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 (EFM/JPO)

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

STINSON MORRISON HECKER LLP

Mark D. Hinderks KS #11293
Scott C. Hecht KS #16492
Christopher J. Leopold KS #19638
1201 Walnut Street, Suite 2900
Kansas City, Missouri 64106
(816) 842-8600 (Telephone)
(816) 691-3495 (Facsimile)
mhinderks@stinson.com
shecht@stinson.com
cleopold@stinson.com

MORGAN, LEWIS & BOCKIUS LLP

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

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

ATTORNEYS FOR DEFENDANTS

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 1

I. DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT IS RIPE FOR ADJUDICATION 1

II. PLAINTIFFS MISSTATE THE APPLICABLE LEGAL STANDARDS OF ERISA PLAN INTERPRETATION 3

A. Extrinsic Evidence Is Not Relevant To The Motion. 3

B. The Doctrine Of *Contra Proferentem* Is Not Relevant To The Motion 4

C. Plaintiffs' "ERISA Notice" Claim Is Not Relevant To The Motion 5

D. Even If The Court Considers Plaintiffs' Notice Claim, The Reservation Of Rights Provisions Satisfy ERISA's Notice Requirements. 6

E. Under Controlling Tenth Circuit Precedent, Courts Interpret ERISA Plans By Reviewing The Language Within The "Four Corners" Of The Applicable Plans And SPDs. 8

F. Plaintiffs' Proposed Expert Report Is Inadmissible 8

III. PLAINTIFFS' CLAIMS FOR VESTED BENEFITS (COUNTS I AND III) FAIL 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." 10

A. The "Termination Of Coverage" Provisions Do Not Clearly And Expressly Evidence An Intent To Vest Welfare Benefits; Reservations Of Rights Provisions Eliminate Any Ambiguity. 10

B. The RORs Unambiguously Expressed Embarq's Intent To *Not* Vest The Welfare Benefits, And To Reserve Its Right To Change The Plans 13

C. Under Tenth Circuit Law, A "Business Necessity" Clause Does Not Restrict An Employer's Reservation Of Rights In Any Significant Manner 15

D. Plaintiffs' Vesting Argument Rests On The Thin Reed Of Three Distinguishable, Non-Controlling Cases. 15

E. Plaintiffs' Arguments Regarding The Life Insurance Benefits Are Unpersuasive. 18

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 20

A. Plaintiffs Have Failed To State A Claim For Disparate Impact Age Discrimination. 21

TABLE OF CONTENTS
(continued)

Page

B. The Regulations Exempting The Elimination Of Life Insurance From The ADEA Apply With Equal Force To Disparate Impact Claims 22

C. Plaintiffs' Disparate Impact Theory Is Untenable And Illogical 22

D. Embarq Provides "Equal Benefits" To Plaintiffs; Status As A VEBA Or Non-VEBA Participant Is Not Based On Age. 23

V. THE PARTIES AGREE THAT THE RESOLUTION OF THE ADEA CLAIMS WILL DISPOSE OF PLAINTIFFS' STATE LAW CLAIMS (COUNTS V, VI, AND VII) 24

CONCLUSION 24

TABLE OF AUTHORITIES

Page

Admin. Comm. of Wal-Mart Assocs. Health & Welfare Plan v. Willard,
393 F.3d 1119 (10th Cir. 2004) 8

Aguilar v. Basin Res., Inc.,
47 F. App'x 872 (10th Cir. 2002)....................12

Alexander v. Primerica Holdings, Inc.,
967 F.2d 90 (3d Cir. 1992)....................15

Austin Fireworks, Inc. v. T.H.E. Inc. Co.,
No. 90-1341, 1993 WL 484214 (D. Kan. Aug. 2, 1003) 9

Balestracci v. NSTAR Elec. & Gas Corp.,
449 F.3d 224 (1st Cir. 2006)....................20

Bozner v. Sweetwater County Sch. Dist. No. 1.,
No. 96-8087, 110 F.3d 73, 1997 WL 165168 (10th Cir. April 9, 1997)....................23

Burke v. Kodak Ret. Income Plan,
336 F.3d 103 (2d Cir. 2003)....................6

Chastain v. AT&T,
No. CIV-04-0281-F, 2007 WL 3357516 (W.D. Okla. Nov. 8, 2007),
aff'd on other grounds 558 F.3d 1177 (10th Cir. 2009) 20

Chiles v. Ceridian Corp.,
95 F.3d 1505 (10th Cir. 1996) .... passim

Chisholm v. Plan Admin. of the Joint Indus.
Bd. of the Elec. Indus. Benefit Funds,
No. 03-1968, 2004 U.S. Dist. LEXIS 30175 (E.D. N.Y. Oct. 19, 2004)....................6

Christiansen v. City of Tulsa,
332 F.3d 1270 (10th Cir. 2003) 9

Cincinatti Ins. Co. v. Prof'l Data Servs.,
No. 01-2160, 2003 WL 22102138 (D. Kan. July 18, 2008) 9

Crown Cork & Seal Co., Inc. v. Int'l Ass'n of
Machinists and Aerospace Workers,
501 F.3d 912 (8th Cir. 2007) 11

TABLE OF AUTHORITIES
(continued)

Page

Curtiss-Wright Corp. v. Schoonejongen,
514 U.S. 73 (1995)......7, 16, 22

Deboard v. Sunshine Mining and Refining Co.,
208 F.3d 1228 (10th Cir. 2000)......16, 17

EEOC v. Cargill Inc.,
No. 81-4193, 1984 WL 14136 (D. Kan. Oct. 11, 1984)......21

Frahm v. The Equitable Life Assurance Soc.,
No. 93 C0881, 1995 WL 579282 (N.D. Ill. Sept. 29, 1995),
aff'd, 137 F.3d 955 (7th Cir. 1998)......7

Gable v. Sweetheart Cup. Co., Inc.,
35 F.3d 851 (4th Cir. 1994)......10, 20

Hart v. Sprint Commc'ns Co. L.P.,
872 F. Supp. 848 (D. Kan. 1994)......5

Haymond v. Eighth Dist. Elec. Benefit Fund,
36 F. App'x 369 (10th Cir. 2002)......16

Hickman v. GEM Ins. Co.,
299 F.3d 1208 (10th Cir. 2002)......6

Hughes v. 3M Retiree Med. Plan,
134 F. Supp. 2d 1062 (D. Minn. 2001)......7

Hughes v. 3M Retiree Med. Plan,
281 F.3d 786 (8th Cir. 2002)......15

Inter-Modal Rail Employees Ass'n v. Atchison,
Topeka and Santa Fe Ry. Co.,
520 U.S. 510 (1997)......15

John Deere Health Benefit Plan v. Chubb,
45 F. Supp. 2d 1131 (D. Kan. 1999)......3

Jensen v SIPCO,
38 F.3d 945 (8th Cir. 1994)......16

Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan,
129 S. Ct. 865 (2009)......3

TABLE OF AUTHORITIES
(continued)

Page

Leannah v. Alliant Energy Corp.,
No. 07-169, 2009 U.S. Dist. LEXIS 16075 (E.D. Wis. Feb. 26, 2009)....4, 13, 14

