

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

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

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION FOR STAY OR, IN THE ALTERNATIVE,
FOR AN EXTENSION OF TIME**

On April 13, 2006, plaintiffs filed a motion seeking class certification. Defendants' response to this motion is due on or before May 15, 2006. On May 5, 2006, defendants filed a motion to transfer venue in this matter to the Western District of North Carolina. Defendants simultaneously filed the within motion to stay, requesting that the class certification issue be stayed pending the court's resolution of the motion to transfer venue or, in the alternative, that the Court grant a sixty-day extension of time and permission to conduct discovery.

Defendants assert that the venue issue is a threshold matter that should be resolved before the substantive issue of class certification. Defendants also claim that this Court's Specialized Case Management Order precludes discovery and thereby prevents defendants from engaging in discovery concerning class certification issues.

The circumstances of this litigation do not warrant the imposition of a stay. Courts have frequently decided motions to transfer venue and to certify a class simultaneously. *See McCoy v. Meridian Auto. Sys., Inc.*, 2004 U.S. Dist. LEXIS 29219 (D. Mich. 2004) (denying defendants' motion to transfer venue and granting plaintiffs' motion for class certification at the same hearing);

Jolly v. Pittore, 1992 U.S. Dist. LEXIS 11527 (D.N.Y. 1992) (denying defendants' motion to transfer and granting plaintiff's motion for class certification in the same order); *Alix v. Shoney's, Inc.*, 1997 U.S. Dist. LEXIS 1963 (D. La. 1997) (denying both the plaintiffs' motion for class certification and the defendant's motion to transfer venue in the same order).

This case has been filed for approximately three months and defendants admitted in their answer that venue is proper in this District. Although defendants stated in their answer that the United States District Court for the Western District of North Carolina, Charlotte Division, would be a more convenient forum, they delayed raising the issue by motion until the plaintiffs' motion for class certification was filed. Granting defendants' motion to stay at this juncture will result in a delay of the litigation and is unwarranted. Plaintiffs' motion for class certification should not be tabled for the "convenience" issue defendants now seek to move to the forefront of this litigation.

Additionally, neither a stay nor a sixty-day extension of time for defendants to engage in discovery is warranted. Rule 23(c)(1)(A) requires that a court must "determine by order whether to certify the action as a class action" at "an early practicable time." Fed. R. Civ. P. 23(c)(1)(A). "[I]t is within the trial court's discretion to schedule discovery and decide whether and how much discovery is warranted to determine any certification questions." *In re Alford Chevrolet-Geo, et al.*, 997 S.W.2d 173, 182-83 (Texas 1999). Some of the factors a court should consider when determining the scope of pre-certification discovery include the importance, benefit, burden, expense, and time needed to produce the proposed discovery. *Id.*

In this case, the issues related to class certification are already within the knowledge of defendants. Defendants possess complete information concerning their employees, the employees' and retirees' cash balance accounts, the cash balance conversion, and all other aspects of the pension plan at issue. This action is also of a type that is uniquely suited to class certification. *See, e.g.*,

Richards v. FleetBoston Financial Corp., 2006 U.S. Dist. LEXIS 15601 (D.Conn. March 31, 2006) (certification of a class action alleging cash balance plan violated various ERISA provisions); *Cooper v. IBM Personal Pension Plan and IBM Corporation*, C.A. No. 99-829-GPM (S.D. Ill. September 17, 2001) (certification of class action involving cash balance plan of ERISA and ADEA issues). See attached Exhibit A. Thus, “class certification” discovery would serve no useful purpose.

In addition, defendants failed to delineate for this Court the areas in which they purportedly are lacking the information to respond to the class certification motion. They have failed to define the parameters of the discovery requested. Thus, they have failed to meet their burden of demonstrating sufficient grounds warranting a grant of pre-certification discovery.

In conclusion, plaintiffs respectfully request that this Court deny defendants’ motion to stay class certification and deny defendants’ request for a sixty-day extension of time and permission to conduct discovery. Plaintiffs do not object to a brief extension of time for defendants to complete their responsive filing.

Respectfully submitted,

/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
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

Columbia, South Carolina

_____, 2006