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 OPPOSITION TO
DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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For the reasons stated in the accompanying Motion Under Rule 56(f) to Deny or Continue Defendants' Motion for Partial Summary Judgment and the Affidavit of Alan M. Sandals, the Court should deny or continue Defendants' Motion For Partial Summary Judgment on the First, Third, Fourth, Fifth, Sixth and Seventh Claims for Relief in the Second Amended Complaint (Doc. 68) pursuant to Fed. R. Civ. P. 56(f) due to the incomplete state of pertinent discovery. In the event that the Court addresses the merits of any aspect of defendants' motion, plaintiffs oppose the motion and it should be denied.

INTRODUCTION

In largely denying defendants' motion to dismiss on December 2, 2008, Chief Judge Vratil noted that the lack of a developed record prevented the Court from making an informed decision even on the question whether a correct and complete set of plan documents had been presented by defendants. Memorandum, dated December 2, 2008, at 15 (Doc. 45). A few weeks later, Magistrate Judge O'Hara denied defendants' "phased discovery" proposal to develop only a limited record for use in a proposed motion for partial summary judgment identical to

defendants' current motion, holding that "discovery should proceed on all fronts" because, under Tenth Circuit law, a summary judgment motion based on the mere existence of general reservation clauses in SPDs – the sole basis for defendants' current motion for partial summary judgment – would likely fail, and thus would only serve to delay the prosecution of this action involving a proposed class of elderly retirees in great need of the medical and life insurance benefits they were promised. *See* Feb. 6, 2009 Scheduling Order at 5-6 & n.2 (Doc. 59).

Despite these admonitions by the Court, defendants have rushed ahead to file a pre-discovery motion for partial summary judgment which likewise should be rejected. First, in their haste to file the motion – one almost identical in form to their rejected motion to dismiss the bulk of the ERISA claims – defendants have once again (1) failed to include a complete and correct set of the plan documents and summary plan descriptions ("SPDs") for plans which clearly govern many of the plaintiffs' retiree benefits; (2) failed to even make clear which plans they do provide are applicable to which plaintiffs; and (3) failed to include documents required to be considered in conjunction with the SPDs, including collective bargaining agreements and other evidence bearing on the question whether the defendants modified their plans. Second, even as to the SPDs that defendants do present, defendants improperly rely on an incomplete, one-sided reading of snippets of isolated language which they assert reserves their right to amend or terminate each of the plans as to current retiree benefit recipients. Defendants do not even acknowledge other portions of the same documents which confirm that, as plaintiffs have alleged, defendants consistently and expressly promised retiree medical and life insurance benefits that would continue for plaintiffs' lifetimes, ending only "when you die" and "on the date of your death." Third, defendants also fail to acknowledge controlling principles in the statutes and in Tenth Circuit case law Circuit establishing that, at best for defendants, the documents expressly promise, and at a minimum are reasonably susceptible to the interpretation

that, the medical and life insurance benefits will not end until the death of the retiree. Accordingly, defendants have not shown that the plan-related documents they have provided are unambiguous, and therefore, extrinsic evidence which has not yet been produced must be considered. Accordingly, summary judgment must be denied.

The Court also should deny summary judgment on plaintiffs' Fourth Claim for Relief which alleges violation of the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.* ("ADEA'). Defendants ignore the disparate impact theory of discrimination that forms the basis for this claim and instead rely on a misreading of the ADEA and the applicable regulations, wrongly asserting that defendants are exempt from the protections of the statute. Defendants are not exempt from the ADEA and they have made no legal or factual showing that would support the arguments they advance.

Similarly, summary judgment should be denied on plaintiff's Fifth, Sixth, and Seventh Claims for Relief alleging age discrimination under the laws of Ohio, Oregon, and Tennessee. Under established Supreme Court precedent, these claims are not preempted by the ADEA and they are viable to the same extent as the ADEA claim.

STATEMENT OF PLAINTIFFS' ALLEGATIONS

1. Plaintiffs and the members of the proposed Class are retired, former long-term management and unionized employees of several regional and local telephone operating companies which eventually became wholly-owned subsidiaries of defendant Embarq upon its spin-off from Sprint in 2006. Second Amended Complaint ("AC") ¶¶ 9-26, 63 and Appendix A thereto. (Doc. 42). 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. *Id.* For many years during their retirements, plaintiffs and the Class members

received these benefits at no or 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. AC ¶¶ 87-89, 91-92, 115. Defendants also used the availability of the retiree benefits as inducements for employees to accept periodic special early retirement programs. Plaintiffs and others who received and accepted these offers were informed by defendants, and thereby understood, that acceptance of early retirement would have the desired effect of securing the promised benefits throughout retirement. AC ¶¶ 73-75, 82-87, 93-96. These historic facts are summarized by the Court in its Memorandum denying in substantial part defendants' motion to dismiss. Memorandum, dated December 2, 2008, at (Doc. 45) (hereinafter "Op.").

2. This case arises from (1) Sprint's 2006 elimination of the retiree prescription drug benefits for Medicare-eligible retirees and dependents (replacing it with a $500 annual subsidy payment to obtain Medicare Part D coverage from third-party vendors); (2) Embarq's 2007 elimination of company-paid regular 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, for Medicare-eligible retirees and their dependents; and (4) Embarq's 2008 reduction of company-paid regular life insurance, reducing coverage levels to $10,000. AC ¶¶ 29-30, 68-69, 77, 81-88, 100-02.

3. Plaintiffs filed this case to challenge defendants' actions as violations of ERISA, the ADEA and age discrimination laws of several states. The named plaintiffs seek to represent a class of "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." Motion for Class Action Certification, filed Jan. 29, 2009 (Doc. 56).

PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS

A. Defendants' Retiree Medical Plan SPDs.

Plaintiffs Controvert Defendants' ¶¶ 12-14

4. The first three ERISA summary plan descriptions ("SPDs") proffered by defendants as the documents governing the retiree medical and prescription drug benefits for plaintiffs King, Dorman, Joyner, Fulgham, Daniel, Hollingsworth, Bullock, Games and Dillon, *see* Def. Mem. at ¶¶ 12-14, contain express language that retiree participants are entitled to receive the medical benefits for life, stating that "Your coverage under the Retiree Medical Plan ends . . . when you die." (emphasis added). *See* Def. Exs. 4, 6 and 7. The earliest such SPD, the "United Telecom Retiree Medical Plan Summary Plan Description, effective January 1, 1991" (Def. Ex. 4), stated as follows regarding the medical, prescription drug, and dental benefits for retirees:

> **RETIREE MEDICAL PLAN**
>
> ***When Coverage Ends***
>
> You may stop participating in the Retiree Medical Plan on the first day of any month. Generally, if your coverage ends, your spouse's and dependent children's coverage ends. These rules are described below.
>
> There are other circumstances in which your, your spouse's and your dependent children's coverage ends.
>
> ***Retiree's***
>
> **Your coverage under the Retiree Medical Plan ends**
>
> — **when you die**, or
>
> — you do not pay your share of the cost of your coverage.
>
> ***Spouse's***
>
> You may terminate your spouse's coverage under the Retiree Medical Plan on the first day of any month. Your spouse's coverage will also end if you and your spouse divorce or your spouse dies.

Def. Ex. 4 at EQ_FUL_108 (emphasis added). Substantially the same text promising medical benefits until "you die" appears in the subsequent SPDs.[1] None of this express language providing for lifetime medical benefits – on the Retiree Medical Plan page entitled "When Coverage Ends" – sets forth or contains a cross-reference of any kind to any of the reservation of rights language cited by defendants. Further, the sole reservation of rights language in the main document of these SPDs is found on the third page, without any heading, and, unlike the vesting language above, it is not even listed in the Table of Contents. *See, e.g.,* Def. Ex. 4 at EQ_FUL_94.

5. Examination of these three SPDs also shows, in the section entitled "Answering Your Needs" (the first section listed in the Table of Contents), an express assurance to the retiree that participating in the plan provides financial and health security throughout retirement:

> **Answering Your Needs**
>
> Rising health care costs are a major concern of employers and retirees today. Over the past few years, health care spending by and for retirees has risen faster than health care spending for any other group in the country. **For one thing, retirees and their spouses live longer, extending the period during which claims are paid.** Coupled with more expensive medical technology and a decrease in the share of benefits provided by Medicare, **the cost for retiree health benefits is a heavy burden for employers or retirees to bear alone.**
>
> * * *
>
> [Y]ou may wonder how healthy you'll be and whether an illness or injury will affect your family's financial security [in retirement]. When people become seriously ill, retirement benefits, personal savings and Social Security may not be enough. **By participating in the United Telecom Retiree Medical Plan, you can feel secure that your family's health and well-being will be protected after you stop working.**

[1] *See* Def. Ex. 6 at EQ_FUL_ 219 (Sprint 1998 SPD); Def. Ex. 7 at EQ_FUL_ 330 (Sprint 2001 SPD).

Id. at EQ_FUL_95 (emphasis added). The same express assurances of life-long retirement security are found in the two other SPDs. *See* Def. Ex. 6 at EQ_FUL_209; Def. Ex. 7 at EQ_FUL_323.