MIC Prop. and Cas. Ins. Corp. v. Int'l Ins. Co.,
990 F.2d 573 (10th Cir. 1993) 4

Meacham v. Knolls Atomic Power Labs.,
128 S. Ct. 2395 (2008)....21

Miller v. Monumental Life Ins. Co.,
502 F.3d 1245 (10th Cir. 2007) 3, 5, 8

Musto v. Am. Gen. Corp.,
861 F.2d 897 (6th Cir. 1988) 15

Randles v. Galichia Med. Group, P.A.,
No. 05-1374-WEB, 2006 U.S. Dist. LEXIS 92428 (D. Kan. Dec. 18, 2006) 7

Salamouni v. Daiwa,
966 F. Supp. 672 (N.D. Ill. 1997)....20

In re Sears Retiree Group Life Ins. Litig.,
90 F. Supp. 2d 940 (N.D. Ill. 2000)....19

Schaum v. Honeywell Retiree Med. Plan Number 507,
No. 04-2290, 2006 U.S. Dist. LEXIS 88835 (D. Ariz. March 31, 2006)....6

Senn v. United Dominion Indus., Inc.,
951 F.2d 806 (7th Cir. 1992) 12

Shaw v. Delta Airlines,
463 U.S. 85 (1983)....24

Smith v. City of Jackson,
544 U.S. 228 (2005)....21

Sprague v. Gen. Motors Corp.,
133 F.3d 388 (6th Cir. 1998) 4, 12, 17

U.S. v. Banks,
262 F. App'x 900 (10th Cir. 2008) 9

TABLE OF AUTHORITIES
(continued)

Page

Vallone v. CNA Fin. Corp.,
375 F.3d 623 (7th Cir. 2004) 12

Weber v. GE Group Life Assur. Co.,
541 F.3d 1002 (10th Cir. 2008) 3, 8, 18

Welch v. Unum Life Ins. Co. of Am.,
382 F.3d 1078 (10th Cir. 2004) 12

Wise v. El Paso Natural Gas Co.,
986 F.2d 929 (5th Cir. 1993) 10

STATUTES

29 C.F.R. § 1625.10(f) 22

29 C.F.R. § 1625.10(a)(2) 22

29 C.F.R. § 2520.102-2 ....5, 7

29 U.S.C. § 1022(a) 5

29 U.S.C. § 1102(b)(3) 7

29 U.S.C. § 623(b) 24

29 U.S.C. § 626(b) 23

RULES

Fed. R. Civ. P. 56(e)(2) 17

Fed. R. Evid. 702 9

D. Kan. R. 56.1 1

MISCELLANEOUS

EEOC Policy Manual, Ch. 3 (October 3, 2000) 23

INTRODUCTION

In their Opening Brief, Defendants demonstrated that the ERISA Plaintiffs' individual claims are barred by the straightforward interpretation of the language of the applicable Plans, statutory and regulatory exemptions, and the doctrine of ERISA preemption. In their Opposition, Plaintiffs claim that it is premature to decide the Motion because Defendants have not produced enough discovery related to the *putative class claims* (which are not the subject of the motion). They also distort applicable law and incorrectly attempt to introduce extrinsic evidence and inadmissible "expert" legal opinions. When the layers of Plaintiffs' unsupported assertions are peeled away, however, the threshold issues at the core of Defendants' motion remain direct and purely legal: (1) the language of the controlling Plan documents is unambiguous and permitted Embarq to modify the welfare benefits that are at issue in this case; (2) the reduction of life insurance benefits is exempted from the ADEA – whether asserted under a disparate treatment or disparate impact theory; and (3) ERISA preempts Plaintiffs' state-law claims.

ARGUMENT[1]

I. DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT IS RIPE FOR ADJUDICATION.

In their Opposition, Plaintiffs argue that the Court should deny or continue the Motion because deciding it will "suspend progress" in the case and is "procedurally improper." Plaintiffs further allege that they need an opportunity to conduct class-wide discovery before responding to the Motion. (Opp. at 15-16.) Plaintiffs' arguments are not persuasive.

Fundamentally, Plaintiffs mischaracterize the scope of Defendants' motion, which

---

[1] Plaintiffs included in their opposing memorandum a "response" to Defendants' Statement of Undisputed Material Facts (Opp. at 5-13 (purporting to "controvert" Defendants' facts)), but did not include, pursuant to D. Kan. Rule 56.1(b)(2), a counter-statement of undisputed material facts requiring a response by Defendants. See D. Kan. Rule 56.1(a), (b), (c).

challenges the claims of ten individuals – the "ERISA Plaintiffs."[2] Plaintiffs insist that "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." (Opp. at 12 n.4.) The plan documents applicable to *other* retirees, however, simply are not germane to Defendants' motion. The issue of discovery is a red herring.

For instance, Plaintiffs allege that Defendants have not "proceed[ed] with their discovery obligations." (Opp. at 15.) Plaintiffs further allege that Defendants "have made only a minimal document production" and also mischaracterize the motion as a "pre-discovery motion." (Id.) The record of discovery does not support Plaintiffs' allegations. First, Defendants have produced each Plan and SPD that is the subject of the Motion in its entirety, comprising 1,283 pages of documents. Most of these documents were produced in May 2008, more than a year ago. As explained above and in Defendants' Opening Brief, the language of the Plans and the SPDs controls the disposition of Defendants' motion as to Counts I and III. Second, Defendants have produced over 13,000 pages of documents and continue to produce documents on a rolling basis.[3]

In the Scheduling Order, the Court, while stating that discovery should proceed, also was "[m]indful that 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[.]" (Dkt. No. 59 at 5.) (emphasis in original). Here, Defendants are meeting their discovery obligations and also have filed a summary judgment motion that

---

[2] The "ERISA Plaintiffs" are the proposed class representatives as set forth in the Second Amended Complaint: "Plaintiffs Fulghum, Daniel, Hollingsworth, Dorman, King, Joyner, Dillon, Barnes, Games, and Bullock." (2d Compl. ¶54; see also Defs' Open. Brief, Dkt. No. 68, at 3.)

[3] Defendants produced over 6,000 pages of documents *before* Plaintiffs filed their Opposition. In May 2008, Defendants produced most of the Plan documents and SPDs that have been submitted to the Court. Defendants produced the remainder of the Plan documents and SPDs on March 3, 2009. Defendants again produced documents on March 25, 2009 and April 2, 2009, including the personnel and benefits records of the ERISA Plaintiffs, plan participant communications, and other plan-related materials.

raises threshold legal questions, the resolution of which will greatly streamline discovery and trial in this case. This is precisely the procedure contemplated in the Scheduling Order.

II. PLAINTIFFS MISSTATE THE APPLICABLE LEGAL STANDARDS OF ERISA PLAN INTERPRETATION

In their attempt to prevent the Court from construing the unambiguous language of the controlling Plan documents and SPDs, Plaintiffs make a host of meritless assertions that purportedly require the Court to consider extrinsic evidence, to employ the doctrine of *contra proferentem*, to find violations of ERISA's notice requirements, and to "look beyond the four corners of the SPD to determine whether plan terms are ambiguous." (Opp. at 20-23.) Plaintiffs' insistence that the Court move "beyond the four corners of the SPD" is an implicit admission that the language *within* the four corners is *un*ambiguous. Plaintiffs also have submitted a so-called "expert report" that is both superfluous and inadmissible.

