IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WILLIAM DOUGLAS FULGHUM, *et al.*, Plaintiffs, v. EMBARQ CORPORATION, *et al.*, Defendants.	Civil Action No. 07-CV-2602 (KHV/JPO)

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE FIRST, THIRD, FOURTH, FIFTH, SIXTH AND SEVENTH CLAIMS FOR RELIEF IN PLAINTIFFS' AMENDED COMPLAINT

Mark D. Hinderks KS #11293
12 Corporate Woods
10975 Benson, Suite 550
Overland Park, KS 66210
(913) 451-8600 (Telephone)
(913) 451-6352 (Facsimile)
mhinderks@stinson.com

Scott C. Hecht KS #16492
1201 Walnut Street, Suite 2900
Kansas City, Missouri 64106
(816) 842-8600 (Telephone)
(816) 691-3495 (Facsimile)
shecht@stinson.com

Michael L. Banks (*pro hac vice)*
Joseph J. Costello (*pro hac vice)*
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103-2921
(215) 963-5387/5295 (Telephone)
(215) 963-5001 (Facsimile)
mbanks@morganlewis.com
jcostello@morganlewis.com

James P. Walsh, Jr. (*pro hac vice)*
MORGAN, LEWIS & BOCKIUS LLP
502 Carnegie Center
Princeton, NJ 08540
(609) 919-6647 (Telephone)
(609) 919-6701 (Facsimile)
jwalsh@morganlewis.com

Attorneys for Defendants

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I. INTRODUCTION

Plaintiffs in this case seek to reverse the lawful decision of Defendant Embarq Corporation ("Embarq")[1] to exercise its unqualified right under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. ("ERISA") to modify its retiree medical and life insurance plans ("Welfare Plans" or "Plans"). That right was clearly communicated to plan participants, including Plaintiffs, in plain language that appeared in the Plan documents and summary plan descriptions ("SPDs"). In their Amended Complaint, Plaintiffs completely ignore Embarq's explicit reservation of the right to modify the Plans. They also misapply the law and erroneously assert that Embarq did not have the right to modify the terms of their benefits under the Plans because those benefits were "vested." Thus, Plaintiffs ask this Court to do what the United States Supreme Court and the Tenth Circuit Court of Appeals have repeatedly refused to do – that is, hold that ERISA requires an employer to provide vested welfare benefits absent a clear and express agreement to do so.

Apparently recognizing that their ERISA claims lack merit, Plaintiffs further allege that the Plan amendments violate federal and state age discrimination laws. The EEOC has made clear, however, that Embarq's modifications do not violate the federal Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"), and the state-law claims, although also lacking in merit, are completely preempted by ERISA. Accordingly, Defendants now move this Court to dismiss the First, Third, Fourth, Fifth, Sixth and Seventh Claims of the Amended Complaint.[2]

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[1] While Defendant Embarq is referenced more often herein than the other Defendants, the legal arguments contained in this Memorandum of Law are made on behalf of all Defendants.

[2] All Defendants seek dismissal of the First, Third, Fourth, Fifth, Sixth and Seventh Claims for Relief, as well as that part of the Second Claim that challenges the sufficiency of the Summary Plan Descriptions. The remainder of Plaintiffs' Second Claim for breach of fiduciary duty is likewise meritless and will be addressed at a later stage of these proceedings through a motion for summary judgment.

The First and Third Claims for Relief are based on the erroneous assumption that the Plaintiffs' benefits under the Welfare Plans were vested. In the First Claim, Plaintiffs allege that they are entitled to benefits based on the "grandfathered" terms of those Plans. In the Third Claim, which is merely derivative of the First Claim, Plaintiffs seek a declaration that benefits under the Welfare Plans were vested and that Defendants must restore their benefits in accordance with the pre-modification terms of the Welfare Plans. It is well-established that ERISA welfare plan benefits do not vest unless the plan contains "clear and express" language evidencing the plan sponsor's intent to render the benefits "forever unalterable." Plaintiffs do not – and cannot – allege that the Welfare Plans contain any such language. The mere fact that an employee continues to receive welfare benefits upon retirement does not indicate that the benefits become vested for life. Thus, the First and Third Claims must be dismissed for the simple reason that Embarq clearly retained the right to amend the Welfare Plans at any time, and exercising this right does not violate ERISA.

The Fourth through Seventh Claims for Relief allege that the decision to amend the Welfare Plans violates the ADEA and three state anti-discrimination laws. These claims fail as a matter of law for three reasons. First, the EEOC, which has been charged with interpreting and enforcing the ADEA, has promulgated a regulation that expressly permits an employer to coordinate the provision of company-sponsored retiree medical benefits with government-sponsored medical benefits (Medicare), including the partial or total elimination of employer-provided retiree medical benefits. Second, Plaintiffs have not and cannot allege that Embarq's modification of life insurance benefits was based on a participant's age or any other allegedly age-based criteria, such as Medicare eligibility. To the contrary, the amendment applied across the board and either capped retiree life insurance coverage at $10,000 or, for VEBA Plan

participants, eliminated the benefit completely. Third, ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan[.]" ERISA section 514(a), 29 U.S.C. § 1144(a). Thus, because Plaintiffs have attempted to apply the anti-discrimination laws of Ohio, Oregon and Tennessee to Embarq's employee benefit plans, ERISA completely preempts those laws and requires the dismissal of the Fifth, Sixth, and Seventh Claims.

In short, the Amended Complaint does not, and cannot, state a plausible claim for relief under ERISA, the ADEA, or state law. Accordingly, the First, Third, Fourth, Fifth, Sixth and Seventh Claims for Relief in Plaintiffs' Amended Complaint should be dismissed with prejudice.

