**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF KANSAS**

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| WILLIAM DOUGLAS FULGHUM, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>EMBARQ CORPORATION, *et al.*,<br><br>Defendants. | Civil Action No.: 07-CV-2602 (EFM/JPO) |

# DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON NAMED PLAINTIFFS' FIRST AND THIRD CLAIMS FOR RELIEF (CONTRACTUAL VESTING CLAIMS)

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## I. INTRODUCTION

The question presented by Plaintiffs' First and Third Claims for Relief is whether ERISA welfare benefit plan documents can be held to state in "clear and express language" that retirees are entitled to vested health, prescription drug, and life insurance benefits, when those very documents unambiguously state that the benefits can be terminated. The answer, as every court to consider the question has held, is no.

Plaintiffs are participants in ERISA welfare benefit plans (the "Plans") offered by Defendants Sprint Nextel Corporation ("Sprint"), Embarq Corporation ("Embarq"), or their predecessors or affiliates (collectively, the "Companies"). In their First and Third Claims for Relief (the "Claims" or "Contractual Vesting Claims"), Plaintiffs allege that the summary plan descriptions ("SPDs") in effect when they retired gave them a contractual right to vested health, prescription drug, and life insurance benefits (the "Disputed Benefits"). Plaintiffs further allege that Sprint and Embarq violated ERISA when they reduced or eliminated the Disputed Benefits in 2005 and 2007.

Plaintiffs' Contractual Vesting Claims fail for two independent reasons. First, the SPDs that allegedly created Plaintiffs' "contractually vested" rights include provisions—and in most instances, *multiple* provisions—unambiguously stating that the Plans could be terminated (the "ROR provisions"). The Tenth Circuit, as well as the Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits, have all held that no contractual vesting occurs when a plan document contains both an unambiguous ROR provision and a coverage provision allegedly referring to lifetime welfare benefits.

Second, contractual vesting occurs only if a plan document states in clear and express language that the benefits in question are vested, *i.e.*, forever unalterable. Plaintiffs cannot point to a single sentence in any SPD that clearly and expressly states the Disputed Benefits are

unchangeable throughout their lifetimes. Indeed, the coverage provisions upon which Plaintiffs rely typically say nothing whatever about the duration of those benefits. It is thus not surprising that numerous courts, including the Second, Third, Sixth, Eighth, and Eleventh Circuits, have held that the coverage provisions upon which Plaintiffs rely do not suffice to establish vesting. Defendants would therefore be entitled to summary judgment on Plaintiffs' Contractual Vesting Claims even if the SPDs did not expressly reserve the Companies' right to terminate the Disputed Benefits.

The Companies provided generous medical and life insurance benefit plans for Plaintiffs in reliance on the well-established, statutory right to amend those plans in the future, and expressly notified Plaintiffs in the SPDs that they were reserving this amendment right. The law does not, and should not, preclude companies from exercising a power to amend welfare benefit plans when they have expressly reserved such power. It is in the long-term interests of employees that companies have the power to amend such plans, because if companies were locked into providing welfare benefits even when they have expressly reserved the right to reduce or eliminate such benefits, they will be far less willing to offer such benefits, to the detriment of both employees and retirees. This Court should therefore decline Plaintiffs' invitation to write the ROR provisions out of the SPDs.

Plaintiffs state that "[a]t its core, this case presents disputes about whether the subject retiree medical, prescription drug, and life insurance benefits are vested." Doc. 21 at 22. The undisputed facts set forth below show that those benefits are not vested as a matter of law, and that Defendants are entitled to summary judgment on Plaintiffs' Contractual Vesting Claims.

Defendants' entitlement to summary judgment on Plaintiffs' Contractual Vesting Claims has significant ramifications for Defendants' pending motion to decertify the classes previously certified with respect to those claims (Doc. 285). Although Plaintiffs presently oppose that

motion (*see* Doc. 297), they and their counsel may be obligated to *support* that motion if the Court grants this motion for summary judgment. As the court stated in *Frahm v. Equitable Life Assur. Soc. of U.S.*, 137 F.3d 955 (7th Cir. 1998):

> [P]laintiffs' request that we . . . certify the case as a class action across the board calls into question their adequacy as class representatives. They litigated and lost; do they want to take all other retirees down in flames with them? A class representative who has lost on the merits may have a duty to the class to *oppose* class certification, to avoid the preclusive effect of the judgment.

*Id.* at 957 (emphasis in original; citations and quotation marks omitted). In light of these circumstances, Defendants respectfully request that the Court decide this motion before deciding Defendants' decertification motion.

## II. STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Fed. R. Civ. P. 56 and D. Kan. Local Rule 56.1, Defendants provide the following Statement of Undisputed Material Facts ("UF") entitling them to summary judgment. Citations are to the pleadings, the discovery materials on file, and the exhibits attached to Defendants' Motion for Summary Judgment on Named Plaintiffs' First and Third Claims for Relief (Contractual Vesting Claims) ("Motion"), including the Declaration of Randall T. Parker ("Ex. A") and the exhibits thereto (referred to as, *e.g.*, "Ex. A-1," *etc.*).

### A. The Parties

1. Plaintiff Donald Clark ("Clark") retired from Carolina Telephone and Telegraph Company, now known as Carolina Telephone and Telegraph Company LLC ("CT&T"), in August 1976. Third Amended Complaint ("Complaint," Doc. 117) ¶ 23a; Amended Answer and Defenses to Third Amended Complaint ("Answer," Doc. 160) ¶ 23a.

2. Plaintiffs James Britt ("Britt") and Laudie McLaurin ("McLaurin") retired from CT&T in approximately June 1985 and December 1988, respectively. Complaint ¶ 23c-d; Answer ¶ 23c-d.

3. Plaintiffs Willie Dorman ("Dorman") and Calvin Joyner ("Joyner") retired from CT&T in March 1994. Complaint ¶¶ 12 & 14; Answer ¶¶ 12 & 14.

4. Plaintiffs William Fulghum ("Fulghum") and William Daniel ("Daniel") retired from CT&T in September 1996 and June 1999, respectively. Complaint ¶¶ 9-10; Answer ¶¶ 9-10.

5. Plaintiffs John Hollingsworth ("Hollingsworth"), Betsy Bullock ("Bullock"), and William Games ("Games") retired from CT&T in December 2001. Complaint ¶¶ 11 & 17-18; Answer ¶¶ 11 & 17-18.

6. Plaintiff Sue Barnes ("Barnes") retired from CT&T in March 2003. Complaint ¶ 16; Answer ¶ 16.

7. Plaintiff Robert King ("King") retired from United Telephone Company of Florida ("UTC-Florida") in September 1993. Complaint ¶ 13; Answer ¶ 13. UTC-Florida is a predecessor-in-interest to Sprint-Florida, Inc., which is a predecessor-in-interest to Embarq-Florida, Inc., which was a subsidiary of Embarq at the time the Complaint was filed. Ex. A ¶ 17.

8. Plaintiffs Betty Carpenter and Kenneth Carpenter (jointly, the "Carpenters") retired from United Telephone Company of Ohio ("UTC-Ohio") in November 1997 and January 1998 at the age of 55 and 59, respectively. Complaint ¶¶ 19-20; Answer ¶¶ 19-20. UTC-Ohio was a subsidiary of Embarq at the time the Complaint was filed. Ex. A ¶ 15.

9. Plaintiff Carl Somdahl ("Somdahl") retired from United Telephone Company of the Northwest ("UTC-NW") in January 1999. Complaint ¶ 21; Answer ¶ 21. UTC-NW was a subsidiary of Embarq at the time the Complaint was filed. Ex. A ¶ 16.

10. Plaintiff Wanda Shipley ("Shipley") retired from United Inter-Mountain Telephone Company ("Inter-Mountain") in June 1999. Complaint ¶ 23; Answer ¶ 23.

Inter-Mountain is a predecessor-in-interest to United Telephone-Southeast Inc., which was a subsidiary of Embarq at the time the Complaint was filed. Ex. A ¶ 24.

11. Plaintiff Timothy Dillon ("Dillon") retired from Sprint North Supply Company in approximately December 2002. Complaint ¶ 15; Answer ¶ 15. Sprint North Supply Company was a subsidiary of Sprint until 2006, when it became a subsidiary of Embarq and changed its name to Embarq Logistics, Inc. Ex. A ¶ 35.

12. Defendant Sprint, formerly known as United Telecommunications, Inc. ("United Telecom") and Sprint Corporation, is a corporation incorporated under the laws of the State of Kansas. Complaint ¶ 36; Answer ¶ 36.

13. Defendant Embarq Corporation ("Embarq") is a corporation incorporated under the laws of the state of Delaware, and was created in May 2006 as a spin-off of Sprint's local communications business and product distribution operations. Complaint ¶ 27; Answer ¶ 27.

14. Defendant Embarq Mid-Atlantic Management Services Company ("Embarq Mid-Atlantic") is a North Carolina corporation that was previously known as Sprint Mid-Atlantic Telecom, Inc. Complaint ¶ 41; Answer ¶ 41.

15. Defendant CT&T is a North Carolina limited liability company and was formerly a wholly-owned subsidiary of Sprint. Complaint ¶ 45; Answer ¶ 45.

16. Defendants Embarq Retiree Medical Plan, 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, Sprint Group Life and Long Term Disability Plans, Group Life Accidental Death and Dismemberment and Dependent Life Plan for Employees of Carolina Telephone and Telegraph Company, and Carolina Telephone and Telegraph Company Voluntary Employees' Beneficiary Association Sickness Death Benefit

Plan ("VEBA") (collectively, the "Plans") are employee welfare benefit plans within the meaning of ERISA. Complaint ¶¶ 34, 43 & 47-48; Answer ¶¶ 34, 43 & 47-48.

