(Rev. 3/3/08)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WILLIAM DOUGLAS FULGHUM, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 07-2602-EFM
	)	
EMBARQ CORPORATION, et al.,	)	
	)	
Defendants.	)	

SCHEDULING ORDER

This case involves claims by corporate retirees under certain benefit plans, alleging violations of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 et seq., the Ohio Civil Rights Act, Ohio Rev. Code § 4112.01 et seq., the Oregon Unlawful Discrimination Law, O.R.S. § 659A.001 et seq., and the Tennessee Human Rights Act, Tenn. Stat. § 4-21-101 et seq. On February 6, 2009, pursuant to Fed. R. Civ. P. 16(b)(1) and prior notice to all concerned (doc. 54), the undersigned U.S. Magistrate Judge, James P. O'Hara, conducted an informal telephone scheduling conference with the parties. Plaintiffs appeared through counsel, Alan M. Sandals, Scott M. Lempert, Stewart W. Fisher, Richard T. Seymour, Christopher J. Lucas, and Mary C. O'Connell. Defendants appeared through counsel, Joseph J. Costello, Mark D. Hinderks, and Scott C. Hecht.

The scheduling conference was convened principally because, on December 2, 2008, the originally assigned presiding U.S. District Judge, Hon. Kathryn H. Vratil, had entered an order (doc. 45) ruling on defendants' motion (doc. 17) to dismiss certain claims in plaintiffs' complaint, as amended (docs. 1, 14, and 42). Judge Vratil granted the motion only to the extent she dismissed plaintiffs' claims for declaratory relief under ERISA § 502(a)(3) (part of Count III), and plaintiffs' ADEA claims regarding medical and prescription drug benefits (part of Count IV); all other claims survived. Immediately after deciding the motion, Chief Judge Vratil reassigned the case to Hon. Eric F. Melgren (doc. 46), as part of assembling a docket for him upon appointment as a new U.S. District Judge.

After consultation with the parties' attorneys, and subsequently with Judge Melgren, the undersigned magistrate judge now enters the court's scheduling order, summarized in the table on the following page:

SUMMARY OF DEADLINES AND SETTINGS	
Event	Deadline/Setting
Plaintiffs' settlement proposal	within 15 days of the court's ruling on the pending class certification and collective action motions
Defendants' settlement counter-proposal	within 15 days of plaintiffs' settlement proposal
Confidential settlement reports to mediator	one week prior to mediation
Mediation completed	no later than 60 days from the date of the court's ruling on the pending class certification and collective action motions
Initial disclosures exchanged	February 27, 2009
All fact discovery completed	January 29, 2010
Experts disclosed by plaintiffs	March 1, 2010
Experts disclosed by defendants	May 3, 2010
Rebuttal experts disclosed	June 1, 2010
All expert discovery completed	July 1, 2010
Supplementation of disclosures	40 days before completion of fact discovery
Jointly proposed protective order submitted to court	February 20, 2009
Motion and brief in support of proposed protective order (only if parties disagree about need for and/or scope of order)	February 23, 2009
Defendants' briefs in opposition to plaintiffs' pending motions for class action certification and for collective action	March 2, 2009
Reply briefs in support of plaintiffs' pending motions for class action certification and for collective action	April 1, 2009
Motions to join additional parties or otherwise amend the pleadings	June 30, 2009
All other potentially dispositive motions (e.g., summary judgment)	August 31, 2010
Motions challenging admissibility of expert testimony	August 31, 2010
Final pretrial conference	July 23, 2010, at 9:00 a.m.
Proposed pretrial order due	July 9, 2010
Trial	March 1, 2011, at 9:00 a.m.