II. BRIEF STATEMENT OF ALLEGED FACTS[3]

A. The Plaintiffs

1. The ERISA Plaintiffs

(1). The named Plaintiffs for the putative ERISA class claims are retired employees of various companies, which are now wholly-owned subsidiaries of Embarq. (Compl. ¶¶ 2, 9-23, 54).[4] As alleged in the Amended Complaint, the proposed ERISA class representatives are Plaintiffs Fulghum, Daniel, Hollingsworth, Dorman, King, Joyner, Dillon, Barnes, Games, and Bullock (hereafter, the "ERISA Plaintiffs"). (Id. at ¶ 54).[5] The ERISA Plaintiffs retired at various times between September 1993 and March 2003. (Id. at ¶¶ 9-23). The ERISA Plaintiffs are participants in Embarq's Welfare Plans. (Id. at ¶ 28). The ERISA Plaintiffs purport to represent a class consisting of plan participants and beneficiaries

> whose rights to medical, prescription drug, and/or life insurance benefits or premium subsidies have been adversely affected by the

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[3] For purposes of this Motion only, Defendants accept as true all of Plaintiffs' well-pled factual allegations.

[4] Hereinafter, the Amended Complaint is abbreviated "Compl."

[5] Plaintiffs allege that one or more of them worked for the following employers, which allegedly are predecessor companies of Embarq: Carolina Telephone and Telegraph Company ("CT&T"), United Telecom of Florida, Sprint of Florida, Florida Telephone Company, and North Supply Company. (Compl. ¶¶ 9-23).

> 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.

(Id. ¶ 50). Plaintiffs have alleged a "VEBA Sub-Class" consisting of "members of the Class who were participants or beneficiaries in the Carolina Telephone & Telegraph Voluntary Employee Beneficiary Association (VEBA) as of July 26, 2007." (Id. ¶ 50(a)).

2. **The ADEA Plaintiffs**

(2). The proposed representatives for Plaintiffs' ADEA collective action claim are Plaintiffs Dorman, Daniel, Joyner, Barnes, Games, Bullock, and Hollingsworth (hereafter, the "ADEA Plaintiffs"). (Compl. ¶ 129). The ADEA Plaintiffs allegedly filed charges with the EEOC and each received a Notice of Right to Sue. (Id. at ¶ 5). The ADEA Plaintiffs purportedly represent a class of participants and beneficiaries who "have been adversely affected by the terminations, reductions and changes in retiree benefits which were announced by Defendant Embarq Corporation on July 26, 2007." (Id. at ¶ 133). Plaintiffs have identified 755 individuals who allegedly have filed an EEOC charge, but have not received a Notice of Right to Sue and who nonetheless "join this lawsuit individually for the purpose of bringing their own claims of age discrimination" (referred to in the Complaint as the "Individual Age Discrimination Plaintiffs") (Id. at ¶ 25 and Appendix to Compl.). Plaintiffs purport to represent three sub-classes consisting of "members of the Class whose final place of employment by any Defendant or any of their affiliates or subsidiaries was in [Ohio, Oregon, or Tennessee]." (Compl. ¶ 50(b, c, d)).

B. The Defendant Plan Sponsors

(3). Embarq is a Delaware corporation with its principal place of business in Overland Park, Kansas. On May 17, 2006, Defendant Sprint Nextel Corporation ("Sprint Nextel") spun-

off its local communications business and product distribution operations, thereby establishing Embarq as a separate, stand-alone company. Sprint Nextel formerly was known as United Utilities, Inc., United Telecommunications, Inc., and Sprint Corporation, before becoming Sprint Nextel Corporation (together, "Sprint"). (Compl. ¶ 27, 36, 71). Defendant CT&T was a wholly-owned subsidiary of Sprint and now is a wholly-owned subsidiary of Embarq. (Compl. ¶ 45).

C. The Defendant Welfare Plans

(4). Plaintiffs allege that the Embarq Retiree Medical Plan[6] and the Group Life, Accidental Death and Dismemberment and Dependent Life Plan for Employees of Carolina Telephone and Telegraph Company are employee welfare benefit plans within the meaning of ERISA § 3(1), 29 U.S.C. § 1002(1), and provide medical and life insurance coverage to retired employees of Embarq and its predecessors who meet certain age and service requirements, and similar healthcare benefits to their eligible spouses and dependents (the "Welfare Benefits"). (Compl. ¶¶ 34, 47, 70).

(5). Plaintiffs have not identified any "clear and express" language that demonstrates Embarq's or its predecessors' intent to vest the Welfare Benefits. To the contrary, Embarq explicitly reserved the unilateral right to alter, amend or terminate Welfare Benefits. See Defendants' Appendix in Support of Motion to Dismiss ("Appx."), Exhibits 1 - 17; see, e.g., United Telecom Retiree Medical Plan,[7] effective Jan. 1, 1990, Article VIII, p. 22, Appx., Exh. 1 ("The Company shall have the sole right to alter, amend or terminate this Plan in whole or in part at any time it determines to be appropriate."); Sprint Retiree Benefits Summary Plan Description, effective Jan. 1, 2001, p. 2, Appx., Exh. 8 ("The company expects to continue the Retiree Benefits indefinitely. However, the company reserves the right to amend or terminate this plan,

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[6] On May 17, 2006, the Embarq Retiree Medical Plan replaced and superseded the Sprint Retiree Medical Plan. The latter plan governed Plaintiffs' receipt of benefits from January 1, 1991 through May 16, 2006.

[7] The United Telecom Retiree Medical Plan was renamed the Sprint Retiree Medical Plan. (Compl. ¶ 90).

or any statement made in this summary plan description, at any time").[8]

D. Embarq Exercises Its Unqualified Right To Modify The Welfare Benefits

(6). Plaintiffs concede that Embarq, and its predecessors, have modified, amended, and terminated the Welfare Benefits from at least the mid-1980's through January 2008. (Compl. ¶¶ 82, 84, 85, 93, 95, 96, 100-102). For instance, Plaintiffs allege that, in 1989, United Telecom "announced to employees that the retiree medical plan was going to change and become less valuable due to a new premium-sharing method, effective with retirements occurring on and after January 1, 1991." (Compl. ¶ 85). Plaintiffs allege that on December 15, 1993, "Sprint Mid-Atlantic announced prospective changes in its retirement plans to induce employees to retire early" – i.e., employees who opted not to retire early would participate in the future in a less rich retiree benefits plan. (Id. at ¶ 93). Plaintiffs also allege that later,

> Defendant Sprint announced further, prospective changes in the retiree welfare benefit plans. . . . Sprint announced that it was changing the medical and prescription drug benefits program to a 'SHARE' program and that employees who did not elect to retire by December 31, 2001 would no longer be eligible to retire with the traditional plan of company-paid and subsidized medical and prescription drug benefits. Defendant Sprint also announced that it was changing its retirement benefit programs and that any employees who were participants in the VEBA and who elected to retire after December 31, 2001 would no longer be entitled to the Grand-fathered Life Insurance.
>
> At the same time, [Sprint] verif[ied] that the CT&T Grand-fathered Life Insurance equal to 'two times salary' would only be available to those who retired by the end of 2001.

