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)

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR CLASS ACTION CERTIFICATION AND FOR APPROVAL OF AN ADEA COLLECTIVE ACTION

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INTRODUCTION

Plaintiffs move to certify their various claims as class or collective actions, neither of which are appropriate vehicles in this case. As set forth below, Plaintiffs have failed to provide the Court with a proper legal or factual basis for entering any certification under Fed. R. Civ. P. 23, or any collective action determination under the Age Discrimination in Employment Act ("ADEA"). Their Motions should therefore be denied.

First, Plaintiffs have failed to demonstrate that their claims under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"), meet the commonality, typicality, and adequate representation requirements necessary to justify class treatment under Rule 23(a). Plaintiffs' breach of fiduciary duty claim under ERISA Section 502(a)(3), which is based on alleged misrepresentations and omissions dating back to at least 1973, requires an individualized, fact-sensitive analysis that precludes class certification. While Plaintiffs contend that the Court may "presume" that they detrimentally relied on alleged misrepresentations and omissions, every Court of Appeals to have considered the issue, including the Tenth Circuit, has held that an ERISA plaintiff must prove individual reliance. By definition, that issue is not amenable to class treatment.

Plaintiffs' claim for restoration of benefits under ERISA Section 502(a)(1)(B) is equally unsuitable for class treatment. Recognizing that their claims would be doomed if they were to rely on the governing summary plan descriptions and plan documents, Plaintiffs have insisted in prior filings that they are entitled to sprawling discovery to ascertain if new and different "plans" have been created as a result of communications with various participants. Such arguments eviscerate Plaintiffs' position that the "uniformity" of the benefits plans at issue render the Section 502(a)(1)(B) claim ripe for class certification. Where Plaintiffs themselves contend that

they cannot possibly verify the existence of various hypothetical plans without extensive discovery, the Court cannot assume these unknown "plans" share terms typical of or common to the class.

Plaintiffs' proposed ERISA class representatives are also woefully inadequate. While Plaintiffs purport to include every person who retired at any time from Defendants Embarq and Sprint or one of their many affiliates, the proposed class representatives for the ERISA claims represent participants in only a small fraction of the benefit plans that would be at issue if such claims were certified, as they retired at the earliest in September 1993 and at the latest in March 2003. There is no evidence that any of the ERISA Plaintiffs could adequately represent class members who retired at a different time or who worked at other subsidiary companies with different plan terms.

Even if the purported ERISA Plaintiffs were to satisfy Rule 23(a)'s threshold typicality, commonality and adequacy of representation requirements (which Defendants refute), any attempt to adjudicate the claims of their proposed class would also fail to satisfy the requirements of Rule 23(b). Given the individualized nature of their claims, class treatment would be neither manageable nor efficient as required by Rules 23(b)(2) and 23(b)(3). Plaintiffs' fiduciary breach claims could not be resolved without individualized determinations of detrimental reliance. Their plan-based claims rely first on individualized determinations as to the very existence of potential plans and, second, on the terms of these new plans. In both instances, the Court must make specific assessments on a plaintiff-by-plaintiff or document-by-document basis, rendering the claims of the purported class impossible to try in an efficient way. Moreover, Plaintiffs have utterly failed to meet their burden of establishing a basis for certifying an ERISA class under Rule 23(b)(1)(B).

Second, Plaintiffs have failed to carry their burden to establish that the subclass representatives adequately represent the interests of each of the proposed subclasses in their state law age discrimination claims. The proposed Ohio and Oregon named plaintiffs represent only a narrow portion of the proposed subclasses for those states, and Plaintiffs' proposed "Tennessee Age Claim Subclass" lacks *any* class representative, let alone a representative alleged to be adequate. It is axiomatic that a class action cannot be certified or maintained in the absence of a class representative.

Finally, Plaintiff's ADEA claims are inappropriate for collective action treatment. Plaintiffs allege in only the most conclusory terms that the proposed collective action members were similarly situated. More is required to satisfy even the preliminary certification standard. In addition, Plaintiffs' ADEA claim is so flawed as to justify mooting the collective action certification motion by disposing of the claim altogether.

BRIEF STATEMENT OF FACTS

Plaintiffs in this case seek to reverse the lawful decision of Defendant Embarq to exercise its right under ERISA to modify retiree medical and life insurance benefits of former employees of Embarq and Sprint. In their First Claim for Relief, Plaintiffs allege that their benefits were vested and therefore could not be changed without violating ERISA Section 502(a)(1)(B). *See* Second Amended Compl. ("2d Compl."),[1] Count I, ¶¶104-09. In their Second Claim, Plaintiffs allege that certain named and unnamed fiduciaries of the Plans "did not make clear that the subject retiree benefits could be amended or terminated during a participant's retirement, but rather misinformed and misled participants and beneficiaries into believing that they would receive their benefits until death." *Id.*, Count II, ¶115. In their Third Claim, Plaintiffs seek relief

[1] While Plaintiffs have moved to file a Third Amended Complaint, the Court has not yet ruled on that motion.

under the Declaratory Judgment Act[2] that essentially duplicates the relief sought in the First Claim and, in any event, is derivative of that claim. *Id.*, Count III, ¶¶122-26. In their Fourth Claim, Plaintiffs assert that Defendants' plans, as amended, now violate the ADEA, and have a disparate impact on older retirees.[3] *Id.*, Count IV, ¶¶127-47. Finally, in their Fifth, Sixth and Seventh Claims, Plaintiffs reassert their age discrimination claims as violations of Ohio, Oregon, and Tennessee state anti-discrimination statutes, respectively. *Id.*, Counts V-VII, ¶¶148-67.

