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## I. INTRODUCTION

Defendants' Motion for Partial Summary Judgment ("Summary Judgment Motion") is founded on narrow and purely legal bases: (1) the language of the controlling Plan documents is unambiguous and authorized Sprint and Embarq to make the changes to the retiree welfare benefits challenged in this litigation; (2) statutory and regulatory exemptions expressly permitted Embarq to reduce or terminate life insurance benefits; and, (3) ERISA preempts Plaintiffs' state law claims. Plaintiffs' responsive Rule 56(f) motion misconstrues the nature and scope of the Summary Judgment Motion. Plaintiffs contend they need broad discovery of "extrinsic evidence" to interpret unambiguous Plan language. Plaintiffs also assert that they need Plan documents that do *not* apply to the existing named plaintiffs. Plaintiffs, finally, contend that they need "demographic information" concerning putative class members. None of the information Plaintiffs seek is "essential," as required by Rule 56(f), to dispute the facts on which the Summary Judgment Motion is predicated.

Defendants seek summary judgment on Plaintiffs' First and Third Claims, for contractual vesting of retiree welfare benefits, because the unambiguous language of the controlling documents gives Defendants the right to change benefits as they deem appropriate. It is a bedrock principle of ERISA that extrinsic evidence is *not* relevant to the interpretation of unambiguous plan documents. Because the Plan documents are unambiguous, "extrinsic evidence" is not even material, let alone "essential."

Similarly, the production of Plan documents that solely relate to members of the putative class and the newly proposed additional five putative class representatives is not essential to Plaintiffs' opposition for a simple reason: while the Summary Judgment Motion is directed

against the claims of the 10 specifically identified “ERISA Plaintiffs,”<sup>1</sup> it is not directed against the claims of the members of the putative class or the newly proposed additional five putative class representatives. No class has been certified, and the Court has not authorized the addition of the newly proposed five putative class representatives.

Likewise, there is no amount of discovery that will alter the outcome of the Court’s determination of Defendants’ motion for summary judgment on the ADEA (Fourth Claim) and state-law age discrimination claims (Fifth, Sixth and Seventh Claims), which fail as a matter of law. Defendants’ amendments to the Plans fit within the express language of the exemptions set forth in the ADEA and the EEOC regulations. Plaintiffs’ state-law age discrimination claims are preempted by ERISA. Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983). No discovery will affect the outcome of these purely legal issues, let alone discovery of the “demographic information” that Plaintiffs specifically request in their Rule 56(f) motion.

In short, Defendants’ Motion for Partial Summary Judgment is ripe for resolution on the record before the Court. Thus, Plaintiffs’ Rule 56(f) motion should be denied.

## **II. ARGUMENT**

### **A. Legal Standards For A Rule 56(f) Motion**

Summary judgment is appropriate where “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 may deny a motion for summary judgment or continue the motion where the party opposing the

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<sup>1</sup> 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. Mem. in Supp. of Part. Motn. for Summ. Judgment, Dkt. No. 68, at 3.)

motion demonstrates that it cannot present “facts essential to justify the party’s opposition.”<sup>2</sup> Fed. R. Civ. P. 56(f). The Tenth Circuit has held that the party seeking relief under Rule 56(f) must explain: (1) why facts precluding summary judgment are unavailable; (2) what probable facts can be found through further discovery; (3) what steps have been taken to obtain such facts; and (4) how additional time will allow the party to controvert facts. Price v. W. Res., Inc., 232 F.3d 779, 783 (10th Cir. 2000).

Thus, to succeed on their motion, Plaintiffs “must state with specificity” how the additional discovery they seek will enable them to meet their burden in opposing summary judgment. Tabron v. Colgate-Palmolive Co., 881 F. Supp. 512, 517 (D. Kan. 1995). In doing so, Plaintiffs cannot merely assert “that discovery is incomplete or that specific facts necessary to oppose summary judgment are unavailable.” Id. Rather, Plaintiffs must show that “additional discovery time would establish facts sufficient to create a genuine issue of fact” that would preclude summary judgment. Id. If the information sought “is either irrelevant to the summary judgment motion or merely cumulative, no extension will be granted.” Patty Precision v. Brown & Sharpe Mfg. Co., 742 F.2d 1260, 1264-65 (10th Cir. 1984); Chavez v. Perry, 142 F. App’x 325, 334 (10th Cir. 2005) (“[A] party must specifically identify what facts it seeks to discover and show how those facts would materially aid its case on the dispositive issues.”). “[I]t is well settled that Rule 56(f) does not condone a fishing expedition where a plaintiff merely hopes to

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<sup>2</sup> Rule 56(f) provides:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party’s opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just.

