IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WILLIAM DOUGLAS FULGHUM, et al., Individually and on behalf of all others similarly situated, Plaintiffs, v. EMBARQ CORPORATION, et al., Defendants.	CIVIL ACTION CASE NO. 07-CV-2602 (EFM/JPO) CLASS ACTION

PLAINTIFFS' MEMORANDUM
IN SUPPORT OF MOTION FOR CLASS ACTION CERTIFICATION

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

Alan M. Sandals, Esquire *(pro hac vice)*
Scott M. Lempert, Esquire *(pro hac vice)*
SANDALS & ASSOCIATES, P.C.
One South Broad Street, Suite 1850
Philadelphia, PA 19107
Telephone: (215) 825-4000
Facsimile: (213) 825-4001

Stewart W. Fisher, Esquire *(pro hac vice)*
GLENN, MILLS, FISHER & MAHONEY, P.A.
Post Office Drawer 3865
Durham, NC 27702
Telephone: (919) 683-2135
Facsimile: (919) 688-9339

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

Bruce Keplinger
Christopher J. Lucas
NORRIS & KEPLINGER, L.L.C.
6800 College Boulevard, Suite 630
Overland Park, KS 66211
Telephone: (913) 663-2000
Facsimile: (913) 663-2006

Mary C. O'Connell
R. Douglas Gentile
DOUTHIT FRETS ROUSE GENTILE & RHODES, LLC
903 East 104th Street, Suite 610
Kansas City, MO 64131
Telephone: (816) 941-76000
Facsimile: (816) 941-6666

Attorneys for Plaintiffs and the Class and Sub-Class

January 29, 2009

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Pages

Pages

Pages

Pages

Federal Statutes

Pages

State Statutes

Court Rules

Other Authorities

INTRODUCTION

Plaintiffs Fulghum, Daniel, Hollingsworth, Dorman, King, Joyner, Dillon, Barnes, Games, Bullock, Kenneth and Betty Carpenter, Somdahl, and Dugger move for certification of this action as a class action under Rules 23(a) and (b) of the Federal Rules of Civil Procedure.[1]

Plaintiffs seek certification of a plaintiff class (the "Class"), defined as follows:

> 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.

The Class includes the following sub-classes, all the members of which are also members of the Class:

(a) The "VEBA Sub-Class" is defined as follows:

> All members of the Class who were participants or beneficiaries in the Carolina Telephone & Telegraph Voluntary Employee Beneficiary Association (VEBA) as of July 26, 2007.

(b) Three other subclasses relate to the state law age discrimination claims brought under the laws of Ohio, Oregon, and Tennessee. Each of these subclasses, entitled the "Ohio [or Oregon or Tennessee] Age Claim Sub-Class" is defined as follows:

> All members of the Class whose final place of employment by any Defendant or any of their affiliates or subsidiaries was in the State of [insert name of state].

In the event that later proceedings in the case indicate that it would be appropriate to formally constitute additional sub-classes based on common factors such as operating company or date of retirement, such additional sub-classes will be proposed for approval by the Court.[2]

---

[1] Due to recent health concerns, additional named plaintiff Lewis Sams will soon withdraw as a named plaintiff. Plaintiffs are currently in the process of identifying another former employee from Tennessee to represent the Tennessee state law age claim sub-class.

Plaintiffs' motion for class certification under Fed.R.Civ.P. 23(b)(1), (2) and (3) pertains to the following claims asserted in the Second Amended Complaint: restoration of benefits under ERISA § 502(a)(1)(B) (Count I), Declaratory Judgment Act (Count III), and age discrimination under Ohio, Oregon and Tennessee state statues (Counts V through VII). Plaintiffs also move for class certification under Rule 23(c)(4) on the common legal and factual issues associated with most of the elements of their ERISA breach of fiduciary duty ("BOFD") claims (Count II), i.e. the claim elements of defendants' fiduciary status, misrepresentations and omissions made by defendants, the materiality of those misrepresentations and omissions, and presumed reliance on such misrepresentations under governing law. Plaintiffs' federal law age discrimination claims asserted in Count IV are the subject of a separate motion under the "collective action" provisions of the ADEA, 29 U.S.C. § 626(b), which incorporate the remedial provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b).

Class certification is entirely appropriate here. This case raises uniform, classwide legal and factual questions whether defendants' retiree medical, prescription drug, and life insurance plans, when evaluated under the protective standards articulated by the Tenth Circuit, provided plaintiffs and all members of the proposed class and subclasses an irrevocable right to free or company-subsidized benefits, and whether defendants' decisions to eliminate company-paid and subsidized medical and prescription drug coverage, and to reduce or eliminate life insurance

---

[2] Although the proposed representative plaintiffs and members of the Class retired under separate retiree benefit plans and special early retirement offers in force at the time of their retirements, there is a high degree of continuity and similarity among these plans, thus presenting common factual and legal issues. By way of example, the parties presented excerpted copies of selected summary plan descriptions (SPDs) in support of and in opposition to defendants' motion to dismiss, which show a high degree of similarity from year to year. *See* Defs. Exs. 1-17 (Docket Item # 18); Pls. Exs. 1-16 (Docket Item # 20). In the event that later proceedings reveal significant factual differences within the Class, appropriate recognition of such functional differences can be achieved though creation of additional subclasses.

plans, violated their obligations under the plans and discriminated against plaintiffs and the Class based on age. Finally, the ERISA BOFD claims focus on defendants' conduct in describing and misrepresenting the nature of these benefits.

Due to its complete suitability for Rule 23 certification, this case should be ruled a class action so that the parties and the Court can gain the efficiencies and procedural certainty of class treatment. The alternative, of course, would be potentially thousands of individual claims that would demand a much greater use of resources by the parties and the Court.

FACTUAL BACKGROUND

The Court is no doubt familiar with the factual background and claims asserted in this case from Chief Judge Vratil's December 2, 2008 ruling on defendants' motion to dismiss, so only a brief introduction is needed.

Plaintiffs and the Class are retired, former long-term management and unionized employees of regional and local telephone operating companies that eventually became wholly-owned subsidiaries of defendant Sprint and ultimately of defendant Embarq upon its spin-off from Sprint in 2006. As retired employees, plaintiffs and their eligible spouses and other dependents were participants in various ERISA-governed plans that were sponsored by Sprint and its operating subsidiaries to provide medical, prescription drug and life insurance benefits during retirement. Plaintiffs and the Class had long received these retirement benefits for free or at minimal cost, which was consistent with the benefits plans' terms and defendants' repeated written and oral representations that these benefits were for life, and once retirement commenced, could not be changed.

At the heart of this case is (1) Sprint's 2006 elimination of the retiree prescription drug benefits for Medicare-eligible retirees and dependents (replacing it with a $500 annual benefit to

obtain third party Medicare D coverage); (2) Embarq's 2007 elimination of company-paid life insurance benefits for the VEBA Sub-Class; (3) Embarq's 2008 elimination of all retiree medical benefits, including all prescription drug coverage and the $500 annual prescription drug payments; and (4) Embarq's 2008 reduction of company-paid life insurance, reducing coverage levels as much as $40,000 to $10,000. Plaintiffs filed this case to challenge defendants' actions as violations of ERISA, the ADEA and age discrimination laws of several states.

ARGUMENT

I. THIS IS A CLASSIC CASE FOR CLASS CERTIFICATION. PLAINTIFFS' CLAIMS ARE BASED ON DEFENDANTS' UNIFORM CONDUCT WHICH HAS AFFECTED ALL CLASS MEMBERS IN THE SAME WAY AND THE CLAIMS WILL BE DECIDED UNDER THE PROVISIONS OF THE PLANS AND THE ERISA AND STATE STATUTES.

