

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WILLIAM DOUGLAS FULGHUM, et al.,)
Individually and on behalf of all others similarly)
situated,)

Plaintiffs,)

Case No. 07-2602-EFM

v.)

EMBARQ CORPORATION, et al.,)

Defendants.)

PRETRIAL ORDER

Pursuant to Fed. R. Civ. P. 16(e), a pretrial conference was held in this case, by telephone, on December 15, 2011, before U.S. Magistrate Judge James P. O’Hara.

This pretrial order shall supersede all pleadings and control the subsequent course of this case. It shall not be modified except by consent of the parties and the court’s approval, or by order of the court to prevent manifest injustice. *See* Fed. R. Civ. P. 16(e); D. Kan. Rule 16.2(c).

1. APPEARANCES.

Plaintiffs appeared at the pretrial conference through counsel, Alan M. Sandals, Scott M. Lempert, Stewart W. Fisher, Richard T. Seymour, Diane A. Nygaard, and Mary C. O’Connell. Defendants appeared through counsel, Joseph J. Costello, James P. Walsh, Jr., Christopher J. Koenigs, Mark D. Hinderks, and Christopher J. Leopold; Chris Abele,

defendants' in-house attorney, also participated in the conference.

2. NATURE OF THE CASE.

Plaintiffs, on behalf of themselves and the members of the certified class, allege certain changes to retiree medical, prescription drug, and life insurance benefits, and certain communications about those benefits, violated the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 et seq., the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621 et seq., and/or the state anti-discrimination statutes of Ohio, Oregon, and Tennessee.

3. PRELIMINARY MATTERS.

a. Subject Matter Jurisdiction. Subject matter jurisdiction is invoked under 28 U.S.C. §§ 1331 and 1367, and is not disputed.

b. Personal Jurisdiction. There are no objections to personal jurisdiction over the parties.

c. Venue. The parties stipulate that venue properly rests with this court.

d. Governing Law. Subject to the court's determination of the law that applies to the case, the parties believe and agree the substantive issues in this case are governed by the following law:

- (1) Plaintiffs' claims in Counts 1 through 3 of the third amended complaint (doc. 117) are governed by ERISA.
- (2) Plaintiffs' claims in Count 4 of the third amended complaint are governed by the ADEA.
- (3) Plaintiffs' claims under the age discrimination laws of Ohio in Count

5 of the third amended complaint are governed by the Ohio Civil Rights Act, Ohio Rev. Code §§ 4112.01 et seq.

(4) Plaintiffs' claims under the age discrimination laws of Oregon in Count 6 of the third amended complaint are governed by the Oregon Unlawful Discrimination in Employment Law, Ore. Rev. Stat. §§ 659A.001 et seq.

(5) Plaintiffs' claims under the age discrimination laws of Tennessee in Count 7 of the third amended complaint are governed by the Tennessee Human Rights Act, Tenn. Stat. §§ 4-21-101 et seq.

4. STIPULATIONS.

The parties have begun the process of preparing a number of stipulations regarding facts not in dispute, admissibility of documents as business records, and admissibility of trial exhibits. The parties will complete this work in advance of trial, but at this time are providing preliminary (but incomplete) listings of the current versions of these stipulations, as set forth in paragraphs 4(a), 4(c), and 4(e) below.

a. The following facts are stipulated by all parties:

A. Facts Related to Welfare Benefit Plan Changes

1. In November 2005, Sprint announced that the prescription drug benefits for participants and beneficiaries who were eligible for Medicare Part D coverage would be modified such that each participant who was eligible for Medicare Part D coverage would receive an annual subsidy of \$500 effective January 1, 2006.

2. On July 26, 2007, Embarq announced that Company-sponsored basic life insurance coverage would be eliminated for retirees who were also participants in the CT&T VEBA effective September 1, 2007.

3. Also on July 26, 2007, Embarq announced that Company-sponsored medical coverage and the prescription drug subsidy provided to Medicare-eligible retirees and dependents would be eliminated, and that Company-sponsored basic life insurance coverage for retirees who were not participants in the CT&T VEBA plan would be capped at \$10,000,

effective January 1, 2008.

4. The medical, prescription drug, and life insurance benefits at issue in this litigation have not been restored.

5. Defendant Randall T. Parker is a Kansas resident.

B. Facts Related to Plaintiffs

1. Plaintiffs Fulghum, Daniel, Hollingsworth, Dorman, Joyner, Games, Bullock, Clark, Britt, and McLaurin filed Charges of Discrimination based upon age with the Equal Employment Opportunity Commission (EEOC) prior to filing this action, 60 days have elapsed since the filing of these Charges, and the EEOC has issued Right to Sue letters to Plaintiffs Fulghum, Daniel, Hollingsworth, Dorman, Joyner, Games and Bullock.

2. The Charges of Discrimination filed by Games, Bullock, Clark, Britt and McLaurin stated that they were filed on behalf of a class of retirees. The Amended Charges of Discrimination filed by Daniel, Dorman, Hollingsworth and Joyner stated that they were filed on a behalf of a class of retirees.

3. Plaintiff William Douglas Fulghum ("Fulghum") was born in 1938, is a resident of Fayetteville, North Carolina, was employed by CT&T and began working on or about June 1956. His last day worked was July 31, 1996, at which time he was 58 years old.

4. Plaintiff Dorsey Daniel ("Daniel") was born in 1940, is a resident of Tarboro, North Carolina, was employed by CT&T and began working on or around July 1965. His last day worked was December 31, 1997, at which time he was 57 years old.

5. Plaintiff John Douglas Hollingsworth ("Hollingsworth") was born in 1944, is a resident of Fayetteville, North Carolina, was employed by CT&T and began working on or around June 1964. His last day worked was December 31, 2001, at which time he was 57 years old.

6. Plaintiff Willie Dorman ("Dorman") was born in 1938, is a resident of Erwin, North Carolina, was employed by CT&T and began working on or around April 1959. His last day worked was January 3, 1994, at which time he was 56 years old.

7. Plaintiff Robert E. King ("King") was born in 1930, is a resident of Ocala, Florida, was employed by United Telephone Company of Florida and began working on or about April 1959. His last day worked was August 31, 1993, at which time he was 63 years old.

8. Plaintiff Calvin Bruce Joyner ("Joyner") was born in 1938, is a resident of Tarboro, North Carolina, was employed by CT&T and began working on or about June 25, 1956. His last day worked was February 18, 1994, at which time he was 56 years old.

9. Plaintiff Timothy Dillon ("Dillon") was born in 1943, is a resident of Niceville, Florida, was employed by Florida Telephone Corporation and, subsequently, by North Supply Company, and began working on or around May 1969. His last day worked was November 9, 2001, at which time he was 57 years old.

10. Plaintiff Sue Barnes ("Barnes") was born in 1941, is a resident of Wilson, North Carolina, was employed by CT&T on two occasions, initially in 1959 and subsequently in 1994. Her last day worked was March 31, 2003 at the age of 61.

11. Plaintiff William Games ("Games") was born in 1940, is a resident of Camden, North Carolina, was employed by CT&T and began working on or about October 1959. His last day worked was December 31, 2001, at which time he was 61 years old.

12. Plaintiff Betsy Bullock ("Bullock") was born in 1943, is a resident of Tarboro, North Carolina, was employed by CT&T and began working on or about August 1971. Her last day worked was December 31, 2001, at which time she was 58 years old.

13. Plaintiff Kenneth A. Carpenter ("K. Carpenter") was born in 1938, is a resident of Mansfield, Ohio, was employed by United Telephone Company of Ohio and began working on or about 1965. His last day worked was August 16, 1996, at which time he was 57 years old. He is the spouse of plaintiff Betty A. Carpenter.

14. Plaintiff Betty A. Carpenter ("B. Carpenter") was born in 1942, is a resident of Mansfield, Ohio, was employed by United Telephone Company of Ohio and began working on or about 1978. Her last day worked was November 1, 1996, at which time she was 54 years old. She is the spouse of plaintiff Kenneth A. Carpenter.

15. Plaintiff Carl W. Somdahl ("Somdahl") was born in 1934, is a resident of Pacific City, Oregon, was employed by United Telephone Company of the Northwest and began working on or about 1977. His last day worked was January 29, 1999, at which time he was 65 years old.

16. Plaintiff Wanda W. Shipley ("Shipley") was born in 1942, is a resident of Greenville, Tennessee, was employed by United Inter-Mountain Telephone Company and began working in 1960. Her last day worked was June 30, 1999, at which time she was 56 years old.

17. Plaintiff Donald Ray Clark ("Clark") was born in 1926, is a resident of Wilmington, North Carolina, was employed by CT&T and began working on or about November 6, 1950. His last day worked was August 31, 1976, at which time he was 50 years old.

18. Plaintiff James Woodie Britt ("Britt") was born in 1918, is a resident of Greenville, North Carolina, was employed by CT&T and began working on or about February 1946. His last day worked was July 3, 1985, at which time he was 66 years old.

19. Plaintiff Laudie Colon McLaurin ("McLaurin") was born in 1933, is a resident of Erwin, North Carolina, was employed by CT&T and began working on or about November 1953. His last day worked was December 30, 1988, at which time he was 55 years old.

20. An Amended Charge of discrimination was filed with the EEOC on behalf of the following individuals more than 60 days before the date of the Third Amended Complaint: Faye P. Abbott, Judith R. Adams, Lois J. Ainsley, Robert D. Aldridge, James L. Alford, Mary S. Allen, Johnny W. Allen, Thomas G. Allgood, Jr., Evelyn A. Allgood, Estate Of Henry W. Ammons, Clara W.L. Anderson, Mary Ellen Anderson, Anzilia K. Anderson, Howard D. Armstrong, Donald E. Armstrong, James E. Armstrong, Michael L. Atkinson, Dwight C. Autry, Lila H. Autry, Charles E. Autry, James L. Autry, W.J. Avent, Effie H. Avery, Janie B. Ayers, George W. Bailey, Lough Massey Baker, Joseph K. Baker, Ophelia H. Baker, Shelby M. Baker, Rufus James Baker, Mary Harrell Baker, Johnny Preston Baker, William A. Baker, Clifford E. Ball, Naomi M. Ball, Thomas V. Barden, Katie Cook Barnes, Willie E. Barnes, Thomas Scott Barnes, Judith W. Basnight, Gerald Bass, Verona W. Bass, Carolyn J. Batchelor, Frances L. Batts, Gerald C. Batts, Mary P. Batts, Madeline B. Beach, Carl Beacham, Jr., Linda C. Beaman, Noah Alfred Beamon, Jenette C. Bell, V. Allen Bender, Iii, John O. Benson, Peggy J. Biggs, Ronnie Bill, L.S. Blades, Iii, Essie L. Blalock, Curtis W. Bland, Wynona H. Blount, Mel Steven Bobbitt, Johnny D. Bordeaux, Ann L. Boyette, Jack H. Boyette, Geraldine E. Boyette, Mary B. Boykin, Marian E. Bracy, Joyce C. Bracy, Thelma Robbins Braddy, Janice C. Braddy, Claude Braddy, Jr., Steven P. Bradley, Jean T. Bradshaw, Edward R. Brady, Mary Ann Brame, Charles M. Bratcher, Josephine S. Bratcher, Linda G. Brewer, James Woodie Britt, Mary E. Britton, Audrey A. Brown, Henry W. Brown, William P. Brown, Graham T. Brown, Carol J. Brown, Janice Brown, Eddie R. Brown, Gordon D. Brunson, Marie W. Bucknam, Geneva E. Bullock, Mattie J. Bullock, Patricia W. Bunch, Tony A. Bunch, Carol S. Burchette, John Lee Burgess, James F. Burnette, Ethel A. Burns, Clayton O. Burriss, Jr., Diamond H. Butler, Franklin D. Butler, Dorothy G. Butler, Robert C. Byrd, Ruth M. Cagle, Bertha S. Campbell, Shirley G. Canady, Kerry W. Carawan, Daniel H. Carlisle, Stanton R. Carnes, Estate Of Milton R. Carpenter, Betty M. Carr, Dolores P. Carraway, Linda K. Carroll, Lucille H. Carta, Carl Ray Carter, Melvin S. Carter, Bernard John Carter, Jr., Lois Ann Carver, Bobby B.