Fed. R. Civ. P. 56(f).

uncover some possible evidence” in support of its claim. Duffy v. Wolle, 123 F.3d 1026, 1041 (8th Cir. 1997).

**B. Plaintiffs Have Not Identified Facts That May Be Obtained In Discovery That Are Essential To Oppose Defendants' Motion.**

“Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). While Plaintiffs’ Rule 56(f) motion and the supporting declaration seek wide-ranging discovery that is not in any way limited to the narrow legal issues presented by Defendants’ motion, they fail to identify any facts which, even if discoverable, would preclude summary judgment.

**1. Plaintiffs’ Proposed Discovery Of Documents That Do *Not* Relate To The ERISA Plaintiffs Is *Not* Essential To Oppose Defendants’ Motion.**

Plaintiffs assert that “Defendants’ arguments seeking partial summary judgment are based upon the premise that the only relevant plan-related documents are those covering plans from 1993 to 2003, the period during which the named class representatives retired.” (Pls’ Mem. in Support of Rule 56(f) Motion, Dkt. No. 80 at 7.) This is precisely the case. Defendants’ motion is narrowly drawn, both in terms of the specific, named plaintiffs against whom it was filed, and in terms of the legal issues that it presents. Plaintiffs, however, lament that Defendants did not move for summary judgment against the proposed class – which has not been certified – because it “consists of a much broader class of plan participants and involves many more plans than defendants have produced thus far.” (Id.)

Plaintiffs’ reluctance to address the governing Plan documents is understandable. The applicable Plan documents, in effect when the ERISA Plaintiffs retired from 1993 to 2003, have been produced and are devoid of any “clear and express” language demonstrating an intent to vest welfare benefits – i.e., language waiving Defendants’ right to amend or terminate the Plans

and which would render the benefits “forever unalterable.” Chiles v. Ceridian Corp., 95 F.3d 1505, 1513 (10th Cir. 1996). To the contrary, the governing Plan language unambiguously reserved the rights of Sprint and Embarq to amend or terminate the welfare benefits at any time.

Nevertheless, Plaintiffs insist that myriad documents that allegedly relate to proposed class members who retired before 1993 (but not to the ERISA Plaintiffs against whom the motion is directed) must be produced before they can respond to Defendants’ motion. (See Affidavit of A. Sandals at Dkt. 79 (“Sandals Aff.”) ¶¶12, 16 (seeking pre-1993 SPDs, “plan documents, special retirement program descriptions, and collective bargaining agreements.”)<sup>3</sup> Of course, Defendants’ motion challenges the claims of the ERISA Plaintiffs, who retired *after* 1993. In essence, Plaintiffs ask the Court to ignore Defendants’ motion, and instead consider the Rule 56(f) motion against the backdrop of a fictional and much broader motion for partial summary judgment.

Plaintiffs’ strategic wishful thinking aside, Defendants were not required to delay filing their Summary Judgment Motion until a later time, or to assert the motion against an uncertified class, or individuals hand-picked by Plaintiffs. See Fed. R. Civ. P. 56(b) (“A party against whom relief is sought may move *at any time* . . . for summary judgment *on all or part of the claim.*”) (emphasis added); Herrera v. Int’l Union, UAW, 858 F. Supp. 1529, 1546 (D. Kan. 1994)

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<sup>3</sup> 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).

(granting defendant's motion for summary judgment on ERISA and other claims and finding motion for class certification moot); Muller v. Am. Mgmt. Ass'n Int'l, 368 F. Supp. 2d 1166, 1177 (D. Kan. 2004) (granting summary judgment to defendant on ERISA and FLSA claims, and denying plaintiffs' motion for class certification as moot); Dean v. Boeing Co., No. 02-1019-WEB, 2003 U.S. Dist. LEXIS 8787, \*1-2 (D. Kan. Apr. 24, 2003) ("The Court is aware of a dispute between the parties regarding the timing of the Defendant's summary judgment motion, but since the issues raised by Defendant bear on the question of class certification, the Court will consider summary judgment first.").

