IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' SECOND CLAIM FOR RELIEF (BREACH OF FIDUCIARY DUTY CLAIM)

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

SHERMAN & HOWARD L.L.C.
Christopher J. Koenigs (pro hac vice)
Michael B. Carroll (pro hac vice)
633 Seventeenth Street, Suite 3000
Denver, CO 80202
(303) 297-2900 (Telephone)
(303) 298-0940 (Facsimile)
ckoenigs@shermanhoward.com
mcarroll@shermanhoward.com

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

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

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I. INTRODUCTION

The question presented by Plaintiffs' Second Claim for Relief (Breach of Fiduciary Duty ("BOFD")) is whether an objectively reasonable ERISA plan participant would conclude that welfare benefits are forever unalterable, when, in fact, the benefits regularly changed, the participant was provided with summary plan descriptions ("SPDs") that accurately described the benefits, and the participant received SPDs (and other documents) that advised the participant of plan changes and the plan sponsor's intent to make them. The answer, of course, is no.

Plaintiffs are 17 participants in ERISA welfare benefit plans (the "Plans") offered by Defendant Embarq Corporation ("Embarq") and Sprint Nextel Corporation ("Sprint") or their predecessors or affiliates (collectively, the "Company"). In their Second Claim for Relief (the "Claim" or "BOFD Claim"), Plaintiffs allege that Defendants breached their ERISA fiduciary duties by distributing SPDs that misled Plaintiffs into believing that they would receive unalterable health, prescription drug, and life insurance benefits (the "Disputed Benefits") – *forever*. Plaintiffs contend that the "coverage provisions" of the SPDs – *e.g.*, "your coverage ends – when you die," – misled them into believing that the Plans could not be changed. Plaintiffs also allege that various oral and written statements constitute material misrepresentations and entitle them to benefits not provided by the terms of the Plans.

Plaintiffs' BOFD Claims fail for six independent reasons. First, the SPDs that allegedly misrepresented Plaintiffs' right to unalterable benefits include provisions – and in most instances, *multiple* provisions – unambiguously stating that the Plans could be terminated (the "ROR provisions"). The Tenth Circuit has held that a coverage provision does not speak to the separate issue of plan amendment and termination. Therefore, a document that contains a coverage provision and an ROR provision is susceptible to only one "reasonable reading" – that the document is *not* materially misleading. Notably, ***Plaintiffs received dozens of SPDs and***

other benefits-related documents that contained scores of ROR provisions before they retired. Those documents were found in Plaintiffs' own document production, even taking into account that six Plaintiffs barely produced any Company-provided documents.

Second, Plaintiffs have failed to adduce evidence of a misrepresentation in any written or oral statement. Several Plaintiffs testified that they were told the "same thing" as the coverage provision – *i.e.*, that the benefits would continue in their retirement until death. But that is not the "same thing" as being told the Company would never change the Disputed Benefits. Moreover, if made, a statement that mirrors the coverage provision is not a misrepresentation because, as the Tenth Circuit also has held, it is an accurate statement of the then-existing Plan's terms. Numerous other courts similarly have held that a statement containing so-called "lifetime" language is a truthful statement of then-existing plan benefits and the plan sponsor's present intention to continue offering the plan.

Third, certain Plaintiffs base their Claims on a statement made *after* they decided to retire. The Tenth Circuit has decided the issue as well. Where an alleged statement – even if it is a misrepresentation – is made after the retirement decision, it is not material because it could not have informed the decision.

Fourth, several Plaintiffs attribute misrepresentations to non-fiduciaries and therefore cannot satisfy the first prong of their prima facie case.

Fifth, Plaintiffs have failed to adduce evidence that they reasonably relied to their detriment on the alleged misrepresentations or omissions.

Finally, all Claims except those of Plaintiff Barnes are time-barred by ERISA's six-year statute of repose.

The centerpiece of the BOFD Claims is the assertion that Plaintiffs relied on misleading SPDs. Their depositions revealed that a *majority* of Plaintiffs did *not read* SPDs – or any other documents that undermine their Claims. This "majority" does not include Plaintiffs Shipley and Somdahl, who have testified about reading SPDs, albeit in a highly selective manner. Nor does the majority include Dorman, Joyner, and King, who read into SPDs terms that are not there (*i.e.*, benefits that can never be changed and last forever), and read out terms that are there (*i.e.*, the Company reserved its right to change benefits, but not *their* benefits). Dorman and Joyner each even go so far as to *deny* that ROR provisions in *his* retirement papers reserved the right to change *his* benefits, but to *admit* that ROR provisions in *other class members'* retirement papers did reserve the right to change the *class members'* benefits.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS[1]

Pursuant to Fed. R. Civ. P. 56 and D. Kan. Local Rule 56.1, Defendants provide the following Statement of Undisputed Material Facts entitling them to summary judgment. Citations are to the pleadings and discovery materials on file and the exhibits attached hereto, including the Declarations of Christopher J. Leopold and the exhibits thereto (referred to as, *e.g.*, "Ex. B-1," *etc.*). "UF" refers to the facts set forth below as well as to paragraphs 1-75 of the Statement of Undisputed Facts in their Memorandum in Support of Motion for Summary Judgment on Named Plaintiffs' First and Third Claims for Relief (Contractual Vesting Claims) ("Doc. 324").[2] As used herein, the terms "SPD 1" through "SPD 17" have the meanings given them in Doc. 324 (*see Id.* at 6-14), and "Ex. A-1" through "Ex. A-25" refer to the exhibits attached to the Declaration of Randall T. Parker ("Doc. 324-2").

[1] For the purposes of this Motion only, Defendants accept as true the allegations and contentions of Plaintiffs set forth in this Statement of Undisputed Material Facts.

[2] Defendants assume for purposes of this Motion that, as the class members contend, the SPDs in effect when they retired govern their claims for benefits.

76. The Defendants with respect to Plaintiffs' BOFD Claims are Embarq, the Committee, Sprint Nextel, Embarq Mid-Atlantic, CT&T, and Parker. UF ¶¶12-18.

A. WILLIAM FULGHUM[3]

77. Plaintiff William Fulghum ("Fulghum") began his employment at CT&T in 1956, and remained on CT&T's payroll as an active employee until July 31, 1996, at which time he was 58 years old. Pretrial Order ("Doc. 295") at 4.

78. On or about March 21, 1996, Fulghum notified CT&T that he would retire early pursuant to a special early retirement program. Fulghum Tr. at 35:3-36:18, 39:15-41:15; Fulghum Ex. 5.

79. Fulghum contends that SPDs 1 (medical insurance) and 9 (life insurance) were in effect when he retired. UF ¶¶20 & 44; Exs. A-1 & A-9.

Alleged Oral Communications

80. Fulghum does not allege that any oral communication caused him to conclude that retiree medical benefits could not be terminated. Fulghum Tr. at 27:6-16, 32:20-33:12.

81. With respect to retiree life insurance benefits, Fulghum alleges that in approximately July 1996, human resources employees Gayle Phillips or Faye Bland told him that when he retired he would receive life insurance in an amount equal to two times his annual salary for a period of five years, after which he would receive life insurance in an amount equal to one times his annual salary for the remainder of his life. Fulghum Tr. at 181:5-183:2, 189:9-21.

[3] The evidence cited in this section of the UF is located at APP 1131 to APP 1252, and APP 2185: The Fulghum deposition transcript ("Fulghum Tr.") is at APP 1131 to APP 1181, and the documents are at APP 1182 to APP 1252 and APP 2185.

82. In 1996, Fulghum spoke with Gayle Phillips who said "this is what you will get when you retire . . . [m]edical insurance, retiree life insurance, concession telephone service[.]" *Id.* at 79:9-80:20. However, he could not recall the specifics of the conversation and characterized it as "routine." *Id.*

83. Fulghum also spoke to Faye Bland about his retirement benefits in July 1996, who indicated that he was eligible for the benefits outlined in her July 18, 1996 letter described below. *Id.* at 81:7-83:14. Fulghum does not recall Ms. Bland saying anything that conflicted with what she said in her July 18, 1996 letter. *Id.* at 82:2-83:19.

Written Communications

84. On July 18, 1996, Ms. Bland sent Fulghum a letter which stated in part:

> This letter is in connection with your retirement effective September 1, 1996.
>
> * * *
>
> Should the premiums for medical . . . insurance increase in the future, you must pay the increased premium rates if you wish to continue coverage . . . .
>
> * * *
>
> Your group life insurance (2x salary) with CIGNA will be continued at no cost to you * * * On the fifth anniversary of retirement, your life insurance will be reduced by 50% ($69,000) and remain at this figure for your lifetime.
>
> * * *
>
> The Company expects to continue the benefits described for the foreseeable future. However, *the Company reserves the right to amend, discontinue, or terminate these benefits*.

Fulghum Tr. at 67:24-68:7; APP 1229-31 (emphasis added).

85. Fulghum testified as follows regarding this letter:

Q. Did you review this letter upon receipt?
A. Yes, I did.

* * *

Q. Were you concerned when you read this letter in 1996…

A. No.
Q. – and it stated that the company reserves the right to amend, discontinue, or terminate these benefits?
A. No.
Q. *Did you just ignore that provision*?
A. *Yes*.
Q. Why?
A. It was my belief that my benefits could not be terminated after I retired.
Q. *Other than providing the information to you in writing, is there anything the company could have done in 1996 to convince you that the company had reserved the right to amend, discontinue, or terminate the benefits*?
A. *No*.

Fulghum Tr. at 68:8-9, 73:7-24 (emphasis added).

86. The ROR provision quoted above was consistent with provisions in documents describing retiree benefits that Fulghum had previously received from the Company. For example, in 1989 the Company gave Fulghum a brochure that summarized new retiree benefits plans, including the Retiree Medical Plan, and which stated in part: "Each plan is governed by the specific terms of the plan documents *and may be amended or terminated at any time*." Fulghum Tr. at 101:17-102:23; APP 1251 (emphasis added).

87. The Company also sent Fulghum the Sprint retiree medical SPD 1 sometime before March 1996. Fulghum Tr. at 27:6-28:4; APP 1182.

88. The basis for Fulghum's belief that retiree medical benefits could not be terminated is the following sentence in SPD 1: "Your coverage under the Retiree Medical Plan ends: – when you die, or – you do no pay your share of the cost of coverage." APP 1198; Fulghum Tr. at 32:20-33:12. Fulghum admits he did not fully read SPD 1 until 2008 (more than twelve years after he retired). *Id.* at 28:5-29:11.

89. If Fulghum read only the first page of text of SPD 1, he would have read the following: "[T]he company reserves the right to amend or terminate this plan, or any statements made in this summary plan description, at any time." APP 1184.

90. If Fulghum read the section of SPD 1 describing "What the Plan Covers," he would have read the following: "Just as medical coverage can change in the future for active employees, so can the coverage that is available to retirees." *Id.* at APP 1196.

91. If Fulghum read only the first page of the section of SPD 1 entitled "Medical Coverage," he would have read the following: "[I]n the future, the company may change or terminate any of the coverages that are described." *Id.* at APP 1203.

B. BETSY BULLOCK[4]

92. Plaintiff Betsy Bullock ("Bullock") began her employment at CT&T in 1971 and remained on CT&T's payroll as an active employee until December 31, 2001, at which time she was 58 years old. Doc. 295 at 5.

93. Bullock contends that SPD 5 (medical and life insurance) and SPD 9 (life insurance) were in effect when she retired. UF ¶¶30 & 44; Exs. A-5 & A-9.

Alleged Oral Communications

94. Bullock alleges that during a two-minute conversation in a stairwell sometime during the 1980s, CT&T benefits manager Gayle Phillips told her that she "would have life insurance and medical benefits. . . . [t]hat [her] life insurance was under the contract, the old CT&T contract, but the medical benefits [were] not." Bullock Tr. at 134:19-138:2, 305:6-308:1.

[4] The evidence cited in this section of the UF is located at APP 292 to APP 529, APP 2157 to APP 2168, and APP 2178 – APP 2182: The Bullock deposition transcript ("Bullock Tr.") is at APP 292 to APP 392, and the documents are at APP 393 to APP 529, APP 2157 to APP 2168, and APP 2178 to APP 2182.

Written Communications

95. When Bullock joined CT&T in 1971, she received a life insurance SPD describing an active and retiree life insurance benefit, which stated in part: "The Company hopes and fully intends to continue this program indefinitely, but must reserve the right to terminate or change it." Bullock Tr. at 71:5-74:18; APP 399.

96. According to Bullock, the SPD language quoted in Paragraph 95 above preserved CT&T's right to change or terminate the plan. Bullock Tr. at 81:10-13.

97. In 1971 or 1972, Bullock received an SPD describing medical benefits that contained a provision stating the group policy could be terminated. *Id.* at 81:18-83:7; APP 402. Bullock understood that this provision meant that the group policy could be terminated. Bullock Tr. at 84:7-18.

98. Bullock received SPD 1 and SPD 2 which covered medical and/or prescription drug benefits and contained multiple provisions stating that the medical and prescription drug plans could be amended or terminated. APP 2160-61; 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.

99. In October 1999, Bullock inquired regarding the potential impact on retiree benefits of a proposed corporate merger. Bullock Tr. at 195:24-198:7; APP 427. In response, benefits manager Gail Phillips informed Bullock via email that CT&T had the right to change or terminate retiree welfare benefits, and that although Bullock's pension benefit was protected:

> retiree benefits . . . are not, nor have they ever been, guaranteed. The company has always had the right to amend, change or terminate them at any time. Fortunately, that is not something that has been done. We can only hope and pray that doesn't happen in the future.

APP 426-27; Bullock Tr. at 201:2-202:8.

100. In February 2000, Bullock asked Phillips about the impact of a proposed job reclassification on benefits. APP 426. In response, Phillips advised Bullock that an intracompany transfer could result in the loss of the so-called "grandfathered" life insurance and the VEBA death benefit. *Id.*

101. By February 2000, Bullock understood that CT&T had the right to terminate grandfathered life insurance benefits for certain employees, even though they had been "grandfathered" years before. Bullock Tr. at 204:23-205:3.

102. Bullock was aware that medical benefits changed while she was an active employee. *Id.* at 101:1-5, 102:14-17.

103. Before she retired, Bullock received SPD 5 which covered medical, prescription drug, and life insurance benefits. *Id.* at 291:12-292:13; APP 461.

104. SPD 5 and SPD 9 contained multiple provisions stating that the medical, prescription drug, and/or life insurance plans could be amended or terminated. Ex. A-5 at 2, 8, 14, 30, 35, 41 "Legal Information" at 3; Ex. A-9 at 1, 6, 7, 10.

105. Bullock contends that a provision of an SPD entitled "When Does Coverage End" misled her into believing that her life insurance benefits could not be terminated. Bullock Tr. at 326:8-24, APP 514.

106. In October 2001 – two months before she retired – Bullock received a brochure entitled "Important News for Everyone." Bullock Tr. at 235:8-236:10; APP 430. The brochure contains an ROR provision, stating: "Sprint reserves the right to amend the SHARE credit amount at any time." APP 436; *see also id.* APP 435 ("Whether you are better off under the current program or the SHARE account depends on several factors, including…whether the program before the SHARE account will be maintained in its current form.").

107. In the fall of 2001, Bullock received a letter regarding retirement from E.J. Holland, Jr., CT&T's vice-president in charge of Compensation, Benefits, & Labor Relations, which stated that employees like Bullock who retired in 2001 would be subject to a cost-sharing arrangement that was "subject to adjustment each year." Bullock Tr. at 220:17-221:15; APP 428.

108. Included with Mr. Holland's letter was a Retiree Medical Financial Support Comparison which stated: "Sprint reserves the right to amend or terminate the Sprint Retiree Benefits Program at any time." APP 429.

109. Holland's letter encouraged retirement-eligible employees to review carefully: (a) the "Important News for Everyone" brochure described in paragraph 106 above; and (b) the Retiree Medical Financial Support Comparison described in paragraph 108 above. The letter also included the following hypothetical employee question and answer:

> Am I better off retiring this year under the Sprint Retiree Medical Program in place before the SHARE account?
>
> Whether you are better off under the current funding method or the SHARE account depends on several factors, including: your current age and years of service; how many years you will live in retirement; and *whether the program before the SHARE account will be maintained in its current form*.

APP 428 (emphasis added).

110. Bullock conceded that Holland's answer stated that the retirement program in which she participated "could be changed drastically at any time." Bullock Tr. at 314:11-315:4.

111. In the fall of 2001, Bullock received retirement enrollment materials, including SPD 4, which stated that decisions with respect to retiree benefits are subject to change. Bullock Tr. at 235:8-236:10, 272:6-273:8, 291:12-292:1; APP 430, 437, 461.

112. In November 2001, Bullock attended and took notes regarding a webcast. Bullock Tr. at 272:4-288:17; APP 437. Mr. Holland stated that decisions with respect to retiree

benefits were subject to change. *Id.* at 284:5-285:13; APP 454 (noting adjacent to the question "Is this new plan a step toward phasing out retiree medical coverage?" on "Future Retiree Benefits Questions" slide, "*Hope to continue; decisions made each year*") (emphasis added); *see also* APP 1518, 1542.

113. Bullock made her decision to retire in November 2001 after she received the retirement package described in paragraph 111 above and attended the webcast described in paragraph 112 above. Bullock Tr. at 156:23-158:6; 164:14-46. She signed a Letter of Intent in November 2001. *Id.* at 364:13-16.

114. At the time she retired, Bullock understood that CT&T could increase without limit the amount of premiums for retiree medical benefits. *Id.* at 396:8-397:7, 360:2-361:10; APP 2182.

C. WILLIAM GAMES[5]

115. Plaintiff William Games ("Games") began his employment at CT&T in 1959 and remained on CT&T's payroll as an active employee until December 31, 2001, at which time he was 61 years old. Doc. 295 at 5.

116. Like Bullock, Games contends that SPD 5 (medical and life insurance) and SPD 9 (life insurance) were in effect when he retired. UF ¶¶30 & 44; Exs. A-5 & A-9.

Alleged Oral Communications

117. Games alleges that in November 2001, Barbara Westfall in Sprint's human resources department told him that if he retired by December 31, 2001 under the special early retirement program, he would get his retiree benefits "until you die." Games Tr. at 65:25-66:14, 220:6-221:25, 224:8-225:10.

[5] The evidence cited in this section of the UF is located at APP 1253 to APP 1412: The Games deposition transcript ("Games Tr.") is at APP 1253 to APP 1351, and the documents are at APP 1352 to APP 1412.

118. Games never asked Westfall whether Sprint could change his post-retirement benefits. *Id.* at 91:22-92:1.

Written Communications

119. Before he retired, Games understood that Sprint had the right to change retiree medical insurance premiums. Games Tr. at 125:8-126:6, 140:3-6, 233:2-12.

120. Games received the Holland letter and enclosures described in paragraphs 107-109 above. Games Tr. at 34:25-38:9, 41:3-9, 51:22-52:13, 273:3-16; APP 1357; APP 1360; APP 1365.

121. Games received an August 1999 Retiree Benefits SPD that stated in part: "[T]he company reserves the right to amend or terminate this plan, or any statement made in this summary plan description, at any time." Games Tr. at 280:13-281:13, 282:14-25; APP 1368.

122. Games received other retirement-related documents that refer to the retiree medical plan SPD. *See, e.g.*, Games Tr. at 249:3-20; APP 1364 ("*Please refer to the Retiree Medical Plan Summary Plan Description for complete details.*" (emphasis in original)), APP 1409 ("Be sure to read the restrictions in your Retiree Medical Plan Summary Plan Description before you make your elections for the first year of retirement.").

123. Games alleges that letters from human resources in 2001 induced him to retire early in order to retain the existing program of Company-paid medical, prescription drug and life insurance benefits. Games Tr. at 340:25-341:11, 350:17-25.

124. Games made his decision to retire and signed a Letter of Intent on November 27, 2001. *Id.* at 199:12-201:25, APP 1361.

D. JOHN HOLLINGSWORTH[6]

125. Plaintiff John Hollingsworth ("Hollingsworth") began his employment at CT&T in 1964 and remained on CT&T's payroll as an active employee until December 31, 2001, at which time he was 57 years old. Doc. No. 295 at 4.

126. Like Bullock and Games, Hollingsworth contends that SPD 5 (medical and life insurance) and SPD 9 (life insurance) were in effect when he retired. UF ¶¶30 & 44; Exs. A-5 & A-9.

Alleged Oral Communications

127. Hollingsworth could not identify any person who told him that he would have retiree benefits for life. Hollingsworth Tr. at 346:17-25.

128. Hollingsworth alleges he "was told, if [he] would retire by 12/31/2001 that [he] could keep [his] benefits in their current form, which was the FlexCare medical plan and the grandfathered life insurance." *Id.* at 96:24-97:4; *see also id* at 192:21-193:11.

Written Communications

129. Hollingsworth received the "Important News for Everyone" brochure and the Retiree Medical Financial Support Comparison described in paragraphs 106 and 108 above. Hollingsworth Tr. at 186:15-187:9; APP 1516, 2144.

130. Hollingsworth primarily relied upon his wife for information regarding benefits and retirement. Hollingsworth at 72:11-74:16, 84:17-85:14.

131. Hollingsworth claims that he was provided documents in fall 2001 that induced him to retire early. *Id.* at 347:23-348:7, 352:14-355:4; APP 1549.

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[6] The evidence cited in this section of the UF is located at APP 1413 to APP 1550 and APP 2144 to APP 2150: The Hollingsworth deposition transcript ("Hollingsworth Tr.") is at APP 1413 to APP 1515, and the documents are at APP 1516 to APP 1550 and APP 2144 to APP 2150.

132. Hollingsworth reviewed his wife's notes from a fall 2001 retiree benefits meeting that explained that there was "*no locking at all*" with regard to retiree medical and life insurance benefits that the new medical plan was "*not like a pension plan*," and that there would be "*No Vesting Associated with Share Acct.*" Hollingsworth Tr. at 305:24-317:22; APP 1542-43.

133. Hollingsworth understood that the Company had the right to change retiree medical insurance premiums, deductibles and co-pays. Hollingsworth Tr. at 302:14-303:20.

134. Hollingsworth alleges that his wife, an administrative assistant employed at the Company, gave him an allegedly misleading one-page "checklist" prepared prior to the fall 2001. *Id.* at 72:11-75:2, 379:23-392:16; APP 1548.

135. Hollingsworth admitted that the "checklist" does not state how long medical insurance would continue in retirement, and that benefits listed in the checklist are described in more detail in other documents. Hollingsworth Tr. at 386:23-387:25, 388:5-389, 391:3-22; APP 1549.

136. Hollingsworth made his decision to retire and signed a Letter of Intent on November 1, 2001. Hollingsworth Tr. at 73:12-23, 352:14-353:21; Hollingsworth Ex. 23 at APP 1549.

E. DONALD CLARK[7]

137. Plaintiff Donald Clark ("Clark") began his employment at CT&T in 1950, and remained on CT&T's payroll as an active employee until August 31, 1976, at which time he was 50 years of age. Doc. 295 at 6.

138. Clark contends that SPD 16 (medical insurance) and SPD 17 (life insurance) were in effect when he retired. UF ¶60; Ex. A-16.

[7] The evidence cited in this section of the UF is located at APP 649 to APP 702: The Clark deposition transcript ("Clark Tr.") is at APP 649 to APP 702.

Alleged Oral Communications

139. Clark alleges that a conversation with a "chief operator" before he retired in 1976 led him to believe that his retiree benefits could not be terminated. Clark Tr. at 113:24-116:8. According to Clark, "[w]e were in the process of a coffee break, talking, and I said 'I'm thinking about retiring and all that, and I've read the book' and [the chief operator] said, 'Well, you will get so-and-so . . . hospital, pension telephone.'" *Id.* at 197:12-199:1.

140. Clark cannot recall if the chief operator told him he would receive these benefits for life. *Id.* at 199:2-5.

141. Clark does not recall anyone else telling him that retiree benefits were for life. *Id.* at 69:9-70:4, 205:3-206:22.

142. Clark also recollects speaking with a plant manager, Charlie Burns, in 1950 about retiree benefits, but it is unclear what, if anything, Mr. Burns said about retiree benefits. *Id.* at 33:1-12, 195:15-196:1, 205:17-209:05.

Written Communications

143. At the time Clark retired, CT&T and the CWA were parties to a CBA effective June 29, 1974 to June 29, 1977 (the "1974-77 CBA"). Clark contends that this document is relevant to his claims. UF ¶65; Ex. A-17.

144. Clark believes he received a document that allegedly suggested he would be entitled to lifetime benefits at some point before he retired 35 years ago, but that he did not retain and cannot further identify this document. Clark Tr. at 69:11-14, 194:23-197:17. Clark testified as follows regarding this alleged document: "I don't know if you could call it misleading, but I didn't pick up on it. It might have been my fault." *Id.* at 194:23-195:5.

145. Clark recalls reviewing documents provided by CT&T shortly before he retired in August 1976 that described his retirement benefits. *Id.* at 148:6-22.

146. Clark testified that one document he received at the time he retired in 1976 resembled a form letter summarizing retiree benefits that another CT&T employee (former named plaintiff Burgess) received shortly before his retirement in 1989. *Id.* at 148:6-149:13; APP 1004. This 1989 form letter stated that "the Company reserves the right to amend, discontinue or terminate these benefits." APP 1006.

147. At one point in his deposition, Clark stated that he would not have retired when he did if he had known CT&T was reserving its right to terminate benefits. Clark Tr. at 71:6-10. But he later admitted he might not have made a different decision, because he had planned to retire by age 50 even before he started working for CT&T. *Id.* at 83:16-84:3, 84:14-24, 193:20-194:5, 121:2-9. As Clark stated, "I always said I was going [to retire] as soon as I was eligible, and I did." *Id.* at 83:18-20.

F. KENNETH CARPENTER[8]

148. Plaintiff Kenneth Carpenter ("K. Carpenter") was employed by United Telephone Company of Ohio ("UTC-Ohio") from approximately 1965 until his last day of work on August 16, 1996, at which time he was 57 years old. Doc. 295 at 5. At all pertinent times, K. Carpenter has been married to Plaintiff Betty A. Carpenter ("B. Carpenter"). *Id.*

149. K. Carpenter contends that SPD 1 (medical insurance) and SPD 13 (life insurance) were in effect when he retired. UF ¶¶20 & 52; Exs. A-1 & A-13.

[8] The evidence cited in this section of the UF is located at APP 597 to APP 648: The K. Carpenter deposition transcript ("K. Carpenter Tr.") is at APP 597 to APP 646, and the documents are at APP 647 to APP 648.

Alleged Oral Communications

150. On March 26, 1996 – 11 days after he submitted his application to participate in the early retirement program – K. Carpenter attended a group meeting conducted by Harland Groves and Betty Gorney from human resources. K. Carpenter Tr. at 27:24-28:12, 29:25-30:23, 32:8-12, 33:7-34:15; APP 647.

151. K. Carpenter contends that Groves and/or Gorney explained that his wife, B. Carpenter, who also was subject to layoff, could reinstate her health care coverage under the Retiree Medical Plan if she died before he died. K. Carpetner Tr. at 29:25-30:23, 80:20-81:19.

152. K. Carpenter does not recall whether Mr. Gorney or Ms. Groves told him that the Company did not have the right to change the retiree medical plan. *Id.* at 82:12-20.

153. On November 5, 1997, K. Carpenter also contends that he attended a "very informal" group meeting with Rita Etzweiller from human resources. *Id.* at 57:17-58:23, 82:21-83:3, 84:4-85:5. Etzweiller allegedly said that he would have life insurance coverage in retirement. *Id.* at 57:17-58:2. This alleged meeting occurred approximately eighteen months after he decided to retire and fifteen months after his last day of work. *Id.*

Written Communications

154. K. Carpenter received numerous benefit-related documents from UTC-Ohio that included ROR provisions, but it was his practice to throw away benefit-related materials that were not for the current year. K. Carpenter Tr. at 61:23-62:2, 64:16-65:5, 65:24-66:21, 71:4-12, 73:19-74:2, 101:5-13, 136:25-137:9.

155. K. Carpenter remembers receiving a document each year during *his* employment that outlined the active employee medical benefits under FlexCare, and identified one such

document as the Medical Plan SPD. *Id.* at 100:20-101:19; B. APP 576-94. This SPD included a provision stating that the plan could be terminated. APP 594.

156. K. Carpenter agreed that the ROR provision in the Medical Plan SPD "means that the company has the right to amend or terminate the plan for employees." K. Carpenter Tr. at 101:24-102:20.

157. K. Carpenter admits that UTC-Ohio had the right to change health care insurance options (*e.g.*, PPO, HMO), co-payments, and the prescription drug formulary and to increase the cost of medical insurance premiums every year. *Id.* at 79:11-23, 111:19-112:2.

158. On October 19, 1989, K. Carpenter signed a FlexCare Enrollment Form for 1990 for active employees under the statement, "I have received, read and understood my personalized material, enrollment guide, and summary plan descriptions." *Id.* at 105:23-106:19; APP 648.

159. K. Carpenter never read any document that guaranteed a certain amount of life insurance coverage, said he would maintain his $23,000 retiree life insurance coverage forever, or stated he would participate in the retiree medical plan forever. K. Carpenter Tr. at 136:4-21, 57:17-59:18.

160. On March 15, 1996, K. Carpenter applied to participate in the early retirement program. K. Carpenter Tr. at 27:22-28:12, 33:7-34:15; APP 647.

161. K. Carpenter was involuntarily terminated. K. Carpenter Tr. at 26:3-9.

G. BETTY CARPENTER[9]

162. Plaintiff Betty Carpenter ("B. Carpenter") was employed by UTC-Ohio from 1978 until her last day of work on November 1, 1996, at which time she was 54 years old. Doc. 295 at 5; B. Carpenter Tr. at 12:20-13:7.

[9] The evidence cited in this section of the UF is located at APP 530 to APP 596: The B. Carpenter deposition transcript ("B. Carpenter Tr.") is at APP 530 to APP 569, and the documents are at APP 570 to APP 596.

Alleged Oral Communications

163. No UTC-Ohio employee ever told B. Carpenter that her life insurance benefits could not change. *Id.* at 90:25-91:3, 117:16-19.

164. B. Carpenter did not attend the March 1996 group meeting conducted by Gorney and Groves or any other group presentations regarding retirement benefits. *Id.* at 55:8-12, 57:10-12.

Written Communications

165. B. Carpenter reviewed the notes her husband, K. Carpenter, made after the March 26, 1996 and November 5, 1997 meetings described in paragraphs 150-153 above. B. Carpenter Tr. at 98:18-102:17.

166. At the time of her retirement, B. Carpenter signed a 1998 Retiree Flexcare Enrollment Form, which specifically refers in "Section I," "Medical Plan," to the "medical SPD." APP 595.

167. B. Carpenter claims she never received a SPD while an employee. B. Carpenter Tr. at 59:23-60:1. To the extent she had any knowledge of the medical and life insurance plans, that knowledge came from "talking to other employees," whom she cannot remember, during perhaps two or three conversations. *Id.* at 68:20-69:25. B. Carpenter admits that she could have requested SPDs from the human resources department. *Id.* at 70:12-14.

168. B. Carpenter was involuntarily terminated. *Id.* at 48:2-8.

H. SUE BARNES[10]

169. Plaintiff Sue Barnes ("Barnes") was employed by CT&T between 1959 and 1986, when she was laid off. She returned to work at CT&T in 1994 and remained on its payroll as an active employee until March 31, 2003, at which time she was 61 years old. Doc. No. 295 at 5.

170. Barnes alleges that SPD 8 (life insurance) and SPDs 11 and 12 (medical insurance) were in effect when she retired. UF ¶¶39, 48; Exs. A-8, A-11 & A-12.

Alleged Oral Communications

171. Barnes alleges that her manager, Gloria Jones, told her in informal conversations in early 2003 that she had to retire by April 1, 2003 to "secure" or "keep" benefits in retirement. Barnes Tr. at 35:9-36:12, 42:9-16.

172. Notwithstanding Jones' alleged statement, Barnes testified that she understood before she retired that elements of her retiree medical benefits, such as deductible amounts for medical care and out-of-pocket costs, could change. *Id.* at 84:23-85:23.

173. Jones referred Barnes before she retired to human resources for more information regarding retiree benefits, but Barnes did not contact human resources. *Id.* at 48:17-23.

Written Communications

174. Barnes discarded all documents she had received from CT&T when she was laid off in 1986. She received additional documents relating to retiree benefits between 1994 and 2003, but in 2007 she destroyed all documents she had retained. Barnes Tr. at 70:17-25.

175. Barnes alleges that a Sprint Retiree Life Insurance–Retiree Worksheet that included the term "grandfathered" misled her, because she inferred from the term

[10] The evidence cited in this section of the UF is located at APP 1 to APP 214: The Barnes deposition transcript ("Barnes Tr.") is at APP 1 to APP 44, and the documents are at APP 45 to APP 214.

"grandfathered" that "grandfathered life insurance" benefits were for life. *Id.* at 64:4, 75:12-76:5; APP 202.

176. Barnes alleges that Jones posted a misleading document at work that stated "[y]ou do have to retire by April 1st to retire under current retirement." *Id.* at 53:4-5, 54:6-55:11; APP 172.

177. The Company never advised Barnes in writing that her benefits would be "secured." *Id.* at 52:13-53:3.

178. In the months before she retired, the Company advised Barnes to familiarize herself with the retiree benefit documentation she received. APP 210.

179. This documentation advised Barnes to "[b]e sure to read your Retiree Medical Plan Summary Plan Description before you make your elections for the first year of retirement" and that "[r]etiree health insurance premiums and options are reviewed annually." APP 176.

180. As a union member, Barnes received copies of the applicable collective bargaining agreements ("CBAs") through her office while she was employed at CT&T. Barnes Tr. at 26:21-27:17.

181. The CBA in effect when Barnes retired was the Agreement between the Communications Workers of America (the "CWA") and CT&T effective November 30, 2002 through November 29, 2005 ("the 2002-05 CBA"). *Id.* at 25:8; APP 45.

182. The 2002-05 CBA stated that "the company reserves the right to amend or terminate any one of the various components of the Sprint retiree medical plan at any time." *Id.* at 29:22-25, 50:5:-51:1; APP 45.

183. Barnes would not have believed anything she was told in writing, including the CBA's statement that the Plan could be terminated, that contradicted Jones' oral statement to her that benefits were "secured" if she retired. Barnes Tr. at 50:5-52:7.

I. JAMES BRITT[11]

184. Plaintiff James Britt ("Britt") began his employment at CT&T in February 1946, and remained on CT&T's payroll as an active employee until July 3, 1985, at which time he was 66 years old. Doc. 295 at 6.

185. Britt contends that SPD 7 (life insurance) and SPD 10 (medical insurance) were in effect when he retired. UF ¶¶37 & 47; Exs. A-7 & A-10.

Alleged Oral Communications

186. Britt alleges that in February or March 1985, a CT&T human resources employee, whom Britt could not identify, told him that CT&T would pay for medical benefits for as long as he lived. Britt Tr. 69:25-70:21, 149:23-150:9, 173:1-174:17.

187. Britt does not recall what the employee said about retiree life insurance benefits, *Id.* at 172:10-18, and at one point testified that the employee said nothing about that subject. *Id.* at 170:1-8. Nonetheless, Britt was "under the impression it would be for [his] lifetime." *Id.* at 171:22-172:3.

188. At the time of this meeting, Britt did not understand that he was entitled to life insurance benefits in retirement. *Id.* at 96:14-97:5, 172:19-25, 283:4-11.

189. Before this alleged conversation, Britt had already decided to retire. *Id.* at 159:1-7, 174:18-21, 175:23-25, 283:12-284:3.

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[11] The evidence cited in this section of the UF is located at APP 215 to APP 291 and APP 2151 to APP 2156: The Britt deposition transcript ("Britt Tr.") is at APP 215 to APP 289, and the documents are at APP 2151 to APP 2156.

190. Britt notified CT&T of his decision to retire no later than March 19, 1985. Britt Tr. at 137:14-138:14; APP 291.

Written Communications

191. Britt recalls receiving "documents referring to the retiree medical, prescription drug, life insurance" provided by CT&T before he retired, but he threw them away because he "did not believe he would need them." *See generally*, APP 2153.

192. Britt received nothing in writing misrepresenting CT&T's right to change or terminate retiree life insurance benefits. Britt. Tr. at 173:1-5.

193. SPD-10, which Britt contends governed his medical benefits at the time he retired, provided in part: "The Company expects to continue the Plan for the foreseeable future. However, it reserves the right to amend, discontinue or terminate the Plan for reasons of business necessity or financial hardship." Ex. A-10 at 37; Ex. A-20 at 57-60.

194. Britt was a member of the CWA. *Id* at 61:1-7. At the time he retired, CT&T and the CWA were parties to a CBA effective November 30, 1984 to November 29, 1987 (the "1984-87 CBA"). Ex. A-19. Britt did not read the 1984-87 CBA. Britt Tr. at 108:14-17. Nonetheless, Britt alleges the 1984-87 CBA contains a misrepresentation. *Id.* at 108:1-9.

195. The 1984-87 CBA provided that the Company would maintain medical and life insurance benefits only "during the term of the agreement." Ex. A-19 at 74.

196. The 1984-87 CBA further provided: "This agreement shall continue in full force and effect after November 29th, 1987, unless either party gives the other party 60 days written notice to cancel, revise, or modify part of the agreement. In the event agreement is not reached after 60 days after such notice of cancellation, this agreement shall in all respects be voided and terminated." *Id.* at 91.

J. DORSEY DANIEL[12]

197. Plaintiff Dorsey Daniel ("Daniel") began his employment at CT&T in July 1965, and remained on CT&T's payroll as an active employee until December 31, 1997, at which time he was 57 years old. Doc. 295 at 4.

198. Daniels contends that SPD 2 (medical insurance) and SPD 9 (life insurance) were in effect when he retired. UF ¶¶22 & 44; Exs. A-2 & A-9.

Alleged Oral Communications

199. Daniel does not recall discussing retiree benefits before he retired with anyone at the company other than his secretary, nor does he recall anyone at the company ever telling him that retiree benefits were "for life." Daniel Tr. at 60:3-61:3, 27:3-10.

Written Communications

200. In 1989, Daniel received a letter together with a booklet describing retiree benefit plans which stated: "Each plan is governed by the specific terms of the plan documents and may be amended or terminated at any time." Daniel Tr. at 77:10-78:1; APP 780. Daniel read the booklet, and assumes he read this provision in particular, when he received it. Daniel Tr. at 77:24-79:4.

201. In 1993, Daniel received a letter together with a document describing changes in retiree benefit plans which stated in part: "The company reserves the right, at any time, to add, subtract, eliminate, or modify benefits." APP 2171.

202. Daniel alleges that when he was deciding to retire, he had in his possession and relied upon the following allegedly misleading documents: (a) a checklist; (b) a single page

[12] The evidence cited in this section of the UF is located at APP 703 to APP 790, APP 2169 to APP 2177 and APP 2183 to APP 2184. The Daniel deposition transcript ("Daniel Tr.") is at APP 703 to APP 755, and the documents are at APP 756 to APP 790, APP 2169 to APP 2177 and APP 2183 to APP 2184.

regarding Daniel's pension/retiree benefits (the "Pension/Retiree Benefits Document"); and (c) a "retirement package," described below.

203. Daniel claims that the checklist constituted a promise of lifetime benefits. Daniel Tr. at 125:12-20; 202:15-204:25; APP 2183. Specifically, Daniel alleges language that medical coverage "may be continued after retirement provided the monthly premium (if applicable) is paid" and that life insurance coverage would remain a specified figure "for the remainder of the employee's life" was misleading. Daniel Tr. at 202:15-204:25.

204. The Pension/Retiree Benefits Document is a one-page document that Daniel originally stated, in a sworn interrogatory answer, he received as an enclosure with a March 15, 1999 letter, more than 14 months after (a) he had decided to retire and (b) his last day of work. Daniel Tr. at 41:5-42:9; APP 762, 2170, 2177. But Daniel testified in his deposition, in response to questioning by his own attorney, that he actually received the Pension/Retiree Benefits Document, not in March 1999 as reflected in the cover letter accompanying it, but in 1997, before he made his decision to retire. *Id.* Daniel alleges that the Pension/Retiree Benefits Document led him to believe that his retiree benefits were lifetime benefits. Daniel Tr. at 162:16-165:18, 166:16-167:19; APP 762.

205. Daniel testified that he received the March 15, 1999 letter, and all pages enclosed therewith other than the Pension/Retiree Benefits Document, in March 1999. Daniel Tr. at 41:5-42:9. The letter stated: "The Company expects to continue the benefits described for the foreseeable future. However, the Company reserves the right to amend, discontinue or terminate these benefits." APP 758.

206. With respect to the "retirement package," Daniel testified as follows in his deposition:

> Q. [I]t's your testimony that nothing that you received as part of, quote, the retirement package contained any information about the company's ability to terminate retiree medical benefits; is that correct?
> A. They–they've mentioned the right to change, but I don't know the word "terminate" being in there.
> Q. So you recall being told at the time that you made your retirement decision that your retiree medical benefits could change; is that correct?
> A. Correct.
> Q. But sitting here today, you do not recall being told that the benefits could be terminated; is that correct?
> A. No.
>
> * * *
>
> Q. Did you ever receive a document that said your retiree medical benefits could not be terminated after retirement?
> A. Not a document, no.

Daniel Tr. at 183:8-23, 184:23-185:1.

K. TIMOTHY DILLON[13]

207. Plaintiff Timothy Dillon ("Dillon") began his employment at Florida Telephone Corporation in 1969 and later worked for North Supply Company. He remained on the payroll of North Supply Company as an active employee until November 9, 2001, at which time he was 57 years old. Doc. 295 at p. 5.

208. Dillon contends that SPD 5, which covers both retiree medical benefits and retiree life insurance benefits, was in effect when he retired. UF ¶¶30; Ex. A-5.

Alleged Oral Communications

209. Dillon alleges that sometime in the 1980s – *i.e.*, at least 20 years before he retired – the then-President of North Supply Company, Stan Fisher, had a discussion with him relating to the "lifetime nature" of welfare benefits, which led him to believe his retire benefits could not be terminated. Dillon Tr. at 186:4-190:4. Dillon does not recall exactly what Mr. Fisher told him about this subject. *Id.*

[13] The evidence cited in this section of the UF is located at APP 791 to APP 894: The Dillon deposition transcript ("Dillon Tr.") is at APP 791 to APP 850, and the documents are at APP 851 to APP 894.

210. Dillon alleges that in 2001, he attended two group meetings led by human resources personnel in which "it was emphasized that if you took the retirement package now, you would be grandfathered in under the old or existing medical plan." *Id.* at 82:5-14.

211. At the group meetings, neither Dillon nor anyone else asked if the retiree benefits were guaranteed for life. *Id.* at 109:13-18. Dillon nevertheless believed that retiree medical and life insurance benefits "vested" with the pension benefit. *Id.* at 108:15-109:1.

212. Dillon alleges that in 2003, human resources employee Hollie Pastor told him that he would have $15,000 in life insurance for life. *Id.* at 227:20-228:14.

Written Communications

213. Before he retired, Dillon annually received booklets that described the terms of employee medical and life insurance benefits. *Id.* at 28:13-29:9; 56:6-25.

214. When Dillon was contemplating early retirement in 2001, he requested retirement documentation from human resources "so I could understand it." Dillon Tr. at 29:6-9. In response to that request human resources referred him to SPD 5, which the Company had previously given to him. *Id.* at 56:6-16; 78:2-79:9; APP 851; Ex. A-5.

215. Dillon asserts that SPD 5 contains an express promise of lifetime benefits because of the language "when you die" in the section entitled "When Your Coverage Ends." Dillon Tr. at 179:22-180:11; APP 861.

216. The second page of SPD 5 states that "the company reserves the right to amend or terminate this plan, or any statement made in this summary plan description at any time." Dillon APP 854; *see also* Ex. A-5 at 2.

217. The first page of the section of SPD 5 entitled "Appendix A-Medical Coverage" states that "the company may change or terminate any of the coverages or options that are described." APP 866; *see also* Ex. A-5 at 14.

218. Dillon admits that he understands the provision quoted in paragraph 217 to mean that the "company may change or terminate coverages and options," and that this was inconsistent with his understanding of his retiree benefits. Dillon Tr. at 180:22-182:7; Dillon APP 866; Ex. A-5 at 14; *see also* Ex. A-5 at 2. Dillon Tr. at 87:17-18.

219. Even when referred to the SPD for more information, Dillon did not read the SPD because he believed he already understood the Plan. *Id.* at 164:25-165:20, 168:11-169:12.

220. While Dillon claims that he did not need to read Company-provided documents concerning retiree welfare benefits because he understood the benefits, when he reviewed the SPD, he admitted that certain presumptions about the retiree benefits program turned out not to be true. *Id.* at 98:10-25.

L. WILLIAM DORMAN[14]

221. Plaintiff William Dorman ("Dorman") began his employment at CT&T in 1959, and remained on CT&T's payroll as an active employee until January 3, 1994, at which time he was 56 years old. Doc. 295 at 4.

222. Dorman contends that SPD 1 (medical insurance) and SPD 9 (life insurance) were in effect when he retired. UF ¶¶20 & 44; Exs. A-1 & A-9.

[14] The evidence cited in this section of the UF is located at APP 895 to APP 1130: The Dorman deposition transcript ("Dorman Tr.") is at APP 895 to APP 1003, and the documents are at APP 1004 to APP 1130.

Alleged Oral Communications

223. Dorman alleges that he attended a new-supervisor training program in the late 1960s, at least 25 years before he retired, at which a human resources employee allegedly said that retiree benefits would remain in effect until death. Dorman Tr. at 397:5-400:15.

224. Dorman alleges that he discussed retiree benefits with his direct supervisor, Vernon Hodges, but does not recall when these conversations took place or exactly what was said. *Id.* at 190:5-192:11, 382:25-384:2.

225. Dorman never asked anyone at Sprint corporate headquarters questions regarding retiree benefits before he retired. *Id.* at 148:20-25.

Written Communications

226. In 1989, Dorman received a retirement program brochure that summarized new retiree benefits plans, including the Retiree Medical Plan, and stated in part that the "Plan may be amended or terminated at any time." Dorman Tr. at 157:12-160:9; APP 1022.

227. Dorman understood that both employees and retirees would pay more for medical benefits under the Company's new plans and that the Company would adjust the costs annually. Dorman Tr. at 158:13-21. The brochure refers to a new SPD that would be distributed in 1990, which Dorman subsequently received. *Id.* at 159:21-160:3.

228. In 1991 or 1992, Dorman received a copy of the Sprint Retiree Medical Plan SPD, which stated that "the company reserves the right to amend or terminate this plan, or any statement made in this summary plan description." *Id.* at 244:24-245:22; APP 1076.

229. In 1993, Dorman received a Sprint Benefits Handbook, the Introduction to which stated in part:

> [T]he benefits are subject to the full terms and conditions of the plan documents and/or insurance contracts from which this handbook has been prepared.

* * *

> Sprint intends to continue to provide benefits that help answer your needs, but it reserves the right to amend any of the plans, to change the method of providing benefits, or to terminate any or all of the plans.

Dorman Tr. at 198:1-23, 203:17-204:14; APP 1027.

230. In 1993, in connection with his termination, Dorman received an "Explanation of Benefits" (the "Dorman EOB") which summarized severance benefits and retirement benefits, and which stated in part:

> BENEFITS CONTINUATION: The Company expects to continue the benefits described for the foreseeable future. However, *the Company reserves the right to amend, discontinue, or terminate these benefits*.
>
> * * *
>
> [G]roup medical coverage may continue under the Retiree Medical Plan. . . . If you elect group medical coverage, it is expressly understood that the company reserves the right to change such treatment of retirees, but will not treat you less favorably than any other retiree similarly situated."
>
> * * *
>
> Your group life insurance (2x salary) with Equicor will be continued at no cost to you . . . . On the fifth anniversary of your retirement, your life insurance will be reduced by 50% and remain at that figure for your lifetime.

Dorman Tr. at 338:13-339:5; APP 1124-25 (emphasis added).

231. Around December 15, 1993, Dorman received a letter from Randall Parker and an enclosed document that described retiree life insurance, which referred employees and retirees to the SPD for more information, and stated: "The company reserves the right, at any time, to add, subtract, eliminate, or modify benefits." Dorman Tr. at 258:10-264:6; APP 1122.

232. Although he expected retiree benefits to continue, Dorman believed the Company could "amend" the FlexCare Plan. Dorman Tr. at 346:9-347:6; *see also Id.* at 115:11-116:18.

233. Dorman understood that the CT&T "grandfathered" life insurance was described in benefits booklets distributed by CT&T, but admits that he never read the booklets. *Id.* at

113:12-22, 137:15-20. Dorman also received insurance contracts related to retiree benefits which he did not read. *Id.* at 113:12-22.

234. Dorman alleges that a "checklist" of retiree benefits he first received in 1968 vested the Disputed Benefits. *Id.* at 38:18-39:24.

235. Dorman admits that the checklist changed over the years and is a summary of other documents that described retiree benefits in more detail. *Id.* at 271:23-284:21, 291:5-296:6 ("summary benefit plans of CT&T," attachment regarding medical benefits, "service award" booklet, pension plan SPD and related forms, payroll authorization form, employee stock grant letters).

236. In 1993, Dorman asked to retire under the surplus termination program because it was a "golden parachute," which "was too good to give up." *Id.* at 73:2-74:1, 77:7-9.

237. Dorman agreed that an ROR provision in a letter addressed to former named Plaintiff Burgess, APP 1004, reserved the Company's right to terminate retiree benefits. *Id.* at 65:20-68:15.

M. CALVIN JOYNER[15]

238. Plaintiff Calvin Joyner ("Joyner") began his employment at CT&T in 1956, and remained on CT&T's payroll as an active employee until February 18, 1994, at which time he was 56 years old. Doc. 295 at 5.

239. Joyner contends that SPD 1 (medical insurance) and SPD 9 (life insurance) were in effect when he retired. UF ¶¶20 & 44; Exs. A-1 & A-9.

[15] The evidence cited in this section of the UF is located at APP 1551 to APP 1720: The Joyner deposition transcript ("Joyner Tr.") is at APP 1551 to APP 1635, and the documents are at APP 1636 to APP 1720.

Alleged Oral Communications

240. Joyner alleges that he met with human resources employee Gayle Phillips in 1991 and 1993 and they "generally took the checklist of retirement benefits and walked through them on a then current basis[.]" Joyner Tr. at 60:13-61:10. Joyner does not recall what was said about the Disputed Benefits during the first meeting with Phillips and the second meeting may have taken place after he made his decision to retiree under a reduction in force program, but in any event he does not recall what Phillips said and does not recall that she used the word "lifetime" but he understood the benefits would last a lifetime. *Id.* at 64:1-13, 69:17-70:2, 70:17-24, 73:16-25, 74:15-75:6, 76:13-77:3, 103:2-105:11, 144:8-18, 248:25-249:8, 269:4-22, 319:14-24.

241. Joyner alleges that in 1993 he told his supervisor, Wayne Peterson, that one reason he was considering retiring under a special early retirement program was that his retiree medical and life insurance benefits were "lifetime" benefits. *Id.* at 129:10-132:11, 133:9-134:22. In response, Peterson said nothing to him about retiree benefits, but merely said that he would "see what I can do" if Joyner was sure that he wanted to leave the Company. *Id.* at 137:2-15.

Written Communications

242. Joyner read documents that CT&T gave him concerning retiree benefits, because he had been considering retirement since 1984 and "was concerned about my retirement in the future." *Id.* at 152:2-153:3.

243. In late 1989 or early 1990, Joyner received a document that summarized new retiree benefits plans, including the Retiree Medical Plan, and stated in part: "Each plan is governed by the specific terms of the plan documents and may be amended or terminated at any time." APP 1716; Joyner Tr. at 239:23-241:14, 241:20-242:18.

244. Before he retired, Joyner received SPD 1, which states in part: "[T]he company expects to continue the retiree medical plan indefinitely. However, the company reserves the right to amend or terminate this plan, or any statement made in this summary plan description, at any time." *Id.* at 225:23-227:22; APP 1653. Although Joyner testified that he believed this provision reserved only the Company's right to change benefits for active employees, he admitted that SPD 1 includes no such limiting language. Joyner Tr. at 227:23-228:16, 231:8-21 ("[T]hat language is not there.").

245. SPD 1 contains additional provisions reserves the Company's right to change or terminate retiree benefits, including one on the first page of Appendix A – Medical Coverage, which provides, in relevant part: "[i]n the future the company may change or terminate any of the coverages or options that are described." APP 1674.

246. Before his retirement, Joyner received an "Explanation of Benefits" document (the "Joyner EOB") that summarized his severance and retirement benefits and provided in part:

> [G]roup medical coverage may continue under the Retiree Medical Plan. . . . If you elect group medical coverage, *it is expressly understood that the company reserves the right to change such treatment of retirees but will not treat you less favorably than any other retiree similarly situated*."
>
> * * *
>
> BENEFITS CONTINUATION: The Company expects to continue the benefits described for the foreseeable future. However, *the Company reserves the right to amend, discontinue, or terminate these benefits*.

187:8-12; APP 1644; 203:7-208:15; APP 1647-48 (emphases added); Joyner Tr. at 175:1-18; APP 1643.

247. Joyner's copy of the EOB did not include the fourth page on which this ROR provision appears. *See* APP 1644. However, Joyner thought that it was possible that the fourth page was lost in his files. Joyner Tr. at 208:10-15. Plaintiff Dorman also was terminated in the

same restructuring and has the same four-page document. Dorman Tr. 338:11-340:12; APP 1124.

248. Joyner bases his claims on the "when coverage ends" provision of SPD 1 which he claims misled him into believing that CT&T could not terminate his retiree medical benefits. Joyner Tr. at 228:17-230:9; *see also id.* at 269:4-9. It provides:

> *Retirees*
> Your coverage under the Retiree Medical Plan ends:
> - when you die, or
> - when you no longer pay your share of the cost coverage.

225:23-226:11; APP 1669.

249. Phillips gave Joyner a "checklist" which itemized his retirement benefits. *Id.* at 270:12-23, APP 1128; 271:14-16; *see also id.* at 60:13-61:18, 64:1-13, 73:16-22. Joyner understood that many of the benefits listed in the checklist were described in SPDs. *Id.* at 271:23-272:6; *see also id.* at 116:9-117:2. Joyner alleges that the checklist and SPD 1 are the two written documents that support his claim for vested benefits. *Id.* at 274:7-18. The checklist contains the following description of retiree life insurance and medical benefits:

> "[L]ife insurance will be continued at no cost to the retiree . . . on the fifth anniversary of retirement, insurance will be reduced by 50% and will remain at this figure for the remainder of the retiree's lifetime."
>
> "[Medical] insurance may be continued after retirement provided that the monthly premium for dental insurance is paid in advance."

250. Joyner's employment at CT&T ended because his position was eliminated in a Sprint restructuring. *Id.* at 191:15-24.

251. Joyner admitted that an ROR provision in the "retiree letter" of another class member reserved the Company's right to change that class member's retiree benefits. Joyner Tr. at 277:2-278:2, 279:23-280:24; APP 1718.

N. ROBERT KING[16]

252. Plaintiff Robert King ("King") began his employment at United Telephone Company of Florida in 1959, and remained on that company's payroll as an active employee until August 31, 1993, at which time he was 63 years old. Doc. 295 at 4.

253. King contends that SPD 1 (medical insurance) and SPD 15 (life insurance) were in effect when he retired. UF ¶¶20 & 54; Exs. A-1 & A-15.

Alleged Oral Communications

254. King's claim is based on an alleged omission in a single conversation he had with Mary Rose, a human resources employee who informed him shortly before his retirement in 1993 that the Company had the right to *change* retiree benefits. King Tr. at 44:15-47:1. Because Mary Rose did not tell King that the Company could "terminate" its benefit programs, King inferred the Company did not have this right. *Id.*

Written Communications

255. In 1990, King received an "employee handbook" that included SPD 1. *Id.* at 60:7-61:2; APP 1778. The SPD states in part: "The company expects to continue the retiree medical plan indefinitely, however, the company reserves the right to amend or terminate this plan or any statement made in this Summary Plan Description at any time." Ex. A-1 at EQ_FUL_0094.

256. King contends the "When Does Coverage End" provision of SPD 1 means that the Company could not change the retiree medical benefits until he dies. King Tr. at 62:13-63:13.

257. In 1992, King received a memorandum in response to questions he asked regarding retiree benefits which stated in part:

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[16] The evidence cited in this section of the UF is located at APP 1721 to APP 1845: The King deposition transcript ("King Tr.") is at APP 1721 to APP 1777, and the documents are at APP 1778 to APP 1845.

> Q9. Am I correct in my understanding that the company will pay 85% of the premiums under the company's retiree medical program for me and my spouse for my life? . . .
>
> A9. *The company will not pay 85% of the medical premiums for you and your spouse during your life*. Retirees fall into one of eight categories . . . [t]hese categories are listed on page 7 of the *Retiree Medical Summary Plan Description (SPD)*. . . . Please note that . . . *price tags change* effective January 1 of each year. *In addition, deductibles, out-of-pocket maximums and other features may change from year to year*.
>
> A11. As a retiree's coverage category changes, the retiree dollars and price tags change to reflect the appropriate coverage category. Generally, the price tag is lower at age 65 because Medicare is primary. *We cannot predict what will happen in the future*. . .
>
> * * *
>
> Please note that *all responses are in accordance with current policies and provisions and are subject to change*.

King Tr. 91:17-93:1; APP 1838-39, 1845. (emphasis added).

258. King understood this memorandum to mean that "we were in the process of reorganization, and that things were changing almost on a daily basis, and that this is what it is at this time." *Id.* at 96:11-97:9.

O. LAUDIE MCLAURIN[17]

259. Plaintiff Laudie McLaurin ("McLaurin") began his employment at CT&T in 1953, and remained on CT&T's payroll as an active employee until December 30, 1988, at which time he was 55 years old. Doc. 295 at 6.

260. McLaurin contends that SPDs 9 (life insurance) and 10 (medical insurance) were in effect when he retired. UF ¶¶44 & 47; Exs. A-9 & A-10.

[17] The evidence cited in this section of the UF is located at APP 1846 to APP 1881: The McLaurin deposition transcript ("McLaurin Tr.") is at APP 1846 to APP 1881.

Alleged Oral Communications

261. McLaurin alleges that in the summer of 1998, after he decided to retire, his supervisor, Donald E. Clark, told him that retiree medical and life insurance were for life. McLaurin Tr. at 50:12-56:6, 57:2-14. Other than this, McLaurin could not recall anything specific that Clark said, and neither he nor Clark referred to any documents in this conversation. *Id.*

262. McLaurin alleges that in the second or third week of December 1988, Plaintiff Dorman telephoned him to apologize for missing McLaurin's retirement party and confirmed the life insurance, health insurance, and concession telephone service benefits he would receive would be or the remained of his life. *Id.* at 46:18-48:10.

Written Communications

263. McLaurin testified that he was "sure" he received documents describing his medical benefits during retirement, and that he did not receive any documents from the Company suggesting that his retiree benefits were for life. McLaurin Tr. at 81:7-18, 57:18-21.

264. McLaurin decided to retire in spring 1988 when he did because he had reached the milestones of 55 years of age and 35 years with the Company, and "felt like I was ready to go." *Id.* at 19:4-9, 19:23-20:22; *see also* Hollingsworth Tr. at 367:15-368:6 (Hollingsworth testified that McLaurin told him that it was always McLaurin's plan to retire at age fifty-five).

P. WANDA SHIPLEY[18]

265. Plaintiff Wanda Shipley ("Shipley") began her employment at United Inter-Mountain Telephone Company ("UITC") in 1960, and her last day worked was June 30, 1999, at which time she was 56 years old. Doc. 295 at 5.

[18] The evidence cited in this section of the UF is located at APP 1882 to APP 1978 and APP 2186 to APP 2203: The Shipley deposition transcript ("Shipley Tr.") is at APP 1882 to APP 1931, and the documents are at APP 1932 to APP 1978 and APP 2186 to APP 2203.

266. Shipley contends that SPD 6 (medical and life insurance) was in effect when she retired. UF ¶31 & Ex. A-6.

Alleged Oral Communications

267. Shipley alleges that human resources employee Jim Walters orally promised her a retirement package that included lifetime retiree medical and life insurance benefits in a group session with four other employees in the Spring of 1999. Shipley Tr. at 8:23-9:16.

Written Communications

268. Shipley alleges that Walters, also provided her with a written "package" that allegedly contained promises of lifetime benefits, which she read from "cover to cover." Shipley Tr. at 8:23-10:23, 38:25-39:1. The package also allegedly included severance pay for two years, a pension and a 401k account, dental benefits, unemployment insurance, and a telephone concession of $30 per month. *Id.* at 50:21-51:20.

269. Shipley claims she no longer has a copy of the "package" that Walter allegedly gave to her or any related documents that describe the alleged benefits the Company promised. *Id.* at 108:12-109:15.

270. Although Shipley alleges that her retiree medical and life insurance benefits were "for life" based on the "package" she allegedly received from Walters, *id.* at 8:25-10:1, she could not recall in her deposition any specific statements to that effect. *Id.* at 42:3-12, 50:21-56:18

271. On or about November 7, 2000, prior to her retirement commencement date, but after allegedly receiving the "package" from Walters, Shipley received and read a letter from Linda Davidson, Benefits Administrator, summarizing various elections, forms, and benefits related to retirement. *Id.* at 26:7-27:17; 31:4-8; APP 193, at Davidson's letter stated in part: "The

Company reserves the right to amend, discontinue, or terminate these benefits." *Id.* at 46:23-47:13, APP 1933-34.

272. Enclosed with Davidson's letter was a "Retiree Medical Plan packet," which included an SPD. Shipley Tr. at 90:18-91:1, APP 1933-34.

273. On December 8, 2000, Shipley sent her completed retirement forms back to Davidson. Shipley Tr. at 90:18-91:1.

274. Prior to making her decision to retire, Shipley received and reviewed SPD 6, which provided in relevant part: "the company reserves the right to amend or terminate this plan, or any statement made in this summary plan description, at any time." *Id.* at 57:17-61:2; APP 1937; Shipley Tr. at 140:25-141:14.

275. Shipley did not read any of the ROR provisions in SPD 6 nor believe such provisions applied to her, Shipley Tr. at 60:2-23; 63:10-66:4, but she did read the "When Does Coverage End" provision the very first time she opened the SPD because that section, in her words, "jumped out like a tiger at me." *Id.* at 193:16-194:10

276. Shipley would not have done anything different had she known that the Company had the right to terminate her benefits. *Id.* at 10:2-5, 110:11-19, 168:2-16, 186:12-187:4.

Q. CARL SOMDAHL[19]

277. Plaintiff Carl Somdahl ("Somdahl") began his employment at United Telephone Company of the Northwest ("UTC-NW") in 1977, and remained on that company's payroll as an active employee until January 29, 1999, at which time he was 65 years old. Doc. No. 295, at 5.

278. Somdahl contends that SPD 3 (medical insurance) and SPD 14 (life insurance) were in effect when he retired. UF ¶¶ 23 & 53; Exs. A-3 & A-14.

[19] The evidence cited in this section of the UF is located at APP 1979 to APP 2143: The Somdahl deposition transcript ("Somdahl Tr.") is at APP 1979 to APP 2032, and the documents are at APP 2033 to APP 2143.

Alleged Oral Misrepresentations

279. Somdahl alleges that in March 1998, human resources employee Sherry Chichester told him that his retiree medical coverage would continue until his death. Somdahl Tr. at 21:17-23:25.

280. Somdahl alleges that in December 1998 he had a discussion with human resources employee Linda Smith, and that although he does not recall exactly what Smith said, he recalls that the "general tone of the conversation was that [medical] was for a lifetime." *Id.* at 69:20-70:10, 74:11-76:17.

281. Somdahl alleges that in 1998, he had a conversation with Margie Balough, a Benefits Coordinator, about whether his medical benefits "would be there" in retirement. Somdahl alleges that this conversation was one of the reasons he concluded his retiree benefits were lifetime. *Id.* at 125:8-21, 134:5-16.

282. Although Somdahl prepared notes of several of his conversations with human resources personnel, those notes contain no references to "lifetime" benefits. *Id.* at 50:24-51:19, APP 2033; 67:24-68:13, APP 2034, 134:23-135:9, APP 2079, 131:18-133:8, APP 2078, 80:5-81:12, APP 2077, 157:1-9, APP 2082.

Written Communications

283. In 1991, Somdahl received a memo from Sherry Chichester enclosing an employee handbook that stated on the first page: "United reserves the right to change or eliminate any or all of the policies, practices, and plans contained in this handbook at any time and to take actions that vary from them." Somdahl Tr. at 160:12-25, APP 2086. Somdahl signed an acknowledgment saying that he would read the handbook in its entirety, but did not do so. Somdahl Tr. at 161:19-21, 162:5-21.

284. One of the benefit programs listed in the "ABOUT YOUR BENEFITS" section of the handbook was the retirement plan, including the "pension plan, savings plan, and retiree medical plan." APP 2131. That same section stated: "Please keep in mind that United Telephone Company of Northwest retains the right to eliminate, to amend, or to improve your benefit programs." *Id.* at APP 2123. Although this portion of the handbook informs employees that they are vested in the pension plan once they have completed five years of continuous service, no similar vesting language is used to describe retiree medical benefits. *Id.* at APP 2131.

285. On December 11, 1998, Somdahl contacted another human resources employee, Linda Smith, in part because he wanted written documentation about his retirement benefits. Somdahl Tr. at 69:20-70:10, 74:20-75:1, 76:24-78:7. Smith immediately sent Somdahl a copy of the Retiree Medical Plan SPD. *Id.* at 74:11-75:4.

286. During the two week period before he finalized his retirement paperwork, Somdahl received SPD 3. Somdahl Tr. at 53:3-16; APP 2034.

287. A provision on the first page of SPD 3 reserves the Company's right to terminate benefits. APP 2034; Somdahl Tr. 54:21-55:19. Somdahl claims not to have read this provision and suggested that he read only the "When Coverage Ends" section on page 13, and the Prescription Drug Program on page 32. *Id.* at 56:2-15.

288. A section of SPD 3 entitled "Appendix A–Medical Coverage," included the following provision on the first page:

> Appendix A explains the medical coverage that is available to retirees under the Sprint Retiree Medical Plan. This coverage is available beginning in 1991, but in the future, the company may change or terminate any of the coverages or options that are described.

APP 2050.

289. Although Somdahl claimed that "the specifics of [his] medical coverage [were] important in [his] decision to retire," *id.* at 63:7-9, he claims he never read any part of Appendix A–Medical Coverage. *Id.* at 62:14-25. Rather, Somdahl assumed that he adequately understood the retiree medical benefits based on documents he received regarding coverage options. Somdahl Tr. at 63:7-22.

290. Likewise, Somdahl claims that he did not read the ROR provision on the first page of "Appendix B–Prescription Drug Program," but probably started his review on the *second page* of Appendix B. *Id.* at 64:19-65:9; APP 2065.

291. Somdahl alleges that the following sentence in SPD 3 guaranteed him medical benefits until death: "Retirees: Your coverage under the Retiree Medical Plan ends: – when you die, or – when you no longer pay your share of your cost coverage." Somdahl Tr. at 77:5-18, 32:4-33:1, 53:3-54:3; APP 2046.

292. Somdahl had always planned to retire when he turned 65, which was on January 27, 1999. Somdahl Tr. at 21:9-16.

III. ARGUMENT

A. APPLICABLE LEGAL STANDARDS

To pursue a breach of fiduciary duty claim pursuant to ERISA §404(a), a plaintiff must establish: "'(1) the defendant's status as an ERISA fiduciary acting as a fiduciary; (2) a misrepresentation on the part of the defendant; (3) the materiality of that misrepresentation; and (4) detrimental reliance by the plaintiff on the misrepresentation.'" Doc. 199, *Fulghum v. Embarq Corp.*, No. 07-2602, 2011 WL 13615, at *2 (D. Kan., Jan. 4, 2011) (quoting *Randles v. Galichia Med. Group, P.A.*, No. 05-1374, 2006 WL 3760251, at *13 (D. Kan. Dec. 18, 2006); *see also Kerber v. Qwest Group Life Ins. Plan*, 656 F. Supp. 2d 1279, 1287 (D. Colo. 2009),

aff'd, 647 F.3d 950 (10th Cir. 2011) (citing *Daniels v. Thomas & Betts Corp.*, 263 F.3d 66, 73 (3d Cir. 2001)); *Owen v. Regence Bluecross Blueshield of Utah*, 388 F. Supp. 2d 1335, 1338 (D. Utah 2005).[20]

Plaintiffs' BOFD Claims fall into two broad categories. First, Plaintiffs claim that, through SPDs the Company periodically distributed, Defendants "misinformed and misled [them] into believing that they would receive their benefits until death," and failed to "clearly and conspicuously disclose that the benefits were subject to change[.]" Pretrial Order, Doc. 295 at 21, 22. Second, Plaintiffs claim that Defendants made additional oral and written representations to them that the Disputed Benefits would continue in retirement "until death" or "for life." These representations allegedly were made in: (1) SPDs, (2) Other Written Statements; and (3) Oral Statements.[21]

The Tenth Circuit's recent decision in *Kerber* confirms that Plaintiffs' BOFD Claims are futile. "A misrepresentation is material 'if there is a *substantial* likelihood that it would mislead a *reasonable* employee in making an *adequately informed* [retirement] decision.'" *Kerber*, 647 F.3d at 971 (quoting *Horn v. Cendant Operations, Inc.*, 69 F. App'x 421, 428 (10th Cir. 2003))

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[20] As noted in *Kerber*, the Tenth Circuit has not decided whether detrimental reliance is a required element of a breach of fiduciary duty claim based on a misrepresentation. In *Tomlinson v. El Paso Corp.*, 653 F.3d 1281 (10th Cir. 2011), *cert. denied*, -- S. Ct. --, 2012 WL 538411 (U.S. Feb. 21, 2012), the court commented that in a disclosure case under 29 U.S.C. §§1022 at 1054(h), reliance on the SPD is no longer required following the Supreme Court's decision in *Cigna Corp. v. Amara*, 131 S. Ct. 1866 (2011). 653 F.3d at 1295. However, this discussion from *Amara* is *dicta*. *See Amara*, 131 S.Ct. at 1884 (Scalia, J. dissenting). In addition, the *Tomlinson* court also observed that *Amara* did not eliminate the reliance element for claims such as those presented by Plaintiffs here. *Tomlinson*, 653 F.3d at 1295 (discussing estoppel remedy). Moreover, the Tenth Circuit's discussion of *Amara* was unnecessary to resolve the issue in *Tomlinson* because the court decided the issue on appeal under a separate legal principle. *Id.* ("[P]laintiffs' SPD claim suffers from a more fundamental problem--under our precedent it is clear that wear-aways need not be explicitly disclosed in the SPD."). Thus, not only is *Tomlinson* based on untested *dicta*, it is also factually distinguishable and therefore not controlling here. In any event, as discussed below, Plaintiffs' claims fail even without reaching the reasonable reliance element.

[21] Specifically, seven of the 17 Plaintiffs allege that an SPD's coverage provision (e.g., "your coverage ends when – you die") is a misrepresentation. Nine Plaintiffs claim that the Company misrepresented its right to amend or terminate the Disputed Benefits in other forms of written communications, including benefits, brochures, forms and notes, and a CBA. Finally, 14 Plaintiffs claim that various oral statements over the course of more than 60 years by more than a dozen individuals, located all over the country, constitute actionable misrepresentations.

(brackets in original; emphasis added). Here, the undisputed facts prove that there was not a substantial likelihood that the alleged statements would mislead anyone. At most, Plaintiffs have adduced evidence of accurate statements regarding then-existing benefits and intentions. Plaintiffs' failure to read SPDs and other relevant documents underscores that Plaintiffs did not act reasonably and, accordingly, were not engaged in making an adequately informed retirement decision.

Thus, even when viewed in the light most favorable to Plaintiffs, it is undisputed that Defendants *repeatedly* informed the Plaintiffs – through SPDs and other communications – that the Disputed Benefits were subject to change and termination. Accordingly, Defendants are entitled to summary judgment on Plaintiffs' BOFD Claims.

B. THE SPDS CONTAIN NO MISREPRESENTATIONS OR OMISSIONS.

Plaintiffs allege that if the Disputed Benefits "were not in fact secure from reduction or termination during retirement," then Defendants breached their fiduciary duties under ERISA §404(a)(1) "by failing to issue [SPDs] which prominently, clearly and accurately disclosed this fact in a manner that could be understood by the average plan participant." TAC ¶¶114-16 at 115 (citing 29 U.S.C. §1022(a) and (b)); *see also* Pre-Trial Order at 20 ("The SPDs did not make clear that 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."); *see also id.* at 22 ("The same types of evidence [supporting contractual vesting claims] will be cited in support of the ERISA breach of fiduciary duty claims of 17 named plaintiffs.").

As demonstrated in Defendants' Motion for Summary Judgment on the Named Plaintiffs' First and Third Claims for Relief (Contractual Vesting Claims), the SPDs in effect when all of the Plaintiffs retired are devoid of any "clear and express language" stating that the Disputed

Benefits are forever unalterable (*i.e.*, "vested"). Instead these SPDs state – sometimes numerous times – that the benefits can be terminated. UF¶¶ 28, 34, 35, 40, 45, 49, 50, 55, 63, 64. An SPD that accurately describes *un*vested benefits as such cannot form the basis of a breach of fiduciary duty claim because it is not misleading as a matter of law. *Kerber*, 647 F.3d at 970 (holding that an accurate statement "[can]not constitute a material misrepresentation"). Accordingly, Defendants are entitled to summary judgment on all BOFD Claims premised on an allegedly misleading SPD.

Alternatively, Defendants are entitled to summary judgment because Bullock, Dillon, Fulghum, Joyner, King, Shipley, and Somdahl – the Plaintiffs who allege an SPD forms a basis of their claims – have failed to adduce evidence that the SPDs contain an actionable misrepresentation. Despite not having fully read SPD 1 until 2008, after this lawsuit was filed, Fulghum identifies the "When Coverage Ends" provision of SPD 1 as the source of the misrepresentation on which he bases his Claim. UF ¶88. So do Joyner and King. UF ¶¶248, 256. Somdahl and Bullock (SPD 3), Dillon (SPD 5), and Shipley (SPD 6) likewise allege that the "When Coverage Ends" provision was materially misleading. UF ¶¶287, 105, 215 and 275. These SPDs do not contain an actionable misrepresentation or omission. To the contrary, SPD 1 has *five* ROR provisions, SPD 3 and SPD 6 have *six* ROR provisions, and SPD 5 has *seven* ROR provisions. UF ¶¶28, 34, 35.

In *Kerber*, the Tenth Circuit affirmed summary judgment for defendant on the plaintiffs' contractual vesting and breach of fiduciary duty claims. There, the plaintiffs asserted that retiree life insurance benefits could not be reduced to $10,000, notwithstanding the plan document's ROR provision, because the coverage provisions 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. Secondly, as Plaintiffs do here, the *Kerber* plaintiffs alleged that Qwest made additional misrepresentations in (1) a brochure, entitled "Insurance Plan Description" ("IPD"), which was included with a retirement information packet, (2) a videoconference presentation, and (3) confirmation of benefits statements. *Id.* at 968.

After rejecting the plaintiffs' contractual vesting argument, the Tenth Circuit held that none of the alleged misrepresentations was material. *Id.* at 969-971. The IPD described the life insurance coverage in terms similar to some of the benefits descriptions at issue here: "your Basic coverage . . . continues at no cost to you. The amount of coverage . . . will be reduced by 10% beginning on your 66th birthday and each year thereafter up to a maximum reduction of 50% at age 70." *Id.* at 969 (citation and quotations omitted). On a separate page in the IPD appeared an ROR provision. *Id.* The *Kerbe*r plaintiffs alleged that Qwest "promised" not to amend the plan in any way inconsistent with the coverage provision, just as Plaintiffs here allege that the Company promised not to amend the Plans in any way inconsistent with terms like "your coverage ends – when you die" or "until your death." *Id.*

Critically, the Tenth Circuit rejected this argument on two grounds. First, the court held that the coverage provision "is not a promise that Qwest would not amend the Plan." *Id.* The same is true here. The coverage provisions in *Kerber*, like the coverage provisions here, accurately described the benefits that existed at that time, and were not promises regarding the separate – and non-fiduciary – act of plan amendment. 647 F.3d at 969. *See also* Doc. 324.

Second, as the Tenth Circuit also held in *Kerber*, an accurate statement "[can]not constitute a material misrepresentation." *Id.* at 970. Thus, *Kerber* compels the conclusion that coverage provisions are not material misrepresentations regardless of whether an ROR provision appears in the document. *Id.* at 969-970. The court held that such provisions have nothing to do

with amendment and termination. When a plan sponsor also includes provisions that state the benefits are subject to termination, the force of this conclusion is even greater. *Id.* at 969 (finding that a representation is immaterial "is the only reasonable reading").

Next, the *Kerber* plaintiffs argued that Qwest misled them regarding the effect of the ROR during a videoconference to discuss the "5+5" early retirement offer. 647 F.3d at 970. Qwest representatives explained, in part, that the ROR is "intended to make the Plan more meaningful and more affordable not only for the employee, but for the company." *Id.* The Tenth Circuit concluded that this statement is true, noting that Qwest – like Defendants here – changed the plans sometimes to benefit retirees, *see, e.g.*, APP 1121 (notifying retirees of "significant improvements to the retirement programs"), and sometimes to the detriment of retirees. *Id.* The court held that an accurate statement "cannot constitute a material misrepresentation[.]" *Id.* at 970.

Finally, the Tenth Circuit held that a representation in a benefits confirmation statement was not "material," even if it was a "misrepresentation," because the *Kerber* plaintiffs retired before the confirmation statements were issued and did not rely on them to inform their retirement decisions. "Accordingly, the misrepresentations in the Confirmations Statements were immaterial, and summary judgment to Qwest was appropriate." *Id.* The Tenth Circuit's materiality analysis in *Kerber* thus demonstrates that the "materiality" element and the "reliance" element of a breach of fiduciary duty claim are "two sides of the same coin." *Owen*, 388 F. Supp. 2d at 1338 (observing that where a person is not misled, "the alleged misrepresentation is not material.").

Here, Plaintiffs either did not read the SPD in question, or ignored the ROR provisions

and did not care what they said. Fulghum, for instance, did not read the SPD at all.[22] UF ¶88. In his deposition, Fulghum testified that "[o]ther than providing the information to [him] in writing, *[there was nothing] the company could have done in 1996 to convince [him] that the company had reserved the right to amend, discontinue, or terminate the benefits*." UF ¶85. He further admitted that even though the Company provided the ROR provision to him in a separate writing – a letter addressed to him concerning his retirement – it had no effect on Fulghum's unilateral decision that the Disputed Benefits could not be changed. UF ¶¶84-85. The retiree letter was a three page document, functionally similar to the "IPD" in *Kerber*. Under Tenth Circuit law, a reasonable plan participant who received such a letter, could only come to one reasonable conclusion – the Disputed Benefits were subject to change. *Id.* at 969.

Indeed, Joyner (and Dorman) reviewed the ROR in another class member's retiree letter and reached exactly that conclusion. UF ¶¶251, 237. Yet, Fulghum and Joyner (and Dorman) did not reach the same conclusion when the ROR provisions were in documents that applied to *them*. UF ¶85, 231-32, 244. There is no room after *Kerber* (or, for that matter, before *Kerber*) for Plaintiffs to ignore the "only reasonable reading" of one document for a patently unreasonable reading of a second document.

Accordingly, Defendants are entitled to partial summary judgment on the BOFD Claims of Fulghum, Bullock, Dillon, Joyner, King, Shipley and Somdahl. Although each of these Plaintiffs also alleges an alternative basis for his or her BOFD Claims, as demonstrated below, those arguments fare no better.

[22] Fulghum's failure – indeed refusal – to read SPD 1 provides an additional basis for granting summary judgment. Because he did not read it, the SPD "could not have informed [his] retirement decisions in any way." *Kerber*, 647 F.3d at 970. Thus, any alleged misrepresentations in SPD 1 were not material. *Id.*

C. THE WRITTEN STATEMENTS IDENTIFIED BY BARNES, BRITT, BULLOCK, DANIEL, DORMAN, GAMES, JOYNER, HOLLINGSWORTH, AND SHIPLEY CONTAIN NO ACTIONABLE MISREPRESENTATIONS OR OMISSIONS.

Nine Plaintiffs allege that written statements in other types of documents constitute material misrepresentations. These documents fall into three categories: benefits correspondence, forms and notes, and a CBA. As with the SPDs discussed above, none of these documents contain an actionable misrepresentation or omission.

1. Benefits Correspondence[23]

Bullock, Games and Hollingsworth allege that benefits information received in Fall 2001 misled them and induced them to retire. UF ¶¶113, 123, 131. Each Plaintiff received the "Important News for Everyone" brochure, a letter (""Retirement and Your Future with Sprint") from Sprint's VP of Benefits, E.J. Holland, and the Retiree Medical Financial Support Comparison. UF ¶¶106, 120, 129. Games and Bullock received through the mail the Important News brochure and SPD 5. UF ¶¶103, 106, 116, 120. Bullock and Hollingsworth also point to a slide presentation from a November 2001 webcast. None of this information is materially misleading. To the contrary, these documents informed Plaintiffs that the benefits were *subject to change and termination*, which accurately described the terms of the Plans. *See Kerber*, 647 F.3d at 968-71 (explaining that documents, presentations and oral statements that accurately describe the terms of a plan cannot constitute material misrepresentation).

For example, the "Retirement and Your Future with Sprint" letter stated that employees retiring in 2001 would be subject to a cost-sharing arrangement that was "subject to adjustment each year." UF ¶107. That letter enclosed the Retiree Medical Financial Support Comparison,

[23] Daniel also alleges that a document promised him vested benefits. Shipley makes a similar allegation regarding a document that she calls a "package" (presumably, these are different documents). However, neither Plaintiff has a copy of the document nor can either recall its terms. UF ¶¶206, 268, 269. Accordingly, Daniel and Shipley have failed to adduce evidence of a material misrepresentation and their Claims based on these unidentified documents should be dismissed.

which stated that the "Retiree Programs" were subject to amendment or termination. UF ¶108. In November 2001, Bullock and Hollingsworth's wife (who was then also a Company employee) attended and took notes of a webcast regarding upcoming changes to the Disputed Benefits – *i.e.*, phasing out retiree life insurance and introducing a new retiree medical funding method (SHARE account). UF ¶¶112, 132. On Bullock's copy of the slide presentation, adjacent to the question "Is this new plan a step toward phasing out retiree medical coverage?" Bullock noted the answer "Hope to continue; decisions made each year." UF ¶112. Similarly, Mrs. Hollingsworth wrote in her notes that there was "*no locking at all*" with regard to retiree medical and life insurance benefits, including the CT&T "grandfathered" life insurance, that the new medical plan was "*not like a pension plan*," and that there would be "*No Vesting Associated with Share Acct*." UF ¶132.

Far from being a misrepresentation – let alone a material misrepresentation – this information disclosed that the Disputed Benefits could change and Plaintiffs knew it. Indeed, the benefits were changing in 2001 and these documents confirmed that there could be additional changes in the future. After reading a statement in the "Retirement and Your Future" letter regarding the funding method through which the Company subsidized her retiree medical benefits, Bullock reached the conclusion that it "could be changed drastically at any time[.]" UF ¶110. Moreover, these documents included ROR provisions. UF ¶¶104, 106-09. Therefore, these written statements were not material misrepresentations. *See Kerber*, 647 F.3d at 969, 970 (the "only reasonable reading" of the document is that there are no material misrepresentations).

2. Forms and Notes

Plaintiffs essentially contend that retirement forms should trump the SPDs. Barnes identifies a note that her supervisor posted in the workplace, which stated that employees must retire by a certain date in order to "retire under" the then-existing retiree medical funding method. UF ¶176. Barnes also alleges that a form entitled "Sprint Retiree Life Insurance –

Retiree Worksheet" is a misrepresentation because it described her life insurance benefit as "grandfathered." UF ¶175. Similarly, Daniel alleges that a Pension/Retiree Benefits document that lists retiree medical premiums is misleading, and Daniel, Dorman, Joyner and Hollingsworth allege that a "checklist" was misleading because the item dealing with medical insurance said that it "may continue" in retirement and the life insurance benefit was described as reducing after five years and then remaining at a fixed amount for "lifetime." UF ¶¶135, 203, 234, 249.

As a matter of law, none of these statements constitute a material misrepresentation. In *Robinson v. Sheet Metal Workers' Nat'l Pension Fund, Plan A*, 441 F. Supp. 2d 405 (D. Conn. 2006), plaintiffs alleged that defendants breached their fiduciary duties by giving them documents containing "lifetime" language that failed to mention any right to amend plan benefits. *Id.* at 433. In granting summary judgment for defendants, the court held that plaintiffs failed to establish a material misrepresentation as a matter of law:

> First . . . the "lifetime" language those documents use was a factually correct statement of the benefits then existing under the Plan . . . . *Second, these non-plan documents were relatively cursory in nature . . . and did not purport to set out the full terms of the Plan. The Court does not believe that any reasonable beneficiary would have looked at these forms and assumed that they spelled out the full terms and conditions of the IRD benefit.* Third, beneficiaries were repeatedly informed, through successive versions of the Plan and SPDs, that IRD benefits might be amended.

Id. at 434 (emphasis added). *See also Jensen v. SIPCO, Inc.*, 38 F.3d 945,952 (8th Cir. 1994) ("the failure to disclose that a welfare plan's benefits are not vested is neither a material misrepresentation nor a breach of the plan administrator's fiduciary duties").

The "checklist" is exactly such a "cursory" document that each Plaintiff – Daniel, Dorman, Joyner and Hollingsworth – acknowledged, and a reasonable employee should have understood, "did not purport to set out the full terms of the Plan." *Robinson*, 441 F. Supp. 2d at

434. Indeed, Plaintiffs Dorman, Joyner and Hollingsworth admitted that the "checklist" was a summary of summaries – that is, throughout the checklist it references (and purports to attach) other documents that described retiree benefits in more detail, *including* SPDs. UF ¶¶135, 235, 249 (confirming the checklist references "summary benefit plans of CT&T," "service award" booklet, pension plan SPD and related forms, payroll authorization form, employee stock grant letters, telephone concession, and attachments regarding medical benefits and taxes).

At most, the checklist and the notes are accurate descriptions of then-existing benefits. *Robinson, supra; Kerber, supra* at 969. In *Frahm v. Equitable Life Assurance Soc'y*, 137 F.3d 955 (7th Cir. 1998), the plaintiffs alleged that oral and written statements made to them regarding their retirement benefits violated their employer's fiduciary duties. 137 F.2d at 957, 959. In rejecting this claim, the court stated:

> Statements of the kind to which plaintiffs point - that retirees should expect to receive the health benefits in force at the date of their retirement . . . were, when made, not false statements of fact. They were not false, because they accurately informed the [retirees] about the operation of the plans the [company] then had in force; and to the extent they were forward-looking, it was not clearly erroneous for the district court to conclude that they were statements not of "fact" but of present intention.

Id. at 961. Similarly, in *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998), retirees alleged that GM breached its fiduciary duties under ERISA by its oral and written representations to retirees regarding an early retirement program. *Id.* at 393-94. GM had provided health insurance benefits to retirees for more than two decades pursuant to plan documents that stated retirees would receive such benefits at GM's expense "for your lifetime," but that reserved GM's right to amend or terminate the plan at any time. *Id.* The Sixth Circuit noted that GM had not told the early retirees that their benefits "vested" upon retirement, but instead told them something "undeniably true under the terms of GM's then-existing plan,"

namely, that "their coverage was to be paid by GM for their lifetimes." *Id.* The court then stated:

> Explanations of benefits tend to sound promissory by their very nature. While these explanations may state a company's current intentions with respect to the plan, they cannot be expected to foreclose the possibility that changing financial conditions will require a company to modify welfare benefit plan provisions at some point in the future. GM's failure, if it may properly be called such, amounted to this: the company did not tell the early retirees at every possible opportunity that which it had told them many times before-namely, that the terms of the plan were subject to change.

Id. (quotation marks and citation omitted). The court concluded that GM had not breached its fiduciary duties as a matter of law. *Id.* at 405.

The same is true here. Not only are the alleged statements in the checklist true (and, therefore, not material misrepresentations under *Kerber*), but Sprint repeatedly informed Plaintiffs that the benefits could be changed or terminated – in SPDs, brochures, and other documents. Hollingsworth, for example, admits he received the Fall 2001 retiree enrollment material, including the Holland letter and Retiree Medical Financial Support Comparison document. UF ¶129. Dorman and Joyner similarly admit that each had the applicable SPD, which stated the Disputed Benefits could be terminated. UF ¶¶222, 239. Dorman and Joyner each received an "Explanation of Benefits" in connection with the termination program under which he was involuntarily terminated that stated *twice* that the Company could amend or terminate the Disputed Benefits. UF ¶¶230, 246. Both admitted that a similar ROR provision in the "retiree letter" of another class member reserved the Company's right to change that class member's retiree benefits. UF ¶¶237, 251. At the time of his retirement, Daniel also received a "retiree letter" with an ROR provision. UF ¶201. Barnes' supervisor recommended that Barnes consult with HR regarding her decision. UF ¶173. Barnes ignored the recommendation. *Id.* Barnes received a document prior to her retirement encouraging her to consult the SPD and the

CBA in effect at the time of her retirement also contained an ROR provision applicable to the Disputed Benefits. Barnes did not consult any of these resources and, like Fulghum, testified that there was nothing anyone could do (say or write) that would dissuade her from believing her benefits were vested. UF ¶183.

In addition, the EOB, the SPDs, the retiree letter, and the Fall 2001 material are similar to the "IPD" in the *Kerber* case. Of course, most of the Plaintiffs do not point to these documents as evidence supporting the BOFD Claims. But these documents nullify their Claims just the same, because there is no other reasonable reading of the documents, other than that the documents do *not* describe vested welfare benefits. A plaintiff states a claim for BOFD only if a *reasonable* plan participant would be misled. It is *unreasonable* to ignore ROR provisions. *Kerber, supra* at 968-70; *see also Balestracci v. NSTAR Elec. & Gas Corp.*, 449 F.3d 224, 233-34 (1st Cir. 2006) (where plaintiffs alleged employer breached its fiduciary duties by failing to state during meetings that dental benefits could be terminated, court affirmed summary judgment for employer because "plaintiffs were put on notice of the company's right to modify, amend, and terminate the plan by the individualized benefits summaries and program brochures, which pointed to the underlying plan documents that contained the reservation of rights") (footnote omitted); *Kamler v. H/N Telecomm. Servs., Inc.*, 305 F.3d 672, 682 (7th Cir. 2002) ("The failure expressly to inform Kamler that enrollment was a requirement of coverage was not a breach of fiduciary duty because the PAL Plan made this abundantly clear. PAL had no duty to emphasize something that had already been clearly communicated to Kamler.").

The retiree life insurance form and workplace posting, and the Pension/Retiree Benefits Document that allegedly misled Barnes and Daniel, respectively, are even more innocuous. UF ¶¶176, 204-05. There are no alleged "promises" in either document. Rather, Plaintiffs allege

that the forms led them to believe benefits were vested because the forms do not state otherwise. But silence regarding the right to change a welfare benefit, particularly in a form that contains no such promises, is not misleading. *See* cases discussed *supra*; *see also Sullivan v. CUNA Mut. Ins. Soc'y*, 649 F.3d 553, 557 (7th Cir. 2011) ("silence in election forms . . . cannot override the express terms of the formal plan"), *petition for cert. filed*, No. 11-978, 2012 S. Ct. Briefs LEXIS 570 (U.S. Feb. 7, 2012). In *Sullivan*, the Seventh Circuit rejected the plaintiffs' contractual vesting claims. However, the court's discussion of forms applies equally to breach of fiduciary duty claims based on the same "omission" at issue in that case. The Seventh Circuit explained

> Just as it would be a mistake for an employer to lard a summary plan description with the complexities of a full plan, it would be a blunder to add pages of caveats and reservations to an election form, which is supposed to be simple. People who want more details can look to other documents. It takes time to read and understand extra information, and the addition of hard-to-digest notices can lead to errors by masking the nature of the choice that a participant needs to make. Employers that want to help their workers make intelligent retirement decisions should pare down forms so that they focus on what matters most.

Id. at 558.

3. Collective Bargaining Agreement

Britt alleges that the CBA in effect at the time of his retirement contains a misrepresentation. UF ¶194. It does not. The CBA provided that the medical and life insurance coverage would remain in effect "during the term of the agreement." UF ¶195. It is undisputed that the benefits did in fact remain in effect during the term of the CBA, which expired in 1987, so the statement in the CBA was true. It therefore cannot be a misrepresentation. *Kerber, supra* at 970. Moreover, even if the CBA did contain a misrepresentation, it would be immaterial because Britt admits that he did not read it. *Kerber, supra* at 971; UF ¶194. Accordingly, the alleged misrepresentation "could not have informed [Britt's] retirement decisions in any way."

Id.

D. PLAINTIFFS' BOFD CLAIMS FAIL AS A MATTER OF LAW TO THE EXTENT THEY ARE BASED ON ORAL STATEMENTS.

Nearly all of the Plaintiffs base their BOFD Claims in part on alleged oral statements that retiree medical and life insurance benefits were "lifetime" benefits, *i.e.*, benefits that allegedly *could not* be reduced or eliminated. *See* UF ¶¶81, 117, 127, 186-87, 212, 223, 241. Even assuming these alleged statements could accurately be characterized as misrepresentations – a subject addressed below – they would contradict provisions, found both in SPDs in Plaintiffs' possession and in plan documents themselves, unambiguously stating that the benefits in question *could* be reduced or eliminated. *See* UF ¶¶88-91, 97-98, 106-09, 129, 156, 181, 193, 201, 205, 216, 220-31, 240, 245-46, 255, 271, 274, 283, 288; *see also* Ex. A-21 at EQ_FUL_0021, Ex. A-22 at EQ_FUL_0090. Thus, by means of their BOFD Claims, Plaintiffs seek to enforce alleged oral modifications to unambiguous ERISA benefit plans. As a matter of law, they cannot do so.

In *Averhart v. US West Mgmt. Pension Plan*, 46 F.3d 1480 (10th Cir. 1994), the Tenth Circuit declared: "Where the written language of the plan is clear, as here, any representation that is contrary to the written language of an ERISA plan can be viewed only as a purported modification of the plan and, hence, preempted by ERISA." *Id.* at 1485 (citation and brackets omitted). *Accord Straub v. Western Union Telegraph*, 851 F.2d 1262 (10th Cir. 1988) ("no liability exists under ERISA for purported oral modifications of the terms of an employee benefit plan"); *Miller v. Coastal Corp.*, 978 F.2d 622, 625 (10th Cir. 1992) (same).

The Tenth Circuit has not yet had occasion to decide whether the rule set forth above, which it has held applies to estoppel claims under ERISA (*Averhart*, 46 F.3d at 1485), also applies to BOFD claims under that statute. *See Kerber*, 647 F.3d at 970 ("Even assuming,

without deciding, that an oral statement that contradicts unambiguous, written plan language could form the basis of a material misrepresentation claim, the statements in the video conference are not misrepresentations."). However, both *Averhart* and a case cited in *Kerber (Id.)* – *Ladouceur v. Credit Lyonnais*, 584 F.3d 510 (2d Cir. 2009) – make clear that this rule should apply equally to estoppel and BOFD claims, and that applying the rule to one but not the other of these claims makes no sense.

The plaintiffs in *Ladouceur* based their BOFD claim, as Plaintiffs do here, on alleged oral statements that were inconsistent with the terms of an ERISA benefits plan. *Id.* at 511-12. The Second Circuit began its analysis in *Ladouceur* with the same principle that the Tenth Circuit announced in *Averhart*:

> "[O]ral promises are unenforceable under ERISA and therefore cannot vary the terms of an ERISA plan." *Perreca v. Gluck*, 295 F.3d 215, 225 (2d Cir. 2002); *see also* 29 U.S.C. § 1102(a)(1) ("Every employee benefit plan shall be established and maintained pursuant to a written instrument ...."). For this reason, we held in *Perreca* that an oral statement purporting to alter the terms of an ERISA benefit plan was insufficient to give rise to a claim for promissory estoppel.

584 F.3d at 512. The court then stated:

> This logic applies with equal force to alleged breaches of fiduciary duty when the alleged breach is an oral representation that purports to change an ERISA benefit plan. Since such a statement cannot effect a change in an ERISA plan, we see no reason to give the statement effect by re-characterizing it as a breach of fiduciary duty. Giving such effect to an oral statement would undermine ERISA's framework which ensures that ERISA plans be governed by written documents[.]

Id. (citation, quotation marks and brackets omitted).

Like the Second Circuit, the Seventh Circuit has held that BOFD claims cannot be based on oral statements that contradict the terms of ERISA benefits plans. *Frahm*, 137 F.3d at 958-60. Referring to 29 U.S.C. § 1104(a) – the ERISA provision on which Plaintiffs base their BOFD Claims (*see* Complaint ¶¶114 & 116) – the court stated:

> Treating § 1104(a) as establishing a duty to give plan participants whatever benefits someone on the staff led them to believe were available would undermine an essential principle established by ERISA: there are no oral variances from written plans. * * * Havoc would ensue if plans meant different things for different participants, depending on what someone said to them years earlier. Memory is weak compared to the written word, and there is a substantial risk that participants will not correctly recall what was said, will exaggerate (in their favor) what they heard, or will simply prevaricate in order to improve their position. Employers could do little to protect themselves against such claims – which is why ERISA calls for writings . . . . If it is hard now to administer plans that apply to all participants, it is impossible to see how any employer could administer a plan that meant something different for each participant, where the difference was not committed to writing. * * * We do not think that § 1104(a)(1)(B) takes back with the left hand the primacy of the written word that ERISA establishes with the right hand.

137 F.3d at 960.

This case amply illustrates the "havoc" that the court in *Frahm* warned would ensue if "plans meant different things for different participants, depending on what someone said to them years earlier" *Id.* Plaintiffs in this case – and presumably, the more than 14,000 class members waiting in the wings – allege that *different* oral statements allegedly made by *different* individuals between *nine and 62 years ago* entitle them to irreducible plan benefits, even though the SPDs in their possession state that those benefits can be reduced or eliminated. For example, Clark relies on statements allegedly made by *Charlie Burns* in *1950* and *Mildred Pierce*, the "chief operator," in *1976* (UF ¶139-40); Dorman relies on statements allegedly made by *M.J. Lamb* in *the late 1960s* (UF ¶223); Dillon relies on statements allegedly made by *Stan Fisher* in *the 1980s* (UF ¶209); Bullock relies on statements allegedly made by *Gayle Phillips* during a two-minute conversation in a stairwell in *the 1980s* (UF ¶94); Britt relies on statements allegedly made by *an unidentified employee* in *1985* (UF ¶186); McLaurin relies on statements allegedly made by *Donald Clark* in *1988* (UF ¶261); King relies on statements allegedly made by *Mary*

Rose in *1993* (UF ¶254); Joyner relies on statements allegedly made by *Wayne Peterson* in *1993* (UF ¶241); K. Carpenter relies on statements allegedly made by *Harland Groves, Betty Gorney, and Rita Etzwiler* in *1996* and *1997* (UF ¶150-53); Somdahl relies on statements allegedly made by *Sherry Chichester, Linda Smith, and Margie Balough* in *1998* (UF ¶279-82); Shipley relies on statements allegedly made by *Jim Walters* in *1999* (UF ¶267); Games relies on statements allegedly made by *Barbara Westfall* in *2001* (UF ¶117); and Barnes relies on statements allegedly made by *Gloria Jones* in *2003* (UF ¶171).

As the Seventh Circuit stated in *Frahm*, allowing Plaintiffs to amend written plan documents by means of these alleged oral statements makes no sense, because "[m]emory is weak compared to the written word, and there is a substantial risk that participants will not correctly recall what was said, will exaggerate (in their favor) what they heard, or will simply prevaricate in order to improve their position." 137 F.3d at 960. What's worse, "[e]mployers could do little to protect themselves against such claims." *Id.* For example, Defendants could not possibly rebut Britt's testimony regarding statements allegedly made to him 27 years ago, when Britt can't identify the person who allegedly made the statements and there is no chance whatever that the person could recall a 27-year-old conversation even if she could be identified and were still alive.

In sum, here as in *Averhart*, *Ladouceur*, and *Frahm*, Plaintiffs assert that alleged oral representations that are inconsistent with unambiguous plan documents are enforceable under ERISA. But "[w]here the written language of the plan is clear, as here, any representation that is contrary to the written language of an ERISA plan can be viewed only as a purported modification of the plan and, hence, preempted by ERISA." *Averhart*, 46 F.3d at 1485; *accord Ladouceur*, 584 F.3d at 512; *Frahm*, 137 at 960. Plaintiffs' BOFD Claims therefore fail as a

matter of law.

Moreover, nearly all of the oral statements upon which Plaintiffs base their BOFD Claims amount to, at most, accurate statements regarding the benefits that existed at the time of each Plaintiff's retirement and the Company's then-existing intention to continue providing such benefits. *See, e.g.*, UF ¶¶81, 128. Under *Kerber*, such accurate statements are not material misrepresentations. *Kerber, supra; see also Frahm*, 137 F.2d at 957, 959; *Vallone v. CNA Financial Corp.*, 375 F.3d 623, 633 (7th Cir. 2004) (holding that "lifetime" is not a magic word as it "may be construed as 'good for life unless revoked or modified'"); *Leuthner v. Blue Cross and Blue Shield of Northeastern Penn.*, 454 F.3d 120, 129 (3d Cir. 2006) ("A representation is not a misrepresentation if it is an accurate reflection of the plan administrator's intent when the statement was made."); *Armbruster v. K-H Corp.*, 206 F. Supp. 2d 870 (E.D. Mich. 2002) (granting summary judgment on retirees' BOFD claim where the SPDs in question stated, *inter alia*, that "your Medical insurance will continue for the rest of your life," and the company instructed human resource counselors to advise employees that their company health insurance benefits would be provided for life at company expense, because "[t]he information they were given was, at the time it was given, accurate"); *Byrnes v. Empire Blue Cross and Blue Shield*, No. 98 CIV. 8520, 2000 WL 1538605, at *9 (S.D.N.Y. Oct. 18, 2000) (granting summary judgment on BOFD claim because defendants' description of benefits as "lifetime" was an accurate statement of defendant's intent).[24]

Moreover, the Tenth Circuit's standard for materiality includes a reasonableness

[24] In *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 579 F.3d 220 (3d Cir. 2009), the Third Circuit affirmed the district court's finding that Unisys was aware of widespread confusion on the part of retirees concerning the nature of their benefits, did not regularly distribute SPDs, and therefore should have repeated its statutory right to terminate the plans in each individual communication with an employee regarding retiree medical benefits. *Id.* at 230-232. Here, by contrast, Defendants repeatedly apprised Plaintiffs, both *before* and *during* the periods when they were retiring, that the benefits could change or terminate. Moreover, *Unisys* is contrary to controlling cases in the Tenth Circuit, including *Averhart* and *Kerber*, as well as to the numerous cases from other circuits cited herein.

requirement. *Kerber*, 647 F.3d at 971 ("A misrepresentation is material if there is a substantial likelihood that it would mislead a *reasonable* employee in making an adequately informed [retirement] decision.") (emphasis added). The effect of an oral or written statement is judged as if the statement were received by a reasonable employee. Plaintiffs' conduct, however, was not reasonable in myriad ways and generally falls into one or more of the following categories of unreasonableness:

- **Did Not Read SPDs**: Most Plaintiffs did not read the SPDs.
- **Ignored / Misread SPDs**: Those that did not read them, ignored terms that conflicted with their view.
- **Ignored Other Notice of Change/Termination**: Plaintiffs' frequently disregarded other plan communications that contained information about their rights, including:
    - Personalized "retiree letters," email, or "Explanations of Benefits" that contained ROR provisions.
    - Enrollment Guides, which described changes and contained ROR provisions.
    - Other Company correspondence regarding changes and/or ROR provisions.
- **Acknowledged Rights**: Plaintiffs acknowledged that the Company had a right to change the benefits – and had repeatedly had exercised that right – yet asserted that the Company could not make the particular kinds of changes that are at issue in this lawsuit (e.g., termination of benefits).
- **Ignored Cross-References to SPDs**: Many Plaintiffs ignored cross-references to SPDs in documents and recommendations to consult with individuals who could provide SPDs or more information.
- **Access to SPDs**: None of the Plaintiffs alleged that they did not know how to obtain SPDs. Indeed, all Plaintiffs, save for Britt (who could not recall), received SPDs, booklets and other plan summaries.

The record confirms that Plaintiffs selectively listened to Company employees and selectively read written materials provided by the Company. The lead plaintiff, Fulghum, did not fully read the SPD. UF ¶88. He explained that there was nothing the Company could say (or

write) that would disabuse him of his mistaken belief that he was entitled to lifetime benefits – not even an ROR provision contained in a personalized letter sent directly to him that he admits he received with a retiree enrollment packet. UF ¶85. Bullock, the only Plaintiff to ask directly whether the Company could "do[] away" with her retiree welfare benefits received an unqualified "yes" in response: Gayle Phillips, a benefits manager, wrote to Bullock that the Disputed Benefits "*are not, nor have they ever been, guaranteed. The company has always had the right to amend, change or terminate them at any time. Fortunately, that is not something that has been done. We can only hope and pray that doesn't happen in the future*." UF ¶99. Yet, Bullock ignores this clear statement, made shortly before her retirement, and claims instead that she was misled by Ms. Phillips' statement 15 years earlier during a brief conversation in a stairwell. UF ¶94. This is plainly *unreasonable*.

Equally unreasonable, is Plaintiff King, who claims that a human resources employee told him that retiree benefits *could change*, but did not say they could terminate. UF ¶254. From this word choice alone, King inferred that his retiree benefits could not *terminate*. *Id*; *Sullivan v. CUNA Mut. Ins. Soc'y*, 649 F.3d 553, 557-58 (7th Cir. 2011) ("A participant who draws an unfounded inference from an omission from a summary plan description is not entitled to a remedy.").

Finally, Shipley and Somdahl further exemplify the unreasonable manner in which Plaintiffs construed the SPDs. Like many Plaintiffs, Shipley read and believed what she wanted to believe. For instance, Shipley incredibly testified that she did not read any of the multiple RORs in her SPD, including one *on the first page*, but contended that the coverage provision – found *on page 17* – "jumped out like a tiger at [her]." UF ¶275. Similarly, Somdahl alleges that three human resources employees made misrepresentations. After speaking with the first

employee, he testified that he wanted to "get something in writing." UF ¶285. When he asked the second employee, she "immediately got a copy of the medical plan [SPD]" to him. *Id.* During his deposition, however, Somdahl explained that he overlooked the ROR provision *on the cover* of his SPD and skipped to Appendix B. When it was pointed out to him that the cover of Appendix B *also* has an ROR provision, he testified that he began his review *on the second page*. UF ¶290.

E. THE POST-RETIREMENT STATEMENTS IDENTIFIED BY BRITT, THE CARPENTERS, FULGHUM, AND MCLAURIN ARE IMMATERIAL.

Five Plaintiffs – Britt, Betty Carpenter, Kenneth Carpenter, Fulghum, and McLaurin - allege that statements which occurred *after* they had made their decision to retire constitute material misrepresentations. But statements made after the decision to retire cannot be material because the element of causation is lacking. *See Owen*, 388 F. Supp. 3d at 1338. A statement simply cannot be causally linked to a decision which already has occurred and as a result, these statements cannot serve as the foundation of a breach of fiduciary duty claim.

In *Kerber*, the Tenth Circuit held that, "[a] misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed [retirement] decision." *Kerber*, 647 F.3d at 971 (citations and quotations omitted). The *Kerber* Court, faced with alleged misrepresentations that occurred after the plaintiffs had retired, determined that such misrepresentations "could not have informed Plaintiffs' retirement *decisions* in any way," and held that these misrepresentations were immaterial. *Kerber*, 647 F.3d at 971 (emphasis added).

In this case, five Plaintiffs have based their BOFD Claims on allegations of misrepresentations that occurred *after* they had already made the decision to retire. Britt alleges that he was misled in a meeting with an unidentified human resources employee, even though he

admits he had made his decision to retire prior to that meeting. UF ¶¶186-90. Betty Carpenter alleges that notes her husband made of a meeting that took place a year after she retired misled her. UF ¶165. Kenneth Carpenter testified that he applied for early retirement on March 12, 1996 but his Claims are based on misrepresentations that allegedly occurred on March 26, 1996 and November 5, 1997. UF ¶150-52. Fulghum alleges that he was misled by SPD 1 which he acknowledges he read fully for the first time more than twelve years after he retired. UF ¶88. And, lastly, McLaurin alleges that he was misled by his supervisor and Plaintiff Dorman, in conversations that occurred after McLaurin had already decided to retire. UF ¶261. Each of these misrepresentations occurred after the Plaintiff had made his or her decision to retire. Each of these alleged misrepresentations is therefore immaterial as it cannot be said to have informed that Plaintiff's decision to retire. *Kerber*, 647 F.3d at 971.

Moreover, the Carpenters and Joyner "retired" because their positions were eliminated. UF ¶¶161, 168, 250. Because they had no choice, no alleged misrepresentation could have caused their decision to retire. *Nydes v. Equitable Resources, Inc.*, 33 F. App'x 598, 600 (3d Cir. 2002) (affirming grant of summary judgment against plan participant because he did not have control over his decision to retire and therefore an alleged misrepresentation could not be material to his decision to retire).

F. THE NON-FIDUCIARY STATEMENTS IDENTIFIED BY BARNES, BRITT, BETTY CARPENTER, CLARK, DORMAN, HOLLINGSWORTH, JOYNER, AND MCLAURIN ARE NOT ACTIONABLE.

To recover for breach of a fiduciary duty based on misrepresentation, a plaintiff must prove that a fiduciary made the misrepresentation about which he complains. *Fulghum v. Embarq Corp.*, No. 07-2602, 2011 WL 13615, at *2 (holding that the elements of Plaintiffs' breach of fiduciary duty claim include "the defendant's status as an ERISA fiduciary acting as a fiduciary . . . .") (quotations and citations omitted); *see also Burstein v. Ret. Account Plan for*

Employees of Allegheny Health Educ. & Res. Found., 334 F.3d 365, 384 (3d Cir. 2003); *Daniels*, 263 F.3d at 73. Under ERISA, a fiduciary is one who exercises discretionary control over some aspect of the management or administration of an ERISA plan, or any control whatsoever over plan assets. *See* 29 U.S.C. § 1002(21)(A).[25] A person, furthermore, may be deemed a fiduciary on the basis of his or her functional authority and control relative to the plan. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993). However, Plaintiffs Barnes, Britt, Betty Carpenter, Clark, Dorman, Hollingsworth, Joyner, and McLaurin all base their Claims, in part, on statements that were made by non-fiduciaries. Those statements cannot serve as the basis for a breach of fiduciary duty claim as a matter of law.

Barnes alleges that her supervisor led her to believe that her benefits could not be terminated. UF ¶171. Britt alleges that an unidentified human resources employee misrepresented his benefits to him. UF ¶¶186-88. Betty Carpenter bases her allegations that the Company made misrepresentations to her on information she received from her husband. UF ¶165. Clark alleges that a conversation with a "chief operator" led him to believe that his retiree benefits could not be terminated. UF ¶139. Dorman alleges that he was promised that benefits would remain in effect until death by a human resources employee in a new-hire training program in the late 1960s, and later by his own supervisor, Vernon Hodges. UF ¶¶223-24. Hollingsworth alleges that his wife, an administrative assistant employed at the Company, gave him a document that misled him. UF ¶134. Joyner alleges that he was misled by his supervisor during a conversation about retirement in which the supervisor admittedly said nothing about

[25] The statute provides: "[A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A).

retiree benefits. UF ¶241. McLaurin alleges that he was misled by conversations with his supervisor and Plaintiff Dorman. UF ¶261-62.

Nothing in the record suggests that any of these individuals had a managerial, investment, or discretionary role for the Plans within the meaning of ERISA § 1002(21)(A). Therefore, Plaintiffs cannot demonstrate that the individuals identified above were fiduciaries[26] and, as a result, none of these statements are actionable. *Kannapien v. Quaker Oats Co.*, 507 F.3d 629, 639-40 (7th Cir. 2007) (holding that neither a plant manager nor a human resources manager were fiduciaries for the purposes of an ERISA breach of fiduciary duty claim).

G. PLAINTIFFS DID NOT REASONABLY RELY ON THE ALLEGED MISREPRESENTATIONS AND OMISSIONS.

As numerous courts have held, a plaintiff's reliance on alleged representations that plan benefits cannot be amended is inherently unreasonable where, as here, the plaintiff received SPDs and other documents that unambiguously reserved the right to amend or terminate the benefits in question. *See, e.g.*, *Frahm*, 137 F.3d at 961 ("In federal law, a person cannot rely on an oral statement, when he has in hand written materials disclosing the truth."); *Crosby v. Rohm & Haas Co.*, 480 F.3d 423, 431 (6th Cir. 2007) (affirming summary judgment for employer where "[t]he terms of this plan . . . were exceedingly clear, making [plaintiff's] alleged reliance on contrary informal communications from the company unreasonable as a matter of law"); *Mello v. Sara Lee Corp.*, 431 F.3d 440, 447-48 (5th Cir. 2005) (reversing summary judgment for employee on the ground that his "reliance on the informal benefit statements and oral representations was unreasonable" as a matter of law in light of "the clear and consistent case law forbidding recognizing reasonable reliance on informal documents in the face of unambiguous Plan terms") (footnote omitted); *In re Unisys Corp. Retiree Med. Benefit ERISA*

[26] Britt's allegation is so vague that it is impossible to identify the human resources employee, let alone assess that individual's role with the Plans.

Litig., 58 F.3d 896, 907 (3d Cir. 1995) ("Due to the unambiguous reservation of rights clauses in the summary plan descriptions by which Unisys could terminate its retiree medical benefit plans, the regular retirees cannot establish 'reasonable' detrimental reliance based on an interpretation that the SPDs promised vested benefits."); *Livick v. The Gillette Co.*, 524 F.3d 24, 31 (1st Cir. 2008) ("if the [plan] provision is clear . . . an informal statement in conflict with it is in effect purporting to *modify* the plan term, rendering any reliance on it inherently unreasonable.") (emphasis in original); *see also Woods v. Nat'l Med. Care, Inc.*, 25 F. App'x 767, 772 (10th Cir. 2001) (affirming summary judgment for employer on former employees' promissory estoppel claim on ground that "any reliance on [oral statements] could not have been reasonable given that they were clearly contradicted in writing").

Although the cases cited above generally deal with ERISA estoppel claims, "the rule applies with equal force in misrepresentation claims." *Kerber*, 656 F. Supp. 2d at 1292 (applying rule in granting summary judgment to defendants on retirees' BOFD claim based on alleged misrepresentations regarding life insurance benefits). Thus, in *Watson v. Consolidated Edison Pension & Benefits Plan*, 374 F. App'x 159, 162 (2d Cir. 2010), the Second Circuit affirmed summary judgment for defendants on retirees' BOFD claim, stating: "Given the clear written plan materials, no reasonable jury could find that these alleged vague oral statements were sufficient to induce reasonable reliance on the part of Appellants."

For many years before Plaintiffs retired, and often at the very time Plaintiffs were contemplating retirement, Defendants gave Plaintiffs SPDs and other documents that unambiguously reserved the right to amend or terminate the disputed benefits. Under these circumstances, Plaintiffs are barred as a matter of law from claiming that they reasonably relied on alleged informal contrary misstatements or omissions.

H. PLAINTIFFS' BREACH OF FIDUCIARY DUTY CLAIMS ARE TIME-BARRED UNDER ERISA § 413.

As discussed above, Plaintiffs cannot prevail on their Claims because an avalanche of documentary evidence advising Plaintiffs of Defendants' ERISA-protected right to amend welfare plans and reduce or terminate the Disputed Benefits confirms that no breach occurred. But even if misrepresentations had occurred, all but one of Plaintiffs' Claims nevertheless fail because they are time-barred under ERISA § 413's six-year statute of repose.

ERISA § 413 provides, in relevant part:

> No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part . . .
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation . . . .

29 U.S.C. § 1113. Section 413(1)(A) bars the claims of all Plaintiffs except Barnes because they filed suit more than six years after either their last date of work or the date they decided to retire.

All seventeen Plaintiffs contend that Defendants misled them prior to their retirement date, and that they relied on these misrepresentations when they made the decision to retire and leave the Company. Thus, to the extent there was a breach, it was complete for purposes of Section 413(1)(A) no later than the date Plaintiffs either stopped working or made the decision to retire. *See In re Unisys Corp. Ret. Med. Benefit ERISA Litig.*, 242 F.3d 497, 505-06 (3d Cir. 2001); *Zirnhelt v. Michigan Consol. Gas Co.*, 526 F.3d 282, 288-89 (6th Cir. 2008).

In *Unisys*, for example, the plaintiff retirees argued that they did not suffer actual harm, and ERISA's statute of limitations did not begin to run, until the company made changes to their benefit plans. Rejecting their argument and applying ERISA §413(1), the Third Circuit concluded that the statute of limitation began to run much earlier – as of the date plaintiffs retired because that was the last date the company could have made a relevant misrepresentation or

prevented detrimental reliance with a clarifying communication. *See Unisys*, 242 F.3d at 505-06 ("[A]ny breach that may have occurred was completed, and a claim based thereon accrued, no later than the date upon which the employee relied to his detriment on the misrepresentations."). Similarly, in *Zirnhelt*, plaintiff argued that her employer breached its fiduciary duty because it failed to provide her plan documents during her employment that explained pension vesting requirements and, as a result of this failure, she retired prior to obtaining the necessary ten years of service. Although plaintiff did not learn that she was unvested until she applied for benefits *more than twenty years later*, the Sixth Circuit nevertheless concluded that her breach claims were time-barred under ERISA § 413(1)(A) no later than six years after the date she left the company. According to the Court, "the alleged misconduct occurred between 1965 and 1977, after which the company could not have cured any breach. . . . [B]y then, the harm had been done: Zirnhelt had left the company without ten years of qualifying service." *Zirnhelt*, 526 F.3d at 288-89. The Third Circuit's reasoning in *Unisys* and the Sixth Circuit's reasoning in *Zirnhelt* bar all but Barnes's Claims.

In this case, as in *Unisys* and *Zirnhelt*, the fiduciary breach is *not* the benefits reduction that Embarq announced in 2007, as Plaintiffs may try misleadingly to argue. *Hughes Aircraft v. Jacobson*, 525 U.S. 532, 444-45 (1999) ("ERISA's fiduciary duty requirement simply is not implicated where [someone] is acting as the Plan's settlor;" holding breach of fiduciary duty claims "directly foreclosed" because "without exception, '[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries.'") (internal citation omitted). The breach is the promise of vested benefits that allegedly occurred during employment and that induced Plaintiffs to retire and later turned out not to be true. *See Unisys*, 242 F.3d at 506 (holding "the alleged breach of fiduciary duty . . . concerned the counsel allegedly given or not given, and there is no

causal nexus between the counsel and the [plan amendment that eliminated] free health coverage"). That breach – the misrepresentation – was indisputably complete by the date Plaintiffs left the Company because once Plaintiffs quit no curative was possible. As in *Unisys* and *Zirnhelt*, it is irrelevant that no benefits reduction had yet occurred when they left the Company and the breach remained undiscovered. *See Ranke v. Sanofi-Synthelabo Inc.*, 436 F.3d 197, 205 (3d Cir. 2006) (ERISA's six-year limitation period creates a statute of repose not dependant on actual knowledge, which enables a fiduciary to "recognize a firm cutoff date for future breach of fiduciary duty claims . . . ."). Therefore, the Claims of thirteen Plaintiffs (those of all but Barnes, Bullock, Games and Hollingsworth) are time-barred because each stopped working prior to December 28, 2001 – the six-year cut-off date under Section 413(1). UF ¶¶77, 137, 148, 162, 169, 184, 197, 207, 221, 238, 252, 265, 277.

Of the remaining four Plaintiffs who continued to work into the statute of repose window, which opened after December 28, 2001, three (Bullock, Games and Hollingsworth) admit they made their decision, and had filed paperwork, to retire prior to December 28, 2001. UF ¶¶113, 124, 136. Accordingly, these three Claims are also time-barred under Section 413(1). The alleged breaches were just as complete with respect to Bullock, Games and Hollingsworth before December 28, 2001 as they were for the other 13 time-barred Plaintiffs because nothing Defendants said or wrote to them after they decided to retire had, or could have had, any detrimental effect on their retirement planning. *See Unisys*, 242 F.3d at 505-06; *see also Ranke*, 436 F.3d at 203 (plaintiffs cannot "'reset the clock' by later detrimental reliances occurring after their claims first accrued"). Thus, their later "official" retirement dates are irrelevant technicalities.

It is true that under Section 413(1)(A), a plaintiff may be time-barred with respect to a

breach he or she did not even know had occurred. As the Third Circuit stressed in *Ranke*, ERISA Section 413(1) is a statute of repose, not a statute of limitations. *See Ranke*, 436 F.3d at 205. They have different functions. "A statue of repose runs from a fixed date readily determinable by the defendant, thus serving the need for finality." *Sterlin v. Biomune Systems*, 154 F.3d 1191, 1196 n.9 (10th Cir. 1998) (citations and internal quotes omitted). Unlike a statute of limitation, whose main purpose is the prevention of stale claims, and which serves as an "instrument[] of public policy and court management, [which] do not confer upon defendants any right to be free from liability," a statute of repose "operate[s] as a grant of immunity serving primarily to relieve potential defendants from anxiety over liability for acts committed long ago." *Menne v. Celotex Corp.*, 722 F. Supp. 662, 666 (D. Kan. 1989) (citation and internal quotes omitted); *Kastner v. Guenther*, No. 10-1013-EFM, 2010 U.S. Dist. LEXIS 119035, *9-10, *13 (D. Kan. Nov. 5, 2010) (Melgren, J.) (holding pro se plaintiff's tort claims, including breach of fiduciary duty and fraud, barred by 10-year statute of repose where claims asserted 14 years after alleged breach).[27]

Thus, by providing a statute of repose in Section 413(1)(A), and not a statute of limitation, Congress made a policy decision that, regardless of the severity of the original breach or how sympathetic (or unknowledgeable) a plaintiff might be, the breach of fiduciary duty claim eventually must be extinguished. *Cf. Hartford v. Gibbons & Reed Co.*, 617 F.2d 567, 569 (10th Cir. 1980) (noting that statutes of repose "operate against even the most meritorious claims without regard to the nature of the injury involved, the social considerations or the emotional appeal of the claim."). Congress concluded six years is long enough. *See Larson v. Northrop*

[27] The need for finality, and thus the wisdom of a statute of repose, is particularly acute in a case such as this one, where several Plaintiffs assert claims that accrued decades ago. Plaintiff Clark, for example, alleges he was promised vested retirement benefits during a vague conversation with a "chief operator" sometime prior to his retirement in 1976 – more than three decades before this case was filed. UF ¶139.

Corp., 21 F.3d 1164, 1171-72 (D.C. Cir. 1994) ("[T]he limitations period . . . suggests a judgment by Congress that when six years has passed after a breach or violation . . . the value of repose will trump other interests, such as a plaintiff's right to seek a remedy."). In this case, however, Plaintiffs are *not* left without a "right to seek a remedy" because each Plaintiff also seeks a separate – and complete – remedy under ERISA §502(a)(1)(B). *See* Doc. 295 at 46, 52 ¶¶1-2, 9-10. Accordingly, ERISA's six-year statute of repose bars the Claims of all Plaintiffs except Barnes.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss with prejudice the Second Claim for Relief in Plaintiffs' Third Amended Complaint in its entirety.

Respectfully submitted,
STINSON MORRISON HECKER LLP

By: /s/Christopher J. Leopold

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

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

James P. Walsh, Jr. (*pro hac vice)*
502 Carnegie Center

Princeton, NJ 08540
(609) 919-6647 (Telephone)
(609) 919-6701 (Facsimile)
jwalsh@morganlewis.com

SHERMAN & HOWARD L.L.C.
Christopher J. Koenigs (pro hac vice)
Michael B. Carroll (pro hac vice)
633 Seventeenth Street, Suite 3000
Denver, CO 80202
(303) 297 2900
(303) 208 0940 (fax)
ckoenigs@shermanhoward.com
mcarroll@shermanhoward.com

Attorneys for Defendants