1. Alternative Dispute Resolution (ADR).

On January 29, 2009, plaintiffs filed motions for class action certification and for a collective action on their ADEA claims (docs. 55 and 57, respectively). Within 15 days of Judge Melgren's ruling these motions, plaintiffs shall submit to defendants a good faith proposal to settle the case. Within 15 days of such proposal, defendants shall make a good faith response, either accepting the proposal or submitting defendants' own good faith proposal to settle the case. If the case does not settle through the exchange of information among the parties within 15 days of defendants' response, then within 10 days thereafter the parties shall file a notice confirming their joint choice of mediator and the scheduled mediation date. At least one week prior to the mediation, the parties shall send confidential reports to the mediator, detailing the efforts to settle the case, current evaluations of the case, relevant legal and factual issues presented, and any further information requested by the mediator. The mediation shall occur no later than 60 days from the date of the ruling on the above-referenced motions, unless extended by the court for good cause shown. An ADR report, on the form located on the court's Internet website, must be filed by defense counsel within five days of the scheduled mediation:

(*http://www.ksd.uscourts.gov/attorney/adr/adrreport.pdf*).

2. Discovery.

a. The court respectfully declines to adopt defendants' suggestion that discovery

in this case be "phased" pursuant to Fed. R. Civ. P. 26(f)(3)(B).[1] Mindful that defendants are free to file a relatively early motion for partial summary judgment at *any* time if they believe certain rulings on key legal issues by Judge Melgren will streamline discovery and trial in this case, the court ultimately has concluded that, at least for now, discovery should proceed

[1] In the parties' joint planning report, submitted to the undersigned's chambers pursuant to Fed. R. Civ. P. P. 26(f), defendants state:

> the parties should engage in targeted discovery that would address the court's concern that "the record is insufficiently developed to determine which plan documents may apply to which plaintiffs, or whether all applicable plan documents are before the Court." *See* Order [doc. 45], p. 15. The court, therefore, did not decide whether the plans' terms are ambiguous. Whether the reservation of rights clauses are "controlling" or not (as argued by plaintiffs), the plans must be read to give effect to all of their terms, including the clear reservations of defendants' rights to modify or terminate benefits that were expressly, and repeatedly, set forth in the plans. Without phasing of discovery, the parties will expend time and resources in search of "extrinsic evidence" to interpret the plan, even though that information will not be considered by the court if it determines the plans' terms are unambiguous.
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> Thus, in the first phase, discovery would identify the applicable plans. Defendants believe the parties will be able to stipulate to the plans that apply to each plaintiff. Phase I discovery would conclude on March 31, 2009. Within 30 days, the defendants would file a motion for summary judgment on plaintiffs' claim for "vested" benefits under ERISA Section 502(a)(1)(B) – Count I – and the remaining claims under state age discrimination statutes (Counts V, VI, and VII).
>
> If the court denies defendants' motion and finds the plan terms are ambiguous, the second phase of discovery would focus on extrinsic evidence related to plan interpretation. In addition, the second phase would address the discovery needed on the merits of plaintiffs' individualized breach of fiduciary duty claims (Count II). The final phase of discovery would focus on damages.

on all fronts, essentially for the reasons argued by plaintiffs.[2] It is quite possible much discovery time and expense would be obviated if Judge Melgren ultimately were to rule in defendants' favor on the above-referenced issues. But unfortunately his current docket is such that he is unable to guarantee the parties an expedited ruling even if discovery were phased and the issues briefed on an expedited basis as was discussed conceptually during the scheduling conference. The court also wishes to move forward given the case has been on file for over one year with no discovery and, were defendants' proposal adopted, any meaningful discovery probably would be delayed for yet another six months.

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[2] In the parties' Rule 26(f) report, plaintiffs state:

> it would be improper and inefficient to bifurcate or phase discovery in this case. Under Tenth Circuit law, there is a large overlap between evidence that is relevant to the benefits claims in Counts I and III and the fiduciary breach claim in Count II, such as common evidence of the manner in which defendants described (or omitted to disclose) material information about the benefits in summary plan descriptions ("SPDs") and other generalized communications. Plaintiffs believe defendants are mistaken in assuming there is any realistic prospect of securing partial summary judgment on the benefits claims based on the mere presence of a reservation clause in SPDs in view of Tenth Circuit case law holding that (1) reservation clauses do not have controlling weight, (2) extrinsic evidence must be considered in interpreting facially ambiguous SPDs and other plan documents, such as the SPDs presented in connection with defendants' motion to dismiss, and (3) employers must bear the consequences of unclear drafting. Plaintiffs therefore believe defendants' proposal . . . to bifurcate discovery, provide only "targeted discovery" in advance of their motion, and interrupt the proceedings with a likely unsuccessful motion for partial summary judgment that would remain pending for an unknown number of months, would needlessly delay the overall discovery program. This proposal also would require the court to evaluate two rounds of summary judgment motions relating to interpretation of SPDs and other plan documents – first on a record limited to the documents themselves, and a second time on a record that included extrinsic evidence.

