

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ANDERSON 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,)

Plaintiffs,)

v.)

CASE NO.: 8:06-cv-00373-RBH

DUKE ENERGY RETIREMENT CASH)
BALANCE PLAN and DUKE ENERGY)
CORPORATION,)

Defendants.)

MEMORANDUM IN SUPPORT OF MOTION TO TRANSFER VENUE

INTRODUCTION

Plaintiffs, on behalf of a putative class, have sued Duke Energy Retirement Cash Balance Plan (“Plan”) and Duke Energy Corporation (“Duke” or “Company”), claiming violations of the Employee Retirement Income Security Act of 1974 (“ERISA”) and the Age Discrimination in Employment Act (“ADEA”). In their complaint, Plaintiffs attack the design of the Plan, the process and implementation of the conversion of the benefit formula, the ongoing operation and administration of the Plan, the benefits provided to Plan participants, and the communication of the Plan. To the extent these issues are not resolved on purely legal grounds, their resolution will require voluminous evidence pertaining to the design, implementation, and administration of the Plan, and Duke’s intent in those activities. The documents and witnesses comprising this evidence are

almost exclusively located in Charlotte, North Carolina, and every material event described in the Complaint occurred there.

Although Plaintiffs could have filed suit in a district with numerous significant connections to the claims asserted, they have chosen instead to file the suit in a district with no significant connection to the litigation. No events pertinent to the lawsuit occurred in Anderson, South Carolina, and no witnesses or documents pertinent to these events are here. All but one of the six named Plaintiffs lives in or near the most convenient forum – the Charlotte Division of the Western District of North Carolina. Accordingly, and for the reasons more fully set forth herein, Defendants are entitled to have venue transferred from this Court to the United States District Court for the Western District of North Carolina – Charlotte Division pursuant to 28 U.S.C. § 1404(a).

STATEMENT OF FACTS

Duke, a Fortune 500 company, is a diversified energy company with natural gas and electric businesses. As an energy company, Duke supplies, delivers, and processes energy for its customers. (Rolfe Aff. ¶ 4.) Duke's headquarters are in Charlotte, North Carolina. (Rolfe Aff. ¶ 6.) Duke's Board of Directors normally meets in Charlotte. As Christopher Rolfe states in his Affidavit, he knows that there has not been a Board of Directors meeting in Anderson, South Carolina, since he became head of Human Resources in 1994, and he is not aware of any Board of Directors meeting having been held in Anderson prior to that time. (Rolfe Aff. ¶ 8.) Duke's electric utility coverage includes the western part of South Carolina. (Rolfe Aff. ¶ 7.)

The Plan is a defined benefit pension plan as described in ERISA, 29 U.S.C. § 1102(35), and is funded by contributions from Duke and its affiliated companies.

(Jefferies Aff. ¶ 4.) The Plan is administered by a Benefits Committee, which is responsible for all material aspects of the administration of the Plan and serves as the “Plan Administrator” as defined in ERISA, 29 U.S.C. § 1102(16)(A). (Jefferies Aff. ¶ 5.) At all times relevant to the Complaint, all members of the Benefits Committee were employed at Duke’s Charlotte office in the Western District of North Carolina. (*Id.* ¶ 5.) The Benefits Committee meets regularly and exclusively in Charlotte, North Carolina and all records relating to the Benefits Committee’s activities are maintained there. (*Id.*) Accordingly, the Plan is administered and operated in all material respects, and all respects relevant to the Complaint, in Charlotte, North Carolina and has never been administered or operated in Anderson, South Carolina. (*Id.*)

Prior to 1999, the Plan was administered by the Retirement Plan Committee, consisting exclusively of individuals also employed in Duke’s Charlotte office and the Retirement Plan Committee made all of its decisions there. (*Id.*) All of the records relating to the Retirement Plan Committee’s actions are in Charlotte. (*Id.*)

The day-to-day administration of the Plan is, and at all times relevant to the Complaint was, conducted through Duke’s Benefits Division. (*Id.* ¶ 6.) All Benefits Division personnel responsible for Plan administration are employed in Charlotte and none resided or currently resides in Anderson, South Carolina. (*Id.*) All records relating to the Benefits Division’s operations are maintained in Charlotte, North Carolina. (*Id.*)