Cashwell, Glenn M. Causway, John W. Cherry, Linda W. Chesson, Betty W. Chesson, Eileen L. Childers, Ann P. Chipps, Daisy A. Clark, Donald R. Clark, Donald E. Clark, Robert L. Clegg, Shirley W. Cleland, Cullen Cobb, Jr., Earl G. Coble, Josie D. Cofield, Annie M. Coggins, Colleen H. Coker, Naomi M. Coker, Alvin L. Coley, Linda C. Coley, Victoria C. Collins, Raymond A. Collins, Joyce L. Connor, Nancy D. Cook, Carl T. Cooley, William H. Cooley, Ann G. Cooper, Charles W. Cooper, Callie L. Cooper, Edward G. Corey, James H. Council, Dolly E. Cox, Walter L. Cratch, John W. Craver, Henry E. Creel, Arvey O. Crocker, Jr., Shelby A. Croom, Melvin D. Crumpler, Marshall W. Crumpler, Nancy R. Curtis, Harold B. Cutler, Jack E. Cutler, Vernon R. Dail, Ada F. Daniel, Terry F. Daniels, Ulyss Glenn Daughtridg, Belva J. Davenport, Shelby F. Davenport, Billy E. Davidson, Robert I. Davis, Selma W. Davis, Hinton Carlton Davis, Helen I. Davis, Lesly B. Davis, Vivian W. Davis, Jack D. Dawson, Betty W. Deal, Walter F. Deal, Janis S. Dempster, Betty Jean Dennie, Bobby C. Dennie, Marcelene D. Denny, Richard H. Denton, Grace J. Devane, Edward M. Dickens, Margaret S. Dildy, Charles T. Dorman, Paul D. Dorman, Gordon H. Doughtie, Lena W. Doughtie, Martha M. Douglas, Isabel Downing, Eugene F. Dozier, William P. Duckett, Jr., George F. Duke, Julia J. Duke, Lois W. Dunn, Bobby E. Dunn, Robert W. Duvall, Dolly O. Eastwood, Billy Y. Edgerton, Bobby Ray Edmondson, Amy T. Edwards, W. Thomas Edwards, Finley C. Edwards, Mary Eldridge, Mildred T. Elks, Eva Kaye G. Ellington, Larry T. Ellis, Lucille B. Ellis, Louis E. Ellis, Michael L. Ellis, Christine K. Ellis, William E. Elmore, Betty Elmore-Stancill, Selby A. Etherdige, Jr., Carolyn R. Evans, Kermit M. Evans, Tony W. Evans, Vonita H. Evans, Jeannette M. Ezzell, Jenell B. Ezzell, John D. Ezzelle, Mavis E. Faircloth, Olivia B. Farrell, Michael E. Ferrell, Preston L. Fields, Ruth F. Fisher, Charles W. Fisher, Leslie B. Fisher, Janie G. Fleming, Donna S. Fling, Dianne K. Flint, Bertha S. Floyd, Linda L. Flythe, Clarence G. Forbes, Marilyn B. Forbes, Martha S. Foster, Barbara Franks, William R. Frazier, Judy S. Freeman, I. Gerald Futrell, Elizabeth H. Gardner, Robert L. Garrett, Linda A. Garrett, Margie A. Garris, Deidrick H. Gaskill, Donald P. Gaskins, Linda H. Gaskins, Willie R. Gay, Herbert L. Gay, William A. Gilbert, Willie E. Godwin, Jerry S. Gore, Lillie B. Grady, Priscilla T. Granger, Jane T. Grantham, Hilda B. Gray, Grover L. Griffin, Alton C. Grissom, Rosalyn S. Guirkins, Charlie J. Gurganus, Van A. Gurkins, Brenda B. Hairr, Junie Mack Hairr, John O. Hall, Jimmy C. Hamilton, Betty F. Hamm, Joel F. Hancock, James E. Haney, Robert Alton Hanford, Frances H. Hardee, Linda P. Hardee, Loretta F. Harrell, Kenneth R. Harrell, Melvin R. Harrell, Linda H. Harrell, John Harrington, Doris C. Harris, Elizabeth R. Harris, Donnie P. Harris, Alice W. Harris, Jimmy L. Harris, Sr., Barbara J. Harrison, Norma H. Harrison, Jonathan F. Havens, Shelby B. Heath, David R. Hemby, Shirley G. Henderson, Bennie Herman, Jr., Hoytte Douglas Herrin, Wilton L. Herring, Lindsey W. Hewitt, Charles D. Hinson, Ruby M. Hinton, Bobby R. Hobgood, Lindbergh Holden, Julia H. Holland, Eugene R. Holland, Christine M. Holland, Nancy L. Hollis, Jane F. Holloman, Murrell T. Holloman, Roger L. Holt, Rebecca F. Hooker, Rosby R. Hopkins, William H. Hopkins, Willie C. Hopkins, Dennis Horchler, Jeannette Faye Horne, Carolyn M. Horton, Clarence S. Hough, Annette A. House, Chester B. Houston, Stacy J. Houston, Heywood B. Houtz, Maryland Y. Howard, Marvin Howell,

Katherine H. Howse, Dorothy E. Hudson, S.J. Humienny, Sr., James S. Ikner, Estella Ipock, George L. Ipock, Lewis R. Irvin, Charles E. Isles, Patricia D. Jackson, Paul A. Jackson, Raymond L. Jackson, William Franklin Jackson, Johnnie E. James, William W. Jefferson, Joyce S. Jefferson, Donald S. Jenkins, James Kenneth Johnson, Marcus W. Johnson, Lillie M. Johnson, John Charles Johnson, Ralph A. Johnson, Bobby D. Jolly, Leona A. Jones, Alice R. Jones, Aubrey D. Jones, Peter H. Jones, Shirley L. Jones, Willie J. Jones, John C. Jones, Norma C. Josey, Dolly J. Joyner, Dorothy B. Joyner, Doris L. Joyner, Wilbur Glenn Joyner, Nancy R. Justice, Charles J. Kearney, Martha H. Keen, W.E. Kelchner, Donald G. Kennedy, Walter L. Kennedy, J.J. Killebrew, Irma E. King, Thelma V. King, William B. King, Eleanor S. King, Lorraine E. Kirkwood, Bruce R. Kirkwood, Wesley G. Knott, Charles Ray Knowles, Miriam S. Kricko, Thelma W. Lafferty, Bobby L. Lamm, Martha C. Lamm, William E. Lamm, Dennis R. Lane, Ernestine C. Langley, James D. Langley, Violet H. Lanier, William A. Larrimore, Frances W. Latham, Patricia B. Lee, Kenneth Lee, Milton E. Lee, Roslyn A. Lefevers, Sherrie B. Leggett, Billy M. Leggett, Patricia C. Letchworth, Leo N. Lewis, Sandra B. Lewis, Sybil Rowe Lewis, Brenda B. Lewis, Sylvia B. Lewis, Betty D. Lewis, Polly C. Lilley, Shelby M. Lilley, Norma Midyette Lindsey, Geraldine Little, Thomas E. Littleton, B.G. Littleton, Gerald T. Lockamy, Clara M. Long, Alice D. Long, Betty B. Long, Elsie O. Long, Rachel G. Lovick, Terry T. Lucas, Faye M. Lucas, Joyce C. Mahan, George P. Maier, Donald H. Mallard, Randall G. Mallard, Shirley B. Malpass, Mamie R. Manning, Lucy O. Mantas, Joyce A. Marshburn, Joe E. Martin, Clarence L. Mason, Helen C. Massey, Ruth H. Matthews, Rose D. Matthews, Kenneth S. May, John T. May, Mary H. Maynard, James P. Mayo, Mickey R. McAdams, Naomi B. McBride, Roy E. McCarter, William Troy McCarter, David L. McCaskill, Mae Vonne McClure, Alice R. McCorquodale, Clifford C. McCullough, Donna H. McCullough, Roderick A. McGlohon, Nellie O. McLamb, Daniel B. McLamb, Laudie Colon McLaurin, Eunice Stephens McLaurin, Hilda A. McLawhorn, Weldon E. McLawhorn, Neal C. McLeod, Jr., Rachel C. McManus, Rodney M. Medlin, William Ann Meeks, Margaret Ann Meeks, Linda L. Meeks, Ennis W. Mercer, Carlton V. Metts, Jeanette Y. Miller, Mary M. Miller, Leon Gene Miller, James Truitt Miller, Darling David Mills, Virginia R. Minton, Ethel D. Mitchell, George Moore, Jr., Jesse C. Moore, James H. Moore, John Thomas Moore, Lemuel K. Moore, Dorothy R. Moore, Jane T. Moore, Marland G. Moore, Barbara P. Mooring, William C. Morris, Evelyn F. Morrow, Patricia B. Morrow, Nancy J. Moseley, Norman Carlton Moseley, Gloria P. Mosley, Ernest Mazingo, Emma Frances Nanney, Mary D. Narron, Claude T. Neal, Dianne S. Neal, Charlie G. Neal, Lonnie R. Nelms, Eleanor Nelms, Peggy S. Nelson, June W. Newberry, Janie P. Nicholson, Evelyn W. Nicholson, Hazel M. Nixo, Ramona S. Norman, Kay W. Norville, Sr., Gregory Nunnery, Joseph W. Odom, Grace O'Geary, Braxton S. Oliver, Herbert W. Oliver, Thomas M. Oliver, Jacqueline L. O'Neal, Michael D. Outlaw, Evelyn C. Overby, Barbara B. Overby, Charles G. Overby, John Wayne Overton, Joyce Y. Owens, George C. Pace, Joyce E. Pace, Jimmy L. Packard, Charles E. Page, Lynwood V. Page, Allen R. Parker, Albert B. Parker, Bobby F. Parrish, Doris J. Patterson, Willis R. Peaden, Jewell H. Pearsall, Luther D. Pearsall, Sr., Ethel J. Peedin, Lucille Peele, David B. Pepper, Theodore B. Perritt, Robert L. Perry, Linda

P. Perry, Albert Ray Phelps, Violet W. Phillips, Faye E. Phykitt, Brenda S. Pilgreen, Alice R. Pitt, Charles G. Pittman, Curtis C. Pittman, Kenneth N. Pollock, Marshall B. Pope, Mary B. Pope, Harold D. Pope, Margie L. Pope, Larry Powell, Iris E. Powell, Catherine R. Powers, Joyce P. Powers, Bobby F. Price, Retha A. Price, Joseph Earl Price, Shelby F. Pridgen, Grace N. Proctor, Sidney H. Purvis, Barbara B. Rackley, Francis Dalton Rackley, Gene D. Rackley, Margie T. Raines, Rebecca R. Raynor, Sally C. Register, Shirley P. Respass, Bessie M. Reveal, W.S. Richardson, Janie S. Ridgeway, Albert F. Roach, Elinor S. Robeson, Johnathan L. Robeson, Jr., Maxine R. Rogers, Margie S. Rogers, Betty G. Rogers, Mary D. Roller, Rosemary V. Romanus, W.H. Ross, Naomi M. Roundtree, William A. Rouse, Betty E. Ruffin, Johnnie Mack Ruffin, Clifton E. Ruffin, Ethel V. Ruffin-Collier, Dudley J. Rutledge, Hilda G. Saleeby, Marilyn L. Sandlin, Frederick L. Satterfield, Judy D. Satterwhite, Melody G. Savage, J.P. Scott, Benjamin F. Scott, Vicki Jean Seadore, George T. Sessoms, Sr., Rita T. Sexton, Virgil B. Shaw, Gaynelle S. Shipp, Vickie A. Shivar, Douglas E. Sibbett, Betty Gayle Simmons, Milford L. Simmons, Maureen L. Simmons, Bryant Simmons, Jr., Arthur D. Simoneau, Leon H. Simpkins, Willard G. Simpson, Wilton A. Smith, Barbara S. Smith, Franklin D. Smith, Linda Faye Smith, Betty G. Smith, Zelia S. Snead, Martha J. Snead, Talmadge R. Snead, Ronald D. Sondergard, Rachel O. Spann, Frank J. Sparks, George R. Speight, James A. Speight, James A. Spruill, Doris A. Stainback, Gerald T. Stallings, Margaret A. Stallings, John Harold Stallings, William W. Stallings, Raymeta B. Stancil, Carlene Stanley, James E. Stanley, Donald G. Steele, Estate Of Blanche R. Stell, Charles W. Stephens, Jr., Floyd W. Stewart, Peggy A. Stewart, Levy C. Stilley, James A. Stocks, Stanley M. Stone, Sr., Hazel Stox, Grady C. Strickland, Patricia L. Strickland, Owen W. Strickland, Linda P. Strickland, Clayton Thomas Strickland, Raymond O. Strum, Bobby G. Suggs, Dianne M. Summerlin, Mattie Bass Sumner, Elizabeth V. Sumner, Billy V. Sutton, Cecil E. Swinson, Rebecca R. Swinson, Kenneth H. Sykes, Kenneth F. Tarleton, Grady Tart, Emmett L. Tatum, Jr., Carol J. Taylor, Curtis V. Taylor, Edmond R. Taylor, Jennings B. Teal, Sr., Hubert D. Terry, Virginia Tew, Mary L. Tharrington, Garland V. Thomas, Donald L. Thomas, Pearl N. Thompson, Roy H. Thompson, Carlton G. Thompson, Ella W. Thompson, Gene R. Thompson, Elizabeth J. Thornell, Melody J. Thursby, Clennis T. Tolston, Henry T. Tolston, Annie Robinson Trevathan, Daphne B. Tripp, Geraldine H. Tucker, Shelby Jean Turnage, Jesse L. Turner, Robert C. Tyndall, Henry H. Umphlet, Jean Varnell, Joann A. Vaughan, Verchie A. Vick, Ronald Vick, Susie P. Vick, Alfred M. Waddell, Jr., Mary Frances Wagner, Carolyn R. Wagner, Shirley B. Wainwright, Jean M. Walden, Rosa A. Walker, Angela Walker, Charles W. Wall, Joyce F. Wallace, Charles G. Wallace, Randy W. Wallace, Edith A. Walston, Lorene P. Walters, George M. Walters, Jr., Janice C. Ward, John T. Ward, Myrtle W. Ward, Hassell Ray Wardsworth, Rebecca B. Warren, Ruby J. Waters, Martha R. Waters, Frances H. Watson, Richard B. Weatherington, Evelyn G. Webb, Battle Brooks Webb, Earldean T. Webb, Ellie H. Webb, Joseph W. Weeks, Margaret Wethington, Walter Thomas Wheeler, Walter C. White, Henry M. White, Mary M. White, Kenneth L. White, Vivian M. White, Treacy Turner White, Louise M. Whitehurst, George F. Whitehurst, Nancy B. Whitehurst, Ellis Reid Whitford, Sr., Billy S. Wilder, Bonner Wilder, Gordon Earl

Wilkins, Jr., Ann W. Wilkinson, Bradley Willaford, George E. Williams, Julia V. Williams, Connie L. Williams, Herscal P. Williams, Mary C. Williams, Roy K. Williams, Carl B. Williams, Hazel C. Williams, Roger Bert Williams, Mollie L. Williamson, Margie E. Williamson, T.P. Williamson, Alice L. Williford, Jerry D. Williford, Ralph L. Williford, Jean Wilson, Howard C. Wilson, Jr., Ann D. Winborne, Sonya L. Winstead, Frances M. Winstead, Derwood L. Winstead, Marion Branch Winstead, Grady H. Winstead, Sr., William Boyd Wood, Thomas H. Woodard, Billy G. Woodard, John E. Woodlief, Alice B. Woodruff, Steven G. Woodward, Vernell H. Woolard, Darrell Woolard, David F. Woolsey, Earl D. Wooten, John T. Worrell, Lynwood R. Worrell, Jr., Lydia B. Wynne, Annie T. Wynne, Janet N. Wynne, Guy E. York, Ernest H. Young, and David M. Young.