(Compl. ¶¶ 95-96).

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[8] In ruling on a motion to dismiss, a court may consider any document attached to the complaint along with any document the defendant introduces which is referred to in the complaint and which is central to the plaintiff's claims. Continental Coal, Inc. v. Cunningham, 511 F.Supp.2d 1065, 1070-71 (D. Kan. 2007) (Vratil, J.) (citing GFF Corp. v. Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1384-85 (10th Cir.1997) (stating that a plaintiff with a deficient claim could otherwise survive a motion to dismiss simply by not attaching a dispositive document upon which it relied)); In re Sprint Corp. ERISA Litigation, 288 F. Supp. 2d 1207, 1217 (D. Kan. 2004) (Lungstrum, J.) (holding that the court would consider ERISA plan documents submitted by defendants with their motion to dismiss where plaintiffs referenced the documents in their complaint).

(7). Here, Plaintiffs challenge Plan modifications announced in November 2005 and July 2007. As alleged in the Amended Complaint:

a. Sprint Nextel announced in November 2005 "that it was terminating its program of prescription drug benefits for Medicare-eligible retirees and dependents, effective January 1, 2006." (Compl. ¶ 100).

b. Plaintiffs complain that the 2005 amendment reduced the company-provided drug benefit to $500 per year "to each Medicare-eligible retiree and dependent to assist them in securing their own prescription drug coverage under Medicare Part D." (Id.)

c. In July 2007, "Defendant Embarq announced that it was eliminating medical benefits and the program of subsidies for drug benefits for any retirees who were eligible for Medicare." (Id. at ¶ 101). All other retirees remain covered by the Medical Plan. However, Embarq employees hired on and after January 1, 2008 will not be eligible to participate in the Medical Plan. See June 27, 2007 Employee Benefits Committee Minutes, Exhibit A ("2007 Amendments"), Appx., Exh. 20.

d. Embarq also limited company-provided life insurance benefits. While participants in the VEBA Plan continue to be eligible for a death benefit under that Plan, they are not eligible to receive the additional company-provided life insurance benefit. (Id. at ¶ 102). In addition, the maximum life insurance benefit for non-VEBA participants has been capped at $10,000. (Id.). Thus, the 2007 Amendments affect all participants who retired before 2004 regardless of age or Medicare eligibility. Compare 2007 Amendments with 2002 Summary Plan

Description, Sprint Retiree Benefits, p. 7, Appx., Exh. 9. The 2007 amendments have no impact whatsoever on individuals who retired in 2004 or after, because those retirees have never received life insurance benefits in retirement. (Id.).

III. LEGAL ARGUMENT

A. Legal Standard For A 12(b)(6) Motion to Dismiss

Rule 12(b)(6) authorizes the Court to dismiss a complaint which fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In ruling on a motion to dismiss under Rule 12(b)(6), the Court assumes as true all well pleaded facts in the complaint and views them in a light most favorable to plaintiffs. See Zinermon v. Burch, 494 U.S. 113, 118 (1990); Swanson v. Bixler, 750 F.2d 810, 813 (10th Cir. 1984). Rule 12(b)(6) does not require detailed factual allegations, but the complaint must set forth the grounds of plaintiffs' entitlement to relief through more than labels, conclusions and a formulaic recitation of the elements of a cause of action. See Bell Atlantic Corp. v. Twombly, __ U.S. __, 127 S. Ct. 1955, 1964-65 (2007). In other words, plaintiffs must allege facts sufficient to state a claim which is plausible – rather than merely conceivable – on its face. See id. Indeed, the purpose of Rule 12(b)(6) is to "streamline litigation by dispensing with needless discovery and fact finding." Neitzke v. Williams, 490 U.S. 319, 326-27 (1989). In ruling on a motion to dismiss, the Court may consider any document attached to the complaint, or any document the defendant introduces which is referred to in the complaint and which is central to the plaintiff's claims. Cont'l Coal, Inc., 511 F. Supp. 2d at 1070-71 (citing GFF Corp., 130 F.3d at 1384-85).

B. The First Claim For Relief – "Restoration Of Benefits" Under ERISA Section 502(a)(1)(B) – Fails As A Matter Of Law Because Plaintiffs' Medical And Life Insurance Benefits Were Not Vested And, Therefore, There Are No Vested Benefits To Be "Restored."

1. Welfare Plan Benefits Do Not Vest Unless The Plan Document Incorporates The Plan Sponsor's Intent To Render The Benefits "Forever Unalterable" In "Clear And Express" Language.

All of the Plans at issue in this case are "employee welfare benefit plans" rather than "employee pension benefit plans" as defined by ERISA. This distinction is critical, because ERISA exempts welfare benefit plans from many of the rules applicable to pension plans. In particular,

> Congress intentionally exempted welfare benefit plans for ERISA vesting requirements, determining that to require the vesting of those ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income.