Plaintiffs seek certification of a class and four subclasses for all claims in the Second Amended Complaint, except for the Fourth Claim (ADEA), for which they seek approval to maintain an opt-in collective action under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b), which has been incorporated into the ADEA. Plaintiffs propose the following definition of the "Proposed Class" for all ERISA and state law claims:

> All persons, including all plan participants and all eligible spouse and dependent plan beneficiaries, whose rights to medical, prescription drug, and/or life insurance benefits or premium subsidies have been adversely affected by the terminations, reductions and changes in retiree benefits which were announced (1) by Defendant Sprint Nextel Corporation in or about November 2005, and (2) by Defendant Embarq Corporation on July 26, 2007.

See Plaintiffs' Memorandum in Support of Motion for Class Action Certification (Dkt. No. 56) ("Pls' Class Cert. Mem.") at 1.

The proposed "VEBA Subclass" is defined as follows:

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

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[2] This Court dismissed Plaintiffs' request for declaratory relief under ERISA Section 502(a)(3). Memorandum and Order dated December 2, 2008 (Doc. No. 45) ("Dismissal Order") at 19.

[3] Only Plaintiffs' claim regarding retiree life insurance benefits in Count IV survived Defendants' motion to dismiss. Dismissal Order at 22-23. Judge Vratil held that Defendants' plan amendments affecting retiree medical and prescription drug benefits were permitted by the ADEA and the governing EEOC regulations.

Id.

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

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

Id.

ARGUMENT

I. PLAINTIFFS' ERISA CLAIMS ARE NOT SUITABLE FOR CLASS TREATMENT UNDER RULE 23.

Plaintiffs move to certify a class under Fed. R. Civ. P. 23 with regard to their claims for restoration of benefits under ERISA Section 502(a)(1)(B) and breach of fiduciary duty under ERISA Section 502(a)(3) in Counts I and II of their Second Amended Complaint. Plaintiffs bear the burden of establishing that the requirements of Rule 23 are met. *Reed v. Bowen*, 849 F.2d 1307 (10th Cir. 1988). They have not satisfied that burden here.

A. Legal Standard Under Rule 23

Rule 23(a) provides that class certification is warranted "*only* if":

> (1) the class is so numerous that joinder of all members is impracticable [numerosity]; (2) there are questions of law or fact common to the class [commonality]; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class [typicality]; and (4) the representative parties will fairly and adequately protect the interests of the class [adequacy]."

Fed. R. Civ. P. 23(a) (emphasis added). Even where the elements of Rule 23(a) are met, however, Rule 23(b) permits class certification only where:

> (1) prosecuting separate actions by or against individual class members would create a risk of:
>
> (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
>
> (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)

The class question is not to be taken lightly. Courts must conduct a "rigorous analysis" to determine whether the prerequisites of Rule 23 have been met. *Shook v. El Paso County ("Shook I")*, 386 F.3d 963, 968 (10th Cir. 2004), *aff'd*, 543 F.3d 597 (10th Cir. 2008) (quoting *Gen'l Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982)); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-15 (1997). As recognized at the time of the 2003 Amendments to Rule 23, "[A] critical need is to determine how the case will be tried. An increasing number of courts require a

party requesting class certification to present a 'trial plan' that describes the issues likely to be presented at trial and tests whether they are susceptible to class-wide proof." Advisory Committee Note, 2003 Amendments to Rule 23(c)(1) (citing Manual for Complex Litigation Trial, §§21.213, 30.11 and 30.12). Thus, the Tenth Circuit has recognized that a decision on class certification may entail consideration of issues regarding the proof of the merits of the putative class claims. *See Shook v. Bd. of County Comm'rs of County of El Paso ("Shook II")*, 543 F.3d 597, 612 (10th Cir. 2008) (emphasis in original); *accord Shook I*, 386 F.3d at 974 (recognizing that reasons might exist "why the 'merits may become intertwined with proper consideration of other issues germane to whether the case should be certified as a class action' that guide the court's class certification decision") (citing *Adamson v. Bowen*, 855 F.2d 668, 677 n.12 (10th Cir. 1988) *superceded by rule on other grounds by Schrag v. Dinges*, 153 F.R.D. 665 (D. Kan. 1994)); *accord Vandehey v. Vallario*, 554 F.3d 1259, 1267 (10th Cir. 2009) ("District courts ensure Rule 23's provisions are satisfied by conducting a 'rigorous analysis' addressing the rule's requirements 'through findings,' regardless of whether these findings necessarily 'overlap with issues on the merits.'") (citations omitted).

Considerations of efficiency also inform the class certification analysis. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 349 (1983) (explaining that a court should consider not only technical requirements of Rule 23, but also the "principal purpose of the class action procedure—promotion of efficiency and economy of litigation"). Critically, where proof of each plaintiff's ERISA claim at trial necessarily would require individualized and fact-sensitive inquiries, a class action is not appropriate. *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1996) (holding that claim that a summary plan description was "ambiguous or faulty" is not suitable for class treatment because each plaintiff would need to prove detrimental reliance);

Owen v. Regence BlueCross BlueShield of Utah, 388 F. Supp. 2d 1335, 1338-39 (D. Utah 2005) (holding that class certification was inappropriate where individualized determination of causation was required for breach of fiduciary duty claims based on material omissions).

B. Plaintiffs' ERISA Claims Fail To Satisfy Rule 23(a).

1. Plaintiffs' Breach Of Fiduciary Duty Claims In Count II Fail To Satisfy Rule 23(a)'s Typicality Or Commonality Requirements.

To prevail on an ERISA breach of fiduciary duty claim, every "plaintiff must establish each of the following elements: (1) the defendant's status as an ERISA fiduciary acting as a fiduciary; (2) a misrepresentation on the part of the defendant; (3) the materiality of that misrepresentation; and (4) detrimental reliance by the plaintiff on the misrepresentation." *Randles v. Galichia Med. Group, P.A.*, No. Civ. 05-1374-WEB, 2006 WL 3760251, at *13 (D. Kan. Dec. 18, 2006) (quotation omitted); *see also Owen*, 388 F. Supp. 2d at 1338 (applying same standards in evaluating ERISA fiduciary breach claim based on omissions) (citing *Horn v. Cendant Operations, Inc.*, 69 F. App'x 421 (10th Cir. 2003) and *Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 384 (3d Cir. 2003)).

Each of these elements requires individualized proof that forecloses class certification. Whether someone acts in a fiduciary capacity is a fact-bound inquiry depending on the nature of the communications and the authority of the individual to make them. *See Kayes v. Pac. Lumber Co.*, 51 F.3d 1449, 1461 (9th Cir. 1995); *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, MDL No. 969, 2003 WL 252106, at *5 (E.D. Pa. Feb. 4, 2003). Similarly, whether a particular communication from a person alleged to be a fiduciary constitutes a material representation will depend on "the circumstances surrounding each communication (*i.e.*, the timing, content and context)." *Id.* Finally, "[t]he issue of detrimental reliance . . . is not appropriate for class action determination." *Chiles*, 95 F.3d at 1519.

Plaintiffs attempt to cure part of their Rule 23(a) problem by arguing that the Court may presume that each of the several thousand members of the proposed class reasonably relied to his or her detriment on alleged misrepresentations or omissions. *See* Pls' Class Cert. Mem. at 16. Plaintiffs are incorrect. As an initial matter, the cases cited by Plaintiffs are inapposite. *See id.* and cases cited therein. All of the cases, save one, arose in the context of securities fraud or common-law fraud lawsuits. While Plaintiffs contend that the theory of presumed reliance has been "settled law since 1972," *id.* (citing *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153 (1972)), they cannot cite a single case decided in the Tenth Circuit in the ensuing 37 years in which a court has applied that "settled law" in an ERISA context.

In fact, Plaintiffs cite only one ERISA case, in *any* circuit, that has followed *Affiliated Ute*. *See In re Tyco Int'l Ltd. MDL Litig.*, MDL No. Civ. 02-1335 (PB), 2006 U.S. Dist. LEXIS 58278, *25 (D.N.H. Aug. 15, 2006). As discussed below, *Tyco* exists on an island, surrounded by countless decisions that expressly require proof of detrimental reliance in ERISA fiduciary breach cases. *See, e.g., In re Merck & Co. Sec. Derivative & ERISA Litig.*, MDL No. 1658 (SRC), 2009 U.S. Dist. LEXIS 10243, at *15-16 (D.N.J. Feb. 10, 2009) (rejecting the *Tyco* court's reasoning that securities law principles apply to ERISA as a "big leap" and finding unpersuasive the argument that the court should "presume reliance from materiality"). Moreover, *Tyco* is distinguishable on its facts. There, the plaintiffs alleged that the defendants breached their fiduciary duties by offering Tyco's stock as an investment option in the company's defined contribution (401(k)) pension plan. The *Tyco* "[p]laintiffs' case hinge[d] on defendants' alleged failure to disclose material information about the Tyco Stock Fund." *Id.* at *25. Thus, the underlying facts in *Tyco* sounded in securities fraud. *Id.*; *cf. Rogers v. Baxter Int'l Inc.*, 521 F.3d 702, 705 (7th Cir. 2008) (distinguishing ERISA and securities law principles:

"[T]his is not a securities suit. It is an action against fiduciaries of a pension plan. To prevail, the participants must show that defendants breached the duties they owed as fiduciaries of pension funds, not whatever duties Baxter and its managers owed to investors at large.").

Notwithstanding a single, out-of-circuit decision, detrimental reliance is not presumed and must be established by each plaintiff on an *individual basis* in the Tenth Circuit. *Chiles*, 95 F.3d at 1519; *see also In re Westar Energy, Inc., ERISA Litig.*, No. Civ. 03-4032 (JAR), 2005 WL 2403832, at *11 (D. Kan. Sept. 29, 2005) (observing that the Tenth Circuit has held that breach of fiduciary duty claims require a showing of a "causal link between the alleged breach… and the loss plaintiff seeks to recover") (quoting *Allison v. Bank One-Denver*, 289 F.3d 1223, 1239 (10th Cir. 2002) (citations omitted)); *Randles*, 2006 WL 3760251 at *13 (holding that "a plaintiff must establish detrimental reliance by the plaintiff on the misrepresentation"); *Owen*, 388 F. Supp. 2d at 1338-39 (detrimental reliance is a necessary element of a claim based upon a material misrepresentation *or* omission); *Kerber v. Qwest Group Life Ins. Plan*, No. Civ. 07-644, 2009 WL 2710207 (D. Colo. Aug. 25, 2009) (granting defendant's motion for summary judgment on breach of fiduciary duty claim because plaintiff failed to establish detrimental reliance on material misrepresentation); *Horn*, 69 F. App'x at 429 (plaintiff established detrimental reliance on claim that fiduciary failed to disclose LTD plan's "actively at work" requirement by proving that she could have satisfied plan requirement but for defendants' breach).[4]

[4] Similarly, the clear weight of authority in other circuits is that an ERISA plaintiff must prove detrimental reliance to prevail on a breach of fiduciary duty claim. *See, e.g., Leuthner v. Blue Cross & Blue Shield of Ne. Pa.*, 454 F.3d 120, 127-28 (3d Cir. 2006) (plaintiff must prove detrimental reliance), *cert. denied*, 549 U.S. 1206 (2007); *Pierce v. Sec. Trust Life Ins. Co.*, 979 F.2d 23, 30 (4th Cir. 1992) (rejecting district court's holding that "reliance and prejudice can be presumed"); *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 858 (4th Cir. 1994) (finding that reliance may not be presumed and plaintiffs must provide affirmative evidence of detrimental reliance*); Frahm v. Equitable Life Assurance Soc'y of U.S.*, 137 F.3d 955, 957 (7th Cir. 1998) (finding evidence of reliance dependent upon "what was said or sent to

In summary, Plaintiffs' breach of fiduciary duty claims require individualized proof that a plan participant retired or took some other specific action in reliance on a material misrepresentation or omission made by someone acting in a fiduciary capacity. Plaintiffs' fiduciary breach claims are therefore wholly inappropriate for class certification.

2. Plaintiffs' Claim For Restoration Of Benefits In Count I Fails To Satisfy Rule 23(a)'s Typicality Or Commonality Requirements.

Plaintiffs allege that their "claims for restoration of benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), are ideally suited for class treatment because they involve identical claims for benefits under the uniform terms of common benefit plans." Pls' Class Cert. Mem. at 9. Yet Plaintiffs simultaneously assert that the terms of the benefits plans at issue cannot be assumed to be "uniform" at all. In response to Defendants' dispositive motions, Plaintiffs have repeatedly challenged Defendants' assertion that the summary plan descriptions in which the Company disclosed its right to amend or terminate its benefit plans govern their Section 502(a)(1)(B) claims. Pointing to various communications to plan participants, they have claimed the existence of and sought broad discovery regarding potential additional "plans." In departing from the uniform summary plan descriptions and relying on these individualized communications, Plaintiffs implicitly concede that their Section 502(a)(1)(B) claims are not appropriate for class treatment.

In prior briefing, Plaintiffs have relied heavily upon *DeBoard v. Sunshine Mining & Ref. Co.*, 208 F.3d 1228 (10th Cir. 2000), in support of their argument that they are entitled to discovery of plan participant communications which may have allegedly created new ERISA

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each agent personally, and different benefits advisers said or wrote different things to different agents"); *Kalda v. Sioux Valley Physician Partners, Inc.*, 481 F.3d 639, 645 (8th Cir. 2007) (detrimental reliance is an element of ERISA breach of fiduciary duty claim); *Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1344 (11th Cir. 2006) ("[T]he reliance element of a class claim presents problems of individualized proof that preclude class certification.").

plans providing for vested benefits. *See* Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss (Dkt. No. 21) at 14; Plaintiffs' Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment (Dkt. No. 82) at 24; Plaintiffs' Memorandum in Support of Rule 56(f) Motion (Dkt. No. 80) at 5; and Plaintiffs' Reply Memorandum in Support of 56(f) Motion (Dkt. No. 92) at 3 n.1. They make much of *DeBoard*'s holding that it is possible to create an independent ERISA plan if an informational letter sent to plan participants evidences an intent to establish vested benefits. According to Plaintiffs, *DeBoard* requires discovery of all such participant communications so that Plaintiffs can determine if any other independent plan obligations were indeed created. *See* Plaintiffs' Memorandum in Support of Motion to Compel Discovery (Dkt. No. 100) at 12-13.

Based on these prior arguments, Plaintiffs have essentially posited that their purported class members do not share the requisite commonality and typicality because they may all be subject to unknown individual plans, each defined by its own terms, created by the dissemination of various informational communications. Having taken this position, Plaintiffs cannot now argue to the contrary when it suits their goal of class certification.

An analogy may be drawn from *Mulder v. PCS Health Sys., Inc.*, 216 F.R.D. 307 (D.N.J. 2003), where the defendant pharmaceutical benefits manager company PCS contracted with a number of plan administrators, which in turn contracted with multiple employers to provide benefits to individual employees composing the proposed class. While the court acknowledged commonality can be satisfied despite class members' participation in numerous plans, it distinguished the scenario where

> significant variations exist between the provisions of the different contracts entered into between PCS and the ERISA plan administrators that were its customers. These provisions made different guarantees to plan beneficiaries (such as the percentage of

> rebates to be paid to the plan rather than retained by PCS) and therefore set forth distinct obligations on the part of PCS.

Id. at 316. Thus, in situations where PCS had entered into individual and differing contracts to provide services that varied among proposed class members, the question of its obligations under these contracts did not present an issue common to the proposed class. Indeed, the court went on to observe that

> even if, as [plaintiff] asserts, PCS's 'conduct' was the same with respect to each ERISA plan, the alleged identical conduct amounts to a legal conclusion by [plaintiff] that in every instance in which PCS negotiated with drug manufacturers, PCS' actions violated its ERISA fiduciary obligations.

Id.

Herein lies the distinction from a class involving established ERISA plans documented in a summary plan description: Plaintiffs' efforts to certify a class on their *DeBoard* claims would require a legal conclusion that in every instance where various alleged communications were disseminated, additional ERISA "plans" were created and with them, additional and identical fiduciary relationships and obligations. In certifying a class, the Court cannot simply accept Plaintiffs' factual assertion that such plans and obligations were created. The discovery Plaintiffs claim is necessary to determine whether such plans were created renders certification inappropriate because each alleged communication would have to be produced by Defendants and examined by the Court on an individual basis to determine if there was a "plan" in the first place. *See also Owner-Operator Indep. Drivers Ass'n, Inc. v. USIS Commercial Servs., Inc.*, 537 F.3d 1184, 1194 (10th Cir. 2008) (denying certification of proposed class of truck drivers bringing Fair Credit Reporting Act claims against company that compiled allegedly inaccurate employment histories of truck drivers because the issue of "whether a report is accurate may involve an individualized inquiry").

