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-RBH**
	)	
vs.	)	
	)	
DUKE ENERGY RETIREMENT CASH BALANCE PLAN, *et al.*,	)	
	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER

The plaintiffs respectfully submit this Memorandum in Opposition to Defendants' Motion to Transfer, showing the Court as follows:

INTRODUCTION

This action was commenced on February 6, 2006, against Duke Energy Retirement Cash Balance Plan and Duke Energy Corporation ("Duke") in the United States District Court for the District of South Carolina, Anderson Division. The Complaint alleges that the plaintiffs, and other similarly situated Duke employees and retirees, suffered losses, some as a result of Duke's conversion of its pension plan into a cash balance pension plan ("Plan") on January 1, 1997, and some as a result of Duke's violation of certain of that Plan's terms. The plaintiffs assert that the cash balance plan violates provisions of ERISA and the ADEA.

On May 5, 2006, Duke moved to change venue from the District Court of South Carolina to the Western District of North Carolina, Charlotte Division. The motion is premised on Duke's assertion that the convenience of the parties and the interests of justice warrant a transfer of

venue out of South Carolina.

STATEMENT OF FACTS

The plaintiffs are all current and former employees of Duke. Venue is proper in the District of South Carolina because the Plan is administered in this District, many of the breaches for which relief is sought occurred in this District, and at least one of the defendants can be found in this District. 29 U.S.C. § 1132(e)(2).

Duke has moved pursuant to 28 U.S.C. § 1404(a) to transfer this action to the United States District Court for the Western District of North Carolina. Duke states that venue is proper in the Western District of North Carolina because Duke Energy Corporation is a North Carolina corporation with its principal place of business located in Charlotte, North Carolina, and Duke Energy Retirement Cash Balance Plan's administrative offices are located in Charlotte, North Carolina.

As a threshold matter, the plaintiffs are informed and believe the most likely place of trial for this action is the Federal Courthouse located at 300 East Washington Street, Greenville, South Carolina. The proposed transfer would move venue to the Federal Courthouse located at 401 West Trade Street, Charlotte, North Carolina, a distance of 98.34 miles. **Exhibit A**. Duke's corporate headquarters in Charlotte, North Carolina is 96.1 miles from the Federal District Courthouse in Greenville, South Carolina. Affidavit of Krystal Clark Draughn, **Exhibit B**.

According to the computer-generated list of Duke employees and retirees by resident city and state submitted by Duke in support of the motion to transfer, 4,380 of Duke's 19,276 employees/retirees participating in the Plan reside in South Carolina and receive and/or accrue benefits within this District. Defendant's Exhibit 1, p.108 and 118. These thousands of South

Carolina employees/retirees made decisions regarding their pension plans in South Carolina.

Two of the named plaintiffs are South Carolina residents formerly employed at Duke Energy plants operating in South Carolina. Duke has not set out the number of employees/retirees who reside within the Western District of North Carolina, but states that 2,326 are Charlotte-area residents. Defendant's Memorandum in Support of Motion to Transfer Venue, p. "-v-" [5] and Affidavit of William L. Fuller, ¶ 6. Thus, neither the District of South Carolina nor the Western District of North Carolina will be home to the majority of the putative class members.

Duke maintains and operates 14 plants in South Carolina: Catawba Nuclear Station, Oconee Nuclear Station, Lee Steam Station, Lake Wylie Hydro Station, Great Falls Hydro Station, Dearborn Hydro Station, Wateree Hydro Station, Fishing Creek Hydro Station, Rocky Creek Hydro Station, Cedar Creek Hydro Station, Keowee Hydro Station, Mill Creek Combustion Turbine Station, Bad Creek Hydro Station, and Jocassee Hydro Station. **Exhibit C**. Duke maintains 24 listed offices within South Carolina. **Exhibit D**.

