the Director Defendants.

58. Chairman Finley stated the following on the record during Rogers' testimony on July 10, 2012:

> Nevertheless, during this time period, this Commission was holding hearings, deliberating, working on issuing an Order on the time lines that you are requesting us to do to try to get an Order out on June 29, 2012. And we are clearly operating on an assumption based on sworn testimony that you and others gave that Mr. Johnson would be president and CEO. And it appears that there was serious consideration going on within Duke that that might not be the case; is that right?

59. Chairman Finley's comment quoted in the foregoing paragraph is too charitable. It is obvious that the Director Defendants had come to this conclusion well before June 29, 2012, and simply decided not to tell NCUC (or others). Indeed, Rogers testified that the question of what the reaction of the regulatory agencies might be came up in discussion among the DUKE Board members.

60. It is a violation of the laws of North Carolina to "give false information" to NCUC or to "willfully withhold clearly specified and reasonably obtainable information" from NCUC. N.C.G.S.A. § 62-326. It is a breach of the duty of loyalty for a fiduciary to lead his corporation into illegal acts, even if the fiduciary thinks he or she is doing so for the benefit of the corporation.

61. Knowing public deceit of an agency of government is a breach of the duty of loyalty. How much worse is it if the agency deceived through a material and intentional omission is one that has life and death power over the economics of the corporation. Each and every one of the Director Defendants knew that this was the result of his action and inaction.

62. The crux of the matter is NCUC Commissioner Beatty's rhetorical question, asked of Rogers on July 10, 2012, as follows:

> But if Duke makes a representation to this Commission and you know you are not going to fulfill that beyond the closing, that as soon as the closing occurs, he's out, don't you see how that might affect the credibility at least of the company with this Commission?

F. The Boardroom Coup

63. Immediately after the merger closed, the newly expanded DUKE Board met by teleconference on the evening of July 2, 2012. According to Rogers, Rogers and Johnson were together, but after routine business the Board went into executive session, and Rogers and Johnson were told to get off the call. One other of the PROGRESS-DUKE Directors did not attend and vote. On a vote of ten to five, the Board dismissed Johnson and elected Rogers the CEO. All ten of the Outside DUKE Directors (all of the Director Defendants except Rogers) voted for the CEO switch, and all five of the PROGRESS-DUKE Directors present and voting voted against it. Instantaneously, Rogers was both Johnson's predecessor and successor.

64. Gray then spoke with Johnson about what had been decided. Johnson resigned as officer and director (having been permitted to resign with "good reason"), signed a severance agreement, and left with his severance package,

including a cash payment of $10.3 million. The value of Johnson's severance package has been reported to be in excess of $40 million, including deferred compensation and accelerated vesting of restricted stock.

65. As NCUC made clear in the hearings to date, it expects its regulated companies to follow a long-standing practice of giving NCUC a heads-up when a significant event occurs within the NCUC's purview.

66. NCUC was still not told and did not learn of this decision until Rogers attempted to phone Chairman Finley that evening. DUKE then filed a Form 8-K with the SEC the following morning, July 3, 2012, which is the first any regulatory agency or the public was advised of the switch in CEOs.

67. The Director Defendants also concealed their intentions from the investing public. As late as June 29, 2012, they caused DUKE to release a press statement and file a Form 8-K with the SEC, trumpeting the approval of NCUC, but the 8-K omitted to disclose the planned CEO switch, clearly a material fact. Numerous other SEC filings concerning the merger were made after the Director Defendants planned the boardroom coup, but it was not disclosed to the public until after the fact. Plaintiff does not allege securities fraud, but good faith practices would have required disclosure.

G. The Damaging and Foreseeable Reaction

68. Three of the five top PROGRESS executives that DUKE had hoped to retain resigned immediately as a result of the DUKE Board's actions; they are Executive Vice President John McArthur, Chief Integration and Innovation Officer

Paula Sims, and Chief Administration Officer Mark Mulhern. Their severance rights are in negotiation, and will one way or another cost DUKE substantial money. Moreover, Ms. Sims was to have played a central role in the integration of the two companies, a value now lost to DUKE.