C. Facts Related to Defendants

1. Embarq Corporation is a corporation incorporated under the laws of the state of Delaware, with its current principal place of business in Monroe, Louisiana.
2. Embarq Corporation was created on May 17, 2006, as a spin-off of Sprint Nextel Corporation's local communications business and product distribution operations.
3. Operating subsidiaries of Embarq Corporation provide communications products and services to customers domestically and operate principally in Kansas, North Carolina, South Carolina, Florida, Ohio, Pennsylvania, Indiana, New Jersey, Texas, Virginia, Tennessee, Minnesota, Missouri, Nevada, Nebraska, Wyoming, Oregon and Washington.
4. The Embarq Retiree Medical Plan was an employee welfare benefit plan within the meaning of ERISA.
5. Defendant Embarq Mid-Atlantic Management Services Company formerly known as Sprint Mid-Atlantic Telecom, Inc. ("Embarq Mid-Atlantic") is a North Carolina corporation with its current principal place of business in Monroe, Louisiana.
6. Defendant Embarq Mid-Atlantic is a wholly-owned subsidiary of Defendant Embarq Corporation.
7. Sprint Nextel Corporation is a corporation incorporated under the laws of the State of Kansas, with its principal place of business in Overland Park, Kansas.
8. Sprint Nextel Corporation was formerly known as United Utilities, Incorporated, United Telecommunications, Inc., and Sprint Corporation.
9. United Utilities, Incorporated changed its name to United Telecommunications,

Inc. in 1972.

10. On February 27, 1992, United Telecommunications changed its name to Sprint Corporation.

11. In or around March 1993, Sprint Corporation completed its merger with Centel Corporation.

12. Defendants Sprint Retiree Medical Plan, Group Health Plan for Certain Retirees and Employees of Sprint Corporation, Sprint Welfare Benefit Plan for Retirees and Non- Flexcare Participants, and Sprint Group Life and Long Term Disability Plan are employee welfare benefit plans within the meaning of ERISA.

13. Defendant Carolina Telephone and Telegraph Company LLC formerly known as Carolina Telephone and Telegraph Company ("CT&T") is a North Carolina limited liability company with its current principal place of business in Monroe, Louisiana.

14. CT&T was formerly known as Carolina Telephone and Telegraph Company and was a wholly-owned subsidiary of Defendant Sprint Nextel Corporation prior to May 17, 2006.

15. CT&T is currently a wholly-owned subsidiary of Defendant Embarq Corporation.

16. The Group Life, Accidental Death and Dismemberment and Dependent Life Plan for Employees of Carolina Telephone and Telegraph Company is an employee welfare benefit plan within the meaning of ERISA.

17. The Carolina Telephone and Telegraph Company Sickness Death Benefit Plan, also referred to as the "VEBA," is an employee welfare benefit plan within the meaning of ERISA.

18. CT&T provides local telecommunications services in North Carolina.

19. CT&T merged into United Utilities, Inc. on March 28, 1969.

20. CT&T merged with United Telephone Company of the Carolinas, Inc. in October 1978 and with Norfolk Carolina Telephone Company in December 1979.

b. All documents within the scope of Fed. R. Evid. 803(6) may be introduced in

evidence subject to objections other than foundation.

c. The following documents constitute business records within the scope of Fed. R. Evid. 803(6) and may be introduced in evidence during trial without further foundation, subject to objections based solely on grounds of relevancy:

Description	Begin Bates	End Bates
1/28/1999 email from Robin Olsen re: Revised Phone List with attachment	EQ_FUL_193119	EQ_FUL_193121
Organizational Chart [description for identification purposes only]	EQ_FUL_183717	EQ_FUL_183726
Compensation, Benefits, Labor & Employee Relations	EQ_FUL_183728	EQ_FUL_183743
Organization: Sprint Compensation, Benefits, Labor & Employee Relations	EQ_FUL_183744	EQ_FUL_183752
Reporting Listing [description for identification purposes only]	EQ_FUL_183754	EQ_FUL_183765
FCS Program Numbers and Category Codes	EQ_FUL_181989	EQ_FUL_181997
1/27/2003 email from Mindy Means re: Retirement Checklist, with attachment	EQ_FUL_073844	EQ_FUL_073847
Embarq Corporation Employee Benefits Committee Minutes June 27, 2007	EQ_FUL_001150	EQ_FUL_001153
Minutes, Employee Benefits Committee, July 27, 2005	EQ_FUL_001147	EQ_FUL_001149
All completed and filed 10-Ks for Embarq Corporation and Sprint Nextel Corporation	no bates	

d. Copies of exhibits may be used during trial in lieu of originals, provided that a party may make limited requests for use during trial of originals in situations where the offered copy does not reveal all pertinent characteristics of the document.

e. The parties have stipulated to the admissibility of the following exhibits at trial, subject to the parties' confirmation that each document is the effective final version:

Production Nos.	Document Name
EQ FUL 094473-094499	Your Group Insurance Plan, Centel Telephone Company Nevada Division
EQ FUL 000321-000378	Sprint Retiree Benefits SPD (2001)
EQ FUL 000379-000450	Sprint Retiree Benefits SPD (2002)
EQ FUL 000451-000526	Sprint Retiree Benefits SPD (2003)
EQ FUL 000527-000604	Sprint Retiree Benefits SPD (2004)
EQ FUL 000605-000697	Sprint Retiree Benefits SPD (2005)
EQ FUL 000765-000856	Sprint Nextel Retiree Benefits SPD (2006)
EQ FUL 001048-001143	Sprint Retiree Benefits SPD (2008)
EQ FUL 000857-000951	Embarq Retiree Benefits SPD (2006)
EQ FUL 000952-001047	Embarq Retiree Benefits SPD (2007)
EQ FUL 050493-50543	Embarq Retiree Medical Plan (Non Flex) SPD (2007)
EQ FUL 211309-211406	Centel Your Group Benefit Plan Description Certain Salaried Employees of Telephone and Electric Operations, Cellular, Supply and Videopath, including Corporate and Telephone Staff
EQ FUL 210089-210213	Centel Your Group Benefit Plan Description For Bargaining Employees of Central Telephone Company - North Carolina; Asheboro, Elkin, Eden and Roxboro Districts
EQ FUL 201760-201784	Your Group Insurance Plan for Medical Care Insurance with Basic Life Insurance and Accidental Death and Dismemberment Benefits Carolina Telephone United Telephone System
EQ FUL 120015-120033	Medicare Supplement Plan for Pre 1990 Retirees A Summary Plan Description, United - North Central
EQ FUL 000092-000148	United Telecom Retiree Medical Plan SPD (1991)
EQ FUL 000149-000205	Sprint Retiree Medical Plan SPD (1996)
EQ FUL 000206-000262	Sprint Retiree Medical Plan Summary Plan Description
EQ FUL 053881-053914	Sprint CWA Local 4700 & 4782/Indiana Retiree Medical Plan Summary Plan Effective April 1, 2000
EQ FUL 054292-05324	Sprint IBEW 723/Indiana Retiree Medical Plan
EQ FUL 000698-000764	Sprint Retiree Medical Plan - Non-Flex
EQ FUL 199242-199261	Group Health Plan for Bargaining Unit Employees of United Telephone Co. of Florida North Division
EQ FUL 203457-203484	Group Health Plan for Bargaining Employees of United Telephone Company of the Northwest
EQ FUL 210540-210557	Group Health Plan for Bargaining Unit Employees of United Telephone Company of Florida Leesburg, Ocala and Winter Garden Districts
EQ FUL 199776-199795	Group Health Plan for the Employees of United Telephone Co. of Indiana Represented by CWA
EQ FUL 098945-098967	Group Health Plan For the Bargaining Employees Represented by CWA Local 6372 United Telephone System Midwest Group
EQ FUL 211429-211447	Group Health Plan - For the Bargaining Employees of United Telephone System Southeast Group
EQ FUL 201110-201135	Group Health Plan for Bargaining Employees of the United Telephone Co. of Florida South Division Represented by IBEW Local 199
EQ FUL 098969-099015	Group Health Plan For Bargaining Employees of The United

Production Nos.	Document Name
	Telephone Company of Kansas and United Telephone Company of Missouri Represented by CWA Local 6372 SPD
EQ FUL 201064-201086	Group Health Plan For The Bargaining Unit Employees of United Telephone Company of Florida Leesburg, Ocala and Winter Garden Districts
EQ FUL 099017-099065	Group Health Plan For Bargaining Employees of United Telephone Company of Kansas and Missouri Represented by CWA Local 6372 SPD
EQ FUL 039540-039578	Group Health Care Plan for the Employees of United Telephone Company of Ohio represented by CWA
EQ FUL 099067-099103	Group Health Plan for the Bargaining Employees of Sprint/Western Operations Kansas and Missouri Represented by CWA Local 6372 SPD
EQ FUL 199949-199970	Group Health Plan for the Employees of United Telephone Co. of the Northwest SPD
EQ FUL 202051-202068	Group Health Benefits Plan for the Non-Bargaining Employees of United Inter-Mountain Telephone Company and United Telephone Company of the Carolinas - United Telephone System - United Telephone - Southeast Group
EQ FUL 054180-054215	Group Health Care Plan for the 1990 Non-bargaining Retirees of United Telephone Company of Ohio and Indiana SPD
EQ FUL 201480-201500	Group Health Plan for Non-Bargaining Employees of United Telephone Co. of Texas Summary Plan Description
EQ FUL 037490-037507	Group Health Plan for Non-Bargaining Employees of United Telephone Co. of Florida Summary Plan Description,
EQ FUL 038022-038058	Group Medical Insurance For the Bargaining Employees of Carolina Telephone Represented by IBEW Local 1912 CWA Locals 3680, 3681, 3682, and 3685 Summary Plan Description
EQ FUL 001154-001191	Group Medical Insurance For the Bargaining Employees of Carolina Telephone Represented by IBEW Local 1912 CWA Locals 3680, 3681, 3682, and 3685 Summary Plan Description
EQ FUL 201607-201637	Your Group Insurance Plan for Medical Care Insurance United Telephone System Carolina Telephone
EQ FUL 094585-094600	Centel Retiree Hospitalization and Major Medical Coverage Your Group Benefit Plan
EQ FUL 210845-210894	Centel Retiree Hospitalization and Major Medical Coverage Your Group Benefit Plan
EQ FUL 210799-210842	We're United! - Group Health Insurance Medical Plan
EQ FUL 202283-202291	Group Non-contributory & Contributory Life Ins. Plan for the Employees Represented by the CWA of United Inter-Mountain Telephone Co.
EQ FUL 191117-191126	Group Basic Noncontributory & Contributory Life Ins. and Group Accidental Death and Dismemberment Benefits For the Bargaining Employees of United Tel. Co.of Iowa Represented by IBEW 735 SPD
EQ FUL 199589-199600	Group Basic Noncontributory & Contributory Life Ins. & Survivor Benefits & Group Accidental Death and Dismemberment

