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

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' RULE 56(f) MOTION TO DEFER DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' RULE 56(f) MOTION TO DEFER DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs have established that the Court should continue or deny defendants' motion for partial summary judgment pursuant to Fed.R.Civ.P. 56(f). This treatment of defendants' motion is especially warranted given the circumstances, including (1) defendants' continuing failure to make clear which of the plans that they have selectively produced apply to which named plaintiffs; (2) their failure to respond to, or even acknowledge, their fundamental errors in assembling their exhibits and in describing them to the Court; (3) their failure to produce all of the plans, summary plan descriptions (SPDs), early retirement plan documentation and collective bargaining agreements (CBAs) that are applicable to the named plaintiffs; and (4) their failure to produce all the governing plans and SPDs under which the members of the class retired. Defendants' response to the motion makes no effort to actually respond to the identified defects in defendants' summary judgment exhibits.

Further, on the retiree life insurance age discrimination claims, defendants ask the Court make implicit and explicit factual findings – including a determination that plaintiffs claim

disparate treatment, not disparate impact from the reductions and terminations of the benefits, that there is no material difference between canceling or limiting the benefits for active employees and those already retired, and that plaintiffs and the Class actually incurred equal costs under 29 C.F.R. §§ 1625.10(d) and (f)(2)(v) – all without the benefit of discovery. This effectively bars plaintiffs from obtaining any evidence to counter defendants' arguments made in their motion.

The shortcomings of defendants' motion also create legal impediments to entertainment of the motion. Under the Tenth Circuit's standard liberally construing and granting in the interest of justice Rule 56(f) motions, the circumstances here warrant the denial, or at best for defendants, a continuance of their motion for summary judgment until discovery on these issues has been completed. *King Airway Co. v. Routt County*, No. 95-1315, 1997 U.S. App. LEXIS 7622 at *14 (10th Cir. April 17, 1997) (finding abuse of discretion in not granting Rule 56(f) motion, reversing summary judgment and remanding case, holding that "because the purpose of Rule 56(f) "'is to provide an additional safeguard against an improvident or premature grant of summary judgment,' the rule 'should be applied with a spirit of liberality'"), *citing*, 10A Wright, *Federal Practice and Procedure:* Civil 2d § 2740, at 532 (2d ed. 1983); *see also Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1523 (10th Cir. 1992), *citing*, 6 *Moore's Federal Practice* ¶ 56.24. The Court should grant plaintiffs' Rule 56(f) motion, deny or continue defendants' motion for partial summary judgment, and allow the parties to complete discovery before dispositive motions are heard, as was intended by the Court in ruling on the conflicting positions of the parties in their Rule 26(f) Report.

I. Discovery is Necessary on the ERISA Claims

In defendants' first attempt to obtain dismissal of the ERISA claims for benefits, the Court held that the record was insufficiently developed to make an informed decision even on

the question whether a current and complete set of plan-related documents had been presented by defendants. Memorandum and Order, dated December 2, 2008, at 15 (Doc. 45). Plaintiffs' Rule 56(f) motion, including the affidavits in support thereof, and defendants' response confirm that defendants have again failed to produce the relevant plan documents and SPDs which actually govern the retiree benefits for the named plaintiffs. Plaintiffs' supporting Affidavit of Alan M. Sandals describes the documents defendants unilaterally produced in support of their partial motion for summary judgment as those pertaining to active employees, not retired employees, and shows that defendants did not even produce 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. Plaintiffs also demonstrate that defendants' memorandum conflicts with the Declaration of their primary witness, Director of Benefits Randall T. Parker, on the question of which plan document governs other named plaintiffs' retiree life insurance.

Given the apparent haste and carelessness with which defendants compiled their plan document and SPD exhibits within weeks of Magistrate O'Hara's refusal to endorse their efforts to conduct "phased" discovery and move for early pre-discovery summary judgment, it is not surprising that defendants have failed to provide any substantive response in opposition to plaintiffs' detailed identification of the defects in their summary judgment exhibits.[1] In fact,

