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.	)	

ORDER

The plaintiffs in this putative class action have alleged that the defendants improperly discontinued their retirement benefits. Currently before the court is plaintiffs' motion to compel, which seeks to compel defendants' responses to plaintiffs' first set of interrogatories and first request for production of documents (**doc. 99**). For the reasons set forth below, plaintiffs' motion is granted.

Plaintiffs have brought this action on behalf of a putative class of individuals asserting a class action against defendants under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"). Class-certification motions are pending, and the putative class is currently represented by 15 individual retirees.[1] Five of these class representatives were recently added when the court granted plaintiffs leave to amend their complaint. The additional 5 class representatives retired prior to 1993—one apparently as early as 1976. Plaintiffs sought to designate these individuals as class representatives

[1]Doc. 117 at 39.

because of a dispute between the parties as to whether anything from before 1993 was relevant to this case during this pre-certification stage of the litigation—the same issue raised in this motion to compel.[2]

The class proposed by the third-amended complaint includes:

> All persons, including all plan participants and all eligible spouse and dependent plan beneficiaries, whose rights to medical, prescription drug, and/or life insurance benefits or premium subsidies have been adversely affected by the terminations, reductions and changes in retiree benefits which were announced (1) by Defendant Sprint Nextel Corporation in or about November 2005, and (2) by Defendant Embarq Corporation on July 26, 2007.[3]

Also part of this lawsuit are more than 700 so-called individual age-discrimination plaintiffs alleging disparate-impact age discrimination under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq*. ("ADEA"). The third-amended complaint states that these individuals are also putative class members.[4] In the event a class is not certified, plaintiffs have stated their intention to plead their cases individually.

Although the parties have dedicated more than 100 pages of briefing to this motion, the dispute here essentially turns on whether plaintiffs are entitled to discovery on a class-wide level while certification is pending. Defendants have limited the responses to the named class representatives and maintain that any documents or interrogatories related to

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[2]Doc. 107 at 2-4. This motion to compel was filed before the court granted plaintiffs leave to amend their complaint.

[3]Doc. 117 at 36.

[4]Doc. 117 at 20-21; 40-41; 58. Some of these plaintiffs are also bringing claims under state discrimination laws.

any putative class members are not relevant until a class is certified. Because of this, plaintiffs state that defendants have refused to produce any documents from before 1993 or any documents regarding putative class members.

Although defendants are adamant that they should not be required to produce documents relating to the putative class until such a class is certified, they have not provided any compelling caselaw supporting that position. "Courts typically allow pre-certification discovery that relates to, or is necessary for, defining the proposed class, i.e., discovery which seeks 'to identify those employees who may be similarly situated, and who may therefore ultimately seek to opt into the action.'"[5] Further, and as noted in the recent order granting plaintiffs leave to amend their complaint, the complaint states that plaintiffs will plead their cases individually if a class is not certified. Merits discovery prior to class certification is generally viewed as appropriate in large cases that are likely to continue even if certification fails.[6] The court further notes that discovery in this case, which has not been

[5]*Long v. Landvest Corp.*, No. 04-2025, 2006 WL 897612, at *5 (D. Kan. Mar. 31, 2006) (quoting *Hammond v. Lowe's Home Ctrs, Inc.*, 216 F.R.D. 666, 671 (D. Kan. 2003)); *see also McPhail v. First Command Fin. Planning, Inc.*, 251 F.R.D. 514, 517 (S.D. Cal. 2008) ("'Whether prior to class certification or after, discovery, except in the rarest of cases, should be conducted on a class wide level . . . . [¶] If joinder of all parties is impracticable, propounding discovery like interrogatories, depositions, and requests to produce on an individual basis is even more impracticable.'" (quoting *Adkins v. Mid-America Growers, Inc.*, 141 F.R.D. 466, 468 (N.D. Ill. 1992))).

[6]*Gonzalez v. Pepsico, Inc.*, No. 06-2163, 2007 WL 1100204, at *3 (D. Kan. April 11, 2007) (quoting Manual for Complex Litigation (4th) § 21.14 (2006)).

bifurcated, closes on January 29, 2010.[7] Defendants should not be permitted to simply wait out plaintiffs' discovery requests while the motions for class certification are pending when the plaintiffs' requests are aimed at discovering evidence regarding the putative class they seek to represent.

