

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

JINO KURIAKOSE, Individually and On )  
Behalf of All Others Similarly Situated, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
FEDERAL HOME LOAN MORTGAGE )  
COMPANY, RICHARD SYRON, )  
PATRICIA L. COOK and ANTHONY S. )  
PISZEL, )  
 )  
Defendants. )

Civil Action  
No. 1:08-CV-07281-JFK  
ECF Case

**MEMORANDUM IN SUPPORT OF THE  
RESPONSE OF THE ATTORNEY GENERAL OF NORTH CAROLINA TO THE  
MOTION OF THE TREASURER OF NORTH CAROLINA  
FOR APPOINTMENT AS LEAD PLAINTIFF AND APPROVAL OF COUNSEL**

**INTRODUCTION**

This class action was brought August 15, 2008, by plaintiff pursuant to Section 21D of the Securities Exchange Act of 1934, as amended by the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4. On August 18, 2008, counsel in the first-filed action issued the notice required by 15 U.S.C. § 78u-4(a)(3)(A)(i). Pursuant to that same statute, on October 17, 2008, the Treasurer of North Carolina (“the Treasurer”), filed his “Motion of Richard H. Moore, as Treasurer of the State of North Carolina and as the Sole Trustee of the North Carolina Retirement Systems, for Appointment as Lead Plaintiff and Approval of its Selection of Counsel” (“the Motion”). In the Motion, the Treasurer, “as Treasurer of the State of North Carolina and as the sole trustee of the North Carolina Retirement Systems (“NCRS”),” moved the Court for an order “appointing NCRS

as Lead Plaintiff” and “appointing the law firm of Motley Rice LLC to serve as Lead Counsel.”

(Docket Entry No. 19; Motion, p. 2) The Motion further stated:

NCRS include the Teachers’ and State Employees’ Retirement System, the Consolidated Judicial Retirement System, the Firemen’s and Rescue Workers’ Pension Fund, the Local Governmental Employees’ Retirement System, the Legislative Retirement System, and the North Carolina National Guard Pension Fund. The Motion is made by Richard H. Moore, as Treasurer of the State of North Carolina and as the sole trustee of the North Carolina Retirement Systems, without limitation.

(*Id.*, p. 2, fn. 1)

As described below, the Treasurer lacked authority to file his Motion and Motley Rice LLC has not been authorized to represent NCRS in this litigation.

### **FACTUAL AND PROCEDURAL BACKGROUND**

The factual and procedural background are as set forth in the Motion.

### **ARGUMENT**

#### **I. THE TREASURER OF NORTH CAROLINA LACKED AUTHORITY TO FILE THE MOTION FOR APPOINTMENT OF NCRS AS LEAD PLAINTIFF.**

In the Motion and supporting memorandum, the Treasurer described himself as the “sole trustee” of NCRS on whose behalf he purported to file the Motion. Contrary to this representation, each of the component retirement systems (with one exception) is governed by a statutory board of trustees with specific management and fiduciary duties specified by North Carolina law.<sup>1</sup> For

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<sup>1</sup> The one exception is the North Carolina National Guard Pension Fund, which provides a monthly benefit of \$95.00 to all members of the North Carolina National Guard who retire with at least 20 years of creditable military service, with an additional benefit of \$9.50 per month for each additional year of such service. N.C. GEN. STAT. § 127A-40(a). The Treasurer makes these benefit payments to all persons certified as eligible to receive them by the Secretary of the North Carolina Department of Crime Control and Public Safety. N.C. GEN. STAT. § 127A-40(f). The North Carolina National Guard Pension Fund is funded, in part, by appropriations by the North Carolina General Assembly.