[1] Defendants claim that they produced relevant documents relating to the Special Early Retirement Plans under which many named plaintiffs retired, and assert that they therefore have satisfied the Court's concerns that under *DeBoard v. Sunshine Min. & Refining Co.*, 208 F.3d 1228 (10th Cir. 2000), these documents may have created new ERISA plans which provide for vested benefits, and must be produced before a dispositive ruling can be made. *See* Def. Mem. at 8-9, n. 4. However, by defendants' own admission, their production of Special Early Retirement documents is incomplete. First, defendants limited their production to only those forms that found their way into the named plaintiffs' specific personnel and benefits files. Defendants have not conducted the necessary wider search of multiple other sources of corporate records, including records of defendants' benefits offices, for documents relating to these plans. Second, in contrast to their representation that "Plaintiffs now possess the documents that they contend may have created a new plan under *DeBoard*," defendants instead have agreed, pursuant to the

defendants' only reference to their continuing failure to produce the correct plans and SPDs is found in a footnote to their reply memorandum in support of their motion for partial summary judgment. *See* Def. Reply at 19 n. 16 (Doc. 91). There, defendants meekly suggest that – without the benefit of discovery – the Court should evaluate the parties' claims about whether the plans presented by defendants are actually the correct governing documents, and if the Court decides one or more have been shown to govern some of the named plaintiffs claims to retiree benefits, determine whether the language in those selected plans unambiguously allows defendants to reduce and terminate the retiree benefits. In other words, defendants are standing fast. They refuse to correct their record and want to put the Court to the task of resolving the factual questions created by their imperfect record and force the Court to salvage their motion in some way. In taking this approach, defendants have tacitly conceded that they have not produced the correct and complete set of plan-related documents for the named plaintiffs. Defendants' improper approach also would result in piecemeal decision making, whereby only a subset of defendants' admittedly incomplete and erroneous exhibits could be the subject of any ruling by the Court, and even those rulings would be subject to reexamination and revision once the proper, complete record is later presented. Because defendants have done nothing to remedy the patent defects in their summary judgment exhibits, the Court should grant plaintiffs' Rule 56(f) motion, deny defendants' motion for partial summary judgment, and order that discovery must be complete before another dispositive motion on these issues is filed.

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parties' discussions concerning defendants' compliance with plaintiffs' discovery requests, to produce all documents describing the Special Early Retirement programs under which the named plaintiffs retired. *See* June 5, 2009 ltr. from James Walsh to Scott Lempert at 3-4, attached hereto as Exhibit 1. Accordingly, defendants concede that other documents relating to these early retirement plans exist outside the named plaintiffs' employee-specific files, and acknowledge that they still must produce these documents. These documents are clearly germane to plaintiffs' opposition to the summary judgment motion. Plaintiffs' Rule 56(f) motion can be granted on this basis alone.

While the Court can grant plaintiffs' Rule 56(f) motion simply because of the patent defects in defendants' exhibits, their opposition memorandum provides even further support for denying or deferring their motion for partial summary judgment. Plaintiffs' memoranda filed in opposition to defendants' motion and in support of the Rule 56(f) motion present case law establishing that because defendants uniformly terminated or reduced the benefits for all retirees, the named plaintiffs have standing to represent all of these affected retirees, even if the plaintiffs did not personally participate in each of the ERISA-governed plans affected by defendants' unlawful conduct. *See* Pls. Mem. in Support of Rule 56(f) at 7 (Doc. 80), *citing, Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 422-24 (6th Cir. 1998); *Forbush v. J.C. Penney Co., Inc.*, 994 F.2d 1101, 1106 (5th Cir. 1993); *Davis v. Bailey*, No. 05-00042, 2005 U.S. Dist. LEXIS 38204 at *5-7 (D. Colo. Dec. 22, 2005); Pls. Opp. Mem at 12, n. 4 (Doc. 81). In limiting their production to a few plans which they assert – incorrectly – apply to the class representatives, and failing to produce any of the plans applicable to other retirees in the Class, defendants' motion is rendered premature. Under *Fallick, Forbush* and their progeny, all plan documents and SPDs for all retirees represented by the named plaintiffs must be produced before a motion for summary judgment on Counts One and Three can be heard.

