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 (EJM/JPO)

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE FIRST, THIRD, FOURTH, FIFTH, SIXTH AND SEVENTH CLAIMS FOR RELIEF IN THE SECOND AMENDED COMPLAINT

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INTRODUCTION

Plaintiffs seek to reverse Defendant Embarq Corporation's ("Embarq's") decision to exercise its 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"). In its December 2, 2008 Order (the "Order"), this Court dismissed, in part, Plaintiffs' Third and Fourth Claims for Relief in the Second Amended Complaint. The Court did not dismiss Plaintiffs' principal claim – that the terms of the Plan documents granted them "vested" rights to retirement benefits that never could be altered – because of a concern that the Plan documents and summary plan descriptions ("SPDs") were not before the Court. The Court likewise expressed concern that both Plaintiffs and Defendants submitted only excerpts of the Plan documents and SPDs for the Court's review. Now, however, the record is sufficiently developed and the controlling Plan documents and SPDs have been identified and are submitted with Defendants' motion in their entirety. Thus, whether the terms of the Plans and SPDs are unambiguous is a question that is ripe for resolution by the Court.

Indeed, the narrow basis for Embarq's motion for partial summary judgment on the First and Third Claims is purely legal: the language of the controlling Plan documents is unambiguous and permitted Embarq to modify the welfare benefits that are at issue in this case. This Court need not look beyond the Plan documents and SPDs when ruling on this motion because the terms are not subject to multiple interpretations. Whether Plaintiffs can meet their burden to rebut the strong presumption under ERISA that welfare benefits are *not* vested is a matter of pure contract interpretation.

Similarly, the remaining claim for life insurance benefits in the Fourth Claim for Relief is barred by the straightforward application of the statutory exemptions set forth in the Age Discrimination in Employment Act ("ADEA") and applicable EEOC regulations. It follows that,

under Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983), ERISA preempts Plaintiffs' identical age discrimination claims (Counts V, VI and VII) under Ohio, Oregon, and Tennessee state laws.

Accordingly, Defendants respectfully request that the Court enter judgment in their favor on the First, Third, Fourth, Fifth, Sixth and Seventh Claims of the Second Amended Complaint.[1]

STATEMENT OF UNDISPUTED MATERIAL FACTS

A. The Plan Sponsors

(1). Embarq is a Delaware corporation with its principal place of business in Overland Park, Kansas. See Second Amended Complaint ("2d Compl.") ¶ 27.

(2). 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 (together, "Sprint"). See 2d Compl. ¶¶ 36, 71.

(3). Defendant Carolina Telephone & Telegraph Company ("CT&T") was a wholly-owned subsidiary of Sprint and now is a wholly-owned subsidiary of Embarq. See 2d Compl. ¶ 45.

B. The Welfare Plans

(4). Embarq retiree medical and prescription drug benefits are provided to eligible participants through the Embarq Retiree Medical Plan, a successor plan to the Sprint Retiree Medical Plan, which formerly was known as the United Telecom Retiree Medical Plan. See 2d Compl. ¶¶ 34, 47, 70; Declaration of Randall T. Parker ("Parker Decl."), ¶¶ 2-3, Exhs. 1 and 2.

(5). The Sprint Retiree Medical Plan was one of several retiree welfare benefit plans

[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.

incorporated by reference in the Sprint Welfare Benefit Plan for Retirees and Non-FlexCare Participants, effective December 31, 2001 ("Wrap Plan"). See Parker Decl. ¶ 4, Exh. 3.

(6). The Wrap Plan also provided, in part, the retiree life insurance benefits at issue in this litigation. See id.

(7). All of the plans described in paragraphs (4) and (5) above, are employee welfare benefit plans within the meaning of ERISA § 3(1), 29 U.S.C. § 1002(1). See, e.g., 2d Compl. ¶¶ 34, 47, 70.

C. The Plaintiffs

1. **The ERISA Plaintiffs**

(8). The named Plaintiffs who purport to represent the putative ERISA class are Fulghum, Daniel, Hollingsworth, Dorman, King, Joyner, Dillon, Barnes, Games, and Bullock (hereafter, the "ERISA Plaintiffs"). The ERISA Plaintiffs are retired employees of various companies that are now wholly-owned subsidiaries of Embarq. See 2d Compl. ¶¶ 2, 9-23, 54.

(9). Plaintiffs Fulghum, Daniel, Hollingsworth, Dorman, Joyner, Barnes, Games, and Bullock purport to represent a sub-class of participants in the CT&T Company Voluntary Employee Beneficiary Association (the "VEBA").

(10). The ERISA Plaintiffs retired at various times between September 1993 and March 2003. Id. at ¶¶ 9-23.

(11). The governing retiree medical benefits plan in effect during this time period was the Sprint Retiree Medical Plan, which contained an express reservation of Sprint's right to change the benefits provided under the Plan: "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." See Parker Decl. ¶ 3, Exh. 2, EQ_FUL_22.

(12). Plaintiffs King, Dorman, Joyner, and Fulghum retired between September 1, 1993

and September 1, 1996. See 2d Compl. ¶¶ 12, 13, 14, 24. During this period, the relevant SPD described the retiree medical and prescription drug benefits that King, Dorman, Joyner, and Fulghum may have been eligible to receive at the time of their retirement. See Parker Decl., Exh. 4. This SPD prominently displayed Sprint's reservation of its right to amend or terminate the plan: "The company expects to continue the Retiree Medical Plan indefinitely. However, the company reserves the right to amend or terminate this plan or any statement made in this summary plan description, at any time." Id., Exh. 4, EQ_FUL_94. Likewise, the Summary Plan Description explained that "[j]ust as medical coverage can change in the future for active employees, so can the coverage that is available to retirees." Id., EQ_FUL_106.