Production Nos.	Document Name
	Benefits & Additional Accidental Death Benefits and Dependent Life Benefits For the Bargaining Employees of United Telephone Company of New Jersey, Inc. at Lafayette and Sussex SPD
EQ FUL 211484-211495	Group Basic Non-contributory & Contributory Life Insurance & Group Accidental Death & Dismemberment Benefits & Dependent Life Benefits - For the Bargaining Employees of United Telephone Company of the Carolinas Represented by IBEW Local 1649 (Summary Plan Description)
EQ FUL 207618-207626	Group Basic Noncontributory & Contributory Life Ins. & Optional Contributory Life Insurance For the Bargaining Employees of United Telephone Company of Texas Represented by IBEW Local 1506
EQ FUL 201136-201143	Group Basic Contributory Life Insurance and Group Accidental Death and Dismemberment Benefits for Bargaining Employees of The United Telephone Company of Florida Represented by IBEW Local 199
EQ FUL 191127-191137	Group Basic Noncontributory & Contributory Life Ins. and Accidental Death and Dismemberment Benefits For the Bargaining Employees of United Tel. Co.of Missouri Represented by CWA 6314 and IBEW 0002 SPD
EQ FUL 204072-204083	Group Basic Contributory Life Insurance and Group Accidental Death and Dismemberment Benefits for Bargaining Employees of The United Telephone Company of Florida Represented by IBEW Local 199
EQ FUL 207663-207675	Group Basic Noncontributory and Contributory Life Insurance and Group Accidental Death and Dismemberment Benefits and Dependent Life Benefits for the Bargaining Employees of United Telephone Company of the Northwest SPD
EQ FUL 190991-191001	Group Basic Noncontributory & Contributory Life Ins., Group Accidental Death and Dismemberment Benefits, Additional Accidental Death Benefits, and Survivor Income Benefits for the Nonbargaining Employees of United Tel. Co.of Arkansas, United Tel. Co. of Kansas, United Tel. Co. of Missouri, United Tel. Co. of the West SPD
EQ FUL 191002-191012	Group Basic Noncontributory & Contributory Life Ins., Group Accidental Death and Dismemberment Benefits, Additional Accidental Death Benefits, and Survivor Income Benefits for the Nonbargaining Employees of United Tel. Co.of Iowa SPD
EQ FUL 191013-191026	Group Basic Noncontributory & Contributory Life Ins., Group Accidental Death and Dismemberment Benefits, Additional Accidental Death Benefits, Dependent Life Benefits and Survivor Income Benefits for the Employees of United Tel. Co.of Minnesota SPD
EQ FUL 199538-199551	Group Basic Noncontributory & Contributory Life Ins. and Survivor Benefits and Group Accidental Death and Dismemberment Benefits and Additional Accidental Death Benefits and Survivor Income Benefits and Dependent Life

Production Nos.	Document Name
	Benefits for the Nonbargaining Employees of United Tel. Co.of Pennsylvania SPD
EQ FUL 199552-199565	Group Basic Noncontributory & Contributory Life Ins. and Survivor Benefits and Group Accidental Death and Dismemberment Benefits and Additional Accidental Death Benefits and Dependent Life Benefits and Survivor Income Benefits for the Nonbargaining Employees of United Tel. Co.of New Jersey SPD
EQ FUL 201982-201994	Group Basic Noncontributory & Contributory Life Ins. & Group Accidental Death and Dismemberment Benefits & Survivor Income Benefits and Dependent Life Benefits for the Nonbargaining Employees of United Tel. Co.of the Carolinas & United Inter-Mountain Telephone Co.
EQ FUL 199566-199578	Group Basic Noncontributory and Contributory Life Insurance and Group Accidental Death and Dismemberment Benefits and Additional Accidental Death Benefits and Survivor Benefits and Dependent Life Benefits SPD
EQ FUL 202382-202406	Group Life Ins. Plans Noncontributory Basic Contributory Dependent Life for the Nonbargaining Employees of United Telephone Co. of Ohio - Summary Plan Description
EQ FUL 051464-051474	Group Contributory and Non-Contributory Life Insurance Plan for the Non-Bargaining Employees of United Telephone Company of the Northwest SPD
EQ FUL 202143-202151	Group Contributory & Non-Contributory Life Ins. Plan for Non-Bargaining Employees - United Telephone
EQ FUL 001192-001201	The Group Contributory and Non-Contributory Life Insurance Plan for Non-Bargaining Employees of United Telephone of Florida Summary Plan Description
EQ FUL 210784-210792	Group Contributory and Non-Contributory Life Insurance Plan for Non-Bargaining Employees of United Telephone of Florida Summary Plan Description
EQ FUL 051804-051811	Group Contributory and Non-contributory Life Insurance Plan for Non-bargaining Employees of United Telephone Co of Texas and Management Employees of Palo Pinto Telephone Co. SPD
EQ FUL 207560-207468	Group Contributory and Non-contributory Life Insurance Plan for Non-bargaining Employees of United Telephone Co of Texas and Management Employees of Palo Pinto Telephone Co. SPD
EQ FUL 039142-039152	Carolina Telephone "Your Group Insurance Plan" for Life Insurance, Accidental Death And Dismemberment Benefits and Life Insurance on Dependents SPD
EQ FUL 051531-051551	Group Basic Contributory Life Insurance and Group Accidental Death and Dismemberment Benefits and Additional Accidental Death Benefits and Dependent Life Benefits For the Bargaining Employees of Carolina Telephone Represented by IBEW Local 1912 CWA Locals 3680, 3681, 3682, and 3685 Summary Plan Description
EQ FUL 001202-001261	Group Insurance Plan Summary Descripton

Production Nos.	Document Name
EQ FUL 200843-200886	Benefit Highlights: Non Bargaining United Employees - Comprehensive Major Medical Insurance SPD, United Telephone Company of Ohio
EQ FUL 206301-206366	Centel Corporation CenCare-Medical Booklet
EQ FUL 051680-051695	Pre 1990 Eastern Group Retiree Medical Plan (Equicor)
EQ FUL 211078-211117	Centel Your Group Benefit Plan Description Retired Employees of Central Telephone Company of Ohio
EQ FUL 210642-210689	Major Medical Expense Coverage
EQ FUL 210896-210943	Major Medical Expense Coverage

f. At trial, witnesses who are within the subpoena power of the court and who are officers, agents, or employees of the parties need not be formally subpoenaed to testify, provided that opposing counsel is given at least 5 business days advance notice of the desired date of trial testimony. For purposes of this entire pretrial order, the calculation of “business days” does not include Saturday, Sunday, or any legal holiday as defined by Fed. R. Civ. P. 6(a).

g. By no later than 2:30 p.m. each day of trial, counsel shall confer and exchange a good faith list of the witnesses who are expected to testify the next day of trial.

5. FACTUAL CONTENTIONS.

a. Plaintiffs’ Contentions.

Plaintiffs and the members of the certified class are retired, former long-term management and unionized employees of several regional and local telephone operating companies which eventually became wholly-owned subsidiaries of defendant Embarq Corporation (“Embarq”) upon its spin-off from defendant Sprint Nextel Corporation (“Sprint”) in May 2006. As retired employees, plaintiffs and their eligible spouses and other dependents were participants in various ERISA-governed plans sponsored by Sprint and its

operating subsidiaries to provide benefits during retirement. The retiree benefits that are the subject of this suit are: (a) medical benefits covering participants both before and after attainment of Medicare eligibility; (b) prescription drug benefits; and (c) life insurance benefits. The named plaintiffs represent a certified class of “all plan participants and all eligible spouse and dependent plan beneficiaries, whose rights to medical, prescription drug, and/or life insurance benefits or premium subsidies have been adversely affected.”

In November 2005, Sprint announced it was terminating the program of prescription drug benefits for Medicare-eligible retirees and dependents effective January 1, 2006. Sprint replaced the drug benefits with an inferior plan under which Sprint (and later Embarq) paid a monthly allowance, equal to \$500 per person per year, to assist participants in obtaining third-party coverage under Medicare Part D.

On or about July 26, 2007, following the spin-off of Embarq and the transfer to Embarq of Sprint’s benefit obligations to the class members, Embarq announced it was terminating or reducing the subject retiree benefits as follows: (1) effective January 1, 2008, the company terminated completely the program of medical benefits and ended the \$500 per year prescription drug payments for every retiree and dependent who was then eligible for Medicare or who became eligible in the future; (2) effective September 1, 2007, the company terminated the “grandfathered” company-paid life insurance benefits provided to certain plaintiffs and other retirees who were also participants in the Voluntary Employee Benefit

Association (“VEBA”) plan sponsored by Carolina Telephone & Telegraph¹; and (3) effective January 1, 2008, the company reduced the level of all other company-paid life insurance benefits so that these benefits, which previously had provided coverage of as much as \$40,000 or more, would be capped at \$10,000 in all cases.

Historically, Sprint demonstrated an intention and understanding that the subject benefits were permanent benefits which could not be changed after retirement and that the benefits would continue until the death of the retiree. For example, defendants continued to maintain over 170 different “legacy” retiree medical plans, as shown through hundreds of summary plan descriptions (“SPDs”) drafted and in force during the relevant time period. While these SPDs contain varying language, they can generally be broken down into two groups, pre-1991 and post-1991 SPDs.

Defendants’ SPDs for post-1991 retirees specifically informed employees and retirees that their medical and life insurance benefits continued for the rest of their lives. These employer-drafted documents clearly and specifically stated, when describing the benefits that the class members would receive during retirement, that “Your coverage under the Retiree Medical Plan ends . . . when you die.” (emphasis added), while containing only generalized and vague reservation of rights language in other sections of the lengthy, multi-plan SPDs,

¹Since 1971, employees of the Sprint/Embarq subsidiary Carolina Telephone & Telegraph Company had a program of life insurance benefits that paid twice a retiree’s final annual salary during the first five years of retirement, reduced to one times final salary thereafter. This company-paid benefit is referred to as the “grandfathered” life insurance.

without any cross-reference in the section titled “When Coverage Ends” where these lifetime promises appeared. Regarding the life insurance benefits, the SPDs likewise stated that the benefits “end on the date of your death.” Beginning with the 2002 SPD, the text was rephrased but made the same lifetime promise, that: “Retirees eligible for Basic Life Insurance will be covered as of their effective pension date. Coverage ends on the date of death.” (emphasis added). These SPDs also included statements that beginning in 2002 the company was “phasing out” life insurance benefits for future retirees, with declining coverage amounts for each new annual retiree cohort. But, consistent with its practices for the medical benefits, Sprint did not alter life insurance coverage amounts for existing retirees.

Defendants’ pre-1991 SPDs also contain language and text indicating the benefits were permanent. Alternatively and at a minimum, the language is ambiguous. Many of these earlier SPDs have no reservation language at all to indicate that the company intended to reserve any right to change the benefits, a fact defendants themselves concluded during a thorough internal review of these SPDs in 1999-2000. Other SPDs have language which defendants themselves characterized during their review as “indefinite” and vague and therefore ineffective to preserve any right to change benefits. For example, many of these older SPDs contain purported reservation of rights language which, even if potentially applicable to the benefits of currently retired employees, limited defendants’ right to amend or terminate the plan only for reasons of “business necessity or financial hardship,” thereby indicating that the plan will only terminate if the company is in bankruptcy or other severe

financial position. Defendants continued to rely on this limited reservation of rights language for a decade or more after 1990 for some class members.

Plaintiffs' forensic linguistics expert reviewed defendants' SPDs governing these retiree benefits and found that the language contained in all of defendants' pre- and post-1991 SPDs either expresses promises of vested lifetime benefits, or at a minimum, given the vague or confusing reservation of rights language, is ambiguous on the duration and alterability of the retiree benefits.²

This evidence also establishes that defendants violated ERISA by failing to issue SPDs which prominently, clearly, and accurately disclosed the possibility of amendment or termination of the promised benefits during retirement in a manner that could be understood by the average plan participant. The SPDs did not make clear the retiree benefits could be amended or terminated during retirement, and instead misinformed and misled retirees and beneficiaries into believing they would receive their benefits until death.

Document productions in this case also reveal many examples of "extrinsic evidence," which can be used to confirm the lifetime nature of the benefits even if SPDs themselves are found to be ambiguous. These forms of evidence include (1) contemporaneous written company promises of lifetime benefits to employees, through both form and individually

²On November 4, 2011, the court ordered defendants to identify which SPDs, plan documents, and collective bargaining agreements govern each class member's retiree benefits. (doc. 280). The court also ordered defendants to produce any such documents not already produced. *Id.* If any SPDs are identified by defendants that were not reviewed by plaintiffs' expert, she will amend her report.

crafted communications; (2) defendants' "Retiree Compact" project in 2001, in which senior Sprint executives themselves expressed their understanding that these benefits were lifetime benefits for current retirees which could not be changed; (3) Sprint's longstanding practice of preserving benefits without alteration by maintaining 170 different legacy plans for pre-1991 retirees, despite the administrative burdens associated with this complexity; (4) collective bargaining agreements; (5) defendants' various early retirement incentive plans and programs encouraging employees to retire with statements that retirement would have the effect of securing the benefits features then in effect; (6) defendants' notices regarding the phasing-out of current retiree features and plans and offering grandfathered benefits for employees who retired by a certain date; and (7) the aforementioned 1999-2000 detailed analysis by Sprint of all existing retiree medical and life insurance SPDs to assess whether language in the booklets was adequate to preserve a company right to amend, and finding that many SPDs did not contain any reservation of rights language at all or had language that defendants themselves characterized as "indefinite."

The same types of evidence will be cited in support of the ERISA breach of fiduciary duty claims of 17 named plaintiffs, which are being prosecuted on an individual basis in this action. These claims assert that defendants breached their fiduciary duty by misrepresenting the terms of the plans through misleading failures to clearly and conspicuously disclose that the benefits were subject to change and could end sooner than "when you die" and/or by affirmative misrepresentations that these were lifetime benefits.

In addition, based on the opinions and conclusions of plaintiffs' actuarial life

insurance expert, the reduction and termination of the retiree life insurance disparately impacted retirees based on age because the premiums plaintiffs and the Class would have to pay to replace the reduced or terminated life insurance benefits are significantly greater than they are for those who are ten years younger. Defendants historically understood that retirees would either be unable to secure life insurance coverage on their own, or that any available coverage secured individually would be prohibitively expensive. Defendants have not presented any expert opinion to controvert this finding of adverse impact.