Again, defendants have failed to directly respond to plaintiffs' arguments. Without citation to any contrary authority, defendants – in complete denial of the allegations made in the Second Amended Class Action Complaint – merely label the proposed ERISA class, and the plans under which they retired, "fictional," and cite inapposite caselaw. *See* Def. Mem. at 5-6. None of defendants' cases involved ERISA plans other than those in which all plaintiffs participated, and all were decided on statute of limitations grounds which apparently disposed of the claims of all plaintiffs and class members. *See, e.g., Herrera v. Int'l Union, UAW,* 858 F. Supp. 1529, 1541 (D. Kan. 1994); *Muller v. Am. Mgmt. Ass'n Int'l,* 368 F. Supp. 2d 1166, 1173

(D. Kan. 2004); *Dean v. Boeing Co.*, No. 02-1019, 2003 U.S. Dist. Lexis 8787, at *15-18 (D. Kan. Apr. 24, 2003). In this case, defendants make no pretense that their motion could decide the claims of class members.

Defendants also err in arguing that collective bargaining agreements ("CBAs") are not relevant to the ERISA claims in Counts One and Three, ostensibly because plaintiffs do not currently include a claim under the Labor Management Relations Act. *See* Def. Mem. at 5 n. 3. The case law is clear that where entitlements to retiree benefits are defined not only by ERISA plans but also CBAs, those agreements must also be examined to determine whether retiree benefits vest. "[I]f it is the intention of the parties to confer on retirees vested rights in medical insurance benefits under a CBA, it is also their intention to confer those same rights under the 'welfare benefit plan' protected by ERISA." *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1298 (6th Cir. 1996) (affirming district court's finding that breach of contract under LMRA § 301 separately constitutes a violation of ERISA), *cited with approval in Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1514 (10th Cir. 1996) (*Yard-Man* inference of vested ERISA retiree benefits appropriate "where parties bargained over the language of retirement benefits"); *see also Winnett v. Caterpillar, Inc.*, 553 F.3d 1000, 1009 n. 5 (6th Cir. 2009) ("If parties intended to vest benefits and the agreement establishing this is breached, there is an ERISA violation as well as a Labor-Management Act violation") (citation omitted).

Defendants' most recent document production, made on May 18, 2009, constitutes more than half of its entire production thus far, but consists entirely of Form 5500s and other financial-related documents associated with various retiree benefits plans. Significantly, the financial statements for the retiree medical insurance plan for CT&T unionized retirees, including named plaintiff Barnes, states that a "more complete description of the Plan's provisions" can be found in the Plan document, SPD *and* the CBA, and that defendant CT&T's right to terminate the Plan

is "subject to the requirements of the applicable collective bargaining agreements." *See* Financial Statements, Group Medical Insurance Plan For Certain Retirees and the Bargaining Employees of Carolina Telephone and Telegraph Company, attached hereto as Exhibit 2, at EQ_FUL_012756-57. Defendants' own documents thus refute their contention that defendants' still-unproduced CBAs are not relevant and necessary to oppose defendants' motion for partial summary judgment.

Defendants' citation to the First Circuit's decision in *Balestracci v. NSTAR Elec. & Gas Corp.*, 449 F.3d 224 (1st Cir. 2006), is inapposite. In *Balestracci*, unlike this case, the CBAs were irrelevant to the issue of vested retiree benefits plans because *none* of the plaintiffs were union retirees. *Id.* at 226. It is fundamental that retirees who did not retire under a CBA cannot assert rights under that CBA (although a CBA may have other evidentiary value in proving course of dealing and employer intent with respect to management retirees). Conversely here, named plaintiff Barnes and many other union employees retired under CBAs that govern their rights to retiree medical and life insurance benefits, and plaintiffs are entitled to discovery of these documents before a motion for summary judgment on the question of vested retiree benefits is briefed and decided.

Similarly unpersuasive is defendants' response to plaintiffs' asserted need for evidence bearing on the question whether defendants modified the plans by their subsequent course of performance, and other documents revealing how the companies administered and described the benefits, particularly in light of the unrefuted illustrative evidence presented by named plaintiff King that defendant Sprint repeatedly advised him in writing that his retiree life insurance was at a fixed amount "until your death" and that the premium "will not change during your life time," and evidence in the public record that although some of the life insurance plan documents stated coverage ends when the "Group Policy terminates," life insurance policies did terminate without

a cessation of benefits. *See* Pls. Mem. at 6-7, 10. Plaintiffs' opposition memorandum presented multiple decisions demonstrating that Tenth Circuit courts look beyond the four corners of the SPD to determine whether plan terms are ambiguous. *See* Pls. Opp. Mem. at 22-23 (discussing *Miller v. Monumental Life Ins. Co.*, 502 F.3d 1245, 1248-52 (10th Cir. 2007), *Blair v. Metropolitan Life Ins. Co.*, 974 F.2d 1219, 1221-22 (10th Cir. 1992), *Hickman v. GEM Ins. Co.*, 299 F.3d 1208, 1212 (10th Cir. 2002), and *Stewart v. Adolph Coors Co.*, 217 F.3d 1285, 1290 (10th Cir. 2000)). Other than their faulty discussion of *Miller*, which ignores the fact that the court rejected the technical meaning of a plan term in light of evidence of administrative practice, defendants have failed to distinguish or even acknowledge any of these other decisions which relied on extrinsic evidence to determine whether plan language was ambiguous.