The requirements of Rule 23 are readily met in this case, which presents uniform, common questions of fact and law regarding the legality of defendants' conduct in eliminating company-sponsored and company-paid retiree benefits, and uniform company-wide misrepresentations and omissions concerning the nature of these benefits and defendants' alleged right to modify or terminate these benefits during retirement.

"Class actions serve an important function in our system of civil justice." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981). Class actions permit plaintiffs to "vindicat[e] the rights of individuals" who might not have initiated litigation, "in which the optimum result might be more than consumed by the cost." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980). Accordingly, "if there is to be an error made, let it be in favor and not against the maintenance of the class action." *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968); *Sibley v. Sprint Nextel Corp.*, No. 08-2063, 2008 WL 5046348 at *5 (D. Kan. Nov. 24, 2008) (*citing Esplin); In re Universal Service Fund Telephone Billing Practices Litig.*, 219 F.R.D. 661, 681 (D.Kan. 2004)

("The court is mindful of the Tenth Circuit's mandate that 'if there is to be an error made, let it be in favor and not against the maintenance of the class action.'"). In this case, there should be no doubt whatsoever that class certification is warranted.

Rule 23 requires a two-step analysis to determine whether class certification is appropriate. First, plaintiffs must satisfy the four prerequisites in Rule 23(a): that (1) the Class is so numerous that joinder of all members is impracticable ("numerosity"); (2) there are questions of law or fact common to the Class ("commonality"); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the Class ("typicality"); and (4) the representative parties will fairly and adequately protect the interests of the Class ("adequacy of representation"). If all four requirements of Rule 23(a) are met, the plaintiff must then satisfy at least one of the subsections of Rule 23(b). *Adamson v. Bowen*, 855 F.2d 668, 675 (10th Cir. 1988).[3] In determining whether class treatment is appropriate, a court need not consider the underlying merits of the action. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) (there is "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule"); *Adamson*, 855 F.2d at 676; *Sibley*, 2008 WL 5046348 at *4; *Capital Cities/ABC, Inc. v. Ratcliff*, No. 9502212, 1996 U.S. Dist. LEXIS 13153 at *19 (D. Kan. Aug. 13, 1996) (*citing*, *Eisen*). The focus is simply on whether the requirements of Rule 23 are satisfied. *Shook v. El Paso County*, 386 F.3d 963, 971 (10th Cir. 2004). For purposes of class certification, a court takes the substantive allegations of the complaint as true. *Id.* at 967.

[3] The provisions stating the requirements for class certification under Rule 23(a) and 23(b) have not been altered since 1966. The 2007 amendments were "intended to be stylistic only." 2007 Advisory Committee Notes.

A court that certifies a class must also appoint class counsel who will fairly and adequately represent the interests of the class, as required by Rule 23(g). *See* Fed. R. Civ. P. 23(g)(1)(C); *Sibley,* 2008 WL 5046348 at *11. Finally, plaintiffs seek class certification with respect to particular common issues under their ERISA BOFD claim pursuant to Rule 23(c)(4).[4] This provision allows a class action to be brought "with respect to particular [common] issues" that meet the requirements of Rule 23(a) and at least one prong of Rule 23(b). *See, e.g., Schreiber v. National Collegiate Athletic Ass'n,* 167 F.R.D. 169, 176 (D. Kan. 1996). As explained below, the liability elements under an ERISA BOFD claim (fiduciary status, affirmative misrepresentations and inadequate disclosures, their materiality, and the presumption of reliance where available) are all subject to class-wide, common proof. Certification of these issues therefore will take full advantage of Rule 23's objective of achieving judicial economy by avoiding presentation of identical or similar evidence by potentially thousands of plaintiffs. Once defendants' liability on the BOFD claims is established, in a remedial phase plaintiffs and class members can then present additional, individual evidence of detrimental reliance in making important financial or other decisions and other evidence relevant to relief. Accordingly, certifying the predominant common issues of the fiduciary breach claims under Rule 23(c)(4) will materially advance the efficient resolution of those claims and of the litigation overall.

A. The Proposed Class Satisfies The Requirements Of Rule 23(a).

1. The Class is So Numerous that Joinder of All Members is Impracticable.

Rule 23(a)(1) requires that the members of the class be so numerous that joinder of all class members is impracticable. "Impracticable," however, does not mean impossible. Rather, proof of difficulty or inconvenience of joining all members of the class suffices. *Olenhouse v.*

[4] The 2007 amendments moved this provision of Rule 23 from Rule 23(c)(4)(A) to Rule 23(c)(4). The language of the Rule was not altered.

Commodity Credit Corp., 136 F.R.D. 672, 679 (D. Kan. 1991). It is permissible to estimate the class size. *Sibley*, 2008 WL 5046348 at *6, *citing Rex v. Owens ex rel. State of Okla.*, 585 F.2d 432, 436 (10th Cir. 1978).

In this case, the 2004 Form 5500 Annual Report for the Sprint Welfare Benefit Plan for Retirees reveals that there were 12,975 retired participants in the plan as of January 1, 2004. The 2005 Form 5500 Annual Report for the VEBA reveals that there were 2,569 retired participants who were entitled to future benefits from the plan as of January 1, 2005 and who are potential members of the VEBA Sub-Class. Further, plaintiffs' Amended Complaint includes approximately 750 individuals who are named, non-representative plaintiffs for purposes of the federal ADEA claims, but who are also members of the proposed Class under the ERISA counts. Finally, despite the current unavailability of data on the number of affected former employees from Ohio, Oregon, and Tennessee, there is no reason to doubt that a sufficient number of members exists for each state law sub-class given the extensive operations carried out in each of these states. Accordingly, whatever the exact total number of affected Class members, there is no doubt that thousands of persons are involved and that joinder would be impracticable.

There is no minimum number of plaintiffs required to maintain a suit as a class action, but, generally, numerosity is satisfied with a showing of as few as 50 class members. *Olenhouse*, 136 F.R.D. at 679. In this case, while the precise number of class members is not known, it is clear that the retirees and beneficiaries who would be included in the Class number in the thousands, and are widely dispersed throughout the United States. Plaintiffs allege that defendants did business in at least 22 states (Second Am. Complaint, ¶ 63), and the existing named representative plaintiffs reside in 5 states. These circumstances establish numerosity and impracticability of individual litigation. *See Heartland Communications, Inc. v. Sprint Corp.*,

161 F.R.D. 111, 115 (D. Kan. 1995) ("geographic diversity among potential claimants adds to impracticability of joinder") (citation omitted); *see also Bittinger v. Tecumseh Div. Grp. Ins. Plan For Retirees,* 123 F.3d 877, 884 n.1 (6th Cir. 1997) (in a class of over 1000 retirees, "joinder of so many parties would be impracticable" and "to reach this conclusion is to state the obvious"); *In re Ikon Office Solutions, Inc. Sec. Litig.*, 191 F.R.D. 457, 462 (E.D. Pa. 2000) (thousands of participants in ERISA plan in any given year easily satisfies numerosity).

2. There are Questions of Law and Fact Common to the Class.

The commonality provision of Rule 23(a)(2) is also easily met in this case. The rule does not require that *all* questions of law *and* fact be common to every member of the class. Rather, it is well established that only *one question* of law *or* fact needs to be common among the class members. *See, e.g., Harlow v. Sprint Nextel Corp.*, No. 08-2222, 2008 WL 5173136 at *7 (D. Kan. Dec. 10, 2008) ("a finding of commonality 'requires only a single issue common to the class'"), *quoting, J.B. ex rel Hart v. Valdez,* 186 F.3d 1280, 1287 (10th Cir. 1999). As stated in the leading treatise on class actions:

> Rule 23(a)(2) does not require that all questions of law or fact raised in the litigation be common. The test or standard for meeting the Rule 23(a)(2) prerequisite is qualitative rather than quantitative; that is, there need be only a single issue common to all members of the class. Therefore, this requirement is easily met in most cases.