In another instructive case, *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584 (7th Cir. 1993), the police association plaintiffs brought claims under 42 U.S.C. § 1983 alleging that city, police, fire, municipal and laborers' pension funds abrogated their 14th Amendment rights by entering a settlement agreement regarding health care coverage for retired city employees. The Seventh Circuit affirmed the district court's denial of class certification, noting that the plaintiffs' primary allegations concerned the defendants' communications to annuitants regarding the availability of health care. However, it was "not known whether the communications allegedly made by [the defendants] to each group of city employees were identical;" the only evidence in the record pertained to police pre-retirement seminars and it was unclear whether communications were uniformly made at each seminar, or whether similar representations were made to the other groups of city employees. *See id.* at 597. The appeals court found that the police association plaintiffs could not demonstrate that they were typical of all class members, where they could not demonstrate that they received (never mind relied upon) the same communications regarding the pension funds. *See id.*

Notably, the court seized upon the fact that the plaintiffs had "not provided any evidence other than speculation that any alleged communications by the City or the Funds to the fire, laborer or municipal annuitants were the same as those made to the police." *Id.* In the same way, Plaintiffs here have provided nothing but vague allegations of multiple plans being created by various communications from Defendants, requiring considerable additional discovery of such communications. The death knell for class certification in *Retired Police* was not only that proof of reliance on the communications at issue required individualized inquiry, but that proof of the communications themselves required such inquiry. Furthermore, the Seventh Circuit

emphasized that class certification was particularly inappropriate where the communications at issue were, for the most part, oral representations. *See id.*

Given that Plaintiffs' claims rest on of individualized communications under *DeBoard*, they remain unsuitable for treatment as a class action. *See Diehl v. Twin Disc., Inc.*, No. 94 C 50031, 1995 U.S. Dist. LEXIS 7569, at *20 (N.D. Ill. May 30, 1995) (certification impossible where "the communications occurred at the retirees' exit interviews, presumably at least 120 separate oral communications over an eighteen year period"); *Spencer v. Cent. States Se. & Sw. Areas Pension Fund*, 778 F. Supp. 985, 991 (N.D. Ill. 1991) (finding that plaintiffs failed to satisfy Rule 23(a) "[b]ecause the oral representations allegedly were communicated to 27 different groups of Kroger employees, the substance and presentation of which most likely varied from group to group"); *Ruppert v. Principal Life Ins. Co.*, No. Civ. 07-344, 2008 WL 3970872 (S.D. Iowa Aug. 27, 2008) (denying certification where plaintiff failed to meet the commonality and typicality requirements due to the varied representations and products provided to each putative class member); *In re Sears Retiree Group Life Ins. Litig.*, 198 F.R.D. 487, 493 (N.D. Ill. 2000) (class treatment is not appropriate when different representations were made to different individuals). For that reason, Plaintiffs' attempt to certify a class on their ERISA Section 502(a)(1)(B) claim in Count I should be denied.

C. The Named Plaintiffs Fail To Adequately Represent The ERISA Classes Under Rule 23(a)(4).

As required by Rule 23, Plaintiffs must demonstrate that the representative parties will fairly and adequately protect the interests of all class members. That requirement has not been met here. To meet this requirement, class representatives must be part of the class and possess the same interest and suffer the same injury as the class members they purport to represent.

Amchem Prods., Inc., 521 U.S. at 625-26. Plaintiffs' proposed ERISA class representatives cannot meet this standard. [5]

Plaintiffs' proposed class is exceedingly unwieldy. It purports to include "[a]ll persons" who retired *at any time* from Embarq or one of the numerous former "independent and regional telephone companies," and each retiree's spouse and dependents. Yet the ERISA Plaintiffs as well as Representatives for the ERISA claim retired, at the earliest, in September 1993 and, at the latest, in March 2003. *See* 2d Compl. ¶¶ 9-18. Although purporting to represent a nationwide class of individuals who worked in at least 22 states and who retired over several decades, the ERISA Plaintiffs apparently worked in only two states (North Carolina and Florida) and for only five of the predecessor companies. *Id.* The ERISA Plaintiffs cover only a fraction of the numerous affiliated companies, many of which had different welfare/benefit plans with varying terms. Participants in numerous plans with distinct terms are allegedly represented by Plaintiffs who were neither members of those plans nor retirees of those companies. The ERISA Plaintiffs cannot adequately represent the interests of individuals who retired at different times, under different plans and from companies for which the ERISA Plaintiffs did not work. These ERISA Plaintiffs cannot possibly represent class members with whom they have no association.

As underscored by the Supreme Court in *Amchem*, class representatives must possess the same interest and suffer the same injury as the class members they purport to represent. Indeed, it has long been the law in the Tenth Circuit that "[r]epresentatives of one group may not adequately represent members of another group." *Monarch Asphalt Sales Co. v. Wilshire Oil*

[5] Plaintiffs Fulghum, Daniel, Hollingsworth, Dorman, King, Joyner, Dillon, Barnes, Games, and Bullock (the "ERISA Plaintiffs") are the proposed ERISA class representatives. 2d Compl. ¶ 54. As alleged in the Complaint, the ERISA Plaintiffs worked for the following employers: Carolina Telephone and Telegraph Company, United Telecom of Florida, Sprint of Florida, Florida Telephone Company, and North Supply Company. *Id.* at ¶¶ 9-18.

Co. of Tex., 511 F.2d 1073, 1077 (10th Cir. 1975) (holding that class representatives of public purchasers of liquid asphalt would not adequately represent the interests of private purchasers). Here, Plaintiffs have not carried their burden to establish that the class representatives adequately represent all members of the putative class. *Id.*; *Reed*, 849 F.2d 1307.

