**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

GARY CAUDILL, SYLVESTOR J. DEROSA, STEVEN D. FORD, SR., JAMES HILTON, DAVID MCKILLOP, DONALD MURPHY, SUZANNE J. NOVAK, and GREGORY TILL, on behalf of themselves and those similarly situated,

Plaintiffs,

v.

SEARS TRANSITION PAY PLAN, as amended and restated January 1, 2004, SEARS ROEBUCK AND CO., SEARS HOME IMPROVEMENT PRODUCTS, INC., and SEARS HOLDINGS CORPORATION, as Plan Administrators and Employers, jointly and severally,

Defendants.
_______________________________________/

Case No. 06-12866

District Judge Arthur J. Tarnow

Magistrate Judge Virginia M. Morgan

**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR CLASS CERTIFICATION [52];**
**DENYING DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR CLASS CERTIFICATION [63];**
**DENYING DEFENDANTS' MOTION TO STRIKE EXHIBITS NOT PART OF THE ADMINISTRATIVE RECORD [99];**
**GRANTING PLAINTIFFS' MOTION FOR CONSIDERATION OF EVIDENCE SUBMITTED IN SUPPORT OF JUDGMENT FOR PLAINTIFFS [143];**
**DENYING DEFENDANTS' SECOND MOTION TO STRIKE [149];**
**DENYING DEFENDANTS' THIRD MOTION TO STRIKE [159];**
**SETTING SCHEDULE;**
**AND HOLDING IN ABEYANCE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [71]**

Before the court are plaintiffs' motion for class certification, defendants' motions to strike, and plaintiffs' motion for consideration of non-record evidence. This matter came on for a hearing on April 29, 2009.

I. Evidence outside of the administrative record

For the reasons stated on the record, the motions to strike are DENIED, and plaintiffs' motion for consideration of non-record evidence is GRANTED. Plaintiffs assert a procedural challenge to the administrator's decision, under the exception to the general rule limiting this court's review to the administrative record. *Wilkins v. Baptist Healthcare System, Inc.*, 150 F.3d 609, 619 (6th Cir. 1998). Plaintiffs accordingly offer evidence outside of the administrative record to support the claim that the defendants wrongfully denied benefits in a procedurally inadequate way.

II. Class certification

As stated at the hearing, plaintiffs' motion for certification is GRANTED IN PART as to the 88 employees who filed a claim for severance benefits, under either Rule 23(b)(1) or 23(b)(3). As to the remainder of the employees in the putative class, the motion is DENIED IN PART. Notwithstanding that it may have been futile — in view of plaintiffs' procedural challenge — to apply for benefits and to exhaust administrative remedies, the court cannot now ascertain on a class-wide basis whether a given employee who had not applied for benefits would have chosen to apply for benefits or to accept a job, even if it was non-comparable, at SHIP. To determine what an employee would have chosen *ex ante* requires an examination of the employee's state of mind. That renders this group of non-applicant employees unsuitable for class certification on plaintiffs' claim under the benefits-denial provision of ERISA, 29 U.S.C. § 1132(a)(1)(B).

But the court makes no determination on whether the non-applicant employees could

have a claim, either individually or as a class, under the catch-all provision of ERISA, § 1132(a)(3), for alleged misrepresentations and breaches of fiduciary duty based on the defendants' supposed pre-determined policy to deny severance benefits.

In accordance with Fed. R. Civ. P. 23(c)(1)(B), the class is defined as all full-time HVAC Sales Associates (1) who had a minimum of one year of service with Defendant Sears, Roebuck and Co., at the time of the transition to Defendant SHIP and (2) who applied for severance benefits under the Transition Pay Plan.

The class issues to be litigated are as follows:

1. Whether, under 29 U.S.C. § 1132(a)(1)(B), defendants wrongfully denied benefits to the class in a manner that was procedurally defective.
2. Whether benefits are due to the class under the terms of the Transition Pay Plan.

The court appoints Dib, Fagan, and Brault, P.C., and Fieger Fieger Kenney & Johnson, P.C., as co-lead counsel for the class.

Defendants may have until July 15, 2009 for discovery. Because the court is denying the plaintiffs' motion for certification as to the non-applicant employees, discovery will not be permitted as to these non-applicant employees. The parties may file discovery motions by August 15, 2009. Any new dispositive motions — or new briefs supplementing already filed dispositive motions or supplementing responses to such motions — shall be filed by September 15, 2009. Because plaintiffs present evidence outside of the administrative record in their procedural challenge, Fed. R. Civ. P. 56 is the appropriate vehicle to test whether there is a genuine issue of material fact as to both of the class issues. *Cf. Moore v. Lafayette Life Ins. Co.*,

458 F.3d 416, 430–31 (6th Cir. 2006) (explaining in discovery context that procedural challenge under *Wilkins* exception can make way for consideration of "more substantive areas of a plaintiff's claim."). If a genuine issue of material fact exists, the class issues will be set for a bench trial.

The parties shall submit a proposed class notice by June 1, 2009. If the parties cannot agree on notice, they shall submit competing proposed class notices by June 1, 2009 and respond to the other side's class notice by June 8, 2009. Replies may be filed by June 15, 2009.

Plaintiffs' motion for summary judgment is HELD IN ABEYANCE until the deadline for filing new dispositive motions or new supporting briefs. The clerk shall administratively close plaintiffs' motion, which can be reinstated by letter.

SO ORDERED.

S/ARTHUR J. TARNOW
Arthur J. Tarnow
United States District Judge

Dated: April 30, 2009

I hereby certify that a copy of the foregoing document was served upon counsel of record on April 30, 2009, by electronic and/or ordinary mail.

S/THERESA E. TAYLOR
Case Manager