A. Extrinsic Evidence Is Not Relevant To The Motion.

Plaintiffs' contention that "extrinsic evidence" is necessary to interpret the terms of the Plan documents is incorrect as a matter of law. (Opp. 15-16.) Where the relevant plan documents are unambiguous, a motion for summary judgment must be resolved *without* resort to extrinsic evidence. Weber v. GE Group Life Assur. Co., 541 F.3d 1002, 1011 (10th Cir. 2008) (stating that 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.'") (quoting Miller v. Monumental Life Ins. Co., 502 F.3d 1245, 1250 (10th Cir. 2007); John Deere Health Benefit Plan v. Chubb, 45 F. Supp. 2d 1131, 1136 (D. Kan. 1999). It is a bedrock principle of ERISA that extrinsic evidence is ***not*** relevant to the interpretation of an ***un***ambiguous plan. See Chiles v. Ceridian Corp., 95 F.3d 1505, 1511 (10th Cir. 1996); see also Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 129 S. Ct. 865, 875 (2009) (holding that an ERISA claim for benefits

under Section 502(a)(1)(B) "stands or falls by 'the terms of the plan'" and that ERISA's statutory scheme "forecloses any justification for enquiries into nice expressions of intent"); MIC Prop. and Cas. Ins. Corp. v. Int'l 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"). Thus, should this Court find that the terms of the Plans and SPDs do not "clearly and expressly" create welfare benefits that never can be changed, or that the terms unambiguously reserve the right to amend the Plans, Defendants are entitled to summary judgment on Counts I and III as a matter of law.

Furthermore, Plaintiffs' related contention that letters and other communications should be examined to determine whether they have "modified" the Plans is incorrect as a matter of law. (Opp. at 2, 24-25.) "Because an employee benefit plan must be established by a written instrument, a promise to provide vested benefits must be incorporated, in some fashion, into the formal written ERISA plan." Chiles, 95 F.3d at 1511 (citations omitted); Sprague v. Gen. Motors Corp., 133 F.3d 388, 403 (6th Cir. 1998) (en banc) (holding that written representations from employer to employees do not modify or supersede Plan document); Leannah v. Alliant Energy Corp., No. 07-169, 2009 U.S. Dist. LEXIS 16075, *24 (E.D. Wis. Feb. 26, 2009) (holding that "correspondences between the company and employees regarding health benefits are [not] incorporated [into the applicable retiree medical plan].").[4]

B. The Doctrine Of *Contra Proferentem* Is Not Relevant To The Motion.

Plaintiffs' suggestion that the Court apply the doctrine of *contra proferentem* puts the cart before the horse. (Opp. at 20-21.) The Tenth Circuit has held that this interpretive aid only

[4] Although these types of documents conceivably may be relevant to Plaintiffs' Second Claim for Relief, which alleges a breach of fiduciary duties, Defendants have not moved for summary judgment on that claim.

comes into play *after* an ERISA plan is found to be ambiguous. Miller, 502 F.3d at 1253 (explaining that the doctrine is applicable in ERISA cases when the court is "reviewing an ambiguous ERISA plan de novo"); cf. Hart v. Sprint Commc'ns Co. L.P., 872 F. Supp. 848, 855 n.5 (D. Kan. 1994) ("The rule that ambiguities within a contract are to be construed against the preparer is applied only where the contract is still ambiguous after the ordinary rules of construction are applied."). Here, the Plan language is not ambiguous.

C. Plaintiffs' "ERISA Notice" Claim Is Not Relevant To The Motion.

Plaintiffs half-heartedly suggest that the SPDs do not satisfy ERISA's notice requirements because the reservation of Embarq's right to amend or terminate the Plans is not repeated or cross-referenced with every description of a benefit in the SPD. (Opp. at 18-19.) The basis of this allegation is that the SPDs' "coverage" sections do not "cross-reference" the reservations of rights ("ROR") provisions, and the reservations are not listed on the SPDs' table of contents. (Opp. at 19.) Plaintiffs accuse Defendants of focusing on "fragments taken out of context" (Opp. at 20.), suggesting that Defendants rely solely on the numerous reservations of rights in their construction of the Plans' terms. While Plaintiffs are wrong on the facts and the law – the SPDs provide explicit notice of Embarq's reserved rights – the Court need not consider this issue because it is not relevant to the disposition of Defendants' motion.

ERISA requires that plan sponsors prepare SPDs "in a manner calculated to be understood by the average plan participant" and "sufficiently accurate and comprehensive to reasonable apprise [plan] participants and beneficiaries of their rights and obligations under the plan." See 29 U.S.C. §§ 1022(a), (b), quoted in Opp. at 18; see also 29 C.F.R. §§ 2520.102-2, 102-3. Although the SPDs at issue contain clear and prominent RORs, Plaintiffs have asserted that Defendants failed to comply with the disclosure rules. Plaintiffs' claim is set forth in their Second Claim for Relief, titled "Violation Of Duty To Provide Clear And Accurate Plan

Summaries And Breach Of Fiduciary Duty." (2d Compl., Count II, ¶¶113, 115.) Defendants, however, have not moved for summary judgment on Count II. Thus, to the extent the notice rules are relevant to this case, they are no barrier to the Court ruling on Defendants' motion for summary judgment on Counts I and III, the contractual vesting claims. There, the threshold legal question is whether the language of the Plan is unambiguous.

Indeed, the Tenth Circuit has expressly held that "[ERISA] § 1022 has no relevance to the primary issues of whether the policy language is ambiguous[.]" Hickman v. GEM Ins. Co., 299 F.3d 1208, 1216 (10th Cir. 2002). The Hickman court affirmed summary judgment for the defendant and held that the District Court "followed the correct procedure in first resolving the question of ambiguity before proceeding to examine the question of an alleged violation of the notice requirements." Id. at 1212. More to the point, the Tenth Circuit held that "[t]his procedure is appropriate in ERISA cases, where the plan language should be construed *first* in order to determine whether that language was clear and unambiguous. Id. (citing Chiles, 95 F.3d at 1515) (emphasis added). Thus, Plaintiffs cannot forestall this Court's analysis of the unambiguous language of the applicable Plans and SPDs by arguing that the placement of the ROR did not satisfy ERISA's notice rules.

D. Even If The Court Considers Plaintiffs' Notice Claim, The Reservation Of Rights Provisions Satisfy ERISA's Notice Requirements.

In the face of controlling Tenth Circuit authority, Plaintiffs' reliance on three out-of-circuit cases is clearly misplaced. (See Opp. at 19.)[5] Moreover, the Supreme Court has held that

[5] In Burke v. Kodak Ret. Income Plan, 336 F.3d 103 (2d Cir. 2003), the court refused to enforce a 90-day limitations period against a plaintiff appealing a claim denial because the denial letter did not expressly inform the plaintiff of the limitations period, and the letter referred the plaintiff to a page in the SPD that did not list the applicable period. Id. at 108. In Chisholm v. Plan Admin. of the Joint Indus. Bd. of the Elec. Indus. Benefit Funds, No. 03-1968, 2004 U.S. Dist. LEXIS 30175 (E.D.N.Y. Oct. 19, 2004), the SPD described a spousal pension benefit using at least three different terms and did not give "notice to the participant that the terms should be treated the same and that the one-year marriage requirement applies under all circumstances. Id. at *12-13. Finally, in Schaum v. Honeywell Retiree Med. Plan Number 507, No. 40-2290, 2006 U.S. Dist. LEXIS 88835 at *27-31 (D. Ariz.

a reservation of rights clause that is essentially identical to the clauses at issue here, "satisfies the plaint text of both requirements of [29 U.S.C. § 1102(b)(3)]."[6] Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 81 (1995). In Curtiss-Wright, the Supreme Court rejected the same argument that Plaintiffs advance here – namely, that the reservation of rights was "vague and generalized." (Opp. at 8 n.3, 19.)