Chiles v. Ceridian Corp., 95 F.3d 1505, 1510 (10th Cir. 1996). Thus, "[e]mployers . . . are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995); Chiles, 95 F.3d at 1510 ("Benefits provided under a welfare benefit plan need never vest. . . . An employer or plan sponsor may unilaterally modify or terminate welfare benefits, unless it contractually agrees to grant vested benefits."); American Fed'n of Grain Millers v. Int'l Multifoods Corp., 116 F.3d 976, 979 (2d Cir. 1997) ("The rule is the same for plans that provide welfare benefits to retirees – retiree welfare benefits are generally not vested, and an employer can amend or terminate a plan providing such benefits at any time.") (citing Curtiss-Wright, 514 U.S. at 75).

Because welfare benefits are presumed to be unvested under ERISA, plaintiffs carry the burden of showing an agreement to vest. Chiles, 95 F.3d 1505 at 1511. An employer's alleged "promise to provide vested benefits 'must be incorporated, in some fashion, into the formal

written ERISA plan.'" Id. (quoting Jensen v SIPCO, 38 F.3d 945, 949 (8th Cir. 1994)); see also Sprague v. General Motors Corp, 133 F.3d 388, 400 (6th Cir. 1998) ("Because vesting of welfare plan benefits is not required by law, an employer's commitment to vest such benefits is not to be inferred lightly.") (internal quotation omitted). In addition, an employer's intent to vest benefits "'must be stated in clear and express language.'" Chiles, 95 F.3d at 1513 (quoting Wise v. El Paso Natural Gas Co., 986 F.2d 929, 937 (5th Cir. 1993)). Absent such a showing, a plan sponsor or employer can amend or terminate welfare benefits without violating ERISA. In short, "[c]ontractual vesting is a narrow doctrine." Id.; see also Welch v. Unum Life Ins. Co. of Am., 382 F.3d 1078, 1085-6 (10th Cir. 2004) (plan language stating that disability benefits will be payable until "the insured is no longer disabled . . . the insured dies. . . [or until] the maximum benefit period" did not vest benefits); Jones v. Am. Gen. Life & Accident Ins. Co., 370 F.3d 1065, 1071 (11th Cir. 2004) (plan language stating that benefits "will continue . . . after . . . age 65" was insufficient to establish vesting).

A reservation of rights clause reinforces the general principle that an employer or plan sponsor may amend or terminate welfare benefits at any time. See Chiles, 95 F.3d at 1511-12. Even where a plan incorporates clear language promising company-paid benefits, an unambiguous reservation of rights clause will permit the amendment or termination of such benefits. Sprague, 133 F.3d at 401 ("We see no ambiguity in a summary plan description that tells participants both that the terms of the current plan entitle them to health insurance at no cost throughout retirement and that the terms of the current plan are subject to change.") Where a plan contains both a reservation of rights clause and a promise of benefits,

> the question is not whether an ERISA plan document containing apparently conflicting provisions is ambiguous in toto. Rather, it is whether the reservation of rights clause itself, read in tandem with the promise of continuing benefits to participants who maintain a

> particular status, is ambiguous with respect to the rights of the participants who have attained the status if the reservation does not specifically address alteration or termination of their benefits.

Chiles, 95 F.3d at 1511-1512. Thus, where the reservation of rights clause is unambiguous, as is the case here, the employer remains free to amend the plan as it sees fit. Id.; see also Gable v. Sweetheart Cup Co., 35 F.3d 851, 856 (4th Cir. 1994) (holding that an "express reservation of the company's right to modify or terminate the participants' benefits . . . *standing alone*, is more than sufficient to defeat plaintiffs' claim that the company provided vested benefits") (internal citation omitted) (emphasis added).

2. Plaintiffs Have Failed To Allege "Clear And Express" Plan Language Evidencing The Intent To Vest The Welfare Plans' Benefits.

Given the presumption against vesting and the Tenth Circuit's rigorous standard for proving intent to vest benefits, Plaintiffs have failed completely to allege facts suggesting that the medical and life insurance benefits vested. Plaintiffs have not identified ***any*** "clear and express" language indicating that Embarq or its predecessors intended the Welfare Benefits to be "forever unalterable." Chiles, 95 F.3d at 1513; Sengpiel v. BF Goodrich, Co., 156 F.3d 660, 667 (6th Cir. 1998). Here, Plaintiffs merely assert in a conclusory fashion that the retiree medical benefits and life insurance benefits were vested. (Compl. ¶¶ 107-08). Plaintiffs further contend that these benefits vested upon their retirement, but again without benefit of any identification of "clear and express" vesting language. (Id. at ¶ 108). Thus, because the Complaint does not identify ***any*** language that provides for the vesting of the Welfare Benefits, Plaintiffs have not alleged (and cannot allege) that the Plan documents provided for vesting.

Rather, Plaintiffs baldly suggest that "Defendant Randall T. Parker, acting in a fiduciary capacity . . . made numerous promises and representations to Plaintiffs and members of the Class regarding their lifetime rights to post-retirement benefits." (Compl.¶ 33). While this vague

allegation – which Defendants dispute – purportedly supports Plaintiffs' Second Claim for breach of fiduciary duty (which Defendants have not moved to dismiss),[9] it is irrelevant to the First Claim under Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). With respect to the First Claim, Plaintiffs have failed to allege – as they must – that these "promises and representations" became ***incorporated*** into the formal ***written*** plan. See Anderson v. Intermountain Power Serv. Corp., No. 98-4175, 1999 WL 824367, at *4 (10th Cir. 1999) (holding that an employer could rightfully terminate a participant's long term disability benefits under section 502(a)(1)(B), where none of the plan documents stated in any way that the employer intended to vest the participant's benefits).

Plaintiffs' inability to allege – beyond a mere legal conclusion – that these benefits were vested requires the dismissal of the First Claim. Absent an allegation founded upon the Plan documents that benefits vest under the terms of those documents, Tenth Circuit and U.S. Supreme Court precedents require dismissal of the First Claim. Furthermore, Plaintiffs cannot make such an allegation in this case because Embarq had, and reserved, the right to amend or terminate the welfare benefits at any time.

3. The Unambiguous Reservation Of Rights Clauses Refute Any Notion That The Plans' Language Evidences A "Clear And Express" Intent To Vest Benefits.