6. In contrast to these specific, express promises of financial and health security throughout retirement and that retirees will receive the retiree medical benefits until "you die", the reservation of rights language cited by defendants (Def. Mem. ¶¶ 12-14), contains only vague, ambiguous references to a *general* right to amend or terminate in undefined circumstances for undefined persons, or stating under the heading "What the Plan Covers" that specific "coverage" terms or "coverages or options that are described" can change, suggesting only that certain of the enumerated procedures, services or methods of providing benefits might change, but not stating that the Plan itself may be terminated. *See, e.g.,* Def. Ex. 4 at EQ_FUL_94, 106, 113, 132, 143.[2]

Plaintiffs Controvert Defendants' ¶ 15

7. Even weaker reservation of rights language appears in the SPD that defendants claim is applicable to plaintiff Barnes, a former union employee. *See* Def. Mem. at ¶ 15; Def. Ex. 8. First, this SPD was written for *current* union employees and contains only scant references to employees who are "retired on pensions by CT&T." Def. Ex. 8 at EQ_FUL_1156. Second, as a union employee, the relevant collective bargaining agreements ("CBAs") must be viewed in conjunction with the SPD to determine whether the CBA provides for vested benefits. *See* page 28-29 below. Defendants have not produced any of the controlling CBAs. *See* Affidavit of Alan M. Sandals, ¶ 13. Third, the reservation of rights language in Def. Ex. 8 limits

[2] The other SPDs contain some of the same language. *See* Def. Mem. at ¶¶ 13; Def. Ex. 7 at EQ_FUL_0335.

defendants' right to amend or terminate the plan only in the event of "business necessity or financial hardship," indicating to a reasonable reader that the plan will only terminate if the company is in bankruptcy or some other severe financial position. *See* Def. Ex. 8 at EQ_FUL_1189.[3] Despite this express limitation, the business condition of Embarq was not mentioned in the Employee Benefits Committee Minutes and Resolutions authorizing the challenged 2005 and 2007 amendments (Def. Exs. 12 and 13), and defendants have presented no information to justify any conclusion on summary judgment about this essential fact.

B. Defendants' Retiree Life Insurance Plan SPDs.

Plaintiffs Controvert Defendants' ¶¶ 6, 17-24

8. Defendants do not cite to any SPDs for *retiree* life insurance benefits. All of the SPDs that defendants do cite govern life insurance benefits for *current employees*. *See* Def. Mem. at ¶¶ 17-24; Def. Exs. 9-11. Defendants' lone citation to a *retiree* life insurance document is a plan document, which they incorrectly assert to be applicable to plaintiffs Hollingsworth, Dillon, Games and Bullock. *See* Def. Mem. at ¶¶ 6, 21-22 (referring to the "Wrap Plan", Def. Ex. 3). In addition to being a plan document which under Tenth Circuit law cannot be used

[3] **Plaintiffs Controvert Defendants' ¶¶ 4-6, 11**: Defendants also present a few "plan documents." *See* Def. Exs. 1-3. However, plan documents are not distributed to participants, and terms in plan documents that do not appear in SPDs cannot be used offensively to limit the rights of participants. "Allowing the plan's master documents to trump the SPD would both undermine Congress's intent for the SPD to convey accurately plan information . . . and would tempt plan sponsors to engage in drafting legerdemain." *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1518 (10th Cir. 1996); *see also* Op. at 11. In any event, the amendment clauses in defendants' plan documents, like those in its SPDs, are vague and generalized. Even if pertinent, these plan documents cannot negate, and must be construed in the context of, the express statements in the contemporaneous SPDs that the benefits will end only when "you die" or fail to pay any required premiums, and that retired participants "can feel secure" in the benefits program after they retire. The plans do not state that benefits provided to currently participating retirees can be terminated. *See also* Affidavit of Todd B. Hilsee at ¶ 30 ("the general language in the Plan documents must be viewed in the full context, which includes specific statements in the SPDs that benefits can end only on death or non-payment of premiums").

offensively to limit the rights of participants (*see* footnote 3 *supra*), the Declaration of Randall Parker, Director of Benefits for defendant Embarq, expressly states that the Sprint Retiree Benefits Summary Plan Description, Def. Ex. 7, is the SPD governing the life insurance (and medical) benefits for these plaintiffs. *See* Declaration of Randall T. Parker at ¶ 12. Defendants acknowledge that Def. Ex. 7 is the SPD that applies to these plaintiffs' retiree medical benefits. *See* Def. Mem. at ¶ 14.

9. Even though the Parker declaration identifies it as the SPD applicable for plaintiffs Hollingsworth, Dillon, Games and Bullock for life insurance benefits, and defendants' brief recognizes it as the SPD for medical benefits, defendants never acknowledge or address the portions of Exhibit 7 dealing with life insurance. Like the other retiree SPDs, Exhibit 7 expressly states that the retiree life insurance "*ends on the date of your death*":

> ***Basic Retiree Life Insurance***
>
> ***Basic Coverage***
>
> The company provides you with coverage of 50% of eligible pay at your retirement rounded up to the next highest $1,000 increment.
>
> ***Maximum Benefit***
>
> The maximum benefit under the basic life insurance plan is $25,000.
>
> ***When Does Coverage End***
>
> **The basic life insurance coverage ends on the date of your death.**

Def. Ex. 7 at EQ_FUL_ 362.

Plaintiffs Controvert Defendants' ¶¶ 17-18

10. Defendants assert that plaintiff King received retiree life insurance benefits pursuant to the "Group Contributory and Non-Contributory Life Insurance Plan for Non-Bargaining Employees." *See* Def. Mem at ¶ 17; Def. Ex. 9. However, the only reference to life

insurance *during retirement* in this SPD describes the amount of insurance the retiree will receive, and states that this amount "will be paid" to surviving beneficiaries. *Id.* at EQ_FUL_1195. Further, the alleged reservation of rights language cited by defendants expressly states that if an employee "cease[s] active work," the employee should ask about continued insurance, suggesting that there is a separate plan for retirees. *Id.* at EQ_FUL_1196. Indeed, the language states that this insurance ends when "you leave our employ," but some other insurance must replace this plan because retirees by definition have left defendants' employ but they continue to have life insurance benefits in retirement. *Id.* The SPD also indicates "insurance ends" when "the Group Policy ceases," and appears to be a form document prepared by the insurer. *Id.* None of this language is a clear indication of a company right to terminate the *retiree* life insurance benefits plan. *See also* Hilsee Affidavit at ¶ 32.

11. Defendants' own personnel demonstrated that the SPDs are reasonably susceptible to the conclusion that the retiree life insurance will continue until death (and that they so understood and informed retirees). Seventeen months before defendant Embarq severely reduced (or terminated, in the case of the CT&T VEBA participants) these retiree life insurance benefits, the Sprint benefits department expressly told plaintiff King that his life insurance amount and premiums would remain the same until his death. *See* Declaration of Robert E. King and Exhibit A thereto (Feb. 7, 2006 email from Ledora Lavender [Sprint HR representative] to Robert King stating that he had retiree life insurance, including the Survivor Income Benefit, in the combined amount of $25,000 "which will remain the same until your death" and that the premium "will not change during your life time").

12. The SPD presented as Def. Ex. 9 also discloses that the retiree life insurance plan used the vehicle of a Group Policy issued by The Equitable Life Assurance Society. *Id.* at EQ_FUL_1197. However, despite the fact that defendants have objected to and still have not

produced any discovery of the actual policy language or defendants' course of dealing with their insurers, *see* Sandals Affidavit ¶ 23, other documents produced by defendants establish that the Group Policy with Equitable did in fact terminate and was replaced by a group policy issued by The Hartford – without any impact on the retirees' life insurance benefits. *See* Sandals Affidavit, Ex. A (excerpted pages from Embarq's 2006 Retiree Benefits SPD).

Plaintiffs Controvert Defendants' ¶¶ 10, 19-20, 24

13. Defendants attach the employee Group Insurance Plan, Def. Ex. 10, and the bargaining employee life insurance SPD, Def. Ex. 11, and assert that these employee SPDs govern retiree life insurance benefits for CT&T retirees Dorman, Joyner, Fulghum, Daniel, and Barnes, Def. Mem. at ¶¶ 19-20, 24. However, these plaintiffs did not retire under the plans produced by defendants. As alleged in the Second Amended Complaint and made clear through the accompanying Declaration of plaintiff Willie Dorman and company documents, these plaintiffs retired with life insurance benefits under the "Grand-fathered" CT&T Life Insurance Plan, which has not been produced by defendants. *See* AC ¶¶ 68-70; Declaration of Willie Dorman at ¶¶ 7-8, 13-14, 31-34 & Exs. 1 & 2 thereto; Sandals Affidavit, Ex. B (memo titled "Sprint Retiree Life Insurance" including description of "Grandfathered Basic Coverage" provided to retirees of IBW and CWA unions).

14. As further evidence that defendants have not produced the correct SPD, the life insurance benefits described in Defendants' Group Insurance Plan and bargaining employee life insurance plan, Def. Exs. 10 & 11, also do not match up with the life insurance benefits these plaintiffs received. As alleged in the Second Amended Complaint and shown through plaintiffs' records, CT&T retirees received both a VEBA death benefit equal to twelve months of annual wages, and a "Grand-fathered Life Insurance" benefit in the amount of two times their annual

salary (rounded down to the nearest $1,000) in force during the first five years of retirement, reduced to one times annual salary after the fifth year. *See* AC at ¶¶ 66-69; Dorman Decl. at ¶¶ 7-13 and Ex. 2 thereto.