b. The parties shall exchange by **February 27, 2009** the information required by Fed. R. Civ. P. 26(a)(1). The parties are reminded that, although Rule 26(a)(1) is keyed to disclosure of information the disclosing party "may use to support its claims or defenses, unless solely for impeachment," the advisory committee notes to the 2000 amendments to that rule make it clear this also requires a party to disclose information it may use to support its denial or rebuttal of the allegations, claim, or defense of another party. In addition to other sanctions that may be applicable, a party who without substantial justification fails to disclose information required by Fed. R. Civ. P. 26(a) or Fed. R. Civ. P. 26(e)(1) is not, unless such failure is harmless, permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed. *See* Fed. R. Civ. P. 37(c)(1).

c. All fact discovery shall be commenced or served in time to be completed by **January 29, 2010**.

d. Consistent with Fed. R. Civ. P. 26(a)(2), plaintiffs shall submit their expert reports on or before **March 1, 2010**, and shall make their experts available for deposition by defendants on the subjects covered by their reports within 25 days after the submission of these expert reports. Defendants shall submit their Rule 26(a)(2) expert reports on or before **May 3, 2010**, and shall make their experts available for deposition by plaintiffs on the subjects covered by their reports within 25 days after the submission of these expert reports. Plaintiffs shall submit any rebuttal expert reports on or before **June 1, 2010**, and shall make their rebuttal experts available for deposition by defendants on the subjects covered by their reports within 25 days after the submission of these rebuttal expert reports. The parties may

by agreement make minor adjustments to these deadlines without seeking leave of court, provided such adjustments do not affect the deadline for completion of all expert discovery. The parties shall serve any objections to such disclosures (other than objections pursuant to Fed. R. Evid. 702-705, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), or similar case law), within 11 days after service of the disclosures upon them. These objections should be confined to technical objections related to the sufficiency of the written expert disclosures (e.g., whether all of the information required by Rule 26(a)(2)(B) has been provided, such as lists of prior testimony and publications). These objections need not extend to the admissibility of the expert's proposed testimony. If such technical objections are served, counsel shall confer or make a reasonable effort to confer consistent with requirements of D. Kan. Rule 37.2 before filing any motion based on those objections. As noted below, any motion to compel discovery in compliance with D. Kan. Rules 7.1 and 37.2 must be filed and served within 30 days of the default or service of the response, answer, or objection which is the subject of the motion, unless the time for filing such a motion is extended for good cause shown; otherwise, the objection to the default, response, answer, or objection shall be deemed waived. *See* D. Kan. Rule 37.1(b).

e. All expert discovery, including but not limited to experts' depositions, shall be commenced in time to be completed by **July 1, 2010**.

f. The parties intend to serve disclosures and discovery electronically, as permitted by D. Kan. Rules 5.4.2 and 26.3.

g. Consistent with the parties' agreements as set forth in the planning conference report submitted pursuant to Fed. R. Civ. P. 26(f), electronically stored information (ESI) in this case will be handled as follows:

> The parties agree responsive, relevant and non-privileged electronic records that may be located and retrieved by reasonable means will be made available consistent with the parties' document retention and retrieval policies. The parties have discussed, but not yet decided the format(s) in which electronic records will be produced. The parties will also meet and confer to resolve any disputes and to discuss any issues that may arise regarding any proposals to allocate to the discovering parties any portion of the costs of producing discovery of electronic information.

h. Consistent with the parties' agreements as set forth in their Rule 26(f) report, claims of privilege or of protection as trial-preparation material asserted after production will be handled as follows:

> The parties agree that in the event privileged or trial preparation materials are inadvertently disclosed, each party will notify the requesting party of such inadvertent disclosure. Upon notification, the party receiving the inadvertently disclosed materials must return, sequester or destroy all such material and copies of such material, and may not use or disclose such material or the information contained therein until the claim of privilege or protection as trial preparation materials is resolved by agreement or by the court.

i. No party shall serve more than 50 interrogatories, including all discrete subparts, to any other party.

j. Many current and former employees of defendants and their operating companies are likely to possess information relevant to the ERISA claims. At this time,

without document discovery having been completed, the number of depositions that will need be conducted cannot be predicted accurately. Accordingly, plaintiffs at this time are granted leave to conduct a maximum of 50 depositions of current and former employees of defendants and their operating companies. Defendants may depose each proposed class representative plaintiff on the ERISA claims and the state law age discrimination claims; further, defendants may depose a maximum of 10 additional plaintiffs who are named solely for purposes of the federal ADEA claims. Plaintiffs and defendants each may depose as many as 15 third-party witnesses. These limits are without prejudice to increase by mutual agreement of the parties or by leave of the court for good cause shown.

k. Each deposition shall be limited to 7 hours. All depositions shall be governed by the written guidelines that are available on the court's Internet website:

(http://www.ksd.uscourts.gov/guidelines/depoguidelines.pdf).

l. Supplementations of disclosures under Fed. R. Civ. P. 26(e) shall be served at such times and under such circumstances as required by that rule. In addition, such supplemental disclosures shall be served 40 days before the deadline for completion of fact discovery. The supplemental disclosures served 40 days before the deadline for completion of all fact discovery must identify the universe of all witnesses and exhibits that probably or even might be used at trial. The rationale for the mandatory supplemental disclosures 40 days before the fact discovery cutoff is to put opposing counsel in a realistic position to make strategic, tactical, and economic judgments about whether to take a particular deposition (or pursue follow-up "written" discovery) concerning a witness or exhibit disclosed by another

party before the time allowed for discovery expires. Counsel should bear in mind that seldom should anything be included in the final Rule 26(a)(3) disclosures, which as explained below usually are filed 21 days before trial, that has not previously appeared in the initial Rule 26(a)(1) disclosures or a timely Rule 26(e) supplement thereto; otherwise, the witness or exhibit probably will be excluded at trial. *See* Fed. R. Civ. P. 37(c)(1).

m. At the final pretrial conference after the close of discovery, the court will set a deadline, usually 21 days prior to the trial date, for the parties to file their final disclosures pursuant to Fed. R. Civ. P. 26(a)(3)(A)(i), (ii) & (iii). As indicated above, if a witness or exhibit appears on a final Rule 26(a)(3) disclosure that has not previously been included in a Rule 26(a)(1) disclosure (or a timely supplement thereto), that witness or exhibit probably will be excluded at trial. *See* Fed. R. Civ. P. 37(c)(1).

n. Discovery in this case may be governed by a protective order. If the parties agree concerning the need for and scope and form of such a protective order, their counsel shall confer and then submit a jointly proposed protective order by **February 20, 2009**. Such jointly proposed protective orders should be drafted in compliance with the written guidelines that are available on the court's Internet website:

(http://www.ksd.uscourts.gov/guidelines/protectiveorder.pdf).

At a minimum, such proposed orders shall include, in the first paragraph, a concise but sufficiently specific recitation of the particular facts in this case that would provide the court with an adequate basis upon which to make the required finding of good cause pursuant to Fed. R. Civ. P. 26(c). If the parties disagree concerning the need for, and/or the scope or

form of a protective order, the party or parties seeking such an order shall file an appropriate motion and supporting memorandum by **February 23, 2009**.

o. To avoid the filing of unnecessary motions, the court encourages the parties to utilize stipulations regarding discovery procedures. However, this does not apply to extensions of time that interfere with the deadlines to complete all discovery, for the briefing or hearing of a motion, or for trial. *See* Fed. R. Civ. P. 29; D. Kan. Rule 6.1(a). Nor does this apply to modifying the requirements of Fed. R. Civ. P. 26(a)(2) concerning experts' reports. *See* D. Kan. Rule 26.4(b).