Since 1997, Duke has defended 24 lawsuits in South Carolina, one of which is currently being litigated in the Greenville Division of the District Court of South Carolina. **Exhibit E and F**. Of the many cases Duke has defended in federal district court in South Carolina since 1997, Duke has moved to transfer but one of them. *The Saxon Group Inc. v. Duke Energy, Inc., et al.*, C.A. No. 1:01CV00333-CMC (D.S.C.), order entered 06/26/2001. **Exhibit G**. Accordingly, Duke's own action (or inaction) objectively indicates that it does not generally consider the District of South Carolina an inconvenient forum. Moreover, although Duke was granted a transfer in the *Saxon* case, the facts of that case were very different from the facts herein. In

Saxon, the plaintiff was a Georgia corporation, no plaintiff was a resident of South Carolina, and the plaintiff's representatives would have had to travel from Georgia regardless of whether the trial was in North or South Carolina. **Exhibit G**. In *Saxon*, the only nexus between the litigation and South Carolina was one e-mail forwarded to a few of defendant Duke/Fluor Daniel's employees in Greenville. **Exhibit G**. Here, by contrast, thousands of putative class members reside and receive benefits under the Plan at issue in South Carolina, and the breaches as to those South Carolina residents occurred in South Carolina.

In 2005, an average civil case in the Western District of North Carolina, took 27 months from filing to trial, while the Courts in the District of South Carolina brought cases to trial in just 21 months. **Exhibit H**. It took the Western District of North Carolina, on average, 10.9 months from filing to disposition in civil cases, while the District of South Carolina disposed of cases in 9 months. **Exhibit H**. The Western District of North Carolina, in 2005, had 4.4% of its cases pending for more than three years, while the tally for District of South Carolina Courts was only 2.3% surpassing the three-year mark. **Exhibit H**.

All counsel for Duke are located in relative proximity to the Greenville Federal Courthouse. Duke's local counsel practices in Greenville, South Carolina, and Alston & Bird is located in Atlanta, Georgia, much closer to the Greenville Federal Courthouse than to Charlotte.

Duke notes that substantial records maintained by its consultants regarding benefits are maintained in Charlotte, North Carolina. Duke also indicates that records pertaining to the accrued benefits of the Plan participants are maintained in electronic format at an undisclosed location. The two major consulting firms referenced by Duke, William M. Mercer, Inc. and Hewitt & Associates, Inc., are both located within one-hundred (100) miles from the likely trial

venue, 98.30 miles and 98.31 miles, respectively. **Exhibits I and J**.

Two of the six named plaintiffs reside in South Carolina. All of the named plaintiffs, including the ones who reside outside of South Carolina, have stated that they will not be inconvenienced by this case being litigated and tried in the Anderson Division of the District Court of South Carolina. Affidavits of named plaintiffs, *see, e.g.*, **Exhibits K, L, M, and N**.

SUMMARY OF ARGUMENT

Duke's Motion should be viewed in the context of modern technology and the nominal distances involved. The Honorable G. Ross Anderson succinctly described the impact of modern technology on transfer motions in a case seeking transfer from the District of South Carolina to a District Court in Minnesota:

> [A]s is apparently recognized in Commercial's response to the transfer motion, in this day of photocopying and modern air transportation the burden of witness and document transportation to a large and highly solvent defendant (especially in a case in which over one million is at issue) cannot be regarded as an overriding consideration.

Reigel Textile Corp. v. Employers Ins. Co. of Wausau, 1980 U.S. Dist. LEXIS 15329, at *8 (D.S.C. Dec. 2, 1980).

Thousands of South Carolina residents, employed at Duke plants all over this state, have been deprived of pension benefits through breaches of ERISA and the ADEA by Duke occurring within South Carolina. The individuals that Duke characterizes as key witnesses are its own employees and consultants, whose presence Duke is well able to procure whether a trial takes place in Greenville or Charlotte. Additionally, many parts of Charlotte lie within the 100-mile radius of the Greenville Federal Courthouse for the purpose of compelling attendance of any unwilling Charlotte witnesses at trial.

Some documents relevant to the case are located in Charlotte, but Duke concedes that substantial numbers of the documents are maintained in electronic format, thus the ease of access and transfer of electronic documents deprives this factor of any significant impact. Discovery concerning Duke's documents will take place where the documents are located whether this case is tried in Greenville or Charlotte.

Duke entered this state and established more than a dozen large sites of employment. It has litigated in the Courts of South Carolina many times and is by no means a stranger to this forum.

The balance of convenience in this case, given the nominal distance courthouse to courthouse, does not outweigh the deference given to plaintiffs' choice of forum, particularly given this state's interest in protecting the pension benefits of thousands of its residents. In addition, the South Carolina District Courts, while having a slightly heavier docket that the Western District of North Carolina, have historically brought cases to trial and completion more quickly, potentially affording relief to the putative class herein in a more timely manner.