(13). Plaintiff Daniel retired on June 1, 1999, at which time the Sprint Retiree Medical Plan Summary Plan Description effective January 1, 1998 described the medical and prescription drug benefits that Daniel may have been eligible to receive at the time of his retirement. See Parker Decl., Exh. 6. This SPD contained a reservation of rights provision identical to the 1991 SPD: "The company expects to continue the Retiree Medical Plan indefinitely. However, the company reserves the right to amend or terminate this plan or any statement made in this summary plan description, at any time." Id., Exh. 6, EQ_FUL_207. Likewise, this SPD explained that "[j]ust as medical coverage can change in the future for active employees, so can the coverage that is available to retirees." Id., EQ_FUL_217.[2]

(14). Plaintiffs Hollingsworth, Bullock, Games and Dillon retired between January 1, 2002 and January 1, 2003, at which time the Sprint Retiree Benefits Summary Plan Description described the medical and prescription drug benefits they may have been eligible to receive at the time of retirement. See Parker Decl., ¶ 8, Exh. 7. This SPD also contained a reservation of

[2] Sprint also issued an SPD for the Sprint Retiree Medical Plan that became effective on January 1, 1997. Id., Exh. 5. This SPD also contained an identical reservation of rights provision and the same forewarning that the retiree medical coverage was subject to change. Id., EQ_FUL_149, 159.

rights provision: "The company expects to continue the Retiree Benefits indefinitely. However, the company reserves the right to amend or terminate this plan, or any statement made in this summary plan description, at any time." Id., EQ_FUL_323.

(15). Plaintiff Barnes retired in March, 2003, at which time the Group Medical Insurance Plan for Bargaining Employees of Carolina Telephone Summary Plan Description described the medical and prescription drug benefits she may have been eligible to receive at the time of retirement. See Parker Decl., ¶ 9, Exh. 8. The SPD contained a reservation of rights provision: "The Company expects to continue the plan for the foreseeable future. However, the Company reserves the right to amend, discontinue or terminate the plan for reasons of business necessity or financial hardship." Id., EQ_FUL_1189.

(16). Unlike the ERISA Plaintiffs' retiree medical and prescription drug benefits, their life insurance benefits were provided at times through different plans depending on their retirement dates and direct employers. See Parker Decl. ¶¶ 10-13.

(17). For example, Plaintiff King retired on September 1, 1993 from United Telephone Company of Florida. See 2d Compl. ¶ 13. United Telephone Company of Florida provided retiree life insurance benefits through the Group Contributory and Non-Contributory Life Insurance Plan for Non-Bargaining Employees of United Telephone Company of Florida. See Parker Decl. ¶10, Exh. 9.

(18). The SPD for the Group Contributory and Non-Contributory Life Insurance Plan, which was effective at the time of King's retirement, contained a reservation of rights provision: "The Company expects to continue the Plan for the foreseeable future. However, the Company reserves the right to amend, discontinue or terminate the Plan, for reasons of business necessity or financial hardship." Id., EQ_FUL_1200.

(19). Plaintiffs Dorman, Joyner, Fulghum, and Daniel, retired from CT&T between March 1, 1994 and June 1, 1999. See 2d Compl. ¶¶ 9, 10, 12, 14. Because all these individuals retired after January 1, 1994, but prior to January 1, 2001, their life insurance benefits were provided through the Group Insurance Plan. See Parker Decl. ¶ 11, Exh. 10.

(20). The SPD for the Group Insurance Plan made clear that active employees receiving benefits under the plan were not guaranteed continued life insurance coverage upon retirement. For example, the SPD states: "A retiree who has Contributory Life insurance coverage as an employee . . . *can* continue the amount of coverage under this plan. . . ." Id., EQ_FUL_1210 (emphasis added). Likewise, the SPD explains that life insurance under the plan would terminate "when the group policy terminates" and instructs participants, who meet certain eligibility requirements, on how to seek coverage under an individual life insurance policy if the group policy terminated. Id., EQ_FUL_1214, 1216. Moreover, the SPD also contained a reservation of rights provision: "The Company expects to continue the plan for the foreseeable future. However, the company reserves the right to amend, discontinue or terminate the plan." Id., EQ_FUL_1261.[3]

(21). Plaintiffs Hollingsworth, Dillon, Games, and Bullock retired between January 1, 2002 and January 1, 2003. See 2d Compl. ¶¶ 11, 15, 17, 18. Hollingsworth, Games and Bullock all retired from CT&T. Id. ¶¶ 11, 17, 18. Dillon retired from Florida Telephone Company. Id. ¶ 15. At the time of their respective retirements, these ERISA Plaintiffs received retiree life insurance benefits pursuant to the Wrap Plan. See Parker Decl. ¶ 4, Exh. 3.

(22). The Wrap Plan contains a reservation of rights provision: "The Plan Sponsor reserves the right to amend the Plan at any time, including the right to amend any of the Benefit

[3] Although the reservation of rights provision appears in the Supplemental Information section after the description of the Dependents Life Insurance benefits, the reservation of rights language applies to the "plan" generally. See id., Exh. 10, EQ_FUL 1259 (describing all of the benefit programs provided under the plan).

Programs. . . ." See Parker Decl., Exh. 3, EQ_FUL_45.

(23). The Sprint Welfare Benefit Plan Summary Plan Descriptions effective when Hollingsworth, Dillon, Games, and Bullock retired, which described the retiree medical, prescription drug and life insurance benefits for which they may have been eligible at retirement also contained reservation of rights provisions. See Parker Decl. ¶¶ 8, 12.