In 1996, Duke’s Management Committee, consisting of Bill Grigg, Rick Priory, Bill Coley, and Steve Griffith made the decision to amend the Plan to change the benefit formula to a “cash balance” formula. (*Id.* ¶ 7.) The Plaintiffs contend in Counts I, II and V that this new benefit formula violates ERISA and that it reflects intentional age

discrimination. The Management Committee made the decision to change the Plan's benefit formula in Charlotte and all books and records pertaining to the decision are located in or near Charlotte. (Jefferies Aff. ¶ 7.) No actions pertaining to the amendment of the Plan were taken in Anderson, South Carolina and there are no documents or witnesses with information pertaining to the decision located there. (*Id.* ¶¶ 7, 9 10, 13, 14, 15.)

Duke engaged actuarial and benefits consultants to assist in the design, implementation, and communication of the new cash balance formula and the amendment of the Plan. (*Id.* ¶ 9.) These consultants worked in the Charlotte office of William M. Mercer, Inc. ("Mercer") and substantially all the records maintained by these consultants pertaining to the Plan design that Plaintiffs challenge in Counts I, II and V are located in Charlotte. (*Id.*) None of these consultants or documents is located in Anderson, South Carolina. (*Id.*)

Counts III and IV of the Complaint challenge the ongoing administration of the Plan and the calculation and payment of the Plaintiffs' benefits. As noted, the Plan is administered in all material respects in Charlotte, North Carolina by the Plan's Benefits Committee. All Plan benefits are calculated under the direction of the Benefits Committee by the Plan's actuarial consultants, Hewitt Associates ("Hewitt"). (Jefferies Aff. ¶ 11.) The actuaries for the Plan are located in Hewitt's Charlotte, North Carolina office. (*Id.*) All records pertaining to the accrued benefits of the Plan participants, the determination of which is challenged in Counts III and IV, are maintained electronically but are regularly accessed in Charlotte by Duke and Hewitt personnel. (*Id.*) None of

these functions is performed in Anderson, South Carolina and no Plan records can be found there. (*Id.* ¶ 13.)

The Complaint also alleges that the amendment changing the Plan benefit formula constituted a “partial termination” of the Plan. (Compl. ¶¶ 85-87.) Those allegations depend on whether the rate of future benefit accrual was reduced and whether the possibility of a “reversion” was increased. The Plan financial records and documents pertinent to those allegations are located in Charlotte, North Carolina. (Jefferies Aff. ¶ 12.) None of the documents pertinent to Plaintiffs’ “partial termination” allegations is located in Anderson, South Carolina.

Finally, Count VI of the Complaint alleges that Duke misrepresented the effect of the Plan amendment in communications to Plan participants. These communications issued from Charlotte, North Carolina; all documents and most witnesses pertinent to the communications are located in or near Charlotte, North Carolina (*Id.* ¶ 10.) No communications were created in Anderson, South Carolina and no witnesses or documents pertinent to the communications are located there. (*Id.*)

There are 19,276 employees and retirees in the United States participating in the Plan. (Fuller Aff. ¶ 6.) The largest single concentration eligible to receive benefits under the Plan’s cash balance benefit formula, 2,326, reside in or near Charlotte, North Carolina. (*Id.*) By contrast, only 230 reside in or near Anderson, South Carolina. (*Id.*)

Finally, the Complaint was not filed in Anderson, South Carolina for the convenience of the Plaintiffs. Of the six named Plaintiffs, five reside closer to the courthouse in the Charlotte Division of the Western District of North Carolina than to the

Anderson, South Carolina courthouse. (Von Thielen Aff. ¶ 6.) Indeed, only Plaintiff George resides in or near Anderson, South Carolina.

ARGUMENT

This Court should exercise its authority and transfer the case to the Western District of North Carolina – Charlotte Division pursuant to 28 U.S.C. § 1404(a) which provides that “[f]or 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.” “The purpose of this section is to prevent the waste of ‘time, energy and money’ and ‘to protect litigants, witnesses, and the public against unnecessary inconvenience and expense.’” *DeLay & Daniels, Inc. v. Allen M. Campbell Co., General Contractors, Inc.*, 71 F.R.D. 368, 371 (D.S.C. 1976) (citations omitted).