This Court also has had occasion to consider the nub of Plaintiffs' claim, i.e., that "the SPD arguably should have contained a clearer cross-reference describing specifically where the limitations could be found in the SPD."[7] Randles v. Galichia Med. Group, P.A., No. 05-1374-WEB, 2006 U.S. Dist. LEXIS 92428, *28 (D. Kan. Dec. 18, 2006) (citing 29 C.F.R. §§ 2520.102-2(b)). In Randles, this Court rejected the argument because, like the ROR at issue here, the provision "is clear and apparent to any reasonable person reading the SPD." Id. (granting defendant's motion for summary judgment on claim for wrongful denial of disability benefits); see also Hughes v. 3M Retiree Med. Plan, 134 F. Supp. 2d 1062, 1073 (D. Minn. 2001) (finding plaintiffs' notice claim to be a "baseless contention," holding that a ROR "need only be located in a single place within the plan document."), aff'd 281 F.3d 786 (8th Cir. 2002); Frahm v. The Equitable Life Assurance Soc., No. 93 C0881, 1995 WL 579282, *7 (N.D. Ill. Sept. 29, 1995) ("ERISA permits an employer to insert a general reservation of rights clause in the plan but does not require that a specific reservation of rights clause be placed after each

---

March 31, 2006), the court found that an anti-assignment clause was "hidden within the Plan language in a location that a reasonable person would not expect to find it[.]" Id. at *29. The court contrasted this hidden language with a Fifth Circuit case in which the clause there, like the RORs in the Embarq SPDs, contained "clear language and apparent readily ascertainable location . . . within the plan." Id. at *32-33. Thus, to the extent Schaum is persuasive, it supports Defendants' position that the RORs gave participants unambiguous notice of Embarq's right to amend or terminate the welfare benefits.

[6] Section 1102(b)(3) provides that "[e]very employee benefit plan shall . . . provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan[.]" 29 U.S.C. § 1102(b)(3).

[7] Presumably, Plaintiffs would repeat the ROR on almost every page of the SPD because almost every page contains a description of some benefit. Plaintiffs' arguments regarding the placement of the RORs are unsupported by legal authority.

provision of the plan."), aff'd, 137 F.3d 955 (7th Cir. 1998).

E. Under Controlling Tenth Circuit Precedent, Courts Interpret ERISA Plans By Reviewing The Language Within The "Four Corners" Of The Applicable Plans And SPDs.

Plaintiffs' distortion of the applicable legal standards for ERISA plan construction reaches its apex when they assert that "courts in the Tenth Circuit look beyond the four corners of the SPD to determine whether plan terms are ambiguous." (Opp. at 22.) (citing Miller, 502 F.3d at 1248). In Miller, the court reviewed a decision by a plan administrator that denied disability benefits to a participant. 502 F.3d at 1248. Under the plan in Miller, the insurer required applicants to present proof of a "Social Security Award" to be eligible for benefits. Id. at 1253. The Social Security Administration makes awards under two statutory provisions, Title II and Title XVI. Id. at 1252. However, the plan did not expressly refer to either Title. Id. The court held that "Social Security Award" "is reasonably susceptible to more than one meaning." Id. at 1253.

Setting aside that Miller is factually (and textually) distinguishable, the Tenth Circuit expressly *disclaimed* reliance on extrinsic evidence in reaching the threshold determination that the term was ambiguous. Id. The court held that "the record in this case reveals ***no extrinsic evidence*** that would illuminate the parties' intent." Id. (emphasis added). Indeed, the Tenth Circuit reiterated the well-settled rule that "'[i]n interpreting an ERISA plan, [we] examine[ ] the plan documents as a whole and, if unambiguous, construe[ ] them as a matter of law.'" Id. at 1250 (quoting Admin. Comm. of Wal-Mart Assocs. Health & Welfare Plan v. Willard, 393 F.3d 1119, 1123 (10th Cir. 2004)); see also Weber, 541 F.3d at 1011.

F. Plaintiffs' Proposed Expert Report Is Inadmissible.

In a further attempt to undermine this Court's straightforward interpretation of the Plan language at issue, Plaintiffs propose to introduce the testimony of an alleged "communications

expert," Todd Hilsee. (Opp. at 21 n.5; Affidavit of T. Hilsee ("Hilsee Aff."), Dkt. No. 82-8.) Mr. Hilsee purports to be an expert in the area of "class action notices." (Hilsee Aff. ¶5.) Mr. Hilsee's testimony is objectionable for several reasons, not the least of which is that he lacks the qualifications necessary to testify regarding ERISA summary plan descriptions (as opposed to class notices). See Fed. R. Evid. 702. Nevertheless, Mr. Hilsee purports to construe the Plan language, then renders a legal opinion. (Hilsee Aff. ¶¶3, 16-32.) Mr. Hilsee's testimony is inadmissible because legal conclusions, including whether terms are ambiguous, are the exclusive province of this Court.

In the Tenth Circuit, "an expert may not state his or her opinion as to legal standards nor may he or she state legal conclusions drawn by applying the law to the facts. Christiansen v. City of Tulsa, 332 F.3d 1270, 1283 (10th Cir. 2003) (holding that the district court correctly excluded expert's testimony that defendants acted "recklessly" because it stated a legal conclusion); see also U.S. v. Banks, 262 F. App'x 900, 907 (10th Cir. 2008) (explaining that expert testimony should be excluded where it states a legal conclusion). Moreover, in an analogous context, this Court has held that the interpretation of an insurance contract is a purely legal issue for the court to decide and not the proper subject of expert testimony. See Cincinnati Ins. Co. v. Prof'l Data Servs., No. 01-2160, 2003 WL 22102138, *3-4 (D. Kan. July 18, 2003) (granting motion to strike expert opinion as to whether the terms of an insurance contract were ambiguous because the issue was a question of law for the court); Austin Fireworks, Inc. v. T.H.E. Ins. Co., No. 90-1341, 1993 WL 484214, *1 (D. Kan. Aug. 2, 1993) (finding expert testimony inadmissible; "[t]he interpretation of a policy of insurance is not a proper subject for expert testimony. The court does not require the testimony of an expert witness to determine how a reasonable person would construe the language of the policy.").

III. PLAINTIFFS' CLAIMS FOR VESTED BENEFITS (COUNTS I AND III) FAIL 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. The "Termination Of Coverage" Provisions Do Not Clearly And Expressly Evidence An Intent To Vest Welfare Benefits; Reservations Of Rights Provisions Eliminate Any Ambiguity.