1 Newberg on Class Actions § 3.10 at p. 48-50 (4th ed. 2002) (footnotes and citations omitted). S*ee also In re: Williams Cos. ERISA Litigation,* 231 F.R.D. 416, 420 (N.D. Okla. 2005) ("The commonality requirement is usually easily met") (citation omitted). Further, "[f]actual differences in the claims of the class members should not result in a denial of class certification where common questions of law exist." *Milonas v. Williams*, 691 F.2d 931, 938 (10th Cir. 1982).

Plaintiffs' claims present a variety of common questions of law and fact surrounding the elimination of retiree medical, prescription drug and life insurance benefits, because the Class

members share common legal and factual theories. *Sibley*, 2008 WL 5046348 at *8. These questions include: (1) whether plaintiffs and members of the Class have been or will be unlawfully excluded from and deprived of their rights under defendants' ERISA benefit plans; (2) whether defendants breached the terms of these ERISA benefit plans; (3) whether plaintiffs and the members of the Class and Sub-Classes have a vested right to the retiree medical, prescription drug and life insurance benefits; (4) whether defendants and their agents were acting as fiduciaries when communicating about the retiree benefits; (5) whether defendants engaged in a course of conduct of misrepresenting the lifetime nature of the retiree benefits; (6) whether defendants engaged in a practice of inadequately disclosing the companies' reservation of rights to amend or terminate the retiree benefits in summary plan descriptions and in other communications; (8) whether a reasonable employee would be misled by defendants' misrepresentations and omissions; (9) whether defendants' omissions of material information about the retiree benefits give rise to presumptions of reliance; (10) whether defendants violated the Ohio Civil Rights Act, Oregon Civil Rights Act, and/or Tennessee Human Rights Act by direct and/or indirect age discrimination as a result of eliminating or reducing the life insurance benefits; and (11) whether plaintiffs and the members of the Class and Sub-Classes are entitled to the relief prayed for in their Amended Complaint.

Each of these legal questions also presents common factual questions dealing with, *inter alia*, defendants' common course of conduct, past practices, interpretive statements, and the customary usage of the language found in the SPDs and plans. The claims for restoration of benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), are ideally suited for class treatment because they involve identical claims for benefits under the uniform terms of common benefit plans. *See, e.g.*, *Reese v. CNH America LLC*, 227 F.R.D. 483, 486-89 (E.D. Mich. 2005).

In *Reese,* as here, the plaintiffs sought a declaratory judgment that they had a vested right to no-cost retiree medical benefits under a variety of different collective bargaining agreements ("CBAs") and summary plan descriptions ("SPDs"). Although these common documents contained different language, including reservations of rights, cap agreements on retiree medical costs, and agreements that retirees would contribute to health care coverage, the court held that commonality was satisfied since all plaintiffs based their claims for vested benefits on "the same legal theory – that the relevant agreements provide retirees and surviving spouses of retirees fully-funded, lifetime health care benefits." *Id.* at 488. *See also Bittinger,* 123 F.R.D. at 879 & 884 (commonality satisfied where retirees sought guaranteed, lifetime, fully-funded benefits, despite differing documents governing those benefits); *Cates v. Cooper Tire and Rubber Co.*, 253 F.R.D. 422, 429 (N.D. Ohio 2008) (commonality met where all class members shared same legal questions – "namely, whether retiree health benefits provided in the Agreements were vested and whether [defendant] violated ERISA by imposing caps and contribution requirements on such benefits"); *Feret v. Corestates Financial Corp,* No. 97-6759, 1998 U.S. Dist LEXIS 12734 at *33 (E.D. Pa. Aug. 18, 1998) (common questions include proper interpretation of plan terms); *Bradford v. AGCO Corp.*, 187 F.R.D. 600, 604-05 (W.D. Mo. 1999).

Similarly, the principal elements of Plaintiffs' ERISA BOFD claim present common legal and factual questions and also satisfy commonality. The elements of the BOFD claim are well defined:

> (1) the defendant's status as an ERISA fiduciary acting as a fiduciary; (2) a misrepresentation or omission on the part of the defendant; (3) the materiality of the misrepresentation; and (4) detrimental reliance by plaintiff on the misrepresentation.

Randles v. Galichia Medical Group, P.A., No. 05-1374, 2006 U.S. Dist. LEXIS 92429 at *41 (D. Kan. Dec. 18, 2006), *citing Romero v. Allstate Corp.*, 404 F.3d 212, 226 (3d Cir. 2005);

Horn v. Cendant Operations, Inc., 69 Fed.Appx. 421, 427-28 (10th Cir. 2003) (under ERISA, a plaintiff may also sue for breach of fiduciary duty based upon a material omission). Pursuant to Rule 23(c)(4), plaintiffs seek certification of the first three elements of their BOFD claim, as well as the fourth element to the extent that a presumption of reliance is available. The Court's determinations on these claim elements based on common evidence (as discussed in detail below) will determine whether and how plaintiffs and Class members will then present additional individual evidence relating to their detrimental reliance and relief.

Certification of these particular elements of the BOFD claim is entirely proper. "Certification of all asserted causes of action is not an all-or-nothing proposition." *Elias v. Ungar's Food Products, Inc.*, 252 F.R.D. 233, 252 (D.N.J. 2008) (citations omitted). Rule 23(c)(4) permits a class action to be brought with respect to "particular [common] issues," even though other issues in the case may be litigated on an individualized basis. Fed. R. Civ. P. 23(c)(4); *see Schreiber v. National Collegiate Athletic Ass'n*, 167 F.R.D. at 176; *Wyandotte Nation v. City of Kansas City, Kansas*, 2002 U.S. Dist. LEXIS 25144 at *18 (D. Kan. Dec. 2, 2002); *In re Copley Pharmaceutical, Inc*, 158 F.R.D. 485, 489 (D. Wyo. 1994) (certifying common issues of liability, including strict liability, negligence, breach of warranties and declaratory relief under Rule 23(c)(4)(A), in advance of adjudicating individual issues of causation and damages). *See also* 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane**,** *Federal Practice and Procedure*, Civ. 3d, §1790 (2005) ("Courts have applied subdivision (c)(4)(A) to allow a partial class action to go forward, leaving questions of reliance, damages and other issues to be adjudicated on an individual basis").

It is widely understood that the class action procedure was devised to "manage group litigation fairly and efficiently," thereby allowing parties with very small individual recoveries to

litigate claims which otherwise could not be economically justified, and to avoid burdening the judicial system with multiple suits presenting duplicative litigation. *Manual for Complex Litigation* § 21 at 243 (4th ed. 2004); *see also Sibley*, 2008 WL 5046348 at *11. Rule 23(c)(4) was promulgated to assist courts in achieving class action efficiencies even where some issues in a case cannot be litigated on a class basis. "The theory of Rule 23(c)(4)(A) is that the advantages and economies of adjudicating issues that are common to the entire class on a representative basis should be secured even though other issues in the case may have to be litigated separately by each class member." *Schreiber*, 167 F.R.D at 176-177, *citing*, 7B Wright, Miller & Kane, *Federal Practice and Procedure*, Civ. 2d § 1790 at 271 (1986). "Accordingly, even if only one common issue can be identified as appropriate for class action treatment, that is enough to justify the application of the provision as long as the other Rule 23 requirements are met." *Id.* at 177. *See also In re Copley Pharmaceutical, Inc*, 161 F.R.D. 456, 461, 463-64 (D. Wyo. 1995) (finding that Rule 23(c)(4)(A) is "a highly efficient way to preserve both judicial economy and the rights of the parties," and that "in order to promote the use of the class device and to reduce the range of disputed issues, courts should take full advantage of the provision in subsection (c)(4)(A) permitting class treatment of separate issues in the case"), *quoting, In Re A.H. Robins Co., Inc*., 880 F.2d 709, 740 (4th Cir. 1989).