“Section 1404(a) directs a district court to take account of factors other than those that bear solely on the parties’ private ordering of their affairs. The district court must also weigh in the balance the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of the ‘interest of justice.’” *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 30-31 (1988); *Brock v. Entre Computer Centers, Inc.*, 933 F.2d 1253 (4th Cir. 1991).

In determining whether to transfer a case pursuant to § 1404(a), District Courts in the Fourth Circuit consider: (i) whether the case could have been filed in the transferee forum, (ii) the parties’ contact, or lack thereof, with the alternative forums, (iii) the location of the documents and exhibits, (iv) the location of the witnesses, (v) the availability of compulsory process, and (vi) the caseloads in the alternative forums. *E.g.*, *Piedmont Hawthorne Aviation, Inc. v. TriTech Env'tl. Health & Safety, Inc.*, 402

F. Supp. 2d 609, 614-15 (M.D.N.C. 2005); *Nutrition & Fitness, Inc. v. Blue Stuff, Inc.*, 264 F. Supp. 2d 357, 362 (W.D.N.C. 2003); *GTE Wireless, Inc. v. Qualcomm, Inc.*, 71 F. Supp. 2d 517, 518-19 (E.D. Va. 1999); *Fairchild Semiconductor Corp. v. Nintendo Co., Ltd.*, 810 F. Supp. 173, 174-75 (D.S.C. 1992).

These are the very same factors considered by Courts deciding transfer motions in ERISA-based actions. *E.g.*, *Bunch v. W.R. Grace & Co.*, No. 04-218-DLB, 2005 WL 1705745, at *2-*4 (E.D. Ky. July 21, 2005); *Cent. States, S.E. & S.W. Areas Pension Fund v. KAW Transport Co.*, No. 96-C-7935, 1997 WL 135680, at *3-*5 (N.D. Ill. March 21, 1997); *Total Licensed Care, Inc. v. Aetna Life & Cas., Inc.*, No. 92-Civ-5817 (MBM), 1993 WL 410456, at *2-*4 (S.D.N.Y. Oct. 13, 1993); *Darchuk v. Kellwood Co.*, 715 F. Supp. 1438, 1439-40 (E.D. Ark. 1988).

I. THIS CASE COULD HAVE BEEN FILED IN THE WESTERN DISTRICT OF NORTH CAROLINA – CHARLOTTE DIVISION.

An analysis under § 1404(a) begins with a determination of whether venue would be proper in the transferee forum. *U.S. Ship Mgmt., Inc. v. Maersk Line, Ltd.*, 357 F. Supp. 2d 924, 930 (E.D. Va. 2005); *Cable-La, Inc. v. Williams Communications, Inc.*, 104 F. Supp. 2d 569, 574 (M.D.N.C. 1999). The ERISA venue provision, 29 U.S.C. § 1132(e)(2), provides that venue is proper where: (1) the plan is administered, (2) the alleged breach took place, or (3) a defendant resides or may be found. Duke's headquarters are in Charlotte, the Plan is, and at all times material to the Complaint was, administered in Charlotte, and the alleged ERISA breaches took place there. While only one of these conditions is required for proper venue under ERISA, all three of these conditions are satisfied as to the Western District of North Carolina.

The ADEA has no specific venue provision, so venue for Count II would be determined by the general venue provision, 28 U.S.C. § 1391. Venue is also proper in the Western District of North Carolina under this general provision, because Duke is located in Charlotte and a substantial part of the events giving rise to the claims occurred there.

II. THE CONVENIENCE OF THE PARTIES AND ALL PRIVATE INTERESTS COMPEL TRANSFER TO THE WESTERN DISTRICT OF NORTH CAROLINA.

A. Plaintiffs' Choice of Forum is Not Unfettered.

“While it is true that a plaintiff’s choice of forum is entitled to great deference, that choice is not unfettered. Where a defendant is able to show that the convenience of parties and witnesses and the interests of justice weigh heavily in favor of a transfer, the plaintiff’s choice must give way to the important objective of judicial economy.” *Bennett v. Bally Mfg. Corp.*, 785 F. Supp. 559, 563 (D.S.C. 1992) (finding that transfer from South Carolina to Illinois would promote the just and efficient conduct of the litigation).

