IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PHYLLIS JOHNSON,

Plaintiff,

v.

MERITER HEALTH SERVICES EMPLOYEE RETIREMENT PLAN and MERITER HEALTH SERVICES, INC.,

Defendants.

OPINION & ORDER

10-cv-426-wmc

On December 4, 2012, the Seventh Circuit affirmed this court's grant of class certification and remanded for further proceedings. Because this court struck the remaining calendar in the case pending resolution of the appeal, a scheduling conference has been set for February 13, 2013. The purpose of this order is to address the following topics in advance of that conference: (1) remaining issues on class certification; (2) lingering discovery disputes; and (3) establishing deadlines and a firm trial date. The court will then hear from the parties on February 13th with respect to further discovery or scheduling matters.

I. Remaining Class Certification Issues

A. Certification of Subclass E2

In the decision granting class certification, the court (1) declined to certify subclass E2 because the named class representative was not adequate; and (2) provided plaintiffs an opportunity to either "file a motion for a new proposed class representative

as to subclass E2 *or* to certify a consolidated subclass which includes members of E2." (2/17/12 Order (dkt. #186) 31.) In response, plaintiffs filed a motion to certify subclass E -- consisting of E1 and E2 -- with E1's representative Stephen Hansen as the class representative of proposed subclass E. (Dkt. #190.)

The only difference between subclass E1 and proposed subclass E2 appears to be the date by which the participants received their lump sum payments. Members of E1 received their payments on or before July 30, 2004; members of E2 received their payments on or after July 31, 2004. This date is potentially material because plaintiffs filed the present lawsuit on July 31, 2010. As a result, the plan participants who received their lump sum payments prior to July 31, 2004, may be time barred. *See Thompson v. Ret. Plan for Emp. of S.C. Johnson & Sons, Inc.*, 651 F.3d 600, 606 (7th Cir. 2011) (holding that the receipt of lump sum distribution "served as an unequivocal repudiation of any entitlement to benefits beyond the account balance" so as to bar claims of class members who received such a distribution more than six years before the lawsuit commenced).

Plaintiffs argue that Hansen is an adequate representative of proposed subclass E, because "[d]efendant asserts the statute of limitations against *all* participants and *all* claims -- not just participants receiving payment more than 6 years before the date suit was filed." (Dkt. #190 at 2 (emphasis in original).) While this may be true, the defense is still different for the members of these two subclasses. Without deciding the application of the defense to *either* subclass, defendants certainly appear to have a stronger argument that the claims of the members of subclass E1 are barred by the statute of limitations in light of the Seventh Circuit's holding in *Thompson.* While

plaintiffs contend that they have a basis for distinguishing *Thompson*, defendants have nevertheless posited "an arguable defense peculiar to" Hansen (and the other members of subclass E1) but not "peculiar to" to the members of proposed subclass E2, which "bring[s] into question the adequacy of the named plaintiff's representation." *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 726 (7th Cir. 2011).

In fairness, plaintiffs have been careful in recognizing potential conflicts and attempting to define appropriate subclasses in this case, and may well have read into this court's earlier opinion tacit approval for consolidating the E1 and E2 subclasses. Nevertheless, the possibility that differences in payment dates may affect the merits defining the statute of limitations defense makes separate E1 and E2 subclasses necessary here. Moreover, Hansen is "subject to a defense that would not defeat unnamed class members" of E2 and is, therefore, not adequate to serve as the class representative of that subclass. *Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 824 (7th Cir. 2011). As such, the court must reject plaintiffs' proposal to certify a subclass E with Stephen Hansen as the proposed class representative.[1]

No doubt anticipating the court's rejection of Hansen as the representative of subclass E2, plaintiffs alternatively proposed Donna L. Smith, a putative member of subclass E2, to serve as the class representative. (Pls.' Mot. (dkt. #190) 3.) Plaintiffs also represent that they originally identified her in their September 26, 2011, reply brief, as the class representative of proposed subclass E2. (*Id.*) While this may be so, plaintiffs

[1] For the same reason, the court also rejects plaintiffs' suggestion that Linda Mueller, the representative of subclass F, could also represent E2. Mueller is subject to defendants' defense concerning the Pension Protection Act of 2006 and the members of subclass E2 are not.

did not seek leave to add her as a named plaintiff or expressly propose her as a class representative until recently. As such, defendants have not had sufficient reason or notice to seek discovery specific to her, including an opportunity to depose her until now -- at least to the court's knowledge. As reluctant as the court is to drag out the class certification process any further, it is equally reluctant to deny certification of a subclass based on the lack of an adequate representative. Indeed, in opposing Smith, defendants merely argue that Smith would need to intervene in the litigation and plaintiffs would have to demonstrate her adequacy, after defendants are afforded discovery. (Defs.' Opp'n (dkt. #191) 5-6 n.2.) As such, the court *sua sponte* will allow Smith to be added as a named plaintiff and will afford defendants 45 days to file a brief, if any, specific to challenging her adequacy to act as the representative to subclass E2. Any response by plaintiffs will be due ten days from the filing of that brief.