15. The Group Life Insurance Policy presented as Def. Ex. 10 also provides a cap of $13,000 or $25,000 of life insurance, depending on years of service at retirement, and makes no reference to the schedule of benefits received by these plaintiffs. Similarly, the bargaining employee life insurance SPD calculates retiree life insurance by an entirely different formula than the amount actually provided to plaintiff Barnes. *See* Def. Ex. 11 at EQ_FUL_1270. Accordingly, defendants have not produced the life insurance SPD for any of the plaintiffs who retired from CT&T. In Barnes' case, defendants also have not produced the relevant CBAs. The incomplete and incorrect documentary showing by defendants is one ground to deny their motion for summary judgment.[4]

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[4] **Plaintiffs Controvert Defendants' ¶ 10**: As discussed in plaintiffs' Rule 56(f) motion and supporting memorandum, defendants' motion for summary judgment is not ripe because not all of the relevant SPDs have been produced. In addition to the deficient production and showing as to CT&T retirees, defendants have ignored the fact that there are many other retirees whose medical and life insurance benefits were provided by plans other than the limited number presented as exhibits to defendants' motion. Because defendants uniformly terminated or reduced the benefits for all of its retirees, the named plaintiffs have standing to represent all retirees, even if they did not personally participate in each of the ERISA-governed plans affected by defendants' unlawful reductions and terminations. *See Fallick v. Nationwide Mut. Ins. Co.,* 162 F.3d 410, 422-24 (6th Cir. 1998) ("an individual in one ERISA benefit plan can represent a class of participants in numerous plans other than his own, if the gravamen of the plaintiff's challenge is to the general practices which affect all of the plans"), *citing Forbush v. J.C. Penney Co., Inc.,* 994 F.2d 1101, 1106 (5th Cir. 1993); *see also Davis v. Bailey,* No. 05-00042, 2005 U.S. Dist. LEXIS 38204 at *5-7 (D.Colo. Dec. 22, 2005) (adopting *Fallick*).

Out of an abundance of caution, plaintiffs are moving contemporaneously to amend the Second Amended Complaint to designate several existing plaintiffs as additional proposed class representatives. The amendment serves as an additional basis to reject defendants' assertion that they have presented all relevant plan documents. The additional proposed class rerpresentative include former employees who retired in the 1970s and 1980s, and whose ERISA rights are governed by documents that defendants have not presented. Until defendants produce and present those documents (as well as others noted for the currently designated class

16. In any event, the Group Insurance Plan (Def. Ex. 10) sets forth four separate *active* employee life insurance plans, none of which describes the Grand-fathered Life Insurance applicable to retirees of CT&T. Moreover, the Group Life Insurance Plan section that defendants cite does not contain any reservation of rights language. *See* Def. Ex. 10 at EQ_FUL_1210-19. Indeed, the Group Life Insurance Plan indicates that the Contributory Life insurance is a lifetime benefit. *See id.* at EQ_FUL_1212 (limiting termination to events other than retirement, and stating, without any reservation of rights language, that "When you retire, your Contributory Life insurance *will be* 50 percent of the amount you had before you retired, but may not exceed $25,000" (emphasis supplied). The only reservation of rights language defendants cite in the document is found following the Dependents Life Insurance Plan, some 40 pages and three other plans after the section describing the Group Life Insurance Plan. In addition, this language is not cross-referenced in the Group Life Insurance Plan and the reservation of rights language itself does not state that it applies to the Group Life Insurance Plan. Similarly, the bargaining employee life insurance SPD (Def. Ex. 11) does not contain reservation of rights language, stating only that for employees, the "Group Policy" (but not the plan) will end when the "Group Policy" terminates, but not indicating that the life insurance benefits and plan will end at that time. Like the Group Contributory and Non-Contributory Life Insurance Plan for Non-Bargaining Employees (Def. Ex. 9), in Def. Ex. 11 the life insurance ends on "the date your employment as a member of the Eligible Group ends," so some other insurance must take over because retirees clearly ended their employment but continued to have life insurance benefits. Def. Ex. 11 at EQ_FUL_1269.

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representatives) and the parties present appropriate argument thereon, there is no record on which to make any summary judgment determination. Concern about defendants' failure to produce all relevant plans was cited by Chief Judge Vratil in the course of denying defendants' motion to dismiss the ERISA claims for benefits. Op. at 13 n. 9, 15.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

The rules of decision governing defendants' motion for partial summary judgment are familiar ones. These standards were recently summarized by the Court in *Continental Western Ins. Co. v. Ard*, No. 07-1201, 2009 U.S. Dist. LEXIS 13921 (D. Kan. Feb. 23, 2009).

Summary judgment is appropriate only "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). A court's role is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The party seeking summary judgment bears the burden to demonstrate the "absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).

A court must view all of the evidence and any factual inferences in the light most favorable to plaintiffs as the non-movant. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986); *Mickelson v. New York Life Ins. Co.,* 460 F.3d 1304, 1310 (10th Cir. 2006) ("We view the evidence, and draw reasonable inferences therefrom, in the light most favorable to the nonmoving party"). The court "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves v. Sanderson Plumbing Prod., Inc.,* 530 U.S. 133, 151 (2000). The court should only give credence to the nonmovant's favorable evidence and evidence of the movant which is uncontradicted, unimpeached and "comes from disinterested witnesses." *Id.*

II. DEFENDANTS' PRE-DISCOVERY MOTION FOR PARTIAL SUMMARY JUDGMENT IS PROCEDURALLY IMPROPER.

Defendants have moved for partial summary judgment before any meaningful discovery has commenced, in direct contravention to Magistrate Judge O'Hara's Scheduling Order refusing to effectively suspend progress in the case while a motion for partial summary judgment was briefed and decided. The Order requires defendants to proceed with their discovery obligations. *See* Doc. 59 at 5-6. To date, more than 15 months after commencement of this case, defendants have made only a minimal document production. *See* Sandals Affidavit at ¶ 8.

Compounding defendants' failure to proceed as directed in the Scheduling Order, defendants present an incomplete and often incorrect set of exhibits at the same time that they erroneously assert that the terms of these SPDs and plans unambiguously provide the right to terminate plaintiffs' retiree medical and life insurance benefits. Def. Mem. at 11. However, if the Court determines that the language is ambiguous, extrinsic evidence must be considered, including, "interpretive statements made by [the employer], past practices, customary usage in the trade, and other competent evidence bearing on the understanding of the parties," and summary judgment must be denied. *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1515, 1519, n.12 (10th Cir. 1996) ("when conflicting extrinsic evidence must be evaluated in order to illuminate a plan's terms, summary judgment is not appropriate"); *May v. Interstate Moving & Storage Co.*, 739 F.2d 521, 523 (10th Cir. 1984). *See also* Op. at 15 ("Plaintiffs point to plan language which indicates that coverage will continue until the employee either dies or fails to pay his or her share of the cost. This potentially conflicting language may render the plans ambiguous, in which case the Court can consider extrinsic evidence"), *citing, DeBoard v. Sunshine Min. & Refining Co.*, 208 F.3d 1228, 1240-41 (10th Cir. 2000).

Since defendants have filed their motion before they have produced correct plan-related documents or any extrinsic evidence of their course of dealing under the plans, plaintiffs are not currently able to present such evidence in opposition to the motion and it should be denied or continued under Fed. R. Civ. P. 56(f). If the Court were to reach the merits, the retiree medical and life insurance plans at issue are ambiguous and summary judgment must be denied. *See Haymond v. Eighth Dist. Elec. Benefit Fund*, 36 Fed. Appx. 369, 373-74 (10th Cir. 2002) (finding ambiguity in plan's terms and reversing summary judgment for defendant); *Miller v. Monumental Life Ins. Co.,* 502 F.3d 1245, 1252-53 (10th Cir. 2007) (reversing summary judgment, court found plan terms to be ambiguous, and because fully developed record contained no extrinsic evidence of the parties' understanding of the terms, applied doctrine of *contra proferentem* – construing all ambiguities against drafter-defendants – in remanding for judgment for plaintiff); *Blair v. Metropolitan Life Ins. Co.,* 974 F.2d 1219, 1222 (10th Cir. 1992) (resolving ambiguity in favor of participant "is consistent with basic trust principles that protect, in a case like this, the interests of the beneficiary-employee").

To the extent they even pertain to plaintiffs' retiree benefits, defendants' plan-related documents are, at a minimum, reasonably susceptible to the interpretation that plaintiffs' retiree medical and life insurance benefits will not end until "you die" and are vested, so the documents are amiguous. Plaintiffs are entitled to discover and present extrinsic evidence to show that "a reasonable person in the position of [a plan] participant could find the language in the SPD" to provide secure benefits for life. *See Chiles*, 95 F.3d at 1517.

III. THE MOTION FOR SUMMARY JUDGMENT ON THE FIRST CLAIM IGNORES THE PROTECTIVE PROVISIONS OF ERISA REPEATEDLY EMPHASIZED BY THE TENTH CIRCUIT AND THIS COURT.

Defendants' arguments seeking summary judgment on plaintiffs' First Claim ignore cardinal principles of ERISA and fail to adequately address the law of the Tenth Circuit, which

has repeatedly emphasized ERISA's strongly protective purposes and the obligation of employers to make accurate, complete and understandable disclosures about rights to benefits.

In this case, defendants' own exhibits confirm plaintiffs' allegations that the employers expressly and continuously promised that the subject benefits would be provided to a retiree for life – until "you die." Given these express statements of permanent benefits, at best for defendants the documents are ambiguous on the question whether the employer could change or terminate the benefits before the death of the retiree.

A. ERISA Imposes Strict Measures to Ensure that Plan Participants Receive Accurate and Understandable Information About their Benefits.

After decades of state law regulation during which working men and women were repeatedly deprived of promised retirement benefits, Congress imposed stringent duties on employers and other ERISA fiduciaries. "It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b).