1. Where, as Here, Plaintiffs Purport to Represent a Class, Their Choice of Forum is Entitled to Less Deference.

As a threshold matter, it is well settled that the plaintiff’s choice of forum is accorded little weight in the context of a putative class action. *In re Warrick*, 70 F.3d 736, 741 n.7 (2d Cir. 1995); *Owner-Operator Indep. Drivers Ass’n, Inc. v. N. Am. Van Lines, Inc.*, 382 F. Supp. 2d 821, 824 n.4 (W.D. Va. 2005); *Schecher v. Purdue Pharma, L.P.*, 317 F. Supp. 2d 1253, 1263 (D. Kan. 2004); *Barnett v. Ala.*, 171 F. Supp. 2d 1292, 1295 (S.D. Ala. 2001). Indeed, some courts have characterized the plaintiff’s choice of forum in a class action as “irrelevant.” *Nelson v. Aim Advisors, Inc.*, No. 01-CV-0282, 2002 WL 442189, at *3-*4 (S.D. Ill. March 8, 2002); *Georgouses v. NaTec Res., Inc.*,

963 F. Supp. 728, 730 (N.D. Ill. 1997). See also *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947) (“But where there are hundreds of potential plaintiffs, all equally entitled voluntarily to invest themselves with the corporation’s cause of action and all of whom could with equal show of right go into their many home courts, the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened.”); *Eichenholtz v. Brennan*, 677 F. Supp. 198, 202 (S.D.N.Y. 1988) (“In a class action, the named plaintiff’s choice of forum is afforded little weight because in such a case, there will be numerous potential plaintiffs, each possibly able to make a showing that a particular forum is best suited for the adjudication of the class’ claim.” (citing *Koster*)). In class actions arising under ERISA as well, courts accord less deference to the plaintiff’s choice of forum. E.g., *Finley v. Dun & Bradstreet Corp.*, No. 05-C-5134, 2006 WL 861920, at *2 (N.D. Ill. March 31, 2006) (noting in transferring ERISA action to New Jersey that “deference shown a plaintiff’s choice of forum is diminished where, as here, Plaintiff is a representative of a class”); *Fox v. Massey-Ferguson, Inc.*, No. 93-CV-74615-DT, 1995 WL 307485, at *2 (E.D. Mich. March 14, 1994) (explaining that “as this is a class action law suit plaintiffs’ choice of forum is less important,” and transferring ERISA-based class action from Michigan to Wisconsin); *Pothier v. Bank of America Corp. et al.*, No. 04-458, slip op. at 3 (S.D. Ill. May 25, 2005) (See Exhibit 1, page 3) (transferring a cash balance plan case to the W.D.N.C. and observing that “. . . courts have held that when an individual brings a derivative suit or represents a class, the named plaintiffs’ choice of forum is given less weight”).

2. *Where, as Here, the Plaintiffs' Chosen Forum Has Little or No Connection with the Claims Asserted, It is Entitled to Little Deference.*

Moreover, the weight given to the plaintiff's choice of venue varies with the significance of the contacts between the venue and the underlying cause of action. *See Van Ru Credit Corp. v. Professional Brokerage Consultants, Inc.*, No. 03-C-1170, 2002 WL 22462607, at *4 (N.D. Ill. Oct. 29, 2003) (explaining, in transferring ERISA case, that "the weight given to a plaintiff's choice of forum is lessened if the chosen forum has relatively weak connections with the operative facts giving rise to the claim") (citation and internal quote marks omitted).

A plaintiff's choice is entitled to less weight where there is little to connect the chosen forum with the cause of action. *Bryant v. ITT Corp.*, 48 F. Supp. 2d 829, 832 (N.D. Ill. 1999) (transferring ERISA case to Kentucky). *See also Chicelo v. Hoffman-La Roche, Inc.*, No. 97-Civ-4591(RPP), 1997 WL 654637, at *3 (S.D.N.Y. Oct. 21, 1997) (explaining that presumption favoring plaintiff's choice of forum "does not apply where there is little material connection between the chosen forum and the facts and issues of the case," and transferring ERISA action to New Jersey). Therefore, "deference would be misplaced [where the chosen forum] lacks sufficient ties to the parties, facts, and claims in the controversy." *Nat'l Air Traffic Controllers Assoc. v. Dental Plans, Inc.*, 407 F. Supp. 2d 1, 3 (D.D.C. 2005) (transferring ERISA action from District of Columbia to Georgia due to convenience of the parties and witnesses and the interest of justice; in addition, the plan was administered in Georgia).