example. N.C. GEN. STAT. § 135-6(a) creates the Board of Trustees of the Teachers’ and State Employees’ Retirement System as a body politic and corporate and provides that “as a body politic and corporate shall have the right to sue and be sued . . . .” In addition, N.C. GEN. STAT. § 135-7(a) provides that “[t]he Board of Trustees [of the Teachers’ and State Employees’ Retirement System] shall be the trustee of the several funds created by this Chapter . . . .” Similar statutory provisions exist creating and defining the duties of the Board of Trustees of the North Carolina Local Governmental Employees’ Retirement System. *See* N.C. GEN. STAT. §§ 128-28(a) and -29(a). *See also* N.C. GEN. STAT. § 120-4.10 (designating the Board of Trustees of the Teachers’ and State Employees’ Retirement System as the “trustee” of the North Carolina Legislative Retirement System); N.C. GEN. STAT. § 135-52(b) (vesting administration of the North Carolina Consolidated Judicial Retirement System with the Board of Trustees of the North Carolina Teachers’ and State Employees’ Retirement System); N.C. GEN. STAT. § 58-86-5 (creating the Board of Trustees of the North Carolina Firemen’s and Rescue Workers’ Pension Fund).

North Carolina law designates the Treasurer as *ex officio* chairman of the Board of Trustees of the Teachers’ and State Employees’ Retirement System, N.C. GEN. STAT. § 135-6(g), and of the Board of Trustees of the North Carolina Firemen’s and Rescue Workers’ Pension Fund. N.C. GEN. STAT. §§ 58-86-5(1). He is also, by statute, a member of the Board of Trustees of the North Carolina Local Governmental Employees’ Retirement System, N.C. GEN. STAT. § 128-28(c), and is custodian of the funds of the North Carolina Firemen’s and Rescue Workers’ Pension Fund, N.C. GEN. STAT. §§ 58-86-20, the North Carolina Legislative Retirement System, N.C. GEN. STAT. § 120-4.18, the North Carolina Local Governmental Employees’ Retirement System, N.C. GEN. STAT. § 128-29(c), the North Carolina Teachers’ and State Employees’ Retirement System, N.C. GEN. STAT.

§ 135-7(c), and the North Carolina Consolidated Judicial Retirement System. N.C. GEN. STAT. § 135-66. As is clear from the North Carolina statutory provisions cited, however, he is not “sole trustee” of the funds of these retirement systems, and he does not have independent authority to prosecute any legal action on behalf of the retirement system. Such authority lies solely with the respective boards of trustees.

The Attorney General does not take any position as to whether the Court could find, pursuant to 15 U.S.C. § 78u-4(a)(3)(B)(i), that NCRS qualify as the “most adequate plaintiff” if they had, in fact, authorized such a motion. However, the Motion and supporting memorandum filed with this Court do not indicate that the Treasurer either advised these boards of trustees concerning this litigation, much less whether he received the approval of all of the boards of trustees to seek appointment as lead plaintiff in this litigation. It is the belief of the Attorney General of North Carolina that such approval was in fact not sought by the Treasurer. Because North Carolina law vests trusteeship of these various retirement systems in their boards of trustees and not in the Treasurer, such approval must be obtained before the Treasurer can seek appointment as lead plaintiff.

## **II. MOTLEY RICE LLC IS NOT AUTHORIZED TO REPRESENT NCRS IN THIS ACTION.**

The Treasurer further seeks to have his choice of counsel, the law firm of Motley Rice LLC, designated as lead counsel in this class action. Under North Carolina law, however, Motley Rice is not currently authorized to represent NCRS in this action.

Each of the North Carolina retirement systems that Motley Rice purports to represent is an agency of the State of North Carolina. Pursuant to N.C. GEN. STAT. § 135-6(j), “[t]he Attorney General shall be the legal advisor to the Board of Trustees” of the North Carolina Teachers’ and

State Employees' Retirement System. See also N.C. GEN. STAT. § 128-28(k) (the North Carolina Local Governmental Employees' Retirement System); N.C. GEN. STAT. § 120-4.18 (the North Carolina Legislative Retirement System); N.C. GEN. STAT. § 135-52 (the North Carolina Consolidated Judicial Retirement System). In addition, Article III, § 7, of the Constitution of North Carolina establishes the Attorney General as an elected officer of the State whose duties are prescribed by law. Pursuant to N.C. GEN. STAT. § 114-2(1) it is the duty of the Attorney General:

To defend all actions in the appellate division in which the State shall be interested, or a party, and to appear for the State in any other court or tribunal in any cause or matter, civil or criminal, in which the State may be a party or interested.