Accordingly, to the extent plaintiffs are seeking discovery regarding the putative class—including information pertaining to both individuals not named as class representatives and documents that predate the retirement dates of the named class representatives—they are entitled to the discovery they have requested. Further, defendants' argument that the discovery sought is too broad because of various statutes of limitation is not persuasive.[8] Just because there may be applicable statutes of limitation—and, to be clear, the court is not commenting one way or the other as to the applicability of any of the statues of limitation cited by defendants—this doesn't mean that nothing from beyond that time is relevant for discovery purposes, defendants' conclusory statements to the contrary notwithstanding.

Plaintiffs, in their memorandum in support of their motion to compel, have also asked the court to compel production of electronically stored information ("ESI") responsive to their requests.[9] The scheduling order in this case recites the parties' agreement that

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[7]Doc. 59 at 3, 5-6 ("[D]iscovery should proceed on all fronts . . .").

[8]Doc. 103 at 15-16.

[9]Doc. 100 at 9-10.

"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."[10] Thus, to the extent there is ESI responsive to plaintiffs' requests, plaintiffs are entitled to that discovery.

It appears that defendants have been producing ESI, but in addition to disputes over the general scope of discovery addressed above, that there is an additional dispute between the parties regarding the keywords used to access the ESI.[11] Although plaintiffs' reply brief briefly makes the argument that "they have an obvious need to know the key words used in order to able to [*sic*] make a determination whether these key words were or were not adequate to the task,"[12] plaintiffs never explicitly ask the court to compel defendants to divulge the keywords used to search their electronic databases. But even if they had, the court sees no need to grant such a request under these circumstances. By this order, the scope of discovery has been established as class-wide. Defendants are ordered to comply with the discovery requests at issue, and per the scheduling order, that includes ESI. If defendants fail to comply with this order, plaintiffs are free to file a motion seeking appropriate relief. But at this juncture, the court sees no need to compel defendants to turn over their keywords just so plaintiffs can decide whether they deem defendants' attempts

[10]Doc. 59 at 9.

[11]Doc. 103 at 17-18; doc. 100 at 10; doc. 105 at 21.

[12]Doc. 105 at 21.

"adequate to the task."

Plaintiffs are also entitled to discover documents and other information pertaining to the individual age-discrimination plaintiffs. Defendants claim that no additional discovery is necessary for these age-discrimination plaintiffs since the only age-discrimination claim remaining in this litigation is limited to what, if any, disparate impact the plaintiffs suffered due to the modification of life-insurance benefits, and also because this claim is the subject of a motion for summary judgment. But since the filing of this motion, U.S. District Judge Eric F. Melgren granted plaintiffs' motion to deny or continue defendants' motion for partial summary judgment because plaintiffs have been unable to present facts precluding summary judgment since "no meaningful discovery has taken place as to the governing plans and [summary plan descriptions]."[13] Thus, contrary to defendants' assertion, more discovery is exactly what is needed in this case. Further, as noted above, since the individual age-discrimination plaintiffs are also putative class members, plaintiffs are entitled to discovery for those individuals based on the ERISA putative class claims.

The parties have dedicated a significant number of pages to several specific discovery requests that defendants say are not relevant to the claims in this case, whether limited to the class representatives or not. To the extent these requests are disputed because plaintiffs are seeking class-wide information, plaintiffs are entitled to the discovery as noted above. With regard to the relevancy objections, the court has reviewed all of the requests at issue and the

[13]Doc. 104 at 6-7.

objections raised by defendants and concludes that all of the requests, with one exception, seek documents or information relevant to the claims and defenses in this case. However, plaintiffs' request for documents regarding the financial effect this litigation will have on a recent merger between defendant Embarq and Century Tel[14] has no bearing on any claim or defense since this merger was completed after the events that led to this lawsuit. Thus, with regard to the interrogatories and requests for production at issue in the instant motion, with the exception of Request No. 45, plaintiffs' motion is granted.

In consideration of the foregoing,

IT IS HEREBY ORDERED:

1. Plaintiffs' motion to compel is granted with the exception of Request for Production No. 45.

2. Defendants shall serve responses to plaintiffs' requests by **January 11, 2010**. This includes all applicable ESI. Defendants, however, need not disclose their keywords.

Dated this 24th day of November, 2009, at Kansas City, Kansas.

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

[14]Ex. B to doc. 100 at 12-13.