The principal elements of the BOFD claim present common class-wide questions, because the "focus in a breach of fiduciary duty claim is the conduct of the defendants, not the plaintiffs." *In re: Williams Cos. ERISA Litig.*, 231 F.R.D. at 422, *quoting, Ikon Office Solutions*, 191 F.R.D. at 465. Accordingly, evidence of an employer's common course of conduct will be used to establish a BOFD claim. For example, in proving defendants' fiduciary status, plaintiffs will rely on *defendants'* policies and practices to establish whether defendants and their agents,

including plan administrators, benefits personnel, managers and supervisors, had actual authority to provide benefits information to employees, or alternatively that they had apparent authority to do so. *See Horn,* 69 Fed. Appx. at 427. Consequently, evidence of fiduciary status will be common to all plaintiffs and the Class. *See, e.g., In re: Williams Cos. ERISA Litig.*, 231 F.R.D. at 421 (whether defendants acted as fiduciaries found to be a common issue); *In re Unisys Corp. Retiree Medical Benefits ERISA Litg.*, 57 F.3d 1255, 1261 (3d Cir. 1995) ("There is no question but that [the employers were] acting . . . in a fiduciary capacity when they made the material misrepresentations that support the claim for BOFD"); *In re Unisys Corp. Retiree Medical Benefits ERISA Litig.*, 957 F. Supp. 628, 645 (E.D. Pa. 1997) (finding that proof of fiduciary status had been proven on a class-wide basis).

To prove their BOFD claim, plaintiffs will also present common evidence of what defendants did in providing benefits information. This evidence will include company-wide and divisional written communications (including SPDs and other uniform benefit offerings and descriptions), corporate documentation and testimony of defendants' executives and benefits personnel demonstrating the companies' standard practices for group and individual oral communications, and internal company memoranda. Inasmuch as this evidence focuses on defendants' conduct, establishing liability does not depend on individual class member proof of misrepresentations and therefore presents common issues sufficient to satisfy Rule 23(a)(2). *See, Bittinger*, 123 F.3d at 884 (presenting evidence of a pattern of misrepresentations made largely by the same company agents sufficient for class certification, even where the evidence among plaintiffs differ); *In re: Williams Cos. ERISA Litig.*, 231 F.R.D. at 422 (commonality met where evidence of misrepresentations was based on defendants' conduct); *In re Qwest Savings and Investment Plan ERISA Litig.*, No. 02-464, 2004 U.S. Dist. LEXIS 24693 at *15-16 (D. Colo. Sept.

24, 2004) (fact that plaintiffs were provided different alleged misrepresentations does "not destroy the large foundation of commonality among the plaintiffs' misrepresentation allegations. The tool of a class action can be adapted to accommodate differences among these groups"); *In re Ikon*, 191 F.R.D. at 464 (common issues include what communications were made by fiduciary to plan participants); *Feret*, 1998 U.S. Dist LEXIS 12734 at *29 (common question is whether defendant's documents constitute material misrepresentations).

The procedural history of the groundbreaking retiree benefits litigation, *In re Unisys Corp. Retiree Medical Benefits ERISA Litigation*, confirms that the principal elements of the BOFD claim can be adjudicated on a class basis. *See In re Unisys Retiree Medical Benefits ERISA Litg.*, No. 93-1668, 2002 U.S. Dist. LEXIS 25737 at *7-9 (E.D. Pa. Jan. 30, 2002) (defendant's arguments that plaintiffs failed to establish fiduciary status, and material misrepresentations and omissions on a class-wide basis rejected at summary judgment). Indeed, the class device ultimately was discontinued in that case only at the point at which solely individualized issues remained to be decided. *See In re Unisys Retiree Medical Benefits ERISA Litg.*, No. 93-1668, 2003 WL 252106 (E.D. Pa. Feb. 4, 2003) (granting decertification only after discovery was complete).

The same common evidence will be examined to determine whether defendants adequately disclosed their alleged right to modify or terminate the retiree benefits. To prove a fiduciary breach through omission, plaintiffs must establish that defendants failed to adequately inform them, and that the company knew of the confusion generated by its silence. *Horn*, 69 Fed. Appx. at 428. It is axiomatic that proof of what the defendants *failed* to provide will be common to the Class since this claim is completely dependent on defendants' conduct and whether as reasonable fiduciaries they knew or should have known that employees were

confused about the duration of benefits. Accordingly, commonality is satisfied. *In re: Williams Cos. ERISA Litig.*, 231 F.R.D. at 421-22 (whether defendants improperly withheld information from plan participants found to be common issue); *Bunnion v. Conrail*, 1998 U.S. Dist. LEXIS 7727 at *22 (E.D. Pa. May 18, 1998).

The question whether the omissions and misrepresentations are material is also a common class-wide issue. A misrepresentation is material "if there is a substantial likelihood that it would mislead a *reasonable employee* in making an adequately informed . . . decision." *Horn*, 69 Fed. Appx. at 427 (emphasis added), *quoting*, *Jordan v. Federal Express Corp.*, 116 F.3d 1005, 1015-16 (3d Cir. 1997). "An omission may rise to a material level for the same reason." *Jordan*, 116 F.3d at 1016; *Horn*, 69 Fed. Appx. at 427. "Any provision of a plan subject to ERISA that establishes a benefit is a material term of the plan." *Curcio v. John Hancock Mutual Ins. Co.*, 33 F.3d 226, 237 (3d Cir. 1994).

Given that the materiality of a benefits misrepresentation is governed by the objective test of whether a "reasonable employee" would be misled, the element of materiality is inherently a common, class-wide issue subject to common proof. *See Horn*, 69 Fed. Appx. at 428-29 (holding that defendant breached its fiduciary duty by making misrepresentations and omissions about employees' rights under benefit plans, "of which it knew or should have known as a fiduciary . . . was material to [the employee's] circumstances"); *Feret*, 1998 U.S. Dist. LEXIS 12734 at *29 ("reasonable employee" test does "not entail individual inquires into the nature and context" in which defendants documents were read, and consequently, materiality of a misrepresentation is a common issue); *Bunnion*, 1998 U.S. Dist. LEXIS 7727 at *20-21 ("reasonable employee" standard "does not differ from plaintiff to plaintiff" and therefore, no individual issues exist). Thus, the litigation question for every class member is the same –

"Would a reasonable employee view the promise of free or low-cost lifetime medical benefits (or the concealed fact that the benefits were terminable) as important to his or her decision-making?"