(24). Barnes received life insurance benefits through the Group Basic Contributory Life Insurance and Group Accidental Death and Dismemberment Benefits and Additional Accidental Death Benefits and Dependent Life Benefits Plan for the Bargaining Employees of Carolina Telephone. See Parker Decl. ¶ 13, Exh. 11. The SPD for this plan made clear that the insurance benefits provided under the plan were not vested and could terminate if the group policy terminated. Id., EQ_FUL_1269 ("Your insurance under the Group Policy will end on . . . the date the Group Policy terminates. . . ."). Likewise, the SPD described the process through which participants meeting certain eligibility requirements could obtain an individual life insurance policy at their own cost if the group policy terminated. Id., EQ_FUL_1274 ("If your group life insurance . . . ceases because the Group Policy is terminated . . . you will be entitled to have an individual insurance policy issued to you as if your insurance had ceased because of termination of employment.").

2. **The ADEA Plaintiffs**

(25). The proposed representatives for Plaintiffs' ADEA collective action claim are Plaintiffs Dorman, Daniel, Joyner, Barnes, Games, Bullock, and Hollingsworth (hereafter, the "ADEA Plaintiffs"). 2d Compl. ¶ 129.

(26). Plaintiffs purport to bring class actions under three state anti-discrimination laws

– Oregon, Ohio, and Tennessee – challenging the amendments at issue here.[4] Id. ¶ 50(b)-(d).

(27). 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. ¶ 133.

(28). Plaintiffs have identified 756 individuals who allegedly have filed EEOC charges, and who "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. ¶ 25.

D. Embarq Exercised Its Right To Modify The Welfare Benefits

(29). In this lawsuit, Plaintiffs challenge Plan modifications announced in November 2005 and July 2007 to retiree medical, prescription drug and life insurance benefits (the "Welfare Benefits").

(30). In November 2005, Sprint Nextel announced "that it was terminating its program of prescription drug benefits for Medicare-eligible retirees and dependents, effective January 1, 2006." 2d Compl. ¶ 100. 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.; see also Parker Decl. ¶ 14, Exh. 12.

(31). In July 2007, Embarq announced that, effective January 1, 2008, "it was eliminating medical benefits and the program of subsidies for drug benefits for any retirees who

[4] Plaintiffs Kenneth and Betty Carpenter seek to represent the Ohio Age Discrimination Sub-Class. Id. ¶ 56. Plaintiffs Carl Somdahl and William Dugger seek to represent the Oregon Age Discrimination Sub-Class. Id. ¶ 57. Although Lewis Sams sought to represent the Tennessee Age Discrimination Sub-Class, Plaintiffs' counsel recently stated that Mr. Dugger will no longer be a Plaintiff in this action. See Plaintiffs' Motion for Class Certification 1, n.1. Plaintiffs' have not yet proposed a substitute class representative.

were eligible for Medicare." Id. ¶ 101. All other eligible retirees remain covered by the Embarq Retiree Medical Plan. See Parker Decl. ¶15, Exh. 13.

(32). In July 2007, Embarq also announced two across-the-board changes to retiree life insurance benefits. First, all retired participants in the VEBA Plan remain eligible to receive a death benefit from that plan, but no longer are eligible to receive an additional company-provided life insurance benefit regardless of age. Id. Second, for all other retirees, the maximum life insurance benefit was capped at $10,000 regardless of age. Id.

ARGUMENT

I. APPLICABLE LEGAL STANDARDS

A. Summary Judgment Standards

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is particularly appropriate, where, as here, the dispositive issues are matters of plan interpretation because the "unresolved issues are merely legal rather than factual." Bartel v. United States, No. 96-1022-MLB, 1997 U.S. Dist. LEXIS 23488 (D. Kan. Sept. 29, 1997) (citation omitted); Utah Power & Light Co. v. Fed. Ins. Co., 983 F.2d 1549, 1553 (10th Cir. 1993) (construing insurance policy terms, holding that "interpretation of an unambiguous contract is a question of law to be determined by the court and may be decided on summary judgment"); Mansker v. TMG Life Ins. Co., 54 F.3d 1322, 1326 (8th Cir. 1995) ("summary judgment is particularly appropriate" when interpreting an ERISA plan because "the unresolved issues are primarily legal rather than factual"); see also Scheduling Order, Doc. No. 59, p. 5 ("defendants are free to file a relatively early motion for partial summary judgment at *any* time if

they believe certain rulings on key legal issues by Judge Melgren will streamline discovery and trial in this case") (emphasis in original).

B. Principles Of ERISA Plan Interpretation

As the Tenth Circuit recently reaffirmed, the "first step" in interpreting an ERISA plan is to "scrutinize the 'plan documents as a whole and, if unambiguous, construe them as a matter of law.'" Weber v. GE Group Life Assur. Co., 541 F.3d 1002, 1011 (10th Cir. 2008) (quoting Miller v. Monumental Life Ins. Co., 502 F.3d 1245, 1250 (10th Cir. 2007), and Admin. Comm. of the Wal-Mart Assocs. Health & Welfare Plan v. Willard, 393 F.3d 1119, 1123 (10th Cir. 2004); see also Shields v. Cont'l Cas. Co., 209 F. Supp. 2d 1167, 1178 (D. Kan. 2002) (citing Chiles v. Ceridian Corp., 95 F.3d 1505, 1511 (10th Cir. 1996)). In construing the plan's terms, the court gives "the language its common and ordinary meaning as a reasonable person in the position of the [plan] participant, not the actual participant, would have understood the words to mean." Blair v. Metro. Life Ins. Co., 974 F.2d 1219, 1221 (10th Cir. 1992) (emphasis omitted). A plan provision is not ambiguous unless it "is reasonably susceptible to more than one meaning, or where there is uncertainty as to the meaning of the term." Willard, 393 F.3d at 1123 (quotation omitted). Only if the plan is ambiguous may the court consider extrinsic evidence of the parties' intent. Deboard v. Sunshine Mining and Refining Co., 208 F.3d 1228, 1240 (10th Cir. 2000).