As there are virtually no contacts between the chosen forum and this cause of action, Plaintiffs' choice is entitled to little or no deference, and the case should be transferred to the Western District of North Carolina. *E.g., Canade v. Grumman Corp.*,

No. 93-C-6628, 1994 WL 87307, at *2 (N.D. Ill. March 16, 1994) (transferring ERISA-based action from Illinois to New York “[g]iven the virtually complete absence of any connection to this forum”).

The case in point is *Pothier v. Bank of America Corp. et al.*, No. 04-458 (S.D. Ill. May 25, 2005) (attached hereto as Exhibit 1). There the plaintiffs sued Bank of America over the design and implementation of its cash balance plan, alleging many of the same claims asserted by the Plaintiffs in this case. *Id.*, slip op. at 2. In ordering transfer from the Southern District of Illinois – East St. Louis Division to the Western District of North Carolina – Charlotte Division, Chief Judge Murphy noted “this is not even a close case,” and further observed:

- Bank of America maintained its headquarters in Charlotte, N.C.
- “The design and development of the Pension Plan’s cash balance formula” and decisions pertaining to the implementation of the plan “took place in the Western District of North Carolina.” *Id.* at 4.
- Bank of America’s advisors on the cash balance plan performed their services in Charlotte.
- The cash balance formula was approved by management in Charlotte.
- “Essential plan functions are coordinated and supervised” in Charlotte. *Id.*

Addressing witnesses, Chief Judge Murphy reasoned: “The Court is not sure at this point who the witnesses will be, but Plaintiffs’ second amended complaint attacks the decisions made in designing and administering the Plans and charges all those in any way related to decisions. Therefore, it is reasonable to look to where those decisions were made and to where the decision makers may be found.” *Id.* at 6. Chief Judge Murphy

also observed that the only connection to the Southern District of Illinois and the claims in the case was the small number of plan participants that resided there. *Id.* at 5.

In an even more recent case challenging amendment of a traditional pension plan to add a cash balance plan formula, the Northern District of Illinois reached the same conclusions:

In his complaint Finley claims that Defendants have violated ERISA because they: (1) did not notify plan participants that their benefits would be reduced; (2) failed to provide participants with a summary plan description about their new benefits; (3) conditioned the amount of benefits payable; (4) reduced the rate of accruals based on a participant's age; and (5) failed to correctly inform participants of their pensions. All of the alleged missteps occurred in New Jersey where the plan is administered. The plan change was approved and the decisions and consulting took place in either Connecticut where the plan was based prior to 1996, or in the New Jersey area. Thus, as Plaintiff's choice of forum is further diminished, this factor weighs in favor of transfer.

Finley, 2006 WL 861920, at *3.¹

Each of the factors cited by these courts in favor of transferring venue is present in this case and these factors demonstrate that there is no material connection between the District of South Carolina – Anderson Division and the claims asserted in this case. Accordingly, the Court should follow these decisions and transfer venue to the Western District of North Carolina – Charlotte Division.

¹ Numerous other courts considering venue transfer motions under ERISA have followed suit, transferring the litigation to the forum where the complained-of events occurred. *See, e.g., Int'l Union, United Auto., Aerospace & Agric. Implement Workers v. C.F. Gomma, U.S.A., Inc.*, No. 05-CV-71633-DT, 2005 WL 1838344, at *5 (E.D. Mich. July 29, 2005) (“A decision to transfer venue [in ERISA-based action] is supported by general interests of justice because the disputes revolve around an Indiana plant and events that occurred in Indiana.”); *Beissbarth USA, Inc. v. KW Prods., Inc.*, No. 04-C-7738, 2005 WL 38741, at *4 (N.D. Ill. Jan. 6, 2005) (transferring ERISA action to Northern District of Iowa “because few, if any of the material events underpinning this case occurred in this district while a significant number of material events occurred in the Northern District of Iowa”); *Van Ru Credit*, 2003 WL 22462607, at *4 (transferring ERISA action to Iowa, “because most of the events leading up to the complaint were performed in Iowa”); *Bryant*, 48 F. Supp. 2d at 833-34 (transferring ERISA action to Kentucky, “the situs of the majority of the material events”).