Finally, the class proceedings on the fiduciary breach claims also permit class-wide rulings on employee/retiree reliance on the misrepresentations. Under settled law since 1972, "a rebuttable presumption of reliance" arises "if there is an omission of a material fact by one with a duty to disclose," so that the plaintiff "to whom the duty was owed need not provide specific proof of reliance." *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, __ U.S. __, 128 S.Ct. 761, 769 (2008), *citing Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153-54 (1972). *See also Grubb v. FDIC*, 868 F. 1151, 1163 (10th Cir. 1989) ("reliance on the omission is presumed when the plaintiff establishes that the defendant withheld material information and that the defendant owed the plaintiff a duty to disclose. This presumption recognizes the unique difficulty of proving reliance on a failure to disclose material information of which the plaintiff did not know"), *citing Affiliated Ute* at 153-54; *Edgington v. R.G. Dickinson and Co.*, 139 F.R.D. 183, 192 (D. Kan. 1991). The presumption of reliance is applicable in ERISA BOFD cases and is a basis for granting class certification. *See, e.g., In re Tyco Int'l, Ltd,* 2006 U.S. Dist. LEXIS 58278 at *26-28 (D.N.H. Aug. 15, 2006) (confirming presumption of reliance under *Affiliated Ute* applies to ERISA BOFD claims, and holding that "*Affiliated Ute* lends itself equally well to a claim like plaintiffs' misrepresentation count because if would be 'practically impossible' for plaintiffs to prove that they relied on information that was never provided to them"), *quoting, Edens v. Goodyear Tire & Rubber Co.*, 858 F.2d 198, 206 (4th Cir. 1988) (presumption of reliance in fraudulent breach of contract); *Esplin*, 402 F.2d at 99-101 (Tenth Circuit holding that certification was proper because, *inter alia*, material omissions were common to class and did not invoke separate questions of reliance).

The commonality requirement is undeniably satisfied in this case because the ERISA claims present numerous common questions of both law *and* fact, including issues of liability under plaintiffs' BOFD claim which should be certified under Rule 23(c)(4).

Finally, the state-law age discrimination claims based on common policies and similar state laws also meet the commonality requirement and are suitable for class certification. *See Sibley*, 2008 WL 5046348 at *9 (certifying a nationwide class and referring to the possibility of separate state-law subclasses). The state-law claims track federal law barring age discrimination, allow disparate-impact claims, and thus are amenable to class treatment.[5]

---

[5] The Ohio Civil Rights Act, Ohio Revised Code §§ 4112.02(A) bars age and other discrimination "directly or indirectly related to employment." Disparate-impact claims are recognized. *Little Forest Med. Ctr. v. Ohio Civ. Rights Comm.*, 61 Ohio St.3d 607, 575 N.E.2d 1164 (1991). There is no restriction on class actions. Ohio's class action rules are similar to Federal Rule 23, *Warner v. Waste Management, Inc.*, 36 Ohio St.3d 91, 521 N.E.2d 1091 (Ohio 1988), and class certification of Ohio Civil Rights Act claims has been allowed under Ohio's counterparts to Rules 23(b)(2) and (b)(3). *See Toledo Fair Housing Center v. Nationwide Mut. Ins. Co.*, 703 N.E.2d 340 (Cuyahoga Cty. Court of Common Pleas, 1996). Ohio courts follow federal courts' construction of the ADEA in construing Ohio's own Civil Rights Act. *Mauzy v. Kelly Services, Inc.*, 75 Ohio St.3d 578, 664 N.E.2d 1272 (Ohio 1996) (age discrimination).

Oregon Rev. Stat. § 659A.030(1)(b) prohibits age discrimination "in compensation or in terms, conditions or privileges of employment" against those 18 and older. Oregon Rule of Civil Procedure 32 governs class actions in state courts, and does not contain any restriction that would bar class treatment. Disparate-impact claims may be brought under the Oregon law. *Tanner v. Oregon Health Sciences University*, 157 Or.App. 502, 516, 971 P.2d 435, 443 (Ore. App. 1998). The court in *Harris v. Pameco Corp.*, 170 Or.App. 164, 176, 12 P.3d 524, 532 (Or. App. 2000), stated that "because ORS 659.030 was modeled after Title VII of the federal Civil Rights Act of 1964, 42 U.S.C. § 2000E *et seq.*, federal cases interpreting Title VII are instructive." This rule of substantive construction applies to ADEA claims as well. *Pascoe v. Mentor Graphics Corp.*, 199 F. Supp.2d 1034, 1052 (D. Ore. 2001).

The Tennessee Human Rights Act, § 4-21-102, prohibits "any direct or indirect act or practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, or any other act or practice of differentiation or preference in the treatment of a person or persons because of . . . age." The Act's first statement of its purposes is to "Provide for execution within Tennessee of the policies embodied in . . . the Age Discrimination in Employment Act of 1967, as amended." Sec. 4-21-101(a)(1). Tennessee courts regard federal court decisions construing federal employment discrimination laws as instructive. *Bredesen v. Tennessee Judicial Selection Comm'n*, 214 S.W.3d 419, 430 (Tenn. 2007) ("In light of the intended overlap in purpose

3. **Plaintiffs' Claims are Typical of the Claims of the Class.**

Rule 23(a)(3) requires that the claims asserted by a plaintiff on behalf of a class be typical of the claims of the other class members. The analysis under this requirement overlaps and "tend[s] to merge" with Rule 23(a)(2)'s requirement of commonality, because both "serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are [sufficiently] interrelated." *In re Qwest Savings and Investment Plan ERISA Litig.*, 2004 U.S. Dist. LEXIS 24693 at *12, *quoting, General Telephone Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982); *see also Dean v. The Boeing Co.*, No. 02-1019, 2003 U.S. Dist. LEXIS 8787 at *45 (D.Kan. Apr. 24, 2003) (commonality, typicality and adequacy of representation tend to merge), *citing, Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1999). The basic question under the typicality requirement is whether "the claims of the class representative and class members are based on the same legal or remedial theory." *Adamson*, 855 F.2d at 675. Typicality is established when the plaintiffs "possess the same interests and suffer the same injuries as the proposed class members." *Sibley*, 2008 WL 5046348 at *8, c*iting Olenhouse*, 136 F.R.D. at 680. The focus of the typicality inquiry is on defendants' conduct. *Smith v. MCI Telecommunicaitons Corp.*, 124 F.R.D. 665, 675 (D. Kan. 1989). Therefore, as with commonality, it is not necessary that the claims of representative plaintiffs be

---

between the Tennessee Human Rights Act and federal anti-discrimination laws, Tennessee courts regularly consult the decisions of their federal counterparts for guidance when called upon to construe and apply the Tennessee Human Rights Act.") (citations omitted). The court in *Moore v. Nashville Elec. Power Bd.*, 72 S.W.3d 643, 651 (Tenn. Ct. App. 2001), *appeal denied* (Feb. 11, 2002), recognized the availability of disparate-impact analysis under the Human Rights Act, and stated: "This Court has construed the Tennessee Human Rights Act under the framework of the federal statutes upon which it was patterned, such as the Age Discrimination in Employment Act ("ADEA")." *Aldridge v. City of Memphis*, No. 05-296, 2008 WL 2999557 at *5 (W.D.Tenn. July 31, 2008), discussed a disparate-impact claim and stated: "Courts analyze THRA claims according to the same standards as ADEA claims." (footnote omitted). Disparate-impact claims are allowed. *Id.* at *5-7.

identical to the claims of the class. *Milonas*, 691 F.2d at 938 ("Factual differences in the claims of the class members should not result in a denial of class certification where common questions of law exist"); *Baby Neal v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994) (even "relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories"). The representative parties' claims are found to be typical if they are not "significantly antagonistic" to the Class. *Heartland*, 161 F.R.D. at 116.