69. Mullin, who up until the moment of the merger was lead director of PROGRESS, wrote a letter to the WSJ, reported in both the WSJ and the New York Times, and subsequently widely quoted in many major financial news sources, aptly stating the following:

> In negotiations with Duke leading to the merger our Board voted to accept a "semi merger of equals" transaction with the explicit agreement that the Progress CEO, Bill Johnson, would become the CEO of the combined company upon consummation of the merger. This was a critical element in the merger deliberations of our Board because we had confidence that Bill would successfully lead the combined companies to achieve the potential synergistic benefits of the combination. ***I do not believe that a single director of Progress would have voted for this transaction as structured with the knowledge that the CEO of Duke, Jim Rogers, would remain as CEO of the combined company.***
>
> After a long gestation period, the merger finally closed on July 2nd. As stipulated in the Merger Agreement, Bill Johnson became President and CEO of the newly combined companies -- for approximately 20 minutes!
>
> Following a short organizational meeting, the newly constituted board, which contains a majority of "Old Duke" directors, went into executive session and voted to request the resignation of Bill Johnson and the retention of Jim Rogers as the CEO of the newly combined company. In my opinion, this can only be described as an incredible act of bad faith with regard to the undertakings of the Merger Agreement. ***I think it was a clearly premeditated contravention of one of the most central tenets of our Agreement.***

> ***In my opinion, this is the most blatant example of corporate deceit that I have witness during a long career*** on Wall Street and as a director of ten publicly traded companies . . .
>
> As a non-continuing director of the combined company I now, along with similarly situated former directors of Progress, find myself without a constituency and without an ability to mount a challenge to what I believe is one of the greatest corporate hijackings in US business history.
>
> Consequently, this letter is being written in the hopes that what I believe to be a deceitful and pre-meditated contravention of good faith negotiations will not go un-noticed [sic] in the "court of public opinion."

[Emphasis added.] Unfortunately for DUKE, it did not "go un-noticed."

70. On July 3, 2012, S&P placed DUKE's debt on "watch for a possible downgrade" because of the "abrupt change in executive leadership." S&P stated that it was placing DUKE's "A-" rating on "CreditWatch Negative." DUKE had hoped that pre-existing PROGRESS debt that DUKE assumed in the merger would be upgraded by the rating agencies, but S&P negatively changed its outlook on a possible upgrade of the debt of PROGRESS and its subsidiaries from "positive" to "developing," again based on the "sudden shift in management." Such negative action and statements by either of the two large rating agencies results in higher cost of borrowing, and this was a plainly foreseeable result of the boardroom coup.

71. NCUC came under fierce public criticism for being so easily fooled. Rogers and the other Director Defendants publicly embarrassed NCUC. The reaction was foreseeable.

72. NCUC opened the Investigation on July 6, 2012. Rogers testified on July 10, 2012, and Johnson and Gray are scheduled to testify next week.

73. The Attorney General of North Carolina, Roy Cooper, has sought to intervene in the Investigation and has begun an investigation of his own.

74. Commissioner ToNola Brown-Bland of NCUC stated on the record on July 10, 2012, utility commissions in other states in which DUKE operates are "watching and listening," particularly Florida. Her clear implication is that other regulatory investigations or actions in other states besides North Carolina may follow.

75. It is likely that the Director Defendants' bad faith actions and omissions as pled herein will thwart, or at least delay, planned petitions for rate increases in North Carolina and other states in which the combined entity operates.

76. In North Carolina, DUKE has sought a one percentage point increase in the rates it charges, from a 10.5% return on equity from operations that it performs in the state to an 11.5% return. An article in Reuters dated July 11, 2012, reported that DUKE "could face a cold reception" when it seeks new power rates in North Carolina later this year. According to Robert Gruber, Executive Director of NCUC's public staff, NCUC could impose a penalty short of undoing the merger. According to the Reuters article, Gruber stated that "a percentage point or two [in rates in North Carolina] could easily top $100 million for Duke's earnings."

77. The Director Defendants' conspiracy and tactics have had a devastating effect on DUKE's credibility. As NCUC Commissioner Susan Rabon asked Rogers on July 10, 2012, "Have we as the Commission been misled, or as others have said, duped in this process to get approval of this merger?". Further,

Commissioner Rabon stated to Rogers, "I hope you can understand that I may not find your commitment as reassuring as I would have several weeks ago."

78. The National Legal and Policy Center ("NLPC"), a non-profit organization that promotes corporate ethics, referred to Rogers representations that he had no knowledge of the planned CEO switch before May 2012, and stated, "If you believe that, then Rogers has a $3.3 billion, scandal-ridden, carbon dioxide-capturing power plant in Edwardsport, Indiana that I'm sure he'd love to sell you."

79. Based on the objective facts pled herein, there is a reasonable basis, indeed a compelling basis, to believe, as Mullin stated, that the CEO switch was premeditated, deceitful, in bad faith, and in contravention of the merger agreement.

H. Director Defendants' Bad Faith

80. By the actions pled herein, the Director Defendants manifested their bad faith and consequent breach of the duty of loyalty in the following ways:

(a) Conspired to breach the merger agreement and to conceal the breach until after the closing;

(b) Conspired to vote to oust Johnson without hearing any input from, the PROGRESS-DUKE Directors who had the best opportunity to observe Johnson's effectiveness;

(c) Acted illegally under North Carolina law;

(d) Failed to advise the SEC and the investing public of facts material in light of other disclosure regarding the merger;

(e) Recklessly placed DUKE at risk by publicly embarrassing the regulatory agencies with control over DUKE's economic future;

(f) Concealed from their soon-to-be fellow directors, the PROGRESS-DUKE Directors, their conspiratorial intentions;

(g) Placed DUKE in ill repute, subjected it to widespread ridicule, and befouled its good name; and

(h) Injured DUKE's standing and ratings with the credit rating agencies.

I. Damages

81. Damages to DUKE as a result of the Director Defendants' breach of fiduciary duty include, *inter alia*, the following:

(a) Loss of prospective revenue through denial or delay of rate increases;

(b) Increase in the cost of money based on the comments, actions, possible future downgrades of, and failure to obtain upgrades from, the rating agencies;

(c) The cost of Johnson's severance package;

(d) Cost of possible severance packages of McArthur, Sims, and Mulhern;

(e) Cost of defense of the Investigation, the investigation of the North Carolina Attorney General, and possible other investigations, regulatory actions, and litigations in North Carolina and other jurisdictions; and

(f) Legal and settlement costs of possible future related litigation.

COUNT ONE

BREACH OF FIDUCIARY DUTY IN ACTIONS PRECEDING THE MERGER

82. Plaintiff alleges all of the foregoing allegations as if fully set forth herein.

83. Each Director Defendant failed to act in good faith and breached his or her fiduciary duties of loyalty and care by each of the following acts or omissions before completion of the merger:

(a) conspiring to breach the merger agreement and to conceal it until the merger was complete;

(b) knowingly permitting DUKE to conceal the planned switch in top management positions from NUNC and from other governmental and regulatory bodies;

(c) knowingly violating the laws of North Carolina and other laws;

(d) concealing the planned switch in top management from soon-to-be fellow directors;

(e) failing, through fear, sloth, misplaced collegiality, or other insupportable motives, to resolve at an earlier date, any issues or misgivings that they had with Johnson's prospective leadership; and

(f) conspiring to vote to oust Johnson without even listening to what the PROGRESS-DUKE directors have to say.

84. Director Defendants' actions and inactions preceding the merger manifested a conscious disregard of their fiduciary duties of loyalty and care.

COUNT TWO

BREACH OF FIDUCIARY DUTY IN ACTIONS FOLLOWING THE MERGER

85. Plaintiff alleges all of the foregoing allegations as if fully set forth herein.

86. Each Director Defendant failed to act in good faith and breached his or her fiduciary duties of loyalty and care by each of the following acts or omissions immediately after completion of the merger:

(a) knowingly disregarding their fiduciary duties by shutting off any input from their fellow directors regarding Johnson;

(b) knowingly breaching the merger agreement in furtherance of the conspiracy pled in COUNT ONE;

(c) knowingly violating its representations to DUKE's shareholders, including but not limited to the recent shareholders of PROGRESS;

(d) knowingly violating its representations to NCUC and its counterpart utilities agencies in other states;

(e) knowingly and recklessly jeopardizing DUKE's standing and reputation with NCUC and its counterpart utilities agencies in other states, causing probable future delays or denials of rate increases;

(f) knowingly and recklessly provoking negative actions of the credit rating agencies;

(g) knowingly incurring liability for severance pay; and

(h) recklessly incurring public opprobrium, injuring the public reputation of DUKE, and subjecting it to public ridicule.