Moreover, the numerous reservation of rights clauses that appear throughout the Plan documents and SPDs reinforce Embarq's unqualified right to amend or terminate the Plans *at any time* and support the dismissal of the First Claim.[10] See, e.g., Appx., Exhs. 1-17, and Brief

[9] To the extent Plaintiffs' Second Claim for Relief challenges the adequacy of Defendants' SPDs, that Claim fails for the reasons discussed herein – namely, the SPDs clearly communicated Defendants' reserved right to amend, modify or terminate the benefits at issue. Accordingly, Plaintiffs' Second Claim for Relief should be dismissed in part.

[10] In addition to the Plan documents and SPDs, Embarq and its predecessors communicated their right to amend or terminate the Welfare Benefits to employees through other documents. See, e.g., Letter from R. Parker, dated December 15, 1993, Appx., Exh. 18 (the "1993 Letter"). The attachment to the 1993 Letter, which discusses

Statement of Alleged Facts, supra, at Section II-C, pp. 5-6. In Chiles, the Tenth Circuit interpreted the following provisions in a long-term disability plan's SPDs:

> Control Data expects to continue the [Long-Term Disability/Health/Dental/Life] Plan indefinitely, but must reserve the right to change or discontinue it if it becomes necessary. This would be done only after careful consideration.
>
> * * *
>
> If the group Long-Term Disability Plan terminates, and if on the date of such termination you are totally disabled, your Long-Term Disability benefits and your claim for such benefits will continue as long as you remain totally disabled as defined by the plan.

95 F.3d at 1509, 1512 (brackets in original). There, the Tenth Circuit held, as a matter of law, that "Control Data retained the right to change the benefits of all LTD plan participants – including those who had already qualified for long-term disability." Id. at 1512.

Other Circuit Courts of Appeals, interpreting language similar to that presented here, likewise have held that a reservation of rights clause preserves the plan sponsor's right to change or terminate the health care plan at any time. For instance, in Sprague v. General Motors, the plan document stated that "General Motors believes wholeheartedly in this Insurance Program for GM men and women, and expects to continue the Program indefinitely. However, GM reserves the right to modify, revoke, suspend, terminate, or change the Program, in whole or in part at any time." 133 F.3d at 394. The SPDs provided that either "[GM] reserves the right to amend, change or terminate the Plans and Programs described in this booklet" or "[GM] reserves the right to amend modify, suspend, or terminate its benefit Plans or Programs by action of its Board of Directors." Id. at 401. There, the Sixth Circuit upheld GM's right to terminate retiree welfare benefits.

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the life insurance benefits, provides that "[t]he Company reserves the right, at any time, to add, subtract, eliminate, or modify benefits." See 1993 Letter, Attachment, p. 2. Despite this explicit language, Plaintiffs assert that the 1993 Letter was part of "Defendants' misrepresentations." (Compl. ¶¶ 94, 99, 110).

Similarly, in Frahm v. Equitable Life Assurance Soc'y of the United States, No. 93-0081, 1997 WL 15932 (N.D. Ill. March 25, 1997), the plan document stated:

> Equitable shall have the right at any time . . . to modify, alter or amend the Plan in whole or in part, provided, however, that no such amendment shall diminish or eliminate any claim for benefit to which a Member [or] Dependent shall have become entitled to prior to such amendment.

Id. at *2. In addition, the SPD explained that "Equitable or a participating subsidiary reserves the right to change or terminate the group benefit program or a particular plan at any time." Id. There, the Seventh Circuit held that "[b]oth the plan and the summary plan descriptions accurately told the plaintiffs that the Equitable had retained the right to change or even discontinue the medical care-plan." Frahm v. Equitable Life Assurance Soc'y of the United States, 137 F.3d 955, 961 (7th Cir. 1998). The same is true here. See also Alday v. Container Corp. of Am., 906 F.2d 660, 664 (11th Cir. 1990) (rejecting plaintiff's contention that "health benefits were vested at the time of retirement, and that the right reserved . . . in the plan documents to modify or terminate the plan cannot be applied to affect his rights."); Howe v. Varity Corp., 896 F.2d 1107, 1110 (8th Cir. 1990) (holding that the mere fact that plaintiffs received welfare benefits upon retirement "does not indicate that the benefits become vested for life at the moment of retirement"), aff'd on other grounds, 516 U.S. 489 (1996); Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 490, 492 (2d Cir. 1988) (holding that employee welfare benefits do not vest where a reservation of rights clause both states a company's present expectation to continue benefits and its right to discontinue benefits in the future); Hughes v. 3M Retiree Med. Plan, 281 F.3d 786, 792-93 (8th Cir. 2002) ("It is plain and unambiguous that the word 'intends' does not indicate finality. To hold otherwise would render the words 'reserves the right to change or discontinue it if necessary' meaningless").

In the instant case, the governing Plan documents and SPDs do not suggest, in any way,

that Embarq intended to vest the Welfare Benefits.[11] Plaintiffs have not alleged any facts to the contrary. Further, the reservation of rights provisions in the various plan documents, as outlined above, foreclose any argument that the Welfare Benefits vested at the time of retirement. Indeed, Embarq's reservation of rights provisions are similar to provisions that the Tenth Circuit and other Courts of Appeals have repeatedly found foreclose vesting and preserve an employer's right to amend or terminate welfare plan benefits. Accordingly, the First Claim for Relief should be dismissed with prejudice.

C. Plaintiffs' Third Claim For "Declaratory Relief" Should Be Dismissed.

1. The Third Claim Is Derivative Of The First Claim And Should Be Dismissed For The Same Reason – The Benefits Were Not Vested As A Matter Of Law.

In the First Claim, pursuant to ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), Plaintiffs seek to enforce certain rights the Welfare Plans allegedly granted them. In the Third Claim, Plaintiffs seek to protect the identical alleged rights, again under section 502(a)(1)(B). Thus, Plaintiffs' Third Claim, to the extent it is based on section 502(a)(1)(B), should be dismissed for the reasons discussed above.