D. Plaintiffs' ERISA Claims In Counts I And II Fail To Satisfy Rule 23(b).

Even if Plaintiffs were somehow capable of satisfying their burden under Rule 23(a) with respect to their breach of fiduciary duty and restoration of benefits claims, they cannot meet their burden under Rule 23(b). They rely on Rules 23(b)(1)(B), 23(b)(2) and 23(b)(3) as a basis for certification, but fail to provide the Court with a factual or legal basis for concluding that certification is appropriate under any of these provisions.[6]

As a starting point, class treatment would be neither manageable nor efficient as required by Rules 23(b)(2) and 23(b)(3) given the individualized nature of Plaintiffs' ERISA claims, as described above. Certification under Rule 23(b)(3) is warranted only when "questions of law or fact common to class members predominate over any questions affecting only individual members," and class treatment is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). As the Supreme Court has stated, this predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation" and is grounded in considerations of manageability and efficiency in light of individual issues. *Amchem Prods., Inc.*, 521 U.S. at 623. The Tenth Circuit has held that these elements of manageability and efficiency are also relevant to the class certification inquiry under Rule 23(b)(2). *See Shook I* , 386 F.3d at 973 ("The vehicle of class action litigation must ultimately satisfy practical as well as purely legal considerations."); *see*

[6] Plaintiffs do not seek certification under Rule 23(b)(1)(A).

also Barnes v. Am. Tobacco Co., 161 F.3d 127, 143 (3d Cir. 1988) (holding that class certification is appropriate under Rule 23(b)(2) only when "significant individual issues do not pervade the entire action").

As noted above, the alleged communications that form the basis for Plaintiffs' ERISA Section 502(a)(1)(B) claims under *DeBoard* allegedly occurred over a 30-plus year period at a number of facilities under varying circumstances, and are replete with the types of individual differences that make class treatment impractical. Similarly, Plaintiffs' breach of fiduciary duty claims—requiring proof of fiduciary conduct, material misrepresentations and detrimental reliance—are simply not sufficiently cohesive to warrant class treatment under Rules 23(b)(2) or 23(b)(3). *See In re Unisys*, at *6 (decertifying class certified under Rule 23(b)(2) because breach of fiduciary duty claims were not sufficiently cohesive and would require "a myriad of individual determinations"); *Chiles*, 95 F.3d at 1519 (holding that issue of detrimental reliance "is not appropriate for class action determination"); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1278 (11th Cir. 2009) (overturning district court's class certification in breach of contract matter, in part due to lack of manageability; too many individual issues existed where plaintiff failed to allege existence of common contract under which company employed all class members and class certified by court included members who were not subject to such contract).

Plaintiffs also improperly invoke Rule 23(b)(1)(B) as a basis for certification of their ERISA claims. The Rule provides that a class may be certified if there is a risk that "adjudications with respect to individual class members. . .would be dispositive of the interests of other members not parties" that multiple adjudications would or "substantially improve or impede" the ability of absent persons to protect their interests. Fed. R. Civ. P. 23(b)(1)(B). The quintessential claim that is appropriate for Rule 23(b)(1)(B) certification is one arising in a

"limited fund" case, where the assets available to satisfy all claims would be insufficient and there is a risk that recovery by some class members would in fact preclude recovery by others. *See, e.g. Ortiz v. Fiberboard Corp.*, 527 U.S. 815 (1999). That risk is simply not present here.

Nonetheless, Plaintiffs argue that Rule 23(b)(1)(B) certification is appropriate because "individual actions could be dispositive of the interests of other affected participants by virtue of the *stare decisis* effects of the rulings." Pls' Class Cert. Mem. at 23. However, the possible *stare decisis* or precedential effects of rulings is not enough to trigger the application of Rule 23(b)(1)(B). *See, e.g., In re Dennis Gleeman Sec. Litig.*, 829 F.2d 1539, 1546 (11th Cir. 1987); *see also* 7AA C. WRIGHT, A. MILLER & M. KANE, *Federal Practice and Procedure* § 1774 (3d ed. 2005). ("[T]he party seeking class certification must be able to allege more than that an individual adjudication may be given *stare decisis* effect in other lawsuits; some greater practical effect must be shown. If it is not, certification under Rule 23(b)(1)(B) must be denied.") (footnotes omitted). Thus, Plaintiffs' ERISA claims do not meet the requirements of Fed. R. Civ. P. 23(b)(1)(B).

II. PLAINTIFFS CANNOT CERTIFY THEIR STATE LAW SUBCLASSES UNDER OHIO, OREGON, OR TENNESSEE LAW.

In addition to the already unwieldy ERISA class, Plaintiffs also seek to certify three proposed subclasses of state law age discrimination claims from Ohio, Oregon and Tennessee in relation to Counts V, VI and VII of the Second Amended Complaint. Plaintiffs allege that the Plan changes at issue had a "disparate impact" on retirees in violation of the Ohio Civil Rights Act, the Oregon Unlawful Discrimination Act and the Tennessee Civil Rights Act. However, Plaintiffs' proposed subclass state representatives cannot adequately represent the interests of the members of the Ohio, Oregon, and Tennessee subclasses.

Class certification requirements for state law age discrimination claims in Ohio, Oregon and Tennessee all require that Plaintiffs' subclass and class representatives meet the rigorous standards of Rule 23. While Rule 23(c)(4)(B) allows for a class to be divided into subclasses, those subclasses must independently satisfy the requirements of Rule 23(a) and (b), including the requirement of an adequate representative. *Monarch*, 511 F.2d at 1077. Most importantly, the proposed subclass representatives must be part of the class, and possess the same interest and suffer the same injury as the class members. *Amchem Prods., Inc.*, 521 U.S. at 625-26. As outlined below, the purported subclass representatives for Ohio, Oregon and Tennessee fail to meet the rigorous requirements of Rule 23.

