IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

STEVE WILDMAN and JON BORCHERDING, Individually and as representatives of a class of similarly situated persons, and ON BEHALF OF THE AMERICAN CENTURY RETIREMENT PLAN,	)	
Plaintiffs,	)	
v.	)	No. 4:16-CV-00737-DGK
AMERICAN CENTURY SERVICES, LLC, et al.,	)	
Defendants.	)	

ORDER GRANTING MOTION TO COMPEL

This case involves claims for breach of fiduciary duty brought pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq*. Plaintiffs Steve Wildman and Jon Borcherding bring this suit on their own behalf and on the behalf of a proposed class claiming Defendants breached their fiduciary duties and engaged in prohibited transactions.

Now before the Court is Plaintiffs' Motion to Compel Defendants to Produce 15(c) Materials (Doc. 97). On July 21, 2017, the Court held a discovery dispute teleconference with the parties. For the following reasons, the motion is GRANTED.

Background

Defendant American Century Companies, Inc. ("American Century") makes available to its eligible employees and the employees of its affiliates, the American Century Retirement Plan (the "Plan). The Plan is a defined contribution "401k" plan[1], that allows participants to

[1] The Plan is a "employee pension benefit plan" and a "defined contribution plan" within the meaning of 29 U.S.C. §§ 1002(2)(A), (34).

contribute a percentage of their pre-tax earnings and invest those contributions among different investment options. Defendant The American Century Retirement Plan Committee (the "Committee") is responsible for selecting, retaining, and reviewing the funds within the Plan as well as the costs of the funds and fees charged by service providers.

Plaintiffs are former employees of American Century. They allege Defendants breached their fiduciary duties under ERISA in their management and oversight of the Plan. Plaintiffs claim the Plan fiduciaries breached their duties of loyalty and prudence to the Plan by, among other things, acting in their own self-interest in limiting the investments offered to almost exclusively high cost American Century mutual funds. As to damages, Plaintiffs seek disgorgement of all ill-gotten profits associated with Defendants' alleged breach of fiduciary duty.

Plaintiffs bring this motion to compel Defendants to produce certain reports created under the provisions of the Investment Company Act ("ICA"), 15 U.S.C. § 80a-15(c) ("15(c) reports"). In their Request for Production No. 53, Plaintiffs sought:

> For each year of the Subject Period [2010 – to the present], all reports (including but not limited to the Profitability, Expense, and Performance Reports) prepared as part of the 15(c) process for each investment adviser subsidiary or affiliate of the American Century Entities, so long as the entity managed one or more Designated Investment Alternatives within the Plan during the year in question.

Pls.' Mot. at 2 (Doc. 98). In Plaintiffs' motion to compel, they limit this request to the 15(c) reports relating to performance, expense, and profitability. *Id.* at 6.

Defendants oppose this motion, stating the reports sought are not relevant, producing the reports would be unduly burdensome, and the request is disproportional to the needs of the case.

After complying with Local Rule 37.1, the Court ordered both parties to file briefs regarding the dispute (Doc. 100). The Court held a teleconference with the parties and now rules as follows.

Standard

A district court has wide discretion in handling pretrial discovery. *Chavis Van & Storage of Myrtle Beach, Inc. v. United Van Lines, LLC*, 784 F.3d 1183, 1198 (8th Cir. 2015). Information is discoverable if it is relevant to any party's claim or defense and is proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1). Discovery may be limited if the court finds the discovery sought is duplicative or "can be obtained from some other source that is . . . less burdensome." Fed. R. Civ. P. 26(b)(2)(C)(i).

The requesting party must make a threshold showing that the information sought falls within the scope of Rule 26(b)(1). *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1992). "Mere speculation that information might be useful will not suffice; litigants seeking to compel discovery must describe with a reasonable degree of specificity, the information they hope to obtain and its importance to their case." *E.E.O.C. v. Woodmen of the World Life Ins. Soc.*, No. 8:03–CV–165, 2007 WL 1217919, at *1 (D. Neb. Mar. 15, 2007) (citing *Cervantes v. Time, Inc.*, 464 F.2d 986, 994 (8th Cir. 1972)). Once the requesting party has made this showing, the burden shifts to the party resisting discovery to show specific facts demonstrating that the discovery is irrelevant or disproportional. *See Penford Corp. v. Nat'l Union Fire Ins. Co.*, 265 F.R.D. 430, 433 (N.D. Iowa 2009). Mere conclusory objections that something is "overly broad, burdensome, or oppressive," is insufficient to carry the resisting party's burden to specifically show *why* the particular discovery should not be had. *Cincinnati Ins. Co. v. Fine Home Managers, Inc.*, Civ. No. 4:09–CV–234–DJS, 2010 WL 2990118, at *1 (E.D. Mo. July 27, 2010).