ARGUMENT

I. Venue is Proper in This District

Duke does not dispute the propriety of venue in this district, and for good reason. ERISA § 502(e)(2) provides that an action "may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found." 29 U.S.C. § 1132(e)(2). Duke's pension plan was administered in South Carolina because Duke operates facilities in South Carolina and employees of those facilities were participants in Duke's pension plan.

"[M]ost courts have found that in ERISA benefit claims the alleged breach occurred in the district where the beneficiary receives, or should have received, his benefits." *Cross v. Fleet Reserve Ass'n Pension Plan*, 383 F. Supp. 2d 852, 856 (D. Md. 2005); *see also Schrader v. Trucking Employees of N. Jersey Welfare Fund, Inc.-Pension Fund*, 232 F. Supp. 2d 560, 573 (W.D.N.C. 2002); *Toy v. Plumbers & Pipefitters Local Union No. 74 Pension Plan*, 2005 U.S. Dist. LEXIS 21568, at *8 (E.D. Pa. 2005); *Coulter v. Office and Prof'l Employees Int'l Union*, 2003 U.S. Dist. LEXIS 13958, at *7 (E.D. Tenn. 2003); *Cole v. Cent. States Southeast*, 227 F. Supp. 2d 190, 195 (D. Mass. 2002); *Brown Schools, Inc. v. Florida Power Corp.*, 806 F. Supp. 146, 149 (W.D. Tex. 1992); *Helder v. Hitachi Power Tools, Ltd.*, 764 F. Supp. 93, 95 (E.D. Mich. 1991); *Wallace v. Am. Petrofina, Inc.*, 659 F. Supp. 829, 832 (E.D. Tex. 1987); *Bostic v. Ohio River Co. Basic Pension Plan*, 517 F. Supp. 627, 636 (D. W.Va. 1981).

A beneficiary receives his or her benefits where he or she resides. *Cross*, 383 F. Supp. 2d at 856; *Schrader*, 232 F. Supp. 2d at 573. A substantial number of the breaches alleged in plaintiffs' complaint took place in South Carolina because thousands of employees who participated in Duke's pension plan lived in South Carolina and, thus, should have received their benefits in South Carolina.

Duke can be "found" in South Carolina because in an ERISA case "a defendant plan can be 'found' in a district in which a plaintiff's place of employment is located and in which he earns pension credits." *Cross*, 383 F. Supp. 2d at 855. Thousands of the putative class members work or worked in one or more of Duke's 14 plants in South Carolina and earn their pension credits here. Two of the named plaintiffs worked in South Carolina plants and earned their

pension credits here.[1]

II. Duke's Burden of Proof to Justify a Transfer of Venue is a Heavy One

Section 1404(a) of the United States Code provides that "[f]or the convenience of parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). Section 1404(a) gives discretion to the district court "to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.'" *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964)).

"The burden is on the moving party to show that transfer to another forum is proper." *Cross*, 383 F. Supp. 2d at 856. Courts are to consider (1) the convenience of the parties; (2) the convenience of the witnesses; and (3) the interests of justice. *Red Light, LLC v. Am. Traffic Solutions, Inc.*, 206 U.S. Dist. LEXIS 10195, at *11-12 (D.S.C. Feb. 23, 2006).

"Generally, the test of whether an action should be transferred to another jurisdiction is one of balancing convenience. Unless the balance is strongly in favor of the movant, the plaintiff's choice of forum should rarely be disturbed." *Avant v. Traveler's Ins. Co.*, 668 F.Supp. 509, 510 (D.S.C. 1987); *see also Morehead v. Barksdale*, 263 F.2d 117 (4th Cir. 1959); *Figgie Int'l, Inc. v. Destileria Serralles, Inc.*, 925 F. Supp. 411, 414 (D.S.C. 1996); *Regent Lighting Corp. v. Galaxy Elec. Mgf., Inc.*, 933 F. Supp. 507, 513 (M.D.N.C. 1996). Furthermore, the

---

[1] The ADEA does not have a specific venue provision, so venue for the ADEA claims are determined by the general venue provision found in 28 U.S.C. § 1391, which provides that an action may be brought in a judicial district where a substantial part of the events or omissions giving rise to the claim occurred. 28 U.S.C. § 1391(b). As stated above, a substantial number of the alleged breaches occurred in South Carolina, therefore, the District of South Carolina is a proper venue under the Code.

burden on the defendant to establish the propriety of a transfer is "especially heavy" where the action is for collection of pension contributions allegedly owed by the employer under ERISA. *Int'l Bhd. of Painters & Allied Trades Union v. Best Painting & Sandblasting Co.*, 621 F. Supp. 906, 907 (D.D.C. 1985).

