IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WILLIAM DOUGLAS FULGHUM, et al., Individually and on behalf of all others similarly situated, Plaintiffs, v. EMBARQ CORPORATION, et al., Defendants.	CIVIL ACTION CASE NO. 07-CV-2602 (EFM/JPO) CLASS ACTION

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

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April 11, 2012

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Plaintiffs,	CIVIL ACTION CASE NO. 07-CV-2602 (EFM/JPO)
v.	
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Defendants' Motion for Summary Judgment must be denied because it ignores countervailing evidence and misconstrues the law. Defendants improperly rely on an incomplete, one-sided reading of isolated snippets from summary plan descriptions ("SPDs") which they assert were legally sufficient to reserve their right to amend or terminate each of the plans as to current retiree benefit recipients. Defendants do not even acknowledge other portions of the same documents confirming what plaintiffs have claimed – that defendants expressly promised that the retiree medical and life insurance benefits would continue for plaintiffs' lifetimes, ending only "when you die" or "on the date of your death."

Defendants also fail to acknowledge controlling principles of ERISA and Tenth Circuit case law establishing that, at best for defendants, the documents are reasonably susceptible to the interpretation that the medical and life insurance benefits will not end until the death of the retiree. In addition, course-of-performance evidence over many years establishes (1) defendants'

own practice of describing these benefits as secure lifetime benefits for current retirees, (2) defendants' own recognition that they could not reduce or terminate these benefits, and/or (3) defendants' relinquishment of any reserved right to do so.

Defendants have not shown that the SPDs presented in their motion are clear and unambiguous when read from the judicially required viewpoint of an average plan participant. Under Tenth Circuit law, the relevant inquiry "is not what the [drafter] unilaterally intended the terms of the Plan to mean, but what a reasonable person in the position of the participant would have understood those terms to mean." *LaAsmar v. Phelps Dodge Corp. Life, Accid. Death & Dismemberment and Dependent Life Ins. Plan*, 605 F.3d 789, 801 (10th Cir. 2010). Participants are not required to adopt the skills of a lawyer in parsing language, and any ambiguity must be construed against the employer.

The SPDs themselves and the course-of-performance evidence present questions that cannot be resolved on summary judgment. Defendants' motion should be denied.

PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS

A. The Parties

1-18. Plaintiffs do not dispute paragraphs 1-18 of Defendants' Statement of Undisputed Material Facts ("DSF"), summarizing background facts about the parties.

B. The Summary Plan Descriptions ("SPDs")

1. Plaintiffs controvert DSF Paragraphs 27-28 (SPDs 1-4)

19-26. Plaintiffs do not dispute DSF paragraphs 19-26, which identify SPDs in effect at the time of retirement of the plaintiffs listed therein.

27-28. Plaintiffs do not dispute that the brief textual portions quoted in these paragraphs appear in the cited documents. However, plaintiffs controvert paragraphs 27-28 because they provide an incomplete statement of the textual portions and other evidence relevant to the proper analysis of SPDs 1-4 (Def. Exs. A-1, A-2, A-3, and A-4). The additional relevant portions and other evidence are presented below in Plaintiffs' Counter-Statement of Material Facts.

2. Plaintiffs controvert DSF Paragraphs 33-35 (SPDs 5-6)

29-32. Plaintiffs do not dispute DSF paragraphs 29-32, which identify the particular SPDs applicable to the stated named plaintiffs.

33-35. Plaintiffs do not dispute that the brief textual portions quoted in these paragraphs appear in the cited documents. However, plaintiffs controvert paragraphs 33-35 because they provide an incomplete statement of the textual portions and other evidence relevant to the proper analysis of SPDs 5 and 6 (Def. Exs. A-5 (Sprint SPD dated "8/00") and A-6 (Sprint SPD dated "2001")). The additional relevant portions and other evidence are presented below in Plaintiffs' Counter-Statement.

3. Plaintiffs controvert DSF Paragraphs 40 and 42 (SPDs 7-8)

36-39 & 41. Plaintiffs do not dispute DSF paragraphs 36-39 and 41, which identify the particular SPDs applicable to the stated named plaintiffs.

40 & 42. Plaintiffs do not dispute that the brief textual portions quoted in these paragraphs appear in the cited documents. However, plaintiffs controvert DSF paragraphs 40 and 42 because they provide an incomplete statement of the textual portions and other evidence relevant to the proper analysis of SPDs 7 and 8 (Def. Exs. A-7 (undated CT&T SPD) and A-8 (same)) as well as the "1984-87 CBA" (Def. Ex. A-19). The additional relevant portions and other evidence are presented below in Plaintiffs' Counter-Statement.

4. Plaintiffs controvert DSF Paragraph 45 (SPD 9)

43-44. Plaintiffs do not dispute DSF paragraphs 43-44, which identify the particular SPDs applicable to the stated named plaintiffs.

45. Plaintiffs do not dispute that the brief textual portions quoted in this paragraph appear in the cited documents. However, plaintiffs controvert DSF paragraph 45 because it provides an incomplete statement of the textual portions and other evidence relevant to the proper analysis of SPD 9 (Def. Ex. A-9 (May 17, 1982 CT&T SPD for life insurance benefits then provided by Pilot Life Insurance Company). The additional relevant portions and other evidence are presented below in Plaintiffs' Counter-Statement.

5. Plaintiffs controvert DSF Paragraph 50 (SPDs 10-12)

46-49. Plaintiffs do not dispute DSF paragraphs 46-49, which identify the particular SPDs applicable to the stated named plaintiffs.

50. Plaintiffs do not dispute that the brief textual portions quoted in these paragraphs appear in the cited documents. However, plaintiffs controvert DSF paragraph 50

because it provides an incomplete statement of the textual portions and other evidence relevant to the proper analysis of SPDs 10, 11 and 12 (Def. Exs. A-10 (CT&T SPD for Medical Care Insurance, effective February 1, 1985), A-11 (CT&T SPD for Group Medical Insurance for Bargaining Employees, effective February 1, 1985), and A-12 (CT&T SPD for Group Medical Insurance for Bargaining Employees, effective February 1, 1985)). The additional relevant portions and other evidence are presented below in Plaintiffs' Counter-Statement.

6. Plaintiffs controvert DSF Paragraphs 55-58 (SPDs 13-15)

51-54. Plaintiffs do not dispute DSF paragraphs 51-54, which identify the particular SPDs applicable to the stated named plaintiffs.

55-58. Plaintiffs do not dispute that the brief textual portions quoted in these paragraphs appear in the cited documents. However, plaintiffs controvert DSF paragraphs 55-58 because they provide an incomplete statement of the textual portions and other evidence relevant to the proper analysis of SPDs 13, 14 and 15 (Def. Exs. A-13 (Group Life Insurance Plan, United Telephone Company of Ohio, dated "12/88"), A-14 (Group Life Insurance Plan SPD for Bargaining Employees, United Telephone Company of the Northwest, dated "3/89"), and A-15 (Group Life Insurance Plan, United Telephone of Florida, dated "8502" [2/85]). The additional relevant portions and other evidence are presented below in Plaintiffs' Counter-Statement.

7. Plaintiffs controvert DSF Paragraphs 62-64 and 67 (SPDs 16-17)

59-61 and 65-66. Plaintiffs do not dispute DSF paragraphs 59-61 and 65-66, which identify the particular SPDs and collective bargaining agreements applicable to the stated named plaintiffs.

62-64 and 67. Plaintiffs controvert DSF paragraphs 62-64 and 67 because they provide an incomplete statement of the textual portions and other evidence relevant to the proper

analysis of SPDs 16 and 17 (Def. Ex. A-16 (1976 CT&T SPDs for Basic Hospital-Surgical Plan, Extraordinary Medical Expense Plan, and Group Life Insurance Plan) as well as the "1974-77 CBA" (Def. Ex. A-17). The additional relevant portions and other evidence are presented below in Plaintiffs' Counter-Statement.

8. Plaintiffs controvert DSF Paragraph 68

68. In DSF paragraph 68, defendants assert that "The Group Policies referred to in SPDs 7-15 were, together with those SPDs, the plan documents for the benefits provided under those policies. [Def.] Ex. A ¶ 20." Plaintiffs controvert this paragraph for two reasons. First, it presents a legal question (whether, under ERISA, an insurance policy can be considered part of a plan document) which is not appropriate for inclusion in a Rule 56 fact statement. Second, the "Group Policies" have not been submitted as part of defendants' record and cannot be considered.

C. <u>Plan Amendments</u>

9. Plaintiffs controvert DSF Paragraphs 69-72

69-72. Plaintiffs do not dispute that the events summarized in paragraphs 69 and 71 occurred, and that the brief textual portions quoted in paragraphs 70 and 72 appear in the cited documents. However, plaintiffs controvert DSF paragraphs 69-72 because they provide an incomplete statement of the factual circumstances relevant to the validity of these amendments. This additional evidence is presented below in Plaintiffs' Counter-Statement.

D. <u>Plaintiffs' Claims</u>

10. Plaintiffs controvert DSF Paragraph 73

73. Plaintiffs controvert paragraph 73 because it provides an incomplete summary of the statement of Plaintiffs' Contentions appearing on pages 17-23 of the Pretrial Order (Doc. 295).

74. Plaintiffs do not dispute paragraph 74. However, the correct page citation is page 28 of the Pretrial Order.

75. Plaintiffs do not dispute paragraph 75. However, the correct page citation is pages 29-30 of the Pretrial Order.

PLAINTIFFS' COUNTER-STATEMENT OF MATERIAL FACTS

Pursuant to Fed. R. Civ.P. 56(c)(1) and D. Kan. Rule 56.1(b), plaintiffs present this Counter-Statement of additional material facts relevant to defendants' motion.

A. The Summary Plan Descriptions ("SPDs")

1. (SPDs 1-4)

DSF paragraphs 27-28 provide an incomplete statement of the textual portions relevant to the proper analysis of SPDs 1-4 (Def. Exs. A-1, A-2, A-3, and A-4).

1. SPDs 1-4 contain express language that retiree participants are entitled to receive the retiree medical benefits for life, stating that "Your coverage under the Retiree Medical Plan ends . . . when you die." (emphasis added). *See* Def. Exs. A-1 at 17; A-2 at 13; A-3 at 13; A-4 at 13.

2. The earliest of these SPDs (defendants' "SPD 1"), the "United Telecom Retiree Medical Plan Summary Plan Description, effective January 1, 1991" (Def. Ex. A-1), stated as follows regarding the medical, prescription drug, and dental benefits for retirees:

> **RETIREE MEDICAL PLAN**
>
> ***When Coverage Ends***
>
> You may stop participating in the Retiree Medical Plan on the first day of any month. Generally, if your coverage ends, your spouse's and dependent children's coverage ends. These rules are described below.
>
> There are other circumstances in which your, your spouse's and your dependent children's coverage ends.
>
> ***Retiree's***
>
> **Your coverage under the Retiree Medical Plan ends**
>
> — **when you die**, or
>
> — you do not pay your share of the cost of your coverage.
>
> * * * *

> ***Spouse's***
>
> You may terminate your spouse's coverage under the Retiree Medical Plan on the first day of any month. Your spouse's coverage will also end if you and your spouse divorce or your spouse dies.
>
> However, if your spouse is a covered dependent **when you die**, he or she may continue coverage under this plan. . . . .

Def. Ex. A-1 at 17 (emphasis added). With minor immaterial variations, the same text promising medical benefits until "you die" appears in SPDs 2-4.[1]

3. None of this express language providing for lifetime medical benefits – on the Retiree Medical Plan page entitled "When Coverage Ends" – sets forth or contains a cross-reference of any kind to any of the reservation of rights language cited by defendants. *See* Def. Exs. A-1 at 17, A-2 at 13, A-3 at 13, A-4 at 13.

4. SPDs 1-4 include a section entitled "Answering Your Needs" (the first section listed in the Table of Contents), which contains an express assurance to the retiree that participating in the retiree medical plan provides financial and health security throughout retirement:

> **Answering Your Needs**
>
> Rising health care costs are a major concern of employers and retirees today. Over the past few years, health care spending by and for retirees has risen faster than health care spending for any other group in the country. **For one thing, retirees and their spouses live longer, extending the period during which claims are paid.** Coupled with more expensive medical technology and a decrease in the share of benefits provided by Medicare, **the cost for retiree health benefits is a heavy burden for employers or retirees to bear alone.**

---

[1] The minor, immaterial variations in the language of SPDs 2-4 are as follows: (a) the phrase "on the same day" is added to the end of the second quoted sentence; (b) the sentence, "These rules are described below" is shifted to the end of the second quoted paragraph; and (c) a new paragraph referring to the availability of the "retiree medical account" as a means to satisfy cost of coverage requirements is inserted after the second "Retiree's" bullet point. *See* Def. Exs. A-2 at 13 (Sprint SPD dated "8/96"); A-3 at 13 (Sprint SPD dated "8/96"); A-4 at 13 (Sprint SPD dated "10/97").

> * * *
> We all look forward to retirement. However, you may wonder how healthy you'll be and whether an illness or injury will affect your family's financial security. When people become seriously ill, retirement benefits, personal savings and Social Security may not be enough. **By participating in the United Telecom Retiree Medical Plan, you can feel secure that your family's health and well-being will be protected after you stop working.**

Def. Ex. A-1 at 4 (emphasis added). The same assurances of life-long retirement security under the retiree medical plan are found in SPDs 2-4. *See* Def. Exs. A-2 at 3, A-3 at 3. Def. Ex. A-4 is an excerpted copy of SPD 4 which does not include all relevant pages. If the full version were on file, the correct citation would be Def. Ex. A-4 at 3 (if defendants dispute the page reference, plaintiffs will lodge the full version as a matter of record).

5. SPDs 1-4 describe eligibility to participate in the plan as being dependent on retirement under the company pension plan. "You're eligible to participate in the Retiree Medical Plan if you retire from the company after December 31, 1990. You can retire under the following circumstances." The text then includes a list of various retirement options under the pension plan linked to age and years of service. *See* Def. Exs. A-1 at 8; A-2 at 5; A-3 at 5; A-4 at 5 (full version available).

6. SPDs 1-4 also include text pertaining to the "retiree medical dollars" format used for employer funding of the retiree medical plan which was then in use. For example, the page entitled "Answering Your Needs" includes text linking the company subsidy to age and years of service at retirement, like the pension: "The company provides 'retiree medical dollars' each month to help you pay for your coverage. You pay the difference. Your cost will depend on [coverage elected, number of dependents,] your years of service, your age when you retire and Medicare eligibility." *See* Def. Exs. A-1 at 4; A-2 at 3; A-3 at 3; A-4 at 3 (full version available). The SPDs also reproduce a table specifying the amount of "retiree medical dollars"

to which a retiree is entitled based on the "years of credited service you earned under the Retirement Plan," with retirees who have 30 or more years of service being entitled to 100% of the relevant retiree medical dollar amount. The retiree medical dollars that accumulate unused in a retiree's account "may be carried over from year to year" or "1/12th of that amount will be credited to your retiree medical account each month in the following year." *See* Def. Exs. A-1 at 12; A-2 at 9; A-3 at 9; A-4 at 9 (full version available).

7. The reservation of rights language cited by defendants contains only references to a *general* right to amend or terminate in undefined circumstances for undefined persons.

8. The sole reservation of rights language in the main document of these SPDs appears without any heading or other warning. Unlike the specific vesting language above, it is not listed in the Table of Contents. Its generalized text states only that "the company reserves the right to amend or terminate this plan, or any statement made in this summary plan description, at any time." *See* Def. Exs. A-1 at 3; A-2 at 1; A-3 at 1; A-4 at 1.

9. The other reservation language cited by defendants in these SPDs refers only to a possible "change" in "any part of the plan," "any or all parts of the plan," or stating under the heading "What the Plan Covers" that specific medical, dental or "coverage" terms or "coverages or options that are described," or "the method of providing benefits," can change, suggesting that certain of the specific enumerated procedures, services or methods of providing benefits might change, but not stating that the plan itself may be terminated. *See* Def. Exs. A-1 at 15, 22, 41; A-2 at 11, 17, 32, 37; A-3 at 11, 17, 32, 37; A-4 at 11, 17, 32, 37.