2. Plaintiffs' Request For Equitable Relief Under Section 502(a)(3) Is Not "Appropriate" Because An Adequate Legal Remedy Exists Under Section 502(a)(1)(B).

The ERISA Plaintiffs also seek relief in the Third Claim under section 502(a)(3), 29 U.S.C. § 1132(a)(3), and the Declaratory Judgment Act, 28 U.S.C. § 2201. This they cannot do. Congress created a comprehensive and exclusive remedial scheme in section 502. Moreover, the

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[11] As discussed above, Plaintiffs have the burden to allege the existence of a plan and, specifically, the clear and express vesting language in the plan. Chiles, 95 F.3d at 1511-13. Here, Plaintiffs allege "[u]pon information and belief" that CT&T began providing the life insurance benefits in 1971 "as part of the Defendant Group Life, Accidental Death and Dismemberment and Dependent Life Plan for Employees of [CT&T]." (Compl. ¶¶ 68, 70). Plaintiffs have not cited any vesting language in such a plan (if it exists). Moreover, for the applicable time period (1993-2003), the plan documents that Defendants have located are not only bereft of vesting language, but also include an express reservation of Embarq's and its predecessors' right to amend, alter, or terminate the Welfare Benefits, see Appx., Exhs. 1-2, 4-10, including the life insurance coverage at issue here. Id., Exhs. 7-10.

remedies Congress provided in section 502(a)(1)(B) and section 502(a)(3) are mutually exclusive. That is, when a plaintiff files suit under section 502(a)(1)(B), he may not also seek to remedy the same alleged violation under section 502(a)(3) – not to mention the Declaratory Judgment Act. Thus, because Plaintiffs may properly seek a remedy under section 502(a)(1)(B), putting to the side that this claim is meritless, Plaintiffs' claim under section 502(a)(3) must be dismissed.

ERISA is a "'comprehensive and reticulated statute'" that is "'enormously complex and detailed.'" Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 447 (1999). Pursuant to this comprehensive scheme, Congress specified all of the remedies available to ERISA plaintiffs in section 502(a). Participants and beneficiaries may bring suit under section 502(a)(1)(B) to:

> recover benefits due [them] under the terms of [their] plan, to enforce [their] rights under the terms of the plan, or to clarify [their] rights to future benefits under the terms of the plan.

29 U.S.C. § 1132(a)(1)(B). And, in section 502(a)(3), Congress created a "safety net offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." Varity Corp. v. Howe, 516 U.S. 489, 512 (1996) (emphasis added).

Consequently, when a plaintiff seeks a remedy under section 502(a)(1)(B), he may not challenge the same alleged violation under section 502(a)(3). Lefler v. United Healthcare of Utah, Inc., 72 F. Appx. 818, 826 (10th Cir. 2003) (holding that "consideration of a claim under 29 U.S.C. § 1132(a)(3) is improper when the plaintiff . . . states a cognizable claim under 29 U.S.C. § 1132(a)(1)(B)."); see also Korotynska v. Metro. Life Ins. Co., 474 F.3d 101, 106 (4th Cir. 2006) (noting that "the great majority of circuit courts have interpreted Varity Corp. v. Howe to hold that a claimant whose injury creates a cause of action under § 1132(a)(1)(B) may not proceed with a claim under § 1132(a)(3)"); Antolikv. Saks, Inc., 463 F.3d 796, 803 (8th Cir. 2006) ("Where a plaintiff is provided adequate relief by the right to bring a claim for benefits

under . . . § 1132(a)(1)(B), the plaintiff does not have a cause of action to seek the same remedy under § 1132(a)(3)(B)."); Ogden v. Blue Bell Creameries U.S.A., Inc., 348 F.3d 1284, 1287 (11th Cir. 2003) (same); Larocca v. Borden, Inc., 276 F.3d 22, 28 (1st Cir. 2002) (same); Wilkins v. Baptist Healthcare Sys., 150 F.3d 609, 615 (6th Cir. 1998) (same); Tolson v. Avondale Indus., Inc., 141 F.3d 604, 610 (5th Cir. 1998) (same); Forsyth v. Humana, Inc., 114 F.3d 1467, 1475 (9th Cir. 1997) (same).

Plaintiffs improperly seek to remedy the identical alleged wrongs under both section 502(a)(1)(B) and section 502(a)(3) – in two separate but largely identical claims. Because Plaintiffs have an adequate remedy under section 502(a)(1)(B), their request for relief pursuant to section 502(a)(3) in the Third Claim must be dismissed.

3. The Court Should Decline To Accept Jurisdiction Under The Declaratory Judgment Act.

Plaintiffs' claim for declaratory relief pursuant to 28 U.S.C. § 2201, the Declaratory Judgment Act, should likewise fail. As an initial matter, the issue presented by the First Claim, whether Plaintiffs' benefits under the Welfare Plans vested, is dispositive of the Third Claim. Accordingly, the Court's resolution of the First Claim will render Plaintiffs' claim for declaratory relief moot, whether brought under the Declaratory Judgment Act or ERISA.

Nevertheless, the Court should dismiss Plaintiffs' claim under the Declaratory Judgment Act. This Court is not required to exercise jurisdiction over a Declaratory Judgment Act claim. See Shannon v. Sequeechi, 365 F.2d 827, 829 (10th Cir. 1996) (explaining that the "grant of jurisdiction contained in the [Declaratory Judgment] Act is not one of compulsion and the court has the discretion whether to entertain an action for declaratory relief") (internal citation omitted). Where, as here, another federal statute provides an exclusive means for settling the controversy that is the subject of Declaratory Judgment Act claim, a court should not exercise its

jurisdiction. See Rosette Inc. v. United States of Am., 141 F.3d 1394, 1397 (10th Cir. 1998) (holding that plaintiffs could not sustain an action under the Declaratory Judgment Act where the claim was properly decided under the Quiet Title Act). In the context of ERISA claims, "the Supreme Court has clarified Congress intended the civil enforcement mechanisms of ERISA to be exclusive." Cannon v. Group Health Serv. of Oklahoma, 77 F.3d 1270, 1274 (10th Cir. 1996). Indeed, courts should remain "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." Mass. Mut'l Life Ins. Co. v. Russell, 473 U.S. 134, 147 (1985).