17. Defendant Employee Benefits Committee of Embarq Corporation (the "Committee") is the administrator of the Plans sponsored by Embarq and CT&T. Ex. A ¶ 27.

18. Defendant Randall T. Parker served as Embarq's Director of Benefits between August 2005 and March 2010 and as Sprint's Director - Benefits Strategy and Sprint Benefits Brand Management between 1995 and August 2005. Ex. A ¶ 2.

**B. The SPDs**

**1. SPDs 1-4[1]**

19. Sprint predecessor United Telecom issued an SPD regarding retiree medical benefits ("medical SPD") effective January 1, 1991 that bears Bates Numbers EQ_FUL_92-148 ("SPD 1"). Ex. A ¶ 3; Ex. A-1.

20. Fulghum, Dorman, King, Joyner, and the Carpenters contend that SPD 1 was in effect when they retired, and that their medical benefits vested under the terms of that SPD. Ex. A-20 at 57 & 60.

21. Sprint issued a retiree medical SPD effective January 1, 1997 bearing Bates Nos. EQ_FUL_149-205 ("SPD 2"). Ex. A ¶ 4; Ex. A-2.

22. Daniel contends that SPD 2 was in effect when he retired, and that his medical benefits vested under the terms of that SPD. Ex. A-20 at 57 & 60.

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[1] Defendants describe herein the SPDs, as well as the collective bargaining agreements ("CBAs"), that the named Plaintiffs contend were in effect when they retired and upon which they base their claims for vested benefits. Defendants dispute some Plaintiffs' contentions regarding which SPDs and/or CBAs govern their claims for vested benefits, and assert that the current Plan documents control Plaintiffs' rights under the Plans. However, for purposes of this Motion, Defendants assume the accuracy of all Plaintiffs' allegations regarding the SPDs and CBAs governing the named Plaintiffs' claims for vested benefits.

23. Somdahl contends that a medical SPD bearing Bates Nos. Somdahl179-220 ("SPD 3") was in effect when he retired. Ex. A-20 at 57 & 60.

24. SPD 3 is identical to SPD 2, except that SPD 3 is missing a section in SPD 2 that is entitled "Legal Information" and that bears Bates Nos. EQ_FUL_191-205. Ex. A ¶ 5.

25. Sprint issued a retiree medical SPD effective January 1, 1998 bearing Bates Nos. EQ_FUL_206-251 ("SPD 4"). Ex. A ¶ 6; Ex A-4.

26. Somdahl contends that SPD 4 was in effect when he retired, and that his medical benefits vested under the terms of both SPD 3 and SPD 4. Ex. A-20 at 57 & 60.

27. SPDs 1-4 included sections entitled "When Coverage Ends" that stated under the heading "Retirees":

> Your coverage under the Retiree Medical Plan ends:
> -- when you die, or
> -- you do not pay your share of the cost of your coverage.

Ex. A-1 at 17; Ex. A-2 at 13; Ex. A-3 at 13; Ex. A-14 at 13.

28. SPDs 1-4 each included between five and six ROR provisions. In each SPD:

a. The first page of text states that "*the company reserves the right to amend or terminate this plan, or any statements made in this summary plan description, at any time*."

b. A section entitled "What the Plan Covers" appears two pages before the sentence quoted in paragraph 27, and states in the first paragraph: "*Just as medical coverage can change in the future for active employees, so can the coverage that is available to retirees*."

c. Sections entitled "Medical Coverage" and "Dental Coverage" (and in SPDs 2, 3 and 4, a section entitled "Prescription Drug Program") each begin with a paragraph stating that "*in the future, the company may change or terminate any of the coverages that are described*."

d. The "Legal Information" section states under the heading "The Plans' Future" that the company "*reserves the right to amend any part of the Plan, to change the method of providing benefits, or to terminate any or all parts of the Plan*."

Ex. A-1 at 3, 15, 22, 41 & "Legal Information" at 5; Ex. A-2 at 1, 11, 17, 32, 37 & "Legal Information" at 4; Ex. A-3 at 1, 11, 17, 32, 37 & "Legal Information" at 4; Ex. A-4 at 1, 11, 17, 32, 37 & "Legal Information" at 4 (emphasis added).

**2. SPDs 5 and 6**

29. Sprint issued an SPD regarding both retiree medical and retiree life insurance benefits ("medical and life SPD") effective January 1, 2001 that bears Bates Nos. EQ_FUL_321-378 ("SPD 5"). Ex. A ¶ 7; Ex. A-5.

30. Hollingsworth, Bullock, Games, and Dillon contend that SPD 5 was in effect when they retired, and that their medical benefits vested under the terms of that SPD. Dillon contends that his life insurance benefits also vested under the terms of SPD 5, and Hollingsworth, Bullock, and Games contend that their life insurance benefits vested under the terms of both SPD 5 and SPD 9 identified below. Ex. A-20 at 57 & 60.

31. Shipley contends that a medical and life SPD bearing Bates Nos. Shipley35-78 ("SPD 6") was in effect when she retired, and that her medical and life insurance benefits vested under the terms of that SPD. Ex. A-20 at 57 & 60.

32. SPD 6 is identical to SPD 5, except that SPD 6 is missing a section in SPD 5 that is entitled "Legal Information" and that bears Bates Nos. EQ_FUL_364-378. Ex. A ¶ 8.

33. SPDs 5-6 included the following provisions:

> When [Medical] Coverage Ends
>
> * * *
>
> Retiree
> Your coverage under the Retiree Medical Plan ends when:
> - you die, or
> - you do not pay your share of the cost of your coverage.
>
> * * *

When Does [Life Insurance] Coverage End

The basic life insurance coverage ends on the date of your death.

Ex. A-5 at 9 & 41; Ex. A-6 at Shipley44 & -77.

34. SPD 5 included seven ROR provisions:

a. The "Introduction" section states that "*the company reserves the right to amend or terminate this plan, or any statements made in this summary plan description, at any time*."

b. A section entitled "What the Plan Covers," which appears two pages before the sentence regarding medical benefits quoted in paragraph 33, states: "*Just as medical, dental and life coverage can change in the future for active employees, so can the coverage that is available to retirees*."

c. Sections entitled "Medical Coverage," "Prescription Drug Coverage," "Dental Coverage," and "Life Coverage" state: "*In the future, the company may change or terminate any of the coverages that are described*." This sentence in the "Life Coverage" section appears on the same page (in SPD 5) or immediately preceding page (in SPD 6) as the sentence regarding life insurance benefits quoted in paragraph 33.

d. The "Legal Information" section states under the heading "The Plans' Future": "*Sprint . . . reserves the right to amend any part of the Plan, to change the method of providing benefits, or to terminate any or all parts of the Plan*."

Ex. A-5 at 2, 8, 14, 30, 35, 41 "Legal Information" at 3 (emphasis added throughout).

35. Ex. A-6 included the six ROR provisions set forth in paragraph 34(a)-(c) above.

Ex. A-6 at Shipley37, -43, -49, -66 & -70.

**3. SPDs 7-8**

36. CT&T issued an SPD regarding life insurance and related benefits ("life SPD") that bears Bates Nos. EQ_FUL_51531-51 ("SPD 7"). Ex. A ¶ 9; Ex. A-7.

37. Britt contends that SPD 7 was in effect when he retired, and that his life insurance benefits vested under the terms of that SPD. Ex. A-20 at 57 & 60.

38. CT&T issued a life SPD that bears Bates Nos. EQ_FUL_1262-83 ("SPD 8"). Ex. A ¶ 10; Ex. A-8.

39. Barnes contends that SPD 8 was in effect when she retired, and that her life insurance benefits vested under the terms of that SPD. Ex. A-20 at 57 & 60.

40. SPDs 7-8 were identical to one another in all material respects, and included the following provisions:

> *Your insurance under the Group Policy will end on* the earliest of the following dates:
> (a) *the date the Group Policy terminates*;
> (b) the date ending the period for which you last contributed toward the cost of your insurance, if you discontinue your contributions; and
> (c) the date your employment as a member of the Eligible Group ends.
>
> * * *
>
> If you are an Employee who is retired on pension on or after June 1, 1981, and you were insured as an Active Employee for contributory insurance under the Group Policy . . . the amount of your Life Insurance during the first five years following the date of your retirement will be an amount equal to the amount of the Life Insurance on the day preceding the date of your retirement. On the fifth anniversary of the date of your retirement the amount of your Life Insurance will automatically reduce to the greater of (a) one-half of the amount of Life Insurance applicable to you prior to such fifth anniversary, and (b) $1,500.
>
> * * *
>
> If your death occurs *while you are insured under the Group Policy*, [insurer] will pay the amount of your group life insurance to your beneficiary.

Ex. A ¶ 10; Ex. A-7 at 4, 5 & 8; Ex. A-8 at 4, 5 & 8 (emphasis added).

41. At the time Britt retired in 1985, CT&T and the Communications Workers of America ("CWA") were parties to a CBA effective November 30, 1984 through November 29, 1987 (the "1984-87 CBA"). Complaint ¶ 23c & Ex. A-19. Britt has identified the 1984-87 CBA as a document that is (at a minimum) relevant to his claim for vested benefits. Ex. A-20 at 57 & 60.

42. The 1984-87 CBA included the following provisions:

> The Company will maintain a medical care insurance plan and pay 100% of the plan premium *during the term of the agreement*. * * *
>
> Other insurance programs of the Company, including group life insurance . . ., shall remain in force *during the term of the agreement.*

* * *

> This Agreement becomes effective on November 30, 1984 and shall remain in full force and effect until 12:00 midnight on November 29, 1987.