In determining whether participants in ERISA plans have "vested" rights to welfare benefits, the inquiry begins with the language of the operative plan documents. The governing documents are the Plan document and the SPDs in effect at the time of each Plaintiff's retirement. Wise v. El Paso Natural Gas Co., 986 F.2d 929, 938 (5th Cir. 1993) (observing that the summary plan descriptions in effect at the time of a plaintiff's retirement control the question of contractual vesting, and holding that failure to include reservation of rights provision in *pre-*

1985 SPD does not bar modification of benefits as to *post*-1985 retirees); Pitchford v. Gen. Motors Corp., 248 F. Supp. 2d 675, 677 (W.D. Mich. 2003) ("The 1996 Supplemental Agreement Covering Pension Plan was in effect at the time Pitchford commenced retirement, and it governs Pitchford's entitlement to benefits."). When the terms of the plan documents are clear, that is the end of the inquiry. Welch v. Unum Life Ins. Co. of Am., 382 F.3d 1078, 1082 (10th Cir. 2004) ("In interpreting the terms of an ERISA plan[,] we examine the plan documents as a whole and, if unambiguous, we construe them as a matter of law.") (citation and quotation omitted).

Indeed, where the relevant Plan documents and SPDs are unambiguous, a motion for summary judgment must be resolved without resort to extrinsic evidence. See Hickman v. GEM Ins. Co., 299 F.3d 1208, 1212 (10th Cir. 2002) ("If plan documents are reviewed and found not to be ambiguous, then they may be construed as a matter of law."); see also Hughes v. 3M Retiree Med. Plan, 281 F.3d 786, 790 (8th Cir. 2002) (holding that when interpreting ERISA plan documents, extrinsic evidence is only "admissible if the language of the plan provision at issue is ambiguous") (citations omitted). Thus, should this Court find that the terms of the Plan documents and SPDs did not "clearly and expressly" grant Plaintiffs a vested right to welfare benefits that never could be altered, or that the terms unambiguously reserved Embarq's right to amend the Plans, Defendants are entitled to summary judgment on Plaintiffs' First and Third Claims for Relief as a matter of law. MIC Prop. and Cas. Ins. Corp. v. Intl Ins. Co., 990 F. 2d 573, 576 (10th Cir. 1993) (granting summary judgment, and holding that "determination of whether policy language is ambiguous is a matter of law, and therefore appropriate for a summary judgment determination"); Chervin v. Sulzer Bingham Pumps, Inc., No. 91-35144, 967 F.2d 584, 1992 WL 116092, *1 (9th Cir. May 29, 1992) (refusing to consider extrinsic evidence

"[b]ecause the plan contains a clear reservation of Sulzer's right to amend or terminate plan provisions.").

C. The Distinction Between Pension And Welfare Benefits Under ERISA

All of the Plans at issue in this case are "employee welfare benefit plans" rather than "employee pension benefit plans" as defined by ERISA. See 29 U.S.C. §§ 1002(1), (2)(A). 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, 95 F.3d at 1510. 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."); Am. 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. (citation and internal quotations omitted). "Contractual vesting is not inferred." Kerber v. Qwest Group Life Ins. Plan, No. 05-cv-00478, 2008 WL 4377562, *14 (D.

Colo. Sept. 19, 2008) (citing Chiles, supra). 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, 382 F.3d at 1085-86 (10th Cir. 2004) (holding that 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).

II. PLAINTIFFS' CLAIM FOR VESTED BENEFITS (COUNT I) FAILS AS A MATTER OF LAW BECAUSE THERE IS NO CLEAR AND EXPRESS LANGUAGE THAT ESTABLISHES EMBARQ'S ALLEGED INTENT TO RENDER THE WELFARE BENEFITS "FOREVER UNALTERABLE."

A. To The Contrary, The Controlling Plans And SPDs Unambiguously Reserve To Embarq The Right To Amend, Modify Or Terminate The Terms Of The Plans.

Here, whether the Welfare Benefits were vested must be determined by the plan documents and the SPDs that were in effect at the time of retirement. All of the ERISA Plaintiffs retired on or after September 1, 1993 and before April 1, 2003. See Statement of Undisputed Material Facts (hereafter "SOF") ¶ 10. As demonstrated below, it is beyond dispute that the Plan documents in effect during this period do not contain any clear and express language that establishes any intent to vest the Welfare Benefits and make them "forever unalterable." Sengpiel v. BF Goodrich, Co., 156 F.3d 660, 667 (6th Cir. 1998); Chiles, 95 F.3d at 1513. Quite the opposite is true – the Plan documents contain clear and express reservations of the right to alter or amend the Welfare Benefits at any time.

The Retiree Medical Plan and SPDs, in their current form and in previous iterations since at least 1990 (i.e., more than *three years before* any ERISA Plaintiff retired), have unambiguously reserved the right to terminate, modify or amend the Plans. See SOF ¶¶ 11-12.

Indeed, from January 1, 1990 to the present, the reservation of rights language in the Retiree Medical Plan has stated:

> 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. The Company shall act through its Board or through any party properly authorized to so act by a Board resolution.

See Parker Decl., Exh. 2, EQ_FUL_22 and Exh. 1, EQ_FUL_90. Similarly, the Wrap Plan provides in pertinent part:

> The Plan Sponsor reserves the right to amend the Plan at any time, including the right to amend any of the Benefit Programs or to transfer any Benefit Program from the Plan into a separate, unrelated plan.

See id., Exh. 3, EQ_FUL_0045.

The SPDs (the primary ERISA disclosure document) have at all times since 1991 contained clear and explicit reservation of rights language, in substantially the following form:

> This is a summary plan description of the United Telecom Retiree medical Plan. We urge you to read it carefully for a better understanding of how the plan works. You will learn when you can join the plan, how you enroll, who can be covered and how your cost is determined.
>
> The company expects to continue the Retiree Medical Plan indefinitely. However, the company reserves the right to amend or terminate this plan, or any statement made in this summary plan description, at any time.