Accurate and understandable disclosure of benefits rights is a central objective of ERISA. "Congress' purpose in enacting the ERISA disclosure provisions [was to] ensur[e] that 'the individual participant knows exactly where he stands with respect to the plan.'" *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 118 (1989), *quoting* H.R. Rep. No. 93-533, 93rd Cong., 1st Sess. 11 (1973). ERISA requires distribution of plan summaries "in order that every employee may, *on examining the plan documents*, determine exactly what his rights and obligations are under the plan." *Curtiss-Wright Corp. v. Schoonejongen,* 514 U.S. 73, 83 (1995),

quoting with emphasis H.R. Rep. No. 93-1280, 93rd Cong., 2d Sess. 297 (1974); *see also Member Services Life Ins. Co. v. Am. Nat'l Bank & Trust Co.*, 130 F.3d 950, 956 (10th Cir. 1997). The statute thereby implements "the important policy of protecting beneficiaries from misleading or false information contained in a summary plan description." *Charter Canyon Treatment Center v. Pool Co.*, 153 F.3d 1132, 1136 (10th Cir. 1998); *accord*: *Shields v. Continental Cas. Co.*, 209 F. Supp. 2d 1167, 1178 (D. Kan. 2002).

To achieve these protections, ERISA requires plan administrators to furnish to participants and beneficiaries a summary plan description ("SPD") that is "written in a manner calculated to be understood by the average plan participant" and "sufficiently accurate and comprehensive to reasonably apprise [plan] participants and beneficiaries of their rights and obligations under the plan," including the "circumstances which may result in . . . denial or loss of benefits." ERISA § 102(a)-(b), 29 U.S.C. § 1022(a)-(b).

The Department of Labor regulation on these requirements, 29 C.F.R. § 2520.102-2 and 102-3, became effective on March 15, 1977. *See* 42 Fed. Reg. 14266. It requires plan administrators to "tak[e] into account such factors as the level of comprehension and education of typical participants in the plan and the complexity of the terms of the plan." 29 C.F.R. § 2520.102-2(a). The regulation prohibits SPDs that "have the effect of misleading, misinforming or failing to inform participants and beneficiaries. Any description of exceptions, limitations, reductions or restrictions of plan benefits shall not be minimized, rendered obscure, or otherwise made to appear unimportant." 29 C.F.R. § 2520.102-2(b). "The description or summary of restrictive plan provisions need not be disclosed in the summary plan description in close conjunction with the description or summary of the benefits, provided that adjacent to the benefit description the page on which the restrictions are described is noted." *Id.* Finally, SPDs must include a "statement clearly identifying circumstances which may result in disqualification,

ineligibility, or denial, loss, forfeiture, suspension, offset, reduction or recovery . . . of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits." 29 C.F.R. § 2520.102-3(*l*).

An employer thus "is obligated by the SPD to inform its employees" of any limitations on benefits. *Chiles*, 95 F.3d 1505, 1518 (10th Cir. 1996) (citing statute). This requirement is enforced by the courts. *See Burke v. Kodak Retirement Income Plan,* 336 F.3d 103, 111 (2d Cir. 2003) (reversing summary judgment for employer and ordering judgment for plaintiff due to employer's failure to include a cross-reference to requirement for benefit in section describing benefit, despite other separate references to requirement in SPD); *Schaum v. Honeywell Retiree Medical Plan Number 507,* No. 40-2290, 2006 U.S. Dist. LEXIS 88835 at *27-31 (March 31, 2006) (failure to satisfy statute by, *inter alia*, not providing reference to restriction on benefits in SPD section describing benefit, rendering restriction invalid); *Chisholm v. Plan Administrator of the Joint Indus. Bd. of the Electrical Industry Benefit Funds,* No. 03-1968, 2004 U.S. Dist. LEXIS 30175 at *12-14 (E.D. N.Y. Oct. 19, 2004) (finding that SPD failed to comply with requirements of ERISA because limitation on benefits not contained in section describing benefits and did not cross-reference limitation language found two pages later).

As discussed above in the Statement of Disputed Material Facts, the vague reservation of rights language cited by defendants did not appear in nor was it ever cross-referenced in the SPD sections which were entitled "When Coverage Ends" and which stated that benefits under the plans end only "when you die." *See, e.g.*, Def. Ex. 4 at EQ_FUL_108 (no reference to any limitation to lifetime promise contained in the "When Coverage Ends" section); Def. Ex. 7 at EQ_FUL_362 (no reference to reservation of right to terminate plan under "When Does Coverage End" section). Further, while the "When Coverage Ends" sections are contained in the table of contents of the SPDs, the vague language cited by defendants is not listed. *See, e.g.,*

Def. Ex. 4 at EQ_FUL_92-93; Def. Ex. 7 at EQ_FUL_322. *See Schaum,* 2006 U.S. Dist. LEXIS 88835 at *28 (finding that a reasonable person would likely be unaware of restriction due to, *inter alia,* the failure to include it in the SPD's table of contents. The terms of the SPDs must be considered "as a whole and not as fragments taken out of context." *Continental Western Ins. Co.*, 2009 U.S. Dist. LEXIS 13921 at * 7. By citing only the vague reservation language, defendants commit the error of ignoring the whole as well as the "common and ordinary meaning" of their express "when you die" language.

B. Tenth Circuit Law Requires That Employers and Plan Administrators Who Prepare Summary Plan Descriptions Bear the Consequences of Uncertainty Resulting from their Faulty Drafting.

These protective principles also govern interpretation of plan-related documents. "[T]he relative clarity of plan documents must be viewed against the special obligations that attach in the ERISA context." *Haymond v. Eighth Dist. Elec. Benefit Fund*, 36 Fed. Appx. 369, 372-73 (10th Cir. 2002) (referring to requirement of 29 U.S.C. § 1022(a) that SPDs be "written in a manner clearly calculated to be understood by the average plan participant"). *See also* Op. at 11 (same, citing *Haymond*). Plans and administrators have an "obligation to draft an SPD that is clear to participants." 36 Fed. Appx. at 373.

The Tenth Circuit in *Chiles* left no doubt that the consequences of loose, inaccurate or ambiguous drafting must be imposed on the employer (or plan administrator) who prepares the summary plan description, not on the employees:

> "Any burden of uncertainty created by careless or inaccurate drafting of the summary [plan description] must be placed on those who do the drafting, and who are most able to bear that burden, and not on the individual employee, who is powerless to affect the drafting of the summary or the policy and ill equipped to bear the financial hardship that might result from a misleading or confusing document. Accuracy is not a lot to ask.

Chiles, 95 F.3d at 1518 (emphasis added), *quoting Hansen v. Continental Ins. Co.*, 940 F.2d 971, 982 (5th Cir. 1991).[5] The employer "must bear the burden of uncertainty created by its carelessly drafted policy" and "the construction most favorable to the [participant] must prevail." *Steil*, 124 F. Supp. 2d at 662, 664. "Our court has never construed the ambiguities of an ERISA plan against a beneficiary" and so the doctrine of *contra proferentem* applies. *Miller v. Monumental Life Ins. Co.*, 502 F.3d 1245, 1254 (10th Cir. 2007). "Strictly construing ambiguous terms presents ERISA providers with a clear alternative: draft plans that reasonable people can understand or pay for ambiguity." *Id.* at 1255.

C. Defendants Are Not Entitled to Judgment on The First Claim for Relief.

A plan provision is ambiguous when it is "reasonably susceptible to more than one meaning, or where there is uncertainty as to the meaning of a term." *Stewart v. Adolph Coors Co.*, 217 F.3d 1285, 1290 (10th Cir. 2000); *see also Flinders v. Workforce Stabilization Plan of Phillips Petroleum Co.*, 491 F.3d 1180, 1193 (10th Cir. 2007) (ambiguity found where provision is "susceptible to more than one reasonable interpretation"), *citing Hickman v. GEM Ins. Co.*, 299 F.3d 1208, 1212 (10th Cir. 2002). In determining whether a plan term can reasonably be interpreted multiple ways, "the proper inquiry is not what [the drafter] intended a term to signify, [but] rather," the language must be given its "common and ordinary meaning as a reasonable person *in the position of the [plan] participant* . . . would have understood the words to mean.'" *Miller v. Monumental Life Ins. Co.*, 502 F.3d 1245, 1249 (10th Cir. 2007) (emphasis added),

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[5] *Chiles* cited empirical research – published before the issuance of any of defendants' SPD exhibits – showing "how employees reading SPDs can be misled as to their contractual rights." *Chiles*, 95 F.3d at 1519, *citing* James F. Stratman, "Contract Disclaimers in ERISA Summary Plan Documents: A Deceptive Practice?," 10 *Indus. Rel. L. J.* 350 (1988). In this case, plaintiffs present the analysis of Todd B. Hilsee, a communications expert whose work on standards and practices for clear and effective class action notices has been adopted by the Federal Judicial Center. Hilsee confirms that the language of the SPDs is at least ambiguous. *See* Hilsee Affidavit.

quoting Admin Comm. of Wal-Mart Assocs. Health & Welfare Plan v. Willard, 393 F.3d 1119, 1123 (10th Cir. 2004). The issue is not whether defendants' interpretation is reasonable, but whether there is more than one reasonable interpretation of the plan terms. *Miller,* 502 F.3d at 1252.