Ex. A-19 at 74 & 91 (emphasis added).

**4. SPD 9**

43. CT&T issued a life SPD bearing Bates Nos. EQ_FUL_39142-52 ("SPD 9"). Ex. A ¶ 11; Ex. A-9.

44. Fulghum, Daniel, Dorman, Joyner, McLaurin, Hollingsworth, Bullock, and Games contend that SPD 9 was in effect when they retired. Fulghum, Daniel, Dorman, Joyner, and McLaurin contend that their life insurance benefits vested under the terms of SPD 9, and Hollingsworth, Bullock, and Games contend that their life insurance benefits vested under the terms of both SPD 5 and SPD 9. Ex. A-20 at 57 & 60.

45. SPD 9 included the provisions set forth in paragraph 40, *id.* at 6, 7 & 10, and also provided that "[t]he Group Policy is a contract between the Policyholder and Pilot Life *which * * * may be changed or terminated* only *by those parties*," *id.* at 1 (emphasis added).

**5. SPDs 10-12**

46. CT&T issued medical SPDs bearing Bates Nos. EQ_FUL_201607-37 ("SPD 10"), EQ_FUL_1154-91 ("SPD 11") and EQ_FUL_51630-67 ("SPD 12"). Ex. A ¶¶ 12-14; Exs. A-11, A-12 & A-13.

47. McLaurin and Britt contend that SPD 10 was in effect when they retired, and that their medical benefits vested under the terms of that SPD. Ex. A-20 at 57 & 60.

48. Barnes contends that SPDs 11 and 12 were in effect when she retired, and that her medical benefits vested under the terms of those SPDs. Ex. A-20 at 57 & 60.

49. Like SPD 9, SPD 10 stated that "The Group Policy is a contract between the Policyholder and Pilot Life" which "*may be changed or terminated* only *by one of these parties*." Ex. A-10 at 1 (emphasis added).

50. SPDs 10-12 also included the following provisions:

> When You Retire
>
> All benefits currently offered to active employees *will continue after retirement* by Carolina Telephone And Telegraph Company.
>
> * * *
>
> Health Care Benefits – What Is Covered
>
> Benefits are payable for covered charges incurred *while the person is insured for these benefits*.
>
> * * *
>
> Cessation of Benefits (Group Health Insurance)
>
> *No benefits . . . will be paid under the plan* for any charges, fees or expenses incurred *on or after* the first of these dates to occur:
> (1) *the date the Group Policy ceases*.
> (2) the date the coverage ends on the class of which a person is a member.
>
> * * *
>
> When Insurance Ends
>
> *Your insurance ends when* any of the following events occurs:
> you leave our employ.
> you are no longer eligible.
> *the Group Policy ceases*.
>
> Future Plan Benefits
>
> The Company expects to continue the Plan for the foreseeable future. However, *the Company reserves the right to amend, discontinue or terminate the plan, for reasons of business necessity or financial hardship*."

*Id.* at 6, 9, 24, 34 & 39; Ex. A-11 at 8, 10, 21, 29 & 34; Ex. A-12 at 8, 10, 23, 31 & 36 (emphasis added).

**6. SPDs 13-15**

51. UTC-Ohio, UTC-NW, and UTC-Florida issued life SPDs bearing Bates Nos. EQ_FUL_202382-406 ("SPD 13"), EQ_FUL_203502-14 ("SPD 14"), and EQ_FUL_1192-201 ("SPD 15"), respectively. Ex. A ¶¶ 15-17; Exs. A-13, A-14 & A-15.

52. The Carpenters contend that SPD 13 was in effect when they retired, and that their life insurance benefits vested under the terms of that SPD. Ex. A-20 at 57 & 60.

53. Somdahl contends that SPD 14 was in effect when he retired, and that his life insurance benefits vested under the terms of that SPD. Ex. A-20 at 57 & 60.

54. King contends that SPD 15 was in effect when he retired, and that his life insurance benefits vested under the terms of that SPD. Ex. A-20 at 57 & 60.

55. SPDs 13-15 included the following provisions:

> WHEN INSURANCE ENDS
> *Your insurance ends when* any of the following events occurs:
> 1. You leave our employ.
> 2. You are no longer eligible.
> 3. *The group policy ceases*.
>
> * * *
>
> FUTURE PLAN BENEFITS
> The company expects to continue the Plan for the foreseeable future. However, *the company reserves the right to amend, discontinue or terminate the plan, for reasons of business necessity or financial hardship.*

Ex. A-13 at B-16 & B-24; Ex. A-14 at 9 & 18; Ex. A-15 at 7 & 14 (emphasis added).

56. SPDs 13-15 included charts setting forth the amount of life insurance coverage for active employees depending on the employee's salary. Ex. A-13 at B-3; Ex. A-14 at 2; Ex. A-15 at 3.

57. SPDs 13-14 (but not SPD 15) included the following provision:

> If you have at least five years of service with United Telephone System on the date you retire, your Basic Contributory Life Benefits will be reduced by 50 percent. Such insurance will not be more than $13,000.

Ex. A-13 at B-4; Ex. A-14 at 2.

58. SPD 15 (but not SPDs 13-14) included the following provision:

> Your basic Contributory Life Benefits will be reduced by 50% when you retire. Such insurance will not be more than $13,000. If you have 10 or more years of service, this $13,000 maximum will be increased to 50% of the amount of Basic Contributory Life up to a maximum of $25,000, whichever is less, for anyone retiring on or after 5/1/84.

Ex. A-15 at 4.

**7. SPDs 16-17**

59. CT&T issued medical SPDs bearing Bates Nos. Bullock158-68 ("SPD 16") and a life SPD bearing Bates Nos. Bullock169-73 ("SPD 17"). Ex. A ¶¶ 18-19; Ex. A-16.

60. Clark contends that SPDs 16 and 17 were in effect when he retired, and that his medical and life insurance benefits vested under the terms of those SPDs. Ex. A-20 at 57 & 60.

61. SPD 16 included the following provision under the heading "Eligibility": "Insurance coverage for you and your dependents can be continued after retirement." Ex. A-16 at 1-2 & 7-8.

62. SPD 17 included the following provision under the heading "Eligibility": "Regular life insurance, but not Accidental Death and Dismembership, is continued for employees after retirement." *Id.* at 13.

63. SPD 17 also included the following provision:

> *Limitation of Benefits*
>
> *Regular life insurance*, but not Accidental Death and Dismembership, *is continued for employees after retirement if they have been insured the entire time they were eligible after age forty-five. On the fifth anniversary of retirement, the amount of the insurance is reduced by fifty percent (50%) and remains at that figure for lifetime.*

*Id.* (emphasis added).

64. SPD 16 and 17 both included the following provisions:

> *Termination of Benefits*
>
> *Insurance coverage will automatically terminate* if your active full time employment in the classes eligible for insurance terminates, or *if the provisions of the group policy under which you are covered terminate*.
>
> * * *
>
> Collective Bargaining Agreement
>
> This plan, as applicable to union represented employees, is maintained pursuant to a collective bargaining agreement. Benefits under the plan for employees covered under the bargaining agreement will depend on the terms of the agreement.

Ex. A-16 at 4, 9 & 14 (emphasis added).

65. At the time of Clark's retirement in 1976, CT&T and the CWA were parties to a CBA effective June 29, 1974 through June 29, 1977 (the "1974-77 CBA"). Ex. A-17. Clark has identified the 1974-77 CBA as a document that is (at a minimum) relevant to his claim for vested benefits. Ex. A-20 at 57 & 60.

66. Clark testified that as an hourly employee he was covered by the CBA between CT&T and the CWA in effect at the time he retired. Ex. A-18 at 88:14-90:4 & 98:18-99:16.

67. The 1974-77 CBA includes no specific reference to retiree benefits, but states the following regarding benefits in general:

> *The insurance programs of the Company*, including group life insurance, dependent life insurance, basic hospitalization insurance and extraordinary medical expense plan, *shall remain in force during the term of the Agreement.*
> * * *
>
> *The Company reserves the right to charge individual employees with any increases in premium costs beyond those in effect for all insurance programs on the date of this Agreement*.
>
> * * *
>
> This Agreement becomes effective at 12:00 noon on June 29, 1974 and shall remain in full force and effect until 12:00 noon on June 29, 1977 . . . .

Ex. A-17 at EQ_FUL_32827 (emphasis added).

68. The Group Policies referred to in SPDs 7-15 were, together with those SPDs, the plan documents for the benefits provided under those policies. Ex. A ¶ 20.

**C. Plan Amendments**

69. In November 2005, Sprint announced that prescription drug benefits for participants and beneficiaries who were eligible for Medicare Part D coverage would be modified such that each such participant and beneficiary would receive an annual subsidy of $500 effective January 1, 2006. Pretrial Order (Doc. 295) at 3; Ex. A-23.

70. In an October 7, 2005 letter to retirees, Sprint's Director of Health and Productivity Benefits stated:

> Because prescription drug coverage will now be available from Medicare, beginning Jan. 1, 2006, Sprint Nextel will no longer provide prescription drug coverage for Medicare eligible retirees, and their Medicare eligible dependents.
>
> * * *
>
> However, Sprint Nextel will provide the eligible retiree a monthly allowance of $41.67 (that's $500 a year) for each Medicare covered retiree and each of their Medicare covered dependents to cover Medicare Part D premiums and any other Medicare premiums and expenses.

*Id.* at EQ_FUL_14700. An attached document entitled "Q&As About Medicare Part D Prescription Drug Plans" stated in part:

> Why is Sprint Nextel no longer providing prescription drug coverage for Medicare eligible retirees and their dependents?
>
> Previously, Medicare did not provide prescription drug coverage. Now that Medicare provides prescription drug coverage, the necessity for Sprint Nextel to provide this coverage is removed.

