

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

Kenneth Walton George, Dennis)
Reed Bowen, Clyde Freeman, George)
Moyers, Jim Matthews, and Henry)
Miller, on their own behalf and on)
behalf of a class of persons similarly)
situated,)

Civil Action No. 8:06-373-RBH-WMC

Plaintiffs,)

ORDER

vs.)

Duke Energy Retirement Cash Balance)
Plan and Duke Energy Corporation,)

Defendants.)
_____)

This matter is before the court on two motions, the plaintiffs' motion to compel (doc. 263) and the plaintiffs' motion for *in camera* review, to abrogate privilege, and to compel (doc. 283), which were referred to this court by the Honorable R. Bryan Harwell, United States District Judge. The plaintiffs' amended class action complaint alleged causes of action under the Employee Retirement Income Security Act ("ERISA"). One of those causes of action is a claim for benefits under 29 U.S.C. § 1132(a)(1) based on the allegation that defendants Duke Energy Retirement Cash Balance Plan and Duke Energy Corporation (collectively referred to as "Duke") failed to properly calculate participants' lump sum distributions (the "whipsaw claim").

A hearing was held before this court on Tuesday, May 4, 2010. The plaintiffs argue that Duke should be compelled to produce certain privileged documents regarding an IRS proceeding that concerned a plan provision relevant to the whipsaw claim. The plaintiffs contend that the fiduciary exception to privilege applies to those documents. Duke

argues that the documents encompass legal advice concerning the design of an ERISA plan, which is a settlor function to which fiduciary obligations do not apply. Based upon the parties' memoranda and the arguments of counsel presented at the hearing, this court finds that the fiduciary exception applies to the documents identified by Duke as attorney-client privileged. However, the fiduciary exception does not apply to the work product documents. Accordingly, the plaintiffs' motion to compel (doc. 263) is granted in part and denied in part. The defendants must produce the documents at issue to the plaintiffs on or before May 25, 2010.

Further, the plaintiffs' motion for *in camera* review, to abrogate privilege, and to compel (doc. 283) is granted in part. The documents at issue are described in Section II of the plaintiffs' motion. The defendants must produce the document(s) at issue on or before May 25, 2010, for *in camera* review. The court will then determine whether Duke's privilege claim should be abrogated.

IT IS SO ORDERED.

s/William M. Catoe
United States Magistrate Judge

May 5, 2010

Greenville, South Carolina