As a result of defendants' unlawful reduction and termination of these retiree benefits, plaintiffs and the Class have been deprived of their rights under ERISA and the age discrimination statutes, and they have suffered injury and financial losses in the form of lost coverage for, and increased premiums and charges for, medical, prescription drug, and life insurance benefits, and an inability to obtain or maintain alternative medical, prescription drug, and life insurance coverage at reasonable cost due to their now advanced ages and impaired health conditions. Plaintiffs also suffered other financial losses resulting from defendants' misrepresentations, including the loss of salary, pension, and other fringe benefits that they would have received as a result of continued employment had they not been induced by defendants to retire early, and the loss of income and earnings from post-retirement employment and business opportunities that they would have received had they not been misled by defendants about the security of their retiree benefits.

b. Defendants' Contentions.

The welfare benefits at issue in this case were not vested. To the contrary, the benefits

were and are subject to change at any time. Under ERISA, welfare benefits, unlike pension benefits, do not vest unless the plan sponsor makes a contractual commitment that it will never change or alter the benefits. Such an “extra-ERISA” commitment must be set forth in “clear and express language” that is incorporated into the written plan documents. Here, the plan documents not only are devoid of such clear and express language, they expressly reserve the right of Sprint Nextel Corporation and Embarq Corporation (the “Company”) to amend, modify, or terminate any or all of the retiree welfare benefits at issue.

The welfare benefits were also described in SPDs that were periodically revised and distributed to participants. The SPDs distributed to the vast majority of the plaintiffs in this litigation likewise advised participants that the Company reserved the right to amend, modify, or terminate the benefits. While not all SPDs—particularly older ones—contained an express reservation of rights (“ROR”), the absence of an ROR does not convert presumptively unvested benefits to vested benefits. To the contrary, plaintiffs must prove the plans contained “clear and express language” establishing the Company waived its statutory right to modify the benefits in question. Plaintiffs simply cannot meet that burden. Indeed, there is a long history of making changes—some big, some small, some that benefited retirees, some that reduced benefits for retirees—to their welfare benefit plans.

There are three specific welfare plan changes that are at issue in this lawsuit. In November 2005, the Company informed its current employees and retirees, including the plaintiffs, that effective January 1, 2006, it was terminating Company-paid prescription drug benefits for those retirees and dependents who were eligible for Medicare. The Company

thereafter provided a \$500 annual subsidy to Medicare-eligible retirees to assist them in obtaining their own prescription drug coverage under Medicare Part D. On July 26, 2007, the Company announced that, effective September 1, 2007 and January 1, 2008, it was terminating or reducing certain Company-paid medical, prescription drug, and life insurance benefits and/or subsidies. Specifically, the Company eliminated medical benefits and subsidies for prescription drug benefits for Medicare-eligible retirees. The Company continued to provide medical and prescription drug benefits for participating non-Medicare eligible retirees. The Company also announced that it was capping the maximum level of life insurance benefits at \$10,000 for all eligible retirees, except those participating in the Carolina Telephone & Telegraph (“CT&T”) VEBA. The VEBA provides eligible retirees with a death benefit of one times the retiree’s final salary at no cost to the retiree. For VEBA participants, other Company-paid life insurance benefits were eliminated. In general, the changes to life insurance benefits only affected individuals who retired before 2004 because the Company had previously eliminated certain retiree life insurance benefits and thereafter phased out all retiree life insurance benefits in 2002 (maximum benefit of \$15,000) and 2003 (maximum benefit of \$10,000). The 2001, 2002, and 2003 changes have not been challenged by plaintiffs.

The 17 named ERISA plaintiffs have alleged that even if their welfare benefits were not vested, the SPDs and various oral statements and written communications from managers, co-workers, HR or benefits representatives, and even union officials, suggested to them that their retiree benefits were in fact secure and indefeasible. Based on these fact-

specific allegations, these plaintiffs assert individual breach of fiduciary duty claims. However, none of the plaintiffs can meet his or her burden of proving the elements of a breach of fiduciary duty claim. In fact, several of them have failed to identify any actionable misrepresentations or have admitted that he/she made the decision to retire prior to any alleged misrepresentation. Moreover, with only one exception, the named plaintiffs retired more than six years prior to the filing of the complaint in this case and, therefore, their claims fall outside of the applicable statute of limitations.

Plaintiffs also claim the amendment of life insurance benefits violated the ADEA. Although the reduction (or in the case of VEBA participants, elimination) of Company-paid life insurance benefits applied to all retirees regardless of their age, plaintiffs nonetheless argue this decision had a disparate impact on older retirees because they had to pay more to buy their own individual replacement policies directly from an insurance company than “those who are ten years younger.” But that circumstance results from the insurance marketplace and the retirees’ own purchasing decisions, not from any employment policy of the Company. Plaintiffs’ expert has been unable to identify any cognizable adverse impact on older retirees that resulted from the age-neutral reduction or elimination of life insurance benefits. Moreover, the ADEA’s regulations provide that employer-provided life insurance can be terminated upon retirement and that the provision of equal benefits to older and younger retirees (as in this case) does not give rise to an ADEA claim. Finally, the Company’s decision to reduce or eliminate life insurance benefits was based on a reasonable factor other than age—the objective of alleviating the substantial financial burden of

providing these benefits to former employees.

Defendants have challenged the conditional certification of the ADEA claims as a collective action through a motion to decertify collective action (doc. 287). Adjudication of the ADEA claims will require consideration of myriad individual issues under the plaintiffs' theory of the case as set forth in defendants' memorandum of law (doc. 289). Evaluated under the standard for post-discovery collective action certification, these individual issues, as well as fairness and procedural considerations, require that the ADEA collective action be decertified.

Defendants also have recently filed a motion to decertify class action (doc. 285), based largely on the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), which was decided five months after this court certified the class in this case. *Dukes* requires a common contention that can be resolved as to all class members in one stroke. But plaintiffs' expert, Gail Stygall, has opined that the language in many of the 116 differing SPDs upon which plaintiffs rely differs materially from one SPD to another. Plaintiffs' discovery responses, furthermore, have identified a variety of documents that plaintiffs claim must be examined to determine whether benefits were vested as to individual class members, including 38 collective bargaining agreements, early retirement opportunity documents, and other extrinsic evidence. Consequently, the classes applicable to plaintiffs' ERISA and state law age discrimination claims should be decertified. *See* generally doc. 286.

6. THEORIES OF RECOVERY.

a. **Plaintiffs' Theories of Recovery.** Plaintiffs assert they are entitled to recover upon the following alternative theories:

(1) Defendants violated the terms of the subject benefit plans and ERISA when they reduced or terminated medical, prescription drug, and life insurance benefits during the retirement of plaintiffs and the members of the Class (Counts 1 and 3 of the third amended complaint (doc. 117)).

(2) Defendants Sprint Nextel and its employees and other agents who had apparent authority to provide information about the subject benefits, including defendant Randall Parker, violated the strict fiduciary duty provisions of ERISA by misrepresenting the nature of the subject medical, prescription drug, and life insurance benefits, through affirmative misrepresentations and other misleading statements and/or failures to disclose material information about any limitations on the benefits (Count 2 of the third amended complaint).

(3) Defendant Embarq discriminated on the basis of age when it reduced or terminated retiree life insurance benefits of plaintiffs, the Individual Age Plaintiffs, and the members of the ADEA class in violation of the ADEA, because that action had a discriminatory adverse impact based on age (Count 4 of the third amended complaint).

(4) Defendant Embarq discriminated on the basis of age when it reduced or terminated retiree life insurance benefits of certain plaintiffs and the members of the Ohio, Oregon, and Tennessee Age Claim Sub-Classes in violation of the Ohio, Oregon, and

Tennessee anti-discrimination statutes, because that action had a discriminatory adverse impact based on age (Counts 5, 6, and 7 of the third amended complaint).

b. Essential Elements of Plaintiffs' First Theory of Recovery (i.e., Counts 1 and 3, Violation of ERISA – Benefit Claim). Subject to the court's determination of the law that applies to this case, and subject to the few disagreements noted, the parties agree that, in order to prevail on this theory of recovery, plaintiffs have the burden of proving the following essential elements:

- (1) Plaintiffs and the class members were participants or beneficiaries in the subject plans providing them with post-retirement medical, prescription drug, and life insurance benefits.
- (2A) Plaintiffs' Statement: The documents in force at the time of retirement and governing the provision of the medical, prescription drug, and life insurance benefits to plaintiffs and the members of the class did not authorize reduction or termination of those benefits during retirement. These documents also did not clearly and accurately disclose any limitations on the medical, prescription drug, and life insurance benefits that would be provided to plaintiffs and the members of the class during retirement. *See Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1511, 1513, 1517-19 (10th Cir. 1996); *DeBoard v. Sunshine Min. & Refining Co.*, 208 F.3d 1228, 1238 (10th Cir. 2000); *Haymond v. Eighth Dist. Elec. Benefit Fund*, 36 Fed. Appx. 369, 373-74 (10th Cir. 2002); *Miller v.*

Monumental Life Ins. Co., 502 F.3d 1245, 1249, 1252-54 (10th Cir. 2007); *Kellogg v. Metropolitan Life Ins. Co.*, 549 F.3d 818, 830 (10th Cir. 2008); *LaAsmar v. Phelps Dodge Corp. Life, Accid. Death & Dismemberment and Dependent Life Ins. Plan*, 605 F.3d 789, 805-06 (10th Cir. 2010); *Rasenack v. AIG Life Ins. Co.*, 585 F.3d 1311, 1318-20 (10th Cir. 2009).

- (2B) Defendants' Restatement of Element to Be Proven by Plaintiffs: The Company waived its statutory right to modify welfare benefits through "clear and express language" in the written plan documents. *See Kerber v. Qwest Group Life Ins. Plan*, 647 F.3d. 950, 961 (10th Cir. 2011), *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1511 (10th Cir. 1996).
- (3) The actions of defendant Sprint Nextel in 2005 to reduce prescription drug benefits, and the actions of defendant Embarq in 2007 to reduce or terminate medical, prescription drug, and life insurance benefits for plaintiffs and the members of the class violated the terms of the relevant plans.
- (4) Plaintiffs and the members of the class were harmed and suffered injury and damages and are entitled to relief.

c. Essential Elements of Plaintiffs' Second Theory of Recovery (i.e., Count 2, Violation of ERISA – Fiduciary Breach Claim). Subject to the court's determination of the law that applies to this case, the parties agree that, in order to prevail on this theory of

recovery, each plaintiff who is asserting this claim on an individual basis has the burden of proving the following essential elements:

- (1) He or she was a participant or beneficiary in the subject plans providing him or her with medical, prescription drug, and/or life insurance benefits.
- (2) One or more of the defendants, acting in a fiduciary capacity, made material misrepresentations, either affirmatively or by omission, regarding the benefits at issue.
- (3A) Defendants contend that each plaintiff must prove that he or she took actions in reliance upon a material misrepresentation made to him or her regarding the welfare benefits at issue by a defendant acting in a fiduciary capacity.
- (3B) Plaintiffs contend that detrimental reliance is not a required element in ERISA claims seeking appropriate equitable relief for a defendant's failure to provide sufficient benefits-related information, as the U.S. Supreme Court held in *CIGNA Corp. v. Amara*, U.S. 131 S.Ct. 1866, 1881-82 (2011).
- (4) He or she was harmed and suffered injury as a result of the material misrepresentations.
- (5) He or she is entitled to relief.

d. Essential Elements of Plaintiffs' Third Theory of Recovery (i.e., Count 4,

Violation of the ADEA). Subject to the court's determination of the law that applies to this case, the parties agree that, in order to prevail on this theory of recovery, plaintiffs have the burden of proving the following essential elements:

- (1) The protections of the ADEA apply to plaintiffs and participants in the collective action.
- (2) The specific employment practice(s) of defendants which is asserted to have had a disparate impact on plaintiffs and participants in the collective action because of their age.
- (3A) The adverse impact of the specific employment practice(s) on plaintiffs and participants in the collective action because of their age.
- (3B) Defendants contend that plaintiffs must prove that the specific employment practices which they have identified caused a statistically significant employment related disparate impact on plaintiffs and participants in the collective action because of their age.
- (4) Plaintiffs and participants in the collective action were harmed and suffered injury as a result of the violation of ADEA and are entitled to relief.

e. Essential Elements of Plaintiffs' Fourth Theory of Recovery (i.e., Count 5, Violation of the Ohio Civil Rights Act). Subject to the court's determination of the law that applies to this case, the parties agree that, in order to prevail on this theory of recovery, plaintiffs have the burden of proving the following essential elements:

- (1) The protections of the Ohio Civil Rights Act apply to the Ohio Age Claim Sub-Class representative plaintiffs and participants in the Ohio Age Claim Sub-Class.
- (2) The specific employment practice(s) of defendants which is asserted to have had a disparate impact on the Ohio Age Claim Sub-Class representative plaintiffs and participants in the Ohio Age Claim Sub-Class because of their age.
- (3A) The adverse impact of the employment practice(s) on the Ohio Age Claim Sub-Class representative plaintiffs and participants in the Ohio Age Claim Sub-Class because of their age.
- (3B) Defendants contend that plaintiffs must prove that the specific employment practices which they have identified caused a statistically significant employment related disparate impact on the Ohio Age Claim Sub-Class representative plaintiffs and participants in the Ohio Age Claim Sub-Class because of their age.
- (4) The Ohio Age Claim Sub-Class representative plaintiffs and participants in the Ohio Age Claim Sub-Class were harmed and suffered injury as a result of the violation of the Ohio Civil Rights Act and are entitled to relief.