*Id.* at -14702.

71. On July 26, 2007, Embarq announced that Company-sponsored: (a) medical coverage and the prescription drug subsidy provided to Medicare-eligible retirees and Medicare-eligible dependents of retirees would be eliminated effective January 1, 2008; and (b) basic life insurance coverage would be eliminated for retirees who were also participants in the CT&T

VEBA effective September 1, 2007, and would be capped at $10,000 for all other retirees effective January 1, 2008. Pretrial Order at 3-4; Ex. A-25.

72. A July 26, 2007 written communication from Embarq to employees regarding these changes stated in part:

> Why is this occurring?
>
> To offer high-quality products and services to our customers, EMBARQ must continuously adapt to today's fast-paced and changing communications market. This means that, as an employer, we must periodically adjust the programs we offer to keep the company competitive. Recent changes in the Medicare marketplace make it more practical and efficient for many Medicare-eligible retirees and Medicare-eligible dependents to purchase medical coverage directly through a national carrier or one of the many companies who specialize in the Medicare market than for EMBARQ to provide this coverage.
>
> These changes are designed to:
>
> - Keep EMBARQ competitive within our industry and the markets where we operate
> - Offer more flexibility and choice to Medicare-eligible retirees and Medicare-eligible dependents in selecting coverage
> - Balance the needs of EMBARQ retirees, employees, shareholders, customers and other stakeholders.
>
> * * *
>
> A recent study shows that only 19 percent of U.S. large employers offer any form of medical coverage to Medicare-eligible retirees.

Ex. A-25 at EQ_FUL_005234-35.

## D. Plaintiffs' Claims

73. Plaintiffs allege that Defendants' reduction or elimination of the Disputed Benefits violated ERISA because those benefits were vested by virtue of language in the SPDs in effect when they retired. Pretrial Order at 22.

74. Plaintiffs' First and Third Claims for Relief assert the same theory of recovery—namely, that "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." *Id.* at 20.

75. Plaintiffs assert they must prove the exact same elements to prevail on their First and Third Claims for Relief. *Id.* at 21-22.

## III. ARGUMENT

### A. Defendants Are Entitled to Summary Judgment on Plaintiffs' Claims Unless the SPDs Clearly and Expressly Grant Plaintiffs a Vested Right to the Disputed Benefits.

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the federal rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), *quoting* Fed. R. Civ. P. 1.

Notably, judgment as a matter of law is particularly appropriate where, as here, plaintiffs' claims turn on the language of unambiguous ERISA plan documents. *See*, *e.g.*, *Kerber v. Qwest Group Life Ins. Co.*, 647 F.3d 950, 959-62 (10th Cir. 2011) (affirming dismissal of claim alleging ERISA plan document barred reduction of life insurance benefits where document was unambiguous); *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 855-57 & 860 (4th Cir. 1994) (affirming summary judgment for defendant on plaintiffs' contractual vesting claim where ERISA plan documents were unambiguous); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937-40 (5th Cir. 1993) (same); *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 667-68 (6th Cir. 1998) (same). *See also MIC Prop. & Cas. Ins. Com. v. Int'l Ins. Co.*, 990 F. 2d 573, 576 (10th Cir. 1993) ("The determination of whether policy language is ambiguous is a matter of law . . .

and therefore appropriate for a summary judgment determination."); *Utah Power & Light Co. v. Fed. Ins. Co.*, 983 F.2d 1549, 1553 (10th Cir. 1993) ("The interpretation of an unambiguous contract is a question of law to be determined by the court and may be decided on summary judgment.").

"ERISA regulates two types of benefit plans, pension benefit plans that create vested rights and welfare benefit plans that need not create vested rights." *Member Services Life Ins. Co. v. American Nat. Bank and Trust Co. of Sapulpa*, 130 F.3d 950, 954 (10th Cir. 1997). The Disputed Benefits are welfare benefits, *see* 29 U.S.C. § 1002(1), and the Plans are welfare benefit plans, *see* Complaint ¶ 21. Welfare benefit plans are specifically exempted from vesting requirements to which pension plans are subject. 29 U.S.C. § 1051(1). As a result, employers "are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp. v. Schoonejongen,* 514 U.S. 73, 78 (1995).

It is true that "an employer and employee may contract for vested post-employment welfare benefits." *Deboard v. Sunshine Min. and Refining Co.*, 208 F.3d 1228, 1240 (10th Cir. 2000). However, the Tenth Circuit has held that "[c]ontractual vesting of a welfare benefit is an extra-ERISA commitment that *must be stated in clear and express language*. . . . [It] is a narrow doctrine." *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1513 (10th Cir. 1996) (emphasis added; citation and quotation marks omitted). Moreover, "[b]ecause welfare benefits do not statutorily vest under the terms of ERISA, plaintiffs carry the burden of showing an agreement or other demonstration of employer intent to have [such benefits] vest under the plan." *Id.* at 1511.

Plaintiffs base their claims to vested benefits on what they contend to be the SPDs in effect when they retired. Pretrial Order at 22. To decide Plaintiffs' Claims, the Court must "scrutinize the plan documents as a whole and, if unambiguous, construe them as a matter of law." *Weber v. GE Group Life Assur. Co.*, 541 F.3d 1002, 1011 (10th Cir. 2008) (citation and

quotation marks omitted). The SPDs are ambiguous only if they are "reasonably susceptible to more than one interpretation." *Hickman v. Gem Ins. Co.*, 299 F.3d 1208, 1212 (10th Cir. 2002) (citation and quotation marks omitted). Language in the SPDs must be given "its common and ordinary meaning as a reasonable person in the position of the [plan] participant . . . would have understood the words to mean." *Id.* (citation and quotation marks omitted).

"[V]ested benefits are forever unalterable." *Sengpiel*, 156 F.3d at 667; *Bland v. Fiatallis North America, Inc.*, 401 F.3d 779, 784 (7th Cir. 2005) (same). Plaintiffs' Contractual Vesting Claims thus fail as a matter of law if the SPDs in effect when Plaintiffs retired: (1) *do not* state in "clear and express language" that the Disputed Benefits are forever unalterable; or (2) *do* state that those benefits can be terminated. Plaintiffs' Claims fail for both of these independent reasons.[2]

**B. Defendants Are Entitled To Summary Judgment on 13 Plaintiffs' Claims for Vested Medical Benefits and Two Plaintiffs' Claims for Vested Life Insurance Benefits.**

Fulghum, Dorman, King, Joyner, Daniel, Somdahl, Hollingsworth, Bullock, Games, Dillon, Shipley, and the Carpenters (the "13 Plaintiffs") base their claims for vested medical benefits on SPDs 1-6. UF ¶¶ 20, 22, 23 & 26. Dillon and Shipley (the "Two Plaintiffs"), among others,[3] base their claims for vested life insurance benefits on SPDs 5-6. UF ¶¶ 30-31. All of those claims fail for two independent reasons.

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2 In its June 23, 2008 Order, this Court stated that "[a]s a practical matter, it appears that plaintiffs' DJA [Declaratory Judgment Act] claims are superfluous because ERISA (not the DJA) provides the substantive rights which plaintiffs invoke." Doc. 45 at 21. For this reason and in light of UF ¶¶ 74-75, Defendants do not separately analyze herein Plaintiffs' First and Third Claims for Relief.

3 Hollingsworth, Bullock, and Games contend that their life insurance benefits vested under the terms of both SPD 5 and SPD 9. UF ¶¶ 30 & 44. These Plaintiffs' claims for vested life insurance benefits accordingly fail as a matter of law for all of the reasons set forth in *both* this Section III(B) and Section III(C).

**1. SPDs 1-6 Nowhere State that Medical and Life Insurance Benefits Are Forever Unalterable.**

Although SPDs 1-6 are each more than 50 pages long, the 13 Plaintiffs base their claim for vested medical benefits on a single sentence in those SPDs:

> Your coverage under the Retiree Medical Plan ends when
> --you die, or
> --you do not pay your share of the cost of your coverage.

*See* UF ¶¶ 27 & 33. The Two Plaintiffs likewise base their claims for vested life insurance benefits on a single sentence, which states that "basic life insurance coverage ends on the date of your death." *See* UF ¶ 33. Plaintiffs assert that these provisions "clearly indicate an intent on the part of the employer to provide plaintiffs with lifetime . . . benefits." Doc. 82 at 24 (citation, brackets and quotation marks omitted).

The Second, Sixth, and Eighth Circuits have all rejected this argument. In *Bouboulis v. Transport Workers Union of Am.*, 442 F.3d 55 (2d Cir. 2006), the SPD listed "two circumstances under which benefits may be terminated: ceasing employment and death." *Id.* at 61. Based on this provision, plaintiffs argued that "because they are already retired, the only applicable termination event is death, and that it is reasonable to infer that lifetime benefits are being promised." *Id.* The Second Circuit rejected this argument as a matter of law, holding that the SPD "does not contain any affirmative . . . 'lifetime' language," and therefore "does not vest lifetime health benefits." *Id.*

Similarly, in *Crown Cork & Seal Co., Inc. v. Int'l Ass'n of Machinists & Aerospace Workers*, 501 F.3d 912 (8th Cir. 2007), the Eighth Circuit held that a provision stating that "[y]our personal coverage continues until your death" was "not explicit vesting language." *Id.* at 918. And in *Sengpiel*, the Sixth Circuit held that a provision stating that a retiree's spouse would receive benefits after the retiree dies "until death or remarriage" "falls far short of expressing a

clear intent to render such benefits forever unalterable." 156 F.3d at 668. The only district court in the Tenth Circuit to consider this argument has likewise rejected it. *See Chastain v. AT&T*, No. Civ-04-0281-F, 2007 WL 3357516, at *14-15 (W.D. Okla. Nov. 8, 2007), *aff'd*, 558 F.3d 1177 (10th Cir. 2009) (provision stating that "Coverage ceases at the end of the month in which the retiree dies" is not "language that vests entitlement to undiminished . . . coverage"). In sum, SPDs 1-6 contain no language stating that retirees' medical and life insurance benefits are forever unalterable.