In its recent controlling decision on this point, *Kellogg v. Metropolitan Life Ins. Co.,* 549 F.3d 818, 830 (10th Cir. 2008), the Tenth Circuit ruled that the protective principles governing construction of insurance contracts "apply equally to ERISA cases governed by federal common law," which "from pre-Erie diversity cases to present day ERISA cases – focuses upon the expectation and intentions of the insured." (citation omitted) In viewing the ERISA plan as an ordinary participant would, "'[i]nsurance contract language is ambiguous if it is reasonably susceptible of different interpretations *or* if an ordinary person in the shoes of the insured would not understand that the policy did not cover claims such as those brought.'" *Id.* at 830 n. 3 (emphasis added) (citation omitted). Accordingly, an insurer "should be expected to set forth any limitations on its liability clearly enough for a common layperson to understand." If it fails to do so, "it should not be permitted to take advantage of the very ambiguities that it could have prevented." *Id.* at 1254 (citation omitted). *See also Continental Western Ins. Co.*, 2009 U.S. Dist. LEXIS 13921 at * 7 (quoting Kansas caselaw: "To restrict or limit coverage, an insurer must use clear and unambiguous language.").

Importantly, courts in the Tenth Circuit look beyond the four corners of the SPD to determine whether plan terms are ambiguous. In *Miller,* the plan at issue required a Social Security Disability Award be granted before qualifying for benefits. *Id.* at 1248. The district court found that this requirement was unambiguous. Because the term had a technical meaning that required the applicant to have been awarded a disability award under Title II of the Social Security Act, and since the plaintiff had been denied an award under Title II, he could not

receive benefits under the Plan. *Id.* The Tenth Circuit reversed, holding that although the term "Social Security Disability Award" had a technical meaning, and the employer included that term to assure that participants in the plan were in fact disabled, the question for the court's determination was what "a reasonable person in [the applicant's] position would have believed" the term to mean. *Id.* at 1250. This required the court not simply to rely on common definitions of the terms, but also to examine the facts of the case and the regulations governing various Social Security disability programs, and to determine the reasoning behind the Social Security Disability Award requirement and whether a reasonable person would expect that another form of disability determination would satisfy the requirement. Since the plaintiff was granted supplemental security income under Title XVI of the Social Security Act based on disability, the court found that the plaintiff "could have reasonably expected that the Title XVI award would have satisfied the Social Security Award prescription." *Id.* at 1251. In its opinion, the court made clear that determining whether a plan term is ambiguous is a question that required consideration of facts and information outside of the document itself. "In order to make this determination [whether plaintiffs' Title XVI award and finding of disability by the ALJ was sufficient], we look . . . to this particular plan's language and the SSA's determinations regarding [plaintiff's] condition." *Id.* at 1252. *See also Blair v. Metropolitan Life Ins. Co.*, 974 F.2d 1219, 1221-22 (10th Cir. 1992) (in determining that the plan term at issue was ambiguous, the court considered, *inter alia,* expert testimony); *Hickman v. GEM Ins. Co., Inc.*, 299 F.3d 1208, 1212 (10th Cir. 2002)(expert testimony considered before ruling term not ambiguous); *Stewart v. Adolph Coors Co.*, 217 F.3d 1285, 1290 (10th Cir. 2000) (evidence of how company administered recall rights considered in determining form ambiguous); *Bock v. Computer Assocs. Int'l, Inc.*, 257 F.3d 700, 707-09 & n. 1 (7th Cir. 2001) (objective evidence such as summaries of benefits admissible to establish ambiguity).

D. The SPDs and Plans Are Ambiguous and Reasonably Interpreted to Provide Lifetime Benefits.

Defendants' SPDs, even though incomplete and incorrect in some instances, confirm that "a reasonable person in the position of [a plan] participant could find the language in the SPD" to provide secure benefits for life. *See Chiles*, 95 F.3d at 1517. Under Tenth Circuit law, it is only necessary to show that "a promise to provide vested benefits '[was] incorporated, in some fashion, into the formal written ERISA plan.'" *Chiles*, 95 F.3d at 1511, *quoting Jensen v. SIPCO, Inc.*, 38 F.3d 945, 949 (8th Cir. 1994). Unlike other circuits, the Tenth Circuit has expressly declined to adopt "a hard and fast rule finding a general reservation of rights clause unambiguously controlling any promise located in another part of an ERISA document." *Id*. at 1512. These Tenth Circuit principles governing the plaintiff's burden of proof operate hand-in-hand with the protective rules governing plan interpretation that are summarized in Subsection A above.

As concluded by communications expert Todd Hilsee in his accompanying affidavit, the SPDs in this case expressly promise that benefits will continue until the death of the retiree. Under Tenth Circuit law, it also is clear that the SPDs are at least ambiguous. This case most closely resembles two Tenth Circuit decisions decided in favor of the participants. The SPD language here, promising benefits that would end "when you die" or on "the date of your death" is sufficient to "clearly indicate[ ] an intent on the part of [the employer] to provide plaintiffs with lifetime health [and life] insurance benefits." *DeBoard v. Sunshine Min. & Refining Co.*, 208 F.3d 1228, 1238 (10th Cir. 2000). *DeBoard* held that the employer's informational letters to induce employees to accept a special early retirement program, which promised a health plan "fully paid for at [employer] expense until the time of your death," constituted enforceable plans with vested benefits. "[T]he language of the letters clearly indicates an intent on the part of [the

employer] to provide plaintiffs with lifetime health insurance benefits." *Id*. at 1233, 1239, 1241. Also significant is the fact that *DeBoard* establishes an alternative decisional framework for claims to benefits based on participation in special early retirement programs. *Id*. at 1241. Although plaintiffs allege that several plaintiffs and members of the proposed class secured their benefits through participation in these programs (AC ¶ 97), defendants ignore this additional basis for relief and have neither produced in discovery nor presented documents relating to the Special Early Retirement Programs under which these named plaintiffs retired.

In the second Tenth Circuit decision that is closest to this case, *Haymond*, the court considered a claim for health benefits and reversed summary judgment for the plan. The court concluded that, "In light of the Fund's obligation to draft an SPD that is clear to participants" the limitations provisions in the SPD were "clouded by at least two ambiguities." 36 Fed. Appx. at 373. The first ambiguity was "a flat contradiction between the two provisions" in issue. "[T]he provisions appear in different sections of the SPD without cross-referencing one another or providing any suggestion of how they might properly be read together." *Id*. Although the district court attempted to "harmonize" these conflicting provisions, the Tenth Circuit ruled that "this approach places on the participant the burden of harmonizing apparently unrelated and conflicting provisions, thus contradicting ERISA's mandate that the SPD be clear to the layperson. See 29 U.S.C. § 1022." *Id.* Invoking *Chiles*, the court ruled that "an employee should not be required to adopt the skills of a lawyer." *Id., quoting Chiles*, 95 F. 3d at 1517-18. The court concluded that the plan was not entitled to judgment, but instead "must bear the consequences of this inaccuracy":

> In short, the provisions of the SPD are at best ambiguous regarding the applicable limitations period. . . . The Fund has failed in its duty to provide this critical information to participants in a clearly understandable manner. As the drafter of the SPD, the Fund must bear the consequences of this inaccuracy.

Haymond, 36 Fed. Appx. at 374. At best for defendants, the specific and express language that benefits will continue until "you die" is in conflict with the vague language reserving the right to change or terminate benefits in undefined circumstances for undefined persons.

This case also is indistinguishable from one decided by the Eighth Circuit and frequently followed by the Tenth Circuit, *Jensen v. SIPCO, Inc.*, 38 F.3d 945 (8th Cir. 1994), which held that retiree medical benefits were vested. The evidence in *Jensen* included a generic reservation of rights clause, much like the ones invoked by defendants. The clause, set out in bold type in the SPD, stated vaguely that the employer "reserves the right to terminate, discontinue, alter, modify, or change this plan or any provision of this plan at any time." *Jensen*, 38 F.3d at 948. However, the section of the SPD with the heading "Termination of Coverage" stated that the medical coverage would terminate for dependents 90 days following the date of death of the retiree; for dependent children on the date of attaining age 19 or marriage; and for spouses on the date of divorce. *Id*. at 949.

After trial, the district court concluded that the plan provided vested medical benefits for the retirees. This ruling was affirmed on the ground that the "Termination of Coverage" provisions constituted "an ambiguous expression of an intent to vest retiree benefits." *Jensen*, 38 F.3d at 950. Although the employer cited the provision generally reserving its power to amend or terminate provisions of the plan, the Eighth Circuit ruled that this was insufficient:

> SIPCO relies exclusively on the Plan provisions permitting it to amend or terminate "any of the provisions of this Pensioner Medical Plan." SIPCO argues that this is an unambiguous declaration that retiree benefits are not vested. We agree that a reservation-of-rights provision is inconsistent with, and in most cases would defeat, a claim of vested benefits. But the question at this stage of the analysis is whether these provisions are so unambiguous as to make unnecessary any reference to other Plan provisions and extrinsic evidence. We think not. In the first place, the reservation-of-rights provisions are not facially unambiguous – they leave at least some doubt as to whether SIPCO intended to reserve the right to change or terminate benefits to already retired pensioners, or only the right to make prospective changes for those covered by the Plan but not yet retired. In the

> second place, "[t]he power to modify [a trust] may be relinquished by the settlor." Bogert, The Law of Trusts & Trustees § 993, at p. 232. Whether a power has been relinquished obviously requires examination of extrinsic evidence, which the district court properly undertook.

Jensen, 38 F.3d at 950 (citation omitted; emphasis added).