Plaintiffs incorrectly accuse Defendants of focusing solely on the broad reservation of rights provisions in the Plans and applicable SPDs and ignoring the vague termination of coverage provisions. (Opp. at 26.) In their Opening Brief, Defendants first pointed out that the Plans and SPDs are devoid of any "clear and express" language of the kind that has been recognized as creating a vested benefit in the Tenth Circuit. For instance, in Chiles, an LTD plan contained a reservation of rights clause that contained the following clauses:

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

Chiles, 95 F.3d at 1509. The court held that the carve-out in the second paragraph above "exhibits the 'clear and express language' necessary to vest an extra-ERISA commitment." Id. at 1515 (citing Gable v. Sweetheart Cup. Co., Inc., 35 F.3d 851, 855 (4th Cir. 1994) (quoting Wise v. El Paso Natural Gas Co., 986 F.2d 929, 937 (5th Cir. 1993)). The language in Chiles, which "clearly and expressly" carved-out a specific benefit, is a far cry from the "coverage" provision relied upon by Plaintiffs. (Opp. at 5.) (quoting 1991 United Telecom 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.").

In Chiles, the Tenth Circuit considered not only the "LTD Plan," but three other plans sponsored by the defendant. The "Health Care Plan" contained an ROR that closely resembles the Sprint/Embarq ROR. In contrast to the LTD Plan, the Health Care Plan ROR did not include a carve-out for the termination of the plan. Chiles, 95 F.3d at 1509. Construing the "coverage" and ROR provisions for "clear and express language," the Tenth Circuit held that the Health Care Plan did not "create[] an unforfeitable vested right." Id. at 1513 n.3.

In their Opposition, Plaintiffs point to the Chiles court's holding regarding the Health Care Plan and opaquely state that the "court also noted other evidence showing the employer did not intend to vest the benefits." (Opp. at 32.) (citing Chiles, 95 F.3d at 1513 n.3). The "other evidence" vaguely referenced by Plaintiffs includes the *unrestricted* reservation of rights provision in the Health Care Plan, which is substantially similar to the ROR here. "Given the contingent and ambiguous nature of the Health Care Plan's promise of disability benefits *and the reservation of the right to change or discontinue the plan*, we see no intent to vest an open-ended benefit." Id. at 1513 n.3, 1512 n.2 ("[T]he weight of case authority supports . . . that a reservation of rights clause allows the employer to retroactively change the medical benefits of retired participants, even in the face of clear language promising company-paid lifetime benefits.").

Here, the "coverage" provisions – taken alone – are not "clear and express" evidence of an intent to create unalterable, lifetime benefits. In Crown Cork & Seal Co., Inc. v. Int'l Ass'n of Machinists and Aerospace Workers, 501 F.3d 912 (8th Cir. 2007), the plaintiffs claimed that their retiree medical benefits were vested because the SPD provided "Your personal coverage continues until your death." Id. at 918. The Eighth Circuit held that "[t]his is not explicit vesting language, and in any event, it is inconsistent with the reservation of rights clause[.]" Id.

Numerous courts within the Tenth Circuit and beyond agree that language such as "until you die" or "until death" is not clear and express language. Moreover, when that language is considered alongside a reservation of rights clause, the SPD unambiguously reserves the plan sponsor's right to change the plans. See Welch v. Unum Life Ins. Co. of Am., 382 F.3d 1078, 1085-86 (10th Cir. 2004) (holding that plaintiff could not establish contractual vesting by "clear and express" language where coverage provision promised benefits until "the date the insured dies" and SPD had ROR clause);[8] Vallone v. CNA Fin. Corp., 375 F.3d 623, 633 (7th Cir. 2004) ("The problem for the plaintiffs is that 'lifetime' may be construed as 'good for life unless revoked or modified.' This construction is particularly plausible if the contract documents include a reservation of rights clause."); Senn v. United Dominion Indus., Inc., 951 F.2d 806, 810, 815 (7th Cir. 1992) (language that the company "will continue" to pay premiums does not create an ambiguity as to vesting). (See generally Def's Open. Brief, Dkt. No. 68, at 18-21 and cases cited therein.)[9]

Thus, even if one were to ignore the reservation of rights provisions, the Plans and SPDs at issue here simply cannot be construed as intending to waive Defendants' statutory right to amend or terminate welfare benefits at any time. When the Plan language is viewed as a whole – including the repeated reservations of rights provisions that appear throughout the SPDs – then the only reasonable interpretation, as a matter of law, is that there is "no intent to vest an open-

---

[8] Plaintiffs attempt to distinguish Welch and Chiles, arguing that "unlike retirement disability is not necessarily a permanent condition. Therefore, descriptions of disability benefits often do not support claims of vesting." (Opp. at 32.) Plaintiffs cite no authority for this proposition. In fact, the Tenth Circuit considered this issue in Chiles and found the distinction without a difference. Chiles, 95 F.3d at 1512 ("In either situation, plaintiffs have voluntarily or involuntarily reached the status for which the plan promises continued benefits.").

[9] The unpublished decision cited by Plaintiffs, Aguilar v. Basin Res., Inc., 47 F. App'x 872 (10th Cir. 2002) is not to the contrary. There, the collective bargaining agreement that covered a group of retired miners did *not* contain a ROR provision. Id. at 873. Moreover, the terms at issue originated from the Coal Act and National Bituminous Coal Wage Agreements ("NBCWAs"). Id. As noted by the court, "[t]he Coal Act provides that signatories to an NBCWA and their successors, whether or not in the coal business, are responsible for paying the lifetime health benefits of their own employees[.]" Id. at 874 n.3. While the plaintiffs did not retire under the Coal Act's provisions, the court observed that the "germ of this ambiguity" was the parties use of NBCWAs, which "have been interpreted to guarantee lifetime health benefits to retired miners." Id. at 875 n.5.

ended benefit." Chiles, 95 F.3d at 1513 n.3; Sprague, 133 F.3d at 401 (even a statement providing for "lifetime" benefits did not create a vested benefit in the face of an unambiguous reservation of rights clause in the same SPD); Leannah v. Alliant Energy Corp., Case No. 07-CV-169, 2009 U.S. Dist. LEXIS 16075, *22 ("[A]mbiguities should not be deemed to arise from portions of a contract being read on their own, but rather from a contract being read as a whole. Thus, other portions of the contract, specifically reservation of rights clauses, can disambiguate seeming ambiguities.").

B. The RORs Unambiguously Expressed Embarq's Intent To *Not* Vest The Welfare Benefits, And To Reserve Its Right To Change The Plans.

Here, the reservation of rights provisions appeared not once, but multiple times throughout the SPDs (a fact apparently not present in many of the reported cases – which is even stronger support for holding that the Plan language did not contain clear and express vesting language). For example, in the 1991 SPD, the ROR is placed on page 3 (immediately after the table of contents and before the descriptions of benefits) and set off by itself:

> 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.

(Affidavit of Randall T. Parker ("Parker Aff."), Dkt. No. 68-1, 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"[10] 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.) In later SPDs, the ROR was listed on the table of contents for the Legal Information section.[11] (Parker Aff., Dkt. No 68-1, Exh. 6, EQ_FUL_0249 ("The Plans' Future"); Exh. 7, EQ_FUL_0365 ("The Plans' Future").)