**2. SPDs 1-6 Expressly State that the Plan Can Be Terminated.**

Even assuming that the quoted sentences in SPDs 1-6 could be construed to promise lifetime medical and life insurance benefits, SPDs 1-6 state at least *five times* that the Company reserved the right to change or terminate those benefits. *See* UF ¶¶ 28 & 34. These ROR provisions appear (among other places): (1) on *the first page of text* in the SPDs; (2) *two pages* before the sentence on which the 13 Plaintiffs base their claim for vested medical benefits; (3) on the *first page* of the SPD section that describes medical benefits in detail; (4) on the *same or immediately preceding page* as the sentence on which the Two Plaintiffs base their claims for vested life insurance benefits; and (5) in the SPDs' "Legal Information" section, under the heading "*The Plans' Future*." *Id.*

As the Tenth Circuit noted in *Chiles*, the overwhelming weight of case authority holds that a "reservation of rights clause allows the employer to retroactively change the . . . benefits of retired participants, *even in the face of clear language promising company-paid lifetime*

*benefits*." *Chiles*, 95 F.3d at 1512 n. 2 (emphasis added). The Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits have all so held.[4]

The rule described above had been adopted by three circuits at the time *Chiles* was decided, and it has since been adopted by all four additional circuits to address the issue. *See supra* n. 4; *Chiles*, 95 F.3d at 1512 n. 2. The Tenth Circuit in *Chiles* did not need to decide whether to adopt that rule, because plaintiffs' contractual vesting claim could be decided (and rejected) on narrower grounds. *See id.* at 1512. But in *Welch v. Unum Life Ins. Co. of America*, 382 F.3d 1078 (10th Cir. 2004), plaintiff alleged that she had a vested right to disability benefits

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[4] *See Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90, 99 (2d Cir. 2001) ("Because the same document that potentially provided the 'lifetime' benefits also clearly informed employees that these benefits were subject to modification, we conclude that the language contained in the 1987 SPD is not susceptible to an interpretation that promises vested lifetime life insurance benefits."); *In re Unisys Corp. Retiree Medical Benefit ERISA Litig.,* 58 F.3d 896, 903-04 (3d Cir. 1995) ("An employer who promises lifetime medical benefits, while at the same time reserving the right to amend the plan under which those benefits were provided, has informed plan participants of the time period during which they will be eligible to receive benefits *provided* the plan continues to exist.") (emphasis in original); *Gable*, 35 F.3d at 856 (4th Cir.) (holding that the "express reservation of the company's right to modify or terminate the participants' benefits is plainly inconsistent with any alleged intent to vest those benefits," and that "the modification clause, standing alone, is more than sufficient to defeat plaintiffs' claim that the company provided vested benefits and thus waived its statutory right to modify or terminate the health benefit plan"); *Spacek v. Maritime Ass'n*, 134 F.3d 283, 293 (5th Cir. 1998), *abrogated on other grounds*, *Central Laborers-Pension Fund v. Heinz,* 541 U.S. 739 (2004) (stating that "[t]he strong weight of authority throughout the circuits indicates that, in the area of welfare benefits . . . a general amendment provision in a welfare benefits plan is of itself sufficient to unambiguously negate any inference that the employer intends for employee welfare benefits to vest contractually"); *Sprague v. Gen. Motors Corp.,* 133 F.3d 388, 410 (6th Cir. 1998) (en banc) ("We see no ambiguity in a summary plan description that tells participants both that the terms of the current plan entitle them to health insurance at no cost throughout retirement and that the terms of the current plan are subject to change."); *Barnett v. Ameren Corp.*, 436 F.3d 830, 833 (7th Cir. 2006) ("when 'lifetime' benefits are granted by the same contract that reserves the right to change or terminate the benefits, the 'lifetime' benefits are not vested") (citation and quotation marks omitted); *Howe v. Variety Corp.*, 896 F.2d 1107, 1109 (8th Cir. 1990) (stating that "the burden of proving vested welfare benefits" is "not met by the employer's promise to provide welfare benefits 'until death of retiree' where the employer had expressly reserved the right to terminate or amend the plan").

by virtue of a plan provision stating that benefits would cease on the earliest of five dates, one of which was "the date the insured dies." *Id.* at 1085-86. After noting that the plan document included a ROR provision stating that "[t]his policy may be changed in whole or in part" (*id.* at 1086), the Tenth Circuit stated:

> There is no language in the LTD plan that provides for the vesting of claims for benefits upon disability or at the end of the elimination period, and the plan specifically reserves UNUM's right to change the plan. We cannot read a vesting requirement into the contract. Therefore, we hold that Ms. Welch's benefits did not vest . . . .

*Id.* (citation omitted). The Tenth Circuit thus rejected plaintiff's contractual vesting claim in *Welch* because the plan document (1) *did* include a ROR provision and (2) *did not* include a vesting provision—which exactly describes SPDs 1-6 in this case.

The plaintiffs in *Kerber* argued that retirees' life insurance benefits could not be reduced to $10,000, notwithstanding the plan document's ROR provision, because the plan document specified that such benefits "shall not be reduced below" $20,000 for pre-1996 retirees or $30,000 for post-1995 retirees. 647 F.3d at 955 & 960. The Tenth Circuit rejected this argument on the ground that the ROR provision "clearly controls the entire Plan," including the coverage provision cited by plaintiffs, and "unambiguously reserves in Qwest the right to amend the Plan." *Id.* at 960. So too here, the ROR provisions in SPDs 1-6 clearly controlled the entire SPDs, including the sentences upon which Plaintiffs rely, and unambiguously reserved in Embarq the right to amend the Plan.

In sum, the 13 Plaintiffs' claims for vested medical benefits, and the Two Plaintiffs' claims for vested life insurance benefits, fail under both Tenth Circuit law and the law of every other circuit to address the issue. This is not surprising, because to read SPDs 1-6 as saying that benefits can never be changed would be to read *into* those SPDs something that is *not* there (a

promise to provide lifetime benefits), while reading *out of* those SPDs something that *is* there (multiple provisions reserving the right to terminate benefits).

"In deciding whether an ERISA employee welfare benefit plan provides for vested benefits" this Court must "apply general principles of contract construction." *Deboard*, 208 F.3d at 1240. Plaintiffs' proposed interpretation of SPDs 1-6 violates two such principles. First, "when interpreting the terms of the plan, [a court] cannot ignore provisions" in a plan document. *Kitterman v. Coventry Health Care of Iowa, Inc.*, 632 F.3d 445, 449 (8th Cir. 2011). To hold that the welfare benefits described in SPDs 1-6 can never be altered, this Court would need to ignore multiple ROR provisions expressly stating that those benefits *can* be altered.

Second, "when interpreting the terms of the plan, [a court] cannot . . . rewrite the plan documents." *Id.* To hold that the welfare benefits described in SPDs 1-6 can never be altered, this Court would need to rewrite SPDs 1-6 so that they include something that is not there—namely, a promise to provide lifetime benefits. For all these reasons, the 13 Plaintiffs' claims for vested medical benefits, and the Two Plaintiffs' claims for vested life insurance benefits, fail as a matter of law.

### C. Defendants Are Entitled To Summary Judgment on Ten Plaintiffs' Claims for Vested Life Insurance Benefits.

Fulghum, Daniel, Dorman, Joyner and McLaurin base their claims for vested life insurance benefits on SPD 9, Hollingsworth, Bullock, and Games base their claims for such benefits on SPDs 5 and 9, and Britt and Barnes base their claims for such benefits on SPDs 7-8.

*See* UF ¶¶ 37 & 44. The claims of all ten of these Plaintiffs (collectively, the "10 Plaintiffs") for vested life insurance benefits under SPDs 7-9[5] fail for two independent reasons.

**1. SPDs 7-9 Nowhere States that Retirees' Life Insurance Benefits Are Forever Unalterable.**

The 10 Plaintiffs base their claim for vested life insurance benefits on the following provision in SPDs 7-9:

> [T]he *amount* of your Life Insurance during the first five years following the date of your retirement will be *an amount equal to the amount of the Life Insurance on the day preceding the date of your retirement*. On the fifth anniversary of the date of your retirement the *amount* of your Life Insurance will automatically reduce to *the greater of (a) one-half of the amount of Life Insurance applicable to you prior to such fifth anniversary, and (b) $1,500*.

*See* UF ¶¶ 40 & 45 (emphasis added). The obvious purpose of this provision is to describe the *amount* of retirees' life insurance benefits. The provision says nothing whatever about the *duration* of those benefits, much less state that those benefits are forever unalterable.

One of the "general principles of contract construction" (*Deboard*, 208 F.3d at 1240) that apply when interpreting SPDs is that "words cannot be written into the agreement imparting an intent wholly unexpressed when it was executed." *McGee v. Equicor-Equitable HCA Corp.*, 953 F.2d 1192, 1202 (10th Cir. 1992) (citation and quotation marks omitted). Nor may a court, "under the guise of contract interpretation, write a new contract for the parties to achieve some perceived equitable result." *Terra Venture, Inc. v. JDN Real Estate-Overland Park, L.P.*, 443 F.3d 1240 (10th Cir. 2006). The provision quoted above does not even imply, much less "clearly and expressly" state, that life insurance benefits are vested. For this reason, the 10 Plaintiffs' claims for vested life insurance benefits fail as a matter of law.