E. Analysis of the Language of Defendants' SPDs Establishes that Summary Judgment Cannot be Granted.

As noted, the failure of all the SPDs presented by defendants to cross-reference defendants' alleged reservation of rights in connection with their express terms that the retiree medical and life insurance benefits will continue until death or failure to pay any premiums, is a violation of 29 C.F.R. § 2520.102-2(b). In addition, specific promises in SPDs that benefits end only on death must control over any vague, ambiguous references to a general right to amend. "[S]pecific and exact terms are given greater weight than general language." *Chiles*, 95 F.3d at 1513, *quoting Restatement (Second) of Contracts* § 203(c); *see also Steil v. Humana Kansas City, Inc.*, 124 F. Supp. 2d 660, 663-64 (D. Kan. 2000). The phrase "when you die" is equivalent to "for life" or "until death." These terms signify lifetime benefits. *See, e.g., Aguilar v. Basin Resources, Inc.*, 47 Fed. Appx. 872, 876 (10th Cir. 2002). Given the conflicting language between the specific "When Coverage Ends" and the general reservation of rights language cited by defendants, *see* SOF ¶¶ 4-6, 8-9, Def. Exs. 4, 6, & 7, a reasonable plan participant could understand that while the plan benefits will remain in effect for current retirees until death, the plan could be changed or terminated for active employees before they retire, or that specific terms for coverages, medical procedures or providers under the medical plan could be changed but not that the entire plan could be terminated. *See* Hilsee Affidavit at ¶¶ 18-23, 27-29. *See*

also Op. at 15 (Chief Judge Vratil's determination, in denying motion to dismiss Count One, that the conflicting language "may render the plans ambiguous").[6]

In addition, as discussed in SOF ¶ 5, these SPDs contain express assurances of life-long retirement security under a section titled "Answering Your Needs." The section states that the retirees who participate in the retiree medical plan "can feel secure that your family's health and well-being will be protected after you stop working". *See, e.g.,* Def. Ex. 4 at EQ_FUL_95. At best for defendants, this language, in conjunction with the specific promise of retiree medical and life insurance benefits until death and the vague references to a general right to amend or terminate cited by defendants, renders the plan ambiguous on vesting. *See* Hilsee Aff. at ¶ 29(b) ("Answering Your Needs" section "provides assurance to the reader that the benefits are secure for retired participants").

The SPD proffered by defendants as the one governing former union employee Barnes' retiree medical benefits also is ambiguous. As discussed above in SOF ¶ 7, the SPD presents text applicable to currently active union employees. As to retirees, the SPD notes only that union employees who retire under the company's pension plan are also included in the schedule of benefits and that the retiree should "ask your Employer" about additional information regarding those benefits. Def. Ex. 8 at EQ_FUL_ 1156 & 1184. Significantly, the case law establishes that the relevant CBAs must also be examined to determine whether retiree benefits vest for retired union employees. *See Flinders,* 491 F.3d at 1193-94 (review plan document and CBA to determine ambiguity); *Chiles,* 95 F.3d at 1514 (discussing review of CBA and *citing Armistead*

[6] A document that defendants happened to produce on April 2, 2009 reveals defendants' own recognition that they had informed retirees that they had lifetime benefits. Defendants prepared a Q&A for use in answering the telephone calls that Embarq expected to receive after its July 2007 announcement of the reductions and eliminations of the retiree medical and life insurance benefits. One question anticipated by the company was that, "I [the retiree] have a letter that states I will receive medical and life insurance benefits for life." Exhibit C to Sandals Affidavit.

v. Vernitron Corp., 944 F.2d 1287, 1295-96 (6th Cir. 1996), which held that promise to provide retirement benefits under CBA would be "illusory" if employer had right to terminate unilaterally); *Int'l Assoc. of Machinists and Aerospace Workers v. Masonite Corp.*, 122 F.3d 228, 233-34 (5th Cir. 1997) (reservation of rights in plan document does not empower company to terminate retirees' health insurance where CBA contained no such clause; in light of CBA language, extrinsic evidence ordered to determine parties' intent). The Sixth Circuit found that where participation in the employer's retiree group medical insurance plan was expressly tied to participation in the company's pension plan – as the terms of defendants' SPD (Def. Ex. 8) states – retirees' medical benefits are vested because the pension plan benefits are vested. *Yolton v. El Paso Tennessee Pipeline Co.*, 435 F.3d 571, 580 (6th Cir. 2006). Defendants have not produced the relevant CBA for plaintiff Barnes or any other retiree, and for this reason alone, the Court should deny summary judgment regarding the rights of former unionized employees.

Furthermore, the purported reservation of rights language contained in the SPD for union employees (Def. Ex. 8) limits defendants' right to amend or terminate the plan only on occasion of "business necessity or financial hardship," indicating to the reasonable plan participant that the plan will only terminate if the company is in bankruptcy or other severe financial position. *See, e.g., Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90, 93-94 (3d Cir 1992) (finding reservation of rights ambiguous where clause conditioned on certain events or circumstances). However, the records of the companies' actions to end the benefits contain no evidence that this limiting condition was satisfied and defendants present no such evidence here. *See* SOF ¶ 7 above. Accordingly, there is no basis to conclude that the CT&T bargaining employees' group

medical insurance plan unambiguously reserves defendants' rights to terminate plaintiff Barnes' retiree medical benefits or that any such right was properly exercised.[7]

Turning to the retiree life insurance, and putting aside the fact that defendants have not produced the life insurance SPDs for CT&T retirees and therefore have not made an adequate threshold showing to support summary judgment as to these claims, the SPDs defendants did produce are ambiguous for multiple reasons. First, like the medical benefits SPD for plaintiff Barnes, all of the life insurance SPDs other than the Sprint Retiree Benefits SPD, Def. Ex. 7 discussed above, pertain to *current employee* life insurance, not retiree life insurance, *see* SOF ¶¶ 10, 16, and therefore "are not effective in communicating information about whether the *retiree* Plans can be changed or terminated." Hilsee Aff. at ¶ 31. *See also Rose v. Volvo Const. Equip. N.A., Inc.*, 542 F. Supp.2d 751, 766 (N.D. Ohio 2008) (terms in life insurance plan for current employees not specific enough to reserve employer's right to amend or terminate retirees' life insurance).

Second, like the retiree medical SPDs and the retiree SPD for both retiree medical and life insurance (Def. Exs. 4, 6 & 7) discussed above, the language cited by defendants is not cross-referenced with the description of the life insurance benefit. *See, e.g.,* Def. Ex. 10 at EQ_FUL_1210-19 & 1261 (no reservation of rights in description of benefit; cited, generic reservation of rights language found 40 pages after Group Life Insurance Plan; generic language does not expressly state it applies to the retiree group life plan).

Third, the language cited by defendants in the Florida non-bargaining SPD (Def. Ex. 9) and the active bargaining employee SPD (Def. Ex. 11) states only that the insurance ends when "the Group Policy ceases." This language is ambiguous because the provision only defines the

[7] The Group Contributory and Non-Contributory Life Insurance Plan for Non-Bargaining Employees of United Telephone of Florida SPD (Def. Ex. 9) contains identical language.

insurer's separate contractual obligation to the plan sponsor under the insurance policy. Accordingly, the stated right to terminate the group policy can be reasonably read as the right to end the policy with one insurance carrier and obtain the insurance through another. *See* Hilsee Aff. at ¶ 32; *DeBoard,* 208 F.3d at 1240-41 & n. 6 (upholding district court conclusion that section of SPD stating that plan "is intended to continue" but the policy "can be changed or terminated" did not state that plan sponsor could terminate plan and was "muddy and baffling"); *Karl v. Asarco Inc.,* No. 02-5565, 2004 U.S. Dist. LEXIS 25956 at *13-14 (S.D.N.Y Dec. 22, 2004) (finding nearly identical language ambiguous, and holding that "it does not unconditionally reserve the defendants' right to unilaterally terminate the plan").[8]

Finally, the SPDs contain conflicting vesting language, including statements – with no reference to reservation of rights language – that retiree life insurance benefits will end only "when you die" and "will be payable" and "will be paid" at a level dependent upon the years of service before retirement. *See* Def. Ex. 9 at EQ_FUL_1195; Def. Ex. 10 at EQ_FUL_1211. Terms of this kind indicate vesting. *See Devlin v. Empire Blue Cross and Blue Shield,* 274 F.3d 76, 84 (2d Cir. 2001) (terms stating employees who retire after age 55 with 20 years of service 'will be insured' "can be reasonably read as promising . . . lifetime life insurance benefits upon performance").

F. None of Defendants' Cited Cases Supports Granting Summary Judgment.

[8] As noted in SOF ¶ 12, the public record confirms this understanding because the Group Policy did in fact cease and was replaced by another policy during the retirees' retirement, without any impact on their life insurance benefits. *See* Sandals Aff. Ex. A. Further, the SPDs, which were written for active employees, indicate that insurance ends when "you leave our employ," but a reasonable plan participant would conclude that this does not govern the *retiree* life insurance because, by definition, retirees have left employment but receive the retiree life insurance. *See* SOF ¶ 10, Hillsee Aff. ¶ 31 ("the fact that benefits continue under a retiree Plan despite the person's employment having ended, disconnects the active employee SPD from the retiree benefits. In other words, a reasonable reader would recognize that one Plan (described by the active employee SPD) would end (because he/she is told the insurance ends when employment ends), but that a separate Plan of retiree benefits would then begin").

Just as defendants' incomplete and incorrect documentary record does not provide a factual basis for summary judgment, defendants' cited decisions do not support their legal conclusions.