III. Plaintiffs' Choice of Forum is Entitled to Substantial Deference

Courts routinely accord great deference to the plaintiff's choice of a forum when considering requests to transfer venue on the basis of convenience. *See Bennett v. Bally Mfg. Corp.*, 785 F. Supp. 559 (D.S.C. 1992); *Fairchild Semiconductor Corp. v. Nintendo Co.*, 810 F. Supp. 173, 175 (D.S.C. 1992). Duke argues that this well-established presumption should be ignored because (a) this is an ERISA action; (b) South Carolina purportedly has no connection with the claims asserted; and (c) plaintiffs seek to certify a class action.

A. Impact of ERISA action on Plaintiffs' Choice of Forum

Contrary to Duke's assertion, the plaintiff's choice of forum in an ERISA action is entitled to greater – not lesser – weight. In *Cross v. Fleet Reserve Association Pension Plan*, the court denied a motion to transfer where the case had been filed in a proper venue under 29 U.S.C. § 1132(e)(2). 383 F. Supp. 2d at 856. The court accorded "considerable weight" to the plaintiffs' choice of venue because the alleged breach of the pension plan occurred in that district and because of "Congress's stated intent to provide ERISA claims liberal venue provision." *Id.* at 856-57. The *Cross* court's reasoning is in accord with standard practice both in and outside the Fourth Circuit. *See Schrader*, 232 F. Supp. 2d at 573-74 (noting the recognized congressional intent regarding ERISA to provide plaintiffs with ready access to the federal courts by giving the venue provisions of ERISA a broad interpretation); *Trs. of the Plumbers &*

Pipefitters Nat'l Pension Fund v. T.L. Servs., Inc., 2000 U.S. Dist. LEXIS 19162, *2 (E.D. Va. 2000) ("The plaintiff's venue selection deserves substantial weight, particularly in ERISA cases."); *Boilermaker-Blacksmith Nat'l Pension Fund v. Gendron*, 67 F. Supp. 2d 1250, 1257 (D. Kan. 1999) (noting that disturbing plaintiffs' chosen venue is more difficult in an ERISA case because of its special venue provision); *Briesch v. Auto. Club*, 40 F. Supp. 2d 1318, 1322 (D. Utah 1999) (finding Congressional policy favors plaintiff's choice of forum in ERISA actions); *Kiely v. Shores Group*, 1993 U.S. Dist. LEXIS 14496, at *14 (D. Kan. 1993) ("[T]he weight given to plaintiffs' choice of forum must be increased somewhat to reflect Congressional policies favoring plaintiffs' choice of venue in ERISA actions."); *Trs. of Nat'l Automatic Sprinkler Indus. Pension Fund v. Best Automatic Fire Prot., Inc.*, 578 F. Supp. 94, 96 (D. Md. 1983) (stating that 29 U.S.C. § 1132(e)(2) encourages courts to accept the venue in which ERISA actions are filed); *Ballinger v. Perkins*, 515 F. Supp. 673, 675 (W.D. Va. 1981) (concluding that the ERISA venue provision is intended to expand, rather than restrict, the range of permissible venue locations). Thus, this Court should give "considerable weight" to plaintiffs' choice of the District of South Carolina as its venue because an appreciable quantity of the ERISA violations occurred in South Carolina, where many of the plaintiffs reside.

B. Connection Between South Carolina and Plaintiffs' Causes of Action

Duke argues that plaintiffs' choice of forum is entitled to little deference, based on what it characterizes as "virtually no contacts" between the chosen forum and the causes of action. Defendant's Memorandum in Support of Motion to Transfer Venue, p. "-x-" [10]. A plaintiff's choice of forum should only "yield where . . . the 'operative facts of [the] case have *no material connection* with [the] district.'" *Westmoreland v. CBS, Inc.*, 1982 U.S. Dist. LEXIS 18364, at

*11 (D.S.C. 1982) (citing *Credit Alliance Corp. v. Nationwide Mutual Insurance Company*, 433 F. Supp. 688, 689 (S.D.N.Y. 1977)) [emphasis added]. As shown by the facts stated above, Duke's premise is simply wrong.