3. Motions.

a. As earlier indicated, on January 29, 2009, plaintiffs filed motions for class action certification and for a collective action for their ADEA claims (docs. 55 and 57, respectively). As agreed by the parties, defendants shall have until **March 2, 2009** to file their response to the above-referenced motions, and plaintiffs shall have until **April 1, 2009** to file any reply briefs.

b. Subject to extension by the court for good cause, any motion for leave to join additional parties (other than by operation of Fed. R. Civ. P. 23 class certification) or to otherwise amend the pleadings shall be filed by **June 30, 2009**. The date by which additional plaintiffs must be joined under the collective action proceedings on the ADEA claims shall be the date set by the court in connection with those proceedings. Should the resolution of the pending merger of defendant Embarq Corp. and CenturyTel, Inc., present an issue with respect to amending the pleadings or adding additional parties, the parties shall meet and

confer on the issue and, if necessary, promptly notify the court.

c. All other potentially dispositive motions (e.g., motions for summary judgment) shall be filed by **August 31, 2010**. Notwithstanding D. Kan. Rule 6.1(d)(2), in this case, parties responding to a dispositive motion shall have 30 days to respond (i.e., instead of 23). Any reply briefs likewise shall be filed 30 days after such response.

d. All motions to exclude testimony of expert witnesses pursuant to Fed. R. Evid. 702-705, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), or similar case law, shall be filed no later than **August 31, 2010**.

e. Any motion to compel discovery in compliance with D. Kan. Rules 7.1 and 37.2 shall be filed and served within 30 days of the default or service of the response, answer, or objection which is the subject of the motion, unless the time for filing such a motion is extended for good cause shown. Otherwise, the objection to the default, response, answer, or objection shall be waived. *See* D. Kan. Rule 37.1(b).

4. Other Matters.

a. The parties agree that principles of comparative fault do not apply to this case.

b. At *any* time, the parties may request the undersigned magistrate judge to conduct a status conference to address matters relating to discovery or general case management.

c. Pursuant to Fed. R. Civ. P. 16(e), a final pretrial conference is scheduled for **July 23, 2010, at 9:00 a.m.**, in the U.S. Courthouse, Room 236, 500 State Avenue, Kansas

City, Kansas, or by telephone if the judge determines the proposed pretrial order is in the appropriate format and there are no other problems requiring counsel to appear in person. Unless otherwise notified, the undersigned magistrate judge will conduct the conference. No later than **July 9, 2010**, the parties shall submit their jointly proposed pretrial order (formatted in WordPerfect 9.0, or earlier version) as an attachment to an Internet e-mail sent to *ksd_ohara_chambers@ksd.uscourts.gov*. The proposed pretrial order shall not be filed with the Clerk's Office. It shall be in the form available on the court's Internet website (*www.ksd.uscourts.gov*), and the parties shall affix their signatures according to the procedures governing multiple signatures set forth in paragraphs II(C) of the *Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means in Civil Cases*.

d. The parties expect the trial of this case to take approximately 15 days. This case is set for trial on Judge Melgren's docket beginning on **March 1, 2011, at 9:00 a.m.** Unless otherwise ordered, this is not a "special" or "No. 1" trial setting. Therefore, during the month preceding the trial docket setting, counsel should stay in contact with Judge Melgren's courtroom deputy to determine the day of the docket on which trial of the case actually will begin. The trial setting may be changed only by order of Judge Melgren.

e. The parties are not prepared to consent to trial by a U.S. Magistrate Judge at this time.

f. The arguments and authorities section of briefs or memoranda submitted shall not exceed 30 pages, absent an order of the court.

This scheduling order shall not be modified except by leave of court upon a showing of good cause.

IT IS SO ORDERED.

Dated this 6th day of February, 2009, at Kansas City, Kansas.

s/ James P. O'Hara
James P. O'Hara
U.S. Magistrate Judge