B. Entry of Final Order

Entry of a final order will await approval of subclass E2, but the parties should prepare with an understanding that final approval *will* be entered with respect to all other subclasses. The court will be prepared to issue that order by May 1, 2013.

C. Notice

The Seventh Circuit's opinion included a discussion of the notice requirements in this case. Specifically, Judge Posner stated:

> But given the potential harm to individual class members if the monetary relief to which each is entitled is determined by

> averaging rather than by individual determination, either the class members should be notified of the class action and allowed to opt out (and notice and opt out, we just said, are permitted in a (b)(2) class action even though not required), or the class should be bifurcated, much as a non-class action for damages is often bifurcated, which is to say divided into a trial on liability followed by a trial on damages if liability is found.

Slip op. at 15. In light of these comments, as well as the court's regular practice, the liability and damages phases of this trial will be bifurcated. In addiction, the court will give each party thirty days to address whether, what and when notice should be given here.

II. Lingering Discovery Disputes

There remain three discovery related motions pending, all of which were originally before Judge Crocker, but which I will now consider.[2]

A. Privilege Log Dispute (dkt. #151)

Plaintiffs filed a motion to compel on December 20, 2011, seeking an order that either (1) defendants have waived any privilege objections as to certain withheld or untimely produced documents based on their failure to timely produce a privilege log; or (2) requiring defendants to produce a privilege log timely, along with any remaining documents that defendants have since determined are not privileged. Plaintiffs complain about three different sets of documents, which are purported to be responsive to document requests dated January 10, March 3, March 17, May 20 and June 29, 2011:

1. Approximately 2,000 responsive Meriter documents which defendants have not produced as privileged and for which defendants have not produced a log reflecting all of these documents;
2. Approximately 1,000 to 2,000 responsive Godfrey & Kahn documents which defendants have not produced as privileged and for which defendants have not produced a log reflecting all of these documents, and 62 redacted documents which were produced but for which defendants have not produced a log; and
3. Defendants' failure to timely produce a privilege log with respect to Towers documents and their delay in producing documents, which were initially withheld as privileged.

[2] Going forward, I will decide all disputes, including discovery-related issues.

In their response dated January 6, 2012, defendants contend that they were doing their best given the breadth of plaintiffs' discovery requests and updated the court on developments on the privilege log front. Defendants further argue that (1) plaintiffs have failed to demonstrate bad faith which would be required to find waiver of the privilege; and (2) plaintiffs' own "abusive discovery tactics" slowed defendants' progress in reviewing documents for privilege and updating the privilege log.

Whatever reasons there may have been to justify defendants' past delays, none are valid more than a year later. Accordingly, to the extent production of a privilege log and/or all responsive, non-privileged documents has not been accomplished, defendants may have 45 days to do so. Both parties also have 45 days to supplement all other disclosure and discovery responses pursuant to Fed. R. Civ. P. 26(e).[3]

B. Adequacy of Responses to Discovery regarding Amendment of the Plan (dkt. #161)

On January 10, 2012, plaintiffs filed a separate motion to compel, pointing out claimed inadequacies in defendants' responses to discovery requests concerning the amendment of the Plan from a traditional defined benefit plan to a cash balance plan, which seeks information dating back to 1987. Plaintiffs contend that defendants' responses were inadequate in a number of respects and take issue with defendants' objections to plaintiffs' requests. The court will address each issue in turn:

[3] Plaintiffs recently filed an additional motion to compel concerning the privilege log issue. (Dkt. #213.) The court will take up this motion during the February 13, 2013, conference.

1. Plaintiffs may well have exceeded the 25 allowed interrogatories based on a counting of the "discrete subparts" in certain interrogatories. Given the complexity of this case, the court will nevertheless require a response to all subparts of these interrogatories within 45 days. Plaintiffs may not serve any further interrogatories in this case without the advance, express leave of this court.

2. While defendants may direct plaintiffs to discovery productions in responding to contention interrogatories, they must also adequately identify the specific discovery that is responsive to each contention interrogatory. To the extent not already done, defendants may have 45 days to identify by Bates number (or some other clear, unambiguous and cost-effective manner) those documents responsive to each interrogatory.

3. Defendants object broadly to certain interrogatories as "vague," "unclear," "confusing," "internally inconsistent," etc., but are still obligated to produce documents responsive to a good faith interpretation of that interrogatory *and* to state what that interpretation is. To the extent this has not yet been done, defendants may have 21 days to do so.