See id., Exh. 4, EQ_FUL_94. This comprehensive disclaimer appeared in the front of the SPD, on its own page, preceding the description of Plan benefits – i.e., it was not "hidden in the fine print."

The SPD's overview of health coverage informed Plaintiffs that "[j]ust as medical coverage can change in the future for active employees, so can the coverage that is available to retirees." Id., EQ_FUL_106. In addition, set forth on a separate cover page for "Appendix A –

Medical Coverage," was the following reservation of rights:

> Appendix A explains the medical coverage that is available to retirees under the [Plan]. This coverage is available beginning in 1991, but in the future the company may change or terminate any of the coverages or options that are described.

Id., EQ_FUL_113. An identical disclaimer appeared on the cover page for "Appendix B – Dental Coverage." Id., EQ_FUL_132.

The "Legal Information" section of the benefits handbook that contained the SPDs for Sprint's benefit plans contained the following reservation of rights:

> ***The Plans' Future***
>
> United Telecom intends to continue providing benefits that help answer your needs, but it reserves the right to amend any of the plans, to change the method of providing benefits, or to terminate any or all of the plans. You'll be notified of any changes.

Id., EQ_FUL_143. The 1991 SPD and the Sprint Retiree Medical Plan are the governing Plan documents for Plaintiffs King, Dorman, Joyner, and Fulghum. See SOF ¶ 11-12.

Likewise, the prominent disclaimer for the 1998 SPD, which is the controlling SPD for Plaintiff Daniel's claim, appeared on the *first page of the SPD*:

> This is a summary plan description of the Sprint Retiree Medical Plan. We urge you to read it carefully . . .
>
> The company expects to continue the Retiree Medical Plan indefinitely. However, the company reserves the right to amend or terminate this plan, or any statement made in this summary plan description, at any time.

See Parker Decl. ¶ 7, Exh 6, EQ_FUL_207; see also id., EQ_FUL_217 ("Just as medical coverage can change in the future for active employees, so can the coverage that is available to retirees."). As Embarq's predecessors did in the 1991 SPD, the cover page for Appendix A ("Medical Coverage"), B ("Prescription Drug Program"), and C ("Dental Coverage") in the 1998 SPD informed Plaintiffs that "*in the future the company may change or terminate any of the*

coverages or options that are described [herein]." Id., EQ_FUL_223, 238, 243 (emphasis added). The "Legal Information" section contained substantially the same reservation of rights as the 1991 SPD and appeared under the same descriptive heading – "The Plans' Future." Id., EQ_FUL_251.

Similarly, the SPD in effect when Plaintiffs Hollingsworth, Bullock, Games, and Dillon retired contained the following reservation of rights on the first page:

> The company expects to continue the Retiree Benefits indefinitely. However, the company reserves the right to amend or terminate this plan, or any statement made in this summary plan description, at any time.

Parker Decl., Exh. 7, EQ_FUL_323. In addition, the introductory paragraph to the Appendix D – Life Insurance Coverage section of the SPD states: "Appendix D explains the life insurance coverage available to retirees. In the future, the company may change or terminate any of the coverages described in this Section." Id., EQ_FUL_362. Likewise the "Legal Information" brochure, which is included in the benefits handbook that also contains the SPD, see id., EQ_FUL_365, under the heading "***The Plans' Future***," provides: "Sprint intends to continue providing benefits that help answer your needs, but it reserves the right to amend any part of the Plan, to change the method of providing benefits, or to terminate any or all parts of the Plan. You will be notified of any changes." Id., EQ_FUL_367.

Likewise, the retiree medical benefits SPD in effect when Plaintiff Barnes retired provided that the "Company expects to continue the plan for the foreseeable future. However, the Company reserves the right to amend, discontinue or terminate the plan for reasons of business necessity or financial hardship." See SOF ¶ 16.

The SPDs governing the life insurance benefits similarly contained clear and express reservations of Embarq's right to amend, modify or terminate the benefits. See SOF ¶¶ 18-25.

Moreover, the plain language of the SPDs also described the life insurance benefits themselves as subject to change and subject to cancellation of the respective group policies. Id.

In stark contrast to the clear, express, and repeated admonition to Plan participants that the Welfare Benefits could be amended, changed or discontinued at any time, Plaintiffs point to a general statement regarding when coverage under the Plan ends as alleged proof of an intent to vest benefits. For instance, Plaintiffs have argued that the following statement in the 2000 Sprint Retiree SPD establishes intent to forever provide life insurance benefits: "When Does Coverage End[:] The basic life insurance coverage ends on the date of your death." Doc. No. 21, p. 12 (quoting Ex. 7 to Pls' Opp. Brief). With respect to medical benefits, the Plaintiffs rely upon a similar provision of the 1991 Retiree Medical Plan SPD: "Your coverage under the Retiree Medical Plan ends – when you die, or you do not pay your share of the cost of your coverage." Id., p. 11. As an initial matter, this statement is literally surrounded by no fewer than four reservations of the right to amend the Retiree Medical Plan, including, specifically, the right to amend any *statement* or *coverage* in the SPD. See Parker Decl., Exh. 4, EQ_FUL_94 (reserving the "right to amend or terminate this plan, or any statement made in this [SPD], at any time"), EQ_FUL_113, 132 ("in the future the company may change or terminate any of the coverages or options that are described [in the SPD]"), EQ_FUL_143 (in the "Plans' Future," company reserves the right to amend or terminate the Plan or benefits), and EQ_FUL_106 ("Just as medical coverage can change in the future for active employees, so can the coverage that is available to retirees."). In each case where a general description of the coverage under on of the Plans appears, the general statement is qualified by the specific reservation of rights and, more frequently, is sandwiched between at least two express reservations of the right to amend or

terminate the Welfare Benefits at any time.[5]

In order to rebut the strong presumption that a plan sponsor has ***not*** agreed to waive its statutory right to alter, amend, or terminate welfare benefits under ERISA, a plaintiff has the burden to identify "clear and express language" incorporated into the written plan documents demonstrating as much. Chiles, 95 F.3d at 1513. Here, Plaintiffs focus exclusively on the "coverage" section of the SPDs – and completely ignore the reservation of rights clauses that qualify all of the terms of the SPDs and which were prominently displayed at the front and back of the SPDs (and frequently in the middle sections, too). Plaintiffs' myopic approach to ERISA plan interpretation is not supported by Tenth Circuit precedent.