Although they rely on *Chiles*, defendants fail to acknowledge a key factual distinction present in that case. In *Chiles*, the very provision that the plaintiffs cited as the basis for vesting of premium levels for disability insurance also contained an express provision that the coverage could be terminated, and in that event benefits would continue only for those who then were qualified to receive disability benefits. As summarized by the Tenth Circuit, this termination proviso showed that the employer had reserved the right to make other types of changes to the benefits of disabled participants. "By explicitly listing a qualification to the [employer's] ability to change the LTD plan, it is proper to infer that the right to make other changes to disabled participants' benefits was reserved." *Chiles*, 95 F.3d 1512. The court also noted other evidence showing the employer did not intend to vest the benefits. Id. at 1513 n. 3. Further, unlike retirement, disability is not necessarily a permanent condition. Therefore, descriptions of disability benefits often do not support claims of vesting. In this case, the SPD sections that inform participants "When Coverage Ends" contain no reservation language.

Defendants are also misguided in their heavy reliance on *Welch v. UNUM Life Ins. Co. of Am.*, 382 F.3d 1078 (10th Cir. 2004), another disability benefits case. Defendants argue that the language here promising lifetime retiree medical and life insurance benefits (i.e., coverage ends "when you die") is identical to language that was found insufficient to vest disability benefits in *Welch*. (Def. Mem. at 18-19). *Welch* reversed a summary judgment for the plaintiff based solely on her argument that an amendment terminated the plan and triggered a vesting provision. *Id.* at 1082-84. On appeal, the court ruled that the plan had not terminated, so it did not reach the question whether the termination provision was sufficient to vest benefits. *Id.* at 1085. The

plaintiff alternatively argued that disability benefits vested either at the end of a waiting period or on the date of disability. *Id.* But as in *Chiles*, plan language expressly identified plan termination as a vesting trigger, so other unexpressed vesting conditions could not be inferred. *Id.* at 1086.[9] Defendants' loose comparison of the SPD language in this case to the language in *Welch* therefore is unfounded. The SPDs here clearly and expressly state, in the section entitled "When Coverage Ends," that coverage only terminates upon death or failure to pay premiums. In contrast, the SPD in *Welch* expressly stated that the disability benefits would vest if and only if a plan termination occurred.

In addition, none of defendants' other cited decisions can support a conclusion that the claims in this case can be decided on summary judgment. *See Alday v. Container Corp. of Am.*, 906 F.2d 660, 665 (11th Cir. 1990) (no argument by plaintiff "that the language of the SPD is ambiguous"); *Am. Fed'n of Grain Millers v. Int'l Multifoods Corp.*, 116 F.3d 976, 982 (2d Cir. 1997) (SPD statements that company would pay cost but not referring to duration of benefits "could not reasonably be interpreted as promising vested benefits"); *Chastain v. AT&T,* No. 04-0281-F, 2007 U.S. Dist. LEXIS 83038 (W.D. Okla. Nov. 8, 2007) (plaintiffs lacked standing to sue AT&T after benefit obligations transferred to Lucent; plaintiffs did not argue that language in plan documents was ambiguous), *aff'd on standing grounds only*, 2009 U.S. App. LEXIS 5268 (10th Cir. March 9, 2009); *Frahm v. Equitable Life Assurance Soc'y of the United States*, No. 93-0081, 1997 WL 15932 at *12 (N.D. Ill. March 25, 1997), and 137 F.3d 955, 957 (7th Cir. 1998) (SPDs contained no provisions promising lifetime benefits; summary judgment decision on plan provisions not appealed; bench trial on fiduciary misrepresentation claim); *Hollingshead*

[9] The court in *Welch* remanded on the question whether a plan amendment which ended plaintiffs' disability benefits was ambiguous. *Id*. at 1086 & n. 1. On remand, the district court found that provision ambiguous, considered extrinsic evidence and ordered judgment for the plaintiff, awarding unpaid benefits and future benefits to age 65. *Welch v. Unum Life. Ins. Co. of Am.,* No. 00-1439, 2007 U.S. Dist. LEXIS 91796 at *15, 20-39 (D. Kan. Dec. 13, 2007).

v. Blue Cross and Blue Shield of Okla., 216 Fed. App'x 797, 820 (10th Cir. 2007) (plan document language, not SPD, reviewed, reservation of rights and vesting of benefit not at issue); *Hughes v. 3M Retiree Med. Plan*, 281 F.3d 786, 792 (8th Cir. 2002) (plaintiffs "pointed to no vesting language" in relevant SPD); *Jones v. Am. Gen. Life & Accident Ins. Co.*, 370 F.3d 1065, 1068, 1070-71 (11th Cir. 2004) (coverage termination provision specifically referred to termination of policy; use of words "keep" and "continue" insufficient to raise vesting issue); *Kerber v. Qwest Pension Plan,* No. 05-00478, 2008 WL 4377562 (D. Colo. Sept. 19, 2008) (consideration of plan document language; alleged vesting terms used in conjunction with other unspecified provisions stating that benefits were not vested); *Moore v. Metro. Life Ins. Co.*, 856 F.2d 488, 491 (2d Cir. 1988) (no appeal from ruling that plaintiffs identified no language in SPDs to counter reservation clause); *Musto v. Am. Gen. Corp.*, 861 F.2d 8897 (6th Cir. 1988) (reversing preliminary injunction; extrinsic evidence of vested benefits considered); *Sengpiel v. B. F. Goodrich Co.*, 156 F.3d 660, 667-68 (6th Cir. 1998) (no language in SPDs expressed intention to vest); *Sprague v. General Motors Corp*, 133 F.3d 388, 401 (6th Cir. 1998) (decision after trial; following minority Sixth Circuit position that SPD language promising lifetime benefits was insufficient to create ambiguity).

IV. PLAINTIFFS' THIRD CLAIM FOR RELIEF CANNOT BE DISMISSED.

For the same reasons that plaintiffs' First Claim for Relief cannot be dismissed, their associated Third Claim for ERISA declaratory relief cannot be dismissed.

V. DEFENDANTS HAVE NOT MET THEIR BURDEN TO OBTAIN SUMMARY JUDGMENT ON THE FOURTH CAUSE OF ACTION UNDER THE ADEA.

A. Plaintiffs Have Alleged Disparate Impact Discrimination, Not Disparate-Treatment Discrimination.

Defendants argue that the elimination of life insurance benefits for VEBA participants and the "across the board" reduction of benefits for all other retirees did not violate the ADEA because they did not "discriminate against *any* retiree on the basis of age." (Def. Mem. at 23) This argument is marked by a fundamental error. Defendants have neither cited nor addressed the controlling case, *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005), which held that the ADEA prohibits practices that have an adverse impact on older workers and that are not justified by a reasonable factor other than age. The Supreme Court ruled in *Smith* that, unlike disparate-treatment claims, in disparate-impact claims "the allegedly 'otherwise prohibited' activity is not based on age." *Id.* at 239. The Court quoted *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n. 16 (1977), as stating "[C]laims that stress 'disparate impact' [by contrast] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another . . . ." *Id.*

Disparate-impact age claims turn on two types of evidence. First, plaintiffs have the burden to show the disparate impact of a particular decision or practice. *Smith*, 544 U.S. at 239-42; *Meacham v. Knolls Atomic Power Laboratory*, 128 S. Ct. 2395, 2405-06 (2008). Plaintiffs have produced evidence to support the common sense observation that it costs more to obtain life insurance as one ages, due to underwriting practices which tie the threshold availability and cost of coverage to attained age. Dorman Dec. at ¶¶ 21-24. Moreover, the decision to cancel retiree life insurance benefits necessarily has a greater adverse impact on older workers as compared to younger ones. Retirees are generally defined under the plans at issue as those 55 and older who meet a years-of-service requirement. *See* Def. Ex. 7 at EQ_FUL_0324. The impact of the

decision to cancel benefits therefore necessarily falls more harshly upon retirees based on their age.

Defendants have made no effort to show the absence of a triable issue of fact on this threshold issue and have produced no discovery regarding the demographic characteristics of the proposed ADEA class which would enable plaintiffs to present demographic statistics establishing this disparate impact. By way of preview, however, the median age of the 757 individual plaintiffs in Appendix A to the Second Amended Complaint is 72. Defendants' across-the-board reduction in existing life insurance benefits to $10,000 and termination of all benefits to VEBA participants caused harm to retirees in direct relation to their ages, as plaintiffs will eventually show once defendants have produced the necessary data.

The second type of evidence that can be dispositive in a disparate impact age case is evidence proving the contested action was justified by a reasonable factor other than age ("RFOA"). *Meacham*, 128 S. Ct. at 2401-02. Defendants here have made no effort to show a reasonable, non-discriminatory rationale for the reduction and/or cancellation of life insurance benefits, thus there is no basis for the grant of summary judgment on the ROFA affirmative defense.

Plaintiffs have alleged precisely the type of claim permitted by *Smith* and *Meacham*. Rule 56(c) requires the moving party to demonstrate "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Defendants have not made either of the showings required for summary judgment.

A. Defendants' Elimination of Life Insurance Benefits is Not Exempted from the Protections of the ADEA.

Defendants misinterpret an EEOC regulation regarding termination of life insurance benefits at the time an employee leaves active status. Def. Mem. at 24. The EEOC regulation, 29

C.F.R. § 1625.10(f)(1)(i), reproduced in the Appendix at p. 4a, interprets a section of the statute that allows a reduction in benefits provided to older workers if the employer still is spending an equal amount to provide them with the comparable benefits that it provides to younger workers. The regulation describes the benefit-by-benefit approach on which defendants rely, and then provides that "a total denial of life insurance, on the basis of age, would not be justified under a benefit-by-benefit analysis. However, it is not unlawful for life insurance coverage to cease upon separation from service." *Id.* The last sentence allows an employer to insure only active employees without offending the ADEA.