B. The Western District of North Carolina – Charlotte Division is More Convenient for the Parties.

The factors courts consider when giving effect to the convenience of the parties, the first criterion of 28 U.S.C. § 1404(a), include: the contact or lack of contact the parties have with the alternative forums; the location of parties and employees of parties to be examined before trial or called as witnesses; and the location of documents to be used or produced by the parties before or at trial. *DeLay*, 71 F.R.D. at 371-72.

1. Five of the Six Named Plaintiffs Live Closer to Charlotte, North Carolina Than Anderson, South Carolina.

As indicated, only one of the six named Plaintiffs lives in the Anderson Division. The other South Carolina plaintiff, Bowen, resides in the York Division which is closer to the Charlotte Division of the Western District of North Carolina than the Anderson Division of this Court. In short, all but one of the Plaintiffs lives closer to the Charlotte courthouse than to the Anderson courthouse. (Von Thielen Aff. ¶ 6.) Thus, the Plaintiffs' contact with the District of South Carolina is minimal. *See Pothier*, slip op. at 5 (Exhibit 1, page 5) (noting that transferor jurisdiction was not convenient for plaintiffs because only one of several named plaintiffs resided there); *Aschbacher v. Delta Pilots Ret. Plan*, No. 00-6086, slip op. at 4 (D. Or. Aug. 7, 2000) (copy attached as Exhibit 2, page 4) (“In sum, the only justification for maintaining this action in Oregon is the fact that one named plaintiff resides in this district. The court finds this factor significantly outweighed by the numerous factors supporting transfer.”).

2. Virtually All of the Defendants and Documents Pertinent to This Case are in Charlotte, North Carolina.

The Charlotte Division of the Western District of North Carolina is also more convenient for the Defendants. As previously stated, Duke has its principal place of

business in Charlotte and the Plan administrator and administrative offices are in Charlotte. All material events concerning the design, development, approval, communication, conversion, and administration of the Plan that are complained of in the Complaint occurred in Charlotte. (Jefferies Aff. ¶¶ 5,6,7,9,10,11.) Therefore, Duke has significant contact with the transferee forum.

In *DeLay*, the Court stated that “[t]he location of documents may be of primary importance in this action.” 71 F.R.D. at 372. Because Duke’s headquarters are in Charlotte, all relevant decisions regarding the Plan were made in Charlotte, and the Plan was (and is) administered in Charlotte, substantially all relevant documentary evidence and data regarding the Plan are located in or accessible from either Duke’s headquarters or Mercer’s Charlotte office, or Hewitt’s Charlotte office. (Jefferies Aff. ¶¶ 5,6,7,10,11.) Relevant documents and data include employee personnel files, pay records, retirement files, information on each putative class members’ accrued benefits under the Plan, Plan financial data, documents relating to the amendment adding the cash balance formula, opening balance calculations, and the communication of the amendment. (*Id.* ¶ 13.) Substantially all records relating to the cash balance amendment, its design and its implementation are in hard copy located in Charlotte. Records relating to post-conversion Plan matters are either in hard copy located in Charlotte or in electronic format accessible by Duke employees located in Charlotte. (*Id.* ¶¶ 5,6,11,12.) In contrast, no relevant documentary evidence regarding the conversion of Plan or its ongoing administration is located in the Anderson Division of the District of South Carolina. (*Id.* ¶ 15.)

In *DeLay* this Court transferred venue to the Eastern District of Texas because the records, documentation and witnesses appeared to be available at the defendant's principal place of business in Texas. 71 F.R.D. at 372. See also *Terry v. Furniture Brands Int'l*, No. 1:01CV452-D-A, 2002 WL 449067, at *3 (N.D. Miss. Feb. 4, 2002) (transferring ERISA action to Missouri because "all interpretative source documentation and employee records (such as employment criteria, records request, appeal processes, and salary histories) are maintained in St. Louis"); *Bennett*, 785 F. Supp. at 562 (noting that most of the evidence produced finds its home in the transferee forum, including voluminous documents at the defendant's corporate headquarters in Illinois; plaintiff did not identify any significant amount of document production that must take place in South Carolina).

Similarly, the determination of whether the Plan violates ERISA and the ADEA will require documentation, data, and witnesses knowledgeable about the documentation and data, substantially all located in Charlotte. Therefore, venue should be transferred to the Western District of North Carolina where the documents and data are located. See, e.g., *C.F. Gomma*, 2005 WL 1838344, at *5 (transferring ERISA action from Michigan to Indiana, location of "most of the relevant employees and other witnesses" and "almost all of the relevant documents"); *KAW Transport*, 1997 WL 135680, at *3 (transferring ERISA action to Missouri where "the majority of documents involved in and/or pertaining to the present dispute are located"); *Darchuk*, 715 F. Supp. at 1439 (transferring ERISA action from Arkansas to Missouri where all key witnesses and documents were located).

C. The Western District of North Carolina is More Convenient for the Witnesses.

The convenience of the witnesses also favors transfer to the Western District of North Carolina. The majority of key witnesses are located in Charlotte, North Carolina. (Jefferies Aff. ¶¶ 5,6,7,9,10.) The individuals who made decisions regarding the Plan's conversion or who were involved in communications related to the conversion or decisions subsequent to the conversion that are addressed in the Complaint, including Ruth Shaw, Christopher Rolfe, Charlotte Wayland, Jeff Allee, Shelia Zink, Steve Covington, Rich Osborne, Mary Joy, Marty Brown and Richard Jefferies, are located in or around Charlotte. (*Id.* ¶ 10.) There are no Duke employees with material roles in the design, communication, implementation, or administration of the Plan and no material witnesses, in Anderson, South Carolina. (*Id.* ¶¶ 7,9,10,14.)

Besides the Duke witnesses, the principal Hewitt witnesses who have extensive knowledge concerning the ongoing administration of the Plan, its benefit formula, the calculation of benefits, and the maintenance of the Plan's benefits records reside in Charlotte. (*Id.* ¶ 11). The principal witnesses from Mercer who worked on the design and implementation of the cash balance plan amendment in Charlotte and resided in Charlotte at all times material to the Complaint, are now located in Charlotte and Atlanta, Georgia. (*Id.* ¶ 9.) None is (or has been) located in Anderson, South Carolina.

In addition, the six named Plaintiffs claim to be representative of a class and, therefore, will be primarily responsible for proving their claims and will likely serve as witnesses. The Western District of North Carolina is more convenient for them than the District of South Carolina, as all but one of them live closer to the courthouse in Charlotte than the courthouse in Anderson. (Von Thielen Aff. ¶ 6). Because most of the

witnesses – party and non-party – are in or near the Charlotte Division of the Western District of North Carolina, venue should be transferred to Charlotte. *See Finley*, 2006 WL 861920, at *4 (“There are individuals that were apparently integral in the pension plan decisions that may need to appear in court and Defendants have sufficiently asserted that it is more practical to access the witness if the case were in the New Jersey district court.”); *Pothier*, slip op. at 6 (Exhibit 1, page 6) (in transferring cash balance plan case to Charlotte, N.C., the court noted that in determining convenience of witnesses it is “reasonable to look to where those decisions were made and to where the decision-makers may be found”); *Chichelo*, 1997 WL 654637, at *3 (transferring ERISA action from New York to New Jersey, “where the probable witnesses and documentary evidence are located”); *KAW Transport*, 1997 WL 135680, at *3 (transferring ERISA case to Missouri, location of “the vast majority of persons having knowledge pertinent to the present controversy”); *Bennett*, 785 F. Supp. at 562 (transfer to the Northern District of Illinois from the District of South Carolina warranted based on several factors, including that most of the party and non-party witnesses resided in Illinois).

Finally and perhaps most importantly, the Court should also consider the fact that virtually all of the material witnesses will not be subject to compulsory process in the District of South Carolina. *E.g.*, *C.F. Gomma*, 2005 WL 1838344, at *4; *Deputy v. Long-Term Disability Plan of Sponsor Aventis Pharms.*, No. C02-2010 TEH, 2002 WL 31655328, at *4 (N.D. Cal. Nov. 21, 2002); *KAW Transport*, 1997 WL 135680, at *3; *Fox*, 1995 WL 307485, at *4; *Total Licensed Care*, 1993 WL 410456, at *2; *Darchuk*, 715 F. Supp. at 1440. Witnesses may be compelled to attend trial only if they live within 100 miles of the place of trial. Fed. R. Civ. P. 45(b)(2). As stated above, the majority of

witnesses are located in and around Charlotte, which is more than 100 miles from Anderson. These witnesses will be essential to both the Plaintiffs' and the Defendants' cases and a number are former employees or vendors outside the control or influence of the parties. Therefore, if the case is tried in the Anderson Division, the 100 mile rule will prohibit both plaintiffs and defendants from compelling the attendance of potentially dispositive witnesses. Courts have recognized that where the credibility of witnesses is a crucial factor live testimony is preferable to depositions of key witnesses. *DeLay*, 71 F.R.D. at 373. *E.g., Canade*, 1994 WL 83707, at *2-*3.