Simply put, Plaintiffs' proposal to take discovery regarding pre-1993 plans and events (i.e., before any ERISA Plaintiff retired) is not essential to Plaintiffs' opposition to Defendants' motion for partial summary judgment. As Plaintiffs concede, the operative Plan documents are those in effect at the time the ERISA Plaintiffs retired. See Sandals Aff. at ¶ 11 ("the benefits entitlements of a retired employee are determined by reference to the summary plan description (and possibly the full plan document) in effect at the time of his or her retirement."). Here, Defendants' motion concerns only the ERISA Plaintiffs, who retired between September 1993 and March 2003. Accordingly, Plaintiffs' request for documents related to earlier (or later) periods of time is irrelevant. Burke v. Utah Transit Auth., 462 F.3d 1253, 1264 (10th Cir. 2006) (denying plaintiff's Rule 56(f) motion where it had "questionable relevance to the motion for summary judgment"); Bldg. & Constr. Dep't v. Rockwell Int'l Corp., 7 F.3d 1487, 1496 (10th Cir. 1993) (finding district court did not abuse its discretion where it denied Rule 56(f) motion on grounds of relevance); Allen v. Bridgestone/Firestone, Inc., 81 F.3d 793, 797-98 (8th Cir. 1996) (denying plaintiff's motion for continuance in age discrimination suit where plaintiff failed to demonstrate how any of the discovery sought was relevant to his constructive discharge).

**2. Plaintiffs' Proposed Discovery Of Extrinsic Evidence Has No Bearing On Defendants' Motion For Partial Summary Judgment On The First And Third Claims For Relief, Which Is Based Exclusively On The Controlling Plan Documents.**

Plaintiffs contend that discovery regarding “extrinsic evidence” is necessary to interpret the unambiguous terms of the governing Plan documents. (Pls’ Memorandum in Support of Rule 56(f) Motion (Pl’s Memo) Dkt. No. 80 at 4; Sandals Aff. at ¶12 (requesting and special retirement program materials); ¶ 14 (requesting “written communications made by Sprint and its predecessors” that might “reveal whether [] [P]lan terms were modified” by subsequent communications); ¶16 (requesting Plan documents and SPDs pre-dating the earliest retirement of the ERISA Plaintiffs); and ¶23 (requesting documents related to the “history of the various insurance vehicles used by Sprint and its predecessors”). 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 Assurance 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.’”) (quotation omitted); 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 *unambiguous* plan. Chiles, 95 F.3d at 1511; Hickman v. GEM Ins. Co., 299 F.3d 1208, 1212 (10th Cir. 2002) (“If plan documents are reviewed and found not to be ambiguous, then they may be construed as a matter of law.”); see also Hughes v. 3M Retiree Med. Plan, 281 F.3d 786, 790 (8th Cir. 2002) (holding that when interpreting ERISA plan documents, extrinsic evidence is only “admissible if the language of the plan provision at issue is ambiguous”) (citations omitted).

Here, the discovery sought by Plaintiffs would not create a genuine issue with respect to the material facts underlying Defendants’ motion, which asserts that, as a matter of law, the Plan

language is unambiguous. Utah Power & Light Co., v. Fed. Ins. Co., 983 F.2d 1549, 1553 (10th Cir. 1993) (“interpretation of an unambiguous contract is a question of law to be determined by the court and may be decided on summary judgment.”). Plaintiffs, therefore, have not carried their burden under Rule 56(f) and “postponement of a ruling on a motion for summary judgment is unjustified.” Humphreys v. Roche Biomed. Labs., Inc., 990 F.2d 1078, 1081 (8th Cir. 1993) (upholding district court’s grant of summary judgment prior to discovery where plaintiffs failed to show how the requested discovery was “relevan[t] to the issues pleaded”).

In light of the narrow issues presented by Defendants’ motion, Plaintiffs’ broad request for discovery of such extrinsic evidence is, at best, an impermissible fishing expedition. Price, 232 F.3d at 783; Duffy, 123 F.3d at 1041. Plaintiffs’ suggestion that a continuance is appropriate because these documents allegedly are in Defendants’ exclusive control misses the mark. (Pls’ Memo at 4). “If all one had to do to obtain a grant of a Rule 56(f) motion were to allege possession by movant of certain information and other evidence, every summary judgment decision would have to be delayed while the non-movant goes fishing in the movant’s files.” Price, 232 F.3d at 784 (internal citation omitted).