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[5] As noted above, the claims of Hollingsworth, Bullock, and Games for vested life insurance benefits fail as a matter of law for all of the reasons set forth in both this section and Section III(B).

**2. SPDs 7-9 Expressly State that the Policies Can Be Terminated.**

SPDs 7-9 include a provision (the "termination provision") that states in pertinent part: "Your insurance under the Group Policy *will end on . . . the date the Group Policy terminates*." UF ¶¶ 40 & 45 (emphasis added). SPD 9, which governs the claims of eight of the 10 Plaintiffs for vested life insurance benefits, does not merely include the provision quoted above; it *also* states that "[t]he Group Policy is a contract between the Policyholder and Pilot Life" which "*may be changed or terminated . . . by those parties*." *Id.* ¶ 45 (emphasis added).

As noted above, a court "cannot ignore provisions" in SPDs. *Kitterman*, 632 F.3d at 449. To the contrary, a "cardinal principle of contract construction [is] that a document should be read *to give effect to all its provisions*." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) (emphasis added). The only way to give effect to the provisions quoted in the preceding paragraph is to hold that the Companies can terminate the benefits described in SPDs 7-9.

Plaintiffs argue that the termination provisions in SPDs 7-9 are ambiguous, because they "can be reasonably read as the right to end the policy with one insurance carrier and obtain the insurance through another." Doc. 82 at 30-31. This argument is without merit. In *Welch*, the SPD likewise provided that the insurance "policy," rather than the welfare benefit "plan," could be changed. *See* 382 F.3d at 1086 ("*[t]his policy* may be changed in whole or in part") (emphasis added). The Tenth Circuit nevertheless interpreted the term "policy" to be interchangeable with "plan." *See id.* (stating that "the plan specifically reserves UNUM's right to change *the plan*") (emphasis added). *Accord Musto v. Am. Gen. Corp.*, 861 F.2d 897, 901-02 (6th Cir. 1988) (holding that employer had right to amend the *plan* where ROR provision stated that "[t]his *policy* may be amended or changed at any time") (emphasis added).

The plaintiffs in *Gable* argued, as do Plaintiffs here, that "because the clause provided that the '*Policy* may be amended or discontinued,' it reserved only a right to change the particular insurance policy that the company purchased, not a right to change plan benefits in general." 35 F.3d at 856 (emphasis in original). The Fourth Circuit rejected this argument, stating:

> [T]he fact that the modification provision stated that the company may amend the "Policy" does not limit the company's amendment right, because the John Hancock master policy constituted the entirety of the company's welfare benefit plan. A company may establish an employee welfare benefit plan merely by purchasing a group policy for its employees, and the plan may consist of nothing but the purchased policy document. Therefore, Maryland Cup's reservation of its right to modify the policy was equivalent to a reservation of the right to modify plan benefits generally.

*Id.* (citations omitted). Here too, no plan documents separate from the Group Policies and SPDs 7-9 exist. UF ¶ 68. For this and other reasons, the Companies' reservation of the right to modify the Policies was equivalent to a reservation of the right to modify plan benefits generally.

The plaintiffs in *In re Sears Retiree Group Life Ins. Litig.*, 90 F. Supp. 2d 940 (N.D. Ill. 2000), likewise argued that an SPD's termination provision "reserve[d] Sears' right to cancel its insurance policy," but did "not authorize Sears to amend or terminate the Plan." *Id.* at 946. This court too rejected plaintiffs' argument, stating: "[T]here is little ground[] for distinguishing between the MetLife policy and the Plan on this point as courts have held that a company's reservation of its right to terminate the insurance policy is the functional equivalent of a reservation of the right to terminate the benefit plan." *Id. Accord Local 56, United Food & Comm. Workers Union v. Campbell Soup Co.*, 898 F. Supp. 1118, 1134 (D.N.J. 1995) (provision stating that "insurance . . . shall automatically terminate when the policy is terminated" unambiguously reserved employer's right to terminate insurance; rejecting plaintiffs' argument that this provision "merely describes the relationship between Provident and Defendant

Company"); *Center v. First Int'l Life Ins. Co.*, No. 94-11596, 1997 WL 136473, at *11 (D. Mass. Mar. 13, 1997) ("the employer's right to modify or terminate the policy is also the right to modify or terminate the plan if the policy is the plan").

In sum, SPDs 7-9 cannot be held to state in "clear and express language" that life insurance benefits *cannot* end, because the SPDs expressly state that those benefits *can* end. For this additional reason, the 10 Plaintiffs' claims for vested life insurance benefits fail as a matter of law.

**D. Defendants Are Entitled To Summary Judgment on Three Plaintiffs' Claims for Vested Medical Benefits.**

McLaurin, Britt and Barnes (collectively, the "Three Plaintiffs") base their claims for vested medical benefits on SPDs 10-12. UF ¶¶ 47-48. Those claims fail for two independent reasons.

**1. SPDs 10-12 Nowhere State that Medical Benefits Are Forever Unalterable.**

The Three Plaintiffs argue that their medical benefits are vested by virtue of SPD provisions stating that "[a]ll benefits currently offered to active employees will continue after retirement." *See* UF ¶ 50. The Third, Sixth, and Eleventh Circuits have all rejected this argument as a matter of law.

In *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Skinner Engine Co.*, 188 F.3d 130 (3rd Cir. 1999), the Third Circuit stated:

> A plain reading of the phrases, "will continue" and "shall remain," certainly does not *unambiguously* indicate that the benefits will continue *ad infinitum,* as argued by the appellants. It cannot be said that the phrases clearly and expressly indicate vesting since there is simply no durational language to qualify these phrases. That is, the CBAs do not state that retiree benefits "will continue for the life of the retiree," or that they "shall remain unalterable for the life of the retiree."

*Id.* at 141 (emphasis in original). The court rejected plaintiffs' further argument that the quoted phrases were ambiguous, and could reasonably be interpreted to mean that the benefits would continue for the life of the retiree. *Id.* at 143.

Similarly, the Sixth Circuit in *Sengpiel* held that a provision stating that "if you retire and are eligible for a pension you *shall continue* to have the same health coverage" "neither expressly guarantees lifetime benefits nor creates an ambiguity as to whether such benefits are vested." 156 F.3d at 668. And in *Jones v. Am. General Life & Accident Ins. Co.*, 370 F.3d 1065, 1070-71 (11th Cir. 2004), the Eleventh Circuit held that a provision stating that employees "*will continue* to be covered after they . . . retire for the full amount of insurance in effect immediately before retirement" was insufficient to establish vesting. The only district court in the Tenth Circuit to consider Plaintiffs' argument has likewise rejected it. *See Chastain*, 2007 WL 3357516, at *14-15 (provision stating that "medical expense plan coverage will continue during your retirement" did not suffice to "vest[] entitlement to undiminished reimbursement for Medicare Part B payments"). *See also Brubaker v. Deere & Co.*, 664 F. Supp. 2d 972, 989 (S.D. Iowa 2009) ("language that medical benefit coverage 'continues' in retirement is not synonymous with being 'vested'"); *Peterson v. Windham Community Mem. Hospital*, 803 F. Supp. 2d 96, 104 (D. Conn. 2011) (language that employer "will continue your present benefits" "does not express an irrevocable promise to provide lifetime benefits").

The holdings of these cases are indisputably correct. As a matter of law, a provision stating that benefits continue *after* retirement does not "clearly and expressly" state that benefits continue *throughout* retirement. And Plaintiffs' attempt to rewrite SPDs 8-9 to state that benefits will continue "throughout" retirement is unavailing. *See Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1152 (10th Cir. 2000) ("it is hornbook law that the court's duty is to interpret and enforce contracts as written between the parties, not to rewrite or restructure

them"); *Burke v. PriceWaterhouseCoopers LLP Long Term Disability Plan*, 572 F.3d 76, 81 (2d Cir. 2009) ("because we apply rules of contract law to ERISA plans, a court must not rewrite, under the guise of interpretation, a term of the contract when the term is clear and unambiguous") (citations and quotation marks omitted).

**2. SPDs 10-12 Expressly State that Medical Benefits Can Be Terminated.**

Even if it were permissible to rewrite SPDs 10-12 to state that medical benefits continue throughout retirement, those SPDs would still not create vested medical benefits. That is because they state unequivocally that: (1) the "*Group Policy may be changed or terminated*"; (2) medical insurance "*ends when . . . the Group Policy ceases*"; (3) benefits will not be paid for charges incurred "*after . . . the Group Policy ceases*"; and (4) "*the Company reserves the right to amend, discontinue or terminate the plan*, for reasons of business necessity or financial hardship." UF ¶¶ 49-50 & 55 (emphasis added).

As the numerous cases cited in footnote 4 *supra* have held, "[a]n employer who promises lifetime medical benefits, while at the same time reserving the right to amend the plan under which those benefits were provided, has informed plan participants of the time period during which they will be eligible to receive benefits *provided* the plan continues to exist." *Unisys*, 58 F.3d at 903-04 (emphasis in original). Thus, even if SPDs 10-12 were re-written to state that medical benefits continue "throughout" retirement, because those SPDs also reserve the Companies' right to amend the Plans under which those benefits are provided, the SPDs would still inform retirees that medical benefits continue throughout retirement *provided* the plan continues to exist.

Plaintiffs try to negate the impact of provisions (1) through (4) quoted above in two ways. First, they argue that because provisions (1) through (3) refer to the "Group Policy" rather than

the plan, they do not authorize termination of the plan. This argument is without merit for the reasons discussed at pages 27-28 above.

Second, Plaintiffs argue that the phrase "for reasons of business necessity" in provision (4) means that medical benefits can be amended or terminated only "if the company is in bankruptcy or some other severe financial position." Doc. 82 at 8. The Tenth Circuit rejected this very argument in *Chiles*.

The ROR provision in *Chiles*, like those in SPDs 10-12, stated that the company "reserve[s] the right to change or discontinue [the plan] it *if it becomes necessary*." 95 F.3d at 1509 (emphasis added). Like Plaintiffs here, the plaintiffs in *Chiles* argued that the phrase "if necessary" meant "the plans can only be amended if necessary to their fiscal survival." *Id.* at 1513. In granting summary judgment for defendants on plaintiffs' contractual vesting claim, the district court rejected this argument because: (1) the ROR provision gave defendants "almost unlimited discretion . . . to change the plan" notwithstanding the phrase "if it becomes necessary"; and (2) "even if Control Data/Ceridian could not change its plans without a showing of necessity, it satisfied this requirement in its letter explaining the change in benefits." *See id.* at 1513 & 1514 n. 5.

On appeal, plaintiffs argued that "a question of material fact exists over whether it became 'necessary' for Ceridian to eliminate the benefit." *Id.* at 1510. The Tenth Circuit rejected this argument for the same reasons the district court did. First, the Tenth Circuit stated:

> We agree with the district court that the termination clause retained almost unlimited discretion in Control Data to change the plan. * * * The term 'if necessary' . . . is not conditioned on any event or circumstance. Thus its meaning cannot fairly imply, as plaintiffs suggest, that the plans can only be amended if necessary to their fiscal survival. * * * The term 'if necessary,' in the Control Data plan SPDs cannot be read to limit the reserved right in any significant manner.

*Id.* at 1513-14. Second, the Court stated: "The district court found, alternatively, that even if Control/Data Ceridian could not change its plans without a showing of necessity, it satisfied this requirement in its letter explaining the change in benefits. We agree." *Id.* at 1514 n. 5.

The only other court of appeals to address the issue has likewise held that inclusion of the phrase "if necessary" in a ROR provision does not materially affect a company's ability to amend or terminate welfare plans. In *Musto*, a 1968 booklet stated that the company reserved the right to change or discontinue the plan "if it becomes necessary." 861 F.2d at 904-05. The Sixth Circuit declared:

> The 1968 booklet might conceivably be read as saying that the company reserves the right to change the plan "if it becomes necessary," while subsequent versions of the booklet contained no such qualification on the right to change the plan. *This minor change in wording . . . did not materially affect the company's expressly reserved right to amend the policy*. The 1968 version of the booklet *cannot fairly be read as saying that the company reserves the right to change or even discontinue the policy only if it becomes necessary to do so in order to avoid bankruptcy or some comparable threat to the financial base of the entire corporation*.

*Id.* at 906 n. 5 (emphasis added).

The holdings of *Chiles* and *Musto* are eminently sensible. "Plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries." *Lockheed Corp. v. Spink,* 517 U.S. 882, 890 (1996). To the contrary, "[i]n its corporate role as employer . . . the company must see that such benefit plans as it chooses to maintain are designed to further the company's business interests in consonance with the company's obligations to its stockholders." *Musto*, 861 F.2d at 910. As a result, "courts have no authority to decide which benefits employers must confer upon their employees; these are decisions which are more appropriately influenced by forces in the marketplace." *Moore v. Reynolds Metals Co. Retirement Program*, 740 F.2d 454, 456 (6th Cir. 1984). For these reasons, "review of a plan's provisions for reasonableness is *improper*." *Id.* at 456 & n. 3 (emphasis added). Notwithstanding these well-established legal principles, Plaintiffs

demand that this Court review Sprint's and Embarq's Plan amendments to determine whether they were necessary in light of the business conditions those companies faced in 2005 and 2007, respectively.

Sprint's 2005 amendment to its prescription drugs benefit plan illustrates why courts should not second-guess a company's decision that it is "necessary"—or that there is a "business necessity," which for a business is the same thing—to reduce or eliminate welfare benefits. Sprint approved a plan amendment under which retirees who were eligible for Medicare Part D coverage received what Plaintiffs characterize as an "inferior" prescription drug annual subsidy of $500 effective January 1, 2006. *See* Pretrial Order at 11; UF ¶ 69. To evaluate the "business necessity" for this change, Plaintiffs demand that the Court: (1) review hundreds of e-mails, memoranda, cost projections, and financial analyses relating to Sprint's reasons for implementing the change; (2) listen to days of testimony from fact and expert witnesses regarding whether this change was necessary; and (3) decide whether Sprint's financial condition at the time of this change was equivalent to "bankruptcy or some other severe financial position." *See* Doc. 82 at 8.

Sprint made this change in its prescription drug plan effective January 1, 2006 because the Medicare Prescription Drug, Improvement, and Modernization Act went into effect that day. *See* UF ¶ 70. Beginning January 1, 2006, Medicare paid for most prescription drug costs of Medicare-eligible retirees that Sprint had previously paid under its prescription drug plan. *See id.* Had Sprint not amended that plan, it would have wasted tens of millions of dollars on prescription drug benefits that retirees *no longer needed*. Thus, for Sprint *not* to have reduced the benefits provided under its prescription drug plan would have been nonsensical. The only thing more nonsensical is Plaintiffs' argument that Sprint must continue paying tens of millions of

dollars for prescription drug benefits covered by Medicare because it was not in "bankruptcy or some other severe financial position" when it amended its plan.

As the preceding discussion makes clear, companies are well-suited—and Plaintiffs' lawyers are singularly ill-suited—to evaluate when changed circumstances create a "business necessity" to amend or terminate welfare plans. For this reason, "courts should not analyze or second-guess the employer's business reason(s) for amending or terminating welfare benefits. Were the court to do otherwise, it would potentially become a micro-manager of ERISA plans, a role it should certainly avoid." *Frahm v. Equitable Life Assurance Co.*, No. 93-C-0081, 1995 WL 579282, at *11 n. 13 (N.D. Ill. Sept. 29, 1995), *aff'd*, 137 F.3d 955 (7th Cir. 1998).

In sum, Plaintiffs' "business necessity" argument fails for two independent reasons: (1) because the ROR provisions in SPDs 10-12 gave Sprint and Embarq almost unlimited discretion to change the Plans, notwithstanding the phrase "for reasons of business necessity or financial hardship"; and (2) even if that phrase materially limited those Companies' discretion, they still satisfied the "business necessity" requirement by virtue of the reasons set forth in their written communications to retirees explaining the benefit changes. *See Chiles*, 95 F.3d at 1513-14 & n. 5; UF ¶¶ 70 & 72.

## E. Defendants Are Entitled To Summary Judgment on Four Plaintiffs' Claims for Vested Life Insurance Benefits.

Somdahl, King, and the Carpenters (the "Four Plaintiffs") base their claims for vested life insurance benefits on SPDs 13-15. UF ¶¶ 52-54. Those claims fail for two independent reasons.

### 1. SPDs 13-15 Nowhere State that Life Insurance Benefits Are Forever Unalterable.

King and the Carpenters contend that their life insurance benefits are vested by virtue of the following provision in SPDs 13 and 14:

> If you have at least five years of service with United Telephone System on the date you retire, your Basic Contributory Life Benefits *will be reduced by 50 percent*. Such insurance *will not be more than $13,000*.

*See* UF ¶ 57 (emphasis added). Somdahl contends that his life insurance benefits are vested by virtue of the following provision in SPD 15:

> Your basic Contributory Life Benefits *will be reduced by 50%* when you retire. Such insurance *will not be more than $13,000*. If you have 10 or more years of service, this $13,000 maximum *will be increased to 50% of the amount of Basic Contributory Life up to a maximum of $25,000, whichever is less* . . . .

*See* UF ¶ 58 (emphasis added). These provisions have the same purpose as the equivalent provisions in SPDs 10-12—to describe the *amount* of retirees' life insurance benefits. The provisions say nothing whatever about the *duration* of such benefits, much less state that such benefits are forever unalterable. In light of the case law discussed at pages 25-26 above, the Four Plaintiffs' claims for vested life insurance benefits fail as a matter of law because SPDs 13-15 do not clearly and expressly state that life insurance benefits are vested.

**2. SPDs 13-15 Expressly State that the Plan Can Be Terminated.**

SPDs 13-15 provide that: (a) "[y]our insurance ends when . . . [t]he group policy ceases; and (b) "the company reserves the right to amend, discontinue or terminate the plan, for reasons of business necessity or financial hardship." UF ¶ 55. Here as with SPDs 10-12, Plaintiffs argue that the provisions authorize termination (1) only of the group policy rather than the plan, and (2) only if the company is in bankruptcy or some other severe financial position. Those arguments fail as a matter of law for the reasons set forth at pages 27-28 and 31-35 above.

**F. Defendants Are Entitled To Summary Judgment on Clark's Claims for Vested Medical and Life Insurance Benefits.**

Clark bases his claim for vested medical benefits on SPD 16, and his claim for vested life insurance benefits on SPD 17. UF ¶ 60. Both claims fail for two independent reasons.

**1. SPDs 16-17 Nowhere State that Medical and Life Insurance Benefits Are Forever Unalterable.**

Clark's claim for vested medical benefits is based on a sentence in SPD 16 that states: "Insurance coverage for you and your dependents *can be continued after retirement*." UF ¶ 61 (emphasis added). For all the reasons discussed at pages 28-30 above, a sentence stating that benefits *can* be continued *after* retirement does not clearly and expressly state that benefits *will* be continued *throughout* retirement.