Discussion

The Court will grant Plaintiffs' motion to compel if it is satisfied the 15(c) reports are relevant and proportional to the needs of the case but not unduly burdensome to the Defendants to produce.

Plaintiffs argue the 15(c) reports are relevant to showing Defendants motivation to breach their fiduciary duties of loyalty and prudence. Plaintiffs also argue the expense data in these reports is relevant to calculating damages from their breach of fiduciary duty claims and their claim for equitable disgorgement of profits.

Plaintiffs assert producing these reports would not be unduly burdensome because federal law requires Defendants maintain and preserve the documents in an easily accessible location. Plaintiffs explain the request is proportional to the needs of the case because Defendants are the only parties that have access to the information in the reports, and there is no publically available information regarding the profitability of each mutual fund. Finally, Plaintiffs argue given the size of the case and the amount of discovery already produced, these additional reports are an inconsequential amount of additional discovery.[2]

Defendants counter that these reports are not relevant because the Committee did not rely on them in making their decisions[3] and Plaintiffs' expert has already calculated damages without these reports. Defendants explain producing these reports would be unduly burdensome because it would require a manual review of approximately 72,600 pages, which is expected to take several hundred hours to complete. Defs.' Sugg. in Opp. (Doc. 101 at 2). Defendants also state

[2] Plaintiffs estimate there are 2,000 class members and $10-20 million in Plan losses. This case has involved tens of thousands pages of electronic discovery.

[3] During the teleconference, Plaintiffs stated while they dispute whether the Committee relied on the 15(c) reports in their decision-making, the reports are nonetheless relevant because they factor into what information the Committee *did not* consider.

these reports are not their records, but rather the records of the mutual funds themselves. Defendants argue this request is not proportional to the needs of the case because much of the information is duplicative and there is a less burdensome way to obtain the other information. Defendants explain the Plan's funds' fee and performance information is publicly available or has already been produced during discovery. For the profitability information, Defendants offered to provide profit margin information through an interrogatory.

Federal Rule of Civil Procedure 26 permits discovery of anything "relevant to any party's claim or defense" in the case. Fed. R. Civ. P. 26(b)(1). In determining whether a discovery request is proportional to the needs of a case, the court considers the importance of the issues, the amount in controversy, the parties' relative access to the information, the importance of the discovery in the case, and "whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1).

Plaintiffs have met their burden by making a threshold showing that the 15(c) reports are relevant to their claims and to the calculation of damages in this case. Plaintiffs have described with a reasonable degree of specificity the information they hope to obtain from the 15(c) reports and their importance in supporting their claims of breach of fiduciary duty and calculation of damages.

Further, Defendants have not shown producing the 15(c) reports would be unduly burdensome or disproportional to the needs of the case. The factors outlined in Rule 26 lean in favor of finding the 15(c) reports within the scope of discovery, specifically, the importance these reports have to Plaintiffs' case, the amount in controversy in this case, and that Defendants are the only source of the 15(c) reports. Further, while Defendants explain effort to comply with this discovery request, the Court is not persuaded this represents an undue burden. *See*

Continental Illinois Nat'l Bank & Trust Co. of Chicago v. Caton, 136 F.R.D. 682, 684–85 (D. Kan. 1991) ("All discovery requests are a burden on the party who must respond thereto. Unless the task of producing or answering is unusual, undue or extraordinary, the general rule requires the entity answering or producing the documents to bear that burden.").

Finally, Plaintiffs' original request encompassed "all reports" however, in Plaintiffs' motion, they limit their request to only "performance, expense, and profitability reports" and only for those mutual funds within the Plan. Pls.' Mot. at 6 (Doc. 98). Accordingly, this motion is granted with those limitations.

Conclusion

The Court finds the 15(c) reports are relevant to Plaintiffs' claims, proportional to the needs of the case, and would not pose an undue burden to Defendants to produce. Accordingly, the motion is GRANTED.

IT IS SO ORDERED.

Dated: July 27, 2017

/s/ Greg Kays
GREG KAYS, CHIEF JUDGE
UNITED STATES DISTRICT COURT