Duke maintains more than a dozen large employment sites in the State of South Carolina and employs thousands of workers who are participants in the pension plan at issue. The benefits are deemed to accrue for these thousands of employees and retirees in the State of South Carolina. These employees received their benefits in South Carolina, and the alleged breaches are deemed to have occurred in South Carolina.

In support of their argument, Duke cites to *Pothier v. Bank of America Corp., et al.*, C.A. No. 3:04CV00458-GPM-PMF (S.D. Ill.), order entered 05/18/2005. However, in *Pothier*, of the 111,800 putative class members, only 100 accrued benefits in the Southern District of Illinois, while 11,500 accrued benefits in the Western District of North Carolina. Unlike this case, none of the named plaintiffs in *Pothier* resided in the transferor state. In the case at hand, Duke's own submissions establish that 4,380 class members live and accrue benefits in the District of South Carolina, whereas, the number residing in the Western District of North Carolina is not set out by Duke – it simply argues that 2,326 are Charlotte-based. Defendants' Memorandum in Support of Motion to Transfer Venue, p. "-v-" [5], Affidavit of William L. Fuller, ¶ 6, and Defendant's Exhibit 1, p.108 Also, common sense dictates recognition that the convenience issues before the district court in *Potheir*, where the choice was between courts in Illinois and North Carolina, were much more acute than here, where the two competing districts are contiguous and the two courthouses are but a short drive apart – less than 100 miles.

C. Choice of Forum in Class Action Litigation

Duke acknowledges that plaintiffs' choice of forum is entitled to great deference, albeit somewhat lessened in the class action context. Defendants' Memorandum in Support of Motion to Transfer Venue, p. "-viii-" [8]. Contrary to Duke's assertion, the degree to which plaintiffs' choice of forum is considered in a class context varies from court to court – it is not "well-settled" that plaintiffs' choice carries "little weight" or is "irrelevent." The cases cited to by Duke, *Nelson v. Aim Advisors, Inc.*, 2002 U.S. Dist. LEXIS 5101 (D. Ill. March 8, 2002) and *Georgouses v. Natec Res., Inc.*, 963 F. Supp. 728 (N.D. Ill. 1997), have been criticized in their own circuit as not stating good law. *See Chamberlain v. U.S. Bancorp Cash Balance Ret. Plan*, 2005 U.S. Dist. LEXIS 25571, *10-11 (S.D. Ill. 2005) (criticizing *Nelson* and *Georgouses* and stating that the Seventh Circuit has held that a "class action plaintiff's forum choice should enter into the transfer analysis.").

It is indisputable that plaintiffs' choice of forum in this case is entitled to deference and, as shown herein, Duke has made no showing sufficient to overcome that deference and to warrant a transfer of venue.

IV. Convenience of the Parties

Duke has frequently engaged, without complaint, in litigation within the District of South Carolina and is presently involved in litigation in the Greenville Division of the South Carolina District Court. **Exhibits E and F**. In only one of 24 cases documented on PACER, has Duke felt the need to move to transfer venue. In that particular case, there were no parties residing within South Carolina and the sole tie to this District was one e-mail. **Exhibit G**.

The "inconvenience" which forms the basis for Duke's motion is the less than 100-mile

distance between the Greenville Federal Courthouse and the Federal Courthouse in Charlotte – a short 98.25 miles by car. Most of the cases cited by Duke deal with distances that would require air travel. In looking at a similar distance in analyzing a transfer motion, the District Court for the Southern District of Texas noted that "it is not as if the key witnesses will be asked to travel to the wilds of Alaska or the furthest reaches of the Continental United States." *Continental Airlines, Inc. v. Am. Airlines, Inc.*, 805 F. Supp. 1392, 1397 (S.D. Tex. 1992); *see also Senior Settlements, LLC v. Growth Trust Fund*, 2005 U.S. Dist. LEXIS 25091, at *10 (D.N.J. Oct. 26, 2005) (characterizing a 100-mile distance as "less than a two-hour car ride" and noting "[t]his is not a circumstance which makes attendance in court unusually difficult for Mr. Steinmatz or other Defendants."); *Turner v. Grand Casinos of Mississippi, Inc.*, 1994 U.S. Dist. LEXIS 17201, at *3 (E.D. La. Nov. 28, 1994) (stating that the less than 100-mile distance between Gulfport, MS and New Orleans, LA was "not a significant burden"); *Abraham v. Exxon Corp.*, 1994 U.S. Dist. LEXIS 1045, at *4 (E.D. La. Feb. 2, 1994) (holding the inconvenience factor to be "relatively minor" based on distance between courthouses in Baton Rouge and New Orleans of "less than 100 miles"); *Leesona Corp. v. Duplan Corp.*, 317 F. Supp. 290, 300 (D.R.I. 1970) (denying motion to transfer where distance between two forums, 200 miles, was relatively short).

"'[E]asy air transportation, the rapid transmission of documents and the abundance of law firms with nationwide practices makes it easy . . . for cases to be litigated with little extra burden in any of the major metropolitan areas.'" *Chamberlain*, 2005 U.S. Dist. LEXIS 25571, at *9 (quoting *Bd. of Trs. v. Elite Erection, Inc.*, 212 F.3d 1031, 1037 (7th Cir. 2000)).

In addition, "venue should not be transferred to another district if doing so would simply shift the inconvenience from one party to another." *Schrader*, 232 F. Supp. 2d at 573; *see also*

McDevitt & Street Co. v. Fidelity & Deposit Co., 737 F. Supp. 351, 354 (W.D.N.C. 1990) ("[A] court should refrain from transferring an action if the transfer merely would shift the inconvenience from one party to another."). Although Duke Energy Corporation's principal place of business and the Plan's administrative offices are located in North Carolina, a large number of the putative plaintiffs reside in South Carolina and the transfer of venue would simply shift the burden from Duke and the North Carolina-based witnesses and plaintiffs to the South Carolina-based plaintiffs, a shift which case law does not allow.

V. Convenience of Witnesses

Thousands of the potential class members in this action are residents of South Carolina and/or work in South Carolina, many of the alleged breaches occurred in South Carolina, and Duke is currently involved in litigation in South Carolina.

The "key" witnesses Duke references in its motion are for the most part its own employees. Where, "the key witnesses are (at least allegedly) employees of the party seeking transfer, their convenience is entitled to less weight because that party will be able to compel their testimony at trial." *Continental Airlines, Inc.*, 805 F. Supp. at 1397.

Also, other than stating that its "key" witnesses are located in North Carolina, Duke has failed to present any evidence that these witnesses will be unduly burdened if the trial is held in South Carolina or why it believes witnesses would refuse to cooperate with a subpoena from the District of South Carolina. *See Figgie International, Inc.*, 925 F. Supp. at 414 ("Counsel's assertion of hardship, without affidavits from the parties and/or witnesses who are purportedly going to be inconvenienced, is insufficient to convince the court that venue should be changed."); *Chamberlain*, 2005 U.S.Dist. LEXIS 25571, at *11-12 ("Defendant does not indicate

why this witness testimony will be critical, nor does it explain why it believes these witnesses would refuse to cooperate with a subpoena from this court."); *Dakotas & W. Minn. Elec. Workers Health & Welfare Fund v. All County Elec. Co.*, 2002 U.S. Dist. LEXIS 4250, at *6 (D.N.D. Feb. 25, 2002) (moving that defendant failed the "convenience of witnesses" prong because it made no showing that, for example, its witnesses might not be willing to appear in the forum state or that if such witnesses would be unwilling to appear, that their deposition testimony would be inadequate).

The plaintiffs are informed and believe that the most likely location of the trial is the Greenville Federal Courthouse. The distance from Duke's Charlotte offices to the Greenville courthouse is only 96.1 miles, which is within the 100-mile radius and will cause minimal inconvenience to witnesses, even if they have to travel from Charlotte to Greenville. Fed. R. Civ. P. 45(b)(2); Affidavit of Krystal Clark Draughn, **Exhibit B**. Also, many of the potential witnesses may live in areas between Charlotte and Greenville, making travel to either one just as convenient. Furthermore, all of the named plaintiffs prefer that the case remain in the District of South Carolina. Affidavits of named plaintiffs, *see, e.g.*, **Exhibits K, L, M, and N**.