In the Tenth Circuit and all other circuits, as discussed above, the appearance of a single ROR provision is evidence of the employer's intent *not* to vest welfare benefits. Here, Sprint and Embarq published an unequivocal reservation of the right to amend or terminate the Welfare Benefits *multiple times* in the same SPD. Under these circumstances, there can be no dispute that a *reasonable* participant would conclude that the benefits described in the SPD were subject to Embarq's reservation of its "right to amend or terminate this plan, or any statement made in

---

[10] The introduction to the Legal Information section stated that "you need to know about your legal rights as a participant in these plans and programs. This section of the benefits handbook describes those rights." (See, e.g., Parker Aff., Dkt. No. 68-1, Exh. 5, EQ_FUL_0191.)

[11] This section, like the SPDs in general, is brief and did not always have a table of contents, which, as explained above, is not necessary to provide notice to a participant of an ROR.

this summary plan description, at any time." (Parker Aff., Dkt. No. 68-1, Exh. 4, EQ_FUL_94.)

C. Under Tenth Circuit Law, A "Business Necessity" Clause Does Not Restrict An Employer's Reservation Of Rights In Any Significant Manner.

In the very few SPDs where a reservation of rights provision also includes the clause "for business necessity," Plaintiffs argue that such language indicates the "plan will only terminate if the company is in bankruptcy or some other severe financial position." (Opp. at 8.) Plaintiffs' argument is completely unsupported.[12] Moreover, the Tenth Circuit has held that such language "cannot fairly imply, as plaintiffs suggest, that the plans can only be amended if necessary to their fiscal survival." Chiles, 95 F.3d at 1513. In Chiles, the ROR provided that the company could "change or discontinue [the plan] if it becomes necessary. This would be done only after careful consideration." Id. at 1509. There, the court held that the term "necessary" "cannot be read to limit the reserved right in any significant manner." Id. at 1513-14; see also Musto v. Am. Gen. Corp., 861 F.2d 897, 904 (6th Cir. 1988) (where the ROR stated "the company does, as it always has, reserve the right to change the plan, and if necessary, discontinue it," held that the reservation could not be read to limit the company's power to amend the policy only if it becomes necessary to avoid bankruptcy); Hughes v. 3M Retiree Med. Plan, 281 F.3d 786, 792 (8th Cir. 2002) (explaining that reserving the right to change the plan if necessary unambiguously reserved the right to modify the plan at any time).

D. Plaintiffs' Vesting Argument Rests On The Thin Reed Of Three Distinguishable, Non-Controlling Cases.

In addition to attempting to side-step controlling law, Plaintiffs have not cited any Tenth Circuit authority that supports the proposition that the language of the coverage provisions is

---

[12] The only case Plaintiffs cite for support is inapposite. Alexander v. Primerica Holdings, Inc., 967 F.2d 90, 93-94 (3d Cir 1992) (finding reservation of rights ambiguous where clause conditioned amendment on legislative changes and collective bargaining), cited in Chiles, 95 F.3d at 1513 (distinguishing that language from ROR that states an employer will amend or terminate a plan "if necessary").

sufficiently "clear and express" to trump the general rule that "[u]nless an employer contractually cedes its freedom, it is generally free under ERISA, for any reason at any time, to adopt, modify, or terminate its welfare plan." Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Ry. Co., 520 U.S. 510, 515 (1997); Curtiss-Wright Corp., 514 U.S. at 78.

Rather, Plaintiffs' vesting argument is premised on their misinterpretation of three cases – Haymond, SIPCO, and Deboard. (Opp. at 24-27.) In Haymond v. Eighth Dist. Elec. Benefit Fund, 36 F. App'x 369 (10th Cir. 2002), the court did not consider either a "coverage" provision or a reservation of rights clause. There, the court considered a "flat contradiction" between two statutes of limitations provisions. Id. at 373. Thus, Haymond does not shed any light on the plan language at issue here.

In Jensen v SIPCO, 38 F.3d 945 (8th Cir. 1994), there were two conflicting reservation of rights clauses. In the first clause, the formal plan document provided that any "amendments shall not be applicable to persons who are receiving pensions hereunder prior to the effective date of such amendment." Id. at 949. The subsequent employer inserted a second, broader ROR in the SPD, which created a conflict with the formal plan. Id. at 948. Under the facts presented, the court found that it was unclear whether the company reserved the right to amend or terminate the benefits of "already retired pensioners, or only the right to make prospective changes for those covered by the Plan but not yet retired." Id. at 950. The Eighth Circuit left little doubt, however, that it would have found that the SIPCO plan did *not* vest welfare benefits, absent the conflicting RORs: "a reservation-of-rights provision is inconsistent with, ***and in most cases would defeat***, a claim of vested benefits." Id. at 950 (emphasis added). Here, there is no conflict between the terms of the formal Plan document and the SPDs. The broad reservation of rights clause in the Welfare Plans and SPDs does not limit its effect only to participants currently

receiving benefits, as did the ROR in SIPCO.

The court's decision in Deboard v. Sunshine Mining and Refining Co., 208 F.3d 1228 (10th Cir. 2000) is inapposite. There, the Tenth Circuit held that a letter sent to inform employees of certain welfare benefits offered in connection with an early retirement program created a "new plan." Id. at 1238. However, the "new plan" did not contain a reservation of the company's right to amend or terminate the plan and the letter did not incorporate by reference any of the prior company's existing welfare plans. Id. at 1232-33.

Simply put, Deboard is not on point. The Plan documents at issue here explicitly reserved the Company's (i.e., Embarq's and its predecessors') right to amend or terminate the Plan. In fact, in Deboard, the Tenth Circuit observed that a reservation of rights provision such as the one in Embarq's Plans and SPDs would have clearly reserved the plan sponsor's right to amend or terminate plan. Id. at 1240 n.7 (citing with approval Sprague, 133 F.3d at 401 (holding that retiree medical benefits were not vested under terms of a plan in which the SPD "reserved the right to amend, change or terminate the Plans and Programs described in this booklet.")).[13]

More to the point, Defendants produced to the ERISA Plaintiffs' their personnel and benefits records, including letters that were sent to each plaintiff regarding his/her then-impending retirement, including "special early" retirements. Thus, Plaintiffs possess the documents that, allegedly, would establish a "new plan." In response to Defendants' motion for partial summary judgment, Plaintiffs were required to "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2). At most, Plaintiffs "rely merely on allegations or denials in [their] own pleading," and summary judgment should be entered against them. Id.

---

[13] Unlike the formal plan in Deboard, the Plans and SPDs here are the *source* of the "early" and "special early" benefits. (See, e.g., Parker Aff., Dkt. No. 68-1, Exh. 1, § 1.19; Exh. 4, EQ_FUL_0099.) The Plans define and control the "early" retirement benefits, including the letters that confirm or discuss such benefits. Id.

Even if, as Plaintiffs suggest, Deboard created an "alternative decisional framework," it is just that – an alternate theory of recovery that should be considered on its own merits.[14] There is no reason for the Court to refrain from deciding the threshold question of whether the language in the Plans and SPDs is unambiguous. To do so would "suspend progress" because the interpretation of the Plans and SPDs is the "first step" in *any* analysis of Plaintiffs' claims. Weber, 541 F.3d at 1011.