10. Finally, there is generic reservation language in the section of the SPDs entitled "Legal Information" providing additional information about "the various benefit plans and programs available to regular employees of Sprint and its participating companies." This section

therefore appears to pertain to active employees (including "Participating Employees"), not retirees. This section provides general information for multiple active employee plans, including the travel accident plan, business travel plan, supplemental LTD plan, and the "Reimbursement Accounts." A generic reservation states that the company "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." There is no specific reference to amendment or termination of plans providing benefits to current retirees. The plans covered by this section include the "Sprint Retirement Pension Plan," for which the reserved right is obviously inapplicable with respect to participants who are retired on pension. *See* Def. Exs. A-1 at "Legal Information" at 1, 4, 5, 7-10 (including information about where to file a claim "If You're An Employee of" various units); A-2 at "Legal Information" at 1, 3, 4, 12 (including information about where to file a claim "If You're An Employee of" various units); A-3 [no "Legal Information" section appears in this exhibit]; A-4 at "Legal Information" at 1, 4, 7-11 (full version available).

In addition to these textual portions of SPDs 1-4, evaluation of their meaning to an average plan participant requires consideration of course-of-performance evidence, expert opinion evidence, and extrinsic evidence. These forms of evidence are summarized below.

2. SPDs 5-6

DSF paragraphs 33-35 provide an incomplete statement of the textual portions relevant to the proper analysis of SPDs 5 and 6 (Def. Exs. A-5 (Sprint SPD dated "8/00") and A-6 (Sprint SPD dated "2001")).

11. SPDs 5 and 6 contain express language stating that retiree participants are entitled to receive the retiree medical benefits for life – "Your coverage under the Retiree Medical Plan ends when . . . you die." (emphasis added). *See* Def. Exs. A-5 at 9; A-6 at Shipley 0044.

12. SPDs 5 and 6 stated as follows regarding the medical and prescription drug benefits for retirees:

> ***When Coverage Ends***
>
> You may stop participating in the Retiree Medical Plan on the first day of any month. Generally, if your coverage ends, your spouse's and dependent children's coverage ends on the same day.
>
> There are other circumstances in which your, your spouse's and your dependent children's coverage ends. These rules are described below.
>
> **Retiree**
>
> **Your coverage under the Retiree Medical Plan ends when:**
>
> — **you die**, or
>
> — you do not pay your share of the cost of your coverage.
>
> * * * *
>
> **Spouse**
>
> You may terminate your spouse's coverage under the Retiree Medical Plan on the first day of any month. Your spouse's coverage will also end if you and your spouse divorce, your spouse dies, or you do not pay your share of the cost of coverage.
>
> However, if your spouse is a covered dependent **when you die**, he or she may continue coverage under this plan. . . . .

Def. Exs. A-5 at 9 and A-6 at Shipley 0044 (emphasis added). None of this express language providing for lifetime medical benefits – on the Retiree Medical Plan page entitled "When Coverage Ends" – sets forth or contains a cross-reference of any kind to any of the reservation of rights language cited by defendants. *See* Def. Exs. A-5 at 9 and A-6 at Shipley 0044.

13. SPDs 5 and 6 include the following express promises of lifetime coverage under the Basic Retiree Life Insurance plan:

> ***Basic Retiree Life Insurance***
>
> ***Basic Coverage***

> The company provides you with coverage of 50% of eligible pay at your retirement rounded up to the next highest $1,000 increment.
>
> ***Maximum Benefit***
>
> The maximum benefit under the basic life insurance plan is $25,000.
>
> ***When Does Coverage End***
>
> **The basic life insurance coverage ends on the date of your death.**

Def. Exs. A-5 at 41; A-6 at Shipley0077 (emphasis added).

14. SPDs 5 and 6 include a section entitled "Answering Your Needs" (the first section listed in the Table of Contents), which contains an express assurance to the retiree that participating in the retiree medical plan provides financial and health security throughout retirement:

> **Answering Your Needs**
>
> Rising health care costs are a major concern of employers and retirees today. Over the past few years, health care spending by and for retirees has risen faster than health care spending for any other group in the country. **For one thing, retirees and their spouses live longer, extending the period during which claims are paid.** Coupled with more expensive medical technology and a decrease in the share of benefits provided by Medicare, **the cost for retiree health benefits is a heavy burden for employers or retirees to bear alone.**
>
> * * *
>
> We all look forward to retirement. However, you may wonder how healthy you'll be and whether an illness or injury will affect your family's financial security. When people become seriously ill, retirement benefits, personal savings and Social Security may not be enough. **By participating in the Sprint Retiree Medical Plan, you can feel secure that your family's health and well-being will be protected after you stop working.**

Def. Exs. A-5 at 2 and A-6 at Shipley0037 (emphasis added).

15. SPDs 5 and 6 describe eligibility to participate in the plan as being dependent on retirement under the company pension plan. "You're eligible to participate in the Retiree Medical Plan if you retire from the company after December 31, 1990. You can retire under the

following circumstances." The text then includes a list of various retirement options under the pension plan linked to age and years of service. *See* Def. Exs. A-5 at 3; A-6 at Shipley 0038.

16. SPDs 5 and 6 include text pertaining to the "retiree medical dollars" format used for employer funding of the retiree medical plan which was then in use. For example, the page entitled "Answering Your Needs" includes text linking the company subsidy to age and years of service at retirement, like the pension: "The company provides 'retiree medical dollars' each month to help you pay for your coverage. You pay the difference. Your cost will depend on [coverage elected, number of dependents,] your years of service, your age when you retire and Medicare eligibility." *See* Def. Exs. A-5 at 2 and A-6 at Shipley0037 (emphasis added). These SPDs also reproduce a table specifying the amount of "retiree medical dollars" to which a retiree is entitled based on the "years of credited service you earned under the Retirement Plan", with retirees who have 30 or more years of service entitled to 100% of the relevant retiree medical dollar amount. The retiree medical dollars that accumulate unused in a retiree's account "may be carried over from year to year" or "1/12th of that amount will be credited to your retiree medical account each month in the following year." *See* Def. Ex. A-5 at 7. Def. Ex. A-6 is an excerpted copy of SPD 6 which does not include all relevant pages. If the full version were on file, the correct citation would be Def. Ex. A-6 at Shipley0040 (if defendants dispute the page reference, plaintiffs will lodge the full version as a matter of record).

17. The reservation of rights language cited by defendants contains only references to a *general* right to amend or terminate in undefined circumstances for undefined persons.

18. The sole reservation of rights language in the main document of these SPDs appears without any heading or other warning. This language is not listed in the Table of Contents. Its generalized text states only that "the company reserves the right to amend or

terminate this plan, or any statement made in this summary plan description, at any time." *See* Def. Exs. A-5 at 2; A-6 at Shipley0037.

19. The other reservation language cited by defendants in these SPDs refers only to a possible "change" in "any part of the plan," "any or all parts of the plan," or stating under the heading "What the Plan Covers" that specific medical, dental, prescription drug, or life insurance "coverage" terms or "coverages or options that are described," or "the method of providing benefits," can change, suggesting that certain of the specific enumerated procedures, services or methods of providing benefits might change, but not stating that the plan itself may be terminated. *See* Def. Exs. A-5 at 8, 14, 30, 35, 41; A-6 at Shipley0043, 49, 66, 70.

20. Finally, there is generic reservation language in the section of the SPDs entitled "Legal Information" providing additional information about "the various benefit plans and programs available to regular employees of Sprint and its participating companies." This section therefore appears to pertain to active employees (including "Participating Employees"), not retirees. This section provides general information for multiple active employee plans, including the travel accident plan, business travel plan, supplemental LTD plan, and the "Reimbursement Accounts." A generic reservation states that the company "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." There is no specific reference to amendment or termination of plans providing benefits to current retirees. The plans covered by this section include the "Sprint Retirement Pension Plan," for which the reserved right is obviously inapplicable with respect to participants who are retired on pension. *See* Def. Ex. A-5 at "Legal Information" at 2, 3, 6-8 (including references to "Participating Employees" paying for benefit costs), 10 (including information about contacting the "Employee Benefits Assistance Center" about claims). Def. Ex. A-6 does not include the

"Legal Information" section. As stated above, the SPD covers both active employees and retired employees. The quoted text does not contain any specific statement that this limited reserved right is applicable to benefits for retired employees.

In addition to these textual portions of SPDs 5 and 6, evaluation of their meaning to an average plan participant requires consideration of course-of-performance evidence, expert opinion evidence, and extrinsic evidence. These forms of evidence are summarized below.

3. SPDs 7-8

DSF paragraphs 40 and 42 provide an incomplete statement of the textual portions relevant to the proper analysis of SPDs 7 and 8 (Def. Exs. A-7 (undated CT&T SPD) and A-8 (same)) as well as the "1984-87 CBA" (Def. Ex. A-19).

21. SPDs 7 and 8 describe Basic Contributory Life Insurance, Accidental Death and Dismemberment Benefits and Additional Accidental Death Benefits. Only the Basic Contributory Life Insurance benefits are in issue in this case. The SPD is primarily directed to active employees. *See, e.g.,* Def. Exs. A-7 and A-8 at 1 (referring to "all persons employed on a regular full time basis by the Policyholder" as well as "persons retired by the Policyholder" as "members of the Eligible Group"), 2 (describing the active work requirement). The section on "When Your Insurance Ends" states that "your insurance under the Group Policy will end on the earliest of the following dates" including "the date your employment as a member of the Eligible Group ends." However, this is subject to the caveat that, "Notwithstanding any provision herein to the contrary, if any person is absent from active work as the result of retirement on pension, his employment may be deemed to continue for the purposes of the insurance hereunder [*i.e.*, "under the Group Policy"] until terminated by the Policyholder." Def. Exs. A-7 and A-8 at 4.

The text refers to termination of the particular "Group Policy" and the "insurance" thereunder, rather than termination of the plan itself and its stated benefits.

22. In SPDs 7 and 8, the special arrangements for retiree coverage are specifically described in the following paragraphs:

> If you are an Employee who is retired on pension on or after June 1, 1981, and you were insured as an Active Employee for contributory insurance under the Group Policy, or the Group Policy replaced on June 1, 1981, for the full time after your forty-fifth birthday that you were eligible for such insurance, the amount of your Life Insurance during the first five years of your retirement will be an amount equal to the amount of your Life Insurance on the day preceding the date of your retirement. On the fifth anniversary of the date of your retirement the amount of your Life Insurance will automatically reduce to the greater of (a) one-half of the amount of Life Insurance applicable to you prior to such fifth anniversary, and (b) $ 1,500.
>
> If you retired on or after September 1, 1965, but before June 1, 1981, your Life Insurance will be that amount, if any, applicable to you under the Group Policy on May 31, 1981, and, if the fifth anniversary of the date of your retirement is on or after June 1, 1981, will be subject to the reduction set out in the preceding paragraph on the fifth anniversary of the date of your retirement.
>
> If you retired prior to September 1, 1965, your Life Insurance on June 1, 1981, will be that amount, if any applicable to you under the Group Policy on May 31, 1981.

Def. Exs. A-7 and A-8 at 5-6.

23. The text applicable to retiree life insurance coverage informs the reader that (a) the amount of coverage "will be" the amount stated and will only be subject to reduction on the fifth anniversary of retirement; (b) the amount of coverage will continue and is not limited in duration; (c) even in the event a Group Policy terminates and is "replace[d]", the promised coverage will continue to be provided to the retiree; (d) the amounts of coverage applicable to employees who retired before June 1, 1981 are grandfathered and are not affected by the terms of a later-issued Group Policy; and (e) the life insurance benefits are linked to "retirement on pension" from the company. SPDs 7 and 8 state durational limits for life insurance during total

disability before retirement, but no durational limits are stated for the retiree coverage. Def. Exs. A-7 and A-8 at 5-6.

24. SPDs 7 and 8 include three pages at the end setting forth additional information required to be included in SPDs by Department of Labor regulations. These pages identify the plan as "The Group Life, Accidental Death and Dismemberment and Life Insurance On Dependents Insurance Plan" and the "Plan Sponsor" as Carolina Telephone and Telegraph Company. The pages also state that benefits under the plan "are provided by Group Policy number 66771 [or 77100] issued to the Plan Sponsor by EQUICOR [or CIGNA]." The text thus differentiates between the plan and the plan sponsor on the one hand, and the particular Group Policy and insurer being used by the plan sponsor as the vehicle to "provide" the benefits at the time the booklet was issued. Def. Exs. A-7 and A-8 at 16. As comparison of the change in language from SPD 7 to SPD 8 shows, the insurer and its Group Policy changed from EQUICOR to CIGNA, but the benefits under the plan did not change.

25. SPDs 7 and 8 do not include any text purporting to reserve a right to amend or terminate the plan or its benefits for currently retired persons. The ERISA information pages include this text referring back to the text quoted above:

> The requirements for being covered under this plan, the provision concerning termination of coverage, a description of the plan benefits (including any limitations and exclusions which may result in reduction or loss of benefits) are shown on the preceding pages of this booklet.

Def. Exs. A-7 and A-8 at 16-17. As stated above, the SPDs cover both active employees and retired employees. The SPDs do not contain any specific statement that benefits for retired employees can be amended or terminated.

26. The "1984-87 CBA" is presented by defendants in excerpted form in Def. Ex. A-19. The cover of this CBA states that it is an agreement between the Communications Workers

of America and Carolina Telephone and Telegraph, effective November 30, 1984 through November 29, 1987. Def. Ex. A-19 at cover page. Article 36, entitled "Duration of Agreement", states that "the Agreement shall continue in force and effect *after* November 29, 1987 unless either party" gives written notice to cancel, revise or modify part of the Agreement. Def. Ex. A-19 at 91 (emphasis added). Article 22 of the CBA states that "The Company will maintain a medical care insurance plan and pay 100% of the premium during the term of the agreement" at the benefit levels agreed "effective February 1, 1985", and that "Other insurance programs of the Company, including group life insurance, . . . , shall remain in force during the term of the agreement." Def. Ex. A-19 at 74. The same Article states in Sections 2 and 3 that the company "retains the right" to make changes in both the Pension Plan and Savings Plan, *id.* at 74-75, but no such right is stated with respect to the medical or life insurance benefits.

27. In addition to these textual portions of SPDs 7 and 8, evaluation of their meaning to an average plan participant requires consideration of course-of-performance evidence, expert opinion evidence, and extrinsic evidence. These forms of evidence are summarized below.

4. SPD 9

DSF paragraph 45 provides an incomplete statement of the textual portions relevant to the proper analysis of SPD 9 (Def. Ex. A-9 (May 17, 1982 CT&T SPD for life insurance benefits then provided by Pilot Life Insurance Company).

28. As defendants acknowledge, SPD 9 is substantially the same as SPDs 7 and 8. The same textual portions and comments stated above in paragraphs (a) – (d) for SPDs 7 and 8 also appear in and apply to SPD 9 and are incorporated here by reference. *See* Def. Ex. A-9 at 3, 4, 6, 7-8, 18 and 19.

29. In addition, the "certificate" appearing at the front of SPD 9 states that Pilot Life "has issued Group Policy Number 3363 (Revised) to insure certain employees of Carolina Telephone and Telegraph Company", which is defined as the "Policyholder." The certificate also states that, "The Group Policy is a contract between the Policyholder and Pilot Life which alone constitutes the agreement under which payments are made." Def. Ex. A-9 at 1.

In addition to these textual portions of SPD 9, evaluation of their meaning to an average plan participant requires consideration of course-of-performance evidence, expert opinion evidence, and extrinsic evidence. These forms of evidence are summarized below.

5. SPDs 10-12

DSF paragraph 50 provides an incomplete statement of the textual portions relevant to the proper analysis of SPDs 10, 11 and 12 (Def. Exs. A-10 (CT&T SPD for Medical Care Insurance, effective February 1, 1985), A-11 (CT&T SPD for Group Medical Insurance for Bargaining Employees, effective February 1, 1985), and A-12 (CT&T SPD for Group Medical Insurance for Bargaining Employees, effective February 1, 1985)).

30. The "certificate" appearing at the front of SPD 10 states that Pilot Life "has issued a Group Policy" to Carolina Telephone and Telegraph Company," which is defined as the "Policyholder." The certificate also states that, "The Group Policy is a contract between the Policyholder and Pilot Life which alone constitutes the agreement under which payments are made. They are the only parties to the contract." Def. Ex. A-10 at 1.

31. SPDs 10-12 are primarily directed to active employees. *See, e.g.*, Def. Exs. A-10 at 3, A-11 at 1, A-12 at 1 (each referring to "Eligible Employees" as being "all regular employees"). Thus, the section on "When Insurance Ends" states that "Your insurance ends when any of the following events occurs: (1) you leave our employ, (2) you are no longer

eligible, (3) the Group Policy ceases." The text therefore refers to cessation/termination of the particular "Group Policy" and the "insurance" thereunder, rather than termination of the plan itself and its stated benefits. The only provision in this section which is potentially applicable to retirees states, "If you cease active work, ask your Employer if arrangements may be made to continue insurance." Def. Exs. A-10 at 34, A-11 at 29, A-12 at 31-32.

32. The "Schedule of Benefits" states that "Retirees Included" are "Previous employees who were participants in this medical plan and are retired on pension by the Carolina Telephone and Telegraph Company and their dependents." Def. Exs. A-10 at 3, A-11 at 1, A-12 at 1.

33. The section entitled "When Your Insurance Begins" includes the sub-heading "When You Retire" over the following text:

> **All benefits currently offered to active employees will continue after retirement by Carolina Telephone and Telegraph Company.**
>
> If you have not attained age 65, **you will be insured for the same benefits currently offered to regular employees**.
>
> If you have attained age 65, **you will be insured for the same benefits currently offered to regular employees** but subject to the application of the Non-Duplication of Benefits Provisions [due to Medicare eligibility and benefits].

Def. Exs. A-10 at 6, A-11 at 8, A-12 at 8 (emphasis added). No durational limits are stated for this retiree coverage. In contrast, durational limits are stated elsewhere, *e.g.*, three months for "Continuation Coverage" (Def. Ex. A-10 at 31, A-11 at 27, A-12 at 29). None of this express language providing for retiree medical benefits sets forth or contains a cross-reference of any kind to any of the reservation of rights language cited by defendants.

34. The concluding paragraph of the section on "When Insurance Ends" states the following about coverage after "the date of your death":

> If you are insured for your dependents under the Group Policy on the date of your death, and your spouse survives you, the Medical Care Insurance only on account of your Eligible Dependents may be continued, while the Group Policy remains in force and subject to all its other provisions, until the widow's (or widower's) remarriage, provided the payment of any required contribution is made when due.

Def. Exs. A-10 at 34, A-11 at 29, A-12 at 32.

35. SPDs 10-12 include four (or five) pages at the end setting forth additional information required to be included in SPDs by Department of Labor regulations. These pages identify the plan as "The Group Medical Insurance Plan" and the "Plan Sponsor" as Carolina Telephone and Telegraph Company. They also state that benefits under the plan "are provided by the Group Policy number 3780A [or 77100 or 66771] . . . issued to the Plan Sponsor." The text differentiates between the plan and the plan sponsor on the one hand, and the particular Group Policy and insurer being used by the plan sponsor as the vehicle to "provide" the benefits at the time the booklet was issued. Def. Exs. A-10 at 36, A-11 at 30-31, A-12 at 33.

36. The SPD 10-12 ERISA information pages include this text referring back to the texts quoted above:

> The requirements for being covered by this plan, the provision concerning termination of coverage, a description of the plan benefits (including any limitations and exclusions which may result in reduction or loss of benefits) are shown on the preceding pages of this booklet.

Def. Exs. A-10 at 37, A-11 at 31, A-12 at 33. These pages also include the following paragraph on the very last page of the booklet:

> The Company expects to continue the Plan for the foreseeable future. However, the Company reserves the right to amend, discontinue or terminate the Plan, for reasons of business necessity or financial hardship.

Def. Exs. A-10 at 39, A-11 at 34, A-12 at 36. As stated above, the SPDs cover both active employees and retired employees. The quoted text does not contain any specific statement that this limited reserved right is applicable to benefits for retired employees.

In addition to these textual portions of SPDs 10-12, evaluation of their meaning to an average plan participant requires consideration of course-of-performance evidence, expert opinion evidence, and extrinsic evidence. These forms of evidence are summarized below.

6. SPDs 13-15

DSF paragraphs 55-58 provide an incomplete statement of the textual portions relevant to the proper analysis of SPDs 13, 14 and 15 (Def. Exs. A-13 (Group Life Insurance Plan, United Telephone Company of Ohio, dated "12/88"), A-14 (Group Life Insurance Plan SPD for Bargaining Employees, United Telephone Company of the Northwest, dated "3/89"), and A-15 (Group Life Insurance Plan, United Telephone of Florida, dated "8502" [2/85]).

37. SPDs 13-15 are primarily directed to active employees. *See, e.g.*, Def. Exs. A-13 at B-2.0 and B-6.0; A-14 at 1, 4; A-15 at 3, 7 (text referring to "Employees Eligible" as being "All regular full-time . . . employees" and explaining "active work" requirement). Thus, the section on "When Insurance Ends" states that "Your insurance ends when any of the following events occurs: (1) You leave our employ. (2) You are no longer eligible. (3) The group policy ceases." The text therefore refers to cessation/termination of the particular "group policy" and the "insurance" thereunder, rather than termination of the plan itself and its stated benefits. The only provision in this section which is potentially applicable to retirees states, "If you cease active work, ask your Human Resources Department [or Employer] if arrangements may be made to continue insurance." Def. Exs. A-13 at B-16.0; A-14 at 9-10; A-15 at 7. Retirees therefore represent a special case and are not subject to termination on the grounds stated.

38. SPDs 13 and 14 make the following express promise regarding continuation of Basic Noncontributory Life Benefits upon retirement: "If you have at least five years of service with United Telephone System on the date you retire, your Basic Noncontributory Life Benefits

will be reduced by 50 percent. Such insurance will not be more than $ 13,000." Def. Exs. A-13 at B-4.0; A-14 at 2.

39. SPD 15 makes the following express promise about these benefits:

> (b) Your Basic Noncontributory Life Benefits will be reduced by 50 percent when you retire. Such insurance will not be more than $ 13,000. If you have 10 or more years of service, this $ 13,000 maximum will be increased to 50% of the amount of Basic Noncontributory Life up to a maximum of $ 25,000, whichever is less, for anyone retiring on or after 5/1/84. Any excess amount over the basic $ 13,000 will be payable only to a surviving spouse. If there is no surviving spouse or if the employee so designates, it will be payable to a minor or dependent child or children as defined in our group health and medical insurance plan. This excess amount over $ 13,000 will be paid as a survivor's insurance and will be paid in equal monthly installments.

Def. Ex. A-15 at 4.

40. No durational limits are stated for this retiree coverage in SPDs 13-15. In contrast, durational limits are stated elsewhere, *e.g.*, active employee benefits are reduced at ages 65, 70, 75 and 80 by the percentages stated, benefits for disabled employees are not continued past six months from onset of disability, and employees otherwise leaving employment are covered by the group life insurance only for 31 days. *See* Def. Ex. A-13 at B-4.0, B-16.0, B-8.0; A-14 at 2, 10, 5; A-15 at 5. None of this express language providing for lifetime medical benefits sets forth or contains a cross-reference of any kind to any of the reservation of rights language cited by defendants.

41. SPDs 13-15 include three (or four) pages at the end setting forth additional information required to be included in SPDs by Department of Labor regulations. These pages identify the plan as "The Group Insurance Plan" and the "Plan Sponsor" as United Telecommunications, Inc. and Participating Companies. The text also states that the plan "is administered and funded through an insurance contract with Equitable Life Assurance Society." The text differentiates between the plan and the plan sponsor on the one hand, and the particular

group insurance contract and insurer being used by the plan sponsor as the vehicle to provide the benefits at the time the booklet was issued. Def. Exs. A-13 at B-22.0; A-14 at 16; A-15 at 11.

42. The SPD 13-15 ERISA information pages include this text referring to collective bargaining agreements: "This plan is maintained **in accordance with labor agreements** at some companies participating in the plan." Def. Exs. A-13 at B-23.0; A-14 at 17; A-15 at 12. Defendants have not presented these collective bargaining agreements.

43. These information pages also include the following paragraph on the very last page of the booklet:

> The company expects to continue the plan for the foreseeable future. However, the company reserves the right to amend, discontinue or terminate the plan, for reasons of business necessity or financial hardship.

Def. Exs. A-13 at B-24.0; A-14 at 18; A-15 at 14. As stated above, the SPDs cover both active employees and retired employees. The quoted text does not contain any specific statement that this limited reserved right is applicable to benefits for retired employees.

In addition to these textual portions of SPDs 13-15, evaluation of their meaning to an average plan participant requires consideration of course-of-performance evidence, expert opinion evidence, and extrinsic evidence. These forms of evidence are summarized below.

7. SPDs 16 and 17

DSF paragraphs 62-64 and 67 provide an incomplete statement of the textual portions relevant to the proper analysis of SPDs 16 and 17 (Def. Ex. A-16 (1976 CT&T SPDs for Basic Hospital-Surgical Plan, Extraordinary Medical Expense Plan, and Group Life Insurance Plan) as well as the "1974-77 CBA" (Def. Ex. A-17).

44. SPDs 16 and 17 are primarily directed to active employees. *See, e.g.,* Def. Ex. A-16 at ECF pages 1, 7, 12 ("Eligibility" text referring to "Regular employees"). The sections on

"When Insurance Ends" state that, "Insurance coverage will automatically terminate if your active full time employment in the classes eligible for insurance terminates, or if the provisions of the group policy under which you are covered terminate." Def. Ex. A-16 at ECF pages 4, 9, 14. The text thus refers to cessation/termination of the particular "group policy" and the "insurance" thereunder, rather than termination of the plan itself and its stated benefits. The only provision in this section which is potentially applicable to retirees states with respect to medical coverage, "Insurance coverage for you and your dependents can be continued after retirement." Def. Ex. A-16 at ECF pages 2, 8.

45. SPD 17 makes the following express promise regarding lifetime continuation of life insurance benefits upon retirement:

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

Def. Ex. A-16 at ECF page 13 (emphasis added).

46. No durational limits are stated for this retiree medical and life insurance coverage. In contrast, durational limits are stated elsewhere, *e.g.*, active employee medical benefits are continued for four months for laid-off employees and for 12 months for disabled employees; and life insurance benefits for disabled employees are continued for a period of not more than three years depending on length of service. Def. Ex. A-16 at ECF pages 4 and 13.

47. SPDs 16 and 17 include additional information required to be included in SPDs by Department of Labor regulations. These pages identify the plans covered by SPD 16 as "The Basic Hospital-Surgical Plan," the "Extraordinary Medical Expense Plan," and the plan covered by SPD 17 as the "Group Life Insurance, Accidental Death and Dismemberment, and Dependent

Life Insurance Plan." The "Plan Sponsor" of each is Carolina Telephone and Telegraph Company. The text also states that the benefits under each plan "are provided through an insurance contract with Pilot Life Insurance Company." Def. Ex. A-16 at ECF pages 1, 7 and 12. The text thus differentiates between the plan and the plan sponsor on the one hand, and the particular group insurance contract and insurer being used by the plan sponsor as the vehicle to provide the benefits at the time the booklet was issued.

48. SPDs 16 and 17 do not include any text purporting to reserve the right to amend or terminate benefits. As stated above, the SPDs cover both active employees and retired employees. The SPDs do not contain any specific statement that the company reserves the right to amend or terminate benefits for retired employees.

49. SPDs 16 and 17 include the following text referring to collective bargaining agreements: "The plan, as applicable to union represented employees, is maintained **pursuant to a collective bargaining agreement.** Benefits under the plan for employees covered under the bargaining agreement will depend on the terms of the agreement." Def. Ex. A-16 at ECF pages 4, 9, and 14.

50. The "1974-77 CBA" is presented by defendants in excerpted form in Def. Ex. A-17. The cover of this CBA states that it is an agreement between the Communications Workers of America and Carolina Telephone and Telegraph, effective June 29, 1974. However, Section 3 of Article 36, entitled "Duration of Agreement", states that "This Agreement shall continue in full force and effect after June 29, 1977 unless either party" gives written notice to cancel, revise or modify part of the Agreement. Def. Ex. A-17 at 70-71. Article 22 of the CBA, entitled "Pensions and Benefits," states that "The insurance programs of the Company, including [group

life insurance and medical and hospitalization insurance] shall remain in force during the term of the Agreement." Def. Ex. A-17 at 56.

In addition to these textual portions of SPDs 16-17, evaluation of their meaning to an average plan participant requires consideration of course-of-performance evidence, expert opinion evidence, and extrinsic evidence. These forms of evidence are summarized below.

B. Plan Amendments

1. The Circumstances of the 2005 and 2007 Plan Amendments

DSF paragraphs 69-72, which summarize the various benefit plan amendments giving rise to plaintiffs' claims, provide an incomplete statement of the factual circumstances necessary to assess the validity of the amendments.

51. DSF paragraphs 69-70 summarize the action by Sprint effective January 1, 2006 to terminate all existing plans providing prescription drug coverage for current retirees who were eligible for Medicare Part D and to replace those plans with a flat allowance of $ 41.67 per month (or $ 500 year). Neither the announcement materials (Def. Ex. A-23), nor the minutes of the meeting of the Sprint Employee Benefits Committee at which this action was approved (Def. Ex. A-24) contain any reference to, or discussion of, any facts asserted to satisfy the requirement of certain SPDs (SPDs 10-15) limiting a general reserved right to make plan changes "for reasons of business necessity or financial hardship."

52. DSF paragraphs 71-72 summarize the actions by Embarq (1) effective September 1, 2007 to reduce or eliminate retiree life insurance coverage, including all coverage for retirees who also were entitled to receive death benefits under the Carolina Telephone & Telegraph Company VEBA, and (2) effective January 1, 2008 to terminate all existing plans providing medical and prescription drug coverage for current retirees who were eligible for Medicare.

Neither the announcement materials (Def. Ex. A-25), nor the minutes of the meeting of the Embarq Employee Benefits Committee at which these actions were approved (Def. Ex. A-26) contain any reference to, or discussion of, any facts asserted to satisfy the requirement of certain SPDs (SPDs 10-15) limiting a general reserved right to make plan changes "for reasons of business necessity or financial hardship."

53. With respect to both the 2005 and 2007 changes, defendants do not present evidence to demonstrate the absence of factual dispute on the question of whether the limiting conditions of the reservation language in SPDs 10-15 were satisfied.

54. For calendar year 2005, Sprint reported total operating expenses of $ 26.648 billion and net income of $ 1.785 billion. For calendar year 2006, following the merger with Nextel and the spin-off of Embarq, Sprint reported total operating expenses of $ 38.544 billion and net income of $ 1.329 billion. Sprint Corp. SEC Form 10-K Annual Report as of December 31, 2006, at page F-6. (Pl. Ex. 1) (this exhibit and all other "Pl. Ex." documents are attached to accompanying Affidavit of Alan M. Sandals).

55. In July, 2005, Sprint management informed the members of its Employee Benefit Committee that the elimination of the prescription drug program for Medicare-eligible retirees and its replacement with a $ 500 annual payment would result in annual cash savings of $ 22.4 million during 2006. Presentation Materials, July 27, 2005 Employee Benefits Committee Meeting, at 2 (Pl. Ex. 2). This amount was equal to 0.058% of the annual operating expenses reported for calendar 2006.

56. For calendar year 2006, Embarq reported total operating expenses of $ 4.819 billion and net income of $ 784 million. For calendar year 2007, Embarq reported total operating expenses

of $ 4.861 billion and net income of $ 683 million. Embarq Corp. SEC Form 10-K Annual Report as of December 31, 2007, at page F-4 (Pl. Ex. 3).

57. In June 2007, Embarq management informed the members of its Employee Benefits Committee that the decision to eliminate retiree medical benefits for Medicare-eligible retirees and to reduce or eliminate retiree life insurance benefits would result in annual cash savings of $ 21.4 million (the sum of $ 17.3 million for the medical benefit reductions and $ 4.1 million for the life insurance reductions). This amount was equal to 0.44% of Embarq's operating expenses for 2007. Presentation Materials, June 27, 2007 Employee Benefits Committee at page 2 (Pl. Ex. 4).

C. Course of Performance Evidence

58. Historically, benefits staff at United Telephone, United Telecommunications, and Sprint informed retirees that their medical or life insurance benefits were "lifetime" benefits. Examples of this corporate conduct include the following:

59. October 18, 1989 memorandum from William J. McCullough, Vice President of Human Resources, explaining plan changes to the company's "retirement program," and on page 3 explaining that "benefit dollars" used to pay for retiree medical benefits "will continue to be provided to the spouse [of a retiree] for six months after the death of the employee. The spouse can continue to purchase coverage for the rest of his or her life." Also on page 3, it is explained that those who retire in 1990 will be "grandfathered" and therefore be eligible for a low deductible plan not available to later retirees. (Pl. Ex. 5).

60. Documents describing the retiree medical coverage for retirements in 1989, 1990 and 1991 stated that "The retiree and spouse are entitled to continue the medical coverage for life" (if retired in 1989), and "The retiree and spouse can have medical coverage until death" (if retired in

1990). Similarly, in the portion describing the changes applicable to retirements in 1991, the documents stated that., "At the death of the retiree, the spouse will receive benefit dollars for six months." (Pl. Ex. 6).

61. A June 18, 1990 letter from Nancy J. Warren, Human Resources Analyst at United Telephone Company of Florida, to employee Frank V. VanBuren, stating "You will have lifetime [medical] coverage for you and your wife." (Pl. Ex. 7).

62. Seventeen months before defendant Embarq severely reduced (or terminated, in the case of the CT&T VEBA participants) the retiree life insurance benefits, the Sprint benefits department expressly told plaintiff Robert King, a 1993 management retiree from United Telephone Co. of Florida, that he had lifetime life insurance benefits. King received a February 7, 2006 email from Ledora Lavender, a Sprint HR representative, stating that his "Basic retiree life insurance in the amount of $ 13,000 . . . will remain the same until your death. At that time that amount will be paid to your beneficiary. The premium amount of $ 2.08 will not change during your lifetime. Survivor Income Benefit [another component of the retiree life insurance benefit for some retirees] in the amount of $ 12,000 . . . will remain the same until your death. At that time the benefit amount will be paid out to your spouse over a 12 month time period. If your spouse pre-deceases you, this benefit would terminate at that time. The current premium of $ 1.32 will remain the same during your life time or until your spouse dies." King Affidavit at ¶ 2 and attachment (Pl. Ex. 8).

63. Gayle Phillips served in North Carolina for CT&T/United/Sprint as Benefits Supervisor from 1977 to 2001 and counseled thousands of employees who were about to retire regarding their retirement benefits. She did the counseling both face to face and in group settings. Phillips Dep. at 9-11, 42-45 (Pl. Ex. 9). She never told employees during these counseling sessions

that the company might take away their benefits during retirement or that the company was reserving a right to terminate their benefits in the future. *Id.* at 45-46.

64. Benefits Supervisor Gayle Phillips at CT&T had her staff create benefits information sheets or "checklists" which were provided to employees who were about to retire in order to explain their benefits during retirement. Phillips Dep. Exs. 7-11 (Pl. Ex. 10); Fulghum Dep. Ex. 18 (Pl. Ex. 11); Bullock Dep. Ex. 39 (Pl. Ex. 12); Joyner Dep. Ex. 12 (Doc. 340-22 at APP 1644-46); Phillips Dep. at 91-95 (Pl. Ex. 9). These checklists were given individually to employees who were considering retirement and were used at group retirement planning sessions. Phillips expected employees to rely upon these checklists. *Id.*

65. The checklists stated that "medical care insurance will be continued at no cost for the retiree and their dependent(s) (*see, e.g.,* Phillips Dep. Ex. 7 (Pl. Ex. 10); Dorman Dep. Ex. 26 (Doc. 340-15 at APP 1128-30)), or that "insurance may be continued after retirement provided the monthly premium (if applicable) is paid." *See e.g.,* Phillips Dep. Exs. 8, 9, 10 (Pl. Ex. 10); Daniel Dep. Ex. 20 (Pl. Ex. 13). Benefits Supervisor Phillips instructed retiring employees that they would continue to have medical insurance throughout their retirements. *Id.* at 99.

66. Regarding the life insurance benefits, the checklists stated that "life insurance (2 x salary) will be continued at no cost to the retiree. . . . *On the fifth anniversary of your retirement, insurance will be reduced by 50% and will remain at this figure for the remainder of the retiree's lifetime*." (emphasis added). *See, e.g,.* Phillips Dep. Exs. 7-10 (Pl. Ex. 10); Phillips Dep. at 52-53 (Pl. Ex. 9). Phillips herself understood the grandfathered life to be a lifetime benefit for retirees. *Id.* at 101.

67. The "grandfathered life insurance" was a benefit separate from the benefits provided under by the CT&T Voluntary Employee Benefit Association (VEBA) trust. *Id.* at 108-09. After

Sprint centralized benefits administration in Kansas City, Phillips found that personnel in Kansas City would incorrectly refer to the VEBA as life insurance even though it was paid from a trust fund and was not life insurance. *Id.* at 121.

68. When Phillips left Sprint in 2001, benefits administration was centralized in Kansas City. She identified a document that was distributed by benefits administrators in Kansas City on her last day of employment entitled "Grandfathered Life - Mid Atlantic Operations" and describing the "existing retirees" from both management and bargaining unit groups who were entitled to the grandfathered life benefit. Phillips Dep. Ex. 16 (Pl. Ex. 14); Phillips Dep. at 156-161 (Pl. Ex. 9).

69. Phillips was involved in preparing SPDs for most of her career, including the SPDs related to the grandfathered life insurance. The description of grandfathered life benefits available to CT&T employees was never changed. Phillips Dep. at 247-253 (Pl. Ex. 9).

70. Plaintiff Betsy Bullock worked for CT&T for more than thirty years before she retired on December 31, 2001. She received retirement information from HR representatives while she was an active employee. She recalled that Benefits Supervisor Phillips told her that she would have lifetime medical and life insurance benefits after she retired. Phillips specifically said, "your life insurance is written down in blood. You will have that." Bullock Dep. at 306-307 (Doc. 340-5, p. 18 to Doc. 340-6, p. 34 (APP 292-392)).

71. Lisa Hux worked for CT&T from 1979 until 2004 as a Benefits Manager, an HR Manager, and an Employee Relation Manager. Hux Dep. at 9-12 (Pl. Ex. 15). When she began work for the company in 1979, it already had the life insurance benefit that later became known as the grandfathered life benefit. *Id.* at 15. Hux frequently discussed benefits with both retiring employees and managers both in group and individual meetings. *Id.* at 26-27. It was a common understanding among the management staff that the company had an obligation to provide medical

insurance to retirees throughout their retirement and Hux counseled employees that they were going to have medical benefits throughout their retirements. *Id.* at 27-28. She also counseled employees that they would have life insurance benefits throughout their retirements until they passed away. *Id.* at 28-29.

72. Benefits Manager Hux distributed the checklists (Phillips Dep. Ex. 7-11, Pl. Ex. 10) to employees and went through every item on the list with employees who were considering retirement. Hux Dep. at 29-31 (Pl. Ex. 15). She understood the checklists to promise lifetime medical and life insurance benefits to retirees. *Id.* at 31-33.

73. Benefits Manager Hux recalls that at the end of 2001, employees were told to retire by the end of the year in order to keep their existing benefits throughout their retirements: "If they were eligible for the grandfathered life insurance, they would have been told that they would get that benefit for the remainder of their life." *Id.* at 59-60.

74. At her deposition, Benefits Manager Hux examined language contained in a section of the SPD marked as Barnes Ex. 18, which is the the same language contained in SPD 5, saying "Your coverage under the retiree medical plan ends when you die or you do not pay your share of the cost of the coverage" and said she understood that language as a promise of lifetime medical insurance to a retiree as long as the retiree paid his or her share of the cost. *Id.* at 267.

75. With regard to the language in the company's SPD saying "the company reserves the right to amend or terminate this plan or any statements made in this Summary Plan Description at any time," Benefits Manager Hux testified that it was her understanding the language applied to active employees, but not to retirees who had already left the company. *Id.* at 105-107.

76. Benefits Manager Hux has no doubt that when she met with employees, both individually and as a group, she made representations that their medical insurance and life insurance would continue "for the remainder of your lifetime." *Id.* at 3.

77. All of the named plaintiffs were promised lifetime retiree medical and life insurance benefits.

78. Plaintiff Betsy Bullock was promised lifetime medical and life insurance benefits in conversations with CT&T Benefits Supervisor Gayle Phillips and in correspondence with Sprint Benefits Representative Mina Rezayazdi and Corporate Benefits Manager Gaylene Van Horn. Bullock Dep. at 135-138, 305-308, 346-352 (Doc. 340-5, p. 18 to Doc. 340-6, p. 34 (APP 292-392)); Bullock Dep. Exs. 40-42 (Pl. Ex. 16).

79. Plaintiff Donald Clark was given a checklist by the Chief Operator and Gayle Phillips that promised lifetime medical and life insurance benefits. Clark Initial Dep. at 119, 159-162 (Doc. 340-10, p. 16-69 (App. 649-702)); Clark Dep. Day Two at 10-15 (Pl. Ex. 17); Bullock Ex. 39 (Pl. Ex. 12).

80. Plaintiff Colon McLaurin was told by his Plant Manager that he would have lifetime medical and life insurance benefits at no cost. McLaurin Dep. at 18, 36-40, 49-55, 72-73 (Doc.340-24, pp. 14-49 (APP. 1846-1881)).

81. Plaintiff Woodie Britt received a checklist of benefits and was told by an "upper position" HR Representative that he would have medical benefits at no cost "as long as you and your wife lived." Britt Dep. at 158, see also 256, 267-269 (Doc. 340-4, p. 20 to Doc. 340-5, p. 15 (APP 215 -289)). The HR Representative also informed Britt he would have $ 26,000 worth of life insurance for his entire life. Britt Dep. at 253-254, 270, 281-283, 290-291.

82. Plaintiff William Games questioned Sprint Benefits Representative Barbara Westfall in Kansas City during a phone call. She told him that his medical benefits would last until he died. Games Dep. at 218-226 (Doc. 340-16, p. 90 to 340-18, p. 19 (APP 1253-1351)).

83. Plaintiff Sue Barnes was told by her Manager that she needed to retire in order to secure and keep her life insurance benefits during retirement. Barnes Dep. at 35:9-25, 27:4-7, 39:15-40:9, 145:2-7 (Doc. 340-2, pp. 1-44 (APP 1-44)). The retirement package that Plaintiff Barnes received from Human Resources Representative Mindy Means described her medical and "grandfathered" life insurance benefit and confirmed her understanding that these were lifetime benefits. Barnes Ex. 4 (Doc. 340-3 at APP 173-208); Barnes Dep. at 75:12-25, 152:19-23.

84. Plaintiff Dorsey Daniel was told during his employment by Human Resources personnel, including Herb Henderson, that the medical and grandfathered life insurance benefits were lifetime benefits. As part of his job duties as Manager and Director, he was required to provide employees with retirement packages from Human Resources that included the checklist. At the time he retired, he also received a checklist and another retiree benefits document from Human Resources stating that he would have life insurance for his "lifetime." Daniel Dep. at 125:14-126:11, 127:13-20 (Doc. 340-10, p. 70 to Doc. 340-11, p. 35 (APP 703-755)); Daniel Ex. 7 (Doc. 340-11 at APP 756-781) and Daniel Ex. 20 (Pl. Ex. 13).

85. Plaintiff William Fulghum understood from the "when you die" language in SPD 1 that he would have lifetime medical insurance benefits. Fulghum Dep. at 27:8–28:11, 32:20–33:2 (Doc. 340-15, p. 77 to Doc. 340-16, p. 18 (APP 1131-1181)). He also received a letter from Human Resources Representative Faye Bland that said his medical insurance would continue and that his life insurance was a "lifetime" benefit. Fulghum Dep. at 67:24-68:4, 183:14-184:7;

Fulghum Dep. Ex. 11 (Doc. 340-16 at APP 1229-1236). Human Resources also told him that his life insurance was a lifetime benefit. Fulghum Dep. at 181-183:1-2, 187:8-17, 197:4-199:10.

86. Plaintiff Douglas Hollingsworth received a checklist and understood from his supervisors, Engineering Manager David Walker and District Manager Peter O'Toole, and Human Resources representative Christy Principe, that he had to retire in 2001 to lock in his health insurance and the full amount of his grandfathered life insurance for the rest of his life. Hollingsworth Dep. Ex. 21 (Doc. 340-20 at APP 1548); Hollingsworth Dep. at 132:6-133:3, 192:18-193:1, 199:10-25, 347:1-348:7, 365:2-10 (Doc. 340-19, p. 21 to Doc. 340-20, p. 39 (APP 1413-1515)).

87. Plaintiff Willie Dorman understood from summary plan descriptions and Human Resources personnel and his supervisor Vernon Hodges that the medical and grandfathered life insurance benefits were lifetime benefits. As part of his job duties as Foreman and District and Division Manager, he was required to review the benefits checklists from Human Resources with employees and answer questions about retirement benefits. He described to approximately 1,500 employees that the medical and life insurance were lifetime benefits. At the time he retired, he also received a checklist. Dorman Dep. Ex. 26 (Doc. 340-15 at APP 1128-30); Dorman Dep. at 376:11-374:20, 382:25-388:14 (Doc. 340-13, p. 8 to Doc. 340-14, p. 38 (APP 895-1003)).

88. Plaintiff Calvin Bruce Joyner was an Assistant Vice President at CT&T. In 1993, while discussing his decision to retire with his boss, CT&T President D. Wayne Peterson, Joyner told him that he understood he would have lifetime retiree medical and life insurance benefits. Joyner Dep. at 129-135 (Doc. 340-20, p. 75 to Doc. 340-21, p. 73 (APP 1551-1635)). It was Joyner's understanding that his benefits could not be terminated after he retired. *Id.* at 150-151. This understanding was later confirmed when Joyner met with Human Resources Supervisor Gayle

Phillips to discuss his retirement benefits. In the fall of 1993, Phillips reviewed a checklist of benefits with Joyner (Joyner Dep. Ex. 12) and confirmed that the company did not have the right to terminate his medical and life insurance benefits after his retirement. *Id.* at 209-210, 224, 246, 299-300, 303-304.

89. Plaintiffs Betty Carpenter and Kenneth Carpenter both retired from the Company. Before their respective retirements, Kenneth Carpenter was told by Human Resources personnel, Betty Gorney and Harland Groves, that he would have retiree medical and life insurance benefits for life. K. Carpenter Dep. at 29-30, 103 (Doc. 340-9, p. 36 to Doc. 340-10, p. 13 (APP 597-646)). Mr. Carpenter discussed this assurance of lifetime retiree medical and life insurance benefits with his wife Betty at the time in which those conversations took place. B. Carpenter Dep. at 141. Ms. Gorney and Mr. Groves also told Mr. Carpenter that if Betty suspended her medical insurance following her retirement, she could be carried under his medical insurance until he died and then she could reinstate her own retiree medical benefits. K. Carpenter Dep. at 30-23; B. Carpenter Dep. at 54-56 (Doc. 340-8, p. 27 to Doc. 340-9, p. 8 (APP 530-569)). Mr. Carpenter also attended a group meeting with another Human Resources representative, Rita Etzwiler. In that meeting, he asked whether the amount of life insurance he was to receive at retirement would remain the same until his death. K. Carpenter Dep. at 75. Ms. Etzwiler confirmed that the life insurance benefits were for life and the amount of the benefit would remain the same. K. Carpenter Dep. at 57, 60.

90. During his long career with the Company, plaintiff Timothy Dillon held many discussions with his Human Resources manager, John Blanchet, and with Stan Fisher, Company president, on the topic of lifetime retiree benefits, including lifetime retiree medical and life insurance benefits. Dillon Dep. at 69-70, 187, 191-192 (Doc. 340-11, p. 71 to Doc. 340-12, p. 38

(APP 791-850)). During these discussions, typically about recruitment and retention issues, both men repeatedly told him the Company's retiree medical and life insurance benefits were provided for the retiree's lifetime. Dillon Dep. at 74-75, 187, 191-192. Mr. Dillon also attended a presentation by the manager of Human Resources in late 2001, who emphasized there was a new medical plan being implemented in 2002 and assured Mr. Dillon and the other employees in attendance that if they retired under the retirement package before 2002, they would be grandfathered under the existing retiree medical plan. Dillon Dep. at 81-82. At this meeting, Mr. Dillon and the other attendees were also told that their retiree benefits were lifetime benefits. Dillon Dep. at 108-110. Mr. Dillon was similarly told by Human Resources representative Holly Pastor that his Sprint retiree life insurance benefit was a lifetime benefit. Dillon Dep. at 228.

91. Shortly before he retired, Plaintiff Robert King was told by Human Resources manager Mary Rose that his retiree medical and life insurance benefits would remain the same for the rest of his retirement. King Affidavit at ¶ 2 (Pl. Ex. 8). In addition, in a February 7, 2006 email, Human Resources representative Ledora A. Lavender stated to Mr. King that his total retiree life insurance benefit of $25,000 would remain the same until his death. King Affidavit at ¶ 1 and attachment (February 2006 emails between Mr. King and Ms. Lavender).

92. Plaintiff Wanda Shipley was told at a group meeting conducted by Jim Walters, Human Resources Coordinator, that if she accepted an early retirement offer, she would receive lifetime retiree medical and retiree life insurance benefits. Shipley Dep. at 9, 11, 19, 41-42 (Doc. 340-24, p. 50 to Doc. 340-25, p. 19 (APP 1882-1931)). Ms. Shipley's supervisors, Robert Street and Steve Brown confirmed that the retirement package offered to her was "a good deal." Shipley Dep. at 19, 107.

93. Plaintiff Carl Somdahl was told throughout his career with the Company that the retiree medical and life insurance benefits were lifetime beneefits. Ray Murray, the District Manager of United Telephone of the Northwest, who hired him in 1977, told him these benefits would be provided throughout his retirement. Somdahl Dep. at 42, 190-191 (Doc. 340-25, p. 67 to Doc. 340-26, p. 42 (APP 1979-2032)). In deciding whether to retire, Mr. Somdahl met with Human Resource representative Sherry Chichester, who confirmed that the retiree medical benefits were lifetime. Somdahl Dep. at 21-24. Mr. Somdahl also discussed his retirement benefits with Human Resource representative Linda Smith, who similarly told him that his retiree medical and life insurance benefits were for life and "there was not going to be a problem." Somdahl Dep. at 70, 74-76. Margie Balough, Human Resources representative in the Company's head office, also confirmed the lifetime nature of these benefits. Somdahl Dep. at 51, 125.

94. In July 2007, Embarq prepared a Q&A for use by staff in answering telephone calls the company expected to receive once it announced the reductions and eliminations of the retiree medical and life insurance benefits. One question anticipated by the company was that, "I [the retiree] have a letter that states I will receive medical and life insurance benefits for life." (Pl. Ex. 29 at attachment page 2.

95. During 1999-2000, benefits staff at Sprint conducted a detailed analysis of all existing retiree medical and life insurance SPDs and booklets to assess whether language in the booklets was adequate to preserve a company right to amend. As a result of this process, in the spring of 2000 Sprint management prepared a chart showing that 3,348 retirees had retired under retiree medical SPDs in which there either was no reservation of rights allowing defendants to amend or terminate the benefits, or the language present was "indefinite" such that defendants could

not determine whether the SPD language allowed for amendment or termination. These retirees are identified as "Pre-1991" retirees. *See* Chart, Retiree Medical Coverage, Summary Plan Description Disclaimer Research and Analysis, Spring 2000 (Pl. Ex. 19).

96. Gaylene Van Horn, the deputy to defendant Randall Parker who led this analysis of SPD language, confirmed at her deposition that SPDs which included reservation language limited to "business necessity or financial hardship" were identified as having "indefinite" language. The same conclusion was reached for reservation language limited by collective bargaining agreements. Van Horn Dep. (April 28, 2011) at 72-112 (Pl. Ex. 20).

97. In subsequent correspondence, dated April 14, 2000, to Sprint Assistant Vice President for Corporate Benefits Ned Holland, benefits consultant Watson Wyatt noted that for "Existing Retirees" in the "Pre-1990 Plans" it would develop models "Based on Sprint analysis of reservation of rights language, [which would] either Freeze at 2000 subsidy or continue existing benefits." (Pl. Ex. 21 at page 2).

98. Sprint benefits staff prepared a presentation packet for the August 2000 Employee Benefits Committee Meeting. One draft stated that, "Culturally at Sprint, retiree medical coverage is viewed by employees as an entitlement and by retirees as a 'vested' benefit." (Pl. Ex. 22 at 4).

99. In 2001, Sprint engaged benefits consultant Watson Wyatt to evaluate possible changes to the retiree benefits offered to both future and current retirees. In reviewing what the company called the "Retiree Compact," Watson Wyatt conducted interviews of various company executives. I. Benjamin Watson, Senior Vice President for Human Resources, stated in his interview that "**Sprint probably can't take away benefits from current retirees**." Mr. Watson referred to minor actions such as "not giv[ing] COLAs or lock[ing] down the medical contributions" as only constituting " 'technical compliance' with the **commitment to them** [current retirees]." (Pl.

Ex. 23 at 22-23) (emphasis added). Mr. Watson also stated that "Sprint has an obligation to longer-term employees (perhaps 15 or more years). Sprint should stand behind the commitment made to these employees and not jerk the rug out from under them." *Id.* at 22. Ric Walter, Assistant Vice President for Human Resources, stated in his interview that there would be repercussions if any company action regarding retiree medical benefits for existing retirees were to "significantly change **the deal that was communicated to them**." *Id.* at 7 (emphasis added).

100. A presentation packet prepared for the March 2001 Employee Benefits Committee Meeting stated that the company had an "obligation" to maintain the benefits for current retirees. The document listed "consistent themes heard in many or all of the interviews" with Sprint executives. These themes included, "Sprint has an obligation to current retirees to maintain benefit levels similar in value to the current arrangements." The same bullet point also refers to the retiree benefits for current retirees as "existing commitments" of Sprint. (Pl. Ex. 24 at page 5). The presentation materials recommended that for "Existing Retirees" the company "Maintain current retiree coverage" for life insurance benefits. As to medical benefits, it was recommended only that a second medical option be introduced for pre-1991 retirees, and that the cost-sharing arrangements be maintained in their current form for post-1990 retirees. The March 2001 Employee Benefits Committee presentation materials recommended changes in both medical and life insurance benefits only for *future* retirees. (Pl. Ex. 24 at pages 5-6).

101. The March 2001 Employee Benefits Committee presentation materials also discussed the company's practice of grandfathering retiree medical and life insurance benefits. The document reported that Sprint was sponsoring 170 different legacy retiree medical plans: "Pre-1991 retiree medical is delivered through 170 different branches [internal recordkeeping system] representing 170 different levels of benefits." (Pl. Ex. 24 at 2). Similar

"grandfathering" practices were followed for the retiree life insurance benefits. For example, a February 18, 1994 memorandum from Randall T. Parker, then Director of Benefits, explained that some employees and retirees were in "grandfathered groups" that were provided greater levels of retiree life insurance and were insulated from benefit changes. (Pl. Ex. 25).

102. At Carolina Telephone and Telegraph ("CT&T") and elsewhere in Sprint's Mid-Atlantic Operations, levels of retiree life insurance were preserved for certain retirees under a benefits plan that was itself called "Grandfathered Life Insurance." SPD 16 includes the 1976 "Summary Plan Description for the Group Life Insurance, Accidental Death and Dismemberment, and Dependent Life Insurance Plan," which was the original summary plan description covering the grandfathered life insurance applicable to CT&T employees after the company was acquired by United Telephone System. (Def. Ex. A-16). The language promising lifetime grandfathered life insurance is discussed above at ¶¶ 64-65. The summary plan description covering the CT&T grandfathered life insurance was changed in the 1980s to SPD 9 beginning on May 17, 1982. (Def. Ex. A-9). The company also developed separate summary plan descriptions, SPD 7 and SPD 8, which covered bargaining-unit employees.

103. The CT&T grandfathered life insurance was described as a lifetime benefit in summaries provided to employees in the form of checklists explaining retiree benefits. Examples of these checklists include the following:

(a) Both an untitled version of the checklist, and a version entitled "Retiree Benefits" state: "If the retiree is participating in the group life insurance plan, life 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." Dorman Dep. Ex. 26 (Doc. 340-15 at APP 1128-30); Phillips Dep. Ex. 7 (Pl. Ex. 10); Bullock Dep. Ex. 39 (Pl. Ex. 12); Fulghum Dep. Ex. 18 (Pl. Ex. 11).

(b) Another version of the checklist entitled "Retiree Benefits" and two versions entitled "Retiree Benefits – CTT" state: "Life insurance (2 x Salary) will be continued at no cost to the retiree. . . . On the fifth anniversary of your retirement, insurance will be reduced by 50% and will remain at this figure for the remainder of the retiree's lifetime." Phillips Dep. Ex. 8 (Pl. Ex. 10); Dorman Ex. 26 at Joyner000123 (Doc. 340-15 at APP 1128-30); Phillips Dep. Ex. 9 (Pl. Ex. 10); Daniel Dep. Ex. 20 (Pl. Ex. 13).

(c) Versions of a Carolina Telephone & Telegraph information sheet entitled, "Retiree Benefits – CTT – NBU or MGT" stating that, "Life insurance (2 x salary) will be continued at no cost to the retiree. . . . On the 5th anniversary of retirement, insurance will be reduced by 50% and will remain at this figure for the remainder of the retiree's lifetime." Pl. Exs. 26 and 27; Phillips Dep. Exs. 10-11 (Pl. Ex. 10); Dorman Ex. 26 at Joyner000124 (Doc. 340-15 at APP 1128-30), Hollingsworth Ex. 21 (Pl. Ex. 28).

(d) Other examples of these checklists are in the discovery record. All have similar language describing the grandfathered life insurance benefits as "lifetime" and do not include any reservation of rights language.

104. The CT&T grandfathered life insurance was also summarized as a lifetime benefit in letters and other documents detailing retiree benefits that were provided to employees by Human Resources representatives. Examples of these letters and documents include the following:

(a) Former named plaintiff Curtis Pittman received a letter from Benefit Committee Representative Deanie Lilley that stated: "Your group life insurance with Pilot Life will be continued at no cost to you. . . On the fifth anniversary of retirement, your life

insurance will be reduced by 50% ($35,000) and will remain at this figure for the remainder of your lifetime." (Pl. Ex. 18).

(b) A document entitled "W. Dorsey Daniel" that Plaintiff Daniel received from Human Resources detailing the amount of his pension and retiree benefits. Under the column labeled "Retiree Benefits," the document stated that his life insurance was "$228,000 (1st five years)" and "$114,000 (after 5 years for lifetime"), at "[n]o cost to retiree." Daniel Ex. 7 at Daniel000146 (Doc. 340-11 at APP 756-781).

D. Expert Report of Gail Stygall, Ph.D.

105. Plaintiffs will present expert testimony from Gail Stygall, Ph.D. Stygall is a professor of English and Linguistics at the University of Washington, who teaches, conducts research, and has served as an expert on issues of comprehensibility of pension-related and other complex documents. She analyzed over 100 SPDs, reviewing each not only for substance, but also for similarities in language and format in order to properly organize them for analysis. Professsor Stygall's Declaration and Expert Report are attached as Pl. Ex. 30. Plaintiffs acknowledge that defendants have filed a motion to exclude her Report and testimony (Doc. 321). Plaintiffs' memorandum in opposition is being filed concurrently.

106. Defendants' SPDs 1-6 are included within Group 1 of the Stygall analysis. Although SPD 3 is not specifically listed as being part of Group 1, the parties agree that it is a variant (issued to plaintiff Somdahl) of SPDs 1, 2 and 4 which are listed. Stygall states, *inter alia*, that the SPDs in this group are reasonably susceptible to the reader's conclusion that lifetime benefits have been promised due to the fact that they contain "strong, specific statements associated with retiree medical care and life insurance benefits that coverage ends when 'you die.'" In addition, the reservation of rights text "never [appears] within the proximity of the

presentation of an actual specific benefit or in conjunction or cross-referenced with the specific statement that coverage ends 'when you die.'" *See* Stygall Report at 21. The statements that coverage ends on death "are specific and straightforward and there is no reason for an average plan participant to think anything other than he had medical [or life insurance] coverage until he died." *Id.* at 22. The contrast between the statements specifically stating that the benefits end 'when you die' and the vague, general disclaimers stating that the plan may be terminated produces ambiguity." *Id.* at 23.

107. Defendants' SPDs 7-9 are included within Group 4 of the Stygall analysis. Stygall states, *inter alia*, that the SPDs in this group are reasonably susceptible to the reader's conclusion that lifetime benefits have been promised due to the fact that they use "promissory language" to describe the retiree benefits, such as "will continue," "will be," "payable," and "will pay." No limitations accompany these promises, which are "straightforward and clear and there is no ambiguity or confusion about the benefit." *See* Stygall Report at 37. The descriptions of life insurance coverage use "vesting language" based on years of service, and the text otherwise refers to enhancement of benefit coverage amounts for later retirees, which "contributes to the reader's perception of lifetime benefits." *Id.* at 39-40. Language referring to possible changes in the "group policy" denotes a change in the specific insurance vehicle rather than the plan itself. "The insurance that could terminate is the particular group policy which can be replaced with another group policy." *Id.* at 38.

108. Defendants' SPDs 10-15 are included within Group 2 of the Stygall analysis. Although SPDs 12, 13, and 14 are not specifically listed as being part of Group 2, the parties agree that SPD 12 is a variant of SPDs 10 and 11 which are listed, and that SPDs 13 and 14 are variants of SPD 15 which is listed. Stygall states, *inter alia*, that the SPDs in this group are

reasonably susceptible to the reader's conclusion that lifetime benefits have been promised due to the fact that the SPDs describe the medical and life benefits in a straightforward manner using phrases that the medical benefits "are payable" upon retirement and the life insurance benefits are "payable" upon death of the retiree. *See* Stygall Report at 24-25. The SPDs' coverage of both active and retired employees leads the average reader to conclude that events such as leaving employment or group policy termination "would naturally apply to active workers rather than retired workers." *Id.* at 26. The life insurance coverage also is stated in terms of years of service and thus "uses the language of vesting to express eligibility." *Id.* at 27. These SPDs are also "characterized by a reservation of rights that expressly limits the company's right to amend or terminate the benefits only 'for reasons of business necessity or financial hardship.'" Using standard reference works showing the contexts in which these terms are generally used, Stygall concludes that, "For the retiree reader, the circumstances under which 'business necessity' and 'financial hardship' could be invoked means that the right is "limited to only instances where the company is demonstratively in financial distress, such as bankruptcy." *Id.* at 28.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

The rules of decision governing defendants' motion for partial summary judgment are familiar ones. Summary judgment is appropriate only "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A court's role is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The party seeking summary judgment bears the burden to demonstrate the "absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

A court must view all of the evidence and any factual inferences in the light most favorable to plaintiffs as the non-movant. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Mickelson v. New York Life Ins. Co.*, 460 F.3d 1304, 1310 (10th Cir. 2006) ("We view the evidence, and draw reasonable inferences therefrom, in the light most favorable to the nonmoving party"). The court "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 151 (2000). The court should only give credence to the nonmovant's favorable evidence and evidence of the movant which is uncontradicted, unimpeached and "comes from disinterested witnesses." *Id.*

II. THE MOTION FOR SUMMARY JUDGMENT IGNORES THE PROTECTIVE PROVISIONS OF ERISA REPEATEDLY EMPHASIZED BY THE TENTH CIRCUIT AND THIS COURT.

Defendants' arguments seeking summary judgment on plaintiffs' First Claim ignore cardinal principles of ERISA and fail to adequately address the law of the Tenth Circuit, which has repeatedly emphasized ERISA's strongly protective purposes and the obligation of employers to make accurate, complete and understandable disclosures about rights to benefits.

At best for defendants, the retiree medical and life insurance plans at issue on their motion are ambiguous and summary judgment must be denied. *See Haymond v. Eighth Dist. Elec. Benefit Fund*, 36 Fed. Appx. 369, 373-74 (10th Cir. 2002) (finding ambiguity in plan's terms and reversing summary judgment for defendant); *Miller v. Monumental Life Ins. Co.,* 502 F.3d 1245, 1252-53 (10th Cir. 2007) (reversing summary judgment, court found plan terms to be ambiguous, and applied doctrine of *contra proferentem* – construing all ambiguities against drafter-defendants – in remanding for judgment for plaintiff); *Blair v. Metropolitan Life Ins. Co.,* 974 F.2d 1219, 1222 (10th Cir. 1992) (resolving ambiguity in favor of participant "is consistent with basic trust principles that protect, in a case like this, the interests of the beneficiary-employee"); *see also Nutrition Physiology Co., LLC v. Kurtz*, No. 11-2353-EFM, 2011 U.S. Dist. LEXIS 75368 at * 5 (D. Kan. July 12, 2011) (applying "the near-universal maxim that ambiguities in contracts are interpreted against the draftsman").

Under Tenth Circuit law, the question presented by the motion is whether "a reasonable person in the position of [a plan] participant could find the language in the SPD" to provide secure benefits for life. *See Chiles v. Ceridian Corp.,* 95 F.3d 1505, 1517 (10th Cir. 1996). The question is not what company management now believes, or what company lawyers can pull together after scouring decades of ERISA rulings. When all relevant portions of the SPDs are

considered, along with relevant course-of-performance evidence and expert opinion from a highly qualified linguistics professor, the only possible conclusion on this record is that, at a minimum, the SPDs are reasonably susceptible to the interpretation by a plan participant that plaintiffs' retiree medical and life insurance benefits are permanent and vested

These fact questions must be resolved at trial and summary judgment is not appropriate. *See, e.g., Eatinger v. BP American Production Co.*, No. 07-1266-EFM-KMH, 2012 U.S. Dist. LEXIS 7783 at * 13-14 (D. Kan. January 24, 2012) ("releases are ambiguous in several ways" so "there are questions of fact and summary judgment is improper").

A. ERISA Imposes Strict Measures to Ensure that Plan Participants Receive Accurate and Understandable Information About their Benefits.

After decades of state law regulation during which working men and women were repeatedly deprived of promised retirement benefits, Congress imposed stringent duties on employers and other ERISA fiduciaries. "It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b).

Accurate and understandable disclosure of benefits rights is a central objective of ERISA. "Congress' purpose in enacting the ERISA disclosure provisions [was to] ensur[e] that 'the individual participant knows exactly where he stands with respect to the plan.'" *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 118 (1989), *quoting* H.R. Rep. No. 93-533, 93rd Cong., 1st Sess. 11 (1973). ERISA requires distribution of plan summaries "in order that every employee may, *on examining the plan documents*, determine exactly what his rights and

obligations are under the plan." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995), quoting with emphasis H.R. Rep. No. 93-1280, 93rd Cong., 2d Sess. 297 (1974); *see also Member Services Life Ins. Co. v. Am. Nat'l Bank & Trust Co.*, 130 F.3d 950, 956 (10th Cir. 1997). The statute thereby implements "the important policy of protecting beneficiaries from misleading or false information contained in a summary plan description." *Charter Canyon Treatment Center v. Pool Co.*, 153 F.3d 1132, 1136 (10th Cir. 1998); *accord*: *Shields v. Continental Cas. Co.*, 209 F. Supp. 2d 1167, 1178 (D. Kan. 2002).

To achieve these protections, ERISA requires plan administrators to furnish to participants and beneficiaries a summary plan description ("SPD") that is "written in a manner calculated to be understood by the average plan participant" and "sufficiently accurate and comprehensive to reasonably apprise [plan] participants and beneficiaries of their rights and obligations under the plan," including the "circumstances which may result in . . . denial or loss of benefits." ERISA § 102(a)-(b), 29 U.S.C. § 1022(a)-(b).

The Department of Labor regulation on these requirements, 29 C.F.R. § 2520.102-2 and 102-3, became effective on March 15, 1977. *See* 42 Fed. Reg. 14266. It requires plan administrators to "tak[e] into account such factors as the level of comprehension and education of typical participants in the plan and the complexity of the terms of the plan." 29 C.F.R. § 2520.102-2(a). The regulation prohibits SPDs that "have the effect of misleading, misinforming or failing to inform participants and beneficiaries. Any description of exceptions, limitations, reductions or restrictions of plan benefits shall not be minimized, rendered obscure, or otherwise made to appear unimportant." 29 C.F.R. § 2520.102-2(b). "The description or summary of restrictive plan provisions need not be disclosed in the summary plan description in close conjunction with the description or summary of the benefits, provided that adjacent to the

benefit description the page on which the restrictions are described is noted." *Id.* Finally, SPDs must include a "statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture, suspension, offset, reduction or recovery . . . of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits." 29 C.F.R. § 2520.102-3(*l*). An employer thus "is obligated by the SPD to inform its employees" of any limitations on benefits. *Chiles*, 95 F.3d 1505, 1518 (10th Cir. 1996) (citing statute).

As discussed above in the Counter-Statement, the vague and generalized reservation of rights language cited by defendants did not appear in, nor was it ever cross-referenced in, the SPD sections describing the retirees' benefits, even in the specific sections of SPDs 1-6 which were entitled "When Coverage Ends" and which stated that benefits under the plans end only "when you die" (or fail to pay any required premiums). *See, e.g.*, Def. Ex. A-1 at 17; Def. Ex. A-5 at 41. In addition, while the "When Coverage Ends" sections are contained in the table of contents of the SPDs, the vague reservation language cited by defendants is not even listed in the table of contents. *See Schaum v. Honeywell Retiree Medical Plan Number 507,* No. 40-2290, 2006 U.S. Dist. LEXIS 88835 at *28 (D. Ariz. March 31, 2006) (finding that reasonable person would likely be unaware of restriction due to, *inter alia*, failure to include it in SPD table of contents).

In interpreting a contract, "an interpretation which gives a reasonable, lawful and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect." *Restatement (Second) of Contracts*, § 203(a). As with any contract, the terms of the SPDs must be considered "as a whole and not as fragments taken out of context." *Continental Western Ins. Co. v. Ard*, No. 07-1201, 2009 U.S. Dist. LEXIS

13921 at * 7 (D. Kan. Feb. 23, 2009). By citing only the snippets of vague reservation language, defendants commit the error of ignoring the whole as well as the "common and ordinary meaning" of their express promises of benefits.

B. Tenth Circuit Law Requires That Employers and Plan Administrators Who Prepare Summary Plan Descriptions Bear the Consequences of Uncertainty Resulting from their Faulty Drafting.

These protective principles also govern interpretation of plan-related documents. "[T]he relative clarity of plan documents must be viewed against the special obligations that attach in the ERISA context." *Haymond v. Eighth Dist. Elec. Benefit Fund*, 36 Fed. Appx. 369, 372-73 (10th Cir. 2002) (referring to requirement of 29 U.S.C. § 1022(a) that SPDs be "written in a manner clearly calculated to be understood by the average plan participant"). *See also* Memorandum Opinion, dated December 2, 2008, at 11 (Doc. 45) (hereinafter "Op.") (same, citing *Haymond*). Plans and administrators have an "obligation to draft an SPD that is clear to participants." 36 Fed. Appx. at 373. "Just as a trustee must conduct his dealings with a beneficiary with the utmost degree of honesty and transparency, an ERISA provider [of benefits] is required to clearly delineate the scope of its obligations." *Rasenack v. AIG Life Ins. Co.,* 585 F.3d 1311, 1318-19 (10th Cir. 2009), *quoting Miller v. Monumental Life Ins. Co.,* 502 F.3d 1245, 1250 (10th Cir. 2007).

The Tenth Circuit in *Chiles* left no doubt that the consequences of loose, inaccurate or ambiguous drafting must be imposed on the employer (or plan administrator) who prepares the summary plan description, not on the employees:

> Any burden of uncertainty created by careless or inaccurate drafting of the summary [plan description] must be placed on those who do the drafting, and who are most able to bear that burden, and not on the individual employee, who is powerless to affect the drafting of the summary or the policy and ill equipped to bear the financial hardship that might result from a misleading or confusing document. Accuracy is not a lot to ask.

Chiles, 95 F.3d at 1518 (emphasis added), *quoting Hansen v. Continental Ins. Co.*, 940 F.2d 971, 982 (5th Cir. 1991).[2] "An SPD is intended to be a document easily interpreted by a layman." *Chiles*, 95 F. 3d at 1517-18. Applying this general ERISA rule in the context of an insured benefit, the Tenth Circuit amplified as follows:

> In light of the drafters' expertise and experience, the insurer should be expected to set forth any limitations on its liability clearly enough for a common layperson to understand; if it fails to do this, it should not be allowed to take advantage of the very ambiguities that it could have prevented with greater diligence.

LaAsmar v. Phelps Dodge Corp. Life, Accid. Death & Dismemberment and Dependent Life Ins. Plan, 605 F.3d 789, 806 (10th Cir. 2010), *quoting Miller v. Monumental Life Ins. Co.*, 502 F.3d 1245, 1254-55 (10th Cir. 2007).

"Our court has never construed the ambiguities of an ERISA plan against a beneficiary." *Miller,* 502 F.3d at 1254. "Strictly construing ambiguous terms presents ERISA providers with a clear alternative: draft plans that reasonable people can understand or pay for ambiguity." *Id.* at 1255.

C. SPDs Are Ambiguous If They Are Reasonably Susceptible to A Participant's Interpretation that Permanent Benefits Are Being Promised.

A plan provision is ambiguous if it is "reasonably susceptible to more than one meaning, or where there is uncertainty as to the meaning of a term." *LaAsmar v. Phelps Dodge Corp. Life, Accid. Death & Dismemberment and Dependent Life Ins. Plan*, 605 F.3d 789, 804 (10th Cir.

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[2] *Chiles* cited empirical research – published before the issuance of most of defendants' SPD exhibits – showing "how employees reading SPDs can be misled as to their contractual rights." *Chiles*, 95 F.3d at 1519, *citing* James F. Stratman, "Contract Disclaimers in ERISA Summary Plan Documents: A Deceptive Practice?," 10 *Indus. Rel. L. J.* 350 (1988). In this case, plaintiffs present the analysis of Gail Stygall, Ph.D., a linguistics professor at the University of Washington whose research has concentrated on laypersons' understanding of legal documents. Stygall confirms that the language of the SPDs is at least ambiguous. *See* Stygall Report and Declaration, dated August 1, 2011 (Pl. Ex. 30).

2010), *quoting Rasenack v. AIG Life Ins. Co.,* 585 F.3d 1311, 1318 (10th Cir. 2009). *See also Stewart v. Adolph Coors Co.*, 217 F.3d 1285, 1290 (10th Cir. 2000); *Flinders v. Workforce Stabilization Plan of Phillips Petroleum Co.,* 491 F.3d 1180, 1193 (10th Cir. 2007) (ambiguity found where provision is "susceptible to more than one reasonable interpretation"), *citing Hickman v. GEM Ins. Co.,* 299 F.3d 1208, 1212 (10th Cir. 2002).

In determining whether a plan term can reasonably be interpreted multiple ways, "our inquiry is not what the [drafter] unilaterally intended the terms of the Plan to mean, but what a reasonable person in the position of the participant would have understood those terms to mean." *LaAsmar v. Phelps Dodge Corp. Life, Accid. Death & Dismemberment and Dependent Life Ins. Plan*, 605 F.3d 789, 801 (10th Cir. 2010), *citing Rasenack v. AIG Life Ins. Co.,* 585 F.3d 1311, 1318 (10th Cir. 2009). The language accordingly must be given its "common and ordinary meaning as a reasonable person *in the position of the [plan] participant* . . . would have understood the words to mean.'" *Miller v. Monumental Life Ins. Co.,* 502 F.3d 1245, 1249 (10th Cir. 2007) (emphasis added), *quoting Admin Comm. of Wal-Mart Assocs. Health & Welfare Plan v. Willard,* 393 F.3d 1119, 1123 (10th Cir. 2004). The issue is not whether defendants' interpretation is reasonable, but whether there is more than one reasonable interpretation of the plan terms. *Miller,* 502 F.3d at 1252.

In its controlling decision on this point, *Kellogg v. Metropolitan Life Ins. Co.,* 549 F.3d 818, 830 (10th Cir. 2008), the Tenth Circuit ruled that the protective principles governing construction of insurance contracts "apply equally to ERISA cases governed by federal common law," which "from pre-Erie diversity cases to present day ERISA cases – focuses upon *the expectation and intentions of the insured*." (citation omitted; emphasis added) In viewing the ERISA plan as an ordinary participant would, "'language is ambiguous if it is reasonably

susceptible of different interpretations *or* if an ordinary person in the shoes of the insured would not understand that the policy did not cover claims such as those brought.'" *Id.* at 830 n. 3 (emphasis added) (citation omitted). Accordingly, an insurer "should be expected to set forth any limitations on its liability clearly enough for a common layperson to understand." If it fails to do so, "it should not be permitted to take advantage of the very ambiguities that it could have prevented." *Id.* at 1254 (citation omitted). *See also Continental Western Ins. Co.*, 2009 U.S. Dist. LEXIS 13921 at * 7 (quoting Kansas caselaw: "To restrict or limit coverage, an insurer must use clear and unambiguous language.").

If the SPDs are ambiguous, extrinsic evidence also must be considered, including, "interpretive statements made by [the employer], past practices, customary usage in the trade, and other competent evidence bearing on the understanding of the parties." *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1515, 1519, n. 12 (10th Cir. 1996) ("when conflicting extrinsic evidence must be evaluated in order to illuminate a plan's terms, summary judgment is not appropriate"); *May v. Interstate Moving & Storage Co.*, 739 F.2d 521, 523 (10th Cir. 1984). *See also* Op. at 15 ("Plaintiffs point to plan language which indicates that coverage will continue until the employee either dies or fails to pay his or her share of the cost. This potentially conflicting language may render the plans ambiguous, in which case the Court can consider extrinsic evidence"), *citing DeBoard v. Sunshine Min. & Refining Co.*, 208 F.3d 1228, 1240-41 (10th Cir. 2000).

The practical construction accorded to a contract by the parties' conduct "will be given substantial weight in determining the proper interpretation, particularly if the conduct manifesting their construction occurred prior to any controversy." *Boswell v. Chapel*, 298 F.2d 502, 506 (10th Cir. 1961); *see also Schlumberger Technology Corp. v. Greenwich Metals, Inc.*, No. 07-2252-EFM, 2009 U.S. Dist. LEXIS 121343 at * 25 n. 39 (D. Kan. December 30, 2009)

(despite parole evidence rule, terms "may be explained or supplemented by course of performance" under K.S.A. § 84-2-202). Even if the extrinsic evidence ultimately is found to be "equivocal regarding the parties' intent on this point [regarding the nature of benefits promised], we believe the ambiguity should have been construed in favor of plaintiffs." *DeBoard*, 208 F.3d at 1243.

D. Analysis of the SPDs Establishes that Defendants Are Not Entitled to Summary Judgment.

Defendants' SPDs confirm that "a reasonable person in the position of [a plan] participant could find the language in the SPD" to provide secure benefits for life. *See Chiles*, 95 F.3d at 1517. Under Tenth Circuit law, it is only necessary to show that "a promise to provide vested benefits '[was] incorporated, *in some fashion*, into the formal written ERISA plan.'" *Chiles*, 95 F.3d at 1511 (emphasis added), *quoting Jensen v. SIPCO, Inc.*, 38 F.3d 945, 949 (8th Cir. 1994). *See also Temme v. Bemis Company, Inc.*, 622 F.3d 730, 736 (7th Cir. 2010) ("[T]he lack of an explicit vesting term is not determinative. We have previously rejected the position that 'magic words' or unequivocal contract language must state that lifetime benefits were being created."). Unlike other circuits, the Tenth Circuit has expressly declined to adopt "a hard and fast rule finding a general reservation of rights clause unambiguously controlling any promise located in another part of an ERISA document." *Id*. at 1512. These Tenth Circuit principles governing the plaintiff's burden of proof operate hand-in-hand with the protective rules governing plan interpretation that are discussed in Subsections A-B above.

Defendants cannot establish on summary judgment that the SPDs are clear and unambiguous. First, and as noted, the failure of all the SPDs presented by defendants to cross-reference defendants' alleged reservation of rights in connection with the express descriptions of the *retiree* medical and life insurance benefits is a violation of 29 C.F.R. § 2520.102-2(b). In

addition, specific statements in the SPDs that benefits will continue, either until death or otherwise without limitation, control over any vague, ambiguous references to a general right to amend. "[S]pecific terms and exact terms are given greater weight than general language." *Chiles*, 95 F.3d at 1513, *quoting Restatement (Second) of Contracts* § 203(c). More than a century ago, the Supreme Court explained the rule as follows:

> The ordinary rule in respect to construction of contracts is this: that where there are two clauses in any respect conflicting, **that which is specifically directed to a particular matter controls in respect thereto over one which is general in its terms, although within its general terms the particular may be included.**

Mut. Life Ins. Co. v. Hill, 193 U.S. 551, 558 (1904) (emphasis added); *see also Steil v. Humana Kansas City, Inc.*, 124 F. Supp. 2d 660, 663-64 (D. Kan. 2000).

1. SPDs 1-4

SPDs 1-4 include express and unconditional promises that the retiree medical benefits will end only "when you die." *See* Pls. Counter-Statement of Facts ("PCSF") 1-3 above. This language is sufficient to "clearly indicate[ ] an intent on the part of [the employer] to provide plaintiffs with lifetime health insurance benefits." *DeBoard v. Sunshine Min. & Refining Co.*, 208 F.3d 1228, 1238 (10th Cir. 2000). *DeBoard* held that the employer's informational letters describing a special early retirement program, which promised a health plan "fully paid for at [employer] expense until the time of your death," constituted enforceable plans with vested benefits. "[T]he language of the letters clearly indicates an intent on the part of [the employer] to provide plaintiffs with lifetime health insurance benefits." *Id*. at 1233, 1239, 1241. There can be no dispute here that if a promise of benefits "until the time of your death" is sufficient to provide lifetime benefits, then so does the promise in SPDs 1-4 that benefits will only end "when you die." *See also Noe v. Polyone Corp.*, 520 F.3d 548, 560 (6th Cir. 2008) ("promising to provide a benefit until a person dies undoubtedly means that the benefit lasts for the person's life");

Aguilar v. Basin Resources, Inc., 47 Fed. Appx. 872, 876 (10th Cir. 2002) (promises of retiree medical benefits "for life" or "until death" interpreted to provide lifetime benefits); *Devlin .v Empire Blue Cross and Blue Shield*, 274 F.3d 76, 85 (2d Cir. 2001) (language promising "lifetime" benefits "sufficient to create a triable issue of fact" regarding vested status).[3]

Other portions of SPDs 1-4 reinforce the reasonable interpretation that the medical benefits promised to retirees are permanent. Both the eligibility for medical benefits, and the "retiree medical dollars" funding feature, are expressly linked to pension eligibility and age and years of service. PCSF 5-6. This pension linkage is a judicially recognized indicator of lifetime benefits. Language that "ties eligibility for retiree health benefits to eligibility for a pension indicates an intent to vest the health benefits." *Noe v. Polyone Corp.*, 520 F.3d 548, 558 (6th Cir. 2008).

The text of SPDs 1-4 also contains express assurances of life-long retirement security under a section titled "Answering Your Needs." The section states that the retirees who participate in the retiree medical plan "can feel secure that your family's health and well-being will be protected after you stop working". PCSF 4.

Defendants of course cite to the generalized reservation of rights clause, but that paragraph does not appear with the promise of lifetime coverage, nor is it cross-referenced in any

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[3] Defendants do not acknowledge these statements in *Chiles* and *Aguilar*, which are controlling decisions of the Tenth Circuit. Nor do they acknowledge *Miller*, *LaAsmar*, and *Rasenack* from the Tenth Circuit. Defendants instead cite and rely upon decisions from other Circuits. *See* Def. Mem. at 21-22, *citing Bouboulis v. Transport Workers Union of Am.*, 442 F.3d 55 (2d Cir. 2006); *Crown Cork & Seal Co., Inc. v. Int'l Ass'n of Machinists & Aerospace Workers*, 501 F.3d 912 (8th Cir. 2007); *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660 (6th Cir. 1998). Defendants do cite one district court decision from this Circuit, but it can be readily distinguished. *Chastain v. AT&T,* No. 04-0281-F, 2007 WL 3357516, 2007 U.S. Dist. LEXIS 83038 (W.D. Okla. Nov. 8, 2007) (plaintiffs lacked standing to sue AT&T after benefit obligations transferred to Lucent; plaintiffs did not argue that language in plan documents was ambiguous), *aff'd on standing grounds only*, 558 F.3d 1177 (10th Cir. 2009).

way. Indeed, it is not even listed in the Table of Contents. PCSF 7-8. Defendants' position in effect requires that new text be added to the "When Coverage Ends" section. But words should not be added to a contract under the guise of construing it. *See* Richard A. Lord, *Williston on Contracts* § 31:5 (4th ed. 2007). Moreover, under the ERISA regulation for SPDs, limitations of this type must be clearly disclosed.

The other reservation language cited by defendants is limited, merely indicating that specific "coverages" and "options" may be changed. PCSF 9. This is not inconsistent with the promise of lifetime benefits, because medical care evolves over time and participants expect such changes in the ordinary course of their participation in a plan. "Common experience suggests that health-care plans invariably change over time, if not from year to year" in ways that are not contrary to a promise of permanent benefits. *Reese v. CNH America LLC*, 574 F.3d 315, 324 (6th Cir. 2009); *Diehl v. Twin Disc, Inc.*, 102 F.3d 301, 309 (7th Cir. 1996) (distinguishing between promise to provide "lifetime insurance benefits" from "decid[ing] precisely what those benefits are").

Finally, reservation language appeared in a "Legal Information" section applicable to multiple plans in which both active employees and retirees were participants. PCSF 10. Since that language had such broad application, the general statements of a right to amend or terminate can reasonably be interpreted to not override the specific promise of lifetime benefits.

Under Tenth Circuit law, lay participants are not expected or required to guess that a *specific* promise of benefits (in answer to the question "When Coverage Ends") is controlled by another paragraph which is not even referenced. In *Haymond*, the Tenth Circuit considered a claim for health benefits and reversed summary judgment for the plan. The court concluded that, "In light of the Fund's obligation to draft an SPD that is clear to participants" the limitations

provisions in the SPD were "clouded by at least two ambiguities." 36 Fed. Appx. at 373. The first ambiguity was "a flat contradiction between the two provisions" in issue. "[T]he provisions appear in different sections of the SPD without cross-referencing one another or providing any suggestion of how they might properly be read together." *Id*. Although the district court attempted to "harmonize" these conflicting provisions, the Tenth Circuit ruled that "this approach places on the participant the burden of harmonizing apparently unrelated and conflicting provisions, thus contradicting ERISA's mandate that the SPD be clear to the layperson. See 29 U.S.C. § 1022." *Id.* Invoking *Chiles*, the court ruled that "an employee should not be required to adopt the skills of a lawyer." *Id., quoting Chiles*, 95 F. 3d at 1517-18. The court concluded that the plan was not entitled to judgment, but instead "must bear the consequences of this inaccuracy":

> In short, the provisions of the SPD are at best ambiguous regarding the applicable limitations period. . . . The Fund has failed in its duty to provide this critical information to participants in a clearly understandable manner. As the drafter of the SPD, the Fund must bear the consequences of this inaccuracy.

Haymond, 36 Fed. Appx. at 374. At best for defendants, the specific and express language that benefits will continue until "you die" is in conflict with the vague language reserving the right to change or terminate benefits in undefined circumstances for undefined persons.

The Tenth Circuit in *Chiles* identified the circumstances creating this ambiguity:

> Boiled down to its essence, the question is not whether an ERISA plan document containing apparently conflicting provisions is ambiguous in toto. Rather, it is whether the reservation of rights clause itself, read in tandem with the promise of continuing benefits to participants who maintain a particular status, is ambiguous with respect to the rights of the participants who have attained the status *if the reservation does not specifically address alteration or termination of their benefits*. In most cases, the issue involves retirees who are promised continued health care coverage for life; here the plan allegedly promises continued health insurance to participants on disability. In either situation, plaintiffs have voluntarily or involuntarily reached the status for which the plan promises continued benefits.

Chiles, 95 F.3d at 1511-12 (emphasis added). As one might expect, defendants never acknowledge or discuss this portion of *Chiles*, and instead point to cases from other circuits which the Tenth Circuit cited in a footnote but declined to follow. 95 F.3d at 1512 n. 2. Worse still, defendants cite to the 1990 decision of the Eighth Circuit in *Howe v. Varity Corp.*, 896 F.2d 1107 (8th Cir. 1990), but they do not mention anywhere in their brief the Eighth Circuit's later decision in *Jensen v. SIPCO, Inc.*, 38 F.3d 945 (8th Cir. 1994), which the Tenth Circuit repeatedly cited and discussed in *Chiles*. *See* Def. Mem. at 22-23.

This case is indistinguishable from *Jensen*, which held that retiree medical benefits were vested. The evidence in *Jensen* included a generic reservation of rights clause, much like the ones invoked by defendants. The clause, set out in bold type in the SPD, stated vaguely that the employer "reserves the right to terminate, discontinue, alter, modify, or change this plan or any provision of this plan at any time." *Jensen*, 38 F.3d at 948. However, the section of the SPD with the heading "Termination of Coverage" stated that the medical coverage would terminate for dependents 90 days following the date of death of the retiree; for dependent children on the date of attaining age 19 or marriage; and for spouses on the date of divorce. *Id*. at 949.

After trial, the district court concluded that the plan provided vested medical benefits for the retirees. This ruling was affirmed on the ground that the "Termination of Coverage" provisions constituted "an ambiguous expression of an intent to vest retiree benefits." *Jensen*, 38 F.3d at 950. Although the employer cited the provision generally reserving its power to amend or terminate provisions of the plan, the Eighth Circuit ruled that this was insufficient:

> SIPCO relies exclusively on the Plan provisions permitting it to amend or terminate "any of the provisions of this Pensioner Medical Plan." SIPCO argues that this is an unambiguous declaration that retiree benefits are not vested. We agree that a reservation-of-rights provision is inconsistent with, and in most cases would defeat, a claim of vested benefits. **But the question at this stage of the**

> **analysis is whether these provisions are so unambiguous as to make unnecessary any reference to other Plan provisions and extrinsic evidence. We think not. In the first place, the reservation-of-rights provisions are not facially unambiguous – they leave at least some doubt as to whether SIPCO intended to reserve the right to change or terminate benefits to already retired pensioners, or only the right to make prospective changes for those covered by the Plan but not yet retired.** In the second place, "[t]he power to modify [a trust] may be relinquished by the settlor." Bogert, *The Law of Trusts & Trustees* § 993, at p. 232. Whether a power has been relinquished obviously requires examination of extrinsic evidence, which the district court properly undertook.

Jensen, 38 F.3d at 950 (citation omitted; emphasis added).

Given the patent conflict in SPDs 1-4 between the specific "When Coverage Ends" promise of lifetime benefits, and the general reservation of rights language cited by defendants, a reasonable plan participant could understand that while the plan benefits will remain in effect for current retirees until death, the plan could be changed or terminated for active employees before they retire and begin participation, or that specific terms for coverages, medical procedures or providers under the medical plan could be changed but not that the entire plan could be terminated. *See also* Report of Professor Stygall at 2-6, 20-23 (Pl. Ex. 30); Op. at 15 (Chief Judge Vratil's determination, in denying motion to dismiss Count One, that the conflicting language "may render the plans ambiguous").

Defendants also err in their heavy reliance on *Welch v. UNUM Life Ins. Co. of Am.*, 382 F.3d 1078 (10th Cir. 2004), a disability benefits case. *Welch* reversed a summary judgment for the plaintiff based solely on her argument that an amendment terminated the plan and triggered a vesting provision *for disability benefits*. *Id.* at 1082-84. On appeal, the court ruled that the plan had not terminated, so it did not reach the question whether the termination provision was sufficient to vest benefits. *Id.* at 1085. The plaintiff alternatively argued that disability benefits vested either at the end of a waiting period or on the date of disability. *Id.* But as in *Chiles*, plan

language expressly identified plan termination as a vesting trigger, so other unexpressed vesting conditions could not be inferred. *Id.* at 1086.[4] Defendants' loose comparison of the SPD language in this case to the language in *Welch* therefore is unfounded. The SPDs here clearly and expressly state, in the section entitled "When Coverage Ends," that coverage only terminates upon death or failure to pay premiums. Under Tenth Circuit law, specific language promising benefits until "you die" controls over general language in a reservation of rights clause. In contrast, the SPD in *Welch* expressly stated that the disability benefits would vest if and only if a plan termination occurred.

Defendants also gain no support from *Kerber v. Qwest Group Life Ins. Co.*, 647 F.3d 950 (10th Cir. 2011). The plaintiffs there agreed that "the Plan unambiguously reserved the right to amend the Plan at any time." They did "not allege that the Plan created vested rights" and conceded that the company "could have completely terminated the life insurance benefits." The plaintiffs thus made no effort prove that the language vested the benefit. *Id.* at 957, 959-60. Instead, the plaintiffs sought to use the reservation of rights clause itself to limit the company's right to amend. The case therefore was controlled by the similar language in *Chiles* and met the same fate. *Id.* at 961.

In addition to this textual analysis, there is course-of-performance evidence which confirms the conclusion that lifetime benefits have been promised. Sprint and its predecessors had a longstanding practice of "grandfathering" the benefits of existing retirees, so that their benefits were not affected by changes introduced for later retirees. For example, the company

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[4] The court in *Welch* remanded on the question whether a plan amendment which ended the plaintiff's disability benefits was ambiguous. *Id*. at 1086 & n. 1. On remand, the district court found that provision ambiguous, considered extrinsic evidence, and ordered judgment for the plaintiff, awarding unpaid benefits and future benefits to age 65. *Welch v. Unum Life. Ins. Co. of Am.,* No. 00-1439, 2007 U.S. Dist. LEXIS 91796 at *15, 20-39 (D. Kan. Dec. 13, 2007).

preserved the specific programs of medical benefits offered before 1990 and maintained 170 legacy plans. PCSF 99-101. Under the caselaw, this grandfathering is evidence of vested benefits. For example, in *DeBoard*, the Tenth Circuit ruled that the conduct of the employer "also demonstrates an intent to create vested benefits" because approximately one year after the retirements, the company imposed new contribution requirements for dependent coverage, but did not apply those changes to existing retirees. Indeed, the evidence showed that the company continued the benefits for existing retirees without change for "nearly ten years." *DeBoard*, 208 F.3d at 1233, 1241. In *Jensen*, the Eighth Circuit likewise ruled that an employer's "policy of not changing the benefits of prior retirees is consistent with the concept of vested benefits." *Jensen*, 38 F.3d at 951.

The record also shows that in 2001 Sprint management recognized that the company "probably can't take away benefits from current retirees" and that the company "has an obligation to current retirees to maintain benefit levels" and to honor "existing commitments" and maintain their benefits. PCSF 99-100. As a result, the company decided to make no changes in either the medical or life insurance benefits for existing retirees. This confirms the company's own understanding that it had promised lifetime benefits, and indeed that retirees were told and understood that these were vested lifetime benefits. PCSF 62-94, 98. In *Jensen*, the Eighth Circuit cited as evidence of vesting the fact that an outside actuarial consultant had opined that it "would be very difficult, if not impossible for [the company] to unilaterally reduce benefits" for existing retirees. *Jensen*, 38 F.3d at 951. The same evidence supports the conclusion that the company waived or relinquished any right to change the benefits:

> "The power to modify [a trust] may be relinquished by the settlor." Bogert, *The Law of Trusts & Trustees* § 993, at p. 232. Whether a power has been relinquished obviously requires examination of extrinsic evidence, which the district court properly undertook.

Jensen, 38 F.3d at 950. Thus, even assuming that a right to amend or terminate benefits for existing retirees had been properly reserved by the company and clearly communicated to the participants, there still would be a fact question whether that right was relinquished. This question also cannot be resolved on a summary judgment motion by examining the SPDs.

The course-of-performance evidence also includes examples of company practices describing the benefits as "lifetime" benefits in communications with employees and retirees. PCSF 58-94, 102-104.

At best for defendants, the generalized reservation language conflicts with the specific promises of retiree medical benefits until death, thus rendering SPDs 1-4 ambiguous on vesting. Summary judgment is improper.

2. SPDs 5 and 6

SPDs 5 and 6 possess the same attributes as SPDs 1-4, except that SPDs 5 and 6 also include a section on retiree life insurance. As with the medical benefits, these SPDs include a section "When Does Coverage End." As with the medical benefits, these SPDs promise lifetime benefits: "The basic life insurance coverage ends on the date of your death."

Given the nearly complete overlap of text and arguments, plaintiffs incorporate by reference the text appearing immediately above for SPDs 1-4. For the reasons stated, defendants are not entitled to summary judgment on SPDs 5 and 6.

3. SPDs 7-9

SPDs 7-9 describe life insurance benefits for both active and retired employees.

SPDs 7-9 do not include any reservation of rights provisions. PCSF 25, 28. Indeed, the text states that "the provision concerning termination of coverage" is stated earlier in the booklet (PCSF 25), but the description of retiree benefits has no termination provision.

Under ERISA, an employer must "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." 29 U.S.C. § 1102(b)(3). Although no particular formalities need be specified, at a minimum an employer must state *some* amendment procedure. *See Halliburton Co. Benefits Committee v. Graves*, 463 F.3d 360, 371-72 (5th Cir. 2006) ("In order to amend a welfare benefit plan governed by ERISA the employer must provide a procedure . . ."), *citing Curtiss-Wright Corp. v. Schoonejongen,* 514 U.S. 73, 80 (1995). This is consistent with the longstanding rule under the common law of trusts. As the Supreme Court stated in *Curtiss-Wright*, "for a plan *not* to have such a procedure would risk rendering the plan forever unamendable under standard trust law principles." 514 U.S. at 82, *citing* the *Restatement (Second) of Trusts* § 331(2). "[T]he settlor cannot revoke [or modify] the trust if by the terms of the trust he did not reserve a power of revocation [or modification].". *Restatement (Second) of Trusts*, §§ 330(2), 331(2); *see also Peterson v. Peterson*, 10 Kan. App. 2d 437, 439, 700 P.2d 585, 588 (Kan. 1985) ("generally, a private express trust cannot be revoked or amended by the grantor unless that power is reserved"). In its detailed review of SPD language in 2000, Sprint recognized that many of the SPDs did not include any reservation provision. PCSF 95.

Defendants sidestep the fact that there is no statement in SPDs 7-9 that the company can amend or terminate the plan. Def. Mem. at 26. They do correctly state that under Tenth Circuit law, "words cannot be written into the agreement imparting an intent wholly unexpressed when it was executed." *McGee v. Equicor-Equitable HCA Corp.*, 953 F.2d 1192, 1202 (10th Cir. 1992). Yet their arguments here presume a right to amend or terminate that was "wholly unexpressed" in the SPDs.

Because the company did not preserve the right to amend or terminate the benefits provided under SPDs 7-9, defendants had no power to make the challenged changes. Even if a power to amend or terminate were relevant, the provisions of the SPDs support the conclusion that the benefits are vested. Defendants fail to acknowledge these features of the SPDs.

The benefits described are provided pursuant to a collective bargaining agreement. Case law establishes that the relevant CBAs must also be examined to determine whether retiree benefits vest for retired union employees. *See Flinders,* 491 F.3d at 1193-94 (review plan document and CBA to determine ambiguity); *Chiles,* 95 F.3d at 1514 (discussing review of CBA and *citing Armistead v. Vernitron Corp.,* 944 F.2d 1287, 1295-96 (6th Cir. 1996), which held that promise to provide retirement benefits under CBA would be "illusory" if employer had right to terminate unilaterally); *Int'l Assoc. of Machinists and Aerospace Workers v. Masonite Corp.,* 122 F.3d 228, 233-34 (5th Cir. 1997) (reservation of rights in plan document does not empower company to terminate retirees' health insurance where CBA contained no such clause; in light of CBA language, extrinsic evidence ordered to determine parties' intent).

This CBA (Def. Ex. A-19) contains a provision for continuity past the nominal third anniversary expiration date. The CBA expressly states that its provisions (which include the promised retiree benefits) continue past the nominal expiration date, *unless* the union and the employer agree to a revision or modification. PCSF 26. In other words, the bargained agreement to provide the retiree benefits does not expire. "Absent specific durational language referring to the retiree benefits themselves, courts have held that general durational language says nothing about those retiree benefits." *Yolton v. El Paso Tennessee Pipeline Co.*, 435 F.3d 571, 581 (6th Cir. 2006). Indeed, the company's 2000 review of SPDs included findings that benefit terms were controlled by the provisions of CBAs and that the company's amendment

rights were thus restricted. PCSF 95-96. In this CBA, the company expressly reserved the right to make changes to the pension and savings plans, but no such right to change was stated with respect to the medical and life insurance program. PCSF 26. The absence of that provision is another indicator that the company did not have the right to change those benefits. *See* discussion of caselaw on page 71 below.

There are other factors which support the conclusion that SPDs 7-9 provide vested benefits. In several different ways, these SPDs present the retiree life insurance as being separate from the rules applicable to active employees. *See* PCSF 21-22 (notwithstanding statement that coverage ends on date your employment ends, employees whose work ends "as the result of retirement on pension" are covered by special provisions). These retiree provisions include specific unqualified promises that life insurance "will be" in the amount equal to the employee coverage, subject only to a 50% reduction on the fifth anniversary of retirement." PCSF 22. Terms of this kind indicate vesting. *See Devlin v. Empire Blue Cross and Blue Shield,* 274 F.3d 76, 84 (2d Cir. 2001) (terms stating employees who retire after age 55 with 20 years of service "will be insured" "can be reasonably read as promising . . . lifetime life insurance benefits upon performance"); *see also Cole v. ArvinMeritor. Inc.*, 549 F.3d 1064, 1070-71, 1075 (6th Cir. 2008) (statement in Insurance Program booklet that medical coverages at time of retirement "shall be continued" created unambiguous promise of lifetime benefits).

A number of other textual provisions confirm the lifetime nature of these benefits. First, the benefits are linked to pension status. *See* page 60 above. Second, the promised life insurance benefits are not subject to any durational limits, while other benefits described in the booklet are subject to durational limits. PCSF 22-23. Stating durational limits on those benefits, but not on the retiree benefits, leads to the conclusion that the retiree benefits are not limited. This follows

from the general interpretive canon *expressio unius est exclusio alterius* and the presumption of "consistent usage and meaningful variation." The presence of a particular provision for some benefit recipients "makes clear that the omission of that provision in the part of the plan governing another type of [benefit] was deliberate." *See Novella v. Westchester County, New York*, 661 F.3d 128, 142 (2d Cir. 2011). This likewise is evidence of vesting. *See Yolton v. El Paso Tennessee Pipeline Co.*, 435 F.3d 571, 582 (6th Cir. 2006) (inclusion of "specific durational limitations in other provisions . . . suggests that retiree benefits, not so specifically limited, were intended to survive"); *see also Zielinski v. Pabst Brewing Co.*, 463 F.3d 615, 617 (7th Cir. 2006) (agreement providing that retiree drug benefits "shall continue" contained "no termination date, and we cannot find any basis for interpolating one"; summary judgment vacated).

Finally, defendants rely on various references to the possibility that the "Group Policy" can be terminated. Def. Mem. at 27-29. However, the SPDs themselves make clear that group policies can be replaced but the benefits will be continued, even on a grandfathered basis, and the SPDs specifically distinguish the "plan" from the "group policy" that may be used as the vehicle to deliver plan benefits. PCSF 23. Defendants' argument ignores these contrary textual portions. These factors, as well as the other textual indicators of vesting, also distinguish this case from defendants' cited cases. At best for defendants, the references to the "group policy" are ambiguous, because these provisions only define the *insurer's* separate contractual obligation to the plan sponsor to provide coverage under the insurance policy while it remains in force.

Moreover, caselaw rejects the simplistic conclusion that the right to change or terminate a particular insurance policy or contract must mean the right to change or terminate the ERISA plan. *See DeBoard,* 208 F.3d at 1240-41 & n. 6 (upholding district court conclusion that section

of SPD stating that plan "is intended to continue" but the policy "can be changed or terminated" did not state that plan sponsor could terminate plan and was "muddy and baffling"); *Diehl*, 102 F.3d at 308 (references in insurance booklets to change or discontinuance of insurance policy ambiguous as to plan termination); *Karl v. Asarco Inc.*, No. 02-5565, 2004 U.S. Dist. LEXIS 25956 at *13-14 (S.D.N.Y Dec. 22, 2004) (finding nearly identical language ambiguous, and holding that "it does not unconditionally reserve the defendants' right to unilaterally terminate the plan").

The course-of-performance evidence cited above for SPDs 1-4 and the analysis by Professor Stygall (*see* PCSF 107 and Stygall Report) are also relevant to these SPDs.

The benefits under SPDs 7-9 thus can reasonably be interpreted by a participant to provide lifetime benefits.

4. SPDs 10-12

SPDs 10-12 are primarily directed to active employee medical benefits. However, specific provisions apply to retirees, both before and after attaining age 65 and Medicare eligibility. PCSF 31-33. This retiree-only provision contains unqualified promises that the stated medical coverage "will continue" and that "you will be insured." No durational limits are stated for this retiree coverage, although durational limits are stated elsewhere for other types of benefit recipients. This unqualified promissory language, coupled with the absence of limits that are stated elsewhere, supports the conclusion that the retiree benefits are permanent ones. The specific provisions promising coverage that coordinates with Medicare upon attainment of age

65 likewise demonstrate an intent to vest benefits, "because otherwise it would be illusory for many individuals." *Noe v. Polyone Corp.*, 520 F.3d 548, 561 (6th Cir. 2008).[5]

In addition, retiree benefits are expressly linked to pension eligibility and this likewise suggests vesting. Plaintiffs incorporate by reference the arguments appearing on page 60 above.

These SPDs address benefits for both active and retired employees. Reservation language thus must be interpreted in light of the predominant focus on active employee coverages. Furthermore, the purported reservation of rights language contained in the SPDs limits defendants' right to amend or terminate the plan only on occasion of "business necessity or financial hardship," indicating to the reasonable plan participant that the plan will only terminate if the company is in bankruptcy or other severe financial position. PCSF 36, 108. *See, e.g., Alexander v. Primerica Holdings, Inc.,* 967 F.2d 90, 93-94 (3d Cir 1992) (finding reservation of rights ambiguous where clause conditioned on certain events or circumstances). However, the records of the companies' actions to end the benefits contain no evidence that this limiting condition was satisfied and defendants present no such evidence here. Accordingly, there is no basis to conclude that, even if the SPDs unambiguously reserve the right to reduce or terminate retiree medical benefits, any such right was properly exercised in the circumstances presented here – a profitable company and benefits representing a minute portion of its operating expenses. *See* PCSF 51-57.

Defendants argue that the specific phrase "reasons of business necessity or financial hardship" must mean the same thing as "if necessary." Def. Mem. at 32-33. However, the

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[5] Defendants principally rely on *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Skinner Engine Co.*, 188 F.3d 130 (3d Cir. 1999), for the proposition that the "will continue" language of the SPDs is insufficient to suggest vesting. However, the ruling in *Skinner* was based on the fact that "the terms were used to refer back to previous CBAs." *Id.* at 142. SPDs 10-12 contain no references to CBAs.

phrase "if necessary" is an empty standard, as defendants' cited cases hold. It "is not conditioned on any event or circumstance." *Chiles*, 95 F.3d at 1513. In contrast, these SPDs employ the more rigorous standard of "business necessity or financial hardship" to indicate a specific set of circumstances compelling amendment or termination. Defendants' reading thus changes and deletes words on the page, which is an impermissible interpretive approach. In addition, courts apply the canon of "*noscitur a sociis*" because "words, like people, are known by the company they keep." So "the meaning of an unclear word or phrase should be determined by the words immediately surrounding it" and the word or phrase should be given a meaning "that makes it fit with the words with which it is closely associated." *Alioto v. Hoiles*, 341 Fed. Appx. 433, 440 & n. 12, 2009 U.S. App. LEXIS 18086 at * 19 & n. 12 (10th Cir. 2009) (unpublished). "Business necessity" thus has a financial aspect as well and is not synonymous with "necessary" or "desirable" as defendants contend. In this case, moreover, the company never made any effort to establish that these conditions had been satisfied. PCSF 51-57. Even assuming that the reservation language was meant to apply to the benefits of existing retirees, the company was not authorized to exercise that power. Contrary to defendants' premise that plaintiffs' must prove the *absence* of circumstances satisfying the limited reservation clause, Def. Mem. at 33-34, it is the company that must establish its compliance with plan terms. But the company made no effort whatsoever to meet its own standard. This is not surprising, because the company was profitable and the retiree benefits in question were a minute portion of its operating expenses. PCSF55-57.[6]

[6] Defendants also have not established that Sprint's elimination of the prescription drug program in 2006 did not harm the retirees. *See* Def. Mem. at 34-35. By defendants' own reckoning this change harmed the retirees to the tune of $ 22 million per year. PCSF 55. The "happy talk" company announcement cited in DSF 70 obscures the fact that Medicare Part D had many deficiencies, including the infamous "donut hole" in which there was no coverage.

The course-of-performance evidence cited above for SPDs 1-4 and Professor Stygall's analysis are also relevant to these SPDs.

The benefits under SPDs 10-12 thus can reasonably be interpreted by a participant to provide lifetime benefits.

5. SPDs 13-15

SPDs 13-15 likewise are primarily directed to active employee benefits, in this case life insurance benefits. However, specific provisions apply to retirees. PCSF 38-40. This retiree-only provision contains unqualified promises that the stated life insurance coverage "will be," "will be paid," or "will be payable" in the amounts stated. No durational limits are stated for this retiree coverage, although durational limits are stated elsewhere for other types of benefit recipients. This unqualified promissory language, coupled with the absence of limits that are stated elsewhere, supports the conclusion that the retiree life insurance benefits are permanent ones.

In addition, retiree benefits are expressly linked to pension eligibility (five years of service), PCSF 38, and this likewise suggests vesting. Plaintiffs incorporate by reference the arguments appearing on page 60 above.

Finally, the reserved power to amend or terminate was limited to cases of "business necessity or financial hardship." That condition was not satisfied by the company for the reasons stated under SPDs 10-12.

Plaintiffs also are not "second-guessing" a business decision. They are enforcing their rights under ERISA to promised benefits that were earned over their working careers.

6. SPDs 16 and 17

SPD 16 describes medical benefits and is directed primarily to active employees. However, specific provisions apply to retirees. The retiree provision states that "Insurance coverage for you and your dependents can be continued after retirement." No durational limits are stated for this retiree coverage, although durational limits are stated elsewhere for other types of benefit recipients. PCSF 44. This unqualified promissory language, coupled with the absence of limits that are stated elsewhere, PCSF 46, supports the conclusion that the retiree life insurance benefits are permanent ones.

SPD 17 describes life insurance benefits and contains express "lifetime" promises that on the fifth anniversary of retirement, "the amount of the insurance is reduced by fifty percent (50%) and remains at that figure *for lifetime*." (emphasis added). PCSF 45. This language supports the conclusion that the life insurance benefits are vested. In addition to the caselaw on "for life" and "until death" benefits cited on pages 59-60 above, *see also Devlin v. Empire Blue Cross and Blue Shield*, 274 F.3d 76, 85 (2d Cir. 2001) (language promising that retiree life insurance coverage "will remain [at the annual salary level] for the remainder of their lives" sufficient to "create a triable issue of fact" regarding vested status). Defendants seize on the heading of this section, referring to "Limitation of Benefits", as defeating any argument for vested benefits. However, the limitation goes to the amount, not the duration, of the life insurance. Defendants have to turn the English language on its head in order to argue that coverage for your lifetime, which is the maximum amount of time any person could be insured, constitutes a "limit" and not a promise. Def. Mem. at 37.

No durational limits are stated for this retiree life coverage, although durational limits are stated elsewhere for other types of benefit recipients. PCSF 46. This also supports the conclusion that the retiree life insurance benefits are permanent ones.

SPDs 16 and 17 do not include any text which purports to reserve the right to amend or terminate benefits. PCSF 48. Defendants rely solely on the separate insurance-related "group policy" provisions of the SPD. Def. Mem. at 38. Plaintiffs therefore incorporate the argument on this issue stated at page 61 and 68 above based on PCSF 47.

Defendants assert that SPDs 16 and 17 also refer to the plans being maintained pursuant to a collective bargaining agreement. PCSF 50. Plaintiffs therefore incorporate the argument on this issue stated under SPDs 7-9 at pages 69-70 above. Defendants cite cases in which the CBAs stated that benefits "could not be reduced '[d]uring the term of this Agreement" or "shall remain in effect for the term" or "the agreement makes clear that the entitlement expires with the agreement" or that the "benefits expire on a certain date." Def. Mem. at 39-40. The CBA here does not contain this limiting language and affirmatively states that its provisions will continue past the stated expiration date unless changed by agreement with the union.

As stated above, the course of performance evidence likewise contains many examples of the company's recognition that life insurance benefits will be provided for the "lifetime" of the retirees. Although Professor Stygall did not specifically address SPDs 16 and 17, her analysis of common language which also appears in other SPDs she does address is applicable here as well.

IV. PLAINTIFFS' THIRD CLAIM FOR RELIEF CANNOT BE DISMISSED.

For the same reasons that plaintiffs' First Claim for Relief cannot be dismissed on summary judgment, their associated Third Claim for ERISA declaratory relief also cannot be dismissed.

V. THE MOTION FOR SUMMARY JUDGMENT CONFIRMS THAT CLASS CERTIFICATION REMAINS PROPER.

Defendants include in their memorandum an unauthorized surreply on their pending motion for class decertification. Def. Mem. at 40-42.

In opposing the class decertification motion, plaintiffs predicted that defendants' summary judgment motion would confirm that class certification is proper. (Doc. 297 at 32). And the motion has done just that. Defendants have now conclusively demonstrated that the questions of liability can be presented and framed for both the named plaintiffs and thousands of class members based on the common questions of fact and law presented by the various SPDs. Although defendants refrain from providing this information, the number of retiree class member households covered by defendants' companion Motion for Summary Judgment on Selected Class Members' First and Third Claims for Relief (Doc. 332) can be tabulated based on the information presented in their supporting memorandum (Doc. 335). This tabulation is attached as Pl. Ex. 31 and shows that defendants' common arguments apply to the claims for medical benefits asserted by 12,393 retiree households and the claims for life insurance benefits asserted by 9,468 retiree households. This would not be possible if the class were not appropriately certified in this case.

Defendants' speculations about what actions class counsel should take at this procedural juncture are as unfounded as they are improper. For the reasons stated here, defendants are not entitled to summary judgment, so the premise for defendants' renewed discussion of class decertification is entirely mistaken.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court deny Defendants' Motion for Summary Judgment on the Named Plaintiffs' First and Third Claims for Relief.

Dated: April 11, 2012

Respectfully submitted,

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