The North Carolina Supreme Court has reaffirmed that the duties of the Attorney General as prescribed by statutory and common law include the duty to prosecute and defend all actions in which the State may be a party or interested. *Martin v. Thornburg*, 320 N.C. 533, 359 S.E.2d 472 (1987). Furthermore, N.C. GEN. STAT. § 147-17(a) states:

No department, office, agency, institution, commission, bureau or other organized activity of the State which receives support in whole or in part from the State shall employ any counsel, except with the approval of the Governor. The Governor shall give his approval only if the Attorney General has advised him, as provided in subsection (b) of this section, that it is impracticable for the Attorney General to render the legal services. In any case or proceeding, civil or criminal, in or before any court or agency of this State or any other state or the United States, or in any other matter in which the State of North Carolina is interested, the Governor may employ such special counsel as he may deem proper or necessary to represent the interest of the State, and may fix the compensation for their services.

As described by the North Carolina Supreme Court:

The first sentence of this statute provides inter alia that *no officer* of the State shall employ any counsel except with the approval of the Governor. The second sentence provides that the Governor shall give his approval only if the Attorney General has advised him that representation by the Attorney General would be impracticable.

*Martin*, 320 N.C. at 547, 359 S.E.2d at 480 (emphasis added).<sup>2</sup>

The provisions of N.C. GEN. STAT. § 147-17(a) are supplemented by N.C. GEN. STAT. § 114-2.3, entitled “Use of private counsel limited”:

Every agency, institution, department, bureau, board, or commission of the State, authorized by law to retain private counsel, *shall obtain written permission from the Attorney General prior to employing private counsel.*<sup>3</sup>

(Emphasis added.) The North Carolina Supreme Court has also held that N.C. GEN. STAT. § 114-17

directs that no State official or agency may employ outside counsel without the Governor’s approval. That statute also mandates that before such counsel may be employed, the Attorney General must provide the Governor with a determination that it is impractical for the Attorney General to render the necessary legal services for the State. Finally, the Governor must determine the amount of compensation that the attorney to be employed will receive and may determine the source of State funds for the compensation. *All of these specific requirements must be satisfied in order for the State to have entered a valid contract with outside counsel to represent the State’s interest. Otherwise, no valid contract exists.*

*Whitfield v. Gilchrist*, 348 N.C. 39, 44, 497 S.E.2d 412, 416 (1998) (emphasis added).

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<sup>2</sup> The North Carolina Supreme Court also held that the third sentence of N.C. GEN. STAT. § 147-17(a) “gives *the Governor* the unrestricted right to ‘employ such special counsel as he may deem proper or necessary.’” *Martin*, 320 N.C. at 548, 359 S.E.2d at 480 (emphasis added). The statute does not give any such unrestricted authority to any other State official.

<sup>3</sup> The statutes governing the various North Carolina retirement systems do not authorize those retirement systems to retain private counsel. Pursuant to N.C. GEN. STAT. § 147-69.3, “[t]he State Treasurer is authorized to retain the services of . . . attorneys . . . necessary for the proper administration of investment programs created pursuant to this section.” This provision must be understood in the context of N.C. GEN. STAT. § 147-69.3 as a whole. That statute addresses the authority of the Treasurer to manage the investments of the wide spectrum of funds of which the Treasurer is custodian; it does not authorize the Treasurer to retain counsel to prosecute litigation on behalf of NCRS. In addition, N.C. GEN. STAT. § 147-69.3 must also be read in the context of N.C. GEN. STAT. § 114-2.3, which requires the approval of the Attorney General before outside counsel is retained.

It is therefore the law of the State of North Carolina that State agencies and officials must have prior authorization by the Attorney General, and in some instances the Governor, before employing private counsel. Neither the Governor nor the Attorney General has approved the engagement of Motley Rice LLC in this litigation. Under North Carolina law, then, no valid contract for representation of NCRS exists with Motley Rice LLC. Unless and until the requirements of North Carolina law are satisfied, only the Attorney General of North Carolina is authorized to represent NCRS in litigation and to file motions on their behalf.

### **CONCLUSION**

For the foregoing reasons, the Treasurer of North Carolina lacked authority to file the Motion and related documents with this Court, and Motley Rice LLC has not been authorized to represent NCRS in this litigation.

Respectfully submitted, this the 6<sup>th</sup> day of November, 2008.

**ROY COOPER**  
Attorney General

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