Indeed, the Tenth Circuit has flatly rejected an attempt to establish contractual vesting through reference to nearly identical language. In Welch v. Unum Life Ins. Co. of Am., 382 F.3d 1078 (10th Cir. 2004), the Court of Appeals held that the plaintiff could not establish contractual vesting by "clear and express" language where the plan contained both a coverage provision "promising" benefits until death and also a reservation of the sponsor's right to amend or terminate the plan. The relevant plan language at issue in Welch provided:

> Disability benefits will cease on the earliest of:
> 1. the date the insured is no longer disabled;
> 2. the date the insured dies;
> 3. the end of the maximum benefit period;
> 4. the date the insured's current earnings exceed 80% of his indexed pre-disability earnings;
> 5. the date the insured receives retirement benefits under the employer's retirement plan due to his voluntary election to receive such benefits.

Id. at 1085-86. The court noted that on a separate page the plan also advised that "[t]his policy

[5] The CT&T SPD does not even provide that coverage under the Group Policy continues until the retiree dies. Rather, it explicitly contemplates that "[y]our insurance ends when any of the following events occurs: (1) you leave our employ, (2) you are no longer eligible, (3) *the Group Policy ceases*." Parker Decl., Exh. 8, EQ_FUL 1184 (emphasis added).

may be changed in whole or in part." Id. at 1086 (citation omitted).

In Welch, the Tenth Circuit held:

> There is ***no language*** in the LTD plan that provides for the vesting of claims for benefits upon disability or at the end of the elimination period, ***and*** the plan specifically reserves UNUM's right to change the plan.

Id. at 1086 (emphasis added). Significantly, the court *first* held that the terms of the coverage provision *themselves* did not satisfy the "clear and express" standard for contractual vesting. The court *secondly* held that the reservation of rights provision was an *additional reason* for concluding that the plan did not vest the welfare benefits at issue. Id.

Other District Courts and Courts of Appeals have interpreted welfare plans in the same manner and with the same result. For instance, in Kerber v. Qwest Pension Plan, No. 05-cv-00478-BNB-KLM, 2008 WL 4377562 (D. Colo. Sept. 19, 2008), the court held that the plans' coverage provisions and language that death benefits "will be paid" and that participants are "entitled" to such benefits "merely describes the benefit assuming it remained available at the time of the retiree's death. Nothing in the language . . . promises that the [welfare benefit] would not be eliminated in the future." Id. at *14. After interpreting those terms, the court found that "[i]n addition, the plans contain reservation of rights clauses which inform the participant that the plans may be amended or terminated." Id. at *15. The Kerber court held that "[e]xamining the plan documents as a whole, a reasonable person in the position of the plan participant would have understood that the Pensioner Death Benefit was *not* contractually vested and could be amended." Id. at *16 ("The plaintiffs have failed to point to any clear and express language that the welfare benefit right was vested and not subject to change.") (emphasis added). The same is true here. See also Chastain v. AT&T, No. CIV-04-0281-F, 2007 WL 3357516, *11, 15 (W.D. Okla. Nov. 8, 2007) (holding that references to continuing coverage were "necessarily references

to the continuation of existing coverage . . . and it is undisputed that the existing coverage included AT & T's reservation of its rights to reduce or eliminate the medical and dental benefits in question."); Jones v. Am. Gen. Life & Accident Ins. Co., 370 F.3d 1065, 1071 (11th Cir. 2004) (holding that plan language stating that benefits "will continue . . . after . . . age 65" was insufficient to establish vesting).

Moreover, the Tenth Circuit has held that a court "cannot read a vesting requirement into the contract." Welch, 382 F.3d at 1086; Hollingshead v. Blue Cross and Blue Shield of Okla., 216 F. App'x 797, 802 (10th Cir. 2007) (construing terms of ERISA health plan to exclude payment for a liver transplant operation, holding "words cannot be written into the agreement imparting an intent wholly unexpressed when it was executed;") (quoting Blair, 974 F.2d at 1221). The corollary to the Tenth Circuit's rule also is true and applies with equal force – i.e., Embarq's repeated reservations of its right to amend or terminate the Welfare Benefits cannot be written *out* of the Plan documents. Welch, supra at 1086; Chiles, 95 F.3d at 1513 (holding that reservation of rights clause "retained almost unlimited discretion [in the employer] . . . to change the plan.") (citing Musto v. Am. Gen. Corp., 861 F.2d 897, 904 (6th Cir. 1988) (upholding plan amendment where the SPD stated that "the company fully intends to continue the plan indefinitely and to meet any foreseeable situations that may occur. However, the company does . . . reserve the right to change the plan and, if necessary, discontinue it."); Sprague v. Gen. Motors Corp., 133 F.3d 388, 394, 401 (6th Cir. 1998) (upholding plan sponsor's right to terminate retiree welfare benefits where the plan documents contained a reservation of rights similar to those at issue here); Frahm v. Equitable Life Assurance Soc'y of the U.S., 137 F.3d 955, 961 (7th Cir. 1998) (holding 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."); 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."); Moore v. Metro. 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, Sprint, their predecessors, or their subsidiaries intended to vest the medical, prescription drug, or life insurance benefits affected by the 2005 or 2007 Plan amendments. Standing alone, the coverage provisions on which Plaintiffs rely are insufficient as a matter of law to find a "clear and express" intention to render the benefits "forever unalterable." The reservation of rights provisions support and confirm this interpretation of the Plans' terms. Indeed, the Plans' reservation of rights provisions are similar to provisions that the Tenth Circuit and other Courts of Appeals have repeatedly found – after reviewing the Plan documents as a whole – foreclose vesting and preserve an employer's right to amend or terminate welfare plan benefits. Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiffs' First Claim for Relief.