87. As a proximate result of the these breaches of fiduciary duty, pled in COUNT ONE and COUNT TWO, DUKE has incurred and will continue to incur enormous damages, including those pled in Subsection I. of the FACT section of this Complaint.

DEMAND EXCUSAL

88. Plaintiffs did not make a pre-suit demand on the DUKE Board of Directors to bring this suit because such a demand would have been futile. Demand under Court of Chancery Rule 23.1 is excused, for the reasons that follow.

89. Eleven of the 17 directors now serving on the DUKE Board of Directors are defendants herein. Each of the Director Defendants faces a substantial likelihood that faces substantial likelihood of liability. This Complaint pleads particularized facts supporting a reasonable inference that a majority of the Board of DUKE serving on this day is subject to a nonexculpated claim for breach of fiduciary duty.

90. Plaintiff alleges that COUNT ONE as well as COUNT TWO involves Board action, and demand excusal is governed by Aronson v. Lewis, 473 A.2d 805 (Del. 1984). Under the "second prong" of the rule in Aronson, demand is excused if the challenged Board action is "so egregious on its face that Board approval cannot meet the test of business judgment, and a substantial likelihood of director liability therefore exists." Aronson, 473 A.2d at 815. Based on the allegations of this

Complaint, taken as true, the eleven Director Defendants face a substantial likelihood of liability.

91. Moreover, the eleven Director Defendants are not disinterested in this litigation the "first prong" of Aronson because the allegations in the Complaint "raise a reasonable doubt, as a threshold matter, that the protections of the business judgment rule are available to the board." Aronson, 473 A.2d at 814-815.

92. Here, among several other manifestations of actions not in good faith and consequent breach of the fiduciary duty of loyalty, this Complaint makes particularized allegations that the Director Defendants caused DUKE to act or fail to act in such a way as to violate the law. "Under Delaware Law, a fiduciary may not manage an entity in an illegal fashion, even if the fiduciary believes that the illegal activity will result in profits for the entity." Metro Comm. BVI v. Advanced Mobilecomm., 854 A.2d 121,131 (Del .Ch. 2004). Intentionally withholding material information from NCUC that prior material representations were no longer true, while pressing it to issue final approval of the merger, can never gain the protection of the Business Judgment Rule. The allegations herein easily clear this hurdle, as "plaintiff has alleged facts with particularity which, taken as true, support a reasonable doubt that the challenged transaction was the product of a valid exercise of business judgment." Aronson, 473 A.2d at 815.

93. Alternatively, if Plaintiff is wrong in deeming COUNT ONE and the bad faith actions, inactions, and conspiracy pled therein to constitute "board action," demand is nonetheless excused under the rule in Rales v. Blasband, 634 A.2d 927

(Del. 1993). Here, a majority of the Board is incapable of objectively considering a demand to bring a suit because, under the facts of this Complaint, taken as true, the Director Defendants face substantial likelihood of personal liability. Id. at 936.

WHEREFORE, Plaintiff demands judgment as follows:

A. Directing the Director Defendants to account to DUKE for, and to pay to DUKE, all damages sustained or to be sustained by them by reason of the wrongs alleged herein;

B. Directing Defendants to pay interest at the highest rate allowable by law on the damages sustained by DUKE as a proximate result of the Director Defendants' culpable conduct;

C. Awarding Plaintiffs the costs and disbursements of this action, including reasonable attorneys' fees and expenses; and

D. Granting such other and further relief as the Court may deem just and proper.

PRICKETT JONES & ELLIOTT, P.A.

By: /s/ Ronald A. Brown, Jr.

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