More importantly, Defendants do not have exclusive control of these documents. One would like to think that Plaintiffs already possessed what they would contend suffices for evidence to support their claims prior to filing this lawsuit. Perhaps that is naïve, and even if Plaintiffs did not have evidence supporting their claims before filing the lawsuit, Defendants have produced thousands of pages of documents that relate to the ERISA Plaintiffs.<sup>4</sup> (Dkt. No.

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<sup>4</sup> Defendants produced over 6,000 pages of documents before Plaintiffs filed their Rule 56(f) motion. More than a year ago, on May 13, 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

80 at 5-6.) The Rule 56(f) motion remains overly broad and confusing because Plaintiffs have not complied with the Rule's specificity requirement. Plaintiffs apparently are content to muddle the record by continually asserting that they need "all" documents from "all" plaintiffs when, in fact, they have all documents essential to oppose the Summary Judgment Motion.

Indeed, the Sixth Circuit's recent decision in Winnett v. Caterpillar, Inc., 553 F.3d 1000 (6th Cir. 2009) ("Winnett II") illustrates that only limited discovery is needed prior to deciding whether documents are unambiguous.<sup>5</sup> There, the district court concluded that the plaintiffs had a right to vested benefits under the terms of the plan, Winnett v. Caterpillar, Inc., 496 F. Supp. 2d 904, 922 (M.D. Tenn. 2007) ("Winnett I"), but a unanimous panel of the Sixth Circuit reversed the decision. Winnett II, 553 F.3d at 1011-12. Importantly here, the Sixth Circuit held that discovery was not needed even though the issue was decided *at the pleadings stage*:

Plaintiffs maintain that additional discovery would reveal extrinsic evidence in support of their interpretation of the document language. But, as discussed below, the controlling documents cannot reasonably be interpreted to vest retiree benefits while workers are still active and represented by their union. ***Because no amount of additional discovery would render the controlling documents ambiguous on this point, Plaintiffs are not prejudiced by our reaching the merits now.***

Id. at 1008 (emphasis added, citation omitted). "[O]ur decision on the vesting question 'has the

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Plaintiffs, plan participant communications, and other plan-related materials. The production of the ERISA Plaintiffs' personnel and benefits records renders Plaintiffs' attempted reliance on Deboard v. Sunshine Mining and Ref. Co., 208 F.3d 1228, 1240 (10th Cir. 2000) misplaced. (See Pls' Memo at 4-5.) Plaintiffs now possess the documents that they contend may have created a "new plan" under Deboard. (Id. at 25.) ("Deboard establishes an alternative decisional framework for claims to benefits based on participation in special early retirement programs") (citing Deboard, supra at 1241). Hence, Plaintiffs cannot meet their burden for a continuance under Rule 56(f) because they already possess the documents that they claim are essential to rebut Defendants' motion.

<sup>5</sup> Defendants have not moved for a stay of discovery. Indeed, Defendants have produced over 13,000 pages of documents to date. Rather, Defendants merely note that there is a narrow universe of documents (the Plan agreements and SPDs referred to by Judge Vratil in her Order on the Motion to Dismiss; Dkt. No. 45 at 15) that the Court will consider in determining, as a matter of law, that the terms of the Plans are unambiguous.

potential to save the parties and the judicial system significant resources’ because ‘[i]f the Sixth Circuit reverses the court’s finding as to vesting . . . the vast majority of the claims would be resolved.’” *Id.* (quoting Winnett v. Caterpillar, Inc., No. 3:06-cv-00235, 2007 WL 2123905, \*6 (M.D. Tenn., July 20, 2007)).

The same is true here. If the Plan’s terms are *unambiguous*, then extrinsic evidence *never comes into play* and Plaintiffs’ contractual claim for benefits fails as a matter of law.