B. Plaintiffs' "Alternate Theory" That Plan Participant Communications Created A "New Plan" Is Unavailing.

Plaintiffs previously have relied upon Deboard v. Sunshine Min. & Refining Co., 208 F.3d 1228 (10th Cir. 2000), for the unremarkable proposition that a letter that sets forth all of the statutory requirements for an ERISA plan can be found to be an "employee benefit plan." See Doc. No. 21, p. 14; Deboard, 208 F.3d at 1239 (citing Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 12 (1987)). Here, Plaintiffs' so-called "alternative decisional framework" is unavailing. At most, Plaintiffs have alleged that certain letters "induced" some employees to retire earlier than they otherwise may have retired and "misrepresent[ed] the subject retiree benefits" and "concealed the fact that Defendants believed they retained the ability to reduce or terminate the benefits[.]" See 2d Compl. ¶¶ 98, 95-99. Importantly, the communications in question specifically described changes to the *Plans* and *Welfare Benefits*, not some other "new plan." Id. While these communications may be relevant to Plaintiffs' breach of fiduciary duty claim (which is *not* the subject of this Motion), they simply are irrelevant to the Court's determination of whether the controlling Plans and SPDs unambiguously vest the Welfare Benefits or reserve Embarq's right to amend or terminate the Plans at any time. In other words, while these communications may be "extrinsic evidence" of the parties' intent, resort to extrinsic evidence is unnecessary in this case because the Plans' terms are unambiguous. Hickman, 299 F.3d at 1212 (rejecting plaintiffs' attempt to introduce extrinsic evidence to interpret unambiguous plan terms); Hughes, 281 F.3d at 790 (extrinsic evidence is only "admissible if the language of the plan provision at issue is ambiguous") (citations omitted).

III. PLAINTIFFS' THIRD CLAIM FOR "DECLARATORY RELIEF" FAILS AS A MATTER OF LAW BECAUSE IT IS DERIVATIVE OF THE FIRST CLAIM AND JUDGMENT SHOULD BE ENTERED FOR THE SAME REASON.

This Court dismissed Plaintiffs' Third Claim, in part, insofar as that claim was based on

ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3). Doc. No. 45, p. 19. The Court denied Embarq's motion to dismiss Plaintiffs' claim under the Declaratory Judgment Act, 28 U.S.C. § 2201 ("DJA"), but observed that "[a]s a practical matter, it appears that plaintiffs' DJA claims are superfluous because ERISA (not the DJA) provides the substantive rights which plaintiffs invoke." Id. at 21 (citing Farmers Alliance Mut. Ins. Co. v. Jones, 570 F.2d 1384, 1386 (10th Cir. 1978) (holding that the DJA provides procedural remedies, not substantive rights). For the reasons discussed above with respect to the First Claim, Plaintiffs' claim for declaratory relief pursuant to the DJA – but based on ERISA – fails as a matter of law.

IV. PLAINTIFFS' ADEA CLAIMS (COUNT IV) REGARDING AMENDMENTS TO THE LIFE INSURANCE BENEFITS FAIL AS A MATTER OF LAW BECAUSE THE ADEA AND THE APPLICABLE REGULATIONS EXPRESSLY PERMIT THE PLAN AMENDMENTS AND THE AMENDMENTS AFFECT ALL RETIREES EQUALLY.

In Count IV, Plaintiffs allege that Embarq's reduction of life insurance benefits violates the ADEA. In the Order, the Court dismissed Plaintiffs' ADEA claim with respect to Embarq's decision to coordinate retiree medical benefits with the Medicare program, which has age-based eligibility requirements. Doc. No. 45, p. 29. The life insurance Plan amendments, however, contain absolutely no age-based distinctions or references to a program that can be alleged to be a "proxy" for age. See Parker Decl., Ex. 13, EQ_FUL_1153 (Nos. 4, 5). Embarq's elimination of life insurance benefits did not discriminate against *any* retiree on the basis of age. Yet, Plaintiffs challenge the elimination of life insurance benefits for *all* retired participants in the VEBA and the across-the-board cap of life insurance benefits for *all* other retirees.

Plaintiffs' claims cannot stand for at least two additional reasons. First, the regulations governing the ADEA expressly permit the elimination of life insurance benefits for retirees. Secondly, the ADEA, as amended by the Older Workers Benefit Protection Act ("OWBPA"), Pub. L. 101-433, § 101, 29 U.S.C. § 621 et seq., permits a plan sponsor to provide all retirees

with the same level of benefits regardless of age. Thus, Plaintiffs challenge a practice that the ADEA and its regulations expressly permit.

A. The Plan Amendments Fit Squarely Within The ADEA's And EEOC's Exemption For Elimination Of Life Insurance Benefits.

In the Order, the Court dismissed Plaintiffs' claims insofar as they alleged that the Plan amendments to medical and prescription drug coverage violated the ADEA. Doc. No. 45, p. 29. Judgment now should be entered on the remainder of the Fourth Claim because the ADEA's implementing regulations explicitly permit a plan sponsor to terminate – in their entirety – retiree life insurance benefits, regardless of any alleged discriminatory intent or "disparate impact" on older retirees. See 29 C.F.R. 1625.10(f)(i). Because Embarq's amendment of the Plans fits squarely within this safe harbor, Plaintiffs' ADEA claims fail as a matter of law.