Accordingly, consistent with the Tenth Circuit's holding in Rosette, this Court should not exercise jurisdiction over Plaintiffs' Declaratory Judgment Act claim. Plaintiffs' invocation of the Declaratory Judgment Act is superfluous. See Key Construction, Inc. v. State Auto Property and Casualty. Ins. Co., No. 06-CV-2395-KHV, 2008 U.S. Dist. LEXIS 19915, *14 (D. Kan. March 5, 2008) (Vratil, J) (declining to exercise jurisdiction under Declaratory Judgment Act because "[e]ven if the Court found some validity in plaintiff's claim, the fact that the arbitrator will ultimately decide questions of negligence -- thereby resolving the indemnity question -- justifies the Court's declination of declaratory relief."). As expressly pleaded in the Complaint, the Third Claim seeks the same equitable remedies that are available under ERISA section 502(a)(1)(B). (Compl. ¶ 109). Moreover, the Third Claim must be decided with reference to ERISA's carefully crafted remedial scheme. Cf. Admin. Comm. of the Wal-Mart Assocs. Health & Welfare Plan v. Willard, 302 F. Supp. 2d 1267, 1276 (D. Kan. 2004) (Vratil, J.) (in a subrogation action, the Court, "to prevent manifest injustice," would "liberally construe[] the pretrial order to include a request for declaratory relief both under ERISA and the Declaratory Judgment Act"). Here, as explained above, dismissing Plaintiffs' claim under the Declaratory

Judgment Act and section 502(a)(3) will not prejudice Plaintiffs, who are seeking the same relief under ERISA section 502(a)(1)(B) in the First Claim.

D. The Fourth Claim for Relief Should Be Dismissed Because The Plan Amendments Are Permitted By The ADEA.

Plaintiffs allege that Embarq discriminated against them in violation of the ADEA when it terminated, reduced, or changed the Welfare Benefits. Plaintiffs' claims should be dismissed because the Plan amendments at issue are lawful under the ADEA. The amendments that affected life insurance benefits were not based upon the age of retirees. In addition, the amendments reducing medical and prescription drug benefits for Medicare-eligible retirees are expressly permitted by the Equal Employment Opportunity Commission's ("EEOC's") regulations, which interpret and implement the ADEA. Accordingly, this Court should dismiss Plaintiffs' Fourth Claim in its entirety.

1. The Plan Amendments Regarding Life Insurance Benefits Do Not Violate The ADEA Because The Amendments Are Not Based On Age.

It is axiomatic that an employer's decision does not violate the ADEA where that decision is not based on age. See Perrell v. Financeamerica Corp., 726 F.2d 654, 656 (10th Cir. 1984) ("age must 'make a difference' . . . in the sense that, 'but for' the factor of age discrimination the employee would not have been adversely affected.") (internal citation omitted). In the Fourth Claim, Plaintiffs baldly assert that the Plan amendments limiting life insurance benefits discriminated against retirees on the basis of age. (Compl. ¶ 143). The Plan amendments, however, are not based on the age of retirees. See 2007 Amendments, supra. Indeed, in the Complaint's "Statement of Facts," Plaintiffs concede that the two modifications to the life insurance benefits were based on non-discriminatory factors: (1) "eliminating the Grand-fathered Life Insurance benefit and all other life insurance benefit[s] for retirees participating in the VEBA plan", and (2) implementing an across-the-board cap on life insurance benefits for all

other retirees, setting a maximum benefit of $10,000. (Compl. ¶ 102). Neither of these criteria implicates the age of retirees. In other words, retirees of all ages are subject to the same eligibility requirements. Therefore, Plaintiffs' Fourth Claim, as it pertains to life insurance benefits, fails as a matter of law. See Bozner v. Sweetwater County Sch. Dist., No. 96-08087, 1997 WL 165168 at *3 (10th Cir. April 9, 1997) (where the plan "provides the same level of benefits to older workers as to younger workers, there is no violation" of the ADEA) (quoting 29 C.F.R. § 1625.10(a)(2)); cf. DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 730 (3d Cir. 1995) (holding that a facially neutral policy related to the award of enhanced severance benefits that provided the same benefit packages to older and younger workers did not violate the ADEA).

2. The Plan Amendments Regarding Medical And Prescription Drug Benefits Do Not Violate The ADEA, Which Permits The Coordination Of An Employer's Medical Benefits Plans With The Medicare Program.

Plaintiffs' claims regarding reductions in medical and prescription drug benefits for Medicare-eligible retirees are equally misguided. The EEOC has promulgated a regulation that explicitly permits the reduction of these benefits. See 29 U.S.C. § 1625.32(b). The EEOC's regulation provides in pertinent part:

> Some employee benefit plans provide health benefits for retired participants that are altered, reduced or eliminated when the participant is eligible for Medicare health benefits or for health benefits under a comparable State health benefit plan, whether or not the participant actually enrolls in the other benefit program. Pursuant to the authority contained in section 9 of the [ADEA] . . . it is hereby found necessary and proper in the public interest to exempt from all prohibitions of the [ADEA] such coordination of retiree health benefits with Medicare or a comparable State health benefit plan.

Id. The clear and express language of this regulation demonstrates the legality and propriety of Embarq's amendments to the Medical Plan, which affected medical benefits for retirees eligible

for Medicare health benefits.[12]

As Plaintiffs cannot point to any changes to the Welfare Plans that violate the ADEA, Plaintiffs' Fourth Claim for Relief must be dismissed.