Instead, defendants grasp for the Sixth Circuit's decision in *Winnett v. Caterpillar, Inc.*, 553 F.3d 1000 (6th Cir. 2009), which ruled that additional discovery could not render the relevant CBAs ambiguous. *See* Def. Mem. at 9-10. However, the court in *Winnett* was not asked to determine whether a plan document or CBA provided vested retiree benefits for retirees. In *Winnett*, the plaintiffs had not yet retired and the question for the court was whether the right to vested benefits was created at the time the worker became eligible for the benefits but continued active work thereafter. *Id.* at 1002. In ruling that the plan language did not provide for vested retiree benefits to active employees, the court relied heavily on Sixth Circuit case law establishing the legal distinction between retired workers and active employees when deciding whether retirement benefits vest. *Id.* at 1010-11 ("Plaintiffs here were not retired; they were 'contemplating retirement,' when the 1988 Collective Labor Agreement expired – and therefore were within the category of workers whose retirement package, we explained, 'will change with the expiration' of their collective labor agreement"), *citing, Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 581 (6th Cir. 2006). Accordingly, *Winnett* does not contradict Tenth Circuit

authority that it is permissible to consider evidence outside the plan language itself to determine whether retiree benefits have vested for retired employees.

II. Discovery is Necessary on the Age Discrimination Claims

Defendants contend that there is no need for discovery prior to ruling on partial summary judgment, but in their motion for partial summary judgment request the Court to make a series of implicit and explicit factual findings drawn from thin air, all of which are critical to their claim of exemption from the disparate-impact provisions of the ADEA, and all of which are subject to refutation by the types of facts which remain to be assembled through discovery:

(a) Defendants ask this Court to find that there is only a disparate-treatment claim, so that there is no need to go beyond the fact that all retirees were affected (Def. Mem. in Support of Partial S.J. at 23), which plaintiffs refuted by their discussion of the disparate-impact claim and their need for evidence as to that claim (Pls. Opp. at 35-36);

(b) Defendants ask this Court to find that there is no material difference between a prospective cancellation or limitation of future retiree life insurance benefits for employees who are still working, and employees who have retired and are on limited incomes (Def. Mem. in Support of Partial S.J. at 24-25);

(c) Defendants implicitly ask this Court to find that their cancellation or limitation of life insurance benefits for persons already retired is a bona fide employee benefit plan, which is a condition of the "equal cost / equal benefit" exemption. (Def. Mem. in support of Partial S.J. at 25-26), which plaintiffs have questioned (Pls. Opp. at 38-39);

(d) Defendants implicitly ask this Court to find that they provided accurate, clear, understandable written notice to employees. Such notice is a condition of a bona fide employee benefit plan. However, defendants have refused to provide the discovery necessary to determine that issue, as shown above;

(e) Defendants implicitly ask this Court to find that they actually provided the benefits they described to employees. The actual provision of the benefits they described to employees is a condition of a bona fide employee benefit plan. However, defendants have refused to provide the discovery necessary to determine that issue, as shown above;

(f) Defendants ask this Court to find that they actually incurred equal costs as defined by the EEOC in 29 C.F.R. §§ 1625.10(d) and (f)(2)(v), but have made no factual showing and are trying to prevent plaintiffs from obtaining evidence to the contrary. *See* Pls. Opp. at 39;

(g) Defendants ask this Court to find that they actually provided equal benefits to VEBA participants, but have made no factual showing that they have done so, and are trying to prevent plaintiffs from obtaining evidence to the contrary. *See* Pls. Opp. at 39-40, for the explanation of plaintiffs' factual disagreement with defendants on this point;