A. The Tennessee Subclass Should Not Be Certified Because There Is No Subclass Representative.

Plaintiffs have announced that the only proposed class representative for the putative Tennessee subclass, Lewis D. Sams, is withdrawing from the lawsuit as a named plaintiff. *See* Pls' Class Cert. Mem. at 1 n.1. It is axiomatic that a class action cannot be certified or maintained in the absence of a class representative. A representative must be part of the class, possess the same interest and suffer the same injury as the class members she or he purports to represent. *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977). Moreover, the Court should not accept Plaintiff's assurance that they "are currently in the process of identifying another former employee from Tennessee to represent the Tennessee state law age claim subclass." Pls' Class Cert. Mem. at 1 n.1. The class certification decision calls for a "rigorous analysis." *Shook I*, 386 F.3d at 968; *Falcon*, 457 U.S. at 161. "A party's assurance to the court that it intends or plans to meet the requirements is insufficient." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318 (3d Cir. 2008) (cited in *Garcia v. Tyson Foods, Inc.*, No. Civ. 06-2198 (JWL) 2009 U.S. Dist. LEXIS 11802, at *42 (D. Kan. Feb. 12, 2009) ("[T]he

decision to certify a class calls for findings by the court based on a preponderance of the evidence, not merely a 'threshold showing' by a party, that each requirement of Rule 23 is met.")). "[W]here the court finds, on the basis of substantial evidence as here, that there are serious problems now appearing, it should not certify the class merely on the assurance of counsel that some solution *will* be found." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 318 (emphasis in original; quotation and citation omitted). Since the Tennessee state law age discrimination subclass does not have a class representative, let alone an adequate class representative, the subclass may not be certified.

B. The Ohio And Oregon Subclasses Should Not Be Certified Because The Purported Representatives Are Inadequate Under Rule 23(a).

None of the proposed representatives of Ohio or Oregon adequately represents the interests and alleged injuries of the subclasses they seek to represent in this matter. With regard to Ohio, the proposed subclass representatives occupy an extremely limited portion of the alleged Ohio subclass, severely limiting their ability to represent such a class. Plaintiffs Kenneth and Betty Carpenter seek to represent the Ohio Age Discrimination subclass. *Id.* at ¶ 56. Mr. and Ms. Carpenter retired in 1997 and 1998. 2d Compl. ¶¶ 19-20. The proposed subclass representatives for Oregon represent a similarly narrow portion of the subclass, as one of the two Oregon subclass representatives retired in 1999, and the other retired 14 years earlier. *Id.* at ¶¶ 21-22. Plaintiffs have provided no additional evidence of how these individuals will adequately represent the interests and injuries of these state law-based subclasses. Accordingly, the proposed subclass representatives for Ohio and Oregon fail to meet the rigorous requirements of Rule 23.

III. PLAINTIFFS' CLAIMS FOR COLLECTIVE ACTION UNDER THE ADEA CANNOT BE CERTIFIED BECAUSE PLAINTIFFS ARE NOT SIMILARLY SITUATED.

In Count IV of the Second Amended Complaint, Plaintiffs assert a claim under ADEA challenging the elimination of life insurance benefits for all retired participants in the VEBA and the across-the-board cap of life insurance benefits for all other retirees. They seek to bring an ADEA collective action on behalf of all such retirees, despite the fact that the life insurance plan amendments contain absolutely no age-based distinctions or references to a program that can be alleged to be a "proxy" for age. *See* Defendants' Memorandum in Support of Motion for Partial Summary Judgment (Dkt. No. 68) ("Embarq MSJ") at 23. Plaintiffs have failed to establish that the proposed ADEA collective action members are similarly situated such as to justify certification. Even if Plaintiffs were able to meet their burden, their quest for certification would be rendered moot in light of the ADEA and its own regulations.

A. Standard of Certification

Collective actions under the ADEA are authorized by 29 U.S.C. § 626(b), which expressly borrows the opt-in class action mechanism of the FLSA, 29 U.S.C. § 216(b) (1994). Section 216(b) provides for a collective action where the complaining employees are "similarly situated." The Tenth Circuit has promulgated a two-step approach in determining whether plaintiffs are "similarly situated" for purposes of § 216(b). *See Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001). Under this approach, a court first arrives at an initial "notice stage" assessment of whether plaintiffs are "similarly situated." *See id.* at 1102 (citing *Vaszlavik v. Storage Tech. Corp.*, 175 F.R.D. 672, 678 (D. Colo. 1997)). In other words, "the district court determines whether a collective action should be certified for purposes of sending notice of the action to potential class members." *Williams v. Sprint/United Mgmt. Co.*, 222 F.R.D. 483, 484-85 (D. Kan. 2004).

Upon close of discovery, the court weighs the certification question again and makes a second determination (often prompted by a motion to decertify) of whether the plaintiffs are "similarly situated" under a stricter standard. *See Thiessen*, 267 F.3d at 1102-03. During this phase, the court reviews several factors, "including the disparate factual and employment settings of the individual plaintiffs; the various defenses available to the defendants which appear to be individual to each plaintiff; fairness and procedural considerations; and whether the plaintiffs made the filings required by the ADEA before instituting suit." *Williams*, 222 F.R.D. at 485 (citing *Thiessen).*

B. Plaintiffs Have Not Met Their Burden Of Establishing That All Retirees Are "Similarly Situated" Victims Of An Unlawful Common Policy Or Plan.

This Court has the absolute discretionary power to deny the sending of notice to potential class members in a collective action under the standards of 29 U.S.C. § 216(b) where the evidence fails to demonstrate that members of the putative class are "similarly situated." The United States Supreme Court has made clear that a court's discretion to permit the sending of notice should be exercised "only in appropriate cases," where the plaintiff has met his or her burden. *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989); *see Camper v. Home Quality Mgmt. Inc.*, 200 F.R.D. 516, 519 (D. Md. 2000) ("The relevant inquiry then is not whether the court has discretion to facilitate notice, but whether this is an appropriate case in which to exercise that discretion."). In deciding whether to facilitate notice, the court has the responsibility to avoid the stirring up of litigation through unwarranted solicitation in a collective action. *See Freeman v. Wal-Mart Stores, Inc.*, 256 F. Supp. 2d 941, 944 (W.D. Ark. 2003).