Clark's claim for vested life insurance benefits is based on a sentence in SPD 17 stating that "[r]egular life insurance . . . is *continued for employees after retirement*," as well as on the following section:

> *Limitation of Benefits*
>
> Regular life insurance . . . *is continued for employees after retirement* if they have been insured the entire time they were eligible after age forty-five. *On the fifth anniversary of retirement, the amount of the insurance is reduced by fifty percent (50%) and remains at that figure for lifetime*.

UF ¶ 63 (emphasis added). The obvious purpose of this "Limitation of Benefits" provision, as its title makes clear, is to describe *limitations* on retiree life insurance. Specifically, it limits both: (1) the group of retirees for whom life insurance "is continued after retirement" (namely, those who "have been insured the entire time they were eligible after age forty-five"); and (2) the amount of life insurance provided (namely, an amount that initially equals the amount in place when the employee retires, and that is then "reduced by fifty percent (50%)" beginning on the fifth anniversary of retirement and that remains level thereafter).

Even though this "Limitations of Benefits" provision is clearly intended to set forth the *limitations* on retiree life insurance, Clark argues that it actually promises that such insurance *will never be eliminated* during retirement. But an SPD provision intended to impose *limits* on the *availability* of life insurance cannot reasonably be construed to mean there is *no limit* to the

*duration* of such insurance. Defendants are accordingly entitled to judgment as a matter of law on Clark's claims for vested benefits.

**2. SPDs 16-17 Expressly State that the Plan Can Be Terminated.**

Even if the "Eligibility" and "Limitation of Benefits" provisions of SPDs 16-17 could reasonably be construed to mean that there is no limit to the duration of such insurance, the SPDs would still not create vested benefits. That is because both SPDs state the following under the heading "*Termination of Benefits*": "*Insurance coverage will automatically terminate . . . if the provisions of the group policy under which you are covered terminate*." UF ¶ 64 (emphasis added).

Because a court must "examine the plan documents as a whole" (*Chiles*, 95 F.2d at 1511), "[i]t would be error to attend only to one paragraph, page, or portion of the summary." *Wise*, 986 F.2d at 939. Instead, "the meaning of separate provisions should be considered in light of one another and the context of the entire agreement." *Young v. Verizon's Bell Atlantic Cash Balance*, 615 F.3d 808, 823 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2924 (2011). Application of these principles makes clear as a matter of law that SPDs 16-17 do not create vested benefits. *See*, *e.g.*, *Welch*, 382 F.3d at 1085-86 (no contractual vesting where SPD stated that benefits could last until "the date the insured dies" but also stated that the insurance policy could be changed); *Amatangelo v. Nat. Grid USA Service Co.*, No. 04-CV-246S, 2011 WL 3687563, at * 5 (W.D.N.Y. Aug. 23, 2011) (no contractual vesting where policy stated that "if you retire at age 68 . . . [t]here would be two more reductions down to 50% where it would stay until your death" but also included ROR provision).

In *Chiles*, the Tenth Circuit held that disability benefits were not contractually vested in part because "plaintiffs' reading of the plan would render the termination exception superfluous; under plaintiffs' interpretation, Control Data may not alter the benefits of disabled participants

under any condition." 95 F.3d at 1513. Here too, Clark's reading of SPDs 16-17 would render the "Termination of Benefits" provisions superfluous, because CT&T could never reduce retirees' benefits even though those provisions said the company could do exactly that.

Finally, SPDs 16-17 include the following provision: "This plan, as applicable to union represented employees, is maintained pursuant to a collective bargaining agreement. Benefits under the plan for employees covered under the bargaining agreement will depend on the terms of the agreement." UF ¶ 64. Clark asserts that he was covered by the 1974-77 CBA when he retired, and further asserts that this CBA is (at a minimum) relevant to his claim for vested benefits. UF ¶¶ 65-66. But if anything, this CBA further refutes Clark's vesting claim. Although the CBA says nothing about retiree benefits in particular, it states that "*[t]he insurance programs of the Company*, including group life insurance, dependent life insurance, basic hospitalization insurance and extraordinary medical expense plan, *shall remain in force during the term of the Agreement*." UF ¶ 67 (emphasis added). The CBA further states that its term ends on June 29, 1977. *Id.*

The Second, Fourth, Seventh, and Eighth Circuits have all held that this language defeats a claim for lifetime benefits. Thus, in *American Fed'n of Grain Millers v. Int'l Multifoods Corp.*, 116 F.3d 976 (2d Cir. 1997), the Second Circuit stated:

> Each CBA states that retiree medical benefits could not be reduced "[d]uring the term of this Agreement." Promising to provide benefits for a certain period of time necessarily establishes that once that time period expires, the promise does as well. Therefore, we conclude that this provision unambiguously establishes that once the CBAs expired, Multifoods was free to reduce retiree medical benefits.

*Id.* at 981 (citation omitted). *Accord Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 292 (4th Cir. 2011) (language in CBA stating that medical benefits "shall remain in effect for the term of this Labor Agreement" did not extend benefits beyond CBA's expiration); *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 547 (7th Cir. 2000) ("If the agreement makes clear that the

entitlement expires with the agreement, as by including such a phrase as 'during the term of this agreement' . . . plaintiff loses as a matter of law unless he can show a latent ambiguity"); *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1519 (8th Cir. 1988) ("[i]t would render the durational clauses nugatory to hold that benefits continue for life even though the agreement which provides the benefits expires on a certain date"). For all these reasons, Clark's claims for vested medical and life insurance benefits fail as a matter of law.[6]

**G. The Court Should Decide This Motion Before Deciding Defendants' Motion To Decertify Class Action.**

For all the reasons set forth above, the Disputed Benefits were not vested, and Defendants retained the flexibility to reduce or terminate those benefits. As the Supreme Court has stated, "[t]he flexibility an employer enjoys to amend or eliminate its welfare plan is not an accident." *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997). Allowing employers to amend or terminate welfare plans "encourages them to offer more generous benefits at the outset, since they are free to reduce benefits should economic conditions sour. If employers were locked into the plans they initially offered, they would err initially on the side of omission." *Id.* (citation and quotation marks omitted). Because Defendants were free to reduce or terminate Plaintiffs' benefits, they acted properly in doing so, and they are entitled to summary judgment on Plaintiffs' Contractual Vesting Claims.

Defendants' entitlement to summary judgment on Plaintiffs' Contractual Vesting Claims has significant ramifications for Defendants' pending motion to decertify the classes previously certified regarding those claims (Doc. 285). "Class representatives who do not have viable claims jeopardize the interests of the class they seek to represent." *Kremers v. Coca-Cola Co.*,

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[6] SPDs 1-17 represent only eight of the 37 different groups of SPDs identified in Exhibit A-4 to the Declaration of Randall T. Parker dated November 23, 2011. Ex. A ¶ 35.

712 F. Supp. 2d 759, 762 n. 2 (S.D. Ill. 2010). In *Pruitt v. City of Chicago, Illinois*, 472 F.3d 925 (7th Cir. 2006), class representatives who lost on the merits continued to take the position that class certification was appropriate. The Seventh Circuit stated:

> Coming after the plaintiffs have lost on the merits, that's problematic. Do they want to take all other employees down in flames with them? If so—or if they just don't care about that risk—then they have demonstrated inadequacy as other workers' representatives and rendered class certification impossible. See Fed. R. Civ. P. 23(a)(4).

472 F.3d at 926. For this reason, a "class representative who has lost on the merits may have a duty to the class to *oppose* class certification, to avoid the preclusive effect of the judgment." *Frahm*, 137 F.3d at 957 (emphasis in original).

Plaintiffs currently oppose Defendants' decertification motion. *See* Doc. 297. But if Plaintiffs' Contractual Vesting Claims fail as a matter of law, they may be obligated to *support* that motion, lest they take similarly situated retirees "down in flames with them." *Pruitt*, 472 F.3d at 926.

"[B]ecause class representatives who do not have viable claims jeopardize the interests of the class they seek to represent," a court "should address the merits of the claims of the named plaintiffs in a putative class action before addressing any issues about class certification." *Kremers*, 712 F. Supp. 2d at 762 n. 2. Judicial efficiency also favors this approach. *See Wright v. Schock*, 742 F.2d 541, 544 (9th Cir. 1984) ("It is reasonable for a district court to consider a motion for summary judgment before reaching a motion for class certification when resolution of the former is likely to prevent needless and costly further litigation") (citation and quotation marks omitted).

Deciding this motion before the decertification motion is sensible no matter how the Court decides this motion. If the Court *denies* this motion in whole or in part, then in deciding Defendants' decertification motion it can consider whether, if some Plaintiffs' Contractual

Vesting Claims do not survive this motion, the remaining Plaintiffs can adequately represent the 14,000 class members. If the Court *grants* this motion with respect to all 17 Plaintiffs, it can ask Plaintiffs whether they continue to oppose the decertification motion. If *not*, deciding the unopposed decertification motion will obviously be easy. If *so*, deciding that motion will still be easy, because Plaintiffs will then "have demonstrated inadequacy as other [retirees'] representatives and rendered class certification impossible." *Pruitt*, 472 F.3d at 926, *citing* Fed. R. Civ. P. 23(a)(4). *See also In re Static Random Access Memory Lit.*, No. 07-md-01819, 2010 WL 5094289, at * 3 & 11 (N.D. Cal. 2010) (decertifying class after granting summary judgment for defendants on class representatives' claims). Defendants accordingly request that the Court decide this motion before deciding their decertification motion.

## IV. CONCLUSION

For the reasons set forth above, Defendants respectfully ask this Court to enter judgment as a matter of law in their favor on Plaintiffs' Contractual Vesting Claims.

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**Certificate of Service**

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