E. Plaintiffs' Arguments Regarding The Life Insurance Benefits Are Unpersuasive.

With respect to life insurance benefits, Plaintiffs complain that the Plans and SPDs do not expressly refer to "retirees" (except for the 2001 Sprint Retiree Medical Benefits SPD) and that language such as "the Group Policy ceases" is ambiguous because it allegedly can be read as the "right to end the policy with one insurance carrier and obtain the insurance through another." (Opp. at 30-31.)[15] Plaintiffs arguments are not persuasive and do not preclude the entry of summary judgment.

As an initial matter, Plaintiffs have not taken serious issue with the 2001 Sprint Retiree Medical Benefits SPD, which is the SPD for life insurance benefits as well. (See Parker Aff., Dkt. No. 68-1, Exh. 7, Appendix D.) The 2001 SPD applies to Plaintiffs Hollingsworth, Bullock, Games and Dillon and, as discussed at length above, is devoid of clear and express vesting language and also contains broad RORs.

[14] Plaintiffs' theory that individual letters may control the question of their benefits also undermines the assertion that this case is appropriate for class treatment. Cf. Chiles, 95 F.3d at 1519 ("The issue of detrimental reliance on the plan document is not appropriate for class action determination."). If each Plaintiffs' retirement letters must be considered to determine the scope of his/her benefits under the Plans, clearly individualized issues will predominate over common class issues and, moreover, the class representatives' claims will not be typical of the class.

[15] Plaintiffs also complain that the ROR provisions in the life insurance Plans and SPDs are not cross-referenced with the coverage provisions, that language such as "until you die" and "will be paid" is evidence of vesting, and that Defendants have not produced the full panoply of Plans and SPDs that may be applicable to the entire class. Inasmuch as Defendants have addressed these arguments above, see supra, pp. 10-14, they will not be addressed in this section.

Plaintiffs' assertion that the other three Plans and SPDs do not refer or apply to retirees is unfounded. Each of the Plans, in fact, refers to retirees. (See, e.g., Parker Aff., Dkt. No. 68-1, Exh. 11, EQ_FUL_1266 ("WHO CAN BE INSURED . . . persons retired by [CT&T] are members of the Eligible Group and can be insured"), EQ_FUL_1267 ("THE ACTIVE WORK REQUIREMENT (Not applicable to retired persons"); Exh. 10, EQ_FUL_1206 (listing on table of contents – "General Information: Non-Contributory and Contributory Life . . . Insurance Available Following Retirement"), EQ_FUL_1212 ("If you leave our employment for any reason other than retirement . . . When you retire, your Contributory Life . . ."); Exh. 9, EQ_FUL_1195 ("SCHEDULE OF BENEFITS . . . (b) Your Basic Contributory Life Benefits will be reduced by 50% when you retire.").)[16]

Plaintiffs' legal argument – that language such as "the Group Policy ceases" is ambiguous – is unavailing. See In re Sears Retiree Group Life Ins. Litig., 90 F. Supp. 2d 940 (N.D. Ill. 2000). In Sears, the court considered and rejected this same argument. There, the plaintiffs brought an action alleging breach of an ERISA-regulated life insurance plan after the employer reduced retiree death benefits. The Sears plaintiffs argued, as the ERISA Plaintiffs do here, that language such as "benefits will end on the date [t]his Plan is changed" and if "[t]his Plan or the Group Policy ends …" only concerned the insurance policy between Sears and the insurer (MetLife), and not the welfare benefits provided under the plan. Id. at 946. As explained by the court, "plaintiffs assert that the clauses reserve Sears' right to cancel its insurance policy with MetLife and to release MetLife from providing coverage if the policy is canceled, but do

[16] While Plaintiffs have labored to call into question the propriety of these life insurance plans, they have not pointed to any vesting language that would entitle them to benefits that never could be changed or terminated, as they must to succeed on their ERISA section 502(a)(1)(B) claims. Moreover, the merits of each plaintiff's life insurance benefits claim, and each medical benefits claim, are not necessarily co-extensive because the Plan and/or SPD in effect at the time each ERISA Plaintiff retired was not always the same. Thus, even if Plaintiffs were correct about one plan, summary judgment is still appropriate on the remaining claims for life insurance benefits, as well as all of the ERISA Plaintiffs' claims for medical benefits, which, as noted above, would streamline this case.

not authorize Sears to amend or terminate the Plan." Id. The court held that "there is little ground[] for distinguishing between the MetLife policy and the Plan on this point as courts have held that a company's reservation of its right to terminate the insurance policy is the functional equivalent of a reservation of the right to terminate the benefit plan." Id. at 946 (citing Gable, 35 F.3d at 856; Musto, 861 F.2d at 902; Salamouni v. Daiwa, 966 F. Supp. 672, 673-74, 677-78 (N.D. Ill. 1997)). Accordingly, the fact that the SPD refers to the "Group Policy" (see Parker Aff., Dkt. No. 68-1, Exh. 9, EQ_FUL_1196) is irrelevant as a matter of law.[17]

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.

Defendants moved for summary judgment on Plaintiffs' ADEA claims because: (1) the challenged Plan amendments did not discriminate against any retiree on the basis of age; (2) the regulations governing the ADEA explicitly permit an ERISA plan sponsor to terminate retiree life insurance benefits in their entirety; and (3) under the Older Workers Benefit Protection Act (the "OWBPA"), a plan amendment that provides the same level of benefits to older and younger retirees regardless of age will not violate the ADEA. These legal defenses apply regardless of whether Plaintiffs proceed under a disparate impact or disparate treatment theory.

Nonetheless, Plaintiffs argue that under their disparate impact theory, it is irrelevant that the Plan amendments resulted in the same level of benefits being provided to older and younger

---

[17] Plaintiffs complain that Defendants have not produced the collective bargaining agreement ("CBA") for Plaintiff Barnes, who is the only plaintiff who worked in a bargaining unit. As an initial matter, Plaintiff Barnes has not asserted a claim against Defendants for violating the terms of any collective bargaining agreement. Indeed, the Second Amended Complaint does not even allege that Plaintiff Barnes was a member of a union. (See, e.g., 2d Compl. ¶16.) (identifying Barnes, but failing to allege that she was a member of a union). Thus, the CBA is irrelevant to her claim. Balestracci v. NSTAR Elec. & Gas Corp., 449 F.3d 224, 226 (1st Cir. 2006) ("[T]here are no labor agreements to be analyzed under § 301 of the [Labor Management and Relations Act, 29 U.S.C. § 185]; only ERISA claims are raised."), cited in Chastain v. AT&T, No. CIV-04-0281-F, 2007 WL 3357516, *13 (W.D. Okla. Nov. 8, 2007), aff'd on other grounds 558 F.3d 1177 (10th Cir. 2009).

retirees because "the decision to cancel retiree life insurance benefits *necessarily* has a greater adverse impact on older workers as compared to younger ones." (Opp. at 35.) (emphasis added). Plaintiffs further contend that an EEOC regulation that exempts from the ADEA the total elimination of life insurance benefits "upon separation from service" does not apply to the elimination or reduction of life insurance benefits in this case. (Opp. at 36-37.) Lastly, Plaintiffs contend that the OWBPA's "equal cost/equal benefit" exemption does not apply because Defendants did not provide equal benefits to retirees.[18] These arguments, however, misconstrue the statutory and regulatory exemptions and, taken to their logical extensions, would prohibit practices expressly permitted under the ADEA.