Here, the claims of plaintiffs and all members of the Class arise out of the same course of conduct by defendants and are based on the same legal theories. The claims will be decided on the basis of the same provisions of the SPDs and other plan documents, the uniform consequences for the affected retirees, and the same historic evidence of defendants' disclosures and other actions with respect to the benefits plans. The representative plaintiffs will rely upon and present the same legal and remedial theories for themselves and for the Class members. The claims of all members of the Class depend on showing that the plans provide a right to retiree medical, prescription drug and life insurance benefits, that in eliminating or reducing the life insurance plans, plaintiffs and the Class were subject to age discrimination, and that defendants breached their fiduciary duties by failing to clearly and adequately disclose their supposed right to modify or terminate those benefits and misrepresenting the benefits as secure throughout retirement. The harm suffered by plaintiffs, the elimination and reduction of these benefits, is the same as to all Class members, and there is no basis to find antagonistic interests between the named plaintiffs and the Class. Accordingly, the typicality element is satisfied. *See, e.g.*, *Stoffels v. SBC Communications, Inc.*, 238 F.R.D. 446, 253 (W.D. Tex. 2006) ("Course of conduct challenged and the legal theories behind [claims under ERISA § 502(a)(1)(B)] are shared by all, and therefore typical"); *Reese*, 227 F.R.D. at 486-89 (typicality satisfied because

plaintiffs' claim "is universally based on the same legal theory"); *In re Qwest*, 2004 U.S. Dist. LEXIS 24693 at *14-16 (in BOFD case, "[f]actual differences among individual claims do not defeat typicality, as long as the legal theory underlying the plaintiffs claims is the same") (citation omitted);[6] *Feret*, 1998 U.S. Dist. LEXIS 12734 at *37-38 (typicality satisfied where 502(a)(1)(B) claims all arise from defendant's decision to terminate employees and deny benefits, and 502(a)(3) claims all arise from defendant's alleged misrepresentations regarding eligibility for benefits); *Bunnion*, 1998 U.S. Dist. LEXIS 7727 at *22 ("Because the plaintiffs all challenge the same unlawful conduct, that is, alleged company-wide misrepresentations and omissions, the representative plaintiffs are typical of the class. The fact that some individual plaintiffs may also have received personal misrepresentations from [defendant's] managers or supervisors does not pose a conflict within the class").

4. Plaintiffs Will Fairly and Adequately Protect Class Interests.

Before certifying a class, the Court must find that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy requirement has two related elements: the interests of the named plaintiffs must be sufficiently aligned with those of the class members; and class counsel must be qualified, experienced and generally capable of serving the interests of the entire class. *Amchem*, 521 U.S. at 635; *Rutter and Wilbanks v. Shell Oli Co.*, 314 F.3d 1180, 1187-88 (10th Cir. 2002); *Olenhouse*, 136 F.R.D. at 680.

Both prongs of the adequacy test are readily satisfied here. First, there is nothing to suggest that any of the named representative plaintiffs has any interest antagonistic to the vigorous pursuit of the claims against defendants on behalf of all members of the Class. They

[6] The court also held that different plans with different terms did not defeat commonality and typicality, but might require creation of sub-classes as the litigation progressed. *Id.* at *16-17.

share with the Class an interest in establishing that the retiree medical, prescription drug and life insurance benefits are not subject to reduction or termination, that in reducing and terminating these benefits all suffered age discrimination, and that defendants violated their fiduciary duty to communicate complete, accurate and truthful information about these benefits. Second, plaintiffs have retained highly experienced counsel in the field of class action litigation, and particularly class litigation brought under ERISA and employment discrimination laws on behalf of participants and beneficiaries. Affidavits including brief biographical statements for the principal attorneys and their law firms are attached hereto as Exhibits A through F. Through their counsel, plaintiffs have pursued and will continue to vigorously pursue this litigation on behalf of all members of the Class. The extensive experience of plaintiffs' counsel in ERISA and employment discrimination class litigation, and the named plaintiffs' personal commitment to the vigorous prosecution of this action as demonstrated by the proceedings to date, should leave no doubt that plaintiffs and their counsel are adequate representatives of the Class. *See Marcus v. State of Kansas, Dept. of Revenue*, 206 F.R.D. 509, 512 (D. Kan. 2002) ("In the absence of evidence to the contrary, courts will presume the proposed class counsel is adequately competent to conduct the proposed litigation") (citation omitted).

B. The Class Satisfies the Requirements of Rule 23(b).

In addition to meeting the prerequisites of Rule 23(a), parties seeking class certification must also show that the action is maintainable under Rule 23(b)(1), (2), or (3). *Amchem Prods*., 521 U.S. at 614. Here, this action satisfies the requirements set forth in Rule 23(b)(1)(B), Rule 23(b)(2), *and* Rule 23(b)(3). Certification under either Rule 23(b)(1) or 23(b)(2) provides for a "mandatory" class, under which class members would be precluded from opting-out of the action to pursue, for example, "separate suits [that] could result in courts reaching differing decisions

on whether [plaintiffs] are entitled to benefits under the Plans and could require the Plan fiduciaries to treat certain [plaintiffs] differently than others depending on the outcome of the lawsuits." *Capital Cities*, 1996 U.S. Dist. LEXIS 13153 at *23. In contrast, certification pursuant to Rule 23(b)(3) specifically affords class members the ability to opt out of the class. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 844 (1999).

When a lawsuit can be certified under Rules 23(b)(1) or 23(b)(2), as well as under Rule 23(b)(3), class certification should be made under 23(b)(1) or 23(b)(2) or both, so that the judgment will have *res judicata* effect as to all the class (since no member has the right to opt out in a (b)(1) or (b)(2) suit), thereby furthering the policy underlying (b)(1) and (b)(2) class suits. *Capital Cities*, 1996 U.S. Dist. LEXIS 13153 at *21-22 ("when a class action can be maintained under any of the three categories provided in Rule 23(b), then certification is preferable under (b)(1) and/or (b)(2). The decision to avoid the opt-out procedures provided under subsection (b)(3) furthers the purposes of Rule 23 because it prevents multiplicity of suits and inconsistent or varying adjudications") (citations omitted); *see also In Re A.H. Robins Co., Inc.*, 880 F.2d at 728. Since certification is appropriate here under Rules 23(b)(1), 23(b)(2), and 23(b)(3), a class maintained under Rule 23(b)(1) or Rule 23(b)(2), or under both, is the preferred method.

1. The Class Meets the Requirements of Rule 23(b)(1)(B).

Rule 23(b)(1)(B) applies where individual cases would "as a practical matter be dispositive of the interests" of nonparty class members "or substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B). Therefore, Rule 23(b)(1)(B) frequently has served as the basis for class certification in ERISA cases challenging the conduct of plan representatives alleged to have violated plan terms or statutory rights, including fiduciary breaches. *See, e.g., In re: Williams Cos. ERISA Litig.*, 231 F.R.D. at 424-25 (BOFD claims "are

particularly well suited for Rule 23(b)(1) certification by virtue of the substantive law of ERISA"), *quoting, Ikon Office Solutions*, 191 F.R.D. at 466; *Feret*, 1998 U.S. Dist. LEXIS 12734 at *44 (class members would be prejudiced if individual suits granted declaratory and injunctive relief in some cases, but not others: "The conflicting decisions would affect the interests of all proposed class members, as the relief sought pertains directly to the plans and contracts under which all class members are allegedly covered"); *Bunnion*, 1998 U.S. Dist. LEXIS 7727 at *43 (certification under, *inter alia*, 23(b)(1)(B) common for like cases because "[I]nconsistent judgments concerning how the Plans should have been interpreted or applied would result in prejudice").

The 1966 Advisory Committee Note makes clear that Rule 23(b)(1)(B) was designed to address situations where trust beneficiaries alleged a breach of a fiduciary duty. *See* 1966 Advisory Committee Note, Rule 23(b)(1) ("The same reasoning applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries").

In this case, plaintiffs seek declaratory, monetary and injunctive relief related to defendants' elimination and reduction of benefits. There is a realistic possibility that, in the absence of a class action, separate actions would be brought. The Court's determination of whether plaintiffs have a right to the retiree medical, prescription drug and life insurance benefits, whether defendants breached their fiduciary duties, and whether defendants violated state-law age discrimination statues, will necessarily affect all plan participants and beneficiaries. Accordingly, these individual actions could be dispositive of the interests of other affected participants by virtue of the *stare decisis* effects of the rulings.