f. Essential Elements of Plaintiffs' Fifth Theory of Recovery (i.e., Count 6, Violation of the Oregon Unlawful Discrimination Law). Subject to the court's

determination of the law that applies to this case, the parties agree that, in order to prevail on this theory of recovery, plaintiffs have the burden of proving the following essential elements:

- (1) The protections of the Oregon Unlawful Discrimination Law apply to the Oregon Age Claim Sub-Class representative plaintiffs and participants in the Oregon Age Claim Sub-Class.
- (2) The specific employment practice(s) of defendants which is asserted to have had a disparate impact on the Oregon Age Claim Sub-Class representative plaintiffs and participants in the Oregon Age Claim Sub-Class because of their age.
- (3A) The adverse impact of the employment practice(s) on the Oregon Age Claim Sub-Class representative plaintiffs and participants in the Oregon Age Claim Sub-Class because of their age.
- (3B) Defendants contend that plaintiffs must prove that the specific employment practices which they have identified caused a statistically significant employment related disparate impact on the Oregon Age Claim Sub-Class representative plaintiffs and participants in the Oregon Age Claim Sub-Class because of their age.
- (4) The Oregon Age Claim Sub-Class representative plaintiffs and participants in the Oregon Age Claim Sub-Class were harmed and suffered injury as a result of the violation of the Oregon Civil Rights

Act and are entitled to relief.

g. Essential Elements of Plaintiffs' Sixth Theory of Recovery (i.e., Count 7, Violation of the Tennessee Human Rights Act). Subject to the court's determination of the law that applies to this case, the parties agree that, in order to prevail on this theory of recovery, plaintiffs have the burden of proving the following essential elements:

- (1) The protections of the Tennessee Human Rights Act apply to the Tennessee Age Claim Sub-Class representative plaintiffs and participants in the Tennessee Age Claim Sub-Class.
- (2) The specific employment practice(s) of defendants which is asserted to have had a disparate impact on the Tennessee Age Claim Sub-Class representative plaintiffs and participants in the Tennessee Age Claim Sub-Class because of their age.
- (3A) The adverse impact of the specific employment practice(s) on the Tennessee Age Claim Sub-Class representative plaintiffs and participants in the Tennessee Age Claim Sub-Class because of their age.
- (3B) Defendants contend that plaintiffs must prove that the specific employment practices which they have identified caused a statistically significant employment related disparate impact on the Tennessee Age Claim Sub-Class representative plaintiffs and participants in the Tennessee Age Claim Sub-Class because of their age.

- (4) The Tennessee Age Claim Sub-Class representative plaintiffs and participants in the Tennessee Age Claim Sub-Class were harmed and suffered injury as a result of the violation of the Tennessee Human Rights Act and are entitled to relief.

7. DEFENSES.

a. List of Defendants' Defenses and Affirmative Defenses. Defendants assert the following defenses and affirmative defenses:

- (1) There is no right to a jury trial, compensatory damages, or punitive damages under plaintiffs' ERISA claims.
- (2) Plaintiffs' claims are time-barred to the extent they relate to events that occurred beyond the applicable statutes of limitations.
- (3) Plaintiffs' claims are barred in whole, or in part, against each defendant to the extent such defendant was not a fiduciary with respect to the applicable plan.
- (4) The conduct upon which plaintiffs' claims are based was not fiduciary conduct.
- (5) The alleged misrepresentations upon which plaintiffs' claims are based were not material.
- (6) Each fiduciary duty plaintiff failed to prove that he or she suffered harm as a result of actions taken in reliance upon a material misrepresentation made to him or her regarding the welfare benefits at issue by a defendant acting in a fiduciary capacity.
- (7) To the extent any of the applicable summary plan descriptions did not

contain a reservation of rights clause, the absence of a reservation of rights clause does not give rise to a claim under the Department of Labor regulations applicable to at the time the summary plan description was issued.

(8) Plaintiffs have failed to demonstrate that the Company waived its statutory right to modify welfare benefits through “clear and express language” in the written plan documents.

(9) Defendants’ actions have been justified by and are consistent with the terms of the applicable plan documents, ERISA and other federal, state, and common law.

(10) Plaintiffs have failed to state a prima facie case for discrimination under the ADEA and the state anti-discrimination laws.

(11) Plaintiffs’ ADEA claims are barred in whole, or in part, by 29 C.F.R. § 1625.10 et seq.

(12) Defendants have a legitimate, reasonable, non-discriminatory reason unrelated to plaintiffs’ age for any action taken under the ADEA and the state anti-discrimination laws.

(13) Defendants’ actions with regard to plaintiffs’ medical, prescription drug, and life insurance benefits were based on reasonable factors other than age.

(14) Plaintiffs cannot establish that the legitimate, non-discriminatory reason for any action taken was mere pretext for age discrimination under the ADEA and the state anti-discrimination laws

(15) Defendants did not willfully violate the ADEA or the state anti-

discrimination laws.

(16) Plaintiffs have failed to identify a claim cognizable under the ADEA.

(17) Plaintiffs have failed to identify an employment practice cognizable under the ADEA.

(18) Plaintiffs have failed to identify an employment related harm cognizable under the ADEA.

(19) Plaintiffs are not entitled to liquidated damages under the ADEA or the state anti-discrimination laws because defendants acted in good faith and had reasonable grounds for believing their actions were not a violation of the statutes.

(20) Plaintiffs' state law claims are barred in whole, or in part, to the extent that plaintiffs failed to comply with the statutory or jurisdictional prerequisites for the institution of actions under the statutes upon which they rely.

(21) ERISA preempts plaintiffs' state law claims to the extent that the statutes upon which plaintiffs rely prohibit conduct that is permissible under the ADEA.

(22) Plaintiffs' claims for monetary relief are barred in whole, or in part, by their failure to mitigate any harm that they claim to have suffered.

(23) Plaintiffs' state law claims are barred in whole, or in part, to the extent that the state laws upon which plaintiffs rely adopt the regulations promulgated by the EEOC.

(24) To the extent that plaintiffs or any member of the classes or sub-classes described in the third amended complaint have signed releases or waived claims or benefits,

their claims are barred in whole, or in part, by such releases and waivers.

(25) In the event plaintiffs prevail on liability in this matter, plaintiffs are not entitled to any or some of the amount of attorneys' fees and costs that she might seek under the ADEA, the state anti-discrimination laws, or ERISA.

(26) This action is not properly maintainable as a class action.

(27) This action is not properly maintainable as a collective action.

(28) Plaintiffs have failed to establish a factual and/or legal basis for the relief they seek under ERISA, the ADEA, and state law.

b. Essential Elements of Defendants' First Affirmative Defense (i.e., mitigation). Subject to the court's determination of the law that applies to this case, the parties agree that, in order to prevail on this affirmative defense, defendants have the burden of proving that under the circumstances presented, some or all of the damage suffered by plaintiffs could have been avoided through use of reasonable care and diligence.

c. Essential Elements of Defendants' Second Affirmative Defense (i.e., statute of limitations). Subject to the court's determination of the law that applies to this case, the parties agree that, in order to prevail on this affirmative defense, defendants have the burden of proving that plaintiffs, either individually or as a member of a class or collective action, did not assert their claims within the time period required by the relevant statute of limitations.

d. Essential Elements of Defendants' Third Affirmative Defense (i.e., "right to sue" letter). Subject to the court's determination of the law that applies to this case, the

parties agree that, in order to prevail on this affirmative defense, defendants have the burden of proving that plaintiffs did not assert their ADEA and/or state discrimination claims within the time provided in any applicable “right to sue” letter.

e. Essential Elements of Defendants’ Fourth Affirmative Defense (i.e., equal cost / equal benefits). Subject to the court's determination of the law that applies to this case, the parties agree that, in order to prevail on this affirmative defense, defendants have the burden of proving the following essential elements: Any actions taken by defendants that allegedly violated the ADEA were taken in observance of a bona fide employee benefit plan, were not taken as a subterfuge to evade the purposes of the ADEA, and the actual amount of payment made or cost incurred on behalf of an older retiree was no less than that made or incurred on behalf of a younger retiree.

f. Essential Elements of Defendants’ Fifth Affirmative Defense (i.e., releases and waivers). Subject to the court’s determination of the law that applies to this case, the parties agree that, in order to prevail on this affirmative defense, defendants have the burden of proving that plaintiffs knowingly and voluntarily executed a valid and enforceable release that covers some or all of the claims brought against defendants.

g. Essential Elements of Defendants Sixth Affirmative Defense (i.e., reasonable factor other than age).

(1) Defendants’ Statement: Subject to the court's determination of the law that applies to this case, defendants believe that, in order to prevail on this affirmative defense, defendants have the burden of proving the following essential elements: Any

actions taken by defendants that allegedly violated the ADEA were based upon a reasonable factor other than age.

(2) Plaintiffs' Statement: Plaintiffs understand that this defense is only available in discrimination actions challenging employment selection procedures (hiring, promotion and the like) and it is not available in this case.

h. Essential Elements of Defendants Seventh Affirmative Defense (i.e., preemption). Subject to the court's determination of the law that applies to this case, defendants believe that, in order to prevail on this affirmative defense, defendants have the burden of proving that the state law claims that are the subject of Counts 5, 6, and 7 of the third amended complaint purport to prohibit practices that are lawful under federal law.

8. FACTUAL ISSUES.

One or more of the parties believe the following material issues will need to be resolved at trial by the trier of fact if summary judgment is not granted. To the extent not readily apparent from the parties' factual contentions and legal theories set forth above, the following are significant issues of fact in this case:

a. Plaintiffs' Issues:

(1) Whether the documents defining the subject medical, prescription drug, and life insurance benefits, when properly interpreted under the rules of construction mandated by the Court of Appeals, granted plaintiffs and the members of the class permanent benefits and did not allow defendants to reduce or terminate the subject benefits once retirement had occurred.

(2) Whether defendant Sprint Nextel and its predecessors properly reserved and clearly disclosed and communicated any right to reduce or terminate the subject benefits during the retirement of plaintiffs and the members of the class.

(3) Whether defendant Sprint Nextel and its predecessors failed to comply with their obligations under the ERISA statute and regulations governing the content of summary plan descriptions.

(4) Whether defendant Sprint Nextel had relinquished any possible right to reduce or terminate the subject benefits during the retirement of plaintiffs and the members of the class.

(5) Whether, assuming that a right to reduce or terminate the subject benefits during the retirement of plaintiffs and the members of the class was permissibly and properly reserved, was clearly disclosed and communicated, and had not been previously relinquished, defendants Sprint Nextel and Embarq satisfied the conditions for exercise of any supposed reserved right to reduce or terminate the subject benefits during the retirement of plaintiffs and the members of the class.

(6) Whether defendant Sprint Nextel and its employees and other agents who had apparent authority to provide information about the subject benefits and thus were acting in an ERISA fiduciary capacity, including defendant Randall Parker, misrepresented the nature of the subject medical, prescription drug, and life insurance benefits, through affirmative misrepresentations and other misleading statements and/or failures to disclose material information about any limitations on the benefits.

(7) Whether the reduction or termination of life insurance benefits had an adverse impact on the ADEA class, the Individual Age Plaintiffs, and the members of the Ohio, Oregon and Tennessee Subclasses based on age.

(8) The nature and amount of damages and other monetary and equitable relief to which plaintiffs and the members of the class are entitled.

b. Defendants' Issues:

(1) Whether the Company waived its statutory right to modify welfare benefits through "clear and express language" in the written plan documents.

(2) Whether each breach of fiduciary duty claim defendant, acting in a fiduciary capacity, made a material misrepresentation to a breach of fiduciary claim plaintiff regarding the welfare benefits at issue and whether that plaintiff suffered harm as a result of actions taken in reliance upon a material misrepresentation made to him or her regarding the welfare benefits at issue by a defendant acting in a fiduciary.

(3) Whether plaintiffs filed their breach of fiduciary duty claims within the applicable ERISA statute of limitations.

(4) Whether the specific employment practices identified by plaintiffs had a statistically significant employment related disparate impact on the ADEA class, the Individual Age Plaintiffs, and the members of the Ohio, Oregon and Tennessee Subclasses because of their age.

(5) Whether each individual class member suffered injury as a result of defendants' conduct and, if so, the nature and extent of the damages suffered by each

individual class member.