Defendants err in construing the final sentence to allow the termination of benefits when employees are substantially into their retirements — not upon separation from service. The language of the regulation is forward-looking. It only authorizes plans that prospectively state that life insurance will "cease" or expire on a future separation from service. Nothing in the language addresses the situation here, in which the employer *retroactively* terminated post-retirement life insurance benefits after they had become operational, for retirees who had separated from service years earlier.

Defendants' argument finds no support in any case law. It also disregards their heavy burden to justify an exemption from the ADEA. The general rule for employee-protective laws is that "exemptions are to be narrowly construed against the employers seeking to assert them." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960) (Fair Labor Standards Act). The EEOC itself has taken this position: "Since section 4(f)(2) is an exception from the general non-discrimination provisions of the Act, the burden is on the one seeking to invoke the exception to show that every element has been clearly and unmistakably met. The exception must be narrowly construed." 29 C.F.R. § 1625.10(a)(1). *See* the Appendix at p. 2a.

Stretching the regulation to apply to, and exempt, retroactive, post-retirement termination or reduction of life insurance benefits could not possibly promote the interests protected by the statute. Defendants have made no factual showing that actions would promote the hiring of older workers or comport with the protections of the ADEA in some other way. Particularly in light of the serious hardships caused by defendants' conduct, defendants' expansive construction of the regulation is simply inconsistent with the ADEA. *See* Dorman Decl. at ¶¶ 21-24.

B. Defendants Cannot Rely on the Exemption for Equal Costs or Equal Benefits.

Defendants' final argument is that the OWBPA amendments to the ADEA established an "equal cost/equal benefit" exemption from the statute that applies to their plan amendments. They rely on 29 U.S.C. § 623(f)(2)(B)(i), set forth on p. 1a of the Appendix, which states that it shall not be unlawful to observe the terms of a *bona fide employee benefit plan* "where, for each benefit or benefit package, *the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker*, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989)." (Emphasis added). The regulation also states that an entity relying on this language "shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter . . . ." (Emphasis added).

Defendants' argument in reliance on this provision fails for several different reasons.

1. The Lack of a Bona Fide Employee Benefit Plan as to All Retirees.

The ADEA exemption applies only if there is a "bona fide employee benefit plan." 29 U.S.C. § 623(f)(2)(B). The EEOC has defined a bona fide employee benefit plan in terms that exclude plans in which the employer has failed to provide accurate written notice to employees, and has adopted the standards of ERISA in doing so. 29 C.F.R. § 1625.10(b) (set forth at p. 1a

of the Appendix). This regulation limits the meaning of "bona fide employee benefit plan" to those whose terms *have been accurately described in writing to all employees*" and that "*actually provides the benefits in accordance with the terms of the plan.*" (Emphasis supplied.) The regulation states that notice is "essential," and allows employers to satisfy the ADEA notice requirement if they "follow the disclosure requirements of ERISA and the regulations thereunder." "The plan must actually provide the benefits its provisions describe, since otherwise the notification of the provisions to employees is misleading and inaccurate." 29 C.F.R. § 1625.10(b) (emphasis supplied) (set forth in the Appendix at 2a).

In the event that the Court ultimately rules that defendants did not provide the clear and understandable benefits information required by ERISA, then defendants cannot be said to have "accurately described" the terms within the meaning of this regulation, and summary judgment must be denied as to the exceptions described in 29 C.F.R. § 1625.10(f) (set forth in the Appendix at 4a) as to both the VEBA and non-VEBA retirees.

2. Defendants Have Provided No Evidence to Support the "Equal Cost" Exemption.

The EEOC has imposed very specific requirements for showings of "equal cost." 29 C.F.R. §§ 1625.10(d), (f)(2)(v), set forth in the Appendix at 3a-5a. Defendants have produced no evidence or argument to show that the plan amendments qualify for the "equal cost" exemption and accordingly summary judgment on this basis is completely inappropriate.

3. Defendants Have Not Provided "Equal Benefits" to VEBA Participants.

It is axiomatic that defendants cannot rely upon the "equal benefit" exemption if they have completely eliminated a benefit to older workers that continues to be provided to those younger. This is exactly what has happened for the retirees of Carolina Telephone and

Telegraph ("CT&T") who are participants in the Voluntary Employees' Benefit Association plan ("VEBA").

As the Declaration of Willie Dorman makes clear, before CT&T was taken over by Sprint, it provided each retiree with a life insurance policy that paid at least one year's salary upon the retiree's death. This insurance was continued in effect despite the Sprint takeover and is known in this case as "the grandfathered life insurance," because it was a legacy policy. It was superior to what Sprint offered its other units. Dorman Dec. at ¶¶ 7-8.

Many of the CT&T retirees in this case are also members of a voluntary employee association, the VEBA, that has a fully-funded trust fund to pay death and disability benefits. This VEBA fund was originally established to help the company avoid unionization. *Id.* at ¶ 9. It is a separate legal entity, not an insurance policy provided by the employer. It was funded before Sprint took over CT&T and has on hand more than $21 million dollars to pay death and disability benefits. *Id.* at ¶¶ 9-12 & Ex. 1 attached thereto.

On July 26, 2007, Embarq singled out all the CT&T retirees who are VEBA participants and informed them that it was cancelling their grand-fathered life insurance policy completely. Unlike all the other Embarq retirees who are now being provided a company paid $10,000 life insurance policy, the VEBA participants have been given no company paid coverage to replace the grandfathered policy that was eliminated. Dorman Dec. at ¶ 16.

Embarq cannot possibly show that it has provided an equal life insurance benefit to VEBA participants regardless of their ages, because it has provided them with no benefit.

4. Defendants' Cited Cases Do Not Support Summary Judgment On This Issue.

Defendants' cases on this issue are inapposite. *Bozner v. Sweetwater County School Dist. No. One*, 110 F.3d 73 (10th Cir.) (Table, text in WESTLAW, No. 96-8087), *cert. denied sub nom. Tschanz v. Sweetwater County School Dist. No. One*, 522 U.S. 1030 (1997), involved

plaintiffs whose applications for early retirement under the former age-discriminatory plan were denied, and who challenged the denial and argued that defendants were obligated by the EEOC's regulations to implement the age-discriminatory plan. Such a challenge could not possibly produce a decision relevant to the issues here. The court affirmed the judgment for defendants on the ground that the plaintiffs' claim was untimely. It stated in *dictum* that, if it were to reach the merits, it would reject the claim that employees have a right to continuation of the prior early-retirement plan despite its violation of the ADEA. It quoted language from an EEOC regulation, and that is what defendants quote. The case did not even mention disparate impact.

Devlin v. Transportation Communications Int'l Union, 175 F.3d 121 (2d Cir. 1999), involved the elimination of a $300 death benefit fund for both active and retired employees. The district court held that there was no showing of disparate impact and this was not an ERISA plan. *Id.* at 127-28. This case provides no support for defendants' argument because there could be no disparate impact analysis or application of the regulatory exemptions on these facts.

DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 721 (3d Cir. 1995), *cert. denied*, 516 U.S. 916 (1995) is not remotely similar to the case at bar. It only involved the claim that requiring a release of ADEA and other claims in return for enhanced severance benefits constituted disparate treatment against older workers. The court declined to address the disparate-impact theory. *Id.* at 730-734.

Tusting v. Bay View Federal Sav. and Loan Ass'n, 789 F.Supp. 1034 (N.D. Calif. 1992), is similarly wide of the mark. In that case, the plaintiffs retired during a grace period so that they would keep health benefits in retirement, and then claimed constructive discharge. The defendant was eliminating the benefits for existing employees but keeping the benefits for retirees and for employees who retired during the grace period. Not only does this case have nothing to do with the issues here, but the language quoted by defendants as if it were a holding

was actually just part of a hypothetical: "If Bay View's 1988 plan change had ordered an immediate, across-the-board elimination of fully-paid retirement health benefits for all current employees, irrespective of age or seniority, plaintiffs could not (and do not, even hypothetically) argue that the plan change violated the ADEA." *Id.* at 1037.

Summary judgment based on the equal cost/equal benefit exemption must be denied.

VI. ERISA DOES NOT PREEMPT PLAINTIFFS' STATE LAW AGE DISCRIMINATION CLAIMS IN THE FIFTH, SIXTH, AND SEVENTH CLAIMS FOR RELIEF.

As plaintiffs observed in their Memorandum in Opposition to Defendants' Motion to Dismiss at 32-34 (Doc. 21), the ADEA, like Title VII, relies upon a joint state/federal enforcement scheme. The Court accepted this in its December 2, 2008, Memorandum and Order, stating "Under *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), ERISA preempts state antidiscrimination law [only if and] to the extent that state law prohibits practices which are otherwise lawful under federal law." Op. at 29.

The state law claims track the corresponding ADEA claims. For the same reasons that summary judgment should be denied as to the ADEA claims, it should be denied as to the claims under the Ohio, Oregon and Tennessee age discrimination statutes.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court deny or continue defendants' motion for partial summary judgment pursuant to Rule 56(f). If the merits are reached at this time, the motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of April, 2009, I electronically filed the foregoing Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss the First, Third, Fourth, Fifth, Sixth and Seventh Claims for Relief in Plaintiffs' Amended Complaint and the accompanying Affidavits/Declarations of Alan M. Sandals, Todd B. Hilsee, Robert E. King, and Willie Dorman using the CM/ECF system, which will send notice of electronic filing to the following counsel for defendants:

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