VI. Interests of Justice

Duke asserts that the location of documents is "of primary importance in this action"; however, there is no logical reason for this contention because Duke will have to produce the documents during this litigation, either by making them available for review at their Charlotte office or by producing the documents electronically to plaintiffs. In this day and age of the electronic courtroom it is highly unlikely that Duke will arrive at the trial with moving vans of hard-copy exhibits. Thus, the location of Duke's documents is of little importance. *See Red*

Light, LLC, 2006 U.S. Dist. LEXIS 10195, at *11 ("Defendant can better bear the expense and hardship of having representatives travel from Arizona, as well as having administrative processes transported to South Carolina via paper or electronic format."); *Abraham*, 1994 U.S. Dist. LEXIS 1045, at *5 ("Discovery can be conducted and documents reviewed where they are located. The inconvenience of producing those needed for trial exhibits in New Orleans rather than in Baton Rouge would be minimal considering the proximity of the courthouses."); *Continental Airlines, Inc.*, 805 F.Supp. at 1398 (finding the location of defendant's records insufficient to compel change of venue); *Manu Int'l, S.A. v. Avon Prods., Inc.*, 641 F.2d 62, 65 (2nd Cir. 1981) (transportation of documents a minor inconvenience "in light of realities of modern transportation and communication.").

In addition, to determine if a transfer is in the interests of justice, a court may consider the court's familiarity with the applicable law and the speed at which the case will proceed to trial. *Chamberlain*, 2005 U.S.Dist. LEXIS 25571, at *11-12. In this case, the plaintiffs are alleging breaches of federal law, not state law, and, therefore, "the genesis of the substantive law does not supply a significant connection to the putative transferee forum." *Quinton Instrument Co. v. Datascope Corp.*, 1996 U.S. Dist. LEXIS 22740, at *11 (E.D. Va. June 3,1996).

Also, Duke points out that the average civil caseload among judges in the Western District of North Carolina is lower than in the District of South Carolina and, thus, the case should be transferred. However, in 2005, it took the Western District of North Carolina, on average, 27 months from filing to trial, while the District of South Carolina did the same in 21 months. In 2005, it took the Western District of North Carolina, on average, 10.9 months from filing to disposition in civil cases, while the District of South Carolina disposed of cases on

average in 9 months. Tellingly, 4.4% of civil cases in the Western District of North Carolina are more than 3 years old. In the District of South Carolina, only 2.3% remained undisposed of after three years. Thus, while the District of South Carolina may have a slightly heavier caseload than the Western District of North Carolina, on average, cases in the South Carolina district are disposed of more quickly. **Exhibits J and K**.

CONCLUSION

The plaintiffs have established venue under 29 U.S.C. § 1132(e)(2) because the Plan is administered in South Carolina, many of the alleged breaches took place in South Carolina, and Duke may be found in South Carolina. The facts clearly do not support a transfer of venue under 28 U.S.C. § 1404(a). Therefore, this Court should deny Duke's motion to transfer.

Respectfully submitted,

By: /s/ Thad L. Myers
Thad L. Myers (Fed. I.D. No. 6260)
Charles W. Whetstone, Jr. (Fed. I.D. No. 4604)
Cheryl F. Perkins (Fed. I.D. No. 4969)
WHETSTONE MYERS PERKINS & YOUNG, L.L.C.
PO Box 8086
Columbia, SC 29202
(803) 799-9400 Telephone
(803) 799-2017 Facsimile
tmyers@attorneyssc.com
cwhetstone@attorneyssc.com
cperkins@attorneyssc.com

James R. Gilreath (Fed. I.D. No. 2101)
William M. Hogan (Fed. I.D. No. 6141)
THE GILREATH LAW FIRM, P.A.
PO Box 2147
Greenville, SC 29602
(864) 242-4727 Telephone
(864) 232-4395 Facsimile
jim@gilreathlaw.com
bhogan@gilreathlaw.com

Mona Lisa Wallace (Fed. I.D. No. 7216)
WALLACE & GRAHAM, P.A.
525 North Main Street
Salisbury, NC 28144
(704) 633-5244 Telephone
(704) 633-9434 Facsimile
mwallace@wallacegraham.com

ATTORNEYS FOR PLAINTIFFS

Greenville, South Carolina

May 19, 2006