2. The Class also Meets the Requirements of Rule 23(b)(2).

Rule 23(b)(2) permits an action to be maintained as a class action when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

The Tenth Circuit has identified two requirements for proceeding under Rule 23(b)(2). First, "the defendants' actions or inactions must be based on grounds generally applicable to all class members." *Shook v. El Paso County*, 543 F.3d 597, 604 (10th Cir. 2008). Second, the class must be "amenable to uniform group remedies." *Id.* (citation omitted). Such a showing is made when the conduct giving rise to the action results from a policy or course of conduct generally applicable to all members of the class. *Adamson*, 855 F.2d at 676 ("That the claims of individual class members may differ factually should not preclude certification under Rule 23(b)(2) of a claim seeking application of a common policy"), *citing*, *Liberty Alliance of the Blind v. Califano*, 568 F.2d 333, 346-47 (3d Cir. 1977). Certification of an ERISA claim is proper under Rule 23(b)(2) where monetary relief is sought in conjunction with declaratory and injunctive relief. *See Bradford*, 187 F.R.D. at 605. In *Bradford*, retired employees, like plaintiffs here, alleged that their employer's benefit plan provided for vested, no-cost coverage and that benefit modifications violated ERISA §§ 502(a)(1)(B) and (a)(3). *Id.* at 602. Despite the plaintiffs' request for monetary relief, the court granted certification under Rule 23(b)(2): "Monetary damages are almost always requested when injunctive relief is sought. Refusing to certify a Rule 23(b)(2) class action based on a request for monetary relief defeats the possibility of ever maintaining an injunctive class action. Such a nonsensical reading of the federal rules does not make good law and is flatly rejected by this Court." *Id.* at 605. The court also found

that it was common for ERISA Section 502(a)(1)(B) and (a)(3) claims to be certified under Rule 23(b)(2). *Id.* at 603-04 (listing cases)). *See also Cates*, 253 F.R.D. at 431 (monetary relief reflecting loss of four and half years of vested retiree medical benefit does not predominate over injunctive value of lifetime retiree medical benefits paid by employer); *Universal Service Fund*, 219 F.R.D. at 681 (certification under Rule 23(b)(2) appropriate where future value of injunctive relief higher than current damage claims).

All of these factors are present here. Plaintiffs and the Class seek the same declaratory and injunctive relief based on the identical claim for benefits under the terms of defendants' benefit plans, and rely on defendants' common course of conduct that was uniformly applicable to plaintiffs and all Class members generally. Monetary relief to remedy pre-judgment denials of benefits, which cannot be remedied through the declaratory and injunctive relief, will be ancillary to and follow from this class-wide relief, based on common calculation criteria, and are less significant than the value of injunctive relief requiring continued provision of benefits going forward. Defendants have acted or refused to act on grounds generally applicable to the Class, satisfying the requirements of Rule 23(b)(2).

Rule 23(b)(2) has also traditionally been used to certify classes in employment discrimination actions seeking forms of back pay (including life insurance and other benefits) as well as injunctive or declaratory relief. *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 341 (10th Cir. 1975); *Pitre v. Western Elec. Co., Inc.*, 843 F.2d 1262, 1276 (10th Cir. 1988).[7] The leading treatise on employment discrimination, Lindemann & Grossman, 2 EMPLOYMENT DISCRIMINATION LAW at 2147 (4th ed.), states: "Although plaintiffs typically sought monetary

[7] The district court decision shows that the class was certified under Rule 23(b)(2). *Pitre v. Western Elec. Co., Inc.*, 51 Fair Empl.Prac.Cas. 620, 624 (D. Kan. April 23, 1985).

relief in the form of back pay, courts concluded that this request did not preclude certification under Rule 23(b)(2) because such relief was considered to be an equitable remedy rather than a legal remedy of money damages." The same treatise states: "Medical and life insurance also can be components of back pay." *Id.* at 2762.[8]

3. If Necessary, the Class Would Meet the Requirements of Rule 23(b)(3) on its ERISA Claims.

As noted above, certification under Rule 23(b)(1) and or 23(b)(2) is preferred when these provisions are applicable. *See, e.g., Capital Cities*, 1996 U.S. Dist. LEXIS 13153 at *21-22. Thus, certification under Rule 23(b)(3) need not be reached in this case.

Class certification would, if necessary, also be appropriate under Rule 23(b)(3). Where certification is sought pursuant to Rule 23(b)(3), the court must find "that the questions of law or fact common to members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). The proposed Class in this case satisfies the requirements of Rule 23(b)(3).

a. Predominance

Predominance is found where "there is a common nucleus of operative facts relevant to the dispute and those common questions represent a significant aspect of the case which can be resolved for all members of the class in a single adjudication." *Harlow*, 2008 WL 5173136 at *3, *quoting*, *Heartland*, 161 F.R.D. at 117. Common issues predominate where the proper

[8] Decisions in the Tenth Circuit recognizing that insurance premiums or benefits are proper elements of back pay include *Combes v. Griffin Television, Inc.*, 421 F. Supp. 841, 844 (W.D.Okla. 1976) (ADEA); *Jackson v. City of Albuquerque*, 715 F.Supp. 1048, 1050 (D.N.M. 1987), *rev'd in part on other grounds*, 890 F.2d 225 (10th Cir. 1989) (fringe benefits awarded under § 1983); *Clyma v. Sunoco, Inc.*, No. 03-809, 2008 WL 3394616 (N.D. Okla. Aug. 8, 2008) (awarding insurance premiums under ADA).

interpretation of an employer's benefit plans and contracts are at issue, *see, e.g.*, *Sibley*, 2008 WL 5046348 at *10; *Heartland,* 161 F.R.D. at 117-18, or where written and oral misrepresentations giving rise to claims are essentially uniform. *Smith,* 124 F.R.D. at 678-79.

The Tenth Circuit has held that the critical test of predominance is whether 'material variation' in the claims exists. *Esplin,* 402 F.2d at 99. "[W]hen one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses particular to some individual class members." *Ponca Tribe of Indians of Okla.,* No. 05-445, 2007 U.S. Dist. LEXIS 577 at *24 (D. Okla. Jan. 3, 2007), *quoting,* 7AA Wright, Miller & Kane, *Federal Practice and Procedure,* 3d § 1778, 122-23 (2005). Accordingly, common issues predominate where, as here, "the focus is on the defendant's common course of conduct to establish liability." *See In re Urethane Antitrust Litig.,* 251 F.R.D. 629, 633-34 (D. Kan. 2008); *McNeely v. Nat'l Mobile Health Care, LLC,* No. 07-933, 2008 U.S. Dist. LEXIS at *25 (D. Okla. Oct. 27, 2008).

The claims asserted here center on whether defendants' decisions to eliminate company-paid and subsidized medical and prescription drug coverage, and to reduce or eliminate life insurance coverage, violated their obligations under the plans, and whether misrepresentation of the duration of these benefits violated defendants' fiduciary duty under ERISA. Each Class member seeks relief on claims arising from the same conduct by defendants. The elements of these claims are susceptible to class-wide proof, which will be the same for each and every Class member.