Similarly off-base is Plaintiffs’ contention that “evidence bearing on . . . a subsequent course of performance” and “the written communications made by Sprint and its predecessors to employees and others can reveal whether ERISA plan terms were modified.” (Pls’ Memo. at 6). In the Tenth Circuit, to successfully challenge a plan amendment that eliminates or reduces welfare benefits provided under an ERISA plan, a plaintiff must 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 (emphasis added); Sprague v. Gen. Motors Corp., 133 F.3d 388, 403 (6th Cir. 1998) (en banc) (written representations from employer to employees do not modify or supersede Plan document).<sup>6</sup> Thus, in determining whether an ERISA plan unambiguously vests retiree welfare benefits, a court’s inquiry begins and ends with the terms of the formal Plan documents and SPDs. Chiles 95 F.3d at 1511; Utah Power & Light Co., 983 F.2d at 1553. If the Plan documents and SPDs are unambiguous, the Court “may construe them as a matter of law.” Chiles, 95 F.3d at 1511.

Plaintiffs’ request to use extrinsic evidence to demonstrate ambiguities in the Plan documents and SPDs flies in the face of the fundamental principles of contract interpretation and

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<sup>6</sup> 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.

relevant ERISA jurisprudence. See Chiles, 95 F.3d at 1511; see also Joyce v. Curtiss-Wright Corp., 171 F.3d 130, 134 (2d Cir. 1999) (“All courts agreed that if a document unambiguously indicates whether retiree medical benefits are vested, the unambiguous language should be enforced.”).

Thus, all of the documents and information Plaintiffs identify in their Rule 56(f) motion are extrinsic to the Plan documents and SPDs. If, as the parties agree, the Plan documents in effect at the time each ERISA Plaintiff retired are unambiguous, then the Court should grant summary judgment without resorting to such extrinsic evidence. On the other hand, if the Court determines that a Plan document or SPD is ambiguous, it should deny Defendants’ motion to the extent it is based on that document.<sup>7</sup> Either way, none of the information requested by Plaintiff is necessary to oppose Defendants’ motion.

**C. Plaintiffs Have Not Identified Any Discovery Relevant To Their Age Discrimination Claims That Is Essential To Oppose Defendants’ Motion.**

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. In turn, because ERISA preempts state employment discrimination statutes to the extent they prohibit conduct that is permissible under the ADEA, see Shaw, 463 U.S. at 95-108, Plaintiffs’ state-law discrimination claims must also

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<sup>7</sup> The resolution of one ERISA Plaintiff’s contractual vesting claim (or a part of a claim, i.e., medical benefits or life insurance benefits) does not necessarily impact the resolution of the claims (or parts of claims) of other ERISA Plaintiffs because the Plan and/or SPD in effect at the time each ERISA Plaintiff retired was not the same.

fail. While Plaintiffs suggest that “documents demonstrating the demographic characteristics of the proposed ADEA class” are relevant to their “disparate impact” claims under the ADEA (Sandals Aff. at ¶ 24), they do not explain why those demographics are essential to rebut Defendants’ motion. Plaintiffs do not identify any other information that they deem lacking with regard to their age discrimination claims.

As a threshold matter, Defendants’ motion for summary judgment on Plaintiffs’ age discrimination claims is wholly unrelated to the “demographic characteristics” of the class, regardless of the theory under which Plaintiffs pursue their claims. Defendants moved for summary judgment on the remainder of the Fourth Claim because the ADEA’s implementing regulations explicitly permit a plan sponsor to completely terminate retiree life insurance benefits, regardless of any alleged discriminatory intent or “disparate impact” on older retirees. The issue of whether the ADEA provides a statutory safe harbor for plan sponsors to completely eliminate retiree life insurance benefits is purely legal and does not implicate the need for any demographic information relevant to the putative class. 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.”). Similarly, the demographics of the proposed ADEA class are irrelevant to the issue of whether the plan amendments uniformly applied to *all* of the proposed ADEA class members – a fact that is conclusively demonstrated by the Plan amendments themselves. (See Declaration of Randall T. Parker, Dkt. 68-2 at ¶ 15, Exh. 13.)

Second, as a matter of law, ERISA preempts state employment discrimination laws to the extent that they prohibit practices which are otherwise lawful under the ADEA. Shaw, 463 U.S. at 95-108. Clearly, the doctrine of ERISA preemption is a purely legal concept and does not require additional discovery regarding the demographics of the putative class. Indeed, Plaintiffs

have not argued otherwise.

**III. CONCLUSION**

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' Rule 56(f) motion.

Respectfully submitted,  
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