(h) Defendants' Reply in support of their Motion for Partial Summary Judgment argues for the first time that plaintiffs have failed to state a disparate-impact claim under the ADEA because they have not sufficiently alleged or shown the disparate impact, and mischaracterize plaintiffs' claim as simply that the plan is not as "generous" to older workers who are retired as it is to younger workers. Def. Reply at 21-22. While this contention is waived because it is stated for the first time in a reply brief,[2] it demonstrates

[2] *Sloan v. Astrue*, No. 07-2240, 2008 WL 2561102 at *3 (D. Kan. June 26, 2008) ("Ordinarily, this court will not review issues raised for the first time in a reply brief. *Nichols v. Comm'r*, 260 F. Supp.2d 1057, 1077 (D. Kan. 2003), *citing Stump v. Gates*, 211 F.3d 527, 533 (10th Cir.2000), and *Sadeghi v. INS*, 40 F.3d 1139, 1143 (10th Cir.1994)"). The court in *Stump* explained the need for the waiver rule when an argument is raised for the first time in a reply brief: "This court does not ordinarily review issues raised for the first time in a reply brief. The reasons are obvious. It robs the appellee of the opportunity to demonstrate that the record does not support an appellant's factual assertions and to present an analysis of the pertinent legal precedent that may compel a contrary result. The rule also protects this court from publishing an erroneous opinion because we did not have the benefit of the appellee's response." 211 F.3d at

the Catch-22 in which defendants find themselves: they argue that plaintiffs need more facts in order to plead an adequate disparate-impact claim, but cannot be allowed access to discovery to obtain such facts because the claim as pleaded is inadequate. To this convoluted argument, Fed.R.Civ.P. 1 provides a clear refutation: "These rules . . . shall be construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding"; and

(i) Defendants' Reply Memorandum in Support of their Motion for Partial Summary Judgment at pp. 22-23 hyperbolically asks this Court to accept that plaintiffs' ADEA claim would automatically result in the vesting under the ADEA of all retirement benefits that did not vest under ERISA, because any reduction would necessarily have disparate impact, as if plaintiffs were arguing – which they are not – that there is no such thing as a bona fide retirement plan, no such thing as a plan that has equal costs within the meaning of the EEOC regulations, no such thing as a plan that has equal benefits under the EEOC regulations, and no such thing as a reasonable factor other than age. Defendants' hyperbolic argument is intended to make such a caricature of plaintiffs' argument that the need for factual development on all of these subsidiary questions will be obscured.

Because the question whether the ADEA exempts the defendants' conduct is dependent on the facts to be developed in discovery, the state age discrimination claims also depend on the development of the same facts.

In conclusion on the age discrimination issues, it is not the function of summary judgment for one side to present a purely conclusory case to the Court, ask the Court to assume a series of necessary predicate facts without any foundation for doing so, seek to bar its opponent

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533, *citing*, *Headrick v. Rockwell Intern. Corp.*, 24 F.3d 1272, 1278 (10th Cir.1994).

from finding any evidence to counter its conclusions, and seek summary judgment for the lack of contrary evidence. Yet this is exactly what defendants have done in their Opposition.

CONCLUSION

Defendants have done nothing to remedy the defects found by the Court in their earlier attempts to secure dismissal of plaintiffs' claims. Accordingly, it remains premature for the Court to hear defendants' motion for partial summary judgment until it has before it the plans, SPDs, and early retirement documents that actually govern the retiree benefits for the named plaintiffs and all class members. In addition to the correct and complete set of plans and SPDs, defendants' motion for partial summary judgment cannot be fully briefed and decided until the CBAs governing the retiree benefits are produced, in conjunction with the production of evidence of defendants' course of performance relating to the plans, and other documents revealing how the companies administered and described the benefits, and the evidence necessary to counter defendants' arguments on the age discrimination issues. The purpose of Rule 56(f) is to give the parties to a lawsuit a reasonable opportunity to develop a complete factual record before the Court rules on a motion for summary judgment and to bar the unfair tactic of filing premature summary judgments before the opposing party has time to uncover the

relevant facts. For the reasons stated here and in plaintiffs' initial memorandum, the Court should continue or deny defendants' motion for partial summary judgment pursuant to Rule 56(f).

June 18, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of June, 2009, I electronically filed the foregoing Plaintiffs' Reply Memorandum in Support Of Plaintiffs' Rule 56(f) Motion To Defer Defendants' Motion For Partial Summary Judgment using the CM/ECF system, which will send notice of electronic filing to the following counsel for defendants:

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