IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WILLIAM DOUGLAS FULGHUM, et al., Individually and on behalf of all others similarly situated, Plaintiffs, v. EMBARQ CORPORATION, et al., Defendants.	CIVIL ACTION CASE NO. 07-CV-2602 (EFM/JPO) CLASS ACTION

MEMORANDUM IN SUPPORT OF PLAINTIFFS' RULE 56(f) MOTION
TO DENY OR CONTINUE MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants have twice attempted to secure dismissal of the ERISA claims for benefits in this case based on an incomplete record. First, defendants attempted to obtain such a ruling in advance of any discovery by filing a motion to dismiss which presented a few pages from plan-related documents they selected. In its December 2, 2008 decision denying in substantial part defendants' motion, the Court admonished defendants that the record was not sufficiently developed to make an informed decision even on the question whether a correct and complete set of plan-related documents had been presented by defendants. Memorandum and Order, dated December 2, 2008, at 15 (Doc. 45).

Following denial of their dismissal request, defendants then proposed a Scheduling Order in which discovery would be "phased," allowing defendants to unilaterally compile a limited record and move for early, pre-discovery summary judgment. After consultation with the Court, Magistrate Judge O'Hara rejected defendants' proposal and ordered defendants to proceed with full discovery. February 6, 2009 Scheduling Order (Doc. 59).

Apparently unwilling to learn the lesson from their past two failed attempts, defendants have now turned back to their original strategy: obtain dismissal of plaintiffs' claims through the unilateral production of a limited number of documents they assert are the plan documents applicable to the plaintiffs, without allowing any opportunity for discovery. Since the Court's December 2, 2008 decision denying the motion to dismiss the ERISA plan-based claims, defendants have done nothing to assure the Court that the plan documents presented with their new motion are the correct and complete set for all plaintiffs. As shown below and in the Affidavit of Alan M. Sandals, defendants have once again (1) failed to include all of, and the correct, plan documents and summary plan descriptions ("SPDs") for the plans which govern the benefits of many of the plaintiffs; (2) failed to make clear which plans they did provide are applicable to which plaintiffs; and (3) failed to include documents required to be considered in conjunction with the SPDs, including collective bargaining agreements and other evidence bearing on the question whether the defendants modified their plans.

For these and other reasons explained below, plaintiffs have been denied discovery of the documents they need to compile a proper record and fully respond the motion for partial summary judgment. As provided under Fed. R. Civ. P. 56(f), the Court should either deny outright or continue defendants' Motion for Partial Summary Judgment.

I. THE LEGAL STANDARDS GOVERNING APPLICATION OF RULE 56(f)

Fed. R. Civ. P. 56(f), as rephrased in 2007, provides that, "If a party opposing the [summary judgment] motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition," the court may deny or defer consideration of the motion for summary judgment.

Rule 56(f) implements the general principle that "summary judgment [should] be refused where the nonmoving party has not had the opportunity to discover information that is essential

to its opposition." *Hackworth v. Progressive Casualty Ins. Co.*, 468 F.3d 722, 732 (10th Cir. 2006), *quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5 (1986).

The case law of this Circuit directs that properly supported applications under Rule 56(f) should be freely granted where the circumstances indicate that the party opposing summary judgment has acted diligently but is unable to gather and present its opposing evidence due to the early and/or incomplete status of discovery. "Unless dilatory or lacking in merit, the motion should be liberally treated." *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1522 (10th Cir. 1992), *quoting* Moore & Wicker, *Moore's Fed'l Practice* ¶ 56.24 (1988); *see also King Airway Co. v. Rosenthal*, 1997 U.S. App. LEXIS 7622 at *14 (10th Cir. 1997); *Patty Precision v. Brown & Sharpe Mfg. Co.*, 742 F.2d 1260, 1265 (10th Cir. 1984); *Morris-Eberhart v. J. G. Mathena & Assoc., Inc.*, 186 F.R.D. 619, 621 (D. Kan. 1999).

In cases where information needed to oppose summary judgment is likely to be in the sole possession of the moving party, "a party's access to witnesses or material is of crucial importance." *Patty Precision*, 742 F.2d at 1264. "Sufficient time for discovery is especially important where relevant facts are exclusively in the control of the opposing party." *Weir v. The Anaconda Co.*, 773 F.2d 1073, 1081 (10th Cir. 1985). A moving party's exclusive control of needed information "is a factor weighing heavily in favor of relief under Rule 56(f)." *Price v. Western Resources, Inc.*, 232 F.3d 779, 783 (10th Cir. 2000); *see also American Maplan Corp. v. Hellmayr*, 165 F. Supp. 2d 1247, 1254 (D. Kan. 2001).

An affidavit invoking Rule 56(f) "need not contain evidentiary facts, [but] it must explain why facts precluding summary judgment cannot be presented." *Committee for the First Amendment*, 962 F.2d at 1522. The affidavit should identify the probable facts that are not currently available and the steps taken to obtain them, as well explain how allowance of additional time for discovery will enable the party to rebut the movants' factual showing. *Id.*

Upon the required showing, the court may deny the motion for summary judgment, order a continuance of the motion to enable the opposing party to conduct discovery, or "issue any other just order." Fed. R. Civ. P. 56(f).

As shown in the remainder of this Memorandum, this case is at an early discovery phase and documents and facts pertinent to the identification, history and administration of the subject benefit plans lie within the exclusive control of defendants. Accordingly, the motion for partial summary judgment should be denied or continued so that the required discovery can be conducted in accordance with the February 6, 2009 Scheduling Order (Doc. 59). "A significant amount of historical discovery has not taken place, but the interpretation and significance of historical documents are central to the [summary judgment] motions pending before the court." *Kickapoo Tribe of Indians v. Knight*, No. 06-2248 (CM), 2007 U.S. Dist. LEXIS 39698 at * 8 (D. Kan. May 30, 2007) (granting Rule 56(f) motion and denying without prejudice motions for partial summary judgment).

II. THE FACTS PERTINENT TO PLAINTIFFS' RULE 56(F) MOTION TO DENY OR CONTINUE DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT.

The facts and circumstances of this case which support relief under Rule 56(f) are enumerated in the accompanying Affidavit of Alan M. Sandals, which plaintiffs incorporate by reference. The following statement largely summarizes the information set forth in the affidavit without specific citation.

Under Tenth Circuit law, the benefits entitlements of a retired employee are determined by reference to the summary plan description (and possibly the full plan document) in effect at the time of his or her retirement. In addition, the benefits entitlements of employees who accepted and participated in special retirement programs which were offered by defendants from time to time may be defined or supplemented in the documents describing the terms of those programs. *See*

Memorandum and Order, dated December 2, 2008 at 13-14 & n. 11 (Doc. 45) (hereinafter "Op.") ("The Tenth Circuit has found that subsequent writings can create a new employee benefit plan for purposes of ERISA"), *citing DeBoard v. Sunshine Min. & Refining Co.*, 208 F.3d 1228, 1238-39 (10th Cir. 2000); Plaintiffs' Memorandum in Opposition to Motion to Dismiss at 14 (Doc. 21). For retirees who were members of collective bargaining units, entitlements to retiree benefits are also defined by collective bargaining agreements (CBAs), which are considered to be among the "documents or instruments under which the plan is established or operated" under ERISA, 29 U.S.C. § 1024, and must also be examined to determine whether retiree benefits vest for retired union employees. *See Flinders v. Workforce Stabilization Plan of Phillips Petroleum Co.,* 491 F.3d 1180, 1193-94 (10th Cir. 2007); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1514 (10th Cir. 1996) (discussing review of CBA and *citing Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1295-96 (6th Cir. 1996), which held that promise to provide retirement benefits under CBA would be "illusory" if employer had right to terminate unilaterally); *Int'l Assoc. of Machinists and Aerospace Workers v. Masonite Corp.,* 122 F.3d 228, 233-34 (5th Cir. 1997) (reservation of rights in plan document does not empower company to terminate retirees' health insurance where CBA contained no such clause; in light of CBA language, extrinsic evidence ordered to determine parties' intent).

Therefore, in order to determine and evaluate the governing operative documents for a member of the class in this case, it is first necessary to assemble the pertinent summary plan descriptions and plan documents along with special retirement program descriptions and collective bargaining agreements. All of the SPDs, plan documents, special early retirement related documents and CBAs have been requested by plaintiffs in Document Requests Nos. 1 and 7 of their pending discovery requests. To date however, defendants have produced in this litigation only those summary plan descriptions and plan documents which they presented as exhibits to their

motion to dismiss and motion for partial summary judgment. No collective bargaining agreements or special retirement program materials have been produced by defendants and they remain in defendants' control. Due to the incomplete state of discovery, plaintiffs are not currently able to present these types of documents in opposition to the motion for partial summary judgment.

In addition, under Tenth Circuit case law, courts determining the meaning of ERISA plans (and of contracts generally) may consider evidence bearing on the question whether the employer (or other contracting party) modified the plan or contract as evidenced by its subsequent course of performance. *See* Pl. Memorandum in Opposition at 26-27. Accordingly, the written communications made by Sprint and its predecessors to employees and others can reveal whether ERISA plan terms were modified. For example, in the February 2006 email exchange between named plaintiff Robert King and Sprint benefits representative Ledora Lavender, Sprint repeatedly advised King in writing that he had retiree life insurance, including a Survivor Income Benefit, in the combined amount of $25,000, "which will remain the same until your death" and that the premium "will not change during your life time." *See* Declaration of Robert E. King and Exhibit A thereto (presented with Pls. Opposition to Motion for Partial Summary Judgment).

The same types of evidence indicate the employer's own understanding of benefits under the relevant plans and reveal whether plan language is reasonably susceptible to more than one meaning, including for example, the meaning that an employee who has retired and begun to receive retiree benefits is entitled to continue receiving them until death. Put another way, if Sprint's own benefits staff – who worked with plan language and provided information to employees and retirees every day – understood the plan to provide life insurance coverage for a retiree's "lifetime" which would "remain the same until your death" and so communicated to retirees, then the plan at a minimum is reasonably susceptible to that interpretation. Defendants have produced none of this evidence revealing how the companies administered and described the

benefits, and plaintiffs therefore are unable to present these pertinent documents in opposition to the motion for partial summary judgment.

Moreover, defendants have ignored the fact that there are many other retirees whose medical and life insurance benefits were provided by plans other than the limited number presented by defendants in their motion. Defendants' arguments seeking partial summary judgment are based upon the premise that the only relevant plan-related documents are those covering plans from 1993 to 2003, the period during which the named class representatives retired. However, the proposed ERISA class, as defined in plaintiffs' motion for class certification, includes all plan participants and beneficiaries whose retiree medical and life insurance benefits were reduced and eliminated by defendants' conduct, and therefore consists of a much broader class of plan participants and involves many more plans than defendants have produced thus far. Because defendants uniformly terminated or reduced the benefits for all of its retirees, the named plaintiffs have standing to represent all retirees, even if they did not personally participate in each of the ERISA-governed plans affected by defendants' unlawful reductions and terminations. *See Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 422-24 (6th Cir. 1998) ("an individual in one ERISA benefit plan can represent a class of participants in numerous plans other than his own, if the gravamen of the plaintiff's challenge is to the general practices which affect all of the plans"), *citing Forbush v. J.C. Penney Co., Inc.*, 994 F.2d 1101, 1106 (5th Cir. 1993); *see also Davis v. Bailey*, No. 05-00042, 2005 U.S. Dist. LEXIS 38204 at *5-7 (D.Colo. Dec. 22, 2005) (adopting *Fallick*). Defendants have not produced any of the plans applicable to retirees in the Class for whom the named plaintiffs represent, other than the few they assert applies to the class representatives, and consequently, defendants' partial motion for summary judgment on the First and Third Claims is not ripe for adjudication for all of plaintiffs' claims in the Second Amended Complaint.

Out of an abundance of caution, plaintiffs have moved to amend the Second Amended Complaint contemporaneously with the filing of their summary judgment response and Rule 56(f) motion to designate additional class representatives from among the existing plaintiffs. The amendment will eliminate any argument by defendants that the only relevant plan documents are those dating from 1993 to 2003. The new class representatives designated in the proposed Third Amended Complaint are Donald Ray Clark (retired August 31, 1976), Curtis C. Pittman (retired November 1, 1983), James Woodie Britt (retired June 30, 1985), Laudie Colon McLaurin (retired December 31, 1988), and John Lee Burgess (retired August 1, 1989). Mr. Clark was also a union member at the time of his retirement. These retirees are already named in the pleadings as individual age discrimination plaintiffs and are being designated as class representatives for all purposes.

Even as to the selected exhibits presented by defendants in support of their motion for partial summary judgment, review shows that several of them pertain to active employees and do not fully govern and define the rights of retired employees. *See* Defendants' Exhibits 8-11. *See* Pl. Memorandum in Opposition at 12-13. For example, the SPD that defendants claim to be applicable to plaintiff Sue Barnes, a former union employee, was written for current, active union employees, not retired employees. Likewise, all of the life insurance SPDs that defendants cite govern life insurance for current employees. Although these documents contain scattered statements about entitlement to receive life insurance benefits after retirement, they do not specify the terms for post-employment coverage and instead instruct the reader to "ask your Employer if arrangements may be made to continue insurance." *See, e.g.,* Def. Ex. 9 at EQ_FUL_1196. On their face, these documents constitute incomplete statements of the benefits applicable to retired employees. Other documents that defendants have not produced must contain the detailed information governing the benefits for retirees. It is unlikely that programs of retiree life insurance were in force without such

documentation, given the requirements of ERISA that have been in force since 1974.

Furthermore, defendants still have not produced the relevant plan documents and SPDs that govern the life insurance benefits for the named plaintiffs, both non-bargaining and union, who retired from defendant CT&T. Defendant asserts that the Group Life Insurance Plan, a plan for active employees contained in a document with three other active employee life insurance plans, governs the non-bargaining retirees. Def. Ex. 10. However, as is clear from the Declaration of Willie Dorman, one of the non-bargaining CT&T retiree plaintiffs and a class representative, CT&T employees retired under a different plan called the "Grand-fathered Life Insurance Plan," and were entitled to life insurance benefits that do not remotely resemble the benefits described in the Group Life Insurance Plan. *See* Dorman Decl. at ¶¶ 13-14 and Ex. 2 thereto (explaining that CT&T retirees received life insurance in the amount of two times their annual salary (rounded down to the nearest $1,000) in force during the first five years of retirement, reduced to one times annual salary after the fifth year); *see also* Second Amended Complaint at ¶¶ 68-70. These plaintiffs therefore did not retire under the plan that defendants presented with their motion.

Defendants also claim that former CT&T union employee Barnes retired under the Group Basic Contributory Life Insurance and Group Accidental Death and Dismemberment Benefits and Additional Accidental Death Benefits and Dependent Life Benefits Plan for the Bargaining Employees of Carolina Telephone SPD. Def. Ex. 11. As a CT&T retiree, however, Barnes received the same Grand-fathered Life Insurance benefits as non-bargaining CT&T retirees, and like the Group Life Insurance Plan, the schedule of benefits listed in Def. Ex. 11 calculates retiree life insurance by an entirely different formula than the amount actually provided to Barnes under the different plan that was applicable to her but has not yet been produced by defendants. *See* Ex. B, attached hereto (memo titled "Sprint Retiree Life Insurance" which includes a description of "Grandfathered Basic Coverage" provided to retirees of IBEW and CWA unions). Therefore

defendants have also failed to produce the relevant SPDs governing her retiree life insurance benefits, and discovery on the Grand-fathered life insurance plan must be completed before defendants' dispositive motion can be entertained on a proper record.

In addition, the supporting Declaration of Randall T. Parker and defendants' memorandum contain conflicting statements about the nature and governing scope of the life insurance described in Def. Exs. 3 and 7. *See* Pl. Memorandum in Opposition at 8-9. Defendants assert in their unverified memorandum that Def. Ex 3, the so-called "Wrap Plan," governs some of the named plaintiffs' retiree life insurance. However, Parker states in his declaration that the Sprint Retiree Benefits SPD, Def. Ex. 7, governs these plaintiffs' retiree life insurance benefits. Additional document discovery and deposition discovery must be conducted in order to resolve these gaps and conflicts in the record.

The life insurance exhibits defendants did present with their motion indicate that, for some plaintiffs and class members, defendant Sprint and its predecessors purchased life insurance group policies from Equitable Life Assurance Society of America. *See, e.g.,* Def. Ex. 9 at EQ_FUL_1197. It also appears that the insurer, rather than the employer, prepared the portions of summary plan descriptions describing that coverage, referred to as "certificates," principally for active employees. *See, e.g.,* Def. Ex. 9 at EQ_FUL_1197. Although these portions state that the life insurance "coverage" will end when the "Group Policy terminates," the limited record currently available shows that, in fact, the Equitable group policy did terminate at some point but the life insurance benefits continued in force for retirees until they were reduced or terminated by Embarq effective January 1, 2008. For example, the 2006 Embarq retiree SPD, pertinent excerpts of which are attached as Exhibit A, states that the retiree life insurance benefits were administered by "The Hartford" and the North Carolina Mutual Life Insurance Company rather than by Equitable.

Plaintiffs have requested in Document Requests Nos. 6, 12, 16 the documents relating to the history of the various insurance vehicles used by Sprint and its predecessors to fulfill their retiree life insurance benefit obligations. None of these documents have been produced by defendants and pertinent documents cannot be presented in opposition to the motion for partial summary judgment.

Plaintiffs also allege that defendants' reduction and elimination of the retiree life insurance disproportionately impacted the Class in violation of the ADEA and anti-discrimination laws of several states. Plaintiffs have requested in Document Request No. 20 the documents demonstrating the demographic characteristics of the proposed ADEA class to be used in establishing this cause of action. Defendants have produced none of this discovery, and therefore pertinent documents of this type cannot be presented by plaintiffs in opposition to the motion for partial summary judgment.

For all of these reasons, it is premature for the Court to consider defendants' motion for partial summary judgment motion until it has before it the correct documents relevant to the plans that cover all of the retirees affected by the reduction and elimination of benefits. These documents, which defendants possess but still have not produced, are enumerated in the accompanying Affidavit. Plaintiffs will not be able to fully respond and oppose the motion for partial summary judgment until defendants have produced these documents.

CONCLUSION

For the reasons stated, plaintiffs hereby invoke the protections of Fed. R. Civ. P. 56(f) and respectfully request that the Court either deny defendants' motion for partial summary judgment or continue it until such time as plaintiffs have been provided the necessary discovery in conformity with the Scheduling Order.

April 7, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of April, 2009, I electronically filed the foregoing Plaintiffs' Memorandum in Support of Plaintiffs' Rule 56(f) Motion To Deny or Continue Motion for Partial Summary Judgment and the accompanying Affidavit of Alan M. Sandals using the CM/ECF system, which will send notice of electronic filing to the following counsel for defendants:

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