Plaintiffs' remaining ADEA claims challenge the (1) elimination of "Grand-fathered Life Insurance" benefits for CT&T Company Voluntary Employee Beneficiary Association (the "VEBA") participants; and (2) implementing an across-the-board $10,000 cap on life insurance benefits for non-VEBA participants. See 2d Compl. ¶ 143. The EEOC's regulation, 29 C.F.R. 1625.10, interprets the statutory exemptions set forth in 29 U.S.C. § 623(f)(2). Both the statute and the regulation apply to "the terms of . . . [an ERISA] employee benefit plan such as a retirement, pension or insurance plan[.]" 29 C.F.R. 1625.10(a)(1) (quoting 29 U.S.C. § 623(f)(2)). The applicable regulation provides, in pertinent part, that "it is *not* unlawful for life insurance coverage to cease upon [an employee's] separation from service." 29 C.F.R. 1625.10(f)(i) (emphasis added). By definition, a "retiree" is an employee who has "separat[ed] from service" and the statute and the regulation address themselves specifically to retiree benefits. Hence, the Plan amendment, which completely eliminates certain life insurance coverage for VEBA participants, fits squarely within the regulation's safe harbor. And, since a

total elimination of life insurance benefits for retirees does not violate the ADEA, a lesser reduction in such benefits – as in the case of non-VEBA participants – also does not violate the ADEA.

B. In Addition, The Plan Amendments Fit Squarely Within The OWBPA's Safe Harbor For Plans That Provide An "Equal Benefit" To Participants Of All Ages.

Plaintiffs' claim also fails as a matter of law because the Plans comply with the "equal-cost/equal-benefit" rule established by the OWBPA. The OWBPA rule provides that even facially discriminatory provisions of an employee benefit plan will *not* violate the ADEA, where "for each benefit or benefit package, the actual amount of payment made . . . on behalf of an older worker is no less than that made . . . on behalf of a younger worker. . . ." 29 U.S.C. § 623(f)(2)(B)(i). Thus, where, as here, a plan amendment results in an employer providing the *same level of benefits to older and younger retirees regardless of age*, that amendment does not violate the ADEA. See 29 U.S.C. § 623(f)(2)(B)(i); Bozner v. Sweetwater County Sch. Dist., No. 96-8087, 1997 WL 165168, *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)); Devlin v. Transp. Comm. Int'l Union, 175 F.3d 121, 126-28 (2d Cir. 1999) (holding that Plaintiffs could not establish an ADEA claim under a disparate treatment or disparate impact theory, where the employer terminated death benefits for "all members and retirees, not just the older constituents"); 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); Tusting v. Bay View Fed. Sav. and Loan Ass'n, 789 F. Supp 1034, 1037 (N.D. Cal. 1992) (stating that an "across-the-board elimination of fully paid retirement health benefits for all current employees, irrespective of age or seniority" would not

violate the ADEA).

Accordingly, judgment should be entered for the Defendants on the remaining ADEA claims in the Fourth Claim for Relief.

V. BECAUSE THE PLAN AMENDMENTS ARE PERMITTED BY THE ADEA, PLAINTIFFS' IDENTICAL STATE LAW DISCRIMINATION CLAIMS ARE PREEMPTED BY ERISA AS ESTABLISHED BY SUPREME COURT PRECEDENT.

In the Order, the Court recognized that, under the Supreme Court's decision in Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983), ERISA preempts Plaintiffs' state-law age discrimination claims "to the extent that the state statutes may prohibit practices which are lawful under the ADEA[.]" Doc. No. 45, p. 29. The Court did not dismiss Plaintiffs' state-law age discrimination claims, because Defendants did not "articulate in what way the state age discrimination statutes prohibit practices which are lawful under the ADEA." Id. Importantly, however, Plaintiffs have not and cannot articulate how their claims under the Ohio, Oregon, and Tennessee anti-discrimination statutes differ from their claims under the ADEA. See, e.g., Pls' Motion for Class Certification, Doc. No. 56, p. 17 ("The state-law claims track federal law barring age discrimination, allow disparate impact claims, and thus are amenable to class treatment."). As explained above and in the Order, the ADEA, its implementing regulations, and the OWBPA expressly ***permit*** the Plan amendments at issue. Because Plaintiffs' claims seek to apply the Ohio, Oregon, and Tennessee anti-discrimination statutes in a manner that would ***forbid*** those amendments, ERISA section 514(a) preempts Plaintiffs' Fifth, Sixth, and Seventh Claims for Relief.

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, 463 U.S. at 96-97 (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). ERISA preempts a state anti-discrimination statute to the extent it prohibits practices which are otherwise lawful under federal law. Shaw, 463 U.S. at 95-108.

Thus, ERISA preempts all of these state-law claims because each of the state laws, if applicable, would invalidate the amendment of the Plans and may require reformation of the Plans in order to reinstate the life insurance benefits. Without question, such an application of the laws would "relate to" an employee benefit plan. In addition, this Court already has dismissed Plaintiffs' ADEA claims based on the coordination of retiree medical and prescription drug benefits with Medicare eligibility. See Doc. No. 45, pp. 28-29. As explained above, the ADEA also permits the Plan amendments that eliminated and reduced life insurance benefits. Plaintiffs' state-law claims purport to make an "end run" around the ADEA, which permits Embarq to amend its ERISA plans. Accordingly, under Shaw, ERISA preempts all of Plaintiffs' state-law age discrimination claims.[6] Shaw, 463 U.S. at 95-108; Doc. No. 45, p. 29.

[6] The Complaint also refers to certain Plan amendments that were announced in November 2005 and became effective on January 1, 2006. See 2d 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) (stating that 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, *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).

VI. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court enter judgment for Defendants on the First, Third, Fourth, Fifth, Sixth and Seventh Claims for Relief in Plaintiffs' Second Amended Complaint in their entirety.

Respectfully submitted,

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I hereby certify that on the 2nd day of March, 2009, I electronically filed the foregoing document using the CM/ECF system, which will send notice of electronic filing to the following attorneys for Plaintiffs:

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