4. To the extent in their possession and control, defendants will be required to produce for inspection only in their counsel's office or other mutually-agreed upon location the original instruments of adoptions within 30 days.

C. Protective Order against Fifth Supplemental Discovery Requests directed solely about Meriter's information technology system, etc. (dkt. #174)

On February 1, 2012, defendants filed a motion for protective order preventing defendants from having to respond to plaintiffs' fifth supplemental discovery requests. These requests concern Meriter's information technology systems, including all servers, email and documents management systems, work computers, usb flash drives, compact discs, DVDs, etc. for the past 20+ years and the collection and preservation of ESI. In their motion defendants explain in detail their efforts to date regarding ESI discovery and the discussions and formal discovery they have had specific to their electronic systems. Defendants contend that plaintiffs' latest requests are unduly burdensome and abusive. For examples, defendants point to interrogatory no. 25 requiring them to explain how their ESI discovery was collected, and interrogatory nos. 28 and 29, which seeks a detailed description of "each item" of ESI.

In response, plaintiffs contend that defendants' motion is premature because they have not attempted to confer in good faith, and that defendants failed to mention plaintiffs' January 2, 2012, proposal offering to hold these requests in abeyance if "Defendants agreed to supply information Plaintiff and her ESI consultant believe she needs (and that Defendants previously committed to supplying voluntarily) during a suggested 3-hour all-hands ESI call." (Pls.' Opp'n (dkt. #179) 5-6.)

The written requests are overblown, burdensome and unnecessary. Accordingly, the motion for protective order will be granted. The parties shall designate ESI consultants within 14 days, who will meet and confer within 28 days for the purpose of agreeing on a practical, inexpensive means to address plaintiffs' remaining, reasonable

requests of defendants' collected ESI. Counsel may be present, but may not speak to the opposing side during these discussions. If no agreement can be reached among the consultants, then plaintiffs may submit a brief of ten pages or less setting forth a practical approach to complete discovery and defendants may have ten days to respond by a brief of similar length.

III.Reset Deadlines

Consistent with the class certification order being issued by May 1, 2013, the following schedule shall apply to this case going forward:

- Disclosure of liability experts: Proponent: September 6, 2013
  Respondent: October 4, 2013
- Deadline for filing dispositive motions: November 1, 2013
  Responses: November 22, 2013
  Reply: December 4, 2013
- Disclosure of damages experts: Proponent: February 7, 2014
  Respondent: March 7, 2014
- Settlement letters: March 28, 2014
- Discovery cutoff: April 4, 2014
- Trial: May 12, 2014

In addition, any filing by a party after 5:00 p.m., Central Time, will be deemed by the court and may be deemed by opposing parties to have been filed the following day.[4] In addition, going forward, all discovery-related briefs are limited to ten pages. In particular, the court does not need or want a lengthy presentation of the background. The court's Preliminary Pretrial Conference Order will remain in effect for all other purposes.

ORDER

IT IS ORDERED that:

1) Plaintiffs' motion to certify consolidated subclass E (dkt. #190) is DENIED. The court, however, will consider certifying subclass E2 with Donna L. Smith as the representative. Defendants shall have 45 days to challenge Smith's adequacy to act as the representative of proposed subclass E2, and plaintiffs shall have 10 days thereafter to file a response, if any.

2) The parties shall file briefs addressing the notice requirements in this case on or before March 8, 2013.

3) Plaintiffs' third motion to compel (dkt. #151) is GRANTED IN PART AND DENIED IN PART as described above.

4) Plaintiffs' motion to compel (dkt. #161) is GRANTED IN PART AND DENIED IN PART as described above.

5) Defendants' motion for protective order (dkt. #174) is GRANTED IN PART AND DENIED IN PART as described above.

[4] The clerk's office will attempt to note the difference in this case in setting a briefing schedule, but if one is entered that does not allow for an additional day to respond, the parties should feel free to contact the clerk's office to advise the court of the need to adjust the briefing schedule.

6) The following the following schedule shall apply to this case going forward:

• Disclosure of liability experts:	Proponent:	September 6, 2013
	Respondent:	October 4, 2013
• Deadline for filing dispositive motions:		November 1, 2013
	Responses:	November 22, 2013
	Reply:	December 4, 2013
• Disclosure of damages experts:	Proponent:	February 7, 2014
	Respondent:	March 7, 2014
• Settlement letters:		March 28, 2014
• Discovery cutoff:		April 4, 2014
• Trial:		May 12, 2014

7) Any filing by a party after 5:00 p.m., Central Time, will be deemed by the court and may be deemed by opposing parties to have been filed the following day.

8) Going forward, all discovery-related briefs are limited to ten pages.

Entered this 8th day of February, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge