

**IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA**

EDGAR "BO" POUNDS, et al.,

Plaintiffs,

vs.

COBB ELECTRIC MEMBERSHIP
CORPORATION, et al.,

Defendants.

Civil Action No. 07-1-9408-48

**DEFENDANT COBB ELECTRIC MEMBERSHIP CORPORATION'S
MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION FOR EXTENSION OF TIME TO ANSWER
AND FOR A PROTECTIVE ORDER**

Defendant Cobb Electric Membership Corporation ("Cobb EMC") submits this Memorandum of Law in support of its motion to extend the time to answer Plaintiffs' Complaint and motion for a protective order, showing the Court as follows:

I. PRELIMINARY STATEMENT

Under Georgia's Civil Practice Act, this Court has broad discretion, for cause shown, to extend the time that defendants have to answer the plaintiffs' complaint. Also under the Civil Practice Act, this Court has broad discretion to protect parties from annoyance, oppression and undue burden and expense in discovery. Here, Cobb EMC, on November 9, 2007, filed a motion to stay Plaintiffs' derivative lawsuit for 120 days, or until the Special Litigation

Committee (“Committee”) of the Board of Directors of Cobb EMC has completed its investigation of the claims in Plaintiffs’ lawsuit, whichever occurs first.¹ In moving for a stay, Cobb EMC asked that the Court postpone the time that all 11 Defendants have to answer, or otherwise respond to, Plaintiffs’ Complaint until 30 days after the stay has been lifted.

The deadlines for the Answers, however, and the time for a proposed 30(b)(6) deposition by Plaintiffs of Cobb EMC, are before the hearing on the Motion to Stay. In talking with the Court’s staff attorney, counsel for Cobb EMC learned that the earliest date for a hearing on its Motion to Stay is December 3, 2007. Cobb EMC’s Answer, however, is due on November 26, 2007. The other Defendants’ Answers are presumably due on or about the same date. In addition, Plaintiffs have sent Cobb EMC a notice of Rule 30(b)(6) deposition to occur on November 30, 2007. This notice requests that Cobb EMC provide representatives to speak to 32 different, broad topics, and purports to require Cobb EMC to produce, on the day of the deposition, 30 different categories of documents.

To protect the various Defendants from the undue burden and expense of preparing 11 answers, Cobb EMC asks that the Court extend the time for

¹ As explained more fully in Cobb EMC’s brief in support of its Motion to Stay, this Court has broad discretion to stay a derivative lawsuit, such as Plaintiffs’ suit, to allow a corporate defendant to determine — through a special litigation committee — if the lawsuit is in the company’s best interests. Under Georgia case law, the Committee’s recommendations and the Board’s decision thereof will determine whether Cobb EMC will undertake prosecuting the claims on its own or move to dismiss Plaintiffs’ derivative action.

answering Plaintiffs' Complaint until the later of December 17, 2007 or 30 days after the expiration of any stay that the Court may grant. In addition, to protect Cobb EMC from the annoyance, oppression and undue burden and expense of having to prepare witnesses and documents in response to Plaintiffs' 30(b)(6) notice, Cobb EMC asks that the Court issue a protective order, extending the time for Plaintiffs' 30(b)(6) deposition until the later of December 17, 2007 or 30 days after the expiration of any stay that the Court may grant.

Because the due date for Defendants' Answers is fast approaching — and because the 30(b)(6) deposition is scheduled before the hearing on the Motion to Stay — Cobb EMC requests that the Court treat this Motion as an emergency motion under Uniform Superior Court Rule 6.7 and grant Cobb EMC immediate relief.

II. STATEMENT OF FACTS

Defendant Cobb EMC is a nonprofit electrical cooperative that it is owned by its members and provides electrical power to its membership in several counties in Georgia, including Cobb County. On October 22, 2007, Plaintiffs filed this lawsuit “on behalf of Cobb EMC against certain of its officers and directors” seeking to remedy Defendants' alleged violations of state law. (Compl. at ¶ 1.) Plaintiffs also seek damages and other relief against Defendant Cobb Energy Management Corporation (“Cobb Energy”), a for-profit affiliate of Cobb EMC,

and certain of its officers and directors. (*Id.*) In all, Plaintiffs' Complaint is 27 pages long and includes 92 individually-numbered paragraphs, in addition to Plaintiffs' Prayer for Relief. In addition to naming Cobb Energy as a Defendant, and naming Cobb EMC as a "nominal defendant," Plaintiffs also brought their suit against nine individual Plaintiffs:

- Don Barnett (Vice President, Wholesale Division of Lummus Supply Company, Atlanta)
- David McGinnis (President and CEO of Security Exchange Bank, Marietta)
- Kay Anderson (Director of Cobb County Department of Family and Children Services ("DFCS"); Regional Director of DFCS for Cherokee, Cobb and Douglas Counties)
- Al Fortney, Jr. (owner of Fortney Sales, Kennesaw)
- Frank Boone (owner and President of North Cobb Animal Clinic, Kennesaw)
- Sarah Brown (retired)
- Larry Chadwick (retired)
- Henry Balkcom III (engineer with American Buildings Company, Quitman County)
- Dwight Brown (CEO of Cobb EMC and Cobb Energy)

As a derivative case, this lawsuit seeks to recover from third parties on behalf of the corporation, Cobb EMC. Because Cobb EMC is the ultimate

beneficiary of any recovery that might be had against third parties, the law allows Cobb EMC to decide first whether it will take on the claims.² Toward that end, on October 18, 2007, several days before Plaintiffs filed this suit, Cobb EMC's Board created the Committee for the express purpose of independently investigating and evaluating the claims set forth in this lawsuit. The Committee has been charged by the Board with the responsibility of independently reviewing and investigating all of the allegations in the two lawsuits against Cobb EMC, for the purpose of reporting its findings and making recommendations to all of the disinterested members of the Board on the appropriate response to the allegations. (*See* Cobb EMC's Brf. in Support of Its Motion to Stay.)

On October 26, 2007, Plaintiffs sent to Cobb EMC a notice of Rule 30(b)(6) deposition to occur on November 30, 2007. (*See* Ex. 1.) The notice requested that Cobb EMC provide representatives to speak to 32 different topics, which cover roughly all of the allegations in Plaintiffs' Complaint. (*Id.*) These topics include, among other things:

- The circumstances surrounding the creation of Cobb Energy
- The ownership history and structure of Cobb Energy

² *See, e.g., Thompson v. Scientific Atlanta, Inc.*, 275 Ga. App. 680, 621 S.E.2d 796 (2005). *See* Cobb EMC's brief in support of its Motion to Stay, at pp. 12-15, for additional authorities.

- The facts, circumstances and professional opinions related to a 40-year operating agreement between Cobb EMC and Cobb Energy
- The names and present whereabouts of officers and directors of Cobb EMC and Cobb Energy
- Payments and benefits to officers and directors of Cobb Energy and Cobb EMC
- The consideration paid by each individual or entity having an ownership interest in Cobb Energy since its inception date to present
- All loans to Cobb Energy from its inception to present
- All loans made by Cobb EMC and Cobb Energy to the officers and directors of these two entities
- The amount and description of all charges by Cobb Energy to Cobb EMC for goods or services since the inception date of the operating agreement between the two

(Id.) The notice also purports to require Cobb EMC to produce, on the day of the deposition, 30 different categories of documents. *(Id.)* Roughly mirroring the deposition topics, these categories of documents include, among other things, documents that “state or evidence”:

- The complete ownership history and structure of Cobb Energy from its inception to present
- All professional opinions, including attorney opinions, addressing the legality and propriety of the operating agreement between Cobb Energy and Cobb EMC

- Payments and benefits to officers and directors of Cobb Energy and Cobb EMC
- The consideration paid by each individual or entity having an ownership interest in Cobb Energy since its inception date to present
- All loans to Cobb Energy from its inception to present
- All loans made by Cobb EMC and Cobb Energy to the officers and directors of these two entities
- The amount and description of all charges by Cobb Energy to Cobb EMC for goods or services since the inception date of the operating agreement between the two
- All of the outstanding shares of Cobb Energy stock from its inception to present

(*Id.*)

On October 9, 2007, Cobb EMC filed its Motion to Stay. On October 13th, the Court's staff attorney informed counsel for Cobb EMC that the earliest date for hearing on the motion is December 3, 2007.

III. ARGUMENT AND CITATION TO AUTHORITY

A. UNDER O.C.G.A. § 9-11-6, THE COURT SHOULD EXTEND THE TIME FOR DEFENDANTS TO ANSWER PLAINTIFFS' COMPLAINT.

O.C.G.A. § 9-11-6(b) provides in relevant part:

When by this chapter or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time . . . the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period extended if

request therefor is made before the expiration of the period originally prescribed or as extended by a previous order

Here, to protect the 11 Defendants in this lawsuit from the undue burden and expense of having to prepare Answers to Plaintiffs' lengthy Complaint before the Court has decided Cobb EMC's Motion to Stay, the Court should extend the time for all Defendants to answer Plaintiffs' Complaint until the later of December 17, 2007 or 30 days after the expiration of any stay that the Court may grant.

B. A PROTECTIVE ORDER IS NECESSARY TO PROTECT COBB EMC FROM ANNOYANCE, OPPRESSION AND UNDUE BURDEN AND EXPENSE RELATED TO PLAINTIFFS' DEPOSITION NOTICE.

O.C.G.A. § 9-11-26(c) addresses protective orders and provides in relevant part:

Upon motion by a party . . . and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, including one or more of the following:
. . . .

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place

A trial court has broad discretion under this Code section to take action to protect a party from annoyance, embarrassment, or oppression. *Anderberg v. Georgia Electric Membership Corp.*, 175 Ga. App. 14, 17, 332 S.E.2d 326, 328 (1985).

Here, Plaintiffs' 30(b)(6) notice — which schedules a deposition and document production before the hearing on the Motion to Stay — would require Cobb EMC to find and prepare corporate representatives to speak to 32 different topics, which cover roughly all of the allegations in Plaintiffs' Complaint. The notice would also require Cobb EMC to locate, and review for privilege and proprietary and confidential information, documents under 30 different broad, unduly burdensome categories which also cover roughly all of the allegations in Plaintiffs' Complaint. To protect Cobb EMC from the annoyance, oppression and undue burden and expense of having to prepare numerous witnesses and produce voluminous amounts of documents before the hearing on the Motion to Stay, this Court should extend the time for Plaintiffs' 30(b)(6) deposition until the later of December 17, 2007 or 30 days after the expiration of any stay that the Court may grant.

Respectfully submitted this 14th day of November, 2007.



Bruce P. Brown
Georgia Bar No. 064460
J. Patton Dycus
Georgia Bar No. 236636

McKenna Long & Aldridge LLP
303 Peachtree Street, Suite 5300
Atlanta, Georgia 30308
(404) 527-4000
(404) 527-4198 (facsimile)

Robert B. Silliman
Georgia Bar No. 646000
Awtrey & Parker, PC
250 Lawrence Street
Marietta, Georgia 30060
(770) 424-8000
(770) 424-1594 (facsimile)

*Attorneys for Defendant
Cobb Electric Membership
Corporation*

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CERTIFICATE OF COUNSEL

In accordance with Uniform Superior Court Rule 6.4(B), undersigned counsel certifies that he has conferred with counsel for Plaintiffs in a good faith effort to resolve the disputes discussed in Defendant Cobb Electric Membership Corporation's Motion for Extension of Time to Answer and for a Protective Order, and the brief in support of this motion, but was unable to resolve by agreement the disputes addressed in the motion.

Respectfully submitted this 14th day of November, 2007.



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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the within and foregoing

**Memorandum of Law in Support of Motion for Extension of Time to Answer
and for a Protective Order** upon counsel of record by email and via United States

Mail, postage prepaid to ensure delivery as follows:

W. Pitts Carr
David M. Cohen
Carr & Palmer, LLP
10 North Parkway Square
4200 Northside Parkway
Atlanta, Georgia 30327

Hylton B. Dupree Jr.
Dupree & Kimbrough, LLP
49 Green Street
P.O. Box 525
Marietta, Georgia 30061

H. Scott Gregory, Jr.
Brock, Clay, Calhoun & Rogers, P.C.
49 Atlanta Street
Marietta, Georgia 30060

E. Adam Webb
The Webb Law Group, L.L.C.
1900 The Exchange, S.E.
Suite 480
Atlanta, Georgia 30339

This 14th day of November, 2007.



Bruce P. Brown