9. LEGAL ISSUES.

One or more of the parties believe the following are the significant legal or evidentiary issues that will need to be resolved by the court in this case, whether on summary judgment motion or at trial:

a. Whether defendants Sprint Nextel and Embarq were permitted to reduce or terminate medical, prescription drug, or life insurance benefits during the retirement of a former employee where any such right to reduce or terminate benefits was not reserved or clearly disclosed and communicated before the employee retired.

b. Whether plaintiffs have identified the specific employment practices causing adverse impact against plaintiffs, i.e., the reduction or elimination of company-sponsored life insurance benefits.

c. Whether the reduction or elimination of company-sponsored life insurance benefits caused adverse impact against plaintiffs and the ADEA class and the subclasses.

d. Whether defendants met their burden of production of information showing that the reduction or elimination of company-sponsored life insurance benefits was justified by the cost defense in 29 C.F.R. § 1610.25(a)(1).

e. Whether defendants met their burden of persuasion that the reduction or elimination of company-sponsored life insurance benefits was justified by the cost defense in 29 C.F.R. § 1610.25(a)(1).

f. Whether a Plan that does not contain “clear and express language” creating a

vested right to benefits can be deemed to have provided vested benefits to Plan participants.

g. Whether any alleged misrepresentations made by a defendant acting in a fiduciary capacity were material.

h. Whether the ADEA and applicable regulations permit the amendments to retiree life insurance benefits at issue in plaintiffs' age discrimination claims.

i. Whether plaintiffs' state law claims are preempted by ERISA.

j. Whether plaintiffs' ERISA claims can be sustained as a class action in light of the individual questions and individual answers regarding vesting and damages for each class member.

k. Whether plaintiffs' ADEA and state law claims can be sustained as a collective action in light of the individual questions and individual answers regarding vesting and damages for each class member.

10. DAMAGES.

a. Plaintiffs' Damages. Plaintiffs principally seek declaratory and injunctive relief compelling defendants to reinstate the subject benefits. To date, plaintiffs and the members of the class have suffered financial losses to the extent that the subject benefits have not been paid due to defendants' actions reducing or terminating benefits. Plaintiffs will present evidence at trial regarding illustrative financial losses to representative plaintiffs and the annual cost savings accruing to Sprint Nextel and Embarq as a result of the benefits changes, as estimated by defendants themselves. Plaintiffs believe the precise calculation of the amount of past due benefits and other monetary losses, which are largely liquidated,

can be conducted more efficiently, for both the parties and the court, in a second remedial phase of the case, either in claim proceedings under the relevant plans, or through actuarial and accounting analyses, in both cases subject to the supervision of the court.

(1) On the ERISA benefit claims (Count 1), the dollar value of medical, prescription drug, and life insurance benefits amounts denied to the members of the class and their eligible dependents and beneficiaries as a result of the challenged reductions and terminations of benefits from the effective dates of those changes until the time of judgment, net of the amount of any premiums which would have been properly charged and collected by the plans for coverage during that time period. The precise amounts of this relief will be determined in either claim proceedings under the relevant plans, or through actuarial and accounting analyses, in both cases subject to the supervision of the court.

(2) On the ERISA benefit claims (Count 1), the cost of any replacement insurance policies or coverage obtained by members of the class and their eligible dependents and beneficiaries from the effective dates of those changes until the time of judgment, net of the amount of any premiums which would have been properly charged and collected by the plans for coverage during that time period. The precise amounts of this relief will be determined in either claim proceedings under the relevant plans, or through actuarial and accounting analyses, in both cases subject to the supervision of the court.

(3) On the ERISA fiduciary breach claims (Count 2), a surcharge on the fiduciary defendants, restitution and other monetary relief to make plaintiffs and the members of the class whole for all losses caused by the fiduciary defendants'

misrepresentation of material information about the benefits, or attributable to their elimination of retiree medical, prescription drug, and life insurance benefits or their inducement of plaintiffs and the members of the class to retire early, including payment of all medical benefits, prescription drug benefits and subsidies, and life insurance benefits, that have been improperly withheld from plaintiffs and the members of the class from the effective dates of those changes until the time of judgment, net of the amount of any premiums which would have been properly charged and collected by the plans for coverage during that time period. The precise amounts of this relief will be determined in either claim proceedings under the relevant plans, or through actuarial and accounting analyses, in both cases subject to the supervision of the court.

(4) On the ERISA fiduciary breach claims (Count 2), all profits and savings realized by the fiduciary defendants which are attributable to their misrepresentation of material information about the benefits, or attributable to their elimination of retiree medical, prescription drug, and life insurance benefits or their inducement of plaintiffs and the members of the class to retire early, including all such profits and savings relating to salary, compensation, pension benefits, fringe benefits, and all other payroll and overhead costs that were avoided as a result of inducing them to retire early. The precise amounts of this relief will be determined in either claim proceedings under the relevant plans, or through actuarial and accounting analyses, in both cases subject to the supervision of the court.

(5) On the federal ADEA age discrimination claims (Count 4), as to the Individual Age Discrimination Plaintiffs,

- (a) For surviving Individual Age Discrimination Plaintiffs, reinstatement of their company-provided life insurance under the same terms that were in effect prior to the 2007 changes
- (b) For deceased Individual Age Discrimination Plaintiffs, payment of the face amounts, prior to the 2007 changes, of their company-provided life insurance, net of the amount of any premiums which would have been properly charged and collected by the plans for coverage, from the effective date of the changes through the date of judgment, for that portion of the coverage which was denied;
- (c) For both surviving and deceased Individual Age Discrimination Plaintiffs, reimbursement for the costs of any replacement coverage they obtained at some time following the announcement of the 2007 life insurance changes, but which was not in force at the time of death and did not pay any benefit;
- (d) For both surviving and deceased Individual Age Discrimination Plaintiffs, doubling the amount of the lost coverage as liquidated damages for willful age discrimination, i.e., the amount equal to the value of the company-provided life insurance taken away from them by defendants' 2007 changes, net of the amount of any premiums which would have been properly charged and

collected by the plans for coverage, from the effective date of the changes through the date of judgment, for that portion of the coverage which was denied.

The precise amounts of this relief will be determined in claim proceedings (which in the case of life insurance benefits consists of proof of death and identification of beneficiaries), subject to the supervision of the Court.

(6) On the Ohio-law age discrimination claims (Count 5), for members of the Ohio Age Claim Sub-Class who did not opt out:

- (a) For surviving members of the Ohio Age Claim Sub-Class, reinstatement of their company-provided life insurance under the same terms that were in effect prior to the 2007 changes;
- (b) For deceased members of the Ohio Age Claim Sub-Class, payment of the face amounts, prior to the 2007 changes, of their company-provided life insurance, net of the amount of any premiums which would have been properly charged and collected by the plans for coverage, from the effective date of the changes through the date of judgment, for that portion of the coverage which was denied;
- (c) For both surviving and deceased members of the Ohio Age Claim Sub-Class, reimbursement for the costs of any replacement coverage they obtained at some time following the

announcement of the 2007 life insurance changes, but which was not in force at the time of death and did not pay any benefit.

The precise amounts of this relief will be determined in claim proceedings (which in the case of life insurance benefits consists of proof of death and identification of beneficiaries), subject to the supervision of the Court.

(7) On the Oregon-law age discrimination claims (Count 6), for members of the Oregon Age Claim Sub-Class who did not opt out:

- (a) For surviving members of the Oregon Age Claim Sub-Class, reinstatement of their company-provided life insurance under the same terms that were in effect prior to the 2007 changes;
- (b) For deceased members of the Oregon Age Claim Sub-Class, payment of the face amounts, prior to the 2007 changes, of their company-provided life insurance, net of the amount of any premiums which would have been properly charged and collected by the plans for coverage, from the effective date of the changes through the date of judgment, for that portion of the coverage which was denied
- (c) For both surviving and deceased members of the Oregon Age Claim Sub-Class, reimbursement for the costs of any replacement coverage they obtained at some time following the announcement of the 2007 life insurance changes, but which

was not in force at the time of death and did not pay any benefit;

- (d) For both surviving and deceased members of the Oregon Age Claim Sub-Class, compensatory damages or \$200, whichever is greater, and punitive damages.

The precise amounts of this relief will be determined in claim proceedings (which in the case of life insurance benefits consists of proof of death and identification of beneficiaries), subject to the supervision of the Court.

(8) On the Tennessee-law age discrimination claims (Count 7), for members of the Tennessee Age Claim Sub-Class who did not opt out:

- (a) For surviving members of the Tennessee Age Claim Sub-Class, reinstatement of their company-provided life insurance under the same terms that were in effect prior to the 2007 changes;
- (b) For deceased members of the Tennessee Age Claim Sub-Class, payment of the face amounts, prior to the 2007 changes, of their company-provided life insurance, net of the amount of any premiums which would have been properly charged and collected by the plans for coverage, from the effective date of the changes through the date of judgment, for that portion of the coverage which was denied;
- (c) For both surviving and deceased members of the Tennessee Age Claim Sub-Class, reimbursement for the costs of any

replacement coverage they obtained at some time following the announcement of the 2007 life insurance changes, but which was not in force at the time of death and did not pay any benefit.

The precise amounts of this relief will be determined in claim proceedings (which in the case of life insurance benefits consists of proof of death and identification of beneficiaries), subject to the supervision of the Court.

(9) On all Counts, pre-judgment and post-judgment interest.

(10) On all Counts, attorneys' fees, costs, and litigation expenses under 29 U.S.C. § 1132(g)(1) and 29 U.S.C. §§ 216(b) and 626(b), and pursuant to Ohio Rev. Code § 4112.99, Oregon Rev. Stat. § 659A.885(1), and Tennessee Code § 4-21-311(b).

b. Defendants' Damages. Should defendants prevail on some or all of the plaintiffs' claims, defendants will seek attorneys' fees as available under the applicable statutes.

11. NON-MONETARY RELIEF REQUESTED, IF ANY.

As set forth in their third amended complaint, plaintiffs also request relief in the form of declaratory and permanent injunctive relief declaring that defendants cannot reduce or terminate the subject medical, prescription drug, and life insurance benefits, and compelling defendants to provide these benefits to plaintiffs and the members of the class in the future, and to pay these benefits when they become due under the terms of the relevant benefit plans. Plaintiffs also request relief in the form of reformation of the subject benefit plans to remove any asserted textual authorization for any reduction or termination of these benefits in the

future which is not consistent with the judgment and injunctive relief entered by the court.

These forms of non-monetary relief are specifically authorized by ERISA, 29 U.S.C. § 1132(a)(1) and (3); by the ADEA, 29 U.S.C. § 626(b); by the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02; by Ohio Rev. Code § 4112.99; by Oregon Rev. Stat. § 659A.885(1); and by Tenn. Code §§ 4-21-306(a) and 4-21-311(b).

12. AMENDMENTS TO PLEADINGS.

The parties do not request authorization to further amend their pleadings before trial. The parties do hereby preserve their rights to seek to amend their pleadings during and after trial pursuant to Fed. R. Civ. P. 15(b).

13. DISCOVERY.

Under the scheduling order and any amendments, all discovery was to be completed by December 5, 2011. On November 23, 2011, the court issued an order (doc. 284) granting an extension of the expert discovery deadline to December 13, 2011, for the purpose of deposing three expert witnesses. Counsel reported during the pretrial conference that those depositions had been completed.

In addition, the court recently entered two orders compelling certain discovery (*see* docs. 280 and 282), and directed the parties to complete that discovery by dates which follow December 5, 2011. The parties do not anticipate that this additional discovery will interfere with any remaining pretrial activities, including the timely briefing of dispositive motions. As requested by the parties, the court will continue to be available to resolve any disputes that may arise regarding compliance with the court's orders granting the motions to compel.

Other unopposed discovery may continue after the deadline for completion of discovery so long as it does not delay the briefing of or ruling on dispositive motions, or other pretrial preparations. Under these circumstances, the parties may conduct discovery beyond the deadline for completion of discovery if all parties are in agreement to do so, but the court will not be available to resolve any additional disputes that arise during the course of this other extended discovery.

14. WITNESSES AND EXHIBITS.

a. Final Witness and Exhibit Disclosures Under Rule 26(a)(3). The parties' final witness and exhibit disclosures pursuant to Fed. R. Civ. P. 26(a)(3) shall be filed no later than 21 days before trial. With regard to each witness disclosed under Fed. R. Civ. P. 26(a)(3)(A)(I), the disclosures also shall set forth the subject matter of the expected testimony and a brief synopsis of the substance of the facts to which the witness is expected to testify. Witnesses expected to testify as experts shall be so designated. Witnesses and exhibits disclosed by one party may be called or offered by any other party. Witnesses and exhibits not so disclosed and exchanged as required by the court's order shall not be permitted to testify or be received in evidence, respectively, except by agreement of counsel or upon order of the court. The parties should bear in mind that seldom should anything be included in the final Rule 26(a)(3) disclosures that has not previously appeared in the initial Rule 26(a)(1) disclosures or a timely Rule 26(e) supplement thereto; otherwise, the witness or exhibit probably will be excluded at trial. *See* Fed. R. Civ. P. 37(c)(1).

b. Objections. The parties shall file any objections under Fed. R. Civ. P. 26(a)(3)

no later than 14 days before trial. The court shall deem waived any objection not timely asserted, unless excused by the court for good cause shown.

c. Marking and Exchange of Exhibits. All exhibits shall be marked no later than 5 business days before trial. The parties shall exchange copies of exhibits at or before the time they are marked. The parties shall also prepare lists of their expected exhibits, in the form attached to this pretrial order, for use by the courtroom deputy clerk and the court reporter. In marking their exhibits, the parties shall use preassigned ranges of numbered exhibits. Exhibit Nos. 1-500 shall be reserved for plaintiffs; and Exhibit Nos. 501-999 shall be reserved for defendants. Each exhibit that the parties expect to offer shall be marked with an exhibit sticker, placed in a three-ring notebook, and tabbed with a numbered tab that corresponds to the exhibit number. The parties shall prepare exhibit books in accordance with the requirements of the judge who will preside over trial. The parties shall contact the judge's courtroom deputy clerk to determine that judge's specific requirements.

d. Designations of Deposition Testimony.