III. THE INTERESTS OF JUSTICE COMPEL TRANSFER TO THE WESTERN DISTRICT OF NORTH CAROLINA.

In addition to the convenience of the parties and witnesses, the interests of justice also compel transferring venue to the Western District of North Carolina. Transferring this case will have no impact on the substantive law at issue, as ERISA and the ADEA are federal laws and both the District of South Carolina and the Western District of North Carolina are in the Fourth Circuit.

Further, costs and practical problems of litigation are certainly lower in Charlotte, since virtually all the documents and witnesses are located in Charlotte. *See Fox*, 1995 WL 307485, at *4 ("If defendant is forced to litigate suits based on where its retirees live, defendant will incur a significant increase in the cost of participating in such litigation. Costs which can, and should be avoided, in order to help protect the integrity of defendant's welfare benefit plan."); *Darduk*, 715 F. Supp. at 1439-40 (factoring in "the cost of obtaining these witnesses such as transportation, meals, lodging and work schedules"). Access to sources of proof will be greater and easier in Charlotte than in Anderson, South Carolina. *See Van Ru Credit*, 2003 WL 22462607, at *4 ("there are

more material sources of proof overall located in Iowa, rather than Illinois, and therefore, this factor weighs in favor of transferring venue to Iowa”).

One of Plaintiffs’ counsel and all of Defendants’ counsel have offices in Charlotte. *Pothier*, slip op. at 7 (Exhibit 1, page 7) (“The Court does not see how [the Western District of North Carolina – Charlotte Division] is an inconvenient forum for plaintiffs. In fact, plaintiffs’ counsel is from Washington, D.C.”).

This case has no meaningful connection to the Anderson Division of the District of South Carolina, as only one Plaintiff lives in the Anderson Division and not a single event alleged in the Complaint occurred there. This case does have a substantial connection to the Western District of North Carolina because Charlotte is where Duke is headquartered, where material events took place, and where material witnesses and documents are located, and where the greatest concentration of Plan participants is located. Therefore, the interests of justice will be far better served if this case is transferred to the Western District of North Carolina.

Finally, relative caseloads in the transferor and transferee forums may also be an appropriate consideration in a § 1404(a) motion to transfer. *Pothier*, slip op. at 7 (Exhibit 1, page 7) (comparing case loads and concluding “[t]his Court finds no reason that the Western District of North Carolina will not ably and swiftly adjudicate this action”).² While the judges of both districts have substantial caseloads, the average civil

² See *P & S Business Machines, Inc. v. Canon USA, Inc.*, 331 F.3d 804, 808 (11th Cir. 2003) (citing *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509 (10th Cir. 1991)) (including “difficulties that may arise from congested dockets” among other factors a district court should consider in deciding a § 1404(a) motion to transfer). E.g., *Finley*, 2006 WL 861920, at *5 (“A longer road to disposition or trial will only increase the expenses of both parties, and trying the case in the Northern District of Illinois will further clog an already congested court. Thus, this factor favors transfer.”); *Total Licensed Care*, 1993 WL 410456, at *3 (“The relative caseload of the transferor and transferee court also favors transfer.”). *Van Ru Credit*, 2003 WL 22462607, at *5 (comparing “the docket congestion” of the transferor and transferee courts); *Bryant*, 48 F. Supp. 2d at 834-35 (same).

caseload among the judges in the Western District of North Carolina, is lower than in the District of South Carolina. (Exhibit 3.)

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court transfer this case to the Charlotte Division of the Western District of North Carolina pursuant to 28 U.S.C. § 1404(a). By separate motion, Defendants are also respectfully requesting that this Court stay further proceedings until it has had an opportunity to rule on the present Motion to Transfer Venue.

Dated this 5th day of May, 2006.

Respectfully submitted,

s/Kristofer K. Strasser-----
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