E. ERISA Preempts Plaintiffs' State Law Age Discrimination Claims In The Fifth, Sixth and Seventh Claims For Relief.

Because the ADEA expressly permits the Welfare Plan amendments, Plaintiffs attempt to fashion an alternative age discrimination claim under the state laws of Ohio, Oregon, and Tennessee. ERISA, however, preempts all of these state law claims.[13] Under ERISA section 514(a), ERISA "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." 29 U.S.C. § 1144(a). A state law "relates to" an employee benefit plan where it "has a connection with or reference to such a plan." Shaw v. Delta Airlines, Inc., 463 U.S. 85, 96-97 (1983) (holding that ERISA preempts New York's Human Rights Law with respect to ERISA benefit plans insofar as the state law prohibited conduct that was lawful under Title VII). Accordingly, ERISA will preempt any state law that directly affects the material provisions in an employee benefit plan. St. Francis Reg'l Med. Ctr. v. Blue Cross and Blue Shield of Kan., Inc., 49 F.3d 1460, 1464 (10th Cir. 1995) (holding that ERISA preempts a Kansas state law governing the assignment of benefits under an ERISA plan). The breadth of ERISA's preemptive scheme saves "employers from conflicting and inconsistent state and local regulation of employee benefit plans." Champion Int'l Corp. v. Brown, 731 F.2d 1406,

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[12] Plaintiffs contend that this regulation was an invalid exercise of authority by the EEOC. (Compl. ¶ 135). The only Court of Appeals that has spoken directly to Plaintiffs' argument has flatly rejected it. See American Ass'n of Retired Persons v. Equal Employment Opportunity Comm'n, 489 F.3d 558, 563 (3d Cir. 2007) ("Section 9 [of the ADEA] unambiguously grants reasonable exemption authority to the EEOC, and plainly states that such authority applies to any and all parts of the statute."), cert. denied, 2008 U.S. LEXIS 2762, 76 U.S.L.W. 3510 (U.S. Mar. 24, 2008); cf. Int'l Union, United Automobile, Aerospace, and Agricultural Implement Workers of Am. v. Gen. Motors Corp., 497 F.3d 615, 634 (6th Cir. 2007) (holding that the provisions of a settlement between an employer and two unions which coordinated retiree healthcare benefits with Medicare-eligibility did not violate the ADEA).

[13] Although the Plan amendments do not violate any state law, it is unnecessary for the Court or the parties to address that issue, as ERISA preempts the state laws in any event.

1409 (9th Cir. 1984) (holding that ERISA preempts Montana's age discrimination law to the extent that law conflicts with ERISA-authorized provisions of the pension plan at issue).

The relief sought in Plaintiffs Fifth, Sixth and Seventh Claims would directly affect the material provisions of the ERISA plans at issue. Further, as explained above, the Plan amendments are permitted under ERISA and the ADEA. Thus, consistent with ERISA's broad preemptive scope, Plaintiffs' Fifth, Sixth, and Seventh Claims for Relief must also be dismissed.[14]

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss with prejudice the First, Third, Fourth, Fifth, Sixth and Seventh Claims for Relief in Plaintiffs' Amended Complaint in their entirety, and so much of the Second Claim for Relief that challenges the sufficiency of the applicable Summary Plan Descriptions.

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[14] The Complaint also references certain Plan amendments that were announced in November 2005 and became effective on January 1, 2006. (Compl. ¶ 100). To the extent that Plaintiffs' state law claims are based on these amendments, the claims are time-barred. See OHIO REV. CODE ANN. § 4112.02(N) (discrimination claims must be filed within 180 days of the alleged unlawful discriminatory practice); El Zebet v. Nissan N. Am., No 4:04-59, 2005 WL 2206684 at *6 (E.D. Tenn. Sept. 12, 2005) (stating that suits under the Tennessee fair employment law are subject a one-year statute of limitations); OR. REV. STAT. § 659A.875 (establishing a one-year statute of limitations for discrimination claims under the Oregon fair employment statute).

Respectfully submitted,

STINSON MORRISON HECKER LLP

By: */s/ M ark D. Hinderks*
Mark D. Hinderks KS #11293
12 Corporate Woods
10975 Benson, Suite 550
Overland Park, KS 66210
(913) 451-8600 (Telephone)
(913) 451-6352 (Facsimile)
mhinderks@stinson.com

Scott C. Hecht KS #16492
1201 Walnut Street, Suite 2900
Kansas City, Missouri 64106
(816) 842-8600 (Telephone)
(816) 691-3495 (Facsimile)
shecht@stinson.com

and

Michael L. Banks (*pro hac vice)*
Joseph J. Costello (*pro hac vice)*
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103-2921
(215) 963-5387/5295 (Telephone)
(215) 963-5001 (Facsimile)
mbanks@morganlewis.com
jcostello@morganlewis.com

James P. Walsh, Jr. (*pro hac vice)*
MORGAN, LEWIS & BOCKIUS LLP
502 Carnegie Center
Princeton, NJ 08540
(609) 919-6647 (Telephone)
(609) 919-6701 (Facsimile)
jwalsh@morganlewis.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April, 2008, I electronically filed the foregoing document using the CM/ECF system, which will send notice of electronic filing to the following:

THE NYGAARD LAW FIRM
Diane A. Nygaard
Jason M. Kueser
4501 College Boulevard, Suite 260
Leawood, Kansas 66211
Telephone: (913) 469-5544
Facsimile: (913) 469-1561
diane@nygaardlaw.com

SANDALS & ASSOCIATES, P.C.
Alan M. Sandals
Scott M. Lempert
One South Broad Street, Suite 1850
Philadelphia, PA 19107
Telephone: (215) 825-4000
Facsimile: (215) 825-4001
asandals@sandalslaw.com

GLENN, MILLS & FISHER, P.A.
Stewart W. Fisher
Post Office Drawer 3865
Durham, NC 27702
Telephone: (919) 683-2135
Facsimile: (919) 688-9339
sfisher@gmf-law.com

LAW OFFICE OF RICHARD T. SEYMOUR, PLLC
Richard T. Seymour
Adele Rapport
1150 Connecticut Avenue, NW
Suite 900
Washington, DC 20036
Telephone: (202) 862-4320
Facsimile: (800) 805-1065
rick@rickseymourlaw.com

Attorneys for Plaintiffs

/s/ *Mark D. Hinderks*
Mark D. Hinderks