The initial collective action standard under the FLSA and thus the ADEA "requires plaintiff[s] to provide more than [their] own speculative allegations, standing alone." *Stubbs v. McDonald's Corp.*, 227 F.R.D. 661, 666 (D. Kan. 2004) (denying conditional certification of

FLSA collective action brought by restaurant worker for overtime pay, where named plaintiff failed to establish that proposed class members were "similarly situated;" plaintiff provided little evidence of how his job duties were similar to those of other purported class members). At the conditional certification stage, the court must consider all of the evidence and declarations before it determines whether plaintiffs have made a sufficient "factual showing" that they and the purported class were "similarly situated" victims of an unlawful common policy or plan. *See Hoffmann v. Sbarro, Inc.*, 982 F. Supp. 249, 261-62 (S.D.N.Y. 1997); *Bond v. Nat'l City Bank of Pa.*, No. Civ. 05-0681, 2006 U.S. Dist. LEXIS 41876, at *16 (W.D. Pa. June 22, 2006) (affirming denial of motion for conditional class certification where plaintiffs had not shown that they were together victims of an unlawful policy). Plaintiffs must make their showing with competent evidence and neither unsupported assertions nor conclusory allegations will suffice. *See Haynes v. Singer Co.*, 696 F.2d 884, 887 (11th Cir. 1983) (affirming district court's denial of notice where judge had before him only "unsupported assertions" that FLSA violations were widespread and that additional plaintiffs would come from other stores"); *Bernard v. Household Int'l, Inc.*, 231 F. Supp. 2d 433, 435 (E.D. Va. 2002) ("Mere allegations will not suffice; some factual evidence is necessary."); *H&R Block, Ltd. v. Housden*, 186 F.R.D. 399, 400 (E.D. Tex. 1999) (denying certification where plaintiffs relied on "unsupported assertions" and "affidavits making conclusory allegations"); *Barfield v. N.Y. City Health & Hosps. Corp.*, No. Civ. 05-6319, 2005 WL 3098730, at *1 (S.D.N.Y. Nov. 18, 2005) (denying motion for collective certification of hospital nurses and holding that "anecdotal hearsay" was insufficient to establish purported company-wide unlawful policy or plan).

Here Plaintiffs baldly assert that all Embarq and Sprint retirees were subjected to age discrimination due to the reduction in their life insurance benefits. They offer nothing but

conclusory statements regarding how these reductions possibly constituted age discrimination or how they were similarly situated in that regard. In light of Plaintiffs' own position that they do not know which plans existed or to whom the plans applied (*see supra* at 11-15), Plaintiffs cannot now demonstrate that all putative class members were subject to the same plans or plan terms or any alleged discrimination related to these plans. Such unsupported allegations are insufficient to justify even conditional collective action certification.

C. Plaintiffs' Motion To Certify A Collective Action Should Be Moot.

Even if Plaintiffs could establish that the purported ADEA class members were similarly situated for purposes of collective action certification, such certification would be rendered moot in light of the fact that: (1) the ADEA's regulations expressly permit the elimination of life insurance benefits for retirees; and (2) the ADEA permits a plan sponsor to provide all retirees with the same level of benefits regardless of age. *See* Embarq MSJ at 23-24 (citing 29 C.F.R. 1625.10(f)(i); 29 U.S.C. § 623(f)(2)(B)(i); *Bozner v. Sweetwater County Sch. Dist.*, No. Civ. 96-8087, 1997 WL 165168, *3 (10th Cir. April 9, 1997) (where the plan "provides the same level of benefits to older workers as to younger workers, there is no violation" of the ADEA) (quoting 29 C.F.R. § 1625.10(a)(2)); *Devlin v. Transp. Commc'ns Int'l Union*, 175 F.3d 121, 126-28 (2d Cir. 1999) (holding that Plaintiffs could not establish an ADEA claim under a disparate treatment or disparate impact theory, where the employer terminated death benefits for "all members and retirees, not just the older constituents"); *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 730 (3d Cir. 1995) (holding that a facially neutral policy related to the award of enhanced severance benefits that provided the same benefit packages to older and younger workers did not violate the ADEA); *Tusting v. Bay View Fed. Sav. & Loan Ass'n*, 789 F. Supp. 1034, 1037 (N.D. Cal. 1992) (stating that an "across-the-board elimination of fully paid retirement health benefits for all current employees, irrespective of age or seniority" would not violate the ADEA)).

Indeed, where claims are so inherently flawed, as Plaintiffs' ADEA claims are here, courts have often disposed of the claims in spite of pending collective action certification motions. In these instances, the courts have simply mooted the certification motions. *See Berger v. Cleveland Clinic Found.*, No. Civ. 05-1508, 2007 WL 2902907, at *19 (N.D. Ohio Sept. 29, 2007) (denying FLSA collective action claim for employees' allegedly missed lunch breaks as moot where court granted summary judgment in defendants' favor for same individual claim) (citing *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 616 (6th Cir. 2002) (affirming a district court's decision to grant the defendants' motion for summary judgment and then deny as moot plaintiffs' pending motion for class certification on the ground that "a district court is not required to rule on a motion for class certification before ruling on the merits of the case")); *O'Neal v. Kilbourne Med. Labs., Inc.*, No. Civ. 05-50, 2007 WL 956428, at * 7 (E.D. Ky. March 28, 2007) (in a collective action, the plaintiff, whose individual claim was dismissed at summary judgment, could not show that she was similarly situated to other potential § 216(b) plaintiffs). For the Court to grant conditional certification here in the face of dispositive law establishing that they have no claim under the ADEA will result in an unnecessary waste of judicial resources. Even if certified, Plaintiffs' collective action claims simply cannot survive.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' Motions for class and collective action certification.

Respectfully submitted,
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I hereby certify that on the 22nd day of September, 2009, I electronically filed the foregoing document using the CM/ECF system, which will send notice of electronic filing to the following attorneys for Plaintiffs:

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