(1) **Written Depositions.** Consistent with Fed. R. Civ. P. 26(a)(3)(B), any deposition testimony sought to be offered by a party other than to impeach a testifying witness shall be designated by page and line in a pleading filed no later than 21 days before trial. Any counter-designation in accordance with Fed. R. Civ. P. 32(a)(6), and any objections to the designations made by the offering party, shall be filed no later than 14 days before trial. Any objections to counter-designations shall be filed no later than 5 business days before trial. Before filing any objections, the parties shall have conferred in good faith

to resolve the dispute among themselves. No later than 3 business days before trial, to facilitate the court's ruling on any objections to designations or counter-designations, the party seeking to offer the deposition testimony shall provide the trial judge a copy of each deposition transcript at issue. Each such transcript shall be marked with different colored highlighting. Red highlighting shall be used to identify the testimony that plaintiffs have designated, blue highlighting shall be used for defendants, and green highlighting shall be used to identify the objections to any designated testimony. After receiving and reviewing these highlighted transcripts, the court will issue its rulings regarding any objections. The parties shall then file the portions of the depositions to be used at trial in accordance with D. Kan. Rule 32.1.

(2) **Videotaped Depositions.** The paragraph immediately above applies to videotaped depositions as well as written deposition transcripts. After the court issues its rulings on the objections to testimony to be presented by videotape or DVD, the court will set a deadline for the parties to submit the videotape or DVD edited to reflect the designations and the court's rulings on objections.

15. MOTIONS.

a. **Pending Motions.** On November 23, 2011, defendants filed a motion to decertify class action (**doc. 285**) and a separate motion to decertify collective action (**doc. 287**). As earlier ordered by the court, the deadline for plaintiffs to file their responses to these two motions has been extended to **December 23, 2011**, and defendants' reply brief deadline has been extended to **January 23, 2012** (*see docs. 291 and 292*).

b. Additional Pretrial Motions. After the pretrial conference, plaintiffs intend to file a motion pursuant to Fed. R. Civ. P. 39(c) to allow the jury to sit in an advisory role with respect to the ERISA claims. This motion shall be filed by the dispositive motion deadline.

Defendants intend to file motions for summary judgment. If the court grants defendants' pending motion to decertify collective action (doc. 287), defendants intend to file a motion under Fed. R. Civ. P. 21 to drop the approximately 750 Individual Age Discrimination Plaintiffs as parties and/or to sever their claims; any such motion shall be filed within 14 days of the court's ruling on defendants' request for decertification.

The dispositive motion deadline, as established in the scheduling order and any amendments, is **March 2, 2012**. Due the complexity of the issues in this case, the court is extending the deadline for filing responses to dispositive motions to **April 11, 2012**, and extending the reply brief deadline to **May 11, 2012**. But the parties and counsel are forewarned that absent a showing of truly extraordinary circumstances, no motions for further briefing extensions (even if unopposed) are likely to be granted. The court expects it will take at least 120 days from when all briefing is complete to rule on the motions, which would be mid-September 2012.

Consistent with the scheduling order filed earlier in this case, the arguments and authorities section of briefs or memoranda submitted in connection with all further motions or other pretrial matters shall not exceed 30 pages, absent an order of the court.

c. Motions Regarding Expert Testimony. All motions to exclude testimony of

expert witnesses pursuant to Fed. R. Evid. 702-705, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), or similar case law, shall be filed by **March 2, 2012**. The court respectfully declines to adopt defendants' suggestion during the pretrial conference of having *Daubert* motions filed concurrent with reply briefs in support of dispositive motions. The extended briefing schedule set out above for dispositive motions shall also apply to *Daubert* motions.

d. Motions in Limine. All motions in limine, other than those challenging the propriety of an expert witness, shall be filed no later than 14 days before trial. Briefs in opposition to such motions shall be filed within the time period required by D. Kan. Rule 6.1(d)(1), or at least 5 business days before trial, whichever is earlier. Reply briefs in support of motions in limine shall not be allowed without leave of court.

16. TRIAL.

a. This case is set for trial on the court's docket beginning on **January 8, 2013, at 9:00 a.m.** This is a "special" (i.e., No. 1) trial setting. It is subject only to any criminal cases on the court's docket that may have priority by virtue of the Speedy Trial Act. During the month preceding the trial docket setting, counsel should stay in contact with the trial judge's courtroom deputy to determine the day on which trial of the case actually will begin.

b. Trial will be by jury on the ADEA and state law age discrimination claims. The ERISA claims will be tried to the court. As earlier indicated, however, plaintiffs intend to file a motion pursuant to Fed. R. Civ. P. 39(c) requesting that the court try the ERISA claims with the jury sitting as an advisory jury.

c. Estimated trial time.

Plaintiffs: Plaintiffs expect the trial of this case to take approximately 15 days.

Defendants: Defendants expect the trial to take years if the case is tried as a class and collective action, for the reasons set forth at pages 46-50 of defendants' memorandum in support of motion to decertify class action (doc. 286) and pages 17-20 of their memorandum in support of motion to decertify collective action (doc. 289). Defendants expect the trial of this case to take approximately 15 days if defendants' pending motions to decertify are granted and trial is held solely with respect to the claims of the 17 named plaintiffs.

d. Trial will be in Kansas City, Kansas, or such other place in the District of Kansas where the case may first be reached for trial.

e. Not all of the parties are willing to consent at this time to the trial of this case being presided over by a U.S. Magistrate Judge, even on a backup basis if the assigned U.S. District Judge determines that his or her schedule will be unable to accommodate any trial date stated above.

f. Because of constraints on the judiciary's budget for the compensation of jurors, in any case in which the court is not notified of a settlement at least 1 full business day prior to the scheduled trial date, the costs of jury fees and expenses will be assessed to the parties, or any of them, as the court may order. *See* D. Kan. Rule 40.3.

17. SETTLEMENT.

a. Status of Settlement Efforts. The parties conferred in writing regarding

settlement on January 26, 2011 and February 10, 2011. The parties later participated in an effort to settle this litigation through mediation on August 3, 2011 before private mediator Philip J. Pfeiffer, Esq. of Fulbright & Jaworski, L.L.P. The parties last exchanged settlement proposals in conjunction with the mediation. Based on their respective settlement proposals, the parties believe that future mediation should be resumed, either with Mr. Pfeifer or another private mediator, following the court's decisions on defendants' class decertification and summary judgment motions.

b. Mediation and/or Other Method of Alternative Dispute Resolution. As earlier indicated, the court plans to decide the class decertification, dispositive, and *Daubert* motions in mid-September 2012 or soon thereafter. With that in mind, the parties shall participate in a second meditation with Mr. Pfeiffer (or another mediator jointly selected by the parties) by **November 9, 2012**. This schedule should allow the parties and counsel two full months for their intensive final trial preparation if the case cannot be settled through mediation.

18. FURTHER PROCEEDINGS AND FILINGS.

a. Status and/or Limine Conference. No status and/or limine conference has been scheduled at this time, but the court probably will schedule one shortly before trial.

b. Trial Briefs. A party desiring to submit a trial brief shall comply with the requirements of D. Kan. Rule 7.6. The court does not require trial briefs but finds them helpful if the parties anticipate that unique or difficult issues will arise during trial.

c. Voir Dire. Due to substantially differing views among judges of this court

concerning the extent to which counsel will be allowed to participate in voir dire, counsel are encouraged to contact the trial judge's law clerk or courtroom deputy (in accordance with the preference of the particular trial judge) to determine what, if anything, actually needs to be submitted by way of proposed voir dire questions. Generally, proposed voir dire questions only need to be submitted to address particularly unusual areas of questioning, or questions that are likely to result in objections by the opposing party.

d. Jury Instructions.

(1) Requests for proposed instructions in jury cases shall be submitted in compliance with Fed. R. Civ. P. 51 and D. Kan. Rule 51.1. Under D. Kan. Rule 51.1, the parties and the attorneys have the joint responsibility to attempt to submit one agreed set of preliminary and final instructions that specifically focuses on the parties' factual contentions, the controverted essential elements of any claims or defenses, damages, and any other instructions unique to this case. In the event of disagreement, each party shall submit its own proposed instructions with a brief explanation, including legal authority as to why its proposed instruction is appropriate, or why its opponent's proposed instruction is inappropriate, or both. Counsel are encouraged to contact the trial judge's law clerk or courtroom deputy (in accordance with the preference of the particular trial judge) to determine that judge's so-called standard or stock instructions, e.g., concerning the jury's deliberations, the evaluation of witnesses' credibility, etc.; it is not necessary to submit such proposed jury instructions to the court.

(2) Proposed instructions in jury cases shall be filed no later than 3 business

days before trial. Objections to any proposed instructions shall be filed no later than 1 business day before trial.

(3) In addition to filing the proposed jury instructions, the parties shall submit their proposed instructions as an attachment to an Internet e-mail sent to the e-mail address of the assigned trial judge listed in paragraph II(E)(2)(c) of the *Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means in Civil Cases*.

e. Proposed Findings of Fact and Conclusions of Law. To the extent this case is tried to the court sitting without a jury as to certain claims, in order to better focus the presentation of evidence on those claims, the parties shall file preliminary sets of proposed findings of fact and conclusions of law pertinent to those claims no later than 5 business days before trial. In most cases, the trial judge will order the parties to file final sets of proposed findings after the trial transcript has been prepared.

19. OTHER.

a. Conventionally Filed Documents. The following documents shall be served by mail and by fax or hand-delivery on the same date they are filed with the court if they are filed conventionally (i.e., not filed electronically): final witness and exhibit disclosures and objections; deposition designations, counter-designations, and objections; motions in limine and briefs in support of or in opposition to such motions; trial briefs; proposed voir dire questions and objections; proposed jury instructions and objections; and proposed findings of fact and conclusions of law. In addition, a party filing a trial brief conventionally shall

deliver an extra copy to the trial judge's chambers at the time of filing.

b. Miscellaneous. None.

20. POSSIBLE ADJUSTMENT OF DEADLINES BY TRIAL JUDGE.

With regard to pleadings filed shortly before or during trial (e.g., motions in limine, trial briefs, proposed jury instructions, etc.), this pretrial order reflects the deadlines that the court applies as a norm in most cases. However, the parties should keep in mind that, as a practical matter, complete standardization of the court's pretrial orders is neither feasible nor desirable. Depending on the judge who will preside over trial, and what adjustments may be appropriate given the complexity of a particular case, different deadlines and settings may be ordered. Therefore, from the pretrial conference up to the date of trial, the parties must comply with any orders that might be entered by the trial judge, as well as that judge's trial guidelines and/or exhibit instructions as posted on the court's Internet website:

(<http://www.ksd.uscourts.gov/chambers>).

IT IS SO ORDERED.

Dated December 21, 2011, at Kansas City, Kansas.

s/ James P. O'Hara
James P. O'Hara
U. S. Magistrate Judge

SUMMARY OF DEADLINES AND SETTINGS	
Event	Deadline/Setting
Plaintiffs' responses to defendants decertification motions	December 23, 2011
Reply briefs in support of decertification motions	January 23, 2012
Dispositive motions (e.g., summary judgment) and motions challenging admissibility of expert testimony	March 2, 2012
Responses to dispositive motions and Daubert motions	April 11, 2012
Reply briefs in support of dispositive motions and Daubert motions	May 11, 2012
Second mediation	November 9, 2012
Trial	January 8, 2013, at 9:00 a.m.
Final witness & exhibit disclosures	21 days before trial
Objections to final witness & exhibit disclosures	14 days before trial
Exhibits marked	5 business days before trial
Deposition testimony designated	21 days before trial
Objections to deposition designations, along with any counter-designations	14 days before trial
Objections to counter-designations of deposition testimony	5 business days before trial
Submission of disputed deposition designations to trial judge	3 business days before trial
Motions in limine	14 days before trial
Briefs in opposition to motions in limine	5 business days before trial, unless due earlier under D. Kan. Rule 6.1(d)(1)
Proposed jury instructions	3 business days before trial
Objections to proposed jury instructions	1 business day before trial
Preliminary sets of proposed findings of fact and conclusions of law in bench trials	5 business days before trial

CERTIFICATE OF SERVICE

Counsel are hereby notified that, unless the undersigned Magistrate Judge receives objections, corrections, or revisions to the foregoing proposed pretrial order by **December 22, 2012**, it will be signed and filed. **If revisions are requested, counsel shall state in writing on a separate document in letter form the requested revision, identifying the paragraph number and the reason for such revision, and serve on opposing counsel and to the Magistrate Judge. Counsel shall confer about all such revisions before communicating them to the Magistrate Judge. Counsel are encouraged (but not required) to submit jointly any requests for revisions. At a minimum, written requests for revisions shall state whether opposing counsel consents or objects, and summarize the bases of all objections.** All such requests for revisions shall be submitted via e-mail to:

ksd_ohara_chambers@ksd.uscourts.gov

This proposed pretrial order was served this 15th day of December, 2011, on the following:

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s/ James P. O'Hara
James P. O'Hara
U.S. Magistrate Judge