The Class is also sufficiently cohesive to warrant class-wide adjudication in that there are no disparities in the way individual class members were treated. This case involves a single

course of conduct and practices that applied uniformly to all class members without regard to their individual circumstances. Further, there is cohesiveness of the Class in that the remedies are common. *See Harlow*, 2008 WL 5173136 at *5 (predominance met where all class members suffer from same harm from the same cause). Although the particular amount of the previously denied benefits may vary among the Class members, these amounts are liquidated and can be determined by accounting and actuarial experts. The common questions regarding defendants' liability still predominate. *Id.* at *6 ("The court is comfortable that the class claims are manageable and that even the damages calculation would not be insurmountable with the assistance of experts from both sides"). "[T]he actual amount of damages 'is invariably an individual question and does not defeat class action treatment." *Smith*, 124 F.R.D. at 677.

b. Superiority

Rule 23(b)(3) also requires that the court determine that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). A class action is superior to other available methods for the fair and efficient adjudication of a dispute that affects a large number of persons injured by the common acts of a defendant. "[T]he court appreciates the usefulness of the class action as a vehicle for lawsuits like this one." *Harlow*, 2008 WL 5173136 at *5. In this case, plaintiffs allege that defendants have caused identical harm and injury to a large number of individuals. Defendants owed the same duties to comply with plan terms and to faithfully discharge their fiduciary duties to each and every member of the Class.

A class-wide adjudication is clearly superior to individual litigation. First, looking at the "relatively small amounts of money" of each individual claim, "a class action may be the only feasible way for some plaintiffs to pursue their claims." *Sibley*, 2008 WL 5046348 at *11.

Second, the existence of this action weighs in favor of class certification, as the issues will be adjudicated, and it is more efficient to do so on a class-wide basis. Third, plaintiffs' claims are appropriately pursued in this District, because principal defendants Embarq and Sprint and most of the defendant plans are based here, and many relevant transactions occurred here. Finally, no anticipated difficulties exist which would render this action unmanageable as a class action.

The alternative to a class action is either no recourse for thousands of retirees and beneficiaries, or a multiplicity of suits, resulting in the inefficient and incomplete administration of justice. *Id.* ("the obvious alternative to a class action would be for plaintiffs to bring individual suits. This would be inefficient, costly and time consuming and parties, witnesses and courts would be forced to endure unnecessary duplicative litigation"); *Smith*, 124 F.R.D. at 679 ("individual actions or arbitration proceedings would be grossly inefficient and wasteful of judicial resources") (citation and internal quotation omitted). Accordingly, a class action is superior to the other available methods for fair and efficient adjudication of this controversy, within the meaning of Rule 23(b)(3).

C. Plaintiffs' Counsel Satisfy the Requirements of Rule 23(g).

When certifying a class, a court must also appoint class counsel under Rule 23(g), which mandates that a court appoint class counsel who will "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1). Rule 23(g) also requires the court to consider the following four factors in appointing class counsel: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action; (3) counsel's knowledge of the applicable law, and (4) the resources counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(C)(i). In considering such factors, courts in this District review

evidence submitted by plaintiffs' counsel and their work to date. *See Harlow*, 2008 WL 5173136 at * 8; *Universal Service Fund,* 219 F.R.D. at 684.

Plaintiffs seek appointment of their attorneys as class counsel under Rule 23(g) of the Federal Rules of Civil Procedure. Senior counsel in charge of the litigation, Messrs. Sandals, Fisher, Seymour, and Keplinger and Mss. Nygaard and O'Connell, are each submitting herewith evidence in support of each of the factors listed in Rule 23(g) in the form of an Affidavit (attached hereto as Exhibits A-F). These materials demonstrate the work that plaintiffs' counsel has performed to date to prosecute the claims, their knowledge and experience in ERISA, employment and securities class action litigation, and their commitment to the litigation. This evidence shows that they are qualified to fairly and adequately represent the interests of the class. *See Harlow,* 2008 WL 5173136 at *8; *Universal Service Fund*, 219 F.R.D. at 684.

Counsel will fairly and adequately represent the class and should be appointed class counsel.

CONCLUSION

For the reasons stated, plaintiffs request that their Motion for Class Action Certification be granted.

Dated: January 29, 2009

Respectfully submitted,

THE NYGAARD LAW FIRM

/s/Diane A. Nygaard
Diane A. Nygaard (KS Bar No. 10997)
Jason M. Kueser (KS Bar No. 22685)
4501 College Boulevard, Suite 260
Leawood, KS 66211
Telephone: (913) 469-5544
Facsimile: (913) 469-1561
Email: diane@nygaardlaw.com

and

SANDALS & ASSOCIATES, P.C.

/s/Alan M. Sandals
Alan M. Sandals (Pro hac vice) (PA Bar No. 36044)
Scott M. Lempert (Pro hac vice) (PA Bar No. 76765)
One South Broad Street, Suite 1850
Philadelphia, PA 19107-3418
Telephone: (215) 825-4005
Facsimile: (215) 825-4001
Email: asandals@sandalslaw.com

GLENN, MILLS, FISHER & MAHONEY, P.A.

/s/Stewart W. Fisher
Stewart W. Fisher (Pro hac vice) (NC Bar No. 10327)
Post Office Drawer 3865
Durham, NC 27702
Telephone: (919) 683-2135
Facsimile: (919) 688-9339
Email: sfisher@gmf-law.com

LAW OFFICE OF RICHARD T. SEYMOUR, PLLC

/s/Richard T. Seymour
Richard T. Seymour (Pro hac vice) (DC Bar No. 28100)
1150 Connecticut Avenue, NW, Suite 900
Washington, DC 20036-4129
Telephone: (202) 862-4320
Facsimile: (800) 805-1065
Email: rick@rickseymourlaw.net

NORRIS & KEPLINGER, L.L.C.

/s/Bruce Keplinger
Bruce Keplinger (KS Bar No. 09562)
Christopher J. Lucas (KS Bar No. 20160)
6800 College Boulevard, Suite 630
Overland Park, KS 66211
Telephone: (913) 663-2000
Facsimile: (913) 663-2006
Email: bk@nkfirm.com
cjl@nkfirm.com

and

DOUTHIT FRETS ROUSE GENTILE & RHODES, LLC

/s/Mary C. O'Connell
Mary C. O'Connell (KS Fed'l Bar No. 70038)
R. Douglas Gentile (KS Fed'l Bar No. 13907)
903 East 104th Street, Suite 610
Kansas City, MO 64131
Telephone: (816) 941-7600
Facsimile: (816) 941-6666
Email: moconnell@dfrglaw.com
dgentile@dfrglaw.com

Attorneys for Plaintiffs and the Class and Sub-Classes

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of January, 2009, I electronically filed the foregoing Plaintiffs' Motion for Class Action Certification and the accompanying Memorandum using the CM/ECF system, which will send notice of electronic filing to the following counsel:

Mark D. Hinderks, Esquire
Scott C. Hecht, Esquire
STINSON MORRISON HECKER LLP
10975 Benson, Suite 550
Overland Park, KS 66210

Michael L. Banks, Esquire
Joseph J. Costello, Esquire
MORGAN, LEWIS & BOCKIUS, LLP
1701 Market Street
Philadelphia, PA 19103

Counsel for Defendants

Alan M. Sandals, Esquire
Scott M. Lempert, Esquire
SANDALS & ASSOCIATES, P.C.
One South Broad Street, Suite 1850
Philadelphia, PA 19107

Stewart W. Fisher, Esquire
GLENN, MILLS, FISHER & MAHONEY, P.A.
Post Office Drawer 3865
Durham, NC 27702

Richard T. Seymour, Esquire
LAW OFFICE OF RICHARD T. SEYMOUR, PLLC
1150 Connecticut Avenue, NW, Suite 900
Washington, DC 20036

Bruce Keplinger
Christopher J. Lucas
NORRIS & KEPLINGER, L.L.C.
6800 College Boulevard, Suite 630
Overland Park, KS 66211

and

Mary C. O'Connell
R. Douglas Gentile
DOUTHIT FRETS ROUSE GENTILE & RHODES, LLC
903 East 104th Street, Suite 610
Kansas City, MO 64131

Co-Counsel for Plaintiffs and the Class and Sub-Classes

s/ Jason M. Kueser
Jason M. Kueser