A. Plaintiffs Have Failed To State A Claim For Disparate Impact Age Discrimination.

As an initial matter, Plaintiffs have failed to state a claim for disparate impact age discrimination.[19] "[I]t is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact." Smith v. City of Jackson, 544 U.S. 228, 241 (2005). Yet here, all Plaintiffs have done is to say that the Plan, as amended, disparately impacts retirees because it is expensive for them to find additional life insurance. (See 2d Compl. ¶125.) The Supreme Court held that such a claim is insufficient as a matter of law to state a disparate impact claim. See Meacham v. Knolls Atomic Power Lab., 128 S. Ct. 2395, 2405-06 (2008) (holding that it was insufficient for plaintiffs to plead that a pay plan was simply less generous to older workers than to younger workers to state a disparate impact claim

[18] Plaintiffs also contend that the plans at issue are not "bona fide" benefit plans because of Defendants alleged failure to "accurately describe" the benefits provided under them. However, as there is no dispute that these plans exist and pay benefits, there can be no dispute that these plans are "bona fide." See EEOC v. Cargill Inc., No. 81-4193, 1984 WL 14136, at *1 (D. Kan. Oct. 11, 1984) (holding that a disability plan that existed and paid benefits was "bona fide" for the purposes of the ADEA). Plaintiffs' own pleadings belie their argument – they concede that the plans at issue have been in place and providing retiree life insurance benefits since at least "1977, if not earlier." (See 2d Compl. ¶77.)

[19] In their Opposition, Plaintiffs clarify that they are not asserting a disparate treatment claim. (Opp. at 35.)

under the ADEA). Plaintiffs have "not identified any specific test, requirement, or practice within the [Plan] that had an adverse impact on older workers." Meacham, 128 S. Ct. at 2406. Accordingly, Plaintiffs disparate impact claim fails as a matter of law.

B. The Regulations Exempting The Elimination Of Life Insurance From The ADEA Apply With Equal Force To Disparate Impact Claims.

Moreover, the regulatory safe harbors upon which Defendants rely apply with equal force to disparate impact claims. See 29 C.F.R. § 1625.10(f)(i) ("[I]t is not unlawful for life insurance coverage to cease upon [an employee's] separation from service"); 29 C.F.R. § 1625.10(a)(2) ("Where an employer under an employee benefit plan provides the same level of benefits to older workers as to younger workers, there is no violation of [the ADEA]"). These regulations provide an absolute exemption for the specific actions that Plaintiffs challenge in this lawsuit.

C. Plaintiffs' Disparate Impact Theory Is Untenable And Illogical.

Through their disparate impact claim, Plaintiffs seek to impermissibly expand the scope of protection afforded by the ADEA. Under Plaintiffs' far-flung theory, any reduction or elimination of retiree life insurance benefits would be a *per se* violation of the ADEA because "the decision to cancel benefits [] necessarily falls more harshly upon retirees based on their age." (Opp. at 36.) Thus, once an employer provides a life insurance benefit to retirees, even if the benefit is unvested pursuant to ERISA, the employer could never exercise its right to terminate (or reduce) such a benefit because it "necessarily" would have a disparate impact on the retirees. Accordingly, these welfare benefits, which do not automatically vest under ERISA, see, e.g., Curtiss-Wright Corp., 514 U.S. at 78, would ***automatically vest under the ADEA*** because elimination of the benefits allegedly would adversely impact older retirees. Such a rule turns ERISA (and the ADEA) on its head and ultimately would result in fewer employers providing welfare benefits to retirees – just the opposite of what Congress intended when it

enacted ERISA and the ADEA.

Here, Plaintiffs concede that the EEOC regulation explicitly exempts the elimination of life insurance benefits at the *time of* retirement, see 29 C.F.R. § 1625.10(f)(i), but they contend that the regulation does not apply to the same action *during* retirement. Plaintiffs have articulated no reasoned basis such a contention. This Court should not adopt Plaintiffs' illogical supposition.

D. Embarq Provides "Equal Benefits" To Plaintiffs; Status As A VEBA Or Non-VEBA Participant Is Not Based On Age.

Congress enacted the ADEA "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; and to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 626(b). As the EEOC explains in its Policy Manual on Employee Benefits: "The first question in evaluating employee benefits is *whether* the employer has provided lesser benefits to older than to younger workers. If the benefits are the same, there is no need to proceed further." EEOC Policy Manual, Ch. 3 (October 3, 2000) (emphasis in original); see also Bozner v. Sweetwater County Sch. Dist. No. 1., No. 96-8087, 110 F.3d 73, 1997 WL 165168, at *3 (10th Cir. April 9, 1997) ("If [a] plan 'provides the same level of benefits to older workers as to younger workers, there is no violation' of the general prohibition against age discrimination, and 'the practice does not have to be justified as an exception.'") (quoting 29 C.F.R. § 1625.10(a)(2)).

Plaintiffs have not and cannot contend that the Plan amendment here resulted in older retirees receiving lesser benefits than those provided to younger retirees. Rather, Plaintiffs' only argument in this regard is that the equal cost/equal benefit exception should not apply because VEBA and non-VEBA participants received different levels of benefits. However, Defendants

need not justify this distinction. Unless the Plan favors *younger* retirees, there can be no violation of the ADEA. Id. Status as a VEBA or non-VEBA retiree does not implicate the relative ages of the two retiree groups. Thus, in light of the ADEA's intention to prohibit arbitrary discrimination ***on the basis of age***, see 29 U.S.C. § 623(b), the VEBA/non-VEBA dichotomy is a distinction without merit.

V. THE PARTIES AGREE THAT THE RESOLUTION OF THE ADEA CLAIMS WILL DISPOSE OF PLAINTIFFS' STATE LAW CLAIMS (COUNTS V, VI, AND VII).

Plaintiffs do not dispute that if their ADEA claims fail as a matter of law, so too must their state-law age discrimination claims under the doctrine of ERISA preemption. See Shaw v. Delta Airlines, 463 U.S. 85 (1983). For the reasons stated above and in Defendants' opening brief, Plaintiffs' ADEA claims fail as a matter of law. It follows that their state law claims, which "track the corresponding ADEA claims," must fail as well. (Opp. at 42.)

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,
STINSON MORRISON HECKER LLP

By *s/Christopher J. Leopold*
Mark D. Hinderks KS #11293
Scott C. Hecht KS #16492
Christopher J. Leopold KS #19638
1201 Walnut Street, Suite 2900
Kansas City, Missouri 64106
(816) 842-8600 (Telephone)
(816) 691-3495 (Facsimile)
mhinderks@stinson.com
shecht@stinson.com
cleopold@stinson.com

and

MORGAN, LEWIS & BOCKIUS LLP

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

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

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of May, 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:

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

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

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

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

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

DOUTHIT FRETS ROUSE GENTILE & RHODES, LLC
Mary C. O'Connell
R. Douglas Gentile
903 East 104th Street, Suite 610
Kansas City, MO 64131
Telephone: (816) 941-7600
Facsimile: (816) 941-6666
Email: moconnell@dfrglaw.com
dgentile@dfrglaw.com

s/Christopher J. Leopold
Attorney for Defendants